'BAD' MOTHERS?

Infant killing in Victoria

1885 - 1914

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12 000 words
- a hideous wastage of life
from which society in its
impotence averted its gaze.

R. S. Lambert, When Justice
Paltered (1936) quoted in
D. Seaborne Davies, 'Child-
Killing in English Law',
Modern Law Review, December
1937, p.223
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INTRODUCTION

On 30 March 1578, Marie Lyttell, the mother of an illegitimate child most unnatyrally by all cychstance murthered it, cast it into a privie hagyng before hysed it by the throte and sculle most lamentablibe.¹

Throughout history, women have killed infant children, but the consequences of such acts have varied greatly.

In late medieval France, convicted infant murderers faced burning or burial alive. In late nineteenth-/early twentieth-century- Australia, the prescribed penalty was death by hanging. In Victoria today, statutory infanticide is treated as manslaughter, punishable by imprisonment and/or fine.² Infanticide provides an example of 'the processes by which crime is defined and redefined and of the complex interrelationships between the law and social, moral and communal values'.³

In Judeo-Christian society, infanticide is presented as an 'unnatural and irrational' act, explicable in terms of human iniquity or mental imbalance. Yet in other social circumstances, it has been a 'natural and rational' response to the problem of an unwanted child, a socially-responsible solution to difficulties threatening the larger group.⁴ Such seeming contradictions demonstrate that, as Foucault has argued, 'criminality' and 'insanity' are 'historical subjects

2. This offence was introduced in Victoria in the 1949 Crimes Act. The reproduction-related offences existing in 1885 are set out in Appendix 5, those contained in the current Crimes Act in Appendix 6.
3. Wrightson, p.3
4. For instance, among the Tikopa of Polynesia, population was measured according to food by the smothering of children at birth. In eighteenth-century Japan, infanticide avoided excessive population pressure on resources and was also the means of achieving a family of optimum size and sex composition. Wrightson, p.2. The same point is made by R. W. Malcolmson in ’Infanticide in the Eighteenth Century’, in J. S. Cockburn (ed.), Crime in England 1550-1800 (London: Methuen, 1977), p.208
... social constructions that can undergo marked changes.\textsuperscript{5}

Infanticide represents a point of tension between Christian morality and economic reality. Throughout European history, infanticide received attention because of its significance as the element defining pagan from Christian society. In times of turmoil, infanticide, like witchcraft, became the focus of legislators seeking by its suppression to reassert the Christian moral order, though their response differed with changed social realities.\textsuperscript{6}

Much less attention was focussed on infanticidal nursing, where the baby was left with another woman or, in France, abandoned to a foundling hospital. At best, such babies died of malnutrition; at worst, they were deliberately killed. Though 'baby-farming' is well-documented in eighteenth-century England and France, only in the nineteenth century did its prevalence force legislative action.\textsuperscript{7}

The association of infanticide with 'immorality' obscures the role of economic factors.\textsuperscript{8} In early seventeenth-century Lancashire, control by church and state was weak and illegitimacy was unremarkable. But here infanticide was also common, suggesting that expense and inconvenience were also motivating factors, especially in the absence of 'institutionalized' means of disposing of unwanted

\begin{enumerate}
\item Wrightson, pp.1-20
\item Wrightson, p.12
\item Indeed, with the economic penalties imposed on mothers of illegitimate children by the new Poor Law of 1834, illegitimacy became as much an economic as a moral factor. See Shurlee Swain, \textit{A Refuge at Kildare, The History of the Geelong Female Refuge and Bethany Babies' Home} (Geelong: Bethany, 1985), p.47
\end{enumerate}
children.\textsuperscript{9} This is reinforced by the fact that, in France, where foundling hospitals were widespread, children were abandoned rather than killed.\textsuperscript{10}

The assumption that most \textit{enfants trouvés} were illegitimate has been questioned. Studies show that short-term fluctuations in the incidence of abandonment were closely linked to economic distress while longer-term upward movements might be attributed to the increase in illegitimacy in later eighteenth-century Europe.\textsuperscript{11}

Abandonment (and baby-farming) offered a way out for those who were unwilling or unable to maintain their children. The existence of these 'lawful' solutions in parallel with laws proscribing infant killing, highlights the disparity between the criminal law and popular attitudes to the lives of unwanted infants.

\textit{Australian} experience appears to echo that of nineteenth-century England. Victorian society was reluctant to acknowledge that mothers were killing their babies and instead focussed attention on baby-farmers. Though attempts to control this practice have received some attention from historians, especially from those tracing the involvement of the state in child welfare,\textsuperscript{12} only Judith Allen has studied reproduction-related crime in any detail.\textsuperscript{13}

Allen uses evidence given to the 1903 NSW 'Birthrate Commission',\textsuperscript{14} to challenge the assumption that the decline was produced by artificial contraception. She argues that infanticide, baby-farming and abortion contributed to both the decline and the increase in infant

\begin{itemize}
\item 10. Wrightson, 'Europe'. p.13
\item 11. Wrightson, 'Europe', p.13
\item 12. See especially the work of Shurlee Swain and Kathy Laster.
\item 14. The Royal Commission on the Decline of the Birth-Rate and on the Mortality of Infants in New South Wales, 1904
\end{itemize}
mortality and asserts the demographic changes 'were evidence of working-class women successfully determining their own fertility'.\(^\text{15}\)

Allen's interpretation is at odds with those offered by English and European historians, though Malcolmson sees that abortion has replaced infanticide. Others offer motivations ranging from mental imbalance, marginal existence and fear of social sanctions, to rational calculation and callous indifference.\(^\text{16}\)

Such diversity of motivation is absent from the work of those criminologists who tend to seek a mono-causal (usually biologically-based) explanation of female crime. Whatever the merits or otherwise of theories of crime (and feminists argue most are inadequate or inappropriate\(^\text{17}\)) few address reproduction-related crime. Since this type of crime is committed almost exclusively by women, its omission indicates something of the priorities of mainstream criminology.\(^\text{18}\)

Wilson,\(^\text{19}\) however, argues for a social explanation of infanticide based on links between socio-economic status and desperate, alienated and powerless people. He stresses the dangers in accepting the myth that such crime is equally distributed in all social classes which suggests a psychiatric origin and a medical rather than a social problem.

The study of crime\(^\text{20}\) in an historical context presents certain

15. Allen, p.112
16. Wrightson, 'Europe' offers a summary of recent work, p.7
18. An exception is S. K. Mukherjee and Joyceylnne A. Scutt (eds), Women and Crime (Sydney: George Allen and Unwin in assoc. with Australian Institute of Criminology, 1981)
20. 'Crime' is behaviour in violation of the criminal law, which, in turn, is defined as a body of specific rules, promulgated by political authority, applying uniformly to all, and enforced by punishment administered by the state. See David Philips, Crime and Authority in Victorian England. The Black Country 1835-1860 (London: Croom Helm, 1977), p.41
problems, compounded in the case of reproduction-related crime. Not least among these is the relative absence of Australian material on law enforcement, but the greatest difficulties stem from the nature of the primary material available.

There are, in fact, no statistics on reproduction-related crime for Victoria; indeed official sources seldom acknowledge its existence. In this study of the period 1885-1915, figures have been constructed from individual references in the Police Gazette and Supreme Court registers, verified by examination of trial briefs. These provide some measure of 'official crime'. While they in no way approach quantification of the incidence of these crimes, they provide valuable information not only about

21. Historians are divided over the relative merits of statistical and literary sources. Jones concludes that, 'the most profitable approach is to use the widest range of sources and to doubt them all'. David Jones, Crime, Protest, Community and Police in Nineteenth Century Britain (London: Routledge, 1982), pp.2-3

22. It is known, for instance, that the rate of recorded crime in eighteenth- and nineteenth-century Britain was influenced by changes in the legal and administrative machinery but there is no research to say whether this was so in Victoria. See Philips, Chapter 2. Nor has it been possible to obtain details of conviction-rates for crimes other than those studied, to enable comparisons to be made.

23. Of course, infanticide in Victoria did not begin in 1885. This study includes examples from the preceding decade to illustrate particular points and to illustrate the 'timelessness' of the crime. Appendix 7 sets out full details of the cases cited in the text, including date and place of trial and how found.

24. The Police Gazette was the means of internal communication within the Victoria Police Force.

25. Details of crimes were taken from the Protho notary of the Supreme Court - Action Book, VPRS 2983 - m/c 3523. This volume will be referred to as the 'Supreme Court Action Book'.

26. The Crown Prosecutor's trial briefs are held at the Public Record Office at Laverton. Files contain depositions and correspondence but do not include details of legal argument.

27. That is, crime which was known to and acted upon by the police.
law-breakers but about those who make and enforce the law.\textsuperscript{28} (Confirming this, and 'closer to the crime'\textsuperscript{29} are references in police files to cases where no charges were laid, so numerous and scattered as to defy collection.\textsuperscript{30})

It must be remembered also that most of these crimes concern babies whose births were never registered and whose 'non-existence' distorts official statistics about birth-rates, infant mortality and illegitimacy. The figures offered are necessarily imperfect, no more than a starting point for a discussion in which few positive conclusions can be drawn.

Literary sources are similarly flawed; most represent the values and attitudes of the dominant culture. Newspapers include overseas material and local reports are shaped by contemporary political factors. Most importantly, they present an overwhelmingly male view of women's social role and psychological/biological processes. Trial briefs provide rare statements from the 'historically inarticulate' but the plight of those women must have influenced

\textsuperscript{28} Sociologists of deviance and the 'New Criminology' stress that 'crime' was 'not a given and constant phenomenon, the same in all societies and at all times, but rather something defined by those who made and enforced the law'. David Philips, "A Just Measure of Crime, Authority, Hunters and Blue Locusts": the "Revisionist" Social History of Crime and the Law in Britain 1780-1850' in S. Cohen and A. Scull (eds), Social Control and the State (Oxford: Martin Robertson & Company, 1983), p.58. See also John I. Kitsuse and Aaron V. Cicourel, 'A Note on the uses of official statistics', Social Problems. Official Journal of the Society for the Study of Social Problems (Fall, (1963) Vol 11, Number 2, pp.131-139

\textsuperscript{29} Gatrell and Hadden argue that 'figures for the number of crimes known to the police, where they are available, are generally to be preferred to those for committals, and those for committals to those relating to convictions', that is, the 'closer to the crime' the better. V. A. Gatrell and T. B. Hadden, 'Criminal Statistics and their interpretation' in E. A. Wrigley (ed.), Nineteenth Century Society. Essays in the use of quantitative methods for the study of social data (Cambridge: University Press, 1972), p.362

\textsuperscript{30} Inward Correspondence Files, Chief Commissioner of Police, VPRS 807
their version of events and touched also that offered by witnesses. Nonetheless such material reveals the social framework within which these crimes were committed.

This thesis will focus on the contradiction between innumerable nameless babies discarded in public places and an ideology which enshrined motherhood and appointed women as society's moral guardians. Chapter one will examine the social context of reproduction-related crime; chapter two will survey the process of criminal justice. It will be asserted that the attribution of 'unmotherly' acts to individual biological weakness led, on the one hand, to an evasion of the criminal law and, on the other, to a masking of the social factors which drove desperate women to seek extreme solutions. The result is the statutory crime of infanticide which defines the problem as one of female biology; society proclaimed itself responsible for the punishment, not for the crime.
CHAPTER ONE

The 'dark figure' of infant killing will never be known; we can but guess at the number of instances. We will never know exactly what drove women to adopt such a final solution to the problem of an unwanted child.

Infant killing is an emotive subject and one on which those who participated in the debates of the early 1890s held firm, if somewhat divergent, opinions. Equally, the startling evidence presented to NSW Royal Commissions in 1904 and 1905 has been used to support strong statements. These have doubtless tinged perceptions of the extent of similar practices in Victoria. Though available sources suggest hundreds of cases, relatively few women were actually convicted. Most women charged claimed their baby was stillborn and coronial inquests often returned open findings. Certainly, infant mortality was high, even in ideal circumstances, and babies born to 'single' mothers were less likely to survive.

Official Victorian sources give little indication of the extent of reproduction-related crime. Prison statistics list the number

1. The 'dark figure' represents the difference between actual and officially-recorded crime.
2. These were a) the Royal Commission on the Decline of the Birth Rate and on the Mortality of Infants in New South Wales, 1904 and b) the Royal Commission on Secret Cures, Drugs and Foods.
3. For instance, Summers asserts, 'Infanticide was widespread in Australia at the turn of the century.' Anne Summers, Damned Whores and God's Police: the Colonization of Women in Australia. (Ringwood: Penguin, 1975), p.320
4. See Appendix 2.
6. That is, self-supporting women.
7. The Victorian Year Book attributed this to a want of breast-food and neglect in rearing. Victorian Year Book 1908-9 (Melbourne: Government Printer), p.306. See also VVB 1939-40, p.108
8. See Victorian Penal and Gaols Department, Annual Reports, 1875-1914 (Photocopies supplied by Office of Corrections, South Melbourne.)
confined at 31 December, giving a false picture where short sentences are involved, exacerbated by the trend towards non-custodial sentences after 1900. The Registers of Inquests cease, after 1892, to indicate the age of the deceased, making it impossible to trace infants. Similarly, while it is clear that coroners attributed some deaths to abortion, not until 1932-33 are figures for criminal abortion included in official statistics.

In Victoria, 'official' recognition of the situation came with evidence given to the 1890 Royal Commission on Charitable Institutions by doctors involved in coronial inquests. Dr Nield attested that he had

made postmortem examinations of about 500 children, the majority of whom have been distinctly killed; most ... immediately after birth, some ... by the slower process of starvation ... these represent a comparatively small percentage of the whole number.

Dr Youl believed destruction of infant life was 'very great'.

I have 30 or 40 children every year that I hold inquests on that are picked up in the streets dead. They are mostly suffocated.

Some indication of the extent of reproduction-related crime can be gained from the Police Gazette listings of babies found exposed (dead and alive) and from results of subsequent inquests.

Large numbers of corpses were dumped in public places. Many

9. This is particularly so with the crime of concealment of birth.
10. Registers of Inquests, VPRS 24
11. See VYB 1932-33, p.78 and 1939-40, p.122
13. VPP, p.310
14. Unfortunately not every inquest was listed. While no comprehensive figures of inquests on unidentified infants exist, a press report discloses that in 1893 of 391 inquests, 32 were due to 'infanticide'. The Police Gazette for 1893 reports 30 findings of 'wilful murder'. See also M. Sussex, 'The Victorian Infant Life Protection Act 1890. A study in the passage of Social Legislation' (B.A. thesis, University of Melbourne, 1973), p.31
15. See Appendix 1
were found at railway stations, particularly in lavatories; some were thrown from the windows of moving trains. Others were cast into rivers, waterholes and the sea, while still others were dropped down mineshafts and wells, buried in vacant allotments or disposed of with nightsoil via the sewerage system. Between 1885 and 1914 some 614 bodies were listed found.\textsuperscript{16} Probably many remained undiscovered.\textsuperscript{17}

Some 315 babies were found alive, in railway waiting-rooms, in churches and on doorsteps of houses, especially in more affluent suburbs. Some, such as the male child found in Lincoln Square Reserve, afterbirth attached, 'apparently delivered by the mother on the footpath', were seemingly left to die.\textsuperscript{18} But others were abandoned in the hope they would gain better care than the mother could give. One such

had been placed in a soap box and covered with part of a new blanket ... supplied with a new feeding bottle containing milk, which it was drinking.\textsuperscript{19}

Another was
dressed in a white nightdress, and wrapped in wadding ... placed in a cardboard box ... [holes] pierced to afford ventilation.\textsuperscript{20}

Occasionally a small amount of money was pinned to the clothing, quite often a note was attached. Whether 'genuine',\textsuperscript{21} or not, the

\begin{footnotes}
\item[16] See Appendix 1
\item[17] The NSW Inspector-General of Police in 1903 estimated that for every one infanticide exposed perhaps some seven others remained hidden. Allen, p.113
\item[18] Police Gazette, 14 November 1901, p.414
\item[19] Police Gazette, 19 March, 1980, p.96
\item[20] Police Gazette, 25 June 1890, p.199
\item[21] Selina Sutherland, the 'child-rescuer', claimed in the Age, 11 November 1893, p.6, that many babies were disposed of in this fashion by baby-farmers. Asked about letters written by mothers who abandoned their children, Dr Youl commented, 'When I come to investigate them in my courts, I find all this grief and remorse is moonshine and water'. VPP, p.314
\end{footnotes}
intent of the messages is clear.

For God's sake, save this poor baby from starving ... I am turned out of my lodgings, no money or clothes ... not one penny to buy milk; it is crying for food ... a nice child, 3 mths old last Wednesday. I done all I could but must part with him to save his life, have pity on him. A lady might adopt it ... my heart is broke. 22

While results of Coroner's Inquests must be treated with caution, 23 it is clear that at least some died of natural causes but were left by parents unwilling or unable to bury them. A male baby, found by the coroner to have died of scarlet fever, was discovered dressed for burial, with a note:

Please bury my dear baby as I can't myself. I hope that I will soon be with it, and God bless it and you. 24

It seems that, with adequate opportunity to dispose of the body, chances of discovery were extremely slim. 25 Probably some babies were discarded by baby-farmers, but others were doubtless offspring of those able to disguise the pregnancy and take their time about the 'arrangements'. Many babies were found wrapped in newspaper parcels, suggesting they were carried about openly, presumably in daylight, until they could be laid to rest, under a seat, or in the ladies room. (Even so, the number of bodies discovered in loads of sewage delivered to outlying regions for fertilizer indicates that many were successfully disposed of by the housebound. 26)

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22. Police Gazette, 21 January 1891, p.21
23. See page 27 below and Appendix 1
25. The overwhelming majority of the dead infants found in the city were never identified and in country areas rates of identification and subsequent arrests were low.
26. For example, see Police Gazette, 23 December 1896, p.393. It is interesting to contemplate the fact that given there was only a slim possibility of being caught, crime must have seemed an infinitely better risk than the certain consequences of allowing a pregnancy to become 'public'.

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12.

By contrast, evidence given in R. v. Koebcke shows the care taken to abandon a baby in a spot where it would soon be found.

He - 'Do you see that right-of-way there? Everybody coming through can see the baby.' I- 'It is dark, I won't put it there; people coming through may kick it.' He - 'I put it up further where light would fall upon it.'

Examples in the Police Gazette support suggestions that illegitimate babies were killed at birth, while legitimate, usually slightly older, babies were abandoned. But this should not preclude recognition of the possibility that legitimate children were also killed at birth, especially in times of economic hardship. Nor should we ignore the fact that deaths of legitimate babies were unlikely to be closely investigated and, even if they were, there were 'numerous plausible ways' in which such deaths might be contrived. A baby might be starved or smothered intentionally or simply neglected and allowed to fall victim to innumerable illnesses and accidents which ended the lives of even the most cherished infants.

There were suggestions too that some nursing homes offered extra services. Dr Jones believed many children were murdered at birth and registered as 'stillborn'. Frequently mothers had confessed to him that they had heard the child cry and knew that it was stifled by the attendants.

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27. R. v. Koebcke, (1894), Vol.XX, p.331
28. See Wrightson, 'Europe', p.13
29. This point is made by R. W. Malcolmson, p.206.
30. Allen, p.116, gives some NSW examples. For instance, a coroner remarked that the practice of allowing infants to sleep between parents had 'taken the toll of many little lives'. Argus, 27 April 1910, p.8.
31. Argus, 23 August 1892, p.7

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The luckiest of the 'unmarrieds' gave birth quietly at home, her baby brought up within the family as a sibling or 'adopted' by another woman. Girls without family support could turn to one of the charitable organizations run by middle-class women. (Australian colonies, having eschewed a Poor Law relied instead on private charity, with some government help, to mete out assistance to the 'deserving' thus, supposedly, encouraging the virtues of self-help, respectability, and independence.) A girl of 'good' character, who had made only one mistake, might find accommodation in a church-run maternity home or at the Victorian Infant Asylum. She would be trained in domestic work and expected to nurse her baby for some months, after which adoption might be arranged. Such institutions viewed the girl as a fallen sinner to be reclaimed; attitudes were often punitive, censorious and certainly restrictive. Others undoubtedly turned to prostitution, 'the most lucrative occupation for a single girl'.

Orphanages were unwilling to take foundlings for, like most artificially-fed babies, their chances of survival were low; few were willing to adopt them. Abandoned babies were made state-wards, committed to Industrial Schools and put out to a wet-nurse. Not all survived. Mary Connell's baby was given to Susan Roberts who had been engaged to wet nurse it ... The child was then in very bad condition It had the appearance of having been starved, the tops of its

32. There was no 'legal' adoption in Victoria until the passage of the Adoption of Children Act, 1928. Even so, many agencies were willing to place babies.
34. Sussex, p.3
35. There were no places where babies could be simply 'given up'. Industrial Schools demanded maintenance payments from parents if they could be located.
little fingers were as having been eaten... It never seemed to improve in health ... the child died.

Maggie Heffernan's attempts to gain a position as a wet-nurse, after the death of her baby led to her arrest. Such positions were available though the practice was not widely approved. Dr Youl thought it meant

the death of a child. When a lady advertises for a wet nurse, the woman's own child is put out to be baby-farmed and killed.

The notorious baby-farmers cared for babies, either for a weekly fee or as an 'adoption' on payment of a lump sum. If some were trained nurses, many were poor and unqualified; the baby was likely to die of ignorance, incompetence and neglect. Godfrey's cordial, and other soothing syrups (usually containing chloroform, opium or laudanum) were widely used, often in lethal doses, to quieten babies.

36. R. v. Connell, VPRS 30, box 567
37. Kathy Laster, 'Frances Knorr: "She Killed Babies, Didn't She?'", in M. Lake and F. Kelly (eds), p.155
38. When the Lying-in Hospital (now the Women's) attempted, in 1863, to set up a ward to care for the infants of those women who took positions as wet nurses, it was denounced by the press. One editorial said, 'It is fraught with the most deadly corruption; and whilst the mother in the higher ranks wastes her vigor away in voluptuous idleness, the hireling nurse who serves her becomes daily more indifferent to her own offspring.', quoted in C. E. Sayers, The Women's ... A Social History (Melbourne: The Royal Women's Hospital, 1956), p.187. Laster, 'Frances Knorr', p.149 notes that by the 1890s the practice was largely abandoned by the upper-class but engagements were to be found within the working-class.
39. VPP, p.314
40. See Kathy Laster, 'The Forgotten Crime: Infanticide. The Infant Life Protection Act, Victoria, 1890' (Unpublished paper presented to the Law and History Seminar, LaTrobe University, June 1982)
41. Summers, p.320, notes the NSW Royal Commission on Secret Drugs, Cures and Foods reported that 15 000 babies died each year in New South Wales from these formulas.

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The worst of these women systematically starved babies to death and earned their ilk an unenviable reputation. But portrayals of baby-farmers as ruthless exploiters ignores the fact that some were themselves lone mothers earning a living the only way possible. If some 'took the money' intending to dispose of the child, there were surely some who took an infant in good faith but were forced to drastic action when payments stopped and they could not afford to maintain the child.

In many ways, the baby-farmers were the scapegoats in the whole sorry saga. Those brought to court often claimed to be doing a public service and Mrs Parry's statement to the coroner 'that she had done a lot of good' was not pure cant.

The Infant Life Protection Act of 1890 was hailed as an important measure to protect infant life from the ministrations of such women. In fact, the substantial provisions of the bill were already contained in the 1883 Health Act (Amendment) and unenthusiastically administered by over-worked public health authorities, doubtless aware that abuses existed. (These provisions, like so much Victorian legislation in this area, were a weakened version of an earlier English act, passed

42. For example, 'baby-farmers like' Frances Knorr engaged in baby-farming because it was a profitable exercise. They also preyed on disadvantaged people', Wilson, p.47. Compare this with Kathy Laster's article on Frances Knorr.

43. Laster, 'Frances Knorr', p.153, states that baby-farmers 'provided a necessary service to nineteenth-century society'. She points out that 'John Makin, the Sydney baby farmer, had remarked before his execution, 'That's what a man gets for obliging people''.

44. Sussex, p.8

45. This act provided for the registration of baby-farming establishments, and supervision of their operation by the police. Laster, in 'The Forgotten Crime' argues that the act might, in fact, have exacerbated the killing.

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by a reluctant government pressured by 'social reformers'.\(^{46}\) The
1890 legislation (and to an extent the 1907 amendment act) can be
seen as a well-publicised attempt to appease public wrath. In August
1892, two years after its passage, Dr Jones lamented that splendid
as the act was, the 'police regulations to enforce it had not been
drafted'.\(^{47}\)

Perhaps baby-farmers were responsible for many of the abandoned
children. Isabella Dobbinson, charged with abandoning a one-month-
old male child, told police

she took the child from a Miss Keene for $5, with the intention
of adopting it, but she afterwards grew tired of it and abandoned
it.

Indeed it is difficult to assess the scale of such practices
in Victoria; the horrific subject made 'fascinating reading' and local
discussion was enlivened by accounts of London practices \(^{49}\) and details
from New South Wales.\(^{50}\) (In Melbourne, only Frances Knorr was convicted
of multiple killings and it might be that she was 'mad' rather than
'bad'.\(^{51}\) But, overall, the idea that unscrupulous people would kill
babies for money was far more palatable than the possibility that
mothers were killing their infants because they had no money to keep
them.

The passage of the act coincided with a debate about the wisdom
of establishing state-financed foundling homes to take unwanted children.
This reflects the increasing pressure from diverse groups for the

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46. Victorian social welfare legislation is discussed by Donella
Jaggs in "Neglect to provide ... or wilfully expose". The development
of Child Maltreatment Legislation in Victoria.' (Unpublished

47. Argus, 23 August 1892, p.7. The act was put into force in January

48. Police Gazette, 25 June 1890, p.198. (See also 10 April, p.120
and 30 April, p.142.

49. For example, the Age 19 November 1892, p.4.

50. For example, the Makin case; R. v. Makin, 1893, Vol. XIV, LR
(NSW) 1.

51. Laster, 'Frances Knorr', p.151
state to take broader responsibility for social welfare. Some, such as the Society for the Promotion of Morality sought legislative action to secure the moral well-being of the community, discouraging illicit relationships by applying punitive deterrents. Others accepted the moral situation and hoped, by practical assistance to mothers, to abolish the need for baby-farmers. (Creches and kindergartens, established from 1888, provided a positive alternative to the baby-farmer.) Still others objected that the homes would be a 'tax on the virtuous for the behoof of the vicious'; while widely proclaiming the need to punish vice and protect virtue, the legislative course adopted was also the least costly.

The medical profession was extremely prominent in the debate though by no means united. Dr Nield favoured institutions because the immorality of child murder is very much worse than the immorality of promiscuous sexual intercourse.

Dr Youl, the Coroner, opposed the scheme because separating mother and child would remove the possibility of reform of the mother but, more importantly, because of the diminished survival chances of institutionalized children. (Youl favoured extension of the Infant Asylum system - and the compulsory registration with police of every unmarried girl who became pregnant.)

The 1892 Intercolonial Medical Congress urged the state to take upon itself the care of these infants that they might grow up useful citizens without a stigma so that distracted mothers would not find themselves attached to a child

52. This is discussed by Elsie Deacon in 'The Promotion of Child Welfare in Victoria by Means of Legislative Intervention: 1870-1907' (Unpublished paper presented to the Law in History Conference, LaTrobe University, May 1986)
53. Sussex, p.14
54. Sussex, p.22
56. VPP, p.211
57. Sussex, pp. 1-2
of sin which seems to point at her the finger of scorn and curse the mother who bore it without the approval of society.

Attention was focussed on the injustice of punishing the woman while the man went free. Certainly the 'double standard', which allowed men sexual licence while demanding chastity of women, must have contributed to the 'downfall' of at least some girls. This attitude was captured in the address of the Dean of Melbourne to the League for the Promotion of Public Morality.

The profligacy of the town was something awful ... it was said that the man was as much to blame as the woman but this was not so for in the Scriptures it was found that a man was allowed to have more wives than one, while a woman was only allowed to have one husband ... On the character of the woman, indeed, civilization depended.

In the campaign to save convicted child-murderer Bella Ferguson from the gallows, the Herald asked 'where is the man?', claiming that to accept the male sinner and slaughter the female is a hideous mockery.

For much of the 1890s, government attention was taken by economic problems which beset the colony, and by the events surrounding Federation. Nonetheless, throughout the decade and into the new century, the press, the churches, women's groups and, especially, the medical profession campaigned vigorously to improve public and, especially, infant, health. Doctors emphasised preventative education, particularly the desirability of breast-feeding to overcome the absence of a reliable milk supply and to develop the 'maternal instinct'.

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59. Argus, 23 August 1892, p.7

60. Herald, 28 February 1890, quoted in Sussex, p.24

61. Deacon, Part 2, p.7, comments that the doctors were 'in a sense the chief pressure group for legislative action'.

62. VPP, p.313
of breast-feeding as a means of preserving infant life (and thus removing the need for and the possibility of conception of another child) was advanced partly to explain the drop in the Victorian birth-rate to the New South Wales enquiry. 63

Doctors also campaigned for licensing and regulation of unqualified practitioners, notably quacks and midwives. If this was prompted by concern for public health, it was motivated also by a desire to eliminate competition, especially in the field of childbirth, and statements by doctors about the willingness of 'midwives' to dispose of babies must be weighed in the light of this. 64

Middle-class feminists extended the doctrine of separate spheres, 65 to enable women to take a broader role in public life. In campaigns for state action to control social problems, they emphasised woman's maternal role; in effect, they worked to make society safe for the family. 66

Such women were also prominent in attempts to reprieve women convicted of infanticide. Petitions usually emphasised (Bella Ferguson's case appears to be the exception) that the jury had overlooked the mental instability of the girl. For instance, in Mary Ellen Kempton's case, the Governor was informed:

2. That ... it appears that her conduct has been eccentric in many ways ...

64. Evan Willis, Medical Dominance; the division of labour in Australian health care (Sydney: George Allen and Unwin, 1983)
65. This doctrine held that woman's role was to sustain and guide the family, drawing on her religious power to improve the moral qualities of society.
66. See Anthea Hyslop, 'Agents and Objects', in Margaret Bevege, Margaret James, Carmel Shute (eds), Worth Her Salt: Women at Work in Australia (Sydney: Hale and Tremonger, 1982, pp. 230-243
3. That her behaviour ... gave the impression to all present that she was not quite right in her mind.\(^67\)

While legal technicalities might have directed the form of such petitions, they also appealed to current popular notions about motherhood, including the idea that infant killing was so unnatural an act as to be evidence of mental imbalance.

The contemporary emphasis on women's familial role perhaps obscures the fact that large numbers of women (some with children to support) were dependent for survival upon their own wages.\(^68\) Employment in factories or domestic service posed problems of child care. Some factories might tolerate babies, semi-drugged and silent, but most people preferred their servants, especially single girls, to be childless. An illegitimate child might bring shame but it would certainly threaten the livelihood and shelter of a live-in servant with no money to pay a baby-farmer. Ada Hicks recounted the conversation that took place before she abandoned her baby.

He -"What are you going to do ...?" I - "I don't know; I can't get a place like this and I can't get any one to take it for what I can afford to pay.'\(^69\)

(Interestingly, Ada had been offered a home with a couple, and their five children, until she was over 'her trouble'. But, in fact, her real troubles began with the birth of the child.)

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67. R. v. Kempton, VPRS 264, box 14, petition. In the appeal on behalf of Maggie Heffernan, the Woman's Sphere, December 1900, stated 'there is absolutely no doubt that she was suffering from puerperal mania when she drowned her baby, that she did not receive justice at her trial', quoted in R. Teale, Colonial Eve - Sources on Women in Australia 1788-1914 (Melbourne: Oxford University Press, 1978), pp.139-41. See also R. v. Plummer, VPRS 264, box 11. Rosanna was convicted of murder but was subsequently granted a free pardon. It was argued in her defence that she was suffering from puerperal mania at the time of the crime.

68. W. A. Sinclair argues that in 1891, 58.4 per cent of unmarried women and 36.5 per cent of all women in Melbourne participated in the workforce. W. A. Sinclair, 'Women and Economic Change in Melbourne 1871-1921', Historical Studies (Vol. 20, No.79), p.279

69. R. v. Koebcke, p.330
Deserted mothers were entitled to sue for maintenance (after 1890 unmarried mothers could also claim confinement expenses \textsuperscript{70}) but such actions usually brought little joy, particularly if the father of the child was himself of limited means or had left Victoria. \textsuperscript{71}

Very probably, infanticide and infanticidal nursing took the lives of many legitimate and illegitimate infants for purely economic reasons.

Figures from the Police Gazette reveal a fairly constant ratio of two babies found dead for every one found alive. \textsuperscript{72} Both sets of figures rise in the period before 1890 to peak during the depression years, dropping away to rise again in the immediate pre-war period when drought prevailed. The highest 'infant mortality' and abandonment coincided with the greatest economic hardship. The babies found dead in the depression years were predominantly new-born, ruling out the possibility they were conceived in prosperity and abandoned in times of hardship.

Given the disparity between unidentified infants and arrests made, \textsuperscript{73} it seems likely that those who appeared in court represented merely the categories of women most likely to be apprehended, that is, those who lacked the opportunity to dispose of a body efficiently and those who were too driven by other pressures either to take cognisance of their action or to care.

The women charged can be divided into those who had their baby openly and those who concealed their pregnancy. Some in the former

\textsuperscript{70} This was provided in the 1890 Pre-maternity Act. The following year the act was amended so cases were heard in camera. Beverley Kingston (ed.), The World Moves Slowly: A Documentary History of Australian Women (Sydney: Cassell, 1977), p.58

\textsuperscript{71} See Susan Tiffin, 'In Pursuit of reluctant parents', in Sydney Labour History Group (ed.), pp. 130-150 for a discussion of attempts to enforce maintenance orders in NSW.

\textsuperscript{72} See Appendix 1.

\textsuperscript{73} Compare appendices 1 and 2.
category were married but the majority overall were women alone (unmarried, widowed, deserted) and most were employed as servants.\textsuperscript{74}

Murder trials received most attention. Tragic tales such as that of Maggie Heffernan, (a young country girl, who, destitute and alone, cast her illegitimate child into the river) drew great sympathy from the newspaper-reading public which organized petitions to save such girls from the hangman.\textsuperscript{75} However, these girls, and their married sisters who did 'rash' things under extreme stress,\textsuperscript{76} represented not the typical but the 'public' face of infanticide.

More common numerically\textsuperscript{77} were the cases where pregnancy was concealed; perhaps from confusion or fear of dismissal, perhaps in the hope of marriage or a miscarriage. In these cases the baby was delivered in secret, usually by the mother alone. Most were arrested upon the discovery of the body of a child they would claim had been stillborn. Files abound with cases of babies hidden hastily, in shallow graves, in cesspits, even under the mattress, while the mother went about her normal work routine. Where the police lacked proof the child was born alive, the relatively minor charge of concealment of birth was brought.\textsuperscript{78}

\textsuperscript{74} Malcolmson makes a similar point about women arrested in eighteenth-century England. He points out that domestic service was the most common employment for young girls and involved their living in close proximity to male servants. See also J. M. Beatie, 'The Criminality of Women in Eighteenth-century England', \textit{Journal of Social History} (8, Summer, 1975, pp.80-105)

\textsuperscript{75} R. v. Heffernan, VPRS 30, box 1402 and VPRS 264 box 14. The case is discussed in Laster, 'Frances Knorr', pp.154-4 and in Teale, p.139-41

\textsuperscript{76} For instance, Sarah Williams was so distressed by her husband's drinking that, when she met him on a bridge, drunk, she apparently lost all control of herself ... and threw her child into the water'. Age, 13 January 1886. R. v. Williams, VPRS 264, box 189.

\textsuperscript{77} See Appendix 2. Note that many charged with murder had concealed their pregnancy.

\textsuperscript{78} Appendix 5 sets out the various offences.
Dr Youl, the city Coroner, believed that many such cases were 'downright murder' but lamented

You cannot find them out, and you cannot convict them if you do get a case ... There is sympathetic for that sort of crime which is most extraordinary.

Those women who had their baby at the Lying-in Hospital were more likely to be 'found out'. Mary Connell's abandoned baby was recognised by Anne O'Brien, the midwife who had cared for him.

I then identified the child as a child that had been born in Hospital and had been discharged from it ... I am perfectly sure.

It is difficult to assess the extent to which 'shame' was a motivating factor. While the middle-class ideology which enshrined women as moral guardians of an increasingly child-centred society is well documented, rather less is known about working-class attitudes to sexuality, marriage and illegitimacy. The relatively high numbers of officially-registered illegitimate babies suggests de facto unions were not uncommon and the numbers of bridal pregnancies, combined with prosecutions for carnal knowledge, suggests a fair degree of sexual activity among the young.

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79. VPP, p.311
80. R.v. Connell, VPRS 30, box 567. See also Teale, p.140 for an account of police investigations in Maggie Heffernan's case.
81. Compare with Teale, p.135 who states the stigma of illegitimacy had a 'profound social effect. Women would resort to crime rather than let their "shame" become known'.
82. This averaged about 5 per cent in the period with a rise in the mid-1890s. See VYB 1890-1, p.307, 1895-8, p.653, 1936-7, p.54, 1940-1, p.86 for figures.
84. This offence is particularly noticeable in the Supreme Court Action Book.
85. Summers, p.321, supports this.
Christine Virtue was presumably not too worried about 'shame' for she had declined an offer of marriage from her landlord, the father of her child. Christine swore her baby had been stillborn' she had given birth alone and 'was at the washtub all the following day'.

Asked whether he did not think a girl would risk punishment rather than publish her shame, Dr Youl responded that, though women of all classes were involved

the bulk of them are among the lower orders. If you had any experience among the women themselves, you would find there is not so much of that shame.

A woman recently before him could have got assistance in every way, but she made no preparation, ... She packed it away in a box ... intending to throw it into the street for me to hold an inquest upon. That woman got three months. There was no seduction there; or if there was any she was the person who seduced this boy of 18.

In some circumstances, infanticide was preferred to abortion as a means of dealing with unwanted pregnancy; in some ways, it was less dangerous for the mother.

By the 1890s the church-imposed restrictions on artificial contraception had been largely overcome (in private, if not in public). With increasing child-centredness grew a desire to limit the size of families and contraceptives were widely used. The feminist Mrs B. Smyth combined a vigorous campaign

86. R. v. Virtue, VPRS 30, box 567
87. VPP, p.311
88. VPP, p.311
90. F. Kelly in 'Mrs Smyth and the Body Politic', in Margaret Bevege, Margaret James and Carmel Shute (eds), p.227, says contraception was 'hardly a respectable subject'.
for female suffrage with attempts to bring knowledge of contraception
to women and offered for sale a range of books, pamphlets and devices.
Some booksellers sold birth-control literature and newspaper 'medical
advertisements' recommended syringes and similar products.92 But such
items were expensive93 and inaccessible to unsophisticated women, ignorant
of the basic facts of fertility and reproduction;94 certainly they were
inappropriate for casual or uninvited encounters.

Among the poor, older methods (abstinence, coitus interruptus and
abortion) were probably more realistic options.95 A range of abortifacients
became available from the 1850s and were openly advertised by the 1890s.96
Nurses and midwives offered abortions and men gave 'manipulations'.97
All methods, often used when pregnancy was well-advanced, were extremely
unpleasant and dangerous. (Doubtless for those with money to pay, abortions were
also obtainable from well-qualified doctors with relative comfort
and safety.) The Royal Commission on Charitable Institutions was told
of several Melbourne institutions run by women which procured abortions;
doctors, quacks and chemists also offered the service.98

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92. See Kelly, pp.213-229
93. Mrs Smyth's publication, The Limitation of Offspring, was priced 1/7d by
post. Her 'French pessaire preventatif' cost 10/6d. Bearing in mind that
the 1907 Harvester judgment set £2.2.0. as an 'adequate' wage for a family
of five, these were very expensive items.
94. Items were referred to by a variety of euphemisms in newspaper
advertisements.
95. Laster, 'Frances Knorr', states that 'abortions were probably
the most favoured device among the poor', p.153.
96. Teale, p.127
97. Teale, p.130, describes one such performed on a woman seven months
pregnant.
98. VPP, p.311. See also, p.43 below.
Allen demonstrates that as convictions for infanticide and concealment decreased so arrests for abortion rose (though convictions were very low.) 99 Victorian figures over the same period (1880-1939) show a similar decline in concealment; Victorian arrests for abortion, however, are dramatically lower and do not increase over time, as in NSW. Overall the Victorian conviction rate is significantly higher.

It is difficult to know what conclusions to draw from these disparities. Obviously one cannot make realistic comparisons without detailed study of the New South Wales material. Victorian sources suggest substantial numbers of abortions were carried out during the years when apprehensions were low (most strikingly in the decade 1930-9, there were 4 convictions and 342 'official' deaths from criminal abortion 100); it might be some aspect of the committal procedures allowed fewer, more watertight cases to be heard in Melbourne, while NSW prosecutions failed for lack of evidence. The abortion figures, in particular, highlight the very real uncertainty of the relationship between actual crime and arrests.

Even so, it seems reasonable to conclude that as the twentieth-century proceeded women were more likely to seek an abortion. Changes in female employment, notably the decrease in numbers employed in domestic service might have contributed. Increasing urbanization with consequent loss of isolation, and changes in female fashion probably made the task of concealment more difficult. Certainly by the late 1930s convictions for all reproduction-related crimes were minimal.

99. See Appendix 4.
100. VYB 1932-33, p.78, 1939-40, p.122
101. During the depression years between 1929 and 1934, only 20 unidentified infants were found dead and 24 alive. This contrasts strikingly with the 200 plus found in the 1890s depression.
But presumably a further factor was the general improvement in options open to women in such circumstances.\textsuperscript{102} Certainly in the post-Federation period, states were very sensitive about their 'public image' and, particularly, about levels of infant mortality.

With the new century a change occurred in the verdicts in coronial inquests into deaths of unidentified infants. Up to 1899, the majority were 'wilful murder' with a minority of 'open' findings; after 1900, these proportions were reversed.\textsuperscript{103} Three explanations appear possible. First, that the deep convictions of Dr Youl caused him to over-state the incidence of murder; secondly, that his successor was more cautious, preferring open findings in the absence of proof and, thirdly, that, on the eve of Federation, the government was trying to cover up the whole unfortunate business. The fact that, after 1900, the practice of posting rewards for information ceased in relation to infant death lends weight to the last possibility though the truth is perhaps a combination of all three.

The Police Gazette listings of unidentified babies continue well into the 1920s; it seems that, in the midst of boldly-declared public concern about infant welfare a core of ambiguity remained.

\textsuperscript{102} For instance, better and legal adoption, state orphanages and changed attitudes to illegitimacy. The 1903 \textit{Legitimation of Children} bill provided the possibility of legitimation at any time after the marriage of the parents. By the 1930s, the \textit{VVR} prefers the term "ex-nuptial" to 'illegitimate'. The 1912 maternity bonus must have helped to some extent; interestingly, the 1912 \textit{Commonwealth Maternity Allowance Act} also provided for the notification to the Registrar of Births, Deaths and Marriages of stillborn infants.

\textsuperscript{103} For instance, in 1899 there were 4 open findings,; in 1900, 13. See Appendix 4.
CHAPTER TWO

The crimes studied were all indictable offences heard in the Supreme Court by a judge and jury of 'ordinary men'. Examination of the trials of women charged with reproduction-related offences\(^1\) provides at once an insight into community attitudes to these crimes and a measure of the efficacy of the criminal law in protecting infant life.

Evidence given to the 1866 English Commission on Capital Punishment 'clearly shows' that the law had 'completely broken down' in relation to child murder.\(^2\) Lord Cranworth deposed that 'infanticide was "practically never" treated as murder'.\(^3\) Justice Keating spoke of the divorce between the law and public opinion.

It is in vain that judges lay down the law and point out the strength of the evidence, as they are bound to do: juries wholly disregard them, and eagerly adopt the wildest suggestions which the ingenuity of counsel can furnish\(^4\)... Juries will not convict whilst infanticide is punished capitaly.\(^4\)

One gains the impression that a similar situation prevailed in Victoria in the late nineteenth/early twentieth century. Given the complexity of legal issues involved, one cannot be sure whether juries were actually unable or merely unwilling to convict very many of those charged. But where convictions were secured; the widespread protest which followed the imposition of the mandatory death penalty and the relatively minor sentences given for other reproduction-related crime, suggest public sympathy lay with the woman.

The law seems never to have been particularly effective in protecting the lives of unwanted infants. Despite the fact that killing of any infant was homicide under the common law, an extreme Act of 1624 provided that where a 'bastard' child was found dead, concealment of its birth was to be taken as evidence of murder.\(^5\) The act attempted to counter the

\(^1\) The offences are set out in Appendix 5.


\(^3\) Davies, p.217

\(^4\) Davies, p.219

\(^5\) See Davies, p.213 and Malcolmson, p.196. This Act, 21 Jas. 1 c.27 reversed the usual need for the prosecution to prove live birth.
practice of killing and secretly disposing of the bodies of illegitimate infants. In practice, juries tended not to convict without evidence of live birth, and not always even then. In 1773 a member of the House of Commons argued 'the law, from its severity, is rendered ineffective'.

A more moderate Act of 1803 restored the presumption of dead birth, specified that the killing of a bastard child born alive should be treated as murder and provided an alternative verdict of concealment of birth, punishable by two years imprisonment. An 1828 Act extended the offence of concealment to all mothers and provided specifically that, 'it shall not be necessary to prove whether the child died before, at, or after birth'. In 1861 concealment was extended to 'any person' and, while remaining an alternative verdict to murder, became a separate substantive charge.

Legislators and judges found difficulty in defining precisely when an unborn baby became a separate person capable of being the victim of a homicide. There was the further problem that the killing of an unborn but viable child seemed to be no crime at all, being neither abortion nor murder.

The Victorian Crimes Acts of 1864, 1871 and 1890 reflect their English antecedents and raise identical problems.

Trial briefs used do not contain details of legal argument but a recent case raises issues remarkably similar to those involved in

6. Malcolmson, p.198
7. 42 Geo.3. c.58, Davies, p.215
8. 9. Geo.4. c.31, Davies, p.214
9. 24 & 25 Vict. c.100, Davies, p.216
10. Davies, p.266ff
11. Davies, p.209ff
earlier trials. Here a 16 year-old unmarried girl concealed her pregnancy and gave birth, apparently unexpectedly, while on the lavatory. When help arrived the baby was found beside the toilet pedestal, dead, wrapped in her shirt with the umbilical cord and a pair of panty-hose coiled about its neck.

The first issue was the point at which a child is 'in being', as demanded by the definition of murder. Turner states:

There can be no murder or manslaughter of a child which dies before being born or even whilst being born, only one that has been born and, moreover, born alive.

In his explanation to the jury, the trial judge indicated that it is not murder unless the person killed ... has been completely extruded from the mother's body and ... after that, had begun to breathe.

As a measure of breathing, considerable emphasis has been placed upon the hydrostatic test though some medical opinion has held this test to be unreliable. It is also known that a baby might commence breathing and then 'die' before being fully 'born'.

The second contentious point concerns the mental state of the defendant. Here it was argued she was automatistic, that is, because of an hysterical disassociation, her mind 'did not go with the act'. Thus

13. Victorian law rests on the common law definition of murder, the traditional formulation of which was provided by Sir Edmund Coke in 3 Inst 47: 'When a man of sound memory and of the age of discretion unlawfully kills within any country of the realm any reasonable creature in being and under the King's peace with malice aforethought either express or implied the death taking place within a year and a day.' A. P. Bates, T. L. Buddin and D. J. Muere, The System of Criminal Law: Cases and Materials. New South Wales, Victoria, South Australia (Sydney: Butterworths, 1980), p.240


15. Milte and Bartholomew, p.7

16. This test, in which aeration of the lungs, that is, their buoyancy in water, is taken as proof of breathing. The test was used in the eighteenth-century cases examined by Malcolmson. Used in 17 Old Bailey trials, it was questioned on 8 occasions. Medical witnesses 'admitted or emphasised ... cont'd ..../31
her behaviour was not that of a 'normal' mind capable of forming a 'specific intention' to commit the act. (In the event there proved to be a lack of proof, beyond a reasonable doubt, that the child had been born alive and the girl was acquitted by direction of the trial judge.)

The question of insanity, which did not arise here, is particularly complex. The McNaghten Rules state

To establish a defence on the ground of insanity it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.

The great difficulty faced by the courts has been in defining 'disease of the mind'; though the effects of birth may create 'mental imbalance' this is not, strictly, a 'disease'. Also, though a person might be temporarily insane, he is not rendered so by the inability to form a specific intent. The rules rest on the view that 'insanity is an intellectual rather than an emotional disorder' affecting the capacity to reason, not the capacity to control one's action.\(^\text{18}\)

16. cont'd

its inconclusiveness': in 1737 - 'too slight to be built upon'; in 1744 - 'cannot be downright certain and positive of it'; in 1771- 'formerly thought decisive ... but now that opinion is exploded'. According to Malcolmson, 'such hesitance and disagreement on the part of the experts ... offered another convenient ground for "reasonable doubt" in the interest of the accused', p.200.

The test was widely used in the period studied. In R. v. Brown, Dr Gibson stated that aeration 'was the main test we rely on to prove that this child had breathed', VPRS 30, box 549. Even so, there was frequent debate about its conclusiveness.

Modern opinion varies. Bartholomew and Milte, p.10, note Polson, The Scientific Aspects of Forensic Medicine (1965), claims 'the test is unreliable', while Gradwohls Legal Medicine claims it 'still holds its own'.

18. Howard, p.332. In 1927, an English judge held that 'between insanity and sanity there is a degree of mental derangement ... called "puerperal"', quoted in Davies, Part 11, p.281.
Murder is the most extreme of a series of responses to unwanted pregnancy proscribed by the criminal law. To get a clear picture of the extent of reproduction-related crime, one needs to consider the offences of abortion, murder, manslaughter, concealment of birth and abandonment. Yet, even to define separate crimes, is to obscure the fact that these represented a spectrum of action, that the lines between were blurred and charges brought were often determined by the evidence available.

A pregnant woman might seek an abortion, for which she could be charged with attempting to procure a miscarriage. Alternatively, and especially if her pregnancy were kept secret, she might have her baby and abandon it, perhaps in the hope that it would be found and taken into care. In the fairly unlikely event that she was linked to the baby, a charge of abandoning and exposing might result.

Where the mother of a baby found dead could be located, a variety of charges could be laid. Generally, if a woman had concealed her pregnancy and the birth of her child, and if there was no proof that the child was born alive, she would be charged with the offence of concealment of birth. Where there was evidence of live birth, she could be charged with murder, leaving the alternative verdict of concealment of birth for a jury not prepared to find she had killed the baby but only that she had disposed of the dead body.

Where the live-birth of the child was well-known, a woman would probably be charged with murder. Here the crucial element would be whether she had formed the intent to kill the child. A jury not satisfied of this might acquit or find her guilty of manslaughter. (A defence of insanity would not usually be appropriate where death resulted from

19. These offences are set out in Appendix 5. The Supreme Court Action Book also refers to 'child murder' but this does not seem to have been specifically defined. The statutory offence of 'infanticide' (see Appendix 6) did not exist in Victoria until 1949.
a sudden rash act caused by great emotional stress but it seems juries were willing to interpret the insanity rules fairly liberally.)

Some examples illustrate how varying charges and verdicts resulted in what appears to have been very similar circumstances.

It is remarkable that in so many cases women managed to conceal their pregnancy from those with whom they lived, deliver themselves and go about their daily routine undetected. Elizabeth Rohan's employer claimed

During the night I heard her get up to one of my children to put the clothes on his bed I heard her speak to my son ... I heard nothing of her until I saw her about 4 past 8 in the morning in the cow yard ... I had no reason to suppose what was the matter with the prisoner ... no one ever told me the state she was in.  

When her employer became suspicious and called the police, 'Lizzie' admitted she had been confined. She said, 'the child was dead born'; she had hidden it under her mattress and thrown the afterbirth behind the kitchen fire. Despite a doctor's statement that 'the child was born alive', Elizabeth was charged with concealment of birth and found not guilty.

Charlotte Bartholomew, whose dead baby was found in a parcel in a cupboard, was also charged with concealment of birth; she was found guilty. She had told police that, after four day's solitary labour,

she was very bad on the bed about midnight and got up and the child fell from her on the floor she tied something round the childs neck and she did not know what she was doing. 

Emma Alford concealed her pregnancy but was discovered just after the birth. Her landlady stated

I said to her where is your baby where did you have it. She said I had it in the closet ... I have drowned it in the tub. I said Emma is it dead, she said it must be now. I said what did you do it for she said I dont know. 

Emma was charged with murder and found not guilty.

20. R. v. Rohan, VPRS 30, box 537
22. R. v. Alford, VPRS 30, box 106
Mary Ellen Kempton was found guilty of murder; her baby, according to medical evidence, also died by drowning. She had left her parent's home in Portland with her 6-week-old child to go to Melbourne, intending to put the child out to nurse. The next morning, the baby was found floating in a dam. Mary Ellen said that 'the child had had a violent fit of coughing and died in her arms'.

Margaret Price went and told police her 3-4-month old baby had drowned. Asked why she 'did it', she said, 'I don't know ...'. She told another Constable:

I was left alone with no one to talk to Williams took the last shilling I had for rent and refused me a jug of water to wash the child and Telford the baker refused me a loaf of bread, and I've had nothing to eat for three days only a bit of cake.

She said she sat on the bridge and the baby slipped off her knee. Margaret was charged with murder and found not guilty on the ground of insanity.

The defences most usually offered to murder and concealment charges were that the child was stillborn, that it had arrived unexpectedly while the mother was on the privy, or that it had died accidentally during birth.

It may seem 'curious' that so many concealed pregnancies resulted in stillbirths, but when one considers the lack of care before and during the birth, the phenomenon becomes intelligible. The problem is compounded because young, inexperienced women gave birth in unsuitable locations. Shocked, frightened and alone, they might easily have thought the baby was born dead, especially if that was the hoped-for conclusion.

Alice Williams delivered herself in her room and hid the body in a cess-pit. She said that she thought it a five or six months child and as it was a disgrace to her mother.

23. R. v. Kempton, VPRS 264, box 14
24. R. V. Price, VPRS 30, box 809
25. This point is also made by Malcolmson, p.198
and sisters and she wanted to hide her shame she saw the child was not alive. 26

Johanna Hogan concealed the birth of her child from her employer who 'never heard the slightest noise all night'. Johanna stated that she didn't call for any assistance ... I never heard the child cry ... I said it was dead I thought as I didn't hear it cry. 27

Sarah Hyde, whose baby was unearthed by dogs digging in a nearby garden, claimed to have been delivered unexpectedly.

I went into the closet and the child slipped from me - It did not cry or move it was dead after a little I made a hole with my hands in the garden and put it in and covered it with earth. 28

(Even so, a doctor believed its injuries the 'result of violence' - 'her foot might have caused the injuries by stamping on it'.)

Interestingly, discussion of the recent case offered medical opinion that the onset of labour pains may be mistaken for a desire to defaecate ... and the mother, especially if a single girl, may be genuinely unaware that labour is about to ensue and the child may be born into the closet pan and smothered or drowned. 28a

Accidental death might result where the delivery was inexpert and rushed, where no assistance was available, and where the mother lost consciousness. The baby could drown in discharges, be suffocated by the cord or be injured in a fall.

Margaret Emma Johnson who, though only 19, had had a child two years previously, stated that after having done a day's working she went into the shed had the child and got up and left it. She also said she thought the child was dead when it was born.

26. R. v. Williams, VPRS 30, box 575
27. R. v. Hogan, VPRS 30, box 909
28. R. v. Hyde, VPRS 30, box 757
28a. K. Bowden, Forensic Medicine (1982), quoted in Bartholomew and Milte, p.10. In the 1976 case, the girl's mother testified that she had had no labour pains in relation to her three children. She was in hospital, receiving treatment before the last one was born. "I wanted to go to the toilet, so I just grabbed a pan and the baby was born in the pan at the hospital with no signs, no warning or anything", quoted in Bartholomew and Milte, p.2.
29. R. v. Johnson, VPRS 30, box 909
Here a doctor considered that

if the child and mother had been attended and nursed properly
the child might have continued to live.

In Johanna Hogan's case the coroner's jury believed the mother

guilty of wilful neglect in endeavouring to conceal her condition
and not calling for assistance at her confinement which assistance
would probably have been the means of saving the child's life.  

It is possible that some girls did not realize they were
pregnant. Lillian Johnson's baby was born into and drowned in a bucket.

Her employer asked

'Lillian why did you deny it' I would have sent you to the
Lying-in Hospital, the girl replied 'I did not know it'.  

As the law was interpreted, there was no crime where the child was fatally
injured before or during birth, either wilfully, or as a result of
negligence. Thus in the case of a female child found

in Sydney Road,

the doctor who made the post mortem was of the opinion that the
child had been wilfully killed while being delivered and before
it had time to breath. As the child had not breathed the Coroner
advised that it could not be murder.

Elizabeth Grieve was observed by her brother-in-law in the backyard
at night, in 'a stooping position', apparently in the 'very act of being
delivered'. She asked him to go away and retreated to her room; a dead infant,
with coarse sand adhering to its skin, was subsequently found under
her mattress. The baby had died from injuries received falling

30. R. v. Hogan, VPRS 30, box 909
31. R. v. Johnson, VPRS 30, box 821
32. Davies, p.211. See also Peter Brett and Louis Waller, Criminal Law Text
and Cases (Melbourne: Butterworths, 1978), p.70. The offence of child
destruction was created by an English Act of 1928 and adopted in Victoria
in 1949.
33. The verdict was that the child was stillborn, a severe wound on its head
having been inflicted during birth. Police Gazette, 18 March 1897, p.87
to the ground after being so delivered but, since no real attempt was made to conceal the body, Elizabeth was not even charged with concealment.\textsuperscript{34} Occasionally an accomplice was implicated. Ellen Brown's sister, Mary Ann, helped with delivery and disposal of Ellen's baby, though their mother, with whom they lived, knew nothing of the matter.\textsuperscript{35} Mary Curtis and a neighbour threw the body of Mary's sister's child over the fence into the Powlett Reserve.\textsuperscript{36} John McDougall was jointly charged with the murder of a baby he buried under a log.\textsuperscript{37} A particularly tragic case involved the Chrosier family. The older members swore Margaret's infant was stillborn, the younger that it had been killed by 13-year-old Janey, at her mother's instruction. Ten-year-old Robert stated

\begin{quote}
My brother Sam told me the child was to be buried as soon as it was born ... It was agreed that the child was to be killed and buried - Everyone in the family knew that ... I was present when it was talked about.\textsuperscript{38}
\end{quote}

\begin{flushright}
34. R. v. Grieve, VPRS 30, box 809. Assessing whether a charge of concealment ought to be brought, the prosecutor noted 'it has been repeatedly held that such secret disposition need not be a final disposition. Now there is no Evidence that what was done here was intended as such a final* disposition - indeed it would be difficult to see what else the girl could have done under the circumstances - a man watching her - no woman present - than to take it with her and place it - if placed, under the mattrass to hide it for the moment. 'Her refusal to be examined appears to have been natural under the circumstances. It does not appear from the depositions that the medical practitioner and the brother in law were endeavouring to examine her for the purpose of attending to her in her distress but to find the body. *the concealment must be by a secret disposition of the body and a disposition could only be secret by placing it where it was not likely to be found.'

35. R. v. Brown, VPRS 30, box 549


37. R. v. McDougall and McDonald, VPRS 30, box 854. (He claimed he was taking it to the cemetery but he had missed the train.

38. R. v. Chrosier, VPRS 30, box 1139
The Chrosier case was similar to that of Sophia Adams; each time medical evidence pointed to murder but those accused offered conflicting statements. Adams swore initially that she drowned her baby but later blamed Stephen Cherry. In both instances, all those charged were found not guilty, presumably because of lack of proof beyond reasonable doubt.

Problems of proof were particularly pronounced in abortion cases, especially because the woman aborted, if she lived, was herself guilty of a crime. In a 1911 inquest, the coroner commented

There is no doubt that the girl was tampered with, but ... a conspiracy of silence has been entered into.

In the highly-publicised trial of the abortionist Madam Radalyski, Superintendent Brown said

We have great difficulty getting them convicted; and indeed to secure a conviction at all is a matter of considerable luck.

Difficulties of conviction are apparent in the very many cases concerning Mrs Elizabeth Taylor, a 'ladies' nurse'. Mrs Taylor appeared in the Supreme Court at least six times on charges of murder and abortion between 1885 and 1891 when she was sentenced to death for murder (commuted to 15 years hard labour). Curiously, she was again charged with abortion offences in 1898. Elizabeth Downey had a similar record of appearances from 1897 but did not reappear after her 1907-death-sentence was commuted to

39. R. v. Adams and Cherry, VPRS 30 box 1062. Again, the prosecutor's remarks are interesting. 'The case against the man is very suspicious but without these statements there is really no evidence. If I tried him & made a Crown witness of the woman her evidence is tainted by the contradictions & if I try her by herself they are equally so, nor could either of them be convicted under the charge of the misdemeanour of secretly disposing of the dead body inasmuch as the Doctor proves the child died by drowning & was therefore not dead when thrown into the creek by whichever did it.

40. Argus, 20 March 1911, p.9

41. Argus, 16 January 1899, p.5. R. v. Radalyski and Tod (1899) 24 VLR, 687; (1899) 5 ALR 51
life with hard labour.42

The Victoria Police was composed entirely of 'working-men, usually
strong six footers able to fight'.43 It was less than ideally-equipped to
deal with this type of crime in a period when the reproduction process was
shrouded in secrecy and little discussed, even by those with nothing to hide.
Consider the embarrassment of Constable Millar in giving evidence. He had
spoken to the prisoner who 'was very stout'; about 'her state'.

I then said to the prisoner 'You are like that again ... I meant
when I said accused was stout - she was in the family way ... [later] She had lost her stoutness.44

The men were badly paid, subject to harsh discipline and expected
to work long hours. Little training was given and raw young constables learned
on the job. The files give glimpses of day to day encounters. For example,
Constable Robinson visited Mrs Tabor, who was minding another woman's baby,
several times between 30 December and 12 January 1883 when he was informed
of the child's death.

I saw the child lying in the passage ... cold and blue. It was
a pitiful object ... I said "It is not a proper place - an open
passage - for a sick child, Mrs Tabor." She said - "Oh! there's
nothing like bringing them up hardy." ... She declined to adopt
my suggestion to take the child to the Children's Hospital.45

Many police were of Irish origin and must be assumed to have sympathy
for the plight of fellow Catholics as well as working people in general.46

Mr Koebcke's advice to Ada Hicks that she say 'a detective told

42. Supreme Court Action Book
43. Robert Haldane, The People's Force - a History of the Victoria
    notes that in 1917 two policewomen were appointed under
    sufferance, p.162
44. R. v. Wilkinson, VPRS 30, box 1080
45. R. v. Tabor, VPRS 30, box 646. The 1887 Neglected Children's
    Act gave police power to intervene in cases such as this.
46. Allen makes this point, p.125. Robert Haldane expressed a similar opinion
    in conversation.
me to leave the baby',\(^{47}\) suggests police were sometimes involved in achieving achieving pragmatic solutions.

In compiling statistics on reproduction-related crime, there is the difficulty that infant killings and deaths resulting from abortion appear in Supreme Court registers under the charge 'murder' and can be detected only by examination of individual files. Detailed search of a ten-year sample shows that 85.3 per cent of murder charges against women involved babies and children and 2.9 per cent resulted from abortions; 11.8 per cent involved 'others'. This decade was chosen for ease of access to trial briefs;\(^{49}\) it includes the depression period so may over-emphasize infant deaths (certainly charges of concealment were highest in these years.) But since findings of concealment as an alternative to a murder conviction remain constant for the period 1885-1915, it seems certain that, overall, a substantial proportion of murder charges involved babies.

Of the 125 women charged with murder, 52 were found not guilty (and a further 30 were found guilty of lesser charges). By comparison, of 85 charged with concealment, 53 were found guilty. Similarly, 34 charges for abandoning resulted in 26 guilty verdicts. Of 31 charged with abortion-related offences (excluding murder), 16 were convicted. Figures show a steady decline in the rates for concealment but figures for all other crimes rise in the period, 1895-1899.

Of those charged with murder, 23 were found 'insane'. In the period, 'puerperal factors' and 'hereditary taint' were accepted as common causes

\(^{47}\) R. v. Koebcke, p.330

\(^{48}\) Forty-three women were charged; in 9 cases, i.e. 20.9 per cent of the files were 'missing'. Of the remaining 34 cases, 3 were 'child murder', 4 children and 22 babies; there was 1 abortion death and 4 'others'.

\(^{49}\) After 1892, access to files can be gained only by working through three indexes.

\(^{50}\) See Appendix 2.
of female insanity.\(^{51}\) Ellen Scarcebrook

had been suffering from her head, and thinking that she might
go insane & be taken away to an Asylum like her mother, & thus parted
from her children, she determined not to leave them behind her ... 
her conduct gives some colouring to the theory of "Mania from lactation"
in a person predisposed to insanity from hereditary
taint.\(^{52}\)

Ellen was one of several women who killed a number of their children;
most then attempted suicide.\(^{53}\) While, strictly, these women were not insane
within the legal definition,\(^{54}\) their acts might be seen as crimes against
Nature. Because such crimes appeared to lack a motive, were 'unnecessary',
they were interpreted as acts of persons not legally responsible, and therefore,
'insane'.\(^{55}\) Mary Carnie's doctor believed she suffered 'pregnant insanity',
a feature of which is 'an absence of a definitive motive'. Her suicide
note read

I can stand the pain of my back and legs no longer so I shall
end it tonight I am going to poison myself and the two little
ones for I cannot leave them behind I hope you will soon be
able to get somebody to look after the others if I could have went
away to have it I might have got over it but that is impossible and
I can stand no more in the summer for I am nearly fainting
every day now.\(^{56}\)

Mary was then 6 months pregnant with her sixth child.

(Such women were sentenced to be 'kept in strict custody until

\(^{51}\) Graham Edwards, in 'Causation of Insanity in Nineteenth Century
Australia', Australian and New Zealand Journal of Psychiatry,
(1982, 16), p.55, sets out the most common causes of insanity in women
admitted to the Gladesville Hospital for the Insane. Causes included:
Moral - domestic trouble, mental anxiety, religious excitement,
disappointment in love, fright and shock, isolation and nostalgia;
Physical - intemperance, syphilis, onanism, sunstroke, injury to the head,
puerperal, climacteric, fever, chronic ill-health and want, phthisis,
epilepsy, cancer and other diseases of the skull and brain, old age,
ereditary taint and congenital.

\(^{52}\) R. v. Scarcebrook, VPRS 30, box 951

\(^{53}\) See also R. v. McCarthy, VPRS 30, box 1419, R. v. McCluskey, VPRS 264
box 32, R. v. Walshe, VPRS 30, box 1271

\(^{54}\) Brett and Waller, 4.35, p.158

\(^{55}\) Foucault comments, 'suspicions of pathology were aroused
precisely when there was no reason for the act; insanity was seen as
the cause of that which made no sense, and the legal non-responsibility
was established in view of this inconsistency'. Michel Foucault (transl.
Alain Baudot and Jane Couchman), 'About the concept of the "Dangerous
Individual" in 19th century Legal Psychiatry', International Journal
of Law and Psychiatry (Vol. 1, 1978), p.15

\(^{56}\) R. V. Carnie, VPRS 30, box 1438
the Governor's pleasure be known' but since most returned to 'normal' while awaiting trial, they were doubtless soon released.)

In general, chances of conviction were greater in the country. Probably in some country areas, at least, the lone local policeman administered the business of crime as he thought most appropriate,\(^{57}\) easing the plight of 'victims of misfortune', bringing 'villains' to justice. Lily Wilkinson's file shows the local constable was suspicious because he heard 'she had been mixed up in doing away with illegitimate children'. He warned her

You are like that again and I would advise you not to do anything with the child ... I told her if she did I would arrest her for it.

Even so, she was delivered 'early', beside a pig sty. Asked about the infant,

She said she supposed the pigs had got it as there were a lot of them about there.\(^{58}\)

Despite middle-class ideas that women were responsible for controlling male sexuality, Constable Hayes of Bright saw Sophia Adams as an 'unfortunate girl', victim of Stephen Cherry who had seduced several women. His report shows how the constable weighed the family backgrounds of each and displays the sort of minute 'local knowledge' brought to bear.

I have been confidentially informed that [Cherry's] father endeavoured to take criminal advantage of one of his own daughters many years ago There is another son Wm who got married recently and he seduced his wife ...

The very high conviction-rate in cases of concealment and abandonment suggests that these cases were brought to court because there was indisputable evidence of crime committed. The high number of concealments in the country suggests that local policemen took action to comply with

\(^{57}\) Haldane, p.111

\(^{58}\) R. v. Wilkinson, VPRS 30, box 1080

\(^{59}\) R. v. Adams and Cherry VPRS 30, box 1062
the law but ease the consequences upon those they knew well. 60

Doctors, on the other hand, seem to have been better placed than
police to deter or at least detect infant killing. Indeed the fact that
the 1912 Maternity bonus enabled all women to have a doctor or midwife in
attendance might have been a significant factor in the decrease in infanticide
and concealment. 61

But doctors were far less keen to report abortion deaths. Some doctors
carried out the operations; others were prepared to issue certificates
disguising the cause of death. In 1889 the death of Helen Nowlands was
attributed to pneumonia and that of Eleanor Hill to hepatic abscess; in both
cases postmortems attributed death to blood poisoning consequent upon an illegal
operation. 62 According to Dr Youl,

The man who procures abortion is not the man usually who attends
the patient if she wants medical attention ... he tells her ...
'call somebody else'. 63

The low conviction rate for murder (compared with the relatively-
high rate for concealment) is attributable to two significant and inter-related
causes: first, the difficulties of securing evidence; second, the unwillingness
of juries to convict women of capital offences.

Before the 1912 'baby bonus' only fairly wealthy women were attended
by a doctor; poorer women might seek a midwife but some had their baby
alone. Bodies discovered by chance had usually been hidden for some

60. The closer surveillance was perhaps an element in the fact that
the proportion of illegitimacy 'in country districts is smallest
of all'. VYB 1912-3, p.404

61. VYB 1928-9, p.297 notes that the percentage of women attended
during confinement rose from 68 per cent in 1911 to 79 per cent in 1918.
Willis, p.118, comments that as late as 1926, some 58 per cent of women
in Richmond were attended by a midwife.


63. VPP, p.311.../44
time and were too decomposed to permit precise autopsy results. Some had been partly devoured by animals.

Even in ideal circumstances, medical witnesses were not always able, or indeed willing, to say whether a child had been born alive. The doctor who examined Ellen Brown could find 'no distinctive mark of her having been recently confined', while in the case of Martha Heffer, the doctor concluded she was 'too ill to examine'. An aversion to capital punishment was said to be common among the medical profession.

The opposition to capital punishment, particularly for women, is highlighted by the national debate which attended the trial of Louisa Collins, believed to have poisoned two husbands. In Victoria, public petitions almost always averted the hanging of women convicted of murder. In the last quarter of the nineteenth century, at least 8 women were sentenced to death for the murder of infants, but only Frances Knorr, the baby-farmer, was executed.

Study of sentencing reveals a movement towards non-custodial sentences, particularly for concealment, especially after 1900. Clearly these women were not regarded as 'dangerous individuals'.

64. R. v. Brown, VPRS 30, box 549
65. R. v. Heffer, VPRS 30, box 716
66. Davies, p.219
67. Laster, 'Frances Knorr', p.152 notes a petition from 'the women of Victoria' stated that 'killing of a woman by any body of men does not accord with the moral sense of the community and ... it is disastrous for the state to undertake any form of punishment which enlists public antipathy to the law'.
68. See Appendix 3
69. In the very few cases where men were convicted of these crimes they received more severe sentences, but in each instance, they had taken the greater part in the crime.
Similar public sympathy seemingly existed for abortionists.

In 1910 Dr Macgillicuddy said that, in general practice, he probably came across 'some 200 in the year'. The coroner observed

There can be no doubt this class of crime is rampant in the city at the present time.

In 1912 the *Argus* editorial commented

... the fact remains that an abnormally large percentage of those accused of it escape condemnation ... We are inclined to believe there is ... a widespread if somewhat vague idea that the punishment prescribed by the law is too severe.

The editorial, which might easily have been referring to infanticide as well, continued

... Sentences that are too severe defeat the deterrent aim of the criminal law, since they lessen the probability of guilty persons having to endure punishment. It is the certainty rather than the severity of punishment that checks crime.

Efforts by English law reformers, begun in 1866, finally achieved the *Infanticide Act* (1922) which provided that where a woman wilfully caused the death of her newly-born child while the balance of her mind was disturbed by the effects of giving birth, then she might be punished as if guilty of manslaughter. In 1929, the *Infant Life (Preservation) Act* was passed to deal with the destruction of infants not yet 'persons'. In 1938 a new act extended the offence to include a child under the

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70. *Argus*, 22 August 1910, p.6
Davies argues that 'the really decisive factor' in achieving the reform was not sympathy for the mother but judicial sentiment against 'the solemn mockery' involved in pronouncing a death sentence never to be carried out, thus 'disgracefully tending to bring into disregard' the most awful function a judge can discharge.

Interestingly, attempts in 1909 and 1936 to add 'distress and despair arising from ... extreme poverty or other causes' as a mitigating factor were unsuccessful.

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71. Davies, pp.269-287. The offences are set out in Appendix 6. See A. A. Bartholomew and A. Bonnici, 'Infanticide: A Statutory Offence' (2 Med. J. Aust. 1018, (1965), pp.1018-1021). This article suggests 'the whole purpose would be better served if infanticide, rather than being a statutory offence, were simply to be introduced as a statutory defence to a charge of murder', p.1021. Bartholomew and Milte argue persuasively that a defence of 'diminished responsibility' would be more satisfactory.

72. Davies, p.284

73. Davies, p.285

74. Davies, p.284
CONCLUSION

To examine infanticide is to confront paradox and contradiction. Though the criminal law regards all life as equal, the crime occurred on such a scale because society placed little value on the lives of children of 'lowly-placed women without position or influence.' Confronted with the choice of assisting these women, and therefore condoning 'immorality', Victorian society chose to profess 'morality'—and the deaths continued.

Infanticide was at once absolute crime and no crime at all. Christian morality stressed infanticide was crime most monstrous and the criminal law imposed severe sanctions. Yet these were negated because juries concluded that the author of so 'unnatural' and act must be 'irrational' and therefore legally 'not-responsible'.

The Victorian situation amplifies Foucault's insight that nineteenth-century legal reforms shifted attention from the crime to the criminal, the punishment becoming a means of reformation and of repression of danger to society. Yet most women who committed this very serious crime received mild punishment indeed, perhaps because, while the 'criminals' themselves presented no real threat, widespread acknowledgement of their existence would have severely challenged social ideology.

Foucault asserts that the focus on the criminal rather than the crime was justified by a 'double concern: to introduce more rationality into penal practice and to adjust the general provisions of laws and legal codes more closely to social reality.' But the prosecution

1. Wilson, p.48
2. Recall Foucault, 'The concept of the Dangerous Individual, p.15
4. Foucault, p.3
of infanticide introduced irrationality into penal practice. The courts allowed women to plead mental imbalance as a result of the effects of childbirth but not as a result of social and economic stress. Such a plea suggested the act had been without motive, the act of a person 'not-responsible'. The fact that social and economic factors provided ample motive was thus obscured. To an extent, therefore, social reality became adjusted to the provisions of the criminal law.

Clearly factors other than the effects of childbirth can produce mental imbalance; arguably not all those women were mentally unbalanced. But the effect of attributing deviance to individual biological weakness was to absolve society from responsibility. The statutory crime of infanticide at once strengthens the notion that those who fail to cope in the role of 'mother' are mentally aberrant and avoids the need to look beyond the individual for the roots of a greater malaise.5

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5. A similar view is expressed by Joycelynne Scutt in 'Sexism in Criminal Law' in Mukherjee and Scutt (eds), p.9
Source:
Victoria Police Gazette

APPENDIX 1

POLICE LISTINGS OF UNIDENTIFIED INFANTS

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<tr>
<th></th>
<th>1885-9</th>
<th>1890-4</th>
<th>1895-9</th>
<th>1900-4</th>
<th>1905-9</th>
<th>1910-14</th>
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FOUND ALIVE

|                  |        |        |        |        |        |         |       |
| City:            |        |        |        |        |        |         |       |
| Number found     | 62     | 67     | 51     | 30     | 33     | 38      | 281   |
| Arrests made     | 2      | 3      | 7      | 4      | 1      | 3       | 20    |
| Country:         |        |        |        |        |        |         |       |
| Number found     | 6      | 5      | 13     | 3      | 3      | 4       | 34    |
| Arrests made     | -      | 3      | 4      | -      | -      | -       | 7     |
| Total Arrests    | 2      | 6      | 11     | 4      | 1      | 3       | 27    |

.../50
Source: Supreme Court Action Book (VPRS 2983 - m/c 3523)

**APPENDIX 2**

<table>
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<tr>
<th>CONVICTION RATES - City and Country</th>
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<th>1890-4</th>
<th>1895-9</th>
<th>1900-4</th>
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**CONCEALMENT OF BIRTH**

| Charged (Total) | 21 | 18 | 18 | 13 | 6  | 9  | 85 |
| Charged         | 9  | 11 | 11 | 11 | 5  | 6  | 53 |
| **City**        |    |    |    |    |    |    |    |
| Charged         | 9  | 2  | 3  | 5  | 3  | 3  | 25 |
| Convicted       | 2  | 1  | 2  | 4  | 2  | 2  | 13 |
| **Country**     |    |    |    |    |    |    |    |
| Charged         | 12 | 16 | 15 | 8  | 3  | 6  | 60 |
| Convicted       | 7  | 10 | 9  | 7  | 3  | 4  | 40 |

... contd/

./51
### Appendix 2 (cont'd)

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**APPENDIX 7**

**CASES CITED**

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*last appearance only

#figures in brackets show how death sentence commuted - hl = hard labour
### APPENDIX 3

#### SENTENCES GIVEN

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Source: Supreme Court Action Book (2983 - m/c 3523)

APPENDIX 4

INFANTICIDE, CONCEALMENT OF BIRTH AND ABORTION RELATED INDICTMENTS AND CONVICTIONS
NEW SOUTH WALES - VICTORIA

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|                   |        |        |        |        |        |        |       |
| Convictions       |        |        |        |        |        |        |       |
| I'cide & c'ment - NSW | 22     | 15     | 16     | 9      | 5      | 6      | 73    |
| C'ment - Vic.     | 27     | 32     | 25     | 16     | 8      | 7      | 115   |
| Abortion - NSW    | 2      | 21     | 21     | 18     | 25     | 26     | 113   |
| Abortion - Vic.   | 2      | 7      | 4      | 3      | 3      | 4      | 23    |

* This figure represents only concealment of birth (including concealment findings on murder charges)

# This figure does not include abortion-related murder charges

Statement of Sophia Adams

I had a child and I threw it in the creek. It gave one cry after it was born and I picked it up and threw it in the creek at the back of my sisters home that was on Sunday morning, after that it was born.

Sophia Adams

R.O.

First statement of Sophia Adams
see page 38 - R. v. Adams and Cherry
VPRS 30 box 1062
Drift, 7th June 1893

Statement of Sophia Adams

The child was not born at the Creek, but was born in the kitchen at the back of the house. That I did not know the child but Alie Cherry, my brother's wife, did. Alie Cherry was in the front room of the house when the child was born in the kitchen. I called to him and told him I had a child. Alie told me to go inside the front room and leave the child in the kitchen. I had the child cry just as soon as ever it was born. I went into the front room as he told me. He came to the kitchen where I was and I went into the front room where he told me to go. I remained only a very little while and I couldn't say what he did with the child. And I did not see him. When the child was found on the Thursday he Alie Cherry told me that he had thrown the child in the river and I told him that it wouldn't be one that would be arrested. He told me I would be. That unless anyone saw it as it was I couldn't be arrested. He then told me to say that I knew the child myself and that she was not the father of it and had nothing to do with it.

Sophia Adams

Second statement of Sophia Adams,
see page 38 - R. v. Adams and Cherry
VPRS 30 box 1062
Dear Tom, I cannot stand the pain of my back and legs no longer so I shall send it tonight I am going to poison myself and the two little ones for I cannot leave them behind. I hope you will somehow be able to get somebody to look after the others if I could have went away I would still have got over it but that is impossible and I can't trust no more in the convent so I am merely jotting this down. God bless Mary 

Mary Carnie's suicide note
see page 41 - R. v. Carnie
VPRS 30 box 1438
Chief's Secretary's Office.
Melbourne. 2-10-1907

Mines.

I have examined Mary Carnie with regard to her mental condition during the time she has been in Melbourne Central. She was depressed and emotional for some days, and was otherwise, some violent, but was rational, coherent, and about 6 days after admission, she became calmer, cheerful, and slept well. She has shown no indications of insanity since she has been in Melbourne Central, and there has been nothing in her conduct nor demeanour during that time, to show the state of her mind before coming under my care.

She is about 6 months pregnant.

The Crown Office

Medical report concerning Mary Carnie, see page 41 - R. v. Carnie, VPRS 30 box 1438
Source:
Crimes Act 1890 (54 Vict. No.1079)
consolidating
Criminal Law and Practice Statute 1864
(27 Vict. No.233)
Criminal Law and Practice Statute 1871
(35 Vict. No. 399)

APPENDIX 5

REPRODUCTION-RELATED OFFENCES: 1885-1915

Murder

s.3 Whosoever shall be convicted of murder shall suffer death as a felon.
(For the definition of murder see page 30, note 13 above)

Abandoning

s.23 Whosoever shall unlawfully abandon or expose any child being under the age of two years (whereby the life of such child shall be endangered or the health of such child have been or shall be likely to be permanently injured) shall be guilty of a misdemeanor; and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding three years.
(The words in italics were repealed by Act No. 1198)

Abortion

s.55 Every woman being with child who with intent to procure her own miscarriage shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever with intent to procure the miscarriage of any woman whether she be or be not with child shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony; and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding fifteen years.

s.56 Whosoever shall unlawfully supply or procure any poison or other noxious thing or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman (a) whether she be or be not with child, shall be guilty of a misdemeanor; and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding three years.

Concealing Birth

s.57 If any woman shall be delivered of a child, every person who shall by any secret disposition of the dead body of the said child whether such child died before at or after its birth endeavour to conceal the birth thereof shall be guilty of a misdemeanor; and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years.
Source: Crimes Act 1958 (No.6231)

APPENDIX 6

REPRODUCTION-RELATED OFFENCES: 1986

Murder

s.3 Notwithstanding any rule of law to the contrary whosoever is convicted of treason or murder shall be liable to imprisonment for the term of his natural life.

Infanticide

s.6 (1) Where a woman by any wilful act or omission causes the death of her child, being a 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 reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for this section the offence would have amounted to murder, she shall be guilty of felony, to wit of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of the child.

(2) Where upon the trial of a woman for the murder of her child, being a child under the age of twelve months, the jury are satisfied that she by any wilful act or omission caused its death, but that 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 reason or the effect of lactation consequent upon the birth of the child, then the jury may, notwithstanding that the circumstances were such that but for the provisions of this section they might have returned a verdict of murder, return in lieu thereof a verdict of infanticide.

Child Destruction

10. (1) Any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act unlawfully causes such child to die before it has an existence independent of its mother shall be guilty of felony, to wit of child destruction, and shall be liable on conviction thereof to be imprisoned for a term of not more than twenty years.

(2) For the purposes of this section evidence that a woman had at any material time been pregnant for a period of twenty-eight weeks or more shall be prima facie proof that she was at that time pregnant of a child capable of being born alive.

(3) Where upon the trial of any person for the murder or manslaughter of any child or for infanticide or for any offence under section sixty-five of this Act the jury are satisfied that the person charged is not guilty of murder manslaughter or infanticide or of any offence under the said section sixty-five (as the case may be) but are satisfied
that he is guilty of the felony of child destruction, the
jury may find him guilty of that felony and he shall be
liable to punishment accordingly.

(4) Where upon the trial of any person for the felony of
child destruction the jury are satisfied that the person
charged is not guilty of that felony but are satisfied that
he is guilty of an offence under section sixty-five of this
Act the jury may find him guilty of that offence and he
shall be liable to punishment accordingly.

(5) Section four hundred and twenty-six of this Act shall
apply in the case of the acquittal of a person upon a charge
of child destruction as it applies upon the acquittal of
a person upon a charge of murder.

Abandoning

s.25 Whosoever unlawfully abandons or exposes any child being
under the age of two years, shall be guilty of a misdemeanour,
and shall be liable to imprisonment for a term of not more
than three years.

Abortion

s.65 Whosoever being a woman with child with intent to procure
her own miscarriage unlawfully administers to herself any
poison or other noxious thing or unlawfully uses any instrument
or other means, and whosoever with intent to procure the
miscarriage of any woman whether she is or is not with child
unlawfully administers to her or causes to be taken by her
any poison or other noxious thing, or unlawfully uses any
instrument or other means with the like intent, shall be
guilty of felony, and shall be liable to imprisonment for
a term of not more than fifteen years.

s.66 Whosoever unlawfully supplies or procures any poison or
other noxious thing or any instrument or thing whatsoever,
knowing that the same is intended to be unlawfully used
or employed with intent to procure the miscarriage of any
woman, whether with child or not, shall be guilty of a misdemeanour,
and shall be liable to imprisonment for a term of not more
than three years.

Concealing Birth

s.67 If any woman has been delivered of a child, every person
who by any secret disposition of the dead body of the said
child whether such child died before at or after its birth
endeavours to conceal the birth thereof, shall be guilty
of a misdemeanour, and shall be liable to imprisonment for
a term of not more than two years.
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FORTHCOMING

The following titles were unavailable in Australia at the time of submission of this study.


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