

CRIME AND WOMEN -- FEMININE EQUALITY AND THE CRIMINAL LAW

by

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By and large, crime is a man's affair. Only 10% of crimes classified as serious in Canada are committed by women.¹ In England, half the male population will be convicted of an offence during their lives; for the female population, the figure is 15%.² Chivalry cannot explain the discrepancies.³ It is sometimes suggested that as women's independence increases, so will women's crime, but there is little in the crime statistics to back this up.⁴

It would be wrong, however, to deduce from the predominance of male involvement, that the criminal law has ignored women. In fact, the criminal law has often trained special attention on women, whether as offenders or victims. In some cases, it can be argued, it has treated women unequally and unfairly, unfairness that found its roots in inappropriate stereotypes of feminine behaviour and the failure to appreciate the true position of women involved in crime.

¹ A. Hatch and K. Faith, "The Female Offender in Canada: A Statistical Profile" (1989-1990) 3 C.J.W.L. 432 at 435.

² F.M. Heidensohn, "The Deviance of Women: A Critique and An Enquiry" (1985) *British Journal of Sociology* 19(2) at 160.

³ O. Pollack, *The Criminality of Women* (Philadelphia: University of Pennsylvania Press, 1950) as reported in Hatch & Faith, *supra*, note 2 at 434.

⁴ See Hatch & Faith, *supra*, note 1 at 434-44, 455.

I propose to examine three areas where the criminal law has impacted peculiarly on the lives of women. I focus first on what have been called the "feminine crimes" -- those crimes committed mainly if not exclusively by women, like infanticide, abortion and prostitution. I turn second to the failure in the past to recognize legitimate feminine perspectives in dealing with traditional common law defences. Finally, I consider women as victims. In each of these three categories, I ask the question, "How has the criminal law treated women?"

I. FEMININE CRIMES

The so-called "feminine" crimes relate mainly to procreation and prostitution. In general, three things particularize these offences.

The first is that they often represent attempts to enforce moral rules through criminalization of the conduct. Most crimes are also immoral--murder, for example, is highly immoral. But generally speaking, more than a breach of morality is required to justify the stigma and infringement on liberty that flows from criminalization. The act must be shown to be (1) generally condemned in society and (2) to harm others, to justify making it a crime. These characteristics are not always found in the feminine crimes.

The second thing which emerges from a look at the feminine crimes is that they can be seen as attempts to deal with complex social issues in a

way that has its primary impact on women. A corollary of this is that police, judges and juries, perceiving the injustice of penalizing victimized women, have often refused to enforce the law by declining to prosecute or convict.

A third theme which recurs through the so-called feminine crimes is the tendency to "medicalize" complex social problems in order to provide a simple, sanitary solution. In fact, this "medicalization" may result in treating women as less than fully responsible and arguably may inappropriately cloak the real social and moral issues.

Infanticide

The earliest attempts to regulate procreation were not through abortion, but through the criminalization of infanticide. Today we view infants as human beings, entitled to the full protection of the law. However that this has not always been so. Infanticide was morally and legally acceptable as a means of controlling population size in pre-Christian and non-Christian societies, societies as admired as ancient Greece and Rome.⁵

Why, we ask ourselves, is it necessary to have a special offence of infanticide. Do not the offences of murder and manslaughter suffice to cover those cases where a mother kills her infant? The reasons,

⁵ G. Williams, *The Sanctity of Life and the Criminal Law* (New York: Alfred A. Knopf, 1957) at 14.

historically, are two: first, to stiffen the offence by making conviction easier; and second, in later years, to ease the penalty for infant killings which were really a product of a strict morality which condemned a woman who had a child out of wedlock and the desperate economic situation of many women.

In 1624, the legislators in England, not content that the usual rules attaching to murder govern the killing of infants, enacted the *Stuart Bastard Neonaticide Act*. The act created a presumption of guilt where an unmarried woman concealed her pregnancy and the child then died. In order to rebut this presumption, the woman had to produce a witness who could prove that the child had been born dead.⁶ Not surprisingly, few women were able to produce such a witness, for the purpose of concealment would have been destroyed by inviting witnesses to attend at the birth of the child.⁷

The position of a woman facing this law must truly have been terrible. Denied a defence, she was nonetheless more victim than criminal. She was typically the victim of a society which condemned unwed motherhood while persisting in sexual practices that imposed it upon women.

The social and economic consequences of unmarried motherhood at the time were dire. Many of the women prosecuted for infanticide were

⁶ 21 Jac. I, c.27.

⁷ "Desperate Women", *supra*, note 5 at 449-50.

domestic servants who had become pregnant by their employer or by their employer's sons,⁸ and the situation these women faced was particularly hopeless. If their pregnancy was discovered, not only would they face severe social ostracism and lose all prospects of marriage, but they would also lose their job and then be unable to secure other domestic work, work which would be made even more necessary by the presence of a child. It was the horrible but inescapable result of such conditions that young women were driven to terminate the lives of their newborn.

Fortunately, judges and juries recognized these social and economic realities. They responded to the *Neonaticide Act* by ignoring and circumventing it. Courts were reluctant to sentence such mothers to death. In many infanticide trials the 1624 Act was completely ignored⁹, and in others the onus was shifted to the Crown to prove that there had been a live birth. Juries grasped at the smallest possible doubts about the mother's guilt, and a number of defences were developed which exculpated the mother. These defences included the argument that the mother had been taken by surprise while on the privy and the baby suddenly came and fell into the soil, and the "benefit of linen" defence whereby the advance preparation of baby clothes was taken to show that the child had been

⁸ *Ibid.* at 457 and R.W. Malcolmson, "Infanticide in the Eighteenth Century" in J.S. Cockburn, ed., *Crime in England 1550-1800* (London: Methuen & Co., 1977) 187 at 202. Malcolmson notes that of the sixty-one infanticide trials at the Old Bailey between 1730 and 1774, at least thirty-five clearly involved servants, and for another ten of the cases occupational identification is unavailable.

⁹ The statute was only specifically mentioned in one of the sixty-one infanticide trials at the Old Bailey between 1730 and 1774: Malcolmson, *ibid.* at 197.

wanted. More plausible defences were that the child had died accidentally during or after birth due to the mother's lack of assistance with the birth, or due to the mother's medical incapacitation as a result of the birth.

This reluctance to sentence a mother to death for the murder of her child was further reflected in England in 1803 by the creation of the new offence of concealment of birth, which carried with it a maximum two year sentence.¹⁰ Recognizing the plight of women driven to desperate measures as a result of unwanted pregnancy, the criminal law created a new and lesser offence. Juries could thus acquit the mother of murder, and instead find her guilty of the lesser offence of concealment. During the 19th century the scope of this offence was expanded in both England and Canada to include the killing of legitimate children, and to cover persons in addition to the child's mother.¹¹ Judges and juries still, however, persisted in acquitting women charged with infanticide, often ignoring evidence clearly establishing murder.¹²

A number of theories have been advanced to explain the courts' lenient attitude to infanticide during this period. The crime was widespread, and generally regarded as somewhat less heinous than other

¹⁰ 43 Geo. III, c.58.

¹¹ See "Desperate Women", *supra*, note 5 at 454-55.

¹² *Ibid.* at 461-62. For example, of the twenty-seven child murder trials which took place in Ontario between 1840 and 1900, eighteen of the women were discharged. In six of the cases a verdict of concealment was substituted. Only two guilty verdicts were returned (one verdict is unknown). The most common sentence for concealment was three months: *Ibid.* at 469.

forms of murder. In part, these views can be traced to a recognition of the social and economic realities of the times. The different perception of the death of an infant, traceable to the significantly higher infant mortality rates existing at the time, could also have played a role, as could the quasi-property status which children then had in the eyes of the law. Another possible reason for the court's reluctance to convict which has been put forward is that the poor, lower-class, unmarried and abandoned women involved in the crime were insignificant in terms of the overall balance of power between the sexes, and the male legislators, lawyers, judges, and jurors who controlled the legal system could afford to exhibit compassion towards such desperate and powerless women.¹³

But there was still a problem. The offence of concealment of birth was of little help where there had been a clear killing. There the mother was still subject to conviction for murder or manslaughter. In order to right the perceived injustice, the law had recourse to medicine. In 1922, England enacted the *Infanticide Act*. This statute, based on the questionable premise that the experience of childbirth temporarily reduced a woman's moral capacity and responsibility, the Act reduced infanticide from murder to manslaughter when the mother caused the death of her newly born child while not fully recovered from the effect of giving birth. In 1938 the term "newly born" was clarified as meaning under twelve months of age.¹⁴ In enacting this legislation, the legislators chose to focus on

¹³ *Ibid.* at 477-78.

¹⁴ J.A. Osborne, "The Crime of Infanticide: Throwing Out the Baby with the Bathwater" [1987] 6 Can.J.Fam.L. 47 at 55.

medical factors, rather than on the socio-economic factors which were more likely responsible for the courts' reluctance to convict. This "medicalisation of infanticide" had the advantage of being scientific, even if these medical reasons were barely recognized and unsubstantiated. As noted by one commentator:

the Act was the product, not of nineteenth century medical theory about the effects of childbirth, but of judicial effort to avoid passing death sentences which were not going to be executed. But medical theory provided a convenient reason for changing the law.¹⁵

In 1948 Canada, for better or worse, adopted this new offence, and gave it a maximum penalty of five years.¹⁶ It still is on our books.

Whatever the reasons for society's attitude towards infanticide in the 19th century, that attitude has changed dramatically in the 20th century. For one thing, infanticide has become much less common with the development of increased access to birth control, abortion, adoption agencies, and foster care. Women faced with an unwanted pregnancy now have a number of less desperate alternatives available to them. Attitudes towards children have also changed significantly over time. Not only are children no longer viewed as quasi-property in the eyes of the law, but they are also seen as being entitled to more, rather than less, protection

¹⁵ K. O'Donovan, "The Medicalisation of Infanticide" [1984] *Crim.L.R.* 259.

¹⁶ *Criminal Code*, R.S.C. 1985, c. C-46, ss. 233, 237 and 663. The offence of concealment, with a maximum penalty of two years, is preserved in s.243.

than adults. Similarly, the significantly lower infant mortality rate has made the death of any child much less acceptable.

These changes in attitude, together with the impact of s.15 of the *Charter*, have led to a recent reconsideration of the crime of infanticide in Canada. In 1984, the Law Reform Commission of Canada recommended that the specific crime of infanticide be removed from the *Criminal Code*, and the crime of a mother killing her child then be dealt with simply as a second degree intentional homicide carrying a maximum penalty of life imprisonment. The judge would therefore be able to take into account all necessary matters in sentencing.¹⁷ The Law Reform Commission pointed out that the twelve month span of the current provision is limited and arbitrary, and that a mother who has not recovered from giving birth could also kill her other children, not just her newly born child. Furthermore, the Commission recognized that it was doubtful that mental disturbance due to childbirth was ever the real cause of infanticide, and that the provision was unnecessary given recent developments with respect to the law of insanity.

Today the infanticide provisions of the *Criminal Code* are rarely used.¹⁸ Despite the Law Reform Commission's recommendations, however,

¹⁷ Law Reform Commission of Canada, *Working Paper #33, Homicide* (Ottawa: Supply and Services Canada, 1984) at 68-77.

¹⁸ The Law Reform Commission reported in 1984 that since 1974 the number of infanticides reported per year has generally not exceeded five, and that in 1981 three offences were reported but only one charge was brought. Furthermore, if a conviction results it is often for a lesser offence such as failure to provide necessaries: *Ibid.* at 77.

they still exist in the *Code*. It appears that the offence was originally "medicalised" because to do so would be less contentious than reliance on the social reasons which clearly lay behind the courts' reluctance to convict mothers of killing their children. The question still remains, however, of what would result from the removal of this "antiquated" medical justification. The social climate has changed considerably since the enactment of the provision, and many of the factors which contributed to the tolerance of infanticide in the 18th and 19th century no longer exist.

The history of the crime of infanticide illustrates how the criminal law sometimes places the burden of social and moral problems involving both sexes on the backs of women. The early laws penalized women with sanctions as grave as death for the crime, in effect, of being unable to produce a live baby after having had been pregnant. The moral structure of the society was ambivalent -- on the one hand castigating sex and hence birth outside marriage, on the other practicing it (sex outside marriage). The moralists chose as their target not the social problems which were the root of the problem, but the women who were its victims.

The judges and juries who actually heard the cases, by and large rejected the law as unjust and refused and invented a myriad of devices to avoid its impact. In due course the legislature took note and modified the law by creating lesser offences, in part through the fiction that due to her medical condition a woman who had given birth was less than fully responsible for her conduct. This combination of condemnation and paternalism recurs like a leitmotif in this and other "feminine" offences.

Abortion

Criminal laws against abortion offer another example of attempts to enforce sexual morality through the criminal law. I do not intend tonight to enter on the debate of whether abortion, like the killing of infants, is properly part of the criminal law. I note only that the matter is much controverted, leading many to question whether the virtually universal consensus which has traditionally been the hallmark of criminal legislation, is present.

At common law, abortion was punishable as a misdemeanour, but only if performed after "quickening". The concept of quickening, which modified the early Christian position, embodied the view that the foetus was not infused with soul until the time, approximately fourteen weeks after conception, when it first stirred in the womb. Although there is little case law from this period, it has been suggested that a woman performing an abortion on herself after quickening was guilty of a misdemeanour at common law. Any third parties involved were undoubtedly guilty.¹⁹

¹⁹ S.A.M. Gavigan, "On 'Bringing on the Menses': The Criminal Liability of Women and the Therapeutic Exception in Canadian Abortion Law" (1986) 1 C.J.W.L. 279 at 287-88.

The force of the criminal law was not brought to bear on abortion until 1803 with the introduction of Lord Ellenborough's Act.²⁰ The Act preserved the concept of quickening, although it prohibited all abortions both before and after that event. The penalty for an abortion performed after quickening was death, whereas the penalty for an abortion before quickening, which had never before been viewed as criminal, was a fine, imprisonment, whipping or transportation beyond the seas for up to fourteen years. There was no express mention in the Act of whether the woman herself was covered by the prohibition, but once again it has been suggested that the woman could have been found guilty of the crime.²¹

Canada picked up on the statutory abortion prohibition in *Lord Ellenborough's Act*, beginning with New Brunswick in 1810. There appears to be little evidence that it was ever enforced, however; there are no reported cases of abortion trials in Canada from 1800 to 1840.²²

The quickening distinction was removed from English law in 1837, and the offence of abortion was amended to provide for a maximum penalty of three years regardless of whether the abortion took place before or after quickening.²³ Once again, Canada soon followed the English lead; Upper Canada in 1841 was the first Canadian jurisdiction to abolish the concept of

²⁰ 43 Geo. III, c. 58. This is the same Act which created the new offence of concealment of birth.

²¹ Gavigan, *supra*, note 19 at 289-91.

²² "Involuntary Motherhood", *supra*, note 5 at 69.

²³ 1 Vict., c. 85, s. 6.

quickenings, and impose a maximum penalty of life imprisonment for all abortions, no matter when performed.²⁴

The focus of these new provisions was still on the abortionist rather than on the woman undergoing the abortion. Even though the concept of quickening was removed from the legislation, it appears that women refused to accept it and continued to practice self-induced abortion early in the pregnancy. One commentator writes:

Men's attitudes toward procreation might have changed but women still retained the traditional view that life was not present until the foetus quickened. Until that time they considered it their right to conduct themselves in any way they saw fit. Moreover, until animation, they perceived themselves not as pregnant, but as 'irregular'; they took drugs not to abort, but to restore the menses.²⁵

The crime of abortion was significantly expanded in the late 19th century to expressly cover a woman procuring her own abortion. New Brunswick first enacted such a provision in 1849²⁶, well before England's move to do so in 1861²⁷. Despite the legislative amendment, however, the practice remained to not prosecute the woman who had undergone the

²⁴ *Offences against the Person Act*, Provincial Statutes of Canada 1841, c.27, s.13.

²⁵ A. McLaren, "Birth Control and Abortion in Canada 1870-1920" *Canadian Historical Review* 59 (1978): 319 at 335.

²⁶ S.N.B. 1849, c.29, s.7.

²⁷ *An Act to consolidate ... Offences against the Person* 1861 (Eng.), 24 & 25 Vict., c. 100, ss. 58, 59.

