An ethico-legal case for baby hatches in South Africa

Kurium Govender

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Supervisors:

Associate Professor Kevin Behrens: BA; Hons BTh; MA; D Litt et Phil
Steve Biko Centre for Bioethics, University of the Witwatersrand

Dr Norma Tsotsi: BDS; Postgraduate Diploma in International Research Ethics;
MSc Med Bioethics and Health Law; MPH
Steve Biko Centre for Bioethics, University of the Witwatersrand

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Abstract

In this study, I analyse the ethical and legal issues on the operation of baby hatches in South Africa. There are no official statistics on South Africa's annual number of infant abandonments or infanticides. Since 1999, baby hatches began emerging across the country for parents (usually mothers) to anonymously surrender infants and relinquish parental responsibility without endangering the child. These facilities have been established by charities and non-governmental organizations, and as there is no provision for baby hatches in South African law, these are illegal. Similar facilities operate in other countries and the United Nations Committee on the Rights of the Child has responded with disapproval. In this report, I examine South Africa's legal child protection framework (including international and domestic law) and how it responds to infant abandonment and infanticide. I present an ethical basis for the operation of baby hatches by applying the principles of the harm reduction paradigm, showing that such relinquishments are (1) morally permissible as they improve the health outcomes for the child, and (2) morally appropriate in the South African context. For comparison, and to enrich this research, I also examine the USA's safe haven laws and France's anonymous birth law as examples of legislative responses to prevent infant endangerment. Baby hatches, safe haven laws, and anonymous birth are all interventions to intercept infanticide and unsafe infant abandonment; and they are each innovations outside the parameters of international child law.

Contents

Chapter 1 - Introduction

It is not known how many infants and newborns are 'unsafely'[1] abandoned or murdered by their parents each year in South Africa as the country does not keep these statistics (Brink 2000; Chaykowski 2012). Despite termination of pregnancy (Choice on Termination of Pregnancy Act, 92 of 1996) and adoption (Children's Act, 38 of 2005, ss 228 – 253) being legal in the country, the media regularly report incidents of infanticide and infant abandonment: a newborn required reconstructive surgery after his nose was chewed off by rats in the rubbish bin in which he was dumped (Skosana 2013); a newborn died from exposure after being dumped in a roadside bin (SAPA 2011a); an infant found on a rubbish dump was hypothermic and covered in bite marks from ants (SAPA 2011b); a newborn who was discarded in a plastic bag and left on the roadside was run over by a motorist (Skosana 2013). In February 2013 it was reported that approximately 100 newborns are discovered by workers at Mamelodi City Dump each year, this does not include infants that may be inside rubbish bags as the bags are not opened (Mentel 2013).

In 2016, the South African Medical Research Council produced South Africa's first study on homicides of children under five years old (Abrahams, Mathews, Martin, et al 2016). The study found that within this age group, infants accounted for more than half of the estimated 454 homicides of under-5-year-olds in 2009, with the highest rate of homicide committed against infants under 6 days old (Abrahams, Mathews, Martin, et al 2016: 5). The authors suggest that these infant and newborn deaths are the result of unsafe abandonments by the mother:

> Many infanticides and neonaticides are the result of abandonment—the mother leaves her infant or newborn in a place without care or protection, either with the intention of killing the child or with the hope that someone will find and care for him/her (Abrahams, Mathews, Martin, et al 2016: 14).

Infanticide is the murder of a child under one year old, usually by the mother. Neonaticide is the murder of a newborn (neonate), also usually by the mother. The literature on newborn homicide and abandonment is inconsistent on the definition of "neonate", varying from a child between 0 to 24 hours old (Hatters Friedman & Resnick 2008); birth to 4 days old (Herman-Giddens, Smith, Mittal, Carlson & Butts 2003: 1425); and less than 1 week old (Sherr, Mueller & Fox 2009). The more widely accepted definition of "neonate" is a child from birth up to 28 days of age, as is used in topics related

[1] I use the term 'unsafe' abandonment to refer to abandonments in places that are harmful to the health or life of the child, such a rubbish bin, or a place where the infant is unlikely to be found.

to infant morbidity and mortality (World Health Organisation 2021; UNICEF 2020). The term infanticide is often used to include homicide of both neonates and infants (van der Westhuizen 2009).

Carina van der Westhuizen, in her article "An Historical Overview of Infanticide in South Africa", states that infanticide is "as old as mankind" (2009: 175). She recounts the history of infanticide and reveals that there was a time in both ancient Greece and Rome when infanticide by a father was not only legal but socially acceptable (2009: 177). Over time this changed and infanticide became "regarded as a serious crime, namely murder" (Brink 2009: 180), but the practice persisted. In response to the problem "Pope Innocent III decreed the establishment of church-sponsored foundling home" for abandoned children in 1198 and babies would be "left 'exposed' on the steps of a church" (Dailey 2011).

In 1660 the first foundling wheel was established at a children's hospital in Florence, Italy (Dailey 2011). The foundling wheel was a turnstile-like device

> consist[ing] of a box affixed to a wooden wheel. When a baby was placed in the box, the wheel would rotate, bringing it to an internal trapdoor that would allow an attendant inside the building to retrieve it (Dailey 2011: 69).

The foundling wheel intended to protect the lives of illegitimate children by protecting the anonymity of the mother (Dailey 2011). As such, foundlings came to be seen as "children of vice" (Bonnet 1992: 502) and the foundling wheel facility came to be viewed as encouraging "moral degeneracy" (Bonnet 1992: 502). In the 19th Century a process of closing the foundling wheels began and "[b]y the century's end, Italy, Spain and Greece were the only European countries with wheels still in operation" (Kertzer 1993 in Ayres 2009: 241). The closures began because the facility proved too costly and unsustainable and also because of a perceived abuse of the facility when it was discovered that

> legitimate infants were being abandoned in foundling wheels… 'leaving a baby at the wheel began to be seen not as a misdeed or a crime, but simply as a right, a new benefit provided by the state' (Kertzer 1993 in Ayres 2009: 241).

The reasons for infant abandonment and infanticide vary, making it very difficult to design a targeted approach to the phenomenon. The reasons may be social (e.g. lack of social support to raise a child); psychological (e.g. feelings of detachment from the foetus during pregnancy); psychosocial (e.g. shame of pregnancy); cultural-political (China's one child policy); or economic (e.g. poverty). The Japanese practice of *mabiki* refers to "kill[ing] a legitimate child because of an impoverished state" (Friedman & Resnick 2008: 43).

Practices of infant abandonment and infanticide are distinct from abandonment and homicide (filicide) of older children (Resnick 1970). ACW Lee and colleagues write that, "[c]ompared with murder of older children neonaticide is generally felt to be the least preventable crime" (Lee, Li, Kwong and So 2006: 64). Studies in the United States of America (USA) suggest that mothers are "more likely to be responsible for child deaths in the first week of life" (Appell 2002b: 62). Across the world, acts of infant endangerment have mobilised civil society responses (e.g. baby hatches) and legislative responses (e.g. safe haven laws and anonymous birth) to protect at-risk infants. These interventions are often directed at women.

Baby hatches

A baby hatch (also called "baby bin" in South Africa, "baby box" in the Czech Republic, and "babyklappe" in Germany) is a box with a window or flap fitted into an accessible external wall of a charitable organisation or hospital. Infants may be anonymously deposited by their parent(s) into this hatch to be received by the care workers inside. Once the infant is placed in the hatch the door cannot be opened again from the outside. Sensors in the hatch signal to the caregivers that a child has arrived, however, the signal is delayed giving the parent a chance to leave unnoticed. It is usually expected that it is the mother who needs and will use this facility. The baby hatch concept recalls the European foundling wheel.

As with the foundling wheel, the aim of the baby hatch is to protect the lives of unwanted infants by assuring the anonymity of the mother (Ayres 2009: 241). The baby hatch concept has been implemented in countries across the world, including the Czech Republic, Japan, Hungary, India, Canada, and South Africa, amongst others (Asai & Ishimoto 2013: 1). Germany supposedly has the "most baby hatches in the world" (Asai & Ishimoto 2013: 2) and at the time of establishing its first baby hatch there was a strong need for an intervention. "Before Germany introduced [its baby hatch], it had about sixty abandoned infants per year (most of whom died), and about thirty-four to thirty-nine killed per year" (Ayres 2009: 242).

Susan Ayres explains that the motivation for the baby hatch was "pragmatism" and "necessity" (Ayres 2009: 243). It is reported that Germany established the first modern baby hatch in 2000 (Asai and Ishimoto 2013: 1). However, Door of Hope, a baby hatch in Hillbrow, Johannesburg, South Africa, was established in 1999 (Skosana 2013). Baby hatches are surrounded by controversy and Door of Hope is no exception.

The foremost arguments against baby hatches are that they encourage the abandonment of infants as they are so easy to use and that they release parents of the responsibility of parenting (Skosana

2013). Proponents of baby hatches counter with arguments that reflect Germany's attitude of 'pragmatism' and 'necessity': "legal abandonment is not viewed as a matter of the woman's choice or rights, but as a matter of necessity" (O'Donovan 2002 in Ayres 2009: 243). Baby hatch advocates fear that a woman who feels the need to conceal her pregnancy "may choose abortion, infanticide, or child abandonment if anonymous drop-offs are not allowed" (Asai and Ishimoto 2013: 1). The argument of protection and safety is used to defend baby hatches from many oppositional arguments.

It is also argued that baby hatches enable the violation of Article 7 of the United Nation's Convention on the Rights of the Child (CRC 1989), namely, "the right to know and be cared for by his or her parents", which is important for identity formation (Asai & Ishimoto 2013: 2). Anonymity of parents further denies children knowledge of their genetic heritage which may have implications for the health of the child. Article 6 of the CRC provides the counter argument to all of these, which is that every child has the right to life (Asai and Ishimoto 2013: 2). The right to life, and life itself, is necessary for other rights to be claimed, including identity formation. For parents who do not want to be identified protecting their anonymity may be necessary to ensure the life and safety of the child. To gather useful medical information for the child, baby hatches in Germany have a self-addressed envelope with an anonymised medical and personal questionnaire. Upon leaving the infant, the parent may retrieve the questionnaire which they may choose to complete and return (Ayres 2009: 242).

It is argued that baby hatches "undermine the…ethical values of traditional societies" (Asai and Ishimoto 2013: 3). This is the position of the South African government which is "devoting more funding to children's and women's shelters that aim to keep families together" (Chaykowski 2012). Child Welfare South Africa disapproves of baby hatches as they "prevent any 'future reunification of the family unit'" (Skosana 2012).

Opponents criticise baby hatches for not providing support, care, and counselling to women before, during and after childbirth (Asai & Ishimoto 2013: 3). However, Storks Cradle, a baby hatch attached to Jikei Hospital in Japan, operates a 24-hour helpline which offers counselling to women "for pregnancy, childbirth and child rearing that are achieving results" (Asai and Ishimoto 2013: 3). Whilst there is no medical care offered to women at Storks Cradle, infants left at the baby hatch will receive medical attention from the hospital.

There is room for abuse of baby hatches. One may leave an infant in a baby hatch without the parents' consent (Asai and Ishimoto 2013: 5); a woman may conceal her pregnancy and put the infant in the hatch without the father's knowledge of his child's existence or of his rights and responsibilities as a parent (Bartsch, Schroder & Windmann 2012); and, in Japan, a toddler was left in a baby hatch (Asai

and Ishimoto 2013: 4). Atsushi Asai and Hiroko Ishimoto acknowledge that the baby hatch can be abused but reply that hatches cannot be blamed for the actions of persons who abuse them (Asai 2013: 4).

Baby hatches may not save all at-risk infants. A woman who is not aware of her pregnancy, or has not accepted her pregnancy, is likely to be unprepared for birth and parenthood (Green & Manohor 1990: 121). As such, she may not be "in the appropriate obstetric setting, with the usual staff and facilities" at the time of delivery (Stotland & Stotland 1998: 249) and she may panic and act rashly endangering the infant (Green & Manohor 1990: 122).

It is said that Germany's baby hatches operate in a legal grey-area (Asai and Ishimoto 2013: 5). In Japan they are "not outright illegal" (Asai and Ishimoto 2013: 5). In the Slovak Republic they are legal (Gulasova, Dvorakova, Hruska 2012). In most other countries baby hatches seem to operate outside the law. South Africa has no legal provision for baby hatches, however, out of need a few charities have established baby hatches to protect infants from endangerment by their parents. Door of Hope in Johannesburg and the Anybody Family Centre in Cape Town are two examples. The Department of Social Development is divided on the need for baby hatches. Margot Davids, former Chief Director of Children at the Department of Social Development, stated in 2013 that "some social services professionals feel that [baby hatches] are more appropriate than having children abandoned in dirt bins" (Skosana 2013). While Beatrix Marais, former National Executive Director of Child Welfare South Africa stated,

> [t]here is no need for [baby hatches]. Babies are typically delivered to our doors. They are seldom dumped in garbage bins or left on the sides of roads. Mothers want their children to receive care (Skosana 2013).

Between 1999 and 2013, Door of Hope received 145 infants through the baby hatch, but report that a further 1300 children they received were brought to them by social workers, police officers, community members and mothers who identified themselves (Skosana 2013). As statistics are not kept on infanticide and infant abandonment in South Africa it is not known what portion of abandoned infants Door of Hope's baby hatch has received nor how many infants have escaped unsafe endangerment. Without records being kept on abandonment and infanticide the accuracy of Marais' statement cannot be verified.

Safe haven laws

In 1999, the state of Texas enacted the USA's first safe haven legislation in response to unsafe abandonment of thirteen infants "in Houston in one year" (Ayres 2009: 265). Currently, all fifty states of the USA have similar laws (Child Welfare Information Gateway 2017), which are collectively known as 'safe haven laws'. The laws allow parents to safely relinquish their children to personnel working at designated safe havens. Anette R Appell explains,

> These statutes apply to infants from three days to one year old, provide legal cover to emergency and medical professionals who receive such infants, grant some defence against or immunity from criminal penalties for abandonment, and mandate anonymity for the relinquishing parent (Appell (2002b: 61)).

Anonymous birth

Anonymous birth is an option for women in France (Bonnet 1992), Italy, Luxembourg (Ayres 2009: 245), Austria (Klier et al 2012) and the Slovak Republic (Gulasova, Dvorakova, Hruska 2012). In France it is provided for in law – it allows a woman to deliver in hospital without revealing her identity, her parental rights are relinquished, and the child is soon made available for adoption.

South African law

South Africa's Children's Act defines abandonment in relation to a child as

> a child who
>
> (a) has obviously been deserted by the parent, guardian or care-giver; or
>
> (b) has, for no apparent reason, had no contact with the parent, guardian or care-giver for a period of at least three months (Art 38 or 2005, s.1.(1)).

The Children's Act articulates the process of restoring care for the child but offers no mechanisms for protecting an at-risk child before the abandonment. Section 9 of the Children's Act states that "in all matters concerning the care, protection and wellbeing of a child the standard that the child's best interest is of paramount importance must be applied" – baby hatches could be said to do this by preserving the life and physiological health of infants.

Van der Westhuizen finds that the Children's Act

> does not make special provision for the protection of the lives of children. Apart from this, the definition of 'child' is very wide. It defines a child as 'a person under the age of 18 years'. This means that there is not a special form of protection for neonates, including premature babies, in this Act (2009: 191).

South Africa regards its social grants as its approach to keeping mothers and children together and thereby reducing infant abandonment and infanticide (Chaykowski 2012). Beatrix Marais, former national Director of Social Development, does not believe that South Africa's infant abandonment and infanticide rates are high enough to justify the existence of baby hatches (Skosana 2013). However, no one knows what these rates are as data on child abandonment or neonaticide is not collected. In the United Kingdom, L Sherr, J Mueller and Z Fox had to piece together data from various public and non-governmental entities, and media reports, to get a picture of abandonment patterns and rates (Sherr, Mueller, Fox 2010). From this anecdotal information they established a link between the infant's age (older infants) and location of abandonment (findable), and survival rates. Data helps to determine patterns of abandonment, review existing policy, and design appropriate interventions.

Above, I have outlined a few approaches to protecting unwanted infants from endangerment. Ayres uses the concept of *kairos* (defined as "right-timing and due measure or propriety") to defend options beyond abortion and adoption for managing unwanted pregnancy. She argues that more options give women more opportunities to act in the best ways they can and "do the right thing at the right time" (Ayres 2009: 289).

Rationale

In South Africa, baby hatches operate outside the law. The main objections from government is that they encourage abandonment and deny the child information necessary to form an identity. There is no provision for baby hatches in international child law and the United Nations accuses them of several violations against the Convention on the Rights of the Child (1989), including the child's right to an identity and parental care, and facilitating the separation of the child from its parents. Yet, ongoing cases of child endangerment suggest that the normative child protection framework does not adequately protect infants. My ethical defence of baby hatches argues that baby hatches are morally permissible and appropriate for the South African context. I propose a legislative reform of child laws

to include baby hatches as these can augment the existing child protection framework. However, it is beyond the scope of this paper to make detailed recommendations for the formulation of such laws.

Aim

This study seeks to establish an ethical and legal basis for the operation of baby hatches in South Africa.

Thesis statement

In this research report I seek to defend the thesis that the use of baby hatches as a means of protecting vulnerable infants is ethically justified.

Objectives

1.) To establish the protections offered to children in South African law and policy and suggest what and how policies will help potentially vulnerable infants.

2.) To establish, in principle, the moral acceptability of the baby hatch in practice in South Africa.

3.) To compare the practice of baby hatches with the laws, regulation and practice of anonymous birth and safe havens in other countries (France and the USA) with a view to considering formulating regulation in South Africa.

Methodology

This was a normative study that involved desk-top and library-based research. It is an ethico-legal paper which drew from the law and literature relevant to the topic. No new data was collected or analysed. The research did not involve study participants.

I employed the typical research methods and standards applicable to philosophical research. This primarily involved the interpretation and critical analysis of salient texts. My critical analysis of relevant texts involved the definition and clarification of concepts, the identification and criticism of assumptions, the analysis and evaluation of theoretical frameworks, the development and defence of arguments, the use of counter-examples, the establishment of consistency between general principle and particular judgement, and the articulation of the most plausible interpretation of significant concepts found in the sources.

The literature for this study was sourced from the Wits University Library, and online library sources which included PubMed, JSTOR, Wiley Science, and Google Scholar amongst others.

Data analysis

For this study, I reviewed the established literature in support and opposition of baby hatches and isolated the ethical and legal themes for analysis and discussion. My primary focus in data analysis will be coherence of the arguments (i.e. philosophical-ethical analysis).

Ethics

This normative study received an ethical waiver from the Human Research Ethics Committee (Medical) of the University of the Witwatersrand, Johannesburg.

Chapter 2 – A moral defence of baby hatches

Ethical and legal child protection norms favour the upbringing of children by their parents and within the family environment. In situations where parental care is not available or forthcoming, South Africa's legal framework (which will be discussed in the next chapter) articulates processes for placing the child in alternative care. However, infant abandonment and infanticide are extreme forms of child neglect that occur so early in a child's life that ensuing harms may not be adequately remedied by the current child protection framework. Baby hatches, which currently exist outside the legal framework, may reduce harm to at-risk infants by facilitating safe relinquishments. Yet the ethics of these facilities remain contested.

I will briefly elaborate on the more common objections to baby hatches and show that these may be easily and rationally dismissed, I will then present an ethical defence for the operation of baby hatches on the grounds of harm reduction for the infant. Thereafter, I will describe the recognised drivers of, and relationship between, unwanted pregnancy, infant abandonment, and infanticide to make a case for the moral appropriateness of baby hatches in the South African context.

2.1 Common objections to baby hatches

The frequent criticisms made about baby hatches is that they encourage infant abandonment; deprive the child of its identity; encourage clandestine births; and do not stop unsafe infant abandonment and infanticide.

In response to the criticism of encouraging infant abandonment – the utilisation of a child welfare policy, like a school feeding programme, is not generally thought of as encouraging child hunger. Similarly, it seems incorrect to view the utilisation of baby hatches as encouraging abandonment and not take account of the instances of infant endangerment that illustrate the existing need for better child protection in this area. The phenomenon of infant endangerment preceded the establishment of baby hatches, it is implausible to view a child protection mechanism as a factor contributing to child abandonment.

The objection that baby hatches infringe on the child's right to an identity is also levied at the USA's safe haven laws, to which Debbe Magnusen responds that a child unsafely abandoned has no knowledge of its origins either (Magnusen 2001: 17). Similarly, baby hatches do not put the child at a greater disadvantage. In the hierarchy of rights, the right to life is antecedent to claiming any other

right, including the right to an identity. However, with some administrative systems and the mother's cooperation, it is possible to collect non-identifying information and secure some aspects of the child's origins, as will be seen with the United States safe haven laws in Chapter 4.

Last are concerns that women planning to take advantage of the baby hatch will undergo a clandestine birth rather than a hospital birth, and that baby hatches do not stop infanticides or abandonments. The first point is fair because media reports on infanticides and unsafe infant abandonments are often highly suggestive of clandestine births, sometimes describing the presence of the placenta at the scene (Mthethwa 2020), showing that this is already a practice. Baby hatches can modify the child protection framework so that the event of a clandestine birth need not result in the action of unsafe abandonment or infanticide. Regarding the point that baby hatches do not stop infanticides and abandonment – this is true of many social and public health policies. For example, the availability of contraception and family planning services does not ensure the use of either. However, the individual's decision not to use a service does not detract from the morality of the policy, so too with baby hatches.

The objections of baby hatches encouraging abandonment, encouraging clandestine births, and not being able to stop infant endangerment are not very strong arguments and are easily dismissed. While possibly well-intentioned, the argument that baby hatches infringe on the child's identity is misplaced when the critical issue of the child's survival is uncertain. I submit that the possibility that a baby hatch will save a child's life outweighs this concern about identity.

2.2 An ethical argument for baby hatches in South Africa

With the weaker arguments against baby hatches refuted, I will now look more closely at the contributions baby hatches can make to the ethical landscape of child protection. I will explain the relationship between harm, risk, and vulnerability before defending baby hatches on the principle of harm reduction.

Harm is the suffering, or setback to the interests, of any being or entity that holds moral status. For an infant, the immediate harms of unsafe abandonment are physiological and include illness, infections, disability, and death.

Harm is the outcome of vulnerability and risk, but it can be influenced. Nadine Ezard explains that risk can refer to (a.) the likelihood or (b.) the extent of the experience of harm in consequence of a

behaviour (Ezard 2001: 211). Similarly, Daniel Sarewitz and colleagues distinguish between event risk – defined as "probabilistic risk of the occurrence", and outcome risk – defined as "risk of a particular outcome" (Sarewitz, Pielke and Keykhah 2003: 805). Joanna Erdman defines vulnerability as one's exposure or proximity to factors that influence harm (2011: 453). Sarewitz and colleagues define vulnerability as the "inherent characteristics of systems that create the potential for harm" (Sarewitz, Pielke and Keykhah 2003: 805). These definitions indicate that risk and vulnerability are first, contextual, and second, not fixed conditions. Thus, in problematic behaviours where risk and/or vulnerability factors can be influenced, the outcome of harm can be reduced.

Emerging from Consequentialism, harm reduction policies take a neutral stance on evaluating the morality of a behaviour, it is instead concerned with the consequences of the behaviour: harm is bad and should be avoided. This extends into policies on social and public health problems, designing interventions that will result in less harm (and often less overall cost). Harm reduction policies seek to improve health outcomes by influencing the changeable nature of vulnerability and risk. While harm reduction interventions have been traced to "narcotic maintenance clinics in the United States" which operated from 1912 – 1923 (Cook, Bridge, Stimson 2010: 38), the term 'harm-reduction' gained popularity with the pragmatic public health responses that swept the USA and Europe in the 1970s (Hawk et al 2017: 1). At that time, it was observed that the reuse and sharing of hypodermic needles by drug users was contributing to the transmission of HIV and other serious infectious diseases within this community. As infections spread by using unsterile needles, it was reasoned that modifying the behaviour to ensure clean needles were used each time would make drug use safer without prohibiting the behaviour. By making the argument and developing a policy of harm reduction, "clean needle exchange programmes" were established for drug users to freely exchange their used needles for clean needles. Clean needle exchange programmes continue in a few countries (e.g. England (Sheffield Drugs and Alcohol Coordination Team 2021), Australia (South Australia Health 2021), and Canada (Hamilton 2021)). The Netherlands clean needle exchange programme has been in operation for over 30 years (McVay 2021). Those who use these facilities experience reduced risk of exposure to infections.

Health activists now support harm reduction policies to improve health outcomes associated with a range of risky behaviours including clandestine abortion (Erdman 2011, Keane 2003), sex work (Rekart 2005), and alcohol abuse (Collins 2019). South Africa's experience with harm reduction interventions is well illustrated by the free distribution of condoms to reduce HIV transmission, indicating that such policies are socially and politically supported for the benefits they provide.

In developing a framework for harm reduction, commentators and critics have attempted to identify the principles on which it operates. Joanna Erdman's account of harm reduction for safer abortion (Erdman 2011) provides a conceptual definition that is appropriate for my ethical defence of baby hatches. She identifies the principles of neutrality, humanism, and pragmatism as necessary principles of a harm reduction policy (Erdman 2009), and I will elaborate on these principles in respect of baby hatches.

The position of neutrality is demonstrated in withholding judgement on the morality of the women who use baby hatches. Pragmatism recognises that trying to stop infant abandonment and infanticide is very difficult if the drivers (e.g. unwanted pregnancy) are not managed – but infant endangerment can be avoided by facilitating safe and timeous child relinquishment. Erdman writes, "harm reduction concerns only the risks and health-related harms of an activity, not whether the activity is normatively right or wrong" (Erdman 2011: 423). Given the apparent tolerance of the harm reduction paradigm to difficult, and often undesirable, public health and social problems, it is not surprising that these policies can be highly controversial. Therefore, the principle of humanism is important to the moral dimension of harm reduction, prescribing that "all individuals are treated with respect and deserving concern for their health and lives" (Erdman 2011: 423). Indeed, the right to dignity is a fundamental right and the principle of humanism is core to many social and health policies as it improves attitudes to public services and policies. The principle of humanism is necessary to gain the mother's trust, which in turn is key to her using the baby hatch.

Unsafe abandonments place the infant in immediate physiological danger and risk of death, it may place the child in a position of weakened claims to rights and services or override its human rights. I submit that baby hatch relinquishments are morally preferable to unsafe abandonments because of the harms they may avert through modifying the child's vulnerability and risk. Baby hatches conform to the moral paradigm of harm reduction by integrating the principles of humanism (in respect of the mother); neutrality (on judgement of her actions); and pragmatism (in minimising adverse consequences to, and advancing the interests of, infants) to offer better outcomes for the infant than an unsafe abandonment.

2.3 The moral appropriateness of baby hatches

Defenders of baby hatches acknowledge that the system is not ideal but, as a last resort for desperate women, the intervention is justified if it saves "just one infant" (Goulden 2019), which places the moral

focus on the infant. My focus so far has, likewise, kept a focus on the at-risk infant, but as the birth mother is a moral being and a moral agent herself, her experiences and actions have implications for her infant. I will make the claim that baby hatches are morally appropriate and imperative by showing the relationship between social vulnerability, unwanted pregnancy, and infant abandonment.

Earlier in this chapter, I refer to complex issues behind unplanned pregnancies and infant abandonments in South Africa. Women who belong to vulnerable and marginalised communities (including young women and girls, and immigrants) tend to have increased exposure to risk of harm in their sexual relationships and reduced autonomy in reproductive health and family planning. This has been examined by Deidre Blackie in her anthropological study of infant abandonment (2014) and the Department of Health in its study on contraception use (2012). Blackie identified teenage and unplanned pregnancy; sexual violence and subsequent conception; drug and alcohol abuse (which is also associated with rape); poverty and inequality; denial of paternity and absent fathers; post-partum depression; unsafe, backstreet, late-term abortion (resulting in live, premature births); single parenthood and illegitimacy; HIV/AIDS; and migrant labour, urbanisation, and illegal immigration as factors that influence infant abandonment of the driving factors (Blackie 2014: 100 – 105). The National Department of Health, in its "National contraception and fertility planning policy and service delivery guidelines: A companion to the 'National contraception clinical guidelines'" (2012) notes a relationship between contraception use and women's levels of education; urban or rural residence; reproductive coercion; lack of knowledge of, or counselling on, available contraceptive methods and their respective side effects; and health care workers prejudice against teenage girls and young, unmarried women as factors that may affect access to, usage of, and discontinuation of contraception (National Department of Health 2012: 15). The "National Contraception and Fertility Planning Policy and Service Delivery Guidelines" (2012) did not mention how non-legal status in South Africa (such as illegal immigrants or South Africans lacking identity documents) affects contraception use.

Thus, there is a connection between a woman's social vulnerability, reduced sexual and reproductive autonomy, and unwanted pregnancy. Whilst there is legal provision for child adoption, Blackie's research strongly suggests that adoption has not achieved assimilation in the South African context and is not well supported by officials in the Department of Social Development and this too may influence infant abandonment practices (Blackie 2014). I submit that, in the absence of effective policies to manage factors contributing to unwanted pregnancy, high estimates of infant

abandonments,[2] and negative attitudes to adoption,[3] baby hatches are not only morally appropriate but also morally imperative to facilitate safer relinquishment of parental responsibility than infant abandonment.

2.4 Conclusion

As a public health intervention baby hatches fill a need in infant protection. By conforming to the principles of harm reduction (neutrality, pragmatism, and humanism) baby hatches are accessible to women wanting to anonymously relinquish a child and is safer than a public abandonment. Baby hatches are morally defensible for the timeous prevention of harm that they can provide to at-risk infants.

The common objections to baby hatches, whilst being easily dismissed, also overlook that women's reduced reproductive autonomy and barriers to reproductive healthcare contribute to unwanted pregnancies. The extent of a woman's vulnerability may affect the choices she makes for her child, and the risk and extent of harm to which it may be exposed. Given the context within which infant endangerment occurs, and the unresolved drivers of unwanted pregnancy and infant endangerment, baby hatches are morally appropriate and morally imperative in the South African context.

[2] Child Welfare South Africa estimated that 3,500 abandoned infants were received by their member organisations in 2010 (Blackie 2014: 7).

[3] Child adoption social workers interviewed by Deidre Blackie's for her study on "Child abandonment and adoption in the context of African ancestral beliefs in contemporary urban South Africa" related their frustrations with bureaucratic processes "tantamount to the constructive prevention of adoption" (Blackie 2014: 12).

Chapter 3 – Legal perspectives of baby hatches

Several baby hatches have been opened around South Africa by non-governmental organisations and charities, demonstrating a civil society concern about, and response to, infant endangerment. However, there is no legal provision for baby hatches in South African law, thus excluding these facilities from the formal legal child protection framework and from regulation.

In this chapter, I examine South Africa's legal child protection framework by referencing international and South African law, as well as other legislation where appropriate. I will describe the legal perspectives on, and approaches to, infant abandonment in South African law; and the United Nation's Committee on the Rights of the Child's view on baby hatches. I will also discuss the ostensible conflict between baby hatches and children's rights and propose a legal basis for the operation of baby hatches.

3.1. South Africa's legal provisions for the care and protection of infants

As a party to the United Nation's Convention on the Rights of the Child (CRC) (1989) and the African Charter on the Rights and Welfare of the Child (ACRWC) (1990), South Africa's legal framework for child rights and protections reflects global, contemporary concerns and safeguards. Children's rights are entrenched in Section 28 of the Constitution of the Republic of South Africa (the Constitution) (Act 108 of 1996) and enacted in the Children's Act (Act 38 of 2005). Across all instruments, the child is defined as a person under 18 years of age (CRC 1989, Art. 1; ACRWC 1990, Art.2; Act 108 of 1996, s. 28.3; Act 38 of 2005 s. 1.1).

In keeping with these laws, the South African Constitution (Act 108 of 1996, s.28 (b)) and the Children's Act (Act 38 of 2005, s.2(a)(i)) uphold the child's right to parental care provided in the CRC and ACRWC (CRC 1989, Art. 7.1; ACRWC 1990, Art 19.1). These entitlements of children are reinforced by duties on parents "for the upbringing and development of the child" (CRC 1989, Art. 18.1) (ACRWC 1990, Art 20.1).

Child neglect is a violation of the child's Constitutional right to parental care (Act 108 of 1996, s.28.1 (b)), and a dereliction of the parents' responsibilities (Act 38 of 2005, s.18 (2) (a-d)) vis-a-vis the child. Desertion of an infant by the parent is an extreme form of child neglect, defined as "abandonment" in the Children's Act:

> ‘abandoned’, in relation to a child, means a child who-
>
> (a) has obviously been deserted by the parent, guardian or care-giver; or
>
> (b) has, for no apparent reason, had no contact with the parent, guardian, or care-giver for a period of at least three months.
>
> (Act 38 of 2005, s1.)

South Africa’s legal response to a child found to be abandoned, and in need of care and protection (Act 38 of 2005, s. 150), is to first establish a suitable temporary placement for the child (Act 38 of 2005, s. 156). Thereafter, the General Regulations Regarding Children (R261 of 2010) prescribes that meaningful efforts must be made “in the area where the child has been found calling upon any person to claim responsibility for the child” (R 261 of 2010, s. 56 (1)). If a suitable placement is not found, a process of establishing the child’s permanent placement in alternative care is engaged (R 261 of 2010, s. 56).

The rights and legal protections described above comprise the current legal protections for all children against abuse and neglect, irrespective of age, and are in keeping with international child laws (CRC 1989; ACRWC 1990). The Children’s Act (38 of 2005) makes provision for restoring care and stability to an abandoned child, but this protection is only activated after the act of abandonment has occurred, which in the case of infants may be too late. Furthermore, although the provisions of children’s law do not differentiate between children of different ages, there are clear differences in the physiological vulnerability of children of different ages and their ability to withstand different degrees of neglect, thus the effects of abandonment are not equal for all children.

3.2 The United Nations Committee on the Rights of the Child’s views on baby hatches

Owing to the regard for the family, the CRC and ACRWC recognise the child’s right to be raised by its parents (CRC 1989, Art. 7.1; ACRWC 1990, Art.19.1) and discourage separation of a child from its parents unless it is in the child’s best interests (CRC 1989, Art. 9.1; ACRWC 1990, Art. 19). The UN seemingly views baby hatches as enabling the separation of the child from its parents rather than as a mechanism of protection. The AU has not commented on baby hatches.

The United Nations Committee on the Rights of the Child (the Committee), in their reports on child protection laws and policies on India (Committee on the Rights of the Child 2014) and the Netherlands

(Committee on the Rights of the Child 2015), expressed its objection to the establishment of baby hatches in those countries. Whilst in both reports the Committee noted the violation of the child's right to an identity (Article 7), in its report to India the Committee further remarked:

> 41.The Committee is deeply concerned about the operation of Cradle Baby Reception Centres that allow for the anonymous abandonment of children in several regions of the State party, in violation of, inter alia, articles 6 to 9 and 19 of the Convention.
>
> 42.The Committee urges the State party [India] to take all necessary measures to end the practice of anonymous abandonment of children and to strengthen and promote alternatives as soon as possible. Furthermore, the Committee urges the State party to increase its efforts to address the root causes that lead to the abandonment of infants, including by providing family-planning services, adequate counselling and social support for unplanned pregnancies, and taking measures to prevent abandonment of infants due to gender or disability or lack of acceptance of children born out of wedlock.
>
> (Committee on the Rights of the Child 2014, para 41 – 42.)

The articles of the CRC alluded to by the Committee in paragraph 41 are:

(i) the child's right to life and the State's duty to "ensure to the maximum extent possible the survival and development of the child" (Art. 6);
(ii) the registration of the child "immediately after birth" and its "right to know and be cared for by his or her parents" (Art. 7);
(iii) the preservation of the child's identity which includes a nationality, name, and family relations "as recognised by law without unlawful interference", and mandates efforts by the State to restore any part of the child's identity that has been illegally deprived (Art. 8);
(iv) a prohibition against separating the child from its parents unless it is determined to be in the best interests of the child (Art. 9.1), mandates the participation of all concerned parties in proceedings related to separation of a child from its parents (Art. 9.2), the child's right to "maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests (Art. 9.3). Where the separation of the child from its parents is initiated by a State party, the State is obliged to respond to requests on the whereabouts of the absent member (Art. 9.4);
(v) the State's obligation, through all proper measures, to protect the child from all forms of neglect and abuse, including from the parents (Art. 19.1), this obligation is to be supported by protective measures and social programmes necessary to support the child – and those who

care for the child – including processes to prevent, investigate, remedy, and follow-up on instances of child maltreatment (Art. 19.2)

Whereas, the Committee's report to the Netherlands reads:

> 34. The Committee is concerned about the establishment of so called "baby-boxes" that allow anonymous abandonment of children in violation of, inter alia, the right of the child to know his or her origin, even though, as stated by the State party, no new born has been placed in the "baby-boxes" so far.
>
> 35. The Committee urges the State party to take all measures necessary to end the "baby box" initiatives as soon as possible and instead strengthen and promote alternatives, in order to prevent unwanted pregnancies and child abandonment, particularly by improving family planning services, counselling and social support for unplanned pregnancies. The Committee also recommends that the State party consider introducing, as a measure of last resort, the possibility of confidential hospital births.
> (UN Committee on the Rights of the Child, 2015, para 34 – 35.)

The Committee notes that the Netherland's baby hatches were not utilised at the time of reporting, and makes general recommendations toward ending baby hatches, including advising confidential hospital births as a last resort. This suggests the Committee views that abandonment in the Netherlands springs from private problems that can be addressed at the maternity ward. Conversely, the Committee's recommendations that India address the "root causes" leading to child abandonment, and specifying out-of-wedlock births, disability, and gender as risk factors, alludes to a recognised wider social problem. The high rate of baby hatch relinquishments in India, as alluded to by the Committee, suggests that in the absence of successful programmes to maintain the child within the family, baby hatches have been effective at diverting infants from abandonment and infanticide.

3.3 A legal analysis of baby hatches

The prominence of the family for the care and protection of the child is a ubiquitous and powerful notion in international and South African child laws. The family is seen as the natural and optimal environment within which the child is to be cared for and raised. The CRC further expresses a view that identity is formed within the context of the family and thus proscribes State Parties from participating in depriving a child of its family relations and identity (CRC 1989, art 8.1 and 8.2).

The Committee on the Rights of the Child claims that baby hatches transgress several articles of the CRC (1989). Noting these conflicts, the Committee has recommended that the Netherlands and India close their baby hatches. In addition, the Committee advised the Netherlands to consider offering confidential birth options as a last resort (Committee on the Rights of the Child 2015, paragraph 35), which itself has implications for a child's filiation and identity.

Whitney Rosenberg (2015) and Ya'ir Ronen (2004) both take issue with the normative legal constructions of the child's identity for (1.) obstructing meaningful legal reforms to child protection (Rosenberg 2015) and (2.) undervaluing the child's self-constructed identity (Ronen 2004). Rosenberg, in her analysis on the right to an identity being an impediment to the legalisation of baby hatches in South Africa, explains that the articles on the child's right to know and be cared for by its parents (CRC 1990, art. 7.1), and preservation of the child's identity (CRC 1990, art 8.1) were included to protect children in "war-stricken countries…and not to supersede the right to life, but to enhance or supplement the protection afforded by the right to life in Article 6 [of the CRC]" (Rosenberg 2015: 206). Whereas Ronen (2004) interrogates the CRC's very concept of identity and argues that the CRC puts personal identity in contention with cultural identity. Ronen regards the CRC as flawed and outmoded because personal identity is a fluid process of "self-actualisation" shaped by the child's participation in its social environment (Ronen 2004: 149 - 150). This is a compelling argument in light of the obstacle that normative conceptions of identity present to child protection reforms, the legalisation of baby hatches, and ultimately to the child's foremost right to survival.

Nevertheless, the transgressions of baby hatches against the CRC are not a legal child protection anomaly. The provisions for adoption and alternative care after abandonment are two examples of legally accepted processes that similarly confront Articles 7 – 9 (on the child's identity, family care, and relations with parents) of the CRC (1989). The State is enabled in these actions by four overarching principles that guide the development and application of children's laws and child welfare policies, namely, non-discrimination; the right to survival and development; the best interests of the child; and the views of the child. To this end, the Children's Act gives effect to the child's Constitutional rights to family care or alternative care; social services; protection from abuse and neglect; and consideration of the child's best interests (38 of 2005, ss 2.(b) (i), (ii), (iii) and (iv)). Within these parameters, the State may divert the child from family care to enforce higher ranking principles in the best interests of the child. Thus, the treatment of baby hatches as legally aberrant is unfounded. Baby hatches can strengthen the child's Constitutional rights to family care or alternative care; social services; protection from abuse and neglect; and consideration of the child's best interests (38 of 2005, ss 2.(b) (i), (ii), (iii) and (iv)).

In addition, baby hatch relinquishments can better ensure the child's registration of birth which will improve its claims to child welfare services, education, and employment in later life. An unsafely abandoned child risks being diverted from the child protection system, denying this child its Constitutional rights and risking exposure to a lifetime of human rights harms (for example, through trafficking) exceeding any harms endured through loss of identity.

In South Africa, infants face the second highest risk of child homicide, and many of these deaths result from abandonment (Abrahams, Mathews, Martin, et al 2016), suggesting that the current child protection framework does not adequately cater for at-risk infants. Due to physiological vulnerability, abandonment of a child in infancy is a profound threat to the child's survival and wellbeing that is not typically matched by older children. However, the infant's heightened vulnerability to harm because of abandonment or homicide is not acknowledged within the child protection framework. In fact, nowhere in the Children's Act (38 of 2005) are infants or newborns referred to despite the patterns of infant abandonment and homicide. Instead of extending special protections to infants within the Children's Act (38 of 2005), South African legislation makes a special provision for prosecuting "Concealment of birth":

> 1. 113. Concealment of birth of a newly born child
> (1) Any person who, without a lawful burial order, disposes of the body of any newly born child with intent to conceal the fact of its birth, whether the child died before, during or after birth, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years.
> (2) A person may be convicted under subsection (1) although it has not been proved that the child in question died before its body was disposed of
> (Act 66 of 2008, s.1. 113. (1) and s.1.113. (2)).

There is a disconnection marked by an absence of legislation for at-risk infants within the child protection framework, and legislation for prosecution after a child's death, when the window period to enable a different outcome was overlooked and has closed.

My legal analysis shows that baby hatches meet at least three principles of child protection, namely non-discrimination; the right to survival and development; and the best interests of the child – which is significantly better than the child's prospects if it is unsafely abandoned. I also show that baby hatches can work within the formal legal child protection framework just as adoption and alternative care do. Baby hatches can facilitate the transition of infants at-risk of abandonment into the State's care and protection services before it is exposed to unsafe abandonment.

3.4 Conclusion

South Africa's child homicide patterns indicate that infants are not adequately covered by the child protection framework. The Committee on the Rights of the Child does not endorse baby hatches and in South Africa these facilities operate illegally. However, I have shown that there is a place for baby hatches within the scope of the formal child protection framework. Baby hatches conform to the principles of non-discrimination; the right to survival and development; and the best interests of the child. The claim that baby hatches are legally aberrant because they interfere in the child's rights to family care and an identity is unsubstantiated when viewed against other child protection practices, such as alternative care and adoption, that similarly confront the child's rights to family care and identity but are legally acceptable. Moreover, detailed legislation for alternative care, adoption, and other provisions that deviate from family care, ensures that processes are carefully managed in the best interests of the child.

Baby hatches can augment South Africa's child protection framework and spare children from a perilous situation at the beginning of life by at once facilitating the mother's relinquishment of parental responsibility and the child's timeous entry into child protection services. Providing for baby hatches in South African law will enable the development of regulations and operational standards for baby hatches, and legal protections of staff, like other legal child protection mechanisms.

Chapter 4: Alternative interventions to protect infants

Infant abandonment and infanticide are global phenomena and baby hatches are but one approach to protecting at-risk infants. In this chapter, I will describe two alternative responses from foreign law, namely the safe haven laws of the United States of America (US) and the anonymous birth legislation of France. I will examine the debates associated with each approach with a view to understanding the implications they may have for my ethical defence of baby hatches and my proposal for the legislative reform of South Africa's child protection laws.

4.1 Safe haven laws

In 1999, the state of Texas passed the US's first safe haven law after cases of infanticide and unsafe abandonments captured media and public attention (Appell 2002a: 61). The law aimed to regulate the safer abandonment of infants at legally designated facilities (called 'safe havens'). By 2008, all US states had enacted similar legislation (Bruce 2016: 7). Safe haven laws do not legalise abandonment, rather, parents are offered some amount of legal immunity for performing a safe haven relinquishment within the provisions of the law. Whilst the laws are broadly similar, each state differs on the details of what is considered a legal safe haven relinquishment. The speed at which the laws were passed sparked intense debate amongst academics and civil society groups about the appropriateness and effectiveness of the laws. In this section, I shall give an overview of the common features of the legislation and discuss the critical debates that have emerged.

4.1.1 Common features of safe haven laws

Relinquishing an infant

The safe haven laws stipulate who may relinquish a child, this may be a parent (e.g. Michigan), or only the mother (e.g. Tennessee), and occasionally a person designated by the parent (e.g. Indiana) (Child Welfare Information Gateway 2017).

Parents who perform a safe haven relinquishment in compliance with the law are offered anonymity and either legal immunity ("mean[ing] parents or their agents will not be charged with a crime") or an affirmative defence ("does not preclude prosecutors from filing criminal charges against people who abandon infants at safe havens, but only provides the opportunity to present the defence that they

safely abandoned the newborn") (Baran 2003: 6). Louisiana, however, provides that a mother may surrender her "child without fear of prosecution" (Verlinden 2002: 105).

Eligibility for a safe haven relinquishment

All the laws have an age limit on infants eligible for safe haven relinquishments which varies widely across the US, from birth to 72 hours old (e.g. Utah) and extending to one year old (only North Dakota) (Child Welfare Information Gateway 2017). In between, there are limits set at up to 7 days (e.g. Florida), 14 days (e.g. Iowa), 30 days (e.g. Indiana), 45 days (e.g. Kansas), 60 days (e.g. South Carolina), and 90 days old (e.g. New Mexico) (Child Welfare Information Gateway 2017). Surrendering a child who is older than the state's age limit, or with signs of abuse or neglect, will void the parent's legal immunity or legal defence (but the child will not be turned away).

Designated safe haven locations

Safe haven sites are most often health or law enforcement facilities that operate 24 hours a day such as hospitals and emergency medical services (which can immediately respond to the child's health needs on arrival), fire departments, and police stations (Child Welfare Information Gateway 2017). Some states designate churches (e.g. Arizona), child welfare agencies, and pregnancy crisis centres as safe havens (e.g. Louisiana) (Child Welfare Information Gateway 2017: 7 and 27). New York's statute allows that "the child may be left with an appropriate person at a suitable location" (Child Welfare Information Gateway 2017: 42). The child must be handed over to personnel of that facility, simply leaving the child on the premises may void the parent's legal immunity. As the statutes do not legalise abandonment most safe haven laws provide legal immunity to the safe haven facility and/or personnel for their participation in receiving the infant (Child Welfare Information Gateway 2017: 42).

Interaction between the safe haven worker and parent

Safe havens bear resemblance to the foundling wheel system of 17th Century Europe, however, because the mother's anonymity and action is protected by law, she can relinquish the child directly to health and law enforcement workers instead of secreting the infant into an architectural feature. There is therefore an opportunity for the safe haven worker to request information about the non-relinquishing parent (which is usually the father); request or record non-identifying information about the relinquishing parent (usually the mother); advise the mother about welfare services available to herself and her child; and advise her on how to reclaim the child (Child Welfare Information Gateway 2017).

Four states, including California, have implemented administrative systems to secure aspects of the child's identity: a mother, on relinquishing her infant is given an identifying coded bracelet and a questionnaire. The bracelet matches an anklet given to the child (Child Welfare Information Gateway 2017: 9) – being able to link the mother and child makes it possible for the mother to reclaim her child within a specified window period, or to reconnect with the child at a later stage. The questionnaire requests non-identifying information that is of relevance to the child and its adoptive parents, such as the mother's medical history (Child Welfare Information Gateway 2017: 9). The mother can complete the form before she leaves, or she can complete it later and return it via postal service. However, the mother is not obliged to provide this information and the safe haven worker is prohibited from being insistent (Child Welfare Information Gateway 2017).

Process after relinquishment

After receiving the infant, the safe haven worker is required to report the relinquishment to child protection services. Some laws prescribe searching the missing children's registry (to ensure the child was not unlawfully relinquished) and searching the putative fathers' registry to invite the father to claim custody of the child or participate in welfare decisions (such as adoption) for the child (Child Welfare Information Gateway 2017: 4). Some laws interpret a safe haven relinquishment as intention to relinquish parental rights for the child, thereby initiating processes to terminate parental rights and make the child available for adoption (Child Welfare Information Gateway 2017: 4).

4.1.2 The debates over safe haven laws

Responses to safe haven laws have been cautiously supportive, strongly supportive, and strongly oppositional; yet even supporters note shortcomings in the laws that may undermine effectiveness. Susan Ayres is a strong supporter of safe haven laws which she defends on the grounds of *kairos* (she defines *Kairos* as "right-timing and due measure or propriety" (Ayres 2009: 278)) and feminism. Ayers' *kairos* argument holds that the alignment of subjective time and opportunity are influential to a woman deciding what action she takes to manage an unwanted pregnancy, she explains:

> Unwanted pregnancies, like other psychological crises, are an example of kairos and contain a continuum of kairic points of possible decision,…first, the acknowledgment early on that one is pregnant, and a decision to terminate the pregnancy, to make an adoption plan, to abandon the infant, or to parent the infant. In some cases there is an inability to accept the pregnancy, and the woman experiences denial. However, there

> may then be later acceptance of the pregnancy and selection of a plan - or the continuing denial of the pregnancy. Finally, at delivery, a woman may continue to deny the existence of the newborn or she may have the ability at that point to make (or have made) a plan. At each point of the unwanted pregnancy, the moment might be auspicious for a woman to take stock of her psychological crisis and choose to 'do the right thing at the right time' (Ayers 2009: 279).

The emphasis on a woman having options and a plan leading to decision making and action are aspects of autonomy. Ayers links this autonomy to a feminist paradigm that serves the woman and her child by activating the woman's agency (Ayers 2009: 281).

However, there are concerns about the ability of safe haven laws to prevent infanticide and infant abandonment. Following the enactment of Texas' safe haven law, continuing cases of unsafe abandonments quickly raised questions around the efficacy of safe haven laws:

> in the two weeks following enactment of its (and the nation's) first safe haven law, Texas saw seven babies abandoned in unsafe places […]. During the first two years of the statute's life, apparently there have been 100 illegally discarded newborns in Texas, compared to five safe haven relinquishments in that same period (Appell 2002c: 68).

Ayers notes that, in the beginning, funding for publicity campaigns was a major setback to the effectiveness of the safe haven laws as public awareness about the law has been found to be key to utilisation of the law:

> states such as California and Florida, which have greater outreach efforts, have shown greater success. Indeed, compelling statistics illustrate that states with increased public awareness campaigns are much more successful than states such as Texas that lack these efforts (Ayers 2009: 263).

Phillip J. Resnick's 1970 publication, "Murder of the Newborn: A Psychiatric Review of Neonaticide" suggested that the mental states that cause American women to kill a newborn within 24 hours of its birth are different from those who kill children older than 24 hours. Resnick's research found that 83% of newborn homicides were because the child was unwanted (Resnick 1970: 1415). Conversely, psychosis was found to affect two-thirds of women who committed homicide of older children (Resnick 1970: 1415). The significance of this study was in finding "that the killing of a newborn infant is a separate entity from other filicides" (Resnick 1970: 1419) and led Resnick to propose the use of the terms 'neonaticide' and 'filicide' to distinguish between the motivations and mental states behind

the mother's actions (Resnick 1970). In 2009, Susan Hatters Friedman and Resnick revisited this topic in their paper, "Neonaticide: Phenomenology and considerations for prevention" with a view to evaluating safe haven laws and anonymous birth legislation (Friedman and Resnick 2009). Their response was guarded and cautiously supportive of safe haven laws:

> Women make quite different choices when they choose abandonment in a safe haven (hospital), abandonment in a place where the infant is not likely to be found (trash receptacle), and neonaticide. It may be different groups of women who act in these different ways. [...] Not much is known about the population of mothers who have left their infants at "Safe Havens." […] States should collect data regarding the use of Safe Havens and their efficacy. Laws should be more standardized based on existing knowledge of neonaticide and abandonment, and should be advertised to the public. In our view, if Safe Haven laws save the lives of even a few infants, they are worthwhile (Friedman and Resnick 2009: 45 – 46).

In 2003, the Evan B Donaldson Adoption Institute (which worked in the field of US adoption advocacy and research and closed in 2018), published "Unintended consequences: "Safe haven" laws are causing problems, not solving them" (Baran 2003). It claimed that safe haven laws

> all create a separate child welfare framework, one apart from, and frequently in conflict with, existing federal and state abuse-and-neglect and adoption policy. Consequently, many of these new statutes inadequately address birth parent and children's rights – or do not address them at all. These include termination of parental rights, facilitating the adoption of abandoned infants, and collecting medical and social histories that enable future access to critical information about health, genealogy and origins (Baran 2003: 5).

The report listed the following objections to safe haven laws:

- encouraging women to conceal pregnancies, then abandon infants who otherwise would have been placed in adoptions through established legal procedures or would have been raised by biological parents or relatives;
- creating the opportunity for upset family members, disgruntled boyfriends, or others who have no legal rights, to abandon babies without the birth mothers' consent;
- inducing abandonment by women who otherwise would not have done so because it seems "easier" than receiving parenting counselling or making an adoption plan;

- depriving biological fathers of their legal right to care for their sons or daughters even if they have the desire and personal resources to do so;
- ensuring that the children who are abandoned can never learn their genealogical or medical histories, even when the consequences for their health are dire;
- precluding the possibility of personal contact and/or the exchange of medical information between birth parents and children in the future; and
- sending a signal, especially to young people, that they do not have to assume responsibility for their actions and that deserting one's children is acceptable.
  (Baran 2003: 1.)

Bastard Nation, a US civil society group that advocates for the rights of adoptees, responded to the Evan B Donaldson report repeating much of the same concerns, but additionally raising the potential "[contravention of] sections of the Federal Indian Child Welfare Act (ICWA) that gives tribes first custody rights in cases of child relinquishment" (Grenier 2003). These concerns of the Evan B Donaldson Adoption Institute and Bastard Nation capture much of the common objections against safe haven laws.

Carol Sanger's (2006) scepticism of safe haven laws reiterates some of the above-mentioned points, but also uniquely examines a socio-political agenda that encroaches on woman's reproductive rights including choices around contraception, family planning, and termination of pregnancy. In her publication, "Infant safe haven laws: Legislating in the culture of life" (Sanger 2006), Sanger identifies moral panic behind the speed at which safe haven laws were enacted across the USA. The characteristics of this moral panic was the media's focus on cases of infanticide and infant abandonment in the late 1990s creating the perception that there was a spate of crimes against infants and giving rise to a desire to "do something" (Sanger 2006: 775 and 787); and a conflation of abortion and abandonment (Sanger 2006: 760). Sanger carefully outlines the conservative political and ideological "culture of life" agenda (a concept introduced into the political mainstream by the then Texas Governor, George W Bush), "with its absolute devotion to the unborn", to construct a morality that takes "unwed pregnancy and abortion off the table" (Sanger 2006: 815).

Sanger also speculates on safe haven laws inviting surveillance of women by putting women's reproductive and sexual behaviour in the forefront of public life. Not just pregnant women, but all women of reproductive age who may be concealing a pregnancy (Sanger 2006: 813 –814):

> The posters on the sides of buses and alongside the New Jersey Transit tracks are meant to be seen by all passengers and passersby, who are now encouraged to ponder just what the young woman two seats away has been up to (Sanger 2006: 814).

Michelle Hammond, Monica Miller and Timothy Griffen assert that safe haven laws function as "crime control theatre" (2010). They claim that safe haven laws were enacted in reaction to public moral panic provoked by media reports on infant abandonments. On this view, the laws are a balm for social outrage and are not capable of being effective at reducing harm against infants of unwanted pregnancies, nor are they intended to be.

4.2 Anonymous birth legislation

Anonymous birth, as provided in French law, allows a woman to give birth in a sanitary clinical setting, at no cost to her, and to not disclose her identity. The child is immediately transferred to state care and adoption processes are initiated. Anonymous birth is aimed at women determined to reject motherhood and who might be at risk of procuring secret and unsafe abortions; committing unsafe infant abandonments or infanticide; or having a dangerous secret birth. I will describe France's anonymous birth legislation as well as the case of *Odièvre v. France* (2003) which specifically examined the conflict between a mother's anonymity and the child's ignorance of her origins. I will then examine the critical debates that have emerged on anonymous birth that may have implications for baby hatches.

4.2.1 Description of anonymous birth law

Processes to manage infant abandonments and reduce child neglect, infanticides, and abortions in France have been traced to the foundling wheel system (called *tours* in France) which was established in 1638 and discontinued in 1904 (*Odièvre v. France* 2003: para 15). The period of the French Revolution saw the first attempts to assist mothers determined to reject motherhood by providing free, anonymous hospital deliveries to ensure a safe delivery for the mother and child (*Odievre v. France* 2003: para 15) followed by terminating the filiation between mother and child. In 1941, this practice of anonymous birth was formally written into law; it has undergone several amendments and currently reads:

> The costs of accommodation and confinement of women who, on being admitted to a public institution or approved private institution, request that their identity remain secret shall be borne by the Child Welfare Service in the département in which the institution's head office is located.
>
> At their request or with their agreement the women referred to in the first sub-paragraph shall receive psychological support and practical advice from the Child Welfare Service.
>
> The first sub-paragraph shall apply without any means of identification being required or inquiry conducted.
>
> If the name of the child's father or mother has been recorded in a birth certificate […] there shall be no legal entitlement to have the costs of accommodation and confinement paid for by the Service.
>
> (Social Action and Families Code 1986, Article L . 222-6 in *Odièvre v. France* 2003: para 15).

The mother is given one month to change her mind and claim the child, after which adoption processes are initiated (*Odièvre v. France* 2003: para 10). In 2003, it was estimated that 600 anonymous births occur each year in France (*Odièvre v. France* 2003: para 36). Michael Freeman and Alice Margaria speak of this law drawing a distinction between maternity and motherhood (Freeman and Margaria 2012: 158).

In 1966, to avoid disruptions to adoptive families by biological families, full adoption was written into law (Bonnet 1993: 503 and Lefaucheur 2004: 322). This law prescribed that, to establish the full integration of the child into the adoptive family, and to prevent the biological family from attempting to claim the child after an adoption placement, the child's link to his birth family must be erased. This was achieved by expunging any residual identifying information of the birth family from the child's birth record (Bonnet 1993: 503). Thus, anonymous birth separates the child from knowledge of their biological families and origins.

France's child protection legislation is framed by two international laws: the Convention on the Rights of the Child (CRC) (1989) and the European Convention for Human Rights (ECHR) (1950). The ECHR is an instrument of the Council of Europe (COE), the COE does not have a treaty on children's rights but states that it

> believes that children are fully-fledged holders of human rights and not mere subjects of protection. Children must enjoy the protection offered by all international human rights treaties […including the Convention of the Rights of the Child]. The Council of Europe […] seeks to secure better implementation of children's rights in the member states by raising awareness and working in co-operation with national authorities (Council of Europe [CoE] 2021).

The loss of identity caused by anonymous birth has been a major concern regarding this system. In 1990, the year that France signed and ratified the CRC (1989), it began enquiries to improve children of anonymous births access to information and knowledge of their origins and birth parents. The report, "Status and protection of the child" proposed that

> children should be given a limited right of access to information regarding the identity of their progenitors through the intermediary of a specially created structure that would be responsible for ascertaining the wishes of the parents and facilitating a psychological *rapprochement* of the parties (Conseil d'Etat 1990 in *Odièvre v. France* 2003: para 16).

Subsequently, proponents of anonymous birth made suggestions to reform the law to improve the child's access to information such that identifying information might be made available with the birth mother's consent (*Odièvre v. France* 2003: para 16). Opponents of the law advocate for the child's right to information and have motivated for the law to be repealed (*Odièvre v. France* 2003: 16). In 2002, the National Council for Access to Information about Personal Origins (CNAOP) was created to assist the disclosure of information between children and their birth mothers, subject to express consent by both (*Odièvre v. France* 2003: para 17).

4.2.2 Anonymous birth and the problem of identity: *Odièvre v. France*

The Committee on the Rights of the Child has not weighed-in on France's anonymous birth legislation, but the European Court of Human Rights (ECtHR) (the Court) has, in the case *Odièvre v. France* (2003).

The complainant, Pascale Odièvre, was born 'under X' in 1965. In 1990, Odièvre sought information on her birth family but her file at child welfare services only contained non-identifying information about her birth family (*Odièvre v. France* 2003: para 12) from which she learned that her birth parents had had three sons (one older and two younger than herself), however the information was insufficient for Odièvre to satisfy her understanding of her biological origins and heritage; nor to

attempt to contact her birth family. Odièvre's application for her long-form birth certificate was denied and France's protection of privacy laws effectively barred her from pursuing this further. Taking her case to the European Court on Human Rights, Odièvre's complaint against France claimed that anonymous birth deprived her of knowing the origins of her birth, a right protected in Article 8 of the European Convention on Human Rights (1950), which states that:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
>
> (European Convention on Human Rights 1950, Article 8)

France responded that the concept of family entailed "at the very least close personal ties […] a mere biological link was insufficient to constitute family life within the meaning of Article 8 [of the ECHR]" (Odièvre v. France 2003: para 26). Thus, as Odièvre had no personal ties with her biological mother or siblings, and her birth mother had expressly refused a relationship, there was no infringement on her family life. However, in the Court's view, "[b]irth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life guaranteed by Article 8 of the Convention" (*Odièvre v. France* 2003: para 29). France maintained that anonymous birth

> sought to protect the mother's and child's health during pregnancy and birth and to avoid abortions, in particular illegal abortions, and children being abandoned other than under the proper procedure. The right to respect for life, a higher-ranking value guaranteed by the Convention, is thus one of the aims pursued by the French system (*Odièvre v. France* 2003: 26).

The Court reviewed the case with reference to the European Convention on Human Rights (1950) and relevant French domestic law, and within the parameters of 1.) balancing the interests of all parties (namely, the applicant, the birth mother, the birth father, the biological siblings, and the adoptive parents) (*Odièvre v. France* 2003: para 5) and 2.) the margin of appreciation allocated to France on account of its unique legal provisions for anonymous birth which is not commonly shared among European nations (*Odièvre v. France* 2003: para 10). The Court determined, by ten votes to seven,

that there was no violation of Odièvre's Article 8 right (*Odièvre v. France* 2003: 29). The Court advised Odièvre to engage the recently created National Council for Access to Information about Personal Origins system to seek her desired information on, and contact with, her biological family (*Odièvre v. France* 2003: para 49).

The case report on *Odièvre v. France* (2003) also holds three opinions of concurring judges and one dissenting opinion jointly submitted by the seven dissenting judges, which raise additional interesting points. The "Concurring opinion of Judge Ress joined by Judge Kūris" (Odièvre v. France 2003: 33 - 34) responds to the disputed claim that anonymous birth does not prevent (illegal or legal) abortion:

> statistical data cannot be the only yardstick for deciding whether or not such an interference is justified. Implicit in a law such as that applicable in France is also a value judgment, as it recognises the situation of deep distress in which the mother finds herself and the need to save the child's life (Odièvre v. France 2003: 34).

Judge Ress and Judge Kūris further argue that in the situation of conflict of interest between the mother's right to withholding her identity and the child's right to its identity, there is an additional dynamic of the State's "interest in offering a solution" (Odièvre v. France 2003: 34). To this end, on the margin of appreciation, "[t]he State is entitled in such situations of distress for the mother to give precedence to her interest over the child's right to know its origins" (Odièvre v. France 2003: 34).

The seven dissenting Judges (Judges Wildhaber, Sir Nicolas Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää) submitted a nuanced opinion disagreeing with several parts of the judgement, stating that "information about one's origins concerns the essence of a person's identity, it constitutes an essential feature of private life protected by Article 8 of the Convention" and linked this to autonomy and development (*Odièvre v. France* 2003: 40 and 43). They also expressed a strong regard for the suffering experienced by adoptees from not knowing their origins (*Odièvre v. France* 2003: 42). Going beyond the ECHR, the dissenting judges referred to the CRC (1989) and the Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption (1993), "which has been ratified by France", pointed to the trend of promoting openness in adoptions and empowering adoptees with a "right to know" their origins (*Odièvre v. France* 2003: 43).

The Judges stated that the Court had a duty to determine if the interests of all parties were treated fairly, "[i]t is not, therefore, a question of determining which interest must, in a given case, take absolute precedence over others". In their opinion, a balance of interests was not possible, "the mother's refusal is definitively binding on the child, who has no legal means at its disposal to challenge the mother's unilateral decision". The Judges reinforced their opinion by highlighting the

inconsistencies between this judgement and ECtHR case law dealing variously with the restoration of identity, application of balance of interests tests, and other comparatively relevant issues. They concluded that "French legislation has not struck a fair balance between the interests concerned [… and that] there has been a violation of Article 8 of the Convention" (*Odièvre v. France* 2003: 47).

For the ECtHR, this case has been important towards the developing case law on Article 8 of the Convention. It has also been important to France in matters of child and social welfare pertaining directly to anonymous birth, encouraging the formation of concerned groups, which include children of anonymous birth and adoptive parents, who continually put pressure on France to repeal anonymous birth legislation.

4.2.3 Critical debates on anonymous birth

Child and adolescent psychiatrist, Catherine Bonnet, views anonymous birth as important legislation within women's reproductive rights (Bonnet 1993). To this end, Bonnet emphasises a distinction between abandonment (an act of child endangerment) and anonymous birth (an act of child protection) and proposed the term "adoption at birth" (Bonnet 1993). She cautions against interpreting the two acts under the term child abandonment.

The main issue with anonymous birth is the effect that anonymity has on subjecting the child to ignorance of its origins. Following Odièvre's application to the ECtHR, France attempted to improve the child's access to information by creating the National Council for Access to Personal Origins (CNAOP). Odièvre saw this not as a move toward openness, but as an implied commitment to the system of anonymity (Odièvre v. France 2003: para 33).

Beyond the conflict between the mother's interest in anonymity, and the child's interest in its origins, Nadine Lefaucheur submits that anonymous birth has always been utilised to serve various socio-political agendas namely,

(i) the pro-life movement (Lefaucheur 2004: 328 – 330);
(ii) feminist arguments on the right to reject motherhood (Lefaucheur 2004: 331);
(iii) positions against "social bonds that are rooted in biology or genetics and a promotion of the 'sociological' bonds of descent […] supported by the adoptive parents' associations but also by some academics […] and is widespread in the present French intellectual

> scene…[A] 'hate of biology' [which is] rooted in the rejection of the European – and especially Nazi – history of racism and eugenics" (Lefaucheur 2004: 333).

Lefaucheur suggests that the work of the CNAOP can be influenced by its composition and the bias of its members. Due to an alleged overrepresentation of opponents of anonymous birth on the CNAOP in its early days, two anti-anonymous birth members were removed and replaced with two medical professionals known to be supporters of anonymous birth (Lefaucheur 2004: 326). The medical profession in general, and especially obstetricians and paediatricians, are regarded as in favour of anonymous birth (Lefaucheaur 2004: 329), and this is perhaps not surprising given the relevance of hospital births to the health profession.

I have examined France's legal provision of anonymous birth, but it is not the only European country with such legislation. Italy, Luxembourg (Ayres 2009: 245), Austria (Klier et al 2012) and the Slovak Republic (Gulasova, Dvorakova, Hruska 2012) have legislated for anonymous or confidential (the mother's identity is not disclosed to the child until it requests it, or it has reached majority) birth. This shows that France is not alone in finding infants are not adequately protected within the child protection framework defined by international law.

4.3 Discussion on legislative approaches to preventing infant endangerment

In the USA and France, the voices of adults who experienced infant abandonment and being born under X contribute to discussions on the respective legislations and concern for the child's loss of identity is a recurring issue. Whilst a public abandonment will also deny the child's identity, the betrayal here is the State or government's complicity in bringing about that effect on the child. Yet these laws also demonstrate efforts to secure aspects of the child's identity. California's safe haven law uses identity bracelets to link the birth mother and child, and questionnaires to collect non-identifying information relevant to the child and its adoptive family. Anonymous birth reforms included changes to how and what information on the mother is recorded, and the creation of a National Council for Access to Personal Origins (CNAOP) which is tasked with assisting children of anonymous birth with accessing information on, and contact with, their birth mothers and families.

The USA is not bound by international child laws, but civil society groups of adult former adoptees and child rights advocates are able to express the significance of knowledge of their origins on the formation of their identities. This is similarly so in France where civil society groups of adoptive and

biological parents, and adults formerly of anonymous birth, advocate for the repeal of anonymous birth because of its violation of identity. Even with the CNAOP, critics note that the mother's interests are still given too much preference in this dynamic as she may refuse to consent to her information being shared with the child.

4.4 Implications for the South African context and recommendations

In this chapter, I examined provisions in foreign law with a view to continue advancing an ethical case for baby hatches. Both the USA and France attempt to protect infants from infanticide and abandonment with legislation that regulates safer infant relinquishment whilst offering the mother anonymity. As with baby hatches, safe haven laws and anonymous birth negotiate a compromise between the mother's interests (anonymity and child relinquishment) and the immediate physiological interests of the child (survival and health). The legal implications of anonymity are the speedy termination of the filiation between mother and child, and mobilisation of processes for the child's adoption. The mother's anonymity translates to the child's ignorance of its origins later in life which causes suffering – but this does not have to be so, anonymous birth and some safe haven law statues make provision to gather non-identifying information on the mother that is of relevance to the child, and information that may facilitate contact in future, strengthening the ethical position of such statutes.

Both these approaches are controversial and confront the normative child protection framework established by international law. Their existence therefore indicates that: (1) infanticide and infant abandonment are child harms that are not adequately covered in normative child protection, and (2) efforts to bring at-risk infants within the US and France's respective formal child protection frameworks necessitated developing legislation outside the parameters of normative child laws. These acknowledgements are instructive for strengthening my ethical defence of baby hatches and proposal for legislative reform.

It is outside of the scope of this paper to make any detailed recommendations on legal change, but the implications of my normative conclusion are that legal reform is necessary. The two alternatives in this chapter strengthen my case and are offered for the consideration of legal reform, safe haven laws offer a model that could be compatible with baby hatches.

Chapter 5: Conclusion

Baby hatches aim to prevent homicide and abandonment of infants, usually by mothers. They do not conform to international child laws and are illegal In South Africa. The UN's condemnation of baby hatches cites numerous child law violations. My ethical defence of baby hatches, on the grounds of harm reduction, makes a case for the infant's immediate survival and physiological wellbeing. Furthermore, consideration of factors that contribute to patterns of unwanted pregnancy and infant abandonment in South Africa support the conclusion that baby hatches are morally appropriate in the South African context.

Normative child protection laws are undifferentiated, and the child is defined as a person under 18 years of age – but vulnerability, risk, and harm are not typically equal to all children of all ages. Secondly, the legal child protection processes are reactive, only being activated after the harm has been committed, which might be too late for an infant given its physiological vulnerability. Therefore, child law infringements that baby hatches risk are less severe than the risks of unsafe abandonment, which can include death, poor health outcomes, and diverting the child from child protection services which can have consequences on broad denials of child and human rights, and state services, in childhood and later life. Baby hatches answer to three of the four principles to be applied in all matters concerning the child, namely: non-discrimination, best interests of the child, and the child's survival and development (CRC 1989). The outstanding principle is consideration of the child's views where possible (CRC 1989), but an infant is too young to express this.

I posit that baby hatches may not be as aberrant as it is claimed. There are examples of child protection mechanisms (like adoption and alternative care) that facilitate the separation of the child from its parents and transfers the child's care to another when it is deemed to be in the child's best interests and meets the other principles concerning the child. Domestic and especially international child adoption can have implications for the development of the child's identity, yet these are legally acceptable. So, the supposed offences that baby hatches commit are already tolerated and regulated elsewhere in the normative child protection framework.

The US and French legislative approaches to preventing infant endangerment, namely safe haven laws and anonymous birth, respectively, also deviate from international child laws. Yet, the existence of these legislations further advances my ethical case for baby hatches by acknowledging that (1.) infant protections against homicide and abandonment are not adequately addressed in international child laws; and (2) developing protections for infants requires legislative innovations outside the parameters set by international child law.

Examination of the US and French debates also revealed the adult views of the former adoptee or abandoned child on the suffering experienced later in life from not knowing their birth families or biological origins. Their experience of suffering is of concern, however some safe haven laws and legislative changes to anonymous birth implement promising administrative systems to establish parts of the child's identity to reduce this suffering. These regulations mean that anonymity is no longer the obstacle it once was, similar considerations can likewise strengthen the ethical position of baby hatches.

The rejection of baby hatches circle around concerns that they are not ideal, supposedly laden with ethical issues, transgressive of child laws, and with no place in law. However, I have made a case for the moral and legal permissibility of baby hatches in the South African context. While not ideal, baby hatches are morally preferable to infant endangerment and can augment South Africa's child protection framework. It was outside the scope of this paper to suggest specific legislative reforms, but this paper might be useful for such consideration by law makers.

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