

Criminal Justice Responses to Maternal Filicide

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Criminal Justice Responses to Maternal Filicide: Judging the failed mother

BY

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INVESTOR IN PEOPLE

*To women everywhere, whether pregnant or not, mothers or not.
Keep fighting, and surviving, and living.*

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Dr Emma Milne is Assistant Professor in Criminal Law and Criminal Justice at Durham University. Her PhD in Sociology from the University of Essex was funded by the Arts and Humanities Research Council. Her research is interdisciplinary, focussing on criminal law and criminal justice responses to newborn child killing and foetal harm. The wider context of her work is social controls and regulations of all women, notably in relation to pregnancy, sex, and motherhood. She co-authored *Sex and Crime* (SAGE, 2020) and co-edited *Women and the Criminal Justice System: Failing Victims and Offenders?* (Palgrave, 2018).

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Chapter 1

The ‘Problem’ of Maternal Filicide of Newborn Children

How could a mother kill her own child? Particularly her newly born child who has developed inside her and is so new to the world as to be seen as nothing but innocent and deserving of love and care? Such questions reflect popular sentiment towards women who are suspected of killing their newborn children. These sentiments perhaps explain why criminal law and justice have focussed on women who are believed to have committed such acts, and why such women are the subject of innumerable research studies. These studies span the disciplines of sociology, criminology, law, history, psychology, medicine, and psychiatry. Most attempt to answer the question ‘Why does she do it?’: Why does a woman hide a pregnancy, give birth alone, and behave in a way that leads to the death of the child?

The focus of the question, the desperate desire to understand *her*, I contend, is wrong. This question is fixated on the woman, as an individual. It is determined to discover who she is, and what she does, in the hope to understand why *she* did ‘it’. Such an approach starts from the premise that the behaviour of accused women is ‘wrong’ – that it is ‘unthinkable’, ‘unnatural’ – embodying the principle that this is a behaviour that society does not expect and cannot accept. Therefore, the natural consequence of such analysis is to conclude that her behaviour should be seen and understood as criminal and so deserving criminal law and justice intervention and, consequently, punishment. As I outline in this book, not only is this an unhelpful approach to these cases, but it also leads us to a false conclusion as to how and why women behave in such ways towards their pregnancies, foetuses, and newborn children, and how and why criminal justice should be involved.

This study throws cases of suspected newborn child killing on their head. Rather than asking ‘Why would a woman do such a thing?’, the focus of my inquiry is upon society, and what society does. What is society’s role in creating a situation whereby a woman experiences her pregnancy as a crisis, to the extent that she feels she cannot accept and respond to her pregnancy, so she conceals and/or denies it to herself and to those around her? What factors in society lead women to take steps to illegally end their pregnancy or to not seek help when they realise that they are about to birth a child? And what responsibility does society bear when a woman ‘decides’ that ending the life of her late-term foetus or newly born baby is her only viable option? When considering the hand society

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has in the outcomes of these cases – the hardships of motherhood, the controls and regulations on women’s sexuality and motherhood, the substantial burden of pregnancy placed on women – the natural question is not ‘Why did she do it?’ but ‘Why wouldn’t she do it?’. And perhaps even ‘Isn’t it surprising that more women don’t do it?’. In light of these revised questions, we need to critically analyse the role of criminal law and criminal justice in sanctioning women when they take extreme steps to remedy the harms of pregnancy and motherhood that occur due to social structures.

This is precisely what this book does: it takes 15 cases of women who are suspected of causing the death of their newborn children and who have been convicted in England and Wales of a criminal offence connected to this behaviour from 2010 to 2019. In assessing these cases, I analyse the nature of each one with a strong focus on the social causes, so moving the centre of analysis away from women as individuals. I evaluate the social norms and ideas that underpin the assessment of these women and their behaviour – specifically ideals of motherhood and expectations of being the ‘responsible’ pregnant women. I then unpack how English and Welsh law works to criminalise the actions of these women. Through this analysis, it becomes clear that women who are suspected of causing the death of newborn children collide with immovable expectations that society holds about motherhood – of who should be a mother, when, where, and how. These expectations are not new and have long and complex histories. They are also not universally experienced and are deeply impacted by perceptions on race, class, sexuality, disability, and other intersecting identities.

In evaluating the function and operation of criminal law and justice in cases of suspected newborn child killing, what becomes clear is that the desire to criminalise the behaviour of suspected women, and to sanction them for their ‘failure’ as mothers and as pregnant women, is incredibly strong. Such a desire operates despite the position of the women who stand accused. The women in these cases, as with other women who have been the subject of other research in this field,¹ are incredibly vulnerable. When I use the term vulnerable here, I am specifically referring to the work of theorists such as Martha Albertson Fineman (2008):

Because we are all positioned differently within a web of economic and institutional relationships, our vulnerabilities range in magnitude and potential at the individual level ... it is experienced uniquely by each of us and this experience is greatly influenced by the quality and quantity of resources we possess or can command. (p. 10)

The vulnerabilities of women who are suspected of causing the death of their newborn child are substantial. To be blunt, a woman does not come to the situation of giving birth alone, scared to call for help, and deciding that the death of the infant is the only option, if she is *not* vulnerable. To make such a claim is not to essentialise women who have such experiences but to acknowledge that newborn child

¹Explored in Chapter 2.

killing in the circumstances explored in this book is a product of desperation and hardship.² The vulnerabilities of these women are directly connected to their interpretation, understanding, and engagement with their pregnancies. As argued in Chapter 2, a woman's experience of her pregnancy as a crisis is closely connected with her social and cultural circumstances (Oberman, 2003; Vellut et al., 2012). Within the context of cases of women suspected of causing the death of newborn children, being pregnant when it is perceived by the pregnant woman, and possibly those around her, that she should not be, adds a distinct level of vulnerability to women who are already disadvantaged (Ayres, 2007).

Despite the apparent vulnerabilities of accused women, the push to criminalise their actions is strong. Why this push exists is explored throughout this book. What becomes clear through the analysis is that the desire to sanction women, to hold them accountable and label their actions as criminal, results in criminal law being contorted and reshaped so that it fits with the circumstances of the cases and so can be applied to capture the behaviour exhibited by the women. Laws are applied in ways never intended by legislators when enacted, and so offences are reinterpreted to fit new scenarios. Such use of the law is common and uncontroversial within criminal justice practice.³ However, the manner in which it is done in the cases assessed here tells us a great deal about how women who hide pregnancies and labour alone, resulting in the death of the foetus/child, are understood and assessed.

The clearest examples of the stretching of the criminal law in these cases can be seen in the approach to the legal principle of the born alive rule. In England and Wales, if you are not born alive, then you are not a legal person who can be a victim of crimes against the person, such as homicide or non-fatal offences. If not born alive – if *in utero* or in the process of being born – then a human does not have legal personality and, thus, does not have the same level of legal protection as all other born humans. Accordingly, foetuses have limited legal protection.⁴ The courts have determined that to be born alive means the body of the child is entirely out of the birth canal,⁵ and so the child has a separate existence.⁶ The umbilical cord and afterbirth (placenta) do not need to have been delivered nor

²The vulnerability of women who have their behaviour controlled and sanctioned by criminal law and criminal justice is widely recognised in feminist literature. See, for example, Carlen and Worrall (1987), Barlow (2016), Milne et al. (2018), and Singh (2017).

³See, for example, McGlynn et al. (2017) in their analysis of using voyeurism laws to facilitate prosecution of defendants for non-consensual sharing of explicit images and image-based violence.

⁴Foetus is not the correct term for all periods of gestational development, with different terms associated with different periods of development: zygote (at fertilisation), blastocyst (during the period leading up to implantation, 6–10 days after ovulation), embryo (following adherence of the cells to the uterine wall), and foetus (from 8 weeks until birth). The term foetus is used throughout this book to indicate a human *in utero* from conception to the completion of birth. This term is used for ease of the narrative and not to indicate a specific period of gestational development.

⁵*Poulton* [1832] 5 C&P 329; *Enoch* [1833] 5 C&P 539; *Crutchley* [1837] 7 C&P 814.

⁶*Paton v. British Pregnancy Advisory Service Trustees* [1979] QB 276.

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severed from the child.⁷ Separate existence is evidenced by the child breathing after birth.⁸ However, as Romanis (2020b) makes clear in her analysis of the born alive rule, these measures are potentially subject to change in line with medical developments.⁹

In many respects, the cases analysed here should be simple: if there is evidence of live birth then the child is treated like any other victim of crime, if not, then limited liability exists for the pregnant woman as it is a foetus, not a born person, who has died. However, as will be illustrated through the course of this book, the application of criminal law in this area is anything but simple. Criminal offences relating to conduct against a foetus/newborn child are a medley of different pieces of statute that have developed from the late sixteenth century to the early twentieth century. As a result, the laws in this area have a long, complex history and are saturated with the legacy of the control and regulation of women's sexuality and ideas around who can and should be a mother. The end result is that prosecutors – the Crown Prosecution Service – have a 'menu' of offences from which they can select the one that works best to fit the facts of a particular case and so criminalise the conduct of the suspected woman. The menu is made up of the following offences:

Evidence of Live Birth Required:

- Homicide, including infanticide. Infanticide is both a homicide offence and a partial defence to murder, under the Infanticide Act 1938. Infanticide prevents a woman from receiving the mandatory life sentence for murder if she kills her own child within a year of its birth, and at the time of the killing, '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'.¹⁰
- Child cruelty.¹¹

⁷Reeves (1839) 9 C&P 25; Trilloe (1842) 2 Mood CC 260; Crutchley.

⁸C v. S [1988] QB 135; Rance and Another v. Mid-Downs Health Authority and Another [1991] 1 QB 587.

⁹For example, foetal surgery, whereby the foetus is removed from the uterus and body of the pregnant woman, operated on and then returned to the uterus to continue gestating. Has this 'baby' been born alive and thus garnered the rights and legal protections of a born person? If so, what are the legal implications for the woman whose body that 'born alive person' is within?

¹⁰According to Ministry of Justice data (Freedom of Information Request 200908003), of the 26 women who were sentenced at the Crown Court 2000–2020, only 1 received an immediate custodial sentence: imprisoned for four years. It is not known if this woman killed a newborn child or an older infant.

¹¹Children and Young Persons Act 1933, s1. This offence is not explored in detail; however, comments are made in a number of the court hearings that the behaviour of women in these situations does not fit neatly into the definition of the offence or the sentencing guidelines; thus, suggesting this offence also operates as a 'makeshift' in light of more suitable offences.

Evidence of live birth not required:

- Concealment of birth – concealing the dead body of a baby in order to conceal the fact it was ever born.¹² Hereafter ‘concealment’.
- Procuring a miscarriage – criminalising attempts to end a pregnancy at any stage of gestation, other than for the purpose of saving the life of the pregnant woman. It does not matter if the foetus dies or is born alive or if the attempts to end the pregnancy fail.¹³
- Child destruction criminalises the killing of a child capable of being born alive; so, a foetus that has passed viability. The foetus has to die before birth for this offence to be committed.¹⁴

In assessing the menu of offences and how they are applied, in this book, I am analysing a range of cases that, on the face of the criminal outcome, are vastly different: ranging from women convicted of homicide offences and sentenced to serve a minimum of 18 years’ imprisonment, through to women convicted of a miscellaneous crime against society (the category in which the offence of concealment sits in police data) and receiving a 12-month community order. My decision to look across the criminal conviction outcomes, rather than at a specific offence, arose from the fact that, in many respects, the circumstances, contexts, and outcomes of these cases are the same: the woman ‘hides’ her pregnancy, gives birth alone, and at some point around the time of birth the foetus/baby dies. This is a distinctly feminist approach to assessing deviant/criminal behaviour: taking the experiences of women as the starting point and demonstrating that the law often does not work with or fit for the lives of women.

As will become clear over the course of this book, legal professionals also appear to see the actions of the women as bearing similarities, whether she violently killed a newborn child or not. The impact of these perceptions is that the criminal law is being applied to criminalise the actions of the women despite the specific circumstances of the cases. The women and their actions (or inactions) are not seen as different, and the born alive rule ceases to have the meaning it is (officially) proscribed in law. The differences lie in which offences can be applied to the conduct of the women and so the label that is attributed to the ‘crime’ committed. I have also included two cases of women who abandoned live born children but resulting in the babies being found soon after they were left and so surviving. These cases were included on the basis that the outcome may easily have been different and the survival of the child occurred through happenstance, rather than due to the actions of the women; thus, they are similar in

¹²Section 60 of the Offences Against the Person Act 1861 (hereafter OAPA 1861).

¹³OAPA 1861, s58. Discussed in detail in Chapter 6. Abortion remains illegal unless conducted within the parameters of the Abortion Act 1967.

¹⁴Infant Life (Preservation) Act 1929, s1(1). The origins of the offence are analysed in Chapter 5. See also Sheldon (2016).

nature to the other cases.¹⁵ In analysing the cases together, I am not suggesting that the women acted in exactly the same way or that their behaviour is comparable. I am illustrating that this is how criminal law and justice is approaching these cases – same behaviour, different outcomes, and so a different choice from the menu of offences.

As will become clear throughout this book, the menu might be working for criminal justice, and perhaps also for wider society, as it allows us to lay the blame for foetal and newborn child death firmly at the door of accused women. It allows us to individualise women's behaviour and hold them, and them alone, responsible for what occurs: for their 'failure' as mothers and pregnant women. This approach to these cases reflects society's beliefs about women more broadly. It is saturated by misogynistic ideas about women, embodying the control and regulation of women's bodies, sexuality, and motherhood. Such regulation of women – as adult female humans – underpins sex-based discrimination and oppression and is one of the cornerstones of heteronormative, capitalist, racist patriarchy.¹⁶ Women are controlled because they can become pregnant. But as outlined in Chapter 3, the ability to become pregnant does not mean motherhood is natural or inherent. Such perceptions of the role of caring for children are driven by discriminatory ideas about women and their role in society. This book is not alone in making such observations about motherhood and pregnancy, and about criminal law and criminal justice approaches to women; it joins a chorus of vibrant and sophisticated feminist voices, providing yet more evidence that criminal law and justice (as well as the structures of life under patriarchy) do not serve women.

The text is best read sequentially, as the early chapters provide details of the cases that underpin the analysis of the law in the latter part of this book. The remainder of the first chapter explains how the research was completed and provides a summary of the cases analysed. Chapter 2 explores the women's experiences of pregnancy and previous research into similar cases, thus offering an explanation for how a woman comes to a concealed/denied pregnancy that results in the

¹⁵While we have very little data to tell us exactly how frequently infants are abandoned, Sherr et al. (2009) estimate that an average of 16 babies are abandoned yearly. The two cases assessed here provide examples of this response to a crisis pregnancy.

¹⁶It is beyond the scope of this book to explore these complex and incredibly important forms of oppression in any detail. My inclusion of this descriptive 'list' of the nature of contemporary society in the Anglo-American world is to acknowledge that the discriminations and oppressions experienced by women go beyond patriarchy – the social organisation whereby men and male power are privileged over women, resulting in the oppression of women. The world is not simply all men on top equally enjoying power, domination, and control, and all women equally experiencing the consequences of subordination. The nature of gender- and sex-based oppressions are shaped and constructed by the expectations that the 'normal' sexuality is heterosexual, that the 'normal' mode of financial operation is capitalist, and the 'normal' race is white. This list is also not exhaustive and could include (dis)ability, nationality, immigration status, educational level, and more. The consequence is that oppression is multifaceted and experienced by individuals differently depending upon their intersecting identities.

death of the foetus/child. Chapters 3 and 4 take a critical look at the ideologies of motherhood and ‘responsible’ pregnancy and how these play out in the courtroom. Chapter 5 provides a historical analysis of the menu of offences, illustrating the misogynistic legacy that surrounds the laws that continue to operate today. Finally, Chapter 6 outlines how the menu works to defeat the born alive rule, so facilitating criminalisation of women who fail as ‘good’ mothers and ‘responsible’ pregnant women, operating despite the principle of legal personhood. In this chapter, I also turn to the United States, to illustrate the potential consequences that could occur if foetuses officially gain legal protection as has been granted in most states. I conclude the text by reflecting on the role of criminal law and justice in protecting newborn children and foetuses and in controlling and regulating women.

Suspicious Perinatal Deaths

Much of our understanding of women suspected of causing the death of a foetus/newborn child is shaped by the language we use to describe what occurs. Within academic literature, ‘filicide’ is defined as the killing of a child by its parent, including a stepparent, and ‘maternal filicide’ is used when the perpetrator is the child’s mother. ‘Infanticide’ is popularly used to refer to the killing of an infant, usually under one year old, by its mother. A further term that is often used within the literature is ‘neonaticide’, coined by Phillip J. Resnick (1969), defined as the killing of a child within 24 hours of its birth. Resnick noted neonaticide as a distinct form of child homicide, most often committed by the mother following an unwanted pregnancy, thus different from other forms of maternal filicide due to the context, motive, and psychological state of the perpetrator. This distinction between the killing of newborn children and older infants has subsequently been embraced within the literature (see, e.g., Bourget et al., 2007; d’Orbán, 1979; Friedman & Friedman, 2010; Meyer & Oberman, 2001; Pitt & Bale, 1995).

Exploration of language, and the meaning and preciseness of the terms used to describe the events that occur, is essential for this study. The nature of the cases analysed is such that often we do not know exactly what happened: exactly when the foetus/child died, exactly how it died, and exactly the role of the woman in the death. As will become clear through this chapter and the course of this book, this level of uncertainty and what this means for the application of law is of immeasurable importance. Therefore, it is crucial to be as precise with language as possible when describing the death of a foetus/newborn child.

As is no doubt already clear, I distinguish between a born child and a not born child: a foetus. I also distinguish between women who kill their newly born children and women who exhibit other behaviour that may result in the death of the foetus/child (such as not taking steps to ‘save’ the baby after live birth).¹⁷

¹⁷While in a legal sense, failure to save a newborn child could also constitute a homicide offence, and murder and infanticide can be committed through an omission, such a failure is more difficult to prove beyond reasonable doubt. For example, if no witnesses are present at the birth and death of the child, how do prosecutors demonstrate

Consequently, I do not use the terms ‘filicide’ or ‘neonaticide’ in this study. By their nature, both terms indicate an act of killing, which have implications in terms of how we discern and view the behaviour of the ‘perpetrator’. For example, the term ‘neonaticide’ comes from the Latin *neos*, meaning new, and *caedere*, meaning to kill – implying action and possibly intent. Examination of cases, both in this study and others (Amon et al., 2012; Beyer et al., 2008; Meyer & Oberman, 2001; Vellut et al., 2012), highlights the extent to which we often do not know who or what caused the death of the ‘baby’, nor if it had been born alive. Difficulties in determining live birth and cause of death have a substantial impact on the criminal law and criminal justice responses to suspected women, as is exemplified throughout this book. Out of the 15 cases assessed here, only 7 women were convicted of a homicide offence. However, as will become clear, in most of the cases, it is presented that the woman was responsible for the child’s failure to survive, even if it cannot be proven she legally killed it or, in fact, if it had been born alive and, thus, could have been unlawfully killed.

For these reasons, the term ‘neonaticide’, and by extension ‘filicide’, is inadequate in capturing the nature of these cases and the legal and criminal justice responses.¹⁸ Consequently, I have developed two alternative phrases to cover killings or suspicious deaths in the period surrounding birth: ‘suspicious perinatal death’ or ‘suspected perinatal killing’. Perinatal refers to the period immediately surrounding birth.¹⁹ Inclusion of this wider window in the definition of these forms of infant death is important as it reflects the legal regulations of women’s pregnant bodies as well as the nature of the cases. As outlined in Chapter 2, the death of the infant around the time of birth is prefixed by a difficult experience of pregnancy by the woman; thus, it is important to take this period into account when examining these cases. For the definition used in this book, the perinatal period commences after 24 completed weeks of gestation (24 + 0, as referred to in medical terms) and ends 24 completed hours after live birth. I have specifically chosen the parameters of this period to reflect key aspects of English and Welsh criminal laws. Section 1(1)(a) of the Abortion Act 1967 places legal limits on medical professionals’ abilities to provide women with abortions if

a woman purposefully did nothing to save the child with the intent to kill, rather than that she did nothing due to panic or falling unconscious after the birth? The cases I have analysed, those presented here and others that are not examined, indicate that homicide convictions are reserved for women who took actions to kill the born alive child, rather than those instances where the child could be said to have died due to an omission of the woman post-birth.

¹⁸I also reject use of the term ‘infanticide’, outside of discussion of the specific criminal offence of infanticide and in the context of popular understanding of women suspected of killing newborn children during the nineteenth century, who were popularly referred to as ‘infanticidal women’, discussed in Chapter 5.

¹⁹Different timescales are used for the ‘perinatal’ period; for example, the World Health Organisation (n.d.) defines the perinatal period as commencing at 22 completed weeks of gestation and ending 7 completed days after birth. However, the principle is that it is the period surrounding birth.