

**Colonies, Condoms and Corsets:  
Fertility Regulation in Australia and Canada**

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This thesis investigates Australian and Canadian legislation that regulated women's reproduction in the late nineteenth and early twentieth century and offers some explanation for their enactment.

At the turn of the twentieth century, Australia and Canada enacted a series of laws that were aimed at limiting the control women could exercise over their reproductive functions. From the 1880s through to the first decade of the twentieth century, legislation that prohibited the advertisement of contraception, regulated maternity homes as well as criminal laws that proscribed abortion were promulgated by Australian and Canadian parliaments. This thesis investigates why such legislative activity occurred and proposes that the initiation of these measures targeting abortion, infanticide and birth control cannot be disassociated from the highly gendered and racialised rhetoric resonating throughout the British Empire. Concern about racial integrity, heightened by a fear generated by the declining birth rate, promoted a climate in which exercising control over women's fertility was seen as warranted. White women's reproductive capabilities were a vital ingredient in keeping the settler colonies of Australia and Canada white and British — white women were expected, quite literally, to give birth to the nation. As this thesis shows, when women did not adhere to these expectations of maternity, the law was used in an attempt to monitor and regulate their reproductive activities.

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Where to start?

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## Introduction

### **Colonies, Calculations, Condoms and Corsets**

We can only justify our claim to this great and fertile country by effectively occupying it. Australia must advance and populate, or perish. A great number of problems confront the Commonwealth, but the declining birth rate overshadows them all. It is impossible to exaggerate its gravity. Australia is bleeding to death ...<sup>1</sup>

Women possessed an ambiguous position in the colonial project, as both subordinates in colonial hierarchies but as active agents of British imperial culture in their own right.<sup>2</sup> Consequently, the British Empire provided both a physical and an ideological space in which the different meanings of femininity were explored and contested.<sup>3</sup> Woman could be the intrepid missionary, bringing light to dark Africa; the *memsahib* creating conflict in the colonies with her petty jealousies; or a vulnerable piece of her husband's property to be defended from the "other". She could also be the heroic mother responsible for the preservation of the race, or, simply an object of intensifying legal control over her reproductive capacities.

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<sup>1</sup> William M. Hughes, Federal Minister for Health, 1937, as quoted in S. Siedlecky & D. Wyndham, *Populate and Perish: Australian Women's Fight for Birth Control* (Sydney: Allen & Unwin, 1990) at 24 and M. J. Lewis, *'Populate or Perish': Aspects of Infant and Maternal Health in Sydney, 1870 – 1939* (Ph. D thesis, Australian National University, 1976) at 259.

<sup>2</sup> L. Stoler, "Making Empire Respectable: The Politics of Race and Sexual Morality in Twentieth Century Colonial Cultures" in A. McClintock, A. Mufti & E. Showat, eds., *Dangerous Liaisons: Gender Nation and Postcolonial Perspectives* (Minneapolis: University of Minnesota Press, 1997) at 344.

The relationship of women to colonisation has been recognised both in its literal and metaphorical sense. "If we transpose the descriptions of colonised and coloniser to women and men, they fit at almost every point".<sup>4</sup> Anne Summers explicitly stated that when the British arrived in Australia they did not just colonise a continent and its Aboriginal inhabitants, but they also colonised the entire female sex.<sup>5</sup> Summers has rejected colonisation as a simple metaphor, preferring to use it as a statement of political fact: "women are colonised by being denied control over their bodies".<sup>6</sup>

The object of this thesis is to investigate the laws that regulated women's reproduction in the nineteenth century and to offer some explanation for their enactment. The principal question to be answered is why Australia and Canada legislated to circumscribe women's reproductive autonomy with such vigour during this period. This thesis proposes that the initiation of a number of measures aimed at regulating abortion, birth control and infanticide in the settler colonies of Australia and Canada cannot be disassociated from the highly gendered and racialised rhetoric resonating throughout the British Empire. Billy

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<sup>3</sup> V. Ware, *Beyond the Pale: White Women, Racism and History* (London: Verso, 1992) at 120.

<sup>4</sup> Marilyn French as quoted in L. E. Donaldson, *Decolonising Feminisms: Race, Gender and Empire-Building* (North Carolina: University of North Carolina Press, 1992) at 5.

<sup>5</sup> A. Summers, *Damned Whores and God's Police*, 2<sup>nd</sup> ed., (Melbourne: Penguin Books, 1994) at 244.

<sup>6</sup> *Ibid.*, at 246.



Hughes<sup>7</sup> infamous cry to “populate or perish”, quoted at the start of this chapter, captures perfectly the anxiety gripping western countries as they struggled to adjust to the significant changes wrought by industrialisation and demographic transition. As the thesis will show, this anxiety played itself out, in part, on the site of the maternal body.

### ***Calculations: The Declining Birth Rate***

By the end of the nineteenth century western nations were experiencing a fundamental shift in their basic family structure. During this period, these countries were undergoing a “fertility transition” whereby society was changing from one with high birth rates and high death rates, to a society with low birth and death rates.<sup>8</sup>

In Australia, contemporaries pinpointed 1889 as the start of the “sudden and remarkable shrinkage of the birth rate”.<sup>9</sup> In fact, the birth rate in Australia had started its steady decline

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<sup>7</sup> William Morris Hughes (1862–1952) was a journalist and trade unionist before becoming Prime Minister of Australia in 1915. Hughes is most remembered for his representation of Australia’s interests at the League of Nations Conventions at the conclusion of the First World War. As a result of his protests, a racial equality clause advocated by the Japanese was not inserted into the Covenant of the League of Nations. During his political career Hughes also held the position of Attorney-General and Minister for Health. L. F. Fitzgerald, “William Morris Hughes” in B. Nairn & G. Serle, eds., *Australian Dictionary of Biography, 1891 – 1939*, vol. 9 (Melbourne: Melbourne University Press, 1983) at 393.

<sup>8</sup> A. McLaren & A. McLaren, *The Bedroom and the State: The Changing Practices of Contraception and Abortion in Canada, 1880 – 1997* (Toronto: Oxford University Press, 1997) at 17.

<sup>9</sup> *Royal Commission on the Decline of the Birth Rate And on the Mortality of Infants in New South Wales*, vol. 1 (Sydney: William Applegate Gullick, Government Printer, 1904) at 8 [hereinafter *NSW Birth Rate Report*]. At around this time the New South Wales Supreme Court handed down its decision in *Ex Parte Collins* (1888) 9 N.S.W.L.R 497 which determined that the publication of certain contraception information was not obscene. See Chapter Three, part one for more detail.

in the 1880s.<sup>10</sup> From an average of seven children per family in 1881, family sizes shrank to an average of four children in 1911.<sup>11</sup> Birth rates were around 43 births per 1000 women in 1862, dropping almost 30% to 27.3 births by 1900.<sup>12</sup> Obviously, both the structure and the growth pattern of the Australian population changed substantially during these decades.<sup>13</sup> Australia was not unique in experiencing this demographic shift. Across Canada, birth rates fell by 24% between 1871 and 1901 and family size correspondingly shrank. Ontario was the Canadian province with the most dramatic decline in its birth rate: between 1871 and 1901 the birth rate fell by 44%.<sup>14</sup> The United States and Britain also experienced similar transformations.<sup>15</sup>

The explanation for this demographic change is complex and, being the direct result of personal sexual decisions, cannot be definitively identified. As a consequence, historians still disagree on the causes of the fertility decline. Economic decline, middle-class

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<sup>10</sup> E. F. Jones, "Fertility Decline in Australia and New Zealand, 1861 – 1936" (1971) 37: 4 Population Index 301 at 308.

<sup>11</sup> R. Howe & S. Swain, "Fertile Grounds for Divorce: Sexuality and Reproductive Imperatives" in K. Saunders & R. Evans, eds., *Gender Relations in Australia: Domination and Negotiation* (Sydney: Harcourt Brace Jovanovich, 1992) at 168.

<sup>12</sup> P. Quiggan, *No Rising Generation: Women and Fertility in Late Nineteenth Century Australia* (Canberra: Australian National University, 1988) at 19.

<sup>13</sup> N. Hicks, "Demographic Transition in the Antipodes: Australian Population Structure and Growth, 1891 – 1911" (1974) 14 Australian Economic History Review 123 at 128, 130.

<sup>14</sup> J. Henripin, *Trends and Factors in Fertility in Canada* (Ottawa: Statistics Canada, 1972) at 19, 21.

<sup>15</sup> For further detail on the United States situation, see L. Gordon, *Woman's Body, Woman's Right: A Social History of Birth Control in America* (New York: Grossman, 1976). For further detail on the British phenomenon, see R. A. Soloway, *Birth Control and the Population Question in England, 1877 – 1930* (North Carolina: University of North Carolina Press, 1982).

aspirations for a better standard of living, a weakening in religious sentiment, shifts in marriage patterns and rising levels of education have been accorded varying degrees of significance in the debate.<sup>16</sup> Importantly, Patricia Branca has highlighted the role of women in this process. In fact, she has stated that “the deliberate limitation of family size was one of the principal contributions of middle-class women to the modernisation process of women generally”.<sup>17</sup> According to Branca, women (particularly middle-class women) had compelling reasons to limit their fertility: there was mounting concern over the health of the mother; there was a increasing sense of obligation to the individual child, and further, there was a growing desire of women to control their personal being.<sup>18</sup>

Branca’s approach is compelling because it re-situates women and their decisions at the centre of the fertility issue. Anne MacKinnon has criticised the “seductively scientific” language used to describe demographic shifts as if it were “some transhistorical, elemental and natural force akin, perhaps, to the ebb and flow of the tide rather than the historically specific refusal or unwillingness of considerable numbers of women to continue to have

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<sup>16</sup> For an overview of the literature on this topic, see Quiggan, *supra* n.12 at 5 –18.

<sup>17</sup> P. Branca, *Silent Sisterhood: Middle Class Women in the Victorian Home* (London: Croom Helm, 1975) at 114.

<sup>18</sup> *Ibid.*, at 121. Branca directly contradicts J. A. Banks & O. Banks’ proposition that the initiative for birth control came from men. The Banks’ have written that, “it might well have been the case that the resolve to adopt birth control was determined by the man alone and that in this, as in other matters, his wife merely acquiesced”. J. A. Banks & O. Banks, *Feminism and Family Planning in Victorian England* (Liverpool: Liverpool University Press, 1964) at 70.

large numbers of babies”.<sup>19</sup> The direct reason for the fertility decline was as obvious to contemporaries as it is to many historians now — it was due to women’s “flight from maternity”.<sup>20</sup>

Angus McLaren and Arlene McLaren have stated that the lowering of the birth rate was arguably the most important social shift to occur in Canada in the twentieth century.<sup>21</sup> It had an equally crucial impact on Australia’s modern history as well, for as the nineteenth century progressed, birth rates had increasingly become a matter of national obsession. As a means to highlight the importance of this demographic shift to Australian and Canadian history, I have used it as a thematic point of departure in this thesis. The first half of the thesis examines legislation promulgated before the decline in the birth rate was recognised, while the second half concentrates on legislation enacted after this recognition. Dividing the thesis in this manner also serves to highlight the impact that women have had on history. History has been generally defined and categorised according to male endeavours

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<sup>19</sup> A. MacKinnon, “Redesigning the Population: Narratives of Sex and Race” in M. Gatens & A. MacKinnon, eds., *Gender and Institutions: Welfare Work and Citizenship* (Cambridge: Cambridge University Press, 1998) at 157.

<sup>20</sup> Soloway, *supra* n.15 at 133.

<sup>21</sup> McLaren & McLaren, *supra* n.8 at 9.

— Federation, Confederation, Gallipoli, Vimy Ridge.<sup>22</sup> The decline in the birth rate, however, although effected by women, affected nations.

### ***Condoms: Nineteenth Century Fertility Control***

For the increasing number of women wishing to prevent conception there were an array of different methods available. These techniques can be placed along a spectrum of intervention, ranging from “natural” ways, to the use of chemicals, to abortion and finally to infanticide. Each of these methods was relied on with varying success by women in the Victorian era.

The most basic methods of prevention were, of course, abstinence and *coitus interruptus*. Some experts recommended *coitus reservatus* (intercourse without ejaculation) while others endorsed “post-coital dancing”!<sup>23</sup> Vigorous dancing, running, lifting or horseback riding as well as forced sneezing and coughing were all said to produce uterine contractions that with gravity would expel the “male seed”.<sup>24</sup> Limiting intercourse to the “safe period” was another routine often advocated. Unfortunately, it was far from “safe” as due to fundamental gynaecological misunderstandings it recommended intercourse at the period

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<sup>22</sup> For more detail on this construction of history in both Australia and Canada, see J. Keshen, “The Great War Soldier as ‘Nation Builder’ in Canada and Australia” in L. Cardinal & D. Headon, eds., *Shaping Nations: Constitutionalism and Society in Australia and Canada* (Ottawa: University of Ottawa Press, 2002).

<sup>23</sup> M. A. La Sorte, “Nineteenth Century Family Planning Practices” (1976) 4 *History of Childhood Quarterly* 163 at 174.

when women were actually the most fertile. These natural methods were largely unreliable and so many women began turning to other preventative measures.

Charles Knowlton's work, "*The Fruits of Philosophy, or the Private Companion of Young Married People*" published in 1834 (although only achieving notoriety in 1877 after the Bradlaugh-Besant trial)<sup>25</sup> was one of the first tracts to give explicit detail on how to effectively employ douches and syringes for preventing conception. Over the century, these procedures were refined and commercialised. By the 1890s, Australian women could purchase Malthus Soluble Quinine Tablets; Lambert's Improved Secret Spring Check Pessary; the Marvel Whirling Spray, or the 'No More Worry Co's' Patent Pessary.<sup>26</sup> Evidence to a New South Wales Royal Commission revealed that in the month of October 1903, imports to New South Wales of sheaths and pessaries alone amounted to more than 21,000 pieces.<sup>27</sup>

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<sup>24</sup> *Ibid.*, at 175.

<sup>25</sup> In 1877, Charles Bradlaugh and Annie Besant were prosecuted in Britain under the obscenity laws for distributing Knowlton's work. Much of the prosecutor's case reflected sexual anxieties about "dirty, filthy books" that decent husbands should keep from their wives. Bradlaugh and Besant were acquitted on appeal, but due to a legal technicality rather than as a consequence of any judicial alliance with neo-Malthusian principles. The case was seen by contemporaries as a watershed in raising awareness of contraception. Soloway, *supra* n.15 at 52. *R. v. Bradlaugh & Besant*, [1876-77] 2 Q.B.D. 569, rev'd [1878] 3 Q.B.D. 607. Interestingly, Bradlaugh went on to become a respected member of Parliament (although not without some struggle). Meanwhile, Besant was ostracised and publicly vilified for her "immorality" and lost custody of her child to her ex-husband as a result of her involvement in the case. Banks & Banks, *supra* n.18 at 88-90.

<sup>26</sup> N. Hicks, *This Sin and Scandal: Australia's Population Debate, 1891 - 1911* (Canberra: Australian National University Press, 1978) at 124.

The vulcanisation of rubber gave an enormous boost to the durability and availability of condoms. Although more associated with extra-marital or pre-marital liaisons than with controlling family size, by the 1890s condoms were being mass-produced in Britain and America and were being distributed to other countries, including Canada.<sup>28</sup> In *Of Toronto The Good*, C. S. Clark commented on the wide availability of condoms in Canadian urban centres:

... 'Rubber Goods of ALL KINDS for sale'. There is not a boy in Toronto, I dare say, who does not know what that means ... A lad of sixteen, a druggist's apprentice informed me that it was incredible the quantity of "rubber goods" they sold... I might say that there is not a boy in the city of Toronto who could not get any such article if he wanted it.<sup>29</sup>

While the range of natural, chemical and barrier methods were significant in controlling fertility, demographers and historians increasingly accord abortion a central role in the decline in the average size of the family.<sup>30</sup> Edward Shorter has stated that contrary to popular belief, the first great increase in induced abortions was at the end of the nineteenth century, rather than in the 1970s as modern scholars think.<sup>31</sup> In fact, to assume that contraception alone produced the decline in the birth rate precludes a class analysis of birth

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<sup>27</sup> *Ibid.*, at 124. For details on the use of contraception in America, see La Sorte, *supra* n.23.

<sup>28</sup> McLaren & McLaren, *supra* n.8 at 21-22.

<sup>29</sup> C. S. Strong, *Of Toronto The Good: The Queen City of Canada As It Is* (Montreal: Toronto Publishing Company, 1898) at 127.

<sup>30</sup> J. Allen, "The Trials of Abortion in Late Nineteenth and Early Twentieth Century Australia" (1993) 12 *Australian Cultural History* 87 at 90.

<sup>31</sup> E. Shorter, *Women's Bodies: A Social History of Women's Encounter with Health, Ill Health and Medicine* (New Brunswick: Transaction Publisher, 1991) at 191.

control practices as, due to its low cost compared with manufactured products, abortion was probably the most prevalent form of contraception for working-class women.<sup>32</sup>

As a very consequence of its illegality, statistics on the rate of abortion are elusive and potentially very misleading. Generally, only botched abortions came to the attention of the authorities and all parties associated with such a catastrophe had reasons to conceal it – the family due to the social stigma, doctors for the legal repercussions and hospitals to avoid bureaucratic entanglements.<sup>33</sup> As Judith Allen has stated, the criminality of abortion has absolutely shaped its place in history. On the one hand, little is known about abortion history because if abortions were successful, they were still criminal, and thus created no historical evidence. On the other hand, what we do know about abortion derives precisely from its criminalised position.<sup>34</sup>

It appears that Australia had a greater incidence of abortion than either the United States or the United Kingdom. In 1902, an Australian doctor comparing the rates of abortion in

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<sup>32</sup> J. A. Allen, "Octavius Beale Reconsidered: Infanticide, Baby Farming and Abortion in NSW, 1880 – 1939" in Sydney Labour History Group, *What Rough Beast? The State and Social Order in Australian History* (Sydney, Allen & Unwin, 1982) at 112; P. Knight, "Women and Abortion in Victorian and Edwardian England" (1977) 4 *History Workshop* 57 at 57.

<sup>33</sup> A. McLaren, "The Impact of Abortion Deaths on Maternal Mortality" (1984/5) 64 *B.C. Studies* 3 at 21.

<sup>34</sup> Allen, *Trials of Abortion*, *supra* n.30 at 88.



Australia and Britain and was able to state that “we beat them easily”.<sup>35</sup> It was estimated that approximately one in three pregnancies were being terminated in Australia at this time.<sup>36</sup> By comparing the rate of infant mortality and the rate of maternal mortality, Angus McLaren has discovered a similarly high rate of abortion among Canadian women. While the infant mortality rate almost halved during the first part of the twentieth century, the maternal mortality rate remained static and actually rose to a century high in 1930. McLaren’s conclusion is that deaths from bungled abortion “artificially” inflated the number of deaths attributed to normal pregnancies and that abortion played an increasingly significant role in keeping maternal mortality figures high.<sup>37</sup>

Moreover, the women accessing abortion were diverse. Research into the working classes has unanimously shown that abortion was prevalent among working-class women.<sup>38</sup> However the extensive sale of expensive abortifacient remedies is an indication that middle-class women were also procuring abortions.<sup>39</sup> Nor was it only single women.

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<sup>35</sup> L. Finch & J. Stratton, “The Australian Working Class and the Practice of Abortion, 1880 – 1939” (1988) 23 *Journal of Australian Studies* 45 at 52.

<sup>36</sup> *Ibid.*

<sup>37</sup> McLaren, *Maternal Mortality*, *supra* n.33 at 19.

<sup>38</sup> See Finch & Stratton, *supra* n.35; A. McLaren, “Women’s Work and Family Size: The Question of Abortion in the Nineteenth century” (1977) 4 *History Workshop* 70; Knight, *supra* n.32.

<sup>39</sup> Knight, *ibid.*, at 58. Evidence of a difference in class behaviour in relation to contraception emerged during the NSW Birth Rate Inquiry as well. See for example, evidence of Dr C. Morgan who stated that the lower to middle classes used abortion and the middle to upper classes relied on preventative measures. *NSW Birth Rate Royal Commission on the Decline of the Birth Rate And on the Mortality of Infants in New South Wales*, vol. 2 (Sydney: William Applegate Gullick, Government Printer, 1904) at 8 [hereinafter *NSW Birth Rate Inquiry*]

Archival research undertaken in British Columbia has revealed that more than half of the women seeking abortions were married.<sup>40</sup> Contemporaries were astounded that evidence pointed to married women seeking to limit their families,<sup>41</sup> and that contraception was being practiced by the “better” classes.<sup>42</sup>

Part of the reason for women’s continued use of abortion was that traditional attitudes towards procreation and conception were changing only gradually. As the century progressed, there was a new and increasing emphasis on conception as the pivotal moment in the creation of human beings.<sup>43</sup> Many women however did not consider themselves pregnant until the foetus moved, or quickened, at which time the soul entered the foetus and life commenced.<sup>44</sup> The new notion of conception had to compete with the widespread belief that abortion was acceptable until quickening which was generally until the end of the first trimester. Until that time, women simply saw themselves as “irregular”, needing to be “made right”, rather than pregnant. Even at the end of the nineteenth century, doctors were still having difficulty convincing women that this quickening distinction was no longer

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questions 1091, 1092 at 28, 29; Evidence of Dr R. Scot Skirving who stated that all classes use abortion, but the working class relied on it more, *ibid.*, question 3184 at 99.

<sup>40</sup> McLaren & McLaren, *supra* n.8 at 41.

<sup>41</sup> Knight, *supra* n.32 at 59.

<sup>42</sup> W. Mitchinson, “Historical Attitudes Towards Women and Childbirth” (1979) 4: 2 Atlantis 13 at 22.

<sup>43</sup> Finch & Stratton, *supra* n.35 at 47.

<sup>44</sup> *Ibid.*, at 48. See also S. Gavigan, “The Criminal Sanction As It Relates to Human Reproduction” (1984) 5 The Journal of Legal History 1.

valid and that abortion conducted at any stage in the pregnancy was a crime.<sup>45</sup>

When all available contraceptive methods had failed and a woman found herself with a baby that for any number of reasons she did not want, infanticide was her last option. In our modern, child-centred society, it can be difficult to conceptualise infanticide within the framework of “birth control”. Yet, the motivations behind abortion and infanticide were identical — they were alternate means of dealing with an unwanted child. Further, there is evidence to suggest that, at least in the minds of some contemporaries, the crime was probably seen as less serious than other kinds of murder because the baby had no self-awareness and the public at large did not feel the crime a threat to themselves.<sup>46</sup>

Infanticide was a prevalent feature of nineteenth century life and it occurred under a variety of circumstances. The archetypal infanticide scenario involved a single mother, usually a domestic servant, facing the stigma of an illegitimate child and often confronted with making a decision between losing her position, or getting rid of her child. Deliberate neglect, ranging from starvation to refusing to call a doctor when the infant fell ill, was the

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<sup>45</sup> McLaren & McLaren, *supra* n.8 at 38. The NSW Birth Rate Inquiry contains evidence of this belief existing in Australia also. See for example evidence of Dr C. W. Morgan, doctor, stating that women do not see the “moral wickedness” of abortion. *NSW Birth Rate Inquiry*, vol. 2, *supra* n.39, question 1086 at 27; Dr S. Jamieson stated that women did not recognise either the immorality or the criminality of the abortion “transaction”. *Ibid.*, question 5257 at 180.

<sup>46</sup> L. Rose, *The Massacre of the Innocents: Infanticide in Britain, 1800-1939* (London: Routledge & Kegan Paul, 1986) at 73.

most common form of infanticide.<sup>47</sup> Some mothers abandoned the child in a public place with the hope that the child would be rescued.<sup>48</sup> Others “farmed” out their babies to carers, knowing that there was little chance for their survival.<sup>49</sup> Other women simply murdered their child, sometimes in particularly brutal ways.<sup>50</sup>

### *Corsets and Colonies: Feminist and Post-colonial Literature*

Scholars have largely neglected the history of the laws of reproduction in Australia. If it has been explored, it has been superficial, if not erroneous.<sup>51</sup> For instance, although Judith Allen’s research and conclusions about abortion and infanticide in Australia have provided an extraordinary contribution to Australia’s history, her analysis of the legislative provisions is inaccurate. She has misstated the gravity of the punishments for abortion introduced by the *Criminal Law (Amendment) Act, 1883* (NSW) and the *Offences Against*

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<sup>47</sup> R. Sauer, “Infanticide and Abortion in Nineteenth Century Britain” (1978) 32: 1 *Journal of Population Studies* 81 at 82.

<sup>48</sup> In *R. v. Fennety* (1855), 8 N.B.R 132 (S.C), the defendant had given birth to an illegitimate child. She had placed the child on a wharf, carefully wrapped in a quilt. Unfortunately, the child rolled off the wharf and into the river. She was convicted by the Court.

<sup>49</sup> See Chapter One, part two for more detail.

<sup>50</sup> See for instance *R. v. Brown* (1870) L. R. 1 C.C.R 244 in which the defendant had thrown her child over a 5 foot wall.

<sup>51</sup> Historians Judith Allen and Kathy Laster have largely focussed on the judicial apparatus to substantiate their historical conclusions, rather than drawing legal conclusions. See for example, Allen, *Trials of Abortion*, *supra* n.30; *Octavius Beale Reconsidered*, *supra* n.32; “Policing Since 1880: Some Questions of Sex” in M. Finnane, ed., *Policing in Australia: Historical Perspectives* (Sydney: New South Wales University Press, 1984). K. Laster, “Frances Knorr: ‘She Killed Babies Didn’t She?’” in M. Lake & K. Farley, eds., *Double Time: Women in Victoria – 150 Years* (Ringwood, Penguin Books, 1985). Kathy Laster has, however, focussed more on the criminology of infanticide. See in particular, K. Laster, “Infanticide: Litmus Test for Feminist Criminology Theory” (1989) 22:3 *Australian and New Zealand Criminology Journal* 151.

*the Person Act, 1861* (UK) and has given only very cursory attention to these statutes.<sup>52</sup>

Similarly, Stefania Siedlecky and Diana Wyndham, although providing the only account of Australia's history of birth control, have misrepresented the influence of the New South Wales Royal Commission on the Decline of the Birth Rate. They have stated that the New South Wales Government responded to the Commission's recommendations by passing the *Poisons Act, 1905* and by legislating against the advertisement of contraception in the *Police Offences (Amendment) Act, 1908* (NSW).<sup>53</sup> Both these assertions are incorrect.<sup>54</sup> These errors exemplify the need for legal scholars to closely examine this area of history. However, while the early legislation has only been of ancillary interest to social historians, lawyers have ignored it completely. Legal historians have tended to focus on the family and infant welfare in their research,<sup>55</sup> and feminist scholars have tended to examine reproduction legislation in the modern context.<sup>56</sup>

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<sup>52</sup> J. A. Allen, *Sex and Secrets: Crimes Involving Australian Women Since 1880* (Melbourne: Oxford University Press, 1990) at 28; Allen, *Octavius Beale Reconsidered*, *ibid.*, at 120. Other scholars, like Suzanne Davies, have in turn based their conclusions on this incorrect analysis. See S. Davies, "Captives of Their Bodies: Women, Law and Punishment, 1880s-1980s" in D. Kirkby, ed., *Sex, Power and Justice* (Melbourne: Oxford University Press, 1995).

<sup>53</sup> Siedlecky & Wyndham, *supra* n.1 at 19-20.

<sup>54</sup> The "Poisons Act" was not enacted — the Bill never proceeded past second reading. Further, the ban on advertising contraceptives was initiated well before the *Police Offences (Amendment) Act, 1908* (NSW). Other scholars have drawn on these incorrect assertions. See, for example, A. Mackinnon, "'Bringing the Unclothed Immigrant Into The World': Population Policies and Gender in Twentieth Century Australia" (2000) 17: 2 *Journal of Population Research* 109 at 112.

<sup>55</sup> See for example, E. Deacon, "The Promotion of Child Welfare in Victoria by Means of Legislative Intervention, 1870 – 1907" in D. Kirkby, ed., *Law and History in Australia*, vol. 4 (Melbourne: La Trobe University, 1987).

<sup>56</sup> See for example, K. Coleman, "The Politics of Abortion in Australia: Freedom, Church and State" (1988) 4 *Feminist Review* 75; H. A. Finlay, "Abortion — Right or Crime" (1990) 10 *University of Tasmania Law Review* 1; B. Baird, "Abortion Politics, 1998" (1998) 13: 28 *Australian Feminist Studies* 3.

Both Constance Backhouse and Judith Allen have investigated abortion and infanticide in nineteenth century Canada and Australia respectively. Their research into court decisions and policing patterns of this period provides significant insight into prosecution trends and reveals that by and large, reproduction-related crime was not rigorously pursued by authorities.<sup>57</sup> However, neither scholar interrogates why legislation aimed at restricting access to abortion and contraception was introduced. Backhouse has tentatively suggested that Canadian legislation was a result of pressure from the emerging medical profession, but this nexus is not convincingly established.<sup>58</sup> Meanwhile, Allen does not seem to address this question of legislative impetus at all.

This gap in the scholarly work begs the question, what propelled Australia and Canada to legislate against abortion, birth control and infanticide with increasing vigour at the end of the nineteenth century? The answer to this question is found somewhere amongst the significant social and legal transformations that characterised the nineteenth century.

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<sup>57</sup> See for example, C. Backhouse, "Involuntary Motherhood: Abortion, Birth Control and the Law in Nineteenth Century Canada" (1983) 3 Windsor Yearbook Access to Justice 61; "Desperate Women and Compassionate Courts: Infanticide in Nineteenth Century Canada" (1984) 34 University of Toronto Law Journal 448; *Petticoats and Prejudice: Women and the Law in Nineteenth Century Canada* (Toronto: The Osgoode Society, 1991). Allen, *Sex and Secrets*, *supra* n.52; *Octavius Beale Reconsidered*, *supra* n.32.

<sup>58</sup> Constance Backhouse has recognised that more historical research into the professionalization of medicine is required before the genesis of stricter abortion laws can be attributed to it. Backhouse, *Involuntary*

It is the fundamental importance of reproduction to the lives of women that demands an answer to this question. "Reproduction affects women as women; it transcends class divisions and penetrates everything".<sup>59</sup> The control of sexuality and reproduction is, according to Sheilah Martin, the most potent example of women's subordination.<sup>60</sup> Martin has cautioned that the regulation of women's sexuality and reproduction is best approached as a fundamental arena of gender conflict in which women and men have competed for the control of women's bodies.<sup>61</sup> In fact, Jane Ursel has stated that the bottom line of patriarchy is not male privilege *per se* but the control of women through the control of reproduction.<sup>62</sup>

While women have traditionally been valued primarily for the sexual and reproductive services society requires of them, it is important to recognise that the law has played a large role in reinforcing this role of women as wives and mothers.<sup>63</sup> W. N. Eskridge has drawn a distinction between those laws that *stigmatise* — disapprove and exclude — and those laws that *normalise* — approve and encourage — certain sexual behaviour. Through this dual process law does not passively reflect larger social changes but actually contributes to these

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*Motherhood*, *ibid.*, at 79. However, Angus McLaren and Arlene McLaren also support this conclusion. McLaren & McLaren, *supra* n.8.

<sup>59</sup> R. P. Petchesky, *Abortion and Woman's Choice: The State, Sexuality and Reproductive Freedom*, 2<sup>nd</sup> ed., (Boston: Northeastern University Press, 1990) at 5.

<sup>60</sup> S. L. Martin "Control of Women Through Gender Biased Laws On Human Reproduction" in R. Devlin, ed., *Feminist Legal Theory* (Toronto: Emond Montgomery Publications Ltd, 1991).

<sup>61</sup> *Ibid.*, at 24.

<sup>62</sup> J. Ursel, *Private Lives, Public Policy: 100 Years of State Intervention in the Family* (Toronto: Women's Press, 1992) at 105.

<sup>63</sup> Martin, *supra* n.60 at 24.

changes.<sup>64</sup> This thesis focuses on the laws that stigmatised conduct falling outside sanctioned reproductive behaviour, yet recognises that they were supplemented by equally powerful laws aimed at normalising procreative sex within marriage.<sup>65</sup>

Chandra Mohanty has warned against the investigation of issues like reproduction, the family and marriage without specifying their local, cultural and historical contexts.<sup>66</sup> Post-colonial scholarship is invaluable in resituating historical issues (and their modern legacies) within their appropriate contexts. Importantly, recent post-colonial scholarship has interrogated the intimate connection between the maternal body and the imperial project. Anne McClintock for instance, has stated that, “controlling women’s sexuality, exalting maternity and breeding a virile race of empire breeders were widely perceived as a paramount means for controlling the health and wealth of the male imperial body politic”.<sup>67</sup> Anna Davin focussed specifically on the efforts within Britain to reduce infant mortality, stating that for many doctors and observers in the 1900s, the saving of infant life had become a “matter of Imperial importance”. The falling British birth rate generated a fear that if the population did not increase fast enough to fill the empty spaces of the empire,

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<sup>64</sup> W. N. Eskridge, “Law and the Construction of the Closet: American Regulation of Same Sex Intimacy” (1997) 82 Iowa Law Review 1007.

<sup>65</sup> For an excellent article on the various laws that promoted and defended heterosexual marriage during this period, see J. G. Snell, “‘The White Life For Two’: The Defence of Marriage and Sexual Morality in Canada, 1890 – 1914” (1983) 31 Social History 111.

<sup>66</sup> C. Mohanty, “Under Western Eyes: Feminist Scholarship and Colonial Discourses” (1988) 30 Feminist Review 61 at 75.



other imperial rivals would.<sup>68</sup> Writing about the “other” side of colonisation, Carol Summers has investigated British concern over the reproduction of the population in Uganda. According to Summers, the promotion of motherhood through Maternity Training Schools, along with other biomedical and ideological interventions, were a means to sustain the local oligarchy and minimise internal dissension and were therefore integral to the maintenance of British colonial power.<sup>69</sup>

For some scholars however, the inclusion of Australia and Canada within the framework of “post-colonial” is problematic.<sup>70</sup> First, it minimises the Third World experience and exaggerates that of white Australia and Canada.<sup>71</sup> It also trivialises the current struggles of indigenous peoples in both these countries. Anne McClintock has maintained that “break away settler colonies” (Australia and Canada) as distinguished from “deep settler colonies” (Algeria and Zimbabwe, for example) have not undergone decolonisation and nor are they

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<sup>67</sup> A. McClintock, *Imperial Leather: Race, Gender and Sexuality in the Colonial Contest* (New York: Routledge, 1995) at 47.

<sup>68</sup> A. Davin, “Imperialism and Motherhood” (1978) 5 *History Workshop* 9 at 10, 12. Although Davin’s work has been classed here as “post-colonial”, Davin’s article did pre-date the post-colonial intellectual movement.

<sup>69</sup> C. Summers, “Intimate Colonialism: The Imperial Production of Reproduction in Uganda, 1907 – 1925” (1991) 16: 4 *Signs* 787.

<sup>70</sup> See for example, L. Hutcheon “Circling the Downspout of Empire: Post Colonialism and Post Modernism” (1989) 20: 4 *Ariel* 149; A. McClintock, “Angels of Progress: Pitfalls in the Term ‘Post Colonialism’” in P. Williams & L. Chrisman, eds., *Colonial Discourse and Post-Colonial Theory: A Reader* (New York, Harvester, 1993); P. Williams & L. Chrisman, “Colonial Discourse and Post-Colonial Theory: An Introduction” in Williams & Chrisman, *supra*.

<sup>71</sup> Hutcheon, *ibid.*, at 155.

likely to.<sup>72</sup> Yet a focus on the colonial history of these two dominions helps to dispel the “totalising analyses of imperialism as a coherent monolith”.<sup>73</sup> Exploration of Australia and Canada’s reproduction legislation reveals another aspect of the sometimes complementary, sometimes contradictory workings of Empire.

Comparing the trajectories of Australia’s legal history with those of Canada makes intuitive sense. In contrast to other colonised parts of the world, Britain privileged these white settler colonies by bestowing upon them the “gift” of liberal democratic government and some measure of political autonomy so that they might participate in and contribute to a shared framework of moral and material standards. In terms of their cultural, social and political entities, these two colonies were “chips off the metropolitan block”.<sup>74</sup> Both were treated as fragments of the metropolitan centre by Britain, which in turn for them, was not the imperial centre but the “Mother Country”.<sup>75</sup> In this way, Canada and Australia were simultaneously burdened by, but receptive to imperial discourse; struggling to mimic the metropolis, yet trying to accommodate their local needs. Scholars have commented that Canada as a nation has never felt central, culturally or politically, having always felt a deep

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<sup>72</sup> McClintock, *Angels of Progress*, *supra* n.70 at 195.

<sup>73</sup> A. Perry, *On the Edge of Empire: Gender, Race and the Making of British Columbia, 1849 – 1871* (Toronto: University of Toronto Press, 2001) at 7.

<sup>74</sup> D. K. Stasiulis & R. Jhappan, “The Fractious Politics of a Settler Society” in D. K. Stasiulis and N. Yuval-Davis, *Unsettling Settler Societies: Articulations of Gender, Race, Ethnicity and Class* (London: Thousand Oaks, 1995) at 97.

<sup>75</sup> V. Mishra & B. Hodge, “What is Post(-) Colonialism” in Williams & Chrisman, *supra* n.70 at 285.

sense of marginality.<sup>76</sup> Australia held, and continues to hold, an equal sense of dislocation. This sense of physical and spiritual isolation mandated various attempts in both colonies to establish and strengthen their position within Empire. Naturally, the reproduction legislation generated in such a milieu was not untouched by this struggle.<sup>77</sup>

### ***Synopsis and Method***

This thesis focuses on the legislative instruments that prohibited infanticide, contraception and abortion in New South Wales (NSW) from the 1870s to the early 1900s. Although the NSW Legislative Assembly's activities were not atypical of legislatures around the world, the report and evidence generated by the Royal Commission on the Decline of the Birth Rate has afforded an unusual degree of transparency to the pro-natalist thinking in this jurisdiction. For this reason, New South Wales parliamentary activities form the focus of this thesis. However, the New South Wales legislation is analysed in tandem with parallel Canadian legislation.<sup>78</sup> This comparative approach not only permits New South Wales legislative conduct to be placed in an international context, but at the same time, further reflects upon the motivations and activities of the Canadian Parliament.

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<sup>76</sup> Hutcheon, *supra* n.70 at 154.

<sup>77</sup> There are important historical and jurisdictional differences between Canada and Australia. First, their development as nation states occurred within different timeframes: Canada confederated in 1867, Australia retained its fragmented colonial status until federation in 1901. Moreover in terms of criminal law, there is a difference in the constitutional split of power between federal and state/provincial governments. The Canadian Federal government gained criminal jurisdiction in 1867, yet crime in Australia has largely remained a state affair.

To answer the question “why the spate of legislative activity around reproduction at the turn of the century?”, the focus must centre on the legislative process and, to a large degree, on the motives of individual legislators and their lobbyists. This, however, has proved to be a difficult task. Perhaps due to the somewhat unsavoury nature of the topic, there is very little discussion in contemporary journals or newspapers.<sup>79</sup> Furthermore, the silence of women’s groups on this issue is blatant as early feminists tended to distance themselves from birth control issues. For instance, no feminist publication in Britain mentioned the infamous trial of Annie Besant, despite her strong defence of women’s rights.<sup>80</sup> The reasons for this silence were manifold. First, the connotations of promiscuity, prostitution and venereal disease rendered birth control beyond the realm of decency, so important to activist women already teetering on the edge of respectability. Secondly, the ideology of motherhood was a crucial platform for the early women’s movement. Moreover, many women were repelled by the use of artificial devices that were viewed as salacious and most likely dangerous.<sup>81</sup>

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<sup>78</sup> In an attempt to broaden the applicability of this research to wider Australian history, at times brief consideration will also be given to Victorian and Queensland legislation.

<sup>79</sup> The few references found through the BCARS Newspaper Index (which includes the British Columbian newspapers the *Colonist*, *Province* and *Victoria Daily Times*) and through manual searches of the *Globe* have been incorporated into this thesis.

<sup>80</sup> Soloway, *supra* n.15 at 134.

<sup>81</sup> *Ibid.* For example, Emily Murphy, one of Canada’s most renowned feminists, denounced artificial means of birth control as “desperate acts”. Canada’s first female doctor and active feminist Emily Stowe was similarly unlikely to have been sympathetic to abortion. Backhouse, *Petticoats and Prejudice*, *supra* n.57 at 152. Notable exceptions to this silence were Melbourne-based Bessie Harrison Lee and Brettana Smyth who

Criminal law manuals from the period are useful in establishing how the law was interpreted, but offer no guidance on the reasons why the legislation was enacted. To the extent that records of parliamentary debates were kept,<sup>82</sup> they offer invaluable insight into the motives behind the promulgation of these laws. However, as the anti-abortion and anti-infanticide provisions were framed within the criminal law, these specific provisions were often ignored in Parliament in favour of debating other larger aspects of the criminal law, like the definition of murder for example. The result of this scarce primary material has meant that definitive conclusions about the reasons for the legislation's enactment cannot be drawn. However, by establishing the historical context and drawing parallels with other social and legal movements, this thesis will offer some explanation for why these fertility control measures were pursued.

The term "fertility control" will be used in this thesis in two different ways. On the one hand, it signifies the control that women were beginning to exert over their own reproductive functions in an effort to reduce their family size. On the other hand, it is a designation for the variety of legislative activity that was designed to control and promote

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publicly advocated women taking control of their own bodies and fertility. See P. Grimshaw, "Bessie Harrison Lee and the Fight for Voluntary Motherhood" in Lake & Farley, *supra* n.51.

<sup>82</sup> New South Wales did not start collating verbatim transcripts of parliamentary debates until 1879. Canadian provincial legislatures did not begin this practice until well into the twentieth century. For example, Ontario

women's reproductive capabilities. These two demonstrations of fertility control are inherently contradictory but began being asserted at around the same time. "Just at a time when women's increasing understanding of conception was helping them to avoid pregnancy, certain government and religious groups desired to continue population growth".<sup>83</sup> Paradoxically, while society outwardly embraced the values of pro-natalism, individuals controlled their fertility, leading to an inevitable separation between social control at the macro level and personal action at the micro level.<sup>84</sup>

Marie de Lepervanche has noted that there has been little mention of the complex relationship between racism and sexism in Australian literature.<sup>85</sup> As reproducers of the race, women have always been a preoccupation in population and immigration policies, being either encouraged (white women) or discouraged (immigrant women and indigenous women) to reproduce.<sup>86</sup> The intersectionality of gender and race is explored in Chapter One. This chapter emphasises the way in which popular understandings of race and gender found their way into the colonial discourse and eventually into the framework of the law. The settler societies heavily relied on these discourses in their attempts to achieve an idealised

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started in 1944 and Manitoba commenced in 1958. Both Federal Governments however have Hansard dating from their inaugural sittings (1867 and 1901).

<sup>83</sup> *Abortion in Law, History and Religion* (Toronto: Childbirth by Choice Trust, 1995) at 9.

<sup>84</sup> E. Browne, *The Empty Cradle: Fertility Control in Australia* (Sydney: New South Wales University Press, 1979) at 3.

<sup>85</sup> M. de Lepervanche, "Breeders for Australia: A National Identity for Women?" (1989) 24: 3 *Australian Journal of Social Issues* 163.

British society and to strengthen their position within Empire. The concepts explored in this chapter function as a framework and a backdrop for the hypotheses outlined in Chapters Two and Three.

Obviously, race and gender were not the only two dialogues that delineated the national discourse. Class in particular was an equally powerful construct that cut across all social issues, including reproduction. For instance, as alluded to above, research undertaken in Britain, Canada and Australia has indicated that class was an important determinant in the choice of contraception chosen by women.<sup>87</sup> Consequently, when considerations of class intersect with the central issues of this thesis, they are canvassed accordingly. However, without minimising the part that class and classist assumptions played, for the purposes of this thesis, themes relating to race and gender remain the focal point of deliberation. As Chapter One shows, it was the coalition of these twin discourses that were particularly powerful in creating and shaping ideas about women and reproduction.

Chapter Two explores the period prior to the identification of the declining birth rate. Almost no scholarly attention has been directed to New South Wales reproduction legislation prior to the *Crimes Act, 1900* (NSW). It is important to recognise the origins of

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<sup>86</sup> *Ibid.*, at 164.

<sup>87</sup> See above at footnotes 38 and 39.

the criminal laws as they form the basis of legislative fertility control in the nineteenth and twentieth centuries. The first part of this chapter investigates the evolution of the criminal law, comparing it with that of Britain and Canada. The latter part of the chapter then turns to non-criminal legislation, the *Children's Protection Acts* of New South Wales, Ontario and Britain, as one of the first expressions of interest by the state in the welfare of its mothers and children.

The period following the widespread recognition of the declining birth rate forms the focus of Chapter Three. The first piece of legislation analysed is the *Indecent Publications Act, 1900* (NSW). By comparing it with provisions in the Canadian *Criminal Code, 1892* (Ca), this statute is placed in the international context of heightened vigilance against birth control. Because the investigations of the Royal Commission on the Decline of the Birth Rate captures perfectly the turn-of-the-century anxiety and pro-natalism, the second part of this chapter explores the conclusions of the Commission's Report. The chapter then turns to parliamentary activity that was influenced by the Royal Commission. The Poisons Bill, 1905 (NSW) although never enacted, attempted to tackle abortion through the restriction of abortifacient poisons. The final part of Chapter Three examines the legislative rationale behind the *Private Hospitals Act, 1908* (NSW) and the *Maternity Act, 1899* (Man), determining that these statutes were a product of parliamentary concern over abortion and the fertility transition.



While it was historically specific factors that produced the legislation examined in this thesis, the Conclusion surmises that the phenomenon of regulatory attempts to control women's reproduction is not one limited to the Victorian period. By revisiting the themes central to this thesis, the Conclusion shows that the forces which coalesced and promoted legislative ambitions to regulate women's bodies has continued, and will continue to resurface.

In sum, these chapters attempt to situate Australian and Canadian nineteenth and early twentieth century reproduction legislation within a broader imperial context and to provide some explanations for their enactment. The roots of all the legislation are obviously to be found in the social and political climate of the nineteenth century. Consequently, it is this the thesis turns to first.

## Chapter One

### **The Mother Country and Her Colonial Progeny**

*The first duty of a young nation must be to know its own self and express itself.*<sup>1</sup>

#### ***Introduction***

In 1901 Australian Attorney-General Alfred Deakin<sup>2</sup> urged the passage of his immigration legislation before his Parliamentary colleagues stating that, “it is nothing less than the national manhood, the national character and the national future that are at stake”, as if all three were easily identifiable.<sup>3</sup> Yet at the turn of the twentieth century both Australian and Canadian leaders were uncertain as to what exactly the “national character” was supposed to be or what their “national future” might hold. While a new sense of national identity and political independence was growing in both dominions, it was within the context of a

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<sup>1</sup> L. Pierce, Editor's Introduction in W. G. Smith, *A Study in Canadian Immigration* (Toronto: The Ryerson Press, 1920).

<sup>2</sup> Alfred Deakin (1856 – 1919) barrister, journalist and Prime Minister of Australia dominated Federal politics during the early years of the Commonwealth. He was Australia's first Attorney-General and was Prime Minister three times during the first decade of the twentieth century. R. Norris, “Alfred Deakin” in B. Nairn & G. Serle, eds., *Australian Dictionary of Biography, 1891 – 1939*, vol. 8 (Melbourne: Melbourne University Press, 1983) at 248.

<sup>3</sup> Australia, House of Representatives, *Debates* (12 September 1901) at 4804 (Mr Deakin).

continuing relationship with Britain.<sup>4</sup> Despite pursuing increased autonomy within the Empire, Canadian and Australian political leaders saw their nation's future as inextricably bound to it.

This chapter establishes the rhetorical and cultural framework in which legislatures were operating at the beginning of the twentieth century. Parliament's attempts to control the fertility of women, as explored in the next two chapters, can be attributed to a number of complementary factors. This chapter outlines two of these — race and gender — and explores how they were affected by the workings of Empire. Other factors were also in operation, like for example, those relating to class. While these other assumptions also had a powerful impact, in the context of reproduction it was the converging discourses around race and gender that were especially powerful in creating a milieu in which law could legitimately intercede and attempt to control women's fertility.

This chapter revolves around the concept of *Englishness*.<sup>5</sup> This indeterminate ideal resonated throughout colonial settings and lay at the heart of white colonial identity.

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<sup>4</sup> R. White, *Inventing Australia: Images and Identity, 1688 – 1980* (Sydney: George Allen & Unwin, 1981) at 112.

<sup>5</sup> I have italicised “Englishness” as a means of visually emphasising its constructed nature, but also to distinguish it from the adjectives “English” and “British”. The word *Englishness* plainly marginalises the other British Isles inhabitants — the Welsh, Scottish and Irish. However, during this period the claim was constantly made that *Englishness* was British. Although a Welsh identity, for example, could never be anything other than distinctively Welsh, an *English* identity could claim to provide the norm for the whole of

Fundamental to *Englishness* were notions of racial superiority. An investigation into the construction of non-white immigrants exposes the fear that underpinned such racial rhetoric. While the policies aimed at assimilating indigenous peoples were also symptomatic of this racial belief, it was genuine fear, as well as racism, that generated concern about immigration. Anne Curthoys has stated that while non-white immigrants were seen as destabilising to the body politic, by the end of the nineteenth century, Aboriginals were seen as totally irrelevant to the liberal vision of a political democracy and were not perceived as a threat.<sup>6</sup> While the Aborigines could be ignored once they had been subdued, the Chinese, for instance, could not be so easily disregarded.<sup>7</sup> This element of fear augmented the racism surrounding non-white immigration, thereby differentiating it from the racism aimed at indigenous peoples. It is because of the additional layer of anxiety that this chapter focuses on Australian and Canadian legislation aimed at discouraging non-white immigration at the turn of the twentieth century, while recognising that these laws represent only part of the history of national racist policies.

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the United Kingdom, if not the Empire. C. Hall, *White, Male and Middle Class: Explorations in Feminism and History* (Cambridge: Polity Press, 1988) at 206.

<sup>6</sup> A. Curthoys, "Racism and Class in the Nineteenth-century Immigration Debate" in A. Markus & M. C. Ricklefs, eds., *Surrender Australia? Essays in the Study and Uses of History, Geoffrey Blainey and Asian Immigration* (Sydney: Allen & Unwin, 1985) at 98.

<sup>7</sup> H. Irving, *To Constitute A Nation: A Cultural History of Australia's Constitution* (Cambridge, Cambridge University Press, 1997) at 114.

The place of women in the formation of colonial identity is explored in the latter part of the chapter. The hegemonic myth of a “white settler society” was gendered as well as racialised, consigning distinctive roles in production, reproduction and nation-building.<sup>8</sup> This becomes particularly apparent when the rhetoric around reproduction and population is fused with the contemporary racial dogma. The discourse on infanticide and the gendered application of immigration policy are explored in the last part of this chapter as specific examples of this fusion. Establishing this interrelationship between the discourses on race and gender is vital if the legislatures’ attempts to control abortion, birth control and infanticide are to be historically contextualised.

***Self-preservation is the highest law***<sup>9</sup>

By the last quarter of the nineteenth century, Britain deserved the epithet “Great”. It directly controlled a quarter of the earth’s surface and a quarter of humanity;<sup>10</sup> the Queen had been declared Empress of India; the civilising missions penetrating deep into the corners of the world continued unabated. Yet at the same time, it had allowed its North American colony to confederate and would extend the same privilege to its other white dominions. The secret behind Great Britain’s success? *Englishness*.

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<sup>8</sup> D. K. Stasiulis & N. Yuval Davis, “Introduction: Beyond Dichotomies — Gender, Race, Ethnicity and Class in Settler Societies” in D. K. Stasiulis & N. Yuval Davis, eds., *Unsettling Settler Societies: Articulations of Gender, Race, Ethnicity and Class* (London: Thousand Oaks, 1995) at 8.

<sup>9</sup> Australia, House of Representatives, *Debates* (7 August 1901) at 3506 (Mr Deakin).

The classic *Englishman* of the period was believed to possess certain qualities. These attributes — leadership, courage, justice, honour, civility and rationality — were revered as distinctively *English*.<sup>11</sup> For instance, there was the strong conviction that the Anglo-Saxon race possessed a special capacity for governing itself, and others, through a constitutional system that combined liberty, justice and efficiency.<sup>12</sup> “What has distinguished the British nation from the Empires which have preceded it is the fact that we, and we alone, have evolved the system of self-government”.<sup>13</sup> The *English* were also more inherently disciplined and therefore “civilised”. Their exercise of self-restraint, in particular sexual restraint, imbued them with “character” that native peoples or other Europeans could not parallel.<sup>14</sup> Inextricably bound to character was the nation’s “manifest destiny” to colonise abroad. According to British Prime Minister Gladstone, “the sentiment of Empire may be called innate in every Briton. If there are exceptions, they are like those of men born blind or lame among us”.<sup>15</sup> Importantly for the colonial endeavour, where-ever the *Englishman* travelled, he carried *England* with him: “they may live or die in the land of their adoption

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<sup>10</sup> C. C. Elridge, “Sinews of Empire: Changing Perspectives” in C. C. Elridge, ed., *British Imperialism in the Nineteenth Century* (London: Macmillan, 1984) at 169.

<sup>11</sup> J. Mackay & P. Thane, “The Englishwoman” in R. Colls & P. Dodd, eds., *Englishness: Politics and Culture, 1880 – 1920* (London: Croom Helm, 1986) at 191.

<sup>12</sup> R. A. Huttenback, *Racism and Empire: White Settlers and Coloured Immigrants in the British Self-Governing Colonies, 1830 – 1910* (Ithaca: Cornell University Press, 1976) at 15.

<sup>13</sup> A. C. Forster Boulton, “Liberalism and Empire” (1899) 151 *Westminster Review* 486 at 486.

<sup>14</sup> M. Valverde, *The Age of Soap, Light and Water: Moral Reform in English Canada, 1885 – 1925* (Toronto: McClelland & Stewart, 1991) at 104.

<sup>15</sup> Elridge, *supra* n.10 at 182.

[but they] look to the mother country as their home".<sup>16</sup> "England will be wherever English people are found".<sup>17</sup>

For all these rational, moral, libertarian attributes, the most essential characteristic of an *Englishman* was his Anglo-Saxon lineage. During the middle of the nineteenth century, "race" had emerged as one of the century's great catchwords.<sup>18</sup> From being perceived as an important influence on human culture, race became *the* crucial determinant. And Britons in particular were developing a sense of racial uniqueness.<sup>19</sup> In his testimony to the Canadian *Royal Commission on Chinese Immigration* (1885), James P. Dameron captured one of the fundamental beliefs of this period: "Mankind is divided into four different groups. First the black; next the red; next the brown, and last, the white".<sup>20</sup> Theories propounded by Charles Darwin and Herbert Spencer were embraced and often contorted by intellectuals, resulting

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<sup>16</sup> E. Dicey, "Mr Gladstone and Our Empire" in P. Cain, ed., *Empire and Imperialism: The Debate of the 1870s* (Indiana: St Augustine's Press, 1989) at 215.

<sup>17</sup> J. R. Seeley, *Expansion of England* (London, 1883) as quoted in R. Colls, "Englishness and Political Culture" in Colls & Dodd, *supra* n.11 at 44.

<sup>18</sup> C. Bolt, *Victorian Attitudes to Race* (London: Routledge & Kegan Paul, 1971) at ix. The word "race" was frequently employed during this period, but there was constant slippage in its meaning. At times "race" meant the whole human race, at times it signified the white race. Often it conveyed both meanings simultaneously, tending to identify the human race with the white race. "The slippery term 'race' allowed Anglo-Saxons to think of themselves as both a specific race and as the vanguard of the human race". L. Gordon, *Woman's Body, Woman's Right: A Social History of Birth Control in America* (New York: Grossman, 1976) at 142; See also Valverde, *supra* n.14 at 109.

<sup>19</sup> Huttenback, *supra* n.12 at 15.

<sup>20</sup> Canada, *Report of the Royal Commission on Chinese Immigration* (Ottawa:1885) at 350 (James P. Dameron, Lawyer).

in assumptions that established a hierarchy of races, with Anglo-Saxons perched at the peak.

The hegemonic faith in the racial superiority of the *Englishman* found equal currency in the white settler colonies:

We sing the fame of the Saxon name  
And the spell of its world wide power,  
Of its triumphs vast in the glorious past,  
And the might of the rising hour:  
And our bosoms glow, for we proudly know,  
With the flag of Right unfurled,  
That the strength and skill of the Saxon will  
Is bound to rule the world...

Let us stand for Right in our race's might  
With our fearless flag unfurled.<sup>21</sup>

In Australia, this racial rhetoric was enthusiastically endorsed by politicians and was disseminated among the population.<sup>22</sup> In 1893 Charles Pearson<sup>23</sup> published *National Life and Character: A Forecast* and it had a profound impact on intellectual and political thought in Australia.<sup>24</sup> In *National Life*, Pearson recited the mantra that the higher races of

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<sup>21</sup> William R. Wood, *Globe*, 24 September 1898.

<sup>22</sup> A. Markus, *Australian Race Relations, 1788 – 1993* (Sydney: Allen & Unwin, 1994) at 14.

<sup>23</sup> Charles Henry Pearson (1830 – 1894) was a distinguished academic and politician in Victoria. When his book *National Life* was published it caused a stir both in London and Washington – William Gladstone commended it and Theodore Roosevelt reviewed it. J. M. Tregenza, "Charles Pearson" in B. Nairn, G. Serle & R. Ward, eds., *Australian Dictionary of Biography, 1851 – 1890*, vol. 5 (Melbourne: Melbourne University Press, 1974) at 420.

<sup>24</sup> For its influence on Commonwealth Parliamentarians see for example, Australia, House of Representatives, *Debates* (7 August 1901) at 3503 (Mr Deakin); (6 September 1901) at 4644 (Mr Glynn).



men, those that attained the highest form of civilisation, were triumphing everywhere over the lower races. However, he warned that the small triumphs that the Aryan race may have achieved were more than likely to be balanced by the disproportionate growth of the inferior races: the “lower races” were increasing upon the “higher races”.<sup>25</sup> In particular, this alarm was raised in relation to the Chinese: “so great a people as the Chinese, and possessed of such enormous national resources, will sooner or later overflow their border and spread over new territory and submerge weaker races”.<sup>26</sup>

Britons and Australians alike had always envisaged Australia as an Anglo-Saxon bastion.<sup>27</sup> While the *Immigration Restriction Act, 1901* (Cth) was the tangible and symbolic manifestation of this sentiment, its roots lay in fifty years of fear. Victoria was the first Australian colony to enact legislation restricting the entry of the Chinese. In 1855, the colony introduced a poll-tax on incoming Chinese and restricted the number arriving on ships.<sup>28</sup> From 1861, New South Wales pursued a similar policy.<sup>29</sup>

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<sup>25</sup> C. H. Pearson, *National Life and Character: A Forecast* (London: Macmillan & Co, 1893) at 45.

<sup>26</sup> *Ibid.* at 51.

<sup>27</sup> “There is not on the globe a social interest more momentous, if we look forward five or six generations, than that of reserving the continent of New Holland as a place where the English race shall be spread from sea to sea ...”. James Stephen, Permanent Under-Secretary for the Colonies, 1841, as quoted in Markus, *Race Relations*, *supra* n.22 at 59.

<sup>28</sup> *An Act to Make Provision For Certain Immigrants, 1855* (Vic), No. 39.

<sup>29</sup> *Chinese Immigrants Regulation and Restriction Act, 1861* (NSW), 25 Vic., No. 3.

There was a hiatus in such legislative activity during the 1870s. As the numbers of Chinese immigrants dwindled, these laws were repealed.<sup>30</sup> This lull was however short-lived and a second round of restrictive legislation was introduced in the 1880s. At the Australasian Intercolonial Conference of 1880-1881, New South Wales and Victoria were the most ardent in their demands to restrict the immigration of Chinese, but the feeling of anti-Chinese sentiment prevailed amongst all colonies.<sup>31</sup> By 1888-89, there were virtually uniform and almost prohibitive laws against Chinese immigration in all Australian colonies.<sup>32</sup>

As Andrew Markus has stated, the White Australia Policy was no electioneering ploy but one of the fundamental principles for the guidance of the new nation.<sup>33</sup> The *Immigration Restriction Act, 1901* (Cth), the legislative embodiment of the “White Australia Policy”, was one of the first Acts passed by the Federal Government. Enacted at the end of 1901, it remained in force, complemented with a number of subsequent statutes, for over fifty years.<sup>34</sup> Under the *Immigration Restriction Act, 1901* (Cth), an immigrant was only permitted entry into Australia upon establishing an ability to write at dictation a passage of

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<sup>30</sup> A. Markus, “Legislating White Australia, 1900 – 1970” in D. Kirkby, ed., *Sex, Power and Justice* (Melbourne: Oxford University Press, 1995) at 238.

<sup>31</sup> C. A. Price, *Restrictive Immigration to North America and Australasia, 1836 – 1888* (Canberra: Australian National University Press, 1974) at 168.

<sup>32</sup> *Ibid.* at 197.

<sup>33</sup> A. Markus, “1984 or 1901? Immigration and Some ‘Lessons’ of Australian History” in Markus & Ricklefs, *supra* n.6 at 12.

fifty words in any European language.<sup>35</sup> Between 1902 – 1903 of 805 immigrants subjected to this test only 46 passed, from 1904 – 1909 only six of 554 passed and after 1909 it seems that no-one passed.<sup>36</sup> If an immigrant actually passed the test and was allowed entry into the country, the Act provided that they could at any time within one year of arrival be required to re-sit the dictation test.<sup>37</sup> A. C. Palfreman has stated that this essentially granted immigration officers time to find and deport immigrants who were not controllable under some other aspect of the Act.<sup>38</sup>

In explaining the rationale behind the White Australia Policy, Alfred Deakin wrote that,

The continent is so stubbornly British in sentiment that it proposes to tolerate nothing within its dominion that is not British in character and constitution or capable of becoming Anglicised without delay. For all those outside that charmed circle, the policy is that of the closed door.<sup>39</sup>

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<sup>34</sup> These statutes included the *Pacific Island Labourers Acts, 1901* (Cth); *War Time Refugees Removal Act, 1949* (Cth); *The Nationality and Citizenship Act, 1948* (Cth).

<sup>35</sup> *Immigration Restriction Act 1901* (Cth), s. 3. "Any European language" was amended in 1905 to "any prescribed language" to lessen offence to the Japanese: *Immigration Restriction Amendment Act, 1905* (Cth) s. 5.

<sup>36</sup> Markus, *Race Relations*, *supra* n.22 at 115.

<sup>37</sup> *Immigration Restriction Act, 1901* (Cth), s. 5(2). In 1920 this was extended to three years and in 1932 to five years: *Immigration Restriction (Amendment) Act, 1920* (Cth), s. 6; *Immigration Restriction (Amendment) Act, 1932* (Cth), s. 4.

<sup>38</sup> A. C. Palfreman, *The Administration of the White Australia Policy* (Melbourne: Melbourne University Press, 1967) at 84.

<sup>39</sup> A. Deakin, "Australia's People", *Morning Post*, 12 November 1901 (London) as reproduced in J. Lack & J. Templeton, eds., *Sources of Australian Immigration History, vol. 1, 1901 – 1945* (Melbourne: University of Melbourne, 1988) at 13.

Opposition to unrestricted immigration arose “principally from a desire to preserve and perpetuate the British type in the various populations”.<sup>40</sup> The paradox is that in attempting to protect the *Englishness* of Australia, the Government had resorted to measures that had no British precedent. As Alfred Deakin noted, “British insularity, though proverbial, has never risen to this height”. He said that Australian immigration measures were “surely the high-water mark of racial exclusiveness”.<sup>41</sup> Moreover, in pursuing these policies, the Government had risked censure and alienation from London.<sup>42</sup>

Not only had national insularity never risen to such a height, as Deakin had proudly announced, it had never been this effective. In 1891, the combined Anglo-Celtic and northern European population comprised 95% of the national population. By 1947, this had marginally increased.<sup>43</sup> The nation was more British than any other dominion, some Australians said more British than Britain itself.<sup>44</sup> Australia had successfully maintained its *English* racial composition.

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<sup>40</sup> Memorial to Secretary of State for Colonies, Westminster, from the Colonial Secretary's Office, Sydney, 25 January 1881 as quoted in Price, *supra* n.31 at 168.

<sup>41</sup> Deakin, *supra* at n.39 at 11, 13.

<sup>42</sup> Apart from generating problems for Britain's international relations with Japan for example, Australia's immigration policy also collided with the imperial philosophy of a non-racial empire that espoused the equality of all subjects, fostered by the liberal humanitarian and evangelical movements of the nineteenth century. Huttenback, *supra* n.12 at 21.

<sup>43</sup> Markus, *Race Relations*, *supra* n.22 at 152.

<sup>44</sup> White, *supra* n.4 at 112.

Of all the constituent parts of the British Empire, Australia is often seen as the most determined to make itself a bastion of Anglo-Saxon civilisation.<sup>45</sup> Yet the desire to maintain Canada as “white” has been identified as a major imperative in determining the national ethnic and racial composition of immigration there as well.<sup>46</sup> Canada had also inherited Social Darwinist philosophies and had in turn reinforced them through the superiority myth of the “northern races”.<sup>47</sup> Meanwhile, immigrants were arriving in Canada just as this racial theory was beginning to captivate the popular imagination.<sup>48</sup> Yet in contrast to the readily identifiable “White Australia Policy”, Freda Hawkins has stated that “the whole lengthy episode of White Canada is often down-played or clothed in discreet silence or simply not extrapolated from its historical context”.<sup>49</sup> Despite this, the idea that Canada should be a nation dominated by the white races of Europe was an assumption shared by all men with

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<sup>45</sup> See for example, Huttenback, *supra* n.12 at 278.

<sup>46</sup> The second major imperative identified, not discussed here, was the drive to meet the demands of the labour market. F. Abele & D. Stasiulis, “What about Natives and Immigrants” in W. Clement & G. Williams, eds., *The New Canadian Political Economy* (Kingston: McGill–Queens University Press, 1989) at 241. Labour considerations, in particular balancing the competing demands of employers wanting cheap labour with the trade union/ working classes concerns over labour displacement also played a crucial role in the formation of Australian immigration policy. For more detail, see for example Curthoys, *supra* n.6 at 94.

<sup>47</sup> The “northern” races, of which Canadians were a part, were assigned the virtues of self-reliance, initiative, individualism and strength. The southern races were seen as degenerate and lacking in energy. This myth of the northern race was often used to express Canadian nationalism. M. Barber, “Introduction” to J. S. Woodsworth, *Strangers Within Our Gates, Or Coming Canadians* (Toronto: University of Toronto Press, 1972) at xiv. For detail on the belief in Social Darwinism among Canadian women, see M. Valverde, “‘When the Mother of the Race is Free’ Race, Reproduction and Sexuality in First-Wave Feminism” in F. Iacovetta & M. Valverde, eds., *Gender Conflicts: New Essays in Women’s History* (Toronto: University of Toronto Press: 1992).

<sup>48</sup> K. J. Anderson, *Vancouver’s Chinatown: Racial Discourse in Canada, 1875 – 1980* (Montreal: McGill-Queen’s University Press, 1991) at 38.

<sup>49</sup> F. Hawkins, *Critical Years in Immigration: Canada and Australia Compared*, 2<sup>nd</sup> ed., (Montreal: McGill-Queen’s University Press, 1991) at 8.

political power in the late nineteenth and early twentieth century.<sup>50</sup> Social Darwinism had obviously received an equally warm reception in Canada.<sup>51</sup>

At the turn of the twentieth century, Canada was the world's fastest growing country.<sup>52</sup>

Between 1896 and 1914, two and a half million immigrants arrived in Canada.<sup>53</sup> Clifford

Sifton, Minister of the Interior, had vigorously promoted immigration to Canada as he

believed that Canadian prosperity involved expanding the domestic market and production

through agricultural immigration and settlement. In comparison with the Australian

Government's position of the same period, Sifton's policy appears expansive. Yet, it was

hardly multiculturalism driving this agenda.<sup>54</sup> Subsumed within it were a number of

measures that targeted only white people as potential immigrants and at the same time,

retarded other immigration.<sup>55</sup>

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<sup>50</sup> B. Ryder, "Racism and the Constitution: The Constitutional Fate of British Columbia Anti-Asian Immigration Legislation, 1884 – 1909" (1991) 29 Osgoode Hall Journal 619 at 621.

<sup>51</sup> The most obvious example of Social Darwinist thinking in Canada is found in J. S. Woodsworth's book *Strangers Within Our Gates*. Published in 1909, this book sought to portray the different nationalities of immigrants arriving to Canada. The book's structure speaks volumes about notions of racial hierarchy. The first chapter was dedicated to immigrants from Great Britain, the second to those from the United States. The author then goes on to discuss the West Europeans, South Europeans, the "Levantine" races, the "Orientals" and finally the "Negro and the Indian". Barber has noted that the author's views of the immigrants were typical of English speaking protestant Canadians of this period. Barber, *supra* n.49 at xi.

<sup>52</sup> A. McLaren, *Our Own Master Race: Eugenics in Canada, 1885 – 1945* (Toronto: McClelland & Stewart, 1990) at 47.

<sup>53</sup> Hawkins, *supra* n.49 at 4.

<sup>54</sup> D. J. Hall, "Clifford Sifton: Immigration and Settlement Policy, 1896 – 1905" in R. D. Francis, & H. Palmer, eds., *The Prairie West: Historical Readings* (Edmonton: Pica Pica Press: 1985) at 297.

<sup>55</sup> Immigration policies underwent a subtle re-orientation when Frank Oliver succeeded Clifford Sifton. Sifton's highest priority was to secure enough "stalwart peasants" to farm the Prairies. In his opinion Blacks, Italians, Jews, Orientals and even English city-dwellers would not be successful prairie farmers and would

Working from the assumption that Anglo-Saxons were racially superior, immigrants were welcomed according to the degree to which they approached this ideal.<sup>56</sup> Britain was still the principal target for promotional literature,<sup>57</sup> and by far the majority at this time were emigrating from Britain.<sup>58</sup> In 1920, W. G. Smith wrote that,

It goes without saying that, other things being satisfactory, those who are born in the British Isles will be preferred [as immigrants] ... They are members of one great empire, inheritors of a common tradition, accustomed to the more or less successful operation of democratic institutions ... there should always be a hearty welcome for the sturdy Britisher who seeks a home in this part of the western world".<sup>59</sup>

When the recruitment efforts to attract British, American, French and to a lesser extent northern and western Europeans failed to populate the Prairies, the Government extended its preferential policies to include other white immigrants: Ukrainians, Italians, Poles and Hutterites.<sup>60</sup> The new immigrants were, however, expected to assimilate and conform to the values and institutions of Canadian society. Marilyn Barber has shown how the major protestant churches in Canada, convinced that it was their responsibility to ensure that

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only add to the growing urban problems. Immigrants with suitable backgrounds that would assist in achieving economic farming success were encouraged. Oliver however instituted a selective system based more on race rather than occupational background. *Ibid.* at 294-295.

<sup>56</sup> McLaren, *Master Race*, *supra* n.52 at 47.

<sup>57</sup> In 1902-1903, \$205,00 was spent on promoting Canada to Britons as a place to emigrate, compared to \$161,000 for the U.S. and \$60,000 for Europe. Hall, *supra* n.55 at 290.

<sup>58</sup> Close to a million immigrants came from Britain, three quarters of a million arrived from the United States and half a million were from continental Europe. Hawkins, *supra* n.49 at 4.

<sup>59</sup> Smith, *supra* n.1 at 179.

<sup>60</sup> L. M. Jakubowski, "'Managing' Canadian Immigration: Racism, Ethnic Selectivity and the Law" in E. Comack, ed., *Locating Law: Race/ Class/ Gender Connections* (Halifax: Fernwood Publishing, 1999) at 100.

Canada remained a British nation, worked to assimilate European foreigners into “English speaking Christian citizens who are clean, educated and loyal to the Dominion and Greater Britain”.<sup>61</sup>

Although white Americans were encouraged to move north of the border, Black Americans were not. Concern about Canada’s public image meant that no laws were passed to exclude them, but careful administrative measures ensured their immigration applications were rejected. Governmental measures were also taken to actively discourage Black Americans from wanting to emigrate in the first instance.<sup>62</sup> Howard Palmer has stated that these informal procedures were effective, as by 1912 Black immigration to Canada had all but ceased.<sup>63</sup>

While the Canadian Government used discrete tactics to dissuade Black Americans, the prohibitive measures aimed at Asian immigrants were more explicit. Modelled on earlier Australian colonial legislation, the *Chinese Immigration Act, 1885* (Ca) imposed a \$50

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<sup>61</sup> Annual Report of the Missionary Society of the Methodist Church, 1909–1910 as quoted in M. Barber, “Nationalism, Nativism and the Social Gospel” in R. Allen, ed., *The Social Gospel in Canada* (Ottawa: National Museum of Canada, 1975) at 223. See also, W. W. Pue, “British Masculinities, Canadian Lawyers: Canadian Legal Education, 1900 – 1930” (1998) 16: 1 *Law In Context* 80.

<sup>62</sup> The Canadian government hired agents to go to the United States to discourage Black American immigrants, informing would-be immigrants that in Canada they would starve or freeze to death, that the soil was poor and so forth. H. Palmer, “Strangers and Stereotypes: The Rise of Nativism, 1880–1920” in Francis & Palmer, *supra* n.54 at 319.

<sup>63</sup> *Ibid.*



head tax on incoming immigrants and incorporated a tonnage limit of Chinese per boat.<sup>64</sup>

This legislation was in direct contrast to the general *Immigration (Amendment) Act, 1875* (Ca) that demanded only a nominal head tax of \$2.<sup>65</sup> Over the next forty years, these stratagems were strengthened: the tax was increased in 1900 to \$100 and again in 1903 to \$500 per immigrant.<sup>66</sup> In 1923, legislation was passed to ensure the complete termination of Chinese immigration.<sup>67</sup>

Britain's international relations militated against the introduction of overt measures to reduce Japanese immigration.<sup>68</sup> Instead, Canada's Minister of Labour and the Japanese Foreign Minister concluded a "Gentleman's Agreement" whereby Japanese immigration was not to exceed 400 people a year.<sup>69</sup> Imperial connections also demanded subtlety in

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<sup>64</sup> The Act incorporated a limit of one Chinese immigrant per fifty tons on any vessel arriving in Canada. *Act to Restrict and Regulate Chinese Immigration into Canada*, S.C. 1885, c. 71, ss. 4 & 5. Like the Federal legislation in Australia, the *Chinese Immigration Act, 1885* (Ca) had had a long gestation period. During the 1870s, the British Columbia Legislative Assembly was increasingly concerned with the unchecked flow of Chinese immigration. With an envious eye on the strategies adopted in the Australian colonies, the provincial legislature made a series of attempts to implement its own measures to combat the influx. However, presented with constitutional barriers that the Australian colonies did not face, Parliamentarians in Victoria belatedly recognised that only Ottawa could deliver the measures it sought. After a period of prevarication, deliberately coinciding with the completion of the transcontinental railway that was heavily reliant on Chinese coolie labour, the Macdonald Government legislated for the restriction of Chinese immigration.

<sup>65</sup> *Immigration (Amendment) Act*, S.C. 1875, c. 15, s. 2.

<sup>66</sup> S.C. 1900, c. 32, s. 6; S.C. 1903, c. 8, s. 6.

<sup>67</sup> *Chinese Immigration Act*, S.C. 1923, c. 38. See below for more detail.

<sup>68</sup> For more detail see, for example, J. P. S. McLaren, "The Burdens of Empire and the Legalisation of White Supremacy in Canada, 1860-1910" in W. M. Gordon & T. D. Fergus, eds., *Legal History in the Making: Proceedings of the Ninth British Legal History Conference, Glasgow 1989* (London: The Hambledon Press, 1991).

<sup>69</sup> W. P. Ward, *White Canada Forever: Popular Attitudes and Public Policy Towards Orientals in British Columbia* (Montreal: McGill-Queen's University Press, 1978) at 75.

dealing with East Indian immigration. While ordering the only company that provided transport from India to Canada not to sell any “through” tickets, in 1908 the Government issued an order-in-council that required a continuous journey from the immigrant’s point of departure to Canada.<sup>70</sup> These methods proved to be very effective and ensured that almost no Asians immigrated to Canada until after the Second World War.<sup>71</sup>

Canadian Secretary of State Chapleau stated to his parliamentary colleagues in 1885, “I would be ashamed to be a British subject ... if I believed for a moment that the survival of the fittest would be the survival of the Chinese race on this continent.”<sup>72</sup> In 1903, Clifford Sifton told a British audience that “we are engaged in overcoming a great many natural difficulties for the purpose of building up what we believe will be outside of England, perhaps the greatest British community in the world”.<sup>73</sup> Even in 1910 a Federal Member of Parliament asked his colleagues “what is a Canadian citizen as distinguished from a British subject?”.<sup>74</sup> As the decades progressed a unique Canadian identity was developing, yet that identity was still firmly bound to notions of *Englishness*.

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<sup>70</sup> Jakubowski, *supra* n.60 at 104

<sup>71</sup> *Ibid.*

<sup>72</sup> Canada, House of Commons, *Debates* (2 July 1885) at 3010 (Mr Chapleau).

<sup>73</sup> As quoted in Hall, *supra* n.55 at 299.

<sup>74</sup> Canada, House of Commons, *Debates* (21 March 1910) at 5818 (Mr Jameson).

With its celebration of the Anglo-Saxon race and its appeal to an English-Canadian heritage, it is hardly surprising that this brand of Canadian nationalism marginalised many French-Canadians. Yet Carl Berger has commented upon the attempts made to incorporate the French minority into the larger national vision. For instance, the point was frequently made that in their racial backgrounds there was no vital difference between the French and British.<sup>75</sup> Similarly, the collective qualities of the French were said to form a necessary counterpoise to the Saxon character. "The grace and cheerfulness of the French, would combine, it was said, with the drive and will of the Anglo-Saxon", producing a uniquely Canadian identity.<sup>76</sup> In order to incorporate the French-Canadian presence, the construction of "white" had been expanded beyond the Anglo-Saxon. This slight elbow-room granted to ethnic diversity may account for the fact that, although exclusionist racial policies were similar to those pursued in Australia, in Canada it was not exhibited as a coherent legislative agenda and was instead a much more fragmented affair.

Similar latitude was not however extended to the original inhabitants of either Canada or Australia and both indigenous peoples were systematically alienated from the national identity. For instance, the law against the Canadian First Nations' potlatch and other

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<sup>75</sup> It was said that the majority of original French settlers had come from Brittany and Normandy and as they were descendants of the Scandinavian invaders who had also conquered Britain, both British and French contained elements of the northern strain. C. Berger, *The Sense of Power: Studies in the Ideas of Canadian Imperialism, 1867 – 1914* (Toronto: University of Toronto Press, 1970) at 131.

<sup>76</sup> *Ibid.*, at 144.

festivals was intended to hasten the indigenous Canadians' assimilation into white society, pushing them into the market economy and wage labour.<sup>77</sup> Laws at both the state and federal level in Australia were also aimed at assimilating, and by implication eliminating, Aborigines. The complete denial of citizenship to Aborigines in the drafting of the Australian Constitution epitomised the belief that these peoples could not contribute to the nation-making processes.<sup>78</sup>

Just as aboriginal people were excluded from the definition of *English*, so too were others who did not fit the *English* mould, like the working-classes in the slums,<sup>79</sup> or the recalcitrant Celt for example.<sup>80</sup> Consequently, when politicians in the white settler colonies created independent nations they were imposing upon a large number of people an identity

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<sup>77</sup> D. C. Harris, *Law, Fish and Colonialism: The Legal Capture of Salmon in British Columbia* (Toronto: University of Toronto Press, 2001) at 6. For a case study of such laws, see the chapter entitled "'Dedecked in Gaudy Feathers': The Legal Prohibition of Aboriginal Dance: Wanduta's Trial, Manitoba, 1903" in C. Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900 – 1950* (Toronto: Osgoode Society, 1999).

<sup>78</sup> Aborigines were not granted citizenship rights until Australia voted in favour of an amendment to the Constitution by way of national referendum in 1967. For more detail on Aboriginal Australians and the Constitution, see Irving, *supra* n.7, 111-114.

<sup>79</sup> Interestingly, Judith Walkowitz has stated that observers of the London poor adapted the language of imperialism to describe the slum environs. "Imperialist rhetoric transformed the unexplored territory of the London poor into an alien place, both exciting and dangerous". For instance, "urban explorers" never seemed to walk or ride into the slums, but "penetrated" inaccessible places where the poor lived. J. R. Walkowitz, *City of Dreadful Delight: Narratives of Sexual Danger Late-Victorian London* (Chicago: University of Chicago Press, 1992) at 18-19. See also T. Loo, *Making Law, Order and Authority in British Columbia, 1821 – 1871* (Toronto: University of Toronto Press, 1994) at 146.

<sup>80</sup> Phillip Dodd has proposed that the British national culture was to a certain extent cultivated in order to incorporate and neuter various social groups, including the working class, women and the Irish. P. Dodd "Englishness and the National Culture" in Colls & Dodd, *supra* n.11 at 2.

and a political culture that they did not necessarily share.<sup>81</sup> The myriad of internal contradictions, disharmonies and differences could be concealed by a unifying national identity, and for two young nations, this was vital.<sup>82</sup> While the phrase “white settler colony” highlights certain shared colonial traits, it does obscure others. In particular, it conceals the existence of diverse indigenous and migrant collectivities that, although neither “white” nor “settled”, equally contributed to the formation of the Australian and Canadian nation-states. Accordingly, the term “white settler society” is not descriptive, but prescriptive. The white majority in both these nations were deeply committed to the dream of becoming outposts of the “British race”.<sup>83</sup> To achieve this however, constant massaging and moulding of the social composition was required. When viewed in this context, “white settler society” is exposed as a hegemonic notion; as a construct that reveals much about historical patterns of social development and state formation.<sup>84</sup>

As Peter Fitzpatrick and Eve Darian-Smith have stated, European identity was constituted in opposition to an alterity that it had itself constructed. This identity was so formed by excluding peoples who were accorded characteristics opposed to that identity — savages

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<sup>81</sup> Stasiulis & Yuval-Davis, *supra* n.8 at 19. This point has particular relevance to the French-Canadian situation as discussed above.

<sup>82</sup> For instance, Strange & Loo have noted the importance that Sir John A. Macdonald placed on achieving a sense of national unity. This manifested itself in obvious ways, like the building of the transcontinental railway, but also in more subtle ways, like the promulgation of the Criminal Code. See next chapter for further detail. C. Strange & T. Loo, *Making Good: Law and Moral Regulation in Canada, 1867 – 1939* (Toronto: University of Toronto Press, 1997) at 17 – 20.

and barbarians, or even those less occidental than they should be.<sup>85</sup> “The rise of the modern nation-state was essentially an imperial project, requiring the idea of a distant other to consolidate internal state divisions”.<sup>86</sup> As well as the native peoples, the “distant other” for Australia and Canada was their non-white immigrants.<sup>87</sup> Constructed as a menace to the body politic and destabilising to the social fabric, their presence (or even threatened presence) was something with which the colonials could negotiate.

In this context, the domestic manifestations of exclusionist policies were symptomatic of more than a need to keep Canada or Australia racially homogenous. Being “white” provided these colonies with a grand and glorious history and even more importantly, it promised a future. Above all else, it represented an identity. Sir Henry Parkes<sup>88</sup> encapsulated this sentiment:

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<sup>83</sup> Huttenback, *supra* n.12 at 26.

<sup>84</sup> Abele & Stasiulis, *supra* n.46 at 269.

<sup>85</sup> P. Fitzpatrick & E. Darian-Smith, “Laws of the Postcolonial: An Insistent Introduction” in E. Darian-Smith & P. Fitzpatrick, *Laws of the Postcolonial* (Ann Arbor: The University of Michigan Press, 1999) at 1.

<sup>86</sup> E. Darian-Smith, “Rabies Rides the Fast Train: Transnational Interactions in Postcolonial times” in Darian-Smith & Fitzpatrick, *ibid.*, at 288.

<sup>87</sup> For writings on the “othering” of native peoples, see for example, J. Purdy, “Post-colonialism: The Emperors New Clothes?” in Darian-Smith & Fitzpatrick, *ibid.*; J. Barman, “Taming Aboriginal Sexuality: Gender, Power and Race in British Columbia, 1850 – 1900” (1997/98) 115/116 B.C. Studies 237.

<sup>88</sup> Sir Henry Parkes (1815-1896) dominated New South Wales from his election to the first Legislative Assembly in 1856. He was premier of New South Wales several times and was a significant contributor to the Federation process. He is said to have been the “largest figure of nineteenth century politics”. A. W. Martin, “Henry Parkes” in B. Nairn, G. Serle & R. Ward, eds., *Australian Dictionary of Biography, 1851 – 1890*, vol. 5 (Melbourne: Melbourne University Press, 1974) at 399.

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the people in Australia were as thoroughly English as the people in the mother-country; they had forfeited nothing by going a distance of 14,000 miles ... they possessed by right of inheritance an equal share in the grand traditions ... which had made England the great civilising power of the world.<sup>89</sup>

Colonial identity was a fragile affair. Marilyn Lake has asserted that because Australia was in an ambiguous position of being both colonised and colonisers, Australian settlers attached special significance to the status and meaning of whiteness in order to distinguish themselves from other (coloured) colonised peoples.<sup>90</sup> “Subject to the humiliations of being treated by the British as ‘colonials’, white Australians responded by asserting their status as white subjects and by redefining the meaning of Australian”.<sup>91</sup> Similarly, “Canada’s Britishness, subjected to considerable pressures, was actively, creatively and constantly renegotiated”.<sup>92</sup> Imperial concepts of race enabled both Australia and Canada to excavate a niche of identity within Empire. Any threat to this racial and social composition was thus perceived as a threat to the national identity itself. In this fundamental way, racial exclusivity was essential to white settler identity.

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<sup>89</sup> Speech delivered in Birmingham, October 22 1861 as reproduced in D. Blair, *Speeches On Various Occasions Connected with the Public Affairs of New South Wales, by Henry Parkes, 1848 – 1874* (Melbourne: George Robertson, 1876) at 153.

<sup>90</sup> M. Lake, “Colonised and Colonising: The White Australian Feminist Project” (1993) 2: 3 *Women’s History Review* 277 at 279.

<sup>91</sup> *Ibid.* In an analogous way, David Roediger has illustrated the inter-dependence of the formation of the working class and the systemic development of a sense of whiteness in the United States. D. R. Roediger, *The Wages of Whiteness: The Making of the American Working Class*, 2<sup>nd</sup> ed. (London: Verso, 1991).

<sup>92</sup> Pue, *supra* n.61 at 86.

### *The Colonial Nursery*<sup>93</sup>

Race was one axis upon which colonial identity turned. Gender was another. By half way through the nineteenth century it was generally assumed that white women going to colonial territories carried as part of their personal “baggage” civilising influences beneficial both to white men and the British Empire.<sup>94</sup> Women of the Victorian era, colonial or metropolitan, were wrapped in an ideology of “ideal womanhood”. Ideal Victorian women were selfless, dependent, sexually subservient and chaste. They “provided sex on demand for their husbands along with preserves, clean linen and roast meat”.<sup>95</sup> These women were “guardians of morality, citadels of respectability”.<sup>96</sup> This ideology of ideal womanhood was appropriated by imperial discourse and reformulated so that white femininity came to symbolise the “heart” of western civilisation.<sup>97</sup> According to the colonial tropes, men behaved more decorously around women; women successfully recreated metropolitan domestic life in uncivilised regions and sexual liaisons with native women were rendered unnecessary — white women “underlined the European sense of a

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<sup>93</sup> Edward Gibbon Wakefield predicted that if colonies were appropriately settled, “the proportion of children to grown up people would be greater than ever took place since Shem, Ham and Japhet were surrounded by their little ones. The colony would be an immense nursery...” M. F. L. Pritchard, ed., *The Collected Works of Edward Gibbon Wakefield* (Glasgow: Collins, 1968) at 972.

<sup>94</sup> J. N. Brownfoot, “Memsahibs in Colonial Malaya: A Study of European Wives in a British Colony and Protectorate, 1900 – 1940” in H. Callan & S. Ardener, eds., *The Incorporated Wife* (London: Croom Helm, 1984) at 189.

<sup>95</sup> Hall, *supra* n.5 at 61.

<sup>96</sup> P. Branca, *Silent Sisterhood: Middle Class Women in the Victorian Home* (London: Croom Helm, 1975) at 7.

<sup>97</sup> P. Williams & L. Chrisman, eds., *Colonial Discourse and Post-Colonial Theory: A Reader* (New York, Harvester, 1993) at 193.



common Caucasianism”.<sup>98</sup> Adele Perry has dubbed it the “well-worn panacea of white womanhood”.<sup>99</sup>

While post-colonial scholarship has tended to emphasise this construction of white womanhood within African and Asian contexts,<sup>100</sup> these assumptions were relied on with equal dependency in the white settler colonies. Edward Gibbon Wakefield, a colonial theorist, had stressed the importance of women in the colonial project early in the nineteenth century: “as respects morals and manners, it is of little importance what colonial fathers are, in comparison with what mothers are”.<sup>101</sup> Colonial authorities in both Australia and Canada subscribed to this belief. White women were constructed as civilising agents who could quell disorderly masculine behaviour associated with frontier settlements.<sup>102</sup> In British Columbia for example, four “bride-ships” had carried white women to the colony in an attempt to transform the gold-rush settlement from a transient frontier to a stable white settler colony.<sup>103</sup> The prodigious efforts of Caroline Chisholm in assisting female

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<sup>98</sup> Brownfoot, *supra* n.94 at 190.

<sup>99</sup> A. Perry, *On the Edge of Empire: Gender, Race and the Making of British Columbia, 1849 – 1871* (Toronto: University of Toronto Press, 2001) at 139.

<sup>100</sup> See for example, Brownfoot, *supra* n.94; N. Chaudhuri & M. Strobel, eds., *Western Women and Imperialism* (Bloomington: Indiana University Press, 1992); M. Jolly, “Colonising Women: The Maternal Body and Empire” in S. Gunew & A. Yeatman, eds., *Feminism and the Politics of Difference* (Halifax: Fernwood Publishing, 1993).

<sup>101</sup> Pritchard, *supra* n.93 at 840.

<sup>102</sup> A. Perry, “‘Oh I’m Just Sick of the Faces of Men’: Gender Imbalance, Race, Sexuality and Sociability in Nineteenth Century British Columbia” (Spring/ Summer 1995) 105/6 B.C. Studies 27 at 32.

<sup>103</sup> Perry, *supra* n.99 at 166.

immigrants to New South Wales fell under the same rubric.<sup>104</sup> As she stated, “the influence of one hundred wives in the Bush would soon be visible in the improved sympathy and feelings of their husbands”.<sup>105</sup> White women were necessary participants in the process of colony-building as they ensured that British law, mores and economic development flourished.<sup>106</sup>

The expatriation of white women to the colonies served a further function. Suzann Buckley has stated that preserving Canada as a loyalist outpost was in fact one of the main objectives in shipping out surplus British females.<sup>107</sup> Emigrant women would “help to keep the British Empire for the British race”.<sup>108</sup> Implicit in this formulation was the expectation that women would marry and that they would also bear children. As potential mothers, all women were affected to some degree by such imperialist ideology.<sup>109</sup> In both Britain and the colonial dependencies, childbirth and child-rearing had become “a matter of imperial

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<sup>104</sup> Carolyn Chisholm (1808 – 1877) has been dubbed the “Emigrant’s friend”. During her residency in Sydney she founded the Female Immigration Home. One example of her continuous endeavours in both Australian and Britain was the successful lobbying of Earl Grey and James Stephen for the free passage of some emancipists’ wives to the colony. J. Iltis, “Carolyn Chisholm” in A. G. L. Shaw & C. M. H. Clark, eds., *Australian Dictionary of Biography, 1788-1850*, vol. 1 (Melbourne: Melbourne University Press, 1966) at 221.

<sup>105</sup> Caroline Chisholm as quoted in A. Summers, *Damned Whores and God’s Police*, 2<sup>nd</sup> ed., (Melbourne: Penguin Books, 1994) at 348.

<sup>106</sup> Perry, *Sick of the Faces*, *supra* n.102 at 34.

<sup>107</sup> S. Buckley, “British Female Emigration and Imperial Development: Experiments in Canada, 1885 – 1931” (1977) 3: 2 *Hecate* 26 at 37.

<sup>108</sup> Mackay & Thane, *supra* n.11 at 203.

<sup>109</sup> V. Ware, *Beyond the Pale: White Women, Racism and History* (London: Verso, 1992) at 162.

importance".<sup>110</sup> Motherhood had come to assume a central role in the process of empire building.<sup>111</sup>

It is not surprising that the imperial discourse on motherhood was soon infected by racial theory. Flowing from the eugenic proclamation of the innate superiority of Anglo-Saxons, white women were constructed as the "conduits of the essence of the race".<sup>112</sup>

[Woman] has in her body the power of handing on and on the life-force which has come to her through millions of years. It is a very sacred and serious thought — is it not? — that by your conduct you can help to keep the life-stream pure, help to uplift the race; that on the other hand, you can hinder the great forces of evolution.<sup>113</sup>

No longer just guardians of morality, by the end of the century women were also guardians of the *English* race.

One example of the way in which gender and race rhetoric collapsed within the maternal body is the development of the discourse on infanticide. From the middle of the nineteenth century, the crime of infanticide was perceived as increasing in both Britain and Australia.

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<sup>110</sup> A. Davin, "Imperialism and Motherhood" (1978) 5 *History Workshop* 9 at 10; C. Summers, "Intimate Colonialism: The Imperial Production of Reproduction in Uganda, 1907 – 1925" (1991) 16: 4 *Signs* 787 at 807. See above at introduction for more detail on these articles.

<sup>111</sup> A. Stoler, "Making Empire Respectable: The Politics of Race and Sexual Morality in Twentieth Century Colonial Cultures" in A. McClintock, A. Mufti & E. Showat, eds., *Dangerous Liaisons: Gender Nation and Postcolonial Perspectives* (Minneapolis: University of Minnesota Press, 1997) at 363.

<sup>112</sup> Mackay & Thane, *supra* n.11 at 201.

<sup>113</sup> Dr E. Sloan Chesser, *From Girlhood to Womanhood* (1914) as quoted in Mackay & Thane, *ibid.*, at 201.

Infanticide has typically been defined by the rhetoric of monstrosity.<sup>114</sup> However as the century progressed, infanticide became more associated with practices of less “civilised” nations and therefore anathema to *Englishness*. For instance, when the British authorities in India discovered a culture that condoned infanticide, they suppressed it with a righteous enthusiasm that stemmed from both imperialism and humanitarianism: female infanticide, alongside *sati* and *thuggee*, justified British rule.<sup>115</sup> Infanticide was also depicted as an “Oriental” custom: “in the present age, Asia takes unhappy precedence in the perpetration of infanticide, which is there often committed with cold-blooded indifference ... indeed some of the accounts appear almost incredible, so teeming are they with horrors”.<sup>116</sup> The Canadian *Royal Commission on Chinese Immigration* (1885) contains observations by witnesses about the prevalence of infanticide amongst the local Chinese population.<sup>117</sup> Infanticide was similarly perceived as an Indigenous peoples’ custom.<sup>118</sup> In this context, parallels can be drawn between infanticide and cannibalism. The label “cannibal”, as Tina Loo has shown, was a powerful mechanism that consigned entire populations to a kind of

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<sup>114</sup> M. Francus, “Monstrous Mothers, Monstrous Societies: Infanticide and the Rule of Law in Restoration and Eighteenth-Century England” (1997) 21: 2 *Eighteenth-Century Life* 133 at 133.

<sup>115</sup> L. Sussex, “Portrait of a Murder in Mixed Media: Cultural Attitudes, Infanticide and the Representation of Frances Knorr” (1994) 4 *Australian Feminist Legal Journal* 39 at 42.

<sup>116</sup> “Child Murder – Obstetric Morality” (1858) 45 *Westminster Review* 54 at 65-6.

<sup>117</sup> See for example, statement of Fredrick F. Low, formerly member of Congress from California about infanticide in China. “[T]here is very little hesitation in destroying female children at early birth, it having a sort of semi-official sanction, although there is a law against it”. Canada, *Report of the Royal Commission on Chinese Immigration* (Ottawa: 1885) at 3184 (Mr F. F. Low). The Report also spends several pages discussing its perceived prevalence: at ix – ixii.

<sup>118</sup> It was estimated that 50 – 60% of indigenous female children were killed in this way. *Report of the Superintendent of Indian Affairs for British Columbia, 1872 – 1873* (Powell: Israel Wood).

moral exile based on the belief that this practice had no place in civilised Christian nations.<sup>119</sup> Infanticide was a similarly powerful means to distinguish between the “savage” and the “civilised”.

This colonial belief ignored the many small skeletons found, in some cases quite literally, in the colonist’s water-closet.<sup>120</sup> As the century progressed however, the prevalence of infanticide was becoming harder to ignore. Mr Balfour, Legislative Councillor, spoke on the escalating crime of infanticide in the colony of Victoria. It was, he said, “a crime little talked about, but slowly and surely establishing itself in the colony and bringing dishonour upon the land”.<sup>121</sup> As Mr Balfour made clear, infanticide was an embarrassment to a culture that prided itself on higher civilisation.<sup>122</sup> The fact that white women were killing their own children blemished the self-perception and projection of a superior *English* civilisation. The stereotype of the pure, maternal white woman was important as a standard against which “other” women could be judged and against which the degree of “progress” of *English* civilisation could be measured.<sup>123</sup> In the settler colonies where East Indians, Aborigines and Chinese were living amongst the white colonials, this role was significant as the

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<sup>119</sup> Loo, *supra* n.79 at 144.

<sup>120</sup> Sussex, *supra* n.115 at 42.

<sup>121</sup> Victoria, Legislative Council, *Debates*, 15 July 1890 (Mr Balfour) as quoted in E. Deacon, “The Promotion of Child Welfare in Victoria By Means of Legislative Intervention, 1870 – 1907” in D. Kirkby, ed., *Law and History in Australia*, vol. 4 (Melbourne: La Trobe University, 1987) at 19.

<sup>122</sup> Sussex, *supra* n.115 at 47.

unblemished image of the white women was another factor that assisted in maintaining racial distinctions. Thus, when colonial mothers committed infanticide they not only desecrated the ideology of the maternal figure, they also threatened the racial hierarchy and blurred the carefully drawn racial boundaries by aligning themselves with the “uncivilised other” — sins equally as grave.

The interconnection of gender, race and reproduction is exemplified further through Australia and Canada’s gendered development of immigration policy. While the introduction of the head-tax on Chinese immigrants significantly impeded male migration, it was a devastatingly effective method of keeping women from migrating. Single women were invariably unable to find the means to pay for their passage, let alone the head-tax on arrival. Similarly, as wives were generally not seen as productive units and were unlikely to recoup the head-tax through their labour, the tax strongly discouraged migration of wives.<sup>124</sup>

The specific issue of wife migration was briefly debated in both the Canadian and Australian Houses of Parliament. Two years after the introduction of the *Chinese Immigration Act, 1885* (Ca), the Canadian government considered, but ultimately declined

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<sup>123</sup> S. Mills, “Post-colonial Feminist Theory” in S. Jackson & J. Jones, eds., *Contemporary Feminist Theories* (New York: New York University, 1998) at 102.

to remove the head-tax from wives of Chinese immigrants. In 1905, Australia formally removed the statutory exception that allowed a wife to accompany her husband if he was not a prohibited immigrant. The parliamentary debates on this issue ostensibly centred upon the fundamental principles of immigration policy — maintaining a legislative exception for wives countered the basic idea that Chinese immigration should be restricted.<sup>125</sup> However, these debates were steeped in sub-text — a sub-text that revolved around women's reproductive capacities. While Parliamentarians recognised that the absence of Chinese women increased the risk of intermarriage and miscegenation with the white population, it did ensure that Chinese men remained sojourners, and importantly, could not reproduce and raise Chinese families.<sup>126</sup> In fact, according to T. Adilman, one of the principal motivations behind the *Chinese Immigration Act, 1923* (Ca) was to keep fertile Chinese women from Canadian shores: "clearly, young women's reproductive capacities made them the subject of exclusion".<sup>127</sup> This policy of excluding women had the obvious and desired effect on

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<sup>124</sup> The \$500 head tax was the equivalent of two years wages for Chinese-Canadian workers. A. Go, "Chinese Canadian Women and the Effect of the Exclusion Act and Head Tax" (1990) 30 *Fireweed* 20.

<sup>125</sup> See for example Mr Chapleau: "As a question of principle, it is understood Chinese immigration should be restricted... If you encourage the increase of Chinese population in this country you go against that principle...". Canada, House of Commons, *Debates* (31 May 1887) at 643 (Mr Chapleau).

<sup>126</sup> See Canada, House of Commons, *Debates* (31 May 1887) at 642-3; Australia, House of Representatives, *Debates* (6 December 1905) at 6369-6370.

<sup>127</sup> T. Adilman, "A Preliminary Sketch of Chinese Women and Work in British Columbia, 1858 – 1950" in B. K. Latham & R. J. Pazdro, eds., *Not Just Pin Money: Selected Essays On the History of Women's Work in British Columbia* (Victoria: Camosun College, 1984) at 66.

fertility rates —the Chinese-Canadian population did not recover from these policies until well into the twentieth century.<sup>128</sup>

Clearly, women's reproductive capacities have been crucial in the ideological battles around nation and race.<sup>129</sup> In 1901 Australia's population was not even four million.<sup>130</sup> It was an island continent of 7.6 million square kilometres, distant from Britain and perceived as surrounded by Asians ready to invade. The problem of the declining birth-rate was depicted as "a national one of overwhelming importance to the Australian people, perhaps more than to any other people and on its satisfactory solution will depend whether this country is ever to take a place amongst the great nations of the world".<sup>131</sup> In Canada, the politics of reproduction had become as equally enmeshed in the politics of race. "The native-born population ... fails to propagate itself, commits race suicide in short, whereas the immigrant population, being inferior ... propagates itself like fish in the sea".<sup>132</sup> For these Governments, it was a matter of "populate or perish". William Holdsman, Member of the New South Wales Legislative Assembly captured the crux of the issue when he stated

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<sup>128</sup> P. S. Li, "Immigration Laws and Family Patterns: Some Demographic Changes Among Chinese Families in Canada, 1885 – 1971" (1980) 12 *Canadian Ethnic Studies* 58. The effects of the *Exclusion Act* and the head-tax were so devastating on the Chinese community that the Chinese Canadian National Council has organised a campaign for redress for the women who suffered from these policies. See Go, *supra* n.124. and the C.C.N.C homepage: <<http://www.ccncc.ca/toronto/history/info/content.html>>.

<sup>129</sup> M. de Lepervanche, "Breeders for Australia: A National Identity for Women?" (1989) 24: 3 *Australian Journal of Social Issues* 163 at 168.

<sup>130</sup> Lack & Templeton, *supra* n.39 at 7.

<sup>131</sup> T. A. Coghlan, *The Wealth and Progress of New South Wales, 1894* (Sydney: Government Printer, 1895) at 69.



that "the best of all immigration is the Australian baby".<sup>133</sup> Given the ideological baggage that attended white women, it is not surprising that motherhood was conceptualised as crucial to maintaining the nation. It has been noted that,

The oppression of women is closely interwoven with notions of race. In Australia ... the desire for a high birth-rate and the maintenance of racial strength and purity have been national priorities ... Concomitant with the cry to "populate or perish" ... and the exclusion and restriction of non-white immigrants, has been the confinement of women to their reproductive functions. White women in Australia have been viewed primarily as breeders of the Anglo-Saxon strain.<sup>134</sup>

While the language and concepts describing fertility depict it as totally natural, it is at the same time intensely political.<sup>135</sup>

The series of legislative measures taken by Canadian and Australian governments at the turn of the century (as investigated in the next two chapters) need to be negotiated with this political context firmly borne in mind. The laws passed during this period were not only products of a moral crusade or benevolent medical endeavour. They were as equally a consequence of highly racialised dogma being refracted through the maternal body. It is only with an understanding of this political and cultural environment that one can

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<sup>132</sup> W. S. Wallace, "The Canadian Immigration Policy" (1907-08) 30 Canadian Magazine 358 at 360.

<sup>133</sup> *Daily Telegraph*, 18 September 1905, as quoted in S. Siedlecky & D. Wyndham, *Populate and Perish: Australian Women's Fight for Birth Control* (Sydney: Allen & Unwin, 1990) at 16.

<sup>134</sup> Editor's Forward to L. Gordon, "Race Suicide and the Feminist Response: Birth Control as a Class Phenomenon in the U.S., Part 2" (1975) 1: 2 Hecate 40 at 40.

appreciate how contemporaries viewed reproduction as a matter of such national and imperial consequence. As the President of the Australasian Association for the Advancement of Science stated, "the propagation of the Anglo-Saxon race has been placed largely under voluntary control ... The extent to which this control is resorted to may determine the fate of the Empire".<sup>136</sup> Control of women's fertility could not be left to chance or personal caprice. If women could not be trusted to safeguard these interests, Parliament would have to step into the breach.

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<sup>135</sup> A. Mackinnon, "Redesigning the Population: Narratives of Sex and Race" in M. Gatens, & A. MacKinnon, eds., *Gender and Institutions: Welfare Work and Citizenship* (Cambridge: Cambridge University Press, 1998) at 150.

<sup>136</sup> Presidential address to the Australasian Association for the Advancement of Science, 1901, as quoted in de Lepervanche, *supra* n.129 at 169.

## Chapter Two

### **“Most Useful Employment For The Women”:**

#### **Before the Decline in the Birth Rate**

[W]omen who certainly would never have bred in any other climate, have produced as fine children as ever were born.<sup>1</sup>

The effects of the climate in Australasia, it is well known, are to increase in a high degree, the productive powers of animals of all descriptions: man is by no means an exception to that general rule ... We had assumed, that in such a country the most useful employment for the woman, would be in bearing children.<sup>2</sup>

#### ***Introduction***

The observations of Captain Tench, like those of John Henderson after him, are representative of assumptions about women and reproduction that have characterised the history of population growth in Australia.<sup>3</sup> Opinions about national strength, imperial power, geography, gender and race have all influenced the debate around women's fertility

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<sup>1</sup> Captain Tench, one of the first English settlers in New South Wales, was remarking on the reproductive future of the new colony. W. Tench, *A Complete Account of the Settlement at Port Jackson in New South Wales* (1793) as quoted in S. Siedlecky & D. Wyndham, *Populate and Perish: Australian Women's Fight for Birth Control* (Sydney: Allen & Unwin, 1990) at 10. In 1905 this argument was adopted by NSW Parliamentarians who suggested that due to the tropical climate, Australian girls matured earlier than those in other parts of the world, and thus were able to bear children from the age of 14. Siedlecky & Wyndham, *ibid.*, at 19.

<sup>2</sup> John Henderson (1832) as quoted in W. Adcock, U. Bayliss, M. Butler, *et al*, eds., *With Courage and Devotion: A History of Midwifery in New South Wales* (Sydney: Anvil Press, 1984) at 24.

<sup>3</sup> For instance, an early explorer originated the belief that once an Aboriginal woman had sex with a white man and bore a child to him, she lost the ability to conceive a child with an Aboriginal man. Venereal disease is a likely explanation, but this myth survived until the 1880s. P. Grimshaw & A. May, "Inducements to the Strong to be Cruel to the Weak": Authoritative White Colonial Male Voices and the Construction of Gender

from the time of the foundation of the colony. This chapter investigates the first statutory demonstrations of this through the New South Wales criminal laws and infant life protection laws.

Suzanne Davies has stated that throughout Australia's history, the criminalisation of women for reproduction-related offences has reflected and reinforced the expectation that women should willingly bear and nurture children.<sup>4</sup> The first part of the chapter explores New South Wales criminal reproduction laws, examining them alongside corresponding legislation in Canada and the United Kingdom. The criminal law on abortion and infanticide in New South Wales has remained almost wholly unchanged from its first draft in 1871 through to the present day, thereby appearing to weather the vicissitudes of history intact.<sup>5</sup> At the time of drafting, the New South Wales criminal laws were initially harsher than contemporaneous legislation of Britain and Canada in their approach to women who had breached the normative assumptions of maternal behaviour. However by the end of the nineteenth century, the New South Wales provisions had been surpassed by newer and more expansive legislative approaches, most notably that of Canada. As the second part of

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in Koori Society" in N. Grieve & A. Burns, eds., *Australian Women: Contemporary Feminist Thought* (Melbourne: Oxford University Press, 1994) at 93.

<sup>4</sup> S. Davies, "Captives of their Bodies: Women, Law and Punishment, 1880s - 1980s" in D. Kirkby, ed., *Sex, Power and Justice* (Melbourne: Oxford University Press, 1995) at 105.

<sup>5</sup> The latest revision of the *Crimes Act, 1900* (NSW) of April 2002 still contained provisions prohibiting abortion phrased almost identically to the very first NSW Criminal law statute of 1883. *Crimes Act, 1900* (NSW), ss. 82, 83, 84. The concealment offence and the definition of child murder also remain unchanged from the nineteenth century drafting. *Crimes Act, 1900* (NSW) ss. 85(1), 20, 21, 22.

this chapter (and the rest of this thesis) examines, while the criminal law may not have been as strident as that of other jurisdictions at the turn of the century, concerns about fertility control were manifested in other legislative activity, like the *Children's Protection Act, 1892* (NSW), that served as important adjuncts to the criminal law.

New South Wales innovations in reproduction-related offences detailed in this chapter could be viewed as sensible reactions to legislative loop-holes that had become evident in the British statutes, or as responses that were heavily influenced by social and jurisprudential thinking on criminology emanating from Britain.<sup>6</sup> To a certain extent, these are valid assessments as both factors would have had an impact on the drafting of legislation in the colonies. However, when comparisons are extended to include the Criminal Code Bill (No. 2), 1880 (UK) and to the Infanticide Law Amendment Bills (UK),<sup>7</sup> the substance and rhetoric of which both heavily influenced the colonies,<sup>8</sup> in many

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<sup>6</sup> The moral panic about sexuality and sexual transgressions, instigated by W. M. Stead's "Maiden Tribute of Modern Babylon", had a profound effect on Britain's popular and parliamentary beliefs. For more detail, see J. R. Walkowitz, *City of Dreadful Delight: Narratives of Sexual Danger in Late-Victorian London* (Chicago: University of Chicago Press, 1992).

<sup>7</sup> The brain-child of Sir James Fitzjames Stephens, the Draft Criminal Code was first introduced into the House of Commons in May 1878. It did not fare well. The Bill was reintroduced in 1879 and 1880, but Benjamin Disraeli's Government was dissolved before it could be passed into law. The Government lost the subsequent election and also the chance to codify the country's criminal law. D. H. Brown, *The Genesis of the Canadian Criminal Code of 1892* (Toronto: University of Toronto Press, 1989) at 31-37. The Infanticide Law Amendment Bills of 1873 and 1875 were similarly never enacted into law. For more detail see L. Rose, *The Massacre of the Innocents: Infanticide in Britain, 1800-1939* (London: Routledge & Kegan Paul, 1986).

<sup>8</sup> For instance, Samuel Griffith closely studied the British Criminal Code proposals when drafting Queensland's *Criminal Code*. A. Castles, *An Australia Legal History* (Sydney: Law Book Company, 1982) at 488. A contemporary law manual reveals that NSW parliamentarians were similarly influenced by the Draft Code. For example, "the novel principle" established by Stephen's Bill of discharging a verdict of murder, if

instances the colonial legislation still surpassed even these revolutionary pieces of legislative drafting.

### ***Rocking the Cradle: Colonial Criminal Reproduction Laws***

The United Kingdom's *Lord Ellenborough's Act* of 1803 signalled the end of the somewhat tolerant common law approach to abortion.<sup>9</sup> According to the leading eighteenth century common law jurists, an abortion procured prior to quickening by the pregnant woman or any third party was not a criminal offence at common law, although an abortion procured after quickening was deemed murder.<sup>10</sup> *Lord Ellenborough's Act, 1803* (UK) significantly altered this common law approach to abortion. Pursuant to section 2 of the Act, an abortion produced after quickening was made a statutory felony punishable by death. Importantly, it also rendered illegal for the first time an abortion in the initial trimester. If an abortion was

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circumstances permitted, was incorporated into the *Criminal Law (Amendment) Act 1883*, s. 13. A. Stephen & A. Oliver, *Criminal Law Manual Comprising the Criminal Law Amendment Act of 1883 with an Introduction, Commentary and Index* (Sydney, Government Printer, 1883). Canadian legislators took particular note of Stephen's work when drafting the Canadian Code. B. M. Dickens & R. Cook, "Development of Commonwealth Abortion Laws" (1979) 28 *International and Comparative Law Quarterly* 424 at 425.

<sup>9</sup> *An Act for the Further Prevention of Malicious Shooting, and Attempting to Discharge Loaded Firearms, Stabbing, Cutting, Wounding, Poisoning and the Malicious Using of Means to Procure a Miscarriage of Women; and also the Malicious Setting Fire to Buildings, and also for Repealing a Certain Act, 1803* (UK), 43 Geo. III, c. 58, ss. 1 & 2. [Hereinafter *Lord Ellenborough's Act*]. The Act is called *Lord Ellenborough's Act* by historians because it was introduced by Edward Law, Lord Ellenborough and Chief Justice of the King's Bench. The actual status of abortion at common law prior to *Lord Ellenborough's Act* is still the subject of debate by legal historians. See S. Gavigan, "The Criminal Sanction As It Relates to Human Reproduction" (1984) 5 *The Journal of Legal History* 1.

<sup>10</sup> Gavigan, *ibid.*, at 21. Finch & Stratton have offered one explanation for this belief: in the eighteenth century the concern was not about the "child" or wasted "life", but rather was about not wasting semen, which was considered to be the basis of life. L. Finch & J. Stratton, "The Australian Working Class and the Practice of Abortion, 1880 – 1939" (1988) 23 *Journal of Australian Studies* 45.

procured prior to quickening, it was a misdemeanour punishable by transportation or imprisonment. The criminality of abortion was expanded in 1828 and again in 1837 when the *Offences Against the Person Act, 1837* (UK) abolished altogether the quickening distinction so that abortion became a felony at any stage of the pregnancy.<sup>11</sup> The law underwent its final nineteenth-century transformation through the *Offences Against the Persons Act, 1861* (UK).<sup>12</sup>

Building upon and expanding the existing legislation, section 58 of the *Offences Against the Person Act, 1861* (UK) stated that:

Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent ... shall be guilty of a felony.

This was the first time that legislation referred to the woman herself and expressly prohibited a pregnant woman from procuring her own miscarriage. This notion that a woman less than three months pregnant who sought to “put herself right” was committing a crime was a new development.<sup>13</sup> According to Angus McLaren and Arlene McLaren, even at the turn of the twentieth century many women still assumed that abortion was

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<sup>11</sup> *Offences Against the Person Act, 1828* (UK), 9 Geo. IV, c. 31; *An Act to Amend the Laws Relating to Offences Against the Person, 1837* (UK), 7 Will. IV & 1 Vic., c. 85

<sup>12</sup> *Offences Against the Person Act, 1861* (UK), 24 & 24 Vic., c. 100. The British position on abortion was not altered again until 1967. See the *Abortion Act, 1967* (UK) c. 87.

permissible before the third month when it was not induced by another person.<sup>14</sup> In addition to that development, section 59 introduced a prohibition against supplying poisons or instruments to any woman with the intent to procure a miscarriage. The reformulation of the law on abortion contained in sections 58 and 59 proved to be pivotal in the development of anti-abortion legislation in jurisdictions throughout the Empire.<sup>15</sup>

The development of British statute law on infanticide can also be traced back to *Lord Ellenborough's Act, 1803* (UK). Prior to this Act, “lewd women” charged with infanticide had to “make proof by one witness at least” that the child had been born dead; otherwise evidence of concealing the child’s body was enough to condemn her for murder.<sup>16</sup> *Lord Ellenborough's Act, 1803* (UK) established that women charged with murder of their “bastards” would be prosecuted in the same way as regular murder trials — these women no longer had the burden of proof.<sup>17</sup> Importantly, Lord Ellenborough also added “concealment” of a bastard birth as an alternative finding, with a significantly lesser penalty

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<sup>13</sup> A. McLaren & A. McLaren, *The Bedroom and the State: The Changing Practices of Contraception and Abortion in Canada, 1880 – 1997* (Toronto: Oxford University Press, 1997) at 39.

<sup>14</sup> *Ibid.*, at 38.

<sup>15</sup> For an account of the ways in which this legislation influenced the various parts of the Commonwealth, see Dickens & Cook, *supra* n.8.

<sup>16</sup> Gavigan, *supra* n.9 at 24. *An Act to Prevent the Destroying and Murdering of Bastard Children, 1623* (UK), 21 James 1, c. 27, s. 2.

<sup>17</sup> *Lord Ellenborough's Act 1803* (UK), s. 3. The penalty for this crime was death.



of two years imprisonment, if the murder charge could not be evidentially sustained.<sup>18</sup> In 1828, the scope of the concealment offence was widened to include all infants, illegitimate or not and was made applicable to all persons, not just mothers.<sup>19</sup> In 1861, concealment was made an independent substantive offence and was no longer dependent on a charge of murder.<sup>20</sup> Consequently, pursuant to the *Offences Against the Person Act, 1861* (UK), it was an offence for a woman having given birth to a child to attempt to conceal that birth, by secret disposition of the dead body, whether the child died before, during or after birth. Importantly, it was not necessary to prove that the child had been born alive, as was the case for infanticide.<sup>21</sup>

In Australia, although the *Colonial Law Validity Act, 1865* (UK) confirmed that Australian colonial legislatures had wide power to fashion and recast laws which regulated local affairs, colonial legislatures continued to rely heavily on British legislation as models.<sup>22</sup> The *Offences Against the Person Act, 1861* (UK) was no exception and in most Australian

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<sup>18</sup> In Scotland, it was even a crime for a woman to fail to call for assistance during delivery should the child thereafter be found dead. *An Act for Repealing an Act of the Parliament of Scotland Relative to Child Murder, 1809* (UK), 49 Geo. III c. 14, s. 4.

<sup>19</sup> *Offences Against the Person Act, 1828* (UK), s. 14.

<sup>20</sup> *Offences Against the Person Act, 1861* (UK), s. 60.

<sup>21</sup> The penalties for this crime, and others, will be discussed below.

<sup>22</sup> Alex Castles has identified two reasons for this practice. Ideologically, it served the obvious and seemingly desirable purpose of maintaining uniformity between Britain and Australian criminal law. Secondly, simple lack of human and other resources prevented the emulation of law making activities of other places. A. Castles, *An Australia Legal History* (Sydney: Law Book Company, 1982) at 449, 486, 490).

colonies it was adopted without delay. Tasmania passed an almost identical statute in 1863, as did Victoria in 1864 and Queensland in 1865.<sup>23</sup>

The exigencies of parliamentary politics meant that the New South Wales' response was extraordinarily slow in comparison.<sup>24</sup> The first Criminal Law Bill was presented to Parliament in March 1871 and over a year later, in September 1872, the Bill was read for the first time in the Legislative Assembly. The Bill was debated numerous times, sent to select committees, shelved and re-instated, and was finally enacted in 1883. More than twenty years after the *Offences Against the Person Act, 1861* (UK) was enacted, New South Wales had promulgated its first criminal statute: the *Criminal Law (Amendment) Act, 1883* (NSW). By this time, the situation had become so dire that the Chief Justice of the Supreme Court of New South Wales was compelled to protest against having to administer an imperfect criminal law which was over 50 years old.<sup>25</sup>

In July 1870, a NSW Law Commission had been appointed to "inquire into the state of the Statute Law of this Colony and submit proposals for its revision, consolidation and

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<sup>23</sup> Stephens & Oliver, *supra* n.8 at iv. See for example, *Offences Against the Person Act, 1863* (Tas), 27 Vic., No. 5; *Criminal Law and Practice Statute, 1864* (Vic), 27 Vic., No. 233.

<sup>24</sup> For instance, the Bill was introduced in 1873, but the Attorney-General retired and the Bill was dropped. In 1874 the Bill made it to Committee stage, but the Government was turned out of office. For more detail, see New South Wales, Legislative Council, *Debates* (20 July 1881) at 221—222; Legislative Assembly, *Debates* (13 September 1882) at 388—389.

amendment”.<sup>26</sup> The inevitably slow process of the Commission’s reform work was criticised by the public and ridiculed by Parliament, and before too long, interest in the project dampened and eventually petered out.<sup>27</sup> Before its demise, the Commission having identified the criminal law as the most pressing subject for consideration, produced a draft Criminal Law Bill.<sup>28</sup> Not surprisingly, the *Offences Against the Person Act, 1861* (UK) and its sister Acts provided the foundation for the Bill.<sup>29</sup> Of the 464 clauses in the NSW Criminal Law Bill, over half were modelled on these statutes. However, the New South Wales Bill did contain several initiatives, some of which related to abortion and infanticide.

The New South Wales provisions on abortion were largely identical to sections 58 and 59 of the British statute.<sup>30</sup> One of the biggest points of departure lay in the prescribed punishments. When drafting the Bill in 1870, the Law Commissioners had specifically turned their mind to the “inequality — occasionally the inadequacy, and in some instances

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<sup>25</sup> C. H. Curry, “Influence of English Law Reformers of the Early Nineteenth Century on the Laws of New South Wales” (1937) 23 *Royal Australian Historical Society* 227 at 240.

<sup>26</sup> Stephens & Oliver, *supra* n.8 at iv.

<sup>27</sup> J. M. Bennett, “Historical Trends in Australian Law Reform” (1969-70) 9 *University of Western Australia Law Review* 211 at 213.

<sup>28</sup> *Consolidation of the Criminal Law, First Report From the Commissioners Appointed to Inquire Into Law Reform, Together with Draft Bill* (Sydney: Government Printer, 1871) at 5 (hereinafter *1870 Criminal Law Report*).

<sup>29</sup> *Accessories and Abettors Act, 1861* (UK), 24 & 25 Vic., c. 94; *Larceny Act, 1861* (UK), 24 & 25 Vic., c. 96; *Malicious Injuries to Property, 1861* (UK), 24 & 25 Vic., c. 97; *Forgery Act, 1861* (UK), 24 & 25 Vict., c. 98; *Coinage Offences Act, 1861* (UK), 24 & 25 Vic., c. 99.

<sup>30</sup> *Criminal Law (Amendment) Act, 1883* (NSW), ss. 55 & 56.

the undue severity — of punishments” contained in the British statutes.<sup>31</sup> Importantly, they stated that “in by far the greater number of instances, the punishments provided in the Bill are much below the English and our own existing scale”.<sup>32</sup> Notwithstanding this declaration, the penalties for all reproduction offences were actually greater in New South Wales.

As in Britain, an attempt to procure an abortion in New South Wales was a felony. Although the maximum penalty for this offence in Britain was greater than in New South Wales (life imprisonment versus penal servitude for ten years), the minimum penalty in NSW was harsher.<sup>33</sup> Moreover, for the closely aligned offence of supplying the means to procure an abortion, in NSW the penalty was five years penal servitude whereas in Britain it was three years.<sup>34</sup>

In terms of infanticide the New South Wales laws, although modelled on the British statute, were quite innovative. This is not surprising since by the 1870s, the issue of infanticide had

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<sup>31</sup> 1870 *Criminal Law Report*, *supra* n.28 at 6.

<sup>32</sup> *Ibid.*

<sup>33</sup> The minimum penalty in NSW was three years imprisonment, whereas in Britain it was two years imprisonment. *Criminal Law (Amendment) Act, 1883* (NSW), s. 8; *Offences Against the Person Act, 1861* (UK) s. 58.

<sup>34</sup> The minimum penalties in NSW were also harsher. In NSW the minimum penalty was imprisonment for one year, whereas in the U.K. there was no scripted minimum penalty. *Criminal Law (Amendment) Act, 1883* (NSW), ss. 8, 56, *Offences Against the Person Act, 1861* (UK), s. 59.

taken hold of popular consciousness.<sup>35</sup> In Britain, the concern had become so great that in 1873 the Infanticide Law Amendment Act Bill, designed to supplement the criminal law by specifically targeting infanticide, was introduced into Parliament.<sup>36</sup> Importantly, the Chief Justice of the New South Wales Supreme Court, the principal force behind the Criminal Law (Amendment) Bill, 1871 (NSW), reputedly viewed infanticide with particular vehemence. He had “with wonted volubility” denounced it as “pre-eminently the ‘growing crime’ of the country”.<sup>37</sup>

Following the New South Wales Law Commission’s recommendations, the distinction between infanticide and concealment was adopted into the *Criminal Law (Amendment) Act*, 1883 (NSW). As in Britain, infanticide remained a capital offence throughout this period. However, divergences in the statutes emerge over the approaches taken to the offence of concealment.

First, the penalty for concealing a birth in New South Wales was fixed at double that of the British penalty.<sup>38</sup> In addition, the New South Wales Parliament also enacted two sections on infanticide that had no precedent in British legislation. Section 11 of the *Criminal Law*

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<sup>35</sup> R. Sauer, “Infanticide and Abortion in Nineteenth Century Britain” (1978) 32: 1 *Population Studies* 81 at 85.

<sup>36</sup> Infanticide Law Amendment Bill, 1873 (UK) 36 & 37 Vic., British Parliamentary Papers, 1873(42) II. 163; Infanticide Law Amendment Bill, 1875 (UK) 38 Vic., British Parliamentary Papers, 1875.

<sup>37</sup> “The Chief Justice on Infanticide”, *The Empire*, May 12 1873.

(*Amendment*) Act, 1883 (NSW) was an attempt to clarify the case law that defined child murder. This section was aimed at ending “the minute disquisitions and inquiries hitherto attending these painful cases”.<sup>39</sup> At a time when medical science did not fully understand the complexities of pregnancy and the complications that could arise, and when infant mortality rates were still very high, establishing that a child had actually been murdered was fraught with difficulties of proof. Moreover, towards the middle of the century there was growing resistance to the use of the death penalty for this crime and every possible advantage was taken of the technicalities of proof to avoid the application of the law.<sup>40</sup> To secure a conviction for child murder, it was necessary for the prosecution to prove not only that the child had lived but also that it did so separated from its mother.<sup>41</sup> And “separate

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<sup>38</sup> *Offences Against the Person Act, 1861* (UK), s. 60; *Criminal Law (Amendment Act) 1883* (NSW), s. 57.

<sup>39</sup> Stephens & Oliver, *supra* n.8 at 10.

<sup>40</sup> Conviction rates and sentences imposed for infanticide during the nineteenth century were significantly mitigated due to sympathy for the defendant woman. D. S. Davies has argued that juries were cognisant of the social realities that often drove women to commit the crime — the stigma attaching to illegitimate births and the lack of any viable alternatives. As a consequence, there was a growing resistance to the crime’s capital offence status. As early as 1866 the UK Royal Commission on Capital Punishment had recognised that the law in relation to infanticide had completely broken down and that the law was divorced from public opinion. D. S. Davies, “Child Killing in English Law” (1937) 1 *Modern Law Review* 203 at 211, 222. See also Sauer, *supra* n.35. For evidence of a similar phenomenon in Canada see C. Backhouse, “Desperate Women and Compassionate Courts: Infanticide in Nineteenth Century Canada” (1984) 34 *University of Toronto Law Journal* 448; and for Australia see J. A. Allen, “Octavius Beale Reconsidered: Infanticide, Baby Farming and Abortion in NSW, 1880 – 1939” in Sydney Labour History Group, *What Rough Beast? The State and Social Order in Australian History* (Sydney, Allen & Unwin, 1982).

<sup>41</sup> Davies, *supra* n.40 at 206.

existence” had been judicially defined to the point of excess.<sup>42</sup> As Lionel Rose stated, “the separate existence rule in England was a godsend to uneasy medical witnesses and juries”.<sup>43</sup>

Closely connected with the question of severance was that of independent circulation of the child. Judges held in the earlier half of the nineteenth century that the child would only be considered alive if the umbilical cord had been severed and the child therefore had an independent circulation.<sup>44</sup> In an attempt to counter such precedent, section 11 provided that on the trial of any person for child murder, the child would be held to have been born alive if it had breathed, and have been wholly born into the world, whether it had an independent circulation or not.<sup>45</sup> In discarding this requirement for independent circulation, New South Wales could have been following a recommendation of a British Royal Commission that the British Parliament itself had evidently ignored.<sup>46</sup>

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<sup>42</sup> For example, if the child had been killed before the leg was fully expelled from the mother, there was no crime. Sauer, *supra* n.35 at 82.

<sup>43</sup> Rose, *supra* n.7 at 74.

<sup>44</sup> Davies, *supra* n.40 at 207.

<sup>45</sup> *Criminal Law (Amendment) Act, 1883* (NSW) s. 11. The wording of this section was a considerable improvement on the first draft in 1871 which, it seems, was a very confusing attempt to achieve the same effect.

<sup>46</sup> The British Criminal Law Commissioners had stated in their 1846 report that they preferred the view that severance need not have occurred. Davies, *supra* n.40 at 206. While the draftsmen of the *Offences Against the Person Act, 1861* (UK) did not heed this recommendation, those drafting the Infanticide Bills in 1873 and 1875 may have. These Bills purported to remove this aspect of the criminal law. Infanticide Law Amendment Bill, 1875 (UK), cl. 4.

The other new provision enacted in New South Wales stated that if a person was found to have inflicted grievous bodily harm upon a child, during or after birth, they faced fourteen years penal servitude. The same section also provided that if it was shown that a mother, indicted for the child's murder, had wilfully contributed to her child's death, or there was a mark of violence on the child, she was liable to servitude for ten years.<sup>47</sup> This section appears to have provided another alternative to a murder charge. Contemporary commentary stated that this section was framed in part on the British Infanticide Bill, yet the New South Wales provision was certainly broader in its application.<sup>48</sup> The ambit of the first half of the section extended to "any person", thereby encompassing midwives or fathers. Moreover, pursuant to the second half of the section that related specifically to mothers, "any mark of violence wilfully caused" on the child was sufficient to convict the mother of this offence. No British legislative instrument contained anything as broad as either of those provisions.

The New South Wales legislature also enacted other variations on British precedent. For instance, to establish the crime of concealment, the British statute required that the defendant must have attempted to conceal the birth of a child "by any secret disposition of

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<sup>47</sup> *Criminal Law (Amendment) Act, 1883* (NSW), s. 58.

<sup>48</sup> Stephens & Oliver stated that the section was based on an Infanticide Bill introduced by Russell Gurney in 1865, yet British Parliamentary records reveal that no such Bill was introduced in that year. Stephens & Oliver, *supra* n.8 at 27.



the dead body”.<sup>49</sup> In other words, to constitute the offence, there had to have been a concealment of the birth and that concealment had to be carried out by secret disposition of the dead body.<sup>50</sup> Old case law shows that “secret disposition” was an essential element of the offence.<sup>51</sup> Leaving the dead body of a child in two boxes, closed but not locked, one inside the other, but in a position as to attract the attention of those who daily resorted to the room was not held to be a secret disposition of the body, and did not therefore constitute the offence of concealment.<sup>52</sup> Although necessary to the operation of the section in the United Kingdom, this aspect of the offence was omitted from the New South Wales statute. Section 57 simply required concealment or an attempt to conceal the fact of the birth, presumably in an attempt to alleviate some evidential burden.<sup>53</sup>

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<sup>49</sup> *Offences Against the Person Act, 1861* (UK), s. 60.

<sup>50</sup> *Warburton's Leading Cases on the Criminal Law*, 4<sup>th</sup> ed., (London: Stevens and Stevens, 1908) at 288.

<sup>51</sup> *R v. Sleep* (1864) 9 Cox C.C. 559: the dead body of a child was placed in an open box in the bedroom. Byles J directed the jury that secrecy was the essence of the case, and the defendant was therefore found not guilty. In *R. v. Derham* (1843) 1 Cox. C.C. 56, Coleridge J held that giving birth to the child in the privy and leaving the child in the dirt of the privy was not an “act” of burying or disposing as contemplated by the legislation. See also, *R. v. Brown* (1870) L.R. 1 C.C.R. 244. H. H. Woolych stated that the evidence necessary to support the charge was that the child was dead, that the woman failed to give proper publicity to her delivery as well as some act of disposal of the body. W. H. Woolrych, *The Criminal Law* (London: Shaw & Sons, 1862) at 869.

<sup>52</sup> *R. v. George* (1868) 11 Cox C.C. 41. In a strange twist of logic, it was held that the defendant had placed the body in the boxes as a way of attracting attention. This kind of decision is indicative of the judicial manoeuvring that so often acquitted infanticidal mothers as discussed above at footnote 40.

<sup>53</sup> This wording was present in the original Criminal Law (Amendment) Bill, 1871 (NSW), thus it is conceivable that NSW was following the British Criminal Code Bill. However, although the Code Bill removed the requirement for “secret disposition”, it still required the disposal of the body in “any manner with intent to conceal” which the NSW legislation did not. Criminal Code (No. 2) Bill 1880 (UK), cl. 522. See also Davies, *supra* n.40 at 275.

The New South Wales Legislative Assembly also subtly re-worded the abandonment provision. The *Offences Against the Person Act, 1861* (UK) held that a person abandoning or exposing a child under two years of age, where its life or health was permanently injured, was guilty of a misdemeanour.<sup>54</sup> In its adoption of this section, the NSW legislature had replaced the word “permanently” injured with “seriously” injured.<sup>55</sup> Whether this made any material difference in the judicial application of the section is difficult to gauge. However, when read in context of the concealment provisions, one can assume that this alteration was another attempt by Parliament to facilitate the prosecution of these crimes.<sup>56</sup>

In contrast to New South Wales, the reproduction-related offences in the Canadian *Offences Against the Person Act, 1869* (Ca) were near verbatim replicas of the British sections.<sup>57</sup> Desmond Brown has stated that after confederation of Canada in 1867, one of Sir John A. Macdonald’s major tasks was to engender a sense of national unity among Canadians, and that this was largely to be accomplished by establishing a common, national criminal law.<sup>58</sup> Due to this imperative, Macdonald’s criminal law draftsmen had neither the time to re-cast the Imperial statutes that served as their model, nor the authority to make any significant

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<sup>54</sup> *Offences Against the Person Act, 1861* (UK) s. 27.

<sup>55</sup> Stephens & Oliver, *supra* n.8 at 16.

<sup>56</sup> The penalty for abandoning a child was also harsher in New South Wales than in Britain. In NSW, the maximum penalty stood at five years penal servitude, in the UK it was three years penal servitude. *Criminal Law (Amendment Act), 1883* (NSW), s. 30; *Offences Against the Person Act, 1861* (UK), s. 27.

<sup>57</sup> *Offences Against the Person Act, 1869* (Ca), 32 & 33 Vic., c. 20.

changes to style or content.<sup>59</sup> As a consequence, the resulting criminal legislation was essentially a duplication of the British Acts of 1861.<sup>60</sup>

While the 1869 Act is notable for its lack of innovation, the *Criminal Code, 1892* (Ca) is remarkable for its ingenuity.<sup>61</sup> All of the existing reproduction offences were expanded and several new provisions were incorporated into the *Code*, particularly and more significantly, in relation to abortion and contraception. In fact, Shelley Gavigan has stated that the effect of the *Code* was to legislatively cover all aspects of fertility control.<sup>62</sup>

Given this substantial expansion into regulating Canadian women's reproduction, it is intriguing that there was almost no parliamentary debate, in either the House of Commons or the Senate on any of these provisions.<sup>63</sup> Although the lack of debate is largely due to the

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<sup>58</sup> Brown, *supra* n.7 at 92. See also C. Strange & T. Loo, *Making Good: Law and Moral Regulation in Canada, 1867 – 1939* (Toronto: University of Toronto Press, 1997) at 19.

<sup>59</sup> Brown has noted that little effort was made to cull the superfluous sections from the legislation and that in fact, the legislation even contained provisions that were *ultra vires* the dominion Parliament. *Ibid.*, at 93, 97.

<sup>60</sup> In terms of the reproduction offences, there was only a minor difference in the penalty for supplying the means to procure an abortion. The Canadian punishment was established at two years imprisonment rather than three years as it was in the U.K. legislation. Backhouse stated that this followed the New Brunswick penalty for the offence. Backhouse, *Involuntary Motherhood*, *supra* n.40 at 76.

<sup>61</sup> *Criminal Code, 1892*, 55-56 Vic., c. 29 (Ca).

<sup>62</sup> S. A. M. Gavigan, "On 'Bringing on the Menses': The Criminal Liability of Women and the Therapeutic Exception in Canadian Abortion Law" (1986) 1 *Canadian Journal of Women and the Law* 279 at 296. The prohibition on contraception is discussed in Chapter Three, part two.

<sup>63</sup> Other parliamentary sources are almost non-existent – most were destroyed in the Parliamentary fire of 1916 and any correspondence which may shed light on these reforms is housed at the Department of Justice and is not accessible to the general public. Moreover, there was very little extra-parliamentary comment about the drafting of the *Code*. Neither newspapers nor legal journals took any real interest in the *Code*. For more

circumstances of the *Code's* promulgation,<sup>64</sup> the dearth of contemporary parliamentary sources has meant that an explanation for the introduction of the fertility provisions remains obscured.

The 1892 *Code* implemented several changes to the law on infanticide. Importantly, it maintained infanticide as a capital offence, resisting British moves that had begun to distinguish the crime from murder.<sup>65</sup> In fact, the technicalities of proof for the crime were significantly simplified by dispensing with the requirement of showing whether the child had breathed or whether it had a separate existence.<sup>66</sup> The opposition voiced by Mr Mills in the debates on this section highlights that, for some, this was a provocative move. Mills took exception to dispensing with the test of whether the child had breathed as a means of determining whether it had lived.<sup>67</sup> Despite his protests, the clause was passed without amendment.

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detail, see Desmond Brown's bibliographical note. Brown, *supra* n.7 at 173-179. See also above at the Introduction.

<sup>64</sup> Aware of the fate that had befallen the British Code of the previous decade, Sir John Thompson pushed the Bill through the Canadian Parliament with very little opportunity for debate in an attempt to secure its passage. R. C. Macleod, "The Shaping of Criminal Law, 1892 – 1902" (1978) 70 *Historical Papers* 64 at 65.

<sup>65</sup> *Criminal Code, 1892* (Ca), ss. 218, 219, 231. The Criminal Code (No. 2) Bill, 1880 (UK) included a separate offence of infanticide whereby a mother was guilty only of manslaughter if she had committed the act "deprived of the ordinary power of self control, by reason of physical or mental suffering or distress". Consequently, infanticide was not classed as a capital offence and was punishable by penal servitude. Criminal Code (No. 2) Bill 1880 (UK), cls. 512, 513. British Parliamentary Papers, 1880 (vcl) II. 409.

<sup>66</sup> *Criminal Code, 1892* (Ca), s. 219. While the Criminal Code (No. 2) Bill, 1880 (UK) had simplified the test even further and stated that it was not necessary to prove that the child was born alive, it also stated that the child "shall be presumed to have been so born alive, unless and until the contrary be shown". Criminal Code (No. 2) Bill, 1880 (UK), cl. 513(a).

<sup>67</sup> Canada, House of Commons, *Debates* (25 May 1892) at 2978 (Mr Mills).

In addition to the familiar provisions establishing the concealment offence,<sup>68</sup> section 239 imposed a positive duty on women to obtain assistance during childbirth. Under this section, a woman was guilty of an indictable offence if “being with child and about to be delivered, [she] neglects to provide reasonable assistance in her delivery [and] the child is permanently injured thereby, or dies”. If the requisite intent could be established, the woman was liable for life imprisonment.

It was the Canadian provisions relating to abortion, however, that diverged most significantly from established British precedent. Pursuant to the *Offences Against the Person Act, 1861* (UK), women performing abortions on themselves or others who performed it for them were liable to the same punishment — life imprisonment.<sup>69</sup> The *Criminal Code, 1892* (Ca) however introduced differential penalties, reducing the sentence for self-induced abortions to seven years imprisonment.<sup>70</sup> Constance Backhouse has suggested that this was not indicative of softening attitudes; rather, this lesser penalty was an attempt by legislators to surmount the reluctance of prosecutors to try, and juries to convict women for this crime.<sup>71</sup>

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<sup>68</sup> *Criminal Code, 1892* (Ca), s. 240.

<sup>69</sup> Criminal Code (No. 2) Bill, 1880 (UK) cl. 520 also maintained equal penalty provisions.

<sup>70</sup> *Criminal Code, 1892* (Ca), ss. 272 & 273.

The closely aligned section 271 reinforced the legitimacy of this interpretation. Pursuant to this section, any person was guilty of an indictable offence who “causes the death of any child which has not become a human being, in such a manner that he [sic] would have been guilty of murder if such a child had been born”. The inclusion of this provision is a little puzzling: it seems unlikely that the *Code* would contain two sections relating to procuring an abortion, particularly as section 272 explicitly prohibited third parties from procuring an abortion. Given that neither “abortion” nor “miscarriage” were defined in the legislation, this section seems to be ensuring that even abortions conducted late in pregnancy fell within the jurisdiction of the criminal law.<sup>72</sup>

Non-pregnant women were now also included within the ambit of this law. Again diverging from British precedent, the *Code* stipulated that it was an offence for a woman to attempt to procure her own miscarriage “whether with child or not”.<sup>73</sup> This expansion challenges the insistence that the abortion prohibition was intended to protect the foetus, for obviously in the non-pregnant woman, there was no foetus to protect. Instead, Shelley Gavigan has

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<sup>71</sup> Backhouse, *Involuntary Motherhood*, *supra* n.40 at 111.

<sup>72</sup> J. J. Lederman, “Therapeutic Abortion and the Canadian Criminal Code” (1963/64) 6 *Criminal Law Quarterly* 36 at 42.

<sup>73</sup> *Criminal Code*, 1892 (Ca), s. 273. Both the *Offences Against the Person Act*, 1861 (UK) and the Criminal Code (No. 2) Bill, 1880 (UK) required the woman to be pregnant before the crime could be committed.

stated that it can be interpreted as a widening of state control over women's sexuality and reproduction.<sup>74</sup>

The Canadian criminal reproduction laws can be differentiated from other jurisdictions in one final way. Contrary to the British legislation, it was sufficient for a woman to be guilty of attempting to procure an abortion if she *permitted* poison to be administered or an instrument to be used.<sup>75</sup> This potentially covered more passive situations in which women were not the active agent, but were still complicit in the offence.

The Canadian criminal law's new emphasis on eradicating abortion is instructive. It reveals how since the middle years of the nineteenth century when the British and New South Wales statutes were first drafted, the focus for legislative concern had enlarged, and in a sense shifted, from infanticidal offences to abortion. As early as 1875 the principal Canadian medical journal, the *Canada Lancet*, alerted the profession to the prevalence of abortion.<sup>76</sup> In 1889, it stated that "it is pretty well known, not only to the profession, but to the laity, that these criminals practice their nefarious trade among us with comparative

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<sup>74</sup> Gavigan, *supra* n.62 at 297.

<sup>75</sup> *Criminal Code, 1892* (Ca), s. 273. This provision was originally introduced by the *Offences Against the Person Act, R.S.C 1886*, c. 162, s. 47. It was probably based on the Criminal Code (No. 2) Bill, 1880 (UK), cl. 520 which also contained this expression. British Parliamentary Papers, 1880 (vcl) II. 411.

<sup>76</sup> McLaren & McLaren, *supra* n.13 at 26.

impunity”.<sup>77</sup> The development of techniques that made abortion a less frightening procedure and potentially less deadly meant that resorting to infanticide became less and less necessary, until, by the next century, infanticide was no longer seen as a major problem.<sup>78</sup> While infanticide still warranted a variety of provisions and even supplementary legislation (as evidenced in the *Children’s Protection Acts* discussed below), the new “problem” of abortion had clearly captured the attention of politicians. As infanticide receded from public attention, abortion replaced it as a subject of concern,<sup>79</sup> and was obviously seen as necessitating a large degree of legislative innovation and intervention.

Given the potential for expanding the reproductive laws as exemplified by the Canadian initiatives, it is surprising that when New South Wales consolidated its criminal legislation in 1900, it made no changes to these laws (or to any other aspect of the criminal law). Although the sections relating to abortion and infanticide were reorganised in the *Crimes Act, 1900* (NSW), the consolidation process did not affect the substantive aspects of these provisions.<sup>80</sup> Despite the fact that around the same time the British Parliament had increased the penalties for these crimes, the New South Wales legislature maintained the

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<sup>77</sup> *The Canada Lancet*, March 1889 at 217.

<sup>78</sup> Sauer, *supra* n.35 at 92.

<sup>79</sup> *Ibid.*, at 91.

<sup>80</sup> The abortion provisions were expanded from two sections into three. The infanticide and concealment provisions were re-numbered. *Crimes Act, 1900* (NSW), ss. 82, 83, 84; ss. 21, 22, 85.



penalties as established in 1871.<sup>81</sup> Paradoxically then, although New South Wales was initially more strident in its condemnation of reproduction-related crime, its position was soon surpassed by other approaches. As a consequence, a narrow analysis of the law at the turn of the century could give the impression that New South Wales was less inclined to circumscribe reproductive autonomy, particularly when compared with the Canadian initiatives. Yet the series of parliamentary endeavours explored below negates this view. The New South Wales criminal law was simply a product of its time. Hypothetically, had the criminal law been substantively redrafted at the end of the century, like the Canadian law, it too could have formed part of the trend of increasing legal intervention in reproductive matters. In other words, it too could have been subject to the emerging influences that helped shape the *Code*. Yet the reproduction-related offences did not undergo revision (and still have not even to this present day). Consequently, New South Wales simply manifested its legal intervention through alternative means, starting with the *Children's Protection Act, 1892* (NSW).

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<sup>81</sup> The combined effect of the *Statute Law Revision Acts* of 1892 and 1893 (UK) raised the minimum penalty for procuring a miscarriage in Britain. These amending statutes erased any discretion from the judge, leaving penal servitude for a minimum of three years, if not life, as the penalty for procuring an abortion. Similarly, if convicted of supplying instruments or poison, the penalty was limited to penal servitude. *Statute Law Revision Act, 1892* (UK), 55 & 56 Vic. c. 19; *Statute Law Revision Act, 1893* (UK), 56 & 57 Vic., c. 54.

***“That’s what you get for obliging people”:<sup>82</sup> Children’s Protection Acts***

In the quiet of the bedroom we raise the box-lid ... By the canal side, or in the water, we  
find the dead child. In the solitude of the wood...<sup>83</sup>

Towards the end of the nineteenth century, infanticide in the settler colonies had adopted a new identity — “baby farming”. Viewed at its best, baby farming was a crude form of child-care for working class women often unable to take children to their workplaces. At its worst, baby farms were typically dumping grounds for unmarried women attempting to avoid scandal, or for those who simply did not have the means to provide for another child.<sup>84</sup> Parents would pay either a regular maintenance fee or a lump sum in exchange for the child being reared by another woman or couple. As a means of maximising profits, infants were often raised on such meagre diets that premature death was disturbingly common.<sup>85</sup> In some cases, particularly after the payment of a lump sum, children were

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<sup>82</sup> While in custody, John Makin, the notorious Australian baby farmer convicted for murder, is reputed to have remarked, “that’s what you get for obliging people”. *R v. Makin* (1893) 14 N.S.W.L.R. 1 at 10.

<sup>83</sup> W. B. Ryan, *Infanticide, its Law, Prevalence, Prevention and History* (London: 1862) quoted in K. Laster, “Infanticide: Litmus Test for Feminist Criminology Theory” (1989) 22:3 *Australian and New Zealand Criminology Journal* 151 at 155.

<sup>84</sup> K. Laster, “Frances Knorr: ‘She Killed Babies Didn’t She?’” in M. Lake & K. Farley, eds., *Double Time: Women in Victoria – 150 Years* (Ringwood, Penguin Books, 1985) at 150.

<sup>85</sup> G. Davison, *The Rise and Fall of Marvellous Melbourne* (Melbourne: Melbourne University Press, 1978) at 225.

murdered.<sup>86</sup> The mother who gave away her child knew that there was little chance for its survival.<sup>87</sup> In Montreal for example, one newspaper claimed that 96 percent of foundlings who were farmed out soon died.<sup>88</sup>

This part of this chapter examines the *Children's Protection Acts* in New South Wales and Ontario. As part of the increasing trend towards regulating mothers and children, these statutes exemplify the ways in which maternity could be controlled in ways other than through the criminal law. Importantly, these statutes signal a legislative shift: they were unmistakable interventions in the "domestic sphere". The legislation was fundamentally humanitarian in its objective. Yet, because the legislative aims clearly intersected with issues of reproduction, the conventional assessment of these laws as part of the infant welfare movement can be supplemented,<sup>89</sup> and can also be critically analysed from the perspective of fertility control.

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<sup>86</sup> K. Laster, "Arbitrary Chivalry: Women and Capital Punishment in Victoria, 1842 – 1867" in D. Philips & S. Davies, eds., *A Nation of Rogues? Crime, Law and Punishment in Colonial Australia* (Melbourne: Melbourne University Press, 1994) at 175.

<sup>87</sup> Laster, *Litmus Test*, *supra* n.82 at 154.

<sup>88</sup> P. Ward, "Unwed Motherhood in Nineteenth-Century English Canada" (1981) *Historical Papers* 34 at 53.

<sup>89</sup> Baby farming legislation is only one aspect of the child welfare movement that gathered momentum in the late nineteenth and early twentieth centuries. For details on this broader social movement see, for example, D. Chunn, *From Punishment to Doing Good: Family Courts and Socialised Justice in Ontario, 1880 - 1940* (Toronto: University of Toronto Press, 1992). See also E. Deacon, "The Promotion of Child Welfare in Victoria by Means of Legislative Intervention, 1870 – 1907" in D. Kirkby, ed., *Law and History in Australia*, vol. 4 (Melbourne: La Trobe University, 1987).

Not surprisingly, baby farming caused considerable public and parliamentary concern in nineteenth-century Australia and Canada. In Australia, New South Wales and Victoria passed legislation targeting baby farmers in the early 1890s.<sup>90</sup> With the exception of Ontario, similar legislative initiatives were not pursued in Canada until the end of that century. Not only did Ontario's legislation pre-date most other provincial attempts by at least a decade,<sup>91</sup> it was also more comprehensive.<sup>92</sup> One explanation is that as the "industrial and cultural prototype for a modern Canada",<sup>93</sup> Ontario was the first province to experience the full impact of modernising forces, thereby producing conditions that contributed to the greater incidence of infanticide and baby farming in Ontario's cities.<sup>94</sup>

Where the state had once turned a discreet eye from reproduction crime, the 1890s was a boom decade for the prosecution and punishment of women in Australia.<sup>95</sup> Three of the five executions of women in Victoria's history were conducted in the mid-1890s. Further, the

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<sup>90</sup> Queensland passed a similar statute in 1905. See *Infant life Protection Act, 1905* (Qld) 3 Edw. III, No. 19.

<sup>91</sup> See for example *Children's Protection Act, 1901*, c. 9 (B.C.); *Children's Protection Act, 1908*, c. 31 (Sask); *The Maternity Act, 1899*, c. 21 (Man.); *An Act for Provide for the Licensing of Boarding Houses for Infants under Twelve years of Age, 1897*, c. 40 (N.S.).

<sup>92</sup> The Nova Scotian legislation, for example, although targeting a similar problem was not nearly as comprehensive. *An Act for Provide for the Licensing of Boarding Houses for Infants under Twelve Years of Age, 1897* (N.S.).

<sup>93</sup> C. R. Comacchio, *Nations are Built of Babies: Saving Ontario's Mothers and Children, 1900 – 1940* (Montreal: McGill–Queen's University Press, 1993) at 14.

<sup>94</sup> A number of factors combined to increase the rate of infanticide and baby farming in the cities. For instance, the greater opportunity for women to work meant increased reliance on baby farms for day care; there was greater freedom for unchaperoned courting and sexual liaisons; and importantly, there was a greater extent of poverty. Judith Allen has also suggested that secret disposal of babies was also easier in rural areas, lessening the chance of discovery. Allen, *Octavious Beale*, *supra* n.40 at 115.

number of women being charged with capital offences in Victoria rose by 10% for this period: their offences largely reproduction-related crimes.<sup>96</sup> Both New South Wales and Victoria had witnessed sensational baby farming trials during the 1890s. Frances Knorr was hanged in Melbourne for the murder of three infants in her care.<sup>97</sup> In Sydney, John and Sara Makin were tried for the murder of an infant. During the hearing, evidence of another seventeen infant deaths was tendered, those decomposing bodies having been found in the Makins' previous residences.<sup>98</sup> John Makin was hanged and his wife was imprisoned for fourteen years.<sup>99</sup>

The *Children's Protection Act, 1892* (NSW) and the *Protection of Infant Children Act, 1887* (Ont.) grew out of the growing concern about the rate of infanticide and the practice of baby farming in the colonies.<sup>100</sup> Relying on the *Infant Life Protection Act, 1872* (UK) as a model,<sup>101</sup> these Acts attempted to regulate infants' nursing homes through a registration system. People who kept houses for the reception of children for reward were required to register with the authorities. Once registered, those homes were obliged to record details of

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<sup>95</sup> R. Douglas & K. Laster, "A Matter of Life and Death: The Victorian Executive and the Decision to Execute, 1842 - 1967" (1991) 24 *Australian and New Zealand Journal of Criminology* 144 at 152.

<sup>96</sup> Laster, *Arbitrary Chivalry*, *supra* n.86 at 171.

<sup>97</sup> For more detail see Laster, *Frances Knorr*, *supra* n.84.

<sup>98</sup> *R v. Makin* (1893), 14 N.S.W.L.R. 1.

<sup>99</sup> J. A. Allen, *Sex and Secrets: Crimes Involving Australian Women Since 1880* (Melbourne: Oxford University Press, 1990) at 35. See also R. Teale, *Colonial Eve: Sources on Women in Australia, 1788 - 1914* (Melbourne: Oxford University Press, 1978) at 138.

<sup>100</sup> For detail about the equivalent Victorian legislation, see Deacon, *supra* n.89.

<sup>101</sup> *Protection of Infant Life Act, 1872* (UK), 35 & 36 Vic., c. 38.

each child in their care and were also liable to inspection. Importantly, the authorities had to be notified within twenty-four hours of any infant death.<sup>102</sup>

In 1885, the Ontario Board of Health presented to its provincial government *A Report on Infanticide*.<sup>103</sup> The most striking feature of this short report is its statement that “infanticide rarely occurs in this province”.<sup>104</sup> It noted that in 1882 the Registrar-General had recorded one instance of infanticide while only two cases of the crime had been reported in the newspapers that summer. It is difficult to judge whether the Board of Health was actually convinced that Ontario women possessed more “humane feelings” than other women and that infanticide was therefore not a problem,<sup>105</sup> but subsequent historical research has shown that it was mistaken. Between 1877 and 1894, fifty-three known or suspected infanticides were investigated in the Toronto region,<sup>106</sup> while the annual number of infants found dead in rubbish heaps, privies, and vacant lots often exceeded thirty.<sup>107</sup> As Peter Ward wrote, “these statistics leave the unmistakable impression that the wilful destruction

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<sup>102</sup> *Children's Protection Act, 1892* (NSW), ss. 2, 4, 6; *An Act for the Protection of Infant Children, 1887*, c. 36 (Ont) ss. 4, 8, 9.

<sup>103</sup> *Report on the Advisability of Taking Precautions to Prevent Infanticide in this Province And Also Suggesting the Best Means by Which the Present Large Mortality Among the Foundlings Of This Province May Be Diminished* (1886) 74 Ontario Sessional Papers 128 – 132 [hereinafter *Report on Infanticide*].

<sup>104</sup> *Ibid.*, at 128.

<sup>105</sup> *Ibid.*

<sup>106</sup> Ward, *supra* n.88 at 45.

<sup>107</sup> C. Strange, *Toronto's Girl Problem: The Perils and Pleasures of the City, 1880 – 1930* (Toronto: University of Toronto Press, 1998) at 73.

of infant lives often occurred in Victorian English Canada".<sup>108</sup> Despite its erroneous assumption about infanticide, the *Report* surprisingly recommended the introduction of legislation like the British *Infant Life Protection Act, 1872* (UK). The Ontario Parliament followed this recommendation strictly and in 1887 duplicated the *Infant Life Protection Act, 1872* (UK) into its own statute books with almost no alterations at all.<sup>109</sup>

While New South Wales and Victoria also relied on the British statute as a model, both legislatures enlarged its operational framework. For instance, the British legislation only required registration if *more* than one child was being cared for. New South Wales expanded this to include the fostering of *any* child.<sup>110</sup> NSW also framed the legislation to include the care-givers of infants under the age of three, rather than one year of age.<sup>111</sup> A person registered in NSW was also required to notify the authorities of any change of residence.<sup>112</sup> Moreover, while the penalty in NSW was a £100 fine or one-year imprisonment for a breach of its provisions, the British statute only imposed a fine of £5 or 6 months imprisonment.<sup>113</sup>

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<sup>108</sup> Ward, *supra* n.88 at 45.

<sup>109</sup> *An Act for the Protection of Infant Children, 1887* (Ont.) 50 Vic, c. 36.

<sup>110</sup> *Protection of Infant Life Act, 1872* (UK), s. 2. *Children's Protection Act, 1892* (NSW), s. 1. The Victorian provision also stipulated *any* child: *Infant Life Protection Act, 1890* (Vic), s. 4.

<sup>111</sup> *Children's Protection Act, 1892* (NSW), s. 1. In Victoria, it was expanded to two years: *Infant Life Protection Act 1890* (Vic), s. 4.

<sup>112</sup> *Children's Protection Act, 1892* (NSW), s. 3. This section seems aimed at countering another *Makin*-like scenario.

<sup>113</sup> *Protection of Infant Life Act, 1872* (UK), s. 9. *Children's Protection Act, 1892* (NSW), s. 1. In Victoria, the penalty was imprisonment for 6 months or a £25 fine: *Infant Life Protection Act, 1890* (Vic), s. 4.

The *Infant Life Protection Act, 1872* (UK) had proved itself to be quite ineffective in halting the malpractice of British baby farms but despite lobbyists' continued efforts to strengthen the infant life protection legislation, an amending statute was not passed until 1897.<sup>114</sup> The *Infant Life Protection Act, 1897* (UK) was more comprehensive than the 1872 statute, but overall the New South Wales legislation still remained more rigorous.<sup>115</sup> The difference in the approaches is exemplified in the statutory position on adoption. NSW had expressly forbidden lump sum fees in exchange for adoption services.<sup>116</sup> By prohibiting payment by anything other than periodical instalments, the legislation clearly removed one of the biggest incentives for the early death of a child. The revised British statute on the other hand still permitted lump sum payments. Authorities did have to be notified, but only if the sum was less than £20.<sup>117</sup>

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<sup>114</sup> The Infant Life Protection Society tried several times during the 1870s to introduce an Infanticide Act as well as an Infant Life Protection Bill in 1890 (UK). For more detail on the British infant life protection movement, see Rose, *supra* n.7 at 108-119.

<sup>115</sup> *Infant Life Protection Act, 1897* (UK) 60 & 61 Vic., c. 57.

<sup>116</sup> *Children's Protection Act, 1892* (NSW), s. 1. The Queensland Act similarly required payments to be made periodically. *Infant Life Protection Act, 1905* (Qld), s. 6(2).

<sup>117</sup> *Infant Life Protection Act, 1897* (UK) s. 5. Rose has stated that this figure was a result of British class assumptions that only in cheap, "low class adoptions" was the child really at risk. Rose, *supra* n.7 at 161.



Scandals like the Lace Baby Farm in Toronto in 1894 had revealed that the *Protection of Infant Children Act, 1887* (Ont.) was ineffective.<sup>118</sup> The *Maternity Boarding Houses Act, 1897* (Ont.) was the Legislative Assembly's attempt to ameliorate some of the statutory problems.<sup>119</sup> One of the more important initiatives in the new legislation was that every birth taking place in such homes or hospitals was required to be attended by a medical doctor, demonstrating the distrust that had grown around mothers and mid-wives.<sup>120</sup> Like New South Wales, the legislation also now prohibited retaining *any* child for reward without a licence.<sup>121</sup> Children of such houses were forbidden to be adopted out except with the consent of a children's aid society or other charitable institution, and, it was an offence to advertise adoption services or to "hold out inducements to parents to part with their offspring".<sup>122</sup>

In the 1893 *State Children's Report* (NSW), Mr Trickett, MLA, stated of the *Children's Protection Act, 1892* (NSW) that "great additional protection has, under its provisions, been

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<sup>118</sup> Six small children were found in the care of a woman on Gladstone Avenue, Toronto. Two of the children were found in a condition that was an "outrage to common humanity. The infant was in a dying condition... The little girl was frantic with vermin". *Globe*, 12 September 1894.

<sup>119</sup> *An Act to Regulate Maternity Boarding Houses and for the Protection of Infant Children Act, 1897* (Ont.) 60 Vic., c. 52. This legislation is also discussed in Chapter Three, part four.

<sup>120</sup> *An Act to Regulate Maternity Boarding Houses and for the Protection of Infant Children Act, 1897* (Ont.), s. 8.

<sup>121</sup> While the U.K. legislation had elevated the age of child to five, Ontario still limited its applicability to those children under the age of one. In contrast, the legislation in Nova Scotia required a license when keeping of any child under the age of twelve. *An Act to Provide for Licensing Boarding Houses for Infants Under Twelve Years of Age, 1897* (N.S.), s. 1.

afforded to infant life ... baby farming does not now exist to any large extent in the thickly populated districts".<sup>123</sup> He noted that the penalties for those prosecuted had been very heavy both in fines and imprisonment, and that the Child Protection Offices were acting as a wholesome deterrent for potential offenders. He further announced that over two hundred infant homes and almost fifty lying-in homes had been registered under the new legislation. In contrast, Judith Allen's research has indicated that from the passage of the Act until 1899, only fifty-nine breaches of the Act were prosecuted, most of which were disposed through fines in the Sydney lower courts. Further, given the high rate of infant mortality, both legitimate and illegitimate child-minders had incentives not to register, and without that initial act of registration, the Act was useless.<sup>124</sup> Based on this data, Trivett's proclamation appears to be an exercise of parliamentary self-congratulation. Nonetheless, it evinces the strong belief in the palliative power of law and the concomitant benefits that it endowed on the community. At least in the eyes of this legislative body, the law was an effective means to produce change in the arena of reproduction — a notion that remained robust throughout this period.<sup>125</sup>

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<sup>122</sup> *An Act to Regulate Maternity Boarding Houses and for the Protection of Infant Children Act, 1897* (Ont.), ss. 9, 10.

<sup>123</sup> New South Wales, *State Children's Relief Department Report* (Sydney: Charles Potter, Government Printer, 1893) at 3.

<sup>124</sup> Allen, *Sex and Secrets*, *supra* n.99 at 35-6.

<sup>125</sup> See below at Chapter Three, part three for further demonstration of this.

The heightened awareness of infant mortality and the legislation enacted to counter it are symptomatic of a broader, growing recognition about the welfare of the child. This legislation was fundamentally humanitarian in its objective and was aimed at saving infant life. At the same time however, critical analysis of this legislation, and importantly the rationale behind it, reveals two important themes that characterise legislative thinking during this period. First, culpability was ascribed solely to the women involved — mothers and mid-wives — without any recognition of the greater social problems that fostered infanticide. The Chairman of the Select Committee on the Children's Protection Bill posed the following question: "Do you think that women are wicked enough to make away with children in order to save themselves the expense of maintaining them?".<sup>126</sup> Although framed as a query, the Chairman's question is indicative of the damning presumptions held by many politicians. Through all the deliberations of the NSW Parliament and the Select Committee on the Children's Protection Bill, only one man, Edmund Fosbery, Inspector-General of Police for NSW, hinted at the need for a more fundamental solution to the problem. In his evidence to the Select Committee, Fosbery very hesitantly suggested that the establishment of a Foundling Hospital might provide an alternative for desperate mothers and therefore counter the rate of infanticide. In the same breath however, he dismissed the idea as one that intelligent people would not be willing to entertain. It seems

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<sup>126</sup> New South Wales, *Minutes of Evidence and Report of the Select Committee on the Children's Protection Bill and the Infants' Protection Bill, 1891-92* (Sydney: 1892) at 380.

it was easier for the law-makers to ascribe culpability to individual women, than to endemic social problems.<sup>127</sup>

The *Children's Protection Acts*, however ineffective, also signalled the beginning of legislative encroachment into the domestic realm. Governments throughout this period (and beyond) typically represented themselves as unwilling and unable to interfere with "family" matters. The fallacy of these representations has now been exposed by feminist historians.<sup>128</sup> The legislation examined here provides yet another example of the fictitious status of governmental non-intervention. Nothing is more likely to fall within the constructed sphere of domesticity than pregnancy, birth and infant welfare, and yet these were increasingly the subjects of regulatory measures. Although liberal philosophy had located these issues within the private sphere, they nevertheless became the subject of public laws. In this way, the infant protection legislation is another example of the uneven interference of governments in the private domain.

Moreover, Dorothy Chunn has illustrated that such intervention not only often depended on the subject, but importantly, the objects of the regulatory intent.<sup>129</sup> Research into historical records has not disclosed the personal profiles of the women arrested and prosecuted under

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<sup>127</sup> Douglas & Laster, *supra* n.95 at 152.

<sup>128</sup> See for example, Chunn, *supra* n.89; J. Ursel, *Private Lives, Public Policy: 100 Years of State Intervention in the Family* (Toronto: Women's Press, 1992).

this legislation.<sup>130</sup> Notwithstanding this, it would not be presumptuous to conclude that working-class women and single mothers would have been disproportionately affected by its operation. Working women would have relied on these crude child-care facilities while mothers of illegitimate children may have called on their adoption services. By contravening normative middle-class maternal expectations, through perceived insufficient supervision of children or disregard for infant welfare, certain women would have found themselves exposed to regulation action and legal censure. To the extent that married and middle-class women may also have relied on baby farms and thereby transgressed bourgeois, nuclear family codes of conduct, they too would have been seen as warranting surveillance and regulation. Thus, this legislation is also an example of the ways in which gender ideologies, in particular maternal ideologies, critically influenced the operation of the public/ private divide.

When the *Children's Protection Acts* are viewed in tandem with the criminal law developments examined earlier in the chapter, a new legislative attitude is exhibited: the law could and would be used in an effort to regulate reproduction issues. The criminal law laid the foundations for intervention, and subsequent legislation, like the *Children's Protection Acts*, capitalised on this. Importantly, this interventionist attitude continued to

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<sup>129</sup> See in particular, Chunn, *ibid.*

garner strength with the commencement of the new century. As the concern over the decline in the birth rate climaxed, Parliament began legislating with renewed vigour, pursuing a variety of new measures that had significant consequences for women and fertility control.

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<sup>130</sup> Research by Judith Allen into NSW court records reveals the numbers and nature of offences, but not details about the women themselves. See Allen, *Octavius Beale*, *supra* n.40 and Allen, *Sex and Secrets*, *supra* n.99.

## Chapter Three

### **“A Grave Disorder”<sup>1</sup>:**

#### **After the Decline in the Birth Rate**

Australia with its large and sparsely populated territory ... might reasonably be pictured as ideal land, wherein the people would prove fruitful and multiply. Such, indeed was the promise of the early years of settlement. Present indications however give no hope of a teeming population springing from Australasian parents ...<sup>2</sup>

#### ***Introduction***

With his publication *The Decline in the Birth Rate in New South Wales* in 1903, T. A. Coghlan<sup>3</sup> alerted the Australian public to a trend that had established itself in western countries around the world: the national birth rate was falling. “This important development”, he wrote “is likely to be attended with very serious results, both social and economic, some of which are already beginning to show themselves”.<sup>4</sup> Coghlan asserted

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<sup>1</sup> “In whatever way the waning birth rate of New South Wales is viewed, whether in its effects on the health, character or social worth of individuals; on the value of the family as the basis of national life; on the quality and dignity of civic life; on the character of the people; on their social, moral and economic progress; on their national aims and aspirations; or on their capacity to survive in their rivalry of nations; and whether it is viewed in the light of history or science, it is seen as a grave disorder sapping the vitals of a new people, dispelling its hopes, blighting its prospects and threatening its continuance”. *Royal Commission on the Decline of the Birth Rate And on the Mortality of Infants in New South Wales*, vol. 1 (Sydney: William Applegate Gullick, Government Printer, 1904) at 53 (hereinafter *NSW Birth Rate Report*).

<sup>2</sup> T. A. Coghlan, *The Decline in the Birth Rate of New South Wales* (Sydney: Government Printer, 1903) at 3.

<sup>3</sup> Timothy Augustine Coghlan (1855-1926) was a statistician and public servant for both the Federal and New South Wales Governments. He was best known for his theories about population growth as a reflection of national prosperity. As a consequence of this experience, Coghlan was selected as a member of the Birth Rate Commission. N. Hicks, “Timothy Coghlan” in B. Nairn & G. Serle, eds., *Australian Dictionary of Biography, 1891 – 1939*, vol. 8 (Melbourne: Melbourne University Press, 1983) at 48.

<sup>4</sup> Coghlan, *supra* n.2 at 3.

that “the existing facts are compatible with only one explanation, viz, that in the years following 1880, the art of applying artificial checks to conception was successfully learnt and has continued in its operation to this day”.<sup>5</sup>

The shift in parliamentary activity whereby governments became less reticent about intruding into matters of reproduction, partially explored in the last chapter, was fully realised in the first decade of the twentieth century, coinciding with the recognition of the declining birth rate. The first example of such activity discussed in this chapter is the *Indecent Advertisements Act, 1900* (NSW). As parliamentary evidence reveals, this legislation, like similar initiatives pursued in Canada, was the product of moralistic crusades and nativist concern. The appointment of the Royal Commission on the Decline of the Birth Rate in 1903 was certainly the climax of pro-natalist anxiety. The assumptions in the Birth Rate Report typify the more extreme beliefs that had gained a degree of public and private legitimacy in Australia. Consequently, the second part of this chapter explores the Commission’s conclusions as being representative of a philosophy that had worked its way into legislative thinking. The rest of the chapter investigates the legislative manifestations of this philosophy. The Poisons Bill, 1905 (NSW) is briefly explored as an example of the faith that had been placed in the ability of the law to effect a reversal in the birth rate trend. Lastly, the *Private Hospitals Act, 1908* (NSW) is compared with similar

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<sup>5</sup> *Ibid.*, at 68.



Canadian provincial legislation. Although innocuously entitled, these acts were principally designed to eliminate abortion institutions. An analysis of these different statutes highlights that concern over the decline in the birth rate had galvanised many politicians into pursuing action that did not have any legislative precedent.

***“An Evil in Our Midst”:<sup>6</sup> The Indecent Publications Act***

Lydia E. Pinkham’s Vegetable Compound is a positive cure... It will cure entirely all ovarian troubles, inflammation and ulceration ... it will dissolve and expel tumours from the uterus in an early stage of development. The tendency to cancerous tumours there is checked very speedily in its use.<sup>7</sup>

New South Wales Members of Parliament at the turn of the century were surprisingly conversant with the prevalence of abortion amongst their colonial constituents. Mr Suttor in the Legislative Council spoke of the “every day” occurrence where women of decent appearance distributed circulars advertising abortion services to young married women in their homes.<sup>8</sup> Mr Bennet, “from his very own knowledge”, knew that abortion brought great disgrace and even ruin upon families,<sup>9</sup> while Dr Graham was personally aware of an institution run by a notorious syndicate whose speciality was curing “nervous debilities”.

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<sup>6</sup> Advertisements for abortion services are “known to be an evil in our midst of a most alarming character which has wrought a great deal of moral and physical ruin”. NSW, Legislative Assembly, *Debates* (26 June 1900) at 404 (Dr Graham).

<sup>7</sup> Advertisement in the *Globe*, 30 June 1884.

<sup>8</sup> NSW, Legislative Council, *Debates* (5 July 1900) at 674 (Mr Suttor).

<sup>9</sup> NSW, Legislative Assembly, *Debates* (26 June 1900) at 406 (Mr Bennett).

Petition after petition had been presented to the Legislative Assembly urging that legislative action be taken to prohibit the advertisement of such services and products.<sup>10</sup>

The *Obscene Publications Prevention Act, 1880* (NSW) regulated “obscenity” during the latter part of the nineteenth century.<sup>11</sup> The provisions were general, targeting the sale or distribution of writings and pictures and granted search and seize powers to police.<sup>12</sup> This law was radically amended by the enactment of the *Indecent Publications Act, 1900* (NSW).<sup>13</sup> Section one of this Act expanded the range of offences to include delivering, affixing and posting of material. An obscene publication as defined under this Act not only included printed matter and pictures, but advertisements and reports. Further, if a Postmaster had reason to believe that any parcel contained offensive material, it was to be forwarded to the Postmaster-General to be destroyed.<sup>14</sup>

The most important amendment however was embodied in section 4 which declared indecent:

[a]ny advertisement, picture, or printed matter relating to any complaint or infirmity arising from or relating to sexual intercourse, or to nervous debility or female irregularities

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<sup>10</sup> NSW, Legislative Assembly, *Debates* (26 June 1900) at 405 (Dr Graham).

<sup>11</sup> This was largely modelled on British legislation. *Obscene Publications Act, 1857* (UK), 20 & 21 Vic., c. 83.

<sup>12</sup> *Obscene Publications Prevention Act, 1880* (NSW), No. 24, ss. 1 & 2.

<sup>13</sup> *Indecent Publications Act, 1900* (NSW), 43 Vic., No. 2.

<sup>14</sup> *Indecent Publications Act, 1900* (NSW), ss. 1, 3.

which might reasonably be construed as relating to any illegal medical treatment or illegal operation.<sup>15</sup>

This section was targeting advertisements for abortionists and abortifacients that were “practically inducements to commit abortion”.<sup>16</sup> In 1889, two members had brought the House’s attention to the prevalence of “ladies only” advertisements in regional newspapers, but almost without exception their concerns were ignored.<sup>17</sup> Little more than ten years later, at the height of the frenzy over the birth rate, Parliament felt compelled to specifically legislate against such advertising.

When introducing the Bill, Dr Graham stated that it was to “put down the nefarious practice followed by abominable scoundrels, which had led to a great deal of murder”.<sup>18</sup> Less a debate and more an opportunity to wax lyrically on the injurious effects of such advertisements, the parliamentary discussions reveal almost unanimous approval in both Houses for the Bill. Although the Bill had a wider operation than simply eradicating

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<sup>15</sup> *Indecent and Obscene Publications Act, 1900* (NSW), s. 4. In 1901 Parliament consolidated the obscenity statutes. This same wording was used to define “indecent” in the consolidating legislation. *Obscene and Indecent Publications Act, 1901* (NSW), No. 12. This Act consolidated the *Obscene Publications Prevention Act, 1880* (NSW), the *Indecent and Obscene Publications Act, 1900* (NSW), and the *Act to Amend the Indecent Publications Act, 1900* (NSW). In 1908, the *Police Offences (Amendment) Act, 1908*, (NSW), No. 12, made further minor amendments to the legislation.

<sup>16</sup> NSW, Legislative Assembly, *Debates* (26 June 1900) at 404 (Dr Graham).

<sup>17</sup> NSW, Legislative Assembly, *Debates* (12 July 1889) at 3039 (Mr O’Sullivan); at 3046 (Mr Melville). In 1889, the New South Wales Parliament had considered the Publication of Obscene Evidence Prevention Bill which was concerned with suppressing the newspaper publication of evidence given in court, principally rape cases and divorce proceedings. NSW, Legislative Assembly, *Debates* (12 July 1889) 3038-3047.

<sup>18</sup> NSW, Legislative Assembly, *Debates* (26 June 1900) at 404 (Dr Graham).

advertisements for abortion and abortifacients, it was this issue that absorbed the attention of Parliament.

Almost every member who spoke on the issue noted that New South Wales was the only Australian colony without such a regulatory regime in place.<sup>19</sup> Attempting to bolster his second reading speech, Dr Graham informed his colleagues that not only were similar statutes in force in all the other colonies, but also in Great Britain. While Great Britain had indeed passed the *Indecent Advertisements Act, 1889* (UK), the focus of this legislation appears not to have been abortion services.<sup>20</sup> Instead, it was the circulation of information about venereal disease. As the Earl of Meath explained to his colleagues in the House of Lords, the Bill targeted persons “who advertise their specifics against a certain class of diseases of a nameless character”.<sup>21</sup> The Bill also proposed to “put a stop to circulars of a class by which thousands of young men have their prospects in life destroyed”.<sup>22</sup> In the legislation, “indecent” was defined as pertaining to “syphilis, gonorrhoea, nervous debility, or other complaint arising from or related to sexual intercourse”.<sup>23</sup> “Female irregularities”, “illegal medical treatment” or “illegal operations” were not encompassed within the statute.

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<sup>19</sup> Each Australian state or colony between 1876 and 1902 passed similar obscenity legislation. See for example, *Indecent Advertisements Act, 1892* (Qld), 56 Vic. no 20; *Crimes Act, 1900* (Vic), No. 1643.

<sup>20</sup> *Indecent Advertisements Act, 1899* (UK), 52 & 53 Vic., c. 18.

<sup>21</sup> Great Britain, House of Lords, *Debates* (8 April 1899) at 1761 (Earl of Meath).

<sup>22</sup> Great Britain, House of Lords, *Debates* (8 April 1899) at 1763 (Earl of Meath).

<sup>23</sup> *Indecent Advertisements Act, 1889* (UK), s. 5.

New South Wales had deviated from the British model in a very important way: the target was not simply obscene literature, but also the aborting mother.

The legislative objective behind the *Indecent Publications Act, 1900* (NSW) was emphasised by the NSW Supreme Court in the case *Potter v Smith* (1902).<sup>24</sup> In *Potter*, the defendant was charged with selling pamphlets containing illustrations and descriptions of birth preventative measures from his shop. Justice Stephen stated that the object of the Act was to “prevent the circulation of literature of an indecent nature in every possible way”.<sup>25</sup> This incredibly broad interpretation was supported by Justice Owen who stated that the Act contained no qualifying words whatsoever. The object of the Act was to “prevent in every possible shape or form the delivery of documents of an indecent character among the people ... the Act is in the widest possible terms”.<sup>26</sup>

This case can be contrasted with the earlier decision *Ex Parte Collins* (1888) which had been decided under the old obscenity legislation.<sup>27</sup> In this case, Windeyer and Stephen JJ, with Darley CJ dissenting, held that the publication of Annie Besant’s *Law of Population*,

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<sup>24</sup> *Potter v. Smith* (1902), 2 N.S.W.L.R 220 (N.S.W.S.C) (hereinafter *Potter*).

<sup>25</sup> *Potter v. Smith* (1902), 2 N.S.W.L.R 220 at 223 per Stephen J.

<sup>26</sup> *Potter v. Smith* (1902), 2 N.S.W.L.R 220 at 224 per Owen J.

<sup>27</sup> *Ex Parte Collins* (1888), 9 N.S.W.L.R 497 (N.S.W.S.C) (hereinafter *Collins*).

which advocated and explained contraceptive measures, was not obscene under NSW law.<sup>28</sup>

However, in finding the defendant guilty in *Potter*, the Supreme Court demonstrated that the *Indecent Publications Act, 1900* (NSW) was capable of achieving what old law had been unable to do — prohibit the dissemination of birth control information.<sup>29</sup>

In specifically legislating against birth control, New South Wales Parliamentarians had unwittingly followed in the wake of their Canadian counterparts. Similar in approach to the British *Obscene Publications Act, 1857* (UK), the Canadian *Criminal Code, 1892* (Ca) had made it an indictable offence to sell or expose for sale or public view obscene books, written matter or other objects.<sup>30</sup> There was, however, an important and innovative addition. Section 179(c) expressly prohibited the selling or advertising of any medicine or article represented as a means of preventing contraception or causing abortion.<sup>31</sup> With the

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<sup>28</sup> This decision had been particularly controversial. This was partly due to the tenor of Justice Windeyer's judgment. Windeyer J denounced the allegation that advocacy of preventative checks was immoral, and directly defied his contemporaries when he declared that it was an insult to English women to argue that it was necessary to keep them in ignorance on sexual matters to maintain the national character.

<sup>29</sup> Fifteen years later, the Commissioners of the Birth Rate Inquiry were still rankled by *Collins* and linked the decline in the birth rate to Windeyer's judgment. As far as the Royal Commission was concerned, "the remarkable coincidence between the promulgation in 1888 of the views expressed in this judgment and the sudden fall of the birth rate in 1889 cannot, we think be considered fortuitous". *NSW Birth Rate Report, supra* n.1 at 18. As Neville Hicks has pointed out, given this staunch belief that the *Collins* decision had impacted so greatly on birth rates, the Commission must have been disappointed to note that the reverse was not evident after *Potter*. N. Hicks, *This Sin and Scandal: Australia's Population Debate, 1891 – 1911* (Canberra: Australian National University Press, 1978) at 23.

<sup>30</sup> *Criminal Code, 1892* (Ca), s. 179(a),(b).

<sup>31</sup> "Every one is guilty of an indictable offence and liable to two years imprisonment who knowingly and without lawful justification or excuse offers to sell, advertises, publishes an advertisement of or has for sale or disposal any medicine, drug or article intended or represented as a means of preventing conception or causing abortion". *Criminal Code, 1892* (Ca), s. 179(c).

inclusion of this section, the operation of the legislation extended far beyond the *Obscene Publications Act, 1857* (UK), the *Indecent Advertisement Act, 1889* (UK), and the British Draft Criminal Code of 1880, upon which a large part of the Canadian *Code* was based.<sup>32</sup>

When drafting this provision, Canadian legislators appear to have turned from British legislative models to American.<sup>33</sup> The American *Comstock Laws*, dubbed after its chief lobbyist and notorious moral vigilante Anthony Comstock,<sup>34</sup> had classed all instruments, images and written material relating to contraception and abortion as obscene.<sup>35</sup> The first three sections of the Act prohibited the importation of such obscene material into the United States by mail, sending it anywhere in the U.S. by mail or any advertising of it. The fourth section provided for the seizure and destruction of such material.<sup>36</sup> In the first five

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<sup>32</sup> The British Code contained only a general section on obscene libel. Criminal Code (No. 2) Bill, 1880 (UK) cl. 583.

<sup>33</sup> A. McLaren & A. McLaren, *The Bedroom and the State: The Changing Practices of Contraception and Abortion in Canada, 1880 – 1997* (Toronto: Oxford University Press, 1997) at 19.

<sup>34</sup> Anthony Comstock in his capacity as special agent for the enforcement of this law spent forty-two years acting not only as a censor of the mail, but as a policeman of public and private morals. He confiscated tonnes of material from literature to condoms, and arrested thousands of people, from pornographers to physicians. He also boasted having caused several suicides. For further information about Comstock see, C. L. La May, "America's Censor: Anthony Comstock and Free Speech" (1997) 19:3 Communications and the Law 1.

<sup>35</sup> It was a federal offence to sell, lend, give away, or in any manner exhibit, publish or offer to publish in any manner, or to have in one's possession any obscene book, pamphlet, paper, advertisement or any instrument or drug for the prevention of contraception or for causing unlawful abortion. It carried a minimum sentence of six months and a maximum of five years imprisonment or a \$2,000 fine. *An Act for the Suppression of Trade in and Circulation of Obscene Literature and Articles of Immoral Use, 1873*, c. 258, § 2, 17 Stat. 598.

<sup>36</sup> Strangely however, the *Criminal Code, 1892* (Ca) did not provide search and seize powers as contained in the British, American or Australian legislation. John McLaren has stated that this may account for the unexceptional nature of the reported cases on obscenity in Canada. J. P. S. McLaren, "'Now You See It, Now You Don't': The Historical Record and the Elusive Task of Defining the Obscene" in D. Sniderman, ed., *Freedom of Expression and The Charter* (Thomson Professional Publishing Canada, 1991) at 124.

years after the introduction of the statute, abortion-related advertising declined precipitously.<sup>37</sup> Abortionists started using handbills and calling cards instead of newspapers and those who did still advertise were much more clandestine in their wording.<sup>38</sup>

The parliamentary debates provide no explanation as to why Canadian legislators chose to follow the American approach in this instance. The House of Commons debate on section 179 centres almost exclusively on whether artists and photographers would be unfairly penalised by its wording: the operation of sub-section (c) is not mentioned.<sup>39</sup> The explanation for why Parliament chose to criminalise birth control lies outside this particular Parliamentary dialogue and is found in another — the debates on the Obscene Literature Bill.

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<sup>37</sup> J. C. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800 – 1900* (New York, Oxford University Press, 1978) at 199.

<sup>38</sup> The Ontario Court of Appeal case of *R. v. Karn* (1903), 6 C.C.C. 479 provides an example of the surreptitious wording of such advertising employed in the Canadian context. Mr F. E. Karn of Toronto was indicted under section 179(c) for advertising and having for sale “Friar’s French Female Regulator”. The medicine contained the following warning: “thousands of married ladies are using these tablets monthly. Ladies who have reason to suspect pregnancy are cautioned against using these tablets”. The Court of Appeal, unlike the trial court judge, was not deceived by the “warning”. As Justice Osler stated, “their object and operation in promoting and ensuring the regularity of menstrual flow ... is so clearly and explicitly stated, that it might well be asked for what other purpose married ladies or others who might desire to prevent pregnancy, would be likely to be using them monthly”. The Court of Appeal held that the warnings were open to criminal interpretation.

<sup>39</sup> Canada, House of Commons, *Debates* (25 May 1892) at 2969 *infra*. In the Senate, the section was not debated at all.



The Obscene Literature Bill, 1892 (Ca) was introduced into the House of Commons by John Charlton in March 1892. John Charlton was an active Member of Parliament who had piloted much nineteenth-century moral legislation through Parliament. A man of strong religious conviction, his dedication to protecting the sexual morality of young women is epitomised in his eventually successful promotion of legislation to criminalise seduction.<sup>40</sup> Apparently in response to requests from the Dominion Women's Christian Temperance Union,<sup>41</sup> Charlton had drafted and then introduced the Obscene Literature Bill, 1892 (Ca) to "promote the welfare and morality of the people of this country".<sup>42</sup>

Clause one of Charlton's Bill prohibited the publishing, possession, exhibition or selling of any obscene or immoral matter. Clause two declared that all obscene, lewd or lascivious matter was "non-mailable". Importantly however, both clauses included in their long list of obscenities "any medicine, drug or article whatever for the prevention of conception or for causing unlawful abortion" or any advertisement of them. Charlton's intention to target contraception and abortifacients was made explicit in his second reading speech: "Drugs and instruments for procuring abortion and for kindred purposes are advertised secretly and

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<sup>40</sup> This legislation became known as the "Charlton Seduction Act". For more information on the seduction legislation, see K. Dubinski, *Improper Advances: Rape and Heterosexual Conflict in Ontario, 1880 – 1929* (Chicago: University of Chicago Press, 1993). For further information about John Charlton, see T. H. Ferns & R. C. Brown, "John Charlton" in R. Cook & J. Hamelin, eds., *Dictionary of Canadian Biography, 1901-1910*, vol. 13 (Toronto: University of Toronto Press, 1994).

are sold by agents and this abuse cannot very readily be reached by the law as it now stands".<sup>43</sup>

Parliamentary records reveal that the inspiration to criminalise contraception in the 1892 *Code* came from Charlton's Bill. The Criminal Law Bill, 1892 (Bill 7) was introduced into the Commons in March 1892.<sup>44</sup> It contained a general section on publishing obscene matter only, and did not at this stage extend its operation to contraception. After its second reading, Bill 7 was referred to a Joint Committee of the Senate and the House of Commons. Unfortunately, a Parliamentary fire in 1916 burned any records that may have been generated by this Committee.<sup>45</sup> However, the copy of the Bill used to record the amendments made during its deliberations still exists in the Department of Justice archives.<sup>46</sup> This original Bill discloses that section 179 was amended and expanded during these sessions of the Joint Committee. Inserted in neat handwriting in the margins of the original Bill is Charlton's phrase: "any medicine, drug or article intended or represented as a means of preventing conception or causing abortion". According to the Parliamentary *Journals*, the Joint Committee chose to incorporate the Obscene Literature Bill, 1892 (Ca)

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<sup>41</sup> C. S. Wilson, "'Our Common Enemy': Censorship Campaigns of the Women's Christian Temperance Union and the National Council of Women, 1890 – 1914" (1998) 10 *Canadian Journal of Women and the Law* 438 at 472. See this article generally for the ways in which women's organisations influenced reform.

<sup>42</sup> Canada, House of Commons, *Debates* (11 May 1892) at 2460 (Mr Charlton).

<sup>43</sup> Canada, House of Commons, *Debates* (11 May 1892) at 2458 (Mr Charlton).

<sup>44</sup> Criminal Law Bill, 1892 (Bill 7), Department of Justice Library.

into the *Code*. As the original Bill reveals, it did so by expanding the operation of section 179 and relegating contraception to the “obscene”.<sup>47</sup>

Throughout his parliamentary speech, John Charlton made frequent connections between morality and a strong nation-state. Drawing upon imagery of decaying empires and “periods of decadence through effeminacy”, he stated that,

we have no reason to doubt that if virtue is maintained, if integrity is maintained, a nation may exist through all time ... vile literature is secretly and widely circulated in Canada, literature of a character calculated to undermine the morals of the people, and entail the most disastrous consequences on society.<sup>48</sup>

Charlton’s rhetoric typified the philosophy of turn-of-the-century moral reform movements — that strong nations could only be built on the foundations of strong morals. “In Charlton’s view, young nations, like young women, needed protection lest the strong ... betray the weak”.<sup>49</sup>

The legislative attempt to eliminate contraception thus needs to be placed in the context of the larger “social purity movement” that had enveloped Canada at this time. With a particular focus on sexual and moral aspects of social life, this movement was driven by organisations and individuals who endeavoured to “raise the moral tone” of Canadian

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<sup>45</sup> D. H. Brown, *The Birth of the Criminal Code: The Evolution of Canada's Justice System* (Toronto: University of Toronto Press, 1995) at 38.

<sup>46</sup> The Department of Justice kindly lent the author these original documents.

<sup>47</sup> Canada, House of Commons, *Journals* (12 May 1892) at 310.

<sup>48</sup> Canada, House of Commons, *Debates* (11 May 1892) at 2458 (Mr Charlton).

society.<sup>50</sup> As Mariana Valverde has outlined, the reshaping of individual sexual morality was a vital component in the move for the social regeneration of English Canada.<sup>51</sup> Obscenity was an obvious vice that required eradication, and advertisements for contraception naturally fell under the rubric of “obscene”. The condemnation of contraception was rendered even more inevitable because the targets of these advertisements and products were women. One of the consequences of treating women as “part angels, part idiots”, as John McLaren has phrased it, was the supposition that women’s natural naivety made them especially susceptible to exploitation and perversion.<sup>52</sup> The sustained attempts by D. A. Watt to raise the age of consent for girls and the campaigning around the white slave trade are representative of the broader movement that had raised the attainment of “purity”, and women’s purity in particular, to new legislative heights. Importantly, the Canadian Parliament proved itself to be responsive to such demands.<sup>53</sup> The government position on contraception can thus be contextualised within

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<sup>49</sup> Dubinsky, *supra* n.40 at 67.

<sup>50</sup> M. Valverde, *The Age of Soap, Light and Water: Moral Reform in English Canada, 1885 – 1925* (Toronto: McClelland & Stewart, 1991) at 17–19.

<sup>51</sup> See generally, Valverde, *ibid.*

<sup>52</sup> McLaren, *Now You See It*, *supra* n.36 at 114.

<sup>53</sup> For instance, the *Criminal Code*, 1892 (Ca) raised the age of consent to 14 years of age for girls. The *Code* had a comprehensive system of offences for protecting young women and girls from “sexual predators”. G. Parker, “The Origins of the Criminal Code” in D. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 1 (Toronto: University of Toronto Press, 1981) at 268. For further details on the parliamentary reaction to the panic around the “white slave trade”, see J. P. S. McLaren, ““Chasing the Social Evil”: Moral Fervour and the Evolution of Canada’s Prostitution Laws, 1867 – 1917” (1986) 1 *Canadian Journal of Law and Society* 125; “Recalculating the Wages of Sin: The Social and Legal Construction of Prostitution in Canada, 1850 – 1920” in D. J. Guth & W. W. Pue eds, *Canada’s Legal Inheritances* (Winnipeg: University of Manitoba, 2001). The continual strengthening of the obscenity provisions in the early twentieth century is also indicative of this. See Wilson, *supra* n.41.

this broader framework of rhetoric that underpinned contemporary demands for moral reformation.

Constance Backhouse has suggested that lobbying from the medical profession was responsible for the passage of this section of the *Criminal Code, 1892* (Ca) that prohibited contraception.<sup>54</sup> Backhouse has pointed to the numerous medical journal articles that denounced the use of birth control to support her contention that the profession successfully campaigned for this legislation. While her research undoubtably shows that doctors opposed contraception, the history of the section 179(c) as revealed in the parliamentary records makes it unlikely that physicians directly affected the passage of this section. However, to the extent that doctors had an impact on the general moral climate, their influence cannot be discounted. The worldwide professionalisation of doctors had imparted to the profession a new-found sense of legitimacy and authority. Doctors began to consider themselves the moral, as well as the physical, guardians of the population: “those who are the guardians of the public health are the guardians of the nation’s prosperity and greatness”.<sup>55</sup> Importantly, the medical profession was almost unanimous in its

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<sup>54</sup> C. Backhouse, “Involuntary Motherhood: Abortion, Birth Control and the Law in Nineteenth Century Canada” (1983) 3 Windsor Yearbook Access to Justice 61 at 120.

<sup>55</sup> R. W. Garrett, *Text book of Medical and Surgical Gynaecology: For the Use of Students and Practitioners* (Kingston, Ont: 1897) <http://www.canadiana.org/ECO/mtq?id=a7efe3c137&doc=01531> at 12.

condemnation of contraception.<sup>56</sup> As society placed increasing importance on maternity, the refusal to countenance contraceptive devices may have been seen by practitioners as part of their self-appointed role of protecting society itself.<sup>57</sup> To the extent that the medical profession's denouncement of birth control was emblematic of broader based demands to bolster "morality", they would have influenced the drafting of the *Code*. There is, however, no evidence at present to support Backhouse's suggestion that the impact of the medical profession was anything more than that.<sup>58</sup>

The converging demands of different social groups obviously influenced the drafting of the *Code*. Yet something further had compelled Canadian legislators, just as it had in America and it would in Australia, to go beyond the British legislative precedent to specifically prohibit birth control. Colin Francome has stated that the excessive American puritanism as

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<sup>56</sup> W. Mitchinson, "Historical Attitudes Towards Women and Childbirth" (1979) 4: 2 *Atlantis* 13 at 22. See also doctors' opinions in the Birth Rate Inquiry discussed in the next part of this chapter.

<sup>57</sup> *Ibid.* Doctors' refusal to provide women with contraception is interesting given the fact that physicians as an occupational group were recording a low fertility rate at this time. J. Lewis, "'Motherhood Issues' in the Late Nineteenth and Twentieth Centuries" in K. Arnup, A. Levesque & R. R. Pierson, eds., *Delivering Motherhood: Maternal Ideologies and Practices in the Nineteenth and Twentieth Centuries* (London: Routledge, 1990) at 3.

<sup>58</sup> The possibility that doctors influenced a stricter approach to the criminal abortion provisions however, which Backhouse also suggested, should not necessarily be discounted. It has been suggested that physicians had much to gain from strong anti-abortion legislation, not least in relation to their moves to solidify their professional status. James Mohr has placed the development of America's anti-abortion legislation in the context of the increasing power of the medical profession. He has stated that for a number of reasons, "regular physicians became interested in abortion policy from an early date and repeatedly dragged it into their prolonged struggle to control the practice of medicine in the United States. At times abortion policy became a focal point in that struggle, at times an incidentally affected by-product, but the struggle itself was always there in the background". Mohr, *supra* n.37 at 37. Further research is needed to grant doctors a causal relationship to these criminal provisions in Australia and Canada.

displayed in the *Comstock Laws* was in part a reaction to the high proportion of immigrants in the country, as the American middle class tended to ascribe deviant behaviour to immigrant groups.<sup>59</sup> Anthony Comstock for instance not only perceived the “vices” he was policing as foreign to America, but that also “a large proportion of those engaged in the nefarious trade ... are not native Americans”.<sup>60</sup>

Canadians had similarly succeeded in externalising “vice”. The discourse on moral pollution arguably reached its most vituperative expression in relation to foreign contamination. “The greatest threat to Canadian values and virtue were seen as coming from visible minorities — Chinese, Japanese, African and East Indian — often characterised as sub-human and believed to be the source of both physical and moral contagion”.<sup>61</sup> The connection between immorality and immigrants had existed in popular consciousness for decades: the Canadian Royal Commission Reports on Chinese immigration, for instance, were replete with references to the depravity of the Chinese.<sup>62</sup> By the early years of the twentieth century, this thinking was seen to be legitimised through the

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<sup>59</sup> The other factor that Francome identified that distinguished America from Britain was the lack of an American upper class that could restrain some of the more excessive moralism of its middle classes. C. Francome, *Abortion Freedom: A Worldwide Movement* (London: George Allen & Unwin, 1984) at 29.

<sup>60</sup> La May, *supra* n.34 at 22.

<sup>61</sup> McLaren, *Recalculating the Wages of Sin*, *supra* n.53 at 539.

<sup>62</sup> Canada, *Report of the Royal Commission on Chinese Immigration* (Ottawa:1885); *Report of the Royal Commission on Chinese and Japanese Immigration, 1902* (New York: Arno Press, 1978). The “white slave trade” movement is the perfect example of the process of the externalisation of vice. See above at footnote 53 for further references.

science of eugenics.<sup>63</sup> Through this intellectual movement the connections linking sexuality, immigrants and national degeneration became firmly established.<sup>64</sup> Just as the leading eugenicists identified the threat posed by the “unfit” reproducing within Canada, they also raised the spectre of hordes of degenerate immigrants flooding into the country.<sup>65</sup> The “scientific” discovery that immigrants were in fact inferior, mentally and morally, added new legitimacy to the implementation of more exclusionist immigration policies. Questions were raised about whether Canada was doing enough to itself from being flooded by defective immigrants who, as had been “scientifically” proven, were over-represented in the ranks of the “sexual perverts, the criminal insane, slum degenerates, general paralytics and other types of weaklings”.<sup>66</sup>

By the turn of the century, C. S. Wilson has stated that the safeguarding of *English* morality against deviant foreign habits was a central theme in the campaign for moral regeneration.<sup>67</sup> A prime example of this is evident in John Charlton’s second reading speech for the

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<sup>63</sup> Valverde, *supra* n.50 at 108.

<sup>64</sup> *Ibid.*

<sup>65</sup> For more detail about the development of eugenics as an intellectual movement in Canada, see A. McLaren, *Our Own Master Race: Eugenics in Canada, 1885–1945* (Toronto: McClelland & Stewart, 1990). For detail on Australia, see for example, Siedlecky & Wyndham, *supra* n.72. For the U.S. situation see for example, L. Gordon, *Woman’s Body, Woman’s Right: A Social History of Birth Control in America* (New York: Grossman, 1976).

<sup>66</sup> Dr Peter H. Bryce, *Canada Lancet*, as quoted in McLaren, *ibid.*, at 51. The moves to institute sterilisation of such “deviants” and the “unfit” to prevent their reproduction are well documented by McLaren. There is certainly scope for further research to determine how this later intellectual movement intersected with the turn-of-the-century reproduction legislation examined here.

<sup>67</sup> Wilson, *supra* n.41 at 459.



Obscene Literature Bill when he spoke about obscene literature being imported into the country. In describing these “corrupting influences”, his choice of language communicates his obvious belief that such influences were alien to, and parasitic on the people of Canada.<sup>68</sup> Anne McClintock has presented the Victorian paranoia about contagion as bound up in anxieties over body boundaries, and in particular sexual and racial boundaries. She stated that “increasingly vigilant efforts to control women’s bodies, especially in the face of feminist resistance, were suffused with acute anxiety about the desecration of sexual boundaries and the consequences that racial contamination had for white male control of progeny, property and power”.<sup>69</sup>

While the moral reform movements were motivated by concerns over class, culture, and family, they were also deeply infected by the racialised dogma that gripped Victorian Australian and Canadian society. The intractable stance against birth control cannot be disassociated from the increasing xenophobia of the white settler colonies, which was at times articulated in terms of explicit racial contamination and other times through the more subtle rhetoric of nation building. It is this anxiety that accounts for the heightened reaction within Australia and Canada to the “dangers” of contraception.

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<sup>68</sup> See Canada, House of Commons, *Debates* (11 May 1892) at 2457–2461 (Mr Charlton).

<sup>69</sup> A. McClintock, *Imperial Leather: Race, Gender and Sexuality in the Colonial Contest* (New York: Rutledge, 1995) at 47.

While the fear of racial contamination implicitly underscored this aspect of fertility control, xenophobic motivation became more transparent in the next significant aspect of colonial parliamentary activity — the investigations of the NSW Royal Commission.

***“Your Excellency’s Most Obedient Servants”: The NSW Birth Rate Inquiry***

The practices involved in the limitation of families are responsible for much physical suffering, for a deadening of moral sensibility, and for a degradation of character among those who resort to them; and these effects must have an unwholesome influence on the general character of the people who move in a social atmosphere so vitiated. Defective health, defective morals and defective character are already manifesting themselves as a warning of more marked deterioration likely to ensue.<sup>70</sup>

In August 1903 Sir John See,<sup>71</sup> Premier of New South Wales, announced the appointment of a Royal Commission of an unusual ilk. The *Royal Commission on the Decline of the Birth Rate and on the Mortality of Infants in New South Wales* was a world first. The Report of the Commission, tabled in Parliament in 1904, was the high-water mark of New South Wales legislative reaction to the state’s declining birth rate and as such provides an extraordinary contribution to Australia’s history.<sup>72</sup>

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<sup>70</sup> *NSW Birth Rate Report*, *supra* n.1 at 30.

<sup>71</sup> Sir John See (1845-1907) was elected into the New South Wales Parliament for the first time in 1880 and became Premier in 1901. He was the archetypal “slab hut Premier” as he illustrated that birth, family and class did not influence the attainment of professional status. See resigned as Premier in June of 1904. “Although his experience of public life extended over a quarter of a century, See made no lasting impact on the history of New South Wales. He had not envisaged that he would”. K. Henry, “John See” in B. Nairn & G. Serle, eds., *Australian Dictionary of Biography, 1891 – 1939*, vol. 11 (Melbourne: Melbourne University Press, 1983) at 562.

<sup>72</sup> Despite this, evidence contained in volume two of the Birth Rate Inquiry was considered so scandalous that this volume was all but suppressed: only twelve copies of it were published at the time. Until recently, it was generally assumed that none of these copies had survived. However, there are two original copies still in existence, one in the United States and one in the National Library of Australia. S. Siedlecky & D. Wyndham, *Populate and Perish: Australian Women’s Fight for Birth Control* (Sydney: Allen & Unwin, 1990) at 17; Hicks, *Sin And Scandal*, *supra* n.29 at ix.

Provoked by the revelations contained in T. A. Coghlan's pamphlet in 1903, debate around New South Wales' falling fertility rates surfaced in local newspapers and the editorials started to blame the Government for the state's predicament. In a move that was not unusual for its time,<sup>73</sup> the See Government appointed the Royal Commission in response to this negative news coverage, principally using it as a means to deflate the contentious population issue.<sup>74</sup>

The Report of the Royal Commission made it clear that the Commission's principal assumption was that it was investigating a threat to the State.<sup>75</sup> Moreover, this threat was the result of two inter-related facts — that women were progressively bearing fewer children and that doing so was a deliberate choice. It is hardly surprising then that the Commission laid the blame for the national predicament squarely at the feet of Australian

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<sup>73</sup> H. M. Clokie and J. W. Robinson have stated that part of the reason for the rise in popularity of Royal Commissions at the end of the nineteenth century, over other parliamentary groups like Select Committees, was because not only could the Commissions be "packed" with partisan, extra-parliamentary personnel, but also such Commissions were initiated by the executive, meaning that the Government could forestall criticisms of its policies and come through those criticisms more or less unscathed. G. N. Hawker has stated that by the end of the nineteenth century, governments in New South Wales were more ready to have commissions appointed than were the governments of any other Australian colonies and so fully shared in the "golden age of royal commissions" common to most of the British Empire. H. M. Clokie & J. W. Robinson, *Royal Commissions of Inquiry: The Significance of Investigations in British Politics* (Stanford: Stanford University Press, 1937) at 74; G. N. Hawker, *The Parliament in New South Wales, 1856 – 1965* (Sydney: Victor C. N. Blight, 1971) at 88.

<sup>74</sup> Hicks, *Sin and Scandal*, *supra* n.29 at 4.

<sup>75</sup> R. Pringle, "Octavius Beale and the Ideology of the Birth-Rate: The Royal Commissions of 1904 and 1905" (1973) 3 *Refractory Girl* 19 at 18.

women. It stated that nothing would ameliorate the situation “unless a radical change takes place in the mental and moral attitudes of women towards child bearing”.<sup>76</sup>

Women exerting control over their fertility were roundly and vigorously condemned by the Report. “It will be seen that the reasons given for resorting to limitation have one element in common, namely selfishness”.<sup>77</sup> Doctors were queried about the frequency of abortion requests and the shamelessness accompanying such requests.<sup>78</sup> Maternal indifference was listed as contributing to the rate of illegitimate infant mortality.<sup>79</sup> The use of artificial checks to prevent conception was said to tell its own tale of social and moral deterioration.<sup>80</sup> For those women who worked, factory conditions brought irreparable harm to the workers’ reproductive systems, reducing the ability to endure the strains of maternity and producing less vigorous offspring.<sup>81</sup> Even those women that had produced children were failing to suckle, feed, educate and medically attend to their infants appropriately.<sup>82</sup>

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<sup>76</sup> *NSW Birth Rate Report*, *supra* n.1 at 69.

<sup>77</sup> *Ibid.*, at 17. See for example, evidence provided by Dr Andrew Watson-Munro about women not “being bothered” to have children due to the inconvenience and inability to participate in the pleasures of society. *Royal Commission on the Decline of the Birth Rate And on the Mortality of Infants in New South Wales*, vol. 2 (Sydney: William Applegate Gullick, Government Printer, 1904) questions 2702-6 at 80 (hereinafter *NSW Birth Rate Inquiry*).

<sup>78</sup> See for example, evidence provided by Dr C. MacLaurin about one of his patients telling him with “upmost frankness” about having procured an abortion and how there were thirty other women waiting in the premises for the same procedure. *NSW Birth Rate Inquiry*, *ibid.*, question 2424 at 69. Dr Cosby William Morgan stated that women did not scruple to talk about abortion as they did not see the “moral wickedness” of it. *Ibid.*, question 1086 at 27.

<sup>79</sup> *NSW Birth Rate Report*, *supra* n.1 at 39.

<sup>80</sup> *Ibid.*, at 28.

<sup>81</sup> *Ibid.*, at 34. See for instance the line of questioning directed at Miss A. J. Duncan, Inspector of Factories, about whether factory work made women less inclined towards maternity, whether factory workers had less

This ineffective or indifferent mothering was presented as affecting a number of different bodies, corporeal and incorporeal. The first victim was the woman herself. The continued practice of methods of prevention was linked with the rise in insanity, hysteria and nervous diseases, not to mention maternal mortality. One doctor opined that such practices made women look old.<sup>83</sup> There was also a loss of self-respect with a resulting degradation of character.<sup>84</sup> The most important consequence however was the long-term effects on women's reproductive capacity. Not surprisingly, the Commission concluded that the prevention of conception, no matter what method was adopted, was the cause of many evils, far worse than any bad consequences that could naturally result from the bearing and rearing of a family.<sup>85</sup>

Another casualty of fertility control was the family. "The benefits of large families to the members of those families and to the nation composed of them cannot be over-estimated".<sup>86</sup>

The Commission noted that the social efficiency of members of small families was

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children than non-workers, or whether harm came to the children when the mothers were at work. Miss Duncan declined to comment. *NSW Birth Rate Inquiry*, *supra* n.77 questions 4078-4080 at 131.

<sup>82</sup> *NSW Birth Rate Report*, *supra* n.1 at 40-45.

<sup>83</sup> *NSW Birth Rate Inquiry*, *supra* n.77 at question 3880 at 124.

<sup>84</sup> *NSW Birth Rate Report*, *supra* n.1 at 21. Rev. Howell Price stated that "the whole moral tone suffers. In cases that come under my own personal notice, I know it has so suffered, and that, generally speaking, neither the husband nor the wife are what they were before they were married – that is speaking from a moral and spiritual standpoint, they have deteriorated". *NSW Birth Rate Inquiry*, *supra* n.1, question 6106 at 215.

<sup>85</sup> *NSW Birth Rate Report*, *supra* n.1 at 20.

<sup>86</sup> *Ibid.*, at 28.

impaired — the only child was less well-equipped for the struggle of life and often those with no dependants were liable to become dependent on others. Basically, men from large families had greater social worth.<sup>87</sup> The prevalence of smaller families in turn had a negative impact on the well-being of the larger community. “From a national standpoint, are not greater patriotism, greater unity of national aim and aspiration, to be expected in a community composed of a greater average number per family?” one Commissioner asked a witness.<sup>88</sup> The effort demanded for the support of a large family was said to stimulate a conscientious regard for duty, and promoted good citizenship.<sup>89</sup>

The most deleterious effect of sustained suppression of fertility was on the nation-state. The Commission continuously emphasised that the implications of a declining birth rate were not only a concern for New South Wales, but for the country. “The problem of the fall of the birth rate is ... a national one of overwhelming importance to the Australian people”.<sup>90</sup> In this context, the Report is paradoxical. Assertions that attempted to capitalise on nascent nationalistic pride and theories of Anglo-Saxon supremacy were gilded with a fear of future insignificance.

Public men seeing in the establishment of the Australian Commonwealth the first step in the construction of a great nation ... have referred hopefully to the day when Australia with her

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<sup>87</sup> *Ibid.*

<sup>88</sup> *NSW Birth Rate Inquiry*, *supra* n.77, question 5982 at 205.

<sup>89</sup> *NSW Birth Rate Report*, *supra* n.1 at 28.

<sup>90</sup> *Ibid.*, at 53.

teeming millions will hold a commanding place among the peoples of the world. The patriotic ardour inspired by this hopeful anticipation is, however, destined to be cooled...<sup>91</sup>

During this period Australia saw itself as a contender for supremacy in the Pacific, a position threatened by the imperialistic endeavours of Russia and Japan. As one journal commented, "whether Russia or Japan wins in the conflict now raging, the puerile attempt of the Commonwealth of Australia to pose as a great Pacific Ocean power will utterly fail before the efforts of the vast hordes of the yellow peoples".<sup>92</sup> If the decline in the birth rate continued, the Commissioners doubted the capacity of Australia to survive in the rivalry of nations.

Crucial to this survival were "those qualities which have made the British race predominant".<sup>93</sup> The Report is peppered with references to the threat that the decline posed to the "race". Intrinsically linked with this concern was another generated by the peculiar geographical attributes of Australia. A distinction was drawn between the older countries facing the question of over-population and Australia that had never "felt the stress of too many inhabitants".<sup>94</sup> As Coghlan had written earlier, "there appears nothing incongruous in a declining birth rate in an old civilisation ... but the extension of this phenomenon to new

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<sup>91</sup> *NSW Birth Rate Report*, *supra* n.1 at 53.

<sup>92</sup> *The Australasian Insurance and Banking Record*, March 19 1904 at 212.

<sup>93</sup> *NSW Birth Rate Report*, *supra* n.1 at 53.

<sup>94</sup> *Ibid.*, at 7.



countries where population is so much desired is novel and astonishing...”.<sup>95</sup> The expanse of the continent needed to be peopled — and peopled by white Australians. As the Commission summed up in its conclusion, “the future of the Commonwealth and especially the possibility of maintaining a ‘white Australia’ depend on the question whether we shall be able to people the vast areas of the continent.”<sup>96</sup>

Based on these conclusions, the Commission made a number of recommendations. Most of the recommendations were, fortunately, never acted upon by Parliament. This is probably partly due to the nature of the recommendations themselves. Some were entirely dependent on fiscal considerations,<sup>97</sup> others could simply never have been enforced.<sup>98</sup> Yet, the mere appointment of the Commission, let alone the contents of the Report, powerfully conveys the tenor of political thought in New South Wales at this time. The *Australasian Insurance and Banking Record* for example, found the conclusions of the Commission “just and accurate” and of “high value”.<sup>99</sup> The *Intercolonial Medical Journal*, although stating that the emphasis ought to be placed on preserving infantile life rather than increasing the number of children, accepted the Report’s basic premise that the stability of the race was

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<sup>95</sup> Coghlan, *supra* n.2 at 4.

<sup>96</sup> *NSW Birth Rate Report*, *supra* n.1 at 176.

<sup>97</sup> See for example, the recommendation for increased public hospital accommodation. *NSW Birth Rate Report*, *supra* n.1 at 31.

<sup>98</sup> See for example, the recommendation that it be made an indictable offence to agree to procure a miscarriage, whether verbally, by letter or otherwise. *NSW Birth Rate Report*, *supra* at n.1 at 32.

<sup>99</sup> *Australasian Insurance and Banking Record*, March 9 1904 at 213, 214.

endangered by the birth rate trend.<sup>100</sup> While publications like the *Bulletin* denounced the “tory-ism” of the Report, Sydney newspapers praised it and accepted most of its conclusions.<sup>101</sup>

Moreover, as more than half of the men sitting on the Commission were members of the New South Wales Parliament or closely associated with the Government, the Report was certainly not ignored by the legislature.<sup>102</sup> The Commission’s findings had the most significant impact on the drafting of the Poisons Bill, 1905 (NSW) and the *Private Hospitals Act, 1908* (NSW). It is in these debates, analysed in the next parts of this chapter, that the powerful rhetoric produced by the intersection of sexual, racial and national chauvinism is rendered most obvious.

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<sup>100</sup> A. McLean, “Alleged Artificial Restriction of Families” (1904) 9 *Intercolonial Medical Journal* 394 at 395-396.

<sup>101</sup> Pringle, *supra* n.75 at 25.

<sup>102</sup> Dr Charles Mackellar, Sir Henry MacLaurin, Edmund Fosbery, Thomas Hughes and John Nash were all Legislative Councillors; T. A. Coghlan was the Government statistician; Robert Paton was a medical advisor to the Government and member of the Board of Health; William Holman was a Labor member of the Legislative Assembly. For further detail see Hicks, *Sin and Scandal*, *supra* n.29 at 8 *infra*.

***"The Monstrous Practice":<sup>103</sup> The Poisons Bill, 1905***

History does not forget to repeat itself. In the time of Julius Caesar, celibacy and childlessness became more and more common; criminal abortion was frequently practiced; pregnancy was considered a mar to beauty and the Roman Empire, for the want of *men*, was overrun by northern hordes ... because she could not brook to have her classic tastes interrupted by family cares and family ties.<sup>104</sup>

Throughout the Birth Rate Inquiry, question after question was directed at the witnesses regarding the ease with which women obtained drugs and poisons for abortion purposes.<sup>105</sup>

Of particular concern for the Commissioners was the use of ergot of rye.<sup>106</sup> New South Wales law did regulate the sale and distribution of ergot of rye. Pursuant to the *Poisons Act, 1902* (NSW) only registered dealers were able to sell poisons listed in the schedule, which included ergot of rye, and upon the sale of such poison had to note the particulars of the

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<sup>103</sup> "[This Bill] will be in the very best interests of the people, because it will do much to preserve the health of the community, will prevent improper dealings with deleterious drugs and stop the monstrous practice that goes on in the treatment of abortive patients". New South Wales, Legislative Assembly, *Debates*, 26 October 1905 at 3252 (Mr Thomas).

<sup>104</sup> Garrett, *supra* n.55 at 12.

<sup>105</sup> See for example evidence provided by Sir James Graham, doctor, on the ease for women "to become regular", *NSW Birth Rate Inquiry*, *supra* n.77, question 3591 at 114; Mr George Stevens, chemist, on the frequency of requests for abortive pills, *ibid.*, question 1671 at 44; Mr William Sharland, importer, for the growing use of pessaries and douches, *ibid.*, question 982 at 24.

<sup>106</sup> Ergot is a toxin derived from a fungus that grows on various plants, most readily on types of rye. It is an oxytocic drug that stimulates movement in the uterus and therefore has had a history of use in both procuring abortions and inducing labour. Although the first deliberate use of ergot to induce an abortion is unknown it was certainly being employed by the sixteenth century. The intentional use of ergot as a drug was dangerous because of the problem in controlling dosage in folk remedies — very often women would just eat contaminated rye grass. It is still used by obstetricians in the form of ergometrine. J. M. Riddle, *Eve's Herbs: A History of Contraception and Abortion in the West* (Cambridge, Mass: Harvard University Press, 1997) at 198-99; McLaren & McLaren, *supra* n.33 at 34.

purchaser, the quantity sold and the purpose for which it was bought.<sup>107</sup> However, evidence of a loop-hole in the legislation was brought before the Commission. If suppliers of the drug gave it away free of charge, they did not fall within the framework of the legislation. The Commissioners heard evidence that women would pay for advice about terminating a pregnancy and would then receive the medication free, thereby allowing their suppliers to circumvent the legislation.<sup>108</sup>

During his testimony to the Commission, Mr Foster, Secretary of the Pharmacy Board, recommended a series of legislative changes to assist in reducing the accessibility of ergot of rye to pregnant women.<sup>109</sup> His recommendations were taken seriously. In July 1905 Mr Dick introduced a Poisons Bill into the Legislative Assembly, noting that it was designed to implement recommendations of the Birth Rate Inquiry about the sale of poison by abortionists.<sup>110</sup>

The Poisons Bill divided the scheduled poisons into three classes. Ergot of rye and its preparations formed a class by itself and therefore warranted different treatment than other poisons in the Bill. Only medical practitioners were able to prescribe ergot if it was for

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<sup>107</sup> *Poisons Act, 1902* (NSW), No. 65, ss. 5(2), 6. Prior to this Act, the *Sale and Use of Poisons Act, 1876* (NSW), 40 Vic., No. 9 regulated the sale of poisons in the colony.

<sup>108</sup> Evidence provided by Mr Foster, Secretary to the Pharmacy Board, *NSW Birth Rate Inquiry*, *supra* n.77, question 3746 at 119.

<sup>109</sup> Evidence provided by Mr Foster, Secretary to the Pharmacy Board, *ibid.*, question 3753 at 119.

“bona fide” purposes. Pharmacists could supply the drug on the condition that the purchaser possessed a signed prescription from a medical practitioner. Moreover, the pharmacist could not repeat that prescription and he was to keep the copy of it in his files.<sup>111</sup> This stipulation was to prevent the repeated use of the same script by friends and family of the patient.

The Poisons Bill was debated in October 1905, and although the Assembly voted it to a third reading, it was not enacted. In 1906, the Bill was reintroduced, but again fell short of enactment, with no indication in the debates about why this occurred.<sup>112</sup> Although the Bill did not receive Royal Assent,<sup>113</sup> the parliamentary debates highlight certain attitudes towards the law that underpinned legislative activity throughout this period.

The most revealing part of the parliamentary dialogue comes from Mr Thomas. He noted that his colleagues were aware of the use of ergot as a means of procuring an abortion and the frequency of its use in the city and in the country. He then went on to say:

The result of the common use of that drug to the extent to which it has been used has been to considerably reduce the birth rate of this state. If this law did nothing else but assist to

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<sup>110</sup> New South Wales, Legislative Assembly, *Debates* (6 July 1905) at 689 (Mr Dick).

<sup>111</sup> Poisons Bill, 1905 (NSW), cl. 14, 15.

<sup>112</sup> More than 50% of bills presented in the period 1901-1905 were not enacted. This can be compared, for example, to years of 1921-1925 where 60% of bills were passed and 1960-1965 where 92% were passed into law. Hawker, *supra* n.73 at 241.

<sup>113</sup> This is contrary to the assertions of Siedlecky & Wyndham who stated that the “Poisons Act” made ergot of rye available only on prescription. Siedlecky & Wyndham, *supra* n.72 at 19.

bring about an increase in the birth rate of the country, that in itself would be sufficient justification for honourable members to at least view the matter seriously, and try to pass the measure into law.<sup>114</sup>

The blatant expression of such pro-natalist policy is startling. Even allowing for a politician's hyperbole, Mr Thomas' insistence that the Bill be passed for no other reason but to bring about an increase in the birth rate is instructive. It provides a clear expression of the expectations placed on the power of the law: it was obviously perceived as having an instrumental and indispensable role to play in reversing the birth rate trend. Where moral and religious exhortations had failed, the law was expected to re-shape couples' reproductive behaviour. This faith in the law was exhibited for the first time in Mr Trickett's evaluation of the *Children's Protection Act, 1892* (NSW), discussed in Chapter Two, but these expectations placed on the law were implicit in the rationale for all the measures of this nature pursued by governments.

Mr Thomas also bluntly articulated the connections between population power and birth control that were tacitly motivating all the relevant governmental activity of this period. Bernard Dickens has proposed that there is some relationship between the practice of abortion and the demands of population numbers. Relying on examples from classic through to modern history, Dickens has documented several instances in which tribes or countries faced with problems of over-population have tended to take a liberal stance on

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<sup>114</sup> New South Wales, Legislative Assembly, *Debates*, 26 October 1905 at 3251 (Mr Thomas).

abortion (and infanticide) as a means of dealing with the problem.<sup>115</sup> In contrast, he has also observed that a threat to tribal, national or racial survival by declining numbers has at times resulted in abortion becoming disfavoured and prohibited.<sup>116</sup>

Dickens' hypothesis is not intended to be, nor should it be, adopted as a cause-and-effect analysis of abortion law. His suggestion is that attitudes to abortion can at times be founded on ecological or national pressures and that there therefore needs to be some acceptance of the relationship between the practice of abortion and population prerogatives. In presenting historical trends in this light, Dickens has made an invaluable link between population power and fertility control. Michel Foucault made a similar connection with sex. Foucault emphasised that it was during the industrial revolution that society affirmed that its future and fortune were tied to the individual use of sex, because governments were recognising the power of a large population.<sup>117</sup> An explicit example of these connections is found in the *British Report of the Inter-departmental Committee on Abortion of 1936*:

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<sup>115</sup> For example, twentieth century Japan, after defeat of her territorial expansionist aims, was faced with the problem of containing her rapidly expanding population. Although birth control was recognised as the superior means to control population growth, in 1948, supplemented by voluntary sterilisation programmes, abortion was deliberately made legal under liberal conditions. B. M. Dickens, *Abortion and The Law* (Bristol: MacGibbon & Kee, 1966) at 12-13. China's one-child policy appears to be a similar example of population policy being driven by ecological pressures.

<sup>116</sup> Post-revolutionary Russia allowed legal abortion freely until the 1930s when war with Germany and Japan, (with their associated population policies) seemed imminent. In 1936 abortion was made illegal. At the same time, literature on contraception suddenly disappeared from Russian bookshops. *Ibid.*, at 13.

<sup>117</sup> M. Foucault, *The History of Sexuality* (New York, Vintage Books, 1990) at 26.

Any considerable extension of the grounds upon which abortion might be lawfully procured would, we believe, almost inevitably tend to hasten a decline in the size of the population... It is a matter of common knowledge that the rate at which the population of this country is at present reproducing itself is such that, unless the rate is considerably raised, the size of the population will before long begin to fall.<sup>118</sup>

The NSW Birth Rate Report had also drawn this link between population power and birth control. The sanctioning of it in the Poisons' Bill debates illustrates that such reasoning did influence the workings of the legislature. From one perspective then, the regulation of fertility control at the turn of the century can be viewed through a Foucaultian lens as an attempt to transform the sexual conduct of couples into concerted political behaviour through the agency of the law.<sup>119</sup>

Paradoxically however, the fact that Parliament felt the need to, again, supplement the criminal law with further legislation reveals that the law was failing in its regulatory role. Despite the legislature's attempts, reliance on contraception and abortion continued unabated during this period.<sup>120</sup> The recognition that prohibition was ineffective in altering women's fertility control patterns was not to come until later in the century. In the meantime, the New South Wales Government tried one last time again to bolster the law's position in relation to reproduction crime.

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<sup>118</sup> *Report of the Inter-departmental Committee on Abortion* (1939), para 232, as quoted in Dickens, *supra* n.115 at 14.

<sup>119</sup> Foucault, *supra* n.117 at 26.

<sup>120</sup> See Introduction for more detail.



***“Places where criminality exists”:<sup>121</sup> Private Hospitals Act***

Q: Have you observed that a considerable number of women have gone to these lying-in homes in the early months of pregnancy with the apparent purpose of having abortions procured?

A: Yes; at that time I did notice a good many — well the fact that they were in the family way was hardly perceptible. That was a point that struck me — it was very noticeable.<sup>122</sup>

The Birth Rate Commissioners had been convinced by “many credible witnesses” that abortion was largely carried out by people operating private lying-in homes. Earlier in the 1890s, observers had noted that lying-in homes did a big trade in abortions,<sup>123</sup> and the criminality of lying-in homes was legislatively asserted for the first time in the *Children’s Protection Act, 1892* (NSW). “Lying-in home” was defined in this Act as a house in which more than one woman was received for confinement, in exchange for payment.<sup>124</sup> Under this legislation, lying-in homes were required to register every birth and death with the authorities. Most notably, in the advent of a still-birth, a medical certificate had to be obtained before burial.<sup>125</sup> Similar assumptions about the criminality of lying-in homes surfaced again during the Birth Rate Inquiry. For instance, one witness was asked, “it is not

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<sup>121</sup> “Those places [lying-in homes] of which I suppose we all have considerable knowledge — [are] places where criminality exists”. NSW, Legislative Council, *Debates* (6 August 1908) at 435 (Mr Fosbery).

<sup>122</sup> Evidence of Mr S. Maxted, Ex-Officer of State Children’s Relief Department, *NSW Birth Rate Inquiry*, *supra* n.77 question 3113 at 95.

<sup>123</sup> *Minutes of Evidence and Report of the Select Committee on the Children’s Protection Bill and the Infants’ Protection Bill, 1891-92* (Sydney: 1892) at 60.

<sup>124</sup> *Children’s Protection Act, 1892* (NSW), s. 28.

<sup>125</sup> *Children’s Protection Act, 1892* (NSW), ss.13, 15, 16. Similar provisions were also in effect in Victoria. They required the occupier of a house where an illegitimate child was born or died to give notice to the authorities. *Infant Life Protection Act, 1890* (Vic), ss. 18, 19.

a fact that women who are notorious abortionists, are keepers of registered lying-in homes?"<sup>126</sup> Of particular concern was that these private maternity hospitals were generally patronised by middle-class girls — the poor were more likely to go to places like the Salvation Army Home where their babies were given over to adoption.<sup>127</sup> As a consequence, one of the Report's recommendations was that a State department should be entrusted with the supervision and control of all private hospitals, lying-in homes and maternity homes where pregnant women were received.<sup>128</sup> Several years later the *Private Hospitals Act, 1908* (NSW) gave legislative effect to this recommendation.<sup>129</sup>

Dr Charles Mackellar who had been President of the Birth Rate Inquiry,<sup>130</sup> steered the *Private Hospitals Act, 1908* (NSW) through Parliament. Ostensibly, he introduced the Bill as a measure aimed at regulating all private hospitals, their management and their staff. Early in the debate however, Mackellar confirmed that the object of the Bill was to tackle abortionists.<sup>131</sup> With this in mind, it becomes apparent that most of the clauses were aimed at eradicating abortion — whether specifically, through the restriction of nurses who

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<sup>126</sup> *NSW Birth Rate Inquiry*, *supra* n.77, question 4174 at 137.

<sup>127</sup> Pringle, *supra* n.75 at 23.

<sup>128</sup> *NSW Birth Rate Report*, *supra* n.x at 31.

<sup>129</sup> *Private Hospitals Act, 1908* (NSW), No. 14.

<sup>130</sup> Sir Charles Kinnaid Mackellar (1844 - 1926) physician, politician and businessman, was nominated to the Legislative Council of New South Wales in 1885 to promote public health legislation that he had helped draft. He was heavily involved in children's protection legislation and latterly was involved in the eugenics movement. A. M. Mitchell, "Charles Mackellar" in B. Nairn & G. Serle, *Australian Dictionary of Biography*, vol. 10 (Melbourne: Melbourne University Press, 1986) at 297.

<sup>131</sup> NSW, Legislative Council, *Debates* (6 August 1908) at 429 (Mr J. Hughes and Dr Mackellar).

otherwise might be “tempted to take to service in an abortion mongering institution”,<sup>132</sup> or generally through its licensing provisions. The Bill above all else was concerned with eliminating a practice that was “disastrous to the state”.<sup>133</sup>

The legislation defined a “private hospital” as any building that received medical and surgical cases, or, lying-in cases. Lying-in homes were thus defined separately from other hospitals. This was reinforced by the licensing system that distinguished them from surgical hospitals and stated that no lying-in patient was to be received in a private hospital unless it was licensed for such cases. Moreover, these licenses were only granted by the Minister once he was satisfied with “the character and fitness” of the applicant.<sup>134</sup>

The Act stipulated that any death or birth in a lying-in hospital had to be reported within twenty-four hours to the Registrar of Births, Deaths and Marriages. It is the definition of “birth” that is alarming. The common meaning of “birth” was extended to include stillbirths, and most importantly, miscarriages *at any period during pregnancy*.<sup>135</sup> This definition was at first resisted by Mackellar’s colleagues until it was explained that if this definition was omitted, the Bill might as well have been thrown under the table.<sup>136</sup> “The

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<sup>132</sup> NSW, Legislative Assembly, *Debates* (4 December 1908) at 3255 (Dr Graham).

<sup>133</sup> NSW, Legislative Council, *Debates* (6 August 1908) at 431 (Dr Nash).

<sup>134</sup> *Public Hospitals Act, 1908* (NSW), ss. 2, 8(1), 8(3).

<sup>135</sup> *Public Hospitals Act, 1908* (NSW), ss. 2, 12.

<sup>136</sup> NSW, Legislative Council, *Debates* (12 August 1908) at 519 (Sir MacLaurin).

whole object was to prevent the perpetration of the crime of abortion and with this line struck out, the Bill would be useless for that purpose”, explained one M. L. A.<sup>137</sup>

The parliamentary debate on what was to become section 11 of the *Private Hospitals Act, 1908* (NSW) exemplifies the legislation’s objective. The original clause as debated in the Upper House required the manager of any public hospital to notify the Board of Health when a patient was found to be suffering from pelvic peritonitis or pelvic cellulitis.<sup>138</sup> When members of the opposition demanded to know what these specific conditions were, members of the Government delicately avoided the issue. Finally, Sir Henry MacLaurin explained that “we were considering cases of abortion ...[where] a patient outside who might have a miscarriage brought on, was taken into a hospital and kept there until she either got better or died. The purpose of the clause was to make certain that that fact should be reported”.<sup>139</sup> Abortionists usually attempted to procure a miscarriage by piercing the placental sac with a sharp metal instrument, thereby inducing contractions and expulsion of uterine contents.<sup>140</sup> By targeting these diseases that were often the result of bungled

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<sup>137</sup> NSW, Legislative Council, *Debates* (12 August 1908) at 523 (Mr Winchcombe).

<sup>138</sup> *Cellulitis* is an inflammation of connective tissue, especially loose subcutaneous tissue and *peritonitis* is inflammation of the peritoneum (the membrane that lines the abdominal cavity). *Dictionary of Scientific and Technical Terms*, 5<sup>th</sup> ed., (New York: McGraw Hill, 1994).

<sup>139</sup> NSW, Legislative Council, *Debates* (13 August 1908) at 595 (Sir MacLaurin).

<sup>140</sup> J. A. Allen, “The Trials of Abortion in Late Nineteenth and Early Twentieth Century Australia” (1993) 12 *Australian Cultural History* 87 at 97.

abortions, the Government was hoping to generate further evidence that would lead authorities to abortionists.

This clause generated more debate than any other clause in the Bill. Despite this, many of the Parliamentarians did not display much concern about the invasive protocol that this clause established. For instance, one member stated that “if the question were put to the purest women in the land as to whether the fact of her suffering from pelvic cellulitis or pelvic peritonitis should be reported, she would submit with pleasure to any suffering it might entail upon her in order to prevent the murder of hundreds of unfortunate girls who went into these private hospitals”.<sup>141</sup> The possibility that some “hypersensitive neurotic girls”, he stated, may feel hurt because their case had to be reported to the Board of Health should not have prevented the honourable members from voting in accordance with where sympathy and humanity lay.<sup>142</sup>

Some members did voice concern that women would be subjected to unnecessary inquisition. These protests however were generally weak and irresolute. Mr Ashton was one Legislative Councillor who was specific and persistent in his condemnation of the clause. He alluded to the “mental torture” of having such personal detail reported to a public office

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<sup>141</sup> NSW, Legislative Council, *Debates* (13 August 1908) at 605 (Mr O’Conor).

<sup>142</sup> NSW, Legislative Council, *Debates* (13 August 1908) at 605 (Mr O’Conor).

and the anguish this would cause women. Yet his opposition wavered. Provided that the diseases were not specifically mentioned in the legislation and the Board of Health was granted the power to regulate the notifiable diseases instead, he was content to support the clause.<sup>143</sup> Another vocal opponent to the clause was Dr Nash, but his concerns did not centre on women's personal integrity. The primary consideration for this Councillor was that pelvic inflammation was also caused by sexually transmitted diseases.

The final compromise made a curious contribution to the Act. Section 11 provided that when lying-in patients were suffering from "any disease" (as proclaimed by the Governor), the matter had to be reported to the Board of Health within twenty-four hours. The parliamentary debate had resulted in the Bill being expanded beyond what was originally proposed to include "any disease" suffered by a patient in a lying-in home. It would strike any reader of the legislation, who did not have knowledge of the debates, as strange that lying-in homes, and not other hospitals, had to report *any* disease to the secretary of the Board of Health.

The debates on the *Public Hospitals Act, 1908* (NSW) show that legislators were not overly troubled by the enactment of measures that negatively affected women. The irresolute concern voiced about women's privacy is reducible to political posturing. If anything,

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<sup>143</sup> NSW, Legislative Council, *Debates* (13 August 1908) at 604-5 (Mr Ashton).

women were potentially even more susceptible to unwarranted investigation under the enacted legislation than they would have been under the provisions in the Bill, depending on the list of diseases proclaimed by the Governor. Even those Legislative Councillors who vigorously debated this clause were "just as anxious as ... anyone in the country, that we should be able in some way to get at the cases which were illegal, and which were sins against morality, sins against the state and against every propriety that could be thought of".<sup>144</sup> The fact that intimate details of women's health were now open to public scrutiny and surveillance does not appear to have unduly concerned most members of Parliament.

The tendency to regulate women, particularly in matters related to pregnancy and birth, was equally evident in the Canadian context. Lying-in homes had also surfaced in Canada and reformers were similarly suspicious of their activities. Although primitive even by nineteenth century standards, these boarding houses offered their clients benefits, not least discrete and inexpensive shelter and a modicum of medical care.<sup>145</sup> Frequently however, these benefits were overlooked because of the boarding house's association with illegitimacy and immorality. The homes were denounced as places where "large numbers of illegitimate children are born into the world annually, which children are, by some means or other, got rid of".<sup>146</sup> In *Of Toronto the Good*, C. S. Clark wrote:

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<sup>144</sup> NSW, Legislative Council, *Debates* (13 August 1908) at 593 (Dr Nash).

<sup>145</sup> P. Ward, "Unwed Motherhood in Nineteenth-Century English Canada" (1981) *Historical Papers* 34 at 49.

<sup>146</sup> *Ibid.*

The many lying-in hospitals and institutions for the reception of illegitimate children tell but a portion of the story, and it is probable that the immorality that produced such results, widespread though it may be, is remarkably limited in comparison with that which escapes detection.<sup>147</sup>

Ontario was the first Canadian province to pass legislation specifically regulating maternity homes: in 1897, it enacted the *Maternity Boarding Houses Act, 1897* (Ont.).<sup>148</sup> Two years later, Manitoba followed suit with an almost identical statute.<sup>149</sup> These statutes appear to have had two main aims: the regulation of adoption and the regulation of births in these homes. The sections relating to adoption largely repeated the measures contained in the *Protection of Infant Children Act, 1887* (Ont.) discussed in Chapter Two. However, the provisions relating to mothers and births were completely new.

The pivotal section of these statutes made it unlawful for any person in exchange for money to receive any woman for accouchement or to keep women (being mothers of infants and not being married) with infants for board unless they were registered with the municipality.<sup>150</sup> The legislation established a registration process whereby licences were granted to maternity homes on the payment of an annual fee, once the officer was satisfied

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<sup>147</sup> C. S. Strong, *Of Toronto The Good: The Queen City of Canada As It Is* (Montreal: Toronto Publishing Company, 1898) at 96.

<sup>148</sup> *Act to Regulate Maternity Boarding Houses and for the Protection of Infant Children, 1897*, R.S.O 1897, c. 258 [hereinafter *Maternity Boarding Houses Act, 1897* (Ont.)]. See also *Act to Regulate Maternity Boarding Houses and for the Protection of Infant Children, 1897* (Ont.), 60 Vic., c. 52.

<sup>149</sup> *The Maternity Act, 1899* (Man.), 62 & 63 Vic., c. 21.



with the proprietor's character and capabilities.<sup>151</sup> The Acts also provided for the inspection by municipal health officers of the premises at any time.<sup>152</sup> And if the proprietors were guilty of serious neglect or were incapable of providing proper food and attention, they would be struck from the register.<sup>153</sup>

These statutes were clearly attempting to regulate the institutions and to impose some standards of care upon the proprietors. Along with surveillance of the institutions however, the legislation also provided for the monitoring of the "inmates". For instance, proprietors of maternity houses were required to ascertain and record the "antecedents of women coming under their care" and to furnish that information as required.<sup>154</sup> They were also expected to maintain a register of every women, girl or infant in their care and to record where they came from, the doctor that attended the birth and to where the women went after leaving the refuge. Failure to do so left the proprietor liable to monetary penalty.<sup>155</sup> The level of distrust that had grown around these maternity homes and the women they housed is made obvious in the section that required every birth taking place to be attended

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<sup>150</sup> *Maternity Boarding Houses Act, 1897* (Ont.), s. 15; *Maternity Act, 1899* (Man.), s. 12.

<sup>151</sup> *Maternity Boarding Houses Act, 1897* (Ont.), s. 18; *Maternity Act, 1899* (Man.), s. 14.

<sup>152</sup> *Maternity Boarding Houses Act, 1897* (Ont.), s. 25; *Maternity Act, 1899* (Man.), s. 21.

<sup>153</sup> *Maternity Boarding Houses Act, 1897* (Ont.), s. 19; *Maternity Act, 1899* (Man.), s. 15.

<sup>154</sup> *Maternity Boarding Houses Act, 1897* (Ont.), s. 22; *Maternity Act, 1899* (Man.), s. 18.

<sup>155</sup> *Maternity Boarding Houses Act, 1897* (Ont.), s. 20; *Maternity Act, 1899* (Man.), s. 16. The fine in Ontario was \$20 while in Manitoba it was \$100.

by a legally qualified medical practitioner and also that the birth had to be reported to the authorities immediately.<sup>156</sup>

There is almost no parliamentary evidence explaining why either Ontario or Manitoba enacted this legislation. The Ontario Legislature did not commence recording its legislative debates until 1944, and Manitoba only started this practice in 1958. Instead, both provinces maintained a scrapbook of newspaper clippings about parliamentary activity. The Manitoba scrapbook, a collation of *Winnipeg Free Press* and *Winnipeg Tribune* articles, does contain a brief reference to the passage of the *Maternity Act, 1899* (Man.).<sup>157</sup> The *Free Press* noted that Manitoba was introducing the legislation because “some philanthropic ladies ask for its introduction here”.<sup>158</sup>

Unwed mothers and their infants had been identified as suitable objects of female philanthropic rescue for most of the nineteenth century.<sup>159</sup> In Manitoba, “philanthropic ladies” had been particularly active in ameliorating the plight of mothers and infants. In 1885, the Christian Women’s Union had founded the Children’s Home of Winnipeg and in 1890 had sent a deputation to the Manitoba Legislature to plead for funds to establish a

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<sup>156</sup> *Maternity Boarding Houses Act, 1897* (Ont.), s. 23; *Maternity Act, 1899* (Man.), s. 19.

<sup>157</sup> Research undertaken by the Ontario Legislature’s librarians on behalf of the author did not reveal any relevant clippings in the Ontario scrapbook.

<sup>158</sup> *Winnipeg Free Press*, 13 July 1899.

female refuge for unmarried or recently widowed mothers. The purpose of the refuge was to allow mothers to care for their children until the children were old enough to be adopted out if necessary.<sup>160</sup> This type of activity was typical of women's social reform agendas across Canada. Patricia Rooke and R. L. Schnell have stated that the work of ladies in foundling and infant homes across Canada marked the first major thrust of middle-class women in British North America into significant forms of social reform and personal service.<sup>161</sup>

The extent to which the "philanthropic ladies" of Manitoba influenced the enactment of this legislation is difficult to gauge without a thorough investigation of their own records. Their efforts do serve as a reminder that reform of women's health was clearly not only a product of parliamentary pro-natalist concern. At the same time however, the excessive regulation of individual women, rather than just the institutions housing them, is indicative of a broader agenda not inconsistent with either the moral reform or pro-natalist movement. The Canadian statutes were not as extreme as those in New South Wales, but like the Australian legislation, they reveal a heightened interest in women's reproductive activities. For the purposes of assisting women in birth, details about where the women came from or were going to, or information about their antecedents should not have mattered to the Canadian

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<sup>159</sup> P. T. Rooke & R. L. Schnell, *Discarding the Asylum: From Child Rescue to the Welfare State in English-Canada, 1800 – 1950* (Lanham: University Press of America, 1983) at 130.

authorities. Nor in the case of New South Wales did the Board of Health need to be notified about any “disease” or any “birth” as expansively defined by the legislation. If the object was to protect women and women’s health, these aspects of the legislation were unnecessary.

There were obviously humanitarian elements to this legislation, just as there were in the *Indecent Advertisements Acts* and the Poisons’ Bill examined earlier in this chapter. Yet when laws of this nature are viewed in their social context, particularly in light of the NSW Royal Commission, the ostensible reasons for their introduction need to be supplemented. The statutes may have been aimed at “protecting” women or improving the standards of women’s health, but they were also about providing authorities with the opportunity to monitor and control women’s reproductive activities. In this way, this chapter has provided examples of laws that, although perhaps innocuous in appearance, were intended to operate in additional ways that are not necessarily obvious from a de-contextualised reading of the legislation. Reading the Poisons’ Bill, for example, without knowledge of the parliamentary debates or an awareness of the conclusions of the Royal Commission could result in a misinterpretation about the breadth of activities this Bill was targeting. Similarly, the amendments to the obscenity law contained in the *Indecent Advertisements Acts* may be

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<sup>160</sup> *Ibid.*, at 116, 124.

<sup>161</sup> *Ibid.*, at 130.

solely, and falsely, attributed to misplaced patriarchal concern. The *Indecent Advertisements Acts*, the *Public Hospitals Act*, the Poisons' Bill and the deliberations of the Birth Rate Inquiry highlight that while legislators may have been trying to deliver what they thought women needed, these needs were only accommodated to the extent that they coincided with the perceived wants of the nation. Elspeth Browne neatly encapsulated this when she wrote, "very often the arguments for marriage and maternity were only peripherally about what was good for women, and substantially about what was good for the state".<sup>162</sup>

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<sup>162</sup> E. Browne, *The Empty Cradle: Fertility Control in Australia* (Sydney: New South Wales University Press, 1979) at 172.

## Conclusion

### **Birth of a Nation**

The mothers of the race deserve the best we can provide for them, as the future of the nation is in their keeping".<sup>1</sup>

Although the trend began at the end of the eighteenth century with *Lord Ellenborough's Act, 1803* (UK), the final years of the nineteenth century were marked by a notable inclination of parliaments to regulate the reproductive activities of women. James Mohr has stated that it was the historically specific conditions of the nineteenth century that combined to affect this transformation, at least in relation to American abortion policy. In his opinion, the nineteenth century's wave of restrictive abortion laws in America can be seen as a deviation from the norm, a period of interruption in the historically tolerant attitude towards abortion.<sup>2</sup> If this theory is accepted and analogised, the cluster of laws enacted in Australia and Canada at the turn of the twentieth century can also be seen as something of a hiatus and can be attributed to a number of historically specific coalescing factors. For these countries, it was the concern over racial integrity, heightened by a fear

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<sup>1</sup> *Charities Gazette*, 3 January 1918 as quoted in M. J. Lewis, "Populate or Perish": Aspects of Infant and Maternal Health in Sydney, 1870 – 1939" (Ph. D Thesis, A.N.U, Canberra, 1976) at 314.

<sup>2</sup> James Mohr stated that it was the short term interests of regular physicians in the face of an unprecedented crisis in the history of medical practice in the United States, and the shift in the socio-demographic role of abortion that combined to produce the American anti-abortion legislation. J. C. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800 – 1900* (New York, Oxford University Press, 1978) at 258-259.

generated by the declining birth rate that promoted a climate in which exercising control over women's fertility was seen as warranted.

The position of Australia and Canada within Empire forms the crux of this particular historical interval. When it came to questions of identity, national uncertainty and fragility forged a heavy reliance upon notions of Empire. As a justification for the Immigration Restriction Bill (Cth) in 1901, for instance, Mr McLean declared to his Parliamentary colleagues that, "it is our loyalty to the Empire, and the supreme conviction that it is the destiny of the British Empire to rule in these southern seas that has promoted us to this drastic kind of legislation".<sup>3</sup> It was this almost blind adherence to the concept of *Englishness* that formed the basis of white settler identity.

The canonisation of *Englishness* manifested itself in number of different ways: *Englishness* was more than a simple racial designation. Even if there was not necessarily the belief that the *English* were more brilliant or attractive than other races, there was the feeling that the *English* were somehow more moral.<sup>4</sup> "If you look around the world and inquire why it is that in so many foreign countries the Englishman ... has ... been invited to undertake, and has successfully undertaken, the task of regeneration and reform, you will find that it has

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<sup>3</sup> Australia, House of Representatives, *Debates* (12 September 1901) at 4857 (Mr McLean).

<sup>4</sup> R. Faber, *The Vision and the Need: Late Victorian Imperialist Aims* (London: Faber & Faber, 1966) at 122.

been because of the universal belief in his integrity".<sup>5</sup> In the words of Sir Stamford Raffles: "it is to British manners and customs that all nations now conform themselves ... It appears that there is something in our national character and condition which fits us for this exalted station".<sup>6</sup> In other words, the *Englishman* possessed "character". "Character" was an ill defined, but also well-understood concept in which white people were seen as having more character than people of colour; and among whites, people of British descent were regarded as having the most character.<sup>7</sup> Importantly, sexual morality was an integral part of this. The ability to control one's sexual needs and wants was central to the acquisition and maintenance of one's character.<sup>8</sup>

While the *English* inherently possessed character, the morally perilous colonies potentially placed it at serious risk. "I think it is hard for you who are at a distance from the colonies to understand them — they are so intensely good and so intensely bad ... women ... who are not really steady in their principles are thousand fold better off at home".<sup>9</sup> If, as Lord Carnarvon stated, the truest imperialism was that based on the "extension of British

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<sup>5</sup> Lord Curzon as quoted in Faber, *ibid.*

<sup>6</sup> *Ibid.*, at 39.

<sup>7</sup> M. Valverde, *The Age of Soap, Light and Water: Moral Reform in English Canada, 1885 – 1925* (Toronto: McClelland & Stewart, 1991) at 104.

<sup>8</sup> *Ibid.*, at 105.

<sup>9</sup> Letter from Maria Rye to Barbara Bodichon (1865) as quoted in A. Perry, *On the Edge of Empire: Gender, Race and the Making of British Columbia, 1849 – 1871* (Toronto: University of Toronto Press, 2001) at 191.



institutions and wholesome influences”,<sup>10</sup> Australia and Canada needed to demonstrate that *English* wholesome influence had extended to their corner of the Empire. For the settler colonies, particularly New South Wales burdened by its convict stain, an adherence to moral righteousness needed to be explicitly exhibited. If the white settler colonies could not achieve and sustain an *English* moral character, the fragile distinction drawn between them and the “uncivilised” parts of the Empire collapsed. For counterpoised against pure and proper *Englishmen* were the *savages*, who were by definition “unrestrained by any sense of delicacy from a copartnery in sexual enjoyments”,<sup>11</sup> people who could not control their sexual desires and thus were unlikely to lead orderly and civilised lives.<sup>12</sup> “Mid-nineteenth century [Canadian] settlers spoke of themselves, their neighbours, and their place using the language of imperialism: they were a civilised and white people surrounded by Indians in an empty and undeveloped place that could be transformed into an exemplary British colony”.<sup>13</sup> A repudiation of *Englishness* and *English* morality thus implied an alliance with those peoples the settler colonies were desperate to distinguish themselves from.

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<sup>10</sup> As quoted in B. Roberts, “‘A Work of Empire’: Canadian Reformers and British Female Immigration” in L. Kealey, ed., *A Not Unreasonable Claim: Women and Reform in Canada, 1880s – 1920s* (Toronto: The Woman’s Press, 1979) at 200.

<sup>11</sup> G. W. Stocking, *Victorian Anthropology* (New York: Free Press, 1987) at 202 as quoted in J. Barman, “Taming Aboriginal Sexuality: Gender, Power and Race in British Columbia, 1850 – 1900” (1997/98) 115/116 B.C. Studies 237 at 242.

<sup>12</sup> Valverde, *supra* n.7 at 105.

<sup>13</sup> Perry, *Edge of Empire*, *supra* n.9 at 194.

White women were necessary ingredients in this establishment of colonial order.<sup>14</sup> “It is women of high moral character possessed of common sense and a sound constitution who can help build up our Empire”.<sup>15</sup> Anne Summers’ conceptualisation of Australian wives and mothers as “God’s Police” captures the belief that posited women as a kind of human shield that deflected vice and absorbed contamination, thereby protecting the home and by extension, the nation.<sup>16</sup> Men’s readiness to establish inter-racial relationships and their hasty descent into a debauched existence in the colonies only served to reinforce the belief that white women needed extraordinary moral fortitude to rescue their men from the hazards of the imperial project. If the mythical *English* man had succeeded in attaining “character”, it was the task of the *English* woman to ensure it remained irreproachable and unassailable.

Yet the settler colonies did not only want to emulate the *English*, they also hoped to better them. There was the hope, frequently a conviction, that Australia would surmount the problems of the Old World and that the Australian environment could create a new man, physically and mentally superior.<sup>17</sup> Similarly, Canada would create a “Canadian people ... taller, straighter, leaner ... hair darker and drier and coarser; muscles more tendinous and

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<sup>14</sup> *Ibid.*, at 130.

<sup>15</sup> The Hon. Mrs E. Cecil, “The Needs of South Africa”, II, Female Emigration to South Africa”, *The Nineteenth Century*, April 1902 at 683 as quoted in J. Mackay & P. Thane, “The Englishwoman” in R. Colls & P. Dodd, eds., *Englishness: Politics and Culture, 1880 – 1920* (London: Croom Helm, 1986) at 205.

<sup>16</sup> A. Summers, *Damned Whores and God’s Police*, 2<sup>nd</sup> ed., (Melbourne: Penguin Books, 1994).

<sup>17</sup> C. L. Bacchi, “The Nature – Nurture Debate in Australia, 1900 – 1914” (1980-81) 19 *Historical Studies* 199 at 200.

prominent and less cushioned".<sup>18</sup> The colonies expected that the essence of British civilisation could be transplanted and that a simpler society free of the social pressures of a decadent and decaying Britain could be produced.<sup>19</sup> This expectation naturally produced tension between the colonies' need and desire to subscribe to *Englishness* and the simultaneous assertion of their autonomy within the Empire — assertions that necessitated locating specifically Canadian or Australian cultural traits.<sup>20</sup> Yet, while Australians and Canadians spoke of "the Coming Man" or an emerging "race", they were both identities essentially predicated on solid *English* characteristics.

It is somewhat ironic that while women were expected to, literally, give birth to the nation, they have been accorded a minimal role in this process of constructing new identities and nations. The new Australian or Canadian cultural traits, and the burgeoning nationalism that fashioned them, were constructed in overtly masculine terms. The very terms "settler" and "frontier society", although ostensibly gender neutral, carried connotations of adventure, hardship and bravery that were quintessentially at odds with Victorian conceptions of white

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<sup>18</sup> W. H. Hingston, *The Climate of Canada and Its Relation to Life and Health* (Montreal: 1884) as quoted in C. Berger, *The Sense of Power: Studies in the Ideas of Canadian Imperialism, 1867 – 1914* (Toronto: University of Toronto Press, 1970) at 129.

<sup>19</sup> Roberts, *supra* n.10 at 199.

<sup>20</sup> Valverde, *supra* n.7 at 107.

womanhood.<sup>21</sup> In real terms women clearly contributed to the establishment of settler colonies and nations. As we have seen, imperial discourse even accorded women a specific, although limited, role to play in the domestication and establishment of the colonies. However, the mythologies that ascribe credit for nation-building as well as describe national characteristics are highly gendered. Marilyn Lake has stated that one of the greatest political struggles in Australian history was the contest between men and women at the end of the nineteenth century for control of the national culture. "Women sought to curtail masculine privilege and those practices most injurious to women – notably drinking, smoking, gambling and male sexual indulgence ... to make men more considerate and responsible fathers, more companionable husbands".<sup>22</sup> The result of the contest is predictable: masculinist values were elevated to the status of national tradition, to the extent that any protesting voices were seen as subversive and counter-cultural.<sup>23</sup> Although the masculinisation of national identity was particularly potent in Australia,<sup>24</sup> Jane Mackay and Pat Thane have illustrated that it was not unique. "One of the distinctions between male and female was that the concept of nationality was almost always on the male side of the

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<sup>21</sup> C. Knapman, "Reproducing Empire: Exploring Ideologies of Gender and Race on Australia's Pacific Frontier" in S. Magarey, S. Rowley, & S. Sheridan, eds., *Debutante Nation: Feminism Contests the 1890s* (Sydney: Allen & Unwin, 1993) at 131.

<sup>22</sup> M. Lake, "The Politics of Respectability: Identifying The Masculinist Context" (1986) 22 *Historical Studies* 116 at 127.

<sup>23</sup> *Ibid.*

<sup>24</sup> Resonances of this are still found within the Australian psyche as seen in the intended use of the highly gendered word "mateship" in the preamble of the failed republication constitution in 1999. See D. Headon, "Mateship, Mayhem and the Australian Constitution's Preamble" in L. Cardinal & D. Headon, eds., *Shaping Nations: Constitutionalism and Society in Australia and Canada* (Ottawa: University of Ottawa Press, 2002).

divide”.<sup>25</sup> The discourses did allocate women a role in the formation of nationhood, but it was an ephemeral one. It was essentially biological and spiritual, being devoted to the rearing of healthy children and guarding the moral values of the *English*.<sup>26</sup> The male role meanwhile was virile and intellectual and was dedicated to the protection and perpetration of the nation through politics, the military and finance.<sup>27</sup>

The rhetoric surrounding, and the reaction to women’s fertility control can be evaluated within this context. If sexual restraint formed an integral part of one’s *English* character, the use of birth control was an indisputable exhibition of lack of sexual self-control and therefore countered any assertions regarding personal worth. Because women were iconified as moral bastions and anglo-saxon masculinity demanded self-discipline, it appears that the use of birth control was seen as indicative of an individual’s moral decline as well as the nation’s. Writing about the destructive effects of contraceptive advertising, the *Australian Medical Gazette* asked: “Is it too much to expect the guardians of our public morals to take up this subject which is eating the heart out of our young and otherwise healthy country?”.<sup>28</sup> Similarly, the NSW Royal Commission posed the following loaded question to one of its witnesses: “I would gather that you consider that the use of

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<sup>25</sup> Mackay & Thane, *supra* n.15 at 191.

<sup>26</sup> Women’s global participation in activities like the temperance movement, for example, is one example of this. For further details see for example, M. Mitchinson, “The WCTU: ‘For God, Home and Native Land’: A Study in Nineteenth Century Feminism” in Kealey, *supra* n.10.

<sup>27</sup> Mackay & Thane, *supra* n.15 at 192.

preventatives to conception is an obscene practice, and it is calculated to lower the morality and degrade the women of Australia?"<sup>29</sup> The *Canada Lancet* wrote of abortion, "that this sin of the age prevails so largely among civilised nations is a disgrace to the boasted cultivation and morality of the present century".<sup>30</sup> Fertility control implied a degree of sexual excess and moral degeneracy that was inimical to the maintenance of good character, in both men and women. However, the fact that it encroached so overtly upon the sexuality of women and by implication impugned their virtue compounded its gravity. Fertility control represented a decline in the health of the nation which Canada and Australia were striving so hard to promote. The condemnation of fertility control can thus be seen as one part of the settler colonies' attempts to fortify their moral integrity and through it their *Englishness*.

This moral aspect of the reproductive laws should not however obscure the irrefutable fact that governments of this period desired population growth, and more importantly, white population growth. The visibility of this agenda is increased when placed alongside other government action, for as the twentieth century progressed, initiatives aimed at producing a desirable population proliferated. For instance, in 1912 the Australian Government introduced a maternity allowance. Aptly termed the "baby bonus", a cash benefit of £5 was

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<sup>28</sup> *Australian Medical Gazette*, November 1898 as quoted in Lewis, *supra* n.1 at 266.

<sup>29</sup> Question to Dr C. W Morgan, *NSW Birth Rate Inquiry* (Sydney: William Applegate Gullick, Government Printer, 1904) question 1094 at 28.

paid to the mother on the birth of a live child. Prime Minister Fisher indicated that he hoped the benefit would help reduce infant mortality and so aid population growth; Attorney-General Hughes implied that population increase was the principal aim.<sup>31</sup> Importantly, while both single and married women were entitled to the benefit, it was denied to “women who are Asiatics, or are aboriginal natives of Australia, Papua or the islands of the Pacific”.<sup>32</sup>

In 1923, the Australian Government introduced customs regulations that prohibited the import of contraceptives.<sup>33</sup> The ostensible aim was to protect local production. A complementary, and possibly not wholly unintended result, was increased difficulty in obtaining contraception.<sup>34</sup> But as one observer wrote of the ban: “it doesn’t, and can’t prevent the use of contraceptives here”.<sup>35</sup> Rather than destroying a reliance on

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<sup>30</sup> *The Canada Lancet*, March 1889 at 218.

<sup>31</sup> Lewis, *supra* n.1 at 276.

<sup>32</sup> *Maternity Allowance Act, 1912* (Cth), No. 8, ss. 5 & 6.

<sup>33</sup> S. Siedlecky & D. Wyndham, *Populate and Perish: Australian Women’s Fight for Birth Control* (Sydney: Allen & Unwin, 1990) at 21.

<sup>34</sup> For detail on the difficulty women had in Australia in obtaining information about contraception use see, S. M. Pyke, “Contraception and Childbirth in the Nineteen-twenties and Nineteen-thirties” in Oral History Workshop, *‘But Nothing Ever Happens to Us...’: Memories of the Twenties and Thirties in Victoria* (Melbourne: Melbourne University, 1986).

<sup>35</sup> George W. R. Southern, *Making Morality Modern* (Mosman: G. W. R Southern, 1933) at 32 as quoted in Siedlecky & Wyndham, *supra* n.33 at 22.

contraceptives, the prohibition placed the price of contraception beyond the reach of some women,<sup>36</sup> and perpetuated the use of harmful and antiquated methods among others.<sup>37</sup>

Yet at around this time there was growing reconciliation with the fact that women's fertility could not be controlled as initially envisaged and the focus shifted from the decline in the birth rate to the issue of infant mortality.<sup>38</sup> As one contemporary noted, "it is useless to plead for larger families when men and women possess the knowledge of means to prevent conception and to interrupt pregnancy. The only practical remedy that remains is care of the pregnant woman and her unborn infant".<sup>39</sup> Education programmes for mothers, pure milk campaigns and the establishment of baby health centres, for example, signalled a shift from questions about the quantity of children to the quality.<sup>40</sup> Milton Lewis has sketched the connections between the promotion of infant welfare work and the concerns about population growth and the maintenance of a white Australia.<sup>41</sup> Similarly, Alison MacKinnon has stated that infant and maternal health programmes were explicitly designed

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<sup>36</sup> "A contraceptive pessary which can be sold at a clinic in England for 1s 6d ... Chemists here [in Australia] charge as much as 1 1s for the same article ... Actually it is manufactured in this country and, even allowing for higher costs of labour and material, the prices charged here are extortionate". Dr N. Haire, *Sex Problems of Today* (Sydney: Angus & Robertson, 1943) as quoted Summers, *supra* n.16 at 454.

<sup>37</sup> Siedlecky & Wyndham, *supra* n.33 at 22.

<sup>38</sup> Bacchi, *Nature - Nurture*, *supra* n.17 at 202.

<sup>39</sup> *Medical Journal of Australia*, April 1926 as quoted in Lewis, *supra* n.1 at 257.

<sup>40</sup> The alliance between the early birth control advocates and the eugenics movement of the time is another indication of this shift. See Chapter Three, part one more detail.

<sup>41</sup> Lewis, *supra* n.1 at xv.



with a population rather than a health rationale.<sup>42</sup> The reform movement's motivation to produce healthy Canadian babies has also been attributed in part to the threat posed by non-white immigration and the declining birth rate.<sup>43</sup> The goal of the infant life crusaders was the same as the pro-natalists — national strength and efficiency — but they were more positive in their methodology.<sup>44</sup> As the Director of one of Sydney's major maternity hospitals stated, "every little one therefore that is saved at the hospital not only helps to lessen that national toll of death, but automatically helps to strengthen our British Empire".<sup>45</sup>

This disparate and continued activity helps explode the myth of liberal democratic governments' commitment to, and non-interference within, the private realm during the nineteenth and early twentieth centuries. The ideological division of life into apparently opposing spheres of "public" and "private" reached its zenith in the *laissez-faire* era of the nineteenth century.<sup>46</sup> Yet despite rhetoric and representations to the contrary, governments encroached into their citizens' personal affairs. As Dorothy Chunn has stated, it is not so

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<sup>42</sup> McKinnon, *Population Policies*, *supra* n.15 at 111.

<sup>43</sup> S. Buckley, "Ladies or Midwives? Efforts to Reduce Infant and Maternal Mortality" in Kealey, *supra* n.10 at 135. See also C. Bacchi, *Liberation Deferred? The Ideas of the English-Canadian Suffragists, 1877 – 1918* (Toronto: University of Toronto Press, 1983) at 104-116. For detail of the British movement, see A. Davin, "Imperialism and Motherhood" (1978) 5 History Workshop 9.

<sup>44</sup> Bacchi, *Nature - Nurture*, *supra* n.17 at 202.

<sup>45</sup> C. R. Moss, *The Oddfellow*, December 1925 as quoted in Lewis, *supra* n.1 at 315.

<sup>46</sup> S. B. Boyd, "Challenging the Public Private Divide: An Overview" in S. B. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997) at 8.

much a question of whether state intervention existed, but rather the form and the extent of that intervention.<sup>47</sup>

By focussing on reproduction legislation, this artificial public/private divide dissolves. As we have seen, in times of population crises, the most intimate and private decisions of women and men become a major focus of national inquiry and often, of national anxiety.<sup>48</sup> But at the same time, the purportedly private domain of gender relations has had a heavy impact on the world of public population policy. In this way, the most intimate aspects of life — sexual pleasure and personal reproductive autonomy — have been inextricably linked with one of the most public and national concerns: the decline in the birth rate.<sup>49</sup>

While an investigation of this legislation exposes the fallacy of non-intervention in the domestic sphere, it simultaneously highlights the indeterminate and shifting nature of the public/private divide and how it is often constructed on the uncertain terrain of gender, class and race distinctions.<sup>50</sup> It demonstrates that the gender, class and race biases of nineteenth century liberals hindered their ability to work with issues straddling the divide.

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<sup>47</sup> D. Chunn, "A Little Sex Can Be A Dangerous Thing: Regulating Sexuality, Venereal Disease and Reproduction in British Columbia, 1919 – 1945" in Boyd, *ibid.*, at 62. See also generally, D. Chunn, *From Punishment to Doing Good: Family Courts and Socialised Justice in Ontario, 1880 - 1940* (Toronto: University of Toronto Press, 1992).

<sup>48</sup> A. MacKinnon, "Redesigning the Population: Narratives of Sex and Race" in M. Gatens & A. MacKinnon, A, eds., *Gender and Institutions: Welfare Work and Citizenship* (Cambridge: Cambridge University Press, 1998) at 153.

From the end of the nineteenth century onwards, there was a growing emphasis on the nuclear family as both the source of, and the answer to, social problems that rationalised state supervision of family life. Generally speaking, the more closely women adhered to their normative and socially prescribed roles as mothers of a white, middle-class nuclear family, the less likely they would feel the incursions of state surveillance, as increasingly, links were made between deviation from the bourgeois family model and social problems.<sup>51</sup> Reproduction legislation is another example of this trend. For instance, although ostensibly directed at all mothers, the baby farming legislation would have disproportionately affected single and working class women. The prevalent assumption underlying these reforms was that mothers of illegitimate babies were untrustworthy and needed to be monitored. Rather than attempting to alleviate the factors that produced the need for baby farms, or perhaps making child-rearing a more supported activity, the appropriate response was seen to be regulation of those women who had stepped beyond the bounds of nuclear family decency. A similar analysis can be extended to the prohibition of abortion and the regulation of lying-in homes. In this case, the reforms were likely targeting middle and upper-class women as it had been generally recognised, with considerable consternation, that these women, as well as the working classes, were availing themselves of such products and

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<sup>49</sup> *Ibid.*, at 155.

<sup>50</sup> Boyd, *supra* n.46 at 4.

<sup>51</sup> Chunn, *From Punishment to Doing Good*, *supra* n.47 at 25, 36.

services.<sup>52</sup> However, to the extent that these women had renounced motherhood and were exhibiting behaviour that departed from their biologically predisposed role of child-bearers, they too were subject to legal reproach.

Dorothy Chunn has reminded us that when particular types of regulation are implemented, they do not automatically constitute a seamless system of social control. She has stated that, “competing ideologies and discourses underpin contradictory motivations and practices among and between the regulators as well as the regulated”.<sup>53</sup> The pieces of legislation examined in this thesis are no exception to Chunn’s observation and it would be erroneous to assert a monolithic state intentionality with regards to biological reproduction and birth rates.<sup>54</sup> Some of the reforms do not justify total condemnation. Clearly, women’s and children’s health issues needed to be rescued from the obscurity of the private realm. The desire to scrutinise the fostering of children so as to improve their chances of survival (*Infant Life Protection Acts*) or to improve the conditions of maternity hospitals (*Private Hospitals Acts*) was surely generated by humanitarianism. However, when underwritten by assertions of deviancy and immorality and implemented without due regard to the systemic

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<sup>52</sup> See the Introduction for more detail on class differences of contraceptive use.

<sup>53</sup> Chunn, *supra* n.47 at 78.

<sup>54</sup> J. A. Allen, “Octavius Beale Reconsidered: Infanticide, Baby Farming and Abortion in NSW, 1880 – 1939” in Sydney Labour History Group, *What Rough Beast? The State and Social Order in Australian History* (Sydney, Allen & Unwin, 1982) at 127. For example, the unrelated but contemporaneous policy of compulsory primary education contributed to the desire for, and achievement of, smaller families. A.

social problems that had cultivated the problem, the benevolent objectives were minimised. This is further emphasised when it is noted that, in relation to the *Public Hospitals Act, 1908* (NSW), women's health was really only at issue when it intersected with concerns about pregnancy and birth. Moreover, it is difficult to ascribe any broad charitable motives to the prohibition of contraception or the advertisement of contraceptives, beyond those rooted in religious or patriarchal fervour.

Clearly, this series of legislative initiatives was the result of complementary political agendas. The attitude frequently displayed in the legislative debates was that women's health was a means to an end, rather than an end in itself. In fact, Mackinnon has stated that "the growth of maternal and child health services needs to be viewed in this perspective as first and foremost, although not exclusively, a population policy and not an intervention for the intrinsic benefit of women and children".<sup>55</sup> The tidy way in which the pro-natalist agenda dovetailed with the dominant ideologies of motherhood and broader humanitarian goals probably sustained and legitimised it, permitting it a measure of success that it may not have accomplished on its own.

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Mackinnon, "'Bringing the Unclothed Immigrant Into The World': Population Policies and Gender in Twentieth Century Australia" (2000) 17: 2 *Journal of Population Research* 109 at 119.

<sup>55</sup> *Ibid.*, at 112.

The central issue propelling this thesis has been the question of how colonial societies arrived at a position in which it was logical and natural that women's reproduction be regulated by law. The spate of legislative activity at the turn of the twentieth century was a turning point in the control of women's fertility, as it passed from being a matter of individual discretion to one requiring state regulation. In an effort to properly situate the inquiry, Chapter One investigated the cultural and social climate of nineteenth century Australia and Canada. By the end of the nineteenth century both had embraced Social Darwinist thinking. This racial dogma propelled both countries' immigration policy and had made a significant contribution to the formation of these states' national identities. At the same time, by focussing on women's purported civilising nature and their maternal propensities, authorities had particular expectations of what women would contribute to the colonial project. As Chapter One showed, these discourses around gender and race coalesced to form powerful beliefs about women's reproductive capabilities and its importance for the nation. The anxiety about the declining birth rate that surfaced in these young nations was a product of uncertainty and aspiration: uncertainty of national identity and aspirations of national and imperial grandeur.

The evolution of reproductive criminal law in New South Wales was analysed in Chapter Two. This is instructive as the criminal law formed the basis for other legislative developments in this area. Exploring the legislation within a comparative framework

reveals that NSW criminal law was initially harsher than contemporaneous legislation in other jurisdictions, like Britain and Canada, in its treatment of women who had disavowed their maternity. Yet while Canada in particular strengthened its criminal laws, New South Wales did not and the stringency of its reproduction legislation was soon surpassed by these other legislative approaches. As a consequence, the NSW Parliament was compelled to enact legislation to supplement its criminal law. In relation to infanticide, this came in the guise of the *Children's Protection Act, 1892* (NSW).

Chapter Three investigated a number of different strategies that were pursued once it was recognised that the criminal law alone was not succeeding in deterring women from contraception and abortion and that this in turn was effecting the birth rate. Members of Parliament in Australia and Canada enacted legislation that prohibited the advertisement of contraception, regulated maternity wards and attempted to legislate for the prohibition of abortifacients. These statutes reveal a paradoxical situation in which there was an obvious reliance placed on the law, yet at the same time the law was increasingly exposed as an inadequate mechanism to redress the situation.

The series of legislative instruments examined in Chapter Three needs to be juxtaposed against those examined in Chapter Two. Panic over declining fertility coincided with a growth in the belief that governments could shape the moral character of its people through

law. As the nineteenth century drew to a close, parliaments became more inclined to attempt to regulate the "morality" of their constituents. The New South Wales and Canadian criminal law of the late 1860s and early 1870s can be contrasted with the reformatory nature of legislation enacted in the 1890s and beyond. In this sense it was fortuitous for pro-natalists and moral reformers that the scare over the birth rate corresponded with the broader based concern over morality, as moves aimed at regulating one were often bolstered through reference to the other.

A review of the evidence offered in the preceding chapters indicates that reproduction legislation was the product of a number of uniting factors: xenophobia, misogyny, racism, imperialism, pro-natalism, humanitarianism, moralism, classism and economics. Most of all however, it was generated by fear — fear of the unknown and fear of change. Unfortunately for Australian and Canadian women, that fear was partly assuaged by exerting control over the maternal body.

In accordance with Jane Ursel's proposition that the bottom line of patriarchy is not male privilege but the control of women through the control of reproduction, Judith Allen has stated that the practice of abortion can be identified as a historically important barometer of



power negotiations between the sexes with regard to sexuality.<sup>56</sup> Yet Allen challenges the rhetoric that represents abortion as an emancipatory practice that ensures women's bodily autonomy. "Viewed historically, it is likely that the need for abortion has marked precisely women's lack of bodily self-determination and autonomy; their too frequent inability to negotiate sexuality in their own best interests, so finding themselves unwillingly pregnant".<sup>57</sup> In other words, it is women with the weakest sexual bargaining position who are found on the abortionist's operating table.<sup>58</sup> Whether the use of abortion historically reflects low levels of female power has been the subject of academic debate.<sup>59</sup> At the same time however, the lack of success in prohibiting abortion must be recognised. As Rosalind Petchesky wrote, "the remarkable thing is not that those in power have attempted to control population by controlling the fertility of women, but that they have been so unsuccessful".<sup>60</sup> Historians and demographers continue to emphasise the extensive use of abortion and contraception by women at this time. According to Shelley Gavigan, "the history of restrictive abortion legislation is also the history of women's resistance to it".<sup>61</sup>

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<sup>56</sup> J. Ursel, *Private Lives, Public Policy: 100 Years of State Intervention in the Family* (Toronto: Women's Press, 1992) at 105.

<sup>57</sup> J. A. Allen, "The Trials of Abortion in Late Nineteenth and Early Twentieth Century Australia" (1993) 12 *Australian Cultural History* 87 at 94.

<sup>58</sup> *Ibid.*

<sup>59</sup> See H. Cook, "Unseemly and Unwomanly Behaviour: Comparing Women's Control of Their Fertility in Australia and England from 1880 – 1970" (2000) 17: 2 *Journal of Population Research* 125 at 128-133.

<sup>60</sup> R. P. Petchesky, *Abortion and Woman's Choice: The State, Sexuality and Reproductive Freedom*, 2<sup>nd</sup> ed., (Boston: Northeastern University Press, 1990) at 26.

<sup>61</sup> S. Gavigan, "On 'Bringing on the Menses': The Criminal Liability of Women and the Therapeutic Exception in Canadian Abortion Law" (1986) 1 *Canadian Journal of Women and the Law* 279 at 284. While acknowledging that abortion was oftentimes a final desperate act, the fact that so many women continuously

The Australian Federal Minister of Health, William Hughes told Parliament in 1934 that a fall in the birth rate had more serious consequences for Australia than for Britain because the White Australia Policy and indeed the very existence of the nation were endangered by such a development.<sup>62</sup> In 1985, Hiram Caton, an Australian philosopher, stated that “it is for women to bear and nurture children; it is for men to provide for and defend kith and kin... [men’s] awe of women, so important for subduing their grosser impulses, disappears with the contraceptive control of the consequences of the sexual act”.<sup>63</sup> In 1999 in *The Decline of Males*, Canadian author Lionel Tiger argued that the use of birth control is leading to an inevitable decrease in men’s power and prestige.<sup>64</sup> More recently in July 2002, the Treasurer of the Australian Liberal Party, Malcolm Turnbull warned that Australia faces a “fertility crisis” as “our young folks are not having enough babies” and advocated tax benefits aimed at the family.<sup>65</sup> While James Mohr contended that the prohibition of abortion in nineteenth century America was the result of peculiar, historically specific

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relied on it as birth control presents the possibility for women’s agency and resistance. Recourse to abortion in the face of considerable social, medical and legal opinion condemning it could potentially be construed as resistance by those women. Further investigation into records like the personal correspondence between birth control activists and women seeking advice (as Angus McLaren has done) or records generated by abortion clinics (which may or may not exist given their criminal status) may contain evidence about why women chose to have abortions and may shed light on whether their actions can indeed be termed “resistance”.

<sup>62</sup> *Sydney Morning Herald*, 5 December 1934 as quoted in Lewis, *supra* n.1 at 259.

<sup>63</sup> H. Caton, “Feminism and the Family”: Address to the Coorparoo Branch of the National Party Queensland, as quoted in M. de Lepervanche, “Breeders for Australia: A National Identity for Women?” (1989) 24: 3 Australian Journal of Social Issues 163 at 175.

<sup>64</sup> L. Tiger, *The Decline of Males* (New York: Golden Books, 1999).

circumstances, the construction of women's reproductive capacity as important to larger sexual, political and national agendas is not. The history of the legislative control of women's fertility is an important reminder that while circumstances may be politically, culturally and historically particular, it is a recurring theme to find women and their bodies buffeted and exploited by the exigencies of the moment. We ought not to, of course, assume that similar circumstances will necessarily foster a repeat of history.<sup>65</sup> Instead, we should remain alive and alert to the potential for new and competing claims to be placed upon the maternal body.

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<sup>65</sup> "Turnbull's Solution: Marry and Multiply", *Sydney Morning Herald*, 15 July 2002; "Fertility Is A Timing Issue", *Canberra Times*, 16 July 2002.

<sup>66</sup> For instance, the world is currently witnessing a new movement in demographics, somewhat similar to the shift of one hundred years ago. Patterns of low fertility and net migration rather than natural growth have established themselves as the norm, which have in turn led to the resurgence of issues of national identity and ethnic conflict. MacKinnon, *Redesigning the Population*, *supra* n.48 at 163.

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## Appendix:

## Table of Legislation

## Chapter Two:

## ***“Rocking the Cradle”: Colonial Criminal Reproduction Laws***

Australia	United Kingdom	Canada
<p>Criminal Law (Amendment) Bill, 1871</p>	<p><i>Offences Against the Person Act, 1861</i>  s. 58: abortion  s. 59: supplying the means to procure abortion  s. 60: concealment</p> <p>Infanticide Bill, 1873, 1875</p> <p>Criminal Code Bill, 1880</p>	<p><i>Offences Against the Person Act, 1869</i>  s. 59: abortion  s. 60: supplying the means to procure abortion  s. 61: concealment.</p>
<p><i>Criminal Law (Amendment) Act, 1883</i>  s. 11: definition of child murder.  s. 55: abortion  s. 56: supplying the means to procure abortion.  s. 57: concealment.  s. 58: inflicting grievous bodily harm on child.</p> <p><i>Crimes Act, 1900</i>  s. 20: definition of “child murder”.  s. 21: grievous bodily harm on child.</p>		<p><i>Criminal Code, 1892</i>  s. 219: definition of “child murder”.  s. 239: neglecting to provide reasonable assistance in delivery.  s. 240: concealment.  s. 271: abortion in late term pregnancies  s. 272: abortion.  s. 273: self- abortion.  s. 274: supplying the means to procure abortion.</p>

s. 82: self-abortion. s. 83: abortion. s. 84: supplying the means to procure abortion. s. 85: concealment.		
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***“That’s what you get for obliging people”: Children’s Protection Acts***

<p><i>Infant Life Protection Act, 1890 (Vic)</i>  s. 4: receiving any infant under the age of two years prohibited unless licensed.  s. 12: to report any death.  Not to be buried without certificate.  s. 15: every private hospital for women to be registered.  s. 18: every illegitimate birth to be reported.  s. 19: any house in which illegitimate death occurs to report it.</p> <p><i>Children’s Protection Act, 1892 (NSW)</i>  s. 1: receiving any child under the age of three prohibited without permission.  Payment prohibited by anything other than periodic payment.  s. 3: shall not change abode.</p>	<p><i>Infant Life Protection Act, 1872 (UK)</i>  s. 2: receiving more than one infant under the age of one prohibited unless licensed.  s. 9: imprisonment for 6 months/ £5.</p> <p><i>Infant Life Protection Bill, 1890</i></p> <p><i>Infant Life Protection Act, 1897 (UK)</i>  s. 2: receiving more than one infant under the age of five prohibited unless licensed.  s.5: receiving an infant for under £20 to be reported.</p>	<p><i>The Protection of Infant Children Act, 1887 (Ont.)</i>  s.1: receiving more than one infant under the age of one prohibited unless licensed.</p> <p><i>The Maternity Boarding Houses and Protection of Children Act, 1897 (Ont.)</i>  s. 1: receiving one or more infants under the age of one prohibited unless licensed.</p> <p><i>An Act to Provide for Licensing Boarding Houses for Infants Under Twelve Years of Age 1897 (N.S).</i>  s. 1: receiving any child under the age of twelve.</p> <p><i>The Maternity Act 1899 (Man.)</i></p>
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s. 6: to report any death. s. 13: lying-in homes to report births. s. 16: no burials for children born in lying in homes without certificate.		s. 1: more than one infant under the age of one.
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### Chapter Three:

#### ***“An Evil in Our Midst”: The Indecent Publications Act***

<p><i>Obscene Publications Prevention Act, 1880</i></p> <p>s. 1: for the purposes of sale or distribution.</p> <p>s. 2: Printing, drawing etc..</p> <p><i>Indecent Publications Act, 1900</i></p> <p>s.4: definition of “indecent” included “female irregularities”.</p> <p><i>Obscene and Indecent Publications Act, 1901</i></p> <p>Codified existing legislation.</p> <p><i>Police Offences Act, 1908</i></p> <p>s. 17: slight amendment to <i>Obscene and Indecent Publications Act, 1901</i>.</p>	<p><i>Obscene Publications Prevention Act, 1857</i></p> <p><i>Indecent Advertisements Act, 1889</i></p> <p>s. 5: advertisements relating to syphilis etc.</p>	<p><i>Criminal Code, 1892</i></p> <p>s. 179(c): advertisements or the sale of contraception prohibited.</p>
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***“Monstrous Practice”: The Poisons Bill***

<i>Poisons Act, 1876</i>		
<i>Poisons Act, 1902</i>		
Poisons Bill, 1905 Ergot of rye to be treated differently from other poisons.		

***“Places Where Criminality Exist”: Private Hospitals Act***

<p><i>Public Hospitals Act, 1908</i></p> <p>s. 2: definition of “birth” and “private hospital”.</p> <p>s. 6: license required.</p> <p>s. 8: license to state whether lying-in home.</p> <p>s. 11: if suffering from any disease.</p> <p>s. 12: required to report deaths.</p>		<p><i>The Maternity Boarding Houses and Protection of Children Act, 1897 (Ont.)</i></p> <p>s. 15: not to receive women for accouchement.</p> <p>s. 16: receiving one or more infants under the age of one prohibited unless licensed.</p> <p>s. 20: required to keep a register</p> <p>s. 23: birth to be attended by practitioner.</p> <p>s. 27: advertising prohibited.</p> <p><i>The Maternity Act 1899 (Man.)</i></p> <p>s. 12: not to receive women for accouchement.</p> <p>s. 18 required to record antecedents of women.</p> <p>s. 19: birth to be attended by practitioner.</p> <p>s. 23: advertising prohibited.</p>
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