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Murderous Mothers & Gentle Judges: Paternalism, Patriarchy, and Infanticide

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Murderous Mothers & Gentle Judges: Paternalism, Patriarchy, and Infanticide

Karen Brennan†

ABSTRACT: This Article explores sentencing of women convicted of infanticide in Ireland in the middle years of the twentieth century, demonstrating the link between lenient punishment of the offender and the preservation of patriarchal norms, laws, and structures. Drawing on gender construction theory and the concept of paternalism, it argues that merciful punishment of this offender ultimately served the interests of the patriarchal state—it denied the structural causes of offending, detracted attention from the crime, and helped to legitimize the patriarchal structures, norms, and laws contributed to women killing their babies in first place. Ultimately lenient treatment of this offender helped the state retain control over all women, particularly with regard to their reproductive autonomy. The article suggests that criminal courts should openly countenance the role of structural causes of infanticide at sentencing, leading to fairer punishment of offenders and also, hopefully, help challenge underlining socio-political structural inequalities and reduce crime.

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INTRODUCTION

Anne, a 20-year-old trainee nurse in England, became pregnant by a U.S. serviceman who had returned to the States. When she visited her parents in Ireland for her annual holiday, she knew she was pregnant and due to give birth. On the day of the birth, she felt unwell and remained in bed, secretly giving birth alone that evening in her bedroom. She admitted that she killed her infant moments after the birth:

Immediately after the baby was born I baptized it. I did not know whether it was a male or a female baby. I was not sure whether it was dead or alive. I tied a small green ribbon around the baby's neck tightly and then wrapped it in a kilt skirt and placed it in my large suitcase—a blue-grey fibre case—that was in my bedroom. The baby did not scream.

Afterwards, she went to a stream behind her house where she washed herself and rolled the afterbirth in some newspaper. She returned to bed and remained there all night. When she got up the next morning, she collapsed on the floor, and medical attention was sought. She was charged with murder but at the preliminary hearing at the District Court the charge was reduced to infanticide. She was convicted of infanticide at the Circuit Criminal Court. The trial judge, stating that he "felt sorry for her" but that he also had a "duty to protect the public," sentenced her to "six months imprisonment, suspended on her entering into recognizances to be of good behavior for five years."1

This Article provides the first critical study of Irish judicial approaches to sentencing women convicted under the Infanticide Act 1949.2 Through an analysis of archival material, I will show that women convicted of infanticide, a homicide offense carrying a maximum of life imprisonment, were given exceptionally lenient sentences, with very few of these offenders being imprisoned following conviction. The offenders in this study were all convicted and sentenced between 1950 and 1975, at a time when Ireland was a deeply conservative and patriarchal society, and where there were harsh and restrictive attitudes to female sexuality, and particularly to unmarried mothers. In this

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wider context, the obvious question that arises when considering sentencing of Irish infanticide offenders, such as Anne, is why women who killed their babies received consistently lenient treatment at the hands of the courts?

To answer this question, I will first examine infanticide sentencing against the existing feminist literature that demonstrates the role of gender constructions in how women offenders are treated by the criminal justice system. The literature reveals that some women offenders, including those who commit violent crimes, are treated leniently by the courts, where they are constructed as “good” within the patriarchal normative framework; others, however—especially those who are taken to have broken patriarchal gender norms—experience harsh treatment, being doubly punished for breaking both the law and their gender role. Drawing on the good/bad analytical framework, I will show that the Irish infanticide offender benefited from being constructed as meeting the feminine ideal. Thus, one way of explaining lenient sentencing of women who killed their babies is that it reflected patriarchal understandings of women.

However, this is only part of the answer. Relying on the concept of paternalism, I will show how sentencing practice in infanticide cases also had the effect of serving patriarchal interests by helping to maintain patriarchal laws and cultural values that placed women in a grossly unequal position in Irish society, particularly with respect to their reproductive autonomy. I will argue that extending “mercy” to the few who killed their babies helped the state to retain control over all women and their reproductive choices. In this regard, “leniency” is reconstructed as “paternalism,” something that is more pernicious because, while beneficial to the individual women who appeared before the courts, it ultimately served the needs of the patriarchal state.

The role that sentencing plays in maintaining the patriarchal social order has already been highlighted by Ballinger, who approaches this from a different perspective, relying on the impact of gender constructions rather than the concept of paternalism to demonstrate how punishment of women killers reinforces and maintains heteropatriarchy. While not disputing the important contribution of critiques of punishment based on gender constructions, in particular how interpreting women offenders as “good” or “bad” can serve to detract attention from the wider structural context and the causes of their offending, I will discuss some limitations of this approach, including that these


4. Ballinger, supra note 3, at 475.
arguments fail to acknowledge that the criminal law always individualizes crime and does not take wider social circumstances into consideration.

Ultimately, both paternalism and gender construction reveal how punishment of women, particularly where this is merciful and/or based on gender constructions, can support patriarchy. The question that arises then is whether compassionate\(^5\) treatment of the infanticide offender under the infanticide law was problematic. For the women in this sample, the approach taken was beneficial to them. However, given what this analysis of infanticide sentencing reveals about the link between lenience and patriarchy, I will argue that going forward, courts, in Ireland and in other jurisdictions, should do more at sentencing to openly acknowledge the structural causes of crime, particularly (in this context at least) gender inequality and the denial of reproductive autonomy. In so doing, this would provide a more honest account of the reasons for mitigation, and possibly help shift focus away from placing the blame for infanticide solely on individual women and towards recognizing the contribution of socio-political inequality to the offense. This would arguably do more to improve women's rights and, as a consequence, help prevent infanticide.

The Infanticide Act, and sentencing under it, is not just an example of how the law and courts respond to crime in a gendered way. The analysis in this Article also offers broader lessons with regard to how the criminal law deals with the question of responsibility in cases where wider social, economic, and/or political inequalities play an important part in the commission of the offense, and where, as a result, a lenient criminal sanction is sought. In this regard, the infanticide example highlights the difficulties that can arise through the law's insistence on individual responsibility and its refusal to engage with the socio-political context of criminal offending.\(^6\) It demonstrates an instance of the law's attempt to show compassion without departing from its requirement for individual responsibility. However, it also reveals how compassion is linked to the preservation of the problematic socio-political structures that contributed to the crime in the first place, and raises questions about the role and the ability of the criminal law and courts to address issues of social inequality where this is linked to the offending behavior in question. In this regard, I argue that a change in how the criminal law understands and punishes offenders is necessary, and that more should be done to take account of the structural causes of criminal offending in order to fairly punish offenders and prevent future crimes.

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5. In this article, "compassion" is used as a synonym for sympathy, pity, mercy, and lenience, though I understand that a finer analysis of these concepts shows key differences among them.

The Infanticide Act, under which the women in this sample were sentenced, is a specifically gendered law, first because it applies only to women, and second because it allows for differential treatment on the basis of a female-only experience—birth or lactation. My previous work on the Irish infanticide law and its implementation in the courts has explored the background to the infanticide reform, including the role of humanitarian sentiment in the enactment of this law, and the importance of social norms in the statute's creation and how it was subsequently implemented by the courts.

In a previous article, I also explored the role of pragmatic and ideological (gendered) considerations in how women convicted of infanticide-related offenses were treated prior to the enactment of the 1949 law, particularly with regard to the use of religious institutions as an alternative to imprisonment.

While this earlier body of work has touched on the gendered aspect of the criminal justice and legislative response to women who killed their babies, it has not explored this issue in detail. More importantly, sentencing of women under the 1949 statute has not been previously explored. This Article, therefore, develops my previous work by providing an explicitly gendered perspective on the criminal justice response to infanticide. It focuses particularly on the issue of sentencing, demonstrating how the criminal justice response to infanticide, both in terms of the how the legislative framework and sentencing practice under this, served patriarchal interests.

This Article is broken into five sections. Section I outlines the methodology for this research, which explores sentencing in cases of women convicted of infanticide in Ireland, focusing on the period 1950 to 1975. Section II outlines the role of patriarchal values, laws, and structures in the crime of infanticide, and the context in which the Infanticide Act of 1949, under which the women in this sample were sentenced, was enacted. This Section will argue that infanticide, which was overwhelmingly committed by unmarried women, was inextricably linked to patriarchal values and laws that denied women reproductive autonomy, not only in choosing to prevent or end pregnancy, but also in their ability to be mothers outside of marriage.

Section III presents original research data on the sentencing of women convicted of infanticide under the Infanticide Act 1949, during the period 1950 to 1975, demonstrating the lenient approach that was taken to these offenders.

7. Karen M. Brennan, 'A Fine Mixture of Pity and Justice: The Criminal Justice Response to Infanticide in Ireland 1922-1949, 31 LAW & HIST. REV. 793 (2013) (arguing that the motivations for adopting the infanticide law in Ireland were primarily pragmatic, but that sympathy for women who killed their newborn illegitimate babies was also a significant motivating factor).

8. Karen Brennan, Social Norms and the Law in Responding to Infanticide, 38 LEGAL STUD. 480 (2018) (arguing that the criminal justice response to infanticide in Ireland, both before and after the enactment of the Infanticide Act 1949, was informed primarily by social rather than legal norms).

Lenient sentencing of women convicted of killing their babies, which saw very few imprisoned, seems at odds with the prevailing patriarchal framework, and in Sections IV and V, this is explained through two different theories: gender construction and paternalism.

Section IV critiques the approach taken to punishing women for infanticide by utilizing gender construction theory. This theory shows how infanticidal women were constructed according to stereotypical gender norms, and how this facilitated lenient punishment. The negative consequences of such constructions, namely denial of the offender's agency and the structural causes of her crime, are explored. Some limitations of this theory are noted, including its failure to take account of the wider context of how the entire criminal law is based on a false construct, that of the abstract rational man, and, as such, always functions to exclude the socio-political causes of crime in the allocation of criminal responsibility and punishment of offenders. In this regard, this Section will argue that that the treatment of infanticide offenders was a compromise of sorts, involving some contextualization of their crime with minimal criminalization.

Section V considers the punishment of infanticide offenders by utilizing the concept of "paternalism." This also highlights the link between lenient punishment of infanticide offenders and the preservation of patriarchal structures. Paternalism shows how mercy functioned on a systematic level to maintain the existing status quo with regard to women's inequality, particularly in relation to their reproductive choices.

Finally, drawing on insights from the preceding analyses on gender construction, criminal law theory, and paternalism, I argue that courts, whether in Ireland or elsewhere, should do more to openly countenance the structural factors at play when faced with women who kill their babies. Hopefully, this would help to break down patriarchal norms, values, and laws that contribute to this crime, providing women with greater choices in relation to motherhood, and ultimately reducing infanticide.

I. METHODOLOGY

This study focuses on those sentenced under the Infanticide Act, 1949. It is based on information available in official criminal records and newspaper articles, covering the period 1950 to 2015. The primary source relied on is the annual Report of the Commissioner of the Garda Síochána on Crime (RCGSC), 1950 to 2005. From 2006, the Central Statistics Office (CSO) took over the responsibility for recording criminal offenses, including information on the
number of reported crimes, proceedings, and outcomes (but not sentences). There were no infanticide convictions recorded between 2007 and 2015.\textsuperscript{11}

Focusing, therefore, on the period from 1950 to 2005, the RCGSC provides information on the number of reported crimes, whether proceedings were taken, and the outcome of proceedings (i.e., whether a conviction resulted). Between 1951 and 1975, the RCGSC also included a summary of the particulars of serious crimes, including the murder of infants and infanticide, and further detail on the proceedings and their outcomes, including the sentence imposed. From this record, seventy-five cases of “infanticide” and “infant murder,” the murder of persons aged under one year, were recorded between 1950 and 2005.\textsuperscript{12} Criminal proceedings were taken in forty-two cases; the remaining thirty-three cases were not subject to criminal prosecution. There are some gaps in the information provided in the RCGSC, such as cases in which the outcome of the proceedings and/or the gender of the accused was not recorded.\textsuperscript{13} However, the records identify at least thirty-six cases where the accused was disposed of under the Infanticide Act,\textsuperscript{14} thirty-one of which (86 percent) resulted in a conviction for that offense.\textsuperscript{15}

The thirty-one infanticide convictions noted in official records all took place between 1950 and 1975. According to information in the RCGSC and CSO sources, this comprises a complete, or almost complete, sample of those convicted and sentenced under the infanticide statute since 1950. The last recorded infanticide conviction and sentence noted in the records was in 1973. Since then the incidence of this crime has fallen (only fifteen cases were

\begin{footnotes}
\item[12] Between 1950 and 1996, murder was recorded as two separate categories—the murder of an infant aged under one year, and the murder of persons aged one year and over. There was also a separate category of infanticide. Since 1997, murder has been recorded as one category—there is not a separate category for the murder of infants.
\item[13] For example, there are three cases in the records—1977, 1978, and 1980—involving proceedings against a person for the murder of an infant where the outcome is not recorded and where a conviction/sentence under the 1949 law may have resulted.
\item[14] Cases were either disposed of on indictment at the Central Criminal Court (the highest court of criminal jurisdiction) or Circuit Criminal Court, or by summary disposition at the District Court. Section 3 of the Criminal Justice Act 1951 (Act No. 2/1951) (Ir.) made provision for persons appearing at the district court for preliminary examination of an indictable offense (except an offense under the Treason Act of 1939, Act No. 10/1939 (Ir.), http://www.irishstatutebook.ie/eli/1939/act/10/enacted/en/html [https://perma.cc/N8YR-DFU6]), including murder, attempt to murder, conspiracy to murder and piracy, and any offense by an accessory before or after the fact, to be tried summarily with the consent of the Attorney General. Section 13 of the Criminal Justice Act 1967 (Act No. 12/1967) (Ir.) made similar provision. For further information on how these cases were processed through the courts, prior to sentencing, see Brennan, \textit{Social Norms and the Law in Responding to Infanticide}, supra note 8.
\item[15] Five of these cases were disposed of summarily at the District Court, and technically in one of these cases the infanticide law was applied “without conviction.” However, because the offender was given a sentence, I have classified this, for ease of analysis, as a “conviction.”
\end{footnotes}
recorded between 1975 and 2015), and very few proceedings have been taken in the few cases that have come to the attention of the authorities over the last four decades. It appears that no woman has been prosecuted for the murder/infanticide of her baby since 1984.16

The second key source consulted were the State Books for the Central and Circuit Criminal Courts (SBCCC and SBCrtCC, respectively).17 These court records are held at the National Archives of Ireland (NAI) and provide an index to all criminal cases appearing for trial on indictment at either court. The record includes information on the outcomes of the proceedings and sentences; as the official court record, it is likely the most reliable source for sentencing information. Unfortunately, however, there are significant gaps in the availability of these records at the NAI, particularly from the 1960s onwards, and at the circuit court level. As a result, I was unable to rely on them as the main source for sentencing information in this study. I was able to obtain a state book record for only eleven cases in the sample.

The State Files for the Central and Circuit Criminal Courts were also consulted (SFCCC and SFCrtCC, respectively). This record does not provide information on the outcome of criminal proceedings or sentences, but it contains witness depositions from the District Court and the accused’s Garda statement(s) at time of arrest, which allows for information on the circumstances of the crime to be pieced together. Again, there was limited access to these records, and I found state files for fifteen of the thirty cases disposed of on indictment under the 1949 law (which also includes cases in which the accused was acquitted). There is no state book or state file record for cases involving a summary disposal at the District Court; five offenders (out of thirty-one) were sentenced at the District Court following a summary disposal.18

Finally, I also conducted a search of the Irish Newspaper archives database for national and local newspaper reports on infanticide cases between 1950 and 1975. There was, however, limited reporting of these cases in both the local

16. For further discussion, see Brennan, Social Norms and the Law in Responding to Infanticide, supra note 8 (exploring the possible reasons for the apparent no prosecution policy that has been adopted since the 1980s, including particularly the role of shifting social norms in terms of how this crime is understood in a more liberal social context).

17. The Irish infanticide law operates as an alternative to a murder charge or conviction and precludes prosecution for infanticide in the first instance. Instead, the prosecution is obliged to charge with murder, and it is for a district justice to reduce this charge to infanticide at a preliminary hearing of the evidence at the District Court. Thus, cases disposed of at the Circuit Criminal Court, the lower court of criminal jurisdiction for cases heard on indictment, were those where the murder charge had been reduced to infanticide; those heard at the Central Criminal Court, the highest court of criminal jurisdiction, were those where the accused was sent for trial for murder but where the accused had a plea of guilty to infanticide accepted or was convicted by the jury of infanticide under the Infanticide Act of 1949 § 1 (Act No. 16/1949) (Ir.).

and national media. For example, even where the initial district court appearance was reported, little information was provided on those proceedings, and there was usually no follow-up report on the subsequent trial or sentence. However, newspaper reports that covered the sentence imposed were incorporated into the data where possible.

From the above sources, I was able to obtain sentencing information for twenty-nine of the thirty-one infanticide convictions I identified in the records. The RCGSC provides information on sentencing for twenty-eight of these cases and, in that respect, was the primary source of information. However, a note of caution is necessary. Although the main aspect of the sentence (i.e., whether it was custodial, suspended, non-custodial) was accurately reflected in the report, it became apparent when other sources were consulted, particularly the SBCCC/SBCrtCC, that the RCGSC did not always include all of the requirements that had been incorporated in the final disposal. For example, that the accused was required to reside with her parents for a specified period, or at a convent, or that she had to undergo medical treatment, was not mentioned in some cases where the SBCCC/SBCrtCC or a newspaper report mentioned this additional requirement. Where possible, information provided in the RCGSC was verified through the SBCCC/SBCrtCC and newspaper reports. However, there were eleven cases in the study where the RCGSC was the only source of information on sentencing, and it is possible that in some of these cases additional requirements were imposed on the offender that were not recorded in that report. Nonetheless, the RCGSC provides a sufficiently good indication of the general sentence.

II. PATRIARCHY AND THE IRISH STATE: PUTTING INFANTICIDE IN CONTEXT

I have argued elsewhere that it is crucial to take account of the wider social context and related social norms in the legal response to infanticide, both before and after the enactment of the Infanticide Act of 1949. It is also important to acknowledge the role of the gendered social order in contributing to this crime. The typical infanticide case involved an unmarried woman who had killed her baby at or soon after a concealed birth. The crime was inextricably linked to illegitimacy, the inequitable position of women in general, and the unmarried mother in particular in a patriarchal society.

The starting point for understanding twentieth-century Irish society is the Great Famine of the mid-nineteenth century, the devastating impact of which


had a significant and enduring effect on Irish social life. One of the lessons learned in the aftermath of the Famine was that subdivision of farming land was not economically viable. Middle-class farming interests, therefore, required a patrilineal system of inheritance, with only one son standing to inherit; the supervision and regulation of marriage arrangements; the operation of a dowry system; and a strict injunction on non-marital sexual relationships. Within this system, female chastity was of crucial importance. These values were disseminated to the remainder of society through the teachings of the Catholic Church.21

The social and economic changes heralded by the Famine were especially damaging to the status of women in Irish society. Rhodes has argued that the substantial importance which was accorded to land, and the associated societal, familial, and economic changes that occurred as a result of this, contributed to Ireland’s emergence as a patriarchal society.22 Rhodes notes, “As the social composition of Ireland changed in favor of farmers and as land became the distinguishing criterion for status, the position of women declined.”23 A reduction in female employment opportunities in agriculture and related areas significantly reduced the economic power and independence of many women, which further damaged their position in the family and in society.24 The changes that occurred in the aftermath of the famine, particularly the predominance of middle-class farmer values, the resultant emergence of the patriarchal family, and the decline in employment opportunities for women, had a long-lasting, negative impact on the economic and social status of all women.

21. See generally TOM INGLIS, TRUTH, POWER AND LIES: IRISH SOCIETY AND THE CASE OF THE KERRY BABIES 133–34 (2003) (summarizing the impact of farming requirements to not subdivide holdings on marriage and sexuality in Ireland, including the injunction on pre-marital sex and the impact of this on attitudes to unmarried mothers, as well as the role of the Church in providing the moral framework for this regulation); JOSEPH J. LEE, Women and the Church Since the Famine, in WOMEN IN IRISH SOCIETY: THE HISTORICAL DIMENSION 37–45 (Margaret Mac Curtain & Donnacha O’Corrain eds. 1978) (providing an overview of the social and economic changes that were dictated by middle-class farming interests post-Famine, including the significant emphasis placed on chastity outside of marriage and the regulation of marriage matches, the impact of these changes on women, and the role of the Catholic Church in endorsing and promulgating these new mores, particularly with regard to the importance of chastity outside of marriage); RITA M. RHODES, WOMEN AND FAMILY IN POST FAMINE IRELAND: STATUS AND OPPORTUNITY IN A PATRIARCHAL SOCIETY 51–88 (1992) (offering an account of how Ireland became a patriarchal society as a consequence of the increasing importance placed on land and its association with the family post-Famine, the impact of this change on the roles of men and women within the family, and, as a consequence, the impact on the status of women).

22. RHODES, supra note 21, at 51–88.

23. Id. at 85.

Patriarchal values and interests were consolidated in the state and its laws following independence from Britain in 1922. In the nation-building era of the nascent Irish state, a state gender ideology developed, supported by the increasingly influential Irish Catholic hierarchy, which cast women in a crucial symbolic role. The largely male, nationalist, and Catholic government embarked on a policy and legislative agenda imbued with patriarchal and Catholic ideology, which sought to create an "Irish" identity separate from and different to the "British" identity. In this regard, the sexual purity of the nation, in particular that of its women, was identified as key to the identity and survival of the newly independent state. As Luddy has argued, during this period, "the female body and the maternal body, particularly in its unmarried condition, became a central focus of concern to the state and the Catholic Church."

The Catholic Church held an especially influential position in the Irish state apparatus. Indeed, it seems that the Catholic Church may have considered that independence from the Crown provided it with an

25. See generally Louise Ryan, Gender, Identity and the Irish Press, 1922–1937: Embodying the Nation 257–59 (2002) (discussing the ways in which women were represented through Catholic, nationalist ideology as having the power to both undermine (through her impurity) and safeguard (though her purity) the new "Irish" nation, and how the control of women, particularly with regard to their sexuality, became ideologically entwined with the success of the nationalist project); Maryann Valiulis, Neither Feminist Nor Flapper: The Ecclesiastical Construction of the Ideal Irish Woman, in CHATEL, SERVANT OR CITIZEN: WOMEN'S STATUS IN CHURCH, STATE AND SOCIETY 168–78 (Mary O'Dowd & Sabine Wichert eds. 1995) (examining the characteristics of the ideal Irish woman as defined by state and church ideology, and the importance of this for Irish society, particularly with regard to how women were defined as mothers and wives, and the resulting restrictions placed on them; arguing that the church served to provide moral justification for a variety of government policies that placed restrictions on women); Maria Luddy, Sex and the Single Girl in 1920s and 1930s Ireland, 35 Irish Rev. 79, 80–81 (2007) (discussing the role of women in Irish society as wives and mothers, and related state and church anxiety over the unmarried mother, as well as consequent efforts to implement changes to prevent illegitimacy and control women); Maryann G. Valiulis, Power, Gender, and Identity in the Irish Free State, 6–7 J. OF WOMEN'S HIST. 117 (1995) (examining how the Irish government following independence sought to relegate women to the private sphere, despite them having played a key public role in the fight for independence, and how this relegation embodied a gender ideology which linked the domestic role of women to the stability, identity, and moral superiority of the "Irish" nation; because it coincided with Catholic teachings and middle-class farming interests, this gender ideology became embedded in Irish society).

26. See supra note 25. See also John Henry Whyte, Church and State in Modern Ireland: 1923–1979 24–64 (1980) (providing an overview of the State's adoption of the Catholic moral code into Irish legislation, and the tendency, particularly amongst one political party, to "equate 'Irish' and 'Catholic'").

27. See supra note 25.


29. See generally Whyte, supra note 26, at 24–64. For the Church's specific role in helping the State promulgate, embed, and justify its gender ideology and related legislative and policy changes, see Chrystel Hug, The Politics of Sexual Morality in Ireland 77–78 (1999); Luddy, Prostitution and Irish Society, supra note 28, at 194–97; Valiulis, Neither Feminist nor Flapper, supra note 25; Luddy, Sex and the Single Girl in 1920s and 1930s Ireland, supra note 25, at 80–81.
unprecedented opportunity to influence governmental and legislative policy on issues that touched on its teachings. As one contemporary Catholic commentator asserted, "for the first time in centuries Irish Catholics have an opportunity of fixing their own legal standard of public morality . . ." He added: "The Irish people have been ever remarkable for their high appreciation of purity and chastity . . . and there is now every probability of fixing the legal standard of morality in true consonance with the ideals set before them by the teaching of the Catholic Church." It should be noted, however, that the state’s preoccupation with morality during the first two decades of independence was not strictly a consequence of Church agitation on these issues; neither were the legal measures which ensued, such as, for example, the prohibition on contraception in Section 17 of the Criminal Law Amendment Act 1935, necessarily instances of Irish governments responding to pressure from Catholic bishops. The fact that many civil servants and politicians were themselves practicing Catholics meant that the Church’s doctrines and values made their way into policy and legislation in more subtle ways, because, during the early decades of Irish independence, public officials naturally legislated in harmony with the Church’s views. As Whyte has noted, during the 1920s and 1930s there was "a remarkable consensus" (without the need for any Church pressure) that Catholic moral teachings should be preserved by the law. Many Irish politicians and other officials did not distinguish the exercise of their private religious convictions from the exercise of their public role, and, as such, functioned in a manner which was inherently Catholic. Those who did not feel bound by their consciences to follow the Church’s teachings in the performance of their official duties were at least convinced of the political folly involved in governing in a manner which would risk alienating a substantial portion of the electorate or which could advantage the opposition. Further, Irish governments sought to regulate public morals for political reasons as part of

31. Id. at 58.
33. WHYTE, supra note 26, at 60.
their efforts to construct a stable nation in the aftermath of the violent struggle for independence and the consequent civil war.\(^ {36}\)

Thus, while the Catholic hierarchy did not necessarily dictate government policy and law, Irish political life was imbued with Catholic thought, and the hierarchy was regularly consulted on issues touching on its moral and social teachings. At times its views were pivotal in government decisions. Government plans to introduce free healthcare for mothers and children aged under sixteen (the Mother and Child Scheme),\(^ {37}\) for example, were met with entrenched opposition from the Catholic hierarchy, which saw the scheme as an infringement on the family and as potentially usurping Catholic teachings on contraception. The controversy led to the government abandoning this policy and the resignation of the Minister for Health, who had proposed the reform.\(^ {38}\)

My research on the background to the enactment of the Infanticide Act 1949 reveals that the Archbishop of Dublin was approached before the bill was presented to Parliament, and that following this consultation, a new clause was added to the bill to address sanctity of human life concerns by reinforcing the point that the killing of a baby should first and foremost be considered murder. Interestingly, however, it appears that the Archbishop did not outright reject the planned reform.\(^ {39}\)

A. The Patriarchal State and the Unmarried Mother

Women’s role within the post-independence Irish gender order was to be domestic and pure.\(^ {40}\) They were expected to be mothers, but only within the married family; otherwise, they were to remain as chaste unmarried sisters and

\(^{36}\) See supra note 25.


\(^{38}\) See generally WHYTE, supra note 26, at 201–38 (discussing the controversy surrounding the proposed scheme, especially the clash that resulted between the Minister for Health and the Catholic Hierarchy, and the circumstances of his resignation).


\(^{40}\) See supra note 25 (two citations to Valiulis).
daughters. As Earnier-Byrne notes: "In the Irish 'social order' the concept of illegitimacy continued in practice, if not in name, to the unmarried mother: she was an illegitimate mother. The status of motherhood was legitimated by marriage." Unmarried mothers, already culturally condemned, attracted particular official attention from the state and church, and there was much discussion of what should be done about these problematic women. Although the idea of compulsory state-imposed confinement within religious-run institutions, such as Magdalene laundries, was touted, and was evidently considered by some to provide a suitable solution, this was never officially endorsed via legislation allowing for compulsory confinement of unmarried mothers. However, the reality was that many pregnant girls and women had to rely on religious institutions, including Magdalene laundries and mother-and-baby homes, for support. Essentially, the state and wider society tacitly supported what was effectively a de facto system of detention of many unmarried mothers, at least for those who were unsupported by family or unable to provide for themselves and their baby by other means. Indeed, some women were sent to these institutions by their families. The rationales for effectively detaining unmarried mothers in institutions were: prevention,

42. Luddy, Prostitution and Irish Society, supra note 28 at 194–97, 200–03; Louise Ryan, Irish Newspaper Representations of Women, Migration and Pregnancy outside Marriage in the 1930s, in Single Motherhood in Twentieth Century Ireland: Cultural, Historical and Social Essays 103, 105–06 (Maria Cinta Ramblado-Minero & Auxiliadora Pérez-Vides eds. 2006); Ryan, supra note 25 at 257–60; Luddy, Sex and the Single Girl in 1920s and 1930s Ireland, supra note 25 at 79–91; Valilius, Neither Feminist Nor Flapper, supra note 25.
43. Earnier-Byrne, supra note 41 at 182–90 (discussing use of religious-run institutions to deal with unmarried mothers); Luddy, Prostitution and Irish Society, supra note 28 at 117–23, 201–203, 235–37 (discussing policy around use of Magdalene laundries and other institutions to deal with unmarried mothers); Carla Fischer, Gender, National and the Politics of Shame: Magdalen Laundries and the Institutionalisation of Feminine Transgression in Modern Ireland, 41 Signs 821, 825–32 (2016) (exploring the role of shame in pathologizing and institutionalizing women in Ireland post-independence as part of national identity formation); Paul M. Garrett, “Unmarried Mothers” in the Republic of Ireland, 16 J. Soc. Work 709 (2016) (discussing policy and practice in relation to unmarried mothers in Ireland post-Independence, including the establishment of quasi-penal Mother and Baby Homes).
44. Earnier-Byrne, supra note 41 at 182–90; Luddy, Prostitution and Irish Society, supra note 28 at 117–23, 201–03, 235–37.
45. There is no access to official records on how women entered these institutions, so we do not have certainty on how pregnant women ended up in mother and baby homes and similar establishments, although undoubtedly families played an important role. The McAleese report on the state’s involvement in Magdalene asylums found that 10.5 percent of women who entered these particular institutions had been left there by their families. Admittedly, these were not pregnant women, but the figure is indicative of family willingness to send their female relatives to convents. See Dep’t of Justice (Ir.), Report of the Inter-Departmental Committee to Establish the Facts of State Involvement with Magdalen Laundries 854–924 (2013), http://www.justice.ie/en/JELR/2013MagdalenP%201V%20Chapter%2018%20Non%20State%20Routes%20(PDF%20-%20347KB).pdf?files/2013Magdalen-P%201V%20Chapter%2018%20Non%20State%20Routes%20(PDF%20-%20347KB).pdf [https://perma.cc/CFH5-DGJB] (last visited Apr. 11, 2018).
redemption, and containment. As Fischer has noted, "the fledging Irish nation-state required the hiding of those bringing national shame through sexual immorality in a system of mass incarceration."

When it is said that the Irish state was patriarchal, this is not to suggest that there was a rigid and coherent form of gender oppression whereby men as a group used the state as an instrument of male domination such that male interests were always oppositional to those of women, and that male interests always prevailed. The reality is of course more nuanced than that. Indeed, Connell rejects the idea that the state is a vehicle for male domination of women, arguing that it is the state itself that is patriarchal; patriarchy is embedded in the state's processes and procedures. In this sense, patriarchy is institutionalized in how the state functions, rather than residing in the hands of individual men. One aspect of this is the state's ability to regulate gender relations in other institutions, such as marriage; another element is that gender is a "major realm of state policy" with the state having far-reaching powers, through its law, policies, and procedures to have an impact in gender politics and the concrete experience of individuals in this regard, such as, for example, in areas of housing, childcare, education, taxation, and healthcare.

There are many examples of how patriarchy was embedded in the Irish state, and how the consequences of the post-independence patriarchal gender ideology had real practical impacts on women and their choices, particularly in the area of reproductive autonomy. Women's sexuality was controlled through both laws (such as those prohibiting contraception) and social norms (such as the intense cultural stigmatization of the unmarried mother, which carried the risk of confinement in a religious institution). In particular, they were denied the opportunity to make autonomous choices about whether, when, and under what circumstances they would become mothers. As Mullally has highlighted, "women's reproductive autonomy was sacrificed to the greater good of the post-colonial political project, and women were defined not by their equal capacity for agency, but by their reproductive and sexual functions."

Contraception was not legally available, due to a variety of prohibitions under Section 17 of the Criminal Law Amendment Act 1935, which included a ban

47. Fischer, supra note 43, at 821.
49. Id. at 155–57.
50. Id. at 159.
on the sale and importation of contraceptives.\textsuperscript{52} This remained in place until the 1980s.\textsuperscript{53} Abortion was a criminal offense, legally available only in exceptionally limited circumstances.\textsuperscript{54} As already noted, women were stigmatized when they became pregnant outside of marriage and faced potential institutionalization. State financial support for unmarried mothers only became available in the early 1970s,\textsuperscript{55} and cultural intolerance of unmarried mothers only began to shift in the 1980s.\textsuperscript{56} Thus, unmarried mothers faced significant

\begin{itemize}
\item \textsuperscript{52} Section 17 of the Criminal Law Amendment Act of 1935 prohibited selling, exposing, offering, advertising, or keeping for sale or importing or attempting to import for sale contraceptives. Act No. 6/1935 (Ir.). For further discussion, see Sandra McAvoy, \textit{The Regulation of Sexuality in the Irish Free State, 1929-1935, in Medicine, Disease and the State in Ireland, 1650-1940} 253 (Greta Jones & Elizabeth Malcolm eds. 1999).
\item \textsuperscript{53} Restrictions were incrementally loosened from 1979 onwards. See, e.g., Health (Family Planning) Act 1979 §§ 4, 5, 13 (Act No. 20/1979) (Ir.); Health (Family Planning) Amendment Act 1985 § 2 (Act No. 4/1984) (Ir.); Health (Family Planning) Amendment Act 1992 (Act No. 20/1992) (Ir.). \textit{See generally} Hug, supra note 29 at 86–91 (discussing the gradual liberalization of Irish laws on contraception).
\item \textsuperscript{54} Abortion was criminalized prior to independence under the Offences Against the Person Act 1861, 24 & 25 Vict. c. 100, §§ 58, 59 (Eng.). This law continued to apply in Ireland after independence from Britain in 1922. In 1983, the Irish public voted in a referendum to insert a new provision into the Irish Constitution equating the life of the fetus, the “unborn,” to the life of the pregnant woman, thus curtailing any potential liberalization of Ireland’s abortion law, as had occurred in England and Wales in 1967 with the Abortion Act 1967 c. 87 and in the U.S. in the 1970s with Roe v. Wade, 410 U.S. 113 (1973)). The Constitution of Ireland 1937, art. 40.3.3, provides (by virtue of the Eighth Amendment): “The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its law to respect, and, as far as practicable, by its laws to defend and vindicate that right.” This was interpreted by the Irish Supreme Court to mean that abortion could only be available in situations involving a real and substantial risk to the life (but not the health) of a pregnant woman, which included a risk of suicide. \textit{Attorney General v. X} [1992] 1 IR 1 (Ir.). In 2013, the Irish Parliament legislated to reflect this constitutional provision, as interpreted by the “X case.” \textit{Protection of Life During Pregnancy Act 2013} (Act No. 35/2013) (Ir.). Abortions in cases falling outside the scope of the very narrow exceptions provided for under this statute continue to be criminalized and punishable to a maximum of 14 years’ imprisonment. Id. § 22. For further detail, see Ivana Bacik, \textit{A History of Abortion Law in Ireland and Prospects for Change}, 20 MEDICO-LEGAL J. IR. 75 (2014). On May 25, 2018, Irish voters passed a referendum to repeal the Eighth Amendment. The significance of this is that it enables the legislature to enact more liberal abortion laws. At the time of writing, the 2013 law remains in place, but it is expected that the government will soon bring forward legislation which, if passed, will allow women significantly greater access to abortion within the Irish state than they currently have. Draft legislation that was published by the government in the lead-up to the referendum vote gives a good indication of the direction and scope of the future law. \textit{See General Scheme of the Bill to Regulation Termination of Pregnancy, DEP’T OF HEALTH (IR.)} (Mar. 27, 2018), available at https://health.gov.ie/wp-content/uploads/2018/03/General-Scheme-for-Publication.pdf [https://perma.cc/V539-N927] (last visited June 4, 2018). The Irish government is set to take forward their plans for liberalizing the current law this year. See Henry McDonald et al., \textit{Ireland Moves Forward with Abortion Law Reform After Historic Vote}, GUARDIAN, May 27, 2018, https://www.theguardian.com/world/2018/may/27/ireland-to-start-abortion-law-reform-after-historic-vote [https://perma.cc/3XCF-BPK4]. For further detail on the background to this referendum, \textit{see infra} note 175.
\item \textsuperscript{55} Social Welfare Act 1973 § 8 (Act No. 10/1973) (Ir.).
\item \textsuperscript{56} \textit{Inglis}, supra note 21, at 125–26, 143. The increased cultural acceptability of unmarried motherhood is evidenced by statistics on births outside of marriage, which in 1950 accounted for only three percent of all births, and in 2000 amounted for thirty-two percent of all births. \textit{See

\end{itemize}
hardships, including stigmatization, unemployment, poverty, and rejection by community and family. Double standards of sexuality meant that men were largely unaccountable for their role.57 The crime of infanticide was closely related to the difficulties faced by unmarried pregnant women—it was a crime that was inextricably linked to gender inequality and, in particular, the effects of patriarchal values, norms, and laws, which, until the latter decades of the twentieth century, essentially barred sexually active women from both preventing pregnancy and being mothers outside of marriage. It was in this context that the Infanticide Act was enacted and subsequently applied.

B. The Infanticide Law

Following the English model of 1922/1938, the Irish legislature adopted a statute specific to infanticide in 1949.58 The legislation allowed for a woman who willfully killed an infant under the age of twelve months, under circumstances that would have amounted to murder, and where the balance of her mind was disturbed by the effect of childbirth or lactation, to be tried for, or at a murder trial convicted of, “infanticide.”59 The maximum sentence was life imprisonment.60


58. Infanticide Act 1949 (Act No. 16/1949) (Ir.), following the English/Welsh Infanticide Act 1922, 12 & 13 Geo. 5 c. 18 (Eng.); Infanticide Act 1938, 1 & 2 Geo. 6 c. 36 (Eng.).

59. Infanticide Act 1949 § 1 (Act No. 16/1949) (Ir.). Infanticide was defined as follows: “A woman shall be guilty of felony, namely infanticide if—(a) by any willful act or omission she causes the death of her child, being a child under the age of 12 months, and (b) the circumstances are such that, but for this section, the act or omission would have amounted to murder, and (c) at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child . . . .” Infanticide Act 1949 § 1(3) (Act No. 16/1949) (Ir.). The reference to the “effect of lactation consequent upon the birth of the child” has since been replaced with a reference to a “mental disorder” within the meaning of the Criminal Law (Insanity) Act 2006 § 22(a) (Act No. 11/2006).

Under § 1(1) of the 1949 statute, it was not possible to charge a woman with infanticide in the first instance. Instead, she would be charged with murder by the prosecuting authorities and a district justice, at the preliminary hearing of the murder charge at the District Court, had the authority to reduce the charge to infanticide and send her for trial for that offense. When the accused was forwarded on the reduced charge she would be tried as for manslaughter under § 1(3), which meant that she would be tried at the Circuit Criminal Court, a court of lower criminal jurisdiction. If the charge was not reduced and the accused was sent for trial for murder to the Central Criminal Court, she would be convicted of infanticide by a jury under § 1(2), or the prosecution could accept an infanticide guilty plea. For further discussion on how the Infanticide Act 1949 was employed by the courts in processing cases of maternal infant murder, see Brennan, Social Norms and the Law in Responding to Infanticide, supra note 8.

60. Section 1(3) of the Infanticide Act provided that infanticide would be punished the same as manslaughter. Infanticide Act 1949 § 1(3) (Act No. 16/1949) (Ir.).
This law was enacted at a time when murder was punished by a mandatory death sentence, and in the decades prior to the infanticide reform this had caused significant problems in cases of maternal infant-murder, for it was generally thought that women who killed their babies should not be subject to a capital conviction. As a result, ad hoc practices developed to avoid murder convictions and sentences in cases of maternal infant-murder. The infanticide statute was enacted to formalize the ad hoc lenient response. Strictly speaking, the infanticide reform wasn’t needed in order to provide for compassionate treatment of women who killed their babies, since, for years, legal practice had ensured a lenient outcome. However, the infanticide law, by creating a specific rationalized mechanism for mercy that differentiated this killer from others on the grounds that she had a mental disturbance linked to birth or breastfeeding, sought to make legal practice more efficient (by avoiding unnecessary murder charges/trials/convictions) and more humane (by sparing this offender the threat of a capital trial/conviction). Allowing for, and formalizing, flexible sentencing was a key motive for this reform, and the “mad” construct was employed to facilitate this.

The infanticide law provided for lenient punishment of women who murdered their babies by permitting conviction for a less serious form of homicide that carried a flexible sentence. The law might thus be construed as a compassionate concession to unmarried women who murdered their babies at birth, and, as such, something that may appear to be at odds with prevailing patriarchal attitudes towards unmarried mothers. However, this Article will demonstrate how the infanticide law and sentencing practice under it were also patriarchal in nature. Before exploring these issues, I will discuss sentencing practice in cases where women were convicted of infanticide. As I will show in the following section, the courts treated women convicted of infanticide very leniently, something that seems anomalous with wider patriarchal structures

61. Capital punishment was abolished for “ordinary” murders in 1964 when the death penalty was limited to murders involving politically motivated killings, and murders of on-duty Garda (police) and prison officers. Criminal Justice Act 1964 § 1 (Act No. 5/1964) (Ir.). Non-capital murder was punished by penal servitude for life. Criminal Justice Act 1964 § 2 (Act No. 5/1964) (Ir.). Capital punishment was completely abolished in 1990. Criminal Justice Act 1990 § 1 (Act No. 16/1990) (Ir.). For further detail on the death penalty in Ireland following independence from Britain, see David M. Doyle & Ian O'Donnell, The Death Penalty in Post-Independence Ireland, 33 J. LEG. HIST. 65 (2012).
63. Id. at 811–18.
64. Id. at 832–33.
65. Id. at 811–18, 827–33.
66. See id. at 827–33.
67. Discussed further infra notes 98–108 and accompanying text.
that were particularly harsh in their treatment of women in general, and of unmarried mothers in particular.

III. IRISH INFANTICIDE SENTENCING

With the enactment of the 1949 Infanticide Act, the new offense of "infanticide" effectively supplanted murder, manslaughter, and concealment of birth, as a conviction option in cases in which women killed their babies. As outlined in section II, according to information in the records consulted for this research, thirty-one women have been convicted of infanticide since the enactment of the 1949 statute. Most of these convictions occurred during the 1950s and 1960s, and there are no recorded convictions for infanticide after 1973, though gaps in the records mean that it is not possible to state definitively that no woman has been convicted of or sentenced for this offense since the early 1970s. Therefore, the analysis of infanticide sentencing in this study is largely historical. However, as I will show, the issues raised relating to how these women were sentenced continue to resonate, highlighting the importance of understanding the structural causes of offending, the limits of the criminal law in this regard, and the patriarchal interests served by the lenient treatment of women offenders, particularly, as in the case of infanticide, where gender inequality played a significant role in the commission of the crime.

Sentencing information is available for twenty-nine cases in the sample, summarized in Table A:

<table>
<thead>
<tr>
<th>Table A: Summary of Sentences Imposed</th>
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</thead>
<tbody>
<tr>
<td>Sentence (Main requirement)</td>
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<tr>
<td>--------------------------------</td>
</tr>
<tr>
<td>Custody</td>
</tr>
<tr>
<td>Served</td>
</tr>
<tr>
<td>Suspended</td>
</tr>
</tbody>
</table>

68. See generally Brennan, Social Norms and the Law in Responding to Infanticide, supra note 8 (analyzing how the new law was applied in the courts).

69. Id.
<table>
<thead>
<tr>
<th>Probation/recognizance</th>
<th>6^70</th>
</tr>
</thead>
<tbody>
<tr>
<td>Other</td>
<td>5</td>
</tr>
</tbody>
</table>

**Specific requirements attached to above:**

- To keep the peace and be of good behavior: 17
- Reside at convent: 3
- Medical treatment: 3 (2 inpatient)
- Reside with parents: 2
- Return to husband: 1

Despite that infanticide is a mitigated form of murder carrying a maximum penalty of life imprisonment, as shown by the above table, punishment was overwhelmingly lenient. While custodial sentences were imposed in most cases (62.1 percent), the vast majority of these (88.9 percent) were suspended. Indeed, only two women in the sample spent any time in prison, in one case for thirteen weeks and in the other for three years. Six women were given a probation order or a recognizance. In the “other” category one woman was fined; one woman was discharged without conditions; one woman was ordered to reside at a convent for a period of between six to twelve months; one woman was given inpatient hospital treatment (between six to twelve months); and, finally, one was ordered to surrender herself for sentence when called. Overall, the approach taken reflects the trend elsewhere in relation to infanticide sentencing, whereby women are rarely imprisoned for this offense. However,

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70. In one case where the offender was disposed of in the District Court, the Probation of Offenders Act 1907 7 Edw. 7 c. 17 (Eng.) was applied “without conviction.” RCGSC, Unknown Name (Co. Cavan, 1964) at app. D, https://www.garda.ie/en/About-Us/Publications/Annual%20Reports/Annual%20Reports/1964-Commissioner-s-Reports.pdf [https://perma.cc/DW95-83WT] (last visited May 15, 2018).

71. See, e.g., NIGEL WALKER, 1 CRIME AND INSANITY IN ENGLAND: THE HISTORICAL PERSPECTIVE 133–34 (1968) (discussing sentencing for infanticide in England and Wales following the enactment of the Infanticide Act 1922, demonstrating a continuous decline in the use of imprisonment and its replacement with non-custodial sentences such as probation); Robyn Lansdowne, Infanticide: Psychiatrists in the Plea Bargaining Process, 16 MONASH U. L. REV. 41, 59–60 (1990) (discussing infanticide sentencing in New South Wales, Australia, between 1976 and 1980, which, though the numbers were small, indicated a tendency to impose non-custodial sentences on women convicted of that crime, while women convicted of manslaughter by diminished responsibility did not consistently receive similarly lenient treatment); Daniel Maier-Katkin & Robbin S. Ogle, Policy and Disparity: The Punishment of Infanticide in Britain and America, 21 INT’L J. COMP. & APPLIED CRIM. JUST. 305, 310 (1997) (discussing sentencing data for infanticide in England and Wales between 1982 and 1988, which showed that almost eighty
in this regard it is important to note that while the infanticide law recognized that a more lenient criminal justice response was necessary, it neither generated nor mandated lenient inclinations. Even prior to the infanticide reform in Ireland, women who killed their babies at birth were generally not imprisoned.  

A woman given a suspended sentence or a probation order after being convicted of infanticide was required to abide by particular conditions. The most common of these was a requirement to keep the peace and/or be on good behavior for a specified period (normally no more than two years). However, other, more onerous conditions were sometimes demanded, including requirements that had a carceral element, such as to reside at a religious institution for a specified period. Based on the evidence available for the cases in this sample of infanticide convictions, from 1950 onward, three women were given a period of institutional residence.

One offender, Nellie O, was to enter a Good Shepard Convent for not less than six months but not more than twelve months, “as the nuns decide,” following a plea of guilty to infanticide at the Central Criminal Court. Nellie, a 29-year-old domestic servant, lived with her parents. According to her statement, three months prior to the birth, she had visited the doctor “as I did not get unwell” (presumably meaning had not been menstruating), and had been told she was pregnant. She concealed her pregnancy from her mother, Margaret, telling her that there was something wrong with her kidneys. On the night that she gave birth, she went to bed around 11 p.m., having had a pain in her back from the previous day. She had told Margaret about this but refused to allow for a doctor to be called. Nellie and her mother shared a bed, a sleeping arrangement that was not uncommon in families living in cramped living conditions at that time. Nellie said she was “in and out of bed during the night trying to get ease,” but got up at around 4 a.m. and told her mother there was something wrong with her.

Here Nellie and Margaret’s stories diverge. Margaret (who was also charged with murder, though that charge was later dropped) claimed that at this point she discovered the baby in the bed, and had put Nellie back into bed with the baby. She said the baby was warm, but she didn’t know whether it was alive; that it hadn’t moved or cried; and that, although the only light in the percent of those convicted were given an order for probation and treatment, and comparing sentencing rates to the U.S., where there is no specific infanticide statute, and where approaches to sentencing of women convicted of offenses related to killing their babies are inconsistent, with some women experiencing harsh responses while others were given more lenient disposals).

72. See generally Brennan, Punishing Infanticide in the Irish Free State, supra note 9.

room was from a small "Sacred Heart" lamp on the table, she had sufficient
light to see the child. She said she left the room, called her husband to summon
a nurse, and sat in the backyard for an hour in a state of shock, before returning
to the bedroom to discover that the baby was dead.

Nellie said in her statement to the Gardaí that after she had gotten out of
the bed at 4 a.m., Margaret went to fetch a lamp from the kitchen. Nellie was
sitting on a chamber pot by the side of the bed, and when her mother returned
with the lamp, she told her mother there was "something wrong" with her, and
her mother responded, "Oh that's a baby." She claimed that she gave birth to
the baby into the pot, and that her mother then lifted it out and put it in the bed.
She "heard the baby give a wee cry" and got back into bed. She recalled, "I
never touched the baby." When the district nurse arrived, she found Nellie in
bed with the baby lying between her legs, and the cord wrapped loosely around
its neck. The pathologist discovered injuries to the baby's face and neck that
could not have been caused in an effort at self-delivery, and determined that the
cause of death was asphyxia caused by pressure over the mouth and that shock
resulting from the injuries sustained had probably also contributed to death.74

Another woman who pleaded guilty to infanticide on a charge of
murdering her unnamed infant, was to reside at a convent for twelve months as
part of a recognizance/probation order.75 Finally, one woman, who killed her
newborn infant by sticking toilet paper into its mouth, was given a suspended
sentence at the Central Criminal Court after pleading guilty to infanticide; she
agreed to a period of residence at a convent of less than four months.76 Mary R.
was a 25-year-old chemist's assistant who concealed her pregnancy and gave
birth alone in the bathroom of her lodgings in Dublin. According to her
statement to the Gardaí, she gave birth on the toilet and, after being interrupted
by her landlady knocking on the bathroom door, panicked and killed the infant.
She said in her statement: "I don't know whether I got frightened—my mind
went blank and I thought it would cry and I just got toilet paper and put it in its
mouth." She then cleaned the toilet and went to her bedroom where she blessed
the child with holy water and put it under her bed. Two days later, on her way
to work, she left the body of the infant, wrapped in newspaper, brown paper
and twine, at a church.

Between 1924 and 1949 (that is, prior to the enactment of the 1949
infanticide law), almost 60 percent of women convicted of an infanticide-
related offense (mainly manslaughter or concealment of birth) were sent to a

74. SFCCC, ID/51/2 (Co. Limerick, 26 Oct. 1953).
76. NAI, SFCCC, Mary R (1964), ID/2/162, (Dublin, May 27, 1964); SBCCC, ID/2/146A (1962–
/Annual%20Reports/An-Garda-Siochana-Annual-Reports/1964-Commissioner-s-Reports.pdf
[https://perma.cc/JQJ7-WPLH] (last visited Apr. 11, 2018).
convent or similar institution.\textsuperscript{77} This stands in notable contrast to what is suggested by the records consulted in this study, which shows that convents were used in only 10 percent of cases after 1949. Possibly, sentences were inaccurately recorded in the sources consulted and convents were used more frequently than the evidence in this study suggests.\textsuperscript{78} However, if it is the case that judges no longer sent women who killed their babies to convents as part of their sentence after the enactment of the infanticide law, this would be a striking change in practice.

Three women in the sample were given a disposition that included a requirement for inpatient/outpatient medical treatment.\textsuperscript{79} These offenders were all married women who had killed older babies. For example, one offender, a thirty-five-year-old married woman who had strangled her four-month-old infant, the youngest of twelve children, was discharged on agreeing to enter a mental hospital and stay there for six to twelve months following a plea of guilty to infanticide at the Central Criminal Court. The accused’s husband had emigrated two days prior to the killing and it was stated that upon his departure “she . . . went into a kind of religious state, praying all day before pictures and shouting and swearing.” On the night of the killing, the accused’s sister-in-law had come to visit, and “she and another woman were so disturbed that they went for the police, leaving the eldest son, aged 17 and the eldest daughter with their mother.” The accused placed her eldest son and daughter “in front of religious pictures, and while they were there, choked the baby.” When the police arrived, the baby was dead. The accused said, “she had been told by the Almighty to kill the child to get her husband back.” The state prosecutor had said at the time of arraignment that the state was satisfied that the accused should not be tried for murder because it was clear that she was “not sane” at the time of the killing.\textsuperscript{80}

\textsuperscript{77} See generally Brennan, Punishing Infanticide in the Irish Free State, supra note 9, at 12–15.

\textsuperscript{78} As noted above, it was not possible to verify the sentence in 11 cases in this sample. Supra Section I.


\textsuperscript{80} Christina M., supra note 79; Mother Pleads Guilty to Killing Baby, IRISH TIMES (Mar. 1, 1955). The facts reported in the newspaper account indicate that the infanticide law was not applied strictly in this case. There was nothing to indicate a mental disturbance caused by childbirth. Rather, it seems the offender had a serious diagnosable mental disorder that was unconnected with
The limited use of medical dispositions may appear surprising, particularly given that the partially excusing rationale of the infanticide offense is that the woman had, at the time of the killing, a disturbance in the balance of the mind caused by the effects of childbirth or lactation. However, as I have previously argued, the medical mitigation framework contained in the infanticide law was based on a lay, not a medical, understanding of mental disturbance, and was not supposed to require a diagnosed mental illness. The way the rationale was interpreted by the courts further demonstrates that a specific mental illness was not required, particularly in cases involving killings that took place at an unassisted birth where a mental disturbance was often presumed due to the circumstances in which birth took place. Sentencing practice, which reveals limited use of medical disposals, and only in cases involving older (legitimate) infants, further reinforces this point.

Very short terms of imprisonment were imposed, with 66.7 percent of the sample being given a term of twelve months or less. Three women were given three years' custody; two women were given two years; and one woman was given eighteen months. However, as already noted, most of these sentences were suspended. Sentencing remarks from judges are not available in the records consulted and it is difficult to determine why some women were given longer custodial terms of over twelve months. One possible aggravating factor may have been the age of the victim, and, tied in with this, the fact that the killing was less typical of the classic infanticide case because it had not taken place in the context of childbirth. One woman, who had been given a three-year suspended sentence, had killed her eleven-month-old child; another woman, who had also killed an infant near the maximum age limit to which the infanticide legislation applied, was given a two-year suspended sentence; in another case, where the offender was given an eighteen-month suspended term, the victim was twelve days old. Notably, the offenders in each of these cases were married and had other children, though in the latter case she was separated from her husband. In that case the accused, Annie M., had been separated from her husband for over a year at the time of the killing. She was living with her mother and other children. She had said that she found her son childbirth and could have relied on the insanity defense. However, given that insanity required a mandatory sentence of indefinite detention, the infanticide law offered a preferable outcome.


82. Brennan, Social Norms and the Law in Responding to Infanticide, supra note 8.

83. Some newspaper reports on some cases did make reference to the judge's comments at sentencing, but there were very few cases where this is available.

dead in bed one afternoon, but then confessed in her third statement to the Gardaí, admitting that she had killed the infant by “put[ting] the [bed] clothes up on his little face.” As an explanation for her actions she said: “I was tormented. I did not know what I was doing because my husband denied he was the father of my child.”

Another woman, given a suspended term of over one year, was a thirty-one-year-old widow who killed her child at birth; and another woman, given six concurrent terms of three years of penal servitude, was a married woman who had killed six newborn infants to conceal an extramarital affair. Overall, of the six women given custody of over one year, only one appears to fit the stereotypical profile of the infanticide offender, namely the (young) unmarried woman who concealed her pregnancy and killed the infant at birth. In that case, the Attorney General had consented to a summary trial of the accused, who had indicated a guilty plea at the district court. The accused, a twenty-one-year-old shop assistant, had given birth at home; the body of the infant was found “with certain injuries” in her room. Given the circumstances, the three-year suspended term imposed by the district justice in this case was somewhat unusual.

Overall, the evidence shows that women convicted of infanticide in Ireland between 1950 and 1975 were given exceptionally lenient sentences. There was, however, some difference in approach depending on the age of the victim and marital status of the offender. Those who benefited most from lenient sentences were unmarried women who killed their babies at a concealed birth. Women who killed older babies tended not only to receive longer suspended prison terms, but also to be given medical requirements, including in-patient treatment. However, on the whole, but especially in cases involving newborn victims, it is evident that infanticide offenders were not viewed as serious or dangerous criminals, and, contrary to what the language of the 1949 Act may suggest, were generally not considered to suffer from a mental illness that required medical intervention.

In the wider social and legal context of the time, the legislative and criminal justice response to infanticide is somewhat of a curiosity. Sexually

active women had difficulty preventing pregnancy because contraception was not legally available; they could not end a pregnancy because abortion was not legally available; and if they gave birth outside of marriage they could expect no state support to help them become mothers. Indeed, they faced widespread cultural stigmatization and the possibility of institutionalization. Yet the legislature and legal system proved consistently willing to effectively allow women who willfully and with malice aforethought killed their newborn illegitimate babies to escape with a suspended prison sentence, or, at worst, a short term of residence at a religious or medical institution. This raises the obvious question: why were those with political and legal power willing to effectively let those few women who killed their newborn babies get away with murder, while refusing to give all women any measure of autonomy over their fertility? This question is addressed in the following sections, first with reference to gender construction theory in the context of punishing women, and, second, through the concept of paternalism. Both approaches serve to explain lenient sentencing of women who killed their babies as reflecting and reinforcing patriarchal norms, values, and structures.

IV. GENDER AND SENTENCING: GENDER CONSTRUCTIONS OF WOMEN WHO KILL AND THE HARSH/LENIENT DEBATE

Literature on women offenders highlights the role of gender constructions based on patriarchal norms of womanhood in sentencing practices. Within wider social discourse, women are often viewed through the lens of a good/bad dichotomy. The “good” woman construct reflects idealized patriarchal gender expectations that hold women to be passive, nurturing, self-sacrificing, weak, vulnerable, irrational, and particularly susceptible to mental instability due to their biological functions. If a women offender can be constructed within legal discourse as meeting the feminine ideal, she may, notwithstanding the seriousness of her crime and her apparent breach of gender norms by committing a criminal offense in the first place, be rehabilitated back into normative femininity. This construct supports lenient sentencing. The other side of this construct, however, is that those women who cannot be recuperated into the feminine ideal are treated more harshly under the law. Worrall, for

89. The infanticide statute specifically requires that the woman committed a “willful act or omission” and that the requirements for murder, which include malice aforethought, were established. See Infanticide Act 1949, § 1(3) (Act No. 16/1949) (Ir.).
90. See generally Ballinger, supra note 3, at 460–62. See also infra note 91.
91. For some of the literature on how women (including those who kill their children) are constructed in the criminal justice system, reflecting wider gender stereotypes, see generally HILARY ALLEN, JUSTICE UNBALANCED (1987) (exploring why women offenders are more likely than their male counterparts to receive psychiatric sentencing disposals, discussing how women’s crimes/behavior are constructed in ways which undermine their agency, and, in this regard, how they are seen as
example, has argued that women offenders are constructed as either “non-criminal” (so essentially “good”) or “non-women” (“bad”).\textsuperscript{92} She identifies a “gender contract” in which women criminals are given the chance to “neutralize the effects of [their] law-breaking by implicitly entering into a contract where [they] permit [their] lives to be represented primarily in terms of [their] domestic, sexual and pathological dimensions.” The gender contract “minimizes punitive consequences.”\textsuperscript{93} Similarly, Morrissey has identified

\textsuperscript{92} Worrall, \textit{supra} note 3, at 31–51.

\textsuperscript{93} \textit{Id.}
strategies that serve to either cast the offender as a victim, reflecting patriarchal norms about the "good" woman, or that demonize her, rendering her non-human/non-woman.94 Other constructions identified by writers which reflect idealized (and non-idealized) norms of womanhood, are the "mad," "sad," and "bad" classifications.95

In cases involving homicidal women, such constructions play a particularly important role. Because women rarely commit violent offenses, the female killer is unusual. This, in conjunction with widely held gender norms that view violence as inimical to femininity, means that the murderess must be explained to alleviate the angst caused by her conduct and the threat her violence poses to the patriarchal social order.96 Constructions of women who kill are therefore said to both explain and neutralize her violence. This is achieved by either recuperating her back into the feminine ideal, for example by casting her as a victim of circumstance or as mentally unstable, or, alternatively, by demonizing her and thus rendering her as "non-woman." Both strategies serve to deny her agency and, in so doing, neutralize the threat posed by her violent act.97

At first glance the infanticide offender had not only committed a serious criminal offense, but had also grossly offended the patriarchal version of idealized femininity. By becoming pregnant outside of marriage, she breached the mandate of feminine virtue; by killing the baby, she breached norms of motherhood (although, arguably, being an unmarried woman, she may not have been viewed as a "mother" anyway).98 However, infanticide as a crime is constructed in such a way that it falls on the good side of the dichotomized view of femininity. The infanticide law itself explains the crime on the basis of a mental disturbance caused by the effects of childbirth or lactation.99 Scholars frequently point to infanticide statutes as a prime example of the medicalization of female violence, and, in particular, as requiring diagnosis of a postnatal mental illness such as post-partum depression or psychosis.100 However, while the language of the statute suggests a requirement for diagnosis of a mental disorder linked to childbirth or lactation, both the history of infanticide laws

95. Weare, Bad, Mad, or Sad?, supra note 91; Weare, "The Mad," "The Bad," "The Victim," supra note 91. For more on how women filicide offenders are medicalized, see Wilczynski, supra note 91, at 425.
98. See supra text at notes 41–42.
99. See supra note 59.
100. For examples of such critiques, see Edwards, supra note 91, at 79–100; Weare, "The Mad," "The Bad," "The Victim," supra note 91, at 343–45.
and the manner in which they have been applied by the courts demonstrate that the mental disturbance requirement encapsulates a lay, not a medical, understanding of this crime.\textsuperscript{101} Although this embodied lay patriarchal norms, it did not require diagnosis of a specific mental illness (such as post-partum depression), and it did take account of the circumstances of the crime.\textsuperscript{102} In other words, while the law represented infanticide as an irrational act, linking it to the idea of biologically produced mental disturbance, it was not meant to embody a true pathologization of the offender. Rather, it was intended to, and did, operate in such a way as to tacitly recognize the mitigating social circumstances involved.\textsuperscript{103} Nonetheless, on the face of it at least, the infanticide law constructs the offender as “mad,” thus allowing her to be rehabilitated back into normative femininity.

Moreover, there are other reasons why women who committed infanticide in this study could be recuperated back into the feminine ideal, and this links with the interpretation of female killers as being “sad” victims of circumstance. Indeed, it is more accurate to say that how women who killed their babies, particularly their newborn babies, were understood involved a blend of the mad/sad constructions of female criminality. Most of the women in the sample

\textsuperscript{101} For the history behind these laws, see Brennan, ‘Traditions of English Liberal Thought:’ A History of the Enactment of an Infanticide Law in Ireland, supra note 39, at 123–33 (discussing how the medical rationale was understood by Irish reformers, and demonstrating that they, too, adopted a lay understanding of mental disturbance, one which did not require medical diagnoses and which was not linked to the biological consequences of childbirth, but the circumstances in which birth took place, particularly when the woman gave birth alone following a concealed pregnancy); Kirsten J. Kramar & W.D. Watson, The Insanities of Reproduction: Medico-Legal Knowledge and the Development of an Infanticide Law, 15 SOC. & LEGAL STUD. 237, 240–50 (2006) (exploring the contemporary medical and ethnographic literature on the subject of infanticide and demonstrating that medical scientists and ethnographers largely explained infanticide on socio-economic, not biological, grounds); Tony Ward, The Sad Subject of Infanticide: Law, Medicine and Child Murder 1860-1938, 8 SOC. & LEGAL STUD. 163, 166–70, 174–75 (1999) (discussing the question of medicalization in the background to the English and Welsh Infanticide Act 1922, and arguing that the disturbance in the balance of the mind requirement was a lay, not a medical, concept—there is no evidence that medical theory was considered by those who drafted or enacted the law). For how infanticide laws have been liberally applied in the courts, see Brennan, Social Norms and the Law in Responding to Infanticide, supra note 8 (demonstrating through analysis of archival court records that the medical rationale of the Irish infanticide law operated as intended on the basis of lay understanding of the mental state of the woman at the time of birth/the killing, and how in practice there appears to have been a presumption of mental disturbance which tacitly took account of the social circumstances involved); Ronald D. Mackay, The Consequences of Killing Very Young Children, CRIM. L. REV. 21, 29 (1993) (concluding, from an examination of psychiatric reports in a sample of infanticide cases in England and Wales in the 1980s, that the mental disturbance requirement was “primarily . . . a legal device for avoiding the mandatory penalty and thus ensure that leniency could be shown in appropriate cases”); Allison Morris & Ania Wilczynski, Rocking the Cradle: Mothers Who Kill Their Children, in MOVING TARGETS: WOMEN, MURDER AND REPRESENTATION 198, 207–10 (1993) (arguing that infanticide legislation has been interpreted “liberally” in a number of jurisdictions including England, Hong Kong, and Australia, and has been used to allow for “covert” consideration of the socio-economic factors that lead to the killing).

\textsuperscript{102} Brennan, Social Norms and the Law in Responding to Infanticide, supra note 8.

\textsuperscript{103} Id.
in this study had killed an illegitimate baby at or soon after a secret birth. If her concealment and the killing could be construed as being motivated, in the wider social context of the time, by a desire to conceal her shame and preserve her respectability, then, according to prevailing norms, she behaved as a “good” woman would in her situation. Indeed, the act of infanticide was, from that perspective, arguably a manifestation of appropriate femininity. This interpretation could be bolstered if she could be considered faultless in her fall from grace, particularly if she could be viewed as the victim of callous male sexuality. This is evident in the way Irish infanticide offenders were understood. For example, one document relating to the 1949 infanticide reform, in which a number of mitigating factors in these cases were outlined, notes that the circumstance that most affected the ordinary person in their judgment of these cases was that the father of the child, who was “so often more guilty than the woman herself . . . got away scot free,” while the woman had to bear “all the trouble and all the shame.”

The characterization of the Irish infanticide offender as embodying a mix of the mad/sad construction of female offenders, particularly her victimhood vis-à-vis the man who impregnated her, is best encapsulated in a 1941 memorandum written by a female probation officer on the treatment of infanticide offenders by the courts. The memorandum paints a profile of those appearing at the Central Criminal Court on charges relating to the death of their infants. In relation to the cause of the “downfall” of these offenders, the author noted that in the case of “young girls,” it was due to “ignorance which left them an easy prey to the snares of the first unscrupulous man who cared to take advantage of them;” with older women, they had “very often [been] led astray by the promise of marriage.” It was noted that in many of these cases the offender might not realize that she was pregnant for some time and then, upon discovering her situation, “becomes bewildered, even desperate.” This is particularly true in the case of domestic servants, where, being afraid to risk “instant dismissal” from her post should her pregnancy become known, the woman keeps silent and continues as normal until the time of birth, and “[t]hen

107. Id.
in the frenzy of a moment and still trying to cover her shame, she kills her child."\textsuperscript{108}

The perception of the role of men in the above is particularly interesting in that there was a willingness to acknowledge that men had played a part in the crime—at least to the extent that they had contributed to the situation that led to the woman committing it. However, it was individual men—reckless, selfish, manipulative men who took advantage of vulnerable women and then abandoned them to their fate—who were responsible, not the dominant gender order that enabled this double standard of sexuality. As noted, patriarchy does not always operate for the benefit of all men as against all women; it does not involve total domination of women as a category by men as a category.\textsuperscript{109} In this regard, Ballinger highlights the role of gender constructions of normative masculinity as another element (in addition to that of gender constructions of female killers) in explaining punishment of women who kill their abusive husbands: the offender met gender norms of appropriate femininity because she could be constructed as a "victim," while the deceased, her violent husband who had displayed "excessive masculinity," did not conform to masculine norms. How both offender and victim were constructed affected the outcome in the case, leading to lenient treatment for the offender.\textsuperscript{110} Men who took advantage of "innocent" women by having sex with them outside of marriage without giving consideration to, or evading the consequences of, their sexual licentiousness were not ideal men either. They had shirked their responsibility to be husbands and providers within the patriarchal family.\textsuperscript{111} These men could therefore be blamed for contributing to the situation, and although they were not held criminally responsible, their failure to fulfill their role in the patriarchal social order did allow for a sympathetic understanding of infanticidal women. In both cases the focus was on individual responsibility—moral in the case of the men, and criminal in the case of the women—rather than the role of wider patriarchal values and structures.\textsuperscript{112}

If the offender demonstrated remorse, this may have also facilitated her accommodation within the "good woman" stereotype. At least 71 percent of the infanticide convictions in this sample involved a guilty plea.\textsuperscript{113} One of the more

\textsuperscript{108}. Id. at 2.


\textsuperscript{110}. See generally Ballinger, \textit{supra} note 3.

\textsuperscript{111}. Id. See also ANETTE BALLINGER, \textit{GENDER, TRUTH AND STATE POWER: CAPITALISING ON PUNISHMENT} 60–61 (2016).

\textsuperscript{112}. For further discussion on the tendency to individualize criminality, see infra notes 141–49 and accompanying text.

\textsuperscript{113}. For further detail, see Brennan, \textit{Social Norms and the Law in Responding to Infanticide, supra} note 8.
interesting cases examined in this study highlights the importance of gender constructions, including those regarding remorse, in how women convicted of infanticide were sentenced. The case involved a married woman, Mary S, who killed six newborn infants conceived in the context of an extra-marital relationship. Mary's husband had immigrated to England, and each time she became pregnant by her lover she hid her pregnancy from the outside world and killed the infant at birth. She confessed to her crimes while being treated for a mental breakdown soon after the birth and death of her last-born infant. Her mental illness appears to have been linked to her intense remorse over her crimes.\textsuperscript{114} She was given the most severe sentence in this sample: three years of penal servitude on each count to run concurrent; this was not suspended.\textsuperscript{115} The comparative severity of the sentence imposed is most likely a consequence of the repeated nature of her offending, but possibly it also indicates disapproval of the wider circumstances involved, namely the on-going extra-marital affair—in other words, that she was doubly punished because she broke gender norms with regard to "wifely" behavior.

However, a newspaper report on the case indicates that she was not perceived to have fallen so far from the feminine ideal that she was beyond sympathy. At the Central Criminal Court, Judge Murnaghan, in his sentencing remarks stated: "You have pleaded guilty to six terrible offenses but I am not going to make things any more difficult for you, because I believe you now see the awful thing you have done, and I feel you regret it." Her victimhood is also highlighted by one of the investigating Garda officers who stated that her lover had "gained more or less complete control over [her]." Another factor which may have influenced the sentencing decision was that her husband, who had been living in England for years, said he would take her back and be good to her while he was living.\textsuperscript{116} Scholars have noted that the courts may rely on social control mechanisms such as the family when punishing women, which can lead them to forego formal penal methods.\textsuperscript{117} This is evident in some other cases in the sample, where offenders were required to reside with their parents, or, in one case, return to her estranged husband, as part of the sentencing disposal.\textsuperscript{118} In summary, despite the apparent breach of feminine norms, Mary S. could still be accommodated within stereotypical notions of womanhood: she could be re-socialized into the patriarchal family unit; she was viewed as a victim of male control; she was evidently remorseful of her crimes; and she experienced a severe mental illness.

\textsuperscript{115} Unpublished case file, Mary S. (on file in SBCCC, V14/8/19 (Jan. 1953–Dec. 1956)).
\textsuperscript{116} Three Years for Killing Six Children, IRISH TIMES (Feb. 20, 1954).
\textsuperscript{117} See generally Mary Eaton, JUSTICE FOR WOMEN: FAMILY, COURT AND SOCIAL CONTROL (1986).
\textsuperscript{118} See supra Table A.
Overall, rather than being viewed as a serious or violent criminal, or as someone who had committed a rational act in response to intolerable social circumstances, the infanticide offender was understood to be a “young girl” or an “unfortunate woman” who deserved pity and not punishment. Her crime was constructed as not being truly criminal.\textsuperscript{119} She was the beneficiary of being constructed as mad/sad and, therefore, as meeting norms of appropriate femininity. In this regard, sentencing of this offender reflected and embodied patriarchal norms and values.

A. Gender Construction Unpicked—A Necessary Evil?

While individual offenders, such as the women in this sample, may benefit from being constructed as meeting idealized femininity, lenient treatment based on gender constructions has been criticized because the cost of mercy is the denial of a woman’s agency and the structural causes of her offense.\textsuperscript{120} First, although non-agentic explanations may help individual offenders secure a more lenient disposal, it is said that they also reinforce and perpetuate gender stereotypes in wider society, casting all women as irrational, passive, vulnerable, and weak.\textsuperscript{121} Linked to the issue of agency denial is the second problem with good/bad woman gender constructions, which is that they individualize criminality, detracting from and indeed obscuring the structural causes of offending: criminal conduct is viewed as residing in the individual, in her weakness, irrationality, victimhood, etc., not in the wider socio-political context which led to the offense.\textsuperscript{122} As Ballinger has argued in the context of child murder in early twentieth-century England and Wales,

“[L]eniency . . . came at a price, particularly when it was the end result of replacing agentic, rational explanations with pathological excuses for women’s actions, because such a strategy neutralized the perceived threat that these women posed to the social order. It therefore also minimized the opportunity for the development of an alternative truth. In particular, it undermined the structural causes of infanticide and child murder such as gross gender inequality and the wider social and economic circumstances which flowed from that inequality.”\textsuperscript{123}

\textsuperscript{119} See Worrall, supra note 3, at 31–51.
\textsuperscript{120} See generally Ballinger, supra note 3, at 475–76; Ballinger, supra note 111, at 57, 66, 74; Morrissey, supra note 3, 1–27, passim.
\textsuperscript{121} See generally Ballinger, supra note 3, at 475; Morrissey, supra note 3, at 3–7, 36–37, passim; Weare, supra note 91, at 345, 350–54.
\textsuperscript{122} See, e.g., Ballinger, supra note 111, at 57, 66, 74; Ballinger, supra note 3, at 475–76, 478; Morrissey, supra note 3, at 1–27.
\textsuperscript{123} Ballinger, supra note 111, at 57.
The upshot of this, according to Ballinger, is that punishment of female offenders helps to maintain the heteropatriarchal social order. Indeed, she argues that the key to understanding women’s punishment is “the state’s role in the production and reproduction of the gendered social order.” Specifically, in this regard, gender constructions of women who kill “produce and reproduce the gendered subject,” reinforce gender differences in society, and individualize offending, which in combination serve to sustain heteropatriarchy: the gendered social order is maintained and the structural causes of offending which lie in patriarchy are unchallenged.

For example, focusing on the treatment of women who killed their abusive husbands in England between 1900 and 1965, Ballinger argues that the female and male gender constructions employed categorized cases of women retaliating in the context of domestic violence as exceptional rather than a consequence of the unequal power structure that the institution of marriage maintains between husbands and wives. The offender was constructed in such a way as to highlight her “helplessness and victimhood.” Such constructions reinforced the inferior status of all women, presented the case as “extraordinary,” and stymied “long term structural changes for women as a category.” Relatedly, male victims were viewed as “‘bad apples’ within a barrel of otherwise unproblematic masculinity.” Thus, the problematic patriarchal structures involved, namely the institution of marriage, which traditionally enshrined male domination of women, remained unchallenged. Mercy stemming from such constructions was a “conservative strategy which sought to preserve the institution of marriage . . . and the existing gender order.”

Similarly, Ballinger argues that the legal response to women who killed their babies and young children in the early twentieth century was closely connected to maintaining the gendered social order. Lenient treatment of these offenders, while well-intentioned, came at the expense of rational agentic explanations and so relied upon and supported gender stereotypes and

125. Id. at 476.
126. Id. at 464, 475–76, 478; Ballinger, supra note 111, at 74.
127. Ballinger, supra note 3, at 475–76.
128. Id. at 475.
129. Id. at 475–76.
130. Id. at 476.
131. Id.
132. Id. at 476.
133. Ballinger, supra note 111. The cases in her sample pre-dated the Infanticide Act of 1922 or fell outside its scope because the victim was over one year of age.
134. Id. at 74.
undermined structural causes, such as gender inequality. Again, this served the interests of heteropatriarchy, because gender inequality, poverty, and the limited alternatives available to these women remained hidden and therefore unchallenged.\footnote{Id. at 57, 66, 74.}

These analyses of punishment based on gender construction theories make an important contribution to understanding and critiquing sentencing of women offenders. They show how gender constructions, which may or may not result in lenient sentencing, deny the woman’s agency and the structural causes of her crime in the courtroom, and can reinforce gender stereotypes in wider society and serve patriarchy by disguising structural inequality, thus allowing the status quo to remain unchallenged. I would like, however, to suggest two limitations to these arguments.

First, while theoretically it can be said that the denial of women’s agency in the courtroom may sustain and perpetuate wider gender norms by casting all women as irrational victims of circumstance or pathology,\footnote{See supra note 91.} it is difficult to assess the significance of denying agency in more practical terms. In other words, whether and to what extent legal constructions of women who kill make an appreciable contribution to the perpetuation of wider gender norms is questionable. Can we evidence the impact on society in general, and on non-criminal women and their lived experiences in particular? For example, the infanticide law, on the face of it at least, constructs women who kill their babies as being mentally disturbed as a consequence of childbirth, and, therefore, according to feminist thinking, constructs all women, but especially new mothers, as being vulnerable to biologically produced mental disturbance. But does this legal construct augment or consolidate existing social constructions of all women? Are all women, but particularly those who give birth, viewed as (potentially) irrational non-agents who may pose a risk to their children? If this is the case, does infanticide law and practice add to this? And, if so, what impact does this have on women, particularly those who are pregnant, parturient, or nursing, in terms of how they are understood, and, more importantly, then treated as citizens?

Ultimately, the question is: if women are already viewed according to social gender norms as potentially irrational beings due to their biology, then what tangible impact does the law or courtroom practice have in helping to sustain such ideologies, and what are the concrete implications of this for other women? It is unclear in these feminist gender-construction critiques, for example, how the use of stereotypical gender constructs in the courtroom in relation to criminal women make their way into wider societal discourse, and, if they do, what impact this has on how non-criminal women are viewed. For
instance, even if the wider public were aware of how the law or the courts constructed women—through, for example, extensive media reporting—it is questionable whether this would have a noticeable impact on reinforcing stereotypes, particularly in light of women's limited contribution to criminality as a whole and the fact that criminal women might well be viewed as being "different" from the rest of the population. In other words, while the way women in general are understood according to patriarchal norms may affect the way women offenders are perceived and treated, the way criminal women are understood may have little bearing on how the rest of the female population is viewed.

In short, the criminal justice system may, by employing stereotypical gender constructions, "reproduce[e] . . . the gendered subject," help validate gender norms, but it is questionable whether this makes an appreciable contribution to the perpetuation of such norms in wider society overall. Indeed, there are other institutions which undoubtedly play a more important role in reinforcing and perpetuating gender stereotypes, such as schools, churches, the family, and other parts of the law which have a greater impact on women's daily lived experiences (such as, for example, family law, health care law, and employment law). In the broader context, the criminal law may have a limited impact. In this light, if the criminal courts did not employ gender constructions it seems unlikely that the gender ideologies from which they are drawn would inevitably collapse or appreciably diminish in wider societal discourse.

Further, it may be important to draw a distinction between legal practice and the law as enshrined in legislation. In this regard, a question is raised about what role the criminal courts can be expected to play in challenging societal stereotypes. Arguably the courts should avoid stereotyping in the way the law is applied and sentences are determined, and certainly there are some areas where it would be crucial, for the purpose of reaching the correct decision and vindicating victims' rights, that concerted efforts be made in this regard. One example that springs to mind is in the adjudication of rape cases where sexist and damaging "rape myths" result in misunderstandings of what constitutes rape under the law, contributing to low conviction rates for this offense.

Further, as I argue later in the section and in the conclusion, the criminal law, particularly at sentencing should be more open to taking account of the structural causes of crime, something which would by implication require judges to avoid stereotyping offenders.

However, it is questionable whether the courts should refute gender stereotypes simply to challenge, or to avoid contributing to the preservation of,

137. Ballinger, supra note 3, at 476.
these norms in wider society, particularly if doing so might risk more punishment for the offender in circumstances where lenient treatment is deserved. Further, when gender stereotypes are pervasive in a society, can we expect judges and others involved in these cases to even recognize that they themselves are succumbing to such constructs in the way they assess the cases they encounter in the courtroom, particularly if this issue has not attracted attention? If they are not conscious that they are relying on gender constructions, then how can we expect judges and other actors to challenge them? This is even more apposite where the law itself also embodies gender stereotypes, as is the case with the Infanticide Act, because, in so doing, the law has arguably legitimized that construct, at least within the courtroom context; more importantly, it has formalized it as part of legal doctrine. Are the courts to then challenge both societal and legal norms in the way they practice justice? In this respect, it may be worth drawing a distinction between legal rules and criminal justice practice. The gender construction argument may have more potency in terms of critiquing legal doctrines which embody gendered understandings of women: first, because we might expect those who create law to avoid sexist stereotyping and to play a part in challenging inequality, and, second, because what “the law” as a body of rules and doctrines says may have a greater impact than individual court decisions on wider society, and its understanding of the world.

Finally, if gender stereotypes help to ensure lenient treatment for offenders who do not deserve a harsh outcome because of the circumstances involved, do we want the courts to challenge those norms when the consequence of highlighting the offender’s rational agency is likely to be harsher punishment? If they do contest gendered understandings of criminality in this way, but also provide for lenient outcomes, it is difficult to see how such differential treatment could be justified. This links into my second critique of gender construction theory, which relates to the individualization of crime in wider criminal law theory and doctrine.

Gender construction theory also reveals how relying on stereotypes individualizes the offender and denies the structural causes of crime, thus helping perpetuate wider inequalities. Rather than acknowledging that gender inequality played an important role in the crime, the legal system blames woman’s (supposedly defective) femininity. This is the more troubling consequence of the employment of gender constructions because it reveals the link between how crime is understood and responded to in the courtroom and the perpetuation of socio-political inequality, notably in this instance patriarchal structures, a point I return to in the following section, using the

139. Whether those involved in infanticide law reform in the early and mid-twentieth centuries would have been able to challenge pervasive social stereotypes of women is, however, questionable. To do so they would have needed to recognize that these stereotypes existed.
concept of paternalism. As Carol Smart argues, "[t]he law can . . . be understood as a mode of reproduction of the existing patriarchal order. . . . Legislation does not create patriarchal relations but it does in a complex and often contradictory fashion reproduce the material and ideological conditions under which these conditions may survive." However, understanding this process through the lens of gender construction does have one limitation. Analyses of women's punishment that critique the law for utilizing gender constructions that deny the structural causes of offending overlook that the criminal law on the whole generally excludes the role of socio-political structural factors in criminal offending: both in how it ascribes criminal liability and how it punishes, criminal behavior is individualized.

Norrie has demonstrated how modern criminal law doctrine and punishment theory, informed by the Enlightenment concept of "liberal individualism," is based on the idea of the "abstract juridical man," a free, rational, calculating and responsible individual divorced from his social context. As a result, criminality is always decontextualized and the wider social and political conflicts which affect the way a person reasons, behaves, etc., are pushed aside. Even where the harshness of the law is mitigated through the use of insanity-type doctrines, such as the insanity defense, diminished responsibility, and infanticide, psychiatric discourse itself also "decontextualizes social agency . . . by locating the problem of insanity in the constitution of the individual." Thus, the criminal law "obscures . . . social realities" and instead locates fault in the individual, either by blaming their rational choice to break the law or their irrational behavior stemming from individual pathology.

The criminal law, therefore, emphasizes rationality and agency, basing liability and punishment on the concepts of free will and choice. What gender construction theory highlights is that women criminals are interpreted in ways that emphasize their irrationality and lack of agency. Although this may allow for lenient treatment, it does so without acknowledging the role of structural inequality in offending. However, while such discourses of female criminality may be criticized, it is important to recognize that decontextualization of offenders is not limited to women and is not solely a function of gender constructions, but of the law's wider theoretical foundations. Within the

140. See SMART, supra note 109, at 144.
141. For a discussion of individualism in criminal law, see Norrie, supra note 6, at 9–29.
142. Id. at 21 (emphasis added).
143. Id. at 19–40 & 304–332; see especially id. at 225 n.140 (noting how "liberal legal enterprise" structures "the legal subject around a psychological individualism that excludes social, moral and police conflict from legal discourse")
144. Id. at 189.
145. Id. at 23.
criminal law, all individuals, male and female, are abstract constructs who are never understood in terms of the social and political structures, such as gender, race and class inequality, that lead to their criminal offending. Thus, even if women offenders were viewed in non-stereotyped terms, the law would still refuse to take account of the socio-political causes of their crimes. Ridding criminal adjudication of gender constructions, therefore, is only part of the solution.

Those who use gender construction theory to critique punishment of women offenders seek rational agentic constructions of women’s criminality that acknowledge wider structural causes, but without an increase in punishment, although they do recognize the challenge inherent in this ambition. As the above demonstrates, in a context where the criminal law generally will not recognize socio-political mitigation, it is difficult to see how lenient treatment of someone such as the infanticide offender could result or be justified if the courts were to challenge gender stereotypes and recognize women’s rational agency. Indeed, no or reduced agency is what is arguably required under criminal law theory and doctrine to generate and defend lenient treatment. With regard to specific infanticide laws, for example, the medical rationale adopted was necessary for the purpose of legislating to allow for special lenient treatment of this offender without infringing the law’s requirement for individual responsibility. In other words, it would not have been possible to allow for social mitigation; officially, at least, pathologizing the infanticide offender was necessary to allow for lenient disposal. As Norrie has noted, “[p]sychiatric discourse [i]s a convenient aid to rescue the law from the embarrassing consequences of its harsh narrowness while at the same time avoiding any focus on the social conditions that gave rise to the crimes in question.”

In short, in a context where criminal liability is based on the notion of the rational, free and abstract individual who chooses to offend, and where the law cannot or will not openly countenance the role of social mitigation in attributing liability for and punishing any form of criminal offending, constructions of an offender that serve to mitigate by denying agency and rationality are arguably a necessary evil in helping foster and then justify differential lenient treatment. As it stands, it seems it is not possible or even realistic, in the context of wider criminal theory, to have both an

146. See, e.g., Morrissey, supra note 3, at 35.
148. Norrie, supra note 6, at 190 (referring to Smith’s study of the use of the insanity defense in nineteenth-century Britain in cases of parents who killed their babies). See also ROGER SMITH, TRIAL BY MEDICINE: INSANITY AND RESPONSIBILITY IN VICTORIAN TRIALS 143–160 (1981).
acknowledgement of agency/rationality and mitigated punishment. In this regard, the entire criminal law must be challenged to allow for all offenders, not only women, to be criminalized and punished according to their responsibility, which should be assessed in such a way as to recognize their rationality in the context of wider socio-economic-political inequality.

Considering these issues in the context of the Irish infanticide offender, although the Infanticide Act labeled the crime as an act of “madness,” in practice, social circumstances were taken into consideration in the way the law was applied. This held out the possibility of structural causes (such as cultural stigmatization of unmarried mothers, sexual double standards, poverty, lack of support, gender inequality, and access to reproductive autonomy) being recognized. While courts may have tacitly acknowledged social mitigation, however, they were arguably still focused on her individual circumstances (e.g., her sense of shame about becoming pregnant outside of marriage and/or the fact that the father had abandoned her), rather than on wider structural factors (e.g., stigmatization and sexual double standards).

Further, through the infanticide doctrine she was officially viewed through the lens of gendered mental disturbance, which downplayed her agency. I would argue that her agency was not entirely eradicated, though, because the statute did require that her conduct was “willful,” and that she had killed with the mens rea for murder. Despite this, ultimately, infanticide was not represented as a rational response to the personal and structural circumstances involved.

However, infanticide law and practice, which takes a sympathetic response to unmarried women who kill their babies at birth, allowed for an imperfect contextualization of their crimes in a society where unmarried mothers were highly stigmatized and faced many structural difficulties. It would have been better to acknowledge more openly structural factors, but at the end of the day the social context was not completely ignored. Given that the criminal law does not generally take account of the wider social, economic, or political context of an offender’s crime in assessing their criminal guilt or in determining punishment, the approach taken to infanticide was perhaps the best that could be hoped for in terms of recognizing mitigating factors. Ultimately, what the Infanticide Act and its sentencing practice allowed for was an imperfect contextualization of the crime, with minimal criminalization.

In summary, gender construction theories allow us to see how sentencing of the Irish infanticide offender reflected norms about gender: offenders were treated leniently because they were constructed as “good” women according to

149. See Wilczynski, supra note 91, at 433.
150. See supra note 101.
151. See, e.g., supra notes 106–08 and accompanying text (quoting probation officer).
152. Infanticide Act 1949 (Act No. 16/1949) (Ir.), §§ 1(2)–(3).
patriarchal norms. Gender constructions may also help maintain patriarchal interests by “producing and reproducing the gendered subject” (the irrational non-agentic woman), and, consequently, denying the structural causes of offending. Some limitations to this approach have been noted, particularly the fact that the criminal law generally ignores the socio-political context of offending and that, in this context, gender constructions may have been a necessary evil to facilitate and justify lenient treatment of certain offenders. Further, despite that the law characterized the offender as “mad,” there was at least veiled recognition of wider social factors in the law’s application. However, as I argue in the conclusion, if we want to do more to prevent the crime of infanticide we must tackle its structural causes, including poverty, denial of reproductive autonomy, and cultural stigmatization. In this context, the courts bear a responsibility to draw attention to these issues.153

In the following section, the criminal justice response to infanticide is explored further, drawing on the concept of paternalism. This also reveals how compassionate punishment of the infanticide offender served patriarchal interests, specifically by helping the state retain control over women’s reproductive autonomy. A paternalism analysis makes a similar contribution, in terms of explaining and critiquing sentencing of Irish infanticide offenders, as that made by gender construction theory, revealing the link between lenient sentencing and the preservation of gender inequality. However, unlike gender construction theory, which critiques the use of stereotypical constructs of women to disguise the socio-political causes of offending, paternalism demonstrates the link between lenient punishment and preservation of patriarchy in a different way. By highlighting the connection between mercy and control, paternalism demonstrates how lenient treatment of this group of offenders functioned on a systematic level to preserve patriarchy. First, it showed that patriarchy had a gentler side. Second, it averted the controversy that may have arisen had women been punished more severely and the stark impact of gender inequality, particularly with regard to reproductive choices, had been laid bare.

153. As will be explained in the conclusion, although there have been no infanticide prosecutions or convictions in Ireland in recent decades, the argument related to preventing infanticide nonetheless remains relevant for a number of reasons, including its resonance outside of the Irish infanticide context. See Brennan, Social Norms and the Law in Responding to Infanticide, supra note 8 (discussing the reasons for the decline in infanticide prosecutions in recent decades). I argue that the impact of controversial events in the 1980s (notably the “Kerry Babies” case) and Ireland’s dramatic transition from a conservative to a liberal society played a key role in shifting attitudes to this, now exceptionally rare, crime away from criminal prosecution.
Moulds argues that legislative and judicial leniency towards women offenders is really paternalism. Paternalism (in the guise of mercy) may be beneficial to some offenders because it can result in lenient sentencing disposals from a desire to "protect" women from a particular evil, such as imprisonment. Paternalism, however, does not involve a straightforward exercise of compassion. Because it occurs in the context of an asymmetrical relationship, where the recipient of mercy is inferior to the benefactor, the apparent altruism exhibited is double-edged. For example, Moulds argues that paternalism allows the "child" to serve the interests of the "father." Paternalism, therefore, is "more complex" than chivalry and "its practice is far more destructive in terms of psychological, social, and political implications." Davis also highlights the ambiguous nature of paternalism: while it involves elements of benevolence, it also involves the exercise of control, and, in fact, can result in more control over the inferior party to the relationship. In a sentencing context, this may mean, for example, that some women are subject to more invasive forms of punishment than what might otherwise be expected for the purposes of "rehabilitat[ion]" or "protection."

The approach to infanticide sentencing in this study demonstrates that individual offenders did not necessarily experience the negative consequences of paternalism. Admittedly, some women were sent to religious and medical institutions as part of their sentence, or were required to reside with parents or spouses. If, for example, the time spent at a "semi-penal" institution was longer than what a prison sentence would have been, and/or if the conditions of detainment were worse than that which pertained in prisons, particularly in terms of the level of surveillance and control she experienced, then arguably

155. Id. at 417.
157. Moulds, supra note 154, at 418.
158. Id. at 418.
159. Davis, supra note 156, at 23, 41–42.
160. Moulds, supra note 154, at 419–20. See Lynsey C. Black, Gendering the Condemned? Women and Capital Punishment in Ireland Post-1922 240–274 (2016) (unpublished Ph.D. thesis, Trinity College Dublin), for an example of this in Ireland where, for the purposes of protection, some women serving a life sentence following a reprieve of the death penalty were sent to convents rather than being released on license. Black argues that lenient treatment of these women (i.e., reprieving the death sentence) was grounded in patriarchy; paternalism was offered to women because they were considered inferior but was only available to those who met gender stereotypes (of the "good" woman), and whose agency could be denied.
these women did experience more control as a consequence of benevolent inclinations that kept them out of prison. However, in cases where women were not sent to semi-penal institutions it is difficult to identify any negative consequences of compassion for the individual offender. Instead, as I will argue in the remainder of this section, the adverse consequences of paternalism may have operated at a macro level, involving control over women in general rather than simply the offender at hand.

Compassionate treatment of the infanticide offender did two things, if we consider the issue of control. First, as Norrie and Ballinger have noted, mercy serves to uphold the authority and legitimacy of the criminal law; it supports the law’s validity as a mechanism of control. As explained in the previous section, the law will not admit to or engage with the socio-political conflicts that lead to crime, and so individualizes criminality. However, on occasion, where the harsh stance the criminal law takes undermines its legitimacy, mercy functions to preserve that legitimacy. Rather than have the law’s authority to penalize lawbreakers challenged on the grounds that it is unfair to criminalize/punish severely in light of the circumstances involved, mercy will be exercised. This is done without acknowledging the wider structural factors involved, and for the purposes of preserving the law’s authority to criminalize and punish in that context by excluding socio-political conflicts from consideration. Lenience, therefore, is not solely a benevolent expression because, ultimately, it serves to maintain the authority and control of the criminal law.

The history of infanticide provides an illustration of this. In the past, harsh criminal law (e.g., the mandatory death penalty) conflicted with public sentiment. As a result, the law was effectively ignored so that a compassionate response, as desired by the public will, would be provided. Thus, although the law and the public opinion were out of sync, criminal justice practice extended mercy to the offender, which helped maintain the legitimacy of the law. However, the law’s routine subversion by such ad hoc arrangements itself challenged its legitimacy, which eventually led to legislative reform to

163. See supra text at 141-49.
164. See supra note 162.
165. Norrie, supra note 6, at 190–91, 222–25.
167. See Ballinger, supra note 111, at 74.
formalize lenience. Among the chief motivations for infanticide law reform were avoiding the “solemn mockery” of judges pronouncing death sentences that would never be carried out,\textsuperscript{168} the “tragic farce” of sending women for trial for an offense they would not be convicted of,\textsuperscript{169} and the abuse of other offenses used to provide for a more compassionate conviction.\textsuperscript{170} Mercy, whether informal (by, for example, commuting death sentences) or formal (as embodied in the law), therefore operated to uphold the law’s legitimacy where it was thought to operate harshly because there was sympathy for the offender in light of the circumstances in which her crime was committed, but where the law could not openly take account of the role of the socio-political factors involved.

Second, compassion not only functioned to endorse the law’s legitimacy, authority, and control, it also helped uphold the socio-political structures that led to this crime in the first place because it showed that patriarchy had a “gentler” side. As outlined above, the crime of infanticide in Ireland during the middle decades of the twentieth century was deeply connected with patriarchal cultural and legal norms, which prevented women from having control over their reproductive lives and castigated those who breached ideals of feminine virtue.\textsuperscript{171} In other words, one of the extreme consequences of patriarchal control of women’s reproduction was infanticide. As the Irish experience of infanticide from the 1970s onwards clearly indicates, when women are given more reproductive choice, in terms of being able to prevent or end an unwanted pregnancy or to be mothers to children outside of wedlock, infanticide as a crime declines significantly.\textsuperscript{172} However, allowing women access to contraception and abortion, or allowing them to be mothers to their illegitimate children by offering state support or making efforts to destigmatize unmarried motherhood, gives them control over their reproductive destinies, and recognizes that women have a right to choose whether to be mothers and in what circumstances. This is something that patriarchal cultures have always struggled with, and, even with modern advancements, continue to grapple with.\textsuperscript{173} Certainly, in the 1950s and 1960s, when most of the cases in this

\textsuperscript{168} Davies, supra note 166, at 319–20.
\textsuperscript{170} KRAMAR, supra note 104, at 69.
\textsuperscript{171} See supra § II.
\textsuperscript{172} See generally Brennan, Social Norms and the Law in Responding to Infanticide, supra note 8 (discussing the factors that led to the decline in this crime). See also infra note 194 and accompanying text.
\textsuperscript{173} Ireland’s strict abortion regime is a clear example of this. See supra note 35. However, even in jurisdictions with more liberal laws, abortion may be subject to certain restrictions. For example, in England and Wales, abortions performed outside of the scope of the Abortion Act, 1967, remain punishable by up to a maximum of life imprisonment. Offences Against the Person Act of 1861
sample occurred, it was not something that prevailing patriarchal ideologies which centered on female virtue and the importance of the married family could permit.

What infanticide law and sentencing shows is that although patriarchy sought to retain control over all women’s reproductive lives, occasionally some women, such as those who committed infanticide, were “protected” from the harshness of this system. I argue that ultimately this “compassion” was self-serving because it helped patriarchy to maintain its grip. Like how mercy functions to legitimize an otherwise unfair and harsh law, so too can it be said that it served to legitimize patriarchy because compassionate treatment of the infanticide offender made patriarchy appear less cruel and objectionable. In other words, protecting those few exceptional women who committed infanticide from the full extent of the criminal law did not grant any woman autonomy over her private life. Rather, it helped the state to retain control over all women’s reproductive freedom and choices. As feminist legal scholars have argued, the law is patriarchal in that it serves to maintain the interests of the dominant patriarchal gender order. Infanticide law and punishment is a good example of this.

Related to the legitimating effect mercy had on patriarchy, lenient punishment arguably helped to divert attention from this crime and its causes, which also helped to maintain the patriarchal status quo. Arguably, if women who killed newborn babies had been imprisoned for lengthy terms, this would have drawn greater public attention to this crime, possibly generating debate about the circumstances in which it was committed and the wider structural factors that contributed to it, and leading to calls for legal and cultural reform. A search of the Irish newspaper database, which covers both national and local newspapers, for the period 1950-1975 showed that most of the cases in this sample generated little or no media attention, particularly in circumstances involving the typical concealed birth. Evidently, infanticide was uncontroversial. However, if women had been given much harsher sentences, this might not have been the case. For example, recent controversies which have highlighted the dangerous and cruel effects of strict abortion laws have helped direct attention to this issue, encourage public debate, and garner energy for change. Although in the context of a more liberal society, it does


174. See generally Janet Rifkin, Toward a Theory of Law and Patriarchy, 3 HARV. WOMEN’S L.J. 83 (1980); Smart, supra note 109.

demonstrate that where public attention is drawn to the reality of the impact of harsh rules and laws, this may encourage reform. In this way, mercy allowed patriarchy to continue uninterrupted by the controversy that may have arisen if the worst effects of gender inequality and women’s lack of reproductive autonomy had been laid bare.

So, mercy towards infanticide offenders helped patriarchy to retain its control over women’s reproductive autonomy because it both minimized the impact of the harshness of patriarchal values, laws and structures, and also diverted attention from the crime and its causes. This is not to suggest, however, that it was necessarily the role of the courts to challenge patriarchy or to argue that if they had done so they would have been successful, though some further points will be made on this in the conclusion. For now, the key point is to highlight the link between mercy and patriarchy. In essence, compassionate treatment of the infanticide offender operated on a systematic level as a patriarchal “pressure valve.” It allowed the state to continue to exercise control over women’s reproduction by showing the gentler side of patriarchy and averting potential controversy. In this regard, compassion (paternalism) is a key facet of patriarchy; paternalism helps to preserve patriarchy.

Finally, the above analysis is not to suggest that judges or anyone else involved in lenient criminal justice practices, including those who enacted the infanticide law, were consciously seeking to preserve patriarchal ideologies or laws, or that they did not feel genuine sympathy for these offenders. For example, documents consulted that related to the reform of the law on infanticide during the 1940s show that humanitarian sentiment played an important role in bringing about this legal change.176 However, as Smart notes, the law is not an instrument for the exercise of male power whereby male criminal justice actors seek to use the law for the benefit of men and against women’s interests.177 As Ballinger argues: “the state is patriarchal and the law

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177. Smart, supra note 109, at 137–44.
is androcentric, but not in a simplistic, male-inspired conspiratorial sense. Rather the state’s role in women’s oppression is subtle to the point where it appears to be gender neutral—or even protective towards women—by seemingly regulating the system to prevent further oppression.¹⁷⁸ The infanticide law and sentencing under it is a good example of how the law and legal practice can sometimes benefit women offenders in ways that exclude male offenders from similar benevolent inclinations. Further, it demonstrates that compassion for the offender from individual criminal justice agents and the preservation of patriarchal structures are not necessarily mutually exclusive; in fact, it highlights how genuine individual sentiment towards infanticide offenders functioned as a system to enable the state to preserve patriarchal norms and structures.

CONCLUSION

So where does this leave us in terms of explaining and critiquing punishment of women who killed their babies in Ireland in the 1950s and 1960s? Both approaches explored above—gender construction and paternalism—highlight the link between punishment of women offenders, particularly for gendered crimes such as infanticide, and the preservation of patriarchy, the very structure that contributed to these crimes in the first place. Gender construction theory critiques the way in which women offenders are understood as being irrational, weak, and lacking in agency, and how this serves to deny the structural causes of offending, thus helping maintain patriarchy. Paternalism highlights the link between compassion and control—the way mercy can function as a system to preserve patriarchy by showing that it has a benevolent side and by diverting attention from the inequalities at hand. In the infanticide case, paternalistic treatment of these offenders allowed the state to retain control over women’s reproduction.

Therefore, in seeking to explain lenient treatment of infanticide offenders, gender construction theory and paternalism both reveal that lenience was a part of patriarchy. It reflected patriarchal norms which viewed women as weak and irrational, and served patriarchal interests, particularly with regard to denying women reproductive autonomy. Ultimately, both theories show that lenient sentencing, when it does not include an honest assessment of the mitigating factors involved, especially structural inequality, is problematic because it can serve to maintain such inequalities. On the face of it, then, it might be said that mercy, whether understood as being informed by gender constructions or by the exercise of paternalism, was bad for women because it helped to support patriarchy.

¹⁷⁸. Ballinger, supra note 3, at 474.
Further, the fairness of prosecuting women for this crime in the first place might also be queried because, when we consider the issue of where responsibility lay for these infants’ deaths, it is evident that society and the state bore some of the fault. Ballinger argues that the notion that women who killed their babies in the early twentieth-century in England were treated leniently should be disputed. She states:

“The fact that all women who had killed their biological children were reprieved . . . did not and could not demonstrate ‘leniency.’ . . . Instead we may question the ‘harshness’ of punishment for this offence . . . thereby placing the burden of structural and socio-economic shortcomings and inadequacies on the shoulders of the very poorest and most powerless in society: individual women who were denied the necessary means to keep their children alive.”

In other words, despite that cultural, social, economic, and legal structural factors contributed to this crime, the infanticide offender was the sole focus of the criminal law. We should not, therefore, label the treatment of these women as “lenient,” but instead challenge that they were the target of the criminal law in the first place.

In this regard, West has argued that patriarchy causes harm to women, especially in the context of sexuality and reproduction, with unwanted pregnancy being an instance of such “gendered harm.” The law/the state can play a part in reinforcing and perpetuating “gendered harms.” In the context at hand, patriarchal norms and values, which were embedded in various legal provisions and in the Irish state’s approach to unmarried mothers, caused harm to women. While it may be unduly facile to say that structural inequality automatically leads to offending, it is certainly evident that there was a causal link between the inequality this offender experienced, particularly with regard to her reproductive choices, and infanticide. Looking at infanticide from this perspective, it is possible to see that the harm caused to the baby by its mother was a consequence of the “gendered harm” caused to her by patriarchy, and the state’s adoption of patriarchal values in its laws and policies. The state, therefore, bears some responsibility for this crime. By criminalizing women, the state arguably further compounded the harm to these mothers by holding them solely responsible for their babies’ deaths.

179. BALLINGER, supra note 111, at 73.
180. Supra § II.
181. ROBIN WEST, CARING FOR JUSTICE 165 (1997).
The recent discovery of “significant quantities of human remains” of babies and children, aged between 35 gestational weeks and two/three years and buried between the 1920s and 1950s in an unmarked grave at the site of a former Mother and Baby Home in Tuam, Co. Galway, reinforces this point. The discovery was made following partial excavation of the site by a Commission of Investigation established in 2015 to investigate procedures and practices related to a number of issues, including deaths and burials, at several Mother and Baby Homes around the country. The Commission was set up in the aftermath of the controversy surrounding the findings of an amateur historian who, prompted by local rumors of a mass unmarked grave at the Tuam site, traced the death certificates for 796 children who had died there between 1925 and 1961, but was unable to obtain burial records for all but two cases.

Although there is no suggestion that these children died by violent means, questions have been raised about whether systematic neglect played a part. As Fischer has noted more generally, “there is evidence of harsh, if not
extremely abusive, treatment of those kept in religious institutions of ‘care.’”\footnote{187} The Commission of Investigation, whose terms of reference include investigating the causes, circumstances and rates of mortality of women and children at the institutions within its purview,\footnote{188} is due to report on its findings in February 2019. For now, the most that can be said is that, irrespective of how these babies died, the discovery at the site of the former Tuam Mother and Baby Home is indicative of Irish attitudes to “illegitimate” children, including the circumstances of their lives and deaths, in the early to middle years of the twentieth century. Given how little the state, the law, and wider society cared about the fate of illegitimate children,\footnote{189} the pursuance of homicide charges against women who killed their babies at birth should be contested. It highlights the unfairness and hypocrisy of a system which blamed individual women for a crime that wider society had “antecedently much to answer for.”\footnote{190}

The impact of criminalization on individual women was, however, somewhat alleviated by the infanticide law and sentencing practice under it. In this regard, the authority of both the patriarchal structures involved and of the criminal law to criminalize and punish in these circumstances, and particularly to lay fault solely on the individual woman, was essentially legitimized by merciful treatment which allowed women to be convicted of a less serious homicide offense and essentially avoid punishment. As Norrie has argued, the criminal law plays a political function in that it keeps social conflicts, particularly class based inequality between rich and poor and the fact that the criminal law is used primarily by the former against the latter, out of the courtroom.\footnote{191} The Infanticide Act and sentencing under it certainly kept the conflicts created by patriarchy away from the courtroom, first by ostensibly pathologizing this offender, blaming the crime on her individual vulnerability, and, second, through merciful treatment which served to further divert attention from her crime and its causes. Indeed, not only did the law and practice in these Irish infanticide cases serve to keep the conflicts of patriarchy out of the courtroom, and to disguise the unfairness of targeting these women for criminalization in the first place, it also helped to sustain unfair and unequal patriarchal structures outside of that context.

\footnote{187} Fischer, \textit{supra} note 43, at 827. This comment is not restricted to mother and baby institutions but also to Magdalene asylums and industrial and reformatory schools.
\footnote{188} Commission of Investigation (Mother and Baby Homes and Certain Related Matters) Order 2015, Statutory Instrument number 57 of 2015, schedule (1) II, III, IV.
\footnote{190} \textit{Royal Commission on Capital Punishment}, in \textit{21 British Parliamentary Papers} 476 (1866). Rev. Ld. S. G. Osborne made this comment when giving evidence before the Royal Commission on Capital Punishment in 1866.
\footnote{191} Norrie, \textit{supra} note 6, at 223–25.
The question that then arises is: what is the appropriate criminal justice response to infanticide? Given the circumstances involved, and, in particular, the role of patriarchy, should women who conceal their pregnancies and kill their babies at a secret birth not be subject to the criminal law? Or, should the wider context serve to mitigate the crime, and, if so, what should this mitigation be based on—the reality of socio-political inequality, or a gender construction that masks the role of patriarchal values, laws and structures, as well as other socio-political inequality, in the commission of the offense? The question of whether the offense should be subject to the criminal law is too complex to address here, so I will limit my conclusions to the matter of mitigation. The following discussion has meaning not only to the Irish experience, but also to how other jurisdictions, including but not solely those with similar infanticide statutes, treat women who kill their newborn or young babies.

The analysis in Sections IV and V above highlights that mercy towards infanticide offenders can help to maintain patriarchy by allowing the state to retain control over women’s reproduction, and how a construction of the offender that reflects stereotypical views of women as being mentally unstable denies the structural causes of offending, which also serves patriarchal interests. In the end, the criminal justice response helps preserve the patriarchal status quo. However, while mercy and gender constructions may be criticized, the question arises as to whether we should abandon these approaches. Although mercy towards the Irish infanticide offender in the 1950s through to the early 1970s helped the state retain control of all women’s reproduction, we wouldn’t necessarily want vulnerable women to have suffered more punishment simply to have provoked a challenge to patriarchal rules. Further, as discussed above gender constructions that deny the offender’s agency, while not ideal, are, when we take the wider context of the criminal law into account, an unfortunate necessity, and, in the context of the Irish infanticide law and practice, allowed for an imperfect contextualization of her crime with minimal criminalization. As argued in section IV, unless we challenge one of the core theoretical foundations of the criminal law, namely that the socio-political context of offending is irrelevant to ascribing criminal liability and punishing, it seems it would be impossible to provide for lenient treatment without in some way highlighting the offender’s lack of agency. In some respects, therefore, flawed as the approach may have been from a theoretical

192. See Michelle Oberman, Mothers Who Kill: Coming to Terms with Modern American Infanticide, 34 AM. CRIM. L. REV. 1 (1996–19–97) (discussing how women accused of killing their babies are treated in different jurisdictions across the United States, and highlighting disparate criminal justice responses—ranging from very lenient to very harsh disposals—in cases with similar facts).

193. See supra notes 150–53 and accompanying text.
perspective, the Infanticide Act and the punishment regime that operated under it was the best outcome for the cases in this sample.

However, given the undesirable implications of this for women's equality and rights, it is argued that a preferable outcome would involve something very different. As is evident from this study of infanticide sentencing in Ireland, mercy coupled with a failure to openly address the contribution of patriarchal values and laws to infanticide is problematic for a number of reasons. First, it is unfair to individual offenders who, even if they were leniently punished, still officially bear sole blame for the crime. Second, it is unfair to women in general because it helps facilitate the continuation of structures that deny them reproductive autonomy and choices around motherhood. Finally, it is unfair to potential victims because, in allowing the causes of infanticide to remain unchecked, it does nothing to help prevent future crimes.

This brings us to the relationship between structural equality, including in the case of infanticide having genuine and supported reproductive choices, criminal offending, the prevention of crime, and the role of courts. In the context of infanticide, there are two desired goals, in addition to ensuring fair treatment of women who commit this crime. First, from a crime prevention perspective, the reduction or elimination of infanticide. Second, from a woman's equality perspective, the realization of the principle that women should have full reproductive autonomy, including the ability to have children outside of marriage without the risk of cultural stigmatization, and the opportunity for all mothers to benefit from adequate support of a financial, emotional, and practical nature. These goals are not mutually exclusive. As noted in Section II, infanticide, especially of newborn infants, was inextricably linked to structural inequality and the denial of reproductive autonomy for Irish women during the period under review in this study. It is no coincidence that, as Irish society began to slowly liberalize and as women gained more equality and better reproductive options in the late 1960s/early 1970s, but particularly from the 1980s onwards, infanticide as a crime virtually disappeared from Irish criminal statistics.\(^{194}\) Drawing on this experience, it seems that what is needed to prevent, or at least reduce, infanticide is not harsh punishment of offenders, but structural reform. I do not mean to claim that structural changes would wholly eradicate infanticide, as undoubtedly there are other factors that can lead to this crime. However, I do suggest that if women can choose, without negative economic, social and personal consequences, whether to be mothers and in what circumstances, and without the expectation that the ideal context in which to do this is within the married family, this would go a long way towards preventing infanticide.

\(^{194}\) See Shane Kilcommins, supra note 56, at 117 (arguing that the decline in infanticide reflects the changed social and moral environment, particularly the fact that giving birth outside of marriage no longer attracts a significant social stigma and the risk of institutionalization).
The fact that infanticide, particularly of newborn babies, has largely disappeared from Irish criminal statistics and is no longer prosecuted does not make this point redundant. First, although there has been a significant decline in infanticide over recent decades, this does not mean that this crime will never occur again, and while women have made important gains in terms of reproductive rights, much more needs to be achieved, not least in relation to abortion. Second, although the Irish criminal authorities have, since the mid-1980s, tended not to prosecute cases of infanticide, this does not mean that women will never again be the subject of criminal proceedings for this offense. Indeed, as I argue elsewhere, the criminal justice response to infanticide in Ireland during the twentieth and into the twenty-first century was informed by social norms about the appropriate response to this crime. As these norms shift, so too can we expect criminal justice agents, namely the Garda and prosecutors, to adapt their approach to this offender. Further, the fact that the criminal authorities have tended to avoid prosecuting the rare cases of infanticide that have come to their attention over the last few decades is itself possibly another example of well-meant but ultimately problematic lenient treatment of women who kill their babies. Again, attention is diverted from the crime, and questions about why it would continue to occur, albeit infrequently, in a more liberal country where women supposedly can prevent pregnancy or chose to be mothers outside of marriage, are potentially suppressed.

Finally, the argument made here about the link between lenient treatment of women who kill their babies and the preservation of patriarchal structures, and the suggestion that a more honest appraisal of criminal responsibility that takes account of the role of structural factors rooted in gender inequality would be preferable, has resonance beyond the Irish context. Although it is outside the scope of this Article to explore the extent of infanticide in other jurisdictions or its causes, it is not untrue to say that this is a crime that has not disappeared entirely from Western society. Further, it is probably fair to say that where infanticide does occur it continues to be rooted in patriarchal attitudes to women and related ideas about appropriate motherhood, alongside wider issues of gender and other socio-political inequality. This is true whether the crime

195. See supra notes 54, 175.
196. See generally, Brennan, Social Norms and the Law in Responding to Infanticide, supra note 8.
197. For an example of a study of contemporary infanticide in America, see Oberman, supra note 192. See also Mackay’s study for the Law Commission in England and Wales in its 2006 report on homicide, in which he identifies 49 infanticide convictions over the period from 1990 to 2003; this number did not include women who killed their babies but who were convicted of other offenses. Ronald D. Mackay, Infanticide and Related Diminished Responsibility Manslaughters: An Empirical Study, in MURDER, MANSLAUGHTER AND INFANTICIDE 193, app. D (Law Commission 2006).
involves newborn or older babies. Certainly women in many Western societies have made significant advances in terms of equality and their reproductive rights since the 1960s (e.g., through medical advances in birth control and the legalization of contraception; social welfare payments to unmarried mothers; greater cultural acceptability of having children outside of marriage; and in some cases, access to abortion). However, there still remain significant areas of patriarchal control of women's reproduction, and women face many barriers and difficulties in relation to their choices around motherhood (such as restrictions on abortion, poor sex education, lack of access to contraception, lingering social disapproval of "single mothers," lack of wider social support for new mothers, the burden of child-care falling largely on women, and unaffordable child-care).

As Meyer and Oberman have argued, "[i]nfanticide is not a random unpredictable crime. Instead it is deeply imbedded in and is a reflection of the societies in which it occurs. The crime of infanticide is committed by mothers who cannot parent their child under the circumstances dictated by their unique position in place and time." Although, as already stated, it would be overly simplistic to claim that structural inequality automatically leads to crime, historically it has certainly been a very potent factor in the case of infanticide; it would be unsurprising if this continued to be the case, despite advances in women's rights since the mid-twentieth century. Arguably, then, one way to prevent or at least reduce infanticide is structural reform which grants women full reproductive autonomy and which provides mothers with social and other support. This would include access to contraception, sex education and abortion services; a cultural shift in attitude towards unmarried mothers which would destigmatize those who give birth outside of the patriarchal family; a strong social safety net with decent welfare support for women and their children; and well-paid job opportunities with affordable childcare.

This brings us to the role the courts. Criminal courts, one function of which is arguably to prevent crime, may have a part to play in drawing attention to the

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198. See generally MICHELLE OBERMAN & CHERYL L. MEYER, WHEN MOTHERS KILL: INTERVIEWS FROM PRISON (2008). In this study, which was based on interviews with eight women convicted of child homicide offences in the US involving newborn and older children, Oberman and Meyer highlight the importance of social support for mothers in helping to prevent filicide (a term that would include children over one year—infanticide as a term is limited to infants), stating: "The absence of support is a constant factor underlying the various categories of mothers who kill their children... At their core, the stories of mothers who kill their children are stories about isolation, and the struggle to be a parent in the absence of a reliable community." Id. at 131. They also highlight the role of cultural assumptions about motherhood, which expect women to "cope with and indeed revel in motherhood," something which makes it difficult for women to admit to the difficulties of mothering and ask for help. They add, "[h]erein lies the most significant roadblock to preventing infanticide: the lack of nonjudgmental resources for mothers and children." Id. at 137.

structural causes of infanticide. Having a more honest conversation in the courtroom about why women kill their babies, including the contribution of patriarchy and related gender inequality, may prompt a wider discussion about what should be done at a structural level to prevent infanticide. However, as noted, the limitations imposed on the courts by criminal law doctrines, even with the wider interpretation taken of the mental disturbance rationale in Infanticide Acts, make it difficult for them to engage with the wider socio-political causes of offending, especially on the question of the attribution of criminal liability. Further, there may be no scope to do this in cases where women plead guilty, which many of the accused in this Irish sample did.

Yet, depending on how constrained judges are by the sentencing framework, there may be some space around discussions on punishment to engage in a more honest conversation about the structural causes of the offense. This would not necessarily mean denying individual responsibility, rather that it may be located within the context of gender inequality, lack of reproductive choice, poverty, and other structural causes of the crime. Further, where sentencing rules allow for flexibility, for example in taking account of aggravating and mitigating circumstances, it may be possible to appropriately mitigate the offender’s responsibility without recourse to false gender constructions, leading to fairer punishment of the offender. In addition, as suggested, an open confrontation with the socio-political causes of this offense in the courtroom may attract wider public attention, particularly from the media, politicians, and policy and lawmakers, possibly stimulating discussions about why women kill their babies, and encouraging an agenda for structural reform. Any subsequent structural reform would benefit all women in their choices around motherhood, and, consequently, reduce the crime of infanticide.

In conclusion, in any jurisdiction where structural factors play an important role in the commission of infanticide offenses, these factors should be openly acknowledged. If infanticidal women are to be criminalized, the criminal justice system should not add further to the “gendered harm” these women have already experienced. Further, prevention of infanticide and equality for women go hand in hand, and neither will be achieved by viewing this crime through false constructs which either deny or emphasize rationality because, in both instances, the structural causes are ignored. Thus, where possible, the courts should strive to highlight the link between gender inequality and infanticide and should be willing to openly take the relationship into account in sentencing as part of the mitigation for the crime.

200. See supra note 101.
201. At least 22 of the 31 women convicted of infanticide in Ireland since 1950 pleaded guilty to that offense. Brennan, Social Norms and the Law in Responding to Infanticide, supra note 8.
202. West, supra note 181.
I do not doubt that this is a contentious argument to make, given the criminal law's deeply ingrained individualized approach to assigning and punishing criminal responsibility. There would be problems, of course, in getting judges to recognize the non-individualized causes of infanticide, to accept that these should play a legitimate role in how offenders are understood and punished, and to openly admit to the role of such factors in sentencing decisions. More importantly, they are likely to be hindered by norms and rules in sentencing practice which mean that socio-political factors can be of limited or no relevance. Nonetheless, as this study of infanticide in Ireland demonstrates, where a crime is embedded in structural inequality, lenient treatment of the offender that fails to openly acknowledge the role of those inequalities not only helps to preserve the laws, values, and norms that contributed to the crime in the first instance, but also allows such factors to remain hidden and so does nothing to help prevent future crimes. In other words, even if, at the end of the day, women who kill their babies are leniently sentenced, it is imperative that courts do more to identify and engage with the wider socio-political context of the crime; to acknowledge, where appropriate, that these factors mitigate the crime; and to at least initiate a conversation about why women kill their babies.

This study of infanticide provides a good illustration of how crime should not be isolated from its structural causes, and how offenders should not be understood as one-dimensional constructs, whether they are "mad/sad/bad" women, or rational abstract men. The lessons from this infanticide study are particularly instructive in highlighting the shortcomings of the criminal law, particularly when structural inequality is one of the root causes of crime, and so may offer insights into the approach to be taken to other offenders, notably where the crime they commit is unambiguously embedded in socio-political inequality, whether this is due to gender, race, or class. It also shines a light on the role of the courts, especially during sentencing, in trying to understand criminal offenders in a more sophisticated way so as to ensure that, if individuals are to be blamed and punished for their offenses, that this also takes account of wider socio-political factors, and, where appropriate, such factors should be worthy of consideration in mitigation. In so doing, the courts will arguably reach fairer outcomes for individual offenders, without disguising the role of unequal social and political structures, and possibly in this way help challenge wider injustice and reduce crime.

What is needed, therefore, is a reorientation of the criminal law away from a decontextualized allocation of responsibility. I do not underestimate not only the controversial nature of this suggestion, but also the complexity of issues it gives rise to. As such, it is suggested that as a starting point we, academics, lawyers, judges, politicians, and the public, should have a conversation about the merits, risks, and other implications, good or bad, of taking a more
contextualized approach to criminal offending. Some factors that could be considered are whether the socio-political context should be relevant only to certain kinds of crimes (such as those where, as with infanticide, the crime is clearly embedded in unequal structures and where there is an evident desire to treat the offender more leniently as a consequence), or could be claimed by all offenders; whether structural factors should be taken into account in attributing criminal responsibility, or only as mitigation in punishment, or both; if the criminal law did shift towards taking account of such factors, what limits, if any, should be placed on this, and, in particular, how this should be balanced against other factors like protecting the public and vindicating victims' rights.