



**ALLEVIATING THE ‘MISERABLE
CONDITION’:
FITZJAMES STEPHEN AND
THE DEVELOPMENT OF MODERN
ABORTION LAW**
*Kate Gleeson*¹

Abstract

Contemporary English abortion law is now typically thought to be a development of the twentieth century, and little academic attention has been paid to its development before the 1938 case of *R v Bourne* or the Abortion Act 1967. Sir James Fitzjames Stephen’s nineteenth century perspectives on pregnancy, abortion and the doctrine of necessity informing the basis of contemporary governance of abortion, child destruction, and infanticide as distinct from homicide, are often overlooked. Stephen understood abortion, child destruction and infanticide as distinct crimes with a common motivation and intention. The desperation of women to conceal or remedy the ‘miserable’ and emotionally destabilising condition of unplanned pregnancy typically defined each crime; the exception being cases of medical emergency during pregnancy which sometimes defined abortion and child destruction. Stephen argued that punishment required public assent and support in order to deter crime, and severe punishment in these cases rarely had either. In the twentieth century Stephen’s radical Victorian arguments to conceptualise abortion as a legitimate medical procedure (in the case of necessity), and to characterise child-killing as distinct from homicide, were finally effective: his model for law therefore informs contemporary English law in these areas.

Keywords: Fitzjames Stephen, abortion, Abortion Act 1967, child destruction, infanticide medical procedure, *R v Bourne*

Introduction

In the nineteenth century Sir James Fitzjames Stephen was well known as a highly influential Victorian patriarch: an Indian administrator, jurist, Queen’s Bench judge, political theorist and prolific journalist, who was John Stuart Mill’s greatest contemporary nemesis. Stephen’s anti-democratic ideals led him to fall into disfavour and then obscurity after his death in 1894. From the twentieth century, Stephen was almost universally remembered, if at all, as a

¹ Senior Lecturer, Macquarie Law School kate.gleeson@mq.edu.au. Kate was a visiting researcher at Plymouth Law school in June 2015.

Calvinistic puritan who led a charge against Evangelical tender-mindedness and democracy² and women's suffrage.³ Notoriously, Stephen described the Sermon on the Mount as the 'hardest part' of Christianity to accept,⁴ and publicised his contempt for the 'sentimentality' of Charles Dickens.⁵ His particular opposition to the discourse of women's rights - the 'pet opinions' of the liberal intelligentsia⁶ - were characterised by Benjamin Lippincott as 'the moral zeal of an indignant puritan, who was out to save the world from the devil'.⁷ On Stephen's death, *The Times* described him as anachronistic to his own era for persisting with antidemocratic ideals 'unpalatable' even to his own generation and society.⁸

Stephen is not well enough known today, given his impact on the development of the criminal law. In this article I focus on a small aspect of Stephen's impact, in regard to his legacy in formulating the crimes of abortion and child-killing. Contemporary English abortion law is now typically thought to be a development of the twentieth century, and 'remarkably little academic attention' has been paid to its development before the 1938 case of *R v Bourne* or the Abortion Act 1967.⁹ However, here I argue that it was Stephen's nineteenth century perspectives on pregnancy, abortion and the doctrine of necessity that form the basis of contemporary governance of abortion, child destruction, and infanticide as distinct from homicide. Questions of the origins of life and personhood as broached in the law concerning abortion, child destruction and infanticide were fundamental to Stephen's vision for the criminal law, and informed his criminal codes and treatises. Stephen advocated capital punishment, but in select cases including child-killing and abortion, he argued for punishment less severe. His approach was pragmatic, taking into account the need for law to be aligned with public morality and sentiment in order to possess legitimacy.

² JC Livingston, 'The Religious Creed and Criticism of Sir James Fitzjames Stephen', *Victorian Studies*, 17, 3, (1974), 279-300, p.280.

³ B Harrison, *Separate Spheres: The Opposition to Women's Suffrage in Britain* (London Croom Helm, 1978).

⁴ L Stephen, *The Life of Sir James Fitzjames Stephen, bart., KCSI, A Judge of the High Court of Justice* (New Jersey Rothman Reprints, 1972), p.1265.

⁵ J Stapleton, 'James Fitzjames Stephen: Liberalism, Patriotism and English Liberty' *Victorian Studies*, Winter (1998), 243-263, p.244.

⁶ KJM Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (Cambridge University Press, 1988) p.186.

⁷ BE Lippincott, *Victorian Critics of Democracy* (New York Octagon Books, 1974), p.135.

⁸ 'Death of Sir James Stephen' *The Times* 13 March (1894), p.11.

⁹ J Keown, *Abortion, Doctors, and the Law* (Cambridge University Press, 1988), p.1.

Stephen understood abortion, child destruction and infanticide as distinct crimes with a common motivation and intention. The desperation of women to conceal or remedy the 'miserable' and emotionally destabilising condition of unplanned pregnancy typically defined each crime;¹⁰ in the exception being cases of medical emergency during pregnancy, which sometimes defined abortion and child destruction. Stephen also understood the three crimes to have a similar effect on society, less comprehensive than the killing of an adult. He believed the crimes shared a common relationship to public morality and sentiment, because juries were usually sympathetic to women with unplanned pregnancies (especially illegitimate pregnancies), and the crimes therefore shared a common relationship to the effects of punishment. Stephen argued that punishment required public assent and support in order to deter crime, and severe punishment in these cases rarely had either. In the twentieth century Stephen's radical Victorian arguments to conceptualise abortion as a legitimate medical procedure (in the case of necessity), and to characterise child-killing as distinct from homicide, were finally effective: his model for law informs contemporary English law in these areas.

Women were 'on the periphery' of medical and legal debates about abortion in the nineteenth century,¹¹ and it was left to jurists and doctors to formulate its governance. In Stephen, women found an unlikely ally who was influential in abortion being recognised as a legitimate medical procedure. With regards to infanticide, Stephen has been identified as 'the faint voice in the wilderness' shaping the law that treats infanticide as manslaughter rather than murder¹² to provide special consideration for women who kill their children. But the centrality of the question of child-killing to Stephen's greater project of criminal law reform has not been explored in depth; and research in general into the genesis and development of abortion law has been 'sparse'.¹³ In regard to his impact on the lives of women, Stephen is far more famous today for his opposition to suffrage than his contribution to the modern laws that provide for abortion and govern child-killing. Paradoxically, the basis of modern abortion law rests on the arguments of a conservative, punitive jurist who believed women to be maddened by pregnancy, not on liberal sentiments or solicitude for women's health and rights, as abortion law reform came to be argued for in the late twentieth century.

¹⁰ Stephen in DR Seaborne Davies 'Child Killing in English Law Part II' *The Modern Law Review*, 1, 4 (1938), 269-287, p.270.

¹¹ B Brookes, *Abortion in England 1900-1967* (London, Croom Helm, 1988), Introduction.

¹² JA Osborne, 'The Crime of Infanticide: Throwing out the Baby with the Bathwater' *Canadian Journal of Family Law* 6 (1987), 47-59, p.52.

¹³ Keown, *Abortion, Doctors and the Law*, p.1.

First I briefly outline the treatment of abortion and child-killing in the law before the movement for criminal law reform of the 1860s and 1870s. Next I explain Stephen's conceptualisation of these crimes and his arguments presented to the 1863 Royal Commission on Capital Punishment, which centred on the *motivation* for child-killing; its effects; and its relationship to public morality. Third I explain Stephen's advancement of the doctrine of necessity in regard to abortion and child destruction, within the *Homicide Bill 1872* and within his draft criminal code for England in 1878. I conclude by explaining how Stephen's vision for abortion and child-killing laws were realised in the twentieth century and came to inform the *Bourne* judgment, which governed English abortion law until the late 1960s, and continues to form a basis for international abortion governance. In this article, abortion, child destruction and infanticide are discussed together. Although they constitute different activities with different social and medical meanings, during the nineteenth century and within Stephen's arguments, the three crimes were thought to represent related phenomena. Twentieth century abortion law, derived in particular from *Bourne*, cannot be understood separate from the law of child destruction (which was thought to relate to infanticide).

1 Abortion, Child Destruction and Infanticide Before Reform.

Abortion was an ecclesiastical offence, but as it came to find a place in the common law, it was not a crime when performed prior to 'quickening'. Like the offences of incest, bigamy, 'overlying children' and ravishment, procuring an abortion was viewed as an issue relating to the 'relation of the sexes' and not punishable by the state.¹⁴ 'Quickening' referred to the stage at which a woman first felt the foetus move, usually at around five months. Both Bracton and Fleta held that it was 'murder' to kill a foetus post-quickening. However, Coke wrote that it was 'no murder', only a great misprision (misdemeanour); Coke insisted that a murder victim must be a 'reasonable creature in being'. It is unclear whether abortion at any stage was prosecuted under the common law, as relevant case law of the era is 'close to non-existent'¹⁵ but in 1803 procuring an abortion at any stage of pregnancy was made a felony, with the 'quickening' distinction maintained to indicate the graver offence of later abortion. Lord Ellenbrough's Act 1803 created a capital offence to wilfully, maliciously, and unlawfully administer to, or cause to be administered, or taken by any of his Majesty's subjects, any deadly poison, or other noxious and destructive substance or thing, with intent such his Majesty's subject or subjects thereby to

¹⁴ Sir James Fitzjames Stephen, *A History of the Criminal Law of England* Volumes I-III (London, Macmillan & Co, 1883) ii, p.411.

¹⁵ S Gavigan, 'The Criminal Sanction as it Relates to Human Reproduction: The Genesis of the Statutory Prohibition of Abortion' *Journal of Legal History* 5 (1984), 20-43, p.20.

murder, or thereby to cause and procure the miscarriage of any woman, then being quick with child.

The main thrust of the 1803 Act was to consolidate offences of assaults and attempts to wound, and so on. The abortion prohibition seems ‘almost incidental’¹⁶ to the general prohibition against attempting to poison with attempt to murder; moreover, there was no great public alarm about abortion at the time.¹⁷ By the 1830s abortion was widespread; therapeutic abortions were acceptable to many doctors¹⁸ but also condemned by many within the medical establishment and the judiciary. In 1836 for example, the *Manual of Medical Jurisprudence* described abortion as a heinous crime, the murder of a human being from the moment of conception.¹⁹ In the same year the *Legal Examiner* identified abortion as the ‘destruction of human life’ and argued for its criminality because sexual freedom in women would result in the bonds that sustained society being ‘broken asunder’.²⁰ In the nineteenth century, abortion law evolved to become less discretionary, and to make it easier to secure convictions. The Criminal Law Commission of 1836 recommended the reduction of capital punishment for abortion, and the removal of the quickening distinction, in order to remove an evidentiary difficulty. As the medical profession consolidated itself and became more influential and concerned to deter lay abortionists, the notion of quickening was viewed as unscientific and distracting for juries; capital punishment was thought to deter convictions. The Commission’s recommendations were enacted in the Offences Against the Person Act 1837.

The 1837 statute did not explicitly allow for lawful abortion procured therapeutically. In 1845 the Criminal Law Commissioners noted that therapeutic justifications for abortion were provided in the criminal codes of other countries (for example, Macaulay’s Indian Code), and that it would be ‘expedient’ to provide a justification in English law for abortion procured ‘in good faith with the intention of saving the life of the woman’,²¹ but this recommendation was not acted on. The 1856 Commission, further influenced by the medical profession’s campaign against ‘irregulars’

¹⁶ Gavigan, ‘The Criminal Sanction’, p.21.

¹⁷ Keown, *Abortion, Doctors and the Law*, p.21.

¹⁸ *Ibid*, p.60.

¹⁹ M Ryan M (ed) *Manual of Medical Jurisprudence and State medicine* (London Sherwood, Gilbert and Piper 1836), p.265.

²⁰ In R Sauer, ‘Infanticide and Abortion in Nineteenth-Century Britain’ *Population Studies* 32,1 (1978), 81-93, p.84.

²¹ Criminal Law Commissioners, *Second Report of Her Majesty’s Commissioners for Revising and Consolidating the Criminal Law* (London HMSO, 1846) <http://www.lareau-legal.ca/SecondReport.pdf>. Accessed 6 November 2015.

(midwives and others), proposed to extend the law to punish abortion attempts whether or not the woman was pregnant. This was reflected in the Offences Against the Person Act 1861, which also expressly prohibited self-abortion. Existing law did not appear to address the crime of child destruction: the deliberate killing of a child in the process of its birth was not addressed by abortion law (addressing the miscarriage of pregnancy) or by homicide (addressing 'any reasonable creature in being'). David Richard Seaborne Davies identified this situation as having left 'a wide gap through which many malefactors walked with impunity'.²²

Historically, infanticide was bound up with ecclesiastical offences of adultery and fornication, and was considered by the courts to be a particularly heinous form of murder.²³ The Stuart Act of 1623 made proof of concealment of an illegitimate infant's death sufficient proof to convict for murder, thereby punishing single women for 'becoming pregnant and for refusing to live with their sin',²⁴ but by the reign of George II the law was not enforced. In 1803 Lord Ellenborough's Act amended the 1623 Act, and accusations of women murdering their illegitimate children came to be governed by the same rules of evidence as murder. The 1803 Act also created an offence of concealment of birth, in the case where the child had died. By the mid nineteenth century, however, the shame of illegitimate birth was increasingly thought by many to reduce the heinousness of abortion and child-killing: it was evident that infanticidal women (and those who procured abortions in the case of illegitimacy) were usually poor, uneducated and unmarried - the 'stepchildren of society' who had been abandoned by their lovers.²⁵ Men were typically blamed for pressuring women to kill their children,²⁶ and the application to such women of the full force of the law was considered by many to be barbaric; capital or severe punishment in these cases was thought to have deterred juries and judges from convicting.²⁷ After 1849 no woman was hanged for killing her child, and by the 1860s public anger and frustration arose at acquittals for infanticide made on the 'most slender' of grounds²⁸ and a belief, 'widely held but

²² DR Seaborne Davies, 'Child Killing in English Law' *The Modern Law Review*, 1, 3 (1937), 203-223, p.203.

²³ N Walker, *Crime and Insanity in England* (Edinburgh University Press, 1968), p.126.

²⁴ K O'Donovan, 'The Medicalisation of Infanticide', *Criminal Law Review* (1984) 259-264, p.265.

²⁵ MJ Wiener, *Reconstructing the Criminal: Culture, Law and Policy in England 1830-1914* (Cambridge University Press, 1990) p.269. GK Behlmer, *Child Abuse and Moral Reform in England 1870-1908* (Stanford University Press, 1982) p.23.

²⁶ L Rose, *The Massacre of the Innocents: Infanticide in Britain 1800-1939* (London Routledge & Kegan Paul, 1986), pp.25-26.

²⁷ Seaborne Davies, 'Child Killing in English Law', p.203.

²⁸ J Marland, 'Getting Away with Murder? Puerperal Insanity, Infanticide and the Defence Plea' in Mark Jackson (Ed) *Infanticide: Historical Perspectives on Child Murder and Concealment 1550-2000* (Aldershot Ashgate, 2002), pp.168-192.

not uncontested', that the failed law had led to an increase in murders of children.²⁹ In the 1860s scandals erupted when illegitimate infants supposed to have been cared for at 'baby farms' were found to be murdered or starved to death routinely. The 1865 trial of Charlotte Winsor for smothering a child and dumping his body at the roadside brought baby farming to 'national, as well as international' attention.³⁰

2 Classifying Child Destruction and Infanticide; the Royal Commission into Capital Punishment 1863

The breakdown of the law in regard to infanticide was one important focus for the Royal Commission into Capital Punishment that was instigated in 1863. The Commission was the 'first official forum' to address infanticide.³¹ It was preoccupied with child murder in regard to which it was widely claimed that the law had 'completely broken down'.³² In their evidence, judges identified the current treatment of infanticide as performing a 'solemn mockery' of the law.³³ It was noted that juries, and even judges, were reluctant to convict especially when the child was newly born and when proof of live birth was difficult to obtain, given that most women gave birth at home. The Commissioners agreed the current law was unworkable: some wanted to 'go back to a time when women were hanged for child murder',³⁴ and others had a greater interest in securing more convictions for child-killing.³⁵ As a QC, Stephen gave evidence to the Royal Commission, and in June 1864 he published a report on its deliberations in *Fraser's Magazine*. In both forums Stephen argued strongly for capital punishment of homicide except in select cases, including child-killing. In particular, he argued for special consideration and lighter punishment of women who killed their children.

Stephen generally had great faith in punishment to deter crime and satisfy society's need for justice. He believed that punishment served to put into effect society's hatred of crime.³⁶ In

²⁹ Seaborne Davies, 'Child Killing in English Law', p.222.

³⁰ DL Haller 'Bastardy and Baby Farming in Victorian England' *The Loyola University Student Historical Journal* (1989-90) <http://www.loyno.edu/~history/journal/1989-0/haller.htm> Accessed 5 November 2015.

³¹ Rose, *The Massacre of the Innocents*, p.77.

³² Seaborne Davies, 'Child Killing in English Law', pp.218-219.

³³ *Ibid*, p.222).

³⁴ Grey in Criminal Law Commissioners, *Report of the Capital Punishment Commission Together With the Minutes of Evidence and Appendix* (London, for HMSO by Eyre and Spottiswoode, 1866), p.215.

³⁵ Walker, *Crime and Insanity in England*, p.128.

³⁶ J Colaiaco, *James Fitzjames Stephen and the Crisis of Victorian Thought* (London Macmillan Press, 1983), pp.149 and 81.

Fraser's he publicly advocated what he viewed as Bentham's endorsement of the pleasure of vengeance:

Sweetness produced from terror, honey from the lion's throat. Produced without expense, the net result of an operation necessary on other grounds, it is an enjoyment to be cultivated like any other; for the pleasure of vengeance, considered in the abstract, is like every other pleasure, a good in itself.³⁷

His brother Leslie descried Stephen as having 'sat at the feet of Bentham'.³⁸ But Stephen did not derive his arguments for capital punishment from Bentham, who considered all punishment 'an evil which should be imposed only if it promised to exclude some greater evil', and was 'totally opposed' to the death penalty.³⁹ In *Fraser's*, Stephen advocated capital punishment because 'no other punishment deters men so effectually from committing murder'. He continued that 'no other punishment gratifies and justifies in so emphatic a manner the vindictive sentiment, the existence of which is one of the great safeguards against crime'. And concluded that 'no other way of disposing of great criminals is equally effectual, appropriate and cheap'.⁴⁰ Stephen viewed most objections to capital punishment as misguidedly 'sentimental', and those who voiced them as 'too soft and pitiful'.⁴¹ He regretted that the remedy was no longer available for attempted murder, or for some forms of burglary and highway robbery.⁴² He feared that the modern age revered the Jesus of the Sermon on the Mount over a vengeful God, and had thereby lost sight of the fact that 'the toleration of what ought not to be tolerated is nearly as great as an evils as the persecution of what ought to be tolerated'. Stephen understood the

³⁷ Sir James Fitzjames Stephen, 'Capital Punishments' *Fraser's Magazine for Town and Country*, 69, June (1864), 753-772, p.759. Stephen paraphrased Bentham's chapter 'Of Vindictive Satisfaction' of his *Principles of Morals and legislation, Fragment on Government, Civil Code, Penal Law* (1843), which read, 'this pleasure is a gain: it recalls the riddle of Samson; it is the sweet which comes out of the strong; it is the honey gathered from the carcase of the lion. Produced without expense, net result of an operation necessary on other accounts, it is an enjoyment to be cultivated as well as any other; for the pleasure of vengeance, considered abstractedly, is, like every other pleasure, only good in itself. It is innocent so long as it is confined within the limits of the laws; it becomes criminal at the moment it breaks them. It is not vengeance which ought to be regarded as the most malignant and most dangerous passion of the human heart; it is antipathy, it is intolerance: these are the enmities of pride, of prejudice, of religion, and of politics. In a word, that enmity is not dangerous which has foundation, but that which is without a legitimate cause'. See J Bentham, *Principles of Morals and legislation, Fragment on Government, Civil Code, Penal Law* (1843) at http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=2009&chapter=139777&layout=html&Itemid=27 Accessed 5 November 2015.

³⁸ L Stephen, *The Life of Sir James Fitzjames Stephen*, p.308.

³⁹ J Hostettler, *The Politics of Criminal Law Reform in the 19th Century* (Chichester Barry Rose Law Publishers Limited, 1992), p.6.

⁴⁰ Sir James Fitzjames Stephen, 'Capital Punishments', p.753.

⁴¹ *Ibid*, p761.

⁴² Sir James Fitzjames Stephen 'The Punishment of Convicts' *Cornhill Magazine*, VII, Jan-June (1863),189-202, p.198.

opposition to capital punishment not as a sign of increasing humanity, but as cowardice; he noted that there was 'as much moral cowardice in shrinking from the execution of a murderer as in hesitating to blow out the brains of a foreign invader'.⁴³

In the Commission proceedings and elsewhere, however, Stephen argued that capital punishment was not an appropriate response to infanticide and abortion. He described infanticide as 'more like procuring abortion' than murder and argued for the creation of a new criminal offence of infanticide, with punishment less severe than homicide.⁴⁴ The classification of crimes of abortion and child destruction was central to Stephen's greater project of law reform, which centred on his interpretation of killing. In the Commission he argued that a nuanced definition of murder was of the 'highest importance', so as to render the law more 'rational and symmetrical' by reflecting the various culpabilities associated with killing, some of which would be 'monstrous to punish with perpetual imprisonment'.⁴⁵ In regard to child destruction in particular, he drew a clear contrast with homicide. In his *History of the Criminal Law* of 1883, Stephen wrote that the offence of killing a child in the act of birth should be provided for in law, 'punishable with extreme severity, as it borders on murder', but he clarified that the offence 'should not be confounded with murder'.⁴⁶ Accordingly, in response to the problem of determining when a foetus was a reasonable creature in being and thereby protected by homicide provisions, Stephen wrote that

The line must obviously be drawn either at the point where the foetus begins to live, or at the point at which it begins to have a life independent of its mother's life, or at a point when it has completely proceeded into the world from its mother's body. It is almost equally obvious that the last of these three periods is the one which is most convenient to choose. The practical importance of the distinction is that it draws the line between the offence of procuring an abortion and the offences of murder and manslaughter....

The conduct, the intentions, and the motives which usually lead to the one offence are so different from those which lead to the other, the effects of the two crimes are also so dissimilar, that it is well to draw a line which makes it practically impossible to confound them. The line has in fact been drawn at this point by the law of England.⁴⁷

⁴³ Sir James Fitzjames Stephen, 'Capital Punishments', p.762.

⁴⁴ Sir James Fitzjames Stephen, 'Capital Punishments', p.765.

⁴⁵ Criminal Law Commissioners, *Report of the Capital Punishment Commission*.

⁴⁶ Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, iii, p.3.

⁴⁷ *Ibid*, p.2.

This contradicted the recommendations of the 1846 Criminal Law Commission, that severance of the child from the woman's body need not have occurred for the child to be regarded as a person protected by homicide provisions.⁴⁸ Although Seaborne Davies characterised Victorian judges considering child destruction as 'wallow[ing] in the troughs of difficult questions of physiology',⁴⁹ Stephen's judgement of the matter was based less on a view of the characteristics of the foetus and its development, and more on what he determined to be the criminal nature of child-killing in general. He understood the crime as the product of women's weak post-natal temperaments. Writing in *Fraser's* he emphasised the 'condition into which a woman is thrown by the pains of childbirth', whereby she has 'so little control over her conduct',⁵⁰ and he argued to the Royal Commission that 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 soon, but a woman just after child-birth is so upset, and is in such an 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... besides that, there is a strong sympathy which it is never safe to neglect, and which will always exist, with the miserable condition of the woman; and there is a sort of feeling (I do not say it is very reasonable, and I do not know exactly how to connect it with the fact) as a general rule against the father of the child, who goes unpunished, which makes its way with juries and with the public.⁵¹

Stephen had a great interest in insanity defences, which he explored at length in the *History of the Criminal Law*.⁵² He campaigned for the notion of the 'irresistible impulse' to fall within the defence of insanity, which would have broadened immunity considerably.⁵³ In this context, the concept of puerperal insanity had become popular in English psychiatric and obstetric medical circles after the 1820s.⁵⁴ There was also much debate about sanity and criminal responsibility following the 1843 McNaughten [M'Naghten] case and the rules it outlined in regard to pleas of insanity where a defendant 'did not know what he was doing' at the time he committed the crime.⁵⁵ Stephen's belief that 'you have to legislate for human behaviour as you find it'⁵⁶ was based on his personal view of human nature – that certain individuals were especially weak and vulnerable, and should be judged accordingly – and his respect for civil liberties to defend the

⁴⁸ Seaborne Davies, 'Child Killing in English Law', p.208.

⁴⁹ Seaborne Davies 'Child Killing in English Law', p.208.

⁵⁰ Sir James Fitzjames Stephen, 'Capital Punishments', p.765.

⁵¹ In DR Seaborne Davies, 'The Law of Abortion and Necessity' *The Modern Law Review*, 2, 2 (1938), 126-138.

⁵² Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, ii, pp.124-186.

⁵³ Colaiaco, *James Fitzjames Stephen and the Crisis of Victorian Thought*, pp.83-85.

⁵⁴ Marland, 'Getting Away with Murder?', p.174.

⁵⁵ Wiener *Reconstructing the Criminal*, p.269.

⁵⁶ Stephen, 'Capital Punishments' p.758.

rights of those whose illegal activities were the result of a 'deranged mind'.⁵⁷ Martin Wiener argues that from the mid Victorian period opinions about the differences between the sexes such as 'women's physical weakness, ever more insisted upon', conflicted with movements promoting 'the universalising struggle against instinct' that saw 'similar dangers in all human nature and demanded similar remedies of character building',⁵⁸ particularly in regard to the treatment of crime. Accordingly, Stephen's position on homicide and child-killing contradicted many established legal views. For example, Baron Bramwell's argument to the Commission was that it was the very great temptation of infanticide, especially to women with illegitimate children, that necessitated *greater* punishment in these situations.⁵⁹ Blackburn also argued for extending culpable negligence to the period of pregnancy.⁶⁰

While others were motivated to reform the law to secure more convictions, Stephen was motivated by his view of the mental element of the crime, the need for law to align with public morality and opinion, and his view of the very purpose of punishment. Stephen understood crime in general terms of its mental element and potential for deterrence, and thought it 'absurd' to punish distinct classes of crime in a uniform fashion.⁶¹ The point of punishment was to remove from the criminal the power to recommit the offence, and to generate a 'terror' of punishment among potential offenders as well as hatred for the crime itself among the general public. Stephen saw the role of public opinion in regulating society as of utmost importance, and wrote in the *Cornhill Magazine* that

if any person of ordinary decency and morality will honestly ask himself what is the real reason why he should not commit a murder, however great might be the gain, and however small the risk, he will find that no small part of his reluctance to do so arises from the horror in which the crime is universally held and which he as one of the public shares.⁶²

The Royal Commission concluded by recommending the creation of a new offence of inflicting grievous bodily harm on a baby within seven days of its birth, where the baby had subsequently died, and with no proof required that the child had been born alive.⁶³ There was much debate in the Commission about the time limit to grant women this relative mercy. Home Secretary

⁵⁷ Colaiaco, *James Fitzjames Stephen and the Crisis of Victorian Thought*, pp.83-85.

⁵⁸ Wiener *Reconstructing the Criminal*, p.129.

⁵⁹ Walker, *Crime and Insanity in England*, p.126.

⁶⁰ Seaborne Davies, 'Child Killing in English Law Part 2', p.273.

⁶¹ Sir James Fitzjames Stephen, 'The Punishment of Convicts' p194.

⁶² *Ibid*,p.196.

⁶³ Seaborne Davies, 'Child Killing in English Law Part 2' p.270.

Spencer Walpole suggested three months; others argued for three days, as in France.⁶⁴ Stephen however, argued for a more flexible approach, stating that he would not wish to limit the time 'very nicely' because the effect of childbirth on a woman's nerves lasts for a 'considerable time' in some cases. He testified to the Commission that he 'would rather have a little indefiniteness in the law than run the risk of an encounter between the law and public sentiment'.⁶⁵ The seven-day limit was agreed on, but subsequent bills failed in parliament because the provision appeared to place a lesser value on infant life. In *Fraser's* Stephen had argued that infanticide was different from homicide because of its motivation and effect:

There can be no doubt that the temptation is so strong, the power of resisting it, under the circumstances, so weak, and it must fairly be owned, the mischief done is so much less, that there is no use in calling it by the same name as the deliberate destruction of a grown up person. A new-born child, or a child in the act of being born, certainly falls within the only definition of a human being that can be given, but that is all that can be said of it.

Murder is a great crime because it inflicts a terrible loss on a circle of people more or less extensive; because it puts an end to all the interests, occupations, and objects of the person murdered; because it gratifies bad passions, and alarms those who are in circumstances similar to the murdered person. In the case of a new-born child murdered by its own mother, every one of these evils is of necessity at a minimum. No one except the mother even knows of the child's existence, the child itself loses nothing, the motive is always the same; and it is one on which the fear of punishment will operate less than on any other likely to lead to such a result, especially when the bodily and mental pain under which the offender is suffering are taken in to account, and new born children are incapable of feeling alarm.⁶⁶

Tony Ward has cited this argument as evidence of Stephen's 'hardhearted utilitarian' character and ideology, in its having 'put a lesser value on infant life',⁶⁷ but in doing so, Ward might have simplified both Stephen and utilitarianism. In formulating the crime of infanticide Stephen was most concerned with the *motivation* for the killing, and secondarily, with its effect. He wrote that it was not desirable to 'try to get people to view the crime of killing a new-born child, from motives of shame, in the same light as that of killing an adult, from motives of gain and revenge'.⁶⁸ Stephen identified the special *relationship* between victim and perpetrator as

⁶⁴ Behlmer, *Child Abuse and Moral Reform in England*, p.20.

⁶⁵ Sir James Fitzjames Stephen, 'Capital Punishments', p.758.

⁶⁶ *Ibid.*

⁶⁷ T Ward, 'Legislating for Human Nature: Legal Responses to Infanticide 1860-1938' in Mark Jackson (ed) *Infanticide: Historical Perspectives on Child Murder and Concealment 1550-2000* (Aldershot Ashgate, 2002), 249-269, p.57.

⁶⁸ Sir James Fitzjames Stephen, 'Capital Punishments' p.765.

defining the crime of infanticide: at no stage did he suggest special consideration for the general killing of infants, other than by their mothers in a 'miserable' and irrational condition.⁶⁹

3 Therapeutic Abortion and Necessity

In 1872 the Infant Life Protection Act was enacted to licence baby farms and quell the furore that surrounded them. Following the deliberations of the 1863 Commission, Stephen was enlisted to another commission help draft the Homicide Law Amendment Bill of 1872, which addressed the neglected crime of child destruction by defining a person as including 'every child in the act of birth that has breathed'. Killing in such cases was thereby identified as a form of homicide. This provision was the work of the broader Commission, not Stephen, who as I have noted, did not classify child destruction as murder. The Homicide Bill did however reflect Stephen's view of women and of infanticide by providing that if a woman murdered her child at, or soon after birth, and 'whilst deprived of her ordinary powers of self-control', a judge had the discretion to sentence her to penal servitude to any term of not less than five years.⁷⁰ This marked the beginning of series of attempts in England to have infanticide treated as manslaughter rather than murder.

The Homicide Bill was rejected by a Select Committee in 1874. Its rejection accelerated Stephen's campaign for codification of the English criminal law, again focused on killing. In 1877 he published his ambitious *Digest of the Criminal Law*, on the basis of which he was enlisted by Lord Chancellor Cairns to draft a criminal code for England.⁷¹ In May 1878, Stephen's *Criminal Code (Indictable Offences) Bill* was tabled in parliament, and after second reading it became the subject of a Royal Commission. This Bill again focused on child-killing. Chapter XIX concerned homicide and commenced by defining the offence as 'the killing of a human being by a human being' with the accompanying clarification that,

a child becomes a human being within the meaning of this definition when it has completely proceeded in a living state from the body of its mother, whether or not it has breathed, and whether the navel string has or has not been divided, and the killing of

⁶⁹ The charge that utilitarianism was 'hardhearted' deserves greater substantiation than provided by Ward. For example, from the eighteenth century Jeremy Bentham applied his utilitarian philosophy to advocate compassion to the oppressed (for example homosexuals, women, animals). In the case of abortion, although he was opposed in principle to the procedure as an 'offence against society', Bentham wrote with compassion about women who could not carry their pregnancies to term due to health reasons, and who without abortion would suffer 'sentence to the mortification of celibacy/ privation of the sweets of marriage' (in L Campos Boralevi, *Bentham and the Oppressed* (New York de Gruyter, 1984), p.13).

⁷⁰ Seaborne Davies, 'Child Killing in English Law Part 2', p.271.

⁷¹ Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist*, p.78.

such a child is homicide, whether it is killed by injuries inflicted before, during, or after birth.

A living child in its mother's womb, or a child in the act of birth, even though such a child may have breathed, is not a human being within the meaning of this definition, and the killing of such a child is not homicide (section 131).⁷²

This was an important distinction, which was at odds with the failed 1872 Homicide Bill. In the Royal Commission on Capital Punishment and elsewhere, commentators had suggested that child destruction was often performed before the child had fully proceeded from its mother.⁷³ Under Stephen's proposed law such an act would not be a capital offence.

Stephen understood child destruction as a form of abortion, punishable by life imprisonment, when not performed for therapeutic reasons. He did not consider abortion or child destruction to be homicide. In keeping with his understanding of abortion as historically concerning the 'regulation of the sexes', he grouped abortion offences in Section 165 of his 1878 Code together with the sexual misconduct offences of rape and 'knowing children'. Under the heading 'Procuring Abortion', he included the offence of causing the 'death of any living child which has not proceeded in a living state from the body of its mother by any act or omission which would have amounted to murder of such a child'. As in the Homicide Bill, Stephen defined a crime of infanticide as manslaughter when performed during or immediately after birth, if the woman was at the time 'deprived by reason of bodily or mental suffering of the power of self control' (in section 138 of his Code).

During his codification campaign of the 1870s, Stephen also publicised the idea that abortion and child destruction might be understood in terms of necessity. In the classic texts, necessity was identified as roughly similar to duress involving objective circumstances where emergencies might compel people to act in ways that would otherwise be criminal. For example, the texts cited situations of choosing the 'lesser of two evils', usually involving property and liberty, such as where a house is destroyed to prevent a fire spreading, or where prisoners leave a burning gaol to save themselves, or sailors jettison cargo to lighten a boat in a storm.⁷⁴ Stephen was unimpressed with the leading judgment on necessity, *R v Dudley and Stephens*,⁷⁵

⁷² *Criminal Code Indictable Offences Bill 1878* <http://www.lareau-law.ca/StephenBill178ONE.pdf>
Accessed 5 November 2015.

⁷³ Criminal Law Commissioners, *Report of the Capital Punishment Commission*, p.215.

⁷⁴ G Williams, 'The Defence of Necessity' *Current Legal Problems* 6 (1953), 217-219, p.216.

⁷⁵ *R v Dudley and Stephens* [1884] 14 QBD 273.

which held that shipwrecked sailors were guilty of murder for killing a cabin boy to eat, in order to save themselves from starvation. It was held that the sailors were neither excused of homicide by the mitigating circumstances, nor justified in their attempts to save three lives at the cost of one.⁷⁶ Commenting on the case in his *Digest of the Criminal Law*, Stephen wrote that he would have agreed with the judgement of the court that rejected the defence, but not with its reasoning.⁷⁷ Stephen understood necessity as an *excuse*: a type of compulsion by circumstance that formed an exception to the general rule that people are responsible for actions falling within the definition of crimes.⁷⁸ His reasoning was that ‘when men are put under compulsion, when they are subjected to motives at once terrible and exceedingly powerful, the great majority of them will act in the same way’.⁷⁹

Departing from the classic examples noted above, in both his *Digest* and *History of the Criminal Law*, Stephen identified abortion and child destruction as providing clear examples of when necessity might be valid, whereby ‘in delivering a woman it is necessary to sacrifice the child’s life to save the mother’. He clarified that it would however be murder to sacrifice a pregnant woman’s life ‘in order to produce an heir’.⁸⁰ Stephen was the first to bring to bear the defence of necessity on questions of abortion and infanticide, a move that would come to fruition many years later in the 1938 judgment in *R v Bourne*. In section 23 of his 1878 Code, Stephen included necessity as a General Exception to criminal liability and offered the following explanation, with explicit provision for women in childbirth:

No act is an offence which is done only in order to avoid consequences which could not otherwise be avoided, and which if they had followed would have inflicted upon the person doing the act, or upon others whom he was bound to protect, inevitable and irreparable evil, and if no more is done than is reasonably necessary for that purpose intended nor likely to be disproportionate to the evil intended to be avoided.

No act which causes harm to the person of another is an offence if the person doing it was, without any fault on his part, so situated at the time that he could not avoid doing the act which caused such harm, to some other person (not being himself), and if he did the one act only in order to avoid doing the other. This section extends to omissions to discharge a legal duty as well as to acts.

⁷⁶ S Uniacke, *Permissible Killing: the Self-Defence Justification of Homicide* (Cambridge University Press, 1994), p.55.

⁷⁷ Stephen & Stephen (eds), *A Digest of the Criminal Law (Crimes and Punishments) by the Late Sir James Fitzjames Stephen, Bart.*, 5th edition (London MacMillan & Co., 1894), p.25.

⁷⁸ Sir James Fitzjames Stephen, *A History of the Criminal Law of England* ii, p.99.

⁷⁹ *Ibid*, p.103.

⁸⁰ *Ibid*, p.110.

Nothing herein contained shall justify any person in any act or omission by which the death of any woman is likely to be caused, in order that any child of which she is pregnant may be born alive.

Stephen also defined both abortion and child destruction as lawful if performed in good faith to save the life of the woman (section 168), and stipulated, again, that necessity would not justify any 'act or omission' by which the death of a pregnant woman was likely to be caused in order to save the life of her child. His inclusion of an act of 'omission' might suggest that it was a legal duty to provide an abortion in the case that the woman's life was at risk of continued pregnancy or childbirth. In Section 67 Stephen provided protection from criminal responsibility for the performance of 'any surgical operation upon any person for his benefit', provided that the operation was 'reasonable, having regard to the patient's state at the time, and to all the circumstances of the case'.

In 1878, together with Lord Blackburn, Mr Justice Barry and Lord Justice Lush, Stephen was appointed to the Royal Commission established to review his criminal code.⁸¹ The Commission produced a draft criminal code bill that 'closely followed' Stephen's own,⁸² the Criminal Law Consolidation Bill 1879. The commissioners' bill was presented as a consolidating measure that stated extant law and did not 'increase or diminish' a discretion presently vested in judges or juries. However, in the case of child murder it was held that the current law was inadequate and required 'alteration'.⁸³ The bill maintained Stephen's definition of a human being, but created new offences aimed at child destruction in regard to neglecting to obtain assistance in childbirth. Here a woman (and only a woman) could be gaoled for life for intentionally killing her child by failing to provide 'reasonable assistance in her delivery' if the child died 'just before', or during, or shortly after birth (Section 186). Unlike Stephen's draft code, in the commissioners' bill these offences were grouped under the heading of 'Murder, Manslaughter etc', and separate from abortion and sexual offences. Oddly however, in the commissioner's bill a separate offence of 'Killing Child at Birth' was also bundled in with the abortion (and rape) offences: Section 212 made it a (non-capital) crime punishable by life imprisonment to cause the death of a child who had not fully proceeded from the body of its mother.

⁸¹ Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist*, p.78.

⁸² Stephen & Stephen (eds), *A Digest of the Criminal Law*, p.79.

⁸³ *Criminal Law Consolidation Bill 1879* <http://www.lareau-legal.ca/EnglishDraftCodeTWO.pdf> Accessed 5 November 2015.

The commissioners' bill made a much more comprehensive assault on the question of child destruction than did Stephen's code. However it did stipulate in Section 212 that it was not an offence to cause, for the preservation of the life of the mother, a child's death '*before, during or after its birth*'. Stephen apparently 'encountered great difficulties' arguing in the Commission for his necessity defence in regard to abortion.⁸⁴ This clause would suggest he was at least partly successful, for it appears to include both child destruction *and* the procuring of therapeutic abortion in its defence of acts performed *before* birth, although in the actual offence of procuring a miscarriage (Section 213) the therapeutic defence is not articulated. That section simply replicated the existing offence outlined in the *Offences Against the Person Act 1861*, with the exception that the woman herself not be indictable for any abortion offences. Unlike Stephen's code, the commissioners' bill included no reference to infanticide, which remained to be treated as murder.

4 The Modern Aftermath: Necessity and Abortion Law in the Twentieth Century

The Criminal Law Consolidation Bill 1879 foundered in Parliament, and it was only after Stephen's death that his work greatly influenced laws governing abortion and child killing. After repeated parliamentary attempts from 1880, infanticide was recognised as a crime different from murder under the 1922 Infanticide Act. The Act left it open to the jury to bring a verdict of manslaughter where the woman had killed her newly born child and it was found that she had not recovered from the 'effect of giving birth'. The Infanticide Act 1938 clarified that the child could be of any age up to twelve months, and that the woman's 'mental imbalance' was to be attributable either to the birth of the child or to the 'consequences of lactation'.⁸⁵ As Ward has noted, Stephen's nineteenth century vision of post-natal female offenders as 'sad' or 'mad', rather than 'bad', was finally realised.⁸⁶ During the same period, the definitions of the crimes of child destruction and abortion were also greatly influenced by Stephen's work.

Child destruction was made an offence in English law in 1929, with the architect of the law, Lord Darling, finding authority in the recommendations of Stephen and the Law Commissioners when proposing the legislation.⁸⁷ The 1929 law was initially called an infanticide bill, but the parliamentary draftsman changed the title to the more accurate Child Destruction Bill.

⁸⁴ Seaborne Davies, 'The Law of Abortion and Necessity' p.136.

⁸⁵ Walker, *Crime and Insanity in England* p.132.

⁸⁶ Ward, 'Legislating for Human Nature', p.269.

⁸⁷ Lords, 21 June 1928, p.618.

Unfortunately this title seems to have misled some members of the House of Commons, who thought the bill was concerned with 'getting rid of the redundant population'⁸⁸ and the House voted against it. In its third incarnation, as the Infant Life Preservation Act, the bill became law. The Act was aimed at women who premeditated the death of their children in birth (as opposed to mentally imbalanced post-natal women) and at unscrupulous abortionists who might skirt abortion law by procuring very late-term procedures, in the process of birth.⁸⁹ The Act was never intended to target doctors who operated in regard to the woman's health, and there was concern voiced in parliament about the implications for the medical profession.

Given such concerns, Stephen's necessity clause was added to the offence, which then read:

1) [it is a criminal offence for] 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 ... Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.

Although the 1929 Act was aimed at convicting pregnant women who terminated their pregnancies at the latest possible stage, it was instrumental, ironically, in securing the articulation of lawful abortion in 1938. Modelled on the original 1803 Act, the 1861 abortion law appeared to some as ambiguous in providing that it was an offence to *unlawfully* procure a miscarriage. Despite a general acceptance of therapeutic abortion within medical jurisprudence in the early twentieth century,⁹⁰ many doctors still feared that the law was ambiguous. In 1938, gynaecologist Aleck Bourne's case provided an opportunity to clarify the law. Mr Bourne was charged under section 58 of the 1861 Act for unlawfully procuring a miscarriage when he operated on a 14 year-old girl who had become pregnant after being gang raped by guardsmen. Bourne understood that therapeutic abortion was justified but wanted the law clarified as to what constituted sufficient risk to the woman's life and health. In this case, Bourne identified great risk to the girl's *mental* health if she were not able to have an abortion.⁹¹ Justice Macnaghtan noted that even at common law there may be justification for an action 'where an unborn child is killed' just as there may be in the case of homicide.⁹² As a means to determining this justification, he provided the jury with the example of the Infant Life Preservation Act 1929 and stated his

⁸⁸ Lord Darling, Lords, 22 November 1928, p.269.

⁸⁹ The Lord Chancellor, Lords, 6 December 1928, p.441.

⁹⁰ *Lancet* 'A Charge of Illegal Abortion: *Rex v Bourne*', *Lancet*, 23 July (1938), 220-226, p.221.

⁹¹ A Bourne 'Letter to the Editor' *Lancet*, 30 July (1938), p.280.

⁹² *R v Bourne* [1939] 1KB687 at 690.

opinion that the word 'unlawfully' in the 1861 Act 'imports the meaning' expressed by the necessity clause of the 1929 Act. Finally, he directed the jury that the burden rested on the Crown to satisfy beyond reasonable doubt that the defendant 'did not procure the miscarriage of the girl in good faith for the purpose only of preserving her life'.⁹³ Bourne was acquitted, and 'therapeutic' abortions were subsequently performed on psychiatric grounds on an increasingly large scale in Britain, governed by the 1938 judgment. In 1967 the Abortion Act responded to the widespread practice of abortion. It articulated the *Bourne* judgment in statute, also making special provision for genetic terminations, and providing an international model for abortion governance.⁹⁴

Conclusion

Contemporary laws governing abortion, child destruction and infanticide represent the coalescence of Stephen's interests in the doctrine of necessity and the mental element of crime, and his views on the role of public opinion in shaping law and punishment and on personhood and homicide. As his brother Leslie wrote, Stephen insisted that the law was an 'organ of the moral sense of the community';⁹⁵ it operated in a reflexive relationship with public opinion: punishment influenced the public's perception of the heinousness of an offence, but at the same time it drew its legitimacy from public morality. Hence the real limit to deterrent punishment was 'public feeling'.⁹⁶ In cases of child killing by mothers, and of abortion, Stephen argued that there simply was not public support for either offence to be considered capital, with such widespread public sympathy evident for women in the 'miserable condition' of unplanned pregnancy. Capital punishment in such cases 'violate[d] the moral sentiment of the country'.⁹⁷ Abortion Stephen understood not in terms of the calculation of homicide, but rather as either a legitimate medical procedure or as an act concerned with sexual regulation, or in the case of child destruction, as involving the desperation of infanticide. The 'madness' of women during and immediately after pregnancy when they had 'so little control' over their conduct, and their motivation to hide their shame of illegitimate birth,⁹⁸ made abortion, child destruction and infanticide wholly distinct from homicide in both motivation and intention. Certainly Stephen condemned women whom he

⁹³ Ibid at 691. Stephen characterised necessity as an excuse; Macnaghtan J characterised it as a justification.

⁹⁴ K Gleeson, 'Persuading Parliament: Abortion Law Reform in the UK' *Australasian Parliamentary Review*, 22, 2 (2007), pp.23-44.

⁹⁵ In Wiener, *Reconstructing the Criminal*, p.53.

⁹⁶ Sir James Fitzjames Stephen, 'The Punishment of Convicts', p.197.

⁹⁷ In Criminal Law Commissioners, *Report of the Capital Punishment Commission*, xxvi.

⁹⁸ Sir James Fitzjames Stephen, 'Capital Punishments', p.765.

thought had acted with criminal cruelty, malice and forethought, and disregard for the law, but in cases he understood as sexual misconduct, or as involving no injury to society or any reasonable creature in being, Stephen argued against the death penalty and for an understanding of the crime that reflected public opinion and morality. Ward has criticised Stephen for the underlying assumption of his work that women, especially 'fallen woman', are the antithesis of the 'autonomous, rational masculine self'.⁹⁹ Jurisdictions that govern abortion by reference to the doctrine of necessity are also subject to criticism, with the defence described as 'indeterminate' and weak, if not inconsistent with fundamental principles of the common law.¹⁰⁰ Regardless, Stephen's radical Victorian formulations of the crimes of abortion and child-killing were influential and longstanding.

⁹⁹ (Ward 2002, 251).

¹⁰⁰ W Neville, 'Abortion Before the High Court – What Next? Caveat Interventus: A Note on *Superclinics Australia PTY LTD v CES*' *Adelaide Law Review* 20 (1998), 183-192, p.187.