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Why the CPS should revise its guidance on women suspected of causing the death of their infants

By Felicity Gerry QC and Dr Emma Milne

This article sets out some of the matters we discussed in our Libertas Lecture on Thursday 28 October 2021 and develops them in the light of a recent decision in Australia.

On 10 November 2021 the Supreme Court in Victoria, Australia sentenced a woman to a non-conviction outcome for endangering the life of her 2-year-old child by placing his face in the bathwater for approximately 5 seconds. She was originally charged with attempted murder, a plea to a lesser offence was accepted and a community corrections order was imposed, albeit after she had served many months in custody. The court accepted that the conduct was in the context of a mental health crisis where the mother had self-reported and sought help. This was held to reduce her culpability, and the sentencing judge exercised her discretionary power not to record a criminal conviction. It is worth reading the sentencing remarks [here](#).

In England and Wales, a non-conviction outcome is not available to sentencing judges. This means that CPS guidance on when to charge a mother or not needs to be robust. There needs to be a recognition of the different approach for those accused persons who are in crisis and do not act out of revenge or cruelty.

Felicity Gerry QC appeared for the mother and relied on research on women who cause the deaths of their infants from [Dr Emma Milne](#) from Durham University, UK and [Lorana Bartels](#) from ANU, Australia. It is plain from their analysis of cases that whilst the consequence for the child is shocking, the courts need to understand the context in which a woman would harm the child she loves. The research shows that these are nearly always loving but acopic parents, often

suffering multiple traumas. To ensure justice for women, it is vital to examine the typology of such cases, and work to comprehend why a woman might harm her own child and to what extent this may involve any criminal responsibility at all.

The research shows there are two distinct forms of infant killing, with similar characteristics in terms of the nature of the women and the situation they find themselves in. The first is a child killed around the time of birth – in the perinatal period. The second is the killing of older infants. It is important we understand both – how they manifest and the key aspects – so as to ensure the criminal justice system and the criminal law are responding correctly. Sadly, the [CPS guidance on infanticide](#) is only 4 lines long and whilst the guidance on familial deaths is longer, this is directed to Section 5 of the Domestic Violence, Crime and Victims Act 2004 which includes allowing a child or vulnerable adult to suffer serious physical harm (in addition to death) where there may be a conflict as to which parent was responsible. The CPS does have a Violence against Women and Girls (VAWG) Strategy but guidance on women in crisis who harm their children is lacking. Accordingly, there is an urgent need to revise CPS guidance on women suspected of causing the death of their infants, particularly now that research is available to develop such a policy that will focus minds on opportunities to be merciful.

What is key is to understand is that women who are suspected of killing their infants are incredibly vulnerable. Women who kill newborn children are often living in situations of poverty, within violent and abusive relationships with family or a partner, have experienced trauma and abuse, and have little to no social support.¹ This is the context in which a woman becomes pregnant. In these situations, women can find it incredibly difficult to recognise that they are pregnant. They experience what Dr Emma Milne has described as a “crisis pregnancy”.² They may have little to no awareness of the pregnancy or they may have some awareness that they suppress. While concealed/denied pregnancies

¹ E Milne, *Criminal Justice Responses to Maternal Filicide: Judging the Failed Mother* (Emerald Publishing Limited 2021); CL Meyer and M Oberman, *Mothers Who Kill Their Children: Understanding the Acts of Moms from Susan Smith to the "Prom Mom"* (New York University Press 2001); CM Alder and J Baker, 'Maternal Filicide: More than One Story to be Told' (1997) 9 *Women & Criminal Justice* 15.

² Milne, *ibid.*

are not uncommon, generally they do not last until birth, with the woman or those around her identifying the signs of pregnancy and taking steps to recognise the pregnancy. For women whose crisis pregnancy ends in the death of the foetus/infant, their lack of social support and/or fear of the consequences of people discovering that she is pregnant results in her either taking steps to end the pregnancy at a late stage, or to giving birth alone: the labour and delivery often coming as a shock to the woman, and the baby dying in the process of delivery, or post birth due to neglect or the violence of the woman herself. When women act to kill the child, she is not, as may be assumed, acting callously to rid herself of an unwanted child, but instead is acting out of fear, shock, panic, and often in a dissociative state.³

For women who kill older infants, the nature of the killing is different, but her level of vulnerability remains. Such women also have limited social support or assistance with the child.⁴ The killings often take place in the context of post-natal depression, severe sleep deprivation, and difficulties feeding and/or settling the infant.⁵ These killings often happen after a woman “snaps” in the moment – taking fatal action against the child that she instantly regrets.

The reality of cases of infant killing – whether of a newborn or an older infant – is that they do not occur unless the woman is vulnerable. Generally, women commit very little violent crime,⁶ and infant killing is clearly a context specific forms of violence induced by the social situations in which women become pregnant or care for their children. It is in this context that we need to ask what is and should be the role of criminal justice and the criminal law.

3 MG Spinelli, 'Neonaticide: A Systematic Investigation of 17 Cases' in Spinelli (ed) *Infanticide: Psychosocial and Legal Perspectives on Mothers Who Kill* (American Psychiatric Pub. 2003)..

4 Alder and Baker (ft n 1); M Smithey, *The Cultural and Economic Context of Maternal Infanticide: A Crying Baby and the Inability to Escape* (Emerald 2019).

5 See, for example, the case of Natasha Sultan: <https://www.bbc.co.uk/news/uk-england-humber-24908037>.

6 E Milne and J Turton, 'Understanding Violent Women' in Milne, Brennan, South and Turton (eds), *Women and the Criminal Justice System: Failing Victims and Offenders?* (Palgrave Macmillan 2018).

Traditionally the Infanticide Act 1938 has provided a means for leniency for these women – allowing women to be spared the mandatory life sentence attached to a murder charge. Infanticide occurs if at the time she kills the infant 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’. This statute has generally been broadly interpreted and liberally applied to cases, so saving women a murder conviction.⁷ However, four recent cases where women have been convicted of the murder of their infants perhaps suggests that the impression of leniency is no longer the direction of criminal justice responses to these vulnerable women.

Looking at the nature of the cases that come before the courts, whether on a murder charge or for a lesser crime, such as child cruelty,⁸ concealment of birth,⁹ or procuring a miscarriage,¹⁰ court hearings are laced with misogynistic and sexist tropes about the role of women as mothers. The expectation that threads through criminal trials and sentencing hearings is that motherhood is natural and inherent to all women, regardless of circumstances or the context in which they become pregnant or are required to parent their child(ren).¹¹ The expectation appears to be that from the moment a woman becomes pregnant her entire life must modify to put the needs of her foetus and, later, born child before her own needs or desires. While such expectations are unrealistic for the vast majority, if not all, women, they are particularly unachievable for women who experience crisis pregnancies and/or lack of support as they mother a child. Judging women next to unachievable standards of motherhood has the impact of amplifying the supposed “unnaturalness”, “evilness”, and “selfishness” of her conduct. Within

7 K Brennan, “‘A Fine Mixture of Pity and Justice:’ The Criminal Justice Response to Infanticide in Ireland, 1922–1949’ (2013) 31 *Law & Hist. Rev.* 793; K Brennan and E Milne, ‘Criminalising Neonaticide: Reflections on Law and Practice in England and Wales’ in Milne, Brennan, South and Turton (eds), *Women and the Criminal Justice System: Failing Victims and Offenders?* (Palgrave Macmillan 2018); RD Mackay, ‘The Consequences of Killing Very Young Children’ (1993) C.L.R.

8 Children and Young Persons Act 1933, section 1.

9 Offences Against the Person Act 1861, section 60.

10 Offences Against the Person Act 1861, section 58.

11 Milne (ft n 1).

this context of “natural and responsible mother” the accused woman is cast as irresponsible, a failure, and entirely to blame for the death of the foetus/child.

We need to step back from these narratives of the idealised mother and stop using them as the basis of the criminal justice responses to suspected women. Instead, we need a contextualised view of their conduct – to consider the crises they face and the lack of support that has surrounded their desperate actions. When viewing these cases in the light of these wider circumstances and in acknowledgment of the women’s vulnerability, we suggest women who kill their infants are often not truly culpable at all. In such circumstances, where sentencing law has not developed in England and Wales to allow for the sophistication of a non-conviction outcome discretion, the burden is on the CPS to adjust and educate their lawyers. What will hopefully follow is a change of approach by counsel and judges.

In the meantime, practitioners need to be aware of the research that highlights women’s vulnerabilities and make sure it is before the CPS decision maker to persuade them it is not in the public interest to prosecute, or before the court, if there is a decision to charge. Women who are charged should generally be dealt with anonymously to protect the best interests of their children, child services should react to recognise the need to support isolated or abused women and the criminal justice system must adapt to value self-reporting. Expert evidence can assist in balancing child protection with acknowledging the value of not punishing women in crisis. Ultimately, parenting is tough and some cope better than others. Some parents need more support than others and the CPS should be engaged in appropriate support networks for women rather than punitive reactions, it is an opportunity to acknowledge that people with mental health issues form relationships and have children and, whilst the outcomes may be shocking, it is capable of not being a crime.