(b) Woman as a Victim

The second construction strongly present in the Parliamentary debates is that of woman as victim. This construction is typically that of the reforming forces, where the woman and her social situation enjoy a far more central place. Advantage was taken of public sympathy for the situation of women at this time, given the highly restricted access to abortion. Newspapers and books had reported horror stories of back-street and self-induced abortions, and as David Steel noted in the debates, in the years preceding the introduction of the Abortion Act, an average of 30 women per year were dying at the hands of criminal abortionists.

The woman of this construction is not 'only on the fringe, but literally, physically inadequate'.[69] She is portrayed as distraught, out of her mind with the worry of pregnancy (possibly because she is young and unmarried, but normally because she already has too many children). She is desperate, and should the doctor not be able to help her, who knows what she will stop at (suicide is often discussed). Her husband is either absent or an alcoholic, her housing situation is intolerable. She is at the end of her tether simply trying to hold the whole situation together. As Madeleine Simms, of the Abortion Law Reform Association (ALRA), later wrote: 'It was chiefly for the worn out mother of many children with an ill or illiterate or feckless or brutal or drunken or otherwise inadequate husband that we were fighting.'

The following letter to Lord Silkin (referred to in the debates) provides a good example of the 'type' of woman envisaged by the reformist forces:

> Dear Lord Silkin
>
> I am married to a complete drunk who is out of work more than he is in. I have four children and now at 40 I am pregnant again. I was just beginning to get on my feet, and get some of the things we needed. I've been working for the last three years, and cannot bear the thought of that terrible struggle to make ends meet again. I've tried all other methods that I've been told about; without success, so as a last resort I appeal to you – please help me if you possibly can.

Lord Silkin himself comments, in presenting the Bill for its second reading that:

> the vast majority of women who are concerned with this are not, as I might have expected originally, single women, but married women, of an age approaching 40 or more, with a number of children, who have become pregnant again, very often unexpectedly, and who for one reason or another find themselves unable to cope with an additional child at that age … [The kind of person that I really want to cater for is] the prospective mother who really is unable to cope with having a child, or another child, whether she has too many already or whether, for physical or other reasons she cannot cope.

The same kind of image is also drawn in the House of Commons, where one MP speaks of 'the mothers with large families and the burdens of large families very often with low incomes'. Another MP describes the illegal abortions he knows of:

> I have represented abortionists, both medical and lay. I have, therefore, met the 30 shilling abortion with Higginson's syringe and a soapy solution undertaken in a kitchen by a grey-faced woman on a *distracted multi-child mother, often the wife of a drunken husband*. I have also come across the more expensive back-bedroom abortion by the hasty medical man whose patient

69 V Greenwood and J Young, *Abortion in Demand* (London: Pluto, 1976), p 76.

> returns to a distant town, *there to lie in terror and blood and without medical attention*.

Even Bernard Braine, a vocal opponent of the Bill accepts the image of the woman presented by the reformers: 'The hope of the sponsors of the Bill is to change the law that many abortions which take place at the moment illegally either in the back streets or, self-induced by some poor unfortunate woman, driven to desperation shall be brought into the framework of legality.'

The woman is portrayed as someone who is not completely in control of her actions, who will be driven to madness if relief is denied to her. David Owen states that: '[such] a woman is in total misery, and could be precipitated into a depression deep and lasting. What happens to that woman when she gets depressed? She is incapable of looking after those children so she retires into a shell of herself and loses all feeling, all her drive and affection.' A more extreme example is given by Lena Jeger, who speaks of the case of an 'honest young woman' with five children, recently deserted by her husband, who was refused an abortion because 'she did not seem quite depressed enough'. The woman was forced to continue the pregnancy, and her depression following the birth of her sixth baby was so extreme that she killed the baby by throwing it on the floor. The woman was now in Holloway prison and the children in care. Lord Strange notes that 'nearly every woman in this condition [of unwanted pregnancy] would be in a state bordering on suicide.

The woman's irrationality is sometimes conceptually linked to her pregnant condition, as David Owen states, for example: 'the reproductive cycle of women is intimately linked with her psyche.' This plays on notions of women as dominated by their biology, as existing through their ovaries. His image of the desperate woman is emphasised by contrasting it with the cool, impassive figure of the doctor (see section 3 below).

The idea that maternity is the female norm is exploited rather than challenged by the reformists. Madeleine Simms argued that it was precisely the woman with a fully developed 'maternal instinct' who might require an abortion, pointing out, however, that most women wished to have not more than two or three children, and they were appalled if they found they were having more children than they believed they could adequately care for. Should they accidentally become pregnant, she argued, they would then seek an abortion because of their feelings of responsibility to their husband and family, and because of their maternal instinct towards their existing children. In the House of Lords, Joan Vickers sums up sentiments which are often expressed or implicit in statements of other MPs when she notes that: 'I think that most women desire motherhood. It is natural for a woman to want to have a child … It is only in extreme cases that a woman wants to terminate her pregnancy.'

In defending the need for a social clause (to allow abortion where the woman's social circumstances are deemed inadequate) within the Act, Roy Jenkins argued that without the presence of such a clause 'many women who are far from anxious to escape the responsibilities of motherhood, but rather wish to discharge their existing ones more effectively, would be denied relief. Edward Dunwoody argues, in similar vein, that in–

> many cases where we have over-large families the mother is so burdened down physically and emotionally with the continual bearing of children that it becomes quite impossible for her to fulfil her real function, her worthwhile function as a mother, of holding together the family unit, so that all too often the family breaks apart, and it is for this reason that we have all too many problem families in many parts of the country.

It is also argued that women should be allowed to abort handicapped foetuses, because the woman who is forced to give birth to a handicapped child will seldom allow herself to become pregnant again. This implicitly asserts that the role of the law must be to protect and entrench motherhood.

3. The Construction of the Doctor within the Debates

A very clear construction of the typical doctor also appears within the debates, in strong contrast to the figure of the woman. The doctor is a male figure, always referred to as 'he'. Doctors are referred to as 'medical men', 'professional medical gentlemen' and 'professional men'. William Deedes notes that 'the medical profession comprises a great diversity of men' and Jill Knight says that the GP is a skilled man. The doctor is perceived as the epitome of maturity, common sense, responsibility and professionalism. He is a 'highly skilled and dedicated', sensitive, sympathetic member of a 'high and proud profession', which acts 'with its own ethical and medical standard', displaying 'skill, judgment and knowledge'. Peter Mahon MP reminds us that 'it would be as well if we applauded the work of some of these men [gynaecologists] to keep our homes and families and country right'.

In presenting the Bill at its second reading, David Steel went so far to say that he felt that given more contact with her doctor and the ability to discuss her pregnancy with him, the woman would 'in some way be reassured and feel that she has been offered some guidance, and no abortion will take place at all'. David Owen echoes this sentiment later in the debates, noting that '[if] we allow abortion to become lawful under certain conditions, a woman will go to her doctor and discuss with him the problems which arise … he may well be able to offer that support which is necessary for her to continue to full term and successfully to have a child'.

4. The Construction of Woman and its Effect in Law

David Steel asserted that the Abortion Act (at the time, the Medical Termination of Pregnancy Bill) is what a 'reasonable man would regard as a reasonable statement of the law'. The Act is often depicted as a compromise between two competing sets of rights: the right to life of the foetus versus the right to choose (the right of the self-determination) of the woman. I would argue that this is a fictitious claim for if the law serves to protect and entrench any rights it is those of the doctor.[70] If the law has achieved any sort of compromise it is between the competing constructions of woman described above. In this section, I aim to show how law has incorporated the above constructions of woman in working with certain assumptions about (a) women's maternal role and (b) the essential irresponsibility and (c) sexual immorality of the sort of woman who would seek to terminate a pregnancy.

(a) An Assumption of Maternity as the Normal Role for Woman

The assumption of maternity as the female norm is reflected both in terms of the very structure of the law and in specific provisions which allow abortion in cases where the continuance of a pregnancy would involve injury to the health of any existing children of the woman's family, and (less obviously) in case of foetal handicap.

70 W Fyfe, 'Abortion Acts: 1803–1967', in Franklin, C Lury and J Stacey (eds), *Off-Centre: Feminism and Cultural Studies* (London: Harper Collins Academic, 1991), pp 160–74, esp at 165; M Berer, 'Whatever Happened to a Woman's Right to Choose?' (Spring 1988) *Feminist Review* at 24–37; L Clarke, 'Abortion: A Rights Issue', in R Lee and D Morgan (eds), *Birthrights: Law and Ethics at the Beginning of Life* (Routledge; 1990), pp 155–70.

The law regarding abortion functions in terms of a blanket ban (s 58 of the Offences Against the Person Act 1861) which renders abortion illegal. The Abortion (Amendment) Act 1967 offers a defence against this law where two doctors deem that the circumstances of the individual woman fall within certain general categories which are laid out within s 1 of the Act. The decision to abort is thus never seen as an intrinsically acceptable one, the possibility of which any woman could face at some time in her life. Rather, it is an option which may be justified only in certain cases by the individual circumstances (or inadequacies) of individual women, with the approval of two doctors. Conceptually then, abortion stands as the exception to the norm of maternity. No woman can reject motherhood: the only women who are allowed to terminate are those who can do so without rejecting maternity/familial norms *per se*, ie those who have reasons to reject this one particular pregnancy without rejecting motherhood as their destiny in general (they are carrying the wrong sort of foetus, they have obligations to meet to existing children, their living conditions are at present inadequate for a child, this particular pregnancy was thrust upon them through rape or incest, and could thus be psychologically damaging).

The woman's role as mother is again emphasised where s 1(1)(a) of the Abortion Act allows abortion where the continuance of a pregnancy 'would involve … injury to the physical or mental health of … any existing children of her family'. The woman is allowed to reject pregnancy in order to fulfil her existing responsibility as a mother more effectively. Here again, she is seen to reject one particular pregnancy rather than motherhood itself. Indeed, she may reject this particular pregnancy in order to be a better mother to those children already in her family.

Section 1(1)(b) of the Act provides that abortion can be allowed where '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'. Whilst clearly displaying eugenicist considerations,[71] this clause can also be interpreted with regard to the status of the woman. It was justified in part on the grounds that to force a woman to carry an abnormal child to term will discourage her from future pregnancy and as Dr Winstanly points out that '[i]n every case the duty of the medical practitioners should be, wherever possible to encourage aid and support the mother towards term with the pregnancy'. Given that the handicapped baby or child is not seen as being as desirable as a 'normal' one (and does not feature in the romanticised family ideal), the woman can reject this pregnancy without rejecting the whole institution of motherhood itself.

(b) Female Irresponsibility

The assertion that many laws assume women to be irresponsible or irrational is a recurrent one within feminist writing. This construction of woman is clearly

71 Much of the debate in Parliament revolves around the number of healthy foetuses which must be sacrificed in order to pick out damaged ones. This appears to give official sanction to the notion that the lives of the handicapped are of less value than the able-bodied. For example, Peter Mahon, MP for Preston South: 'It is argued that if a mother has a particular disease in pregnancy … there is a chance that her child will be deformed in some way. But the real tragedy would be that a large number of perfectly normal unmaimed human lives are to be sacrificed for the sake of one who would be born with some physical deformity. What kind of morality is that?' (see *HC Deb* Vol 750, Col 1358, 1967 (13 July)). See also Calperin: 'Surely it would be more reasonable to have the odd malformed child than to take the risk of killing a normal foetus.' *HC Deb* Vol 749, Col 1065, 1967 (29 June). For a strong criticism by a disabled feminist of the provision of abortion in case of handicap, see J Morris, 'Abortion: Whose Right to Choose?' (October 1991) *Spare Rib* at 16–18.

reflected in the text of the 1967 Act. The woman is seen as irresponsible in that she is deemed incapable of taking for herself this important decision of whether to terminate a pregnancy.

Section 1(1) of the Act provides that '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' (the section goes on to lay out the necessary contra-indications).

The woman of the Abortion Act is clearly treated as someone who cannot take decisions for herself, rather responsibility is handed over to the reassuringly mature and responsible (male) figure of the doctor. The legislation assumes that the doctor is far better equipped to judge what is best for the woman, even though he may never have met her before, and have no real knowledge of, nor interest in, her concrete situation. This construction is perhaps an inevitable result of the constructions of woman used within the debates. If woman is distraught and irrational, then she is an unsuitable party to take such an important decision. Equally, if she is selfish and self-centred, intellectually and morally immature, portrayed as only considering her own needs, and giving no weight to other factors (such as the foetus) in her snap decisions, she is again incapable of taking such an important decision. She is thus in need of the normalising control of the doctor to impose either calm and rationality or morality and consideration of others.

The power of doctors in the field of abortion is very often justified by the argument that abortion is essentially a medical matter. However, the actual decision whether or not to abort is not normally one that requires expert medical advice. Further, the doctors' decision-making power is not contained within a narrow, limited medical field. In judging whether or not abortion could be detrimental to the mental or physical health of the pregnant woman or existing children of her family, 'account may be taken of the pregnant woman's actual or reasonably foreseeable environment', thus her whole lifestyle, home and relationships are opened up to his scrutiny, so that he may judge whether or not she is a deserving case for relief.

It is also worth mentioning the case of rape here, by way of explaining its absence in the English statute. Arguments for allowing abortion in the case of rape were dismissed for two main reasons. The first was that the woman would already be granted abortion under the law as it stood.[72] However a second reason which received much discussion, and stood as the final reason for not codifying the jurisprudential position within statute was that the woman cannot be trusted to tell the truth about whether she has been raped. One MP notes that: 'we also know that a great many charges of rape are made which are quite unfounded and which are made for quite different motives …'. If verification by doctors had been possible, however, this would have provided grounds for rape to be included in the text of the Act: 'if there were a way in which doctors could decide whether or not a lady had been raped, I would be content to allow the provision on rape to go in.'

(c) Female Sexuality

The Abortion Act contains a strong moral element, distinguishing as it does between categories of deserving and undeserving 'victims' of unwanted

72 That is, under s 1(1)(a) of the Abortion Act. Continuance of the pregnancy would involve risk of injury to her mental health. Indeed, in practice, since *R v Bourne* [1938] 3 All ER 615 abortion had been permitted in cases of rape.

pregnancy. The former are allowed abortions, the latter denied them. This distinction works in part with regard to whether or not intercourse was wanted (hence the issue of rape), and whether the woman has a legitimate reason for changing her mind postconception – ie she did want to get pregnant, but now wants to reject this particular pregnancy (because of handicap).

Although, unlike most other European statutes, the English Abortion Act does not explicitly foresee abortion for cases of pregnancy resulting from rape (for the reasons noted above), there were lengthy discussions of this matter in Parliament which are informative with regard to constructions of woman's sexuality. There was practically unanimous agreement that women should be allowed abortion in case of rape, although the clause which allowed it within the statute was deleted for the reason that it is already enshrined in the Bill as amended.

I have argued that the provision with regard to handicap is strongly influenced both by eugenic considerations, and the construction of woman as mother. This clause also bears some relation to constructions of women's sexuality, as it serves to provide a 'get-out clause' for good women who want to become pregnant (and thus do not commit the sin of making the fatal distinction between sex and procreation), but through no fault of their own happen to be carrying a foetus 'of the wrong sort'.

5. Conclusion – Political Implications

I have argued that the law creates its own fiction of the woman it seeks to regulate through the partial legalisation of abortion in the 1967 Act. The statute is predicated upon certain assumptions of maternity as the female norm, female irresponsibility and emotional instability; it also carries implicit assumptions about appropriate female sexual morality.

What clues might this initially give us for how feminist strategies aimed at the law can be made more effective in the future? There are two points which I need initially to clarify. Firstly, legal reform need not be the inevitable focal point of every feminist campaign, indeed perhaps feminism has been too much seduced by what Smart has described as the 'siren call' of the law.[73] However, with regard to abortion, it is impossible to ignore the power exercised by and through the law or to bypass the necessity of engagement with law, even if this is just one focus of political activity amongst others. Secondly, I do not wish to dismiss or denigrate those political strategies which in 1966–67 succeeded in providing limited access to legal abortion. The partial legalisation of abortion has undoubtedly made a very real difference to the concrete possibilities open to many women. However, it is important also to realise the limitations of the 1967 Act, and to assess how it may best be challenged in the future.

I have argued that the law operates through constructing its own image of the legal subject which it seeks to regulate. The recognition that law operates in this way has certain implications for how we seek to address it. Notably, we have to take into account of this subject when constructing challenges to law. This has two implications. Firstly, it means that feminist challenges to law must be more aware of the way that they construct their subject. To take the example of the reformist strategies in 1966-67, to utilise the powerful image of the the 'worn out mother of many children with an ill or illiterate or feckless or brutal or drunken or other wise inadequate husband',[74] may have immediate political purchase at

73 C Smart, *Feminism and the Power of Law* (London: Routledge, 1989), p 160.

74 Simms, *supra*, p 81.

the expense of bringing its own, serious long-term limitations (reinforcement of the perceived need for normalising medical control over women in this situation). Secondly, it means that the most successful short-term strategies may be those which come closest to constructing the issue – and the legal subject – in the terms which are closest to the law's own, as this subject is most readily open to assimilation within the law.

Carol Smart has expressed this problem in the following terms:

> Law hears what we have to say about women as long as we are prepared to occupy the same epistemological and ontological space as law. In other words as long as we translate the vast and differentiated array of women into the more easily knowable woman we can gain a purchase. We may sometimes go even further and collude with the woman that legal discourse has constituted. But we do this at the expense of silencing and alienating many actual women for whom we do not speak.[75]

The tension between woman and women upon which Smart draws is one which has excited a great deal of attention in recent feminist writings. It starts from the recognition that feminism has often sought to create its own 'essential woman' – a unitary, generic woman[76] which seeks to offer one definitive account of women's experience of the world, but only at the expense of ignoring the voices of many real, concrete women. However, it is important to draw a distinction between the way that feminism seeks within itself to theorise issues of women's oppression, and the way that it seeks to develop concrete strategies aimed at achieving particular reforms. Feminist theory has been correctly criticised for falsely universalising from the experience of a relatively select group of women to present one generic woman. Feminist engagement with specific laws, however, may have no alternative but to do just this (albeit in a much more self-conscious way).

In my view, the tension between woman and women is always (and inevitably) present in feminist engagement with the law. This is not merely because the attraction of constructing a feminist truth of the essential woman in order to challenge law's powerful claim to reality is so tempting. Rather, if it is accepted that (criminal) law always works on the basis of constructing a legal subject (as I feel it does), then to mount any effective challenge to the law we have to construct a different subject: a feminist woman to challenge the legal woman. As Smart asserts, this will inevitably silence some women, but it will also give voice to others. The challenge for feminism is to work with an awareness of this tension in a pragmatic way.

The reform that was achieved in 1967 can thus be evaluated in terms of a trade-off between woman and women. In 1992, we are still in a position of having to make the same kind of trade off, but under somewhat different circumstances. With regard to abortion law, the aim must be to construct one feminist woman who can best serve the purposes of the array of concrete women who stand behind her. Given the circumstances, I would suggest the need to construct an image of the woman as rational, self-determining, responsible and mature, as the person best placed to consider the needs of herself and the foetus, and to make the correct decision with regard of whether or not to abort. This should form the

75 C Smart, 'Analysing Law: the Challenge of Feminism and Postmodernism', conference paper presented at Women's Studies in the European Community, European Culture Centre at the European University Institute, Florence, January 1991.

76 EV Spelman, *Inessential Woman* (Boston: Beacon Press, 1988).

basis for demanding a model of law which leaves the decision of whether or not to abort to the individual woman and therefore leaves the maximum amount of space for women's diversity. The feminist woman, then, will seek to leave maximum space to real and concrete women.

Some of the possible reforms which could ground themselves on this construction of woman were suggested in the 1990 Parliamentary debates on abortion, conducted within the ambit of the Human Fertilisation and Embryology Bill. The debates are interesting for the way that pro-choice advocates in the Commons combine traditional images of the woman seeking abortion (as described above) with much more positive images. Teresa Gorman, for example, argues that in 'supposedly a liberal society … we should accord to the women … the maturity and ability to make decisions about such matters for themselves'. Another MP asserts that the women of this country 'are perfectly capable of exercising their consciences over what they do with their bodies'.

Once the woman of abortion legislation is recognised as a creation (or artefact) of the law, then, she becomes the site of possible political struggle. The task facing feminism is to work within the tension between woman and women to construct a meaning in the interests of women, that is, a meaning which will serve as a basis for empowering, rather that disempowering women.

THE MEDICALISATION OF INFANTICIDE[77]

Katherine O'Donovan[78]

> The operation of the criminal law presupposes in the mind of the person who is acted upon a normal state of strength, reflective power, and so on, but a woman after childbirth is so upset, and in such a hysterical state altogether that it seems to me you cannot deal with her in the same manner as if she was in a regular and proper state of health.[79]

This statement, in its time, represented a new attitude to and a new language about the crime of infanticide. Fitzjames Stephen, the speaker, later wrote that:

> physical differences between the two sexes affect every part of the human body, from the hair of the head to the sole of the feet, from the size and density of the bones to the texture of the brain and the character of the nervous system … Men are stronger than women in every shape. They have greater muscular and nervous force, greater intellectual force, greater vigour of character.[80]

Placing the two statements together poses the problem neatly. Does the acknowledgement of post-partum depression necessarily lead to statements about inequality of the sexes? Should the crime of infanticide be subsumed under the general law relating to diminished responsibility in homicide cases?

A brief history of the crime of infanticide

The first statute to create a crime of infanticide was passed in 1623.[81] It was a sex-specific crime committed by women and confined to bastard children as victims. The offence involved was concealment of death rather than death itself,

77 1984 *Criminal Law Review*, p 259.

78 Currently, Professor of Law, Queen Mary and Westfield College, University of London.

79 J Fitzjames Stephen (1866) 21 British Parliamentary Papers, pp 291–92.

80 J Fitzjames Stephen, Liberty, Equality, Fraternity (1873), p 212.

81 [1623] 321 Jac 1, c 27.

but the concealment operated as a presumption of guilt of murder. To rebut the presumption a witness had to be produced to give evidence that the child was born dead. Given the secrecy of the pregnancy and birth in most cases, this was difficult. By contrast, the suspected murder of children born in wedlock was treated as any other crime of homicide until 1922. The burden of proof was on the prosecution to show that the child had been born alive and had completely severed its connection with its mother's body.[82]

Aside from the jurisdiction of the King's courts over homicide the ecclesiastical court also dealt with infanticide. Parish priests were instructed to ask their parishioners in the confessional:

> Hast thou also by hyre I-Iyne,
>
> And so by-twene you they chylde I-slyne.[83]

Helmholz concludes, on the evidence from the Canterbury ecclesiastical courts, that 'medieval men did not regard infanticide with the horror we associate with pre-meditated homicide'.[84]

The statute of 1623 was considered harsh. Blackstone said it 'savours pretty strongly of severity'.[85] Public attitudes to infanticide by unmarried mothers were punitive, yet for single women in certain forms of employment there was considerable risk of pregnancy. It has been suggested that, in the 18th century half the unmarried women under the age of 26 were living-in servants, vulnerable to seduction and rape. Because their good 'character' was of economic and social value to them, pregnancy for these women was a catastrophe. Travelling and abandoning the child was not an available option, so concealment and infanticide were likely to follow pregnancy.[86] Even where the child was born dead, producing a witness to the court was probably difficult because of the secrecy of the affair. According to Blackstone the severity of the statute was mitigated in practice with the burden of proof shifting to the prosecution.[87]

Cases of child murder within wedlock were treated with less harshness. As Blackstone stated: 'to kill a child in its mother's womb is now no murder, but a great misprison'.[88] The reasons why married parents might not wish to accept a new child into the family could have been economic, or related to some physical problem the child had.

Langer argues that 'infanticide has from time immemorial been the accepted procedure for disposing not only of deformed or sickly infants but of all such new borns as might strain the resources of the individual family or the larger community'.[89] Opportunities for disposing of the child through overlaying, accident, sickness or infanticidal nursing were far greater than those available to single women. Writers on medieval coroner rolls suggest that the absence of

82 D Seaborne Davies, 'Child Killing in English Law' (1937) 1 *MLR* 203–23.

83 J Myre, *Instructions for Parish Priests 1359–68* (1902), p 42.

84 RH Helmholz, 'Infanticide in the Province of Canterbury during the 15th Century' (1975) 2 *History of Childhood Quarterly*, pp 379–90 esp, p 387.

85 W Blackstone, *Commentaries on the Laws of England* (1775) Vol IV, p 198.

86 RW Malcolmson, 'Infanticide in the 18th Century', in JS Cockburn (ed), *Crime in England 1550–1800* (1977), p 192.

87 *op cit*, n 7.

88 *Ibid* WL Langer, 'Infanticide: A Historical Survey' (1974) 1 *History of Childhood Quarterly* 353.

89 BA Kellum, 'Infanticide in England in the Later Middle Ages' (1974) 1 *History of Childhood Quarterly* 371; B Hanawalt, *Crime and Conflict in English Communities 1300–1348* (1979).

records on infanticide may be due to the public attitude, that such matters were insignificant.

In 1803 Lord Ellenborough's Act was passed, repealing the 1623 Act, and placing infanticide trials on the same footing as homicide trials. That change has been interpreted as meaning that infanticide could be committed with impunity: 'even the police seemed to think no more of finding a dead child than of finding a dead dog or cat.'[90] Throughout the 19th century there were scandals over burial clubs and baby-farming. The law was seen to be in disarray. There were numerous acquittals for lack of proof that the child had been born alive.[91] The 1803 Act contained a proviso whereby the jury could, in acquitting the defendant of murder, make a finding of concealment of birth which had a maximum two-year sentence. In his evidence to the Commission on Capital Punishment Byles J stated his belief that almost every case tried for concealment was a case of murder.[92] Trials for concealment increased threefold between the 1830s and the 1860s. There were 5,000 coroner's inquests a year on children under seven in the mid-19th century, yet only 39 convictions for child murder between 1849 and 1864. The victims in 34 of these cases were bastards. Recent evidence from the papers of the Thomas Coram Institute suggests that pregnancy for single female servants was still a social and economic disaster in Victorian times.[93]

In the 20th century a new legal approach to child murder was inaugurated by the Infanticide Act 1922. The Act reduced the offence from murder to manslaughter where a woman caused the death of her newly born child by any wilful act or omission 'but at the time of the act or omission she had not fully recovered from the effect of giving birth to such child, but by reason thereof the balance of her mind was then disturbed'.[94] It has been convincingly argued that the Act was the product, not of 19th century medical theory about the effects of childbirth, but of judicial effort to avoid passing death sentences which were not going to be executed.'[95] But medical theory provided a convenient reason for changing the law. Judicial evidence to the Commission on Capital Punishment was that juries would not convict for infanticide,[96] that the judiciary were concerned not to have to go through the 'solemn mockery' involved in a murder trial. Even where there was a conviction capital punishment was rarely carried out. Despite 39 convictions for child murder between 1849 and 1864, no woman was executed,[97] from 1905 to 1921, 60 women were sentenced to death, but in 59 of these cases the sentence was commuted.[98] It can be said however that in order to avoid 'solemn

90 Langer, *op cit*, n 11, p 360.

91 G Greaves, 'On the Laws referring to Child Murder,' *Transactions of the Manchester Stats Soc* (1863).

92 Commission on Capital Punishment (1866) Vol 21 *British Parliamentary Papers*, Seaborne Davies, *op cit*, n 4, p 218.

93 JR Gillis, 'Servants, Sexual Relations and the Risks of Illegitimacy in London 1801–1900' in ed JL Newton *et al*, *Sex and Class in Women's History* (1983).

94 Section 1(1) of the Infanticide Act 1922.

95 Seaborne Davies, *op cit*, n 4, Pt II, pp 269–87 esp, p 284.

96 Keating J in a memorandum to the Commission stated: 'It is in vain that judges lay down the law and point out the strength of the evidence, as they are bound to do; juries wholly disregard them, and eagerly adopt the wildest suggestions which the ingenuity of counsel can furnish … Juries will not convict whilst infanticide is punished capitally.' (1866) Vol 21 *British Parliamentary Papers*, p 625.

97 Seaborne Davies, *op cit*, n 4, p 218.

98 Kenny's, *Outlines of Criminal Law by Turner* (19th edn, 1956), p 195.

mockery' the 1922 Act required a new pretence: that of endeavouring to fit what happened into medical theories about childbirth producing mental disorder.

The Infanticide Act 1938 reformed the 1922 Act in two directions. It altered the definition of the victims of infanticide from 'newly born' to 'under the age of 12 months' and it extended the medicalisation of the crime through the addition of language about 'the effect of lactation'. The cases which brought about the fixing of the age at 12 months illustrate the tension between the socio-economic model of the crime, which informed the statute of 1623, and the medical model which informed the 1922 and 1938 Acts. In *O'Donoghue*[99] the defendant who had killed her 35-day-old child was sentenced to death and duly reprieved. The admitted facts, on which her counsel based his argument on appeal, were that the mother 'was in great distress at the time of the birth for some weeks from poverty and malnutrition, and had only just obtained employment when she killed the child'. In an unsuccessful effort to persuade the court that the trial judge was wrong in holding that a 35-day-old child was not newly born, counsel also argued that 'there was between insanity and sanity a degree of mental derangement which the medical authorities called "puerperal"'.[100] Thus, a mixture of socio-economic causes and medical theory was used in argument. *Hale*[101] was a case in which the mother killed her second child when it was three weeks' old and inflicted injuries on herself. The medical evidence was that at the birth of her first child the mother had symptoms bordering on puerperal insanity. The trial judge, claiming himself bound by *O'Donoghue*, directed the jury to find the defendant 'guilty but insane'.

Medical or socio-economic model?

The Infanticide Act 1938 makes explicit the medicalisation of the crime. It provides for the reduction of the offence from murder to infanticide where the defendant is a woman who causes the death of her child under the age of 12 months by wilful act or omission:

> but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reasons of the effect of lactation consequent upon the birth of the child.[102]

As the wording makes clear, it is to the process of giving birth, the effect of this on the mother's body, and the hormonal and other processes that are involved in lactation that the statute refers. The idea behind this is that physical processes, whether they are called chemistry or hysteria, can influence behaviour in such a way as to reduce criminal responsibility. There is no apparent consistency to this theory, for if a woman who has given birth within 12 months kills adults or other children the Infanticide Act does not apply. This suggests statutory acknowledgement that social role change may produce psychosis. But other members of the household, such as fathers, who may also be affected by role change, cannot rely on the Act.

The medical model for the Act has come under attack in recent years. In 1975 the Butler Committee stated that the medical principles on which the Act is based

99 (1927) 20 Cr App R 132.

100 *Ibid*, p 133.

101 (1936) *The Times*, 22 July, p 13.

102 Section 1(1) of the Infanticide Act 1938.