Punishing Infanticide in the Irish Free State

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This article explores sentencing of women convicted of infanticide offences at the Central Criminal Court between 1922 and 1949. A sample of 124 cases involving women who had been convicted of manslaughter, concealment of birth, or child abandonment/child cruelty, after appearing at the Central Criminal Court on a charge of murdering their newly or recently born infant, is examined. The sentences imposed in this sample mainly include short prison terms, suspended prison sentences, and conditional discharges/probation. It will be argued that the limited use of imprisonment, particularly in cases involving manslaughter convictions, indicates that Irish judges took a lenient approach to sentencing in cases of maternal infanticide. The court records show that a notable aspect of sentencing practice in these Irish infanticide cases is the use of non-penal religious institutions, mostly convents, as an alternative to traditional custody. The impact of patriarchal ideologies and pragmatic considerations on sentencing practice in cases of infanticide is explored, particularly in regard to the use of religious institutions. One of the questions considered is whether the approach to sentencing women convicted of infanticide offences was a unique product of the patriarchal, conservative, catholic, and nationalist philosophies of the Irish Free State, or whether sentencing practice in these cases reflects wider trends in the response to female criminality which have been identified elsewhere.

I - Introduction

During the first decades of Irish independence, the killing of an infant with malice aforethought was murder and, thus, punishable by death. The Irish legislature adopted the English approach to maternal infant-murder (hereinafter infanticide) when it enacted the *Infanticide Act 1949*.[2] This article considers the criminal justice response to maternal

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[1] The Irish Free State was established by the Anglo-Irish Treaty of 1921. The Treaty led to the partition of Ireland, with the creation of a 26-county Free State, an autonomous dominion within the British Empire. The Free State was declared a fully independent republic in 1949 by virtue of the *Republic of Ireland Act 1948* (and the Republic of Ireland Act (Commencement Order) 1949); the Republic of Ireland was granted recognition by Britain in the Ireland Act 1949. See generally F.S.L. Lyons, *Ireland Since the* Famine, 2nd ed. (London: Fontana, 1973) at 421-570.

[2] The term "infanticide" is used in this article in a non-legal sense to refer to cases where women were charged with the murder of their infants aged under one year. This reflects the current legal definition of the term. "Infanticide" was not made a specific offence in Ireland until the enactment of the *Infanticide Act 1949* [hereinafter *1949 Act*]. This statute created the offence of infanticide, a homicide offence akin to manslaughter in terms of its seriousness, punishable by a maximum sentence of penal servitude for life, and triable at the Circuit Criminal Court. Sections 1(2) and (3) of the 1949 Act provided that infanticide would be available as a charge or a conviction, where the woman had "by any wilful act or omission caused the death of her child", in

infanticide in Ireland prior to the introduction of the 1949 statute, focusing on the issue of sentencing of women convicted of non-capital offences after appearing at the Central Criminal Court (C.C.C.) on a murder charge. Drawing on the evidence available in the State Books for the Central Criminal Court (S.B.C.C.C.) for the period 1924-1949, sentencing disposals of women convicted of infanticide-related offences, such as manslaughter and concealment of birth, are explored.[3] As has been found by other scholars,[4] one notable aspect of sentencing in these cases was the use of non-penal institutions, mostly run by Catholic religious congregations, as alternative disposals to imprisonment for women convicted of infanticide-related offences. In this regard, literature concerning the impact of the gender ideologies of the Irish Free State will be examined. The impact of these patriarchal philosophies on sentencing will be considered, alongside other possible motivations for the use of religious establishments in the punishment of maternal infanticide. One of the questions considered is whether the apparent gendered response to infanticide in Ireland was unique to Ireland and a product of the Irish Free State's patriarchal, conservative, catholic, and nationalist philosophies, or whether it reflects wider trends in the response to female criminality which have been identified elsewhere.

II - Gender Ideology of the Irish Free State

In the aftermath of the Great Famine of the mid-nineteenth century, and the social and economic upheaval that ensued, the status of women in Irish society deteriorated.[5] During this period, the economic interests of the strong farmer had a major impact on Irish

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circumstances normally amounting to murder, while "the balance of her mind was disturbed by reason of her not having fully recovered from the effects of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child". The *1949 Act* followed almost exactly the infanticide model created by the English Infanticide Acts of 1922 and 1938. The Irish infanticide provisions have since been amended: see *Criminal Law (Insanity) Act 2006*, s. 22.

[3] Other archival sources were also consulted, including government files on the infanticide reform. Where the term "infanticide-related offence(s)" is used in this article, it refers to convictions for the offences of manslaughter, concealment of birth, or child cruelty/abandonment, on a charge of murder.

[4] For example, see generally, C. Rattigan, *"What Else Could I Do": Single Mothers and Infanticide, Ireland 1900-1950* (Dublin: Irish Academic Press, 2012) [hereinafter Rattigan]; L. Ryan, *Gender, Identity and the Irish Press: Embodying the Nation* (Lampeter: Edwin Mellen, 2002) [hereinafter Ryan, *Gender*]; A. Guilbride, *I Went Away in Silence: A Study of Infanticide in Ireland from 1925-1957* (M.A. Thesis, 1995, WERCC, UCD) [hereinafter Guilbride, *I Went Away*]; S. Larmour, *Aspects of the State and Female Sexuality in the Irish Free State, 1922-1949* (Ph.D. Thesis, University College Cork, 1998) [hereinafter Larmour].

[5] See generally J.J. Lee, "Women and the Church since the Famine" in M. MacCurtain and D. O'Corráin, eds., *Women in Irish Society: The Historical Dimension* (Dublin: Arlen House, 1978) 37-45; R.M. Rhodes, *Women and Family in Post Famine Ireland: Status and Opportunity in a Patriarchal Society* (New York and London: Garland, 1992) at ch. 3 [hereinafter Rhodes].

social life, with one notable effect being an increasingly high regard for female chastity.[6] The predominance of middle-class farmer values contributed to Ireland's emergence as a patriarchal society.[7] With independence from Britain, these patriarchal values made their way into official discourse through the efforts of a predominately male, Catholic, and nationalist administration. Like many of their European counterparts during the inter-war period,[8] Free State officials embarked on a process of "nation-building" and sought to instil and reinforce in the public their ideas of essential "Irish" attributes.[9] As was the case elsewhere,[10] one factor identified as integral to the nation's character was the purity of its citizens, and it seems that increasing disquiet about sexual morality, emanating from government, church and other circles, precipitated a process of legislating to enforce moral order.[11] The Irish state was informed and aided in its legislative efforts by the Catholic Church, which, having gained a uniquely influential position in the new order,[12] served to cultivate, bolster and perpetuate the ideologies on which the Free State leaders sought to develop the Irish nation.[13]

The focus on traditional standards and the perceived link between public morals and the security of the Irish nation had a particular impact on women.[14] Ecclesiastical and political discourse constructed an idealised Irish woman, one who, by being pure, passive, self-sacrificing, and domestic, would support the state's efforts to develop the fledging

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[6] See generally Rhodes, *ibid.*; Lee, *ibid.* at 38-39.
[7] Rhodes, *ibid.*
[8] See J.H. Whyte, *Church and State in Modern Ireland 1923-1979*, 2nd ed., (Dublin: Gill & Macmillan, 1980) at 33-34 [hereinafter Whyte] See also, C. Hug, *The Politics of Sexual Morality in Ireland* (Basingstoke: Macmillan, 1999) at 78-79 [hereinafter Hug]; M. Valiulis, "Neither Feminist nor Flapper: the Ecclesiastical Construction of the Ideal Irish Woman" in M. O'Dowd and S. Wichert, eds., *Chattel, Servant or Citizen: Women's Status in Church, State and Society* (Institute of Irish Studies: Queen's University Belfast, 1995) 168-178, at 177-178 [hereinafter Valiulis].
[9] See generally S. McAvoy, "The Regulation of Sexuality in the Irish Free State, 1929-1935" in G. Jones and E. Malcolm, eds., *Medicine, Disease and the State in Ireland, 1650-1940* (Cork: Cork University Press, 1998) 253-266 [hereinafter McAvoy]; M. Luddy, *Prostitution and Irish Society* (Cambridge: Cambridge University Press, 2007) 194-200 [hereinafter Luddy]; Hug, *ibid.* at 77-84; A. Guilbride, "Infanticide: The Crime of Motherhood" in P. Kennedy, ed., *Motherhood in Ireland* (Cork: Mercier, 2003) 170-180, at 170-171 [hereinafter Guilbride, *Infanticide*]; Valiulis, *ibid.*
[10] See literature cited *supra* note 8.
[11] See literature cited *supra* note 9.
[12] See Whyte, *supra* note 8, esp. chs. 2-10; T. Inglis, *Moral Monopoly: The Rise and Fall of the Catholic Church in Modern Ireland* (Dublin: University College Dublin Press, 1998) at 77-80; D. Ferriter, *The Transformation of Ireland 1900-2000* (London: Profile, 2004) esp. at 337-340, 408-410, 520-523.
[13] See generally, Valiulis, *supra* note 8; Whyte, *supra* note 8, ch. 2; Luddy, *supra* note 9 at 194-197; Hug, *supra* note 8 at 77-78.
[14] This was also the case elsewhere. See literature cited at *supra* note 8.

nation and help defend it against the forces of modern influence.[15] Particular importance was placed on the virtue of Irish women. It seems that a view emerged which identified sexual immorality in females as posing a threat, not only to the family, but also to the stability of the new nation.[16] One group of women attracted particular attention in the state's drive towards national purity: the unmarried mother. These women represented the antithesis of the idealised version of womanhood presented by state and church officials and were thought to pose a particular danger to the nation's morality.[17] Thus, although motherhood was idealised by politicians and church-men alike, "the female body and the maternal body, particularly in its unmarried condition, became a central focus of concern to the state and the Catholic Church".[18]

A. Unmarried Mothers and the Irish Free State

During this period in Irish history, and indeed for decades after, giving birth outside of wedlock was an intensely shameful experience which presented many difficulties for women. Strong cultural disapproval of illegitimacy and sexual immorality meant unmarried mothers potentially faced familial condemnation and alienation from the community, as well as unemployment and economic hardship. Double standards in sexual morality allowed men to avoid responsibility.[19] Although it was possible to seek financial assistance from the infant's father through the courts, this was not without obstacles, not least of which was the requirement for corroborative evidence of paternity.[20] Unmarried pregnant women and girls who were not offered family protection, or who were without other forms of support were expected to rely on the care offered by the local County Home[21] or, preferably, a charitable institution, such as a Magdalen asylum or another special religious establishment which catered for unmarried mothers.[22] Luddy has noted that the Catholic Church willingly adopted the role of providing for care and assistance for unmarried mothers, viewing it as

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[15] See generally Valiulis, *supra n*ote 8. See also Luddy, *supra* note 9 at 194-197; L. Ryan, "Irish Newspaper Representations of Women, Migration and Pregnancy outside Marriage in the 1930s" in M. C. Rambladо-Minero and A. Pérez-Vides, eds., *Single Motherhood in Twentieth Century Ireland: Cultural, Historical and Social Essays* (New York: Edwin Mellen Press, 2006) 103-122, at 105-106 [hereinafter Ryan, *Newspaper Representations*].
[16] Luddy, *supra* note 9 at 194-197; Ryan, *Gender*, *supra* note 4 at 257-259.
[17] Luddy, *supra* note 9 at 197 and 200-203.
[18] *Ibid.* at 194.
[19] Ryan, *Newspaper Representations*, *supra* note 15 at 116-117; Guilbride, *Infanticide*, *supra* note 9 at 176-177.
[20] *Illegitimate Children (Affiliation Orders) Act 1930.* See McAvoy, *supra* note 9 at 260; Guilbride, *ibid.* at 173.
[21] These had previously been workhouses under the Poor Law system.
[22] See generally L. Earner-Byrne, *Mother and Child: Maternity and Child Welfare in Dublin, 1922-60* (Manchester: Manchester University Press, 2007) 182-190 [hereinafter Earner-Byrne]; Luddy, *supra* note 9 at 117-123, 201-203 and 235-237; Ryan, *Newspaper Representations*, *supra* note 15 at 107.

an opportunity not only to reform sexually deviant women and to prevent them from further moral corruption, but also to ensure their retention in the Catholic faith.[23]

Although there were no legal powers by which to compel a woman to attend or remain at an institution for "fallen women", the official stance seems to have been that unwed mothers seeking assistance should rely on voluntary institutions run by Catholic nuns, or, for those of other religious denominations, another suitable home or refuge.[24] The rationale for detention of unmarried mothers was three-fold: prevention; redemption; and containment.[25] Women seem to have been separated into categories depending on their number of "falls".[26] The attitude towards first "offenders", the "hopeful cases", was not necessarily unforgiving.[27] They were identified as innocent victims who were susceptible to moral reform, and, thus, were treated less severely. They were also possibly subject to less lengthy stays, with one year being the recommended residence period.[28] Repeat offenders, the "less hopeful cases", seem to have been separated from other women and were possibly detained for longer periods for the purpose of containment.[29]

In summary, as a result of cultural and ideological views, unmarried motherhood was largely unacceptable in the Irish Free State. From the state's point of view, it appears that the solution to the issue of unmarried motherhood was to tacitly support institutionalisation of problematic women, for such periods as would ensure their reform and, in some cases, protect society against moral contagion.

II - Infanticide in the Irish Free State

The previous section outlines the prevailing official gender ideology of the Irish Free State, and the impact of this, in conjunction with wider cultural disapproval of

[23] See Luddy, *supra* note 9 at 200-201.
[24] *Ibid.* at 117. The state offered no financial support; see E. Conway, "Motherhood Interrupted: Adoption in Ireland" in P. Kennedy, ed., *Motherhood in Ireland* (Cork: Mercier, 2003) 181-193 at 184.
[25] See generally, Luddy, *supra* note 9 at 117-119 and 200-203; Earner-Byrne, *supra* note 22 at 187 and 189-190.
[26] See generally, Luddy, *supra* note 9 at 117-119 and 201-203; Earner-Byrne, *supra* note 22 at 186-187 and 189.
[27] Luddy, *supra* note 9 at 118 and 201.
[28] *Ibid.* at 118 and 201-202.
[29] Luddy, *supra* note 9 at 118-119 and 201-203; Earner-Byrne, *supra* note 22 at 186-187 and 189. The one year minimum period specified is based on the recommendations of a 1927 official report: see Luddy, *supra* note 9 at 201-202, referring to the report of the *Commission on the Relief of the Sick and Destitute Poor, Including the Insane Poor*, Dublin, 1928. See also R.S. Devane, "The Unmarried Mother and the Poor Law Commission" (1928) 31(6) The Irish Ecclesiastical Record 561-588 at 578-580.

illegitimacy, on women who gave birth outside of marriage. This section briefly explores the phenomenon of infanticide during this period of Irish history, focusing in particular on the criminal justice response to this crime.

In Ireland, as has been the case elsewhere where women faced adversity and stigmatisation for bearing children out of wedlock,[30] infanticide also featured as a phenomenon predominantly associated with women who gave birth to illegitimate infants.[31] According to figures published by the Central Statistics Office (hereinafter C.S.O.), there were 135 infant-murders[32] and 896 concealment of birth cases recorded between 1927 and 1949.[33] The S.B.C.C.C. for the period 1924 to 1949 contain the records of at least 181 cases where an individual was charged with the murder of a newly- or recently-born infant; in at least 160 of these cases the victim's mother was charged.[34] The typical offender was an unmarried woman who was suspected of killing her infant at or soon after birth following a

[30] See: P.C. Hoffer & N.E.H. Hull, *Murdering Mothers: Infanticide in England and New England 1558-1803* (New York: New York University Press, 1981) esp. ch. 4; K. Wrightson, "Infanticide in European History" (1982) 3 Criminal Justice History 1-30; F. McLynn, *Crime and Punishment in Eighteenth Century England* (London: Routledge, 1989) 110-115; J.M. Beattie, *Crime and the Courts in England, 1600-1800* (Princeton: Princeton University Press, c.1986)113-124; R.W. Malcolmson, "Infanticide in the Eighteenth Century" in J.S. Cockburn ed., *Crime in England, 1500-1800* (London: Methuen, 1977) 187-209; D. Seaborne Davies, "Child Killing in English Law" in L. Radzinowicz and J.W.C. Turner, eds., *The Modern Approach to Criminal Law* (London: Macmillan, 1945) 301-343 [hereinafter Seaborne Davies]; L. Rose, *Massacre of the Innocents: Infanticide in Britain 1800-1939* (London: Routledge & Kegan Paul, 1986); A.R. Higginbotham, "'Sin of the Age': Infanticide and Illegitimacy in Victorian London" (1989) 32(3) Victorian Studies 319-337 [hereinafter Higginbotham]; C.B. Backhouse, "Desperate Women and Compassionate Courts: Infanticide in Nineteenth Century Canada" (1984) 34(4) University of Toronto Law Journal 447-478.

[31] For accounts of infanticide in the Irish Free State see Rattigan, *supra* note 4; Guilbride, *Infanticide*, *supra* note 9; Ryan, *Gender*, *supra* note 4, ch. 6; L. Ryan, "The Press, Police and Prosecution: Perspectives on Infanticide in the 1920s" in A. Hayes and D. Urquhart, eds., *Irish Women's History* (Dublin: Irish Academic Press, 2004) 137-151.

[32] Defined as the murder infants aged one year and under; Central Statistics Office, *Annual Abstracts 1927-1949*. The murder of persons aged over one year is recorded separately.

[33] *Ibid.* The Central Statistics Office did not publish criminal statistics for the period up to 1927. These figures show a significant fall in these crimes since the mid-eighteenth century. See I. O'Donnell, "Lethal Violence in Ireland, 1841 to 2003: Famine, Celibacy, and Parental Pacification" (2005) 45 British Journal of Criminology 671-695 [hereinafter O'Donnell].

[34] See National Archives of Ireland: State Books at Central Criminal Court IC-88-59 (Oct. 1924-April 1925, Dublin City); IC-88-61 (June 1925 – Dec. 1926, Change of Venue Cases Dublin); IC-88-60 (June 1925 - June 1927, Dublin), ID-33-68 (Nov. 1927 – June 1933); ID-24-129 (Feb. 1928 – Nov. 1943, City of Dublin); ID-11-92 (Nov. 1933 – April 1941), ID-27-1 (Oct. 1941 – Dec. 1945), V15-4-15 (Feb. 1946 – Dec. 1952). National Archives of Ireland [hereinafter N.A.I.]; S.B.C.C.C. These records provide the following information: the name of the offender(s); the offence(s) charged; the result of the criminal proceedings; the sentence imposed. This sample includes only those cases where it is evident from the information contained in the S.B.C.C.C. that the victim was an infant. The mother of the infant was accused of the murder in at least 160 of these cases. In ten of the remaining 21 cases, it is clear that the accused was not the mother of the infant; the relationship of the accused to the victim is unknown in 11 cases, though it is probable that in most, if not all, of these cases that the accused was the victim's mother. There are undoubtedly other cases of infant-murder in the S.B.C.C.C. which have been omitted from this sample due to the limited information provided on the S.B.C.C.C. record. For the period 1922-1950, Rattigan, *supra* note 4, identified 191 cases of "infanticide", involving mothers and other individuals.

concealed pregnancy.[35] The accused usually acted alone.[36] Occasionally, however, a close female relative, such as a sister, mother, or grandmother, provided assistance. Men were rarely charged in connection with the murder of an infant. In particular, the victim's father was normally not involved.[37]

The historical record shows that although numerous women suspected of killing their infants appeared at the C.C.C. on murder indictments between 1924 and 1949, the vast majority of these cases were ultimately disposed of on the basis of a non-capital conviction. As stated, 160 cases of maternal infanticide were identified in the S.B.C.C.C. in this study.[38] Forty-five cases in this sample were disposed of by a jury verdict. Juries proved very reluctant to convict of the capital charge, finding the woman guilty of murder in only eight cases (17.4 % of those tried and 5% of those charged). The majority of the cases, 58.8% (twenty-six in total), where the accused was tried before a jury on a murder indictment, resulted in a full acquittal. However, in two of these cases, the accused, who had also been charged with concealment of birth (hereinafter C.O.B.), had pleaded guilty to that offence and so did not avoid conviction altogether. One woman was found "guilty but insane". In the remaining ten cases, the accused was acquitted of murder, but convicted of either manslaughter (five cases) or C.O.B. (five cases). The majority of women charged with murdering their infants, 72% (112 cases), pleaded guilty, usually at arraignment, to a lesser related offence, mainly manslaughter (sixty-two cases) or C.O.B. (forty-seven cases),[39] and the prosecution did not pursue further the murder charge.[40] This practice is particularly

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[35] See Rattigan, *supra* note 4 at ch. 1, esp. at 38-58; Ryan, *Gender*, *supra* note 4 at 269-271. The S.B.C.C.C. often describes the victim as an "unnamed" or "recently born" infant.

[36] Another person was also charged with the murder of the infant, either on the same or a separate indictment, in 18 out of the 160 cases involving mothers that were identified from the S.B.C.C.C. records.

[37] For accounts of cases involving other persons, particularly family members, see: C. Rattigan, "'Done to Death by Father or Relatives': Irish Families and Infanticide Cases, 1922-1950" (2008) 13(4) The History of the Family 370-383; Ryan, *Gender*, *supra* note 4 at 282-286.

[38] See *supra* at note 34.

[39] Three women pleaded guilty to the statutory offences of abandonment or child cruelty under the *Children's Act 1908*, section 12.

[40] In some cases C.O.B. or abandonment/cruelty had been charged as a separate offence on the same or a separate indictment. The offence of C.O.B. was (and continues to be) provided for by section 60 of the *Offences against the Person Act 1861*; 24 and 25 Vict. c. 100 (hereinafter *O.A.P.A. 1861*). This offence was classified as a misdemeanour and was punishable by a maximum of two years imprisonment (with hard labour). Section 60 makes it an offence for any person to "endeavour to conceal the birth" of a child "by any secret disposition of the dead body of [that] child, whether such child died before, at, or after its birth… ." C.O.B. is not a homicide offence, though historically it has featured very commonly in infanticide cases in England and other jurisdictions as an alternative to a murder conviction where "live birth" could not be established, or where jurors were uneasy about convicting the woman of a capital offence. See R. Sauer, "Infanticide and Abortion in Nineteenth Century Britain" (1978) 32 Population Studies 81-93 at 82; Higginbotham, *supra* note 30 at 331-332; Seaborne Davies, *supra* note 30 at 321; K.J. Kramar, *Unwilling Mothers, Unwanted Babies: Infanticide in Canada* (Vancouver: University of British Columbia Press, 2005) at ch. 1 [hereinafter Kramar].

evident during the 1940s, where over 90% of all cases where a woman appeared before the C.C.C. on a charge of murder did not go to trial because the accused pleaded guilty to a non-capital offence.[41] In total, 124 women were convicted of a non-capital offence after appearing at the C.C.C. on a murder charge and their cases were disposed of on that basis.[42]

This outline of disposals of maternal infanticide cases at the C.C.C. provides only a snapshot of the criminal justice response to this crime. It does not, for example, account for manslaughter and C.O.B. charges prosecuted at either the C.C.C. or the lower courts of criminal trial during this period. As noted, almost 900 cases of C.O.B. were recorded by the C.S.O. between 1927 and 1949, almost all of which would not have been prosecuted at the C.C.C. An unknown number of these cases may have involved unlawful killings for which there was inadequate evidence to support a murder indictment. Furthermore, a Department of Justice memorandum connected with the infanticide reform of 1949 noted that for "motives of humanity", the Attorney General usually reduced a murder charge to C.O.B, unless the evidence obliged him to proceed with the capital indictment.[43] District judges at preliminary hearings may well have reduced a number of murder charges to C.O.B., either for reasons of sympathy or because there was insufficient evidence to support the capital charge. Thus, not every case of suspected murder was prosecuted on that charge.

Overall, the evidence available shows that maternal infanticide was unambiguously treated with leniency. Although this crime was clearly not ignored by the authorities, very few women charged with murdering their infants were actually convicted of that offence, with most of those charged being disposed of on the basis of self-conviction for a non-capital offence. In the following section, the criminal justice response to maternal infanticide is further explored by examining the way the courts sentenced women convicted of an infanticide-related offence at the C.C.C.

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[41] Fifty-seven cases of maternal infant-murder appeared at the C.C.C. during that time: in 52 cases the accused pleaded guilty to a lesser-related offence. The outcomes of the remaining cases, all of which went to trial, are: two murder convictions, one of which was successfully appealed and the woman pleaded guilty to manslaughter at a re-trial; one insanity verdict; two acquittals.

[42] For a detailed discussion of the prosecution of infanticide at the C.C.C. during this period, see K. Brennan, "'A Fine Mixture of Pity and Justice': The Criminal Justice Response to Infanticide in Ireland, 1922-1949" Law and History Review (forthcoming).

[43] N.A.I., DJ 8/144/1, memo dated Feb. 1949.

III - Sentencing of Women Convicted of Infanticide-Related Offences at the C.C.C, 1924-1949

Of the 160 women in this sample who appeared at the C.C.C. on an infant-murder charge, eight were sentenced to death, as was mandatory on a murder conviction.[44] However, a reprieve was granted in each of these cases and the sentence was commuted to penal servitude for life. The S.B.C.C.C. provides no further information on these cases. However, two "Returns of Persons Sentenced to Death", covering the period 1922-1937, indicate that it was standard practice for juries to recommend mercy in infanticide cases and for trial judges to endorse this in their recommendation to the Executive Council (the government).[45] It seems that women were usually released on licence after serving only a few years of their sentence.[46] Given that the judiciary had no discretion regarding the sentence imposed for murder, these cases are not considered further, except to say that it appears to have been unambiguously accepted by the judiciary and the government that women who murdered their infants ought not to be subject to the death penalty, or, indeed, a lengthy prison stay.[47]

One hundred and twenty-four women were sentenced at the C.C.C. for an infanticide-related offence.[48] All of those sentenced in this sample had initially been charged with murder, but the case had been disposed of on the basis of a conviction for manslaughter, C.O.B., or, more rarely, abandonment or child cruelty. The vast majority of these offenders were sentenced on foot of a guilty plea to one of the aforementioned offences; only ten of the 124 women sentenced for an infanticide-related offence in this sample had been convicted by a jury of that offence following a murder trial.[49] Sixty-seven

[44] One other woman was found guilty but insane and was ordered to be detained at the pleasure of the Governor-General. See N.A.I., S.B.C.C.C. I.D.-27-1, *A.G. v. M.F.*, 15 Nov. 1943. To preserve anonymity, only the initials of those accused of infanticide are provided in this article.

[45] N.A.I., Department of Taoiseach file (Capital Punishment) s7788(a), Return of Persons Sentenced to Death, 1922-32/1932-37. This Return of death penalty cases includes two other cases of maternal infanticide that resulted in a murder conviction which are not listed on the S.B.C.C.C. These cases are not included in this sample.

[46] *Ibid.*

[47] Some women who were released early on licence may have been sent to a Magdalen Laundry or another similar institution: see *The Report of the Interdepartmental Committee to establish the facts of State involvement with the Magdalen Laundries* (February 2013) at ch. 9 para. 216-218, available at: http: http://www.justice.ie/en/JELR/Pages/MagdalenRpt2013 [hereinafter Magdalen Report].

[48] See *supra* text at notes 38-42.

[49] *Ibid.*

women were sentenced on a manslaughter conviction; 54 were sentenced on a conviction for C.O.B.; and three women were sentenced for another offence.[50]

Slightly more than half of the women in this sample (65 of the 124 women who were sentenced for an infanticide-related offence; 52.4%) were given a custodial sentence, either a term of penal servitude, or a term of imprisonment, with or without hard labour.[51] 40.7% of women convicted of C.O.B. and 64.2% of those convicted of manslaughter were disposed of in this way. Custodial terms ranged from two months to four years in length, with most sentences, 63.1% (41 in number), being for a period of 12 months or less. In terms of the difference between manslaughter and C.O.B. convictions, the vast majority of those convicted of the latter (90.9%) received a term of imprisonment of 12 months or less, while a little less than half of those convicted of manslaughter were given a custodial term of 12 months or less (48.8%). Indeed, a slight majority (51.2%) of those sentenced on the homicide offence were given a period of at least 18 months custody. No-one convicted of C.O.B. was given a term in excess of eighteen months imprisonment.[52] In about one fifth (20.9%) of cases where a custodial sentence was given on a manslaughter conviction, the term imposed was in excess of two years.[53] Presumably, the fact that custody was imposed more frequently and for longer terms in cases of manslaughter reflects the increased seriousness of this offence.

However, only 20 women (16.1% of the 124 women who were sentenced on an infanticide-related conviction) actually served a term of imprisonment. In the majority of cases (69.2%) where custody was imposed, the sentence was suspended on the accused entering a recognisance to abide by certain conditions. It appears that none of the suspended sentences were subsequently activated as a result of the offender defaulting on her recognisance. There was little difference between the numbers of women convicted of either C.O.B. or manslaughter who actually served a prison sentence: only 14.8% of those convicted of C.O.B. and 17.9% of those convicted of manslaughter were sent to prison. Thus, the disparity noted between the number of C.O.B. and number of manslaughter

[50] See generally, *ibid.*
[51] Women convicted of C.O.B. were punishable by a maximum sentence of two years imprisonment with or without hard labour; *O.A.P.A. 1861*, section 60. Manslaughter was punishably by a maximum sentence of penal servitude for life; *O.A.P.A. 1861*, section 5.
[52] Indeed only two of those convicted of C.O.B. were given a term of greater than 12 months; both of these women were sentenced to 18 months imprisonment. The sentence was not suspended in either case.
[53] In each of these cases the sentence was penal servitude, the minimum term being three years. No woman was given a term in excess of 4 years penal servitude.

convictions that attracted a custodial sentence is accounted for by the fact that suspended sentences were more commonly imposed in cases of manslaughter.[54]

It is apparent that in addition to the trend of suspending custodial sentences in infanticide cases, a high percentage of women who appeared at the C.C.C. for sentence on an infanticide-related conviction were not given a custodial sentence. Indeed, despite the fact that the offences these women were convicted of were all punishable by imprisonment/penal servitude, 47.6% of cases (59 in total) where a woman was sentenced for an infanticide-related offence did not attract a custodial penalty. In five of these cases, the offender was discharged without conditions; in one other case the woman was discharged on the basis of an undertaking entered by a third party.[55] In the remaining 53 cases, the accused was released[56] on entering a recognisance to abide by particular conditions. It appears that recognisances were entered either as part of a conditional discharge (or probation) under the provisions of the *Probation of Offenders Act 1907* (*P.O.A. 1907*),[57] or possibly in some cases as a result of the court's traditional authority to require offenders to enter recognisances or, in other words, to "bind-over" offenders with certain conditions attached.[58]

The *P.O.A. 1907* provides that on a conviction on indictment for an offence punishable by imprisonment the court may, in lieu of imprisonment, order that the offender be conditionally discharged on their entering into a recognisance to be of good behaviour and to appear for sentence if called to do so at any time during a specified period.[59] Aside from probationary supervision,[60] other more onerous conditions, including requirements as

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[54] 46.3% (31 in number) of women convicted of manslaughter were given a suspended custodial sentence; only 25.9 per cent of COB convictions attracted this penalty.

[55] N.A.I., S.B.C.C.C. I.C.-88-61, *A.G. v. M.J.McD.*, 8 Feb. 1927: "discharged on undertaking of Mrs M[…] to hand prisoner over to Mr C[…] of […]". It is not clear who these parties were, and, in particular, whether this involved some kind of institutional disposal.

[56] The terminology used in the records was that the offender was "allowed out", was released, or was discharged.

[57] 7 Edw. VII, c. 17.

[58] For information on the recognisance/the bind-over see: N. Walker, *An Analysis of the Penal System in Theory, Law and Practice: Crime and Punishment in Britain*, 2nd ed., (Edinburgh: Edinburgh University Press, 1968) 169-170 [hereinafter Walker]; T. O'Malley, *Sentencing Law and Practice*, 2nd ed., (Dublin: Thomson Round Hall, 2006) ch. 25 [hereinafter O'Malley]; N. Morgan, "Binding Over: the Law Commission Working Paper" [1998] Criminal Law Review 355-368 [hereinafter Morgan].

[59] *P.O.A. 1907*, section 1(2). The maximum period that could be set was three years.

[60] *P.O.A. 1907*, section 2(1). The Act essentially allowed for two disposals on a conviction on indictment, either a recognisance/a conditional discharge, or a probation order (a conditional discharge with supervision); see G. Mair & L. Burke, *Redemption, Rehabilitation and Risk Management: A History of Probation* (Abingdon: Routledge,

to residence, and any other conditions "as the court may, having regard to the particular circumstances of the case, consider necessary for preventing a repetition of the same offence or the commission of other offences", could also be attached.[61] The S.B.C.C.C. records do not clearly specify whether in cases involving recognisances judges were imposing a conditional discharge/probation under the *P.O.A. 1907* or a bind-over. It is assumed that where the two requirements of a conditional discharge, namely to be of good behaviour and to come up for sentence if called, were imposed, that the judge was exercising his discretion under the 1907 statute.[62]

Where an infanticide offender entered a recognisance, either as a result of a suspended sentence, a conditional discharge/probation,[63] or possibly a bind-over, she was usually conditioned to keep the peace and/or be of good behaviour for a certain period, and, in most cases, was also bound to appear for sentence if called upon to do so. Aside from these standard requirements, the most common condition attached to a recognisance undertaken at the C.C.C. by a woman who had been convicted of an infanticide-related offence was that the she would enter and remain at a designated institution, usually a religious-run establishment, for a specified period, and that she would obey the rules and regulations there.[64] Forty of the 45 women who were given a suspended sentence and 33 of the 53 women who were conditionally discharged/bound over undertook to abide by a condition of institutional residence.

Overall, 73 women (58.9%) in this sample entered a recognisance which incorporated a condition of institutional residence. The vast majority were sent to convents

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2012) at 26 [hereinafter Mair & Burke]. Probation is essentially a conditional discharge with a condition of supervision attached; see O'Malley, *supra* note 58 at 472-473.

[61] See *P.O.A. 1907*, s. 2(2), as amended by the *Criminal Justice Administration Act, 1914*, section 8 [4 & 5 Geo. V, c. 58].

[62] Possibly the Irish records inaccurately recorded the conditions attached to the recognisance in some cases – *i.e.* there may be cases where the offender was conditionally discharged under the *P.O.A. 1907*, but the record does not accurately reflect this. However, in cases where the recognisance did not include the requisite conditions for a conditional discharge, it is possible that the court was using the bind-over option. There appears to be a lack of clarity, however, in the authorities on whether the bind-over could be used as a sentence in its own right, or whether, particularly in cases involving felonies, it was an ancillary order. Walker, *supra* note 58 at 169-170, notes that courts could order persons to enter recognisances to keep the peace and be of good behaviour either in combination with another sentence (for certain offences), or instead of passing sentence. However, see also Morgan, *supra* note 58 at 360-361; O'Malley, *supra* note 58 at 486.

[63] Although in some cases it is evident that probationary supervision was attached, it is not always clear from the records whether the offender was placed under the supervision of a probation officer. Due to the lack of clarity in the records, no distinction will be made in this article between discharges involving probationary supervision and those which did not (see *supra* at note 60); disposals under the *P.O.A. 1907* will be referred to generally as conditional discharges.

[64] In one case, it appears that the judge ordered the woman to reside at the home in question, without her having agreed to this as part of an undertaking to the court.

run by Catholic nuns, such as the various Magdalen asylums in Dublin and other parts of the country, and Our Lady's Home at Henrietta Street in Dublin; protestant offenders were sent to Bethany Home in Dublin, and one woman was sent to a Legion of Mary Hostel.[65] In 93.2 % of cases involving institutional detention, the period specified was between one and two years. The terms imposed were: three months (1 case); 12 months (35 cases); 15 months (2 cases); 18 months (14 cases); two years (17 cases) and three years (3 cases).[66] In one case, the offender was sent to a convent "until her marriage … was solemnised".[67]

In terms of the length of residence required as part of these recognisances, it appears that women sent to convents and other similar establishments were often sentenced to a longer periods of institutional "detention" than those given an ordinary custodial penalty.[68] This is particularly evident in cases involving C.O.B. convictions. For example, over 90% of those given a prison term on foot of a C.O.B. conviction were given a sentence of 12 months or less. No-one convicted of that offence was given the maximum term of two years imprisonment and only two women (9.1%) were given a term exceeding one year.[69] However, just over 35% of institutional disposals in cases involving C.O.B. convictions involved a term of residence in excess of 12 months. Indeed, just over one quarter of convent disposals on a C.O.B. conviction involved at least a two-year residential period.[70] Although the disparity is not as evident in manslaughter cases, there does seem to have been a tendency to impose slightly longer terms of institutional residence.[71]

An examination of those cases where a custodial sentence was suspended in favour of institutional residence also indicates that judges tended to send women to convents for longer periods than they did in the case of prison. In 42.5% of such cases the period of institutional residence was longer than the custodial term imposed. More strikingly, in a significant majority (76.9%) of COB cases where a term of imprisonment had been

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[65] For convenience, references to convents in this article encompass establishments run by Catholic nuns, and Bethany Home. Legion of Mary Hostels were often used as places of residence for offenders on probation; see E. Fahy, "Probation of Offenders" (1943) 62 Hermathena 61 at 80 [hereinafter Fahy].

[66] In the vast majority of cases the period of residence set was definite. Very occasionally, however, the record notes that the offender was to reside at the institution in question for *at least* the period stated.

[67] See N.A.I., S.B.C.C.C. I.D.-11-92, *A.G. v. T.C.*, 19 Nov. 1934.

[68] See Rattigan, *supra* note 4 at 210-211, who makes the same finding.

[69] In both cases an 18-month term was imposed. See *supra* note 52.

[70] 22.58% (seven) were given a 2 year term; 9.68% (three) were given an 18-month term; one woman was given a three-year term, with an option for release after two years on the approval of the institution's medical officer.

[71] 62.5% of women convicted of manslaughter (25) who were given a convent disposal were detained for a period in excess of 12 months, while only slightly more than half of those (51.2%) given prison terms were sentenced to a term of greater than 12 months. However, most of the prison terms were suspended.

suspended in favour of an institutional disposal, the offender was subjected to a lengthier term of detention than if she had been sent to prison; the same is true in a little over a quarter of manslaughter cases.[72]

In choosing the period of residence required, though judges were likely influenced by standard sentencing considerations, such as, for example, offence seriousness, and other aggravating or mitigating factors, they were also possibly constrained by the policies of the institutions involved. The establishments relied on were voluntary organisations and therefore were not subject to state control or interference. Thus, admission to a convent or similar institution was at the discretion of the authorities there and they were not legally obliged to admit criminal offenders.[73] It seems plausible that the institutional authorities were able to suggest, if not prescribe, as a condition of admitting an offender, the period of residence to which she be subject. Institutional disposals at the C.C.C. were usually for periods of between one and two years duration.[74] If the minimum period of residence for unmarried mothers seeking assistance at these institutions was not less than twelve months,[75] it is possible that female offenders would not have been accepted unless they agreed to stay for a period congruent with institutional policy in relation to other residents.

As noted, the provisions of the *P.O.A. 1907* granted judges the authority to impose a wide range of conditions to a conditional discharge, including, specifically, a requirement as to residence.[76] Under this statute judges had the discretion to impose such conditions for a maximum of three years.[77] In the case of suspended sentences and bind-overs, it seems that courts derived authority to impose institutional residence as a result of its own assumed power to attach a wide range of conditions to these non-statutory disposals. Luddy notes, however, that in the early 1940s Department of Justice officials expressed unease about the practice of suspending sentences on condition that the offender undertook to enter a religious institution, noting that this "makeshift practice" left the authorities powerless to force offenders to remain if they decided to leave at any time.[78] However, although there

[72] In 44.4% of manslaughter cases where a woman was given a suspended sentence with an institutional disposal, the required period of residence was equal to the proposed period of imprisonment.
[73] J.M. Smith, *Ireland's Magdalen Laundries and the Nation's Architecture of Containment* (Notre Dame: University of Notre Dame Press, 2007) at 65 [hereinafter Smith].
[74] See *supra* text at notes 66-67. Overall, three women were given a residence period in excess of two years; only two women were given a term of less than one year.
[75] See *supra* text at notes 28-29.
[76] See *supra* text at note 61.
[77] *P.O.A. 1907*, s.1(2). See *supra* text at note 59.
[78] Luddy, *supra* note 9 at 121, referring to N.A.I., Department of Justice 8/128 Criminal Justice (Female Offenders Bill) 1942, File Jus 8/128.

may have been no statutory power by which to compel a female offender to remain at a convent, courts did retain the authority to impose a prison sentence in the event of the offender being in breach the terms of the recognisance. In most cases where a period of institutional residence was agreed to as part of a recognisance, it constituted an alternative to a custodial sentence, which had either been suspended or which the court retained the option to pass for a specified period.[79] The threat of a custodial penalty probably constituted sufficient incentive for compliance with the residential requirement attached to the recognisance. The S.B.C.C.C. notes only one case where a woman defaulted on her recognisance, which was entered as part of a conditional discharge, by breaking the rules and regulations of the convent to which she had been sent. She was brought before the court twice and was eventually ordered to serve a term of imprisonment.[80]

Not every woman who was conditionally discharged, bound-over, or given a suspended sentence was required to undertake a period of institutional residence. Five of those given suspended sentences and 20 of the 53 women who entered a recognisance as part of a conditional discharge or bind-over were released into the community. One woman in the latter group was handed over to her parents on release. Interestingly, one woman who was conditionally discharged/bound-over also undertook to "immediately" marry a particular individual, presumably the father of the infant-victim. Two months later, a certificate of marriage was lodged with the court and it was noted on the record that "there will be no necessity for further appearance or application on her behalf to the court".[81] Finally, in three cases, the offender entered a recognisance to appear at the next sitting of the court for sentence if called upon to do so. All of these women were married in the interim period.[82] Arguably, marriage was an implicit condition of their release and of the court's decision not to sentence.

This account of sentencing of women convicted of infanticide-related offences at the C.C.C. during the period 1924-1949 indicates that Irish judges tended to avoid imposing a custodial sanction on these offenders. Although just over half of those sentenced were given

[79] Forty cases involved a suspended sentence; 33 cases involved recognisances, 23 of which included an undertaking to come up for sentence if called. It is unclear whether in the remaining cases (10 in total) the court retained the power to sentence the offender should she default on the terms of her recognisance. If these cases involved a bind-over, it would appear that no such power existed; see Morgan, *supra* note 58 at 361-362.
[80] N.A.I., S.B.C.C.C. ID-33-68, *A.G. v. N.H.*, 9 June 1931.
[81] N.A.I., S.B.C.C.C. ID-33-68, *A.G. v. M.H.*, 9 June 1931.
[82] N.A.I., S.B.C.C.C. ID-27-1, *A.G. v. K.McG.*, 9 June 1942; *A.G. v. S.M.*, 15 Nov. 1943; *A.G. v. N.O'S.*, 13 Nov. 1945.

a term of imprisonment, only 16% of the women in this sample actually served time in prison.[83] Courts commonly used non-custodial sentencing options, including conditional discharges under the *P.O.A. 1907*, and possibly bind-overs, even in cases involving manslaughter convictions. What is most striking about sentencing practice in these cases is that almost 60% of these offenders were required to reside at a religious institution for a specified period. The use of convents and other similar institutions as a sentencing option in cases of infanticide will be further explored in the following section.

IV - Punishment or Mercy: Religious Institutionalisation as a Sentencing Disposal

From the above analysis it is apparent that Irish judges took a lenient approach to sentencing women for infanticide-related offences. The crimes for which these women were being sentenced were mainly manslaughter, which was punishable by a maximum of life imprisonment, and C.O.B., which was punishable by a maximum sentence of two years imprisonment with hard labour.[84] Custodial sentences were imposed in only slightly more than half of the cases in this sample, and most of these were suspended. While suspended sentences did constitute a formal punishment, the offender was able to avoid the punitive consequences of this sanction by observing certain conditions. Further, even where a sentence had been imposed, suspended or otherwise, it was rare for the offender to be given a custodial period of more than two years. Indeed, looking only at those cases where a term was actually served, only three women, all of whom had been convicted of manslaughter, spent more than two years in prison.

A similar disinclination to send women to prison for infanticide is also evident in England during the same period. Nigel Walker, in his examination of sentencing practice in England between 1922 and 1965 found a steady reduction in the use of imprisonment for the offence of infanticide, which had been made a separate category of homicide by virtue of the *Infanticide Act 1922*.[85] For example, between 1923 and 1927, 59 women were sentenced for infanticide. 49.1% were given a prison sentence, two of them for three or four years

[83] This figure excludes those who were imprisoned following a murder conviction.
[84] See *supra* note 51.
[85] N. Walker, *Crime and Insanity in England, vol 1: The Historical Perspective* (Edinburgh: Edinburgh University Press, 1968) 133. The Infanticide Act 1922 (12 & 13 Geo. V, c. 18) created the offence of infanticide. It was available where a woman wilfully killed her newly-born child while the balance of her mind was disturbed from the effects of childbirth. This was amended in 1938 to extend the provisions to cover victims up to the age of twelve months and mental disturbances caused by the effects of lactation consequent on childbirth; *Infanticide Act 1938* (1 & 2 Geo VI, c. 36). Infanticide was punishable by a maximum sentence of life imprisonment.

penal servitude; 42.4% were given recognisances; 5.1% were given probation; and 3.4% were otherwise dealt with. Between 1946 and 1950, almost half of those convicted of infanticide (49%) were given probation, while only 22.3% were imprisoned; 24.4% were given recognisances and 4.3% were otherwise dealt with.[86] Walker concludes that "… the virtual abandonment of prison sentences as a means of dealing with a crime involving the taking of human life is one of the most striking developments in the history of our sentencing policy".[87]

Interestingly, Kramar's overview of sentencing statistics for C.O.B. in Canada demonstrates a slight increase in the use of imprisonment for those convicted of C.O.B. during this period. For example, for the period 1920-1929, 46.2% of those convicted of C.O.B. were given a sentencing disposal classified as "other" (most likely probation); 43.7% were incarcerated in jails (mostly for a period of one year or less); 10.3% were sent to reformatories. In the following decade, 43% of C.O.B. convictions resulted in an "other" disposal; 40.2% were given jail terms (again mainly for periods of less than one year); while 17.2% were sent to reformatories. For the period 1940-1948, only 34% of convictions resulted in an "other" disposal; 14% were sent to reformatories; the remainder (48.8%) were incarcerated in jails.[88] Overall, however, the data indicates a tendency towards lenient sentences with the majority of women being given a probationary sentence or a period of detention at a reformatory; where jail sentences were imposed, these were generally for short periods and the offender was often released after a serving a few months.[89]

Thus, it seems that Irish judges were not alone in their non-custodial approach to infanticide. However, the common practice of attaching a condition of institutional residence to suspended sentences, conditional discharges and other recognisances meant that in order to avoid a prison term many women had to abide by a particularly onerous condition which, among other things, involved a deprivation of liberty. Indeed, when convent disposals are taken into consideration, it can be said that 75% of infanticide-related convictions resulted in a form of detention, either as a result of a custodial sanction, or, in the majority of cases, an undertaking for a period of institutional residence.

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[86] *Ibid.* Walker does not state that any of the prison sentences imposed on English women convicted of infanticide were suspended.
[87] *Ibid.*
[88] See generally, Kramar, *supra* note 40 at 45-50 and Tables1.4, 1.5 and 1.6.
[89] *Ibid.* at 50.

Some women may have found it difficult to leave religious institutions after the required period of residence had expired. This may have been due to institutional or familial pressure to remain, or because they lacked the necessary support to re-establish themselves in society, especially as a result of the difficulties involved in overcoming the stigma attached to their previous residence.[90] However, while at least some religious congregations may have preferred life-long detention of penitents, there is no conclusive evidence that women were compelled to stay by the religious orders involved.[91] Indeed, the recent Magdalen Report indicates that women who entered the Magdalen institutions via the criminal justice system usually left once they had satisfied their obligation to the court.[92] It seems that in the case of probation admissions in particular, offenders were kept informed by their probation officer of the date on which they were free to leave the institution.[93] Although a small number of women did remain after the probation period had ended, the majority left "at or around" the time their residential obligation expired.[94] Although some of the records are missing or incomplete, it seems that women who went to Magdalen Laundries on the basis of a suspended sentence may have been similarly free to leave at the end of the agreed period, though the Magdalen Report does not reach a clear conclusion with respect to this group of admissions.[95] Possibly because these women were not under the supervision of a probation officer, they may not have been as well informed about their right to depart at a certain date or supported in this regard.[96]

The impact of institutional residence on the offender was undoubtedly severe. In addition to being deprived of their liberty, residents were subject to harsh regimes involving unpaid work, religious/moral instruction, constant supervision and strict discipline.[97] Where there was a focus on religious redemption and reform, particularly if the objective was to meet ideological requirements with respect to appropriate femininity, most

[90] See Smith, *supra* note 73 at 66. See generally Luddy, *supra* note 9 at 121-123.
[91] Luddy, *supra* note 9 at 95 and 119-123; Smith, *supra* note 73 at 45; Earner-Byrne, *supra* note 22 at 187-189.
[92] Magdalen Report, *supra* note 47 at ch. 9.
[93] *Ibid.* at para. 152 and 158.
[94] *Ibid.* at page 205, and see also at paras. 179-193 for sample probation cases with dates of departure from the institution.
[95] See generally, *ibid.* at para. 195-197.
[96] For example, the Magdalen Report noted that probation officers tried to obtain employment for women who left these institutions after a period of probation; *ibid.* at para.158. It does not state whether similar supports were in place for those who entered via other routes.
[97] See generally, Luddy, *supra* note 9 at 76-123.

especially sexual purity, this would have added to the intensity of the experience.[98] In sum, the impact of a residential requirement was punitive.

However, it is not clear whether judges viewed institutional disposals in this way. Unfortunately the court records consulted in this research do not shed any light on judicial motives or reasoning behind sentencing practice, and, in particular, whether judges were cognisant of the burdens entailed in institutional residence. Judges may not have viewed this disposal as being as onerous as a prison term. Indeed, the fact that institutional residence tended to be for longer periods than custodial terms suggests that judges viewed residential requirements as less demanding and punitive than imprisonment. Alexis Guilbride notes that although the Magdalen institutions were known as "fearsome places", little was known about the actual conditions inside, and she concludes that judges probably believed they were being lenient when they sent women there.[99] In the S.B.C.C.C. records, Miss Hetty Walker of Bethany Home in Dublin deposed that if the judge took "a lenient course", the offender would be admitted into said Home.[100] This does suggest that sending women to institutions was considered a relatively lenient option.[101]

Smith, however, argues that the courts "understood [the Magdalen] institutions as primarily recarceral and inherently punitive".[102] Of course, even with "voluntary" detention, the loss of liberty involved would at the very least have implied some element of punishment.[103] Despite the secrecy surrounding these institutions, it is possible that judges were aware that residents were subject to intense supervision and discipline, that they engaged in very demanding work for no payment in the commercial laundries attached, and that some "penitents" may have remained after the required residential period had ended.[104] Presumably, judges were aware of the stigmatising effect of this form of institutionalisation, particularly in the case of the Magdalen asylums.

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[98] See generally, Luddy, *supra* note 9, ch. 3; Smith, *supra* note 73, ch. 1. For further discussion see below text at notes 140-142 and 169-173.
[99] Guilbride, *I Went Away*, *supra* note 4 at 40-46.
[100] N.A.I., S.B.C.C.C. ID-33-68, *A.G. v. E.D.*, 18 Nov. 1930.
[101] Rattigan, *supra* note 4 at 212-213, reaches a similar conclusion.
[102] Smith, *supra* note 73 at 65.
[103] Earner Byrne, *supra* note 22 at 189, notes that detention of unmarried mothers had a punitive element.
[104] Rattigan, *supra* note 4 at 224, observes that "… the religious orders would have had a vested interest in detaining these [criminal] women in their institutions, as they provided them with a cheap form of labour".

However, in opting to suspend a sentence or conditionally discharge/bind-over the offender, it would appear that judges were declining a punitive sanction in favour of a more lenient, and indeed rehabilitative, outcome.[105] In particular, the *P.O.A. 1907*, states that a conditional discharge may be imposed where "it *is inexpedient to inflict any punishment or any other than a nominal punishment*, or that it is expedient to release the offender on probation…".[106] The main objective of the disposal under this statute was to rehabilitate the offender.[107] Suspended sentences were also possibly imposed for the purpose of facilitating rehabilitation or reform.[108] The rehabilitative purpose of probation with a condition of institutional residence was noted by the Department of Justice in the late 1950s.[109]

In England, at least, probation/conditional discharges were viewed as being different to punishment because they rested on the consent of the offender, rather than on compulsion, to enter the recognisance and abide by the conditions attached.[110] Whether, in the unfamiliar and intimidating courtroom, the Irish infanticide offender, and other offenders sentenced in this manner, had a genuine choice in agreeing to undergo a period of institutional residence is perhaps debatable. However, Devane noted in 1924 that an experienced member of the judiciary had told him that many woman offenders "have in *many instances* … expressed to me in Court a desire to go, in *some* cases they have begged to be sent, to prison rather than a Home".[111] It seems that by the late 1940s the Department of Justice became aware of the fact that female offenders were increasingly unwilling to take probation with a condition of institutional residence.[112] This indicates, not only that some women did exercise their discretion to refuse to accept a term of probation with institutional residence, but that convents were perceived by many to be a less attractive alternative to imprisonment.

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[105] Smith, *supra* note 73 at 70.
[106] Section 1(2) [emphasis added].
[107] See O'Malley, *supra* note 58 at 470.
[108] *Ibid.* at 458, referring to a recent case from New Zealand where the rehabilitative purpose of a suspended sentence is acknowledged.
[109] Smith, *supra* note 73 at 70, referring to a 1957 Department of Justice draft proposition paper on the potential use of one particular convent as Remand Home for young female offenders.
[110] Mair & Burke, *supra* note 60 at 26, referring to Home Office guidance on the *P.O.A. 1907*.
[111] Rev. R.S. Devane, "The Unmarried Mother: Some Legal Aspects of the Problem: II - The Legal Position of Unmarried Mothers in the Irish Free State" (1924) 23 Ecclesiastical Record 172-188 at 185, cited in Luddy, *supra* note 9 at 120 [emphasis in Luddy].
[112] Luddy, *supra* note 9 at 122, referring to: N.A.I., Department of Justice, Carrigan Committee Report, File 72/94A, Hand-written notes re convents, "Suppression of Prostitution". Presumably the offenders referred to were those convicted of offences related to prostitution.

Had sentencers not opted for periods of institutional detention, many infanticide offenders may have been given custodial terms. Almost 70% of prison sentences imposed in infanticide-related cases were suspended, with 88.9% of these being suspended on the woman entering a recognisance to stay at a convent or other similar establishment for a specified period. Notwithstanding this, it is probably true that some women were sent to convents where they would not otherwise have been incarcerated. This seems particularly likely in cases involving convictions for C.O.B., which was a misdemeanor carrying a maximum sentence of 2 years imprisonment. It seems that the nature and seriousness of the offence do not appear to have had an impact on judicial determinations about appropriateness of detention at a religious institution: 57.41% of those convicted of C.O.B. and 59.7% of those convicted of manslaughter were given an institutional disposal.

V - Gender and Ideology in Infanticide Sentencing

It is evident from the above that women convicted of infanticide-related offences were commonly given sentencing disposals which entailed a requirement for residence at a religious institution. While judges may not have intended to inflict a severe punishment on the offender, in reality, an institutional disposal would not have been a particularly lenient sentence. This section explores the possible connection between this sentencing custom and the gender ideology of the Irish Free State. It examines, in particular, the possible influence of patriarchal ideology on judicial decisions to impose institutional requirements on these offenders. In this regard, the question of whether judges sought to "punish" women for their breach of the paradigm standard of female behaviour is considered. The possible influence of notions of reform, in particular moral salvation, is also addressed.

It could be said that the practice of sending women to convents post-conviction reflects the church and state response to unmarried motherhood, namely religious institutionalisation for the purposes of redemption, prevention, and, in some cases at least, containment.[113] Larmour argues that "it is likely that the decision to confine women found guilty of causing the deaths of their newly born infants in convents was motivated by contemporary thinking on the possibility of the penance, reform and redemption of women whose sexual behaviour was considered unacceptable….".[114] Indeed, Rattigan's study of

[113] See *supra* text at notes 22-29.
[114] Larmour, *supra* note 4 at 289.

sentencing in infanticide cases in Ireland from 1900 to 1950 shows that the use of convents as a disposal was virtually unheard of prior to independence.[115] Between 1900 and 1921, only one woman (1.9% of those sentenced) was sent to a convent;[116] 51.6% of women in her post-independence sample were sent to a convent or Bethany Home.[117] Rattigan concludes: "[i]n post-independence Ireland, court decisions in terms of sentencing appear to have been affected by the gender, age and marital status of defendants. Single women who had given birth and were suspected of killing their illegitimate newborns seem to have been regarded as sexually transgressive and were, therefore, punished in a particular way".[118] Noting the fact that some women were released on recognisances on agreeing to marry, she adds that "there was perhaps more concern with containing women's sexuality within marriage than with the deaths of illegitimate infants".[119]

It does seem, particularly in light of the change in sentencing practice post-independence, that the gender ideologies of the new nation had an impact on the sentencing of women convicted of offences connected with the death of their illegitimate infants. In this regard, Ryan argues that women convicted of C.O.B. were "treated primarily as sinners", and were punished "as much for sexual 'immorality' as for concealing the births of their infants".[120] Indeed, she contends that these offenders "were not treated like ordinary criminals but as a special case of deviant and disorderly behaviour", and, as a result, were subjected by the legal authorities to social control mechanisms to which other offenders were not exposed.[121]

This raises the possibility that infanticide offenders were "doubly punished" because they had broken social, as well as legal, norms.[122] Double deviance theory asserts that

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[115] Rattigan, *supra* note 4 at 207-218
[116] *Ibid.* at 208, Table 4 and 209.
[117] *Ibid.* at 211, Table 5.
[118] *Ibid.*
[119] *Ibid.* at 212. See also M.J. Maguire, *Precarious Childhood in Post-Independence Ireland* (Manchester University Press: Manchester, 2009) at ch. 6, who argues that government, court, and church officials, though paying lip-service to the sanctity of infant life, demonstrated a "cavalier" attitude to the infant-victim in their response to infanticide. However, see also O'Donnell, *supra* note 33 at 689-690, who argues that the decline in "baby killing" in Ireland from the mid-nineteenth century onwards was due, in part, to the increasing value placed on infant life, and the "civilising" of parents.
[120] Ryan, *Gender*, *supra* note 4 at 275-276.
[121] *Ibid.* at 275.
[122] See generally F. Heidensohn, *Women and Crime* (Basingstoke, UK: Macmillan, 1985) at 46-51 [hereinafter Heidensohn], referring to the following studies: P. Carlen, *Women's Imprisonment*, (London: Routledge & Kegan Paul Ltd, 1983) at 67; and D. P. Farrington & A. M. Morris, "Sex, Sentencing and Reconviction" (1983) 23 British Journal of Criminology 229-248. See also S.S.M. Edwards, *Women on Trial: A Study of the Female Suspect, Defendant and Offender in the Criminal Law and Criminal Justice System* (Manchester: Manchester University Press, 1984) at ch. 7, esp. at 177-182 and ch. 8, esp. at 183-186 and 213 [hereinafter Edwards].

socially deviant female offenders, *i.e.* those who breach conventions in relation to sexuality, motherhood, marriage *etc.*, may be treated more punitively by the courts and, in particular, may be more likely to be imprisoned than those who do not offend against ideal female stereotypes.[123] In this regard, however, it seems that the Irish response to infanticide during the 1920s-1940s does not exactly reflect findings in more contemporary studies in relation to "excessive" punishment of "doubly deviant" women.[124] Somewhat ironically, imprisonment was not considered a suitable sentence for most infanticide offenders. Further, although they were subjected to an alternative disposal, one which arguably was at least as severe as ordinary imprisonment, it does not necessarily follow that these offenders were being excessively punished because they were thought to have violated conventions of femininity, in addition to breaking the law.

The women in this Irish infanticide sentencing sample had originally been charged with one of the most serious offences in the criminal law, the murder of a human being. Yet, their experience in the criminal justice system appears to have been one of overwhelming lenience. Very few women were convicted of murder. Most avoided trial altogether, as the State accepted a plea of guilty to a less serious offence.[125] In terms of sentencing, most were given suspended sentences or conditional discharges, even in cases involving manslaughter convictions. On the face of it, a suspended sentence or a conditional discharge/bind-over with a condition of residence, which rarely exceeded two years and which was imposed with the consent of the offender, was probably not an unduly harsh disposal given the nature of the offences involved.

As noted, however, the impact of an institutional disposal may not have been particularly lenient. Indeed, it is possible that in some cases an institutional disposal had a more severe impact on the offender than a custodial penalty, particularly where a longer term of detention was imposed.[126] However, even if women were imprisoned for shorter periods, some of these offenders may have been sent to Magdalen asylums on release from prison.[127] Further, as Quinlan's research reveals, women imprisoned in Ireland during the

[123] Heidensohn, *Ibid.* at 48 and 50.
[124] *Ibid.*
[125] See *supra* text at notes 38-42.
[126] See *supra* text at notes 68-72 and 97-98.
[127] C. Quinlan, *Inside Ireland's Women's Prisons Past and Present* (Dublin: Irish Academic Press, 2011) at 65 [hereinafter Quinlan]. The practice of sending women to Magdalen asylums post-release, which developed in the previous century, continued until well into the twentieth-century.

twentieth century were kept in the worst and most restricted conditions in the prison system, undertaking work which usually focused on domestic duties, such as laundry and needle-work.[128] Although an institutional disposal had a gendered, moral and religious aspect to it, women's experience of imprisonment in twentieth-century Ireland was also patriarchal, and women's imprisonment was of a "moral, religious and protective" nature.[129]

Assuming trial judges were persuaded to address the offender's breach of moral and feminine conventions, it does not necessarily follow that they sought to "punish" her apparent social deviance in addition to her breach of the criminal law. As noted, probation and suspended sentences were probably meant to be more benign disposals, with a focus on rehabilitation rather than punishment.[130] This may suggest that judges sent women to convents and similar institutions for the purposes of reform, most particularly moral reform. Interestingly, in this regard, Rattigan, in her study of infanticide cases in Ireland between 1921 and 1950, found that women who had more than one illegitimate pregnancy were less likely to be sent to a convent by the court at the time of sentencing.[131] This suggests that the potential for reform and the supposed amenability of the offender to this may have been factors in sentencing decisions.[132] On the other hand, however, the decision to not send a woman who had more than one illegitimate birth to a convent may have related to the willingness of certain institutions to accept such admissions, rather than judicial perceptions about the potential responsiveness of the offender to moral reform.[133]

Indeed, there may be other reasons why judges sent infanticide offenders to convents and other similar institutions; the use of religiously informed establishments in sentencing does not necessarily mean that judges were interested in the moral reform of the offender. Other considerations which likely played a part, such as the danger of imprisonment in terms of the risk of recidivism and the dearth of alternative penal options for young female offenders, are discussed below.[134] In connection with the issue of reform, judges may have simply sought to facilitate the rehabilitation of the offender, in a broader

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[128] *Ibid.* at 47 and 55-59.
[129] *Ibid.* at 65.
[130] See *supra* text at notes 105-110.
[131] Rattigan, *supra* note 4 at 213.
[132] *Ibid.*
[133] For example, Our Lady's Home at Henrietta Street in Dublin was more restrictive in terms of the girls it was willing to admit, taking in only those who were not of "immoral character". See E. Carroll, *Memorandum Re: Women and Girls who come before the Central Criminal Court on serious charges – and other relevant matters*, 7 July, 1941, p. 4, available in the Magdalen Report, *supra* note 47, Appendix 5 [hereinafter Memo on Women and Girls at C.C.C.].
[134] See below at Sections VI and VII.

non-moral sense. In the absence of other more suitable alternatives within the state's own penal architecture, they may have relied on the only institutional provision available that appeared to offer the possibility of rehabilitation.[135] This is not to say that considerations about moral reform were wholly irrelevant. Particularly in the case of infanticide, where there was an ostensible connection between the offender's criminal conduct and her supposed social deviance, it may have been thought that rehabilitation should also embrace moral reform.[136]

Irrespective of whether judges were persuaded by notions of spiritual reform, within the religious institutions it seems that the opportunity for rehabilitation focused largely, if not exclusively, on the religious salvation of the offender. In a 1941 memorandum on women and girls appearing before the C.C.C. on serious charges, a female probation officer wrote: "… there is not provided at any … [religious] institution a well-planned, adequate, or specialised system of reform in keeping with modern requirements".[137] Referring to both Our Lady's Home at Henrietta Street in Dublin and the various Magdalen Homes, the author bemoaned the lack of educational and training facilities at these institutions, and, in the latter case, the lack of aftercare available.[138] She offered particular criticism of the approach to reform taken at the Magdalen institutions, stating:

> [t]he supervision is strict and the religious atmosphere and moral training provide a barrier against contamination not available in prison treatment. This religious training, however, is directed with the purpose of leading the subjects to a permanent renunciation of the world and to a life of penance in the particular institution, in accordance with its rules. All very laudable, but hardly appropriate for the type of girls undergoing a court sentence for a serious crime, seeing that with very rare exceptions none such would dream of remaining on in a Home voluntarily after the period of detention has expired.[139]

Given the origins and purpose of these establishments it is not surprising that the focus in at least some religious institutions was on the spiritual reclamation of the offender, rather than her rehabilitation through general education or training. However, as pointed out in the above memorandum, it could hardly be said that these institutions were performing any useful rehabilitative function.

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[135] See below text at notes 148-149 and Section VII.
[136] For further discussion on overlap between patriarchal ideology and general criminal justice objectives, see generally below at Section VI.
[137] Memo on Women and Girls at C.C.C., *supra* note 133 at 3.
[138] See generally, *ibid.* at 3-6.
[139] *Ibid.* at 5.

In this regard, it has been noted that apparently "humane" sentencing which has an intended rehabilitative objective may actually have an unintended punitive impact. Edwards has argued that, though rehabilitative options may appear lenient on the surface, they can in fact be "doubly oppressive" because their objective is to re-socialise the offender to conform to "traditional female roles".[140] Whether or not Irish judges were guided in this regard, within the religious institutions used for sentencing Irish women there seems to have been a degree of emphasis on religious and moral training, and, as such, re-socialising the offender to meet the standards of appropriate female behaviour, namely sexual purity. This may have added to the repressive environment in which the woman was detained, thus increasing the level of punishment she experienced.[141] As Kramar argues, referring to the use of non-penal institutional supervision of C.O.B. offenders in Canada, although these disposals may appear lenient, they are in fact punitive because they subject women to "extensive moral regulation", in that the offender is expected to meet the ideal norms of femininity prior to release.[142]

Finally, it is worth noting that in the Irish Free State institutional disposals were not reserved for women convicted of serious offences, or, in particular, offences of a "sexually immoral" nature. The records considered in the Magdalen Report indicate that the Irish courts used the Magdalen institutions (and presumably other willing religious institutions) as a sentencing option for a range of offences, most of which were petty in nature, and which, in some instances, appear to have had no overt "sexual" or "immoral" undertone, including for example larceny.[143] This may suggest that all female criminality was thought to offend against the idealised standards of femininity and as such required a particular response which was geared towards addressing the offender's socially deviant behaviour, as well as her criminal conduct. It could equally be argued, however, that since convent disposals do not seem to have been reserved for crimes which had clear moral connotations, such as for example, prostitution and infanticide offences, this indicates that other factors may have affected judicial sentencing decisions. This is explored further in the following section.

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[140] Edwards, *supra* note 122 at ch. 8, esp. at 187-188 and 212-216.
[141] See below text at notes 169-174.
[142] Kramar, s*upra* note 40 at 30-31.
[143] See generally, Magdalen Report, *supra* note 47 at paras. 166, 177-178 and 181.

VI - The Urge to Protect: The Vulnerability of Women and the "Semi-Penal" Institution

In addition to the possibility of rehabilitation/reform, judges may have also been concerned about the related matter of preventing young women and girls who had not previously been in contact with the law from further criminalisation through imprisonment. Most women prisoners had been incarcerated for offences related to prostitution, drunkenness, begging, loitering, vagrancy, and stealing,[144] and there were very high rates of recidivism among this population. This was due, in part, to the difficulty female prisoners had in re-establishing themselves in society on release.[145] Thus, prisons were possibly considered unsuitable as places of confinement for certain kinds of female offenders, particularly the young woman who had not previously been in contact with the criminal law. The disadvantages of imprisonment for young female offenders are highlighted in the following extract from a memorandum written by a female probation officer in 1941:

> there is little advantage to the State in sentencing a girl to a term of imprisonment under our existing system…. Perhaps the greatest disadvantage of the system is that young girls … are able to meet and converse with hardened offenders 'doing time', whose vile influence is seen in the changed attitude of the newcomer, even after a few days…. I have not yet found a first offender really benefiting from a prison sentence but on the contrary have seen many young girls become embittered, hardened and morally decadent as the result of association with the depraved characters who form the normal population of our prisons. Moreover, this first term of imprisonment, especially if a short one, is usually the prelude to many another and soon the girl becomes an 'incorrigible type.'[146]

Thus, a term of imprisonment would expose the first-time offender, not only to stigmatisation, but also to potential criminalisation and further moral decline through contact with habitual criminals. In light of this, it seems that the desire to protect women from harmful influences in prisons, while exposing them to the perceived positive effects of religious institutionalisation, may have influenced decisions to send Irish women convicted of infanticide-related offences to convents. In other words, judges may have sought a more effective means of dealing with this offender and convents were possibly viewed as the less stigmatising and criminalising option.[147] In 1924, Devane argued for the establishment of a

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[144] Quinlan, *supra* note 127 at 105 and 57.
[145] *Ibid.* at 43, 46 and 47.
[146] Memo on Women and Girls at C.C.C., *supra* note 133 at 2-3.
[147] Smith, *supra* note 73 at 19.

female Borstal for young offenders aged 16 to 21 in order to avoid their exposure to the harmful influence of prisoners.[148] It seems that in the absence of other suitable provision judges relied on convents and other similar institutions to fill the gap in the state's penal infrastructure.[149]

Similar to the apparent overlap between rehabilitation and moral reform, the desire to prevent criminalisation also seems to coincide with ideological considerations, such as protecting vulnerable women and girls against moral corruption. Gray and Ryan have noted that the gender ideologies of the Irish Free State also "included notions of women's vulnerability and need for protection."[150] In this regard, Barton, referring to perceptions of women in late eighteenth and early nineteenth-century Britain, states: "[w]omen were seen as both corrupting and corruptible beings, capable of asserting influences *over* others whilst simultaneously being susceptible to influence *from* others."[151] This perceived vulnerability to influence, both good and bad, made women "unsuitable for prisons for fear of their further corruption",[152] but rendered them amenable to another form of institutionalisation which would subject them to a "process of reformation and 'normalisation' … in order that they might eventually return to society where they could appropriately fulfil their domestic and feminine duties".[153] A number of "semi-penal" institutions, such as homes and refuges which admitted both criminal and non-criminal women, developed during this period.[154] Weiner notes that these private institutions, "developed to supplement and in part replace" the state's prisons and jails,[155] constituting "alternatives to, and preventatives of, imprisonment".[156]

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[148] See Smith, *supra* note 73 at 50-51, referring to R.S. Devane, "The Unmarried Mother: Some Legal Aspects of the Problem: II - The Legal Position of the Unmarried Mother in the Irish Free State" (1924) 23 Irish Ecclesiastical Record 172-188 at 181-183.

[149] Smith, *supra* note 73 at 51. See also *Reformatory and Industrial School's System Report* (Dublin: The Stationery Office, 1970) ch. 6 at para. 6.17-6.17, which notes that judges, faced with the problem of what to do with young female offenders who had been refused entry to a reformatory because they were pregnant or prostitutes, often placed these young women/girls on probation with a requirement that they attend a Magdalen asylum.

[150] B. Gray and L. Ryan, "(Dis)locating 'Woman' and Women in Representations of Irish Identity" in A. Byrne and M. Leonard, eds., *Women in Irish Society: A Sociological Reader* (Belfast, Beyond the Pale, 1997) 517-534 at 521.

[151] A. Barton, "'Wayward Girls and Wicked Women': Two Centuries of 'Semi-Penal' Control" (2000) 22(1-2) Liverpool Law Review 157-171 at 159 [hereinafter Barton, *Wayward Girls*] [emphasis in original].

[152] *Ibid.* at 160.

[153] *Ibid.*

[154] *Ibid.* See also M.J. Weiner, *Reconstructing the Criminal: Culture, Law and Policy in England, 1830-1914* (Cambridge: Cambridge University Press, 1990) at 129-131 [hereinafter Wiener]; A. Barton, "Women and Community Punishment: The Probation Hostel as a Semi-Penal Institution for Female Offenders" (2004) 43(2) The Howard Journal 145-163 at 149-150 [hereinafter Barton, *Women*].

[155] Weiner, *Ibid.* at 131.

[156] *Ibid.* at 130.

In the Irish Free State, particular ideological concerns may have arisen in connection with protecting women who had been convicted of infanticide offences from the corrupting influence of imprisonment. One rationale for intervention in the form of institutionalisation and segregation of young, first-time, unmarried mothers who were amenable to reform was to prevent them falling into a life of prostitution.[157] Given the number of prostitutes in prison,[158] there may have been similar considerations involved in the decision to send unmarried mothers who killed their infants to convents. Indeed, Devane in his writings, as well as several professional and philanthropic female witnesses before the Carrigan Committee of 1930, including a representative of the Probation Service, suggested that young prostitutes who were amenable to reform should be given suspended sentences if they agreed to a condition of institutional residence.[159] It is plausible that similar attitudes informed judicial decision-making when dealing with infanticide offenders, and also, possibly, other young female offenders perceived as vulnerable to criminalisation and moral corruption in the prison setting.

It has also been noted that women who were perceived to be immoral, particularly prostitutes and those who had more than one illegitimate pregnancy, were considered mentally deficient by the official authorities.[160] Luddy notes that the perception that immoral women were feeble-minded lent justification to the policy of institutionalisation for the purpose of protecting them against themselves, as well as others.[161] Smith found that many women appearing before the courts on infant-murder charges were diagnosed as being mentally deficient in prison medical reports.[162] Certainly, if infanticide offenders were thought by judges to be mentally deficient, this may also partly explain why detention at a religious institution, rather than immediate release into the community or a prison sentence, was preferred.[163] Convents may have presented a more effective method of disposing of women who were vulnerable to harmful influences in prisons or who were thought to require protection, not only against others, but against themselves.

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[157] Luddy, *supra* note 9 at 201-202
[158] For example, 78 prostitutes were imprisoned in Mountjoy in 1929. See Luddy, *supra* note 9 at 220-225.
[159] Smith, *supra* note 73 at 51 and 18.
[160] Luddy, *supra* note 9 at 233.
[161] *Ibid.*
[162] Smith, *supra* note 73 at 62-63.
[163] *Ibid.* at 63.

VII - Pragmatic Considerations

Aside from considerations about the effectiveness of imprisonment, other pragmatic matters may have informed judicial decisions on sentencing of women in infanticide cases. It seems likely that limitations in the state's penal infrastructure were a significant factor in judicial sentencing decisions. As noted, resource constraints in connection with ordinary custodial options, notably in relation to the fact that there was no female borstal and that fact that prisons did not seem to offer the opportunity for rehabilitation, probably led judges to favour probation with an institutional requirement over imprisonment for young female offenders.[164] Certainly, it was cheaper for the state to send women offenders to convent institutions.[165] By relying on the infrastructure, personnel, and other resources of these convents, the state did not have to provide its own facilities.[166] Further, due to the very basic nature of the probation service in Ireland at the time, judges were possibly restricted in terms of imposing probationary supervision under the *P.O.A. 1907*.[167] In the early 1940s, there were only six probation officers to serve the entire twenty-six counties and as a result courts relied extensively on voluntary organisations, such as the Legion of Mary, to plug the gap in the state's resources.[168] Perhaps, convents and other "fallen women" establishments were similarly employed by judges who conditionally discharged women convicted of infanticide-related offences as a substitute for or supplement to normal probationary supervision.

VIII - The Wider Context: A Uniquely "Irish" Approach to Infanticide?

By sending women convicted of infanticide offences, including manslaughter, to religious institutions rather than prisons, Irish judges appear to have taken an alternative approach to justice in these cases, one which was less formal in the penal sense and which was also possibly influenced by the patriarchal ideologies of the Irish Free State. However, the use of what has been termed the "semi-penal" institution as an alternative to prison for female offenders is not unique to Ireland.[169] Victorian England was similarly influenced by patriarchal gender ideologies which demanded chastity of all women and emphasised the role of the mother in the married family: the virtuous female was the bulwark against moral

[164] See *supra* text at notes 146-149.
[165] Rattigan, *supra* note 4 at 224.
[166] Smith, *supra* note 73 at 46 and 68-69.
[167] Fahy, *supra* note 65 at 80.
[168] *Ibid.*
[169] See generally *supra* text at notes 151-156.

and social disorder.[170] Women who failed to adhere to these idealised norms were considered a significant threat and subject to various forms of regulation, including institutional containment.[171] The semi-penal institution, falling in the middle of the social control continuum because it incorporated both penal and domestic control mechanisms, was utilised to reform, feminise, contain, and regulate socially deviant women, as well as those convicted of criminal offences.[172] Falling outside state control, these establishments were often run by religiously motivated individuals and, therefore, were underpinned by Christian philosophies,[173] "which served to *increase* the levels of discipline that women were subjected to (through the imposition of *moral* expectations)… ."[174]

While the use of semi-penal establishments in dealing with morally and criminally deviant women began to decrease in England from the 1930s onwards, some of these institutions continued to operate in subsequent years.[175] For example, one institution, which was run by The Church of England Temperance Society with little state interference, continued to accept women on probation/recognisances until 1948.[176] Further, Barton argues, that some features of the semi-penal institution, including the influence of Christian values and the use of both informal (domestic) and formal (penal) control mechanisms, persisted in later twentieth-century institutions, most notably in the form of female probation hostels.[177]

Specifically, in relation to infanticide offenders, Kramar found that many women convicted of C.O.B. in Canada in the 1920s-1940s who were not incarcerated in prisons, were subject to other disciplinary measures, which included supervision by institutional authorities.[178] In post-emancipation Jamaica, from World War I onwards, the courts tended to punish young women convicted of C.O.B. by fines or probation; a number of those given the latter disposal spent their probationary period in a Salvation Army Girls Home which

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[170] L. Zedner, *Women, Crime and Custody in Victorian England* (Oxford: Clarendon, 1991) 11-18.
[171] *Ibid.* See also Barton, *Wayward Girls*, *supra* note 151 at 160.
[172] See Barton, *supra* note 151 at 160; Barton, *Women*, *supra* note 154 at 149-152; Weiner, *supra* note 154 at 129-131.
[173] Barton, *Women*, *ibid.*; Barton, *Wayward Girls*, *supra* note 151 at 169.
[174] Barton, *Women*, *ibid.* at 156 [emphasis in original].
[175] *Ibid.* at 153; Barton, *Wayward Girls*, *supra* note 151 at 169.
[176] Barton, *Women*, *ibid.* at 150, 151 and 153.
[177] *Ibid.* at 153-161.
[178] Kramar, *supra* note 40 at 30. See *supra* text at note 142.

provided them with domestic training.[179] It appears, therefore, that sentencing of women for infanticide in the Irish Free State may reflect wider trends in responses to female criminality which have been identified elsewhere. This is particularly apparent in relation to the use of semi-penal institutions as an alternative to imprisonment and reliance on both penal and non-penal social control mechanisms when punishing female offenders. More research is needed, however, in order to draw more precise comparisons with what happened elsewhere. For example, it would be interesting to consider whether the use of semi-penal institutions as a sentencing option for female offenders intensified in post-independent Ireland and had a more enduring effect.[180]

IX - Conclusion

This article explores sentencing practice in relation to maternal infanticide in the Irish Free State. Every woman in this sample of 124 cases had originally been charged with murder, but was convicted of a non-capital offence, usually manslaughter or C.O.B. Overall, the evidence in the S.B.C.C.C. indicates that the approach to sentencing of women convicted of infanticide-related offences was largely non-custodial: these offenders were rarely imprisoned. In this regard, it appears that the criminal justice response to maternal infanticide in the Irish Free State was overwhelmingly lenient. The non-custodial approach taken appears to reflect infanticide sentencing trends elsewhere during the same period, notably in England. However, the Irish approach to sentencing for infanticide was not strictly non-carceral in nature. Indeed, around 60% of women in this sample entered a recognisance, either as part of a suspended sentence, a conditional discharge, or a bind-over, to reside at a religious institution, usually for a period of between one and two years. The regimes inside these institutions were harsh, and women would have been subject to constant discipline and regulation, which may have intensified in the religious and moral environment of at least some of the establishments used. Undoubtedly, therefore, the effect of institutionalisation was punitive. However, given the nature of the offending involved, it may be difficult to conclude that on the whole the response to this offender was unduly harsh, even where she was bound to reside at a religious institution for a period of one to two years.

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[179] H. Altink "'I Did Not Want to Face the Shame of Exposure': Gender Ideologies and Child Murder in Post-Emancipation Jamaica" (2007) 41(2) Journal of Social History 355-387 at 359.

[180] Rattigan, *supra* note 4 at 207-212, suggests that the use of convents and other institutions did intensify in post-independent Ireland. See *supra* text at notes 115-117.

The key issues explored in this article are judicial understandings of sentencing practice and the possible influence of ideological and other factors on sentencing. On the basis of research to date, including that undertaken in this study, it is not possible to determine judicial perceptions with respect to the punitiveness or otherwise of institutional disposals; nor, is it possible to establish with any degree of certainty what factors influenced judges in their sentencing decisions in infanticide cases. Since Magdalen asylums and other homes had originally been established with protective and welfare agendas in mind,[181] judges may have viewed the institutional disposal as being the more lenient option. Indeed, though clearly involving an element of punishment because the offender was detained in an environment where she was subject to constant supervision and regulation, it is possible that the convent disposal was viewed as a lenient option, particularly in light of the ostensibly rehabilitative purpose of conditional discharges, and, suspended sentences. From a criminal justice perspective a recognisance, which rested on the consent of the offender, would probably not have been viewed as an unduly punitive measure. Of course, as has been noted, in reality an institutional disposal may not have been a particularly lenient sentence in terms of its impact on the offender.

As has been argued by other scholars, the use of convent disposals suggests that patriarchal ideologies, particularly those relating to sexual deviance in women, had an impact on the criminal justice response to infanticide.[182] For example, the use of convents, and more rarely disposals involving marriage and parental supervision, indicates that the courts may have been concerned with controlling the offender's unacceptable sexuality.[183] Notions of reforming sexually deviant women may have also played a part; whether judges also sought to punish the woman for her sexual transgression is less clear. Indeed, assuming ideological factors did influence infanticide sentencing decisions, it seems that the custom of favouring relatively short institutional residences over imprisonment was most likely inspired by paternalistic notions of reform, protection, and prevention, rather than a desire to punish the offender's supposed sexual deviance.

It should not be assumed, however, that because judges sent infanticide offenders to convents that this was necessarily due to the influence of patriarchal ideology. Pragmatic issues connected with the penal resources available, as well as particular criminal justice

[181] Luddy, *supra* note 9 at 106.
[182] For example, see Larmour, *supra* note 4; Rattigan, *supra* note 4; Ryan, *Gender*, *supra* note 4.
[183] Rattigan, *supra* note 4.

considerations, such as rehabilitation and concerns about recidivism, were probably significant factors in judicial decisions on punishment for infanticide. Although this author does not seek to deny that patriarchal ideology played a part, it is notable that notions about the reform and protection of sexually immoral women correspond with pragmatic and philosophical sentencing objectives, namely rehabilitation and preventing further criminalisation. For example, concerns about the effectiveness of imprisonment, particularly in light of the risks of stigmatisation and criminalisation, overlap with ideological notions about the need to protect vulnerable girls in danger of moral corruption. Arguably, then, although the focus within the institutions may have been entirely on religious instruction, judges may not have been particularly interested in the spiritual reform of the offender. Indeed, sentencers may have been more concerned about preventing recidivism by offering an opportunity for rehabilitation within an institutional setting, while protecting the offender from the criminalising impact of imprisonment. Due to resource constraints, however, judges motivated by such considerations would have had little option but to rely on non-state institutions which tended to focus on the more spiritual aspects of reform. The fact that religious establishments, such as the Magdalen asylums, also seem to have been used as places of detention for women convicted of offences which had no obvious connection to sexual immorality, suggests that judges may have been more concerned with the pragmatic benefits in terms of preventing recidivism that these institutions appeared to offer.

However, for offences like infanticide which had an ostensible connection to sexual immorality, the prevention of further reoffending through rehabilitation and the avoidance of the criminalising impact of imprisonment may have also been linked to notions about morally reforming the offender and protecting her against further moral corruption. Thus, judges may have been influenced both by patriarchal ideology and more pragmatic sentencing considerations. However, more research is needed before positive conclusions can be drawn about the influence of gender ideology and other factors on sentencing of women convicted of infanticide-related offences. For example, it would be important to understand wider sentencing practice in relation to both male and female offenders, and particularly first-time and young offenders convicted of offences of comparable seriousness, in order to draw more valid conclusions about the impact of patriarchal ideology on the treatment of infanticide offenders.

The use of what have been termed "semi-penal" institutions in sentencing female offenders is not a phenomenon unique to the Irish Free State. Similar institutions have also been used elsewhere as alternatives to imprisonment for female offenders. Semi-penal establishments, which often operated under a religious ethos, served myriad objectives including punishment, reform, protection, containment, and "feminisation" of both criminally and socially deviant women. In the context of sentencing, the semi-penal institution may appear to be a more lenient disposal than imprisonment, and, as noted, institutional disposals were probably mainly employed for laudable motives connected with rehabilitation/reform and protection/prevention. However, as noted, sentencing disposals which appear lenient may be more punitive than intended, particularly where the moral and religious environment of the institution subjects the offender to more intensive control and discipline, and where the focus of the reforming impulse within the institution is on "re-feminising" the offender.

Further research is needed in order to draw better comparisons between Ireland and other jurisdictions in relation to the use of semi-penal institutions for sentencing women convicted of infanticide-related offences, and indeed other female offenders, during the early to mid-twentieth century. Possibly the use of these institutions intensified in post-independent Ireland and Irish courts may have continued to rely on them as alternatives to imprisonment for a longer period than their counterparts elsewhere. However, as noted, it is not clear whether the use of the semi-penal institution as an alternative to imprisonment for certain female offenders was a result of the Irish Free State's patriarchal gender ideologies or whether it was due to practical imperatives, though both sets of factors may have played a part.