

D855 DUFF, c. E. Why mothers kill their children.

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WHY MOTHERS KILL THEIR CHILDREN:
A REASSESSMENT OF THE CRIME OF INFANTICIDE

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I INTRODUCTION

Motherhood is regarded by many as the essence of womanhood. It is a woman's true destiny. Her ultimate fulfilment. The desire to have children of her own, to love them selflessly, to put their interests first, and to willingly and happily carry out all domestic and childcare responsibilities, is after all, what comes "naturally". That these are myths, most people do not deny. But they are myths so deeply rooted in all of us that we have unconsciously internalised them. They have become confused with our reality.

So deeply rooted are these myths, that women who kill their children are regarded as subhuman, as sick and evil monsters.¹ They are regarded as having no motive to kill, and therefore as "mad." Because they are defined as mad, they are not seen as responsible for their child's death. After all, no sane woman would murder her own child. These myths are reflected in the crime of infanticide.²

The crime of infanticide is based upon the proposition that a woman's physiological processes linked to childbirth and/or lactation may influence her behaviour in such a way that she is not really responsible for her actions, or more specifically for the murder of her own child. This view is reflected in the sentencing judgment of a recent New Zealand case, where the Judge said of a mother found guilty of infanticide, "you are not to regard yourself as being responsible for what happened,[t]he fact that you have been treated like a criminal does not mean you are one - you are not."³ Why is the mother not responsible for her own child's death? If she is not responsible, then who is? The Judge did not say.

* I wish to thank Brigit Laidler and Lisa Tortell for their invaluable help in the proof reading of this paper.

¹This can be seen in *R v Witika* [1993] 2 NZLR 424. In this case, Witika and her partner Smith appealed against were appealing 5 convictions for the ill-treatment, neglect, and murder of Witika's two year old daughter Delcelia. Despite acknowledging that Witika was a battered wife, and that she was "dominated physically, mentally and sexually" by Smith, the court refused her a defence of compulsion or duress and instead she was portrayed as a wicked and evil mother for neglecting her child. Justice Gault in the decision of the court said, "[t]he position of battered women calls for sympathy but can be no justification for broadening the grounds on which the law should provide excuses for child abuse."

²Infanticide is defined as "the murder or killing of an infant soon after its birth" in J Nolan and J Nolan-Haley (eds) *Black's Law Dictionary* (6ed, West Publishing Company, St Paul, 1990) 778. Infanticide is also the intentional placing of one's child in a situation where death would be assured. see K Moseley "The History of Infanticide in Western Society" (1986) 1 *Issues in Law and Medicine* 345. The term "infanticide" means a variety of things in a variety of contexts. Some use it when speaking of neonaticide which is the killing of a newly born baby within the day of its birth. Some speak of the mercy killing of disabled children as infanticide. Some use it when talking of cultural practices that require the killing of female children. The killing of disabled newly borns and cultural infanticide is outside the scope of this paper. Neonaticides will be included in the definition of infanticide in this paper unless specifically excluded. The term "infanticide" in this paper will be used to refer to the *crime* of infanticide rather than the *act* of a mother killing her child, unless otherwise stated.

³*R v Williams* Unreported, 22 April 1992, High Court Auckland Registry T261/91, 1-2.

I am not a mother, although one day I may be. I write about infanticide because, in the words of Ann Jones, "[t]he story of women who kill is the story of women."⁴ I write about infanticide because, although the incidence of mothers killing their children is comparatively rare, the lives of *all* women are touched by the belief that "normal" women do not kill their children, and by the supposed irrationality and incomprehensibility of the act. I write this because, like Ann Jones, I see direct connections between the myths surrounding motherhood and infanticide.

In this paper, I examine the crime of infanticide to answer the many unanswered questions about the real reasons why women kill their children. I do this in the hope of showing how the crime of infanticide may one day be prevented from occurring. In doing this, I first trace the history of the English crime of infanticide, and show how English infanticide law has been adopted in New Zealand. I then discuss the challenges to the crime of infanticide by the medical profession and I also discuss the reforms to the crime proposed by several different law reform bodies. However, in the next sections I reveal that the reform proposals suggested by these law reform bodies fail to address the real reasons why women kill their children. I suggest that this may be due to false perceptions of female criminality and the perceived need for lenient judicial and societal treatment for these women. I conclude by suggesting that, contrary to the common belief that mothers who kill their children are mentally disturbed, these mothers are merely responding in an understandable way to particular expectations imposed on them by the society in which we live. Expectations which they cannot meet.

II A BRIEF HISTORY OF THE CRIME OF INFANTICIDE IN ENGLAND

The practice of infanticide,⁵ many believe, is as old as time.⁶ It was viewed in pre-Christian and non-Christian societies, as a morally and legally acceptable means of controlling population size.⁷ In Plato's and Aristotle's time it was generally accepted for population and eugenic reasons, and was in some instances seen as a service for the

⁴A Jones *Women Who Kill* (Holt, Rhinehart and Winston, New York, 1980) 5.

⁵I refer here to the *act* of a mother killing her child and not the *crime* of infanticide.

⁶It is estimated that paleolithic parents actually killed as many as 50% of their newborn females. see J Osborne "The Crime of Infanticide: Throwing the Baby Out With the Bathwater" (1987) 6 Canadian J Family Law 47, 55. In Greco-Roman times the infanticide of children born outside marriage, females or excess children was a common occurrence. See Moseley, above n 2, 349.

⁷B McLachlin "Crime and Women - Feminine Equality and the Criminal Law" [1991] U B C LR 1, 2.

state, as the state desired small families.⁸ In France, as late as the seventeenth century, infanticide was arguably the principle means of birth control.⁹ In New Zealand, it has been recorded that Maori in the early nineteenth century practiced infanticide.¹⁰

The general acceptance of the practice infanticide was condoned as sensible for a variety of reasons, primarily because society had not yet developed ways of dealing with children who were not planned for, or could not be cared for by their mothers or parents. The large numbers of unplanned and unwanted children were undoubtedly the result of the ineffectiveness or unavailability of methods of fertility control.¹¹ Disposing of these babies or the taking of their lives in these circumstances was seen as an acceptable last resort, when raising the child was impossible. This was often the case when an unmarried woman, or young girl, found herself pregnant and could not, or would not, get an abortion.¹² Here, infanticide was a way of avoiding the social stigma of illegitimacy. In this sense infanticide was a type of delayed contraception or abortion.¹³

Infanticide was also condoned because the fragility of infant life in an era of limited medical knowledge, created an environment where the death of a newborn was a feature of daily life. Deliberate child killing was also regarded as less reprehensible than it is now.¹⁴ It was believed that the loss to the child's family was not great, and that the injury done to a child was less than to an adult for it was incapable of the kind of suffering which might be undergone by an adult victim of a murder.¹⁵ The crime of infanticide was also not thought to create the sense of insecurity in society which other murders caused, especially as the motive was frequently just the concealment of shame of the birth of an illegitimate child rather than a malicious killing.¹⁶

With the advent of Christianity, the practice of infanticide was morally censured.¹⁷ This moral censure, however, had little real effect on the continuation of the practice of

⁸C Backhouse "Desperate Women and Compassionate Courts: Infanticide in Nineteenth Century Canada" (1984) 34 University of Toronto LJ 447; Mosely, above n 2, 349.

⁹Above n8, Backhouse, 447.

¹⁰A Crosby *Ecological Imperialism and the Expansion of Europe 900 - 1900* (Cambridge University Press, Cambridge, 1986) 232.

¹¹Above n 8, Backhouse, 476.

¹²K O'Donovan "The Medicalisation of Infanticide" [1984] Crim L R 259, 260.

¹³C Gardner "Postpartum Depression Defense: Are Mothers Getting Away With Murder?" (1990) 24 New England LR 953, 956.

¹⁴Above n 8, Backhouse, 476.

¹⁵J Smith and B Hogan *Criminal Law* (6 ed, Butterworths, London, 1983) 362.

¹⁶Above n 15, 362.

¹⁷Above n6, Osbourne, 49.

infanticide.¹⁸ It is arguable that infanticide was indirectly sanctioned because of the existence of foundling homes.¹⁹ These homes required large numbers of wet nurses to provide milk for the unwanted children the homes looked after. Obviously, a wet nurse can only provide milk if she has recently given birth herself. Yet, by feeding her own child, the less milk she had available to sell. It is argued therefore, that it was in the wet nurse's best interests to either abandon, or kill her own children to increase her income.²⁰

It was not until the nineteenth century, the post-enlightenment period, that there began in the upper and middle classes the beginnings of a concerted public outcry in opposition to the practice of infanticide.²¹ Before this outcry, however, legal sanctions were in place.

The first statute to create a crime of infanticide was the Stuart Bastard Neonaticide Act 1623 (Eng). This Act was entitled "[a]n Act to prevent the Destroying and Murthering of Bastard Children," and was passed to make a woman pay for her sin of adultery and fornication which was condemned by the church.²² The Act provided the death penalty for the mother of an illegitimate child which had been born alive, and whose body was disposed of so as to conceal its death. The offence involved was concealment of death, rather than death itself.²³

Concealment of death led to a presumption of guilt, and of murder.²⁴ In order to rebut this presumption, the woman had to present a witness able to give evidence that the child was born dead.²⁵ Due to the secrecy surrounding the pregnancy and the birth, it was unlikely that this requirement could ever be fulfilled and the mother's burden of proof met.²⁶ In most cases however, the 1623 Act was ignored, due to the reluctance of juries to convict for murder in these cases, and the perceived harshness of the Act at the time.²⁷

¹⁸Above n 2, Moseley, 357.

¹⁹Above n 2, Mosely, 359.

²⁰Above n2, Moseley, 359. Arguably, wet nurses killed their own children in order to obtain employment as a wet nurse in a time of scarce job opportunities for women and of economic pressures.

²¹Above n 2, Moseley, 361.

²²21 Jac. 1 c 27.

²³N Walker *Crime and Insanity in England Volume One: The Historical Perspective* (University Press, Edinburgh, 1968) 126.

²⁴Above n 12, 259.

²⁵Above n 7, 3.

²⁶J Grossman "Postpartum Psychosis - A Defense to Criminal Responsibility or Just Another Gimmick?" [1990] 67 University of Detroit LR 311, 313.

²⁷Between 1730 and 1774, the statute was only specifically mentioned in one of the sixty-one infanticide trials at the Old Baily. See Above n 7, McLauchlin. Blackstone said the Act "savours pretty

It seems that most women who had committed infanticide were saved from being put to death themselves because the jury would grasp at the smallest possible doubt about the mother's guilt. Any suggestion that the baby had been still born, had died in the course of birth or had been accidentally killed would encourage to jury to acquit.²⁸ A number of defences were also developed to help out these woman charged with infanticide and to ensure their lenient treatment if they were going to be convicted.

The "privy defence" was accepted where the mother had been taken by surprise while on the privy, and the baby suddenly came, and fell onto the soil. Another was the "benefit of linen" defence, where the advance preparation of baby clothes was taken to show that the child had been wanted.²⁹ Other defences were the "want of help" defence where it was shown that the baby had been wanted as prior arrangements for a midwife to be present at the birth had been made, and a defence that the mother was incapacitated after the birth and therefore prevented from caring for the child or seeking help.³⁰ In rare cases where the jury could not ignore the facts that unmistakably pointed to murder, they could recommend the mother to mercy. If the judge was in favour of mercy, a reprieve was assured.³¹

Arguably the reason for this lenient treatment was because juries perceived infanticidal mothers as victims rather than criminals.³² Infanticide was seen as a result of a society which condemned unwed motherhood, while persisting in sexual practices that imposed it on women. Many women prosecuted for infanticide were domestic servants who had become pregnant by their employer, or by their employer's son.³³

Nineteenth century reforms attempted to remedy the problem of virtual non-enforcement of the 1623 Act, but with little real success. In 1803, the Neonaticide Act 1623 was replaced by Lord Ellenborough's Act which treated infanticide the same as any other

strongly of severity." W Blackstone *Commentaries on the Laws of England* Vol IV (1775) 198 cited in Above n 12, 260.

²⁸Above n 23, 128.

²⁹Above n 7, 3.

³⁰Above n 6, Osbourne,50.

³¹Above n 23,128. By the time of the Capital Punishment Commission of 1864-6, it was established practice in the Home Office to advise the commutation of the death penalty when a woman was convicted of murdering her own child while it was under 1 year old.

³²The term "infanticidal mother" will be used throughout this paper to mean mothers who have killed their children.

³³A large proportion of the women prosecuted for infanticide were domestic servants who had become pregnant due to seduction and/or rape by their employer or his sons. Knowledge of her pregnancy would have resulted in immediate dismissal, she would have received no character reference and there would be little chance of her being taken into service again. The future job security even more necessary by the presence of a child, loss of marriage prospects, and social ostracism of these women was seen to make their cases particularly hopeless and therefore compassion was exercised. Above n 12; above n 7,

homicide case. There was still however, the common problem of acquittal, due to the lack of proof that the child was born alive, and also due to the establishment of a lesser crime of concealment.³⁴

The crime of concealment was contained in a provision, which provided that a woman could be acquitted of murder if the jury found a concealment of the birth, for which the woman could be separately charged.³⁵ Concealment was favoured as it did not involve the same difficulties of proof of live birth as murder did, and because it allowed for the sympathetic treatment of women accused of murdering their children.³⁶

Concealment had a maximum two year sentence and became the charge favoured in the nineteenth century, even though most courts realised the charge should be murder.³⁷ Katherine O'Donovan writes that concealment trials increased three fold between the 1830s and 1860s, because juries would not convict while infanticide was punished capitally. It is believed that, most cases of concealment, were in fact cases of murder.³⁸ The two year penalty for concealment however, was no doubt sufficient to satisfy the juror who thought that the mother deserved some degree of punishment, rather than acquittal.³⁹

A change of direction in infanticide law came with the Infanticide Act 1922 (UK). This new approach involved what has come to be called the "medicalisation" of infanticide,⁴⁰ as the 1922 Act codified the popular belief that a woman who killed her new born baby was suffering from a medical disorder.⁴¹ Fitzjames Stephen's account of this popular belief reads: ⁴²

The operation of the criminal law presupposes in the mind of the person who is acted upon a normal state of strength, reflective power, and so on, but a woman after child-birth is so upset, and in such a hysterical state altogether that it seems to me you cannot deal with her in the same manner as if she was in a regular and proper state of health.

³⁴Above n 12, O'Donovan, 261.

³⁵The Offences Against the Person Act 1863 expanded the crime of concealment expanded to include legitimate children as well as illegitimate. see M Lentz "A Postmortem of the Postpartum Psychosis Defence" (1989) 18 Capital University LR 525, 528.

³⁶D Seaborne Davis, "Child Killing in English Law" [1937] Mod LR 203, 213.

³⁷Above n 35, 528; Above n 26, 314.

³⁸Above n 12, 261. O'Donovan writes that in evidence presented to the Commission on Capital Punishment in 1866, Byles J stated his belief that almost every case tried for concealment was a case of murder and that there were 5000 coroner's inquests a year on children under seven in the mid-nineteenth century, yet only 39 convictions for child murder between 1849 and 1864.

³⁹Above n 23, 126.

⁴⁰ See generally above n 12.

⁴¹Above n 26, 315.

⁴²J Fitzjames Stephen *British Parliamentary Papers* Vol 21 (1866) 291.

The Act, endorsing this popularly held medical belief, reduced the offence from murder to manslaughter where a woman caused the death of her newly-born child by any wilful act or omission and,⁴³

at the time of the act or omission she had not fully recovered from the effect of giving birth to such child, but by reason thereof the balance of her mind was then disturbed.

Some commentators believe that the 1922 Act at last recognised the legitimacy of the psychological after-effects associated with giving birth.⁴⁴ In contrast O'Donovan argues, that medical theory simply provided a convenient reason for changing the law. She states that the new Act was necessary because juries would not pronounce the death sentence on the mothers convicted of murdering their children. The court by adopting a medical basis to the crime was not, therefore, reflecting current medical theory but merely wished to avoid the "solemn mockery" involved in a murder trial when all parties knew that the sentence would never be carried out even if it was handed down.⁴⁵

In order to reflect the previous lenient treatment of these women in the courts, the drafters focused on the barely perceived medical reasons for the women's behaviour which had the apparent advantage of being scientific and individually rooted.⁴⁶ They made no attempt to recognise the socio-economic factors previously associated with infanticide and the act of concealment. Although this medical theory could not be substantiated, it was used as a tool to show mercy on infanticidal mothers. As Lansdowne argues: ⁴⁷

Infanticide became a crime more closely linked to insanity than to concealment of birth. The mother's state of mind, which was initially convenient shorthand for the whole range of distressing circumstances surrounding a concealed illegitimate pregnancy and birth, [became] the *raison d'etre* of the offence.

Lansdowne's comment shows that the "medicalisation" of infanticide, rather than simply providing a way for the courts to continue to give lenient treatment to infanticidal mothers, actually resulted in a substantially different crime. The Act focused now, not on the mother's circumstances surrounding the birth of her child, but on her state of mind. As will be seen later on in the paper, this different focus lead to a completely

⁴³Infanticide Act 1922 (UK) s 1(1).

⁴⁴For example Above n 26, 315.

⁴⁵Above n 12, 261. O'Donovan quotes Seabourne Davies who also says that, "the act was the product, not of nineteenth century medical theory about the effects of childbirth, but of judicial effort to avoid passing death sentences which were not going to be [carried out]."

⁴⁶Above n 6, Osbourne, 54.

⁴⁷R Lansdowne "Infanticide: Psychiatrists in the Plea Bargaining Process" (1990) 16 Monash University LR 41, 47.

different perception of the crime and of female criminality, by both the judiciary and the public.

The new focus of the 1922 Act also began to cause definitional problems. One problem was the definition of "newly born". This issue was highlighted in the *R v O'Donoghue* where the defendant killed her 35 day old child.⁴⁸ In this case the Judge ruled that while there was evidence of insanity, there was none of infanticide, since the child could not be said to be newly born. The defendant was sentenced to death but was swiftly reprieved.⁴⁹

In another case, *R v Hale*, a mother killed her second child when it was three weeks old and then inflicted injuries on herself.⁵⁰ The medical evidence was that at the birth of her first child the mother had symptoms bordering on puerperal insanity and therefore it was likely she also suffered from some type of insanity at the birth of her second child.⁵¹ The Judge, however, claimed he was bound by *O'Donoghue* as the child here was three weeks old, and could not therefore be said to be a newly born. The Judge directed the jury to find the defendant guilty.⁵²

A bold attempt to widen the scope of this legislation came in an Infanticide Bill 1936 (UK). This Bill would have meant that women found guilty of killing their infants up to the age of eight years would not have been sentenced to death.⁵³ The Bill also widened the definition of the mother's state of mind to include, "distress and despair arising from solicitude for her child or extreme poverty or other causes".⁵⁴ The Bill, however, lapsed before it could become law. A new Bill was introduced which was substantially different from the 1936 Bill and it was this new Bill that became the Infanticide Act 1938 (UK). The new Bill was merely an amended version of the Infanticide Act 1922.

The Infanticide Act 1938 is still in force in England. Section 1(1) states:⁵⁵

Where a woman by any wilful act or omission causes the death of her child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by

⁴⁸(1927) 20 Cr App R 132.

⁴⁹Above n23, 131.

⁵⁰*The Times*, 22 July 1936, 13.

⁵¹See below n 87 and 96 - 99 for a definition of puerperal (psychosis) insanity.

⁵²Above n 12, 262.

⁵³Walker suggests that the age limit was set at eight years as recent legislation had made this the earliest age at which a child could be found guilty of a criminal offence. Although the logic of adopting it for the Bill was not clear, Walker could think of no other explanation. See above n23, 137.

⁵⁴Above n23, 132.

⁵⁵Infanticide Act 1938 (UK) s 1(1).

reason of the effect of lactation consequent upon the birth of the child, then notwithstanding that the circumstances were such that the offence would have amounted to murder, she shall be guilty...of infanticide and may...be dealt with and punished as if she had been guilty of the offence of manslaughter of the child.

As seen in the section above, the 1938 Act reformed the 1922 Act in two ways. The definition of a victim of infanticide has been altered from newly born to "under the age of twelve months," and the "medicialisation" of the crime has been extended through the addition of language about the effect of "lactation".⁵⁶ These changes make it clear that it is the process of giving birth and the effect of this on the mother's body and hormonal processes that gives rise to infanticide.⁵⁷

The statute no longer refers to cases of young, desperate women who conceal their pregnancies and kill their babies out of fear of social disgrace and poverty.⁵⁸ In these cases, the newly born age limitation was adequate as concealment of the child usually took place within a few days of the birth. After the 1938 Act however, where the basis of the Act centres around the mother's temporary insanity after the birth, and not on concealment of it, extension of the age to twelve months was necessary.⁵⁹ This extension was further justified by a reference to the supposedly disturbing effects of lactational insanity.⁶⁰

Although, on its face, the 1938 Act did no more than extend the protection already afforded under the 1922 Act, it in fact radically altered it.⁶¹ As the Act is now based on a medical, rather than a socio-economic model of the crime, infanticide law now applies to two quite different types of homicide - "neonaticides"⁶² and the homicide of older babies. Both types of killing are explained by the physical and mental processes of the mother, related either to chemistry or hysteria, experienced after childbirth. Evidence of such a condition or perhaps a presumption of one, reduces the woman's criminal responsibility.⁶³

⁵⁶Above n 12, 261. Lactation is the period during which a woman breastfeeds.

⁵⁷Above n 12, 262.

⁵⁸Above n 47, 47.

⁵⁹Above n 47, 47.

⁶⁰Above n 47, 47.

⁶¹Above n 47, 47.

⁶²Neonaticide refers to the situation where the mother is usually not mentally disturbed, but is distressed by the immediate physical consequences of giving birth alone and unattended. See above n 47, 47.

⁶³Above n 12, 262. It has also been said that these statutory provisions were enacted not to legally recognise the connection between childbirth and infanticide, but to create it. See above n 6, Osbourne, 55.

III CONSEQUENCES OF THE INFANTICIDE ACT 1938 (UK)

Even accepting at face value the medical assumptions underlying the crime of infanticide, inconsistencies appear due to the limited ambit of the crime. Why does the Act only apply to victims under one year of age by an arbitrary cut off point? There is no evidence that the effects of childbirth, medical or otherwise, disappear miraculously after twelve months.⁶⁴ It is also not clear why killing of other children by the mother are excluded. What about children adopted by the mother? Further, if her mind is disturbed by childbirth or lactation, does it matter that she kills the youngest child, the oldest, her partner or even a complete stranger?

In England, if a mother kills any other than her youngest child under twelve months, she will be charged with murder. What if her child under twelve months is not killed but severely maimed? As there is no such thing as attempted infanticide, the mother may be charged with attempted murder.⁶⁵ Infanticide as defined in England, is also criticised because it is a gender-specific crime and also a biologically-specific crime, in that can only be committed by fertile women. This creates inconsistencies in the treatment of male and female offenders and between non-biological mothers and those who have given birth. The New Zealand crime of infanticide, based on its English counterpart, raises some similar problems.

IV THE HISTORY OF THE CRIME OF INFANTICIDE IN NEW ZEALAND

The crime of infanticide was first introduced in New Zealand in section 178 of the Crimes Act 1961. There was no infanticide provision in the Crimes Act 1908. The infanticide provision in the 1961 Act is based on the English legislation, but it is much wider in scope and more comprehensive in detail.⁶⁶ Section 178(1) states:

Where a woman causes the death of any child of hers under the age of ten years in a manner that amounts to culpable homicide, and where at the time of the offence the balance of her mind was disturbed, by reason of her not having fully recovered from the effect of giving birth to that or any child, or by reason of the effect of lactation, or by reason of any disorder consequent upon

⁶⁴See below Part V.

⁶⁵In New Zealand, she may be charged with causing actual bodily harm to her infant child under s 195 Crimes Act 1961. In *Ericsson v Police* Unreported, 31 March 1993, High Court Wellington Registry AP 52/93 the appellant was found guilty under s 195 Crimes Act 1961 and sentenced to four months imprisonment. This can be contrasted with the infanticide case *Williams* where the defendant was sentenced to two years supervision. See above n3.

⁶⁶J Garrow and G Turkington (eds) *Criminal Law in New Zealand* (7ed, Butterworths, Wellington, 1991) 288.

childbirth or lactation, to such an extent that she should not be held fully responsible, she is guilty of infanticide, and not murder or manslaughter, and is liable to imprisonment for a term not exceeding 3 years.

As the New Zealand legislation is based on English infanticide law, it has adopted apparently without question the "medicalisation" approach to infanticide.⁶⁷ New Zealand criminal law statutes have always had provisions concerning the crime of concealment, and can be seen therefore, to have mirrored the English development from crimes of concealment to crimes of infanticide for essentially the same actions.

The crime of concealment was first introduced into New Zealand in the Criminal Code of 1893. Section 174 of the code provided that:

Everyone is liable to two years imprisonment with hard labour who disposes of the dead body of any child in any manner with intent to conceal the fact that its mother was delivered of it whether the child died before, or during, or after birth.

The Crimes Act 1908, retained the concealment provision, except that two years hard labour was substituted with two years imprisonment.⁶⁸ The concealment provision is still in force in New Zealand today in the Crimes Act 1961 with a penalty "not exceeding two years."⁶⁹ The Crimes Bill 1989 however, contains no clause on concealment. In contrast to concealment, the crime of infanticide was not given any consideration in New Zealand until the late 1950s.

During 1956 and 1957 a preliminary draft for the revision of the Crimes Act 1908 was prepared by a committee on the instructions of the Minister of Justice.⁷⁰ This preliminary draft was then reviewed extensively by an enlarged committee,⁷¹ and from this, a Bill was prepared and introduced in the House of Representatives in 1957. The 1957 Bill contained no infanticide clause.

With a change of government in 1958, Sir George Finlay (the senior puisine Judge of the Supreme Court) was invited to examine the 1957 Bill. In examining the Bill, he took account of comments from judges, law societies and members of the medical and legal profession, and produced an improved version of the Bill. Finlay's examination of the Bill led to an infanticide clause being added in what became the Crimes Bill 1959. In

⁶⁷See above p 6-10.

⁶⁸ Crimes Act 1908 s194.

⁶⁹ Crimes Act 1961 s181.

⁷⁰The exact membership of the committee is noted in the explanatory note of the Crimes Bill 1959.

⁷¹Above n 70.

Finlay's report on his additions and improvements to the Bill, he said of the crime of infanticide:⁷²

There has been necessity for some such clause as this. Prosecutions for homicide in those cases to which the clause will apply have invariably ended in acquittal, quite contrary to the justice of the case in many instances and although....the clause will doubtlessly always end in immediate discharge, for, at the time of the trial, the woman is always completely sane, as I have believed in the past and as psychiatrists assure me, it is better to have order and regularity and consistency in the administration of the Criminal Law rather than verdicts which offend against the spirit of the law.

Finlay was clearly following the "solemn mockery" line of argument here, that held sway in England.⁷³ Rather than the judge and jury having to strain their judicial oaths in order to acquit the women of murder, Finlay thought it best to charge the women with a lesser crime and thereby maintain regularity and consistency within the law. The fact that the clause was focused on the medical condition of the mother after the birth of her child seems not to have been the considered or overriding factor in adding the clause to the Bill as far as I am able to ascertain. A similar position existed in England.⁷⁴ Apart from Finlay's comment above, I can find no other record of why infanticide was added to the 1959 Bill.⁷⁵

The new infanticide clause for the first time created a separate offence of infanticide. Clause 188(1) provided:⁷⁶

Where a woman causes the death of any child of hers under *sixteen* in a manner amounting to culpable homicide, she is guilty of infanticide with a maximum of three years imprisonment, and not murder or manslaughter, if at the time the balance of her mind was disturbed, by reason of the effect of childbirth, to such an extent that she could not be held fully responsible. (my emphasis)

This 1959 Bill lapsed and another Bill was introduced in 1960. The 1960 Bill was substantially similar to the 1959 Bill and was reviewed by the Statutes Revision Committee. The infanticide provision in the 1960 Bill was similar to the clause in the

⁷²G Finlay *Report on the 1957 Crimes Bill* (Justice Department, Wellington, 1958) 82.

⁷³See above p 7.

⁷⁴See above p 6 - 9.

⁷⁵This has not been through lack of trying as I have undertaken research with the help of Jeremy Hammington, Senior Legal Advisor at the Law Reform Division of the Justice Department, the National Library of New Zealand, the National Archives and also the New Zealand Parliamentary Library. There was no indication in the files and documents I uncovered in this process on this point. However, other documents held elsewhere may contain the answer.

⁷⁶Why is the limit sixteen years? This age of is significantly different from its English counterpart. I can find no concrete indication as to why this was the case. The only possible explanation is in a letter from J.L. Robson (Secretary for Justice at the time) to the Minister of Justice 30 March 1960, Justice Department File J 18/10/6 part 3. In this letter Robson mentioned a submission made to the Statutes Revision Committee on the 1959 Bill which suggests that the significance of the age sixteen was chosen because it also appears in the clause on culpable homicide. Age sixteen appears in the current culpable homicide section in the Crimes Act 1961.

1959 Bill, except for one major change.⁷⁷ The age of the child was reduced from sixteen to ten years.⁷⁸

The only reference I have found for the reason behind this age reduction of the child in the infanticide section was in a letter of 1963 by J L Robson, the Secretary for Justice at the time. In this letter Robson writes:⁷⁹

The section ...applies to the killing of any child under ten (*a necessarily arbitrary age*) while the Mother's balance of mind is disturbed in the consequences of childbirth.

This Bill finally became law in 1961 complete with the infanticide section. In the debates on the Bill, infanticide was argued as being needed "to avoid the necessity of bringing a more serious charge in inappropriate circumstances," as it was said that most people, "feel it quite wrong to charge a woman with murder in these circumstances".⁸⁰

The New Zealand infanticide provision is much wider than its English counterpart. First, the age of the child who is killed may be up to ten years, whereas the English section applies only in the case of a child under twelve months. Secondly, the section covers the case of a mother who has not fully recovered from the effect of giving birth to *any* child of hers, whereas the English section applies only where the mental disturbance arises from giving birth to the child killed. The reason for this sensible addition may be seen by reference to a 1963 letter found in a Justice Department file. The letter states:⁸¹

Our provision is a good deal wider than the English legislation. Some years ago a study was made of New Zealand cases where the mothers had killed their children following childbirth. It was found that the victim was often not the newly born child itself but another child.⁸²

These wider provisions of the crime of infanticide are demonstrated in *R v P*.⁸³ In this case, a woman was charged with the murder of a five year old child who was not her

⁷⁷This change occurred after the Bill was reported back from the Statutes Revision Committee.

⁷⁸Clause 188. There is no substantive report of the Statutes Revision Committee which might have explained the reason for the age change, nor is there any record in the Appendices to the Journals of the House of Representatives or any Select Committee Reports. It seems likely that the age of 10 was chosen as this is the age at which a child can be charged with a criminal offence in New Zealand. This is the same position as in the English Bill of 1936. See above n53.

⁷⁹Letter of J L Robson (Secretary of Justice) to C H Rolph of the *New Statesman*, London. Justice Department File J 18/10/6 part 2. Emphasis added.

⁸⁰NZ Parliamentary Debates Vol 328, 1961: 2682.

⁸¹Above n 79.

⁸²I have not been able to locate the study mentioned in the quote.

⁸³[1991] 2 NZLR 116.

natural child, but was living with the woman in her home.⁸⁴ The mother was the child's guardian, but not its natural mother. The court held that the defence of infanticide was available in respect of all children who in fact, law and common sense could be said to be hers. This was because, it would seem strange if the circumstances which would in part excuse an act of violence toward her own natural child would not apply to a child who in all other respects was a member of the family.⁸⁵

Another reason for the wider interpretation of the infanticide provision in New Zealand put forward by Heron J in the case, was that New Zealand does not have the defence of diminished responsibility.⁸⁶

The New Zealand crime of infanticide is therefore based on its English counterpart with the exception of the two differences outlined above. Both Acts, are firmly based on the "medicalisation" approach to infanticide. In recent years, however, this medical model of the crime, linking childbirth with mental disturbance, has come under increasing criticism.

V THE MEDICAL BASIS OF THE CRIME OF INFANTICIDE

The medical basis of infanticide revolves around the assumption that a woman who kills her baby is suffering from puerperal psychosis. This is a rare and severe mental disorder which occurs in about one in five hundred pregnancies⁸⁷ and affects 0.01 per cent - 0.02 per cent of women within the first two weeks of childbirth.⁸⁸ The other types of

⁸⁴Above n 66, 288.

⁸⁵Above n 83, 118.

⁸⁶Above n 83, 119. England has the defence of diminished responsibility. This means that the practical importance of the insanity defence has been reduced by s2 Homicide Act 1957(UK), under which murder may be reduced to manslaughter when abnormality of mind substantially impairs mental responsibility. The "abnormality of mind" need not be a generally recognised type of "insanity." Perhaps what Heron J meant by his comment here was that in most cases of murder in England, defendants would prefer a conviction for manslaughter on the grounds of diminished responsibility rather than acquittal by reason of insanity. As New Zealand does not have diminished responsibility the only option for women who do not fall within the infanticide section is to get an acquittal due to insanity with the possibility of draconian penalty. Thus, there is a the need for a wider interpretation of the crime of infanticide. See above n 15, 210; J Robertson (ed) *Adams on Criminal Law* (Brooker and Friend, Wellington, 1992) Ca 23.22.

⁸⁷Mental Health Foundation of New Zealand *Post Natal Depression* (Mental Health Foundation of New Zealand, Auckland, undated) 5.

⁸⁸See generally A Morris & A Wilczynski "Rocking the Cradle - Mothers who kill their Children" in Birch H (ed) *Moving Targets: Women, Murder and Representation* (Virago Press, London, 1993) 206-207; A Wilczynski "Images of Women who Kill Their Infant: The Mad and the Bad" (1991) 2 *Women and Criminal Justice* 71, 74-75; S Edwards *Women on Trial - A Study of the Female Suspect, Defendant and Offender in the Criminal Law & Criminal Justice System* (Manchester University Press, Manchester, 1984) 95.

depression commonly associated with child birth are, however, much more common. These are the maternity or baby blues, and postnatal depression.

Maternity blues affect approximately 50-80 per cent of women on the third or fourth day after delivery, and it is usually short lived.⁸⁹ Postnatal depression affects about 10-20 per cent of mothers and usually lasts longer than a month in the year following childbirth, sometimes lasting until while the child is a pre-schooler and beyond.⁹⁰

The symptoms of the maternity blues include tiredness, low spirits, tearfulness, anxiety and memory difficulties. The causes are uncertain, but are generally thought to be related to hormonal changes, and to the birth and post birth environment.⁹¹

Postnatal depression is much more serious as it impairs and disables a woman's quality of life. Symptoms include extreme and persisting tiredness, tearfulness, depressed mood, anxiety, insomnia, lack of concentration, difficulty in coping with the demands of baby care, irritability, guilt and negative feelings towards the father and the baby.⁹² Forty percent of mothers who develop postnatal depression have these symptoms for more than one year. The majority do not seek or receive psychological or medical treatment. Most do not know what is wrong and many feel that they are the only ones not basking in the supposed "joys of motherhood".⁹³

Most mothers suffering from postnatal depression do not have previous psychiatric histories and are not liable to depression at other times.⁹⁴ It has been suggested that this means this group of women are comprised in the main of women who are overwhelmed by the stresses that accompany childbirth and the care of babies.⁹⁵

If, on the other hand, the mother is suffering from puerperal psychosis, she will be completely out of touch with reality and her ability to go about her usual life activities will be completely disrupted.⁹⁶ She may have suicidal thoughts, be hostile to those around her, and suffer from delusions which often consist of feelings of inability to care

⁸⁹Mental Health Foundation of New Zealand *What is Post Natal Depression?* (pamphlet produced by the Mental Health Foundation of New Zealand, Auckland, undated)

⁹⁰Above n 89.

⁹¹Above n 87, 5.

⁹²Above n 87, 6.

⁹³Above n 87, 6.

⁹⁴Above n 87, 7.

⁹⁵Above n 87, 7.

⁹⁶Above n 87, 5.

for the new baby and of not having enough love for both the father or the child.⁹⁷ Common symptoms also include severe depression, guilt, clouding of consciousness, bewilderment, panic attacks and paranoia.⁹⁸

Unlike a woman suffering from postnatal depression, she will be completely irrational and disjointed. She may suffer from hallucinations, nightmares, obsessive religious beliefs and delusions. She may be over-active, over-enthusiastic and may exhibit excessive behaviour especially when it comes to spending, writing and cleaning. She may not need sleep.⁹⁹

Studies show that women who develop this severe disorder are, in their family and previous histories and personalities, very like women who develop psychoses at other times.¹⁰⁰ There is considerable controversy therefore, over whether puerperal psychosis is in fact any different from any other type of psychosis, and can therefore be justified as a separate diagnostic category.¹⁰¹ There is certainly some temporal association with childbirth as hospital admissions for psychotic disorders are below the expected level during pregnancy, but are several times above the expected level in the first three months after delivery.¹⁰² It has been suggested however, that stress brought on by difficult labours, first deliveries and still births may be associated with increased risk of psychosis.¹⁰³

What has become clear recently however, is that despite being the medical and legal basis for the crime of infanticide, puerperal psychosis is very rarely the cause of a mother killing her child.¹⁰⁴ Estimates are that this occurs only in around five cases a year in England.¹⁰⁵ In fact, the mental disturbance used to satisfy the terms of the crime of infanticide can vary considerably from puerperal psychosis to postnatal depression, to no mental disturbance at all.¹⁰⁶ Studies in England and Hong Kong have found that

⁹⁷ Above n 87, 5.

⁹⁸ Above n 87. See Mental Health Foundation of New Zealand *Post Natal (Puerperal) Psychosis*. (pamphlet produced by Mental Health Foundation of New Zealand, Auckland, undated)

⁹⁹ Above n 98, *Post Natal Psychosis* pamphlet.

¹⁰⁰ Above n 87, 6.

¹⁰¹ Above n 88, Morris and Wilczynski, 207.

¹⁰² Above n 87, 6.

¹⁰³ Above n 87, 6.

¹⁰⁴ Above n 88, Morris and Wilczynski, 207.

¹⁰⁵ Above n 88, Morris and Wilczynski, 207.

¹⁰⁶ Above n 88, Morris and Wilczynski, 207.

about half the mothers convicted of infanticide could not actually have been described as suffering from any mental disorder at all.¹⁰⁷

It has also been acknowledged, that where an infanticidal woman is recognised as being mentally ill, it is not usually of sufficient severity that it would be recognized by the law in any other context. For example, it would not be a sufficient basis for a plea of diminished responsibility.¹⁰⁸ It is, however, largely assumed on the slightest evidence that a woman who kills her child under twelve months in England, or ten years in New Zealand, is in fact mentally ill within the definition of the crime of infanticide.¹⁰⁹ Virtually any type of perceived psychiatric, emotional, personality, or mental problem whatsoever is interpreted, if psychiatrists and lawyers choose, as the "severe mental illness" theoretically required for the crime of infanticide.¹¹⁰

Ania Wilczynski argues that, this "fudging" of mental illness is particularly apparent in the neonaticide category.¹¹¹ Such cases typically involve young, single women from poor economic backgrounds who are ignorant about sex and contraception. Usually these women conceal their pregnancies and give birth alone without any preparation, in what is obviously a very traumatic and emotionally and physically exhausting experience. In situations like this, it is false to equate the emotional and physical upheaval of the birth with the mental illness that is required by the crime. There is normally no evidence of psychosis or mental illness either before or after the birth.¹¹²

It is clear therefore, that women convicted of killing their children, whether neonaticidal or otherwise, are in fact not usually suffering from the mental illness required by the crime of infanticide. It is more than likely that these women are suffering, not from puerperal psychosis, cases of which occur only very rarely, but from the stresses that accompany childbirth and caring for young babies. These women are ordinary mothers suffering from severe cases of postnatal depression.¹¹³

¹⁰⁷See generally P d'Orban "Women who Kill their Children" (1979) 134 *British J of Psychiatry* 560; P Cheung "Maternal Filicide in Hong Kong 1971-1985" (1986) 26 *Medicine, Science and the Law* 185. I can be no clearer than this here because there has been very little research done on these types of depressions, especially in New Zealand. A Phd in the area is due for publication in late 1993 in New Zealand. The author of this Phd has indicated to me that the situation in New Zealand is most likely to be the same as that in Hong Kong and England.

¹⁰⁸Above n 88, Wilczynski, 76.

¹⁰⁹Above n 88, Wilczynski, 76.

¹¹⁰Above n 88, Wilczynski, 76.

¹¹¹Above n 88, Wilczynski, 76.

¹¹²Above n 88, Wilczynski, 76.

¹¹³See generally above n 87; above n 88.

Infanticidal women's actions reflect the social situations and circumstances in which they have found themselves. Their motive for killing their children is not because they are biologically unstable, nor because they are mad. They kill because they are overwhelmed by the conditions they must face on a daily basis and the expectations they must try to meet in order to look after their children and to be "good" mothers.

Infanticidal mothers are lonely and isolated, they feel powerless and dependent, or they may dread the social stigma of an illegitimate child. They have been given almost total responsibility for the care of another, but they themselves receive little support, spousal or otherwise, from those around them. They may be experiencing economic difficulties, and may also have been provided with unrealistic expectations of motherhood.¹¹⁴ Many of these women may have internalised many false myths about the role of mothers and motherhood. It is against the background of these ideas that the proposals for reform of the crime of infanticide are discussed.

VI PROPOSALS FOR THE REFORM OF THE CRIME OF INFANTICIDE

In recent years, due to the medical debate outlined above, the Infanticide Act 1938 (UK) has become increasingly subject to criticism. In 1975, the Butler Committee on Mentally Abnormal Offenders challenged the medicalisation of infanticide when it stated that the medical principles on which the act is based were probably no longer relevant. Mental illness was no longer considered to be a significant cause of infanticide.¹¹⁵

The Committee recognised also that puerperal psychoses are now regarded as no different from other psychoses.¹¹⁶ They accepted that the operative factors in child killing are not based on the mother's mental disturbance due to the birth of her child, but often relate to "the stress of having to care for the infant, who may be unwanted or difficult, and personality problems....[and that] these stresses affect the father as well as the mother, and are not confined to a year after the birth."¹¹⁷ Consequently, the Butler Committee proposed that infanticide could be adequately dealt with by using diminished

¹¹⁴Above n 113.

¹¹⁵*Butler Committee - Report of the Committee on Mentally Abnormal Offenders* (1975; Cmnd 6244) para 19.23.

¹¹⁶Above n 115, para 19.23.

¹¹⁷Above n 115, para 19.23.

responsibility introduced in 1957, instead of a separate Infanticide Act.¹¹⁸ The repeal of the Infanticide Act was therefore proposed.¹¹⁹

In 1980 the medical model of infanticide was challenged again by the Criminal Law Revision Committee (CLRC) in its *Fourteenth Report*.¹²⁰ The CLRC agreed with the Butler Committee that the medical basis of the Act was probably no longer relevant.¹²¹ They also accepted that "there [was] little or no evidence for an association between lactation and mental disorder," and proposed the reference to lactation be removed from the Act.¹²² In questioning the medical basis of the Act, the CLRC suggested that mental disturbances may arise not from giving birth but from "circumstances consequent upon the birth".¹²³

By the phrase "circumstances consequent upon the birth," the CLRC proposed the extension of the definition of the crime to cover "environmental or other stresses".¹²⁴ These stresses included poverty, incapacity to cope with the child, and failure of bonding.¹²⁵ The CLRC reforms were therefore based on socio-economic factors rather than medical conditions arising from childbirth.

Regardless of the fact, however, that the CLRC, in agreement with the Butler Committee, felt uncomfortable about the medical basis of the 1938 Act, it argued for the retention of an expressed medical basis for the crime. The CLRC proposed amending the present version of infanticide law to take into account some of the socio-economic factors involved in child killing, but, their proposal included leaving the reference to

¹¹⁸The Butler Committee actually recommended the abolition of the mandatory life sentence for murder, thus leaving the judge to suit the sentence to the circumstances of the case. The repeal of the Infanticide Act was proposed as this would render it superfluous. If the mandatory sentence was retained, the Committee's second choice was for infanticide cases be dealt with under the general defence of diminished responsibility. See E Parker and F Good "Infanticide" (1981) 5 *Law and Human Behaviour* 237, 241. However, O'Donovan argues that even if diminished responsibility was used as a defence, "there [will] still be pressure in infanticide cases on psychiatrists 'to conform their medical opinion to the felt need for mercy,' by giving evidence of medical disorder so as to avoid a conviction for murder". O'Donovan suggests that if this is the case, "the current 'stretching' of the law and medical principles w[ill] continue, as w[ill] the myths that surround the crime". See above n12, 263.

¹¹⁹Above n 115, paras 19.17; 19.22.

¹²⁰*Criminal Law Revision Committee - Offences Against the Person* (1980; Cmnd 7844)

¹²¹Above n 120, para 103.

¹²²Above n 120, para 105.

¹²³Above n 120, para 105.

¹²⁴Above n 120, para 105.

¹²⁵Above n 120, para 105.

mental disturbance as it was. The CLRC did not propose that infanticide be completely redrafted or repealed.¹²⁶

A reformulated version of the crime of infanticide along the lines of the CLRC's proposal appears in the Draft Criminal Code 1989 (UK). Clause 64(1) of the code states:¹²⁷

A woman who, but for this action, would be guilty of murder or manslaughter of her child is not guilty of murder or manslaughter, but is guilty of infanticide, if her act is done when the child is under the age of twelve months and when the balance of her mind is disturbed by reason of the effect of giving birth or of circumstances consequent upon the birth.

The Select Committee who developed the Draft Code were arguably ambivalent as to whether the law on infanticide should actually be changed in England. They did suggest, however, that the matter should be considered further.¹²⁸

Other jurisdictions outside England have also proposed to reform their infanticide laws. In 1984, the Law Reform Commission of Canada's report on homicide contained a recommendation that their infanticide provisions be deleted.¹²⁹ This recommendation was made because the Commission saw little evidence to support the underlying medical rationale of the infanticide provision.¹³⁰ In doing this, the Canadian Commission aligned itself with the recommendation of the Butler Committee.

In Australia in 1988, following the approach taken in England in the Draft Criminal Code, the Law Reform Commission of Victoria, in their Discussion Paper on *Mental Malfunction and Criminal Responsibility*, argued for the retention of the crime of infanticide, regardless of whether diminished responsibility was introduced in Victoria or not.¹³¹ The Commission based their reforms on the wording of the English Draft Criminal Code and saw the retention of the offence as recognition of a "distinctive kind

¹²⁶Abolition was opposed by an unusual coalition of police, lawyers and women's organisations. The offence of infanticide has been defended as "an example of common sense and common knowledge triumphing over tidy scientific classification". See above n 120, para 101.

¹²⁷A Criminal Code for England and Wales Law Com No. 177 (1989) Vol 1 Report and Draft Criminal Code Bill.

¹²⁸R MacKay "The Consequences of Killing Very Young Children" [1993] Crim LR, 21.

¹²⁹Law Reform Commission of Canada *Working Paper # 33, Homicide* (Supply Services Canada, Ottawa, 1984). The Canadian infanticide provisions are ss 216 and 590 Canadian Criminal Code.

¹³⁰Above n 6, Osbourne, 48.

¹³¹Law Reform Commission of Victoria *Mental Malfunction and Criminal Responsibility - Discussion Paper No. 14* (no publisher, Melbourne, 1988) para 198.

of human tragedy".¹³² Infanticide was regarded as a class of case "where the law can take a compassionate view of a tragic aberration".¹³³

In New Zealand, the Crimes Bill 1989 proposes to repeal the present infanticide provision in the Crimes Act 1961, and to replace it with a simplified version in clause 124. Clause 124 is to be called "culpable homicide by mother of child".¹³⁴ This clause states:

Where, upon the trial of a woman for culpable homicide of any child of hers under the age of 10 years, the jury is of the opinion that at the time of the killing the woman was mentally disturbed, through not having fully recovered from the effect of giving birth to that child or any other child, or through any disorder consequent upon childbirth, to such an extent that she should not be held fully responsible for the killing, the jury may return a verdict of culpable homicide with mitigating circumstances.

The Crimes Bill 1989, although repealing the present infanticide provision in the Crimes Act 1961, still retains the medical model of the crime of infanticide in its new clause.

In a report by the New Zealand Crimes Consultative Committee on the 1989 Bill, however, they say that "the Committee is not attracted to the different approach to [infanticide] taken by clause 124."¹³⁵ They include in an appendix a redraft of the section, to bring clause 124 much closer to the existing infanticide law. The Consultative Committee's clause 124 states:

Where a woman causes the death of any child of hers under the age of 10 years in a manner that amounts to murder or culpable homicide, and where at the time of the offence the woman was mentally disturbed, through not having fully recovered from the effect of giving birth to that or any other child, or through any disorder consequent upon childbirth, to such an extent that she should be held responsible, she is guilty of infanticide, and not murder or culpable homicide.

The Committee went on to say, "if the policy is kept in order to reduce the jeopardy of a mother who kills her child while suffering from the effects of childbirth, the legislation should retain a specific offence of infanticide."¹³⁶ This was because the rules on insanity and the availability of a plea of mitigation on sentence for manslaughter proposed in the Bill did not cater for infanticidal women.¹³⁷ The Committee saw no

¹³²Above n 131, para 199.

¹³³Above n 131, para 197.

¹³⁴Clause 124 Crimes Bill 1989.

¹³⁵*Report of the Crimes Consultative Committee* (Government Printer, Wellington, 1991) 54.

¹³⁶Above n 135, 54.

¹³⁷Above n 135, 54.

compelling reason to alter the policy established in 1961 by recommending the abolition of the crime of infanticide.¹³⁸

The reform proposal of the Consultative Committee is unique, as it does not propose to repeal the infanticide provision, nor does it propose to adopt the social factors evident in the CLRC's formulation of infanticide. The Crimes Consultative Committee's recommendation is instead to retain the medical model of the crime.

Similarly, the proposal contained in the Crimes Bill 1989, although repealing the old infanticide provisions, has firmly retained the medical model of the crime. The New Zealand reform process therefore, results in no substantial change in focus from the infanticide provisions contained in the Crimes Act 1961.

In summary, the reform process in England, Canada, Australia and New Zealand, as seen in the discussion above, has put forward two distinct possibilities for the reform of the crime of infanticide. One possibility is to repeal the crime. The other is to keep it as it is, with little, if any change, except for the possible addition of some socio-economic factors.

The proposal to repeal the crime seems initially progressive, considering the recognition of the flawed medical basis of the crime. The proposed addition of socio-economic factors also seems progressive. After closer examination, however, and exposure of the crimes long established roots it is clear that retention of the medical basis of the crime¹³⁹ or even its repeal will have little positive effect in the reform process.¹⁴⁰ This is because there can be no successful reform of the crime of infanticide until those who propose the reforms to the crime begin to acknowledge and to understand the real reasons why women kill their children. Until this happens, the repeal of the crime or the addition of socio-economic factors, will have little effect on the perception of the crime as a whole, because infanticidal mothers will continue to be, as they have always been, victims. They will be victims, not only of their social position, but of the theories of female criminality which pathologise their behaviour.

¹³⁸Above n 135, 54.

¹³⁹Retention of the medical basis of infanticide was proposed by the CLRC, the Law Reform Commission of Victoria, and the New Zealand Crimes Consultative Committee.

¹⁴⁰Above n 6, Osbourne, 59.

VII THE PATHOLOGISATION OF INFANTICIDAL MOTHERS

Should we treat you as a wicked person responsible for her actions....or as someone who was sick? 141

The comparatively small numbers of infanticide cases brought before the criminal justice system means that infanticidal mothers brought before the courts, are regarded as deviant and as "abnormal" members of the female sex. These women by killing their children have committed crimes, not against the state but against their own family, and they are therefore considered to be "mad". This classification of infanticidal mothers as "mad" forms a theory about female criminality which pathologises the mother who kills her child.¹⁴² The theory is based on the fact that the crime of infanticide is perceived to be so heinous and in such direct contradiction to women's natural role of wife and mother, that the act of a mother killing her child can surely have only one explanation - madness.¹⁴³

In infanticide cases, where a mother has out of shame or poverty killed her child, or where from physical exhaustion induced by lack of support and community services she takes the life of her newborn, her experience is not validated in the legal system or in society as a whole. Instead, the woman is pathologised because it is much easier and less politically disturbing for an infanticidal mother to be seen in this way.¹⁴⁴ This "pathologisation" enables the meaning of the act of a woman who kills her child to be

¹⁴¹*R v Ricketts* Unreported, May 1989, Central Criminal Court, London, observed by Ania Wilczynski cited in above n88, Wilczynski, 71.

¹⁴²The classification of women criminals as either mad or bad, has been identified by Susan Edwards as being dependent on the "typicality" of the crimes women commit. Crimes typically committed by women have been identified as offences like theft, shoplifting, benefit fraud and forgery. These crimes are acceptable for women to commit, especially if they are doing them for the benefit of their family or children. Here, where the woman is conforming to the appropriate domestic stereotype of devoted wife and mother, the legal system is more than likely to respond to the women's plight in a sympathetic and lenient manner. Untypical crimes for women are robbery, terrorism and crimes outside the family domain. Women who commit these sorts of crimes are regarded as *bad*. In these situations, custodial sentences are imposed and so are medical and psychiatric sentences. The women who are regarded as *mad*, however, are those who commit crimes not against the state, but against their male partners and children. See generally S Edwards "Neither Bad nor Mad: The Female Violent Offender Reassessed" (1986) 9 *Women's Studies Int Forum* 79.

¹⁴³ Women who commit such 'untypical' crimes are considered ill in the true sense. Within criminological ideologies and ideologies of femininity there is no room for the belief that the infanticidal mother's response may be a 'normal' response to a violent situation or indeed be like terrorism, the last and only resort. See above n142, 80.

¹⁴⁴ Above n142, 80. Carol Smart has identified a pathological model of female criminality where it is assumed that criminal action is irrational, illogical and without meaning for the actor. The socio-economic structure of society is seen to have little or no influence on the nature or degree of criminal activity. The crime is an individual rather than a social phenomenon and it denies the significance of will or intention of the actor. See C Smart *Women, Crime And Criminology: A Feminist Critique* (Routledge & Kegan Paul, London, 1976) 147-8.

lost in a portrayal of madness and she is portrayed as a sick and vile monster.¹⁴⁵ Infanticidal mothers are seen in this way even though it is now acknowledged that puerperal psychosis or insanity is very rarely the cause of a mother killing her child. Studies recognised by some of the law reform bodies discussed in this paper, have proved that most women are not suffering from any mental disorder at all.¹⁴⁶

The pathologisation of infanticidal mothers, punishes these women for stepping beyond the bounds of their traditional sex-role expectations, and their acts of violence are explained away by reference to their hormones (biology) or emotions (irrationality). A kind of temporary madness is deemed to exist, and is shown to account for these women's actions if they act in contradiction to their expected roles. This enables the issue of an infanticidal mother's responsibility to disappear, as she was out of control and could not help what she did.¹⁴⁷

The reason infanticidal mothers are portrayed like this is because in the myths surrounding motherhood, the love a mother gives to and for her child is supposed to be the most natural thing in the world. It is what women are for, and includes everything up to the point of self sacrifice. A woman who does not love her child to this point cannot be called a proper mother, she must be mad and sick, she must be suffering from some type of insanity. If she kills her baby she cannot have any reason for doing it except madness, and madness is illness, lack of reason, and madness is motivelessness.¹⁴⁸

Hilary Allen goes further when she argues that the initial pathologisation of infanticidal mothers provides the opportunity for a further manoeuvre: the *naturalisation* of the crime.¹⁴⁹ Allen explains that being mad displaces these women from the realm of the culpable to such an extent, that an infanticidal mother's act is rewritten as a mere event in nature, an occurrence of the natural state of womanhood for which no exceptional cause

¹⁴⁵Above n142, 82-86.

¹⁴⁶See generally Above n 88, Morris and Wilczynski; above n 107, d'Orban; above n 107, Cheung.

¹⁴⁷Above n 88, Birch, 4.

¹⁴⁸Above n 88, Birch, 69. That this is the case can be seen in the way that women's offending is explained in different ways to men's. Hilary Allen suggests in her research based on an examination of psychiatric reports prepared for women and men convicted of violent crime, that while reports on female offenders focused on their mental states, reports on men focused more on their behaviour and lifestyle. Allen says that this was not because of the differences between men's and women's offending but because reports of female offenders were prepared within a context which placed *all* women, not just female offenders, within the discourse of the pathological. See generally H Allen *Justice Unbalanced* (Open University Press, Oxford, 1987).

¹⁴⁹H Allen "Rendering them Harmless: The Professional Portrayal of Women Charged with Serious Crimes" in P Carlen P and A Worrall (eds) *Gender, Crime and Justice* (Open University Press, Milton Keynes, 1987) 85.

need be sought.¹⁵⁰ The activation of her other statuses as housewife, mother and wife, undermines the very possibility of treating her as dangerous.

Infanticidal mothers perceived in this way are seen as victims in need of sympathy, support and most of all, psychiatric treatment.¹⁵¹ This is because such an act cannot be the act of a "normal" woman. She cannot have been fully responsible for her actions. She must need help or treatment because a violent woman is a mad woman, and a mad woman is a sick woman in need of treatment.¹⁵²

In summary, infanticidal mothers are *pathologised* and are portrayed as being "mad" because they kill their children. This pathologisation deprives an infanticidal mother's act of any meaning as all inquiries into the death of her child end with the mother's assumed madness. In turn she is regarded as needing lenient treatment, not punitive sanction. While the consequences of this lenient treatment for individual women may be beneficial in the short term, as few want to see them imprisoned, in the long term, there are several costs and many prices for which - arguably - all women pay.¹⁵³

VIII THE PRICE OF PATHOLOGISATION OF INFANTICIDAL MOTHERS.

The first price of pathologisation is that infanticidal mothers and indeed, all women, are believed to be *potentially mad* during and after childbirth, and at other times in their lives, for example at menstruation. Women in these "ordinary states of womanhood," are subject to stereotypical beliefs about these states, and these beliefs are used against all women. This is because the lives of all women are touched by society's expectations of women's behaviour at different times in their lives.

When a woman commits an act of violence, the legal system by explaining her behaviour in terms of madness, or illness, effectively deprives the act of any meaning. There is deemed an absence of intention, of will, and of responsibility for action. Hilary Allen puts it like this: "[t]he crime 'develops', the 'tragic events' follow, she can

¹⁵⁰Above n 149, 84.

¹⁵¹Above n 149, 85.

¹⁵²Above n 88, Morris and Wilczynski, 206.

¹⁵³Above n 88, Morris and Wilczynski, 215.

do nothing 'to prevent a further tragedy from occurring'.¹⁵⁴ The woman offender is "rendered harmless"; she is a "legal invalid".¹⁵⁵

The second price that infanticidal mothers and other women pay, is that all women are perceived to be born wives and mothers.¹⁵⁶ This centres around the "myth of motherhood" identified by Ann Oakley,¹⁵⁷ and also around the meaning given to motherhood within the patriarchy's social structure. Women who step outside of these strictly defined and guarded gender roles and abuse or kill their children are seen as mad. They are seen as mad and in need of help to be shaped into a perfect wife and mother, the qualities of which their "mental" illness has deprived them. No "normal" wife or mother kills her husband, or child, or commits other violent acts. To portray these women as mad, turns them into less socially and politically disturbing figures. It enables the inquiry of the death of the child to end with the woman herself, and not to begin with society or motherhood in general, or anyone else.

Further, these women's lenient "treatment", rather than punishment, serves to invalidate their actions and responsibility even more, and in turn, the potential power of all women's, actions.¹⁵⁸ This power is censored from public view and disguised as madness, in order that women comply with the myth of their passivity, compliance and harmlessness. The trend of psychological and medical treatment of women offenders is merely to ensure the reinforcement of these myths and traditional expectations, about the proper and desirable behaviour of women in our society. It is clear that the repeal of the crime of infanticide, as discussed above, will have little, or no, effect on the belief in these myths and the enforcement of them.

The last price I identify here, though not the last by any means, is the denial of infanticidal mothers, and of other women's, capacity for violent acts and anger. The current treatment of infanticide signifies that all women wish, and society desires them, to fit within the traditional role of passive and nurturing wife and mother. This enables society to deny the possibility of serious female anger.¹⁵⁹

¹⁵⁴Above n 149, 85.

¹⁵⁵Above n 149, 81.

¹⁵⁶Above n 88, Morris and Wilczynski, 216.

¹⁵⁷See generally A Oakley *Becoming a Mother - From Here to Maternity* (Penguin Books, Middlesex, 1979)

¹⁵⁸Above n 149, 91.

¹⁵⁹M Benn "Body Talk - The Sexual Politics of PMT" in Birch (ed), above n88, 163. Benn writes of women's anger in relation to premenstrual syndrome. She says it is believed that housewives who get irritated at domestic tasks, their husbands or their children are angry because of the time of the month, not because of anything within the dynamic of those relationships and certainly not because of disappointment or frustration. Any anger that women do feel is therefore explained away as merely hormonal.

To pathologise infanticidal mothers because they kill their children is a very powerful, but very misleading portrayal of why women kill their children. The pathologisation of these women is misleading because they are far from "mad" in the psychological sense. They are perceived as pathological however, by society, because this is a convenient way of absolving society of the need to discover the real reasons why women kill their children. Hence, there is the strong desire to retain the medical model of the crime.

The pathological representation of infanticidal mothers as mentally and biologically unstable, and as psychologically unbalanced, means that there is no need to look beyond these individually rooted explanations for the crime of infanticide. Nor is there the need to look beyond an explanation based on a false and mythologised perception of women and the nature of motherhood. There is also no need to acknowledge "the unpalatable truth that 'normal' women *can* kill their children when they are confronted by social and economic circumstances which are severe enough."¹⁶⁰ As this is the case, the real truth about infanticide will not be revealed.

Criminologist Jocelyne Scutt says that infanticide is "clearly the 'band-aid' attitude of the criminal law towards socio-political problems created by role stereotyping."¹⁶¹ This, however, is not admitted by those who make and reform the law. It is now time to remove the "band-aid," to look beneath it, and begin to expose, explain and to understand the real reasons why women kill their children. In doing this, we will avoid the usual individual and biological explanations of the crime, and attack directly at the root of the problem. In doing so, we will attack the myths, the false expectations and the institutionalism of motherhood in the society in which we live.

Katherine O'Donovan wrote, in 1984 that "[t]o admit that social and economic circumstances, or motherhood, may cause crime is to open a hitherto tightly closed box."¹⁶² In 1991, Ania Wilczynski wrote that, "[i]t is clearly time that the rusty hinges of this "box" were prised open" and, in 1993, I agree that to prise open this "box" is both a pressing and an urgent task.¹⁶³ It is a task, however, that is not easy and it is precisely for this reason, that it has taken so long already. Here, I attempt to begin the task, by opening the "box" up a crack. By doing this, I merely make a start on the long

¹⁶⁰Above n 88, Morris and Wilczynski, 215 (Emphasis added).

¹⁶¹J Scutt "Sexism in Criminal Law" in S Mukherjee and J Scutt *Women and Crime* (Allen & Unwin, Sydney, 1981) 7. Scutt also argues that infanticide illustrates all too well the refusal of society to recognise the sexism inherent in our culture and endemic in the family unit as it exists under patriarchy.

¹⁶²Above n 12, 264.

¹⁶³Above n 88, Wilczynski, 84.

road to beginning to understand the real reasons why women kill their children and in the hope that one day, the problem will be solved altogether.

IX EXPOSING THE TRUTH ABOUT THE CRIME OF INFANTICIDE.

Infanticide is a crime that reflects not only a woman's mental state but also her experiences of helplessness and powerlessness as a result of being a mother in our society.¹⁶⁴ It is a response to her poverty, social isolation, loneliness, boredom, physical weariness, child care responsibilities and domestic duties, and her anger and self blame that she cannot feel better or do more. It reflects the "powerless responsibility" felt by mothers who stay at home to care for their children, and it evidences that anger at the conditions of motherhood can become translated into anger at the child.¹⁶⁵ The frequency of infanticide reflects the lack of any meaningful support services for mothers who experience these difficulties. Infanticide is a crime committed by some women who find it impossible to meet the culturally imposed standards of the perfect mother and fulfil the many myths of motherhood.

Jenny Phillips identifies a number of these myths of motherhood in New Zealand.¹⁶⁶ She suggests that they are that: (i) marriage brings happiness and fulfilment to women; (ii) it is essential for children to have their mothers at home for the first five years; (iii) the children of "working" mothers are badly off; and (iv) that child care centres are terrible places. She says another myth is that suburban neurosis is exaggerated, as most women at home are perfectly alright.

These myths are very different from the reality that mothers face. There is a great conflict between the ideal of serene, fulfilled motherhood which is portrayed in the myths and the realities of isolation and exhaustion. Mothering is not a quality inherent in all women, but in fact, is something that must be learned. Since few women handle a small baby before they have their own, they learn on the job, and usually in isolation with very little emotional support. It is also likely that these women have little, or no, social or economic power to determine the environment in which their children will grow up in.¹⁶⁷ In these circumstances it is likely that a new mother will exhaust herself

¹⁶⁴Above n 142, 86.

¹⁶⁵*A Rich Of Woman Born* (Bantam, New York, 1976) 35.

¹⁶⁶J Phillips *Mothers Matter Too - A Book for New Zealand Women at Home* (Reed, Wellington, 1983) 123-134.

¹⁶⁷See generally V Welburn *Postnatal Depression* (Fontana, London, 1980).

caring not only for her baby but also her other children, her partner and her home. Who mothers her ?

The feelings of helplessness and powerlessness felt by mothers often manifest themselves in the condition known as postnatal depression. It is clear that postnatal depression in its most severe form may cause a woman to kill her child.¹⁶⁸ It is not just those mothers with puerperal psychosis that kill their children.¹⁶⁹ This can be seen in the comments of one woman's experience of postnatal depression. She wrote that her experience of postnatal depression was about:¹⁷⁰

feeling hopeless, worthless, miserable and tired. It [was] about repressed anger which erupts as extreme irritability or is turned against the self in self-loathing and even physical attacks. It [was] about energy gone underground, flatness, greyness above ground.

It is understandable that mothers suffering from this kind of depression may lash out at those more vulnerable than themselves. As Allison Morris and Ania Wilczynski write, within our societal structure where men hold all the power and women experience difficulty in living up to the expectation of "doing what comes naturally", " it is perhaps not surprising that the targets for [their] violence are those who are even less powerful than they are: their children."¹⁷¹

It may seem easy to remedy the conditions and problems that mothers face caring for their children and so, to prevent some of the causes of infanticide. However, there is a reluctance to acknowledge that for some women the experience of motherhood itself is what causes them to kill their children. This reluctance is obvious both in the legislature and in societal responses.

This reluctance to accept that the conditions of motherhood cause infanticide exists because such an acknowledgement creates a direct threat to the institution of motherhood. Acceptance of these ideas threatens the nuclear family. Society will be further threatened, when women cast aside their role in the nuclear family and begin to choose the terms of their own lives.¹⁷²

¹⁶⁸See generally above n107.

¹⁶⁹See generally above n107.

¹⁷⁰V Welburn "Depression after Childbirth" cited in above n87, 13.

¹⁷¹Above n 88, Morris and Wilczynski, 216. They also write that if mothers are experiencing such obvious difficulty living up to the expectations of motherhood, we should ask why infanticide does not happen more often.

¹⁷²This can be seen for example by "collective parenting." One example of collective parenting is three women living in separate houses but together raising a "daughter." The "daughter" has her own room in each house and the women say that this means no one woman carries out the 24 hour responsibility of parenting. Each mother has different talents to contribute and the "daughter" always

This threat to the institution of motherhood and the family, is stopped by making the infanticidal mother into a 'scapegoat,' so hiding the fact that it is the society in which she lives that has failed her. As Adrienne Rich says:¹⁷³

[I]nfanticidal mothers become a scapegoat - the one around whom the darkness of maternity is allowed to swirl - the invisible violence of the institution of motherhood, the guilt, the powerless responsibility for human lives, the judgements and condemnations, the fear of her own power, the guilt, the guilt, the guilt.

Once society and the law accepts and integrates the reality that infanticidal mothers are merely 'scapegoats,' hiding a deeper problem about the conditions in the institution of motherhood, infanticide laws become redundant. Repeal of the crime of infanticide will be possible when adequate and easily obtainable support services, and whatever else it may take, are put into place to deal with the problems faced by mothers in society. Ideally, when all this is carried out there will be no need for infanticide law because the possibility of a woman killing her child, although not completely eliminated, will be lessened.

The crime of infanticide will also no longer be needed because it will be understood that most women do not kill because they are, "mentally unstable, psychologically unbalanced [or] mentally aberrant".¹⁷⁴ It will be understood that women kill because the stresses of being a mother in a society which undervalues, ignores and expects too much of them, become too great. It will be realised that women kill in "moments of murderous anger at their children because there is no one, or nothing else, on which to discharge their anger."¹⁷⁵ If the crime of infanticide is removed for these reasons, it will be for the right ones, and not for the admirable, but nevertheless, misguided reasons of the law reform bodies discussed earlier.¹⁷⁶

has a positive adult to relate to, while time is allowed for each adult to follow her own desires and ambitions. This kind of family relationship challenges the foundations of the nuclear family. H, M and D "New Model For Motherhood" (1993) 198 Broadsheet 16.

¹⁷³Above n 165, 282.

¹⁷⁴Above n 161, 9.

¹⁷⁵Above n 165, 5.

¹⁷⁶Above n 6, Osbourne, 48. Osbourne stresses the importance of the crime of infanticide being removed for the right reasons. She says, "the removal of [the crime] without concomitant change in how people view female criminality may result in the law, the courts and public sentiment again moving out of step." She argues, "this is not to say that [they] should remain, but, rather they should be removed for the right reasons."

X CONCLUSION

The treatment of infanticidal mothers in our courts and by the reform bodies discussed in this paper and the perceptions of these women in society invalidates their actions and instead lays the blame for the death of their children, not on the unrealistic expectations and pressures on mothers in our society today, but on the women themselves. Unless political and social change occurs to stem these unrealistic expectations and to change society's perceptions of infanticidal mothers and why they kill their children, the blame for infanticide will rest, and all inquiries about the crime's causes will end with the mothers of these children.

These false perceptions of the crime of infanticide must be challenged and the real reasons why women kill their children must be understood and integrated into our vision of reality. Most importantly however, these changes in perception must occur now, because there is a danger that the real reasons why women kill their children will remain contained in an unopened box, its hinges seized up completely by socio-political neglect.

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