

# **Suspicious perinatal death and the law: criminalising mothers who do not conform**

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# *Abstract*

How should the criminal justice system respond to women who conceal their pregnancies, resulting in the death of the foetus or baby? It is widely expected that a pregnant woman will act in the best interests of her unborn child, including submitting herself to medical examination. However, these expectations are not always met and this causes particular problems for vulnerable women who experience crisis pregnancies. In such situations women have hidden their pregnancies, given birth in secret, and are suspected of causing the death of the baby. Alternatively, their actions while pregnant, and during labour and delivery are deemed to have culminated in the stillbirth of the child. While there are no accurate statistics, every year approximately 7 babies/foetuses are known to die in such circumstances during the perinatal period.

Through a detailed examination of transcripts from sentencing hearings of criminal cases heard 2010-2014, I explore how and why women involved in such cases have come to be dealt with through English criminal law. There appears to be a strong desire to criminalise women who are perceived to fail to put the foetus first. Criminal justice professionals use out-dated offences to capture these perceived criminal wrongs. I conclude that if the state wishes to punish women for harm caused to the foetus, then the enactment of foetal protection laws would be appropriate. However, as critical assessment of such law in the United States of America illustrates, such laws could have dramatic consequences on the rights of women.

The cases analysed in this thesis provide a fascinating lens through which to examine a range of broader issues including, the expectation that women should put the needs of the foetus before their own, and the assumption that motherhood starts at conception and is natural and inherent.

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# *Abbreviations and definitions*

## *Abbreviations*

CDC	Centers for Disease Control and Prevention
CPS	Crown Prosecution Service
FOI	Freedom of information
LSCB	Local Safeguarding Children Board
SCR	Serious Case Review

## *Definitions*

Abortion	The purposeful termination of a foetus in the womb and expulsion of that foetus from the woman's body
Child	Member of the human species who has a separate existence from its mother
Concealment of birth, shortened to 'concealment'	The criminal offences as defined by s60 of the Offences Against the Person Act 1861
Filicide	The killing of a child by its parents, including a step-parent
Foetus	Member of the human species developing in the womb at any gestational age from the point of fertilisation until separate existence from the mother has occurred
Infant	Child aged under one year
Infanticide	The criminal offence as defined by the Infanticide Act 1922 or Infanticide Act 1938
Miscarriage	The spontaneous expulsion of a foetus from the uterus prior to a specific point defined in medicine and law. In the United Kingdom this is up-to 24 weeks gestation. Distinct from 'procuring a miscarriage' which is a criminal offence in England under s58 of the Offences Against the Person Act 1861
Neonaticide	The purposeful killing of a child within the first 24 hours of live-birth
Perinatal	Period surrounding birth – defined in this thesis as commencing at 23 completed weeks of gestation and ending twenty-four completed hours after live-birth
Quickening	The point at which a woman first feels the foetus move inside, typically 15-17 weeks' gestation
Stillbirth	The spontaneous expulsion of a foetus from the uterus after a specific point defined in medicine and law. In the United Kingdom this is after 24 weeks gestation

# Chapter 1 Introduction

But lest there be any misinterpretation about her behaviour, this is not, I would submit, before you a callous, hard-hearted individual who simply swept this aside and carried on as normal, because she is, after all, a grieving mother, this was her child and within two hours or so of giving birth her child had died (Defence mitigation, Hannah's case).

This statement derives from the sentencing hearing of a woman suspected of causing the death of her newborn child. Hannah's<sup>1</sup> child died from neglect. Following the death Hannah left the body in a friend's garden, and continued her normal day. Hannah's defence barrister argued that Hannah returned to her normal routine following the birth *because* she was a grieving mother, so disputing the prosecution's claim that her actions demonstrated her lack of desire to be a mother. Hannah's case is one example from the cases analysed in this thesis of the deployment of the concept of motherly behaviour in the courtroom. The concept is so employed and used to determine wrong deemed to warrant criminalisation, and culpability. This thesis is an interrogation of the gender biases that are encoded in criminal law and the responses by the criminal justice system towards women who 'fail' as 'mothers', resulting in the death of a child around the time of birth. It provides an analysis of the gendered assumptions that operate when criminalisation occurs in such cases, illustrating that the application of criminal law goes beyond the scope and limits of that intended by Parliament upon enactment. Furthermore, it identifies that the intent to criminalise women for perceived moral wrongs is both done with limited regard for the context of the cases, and targets some of the most vulnerable

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<sup>1</sup> Not her real name.

women in society. This introductory chapter provides an overview of the focus of the thesis, outlining key concepts and areas of the debate.

## Aim of the study

The aim of this study is to consider how the criminal justice system responds when it is believed that a woman has caused the death of her newborn child. In addressing this aim, I am interested in three further factors:

1. The perceived wrongs in such cases that are deemed to warrant criminalisation;
2. How complex factors, specifically relating to the concept of 'newborn', affects the application of the law;
3. How the myths of motherhood and subsequent concept of the ideal mother affects and feature within such cases.

Clarification of the phrase 'caused the death of her newborn child' is required here, as this apparently straightforward phrase, masks historic and contemporary legal controversy. I have specifically chosen to use the phrase 'newborn child' due to the nature of the analysed cases. They began as murder investigations. In England, in order to be a victim of homicide or a crime against the person, the victim must be a 'reasonable creature in *Rerum natura*' (Coke, 1681: 50-1); that is, a legal person with full protection under law is one who has been born alive and lived a separate existence. Consequently, if the Crown Prosecution Service (CPS) wish to convict a person of the homicide of a newly born child, then they must prove live-birth occurred. Herein lies one of the complex factors that impact the application of the law. If proof of live-birth is absent then a homicide conviction cannot be made, even if evidence suggests a

woman has purposefully harmed or killed the foetus/child. The second clarification lies in my decision to use the phrase 'caused the death of' rather than 'killed'. In analysed cases, as in cases in the literature on newborn child death, it is often not clear why the foetus/child died. It can also be unclear as to whether the pregnant woman intended to cause the death of the foetus/child. The aim of this study is not to assess why the seven women acted as they did. Not only would that be beyond the scope of the available data, numerous studies have previously considered the 'type' of woman who kills her newborn child and the reasons that motivated her actions (Beyer et al., 2008; Meyer and Oberman, 2001; Spinelli, 2003; Vellut et al., 2012). Thus, further research of this nature has limited merit.

Instead, this study considers how the law is applied when a wrong that is deemed to warrant criminalisation is identified by members of the criminal justice system. The function and role of criminal law has been widely debated within legal philosophy. Simester and Von Hirsch (2011) drawing upon the work of Feinberg (1987, 1988, 1989, 1990), argue that criminal offences are grounded in morally wrongful behaviour that warrants blame; something is wrong if it is something one ought not to do. However, as criminal law is a form of state coercion into the lives of citizens, it must be justified, particularly as it results in censure. The occurrence of a wrong is not sufficient to warrant criminalisation, as disapproval of behaviour can be expressed through civil law. For criminal sanctions to be justified there needs to be a form of harm or offence to others (Jones, 2017).

I complete two tasks in this thesis. Firstly, I offer a critical analysis of cases of newborn child death to examine what wrongs have been identified and how they have been used to justify criminalising the women involved. Secondly, I assess the laws that have been used to facilitate this criminalisation. Through this process I identify the gendered assumptions that continue to exist around women in their roles as mothers and, by extension, pregnant women.

## **Intention of the PhD**

My PhD studies began life as an exploration of responses to violent women. The aim was to explore how women who commit violent acts are understood and perceived in mainstream culture/society and feminist theory. Consequently, the crime of 'infanticide' was picked as a means of conducting such analysis. This form of violence was selected as a distinct and specifically female crime that requires a special response from the criminal justice system, demonstrated by the existence of the Infanticide Act 1938<sup>2</sup> (discussed in Chapter 4). Initial research revealed that maternal filicide has received significant attention from psychologists, psychiatrists, criminologists, and sociologists. 'Filicide' is the term used to describe the killing of a child of any age by their parents, including step-parents. 'Infanticide' is used within the literature to describe the killing of infants, usually aged under one year, often when perpetrated by the infant's mother. The term 'neonaticide' refers to the killing of a child within 24 hours of birth. These terms are not mutually exclusive and scholars do not use them consistently within the literature. For the purpose of this thesis, the term 'infanticide' will only be used to discuss the criminal offence of infanticide, as per

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<sup>2</sup> 1 and 2 Geo.6, c.36.

the Infanticide Acts.<sup>3</sup> Feminists have concerned themselves with the offence of infanticide and the consequences upon offenders and perceptions of women's legal culpability. The legal responses to the killing of infants by their mothers and subsequent legislation has also received considerable scholarship from historians and lawyers. As such, my research began with a review of the historic legal developments of maternal infant killing, specifically considering how and why infanticide became a criminal offence, and the social, legal, political and cultural consequences of the offence. This research highlights the legal controversies that exist within this area of offending due to the historic and contemporary difficulties of proving live-birth. As the analysis in Chapter 4 illustrates, attempts to regulate the behaviour of filicidal women has resulted in numerous changes to the law from the early seventeenth-century. However, there is little scholarship that analyses the operation and application of law relating to newborn child death in contemporary society. A significant amount of research relates to women who kill children of any age, who are known to have been born alive, and a reasonable amount of legal theory exists in relation to the born alive principle. Similarly, research exploring related offences has been conducted, such as procuring a miscarriage<sup>4</sup> and child destruction<sup>5</sup> (both offences outlined in Chapter 4). However, this existing research rarely considers how the law applies to women who actively attempt to harm their foetuses, but often considers illegal abortions provided by third parties, or third parties who attack pregnant women resulting in the death of the foetus. Therefore, a gap exists in research exploring the operation of English law in cases where newborn child death is suspected as being perpetrated by the mother but cannot be

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<sup>3</sup> 1922 (12 and 13 Geo.5, c.18); 1938 (1 and 2 Geo.6, c.36).

<sup>4</sup> Offences Against the Person Act 1861 (24 and 25 Vict. c.100), s58.

<sup>5</sup> Infant Life (Preservation) Act 1929 (19 and 20, Geo.5, c.34).

proven. While legal theory and explanations of the scope and workings of the law exist, no scholar has analysed how the law is applied in practice to this area. My research not only fills this gap, it illustrates how the practice of law and operations of the criminal justice system draw upon and reproduce gendered assumptions, impacting the most vulnerable women in our society, and so furthering their disadvantage not only within law, but also within their lives in general. Within the context of this thesis, vulnerability is defined as an aspect of a woman's life that makes her increasingly susceptible to the hardships and difficulties that can be faced in life; this includes an increased likelihood of involvement with criminal justice as both a victim and offender (Milne et al., Forthcoming). These vulnerabilities can take the form of class, poverty, race/ethnicity, and living within an abusive or controlling relationship, for example. As Fineman (2008) argues,

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 (2008: 10).

Within the context of the cases analysed in this thesis, the vulnerability of the women is directly connected with their interpretation, understanding and engagement with their pregnancies. As argued below, and outlined in the literature discussed in Chapter 3, a woman's interpretation that her pregnancy as a crisis is closely connected with her social and cultural circumstances (Oberman, 2003b; 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 in such circumstances (Ayres, 2007).

Consequently, due to this shift of focus, analysis of the criminal offence of infanticide is not as prominent in this thesis as I initially thought it would be. The infanticide offence is analysed, its use in cases in the sample is considered, and the role of the offence in criminal law and its impact upon women's agency is debated in the Conclusion. Similarly, the specific focus on feminist responses to violent women is also no longer the direct focus of the research. The thesis does consider how women in the cases studies are represented in court, with a particular focus on how they are viewed as failed mothers, but the scope of the research has prevented an analysis of feminist theories of violent women, which, as I argue elsewhere (Milne and Turton, Forthcoming) is still required.

Throughout this thesis, I consider the manifestations of law – theory and practice. I consider the different aspects of the regulation of pregnant women and mothers, and how these manifestations of law operate within legal practice and are reproduced outside the courtroom. The overarching themes that run through these manifestations of law are the failure of women to conform to the ideals of motherhood, and the use of criminal law to criminalise women for the perceived wrong of failure to protect the foetus/child.

For ease of reading the text I have listed legal citations in footnotes, rather than in-text citations. To facilitate a coherent narrative, the thesis employs British



English, including in quotes, some of which have been adapted from American to British English.

## Key areas of debate and concepts

Within my thesis I draw upon a number of key ideas and concepts. It is important that the reader understand specifically to what these refer and why I use particular terminology. As will become clear, language within this area of study has specific meanings and implications, both in terms of what it refers to, and due to legal ramifications. The terms I will define here are 'crisis pregnancy' and 'neonaticide' in contrast to the terms 'infanticide' and 'suspicious perinatal death'. Finally, I will present key feminist theories that underpin the concepts of the myths of motherhood and the perception of the ideal mother.

First, I wish to make a point about language and my use of the phrase 'woman'. The debate about what constitutes a 'woman' is important and should not be ignored, specifically in relation to conceptualisation of gender and human reproduction (Annandale and Clark, 1996). With full awareness that gender is performative (Butler, 2010), and that people who identify as male or do not prescribe to the gender binary can and do become pregnant (Halberstam, 2010), it is important to consider the gendered aspect of this debate. Discourse relating to pregnancy and motherhood, outlined in Chapter 3, will affect not just people who are born female and identify as a woman, but also any person with female reproductive organs, due to their physical ability to menstruate and potential to become pregnant. But the discourse will also affect individuals who identify as a woman, but may not have female reproductive organs, as the debate relating to

risk and pregnancy is applied to women not on the *knowledge* that they can become pregnant, but on the *assumption* they can. This assumption is likely to be extended to a transgender woman. As I have not personally met the individuals whose cases are examined in this thesis, I am not able to comment upon their gender identification. However, all seven were born with female reproductive organs and had (have) the ability to become pregnant. Throughout this thesis I refer to these seven individuals as 'women'. I also refer to 'women' in general. My decision to use this terminology is not to negate the gender debate, but rather for ease of communicating ideas.

## **Crisis pregnancy**

Crisis pregnancy is a term I employ to describe an experience of pregnancy whereby the existence of the pregnancy creates a crisis for a woman, and so it is perceived as such. Crisis pregnancy, as defined here, is not to be confused with an unwanted pregnancy. While a crisis pregnancy is likely to be an unwanted pregnancy, although some commentators have argued against this assumption (Vellut et al., 2012), an unwanted pregnancy is not necessarily cause for crisis if adequate and safe means to end the pregnancy are available and easily accessible. If those services cannot be accessed then an unwanted pregnancy would constitute a crisis pregnancy. For example, Mahon et al. (1998) use the phrase 'crisis pregnancy' when referring to Irish women residing in the Republic of Ireland who are forced to travel abroad to seek abortion services because they are not available in their own country. More specifically, crisis refers to an instance where a woman feels unable to resolve the pregnancy for some reason, for example: she may be terrified of her parents finding out she is pregnant,

particularly if she is very young; she may be in an abusive relationship and therefore not be able to seek medical assistance to end the pregnancy; or the knowledge of the pregnancy may panic her to such an extent that she feels unable to respond to the pregnancy. Use of the phrase 'crisis pregnancy' in my PhD should not be confused with 'Crisis Pregnancy Centers' in the United States of America (US), which market themselves as spaces for women to seek assistance with unwanted pregnancy, with an aim to dissuade women from accessing an abortion or contraception (Winter, 2015).

Crisis pregnancies may result in a woman concealing or denying that pregnancy. It is upon this form of crisis pregnancy my research focuses. All the women in the cases analysed experienced their pregnancy as a crisis, concealing and/or denying their pregnancies, all resulting in them giving birth alone. From analysis of the literature on neonaticide, the majority, if not all women, who are suspected of neonaticide have experienced a crisis pregnancy; this literature is explored in Chapter 3. My research considers neither the reason why individuals experienced pregnancy as a crisis, nor attempts to evaluate the validity of this perception of crisis, instead it explores the responses of the criminal justice system in such situations whereby the foetus/child dies following that crisis pregnancy.

## **Neonaticide**

Women commit relatively little homicide. In England and Wales, between 2005/06 and 2015/16, women made up 9% of all homicide convictions and 14% of all murder convictions (Office for National Statistics, 2017). However, if we

only consider data relating to the killing of children aged under one year (hereafter 'infants') then the rate of female suspected offending increases to 26% (53% male suspects, 21% of suspects sex not recorded).<sup>6</sup> Other studies have found the rates of female perpetrators to be even higher. A Home Office report into homicide concluded that a female suspect was responsible for the killing in 47% of infant homicides (Brookman and Maguire, 2003: 16-18; see also Wilczynski, 1995). The high rate of female criminality in cases of infant killing, in comparison to other forms of homicide, has resulted in considerable academic scholarship (for example Alder and Baker, 1997; Barlow and Clayton, 1999; Brookman and Nolan, 2006; Dean, 2004; Scott, 1973; Wilczynski, 1997a). The killing of newborn children has received specific focus, as the overwhelming majority of perpetrators are mothers following a concealed/denied pregnancy and a solo birth, and the motivation for the killing is deemed to be very different from other homicides. To distinguish this form of infant homicide, Resnick (1969) defined the term 'neonaticide' – the killing of a child within 24 hours of its birth. Resnick noted that neonaticide was a distinct form of child homicide, most often committed by the mother following an unwanted pregnancy. Numerous other scholars have also noted the distinct nature of neonaticide (Bourget et al., 2007; d'Orbán, 1979; Friedman and Friedman, 2010; Meyer and Oberman, 2001; Pitt and Bale, 1995; Porter and Gavin, 2010).

My research brings the term 'neonaticide' into question due to the difficulty presented by evidence of live-birth. While much of the literature on the

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<sup>6</sup> Data as of 14 November 2016; figures are subject to revision as cases are dealt with by the police and the courts, or as further information becomes available. Offences currently recorded as homicide where victims are under the age of one years old by the sex of the principal suspect, 2002/03 to 2015/16. Data obtained from Homicide Index, Home Office. The term 'sex', as opposed to 'gender' is provided by the Home Office.

occurrence and nature of neonaticide does not consider the importance of the born alive rule, I have argued elsewhere that the significance of live-birth must be considered by scholars when investigating this form of killing, particularly if considering legal culpability and the role of the criminal justice system (Milne and Brennan, Forthcoming). The term 'neonaticide' comes from the Latin *neos* meaning new, and *caedere* meaning to kill. To be a victim of homicide in England, and many other jurisdictions, it is necessary to be a legal person. Consequently, I argue the term 'neonaticide' can only cover the killing of a child born alive, living a separate existence prior to being killed. Consequently, a foetus that dies *in utero* or in the course of labour cannot be considered a victim of neonaticide. Thus, when considering the death of a foetus/child around the time of labour – before, during, after – 'neonaticide' as a technical descriptor of a type of killing is not sufficient.

Consequently, I have developed two potential new phrases to cover killings or suspicious deaths in this period – either 'suspicious perinatal death', or 'suspected perinatal killing'. Perinatal refers to the period immediately surrounding birth. Different timescales are used for this period, the World Health Organisation defines the perinatal period as commencing at 22 completed weeks of gestation and ending seven completed days after birth (World Health Organisation, 2016). For the definition used in this thesis, the perinatal period commences at 23 completed weeks of gestation and ends 24 completed hours after live-birth. I have specifically chosen the parameters of this period to reflect key aspects of English law. A woman can legally request an abortion from a registered medical practitioner if 'the continuance of the pregnancy would involve

risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family' under the Abortion Act 1967<sup>7</sup> up to the 24<sup>th</sup> week of pregnancy. Following this gestational age, an abortion can only be obtained if to prevent grave permanent injury or death of the pregnant woman, or due to foetal abnormality.<sup>8</sup> Obtaining an abortion under any other circumstances is a criminal offence; the law surrounding abortion is explored in Chapter 4. At the other end of the time-period, the first 24-hours post-birth marks a critical period in the life of an unwanted child; it is the time during which the child is most likely to be killed (Bortoli et al., 2013; Porter and Gavin, 2010). Consequently, the period between the twenty-fourth week of pregnancy and the first day of life captures the time when a foetus/child may be at risk of being purposefully killed. However, if live-birth does not occur, or cannot be proven, then this act of killing will not fall within the definition of neonaticide or homicide. I prefer the phrase 'suspicious perinatal death' over 'suspected perinatal killing', as not all cases I investigate involve a specific act of killing and in a number, the specific intent to kill the foetus/child appears to be lacking.

It is difficult to know how many cases of suspicious perinatal death occur each year. Numerous scholars researching neonaticide have commented on the inaccuracy of official statistics; Wilczynski (1997a) argues there is a large 'dark figure' of child killing (victim aged under 16 years, no discussion of live-birth), estimating that true incidents of child homicide are 3 to 7 times higher than official statistics report. In England, no official record is kept for how many

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<sup>7</sup> c.87, s1(1)(a).

<sup>8</sup> *Ibid*, s1(1)(b-d).

children are killed within the first day of life, and there are no records that I have found reflecting suspicious deaths that occurred prior to live-birth. Therefore, to attempt to calculate how many examples of suspicious perinatal death occur every year, it is necessary to piece together information from whatever data is collected and reported. The Homicide Index, collated and reported by the Home Office, provides some insight into the occurrence of suspected homicide where the victim is aged one day or less; frequency of such cases can be seen in Table 1.

<b>Year</b>	<b>Number<sup>9</sup></b>
2002/03	3
2003/04	2
2004/05	0
2005/06	0
2006/07	3
2007/08	1
2008/09	5
2009/10	0
2010/11	1
2011/12	1
2012/13	1
2013/14	2
2014/15	1
2015/16	2

*Table 1 Offences currently recorded as homicide, victims one day old or less 2002/03 to 2015/16.*

As these statistics refer to cases considered to be homicides, we can assume that there is evidence of live-birth in each case. To partially capture cases of suspicious perinatal death that lack evidence of live-birth, the police recorded figures for concealment of birth can be used, as this offence does not require evidence of live-birth, see Table 2. Concealment of birth (hereafter 'concealment') is a criminal offence involving the concealment of the dead body

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<sup>9</sup> Data as at 14 November 2016; figures are subject to revision as cases are dealt with by the police and the courts, or as further information becomes available. Data obtained from Homicide Index, Home Office.

of an infant to conceal the fact the infant was ever born;<sup>10</sup> the scope and parameters of the offence are outlined in Chapter 4.

Year	Concealing an infant death close to birth <sup>11</sup>
2002/03	7
2003/04	6
2004/05	6
2005/06	8
2006/07	4
2007/08	8
2008/09	8
2009/10	6
2010/11	9
2011/12	5
2012/13	2
2013/14	2
2014/15	5
2015/16	5

*Table 2 Police recorded data of the offence concealing an infant death close to birth.*

Due to the close connection of concealment with newborn homicide, it is possible that some instances of suspicious perinatal death will be recorded in both the Homicide Index and the police recorded statistics for concealment. Nevertheless, these are the best numbers we have. It is not possible to draw on police recorded statistics from the offences of procuring a miscarriage or child destruction, as both offences can be committed by third parties who attack pregnant women, causing the foetus to die (and most convictions follow such circumstances). Therefore, the data sets presented here offer the most comprehensive picture of suspicious perinatal deaths that are known to the authorities. Taken together, the average is 7 deaths per year, as demonstrated in Table 3.

<sup>10</sup> Offences Against the Person Act 1861 (24 and 25 Vict. c.100), s60.

<sup>11</sup> Data obtained from Office for National Statistics (2016b).



Year	Offences currently recorded as homicide, victims one day old or less	Police recorded crime: Concealing an infant death close to birth	Total
2002/03	3	7	10
2003/04	2	6	8
2004/05	0	6	6
2005/06	0	8	8
2006/07	3	4	7
2007/08	1	8	9
2008/09	5	8	13
2009/10	0	6	6
2010/11	1	9	10
2011/12	1	5	6
2012/13	1	2	3
2013/14	2	2	4
2014/15	1	5	5
2015/16	2	5	5
Annual mean	2	6	7

*Table 3 Rates of suspicious perinatal deaths known to the authorities.*

However, we need to consider that the actual occurrence of suspicious perinatal deaths is likely to be underestimated, due to the ability to hide or dispose of the body of a foetus/child. As most of these cases occur following a concealed/denied pregnancy, the authorities are likely to not look for the body. If we use Wilczynski's (1997a) estimate of actual numbers being three times higher than official statistics, then the possible number of suspicious perinatal deaths to occur each year is 21.

## Further terminology distinctions

The use of the word 'child' will only refer to a member of the human species who has a separate existence from its mother. I may at times refer to 'unborn-child', when doing so I refer to a foetus, rather than a child with a separate existence.

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Foetus refers to a member of the human species developing in the womb.

Foetus is not the technically correct term for all periods of gestational development, different terms are associated with different periods of development: zygote (at fertilization), blastocyst (at implantation, 6-10 days after ovulation), embryo (at about 2 weeks), and foetus (from 8 weeks until birth). I will use the term 'foetus' for ease, and, unless specifically stated otherwise, I am referring to a human developing in the womb from the point of conception until a separate existence has occurred.

I am purposefully referring to 'separate existence' when defining a foetus and a child, as it feels erroneous to refer to a member of the human species that has a separate existence as a 'foetus', even if it was stillborn. Once a human has been born it is generally considered a 'child', even if it died as a foetus. Thus, my use of the words foetus and child does not specifically reflect legal terminology. So, for example, if a woman's foetus died in the womb I would refer to it as the death of a foetus, not a child. However, once that foetus has been delivered, I would then refer to it as a child, possibly also stating it is a dead child. At other times, I use the phrase 'foetus/child'. In using this term, I refer to situation where it is unknown if live-birth has occurred. I often use this phrase when referring to perinatal deaths in general, rather than specific cases, or in reference to a number of cases whereby the timing of the death of the foetus/child is unknown, or they occurred at different times in the perinatal period.

## Myths of motherhood

Feminist writings on motherhood and mothering are extensive. The literature reviewed here focuses on the feminist critique of the 'myths of motherhood'. The myths of motherhood maintain that to be a woman is to be a mother; motherhood and mothering is natural, universal and unchanging for all women. The myths draw on the perception that women are inherently caring, nurturing, and self-sacrificing, and such behaviours originate from biology and a women's ability to birth children. The consideration here does not lie in and of the fact that women, as females, have the capacity to conceive a child, gestate, give birth and lactate, but that some women choose to partake in the nurturing and raising of children. As Arendell (2000: 1193) argues, the issue for consideration is 'How these biological activities are culturally organised and given meaning'.

Oakley (1974: 186) argues the myths are based on three beliefs, 'all women need to be mothers, that all mothers need their children, and that all children need their mothers'. The myths insist that 'no woman is truly complete or fulfilled unless she has kids, that women remain the best primary caretakers of children, and that to be a remotely decent mother, a woman has to devote her entire physical, psychological, emotional, and intellectual being, 24/7, to her children' (Douglas and Michaels, 2005: 3-4). Consequently, the myths set unachievable standards of perfection for women who are mothers, while also constructing and maintaining a popular belief that all women should want to be mothers and motherhood is the true destiny for women to fulfil. The myths saturate society and social and cultural interaction (Johnston and Swanson, 2003; Dally, 1982; Kaplan, 1992; Gillis, 1997).

Barthes (1973) defines a myth as an uncontested and unconscious assumption that is so widely accepted that the cultural and historical origins are no longer remembered. Thus, mothering is presented as 'natural' and 'instinctive', rather than cultural, political, economic and historical (Hrady, 2000). The myths have credit and merit due to the ideologies that shape popular thoughts and beliefs of mothering. The dominant ideology represents the views of the dominant group. In patriarchal society the myths of natural motherhood facilitate locking women into biological reproduction, denying them identities and selfhood outside of mothering (Glenn, 1994). Thus many feminists have identified the perpetuation of patriarchy as the underlying causes of the myths (Chodorow, 1978; Hays, 1996; Rich, 1986; Ruddick, 1989; Maushart, 1999; McMahon, 1995; Thurer, 1994; Trebilcot, 1984). Oakley (1974) argues that the myths are made plausible due to social and cultural conditions that impel women to become mothers. These conditions are reinforced by 'science'. One example Oakley notes is psychoanalytical theory from the 1920s and 1930s that argued 'normal' women desire a child and that those who reject motherhood are rejecting femininity. Her review of the evidence demonstrates that results of these beliefs have been that, to appear normal, women who might otherwise not have had children do so, and women who would have been happier sharing childcare responsibilities make mothering an all-absorbing job.

Medical discourses and governance of the body has reinforced the myths of motherhood, acting as a regime of power, knowledge and veridiction. Foucault's (1980) work on power/knowledge and the birth of the clinic has been central to

theoretical developments in the sociology of health and tandem literature. Here, Foucault argues that medical knowledge (like other regimes of knowledge) is a form of power and coercion. Whilst there is some relevance to this thesis – via its identification of the way in which medical theories relating to pregnancy are utilised by and encoded into law – the focus of research is directed more towards procedural legislative and criminal justice practices. Nevertheless, through the lens of feminist critiques of the gendered assumptions embedded in legal and judicial forms of knowledge and practice, I appreciate the connections of these broader debates, although they do not constitute a central theme of my analysis. Instead the research draws upon a number of feminist conceptual approaches, namely the critique of the myths of motherhood.

The myths construct the notion of the ‘good’ mother, someone who conforms to the myths, compared to the ‘bad’ mother. Today the ‘good’ mother is the intensive mother, defined by Hays (1996) as ‘child-centred, expert-guided, emotionally absorbing, labour-intensive, and financially expensive’ (1996: 8). In contrast, the ‘bad’ mother is identifiable by her deviant care-giving practices and failure to conform to the ideal. The line between ‘good’ and ‘bad’ mothering is not fixed, or stable, rather it is blurred and it shifts (Smart, 1996; Thurer, 1993). The ideal ‘good’ mother is based upon the white, middle-class, married, heterosexual woman who has the exclusive responsibility for mothering her biological children, focused solely on their care and wellbeing (Glenn, 1994; Sanger, 1992). Thus, the myths are not only gendered, but also rooted in class and race, consequently, so is the construction of the ‘bad’ mother. The further away a woman’s identity sits from this ideal and the less privilege she has, the

harder it is for her to adhere to the myths (Geronimus, 2003). An example of the discriminatory nature of the myths is presented by Solinger (1994) in her historic review of the responses to illegitimacy in the US – white single mothers were considered ‘trouble’ but ‘redeemable’, whereas black single mothers were labelled ‘deviant’ by the dominant culture. The construction of the good/bad binary has led scholars to theorise a particular form of gender oppression referred to as mother-blame (Caplan and Hall-McCorquodale, 1985; Jackson and Mannix, 2004; Garey and Arendell, 2001; Caplan, 1998). Children with problems, or children as problems, are often linked to the social situations of their mothers (poor, unmarried, divorced, and unemployed) rather than to the social and economic forces that affect their lives (Arendell, 2000; Garey, 1999; Smith, 1988). Similarly, the feelings of unhappiness or dissatisfaction women may feel as mothers are attributed to the failings of the individual mother, rather than the system; a good mother is a happy mother (Johnston and Swanson, 2003; Taylor, 1996).

One of the main thrusts of feminist critique has been to challenge the notion that motherhood is natural and originates from women’s biology. Nancy Chodorow (1978, 1989) offered one of the earliest critiques, using psychoanalytical object relations theory to argue that female behaviour of caring and mothering is learnt, transmitted from mother to daughter through the experience of being mothered. Alternative analysis is offered by Ruddick (1989) who argues that maternal practice of caring for children is a requirement that is imposed on any person who conducts the work. Mother work is not based on instinct, but on a decision to recognise and respond to the vulnerabilities of a child and to nurture its

intellectual and emotional growth. The work of Chodorow and Ruddick has been highly criticised for being universal in nature and relying upon a narrow experience of mothering that is both racial and class-biased. In their attempt to construct universal theories they accept the dominant ideal of what it means to be a mother – white, middle-class, living in the west (Glenn, 1994).

Nevertheless, the principle that mothering is natural to women is contradicted by clear evidence that not all women mother, and the nurture and care of children is not inevitably exclusively completed by women (Forcey, 1994; Rothman, 1994; Schantz, 1994).

Other challenges to the ideology of the ‘naturalness’ or inherent nature of mothering has focused on the historical and social contexts in which ideologies of motherhood exist. Smart (1996: 48), for example, argues that motherhood is a ‘highly contrived and historically specific condition’, with the ideal image being drawn from ‘a class-specific, historically located ideal of what a mother should be’ (1996: 45). Although this ideal was not accepted unquestioningly by all women, Smart argues that alternative ways of mothering are difficult to maintain when they oppose the dominant ideal, particularly when perceived to lack legitimacy. Furthermore, the actions that demonstrate a good mother change over time, for example, leaving a baby to cry, or self-soothe, has historically been considered the response of a ‘good’ mother who does not spoil their child. Current advice advocates that leaving an infant to cry can be harmful to a child. Smart argues that ‘there is nothing natural in these manifestations of supposedly instinctual behaviour’ (1996: 47; see also Bassin et al., 1994; Glenn et al., 1994; Risman, 1998; Badinter, 1981; Hays, 1996; Johnsen, 1987). Emphasis on the

historic, social, cultural, and political influences that have helped to construct the image of the ideal mother challenges the principles of naturalness and instinctiveness of mothering and motherhood. If women's actions towards their biological children were instinctual, as the myths of motherhood imply, then expectations of maternal behaviour would not have developed and changed over time.

A further critique feminists have levelled at the myths of motherhood is of the universalism that dominant discourses promote. As already stated, the myths are based on the idealised image of white, middle-class, heterosexual, western women. However, critique provided by second-wave feminists has also used such women as the basis for their critique of the myths; which is problematic. Patricia Hugh Collins (1994, 2000) argues that much feminist theorising about motherhood has projected white middle-class women's concerns as universal to all women. For women of colour the subjective experience of motherhood is inextricably linked to sociocultural concerns of the racial ethnic community. She argues motherhood needs to be recontextualised to locate racial ethnic women's experiences of mothering, so allowing the impact of race and class on motherhood to stand out. Such analysis allows for further demonstration of the fallibility of the myths of motherhood, as alternative ways of raising, caring and nurturing children can and do exist, disputing that mothering practices, such as intensive mothering, are natural or inherent to all women. For example, mothering practices in African-American communities from the time of slavery, continuing to modern day in some communities, have been characterised by



shared mothering, in contrast to the individualised model the myths promote (White, 1999; Stack and Burton, 1993).

Similar critiques have been levied in relation to the geographic focus of research and its implications for understandings of motherhood and the family outside the West. As Ambert (1994) argues, 'The western emphasis on mothering and intensive emotional bonding between parents and children results in western biases in constructs which affect research paradigms' (1994: 529). Studies, such as Scheper-Hughes (1992) anthropological study into mothers in shanty towns in Brazil have demonstrated that motherhood and mothering is not a universal experience. Her ethnographic work demonstrates the impact of culture on the experience of mothering, including maternal attachment, again, emphasising the cultural, societal and historic construction of mothering practice and behaviour. The western focus of research and understanding of the family and maternal behaviour has had an effect on the lives of those mothering outside the west. The cultural domination of western ideas has influenced law and policy, for example in Botswana, child support laws are based on the idealised European family, with the privilege given to biological paternity. Such perceptions of motherhood fail to take account of the local culture. Law implemented with intent to support children of unmarried women actually work against their social wellbeing as the structure of kin groups differs from the European model (Garey and Townsend, 1996). Such research further critiques the myths of motherhood, demonstrating the cultural differences that lie in the experiences of raising children.

The impacts of the myths of motherhood are far reaching for women who are mothers, as they influence their behaviour and decisions. However, they also impact women who are not mothers, women who mother children who are not biological offspring, and people who are not women who care for children.

Glenn et al. (1994) argues the impact of the myths is to conflate woman with mother, making women appear as if they are undifferentiated and unchanging, as opposed to men who appear with historic specificity in a variety of roles and contexts. As such, the myths conflate actors and activities, recognising only women, or birth-mothers, as nurturers and caregivers. Consequently, people who are not birth-mothers are excused from the responsibilities of raising children; recognition is denied to those who provide nurturance and care but are not birth-mothers; and nurturance and care are assumed to only flow in one direction. Furthermore, Glenn argues that the myths conflate mothers and children, assuming they are one entity with one set of needs, denying personhood and agency to both, and failing to acknowledge that mothers' and children's interests may conflict. Lack of recognition of distinct subjects with different needs is also significant in relation to the interaction between the pregnant woman and the foetus, explored in Chapter 3. The 'good' mother and pregnant woman is assumed to not conflict with her child/foetus (Roth, 2000). The impact of these confluences, described by Glenn, hinders women from achieving beyond of the role of mother, and places pressure on those women who are not mothers to take up the role. However, it also impedes all individuals who parent outside the 'norms' constructed by the myths of motherhood, such as people of colour (Roberts, 1995; Dill, 1988), LGBTQ people (Hequembourg and Farrell, 1999; Pollack, 1990), individuals who do not identify with the gender-

binary, single parents (Dowd, 1997), young parents (Phoenix, 1991), poor parents (Fineman, 1995), adoptive parents (Letherby, 1994), disabled parents (Frederick, 2015), and numerous others; the list is extensive as a significant majority of people cannot live up to the myths. However, the consequence of failure, while felt by most women, notably with feelings of guilt and inadequacy (see Sutherland, 2010), is experienced most keenly by the most vulnerable. It is poorer women, single women, young women and women of colour who are policed most aggressively and who face greater sanctions for their appearance of failure when compared to the myths (Smart, 1996). As will become clear in the data analysis, Chapters 5, 6 and 7, the policing of vulnerable women is a key feature in cases of suspicious perinatal deaths.

The aim of feminist critiques of the myths of motherhood is to make apparent the structural oppression that exists within the dominant ideology of mothering. It is not aiming to be deterministic, nor does it suggest that all women experience motherhood in the same way, even if the myths are consistent (Johnston and Swanson, 2006). Feminists have been keen to stress the distinction, first outlined by Rich (1986), between motherhood as a relationship between a woman and her children, and the institution of motherhood, noting that the relationship can and does bring many women satisfaction and joy. By identifying and critiquing the myths of motherhood feminists are highlighting the impact it has on how women experience mothering, and how society responds and acts towards mothers and all women. Their aim is to demonstrate that the myths perpetuate inequalities and hardships for women. However, it is important to not see 'women' as a homogenous group, but to consider the vulnerabilities and

struggles individuals and cultural groups experience due to their intersecting identities (Crenshaw, 1991).

# Chapter 2 Methodology

This chapter outlines the methodological approach of the study – the research strategy, approaches to data collection, analysis, and ethical considerations. I discuss the difficulties faced in identifying and accessing cases, provide a justification for the selection of cases, and outline the limitations of this study.

In this research, I draw on two distinct sources of data. The primary source is court transcripts from criminal cases in England. A separate investigation in the US was conducted drawing on Federal and state case law. The study of US cases was conducted to provide an alternative perspective on the nature of criminal law relating to suspicious perinatal deaths. As foetal protection laws are in operation in most states in the US, the legal and political developments in that country reveal key themes that relate the protection of fetuses and impact on women's rights. No comparison between cases or jurisdiction was conducted. As such, both sets of data were analysed and reported separately – analysis of court transcripts and findings from the English cases is presented in Chapters 5 and 6, analysis of US case law is presented in Chapter 7.

## Selection of method

To address the research aims, I chose to conduct a qualitative study. As the aim of the research was to understand how the criminal justice system responds when a woman is suspected of causing the death of her child/foetus in the perinatal period, inductive research was the most effective approach (Bryman, 2012; Ormston et al., 2013). From initial literature reviews of cases of

neonaticide and the history of the law in this area, it was clear that there was a lack of clarity of knowledge of legal practice. As noted in the Introduction, this area of law and the workings of criminal justice in such cases in contemporary England has been little explored by scholars. I wanted to understand what was happening within this area of law, and why it was happening. Using qualitative methodology was essential to view and interpret the underlying assumptions and perceptions that exist within the cases; facilitating a construction of theory from the themes and ideas that emerged from the data. Through this approach, I accessed deeper meanings from analysis of the cases. A further reason for using qualitative methods, rather than quantitative, was in recognition of gendered assumptions that exist within day-to-day life that are often constructed as gender-neutral (Harding, 1991; Hartsock, 1990). As the aim of the research was to identify and analyse these gendered assumptions, I deemed it appropriate to utilise qualitative methods. This decision was taken with recognition of the difficulties of research raised by feminist scholars (Bloom, 1998; Kelly et al., 1994; Maynard, 1994; Stanko, 1994; Stanley and Wise, 1990).

Following a decision to utilise a qualitative approach, I determined my source of data. In line with feminist principles of research (Oakley, 1981), one of the more effective ways to understand women's experiences is to interview women who have lived such an experience. As such, interviewing women who had been convicted of an offence relating to suspicious perinatal death would have been a good primary source of data here. However, there were significant practical and ethical implications of recruiting such women to the study; namely that I would have needed to approach women who had finished serving their sentences; I

deemed this to be inappropriate. Furthermore, while hearing women's narratives of their lives in relation to their crisis pregnancy and the subsequent death of the foetus/child would have been an invaluable source of data for understanding such cases, it is unlikely this data would have fully addressed the research aims. The aim of the research is to understand how the criminal justice system responds to women and how the law is applied. Interviewing women who had been convicted may have provided insight into why the cases proceeded as they did, including why guilty pleas were entered. However, individual perspectives on lived-experience could not access the broader processes and deeper meanings encoded in the legal process, which is the focus of this study. Considering the practical and ethical concerns of such data collection, it was decided this was not a viable option.

Interviewing professionals who have worked on such cases was another option. I attempted to approach both the Crown Prosecution Service (CPS) and police forces which had investigated cases, but all refused to participate in the research. I considered approaching solicitors and barristers who had represented convicted women, but decided against this option as it seemed unlikely that they would have been willing to talk about specific cases due to legal professional privilege. Therefore, all conversation would likely have been hypothetical, having limited value in terms of the data obtained. I came to a similar conclusion regarding approaching judges. As such, interviews with individuals involved in cases of suspicious perinatal death were ruled out as a source of data.

Consequently, I determined that using texts and documents would be the most appropriate data source to address the research aims. Such documentation is created to administer the application of law and other professional practice relating to suspected deaths, providing insight into the workings of the law. As they have not been manufactured for research, the data are less burdened by the reactive effect, which can limit the viability of other sources of data (Bryman, 2012). Handling such documents is no different from any other data in social research, and equivalent rigour must be employed when analysing the source (Scott, 1990). These documents are texts with distinctive purposes in mind, they do not simply reflect reality (Atkinson and Coffey, 2011). As such, the documents need to be contextualised within the context of their function and purpose for and means of their creation (Prior, 2008).

Several sources of documentation relating to cases of suspicious perinatal death exist and could have been drawn upon. The main source used was court transcripts from criminal hearings. This source was identified as useful to achieve the research aims due to the richness of the data provided during criminal hearings, and the practicalities of access. Court hearings are recorded and transcripts can be requested (unless the case is closed to the public). To obtain access to a transcript one seeks permission from a judge in writing (Ministry of Justice, 2015: 4). If permission is granted, then the transcription company which owns the transcript will provide a copy at a cost. If a trial occurs then the entire proceedings will be recorded, including the sentencing hearing (if a guilty verdict is obtained). All cases used in the sample resulted in conviction following a guilty plea, hence I only focus on sentencing the hearing. Within the



sentencing hearing the prosecution must outline why the conviction has been sought; this includes the facts of the case, arguments supporting conviction for the offence, and support for the recommended punishment. The defence present mitigating factors and may aim to rebut the arguments of the prosecution. Finally, the judge is required to provide justification of the sentence given. The nature of the sentencing hearing in these cases is that it provided a re-telling of the events that surrounded the death of the foetus/child.

Consequently, this source of data provides detailed accounts of the legal interpretation of the actions of the defendant. As such, this source provides insight into the broader processes and deeper meanings encoded within the legal process; therefore, directly addressing the research aims. Such accounts are told for the process of the law, rather than in relation to the collection of research data. Therefore, they provide insight into justification of the application of law and inform the key research aims, attending to the broader contexts in which the applications of law take place. They present a narrative that is woven by each player within the courtroom (prosecutor, defence and judge) to justify their legal decisions. This provides insight into both the operation of the law, but also the underlying judgements of individual behaviour that drives application of the law. As the purpose of the research was to understand the criminal wrongs identified in cases and how gendered assumptions of the myths of motherhood affected the cases, court transcripts are ideal in providing a detailed insight into these underlying aspects of the law and its application.

Further documentation exists relating to court hearings, specifically the case file. This file holds documents, relating to the case, which were used during the

hearing, including witness testimony, the indictment sheet, court-ordered psychiatric reports, pre-sentencing reports and reports produced by community supervisors. The court keeps this file for seven years following the conviction. I was allowed access to one court file. This access was granted when a court clerk queried if I wanted permission to access the transcript or the file and I responded I would like to access both. The file had to be read in the court with a clerk present. The clerk seemed to be rather unsettled by my having access to the file, attempting to dissuade me from looking at certain documents, telling me that they would not be relevant; in fact they were very relevant. Eventually the clerk ended my access to the file 50 minutes early. After this experience, and due to the cost of traveling to individual courts and the wealth of information available in the transcripts, I decided that it was unnecessary to access any further court files for the research as the details about each case provided in the court transcript was sufficient to address the research aims. The context of the cases provided by the court files will be useful for postdoctoral work, noted in Chapter 8 – conclusion.

A further source of data available relating to suspicious perinatal deaths is the Homicide Index. Upon discovery of a suspected homicide, police forces complete a *Homicide Return* form for the Home Office. The form must be submitted within one month following a suspected homicide and requires details of the victim and suspected killer, the relationship between the offender and victim, information about the nature of the suspected homicide, circumstances surrounding the death, and legal outcome of the case. This information is collated and presented in statistical form in the Homicide Index. Academic

researchers can be permitted access to record level data from the Homicide Index, providing anonymised information. I only discovered that it was possible to access cases from the Homicide Index after I had secured access to transcripts, and initial analysis had been completed. While access to data from the Homicide Index would be of great interest to this study and would have provided a clearer picture of the number of cases of suspected perinatal death, it is unlikely that it would have assisted with the research aims of understanding how and why women in such cases are criminalised, as the data would be largely quantitative and would provide little contextual information. For this reason, I did not seek access to this source.

The Ministry of Justice holds data on cases that have been tried. I made enquiries about accessing qualitative data from the Ministry of Justice and was provided with information as to how to request access to data collections and research. The Ministry of Justice were not forthcoming about the data they hold, and I assessed that the time to request access may not have justified the outcome. As such, this source of data was deemed unnecessary, specifically considering the data available in the court transcripts.

One final source of data that I have drawn upon are Serious Case Reviews (SCR). When a child dies, the Local Safeguarding Children Board (LSCB) is required to complete a SCR if:

- (a) abuse or neglect of a child is known or suspected; and
- (b) either—
  - (i) the child has died; or

(ii) the child has been seriously harmed and there is cause for concern as to the way in which the authority, their Board partners or other relevant persons have worked together to safeguard the child.<sup>1</sup>

The aim of an SCR is to evaluate individual and agency practice to identify any improvements which may be required in professional practices to better safeguard children; it is not the intention of SCRs to investigate how a child dies or who is responsible for their death (HM Government, 2013).<sup>2</sup> SCRs are completed with the engagement of all professionals who interacted with the child and those who took care of the child. The reports are required to provide a critique of professional conduct of those responsible for safeguarding children. As such, they *should* provide a detailed account of instances of fatal child abuse. However, the quality of the report varies between LSCB, additionally the nature of the amount of detail that LSCB were required to published changed over the research period (HM Government, 2006, 2010, 2013).

Initially I had hoped to use the SCRs as the main source of data. However, it became clear that these reports would not provide sufficient information about the cases as they provide limited information about the application of law. Furthermore, in several cases of suspicious perinatal death an SCR does not appear to have been conducted, possibly as the LSCB decided that as no professional responsible for child protection knew of the existence of the pregnancy, few professional lessons could be obtained from the cases. As such, such SCRs as I used merely provided background information.

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<sup>1</sup> The Local Safeguarding Children Boards Regulations SI 2006 No. 90, regulation 5(2).

<sup>2</sup> National safeguarding children guidelines were republished in April 2015. This occurred after the completion of the data collection process and so these guidelines have not been consulted.

## Data accessed

In this section, I describe how I identified cases for inclusion in my research and what data I accessed for each case. Decisions as to which cases to access developed in line with the progression of initial research and the focus of the analysis upon the application of law in cases of suspicious perinatal death.

Initially data was sought relating to deaths of infants up to the age of one year where the perpetrator was the mother. Following the decision to only consider neonaticides, cases involving the death of a child within 24 hours of a live-birth were sought. Evolution in the focus of the research project, to consider application of the law in relation to women who suffer crisis pregnancies and suspicious perinatal deaths, resulted in cases that fall outside of homicide convictions also being included in the sample. As will become clear following this discussion of the methodology and in the analysis chapters, this project reflects a mosaic or patchwork of information about cases of suspicious perinatal deaths. The difficulty knowing about such cases and then accessing related data, reduces our ability to understand the nature of suspicious perinatal deaths. However, I am confident that my sample provides a sufficiently comprehensive picture of the application of criminal law in this area of offending, for reasons outlined below.

I identified cases in three ways – through SCRs, internet searches, and news reports. As the project began as an investigation into maternal filicide of infants, I began collecting data using SCR reports. To establish how many cases of maternal filicide had occurred, I sourced and processed as many SCRs as

possible relating to the death of a child under the age of one year (hereafter ‘infant’), between 2001-2014 (year of data collection). I sent Freedom of Information (FOI)<sup>3</sup> requests to LSCBs in England and Wales to access SCRs relating to infants and completed from 2002-date. I reviewed all SCRs on LSCB websites and the NSPCC national case review repository (2017) for published SCRs. Table 4 shows the SCRs obtained.

	<b>Executive Summary</b>	<b>Overview Report</b>	<b>Executive Summary and Overview Report</b>	<b>Total</b>
<b>FOI request</b>	105	15	1	120
<b>LSCB websites</b>	95	26	4	145
<b>NSPCC</b>	25	2	19	42
<b>Total</b>	225	43	24	307

*Table 4 SCRs obtained in data collection*

I reviewed all obtained SCRs and created a database, recording information about the report, including: information about the subject of the report – age, gender, ethnicity; information about the incident – injuries received, cause of death, date of incident, if with co-occurring abuse or neglect; the environment in which the child lived, notably if residing with one or both parents; and details of criminal proceedings. From this sample, 30 cases were initially identified as potentially useful for inclusion in the sample as each infant’s biological mother was suspected of committing the act of violence and an investigation for homicide or serious violent assault had occurred.

I identified three further cases using the key words ‘infanticide’, ‘infant killing mother’, ‘concealment of birth’. *Google* searches provided several other cases due to the function of the search engine to link information and deliver results that are connected but were not the subject of the search; eight cases were

<sup>3</sup> Freedom of Information Act 2000, c.36.

identified. Media reporting also assisted in this initial data collection stage, as several cases relating to infant and perinatal deaths occurred during the period of data collection. Seven cases came to my attention through contemporary news reports. A final case was initially identified through an academic article (Ayres, 2014). As such, my initial case search resulted in 46 cases. The details of these cases and how they were identified is presented in appendix 1.

As my research progressed and my focus narrowed to death in the perinatal period, I adapted my list of cases to reflect this change. I removed all cases that did not relate to a foetus/neonate, reducing the sample to 19 cases. A further 12 cases were excluded from the sample: four due to the court proceedings not having occurred at the time of data collection; three due to being unable to locate the case due to lack of information; one case was excluded as it occurred outside England and Wales; four others were excluded as the transcripts were unavailable due to the tapes being destroyed (details below).

The remaining cases therefore reflected a reliable sample of cases concerning the criminalisation of women in relation to suspicious perinatal death during the period 2008 to 2014. During this period, two convictions for infanticide<sup>4</sup> related to neonates, both were included in the sample (Fiona and Tanya). 9 concealment or birth<sup>5</sup> (hereafter concealment) convictions occurred 2008-2014.<sup>6</sup> I successfully identified all four women convicted 2010-2013. The transcript for one of these cases was unavailable as the tapes had been destroyed, but the other three were included in the sample (Hannah, Lily and Sally). The final two

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<sup>4</sup> Infanticide Act 1938 (1 and 2 Geo.6, c.36).

<sup>5</sup> Offences Against the Person Act 1861 (24 and 25 Vict. c.100), s60.

<sup>6</sup> Ministry of Justice FOI ref. 921-14 94607.

cases (Alice and Hayley) were purposefully selected for inclusion in the sample. Both cases offered an alternative legal outcome to infanticide and concealment. Alice's case involved her abandoning a live-born child which was later found alive and so her conviction reflected the survival of the child, despite her intention to dispose of the child (if not kill it). Hayley's case also offers a contrast. Hayley pleaded guilty to purposefully acting to end her own pregnancy, close to term. Therefore, she acted against her foetus, rather than a born alive child. Weir (2006) argues that medical professionals consider late-term foetuses and newly born babies to be essentially the same in all but location, a foetus exists inside a woman, a baby outside and separate from her. As such, it could be argued that Hayley's act of causing the death of her foetus is similar in nature to the actions of Fiona, Hannah, and Tanya (see below and appendix 4 for case details).

Taken together the seven cases demonstrate the range of criminal offences that can be used to convict and punish women who harm a foetus/child in the perinatal period, whether her action was intentional or not. Through my scrutiny of the law and attention to the news, I believe my sample captures all offences that can be employed by the criminal justice system to criminalise women suspected of perinatal killing. The only exception would be use of the offence of child destruction.<sup>7</sup> However, this offence is very similar in nature to procuring a miscarriage,<sup>8</sup> which is explored in Hayley's case, and the only known instance of woman being convicted of child destruction in relation to her own foetus was in 2007, which is outside the date range for my research.

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<sup>7</sup> Infant Life (Preservation) Act 1929 (19 and 20, Geo.5, c.34).

<sup>8</sup> Offences Against the Person Act 1861 (24 and 25 Vict. c.100), s58.



## Summary of cases

Full details of the cases are provided in appendix 4, here I provide a summary.

### Alice:

- Age: mid-twenties
- Left baby in a carrier bag in a park, later found by a member of the public, baby survived
- Pleaded guilty to child cruelty by wilfully abandoning or exposing a child in a manner likely to cause the child unnecessary suffering or injury to health
- Sentenced to 6-months' imprisonment, suspended for 2-years with supervision

### Fiona:

- Age: 16
- Stabbed the baby 27 times with a penknife
- Pleaded guilty to infanticide
- Sentenced to a youth rehabilitation order for 12-months

### Hannah:

- Age: mid-twenties
- Cause of baby's death could not be ascertained
- Left the body in the front garden of a friend's house
- Pleaded guilty to concealment and child cruelty due to not seeking medical assistance for the child
- Sentenced to 6-months imprisonment, suspended for 2-years

### Hayley:

- Age: early thirties
- Evidence to suggest she took Misoprostol, a drug used to start labour or cause an abortion, when she was at, or close to, full-term of her pregnancy
- Pleaded guilty to administering poison with intent to procure a miscarriage

- Initially sentenced to 12-years' imprisonment with a reduction for an early guilty plea; Court of Appeal reduced the sentence to 3½-years

Lily:

- Age: mid-thirties (at time of birth)
- Body of a baby found four years post-birth, Lily identified as the mother
- Pleaded guilty to concealment and preventing the lawful burial of the corpse, also indicted for fraudulent offences
- For all indictments sentenced to 1-year's community sentence with supervision

Sally:

- Age: mid-thirties (at time of births)
- Bodies of four babies found in her bedroom, over ten years after the births
- Pleaded guilty to four counts of concealment
- Received community sentence with supervision for a period of 2-years

Tanya:

- Age: 16
- Suffocated the child with tissue
- Pleaded guilty to infanticide
- Sentenced to a 24-months' youth rehabilitation order with supervision

## **Accessing court transcripts**

As noted above, court transcripts can be accessed after receiving permission from a judge. Once I had identified the cases I emailed the relevant courts to seek permission, copy of the email available appendix 2. My initial requests were made without knowledge of the rules and procedure for application (which I found difficult to identify) and so my request was rejected by a judge from one court. He requested that I resubmit an application which complies with 5.B.8 of the *Criminal Practice Directions*, which states,

An application to which CrimPR 5.8(7) applies must be made in accordance with rule 5.8; it must be in writing, unless the court permits otherwise, and 'must explain for what purpose the information is required.' A clear, detailed application, specifying the name and contact details of the applicant, whether or not he or she represents a media organisation, and setting out the reasons for the application and to what use the information will be put, will be of most assistance to the court. Applicants should state if they have requested the information under a protocol and include any reasons given for the refusal. Before considering such an application, the court will expect the applicant to have given notice of the request to the parties.<sup>9</sup>

As such, I reapplied, redrafting my request, copy available appendix 3. I was granted access to all transcripts requested except for one case. I initially requested access to only the sentencing remarks for Sally's case, but upon reading the case I was interested to view the prosecution's opening remarks and the defence's mitigation. The judge refused to grant access to the rest of the hearing, no reason for refusal was provided.

I experienced several difficulties accessing the transcripts. The first was in accessing cases that had reporting restrictions attached to them. To request permission to view the transcript, details of the case are required. It is necessary to know the name of the defendant, the date of the hearing, the courtroom and the judge who heard the case. In Alice's case, her name was not reported, and so I was only able to provide the name of the judge who heard the case, the date of sentencing (as reported by the media), the offence convicted of and the sentence. The court in question orders cases by defendant name. The only means of determining that defendant's name would have been through access to the daily court listings; however, these are destroyed after one year. Consequently, the court clerks were unable to determine the defendant's identity

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<sup>9</sup> *Criminal Practice Directions* [2015] EWCA Crim 1567.

and therefore, initially, could not forward my request for permission to the judge. I am uncertain how the court managed to identify the case, but permission was eventually granted. This was not a difficulty in all cases with reporting restrictions, and so seems to be due to the nature of storing cases in individual courts.

A further difficulty was due to Ministry of Justice policy relating to data retention. If a transcript has not been made within five years of the date of the court hearing, then the tapes of the transcript and records relating to the case are destroyed. As such, even if permission has been granted, if no one has previously requested access to the transcript within that five-year period then the transcription company will not have any records of the case in their database.<sup>10</sup> It is for this reason that all my cases were heard after 2010, and why four cases were excluded from the sample.

A final difficulty of using court transcripts lies in the cost associated with accessing such records. The recording of the court case and subsequent transcripts belong to the transcription company who made the recording. As such, access to the transcript can only be obtained if the fee for production is met. Production of the transcripts of cases used in this research can be seen in Table 5,

<b>Case no.</b>	<b>Cost (incl. VAT)</b>	<b>Note</b>
Alice	£30.91	Sentencing remarks
Fiona	£42.24	Sentencing remarks
Hannah	£180	Whole transcript
Hayley	£108	Whole transcript

<sup>10</sup> As per the Ministry of Justice policy *The Crown Court Record Retention and Disposition schedule*, accessed through FOI ref. 076-15 95498.

Lily	£540	Whole transcript
Sally	£36	Sentencing remarks
Tanya	£396	Whole transcript

*Table 5 Cost of court transcripts*

As anecdotal evidence, in discussion with another academic who has used court cases as the source of data researching rape trials, I was advised that they decided it was more cost effective to pay a research assistant to sit in court and make verbatim notes of the proceedings, rather than pay for transcripts. While this approach to data collection would work with an offence that is frequently heard in court, it would not work for suspicious perinatal death as the cases rare, and it is difficult to locate these cases prior to the court appearance. Accessing court transcripts is expensive; however, considering the nature of the topic and difficulties accessing other sources of information, it is the most appropriate and feasible way to analyse how the law and criminal justice system respond to women who are suspected of perinatal killing.

## American case study

To assist with my analysis of the law and its application in England, I conducted research into legal developments in the US. This research was conducted while completing an AHRC research fellowship at the Library of Congress in Washington, DC. The Library of Congress has one of the largest and most comprehensive law libraries in the US, providing access to the penal codes for all 50 states and Federal law. Therefore, this research placement offered an ideal opportunity to consider how other legal jurisdictions have developed their laws in response to suspicious perinatal death.

American states provide an excellent example of legal development in criminal law relating to perinatal deaths, offering an example of an alternative process and ways of dealing with behaviour by pregnant women that is deemed to require criminalisation. In most states in the US, a foetus is considered to have legal personhood. As argued in Chapter 6, it may be favourable to change English law to provide protection to foetuses; however, this would have consequences on women's rights. Critical assessment of the developments and application of law in US states provides a case study of the impact of legally protecting the foetus. As such, this research is not designed to be a comparison with the English system or law.

The US provides an excellent case study of the development of law for a several reasons. Developments in the law in these jurisdictions demonstrate the possible route that English law could follow, as most states derived their penal codes from English law and the born alive principle existed until 1970.

Secondly, American Federal and state legal scholarship is advanced, providing a foundation to conduct legal research. Thirdly, the development of law relating to prenatal harm has been subjected to considerable comment and debate from legal, political, sociological and criminological scholars, politicians, and activists. This debate has occurred amid a fierce political dispute surrounding abortion and the rights of the foetus. This debate has informed and influenced the development of law and subsequent academic analysis. Finally, as the legal developments surrounding prenatal harms are relatively new, case law is developing rapidly, and is freely available via *Google Scholar*. Looking to the events in the US to help inform criminal responses to cases in England is not a

new method of analysis, but has been used by a number of scholars (for example Thomson, 1994).

## Analysis

The court transcripts from the English cases were analysed in two different ways for two different purposes. Firstly, they were analysed for their content, to consider what was said about the women within the setting of the court hearing. Thematic analysis was utilised. Spencer et al. (2013b: 271) define thematic analysis as ‘discovering, interpreting and reporting’ meaning which is discovered within the data, based upon the principle of identifying ‘topics’ which are used to develop key ‘themes’. The aim is to gain data driven descriptions which will then be compiled and utilised to create abstract theoretical concepts and ideas. The use of this form of analysis results in a substantive (rather than structural) approach to the data being adopted, I sought to analyse the meaning of the content of documents as a reflection of the situations and events they depict. The analysis was cross-sectional, using the same codes and themes of analysis for each transcript. The analysis approach followed the U-shaped model, first using the literature to inform and create initial ideas; secondly referring to the data to seek emerging themes, leads and ideas that come directly from the research data; finally returning to the literature to contextualise and further inform the themes identified in the data. The principles which I followed are based on Spencer et al. (2013a; 2013b). All seven transcripts were read to become familiarised with the content, and topic areas were identified. The transcripts were indexed and sorted by topic. Following this, the topic areas were developed and further analysed to produce three themes, which spanned

the initial topics. Further analysis of the transcripts was conducted, using the themes as the lenses through which key sections of the transcript were identified and analysed. The findings of this analysis are presented in Chapter 5.

The nature of court transcripts makes thematic analysis the most appropriate form of analysis. Court transcripts are a specific and unique type of source.

They are a verbatim translation of speech presented in court, with the removal of hesitations, pauses and filler words. In my attempts to engage with the transcription companies to enquire into their method of transcribing, I only received feedback from one company who advised their transcripts were 'pretty much verbatim'.

Speeches in court, particularly during the sentencing hearing, contain narrative elements. They are re-constructions of what happened to whom and when, they are story telling with a purpose, a 'contest of stories that transpires' (Olson, 2014: 371; Gewirtz, 1996; Jackson, 1996a; Rackley, 2010). Understanding the courtroom as a place of narrative construction would potentially lead to the conclusion that narrative analysis would be an appropriate form of analysis, as it is concerned with how past events are captured and expressed with for the intended audience, with a focus on the sequencing and temporal nature of the narrative (Elliott, 2005). However, narrative analysis has traditionally been used in the social sciences to capture how an individual narrates their life, the stories they tell, when and where (Plummer, 2001). As a court hearing is a presentation of a narrative by third parties with the intention of telling a story for their own aim, the prosecution to justify the conviction and the suggested sentence, the defence to mitigate culpability, the judge to justify the sentence; it is not an



attempt to express what happened but to justify the process of law. Within legal studies the method of 'narration' has also been used (Olson, 2014), however, this research does not aim to consider the process of law and its working per se, but rather to determine how it is utilised in order to criminalise women, what actions and characteristics of women are drawn upon to justify criminalisation. As such, narration was also not considered to be the most appropriate form of analysis. A further mode of analysis that could have been employed was discourse analysis. However, the focus of my analysis did not relate to how language works as a function to construct reality (Georgaca and Avidi, 2012) but was concerned with how existing social concepts and ideas are utilised in court to justify the legal response. Therefore, it was decided that thematic analysis was the best option to fulfil the research aims.

The second type of analysis conducted on the transcript was a consideration of how law was utilised, which offences were used as the means to criminalise the woman's actions and what criminal wrongs were identified. This form of analysis focused upon the structural aspects of the narrative provided in court, rather than how a defendant's personal characteristics were portrayed. Therefore, I drew on the details from the transcripts that outlined the defendant's actions, how these met the criteria of the offence that was charged and therefore justified. Subsequent analysis is reported in Chapter 6.

The analysis of US case law was conducted with the intention of understanding how statute and the states' penal codes have been interpreted. Therefore, this analysis had a far clearer legal focus upon the consequences of judicial ruling

and the implications this had upon the lives and rights of women. This analysis is presented in Chapter 7.

## Limitations

One of the main limitations of this research project is that it only provides a partial picture of how the law responds in a small number of cases of suspicious perinatal death. As application of the law is largely based upon discretion, police to investigate, CPS to charge, defendant to plead guilty, it is highly problematical to know the extent to which the operation of the law in the sample is representative of the application of the law in other cases. In all cases in the sample, the defendant pleaded guilty to the charge. I have no way of knowing why this decision was made. The incentive to plead guilty in exchange for a sentence reduction or plea or charge bargaining is noted by numerous researchers, leading to a conclusion that production of a guilty plea does not necessarily signify that a defendant has committed the crime to which they have pleaded guilty to (Hedderman et al., 1992; Jeremy, 2008; Henham, 2002; McCabe and Purves, 1972). The extent to which decisions relating to the outcome of cases were based upon the interpersonal relationships between barristers and members of the CPS, or informal decisions of individuals within the system is beyond the scope of this research. Such research would likely only be able to be conducted through interviews with legal professionals. As the aim of the research is to reveal themes and processes that work within the legal system, and the gender biases encoded within criminal law, it is unlikely that interviews with individuals who work within the system would assist in meeting these aims. It is not my aim to present a representative sample of how

individuals within the system complete their role. Due to the personal discretion that operates within the system, interviews with individual professionals would only produce a partial view of how the system works. A further limitation is that I have no information relating to cases that resulted in no legal sanction.

However, what this research does offer is an analysis of the workings of the law once a conviction has been secured through a guilty plea. It also demonstrates the actions of the accused women and their characteristics that are drawn upon to justify conviction.

## **Ethics**

Whilst this research project does not have traditional ethical concerns of data collection, as the data has been collated and constructed by others, there are ethical concerns that need to be considered. A priority was the protection of the accused women and their families. As there are so few cases of suspicious perinatal killing in England, these cases would be easily recognisable if personal information about the accused were provided in the research. I judged that their identification in this thesis and subsequent publications would cause potential harm. As such, personal details of the women, their family, including the foetus/child, professionals who worked on the case, have all been anonymised. Similarly, dates of the events and proceedings, and the geographic location of the events and the courts have been excluded. This includes withholding details of class and ethnicity. These intersecting identities are important and affect the experiences of offenders in the criminal justice system, but neither is the focus of this thesis. As I am interested in the perceived criminal wrongs, the impact of the structures of the law, and the role of the myths of motherhood in the

responses of the criminal justice system, the identities of these women and their personal circumstances are not of fundamental importance. Their cases are examples of how women have been treated in England 2010-2014.

Anonymisation of cases was also a condition under which access to court transcripts were provided. The transcripts were anonymised and names of the defendants and family members were replaced with pseudonyms. Similarly, personal information such as addresses were removed. Use of text from the transcripts in quotes is provided only with the reference to the pseudonym given to the defendant and the section of the transcript from which the texts have been abstracted.

Research data has been stored in encrypted files on a password protected computer. Each type of source – transcripts, SCRs, and data analysis, have been stored in different encrypted folders, with different passwords. Any hard-copies of data have been secured in a locked filing cabinet. The cross-reference list advising me of the identities of the defendant is stored in a separate encrypted folder, kept separately from the data.

My sources of data were created by others and so I hold no copyright. Under the s29 of the Copyright, Designs and Patents Act 1988,<sup>11</sup> the use of copyrighted material for research for a non-commercial purpose is allowed under 'fair dealing'. I have explicit permission from judges to make use of the court transcripts in this PhD research and subsequent research publications, provided

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<sup>11</sup> c.48.

the identities of the defendants and any other person involved in the cases are not revealed.

## Conclusion

As I have outlined in this chapter, researching the application of the law in cases of suspicious perinatal deaths is neither simple nor easily done. I selected the method and source of data most appropriate to achieve the research aims, analysing court transcripts to explore the justifications for the application of criminal law. The sample, while small, provides a comprehensive overview of all cases of suspicious perinatal death that I have identified to have occurred in England between 2010 and 2014. Through my stringent analysis of media reports and criminal statistics I can confidently state that I have included all relevant criminal cases that are known to have occurred and for which data is available. The thematic analysis employed assists in meeting the research aims and is most appropriate for the data source. Researching the killing of a foetus/child is difficult. As noted, our knowledge of the application of law is partial, and a picture of the processes of law can only be constructed by piecing together information. This research project provides the most comprehensive picture of events concerning suspicious perinatal deaths within the English criminal justice system between 2010-2014.

# Chapter 3 Social regulation of motherhood

Pregnancy is a highly medicalised and managed state, regulated and monitored by medical professionals. During the twentieth-century, medical knowledge of pregnancy and childbirth has accumulated, constructing pregnancy as a period where two patients are contained within one body. Desire to protect maternal and foetal life has resulted in check-lists of behaviours that are seen to be positive in pregnancy, as opposed to those considered to create or increase risk to a healthy outcome. Changing expectations of behaviour during pregnancy has had consequences on the lives of pregnant women, who, feminists argue, are expected to self-manage their own risk, and the risk to their foetus. This chapter presents an overview of the literature relating to risk management and governance of pregnancy. The connection between the myths of motherhood and risk management are pervasive. Feminists have argued that a direct connection is made between the 'responsible pregnant woman', who manages her foetus' risk, and the 'good' mother (Lupton, 2011; Gregg, 1995; Harper and Rail, 2012). This body of literature is significant in relation to the discussions of behaviour of the seven women in the data sample who were convicted of offences relating to suspicious perinatal death. The extent to which each woman acted as a 'mother' and responded appropriately to pregnancy was a central feature of the court discussions. To contextualise the court hearings, an understanding of concealed/denied pregnancy is required. The nature of concealed/denied pregnancy and the connection with neonaticide is complex and does not simply demonstrate a woman's intent to dispose of an unwanted

pregnancy, as is suggested by legal professionals during the court hearings. What is clear from the literature is that motherhood is perceived to begin long before birth, and it is widely expected that a mother will put the needs of her foetus before her own. In cases of crisis pregnancy that manifest as a concealed/denied pregnancy, it is unlikely a woman will put the foetus' needs before her own. If the crisis pregnancy ends with the death of the foetus/child then such expectations cause significant problems for vulnerable women.

## **Governing pregnancy**

The development of risk management theories has become a central focus of scholarly analysis of the treatment of pregnant women (Ruhl, 1999). The construction of medical knowledge in relation to pregnancy and foetal development has dramatically changed the ways that pregnancy is approached and managed, by medical professionals and pregnant women. Prior to the twentieth-century pregnancy, labour and delivery were generally conducted in the community, a female-dominated sphere of life (Gowing, 1997). Awareness of pregnancy might be indicated by 'quickening' (the point at which a woman first feels the foetus move inside, typically 15-17 weeks' gestation), but otherwise it was unable to be confirmed until a woman's labour was in its final stages. Furthermore, the health of a foetus was unable to be determined until post-birth. The mechanics of pregnancy were unknown, and no body of knowledge or set of techniques to manage pregnancy existed, consequently there was no rationale for medical supervision (Oakley, 1984). During the twentieth-century, the conceptualisation of pregnancy changed. Medical knowledge developed and pregnancy was pathologised – becoming an occasion for medical surveillance

and treatment (Oakley, 1993). Tests to diagnose pregnancy were developed, for example, the hormonal pregnancy test became available for use by doctors in the 1930s (Oakley, 1984). Pregnancy and childbirth moved from being a female-led, community-based experience, to an institution-based, medical experience, managed predominantly by male professionals (for historiography see Wertz and Wertz, 1989; Leavitt, 1986; Ehrenreich and English, 2010).

The 'medicalisation' of pregnancy has received substantial criticism from second-wave feminists and feminist midwifery groups, who have viewed it as male control over women's reproduction, requiring women to consult medical experts in what is 'naturally' a woman's domain (Davis-Floyd, 1992; Leavitt, 1986; Oakley, 1984; Martin, 1987; Lupton, 2012a; Rothman, 1989, 1993a; Ehrenreich and English, 2010). The aim of this critique is not to argue that all medical intervention and knowledge is inherently negative. Medical advancement has many benefits for women, for example, medical understanding of pre-eclampsia has resulted in successful treatments being developed for what was previously a fatal condition for women and their foetuses. Instead, the critique lies in the harmful consequences of the technocratic model promoted by medical professionals (Davis-Floyd, 2001). However, as Brubaker and Dillaway (2009) argue, there is no clear definition of the concept of medicalisation within sociological literature, nor is the concept of a 'natural' birth fixed or determined, particularly in the minds of women or medical professionals. Brubaker and Dillaway argue that hospital birth has become so common place that it may seem 'natural'. Nevertheless, critique of the over-technical medical intervention remains strong as can be seen by campaigns in the United States, such as *Our*



*bodies, ourselves*, and the movement towards midwifery-led care in the UK (Boston Women's Health Book Collective, 2008, 2011; National Institute for Health and Care Excellence, 2014; Wagner, 2006; Strong, 2000).

The debate about the medicalisation of pregnancy is relevant due to its impact on the development of risk mentality in the medical management of pregnancy. The development of medical knowledge about pregnancy changed the way it was understood and approached. Oakley (1984) argues, a division developed within childbearing of 'normal' and 'abnormal'. When antenatal care first operated, the task was to screen the population in search of the few women who were at risk of disease or death. Now, screening is conducted in the 'population suffering from the pathology of pregnancy for the few women who are normal enough to give birth with the minimum of midwifery attention' (1984: 213). The change in perception happened rapidly – 70 percent of childbirths were thought 'normal'-enough to be delivered at home by a midwife in the 1930s. However, by the 1950s, 70 percent of all births were considered sufficiently 'abnormal' to be delivered in hospital (Oakley, 1984: 142). Today, just 2.3 percent of all women give birth at home (National Health Service, 2015) suggesting that childbirth is perceived to be risky by professionals and also by women and their families. As Ruhl (1999) argues, medical professionals' involvement in pregnancy has had a dual-impact, the creation of risk through testing, monitoring and research, as well as the alleviation of that risk through treatment and medical management.

Weir (2006) notes that the construction of the perinatal threshold was a key element in the development of current responses to pregnancy. She argues that the birth threshold, the point at which the foetus becomes a living subject and enters the social world, was disrupted in the early twentieth-century. In attempts to lower rates of infant mortality and to optimise health of infants', medical intervention moved into the new perinatal threshold. Ideas developed that deaths around birth – before, during and after – bore similarities and remained high, and the foetus in later gestation in the womb was considered to be essentially the same as the newborn baby. Consequently, physicians developed new targets and measures to prevent foetal and neonatal mortality – perinatal death. Weir argues that this reduced the significance of birth and the nature of the treatment of pregnancy, as the threshold of two distinct subjects – mother and baby, moved from the end of labour, to during pregnancy. The shift in perception assisted in the construction of the foetus as a subject requiring care. Rather than pregnancy being a situation where one person (the pregnant woman) needs care to produce a new human life, pregnancy has been constructed as a situation where two distinct beings need care. Weir argues, that the changing concept of the life/birth threshold, developed in the 1950s, signifies the start of the application of risk techniques towards pregnancy.

The development of medical knowledge's construction of the foetus as a subject distinct from its mother, and the responses to that knowledge have led many feminists to critique modern obstetric care, arguing that the foetus has become the focus – the patient, while the pregnant woman has been defined as no more than the foetal carrier or container (Bordo, 2003; Martin, 1987; Young, 1990;

Chavkin, 1992; Lupton, 1999b; Longhurst, 2001; Phelan, 1991). Further development of foetal imaging techniques (Petchesky, 1987) and foetal surgery to directly treat the foetus (Knopoff, 1991; Williams, 2006; Fletcher, 1981) have reinforced this critique. Feminists have argued that such technology and developments have framed the foetus as an independent entity, which marginalises the woman (MacKinnon, 1991). This changing perspective of pregnancy has led to the pregnant woman being constructed as a threat to the foetus, and the role of foetal protector has been reassigned to healthcare professionals who may intercede on its behalf to ensure its wellbeing and security (Phelan, 1991; Halliday). Nevertheless, as Fox and Worts (1999) have argued, medicalisation developed with the endorsement and encouragement of communities of women, many of whom take great comfort in the support provided by medical institutions during pregnancy, and labour and delivery. However, women's desire for intervention should not be accepted without consideration. Fear of a bad outcome and belief in risk management strategies are pervasive and embody the everyday experiences of pregnancy and childbirth. The success of theories of risk relies on people 'buying in' to fear and uncertainty. The impact of risk management on women will be considered later in this chapter.

Rather than consider the appropriateness of constructing the foetus as a distinct medical subject, the focus here is upon the impact of medical development and risk management upon women. Beck's (1992) theory of risk society has been influential, with the development of the preoccupation with risk prevention and security. Risk comprises language, practice and modes of knowledge. The

more attempts that are made to categorise risk, the more risk will be found, as such it is an unfulfilled process; no one can escape the fear of risk or its impact. Furthermore, while risk is often seen as value-free, with the use of scientific knowledge presented as objective, it is value-laden, and, specifically for this study, is gendered (Chan and Rigakos, 2002; Stanko, 1997; Walklate, 1997). Also influential is the work of Rose (1993, 1996a, 1996b, 2000), O'Malley (1992, 2000, 2004) and Simon (1988), who developed Foucault's (1991 [1977], 1992 [1985]) principles of governmentality. This body of literature theorises the governing and regulation of individuals within neoliberal society, arguing that rather than state management through force and coercion, the ideal neoliberal subject is guided and regulated by experts, embodying principles of prudence and self-regulation, managing risk and absorbing the cost of risk as opposed to burdening society by requiring social support. Viewing pregnancy through this prism facilitates an understanding of the controls and regulations placed on pregnant women. Governance of pregnancy is conducted not only by the medical community, but also by the wider community and by pregnant women themselves, which has led theorists to argue that the pregnant body is now a space for monitoring, control, and influence by individuals other than the woman whose body is impregnated (Stormer, 2000). Both pregnant women and their foetuses have become biomedical subjects 'their bodies defined, given meaning and regulated by the discourse of biomedicine' (Lupton, 2012b: 336). One of the consequences of this development is that there is now no such thing as a non-risk pregnancy (Wertz and Wertz, 1989; Ruhl, 1999). Undoubtedly a tension lies within the dynamic of pregnancy – two human subjects within one body, both

potentially needing, and in the case of the woman *desiring*, different and potentially oppositional treatment or behaviour.

Within the discourse of risk, pregnancy has become a state that requires careful and managed risk prevention. Risk management is predominantly focused on the risk to the foetus; the focus is not upon averting maternal risk, but reducing possible risk to the foetus that may be caused by maternal behaviour (Weir, 1996; Ruhl, 1999; Lupton, 2012b; Helén, 2004). The majority of the regulation of risk is achieved through, what Ruhl (1999) defines as the 'liberal governance of pregnancy', which enlists the co-operation of the 'responsible' pregnant woman. Drawing on the work of Rose (1993) and Valverde (1996) and their theories of liberal governance, Ruhl argues that within this context, responsibility is equated with rationality and the principle of adopting behaviour that will ensure the greatest benefit with the least risk, as such this risk discourse is also moralistic. One consequence is that pregnant women absorb the burden of the risk, as it plays out within the form of an individualised risk model, rather than a collective risk model. In this sense, it is the behaviour and factors surrounding the pregnant woman and her responsibility for those factors, drinking alcohol for example, that are perceived to have most impact on the foetus, rather than wider social factors, such as pollution (see Chavkin, 1992; Bordo, 2003; Lane, 2008; Lazarus, 1994). The concept of upholding health as an act of responsible citizenship in neoliberal society is not solely experienced by pregnant women. However, as Lupton (1999b) argues, greater pressure is exerted on pregnant women as they are expected to uphold not only their own health, but also the health of their foetus. As such, the individualised risk model constructs the

pregnant woman as her foetus' most ardent protector, but also its greatest threat (Ruhl, 1999). Within pregnancy, Ruhl argues, risks that attract social commentary are those that are borne by the foetus and the responsibility for these risks falls to the pregnant woman, regardless of the fact that many are beyond her control. In her critique of the individual risk model of pregnancy, Ruhl aims to highlight the inappropriateness of applying the individual risk model to pregnancy. Women do not 'control' their pregnancy as the risk model suggests and the definition of 'responsibility' in pregnancy is often moral and scientific. In an analysis of popular advice manuals written for pregnant women, Ruhl identifies that a 'responsible' pregnant woman is defined as a woman who has planned her pregnancy, has an expected standard of motivation and education, and an acceptance of medical authority. The demands on pregnant women to adapt their behaviour are extensive and rarely acknowledged. Even if a woman decides not to follow the constrained requirements, she nevertheless feels guilty and responsible for anything that may go 'wrong'. Ruhl argues that the construction of risk in pregnancy ignores several key factors. Firstly, assumptions of risk are all encompassing. Secondly, the construction of risk is highly medicalised and so is extremely partial, it includes only the medical aspects of health during pregnancy, ignoring socio-economic factors, such as poverty and domestic abusive situations. Thirdly, the constructions of risk are necessarily partial and so exaggerate some risks, while downplaying others. Finally, the discourse allows for no evaluative mechanism to weigh the effects of different risks. Nevertheless, the actuarial model of government and classic liberal theory holds the concept of prudence as key (O'Malley, 1992). The ideal liberal citizen possesses self-discipline and will refrain from burdening others.

When applying this concept to pregnant women, the suggestion becomes that women are complicit in any birth defects regardless of whether she could have prevented it. Such a perception overlooks women's lack of control over their foetus' development. The 'prudential model of pregnancy' makes demands on women that are simply unrealistic, requiring 'that pregnant women be on their guard, every second of their pregnancy, for something, anything, which might prove to be the slightest bit harmful to their foetus' (Ruhl, 1999: 110).

Weir (1996, 2006) also disputes the validity of the concept of risk in application to pregnancy and foetal development. She considers the risk management of pregnancy as operating as a form of security, defining it as 'clinical risk'. Prior to the 1970s risk in pregnancy was defined on an individual level, based on family medical history and exposure. Following the 'constitution' of the foetal body through verbal and visual distinctions denoted from medical tests and examinations starting in the 1950s, the 'proliferation of foetal objects established parameters of physiology and pathology in the foetus' (1996: 377). This construction has created a new subject of medical governance. Consequently, standardised, population-based, routine risk assessments in clinical practice have 'saturated' management of pregnancy. As Weir argues, 'the schema 'prenatal risk assessment'... has acted as a transmitter of security for the unborn configured as foetus, standardising and concerting care of *foetal* health in clinical practice' (2006: 4). As such, all women are subjected to the same concepts of risk, regardless of their personal circumstances and medical history. Weir argues there is strong argument to suggest that risk prevention models in pregnancy have limited impact upon the outcome of the pregnancy or the health

of the foetus. Nevertheless, all women are expected to adapt their behaviour and conform to 'guidance' provided based on medical knowledge.

It is important to appreciate that public policies and social expectations of the responsible neo-liberal subject are not only experienced by pregnant women. As noted above, neoliberal citizens are expected to self-manage and self-regulate with the guidance of experts. Development of feminist discourse identifying women as rational agents, rather than as being passive, less intelligent and able to reason than men, has undoubtedly had positive impact on women. Feminists have highlighted the distinct nature of women's offending (different to that of men in both nature and volume), the vulnerabilities of female offenders, and the structural disadvantages faced by women that can lead to both victimisation and offending (Worrall, 1990; Edwards, 1984; Carlen, 1983). However, a consequence of this is that women have been 'responsibilised', as both offenders (Kendall, 2002) and victims (Walklate, 1997). Indeed, as Snider (2003) has argued, through attempts to demonstrate the complexities of female offending and punishment, feminists criminologists have been complicit in the responsibilisation of criminal women, and the surge in punitive punishments of women both within and outside criminal justice institutions. Within neoliberal, industrial, capitalist society, only select discourses are heard by politicians, the public and criminal justice professionals. This has had an impact on all women as they interact with regulatory institutions (criminal justice, social services, education, health, for example). For pregnant women, there have been specific consequences in regards to how behaviour deemed to be bad for the 'baby' has



been conceptualised and responded to (Benoit et al., 2014). This idea is explored in Chapter 7, when the experience of American women is analysed.

## **Risk: the impact on women**

The framing of pregnancy in relation to risk has affected women's experiences, scholars have debated whether or not this has been beneficial to women.

Rothman (1986, 1993b) and Tymstra (1991) argue that pregnancy often has a tentative nature for women, only becoming 'real' after all the tests have been carried out and the results are positive. Women have reported that they kept their pregnancy a secret until they were certain that the foetus would be healthy. As already argued, all pregnancies are now considered to involve risk, therefore this uncertainty in pregnancy is likely to continue until the baby is born. Lennon (2016) argues that increased knowledge of pregnancy has not increased a sense of security, instead surveillance and testing have resulted in women feeling at increased risk. Gregg (1995, 1993) supports this finding, arguing that women now face a 'paradox of choice' – increased technology has served to reduce women's choices. The quantity of choices for prenatal testing now available, forces women to make choices, and so pressures them to participate. From her study of pregnant women, Gregg (1995) concludes that for some women the decision to participate in prenatal testing cannot be considered a 'choice', instead they perceive it as a responsibility and expected behaviour. Other women reported feeling obliged to have tests as they were considered to have an elevated risk, such as being aged over 35, hence at an increased risk of their foetus having Down's Syndrome. Women also reported feeling compelled to 'choose' prenatal testing due to pressure exerted by friends and family.

Gregg concludes that ambiguity and contradiction characterises women's experiences of pregnancy.

Other scholars have argued that prenatal testing reassures women. For example, Harpel (2008) reviewed women's opinions of and feeling towards ultrasound tests. She concluded that while the prospect of the test did appear to cause anxiety, this may have represented excitement about the examination as well as concern that they might be told of potential problems with their foetuses. Harpel concludes that pregnant women want to know about the health of their foetuses, they want good news; reassurances about foetal health. Harpel questions how prepared some women would be if they learnt of potential problems. Research, such as Harpel's, suggests that the principle of prenatal testing and risks associated with harm impact the ways that women experience their pregnancies. The concepts of 'normal' pregnancy that can be identified through tests raise difficult ethical questions both in relation to the foetuses and pregnant women. For a foetus, the impact of a test with a negative result may lead to a decision to terminate the pregnancy (for discussion of ethics see Scott, 2007). For pregnant women, the impact of such tests can be numerous. Tymstra (1991), for example, argues screening for detection of disease or risk factors creates the prevention paradox: it is not possible for one person to profit without others losing out. For the risk-based tests to function a high participation rate is required. The benefits of information about high risk obtained by a small number of women is gained at the expense of many more women who will undergo ultimately unnecessary tests, which may result in emotional disturbance due to the tests and results. For some women, a miscarriage of a healthy foetus

may occur as a direct result of testing. While these issues are not the focus of this thesis, the point raised here is that the concept of risk and the construction of 'healthy' and 'unhealthy' fetuses and pregnancies, and 'low-risk' and 'high-risk' pregnancies are not neutral nor purely positive in outcome; they have a direct effect on the way women experience being pregnant and the decisions they make.

A further effect of risk identified through empirical research is the self-regulation and control of behaviour that pregnant women experience. Lupton (2011) argues that women extensively self-regulate and adapt their behaviour to conform to expectations. Furthermore, she argues that the lack of resistance to dominant discourse by mothers in her study of 60 women demonstrates the strong societal pressures exerted upon women. Studies have concluded that, as Ruhl (1999) argued, this pressure often involves extensive burdens on women. For example, in their study of women's perception of weight gain during pregnancy, Harper and Rail (2012) concluded that women found it difficult to reconcile the dominant discourse of maternal responsibility, personal control over weight and health, and criticism of those who did not conform, with alternative and contradictory discourses influenced by external factors and embodied experience; as one woman noted 'if I was in a different culture, probably nobody would care how much I weighed' (2012: 76). However, women also reported feelings of guilt for not meeting recommendation, as the same woman exclaimed: 'Am I doing something wrong? Is the baby going to be too small at birth?' (2012: 76). Nevertheless, women in the study reproduced, or at least accommodated, the medical health discourses, describing their understanding

and employment of this discourse as a maternal and moral responsibility for the foetus's health. Women in the study discussed feelings of anxiety due to not doing everything they should for their unborn child.

Studies have also identified the strong link made between the concept of the 'responsible' pregnant woman and the 'good' mother. Lupton (2011) concludes that the pressure on women to conform to dominant ideas presented in the discourse of maternal responsibility is inextricably linked to the idea of the 'responsible mother' who puts the needs of her foetus and child first. But constraints on pregnant women are not merely from above. The women interviewed in Lupton's study self-regulated and voluntarily disciplined their bodies and their own behaviour. They also policed the actions of other pregnant women; they were the subjects of surveillance as well as the instigators of surveillance over their own infants and other mothers. Lupton concludes that at the centre of these reproductive health imperatives lies the emotional aspect of caring for babies and children: the desire to protect the vulnerable and beloved child, to ensure optimal development and life chances, to avoid distress caused by illness, and to view oneself and be recognised by others as a 'good mother'. This connection between conforming to health and risk discourse and being a 'good' mother was also a conclusion drawn by others (see Gregg, 1995; Harper and Rail, 2012).

The impact of the myths of motherhood and 'good' mother ideology has been noted to have distinct consequences on pregnant women and how they conduct themselves during pregnancy. Van Mulken et al. (2016) interviewed 30 pregnant

women to investigate women's experiences of physical activity while pregnant. They concluded that women's experiences demonstrate that mother-blaming now starts at conception, rather than birth. Many women reported reducing their physical activity due to concerns it would harm the baby. Perceptions of social sanctions against exercising during pregnancy were reported by women and many women felt obliged to reduce physical activity, in line with social expectations, despite their desire to continue to exercise. Similarly, Brooks-Gardner (2003) argues that current cultural expectations for pregnant women maintain that behaviour during pregnancy is understood as a demonstration of her devotion to her foetus and future child. Women are deemed to have ultimate responsibility for the foetus and consequently for its health and development. Thus, her behaviour and self-regulation are symbols of love and her role as a 'good' mother. Lupton (2012b) argues that pregnant women have become public figures; their bodies have become a display for others to touch and comment upon in ways that would not be appropriate for other adult bodies. The medical construction of the foetus as patient also plays a role here. As Bessett (2010) argues, this hierarchy of foetal and maternal health makes maternal sacrifice legitimate.

Despite this increased regulation and control of the female pregnant body (including self-regulation), studies have also found that some women are resistant to medical advice, or specifically search for non-medical experts to guide their pregnancy. For example, van Mulken et al. (2016) found that many women's decisions to exercise during pregnancy were based on how they felt, rather than the opinions of others, including medical professionals. Women who

did not adopt the physical activity recommended demonstrated active resistance to the dominant discourse, noting that they felt 'healthy-enough'. Other research such as studies by Burton-Jeangros (2011) and Johnson (2015) concludes that women do demonstrate agency within the framework of medical management and the governance of pregnancy. However, as Burton-Jeangros (2011) argues, acts of resistance to professional advice are often accompanied by feelings of guilt and anxiety, and dismissal of the risk approach is very difficult. Burton-Jeangros conclude that two mechanisms intervene to prevent rejection of risk, firstly healthism, which advocated maternal responsibility and the reliance on professionals for advice. Secondly, the social-cultural environment reinforces medically defined behaviour among pregnant women by challenging deviant behaviour.

Studies that note women's resistance to the dominant discourse demonstrate the tension between public and cultural expectation, and experience and behaviour of pregnant women. However, as noted in the discussion of the myths of motherhood, resistance to dominant discourse, or failure to conform to the myths, is not experienced equally by all women. Class has been noted as a point of analysis in the governance of pregnancy literature (see Ruhl, 1999). Lupton (2011), for example, concluded that women with higher levels of education and income, living in prosperous suburbs, tended to be more vigilant of what they consumed while pregnant. In contrast, women from working-class backgrounds, with lower levels of education and income, were less likely to change their lifestyles. Women in this demographic were more likely to continue smoking cigarettes and drinking alcohol while pregnant; although they often did

try to reduce their consumption of these substances. Lupton argues that socioeconomic disadvantage, social isolation, and other problems result in difficulties breaking these habits, even with awareness of professional warnings. As previously argued, women and mothers are not policed equally and public scrutiny is often focused on those individuals who are least able to conform to societal expectations of motherhood and the responsible pregnant woman.

Literature exploring the impact of the governance of pregnancy on women has focused on those women who experience a wanted pregnancy. The research presented above demonstrates the stresses and strains placed on women due to the framing of pregnancy in this manner. Within this discourse of risk, responsibilities placed on women and expectations of behaviour are based on voluntary participation. As we will explore in Chapter 4, there is no legal obligation in England for a woman to act in the best interests of her foetus. Nevertheless, expectations of the behaviour shape how professionals respond to pregnant women and new mothers. No previous literature identified has considered the impact of the governance of pregnancy on women who experience a crisis pregnancy. As noted in the Introduction, the cases analysed in this thesis involve situations where a woman has interpreted her pregnancy to be a crisis. In the remainder of the chapter, I will present literature on concealed/denied pregnancy and neonaticide. As we will see, the understanding of risk in such cases is framed in relation to the risk that women cause the unborn child by concealing/denying a pregnancy. Such analysis appears to use expectations of female behaviour outlined above as a standard of normality against which women who conceal/deny pregnancy are judged.

## Concealed/denied pregnancy

Women who give birth without previously advising anyone they were pregnant have been the focus of medical, psychological, and psychiatric literature, as attempts have been made to understand and explain such behaviour. There is limited coherency in the literature as to whether a woman and the people around her can fail to realise she is pregnant. Debate as to appropriate terminology reflects these disputes. One clear distinction in terminology is between psychotic and non-psychotic denial of pregnancy. Psychotic denial of pregnancy relates to schizophrenic disorders. Scholars argue that changes in the body relating to pregnancy are apparent and people around the woman are conscious of the pregnancy. The woman may interpret the pregnancy as a form of illness and the movements of the foetus in a delusional manner, such as perception of a 'bug' living inside of her or her liver moving around (Miller, 2003; Slayton and Soloff, 1981; Gonçalves et al., 2014). None of the women in the sample experienced this form of pregnancy denial.

Within the parameters of behaviour considered to be non-psychotic, disputes lie, notably in the distinction between 'denied' pregnancy and 'concealed' pregnancy, the two terms used most often within the literature. Those who use the terminology of 'denial' argue that women have an initial recognition and awareness of their pregnancy, but that this is followed by a refusal or inability to accept the situation and so denial of the pregnancy occurs (Spinelli, 2001; Brezinka et al., 1994; Overpeck et al., 1999). Miller (2003), for example, identifies two forms of non-psychotic denial of pregnancy: 'affective denial', a



woman intellectually knows she is pregnant, but experiences none or few of the emotions or behavioural changes; and 'pervasive denial', occurs when a woman is not consciously aware she is pregnant. Other scholars have drawn a distinction between 'denied' and 'concealed' pregnancy, perceiving them as two distinct concepts, arguing that a denial is an unconscious awareness of pregnancy, while concealment is being aware of a pregnancy but actively hiding it from the wider world (Friedman and Resnick, 2009; Friedman et al., 2007; Berns, 1982; Wessel et al., 2007; Dulit, 2000; Vellut et al., 2012; Murphy Tighe and Lalor, 2016). Others have used the two terms interchangeably or do not draw a distinction (Wessel et al., 2003; Spielvogel and Hohener, 1995; Milstein and Milstein, 1983). However, Miller (2003) argues that to deny a pregnancy is also to conceal it, thus suggesting they are the same phenomenon. Similarly, Meyer and Oberman (2001) refute the idea that the two phenomena are mutually exclusive, arguing that women could go through both types at any stage in their pregnancy. Other scholars have also documented the co-occurrence of denial and concealment and so have used the phrase 'negation' of pregnancy (Amon et al., 2012; Putkonen et al., 2007a; Putkonen et al., 2007b). As Beier et al. (2006) argue:

...denial and concealment of pregnancy are not separate identities. Instead, they represent different intensity levels of a flawed inner psychological rationalisation of pregnancy that may have many different reasons (2006: 726).

Others have argued that there is no fixed line between unconscious and conscious denial as a defence mechanism, instead it is more of a fluid transition (Brezinka et al., 1994; Green and Manohar, 1990). Similarly, Spinelli (2001) argues that to be able to deny something one must have a prior knowledge of the existence of the reality being denied. Thus, there is no consensus as to

whether a woman can lack conscious awareness of her pregnancy, and consequently the language that should be employed to symbolise awareness. Women's awareness of their pregnancies in these cases does not seem to be clearly definable. Undetermined and varying levels of awareness do not appear to be uncommon. As 'concealed' and 'denied' are the two most common phrases in use in the literature, and as the distinction between the two is unclear I will use the term concealed/denied when discussing this experience.

The consequence of concealed/denied pregnancy is that the expected symptoms and bodily changes of pregnancy can be misinterpreted, significantly reduced or absent (Brezinka et al., 1994; Milstein and Milstein, 1983; Milden et al., 1985; Spielvogel and Hohener, 1995), as can the signs and pains of labour (Spinelli, 2003; Miller, 2003). There have been reports that a discovery of pregnancy at six or more months gestation can lead to a woman who had no previous signs of pregnancy to suddenly developing them, such as growth in breasts, weight gain, growth in abdomen and detection of foetal movements (Bascom, 1977; Sandoz, 2011). Many studies have noted that those around pregnant women, including parents and sexual partners residing in the same home, are also involved in the concealment/denial, the nature of their subjective knowledge also being uncertain (Finnegan et al., 1982; Vellut et al., 2012; Meyer and Oberman, 2001; Beyer et al., 2008; Amon et al., 2012).

Concealed/denied pregnancy is conceptualised from a biomedical perspective and it is perceived that women who experience the phenomenon may have a psychiatric disorder (Murphy Tighe and Lalor, 2016); evident in the description

as a 'reproductive dysfunction' used by Beier et al. (2006). As such, attempts to determine risk factors associated with women who conceal/deny pregnancy have been attempted, but with limited success. Studies have found that women who conceal/deny pregnancy come from all social classes, and are not determined by age or marital status (Friedman et al., 2007; Wessel et al., 2007). Psychological distress, fear, stigma and isolation have been noted as factors (Conlon, 2006; Thynne et al., 2012), as has being a victim of rape, incest, and domestic and emotional violence (Spielvogel and Hohener, 1995; Friedman et al., 2007; Porter and Gavin, 2010; Spinelli, 2001). However, others have disputed some or all of these suggestions, noting that a denial/concealment could occur in any well-adjusted woman if the right external pressure and psychological conflict occurs (Jenkins et al., 2011; Wessel et al., 2007). Consequently, a number of scholars have concluded that increased surveillance of all women of childbearing age is an appropriate tool to prevent concealed/denied pregnancies; including regular administration of pregnancy tests (Jenkins et al., 2011; Kaplan and Grotowski, 1996). Jenkins et al. (2011) argue that concealed/denied pregnancy should be viewed as a 'red flag' that should trigger referral for psychiatric assessment. The overwhelming perception in the literature is that a concealed/denied pregnancy will have detrimental effects on both the woman and the foetus/child. Consequently, stark warnings of the dangers of this behaviour are presented, for example Murphy Tighe and Lalor (2016) note that a woman may experience psychological stress and childbirth complications, such as postpartum haemorrhage or death; the foetus/child may have delayed diagnosis in foetal abnormalities that could be treated, low birth weight, prematurity, birth injuries, abandonment or death.

Fears of such harm are not without their merit, but it must be noted that concern over the welfare of the foetus/child in concealed/denied pregnancies is largely due to the strong connection made with neonaticide. A further aspect of risk and concealed/denied pregnancy, is the concept that this behaviour is abnormal and thus worthy of academic study. While this perception is perhaps not misplaced, it nevertheless signifies the extent to which declaration of pregnancy and pursuit of medical advice is now deemed to be the norm. Consequently, any other behaviour has been pathologised and thus believed to require explanation. This point is significant in relation to the data explored in Chapter 5.

## **Neonaticide**

Many studies focused on neonaticide have concluded that a concealed/denied pregnancy is a risk factor for neonaticide (Jenkins et al., 2011; See also Alder and Baker, 1997; Beier et al., 2006; Beyer et al., 2008; Craig, 2004; Friedman et al., 2012; Friedman and Friedman, 2010; Friedman et al., 2005; Meyer and Oberman, 2001; Oberman, 2003a; Porter and Gavin, 2010; Saunders, 1989). However, as Spinelli (2010) argues, neonaticide is an unusual outcome of denied pregnancy and may be due to other types of psychopathology. Similarly, Vellut et al. (2012) argue that we cannot determine the extent to which concealment/denial of pregnancy results in a neonaticide as studies of occurrences of neonaticide draw on different sources to those studying concealment/denial, preventing any form of meaningful comparison. Statistical evidence further supports the argument that concealed/denied pregnancy is not a risk factor for neonaticide. Wessel et al. (2002) argues that in Germany one in every 2,455 pregnancies are denied for the whole term and result in an

unexpected birth of a viable newborn. Pierronne et al. (2002; cited in Gonçalves et al., 2014) argue the rate in France is one in 1,000. In Wales it is estimated that concealed pregnancies occur one in 2,500 deliveries (Nirmal et al., 2006). In England and Wales 700,999 babies were delivered, live- and stillborn, in 2015 (Office for National Statistics, 2016a). Using the Nirmal et al. (2006) calculation, approximately 280 concealed/denied pregnancies would have occurred in England and Wales in 2015. While we do not know the exact instances of neonaticide (or perinatal death) that occur each year, as discussed in the Introduction, the estimated figure is far lower than 280. Thus, it is reasonable to conclude that while neonaticide often occurs after a concealed/denied pregnancy, a concealed/denied pregnancy does not clearly indicate a risk of neonaticide.

As with the concealment/denial literature, the neonaticide literature also presents a fractured picture of the characteristics of the perpetrator and nature of the killing. This lack of consistency can be partly explained by the nature of individual studies. For example, Beyer et al. (2008) argues that psychiatric literature often includes older women, whereas criminological literature tends to identify younger women. Similarly, the sources of data that a study utilises can also impact the conclusions drawn. Bortoli et al. (2013), for example, reviewed studies conducted in prisons, psychiatric units and the general population, finding that higher rates of mental disturbance were reported in studies conducted in psychiatric units. Nevertheless, even with this caveat, key findings can be drawn from the literature. Due to social, cultural and religious contexts the literature reviewed is focused on Australia, Europe, New Zealand and North

America. It should also be noted that this literature is focused on a contemporary understanding of neonaticide. Newborn child death has a long history and extensive historiographies exist in relation to characteristics of the perpetrator, causes, and social and legal responses to the phenomenon. The legal history of neonaticide in England will be explored in Chapter 4.

Neonaticide is almost exclusively a female crime. Almost all research identifies only female perpetrators. However, two studies have identified male perpetrators, both are based on findings from criminal justice material (Makhlouf and Rambaud, 2014; Beyer et al., 2008). Much of the literature constructs a stereotype of the neonaticidal woman: she is young, often a teenager, single, lives with her parents, comes from a low socioeconomic background, and has few economic, social and emotional resources to deal with the pregnancy (See Alder and Baker, 1997; Camperio Ciani and Fontanesi, 2012; Craig, 2004; d'Orbán, 1979; Resnick, 1970, 1969; Friedman et al., 2012; Porter and Gavin, 2010). Many women are also described as 'passive', not taking active steps to address the pregnancy (Brozovsky and Falit, 1971; Spinelli, 2001; Beyer et al., 2008; Amon et al., 2012). Nevertheless, cases of non-stereotypical neonaticidal women have been presented. For example, perpetrators older than teenagers have been identified in numerous studies (Meyer and Oberman, 2001; Friedman et al., 2005; Beyer et al., 2008; Vellut et al., 2012). The Amon et al. (2012) review of coroner's reports and death certificates in Finland and Austria concluded that perpetrators' average age was 28. There is also dispute in the literature about perpetrators' socioeconomic background, for example Beyer et al. (2008) in their review of law enforcement case files in the US concluded that

the majority of the offenders were middle-class, with only 5 out of 37 women identified as working-class. Similarly, the Vellut et al. (2012) review of French judicial files concluded that no distinctive socio-demographic profile could be identified. A review of cases in the US using newspaper reports, conducted by Meyer and Oberman (2001), found the sample came from diverse socioeconomic backgrounds and across ethnic groups. Many studies reported that perpetrators are not always single, childless and living with their parents. Amon et al. (2012) noted that 16 of 28 perpetrators were married or living with a partner and all sixteen reported having sexual relationships during the pregnancy. Whilst Beyer et al. (2008) found that 15 of 40 perpetrators had experienced previous pregnancies, with eleven women having living biological children. From this review of the literature I would suggest that demographically there is no 'typical' woman who commits neonaticide.

A further debate in the literature concerns the extent to which women who commit neonaticide are in control of their actions and their state of mind at the time of the act or omission that resulted in the death of the child. Scholars argue widely that neonaticidal women are not psychotic and that psychopathology is rare (d'Orbán, 1979; Amon et al., 2012; Meyer and Oberman, 2001; Alder and Baker, 1997; Craig, 2004; Beyer et al., 2008; Camperio Ciani and Fontanesi, 2012; Friedman et al., 2012). After reviewing the literature, Porter and Gavin (2010) conclude that women's 'actions of concealing the pregnancy, labour, and corpse strongly suggest they are able to function in their own best interest' (2010: 108). Indeed, much of the literature appears to consider the actions of the woman to be for the purpose of personal gain or self-preservation in ridding

themselves of an unwanted child (Friedman et al., 2012; Makhoul and Rambaud, 2014; Camperio Ciani and Fontanesi, 2012; Motz, 2008). Studies of this nature provide limited context to the lives of neonatal women.

Studies with the aim of exploring the lives of such women, have provided further understanding of their motivation and mental state. In their review of law enforcement files in the US Beyer et al. (2008) conclude that women are often motivated by fear, associated with shame and guilt of being pregnant and concern about the reaction of parents, partners and others if the pregnancy is discovered. Oberman (2003b) argues that maternal filicide is deeply embedded in and responsive to the societies in which it occurs. Oberman's social-legal work with Meyer (2001) into the instances of maternal filicide and neonaticide in the US has led them to conclude that overwhelming fear and shame of pregnancy explains women's behaviour. In many of the cases in their sample women were living with other sources of stress, such as religious or social values governing sexuality, immigration status, financial hardship, domestic violence. Fear associated with the pregnancy can be experienced as a threat to personal wellbeing. Rather than experiencing a profound psychotic state, the experience is temporary and varies in depth. Meyers and Oberman argue that the active fear and cognitive denial of pregnancy experienced by these women leads them to postpone any decision about the pregnancy until it is too late and they are giving birth alone; the birth often comes as a shock to the woman. They argue that the motivation for killing comes from fear and panic, rather than anger; it is common for women not to remember the birth and some women with a more profound denial will not recall the pregnancy. Spinelli (2003) draws



similar conclusions after conducting psychiatric interviews with seventeen American women who were accused of killing their newborn children. The aim of the interviews was to determine the mental status of the women at the time of the offence to assist the court cases. Spinelli categorised the women as having unassisted births associated with dissociative psychosis in 10 cases, dissociative hallucinations in 14, and intermittent amnesia delivery in 14 cases. All the women in her study described 'watching' themselves during the birth. Twelve experienced dissociative hallucinations ranging from an internal commentary to critical and argumentative voices, 14 experienced brief amnesia, 9 described associated psychotic symptoms at the sight of the infant. Following the dissociation hallucination and amnesia the women awoke to find a dead newborn child whose presence they could not explain. The women lived in a context of social isolation, emotional neglect, leading chaotic lives and with bizarre and strained relationships with their parents. Two psychiatric case studies presented by Brozovsky and Falit (1971) provide similar accounts. Both women denied knowledge of their pregnancies and Brozovsky and Falit conclude that in these situations the birth of the child is a shock to the woman. Denial continued through labour and only ended when the babies began to cry. Brozovsky and Falit hypothesise that it is the end of the denial, accompanied by the overwhelming fear of abandonment by family, that prompted the initial denial, that leads women to kill the child. Further studies have also reported women's feelings of fear of rejection or abandonment by their social circle if the pregnancy is discovered, leading to the concealment/denial of the pregnancy and resulting in the woman birthing alone, often shocked by the experience she is facing (Alder and Baker, 1997; Wheelwright, 2002; Amon et al., 2012).

From this literature it appears that the context of a woman's life before she becomes pregnant has a significant impact on the occurrence of neonaticide. This conclusion is also drawn by Vellut et al. (2012) who conducted a psychological study in France using judicial files. Eight out of the 22 women wanted to keep the baby, and three women changed their opinion from rejection to desire to keep the child during the pregnancy. Nevertheless, they did not prepare for the birth.

Mothers appeared to disconnect pregnancy from childbirth. While a majority was conscious at one time or another of being pregnant, none of them anticipated or prepared for delivery, even though some of them wanted the child. They spoke to no one, did not assign a social existence to the pregnancy, did not register it and did not have prenatal care (2012: 562).

Vellut et al. argue that although the majority of the women knew that they were pregnant at some point, none of them anticipated or prepared for the labour or delivery, and they were unable to confide their knowledge of pregnancy with a third party. Within this context, the only possible outcome in these cases was to give birth in secret, resulting in panic; consequently the woman became a victim of her own deception, and the baby died. Vellut et al. further argue that it is the context prior to the woman being impregnated which causes neonaticide:

The causes of neonaticide are in fact to be looked for prior to pregnancy among these women who appeared to lack knowledge about the realities of sexuality and affective relationships (2012: 562).

They conclude that neonaticide is not unconditionally connected to denied/concealed pregnancy. Similarly, desire for a child and a woman's emotional connection with her pregnancy will not necessarily prevent neonaticide occurring. The context for neonaticide is formed in relation to the characteristics of the woman, the lack of social existence granted to the foetus,

and the nature of her relationships with those around her, 'leading to situations of secrecy and isolation' (2012: 563).

The nature of the context of neonaticide has raised questions about the level of culpability and criminal liability that should be placed on women who cause the death of newborn children. In a case reported by Kaplan and Grotowski (1996) a woman from New South Wales, Australia, gave birth into the toilet, not realising she was pregnant prior to the late stages of labour. She seated herself on the toilet as she believed she was having a bowel movement. Her state is described as an 'emotional panic'. After the arrival of the emergency services she was assisted off the toilet and the baby was found to be full-term, but dead; cause of death is not discussed in the paper. The authors note that no legal consequences occurred for the woman, and the obstetricians believed the death was due to unfortunate consequences of the circumstances of the birth. Kaplan and Grotowski note that this is not a case of neonaticide. Kaplan and Grotowski do not aim to discuss the legal parameters of the case, or reasons why the criminal justice system chose to not respond to the death. I highlight the case to demonstrate a recorded example of leniency. For other women such leniency has not been demonstrated by the criminal justice system. For example, in the US inconsistency in the decisions to prosecute, determination of guilt, and sentencing is noted by numerous legal and sociological academics (Barton, 1998; Fazio and Comito, 1999; Maier-Katkin and Ogle, 1997). Legal commenters in the US have called for neonaticide syndrome to be recognised as a formal medical condition and therefore to be permitted as evidence of criminal insanity in trials of women accused of newborn homicide. In principle, the

literature in favour of this argument suggests that while women who kill newborn children may not have a mental health disorder, such as schizophrenia or bipolar disorder, the accounts of the women who have committed neonaticide suggest that they were not in control of their actions, and that they were not fully aware of what they were doing or the consequences of their actions (Bookwalter, 1998; Macfarlane, 1998; Wills, 2004).

The literature on neonaticide and denial/concealment of pregnancy raises questions about criminal liability when the foetus/child dies. Considering that a woman may not be in a rational state of mind, or in control of her actions during the pregnancy, birth and in postpartum period, it is questionable if she should be held liable for the death. The argument that neonaticide is caused by the context of a woman's life, and her social isolation, raises further questions as to individual culpability.

## Conclusion

During the twentieth-century significant changes in social expectations of pregnant women and mothers have developed. There are strong connections between the myths of motherhood and the demands placed on pregnant women to manage risk. The myths, despite being socially, culturally, politically, and historically constructed, continue to influence the expectations of women's behaviour and activities of many mothers. These expectations now reach into the lives of pregnant women and operate from conception. A contemporary example can be seen in the response to the Zika virus by Public Health England. Women are being advised to not get pregnant for eight weeks after

she or her male partner return from a country with active Zika virus transmission, if they have no symptoms. If symptoms of the virus are observed, then it is advised that pregnancy be avoided for 6 months following the start of symptoms (Public Health England, 2016). This exemplifies the arguments presented above of the governance of pregnancy; demonstrating an expectation that women will put the needs of an unconceived child before their own, acting as the responsible, and so 'good', mother. Such expectations have consequences for all women in relation to their plans to become pregnant, and decisions to have sex, as many pregnancies are unplanned.

Medical knowledge about pregnancy, the development of knowledge of foetal and prenatal health have had significant impact on how women experience pregnancy. As Lupton (2012b) argues, pregnant women have become a social and cultural spectacle. They are legitimately open and available for public concern, comment, and advisement in ways that would be considered unacceptable or intolerable by non-pregnant people. Within neoliberal society a responsible pregnant woman, synonymous with a good mother, is one who calculates the risks of her actions on the likely outcome for her foetus. The outcome of concern to society is mostly focused on that experienced by the foetus. However, as numerous scholars have noted, there are few assurances in pregnancy and poor health of a foetus often has little to do with the behaviour of pregnant woman; strict adherence to professionally provided guidance will not necessarily produce a healthy foetus. Thus, as Ruhl (1999) and Weir (1996) have argued, individualised or actuarial models of risk simply cannot be applied to pregnancy and the behaviour of pregnant women.

Nevertheless, concern over the behaviour of pregnant women continues.

Pregnancy is perceived as a medical condition requiring professional exploration and treatment. The literature on concealment/denial of pregnancy would indicate that women who fail to seek treatment are perceived to be abnormal and in need of academic study to attempt to understand them and mitigate the risk they pose to their unborn child. Similarly, belief about a connection between concealment/denial and neonaticide continues, despite significant evidence that neonaticide is related to the woman and context of her life, rather than directly to the fact that she concealed/denied her pregnancy.

This chapter has provided an overview of the key issues that surround the social and cultural concerns of pregnancy. Understanding this literature is important for analysis of the data, Chapters 5 and 6. The accepted normality of pregnant women putting the foetus first and self-regulating to ensure a good outcome is evident in the cases of suspicious perinatal death. Such cases demonstrate not only the gendered nature of risk management strategies, but the extent to which the application of criminal law is encoded with gendered assumptions. In the next chapter, legal literature of criminal offences relating to suspicious perinatal death is reviewed. Understanding of the social and cultural context is essential to contextualise the law. Application of the law occurs with consent of the society and mostly conforms to the cultural beliefs of the dominant ideology. Specifically, in relation to identifying perceived criminal wrongs (Simester and Von Hirsch, 2011). This chapter has provided an understanding of the dominant beliefs of the appropriate behaviour of pregnant women. Such beliefs underpin

the principles of perceived criminal wrongs. In conjunction with Chapter 4, this analysis provides the framework for how and why the women in the sample are criminalised.

# Chapter 4 Legal regulation of motherhood

To be a victim of a crime against the person in England it is necessary to be born alive. As such, to obtain a conviction for homicide, the prosecution must prove that the child lived an independent existence from its mother. The born alive rule is a fundamental principle of English criminal law and provides the legal context of the case studies analysed in this thesis. As will become clear from the data analysis in Chapters 5 and 6, prosecutors can draw upon several offences to criminalise and punish women who experience a suspicious perinatal death; homicide offences, notably infanticide; concealment of birth; procuring a miscarriage, and by extension child destruction. This chapter outlines the scope and function of each offence to provide context for the legal analysis in chapter 6 and to demonstrate the distinctions between the English system and the development of foetal protection laws in the US, Chapter 7. The offences were enacted during the nineteenth- and early twentieth-centuries, and the historic development of each has a bearing on the structure and application of the law today. As such a historiography of the offences in question is necessary.

## The implications of concealment

A historical examination of newborn child death in England uncovers a prolonged concern that women who are suspected, but cannot be proven, to have killed their newborn children, have got away with murder. As this brief history illustrates, the law has been shaped to facilitate the criminalisation of suspected women in instances where wrong-doing is identified, but is not



specifically punishable under the law; it is through this desire to criminalise that the offence of concealment came in to force.

In 1624 legislation was first enacted to facilitate criminalisation of women who were suspected of killing their newborn children, 'An Act to Prevent the Destroying and Murthering of Bastard Children' (hereafter '1624 Act') mandated that in instances where a 'lewd' (unmarried<sup>1</sup>) woman...

...be delivered of any issue of her Body Male or Female, which being born alive, should by the Lawe of this Realme be a Bastard, and that she endeavour privatelie either by drowning or secret bury thereof, or any other way, either by herself or the procuring of others, soe to conceale the Death thereof, as that it may not come to light, whether it were borne alive or not, but be concealed, in every such Case the Mother soe offending shall suffer Death as in case of Murther, except such Mother can make proof by one Witness at the least, that the Child (whose Death was by her soe intended to be concealed) was borne dead (Parliament Papers, 1624 21 Jac 1 c.27; cited in Kilday, 2013: 17-8).

Prior to the enactment of this legislation, the requirement to prove live-birth and separate existence made convictions for the murder of newborn children difficult to secure without a witness to testify the infant was born alive (Jackson, 1996b). The 1624 Act directly addressed this difficulty, as the offence removed the burden of proving live-birth in such cases where the offender was an unmarried woman. The statute did not create a new offence, as all people were still tried under the common-law offence of murder, a capital offence. However, it did reverse the presumption of dead-birth of a child, replacing it with a presumption of live-birth in cases involving concealment of the birth of the child born to an unmarried woman. In such cases murder was presumed irrespective of whether or not the child was born alive and evidence of concealment of the birth and

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<sup>1</sup> Marriage was not formally regulated by the state at this time. Smart (1998) argues that the status of being married or not married was more fluid than in subsequent eras.

death of an illegitimate child provided 'almost conclusive evidence of the child's being murdered by its mother' (Blackstone, 1791: 198).

Focus on women who concealed the birth and the body of a child, and by extension the pregnancy, arises specifically during the late sixteenth-, early seventeenth-centuries due to changes in state welfare. Sanctions against women who were suspected of causing the death of their newborn children appears to have always existed (Wrightson, 1975, 1981; Staub, 2004; Walker, 1968; Damme, 1978; Kellum, 1974). However, greater public and official concern over women killing illegitimate infants developed within the context of increased regulation and control of the poor in Elizabethan society (Hoffer and Hull, 1981; Kent, 1973; McLaren, 1990). Unwed women became the target for legislation designed to save the local community from bearing the cost of their offspring (Hoffer and Hull, 1981; Kilday, 2013; Sharpe, 1983). It is the enactment of these poor laws which Hoffer and Hull (1981) and Jackson (1996b) attribute to the rise in unwed women killing their illegitimate newborns. Hoffer and Hull cite a 225 percent increase in the number of criminal indictments after 1576 (1981: 8). Despite this rising figure, it is unclear if this reflected a rise in the level of criminality, or if it was simply a rise in the reporting and conviction rates. Nevertheless, there was public anxiety that unmarried women were concealing their pregnancies, giving birth alone, and killing the child, to conceal the fact that they ever gave birth to that child, with the aim of escaping punishment under the poor laws (Jackson, 1996b; Hoffer and Hull, 1981; Beattie, 1986; Kilday, 2013). The 1624 Act was introduced as a means to capture women who aimed to escape punishment under the poor laws; with the

wider aim to reduce the number of illegitimate children who would be a financial burden on the state (Jackson, 1996b). A consequence of the law was to make concealment of birth a criminal offence for unmarried women, punishable by death (Loughnan, 2012b; Jackson, 1996b; Beattie, 1986). While the legislation appears to reflect religious and moral sentiment, analysis of Parliamentary records by Kent (1973) leads to the conclusions that the aim of the legislatures when regulating personal conduct was to curb behaviour that was deemed to have social implications, rather than purely religious and moral ones. In relation to statute targeting bastardry, the aim appears to have been financial in nature, by reducing the burden of illegitimate children (Beattie, 1986; Jackson, 1996b; Hoffer and Hull, 1981). Nevertheless, the 1624 law and subsequent prosecutions had a clear moral focus. While the killing of both legitimate and illegitimate newborn children persisted, unwed women were targeted for criminalisation (Rapaport, 2006). Thus, the statute reflected wider public concerns with illegitimacy and female sexuality (Gowing, 1997).

Following an initial rise in the rate of convictions the numbers quickly declined (Dickinson and Sharpe, 2002; Hoffer and Hull, 1981; Rabin, 2002). However, by the second half of the eighteenth-century the 1624 Act had widely fallen out of use and unmarried women were more frequently tried under the principles of presumed dead-birth, requiring evidence of live-birth to secure a murder conviction (Jackson, 1996b; Beattie, 1986). During the eighteenth-century, developments occurred within the criminal justice system that proved incompatible to the principles of the 1624 Act; the concept of seeking truth became integral to the trial process; the adversarial system developed; and a

greater emphasis on proof, with the growing belief that where doubt exists it should be resolved in favour of the defendant (Beattie, 1986; Langbein, 1977, 2005; Duff, 2004). Jackson (1996b) argues that as well as the changing nature of the standard of proof required to convict a person of an offence, change in use of the law was due to the changing attitudes to the character of accused women. A 'humanist' approach to newborn killing developed, whereby women were perceived by some to be acting due to a desire to protect their modesty and virtue, rather than as a result of them being lewd, inhumane, and unnatural murderers (see also Clayton, 2009; Staub, 2004). Public and judicial concern also grew about the accuracy of tests used to demonstrate live-birth and hence the reliability of evidence supporting the conviction of women, notably the floating lung test (McLaren, 1990; Kilday, 2013). As such, the number of trials conducted under common law increased, and juries were discouraged from convicting women (Jackson, 1996b; Kilday, 2013; Hoffer and Hull, 1981).

The 1624 Act was repealed in 1803, (hereafter '1803 Act') (*The Parliamentary History of England, 1801-1803: 1245-7*).<sup>2</sup> The 1803 Act re-established the presumption of dead-birth for unmarried women tried for newborn child death. However, the Act created a new offence, concealment of birth (hereafter 'concealment'). The legislation read,

...in Evidence that the Prisoner was delivered of Issue from her Body, Male or Female, which if born alive would have been Bastard, and that she did by secret burying or otherwise endeavour to conceal the Birth thereof... that such Prisoner shall be committed to the Common Goal or House of Correction for any Time not exceeding Two Years (a copy of the final Act is available in 19th Century House of Commons Sessional Papers, 1802-1803: s4).

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<sup>2</sup> 43 Geo. 3 c.58.

The offence only applied to an unmarried woman after she had been charged with the murder of her newborn, and at her trial it was determined she could not be convicted of that offence, then in such an instance, the jury could return the verdict of guilty of concealment. Jackson (1996b) argues the offence punished women for a pattern of behaviour that was deemed punishable but was not technically criminal. The act of concealment was deemed to suggest a presumption of wrong-doing. Furthermore, Jackson argues that the new offence demonstrates the 'persistent prejudice' to unmarried pregnant women (1996b: 172); illustrating continued concern with the moral and legal significance of concealment, considering it to be suspicious and punishable in its own right (Jackson, 1996b; Kilday, 2013). However, use of the offence went further. Concealment provided a legitimate means to punish women who were suspected, but could not be proven to have killed their newborn children. As noted, it was extremely difficult to prove that a child had been born alive, and therefore murder convictions were hard to achieve. Thus, concealment offered a pragmatic solution to the problem of how to punish such women; Davies (1937: 213) refers to the offence as a 'convenient stop-gap'. The offence also facilitated a lenient punishment towards women whom a jury suspected of wrong-doing, but did not want to sentence to death with a murder conviction (Higginbotham, 1989; Brennan, 2013a; Rose, 1986; Walker, 1968). In both respects, it fulfilled the Act's sponsor, Lord Ellenborough's, intention to increase the number of convictions and strengthen criminal law (*The Times*, 1803: 2; Jackson, 1996b; Davies, 1937; Kilday, 2013). As McLaren (1984) argues, Ellenborough was a firm believer in using the law to instil terror, and was motivated by the desire to penalise women, even if the punishment was minor,

rather than have the courts appear to condone the actions of such women by refusal to convict.

During the nineteenth-century the offence of concealment was amended. The law was expanded in 1828 to include any woman, regardless of her marital status, and became a substantive criminal offence that did not rely upon a charge of murder.<sup>3</sup> In 1861, under s60 of the Offences Against the Person Act 1861,<sup>4</sup> the offence was amended so that any person who endeavours to conceal the birth of a child would be guilty of the offence, thus facilitating the conviction of a person who may assist a pregnant woman, or acted with or without her permission. The Act passed without Parliamentary debate. It is under this legislation that the offence of concealment still operates. However, it is no longer possible to be convicted of concealment following a not guilty verdict on an indictment of murder. A conviction of concealment can only be obtained following indictment for that offence.<sup>5</sup>

Today, concealment is categorised by the police as a miscellaneous crime against society, it currently reads:

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.<sup>6</sup>

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<sup>3</sup> Offences against the Person Act 1828 (9 Geo. 4, c.31); a copy of the final Act is available in 19th Century House of Commons Sessional Papers, 1828: s17.

<sup>4</sup> 24 and 25 Vict. c.100; a copy of the final Act is available in 19th Century House of Commons Sessional Papers, 1861: s60.

<sup>5</sup> Criminal Law Act 1967, c.58, s2 13(1)(a).

<sup>6</sup> Offences Against the Person Act 1861, s60.

The legislation has been interpreted and defined by extensive case law (Legal analysis supported by Archbold and Richardson, 2017; Halsbury's laws of England, 2016). The offence prohibits the concealment of the knowledge of a birth through the secret disposal of the body.<sup>7</sup> The ingredients of the offence are, firstly, a woman must be delivered of a child, rather than a miscarriage,<sup>8</sup> and the child must have been developed enough to have a fair chance of surviving outside of the womb;<sup>9</sup> currently 24 gestational weeks. Live-birth is not required for the offence. Secondly, the child must be dead prior to the concealment, whether born alive or not. If the child is alive when the body is concealed then this is not concealment,<sup>10</sup> but it may be a homicide or child cruelty offence. Thirdly, there must be a secret disposal of the body either by the woman or by another person. Secret disposal has been defined by the courts as a body being placed in a location in which it is unlikely to be found; such as a secluded place.<sup>11</sup> Leaving the body in the street is not concealment.<sup>12</sup> The offence has not been committed if the woman is found to still have the body in her possession, even if she is about to dispose of it.<sup>13</sup> Similarly, a woman's denial that she has given birth to the child is not sufficient to support a conviction, without a secret disposal of the body.<sup>14</sup> If a woman allows the dead body to be taken away she has not committed the offence, unless she requests for the body to be disposed of in a secret place, or has knowledge of someone else's intent

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<sup>7</sup> *R v Rosenberg* [1906] 70 JP 264.

<sup>8</sup> *R v Hewitt, R v Smith* [1866] 4 F & F 1101.

<sup>9</sup> *R v Berriman* [1854] 6 Cox CC 388.

<sup>10</sup> *R v May* [1867] 10 Cox CC 448.

<sup>11</sup> *R v Brown* [1870] LR 1 CCR 244; see also *R v Sleep* [1864] 9 Cox CC 559; *R v Cook* [1870] 11 Cox CC 542; *R v George* [1868] 11 Cox CC 41; *R v Waterage* [1846] 1 Cox CC 338.

<sup>12</sup> *R v Clark* [1883] 15 Cox CC 171.

<sup>13</sup> *R v Snell* [1837] 2 Mood & R 44.

<sup>14</sup> *R v Turner* [1839] 8 C & P 755.

or consents to it.<sup>15</sup> In which case both the woman and the person who has concealed the body have committed the offence.

The *mens rea* of the offence is to endeavour to conceal the birth of a child. The concealment is from the world at large, not from a particular individual.<sup>16</sup> The offence can be used in circumstances where a child is stillborn, born alive and dies through no fault of the pregnant woman, or born alive and killed by the pregnant woman through an act or omission. As such, the offence can be charged in conjunction with a homicide offence or offence against the person. The concealment of the body does not need to be linked in any way to the cause of death and the offence can be used even where concealment is only a circumstance of the death of the child, rather than the cause. Furthermore, the reason for wishing to conceal the birth, subsequent death and the dead body of the child is not of importance to the offence. It is for the judge to decide as a matter of law if there is evidence that the child's body was so placed in order to conceal it, whilst it is for the jury to decide if the defendant had disposed of the body with the intent to conceal the birth.<sup>17</sup>

The dearth of academic research into the offence of concealment means that we have limited knowledge of its use 1900-2010. From historic crime data, a clear downward trend in the number of recorded instances of the offence has been seen 1930-date, see Figure 1; with exception of during and following the Second World War when a peak is witnessed. This peak corresponds with a growing

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<sup>15</sup> *R v Bate* [1871] 11 Cox CC 686; *R v Douglas* [1836] 1 Mood CC 480; *R v Bird* [1849] 2 Car & Kir 817; *R v Skelton* [1850] 3 Car & Kir 119.

<sup>16</sup> *R v Morris* [1848] 2 Cox CC 489; *R v Higley* [1830] 4 C & P 366.

<sup>17</sup> *R v Clarke* [1866] 4 F&F 1040.



concern about women's sexuality and illegitimacy (see for example DeGroot, 2000; Hartley, 1966; Rose, 1998). Convictions for the offence have been low since 2002, as demonstrated in Table 6. The difference between police recorded and conviction data could be explained by the discovery of a body, but the mother never being found, or decisions by the Crown Prosecution Service (CPS) to not prosecute. Similarly, lack of evidence to ensure a conviction may explain the disparity between the figures. The introduction of the Infanticide Act 1938<sup>18</sup> may also have had an impact on the number of recorded instances, prosecutions and convictions of the offence, this will be discussed below. Further data available on use of the offence in recent times can be gleaned from Mackay's (2006) review of CPS files 1990-2003. Out of the fifteen cases of infanticide, four women were charged with concealment of birth as well as infanticide or murder; Mackay does not note if the women were convicted of concealment alongside their infanticide conviction.

Concealment continues to be used in conjunction with homicide offences, as was the intention of legislators when enacting the 1803 Act. However, it is now also possible for a woman to be indicted for concealment alone, notably in instances where proof of live-birth of the child cannot be ascertained. Use of the offence in these two instances leads to two interpretations of the offence, either, it continues to be used in instances where homicide is suspected, but proof might not be possible, potentially due to lack of clear evidence of live-birth, or alternatively, the act of concealing the dead body of a baby may now be understood and interpreted as a criminal act in and of itself, requiring

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<sup>18</sup> 1 and 2 Geo.6, c.36.

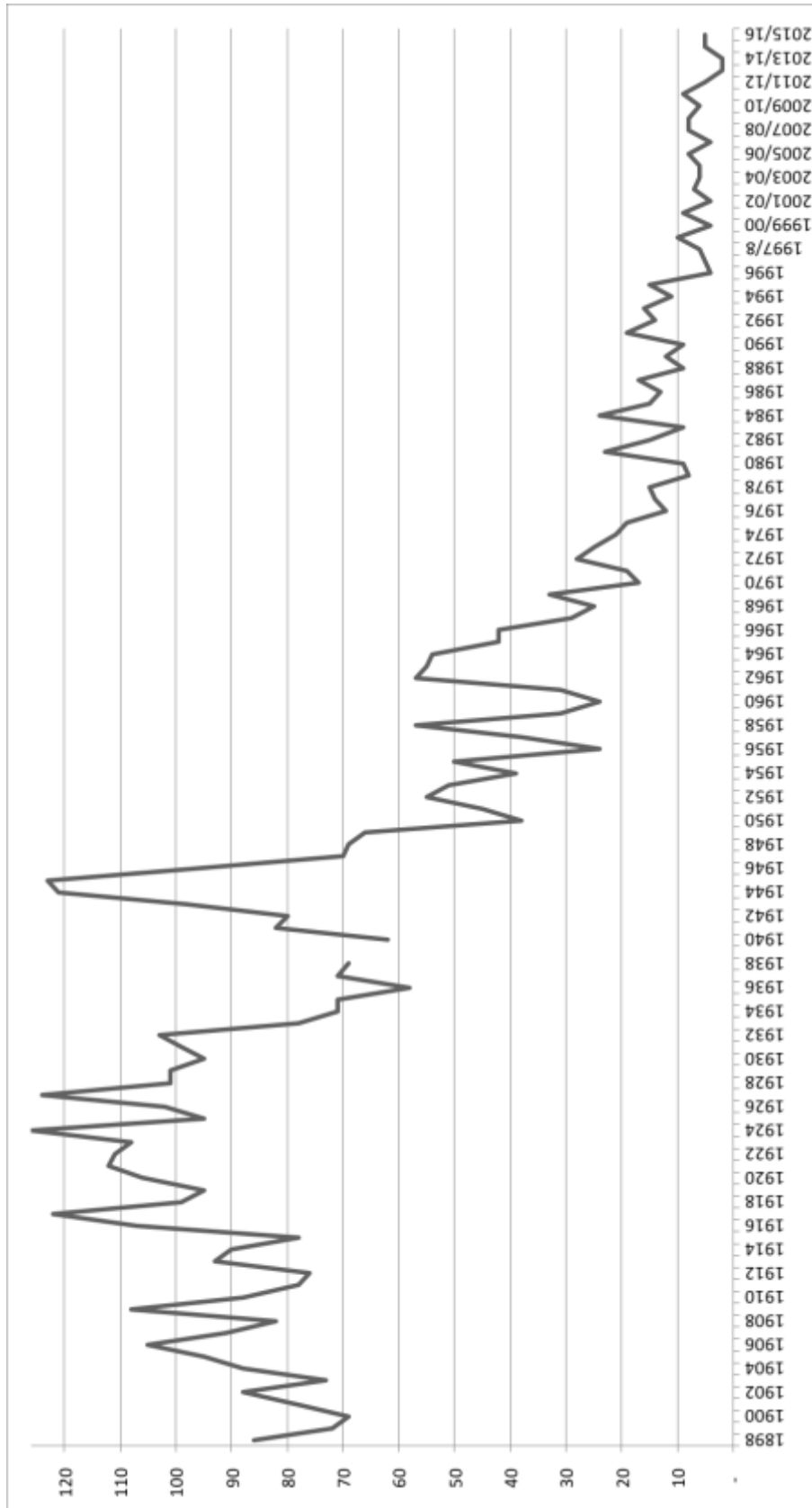


Figure 1 Concealment of birth recorded crime figures 1889 to 2013/14.<sup>19</sup>

<sup>19</sup> Data obtained from Home Office (2016) and Office for National Statistics (2016b).

Year	Police recorded: Concealing an infant death close to birth <sup>20</sup>	Offences charged and reaching a first hearing at Magistrates' courts <sup>21</sup>		Defendants proceeded against at magistrates' courts <sup>22</sup>		Defendants found guilty at all courts <sup>23</sup>	
2002/03	7	2002	-	2002	-	2002	0
2003/04	6	2003	-	2003	4	2003	4
2004/05	6	2004	1	2004	1	2004	0
2005/06	8	2005	3	2005	3	2005	3
2006/07	4	2006	6	2006	3	2006	3
2007/08	8	2007	1	2007	1	2007	1
2008/09	8	2008	3	2008	2	2008	2
2009/10	6	2009	5	2009	4	2009	4
2010/11	9	2010	7	2010	3	2010	3
2011/12	5	2011	0	2011	0	2011	0
2012/13	2	2012	2	2012	0	2012	0
2013/14	2	2013	1	2013	0	2013	0
2014/15	5	2014	0	2014	-	2014	-
2015/2016	5	2015	-	2015	-	2015	-

*Table 6 Offence Concealment of Birth in England and Wales: Police recorded data, offence first charged and reaching a first hearing at the Magistrates' Court, Defendants proceeded against at magistrates' courts, and defendants found guilty at all courts.*

punishment alongside homicide. If the latter, then a shift in the interpretation of behaviour has occurred, moving from what Jackson (1996b) described as criminalising a pattern of behaviour that was deemed punishable, although was not technically criminal, to belief that such behaviour is, in and of itself, criminal. In the cases reviewed by Mackay (2006), not all women who hid the body of their infants were charged with concealment. Such evidence of the use of the law would suggest inconsistency in application. An assessment of the purpose and use of the offence is presented in Chapter 6, with consideration of the cases in the data sample.

<sup>20</sup> Data obtained from Office for National Statistics (2016b).

<sup>21</sup> Data obtained from Crown Prosecution Service FOI ref. 4974.

<sup>22</sup> Data obtain From Ministry of Justice, FOI ref. 921-14 94607.

<sup>23</sup> Ibid.

## Procuring a miscarriage

Debate exists within the historic-legal literature that whether prior to 1861 a woman could be held criminally liable for ending her own pregnancy (see Dickens, 1966; Keown, 1988; McLaren, 1984). This ambiguity ceased with the enactment of s58 of the Offences Against the Person Act 1861 (a copy of the final Act is available in 19th Century House of Commons Sessional Papers, 1861: s58-9). Keown (1988) argues that the change to the statute to specifically target women who self-abort was only a clarification of the law, rather than substantive change, as self-abortion had always been a common-law offence. However, as the statute passed with limited political and popular debate (Potts et al., 1977), it is not possible to know why women were specifically targeted for criminalisation by this legislation. Generally the literature agrees that the historic purpose of the law was to prevent or condemn the intentional destruction of foetal life and to prevent harm from coming to pregnant women (Dickens, 1966; Keown, 1988; Sheldon, 2016b; Potts et al., 1977). Williams (1958) argues that the second purpose was most important, as the concern was not for the unborn child, but for the injury done to the mothers as a result of the actions of an unskilled abortionist.

Today, abortion is legally regulated through the Offences Against the Person Act 1861, in conjunction with the Abortion Act 1967.<sup>24</sup> The Offences Against the Person Act currently reads,

s58 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

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<sup>24</sup> c.87.

whatsoever with the like intent... and being convicted thereof shall be liable to be kept in penal servitude for life.

Exception to prosecution is offered in specific therapeutic circumstances. In its current form, the Abortion Act provides that,

1. (1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith—

(a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or

(b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or

(c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or

(d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

The majority of legal abortions are performed under s1(1)(a), which is interpreted widely and facilitates broad medical discretion (Sheldon, 2016b). In 2015 98% of abortions, numbering 181,231 were carried out under this section, 99.95% of those were reported as being performed because of risk to the woman's mental health (Department of Health, 2016). Numerous scholars have explained why the Abortion Act was passed in 1967 (Brookes, 1988; Keown, 1988; Potts et al., 1977; Sheldon, 1997; Francome, 1986; Dickens, 1966). The main argument is that such a significant number of abortions were occurring without prosecution, that the law was essentially meaningless, and medical professionals exerted significant influence on the framing of abortion legislation, ensuring that control and regulation of therapeutic abortion fell to them. As such, the Act confirmed

previous common-law relating to the medical profession, notably *R v Bourne*<sup>25</sup> which established that abortion was legal if conducted with the intention to preserve the life of the mother and that the concept of preserving life included both physical and mental health.

What is of relevance to this thesis is the consequence of the Offences Against the Person Act 1861 in conjunction with the Abortion Act 1967 upon the liability faced by women who may choose to self-abort (Legal analysis supported by Archbold and Richardson, 2017; Halsbury's laws of England, 2016). A self-abortion remains illegal under s58 of the Offences Against the Person Act, as it would not be conducted within the legal limits of the Abortion Act. It is not necessary for the attempt of self-abortion to cause a miscarriage – the foetus does not need to die, nor does its body need to be expelled from the uterus for the offence to be committed, however intent to procure a miscarriage must be proven.<sup>26</sup> Therefore, if the attempt fails and the pregnancy continues then the offence has still been committed. An attempt to procure a miscarriage that results in the foetus being born alive would also constitute the offence. Similarly, if the attempt results in the foetus dying, but the body not being expelled from the uterus then the offence has still been committed.

The substance must be a poison or noxious thing and it is not sufficient to prove merely that the accused imagined that the substance administered would have the interested effect.<sup>27</sup> 'Poison' is a recognised poison and it is irrelevant if the

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<sup>25</sup> [1939] 1 KB 687.

<sup>26</sup> *R v Cramp* (1880) 5 QBD 307; *R v Spicer* (1955) 39 Cr App R 189.

<sup>27</sup> *R v Isaacs* (1862) LJMC 52; *R v Hollis* (1873) 12 Cox 463.

quantity taken is too small to be capable of doing harm.<sup>28</sup> 'Noxious thing' refers to something other than a recognised poison that is harmful in the dosage when administered, even though it may be harmless in small quantities.<sup>29</sup> If the substance produces a miscarriage then it is clearly a noxious thing within the statute,<sup>30</sup> but even if it does not and cannot it may still be considered a noxious thing,<sup>31</sup> as long as the quantities in which it is administered can have some harmful effect on the human system.<sup>32</sup> However, it is not necessary that the substance should be an abortive.<sup>33</sup> 'Any other means' includes manual interference and hitting a woman in the lower part of her body.<sup>34</sup> It is irrelevant if the means used to procure the miscarriage are incapable of doing so.<sup>35</sup> In order for a woman to be convicted of the offence it must be proved that she was actually pregnant at the time of attempting to procure a miscarriage. If she is not pregnant then she may be convicted of attempt to commit the offence or of conspiracy to commit it or aiding and abetting others.<sup>36</sup> 'Miscarriage' is constructed as presupposing that the fertilised ovum has become implanted in the uterine endometrium, as such the use of drugs or devices that prevent implantation of a fertilised ovum, such as the morning after pill, do not constitute the offence.<sup>37</sup> However, 'contraceptive' drugs that operate at the time of or following implantation to either be taken once per menstrual cycle (rather than

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<sup>28</sup> *R v Cramp* (1880) 5 QBD 307.

<sup>29</sup> *R v Cramp* (1880) 5 QBD 307; *R v Hennah* (1877) 13 Cox CC 547; *R v Marcus* [1981] 1 WLR 774.

<sup>30</sup> *R v Hollis* (1873) 12 Cox 463.

<sup>31</sup> *R v Marlow* (1965) 49 Cr App R 49.

<sup>32</sup> *R v Hennah* (1877) 13 Cox CC 547.

<sup>33</sup> *R v Marlow* (1965) 49 Cr App R 49.

<sup>34</sup> *R v Spicer* (1955) 39 Cr App R 189.

<sup>35</sup> *R v Marlow* (1965) 49 Cr App R 49; *R v Spicer* (1955) 39 Cr App R 189.

<sup>36</sup> *R v Whitchurch* (1890) LR 24 QBD 420; *R v Sockett* (1909) 1 Cr App R 101.

<sup>37</sup> *R (on the application of Smeaton) v Secretary of State for Health* [2002] EWHC 610 (Admin), 2002 WL 498814.

throughout as with currently available contraceptive drugs), or once a woman's menstrual period is late, would constitute the offence (Sheldon, 2015).

The current legal regulation of abortion has come under scrutiny in recent years. Sheldon (1993, 1997) has long argued that the law has always refuses to recognise that women have a fundamental right to decide to terminate a pregnancy. Instead the law advocates that doctors are the best people to determine if a woman should be allowed an abortion. A woman has no fundamental right to an abortion in England (Sheldon, 2014). She concludes that the framing of the Abortion Act 1967 to give control and decision-making to medical professionals directly relates to the way women were constructed by Parliament when enacting the legislation (Sheldon, 1993, 1997). In Parliamentary debates relating to the Abortion Act, motherhood was portrayed as the normal role for a woman; women were constructed by political discourse as minors in terms of immaturity and lacking responsibility or morality; as victims in horror-stories of back-street and self-abortions; and portrayed as fraught and being out of their minds due to the pregnancy. In contrast, the doctor was constructed as a male, mature, responsible and professional. In her most recent work, Sheldon (2016a, 2016b) has directly called for decriminalisation of abortion. Sheldon (2016b) argues that criminal controls on abortion are now outdated, out of step with modern medical science, and serve to hinder clinical best practice. The Abortion Act was enacted with two purposes in mind, neither of which are achieved under current criminal law. Firstly, like the Offences Against the Person Act 1861, the Abortion Act aimed to prevent harm to women by ensuring abortions were conducted by skilled practitioners and in hygienic



conditions. Sheldon argues that the advances in medicine since 1967 make the criminal prohibition of abortion unsustainable: abortion in the UK carries a far lower risk of maternal death than does carrying a pregnancy to term; and there is no good evidence to suggest that abortion causes psychological injuries to women and claims it causes breast cancer or infertility have been demonstrated to be scientifically unfounded. Sheldon argues that as the aim of the Abortion Act was to protect women, it seems odd that they potentially face life imprisonment if accessing abortion outside of the medical system, arguing that other medical practices that have been accessed illegally and result in harm to the user, such as elective cosmetic surgery, result in calls for further regulation of the practice, not criminalisation of the patient. In opposition to the argument that abortion must remain part of criminal law to prevent women being coerced into an abortion, notably sex-selective abortions, Sheldon argues that removal of existing statute would not reduce the robust consent procedure currently practiced and regulated by the medical community. Furthermore, Sheldon questions whether criminalisation of women who seek illegal abortions due to coercion is the most appropriate way to address the structural sexism that leads to such behaviour.

The second purpose of the Abortion Act 1967, Sheldon argues, was to protect foetal health and to ensure that only socially acceptable abortions take place by ensuring that access to abortions is facilitated by the professional medical community. The foetus is of moral value and holds a significance that increases as it grows throughout pregnancy. However, Sheldon argues that this argument is insufficient grounds to criminally prohibit abortion as, even if the rights of the

foetus are seen to be greater than a woman's right to autonomy, gender equality, and reproductive health, criminal regulation of abortion does not function to protect fetuses through prevention or condemnation of abortion. Evidence suggests that restrictive abortion laws do not prevent women from having abortions as some women will successfully access illegal abortions. Such policy causes moral, social, physical, financial, and emotional harm to women by forcing some to continue with an unwanted pregnancy and others to travel outside of their country to access an abortion (such as women living in Northern Ireland or the Republic of Ireland), or to risk mortality and morbidity by having an illegal abortion. Belief that abortion should remain illegal to discourage women from having the procedure would, in Sheldon's opinion, result in medical professionals being required to act as gatekeepers and to persuade women to keep the pregnancy, which would be troublingly coercive. Furthermore, use of criminal law to demonstrate society's moral disapproval of abortion is out of line with popular opinion which generally supports a woman's right to choose to have an abortion. The current framing of the law does not actually convey the message that an abortion is a moral wrong that should be condemned at all gestations, as the Offences Against the Person Act 1861 needs to be read in line with the Abortion Act. Instead, the law advocated that abortion is a serious moral wrong when not carried out under medical orders and 'in line with the best medical practice of the 1960s' (2016b: 356). Thus the message of the law is one of medical paternalism as women are deemed to be relatively incapable of making morally significant decisions. Sheldon (2016b: 356) concludes that abortion law 'fails to fulfil any demonstrable modern purpose': the impact upon the number of abortions performed is unknown; it

stigmatises women who need abortions; and imposes clinically unwarranted and bureaucratic restrictions on medical practice. Sheldon does acknowledge that decriminalisation would offer less appropriate recognition of the moral respect due to the human foetus. However, she also advocates that changing the law would not prevent intentional destruction of foetal life as there is unlikely to be significant impact on the number of abortions performed – most occur before the 13<sup>th</sup> week of gestation has been reached. Sheldon does acknowledge that decriminalisation of abortion would impact post-viability abortions and raising moral concerns for many. Nevertheless, she questions what is gained by criminalising women at any stage of gestation, suggesting that the removal of barriers that discourage women from accessing professional advice and support would be of benefit.

Calls for decriminalisation of abortion have received increased political support since 2016, marked by the launch of the campaign *We Trust Women* (2016), led by the British Pregnancy Advisory Service and supported by a range of women's rights groups, reproductive rights campaigners and professional bodies.<sup>38</sup> On 13 March 2017 MP Diana Johnson introduced a Private Members' Bill, *Reproductive Health (Access to Terminations) Bill 2016-17*. The Bill sought to repeal s58 and s59 of the Offences Against the Person Act 1861, which would result in abortion prior to 24 weeks gestation being regulated solely by the medical community, while abortions post-24 weeks gestation would continue to

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<sup>38</sup> Supporters include, the Royal College of Midwives, Women's Aid, Fawcett Society, Maternity Action, the British Society of Abortion Care Providers, Birthrights, Lawyers for Choice, End Violence Against Women, Equality Now, IPPF European Network, Voice for Choice, Southall Black Sisters, Alliance for Choice NI and Doctors for a Woman's Choice on Abortion.

be controlled within criminal law through the Infant Life (Preservation) Act 1929<sup>39</sup> (discussed below). The Bill passed 172 to 142 and progressed to the second reading, which failed to go ahead due to the calling of the 2017 General Election. Johnson argued that current law poorly serves women as it states that even early-term abortions are inherently criminal, and it poorly serves doctors who must operate within a criminal framework that does not apply to other areas of healthcare (HC Deb 13 March 2017, vol 623). Political engagement with the issue demonstrates discontent with current legislation.

## The gap between spontaneous birth and legal personhood

The offence of procuring a miscarriage is closely connected with the offence of child destruction. If charged with procuring a miscarriage, a defendant can be found guilty of child destruction instead, and vice versa. Similarly, if charged with murder, manslaughter, or infanticide a jury may find the defendant guilty of child destruction instead. Child destruction became a criminal offence in 1929 with the enactment of the Infant Life (Preservation) Act 1929. The statute legislates that,

...any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a 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 on indictment to penal servitude for life.<sup>40</sup>

The term 'capable of being born alive' is defined as meaning one who can breathe naturally or with the aid of a ventilator.<sup>41</sup> In *R v Mid-Downs HA*,<sup>42</sup> it was

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<sup>39</sup> 19 and 20, Geo.5, c.34.

<sup>40</sup> *Ibid*, s1(1).

<sup>41</sup> *C v S (Foetus: Unmarried Father)* [1988] QB 135; [1987] 2 WLR 1108.

<sup>42</sup> [1991] 1 QB 587.

ruled that capable of being born alive meant being able to 'breathe and live by reason of its own breathing without deriving any of its living or power of living by or through any connection with its mother'. When the Infant Life (Preservation) Act was enacted, 28 weeks' gestation was deemed to be the point at which a foetus was capable of being born alive; today it is 24 weeks. The offence of child destruction has not been committed if a registered medical professional terminates a pregnancy in accordance with the Abortion Act. If the case does not fall within the Abortion Act 1967 then the defendant has a defence if the act of causing death to the child was done in good faith for the purpose of preserving the life of the mother.<sup>43</sup> It is presumed that an omission would not constitute the offence, as *R v Shepherd*<sup>44</sup> showed the mother of a pregnant woman was under no duty to procure the attendance of a midwife (Legal analysis supported by Archbold and Richardson, 2017; Halsbury's laws of England, 2016; Mackay, 1988).

The offence of child destruction developed out of desire to close a legal loophole that meant a person who killed an infant that was not fully out of the birth canal following spontaneous birth, and so not a legal person, would not be guilty of any offence. As the labour was not induced, the offence of procuring a miscarriage had not been committed, and no offence against the person had been committed due to the child not living an independent existence (Davies, 1937; Graves, 2006). The offence was not intended to regulate abortion and yet Sheldon (2016b) argues it has been used. Most often the offence is utilised in instances

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<sup>43</sup> *R v Bourne* [1939] 1 K.B. 687; *R v Newton and Stungo* [1958] Crim. L.R. 469. Both cases were decided under s58 of the Offences Against the Person Act 1861, but the judgements also apply to the Infant Life (Preservation) Act 1929 s1(1).

<sup>44</sup> (1862) Le & Ca 147.

where a man attacks a pregnant women resulting in the death of the foetus.

Sheldon identified one instance of the offence being used against a woman who procured her own miscarriage of her viable foetus. Two significant differences exist between the offences of procuring a miscarriage and child destruction.

Firstly, the foetus must be born dead for child destruction to occur; this is not the case with procuring a miscarriage. Secondly, a foetus must be considered

viable for child destruction to occur. This is not the case with procuring a miscarriage which can occur any time following implantation prior to spontaneous labour. While none of the women in the sample in this study were convicted of the offence of child destruction, the overlap of this offence with

procuring a miscarriage will be of significance in the discussion of the application of the law in Chapter 6.

of the law in Chapter 6.

of the law in Chapter 6.

## Infanticide

Infanticide is a homicide offence, as well as a partial defence to murder. As will become clear in the discussion in Chapter 6, the existence of the offence, and its use within criminal law has a bearing on cases of suspicious perinatal death.

Therefore, while a discussion of the offence of infanticide is not the focus of the thesis, it is important to understand how the offence developed and its

significance in today's criminal law. In this section I will outline the scope of the legislation, the historic context in which it was enacted, and scholarly

interpretation of its intention and function.

Infanticide is unique a unique offence, it can only be committed by a woman who kills her biological infant during its first year of life, if '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'.<sup>45</sup> If convicted of infanticide, a defendant will be punished as if she were guilty of manslaughter, rather than murder. As such, infanticide operates as an offence, and as a defence to a murder or manslaughter charge. It is very rare for a woman convicted of infanticide to be given a prison sentence (Walker, 1968). Between 2002 and 2013, 12 women were convicted of infanticide: one was conditionally discharged, eight received a community sentence, one a suspended sentence, and two were given hospital orders.<sup>46</sup>

No direct link between the disturbed mind experienced and the act of homicide is required. As such the woman may be fully aware of her actions, and appreciate that they are immoral and criminal, yet still have acted within the parameters of the offence. Furthermore, the link is only temporal, so the disturbance of mind need not have caused the woman to kill the child, she needs only to be disturbed of mind at the time she kills the child (Walker, 1968; Loughnan, 2012b; Allen, 1987). This is different to the partial defence of diminished responsibility, which requires that the 'abnormality of mental function... provides an explanation for D's acts and omissions in doing or being a party to the killing'.<sup>47</sup> Infanticide only applies if a woman who is disturbed of mind due to child birth or lactation kills her own infant. If she kills someone other than her own infant, she cannot rely upon infanticide. Similarly, if a woman kills her own child who is aged over one year then she cannot avail herself of the Infanticide Act. If another person who

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<sup>45</sup> 1 & 2 Geo.6, c36, s1.

<sup>46</sup> Data obtained from Ministry of Justice FOI request, Ref: 004-15 95231.

<sup>47</sup> Coroners and Justice Act 2009, c.25, s52 (1)(1)(a-c).

may also be suffering from a disturbance of mind due to the birth of a child, such as the child's father, or the mother's partner, kills the child, they also cannot rely upon infanticide as a defence.

Historically the infanticide offence/defence only operated as an alternative to murder; however, the 2009 Coroners and Justice Act<sup>48</sup> incorporated the ruling of the Court of Appeal case *R v Gore*<sup>49</sup> to allow an infanticide conviction to be brought in cases that would otherwise be manslaughter. Prior to *Gore* it was generally perceived that the *mens rea* of murder (malice aforethought – either an intention to kill 'express malice', or an intention to do grievous bodily harm 'implied malice')<sup>50</sup> was required for an infanticide conviction to apply; as such the judgment received criticism (Ashworth, 2008). Changes to the language of the Infanticide Act 1938 introduced by the Coroners and Justice Act 2009, limited the offence/defence to circumstances that would otherwise amount to murder or manslaughter. Thus, neglect of a child that falls below the level of 'gross negligence' could not result in a charge of infanticide, see below for discussion of the relationship between neglect and homicide. Reviews of convictions of infanticide and manslaughter by Mackay (1993) concluded that not all instances of infanticide would have been covered by the defence of diminished responsibility under the Homicide Act 1957.<sup>51</sup> The Law Commission (2006) similarly concluded that the removal of the Infanticide Act 1938 in favour of using diminished responsibility would result in more serious levels of criminality and

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<sup>48</sup> Coroners and Justice Act 2009, c.25, s57.

<sup>49</sup> [2007] EWCA Crim 7289.

<sup>50</sup> *R v Moloney* [1985] AC 905 at 921.

<sup>51</sup> 5 and 6 Eliz.2, c.11.



possibly less lenient sentences than is appropriate for the offence (see also Lansdowne, 1990; Maier-Katkin and Ogle, 1997).

The connection between childbirth and lactation and women's acts of violence towards their infants has received significant criticism (Brennan, 2007; Law Commission, 2006; McSherry, 1993; Langer, 2012). Similarly, the infanticide legislation has received criticism from feminists for perceiving to medicalise or pathologise women's acts of violence. For example, Morris and Wilczynski (1993b) argue that the basis of the offence is that the 'ordinary conditions' of childbirth and lactation 'have potentially disruptive effects on the mental state and behaviour of women' (1993b: 204), and that women who act to kill their infants are pathologised and understood as 'mad'. They argue that such an interpretation avoids the social and economic reasons that could lead to a woman killing her child (see also Allen, 1987; Nicolson, 2000; Edwards, 1984; Weare, 2016; Wilczynski, 1991, 1997b). Such theorists see the law as blaming women's acts of fatal violence towards their infants based on their biology. Such theory was popular in the nineteenth century with the development of medical literature on illnesses such as 'puerperal psychosis' (also known as puerperal insanity or mania). Puerperal psychosis was considered a distinct illness caused by the strain of childbirth. Killing one's newborn was understood to be one of the characteristics of the illness, together with depression, hallucination and acute anxiety (Marland, 2004; Loughnan, 2012b; Cossins, 2015; Kilday, 2013). The medical condition of puerperal psychosis and lactation psychosis subsequently lost support as legitimate medical conditions, and mental illness is now not considered to be the cause of a woman killing her infant (for a summary of the

debate see Brennan, 2007; Kilday, 2013; O'Donovan, 1984). Such developments in medical research have fuelled debates surrounding the appropriateness of the Infanticide Act.

However, to consider the offence of infanticide as an example of pathologisation of female offending and medicalisation of women's crime, is, as Loughnan argues, to fail 'to thoroughly grasp the longevity of a set of lay attitudes and beliefs about the ways in which gender, childbirth and 'madness' relate to child killing by mothers' (2012b: 688). Loughnan is one of a number of commentators who focus upon the social, cultural and political context surrounding newborn child homicide trials and statute. This body of literature considers the use of medical doctrine as a means to facilitate lenient treatment, rather than as the basis of that treatment (Ward, 1999; Brennan, 2007; O'Donovan, 1984; Kramar and Watson, 2008, 2006; Grey, 2014). These theorists argue that when first enacted in 1922, the Infanticide Act employed a lay understanding of mental illness that would be wide enough to cover a range of socio-economic mitigates. To openly recognise such factors as causes of infant homicide would undermine the principles of the law (Brennan, 2013b). And so while the language of the Act was framed in medical terms, these theorists argue that it was not the intention of legislators that it would apply in this way.

As argued above, during the nineteenth- and early twentieth-centuries public sympathy existed for unmarried women who were suspect of killing their newborns, and this impacted the rate of murder conviction of such women. Growing sympathies for the 'type' of women who was accused of newborn death

is widely noted by scholars. The typical perpetrator was the 'fallen' woman: single, pregnant, abandoned by the man who impregnated her, ruined and facing destitution. Loughnan (2012b) argues that the gender construction that occurred during the Victorian period, casting women as the weaker, gentler sex, more closely linked and controlled by biology, and more emotional and irresponsible, facilitated the construction of 'the infanticidal woman'. She, like all women, was less autonomous and heavily determined by social forces. This gendered construction, coupled with the medical condition of puerperal psychosis facilitated a compassionate view of the woman who killed her newborn, 'based on sympathy for her weak physical and moral state and for the physical pain suffered by a woman giving birth without assistance' (2012b: 699; see also Grey, 2014 for discussion of use of the infanticide offence during the twentieth century). Acting out of shame of being pregnant out of marriage was widely accepted as the motivation for women (Davies, 1937; Brennan, 2013a). Consequently, a divide existed between public perception and the letter of the law. As Davies (1937) argues:

The widespread dislike of the application of the law of murder in all its severity to cases of infanticides by mothers led to such a divorce between law and public opinion that prisoners, witnesses, counsel, juries and even many of H.M.'s judges, conspired to defeat the law (1937: 203).

A consequence of this gap between public sentiment and the law meant that holding women criminally responsible for newborn murder was essentially impossible (Brennan, 2013a), and the law had completely broken down (Davies, 1937). Concern over the ineffectiveness of criminal law is evident in the attempts at reform in the second half of the nineteenth-century (see Davies, 1937, 1938; Brennan, 2013a; Ward, 1999; Graves, 2006). The onus of proof of

live-birth continued to impact convictions, as it had from the late sixteenth-century. Medical tests to demonstrate live-birth were still considered unreliable (Kilday, 2013; Brennan, 2007; Graves, 2006), but medical witnesses and jurors actively used these ambiguities to find a woman not guilty so as to spare her the gallows (Brennan, 2013a). If a murder conviction was achieved, then justice was still considered to be evaded, due to the unlikelihood that the mandatory death sentence would be carried out. The last woman to be executed for infant murder was in 1849, and the last woman to be executed for newborn child murder was in 1832 (Wiener, 2004: 124-5). After this date, all other women found guilty of infant murder had their death sentences commuted by Home Secretaries. This pattern of condemning a woman to die, only to have the sentence reprieved was dubbed the 'solemn mockery' by one judge providing evidence to the Royal Commission on Capital punishment in 1866 (Davies, 1937). Similarly, Walker (1968) notes that the parliamentary debates on the various Bills proposed to amend the law frequently noted the distress experienced by judges, when sentencing women to death in such cases. By the end of the nineteenth-century, and in the early twentieth-century, the law was deemed to be neither preventing newborn death, as the punishment was never enacted (Davies, 1937), nor punishing offenders, as the use of offences such as concealment, while offering some punishment, did not provide the severity deemed suitable for homicide (Brennan, 2013a). The creation of the Infanticide Act 1922<sup>52</sup> allowed an end to the 'black-cap farce', and offered 'an official mechanism for compassionate response' (Brennan, 2013a: 800). Ward (1999, 2002) argues that the creation of the infanticide offence facilitated punishment

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<sup>52</sup> 12 and 13 Geo.5, c.18. A copy of the final Act is available in 20th Century House of Commons Sessional Papers (1922).

for those women who killed newborn children, while recognising that their position of becoming pregnant out of marriage had led them to this vulnerable position.

The 1922 Infanticide Act only applied to 'newly-born' victims and for this reason it was swiftly criticised by doctors, lawyers, and the public. The cases of Mary O'Donoghue,<sup>53</sup> who killed her 35-day-old baby, and Brenda Hale who cut the throat of her three-week-old child in 1936, challenged the offence as popular, medical, and legal commenters constructed the women as fitting the aspect of the law regarding their mental state at the time of the killing. This interpretation is notable in the case of Hale, who was deemed to be suffering from puerperal psychosis. As such, in 1938 the law was re-enacted to include infants aged up to one year and lactation was included as a cause of 'disturbance of mind' (for discussion of the change in law see Davies, 1945; Walker, 1968; Ward, 1999, 2002).

Since 1938, developments in criminal law have resulted in further questioning of the need of the offence of infanticide. The creation of diminished responsibility as a defence for murder, introduced by the Homicide Act 1957, raised further critique of the infanticide offence as necessary to spare women a murder conviction and the death penalty. Similarly, the abolition of the death penalty in England in 1965<sup>54</sup> meant that concern that perpetrators would hang no longer existed. Nevertheless, the offence is considered important in facilitating lenient treatment in instances that may not be covered under diminished responsibility

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<sup>53</sup> (1927) 20 Cr App Rep 132.

<sup>54</sup> Murder (Abolition of Death Penalty) Act 1965, c.71.

(Law Commission, 2006). The Commission noted that despite the criticism it has received, the offence/ defence provides a practicable legal solution to particular circumstances and therefore they advised no changes to the offence itself. This recommendation was accepted by the Government at the time (HM Government, 2009; Ministry of Justice, 2008).

Commenters have argued that the offence simplifies the link between *actus reus* of the offence (act of killing) and mental incapacity, thus creating a 'virtual assumption' that the woman was not fully responsible by reason of her mental illness (Walker, 1968: 135; see also Mackay, 1995). Loughnan (2012b) argues that this virtual presumption forecloses the question of the woman's responsibility, and so she is believed to have reduced responsibility for her actions. As Loughnan argues, 'the infanticidal woman's partial responsibility dovetails with the generalised social construction of an infanticidal type, which substitutes for individualised inquiries into an individual's mental capacities at the time of the offence' (2012b: 704). Loughnan further argues the construction of the act of infanticide as an instantiation of abnormality directly leads to the determination that the accused woman is only partially responsible for her actions. The 'network of meaning' held by both experts and non-experts relating to cases of newborn child death, is such that the act came to be understood as an 'instantiation of abnormality' in both a moral sense, and for criminal law adjunction purposes (2012b: 700). The act of killing is more than just evidence of mental illness, instead, Loughnan argues, the Infanticide Act 1938 incorporates the notion that the abnormality that characterises the accused

woman 'linking her lethal conduct (as caused) to her legal responsibility (as attenuated)' (2012b: 701).

As the mental disturbance is linked to the physiological aspects of bearing a child and lactation, the accused woman's mental disturbance has a physical basis in the reproductive practices carried out by many women on a regular basis. Consequently, as Allen (1987) argues, women who kill children soon after birth are constructed in two contradictory ways – either the mother is considered exempt from responsibility as her act of killing is 'unthinkable' unless due to a pathology, or as the violence is connected to a woman's physiology, it suggests a 'natural maternal violence' that cannot be subject to the usual legal restraints (1987: 28). Many feminists have opposed the offence of infanticide, arguing that it pathologises women's acts of deviance and criminality, negating the socio-economic reasons for women's acts of violence against their children, reducing them instead to individual woman's abnormality of mind or body, and consequently 'providing a basis for the 'ordinary state' of womanhood to be subject to medical and psychiatric gaze' (Morris and Wilczynski, 1993b: 215). Such a construction of women who kill infants may also act to reinforce the myths of motherhood explored in the Introduction – only abnormal women kill their children, as all women are 'natural' mothers and therefore to harm a child goes against nature (Edwards, 1984; Wilczynski, 1991, 1997b; Weare, 2013).

Problems exist in assessing the current use of the infanticide law, due to difficulty accessing materials and cases, outlined in the Methodology. However, research into use of the offence has demonstrated that it is loosely framed and

generously applied in England and Wales, as well as other jurisdictions which have similar statute (Wilczynski, 1997a; Morris and Wilczynski, 1993a; d'Orbán, 1979; Brennan, 2013c, Forthcoming-b; Kramar, 2005). The offence allows for recognition of the socio-economic factors that may lead a woman to kill her own child but frames that mitigation in medical terms, facilitating lenient treatment for those women who are able to present themselves as the infanticidal 'type' and so avail themselves of the lenient treatment (Morris and Wilczynski, 1993b; Mackay, 1993; Weare, 2016). Lenient treatment appears to be unavailable for those women who cannot adhere to the image of the infanticidal 'type', which is imbued with the ideals from the myths of motherhood. Similarly, infanticide prevents a recognition of the vulnerabilities that may lead a woman to conceal a pregnancy, give birth alone and kill the child (Ayres, 2007, 2014; O'Donovan, 1984; Milne and Brennan, Forthcoming; Smart, 1992). However, it must be remembered that without the infanticide legislation it is likely that an increased number of vulnerable women would potentially be imprisoned if their socio-economic circumstances lead them to kill their infant (Brennan, Forthcoming-a).

## Child cruelty

The final offence for which women in the sample are convicted is the offence of child cruelty due to neglect or abandonment. A mother has a 'parental responsibility' to her child from birth. Parental responsibility is defined under s3 of the Children Act 1989<sup>55</sup> as:

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<sup>55</sup> c.41.



All the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.<sup>56</sup>

Cruelty to a child under the age of sixteen is a criminal offence under s1 of the Children and Young Persons Act 1933.<sup>57</sup> It is committed if any person with responsibility for a child,

...wilfully assaults, ill-treats (whether physically or otherwise), neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated (whether physically or otherwise), neglected, abandoned or exposed, in a manner likely to cause him unnecessary suffering or injury to health (whether the suffering or injury is of a physical or a psychological nature).

Neglect is defined as failure of a person with parental responsibility for a child to maintain that child, which includes providing food, clothing, medical aid or lodging.<sup>58</sup> If a person with parental responsibility is unable to maintain the child, they should take steps to procure it to be provided. The child's death is not necessary for the offence of neglect to be committed. For neglect to be proved, two behaviours need be shown, as identified in *R v Sheppard*.<sup>59</sup> The defendant failed to provide that which the child needed, and the failure to provide was 'wilful' – the defendant either was aware at the time that the child's health might be at risk if the aid required were not provided, or that the defendant was unaware of the aid needed due to not caring whether the child's health was at risk. Abandonment is defined as 'leaving the child to its fate'.<sup>60</sup> Exposure of a child under the age of two years is a criminal offence under s27 of the Offences Against the Person Act 1861, defined as, 'whereby the life of such child shall be endangered, or the health of such child shall have been or shall be likely to be

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<sup>56</sup> However, due to the requirement that legal personhood in England and Wales requires independent existent, parental responsibility does not begin until the child is wholly born, this will be discussed further below.

<sup>57</sup> 23 and 24 Geo. 5, c.12.

<sup>58</sup> *Ibid*, s1(2).

<sup>59</sup> [1981] AC 394; [1980] 3 WLR 960.

<sup>60</sup> *Mitchell v Wright* (1905) 7 F 568; *R v Boulden* (1957) 41 Cr App R 105.

permanently injured'. Exposure does not necessarily imply abandonment or consist of physically placing a child somewhere with intent to injure.<sup>61</sup> Again, it is not a necessary element of the offence for the child to die.

If neglect of a child results in the death of that child then it is possible that a separate offence of homicide, distinct from child cruelty, has been committed. Gross negligent manslaughter occurs when a person has a duty of care toward the victim, they act, or fail to act which results in a breach of that duty of care, the breach of duty causes death to the victim, and the breach of duty constitutes gross negligence.<sup>62</sup> The establishment of gross negligence requires the circumstances to be such that a reasonable person would have foreseen a serious risk of death occurring, risk of bodily injury or risk to health is not sufficient.<sup>63</sup> In respect of that risk, the defendant's conduct in all circumstances in which she/he was placed must have fallen so far below the standard to be expected of a reasonable person as to constitute a criminal offence.<sup>64</sup> Thus, in order for negligence of a child to warrant gross negligence and the crime of manslaughter, a person responsible for a child must have failed to act and a breach of duty of care must have occurred, such that a reasonable person would foresee the risk and failure to address that risk was so serious as to constitute a crime.<sup>65</sup> This form of involuntary manslaughter is distinct from

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<sup>61</sup> *R v Williams* (1910) 4 Cr App R 89; *R v Falkingham* (1865-72) LR 1 CCR 222; *R v White* (1865-72) LR 1 CCR 311.

<sup>62</sup> *R v Adomako* [1995] 1 AC 171, [1994] 3 WLR 288 (applying *R v Bateman* (1925) 19 Cr App Rep 8; and *Andrews v Director of Public Prosecutions* [1937] AC 576; and overruling *R v Seymour* [1983] 2 AC 493, 3 WLR 349). See also *R v Prentice, Sullman, Adomako, Holloway* [1994] QB 302; [1993] 3 WLR 927.

<sup>63</sup> *R v Singh (Gurphal)* [1999] Crim LR 582 CA (Crim Div), WL 250004; *R v Misra, R v Srivastava* [2004] EWCA Crim 2375, [2005] 1 Cr App R 21; *R v Yaqoob* [2005] EWCA Crim 2169, WL 2003243; *R v S* [2015] EWCA Crim 558, [2015] 2 Cr App R (S.) 29.

<sup>64</sup> *R v Bateman; R v Adomako; R v Misra, R v Srivastava*.

<sup>65</sup> *R v Nicholls* (1874) 13 Cox CC 75; *R v Chattaway* (1924) 17 Cr App R 7.

manslaughter by an unlawful and dangerous act, for which a person will only be liable due to an act of commission likely to cause harm, as opposed to an omission.<sup>66</sup> While no cases of gross negligence manslaughter are presented in the data, there is a case of negligence that resulted in the death of the child (Hannah's case). As Hannah was not convicted of a homicide offence, it must be assumed that her negligence towards the child was not such a significant breach of duty to constitute a homicide offence.

## Harm to the foetus

As noted above, to be a victim of homicide or a crime against the person in England, legal personhood must be established, requiring a child to be born alive and live a separate existence from the mother. The only offence a foetus can be a victim of is child destruction. Even the offence of procuring a miscarriage does not specifically outline the foetus as the victim of the offence, as noted above the offence criminalises the attempt to end the pregnancy, rather than harm to the foetus. To be considered to have lived a separate existence, live-birth is required, and the whole body of the child must be delivered.<sup>67</sup> It is not necessary for the umbilical cord to be cut from the child or the afterbirth delivered,<sup>68</sup> but the child should have an independent circulation and it should have breathed after birth.<sup>69</sup> However, drawing a breath is not a requirement to

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<sup>66</sup> *R v Lowe* [1973] QB 702; [1973] 2 WLR 481; *Andrews v Director of Public Prosecutions* [1937] AC 576.

<sup>67</sup> *R v Poullton* (1832) 5 C&P 329.

<sup>68</sup> *R v Reeves* (1839) 9 C&P 25.

<sup>69</sup> *R v Enoch*, *R v Pulley* (1833) 5 C&P 539.

prove live-birth, if the jury can be satisfied that the child was wholly born into the world and was alive prior to being killed.<sup>70</sup>

While an unborn child cannot be a victim of homicide if it dies before living a separate existence, a homicide offence has been committed if a child is born alive and dies of injuries deliberately inflicted while *in utero*. Such a conviction is reliant upon proof the defendant had the requisite *mens rea* where the intention was to do an act which was unlawful and which all sober and reasonable people would recognise as likely to cause injury to another person (the pregnant woman), as per the ruling of the House of Lords in response to the *Attorney General's Reference (No 3 of 1994)*<sup>71</sup> (hereafter '*A-G Ref*'). The House ruled that an individual who attacks a pregnant woman without intent to kill the foetus/child would be guilty of manslaughter if the child was born alive and subsequently died of those injuries. If the defendant has intent to kill the foetus/child then they would be liable for murder.<sup>72</sup> The ruling has come under criticism for its application of law (Ormerod, 2011; Keown, 1998), and due to its interpretation and application of the historic born alive rule (Temkin, 1986; Cave, 2004).

The liability for a foetus carried by pregnant women is a contentious issue within criminal and civil law. Historic legal authority on the issue of maternal culpability is clear, a woman has no duty of care to a foetus, until it is born alive. In *R v*

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<sup>70</sup> *R v Brain* (1834) C&P 349.

<sup>71</sup> [1998] AC 245; [1997] 3 WLR. 421.

<sup>72</sup> *Attorney General's Reference (No.3 of 1994)* [1996] QB 581; [1996] 2 WLR 412, and the authority of the cases *R v Senior* (1832) 1 Mood CC 346 and *R v West* (1848) 2 C&K 784.

*Knight*,<sup>73</sup> it was ruled that a woman who chooses not to be attended during birth and so does not take the necessary precautions to preserve the life of the child will not be guilty of manslaughter if the child dies during birth. Nor is she guilty of the offence if it can only be demonstrated that the woman was neglectful towards the unborn child by not arranging assistance with the birth. An offence of homicide would only occur if it is proven that the defendant was guilty of negligence towards the child after it was completely born<sup>74</sup>. Once the child obtains legal personality, the mother has a duty of care and if not met and the child dies after birth she will be guilty of homicide. In *R v Handley*,<sup>75</sup> it was ruled that if before or after the birth a woman intends that the child shall die and so upon being born she leaves it to die, she is guilty of murder. If she does not intend for the child to die but conceals the birth using methods that will result in the death of the child, then she is guilty of manslaughter. Similarly, in *R v Middleship*,<sup>76</sup> it was ruled that if it is deemed a woman could seek assistance to save her child's life post-birth and fails to obtain that assistance then she is guilty of manslaughter.

The *A-G Ref* ruling has altered a woman's legal liability towards her foetus. Cave (2004: 61-2) argues that there is the potential to apply the House of Lords' ruling on of the born alive rule to women for their conduct during pregnancy towards their unborn child, if the child is born alive and then dies. Cave argues that the use of illicit substances, for example, might constitute an unlawful act, thus subsequently resulting in a conviction of constructive manslaughter. In this

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<sup>73</sup> (1860) 2 F&F 46.

<sup>74</sup> *R v Izod* (1904) 20 Cox CC 690.

<sup>75</sup> (1874) 13 Cox CC 79.

<sup>76</sup> (1850) 15 JP 41, 5 Cox CC 275.

case, there would not be a requirement to prove the woman foresaw risk to the child, or even knew she was pregnant at the time of the act; the only requirement would be that a reasonable man would foresee resulting injury from the conduct. Cave also argues that gross negligence manslaughter could also potentially be applied to pregnant women, however, such an offence would be complicated by the need to demonstrate a duty of care to the foetus. Alternatively, Cave argues, if it was deemed that there was an obvious and serious risk of causing physical injury to a child when it was born, and a pregnant woman disregarded that risk or did not consider it, then a manslaughter conviction could be brought. Cave argues that the health messages for pregnant women are so prominent in England, that action that caused harm would potentially be considered 'obvious risk'. While the possibility of a woman being held legally culpable for her actions against her foetus that is later born alive are currently only theoretical, the *A-G Ref* has opened the door to criminalisation in the future (see also Brazier, 1999; Fovargue and Miola, 1998, 2016).

These legal developments do not have direct impact upon the cases explored in this thesis. However, widening medical, legal, and public concern over the health of the foetus and the responsibilities of pregnant women may result in extension of the law to hold women liable for acts committed while in the prenatal period of pregnancy. The fact that there is room within the current criminal law to facilitate such expansion could potentially have significant impact upon the rights of women. Certainly, within civil law, the principle that a foetus has the right to be born alive and to be 'healthy' has led to challenges to the position of the law. For example, a local authority sought criminal injuries

compensation for a child born with Foetal Alcohol Spectrum Disorder because of her mother drinking heavily during pregnancy;<sup>77</sup> and women's refusal to consent to Caesarean sections have been overruled<sup>78</sup> (Priaulx, 2015; Brazier, 1999; Fovargue and Miola, 2016; Cave, 2004; Jackson, 2001; Thomson, 1994). Fovargue and Miola (1998) argued that these cases demonstrate how the interests of the foetus have assumed precedence over those of the women and that with the combined logic of the *A-G Ref* there is the potential for sanctions on pregnant women's lives. Furthermore, they argue that the courts have interpreted the law in such a way as to create an imbalance between the interest of the foetus and the woman. Consequently, 'pregnant women have become a new category of incompetent adults' (1998: 281). Furthermore, the judgements demonstrate a legal acceptance of medical authority in relation to pregnancy and foetal health. As Meredith (2005) argues, the judiciary have largely accepted, without question, both the medical evidence of the need for intervention, and the underlying assumption that doctors have a greater claim to knowledge of the foetus' interests and the role of safeguarding, over the pregnant woman. The consequence has been to leave a 'substantial quantum of discretion in the hands of the medical profession' (2005: 209; see also Oberman, 2000).

As the law currently stands, there is no maternal obligation towards the foetus in either civil or criminal law. The only exception here is in the ability for a born alive child to sue its mother for injuries sustained following a car crash while *in utero*. However, this essentially allows the child to claim from the mother's

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<sup>77</sup> *Criminal Injuries Compensation Authority v First-tier Tribunal (Social Entitlement Chamber) (British Pregnancy Advisory Service and others intervening)* [2014] EWCA Civ 1554; [2015] QB 459.

<sup>78</sup> *St. George's Healthcare N.H.S. Trust v S* [1999] Fam 26; *R v Collins and Others* [1998] 3 WLR 936.

insurance company and exists on the basis of compulsory third party car insurance (Cave, 2004). Nevertheless, recent civil cases and the ruling in the *A-G Ref* indicates a desire to hold women accountable for actions while pregnant that may result in harm or death to the foetus. The principles of the born alive rule are halting any attempts to use the law to hold women liable if the foetus dies. However, as outlined in Chapter 6, analysis of the use and application of the law in the cases in this sample raises further questions about the incentive to punish women who are perceived to have harmed their foetuses. Similarly, the exploration of cases from the US in Chapter 7, will illustrate the consequences of removing the principles of the born alive rule on women's rights.

## Conclusion

This chapter has reviewed English criminal law that is most relevant to the cases presented in the data chapters. Concern over the conduct of pregnant women and the welfare of newborn children has existed since the Elizabethan period. Historically, a tension appears to exist between sympathy for women who kill or cause harm to newborn children and a desire to punish their suspected criminal activity. This sympathy was targeted at women who fitted the infanticidal 'type'. Nevertheless, the existence of such pity in contrast with the harsh criminal code that applied into the nineteenth-century, and the creation of the offences of concealment of birth and infanticide suggests that women who kill newborn children have always been considered different from other people who are suspected of committing homicide. Whether such a belief still exists is open to debate. While in the past, the focus of concern may not have been upon the



wellbeing of the foetus, this wellbeing is most certainly the focus of the public, political debate, and the law today.

The medicalisation of pregnancy has dramatically changed the ways a pregnant woman and her foetus/child are conceptualised. As we saw in the last chapter, concepts of expected maternal behaviour have changed since the 1950s, with maternal responsibility and risk management shaping both maternal and medical professionals' behaviour. This change has also been reflected in law. As the analysis above has demonstrated, new challenges to long-standing principles of law have occurred within the last 30 years. While the born alive principle remains intact today, the desire to protect the foetus appears to be creeping into law, offering further protection to the foetus beyond that currently provided under the offences of procuring a miscarriage and child destruction. As has been the case since 1803, to convict a woman of the homicide of her newborn child, it must first be proven that the child was born alive and lived a separate existence. However, the interplay of other offences, namely concealment of birth and procuring a miscarriage appear to work to subvert the principle of legal personhood; this interplay will be explored in the analysis presented in Chapter 6. As noted by Cave (2004), Brazier (1999) and Fovargue and Miola (1998) the *A-G Ref* may have fundamentally changed the concept of maternal legal obligation to an unborn child, and may have opened the door to criminal sanctions against women whose actions while pregnant cause harm to a child who is later born alive, and then dies. In the next chapter I provide an analysis of the social and moral judgements made against the seven women in the sample.

# Chapter 5 Gender expectation and crisis pregnancy in the courtroom

This chapter explores the social and cultural judgements made against seven English women who have experienced crisis pregnancies that led to a suspicious perinatal death. Drawing on analysis of the cases from the sample, it considers how the women's behaviour is understood and considered against the cultural norms and expected behaviour of motherhood and pregnancy. This chapter reports the findings from the thematic analysis of the content of the court transcripts of the seven cases; the first form of data analysis outlined in the Chapter 2 – Methodology. Analysis in this chapter considers how members of the court appear to construct and use preconceived ideas of mothering to judge the behaviours of the seven women. Analysis of these cases considers the ways norms and ideals of motherhood and pregnancy appear to be understood and used within the legal process, alongside, and in conjunction with the principles of criminal law. Consequently, this chapter is concerned with how the women are portrayed as individuals and what representations are deployed by the members of the court to explain the events surrounding the death of the foetus/child. In-depth analysis of the functioning and structure of the law is presented in the next chapter, which considers the perceived criminal wrongs of the women's actions. These cases demonstrate that there is perceived to be a 'correct' way to act as a pregnant woman, which is very much connected to the ideal of the 'good' mother, as encapsulated by the myths of motherhood. Each of the seven women are judged as 'mothers', even though, in all but one case,

the baby died, therefore, arguably negating each woman's status as a mother to that child. As previously noted in the Chapter 2 – Methodology, Alice's case is included to demonstrate a contrast in the judgement of a woman in an instance where the child could have but did not die.

The assessment of a woman's 'motherly' behaviour is not considered within the context of crisis pregnancy and the difficulties that women who experience this type of pregnancy face. In fact, the courts seem unprepared and even naïve about crisis pregnancy and the phenomenon of concealed/denied pregnancy. It is unclear if the lack of engagement with the phenomenon of crisis pregnancies is due to an unwillingness or inability by the courts to consider pregnancy as a negative life-event for some women, or due to failure to realise its significance in cases such as the seven presented. Instead, pregnancy is conceptualised as a desirable event in the life of women. As exploration of the literature of concealed/denied pregnancy in Chapter 3 demonstrates, not all women experience pregnancy in line with this conceptualisation way, including the seven women whose cases are explored here. As the data analysis here will demonstrate, conceptualisation of motherhood and lack of understanding of crisis pregnancy has significant consequences on the perceptions of women's culpability in cases of suspected perinatal killing.

## **Conforming to the myths of motherhood**

As explored in Chapter 3, behaving in a way that is best for the foetus while pregnant is now a dominant idea, not only within medical practice and

expectation, but also within wider cultural norms. There is no legal obligation for a woman to prioritise her unborn child over her own welfare, and the foetus has no legal personality in English law, as outlined Chapter 4. Nevertheless, scholars have argued that application of the law has served to gradually erode these principle, appearing to position the foetus' interests above the interests of the pregnant woman (Brazier, 1999; Fovargue and Miola, 1998). One of the themes identified in the data is that pregnancy is considered synonymous with motherhood and motherly behaviour. In five of the seven cases, the behaviour of the women is judged to conform to the myths of motherhood, and her behaviour is considered next to perceptions of the ideal mother. The two cases where motherly responses are not mentioned, hinted at, or apparently considered are Tanya and Fiona's cases. Both women were sixteen at the time they killed their newborn children. No mention is made by either the prosecution or defence about their role as mothers, or even that their responses to their babies were unmotherly. The social crisis that surrounds teenagers as mothers, or 'children raising children' is well documented and critiqued within feminist literature (for example see Phoenix, 1991; Ayres, 2007, 2014). Nevertheless, social concern over the appropriate minimum age at which it is considered legitimate for a woman to adopt the role of mother continues to dominate in wider society, as evident in media coverage of the 'teen pregnancy rate' (BBC News, 2016). This social crisis could potentially offer one explanation as to why neither Tanya nor Fiona's actions and behaviour are presented within narratives of motherhood or motherly behaviour. If a perception exists that both women were too young to be mothers, then their actions of rejecting motherhood, may be perceived as legitimate, even if, the violence nature of rejection is not.

For the other five women, their appropriation to the role of mother appears to have been used as a benchmark for their behaviour and consequently their culpability and moral character. In Alice's case whilst her decision to conceal her pregnancy and to abandon her child was perceived negatively by the judge, due to the risk to the newborn child's life, her actions were presented as an understandable, motherly response to her situation in relation to her other children. In sentencing, the judge summarised Alice's behaviour as an act of desperation and love for her existing children,

When she realised she was pregnant, she feared her children would be removed. That, regrettably but understandably, was reinforced by some observations made by members of the family, and thus she decided to conceal her pregnancy. Although the family suspected she was pregnant, she denied it, and on [date] the baby was born and, in panic and desperation, she acted as she did (Alice, judge sentencing remarks).

The judge also accepted that Alice did not want the child to be hurt and that she left the baby in a place where it would soon be found. Further evidence of Alice's motherly behaviour is drawn from the long-term plans held by social services to reunite Alice with all her children, including the child she abandoned. Therefore, while Alice's act of abandonment of her child is considered to contradict the role of a mother and the accepted understanding of motherly behaviour, it can be interpreted that she maintained the position of a mother, as she was acting in a manner that she felt was best for her other children.

Ultimately, Alice is considered to have failed as a mother, but her failure fits within the confines of 'normal' motherhood. She has not rejected the principles of motherly behaviour, nor the expected norms by which to act as a mother. Instead she has failed to meet the standards required – to be a good mother who cares for her children to a reasonable standard. This perception of her

children is seen to include her newest child and her motherly behaviour is expected to extend to her additional child, purely by the fact the child has been conceived. This perception of Alice's motherly behaviour and motives may be supported by the fact that the child did not die. Therefore, Alice's position as a 'mother' has not been negated by the death of her child. Alice's case indicates that behaviour of mothers can be understood as a negotiation rather than a binary of categories of 'good' or 'bad' mothers, as suggested in feminist literature (Glenn, 1994; Thurer, 1994). The case suggests that women can be judged in relation to the degree with which they meet the myths. Alice's behaviour does not directly challenge the myths, instead she fails to achieve success within the boundaries of the dominant discourse.

In Hannah's case, the prosecution and defence barristers sparred over her portrayal as a mother. The prosecution's case was built upon the notion that Hannah did not want the child, supported by evidence of her failed attempts to have an abortion and her decision to conceal her pregnancy from her family. The prosecution argued that the child died due to Hannah's decision to not seek assistance during or after the birth and that this decision was based on the fact that she felt she could not have a child out of wedlock. Furthermore, the prosecution barrister pointed to Hannah's response following the death of the child as further evidence of her wrongdoing, exclaiming 'And of course the defendant then simply returned immediately to her normal life and sought to keep her secret, it would appear, forever' (Hannah, prosecution facts). Hannah's behaviour of resuming her day-to-day life was remarked upon several times by

the prosecution, implying that this was an abnormal response to the situation of a dead child and as such demonstrated her unmotherly responses.

In her defence, Hannah's barrister argued that the behaviour that the prosecution construed as unmotherly, namely carrying on with daily life, was in fact evidence of her motherly behaviour,

But lest there be any misinterpretation about her behaviour, this is not, I would submit, before you a callous, hard-hearted individual who simply swept this aside and carried on as normal, because she is, after all, a grieving mother, this was her child and within two hours or so of giving birth her child had died (Hannah, defence mitigation).

It is unclear from the transcript whether either side was successful in its portrayals of Hannah in line with socially expected ideals of motherhood, nevertheless it is significant that this is one of the standards by which her moral character was judged, as it suggests an unspoken assumption that as Hannah was pregnant she should have met a standard of 'motherly' behaviour. Such an expectation exists even though Hannah acted in ways to suggest she had no desire to be a mother to the foetus with which she was pregnant. The existence of Hannah's pregnancy is considered synonymous with her roles as a mother. Furthermore, it would appear that within the court her moral character is constructed and judged alongside idealised images of motherhood, present in the myths of motherhood; this is in spite of her actions appearing to demonstrate her rejection of motherhood.

Sally is deeply criticised in the pre-sentencing report for her life-style during the period she gave birth to the infants (Sally, court file). Her parenting of her three living children during this period is noted to be absent. The three children were

raised by the eldest child, they lived in squalid conditions and Sally was believed to often be drunk or high. She is described as being promiscuous, noted to have had numerous sexual partners, including her daughter's partner, and is alleged to have possibly had sex with her own brother, Sally denied this. It is also stated in the report that it is believed that she would have sex with men while the children were in the same room as her, instructing them to turn the lights off. As I did not have access to the prosecution's case nor the mitigation provided by the defence, it is difficult to know if Sally's behaviour was actively considered within the confines of the myths of motherhood. However, from the sentencing remarks and the presentencing report it would appear that Sally is generally seen as failing to meet any of the standards of the ideal mother. Her behaviour in general was considered unmotherly to her living children. For her unborn children, the judge notes in the sentencing remarks that while she was not culpable for their deaths due to the acceptance that they were stillborn, he appears to imply that her behaviour prevented them from living,

...whilst the circumstances and reasons for the stillborn births will never fully be able to be established, your chaotic lifestyle choices, including alcohol abuse and promiscuity at the time of your pregnancies was such as to put the good health of any unborn child at risk (Sally, judge sentencing remarks).

Her actions during her pregnancies, which potentially did have negative consequences on the welfare of the unborn children, may have prevented Sally from being perceived positively in the role of a mother. As noted in the Chapter 3, previous studies have identified a strong link between the concept of the 'responsible' pregnant woman and the 'good' mother (Brooks-Gardner, 2003; Lupton, 2011; Gregg, 1995; Harper and Rail, 2012; van Mulken et al., 2016). Sally's reported behaviours while pregnant do not conform to current social,



cultural and medical standards expected of 'responsible' pregnant women.

Certainly, the judge who heard the case deemed Sally's behaviour to have been detrimental to her fetuses. As such, this may have impacted perceptions of Sally's role as a mother, and so her character as a defendant.

In Lily's case, the defence barrister drew on Lily's record of being a good mother to her existing children as evidence of her good character. This portrayal is accepted by the judge, who notes in sentencing, 'you have two small children whom on the account of everyone you are... bringing up well' (Lily, judge sentencing remarks). Despite suggestion by the prosecution that Lily's act of concealing her pregnancy, and potentially facilitating the death of the foetus/child, was due to her not wanting another child, the judge appears to reject these claims. Instead, the judge accepts the argument that Lily experienced a crisis pregnancy due to her violent relationship with her partner, Alan. The context of domestic abuse and Lily's fear of Alan appears to have helped facilitate a sympathetic understanding of Lily's behaviour before, during and after the birth,

The circumstances in which this event took place can never to a finite degree ever be established. You say that you were subject to domestic violence from [Alan] and that on that particular day he had kicked you in the stomach, causing the loss of the child. The Prosecution do not accept this. There has been a veiled suggestion in the case, and I put it no higher than that, that there may have been something suspicious about the birth and your subsequent behaviour. You were never charged of course with any homicide, but what can be said is that you were already the mother of three children and you have cared for children subsequently and cared well, and I dismiss any suggestion, veiled or otherwise, that there was something sinister about your birth of the child and procuring its birth (Lily, judge sentencing remarks).

In complete contrast to Lily's case, the judge in Hayley's case rejected attempts to use evidence that she is a good mother to other children to demonstrate her

good character. The defence referred to statements provided by social services and the school Hayley's children attended, both concluding that Hayley is a supportive and loving mother. The judge rejected these claims, drawing on evidence of Hayley's past experiences of pregnancy and motherhood as a basis for why she should not have behaved as she did, due to her awareness of the process of pregnancy and childbirth,

You have experience of childbirth, of abortion, and indeed of adoption, and you must have full knowledge of the developmental stages of the child in the womb as well as the lawful limits on abortion of which you were expressly told (Hayley, judge sentencing).

The judge appears to believe that there is a normal, appropriate, and, arguably, natural response a woman will experience when she becomes pregnant, and Hayley's prior knowledge of pregnancy should have led her to adhere to that response. The judge concludes that with her previous experiences of pregnancy, her educational level and her lack of evidence of mental disorder, she has no mitigation, defining her action as, 'to rob an apparently healthy child *en ventre sa mere*, vulnerable and defenceless, of the life which he was about to commence' (Hayley, judge sentencing remarks).

Lily and Hayley's cases are not comparable. The prosecution accepted that they had no way of knowing if Lily's child was born alive, due to the condition of its body when discovered. The prosecution did present 'a veiled suggestion in the case... that there may have been something suspicious about the birth and [Lily's] subsequent behaviour' (Lily, judge sentencing remarks). Nevertheless, the suggestion is rejected by the judge. In complete contrast, Hayley was suspected of, and pleaded guilty to intentionally taking misoprostol to cause a miscarriage. The court believed that the foetus could have been born alive if the

drugs had not been consumed. The purpose of my comparison of the two responses by the judges is in recognition that both women have mothered other children, but evidence of their past behaviour as mothers is understood and treated very differently.

The evaluation of the behaviour of these women against the perceived ideal motherly behaviour supported by the myths that surround motherhood is significant for a number of reasons. Firstly, an assumption is made in each case that becoming pregnant and continuing to be pregnant until the final stages of gestation and foetal development will directly lead to motherhood and will result in a woman adopting the role of a mother, and consequently meeting the ideals that are subsumed within the myths of motherhood. It is assumed that the physical capabilities of a woman to carry and give birth to a child, to 'mother' a child, will result in her being and acting like a mother. The 'naturalness' of motherhood, and assumption that the role is inherent to women is not contended or questioned. Secondly, these cases illustrate the strength of the ideals that surround motherhood. Each of the women have actively rejected being mothers and have attempted to dispose of their foetus/child. In all but one case the foetus/child has died and so, arguably, the women cease to be mothers of those foetuses/children. Nevertheless, in the cases involving the adult women, there is apparent expectation that their actions will conform to the ideal, and interpretation of their behaviour using the ideal is considered a legitimate area for argument by both the defence and prosecution. If the women were not expected to conform then they would not be judged against the standards constructed by the myths, as with Tanya and Fiona who are possibly considered

too young to be mothers. Finally, the cases highlight the pervasiveness of the myths, as it appears that no participant in the court nor within the trial process questions why these women should be required to conform to the myths. Within these cases it would appear that the judgements made against the characters of these seven women are based upon characterisation of their behaviour next to social and cultural ideals of motherhood constructed by the myths. These findings reflect those of previous feminist work into the perceptions of female offenders within the court (Eaton, 1986; Carlen, 1983), suggesting that offending women continue to be judged in line with gendered stereotypes of domesticity and motherhood.

## **Crisis pregnancy and culpability**

Pregnancy is presented in the cases as a 'normal' event in these women's lives with an assumption that there are few reasons why becoming pregnant should cause any alarm for any woman. The conclusion is drawn after examining the ways that the existence of the seven women's pregnancies were discussed, explained, and perceived by the court during the hearings. From the court proceedings, it appears that crisis pregnancies that result in a concealed/denied pregnancy are misunderstood by the courts. The nature of, causes, and consequences of concealed/denied pregnancies are not presented as prominent features in any of the cases, but rather the denial and/or concealment of the pregnancy is presented merely as behaviour of the defendant when describing the context and circumstances of the case. Furthermore, there also appears to be an unwillingness to understand the nature of a crisis pregnancy and the impact it can have upon a woman. A consequence of lack of understanding

appears to be that culpability for the death of the child is assumed to be linked to knowledge of the pregnancy. To support this conclusion, I present four of the cases: Fiona, who is believed to have been unaware of her pregnancy and is not considered culpable for the death of her child due to the shock experienced by the unexpected birth; Tanya, described as denying her pregnancy to herself and others while knowing she was pregnant, deemed to be culpable for the death as the child would likely have lived if she had told someone about her pregnancy; Hannah, who is presented as having purposefully concealed her pregnancy as she did not want her family to know, and is consequently considered to be culpable for the death of the child, despite the possibility she was unconscious at the time of the child's death; and Sally, who, although she was deemed not to have caused the death of the fetuses/children as the court accepted they were stillborn, is noted to be, at least, partially responsible for preventing the fetuses from living due to her behaviour during pregnancy.

## **Fiona**

Fiona was not considered to be culpable for the death of her infant. After a live-birth, Fiona stabbed the child 27 times. The prosecution presented evidence that Fiona did not know she was pregnant. The report produced by the psychiatrist/psychologist concluded that Fiona seemed to have been 'genuinely unaware of her pregnancy'. Unlike other cases, notably Tanya's, no evidence is presented of Fiona having any indication of her pregnancy. While Fiona is considered responsible for stabbing the baby, it is argued by the prosecution that she lacked criminal intent and was 'driven by panic and the effects of both mental and physical shock' (Fiona, prosecution facts). Generally, the

conclusions presented in the hearing appear to lack the moral judgement and pointed blame of the other cases. Indeed, there appears to be a level of pity and sympathy for Fiona. Comments from the judge when sentencing suggest that historic understandings of newborn homicide that underpinned justification enactment of the Infanticide Acts<sup>1</sup> were reflected in Fiona's case,

Because the law recognises that young ladies are deeply affected by childbirth and the circumstances of this case are unusual but not unique in the lack of awareness of the pregnancy and the very considerable trauma, both physically and emotionally, that giving birth would have brought about (Fiona, judge sentencing remarks).

Later, in sentencing, the judge commented,

You became pregnant but you were not aware of that and you gave birth in what must have been thoroughly frightening circumstances and, whilst the balance of your mind was disturbed, you killed your baby. You have to live with that. That is a heavy burden to carry. But the law recognises that people in a similar predicament do, on occasions, kill their offspring whilst the balance of their mind is disturbed and the law recognises that it is important for the courts to act in a constructive way and mercifully, rather than to concentrate on punishment (Fiona, judge sentencing remarks).

As noted in Chapter 4, scholars have argued that the offence of infanticide is an unofficial recognition that women kill infants due to socio-economic strains and other contextual factors that surround pregnancy, childbirth, and motherhood (Brennan, 2007, 2013a; O'Donovan, 1984; Loughnan, 2012b). I am unable to construe the reasoning for the acceptance of Fiona's crisis pregnancy, due to the lack of discussion in the court hearing or access to any other documentation relating to the offence. It could well be that neither she, nor those around her had any idea she was pregnant. However, much of the literature appears to dispute this probability, or indeed possibility (see Meyer and Oberman, 2001; Spinelli, 2003; Amon et al., 2012; Beier et al., 2006). Alternatively, there could be no evidence to suggest she knew about the pregnancy. Regardless, her

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<sup>1</sup> 1922 (12 and 13 Geo.5, c.18); 1938 (1 and 2 Geo.6, c.36).

claim of unawareness of the pregnancy is accepted by the court and this appears to have facilitated a sympathetic understanding of Fiona's behaviour. As the court accepts that she did not know she was pregnant, then the onset of birth and labour can also be presented as an unexpected occurrence for Fiona. Her alarm at the unexpected delivery, in conjunction with her age, appears to provide the basis for the lenient treatment, as the judge remarked,

At the age of 16 you became pregnant but you were not aware of that and you gave birth in what must have been thoroughly frightening circumstances and, whilst the balance of your mind was disturbed, you killed your baby (Fiona, judge sentencing remarks).

Certainly, this response to a crisis pregnancy is not mirrored in the second conviction for infanticide in the sample, Tanya's case. The significance of Fiona's case lies in the fact that those involved in the case – judge, barristers, solicitors, Crown Prosecution Service (CPS), psychiatrists – accepted she did not know she was pregnant and so they accepted that she would not have anticipated the birth of the child. The perception of Fiona's knowledge appears to have had an impact on the interpretations of her culpability.

## Tanya

During Tanya's trial the prosecution concluded that she denied her pregnancy to herself, her family and her doctor. However, they also presented evidence that she knew she was pregnant. Evidence from Tanya's *Google* search history suggested that she had knowledge of her pregnancy from the early stages of gestation, she used search terms such as: 'abortion', 'Night Nurse day and night capsules, take whilst pregnant', 'how early in pregnancy does milk production start?', 'why do I not have a baby bump?', 'how to cause a miscarriage at 4 months'. Although the prosecution did not argue that Tanya purposefully acted

to conceal her pregnancy, they did present evidence that she went to some lengths to hide her pregnancy from her family, and that she denied being pregnant when asked,

The defendant started showing signs of having a slightly swollen stomach and took to wearing loose fitting tops. She was reluctant to undress in front of her mother (Tanya, prosecution facts).

At no point during the hearing was evidence presented regarding the context of crisis pregnancy that leads to a concealment/denial. As previous literature has argued, the distinction between concealment of pregnancy and denial of pregnancy cannot easily be drawn (Beier et al., 2006; Green and Manohar, 1990; Meyer and Oberman, 2001). Furthermore, the use of the language of 'denial' and 'concealment' has an impact on criminal cases. As Vellut et al. (2012) argue the term 'concealment' implies a woman acted deceitfully to stop others from discovering the pregnancy. The level of Tanya's awareness of her pregnancy is not explored during the hearing. Instead evidence of her continuing to deny being pregnant is presented as evidence,

In the early part of last year, you realised you were pregnant... You then denied it to yourself. For months you denied it to yourself and to your mother, who was plainly very concerned about you and even to your brother to whom you are extremely close... It is apparent to me that you closed your eyes to the inevitable and tried to behave and behaved and interacted with all of those around you as though all was normal when you surely knew that it wasn't. The searches on your computer reveal a teenager in distress, trying to decide what to do and instead of confiding, you withdrew from your family and at one stage they thought your depression seemed to be improving but in truth you were maintaining a facade to prevent them from probing too hard as to what was happening. It is quite clear that by the time the baby was due, you were in complete denial (Tanya, judge sentencing remarks).

Tanya is not considered culpable for her act of suffocating the child with a tissue.

Two psychiatrists concluded that she was not of sound or rational mind at the time of the killing. As presented in Chapter 4, the basis of the offence of



infanticide is that a woman lacks criminal culpability due to the balance of her mind being disturbed due to not having fully recovered from the effects of giving birth. Acceptance of Tanya's plea demonstrates that the Crown does not believe she should be convicted of murder. Nevertheless, despite Tanya not being considered culpable for her act of killing, I contend that there appears to be a perception that Tanya is blameworthy for the death of the child, precisely because she denied her pregnancy – the judge continued:

...in the early hours of that morning you delivered the baby yourself in your bedroom at home, alone. You didn't cry out. You asked for no help. You were at home in your household. Right next door to you were members of your family who could have and would have helped you but you couldn't see that. You were not rational (Tanya, judge sentencing remarks).

The insinuation made by the judge is that if Tanya had called out during the labour, or had admitted to being pregnant when asked by her family or her GP, then she could have prevented the death of the child. Her liability for the death of the child appears to rest on her denial. While this liability may not be based on a legal maternal obligation to the foetus/child, it nevertheless appears to exist. Indeed, the judge notes, 'had you been able to [confide] in someone during your pregnancy, all of this could have been avoided' (Tanya, judge sentencing remarks). Tanya's case demonstrates a lack of understanding of the complexities and difficulties that surround a crisis pregnancy, resulting in a concealed/denied pregnancy.

For Tanya, the lack of understanding of the nature of her crisis pregnancy does not seem to impede the outcome of her trial; lenient treatment occurs, most likely due to her infanticide conviction. This outcome occurred despite the CPS initially rejecting her plea of infanticide, preferring to prosecute a murder charge.

The decision to accept the plea appears to have been made after two psychiatrists, the second for the Crown, concluded that it was a case of infanticide due to 'suffering a severe depressive episode during pregnancy' and she was,

...in a state of derealisation and depersonalisation during delivery. The act of killing her baby was not malicious, not planned or deliberate. Putting the wipe in the baby's mouth was an impulsive, erratic response to hearing the baby making gurgling noises, given her psychological state at the time of the delivery and denial of the pregnancy up to that point (Tanya, prosecution opening facts).

It is not possible to know what outcome would have occurred if Tanya's plea had not been accepted, for it is very possible that evidence of her knowledge of her pregnancy may have been used against her in order to demonstrate intent, as has occurred in other cases (for example as reported in Vellut et al., 2012). In sentencing, the judge concluded that Tanya was 'not rational' in her behaviour during her labour and delivery, and that her actions demonstrated her disturbance of mind – 'In fact, it was the trauma of the birth itself in the context of your isolation and your depression that caused you to act as you did' (Tanya, judge sentencing remarks). Evidence presented in court emphasised the connection between Tanya's mental state and the trauma she experienced during the sexual encounter that resulted in her becoming pregnant (rape, in Tanya's eyes if not the court's). Scholars have commented that the Infanticide Act 1938 operates on a presumption that all women who kill their infants within 12 months are mentally ill (Loughnan, 2012b; Barton, 1998; Morris and Wilczynski, 1993b, 1993a; Weare, 2016). Indeed, it has been suggested that the act of killing is believed to demonstrate the existence of the mental disturbance, rather than that the mental disturbance causes the woman to act as she does – only 'mad' women kill their children (See Weare, 2013; Morris and

Wilczynski, 1993a; Edwards, 1984). As I argue in Chapter 4, scholars have disputed this interpretation of the offence. Nevertheless, it appears that in Tanya's case the judge believed that her act of killing demonstrated her disturbance of mind. What is important to note is that the lack of understanding of the consequences of crisis pregnancy meant that Tanya is considered responsible for the death of the child, not because she killed the child, but because she failed to tell people she was pregnant and therefore allow others to prevent her fatal act towards the child. Thankfully for Tanya, the sympathetic understanding of her situation and her willingness to plead guilty to infanticide resulted in her avoiding the full weight of the law. Not all women in this study were so fortunate.

## **Hannah**

In Hannah's case, evidence of her awareness of her pregnancy was presented by the prosecution. Hannah confirmed she was pregnant to police officers when she was approximately twenty-four weeks pregnant. She was also seen by a doctor at a walk-in centre when she was eight-months pregnant and stated she could feel the baby moving. Evidence was also presented that Hannah booked an appointment to have an abortion, but did not attend. In contrast to Tanya's case, where the prosecution argued that Tanya denied her pregnancy, in Hannah's case, the prosecution argued that she concealed her pregnancy because she did not want the world to know she was pregnant. Hannah's actions are presented as intentionally deceitful; it is noted that her religious and cultural background meant that she could not be pregnant outside of wedlock.

This cultural issue is presented as the reason for her not wanting the child and so purposefully hiding it from her family and the wider world,

The Crown's case is that she had made it plain she didn't want the child and that she could not have a child out of wedlock. She told no one for those reasons. She sought no assistance with the birth as she sought to keep it a secret. She sought no assistance for the newborn child and it died without any attempt, it would appear, by the defendant to give it the care the child required (Hannah, prosecution opening facts).

In her defence, Hannah's barrister highlighted the impact the family dynamic had upon Hannah's experience during her pregnancy, noting that the options that most women have when they face an unwanted pregnancy 'were simply not open to her' (Hannah, defence mitigation). Hannah's barrister noted that Hannah made 'poor' and 'bad' decisions, that she was 'foolish', concluding that the baby may not have died if Hannah had been able to confide in her family. Despite Hannah's family declaring that they would have supported and helped her had they known about the pregnancy, the defence barrister made it clear that Hannah was unaware of this at the time,

[Hannah's Aunt], thought that it was an open relationship, 'I only wish she had come to me and confided in me as I would gladly have helped her with the situation and even moved her and our family out of this area and to another country if needed.' Well, again, that is plainly what her view is and was then, but it was not something that the defendant felt was an available option to her. So the options that are open to most of us, should we find ourselves in this situation, were simply not open to her (Hannah, defence mitigation).

The presentation of Hannah's response to her pregnancy by both the defence and prosecution suggests that Hannah intentionally acted to conceal her pregnancy. From what is known about pregnancy concealment/denial, it appears unlikely that Hannah's actions would have been so purposeful and intentional. As explored in Chapter 3, the context of women's lives and the

circumstances that can result in women concealing/denying their pregnancy and neonaticide occurring, are often very difficult and distressing. The fear, shame and guilt women feel in connection to their pregnancy can be debilitating, and, as noted by many scholars, the level of Hannah's awareness of her pregnancy may not have been consistent or constant (Beyer et al., 2008; Oberman, 2003b; Meyer and Oberman, 2001; Vellut et al., 2012). It is not the aim of this thesis to evaluate Hannah's psychological awareness of her pregnancy nor the reasoning for her action. However, previous research into concealed/denied pregnancy would suggest that such a discussion is relevant and should have been included in the court hearing. Discussion of this nature is missing from Hannah's sentencing hearing. Instead, the evidence presented by the prosecution suggests that Hannah acted purposefully to conceal the pregnancy and aimed to give birth alone, thus suggesting she is culpable for the baby's death, even though she did not act to kill. The defence provided by Hannah's barrister may have portrayed convincing reasons why she concealed her pregnancy, but no attempt is made to consider the wider societal and cultural implications of the pregnancy for Hannah. As such, perceptions of her intention for the baby to die and her culpability for the death are maintained.

Hannah's culpability is deemed to be based on her failure to seek medical attention for the child,

...you have pleaded guilty to two offences before this court, to the concealment of birth of your daughter, and to child cruelty. The basis of that plea is that you failed to seek medical assistance following the birth of your daughter. The tragedy that followed is of the immense disaster for this child. She died within two hours of her birth, and had you acted appropriately her life could have been saved. There is no evidence that you ill-treated or assaulted the child, and it is still a mystery perhaps as to

the course of action that you took following her birth (Hannah, judge sentencing remarks).

It may be the case that had Hannah not concealed/denied her pregnancy or given birth alone then the child might have lived. Hannah maintains that she passed out after the birth, with the baby dying during her period of unconsciousness. Hannah's barrister noted that Hannah reported this version of events to a nurse following her arrest. No further comment is made about this claim, and it is difficult to know whether Hannah was conscious following the birth. If she was in fact unconscious then her culpability for the death of the child is questionable. As is the accusation of negligence; she may not have been physically capable of preventing the death. Collapsing from exhaustion post-birth is documented in neonaticide literature (Oberman, 1996). Nevertheless, the basis of Hannah's criminal wrong-doing, under the offence of child cruelty, is her failure to seek medical assistance for the child and that this failure was wilful. As noted in the Chapter 2 – Methodology, the evidence available for analysis in this thesis does not allow for exploration of the decisions to prosecute nor the offence decided upon for prosecution and conviction. Furthermore, I have no way of knowing why Hannah pleaded guilty. However, what is significant is that if evidence of the nature of concealed/denied pregnancy and its potential impact on a woman's behaviour while pregnant, in labour, and during the postpartum period had been heard then perceptions of Hannah's criminal culpability may have been different. If Hannah had in fact been unconscious after the birth, then it could be argued that she lacks the *mens rea* for the offence of child cruelty. I contend that Hannah's experience is not as clear-cut as the prosecution argued. Furthermore, if Hannah's reaction to her pregnancy is considered in light of the context and circumstances of her life, as advocated by scholars (Oberman,

2003b; Ayres, 2007; Vellut et al., 2012) then her individual responsibility for the child's life could be negated in favour of a collective responsibility held by society. Few questions appear to have been asked as to why Hannah was determined to keep her pregnancy secret from her family. Instead, her response and her beliefs are presented as 'foolish' and 'poor'. By failing to explore the nature and significance of the concealed/denied pregnancy, Hannah's actions are reduced to being selfish, self-preserving behaviour, that can be interpreted as intentional, making her culpable for the death. It may be correct to say that the baby died because Hannah did not tell anyone she was pregnant, but this assertion cannot come close to explaining the wider social and cultural circumstances, or the personal difficulties Hannah appeared to face.

## **Sally**

The psychological report presented to the judge in Sally's case, concluded that she experienced 'affective denial' with all four pregnancies, which resulted in stillbirths (Sally, court file). Miller (2003) defines affective denial as a person having an intellectual awareness of pregnancy, but none or few of the emotions or behavioural changes. The author of the psychological report noted that affective denial is experienced by many women who have substance abuse issues. The nature of Sally's case meant that it would not have been possible to hold Sally to account for the deaths. The prolonged period between the birth/death of the infants and the discovery of their bodies meant that neither evidence of live-birth nor cause of death was determinable. Consequently, the prosecution had little option but to accept Sally's claim that all four children were born dead. However, a note exists in the presentencing report that Sally took no

action to save the lives of the unborn children, nor sought medical attention when she realised the babies were not breathing (Sally, court file). A document also exists in the court file, stating that according to the obstetrician contacted about the case, four stillbirths are unusual, particularly after a woman has experienced three live-births of healthy children. As noted above, the judge in Sally's case concluded that her 'chaotic lifestyle... was such as to put the good health of any unborn child at risk' (Sally, judge sentencing remarks). Similarly, the author of the presentencing report assumes that each foetus would have had a better prognosis and chance of live-birth if Sally had sought antenatal care and had not consumed alcohol or drugs.

An emphasis on Sally's concealment exists within this case. There is an assumption that the babies would have lived if a third-party had known she was pregnant, if for no other reason that this would have allowed for the medical system to manage Sally's pregnancies and potentially have intervened to facilitate live-birth, professionals would have managed the risk Sally posed to the foetuses (Phelan, 1991; Halliday). However, what this assumption fails to consider is the context of Sally's life in which the concealments/denials of pregnancies took place. From the presentencing report, it appears that Sally's life-style was chaotic for a ten-year period; heavy drink and drug-use, living in poverty, raising her children alone. It is also possible that Sally experienced domestic abuse in one of her marriages, although no evidence of this is presented during the hearing and the judge does not consider it when sentencing. At the time of the pregnancies, Sally was a vulnerable woman. It may be that child protection services would have acted on behalf of the welfare



of Sally's living children if they had been aware of her living situation. Her actions during her pregnancy may well have caused the stillbirths of the children, certainly this is the opinion held by the court. Nevertheless, the nature of English law makes this suspicion irrelevant. Sally's case raises questions as to what and why punishment occurs in such circumstances and what criminal wrongs have been identified. As outlined in Chapter 4, there is no legal obligation on a woman in England to seek medical assistance during a pregnancy, labour, or delivery. Neither is there a legal obligation on a woman to cease or reduce behaviour that may harm an unborn child, such as drinking or taking drugs. Thus, the focus on Sally's act of concealment of her pregnancy as a factor in her culpability for the deaths of the fetuses/infants should be redundant. A further debate as to how and why Sally has been criminalised is developed in Chapter 6. However, at this point it should be stressed that no attempt was made to understand concealed/denied birth, nor is the context of Sally's life explored when judging her culpability. Instead, the concealment/denial and behaviour she demonstrated while pregnant are considered to have impacted the unborn children and their chance of being stillborn.

## **The 'normality' of pregnancy**

A further theme identified following analysis of these cases is the concept of pregnancy as a 'normal', and so desirable, event in women's lives. This idea draws together the two previously discussed themes, acting motherly, and understanding crisis pregnancy. The preconception that a woman should act in a motherly way and that this behaviour is inherent, natural, and directly

connected with the ability to get pregnant appears to underlie the workings of the court in each of these cases. When coupled with, what appears to be a lack of understanding of crisis pregnancy, the result is an expectation that becoming pregnant is a normal event in a woman's life, consequently it is perceived as 'no big deal'. The impact of such a perception is a failure to appreciate the complexities and difficulties women experience in these cases, as demonstrated by the exploration of the cases of Fiona, Tanya, Hannah, and Sally above, but also to assume a woman will exhibit and demonstrate certain responses to the discovery of her pregnancy. This assumption of a standard response, is not only inaccurate, but appears to result in punitive and harsh treatment. Hayley's case demonstrates the impact of behavioural expectations of pregnant women and is examined below.

Evidence presented at Hayley's sentencing hearing demonstrates that she has a history of crisis pregnancies, having experienced four such previous pregnancies. In the first she gave birth in hospital without receiving any prior medical treatment; the second pregnancy was terminated very close to the 24-week legal abortion limit; during her third pregnancy, she received no antenatal care and after an abortion was refused due to her being over the legal time-limit, she and her husband kept the child; limited information is provided about the circumstances of her fourth pregnancy other than that Hayley and her husband kept the child. This history, I argue, demonstrates Hayley's complications and struggles with pregnancy. However, as with the other cases presented above, no evidence of the nature and effect of concealed/denied pregnancy or crisis pregnancy was adduced during the hearing. Furthermore, evidence presented

by Hayley's barrister that the 'complicated obstetric history' may require further psychological assessment was rejected by the judge,

JUDGE: The view I take is this was a deliberate calculated decision to break the law in relation to a child which she would have anticipated could have been born alive within the next few days.

DEFENCE BARRISTER: My Lord, I hear clearly what you say, is my Lord minded to even consider the possibility of adjourning for a psychological assessment?

JUDGE: I just do not see how it is going to help (Hayley, discussion during defence mitigation).

Instead, the judge considered Hayley's history to be evidence of her knowledge of pregnancy, demonstrating her intent and culpability for her actions. Rather than appreciating that pregnancy can and does create a crisis for some women, and that this can result in a woman failing to act decisively to deal with the pregnancy, the judge assumes that knowledge of pregnancy will result in certain, 'appropriate' behaviours. This assumption appears to be based on two beliefs, firstly, that pregnancy is a normal, and so desirable event in women's lives; consequently, it is nothing to cause alarm and concern. Secondly, that the responses to pregnancy that are legal (abortion before 24 weeks, adoption, keeping the child) are easily understood and acted upon by all women, despite the context of the pregnancy. The judge appears to hold the belief that only women who are mentally ill would take any other form of action, and as there is no evidence that Hayley experiences a formal mental disorder her actions are deemed to signify intent and clear culpability for ending the pregnancy,

You are a woman who obtained sufficient A-Levels to attend ... University, although you gave up your course in ... your second year. You have experience of childbirth, of abortion, and indeed of adoption, and you must have full knowledge of the developmental stages of the child in the womb as well as the lawful limits on abortion of which you were expressly told. You do not suffer from any mental disorder of any kind (judge, sentencing remarks).

The consequence of negating the significance, impact, and consequences of a crisis pregnancy in Hayley's case results in her actions being interpreted as deceitful, manipulative, and selfish. The prosecution presented evidence demonstrating that Hayley lied about her due date at abortion clinics in an attempt to terminate the pregnancy, and then lied to her GP, saying she had had an abortion and was no longer pregnant. The Crown also presented evidence that Hayley was promiscuous. They argued that her reason for wanting to terminate the baby was because she had had an affair with a co-worker and wanted to hide the pregnancy from her husband. Evidence was also presented that Hayley continued to have the affair even when she was heavily pregnant, just prior to taking the misoprostol. The judge gives the impression that Hayley's husband had weathered a great deal from Hayley and continued to support her, noting also that one of her previous pregnancies was terminated with his agreement, but another pregnancy was concealed from him until delivery. In relation to the pregnancy she illegally aborted, the judge commented,

You concealed the pregnancy from your husband, as you had done once before, though he had been both supportive and understanding following the delivery of that child, unexpected, as it was, to him. He is still supportive of you now (Hayley, judge sentencing remarks).

The suggestion here is that Hayley's husband has the right to knowledge about Hayley's body. The idea completely opposes the principles of bodily autonomy, an important campaign for feminists (see for example Faludi, 1992; Bordo, 2003). It is also suggested that morally correct reasons exist to justify an abortion (Sheldon, 2016b), and that Hayley's reasons do not qualify.

The judge understood Hayley's actions to be equivalent to homicide, although noting that it was not a homicide case,

...the seriousness of the criminality here is that, at whatever stage life can be said to begin, the child in the womb was so near to birth that in my judgement all right thinking people would consider this offence more serious than that of unintentional manslaughter or any offence on the calendar other than murder.

With no real mitigation and no remorse that I can detect, though undoubted emotional distress of the kind that any woman would suffer in relation to the sequence of events, I have to sentence on the basis that a substantial period of imprisonment is required, regardless of the effect that I know this will have on your family (Hayley, judge sentencing remarks).

Without consideration and understanding of a crisis pregnancy, Hayley's actions can be interpreted as deliberate and active – a choice, made by a rational individual. And yet, previous research into neonaticide has highlighted the difficulties faced by women who find themselves pregnant when they believe they cannot be (Vellut et al., 2012). The distinction between Hayley's case and other reported cases of neonaticide in the literature is that Hayley took actions to end the life of the foetus before it was born, while most cases of neonaticide involve a woman killing the child through an act or omission following a solo birth. Nevertheless, the key to these cases is the context in which a woman finds herself to be pregnant and the impact of experiencing a crisis pregnancy (Meyer and Oberman, 2001; Vellut et al., 2012; Alder and Baker, 1997; Amon et al., 2012; Beyer et al., 2008; Ayres, 2007; Fazio and Comito, 1999; Maier-Katkin and Ogle, 1993). The details of Hayley's pregnancy and how she felt about it are not presented in the court hearing; they are not a factor of the case that the judge considers worthy of exploration. It would appear the judge believes that if women have the capacity to be impregnated then they should have the ability to make legal, 'rational' decisions about the fate of that pregnancy and any

subsequent foetus/child. In this sense, pregnancy is seen as a 'normal' life occurrence that women experience. This opinion negates the experiences of many women, for whom the discovery of pregnancy can be terrifying and disastrous. Without consideration of this legitimate experience, any interpretation of Hayley's actions misses the complexities and the wider social implications of her experience. Pregnancy is not a simple life occurrence for all women, it is layered with meaning; that meaning influences how women understand the experience of pregnancy and what action they take, or fail to take in response to the foetus.

## Conclusion

This chapter has explored the judgements made against seven English women as they were sentenced for offences relating to their crisis pregnancies resulting in suspicious perinatal deaths. These women are judged in line with gender biases that exist in relation to the role of 'mother'. The myths of motherhood are used and perpetuated by both the prosecution and defence barristers, and the judges to draw conclusions about the women's behaviour and character. As such idealised images of the mother and popular perceptions of the role of a 'good' mother are drawn upon and used as a standard of comparison. Within the cases there appears to be a perception that there is a 'correct' way to experience being pregnant. As such, appropriate behaviour is presumed to exist and deemed to be instinctual and natural, occurring as soon as a woman comprehends the existence of a foetus within her. As noted in Chapter 1 – Introduction, the ideal of the 'good' mother is inherently flawed and unrealistic, unachievable for the vast majority of women. However, in light of crisis

pregnancies that result in a concealed/denied pregnancy, the idealised image of motherhood contained within the myths has very little bearing on such experiences of pregnancy. As argued in Chapter 3, women who experience such pregnancies can have few or none of the symptoms of pregnancy; they might have some level of awareness that they are pregnant, but this awareness may be quickly suppressed or negated. Women who have experienced crisis pregnancies have reported being terrified of the consequences of the people around them discovering their pregnancy, and the context of their lives are believed to have significant impact on their belief that the foetus cannot exist (Meyer and Oberman, 2001; Vellut et al., 2012; Beyer et al., 2008; Amon et al., 2012). The case studies presented here suggest that the phenomenon of concealed/denied pregnancy is little understood within the English courts. Furthermore, it would appear that there is little appetite among professionals who work within the criminal justice system to appreciate the significance or impact of crisis pregnancy and how it can influence a woman's behaviour. The consequence of this is that often the nature of the circumstances of the death of the foetus/child is not fully understood. Explanations of the behaviour exhibited by the seven women are reduced to assessments of psychiatric disturbance, poor judgement, or callousness and selfishness. This chapter demonstrates that these seven cases are far more complex and cannot be reduced to such simple conclusions. It is my contention that this lack of understanding impacts the perception of criminal wrong in these cases, notably Hannah, Hayley, and Sally. This assertion is not to down-play the significance of the deaths of the foetuses/children resulting from these women's actions. However, I do advocate that a contextual understanding of these cases is required. Furthermore, in the

next chapter I argue that any decision to criminalise women involved in cases of suspicious perinatal deaths need to be made in line with the limits of the law and the evidence available to support criminal conviction.



# Chapter 6 Punishing mothers who do not conform

English criminal law can respond to suspicious perinatal death using several different offences. These offences, the scope and parameters of which are outlined in Chapter 4, are procuring a miscarriage, child destruction, concealment of birth and, if live-birth can be established, homicide offences and offences against the person. From the seven cases in the sample, we can see that although the actions of the women are generally similar, hidden pregnancy and solo birth, with a similar result, a dead child who was either live- or stillborn (with exception of Alice's case), the nature of criminalisation differs. Analysis of these cases suggests that prosecutors have a menu of offences they can draw upon to criminalise women suspected of perinatal killing, depending upon the evidence available in the case. As already outlined, one of the key evidential factors includes indication of live-birth and separate existence. One conclusion drawn from the analysis of these cases is that the desire to criminalise these women is strong. As I argue in this chapter, desire to criminalise seems, in some cases, to negate the principles of criminal law and the evidence available in the cases. As such, it is important to consider what wrongs are perceived to exist that warrant criminal sanctions. Analysis of the cases focuses on the perceived criminal wrongs that were presented in court as justification of conviction. These are identified as: putting the foetus at risk; failure as a mother to put the foetus first; and preventing the foetus/child from living. One theme that threads through the cases is the notion of the failure of women to conform to the expected behaviour of mothers and pregnant women. As outlined in Chapter

1 – Introduction, legal philosophers have argued that for a moral wrong to be determined as criminal, additional factors are needed to justify the state's coercion into people's lives (Simester and Von Hirsch, 2011; Jones, 2017). This chapter assesses the perceptions of criminal wrongs held by members of the criminal system and the second half critically assesses the role of the criminal offence of concealment of birth, when I ask what action this offence is criminalising and if it is appropriate for it to continue to be used today. Focus on this offence specifically comes from lack of academic engagement with the application of the offence in the twenty-first-century<sup>1</sup> and the ambiguous history that surrounds the creation and use of the offence in the nineteenth-century, as outlined in Chapter 4.

The aim of this chapter is not to specifically question the impetus and desire to criminalise women who intentionally harm a foetus or newborn child. The law as it currently stands has clear function – to protect any human being who is considered to have legal personality, this can and should apply to all people, even those who have just been born. Similarly, the law offers some protection to the foetus, through s58 of the Offences Against the Person Act 1861,<sup>2</sup> which criminalises people who procure a miscarriage when not carried out under medical orders, and the Infant Life (Preservation) Act 1929<sup>3</sup>, which criminalises individuals who end the life of a foetus capable of being born alive.

Nevertheless, as outlined in Chapter 4, two factors need to be considered.

Firstly, that evidence of an offence occurring needs to be demonstrated prior to

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<sup>1</sup> The one exception here is a brief mention of the offence in Sheldon (2016B). However, further analysis is warranted.

<sup>2</sup> 24 and 25 Vict. c.100.

<sup>3</sup> 19 and 20, Geo.5, c.34.

conviction. Secondly, that while the impetuous to criminalise action that is deemed morally heinous may be strong, application of the law must reflect legal principles over moral concerns. It is with these two principles in mind that the following analysis is presented.

## **Foetus at risk**

Concern over the wellbeing of the foetus has been a prominent feature of the twentieth- and twenty-first-centuries. As discussed in Chapter 3, feminists have expressed concern over the conceptualisation of pregnancy as a state that requires careful and managed risk prevention, particularly as the risk management is predominantly focused on the risk to the foetus, rather than to the pregnant female body (Weir, 1996; Ruhl, 1999; Lupton, 2012b; Helén, 2004). The individualised risk model constructs the pregnant woman as her foetus' most ardent protector, but also its greatest threat (Ruhl, 1999). It is the security of the foetus that is of predominant concern to medical professionals (Phelan, 1991; Halliday; Ruhl, 1999). When a woman hides a pregnancy from the wider world, generally she will receive no antenatal care, reflected in the cases in the sample. None of the women sought medical assistance with their pregnancies and all went through labour without the assistance of a medical professional. As their pregnancies remained hidden from the wider world, third parties were unable to protect the foetuses from the mothers' actions (or inactions). No one was able to manage the foetuses' security. An element of Tanya's culpability noted by the judge was her failure to protect the foetus by not disclosing her pregnancy, as previously noted in Chapter 5. The judge stated, 'had you been able to [confide] in someone during your pregnancy, all of this could have been

avoided' (Tanya, judge sentencing remarks). The remarks demonstrate a presumption that had others known about Tanya's pregnancy then they could have stopped the death of the child by ensuring that Tanya was not able to kill the child post-birth. The literature on neonaticide, presented in Chapter 3, assumes that a concealed/denied pregnancy is a risk factor of neonaticide (Beier et al., 2006; Beyer et al., 2008; Friedman et al., 2005; Meyer and Oberman, 2001). Such conclusions exist despite evidence contradicting such perceptions, as I presented in Chapter 3, and argued by Vellut et al. (2012). If these women's pregnancies had been uncovered by professionals responsible for the safeguarding of children then it is possible that child protection agencies may have become involved. For example, the Safeguarding Children Boards of Brighton & Hove, East Sussex and West Sussex, have a section in their child protection manual focused on concealed pregnancy. Within it, they advise that concealment of pregnancy 'can lead to a fatal outcome, regardless of the mother's intentions'; lack of antenatal care may lead to a number of consequences, including that 'health and development of the baby during pregnancy and labour may not have been monitored and foetal abnormalities not detected' (Pan Sussex Child Protection and Safeguarding Procedures Manual, 2012: section 8.10.10). The guidance notes that where concerns may occur, such as in lack of engagement or substance misuse, then a referral should be dealt with using child protection procedure and possibly a pre-birth child protection conference.

Conversely, in four of the cases, pregnancy was known or suspected – Tanya, Hannah, Hayley, and Lily. Very little evidence is available relating to public

awareness of Lily's pregnancy as it is only mentioned in court and no Serious Case Review (SCR) appears to exist. Tanya's family strongly suspected that she was pregnant and her mother told the GP of her suspicions. However, upon direct questioning by her GP, Tanya denied the possibility. The SCR into the death of Tanya's baby concluding:

The service delivery provided by the GP was mostly reactive rather than proactive, with a greater degree of professional curiosity required to get a sense of [Tanya's] lifestyle and sexual history. However, the explanations provided by [Tanya], the support provided by her mother and her presenting symptoms all reasonably indicated an alternative diagnosis to that of pregnancy. In addition, when directly asked about the possibility of pregnancy, [Tanya] clearly responded that this was not a possibility. It appears that the service provided by the GP was consistent and timely, with evidence that the GP did listen to [Tanya's] presenting needs and wanted to offer her choice regarding her treatment. Also, [Tanya's] last consultation with the GP prior to the birth of Baby W was positive and illustrated a picture of a young woman's difficulties essentially under control (Tanya, SCR Overview Report: 26-7).

The report identifies that the 'missed opportunity' lies in the lack of engagement with Tanya to counsel her about her sexual activity prior to conception of her child, therefore preventing the pregnancy from occurring. Nevertheless, it is concluded that as Tanya 'either consciously or unconsciously did not share the full extent of her needs with the GP' she prevented services from meeting her needs (Tanya, SCR Overview Report: 33). In Hannah's case, several professionals knew about her pregnancy. Police officers were made aware of her pregnancy when Hannah was in approximately the 23rd week of gestation. She advised the officers she had a termination scheduled for the end of the week. The SCR concludes that it would have been appropriate to refer Hannah to the Public Protection Investigation Unit (PPIU),

This would [have] allowed a specialist and local risk assessment to take place and may in turn have raised issues about the pregnancy and how this impacted upon [Hannah] and her relationships within the wider family and the community. It may also have raised questions about [Hannah's] contact

with medical staff and the arrangements for the birth of the baby (Hannah, SCR Overview Report: 10-1).

A significant amount of detail has been redacted or amended in the SCR to prevent potential identification, therefore it is difficult to interpret the reasoning for the Police officers' decision to not refer Hannah to the PPIU, but it appears that this was due to their belief that the termination was going to go ahead.

Hannah also twice presented to a Health Walk-in-Centre during her pregnancy; she was 8 months pregnant the second time. Information was sent to Hannah's GP about her visit to the Walk-in-Centre. However, as the SCR makes clear, a GP surgery may not be aware that a patient is pregnant nor of her access to antenatal care due to such care being provided directly by community midwives.

The SCR concluded,

With hindsight [Hannah] was a potentially vulnerable, single, pregnant woman and although her presentation at the Centre was unconnected to the pregnancy, it would have been reasonable, in the view of the Overview Report author, to have taken a more holistic approach and at least sensitively raised the issue of the pregnancy and birth arrangements (given that [Hannah] was 8 months pregnant) (Hannah, SCR Overview Report: 12).

The NHS Community Services involved in production of the SCR concluded that there were no indications that Hannah was vulnerable, nor that she was concealing her pregnancy. The SCR notes that the GP surgery could have established that Hannah had not sought antenatal services through communication with the community midwifery team. A referral may have led to awareness being drawn to Hannah's vulnerabilities. As outlined in Chapter 5, the courts do not consider the context and consequences of concealed/denied pregnancy, and limited attention is paid to the vulnerability of these women, particularly Hannah. The emphasis in the court hearing is upon the defendant's failure to reveal their pregnancy and manage the risk to their foetus.

Other examples of concern about risk to the foetus can be identified in Hayley's case. From the transcript, it would appear that her illegal act of procuring a miscarriage was detected by the police after they had been informed of the case by doctors who were aware of her pregnancy. As Hayley had attempted to obtain a legal abortion and had been denied due to being over the legal limit of 24 weeks (she was just under 30 weeks pregnant at the time), the health authorities were aware she was pregnant and so expected to be contacted by her to arrange antenatal care. After receiving no word from Hayley for over two months, the hospital midwifery team contacted her and she advised she had had a legal termination at a clinic. Three weeks later Hayley's general practitioner contacted her and Hayley again advised that she had had a legal termination some months previous. A number of days later the designated nurse from the Safeguarding Children's Services received the same account from Hayley. Hayley was first questioned by the police 6 weeks later. This action by the medical community demonstrates concern held over the safety of the foetus. The legitimacy of this concern is not being disputed here. However, it does suggest that the failure by a woman to mitigate risk to her foetus is one aspect of the wrong perpetrated that requires criminal sanction.

A final indication that the harm identified in these cases of suspicious perinatal death relates to the women's failure to mitigate risk to their foetuses, lies in discussion of the risk women may pose to future children. The conclusion of the pre-sentencing report outlined by appellate judges during Hayley's appeal was, 'She was known to conceal pregnancies and to mislead professionals and she

might well conceal a future or current pregnancy' (Hayley, Court of Appeal sentence hearing), thus, suggesting that Hayley will pose a risk to any future foetus she may conceive. In contrast, a mitigating factor presented in Sally's case was that as she is no longer fertile, due to reaching the menopausal age; consequently she is considered to pose no future risk to other foetuses.

A focus in these cases of the risk posed to the foetus suggests that this is one of the wrongs committed by the defendants that is deemed to warrant criminal sanction. This concern over risk posed to the foetus appears to be warranted. Each woman did fail to manage the risk to their foetus by not engaging with prenatal medical care. As outlined in Chapter 3, the medical community and wider society has deemed prenatal care to be of utmost importance to the health and wellbeing of a foetus (Gregg, 1995; Lupton, 2012b; Ruhl, 1999; Weir, 2006). Whilst it is very possible that lack of engagement with medical professionals did lead to the death of the foetus/child, support may have been provided to bolster the women's vulnerabilities, thus preventing the situations that lead to death of the foetus/child. However, this failure to manage risk does not in and of itself warrant criminalisation. As outlined in Chapter 4, a woman is under no legal obligation to put the needs of her foetus before her own. Therefore, concealment of a pregnancy that results in a woman giving birth on her own does not constitute any criminal offence in England, even if it does result in the death of the foetus during birth. Only upon live-birth and the establishment of separate existence does the woman gain parental responsibility and therefore a legal obligation to provide for the child. A further discussion of the women's legal responsibility will be developed later in this chapter.



Demonstration of these women's wrongdoing through their failure to manage the foetus' risk should not constitute a criminal wrong. Nevertheless, it is presented, at best, as evidence of their wider criminality (such as intent to harm the foetus), and, at worse, as a wrong deserving criminal sanction in and of itself.

## **Failure as a mother to put the foetus first**

Associated with the theme of putting the foetus at risk, is a woman, or mother's, role in management of that risk. Feminists have outlined the links made between expectation to conform to the health and risk discourse as constructed by the medical community, and the perception of the 'good' mother (Lupton, 2011; Gregg, 1995; Harper and Rail, 2012). The 'responsible mother' is the woman who puts the needs of the foetus/child before her own, and the behaviour of a pregnant woman and her self-regulation are seen as symbols of her love and evidence of her role as a 'good' mother (Brooks-Gardner, 2003). As argued in Chapter 5, all the women who are above the age of majority have their behaviour judged against an idealised image of motherhood, and pregnancy is considered synonymous with motherhood. The two women whose behaviour was most clearly presented as being 'unmotherly' in the cases were Hannah and Hayley. Both women were deemed to put their own needs before that of their foetus/child, and so failed to meet the criteria of the myths of motherhood, or of the responsible pregnant woman. Hannah was deemed to be putting her need not to be pregnant outside of marriage before the needs of the foetus, as the prosecution argued, 'she didn't want the child and that she could not have a child out of wedlock. She told no one for those reasons. She sought no assistance with the birth as she sought to keep it a secret' (Hannah,

prosecution opening facts). Similarly, Hayley's act of procuring an illegal miscarriage was believed to be due to her desire to conceal the extra-marital affair she had been having, as the judge notes:

Despite marrying your long-term partner in May 20XX, it seems, on your own say so, that you conducted an on-off seven-year affair with a work colleague before becoming pregnant. You clearly decided, or you clearly thought, I should say, that the child was his because you told him, but not your husband, of the pregnancy in October 20XX. He offered to leave his wife to start a family with you, but you declined. You broke off the relationship with him in January, saying that there was no child and it was none of his business. You told the Probation Officer, however, that it was not until March 20XX that you decided you wanted to remain with your husband and to have an abortion (Hayley, judge sentencing remarks).

At the point at which Hayley decided to have her abortion, she was approximately 30 weeks pregnant. It cannot be denied that both women did act in ways that prioritised their needs rather than the needs of their foetus.

However, it is difficult to know if their actions were as calculated and intentionally done as argued during their hearings, or if they were as a result of a disconnection with the pregnancy and fear and panic of the consequences of discovery as outlined in research by Vellut et al. (2012) and others (Beyer et al., 2008; Meyer and Oberman, 2001; Spinelli, 2003; Alder and Baker, 1997).

Nevertheless, as demonstrated in Chapter 4, there is no legal requirement on a woman to put the needs of the foetus before her own. This focus in the sentencing hearings on the women's decisions to put their own needs first, and so prevent risk to the foetus, would suggest a tension exists in the principles of the law and its application in cases of suspicious perinatal death. While a pregnant woman's decision to act in a way that may be contrary to the wellbeing of her foetus may not be ideal, it is not necessarily criminal. As outlined in Chapter 4, a woman only breaks the law under the Offences Against the Person Act 1861 if she acts with intention to end her pregnancy, and the law is only

broken under the Infant Life (Preservation) Act 1929 is she intends to kill the foetus. Without these intentions, a woman's negligence towards her foetus can be extensive and have extremely negative consequences for the foetus, but she still has not broken the law. This legal principle is not clearly outlined in either Hayley or Hannah's cases.

In several cases in the sample, there is a sense that it is perceived by members of the court that if the women were unprepared to be mothers, then they should not have been pregnant in the first place, and as such it is their sexual activity that is at fault. Certainly, focussing on the women's sexual activity is a point that should arguably be redundant in these cases, as none of the laws in question are concerned with the nature of a woman's pregnancy, or the paternity of the child, although, as outlined in Chapter 4, concern over single women's sexuality was of historic significance for the offence of concealment. In both Hayley and Hannah's cases the prosecution point to the unsuitability of their relationships with those who impregnated them – Hayley due to her affair, Hannah due to her family believing her partner unsuitable. Reference is also made to the fact that both women had experienced previous abortions, suggesting that this was not the first time they had been pregnant when they were unprepared to be mothers. Similarly, Sally is defined by the judge as being 'promiscuous'. The judge appears to draw this conclusion from the pre-sentencing report, which provides a list of sexual activity that could be interpreted as sexually immoral: twice divorced before entering the 'chaotic' period when she had numerous sexual partners, four of whom impregnated her; the father of the second stillborn child was the partner of her teenage daughter – he impregnated both Sally and her

daughter at similar times; there was an accusation that Sally may have had sex with her brother; and that she had sexual intercourse while her children were present in the same room.

Such concern over sexuality is also seen in Tanya's case. As argued in Chapter 5, Tanya was not constructed by either the prosecution or defence as a mother, possibly due to her age. However, the sexual encounter that resulted in her becoming pregnant is referred to throughout the trial. Part of the reason for this reference is likely to be due to it providing an explanation for Tanya's behaviour in her concealment/denial of the pregnancy, and in her post-partum panic/trauma that led her to kill the child. Nevertheless, referring to her sexual encounter, the judge commented,

I don't need to resolve the precise circumstances of this baby's conception. It is plain to me from what you said to Dr [name] that however much you may have flirted with this man, you felt forced into having sex with him, although he may not have realised this. I need say no more about it, but it was not something that you remembered with anything other than revulsion (Tanya, judges sentencing remarks).

While the court is generally sympathetic to Tanya's situation, there is a suggestion here that Tanya is responsible for the sexual encounter that resulted in her becoming pregnant. The experience of having sex with this man is defined as being unpleasant due to both the dubious consent, but also the outcome – pregnancy. There does appear to be a veiled suggestion from members of the court that if Tanya had not flirted with this man, then she would not have had sex and would not have become pregnant and therefore would not have killed the child. Similarly, as noted above, the SCR concludes that an opportunity was lost in preventing the death of Tanya's child by her GP not providing counselling on sexual health prior to the child being conceived.

The connection between inappropriate sexuality, pregnancy and lack of desire to become a mother is only ever suggested. At no point is it blatantly stated by members of the court. Nevertheless, belief in the inappropriateness of these women's pregnancies does appear to be a feature of these cases. The wider belief that pregnancy should only occur if motherhood is sought and desired, is a feature of the myths of motherhood, outlined in Chapter 1 – Introduction. The disapproval of unwanted pregnancy is but one feature of the women's behaviour that appears to be deemed to demonstrate lack of willingness to put the foetus first and so act like a mother. The construction of the 'good' mother, as outlined in Chapter 3 (Hays, 1996; Smart, 1996; Thurer, 1994), appears to have strong impact on these cases. It appears that failure to act like a 'good' mother, or a mother at all, is one of the wrongs deemed to warrant criminalisation. Belief of expected motherly behaviour exists despite maternal neglect towards a foetus not being a criminal wrong that is covered by any offence.

## **Preventing the foetus/child from living**

In each of the cases examined, the woman acted in a way that put the foetus/child's life in danger and potentially prevented it from living. The intention of that act and the culpability for it differs from case to case. I remind the reader that I am not attempting to argue that a woman should not be criminalised for preventing a newborn child from living. Similarly, I am understanding of the desire to punish women who intentionally act to end the life of a foetus in the late stages of pregnancy. However, the desire to criminalise must be tempered by the limits of the law and the availability of evidence to prove an offence has been

committed. Furthermore, the appropriateness of the law needs to be considered. Here I wish to comment on how the cases of Hannah, Sally and Hayley were addressed by members of the criminal justice system, resulting in prosecution, conviction and sentencing.

In Hannah's case, her decision to give birth alone in order to hide her pregnancy is believed to have resulted in the child being prevented from living. What is unclear in Hannah's case is why she was convicted of child neglect rather than infanticide. It is unknown why child cruelty was charged, it could be due to plea bargaining. However, if Hannah's comments about passing-out post-birth, described in Chapter 5, are to be believed then a homicide conviction could arguably not be proven, as being unconscious would mean that she lacked the physical ability to provide the child with the assistance it required and so it is not possible to hold her liable for the death of the child. However, such logic would also apply to child neglect under the offence of child cruelty. As outlined in Chapter 4, the *mens rea* of child neglect is based on the term 'wilful', requiring that the defendant either was aware at the time that the child's health might be at risk if the aid required were not provided, or that the defendant was unaware of the aid needed due to not caring whether the child's health was at risk. If Hannah was unconscious, then it seems unlikely that she could have committed the offence as she would not have 'wilfully' acted, or failed to act. As with all the women in these cases, Hannah pleaded guilty, and so there was no need for the Crown to prove their case. If the case had proceeded to trial then the prosecution would have been required to demonstrate that Hannah had been conscious following birth and that she had wilfully neglected the child. In such a

case, it would have been in Hannah's interests to provide evidence that she had passed out, but the burden of proof would have been on the prosecution. With this consideration in mind, it is possible to surmise that had Hannah not pleaded guilty to child cruelty she may have been acquitted at trial. However, such a suggestion needs to be tempered by the knowledge that a jury may have convicted her regardless of lack of evidence to support Hannah's wilful neglect in the post-partum period. Juries do not need to justify their decision to convict, and what limited research that exists on the decisions of jurors would suggest that their verdicts do not necessarily reflect the evidence presented in court, nor the principles of law (Darbyshire, 1991). Hannah was initially investigated for murder, and it is possible that the Crown Prosecution Service (CPS) agreed to prosecute Hannah for child cruelty rather than murder because she agreed to plead guilty. Such comments cannot be more than speculation due to the absence of data available. Nevertheless, it appears that the available evidence does not support a conviction for either child cruelty or homicide.

Neither Sally nor Hayley were convicted of an offence against the person and yet both were deemed to be acting in a way that prevented their foetus from surviving. Sally was not formally punished for this behaviour, as her conviction was for concealment of birth. Nevertheless, it is apparent from the transcript that her actions while pregnant were suspected to have contributed to the stillbirths. The author of the presentencing report noted that while Sally did not cause the death of the babies, she took no precautionary actions to save their lives. Similarly, Sally is criticised by the judge during sentencing for engaging in

behaviour while pregnant that was deemed to have a negative, and possibly fatal consequence for a foetus:

Whilst the circumstances and reasons for the stillborn births will never fully be able to be established, your chaotic lifestyle choices, including alcohol abuse and promiscuity at the time of your pregnancies was such as to put the good health of any unborn child at risk (Sally, judge sentencing remarks).

The suggestion may be true. However, as noted, there is no legal obligation on a woman to act in a way that will ensure the good health of her foetus. Similarly, there is no legal sanction against a woman who causes unintentional harm to her foetus. Nevertheless, as outlined above, the sentiment is manifested through subtler legal mechanisms. If Sally's acts did cause the foetuses to be stillborn then the only offence open to the crown to criminalise her actions would be child destruction. However, as outlined in Chapter 4, to convict Sally of this offence would require evidence that the foetus died prior to living a separate existence, and that she intentionally acted to cause the death of the foetus. Alternately, if Sally's acts while pregnant caused any of the foetuses to be born alive and then to die as a result of the injury sustained *in utero*, then she could, in theory, be convicted of manslaughter under the *A-G Ref*, as outlined by Cave (2004). However, as it was not possible to determine if the foetuses were born dead or alive, neither of these convictions could be sought. Consequently, without such evidence, Sally's actions while pregnant do not warrant any form of criminal sanction. Furthermore, mentioning these acts during sentencing Sally for concealment is unnecessary, as the offence of concealment has no bearing on the nature of death, nor whether live-birth occurred. Although, as argued in Chapter 4, use of the offence during the nineteenth-century often occurred in instances where it was believed wrong-doing had occurred, but murder could not



be proven. From the cases analysed here, it seems the criminal offence continues to be used in a similar manner today, further explored below.

It is widely accepted by the court that Hayley's act of taking Misoprostol caused the death of her foetus. What is unknown, due to the body of the foetus never being located, is whether live-birth occurred and the child died following delivery, or if the foetus died prior to being born. As outlined in Chapter 4, the offence of procuring an illegal miscarriage, under the Offences Against the Person Act 1861, was enacted, in part, to condemn the intentional destruction of foetal life. However, the offence does not punish a person for causing harm or death to a foetus, as a foetus' lack of legal personality prevents this. During her trial, the judge hearing Hayley's case equates her actions with murder on several occasions:

As matters stand in English law, none of those offences could be committed in relation to an unborn child, but the seriousness of the criminality here is that, at whatever stage life can be said to begin, the child in the womb was so near to birth that in my judgement all right thinking people would consider this offence more serious than that of unintentional manslaughter or any offence on the calendar other than murder (Hayley, judge sentencing remarks).

Similarly, while hearing the sentencing appeal, the Court of Appeal judges considered that Hayley's culpability and harm to be the 'the extinguishing of a life about to begin' (Sally, Court of Appeal sentencing hearing). As noted in Chapter 4, the foetus is offered some legal protection under English criminal law; however, the law has never equated the ending of the life of a foetus with the killing of an individual with legal personality. Consequently, the law distinguishes between a homicide offence and the offence of an illegal abortion.

One query raised by the judge during Hayley's sentencing hearing, was why the offence of child destruction under the Infant Life (Preservation) Act 1929 was not utilised. In response to this query, the prosecution replied that as it could not be proven whether the foetus was stillborn or born alive, the requirements of the offence had not been met. The judge concluded that as the gravity of the offence of child destruction is the same as the offence of procuring an illegal abortion, then the decision on the charge is unimportant. Hayley's defence barrister was keen to argue that there was a distinction between the two offences, as this section of the transcript demonstrates,

DEFENCE: 'Well, in my respectful submission there is a fundamental difference. In 1861 abortion was illegal, it is now no longer so. What [Hayley] has done is failed to obtain a legal abortion within the specified time limit as the law now stands. That is in no way to her mitigation, but that's the gravamen of it. This is not child destruction. This may be the elephant in the room which I have to address, this idea of what has happened to this child, but the Crown have taken the decision to charge under Section 58, administering a noxious substance, the drug Misoprostol, to herself. Distinguish, my Lord, many cases now under that section where it is another with who administers for whatever reason, to procure a miscarriage and abortion. This is a highly unusual case in the 21st Century, to which we're looking at a 19th Century statute.'

...

JUDGE: This is a child who, on the face of it, prospectively was capable of being born alive in the next few days...

... But it doesn't change the nature of the conduct and the sentencing powers are exactly the same whether one looks at the 1861 statute or the 1929 statute, and I am afraid you are going to have persuade me, if you wish to do so, that I am looking at this through the wrong lens, because at present it seems to me, as I say, that we are very much at the upper scale of criminality (Hayley, defence mitigation).

As it transpires, the defence failed to persuade the judge and Hayley was sentenced to 12-years' imprisonment, although the court of appeal reduced the sentence to 3½-years.

Considering the intent of the Infant Life (Preservation) Act 1929 and s58 of the Offences Against the Person Act 1861, the arguments presented by the defence are incorrect. The offence of procuring a miscarriage was intent on protecting foetal life, as well as the welfare of a pregnant woman (due to the dangers of abortion during the Victorian period). As outlined in Chapter 4, and argued by Sheldon (2016b), the two offences overlap as child destruction has been used by prosecutors as a substitute of s58 of the Offences Against the Person Act, and the Infant Life (Preservation) Act appears to have never been used as intended when enacted – to capture the killing of a foetus following spontaneous birth but before separate existence had been achieved. Regardless of these legal specifics, it is clear that the desire to criminalise Hayley stems from her act of preventing a foetus/child from living. Now, as already noted, it is not the aim of my analysis to question the desire to criminalise women who intentionally ending the life of a foetus capable of being born alive. However, use of the offences of procuring an illegal abortion, or child destruction, as the mechanisms for allowing this punishment to occur needs to be critiqued.

In this case, the application of the Offences Against the Person Act 1861 was applied to the letter of the law. As Hayley pleaded guilty there was no need for the prosecution to prove its case – by demonstrating evidence that the drugs had been taken (the only evidence available was that Hayley ordered it online), or discovery of the body and determining cause of death. Similarly, the judge was within his rights to sentence Hayley for up-to life imprisonment, as the statute allows. As Hayley's foetus was at or close to full-term, and it is very possible it would have been born alive in a matter of days, then the judge was

justified in seeing the seriousness of her actions and therefore imposing a stringent sentence. The judge's conservative views and beliefs surrounding abortion appear to have influenced his sentencing decision,

There is no mitigation available to you by reference to the Abortion Act, whatever view one takes of its provisions, which are wrongly so liberally constructed in practice as to make abortion available essentially on demand prior to 24 weeks, subject to medical practitioners' approval (Hayley, judge sentencing remarks).

The judge had no jurisprudence nor statute to assist with sentencing, as the Court of Appeal judges noted during the sentencing appeal. Their review of the case dramatically reduced the sentence starting point from 12 years to 3½ years. As such, the appellant judges redressed the culpability and harm of Hayley's actions, moving them far from the region of murder.

A key issue in this case lies in the purpose of the offence of procuring a miscarriage and child destruction. As noted in Chapter 4, in recent years advocated have outlined strong objection to the continued criminalisation of abortion and related offences. As Sheldon (2016b, 1997) argues, if the Offences Against the Person Act 1861 is read in conjunction with the Abortion Act 1967<sup>4</sup>, the law does not express that abortion is a moral wrong that should be condemned at all stages of gestation. Instead, it considers abortion a serious wrong when not carried out under medical supervision in line with the best medical practice of the 1960s. When considering Sheldon's (2016b) critique of the law together with Hayley's case, a number of points need to be considered. The first is that if restrictions on obtaining an abortion were not limited in time to 24 weeks, then it is possible that Hayley may have been able to access an

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<sup>4</sup> 1967, c.87.

abortion through medical services when she first presented for medical examination. It is also possible that had the legal restrictions on accessing to an abortion not been in place, then Hayley might have successfully obtained an abortion before the 30<sup>th</sup> week of her pregnancy (when she first presented). As Sheldon (2016a) argues, the involvement of criminal law in abortion services acts to stigmatise the procedure and may negatively impact women's ability to access services. Secondly, the positive outcome of criminalising women who procure a miscarriage outside of the legal defence provided by the Abortion Act needs to be questioned. Sheldon (2016b: 349) provides evidence that women obtain illegal abortions across the UK, with very few ever being prosecuted. It appears that prosecutions are only sought when post-viable foetuses are aborted. As already argued, one of the key ideas that was raised in both the sentencing hearing and appeal in Hayley's case was that her actions prevented a foetus from living. However, it must be remembered that any act of abortion prevents a foetus from living, so it needs to be considered why the focus of criminalisation in England is upon women who purposefully end the lives of foetuses in the later stages of development. It is the case that a foetus in this stage of pregnancy is most like a human born alive, and is most capable of surviving outside of the womb. However, that principle is not specifically recognised under English criminal law, nor has it ever been, if the Infant Life (Preservation) Act 1929 is interpreted together with the intent of the law when enacted rather than how it is applied. If the incentive in Hayley's case is to punish her purely because she purposefully ended the life of a foetus at a time when it was capable of living a separate existence, then legislation should be enacted in order to clearly reflect this desire in law, rather than using outdated

legislation that, as outlined in Chapter 4, 'fails to fulfil any demonstrable modern purpose' (Sheldon, 2016b: 356). The enactment of such legislation would remove the principles of the born alive rule, and as Lord Dyson concluded in the most recent case relating to prenatal harm,

Since the relationship between a pregnant woman and her foetus is an area in which Parliament has made a (limited) intervention, I consider that the court should be slow to interpret general criminal legislation as applying to it.<sup>5</sup>

Using the offence of procuring a miscarriage to criminalise Hayley's actions of intentionally ending the life of her foetus does just what Lord Dyson advocates against – applying the law in ways that Parliament had not intended. It may well be that it is appropriate to criminalise women who act to kill a foetus during the late stages of pregnancy. However, as no specific criminal offence currently exists to criminalise such action by pregnant women, and as Parliament has yet to pass such statute, current application of the law in cases such as Hayley's, fails to meet the spirit of the law. If a desire to criminalise such action exists, I contend that, following Lord Dyson's logic, legislation should be enacted to capture the perceived criminal wrong. Such statute would fundamentally change the law to provide the foetus with legal personhood.

A further consideration is that punitive punishment of women who intentionally end the life of a foetus in the late stages of pregnancy is also out of step with the responses by the criminal justice system to the killing of newborn children.

Through my initial data collection, and subsequent review of all identified cases of newborn child killing from 2002 to 2015, it appears that no woman has gone to

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<sup>5</sup> *Criminal Injuries Compensation Authority v First-tier Tribunal (Social Entitlement Chamber) (British Pregnancy Advisory Service and others intervening)* [2014] EWCA Civ 1554; [2015] QB 459: 479.

jail for killing her newborn child over this period. Most of these cases resulted in a conviction of infanticide, for which imprisonment is extremely rare. The only case identified that did not result in an infanticide conviction, ended in a conviction for manslaughter (case 35 in Table 7 Appendix 1); this resulted in a two-year community order with supervision requirements, rather than imprisonment. No woman who has killed a newborn child in this period has been convicted of murder. As noted in Chapter 4, the Infanticide Act 1938<sup>6</sup> facilitates lenient treatment, recognising the socio-economic pressures that could lead a woman to kill her infant, while framing this leniency in medical terminology (Ward, 1999; Brennan, 2007; O'Donovan, 1984; Kramar and Watson, 2008, 2006; Grey, 2014). Continued use of the Infanticide Act 1938 in the late twentieth- and twenty-first-centuries, including in the cases of Fiona and Tanya, reflects continuation of the belief that such vulnerable women may require a demonstration of leniency, as the judge ruled in Fiona's case,

But the law recognises that people in a similar predicament do, on occasions, kill their offspring whilst the balance of their mind is disturbed and the law recognises that it is important for the courts to act in a constructive way and mercifully, rather than to concentrate on punishment (Fiona, judge sentencing remarks).

As noted in Chapter 4, wording of the Infanticide Act 1938, 'balance of her mind was disturbed' has been interpreted in the broadest sense and generously applied, covering a range of situations whereby a woman has killed her born alive child soon after birth. If the law is prepared to accept that women kill newborn children due to socio-economic pressures, such an acceptance should, surely, be extended to women who kill fetuses in the latter stages of pregnancy.

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<sup>6</sup> 1 and 2 Geo.6, c.36.

As Weir (2006) argues, the distinction between a foetus in late gestation and a newborn child is location, hence construction of the 'perinatal' period.

It should be noted that if the body of Hayley's foetus had been found and it could be proven that it was born alive and had subsequently died through an act or omission on Hayley's part, it is very likely that she would have been charged with murder, and it seems unlikely that the defence of infanticide would have been open to her. The prosecution argued, but did not prove, that Hayley took medication to end her pregnancy. As such, her act against her foetus/child occurred before the birth took place. For infanticide to be committed, it must be proven that the 'disturbance of mind' that caused her to act was due to 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'.<sup>7</sup> As the birth of Hayley's child was induced by medication, and not as a result of spontaneous labour, her action cannot be considered a result of a disturbance of mind due to not having fully recovered from the effect of giving birth. Although it could be argued that she was suffering from a 'disturbance of mind', it occurred the wrong side of birth. Hayley undoubtedly suffered a crisis pregnancy. Indeed, there is evidence that this was the fourth, if not fifth crisis pregnancy she suffered (see review in Chapter 5). Her complicated obstetric history has resulted in three previous concealed/denied pregnancies. From the literature review of concealed/denied pregnancy and neonaticide provided in Chapter 3, it is reasonable to conclude that Hayley was suffering from a 'disturbance of mind', as broadly defined by the Infanticide Act 1938, but that this disturbance of mind

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<sup>7</sup> Infanticide Act 1938, s1.



was as a result of the pregnancy, rather than the birth. It is possible that if Hayley had experienced a spontaneous birth, given birth to a live-born child, and either actively killed the child or allowed it to die, she could have been convicted of infanticide on the basis that her complex obstetric history and concealed/denied pregnancy demonstrates that she was disturbed of mind. If an infanticide conviction had been obtained, then it is very likely that she would have received a community sentence, and so spared jail. Hayley's case highlights an inconsistency in criminal law. It seems counterintuitive to imprison a woman who caused the death of a foetus prior to birth, when there is limited desire to imprison women who kill children soon after birth, particularly as a foetus does not have legal personality. Granted, the Infanticide Act 1938 and the Offences Against the Person Act 1861 are two distinct pieces of legislation, with very different intentions and incentives – the Infanticide Act is a clear demonstration of leniency, in comparison to the s58 of the Offences Against the Person Act, which offers stringent punishment to any woman who ends a pregnancy. However, such a discrepancy in law would suggest that a foetus has greater moral significance than a newborn child. Whether it is believed that Hayley's foetus died because of her act of procuring a miscarriage, or if it was born alive and subsequently killed or allowed to die, her punishment 3½ years, reduced from 12 years, is disproportionately severe compared to women who have killed children born alive. Much concern over the whereabouts of the foetus' body is made during Hayley's sentencing hearing and appeal; the appellant judges noted this '...prevented post-mortem examination with its potential to determine the cause and timing of death' (Hayley, Court of Appeal sentencing hearing). Whether Hayley purposefully concealed the body due to

awareness that it would demonstrate an act of homicide cannot be speculated. As such, without this evidence, punishment for an act of killing cannot be given. Regardless of whether Hayley's acts are comparable with an act of homicide of a newborn child, she appears to have been disproportionately punished.

After reviewing and analysing the legal practice of prosecutors in cases of suspicious perinatal death, together with the scholarship on this area of criminal law, I have identified that application of the law reflects neither the principles nor the spirit of the law. Professionals working within the criminal justice system are identifying wrongs that they perceive to warrant criminal sanction. As such, outdated criminal law is utilised by prosecutors to criminalise women. Throughout these cases, the women are judged next to the standard of the idealised mother, encapsulated by the myths of motherhood. The narratives presented in court about the women's motherly behaviour, outlined in Chapter 5, demonstrate the comparison of the women next to the ideal. The ideals of the 'good' mother are also reflected in the perceived criminal wrongs outlined here – failure to protect the foetus from risk, failure as a mother to put the foetus first, and preventing the foetus/child from living. Each of these perceived wrongs stem from the principle that a 'good' mother is a responsible pregnant woman who puts the health and wellbeing of her child, and by extension her foetus, first. Each of the women in the cases examined failed to do that. This failure underlies the desire to criminalise, even in cases where criminal wrong, dictated by the letter of the law, does not appear to exist. An example of criminalising without clear criminal wrong is apparent in the offence of concealment of birth. In this final section of the chapter, I outline the offence and query what criminal wrongs exist.

## Concealment of birth

As outlined in Chapter 4, concealment of birth (hereafter 'concealment') is categorised as a miscellaneous crime against society; it criminalises the hiding of a dead body for the purpose of concealing the fact that a child was ever born. A conviction is not reliant upon proof of live-birth or the cause of death. The offence has historically been used to criminalise women in instances where wrong-doing was suspected but a murder conviction could not be made, as no evidence of live-birth was available (Jackson, 1996b; Kilday, 2013; Higginbotham, 1989; Loughnan, 2012a). Three of the seven women in the sample were convicted of concealment – Hannah, Lily and Sally. These women were not convicted of homicide offences. In Lily and Sally's cases it was concluded that their foetuses were stillborn. In Hannah's case, after originally being arrested for murder, she was convicted of child cruelty based on her failure to seek medical attention. While Hannah was considered to be neglectful towards her child, and it is that act of neglect that resulted in the death of the child, the use of the concealment offence is not designed to punish that behaviour; this is the purpose of the child cruelty conviction. Hence, the offence of concealment is deemed to punish Hannah for actions beyond neglect of the child. With the facts of the three cases in mind, I question what criminal wrong is identifiable in each case. As such, I consider the purpose of the concealment offence, and whether it is still required. I propose five wrongs that might be deemed to require criminalisation: unproven homicide; improper disposal of a body; hiding pregnancy and birth; failure to register a birth or stillbirth; and

hindering a criminal investigation. I will draw on Sally, Hannah and Lily's cases to assist with this analysis.

## **Unproven homicide**

In all the cases analysed here that resulted in a concealment conviction it was suspected, but could not be proven, that the women were responsible for the deaths of their fetuses or newborn children. As already noted, to be a victim of homicide a child must be born alive. Thus, to secure a homicide conviction it is not only necessary to demonstrate cause of death, but also live-birth. During Lily's sentencing hearing, it was stated that when the body was discovered, it was not possible to tell if the 'child had been born alive or was stillborn' (Lily, prosecution opening facts). The judge noted, 'There has been a veiled suggestion in the case, and I put it no higher than that, that there may have been something suspicious about the birth and your subsequent behaviour' (Lily, judge sentencing remarks). Similarly, in Sally's case, as already noted in this chapter, it is perceived that her actions while pregnant were 'such as to put the good health of any unborn child at risk' (Sally, judge sentencing remarks). As with Lily's case, it was not possible to determine whether Sally's fetuses were born alive due to the state of decomposition once the fetuses' bodies had been discovered.

Hannah's case is different in nature. The post-mortem concluded that her child was born alive and died within two hours of birth. There were no signs of injury to the child and no cause of death could be ascertained. Hannah maintained that she fell unconscious post-birth and that the child had died before she

regained consciousness. As already noted in this chapter, Hannah's claim of not being conscious may explain why she did not face a homicide offence, notably infanticide. Similarly, for this reason, if she had not pleaded guilty to the child cruelty charge, she may have been acquitted at trial as the prosecution would have been required to prove she had not passed out. The prosecution noted Hannah's claim to have passed-out in their opening facts, although they make no reference to this point when concluding their case, noting, 'She sought no assistance with the birth as she sought to keep it a secret. She sought no assistance for the newborn child and it died without any attempt, it would appear, by the defendant to give it the care the child required' (Hannah, prosecution opening facts). I feel it important to note that had Hannah been unconscious then she would have been unable to provide any form of assistance. The ambiguity surrounding Hannah's state of consciousness during the time the child lived may explain why a concealment charge was sought in this case. As already noted, the offence of concealment is not concerned with how the child died, only what happens to the body post-death. Inclusion of the offence of concealment on the charge list would mean that even if a conviction of child cruelty could not be secured, then at least a conviction for concealment could be made. As it transpires, it would appear that Hannah's disposal of her child's body does not meet the requirements of the offence of concealment, explored below. As such, it is possible that Hannah might have avoided criminal conviction due to the unavailability of evidence and the principles of criminal law surrounding parental responsibility.

In all three of these cases the actions of the women appear suspicious. Furthermore, as noted in this and previous chapters, an expectation exists that a pregnant woman will do all in her power to ensure the health and wellbeing of her foetus/child. As a healthy child was not the outcome in these cases, suspicion would appear understandable. However, a fundamental principle of criminal law is that evidence of wrong-doing must support a conviction. Use of an offence to punish behaviour that is suspected, but cannot be proven challenges the presumption of innocence. It appears that the offence of concealment is still being used as it was intended to be used when enacted in 1803, to capture women who could not be convicted of homicide and to target a pattern of behaviour that was deemed to require punishment, although was not technically criminal (Jackson, 1996b). Application of law for this purpose has serious implications for defendants. Concealment is significantly easier to prove than a homicide offence and so can facilitate criminalisation where none might be warranted. Furthermore, if a homicide offence is suspected but unproven and concealment is used instead, then the label attached to the criminality and punishment handed down does not match the wrong and harm that was initially identified by officials. The principle here stands – if homicide is suspected then it should be charged and proven by the prosecution. Concealment as a substitute offence to criminalise behaviour that may be homicide, but cannot be proven to be, undermines the principles and the spirit of the law.

## **Improper disposal of a body**

One of the key concerns that may arise from such cases is that the body of a newborn child has been improperly disposed of. Both Sally and Lily placed the

bodies in locations where they were unlikely to be found. Sally kept the bodies of her four infants in her wardrobe for over a decade. The judge in the case noted that she used air fresheners to ‘conceal what she had done’ and moved the bodies several times in the course of changing address; further stating, that Sally had not just put the existence of the bodies out of her mind, but she had ‘continuing thoughts about their concealment’ (Sally, judge sentencing remarks). Lily buried the body of her child in the garden of the house where she was residing. The body was discovered several years later when builders excavated the garden. In contrast, Hannah left the body of her infant in the front garden of her friend’s house. The location of this abandonment raises questions as to whether she actually committed the offence of concealment, as there is significant precedent set by case law that secret disposal of a body in a location where it is unlikely to be found is one of the ingredients of the offence, see Chapter 4. Indeed, in *R v Clark*<sup>8</sup>, the judge ruled that leaving the body of an infant in the street where it could be found did not constitute a concealment. The body of Hannah’s infant was found soon after she left it. As such, the offence of concealment had potentially not occurred as the child’s body was easily found by her friend. Nevertheless, she, Sally and Lily, all disposed of the bodies of their infants in ways that contradict the accepted norm. While this is a moral wrong, it may not meet the requirements to warrant criminal sanction.

Concern may exist in relation to public health measures relating to the disposal of a body. However, as Sheldon (2016b) notes, such justification for criminal sanction would support classifying concealment as an administrative offence,

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<sup>8</sup> [1883] 15 Cox CC 171.

rather than a moral one, this would imply a far lower sentence. It is illegal to dispose of a body in an improper manner. Preventing lawful and decent burial is a common-law offence. Lily was convicted of this offence, as well as of concealment. Jones and Quigley (2016) acknowledge two reasons why concealing a dead body and so preventing a burial might justify criminal sanction. Firstly, as it offends public decency. Secondly, as it causes harms that stretch beyond public health concerns – notably it fails to recognise the wishes of the deceased in terms of their post-death plans, and causes distress to friends and family members of the deceased due to them not knowing the fate of the person. However, Jones and Quigley are critical of both reasons, arguing that neither can justify criminal sanction. In relation to offending public decency, a failure to inform authorities of a dead body and so to facilitate a socially accepted form of disposal, does go against social norms and is arguably wholly objectionable. Nevertheless, Jones and Quigley argue that social norms do not present an objective nor consistent standard against which to measure action that should be criminal. They argue that something should not be illegal just because someone finds it offensive, notably as people's opinions as to morally wrong behaviour differ. Similarly, in relation to potential harms, Jones and Quigley argue that this cannot warrant use of a criminal offence. A dead person is not able to be a victim of a crime, the nature of death means that they are unable to be recipients of either benefit or harm. While harm through distress may be caused to family of the deceased, Jones and Quigley doubt the level of distress is sufficient enough to warrant criminalisation, and this would represent a worrying extension of the use of criminal law. They conclude that there is little



justification and need for the offence to continue to exist, advocating that other, more appropriate offences could be utilised to address such a transgression.

In relation to the concealment cases, the harms outlined by Jones and Quigley arguably do not exist. In relation to the harm caused to a foetus/child in failure to meet their post-death plans for their body, this cannot be considered a harm as the neither a foetus nor a newborn child has the capability of conceptualising death, nor what happens to their body post-death. Awareness of self, desires, existence as a member of the human community, and consideration of its own existence and ability to die are not held by a foetus or newborn child (Tooley, 1972; Warren, 1973; Engelhardt, 1974; Dworkin, 1993). In all three cases examined here, the women concealed/denied their pregnancy, meaning few people were aware of the existence of the child and therefore would arguably fail to be concerned as to the way its remains were disposed. In Sally's case, the presentencing report notes that the fathers of the four infants were victims of Sally's actions, as they were unaware of the existence of their children or their fate. The judge highlights this point, noting that three of the four fathers had been identified and they 'indicate high levels of shock at the revelation of what has happened' (Sally, judge sentencing remarks). In rebuttal to this, Sally's barrister argued that the fathers showed Sally no concern after the conception of each child took place, although the judge qualifies this, noting that Sally's failure to tell them of her positive pregnancy status did not allow for a test of their concern. The judge further noted that Sally's children felt an embarrassment, shame and guilt at their mother's behaviour, identifying them as victims of Sally's conduct. While such distress is understandable, I refer to Jones and Quigley's

argument that it cannot provide a basis for criminal liability for the nature in which the foetus' bodies were disposed. Nor can embarrassment and shame at the actions of a family member justify criminal sanction. Thus, while the nature of the disposal of the body may shock and offend public sentiment, it is difficult to identify this as a criminal wrong. With the logic of Jones and Quigley's (2016), the improper disposal of a body as a wrong does not warrant criminalisation.

## **Hiding pregnancy and birth**

As noted in Chapter 3, a presumption exists that medical management of pregnancy is best. I have already argued that the women's behaviour of putting the foetus at risk is perceived as a criminal wrong by members of the criminal justice system. Concealing a pregnancy and a subsequent birth is perceived as risky behaviour. All three of the women convicted of concealment were deemed to put their foetus/child at risk due to not seeking medical attention during their pregnancy, or labour and delivery. However, in England it is not, nor has it ever been, illegal to conceal a pregnancy, nor give birth alone. While the offence of concealment does not specifically criminalise concealing a pregnancy and the birth of the child, the nature of cases likely to result in a concealment charge are those that occur in a context of a solo birth following a concealed/denied pregnancy. As this behaviour is deemed risky and to be dangerous for the unborn child, this might be identified as a wrong that warrants criminalisation.

There is a growing movement in the UK (free birthing) and the US (UC-ers, or unassisted childbirthers) to give birth without medical assistance (Groskop, 2007; see also Dahlen et al., 2011; Dannaway and Dietz, 2013; Hickman, 2010;

Miller, 2009; Shanley, 1994). The acts of hiding pregnancy and giving birth alone are not illegal. If the child were to survive the birth then concealment has not been committed. Similarly, if the child were to die in the course of the birth or soon after but the stillbirth or live-birth and subsequent death were reported to the authorities, then concealment has not been committed. It is illegal for a person who is not a registered midwife or a registered medical practitioner to attend to a woman in childbirth, except in a case of sudden or urgent necessity, or if the person who attends is in training to become a medical practitioner or a midwife and the attendance is part of that training; the punishment for which is a fine not exceeding level 5 on the standard scale, £5000.<sup>9</sup> An unqualified person may be present at the birth, but may not assume responsibility, assist with the birth, or assume the role of a registered midwife or a registered medical practitioner.

It is estimated that between 20 and 30 women have free births every year (Moorhead, 2013). It is not known how many free births result in the death of the child. While not seeking medical attention during pregnancy and labour may not be considered the safest course of action for a pregnant woman, there is no fundamental criminal behaviour in this act, even if the pregnancy and birth have been concealed from the authorities in the process. While the action may be seen as suspicious and risky, there is no law, common-law or statute, that constructs this behaviour as illegal. Death of a foetus/child in the course of an unassisted labour following a pregnancy that has been concealed from the wider world is tragic, particularly if the death is deemed to have occurred due to the

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<sup>9</sup> The Nursing and Midwifery Order 2001 SI 2002. 258.

decision to conceal the pregnancy, and labour and delivery. However, the undesirable nature of this behaviour does not warrant application of criminal law in the form of the offence of concealment. If it is deemed that solo birth is a criminal wrong, then this should be specifically addressed in criminal law, and not informally criminalised using the offence of concealment. Furthermore, considering the feminist critique of the medicalisation of pregnancy and the governance of pregnancy outlined in Chapter 3, and feminist concerns over maternal obligation to the foetus, many feminists would be fundamentally opposed to the principle of compelling women to conform to the advice provided by the medical community in relation to their pregnancies due to the impact this would have on autonomy and liberty (Brazier, 1999; Fovargue and Miola, 1998; Oberman, 2000).

## **Failure to register a birth**

The offence of concealment may be identifying the failure to register a birth or a stillbirth as a wrong warranting criminalisation. The Births and Deaths Registration Act 1953<sup>10</sup>, currently states that every child born must be registered within 42 days of birth by a qualified person: mother or father; the occupier of the house in which the child was to the knowledge of that occupier born; any person present at the birth; any person having charge of the child; in the case of a stillborn child found exposed, the person who found the child. Under s11, in instances where the child is stillborn, a qualified informant shall,

(a) deliver to the registrar a certificate in the prescribed form signed by a registered medical practitioner who was present at the birth or has examined the body of the child, or, if no registered medical practitioner was so present or has examined the body, by a registered midwife who was so

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<sup>10</sup> 1 and 2 Eliz.2, c.20.

present or has examined the body, being a certificate stating that the child was not born alive and, where possible, stating to the best of the knowledge and belief of the person signing it the cause of death and the estimated duration of the pregnancy; or

(b) make a declaration in the prescribed form to the effect that no registered medical practitioner or registered midwife was present at the birth or has examined the body, or that his or her certificate cannot be obtained, and that the child was not born alive.

A stillbirth is defined under s41 of the Births and Deaths Registration Act 1953, and s1 of the Still-Birth (Definition) Act 1992<sup>11</sup> as,

a child which has issued forth from its mother after the twenty-fourth week of pregnancy and which did not at any time after being completely expelled from its mother breathe or show any other signs of life, and the expression 'still-birth' shall be construed accordingly.

As such, it there is no requirement to register the stillbirth of a foetus born without signs of life before the twenty-fourth weeks of gestation. In March 2016 the Government indicated it had no plans to change the definition of stillbirth, which is based on viability (Fairbairn, 2016). If a foetus is born without signs of life prior to the twenty-fourth week of pregnancy, then it is deemed that the woman has experienced a miscarriage, not a stillbirth. As there is no legal requirement to register the birth of a child born without signs of life before 24 weeks of pregnancy have occurred, then it would appear logical that the offence of concealment cannot be committed through the secret disposal of the body of such a foetus. Case law supports this suggestion, ruling that the foetus must have had a reasonable chance of surviving outside of the womb for the offence to occur.<sup>12</sup>

While failure to register a birth or stillbirth has been outlined by Parliament as a criminal wrong punishable by a fine, maximum penalty of £200, it is classified as

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<sup>11</sup> c.29.

<sup>12</sup> *R v Berriman* [1854] 6 Cox CC 388.

an administrative offence, not a moral offence. In opposition to this, concealment is classified as a moral offence, with a maximum of 2-years' imprisonment. Hannah, Lily and Sally committed this offence as none of them registered the birth or stillbirth of their children; Sally's pre-sentencing report noted this. However, as this criminal wrong can be recognised under the Births and Deaths Registration Act 1953, the offence of concealment must be identifying further wrongs. Furthermore, the wrong must be of greater significance as concealment is considered a moral offence.

## **Hindering a criminal investigation**

A further apparent wrong committed by the actions of the three women convicted of concealment is that their acts prevented, or had the potential to prevent, a full investigation of the circumstances relating to the birth and death of their infants. In Lily and Sally's cases, the time lapse between the birth of the child and the discovery of the body prevented a post-mortem examination from determining whether the child was born alive or the subsequent cause of death. The consequence is that the ability to determine if the child lived an independent existence was lost. In Lily's case, both the judge and the prosecution barrister noted that Lily's actions prevented an investigation into the death of the child,

These offences, and I refer particularly first of all to the offences relating to the birth, are serious because it means that the authorities can never establish in circumstances such as this what has happened to the child, and that is something that everybody is entitled to know about, and the seriousness of the offence is that by doing what you did, that could not happen (Lily, judge sentencing remarks).

In Hannah's case, if her actions of concealing the dead body had been successful then she too may have prevented such an investigation. As her

disposal of the body reflected an abandonment, rather than a secret disposal,<sup>13</sup> the body was easily found and an investigation into death occurred.

In their review of the offence of preventing lawful and decent burial, Jones and Quigley (2016) identify obstructing a coroner and perverting the course of justice as two offences that could capture the criminal wrong committed by individuals who conceal a dead body in order to prevent a post-mortem from taking place. As Jones and Quigley argue, there is a strong public interest in ensuring that coroners are able to carry out their duties, as it allows for an investigation into deaths that may have occurred as a result of a criminal acts. Disposal of a corpse with intent to obstruct or prevent a coroner's inquest when there is a duty to hold one is a common-law offence, triable only on indictment, and carries a maximum penalty of life imprisonment and/or a fine (Crown Prosecution Service, 2017). Perverting the course of justice is also a common-law offence with the same punishment. Jones and Quigley note that both offences would be more difficult to prove than preventing lawful and decent burial, as they require proof of intent. Nevertheless, they conclude that the intention-based offences more accurately reflect the wrong committed and thus requiring punishment – the defendants hid the bodies in order, it would seem, to prevent criminal activities from being discovered. They conclude that it is important to distinguish between the morally wrong behaviour of concealing a body, and the criminally wrong behaviour of obstructing a coroner/justice. Use of these offences would also distinguish between individuals who hide a body with intention to conceal it, and those who act without intention, due to shock or grief.

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<sup>13</sup> *R v Brown* [1870] LR 1 CCR 244; see also *R v Sleep* [1864] 9 Cox CC 559; *R v Cook* [1870] 11 Cox CC 542; *R v George* [1868] 11 Cox CC 41; *R v Waterage* [1846] 1 Cox CC 338.

When applying the logic outlined by Jones and Quigley to the offence of concealment a similar conclusion can be drawn. Sally and Lily's acts prevented a post-mortem from being completed and thus prevented discovery of whether criminal acts had occurred. If their actions of hiding the bodies were intentional to prevent a coroner's inquest, and this intent can be proven, then it seems fitting that such actions be punished. In Sally's case, it would seem that her actions were in fact intentional. As the judge noted, she kept the bodies hidden for a number of years, using air freshener to mask the smell, and moving the bodies several times in the course of moving home. Furthermore, one of Sally's living daughters found the body of one of the babies and she and Sally then buried the remains in the family grave 12 years before Sally appeared in court. However, Sally did not reveal the existence of the other bodies at that time. Sally advised the author of the pre-sentencing report that she had planned to take the babies to the hospital post-birth, but upon realisation that they were dead decided she could not attend the hospital due to the questions that would be asked. She did not know what to do and so 'hid' the bodies (Sally, presentencing report). Considering this evidence, it appears likely that a conviction of obstructing a coroner could have been secured.

In Lily and Hannah's cases, it is less certain if the offence of obstructing a coroner was committed. Lily's defence barrister presented a significant amount of evidence to demonstrate that Lily was living within an abusive and controlling relationship at the time of the birth of the child. It is argued that Lily concealed her pregnancy from her partner, who is described as volatile and a drunk, due to



fear of his violent reaction and previous accusations that she had been having relationships with other men. Lily maintains that the baby was stillborn following a violent assault and resuscitation was unsuccessful:

..she was, she accepts, traumatised by the whole experience and was not thinking straight, and when I asked her specifically why she buried it in the garden, she indicated she just wanted to know that it was near.

She accepts that in the cold light of day sitting in a courtroom and thinking about it, of course she should have called for help and of course she should have contacted people and ensured that there was a proper burial, but even if your Honour puts aside the beating, your Honour is still left in a situation where a woman late at night gives birth alone in a property with only a two year old child present. It must on any view be a traumatic experience, and I would certainly ask your Honour to say that it is such a traumatic experience that what she did then can be explained by that, rather by any deliberate intention on her part to actually conceal the birth and the death for any ulterior motive (Lily, defence mitigation).

The Judge accepts this account,

...you were a woman in desperate circumstances who knew what you were doing was wrong, but nonetheless were in a complete panic in the situation in which you found yourself. It is not to your credit that you did not admit the offence for a period of time, but you did when you came before the court (Lily, judge sentencing).

Considering this evidence, it seems likely that Lily did not act with intent to pervert the cause of justice or prevent a coroner's investigation. Certainly, it appears there would be limited evidence to support such an accusation. Instead, Lily's behaviour reflects that of a woman acting out of shock and desperation due to her victimisation from her abusive partner.

A similar conclusion can be drawn from Hannah's case. As previously noted, Hannah did not conceal the body of her baby, instead she appears to 'abandon' it,

She said she had taken the baby to her friend's house because she thought her friend would know what to do, though she said her friend did

not know she had been pregnant or that she had left the baby there (Hannah, prosecution opening facts).

As already noted, such action seems to fail to meet the requirements of concealment. Furthermore, it strongly suggests that Hannah did not act with intent to prevent a coroner's investigation, but more out of shock.

On the basis of this review of the perceived wrongs in Hannah, Lily and Sally's cases of concealment of birth, I question continued use of the offence. There are a number of identified wrongs in the behaviour of the three women, as outlined above. Several those wrongs are defined as warranting criminal sanction and are captured under other offences – failure to register a birth and obstructing a coroner or obstructing justice. However, the actual wrong outlined in s60 of the Offences Against the Person Act 1861 is the concealment of a body to conceal the birth. While concealing pregnancy, labour and the dead body of a baby may seem like a wrong to wider society, whether the wrong is significant enough to warrant criminal is less clear (Simester and Von Hirsch, 2011; Jones, 2017). Using the offence of concealment to capture a suspected, but unproven, homicide, as has historically been the function of the offence, goes against the principles and spirit of law. For these reasons, the offence of concealment would appear to be an outdated and redundant offence, and so I draw the conclusion that s60 of the Offences Against the Person should be repealed.

## **Conclusion**

The incentive to punish the women in the cases presented here is strong. On the surface, such incentive to punish appears reasonable – the women have hidden their pregnancies, given birth alone, resulting in the deaths of the

foetuses/children. However, when the details and the context of these cases are examined, and the wrongs perceived to be criminal are identified, the appropriateness of criminalisation is less clear. Further doubt of the appropriateness of criminalisation is cast over these cases when an examination of the application of the offences of procuring a miscarriage and concealment of birth are analysed. In Chapter 5, I demonstrated that all seven women experienced a crisis pregnancy and the impact of their concealed/denied pregnancy was not taken into consideration by the court. There are questions as to the suitability of criminalisation in these cases, considering the vulnerabilities of the women, and the impact of a concealed/denied pregnancy on the reaction of women during pregnancy, labour and in the post-partum period (Beyer et al., 2008; Meyer and Oberman, 2001; Spinelli, 2003; Vellut et al., 2012). In this chapter, I have provided evidence that the identified wrongs in these cases may not warrant criminalisation. Each of the women has put her foetus at risk, failed to put the needs of her foetus before her own, and may have prevented the foetus/child from living. While this behaviour is far from ideal, I have argued that it does not necessarily indicate a criminal offence, as per English criminal law. Under English law, behaviour during pregnancy is only illegal if action is completed with intent to end the pregnancy or to kill the viable foetus, in which cases the offence of procuring a miscarriage or child destruction has been committed. Any action while pregnant that may put the foetus at risk or even cause harm to the foetus, that is done without intent to end the pregnancy or kill the viable foetus fails to meet the requirements of any English criminal law. It is only once a child is born alive and a separate existence has been established that a woman has a parental responsibility and therefore she

can be liable for a criminal offence if she fails to meet the needs of her child, or if she causes harm to the person or death through an act or omission. These long-standing, fundamental principles of criminal law, captured in the born alive rule, were rarely acknowledged, nor clearly defined within the seven cases in the sample. Instead, the behaviour of the women during their pregnancies is used as evidence of their intent, or their wider transgressions. Judgement of their actions is made against the standards of the ideal mother, and, by extension, pregnant woman, employing the myths of motherhood.

A second conclusion drawn from analysis of these cases is that prosecutors are making use of out-dated offences to criminalise the actions of women who experience suspicious perinatal deaths – procuring a miscarriage, and child destruction by extension, and concealment of birth. What the cases examined here demonstrate is that the law is a patchwork of legal measures from different periods, with different incentives. On one hand is the Infanticide Act 1938, recognising the socio-economic circumstances that might cause a woman to kill her born alive child, and formally recognising leniency, couched in medical terms. This leniency exists in complete contrast with the offences of procuring a miscarriage, child destruction, and concealment of birth. The three offences offer sanctions against women who act in ways that fail to conform to standards associated with motherhood and pregnancy. If an incentive truly exists to punish women who act in ways contrary to the wellbeing of a foetus then, I argue, legislation must specifically demonstrate this. If it is the will of legislators to protect foetal life, then foetal protection laws would be the most appropriate recognition of this wrong, codifying it into criminal law. Recognition of criminal

wrong needs to be explicitly stated in criminal law through the sanction of Parliament. It cannot be left to the discretion of individual prosecutors to use obsolete offences to capture perceived criminal wrongs that may otherwise not be against the law – namely harming a foetus.

In the next chapter I present a review of legal developments in the US. In many states in the US, criminal law has been extended to include the foetus as a potential victim. As such, in many states criminal law can now be legitimately used to capture the perceived wrongs of women who harm their foetuses – intentionally or not. However, as will be presented in the next chapter, this extension of criminal law has had consequences on the rights and liberties of not only pregnant women, but all women of childbearing age and, as such, brings into question the appropriateness of recognising the foetus as a legal person with equal rights and protection under law.

# Chapter 7 Pregnancy, politics, rights and laws in America

In the previous chapter I outlined the moral wrongs identified by professionals within criminal justice and deemed to warrant criminalisation in cases of suspicious perinatal death. My analysis of the principles of the law and its application led me to question the appropriateness of the use of current criminal offences; I identified that criminalisation using out-dated offences is not the most suitable way to capture the moral wrongs of women who are suspected of perinatal killing. As I concluded at the end of Chapter 6, if it is deemed appropriate to criminalise and punish women for harm committed towards a foetus, whether purposefully or accidentally, then such legal changes should be mandated by Parliament in the form of foetal protection laws. Such laws would remove the principles of the born alive rule outlined in Chapter 4. Such a fundamental shift in English law should be fully considered before implementation. To illustrate the impact of foetal homicide laws, this chapter draws upon the legal developments within the United States of America (US). As outlined in the methodology, this chapter is not designed as a comparison of legal systems. While much state law from the US does originate from historic English common-law and statute, the legal systems and legislative bodies are different; for example, most US states have a penal code, unlike the legal jurisdictions in the UK. The US also operates a both Federal and state governmental and legal system, which is not reflected in the dynamic between the countries of the UK. Instead, this chapter considers the impact of legislation

designed to protect the foetus from harm upon the rights of women and the experience of pregnancy and childbirth.

The illustration provided by US states is particularly relevant when considering legal developments in England, as until the latter half of the twentieth century, the US upheld the common-law principle of the born alive rule, as England does today. Developments in American laws have since led to that principle being removed in favour of providing the foetus with legal 'personhood' in numerous states; Connolly (2002) argues that as of 2002 only half of all states had retained the born alive principle intact. This change in legal principle and the impact upon pregnant women will be explored in this chapter. If such dramatic changes can occur in states that have a similar legal history, and had similar legal principles to England, it is reasonable to assume that such changes could occur in England. A review of changes in the US will allow for consideration of the costs and benefits of developing foetal protections laws. In relation to cases of suspicious perinatal death in England, this review will facilitate a discussion as to whether the enactment of foetal protections laws could be a suitable means to criminalise the wrongs committed by women such as the English seven in the thesis sample.

First I will outline how foetal protection laws operate in the US and interact with the right to obtain an abortion, then I will consider a small number of cases to illustrate the impact of these offences. The analysis presented here is not designed as a systematic review of the state legislation relating to foetal wellbeing. As such, key examples have been purposefully selected to consider

the impact of such laws. This chapter draws heavily on secondary literature from the US. Due to the political nature of this area of law, the issues discussed here have been widely debated and theorised, making my use of such literature, critical analysis of the law and actions of the criminal justice system appropriate and useful for this debate.

## Foetal protection laws

As in England, states in America historically adhered to the common-law principle of the born alive rule. A small number of specific instances occurred in law that recognised the rights of the foetus, but all were contingent upon live-birth occurring, for example inheritance could be granted to a foetus if its father died before its birth (see Johnsen, 1986). The creation of foetal protection<sup>1</sup> laws overturned this. For many, this change in law was considered a positive development. A number of scholars argue that the born alive rule was an evidentiary rule, rather than substantive rule of 'personhood' or of what constitutes a 'human being'. This argument is based on the principle that historically it was difficult to prove what might have caused the death of a foetus before birth (Forsythe, 1986; Forsythe and Arago, 2016; Kime, 1995). This was the opinion of the Massachusetts Supreme court in *Commonwealth v Cass*,<sup>2</sup>

Medical science now may provide competent proof as to whether the foetus was alive at the time of a defendant's conduct and whether his conduct was the cause of death. We have long since concluded that fear of speculation is not a sufficient ground for denying a civil right of action for prenatal injuries.<sup>3</sup>

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<sup>1</sup> I purposefully refer to the laws as 'protection' laws, rather than homicide laws, as several states criminalise behaviour even if it does not result in death of the foetus/born alive child.

<sup>2</sup> 467 NE 2d 1324 – Mass: Supreme Judicial Court 1984.

<sup>3</sup> Ibid: 806.



It should be noted that while this argument has been made in relation to English law (Casey, 2005; Grace, 1999), it is not a position adopted by the courts which have continually upheld the principle of the born alive rule, as discussed in Chapter 4.<sup>4</sup> Changes to law have been made at Federal and state level. The Unborn Victims of Violence Act of 2004 (hereafter 'UVVA')<sup>5</sup> followed the murder of Laci Peterson by her husband while she was eight months pregnant with her son Connor (Murphy, 2014). The UVVA recognises a foetus as a victim separate to the pregnant woman, if it is killed or experiences bodily injury in the commission of a Federal crime of violence. A child in utero is defined as a 'member of the species homo sapiens, at any stage of development, who is carried in the womb'.<sup>6</sup> The Act specifically states that a woman cannot be prosecuted in relation to her own child,<sup>7</sup> therefore only third parties can be convicted of Federal violent crimes against foetuses.

The development of foetal protection laws is often accredited to the desire to protect pregnant women from violent acts committed by third parties; many commentators commending such a legal aim (Murphy, 2014; Johnsen, 1986). The first state foetal homicide law was introduced in California in 1970 after it was ruled that Robert Keeler could not be convicted of murdering the viable foetus of his ex-wife Teresa Keeler, whom he kned in the abdomen while declaring 'I'm going to stamp it out of you'. The attack resulted in the child being stillborn. The Superior Court of California ruled that to be a victim of murder a

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<sup>4</sup> *Attorney General's Reference (No.3 of 1994)* [1998] AC 245; [1997] 3 WLR 421; *Criminal Injuries Compensation Authority v First-tier Tribunal (Social Entitlement Chamber) (British Pregnancy Advisory Service and others intervening)* [2014] EWCA Civ 1554; [2015] QB 459.

<sup>5</sup> Public Law No: 108-212, 118 Stat. 568. 1 April 2004.

<sup>6</sup> *Ibid*: (d).

<sup>7</sup> *Ibid*: (c)(3).

human being must be born alive.<sup>8</sup> The state legislature acted quickly to amend the law, adding a 'foetus' as a possible victim of unlawful killing. The statute now reads: 'Murder is the unlawful killing of a human being, or a foetus, with malice aforethought'.<sup>9</sup> The penal code was changed so that a foetus that had passed the embryonic stage (approximately 6-8-weeks' gestation) could be a victim of murder. California marked the first of many states to amend their penal codes: currently 38 states have foetal homicide laws; the following summary is based on the review of state law by Murphy (2014); Ramsey (2006); Tsao (1998); Smith (1999) and National Conference of State Legislatures (2015). Twenty-five states apply these laws to any stage of development of the foetus or embryo; for examples, Mississippi includes an unborn child 'at every stage of gestation from conception until live-birth' in the definition of 'human being' for the purposes of homicide and assault offences.<sup>10</sup> Other states apply their laws to foetuses that have reached a certain stage of gestational development: specifically referring to a 'foetus' rather than an 'embryo' and so not applying to a pregnancy within the first 8-weeks post conception (such as California<sup>11</sup>); requiring the foetus to have 'quickened' (such as Washington State<sup>12</sup>); to only applying to a 'viable' foetus (for example Maryland,<sup>13</sup> defining 'viable' as 'that stage when, in the best medical judgment of the attending physician based on the particular facts of the case before the physician, there is a reasonable likelihood of the foetus's sustained survival outside the womb'<sup>14</sup>). In some states, the stage of gestational

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<sup>8</sup> *Keeler v Superior Court*, 470 P. 2d 617 – Cal: Supreme Court 1970.

<sup>9</sup> California Penal Code § 8-187(a).

<sup>10</sup> Mississippi Code Ann. § 97-3-37.

<sup>11</sup> California Penal Code § 187 (a).

<sup>12</sup> Washington Revised Code Ann. § 9A.32.060

<sup>13</sup> Maryland Criminal Law Code Ann. § 2-103.

<sup>14</sup> Maryland Health-General Code Ann. § 20-209.

development at which criminal liability for harm inflicted on a foetus can occur is dependent upon the offence committed.

Protection of foetal life under criminal law has occurred in several different ways. Some states have extended their existing penal code to include foetuses as potential victims, of homicide and, in some states, other offences against the person. For example, Utah state criminal code defines homicide as occurring when,

...a person commits criminal homicide if the person intentionally, knowingly, recklessly, with criminal negligence, or acting with a mental state otherwise specified in the statute defining the offense, causes the death of another human being, including an unborn child at any stage of its development.<sup>15</sup>

In contrast, some states have defined a foetus as a 'person' or 'human beings' so that a foetus is captured in existing legislation relating to persons or human beings. In Kansas, homicide and battery offences apply to 'persons', which include, 'unborn child', defined as 'a living individual organism of the species homo sapiens, in utero, at any stage of gestation from fertilization to birth'.<sup>16</sup>

Other states have passed statute that make it a specific offence to injure or kill a foetus, or to commit 'foeticide', for example Louisiana specifies that the offence of foeticide is the 'killing of an unborn child by the act, procurement, or culpable omission of a person other than the mother of the unborn child'.<sup>17</sup> In contrast to all other states, Massachusetts recognises foetuses as victims of homicide through case law alone.<sup>18</sup>

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<sup>15</sup> Utah Code Ann. § 76-5-201.

<sup>16</sup> Kansas State Ann. § 21-5419, in conjunction with Kansas State Ann. § 21-5401 through § 21-5406 and § 21-5413.

<sup>17</sup> La. Rev. Stat. Ann. § 14:32.5

<sup>18</sup> *Commonwealth v Cass*, 467 NE 2d 1324 – Mass: Supreme Judicial Court 1984; *Commonwealth v Lawrence*, 536 NE 2d 571 – Mass: Supreme Judicial Court 1989.

Application of homicide offences is not the only legal method of criminalising individuals who cause harm to fetuses. Interpretation of what constitutes a 'child' in child endangerment/abuse legislation has led to the imprisonment of hundreds of women who have used controlled substances during pregnancy, particularly poor women of colour (Ehrlich, 2008). In South Carolina, in *Whitner v State*<sup>19</sup> the state supreme court ruled 3-2 that a viable foetus is included in the definition of the word 'child', as used in the Children's Code that legislated against child abuse and endangerment. As such, the court upheld Cornelia Whitner's conviction of criminal child neglect for causing her baby to be born with cocaine metabolites in its system due to Whitner's use of crack cocaine during the third trimester of her pregnancy. Seventeen states consider substance abuse during pregnancy a form of child abuse. Furthermore, several states mandate that health professionals must report suspected drug-use during pregnancy and/or test for prenatal drug exposure (Murphy, 2014: 862).

Twenty-four states that recognise a foetus as a potential victim of a crime have included language in their statutes that expressly exempts pregnant women from being prosecuted for causing injury to their own foetus, as with the UVVA (Murphy, 2014). Georgia, for example, legislates that the offence of feticide is committed by those who, 'willfully and without legal justification [cause] the death of an unborn child by any injury to the mother of such child',<sup>20</sup> but is not permitted to be used to prosecute a 'woman with respect to her unborn child'.<sup>21</sup> Murphy's review identifies a further four states that would appear to be unlikely

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<sup>19</sup> 492 SE 2d 777 - SC: Supreme Court 1997

<sup>20</sup> Georgia Code Ann. § 16-5-80(b).

<sup>21</sup> *Ibid* (f)(3).

to prosecute pregnant women for harm against their own foetus due to the wording of their legislation. Other states are silent on whether or not a pregnant woman can be prosecuted for crimes against their foetus, for example in Rhode Island,

The willful killing of an unborn quick child by any injury to the mother of the child, which would be murder if it resulted in the death of the mother; the administration to any woman pregnant with a quick child of any medication, drug, or substance or the use of any instrument or device or other means, with intent to destroy the child, unless it is necessary to preserve the life of the mother; in the event of the death of the child; shall be deemed manslaughter.<sup>22</sup>

In his review of the application of the applicability of foetal homicide laws to pregnant women, Murphy argues that this lack of specific exception for pregnant women may result in them being at risk of facing criminal procedure, as prosecutors have demonstrated willingness to advocate for broad interpretation of such statutes. He is critical of this, arguing that decisions as to whether a woman should face criminal sanction if she harms or kills her own foetus should be determined through the legislative body, rather than statute interpretation. Murphy argues that laws intended to protect pregnant women are being extended by prosecutors and members of the judiciary beyond their initially designed scope to punish behaviour. Murphy concludes that if it had been known how foetal homicide laws would be used at the time of enactment, then it is possible that some statutes would not have been enacted.

Over 800 women have been arrested, detained and forced to have medical interventions up to 2005 (Paltrow and Flavin, 2013; for further examples of criminalisation of pregnant women see Johnsen, 1989). These arrests and

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<sup>22</sup> Rhode Island General Laws § 11-23-5.

detainments have taken the form of enforced Caesarean sections (*In re AC*<sup>23</sup>), and imprisonment following the stillbirth or miscarriage of a baby (Hayes, 2010; Newman, 2010), and in cases where death has occurred shortly after live-birth in instances where women's actions have been believed to have caused the death of that foetus/child, or due to a pregnant woman not following medical advice (BBC News, 2004; Thomson, 2004). Women have also been imprisoned if a live-born child has tested positive for an illegal substance (*Whitner v State*<sup>24</sup>; Bassett, 2014), and homicide convictions have been sought in instances where a lost pregnancy has been believed to be an illegal abortion (Hunt, 1995; Pilkington, 2012).

Interaction between foetal homicide laws and the right to have an abortion is important here and needs to be considered. Women's right to have an abortion was first established in the Supreme Court Case *Roe v Wade*,<sup>25</sup> and was reaffirmed in *Planned Parenthood of Southeastern Pa. v Casey*.<sup>26</sup> *Roe* established two principles that are relevant to foetal protection laws: foetal personhood, and states' interests in the foetus and the interplay with viability. It was ruled in *Roe* that a foetus is not a 'person' within the language of the Fourteenth Amendment and so does not have equal rights and protection under law. While this position has been doubted by scholars (Forsythe and Arago, 2016; Roden, 2010), it nevertheless remains a legal principle today. The ruling leads to queries as to whether or not foetal protection laws are unconstitutional –

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<sup>23</sup> 573 A. 2d 1235 – DC: Court of Appeals 1990, Angela Carder was forced to undergo a life-threatening Caesarean section against her wishes and the wishes of her family and doctor, in an unsuccessful attempt to save the life of her foetus.

<sup>24</sup> 492 SE 2d 777 – SC: Supreme Court 1997

<sup>25</sup> 410 US 113 – Supreme Court 1973.

<sup>26</sup> 505 US 833 - Supreme Court 1992.

if the foetus is not a 'person' how can it be protected under law (Tsao, 1998). This contradiction is able to occur as the ruling in *Roe* only applies to the abortion context (Johnsen, 1986; Forsythe and Arago, 2016). Furthermore, it has been ruled in *Webster v Reproductive Health Services*<sup>27</sup> that states have the right to determine when life begins as a value judgement. The decision about foetal legal personhood does not interfere with a woman's right to choose to abort a foetus, as such statute does not by its own terms regulate abortion or impose an undue interference on a woman's right to choose; this would only be due to the applicability rather than the nature of the statute (Ramsey, 2006; Forsythe and Arago, 2016).

Nevertheless, pro-choice scholars have argued that determination that a foetus is a legal 'person' and the development of foetal protection laws have acted as a means to limit access to abortion and overturn *Roe*, as they are seen to make the foetus an autonomous entity with rights equivalent to that of the pregnant woman and so adverse to her (MacKinnon, 1991; Paltrow, 1999; Johnsen, 1989; Bhattacharjee, 2002; Brown, 2005; Bruchs, 2004; De Ville and Kopelman, 1999; Folger, 1994; Kole and Kadetsky, 2002; Schroedel et al., 2000). However, Ely (1973) argues that even if a foetus was considered to be a legal person or a constitutional person, it would not preclude a woman's right to terminate a pregnancy as Justice Blackmun assumed in *Roe*. If a foetus were considered a person under the Fourteenth Amendment the court would have to weigh the competing rights of each person and decide who had the greatest right. Ely argues that a pregnant woman's rights would prevail as state-compelled

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<sup>27</sup> 492 US 490 - Supreme Court 1989.

pregnancy would require a woman to give her body to the service of an invader (see also Dorf, 2003; Lynch, 1995). Nevertheless, while the foetal protection laws cannot directly implicate *Roe* there is legitimate concern that the statutes will contribute to pro-life cultural messages surrounding the immorality of abortion (for analysis of this cultural message see Sanger, 2006; for review of this debate see Ramsey, 2006).

State interest in the foetus is a further point of consideration together with foetal protection laws. *Roe* recognised that states have an 'important and legitimate interest in protecting the potentiality of human life',<sup>28</sup> as well as the health of a pregnant woman; however, these interests become 'compelling' at different times. The 'compelling' point of a state's interest in potential life is the point of viability of the foetus as it is then presumed capable of a meaningful life outside the womb. As such, the state may proscribe abortion after the point of viability, except where it is necessary to preserve the health of the pregnant woman. Prior to viability, a woman has the right to choose to have an abortion without undue interference from the state based on privacy from state interference with a person's decisions about bodily functions. *Casey* reaffirmed these essential holdings. It is partly this interest in potential life that has facilitated foetal protection laws and intervention of the state in decisions surrounding foetal health. For example, in *Pemberton v Tallahassee Memorial Regional Center*<sup>29</sup> the court dismissed a woman's civil suit against the hospital that sought a court-order to over-rule her consent for a Caesarean section. In dismissing the suit, the court ruled that the state's interest in preserving the right of the unborn

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<sup>28</sup> *Roe*: 162.

<sup>29</sup> U.S. District Court, N.D. Florida, Tallahassee Division, 1999. See also analysis of *Ex parte Ankrom*, 152 So. 3d 397 - Ala: Supreme Court 2013 below.



outweighed the woman's personal constitutional rights, and that this principle was confirmed by *Roe*. The ruling has been criticised by feminists. Rhoden (1986) and Gallagher (1987) argue that such a principle cannot be justified using *Roe* and subsequent cases, as these judgments have maintained that foetal welfare cannot be placed above maternal health, even if the foetus is viable and the state has an interest in protecting foetal life. Gallagher (1987: 42) concludes that to interpret *Roe*'s ruling of state interest in the foetus post-viability as an affirmative granting of legal rights and entitlements to the foetus 'confer[s] more than the very Fourteenth Amendment personhood statute the Supreme Court explicitly found inapplicable'. The consequence would be to 'virtually appropriate the woman's body and life, to the affirmative service of the foetus'. Nevertheless, the principle has been used to promote foetal health and wellbeing over that of pregnant women (Johnsen, 1989).

Legal commentators have questioned how it can be acceptable for a woman to legally abort a foetus, but not for a third party, 'If we are prosecuting a third party for killing an unborn child, it's schizophrenic that a woman can choose an abortion for a child at the same date and we don't call abortion murder' (Schuyler, 1994: 48; cited in Tsao, 1998: 459). It should be noted here that the challenge is to a woman's right to abort, rather than a third party's right to harm a foetus. However, it must be remembered that a woman's right to abort is based on the principle that a woman has the right to privacy from undue state interference in her decision to determine what happens to her own body; the decision to abort is hers and no one else's. Thus, a third party who attacks a pregnant woman, causing the termination of the pregnancy is not similarly

situated with a pregnant woman; 'The woman has a constitutionally protected right to bodily autonomy, but the third party has no right to terminate the woman's pregnancy' (Tsao, 1998: 459; see also Ramsey, 2006). Such arguments do not successfully account for application of foetal protection laws to pregnant women; however, this is the basis of analysis in the remainder of the chapter.

## Case studies

In their review of arrests and forced interventions of pregnant women 1973-2005 Paltrow and Flavin (2013: 309) identified that the vast majority of cases originate in a select number of states, mostly in the South – South Carolina, Florida, Missouri, Georgia, Tennessee, Wisconsin, Illinois, Nevada, New York, and Texas. These states accounted for two-thirds of the total number of cases. It should be noted that Paltrow and Flavin include court-ordered Caesarean sections in their review, rather than just criminal action. As outlined above, not all states target pregnant women, with some specifically stating that a pregnant woman cannot commit a homicide offence against their own foetus. So while the development of foetal personhood legislation and protection statute has been witnessed across most of the US, women are not being targeted uniformly across the country, indeed in six states no cases against pregnant women appear to have occurred up to 2005 – Delaware, Maine, Minnesota, Rhode Island, Vermont, and West Virginia (Paltrow and Flavin, 2013: 309).

I have selected three different types of cases for review. The first is a case of an illegal abortion in Indiana; the second a case of reckless homicide relating to a

car crash in New York; and the third involves women who test positive for illegal substances during or shortly after pregnancy in Alabama. The specifics and relevance of each will be discussed in turn. Following this I will explore the implications of targeting pregnant women using criminal law when harm occurs to the foetus, focusing upon the critique of such laws.

## **Feticide**

In 2013, Purvi Patel purchased Mifepristone and Misoprostol online and consumed the drugs to terminate her pregnancy at home; she was twenty-five to thirty-weeks pregnant at the time. Patel left the aborted foetus' body in a dumpster near her family's restaurant. She then attended the emergency room for medical assistance due to substantial bleeding. She advised a doctor that she had been 12-weeks pregnant and has missed two periods. However, based on the size of the umbilical cord, still in her body, and the results of a physical examination, the doctor estimated she would have been at least 26-weeks' pregnant. The doctors pressed Patel to tell them where the 'baby' was, and after she revealed the location of the body, they left the hospital with the aim of saving its life. The body was found by law enforcement officers and a doctor examined it on-sight, concluding that it was viable and appeared normal and healthy, approximately 30-weeks developed. When questioned, Patel claimed she believed she was only 12-weeks pregnant, that she did not perform CPR on the child because it was not moving and did not cry. The forensic pathologist concluded the foetus was approximately of 25-weeks' gestation and 'more likely than not' was born alive and had breathed after birth. However, it should be noted that the conclusion of live-birth was made after performing a notoriously

unreliable born alive test, as the forensic pathologist acknowledged during Patel's trial. For the purpose of the appeal, Patel stipulated that the child was born alive, and during the appeal it is presented that the baby died due to loss of blood from the severed umbilical cord. Patel was charged with class A felony neglect of a dependent alleging that she failed to provide any medical care to her baby immediately after its birth, which resulted in its death. She was also later charged with the class B felony feticide; prosecutors alleged that Patel knowingly terminated her pregnancy with the intention other than to produce a live-birth or to remove a dead foetus. At trial, Patel was found guilty as charged; she was sentenced to thirty years of imprisonment for neglect of a dependent, with twenty years executed and ten years suspended, and a concurrent executed term of six years for feticide. In 2016 she appealed both of her convictions.<sup>30</sup>

Patel appealed her neglect conviction on the basis of the State failing to prove sufficient evidence to prove the conviction beyond reasonable doubt. At the time the events occurred, the neglect statute<sup>31</sup> read:

(a) A person having the care of a dependent, whether assumed voluntarily or because of a legal obligation, who knowingly or intentionally:

(1) places the dependent in a situation that endangers the dependent's life or health;

...

commits neglect of a dependent, a Class D felony.

(b) However, the offense is:

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<sup>30</sup> Case details from *Patel v State*, Ind: Court of Appeals 2016.

<sup>31</sup> Ind. Code § 35-46-1-4.

(3) a Class A felony if it is committed under subsection (a)(1) ... by a person at least eighteen (18) years of age and results in the death of a dependent who is less than fourteen (14) years of age.

The basis of Patel's neglect charge was that she knowingly placed the baby in danger by failing to provide any medical care immediately after birth resulting in the death of the baby. To establish that Patel committed neglect, the State had to prove that she knowingly endangered her baby; and so proving she had committed a class D felony, punishable by imprisonment for between six months and three years. In order to prove Patel had committed a class A felony, with a sentence of between twenty and fifty years, the State was required to prove beyond reasonable doubt that her failure to provide medical care resulted in the death of the child. Patel appealed her conviction on the basis that the prosecution did not prove this, and the Court of Appeal agreed with Patel. The State failed to 'prove beyond a reasonable doubt that the baby's death could not have occurred but for Patel's failure to provide medical care immediately after its birth'.<sup>32</sup> While Patel's acts of deliberately inducing labour and giving birth without medical assistance were deemed to put her foetus in a dangerous situation, the offence of neglect only applied to a child born alive,

...the plain language of the neglect statute 'contemplates only acts that place one who is a dependent at the time of the conduct at issue in a dangerous situation — not acts that place a future dependent in a dangerous situation'.<sup>33</sup>

Consequently, it was only her postpartum behaviour that could be considered neglectful. Testimony against Patel was only able to establish that there was a possibility, rather than a certainty, that Patel's baby would not have died but for her failure to provide medical care immediacy after birth. As such, Patel's

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<sup>32</sup> *Patel v State*.

<sup>33</sup> *Ibid*.

conviction for the class A felony neglect of a dependent was vacated and she was convicted of a class D felony neglect instead.

Patel also appealed her foeticide conviction on the basis that the statute did not apply to her conduct. At the time of the events of Patel's pregnancy ending, the foeticide<sup>34</sup> offence read:

A person who knowingly or intentionally terminates a human pregnancy with an intention other than to produce a live-birth or to remove a dead foetus commits feticide, a Class B felony.

Patel appealed on the basis that the offence of feticide requires the foetus to die and her child was born alive. The Court of Appeal disagreed with this point, arguing that the plain language of the statute indicated otherwise. However, they did note that the language of the foeticide statute has constructed,

...the apparently absurd outcome [of] a woman being convicted under both the neglect of a dependent statute, which requires a live infant, and the feticide statute, which does not require a dead infant.<sup>35</sup>

Patel further appealed the conviction on the basis that her actions were not a foeticide, but an abortion that was not permitted under the circumstances of legal abortion.<sup>36</sup> Indiana Code Section §16-34-2-1(a) provides that '[a]bortion shall in all instances be a criminal act, except when performed under' certain specified circumstances'. The statute then outlines the requirements for an abortion to be legal. Patel maintained that the feticide statute was not the law that 'governs unlawful abortions; rather, unlawful abortions are governed by the Unlawful Abortion Statute, Ind. Code §16-34-2-7'.<sup>37</sup> The Court of Appeal ruled that the State legislatures had purposefully drawn a clear distinction between foeticide

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<sup>34</sup> Ind. Code § 35-42-1-6.

<sup>35</sup> *Patel v State*.

<sup>36</sup> Ind. Code § 16-34.

<sup>37</sup> *Patel v State*.

and illegal abortion. The court noted that since enactment in 1979, the foeticide statute has been used to prosecute third parties who knowingly terminate pregnancies by using violence against a pregnant woman without her consent. Patel's case was believed to be the first case of the statute being used to prosecute a pregnant woman or anyone else for performing an illegal abortion. Patel further contended that the legislation prohibiting abortion not performed under certain specified circumstances was intended to punish medical professionals, not women who performed their own abortions. The Court of Appeal supported Patel's argument and accordingly overturned her foeticide conviction, concluding that the legislature never intended for the foeticide statute to apply to pregnant women. As such, Patel was remanded to the trial court for resentencing for her conviction of class D felony neglect of a dependent. She was sentenced to 18 months; due to time already spent in jail, Patel was released immediately.

Patel's case reflects that of Hayley's, presented in Chapters 5 and 6. Their decisions to terminate their pregnancies were met with extreme hostility due to the gestational age of the fetuses and the circumstances under which the termination occurred – procuring drugs that resulted in the fetus being expelled from the uterus. In both cases, the response by the prosecution appears to be to punish the women as if they had committed an act of homicide against their fetus. In Patel's case prosecutors perceived that this was possible due to the state's foeticide offence. In Hayley's case, it was known this was not possible due to the requirement to prove live-birth. Nevertheless, when sentencing, the judge in Hayley's case held her action to be between murder and manslaughter

in seriousness (see discussion in Chapter 6). Both cases provide examples of how the law can be, and has been used to punish women for terminating their pregnancies. In Patel's case the use of the statue was ruled to be wrong and in opposition to the intent of the legislatures. In Hayley's case the law was applied correctly, but as I have argued in Chapter 6, the statute regulating abortion<sup>38</sup> is not fit for purpose in modern society. As the Court of Appeal argued in Patel's case, if the legislature wished to consider women who end their own pregnancies as performing an act of foeticide, then they would have made this evident in the statute. Application of the law to include such conduct into the homicide offence goes beyond the scope of the law, which is precisely the conclusion I draw from analysis of Hayley's case in Chapter 6. However, as other cases explored in this chapter will demonstrate, judicial interpretation can also work to uphold prosecutors' stretching of the law in criminalising the behaviour of pregnant women.

## Reckless homicide

Jennifer Jorgensen was 34-weeks' pregnant when her car hit that of Robert and Mary Kelly head on, killing them both. She was taken to an emergency room and due to signs of foetal distress, she consented to an emergency Caesarean section. The baby died 6 days after birth and the cause of death was deemed to be due to injuries sustained in the car crash.<sup>39</sup> Jorgensen was indicted on three counts of manslaughter in the second degree 'recklessly [causing] the death of another person',<sup>40</sup> 'Recklessly is defined as:

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<sup>38</sup> Offences Against the Person Act 1861 (24 and 25 Vict. c.100) s58.

<sup>39</sup> Case details from *People v Jorgensen*, 26 NY 3d 85 - NY: Court of Appeals 2015; *People v Jorgensen*, 2010 NY Slip Op 50348 - NY: Supreme Court 2010.

<sup>40</sup> NY Penal Law § 125.15 [1].



A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.<sup>41</sup>

She was also charged with one count of aggravated vehicular homicide, 'engages in reckless driving',<sup>42</sup> and one count of operating a motor vehicle while under the combined influence of alcohol or drugs.<sup>43</sup> Prior to her first trial, Jorgensen's defence successfully moved for the dismissal of three further offences: operating a motor vehicle while using a mobile telephone, speeding, and endangering the welfare of a child. Endangering the welfare of a child was dismissed as the court held that this crime did not apply to unborn children and if the legislature intended so it would have included language to reflect this, as it has in the case of homicide, defined as,

...conduct which causes the death of a person or an unborn child with which a female has been pregnant for more than twenty-four weeks under circumstances constituting murder, manslaughter in the first degree, manslaughter in the second degree, criminally negligent homicide, abortion in the first degree or self-abortion in the first degree.<sup>44</sup>

At her trial, the prosecution argued that Jorgensen was travelling over 50 miles per-hour in a 30 mile per-hour zone, was under the influence of prescription drugs and alcohol, swerved into the on-coming traffic, hitting the Kelly's car. The collision resulted in Jorgensen, who was not wearing a seatbelt, to hit the steering wheel, causing injury to her foetus. The jury in the first trial failed to

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<sup>41</sup> NY Penal Law § 15.05.

<sup>42</sup> NY Penal Law § 125.14.

<sup>43</sup> NY Vehicle & Traffic Law § 1192 [4-a].

<sup>44</sup> NY Penal Law § 125.00.

reach a unanimous verdict. The jury in the second trial found Jorgensen not guilty on all counts, except manslaughter in the second degree for the death of her child. The conviction was upheld by the Appellate Division of the Supreme Court of New York, Second Department, dismissing Jorgensen's contentions that the weight of evidence was insufficient to convict, evidence was wrongly admitted, and comments of the prosecution were improper.<sup>45</sup> Jorgensen was given leave to appeal.

The Court of Appeals heard the case in September 2015, the sole purpose to decide 'whether a woman can be convicted of manslaughter for reckless conduct that she engaged in while pregnant that caused injury to the foetus *in utero* where the child was born alive but died as a result of that injury days later'.<sup>46</sup> Therefore, the facts of the case were not disputed, but rather, the question for the court was whether reckless manslaughter can apply to a woman in relation to her foetus. The court ruled that it could not and that the legislature, when enacting foetal homicide statute, only intended to hold 'pregnant women criminally responsible for conduct with respect to themselves and their unborn foetuses unless such conduct is done intentionally'.<sup>47</sup> The conviction was overturned in a five-to-one ruling. The basis for the dismissal of the indictment was interpretation of statute. New York's foetal homicide offences are based on the inclusion of the term 'unborn child' in the homicide definition:

Homicide means conduct which causes the death of a person or an unborn child with which a female has been pregnant for more than twenty-four weeks.<sup>48</sup>

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<sup>45</sup> *People v Jorgensen* 113 AD3d 793 [2d Dept 2014].

<sup>46</sup> *People v Jorgensen*, 26 NY 3d 85 - NY: Court of Appeals 2015: 89.

<sup>47</sup> *Ibid.*

<sup>48</sup> NY Penal Law § 125.00.

However, the offence Jorgensen was convicted of was 'recklessly causing the death of another person'.<sup>49</sup> The definition of 'person', 'when referring to the victim of a homicide, means a human being who has been born and is alive'.<sup>50</sup> Therefore, reckless manslaughter only applies to those who have been born alive. As Jorgensen's child was *in utero* at the time of the reckless act that later led to the death of the child born alive and later dying, the statute does not apply to her act, nor would it have applied if the foetus had died *in utero*. As Judge Pigott stated:

The question is, did the legislature, through its enactment of the two statutory provisions, intend to hold pregnant women criminally responsible for engaging in reckless conduct against themselves and their unborn fetuses, such that they should be subject to criminal liability for prenatal conduct that results in postnatal death? Under the current statutory scheme, the answer to this question is no.<sup>51</sup>

Pigott concluded that if the legislature had specifically intended to criminalise a pregnant woman for conduct towards her foetus it would have clearly mandated this in statute. Furthermore, Pigott outlined that the prosecution would not have charged Jorgensen with reckless manslaughter if her child had not been born alive. As such upholding Jorgensen's conviction would have created,

...a perverse incentive for a pregnant woman to refuse a Caesarean section out of fear that if her baby is born alive she would face criminal charges for her alleged reckless conduct, jeopardizing the health of the woman and the unborn foetus.<sup>52</sup>

In the dissenting opinion, Judge Fahey argues that the conviction could have been upheld due to the definition of homicide in PL § 125.00. As such, he disagreed with the temporal qualification that Jorgensen could not be convicted

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<sup>49</sup> NY Penal Law § 125.15 [1].

<sup>50</sup> NY Penal Law § 125.05 [1].

<sup>51</sup> *People v Jorgensen*, 26 NY 3d 85 - NY: Court of Appeals 2015: 89-90.

<sup>52</sup> *Ibid*: 91.

of a crime as her allegedly reckless action occurred before the baby was born alive and as such was not a person. Fahey concluded that the baby was a person when she died and the fact that the reckless action occurred before she was a person should not be relevant. Thus, the interpretation of the case could have been different and Jorgensen could have spent up-to nine years imprisoned for the death of her wanted child due to her 'reckless' action while pregnant.

The judicial reading of New York homicide laws in Jorgensen's case relating to behaviour of a pregnant woman towards her foetus, resulting in death of a child born alive and subsequently dying, indicates that a pregnant woman can only be convicted of self-abortion acts, and this is not considered a homicide. As such, New York does not have foetal homicide laws *per se*, as an act that will result in the death of a foetus would be considered an abortion, or a self-abortion.<sup>53</sup>

Therefore, New York's homicide law reflects that of England – one must be born alive to be a victim of homicide. Being killed whilst in the womb is not an act of homicide, rather it is an illegal abortion. For this reason, Jorgensen's case is of particular relevance when considering the implication of foetal protection laws on the process of criminal law and how this relates to English cases. The incentive to punish Jorgensen for her acts of negligence that resulted in the deaths of three people – her child and the Kelly's, was sufficiently strong that prosecutors were prepared to adopt legislation and use it beyond the scope of that intended by legislators in order to criminalise her actions in regards to her child. In the concluding remarks Judge Pigott stated that the decision to hold pregnant

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<sup>53</sup> NY Penal Law § 125.40-125.55.

women criminally responsible for acts committed against a foetus that is later born alive should be defined by legislature; 'It should also not be left to the whim of the prosecutor'.<sup>54</sup> This case, along with Patel's illustrate Murphy's (2014) argument that prosecutors have demonstrated willingness to advocate for broad interpretation of statute in order to punish pregnant women for wrongs against their foetuses that are perceived to be criminal.

A similar charge to the one brought against Jorgensen could quite possibly be brought against a woman in England. Following the decision in *A-G Ref*, as Cave (2004: 62) argues, outlined in Chapter 4, it is theoretically possible a woman could be charged with manslaughter if there was an obvious and serious risk of causing physical injury to a child when it was born, which the defendant disregarded or failed to consider. Cave's argument is theoretical, and it is not possible to determine if the Crown Prosecution Service (CPS) would respond in such a way, or if the English courts would uphold such use of the law.

Nevertheless, the important points to consider from Jorgensen's case are the willingness and determination to prosecute a woman whose actions, which were far from the 'ideal' of a mother or pregnant woman, resulted in her losing a wanted child. The significance of the application of law is starker when considering what the consequences of Jorgensen's case might have been if her conviction had been upheld. The ruling would have meant that women could be held criminally liable for any action considered 'reckless' that resulted in the death of the child born alive; this could include 'disregard her obstetrician's specific orders concerning bed rest; take prescription and/or illicit drugs; shovel a

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<sup>54</sup> *People v Jorgensen*, 26 NY 3d 85 - NY: Court of Appeals 2015: 92.

walkway; engage in a contact sport; carry groceries; or disregard dietary restrictions'.<sup>55</sup> Such a change in legislation would have a profound effect on pregnant women's lives. An example of that effect can be seen in the next case study.

## Chemical endangerment

In 2008, Amanda Kimbrough's son was born after an emergency Caesarean section; she was 25-weeks and 5-days pregnant at the time. Kimbrough's obstetrician diagnosed her with preterm labour and 'occult cord prolapse', descent of the umbilical cord through the birth canal before the foetus, restricting blood flow through the umbilical cord. The child, Timmy, was born not breathing and with a low heart-rate and he died 19 minutes after birth. Kimbrough's urine was screened for drugs and tested positive for methamphetamine. The paediatrician who treated Timmy opined that he had died from 'respiratory arrest secondary to prematurity'. However, a medical examiner with the Alabama Department of Forensic Sciences who performed an autopsy on Timmy, determined that he died from 'acute methamphetamine intoxication'. Kimbrough later admitted that she had smoked methamphetamine with a friend three days before she had experienced labour pains. Kimbrough pleaded guilty to the chemical endangerment of a child, reserving the right to appeal; the trial court sentenced her to 10 years' imprisonment the mandatory minimum sentence due to the death of the child.<sup>56</sup>

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<sup>55</sup> Ibid: 92.

<sup>56</sup> Case details from *Ex parte Ankrom*, 152 So. 3d 397 - Ala: Supreme Court 2013.

In 2009 Hope Ankrom, gave birth to a son. Medical records demonstrated that she tested positive for cocaine several times during her pregnancy and that the child tested positive for cocaine post-birth. Subsequently, Ankrom admitted she had used marijuana while she was pregnant but denied using cocaine. In 2010, Ankrom pleaded guilty to chemical endangerment of a child, reserving an issue for appellate review, and was sentenced to three years in prison, her sentence was suspended and she was placed on probation for one year.<sup>57</sup>

Chemical endangerment of a child is the exposure of a child to an environment in which her or she,

Knowingly, recklessly, or intentionally causes or permits a child to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia as defined in.<sup>58</sup>

The state law was enacted in 2006 following concern that children were being exposed to dangerous chemicals used in the production of drugs such as methamphetamines in so-called 'meth labs'. However, the rise in the number of babies testing positive for drugs at birth led prosecutors to '[take] it upon themselves to begin applying the chemical endangerment law in a new manner' (Suppé, 2014: 55). Prosecutors argued that the word 'child' in the statute included fetuses as well as born children.

Both Kimbrough and Ankrom appealed their convictions to the Alabama Court of Criminal Appeals. Ankrom argued that '[t]he plain language of § 26-15-3.2, Ala.Code 1975, shows that the legislature intended for the statute to apply only to a child, not a fetus' and that courts in other states with similar legislation

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<sup>57</sup> Case details from *ibid.*

<sup>58</sup> Alabama Code § 26-15-3.2, Section 13A-12-260.

have ruled that statutes do not apply to prenatal conduct that allegedly harms a foetus.<sup>59</sup> The court ruled that the plain meaning of the term 'child', as used in the statute, includes an unborn child. This ruling was based on the State's inclusion of a viable foetus in the term 'child' in other contexts; the dictionary definition of 'child' explicitly includes an unborn person or a foetus; and in everyday language there is nothing extraordinary about using the term 'child' to include a viable foetus.<sup>60</sup> Kimbrough's appeal was not published.<sup>61</sup> Ankrom and Kimbrough petitioned the Alabama Supreme Court and the cases were consolidated and the debate as to whether or not a 'child' included a foetus was settled in *Ex parte Ankrom*.<sup>62</sup> Deferring to the ruling in *Ankrom*,<sup>63</sup> the court cited the judgement from *Ankrom* and concluded, 'We find this reasoning persuasive and agree with the Court of Criminal Appeals that the plain meaning of the word 'child' in the chemical-endangerment statute includes unborn children'.<sup>64</sup> However, the Supreme Court went further, arguing that the adoption of the viability distinction in the plain meaning of the word 'child' was inconsistent with the State's laws. Consequently, the Supreme Court rejected the Court of Criminal Appeals limited application of the chemical engagement to a viable foetus in *Ankrom*,<sup>65</sup> and ruled that the statute applied to all foetuses, regardless of viability;<sup>66</sup> this judgement was reconfirmed in *Hicks v State*.<sup>67</sup> Kimbrough further challenged the conviction on the principle that the majority of states had refused to apply chemical endangerment statute to unborn children and that Alabama should do the same.

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<sup>59</sup> *Ankrom v State*, 152 So. 3d 373 - Ala: Court of Criminal Appeals 2011: 376.

<sup>60</sup> *Ibid*: 382.

<sup>61</sup> *Kimbrough v State*, 114 So. 3d 163 - Ala: Court of Criminal Appeals 2011.

<sup>62</sup> 152 So. 3d 397 - Ala: Supreme Court 2013.

<sup>63</sup> *Ankrom v State*, 152 So. 3d 373 - Ala: Court of Criminal Appeals 2011: 376.

<sup>64</sup> 152 So. 3d 397 - Ala: Supreme Court 2013: 411-2.

<sup>65</sup> *Ankrom v State*, 152 So. 3d 373 - Ala: Court of Criminal Appeals 2011: 376.

<sup>66</sup> 152 So. 3d 397 - Ala: Supreme Court 2013: 419.

<sup>67</sup> *Hicks v State*, 153 So. 3d 53 - Ala: Supreme Court 2014.



In response to this challenge, the court agreed that they had followed the course of South Carolina, the first state to uphold a criminal child abuse conviction based on a woman's substance abuse during pregnancy.<sup>68</sup> Nevertheless the Supreme Court ruled that Alabama's child abuse statute defined a 'child' as a person under 18, not a person ages between birth and 18; citing *Casey*, they concluded that from the outset of pregnancy the state has legitimate interests in the life of the foetus that may become a child. Consequently, the convictions of both women held.

Suppé (2014) provides a detailed analysis of these two cases, concluding that the court was incorrect in holding that the term 'child' was unambiguous and as such the Supreme Court was wrong to conclude that the plain meaning of the word 'child' is broad enough to encompass unborn children. Furthermore, she argues that due to *Ex parte Ankrom* it is now a felony for pregnant women to take many prescription drugs which are legally prescribed to them, regardless of whether the prescription is harmful to the foetus. The ban would even include Methadone, the drug used as a standard of care for opioid dependent pregnant women. A further consequence of the ruling is that a woman may be breaking the law even if she does not know she is pregnant (National Advocates for Pregnant Women, 2014).

The ruling has received substantial criticism, partly due to the inconclusive evidence that drug-use during pregnancy does in fact cause harm to the foetus (Roberts, 1997; Sunderlin and Huss, 2014; Rosenbaum and Murphy, 2005). In

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<sup>68</sup> In *Whitner v State*, 492 SE 2d 777 - SC: Supreme Court 1997 the court decided that the definition of 'child' in the offence of endangerment included a viable foetus.

instances where the pregnancy ends in a miscarriage or stillbirth, frequently the cause of foetal death is unknown and drug-use cannot be definitively determined as the cause of the death of the foetus (Frank et al., 2001; Kellett, 2014; Mohapatra, 2011; Murphy, 2014). Chemical endangerment laws when applied to a foetus have also been criticised as they punish women for activity that is questionable, but would otherwise be legal if conducted by a person who was not pregnant. Suppé (2014) argues that while possession or sale of illegal narcotics is a crime in Alabama, use of those same narcotics is not. As, generally speaking, only women can become pregnant (see discussion in Chapter 1) and because the Alabama Supreme Court held that the chemical exposure statute applies to narcotics use during pregnancy, the statute punishes women but not men who use illegal narcotics, as well as those who use medication lawfully for example, prescription drugs. As the punishment can result in sentence of up-to life imprisonment, Suppé argues that the statute's gender disparity is of grave severity. Concern has also been raised regarding the 'slippery-slope' of such convictions. Commentators have argued that punishment of one type of 'deviant' behaviour during pregnancy under the veil of foetal protection makes it possible that the state will progress to punish women for other acts during pregnancy, such as women who drink alcohol, smoke cigarettes, eat unhealthily, do not seek prenatal care, drive recklessly, work at a location that exposes them to toxic fumes, attempt suicide, or stay in a physically abusive relationship. 'Punishing women solely due to their pregnancy status is a dangerous step towards future erosion of women's rights' (Suppé, 2014: 69; see also Paltrow, 1999; Johnsen, 1986; Kellett, 2014; Adams, 2014; Solinger, 2005).

The criminalisation of women for these offences is further questioned when the vulnerability of the women who have been targeted for prosecution is examined. Women of colour, especially African-American women, and women of low-income are overrepresented among those who have been arrested or subjected to equivalent deprivations of liberty (Paltrow and Flavin, 2013; Roberts, 1997; Mohapatra, 2011; Fentiman, 2006; Paltrow, 1999). Women who are deemed to fit the stereotype of 'white trash' are also criminalised at a higher rate (Howard, 2014). Siegel (1992) argues that the targeting of the convictions is due, firstly, to public clinics and hospitals that serve low-income, often minority women, being more likely to comply with drug reporting regulation than private hospitals. The second reason for targeting is due to doctors being influenced, either consciously or unconsciously, by drug-user profiles, which are based on racial stereotypes. As such, Black women are much more likely to be reported than White women, despite comparable patterns of drug-use. Some have argued that application of laws and policies of criminalisation reflect discrimination based on race, ethnicity, and class. For example, Chasnoff et al. (1990), who reviewed the reporting rate of pregnant women who tested positive for illegal substances found that despite the frequency of a positive result being similar among White women and Black women, Black women were reported at a rate 10 times higher than for White women, and poor women of any ethnicity were more likely than others to be reported. Faludi (1992) reports similar findings. Roberts (1997) has argued that Black women have been the focus of arrests as targeting them is more palatable to the American public than focusing on White women. Roberts further argues that while convictions are seen as a means to legitimise foetal rights, there is a lack of political will to criminalise White women

who use alcohol and cigarettes; society is much more willing to condone poor, Black women who fail to meet the middle-class ideals of motherhood. As already noted in the Introduction, the idealised images of motherhood, constructed through the myths of motherhood, are class and race/ethnicity biased (Collins, 1994, 2000); application of the law in this context supports this argument. Roberts argues that the consequences are that the criminal justice system focuses on women whom society deems undeserving to be mothers (see also Solinger, 2005).

Legal responses to pregnant drug-users also reflects US policy relating to the so-called 'war on drugs' and the popular view that drug-use is a crime, rather than a medical condition (Mohapatra, 2011). The policy operates despite the World Health Organisation and the American Psychiatric Association classifying substance abuse as a disease (Suppé, 2014: 74). Paltrow (1999: 1002) argues that the focus of arrests is upon people and issues that are the hardest to defend 'in the court of public opinion'. Nevertheless, the belief persists that criminalisation of pregnant women will deter them from activity that will harm their foetus, or encourage women who use drugs to quit prior to pregnancy, as does public horror and outrage that any woman would act in a way that would hurt a child – whether born, or not (Adams, 2014; Marano, 2013).

Criminalisation of such women has received particular scrutiny due to the poor health outcomes experienced by pregnant women who are imprisoned in attempts to curb their drug-use during pregnancy. It is widely argued that medical treatment and support for women with substance abuse issues would be far more appropriate, safer and result in better outcomes for both women and

their unborn children (Adams, 2014; Brody and McMillin, 2001; Cave, 2007; De Ville and Kopelman, 1999; Fentiman, 2006; Flavin, 2009; Kampschmidt, 2015; Mohapatra, 2011; Murphy, 2014; Note, 1988). Of course, treatment of pregnant drug-users would require financial commitment to provide reproductive services to women throughout their lives with specific targeted treatment for those who are most vulnerable and most at risk. There is a lack of available treatment programs for pregnant drug-users across the US due to stigma, lack of financial resources, private health insurance refusing cover for alcohol and drug treatment, and many rehab programmes being unable or unwilling to provide pregnant women with both addiction treatment and prenatal medical care (Suppé, 2014). As Fentiman (2006) argues, it is far easier and far cheaper to point to a vulnerable woman with a positive-drug test who has given birth to a stillborn child and announce that it is she alone, who is to blame for the death of her child. Similarly, Rosenbaum and Murphy (2005: 1080) argue that the state has scapegoated vulnerable women through foetal protection laws related to drug-use to provide political cover for the larger social issues, particularly in relation to so-called 'crack' babies of the 1980s: the failed 'post-Reagan social experiment' which cut social welfare programmes, and complex social conditions that would require major political change. The lack of availability of state funded welfare and health services undoubtedly play a role in this debate in ways that may be, at least partially, mitigated in the UK through the provision of services from the welfare state and National Health Service.

However, feminist scholars have further contended that concern of US governments and the public over pregnant drug-users reflects concerns over the

behaviour of women and mothers, rather than the wellbeing of foetuses and children. Solinger (2005) argues that if the state values pregnant women and children, then it would fund treatment for pregnant women. As such, Solinger argues, this state-intervention says far more about the 'type' of woman that it is deemed *should* be a mother; those women who take illegal drugs do not fit that typology. It has been argued that the concern is not that women use drugs, but rather that women who use drugs have become pregnant. The decisions by some courts to require women who take drugs to take long-term contraception to prevent them becoming pregnant indicates that concern here lies in the woman's ability to get pregnant, as treatment for their drug-use in general is not the focus of the system (Flavin, 2009; Roberts, 1997). This perception is further reflected in non-governmental programmes which give financial incentives to drug addicts to be sterilised (Paltrow, 2012). Cherry (2007: 198) argues, that where behaviour of pregnant women has been curbed through threat of imprisonment for the sake of the health of the foetus, a defined identity is being imposed, 'a state legitimised form of motherhood', which requires women to be selfless and mother's to be self-sacrificing; failure to conform results in state detention. Similarly, Johnsen (1989: 612) argues that foetal homicide laws used against women act to proscribe behaviour of women during pregnancy 'the state compels women who desire children to reorganise their lives in accordance with judicially defined norms of behaviour'. Tuerkheimer (2006) also argues the laws target women who fail to conform to the maternal ideal.

The arguments, above, reflect concerns expressed within feminist literature regarding risk management and the governance of pregnancy reflected in

Chapter 3. The liberal governance of pregnancy outlined by Ruhl (1999) is reflected in cases of pregnant drug-users. The state and public expect that, when pregnant, a woman will manage her foetuses' risk, following guidance provided by the medical community. Paradoxically, whilst individual risk factors relating to the behaviour and health of the pregnant woman are understood to have the greatest impact on the wellbeing of the foetus, the impact of social and economic factors on the welfare of pregnant women and their foetuses is disregarded (Lupton, 1999a; Chavkin, 1992; Bordo, 2003; Lane, 2008; Lazarus, 1994). Criminal cases such as Kimbrough and Ankrom's would suggest that feminist theorists have been correct when arguing that the foetus is the focus of intervention in pregnancy (Bordo, 2003; Martin, 1987; Young, 1990; Chavkin, 1992; Lupton, 1999b; Longhurst, 2001). Initially, such intervention was medical. However, as the cases analysed here demonstrate, the intervention, for some women, is now conducted by the criminal justice system and criminal law. As outlined in Chapter 3, the governance of pregnancy has constructed the pregnant woman as a potential threat to the foetus, whose security needs to be managed by third parties (Phelan, 1991; Halliday, 2016). Traditionally this protection has been conceptualised as the role of medical professionals, but foetal protection laws in the US demonstrate that this is now a legitimate role for the state. Furthermore, feminists' arguments that the law has specifically targeted women who least represent the 'ideal' mother reflects the interaction between the 'responsible' pregnant woman who manages her own risk, and ideas of the 'good' mother, as outlined by theorists such as Lupton (2011), Gregg (1995) and Harper and Rail (2012). Self-regulation and maternal sacrifice are perceived to demonstrate a woman's 'love' and devotion to her foetus and

future child (Bessett, 2010; Brooks-Gardner, 2003; Lupton, 2012b). The response by states such as Alabama to pregnant women who use drugs, would suggest that failure to demonstrate such sacrifice and self-regulation is child abuse; the child abuser being the antipathy of the 'good' mother cultivated by the myths of motherhood (Turton, 2008).

Criminalisation of women who fall short of the ideal of motherhood is the most extreme aspect of the governance of pregnancy. As explored in Chapter 3, the majority of women self-regulate, rather than being forcibly regulated by the state. Rhetoric encouraging self-regulation is palpable. For example, in 2016, the Centers for Disease Control and Prevention (CDC) published the following press release,

Sexually active women who stop using birth control should stop drinking alcohol, but most keep drinking...

Alcohol use during pregnancy, even within the first few weeks and before a woman knows she is pregnant, can cause lasting physical, behavioural, and intellectual disabilities that can last for a child's lifetime. These disabilities are known as foetal alcohol spectrum disorders (FASDs). There is no known safe amount of alcohol – even beer or wine – that is safe for a woman to drink at any stage of pregnancy.

'Alcohol can permanently harm a developing baby before a woman knows she is pregnant,' said CDC Principal Deputy Director Anne Schuchat, M.D. 'About half of all pregnancies in the United States are unplanned, and even if planned, most women won't know they are pregnant for the first month or so, when they might still be drinking. The risk is real. Why take the chance?' (Centers for Disease Control and Prevention, 2016).

Such a health recommendation is not abnormal. For example, the US Public Health Services and the CDC advise that all women of childbearing age should take folic acid to reduce the number of cases of spina bifida, as more than half of all pregnancies in the US are unplanned and the birth defects happen in the early stages of pregnancy before a woman might know she was pregnant



(Morbidity and Mortality Weekly Report, 1992). Such public health advice, targeting all women of childbearing age, rather than only women who are pregnant or those attempting to conceive, suggests that the concept of women self-regulating for the betterment of a future child is widely understood as positive and a legitimate message to present, as organisations such as the CDC would not feel able to present such messages unless believing they would receive public acceptance, if not support. That is not to say that the message was accepted without criticism, a number of commenters were highly critical of the press release and a social media storm ensued (Chia, 2016). The result was that the CDC retracted their initial guidelines (a copy available in appendix 5), republishing with an altered message, apparently due to the public outrage at the initial message. The guidelines that were removed advised pregnant women that drinking too much could cause a miscarriage, stillbirth, prematurity, foetal alcohol spectrum disorder and sudden infant death syndrome. It had warned that 'for any woman' drinking too much could cause injuries/violence, heart disease, cancer, sexually transmitted diseases, fertility problems, and unintended pregnancy. The CDC's message has been defended by some as nothing more than sensible advice (Schumaker, 2016). However, the advice (perhaps inadvertently and unintentionally) does suggest that the only function for women's bodies is to get pregnant, and consequently women need to control their behaviour and bodily function in order to protect foetal life, even if that foetal life has not yet been conceived and a woman has no plans for it to be conceived. For example, Alexandra Petri (2016), feminist opinion writer for the Washington Post quipped, 'That's the last time I drink merlot alone in my apartment. I don't want herpes'. She further commented,

No alcohol for you, young women! The most important fact about you is not that you are people but that you might potentially contain people one day. After all, pregnancies are often unplanned, so now it's not just women who are trying to become pregnant but women who aren't who need to lay off the alcohol, because 'You never know when pregnancy might strike!' and 'Think of the children!' (2016).

Whether or not the CDC intended to treat women as object bodies that 'might potentially contain people', the willingness to address women in such ways demonstrates the extent to which society is permeated with the belief that the foetus is a subject in its own right that does need to be cared for and protected. The fact that this subject exists within another subject – the pregnant woman, who has an existence, rights to live her life as she sees fit and to make choices over her own body, seems to have been forgotten. As Bordo (2003) argues, the foetus has become a super-subject and the woman a foetal container, or incubator. Within this context, it is not particularly surprising that the law steps in when a woman fails to heed these warnings and breaches the rights and wellbeing of the subject within her.

## Impact

As already indicated, opposition to foetal protection laws and the criminalisation of pregnant women is strong in the US. For many activists and scholars, foetal protection laws are political in nature. As already noted, many pro-choice activists have argued that constructing the foetus as a legal person is an attempt to recriminalise abortion (Paltrow, 1999; MacKinnon, 1991; Flavin, 2009). It is not the aim of this chapter to determine if foetal protection laws are political, or to consider the impact of the laws on women's abilities to obtain an abortion.

Concern over women's abilities to access abortions is legitimate; however other implications of foetal protection laws have been identified by US scholars. The

implications of foetal protection laws are the focus of this final section of this chapter. Two main arguments have been presented in opposition to foetal protection laws, firstly that they fail in their aims to protect foetuses, even if only applied to third parties and not pregnant women. Secondly, that the laws are discriminatory against women and interfere with women's rights to liberty and privacy.

Not all scholars who oppose the criminalisation of women due to behaviour while pregnant are against the principles of foetal protection laws when applied to third parties. A number of scholars argue that foetal protection laws, including the UVVA, aim to protect foetuses from third parties who commit acts of violence against pregnant women, rather than to protect the foetus from the pregnant woman (Murphy, 2014; Johnson, 1994; Schroedel et al., 2000). Violence against pregnant women is a considerable problem; domestic violence victims often describe their history of abuse beginning or escalating during pregnancy (Tuerkheimer, 2006). Ramsey (2006) argues that when a foetus dies as a result of an attack on a pregnant woman the laws demonstrate that two victims exist, the woman *and* her foetus; as such, heightening the criminal liability and punishment of the attacker. Furthermore, she argues that the majority of American states have approached foetal protection laws in ways that do not challenge women's reproductive rights and the right to terminate a pregnancy. Ramsey argues that if the pro-choice camp does not acknowledge the loss of a foetus as well as of a pregnant woman when a pregnant woman is attacked, then they risk appearing to live up to the image presented by pro-life campaigners that those who support abortion are in support of an agenda of

death, the culture of life rhetoric (Sanger, 2006). Ramsey presents evidence that the majority of Americans questioned are in support of foetal homicide laws that punish third parties, as well as supporting a woman's right to choose to terminate a pregnancy. She advocates a contextual approach to life-taking, recognition that the decision to terminate a pregnancy can only belong to a pregnant woman and not to a third-party who attacks her. If such an attack leads to the death or harm to the foetus then a criminal wrong and a death have occurred and subsequently punishment should ensue.

However, a number of arguments have been raised against recognising the foetus as a victim in such circumstances. Firstly, feminist scholars and domestic-violence policymakers have rejected foetal protection laws as the solution to violence against pregnant women. Flavin (2009) argues much of the legislation at both state and Federal level have been enacted in response to attacks on a pregnant woman by third parties resulting in the death of the foetus. Flavin argues that rhetoric surrounding these laws have often negated the existence of women who have been attacked, in favour of advocating on behalf of their fetuses. Flavin cites the rhetoric that was employed by the Kansas State Senate judiciary committee when referring to the death of Chelsea Brooks who was murdered; at the time of her murder she was nine months pregnant. The State Senator commented, 'Now the bill is dead as is Chelsea's baby'; Flavin comments, 'One feels the need to remind the Senator that Chelsea is dead as well' (2009: 101). Similarly, Tuerkheimer (2006) argues that such laws have constructed the foetus as a new class of victim to the exclusion of the pregnant woman. The laws obscure injuries that have been inflicted upon that

woman and so remove her from consideration altogether, 'effectively preclude[ing] an account of the nature of her suffering, or even recognition of her existence as a person who has been harmed' (2006: 697). Tuerkheimer argues that this renders the woman invisible and leaves the real injuries experienced by her unremedied. Secondly, commenters have argued that if third parties are held criminally liable for ending a pregnancy then surely it is discriminatory to not also hold pregnant women account for similar actions that harm a foetus (Robertson, 1983; Tsao, 1998). Such an argument would, therefore, open the door for foetal protection laws to be applied to pregnant women at a later date. Finally, it has been argued that is it not necessary to give a foetus legal personality to recognise the loss of that foetus if a pregnant woman is attacked by a third party. For example, in Colorado foetuses are not considered separate victims of violent crime from the pregnant woman, instead, the law considers the intentional killing of a pregnant woman with knowledge that she was pregnant as an aggravated factor.<sup>69</sup> Similar increases in sentencing occur in relation to assault and other specific offences against the person.<sup>70</sup> Such an approach unambiguously excludes pregnant women from those potentially subject to criminalisation for harm to a foetus, as a woman could not be prosecuted for causing injury to herself (Murphy, 2014).

One of the main critiques against foetal protection laws is that they fail to protect foetuses, the specific aim of the legislation. Hospitals have been noted to be the initiator of the involvement of the criminal justice system (Paltrow and Flavin, 2013). It is feared that such initiating behaviour by medical professionals may

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<sup>69</sup> Colo. Rev. Stat. §18-1.3-1201.

<sup>70</sup> Colo. Rev. Stat. §18-1.3-401 (13); Colo. Rev. Stat. §18-1.3-501 (6).

damage the doctor-patient relationship and women may avoid prenatal care altogether, rather than dealing with the legal consequences that can result in them seeking treatment for their substance abuse (Boudreaux and Thompson, 2015; Flavin, 2009). Such concerns have also been mirrored by medical associations and groups, such as The American College of Obstetricians and Gynecologists (2014) and American Medical Association and the American Public Health Association; similarly groups who are primarily concerned with the health and rights of children have also opposed punitive approaches to pregnant substance users, such as the American Academy of Pediatrics, and the Center for the Future of Children (Center for Reproductive Rights, 2000). One unintended consequence of foetal protection laws is that the threat of punishment for drug-use or other conduct perceived to cause harm to a foetus may lead a woman to seek a legal abortion in order to avoid being punished (Murphy, 2014; Boudreaux and Thompson, 2015). Such an outcome was unlikely to be the aim of legislators hoping to protect foetal health and life. Advocates argue that socio-economic context of pregnancy is of great importance when considering maternal and foetal health during pregnancy and leads women to make decisions about their health and life. Johnsen (1987) identifies lack of money as the single largest constraint on women to facilitate the protection of foetuses from preventable harm. Research has outlined the multiple factors lead to poor birth outcomes, including maternal poverty, homelessness, history of domestic violence, and lack of prenatal care (Ondersma et al., 2000; Frank et al., 2001; Kampschmidt, 2015). Commentators have noted significant cuts to health services for poor women and the impact of lack of services on pregnancy outcomes (Faludi, 1992; Rosenbaum and Murphy,

2005). Access to available healthcare and affordability of health insurance have been noted to be a significant problem for poor pregnant women, and there are racial and ethnic disparities in insurance status (Fentiman, 2006).

The issues of poverty and lack of access to healthcare are reflected in foetal mortality rates. While US foetal mortality rate (defined as death of foetus at 20-weeks' gestation or later) has declined from 25.0 per 1,000 live-births in 1942 to 5.96 in 2013 (MacDorman and Gregory, 2015), 23,595 foetal deaths occurred in 2013. In the same year 3,932,181 live-births were recorded (Martin et al., 2014). However, this figure needs to be contextualised by ethnicity and race. In the non-Hispanic White community 4.88 out of every 1,000 live-births were stillborn. But in the Non-Hispanic Black community the rate was 10.53 for every 1,000 live-births (MacDorman and Gregory, 2015). The figures are starker when considering the entire perinatal period (from 20 weeks' gestation to 28 days post-birth). In total, the perinatal mortality rate is 9.98 per 1,000 births. For the non-Hispanic White community it is 8.2 per 1,000 live-births, for the non-Hispanic Black population it is 17.92 per 1,000 live-birth (MacDorman and Gregory, 2015). The availability of resources to help support women through pregnancy and motherhood has been the focus of much feminist work on women's reproductive rights, particularly feminists of colour. Lack of available healthcare has been noted by many as one of the barriers for poor women and women of colour to express freedom of choice in relation to reproduction (Nelson, 2003; Silliman, 2002; Roberts, 1997; Ehrenreich, 2008; Fried, 1990; Davis, 1990; Gurr, 2015; Petchesky and Judd, 1998).

A further critique levied at foetal protection laws that target pregnant women is the impact upon women's rights. A number of commentators have argued that foetal protection laws deprive women of their constitutional rights to liberty and privacy. This deprivation of rights occurs due to requirement that women should adapt their behaviour to meet state-sanctioned conduct of pregnancy. These behaviours have been focused upon drug-use and a requirement to follow medical advice through court-ordered Caesarean sections; however, as noted above, there is concern about the 'slippery-slope' of these regulations. Johnsen (1989) argues that this prescription of behaviour deprives women of the right to control their lives during pregnancy, which is a fundamental right of liberty and privacy. Similarly, Gallagher (1987) asserts that women have the right to refuse medical intervention and to be free from criminal or civil liability for their conduct during pregnancy. This right is not based on *Roe's* assessment of the legal personhood of the foetus, but upon common-law and constitutional rights of bodily integrity and personal decision making, which lay at the core of *Roe*, facilitating a woman's choice to abort: self-determination; non-subordination, freedom from bodily invasion and appropriation for the purpose of another; and privacy, freedom from coercion of medical treatment and freedom in choice for a family life (see also Bordo, 2003; Flavin, 2009). And yet, as Halliday (2016) argues, many US states have demonstrated that they are prepared to prioritise the protection of the foetus over the pregnant woman's rights to bodily autonomy and integrity.

The argument here is not that women should not be prosecuted for any criminal offence while pregnant. Instead, the argument is that criminal law should be



applied equally to all people – to pregnant women as it is applied to people who are not pregnant. Therefore, application of the law on the basis of a woman being pregnant or because she may become pregnant, such as harsher punishments for pregnant women or different limits of law, intrudes on fundamental rights of privacy under the Fourteenth Amendment's guarantee of liberty, the right to choose to bear children and the right to bodily autonomy. Such application of law would force women to live with the fear of being pregnant, or even being fertile as the basis under which the government may impose extensive burdens on their freedom (Johnsen, 1989). Consequently, Johnsen (1986) argues that the laws reinforce the traditional sex-based discrimination, disadvantaging women based on their reproductive capacity, in spite of the fact that having a child involves a woman taking on an important function necessary for the survival of the human species (Johnsen, 1987). Similarly, Oberman (1992) argues that application of the law essentially attempts to criminalise sex, conception and gestation, and the only way for a woman to avoid state intrusion into her life is to be sterilised. Her conclusion is based upon analysis of a neonaticide case, a case involving a woman mandated by a court to use Norplant, a long-term contraception, and criminalisation of pregnant drug addicts. A further example of the gendered and discriminatory nature of state intervention is provided by Minkoff and Paltrow (2004). They consider a hypothetical equivalent event – a newborn child, born alive, has a lethal cancer which can only be reversed by a bone marrow transplant, the father of the child has the only compatible marrow, without which the child will die, with the transplant its long-term health is assured. If the father refuses to donate, he is likely to be seen in a negative light, but he is very unlikely to be legally

compelled to donate, nor is he likely to be charged with a homicide offence if the child dies due to not receiving the marrow. US law has upheld that to legally compel a person to donate would enforce intrusion of the body that would fundamentally change principles on which society is founded. However, Minkoff and Paltrow outline cases in which women have been legally compelled to have Caesarean sections and others where women have been criminalised after refusal to undergo a Caesarean section resulted in the death of the foetus. Consequently, they conclude that 'the State has now endowed the foetus with greater rights than its living siblings and, for that matter, any born person of any age' (2004: 1235). While this example specifically applies to forced Caesarean sections, it is also applicable to criminalising women who use illegal substances, or recklessly drive cars, as in the cases presented in this chapter. All these cases involve action by the state that either compelled a woman to conform to state-sanctioned norms and expected maternal behaviours, or to criminalise women post-birth because they did not conform. A consequence of such pressure is, as Brazier (1999) argues, that a woman loses the power and control to make 'mothering' decisions, as she is no longer choosing her behaviour or action, but is legally compelled to follow behaviour or action that the state, with support of the medical community has mandated. As such, a pregnant woman ceases to be an independent moral actor.

## Conclusion

In the previous chapter I argued that if the state wished to punish women for ending the life of their foetus then it would be important to reflect such decisions within legislation through the enactment of foetal protection laws. Enactment of

such legislation would clearly demonstrate the limits and parameters of the law. This demarcation of the law and outlining of intent of the law would be preferable to the current situation in England and Wales whereby the CPS are utilising a select number of criminal offences in order to punish the actions of women that result in the stillbirth or death following live-birth of a foetus/child. To consider some of the possible implications of foetal protection laws in England, I have reviewed examples of application of such laws in states across the US. The examples presented here, Purvi Patel, Jennifer Jorgensen, Amanda Kimbrough and Hope Ankrom, illustrate a number of the outcomes of foetal protection policy. The behaviour of all four women does appear to have endangered the lives of their foetuses, and their actions are very possibly, if not likely, the sole cause of the death of these foetuses/children. As such, it might be perceived that all four women deserve to be punished for their actions. However, when the consequences of foetal protection laws are explored, the cost of such laws are extreme, and very possibly are not worth the gains that are achieved by criminalisation. The costs of the laws to the rights of women are experienced not just by those who are pregnant or plan to become pregnant, but by any person who is believed to have the reproductive potential of bearing a child. The laws create a legal presumption that a woman will act in the best interests of her foetus. While this expectation arguably already exists, as outlined in Chapter 3, there is currently no legal basis to enforce it in England. Construction of foetal personhood has resulted in this legal basis in some states in the US. Such a legal development challenges women's rights to control their own bodies, fundamental principles granted to citizens under the rights to liberty and privacy. Furthermore, the success of foetal protection laws in protecting foetuses is

doubtful. Numerous commenters and medical associations have argued that the laws discourage women from engaging with antenatal services; particularly the most vulnerable women, such as drug-users, who need specific assistance with their pregnancies for their own and their foetuses' health. Anecdotal and statistical evidence from the US shows us that these laws have the greatest and most negative impact on the most vulnerable women in the US (Paltrow and Flavin, 2013). It is not unreasonable to believe that a similar consequence would occur in England, as criminal law is currently targeting the vulnerable women, those who experience crisis pregnancies. Considering the examples from the US, if the true aim of the state is to protect foetal life, then help and support for pregnant women is the most appropriate response. Engagement of criminal law should be the very last resort, if not completely prohibited due to the negative consequences it has upon women and their unborn children. This idea will be considered in the final chapter.

# Chapter 8 Concluding discussion

This thesis has demonstrated the gender biases that are encoded within English criminal law relating to cases of suspicious perinatal deaths. As my analysis has illustrated, the law draws upon and utilises perceptions of idealised motherhood as the basis of expected behaviour of all pregnant women. Three key findings can be drawn from my analysis. Firstly, there is little to no understanding or consideration of the impact of a crisis pregnancy within criminal court hearing relating to suspicious perinatal deaths, and by extension the criminal justice system. As discussed in Chapter 3, a crisis pregnancy that manifests itself as a concealed/denied pregnancy has significant implications on women's reactions and behaviour towards their pregnancies throughout the period of gestation, labour and delivery, and in the postpartum period. As analysis of the cases in the sample demonstrates, lack of comprehension of the significance of crisis pregnancy impacts the perception of a woman's culpability for the death of her foetus/child. In Chapter 5 I present examples of this, such as Hannah who was portrayed as having poor judgement or being callous or selfish, with limited exploration and appreciation of the context that surrounded her actions and the difficulties the pregnancy caused her life. The second finding is that the women are judged according to idealised images of motherhood, informed by the myths of motherhood. The court draws on the societal expectation that a pregnant woman will act like the idealised mother, putting the needs of the foetus first, managing the foetus' risk, and that she will do everything in her power to ensure the foetus is born healthy. None of the women in the sample adhered to this

expected behaviour, and their actions were perceived to demonstrate behaviour that required criminalisation; different offences were used to criminalise them depending upon the context of the cases. The wrongs perceived in each of the cases, summarised in the sentencing hearing, related to the perception of motherly behaviour. However, as I have demonstrated through analysis of criminal law, failure to put the foetus first and to protect the foetus from harm or risk of harm is not illegal in England and Wales; unless such failures are accompanied by intent to end the pregnancy or kill the viable foetus, in which case the offences of procuring a miscarriage<sup>1</sup> or child destruction<sup>2</sup> will have been committed.

This leads to the final finding. In cases of suspicious perinatal deaths analysed in this thesis, application of the law reflects neither the principles nor the spirit of the law. Prosecutors drew upon out-dated legislation to criminalise women. Consequently, the law is being applied to capture behaviour identified as wrong, but which falls beyond that which was intended to be criminalised when these offences were enacted. As argued in Chapter 6, concealment of birth<sup>3</sup> appears to punish several perceived wrongs, including unproven homicide. However, as I have argued following analysis of the three cases, perverting the course of justice or obstructing a coroner would be the most appropriate criminal offences to criminalise the identified wrongs and could only be drawn upon if it could be proven that the defendant hid the dead body of a baby to prevent her further criminal offending from being discovered. Other behaviour that can be identified as morally wrong is either captured by lesser criminal offences, or does not

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<sup>1</sup> Offences Against the Person Act 1861 (24 and 25 Vict. c.100) s58.

<sup>2</sup> Infant Life (Preservation) Act 1929 (19 and 20, Geo.5, c.34).

<sup>3</sup> Offences Against the Person Act 1861 (24 and 25 Vict. c.100) s60.

warrant criminalisation, as my analysis in Chapter 6 concludes. Similarly, in relation to the offence of procuring a miscarriage, and by extension child destruction, in the cases analysed here, the law is being applied to fulfil the function of a foetal homicide offence. As was clearly outlined by the judge in Hayley's case, the wrong identified and deemed to warrant criminalisation was ending the life of her foetus. The offence of procuring a miscarriage does capture such behaviour and label it as criminal. However, my analysis concludes that this offence is inappropriate to capture the identified criminal wrong in Hayley's case. When read in conjunction with the Abortion Act 1967<sup>4</sup>, s58 of the Offences Against the Person Act 1861 does not suggest that abortion is a moral wrong that should be condemned at all stages of gestation. Instead, it considers abortion a serious wrong when not carried out under medical supervision according to the best medical practice of the 1960s. As Sheldon (2016b) concludes, the legislation is out-dated and acts to stigmatise women and hinder professionals who conduct the medical procedure. Consequently, there is strong argument to advocate that abortion should be removed from the criminal law (*We Trust Women*, 2016). Similarly, as the offence of child destruction has only ever been used as an extension of abortion legislation (Sheldon, 2016b), this offence would seem to be similarly obsolete within modern criminal law.

There may be strong public, legal and political support to protect foetal life and to criminalise those who threaten it, including pregnant women. It is not the intention of this thesis to suggest otherwise. However, following analysis of the

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<sup>4</sup> c.87.

application of law, I advocate that any intention within law to specifically protect foetal life from harm, including unlawful killing, should be clearly outlined by legislation enacted by Parliament. As I have argued throughout the thesis, English law has steadfastly maintained the legal principle of the born alive rule. On this basis, Hayley's actions cannot be interpreted as an unlawful killing, as there is no evidence of live-birth. If the protection of foetal life is the aim of the law then it would be appropriate for legislators to enact statute to this effect. Enactment of such legislation would clearly demonstrate intent to protect the foetus, signifying that any person who intentionally attempts to harm a foetus has broken the law. Thus, one contribution of this thesis is to provide evidence that advocates the repeal of the criminal offences of concealment of birth, procuring a miscarriage, and child destruction. Foetal homicide laws may offer a practical solution to the problem of women causing harm to their foetuses, however my analysis in Chapter 7 illustrates some of the difficulties such laws have created in the US brings the appropriateness of these laws into question. This will be discussed in more detail below.

## **Implications of research**

This research has provided a new perspective on the study of maternal newborn child killing. Neonaticide as an area of study has received a large amount of attention from scholars, as has maternal obligation to the foetus and criminal liability for causing harm. I am one of the few scholars to bring these two areas of study together. Oberman (1992) and Flavin (2009) have also brought these two areas together, but with a specific focus on the violation of women's reproductive rights. Within this study I have proposed a reconceptualisation of



the killing of newborn children; developing the terminology 'suspicious perinatal death'. My research has implications for child protection services. While child protection services already focus their attention on pregnant women and the risk they pose to their unborn child (Cox, 2012), my research suggests a more holistic approach is required to ensure safety for unborn children. As argued in this thesis, the women in the cases in the sample were extremely vulnerable. Protection of these perinates would have been achieved not through increased surveillance of all women of childbearing age to prevent concealed/denied pregnancies as some scholars suggest (Jenkins et al., 2011; Kaplan and Grotowski, 1996), but through greater concern with the provision of services and support for vulnerable women.

While it was not the aim of this research to develop feminist theory of violent and offending women, this study does have implications on feminist theory. The findings here support those argued by numerous, eminent feminist scholars – female offenders are often vulnerable; their offending is often a response to the context of their lives; and their behaviour is judged alongside gendered stereotypes (Carlen, 1983, 2002; Worrall, 1990, 2002; Eaton, 1986; Edwards, 1984; Lloyd, 1995; Hudson, 2002). The success of feminists' research to bring these issues to the fore and to have impact on the lives of offending women is questionable, as female prison rates have increased and women's victimisation continues to be high (Snider, 2003; Annison et al., 2015; Milne et al., Forthcoming). Nevertheless, women's offending and punishment remains an important area of study from criminologists due to the impact it has on women's lives. This research makes a valuable contribution to this body of work,

providing further evidence for a need to contextualise women's criminality by looking more broadly at their life experiences, and to consider responses by criminal justice and other regulatory social institutions accordingly.

From a legal standpoint, this thesis offers one of the first critical assessments of the application of the law in relation to suspicious perinatal deaths; analysing laws surrounding newborn child homicide and abortion. My findings have implications in terms of the suitability of the law, and also how that law is applied. As already argued, one of the key implications of this research, that has developed directly from my analysis, is evidence to support the repeal of three criminal offences from the law – concealment of birth, procuring a miscarriage and child destruction. However, my analysis of these seven English cases of suspected perinatal killing, and of the developments of law leads to further implications for the role of law and future legal developments. These will be briefly discussed.

## **Role of law**

One of the broader implications of my research is the role of law in cases of suspicious perinatal death, such as those analysed in this sample. The decision to prosecute a suspect is discretionary in England. A two-staged test is used to determine if prosecution will go ahead – the evidential stage, and the public interest stage (Crown Prosecution Service, 2013). As noted in Chapter 6, a number of the cases in the sample appeared to not meet the evidentiary requirements, but the Crown was not required to prove their cases due to the entrance of guilty pleas. Furthermore, the use of certain criminal laws appears

to go beyond the scope of the intention of legislation, at least in some cases. However, the question here lies in the public interest of prosecuting these cases. A critical assessment of the Crown Prosecution Service (hereafter 'CPS') code is beyond the scope of this thesis. Nevertheless, I believe it is reasonable to question what merit lies in prosecuting women involved in cases of suspicious perinatal death. As outlined in Chapter 5, all seven women experienced a crisis pregnancy, which appears to have affected their behaviour throughout their pregnancies and in the post-partum period. Therefore, culpability for their actions is questionable. The nature of the offences committed can be interpreted as 'serious', and the victims were aged under 18 at the time, both considerations of public interest. However, prosecutions of these women are unlikely to act as a deterrent to others, as the judge suggests in Hayley's case during the sentencing hearing. Women do not purposefully get pregnant to facilitate a concealment/denial allowing them to be in a position to cause the death of the foetus/child. Such cases occur out of the circumstances of these women's lives. While other reasons exist to prosecute, notably the public focus on child abuse and homicide, I feel the contextual factors of these cases warrants scrutiny of the response by the criminal justice system.

One way of conceptualising cases of suspicious perinatal deaths and the role of criminal law is to consider a social justice perspective. Reproductive justice developed as a social justice movement that emphasised the intersection of social identities with community-developed solutions to structural inequalities (Luna and Luker, 2013). The movement specifically rejects the notion of

'choice', particularly in relation to abortion and *Roe v Wade*,<sup>5</sup> advocating that the concept of choosing to have an abortion privatises that decision and, by extension, the decision to parent, thereby legitimising a minimal state response to the problems faced by pregnant women and the social support provided for poor parents (West, 2009). The movement was developed by feminists in the US, particularly feminists of colour, who argued that their personal circumstances – poverty and racial discrimination, meant that for them the legal choice to have an abortion would not mean they had reproductive rights. Instead they argued that the state has a responsibility to facilitate women to make choices about their reproductive functions, this includes addressing the structural factors that challenge the decision to keep a pregnancy – access to healthcare, childcare, housing, jobs that pay a living wage (Nelson, 2003; Roberts, 1997; Ehrenreich, 2008; Fried, 1990; Davis, 1990; Gurr, 2015; Petchesky and Judd, 1998). As Flavin (2009) argues,

Reproductive rights encompass the right to mother and the right to provide for healthy children by meeting not only their physical needs but also their educational, emotional, and social needs (2009: 2-3).

Women involved in cases of suspicious perinatal death do not act, or fail to act, in a vacuum. As Oberman (2003b) argues, maternal filicide is deeply embedded in and responsive to the society in which it occurs (Vellut et al., 2012; Ayres, 2007; Flavin, 2009). These scholars argue that there is a collective responsibility held by society for the actions of these women and the consequential deaths of their fetuses/children. None of the women in the sample can be said to have full reproductive rights as outlined by reproductive

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<sup>5</sup> 410 US 113 – Supreme Court 1973.

justice advocates. If they did, then a crisis pregnancy may not have occurred as social support would have redressed the difficulties that resulted in the pregnancy being perceived as a crisis. Within this context, it is important to ask what function criminal prosecution and conviction serves. There is insufficient space to consider this question in any depth here; however, the findings from this thesis highlight the need for an analysis of prosecutors' decisions. As stated in Chapter 1 – methodology, the CPS were unprepared to engage with this research. The findings from this study support a review of prosecutorial decisions in cases of suspected perinatal killing to assess the appropriateness of the decision to prosecute, the consistency in response to such cases, and how the woman's crisis pregnancy is understood and used as evidence in her cases.

A consideration of the offence of infanticide is useful here. The 1922 Infanticide Act<sup>6</sup> could be interpreted as an unofficial compensatory measure to counteract one aspect of women's lack of reproductive justice. As discussed in Chapter 4, juries during the nineteenth- and early twentieth-centuries were reluctant to convict unmarried women suspected of killing newborn children, as they were perceived to be acting out of desperation due to the social prohibition of bearing a child outside marriage. The 1922 Infanticide Act formalised lenient treatment, and the 1938 Act<sup>7</sup> extended it to women who killed their infants up to the age of one year – recognising other socio-economic causes of maternal infant filicide (O'Donovan, 1984; Brennan, 2013a; Ward, 1999). While neither Infanticide Act aimed to address the inequalities faced by women in relation to pregnancy and childrearing, they acknowledged those difficulties and provided official means to

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<sup>6</sup> 12 and 13 Geo 5 c.18.

<sup>7</sup> 1 and 2 Geo.6, c.36.

curb punishment for the negative consequences of this lack of rights, albeit using medicalisation as its formal justification for leniency. Feminist critiques of the offence of infanticide demonstrate that the leniency of infanticide is not available equally to all women, but is reserved to those whose behaviour and persona fall within the confines of the ideologies of the myths of motherhood (Morris and Wilczynski, 1993b). And as the analysis I have presented in this thesis shows, the principles of the born alive rule prevent women from availing themselves of the leniency in instances where no evidence exists that their child was not born alive, such as Hayley's case in this sample. Therefore, while the offence of infanticide is not a substitution for reproductive justice for all women, it does have its function in providing leniency for some women and so confer a minimal form of compensation for those who can benefit from its protection. In an ideal world, the infanticide offence would be scrapped and all women would experience reproductive justice, potentially reducing the number of crisis pregnancies and therefore the number of suspected perinatal killings. In the meantime, the Infanticide Act 1938 appears to offer a compensatory measure to those women who can avail themselves of its leniency, and it therefore remains an important measure in criminal law. One only needs to look to the US and the harsh punishments experienced by some women due to the lack of an equivalent offence to appreciate the benefit of the Infanticide Act 1938 (Ayres, 2007; Barton, 1998; Fazio and Comito, 1999; Maier-Katkin and Ogle, 1997; Oberman, 1996).

## Future direction of the law

My analysis raises significant questions as to the protection that should be offered to the foetus and subsequently the future direction of criminal law to regulate women's behaviour in the perinatal period. As described in Chapter 7, many American pro-choice feminists have been vocal in their opposition to foetal protection laws, advocating that these laws serve to undermine a woman's right to choose. While public support for the prosecution of women who cause harm to their foetuses is uncertain (Murphy, 2014), there is large support amongst the US public for foetal homicide laws that criminalise third parties who attack pregnant women (Ramsey, 2006: 729-30). Ramsey (2006) is one feminist scholar who advocates for foetal protection laws. She argues that, whether we like it or not or believe it is good, the foetus is seen as a baby that has not yet been born and as a consequence, some women (and other people she knows) will mourn the loss of that foetus if it dies. As such, Ramsey argues that harm that comes to a foetus as a result of a third party attack should be punished. However, she maintains foetal protection laws should be amended to ensure that women cannot be criminalised for their actions while pregnant, nor should they interfere with the right to end a pregnancy. I reached the same conclusion following my analysis of foetal protection laws in Chapter 7.

While it is unclear how widespread support for foetal homicide laws would be in the UK, as I am unaware of any poll asking such questions, cases before the courts would indicate that support does exist, such as the decision in the

*Attorney General's Reference (No 3 of 1994)*<sup>8</sup> (hereafter 'A-G Ref') and in cases such as *Criminal Injuries Compensation Authority v First-tier Tribunal*,<sup>9</sup> analysed in Chapter 4. Public health messages also support foetal health, such as the message about the Zika virus (Public Health England, 2016), and a report into preconception health, commissioned by NHS Greater Glasgow and Clyde (Sher, 2016). The report advocated that all women of childbearing age should be asked whether there is a reasonable chance they will start a pregnancy this year. The suggested advice to be given to women who answer 'yes' is that they should give up harmful substances – drinking alcohol, smoking, taking drugs; should lose weight; leave violent and abusive partners; and avoid exposure to radiation and illnesses such as HIV, diabetes, rubella and the Zika virus. However, the report also acknowledged that approximately 50% of pregnancies are unplanned (Sher, 2016: 12), and so the advice provided by Dr Sher would need to be heeded by all women of childbearing age, as if she engaging in sexual activity, then there is a *reasonable* chance she will start a pregnancy. As argued in Chapter 7, general support for the principle that women should put their unborn child before their own health and needs must have general support, as institutions would be unprepared to advocate such a position if they did not believe it would be positively received by wider society. However, it should be noted that Dr Sher's report was not received without criticism (Yorke, 2016).

The ruling in *A-G Ref* has left pregnant women open to the possibility of prosecution for harm caused to a foetus if born alive, as discussed in Chapter 4 (Cave, 2004). Furthermore, as my analysis shows, use of the offences of

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<sup>8</sup> [1998] AC 245; [1997] 3 WLR. 421.

<sup>9</sup> (*Social Entitlement Chamber*) (*British Pregnancy Advisory Service and others intervening*) [2014] EWCA Civ 1554; [2015] QB 459.



concealment of birth, procuring a miscarriage, and child destruction appear to operate as unofficial foetal homicide laws, criminalising women who fail to act in the foetuses' best interests, or who act with intent to harm foetuses. As in the US, the burden of public policy relating to foetal health and the weight of criminal law is experienced by the most vulnerable. Considering the direction of public policy and criminal law, it may be time to consider changing the law to include the foetus as a legal subject. Certainly, the current principles of the born alive rule appears to do little to protect vulnerable women from prosecution, as a selection of criminal offences have been used to criminalise women.

If the foetus were to be given a legal personality then it would be essential to maintain two important principles, firstly, that a woman has the right to end a pregnancy. Debate still rages as to the moral status of the foetus. Some philosophers argue that foetuses should be protected from conception, conservatives argue life begins at conception (Noonan, 1970; Joyce, 1978), and potentialists see foetuses as potential human life (Finnis, 1973). Others argue that foetal rights grow with gestational development – gradualists (Feinberg, 1992; Scott, 2007), and Steinbock (1996), who argues that foetuses are sentient in the latter stages of pregnancy so have a right to life from this point. Finally, other scholars argue that foetuses are not equivalent to humans who have been born; scholars advocating for personhood argue human beings are those who possess consciousness, reasoning, self-motivated activity, the capacity to communicate, presence of self-concept, hence excluding a foetus from the definition (Warren, 1973; Tooley, 1972; Engelhardt, 1974). Similarly, Dworkin (1993) advocates that human life is sacred due to the 'biographical' picture

captured in the human effort and influence that shapes out lives, a foetus has a physical life, but not the personal life-course of an individual. Nevertheless, as Furedi (2016) argues, there is no question over the moral status of a pregnant woman – she is a moral person who is conscious and self-aware. As such a woman has priority rights over the foetus, and so she, and she alone, should decide whether or not to abort a foetus, due to her rights to bodily integrity and autonomy. As such, access to abortion should be ‘as early as possible and as late as necessary’ (Furedi, 2016: 80). Secondly, foetal protection laws should not apply to women, this point is explored below. By writing into law that a woman cannot be prosecuted for harm against her own foetus, the law would unequivocally state that women cannot be held criminally liable. Such a legal pronouncement would offer a recognition of the unique situation of a pregnant woman, and would recognised the vulnerabilities faced by women due to their lack of reproductive justice. Such a change in law should be accompanied by repeal of the statute relating to concealment of birth, procuring a miscarriage and child destruction, as argued above.

Removing the born alive rule, a fundamental principle of law, would have dramatic consequences on the operation of criminal and civil law, which cannot be explored here. There are potential concerns of the impact of foetal protection laws, even if they only target third parties, notably that such laws would identify the foetus as a victim of the violent assault, potentially negating the pregnant woman who has also been attacked (Tuerkheimer, 2006; Flavin, 2009). Therefore, foetal protection laws may not be a perfect solution to the difficulties created by the current law. Nevertheless, the analysis I have provided in this

thesis supports a change in law to protect vulnerable women from potentially unfair, unjust, and stringent punishments for harm caused to a foetus.

In conjunction with the concept of foetal rights lies the debate as to maternal legal obligation and liability for harm. From my analysis I have concluded that there appears to be a strong desire to criminalise women who are perceived to fail to put the foetus first and manage the foetus' health. However, there is a wider debate here as to the level of liability all pregnant women should face if they cause harm (not necessarily death) to the foetus due to behaviour and actions while pregnant. Scholars have argued that as women have chosen to continue a pregnancy then they have a duty and responsibility to the foetus and they should be compelled to act accordingly (Eekelaar, 1988; Dougherty, 1985; Greenwood, 1994; Cook, 2002; Robertson, 1996, 1983). However, for many feminists, a woman's right to bodily integrity and autonomy remains the basis under which women should not be held criminally liable for harm against a foetus due to actions while pregnant. Jackson (2001) argues that women have the right to make decisions about their lifestyles and medical treatment and this should not be impeded by the existence of a pregnancy (Nelson, 2013; Bordo, 2003; Flavin, 2009; Purdy, 1990; Solinger, 2005; Thomson, 1994).

Feminists have argued that women have a moral duty to protect the foetus (Scott, 2002). However, strong argument is made as to why moral duty should not translate into the legal obligation. Brazier (1999), one of the foremost authorities on the bioethics of maternal duty to the foetus, advocates that legal requirements for pregnant women to act in the best interests of their fetuses

would remove choice and prioritise the needs of the foetus. Introducing law to protect the interests of the foetus would result in undue restrictions on women's liberty, autonomy and privacy over and above restrictions that exist within English tort law. Every choice in a pregnant woman's life would be subject to scrutiny, render her vulnerable to coercion by others. Consequently, a pregnant woman would lose the power to make 'mothering' decisions. Brazier provided the example of a woman who is advised by a doctor that a medical procedure is required, if legal sanctions were a potential consequence of a woman deciding to not follow medical advice then her ability to 'choose' to have the procedure are removed. The consequence would be that a pregnant woman would cease to be an independent moral actor. Furthermore, legal sanctions for action that causes foetal harm could not be constrained by time (9 months gestation) as a woman may not know she is pregnant at the time she conducts the harmful act. Therefore any woman of childbearing age would potentially be required to monitor her behaviour for the benefit of a foetus, just in case she is pregnant. Legal sanctions may also be required when account is taken of the risk of pre-conception harm, such as men smoking while teenagers, as it reduces the strength of sperm (Brazier, 1999). As such, legal sanctions surrounding moral obligation to the foetus would potentially restrict the general liberties of both men and women, from childhood through to menopause for women, and for the remainder of their lives for men. Such restrictions cannot, Brazier argues, be justified. While criminal sanctions may only be limited to 'egregious cases', if the possibility of criminal sanctions existed then it would hang over every woman confronted with a difficult choice in pregnancy and at odds with her partner or her doctor. The consequence would be to give the control of pregnancy to

others, primarily medical professionals. Vulnerable women would bear the brunt of such measures, as is witnessed in the US. As Johnsen (1989) argues, legal mandate to act in the best interests of a foetus would oblige a woman to make herself an incubator throughout pregnancy, sacrificing her obligations to her children, husband<sup>10</sup> and herself. Women would be at risk of being legally liable for any illness or perceived imperfection in their child. As the literature explored in Chapter 3 outlined, it is often unknown what causes a pregnancy to end with a negative outcome. Similarly, as I argued in Chapter 7, there is little evidence to suggest that legal regulation of pregnant women's behaviour actually works to increase the health outcomes of foetuses, with many scholars and medical professionals arguing foetal protection laws that target pregnant women lead to poorer foetal health, or to the death of the foetus as women seek terminations in order to escape prosecution (The American College of Obstetricians and Gynecologists, 2014; Center for Reproductive Rights, 2000; Boudreaux and Thompson, 2015).

Considering these arguments, it would appear that the best result for women, foetuses and society would be to not hold women to account for harm they commit towards their foetuses. Removal of the offences of concealment of birth, procuring a miscarriage, and child destruction, and enactment of foetal protection laws with clear exceptions for maternal liability, would mean that a woman could not be held criminally liable for harming her foetus, even if she acted with intent to kill the foetus in the very late stages of pregnancy, as it is believed Hayley did. Under such changes in law, neither Hayley nor Sally would

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<sup>10</sup> Johnsen's specific reference to 'husband' should be understood more broadly to include any partner, regardless of marital status or sex/gender.

not have committed a criminal offence. Such a conclusion will be considered unthinkable to many, as Ramsey (2006) states, the foetus is considered a child in wider society. It does, on the face of it, seem perverse to punish a woman for killing a child that has been born, but not a child that is unborn. Nevertheless, it is important to consider the consequences of holding women to account – as outlined above. One potential solution would be to only hold women criminally liable if they demonstrate intent to kill the foetus; but it seems unlikely that such a provision would be able to operate without infringing upon a woman's right to have an abortion. The cases analysed in this study can be understood as 'typical' cases of suspect perinatal killing. Women involved in these cases are vulnerable and appear to be acting out of desperation. As already noted, the purpose of prosecution is questionable on a basis of public interest, particularly when considering the cases in light of the theory of reproductive justice. Changing the law to specifically exclude women from criminal liability for harm to a foetus would formalise an acknowledgement that women do not have reproductive justice, making them vulnerable and therefore leniency could be shown. As argued in this thesis, decisions as to whether women should be held liable for harm towards a foetus must only be made by elected officials and mandated in statute. Nevertheless, analysis provided here offers a strong case to promote immunity.

## **Revisiting perceptions of motherhood**

The final implication of this thesis, lies in the relationship between the myths of motherhood and cases of suspicious perinatal death. As argued in Chapter 5, the seven women are judged according to images of the ideal mother, which are

informed by the myths of motherhood. They have all failed to be the 'good' mother. As many feminists have argued, the myths of motherhood maintain that women should put their children first, this expectation seeps into the perceived behavioural requirements of pregnant women (Glenn, 1994; Hays, 1996; Douglas and Michaels, 2005; Lupton, 2011; Gregg, 1995; Harper and Rail, 2012). As I illustrated in Chapter 6, it was subtly suggested in the court hearings of a number of the women, that if they were unprepared to be mothers then they should not have engaged in sexual activity and so not have risked becoming pregnant. Public health messages, such as those produced by the US Centers for Disease Control and Prevention (2016) and Sher (2016), also appear to suggest that women's behaviour should be moderated in favour of a good outcome for the foetus, if this is unachievable then women should refrain from becoming pregnant – presumably by taking long-term contraception which has lower failure rates, or by not engaging in sexual activity. The role of contraception in this debate cannot be explored here. However, it is important to note that the negative impacts of many contraceptive methods on women's physical, mental, and emotional health is rarely considered in public health messages such as those provided by the CDC and Sher (Petchesky, 1990; Albury, 1999; Hardon, 1994; Hoggart and Newton, 2013; Kimport, 2017; Littlejohn, 2013; Mills and Barclay, 2006). Following publication of Sher's (2016) report, one commentator noted 'So now pregnancy is a prize for women who lead a "good life"' (Williams, 2016). As I concluded from the review of literature examined in Chapter 3, the burden of pregnancy on women is onerous. This thesis illustrates that failure to conform to the expectations purported by the myths of motherhood and becoming pregnant while failing to lead a 'good life',

can and does result in criminalisation for vulnerable women. The role of the criminal justice system in these cases works to strengthen and perpetuate the myths of motherhood and expectations of all pregnant women, with the most vulnerable being subjected to punishment for their failures.

## Implications for future research

This research has opened up the field of analysis in this area of criminal law and in the field of social regulation of pregnancy and motherhood. There is more work to be done to further explore the points raised above. Research needs to be undertaken to consider the role of criminal law in cases of suspicious perinatal death, preferably in conjunction with the CPS. This is the direction that I intend to take my research, drawing on previously unused data, the Homicide Index, interviews with police forces, barristers and solicitors and judges, and ideally with the CPS. Therefore, involvement of the Government, notably the Ministry of Justice, would be crucial for this research to proceed.

Further work in the areas of bioethics and legal philosophy is needed to consider the implications of removing the born alive principle and creating foetal homicide legislation. As my analysis in Chapter 7 outlines, such changes in law could have dramatic consequences on the rights of women to access abortion and to control and regulate their bodies. However, as my analysis in Chapter 6 and in this chapter concludes, the current situation for women is ambiguous. As is evident from this research, the law as it stands can result in vulnerable women being criminalised for failure to put the foetus first, if the foetus/baby dies.

Women may also face prosecution if the foetus is born alive and dies. Unless



the born alive principle is swept away, or legislation clearly outlines that women cannot be held liable for harm caused to the foetus, women's autonomy remains at risk. Following domestic UK political developments in 2017, it seems unlikely that women's reproductive rights will feature on the political agenda in the foreseeable future. The increased influence of the Democratic Unionist Party in British politics following the election on June 8<sup>th</sup>, 2017, has the potential to limit any positive developments in women's reproductive rights, as they have clearly demonstrated opposition to a woman's right to choose (O'Brien, 2017; Saul, 2017). In the US, the Trump administration, given its conservative support base, may also mean that the best we can hope for is that we do not lose any ground over the next decade (Kristof, 2017).

This research has added to the significant body of feminist literature relating to the perceptions of motherhood and pregnancy. It demonstrates how such expectations permeate the law and its application, even if the legal principle of the born alive rule should technically prevent such use of criminal sanctions. Despite substantial social change, the role of modern women continues to centre around their reproductive function. Failure to conform to the expected norms of idealised motherhood has gruelling consequences for all women; for the most vulnerable, these consequences are punitive in nature. From the cases analysed in this thesis, it seems we care more for the myths of motherhood than we do for the wellbeing of women.

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## *Appendix 1 List of cases identified during first stage of data collection*

Table 7 List of cases identified during first stage of data collection.

<b>Case No.</b>	<b>PhD Case Study</b>	<b>How identified as potential case</b>	<b>Age of child</b>	<b>Offence (conviction secured unless stated otherwise)</b>	<b>SCR Document(s)</b>	<b>Request court transcript</b>
1	Yes	Google search while looking for a different case	Neonate/perinate – unclear if born alive	Concealment	Unable to locate SCR	Only given permission to view sentencing remarks
2	No	SCR	Neonate/perinate – unclear if born alive	Concealment	Executive summary	Unavailable as tapes destroyed
3	No	SCR	Neonate – born alive	Murder - not guilty	Executive summary (overview report could be viewed in the office of the LSCB)	Unavailable as tapes destroyed
4	No	SCR	Neonate – born alive	Concealment	Executive summary	Unavailable as tapes destroyed
5	No	SCR	Neonate – born alive	Infanticide - not guilty	Executive summary	Did not apply as case occurred outside of England and Wales legal jurisdiction
6	No	SCR	Neonate – born alive	Infanticide	Executive summary	Unavailable as tapes destroyed
7	Yes	SCR	Neonate – born alive	Cruelty to a person under 16 and	Executive Summary and Overview	Prosecution opening of facts,

<b>Case No.</b>	<b>PhD Case Study</b>	<b>How identified as potential case</b>	<b>Age of child</b>	<b>Offence (conviction secured unless stated otherwise)</b>	<b>SCR Document(s)</b>	<b>Request court transcript</b>
				endeavoring to conceal the birth of a child	Report	mitigation and sentencing remarks
8	Yes	Google news alert for infanticide	Neonate – born alive	Infanticide	Executive Summary and Overview Report	Sentencing remarks
9	No	SCR	Neonate – possibly born alive, but limited detail in the SCR does not make this clear.	Unknown – excluded as unable to determine if criminal investigation occurred	Executive summary	Not enough information about the case to identify a court hearing
10	No	SCR	4.5 months	Infanticide	Executive summary	Permission granted
11	No	SCR	10 days	Infanticide	Executive Summary and Overview Report	Sentencing remarks
12	No	SCR	7 months	Infanticide	Executive Summary and Overview Report	Permission granted
13	No	News reports	6 weeks	Infanticide	Overview Report	Prosecution opening of facts, mitigation and sentencing remarks
14	No	News reports	7 months	Infanticide	No SCR published at time of data collection	Prosecution opening of facts, mitigation and sentencing

<b>Case No.</b>	<b>PhD Case Study</b>	<b>How identified as potential case</b>	<b>Age of child</b>	<b>Offence (conviction secured unless stated otherwise)</b>	<b>SCR Document(s)</b>	<b>Request court transcript</b>
						remarks
15	No	Google search while looking for a different case	'A few weeks old'	Infanticide and 'serious assault' on a second baby	Unable to locate SCR	Permission granted
16	No	SCR	1 month	Attempted infanticide	Executive summary	Transcript unavailable, tapes destroyed.
17	No	SCR	4 months	Murder - found not guilty	Executive summary	No sentencing remarks available
18	No	News reports	11 months	Murder	Executive Summary and Overview Report	Sentencing remarks and sentencing appeal
19	No	Google search while looking for a different case	10 months	Murder - judge acquitted	Unable to locate SCR	No sentencing remarks available
20	No	SCR	20 days (approx.)	Attempted murder	Overview Report	Unable to locate details of case via Google search
21	No	SCR	8 months	Attempted murder	Executive summary	Unable to locate details of case via Google search
22	No	Google search while looking for a different case	6 months	Manslaughter	Unable to locate SCR	Permission granted
23	No	SCR	3 months	Manslaughter	Executive	Permission

<b>Case No.</b>	<b>PhD Case Study</b>	<b>How identified as potential case</b>	<b>Age of child</b>	<b>Offence (conviction secured unless stated otherwise)</b>	<b>SCR Document(s)</b>	<b>Request court transcript</b>
					summary	granted
24	No	SCR	4 months & toddler	Manslaughter	Executive summary	Prosecution opening of facts, mitigation and sentencing remarks
25	No	SCR	11 months	Manslaughter	Executive summary	Permission granted
26	No	SCR	6 weeks	Child Cruelty	Executive summary	Did not apply
27	No	SCR	10 months	Causing or allowing the death of a child	Executive summary	Did not apply
28	No	SCR	6 months	Neglect	Executive Summary and Overview Report	Unable to locate details of case via Google search
29	No	SCR	5 months	No criminal case	Executive summary	Did not apply
30	No	SCR	7 weeks	No criminal case	Executive summary	Unable to locate details of case via Google search
31	No	SCR	8 months	administering a noxious substance with intent to endanger life	Executive summary	Did not apply
32	No	News reports	Neonate – born alive	Infanticide	No SCR published at time of data collection	Did not apply – case not heard until after data collection stage
33	No	News reports	Neonate/perinate	Initially arrested for	No SCR published at	No prosecution

Case No.	PhD Case Study	How identified as potential case	Age of child	Offence (conviction secured unless stated otherwise)	SCR Document(s)	Request court transcript
			– unclear if born alive	murder, concealment and sexual offences, later for child neglect	time of data collection	at time of data collection
35	No	News reports	Neonate – born alive	Manslaughter	No SCR published at time of data collection	Did not apply– case not heard until after data collection stage
36	Yes	Google search while looking for a different case	Neonate/perinate – unclear if born alive	Concealment	Unable to locate SCR	Prosecution opening of facts, mitigation and sentencing remarks
37	Yes	Google search while looking for a different case	Neonate – born alive	Child cruelty - wilful neglect	Unable to locate SCR	Sentencing remarks
38	No	Google search while looking for a different case	11 months	manslaughter on the grounds of diminished responsibility	Overview report	Unable to access due to not being able to determine in which court the case was heard.
39	No	SCR	Neonate	Concealment	Executive summary	Unable to locate details of case via Google search
40	No	SCR	6 weeks	Allowing the death of a child	Executive summary	Permission granted
41	Yes	Identified	Neonate	Infanticide	Unable to	Prosecution

<b>Case No.</b>	<b>PhD Case Study</b>	<b>How identified as potential case</b>	<b>Age of child</b>	<b>Offence (conviction secured unless stated otherwise)</b>	<b>SCR Document(s)</b>	<b>Request court transcript</b>
		from secondary literature			locate SCR	opening of facts, mitigation and sentencing remarks
42	No	Google search while looking for a different case	42-day-old baby	Murder	Unable to locate SCR	Permission granted
43	No	SCR	6 weeks	Manslaughter	Executive summary	Permission granted
44	No	Google search	Neonate	Concealment	Unable to locate SCR	Unavailable no tapes – magistrates' court
45	Yes	Google search	Unborn/perinatal	Procuring a miscarriage	Unable to locate SCR	Prosecution opening of facts, mitigation and sentencing remarks
46	No	News reports	Neonate	Charged with infanticide, manslaughter and concealment	No SCR published at time of data collection	Case not heard at time of data collection

## *Appendix 2 Access to court transcripts email 1*

Dear Sir/ Madam,

I am writing to request permission to gain access to the transcript of a court case. I would like access to the judge's sentencing judgement of the below case.

*Name, aged, Address of defendant.*

*Name of Crown Court.*

*Date of hearing.*

*Conviction.*

*Sentence.*

If you are happy to provide access to this case could you please provide me with the details of the company from which to order the transcript (including contact details) and the full reference code which they would need to process the order.

Many thanks for your assistance in advance.

Best wishes,

Emma

Emma Milne  
PhD Student  
Department of Sociology  
University of Essex

## *Appendix 3 Access to court transcripts email 2*

Dear Sir/ Madam,

I am writing to request permission to gain access to the transcript of a court case. I would like access to the judge's sentencing judgement of the below case.

### **Case**

*Name, aged, Address of defendant.*

*Name of Crown Court.*

*Date of hearing.*

*Conviction.*

*Sentence.*

### **Applicant**

Emma Milne

[emilne@essex.ac.uk](mailto:emilne@essex.ac.uk)

Department of Sociology

University of Essex

Wivenhoe Park

Colchester CO4 3SQ

01279870769

### **Represents a media organisation**

No

### **Reason for the application**

I am a PhD student studying at the University of Essex. My supervisors are Professor Pete Fussey and Dr Jackie Turton. One aspect of my PhD is focused on women who have been convicted of the charge of [concealment of birth/ infanticide/ procuring a miscarriage/ child cruelty]. I wish to view the transcript of the judge's sentencing judgement in order to understand the view of the courts in regards to women such as the one involved in this case. Full information about my research can be found on my home page (<http://www.essex.ac.uk/sociology/staff/profile.aspx?ID=3464>).

I have full ethical approval from the University and am fully supported by the Department of Sociology, evident in the fact that I have copied in my supervisors – they will provide a reference if you wish. I am following the ethical guidelines of the University of Essex and the British Association of Sociology.

My interest in this case is in regards to the events surrounding the offence the individual has committed and the response by the criminal justice system. If this case is used in any academic publication, including my PhD, then all names and



places will be changed to ensure anonymity of the subject of the case, their family, family of the victim and all professionals involved.

**Purpose the information is required**

Academic research only.

**What use the information will be put**

Academic research and potential academic publication. All identities and locations will be changed to ensure anonymity.

**Information under a protocol**

No

**Who will pay for the production of any transcript**

My funding body – Consortium of the Humanities and the Arts South-East England (CHASE), who are funded by the Arts and Humanities Research Council (AHRC).

**Agreement to abide by any restrictions on publication which may apply to the case**

Yes

If you require any further information then please contact me.

Best wishes,

Emma

Emma Milne  
PhD Student  
Department of Sociology  
University of Essex

## *Appendix 4 Summary of cases*

### **Alice**

After feeding and clothing her newborn infant, Alice left her in a carrier bag in a park, where she was later found by a member of the public. Although it was initially believed the baby would die of hypothermia, she recovered and was released into foster care. In her mid-twenties at the time, Alice had three other children fathered a man with whom she had been in a long-term relationship. Following the break-up of that relationship and believing she could not cope with a fourth child, Alice concealed her pregnancy and gave birth alone. She left the child in the park, hoping she would be found quickly. After pleading guilty to child cruelty by wilfully abandoning or exposing a child in a manner likely to cause the child unnecessary suffering or injury to health, the judge accepted evidence from the psychiatrists that Alice was suffering a severe depressive episode and from a major depressive disorder. She was sentenced to 6-months' imprisonment, suspended for two years with supervision. Although her three older children were removed from her care, at the time of sentencing social services were working with her to implement a long-term plan to return all four children to her care.

- Sentencing remarks.

### **Fiona**

At the age of 16, Fiona gave birth alone, in a public place. The baby was full-term and born alive. She stated that she had no knowledge of her pregnancy prior to giving birth. Following the birth, Fiona stabbed the baby 27 times with a penknife. Media publication of the details of the birth and death were broadcast

in the local area. Fiona's parents saw the reports and spoke with Fiona who acknowledged the baby was hers and she was responsible for the death. They informed the police and sought medical attention for Fiona. The conclusion of a psychiatric assessment that Fiona's actions were driven by panic and the effects of mental and physical shock. Fiona was indicted with infanticide, she pleaded guilty and was sentenced to a youth rehabilitation order for 12-months.

- Full transcript.

## **Hannah**

Hannah concealed her pregnancy from her family and gave birth alone in her home. Following her arrest and subsequent medical examination, she told a nurse that she passed out following the labour. The child was born alive and died within two hours of birth. There were no signs of injury to the child and no cause of death could be ascertained. In her mid-twenties, Hannah's family disapproved of her relationship with her boyfriend. Despite scheduling two appointments to terminate the pregnancy, Hannah carried the child to full term. The morning after giving birth to the child Hannah left the body in the front garden of a friend's house, who later discovered it. The police traced Hannah through her boyfriend's DNA. During her sentencing hearing, her defence barrister outlined the cultural pressures faced by Hannah, namely that being pregnant out of marriage was unacceptable and so she felt she had no option but to keep her pregnancy secret. Hannah pleaded guilty to concealment and child cruelty due to not seeking medical assistance for the child. She was sentenced to 6-months imprisonment, suspended for 2-years.

- Full transcript.
- SCR Executive Summary and Overview Report.

## Hayley

Hayley first presented at an abortion clinic when she was approximately 30-weeks pregnant, she was in her early 30s at the time. Following the discovery that she could not access a legal termination of the pregnancy she sought means to end the pregnancy. Hayley's internet browsing history reveals that she purchased misoprostol, a drug used to start labour or cause an abortion, over the internet; at the time she was close to, or at, full-term. Hayley claimed that the child was stillborn, the body was never found. At her trial evidence was presented of Hayley's experience of four previous crisis pregnancies. She pleaded guilty to administering poison with intent to procure a miscarriage. The judge sentenced her to 12- years' imprisonment with a third off for an early guilty plea. The sentence was appealed and the Court of Appeal ruled the sentence was excessive, and that the starting point should be five years. Honouring the sentence reduction for the plea, Hayley was imprisoned for 3½-years.

- Full transcript.
- Court of Appeal sentencing hearing transcript.

## Lily

Lily was in her mid-thirties when she discovered she was pregnant. Although a termination of the pregnancy was scheduled, she did not attend the appointment. Four years later the body of a full-term baby was discovered in the grounds a house in which Lily had previously resided. Identification of Lily's former partner, [Alan], through DNA, followed by a media campaign on the BBC's programme *Crime Watch*, resulted in Lily being arrested, ten years after giving birth to the child. Lily advised the police that Alan had been abusive and controlling and she failed to an abortion for that reason. Police records and hospital admissions demonstrate that their relationship was abusive and violent.

Lily stated she gave birth to the baby following an assault by Alan, which resulted in stomach pains, bleeding and the baby 'falling out'. She told the police that she did not bury the body to conceal wrong-doing. Lily pleaded guilty to concealment and preventing the lawful burial of the corpse. At the same hearing, Lily was also indicted for fraudulent offences which involved her assuming different identities to gain bank services, property, documents and a liquor licence, as well as other crimes of dishonesty. Lily's defence barrister maintained that all offences committed were done so in the context of domestic abuse, and that Lily was acting under the influence of Alan and in fear of him and what he may do to her and her young daughter who resided with her. For all indictments, Lily was sentenced to 1- year's community sentence with supervision, she was also required to pay £400 towards the cost of the prosecution.

- Full transcript.

## **Sally**

Sally was convicted of four counts of concealing the birth of a child. While in her thirties, Sally gave birth to four babies, all of whom, she claimed, were stillborn. Sally hid the bodies in her bedroom. The pregnancies and births occurred within a ten-year period following Sally's divorce from her second husband, who was reportedly violent towards her. Sally reportedly abused alcohol and marijuana during this period, and neglected her three living children from her previous two marriages. The bodies of the dead infants were discovered over ten years after the births, and Sally was arrested and charged with four counts of concealment. She pleaded guilty and received a community sentence with supervision for a period of 2-years.

- Sentencing remarks.
- Court file.

## Tanya

Tanya gave birth to her child at the age of 16. Immediately following the birth she pushed a tissue into the baby's airway, suffocating him. The post-mortem concluded that the baby had drawn a breath prior to the tissue being inserted. Although Tanya initially informed the police that the child was conceived through consensual sexual relations, she later reported to a psychiatrist that she believed she had been raped. The court did not share this opinion. Tanya's defence barrister advised the court that Tanya's belief that she had been raped was 'in the context of how it felt in her own mind, rather than in any way seeking to suggest now that it was in fact a criminally properly indictable rape'. At the same hearing, Tanya was also charged on a second indictment with perverting the course of justice, as she falsely claimed to have been raped. Tanya pleaded not guilty and the matter remains on file not to be proceeded with. While I cannot say for certain that this matter relates to Tanya's sexual encounter with the man who fathered her son, it appears likely. Regardless of the legal nature of the sexual encounter, Tanya experienced flashbacks to the attack and was treated for depression (although her GP was unaware of the attack or that she was pregnant). Tanya also experienced flashbacks of the rape during childbirth and reported feeling dazed and confused. She told the psychiatrist that her actions in placing the tissue in the baby's mouth were out of a desire to stop the gurgling noise the baby was making following the birth. Tanya was charged with murder and pleaded guilty to infanticide. The court determined that the balance of Tanya's mind was disturbed at the time she killed the child. Tanya was sentenced to a 24-months' youth rehabilitation order with supervision.

- Full transcript.
- SCR Executive Summary and Overview Report.

## Appendix 5 CDC guidelines on alcohol-exposure during pregnancy

**Drinking too much can have many risks for women.**

**For any pregnant woman and baby**

- miscarriage
- stillbirth
- prematurity
- fetal alcohol spectrum disorders (FASDs)
- sudden infant death syndrome (SIDS)

**For any woman**

- injuries/violence
- heart disease
- cancer
- sexually transmitted diseases
- fertility problems
- unintended pregnancy

**Drinking too much for women includes...**

PREGNANT	NON-PREGNANT
 <p><b>any alcohol use</b> by women who are pregnant or might be pregnant</p>	 <p><b>8 or more drinks</b> per week (more than 1 drink on average per day)</p>
	 <p><b>binge drinking</b> (4 or more drinks within 2-3 hours)</p>
	 <p><b>any alcohol use</b> by those under age 21</p>

**Doctors, nurses, or other health professionals should screen\* every adult patient, including pregnant women, and counsel those who drink too much. Providers can help women avoid drinking too much, including avoiding alcohol during pregnancy, in 5 steps.**

- 1 Assess a woman's drinking.**
  - Use a validated screener (e.g., AUDIT (US)<sup>1</sup>).
  - Take 6-15 minutes to explain results and provide counseling to women who are drinking too much.
  - Advise her not to drink at all if she is pregnant or might be pregnant.
  - Come up with a plan together.
- 2 Recommend birth control if a woman is having sex (if appropriate), not planning to get pregnant, and is drinking alcohol.**
  - Review risk for pregnancy and importance of birth control use.
  - Discuss full range of methods available.
  - Encourage her to always use condoms to reduce risk of sexually transmitted diseases.
- 3 Advise a woman to stop drinking if she is trying to get pregnant or not using birth control with sex.**
  - Discuss the reasons to stop alcohol use before the woman realizes she is pregnant.
- 4 Refer for additional services if a woman cannot stop drinking on her own.**
  - Provide information on local programs or go to SAMHSA treatment locator: [www.findtreatment.samhsa.gov](http://www.findtreatment.samhsa.gov)
  - Consider referral to treatment or recommend Alcoholics Anonymous: [www.aa.org](http://www.aa.org)
- 5 Follow up yearly or more often, as needed.**
  - Set a time for return appointment.
  - Continue support at follow-up.

*"The best advice is to stop drinking alcohol when you start trying to get pregnant."*

\*Learn how to do alcohol screening and counseling at [www.cdc.gov/ncbddd/fasd/alcohol-screening.html](http://www.cdc.gov/ncbddd/fasd/alcohol-screening.html).  
SOURCE: Adapted from American College of Obstetricians and Gynecologists: [www.acog.org/Obstet](http://www.acog.org/Obstet).

Figure 2 Centers for Disease Control and Prevention guidance on alcohol-exposure during pregnancy, as first published.<sup>1</sup>

<sup>1</sup> Accessed from Petri (2016).