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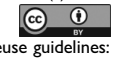

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The Need for Judicial Interpretation of the Infanticide Act 1938

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Abstract

It is widely accepted that the purpose of the Infanticide Act 1938 is to offer mercy for women who kill their infants while 'the balance of her mind was disturbed' due to birth/lactation. However, to date there is limited judicial interpretation of the statute and debate continues as to whether the disturbance of mind must be based on medical evidence of a bio-psychiatric illness. Recent cases indicate women are now finding it difficult to make use of infanticide, especially where the victim is newborn, thus clarification on the meaning of this law is urgently needed. Drawing on statutory interpretation and supported by in-depth historical analysis of the law and Parliament's intent, we argue that the Infanticide Act can and should be interpreted to include social factors that lead women to fatally harm their infants in early motherhood, and should not require a mental disorder diagnosis. In this regard, we highlight the need for a gender-sensitive approach to statutory interpretation which takes account of the history and context of this crime, and lived realities of women who kill their babies. Such an interpretation not only provides just outcomes in these cases, but also re-establishes the purpose of the legislation and clarifies interpretation. In applying the rules of statutory interpretation, we identify the significant role of the socio-historical context of legislation, particularly for older statutes that are rarely used. The article finishes with a brief exploration of the potential for statutory reform.

Keywords

Infanticide, statutory interpretation, homicide, women and crime, law reform

The Infanticide Act 1938, which replaced the 1922 Infanticide Act, provides for a homicide offence as well as a partial defence to murder or manslaughter. Infanticide is committed if a woman kills her infant within a year of birth and at the time of the killing '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

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consequent upon the birth of the child'.[1] The importance of the Infanticide Act is that it allows for flexible sentencing – almost always leading to a non-custodial sentence[2] – and has reduced stigma attached to the crime compared to murder. Compared to diminished responsibility, with which it is often aligned, infanticide also offers the benefit of not placing the burden of proof on the defendant when raised as a partial defence at trial.[3]

Ask any legal scholar or practitioner the meaning and scope of the Infanticide Act 1938, and they will almost certainly tell you it is to offer leniency to women who kill their infants. However, probe a little to understand the circumstances in which that leniency should be granted, and you will elicit unclear and mixed responses. One of the reasons for this uncertainty is that there is limited judicial interpretation of the basis of the mitigation in the 1938 statute.[4] Academic analyses, however, offer differing views of the meaning of the legislation. One strand of scholarship classes infanticide as similar to diminished responsibility, but more specifically as a bio-psychiatric doctrine that requires a mental disorder based on the hormonal consequences of pregnancy, birth and lactation.[5] Feminist scholars, in particular, have embraced this view, strongly criticising the law on that basis. They claim that the 1938 Act medicalises infanticide by adopting sexist nineteenth century medical theories that linked women's reproductive functions to 'madness', consequently ignoring the structural causes of this crime.[6] On the other side of the debate are those who argue that the Infanticide Act provides for a non-medical offence/partial defence based on social mitigation that does not require a mental illness and that is capable of taking into account mitigating social factors connected with pregnancy, childbirth and the mothering of a young child, and thus is more akin to the doctrine of provocation/loss of control than diminished responsibility.[7] These social mitigation analyses, with which we agree, view the infanticide law in its broader context and in particular look at the historical development of this law.

The two differing interpretations of the nature of the doctrine – bio-psychiatric or social mitigation – have significant implications for the applicability of this law. The lack of judicial interpretation of infanticide, however, means that it is left to lawyers, trial judges, juries and medical experts to decide in individual cases what this law means, with little or no guidance. The fact that infanticide is rarely used further exacerbates this problem of uncertainty regarding its meaning and scope. The few academic studies focusing on the application of the infanticide law, however, demonstrate that the statute has been

1. Infanticide Act 1938, s. 1. Women can be charged with infanticide, or, if charged with murder or manslaughter, they may plead infanticide during plea negotiations, or rely on it a partial defence at trial.
2. K. Brennan and E. Milne, '100 Years of Infanticide: The Law in Context' in K. Brennan and E. Milne (eds.), 100 Years of the Infanticide Act: Legacy, Impact and Future Directions (Hart Publishing: Oxford, 2023), 1–46, 26.
3. Law Commission, Murder, Manslaughter and Infanticide, Cm 304 (2006), para. 8.9.
4. The one exception is the Court of Appeal Judgment in Tunstill [2018] EWCA Crim 1696, but this ruling was limited in scope, as we discuss below.
5. For example, see S. S. M. Edwards, Women on Trial: A Study of the Female Suspect, Defendant, and Offender in the Criminal Law and Criminal Justice System, (Manchester University Press: Manchester, 1984); K. O'Donovan, 'The Medicalisation of Infanticide' (1984) Crim LR 259; S. Weare, '"The Mad", "the Bad", "the Victim": Gendered Constructions of Women Who Kill within the Criminal Justice System' (2013) 2 *Laws* 337; B. McSherry, 'The Return of the Raging Hormones Theory: Premenstrual Syndrome, Postpartum Disorders and Criminal Responsibility' (1993) 15 *Sydney Law Review* 292; A. Morris and A. Wilczynski, 'Rocking the Cradle: Mothers Who Kill their Children' in H. Birch (ed.) Moving Targets: Women, Murder, and Representation (Virago: London, 1993) 198.
6. For example see, Edwards, above n. 5 at 96–100; Morris and Wilczynski, above n. 5 at 216; A. Wilczynski, *Child Homicide* (Greenwich Medical Media Ltd.: London, 1997) 124. Feminists are also deeply critical of the legislation for embodying the problematic 'mad' construct of female violence, claiming that the law denies the agency of women who kill their babies. See for example, Weare, above n. 5. For further detail on the feminist argument and challenges to this, see E. Milne and K. Brennan, 'The Infanticide Act as a Means to Provide Justice for Women against the Hardships and Harms of Pregnancy and Motherhood?' in K. Brennan and E. Milne (eds.), 100 Years of the Infanticide Act: Legacy, Impact and Future Directions (Hart Publishing: Oxford, 2023), 143, 144–54.
7. For example, see T. Ward, 'The Sad Subject of Infanticide: Law, Medicine and Child Murder, 1860–1938' (1999) 8 *Social & Legal Studies* 163.

interpreted by prosecutors, medical experts and trial judges to take account of social mitigation and to allow for women who do not have a diagnosed mental illness to rely on infanticide, thus reflecting the social mitigation interpretation of the law.[8] These studies indicate that (at least until recently) there was a common accepted understanding of the sort of case in which infanticide should be used. Indeed, the language itself appears to have been secondary to that shared understanding of the appropriate cases deserving lenient treatment. In particular, Mackay's studies show that up to the 2000s, the Crown Prosecution Service (CPS) seems to have consistently managed these cases through infanticide pleas. Few cases went to trial, including cases of neonaticide where girls/women killed their baby at birth and where there was little evidence of a psychiatric illness, albeit that there was evidence of psychological distress/trauma.[9] He argues that the law was used as a 'legal device' to ensure lenient outcomes in appropriate cases.[10] In its review of homicide in the mid-2000s, the Law Commission, who relied on Mackay's research, recommended that, despite problems with the infanticide law, it should remain unchanged, noting that it 'caused very few problems in practice'.[11]

In the last two decades, however, there has been a discernible shift in the approach to prosecuting these cases, with the CPS proceeding to trial on murder charges, and women and girls finding it increasingly difficult to make use of the infanticide defence, particularly in cases of newborn victims.[12] The recent case of Paris Mayo, the 15-year-old girl who killed her newborn son after a 'crisis pregnancy',[13] found guilty of murder and imprisoned for a minimum term of 12 years, is a striking example of the difficulties that currently surround the infanticide legislation. In his sentencing remarks, His Hon Mr Justice Garnham highlighted a number of significant vulnerabilities experienced by Paris, including that the 'emotional and physical effect of … giving birth alone and unassisted was profound', and he 'accepted that [she] experienced acute stress and anxiety at the time of the offence, which affected [her] conduct and [her] judgment, even though it fell short of what is required to satisfy the partial defence of infanticide'.[14]

The judge's remarks raise the question of what is needed to satisfy the infanticide requirements because, as we will outline in this paper, when infanticide legislation was first enacted there was little doubt that a defendant like Paris would have been able to avail of the offence/partial defence. Indeed, the situation that Paris faced reflects the 'classic' case of infanticide that the law was enacted to cover. As we explain in this article, the commonly held understanding of the statute when it was first enacted in 1922 meant that 'desperate' women and girls who killed newborn children due to extreme distress, following a crisis pregnancy and unassisted birth, would not have faced the prospect of a murder conviction. Further, as we have just outlined, evidence of how the law had been used, at least until the mid-2010s, strongly indicates that Paris is the sort of accused woman/girl who would previously have been able to rely on this law.[15]

8. See P.T. d'Orbán 'Women Who Kill their Children' (1979) 134 *British Journal of Psychiatry* 560; R. D. Mackay, 'The Consequences of Killing Very Young Children' [1993] Crim LR 21; Morris and Wilczynski, above n. 5 at 210; R. D. Mackay, 'Infanticide and Related Diminished Responsibility Manslaughters: An Empirical Study' in Law Commission, Murder, Manslaughter and Infanticide, Cm 304 (2006) Appendix D.
9. See Mackay, 'Infanticide and Related Diminished Responsibility Manslaughters', above n. 8.
10. Mackay, 'The Consequences of Killing Very Young Children', above n. 8, at 29.
11. Law Commission, above n. 3 at para. 8.38. The Government in its reform of homicide did not touch the mitigation framework in the Infanticide Act in the Coroners and Justice Act 2009. The issue of reform is briefly discussed below.
12. See Brennan and Milne, above n. 2 at 21–3.
13. E. Milne, Criminal Justice Responses to Maternal Filicide: Judging the Failed Mother, (Emerald Publishing Limited: Bingley, 2021).
14. ITV, '"Killing Your Baby Was a Dreadful Thing to Do"–Judge's Remarks in Full as Teen Mum Sentenced' (2023) <https://www.itv.com/news/central/2023-06-26/judges-remarks-as-teenage-mum-jailed-for-killing-newborn#> accessed 16 October 2023.
15. More recently, Jia Xin Tao, a 22-year-old Malaysian university student, was convicted of murdering her newborn child after she gave birth alone and put the baby, who was still alive at the time, into a cereal box that she then put into a plastic bag and suitcase. Her reported motivation was fear her family and friends in Malaysia would discove she was pregnant and that the pregnancy would affect her studies. This case also appears to bear the classic characteristics of newborn infanticide, the typical case

Conversely, infanticide seems to have been used without difficulty in recent cases involving women who kill their older babies within a year of birth while suffering from a diagnosable mental health condition – such as Natasha Sultan[16] and Hayley MacFarlane.[17] These cases illustrate the assumed (and, as we will argue, incorrect) interpretation of infanticide that is purported today: that it is a psychiatric defence *only* applicable in situations where there is a diagnosis of a specific mental health condition related to giving birth such as postnatal depression or postpartum psychosis.

Our monitoring of infanticide cases in England and Wales over the last 20 years leads us to conclude that successful convictions of infanticide over the past 15 years have been in cases similar to Natasha and Hayley – older infants, with the woman experiencing a diagnosable mental health condition.[18] However, women and girls such as Paris – who experience a crisis pregnancy, kill newborn children and, although demonstrating clear signs of significant mental distress, may not have a diagnosable mental health condition – have increasingly found it difficult to make use of the law, and so are convicted of murder.[19] Thus, it appears that the Infanticide Act is being pigeon-holed as a psychiatric defence, the assumption being that it is akin to diminished responsibility.[20] Indeed, in Hayley's case both counsels submitted to the judge that for the purpose of sentencing she should take into account the diminished responsibility sentencing guidelines as it is 'analogous to the offence of infanticide'.[21] We argue that this is not the correct interpretation of the infanticide law, and that currently the law is being misunderstood and thus misapplied.

Given the significant adverse implications for women/girls convicted of murdering their infants in circumstances where in the past they would have been able to rely on infanticide, it is crucial that the meaning and scope of the Infanticide Act 1938 is clarified by the courts. In this article we provide a framework for how that judicial task, which must focus on the language of the law, could and should be completed. No existing academic analyses consider in detail the wording in the statute, but rather assume that the words, which speak of a disturbance in mental balance in the context of the biological processes of birth and lactation, convey a bio-psychiatric meaning. The work that does support infanticide as a social mitigation doctrine is based on the historical roots of the law but not its language. We argue that taking account of both the language and the purpose of the statute means the Infanticide Act 1938 can and should be interpreted as an offence/partial defence that does not require diagnosis of a mental disorder and that includes social mitigation. To date, no one has done this work and so we are filling a significant gap in the scholarship.

Our interpretive analysis draws on the 'rules' of statutory interpretation, specifically the literal and purposive rules. In doing so, we conclude that, correctly interpreted, the Infanticide Act 1938 provides for both a medical and a non-medical defence, the latter of which can take account of social mitigation. In other words, it is broad enough to capture cases that range from the situation of a crisis pregnancy, as with Paris Mayo, through to a woman who experiences the rare condition of postpartum psychosis, such as

to be covered by the infanticide law: A. Giddings, 'Student Who Hid Baby in Suitcase Guilty of Murder', BBC News (2024) <https://www.bbc.co.uk/news/articles/cvg0dwq8yejo>, accessed 25 October 2024; R v Jai Xin Teo [2024] Crown Court at Warwick, 25 October <https://www.judiciary.uk/judgments/r-v-jia-xin-teo/>.

16. BBC News, 'Baby Death Mother Natasha Sultan Given Supervision Order' (2013) <https://www.bbc.co.uk/news/uk-england-humber-24908037> accessed 23 August 2024.
17. R v MacFarlane [2024] Crown Court at Leeds, 17 July <https://www.judiciary.uk/judgments/the-king-v-macfarlane/>.
18. For a summary of contemporary infanticide cases see Brennan and Milne, above n. 2 at 6-9. A recent report by the Cambridge Pro Bono Project supports this conclusion. It found in its analysis of cases over the last 20 years that 'psychiatric evidence is critical to the outcome', and 'many of the cases seem to question whether infanticide extends to circumstances subsequent to but connected to childbirth': see Cambridge Pro Bono, The Law of Infanticide: A Preliminary Reivew of the UK Infanticide Act 1938 (2024) <https://www.doughtystreet.co.uk/sites/default/files/media/document/CPP-Infanticide%28final%29.pdf>, accessed 14 January 2025.
19. Brennan and Milne, above n. 2, at 27.
20. Homicide Act 1957, s. 2; as amended by the Coroners and Justice Act 2009, s. 52.
21. MacFarlane, above n. 17 at [15].

Hayley MacFarlane. Specifically, we argue that the requirements for infanticide could be met with or without medical evidence of a mental disorder: a 'disturbance in the balance of the mind' denotes significant emotional or mental distress/agitation/anguish, rather than a mental health condition. Further, we argue that the effect of giving birth/lactation consequent upon birth should not be read as being limited to the biological/physiological aspects of those events, isolated from their social, emotional and psychological aspects: the social meaning and the wider social context of a woman's pregnancy, birthing and mothering experience are part of the doctrine. In this respect we argue that the statute should be interpreted to embody a holistic understanding of birth/lactation that includes the wider social context of pregnancy and birth, especially the impact of a crisis pregnancy and the environmental pressures of being a new mother caring for an infant. Such an interpretation is possible when we read the language of the statute, particularly with reference to the purpose of this law when enacted.

A further argument made in this paper is that the common understanding of cases of infanticide and their causes, and thus the purpose and nature of the Infanticide Acts 1922/1938, has been eroded over time, particularly as perceptions of women and children have changed. Historically, the vulnerability of women who killed their babies particularly in the context of a crisis pregnancy was understood, and consequently for this particular group of homicide offenders punishment for murder was considered inappropriate. However, this understanding has been lost, resulting in the collective meaning behind the law and the interpretation of the statute that Parliament held no longer being at the fore of legal, medical and academic thought. Consequently, when the language is read by contempories, and interpreted without this essential historical information and an understanding of the context of these cases, and alongside modern narratives of the meaning of sex equality and considering the rights of children, the law is easily misunderstood and thus misapplied. Essential to our argument, therefore, is the need to understand the complexities of a crisis pregnancy and mothering, and the impact of the circumstances of such a pregnancy and experience of parenting on a woman's mental state.

In this regard, we argue that for old legislation such as the Infanticide Act 1938, which is rarely used and relates to women's reproductive function and the experiences of pregnancy and birth, an historically informed and gender-sensitive approach to statutory interpretation is essential to prevent injustice. In this respect, a judicial approach to interpreting the infanticide statute must be informed, not only by the words used and Parliament's intention when creating this offence/partial defence, but also by the lived experiences of women who need the mercy the Act was designed to provide. This is particularly important in the context of a criminal law where women often struggle – whether as victims or offenders – due to the difficulties the 'male' law[22] has in accommodating their experiences of harm and their own acts of violence, such as in the context of sexual violence, coercive control, and the use of partial defences when women kill their abusers.[23] Thus, an interpretation of the Infanticide Act – a law that was enacted specifically to deal with a 'woman's crime' and with a situation experienced as a consequence of pregnancy, birth and mothering – that judicial understandings of this law take account of these lived female experiences.

Finally, while a question arises about whether there is a need to re-consider the language in the Infanticide Act 1938 through legislative reform to offer clarity on the meaning of the law, we argue that judicial interpretation can offer at least some clarification, at least to the extent of preventing girls like Paris Mayo from being convicted of murder. It is unlikely that a judicial interpretation will solve all problems with the infanticide law, and, therefore, we will offer some observations on law reform

22. N. Lacey, Unspeakable Subjects: Feminist Essays in Legal and Social Theory (Hart Publishing: Oxford, 1998); D. Nicolson, 'Criminal Law and Feminism', in D. Nicholson and L. Bibbings (eds.), Feminist Perspectives on Criminal Law (Cavendish Publishing: London, 2000) 25.

23. J. Conaghan 'Gendered Harms and the Law of Tort: Remedying (Sexual) Harassment' (1996) 16 *Oxford Journal of Legal Studies* 407; R. West, Caring for Justice, (New York University Press: New York and London, 1997).; J. Radford 'Marriage Licence or Licence to Kill? Womenslaughter and the Criminal Law' (1982) 11 *Feminist Review* 88; S. Edwards, 'Male Violence Against Women: Excusatory and Explanatory Ideologies in Law and Society', in S. Edwards (ed.), Gender, Sex and the Law (Routledge: London, 1985) 34; W. Chan and G. S. Rigakos, 'Risk, Crime and Gender' (2002) 42 *British Journal of Criminology* 743.

in the penultimate section of this article, particularly with respect to the recently announced Law Commission review of infanticide and other homicide laws. Further, although there is a risk that judges too will incline towards assuming a bio-psychiatric doctrine, we argue that a more considered and gender-sensitive reflection on the language contained in the law shows that such an interpretation is not inevitable, and, particularly when Parliament's purpose is taken into account, would result in an incorrect interpretation of the offence/partial defence of infanticide.

In the following section, we briefly discuss some contextual factors that may be relevant to judicial interpretation of the Infanticide Act 1938. Following this, we put forward our argument for a statutory interpretation, drawing on the literal and purposive approaches, which adopts a broad definition of infanticide reflecting the historical roots of this law. We then consider the relevance of a purposive approach to the infanticide law in the twenty-first century, over 100 years after infanticide was first legislated for as a specific criminal offence/partial defence. Following this we offer some reflections on how an appeal court is likely to consider the issue of statutory interpretation, and highlight the importance of adopting an approach that is sensitive to the history of this law and the context of this crime. Before concluding, we briefly provide some thoughts on the potential for law reform to address issues with this law.

The Context for Interpreting the Infanticide Act

Before we begin our statutory interpretation of the Infanticide Act 1938 there are some contextual factors to be considered. First, we briefly outline the existing, though limited, judicial interpretation of the Infanticide Act, highlighting that there is nothing in existing judicial commentary on the law that prevents the wider social mitigation interpretation we argue for. Second, we outline research on the nature of maternal infant killing and the vulnerabilities of infanticidal women. As we indicate in the introduction, a gender-sensitive approach is needed when interpreting laws such as the Infanticide Act, and the lived experiences of women is crucial in this respect. Indeed, a lack of appreciation of the unique features of these cases, the gender-based difficulties that infanticidal women experience and their vulnerabilities in this context, can lead to this crime and thus the law itself being misunderstood, and consequently lead to more punitive inclinations in these cases.[24] Thus, we argue that an important contextual factor for interpreting this law is a deeper appreciation of the crime at which it is directed.

Third, the Infanticide Act is not without its critics. Concerns about the legislation include: its limitation to biological mothers and the exclusion of fathers and other parents/caregivers; that the law undermines child protection and rights of the child; and, the question of whether a sex-specific offence is appropriate in the twenty-first century.[25] In light of these and other criticisms, many object to the existence of this legislation on principle, and point to diminished responsibility as a better option.[26] It is not the purpose of this article to justify the existence of the Infanticide Act, rather we are taking the Act as it is. Elsewhere we have argued that an infanticide offence that provides solely for women is justified,[27] though we acknowledge that further research is needed to provide a comprehensive assessment of the contemporary need for the Infanticide Act. For the purposes of statutory interpretation of the law as it stands, these matters have no direct bearing on the statute. However, they are issues that may influence

24. For example, the sentencing remarks in the case of Teo possibly reveal a misunderstanding of her mental state and motivations, and thus her culpability. A minimum term of 17 year was imposed in this case. See above n. 15.
25. For an overview of current debates on and critiques of the law, see Brennan and Milne, above n. 2 at 29–37. For recent critiques of infanticide see, H. Howard, 'The Offence/Defence of Infanticide: A View from Two Perspectives' (2018) 82 *Journal of Criminal Law* 470; H. Howard, 'Myths and Moral Agency: A Principled Approach to Infanticide Law' in K. Brennan and E. Milne (eds.), 100 Years of the Infanticide Act: Legacy, Impact and Future Directions (Hart Publishing: Oxford, 2023), 117; J. Mason, 'The Myth of Madness: Murderous Mothers and Maternal Infanticide' (2021) 85 *Journal of Criminal Law* 441.
26. For example, see Mason, above n. 25. The Law Commission considered the question of whether infanticide should be merged with diminished reponsibility in the mid-2000s, and concluded against this: see Law Comm, above n. 3 at paras. 8.35–8.39.
27. See Milne and Brennan, above n. 6.

how this law is understood, and so may consciously or unconsciously impact judicial interpretation of the law. Consequently, we briefly offer responses to these criticisms to support our interpretation of the law.

Existing Judicial Interpretations

Tunstill is the only case where judges have been called on to interpret the language of the Infanticide Act 1938.[28] Rachel Tunstill was convicted of murdering her newborn baby. The trial judge declined to leave infanticide to the jury due to her having pre-existing mental ill-health,[29] relying on the dicta of Judge LJ who had stated (*per curiam*) in *Kai-Whitewind* that infanticide requires 'evidence that the "balance of her mind was disturbed" either because the mother has not recovered from giving birth to the child, or the effect of lactation on her. *No other circumstances are relevant*'.[30] The trial judge in *Tunstill* interpreted this statement to mean that infanticide could not be used where pre-existing mental ill-health had contributed, along with the effect of birth/lactation, to her disturbed mental state because such conditions amounted to 'other circumstances'; the effect of birth/lactation had to be the sole cause of her mental state. The Court of Appeal (CA) disagreed with the trial judge,[31] interpreting the phrase 'by reason of' to reflect standard causation principles, stating: if 'failure to recover from the effects of birth is an operative or substantial cause of the disturbance of balance of mind that should be sufficient, even if there are other underlying mental problems (perhaps falling short of diminished responsibility) which are part of the overall picture'.[32] Thus, the CA ruled that other factors such a pre-existing mental ill-health that also contributed to her disturbed mental state did not preclude use of the Infanticide Act, providing the effect of birth/lactation itself made a sufficient contribution.

What *Tunstill* tells us about the infanticide law, and how the court approached it, assists analysis of judicial interpretation of other aspects of this law, in particular the question of whether it is a bio-psychiatric defence or something broader. First, the CA specifically highlighted the merciful purpose of the statute as a reason for the broader interpretation it applied.[33] This approach may be built on to engage more fully with the history and legislative purpose in future cases, as we advocate below.

Second, in terms of seeking insights into the meaning of the law more broadly, namely whether it is a bio-psychiatric defence or a defence that includes social mitigation, the CA in *Tunstill* made no explicit observations. What is clear from this judgement is that evidence of social mitigation that contributed to her mental state would not prevent infanticide from applying, even if we were to view infanticide as a *bio*-psychiatric doctrine, providing birth/lactation itself made a sufficient contribution. However, it is not clear whether social mitigation evidence could be used to support the defence. *Tunstill* said nothing explicit on the question of whether social factors could be part of infanticide, except to refer to Judge LJ recommendation in *Kai-Whitewind* that the question of whether social circumstances should be included be considered as part of the Law Commission's review of homicide in the mid-2000s.[34] *Tunstill* noted that both the Law Commission and Parliament had since considered the law and 'neither … sought to amend the wording as to the circumstances in which the balance of a

28. Above n. 4. Two other cases relating to infanticide have been heard in the past twenty years, but neither focused on how the core elements of mitigation that the Act provides should be interpreted: Gore [2007] EWCA Crim 2789 and Kai-Whitewind [2005] EWCA Crim 1092.
29. The jury rejected diminished responsibility and her claim that she lacked the *mens rea* for murder based on her mental state.
30. Above n. 28 at [134], emphasis added.
31. Above n. 4 at [35].
32. Ibid. at [31]. It also drew an analogy with diminished responsibility and intoxication.
33. According to the CA, to interpret Judge LJ's comments to restrict the availability of the infanticide law so that it could not apply to circumstances where the woman had a pre-existing mental condition would be 'unnecessarily harsh and [run] counter to the intent of the legislation.' Ibid. at [30].
34. The Law Commission decided to not recommend change to the law in this respect: Law Commission, above n. 3 at paras. 8.27–8.31. Discussed further below.

mother's mind is disturbed'.[35] It is probably fair to say, therefore, taking both judgements that the CA seems to incline towards the view that infanticide is a psychiatric offence/partial defence that does not take account of social circumstances. However, the CA has never been directly asked what is meant by key phrases in the legislation. Nothing binding has been said in previous cases on these specific issues, and so there is scope to take an approach that moves beyond the view of this law as being a bio-psychiatric defence, allowing us to engage with the language of the statute, the purpose behind it, and the lived experiences of women who kill their babies in the first year of life.

Nature of Cases

A review of the nature of maternal infant killing cases makes it clear that social circumstances that surround birth and mothering an infant are crucial to understanding infanticidal women's acts of fatal violence. The academic literature and nature of cases draws a distinction between newborn child killing (within the first 24-hours of the child's life) and killing of older infants, aged between one day and one year; we briefly outline both. The below analysis of cases of maternal infant killing is based on academic literature, but also 20 years of observation by the authors of cases as they are reported in the media and come to trial.

Research clearly indicates that newborn child killing by mothers – neonaticide – follows a 'crisis' pregnancy: the pregnancy causes the woman a crisis due to her vulnerabilities and the complex and difficult circumstances of her life (domestic violence and abuse, alcohol and substance abuse, poverty, as examples).[36] As a result of the crisis women conceal and/or deny the pregnancy not only from others, but also from themselves.[37] Generally, women go into labour unexpectedly, giving birth alone. Although it is widely understood that women who kill their newborn children are not mentally ill, there is substantial evidence that women in these situations experience trauma, distress and/or dissociation at the time of the killing, and their actions are a result of intense fear and shame about the pregnancy; the killing occurs due to panic following the unexpected birth and the context that led them to experience the pregnancy as a crisis.[38] While these cases have been described as women ridding themselves of unwanted children,[39] such analysis is crude and fails to account for the crisis and distress faced by women. Research has also shown that women in such situations believe the baby cannot exist due to external factors (such as abusive parents or partner), but that this does not mean they do not *want* the baby.[40]

The killing of older infants by women is different, yet it is still the context that surrounds the woman (e.g. financial problems, exhaustion, isolation and lack of practical support with childcare) that plays a

35. Tunstill above n. 4 at [21].
36. See Milne, above n. 13 at 28–37.
37. Ibid.; C. L. Meyer and M. Oberman, Mothers Who Kill Their Children: Understanding the Acts of Moms from Susan Smith to the "Prom Mom", (New York University Press: New York, 2001); K. Beyer, S. McAuliffe Mack and J. L. Shelton, 'Investigative Analysis of Neonaticide: An Exploratory Study' (2008) 35 *Criminal Justice and Behavior* 522.
38. See generally, P. J. Resnick, 'Murder of the Newborn: A Psychiatric Review of Neonaticide' (1970) 126 *American Journal of Psychiatry* 1414; d'Orbán, above n. 8; S. Amon, H. Putkonen, G. Weizmann-Henelius, M. P. Almiron, A. K. Formann, M. Voracek, M. Eronen, J. Yourstone, M. Friedrich and C. Klier, 'Potential Predictors in Neonaticide: The Impact of the Circumstances of Pregnancy' (2012) 15 *Archives of Women's Mental Health* 167–74; Meyer and Oberman, above n. 37; L. J. Miller, 'Denial of Pregnancy' in M. G. Spinelli (ed.), Infanticide: Psychosocial and Legal Perspectives on Mothers who Kill (American Psychiatric Pub.: Washington DC, 2003), 81; M. G. Spinelli, 'A Systematic Investigation of 16 Cases of Neonaticide' (2001) 158 *American Journal of Psychiatry* 811; Beyer, McAuliffe Mack and Shelton, above n. 37; G. Milia and M. Noonan, 'Experiences and Perspectives of Women who have Committed Neonticide, Infanticide and Filicide: A Systematic Review and Qualitative Evidence Synthesis' (2022) 29 *Journal of Psychiatric and Mental Health Nursing* 813.
39. Resnick, above n. 38.
40. N. Vellut, J. M. Cook and A. Tursz, 'Analysis of the Relationship between Neonaticide and Denial of Pregnancy Using Data from Judicial Files' (2012) 36 *Child Abuse & Neglect* 553.

significant role in her fatal acts.[41] What is distinct from neonaticide is that a significant proportion of women who kill older infants experience diagnosable mental health conditions that are directly connected to pregnancy, birth and parenting an infant, such as postnatal depression.[42] However, significantly, feminists are keen to highlight that even disorders such as postnatal depression cannot be seen as solely caused by hormones and the physical impacts of pregnancy and nursing a child; there are clear social causes of such mental health conditions.[43] Indeed, medical research shows that the impact of childbirth/lactation as biological events is unclear in the aetiology of illnesses such as postnatal depression and postpartum psychosis, but it is generally understood that factors such as poverty, abuse, lack of support, previous psychiatric illness and difficulty with bonding play an important causal role.[44]

Through our engagement with other academic work and monitoring of UK cases over the last 20 years, it is not an exaggeration to say that maternal infant killings are almost always tragedies that involve vulnerable women with responsibility but limited culpability for the death of the child.[45] The evidence from cases clearly indicates that women kill their infants for very different reasons to men.[46] Indeed, women's criminal offending, including their use of violence is both qualitatively and quantitively different to men's.[47] While we are not saying it is impossible for a woman to kill for reasons mostly seen in paternal infant killing,[48] it is incredibly rare.[49] In such cases, infanticide would of course not be a suitable outcome.

The nature of maternal infant killing is not particularly well known, most likely due to how few cases occur. The lack of general knowledge of why a woman would kill her young child likely feeds into perceptions that women only commit such acts if they are mentally unwell or evil: the 'mad' (who are convicted of infanticide) or 'bad' (who are convicted of murder) dichotomous narrative ever present in criminal justice responses to violent women.[50] This contemporary public naivety of the phenomena of

41. C. M. Alder and J. Baker, 'Maternal Filicide: More Than One Story to Be Told' (1997) 9 *Women & Criminal Justice* 15; Meyer and Oberman, above n. 37; M. Smithey, The Cultural and Economic Context of Maternal Infanticide: A Crying Baby and the Inability to Escape, (Emerald Publishing Limited: Bingley, 2019). While the research cited here is from outside the UK, a review of cases over the last 20 years conducted by the authors finds the same patterns.
42. d'Orbán, above n. 8; C. F. Lewis and S. C. Bunce, 'Filicidal Mothers and the Impact of Psychosis on Maternal Filicide' (2003) 31 *Journal of the American Academy of Psychiatry and the Law Online* 459; V. Dobson and B. D. Sales, 'The Science of Infanticide and Mental Illness' (2000) 6 *Psychology, Public Policy, and Law* 1098; S. H. Friedman, S. M. Horwitz and P. J. Resnick, 'Child Murder by Mothers: A Critical Analysis of the Current State of Knowledge and a Research Agenda' (2005) 162 *American Journal of Psychiatry* 1578.
43. N. Mauthner, 'Towards a Feminist Understanding of 'Postnatal Depression'' (1993) 3 *Feminism & Psychology* 350; I. Z. Kherani, 'A Feminist Science Commentary: A Socially Cognizant Analysis of Postpartum Depression in the Western World.' (2021) 98 *University of Toronto Medical Journal* 26.
44. For summaries of the medical research, see McSherry, above n. 5; K. Brennan, 'Beyond the Medical Model: A Rationale for Infanticide Legislation' (2007) 58 NILQ 505, at 507–11; T. Porter and H. Gavin, 'Infanticide and Neonaticide: A Review of 40 Years of Research Literature on Incidence and Causes' (2010) 11 *Trauma, Violence & Abuse* 99.
45. See generally, Brennan and Milne, above n. 2 at 6–9; Milne and Brennan, above n. 6 at 154–65.
46. K. Cavanagh, R. E. Dobash and R. P. Dobash, 'The Murder of Children by Fathers in the Context of Child Abuse' (2007) 31 *Child Abuse & Neglect* 731; A. Wilczynski, 'Mad or Bad? Child-Killers, Gender and the Courts' (1997) 37 *British Journal of Criminology* 419.
47. L. Gelsthorpe and S. Wright, 'The Context: Women as Lawbreakers' in J. Annison, J. Brayford and J. Deering (eds.), Women and Criminal Justice: From the Corston Report to Transforming Rehabilitation (Policy Press: Bristol, 2015) 39.
48. Men are much more likely to kill due to anger and frustration and the killing is often preceded by child abuse, such as shaking the baby in a rage in response to his/her crying. Women, mostly kill infants in a moment of despair, out of desperation, brought on by a form of mental distress, if not a diagnosable mental illness. For research on the context and circumstances of maternal and paternal child homicides, see generally Wilczynski, above n. 6 at 45–64; Wilczynski, above n. 46; Cavanagh, Dobash and. Dobash, above n. 46; Milne, above n. 13.
49. One such rare case is that of Emma Wilson, who inflicted multiple injuries on her son before finally inflicting a fatal brain injury, BBC News, 'Callum Wilson Murder Case: Mother Emma Wilson Found Guilty' (2013) <https://www.bbc.co.uk/news/uk-england-berkshire-25372238> accessed 23 August 2024. However, even in this case, Emma experienced a crisis pregnancy and difficulties mothering the child. Information about the case obtained from the Serious Case Review conducted into the death of the child, examining the missed safeguarding opportunities that could have prevented baby Callum from being killed.
50. B. Naylor, 'The 'Bad Mother' in Media and Legal Texts' (2001) 11 *Social Semiotics* 155; Morris and Wilczynski, above n. 5.

infanticide differs from the level of public knowledge that existed when the laws were enacted. As we outline below, in the early twentieth century there was a collective understanding that infanticidal women were victims of their circumstances, that they were different from other murderers and so a murder conviction was considered inappropriate.[51] In the past, and today, the nature of maternal killing of infants means that exclusion of social circumstances from the operation of the infanticide law would prevent vulnerable women who kill their infants while in a state of significant mental distress from making use of the offence/partial defence. These contextual factors of infanticide provide a core reason why the interpretation we advocate for is both correct and required.

Concerns About the Legislation

We briefly outline criticisms of the law and offer some counter arguments. Our aim is not to provide systematic rebuttals to these points, which is both beyond the scope of this article, and, as we have acknowledged elsewhere, requires further research.[52] Instead, we aim to outline why these arguments should not prevent the interpretation of the law we present in our analysis in the following sections.

Child Protection. There is no doubt that compared to the early twentieth century when the Infanticide Act was enacted, children are considered more important,[53] and there is now an imperative to protect them from harm.[54] Some argue that the existence of the Infanticide Act undermines the basic principles of children's rights and the value of infant life.[55] However, counter arguments have been presented, drawing on the fact that the legislation is limited to biological mothers.[56] Indeed, as the Victorian Law Reform Commission argued, the legislation does not 'condone the killing of babies, but rather recognises the difficulties and complexities which may be present in a woman's relationship with her young child and the kind of factors which can influence maternal infanticide'.[57]

Never has a conviction for infanticide indicated that anyone believes maternal infant killing is acceptable, and indeed as the history of the law reveals one of the purposes of this statute was to reassert the seriousness of this crime.[58] Infanticide is a homicide offence. Furthermore, as a partial defence to murder it is not conceptualised as a justification (no wrongdoing), but rather as an excuse (wrongdoing but punishment is inappropriate or should be reduced). By the time a case comes to court to consider if infanticide is the appropriate outcome, it is no longer about the protection of a child, it is about the appropriate disposal of the woman who killed him or her. Considering the nature of maternal infant killing, as outlined above, it seems unlikely that women are purposefully killing infants because they are aware that they will not be imprisoned if convicted of infanticide, nor that the criminal law will act as a deterrent.[59]

In terms of practical steps to prevent child cruelty and improve safeguarding of children, irradiation of the Infanticide Act seems unlikely to have a positive impact. In fact, a conviction for infanticide will

51. See Ward, above n. 7.
52. Milne and Brennan, above n. 6.
53. V. A. R. Zelizer, Pricing the Priceless Child: The Changing Social Value of Children, (Princeton University Press: Princeton, 1994).
54. The Convention on the Rights of the Child clearly outlines that every child has rights, without discrimination of any kind: United Nations Human Rights Office of the High Commissioner, Convention on the Rights of the Child (1989), General Assembly resolution 44/25.
55. C. Damme, 'Infanticide: The Worth of an Infant under Law' (1978) 22 *Medical History* 1; Howard, 'The Offence/Defence of Infanticide, above n. 25.
56. P. J. Dean, 'Child Homicide and Infanticide in New Zealand' (2004) 27 *International Journal of Law and Psychiatry* 339; M. Oberman, 'Mothers Who Kill: Coming to Terms with Modern American Infanticide' (1996) 34 *American Criminal Law Review* 1.
57. Victorian Law Reform Commission, *Defences to Homicide: Final Report* (Melbourne, 2004) para. 6.23.
58. As we discuss below.
59. M. Oberman and C. L. Meyer, When Mothers Kill: Interviews from Prison, (New York University Press: New York, 2008).

allow for the protection of other (including future) children. Women convicted of infanticide generally receive mental health treatment as part of their sentence, thus reducing the chance of repeat offending. In addition, child protective services are likely to be involved if the woman has other children or becomes pregnant again.[60]

Finally, while imprisonment is unlikely in cases of infanticide, it is not impossible. The maximum sentence for the offence is life imprisonment. If a judge determined that a prison sentence was appropriate, then it would be within his or her power to impose.

Exclusion of Father and Other Parents/Caregivers. One of the core criticisms levied against the Infanticide Act is that it is only available to the biological mother of the child, excluding biological fathers and other non-biological parents (e.g. adoptive mothers) and caregivers.[61] Many see the prioritisation of biological mothers as unfair and discriminatory against other parents/carers. Such arguments may make judges reluctant to interpret the Infanticide Act to include social factors, as a bio-psychiatric defence arguably offers a cleaner justification for the offence/partial-defence only being available to women: giving birth is a physical process with hormonal changes, and thus only birth mothers can experience it and rely upon that experience to make use of the legislation.

However, as we have argued elsewhere,[62] the burden of pregnancy is exclusively experienced by women, and the labour of parenting continues to be overwhelmingly performed by women, most of whom are the biological mother of the child. A crisis pregnancy that leads the woman to a place where she then kills the child soon after birth is only going to be experienced by the biological mother. The father may assist her to kill the newborn child, but from our survey of cases we can conclude male involvement is incredibly rare. The hardships of parenting an infant – the exhaustion, isolation, distress that is reported,[63] and the crisis that this can cause, which in some sad situations leads to the killing of the infant, is most often experienced by the biological mother of the child. Furthermore, the nature of patriarchy is such that motherhood is seldom celebrated or rewarded; is often accompanied by feelings of personal guilt and failure; and society continues to perpetuate the idea that difficulties in meeting social expectations of 'good' mothering indicate personal failure, rather than structural inequalities.[64] A time may come when fathers equally shoulder the challenges of raising infants, but we are not there yet. For these reasons, legislation that focuses on biological mothers does not seem inappropriate.

Ultimately, the legislation specifically excludes fathers and other parents/carers who are not the biological mother from making use of the infanticide offence/partial defence; no amount of judicial interpretation will change this element of the law. Parliament would need to legislate to alter this aspect, and in 2009 they specifically chose to not make such a change, despite calls to do so.[65] Thus, we conclude that when interpreting the law, it is important that judges do not get caught up in the question of discrimination against other parents. Instead, the focus needs to be on how to interpret the law that Parliament has determined should be reserved for biological mothers.

60. In the case of Hayley MacFarlane, one of the justifications the judge gave for sentencing Hayley under section 37 of the Mental Health Act 1983 is that it would allow her to be detained in a hospital in the future if she were to become pregnant and be considered a risk to a future child. MacFarlane, above n. 17.
61. Howard, 'Myths and Moral Agency', above n. 25; Mason, above n. 25.
62. Milne and Brennan, above n. 6 at 154–60.
63. D. B. Copeland and B. L. Harbaugh, '"It's Hard Being a Mama": Validation of the Maternal Distress Concept in Becoming a Mother' (2019) 28 *Journal of Perinatal Education* 28.
64. These structural inequalities require individuals (often women) to bear what should be a collective problem: how we successfully raise the next generation of humans. In our other work we refer to this as a gendered harm–harm that women experience because they *are* women, see Milne and Brennan, above n. 6 at 154–60.
65. Coroners and Justice Act 2009. We discuss this issue of the exclusion of fathers and other parents further below in the context of potential law reform.

Sex-Specific Law. A final criticism often levied at the Infanticide Act is that it is inappropriate for women to have access to a defence that is not available to men. As outlined in the introduction, feminists have made this point, raising concerns that infanticide pathologises women and suggests they cannot be considered responsible for their actions, as men can.[66] However, as we have outlined above, women's criminal acts, including the killing of infants, are qualitatively and quantitatively different to men's. In addition, as we have argued above, and elsewhere,[67] women generally have a very different experience to men in terms of pregnancy and parenting a child. The hardships that come with pregnancy and motherhood are exacerbated in situations of crises experienced by most women who kill their infants, as we have illustrated.

Considering the difference between men's and women's fatal acts of violence towards infants and the context in which they occur, it does not follow that their treatment by the criminal law or criminal justice system should be the same. As feminists, we want rights for women, and for the female sex to have equal opportunities and rights to the male. However, as Baroness Corston reported in her review of the punishment of criminalised women: equal outcomes for men and women does not equate to the *same* approaches.[68] The qualitative difference in maternal and paternal infant homicide makes issuing the same treatment inappropriate, and thus justifies an infanticide offence available for only women.

The issues that surround the Infanticide Act that we have outlined in this section lead us to conclude that a contextualised interpretation of the law is essential, particularly as women are now struggling to make use of the offence/partial defence. As we will demonstrate in the remainder of the article, it is possible to read the existing statute in line with broader non-medical interpretations, and to do so brings the law back in line with Parliament's intent. In the next section we begin this endeavour, drawing on the literal and purposive rules of statutory interpretation. Through this process, we argue that in interpreting older statutes that are infrequently used and relate to the crimes of women, the history, context and lived experiences of women are crucial. Without a contextual interpretation of this and similar statutes, women will continue to be disadvantaged by the criminal law and the criminal justice system.

A Literal Interpretation of the Infanticide Act

When determining the meaning of a statutory provision, judges must exercise their interpretive function within constitutional parameters and have less freedom than academics in how they approach the task.[69] They are bound by constraints such as parliamentary sovereignty and the separation of powers, with an obligation to give effect to the 'will of Parliament' in enacting the law.[70] 'Rules' on statutory interpretation operate to keep judges within 'constitutional limits',[71] and there are practical constraints including resources and time.[72] Nevertheless, statutory interpretation entails a degree of creativity. The 'rules' do not necessarily bind judges to adopt a particular method, but rather are approaches to be drawn on that

66. See Edwards, above n. 5; Weare, above n. 5; H. Allen, Justice Unbalanced: Gender, Psychiatry, and Judicial Decisions (Open University Press: Milton Keynes, 1987). For our critique of this position see Milne and Brennan, above n. 6 at144–54.
67. Milne and Brennan, above n. 6 at 155–60.
68. J. Corston, The Corston Report: A Review of Women with Particular Vulnerabilities in the Criminal Justice System, Home Office (March 2007).
69. R. C. Hunter, C. McGlynn and E. Rackley, 'Feminist Judgments: An Introduction' in R. C. Hunter, C. McGlynn and E. Rackley (eds.), Feminist Judgments: From Theory to Practice (Hart Publishing: Oxford, 2010) 3, 16.
70. See generally, J. Steyn, 'Pepper V Hart; *A Re-Examination*' (2001) 21 *Oxford Journal of Legal Studies* 59; N. Parpworth, Constitutional and Administrative Law, 12th edn (Oxford University Press: Oxford, 2022) 246–252; N. Duxbury, Elements of Legislation (Cambridge University Press: Cambridge, 2012); R. Cross, J. Bell and G. Engle, Cross: Statutory Interpretation, 3rd edn (Oxford University Press: Oxford, 1995); W. Twining and D. Miers, How to Do Things with Rules, 5th edn (Cambridge University Press: Cambridge, 2010) 230–267; M. Zander, The Law-Making Process, 6th edn (Cambridge University Press: Cambridge, 2004) 129–202.
71. See Duxbury, above n. 70 at 129.
72. See Twining and Miers, above n. 70 at 261–2.

may assist with determining what Parliament intended the words of the provision to mean.[73] Consequently, we cannot provide an exhaustive account of how judges may approach this issue or predict the outcome of judicial interpretation of the Infanticide Act 1938. However, we provide an outline for how the statute could be interpreted, firstly from a literal or plain meaning approach[74] to statutory interpretation, and then from a purposive approach.[75] We conclude that it is not only possible to justify an interpretation of the Infanticide Act that supports inclusion of the wider social circumstances of birth and motherhood as key factors of the offence/partial defence, but that the interpretation we present here is the correct interpretation to keep the legislation true to Parliament's intent.

In practice, judges are unlikely cognitively to treat the literal and purposive approaches discretely in the interpretive task.[76] Notwithstanding this, we have focused exclusively on the words themselves as the starting point for our analysis of the language of the Infanticide Act 1938, before moving on to separately consider the purpose behind the law and the impact of this on how it may be interpreted. Although this approach may seem somewhat artificial when compared to how judges interpret the law, we chose to separate the two approaches as no one has probed in detail the meaning of the words of the 1938 statute in previous analyses, resulting in assumptions as to meaning. Thus, we provide the first analysis of what the statute *actually* says – what the words themselves could be taken to mean – and so assess whether the language used in the statute is capable in and of itself of being interpreted in a way that reflects our understanding. Focusing solely on the language highlights the fact that the view that the law only provides for a psychiatric/bio-psychiatric offence/partial defence may be challenged. As we will now go on to demonstrate, the language of the current Infanticide Act is, at the very least, ambiguous, and in fact, as we outline, could support our interpretation of the law.

A Disturbance in the Balance of the Mind

As outlined, it is often assumed that the Infanticide Act requires psychiatric evidence of a mental disorder to support the element of 'a disturbance in the balance of the mind'.[77] We argue, however, that an examination of the language shows that a mental illness/disorder is not necessarily required. We start with a dictionary[78] interpretation of 'disturbance': 'The interruption and breaking up of tranquillity, peace, rest or settled condition; agitation (physical, social or political)'.[79] While this definition is vague, it does not appear to suggest the requirement for a disease, illness, disorder or a specific mental impairment. Rather, it indicates something that would not be medical in nature: an 'interruption' in her usual 'settled' or peaceful or tranquil mental state; that her state of mind was agitated. The definition also suggests a *temporary* disruption in her usual settled mental state.

The phrase, 'a disturbance in the balance of the mind', is particular to the infanticide statute and does not appear in the context of other offences/defences.[80] However, it may be useful in trying to understand

73. Ibid. at 243.
74. The meaning of the language in terms of its ordinary usage by reasonable people: See Duxbury, above n. 70 at 124,140; R. Sullivan, 'Some Implications of Plain Language Drafting' (2001) 22 *Statute Law Review* 145, 162–3.
75. Which allows for the purpose of the legislation to be given greater emphasis, so justifying the more creative meaning of the language adopted, providing the words themselves are capable of bearing that meaning, so giving effect to parliamentary intent: Cross, Bell and Engle, above n. 70 at 32, 50–68; Twining and Miers, above n. 70 at 255.
76. D. Greenberg, Craies on Statutory Interpretation, 12th edn (Sweet & Maxwell: London, 2020) para 18.1.17..
77. For example, the Law Commission's treatment of the doctrine relied on medical evidence in its consideration of the law: Law Commission, above n. 3.
78. For criticisms on use of dictionaries see Duxbury, above n. 70 at 141–3; B. G. Slocum, 'Linguistics and "Ordinary Meaning" Determinations' (2012) 33 *Statute Law Review* 39, 41.
79. O. E. Dictionary, 'Disturbance' (2023) <https://www.oed.com/dictionary/disturbance_n?tab=meaning_and_use#6522701> accessed 16 October 2023.
80. Although in discussions with Tony Ward and Rachel Dixon it appears that the phrase began to be commonly used in verdicts in Coroner's inquests into deaths by suicide after 1922.

the meaning of this phrase to compare it with the language of diminished responsibility. It could be said, for example, that a 'disturbance' is different to an 'abnormality', the language used in the diminished responsibility defence, in that 'disturbance' suggests an upset or disruption in an otherwise 'normal' or 'balanced' mind, with there being nothing to indicate that this has any degree of permanence, longevity or significance, but simply that her mind was not in its usual 'balance'. A mental disorder may have such an impact, but a person's 'balance of mind' may be disturbed or disrupted by something falling short of a mental disorder such as, a stressful event; trauma; intense emotions like fear, anger and shame; physical sensations such as extreme pain; and exhaustion. While diminished responsibility is clearer in aligning the legal requirements with mental ill-health – 'an abnormality of mental functioning' and a 'recognised medical condition' – a 'disturbance in the balance of the mind' suggests a requirement falling short of mental ill-health. Indeed, there is nothing explicit in the provision to suggest infanticide is limited to medical conditions.

Significantly, the Canadian Supreme Court recently recognised that the phrase used in the Canadian Criminal Code, 'her mind is then disturbed',[81] was not a medical or legal term of art and should be given its grammatical and ordinary meaning. The language thus means mentally agitated, mentally unstable or mental discomposure, and does not therefore require a defined mental or psychological condition or a mental illness, or amount to a significant impairment of the accused's reasoning faculties.[82] Similarly, the Fijian CA also recently found that proving the requirements for infanticide are not as 'arduous' as those for diminished responsibility and further that the question of whether the balance of mind was disturbed did not necessarily require medical evidence as it was something within the knowledge of many.[83] Indeed, in an earlier case, the High Court of Fiji had rejected psychiatric evidence relying instead on the accused's account and holding that, in the absence of reliable psychiatric evidence, the factfinders could, having considered all the circumstances surrounding the pregnancy and birth, determine whether the balance of her mind was disturbed.[84] Thus, approaches from jurisdictions that have adopted similar terminology to the 1938 Infanticide Act indicate that it is at least open to the courts of England and Wales to take a non-medicalised approach to the meaning of the phrase and that this may be done by focusing on the language itself.

The Effect of Giving Birth or the Effect of Lactation Consequent upon Birth

The second issue for a literal interpretation is whether 'the effect of giving birth' and 'effect of lactation consequent upon birth' refer solely to the biological/physical/physiological effect of birth/lactating, or whether the language may be more broadly construed to take account of different aspects – biological, social, cultural and emotional – of giving birth/lactating. Birth and lactation may be viewed by many – in terms of the ordinary understanding of these words[85] – as inherently biological/physical processes, thus potentially indicating that the language should be read to mean the biological/physical effect of giving birth/lactation, and therefore that the offence/partial defence is medical. The words of a statute must be understood in the context of the statute as a whole,[86] potentially providing further justification for understanding infanticide as a biologically-based doctrine given that only biological processes (birth/lactation) are mentioned.

81. Criminal Code, RSC, 1985, c C-46, s. 233.
82. Borowiec [2016] 1 SCR 80 at [35].
83. Cagimaira v State [2020] 1 LRC 391 at [44] and [45].
84. State v Alena Mausa 2012 HAC 23.
85. A literal/plain reading of the words is what reasonable people would have meant by the language employed in the context in terms of 'accepted and typical standards of communication': D. Walton, F. Macgno and G. Sartor, Statutory Interpretation: Pragmatics and Argumentation (Cambridge University Press: Cambridge, 2021) 104.
86. See Cross, Bell and Engle, above n. 70 at 50.

However, what the statue focuses on is *the effect* of giving birth/lactation consequent upon birth, not birth/lactation alone. Thus, even if birth/lactation are themselves viewed as essentially biological/physical processes, there is no reason to assume that the 'effect' of either is purely physical/biological in nature; specifically, the language of the statute does not, on a literal interpretation, explicitly limit the offence/partial defence in this way. There is no mention in the statute of biological or physiological effects of giving birth/lactating. The language simply states: 'not having fully recovered from the effect of giving birth or the effect of lactation consequent upon birth'. As outlined above, it has been assumed, particularly by feminist scholars, that this phrase refers to the biological effects (e.g. hormonal) of birth/lactation and the perception it causes 'madness'.[87] However, this interpretation is based largely on a presumed link between the law and nineteenth/early twentieth century medical thinking,[88] rather than on an exploration of what the language *actually* states.

Importantly, as briefly discussed above, birth and lactation are not purely physiological/biological but are also social, cultural, psychological and emotional in nature: a life event, not just a reproductive process.[89] A contextualised understanding of the nature of birth and mothering an infant opens the possibility that the language of the statute does not limit the doctrine to the biological/physical aspects of these events, and so does not preclude consideration of any effect of birth/lactating on the woman's mental balance.[90] It may be significant that legislators employed the phrase 'the effect of *giving birth*' rather than the 'effect of *birth*', conceptualising birth as an experience, thus allowing us to consider the meaning of these events as more than a biological function.

Another consideration is what is meant by the phrase 'the effect of'. This could be interpreted in two possible ways. The phrase '*the* effect' may suggest that one particular effect of giving birth/lactation must be demonstrated, something that was sufficient on its own to produce a disturbance in the balance of the mind; potentially biological, social, psychological, emotional – any – effect of giving birth/lactation on her mental state. Alternatively, the phrase could mean 'the overall impact' of giving birth/lactating, thus not requiring the identification of one particular 'effect' or consequence as the cause of the disturbance in the balance of her mind. Consequently, the question to be asked is 'what was the overall impact of giving birth/lactating on the woman's mental balance'? We argue that the second is the more plausible interpretation. It makes more sense to read 'the effect of giving birth' as meaning the overall impact of giving birth, rather than as requiring us to identify a specific 'effect', particularly given that the statute does not expressly identify which effects of birth are part of the offence/partial defence and which are not. Thus, infanticide could be used where a disturbance in the balance of the mind occurred because of a combination of different effects, whether these are biological, social, emotional or psychological.

Furthermore, viewing the statute as referring to the overall impact of giving birth/lactation arguably allows us to consider the role of social factors in a different way, as being part of the context in which birth/lactation occurred, rather than as particular 'effects' of these events. The consequence is a more holistic and realistic understanding of the impacts of pregnancy, birth and motherhood as life events, rather than biological processes of reproduction. In this regard, a plain reading of language would not preclude consideration of the social context of birth/lactation as causes of a 'disturbance in the balance of the mind'. In fact, understanding the language to mean the overall impact of birth/lactation arguably *requires* us to consider the context of these events, for surely it is not possible to understand the impact on a woman if we just look at these events as processes in isolation from their context. In other words, to understand why birth/lactation, which the vast majority of women experience without killing their

87. A. Loughnan, 'The "Strange" Case of the Infanticide Doctrine' (2012) 32 *Oxford Journal of Legal Studies* 685.

88. A link that has been shown to the false: see Ward, above n. 7; K. J. Kramar and W. D. Watson, 'The Insanities of Reproduction: Medico-Legal Knowledge and the Development of Infanticide Law' (2006) 15 *Social & Legal Studies* 237. See also K. Brennan, '"Traditions of English Liberal Thought": A History of the Enactment of an Infanticide Law in Ireland' (2013) 50 *Irish Jurist* 100, 122–33.

89. L. Ross and R. Solinger, Reproductive Justice: An Introduction (University of California Press: Oakland, 2017) 102.

90. See Loughnan, above n. 87.

children, produced a disturbed mental balance, the circumstances and other contextual factors surely *must* be relevant. Considering the nature of cases of infanticide and the circumstances that lead women to kill their infants, as outlined above, a contextualised approach that recognises the lived experiences of women in this situation is necessary to make the legislation workable; the alternative would prove to provide a nonsensical interpretation and application of the law.

In this regard, approaching the meaning of the law as the overall impact of giving birth/lactating would arguably make it easier for medical experts to present their evidence, and for this evidence to be evaluated by juries. We know that medical understandings of the aetiology of postpartum mental illness recognise that a complex range of factors explain these disorders, though the precise role of childbirth/lactation is undetermined and indeed disputed.[91] If infanticide is viewed as being exclusively biological such that social and other factors are excluded from consideration, psychiatric experts will surely struggle to isolate the contribution made by childbirth/lactation as purely physiological events. Adopting the more holistic approach that we advocate would mean that it would not be necessary to artificially disentangle the myriad factors that contributed to her mental state to determine whether birth/lactation, in isolation from the wider contextual factors that were intimately connected with these experiences, made a 'substantial' contribution to her disturbed mental state.[92] Viewing the law in this more holistic way could also allow for non-psychiatric experts to be called to give evidence of the wider impacts of giving birth/lactation on the accused woman's mental state.

Some may argue that including the context of birth/lactation would insert something into the law that the language does not suggest: the statute makes no reference to the circumstances of giving birth/lactation. However, first, as we have just explained, assessing the effect of giving birth/lactating on someone's mental state when this is divorced from the context in which these events take place is an unrealistic approach. Second, it is not unheard of for the criminal law to take account of contextual factors; loss of control offers an example. In *Clinton* the court concluded that the context of sexual infidelity was 'integral to and forms an essential part of the context in which to make a just evaluation' of whether a qualifying trigger applies.[93] This decision was reached even though the statute specifically states that sexual infidelity could not be a qualifying trigger.[94] While this is an imperfect comparator to infanticide, it is significant that in interpreting a defence where Parliament had explicitly excluded something, the courts actively chose to include it as part of the context for assessing the defence requirements. In comparison, as we argue, the Infanticide Act does not specifically exclude the social context surrounding birth/lactation. Therefore, it is surely open to the courts to include the wider aspects of birth/lactation as a contextual factor for the cause of the disturbance of the balance of the mind of an infanticidal woman.

The final section of language to consider is that infanticide only applies where the disturbed mind was a consequence of the woman 'not having fully recovered from' the effect of giving birth/lactation. It might be argued that this phrase, which speaks of 'recovery', perhaps from an illness, including mental ill-health, further reinforces the point that infanticide is based on the biological/physical effect of birth/lactation. However, our view is that it simply means that the impact of giving birth/lactation – the overall impact that, as we have argued, views birth/lactation as life experiences/events and thus takes account of the context in which these occur – was on-going, and so does not necessarily require a restrictive biological/physical understanding of what is meant by the effect of giving birth/lactation.

Our literal analysis, which we do not claim to be exhaustive, highlights that there are different meanings to take from the Infanticide Act 1938: the language is ambiguous, but nevertheless supports our

91. Mauthner, above n. 43; Kherani, above n. 43.
92. See discussion of *Tunstill* above.
93. Clinton [2012] EWCA Crim 2 at [28].
94. Coroners and Justice Act 2009, s. 54.

interpretation. We now move to consider a purposive approach.[95] Since many writers treat the mischief and purposive rules as being part of the same general 'purposive' approach, we will use the terms 'purpose'/'purposive' to refer to both.[96] Indeed, our view is, particularly when looking at the infanticide law, that the mischief at which the law was directed and its purpose, which we outline below, are essentially the same, albeit framed differently: it would be odd if the 'purpose' of the law was not to defeat the 'mischief' that had been identified.

Before we commence a purposive interpretation, it is worth noting that the 1938 Act was a consolidating Act that extended the age of the child from 'newly-born' to 'under the age of 12 months' and added 'lactation consequent upon the birth' as a further basis for relying on infanticide. We outline the reason for re-enactment in 1938 in the next section, but the significance is that the context of the 1922 Act is essential for understanding the meaning of the law as it stands today, and the 1938 Act cannot be read outside of the broader history of infanticide. The fundamental principles and underpinnings of the 1922 Act continued to operate on the 1938 Act,[97] and whatever meaning was attributed to the language in the 1922 Act continues to be pertinent to an interpretation of the 1938 Act, notably because it used much of the same language.

A Purposive Approach to the Infanticide Act

As the CA has noted, 'the purpose of the [Infanticide Act] was to ameliorate the potential harshness of the law of murder by recognising that in a period after birth a mother's balance of mind may be affected'.[98] This understanding of the purpose behind the infanticide law supports the wider literal interpretation we argued above, though it is possible that some may take the view that the merciful purpose only supports a medicalised interpretation. However, we will now demonstrate that in delving further into the history and purpose of the Infanticide Act, the social context explanation of this law emerges as the proper interpretation.

In adopting a purposive approach to statutory interpretation, the courts may explore the history and purpose of a provision in more detail to discover the intention of Parliament when enacting it, and thus discern the meaning of the words used. Previous examination of the history of this law by scholars, including us,[99] shows that the provision of mercy *per se* was not the purpose behind the enactment of the 1922/1938 Acts.[100] Rather, for almost 100 years prior to the adoption of the 1922 Act, mercy was already being shown to accused women. Judges, jurors, medical experts and successive Home Secretaries ensured no woman sentenced to death for killing her infant was executed, and many were not convicted of murder,[101] regardless of the weight of evidence against them.[102] Thus, the purpose of the 1922/1938 statutes was to bring the law in line with the public's humanitarian responses to accused women and ensure justice was done in such cases through an appropriate homicide conviction and punishment.[103]

95. According to the 'rules' on statutory interpretation a purposive approach may be used where on a literal reading it is found there is ambiguity, such that it is difficult to determine parliamentary intent from the words themselves: see Zander, above n. 70; Cross, Bell and Engle, above n. 70 at 19, 83–4.
96. For example, see See Duxbury, above n. 70, at 204–5; See Zander, above n. 70 at 149; See Twining and Miers, above n. 70 at 253–4.
97. See Ward, above n. 7.
98. Tunstill, above n. 4 at [30].
99. For example see, D. S. Davies, 'Child-Killing in English Law' (1937) 1 MLR203; D. S. Davies, 'Child-Killing in English Law' (1938) 1 MLR 269; See Ward, above n. 7; K. Brennan, '"A Fine Mixture of Pity and Justice": The Criminal Justice Response to Infanticide in Ireland, 1922–1949' (2013) 31 *Law and History Review* 793; Brennan and Milne, above n. 2 at 9–21.
100. See Brennan, above n. 99.
101. Instead acquitted or convicted of concealment of birth.
102. A. R. Higginbotham, '"Sin of the Age": Infanticide and Illegitimacy in Victorian London' (1989) 3 *Victorian Studies* 319.
103. See Ward, above n. 7; Brennan, above n. 99.

Specifically, Parliament aimed to prevent the mischief of women being unjustly acquitted or convicted of non-homicide offences, and to ensure a suitable punishment considering that executing such women was generally considered unacceptable.

A purposive understanding of the law requires appreciation of the origins of humanitarian sentiment towards infanticidal women in the latter half of the 19th century and into the 20th century; this helps us understand why this category of offender was considered deserving of lenient treatment and the mitigation the Infanticide Act was intended to incorporate. First, in relation to the 1922 Act, humanitarian sentiment for woman who killed their newborn children was due to awareness of the social circumstances of their crime, as well as gendered understandings of their supposed mental state in such circumstances, specifically in the context of a concealed birth. Indeed, it was widely understood that an unmarried pregnant woman could be driven through shame and fear of the consequences of an 'illegitimate' child to conceal the pregnancy, give birth alone, and kill the baby.[104] Women in such circumstances were not viewed as cold-blooded killers, but understood to have acted at a time of intense emotional/mental anguish or distress.[105] Crucially, her mental state was perceived as the product of the pain and trauma of childbirth and the pressure of the wider social circumstances involved, particularly the intensely shameful experience of pre-marital pregnancy and abandonment by the man who impregnated her.[106] Furthermore, her 'madness' was not necessarily understood as a form of quasi-insanity, and analogies were sometimes drawn with provocation in terms of explaining the basis of mitigation for infanticide.[107] For example, it was argued that a proposed partial defence contained in the 1874 Bill to codify homicide law put infanticide cases 'on the same footing as other violent excitements like fear or anger', and in the context of the pain and shame that a woman may experience at birth, she ought to be entitled to 'some kind of indulgence to human weakness, just as man is when under a passion of a different kind'.[108] Notwithstanding this, perceptions of infanticidal women were informed by sex-based stereotypes that espoused women as the weaker, gentler sex, more closely linked to and controlled by biology than men, and more emotional and irresponsible.[109]

Humanitarian sentiment for infanticidal women resulted in a refusal to convict them of murder or a reprieve of the death sentence in the small number of cases where murder convictions were obtained. The tradition of judges sentencing such women to death knowing they would never be executed became known as the 'black-cap farce' or 'solemn mockery'.[110] Judicial consternation at sentencing a woman to death knowing full well the sentence would be reprieved played a crucial role in the enactment of the 1922 Act.[111] In this regard there was concern both about the criminal law being brought into disrepute, and also the distress it caused to women who were sentenced to death not knowing that the sentence would certainly be commuted.

Thus, the 1922 Act created a new homicide offence/partial defence: infanticide, so formalising humanitarian responses that were playing out in the courtroom by officially facilitating a merciful

104. See Brennan and Milne, above n. 2.
105. Ibid.
106. Ibid.
107. C. S. Kenny, Outlines of Criminal Law, 13th edn (Cambridge University Press: Cambridge, 1929); cited in R. Dixon and T. Ward, 'Manslaughter, Concealment of Birth and Infanticide, 1900–37' in K. Brennan and E. Milne (eds.), 100 Years of the Infanticide Act: Legacy, Impact and Future Directions (Hart Publishing: Oxford, 2023) 49, 62.
108. British Parliamentary Papers, Special Report of the Select Committee on the Homicide Law Amendment Bill (1874) ix, 493, no. 315.
109. D. Rabin, 'Bodies of Evidence, States of Mind: Infanticide, Emotion and Sensibility in Eighteenth-Century England.' in M. Jackson (ed.) Infanticide: Historic Perspectives on Child Murder and Concealment, 1500–2000 (Ashgate: Aldershot, 2002) 73; H. Marland, Dangerous Motherhood: Insanity and Childbirth in Victorian Britain, (Palgrave Macmillan: Basingstoke, 2004).
110. See Davies, Child-Killing in English Law (1937), above n. 99; Davies, Child-Killing in English Law (1938), above n. 99; Brennan and Milne, above n. 2.
111. Davies, Child-Killing in English Law (1938), above n. 99 at 284–5.

response to infanticidal women, while also acknowledging the seriousness of the crime she committed by ensuring a homicide conviction was obtained, with a maximum sentence of life imprisonment.[112] To achieve its purpose, however, the infanticide law had to capture cases where popular sympathy meant murder was not the appropriate outcome; such cases did not involve mental illness, and the basis of sympathy lay in awareness of the social circumstances of the crime. While there is no explicit reference to social factors, they were the foundation of the mitigation the 1922 Act provided women, as illustrated in parliamentary debates on the 1922 enactment:

> … *taking all the circumstances of the birth*, taking the immense emotional and physical strain in combination under these circumstances, those elements in the human mind which lead to action at its decisive moment have been so deranged that there is not a free decision as between the forces of right and the forces of wrong ….[113]

In making this statement, the Lord Chancellor, Viscount Birkenhead, who proposed the language ultimately adopted in the Act, clearly indicates that the 'circumstances of the birth' were relevant to the application of the infanticide law based on the language contained in the statute,[114] reflecting the humanitarian, 'lay' understanding of this crime that had existed since the Victorian period.[115]

While Birkenhead's use of the term 'deranged' may indicate a mental disorder/illness, and inability to freely choose between right and wrong suggests an insanity-type defence, the context of the passing of this legislation does not support such interpretations. Enactment of the infanticide law involved walking a fine line between ensuring sympathetic and just outcomes, so removing the solemn mockery, and not undermining the deterrent effect of the law, the value of infant life, or violating criminal justice norms relating to individual responsibility.[116] Thus, during the debates, Birkenhead was keen to explain that the law would not apply simply because a woman had given birth in difficult circumstances and wanted to be rid of her child[117] – there had to be an 'exceptional derangement and disturbance'.[118] As Ward argues, the language adopted in the 1922 Act (and subsequent 1938 law) with its veneer of medical legitimacy, was in fact a compromise between the pragmatic necessity of changing the law and ensuring that the controversial aspects to it did not lead to its failure.[119] Thus, with the broader context in mind, it is more convincing that Birkenhead was referring to the need for extreme mental distress, rather than a mental illness. During the debates, he highlighted the difficulty of expressing this concept in a statute, especially considering 'the obvious expediency of not using words which acquire a different atmosphere and intention in the Law Courts',[120] and concluded that 'disturbance' was the best that could be adopted.[121]

When the infanticide law was re-enacted in 1938, the doctrine was extended to incorporate women who killed their infants within the first year of life. Parliament re-legislated following two high-profile cases of women killing infants while suffering from mental ill-health,[122] but where neither could rely on infanticide as it was ruled that their victims could not be considered to be 'newly-born' due to age.[123] Humanitarian sentiment for the two women meant there was no desire to subject them to a

112. Brennan, above n. 99; Ward, above n. 7. There had been numerous failed attempts at reform in the nineteenth century and in the decade or so before the enactment of the 1922 Act; see See Davies, Child-Killing in English Law (1938), above n. 99.
113. Hansard, HL (Series 5) Vol 50, col 760 (our emphasis).
114. See further discussion below on use of Hansard by judges.
115. See Ward, above n. 7.
116. Numerous scholars have made this point, for example, Lansdowne, 'Infanticide: Psychiatrists in the Plea Bargaining Process' (1990) 16 *Monash University Law Review* 41, 45–6; Ward, above n. 7.
117. This issue was discussed in response to concerns raised by Lord Carson; Hansard, HL (Series 5) Vol 50, cols 764–5.
118. Hansard, HL (Series 5) Vol 50, col 768.
119. See Ward, above n. 7; Lansdowne, above n. 116.
120. Hansard, HL (Series 5) Vol 50, col 768.
121. Ibid.
122. As outlined above, women who kill older infants are likely to be suffering from a mental illness, unlike women who kill newborn children.
123. O' Donoghue (1927) 20 Cr App R 132; Hale, The Times, 22 July 1936, 13.

capital conviction, or insanity verdict.[124] Thus the purpose behind the 1938 Act was, as with the 1922 Act, focused on marrying humanitarian sentiment for infanticidal women with criminal justice objectives: specifically preventing this new version of the solemn mockery[125] and reliance on insanity in cases where women killed older babies.[126]

Unlike with the 1922 statute, medical professionals were directly involved in the drafting of the 1938 Act,[127] which may suggest that the statute embodies a medical defence. However, the medical-based changes made to the original offence/partial defence need to be seen as an *addition* to the understanding encapsulated by the language in the original infanticide doctrine, rather than a replacement of it; as noted, the foundation of the 1922 Act underpinned the 1938 Act.[128] Thus, the purpose of the 1938 Act was to extend the application of the 1922 law to cover a different kind of infanticide, the killing of older babies where the mother may have had a diagnosis of puerperal/lactational insanity, while still providing leniency for the 'traditional' infanticidal woman who killed her newborn child. There is no suggestion that the original purpose of the 1922 law was to be replaced, such that infanticide would only apply in situations involving a medical diagnosis of a specific illness related to childbirth/lactation.[129]

Further, a suggestion was made by a Peer during the second reading of the 1938 Bill to widen the scope of infanticide to include 'mental disturbance due to distress and despair arising from solicitude for the child and extreme poverty, or either of these', as well as to increase the maximum age of the victim to further mitigate against the solemn mockery.[130] This proposal was rejected by Dawson (who introduced the Bill), but his disinclination to frame the re-enacted law to specifically include the socio-economic causes of infanticide was based on political considerations: he, like Birkenhead, was fearful of making the Government more 'nervous' than they already were.[131] The fact that the medical consensus at the time also recognised the role of socio-economic factors in puerperal and lactational insanity further supports a conclusion that Parliament intended the law to include social factors.[132]

The history and the purpose behind the Infanticide Act 1938 illustrate that the interpretation that gives effect to the will of Parliament is that which allows for consideration of the social context of birth/lactation. Therefore, although infanticide may be satisfied through diagnosis of a mental illness related to childbirth/lactation, particularly for women who kill older infants, this is not necessary. The original infanticide doctrine found in the 1922 Act was supposed to cover situations involving extreme mental distress and could be met without evidence of a mental illness; this remained a fundamental principle of the 1938 statute.

Relevance of the Purposeful Interpretation to Understanding the Infanticide Act Today

From both a literal and purposive interpretation we conclude that this law is not bio-psychiatric in nature. Indeed, if Parliament had intended to enact a bio-psychiatric offence/partial defence in either 1922 or 1938, the law they created would have done very little to address the mischief that these statutes were aimed to resolve, namely preventing the solemn mockery and other inappropriate criminal justice outcomes in cases of maternal infant killing. Nor would a bio-psychiatric offence/

124. See Brennan and Milne, above n. 2 at 14; Davies, Child-Killing in English Law (1938), above n. 99; Ward, above n. 7.
125. Judges sentencing women to death following a murder conviction, knowing full well she will never be executed.
126. See the speech of Viscount Dawson who introduced the Infanticide Bill to the House of Lords: Hansard, HL (Series 5) Vol 108 col 292–98 (1937–38).
127. See Ward, above n. 7.
128. For further discussion on the involvement of medical professionals in the drafting of the 1938 Act see ibid.
129. Ibid. at 173.
130. Hansard, HL (Series 5) Vol 108, col 303–304 (1937–38).
131. Hansard, HL (Series 5) Vol 108, col 308–309 (1937–38); see Brennan and Milne, above n. 2.
132. See Kramar and Watson, above n. 88.

partial defence have fulfilled the purpose of the law to formalise existing merciful practices that provided for mitigation based on social circumstances. A bio-psychiatric offence/partial defence would have significantly limited the reach of the law, particularly in cases of newborn killings where the woman was rarely mentally unwell due to the birth or suffering from any sort of hormonally induced mental disturbance.

Much has changed since the enactment of the 1922/1938 laws; consequently, the extent to which the original purposes behind the law remain relevant may be questioned. It may be said that the reasons for the infanticide law have all but disappeared, and that therefore the 'purpose' of the law may have limited value in telling us how the language should be interpreted today. We argue, however, that the core reasons for an infanticide offence/partial defence remain relevant.

The criminal law context is undoubtedly different now to what it was in 1922/1938. The death penalty has been abolished, but murder still carries significant stigma as a conviction label and is punished with a mandatory life sentence and a minimum jail term, whereas women convicted of infanticide are usually not imprisoned.[133] The defence of diminished responsibility has been created, providing mitigation from the stigma and mandatory life sentence for murder.[134] However, contemporary cases illustrate that infanticidal women struggle to rely upon diminished responsibility, and many cases of infanticide are not captured under the partial defence, notably women who kill newborn children.[135] Belief that diminished responsibility offers a suitable defence in these cases assumes a false understanding of the Infanticide Act, which, as we have argued above, does not exclusively provide for a psychiatric defence.

The social context has also changed considerably: women now have greater control over their fertility, with improved access to contraception and legal abortion; there is greater awareness and understanding of postnatal depression, although arguably insufficient care; the stigma of unmarried motherhood has lessened, though not vanished; and there is better social and financial support for single mothers, although not necessarily good support.[136] However, although women arguably do have better options in terms of choosing or refusing pregnancy/motherhood, there are still significant barriers for many women in both areas, and some are particularly vulnerable in this respect, as outlined above. For many reasons, mothers sometimes struggle to make 'good' choices for themselves and their babies due to the situations of vulnerability in which they are living.[137] Consequently, a purposeful interpretation of the Infanticide Act still has value in terms of the contextual meaning it can offer.

Appeal Courts and the Role of Purpose in the Infanticide Act?

For an appeal court drawing on a purposive approach to interpreting the Infanticide Act the task would be tackled somewhat differently to how we have considered this issue. Despite the recognised importance of historical context,[138] judges are restricted by time/cost considerations, and, linked with this, the evidence presented by counsel, as well as by rules on which external sources may be legitimately considered in

133. See N. Walker, Crime and Insanity, vol. 1 (Edinburgh University Press: Edinburgh, 1968), 133–4; D. Maier-Katkin and R. S. Ogle, 'Policy and Disparity: The Punishment of Infanticide in Britain and America' (1997) 21 International Journal of Comparative and Applied Criminal Justice 305, 310. For more recent data, see Brennan and Milne, above n. 2 at 21–3. See also, for example, the recent case of Teo where a minimum term of 17 years was imposed following a murder conviction; above n. 15.

134. For example, see Howard, 'The Offence/Defence of Infanticide' above n. 25; Mason, above n. 25.

135. See Mackay, The Consequences of Killing, above n. 8.

136. For example, at the time of writing, Labour have maintained the two-child limit to Child Tax Credit or Universal Credit, J. Elgot, 'Labour Suspends Seven Rebels Who Voted to Scrap Two-Child Benefit Cap' (23 July 2024) <https://www.theguardian.com/politics/article/2024/jul/23/labour-mps-vote-to-scrap-two-child-benefit-cap-in-first-rebellion-for-starmer> accessed 2 September 2024.

137. See Milne, above n. 13.

138. See for example Quintavalle [2003] UKHL 13.

evidence.[139] In particular, judges are cautious about using legislative history to construe the language of a statutory provision, and specifically, there is a prohibition on relying on ministerial statements from parliamentary debates on the Bill to identify the intention of Parliament and to interpret the meaning of words.[140] The limited exception to this rule[141] is rarely used and there remains strong judicial resistance to relying on Hansard.[142] However, although there is a particular reluctance to rely on ministerial statements to determine the meaning of the statutory language, consulting the legislative history – including official reports from committees and commissions that form a background to the development of the law, as well as Hansard – to identify the context and thus the mischief/purpose of the law is considered less problematic.[143] Judges may also rely on Hansard to confirm they have reached the correct interpretation using a literal approach.[144] Regardless, we contend that the nature of the Infanticide Act and the cases it relates to provide a specific reason as to why parliamentary debates play a crucial role in judicial interpretation.

One of the critical factors of maternal infant killing that comes to bear on an interpretation of the Infanticide Act 1938 is that it is thankfully a very rare crime. Generally, as we have outlined, women commit very little violence and the nature of their violent acts are qualitatively different to men's.[145] Furthermore, over the 20th and 21st centuries, there has been a dramatic decrease in the number of cases of maternal killing of infants.[146] When rates of infanticide were significantly higher (for example, in 1968, 26 women were convicted of infanticide,[147] while only 7 were convicted of the offence between April 2013 and March 2023),[148] the Infanticide Act was regularly used, and thus a common understanding of the nature of cases and infanticidal women, and the purpose and meaning of the statute, was shared, as the offence/partial defence was regularly employed throughout the criminal justice system. Furthermore, there was collective understanding of the need for leniency in such cases and so no broader questions arose as to the appropriateness of an infanticide conviction and the subsequent (lenient) sentences handed down.[149] However, now that infanticide occurs so infrequently, it is unsurprising that the meaning and purpose of the Act has disappeared from collective knowledge and understanding. In the broader context, there has been a general hardening of the criminal justice system, with a growth in penal popularism,[150] and the sentiment of leniency embodied in the Infanticide Act is now out of place with general approaches to violent offenders. As noted above, changing approaches to child abuse and arguments about equality of the sexes before the law likely further exacerbate this issue.

139. See generally, Cross, Bell and Engle, above n. 70 at 142–61; Duxbury, above n. 70 at 206–24; Zander, above n. 70 at 158–78; Twining and Miers, above n. 70 at 257–67.
140. See Duxbury, above n. 70 at 206–24; Zander, above n. 70 at 158–78; Twining and Miers, above n. 70 at 254–67; Steyn, above n. 70; S. Vogenauer, 'A Retreat from Pepper V Hart? A Reply to Lord Steyn' (2005) 25 *Oxford Journal of Legal Studies* 629.
141. Pepper (Inspector of Taxes) v Hart [1992] UKHL 3.
142. See Duxbury, above n. 70 at 211–21; Steyn, above n. 70.
143. See Zander, above n. 70 at 158–78; Steyn, above n. 70 at 68, 70; See Vogenauer, above n. 140 at 630.
144. See Zander, above n. 70 at 170; See Vogenauer, above n. 140 at 640.
145. See Gelsthorpe and Wright, above n. 47.
146. See Brennan and Milne, above n. 2 at 22.
147. Office for National Statistics, 'Crime Statistics, Focus on Violent Crime and Sexual Offences, 2013/14 reference tables' (12 February 2015), Appendix tables, table 2.12, <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/compendium/focusonviolentcrimeandsexualoffences/2015-02-12/crimestatisticsfocusonviolentcrimeandsexualoffences201314referencetables>.
148. Office for National Statistics, 'Appendix tables: homicide in England and Wales' (8 February 2024), table 25, <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/appendixtableshomicideinenglandandwales>.
149. D. J. R. Grey, '"A Hard-Working and Nice Person"? Respectability, Femininity, and Infanticide in England and Wales, 1800-2000 ' in S. Banwell, L. Black, D. K. Cecil, Y. K. Djamba, S. R. Kimuna, E. Milne, L. Seal and E. Y. Tenkorang (eds.), The Emerald International Handbook of Feminist Perspectives on Women's Acts of Violence (Emerald Publishing Limited: Bingley, 2023) 33; D. J. R. Grey, '"Sometimes the Worst Happens": Newspaper Reportage of Infanticide and the Law in England and Wales since 1922' in K. Brennan and E. Milne (eds.), 100 Years of the Infanticide Act: Legacy, Impact and Future Directions (Hart Publishing: Oxford, 2023) 91.
150. T. Newburn, '"Tough on Crime": Penal Policy in England and Wales' (2007) 36 *Crime and Justice* 425.

In this context, it is crucial for the Infanticide Act to be interpreted considering its socio-historical roots. On this basis we argue that, notwithstanding judicial reservations about relying on Hansard, what was said during parliamentary debates on the 1922/1938 Infanticide Acts are an essential source for judges to employ to understand and interpret this law. In arguing this, we are not claiming that the statements in Hansard should be considered decisive, that they carry any particular weight, or that there are no risks involved in relying on parliamentary debates.[151] Rather it is to highlight that these debates contain crucial insights for helping judges to understand the purpose of the law, the intention of Parliament and the meaning of the language employed.

Furthermore, the need for reliance on sources such as Hansard to understand legislation has notable significance for historical pieces of legislation that relate to women's offending, such as the Infanticide Act. Other offences relating to women's reproductive function and experiences of pregnancy and birth would also benefit from such an approach to statutory interpretation; namely, sections 58 through 60 of the Offences Against the Person Act 1861, which relate to the criminal offences of procuring a miscarriage[152] and concealment of birth,[153] and the Infant Life (Preservation) Act 1929, which relates to child destruction.[154] These offences are rarely used but have all been misinterpreted over the last ten years,[155] being applied in ways that fail to reflect the fundamental principles, meanings and purposes that Parliament intended to capture when enacting these laws,[156] and thus resulting in unjust outcomes for women. As we have illustrated with the Infanticide Act, to ensure justice for women in instances of criminality where they are likely to be the primary offender/defendant, and where the legislation is old and thus the purpose is no longer part of common public, legal and criminal justice knowledge, the courts must recognise the need for a gender-sensitive approach to statutory interpretation.

The need for a gender-sensitive approach notwithstanding, statements made during parliamentary debates require interpretation and there is a risk of misunderstanding when these statements are taken out of context or if too much weight is placed on them.[157] For example, as outlined above, in the debates on the Infanticide Act 1922, Viscount Birkenhead's statement that an 'exceptional derangement or disturbance' was required to fall under the proposed infanticide legislation could lead modern readers to misunderstand the purpose and language of today's Infanticide Act if they were unaware of the context we have outlined. As this example illustrates, drafters of legislation may *deliberately* employ vague language to avoid drawing parliamentary attention to contentious aspects of a proposed law;[158] a further point that judges need to bear in mind when employing a purposive approach to interpreting older, lesser used pieces of legislation. Given the potential resource implications for lawyers and judges in terms of delving into the history of statues such as the Infanticide Act, collaboration with legal scholars could provide important insights and should be further encouraged.

151. See Vogenauer, above n. 140. who argues that ministerial statements should be admissible but that they do not have to carry any particular weight or be treated as decisive.
152. More popularly known as abortion. In the last 10 years there has been a significant increase in the number of women investigated and prosecuted for offences following an abortion deemed illegal; see Milne, above n. 13.MPs recently voted to support an amendment to the Crime and Policing Bill that, if enacted into law, will decriminalise abortion for women who terminate their own pregnanies at any gestation. Other persons who end a woman's pregnancy outside the legal defence provided by the Abortion Act 1967 will still be breaking the law and risk life-imprisonment, including medical professionals who are acting with the consent of the pregnant woman. At the time of publicaiton the Bill is awaiting the second reading in the House of Lords, see Crime and Policing Bill, part 15, HL Bill 111 *(Corrected)*.
153. An offence of secret disposal of the dead body of a baby to conceal the fact that child was born, see E. Milne, 'Concealment of Birth: Time to Repeal a 200-Year-Old "Convenient Stop-Gap"?' (2019) 27 *Feminist Legal Studies* 139.
154. The crime of destroying the life of a child capable of being born alive.
155. See Milne, above n. 13 and n. 153.
156. Ibid.
157. See Duxbury, above n. 70 at 217–8; Vogenauer, above n. 140.
158. See Twining and Miers, above n. 70 at 180.

The Question of Law Reform

Judicial interpretation could not solve all the problems found in the Infanticide Act 1938, and it is arguable that reform is a better option for addressing issues with the meaning and scope of the law.[159] The recent announcement by the Law Commission, following a request from the Ministry of Justice, of a review of homicide law and sentencing, including infanticide,[160] offers some hope that the current Government is interested in legislative reform, though at this stage we do not know whether or when this may happen, nor whether infanticide would be included for any legislative change.[161] When reform was last considered, almost 20 years ago, the Law Commission examined many of the problems identified with the Infanticide Act 1938, including the question of whether social circumstances should be specifically included in the law. Ultimately, however, it recommended no change to the doctrine on the grounds that it worked well in practice, providing 'a practicable legal solution to a particular set of circumstances'.[162] In 2009, following the Law Commission report, when Parliament amended diminished responsibility and abolished provocation, creating the new defence of loss of control, it did not alter the basis of mitigation for infanticide.[163] Indeed, in their position paper, the Government acknowledged the desire by some to abolish infanticide, but concluded the law worked well and that diminished responsibility could not 'provide an appropriate response to all of these cases; in particular, those mothers (often themselves very young) who kill their babies after a clandestine birth might struggle to meet the evidential requirements of diminished responsibility (where the burden of proof rests with the defendant)'.[164]

The conclusion that reform of infanticide was not needed arguably rested on pragmatic rather than principled grounds. Reading the Law Commission report, one wonders if the potential controversies that could arise should social mitigation be explicitly included as the basis of the doctrine was balanced against the fact that on a practical level the law as it stood was working well: women/girls who deserved lenient treatment were getting it through the infanticide law despite not being diagnosed with a bio-psychiatric, or in some cases any psychiatric, disorder.[165] Our analysis of the history of the 1922/1938 statutes shows that this tension between being explicit about what infanticide is supposed to do,

159. For an overview of issues with the law, see Brennan and Milne, above n. 2 at 29–37.

160. *Law Commission*, Law of Homicide (n.d.) <https://lawcom.gov.uk/project/revisiting–the-law-of-homicide/> accessed 24 February 2025.

161. The fact that infanticide occurs so infrequently may mean it is not prioritised in the legislative agenda, even if reform of other homicide laws results. It is difficult to determine the rate at which women kill their infants in instances where infanticide could apply. Over the period of April 2012 to March 2023, the average number of convictions for infanticide each year was 1: Office for National Statistics, 'Appendix tables: homicide in England and Wales' (8 February 2024), Table 25, <www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/appendixtableshomicideinenglandandwales> accessed 23 August 2024.

162. Law Commission, above n. 3 at para. 8.3.

163. Coroners and Justice Act 2009 ss. 52–58. The only alteration made to the Infanticide Act was to amend the provision to allow it to be available as an alternative to manslaughter as well as murder (Coroners and Justice Act 2009 s. 57), following the CA judgment in *Gore*, above n. 28.

164. HM Government, Murder, Manslaughter and Infanticide: Proposals for Reform of the Law, CP19/08 (2008) 30.

165. See generally the discussion in Law Commission, above n. 3 at paras. 8.13–8.39. It is notable that the evidence considered by the Law Commission showed that medical opinion did not support an exclusively bio-psychiatric basis for the law though the Law Commission concluded there was sufficient medical basis to support the law as it was currently framed, highlighting the temporal connection between mental disorder and the postpartum period (para. 8.25); that women who killed newborn children did so 'in extreme emotional crises including rage, panic and desperation' and that these experiences were '"mental disturbances", but not (in the opinion of most authorities) "mental illness".' (see I. Brockington, 'Infanticide: Disorders and Classification' in Law Commission, Murder, Manslaughter and Infanticide, Cm 304 (2006) Appendix E, 246); and that in practice (at that time) the law was being applied in situations that did not reflect the bio-psychiatric view of the doctrine (see Mackay, 'Infanticide and Related Diminished Responsibility Manslaughter, above n. 8). Yet the Law Commission opted to recommend that the law remain unchanged on the basis that it worked well in practice. Arguably, either the Law Commission understood that the language was capable of being interpreted to include social factors, but did not explicitly make this point, or it shied away from either making that point or recommending reform to the language to render it more explicit due to the potential issues that may have then arisen around excluding fathers and other parents and carers.

and the controversies a more candid expression of this would give rise to, are what lead to the somewhat equivocal language contained in the law in the first place. However, whilst in the past this ambiguity facilitated just outcomes in cases deemed appropriate for a sympathetic response, recent examples of how infanticide is being used reveal that problems emerge if we shy away from a more explicit expression of the meaning and scope of the infanticide law and the true rationale for treating such women leniently. Arguably, the space created by the ambiguity in the language has allowed for shifting attitudes, misconceptions and biases to limit the remit of this statute such that the women who were supposed to be able to rely on this law no longer appear to be able to do so.

In the current context – where the Infanticide Act is no longer working well and where there are strong objections to the law – the Law Commission and Government must take this opportunity to meaningfully engage with the fundamental issues that lie at the heart of the infanticide doctrine. Piecemeal reform to address specific problems with the statute (such as, updating the language to reflect contemporary psychiatric thinking on postpartum mental ill-health) will likely not suffice in a context where the law itself may be viewed as indefensible due to concerns about sexism, child protection, and inequality/unfairness of treatment as against other parents. Thus, the parameters of the Law Commission review, and any potential reform that follows, must enable consideration of the arguments that challenge the very existence of the infanticide offence/defence and must not elide the difficult questions that underlie it.

In the remainder of this section, we will briefly identify and outline some of the essential questions that any review of the law and potential re-legislation should address. Much of this analysis reflects our discussion of criticisms of the statute in the second section of the article and other observations we have made in the course of our analysis of the meaning of the current law, but here we illustrate the direct implication for potential law reform. As we have outlined above and elsewhere, we support an infanticide law that applies only to the biological mother of the victim, and on the basis of a defence that does not require a mental disorder and that includes the impact of social mitigation.[166] Our hope is that the outcome of this review and any possible reform of the law will be in line with our position. Nevertheless, our aim here is not to argue for a particular approach to law reform, nor to answer the difficult questions raised by the infanticide law,[167] but to highlight the important issues that must be engaged with for a full consideration of the law and offer some reflections on these matters. In particular, we wish to emphasise the importance of understanding the nature of this crime and the factors distinctive to it as crucial to any review of the need for a specific infanticide law and the parameters of the mitigation framework it provides for. Essentially, the review must move beyond the approach taken by the Law Commission in the mid-2000s, which placed significant emphasis on whether the 1938 Act was supported by contemporary medical thinking on postpartum mental illness, to engage with other explanations of this crime and potential rationales for retaining this unique law.

As we indicate above, at the heart of the infanticide law is the fundamental question of whether it is necessary and justifiable to offer a lenient criminal justice response to a mother who kills her baby that is not available to other killers. Thus, the review must ask whether we should have an infanticide law in the first place (and, if so, why), in addition to how such a law should be framed in the 21st century, particularly regarding who should be able to rely on it, and in what circumstances.[168] However, specifically in relation to the basis upon which mitigation should be granted in the case of infanticide, and reflecting on the existing infanticide law and criticisms of it, the questions to consider would include whether:

166. Milne and Brennan, above n. 6.

167. We have outlined some brief responses to some of the core challenges above. See also Milne and Brennan, above n. 6.

168. Of course, the infanticide law – and the questions we identify here – cannot be addressed in a vacuum and will need to considered in the context of homicide law as a whole, and specifically in light of any recommendations for reform being made to the scheme of homicide offences/defences more generally.

- childbirth and/or lactation play a role in partially excusing this crime, and, if so, why, and specifically whether it is the biological impact of childbirth (or lactation) that is relevant, or whether there is a broader impact these experiences may have on a woman's mental state that serves to mitigate the crime;
- environmental stressors should be included and, if so, whether these stressors ought to be related to the fact of having birthed the child;
- a psychiatric disorder should be required; and
- infanticide could apply in circumstances involving temporarily 'disturbed' psychological states that do not constitute a mental illness, and, related to this, whether infanticide is a mental capacity type doctrine (as it is currently assumed to be), or something broader in scope?[169]

Related to this complex issue of the basis of mitigation, is the question of whether infanticide should also be available to fathers and other parents/carers, and, if not, the grounds upon which their exclusion is justified.

Focusing on the grounds for mitigation, undoubtedly, the link to women's biological function – the fact that she has given birth to and/or is breastfeeding the child she kills – is crucial to justifying infanticide and limiting it to mothers under the existing law. Indeed, many discussions around the current law seem to presuppose that the only way to limit infanticide to biological mothers is to base the law on her biological experiences of childbirth/lactation and/or because of the psychiatric vulnerabilities that motherhood can bring.[170] A bio-psychiatric approach to mitigation is also attractive because it respects traditional criminal law norms of individual responsibility:[171] such a defence locates responsibility for the killing within the woman as it is her faulty pathology that is to blame. However, as we have outlined above, mitigation directly connected to reproductive function has raised concerns and criticisms, notably that it pathologises women and that medical science does not support a purely bio-psychiatric explanation for infanticide.[172] Thus, in considering how an infanticide law should be framed in the future, it would clearly be indefensible to have a law that relies purely on biological mitigation. Therefore, bearing in mind our argument that the law already implicitly includes social mitigation and is not bio-psychiatric, if infanticide is retained this would have to be on the basis that environmental stressors are unambiguously part of the offence/defence.[173]

However, as was the case historically, a frank exposition of what the infanticide doctrine includes (social mitigation, no mental disorder required), raises difficult questions and risks defeat of the law. It is essential therefore, if an infanticide offence/partial defence is to be retained, that a defensible rationale for exceptional treatment of biological mothers is articulated, one that is appropriate in light of current

169. An important question here is where infanticide sits in the scheme of criminal law defences, specifically whether infanticide is or should be a mental capacity (psychiatric) defence similar to diminished responsibility or whether it is more aligned with other defences such as loss of control, where the law does require significant alteration in a person's mental/emotional state, but where a mental disorder is not required.

170. Notably, the last time the Law Commission reviewed infanticide it relied on the importance of the link between mental health and childbirth/lactation as a justification for retaining a law that applied only to the biological mother of the victim. However, it was the temporal connection between mental ill-health and the postpartum period that the Law Commission highlighted, rather than any clear biological link; see Law Commission, above n. 3 at para.8.25. Previous law reform bodies seem to have understood the law as having a bio-psychiatric foundation: Report of the Committee on Mentally Abnormal Offenders, Cm 6244 (1975) para.19.22–19.26; Criminal Law Revision Committee, Offences against the Person, 14th Report, Cm 7844 (1980) para.105.

171. See Brennan and Milne, above n. 2 at 18; and also discussion above. For broader discussion of the issue of individual responsibility and the criminal law's refusal to engage with the structural causes of criminal offending see A. Norrie, Crime, Reason and History: A Critical Introduction to Criminal Law 2nd edn (Cambridge University Press: Cambridge, 2001) 9–29, 304–32. For further discussion of this in the context of infanticide, see K. Brennan, 'Murderous Mothers and Gentle Judges: Paternalism, Patriarchy and Infanticide' (2018) 30 *Yale Journal of Law and Feminism* 139 at 176–8.

172. See discussion above.

173. We have argued in this article that they are already part of the doctrine.

legal and social norms.[174] In this respect, similar to what we have argued as essential to a judicial interpretation of the existing law, understanding women's experiences as mothers/women who have birthed a child – as opposed to the experiences of other parents – will be crucial to the review of infanticide. It is through identifying the factors unique to maternal infanticide that a rationale for lenient treatment of mothers via an infanticide law may be revealed, as well as a justification for excluding others from the ambit of such a law. Furthermore, falling in line with what we have argued in relation to the meaning of the law as it is currently framed, it may not be necessary to abandon childbirth as the core of the infanticide doctrine simply to avoid the risk of it being viewed as a bio-psychiatric offence/defence. Providing childbirth and its impact is viewed in an holistic way, as a life – not a biological – event, it may still provide a suitable rationale for restricting infanticide to the mother of the baby, without denying that social mitigation connected to the fact of having given birth to that child is part of the doctrine.

Engaging with women's experiences also connects to the matter of the differences between types of maternal infanticide, specifically the distinctions between the killing of newborn children as opposed to slightly older infants. To start with, as we have noted above, women who kill newborn children generally do not have a diagnosable mental illness, whereas women who kill older infants more often do, such as postnatal depression. Furthermore, the nature and circumstances of the killing of these groups of victims differ: it is the circumstances of giving birth that are significant in explaining (and partially excusing) the crime in the case of newborn victims, whereas it is the circumstances of mothering that are usually more pertinent in cases involving older babies. However, this is not to say that childbirth is irrelevant in the older-victim cases: the fact that she gestated and gave birth to the child may still be a relevant factor and something that helps to distinguish these cases from those involving other parents who kill in similar circumstances. This is not an issue we can explore in detail here, but we note, for example, that in their review of infanticide, the Victorian Law Reform Commission concluded one reason for limiting the infanticide offence/defence to the biological mother was the 'unique' relationship she had with her young child, the victim: it was observed that this relationship is a 'symbiotic' one, with both mother and baby being 'interdependent for at least the first 12 months of the child's life'. [175]

It is the newborng child killing cases that are most problematic in terms of the law as it stands, as it is these women who are struggling to make use of infanticide (and diminished responsibility). As we have argued above, it was this type of maternal infanticide that the law was enacted to deal with in the first place, and so one of the crucial questions for the Law Commission review is whether we should continue to provide for a partial defence/offence in such cases. If so, then there needs to be an honest appraisal of the real circumstances of mitigation, including the fact that women who kill their babies at birth are not usually mentally ill and certainly not suffering from conditions such as postnatal depression or psychosis, which usually arise sometime after birth takes place. What these women do experience is trauma, denial, dissociation, acute stress and extreme emotions, particularly fear, all of which are connected to the pregnancy and that they have recently given birth to the victim.[176] Further, it is the circumstances in which birth takes place, not the fact of birth itself, that is usually key in explaining the disturbed psychological state. If we are to provide for a partial defence in newborn child killing cases (and we strongly argue that we should), then a defence based on mental capacity/psychiatric disorders alone would not be effective, nor would a defence that cannot take account of the circumstances in which birth take place.

A further question to then consider is whether both types of maternal infanticide can and should be catered for within the same mitigation framework (as is currently the case), or whether it would be more appropriate to have separate provision for these different types of maternal infanticide in the law –

174. For a discussion of the role of social norms in the criminal justice response to infanticide see K. Brennan, 'Social Norms and the Law in Responding to Infanticide' (2018) 38 *Legal Studies* 480.

175. Victorian Law Reform Commission, above n. 57 at para. 6.29.

176. See discussion above.

one that does not require a mental disorder and is limited to the context of newborn child killings, specifically recognising the unique features of those cases, and one that caters for the case of older infant-victims where there usually is a mental disorder.[177] One consideration is that in the latter case the defence of diminished responsibility would likely apply as there usually is a psychiatric diagnosis, and so there may be no need for additional provision in the law to facilitate a lenient outcome. Such an approach may be appealing particularly in addressing concerns about sexism and equality with regard to cases where fathers/other parents kill in very similar situations of mitigation – that is, where they kill as a consequence of a mental disorder connected with the particular strains of parenting a young child. Treating cases involving older victims under diminished responsibility would also challenge arguments about the value of infants/infant protection in that there is no special provision being made that potentially suggests that infants are less valued in the criminal law than other victims who are killed by those with mental disorders.[178] However, in practical terms, it may prove difficult to separate out these two forms of maternal infant killing, particularly when we recall the problems that arose under the 1922 Act around the meaning of 'newlyborn' and thus the parameters of the law.[179] Furthermore, as we indicate above, there may still be good reason for having a special infanticide law for the older cases too – a law that distinguishes these cases from when other parents kill, with mitigation that bears a clear connection to the fact of having given birth to and mothering the child.

Turning to the language of a future infanticide law, even if there is judicial interpretation of the existing law in line with our approach (that it includes social mitigation and does not require a mental disorder), and assuming the Law Commission and Government agree with this, it may nonetheless be useful to take the opportunity to amend the statute's language to minimise the risk of misconstruction in the future. To start, although, as we have argued in this article, the phrase 'not fully recovered from the effect of giving birth to the child' could be interpreted to consider the overall impact of childbirth on a woman in the context of the circumstances involved, the statute could be framed to be more explicit about the fact that it is giving birth in the circumstances at hand, rather than childbirth per se, that is relevant. For example, 'the balance of her mind was disturbed by reason of the impact of giving birth taking account of all of the circumstances involved' or 'the impact of giving birth in all of the circumstances involved caused her to have a disturbance in the balance of her mind' might offer more clarity on the scope of the law, particularly with regard to capturing cases of newborn child killings and the particular circumstances usually involved in those cases.

Following from this, the specific reference to lactation is odd in the contemporary context and arguably presents the biggest challenge in terms of interpreting the existing law to reflect the approach we argue for. It is difficult to see how 'lactation' could be interpreted in a way that captures something other than breastfeeding (even if we are to consider the impacts of this to be more than biological). However, the reality is that many women do not breastfeed but may nonetheless suffer from mental ill-health connected with the difficulty of mothering in the first year after giving birth; indeed, current medical explanations for postpartum medical disorders do not convincingly support the lactation limb of the doctrine.[180] Thus, it is not contentious to say that lactation should be removed from the statute

177. See Howard, 'Myths and Moral Agency', above n. 25 at 134, who makes an argument for treating neonaticide cases differently to other infanticides. Howard does not support having a specific Infanticide Act on grounds of principle, but does argue that in cases of neonaticide '[t]he particular vulnerability of some women so soon after delivery, who might be experiencing dissociation due to a concealed pregnancy and traumatic secret delivery, should allow for a full, rather than partial, defence due to their complete lack of moral agency.'

178. There are, however, arguments against this approach. For a summary of previous discussions about subsuming infanticide under diminished responsibility, see Brennan and Milne, above n. 2 at 35–6. This issue was considered in the previous Law Commission report, which rejected the option of merging infanticide and diminished responsibility: see Law Commission, above n. 3 at paras. 8.35–8.39.

179. See discussion above.

180. For discussion of this and other criticisms of the medical basis of the law, see Brennan, above n. 44 at 507–19.

and replaced with more suitable language that conveys the reality of the basis of mitigation in situations involving older victims where their mothers are suffering from mental ill-health that is connected with the strains of mothering the child they have borne.[181]

However, language that focuses only on the impact of childbirth may struggle to encapsulate cases involving older infants, even (or possibly especially) if emphasis is placed on the circumstances of giving birth. Consideration thus needs to be given to how to capture cases where the immediate impact of birth and the circumstances in which birth took place are no longer relevant, but where the circumstances of mothering following birth are. As with the existing law, two different limbs will arguably be needed, one that covers newborn cases and the other older infants, but which does not base the latter on lactation. Consideration would also need to be given to ensuring that cases that do not neatly fit into either category but nonetheless deserve a lenient response do not fall between the cracks, and, conversely, that cases that do not warrant lenient treatment (e.g. cases of child abuse) are excluded.

Finally, if a mental disorder is not required (as we have argued is the case with the existing law) but something more significant than an everyday psychological or emotional upset is,[182] then consideration should be given to what language would best express this concept. Arguably the existing language of 'a disturbance in the balance of her mind' may suffice to convey a mental state that is significantly agitated or distressed so as to reduce responsibility for the crime. However, it may be beneficial to be more explicit about the fact that a mental disorder is not necessary in order to establish a disturbance in the balance of her mind.

Some insights may be gained from the experiences of other jurisdictions with similar infanticide laws where amendments have been made to the language of the traditional mitigation framework in recent decades. Interestingly, such reforms have not entirely discarded the wording in their existing laws. For example, both Victoria, Australia,[183] and Ireland[184] reformed their respective infanticide provisions in the mid-2000s. In both cases the reference to lactation was dropped and replaced with a reference to a mental disorder consequent upon giving birth, but the language of a disturbance in the balance of mind, and the effect of giving birth were retained. These reforms suggest that there are two separate and distinct grounds upon which infanticide may be used in those jurisdictions, neither of which appear to stray far from

181. It is worth bearing in mind that when lactation was included in the statute in 1938 as the basis for extending infanticide to older victims, 'lactational psychosis' was recognised by the medical profession, but this type of mental health condition was also classed by some medical experts as 'exhaustion psychosis'. Importantly, as we have noted above in our history of this law, mental health experts recognised the role of socio-economic factors and the strain of mothering in difficult socio-economic situations in the development of both lactational and exhaustion psychosis, rather than breastfeeding per se: see generally, Kramar and Watson, above n. 88 at 246–50. Today, medical understanding of mental illness following childbirth has shifted and so too has the terminology, with different classifications and labels such as 'postpartum psychosis' and 'postnatal depression' being used to cover symptoms of mental ill-health in the postpartum period without specific reference to lactation. So, to amend the language to reflect mental ill-health caused by the strains of mothering a young baby following childbirth, including but not limited to the impact of breastfeeding, would arguably not stray from the notion of mitigation with respect to these cases as it was originally conceived.

182. For example, akin to what is needed for loss of control. In Jewell [2014] EWCA 414 at [24], the CA agreed that a loss of control is the 'loss of the ability to act in accordance with considered judgment or a loss of normal powers of reasoning'.

183. Crimes Act 1958 (version 184), s. 6, as amended by the Crimes (Homicide) Act 2005 (Vic), s. 5, which provides that a woman will be guilty of infanticide, not murder, if she 'carries out conduct that causes the death of her child in circumstances that would constitute murder and, at the time of carrying out the conduct, the balance of her mind was disturbed because of— (a) her not having fully recovered from the effect of giving birth to that child within the preceding 2 years; or (b) a disorder consequent on her giving birth to that child within the preceding 2 years …'.

184. The Irish Infanticide Act 1949, as amended by the Criminal Law (Insanity) Act, 2006, s. 22(a), now provides that a woman will be liability for infanticide where she kills her child aged under 12 months by a wilful act or omission that would otherwise have amounted to murder if 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 a mental disorder (within the meaning of the Criminal Law (Insanity) Act 2006)* consequent upon the birth of the child, (our emphasis). The sentencing arrangements were also amended to allow for (but not require) punishment as if she had been found guilty of manslaughter by diminished responsibility; Criminal Law (Insanity) Act, 2006, s. 22(b).

the original basis for mitigation contained in the previous versions of the law: the first, which does not require a mental disorder and that remains unchanged from the original infanticide provision, applies where the balance of her mind is disturbed by reason of the effect of giving birth; the second, alternative, is where a mental disorder caused her disturbed mental state and where this disorder is connected with – 'consequent upon' – childbirth. One of the potential benefits of this approach is that it seems to reflect the reality of infanticide cases, most importantly in relation to the distinction between newborn cases (where there is no mental disorder but where the balance of mind was disturbed due to the more immediate impact of giving birth) versus older babies (where there is a mental disorder that is connected with having given birth to and mothering the child). The amendment with respect to mothers who kill older babies provides a solution to the issue of how to catch those cases where it would be a stretch to base the defence on the impact of childbirth (even if broadly conceived), given that lactation is no longer an appropriate option.

In addition to the fundamental issues of principle we have just outlined, there are several other points that the Law Commission may wish to consider in its review of the law should infanticide be retained but reformed, including whether:[185]

- the offence/defence should be limited to children aged under one year;[186]
- the punishment for infanticide should remain as a maximum of life imprisonment, bearing in mind that historically infanticide sentencing has been overwhelmingly non-custodial[187]
- if a woman who kills multiple children, one of whom falls within the age range of the Infanticide Act while another does not, she should be able to rely on infanticide for all the killings;[188]
- the mitigation that forms the basis for the partial defence should continue as a *mens rea* factor, or if the English and Welsh law should reflect the Canadian infanticide provision in this respect;[189]
- there is a need to prove a causal link between the killing and mitigating factor such as, for example, that her disturbed mental state affected her ability to make rational judgements or exercise self control (currently it is a presumed link);[190]
- the current burden of proof (partial defence raised by the defendant to be disproven by the prosecution) should be maintained;[191]
- infanticide should continue as a defence to manslaughter;[192]

185. Many of these issues were considered by the Law Commission in its previous review; see Law Commission, n. 3 at para. 8.32–8.59.
186. In other jurisdictions infanticide legislation applies to older children. For example, Victoria, Australia extended the age range to a 2-year-old victims; above n. 183. In New Zealand the age limit is 10 years, and the law covers the killing of other children: Crimes Act 1961, s. 178.
187. Some jurisdictions have lower maximum terms: e.g. in Victoria it is 5 years imprisonment, and in New Zealand it is 3 years imprisonment, ibid.
188. Or as in the recent case of Joanne Sharkey who was convicted of diminished responsibility manslaughter after concealing her pregnancy and killing her baby at birth; she was suffering from postnatal depression following the birth of her older son (aged 3) at the time; R v Sharkey [2025] Crown Court at Liverpool, 4 April <https://www.judiciary.uk/wp-content/uploads/2025/04/R-v-Sharkey.pdf>.
189. Borowiec, above n. 82 at [35].
190. Walker, above n. 133 at 134–5. See also Howard, 'The Offence/Defence of Infanticide', above n. 25 at 478.
191. This is considered a benefit of the infanticide law in comparison to diminished responsibility; for example, see Law Commission, above n. 3 at para. 8.37.
192. Originally it was assumed that infanticide operated only as a defence to murder, thus requiring the *mens rea* for murder to be proven. However, in Gore, above n. 28, the CA stated *obiter* that all the ingredients of murder did not have to be proven for infanticide to apply: Parliament had intended to create a new offence – distinguished from murder – the *mens rea* of which was 'wilfull'; there was no need to prove the *mens rea* for murder. Following this, Parliament opted to insert into the infanticide law the explicit provision that it was available as an alternative to murder or manslaughter: Coroners and Justice Act 2009, s. 57. For a critique of Gore, see A. Ashworth, 'Infanticide: Whether Mens Rea of Infanticide Consists of an Intention to Kill or Cause Grievous Bodily Harm' (2007) 5 *Crim LR* 388.

- women who are unable to admit they have killed their child due to their ongoing mental illness should be able to make use of infanticide, as per *Kai-Whitewind*;[193] and,
- it should be possible to attempt to commit infanticide.

Any proposed revision of the Infanticide Act will need to carefully weigh the balance of fundamental elements of the law and the nature of maternal infant killing with popular opinion, something politicians often (and understandably) struggle to do. Although infanticide offers only a partial defence based on partial excuse, recognising reduced culpability, the mere fact that such a defence exists (being available only in cases where children aged under 12 months are killed by their mothers) undeniably raises uncomfortable questions about what this law conveys in terms of societal attitudes towards babies and women. Indeed, while statutory reform presents the opportunity to provide for a workable offence/partial defence, and particularly to explicitly adopt the interpretation we argue for in this article, such an outcome is not inevitable. Instead, review leading to reform may result in the abolition of infanticide or the law being reframed into a defence with more exacting psychiatric requirements. Therefore, as we have highlighted in our above observations on reform, it is crucial that any review of this law is rooted in research about the nature of infant killing by parents and carers, with specific attention paid to the sex of the preparator, the nature of the relationship, and context of the killing. We advocate that such work should occur before embarking on any form of legislative review of the law due to the risk that popularist arguments may result in a knee-jerk repeal of infanticide based on misguided notions of fairness and equality, and indeed child protection.

In conclusion, as we noted above, one of the original purposes of the 1922 statute was to reaffirm the seriousness of maternal infanticide. Over one-hundred years later, we hope that this opportunity to re-legislate on infanticide could also play an important communicative function in terms of restating the need for a compassionate response in the vast majority of cases where women kill their babies, whilst also recognising that their conduct – the killing of a vulnerable baby – is nonetheless worthy of a homicide conviction. In the meantime, judicial interpretation remains crucial. In particular, should an appropriate case come before the appeal courts, it may be a speedier way to resolve at least some of the more immediate issues surrounding the Infanticide Act as it stands, particularly with regard to the question of whether it is a bio-psychiatric defence or something broader, and specifically, given the issues we have highlighted in recent cases, the question of its availability where women kill their babies following an unassisted secret birth. Judicial interpretation could do much to counteract the increasingly dominant attitude towards this crime, which seems to be linked with punitive inclinations and a misunderstanding that the law is only available to women who are psychiatrically unwell. A judicial interpretation that is sympathetic to the roots of this law and the intentions behind it could also be valuable in reasserting the purpose of infanticide, something that would be an important contextual factor for any future reform. Finally, given the lack of clarity about what the law currently means, judicial interpretation would also be useful in reconsidering whether infanticide should be retained, amended, or left alone. Indeed, we cannot consider the current law's value and weaknesses, or whether infanticide should continue as an offence/partial defence, if we do not know the true meaning and scope of the infanticide law as it currently stands.

193. Kai-Whitewind, above n. 28. A proposal was made for addressing this matter in the previous Law Commission review of infanticide, but this was not taken up by the Government. See Law Commission, above n. 3 at paras. 8.44–8.59.

Conclusion

With this article we hope to reintroduce the infanticide law into legal consciousness so that its true meaning may be realised. The clarification of the meaning of the statute we advocate will benefit appellate judges if called upon to interpret the law in future. In the meantime, the arguments we make, and the evidence provided will support CPS prosecutors in charging decisions for relevant cases, as well as decisions around plea acceptance; defence lawyers in defending their client; medical experts in identifying factors relevant to mitigation under the Infanticide Act in their pre-trial reports and in trial testimony; and trial judges in how they direct the jury on requirements for infanticide. Our hope is that a better-informed understanding of the Infanticide Act 1938 will result in more just outcomes for women who, due to the significant vulnerabilities they experience, are not deserving of a murder conviction and the subsequent punishment.

One of the key points from the analysis presented here is that it is important for legislation to be kept alive by the courts, in terms of the understanding and meaning of a statute. This point is particularly salient for laws that are old and infrequently used. As is evident from our interpretation of the Infanticide Act, when we lose the history of the law – by this we mean the collective understanding that was once widely shared – we lose the meaning of the law. The consequence is that laws can become misunderstood and potentially misused. In making this point we are not proposing that the meaning of law should never change, nor that statutes can never be reinterpreted to meet contemporary needs – it would be unworkable if Parliament needed to constantly re-legislate to keep law relevant. However, there is a clear distinction between legislation such as the Infanticide Act, which is rarely used, and a statute that is employed regularly and so consequently a contemporary interpretation has developed; for example, sections 18 and 20 of the Offences Against the Person Act 1861. The archaic vocabulary of these non-fatal offences against the person has long been criticised,[194] but these sections of the statute have remained in regular use since enactment and thus the courts have provided interpretation of the contemporary meaning of the terms. Consequently, there is little to no doubt of the meaning or purpose of this law, as illustrated by the fact that in recent years few point of law appeals have been raised, despite the frequency with which these crimes are charged and convictions obtained. In contrast, the Infanticide Act has remained dormant, hardly used. And, as we have argued, in the small number of cases where the law is relevant, such as Paris Mayo's case, lack of judicial interpretation and the forgotten purpose and meaning of the legislation hinders its effective use as a partial defence for women accused of murder.

As we have outlined, the misunderstanding of the Infanticide Act is apparent in academic analysis of the law.[195] Recent case outcomes also indicate that infanticide is no longer applied as intended.[196] At the time of enactment of the 1922/1938 Acts, medical professionals giving evidence, prosecutors and defence lawyers, judges and juries understood the aim and function of the Infanticide Act: they has been applying the principles that the legislation enshrined in law long before the offence/partial defence of infanticide existed. Therefore, at this time the vague and non-specific language did not hinder the application. In fact, the imprecision in the language was arguably needed to ensure the law passed by gliding over potential controversies, and proved to be a benefit of the law in respect to its subsequent use. Indeed, possibly the statute was consciously drafted with vague language to allow for a 'deliberate delegation of discretion',[197] enabling flexible application to ensure just outcomes.

194. Law Commission, Reform of Offences Against the Person, Cm 361 (2015) para. 3.6.
195. For example, see Weare, above n. 5.
196. S. Morris, 'Teenager Paris Mayo Sentenced to at Least 12 Years for Murder of Newborn Son', The Guardian (26 June 2023) <https://www.theguardian.com/uk-news/2023/jun/26/teenager-murdered-newborn-son-herefordshire-jailed-paris-mayo> accessed 12 September 2023.
197. See Twining and Miers, above n. 70 at 180.

However, we cannot ignore the fact that obscure language that leaves mercy to be determined by those in the courtroom not only provides space for misunderstandings to develop, but also lends itself to gendered assumptions and subjective assessment of who is deserving of mercy and who is not. The risk is that interpretations are based on who women are and not what they do; feminists have long argued that perceptions of women's criminal culpably are closely connected to whether they are perceived to conform to gender norms of femininity.[198] Research demonstrates that sexist assumptions of what it means to be a 'good' mother surround cases of infanticide, and those women perceived to be 'bad' mothers, and thus 'bad women' receive harsher outcomes.[199] Such biased treatment is potentially a growing concern the further we move away from the historical understanding of the law. However, the potential sexist interpretation of the Infanticide Act is not inevitable, providing there is an understanding of the social context of infanticide cases and its role in applying this law. As we have already noted, women's criminal acts are not the same as men's, and questions continue to be raised about the appropriate response to the differing nature of offending between the sexes.[200] Specifically, infanticide is a product of the society in which a woman lives.[201] Across different cultures and times, including in England and Wales, it has been recognised that women should not bear the full and sole culpability for their homicidal acts towards their infants.[202] The Infanticide Act specifically reflects this understanding. Consequently, as we have illustrated, what we need is a contextualised, contemporary interpretation of the law, where the rules of statutory interpretation are employed in a way that is sensitive to the history of the law and the lived experiences of women who kill their infants. As we have outlined, similar conclusions can be drawn about other rarely used, historical offences that largely relate to the conduct of women, as the history of these offences have also been lost and so the risk of misinterpretation and misapplication is great.[203]

We recognise that the words in a statute are 'always speaking', and that judges will interpret the law in accordance with contemporary rather than historical conditions to meet current needs.[204] However, they must also respect the 'will of Parliament' in how they approach the task of interpreting the language contained within the statute.[205] How far into the history of the 1938 Act a court would be willing to traverse is unclear, and it seems unrealistic to expect a detailed consideration of the various points of note that we have presented. However, as we have argued, for a laws such as infanticide, which deals with a rare crime of women and where so much is at stake in terms of the outcome for the accused, the history of the law is essential to understanding its meaning. This point is particularly salient as the history of infanticide as a crime is still relevant: the act of a woman killing her infant has not changed all that much over the last century. While the specific social factors that cause a woman a crisis may now be different compared to 100 years ago, the reality that pregnancy and motherhood are a time of crisis for many women, and a small number of those will go on to kill their child in a moment of desperation has not changed. The law should continue to reflect this reality experienced by a small number of vulnerable and desperate women, acknowledging that a murder conviction, mandatory life-sentence and minimum jail term is generally not appropriate. In this regard, we hope that the Law Commission's review of the Infanticide Act 1938, and any legislative reform that follows, takes the opportunity to reaffirm the need for this law and

198. For example, A. Lloyd, Doubly Deviant, Doubly Damned: Society's Treatment of Violent Women (Penguin Books: London, 1995); P. Carlen, Women's Imprisonment: A Study in Social Control (Routledge: London, 1983); A. Worrall, Offending Women: Female Lawbreakers and the Criminal Justice System (Routledge: London and New York, 1990).
199. See Morris and Wilczynski, above n. 5; Milne, above n. 13.
200. See Gelsthorpe and Wright, above n. 47.
201. See Oberman, above n. 56. For discussion of this point in the context of the criminal justice response to infanticide in Ireland, see Brennan, above n. 171 at 186–95.
202. See Oberman, above n. 56; Milne and Brennan, above n. 8; C. S. Lewis, American Infanticide: Sexism, Science, and the Politics of Sympathy (Rutgers University Press: New Brunswick, 2025).
203. See Milne, above n. 153.
204. See Zander, above n. 70 at 178, 198, 202; Steyn, above n. 70 at 68.
205. See Zander, above n. 70 at 202.

the reasons for providing special lenient treatment to this group of offending women, as well as to offer clarity on the circumstances in which the law applies.

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