

Murdering Mothers & Gentle Judges: Paternalism, Patriarchy and Infanticide

Karen Brennan*

Anne, a 20-year-old trainee nurse in England, became pregnant by a US 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:

‘[i]mmediately 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 this 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 a recognizance to keep the peace for five years.¹

This article provides a first critical study of Irish judicial approaches to sentencing women convicted under the Infanticide Act 1949. Through an analysis of archival material, it will be shown that women convicted of infanticide, a homicide offence carrying a maximum of life imprisonment, were given exceptionally lenient sentences, with very few of these offenders being imprisoned following conviction. In the wider context of harsh and restrictive attitudes

* Dr Karen Brennan is a lecturer in law at the University of Essex. She expresses her gratitude to Profs Sabine Michalowski and Lorna Fox-O’Mahony for their very helpful comments on earlier drafts of this work.

¹Anne G (1959): National Archives of Ireland, State File Circuit Criminal Court, IC/14/129 (Co. Donegal, 21 Jul. 1959); Report of the Commissioner of the Garda Síochana on Crime for the Year ended 30th September 1959 (no publication details), Appendix D “infanticide” (no page number), available at <http://www.garda.ie/Documents/User/3%201959%20Commissioners%20Report.pdf>, accessed 9 May 2017; and *Suspensory Sentence on St. Johnston Girl*, Donegal Democrat, 31 Jul., 1959, at 6.

to female sexuality, and particularly to unmarried mothers, 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, infanticide sentencing will first be examined against existing feminist literature which 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, 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.² Drawing on the good/bad analytical framework, it will be shown 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 it will be shown how sentencing practice in infanticide cases also had the effect of serving patriarchal interests, helping to maintain patriarchal laws and cultural values which placed women in a grossly unequal position in Irish society, particularly with respect to their reproductive autonomy. It will be argued 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 which is more pernicious because, whilst beneficial to the individual women who appeared before the courts, it ultimately served the needs of the patriarchal state.

² For example, see generally Anne Worrall, *Offending Women: Female Lawbreakers and the Criminal Justice System* page (1990); Belinda Morrissey, *When Women Kill: Questions of Agency and Subjectivity* page (2003); Irene Armstrong, *Women and their ‘Uncontrollable Impulses’: The Medicalisation of Women’s Crime and Differential Gender Sentencing*, 6 *Psychiatry Psychol. & L.* 76 (1999); Anette Ballinger, *Masculinity in the Dock: Legal Responses to Male Violence and Female Retaliation in England and Wales, 1900-1965*, 16(4) *Soc. Legal Stud.* 459 (2007).

The role that sentencing plays in maintaining the patriarchal social order has already been highlighted by Ballinger³ 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. Whilst 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, some limitations of this approach will be argued, including that these 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 treatment of the infanticide offender under the infanticide law was problematic, and there are theoretical, moral, and pragmatic issues to consider here.

The Infanticide Act 1949, 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,⁴ and the importance of social norms in the creation of this statute and the way it was subsequently implemented by the courts.⁵ In a previous article, I also explore the role of pragmatic and ideological (gendered) considerations in how women convicted of infanticide-related offences prior to the enactment of the 1949 law, particularly with regard to the use of religious institutions as an alternative to imprisonment in these cases.⁶ Whilst 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

³ Ballinger, *supra* note 2.

⁴ Karen M Brennan, ‘A Fine Mixture of Pity and Justice:’ *The Criminal Justice Response to Infanticide in Ireland 1922-1949*, 31(4) *Law and History Review* 793 (2013)

⁵ Karen Brennan, *Social Norms and the Law in Responding to Infanticide* (April 2017) (unpublished article) (under review at Legal Studies)

⁶ Karen Brennan, *Punishing Infanticide in the Irish Free State*, 3 (1) *Irish Journal of Legal Studies* 1 (2013)

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.

The infanticide law 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 the wider social, economic, and/or political inequalities played an important part in the commission of the offence, and where, as a result, a compassionate 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.⁷ 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.

This article is broken into five sections. Section I explores the crime of infanticide in Ireland during the 1950s and 1960s and the role of patriarchal values, laws and structures in this crime. Section II presents original research data on sentencing of women convicted of infanticide under the Infanticide Act 1949, during the period 1950 to 1975. Section III critiques the approach taken to punishment women for infanticide utilizing gender construction theory. Section IV develops this analysis further through the concept of 'paternalism'. Section V concludes the article.

⁷ See Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* ch. 1, 2, 11 (2d ed. 2001).

I. The crime of infanticide, law reform and the role of patriarchy

Following the English model of 1922/1938, the Irish legislature adopted a specific infanticide statute in 1949.⁸ The legislation allowed for a woman who willfully killed her infant aged under 12 months in circumstances which would have amounted to murder, to be tried for or convicted of “infanticide”, where the balance of her mind was disturbed by the effect of childbirth or lactation consequent on this.⁹ The maximum sentence was life imprisonment.¹⁰

This law was enacted at a time when murder was punished by a mandatory death sentence,¹¹ 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.¹² As a result, ad hoc practices developed to avoid murder convictions and sentences in cases of maternal infant-murder.¹³ The infanticide statute was enacted to formalize the ad hoc lenient response.¹⁴ Strictly speaking, the infanticide reform wasn’t needed in order to provide for compassionate treatment of women who killed their babies because for years legal practice had ensured a lenient

⁸ The Infanticide Act, 1949, following the English/Welsh Infanticide Act, 1922, 12 & 13 Geo. V, c. 18; and Infanticide Act, 1938, 1 & 2 Geo. VI, c. 36.

⁹ Infanticide Act 1949, §1. Infanticide was defined as follows: “A woman shall be guilty of felony, namely infanticide if – (a) by any wilful 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)). 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)).

Under section 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 offence. When the accused was forwarded on the reduced charge she would be tried as for manslaughter (section 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 (section 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, *supra* note 5.

¹⁰ Infanticide Act 1949, §1(3) provided that infanticide would be punished as for manslaughter.

¹¹ Capital punishment was abolished for “ordinary” murders in 1964 when the death penalty was limited to murders involving political related killings and, murders of on-duty Garda (police) and prison officers: Criminal Justice Act, 1964, §1. Non-capital murder was punished by penal servitude for life: Criminal Justice Act, 1964, §2. Capital punishment was completely abolished in 1990: Criminal Justice Act, 1990, §1. 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(1) J. Leg. Hit. 65 (2012).

¹² See generally Brennan, *supra* note 4.

¹³ *Id.* at 811-18.

¹⁴ *Id.* at 832-33 and *passim*.

outcome.¹⁵ However, the infanticide law, by creating a specific rationalized mechanism for mercy, which 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, because it spared this offender the threat of a capital trial/conviction.¹⁶ Allowing for, and formalizing, flexible sentencing was a key motive for this reform, and the “mad” construct was employed to facilitate this.¹⁷

I have argued elsewhere that it is crucial to take account of the importance of the wider social context and related social norms in the legal response to infanticide, both before and after the enactment of the 1949 law.¹⁸ In particular, it is 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.¹⁹ The crime was inextricably linked to illegitimacy and the inequitable position of women in general and the unmarried mother in particular in a patriarchal society. Ireland emerged as a patriarchal society in the social and economic fallout of the Great Famine of the mid-nineteenth century. Middle-class farming interests required a patrilineal system of inheritance which meant that extra-marital sex and illegitimacy could not be tolerated; daughters especially were held to high standards of sexual purity. These values were disseminated to the remainder of society through the teaching of the catholic church.²⁰ Patriarchal values and interests were consolidated in the state and its laws following independence from Britain in 1922, and 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.²¹

¹⁵ *Id.* at 811-18, 827-33.

¹⁶ *See generally id.* at 827-33.

¹⁷ Discussed further *infra* text at note 68-72.

¹⁸ Brennan, *supra* note 5.

¹⁹ *See generally*, Clíona Rattigan, ‘What else could I do?’: *Single Mothers and Infanticide, Ireland 1900-1950* ch. 1 (2012).

²⁰ *See generally*, Tom Inglis, *Truth Power and Lies: Irish Society and the Case of the Kerry Babies* 133-34 (2003); Joseph J. Lee, *Women and the Church since the Famine*, in *Women in Irish Society: The Historical Dimension* 37-45 (1978); Rita M. Rhodes, *Women and Family in Post Famine Ireland: Status and Opportunity in a Patriarchal Society* ch. 3 (1992).

²¹ *See generally*, Maryann Gialanella Valiulis, *Gender, Power and Identity in the Irish Free State*, 6(4)/7(1) *Journal of Women’s History* 117 (1995); Maryann Valiulis, *Neither Feminist nor Flapper: the Ecclesiastical Construction of the Ideal Irish Woman*, in Chattel, *Servant or Citizen: Women’s Status in Church, State and*

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.²² The woman's role within this gender order was to be domestic and pure.²³ Women were expected to be mothers, but only within the married family; otherwise, they were to remain as chaste unmarried sisters and daughters. As Earner-Byrne notes: “[i]n the Irish ‘social order’ the concept of illegitimacy extended in practice, if not in name, to the unmarried mother: she was an illegitimate mother. The status of motherhood was legitimated by marriage.”²⁴ Unmarried mothers, already culturally condemned, attracted particular official attention from the state and church, and there was much discussion on what should be done about these problematic women.²⁵ Although the idea of compulsory state imposed confinement within religious-run institutions, such as Magdalen laundries, was touted, and was evidently considered to provide a suitable solution, this was never officially endorsed via legislation allowing for compulsory confinement of unmarried mothers.²⁶ Unofficially, however, the reality for women was that, if not supported by the father of the child or their families, they had little option but to rely on religious-run establishments, such as mother and baby homes, and some were sent there by their families.²⁷

Society 168-78 (1995); Maria Luddy, *Sex and the Single Girl in 1920s and 1930s Ireland*, 35 *The Irish Review* 79, 80-81 (2007); Louise Ryan, *Gender, Identity and the Irish Press, 1922-1937: Embodying the Nation* 257-59 (2002).

²² See generally, *id.*

²³ See both pieces by Valiulis, *supra* note 21.

²⁴ Lindsey Earner-Byrne, *Mother and Child: Maternity and Child Welfare in Dublin, 1922-1960* 172 (2007)

²⁵ 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, 105-106 (2006); Ryan, *supra* note 21 at 257-60; Maria Luddy, *Prostitution and Irish Society* 194-97, 200-3 (2007); Luddy, *supra* note 21 at 79-91; Valiulis, *supra* note 21 (*Neither Feminist nor Flapper*).

²⁶ Luddy, *supra* note 25 at 117-123, 201-203, 235-237; Earner-Byrne, *supra* note 24 at 182-90; Paul Michael Garrett, “*Unmarried Mothers*” in *the Republic of Ireland*, 16(6) *Journal of Social Work* 709 (2016); Carla Fischer, *Gender, National and the Politics of Shame: Magdalen Laundries and the Institutionalisation of Feminine Transgression in Modern Ireland*, 41(4) *Signs* 821, 825-32 (2016).

²⁷ 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 Magdalen asylums found that 10.5 per cent 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 Department of Justice, *Report of the Inter-Departmental Committee to Establish the Facts of State Involvement with Magdalen Laundries*, chapter 18 (2013), available at [http://www.justice.ie/en/JELR/2013Magdalen-P%20IV%20Chapter%2018%20Non%20State%20Routes%20\(PDF%20-%20347KB\).pdf/Files/2013Magdalen-P%20IV%20Chapter%2018%20Non%20State%20Routes%20\(PDF%20-%20347KB\).pdf](http://www.justice.ie/en/JELR/2013Magdalen-P%20IV%20Chapter%2018%20Non%20State%20Routes%20(PDF%20-%20347KB).pdf/Files/2013Magdalen-P%20IV%20Chapter%2018%20Non%20State%20Routes%20(PDF%20-%20347KB).pdf), accessed 15 May 2017.

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".²⁸

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 a vehicle for 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.²⁹ 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;³⁰ 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, healthcare.³¹

There are many examples of how patriarchy was embedded in the Irish state, and how the consequences of post-independence patriarchal gender ideology had a real practical impact on women and their choices, particularly in the area of reproductive autonomy. 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".³² 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 on the sale and importation of contraceptives.³³ This

²⁸ *Supra* note 26 at 821.

²⁹ See generally, R.W. Connell, *The State, Gender and Sexual Politics: Theory and Appraisal*, in *Power/Gender: Social Relations in Theory and Practice* 136, 142-46, 163 (1994)

³⁰ *Id.* at 155-57.

³¹ *Id.* at 159.

³² Siobhán Mullally, *Debating Reproductive Rights in Ireland*, 27 *Hum. Rts. Q.* 78, 83 (2005).

³³ The Criminal Law Amendment Act, 1935, §17, prohibited selling, exposing, offering, advertising or keeping for sale or importing or attempting to import for sale contraceptives. For discussion see Sandra McAvoy, *The Regulation of Sexuality in the Irish Free State, 1929-1935*, in *Medicine, Disease and the State in Ireland, 1650-1940* 253 (1999).

remained in place until the 1980s.³⁴ Abortion was, and remains, a criminal offence, legally available only in exceptionally limited circumstances.³⁵ As already noted, women were stigmatized when they became pregnant outside of marriage and faced potential institutionalisation. State financial support for unmarried mothers only became available in the early 1970s,³⁶ and cultural intolerance of unmarried mothers only began to shift in the 1980s.³⁷ 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 and laws which, until the latter decades of the twentieth century, essentially debarred sexually active women from both preventing pregnancy and from being mothers outside of the married state.

It was in this context that the Infanticide Act was enacted and subsequently applied. The infanticide law provided for lenient punishment of women who murdered their babies by allowing for conviction for a less serious form of homicide which 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 which 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 these issues are explored, sentencing practice in cases where women were convicted of infanticide will be discussed.

³⁴ Restrictions were incrementally loosened from 1979 onwards. See for example, Health (Family Planning) Act, 1979, § 4, 5 & 13; Health (family Planning) Amendment Act, 1985, §2; Health (Family Planning) Amendment Act, 1992. See generally Chrystel Hug, *The Politics of Sexual Morality in Ireland* 86-91 (1999).

³⁵ Abortion was criminalised prior to independence under the Offences Against the Person Act, 1861, §58, 59, 24 & 25 Vict. C. 10 (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 liberalisation of Ireland’s abortion law, as had occurred in England and Wales in 1967 (the Abortion Act 1967, c.87) and in the U.S.A in the 1970s (*Roe v Wade* 410 Q.A. 113 (1973)). *Bunracht na hÉireann*, Art 40.3.3 provides (by virtue of the “Eight 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.” As a result, abortion is only available in Ireland where there is a real and substantial risk to the life (but not the health) of a pregnant woman, which includes a risk of suicide: *The Attorney General v X* [1992] 1 I.R. 1. In 2013, the Irish Parliament legislated to reflect this constitutional provision, as interpreted by the “X case”: Protection of Life During Pregnancy Act, 2013. Abortions in cases falling outside the scope of the very narrow exceptions provided for under this statute are criminalized and punishable to a maximum of 14 years’ imprisonment: Protection of Life During Pregnancy Act, 2013, §22. For further detail, see Ivana Bacik, *A History of Abortion Law in Ireland and Prospects for Change*, 20(2) M.L.J.I. 75 (2014).

³⁶ Social Welfare Act 1973, §8.

³⁷ Inglis, *supra* note 20 at 125-26, 141-43. 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 32 percent of all births: see Shane Kilcommins, et. al, *Crime, Punishment and the Search for Order in Ireland* 117 (2004).

II. Irish Infanticide Sentencing

With the enactment of the 1949 Infanticide Act, the new offence of “infanticide” effectively supplanted murder, manslaughter and concealment of birth, as a conviction option in cases where women killed their babies.³⁸ In a sample of 38 cases where a woman was charged with the murder of a baby between 1950 and 2015, 92.3 per cent (36) were disposed of under the infanticide statute, and 86 per cent of these cases resulted in a conviction.³⁹ Most of these cases involved newborn victims. These cases all took place between 1950 and 1975. Since then there have been very few recorded instances of infanticide and, since the 1980s, none of these cases have been prosecuted.⁴⁰

Overall, according to information in crime statistical records, 31 women have been convicted of infanticide since the enactment of the 1949 Act (these cases all occurred during the period 1950-1975). In the research conducted for this study, sentencing information is available for 29 of these cases.⁴¹ Sentencing outcomes are summarized on Table A.

³⁸ Brennan, *supra* note 5.

³⁹ The infanticide legislation required that women first be charged with murder before they could avail of the infanticide option: see *supra* note 9.

⁴⁰ *Id.*

⁴¹ This study focuses on those sentenced under the Infanticide Act, 1949, between 1950 and 2015. It is based on information available in official criminal records and newspaper articles. According to information in these sources, the cases in this study comprise a complete, or almost complete, sample of those sentenced under the infanticide statute since 1950; there are three cases in the records, 1977, 1978, 1980, involving proceedings against a person for the murder of an infant where the outcome is not recorded and where a sentence under the 1949 law may have resulted. The last recorded infanticide conviction and sentence noted in the records was in 1973. Since then the incidence of this crime has fallen (only 15 cases were 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; for further discussion see Brennan, *supra* note 5.

The primary source relied on in this study was the annual Report of the Commissioner of the Garda Síochána on Crime (hereafter RCGSC), covering the years 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, it 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 outcome, including the sentence imposed. Whilst the RCGSC provides information on sentence for 28 of the 29 cases in this sample, a note of caution is needed because 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 that the RCGSC did not always include all of the requirements that had been added to the disposal. The RCGSC can be accessed at the National Library of Ireland, or online at:

<http://www.garda.ie/controller.aspx?page=90>.

For the years 2006 to 2015 the Central Statistic Office’s criminal statistics, which provide information on the number of reported crimes, proceedings and outcome (but not sentence), were consulted. There were no infanticide convictions recorded during this period: Central Statistics Office, CJA01, Recorded Crime Offences

by Type of Offence and Year, available at:

<http://www.cso.ie/px/pxeirestat/Statire/SelectVarVal/Define.asp?maintable=CJA01&PLanguage=0>, accessed 23 October 2015.

The second key source consulted was the State Books for the Central and Circuit Criminal Courts (hereafter SBCCC and SBCrtCC respectively). These court records are held at the National Archives of Ireland (hereafter NAI) and provide an index to all criminal cases appearing for trial on indictment at either court. The record includes information on the outcome of the proceedings and sentence, and as the official court record is likely the most reliable source for sentencing information. However, unfortunately, there are significant gaps in the availability of these records at the NAI, particular from the 1960s onwards and at circuit court level, and so they could not be relied upon as the main source for sentencing information in this study. I was able to obtain a state book record for only 11 cases in the sample. The State Files for the Central and Circuit Criminal Courts were also consulted (hereafter SFCCC and SFCrtCC respectively). This record does not include information on the outcome of criminal proceedings or sentence, but contains witness depositions from the District Court and the accused's Garda statement(s) at time of arrest, which allow for information on the circumstances of the crime to be pieced together. Again, there was limited access to these records, and state files were found for 15 of the 30 cases disposed of on indictment under the 1949 law (this includes cases where 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 were sentenced at the District Court following a summary disposal.

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 and national media. For example, even where the initial district court appearing was reported limited information was provided on those proceedings and there was usually no follow-up report on the subsequent trial or sentence.

Where possible information provided in the RCGSC was verified through an available state book or newspaper article. As noted there were some minor discrepancies in some cases in that the RCGSC sometimes did not record all the additional sentencing requirements. For example, the fact 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. There were 11 cases in total where the RCGSC was the only source of information on sentence and so it is possible that in some of these cases additional requirements were imposed on the offender which are not recorded. Nonetheless, the RCGSC does provide a sufficiently good indication of the general sentence – e.g. where it was custodial or non-custodial, the sentence length, whether it was suspended.

Table A: Summary of Sentences Imposed

| Sentence (Main requirement) | Number (29) |
|--|-----------------------|
| Custody | 18 |
| Served | 2 |
| Suspended | 16 |
| Probation/recognisance | 6⁴² |
| Other | 5 |
| <u>Specific requirements attached to above:</u> | |
| 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 |

It is evident from the above table that, despite the fact that infanticide is a mitigated form of murder which carries a maximum penalty of life imprisonment, punishment was overwhelmingly lenient. Whilst custodial sentences were imposed in most cases (62.1 per cent), the vast majority of these (88.9 per cent) were suspended. Indeed, only 2 women in the sample spent any time in prison, in one case for 13 weeks and in the other for 3 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 12 months; one woman was given inpatient

⁴² In one case where the offender was disposed of at the District Court the Probation of Offenders Act, 1907, was applied “without conviction”. Unknown name (Co. Cavan, 1964): RCGSC for the Year ended 30th Sept. 1964 (The Stationery Office: Dublin, Pr 8202), Appendix D “infanticide”, available at <http://www.garda.ie/Documents/User/1964%20Commissioners%20Report.pdf>, accessed 9 May 2017.

hospital treatment (between six to 12 months); and, finally, one was ordered to come up or sentence when called. Overall, the approach taken reflects the trend elsewhere in relation to infanticide sentencing, whereby women are rarely imprisoned for this offence.⁴³ However, in this regard it is important to note that whilst the infanticide law recognized that a more lenient criminal justice response was needed and facilitated this, it did not generate nor mandate lenient inclinations. Even prior to the infanticide reform in Ireland, women who killed their babies at birth were generally not imprisoned.⁴⁴

Women given a suspended sentence or a probation order on an infanticide conviction were required to abide by particular conditions, the most common of which was a requirement to keep the peace and/or be of good behavior for a specified period (normally no more than two years). However, other more onerous conditions were sometimes attached, including, requirements which 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 onwards, three women were given a period of institutional residence. One offender, a domestic servant who had given birth in bed one night at her parent's home and killed the child at birth, undertook to enter a Good Shepard Convent for not less than six months but not more than 12 months, "as the nuns decide".⁴⁵ Another woman who pleaded guilty to infanticide on a charge of murdering her unnamed infant, undertook to reside at a convent for 12 months as part of a recognisance/probation order.⁴⁶ Finally, one woman, who killed her newborn infant by sticking toilet paper into its mouth, given a suspended sentence at the Central Criminal Court after pleading guilty to infanticide, agreed to a short period of residence of less than four months at a convent.⁴⁷ Prior to the enactment of the 1949 infanticide law, almost 60 percent of women convicted of an infanticide-related offence

⁴³ For example, see Nigel Walker, *Crime and Insanity in England, vol 1: The Historical Perspective* 133-134 (1968); Robyn Lansdowne, *Infanticide: Psychiatrists in the Plea Bargaining Process*, 16 *Monash University Law Review* 41, 59-60 (1990); Daniel Maier-Katkin & Robbin S. Ogle, *Policy and Disparity: The Punishment of Infanticide in Britain and America*, 21(2) *Int. J. Comp. & Appl. Crim. Justice* 305, 310 (1997).

⁴⁴ Brennan, *supra* note 6.

⁴⁵ Nellie O'B (1953): NAI, SBCCC, V14/8/19 (Jan. 1953 – Dec. 1956); RCGSC 1953 (The Stationery Office: Dublin, Pr 2633), p. 7, available at:

<http://www.garda.ie/Documents/User/3%201953%20Commissioners%20Report.pdf>, accessed 9 May 2017; and for details of the case SFCCC, ID/51/2 (Co Limerick, 26 Oct. 1953);

⁴⁶ Margaret R (Wexford, 1950): NAI, SBCCC, V15-4-15 (Feb. 1946 – Dec. 1952)

⁴⁷ Mary R (1964): NAI, SFCCC, ID/2/162, (Dublin, 27 May 1964); SBCCC, ID/2/146A (1962 – Garda Jul. 1964); RCGSC 1964 (The Stationery Office: Dublin, Pr 8202), Appendix D "infanticide", available at <http://www.garda.ie/Documents/User/1964%20Commissioners%20Report.pdf>, accessed 9 May 2017.

between 1924 and 1949 were sent to a convent or similar institution.⁴⁸ This stands in notable contrast to what is suggested by the records consulted in this study which show that convents were used in only ten per cent 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.⁴⁹ 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 disposal that included a requirement for inpatient/outpatient medical treatment.⁵⁰ These offenders were all married women who had killed older babies. For example, one offender, a 35-year-old married woman who had strangled her four-month-old infant, the youngest of 12 children, was discharged on agreeing to enter a mental hospital and stay there for six to 12 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 on 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

⁴⁸ Brennan, *supra* note 6 at 12-15.

⁴⁹ As noted above, it was not possible to verify the sentence in 11 cases in this sample: *supra* note 41.

⁵⁰ Christina McC (1955): NAI, SBCCC, V14/8/19 (Jan. 1953 – Dec. 1956); available at: RCGSC 1955 (The Stationery Office: Dublin, Pr 3782), p. 6, available at

<http://www.garda.ie/Documents/User/3%201955%20Commissioners%20Report.pdf>, accessed 9 May 2017. Bernadette J (1966): NAI, SFCCC, IC/17/58 (Co. Donegal, 25 Jan. 1966); *Sentence on Mother is Suspended*, Irish Independent, 4 Mar., 1966, at 8; RCGSC 1966 (The Stationery Office: Dublin, Pr 9381), Appendix D "murder of infants aged one year and under", available at

<http://www.garda.ie/Documents/User/1966%20Commissioners%20Report.pdf>, accessed 9 May 2017. Eileen C (1971): *State Accepts Guilty Plea to Infanticide*, Irish Examiner, 17 Jul., 1971, at 12; *Sentencing on Mother*, Irish Independent, 17 Jul., 1971, p 22; RCGSC 1971 (The Stationery Office: Dublin, Prl 2642), p. 26, available at

<http://www.garda.ie/Documents/User/3%201971%20Commissioners%20Report.pdf>, accessed 9 May 2017.

the accused should not be tried for murder because it was clear that she was “not sane” at the time of the killing.⁵¹

The limited use of medical disposals may appear surprising, particularly given that the partially excusing rationale of the infanticide offence 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.⁵² The way the rationale was interpreted by the courts further demonstrates that a specific mental illness was not required, particularly in cases involving killings which took place at an unassisted birth where a mental disturbance was often presumed due to the circumstances in which birth took place.⁵³ 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 per cent of the sample being given a term of 12 months or less. Three women were given three years’ custody; two women were given 2 years; and one woman was given 18 months. However, as already noted, most of these were suspended. Sentencing remarks from judges are not available in the records consulted⁵⁴ 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 11-month-old child; another woman, who had also killed an infant near the maximum age limit to which the infanticide legislation

⁵¹ Christina Mc C, *id. Mother Pleads Guilty to Killing Baby*, Irish Times, 1 Mar. 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 childbirth, and could have relied on the insanity defence. However, given that insanity required a mandatory sentence of indefinite detention, the infanticide law offered a preferable outcome.

⁵² See generally Karen Brennan, ‘Traditions of English Liberal Thought:’ *A History of the Enactment of an Infanticide Law in Ireland*, 50 *Irish Jurist* 100, 123-33 (2013).

⁵³ Brennan, *supra* note 5.

⁵⁴ Some newspaper reports on some cases did make reference to the judge’s comments at sentence, but there were very few cases where this is available.

applied, was given a two-year suspended sentence; in another case, where the offender was given an 18-month suspended term, the victim was twelve days old.⁵⁵ Notably, the offenders in each of these cases were married, though in the latter case she was separated from her husband. These women also had other children. Another woman who was given a suspended term of over one year was a thirty-one-year-old widow who killed her child at birth;⁵⁶ and another woman, given six concurrent terms of three-year penal servitude, was a married woman who had killed six newborn infants to conceal an extra marital affair.⁵⁷ 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 on the accused indicating a plea of guilty at the district court. The accused, a 21-year-old shop assistant, had given birth at home; the body of the infant was found “with certain injuries” in her room.⁵⁸ 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 compassionate sentencing disposals. Sentencing in all cases was lenient (in the context of the seriousness of the crime at hand), but the evidence does show 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 to not only receive longer suspended prison terms, but to also be given medical requirements, including in-patient treatment. However, overall, but particularly in cases involving newborn victims, it is evident that infanticide offenders were not viewed as serious or dangerous criminals, and,

⁵⁵ Annie M (1953): NAI, SFCCC, V15/14/45 (Co Carlow, 26 Jan. 1953); SBCCC V14/8/19 (Jan 1953 – Dec 1956); RCGSC 1952 (The Stationery Office: Dublin, Pr 2276), p. 6-7, available at <http://www.garda.ie/Documents/User/3%201952%20Commissioners%20Report.pdf>, accessed 9 May 2017; Bernadette J, *supra* note 50; Eileen C, *supra* note 50.

⁵⁶ Lena M (1957): NAI, SBCCC IC/17/86 (1957-1961); RCGSC 1957 (The Stationery Office: Dublin, Pr 4735) p. 7, available at: <http://www.garda.ie/Documents/User/3%201957%20Commissioners%20Report.pdf>, accessed 9 May 2017.

⁵⁷ Mary S (1954): NAI, SFCCC, V15/14/47 (Co Kildare, 1 Feb. 1954); SBCCC, V14/8/19 (Jan. 1953 – Dec. 1956); RCGSC 1953 (The Stationery Office: Dublin, Pr 2633), p. 7, available at: <http://www.garda.ie/Documents/User/3%201953%20Commissioners%20Report.pdf>, accessed 9 May 2017.

⁵⁸ Unknown name (Kerry, 1966): RCGSC 1966 (The Stationery Office: Dublin, Pr 9381), Appendix D “infanticide”, available at <http://www.garda.ie/Documents/User/1966%20Commissioners%20Report.pdf>, accessed 9 May 2017.

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 in terms of helping them to be mothers, and, indeed, faced widespread cultural stigmatization. Yet, the legislature and legal system proved consistently willing to effectively allow women who wilfully and with malice aforethought⁵⁹ 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 away with murder, whilst 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.

III. 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 practice. Within wider social discourse it is said that women are viewed through the lens of a good/bad dichotomy. The “good” woman construct reflects idealized patriarchal gender expectations which hold women to be passive, nurturing, self-sacrificing, weak, vulnerable, and irrational, being 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 offence in

⁵⁹ The infanticide statute specifically requires that the woman committed a “wilful act or omission” and that the requirements for murder, which include malice aforethought, were established; see Infanticide Act 1949, §1(3).

the first place, be rehabilitated back into normative femininity. This can lead to lenient sentences. The other side of this, however, is that those women who cannot be recuperated into the feminine ideal are treated more harshly under the law.⁶⁰ Worrall, for example, has argued that women offenders are constructed as either “non-criminal” (so essentially “good”) or “non-women” (“bad”).⁶¹ She identifies a “gender contract” whereby 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 its domestic, sexual and pathological dimensions.” The gender contract “minimizes punitive consequences”.⁶² Similarly, Morrissey has identified strategies which serve to either cast the offender as a victim, reflecting patriarchal norms about the “good” woman, or which demonize her, rendering her non-human/non-woman.⁶³ Other constructions identified by writers which reflect idealized (and non-idealized) norms of womanhood, are the mad, sad, and bad classifications.⁶⁴

In cases involving homicidal women, such constructions play a particularly important role. Because women rarely commit violent offences, the female killer is unusual. This, in conjunction with widely held gender norms which 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.⁶⁵ 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

⁶⁰ For some of the literature on how women (and particularly those who kill their children) are constructed in the criminal justice system, reflecting wider gender stereotypes, see generally Worrall, *supra* note 2 at ch. 3; Susan S.M. Edwards, *Women on Trial: A Study of the Female Suspect, Defendant and Offender in Criminal Law and the Criminal Justice System* chs 7 & 8, esp 177-82, 183-86, 213 (1984); Hilary Allen, *Justice Unbalanced* (1987); Morrissey, *supra* note 2 at 3-7, 21-29 and *passim*; Armstrong, *supra* note 2; Ania Wilczynski, *Mad or Bad? Child Killers Gender and the Courts*, 37 *Brit. J. Criminol.* 419, 425-26 (1997); Siobhan Weare, “The Mad”, “The Bad”, “The Victim”: *Gendered Constructions of Women Who Kill within the Criminal Justice System*, 2 *Laws* 337 (2013); Siobhan Weare, *Bad, Mad, or Sad?: Legal Language, Narratives, and Identity Constructions of Women who Kill their Children in England and Wales*, *Int. J. Semiotics Law* 22 (2016); Heather Leigh Stangle, *Murderous Madonna: Femininity, Violence, and the Myth of Postpartum Mental Disorder in Cases of Maternal Infanticide and Filicide*, 50 *Wm. & Mary L. Rev.* 699 (2008-2009)

⁶¹ Worrall, *supra* note 2 at 31.

⁶² *Id.*

⁶³ *Supra* note 2 at 24-25 and *passim*.

⁶⁴ Weare, *supra* note 60 (both articles). Specifically, on how women filicide offenders are medicalized, see Wilczynski, *supra* note 60 at 425.

⁶⁵ Morrissey, *supra* note 2 at 2, 166, 170; Weare, *supra* note 60, 337-38 (*Gendered Constructions of Women Who Kill*).

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.⁶⁶

At first glance the infanticide offender had not only committed a serious criminal offence, but she had also grossly offended the patriarchal version of idealized femininity: by becoming pregnant outside of marriage she breached the mandate of feminine virtue and 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.⁶⁷ 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.⁶⁸ 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 postpartum depression or psychosis.⁶⁹ However, as noted whilst the language does suggest a requirement for diagnosis of a mental disorder linked to childbirth or lactation, both the history of infanticide laws and how they have been applied by the courts demonstrate that the mental disturbance requirement encapsulates a lay, not a medical, understanding of this crime.⁷⁰ Although this did embody lay patriarchal norms, it did not require diagnosis of a specific mental illness (such as postpartum depression) and it did take account of the circumstances of the crime.⁷¹ In other words, whilst the law does represent 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, and was intended to, and did, operate in such a way as to recognize social mitigation.⁷² Nonetheless, on the face of it at least, the infanticide law

⁶⁶ Morrissey, *supra* note 2 at 28, 165, and *passim*; Weare, *supra* note 60 (both articles).

⁶⁷ See *supra* text at note 24.

⁶⁸ *Supra* note 9.

⁶⁹ For examples of such critiques, see Edwards, *supra* note 60 at 79-100; Weare, *supra* note 60 at 343-45 (*Gendered Constructions of Women Who Kill*).

⁷⁰ For the history behind these laws, see Tony Ward, *The Sad Subject of Infanticide: Law, Medicine and Child Murder 1860-1938*, 8 Soc. and Legal Stud. 163, 166-70, 174-75 (1999); Kirsten J Kramar & WD Watson, *The Insanities of Reproduction: Medico-Legal Knowledge and the Development of an Infanticide Law*, 15 Soc. and Legal Stud. 237, 240-50 (2006); Brennan, *supra* note 50 at 123-33. For how infanticide laws have been liberally applied in the courts, see Ronald D. Mackay, *The Consequences of Killing Very Young Children*, Crim. L. R. 21, 29 (1993); Allison Morris & Ania Wilczynski, *Rocking the Cradle: Mothers who Kill their Children in Moving Targets: Women, Murder and Representation* 198, 207-10 (1993); Brennan, *supra* note 5.

⁷¹ Brennan, *supra* note 5.

⁷² *Id.*

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”, as 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 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.⁷³ 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, in one document relating to the 1949 infanticide reform, where a number of mitigating factors in these cases were outlined, it was noted that the circumstance that most affected the ordinary person in their judgement of these cases was the fact 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”.⁷⁴

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 which outlines the profile of those appearing at the Central Criminal Court on charges relating to the death of their infants.⁷⁵ In relation to the cause of the “downfall” of these offenders, the author noted that in

⁷³ Kirsten Johnson Kramar, *Unwilling Mothers, Unwanted Babies: Infanticide in Canada* 7 (2005).

⁷⁴ Archives of Archbishop of Dublin, The McQuaid Papers, AB8/B/XVIII/10: memo entitled “Proposed Infanticide Legislation,” authored by Monsignor Dargan, dated 24 Feb., 1949, para 4.

⁷⁵ EM Carroll, *Memorandum re: Women and Girls who Come Before the Central Criminal Court on Serious Criminal Charges and Other Matters*, 7 Jul., 1941, p 1, in Report of the Interdepartmental Committee to Establish the Facts of State Involvement with the Magdalen Laundries (Department of Justice, 2013), Appendix 5, available at: <http://www.justice.ie/en/JELR/Pages/MagdalenRpt2013>. Accessed 15 November 2014.

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”.⁷⁶ It was noted that in many of these cases the offender might not realize that she was pregnant for some time and then discovering her situation “becomes bewildered, even desperate”. Particularly in the case of domestic servants, 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 in the frenzy of a moment and still trying to cover her shame, she kills her child”.⁷⁷

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.⁷⁸ 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”, whilst 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.⁷⁹ 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.⁸⁰ These men could therefore be blamed for contributing to the situation, and although they were not held criminally responsible, their failure to fulfil their role in the patriarchal social order did allow for a

⁷⁶ *Id.*

⁷⁷ *Id.* at 2.

⁷⁸ See generally Connell, *supra* note 29 at 142-46; Carol Smart, *Legal Regulation or Male Control*, in Law, Crime and Sexuality: Essays in Feminism 128, 137-145 (1995); Ballinger, *supra* note 2 at 462-64.

⁷⁹ See generally Ballinger, *supra* note 2.

⁸⁰ *Id.* See also Anette Ballinger, *Gender, Truth and State Power: Capitalising on Punishment* 60-61 (2016).

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.⁸¹

If the offender demonstrated remorse this may have also facilitated her accommodation within the good woman stereotype. At least 71 per cent of the infanticide convictions in this sample had involved a guilty plea. One of the more interesting cases examined in this study highlights the importance of gender constructions, including with regard to experiencing 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 emigrated 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 whilst 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.⁸² She was given the most severe sentence in this sample: three years' penal servitude on each count to run concurrent; this was not suspended.⁸³ The comparative severity of the sentence imposed might indicate that she was punished not only for the killing of an infant, but also because of her involvement in an extra-marital affair, i.e. because she broke gender norms with regard to "wifely" behaviour and so was doubly punished. However, a three-year term, though severe in the context of the other cases in this sample, was not unduly harsh given the fact that she killed six infants.

Indeed, 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, Murnaghan J in his sentencing remarks stated: "You have pleaded guilty to six terrible offences 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

⁸¹ For further discussion on the tendency to individualise criminality, see *infra* text at note 108-116.

⁸² Mary S (1954): NAI, SFCCC, V15/14/47 (Co Kildare, 1 Feb. 1954). SBCCC, V14/8/19 (Jan. 1953 – Dec. 1956).

⁸³ SBCCC, V14/8/19 (Jan. 1953 – Dec. 1956).

would take her back and be good to her while he was living.⁸⁴ 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,⁸⁵ and 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.⁸⁶ 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.

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 not punishment. Her crime was constructed as not being truly criminal.⁸⁷ 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.

III.i Gender construction unpicked – a necessary evil?

Whilst individual offenders, such as the women in this sample, may benefit from being constructed as meeting idealized femininity, lenient treatment where this is based on gender constructions is criticized because the cost of mercy is the denial of her agency and the structural causes of her offending.⁸⁸ First, whilst non-agentic explanations may help individual offenders to secure a more lenient disposal, it is said that this reinforces and perpetuates gender stereotypes in wider society, namely that all women are irrational, passive, vulnerable and weak.⁸⁹ Linked to the issue of agency denial is the second problem with good/bad woman gender constructions, which is that they individualize criminality,

⁸⁴ *Three Years for Killing Six Children*, Irish Times, 20 Feb. 1954.

⁸⁵ See generally, Mary Eaton, *Justice for Women: Family, Court and Social Control* (1986).

⁸⁶ See *supra* Table A.

⁸⁷ Worrall, *supra* note 2 at 31.

⁸⁸ See generally Morrissey, *supra* note 2, ch.1 and *passim*; Ballinger, *supra* note 2 at 475-76; Ballinger, *supra* note 80 at 57, 66, 74.

⁸⁹ See generally, Morrissey, *supra* note 2 at 3-7, 36-37 and *passim*; Weare, *supra* note 60 at 345, 350-54; Ballinger, *supra* note 2 at 475.

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 lead to that offending.⁹⁰ As Ballinger has argued in the context of child murder in early twentieth-century England and Wales,

“...leniency ... 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.”⁹¹

In regard to the above, Ballinger highlights an important point, namely how punishment of female offenders which is based on gender constructions helps to maintain the heteropatriarchal social order.⁹² 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”.⁹³ Specifically, 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 maintain heteropatriarchy: the gender social order is maintained and the structural causes of offending which lie in patriarchy are unchallenged.⁹⁴ For example, focusing on the treatment of women who killed their abusive husbands in England between 1900 and 1965, she argues that the female and male gender constructions employed categorized these cases of women retaliating in the context of domestic violence as exceptional rather than as a consequence of the unequal power structure that the institution of marriage maintains between husbands and wives.⁹⁵ The offender was constructed in such a

⁹⁰ For example, see Morrissey, *supra* note 2 at ch 1; Ballinger, *supra* note 80 at 57, 66, 74; Ballinger, *supra* note 2 at 475-76, 478.

⁹¹ *Supra* note 80 at 57.

⁹² *Supra* note 2.

⁹³ Ballinger, *supra* note 2 at 476.

⁹⁴ *Id.* at 464, 475-76, 478; Ballinger, *supra* note 80 at 74.

⁹⁵ *Supra* note 2 at 475-76.

way as to highlight her “helplessness and victimhood”.⁹⁶ 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”.⁹⁷ Related to this, the male victims were viewed as “‘bad apples’ within a barrel of otherwise unproblematic masculinity”.⁹⁸ Thus, the problematic patriarchal structures involved, namely the institution of marriage which traditionally enshrined male domination of women, remained unchallenged.⁹⁹ Mercy stemming from such constructions was a “conservative strategy which sought to preserve the institution of marriage ... and the existing gender order”.¹⁰⁰

Similarly, Ballinger argues that the legal response to women who killed their babies and young children in the early twentieth century,¹⁰¹ was closely connected to the maintenance of the gendered social order.¹⁰² Lenient treatment of these offenders, whilst well-intentioned, came at the expense of rational agentic explanations and so maintained gender stereotypes and undermined structural causes such as gender inequality. Again, this served the interests of heteropatriarchy because gender inequality, poverty, and the fact that the women in these cases had limited alternatives, remained hidden and therefore unchallenged.¹⁰³

Although analyses of punishment based on gender construction theories make an important contribution to understanding and critiquing sentencing of women offenders, I would like to suggest two limitations. First, whilst women’s agency may be denied in the courtroom, something which, theoretically, has been said to sustain and perpetuate wider gender norms by casting all women as irrational victims of circumstance or pathology,¹⁰⁴ it is difficult to assess the significance of this 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

⁹⁶ *Id.* at 475.

⁹⁷ *Id.* at 475-76.

⁹⁸ *Id.* at 476

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 476.

¹⁰¹ *Supra* note 80 at ch 4. The cases in her sample pre-dated the Infanticide Act 1922 or fell outside its scope because victim was over one year.

¹⁰² *Id.* at 74.

¹⁰³ *Id.* at 57, 66, 74.

¹⁰⁴ See literature cited *supra* note 89.

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? If this is the case, does infanticide law and practice add to this? And, if so, what impact does this have on woman, 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? 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" to the rest of the population. In other others, whilst 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 are understood.

Carol Smart argues that "[t]he law can ... be understood as a mode of reproduction of the existing patriarchal order.... [L]egislation 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'.¹⁰⁵ However, the role of the *criminal* law, and particularly criminal sentencing, may be fairly limited in this regard. Whilst it can be said that

¹⁰⁵ *Supra* note 78 at 144.

by employing stereotypical gender constructions the criminal justice system does “reproduce the gendered subject”,¹⁰⁶ arguably helping to validate gender norms, it is questionable whether overall this makes an appreciable contribution to the perpetuation of such norms. 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 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, as indicated by the quote from Smart in the previous paragraph, 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 whether it is or ought to be the role of the criminal courts to challenge societal stereotypes. In particular, if 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; if they are not conscious that they are relying on gender constructions, then how can we expect them to challenge them? This is even more apposite where the law itself also embodies gender stereotypes, as in the case with the infanticide legislation, 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,¹⁰⁷ 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.

¹⁰⁶ Ballinger, *supra* note 2 at 476.

¹⁰⁷ 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 recognise that these stereotypes existed.

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 the second critique I would like to make of gender construction theory, which relates to the individualization of crime in wider criminal law theory and doctrine.

Analyses of women's punishment which critique the law for utilizing gender constructions that deny the structural causes of offending overlook the fact that the criminal law 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.¹⁰⁸ 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 who is divorced from their social context.¹⁰⁹ Thus, offenders are decontextualized and the wider social and political conflicts which affect the way a person reasons, behaves etc., are pushed aside.¹¹⁰ Even where the harshness of the law is mitigated through the use of insanity-type doctrines, such as the insanity defence, diminished responsibility, and infanticide, psychiatric discourse itself also "decontextualizes social agency ... by locating the problem of insanity in the constitution of the individual".¹¹¹

Thus, the criminal law "obscures social realities"¹¹² and instead locates fault in the individual, whether by blaming their rational choice to break the law, or their irrational behavior stemming from individual pathology. What this demonstrates is that within the criminal law all individuals, male or female, are abstract constructs, and are never understood in terms of the social and political structures, such as gender, race and class inequality, that lead to criminal offending. The criminal law, therefore, emphasizes rationality and agency, basing

¹⁰⁸ Norrie, *supra* note 7 at ch. 1 & 2.

¹⁰⁹ *Id.* emphasis added.

¹¹⁰ *Id.* chs 2 & 11.

¹¹¹ *Id.* at 188-96.

¹¹² *Id.* at 23.

liability and punishment on the concept of free-will and choice. What gender construction theory highlights is that women criminals are interpreted in ways which emphasize their irrationality and lack of agency. However, whilst 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. In other words, even if women offenders were viewed in non-stereotyped terms, the law would still refuse to take account of the socio-political causes of offending.

Those who use gender construction theory to critique punishment of women offenders seek rational agentic constructions of women's criminality which acknowledge wider structural causes, but without an increase in punishment, although they do recognize the challenge inherent in this ambition.¹¹³ 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, a denial of 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, it has already been noted that 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.¹¹⁴ In other words, it would not have been possible to allow for social mitigation; pathologization of the infanticide offender was necessary in order to allow for a 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 upon the social conditions that gave rise to the crimes in question."¹¹⁵

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

¹¹³ For example, see Morrissey, *supra* note 2 at 35.

¹¹⁴ Ward, *supra* note 70 at 174; Kramar, *supra* note 73 at 88, 95; Brennan, *supra* note 52 at 126, 132.

¹¹⁵ *Supra* note 7 at 190, referring to Smith's study of the use of the insanity defence in nineteenth-century Britain in cases of parents who killed their babies. See Roger Smith, *Trial by Medicine: Insanity and Responsibility in Victorian Trials* ch. 7 (1981).

criminal offending, constructions of an offender which serve to mitigate by denying agency and rationality are arguably a necessary evil in helping to 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 acknowledgement of agency/rationality and mitigated punishment.¹¹⁶ In this regard, it is the entire criminal law which requires challenge to allow for all offenders, not only women, to be criminalized and punished according to their responsibility, which is assessed in such a way as to recognize his or her rationality in the context of wider socio-economic-political inequality.

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 ultimately constructed as “good” women according to patriarchal norms. It has also been said that gender constructions help to maintain patriarchal interests by “producing and reproducing the gendered subject” (the irrational non-agentic woman), and 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. 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 to retain control over women’s reproductive autonomy.

IV. *Paternalism, Patriarchy and Infanticide*

Another approach to explaining and critiquing punishment of women under the infanticide law is to look at the concept of paternalism. This also helps us to see the patriarchal nature of the criminal justice response to this offender. Moulds argues that legislative and court leniency towards women offenders is really paternalism.¹¹⁷ Paternalism (in the guise of mercy) may be beneficial to some offenders because it can result in lenient sentencing

¹¹⁶ See Wilczynski, *supra* note 60 at 433 who makes a similar point.

¹¹⁷ Elizabeth F Moulds, *Chivalry and Paternalism: Disparities of Treatment in the Criminal Justice System*, 31(3) *Western Political Quarterly* 416 (1978).

disposals from a desire to “protect” her from a particular evil, such as imprisonment.¹¹⁸ 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 may be double-edged.¹¹⁹ For example, Moulds argues that paternalism allows the “child” to be used to serve the interests of the “father”.¹²⁰ Paternalism, therefore, is “more complex” than chivalry and “its practice is far more destructive in terms of psychological, social and political implications”.¹²¹ Davis also highlights the ambiguous nature of paternalism: whilst 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.¹²² 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 “rehabilitation” or “protection”.¹²³

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 these women did experience more control as a consequence of benevolent inclinations that kept them out of prison.¹²⁴ However, in cases where women were not sent to semi-penal institutions it is difficult to identify any negative consequences of compassion. Instead, as will be argued 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.

¹¹⁸ *Id.* at 417.

¹¹⁹ Kathy Davis, *Paternalism Under the Microscope*, in *Gender and Discourse: The Power of Talk* 19 (1988)

¹²⁰ Moulds, *supra* note 117 at 419.

¹²¹ *Id.* at 418.

¹²² *Id.* at 23, 41-42.

¹²³ Moulds, *supra* note 117 at 419-20. See Lynsey Catherine Black, *Gendering the Condemned? Women and Capital Punishment in Ireland Post-1922* ch. 7 (PhD Thesis, Trinity College Dublin, 2016), 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 licence.

¹²⁴ Brennan, *supra* note 6 at 13-14, 18-21, 26.

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;¹²⁵ 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.¹²⁶ However, on occasion where the harsh stance the criminal law takes undermines its legitimacy, mercy functions to preserve its legitimacy.¹²⁷ Rather than have the law's authority to penalize those who break the law 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.¹²⁸ 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 which resulted in the law being effectively ignored so that a compassionate response, as desired by the public will, would be provided.¹²⁹ Thus, although the law and the public opinion were out of sync, criminal justice practice extended mercy to the offender and this helped to maintain the legitimacy of the law.¹³⁰ However, because the law was routinely subverted by such ad hoc arrangements, this itself challenged the law's legitimacy, and eventually lead to legislative reform to formalize lenience. Amongst the chief motivations for infanticide law reform were avoiding the "solemn mockery" of judges pronouncing death sentences that would never be carried out;¹³¹ the "tragic farce" of sending women for trial for an offence they would not be convicted of;¹³² and the abuse of other offences that were used to provide for a more compassionate conviction.¹³³ Mercy, whether informal (by, for example, commuting death

¹²⁵ Norrie, *supra* note 7 at 190-91; Ballinger, *supra* note 2 at 472-73, relying on Douglas Hay, *Property, Authority and the Criminal Law* in "Albion's Fatal Tree: Crime and Society in Eighteenth Century England" 17 (1977).

¹²⁶ See *supra* text at 108-16.

¹²⁷ See *supra* note 125.

¹²⁸ Norrie, *supra* note 7 at 190-91, 222-225.

¹²⁹ David Seaborne Davies, *Child Killing in English Law* in *The Modern Approach to Criminal Law* 301-343, 317-18, 320-22 (1945).

¹³⁰ Ballinger, *supra* note 80 at 74.

¹³¹ Davies, *supra* note 129 at 319-20.

¹³² Brennan, *supra* note 4 at 812-18, 823-27.

¹³³ Kramar, *supra* note 73 at 69, 90-92.

sentences) or formal (as embodied in the law), therefore operated to uphold the law's legitimacy in a situation 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 uphold the law's legitimacy, authority and control, but it can also be said that it helped to uphold the legitimacy of the socio-political structures that lead 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.¹³⁴ In a similar way to 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 so less objectionable.

The Irish state sought to deny women control over their reproductive lives, but one consequence of this was that some women concealed pregnancy and killed their babies. 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.¹³⁵ However, to allow women to access contraception and abortion, or to allow 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 are autonomous beings who have a right to choose to be mothers or not, and in what circumstances. This is something that patriarchal cultures have always struggled with, and even with modern advancements, continue to grapple with.¹³⁶ Certainly, in the 1950s and 1960s, when most of the cases in this sample

¹³⁴ See *infra* section I.

¹³⁵ Brennan, *supra* note 5.

¹³⁶ 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; the Offences Against the Person Act, 1861, §58, 59, 24 & 25 Vict. C. 10 (Eng.). See Sally

occurred, it was not something that prevailing patriarchal ideologies which centred on female virtue and the importance of the married family could permit. In this regard, it can be said that whilst 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, and that this compassion helped patriarchy to maintain its grip. 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, and instead 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.¹³⁷ 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 cases 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 reform.¹³⁸ Although in the context of a more

Sheldon, *The Decriminalisation of Abortion: An Argument for Modernisation* 36(2) *Oxf. J. Leg. Stud.* 334 (2016).

¹³⁷ See generally, Smart, *supra* note 78; Janet Rifkin, *Toward a Theory of Law and Patriarchy*, 3 *Harv. Women's L.J.* 83 (1980).

¹³⁸ There have been a number of high profile controversial incidents in Ireland over the last few years, starting with the death of Savita Halappanavar in 2012 (see <http://www.bbc.co.uk/news/world-europe-22204377>; Máiréad Enright, *Savita Halappanavar: Ireland, Abortion and the Politics of Death and Grief* in *Critical Legal Thinking: Law and the Political* (2012) available at: <http://criticallegalthinking.com/2012/11/14/savita-halappanavar-ireland-abortion-and-the-politics-of-death-and-grief/>) and culminating in a Citizen's Assembly on the future of the constitutional provision on abortion (<https://www.citizensassembly.ie/en/The-Eighth-Amendment-of-the-Constitution/>) which recommended, in April 2017, that abortion should be available in Ireland in a wide range of circumstances (<http://www.irishtimes.com/news/ireland/irish-news/citizens-assembly-backs-abortion-rights-in-wide-range-of-circumstances-1.3058170>). For further detail on the currently law on abortion in Ireland see *supra* note 35.

liberal society, it does demonstrate that where public attention is drawn to the reality of the impact of harsh rules and laws, this will generate debate and will encourage reform. In this way, mercy allowed patriarchy to continue uninterrupted by the controversy that may have arisen if the worse 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 the role of the courts to challenge patriarchy or to argue that if they had done so they would have been successful, but merely to highlight the link between mercy and patriarchy. In essence, compassionate treatment of the infanticide offender operated 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.

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 ideology or that they did not feel genuine compassion for this offender. 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.¹³⁹ 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.¹⁴⁰ As Ballinger argues: "the state is patriarchal and the law 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".¹⁴¹ 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 men

¹³⁹ Brennan, *supra* note 4 at 829-33, 836-41.

¹⁴⁰ Smart, *supra* note 78 at 137-44.

¹⁴¹ Ballinger, *supra* note 2 at 474.

offenders from similar benevolent inclinations. Further, it demonstrates that genuine 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.

6. 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 or the murder of an abusive husband, 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 and weak, lacking in agency, and how this serves to deny the structural causes of offending, thus helping to maintain patriarchy. Paternalism highlights the link between compassion and control – the way mercy can function to serve patriarchy by showing that it has a benevolent side and by diverting attention from the inequalities at hand. Specifically, in the infanticide case paternalistic treatment of this offender allowed the state to retain control over women’s reproduction. Thus, 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. On the face of it, then, it might be said that lenient treatment was a bad thing for women because it helped to support patriarchy.

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 needs to be challenged. She states:

“[t]he 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.”¹⁴²

In other words, despite the fact that cultural, social, economic and legal structural factors contributed to this crime,¹⁴³ 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 the fact 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”.¹⁴⁴ The law/the state can play a part in reinforcing and perpetuating “gendered harms”.¹⁴⁵ In the context at hand, patriarchal norms and values, which were embedded in various legal provisions and in the state’s approach to unmarried mothers, caused harm to women. Whilst 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 the crime of 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. It can be said, therefore, that the state did bear some responsibility for this crime. Arguably, by criminalizing women the state further compounded the harm caused to them by holding them solely responsible for the baby’s death.

The recent discovery of the remains of 796 children aged between 2 days and 9 years old who had been buried at an unmarked mass grave between 1925 and 1961 at a mother and baby

¹⁴² *Supra* note 80 at 73.

¹⁴³ *Supra* at section I.

¹⁴⁴ Robin West, *Caring for Justice* (1997).

¹⁴⁵ Sheelagh McGuinness & Ruth Fletcher, *Attorney General v X: Feminist Judgment and Commentary* in Northern/Irish Feminist Judgments: Judges’ Troubles and the Gendered Politics of Identity (2017); Joanne Conaghan, *Gendered Harms and the Law of Tort: Remediating (Sexual) Harassment*, 16 (3) *Oxf. J. Leg. Stud.* 407, 407-408, 427-31 (1996).

home in Tuam, Co Galway reinforces this point.¹⁴⁶ Although no evidence of suspicious death has so far been reported at the site following excavations,¹⁴⁷ and there is no suggestion that any of these children died through violent means, legitimate questions can certainly be raised about whether systematic neglect played a part.¹⁴⁸ As Fischer has noted more generally, “there is evidence of harsh, if not extremely abusive, treatment of those kept in religious institutions of ‘care’”.¹⁴⁹ Given how little the state, the law, and wider society cared about the fate of illegitimate children,¹⁵⁰ 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”.¹⁵¹ 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 the criminal law to criminalize and punish in these circumstances, and to lay fault solely on the individual woman, and the patriarchal structures involved, were essentially legitimized by merciful treatment which allowed women to be convicted of a less serious homicide offence, and, essentially, avoid punishment. As Norrie has argued, the criminal law plays a political function in that it keeps social conflicts, particularly the 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.¹⁵² The infanticide law and sentencing under it certainly kept the conflicts created by patriarchy away from the courtroom, first through pathologizing this offender, blaming the crime on her individual vulnerability, and, second, through merciful treatment which served to further divert attention from her crime. Indeed, not only did the law and practice in these Irish infanticide cases serve to keep the conflicts of

¹⁴⁶ Garrett, *supra* note 26 at 709. For reporting on findings at this site following excavation, see <https://www.theguardian.com/world/2017/mar/03/mass-grave-of-babies-and-children-found-at-tuam-orphanage-in-ireland>; <https://www.rte.ie/news/2017/03/03/856914-tuam-mother-baby/>.

¹⁴⁷ See <http://www.galwayindependent.com/news/topics/articles/2017/03/22/4137034-no-criminal-investigation-into-tuam-home/>.

¹⁴⁸ A commission of investigation was established by the Irish government in 2015 to investigate procedures and practices at Tuam and a number of other Mother and Baby homes, particularly in relation to deaths and burials: see <http://www.irishtimes.com/news/social-affairs/what-is-the-mother-and-baby-homes-commission-of-investigation-1.2996729>. Among the terms of reference for the Mother and Baby Homes Commission of Investigation (see <http://www.mbhcoi.ie/MBH.nsf/page/index-en>) is an examination of mortality among mothers and children at these institutions and to establish the causes, circumstances and rates of mortality; Commission of Investigation (Mother and Baby Homes and Certain Related Matters) Order 2015, Statutory Instrument number 57 of 2015, schedule (1)III.

¹⁴⁹ *Supra* note 26 at 827. This comment is not restricted to mother and baby institutions but also to Magdalen asylums and industrial and reformatory schools.

¹⁵⁰ See generally Moira J. Maguire, *Precarious Childhood in Post Independent Ireland* (2009).

¹⁵¹ As noted by Rev. Ld. S. G. Osborne when giving evidence before the Royal Commission on Capital Punishment in 1866. See *Royal Commission on Capital Punishment*, British Parliamentary Papers, 1866, vol. 21, at 476.

¹⁵² *Supra* note 7 at 223-225.

patriarchy out of the courtroom, and disguise the unfairness of targeting these women for criminalization, it also served to sustain unfair and unequal patriarchal structures outside of that context.

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 circumstances involved 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 which masks the role of patriarchal values, laws and structures in the commission of this offence? The question of whether this offence 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 analysis in sections III and IV above highlights that mercy can help to maintain patriarchy 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, may help to deny the structural causes of offending, which also serves patriarchal interests. In the end, the criminal justice response helps to preserve the patriarchal status quo. However, whilst mercy and gender constructions may be criticized because they help to support an unfair system, and in the case of the latter, also rely on demeaning stereotypes about women, we should not hasten to abandon such approaches. As already argued, gender constructions that deny the offender's agency, whilst not ideal, are, when we take the wider context of the criminal law into account, an unfortunate necessity. Unless, we can 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 provide for lenient treatment without in some way highlighting the offender's lack of agency.

Further, taking the argument from the perspective of paternalism, although mercy towards the infanticide offender helps the state to retain control of all women's reproduction, we wouldn't necessarily want vulnerable women to suffer more punishment simply to provoke a challenge to patriarchal rules that deny women reproductive autonomy. Even if such a challenge were successful, the process of long term and significant change may be slow, and, in the

meantime individual women would suffer more punishment. Arguably, there are other ways to contest unfair social and political structures; this is not a job for the criminal courts. It is important, therefore, to be pragmatic and realistic about what is achievable and how best to achieve this. In the context of infanticide, the desired goal is that women should have full reproductive autonomy. However, the way to realize this is not necessarily by punishing more severely those who kill their babies at a birth. Indeed, if such women are to be criminalized, the criminal justice system should not further add to the “gendered harm”¹⁵³ they have already experienced.

In some respects, therefore, flawed as the approach may have been from a theoretical perspective, the infanticide law and the punishment regime that operated under it, was the best outcome for the cases in this sample. As already noted, although the infanticide statute labeled the crime as an act of “madness”, in practice, social circumstances were taken into consideration in the way the law was applied.¹⁵⁴ The approach to infanticide held out the possibility of structural causes (such as cultural stigmatization of unmarried mothers, sexual double standards, poverty, lack of support, gender inequality, access to reproductive autonomy) being recognized. However, this was an imperfect process because whilst social mitigation may have been acknowledged this was arguably still focused on *her* individual circumstances (e.g. her sense of shame about becoming pregnant outside of marriage, the fact that the father had abandoned her), rather than on wider structural factors (e.g. stigmatization and sexual double standards). Further, she was still viewed through the lens of mental disturbance. Ultimately, the crime was never 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 did, in a context where unmarried mothers were highly stigmatized, allow for an imperfect contextualization of her crime. It may have been better to acknowledge more openly the wider structural factors, but at the end of the day the social context was not completely ignored. Given the fact that the criminal law does not take account of the wider social, economic, or political context of an offender’s crime in assessing their criminal guilt or in punishing, the approach taken to infanticide is perhaps the best that could be hoped for in terms of recognizing the mitigating factors in this crime. Ultimately, what the infanticide law,

¹⁵³ West, *supra* note 144.

¹⁵⁴ See literature cited *supra* note 70.

and sentencing practice under it, allowed for was an imperfect contextualization of her crime, with minimal criminalization.