

# “A Fine Mixture of Pity and Justice:” The Criminal Justice Response to Infanticide in Ireland, 1922–1949

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MH, a domestic cook who was 26 years of age, was charged with murdering her newborn infant in September 1931. MH had been “seeing a boy” who, she stated, “took advantage” of her on one occasion, procuring her consent to sexual intercourse by a promise of marriage. She claimed that she only realized she was pregnant during the later months of her pregnancy, but did not inform the father of her child. Her employer, suspecting that MH was pregnant, enquired on several occasions whether she could do anything to help, but MH did not admit her “condition.” Although her employer was aware that MH had no family or home to go to, she gave MH notice to quit her job. A couple of weeks later, MH gave birth in her bedroom at her employer’s home; she did not call out for assistance or disturb the girl with whom she shared the bedroom. MH admitted in her statement that the baby cried after birth and that she “tied a white dress belt . . . around its neck to kill it,” adding: “I tied it [the belt] tight. I killed the child and I know I killed it.” Afterwards, MH put the body in a suitcase, cleaned up the bloodstains, and returned to work. The

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suspicions of her employer eventually lead to the discovery of the dead infant. The postmortem examination showed that the infant had been born alive, but had received no attention at birth; death was the result of strangulation. MH was acquitted of murder at the Central Criminal Court.<sup>1</sup>

The case of MH is a fairly typical example of the many infant murder prosecutions undertaken in Ireland during the 1920s through the 1940s.<sup>2</sup> Prior to the introduction of the Infanticide Act of 1949, women suspected of killing their infants with *malice aforethought* were liable for murder, which at that time was punished by a mandatory death sentence.<sup>3</sup> There was no special offense of infanticide, and unless the prosecutor, judge, or jury exercised discretion to produce a more lenient outcome, the accused faced the prospect of a capital conviction.

In 1949, the Irish legislature, following the English example,<sup>4</sup> enacted legislation to address the difficulties arising from treating maternal infant murder as a capital offense. The Infanticide Act of 1949 created a new offense, “infanticide,” punishable by a maximum of life

1. The National Archives of Ireland (hereafter NAI): State File Central Criminal Court (hereafter SFCCC), IC-94-66, Co. Meath, November 17, 1931; State Book Central Criminal Court (hereafter SBCCC), ID-33-68, Co. Meath, November 17, 1931.

2. The Anglo-Irish Treaty of 1921, an agreement that brought to an end the War of Independence fought between Irish republican forces and the British Empire, led to the partition of Ireland and the establishment of the twenty-six-county Irish Free State, an autonomous self-governing dominion within the British Empire; the remaining six counties (Northern Ireland) remained part of the United Kingdom of Great Britain and Northern Ireland. The Republic of Ireland Act 1948 declared full independence from the British Empire for the Irish Free State, and the Republic of Ireland was officially established in April 1949 (Republic of Ireland Act [Commencement Order] 1949); this was recognized by Britain in the Ireland Act 1949. See Francis S. L. Lyons, *Ireland Since the Famine*, 2nd ed. (London: Fontana, 1973), 421–570. References to “Ireland” in this article are to the Irish Free State, or, from April 18, 1949 onwards, the Republic of Ireland. The English Infanticide Act of 1938 was introduced in Northern Ireland in 1939: see Infanticide Act (Northern Ireland), 1939.

3. Although obliged to pass a death sentence on a murder conviction, judges could recommend mercy. Prior to the enactment of 1937 Constitution (Bunracht na hÉireann), power to commute death sentences was vested in the governor general, the King’s representative in Ireland, who acted on the advice of the Irish government (known as the Executive Council). After 1937, these powers were vested in the president of Ireland, acting on the government’s advice: Bunracht na hÉireann, Art 13.9. See Gerard O’Brien, “Capital Punishment in Ireland, 1922–1964,” in *Reflections on Law and History: Irish Legal History Society Discourses and Other Papers, 2000–2005*, ed. Norma Dawson (Dublin: Four Courts Press in association with the Irish Legal History Society, 2006), 227–28, 236.

4. An infanticide act was first enacted in England and Wales in 1922; this was amended in 1938. See Infanticide Act 1922 (12 & 13 Geo. V, cap. 18); Infanticide Act 1938, (1 & 2 Geo. VI, cap. 36).

imprisonment.<sup>5</sup> "Infanticide" provided a lenient alternative to a murder charge or conviction in cases in which women were charged with murdering their infants.<sup>6</sup> According to section 1(1) of the Infanticide Act of 1949, a woman must first appear before the District Court on a charge of murder before she can avail herself of the mitigating provisions in the infanticide law.<sup>7</sup> At a preliminary examination of the evidence at the District Court, that charge can be reduced to infanticide,<sup>8</sup> which will result in the accused being sent for trial to the Circuit Criminal Court.<sup>9</sup> If the charge is not altered, the accused will be tried for murder at the Central Criminal Court, where infanticide constitutes an alternative conviction.<sup>10</sup> In this sense, infanticide also acts as a partial "defense" to murder. The 1949 statute provided that infanticide constituted an alternative charge or conviction on a murder charge if a woman "by any wilful act or omission caused the death of her child," in circumstances amounting to murder, while "the balance of her mind was disturbed by reason of her not having

5. The statute provided, in s. 1(3), that infanticide would be punished as for manslaughter. This has been amended by the Criminal Law (Insanity) Act 2006, s. 22(b), and now provides that a woman convicted of infanticide "may be dealt with . . . as if she had been found guilty of manslaughter on the grounds of diminished responsibility." This amendment had no impact on the range of sentencing options available; those found guilty of manslaughter by reason of diminished responsibility are subject to the same punishment options as those convicted of manslaughter: see Louise Kennefick, "Diminished Responsibility in Ireland: Historical Reflections on the Doctrine and Present-Day Analysis of the Law," *Northern Ireland Legal Quarterly* 62 (2011): 287.

6. Infanticide Act 1949, s. 1(1) and 1(2).

7. Infanticide Act, 1949, s. 1(1), which provides: "On the preliminary investigation by the District Court of a charge against a woman for the murder of her child, being a child under the age of twelve months, the Justice may, if he thinks proper, alter the charge to one of infanticide and send her forward for trial on that charge."

8. *Ibid.* The District Court is the lowest court of criminal jurisdiction and is largely concerned with summary matters: see Courts of Justice Act, 1924, s. 77. Until recently, it also played a filtering role in determining whether an indictable case could proceed to trial. At a preliminary examination, the accused would only be sent for trial to the relevant court of jurisdiction if the district judge determined that the prosecution had evidence upon which a jury could reasonably convict. See Dermot Walsh: *Criminal Procedure* (Dublin: Thomson Round Hall, 2002), 677–78.

9. The 1949 infanticide legislation provided, in s. 1(3), that a woman tried for/convicted of infanticide would be "tried and punished as for manslaughter," which meant that those sent for trial for infanticide would be dealt with at the Circuit Criminal Court, not the Central Criminal Court. The Circuit Criminal Court has jurisdiction over manslaughter and all but the most serious criminal offenses. The Central Criminal Court has jurisdiction over all indictable offenses and exclusive jurisdiction over certain offenses, including murder, rape, and treason. See Courts of Justice Act, 1924, s. 49; Courts of Justice Act, 1926, s. 4. See also Walsh, *Criminal Procedure*, 46–59.

10. The accused can be convicted by a jury of infanticide as an alternative to a murder conviction at trial: Infanticide Act 1949, s. 1(2).

fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child.”<sup>11</sup> This partial mitigation, which is medical in nature, followed precisely that which had been adopted in the English Infanticide Act of 1938.<sup>12</sup> Similar infanticide laws have been enacted elsewhere.<sup>13</sup>

This article explores the background to the enactment of the Irish Infanticide Act of 1949. The criminal justice response to infanticide<sup>14</sup> in the decades prior to the enactment of the Irish infanticide statute will be examined. Through an analysis of archival court and government records, it will be shown that prior to the 1949 reform, women charged with the murder of their infants were treated leniently by the Irish criminal justice authorities. The reasons for this, and, in particular, the roles played by pragmatism and sympathy, will be explored. Leading from this, the motivations for the Irish infanticide reform will be assessed. An examination of archival records and the parliamentary debates relating to the Infanticide Act of 1949 indicates that this statute was largely inspired by pragmatic considerations, and, to some degree at least, by humanitarian concern for infanticide offenders.

Questions raised by interpretations of infanticide reform in England and Canada,<sup>15</sup> especially the part played by humanitarian sentiment in legislative action in those jurisdictions, will be considered in the context of the Irish reform. Although precise comparisons cannot be drawn between this

11. Infanticide is defined, in s. 1(3), as follows: “A woman shall be guilty of felony, namely, infanticide if — (a) by any wilful act or omission she causes the death of her child, being a child under the age of 12 months, and (b) the circumstances are such that, but for this section, the act or omission would have amounted to murder, and (c) at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child. . . .” The reference to “the effect of lactation consequent upon the birth of the child” has since been replaced with a reference to “a mental disorder (within the meaning of the Criminal Law [Insanity] Act 2006) consequent upon the birth of the child:” see Criminal Law (Insanity) Act 2006, s. 22(a).

12. Infanticide Act 1938, (1 & 2 Geo. VI, cap. 36).

13. Similar infanticide provisions have been enacted in Canada (Criminal Code, s. 233 [R.S., c. C-34, s. 216]); Hong Kong (Cap. 212, Offenses Against the Person Ordinance, s. 47C); Fiji (Penal Code [Cap. 17], s. 205.); New Zealand (Crimes Act, 1961, s. 178); and in Australian jurisdictions including New South Wales (Crimes Act 1900 [NSW], s. 22A), and Victoria (Crimes Act, 1958 [Vic.], s. 6, as amended by the Crimes [Homicide] Act, 2005 [Vic.], s. 5).

14. “Infanticide” will be used throughout this piece to reflect the current legal definition of the term, that is, to denote cases of maternal infant murder, in which the victim is under 12 months of age.

15. Tony Ward, “The Sad Subject of Infanticide: Law, Medicine and Child Murder 1860–1938,” *Social and Legal Studies* 8 (1999): 163–80; and Kirsten J. Kramar: *Unwilling Mothers, Unwanted Babies: Infanticide in Canada* (Vancouver: UBC Press, 2005).

account of the reasons for reform in Ireland and those given by other scholars' interpretations of the evidence elsewhere, some differences will be noted. In particular, it will be contended that interpretations of the importance of sympathy in the English and Canadian reforms do not capture the Irish experience.

### **Pragmatism, Humanitarianism and Infanticide: Law Reform in England and Canada**

In England, prior to the introduction of the Infanticide Act of 1922, there was an effective breakdown between the law and public opinion on the subject of infanticide.<sup>16</sup> Although murder was punishable by a mandatory death sentence, public opinion, manifesting itself through juries, responded to infanticide offenders in a manner that conflicted with the law's requirement for indiscriminate severity in cases of murder. Indeed, the divergence between the law and public opinion made it impossible to effectively bring to justice women who murdered their infants.<sup>17</sup>

There were two obstacles to the effective administration of justice in cases of maternal infanticide.<sup>18</sup> First, since 1849, the Home Secretary had always commuted the death sentence.<sup>19</sup> This practice, commonly referred to as the "solemn mockery," caused considerable annoyance among trial judges who were obliged to pass a sentence of death with all the formality and solemnity required for the occasion, knowing that the sentence would certainly be commuted.<sup>20</sup> As the Rev. Lord S. G. Osborne, in evidence provided to the 1866 Royal Commission on

16. See, generally, David Seaborne Davies, "Child Killing in English Law," in *The Modern Approach to Criminal Law*, ed. Leon Radzinowicz and James W.C. Turner (London: Macmillan & Co, 1945), 315–22.

17. *Ibid.*, 317–18, 320–22, referring to the evidence of witnesses before the 1866 Royal Commission on Capital Punishment, hereafter the 1866 Commission. See *Royal Commission on Capital Punishment*, British Parliamentary Papers, 1866, vol. 21: hereafter BPP, 1866, vol. 21.

18. See, generally, Lionel Rose: *Massacre of the Innocents: Infanticide in Britain 1800–1939* (London: Routledge & Kegan Paul, 1986), ch. 8; and Davies, "Child Killing in English Law," 303–22. See also Ann R. Higginbotham, "'Sin of the Age: Infanticide and Illegitimacy in Victorian London,'" *Victorian Studies* 32 (1989): 319–37.

19. Davies, "Child Killing in English Law," 317; and Rose, *Massacre of the Innocents*, 76.

20. Davies, "Child Killing in English Law," 319–20. A number of witnesses before the 1866 Commission commented on this issue: for example, see BPP, 1866, vol. 21, 242–46 (per Sir Grey Bart, the home secretary); 327 (per the Right Honourable Sir J.S. Willes). Page numbers cited refer to the page number of the entire volume, rather than the individual paper, report, or document.

Capital Punishment (hereafter 1866 Commission), remarked, “[i]n nine cases out of ten, trying women for their lives for infanticide is a cruel farce” because “no one for one moment believes that the woman will be executed.”<sup>21</sup>

The second obstacle to effective justice in infanticide cases was the difficulty in obtaining murder convictions in the first place. On a charge of murder it was necessary to prove that the victim was a human being, a “reasonable creature *in rerum natura*.”<sup>22</sup> In cases involving newborn infant victims this, from 1803, meant that the prosecution had to prove that the child had been born alive.<sup>23</sup> Indeed, it was not an offense to cause the death of a child during birth and before it had been fully born alive.<sup>24</sup> Not only were there evidential difficulties in establishing that a child had been born alive, there was no agreed upon understanding as to what the legal requirements for live birth actually were.<sup>25</sup> Medical witness and jurors, who disliked sending this offender to the gallows, availed themselves of these uncertainties to spare the woman a capital conviction.<sup>26</sup>

In cases in which live birth could not be established, a conviction for concealment of birth, a misdemeanor with a maximum sentence of 2 years’ imprisonment, often resulted.<sup>27</sup> Concealment of birth, which

21. BPP, 1866, vol. 21, 475.

22. Edward Coke, *Third Part of the Institutes of the Laws of England concerning High Treason, and Other Pleas of the Crown, and Criminal Causes* (London: E. & R. Brooke, 1797), 47 (hereafter 3 Inst.). See also Davies, “Child Killing in English Law,” 303–07.

23. In 1624, the common law presumption of dead birth for murder cases involving newborn illegitimate infants was reversed in the “Act to prevent the destroying and murdering of bastard children.” See 21 Jac. I, cap. 27. Lord Ellenborough’s Act of 1803 reinstated the presumption of dead birth for all infant murder trials; 43 Geo. III, cap. 58, s. 3 & 4. See Davies, “Child Killing in English Law,” 312–13.

24. 3 Inst., 50. Davies, “Child Killing in English Law,” 307–11.

25. See, generally, Stanley B. Atkinson, “Life, Birth and Live-Birth,” *Law Quarterly Review* 20 (1904): 134–59; Davies, “Child Killing in English Law,” 303–10; and Rose, *Massacre of the Innocents*, 71–73. See also Courtney Kenny: *Outlines of Criminal Law*, 5th ed. (Cambridge: Cambridge University Press, 1911), 128–29; Glanville L. Williams: *The Sanctity of Life and the Criminal Law* (London: Faber & Faber, 1958), 19–23; and Gerard Casey: *Born Alive: The Legal Status of the Unborn Child in England and the U.S.A.* (Chichester: Barry Rose Law Publishers, 2005), 12–19.

26. Davies, “Child Killing in English Law,” 310, 316–19; and Rose, *Massacre of the Innocents*, 74. The live-birth problem was highlighted by a number of those who gave evidence to the 1866 Commission: see for example, BPP, 1866, vol. 21, 101 (Lord Wenslydale); 74–75 (Sir G. Bramwell); and 56 (Lord Cranworth). See also William Burke Ryan, *Infanticide: Its Law, Prevalence, Prevention and History* (London: J. Churchill, 1862), 6.

27. See Davies, “Child Killing in English Law,” 312; Higginbotham, “Infanticide and Illegitimacy in Victorian London,” esp. at 331–32. During the nineteenth century, this offense was governed by the following statutes: 43 Geo. III, cap. 58, s. 3; the Offenses

essentially criminalized the concealment of the dead body of an infant,<sup>28</sup> was useful in infanticide cases, because it enabled juries to save accused women from the capital conviction, while facilitating some recognition of their criminal responsibility; it also helped to fill the loophole in relation to the killing of infants during childbirth by criminalizing those who would otherwise not be liable for conviction for any offense.<sup>29</sup> Arguably, concealment of birth was also utilized to punish women who, although clearly not guilty of either murder or manslaughter, were nonetheless considered responsible for their child's failure to survive birth. The concealment offense possibly had a more sinister objective, being employed to criminalize sexual deviance in women, even if they had not been responsible for their infant's death. The offense did not require any evidence of neglect or foul play, and it was irrelevant whether the child had been stillborn or had died of natural causes: it simply punished concealment of the dead body of an infant, and, therefore, particularly targeted unwed women.<sup>30</sup>

There are many reasons why women who murdered their infants were considered deserving of leniency in nineteenth and early-twentieth century England.<sup>31</sup> The most significant of these appears to have been that there was considerable sympathy for the infanticide offender because of the circumstances in which she committed her crime. Most cases of maternal infanticide involved poor unmarried women who, as victims of the Victorian double standard of sexual morality and the "bastardy" clauses of nineteenth century Poor Law provisions, killed their infants because of the shame of bearing a child out of wedlock and the severe economic difficulties they faced.<sup>32</sup> David

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against the Person Act, 1828, s. 14 (9 Geo. IV, cap. 31); and Offenses against the Person Act 1861, s. 60 (24 & 25 Vic., cap. 100).

28. The most recent incarnation of this offense is in the Offenses Against the Person Act 1861, s. 60 (24 & 25 Vic., cap. 100), which provides: "If any woman shall be delivered of a child, every person who shall, by any secret disposition of the dead body of the said child, whether such child died before, at, or after its birth, endeavor to conceal the birth thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years."

29. See Davies, "Child Killing in English Law," 312; Higginbotham, "Infanticide and Illegitimacy in Victorian London," 331–32; and R. Sauer, "Infanticide and Abortion in Nineteenth Century Britain," *Population Studies* 32 (1978): 82. See also Mary Beth Wasserlein Emmerichs, "Trials of Women for Homicide in Nineteenth-Century England," *Women and Criminal Justice* 5 (1993): 99–109.

30. Elizabeth Rapaport, "Mad Women and Desperate Girls: Infanticide and Child Murder in Law and Myth," *Fordham Urban Law Journal* 33 (2006): 549–54.

31. Davies, "Child Killing in English Law," 320–21.

32. See generally: Lucia Zedner, *Women, Crime and Custody in Victorian England* (Oxford: Clarendon Press, 1991), 11–18; U. R. Q. Henriques, "Bastardy and the New



Seaborne Davies notes that, among those who gave evidence to the 1866 Commission, there was a general perception that infanticide was chiefly motivated by shame, a factor that diminished the reprehensibility of the offense; the view was that in cases of maternal infanticide “the execution of the law in its full severity would be barbarous.”<sup>33</sup> For example, Fitzjames Stephen observed that it was difficult to get a capital conviction on a charge against a woman for the willful murder of her infant because of widespread sympathy for her and her “miserable condition,” this being reinforced by the fact that the father of the child went unpunished.<sup>34</sup>

The climax of this agitation over the law relating to maternal infanticide was the enactment of the Infanticide Act of 1922.<sup>35</sup> This measure created a new homicide offense of infanticide, akin to manslaughter in terms of its gravity and punishment (which was a maximum of penal servitude for life).<sup>36</sup> By accepting that the law ought to offer a more lenient option for dealing with women who murdered their infants, the infanticide legislation essentially provided an official mechanism for a compassionate response to this offense, which, by synchronizing the law with public feeling as expressed through jury verdicts, and by addressing judicial grievances, would allow justice to operate more effectively. Therefore, the Infanticide Act of 1922 can largely be viewed as a pragmatic response to the problems and frustrations encountered by those (particularly trial judges) involved in dealing with cases of maternal infant killing.<sup>37</sup> The reform essentially formalized the *de facto* lenient response to women who killed their infants, and, therefore, it could be said that it represented the culmination of the traditional humanitarian response to this crime.

Tony Ward offers an explanation of the English Infanticide Acts of 1922 and 1938 that counters the characterization of these statutes as humanitarian measures in favor of women who killed their infants. Referring to nineteenth century humanitarian narratives of infanticide in which the female offender, who was mainly seen as “an object of male sexual desire or philanthropic sympathy,” came “close to disappearing,” Ward argues that the

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Poor Law,” *Past and Present* 37(1967): 103–29; Davies, “Child Killing in English Law,” 320–21.

33. Davies, “Child Killing in English Law,” 320–21.

34. BPP, 1866, vol. 21, 343.

35. 12 & 13 Geo. V, cap. 18. See generally, Davies, “Child Killing in English Law,” 315–35.

36. Infanticide Act 1922, s. 1(1) (12 & 13 Geo. V, cap. 18); and Offenses Against the Person Act 1861, s. 5 (24 & 25 Vic., cap. 100) which provides for the punishment for manslaughter.

37. Davies, “Child Killing in English Law,” 319–20, claims that judicial agitation over the “solemn mockery” was key in bringing about this reform.



English Infanticide Acts functioned to “reassert[] the woman’s status as a legal subject” by holding her “criminally responsible” for conduct that, formerly, she would have been acquitted of or found insane in relation to.<sup>38</sup> He suggests that the infanticide legislation “attempted to limit the disruption that ... humanitarian sentiments caused to legal ascriptions of responsibility...”<sup>39</sup>

In 1948, Canadian legislators enacted an infanticide law based on the English model. Kirsten Kramar’s study of the background to the enactment of this measure reveals that practical and humanitarian concerns were key factors in the reform.<sup>40</sup> However, it appears that it was humanitarian consideration for infants, not mothers, that encouraged Canadian legislative action.<sup>41</sup> Kramar’s review of the twentieth century court records indicates that the traditional view that “humanitarianism dominated” does not capture the Canadian response to infanticide in the early to mid-twentieth century, when, it seems, sympathy formed only part of the response. Prior to the introduction of the infanticide legislation, Canadian prosecutors regularly pursued murder indictments and convictions, sometimes charging the accused with as many as four alternative offenses in order to secure a conviction, being frustrated in their efforts by jurors who normally opted for a more lenient response, usually in the guise of a concealment of birth charge or conviction.<sup>42</sup> However, it seems that juror refusal to prefer murder was not always the result of simple compassion. Medicolegal issues relating to the live birth and *mens rea* requirements for murder were also factors in juror decisions to discount a capital charge or conviction. Therefore, prosecutorial endeavors to secure murder indictments and convictions were impeded both because the evidential thresholds for particular requirements had not been met, and because sympathetic juries exploited these requirements to serve their humanitarian objective of sparing the woman a murder trial or conviction.<sup>43</sup>

In relation to the motivations for enacting an infanticide law in Canada, Kramar contends that because infanticidal mothers were already receiving

38. Ward, “The Sad Subject of Infanticide,” 176, emphasis in original. Insanity verdicts were rare in cases involving unmarried women, *Ibid.*, 166.

39. *Ibid.*, 176.

40. See generally, Kramar, *Infanticide in Canada*, chs. 1–3. For an account of the nineteenth-century response to infanticide in Canada, which indicates that there was much sympathy for these offenders, see Constance Backhouse, “Desperate Women and Compassionate Courts: Infanticide in Nineteenth-Century Canada,” *University of Toronto Law Journal* 34 (1984): 447–78.

41. Kramar, *Infanticide in Canada*, 66–71, 90–93.

42. *Ibid.*, 20–21, 27–39, 53–71.

43. *Ibid.*

lenient disposals, it was not necessary to legislate to enable sympathetic treatment of these offenders. Instead, she argues, the 1948 infanticide law was enacted to “deal with the negative discretionary effects of popular sympathy” by preventing improper reliance on concealment of birth by jurors, thus ensuring that women who killed their infants would be convicted of an appropriately labelled and punished homicide offense. Kramar concludes that the Canadian infanticide reform was not the product of humanitarian sentiment toward mothers, but was “in part justified as an ameliorative measure on behalf of the infant-victims.”<sup>44</sup>

In the following sections, the criminal justice and legislative background to the enactment of the Irish Infanticide Act of 1949 will be explored. Questions prompted by the foregoing analyses of the reasons for infanticide reform in England and Canada, particularly the role played by sympathy, will be explored with reference to the Irish experience. It will be argued that the history behind the enactment of the Irish measure suggests that, although the criminal justice response to infanticide and, eventually, the 1949 reform, were primarily motivated by practical considerations, sympathy for women also played a part.

### **Infanticide in the Irish Free State**

The purpose of this study is to explore the criminal justice response to maternal infanticide in Ireland from the time of independence up to the enactment of the Infanticide Act of 1949, focusing on how women sent to the Central Criminal Court on charges of murdering their infants were disposed of in terms of conviction,<sup>45</sup> and to examine the background to and, in particular, the motives for, the 1949 law reform. This study does not consider manslaughter or concealment of birth prosecutions at the Circuit Criminal Court, or the Central Criminal Court. Although an examination of these cases would provide a more comprehensive account of the phenomenon of infanticide and the criminal justice approach to it, the focus of this article is on the reasons for the 1949 reform which, it will be seen, was mainly directed at the problems encountered in connection with murder indictments at the Central Criminal Court. A more thorough study of prosecutions of women in connection with the deaths of their

44. *Ibid.*, 69, 90–92.

45. I found no evidence in the court and government records consulted to suggest that sentencing of women convicted of noncapital offenses connected with infanticide was a consideration in the 1949 reform. Therefore, apart from a very brief reference later in the article to sentencing in these cases, this matter is not explored in this study.

infants at the Circuit Criminal Court is, therefore, beyond the scope of this article, although it is acknowledged that this account of what happened at the Central Criminal Court does not tell the whole story of the Irish criminal justice response to infanticide during this period.

A range of court and government records available at the National Archives of Ireland (hereafter NAI), along with contemporary parliamentary debates, and materials from the archives of the Archbishop of Dublin, were consulted in this study. From the evidence in the records, it was possible to gain a good understanding of the approach taken to infanticide at the Central Criminal Court, and to identify and assess the problems with the prevailing law and practice, and, therefore, the motivations for enacting the Infanticide Act of 1949. These records also offer an opportunity to evaluate the attitudes of judges, prosecutors, jurors, and parliamentarians toward this offense. However, whereas a wealth of information can be gleaned from the sources consulted, the evidence is not always comprehensive or unambiguous, and there are limits to what can be inferred from the material. Particular limitations will be noted at relevant points in the following analysis.

The State Books for the Central Criminal Court (hereafter SBCCC), for the period 1924–1949, provide a record of cases appearing at the Central Criminal Court, and are a useful source of information on how the criminal justice authorities dealt with infanticide cases once they reached the point of trial.<sup>46</sup> The following information is provided for each entry: the name of the offender, the charge(s) against her, the particulars of the offense, the result of the proceedings (namely, the plea and verdict), and the sentence imposed. Although the SBCCC record does not normally give information on the age of the victim or the relationship between the victim and the accused in cases of murder, it was possible to isolate infanticide cases from the general cohort of murders because of either the information provided in the “particulars of the offense” and/or the fact that the accused had also been charged with or convicted of concealment of birth (with respect to the same victim).<sup>47</sup> One hundred and eighty-one cases of infant murder were identified in the SBCCC records for the period under

46. NAI, SBCCC, IC-88-59 (October 1924–April 1925, Dublin City); IC-88-61 (June 1925–December 1926, Change of Venue Cases Dublin); IC-88-60 (June 1925–June 1927, Dublin), ID-33–68 (November 1927–June 1933); ID-24-129 (February 1928–November 1943, City of Dublin); ID-11-92 (November 1933–April 1941), ID-27-1 (October 1941–December 1945), V15-4-15 (February 1946–December 1952). These records are also referred to as “Trial Record Books.”

47. It was possible to identify cases involving infants in which the victim was described in the particulars of the offense as being an “infant” or an “unnamed” child, “newly-born”, “recently delivered” or “recently born.” Where the particulars stated that the victim was a

review.<sup>48</sup> In at least 160 cases in this sample, the accused, or, in cases involving more than one accused, one of those charged with murdering the infant, was the victim's mother.<sup>49</sup> The way these cases were disposed of at trial, and what this reveals about the criminal justice response to infanticide, and the attitudes of the state authorities to this offense, will be explored in detail.

The State Files for the Central Criminal Court (hereafter SFCCC) for a small number of infanticide cases were also examined. These records contain the prosecution's case against the accused, and include, for example, witness depositions, the statement(s) of the accused, and trial exhibits (such as the murder weapon and crime scene photographs). Although these records do not shed much light on the response to infanticide in the courts, they do offer an insight into the circumstances in which the crime was committed, and, thus, provide a context for assessing the official response to this offense.<sup>50</sup> Other sources consulted that provide an insight into how infanticide was disposed of at trial are: the Court of Criminal Appeal files (hereafter CCA files), which include a copy of the trial transcript for the small number of cases in which women appealed their convictions; and the Department of Taoiseach files on commuting the death sentence (hereafter DT[CDS]), which provide additional material, including the trial judge's letter of recommendation to the Executive Council

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child, but no other information was available on the record to indicate that the victim was an infant, that is, a child less than 1 year of age, the case was excluded.

48. This figure is restricted to cases involving murder indictments; cases in which persons were charged with manslaughter or concealment of birth, but where no one was charged with murdering the infant, have been excluded. Where it was not possible to positively conclude from the information in the SBCCC that the victim was an infant (see note 47 above), the case was excluded, except in one case in which the fact that the victim was an infant was ascertained from another source consulted during the course of this research (this is the case of EE and RE which is discussed below). There are undoubtedly other cases of infant murder in the SBCCC that have been omitted from this sample because of the limited information provided on the SBCCC record. Further, the SBCCC does not appear to provide a complete record of cases for the period. Two cases, both involving murder convictions, found in another archival source consulted, are not mentioned in the SBCCC records examined; see note 94 below. The first infant murder case recorded in the SBCCC is in 1926; there are no recorded cases for the years 1924 and 1925. For the period 1922–1950, Rattigan identified 191 cases of infanticide, involving mothers and other individuals: see Cliona Rattigan: *“What Else Could I Do?” Single Mothers and Infanticide, Ireland 1900–1950* (Dublin: Irish Academic Press, 2012).

49. It was not possible to ascertain the relationship between the perpetrator and the victim in eleven of the remaining twenty-one cases. A number of these cases may have involved mothers. This sample only includes women who were charged with murder.

50. Also see Rattigan, *What Else Could I Do?* 22–25, on the limitations of these sources as a means of tracing the social history of this crime, and, in particular, the experiences of the women involved.

(the Irish Government), in cases in which the sentence of death was passed and subsequently commuted.<sup>51</sup>

A number of government files connected with the infanticide law reform and with the issue of capital punishment more generally were also consulted, namely: the Department of Justice files on infanticide,<sup>52</sup> the Attorney General Office files on infanticide,<sup>53</sup> and the Department of Taoiseach files on infanticide and capital punishment.<sup>54</sup> The material in these sources provide information on the approach taken to maternal infanticide at the Central Criminal Court, the problems resulting from the practices adopted, and the motivations for reforming the law. Evidence of official attitudes to infanticide and infanticide offenders can also be found in these sources. In addition to the state records, this research also drew on material on the proposed Infanticide Act found in the archives of the Archbishop of Dublin, who was consulted by the Department of Justice prior to the Infanticide Bill being submitted to the Irish Parliament. These records provide further evidence of the reasons for the enactment of this measure.

### “Young Girls” and “Unfortunate” Women: The Irish Infanticide Offender

As noted earlier, the case of MH is typical of infant murder prosecutions during this period in Irish history.<sup>55</sup> Infanticide was predominantly a

51. Overall, twenty-three case files, found either in the Department of Taoiseach file on commuting the death sentence (hereafter DT[CDS]), the Court of Criminal Appeal file (hereafter CCA), or the SFCCC, were consulted in this study, although not all of these cases are referred to in the following analysis. These cases are used for illustrative purposes only; it would not be possible to draw definitive conclusions about the nature of the phenomenon of infanticide or the criminal justice response to this crime from the small number of cases sampled in this study.

52. NAI, Department of Justice files (infanticide) 8/144/1; 8/144/A, H266/61. Hereafter DJ 8/144/1; DJ 8/144/A; DJ H266/61.

53. NAI, Attorney General Office files (infanticide) 2000/10/2921; 2000/10/2922. Hereafter AG 2000/10/2921; AG 2000/10/2922.

54. NAI, Department of Taoiseach file (infanticide) s14493 (hereafter DT s14493); Department of Taoiseach file (capital punishment) s7788A, (hereafter DT s7788A).

55. For a thorough analysis of infanticide in the Irish Free State, see Rattigan, *What Else Could I Do?* See also, Alexis Guilbride, “Infanticide: The Crime of Motherhood,” in *Motherhood in Ireland: Creation and Context*, ed. Patricia Kennedy (Cork: Mercier Press, 2004), 170–80; Louise Ryan: *Gender, Identity and the Irish Press, 1922–1937: Embodying the Nation* (Lewiston, New York: Edwin Mellen Press, 2002), ch. 6; Louise Ryan, “The Press, Police and Prosecution: Perspectives on Infanticide in the 1920s,” in *Irish Women’s History*, ed. Alan Hayes and Diane Urquhart (Dublin: Irish Academic Press, 2004), 137–51; and Cliona Rattigan, “‘Dark Spots’ in Irish Society: Unmarried Mothers and Infanticide in Ireland from 1926 to 1938,” in *Single Motherhood in*

female crime, usually committed by the mother of the infant, or, less commonly, by a close female relative, such as a sister, mother, or grandmother; men were rarely implicated in the killing of an infant.<sup>56</sup> The typical infanticide offender was an unmarried woman, usually a domestic servant or an unemployed woman from a poor rural background.<sup>57</sup> Infanticide normally occurred after a concealed pregnancy and secret birth, and the infant was killed at or very soon after birth.<sup>58</sup> This crime was usually committed in very distressing circumstances by women who were desperate to prevent discovery of the fact that they had been pregnant outside of wedlock. For example, MM gave birth alone after a concealed pregnancy, to a male infant at her family home early one morning in June 1948.<sup>59</sup> She hid the infant in a field, returning sometime later to remove the child to another field where, having stuffed grass into the child's mouth to prevent him from crying, she concealed the body in a heap of stones. She claimed that she had been afraid that her brother "would hear the child cry and be angry with her for the trouble she had brought on the family."<sup>60</sup> MM behaved normally that morning, but went to bed near lunchtime. That night she summoned her brother, and, telling him what had happened, asked him to send for a doctor. This belated call for medical assistance was prompted when MM noticed the umbilical cord protruding from her body; her ignorance of childbirth was such that she was unaware of the need for delivery of the afterbirth. MM pleaded guilty to concealment of birth on a murder charge at the Central Criminal Court.<sup>61</sup>

It appears that some women charged with murdering their infants had given birth at the local county home (old workhouse) where medical assistance had been provided, although these women sometimes did hide their conditions from their families and communities, and concealment also appears to have been a motivating factor for the killing in such cases:

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*Twentieth Century Ireland: Cultural, Historical and Social Essays*, ed. Maria C. Ramlado-Minero and Auxiliadora Pérez-Vides (Lewiston, New York: Edwin Mellen Press, 2006), 83–102.

56. See, generally, Rattigan, *What Else Could I Do?* chs. 1 & 2; Cliona Rattigan, "'Done to Death by Father or Relatives': Irish Families and Infanticide Cases, 1922–1950," *The History of the Family* 13 (2008): 370–83; and Ryan, *Gender, Identity and the Irish Press*, 253, 286.

57. For a detailed profile of women charged with murder/concealment of birth in the Irish Free State, see: Rattigan, *What Else Could I Do?* ch. 1, esp. at 38–58. See also Ryan, "Perspectives on Infanticide," 141–42, 145; Guilbride, "Infanticide," 173.

58. See Rattigan, *What Else Could I Do?* ch. 1.

59. NAI, SFCCC ID-29–7, Co. Kilkenny, October 12, 1948.

60. *Ibid.*, "Extract from Medical Officer's Report," dated September 17, 1948.

61. NAI, SBCCC V15-4–15, Co. Kilkenny, October 12, 1948.

the child was killed soon after discharge before the woman returned to her family and community.<sup>62</sup>

For example, EE, an unmarried woman 23 years of age, who lived with her family in rural Roscommon, registered as Mrs. M. when she attended the local county home to give birth in October 1934. With the help of her 18-year-old sister, RE, EE concealed her pregnancy from her parents. EE was met by her sister when discharged from the county home with her baby 14 days after birth. The baby, a girl named Mary Theresa, was never seen again. The accused claimed that they had intended to leave the infant with a relative, but had abandoned that plan because the child was unwell, and, instead, had smuggled her into their bedroom at the family home where they secretly kept her overnight. They maintained that Mary Theresa had died the following morning and that RE had buried her. However, when the Gardaí (police) examined the alleged grave, they concluded that it had never contained the dead body of an infant. Although a month long search of the area ensued, the body of Mary Theresa was never found. The two sisters were charged with murder. The prosecution alleged that they had killed Mary Theresa before returning home on the day EE was discharged from the county home and had disposed of her body later that night. Both were convicted of murder and sentenced to death. Their appeal against conviction was dismissed, but the capital sentence was commuted in both cases to penal servitude for life,<sup>63</sup> and they were released on license after a few years.<sup>64</sup>

It appears from the court records consulted that some married women were also charged with murdering their newborn infants in situations involving concealment of illicit sexual behavior, either that the woman had been pregnant at the time of marriage, or, had become pregnant as a result of an extramarital affair. For example, JO, a married woman with three children, appeared before the Central Criminal Court in February 1948 on a charge of murdering her newborn infant. JO's husband worked in England, and she, and her children, lived with her parents and brother. She gave birth without assistance, in front of two of her children, in her bedroom early one morning in October, 1947. To stifle the newborn's cries, JO turned the infant over on its face and, tying a cloth around its head, pressed the back of its head down to the floor. She then called her mother, who

62. For example, see NAI, CCA 1930/24 & DT [CDS] s6096 (CR); CCA 1935/13 & DT [CDS] s7777 (EE); DT [CDS] s5884 (MAK); DT [CDS] s5195 (MK). See also Ryan, "Perspectives on Infanticide," 141.

63. NAI, DT [CDS] s7777; CCA 1935/13 & 14.

64. NAI, DT s7788(a), "Return of Persons Sentenced to Death," 1932–37.



discovered the body of the newborn under the bed. JO admitted to smothering the child. The following day, JO wrapped the dead baby in a jacket and a robe and, placing it in a paper bag, asked her mother to bury it. The Gardaí became suspicious when, having no telephone at the family home, the accused's brother placed a telephone call from the Garda Station to a doctor. When they visited the accused's house, her mother showed them where the infant was buried.<sup>65</sup> In her statement, JO said: "I am sorry I did anything to the child and I would not have done anything only I wanted to keep it from my husband."<sup>66</sup> Her plea of guilty to manslaughter was accepted and she was discharged without conditions.<sup>67</sup>

Although there are other similar cases in the records, it appears the vast majority of offenders were unmarried.<sup>68</sup> There is no reason to presume that many married women became pregnant as a result of marital infidelity; and those who did were most likely able to disguise the child's paternity, and had, therefore, no reason to conceal pregnancy or kill the infant. Although it was not possible from the SBCCC to determine whether many married women were charged with murdering their infants in circumstances that did not involve an element of sexual impropriety, it seems, overall, that the vast majority of infanticide victims were illegitimate. It is possible that infanticide by married women was more common than the records suggest, but that it largely remained undetected. The offense may have been so closely associated with illegitimacy that an infant death within the married family did not attract suspicion and, in cases in which there was no evident violence on the body and no obvious motive, could easily be disguised as a natural death.<sup>69</sup>

The predominance of illegitimacy and concealment in infanticide cases can undoubtedly be explained on the basis of the very unfavorable status of unmarried motherhood and the adverse consequences of an "illegitimate" birth in Ireland at this time. Cultural intolerance of illegitimacy and unmarried motherhood was rooted in the values of the middle-class farmer, a class that emerged in the aftermath of the Great Famine in the

65. NAI, SFCCC ID-29-8, Co. Limerick, February 17, 1948.

66. *Ibid.*, JO's statement, October 22, 1947.

67. NAI, SBCCC V15-4-15, Co. Limerick, February 17, 1948.

68. Two similar cases (EK and BC) are discussed below.

69. The local community, as well as the Gardaí (police), kept unmarried women under particular surveillance. This played an important role in bringing to light suspected infanticides. See Cliona Rattigan, "'I Thought from Her Appearance That She Was in the Family Way': Detecting Infanticide Cases in Ireland, 1900-1921," *Family and Community History* 11 (2008): 134-51; Rattigan, *What Else Could I Do?* ch 4; Rattigan, "Unmarried Mothers and Infanticide in Ireland," 95-96; and Ryan, "Perspectives on Infanticide in the 1920s," 145.

mid-1800s, and whose economic interests, namely the accumulation and retention of land, led to Ireland's emergence as a patriarchal society.<sup>70</sup> Social historians have argued that these values were transported into official discourse with the emergence of the independent nationalist state, where, in the nation-building context of the 1920s and 1930s, a view emerged that identified sexual immorality in females as posing a threat to the morality of all of Ireland and, consequently, to the stability of the new nation.<sup>71</sup> Therefore, whereas married motherhood was both expected and exalted in newly independent Ireland, unmarried motherhood was emphatically condemned, not only within families and communities, but also at an official level.<sup>72</sup>

Intolerant attitudes toward female sexual misconduct left prospective unmarried mothers who lacked family support with few attractive options. Unless a woman had the power or desire to convince the father of the infant to marry her, he could evade responsibility for the child: women alone were held liable for the consequences of a culturally unacceptable sexual relationship.<sup>73</sup> Although the Illegitimate Children (Affiliation Orders)

70. See, generally, Joseph J. Lee, "Women and the Church since the Famine," in *Women in Irish Society: The Historical Dimension*, ed. Margaret MacCurtain and Donncha Ó Corráin (Dublin: Arlen House, 1978), 37–45; and Rita M. Rhodes: *Women and Family in Post Famine Ireland: Status and Opportunity in a Patriarchal Society* (New York & London: Garland, 1992), esp. ch. 3.

71. See, generally, Guilbride, "Infanticide," 171–72; Maria Luddy, "Sex and the Single Girl in 1920s and 1930s Ireland," *Irish Review* 35 (2007): 79–91; Maria Luddy: *Prostitution and Irish Society* (New York: Cambridge University Press, 2007), 194–97, 200–3; Ryan, *Gender, Identity and the Irish Press*, 257–60; Louise Ryan, "Irish Newspaper Representations of Women, Migration and Pregnancy outside Marriage in the 1930s," in *Single Motherhood in Twentieth Century Ireland: Cultural, Historical and Social Essays*, ed. Maria C. Ramblado-Minero and Auxiliadora Pérez-Vides (Lewiston, New York: Edwin Mellen Press, 2006), 105–6; Mary-Anne Valiulis, "Neither Feminist nor Flapper: the Ecclesiastical Construction of the Ideal Irish Woman," in *Chattel, Servant or Citizen: Women's Status in Church, State and Society*, ed. Mary O'Dowd and Sabine Wichert (Queen's University Belfast: Institute of Irish Studies, 1995), 168–78; Angela K. Martin, "Death of a Nation: Transnationalism, Bodies and Abortion in Late Twentieth-Century Ireland," in *Gender Ironies of Nationalism: Sexing the Nation*, ed. Tamar Mayer (London: Routledge, 2000), 66–67; Chrystel Hug, *The Politics of Sexual Morality in Ireland* (Basingstoke: Macmillan/New York: St Martin's Press, 1999), 77–84; and Louise Ryan, "'A Decent Girl Well Worth Helping': Women, Migration and Unwanted Pregnancy," in *Ireland Beyond Boundaries: Mapping Irish Studies in the Twenty-First Century*, ed. Liam Harte and Yvonne Whelan (London: Pluto Press, 2007), 142–44.

72. See, generally, the literature cited in note 71 above. See also Lindsey Earner-Byrne, *Mother and Child: Maternity and Child Welfare in Dublin, 1922–1960* (Manchester: Manchester University Press, 2007), ch. 7.

73. See Ryan, "Irish Newspaper Representations of Women," 116–17; Ryan, "Women, Migration and Unwanted Pregnancy," 144; and Guilbride, "Infanticide," 176–77.

Act of 1930 allowed a woman to pursue the father of her child for maintenance in her own right, corroborative evidence of paternity was required, and, for this and other reasons, many women may have been reluctant to engage with this difficult and undoubtedly embarrassing process.<sup>74</sup> Although private or informal adoption arrangements may have been, and doubtless were, made in some cases, adoption was not legally available in Ireland until after the enactment of the Adoption Act of 1952.<sup>75</sup> Emigration to Britain seems to have been used as a means of avoiding the social scandal and other consequences of an illegitimate birth in Ireland,<sup>76</sup> although this probably would not have been an option for women who could not afford to travel or for those who were unable to confront their pregnancy in a proactive manner.

The Irish state did not provide any social welfare for unmarried mothers.<sup>77</sup> Instead, unwed pregnant women were expected to rely on the care offered by the local county home or a charitable institution, such as a Magdalen asylum or another special church-run establishment.<sup>78</sup> Evidence suggests that the regimes inside religious institutions were harsh and that a de facto system of involuntary detention may have operated.<sup>79</sup> Certainly, these institutions were known as “fearsome places.”<sup>80</sup>

74. See Sandra McAvoy, “The Regulation of Sexuality in the Irish Free State, 1929–1935,” in *Medicine, Disease and the State in Ireland, 1650–1940*, ed. Greta Jones and Elizabeth Malcolm (Cork: Cork University Press, 1999), 260; and Guilbride, “Infanticide,” 173. Similar difficulties have been noted about affiliation proceedings in Britain following the enactment of the Poor Law Amendment Act 1844 (7 & 8 Vic., cap. 101): see Rose, *Massacre of the Innocents*, 28–30; and Henriques, “Bastardy and the New Poor Law,” 119.

75. Tom Inglis, *Moral Monopoly: The Rise and Fall of the Catholic Church in Modern Ireland* (Dublin: University College Dublin Press, 1998), 230. He notes that prior to the legalisation of adoption in Ireland, congregations of nuns organized the adoption of Irish babies by American Catholics. Informal adoptions were arranged within some families: Ryan, “Irish Newspaper Representations of Women,” 107.

76. See generally, Ryan, “Irish Newspaper Representations of Women,” 109–18; Ryan, “Women, Migration and Unwanted Pregnancy,” esp. at 142–50; and Guilbride, “Infanticide,” 178.

77. See Eileen Conway, “Motherhood Interrupted: Adoption in Ireland,” in *Motherhood in Ireland: Creation and Context*, ed. Patricia Kennedy (Cork: Mercier Press, 2004), 184.

78. See, generally, Earner-Byrne, *Maternity and Child Welfare in Dublin, 1922–1960*, 180–90; Luddy, *Prostitution and Irish Society*, 117–23, 201–3, 235–37; Luddy, “Sex and the Single Girl,” 83–85, 89; Ryan, “Irish Newspaper Representations of Women,” 107; and Conway, “Motherhood Interrupted,” 182–83.

79. See Earner-Byrne, *Maternity and Child Welfare in Dublin*, 187–89; and Luddy, *Prostitution and Irish Society*, 119–23, 202–3.

80. Alexis Guilbride, *I Went Away in Silence: A Study of Infanticide in Ireland from 1925–1957* (MA Thesis, University College Dublin, Women’s Education Research and Resource Centre, 1995), 45.

Undoubtedly many pregnant unmarried women, particularly those without family protection or other support, dreaded the possibility of having to rely on the charity of a church-run establishment.

A state of independent unmarried motherhood was virtually impossible in Ireland in the 1920s through the 1940s. As Lindsay Earner-Byrne notes, “[t]hose . . . who attempted to brave life outside the institution, if denied parental or familial protection, were fated to a precarious existence with no legal protection.”<sup>81</sup> For many, openly giving birth outside of marriage would not only have attracted considerable familial and cultural disapproval, but could also potentially have resulted in alienation from community and kin, loss of respectable employment, particularly if in domestic service, and a life of penury or prostitution.<sup>82</sup> Although infanticide was not the typical response to an unwed pregnancy, in the face of the aforementioned burdens some women resorted to concealment of pregnancy and birth, and, in some cases, to murder. In the following section, the pre-1949 criminal justice response to women accused of murdering their infants will be explored.

### **The Criminal Justice Response to Infanticide: The Futile Farce of the Murder Trial**

Prior to the enactment of the Infanticide Act of 1949, there was no separate legal category of infanticide: the killing of an infant with *malice aforethought* was murder and, therefore, a capital offense.<sup>83</sup> However, although judges were obliged to pass a death sentence on a murder conviction, a

81. Earner-Byrne, *Maternity and Child Welfare in Dublin*, 190. The fate of illegitimate children during this period was similarly bleak: the mortality rate among illegitimate infants was high, with one in three children born outside of wedlock not living beyond their first year (McAvoy, “The Regulation of Sexuality in the Irish Free State,” 260). Many of those who survived infancy faced an unhappy future in institutional/non-institutional care; see Moira J. Maguire, *Precarious Childhood in Post-Independence Ireland* (Manchester: Manchester University Press, 2009), chs. 2 and 3.

82. Guilbride, “Infanticide,” 172.

83. As in England, murder was a common law offense, defined by Coke as the unlawful killing of a “reasonable creature *in rerum natura*” with *malice aforethought*: 3 Inst. 47. During the period under review, the meaning of *malice aforethought* was not clearly settled, although it was generally thought to cover intentional and some forms of reckless killing, at least where the defendant had foreseen death as a probable consequence of their intentional conduct, or where the defendant had committed a violent felony with foresight that death might result; see Finbarr McAuley, and Paul McCutcheon, *Criminal Liability: A Grammar* (Dublin: Round Hall, Sweet and Maxwell, 2000), 290–93. Manslaughter, punishable by a maximum of penal servitude for life, was an unlawful killing without *malice aforethought*.

reprieve was always granted in infanticide cases.<sup>84</sup> In light of the fact that the last execution for infanticide conducted across the Irish Sea took place in 1849,<sup>85</sup> it is likely that the custom of commuting capital sentences had been inherited from the previous administration.<sup>86</sup> Two “Returns of Persons Sentenced to Death,” which give details for capital convictions during the period 1922–1937, demonstrate the consistency of this practice.<sup>87</sup> During this period, nine women were sentenced to death for murdering their infants; in one case (EE & RE 1935), the mother’s younger sister was also convicted of murder. Every victim was newly or recently born, and the majority of women were unmarried; in three cases the offender was recorded as being married, although sexual impropriety was suggested by the circumstances of the birth.<sup>88</sup> Without exception, the jury recommended mercy, and the trial judge agreed. The sentence of death was always commuted to penal servitude for life, and every woman, bar one, was released on license after serving only a few years imprisonment.<sup>89</sup> It should be noted that it was by no means guaranteed that a reprieve would be issued where a jury recommended mercy. O’Brien found that in fifteen of the thirty-five cases in which the death sentence was imposed during the period 1922–1932, the jury’s recommendation for a reprieve was not heeded by the government. Notably, in these cases the trial judge had not supported the jury’s recommendation.<sup>90</sup>

In the court records examined in this study, one additional case was identified, which fell outside the period covered by the above Returns, in

84. NAI, DT s14493, DJ memorandum, dated January 4, 1944, and memorandum dated February 10, 1949. See also minister for justice’s speech when introducing the Infanticide Bill to Parliament; Parliamentary Debates, vol. 115, col. 265, April 28, 1949 (Dáil Éireann); hereafter Dáil Debates.

85. Rose, *Massacre of the Innocents*, 76.

86. It seems that the practice of commuting the death sentence for infanticide was established in the mid-nineteenth century; see Pauline Prior, *Madness and Murder: Gender, Crime and Mental Disorder in Nineteenth-Century Ireland* (Dublin: Irish Academic Press, 2008), 132–33.

87. NAI, DT s7788(a), “Return of Persons Sentenced to Death,” 1922–32 and 1932–37.

88. One woman, MAK, was living apart from her husband at the time of the birth (NAI, DT [CDS] s5884). Another woman, CA, was pregnant at the time of marriage and continued to live with her parents afterwards (NAI, DT [CDS] s5891). Finally, one woman, ED, was recorded in her file as “Mrs”, but the whereabouts of her husband and the circumstances of her pregnancy are unclear from the information provided; see NAI, SFCCC IC-90–28, Co. Wicklow, June 2, 1926.

89. For more detail on these cases, see NAI, DT [CDS] s5195 (MK); s5571 (EH); s5884 (MAK); s5886 (DS); s5891 (CA); s6129 (MF); s6096 (CR); and s7777 (EE and RE). See also NAI, SFCCC IC-90–28, Co. Wicklow, June 2, 1926 (ED). ED was the only woman not released into the community; she was sent to Dundrum Asylum soon after conviction.

90. O’Brien, “Capital Punishment in Ireland,” 229.

which a woman was finally disposed of by a murder conviction and sentenced to death. In 1943, KO, 36 years of age and unmarried, was charged with the murder of three newborn children.<sup>91</sup> KO admitted that over a number of years, she had given birth to several infants, and that after a concealed pregnancy and unassisted birth, she had immediately smothered each newborn, subsequently burying it in the garden of her home where she lived with her mother. Her motive had been to hide the pregnancy from her mother.<sup>92</sup> KO was arraigned on the first count of murder only, that which related to the killing of her most recently born child, and was found guilty of this offense with a recommendation for mercy.<sup>93</sup> Therefore, by the late 1930s, a capital conviction in cases of infanticide was extremely unusual. The more atypical circumstances involved in KO's case, namely that she admitted to concealing and killing a number of infants born of successive pregnancies, assuming the jury was aware of this background, may have been a significant factor in the decision to convict in this case. The fact that KO was an older woman may have also been a consideration.

Therefore, on the evidence available in the records consulted, only ten women were convicted of murdering their infants from the time of independence up to the enactment of the Infanticide Act of 1949.<sup>94</sup> This is a remarkably low number of convictions, given that the SBCCC records for the period 1924–1949, contain at least 160 cases in which a woman was sent for trial for this offense.<sup>95</sup> Further, as noted, cases of infant murder appearing at the Central Criminal Court do not present a complete account of the overall level of infanticide-related crime in Ireland during this period; some women who murdered their infants may have been sent for trial on less serious charges such as manslaughter or concealment of birth, and the low rate of conviction for murder may be even more striking when other noncapital prosecutions are considered. For example, the Central Statistics Office (CSO) records 856 cases of concealment of

91. NAI, SBCCC ID-27-1, Co. Westmeath, November 15, 1943.

92. NAI, SFCCC ID-22-84, Co. Westmeath, November 15, 1943, Statements of KO dated May 8, 1943.

93. NAI, SBCCC ID-27-1, Co. Westmeath, November 15, 1943. The SBCCC does not indicate whether a reprieve was granted, but presumably the sentence was commuted.

94. This is based on evidence in the SBCCC and in the "Returns of Persons Sentenced to Death." Two cases found in the Returns are not listed in the SBCCC. There may be other cases not accounted for in either of these records. I came across one other case in which a murder conviction was returned, but this was quashed on appeal, and the woman pleaded guilty to manslaughter at retrial. This case is not counted as a murder conviction for the purposes of this study: EK (1944), discussed below.

95. Only eight of the ten murder convictions identified are listed in the SBCCC (see note 94 above).



birth for the period 1927–1949.<sup>96</sup> Of course, it should not be presumed that the death of an infant after a concealed pregnancy was always or often the result of a criminal act or omission on the part of the mother. However, a number of the concealments of birth recorded by the CSO, which if tried would have been dealt with at the Circuit Criminal Court, may have involved murder where there was insufficient or no evidence to support this charge. Moreover, there is evidence to suggest that near the time of the enactment of the 1949 Act, it was prosecutorial policy to favor a concealment charge unless the evidence left little choice but to proceed with a murder charge.<sup>97</sup> Therefore, murder was not charged, for either evidential or other reasons, in every case in which the body of an infant was discovered in suspicious circumstances. Where murder was pursued, very few cases resulted in a capital conviction.

Clearly, a more lenient outcome was favored by those involved in prosecuting and trying infanticide. An analysis of the outcomes of cases in the SBCCC records indicates that the majority of cases proceeded against on a murder indictment did not even result in trial. Of the 160 cases examined in this sample, only 45 (28%) were disposed of by a jury verdict.<sup>98</sup> The outcomes of these trials were (see [Table 1](#)): 8 (18% of those tried; 5% of those charged) were convicted of murder,<sup>99</sup> 1 was found guilty but insane,<sup>100</sup> 26 were fully acquitted, and 10 were convicted

96. Central Statistics Office, *Annual Abstracts 1927–1949*. Concealment of birth was governed by the Offences Against the Person Act 1861, s. 60 (24 & 25 Vic., cap. 100); see note 28 above. The CSO records 135 murders of infants aged under 1 year of age for the same period.

97. NAI, DJ 8/144/1, memorandum dated February, 1949.

98. This figure excludes cases in which the women pleaded guilty to a lesser offense either during trial or after the jury had failed to reach a verdict. These cases were ultimately disposed of on the basis of a guilty plea and are counted as such. I identified seven such cases, although the records are sometimes unclear, and other women may have gone through a full or partial trial before tendering their plea. This figure also excludes the only case in which a woman (EK, 1944) was convicted by a jury but had that conviction quashed on appeal and pleaded guilty at a second trial; this case is also counted as being disposed of by a guilty plea.

99. See notes 94, 95 above. The two cases found on the “Return of Persons Sentenced to Death” that are not listed in the SBCCC are excluded from this calculation.

100. In addition to this case, only one other insanity finding for maternal infanticide was identified in the records examined; in that case, the woman was found insane and unfit to plead. There is one other case of child murder, involving the murder of two children, in the SBCCC, in which an insanity verdict was returned (NAI, SBCCC ID-33-68, KM, Westmeath, February 18, 1930). The record does not state whether the accused was the mother of the two victims, or whether the victims were less than 1 year of age; this case has been excluded from this sample. Evidence from memoranda sent to the Office of the Attorney General in the 1940s, which are discussed below, suggest that there may have been other cases involving insanity verdicts against women accused of killing their infants,



Table 1. SBCCC: Disposals of Women Appearing at Central Criminal Court on a Charge of Murdering their Infant, October 1924–December 1949

Total:	160
<b>Jury Verdict:</b>	<b>45</b>
Guilty (Murder)	8
Guilty but Insane	1
Full Acquittal	26
Other Conviction	10
<b>Guilty Plea:</b>	<b>112</b>
Manslaughter	62
COB	47
Other	3
<b>Not Proceeded Against:</b>	<b>3</b>
<i>Nolle Prosequi</i>	2
Incapable of Pleading	1

of either manslaughter, punishable by a maximum of penal servitude for life, or concealment of birth, punishable by a maximum of 2 years’ imprisonment with hard labor.<sup>101</sup> The majority of women charged with murdering their infants, 70% (112 in total), were disposed of on the basis of a plea of guilty to either manslaughter (62 cases),<sup>102</sup> concealment of birth (47 cases),<sup>103</sup> or the offenses of abandonment or child cruelty (3 cases).<sup>104</sup>

which I was unable to identify from the information provided in the SBCCC. Studies of female admissions to the Central Mental Hospital for this period also suggest there may have been a small number of other cases in which women were found insane on a charge of murdering their infants. See Niamh Mulryan, Pat Gibbons, and Art O’Connor, “Infanticide and Child Murder—Admissions to the Central Mental Hospital 1850–2000,” *Irish Journal of Psychological Medicine* 19 (2002): 8–12; and Brendan D. Kelly, “Poverty, Crime and Mental Illness: Female Forensic Psychiatric Committal in Ireland, 1910–1948,” *Social History of Medicine* 21 (2008): 311–28. It appears, however, that, overall, insanity was rarely found in infanticide cases during this period.

101. Offenses Against the Person Act 1861, ss. 5 & 60 (24 & 25 Vic., cap. 100). Five women were convicted of manslaughter, and five were convicted of concealment of birth. In other one case, counted as an acquittal, the accused had been convicted of manslaughter, but this was later quashed and at a retrial she was found not guilty; see BC (1934), discussed below.

102. In one of these cases, the charge was amended by the judge to one of manslaughter, to which the accused pleaded guilty. In the remaining cases, the woman pleaded guilty to manslaughter on a murder indictment.

103. In seven of these cases, the woman had been indicted for both murder and concealment of birth. The prosecution entered a *nolle prosequi* on the murder indictment in six; in the remaining case, the woman was not arraigned on the murder charge. In the remaining forty cases, the accused pleaded guilty to concealment of birth on a murder indictment.

104. Children’s Act 1908, s. 12 (8 Edw. VII, cap. 67).

The evidence in the SBCCC records indicates that the vast majority of these pleas were tendered at arraignment.<sup>105</sup> Finally, three women were not proceeded against: in two cases the prosecution entered a *nolle prosequi*;<sup>106</sup> in the remaining case the accused was found insane and incapable of pleading.

It seems that guilty pleas became a more common disposal from some time in the mid-1930s onwards. Between 1924 and 1929, an equal number of cases were disposed of on the basis of a guilty plea as were disposed of by a jury verdict (see Table 2). During the 1930s, most cases (63%) were dealt with by a guilty plea. Between 1930 and 1934, only a slightly higher percentage of cases were disposed of on that basis: 54% of women (twenty-one) pleaded guilty to a noncapital offense; and 44% (seventeen) were dealt with by a jury verdict. However, between 1935 and 1939, a little more than three quarters (77%) of women charged with murdering their infants were dealt with through a guilty plea. By the 1940s, very few women charged with murdering their infants were tried for that offense. Between 1940 and July 1949, only four women (7% of those who appeared at the Central Criminal Court) were disposed of by a jury verdict.<sup>107</sup> In one other case, the accused was tried and convicted of the capital charge, but that conviction was quashed, and she pleaded guilty to manslaughter midway through the retrial.<sup>108</sup> The remaining fifty-two women (91%) pleaded guilty to a less serious offense; it seems these pleas were all tendered pretrial. More strikingly, for the years 1945–1949, every woman appearing at the Central Criminal Court on a charge of murdering her infant was disposed of on the basis of a self-conviction for a noncapital offense.

A number of memoranda sent from the Office of the Chief State Solicitor to the Office of the Attorney General during the 1940s also indicate that, at least since 1937, the majority of infanticide cases sent to the Central Criminal Court on a murder indictment were eventually disposed of on acceptance of a manslaughter or concealment of birth plea.<sup>109</sup> These communications repeatedly called for law reform to address the

105. See note 98 above.

106. In both cases, another individual was held criminally accountable.

107. The four defendants were disposed of on the basis of a jury verdict as follows: two were acquitted; one was found insane; and one was convicted of murder (KO, 1943, discussed above).

108. EK (1944), discussed below. This is counted as a guilty plea.

109. NAI, AG 2000/10/2921 and 2000/10/2922, memoranda dated March 22, 1941; May 29, 1945; May 13, 1947; and November 21, 1947. See also memoranda dated August 1, 1944, which provides details of disposals of thirty-six murder charges, most involving infanticide, between 1941 and August 1944; NAI, AG 2000/10/2921.

*Table 2.* SBCCC: Disposals by Jury Verdict & Guilty Plea of Women Appearing at the Central Criminal Court on a Charge of Murdering Their Infant, October 1924–December 1949

	Total	Jury Verdicts		Guilty Pleas		Other	
		<i>n</i>	%	<i>n</i>	%	<i>n</i>	%
1924–29	38	18	47.4	18	47.4	2	5.3
1930–34	39	17	43.6	21	53.9	1	2.6
1935–39	26	6	23.1	20	76.9	—	—
1940–44	37	4	10.8	33	89.2	—	—
1945–49	20	0	0	20	100	—	—

problems highlighted. Figures for the periods 1937 to February 1941, October 1944 to May 1945, June 1945 to April 1947, and for the last sitting of the court in 1947, show that whereas fifty-one “young girls” and women<sup>110</sup> were dealt with on an indictment for the murder of an infant at the Central Criminal Court, only one was eventually convicted of that offense.<sup>111</sup> Thirty-three pleaded guilty to manslaughter and ten pleaded guilty to concealment of birth. Three were acquitted by a jury, and there were three insanity findings.<sup>112</sup> One woman, originally convicted of murder, pleaded guilty to manslaughter at a retrial.<sup>113</sup> In one of these returns, the reluctance of juries to convict in infanticide cases was emphasized. Virtually all of the cases mentioned involved “young girls,” and it was noted in one memorandum that a murder trial presented a “terrible ordeal” for these particular defendants.<sup>114</sup>

In summary, the Irish records show that, throughout the 1920s through the 1940s, and particularly during the period immediately preceding the enactment of the infanticide legislation, women sent for trial on a charge of murdering their infants were treated leniently. In the majority of cases, a plea of guilty to a noncapital offense such as manslaughter or concealment of birth was accepted, or the woman was acquitted by the jury of the murder charge. Most notably, during the 1940s, the period during which the infanticide reform was initiated and a bill was being prepared, more than 90% of women sent for trial on a murder charge were disposed of on the basis of

110. Although not all of the cases referred to involved mothers, presumably most did.

111. The offender in this case was the victim’s maternal grandmother; NAI, DT [CDS] s11040; and CCA 1938/36.

112. See note 100 above.

113. EK (1944), discussed below.

114. NAI, AG 2000/10/2921, memorandum dated March 22, 1941.

a guilty plea to a noncapital offense. In the following section, the attitudes of officials who dealt with this offense will be examined.

*Jurors, Judges and Justice: Sympathy or Severity?*

Although jurors, virtually all of whom would have been male,<sup>115</sup> generally appear to have been averse to convicting women of murdering their infants, widespread and consistent public sympathy for infanticidal women should not be assumed. Although it is evident that juries did acquit women, presumably for motives of sympathy, even where the evidence was compelling, failure by the prosecution to prove murder beyond all reasonable doubt may have been a determining factor some cases.<sup>116</sup> Further, notwithstanding the evidently distressing circumstances in which the crime was committed, some women were convicted of the capital offense. For example, DS was convicted of murdering her newborn infant in 1929. She had given birth alone on the side of a mountain while en route to the county home for her confinement. The dead infant was discovered in a mountain stream; the cause of death was drowning. DS claimed that she felt weak and frightened after giving birth and had put the child in a nearby bush. She offered no explanation for the drowning.<sup>117</sup> The case of EE and RE, in which the body of the infant was never recovered and the accused denied killing the infant throughout the trial, provides another interesting example of juror determination to convict. Even in cases in which the medical evidence cast doubt on the defendant's guilt for murder, juries may not always have taken advantage of this to save the woman from a capital conviction. In one 1931 case, in which the decomposed body of an infant was found with a bootlace around its neck, the medical expert testified that he could not be certain that the infant had been born alive. The jury nonetheless convicted the mother of murder.<sup>118</sup> In the end, however, most juries did acquit or, at most, convicted the accused of a noncapital offense.

115. Although women were not prohibited from sitting on juries, they were exempt from jury service and had to apply to be included; Juries Act 1927, s. 3. Further, restrictions on eligibility for jury service, including certain property requirements, acted as a barrier to many women. The constitutionality of these provisions in the 1927 Act was successfully challenged in *de Burca & Anderson v. Attorney General* [1976] IR 38. See Katie Quinn, "Jury Trial in the Republic of Ireland," *Reveu Internationale de Droit Pénal* 72 (2001): 197.

116. Kramar, *Infanticide in Canada*, ch. 2, esp. at 54, 65–66; Higginbotham, "Infanticide and Illegitimacy in Victorian London," 329. It was noted in one document connected with the Irish infanticide reform that juries "on the slightest excuse" acquitted infanticide offenders of murder. See NAI, AG 2000/10/2921, memorandum dated March 28, 1941.

117. NAI, DT [CDS] s5886.

118. NAI, DT [CDS] s6129 (MF).

The fact that infanticide discoveries were reported to the state authorities in the first place indicates that there was some level of public interest in the prosecution of these cases.<sup>119</sup> It is evident from the Irish court records that public suspicions played an important part in the detection of infanticide,<sup>120</sup> although it does not necessarily follow that those who reported suspicions of infanticide invariably did so with the expectation or hope that the woman responsible would be subjected to the full rigors of the criminal law.

As for the attitudes of public officials, Louise Ryan found evidence of unsympathetic views in newspaper reports from the 1920s and 1930s, where judges and prosecutors expressed "frustration" over the number of acquittals in infanticide cases, and she suggests that the authorities adopted a harsh approach to this offense.<sup>121</sup> There is little direct evidence of official attitudes to infanticide in the court records and government files examined as part of this research, although it is possible to draw some inferences from the data available. The evidence does reflect Ryan's findings to some degree, although there are also indications that official attitudes to infanticide were not consistently harsh, especially if there were pragmatic reasons for adopting a more lenient approach, and some level of sympathy is also apparent.

The Court of Criminal Appeal files, which contain a copy of the trial transcript and the judge's jury summation, give some limited insight into judicial attitudes to infanticide.<sup>122</sup> For example, O'Byrne J, in his jury summation in the 1935 case of EE and her sister RE, stated:

Now, some people are inclined to draw a distinction between the taking of the life of a child and that of an adult. Gentlemen, there is no foundation in law for any such distinction. Neither am I aware of any foundation for such a distinction in any system of morality known in this country. When a child is born into this world and had lived it is entitled to the same protection from our law as any person and it needs that protection more than an adult. An adult can take certain means for the protection of his own life but a helpless babe can do nothing. Its safety depends upon the care and affection of those in whose custody it is placed and upon the protection of the law.<sup>123</sup>

119. See Kramar, *Infanticide in Canada*, 66.

120. See note 69 above.

121. See, generally, Ryan, *Gender, Identity and the Irish Press*, 272–76; and "Perspectives on Infanticide," 145–49.

122. Four women in this sample appealed their convictions. See NAI: CCA 1930/24 (CR); CCA 1934/31 (BC); CCA 1935/13&14 (EE & RE); and CCA 1944/56 (EK). Three of these cases are discussed in this section.

123. NAI, CCA 1935/13 and 14, Trial Transcript, "Judge's Charge to the Jury."

O'Byrne J clearly expresses strong views on the sanctity of infant life and, consequently, the seriousness of the crime at hand, presumably in an effort to dissuade the jury from acquitting. However, he did not adopt a wholly intolerant attitude to the offenders in this case, agreeing with the jury that, in light of their age and sex, EE and RE should not be subject to the capital sentence.<sup>124</sup>

The case of EK (1944) provides another interesting example of judicial attitudes to infanticide.<sup>125</sup> EK, a 40-year-old married woman, was convicted of aiding and abetting the murder of her newborn infant and was sentenced to death. The accused, whose husband lived in England, became pregnant as a result of an extramarital relationship with her husband's friend, JM. EK, in collusion with JM, concealed her pregnancy and gave birth without medical assistance. The body of the infant was discovered, with a cloth tied around its neck, in a sack in a local river; the cause of death was asphyxia and shock.

At trial, the accused claimed that she had fainted at the birth, and that when she recovered the child was gone; she alleged that while she was unconscious JM had taken the baby and killed it. The prosecution's case was that EK had been party to a plan with JM to dispose of the child after birth. In his jury summation, the trial judge, Maguire P, stated:

The association between unmarried girls and men have unhappy consequences and are cases that we are all fairly familiar with. Unhappy and unfortunate associations of this kind do not so frequently come to our notice and I should imagine that you do agree that it is a shocking thing that this woman should betray her husband who was so conscientious in regard to his wife and children that he remitted fortnightly the sum of £3.10; and I am sure that you feel that whatever party was responsible for bringing about that association that both of them should feel sorrow and shame for what they had done apart from the betrayal of the unfortunate husband over in England by his own wife and by the man who was his friend.<sup>126</sup>

Having outlined these circumstances, the judge then warned the jury against "bias." When passing the death sentence, Maguire P stated he found no reason to disagree with the verdict, opining that EK's crime was a "cruel and callous one."<sup>127</sup>

124. O'Byrne J presided over five other infanticide trials that resulted in a conviction. He agreed with the jury's recommendation of mercy in each case. See NAI, DT s7788(a), "Returns of Persons Sentenced to Death," 1922–31, 1932–37.

125. NAI, CCA 1944/56.

126. *Ibid.*, Trial Transcript, "Judge's Charge to the Jury."

127. *Ibid.*

It seems that neither the judge nor jury were sympathetic in their response to EK, although the jury on convicting her did strongly recommend mercy in view of the fact that in the circumstances she had "no option but to aid and abet."<sup>128</sup> Presumably, the motive and circumstances involved had a bearing on the jury's decision to convict. The trial judge seems to have reserved his pity for her husband, expressing very strong disapproval of the circumstances in which the crime was committed. Indeed, despite warning the jury against prejudice, it is evident that Maguire P's condemnation of EK was as much directed at her supposed moral failings as it was at her alleged crime. EK appealed her conviction and at a subsequent retrial, at the conclusion of the state's case, changed her plea to guilty to manslaughter. This plea was accepted and she was sentenced to 3 years' penal servitude.<sup>129</sup>

An interesting contrast to this case is found in the case of BC (1934).<sup>130</sup> BC, 34 years of age, was a married woman who became pregnant by her neighbor, PF. She gave birth alone in the middle of the night in a barn at the home of PF. BC initially admitted in her statement to the Gardaí that after baptizing the infant with water she had taken with her to the barn, she tied a rope around the newborn's neck to stop it from crying.<sup>131</sup> She later changed this account, and during testimony claimed that she had twice fainted, and, after regaining consciousness the second time, found she was lying with her hand across the baby, who was lying beside her.<sup>132</sup> She denied having heard the newborn cry and claimed that she had only noticed the rope around the child's neck at a later stage, but did not know how it got there.<sup>133</sup> The trial judge, Hanna J, explained to the jury the requirements for a murder conviction, adding that they could return a verdict of manslaughter if they were of the view that the accused had "lost complete control of herself" such that she did not act "in a pre-meditated way but in a sudden state of feeling or emotion which diverted her sense of judgment." Of particular interest are the comments he made in relation to the effect of childbirth on a woman: "[E]veryone knows . . . that the bringing of a child into the world is accompanied very often . . . with great pain and suffering to the woman. Some of them become demented

128. NAI, SBCCC ID-27-1, Co. Westmeath, April 18, 1944. JM was also charged with murder, but tried separately. The jury could not agree on a verdict, and he was acquitted at a retrial.

129. NAI, SBCCC ID-27-1, Co. Westmeath, October 11, 1944.

130. NAI, CCA 1934/31.

131. *Ibid.*, BC's statement, dated March 27, 1934.

132. See NAI, CCA 1934/31, Trial Transcript. See also her deposition dated April 7, 1934.

133. *Ibid.*, Trial Transcript.



by it – some of them are not so upset. . . .” Referring to the accused’s account of what had happened, he stated: “Well now, gentlemen even if [the defendant] is exaggerating these pains she must have been in a rather distressed condition—I mean—one would infer naturally she would not be as vigorous in her mind and soul as if going about in the ordinary way. The crisis must have naturally affected her mentally and physically.”<sup>134</sup>

Although much could be said about the gendered and paternalistic tone of these comments, such matters will not be discussed here.<sup>135</sup> What is clear is that, irrespective of the rationale provided, Hanna J does appear to have had sympathy for the accused, and framed his charge to the jury in a way that seemed to encourage a manslaughter conviction. Notably, in contrast, the trial judge at EK’s trial dismissed the possibility of a manslaughter finding.<sup>136</sup> The day prior to the birth, BC had tried to arrange for an ambulance to take her to the county home for her confinement, which Hanna J suggested indicated that she lacked premeditation to kill.<sup>137</sup> This may have made him sympathetic toward her. The jury convicted her of manslaughter and BC was sentenced to 3 years’ penal servitude. She successfully appealed this conviction on the grounds that her first statement should not have been admitted in evidence at trial, and was acquitted at retrial.<sup>138</sup>

The previous comments by individual judges at specific trials should not be taken as indicative of wider judicial attitudes toward infanticide. Notwithstanding this, the evidence does suggest that judges, whether because of their own personal views of infanticide and/or their reaction to the circumstances of the case at hand, displayed both intolerant and sympathetic attitudes to women charged with murdering their infants. In many cases, the judge’s attitude to the offender, his interpretation of the evidence, and his views on the possibility of an alternative verdict undoubtedly had a bearing on the jury’s decision. This is evident in the cases of EK and BC, and it is possible that trial judges played an influential role in at least some of the cases in this sample that resulted in acquittals or convictions for noncapital offenses.

It is certainly clear that trial judges did not think the death penalty was an appropriate punishment for infanticide. On the two “Returns of Persons Sentenced to Death,” discussed previously, the trial judge in each case concurred with the jury’s recommendation of mercy. For example, in the case of

134. *Ibid.*, Trial Transcript, “Judge’s Charge to the Jury.”

135. For brief discussion, see below.

136. NAI, CCA 1944/56, Trial Transcript, “Judge’s Charge to the Jury.”

137. NAI, CCA 1934/31, Trial Transcript, “Judge’s Charge to the Jury.”

138. NAI, SBCCC ID-11-92, Co. Monaghan, June 11 and November 19, 1934.

DS (1929), O’Byrne J, revealing some sympathy for the accused in light of the circumstances in which she committed the offense, stated in his report to the Executive Council: “In all the circumstances of the case, I strongly recommend the accused to mercy—the act was committed immediately after birth when the accused must have still been suffering from the pangs and subsequent prostration of child-birth. She was living at home at the time and she stated in her evidence that she was terrified of her mother.” He added that the mental condition of the accused could be “seriously prejudiced by her remaining for any considerable time under sentence of death.”<sup>139</sup> The fact that trial judges, at least in the cases listed on these Returns,<sup>140</sup> supported the jury’s recommendation of mercy in infanticide cases is noteworthy, not only because they did not consistently agree with the jury’s recommendation in other capital cases, but also because the government seemingly relied on the judge’s, rather than the jury’s, view when deciding whether to advise commuting the sentence.<sup>141</sup>

A judicial committee established by the Department of Justice to consider the issue of capital punishment, the “Committee appointed to Consider and Report on the Law and Practice relating to Capital Punishment” (hereafter the O’Sullivan Committee),<sup>142</sup> recommended in their 1941 report that child murder be dealt with in similar terms to the Infanticide Act of 1938.<sup>143</sup> The O’Sullivan Committee did not explain why it thought reform was necessary, although the fact that it did not suggest the amendment of any other aspect of the law on murder on the grounds that it did not present difficulties for judges and juries may suggest that the infanticide recommendation was prompted by pragmatic rather than humanitarian considerations.<sup>144</sup>

### *Prosecutors: Pity or Pragmatism?*

There is also limited direct evidence in the records consulted of prosecutorial attitudes to infanticide. It is clear from the fact that capital convictions were sought in many cases in which women were suspected of murdering their infants, that infanticide was judged a serious crime. However,

139. NAI, DT [CDS] s5886.

140. It is not clear from the records consulted whether the trial judge agreed with the recommendation for mercy in the case of KO (1943).

141. O’Brien, “Capital Punishment in Ireland,” 229.

142. O’Sullivan CJ chaired the committee.

143. NAI, DT s14493, “Report of the Committee appointed to Consider and Report on the Law and Practice Relating to Capital Punishment,” para. 1. Hereafter O’Sullivan Committee Report.

144. *Ibid.* para. 3.

prosecutors could hardly have treated the suspected murder of a human being as a trivial matter,<sup>145</sup> and they probably considered it their professional duty to instigate robust criminal proceedings and secure convictions where the evidence strongly suggested murder.<sup>146</sup> Notwithstanding, it seems prosecutors sometimes did utilize ambiguities in the evidence to enable them to reduce the indictment to concealment of birth, even where murder was suspected.<sup>147</sup>

Very few women charged with murder were actually tried for the capital offense, because the majority of offenders were disposed of on the basis of a guilty plea. Although in some earlier cases in this sample in which a plea was tendered, the prosecution did pursue the murder indictment, from the early 1930s onwards guilty pleas were always accepted by the state. Judges may have also played a part in this. In a small number of the cases in the SBCCC, it is noted that the guilty plea was accepted by “the court.”<sup>148</sup> The fact that guilty pleas were virtually always accepted indicates that, where possible, it was prosecutorial policy to avoid proceeding with murder indictments in infanticide cases. It is unclear from the records how guilty pleas were instigated and managed, and, in particular, whether prosecutors may have directly or indirectly encouraged women to plead guilty.<sup>149</sup> The increasing use of guilty pleas from the mid-1930s onwards may suggest that prosecutors began to promote the practice. In the absence of prosecutorial involvement, defense counsel, if the accused was legally

145. The attorney general decided whether to prosecute, and what charges to prefer; the actual prosecution was undertaken by lawyers (barristers) in private practice, employed by the state on a contractual basis to conduct individual prosecutions. These barristers were instructed, in the case of trials taking place within Dublin, by the chief state solicitor, a civil servant, who was in turn instructed by the attorney general. See, generally, Walsh, *Criminal Procedure*, 583–604. References to the prosecution/prosecutors are to the attorney general, the chief state solicitor, and their staff, and the individual barristers hired to conduct the prosecution.

146. Kramar, *Infanticide in Canada*, 66. See text below, for evidence suggesting that this was the case for Irish prosecutors.

147. NAI, DJ 8/144/1, memorandum addressed “Minister”, dated February, 1949.

148. Although it was for the prosecution to decide whether or not to accept a plea, the judge may have had the authority to overrule the decision in certain cases; see Walsh, *Criminal Procedure*, 797, referring to *R v. Soanes* (1948) 1 All ER 289. Further, if a plea bargain was involved, the judge may have played an even greater role. It seems the current practice is that if an accused offers to plead guilty to an offense that was not an alternative charge on the indictment, the authority to accept the plea vests in the judge who takes the prosecution’s opinion into account; Walsh, *Criminal Procedure*, 804.

149. It is not clear either whether these pleas were offered as part of a plea bargain. If they were, it may, as is currently the practice, have been improper for the prosecution to initiate the process through an offer to the defense; Walsh, *Criminal Procedure*, 804.

represented,<sup>150</sup> undoubtedly presumed, on the basis of past experience, that a plea would be accepted, and advised the accused accordingly. Certainly it appears, particularly from the mid-1930s, that for both sides, the preferred outcome was a guilty plea to a noncapital offense.

Evidence of prosecutorial attitudes to infanticide is found in two documents contained in government files connected with the 1949 infanticide reform. These sources also highlight the chief motivations for introducing an infanticide law in Ireland. It seems that the difficulty of securing a conviction at a contested trial and related pragmatic concerns were foremost for those tasked with prosecuting women for the murder of their infants. The author of the first document, a letter dated March 1941, sent to the Department of Justice by the Office of the Attorney General, urged the enactment of a law similar to that in England to deal with the problem of infanticide. It was asserted that it was "almost futile" to try "young girls" for the capital offense when they killed their infants soon after birth: "everyone in the court" knew that, if a conviction resulted, the mandatory death sentence would not be executed. Further, the author observed that juries "on the slightest excuse" acquitted or returned a manslaughter verdict in these cases. It was remarked that "the whole proceedings are painful to the prisoner, judge, jury, and counsel." Reform was advocated on the understanding that murder could still be charged on appropriate facts.<sup>151</sup>

In a later document, a letter, dated February 1949, which was sent to the minister for justice along with a copy of the Infanticide Bill and a memorandum for the government that outlined the background to the reform, the burdens inherent in pursuing a murder conviction in infanticide cases were plainly described: the "wretched woman" would have to appear with the necessary witnesses "at the public expense" before the Central Criminal Court, which sat only in Dublin, to face the "ordeal of trial and conviction" and the "grim spectacle" of a capital sentence which everyone, but the woman in question, knew would be reprieved. The author noted that successive attorneys general had supported reform of the law for the purpose of preventing this "tragic farce." It seems that prosecutors were already using what flexibility they had to mitigate the absurdities of the current system. The author observed that, although the medical evidence available usually obliged the attorney general to charge the "unfortunate wom[an]" with murder, where the circumstances allowed it (such as where there was no evident violence on the body of the child), the charge was usually reduced from "motives of humanity" to concealment of birth.<sup>152</sup>

150. Rattigan, *What Else Could I Do?* 45–46.

151. NAI, AG 2000/10/2921, memorandum dated March 28, 1941.

152. NAI, DJ 8/144/1, letter addressed "Minister," dated February, 1949.

It appears, then, that the chief prosecutorial grievance was that if the evidence suggested murder, the attorney general felt bound to charge that offense, which meant that the state had to go to unnecessary trouble and expense in preparing for a murder trial that was unlikely to proceed, or would not result in a conviction. Prosecutors were undoubtedly frustrated about the prevailing situation. However, the extent to which they were influenced by sympathy for infanticide offenders, both in their approach to this crime at the Central Criminal Court and in their calls for the infanticide law reform, is debatable. Having reconciled themselves to the fact that the jury would not convict of murder, they may have simply sought a more expeditious route to conviction. It was undoubtedly evident to prosecutors that, apart from the condemnatory significance of a murder conviction, a trial on the capital charge would probably not produce a very different outcome to that following a plea of guilty to manslaughter or concealment of birth; juries only rarely convicted of murder in infanticide cases, and, even if a capital conviction was returned, a reprieve of the death sentence was always granted, with the offender being released on licence after serving only a few years of the life sentence. Indeed, from a prosecutorial perspective, given that a jury might completely acquit the offender, a plea may have been the preferred outcome, because it guaranteed conviction and punishment without the uncertainty and unnecessary effort involved in a contested murder trial.

Therefore, although the records examined in this research do not indicate why infanticide was consistently dealt with on the basis of a guilty plea to a noncapital offense, it is likely that prosecutorial efficiency was a more significant consideration than humanitarian concern for the accused. Although a guilty plea did save the accused from the trauma of a capital trial, and possible capital conviction, frightened, uneducated, and inexperienced women and girls may have felt they had little choice but to plead guilty to manslaughter or concealment of birth. In effect, the prevailing practice of self-conviction denied the accused the opportunity for a full acquittal, and enabled prosecutors to circumvent the presumption of innocence and their duty to prove guilt.

However, the comments in the abovementioned documents suggest that there was an element of humanitarian consideration involved. First, and perhaps most significantly, it was explicitly stated that it was prosecutorial practice to, where possible, reduce murder charges “for motives of humanity.” Further, the emotive language used, whereby offenders were described as “young girls” and “wretched” or “unfortunate” women, and infanticide trials were termed “painful” or “tragic,” reveals both pity and paternalism in prosecutorial attitudes to this type of offender. A sense of humanitarian concern emerges with respect to the impact of a murder

trial on the accused, particularly given the general understanding that the entire proceedings would prove to be a farcical and pointless exercise. Finally, there is no indication in either document of dissatisfaction with the fact that women were receiving lenient treatment. Indeed, the fact that both authors supported, or indeed advocated, the enactment of the infanticide statute, albeit principally for pragmatic reasons, indicates, at the very least, an acceptance of a formalized lenient approach to this crime. Therefore, although the practical problems encountered in prosecuting infanticide offenders for murder seem to have been the main impetus for seeking reform, sympathy is also evident, at least as an additional argument. The motivations for reform will be discussed further in the next section.

### **Reforming the Law on Infanticide: Pragmatic Imperatives and Humanitarian Aspirations**

Although the idea to introduce an infanticide measure in the Irish Free State seems to have been initially canvassed in the Department of Justice in 1928,<sup>153</sup> the main impetus for reform came from the report of the O'Sullivan Committee (1941), which advised that child murder be dealt with by legislation in similar terms to those of the English Infanticide Act of 1938.<sup>154</sup> In January 1944, this recommendation was taken forward by the government, and an infanticide bill was prepared.<sup>155</sup> After a change in government, a final version of this bill was introduced in the Irish Parliament in 1949. The Infanticide Bill was positively received by both houses of Parliament, the Dáil and the Seanad, and was passed without amendment.

The proposed law was largely viewed as an uncontroversial measure.<sup>156</sup> As women charged with the murder of their infants almost invariably

153. NAI, DJ H266/61, memoranda dated July 31, 1928 and December 13, 1932.

154. NAI, DT s14493, O'Sullivan Committee Report, para. 1. There were also calls for reform from the Office of the Attorney General which predated the O'Sullivan Committee's report; see NAI, AG 2000/10/2921, memorandum dated March 28, 1941. It seems that the government was awaiting an official recommendation from the O'Sullivan Committee before it acted on these calls for reform. For a more detailed account see Karen Brennan, "'Traditions of English Liberal Thought: A History of the Enactment of an Infanticide Law in Ireland,'" *Irish Jurist* (2013, forthcoming).

155. See various documents in NAI, s14493.

156. See Brennan, "A History of the Enactment of an Infanticide Law in Ireland." For the second-stage reading of the bill in both houses of Parliament (the Dáil and the Seanad), see: Dáil Debates, cols. 263–83; Parliamentary Debates, vol. 36, cols. 1470–77, July 7, 1949 (Seanad Éireann) (hereafter Seanad Debates). Although some minor criticisms were made

received lenient treatment in the courts, this is perhaps unsurprising: the infanticide proposal simply gave “statutory authority to what [wa]s already the practice.”<sup>157</sup> In so doing, the 1949 bill promised to address the problems emanating from the traditional ad hoc practices employed to circumvent the capital conviction and sentence in cases of maternal infanticide. The informal system for dealing with these cases saw time, money, and other judicial resources being wasted in treating these cases as murder when, given the inevitable outcome, it was clear the woman should not have to appear before the Central Criminal Court on a murder charge in the first place. The infanticide proposal promised that, where a murder conviction was unlikely to result, the accused would not be sent to the Central Criminal Court on the capital charge.

The minister for justice noted in his introductory speech in the Dáil that for many years no woman had been executed for the murder of her infant, but that in most cases the charge was reduced to concealment of birth, or the death sentence was commuted. He mentioned, in particular, the need to amend the law to ensure that a death sentence would not be passed where it was clear that it would not be executed.<sup>158</sup> The minister also noted that the proposed law would ensure that, “in appropriate cases, it will no longer be necessary to subject unfortunate girls to the strain of undergoing a trial for murder and of being sentenced to death.”<sup>159</sup> Interestingly, he made no reference to the fact that most murder charges that proceeded to the Central Criminal Court were actually dealt with by a guilty plea; although this practice is not mentioned in the letter sent to the minister in February 1949, which accompanied a copy of the Infanticide Bill and a memorandum for the government outlining the background to the reform and the key aspects of the bill, either.<sup>160</sup> Perhaps, it was thought that the case for reform would be more compelling if the picture conveyed of the current practice was that women were avoiding convictions for homicide altogether, or were being subject to the frightening experience of being sentenced to death where this was clearly unnecessary.

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of the bill, the spirit of the proposal was broadly welcomed. Only one member of the Dáil, Maj. V. deValera, spoke out against the reform, strongly criticizing it on sanctity of infant life grounds; see Dáil Debates, cols. 275–82. For more detail see Brennan, “A History of the Enactment of an Infanticide Law in Ireland.”

157. See NAI, DT s7788(a), memorandum entitled “re trials for murder,” dated August 25, 1941, p. 3.

158. Dáil Debates, col. 265.

159. *Ibid.*, col. 266.

160. See NAI, DJ 8/144/1, letter addressed “Minister,” dated February, 1949; and, memorandum entitled, “Infanticide Bill: Memorandum for the Government,” dated February 10, 1949.



Finally, although he did not explicitly state that the existing informal system for processing these cases was an inefficient use of criminal justice resources, the minister did mention that when a woman was sent for trial for infanticide, participants in the case would not need to travel "the whole way to Dublin" for the trial.<sup>161</sup> Other parliamentarians also alluded to the pragmatic motivations for enacting the infanticide statute. For example, one member of the Dáil opined that the current system for dealing with such cases "rather throws derision at what you might call a murder trial."<sup>162</sup> In the Seanad, Senator O'Farrell stated that the bill would avoid "the deplorable necessity of going through the solemn procedure of a trial for murder" in these cases.<sup>163</sup>

Emotional considerations were also important for parliamentarians. Some of those who spoke clearly viewed the infanticide proposal as an act of legislative compassion. A female member of the Seanad described it as "a fine mixture of pity and justice."<sup>164</sup> Senator O'Farrell expressed his support for the bill "in the interest of humanity."<sup>165</sup> In the Dáil, Captain Cowan termed the bill a "humanitarian measure."<sup>166</sup> He stated during the second-stage Dáil debate on the bill: "Any person who has had the unfortunate experience of being in court and seeing one of these charges of murder dealt with, the whole procedure gone through, the whole panoply of the law utilised right down to the final sentence of death, was harrowed by the experience."<sup>167</sup> The minister for justice made it clear that he wanted to change the law so that a woman would not have to endure the "mental strain" of an unnecessary murder trial, and he explicitly stated, as a rejoinder to accusations that he had introduced the bill "in the spirit of liberalism" or in order to emulate the British legislature, that he had brought in the infanticide measure "in a spirit of humanity and charity to people who are among the poorest of our community."<sup>168</sup>

Further evidence of the role of humanitarianism in the passage of the Irish infanticide statute is found in the archival records of the Archbishop of Dublin. The Department of Justice anticipated theological objections to the bill, fearing the Catholic Church would disapprove on the grounds that the proposed law would diminish the sanctity of infant

161. Dáil Debates, col. 282.

162. *Ibid.*, col. 273, per Sir J. Esmonde.

163. Seanad Debates, col. 1474.

164. *Ibid.*, col. 1475, per Senator Concannon.

165. *Ibid.*

166. Dáil Debates, col. 269.

167. *Ibid.*, col. 268.

168. *Ibid.*, col. 283.

life and encourage immorality.<sup>169</sup> It seems that submission of the measure to the cabinet for its approval was postponed in order to facilitate consultation with the Church, and to this end a meeting was arranged for the minister for justice, the attorney general, and the Archbishop of Dublin, Dr. McQuaid.<sup>170</sup> The Catholic Church in Ireland had considerable political influence during this period and it was not unusual for its bishops to be consulted by government officials on policy and legislative matters touching on Catholic social and moral teachings.<sup>171</sup> Assuming that the proposed meeting took place, any views expressed by the archbishop were undoubtedly influential.

There is no explicit statement in the government archives of the archbishop's view of the bill. However, two documents in Dr. McQuaid's records indicate that he probably expressed strong reservations about the proposed reform because of its implications for the sanctity of infant life, and may have advised that amendments be made to the bill to reinforce the law's protection of infant victims by emphasizing the fact that, barring extenuating circumstances, the offense would be murder.<sup>172</sup> After the minister for justice's meeting with Archbishop McQuaid, the cabinet requested that the Infanticide Bill be amended. A new clause (section 1[1]) was inserted, the purpose of which was to underline the fact that the killing of an infant would be treated as murder in the first instance, and that the reduced charge would only apply if a district judge was satisfied on the evidence available that it was an appropriate case in which to show mercy. Most likely, the section 1(1) amendment was a consequence of the minister's meeting with the archbishop.<sup>173</sup>

169. See NAI, DJ 8/144/1, memorandum addressed "Minister," dated February, 1949.

170. *Ibid.*, handwritten notes, signed R.H., dated February 28, 1949 and March 1, 1949, at end of memorandum dated February 26, 1949. For further discussion of this meeting and the likely impact on the Irish law, see Brennan, "A History of the Enactment of an Infanticide Law in Ireland."

171. John H. Whyte, *Church and State in Modern Ireland 1923–1979*, 2nd ed. (Dublin: Gill & Macmillan, 1980), esp. chs. 2–10; Inglis, *Moral Monopoly*, 77–80; and Dairmuid Ferriter, *The Transformation of Ireland 1900–2000* (London: Profile Books, 2004), esp. 337–40, 408–10, 520–23.

172. See Brennan, "A History of the Enactment of an Infanticide Law in Ireland." Three documents relating to the Infanticide Bill are found in Archbishop McQuaid's archives; two of these are referred to in this article. See Archives of Archbishop of Dublin, The McQuaid Papers, AB8/B/XVIII/10 (hereafter AAD, AB8/B/XVIII/10): memorandum entitled "Proposed Infanticide Legislation," by Monsignor Dargan, dated February 24, 1949; and unsigned and undated memorandum entitled "Infanticide Act." Hereafter referred to respectively as memo 1 and memo 2.

173. Brennan, "A History of the Enactment of an Infanticide Law in Ireland." See: NAI, DJ/8/144/1, "Revised Draft of Bill," dated March 5, 1949; and "Memo for Government," dated March 7, 1949; DT s14493, "Government Meeting, 4th March, 1949, Cabinet item

However, it is also apparent from the diocesan records that the archbishop, although not necessarily in favor of the reform, possibly conceded to it and recognized it had merit on humanitarian grounds. Monsignor Dargan, moral theologian and advisor to Dr. McQuaid on legislative matters, admitted that the nation would be accused of "barbarity" should the capital sentence ever again be carried out in a case of infanticide.<sup>174</sup> He strongly emphasized the seriousness of the offense, preferring that the law remain unchanged, unless "sufficiently cogent" reasons for reform were advanced. Despite this, however, he did acknowledge that there may be extenuating factors involved in infanticide cases, including the shame of illegitimacy and the possibility of the woman having experienced an unbalanced mental state in the aftermath of childbirth.<sup>175</sup> He opined that the factor that most affected the ordinary person was the fact that the father of the murdered infant, the man who was responsible for the mother's condition, and "so often more guilty" than the woman, "[got] away scot free," while the mother had to "bear all the trouble and all the shame."<sup>176</sup>

The unknown author of a second diocesan memorandum on the Infanticide Bill similarly acknowledged mitigating circumstances in these cases, and the desire for compassionate treatment of some mothers.<sup>177</sup> Opining that no woman feels an "immediate maternal solicitude" for her infant immediately after birth, he concluded that it was "understandable" that the first instinct of a woman who gave birth to an unwanted child would be to dispose of it, adding that if he were a trial judge, he would be sympathetic and would "assume" the offender had acted impulsively at a time when her mind was "unbalanced or deranged."<sup>178</sup> Although he was unimpressed by the mode of mitigation provided by the Infanticide Bill, he did not wholly reject the case for some form of merciful accommodation being made.<sup>179</sup> In connection with the government's motives for reform, the author queried whether the proposed measure had been "inspired by humanitarian considerations," or whether, given that any "unfortunate woman" convicted of murder would not actually be executed,

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no. 6;" see also NAI, Cabinet Minutes 2/10. See also Dáil Debates, col. 266, per Gen. MacEoin.

174. AAD, AB8/B/XVIII/10, memo 1, para. 5.

175. *Ibid.*, para. 1, 2, 4, 6, 7.

176. *Ibid.*, para. 4.

177. *Ibid.*, memo 2. It is possible that this document was authored by Dr. McQuaid.

178. *Ibid.*, 1–2. It is of note that the woman's mental state is mentioned by both authors as constituting a mitigating factor in infanticide cases. For discussion of the role of popular perceptions of maternal mental disturbance in the Irish infanticide reform see: Brennan, "A History of the Enactment of an Infanticide Law in Ireland."

179. See, generally, AAD, AD8/B/XVIII/10, memo 2, p. 2.

its proponents were more concerned about avoiding costly trials at the Central Criminal Court.<sup>180</sup>

Given the role of Catholic establishments in the punishment of women convicted of offenses such as concealment of birth and manslaughter,<sup>181</sup> the views of the Catholic Church in Ireland on the appropriate response to this offender were undoubtedly more complex than what is evident in the Dublin diocesan records. However, although not necessarily indicative of the official attitude of the Catholic Church to infanticide or unmarried mothers, the evidence does suggest that it was acknowledged that certain extenuating factors could be involved in infanticide cases, that compassion could be shown to these offenders, and, assuming the case for reform had been made, that “humanitarian considerations” would be a more acceptable justification for reform than pragmatic objectives. Further, if Archbishop McQuaid did advise the minister for justice that the infanticide proposal, although justifiable on grounds of humanity, would not be acceptable for resource reasons, this may have prompted the government to emphasize the humanitarian objective of the bill in Parliament. Indeed, in the political context, irrespective of the Church’s view, it was surely thought more prudent to stress the worthier charitable motives for the infanticide law over the pragmatic objectives, which are evident in the government files.

In the government and parliamentary records consulted, it appears to have been generally accepted that women who killed their newborn infants in distressing circumstances did not deserve to be treated as murderers. The reasons for reform and the object of the legislative proposal seem to have been so widely understood that they required little discussion. It was accepted that reform was necessary, or, as was noted by one parliamentarian, was “long overdue.”<sup>182</sup> There was little dispute as to whether or not lenient provision should be made for these cases.<sup>183</sup> Rather, it was accepted that, once the circumstances involved called for a compassionate response, there should be an appropriate method for providing such. It is evident from this account of the background to the enactment of the Irish infanticide law that the humanitarian objective of the reform was not necessarily to provide for lenient outcomes for women because, in practice, the law

180. *Ibid.*, 1.

181. For a brief discussion of sentencing, see below.

182. *Dáil Debates*, col. 272, per Deputy Lynch.

183. Apart from the objections raised by Maj. V. deValera in the *Dáil* (see note 156 above), and, possibly, the Archbishop of Dublin. However, both did seem to concede that some form of lenient provision was necessary to avoid the death penalty in relevant cases; what they disagreed with was the method proposed in the 1949 Bill. For further discussion, see Brennan, “A History of the Enactment of an Infanticide Law in Ireland.”

was already being mitigated to accommodate the sympathy-worthy offender.<sup>184</sup> Rather, the infanticide law was concerned with ensuring that the process for delivering a compassionate response to this offender would not only be more efficient, but also more humane.

### **Reconciling Humanitarianism with Gender Ideology**

Gender was obviously central in the Irish response to infanticide during the period under review: those accused of committing this offense were women who had broken the sexual conventions and gender expectations of a patriarchal society; those determining their fate were virtually all male. Although an in-depth consideration of the gender issues arising falls outside the scope of this article, some brief observations will be made, particularly with respect to the role of gender ideology in the response to this offense.

Sympathy for women who killed their illegitimate infants, and the enactment of a measure to provide for lenient treatment of these offenders, may appear incongruent with accounts of cultural and official intolerance of women who broke social and moral codes. The response to infanticide indicates that whereas contemporary ideologies may have been intolerant of female immorality, it does not necessarily follow that there was no room within this framework for more humane responses to individual woman, particularly if there were strong pragmatic reasons for facilitating compassion. Indeed, it seems that the gender ideology of the Irish Free State did not wholly preclude the possibility of compassion for women who breached the moral paradigm. Maria Luddy has observed, for example, that the response to first-time unmarried mothers who entered religious-run institutions was not always harsh.<sup>185</sup>

Breda Gray and Louise Ryan have argued that in addition to the popular contemporary image of "innocent, pure, unsexed, self-sacrificing motherhood" that prevailed, "public discourses [also] included notions of women's vulnerability and need for protection."<sup>186</sup> The latter appears evident in attitudes toward infanticide offenders, which were often imbued with paternalistic and stereotypical notions. The "poor" or "unfortunate"

184. Kramar makes this point with respect to the Canadian infanticide reform.

185. Luddy, *Prostitution and Irish Society*, 201.

186. Breda Gray and Louise Ryan, "(Dis)locating 'Woman' and Women in Representations of Irish Identity," in *Women in Irish Society: A Sociological Reader*, ed. Anne Byrne and Madeleine Leonard (Belfast: Beyond the Pale, 1997), 521.

woman and the “young girl” were at times portrayed as the victims of their own unstable minds, the cruelty of an inappropriately harsh law, and, in one instance, the inequities of a society that enabled men to avoid responsibility, while exposing women to various burdens, including public disgrace. In particular, popular perceptions about maternal mental instability, which have been evident in passing in this article, raise important questions about sexist attitudes toward female offenders and the medicalization of their deviant behavior that warrant further consideration.<sup>187</sup> For now, suffice it to say, although sympathy for the infanticide offender is evident, it seems that this was often infused with paternalistic and sexist views that reflected the patriarchal nature of Irish society and the gender ideologies of public officials. Indeed, it could be asked whether paternalism played a greater part than did pure humanitarianism in encouraging lenient responses to infanticide.

Sentencing in cases of infanticide, which led to many women being sent to Magdalen asylums and other similar institutions post-conviction, also suggests that ideological views on the treatment of immoral women may have influenced the criminal justice response to infanticide.<sup>188</sup> However, it is likely that other factors, particularly ordinary criminal justice considerations, were also significant, and more research is needed before the impact of patriarchal philosophies on infanticide sentencing practice can be stated with confidence.<sup>189</sup> Sentencing for infanticide was not a factor in the 1949 reform, presumably because the new law would give judges much discretion in terms of punishment, up to a maximum of life imprisonment, and would not, therefore, have interfered with the existing sentencing customs. The practice of sending women to convents rather than prisons on concealment of birth and manslaughter convictions was not acknowledged in any of the documents discussed, although one member of the Dáil did make a

187. Susan S.M. Edwards: *Women on Trial: A Study of the Female Suspect, Defendant and Offender in the Criminal Law and the Criminal Justice System*, (Manchester: Manchester University Press, 1984), 79–85, 91–100; Katherine O’Donovan, “The Medicalisation of Infanticide,” *Criminal Law Review* (1984): 259–64; Zedner, *Women, Crime and Custody*, 83–90; and Roger Smith: *Trial by Medicine: Insanity and Responsibility in Victorian Trials* (Edinburgh, Edinburgh University Press, 1981), ch. 7. For discussion of the medicalization question in the Irish context, see Brennan, “A History of the Enactment of an Infanticide Law in Ireland.”

188. See Sandra Larmour, *Aspects of the State and Female Sexuality in the Irish Free State, 1922–1949* (PhD diss., University College Cork, 1998), 289. See also Ryan, *Gender, Identity and the Irish Press*, 275–76. See, generally, Rattigan, *What Else Could I Do?* 207–25.

189. For detailed discussion of sentencing in infanticide cases, and of the likely influences on sentencing practice, see Karen Brennan, “Punishing Infanticide in the Irish Free State,” *Irish Journal of Legal Studies*, 3(1) (2013): 1.

reference to the use of "suitable" homes for sentencing in these cases.<sup>190</sup> Assumedly, then, it was not thought that this was an inappropriate response by those involved in bringing forward the infanticide statute, and most likely it was assumed that this practice would continue with the enactment of the 1949 Act.

Arguably, women who concealed their pregnancies and killed their infants, presumably in an attempt to avoid the dishonor and stigma of bearing an illegitimate child, conformed to ideological standards of appropriate female behavior,<sup>191</sup> which may partly explain lenient responses to infanticide. Women who did not fit the image of the vulnerable, distressed, frightened girl who was desperate to hide her shame may have had different experiences of justice.<sup>192</sup> Indeed, contemporary studies suggest that female offenders, particularly at the sentencing stage, may experience "chivalry" in the criminal justice system when they conform to conventions of appropriate femininity, whereas those who breach gender stereotypes receive harsher treatment.<sup>193</sup> It is notable that neither KO, who had secretly given birth to numerous illegitimate infants over a number of years, nor EK, who had become pregnant as a result of an extramarital affair and gave birth with the assistance of her lover, appear to have fitted the stereotypical image of the sympathy-worthy offender; both of these women were convicted of murder. EE, convicted of killing her 2-week-old infant with the assistance of her sister, arguably did not either. The circumstances of the killing suggested careful deliberation and composure on the part of the two accused. In the end, however, none of these women were subjected to the death penalty, and EK, whose conviction was overturned on appeal, did have her plea of guilty to manslaughter accepted at retrial. Further, there may be cases in the records that suggest that the response to infanticide was not influenced by male perceptions of whether the accused fit the image of the conventional infanticide offender; indeed, the case of JO mentioned previously, may provide such an example. Certainly, the evidence overall suggests that women charged with murdering their infants overwhelmingly received more lenient treatment than that required by the law in cases of murder, and more research is warranted before conclusions can be made about whether these women experienced different treatment relative to each other depending upon whether or not they conformed to the image of the stereotypical infanticide offender.

190. Dáil Debates, col. 270, per Deputy Moran.

191. Kramar, *Infanticide in Canada*, 7.

192. See Higginbotham, "Infanticide and Illegitimacy in Victorian London," 333.

193. Frances Heidensohn: *Women and Crime* (London: Macmillan, 1985), ch. 3; and Allison Morris: *Women, Crime and Criminal Justice* (Oxford: Basil Blackwell, 1987), ch. 4.



Patriarchy and related gender ideologies were also important contextual factors in the history of infanticide reform in England,<sup>194</sup> and it seems there was nothing unusual in cultural intolerance of women who bore infants outside of marriage operating alongside sympathy for those who killed their illegitimate infants, at least when the woman was deemed worthy of compassion. It was noted in England, in the mid-nineteenth century, that one reason why the death penalty was not executed in cases of infanticide was that “mankind generally are so far conscience stricken in this matter that they feel a very natural reluctance to visit on the woman the full penalty of a crime in which themselves have antecedently much to answer for.”<sup>195</sup> Whether Irish male court, government, and church officials also felt an unarticulated sense of collective responsibility for the crimes of the “unfortunate” women and “young girls” charged with murdering their illegitimate infants is not evident from the records, although the fact that unwed mothers bore an inequitable share of the blame for their situation, at least in comparison with their infants’ fathers, was recognized by one church official.

### **Humanitarianism Examined**

Numerous factors and objectives were undoubtedly involved in the criminal justice and eventual legislative response to infanticide in Ireland, and elsewhere. Different actors, including judges, prosecutors, government officials, and parliamentarians, may have had differing views and agendas, and what these officials said or did in a professional capacity may have varied depending upon the circumstances. Therefore, pragmatism and sympathy, and other considerations, may have been either emphasized or ignored depending upon the context or anticipated audience. It is difficult, therefore, to provide a comprehensive and incontrovertible account of the attitudes of public officials to infanticide and of the motivations for reform. On saying that, however, the evidence considered here does show that pragmatism and sympathy were both key factors, although this is not to say that they carried equal and unvarying weight for those involved, or that they were the only considerations at play.

Interpretations of infanticide reform in England and Canada, put forward by Ward and Kramar respectively, raise particular questions about the role of sympathy and the importance of other factors in legislating for infanticide, including asserting the legal status and accountability of women who

194. Zedner, *Women, Crime and Custody*, 11–18.

195. BPP, 1866, vol. 21, 476 (per Rev. Ld S.G. Osborne).

killed their infants, the appropriate labelling and punishment of criminal conduct, and recognition of the value of infant life. Both view the enactment of infanticide laws in their respective jurisdictions as an attempt to limit the effects of traditional humanitarianism, which, it was thought, discredited the law and/or ignored or downplayed the criminal responsibility of the accused. Therefore, the infanticide acts in England and Canada are viewed in these accounts as a response to practical legal problems connected with holding women criminally accountable and/or ensuring they were convicted of appropriately labelled and punished offenses. For example, Kramar argues that the 1948 Canadian infanticide reform was mainly concerned with addressing legal problems connected with the suitability of conviction and punishment in infanticide cases, and, in connection with this, tempering jury discretion to rely on inappropriate concealment charges and convictions.

The Irish infanticide reform was also largely inspired by practical considerations connected with the administration of justice, although these factors differed from those thought to have affected the English and Canadian reforms. In particular, it appears from the evidence considered that the legal status and accountability of women who killed their infants, and the appropriate labelling and punishment of their crime, were not explicit considerations in Ireland. The minister for justice, when he observed that in most cases of suspected infanticide the murder charge was reduced to concealment, presumably meant to convey some unease about treating infanticide as a mere case of concealment, thus providing a justification for the proposed reform. There is no indication, however, in the records consulted as part of this research, of the extent of this practice; it simply stated in one document, a letter sent to the minister prior to the introduction of the bill to Parliament, that prosecutors used what flexibility they felt was appropriate, depending upon the evidence involved, to reduce the charge to concealment. On the whole, the records consulted do not suggest that charging practices that downgraded murder to concealment were considered particularly problematic by those involved in the reform. Rather, the records suggest that the chief focus of the infanticide proposal was cases in which women were sent for trial for murder to the Central Criminal Court, and as the SBCCC records reveal, most of these cases were disposed of on a manslaughter plea, although concealment pleas were also common. The practice of dealing with infanticide on the basis of guilty pleas ensured that there were very few acquittals, and most Irish women charged with murder and sent for trial to the Central Criminal Court were held criminally accountable, although for less serious offenses.

Possibly, there were concerns about the appropriateness of the use of concealment of birth, or even manslaughter, as alternative offenses in

infanticide cases. It was probably not thought ideal to continually allow persons suspected of murder to be charged with and/or convicted of a mere misdemeanor or a homicide offense that did not reflect the extent of the offender's culpability. Clearly, "infanticide," the "wilful" killing of an infant in which "the circumstances are such that . . . [it] would have amounted to murder,"<sup>196</sup> was a more appropriate reflection of the offender's culpability and her criminal agency. However, as stated, there is no evidence in the records to suggest that these were clearly acknowledged factors in the Irish reform.

Similarly on the sentencing question, aside from an unequivocal rejection of the death sentence as a penalty for infanticide, suitability of punishment does not appear to have been a concern for Irish legislators. The new law, which provided for the same penalty for infanticide as that available for manslaughter, was unlikely to impact on sentencing options in these cases, particularly if the woman would otherwise have been convicted of manslaughter. As noted, Irish judges, at the Central Criminal Court at least, appear to have taken a particular approach to sentencing for infanticide, which seems to have involved a rejection of traditional penal responses to this crime in favor of the use of religious institutions as a means of alternative incarceration. There is no mention of sentencing in the government records connected with the infanticide reform, and it can only be assumed, therefore, that the approach taken was deemed unproblematic and that the proposed change to the law was not intended to affect the existing practice.

At the time of the reform, infanticide cases were being disposed of on an ad hoc lenient basis, and the Infanticide Act 1949 was introduced to address the practical difficulties connected with how these cases were managed in the courts. The new law sought to formalize the existing lenient approach, allowing for infanticide cases to be processed more efficiently by ensuring that deserving women would not be unnecessarily sent to the Central Criminal Court on murder charges. Thus, in relation to the practical matters that prompted the enactment of the 1949 law, Irish reformers were mainly focused, not on the outcome of infanticide trials in terms of labelling and punishing the woman's criminal conduct, although these may have been considerations, but on the process for arriving at the preferred lenient outcome.

As for the significance of sympathy, Ward argues that the 1922 Act served to limit the adverse consequences of humanitarianism. Kramar goes further, claiming that there was no humanitarian interest in the mother in the Canadian context, arguing that as women were already being

196. Infanticide Act 1949, s. 1(3).

leniently disposed of by the courts, reform was not necessary on that ground. Instead, she argues that it was the infant, not the mother, who attracted humanitarian concern during the 1948 Canadian reform.

Similarly, because Irish women were already being leniently disposed of, it was not actually necessary to amend the law to enable humanitarian outcomes for infanticide offenders in Ireland. However, the practical reasons for the Irish reform, which, as noted, were focused on addressing problems in the way these cases were processed, was clearly tied up with a humanitarian impulse that was directed at the mother. There is good evidence in the historical record, both in the government files and in the parliamentary debates, that sympathy played a part in the reform. Particular emphasis was placed on the humanitarian objectives of the Infanticide Bill during the parliamentary debates, especially by the minister for justice. Possibly, in the political context, humanitarian sentiment was thought to constitute a more laudable justification for reform than the administrative considerations highlighted by the attorney general's office. The suggestion in the diocesan archives that the reform, although possibly supportable on grounds of sympathy, would not be justified for the purpose of avoiding costly trials at the Central Criminal Court, may have encouraged proponents of the bill, particularly in the political context, to highlight its humanitarian objectives and downplay the resource-related motivations involved.

Therefore, although pragmatic matters were likely more significant, the Irish infanticide reform was also important on humanitarian grounds. First, in seeking to address the practical difficulties of prosecuting maternal infanticide, reformers incorporated the extant sympathetic approach. Second, although the reasons for compassionate treatment of this offender were not explicitly discussed in the government and parliamentary documents explored, it was generally accepted that women who killed their infants did not usually deserve to be treated as capital offenders. Assumedly, one key reason for sympathy was the fact that this crime was committed in very distressing circumstances. Finally, formalization of the prevailing lenient approach protected the accused from the unnecessary trauma involved in having to appear at the Central Criminal Court on a capital charge, and, therefore, provided a more humane method for dealing with infanticide offenders; this was an explicit consideration in the reform. Therefore, although the reform was not as much focused on ensuring a lenient outcome in these cases, as this was already being guaranteed, it was concerned with ensuring that the process for arriving at this outcome would be more humane.

Although there was no sense of humanitarianism directed toward the infant victim in the files considered, protecting infant life was an important consideration in Ireland. However, contrary to Kramar's conclusion with

respect to Canada, those involved in the Irish reform did not view the proposed law as something that would, per se, vindicate the victims of maternal infanticide. Rather, it was thought that the measure could endanger the status of infant life, and an additional safeguard, which recognized that infanticide was *prima facie* murder, was included to ensure continued respect in the law for infant life.<sup>197</sup>

It is arguable that compassion for infanticide offenders was also important in other jurisdictions. Kramar states that the infanticide law involved “an attempt to gently redirect juror sympathy” toward a more appropriate conviction.<sup>198</sup> Indeed, although Canadian reformers may have been concerned with attempting to provide appropriate conviction and punishment for women who killed their infants, the idea of what was “appropriate” embraced the notion that these offenders were deserving of compassion in comparison with other killers. If it were otherwise, surely a higher penalty than the 3 year maximum set for the new infanticide offense would have been fixed.<sup>199</sup> By adopting a measure that clearly facilitated a lenient response to this crime, rather than attempting to bolster more significantly the punitive option, Canadian lawmakers at least implicitly accepted humanitarianism, albeit within a formal homicide framework.

The extent to which the English infanticide legislation eschewed humanitarian sentiment for mothers who killed their infants can also be questioned. Ward does not dismiss the role of humanitarianism in the English reform. Indeed, though he does not undertake a detailed exploration of the motivations involved, he does note that the 1922 reform was triggered by the humanitarian outcry that resulted from the conviction, and sentencing to death, of Edith Roberts in 1921 for the murder of her newborn infant.<sup>200</sup> As Ward notes, “[t]he infanticide acts ... attempted to limit the disruption that ... humanitarian sentiments caused to legal ascriptions of responsibility...”<sup>201</sup> Therefore, in both the English and Canadian contexts, it appears that these measures served to counteract the unwanted effects of humanitarianism, not to quell absolutely compassionate responses to women who killed their infants. While operating to attribute legal responsibility to infanticidal mothers, this was achieved in a way that respected the traditional humanitarian response to this crime.

The primary objective of lawmakers in adopting an infanticide statute may not have been to demonstrate humanity toward infanticidal mothers, and,

197. Brennan, “A History of the Enactment of an Infanticide Law in Ireland.”

198. Kramar, *Infanticide in Canada*, 5.

199. This was later increased to 5 years’ imprisonment in a 1955 amendment to the Criminal Code; see Kramar, *Infanticide in Canada*, 111–12.

200. Ward, “The Sad Subject of Infanticide,” 170.

201. *Ibid.*, 176.

indeed, they may have been chiefly concerned with other aims, such as, for example, demonstrating compassion for victims, ensuring women were held criminally responsible for their conduct, or addressing practical matters relating to the administration of justice. However, by adopting a formal mitigation framework for this offense, legislators everywhere at least partially accepted the long-standing humanitarian approach. Arguably, then, humanitarianism for offenders has been an essential element of infanticide reforms, although the extent to which it influenced lawmakers probably varied. Sympathy seems to have been more explicit in Ireland, but even the Irish history shows that practical matters were more important. It is certainly arguable that elsewhere, even where other motives are evident, these did not operate to the exclusion of sympathy for women who killed their infants.

Infanticide statutes, in Ireland and elsewhere, based on the English models of 1922/1938, achieved myriad objectives and represented a number of interests: they addressed practical matters relating to the prosecution of women who killed their infants by prevailing ad hoc lenient practices, such as the challenge posed to the professionalism and integrity of lawyers and judges, and the efficient use of limited resources; they ensured that women would be convicted of an appropriately labeled and punished homicide offense, which would demonstrate respect and compassion for the infant victim, and which would protect the integrity of the criminal justice system and the criminal law against inappropriate reliance on other offenses, sham murder trials, and persistent mockery of the death sentence; they assigned responsibility to the woman who killed her infant, but recognized that this could be mitigated; and they embraced a sympathetic response to the offender and facilitated lenient treatment of her. In short, infanticide laws, by accepting the de facto humanitarian response to maternal infanticide, promised effective and legitimate justice by channeling sympathy into a more acceptable and formal mitigation framework.