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The Enactment of an Irish Infanticide Act

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In 1922, an infanticide statute was enacted in England and Wales. The Infanticide Act 1922 was later amended in 1938 to accommodate the killing of infants up to the age of 12 months, allowing a woman who wilfully killed her infant to be charged with/convicted of infanticide, an offence akin to manslaughter in terms of seriousness and punishment, notwithstanding that she would otherwise be guilty of murder, provided that at the time of killing the balance of her mind was disturbed by the effect of childbirth or lactation.[1] The Irish Parliament followed suit in 1949. The Infanticide Act 1949 drew extensively on the English example, allowing a woman who murdered her infant to be tried for/convicted of infanticide where she "by any wilful act or omission caused the death of her child" aged under 12 months while "the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child".[2] Where a woman was sent for trial for or convicted of infanticide she would be tried and punished as if she had been

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[1] Infanticide Act 1922 (12 & 13 Geo. V. c.18); Infanticide Act 1938 (1 & 2 Geo. VI. c.36).

[2] Infanticide Act 1949 s.1(3). The Infanticide Act 1949 was amended in the Criminal Law (Insanity) Act 2006 s.22(a). The reference to lactation was dropped from the provision and replaced with a reference to mental disorder. The Irish infanticide measure now provides that the offence/defence of infanticide will be available where a woman kills her infant while the balance of her mind is disturbed by reason of her not having fully recovered from the effect of giving birth to the child or *by reason of a mental disorder … consequent upon the birth of the child*. A mental disorder is defined by s.1 of the 2006 Act as including mental illness, mental disability, dementia or any disease of the mind, but does not include intoxication.

charged with or convicted of manslaughter.[3] Importantly, this meant she would be tried at the Circuit Criminal Court, a court of lower criminal jurisdiction, and would be subject to a flexible sentencing regime with a maximum penalty of life imprisonment. Numerous other jurisdictions have adopted similar measures.[4]

Drawing on evidence found in archival court and government records,[5] this article explores a number of matters connected with the enactment of the infanticide law in Ireland. The historical record indicates that the enactment of the Irish statute was an uncontroversial affair. Irish lawmakers adopted the English infanticide framework with little opposition. In this regard, two key issues are explored. The first question considered is whether any particular objections to following the English legislative model were expressed during the drafting or the parliamentary stages of the reform and, in connection with this, whether alternative proposals for dealing with the issue of infanticide were offered or considered. The records indicate that the only issue that attracted particular attention in the Irish context, and which did ultimately lead to a deviation from the English law, was that of the importance of ensuring that the proposed legislation would not diminish the value of infant life or, in connection with this, the deterrent effect of the criminal law. This issue is explored in depth.

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[3] Infanticide Act 1949 s.1(3). This was amended by the Criminal Law (Insanity) Act 2006 s.22(b) so that infanticide is now punishable under s. 6(3) of that Act as if the offender had been found guilty of manslaughter on grounds of diminished responsibility.

[4] For example Canada, Hong Kong, Fiji, New South Wales and Victoria have all enacted similar measures.

[5] The following sources dealing with the infanticide reform were consulted at the National Archives of Ireland ("NAI"): Attorney General Office file (infanticide) 2000/10/2921; Attorney General Office file (infanticide) 2000/10/2922 ("AG 2000/10/2921"; and "AG 2000/10/2922"); Cabinet Minutes 2/10; Department of Justice file (infanticide) 8/144/1 ("DJ 8/144/1"); Department of Justice file (infanticide) 8/144/A ("DJ 8/144/A"); Department of Justice file (infanticide) H266/61("DJ H266/61"); Department of Taoiseach file (capital punishment) s7788(a) ("DT s7788(a)"); Department of Taoiseach file (insanity) s13311 ("DT s13311"); Department of Taoiseach file (infanticide) s14493 ("DT s14493"); various Department of Taoiseach files on commuting the death sentence ("DT (CDS)"). The following court records were also consulted: Court of Criminal Appeal files ("CCA"); State Books for the Central Criminal Court ("SBCCC"). Material relating to the infanticide reform found in the Archives of the Archbishop of Dublin was also consulted: Archives of Archbishop of Dublin, The McQuaid Papers, AB8/B/XVIII/10 ("AAD, AB8/B/XVIII/10"). This research also makes use of the parliamentary debates on the enactment of the infanticide law in Ireland: 115 Parliamentary Debates cols 263–283, April 18, 1949 (Dáil Éireann); 36 Parliamentary Debates cols 1470–1477, July 7, 1949 (Seanad Éireann).

The second matter connected with the legislative response to infanticide in Ireland that is considered in detail is the mitigating rationale contained within the 1949 statute. The Irish Infanticide Act 1949 enshrined verbatim the medical basis of the English infanticide law, namely that a woman could be convicted of infanticide if at the time of killing her infant the balance of her mind was disturbed by reason of her not having fully recovered from the effect of childbirth or by reason of the effect of lactation consequent upon childbirth.[6] The historical sources consulted indicate that the 1949 statute was enacted without consideration of the mental disturbance mitigation provided for in the measure. In this regard, the Infanticide Act 1949 is assessed against feminist critiques of infanticide laws based on the English model. It will be argued that the legislative history behind this measure shows that the feminist assessment of infanticide statutes which adopt the English medical approach to this crime has limited relevance in the Irish context, and, in particular, that the Irish perception of infanticide mitigation was broader than what is suggested by these critiques. The reasons for adopting, with such little reflection, the English medical rationale, and the likely meaning and scope of this rationale in the Irish context, are also explored.

In the following section, the phenomenon of infanticide in Ireland during the first three decades of independence will be explored with reference to the prevalence of this offence, the circumstances in which it was committed, and the characteristics of the typical infanticide offender. Following on from this, the criminal justice response to the crime of infanticide will be examined, focusing on how women charged with murdering

[6] Although a literal reading of infanticide statutes based on the English model of 1938 indicate that it is not necessary to prove that this disturbance caused the woman to commit the act in question by impairing her responsibility in a specific way, such as by affecting her ability to make sound judgments or exercise self-control, it seems there is an implicit presumption that the woman's "disturbance in the balance of the mind" was sufficiently connected to her criminal act so as to reduce her responsibility: see N. Walker, *Crime and Insanity*, vol.1 (Edinburgh: Edinburgh University Press, 1968), pp.134–135. As noted, the medical rationale of the infanticide legislation has since been amended in Ireland to cover mental disorders consequent upon childbirth: see n.2 above.

their infants were disposed of at the Central Criminal Court. Problems stemming from the law and practice, and the background reasons for reforming the law in this area, will be briefly noted. The legislative response to infanticide will then be examined, focusing in particular on the matters outlined above.

I. Infanticide in Ireland, 1922–1949

I.i Prevalence

Infanticide, particularly when it involves the killing of neonates after a concealed pregnancy, is not an easy crime to detect,[7] which makes it difficult to provide a reliable figure for its incidence in Ireland during the first decades of independence. It seems, however, that by the 1920s infanticide had long been on the decline in Ireland. O'Donnell found that the rate of "baby killing" fell significantly in the mid-nineteenth century in the immediate aftermath of the Great Famine, with this trend continuing thereafter, though at a less dramatic pace.[8] Official crime figures provided by the Central Statistics Office (hereafter CSO) indicate that 135 infant murders (defined as the killing of an infant aged

[7] See L. Rose, *Massacre of the Innocents: Infanticide in Britain 1800–1939* (London: Routledge & Kegan Paul, 1986), pp.23, 35–39; R. Sauer, "Infanticide and Abortion in Nineteenth Century Britain" 32 *Population Studies* 81 at 82, 85–87, on the difficulties involved in ascertaining the incidence of infanticide in nineteenth-century Britain. See also, A. Wilcynski, *Child Homicide* (London: Greenwich Medical Media, 1997), ch.2, on the "dark figure" for infanticide in contemporary criminal statistics. Detection of infanticide in Ireland during this period did not always begin with the discovery of the dead body of an infant. In her study of court records, Rattigan found that a "considerable number" of investigations into possible infanticides in Ireland in the first half of the twentieth century began before the victim's body had been discovered. Indeed, local gossip and the willingness of the community to report their suspicions to the local police, along with proactive policing of women suspected of infanticide, played a crucial role in the detection of infanticide crimes in Ireland during this period: C. Rattigan, "'I Thought from Her Appearance That She Was in the Family Way': Detecting Infanticide Cases in Ireland, 1900–1921" (2008) 11 *Family and Community History* 134–151; C. Rattigan, *"What Else Could I Do?" Single Mothers and Infanticide, Ireland 1900–1950* (Dublin: Irish Academic Press, 2012), ch.4; C. Rattigan,"'Dark Spots' in Irish Society: Unmarried Mothers and Infanticide in Ireland from 1926 to 1938" in M.C. Ramblado-Minero and A. Pérez-Vides (eds), *Single Motherhood in Twentieth Century Ireland: Cultural, Historical and Social Essays* (Lewiston, New York: Edwin Mellen Press, 2006), pp.95–96. See also, 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), p.145.

[8] I. O'Donnell, "Lethal Violence in Ireland, 1841 to 2003" (2005) 45 *British Journal of Criminology* at 676–681.

under one year) were recorded during the years 1927–1949 inclusive (see Table A), an average of six cases per annum.[9]

Although in the broader historical context infanticide was a diminishing concern, its incidence possibly appeared more significant to contemporary observers, especially when compared to other murders. The homicide rate for non-infant killings also fell in the years following the famine, and during the first four to five decades of independence Ireland experienced its lowest rates of homicide of persons aged over one year.[10] For the period 1927–1949, the CSO records 167 murders of persons aged over one year (see Table A). When compared with the figure for non-infant murders, it is evident that in certain years the number of reported infanticides was higher than or equal to other recorded murders (see Table A). For example, in 1927 there were 19 reported cases of the murder of infants aged one year and under, and only nine reported murders of persons aged over one year. For example in 1937, 1939 and 1945 the number of murders reported for these two categories were equal. When expressed in terms of a percentage of the total number of murders for this period, the incidence of infanticide appears more significant, accounting for 44.7 per cent of all murders recorded by the CSO.

Ryan suggests, from her review of newspaper reports during the 1920s and 1930s, that infanticide was "a monthly if not a weekly reality" in the Irish Free State.[11] When concealment of birth charges, which would normally have been tried at the Circuit Criminal Court, are taken into consideration, infanticide crimes would certainly have appeared prevalent. The CSO records 856 concealment of births between 1927 and 1949 (see Table A). The offence of concealment of birth, provided for by s.60 of the

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[9] See Central Statistics Office, *Annual Abstracts 1927–1949*. Statistics are not provided for the years prior to 1927.

[10] O'Donnell, "Lethal Violence in Ireland" at 677–678.

[11] L. Ryan, *Gender, Identity and the Irish Press* (Lewiston, New York: Edwin Mellen Press, 2002), p.262.

Offences Against the Person Act,[12] has an important relationship with infant murder, particularly in cases involving dead neonates. The s.60 misdemeanour criminalises the mere concealment of the dead body of an infant and is available even where the victim was born dead and/or had died of natural causes.[13] Historically, this offence provided a very useful alternative charge (after 1861)[14] or conviction where the evidence failed to establish murder (or manslaughter), or where, due to sympathy for the accused, it was thought inappropriate to subject her to a capital trial or conviction.[15]

A number of the concealment cases recorded in the CSO figures may have been undetected homicides where, for example, decomposition of the remains or insufficiently advanced medical techniques made it impossible to ascertain the cause of death. Thus, infanticide, both when compared to other murders and when the incidence of concealment of birth is accounted for, was something the courts were confronted with on a fairly regular basis. Indeed, Rattigan notes that Irish trial judges frequently commented on the prevalence of infanticide, and she suggests that the "moral climate" of post-independence Ireland may have particularly highlighted infanticide as being a cause of concern.[16]

I.ii The infanticide offender

[12] 24 & 25 Vic. c.100. Section 60 provides: "If any woman shall be delivered of a child, every person who shall, by any secret disposition of the dead body of the said child, whether such child died before, at, or after its birth, endeavour to conceal the birth thereof, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years."

[13] Offences Against the Person Act 1861 s.60.

[14] Prior to the Offences Against the Person Act 1861, the offence of concealment of birth was governed by Ellenborough's Act (43 Geo. III. c.58, s. 3) and the Offences against the Person Act 1828 s.14 (9 Geo. IV. c.31).

[15] 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), pp.312-315; A.R. Higginbotham, "'Sin of the Age': Infanticide and Illegitimacy in Victorian London" (1989) 32 *Victorian Studies* at 331–332; Sauer, "Infanticide and Abortion in Nineteenth-Century Britain" at 82; K.J. Kramar, *Unwilling Mothers, Unwanted Babies: Infanticide in Canada* (Vancouver: University of British Columbia Press, 2005), ch.1.

[16] Rattigan, *"What Else Could I Do?"*, p.52.

Infanticide was mainly committed by Irish women during this period for the purpose of avoiding the unwanted consequences of an illicit sexual relationship.[17] The typical infant-murder case appearing at the Central Criminal Court during the first three decades of independence involved a woman who had concealed her pregnancy and given birth alone, killing the child at or very soon after birth.[18] The offender was, in the vast majority of cases, the mother of the victim, an unmarried woman in her mid-twenties.[19] In general, the woman acted alone; although other persons, including the mother's siblings, parents and grandparents were occasionally implicated.[20] In addition, although there were cases where the father of the infant was charged, these were the exception; fathers were rarely involved in the pregnancy, the birth or, consequently, the killing.[21]

In a society which insisted on female virtue, and which was intolerant of illegitimacy,[22] unmarried mothers in Ireland during this period faced myriad difficulties with few solutions. As Earner-Byrne has noted: "In the Irish 'social order', the concept of illegitimacy extended in practice, if not in name, to the unmarried mother: she was an illegitimate mother."[23] An unwed pregnancy and birth would, in the vast majority of cases, have been an intensely shameful experience for a woman, inviting social disgrace and possibly other disastrous personal consequences which potentially

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[17] For accounts of infanticide in the Irish Free State, see generally: Rattigan, *"What Else Could I Do?"*, ch.1; A. Guilbride, "Infanticide: The Crime of Motherhood" in P. Kennedy (ed.), *Motherhood in Ireland* (Cork: Mercier Press, 2003), pp.170–180; Ryan, *Gender, Identity and the Irish Press*, ch.6; Ryan, "Perspectives on Infanticide", pp.137–151; Rattigan, "Unmarried Mothers and Infanticide in Ireland" at 83–102.

[18] Rattigan, *"What Else Could I Do?"*, ch.1.

[19] Ibid. p.40.

[20] For accounts of cases involving other persons, particularly family members, see: Rattigan, *"What Else Could I Do?"*, Ch.2; C. Rattigan, "'Done to Death by Father or Relatives': Irish Families and Infanticide Cases, 1922–1950" (2008) 13 *The History of the Family* at 370–383; Ryan, *Gender, Identity and the Irish Press*, pp.282–286.

[21] Ryan, *Gender, Identity and the Irish Press*, p.253.

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

[23] L. Earner-Byrne, *Mother and Child: Maternity and Child Welfare in Dublin, 1922–1960* (Manchester: Manchester University Press, 2007), p.172.

included loss of employment (especially if she worked in domestic service), familial anger and rejection, homelessness and social ostracism.[24] Poverty was also a factor in many infanticide cases, not only because it meant the woman would have been unable to take advantage of other options, such as, for example, emigration,[25] an illegal abortion, or a secret birth at a private maternity home followed by a private adoption, but also because it would have been difficult to provide for both herself and her baby after birth, particularly if without family support.[26] As has been historically the case elsewhere,[27] there appears to have been a strong correlation between domestic service and infanticide in Ireland.[28]

Concealment of pregnancy and birth was a key aspect of this crime. As Rattigan notes, the accused woman had usually gone to great efforts to hide her condition from her family, friends, employer, and community, usually, though not always, giving birth alone without medical assistance.[29] The death of the infant tended to be a continuation or a consequence of the woman's efforts to disguise the fact that she had been pregnant and had given birth in culturally unacceptable circumstances. Thus, illegitimacy,

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[24] See Guilbride, *Infanticide*, pp.171–172.

[25] On use of emigration by pregnant unmarried women, see L. Ryan, "Irish Newspaper Representations of Women, Migration and Pregnancy outside Marriage in the 1930s" in M.C. Ramblado-Minero and A. Pérez-Vides (eds), *Single Motherhood in Twentieth Century Ireland: Cultural, Historical and Social Essays* (Lewiston, New York: Edwin Mellen Press, 2006), pp.109–118; L. Ryan, "'A Decent Girl Well Worth Helping': Women, Migration and Unwanted Pregnancy" in L. Harte and Y. Whelan (eds), *Ireland Beyond Boundaries: Mapping Irish Studies in the Twenty-First Century* (London: Pluto Press, 2007), esp. pp.142–150; Guilbride, "Infanticide", p.178.

[26] See generally, Rattigan, *"What Else Could I Do?"*, pp.38–45,54–62; Ryan, "Perspectives on Infanticide", p.145.

[27] See generally, R.W. Malcolmson, "Infanticide in the Eighteenth Century" in J.S. Cockburn (ed.), *Crime in England 1550–1800* (London: Taylor & Francis, 1977), pp.192–193, 202–206; F. McLynn, *Crime and Punishment in Eighteenth Century England*, (London: Routledge, 1989), pp.111–112; J.M. Beattie, *Crime and the Courts in England 1600–1800* (Oxford: Oxford University Press, 1986), p.114; J.A. Sharpe, *Crime in Early Modern England 1550–*1750 (London: Longman, 1984), p.110; L. Gowing, "Secret Births and Infanticide in Seventeenth Century England" (1997) 156 *Past and Present* 92; W.L. Langer, "Infanticide: A European Survey" (1973) 1 *History of Childhood Quarterly* 357.

[28] Rattigan, *"What Else Could I Do?"*, p.41, 57–58: 92 women out of the 102 cases in which information on employment was available (in a sample of 195 infanticide cases) were domestic servants. See also Ryan, *Gender, Identity and the Irish Press*, p.269

[29] Rattigan, *"What Else Could I Do?"*, pp.65–69. See also Ryan, "Perspectives on Infanticide", p.141; Ryan, *Gender, Identity and the Irish Press*, pp.254–255, 267.

concealment and murder tended to be very closely associated. The criminal justice response to infanticide in Ireland during the 1920s, 1930s, and 1940s will be explored in the following section.

II. The Irish Criminal Justice Response to Infanticide

Prior to the enactment of the Infanticide Act 1949, the law made no special provision for women who murdered their infants. Like other convicted murderers, they were subject to a mandatory death sentence unless a reprieve was issued by the Governor General or, after 1937, by the Irish President.[30] However, in practice, women who murdered their infants were dealt with far more leniently than was advocated by the strict letter of the law. The archival records considered in this research indicate that, despite the fact that between 1922 and 1949 women regularly appeared at the Central Criminal Court on charges of murdering their "newly" or "recently born" infants, only 10 women were actually convicted of the capital offence in connection with infanticide during this period; the death sentence was commuted in each case.[31]

It is evident from the records that jurors, judges and prosecutors all favoured a lenient outcome in infanticide cases. The State Books at the Central Criminal Court show that at least 160 mothers appeared at the Central Criminal Court on an infant-murder charge during the period 1924 to 1949.[32] Of the 157 cases proceeded against, only 45 were disposed of on the basis of a jury verdict. Jurors usually acquitted or

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[30] See G. O'Brien, "Capital Punishment in Ireland, 1922–1964," in N. Dawson (ed.), *Reflections on Law and History: Irish Legal History Society Discourses and Other Papers, 2000–2005* (Dublin: Four Courts Press in association with the Irish Legal History Society, 2006), pp.227–228, 236.

[31] This conclusion is based on an survey of the following sources: NAI: DT s7788(a), Returns of Persons Sentenced to Death, 1922–32 and 1932–37; Index to Department of Taoiseach files; DT (CDS); SBCCC, IC-88-59 (October 1924–April 1925, Dublin City); IC-88-61 (June 1925–December 1926, Change of Venue Cases Dublin); IC-88-60 (June 1925–June 1927, Dublin), ID-33-68 (November 1927–June 1933); ID-24-129 (February 1928–November 1943, City of Dublin); ID-11-92 (November 1933–April 1941), ID-27-1 (October 1941–December 1945), V15-4-15 (February 1946–December 1952). See also NAI: DT s14493, Department of Justice memos dated January 4, 1944 and February 10, 1949.

[32] This figure excludes women appearing at the Central Criminal Court on charges of manslaughter or concealment of birth during this period.

convicted of a non-capital offence. Only eight (five per cent of the total sample) of the 45 cases tried before a jury in this sample of 160 maternal infant-murder cases at the Central Criminal Court resulted in a conviction; one woman was found guilty but insane; 26 women (57.8 per cent of those tried) were acquitted; and 10 women were convicted of either concealment of birth or manslaughter.[33] Where the jury convicted of murder they always recommended mercy; judges consistently supported the jury's recommendation for a reprieve.[34]

It seems that prosecutors favoured dealing with these cases on the basis of a plea of guilty to a less serious offence. One hundred and twelve cases in this sample (70 per cent) were disposed of on the basis of a guilty plea to either manslaughter (62 cases), concealment of birth (47 cases), or the statutory offences of child abandonment or cruelty (three cases).[35] The practice of dealing with these cases on a guilty plea became more entrenched from the mid-1930s onwards, and, indeed, in the years immediately prior to the enactment of the 1949 Act, every woman in this sample who had been charged with murdering her infant had a plea of guilty to a non-capital offence accepted.[36] It also seems that for "motives of humanity" the Attorney General often tried to avoid charging women suspected of infanticide with murder, using his discretion to charge with the concealment offence where the medical evidence was sufficiently ambiguous to allow this; however, where there was evidence of violence against the

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[33] Two cases involving convictions against women who murdered their infants that are listed on the Return of Persons Sentenced to Death are not found in the SBCCC. See NAI: DT s7788(a), Returns of Persons Sentenced to Death, 1922–32 and 1932–37. These returns list nine cases of maternal infanticide; the tenth case involving a capital conviction against a woman for the murder of her own infant (KO, 1943) is found in NAI: SBCCC ID-27-1 (October 1941–December 1945).

[34] NAI: DT s7788(a), Returns of Persons Sentenced to Death, 1922–32 and 1932–37.

[35] Children's Act 1909 s.12.

[36] Between 1945 and 1949, 20 women appeared at the Central Criminal Court on a murder charge related to the death of their infant. Every one of these women pleaded guilty to either manslaughter or concealment of birth; the plea was accepted by the State. See NAI: SBCCC ID-27-1 (October 1941–December 1945); V15-4-15 (February 1946–December 1952). For a more detailed discussion, see K. Brennan, "'A Fine Mixture of Pity and Justice': The Criminal Justice Response to Infanticide in Ireland, 1922–1949" (2013) 31(4) *Law and History Review* at 793-841.

infant, the Attorney General had "no option" but to proceed against the "unfortunate" woman on the capital charge.[37] It seems that, in the latter group of cases, the state prosecutor tried to avoid a murder trial and conviction by accepting a guilty plea to a non-capital offence at the Central Criminal Court.

It appears, therefore, to have been generally accepted that maternal infanticide should not be treated as a capital offence. To circumvent the severity of the existing law, an ad hoc form of lenient justice was practised in the Irish courts which ensured that women were rarely convicted of murdering their infants, and were never executed for this crime.[38] Evidence found in government files connected with the infanticide reform of 1949 indicates that both pragmatic and emotional factors influenced the lenient approach taken in cases of maternal infanticide.[39] As noted, juries rarely convicted and the death sentence was never carried out. It was, therefore, considered both "futile" and "painful" to put "young girls" and "unfortunate" women who killed their infants through the "ordeal" of a capital trial.[40] It was also costly from a resource perspective to charge women suspected of killing their infants with murder because this meant that the accused had to appear, with witnesses, at the Central Criminal Court in Dublin, even where it was clear to everyone involved that she would not be convicted of that offence.[41] In essence, the entire process for dealing with these cases was a "tragic farce".[42] It is evident from government files that those involved in dealing with these cases sought a more efficient and humane way to deal with maternal infanticide.[43] In

[37] NAI: DJ 8/144/1, memo addressed to the Minister for Justice accompanying the Infanticide Bill 1949, dated February 1949.
[38] For more detail see generally, Brennan, "A Fine Mixture of Pity and Justice".
[39] See generally, ibid.
[40] See generally, NAI: AG 2000/10/2921, memo from Attorney General to Department of Justice, dated March 28, 1941; DJ 8/144/1, memo addressed to the Minister for Justice accompanying the Infanticide Bill 1949, dated February 1949.
[41] NAI: DJ 8/144/1, memo addressed to the Minister for Justice accompanying the Infanticide Bill 1949, dated February 1949.
[42] Ibid.
[43] Brennan, "A Fine Mixture of Pity and Justice".

short, from both a practical and a humanitarian perspective, it was necessary to formalise the customary justice being doled out in the courts.[44] The legislative response to these problems is discussed in the following section.

III. The Legislative Response to Infanticide in Ireland

The possibility of introducing a legislative measure on infanticide in Ireland was first raised in the Department of Justice in 1928 by Mr S.A. Roche. Roche, then Assistant Secretary of the Department, requested that consideration be given to the 1922 English Infanticide Act, stating: "we might profitably enact an identical measure."[45] Four years later, Roche wrote to the new Fianna Fáil Minister for Justice, James Geoghegan, again recommending consideration of the 1922 Act,[46] and advising the Minister to see whether his "informal committee" would assist in getting a similar measure passed.[47] Interestingly, Mr Roche titled the memo "Re our social legislation", which perhaps suggests that the issue of infanticide was not viewed as a truly criminal matter by the Department. In 1941, a judicial committee, the "Committee appointed to Consider and Report on the Law and Practice relating to Capital Punishment" (hereafter the O'Sullivan Committee),[48] which had been tasked with reviewing the law on capital punishment,[49]

[44] Ibid.
[45] NAI: DJ H266/61, note dated July 31, 1928. The file contains a copy of the Infanticide Act 1922 and the Infant Life (Preservation) Act 1929 (19 & 20 Geo. V. c.34).
[46] Roche also suggested that the Infanticide Life (Preservation) Act 1929 be considered. However, there seems to have been no subsequent discussion about introducing that statute in Ireland.
[47] NAI: DJ H266/61, note titled "Re our social legislation", dated December 13, 1932.
[48] O'Sullivan C.J. chaired this committee. The O'Sullivan Committee's three other members were Maguire, P. and O'Byrne and Hanna JJ., all of whom were experienced at trying murder cases at the Central Criminal Court. Possibly this is the "informal" committee referred to by Roche; see text at n.47 above.
[49] NAI: DT s14493, letter from Minister for Justice, Mr P.J. Ruttledge, to O'Sullivan C.J., dated April 26, 1939. The O'Sullivan Committee was requested to put forward suggestions for reform without taking evidence or holding public meetings, but relying on their own experiences as trial judges in capital cases.

recommended that infanticide be subject to law reform, pointing to the English infanticide statute of 1938 as the legislative model.[50] This paved the way for legislative action.

The O'Sullivan Committee did not further elaborate on the infanticide proposal in its report, omitting to identify any particular problems with the law in this area or its reasons for recommending reform. Perhaps it was assumed that the Minister for Justice and his Department were already cognisant of the difficulties with the existing law. As noted above, government files connected with the infanticide reform and the Parliamentary debates on the 1949 Bill indicate that sending a woman to the Central Criminal Court on a murder charge when it was evident she would most likely not be convicted of that offence, and would certainly not be subject to the capital penalty, was problematic because it wasted court resources, could be said to turn the trial process into a sham, and caused "unfortunate" women and "young girls", and other persons involved in these trials, unnecessary distress.[51] Essentially, the Infanticide Act 1949 was brought in to formalise the ad hoc lenient practices at play at the Central Criminal Court and, in so doing, to avoid the unwelcome consequences of this customary justice.[52]

The O'Sullivan Committee made no additional suggestions with respect to abolishing the death penalty for murder, and, aside from recommending reform of the insanity defence, stated it was of the view that the law on murder should not be amended as it presented no difficulties for trial judges or juries.[53] The Secretary of the Department of Justice, Mr Roche, who argued in favour of more radical reform, with a

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[50] NAI: DT s14493, "Report of the Committee appointed to Consider and Report on the Law and Practice Relating to Capital Punishment", para.1 ("O'Sullivan Committee Report").

[51] See above text at nn.38–44. See also Brennan, "A Fine Mixture of Pity and Justice".

[52] See Brennan, "A Fine Mixture of Pity and Justice".

[53] NAI: DT s14493, O'Sullivan Committee Report, para.2. The O'Sullivan Committee had not been permitted by the Minister for Justice to consider a general abolition of the death penalty for the crime of murder. See NAI: DT s14493, letter from Minister for Justice, Mr P.J. Ruttledge, to O'Sullivan C.J., dated April 26, 1939. See also NAI: DT s7788(a), note dated May 18, 1939, in which Roche stated that neither the Minster for Justice nor the Taoiseach was in favour of "total abolition" of the death sentence; and that in relation to the scope given to the O'Sullivan Committee in terms of their deliberations on the law of murder, the Committee was not permitted to consider complete abolition of the death penalty.

possible abolition of the death penalty for all non-political murders, criticised the O'Sullivan Committee on the ground that it had been "unduly cautious".[54] He stated that "in the majority of cases the law is too harsh and indiscriminating".[55] Noting that a reprieve was granted in three out of every five capital convictions,[56] Roche advised that this would be "more striking" had the Attorney General and juries not made efforts to "mitigate the severity of the law" in many cases.[57]

There appears, however, to have been little appetite among relevant officials for a more fundamental reform of the sentence for murder, and, indeed, the O'Sullivan Committee had been prevented from considering a wider abolition of the death penalty.[58] In the historical context, twenty or so years after the establishment of a new State followed by a civil war, it is perhaps not surprising that the prevailing view was that a more extensive review of the death penalty would not be countenanced. Indeed Roche, despite his criticisms of the O'Sullivan Committee's recommendations, concluded his comments on the report by stating that the Department of Justice was of the opinion that it would not be prudent to completely abolish the death sentence, especially in regard to "political murder".[59] Arguably, however, infanticide was a unique and inherently private offence committed by a particular group of offenders against a particular group of victims and could, perhaps, be distinguished from other murders on the basis that it posed no danger to the public order and political stability of the fledging Irish nation.[60]

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[54] NAI: DT s7788(a), letter entitled "re trials for murder", dated August 25, 1941, p.2.
[55] Ibid. p.3.
[56] NAI: DT s7788(a), letter entitled "re trials for murder", dated August 25, 1941, p. 3. See T. O'Malley, "Homicide in Ireland: 1972–91: Review and Commentary" (1995) 1 *Medico-Legal Journal of Ireland* 26, who notes that statistics provided in the Dáil and Seanad during the 1950s and 1960s indicate that from the 1920s onwards the death penalty was frequently commuted, with fairly lenient sentences being imposed in its place. For an overview of the wider debate on the abolition of capital punishment in Ireland during this period, see G. O'Brien, "Capital Punishment in Ireland", pp.223–258.
[57] NAI: DT s7788(a), letter entitled "re trials for murder", dated August 25, 1941, p.3.
[58] See above at n.53.
[59] NAI: DT s7788(a), letter entitled "re trials for murder", dated August 25, 1941.
[60] It was noted by two witnesses before the Royal Commission on Capital Punishment in 1866, one of whom was the distinguished jurist Sir James Fitzjames Stephen, that one rationale for discriminating

The death penalty was still the mandatory punishment for murder in England, which left little precedent for a wider abolition of the sentence for this crime. A more fundamental reform along these lines would have been a bold and radical move. Treating infanticide as a non-capital crime, at least in certain prescribed circumstances, was not, however, a novel idea, and Irish reformers could take comfort in the fact that the infanticide proposal essentially involved the implementation of a law which had been long established in England as an effective response to this crime. Further, as noted, there was a deeply entrenched custom of circumventing murder trials and convictions and of commuting death sentences in cases of maternal infanticide. No woman had been executed for killing her infant, at least since the foundation of the Irish Free State, and indeed for many years prior to independence.[61] An infanticide measure along the lines proposed could be easily justified on the basis that it simply gave "statutory authority to what [wa]s already the practice".[62]

In January 1944, the Minister for Justice, Mr Boland, in consultation with the Attorney General, agreed that the recommendation of the O'Sullivan Committee with respect to infanticide should be followed, and approval was given by the Cabinet to proceed along these lines.[63] The Infanticide Bill seems to have caused little difficulty during the drafting stages, presumably because there was a legislative precedent to follow. The draft Infanticide Bills prepared during the 1940s followed the key aspects of

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between the murder of an infant and that of an adult was that the former did not create the same level of terror in society. See: British Parliamentary Papers 1866, Vol. xxi, p.343 (Fitzjames Stephen); p.57 (Lord Cranworth). The page numbers used refer to the page number of the entire volume, rather than the page number of the individual paper, report, document, etc.

[61] The practice of granting reprieves on the death sentence in cases of infanticide was established in Ireland in the mid-nineteenth century: see P. Prior: *Madness and Murder: Gender, Crime and Mental Disorder in Nineteenth-Century Ireland* (Dublin: Irish Academic Press, 2008), pp.132–133.

[62] NAI: DT s7788(a), letter entitled "re trials for murder", dated August 25, 1941, p.3.

[63] See NAI: DT s14493 and s13311, Department of Justice memorandum on the "Proposed Legislation to amend the law relating to (1) Insanity as a Defence to Criminal Charges, and (2) Infanticide", dated January 4, 1944, para.5; and "Extract from Enclosure to Department of Justice Memorandum", dated January 4, 1944, which set out the "Heads for Legislation", and was circulated with this memorandum. See also NAI: DT s14493 and s13311, "Extract from Cabinet Minutes", dated February 15, 1944.

the English legislative example, applying to cases where the victim was aged under 12 months and allowing mitigation where the balance of the woman's mind was disturbed by reason of the effect of childbirth. The earlier drafts did not contain a reference to lactation consequent upon childbirth, which was inserted into the 1949 version as a justification for applying the provisions to the killing of infants up to the age of 12 months.[64] The final Bill that was introduced in the Dáil in April 1949 had also been subject to one other change. In March, at the request of the Cabinet, a new provision (s.1(1)) was inserted which related to the procedure for proceeding against a woman on an infanticide charge. This new subsection implied that infanticide could not be charged in the first instance: a woman could be sent forward for trial for infanticide only where she had first been indicted for murder and where the district judge at the preliminary investigation determined that the charge should be reduced.[65]

The Infanticide Bill passed through the Dáil and Seanad without amendment. It seems to have been viewed as an uncontroversial measure as it passed through both Houses. Indeed, only one Dáil Member spoke out against the Bill,[66] and although minor criticisms and suggestions were offered by other speakers in both Houses, these generated little discussion. The Infanticide Bill was enacted into law in July 1949.[67]

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[64] NAI: DJ 8/144/1, Memorandum dated February, 1949. The earlier drafts had contained a provision stating that juries could still return a manslaughter verdict on a murder indictment in cases involving infants; and that on both murder and infanticide indictments the jury could return a verdict of guilty of concealment of birth, or an insanity verdict. These provisions were not included in the 1949 Bill, though it did amend the Offences Against the Person Act 1861 s.60 allowing for a concealment verdict to be returned on an infanticide charge; see Infanticide Act 1949 s.1(4).

[65] For further discussion on this provision see below, text at nn.98–126. Section 1(1) provides: "On the preliminary investigation by the District Court of a charge against a woman for the murder of her child, being a child under the age of twelve months, the Justice may, if he thinks proper, alter the charge to one of infanticide and send her forward for trial on that charge."

[66] See generally, *Dáil Debates* cols.275–282, Major V de Valera. His criticisms of the Bill are discussed below text at nn.80–89.

[67] At the time it was enacted, the Infanticide Act 1949 provided:

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

The question whether Irish lawmakers considered other options during the drafting stages of the infanticide reform, and the extent to which they modified the English model to suit the Irish context, is considered in the following section. The evidence in the records shows that the only issue to have given Irish reformers any particular concern was that of ensuring that the proposed law would not interfere with the sanctity of infant life. This matter received particular attention during the drafting stages of the reform, resulting, it seems, in a consultation with one prominent member of the Catholic Church, and, ultimately, to the inclusion of a new provision in the Irish measure which was aimed at ensuring that the infanticide statute would not diminish the value of infant life or the deterrent effect of the law.

IV. Special Considerations in the Irish Infanticide Reform

The Irish legislature adopted the English approach to infanticide, making it a separate homicide offence akin to manslaughter in punishment seriousness and rationalising the lenient approach taken on the basis that at the time of the killing the balance of the woman's mind had been disturbed as a result of the effects of childbirth or lactation. In this regard, it appears that Irish lawmakers showed little legislative imagination. They did not consider alternative options when considering the infanticide reform, adopting the

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(2) Where, upon the trial of a woman for the murder of her child, being a child under the age of twelve months, the jury are satisfied that she is guilty of infanticide, they shall return a verdict of infanticide.
(3) A woman shall be guilty of felony, namely, infanticide if –

> (a) by any wilful act or omission she causes the death of her child, being a child under the age of twelve months, and
> (b) the circumstances are such that, but for this section, the act or omission would have amounted to murder, and
> (c) at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child

and may for that offence be tried and punished as for manslaughter.
(4) Section 60 of the Offences against the Person Act, 1861, shall have effect as if the reference therein to the murder of any child included a reference to infanticide.
2. This Act may be cited as the Infanticide Act, 1949."

English approach without question.[68] Possibly reformers felt bound to follow the O'Sullivan Committee's recommendation to consider the English law as the legislative model, though it also seems plausible that they simply lacked the initiative or interest to propose a novel approach to infanticide when there was an effective and well-established legislative precedent to follow.

The only suggestion of hesitance in government files on the infanticide reform about the suitability of the English law in the Irish context came from the Secretary of the Department of Justice, Mr S.A. Roche, who, on initial consideration of the O'Sullivan Committee Report in 1941, wrote to the Office of the Attorney General expressing reservation about the infanticide recommendation.[69] Roche considered that the English law's "meticulous pathological phrases about 'the effect of birth' and 'the effect of lactation consequent upon birth' would sound strange in the Dáil".[70] He also complained that the English approach was "too narrow" because it excluded cases where the victim was aged over one year, situations where mothers killed from "despair or anger", and, referring to a recent case where two sisters had been convicted of murder, "young girls" who helped their older sisters kill their infants.[71] He claimed that these cases should be included in the proposed mitigation framework because there was not the "slightest probability" that the woman or girl would be executed.[72] He argued that "there seem[ed] to be no sense in inflicting upon her, upon the judge, upon the jury, and upon the Government all the distress and worry of an unreal trial for murder followed by a reprieve".[73] Roche favoured a "broader, more flexible, less meticulous system" than that

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[68] For discussion on the medical rationale adopted, see below at section V.

[69] NAI: DT s7788(a), letter entitled "re trials for murder", dated August 25, 1941. Although Roche had suggested the English model as a possible solution to the Irish infanticide problem in the late 1920s and early 1930s, by 1941 he seems to have favoured a different approach; see above text at nn. 45-47.

[70] NAI: DT s7788(a), letter entitled "re trials for murder", dated August 25, 1941, p.3.

[71] Ibid.

[72] Ibid.

[73] Ibid.

proposed.[74] His views do not appear to have generated any discussion about alternatives more suited to the Irish context, at least of a nature which left a paper record.

One other suggested alteration to the substance of the English law appears to have been put forward during the drafting stages of the Bill. The Parliamentary Secretary to the Minister for Local Government and Public Health, Dr Conn Ward,[75] in a 1944 memorandum on the infanticide reform, recommended amending the wording of the proposed measure to replace the phrase "the balance of the accused's mind was so disturbed that" with the phrase "the accused was suffering from such *a disease of the mind* that".[76] There is no evidence that this suggestion was considered by those involved in drafting the Bill. Its resonance with the existing insanity defence would, presumably, have placed an undesirable restriction on the availability of the new provisions and possibly defeated the objectives of the reform.

During the second-stage reading of the Infanticide Bill in the Dáil, Major de Valera, a member of the opposition Fianna Fáil party, proposed that infanticide should continue to be recognised as murder, but that specific provision could be made for the mitigation of punishment in particular cases. He suggested the trial jury could convict of murder with the qualification that the balance of the defendant's mind was disturbed, as set out in s.1(3) of the Bill, allowing the trial judge a discretionary power with regard to

[74] Ibid. pp.3–4.
[75] Mr Seán McEntee was the Minister for Local Government and Public Health at the time. Dr Ward, a medical practitioner and Fianna Fáil TD, had held the position of Parliamentary Secretary since Fianna Fáil had taken up office in 1932. In March 1944, the Minister for Local Government and Public Health formally delegated all his responsibilities in relation to Public Health to Dr Ward, who from then was effectively the head of the Department on matters of health; see J.H. Whyte, *Church and State in Modern Ireland 1923–1979*, 2nd edn (Dublin: Gill & Macmillan, 1980), p.128.
[76] See NAI: DT s14493 and s13311, Department of Local Government memorandum, entitled "Notes by the Parliamentary Secretary to the Minister for Local Government and Public Health on the proposed Legislation to amend the law relating to (1) Insanity; (2) Infanticide", dated February 2, 1944, para.5. For further discussion of this memorandum see below text at nn.149–153.

the sentence imposed.[77] This suggestion was noted during the Committee Stage in the Dáil, but rejected on the basis that it would involve a "complete recasting of the whole Bill and a change in its title".[78] Since the principle of the Bill had been accepted by the Dáil, it was considered "hardly now possible, even if it were desirable" to make the suggested amendment.[79]

IV.i Legislating to preserve the sanctity of infant life

Overall, there appears to have been little interest in developing an alternative approach to infanticide in Ireland and, as noted, there seems to have been very little opposition to adopting the English law. Indeed, Major de Valera was the only member of either House to voice opposition to the Infanticide Bill, strongly objecting to it on sanctity of infant life grounds.[80] He refused to accept that it was permissible to draw a distinction between the killing of infants and older persons, asserting that he "would recognise that the crime [of child killing] is murder, murder in God's law or natural law….".[81] Although he did recognise that infanticide could involve varying degrees of culpability "ranging from [a] possible complete lack of responsibility due to complete mental incapacity to cold-blooded, wilful and unadulterated murder", he claimed that it would not be proper for Parliament to distinguish between different degrees of responsibility by classifying the crime as a different category of unlawful killing.[82] Indeed, he argued that the "killing of a child should … be dealt with as a solemn and extremely serious procedure"[83] and that the full formalities of a murder trial should apply.[84] He did acknowledge, however, that a

[77] See generally, *Dáil Debates* cols 278, 281–282.
[78] NAI: DJ 8/144/1, "Infanticide Bill, 1949: Committee Stage—Dáil, Supplementary Notes", para.4.
[79] Ibid.
[80] See generally *Dáil Debates* cols 275–282.
[81] *Dáil Debates* col.277.
[82] Ibid. col.276.
[83] Ibid. col.277.
[84] Ibid. col.277.

mitigation of punishment could be permitted in some cases, having regard to the offender's "culpability or competency".[85]

Major de Valera's opposition to the proposed bill also appears to have been informed by a degree of anti-English sentiment. He cautioned overall against "traditions of English liberal thought"[86] on the issue of infanticide and he urged the Dáil not to follow "the line taken in another country", but to show that "*we in this country* still recognise the dignity and the importance of human life from the moment of conception to the grave".[87] These comments, which seek to differentiate the Irish nation on the grounds of moral superiority and which question the suitability of "liberal" English developments in the domestic context, may reflect what historians have identified as a wider drive among Irish public officials to create a unique and distinctly "Irish" nation, particularly in relation to moral issues.[88] Post-independence, the predominately male, catholic and nationalist administration embarked on a "nation-building" process, adopting laws and policies which marked the new State as "Irish" and which reflected what were assumed to be the common values and interests of the citizens of the newly independent State.[89] Perhaps

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[85] Ibid.col.277. See also above text at nn. 77-79.

[86] Ibid.col.276.

[87] Ibid. col.282. Italics added.

[88] For accounts of the State's effort to build a unique Irish nation, with a particular focus on enforcing sexual morality, promotion of the family and the adoption of Catholic values, 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, 1999), pp.253–266; M. Luddy, *Prostitution and Irish Society* (New York: Cambridge University Press, 2007), pp.194–200; C. Hug, *The Politics of Sexual Morality in Ireland* (London: Macmillan, 1999), pp.77–84; Guilbride, 'Infanticide', pp.170-171; 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 Students, Queen's University Belfast, 1995), pp.168–178. It has been noted that Ireland was not unique in its concern over these matters, particularly that of public morality. During the interwar period many traditional European societies became similarly concerned about supposed decreasing standards in sexual morality, and they also legislated to maintain traditional moral values. See Whyte, *Church and State in Modern Ireland*, pp.33–34. He notes, however, that the Irish experience was a more intense version of this widespread furore over sexual morality. See also Hug, *The Politics of Sexual Morality in Ireland*, p.78, on French prohibitions on contraception. See Valiulis, "Neither Feminist nor Flapper" at 177–178, on parallels between Irish and Italian experience. L. Zedner, *Women, Crime and Custody in Victorian England* (Oxford: Clarendon Press, 1991), pp.30–31, notes concern among the Victorian middle-class about crimes of immorality and "low" entertainments such as dancing.

[89] See literature cited above at n.88.

what is interesting is that Major de Valera's attitude with respect to the suitability of "liberal" English standards in the Irish context does not appear to have been shared by any of his parliamentary colleagues who spoke; nor does it appear to have been a view held by those involved in bringing forward this measure. Indeed, as noted, the Secretary of the Department of Justice actually thought that the English approach to infanticide would be too narrow to address satisfactorily the difficulties with this crime in Ireland.[90]

It is apparent, however, that the need to appear not to weaken the law's protection of infant life was an important consideration in the Irish context. When he introduced the Bill to the Dáil, the Minister for Justice, General MacEoin, emphasised the importance of legislating in a manner which upheld the sanctity of human life, particularly, in this case, infant life.[91] He specifically drew a distinction between the English approach and the contents of the Irish Bill, suggesting that the 1949 measure would do more to protect the sanctity of infant life than the English model on which it was based because it implied that where a mother wilfully killed her infant the initial charge would be murder.[92] Presumably, the Minister was pre-empting objections to the Bill on the sanctity of life ground, but arguably there also appears to have been a hint of Irish moral superiority in these comments, as well as a desire to draw attention to the fact that the Irish Bill did not *exactly* follow the English example.[93]

In response to Major de Valera's polemic attack on the Bill, the Minister for Justice admitted that initially he too had "very grave misgivings" that it would appear to "cheapen[…] … human life", but that he was satisfied that "the sanctity of human life is maintained and the seriousness of the offence is not lessened".[94] He explained that the proposed statute was framed in such a way that it did not alter the fact that the unlawful

[90] See above text at nn.69–74.
[91] *Dáil Debates* cols 265–266.
[92] Ibid. col.266.
[93] Ibid. col.266.
[94] Ibid. col.282.

killing of an infant is murder and would be treated as such unless certain mitigating conditions existed.[95] This was reinforced by the provision in s.1(1) which implied that the initial charge in cases of infanticide would always be murder.[96] The Minister stressed that s.1 was "so worded that I did want to leave it clear that the death by malice of any person, whether that person was one hour, one minute, or one hundred years old, was murder".[97]

As noted, s.1(1), which is not found in the English law, had not been part of any of the original draft Bills and was inserted after the Cabinet called for a redrafting of the 1949 proposal.[98] The cabinet minutes provide no insight as to the reasons for this request or the nature of the changes sought. It is evident, however, given the Minister for Justice's comments in the Dáil, that the purpose of this redrafting was to prevent a distinction being drawn in terms of relative seriousness between the murder an infant and that of an adult.

The potential difficulty with regard to the sanctity of infant life had been flagged in the Department of Justice prior to the Bill's being submitted to the Cabinet for approval for submission to the Dáil. In particular, the Department anticipated that the Roman Catholic Church would "view with feelings of no great enthusiasm a proposal which may have the effect of cheapening human life or encouraging immorality".[99] As a result of these concerns, the introduction of the Bill to the Cabinet appears to have been delayed until the Minister for Justice and the Attorney General met with the Archbishop of Dublin, Dr McQuaid.[100] The documents found in government and diocesan archives do not detail

[95] Ibid. cols. 265-266.
[96] Ibid. cols. 266, 282.
[97] Ibid. col.282.
[98] See above text at n.65 above.
[99] NAI: DJ 8/144/1, memorandum addressed "Minister", dated February, 1949.
[100] NAI: DJ 8/144/1, handwritten notes dated February 28, 1949, and March 1, 1949, signed R.H, found on note, dated February 26, 1949, which states that the Bill had been withdrawn from the cabinet agenda until March 4.

the substance of the discussion between Dr McQuaid and the government at this meeting; in fact, there is no confirmation in these records that the planned meeting did take place. However, assuming the consultation did go ahead as planned, two documents found in the archives for the Archbishop of Dublin provide some indication of the key issues which likely arose and of the Archbishop's stance on the infanticide proposal.[101]

Unsurprisingly, the Archbishop probably offered strong criticism of the Bill on the grounds that it could reduce the gravity of infant murder in the eyes of the law and in the public mind, and that it would diminish the deterrent effect of the law. One of the Archbishop's advisers, Monsignor Dargan, in a memorandum on the Infanticide Bill, sympathised with the view that infanticide was an aggravated form of murder.[102] Though he recognised that extenuating circumstances were involved in many cases, he criticised the existing practice in the courts where the sentence for this crime was, without exception, reprieved, despite the fact that there must have been cases in the past where the "extreme penalty" was warranted.[103] He opined that the prevailing custom of commuting the death sentence helped foster the notion that infanticide was not actually murder, but he nonetheless acknowledged that the nation would be accused of "barbarity" were this penalty to be carried out again in a case of maternal infanticide.[104]

Dargan faulted the Infanticide Bill on the ground that it would promote the view that the killing of an infant was "not murder in the full sense of the term".[105] He preferred

[101] See McQuaid Papers, AB8/B/XVIII/10: memorandum entitled "Proposed Infanticide Bill, 1949", dated February 24, 1949, authored by Monsignor Patrick Dargan (hereafter Document 1); unsigned and undated memorandum, entitled "Infanticide Act" (hereafter referred to as Document 2). There is one other unsigned memorandum in the file. It is written on High Court of Justice paper, and presumably was authored by a member of the judiciary. The contents of this memorandum are not discussed in this article.
[102] McQuaid Papers, AB8/B/XVIII/10: Document 1, para.1.
[103] Ibid. para.2.
[104] Ibid. para.2, 5.
[105] Ibid. para.6.

that the existing law be left unchanged,[106] but conceded that if compelling reasons were advanced in favour of enacting the proposed legislation, the wording of the Bill ought to be amended to explicitly label the crime murder.[107] He accepted that it may have been an "implicit feature" of the Bill that a mother could be charged with and convicted of murdering her infant, and subject to the penalty for that crime, but he suggested that this be "made explicit, as a means of calling attention to a very important moral truth".[108]

The significance of labelling, in relation to both the deterrent impact of the law and the recognition of the gravity of the offence at hand, was also highlighted in another diocesan memorandum, most likely authored by Archbishop McQuaid or another member of his staff.[109] The term "murder", the author stated, has a "fearsome and ugly sound", and constituted a deterrent in its own right "because its meaning is universally understood".[110] He argued that the proposed infanticide law might eventually foster the view among the public that a woman could never "murder" her infant, and that it could diminish the gravity of the crime in the public mind.[111]

Overall, assuming the scheduled meeting did take place, it appears that the Archbishop probably expressed strong reservations to the Minster for Justice about the Infanticide Bill. However, it seems unlikely that he outright rejected the proposed measure or, more generally, the desirability of altering the law to make lenient provision for certain infanticide offenders, at least those who killed in extenuating circumstances.[112] In light of the evidence in the diocesan records, it seems plausible that the Archbishop would have at least suggested that the Bill be amended to render more

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[106] Ibid.
[107] Ibid. para.7.
[108] Ibid.
[109] McQuaid Papers, AB8/B/XVIII/10: Document 2.
[110] Ibid.
[111] Ibid.
[112] See Brennan, "A Fine Mixture of Pity and Justice".

explicit the fact that the crime at hand was murder, and would continue to be treated as such unless acceptable mitigation was involved.

Further, it is likely the subsequent request by the Cabinet to redraft the Bill was in deference to any such misgivings. At that time, the Catholic Church wielded significant political influence in Ireland.[113] Indeed, with independence from Britain, the architects of the new Irish nation frequently consulted with the Church on legislative and policy matters related to Catholic moral and social teaching, and although the Church's wishes were not always adopted, the bishops were on occasion very influential.[114] Had the Archbishop refused to support any measure along the lines proposed, it is quite possible that the Government would not only have hesitated in proceeding with the Bill, but may have dropped it altogether.

Interestingly, in both of the documents referred to above, the importance of labelling was emphasised, and Monsignor Dargan was particularly concerned about ensuring that the legislation be more explicit about the fact that this crime could still be prosecuted as murder. In this regard, in the second diocesan document found in the McQuaid Papers a suggestion was made that a "better" approach to the infanticide problem would be to legislate to permit trial judges, at the conclusion of the evidence, to use their discretion to reduce the murder charge to one of manslaughter or concealment of birth, and for the jury to then decide the question of guilt in the normal manner.[115] This is not dissimilar to the procedure actually adopted in s.1(1) which allows a district judge to alter a murder charge to one of infanticide on the basis of his assessment of the

[113] For a thorough exploration of the influence of the Catholic Hierarchy over Irish governments and other public officials during this period, see Whyte, *Church and State in Modern Ireland*, esp. chs.2–10; See also T. Inglis, *Moral Monopoly: The Rise and Fall of the Catholic Church in Modern Ireland* (Dublin: University College Dublin Press, 1998), pp.77–80; D. Ferriter, *The Transformation of Ireland 1900–2000* (London, 2004), esp. at pp.337–340,408-412, 520–523.
[114] See literature cited above at n.113. For example, fear of potential opposition from the Catholic hierarchy was a key factor in dissuading Irish governments from legislating for adoption: Whyte, *Church and State in Modern Ireland*, pp.183–193, 274–277, 368. See also Inglis, *Moral Monopoly*, pp.79, 81.
[115] McQuaid Papers, AB8/B/XVIII/10: Document 2.

evidence available at the preliminary examination. Possibly this suggestion was put forward by the Archbishop to the Minister for Justice and the Attorney General, and was then relayed to legislative draftsmen who translated it into a legally workable procedure that retained the key rationale of the proposed legislation and also achieved at least one of the purposes of the reform, the avoidance of costly and unnecessary murder trials at the Central Criminal Court.[116] It certainly appears that s.1(1) was a good compromise between the need to achieve particular practical and humanitarian objectives, while respecting a significant aspect of Catholic, and indeed wider Christian, teaching.

Section 1(1) essentially reaffirmed that where murder was suspected, the case would have to be treated as a capital offence, at least until a district justice was satisfied that there was good evidence on which to reduce the charge to infanticide. This provision was important symbolically, because it conveyed the legislature's respect for infant life and also, possibly, that the Irish law would go further than its English counterpart in this regard.[117] Section 1(1) was also undoubtedly important strategically to mollify potential objectors as the Bill passed through Parliament and perhaps equally, if not more importantly, the Catholic Church. Whether the procedure set out in s.1(1) made a significant practical difference to defendant women and criminal justice officials involved in these cases would have depended on the willingness of district judges to alter the charge on the basis of the evidence presented in the District Court, and also, possibly, on the State's desire to have the charge reduced. In this regard, s.1(1) may have given rise to difficulties in connection with ensuring that appropriate evidence was presented at the District Court that would enable the district justice to make a determination about reducing the charge. This issue was highlighted in the Dáil, by

[116] In his comments in the Dáil, the Minister for Justice noted that the new legislation would "lessen the difficulty with regard to travelling", noting that, as the law currently stood, women accused of murdering their infants and witnesses had to travel from all over the country to Dublin to attend the Central Criminal Court: *Dáil Debates* col.282.
[117] See text at nn.92–93 above.

Fianna Fáil TD, Deputy Lynch. He objected to the procedure in s.1(1), arguing that the district justice would need some evidence upon which to base his decision before reducing the charge, and that since it was unlikely that the prosecution would produce such evidence, the onus would fall on the accused, who would thus be forced to "disclos[e] her hand".[118]

The issue raised by Deputy Lynch was further discussed during the Committee Stage in the Dáil. It was noted that if the prosecution was not responsible at the preliminary hearing for adducing evidence with regard to the mental state of the accused, this obligation would fall on the defendant, thus prejudicing her case at trial.[119] Further, it was noted that, where no evidence relating to the accused's mental state was produced at the preliminary hearing, this would place an undue burden on the district judge, who, feeling unable to make his own determination, may leave it to a trial judge at the Central Criminal Court to decide the question of whether the offence was murder or infanticide.[120] Since one of the objects of the Bill was to reduce "the time and expense" of unnecessary murder trials, such an outcome would clearly be problematic.[121]

In response to these concerns it was noted that, in practice, the evidence "usually raise[d] a presumption" that the accused had been "mentally disturbed" when she killed her child, and that, in such circumstances, a district judge would "almost certainly call for a medical report".[122] It was observed that the Attorney General would introduce the necessary medical evidence where he was of the view that the woman was guilty of infanticide rather than murder.[123] It was noted, however, that where the State was of the opinion that the woman's crime was murder, it could not be expected to

[118] *Dáil Debates* cols. 272–273.
[119] NAI: DJ 8/144/1, "Infanticide Bill, 1949: Committee Stage—Dáil, Supplementary Notes", para.3.
[120] Ibid.
[121] Ibid.
[122] Ibid. For discussion of the medical basis of the legislation see below at section V.
[123] Ibid.

introduce such evidence.[124] In addition to this, it was observed that, in practice, the Attorney General would pursue a murder indictment only where he was satisfied that the evidence supported such a charge.[125] The issue of accused women being forced to introduce medical evidence themselves was not dealt with directly. However, it seems to have been assumed that defendants would not be placed in the position of having to adduce evidence to support infanticide at the preliminary hearing because the Attorney General could be trusted to seek murder only where this was justified on the evidence, and because district justices would call for medical reports in other cases where the facts raised a presumption of infanticide.

The history behind the Irish infanticide reform shows that the Attorney General, and at least the Central Criminal Court judges who sat on the O'Sullivan Committee, sought a better way to deal with women who murdered their infants, one which would not involve sending this offender to the Central Criminal Court on a farcical murder charge.[126] As noted, the object of the Bill would have been frustrated if district judges failed to use their discretion to reduce the charge, and it is not implausible that the new law did operate on the basis of a tacit presumption in favour of reducing the charge in suitable cases.

V. The Medical Rationale for the Infanticide Law

Although concern about the sanctity of infant life had an impact on the framing of the Irish infanticide law, in other respects there appears to have been no interest in developing a different approach to infanticide in Ireland. This is particularly true with regard to the medical justification for facilitating mitigation of this crime. The Irish infanticide statute wholly adopted the extenuating rationale of the English infanticide law,

[124] Ibid.
[125] Ibid.
[126] Brennan, "A Fine Mixture of Pity and Justice".

namely that the balance of the woman's mind was disturbed by reason of the effects of childbirth or lactation. The rationale for lenient treatment may suggest that there was thought to be a link between infanticide and mental disturbance. Indeed, when introducing the Infanticide Bill to both Houses of the Oireachtas, the Minister for Justice certainly suggested that there was such a connection, and he appealed to medical science as a justification for the reform. He outlined the prevailing problem with the law relating to maternal infant murder as follows:

> "…[A]n unmarried mother, to take the most usual type of case, who wilfully kills her child is guilty of murder and liable to be sentenced to death unless she establishes a defence on the ground of insanity. Modern medical opinion strongly favours the view, however, that a woman, although not insane in the sense that would enable her to establish a defence on that ground … might suffer from such disturbance of the mind in the circumstances attendant or following on the birth of the child that she would not be fully responsible for her actions. In practice, for many years no woman has been hanged for the murder her infant child."[127]

However, in the Government records connected with the infanticide reform, there is no clear evidence to indicate that women appearing before the Central Criminal Court on infant murder charges were commonly mentally disturbed, or that this presented a key reason for reforming the law on infanticide. As noted above, the historical record suggests that the main reason for the infanticide reform was to avoid sending women to the Central Criminal Court on murder charges where it was evident that as a result of the circumstances in which the offence was committed a jury would not convict of murder,

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[127] *Dáil Debates* col.265. Emphasis added. While the Minister referred specifically to unmarried mothers, because, as he noted, this was the typical case, it was never suggested that the ambit of the infanticide legislation be restricted only to unwed mothers who killed their infants.

and, where a capital conviction did result, that the death sentence would not be carried out.[128] It is evident that the existing law was thought to be too harsh. Possibly one reason for the sympathetic response to this crime was that it was assumed that women who killed their infants had reduced culpability as a result of having experienced a mental disturbance in the aftermath of childbirth,[129] and it may have been that the reason the existing law proved so problematic was that it failed to provide a formal channel for juries, prosecutors, and judges to recognise this mitigation. However, there is nothing in government files to suggest that the 1949 reform was explicitly connected with infanticide offenders being unable to plead mental disturbance as a defence to the charge of murder. Arguably, if it was thought that women who killed their infants were less culpable as a result of being mentally unbalanced, this was only one of many extenuating factors considered relevant in these cases.

V.i Feminist critiques of infanticide: the Irish context

Despite the Minister for Justice's appeal to the authority of "modern medical opinion", the Irish infanticide reform was not informed by medical expertise, except to the extent that it was based on the English law of 1938, which had been based partly on medical advice.[130] In fact, it appears that the Department of Justice did not consult with medical experts, though it suspected that the medical profession would dispute the foundation of the proposed law, and, similar to what had been the experience with respect to a recent failed attempt to reform the law on insanity, that the Infanticide Bill would provoke "violent disagreement" between the legal and medical professions.[131] Implicit in these

[128] See above text at nn.32–44 above. See also Brennan, "A Fine Mixture of Pity and Justice".
[129] See discussion below text at nn.155–180.
[130] K. Brennan, "Beyond the Medical Model: A Rationale for Infanticide Legislation" (2007) 58 *Northern Ireland Legal Quarterly* 529–532; see also T. Ward, "The Sad Subject of Infanticide: Law, Medicine and Child Murder 1860–1938" (1999) 8 *Social and Legal Studies* 172–173.
[131] NAI: DJ 8/144/1, memo addressed "Minister", dated February, 1949.

comments appears to be a decision to exclude medical experts from discussions on the Infanticide Bill. However, although there was no external consultation with the medical profession, the Parliamentary Secretary to the Minister for Local Government and Public Health, Dr Conn Ward, who was a medical doctor, did present his views of the proposed reform in a 1944 memorandum to the Department of Justice.[132] The details of this memorandum are discussed below.[133] For now, it suffices to say, however, that the only medical expertise that was apparently received during the course of preparing the Infanticide Bill was that tendered by a medical practitioner in his role as a Government official.

The Infanticide Bill also passed through the Dáil and Seanad without any debate about the medical merits of the proposal or any discussion about what precisely the language of the Bill was intended to cover.[134] In summary, no one involved in bringing forward or enacting this law showed any interest in the medical rationale on which it rested. It may have been the case that the medical basis was considered sound, with reliance being placed on the English legislature having scrutinised the disturbance in the balance of the mind rationale in 1922 and again in 1938.[135] Irish parliamentarians, in particular, may have assumed that those involved in drafting the Irish measure had consulted with the relevant experts, particularly in light of the Minister for Justice's comments about contemporary medical views on the issue.

In this regard, feminist scholars claim that infanticide laws based on the English model "medicalise" the crime because they adopt sexist nineteenth-century "biological

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[132] NAI: DT s14493 and s13311, Department of Local Government memorandum, entitled "Notes by the Parliamentary Secretary to the Minister for Local Government and Public Health on the proposed Legislation to amend the law relating to (1) Insanity; (2) Infanticide", dated February 2, 1944.
[133] See below text at nn.149–153.
[134] In the Seanad, Senator Sweetman raised an issue in relation to the specific inclusion of lactation, but he did not question the meaning or validity of this provision; nor did he query the overall legitimacy of the medical basis of the Bill; see *Seanad Debates* cols. 1475–1477. For further discussion, see below text at nn.183–186 below. See also, Brennan, "Beyond the Medical Model" at 532.
[135] Brennan, "Beyond the Medical Model" at 532.

positivist" medical theories of female deviance that explain female criminality on the basis of mental disturbance caused by biological experiences associated with reproduction.[136] The medicalisation of infanticide is deemed problematic, not only because it promotes and legitimises the view that all women are inherently mentally unstable as a result of their biological functions,[137] but also because it ignores the social and political causes of criminal behaviour.[138]

Other scholars, however, have largely rejected the medicalisation account of infanticide laws.[139] Ward claims that the 1922 legislation formally incorporated the "common-sense" lay understanding of infanticide that had operated in the courts in relation to the use of the insanity defence pre-1922 which, though at odds with medical theory and legal constructions, recognised the social context of the crime.[140] He found no evidence that medical theory was considered by those who conceived, drafted and enacted the 1922 Act in England.[141] Further, it appears that even if contemporary

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[136] S.S.M. Edwards, *Women on Trial: A Study of the Female Suspect, Defendant and Offender in the Criminal Law and the Criminal Justice System* (Manchester: Manchester University Press, 1984), pp.80–85, 91–100. E. Showalter, *The Female Malady: Women, Madness and English Culture 1830–1989* (New York, Pantheon, 1985), pp.55–59; Zedner, *Women, Crime and Custody in Victorian England*, pp.83–90, esp. pp.86–90; K. O'Donovan, "The Medicalisation of Infanticide" (1984) Crim. L.R. 259–264. See R. Smith, *Trial by Medicine: Insanity and Responsibility in Victorian Trials* (Edinburgh: Edinburgh University Press, 1981), ch.7, for an account of the medicalisation of infanticide through the use of the insanity defence in Victorian trials.

[137] B. McSherry, "The Return of the Raging Hormones Theory: Premenstrual Syndrome, Postpartum Disorders and Criminal Responsibility" (1993) 15 *Sydney Law Review* 315.

[138] See generally Edwards, *Women on Trial*, pp.79–100, referring to both the infanticide legislation and the trend towards excusing female criminality on the basis of menstruation. Smith, *Trial by Medicine*, pp.149–150, makes a similar criticism in relation to the Victorian approach to this offence.

[139] Ward, "The Sad Subject of Infanticide" at 163–180; K.J. Kramar & W.D. Watson, "The Insanities of Reproduction: Medico-Legal Knowledge and the Development of Infanticide Law" (2006) 15 *Social & Legal Studies* at 237–255. Kramar and Watson are less emphatic in their rejection of the feminist medicalisation thesis. Although they agree that the medical and ethnographic literature supports Ward's argument, they argue that the medicalisation critique should not be rejected "wholesale"; see "The Insanities of Reproduction" at 251.

[140] Ward, "The Sad Subject of Infanticide" at 166,167–169,174–175. See also Smith, *Trial by Medicine*, pp.148–149; Zedner, *Women, Crime and Custody*, p.89.

[141] Ward, "The Sad Subject of Infanticide" at 170. He further argues that while the 1938 amendment was informed by medical thinking, it did not adopt fully the contemporary scientific view of infanticide. The 1938 Bill was introduced by Lord Dawson of Penn, who was President of the Royal College of Physicians. His medical colleagues had been consulted on the matter. Indeed the 1938 Bill was the result of the "united

medical theory had been considered, it would not have supported a bio-psychiatric understanding of infanticide.[142] Indeed, Watson and Kramar's survey of the contemporary mental science and ethnographic literature on the subject of infanticide reveals that, while there was an element of biological thinking in some of these accounts of maternal infant killing, this phenomenon was largely explained by both medical scientists and ethnographers on socio-economic grounds.[143] Although the early twentieth-century medical literature did recognise a link between infanticides occurring sometime after childbirth and lactational insanity or exhaustion psychosis, a disease which was mainly attributed to physical exhaustion and socio-economic factors, there was little or no recognition of any association between puerperal mental disturbance and newborn infanticide.[144] As Ward argues, "[f]rom a medical point of view [the Infanticide Bill 1922] was a curious proposal, in that it created an apparently psychiatric defence for precisely the category of mothers who were *least* likely to be considered insane".[145]

Overall, given the lack of interest in the medical basis of the infanticide reform, and, in particular, the lack of engagement with the medical profession, it seems that Irish lawmakers were similarly unaffected by bio-determinist views of infanticide. Kramar, in her analysis of the adoption of an infanticide law based on the English model in Canada in 1948, found a similar disinterest in medical theory among Canadian lawmakers.[146] She claims that the Canadian legislature "unwittingly operationalised a crude retention of psychiatric theories" which accounted for infanticide in biomedical terms.[147] Rather than

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wisdom" of a committee of the Royal College of Physicians; Ward, "The Sad Subjective of Infanticide"at 172–173. See also Brennan, "Beyond the Medical Model" at 532.

[142] Ward, "The Sad Subject of Infanticide" at.167; Kramar and Watson, "The Insanities of Reproduction" at 246–250. See also Smith, *Trial by Medicine*, p.154, also notes that nineteenth-century medical science "recognised that insanities linked with infanticide had a socially meaningful distribution".

[143] See generally Kramar and Watson, "The Insanities of Reproduction" at 240–250.

[144] See for example Kramar and Watson, "The Insanities of Reproduction" at 246–250, referring to J.S. Hopwood, "Child Murder and Insanity" (1927) 73 *Journal of Mental Science* 95.

[145] Ward, "The Sad Subject of Infanticide" at 170.

[146] Kramar, *Infanticide in Canada*, p.95

[147] Ibid.

being a "well thought out appropriation of sexist psychiatric knowledge", the medical basis of the Canadian infanticide measure provided "at most, a helpful rationalisation" for the reform, enabling the legislature to address the practical problem of how to prosecute, convict and sentence in cases of maternal infanticide, without infringing basic tenets of individual responsibility.[148] It seems that Irish reformers could be accused of the same approach to legislating on this difficult criminal justice matter.

V.ii Justifying differential treatment of the infanticide offender, presumptions of mental disturbance, and assessing the scope of the medical rationale

Overall, as argued in the previous section, Irish reformers and legislators displayed a complete lack of interest in the medical rationale of the infanticide legislation. The reasons for adopting the English approach to infanticide were not discussed in the records consulted. Medical evidence on the role of mental disturbance in cases of maternal infanticide and the impact of the processes of childbirth and lactation on a woman's mental state were not considered; nor was the meaning of the medical mitigation provided for in the proposed infanticide law explored. In this section the likely reasons for adopting the English medical model of infanticide and the perceived scope of the infanticide mitigation are explored.

The English rationale for mitigating infanticide probably appealed to Irish reformers for two reasons. First, it provided a neat justification for differential treatment of these killers. Dr Conn Ward, in his 1944 memorandum on the planned infanticide reform, had opined that "emotional disturbances" caused by "love, jealousy, fear of discovery of a disgraceful secret, etc." could "produc[e] an altogether unbalanced mental state which unhinges the mental process of control, but [which] falls short of what a jury

[148] Ibid.

man would look upon as a disease of the mind", in other words legal insanity.[149] He considered that a mother who gave birth to an unwanted child, if not suffering from the "comparatively rare" condition of puerperal insanity, could "scarcely be held to be so very different from that of other types of criminals who at the time of committing the crime [were] suffering from intense emotional disturbance".[150] Thus, failing to find any distinction between the mother who killed her infant and other emotionally disturbed killers, Dr Ward concluded that if the killing of a "helpless baby" was to be treated as seriously as that of an adult, it would not be possible to give the "baby slayer … any special consideration".[151] Indeed, he noted that certain aggravating features may be apparent in these cases, namely that the woman involved was sometimes a "hardened sinner" who had killed with "full deliberation".[152] He did observe, however, apparently as a means of finding some distinguishing criterion, that it could "always be argued that [the woman who killed her young infant] had not fully recovered from the effect of giving birth to her child".[153] It appears, therefore, that Dr Ward's advice to legislators was that although the cause of the emotional disturbance in cases of infanticide was not childbirth itself but the difficult circumstances in which this occurred, the effects of recent birth could be utilised to justify more lenient treatment of these killers over other similarly disturbed offenders.

This, of course, highlights the challenge that faced any legislature seeking to treat women who killed their infants while in a distressed state more leniently than other killers whose responsibility might be similarly mitigated, and thus the appeal of the medical rationale: how to facilitate a lenient response for the infanticide offender without

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[149] NAI: DT s14493 and s13311, Department of Local Government memorandum, entitled "Notes by the Parliamentary Secretary to the Minister for Local Government and Public Health on the proposed Legislation to amend the law relating to (1) Insanity; (2) Infanticide", dated February 2, 1944, para.1.
[150] Ibid. para.3.
[151] Ibid. para.4.
[152] Ibid.
[153] Ibid.

opening the floodgates to other killers or interfering with fundamental criminal law principles in relation to individual responsibility.[154] The adoption of a rationale for mitigation which appeared to be based on the recent biological experiences of the accused, experiences which were closely connected with her crime, both temporally and emotionally, helped to avoid these problems. Thus, as Dr Ward seemed to advise, although childbirth itself may not have had a special or unique connection to mental disturbance, the fact that the woman had recently given birth could serve to differentiate her from other murderers who had experienced similar emotional disorders: her act of murder could be distinguished on the basis that she had killed in the context of a recent birth.

The second likely reason for the appeal of the medical rationale is that it may have reflected commonly held assumptions about the mental state of infanticide offenders, and the supposed connection between childbirth and mental disturbance. As noted above, it was observed during the Committee Stage in the Dáil that cases of infanticide would often raise a presumption of mental disturbance.[155] There is other evidence in the historical records consulted that women who killed their infants were commonly believed to have been mentally disturbed at the time of the offence. For example, during the second stage debate in the Dáil, Deputy Boland opined that in most infanticide cases "the woman was in a frenzy or … her mind was disturbed".[156] The author of one of the documents dealing with the infanticide reform found in the McQuaid Papers also partly excused newborn infanticide on the basis of a presumed mental

[154] Ward,"The Sad Subject of Infanticide" at 174; Kramar, *Infanticide in Canada*, pp.88, 95.
[155] See above text at n.122 above.
[156] *Dáil Debates* col.268. He made this comment in the context of discussion on whether the Infanticide Bill would lessen the deterrent effect of the law; Deputy Boland was of the view that since most women who committed this offence did so in a mentally unbalanced state, the deterrent impact of the law would not be lessened.

imbalance.[157] The author considered that no woman feels an "immediate maternal solicitude" for her infant at birth, her "natural and powerful maternal instinct" being aroused only after she had cared for the child and "realised its complete dependence on her".[158] He concluded that it was "understandable", therefore, that the first instinct of a "wretched woman" who had given birth to an unwanted child may be to "get rid of it", claiming that if he were a trial judge in such a case, he would have sympathy for the accused and would "assume" that she had "acted on an impulse … at a time when her mind was unbalanced or deranged".[159] On the other hand, the author considered that a woman who killed her infant after having cared for it over a number of months would need to present "positive evidence of her mental derangement" in order to earn any mercy.[160]

Although findings of insanity were very rare in cases of infanticide,[161] there is evidence in some of the court records consulted that the mental state of women accused of murdering their infants did sometimes arise when these cases were dealt with at the Central Criminal Court.[162] In some instances it seems that evidence of mental disturbance was tendered in an effort to support an insanity plea; in other cases, the supposed unbalanced mental state of the accused postpartum arose for consideration in

[157] McQuaid Papers, AB8/B/XVIII/10: Document 2.
[158] Ibid.
[159] Ibid.
[160] McQuaid Papers, AB8/B/XVIII/10: Document 2.
[161] Overall, there were very few insanity verdicts in infanticide cases during this period. In the sample of 160 cases examined in this study, only one insanity verdict was returned (2.2 per cent of those tried); and one woman was found unfit to plead. See above text at n.33. Rattigan, in her sample of 195 Irish infanticide cases for the period 1922–1950 (*"What Else Could I Do?"*, p.204, Table 2), found three cases where the accused was found guilty but insane (1.5 per cent of the sample).
[162] This conclusion is based on a survey of the following sources: CCA files which contain a copy of the trial transcript (only available in cases involving appeals); DT (CDS). An examination of State Files at the Central Criminal Court in every case of maternal infanticide may provide a more complete picture of the extent to which the mental state of the accused arose for consideration. However, given that the majority of cases did not go to trial, there is likely to be little to be gained in terms of understanding the role played by mental disturbance in these cases.

other ways. For example, at the trial of one woman for the murder of her newborn infant, the trial judge in his jury summation stated:

> "…[E]veryone knows … that the bringing of a child into the world is accompanied very often … with great pain and suffering to the woman. Some of them become demented by it —some of them are not so upset.… Well now, … even if [the defendant] is exaggerating these pains she must have been in a rather distressed condition—I mean—one would infer naturally she would not be as vigorous in her mind and soul as if going about in the ordinary way. The crisis must have naturally affected her mentally and physically."[163]

The judge clearly emphasised the difficulty of childbirth, drawing on what he assumed were common perceptions about this event and mental instability, for the purpose of giving the jury a pretext to convict the accused of manslaughter on the ground that she lacked the *mens rea* for murder.[164] The accused in this case, a married woman who had become pregnant as a result of an extra-marital relationship, claimed that she had fainted after giving birth alone in a barn in the middle of the night, and that when she recovered she found the baby lying beside her with a rope around its neck.[165] The jury convicted her of manslaughter.[166]

In another case, where the accused had killed her infant within a day of being discharged from the County Home where she had given birth, defence counsel claimed, possibly in an effort to lay the basis for an insanity plea, that walking a distance of 16

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[163] NAI: CCA 1934/31 (BC, 1934), Judge's Charge to the Jury in trial transcript. Hanna J. was a member of the O'Sullivan Committee.
[164] The trial judge left the jury with the option to convict of manslaughter.
[165] NAI: CCA 1934/31(BC, 1934), trial transcript.
[166] However, on appeal this conviction was quashed and at a retrial the accused was found not guilty. See NAI: CCA 1934/31(BC, 1934); SBCCC (November 1933–April 1941), ID-11-92, June 11, 1934 (trial); November 19, 1934 (retrial).

miles carrying an infant soon after confinement (she had been walking to her estranged husband's home), might have rendered the accused "so upset" that she would have been unable to appreciate what she was doing. Counsel added that it was not uncommon for a woman to become mentally unbalanced after childbirth.[167] A medical witness at the trial of another woman (unmarried) who was accused of murdering her infant at birth stated during cross-examination that the circumstances involved may have caused a "weakness" in the accused such that she may have been led to commit "certain acts". He added that a "form of mania might temporarily set in".[168] It appears that the juries in both of these cases were unconvinced by the evidence: both women were convicted of murder.

In some cases involving murder convictions trial judges, in their recommendation to the Executive Council, pointed to the mental state of the offender as a justification for commuting the death sentence. For example, in one case where a 30-year-old unmarried domestic servant was found guilty of murdering her child by placing the newborn alive into a sandpit and covering it with stones, it was noted in the report to the Executive Council that the trial judge, Johnson J., stated he was:

> "…[S]trongly of the opinion that the sentence ought to be commuted. [The] prisoner appeared … from her demeanour in the dock and her general appearance to be a woman of weak intellect…. [H]er intellect was further clouded by the distressing circumstances attending the birth of the child."[169]

[167] DT (CDS) s5884 (MAK, 1926).
[168] DT (CDS) s6129 (MF, 1930).
[169] DT (CDS) s5571 (EH, 1927). The report sent to the Executive Council noted that the accused had previously given birth to two children who had been born dead, and it noted that the medical officer who examined her at Mountjoy Prison had reported that she was "mentally … below the average".

In another case, involving a young woman of 21 who was found guilty of murdering her newborn infant after giving birth alone on the side of mountain on a winter's day, the trial judge stated in his recommendation to the Executive Council:

> "In all the circumstances of the case, I strongly recommend the accused to mercy-the act was committed immediately after birth when the accused must have still been suffering from the pangs and subsequent prostration of child-birth. She was living at home at the time and she stated in her evidence that she was terrified of her mother."[170]

O'Byrne J. added that the mental condition of the offender, "who is quite a young girl", could be "seriously prejudiced by her remaining for any considerable time under sentence of death".[171] The possibility of the accused being legally insane at the time of the killing seems to have arisen on the evidence at trial. During deliberations the jury, being unable to reach a verdict, informed the trial judge that they had difficulty with the state of the defendant's mind at the time she had killed her infant. O'Byrne J. explained to them that the onus of proof lay on the defendant to establish that at the time she committed the crime she could not appreciate her actions. He added that the defence had failed to satisfy this requirement.[172]

The Medical Prison Officer's Report in the aforementioned case noted that the accused was of a "low mental calibre".[173] It appears that such observations were not uncommon in cases involving women accused of murdering their infants. Luddy has

[170] DT s5886 (DS, 1929).
[171] Ibid.
[172] Ibid.
[173] Ibid.

noted that in Ireland at that time sexually promiscuous women, particularly those who had more than one out-of-wedlock pregnancy, were considered "feeblemined".[174] Rattigan, in her study of the Central Criminal Court infanticide records, refers to cases where women had been found to be educationally or mentally deficient by medical officers who examined them prior to trial.[175] These women were often described as "mentally subnormal", as having a "weak intellect", as being mentally "dull" or "slow", or as being "simple minded".[176] As Rattigan notes, although such comments may betray a class bias, they may also have been made to benefit the accused.[177] Only two women in Rattigan's sample were found to be "mentally defective",[178] and although it seems that a number of women were considered mentally weak or to be of a very low educational standard, it does not appear, at least from the evidence referred to by Rattigan, that at the time of awaiting trial infanticide offenders were commonly described as being mentally unbalanced or disturbed due to the effect of recent childbirth.

In summary, there is some evidence to suggest that women who killed their newborn infants were sometimes perceived, at least in layman's terms and occasionally with the support of medical evidence, to have been mentally weak, distressed or disturbed, and, in such cases, the woman's fragile or unstable mental state was often linked to recent childbirth. Thus, although the Irish infanticide law was not influenced by medical theory, it may, similar to what Ward has argued with respect to the English law,[179] have been informed by common-sense lay notions about the vulnerability of women to mental disturbance in the aftermath of childbirth.[180] As noted above, however, no explicit link is made between infanticide and mental disturbance in the background

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[174] Luddy, *Prostitution and Irish Society*, p.233.
[175] Rattigan, *"What Else Could I Do?"* pp.47–51.
[176] Ibid. pp.48–50.
[177] Ibid. pp.48–49.
[178] Ibid. p.49.
[179] See above text at n.140 above.
[180] Brennan, "Beyond the Medical Model" at 525.

documents connected with this reform. It is not clearly stated in these documents that the reason for lenient treatment of the infanticide offender was that her culpability was reduced because of her having killed while in a mentally disturbed state. Possibly, therefore, other extenuating factors were also thought to be relevant.

In this regard, it seems unlikely that the understanding of infanticide mitigation encapsulated by the 1949 legislation was meant to be limited to situations where the accused had experienced a mental disturbance caused purely by the biological effects of parturition. Indeed, assuming that those involved in bringing forward the Infanticide Bill had the same objective in mind, namely to deal with the practical issue of preventing unnecessary murder trials,[181] reformers possibly intended the infanticide law to apply more widely than the language of the statute could be taken to suggest. Indeed, in his speech to the Dáil, the Minister for Justice spoke of mental disturbances "*in the circumstances attendant or following on the birth of the child*",[182] which suggests that it was not childbirth itself but the wider circumstances in which birth took place that partially mitigated the crime of infanticide. During the Seanad debate, Senator Sweetman appeared to have had a wider understanding of the nature of the mental disturbance the Bill was intended to cover when he referred to the "many complications that are known to exist where … people, who are usually in poor circumstances, are frequently under great stress".[183] He queried why the Bill included a specific reference to the "effect of lactation consequent upon birth", arguing that it appeared to be an unnecessary addition given that the preceding reference to the effect of birth seemed "to cover the ground".[184] Sweetman claimed the reference to lactation "merely giv[es] an example of one effect amongst, in my experience, many others which might just as well

[181] See above text at nn.39–44, 51–52, 121.
[182] *Dáil Debates* col.265. Italics added.
[183] See *Seanad Debates* Cols.1475–1476. Senator Sweetman was a solicitor by profession.
[184] Ibid. col.1475.

be set out one after the other", and expressed concern that problems would arise in applying the law as a result of the provision being drafted to include an explicit reference to lactation only.[185] On being assured that lactation would not be the only defence, it being specifically included to ensure that it would not be later excluded, Senator Sweetman was happy to drop the matter.[186] This exchange does indicate that the infanticide mitigation was meant to be more wide-ranging than the language of the statute could be taken to suggest.

However, there is no clear recognition in the Government records and parliamentary debates connected with the enactment of the Infanticide Act 1949 of the socio-economic or cultural factors which may have been thought to mitigate the crime of infanticide. The legislation itself certainly does not explicitly allow for mitigation on the basis of such disadvantages. Indeed, the law's requirement for individual responsibility would have prevented recognition of the social and other environmental causes of this offending.[187] Further, it is unlikely that Irish lawmakers would have been willing to countenance the possibility of a woman's responsibility being reduced simply because she had given birth in disadvantaged and distressing circumstances. Indeed, in this regard, it may be misleading to imply that environmental factors were the sole cause of infanticide. As Higginbotham notes in relation to infanticide in Victorian England, "crime does not inevitably result from plausible motives".[188] Hoffer and Hull state: "[e]xternal pressures … were certainly motives for [infanticide], but before any individual would undertake it, these forces had to pass through the filter of individual character and

[185] Ibid.
[186] Ibid. col.1477.
[187] Ward, "The Sad Subject of Infanticide" at 174; Kramar, *Infanticide in Canada* (n.15 above), pp.88, 95.
[188] A.R. Higginbotham, '"Sin of the Age": Infanticide and Illegitimacy in Victorian London" (1989) *Victorian Studies* 337.

perception".[189] Thus, while socio-economic difficulties certainly created the conditions for infanticide, and provided a very compelling motive for this crime, they did not automatically impel women to kill their infants: the personalities and psychological make-ups, as well as the particular circumstances of individual women also played a part.

If the socio-economic causes of this offending were recognised by Irish lawmakers, arguably this was only to the extent that it could be said that they contributed, as part of the wider effects of recent childbirth, to the accused having experienced an unbalanced or distressed mental state. The infanticide provisions were probably meant to capture situations where, for example, factors such as severe anxiety and shame over the potential consequences of giving birth to an illegitimate child, the resulting urge to conceal, and the intense fear of discovery, placed such a great strain on the woman that, at the time of the killing, the culmination of this crisis, it could be said that she was so mentally overwhelmed both by the physical effects of recent childbirth and the aforementioned factors, that her responsibility for her conduct was reduced. The type of situation likely to be covered by the infanticide provision was probably one "where, through high mental stress and abnormal circumstances of the accused, it is evident that it is not murder in the ordinary sense of the word".[190] As Ward suggests with respect to the English law, the infanticide mitigation bears a stronger relationship to provocation or intoxication than it does to what would constitute a medically defined mental disturbance.[191]

VI. Conclusion

[189] P.C. Hoffer and N.E.H Hull, *Murdering Mothers: Infanticide in England and New England 1558–1803* (New York University School of Law, 1981), p.157.
[190] *Seanad Eireann* cols.1474, per Senator J.T. O'Farrell.
[191] Ward, "The Sad Subject of Infanticide" at 170.

At a time when murder continued to be punished by death, and long before the adoption of a diminished responsibility defence, the Infanticide Act 1949 was arguably a significant piece of legislation. It reduced the crime of murder to infanticide where the victim was aged under 12 months and where the offender was the biological mother of the victim, provided certain mitigating conditions had been met. The infanticide reform was a direct consequence of the difficulties that arose from an indiscriminately harsh law with respect to the punishment for murder. In the Irish courts, jurors, judges and prosecutors all sought to circumvent the severity of the law. The ad hoc methods for dealing with infanticide created practical problems for the administration of justice, turning the murder trial in cases of maternal infanticide into a "tragic farce".

In this context, it appears to have been generally agreed that the law was in need of reform to ensure that cases of maternal infanticide could be processed in a more effective way. There seems to have been little opposition to modifying the law to ensure more lenient treatment of mothers who murdered their infants, at least in cases where the accused did not deserve to be sentenced to death. Indeed, even Major de Valera, the only person to object to the Infanticide Bill as it passed through Parliament, was not opposed to providing for more lenient punishment of infanticide offenders found guilty of murder.[192] Of course, it is evident from the records that, by the time the 1949 reform was initiated, punishment of infanticide was not actually a significant problem because death sentences in these cases were already invariably commuted. The fact is that very few women were actually sentenced to death for the murder of their infants during the first three decades of Irish independence. The real difficulty with the prevailing system was that, where the evidence was unambiguous with respect to the child having being murdered, the Attorney General had to charge with that offence.[193] This meant that

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[192] See text at n.85 above.
[193] See text at n.37 above.

everyone involved in the case had to prepare for a murder trial at the Central Criminal Court, something which proved to be a farcical exercise when it was obvious that the most likely outcome would be a conviction, usually on the basis of a guilty plea, for manslaughter or concealment of birth, or a full acquittal.[194]

The death sentence also appears to have been routinely commuted in other murder cases and evidently there were wider issues with respect to the use of capital punishment in Ireland. Infanticide, however, was the only form of murder singled out for reform. There were probably a number of reasons for this. The comparative frequency with which the courts encountered the crime of maternal infanticide, the consistency between these cases in terms of the circumstances involved, and the fact that a verdict of murder was rarely returned and the capital sentence was never carried out, are all factors which may have created a sense of urgency with respect to the problem of infanticide. In contrast to other cases of murder where the death penalty was reprieved, infanticide could easily constitute a separate category of homicide: it was readily distinguishable from other kinds of murder on the basis of the age of victim, the sex of the offender, and the relationship between the victim and offender. Given that infanticide was almost always committed by women or "young girls", it is also possible that a sense of chivalry or paternalism motivated the reform.[195] The fact that infanticide had already been subject to law reform in England and that the English approach provided a very neat solution to the problem were probably highly relevant considerations.

The Irish legislature essentially adopted the English law and in that sense legislating for infanticide in Ireland was a fairly straightforward matter. Indeed, the infanticide proposal seems to have attracted very little criticism. Given the conservative, nationalist and Catholic context of Ireland at that time, this may appear surprising. For

[194] See generally Brennan, "A Fine Mixture of Pity and Justice".
[195] For further discussion, see Brennan, "A Fine Mixture of Pity and Justice".

example, efforts to provide for legal adoption and free health care for mothers and children caused significant controversy,[196] yet the enactment of a "liberal" English law which ostensibly reduced the killing of an infant to a lower category of homicide seems to have attracted little dissent.

In this regard, it might be suggested that the response to infanticide in the Irish Free State, and the eventual enactment of the 1949 statute, demonstrate that there was in reality little regard for infant life, particularly illegitimate infant life, among Irish court and Government officials.[197] However, the fact that Parliament enacted a law which rendered maternal infant-murder a lesser form of homicide where certain mitigating conditions had been met does not per se indicate a lack of regard for infant life. Arguably, the reason for differential lenient treatment of mothers was not that the victim was an (illegitimate) infant, but that the offender was a woman who had killed in circumstances that were taken to lower her legal culpability, and who, therefore, did not deserve to be sentenced to death, or indeed severely punished. The infanticide legislation was specific only to the biological mothers of infants; the focus of the new law was arguably on the offender, not the victim. Indeed, though not an objective of the reform,[198] the Infanticide Act, by classifying infanticide as a serious homicide offence and emphasising, in principle at least, that the killing of an infant by its mother was murder unless extenuating circumstances were involved, may have served to curtail any possible diminution of the seriousness of this crime or the value of infant life as a result of the customary lenient justice being practised.[199]

It appears that Irish infanticide reformers were very sensitive to the risk that by formally acknowledging that infanticide could be treated more leniently than other

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[196] See generally, Whyte, *Church and State in Modern Ireland*, esp. at pp.183–193, 274–277, and Ch.7.
[197] See generally M.J. Maguire, *Precarious Childhood in Post-Independence Ireland* (Manchester: Manchester University Press, 2009), ch.6.
[198] Brennan, "A Fine Mixture of Pity and Justice".
[199] Kramar, *Infanticide in Canada*, pp.69, 90–92.

murders, the sanctity of infant life and the deterrent effect of the law might be diminished. This proved to be a significant factor in the Irish reform. In this regard, the English law was not adopted in Ireland without modification, as the Minister for Justice was careful to point out when introducing the Bill to both Houses of the Oireachtas: the Irish law differed from the English model in that it did more to protect the sanctity of infant life. The inclusion of s.1(1), inserted at the request of the Cabinet, was the only way in which drafters of the Irish infanticide law showed any legislative initiative. The archival records suggest that the inclusion of this provision was most likely a result of a consultation with the Archbishop of Dublin, who, it seems, may have informed the Government that he would not oppose the Bill provided it was amended to take proper account of the importance of the sanctity of infant life by emphasising that the crime at hand would continue to be treated as murder unless mitigating circumstances were shown. Though the evidence is not conclusive in this regard, the records consulted strongly suggest that the Archbishop made certain recommendations to the Minister for Justice and that his input was crucial to the Cabinet's decision to seek a redrafting of the Bill, and to the eventual inclusion of the s.1(1) provision.

Interestingly, although the support of the Catholic Church was deemed important to those involved in drafting the Infanticide Bill, the views of medical professionals appear to have been considered wholly irrelevant. The medical rationale from the English law was adopted in Ireland without any consideration of medical expertise on the matter or consultation with the profession. Indeed, Irish reformers demonstrated a mixture of indifference to and fear of the views of the medical profession and, moreover, an attitude that medical agreement was not crucial to the legitimacy of this legislative endeavour. Possibly, the reluctance to consult with medical experts was due to a belief that they would seek to impose rigid medical definitions which would have made it more difficult to apply the law in the kinds of situation intended to be covered by the reform.

In this regard, it does not seem that Irish lawmakers meant to enshrine a bio-determinist understanding of infanticide in the 1949 legislation. External socio-economic and cultural factors, in particular the impact on the accused of becoming pregnant in culturally unacceptable circumstances, were probably considered relevant to the mitigation framework, at least to the extent that, as part of the wider effects of birth, they could be said to have caused the accused to have experienced an unbalanced mental state at the time of the killing. Although the meaning and scope of the mitigation provided for were not discussed in the sources considered, it appears from what was said in the records consulted that socio-economic factors were not to be ignored. However, feminist criticism of infanticide legislation is not wholly without merit. The infanticide law did fail to recognise more explicitly the socio-economic causes of infanticide, appearing to identify mental instability caused by biological processes, rather than socio-economic adversity, as an explanation for this crime. As Smith argues with respect to the Victorian approach to maternal infanticide, although the lay form of insanity which was commonly accepted at trial did encompass a social account of the crime, an insanity verdict served to disguise the true causes of the offence and "detracted from examining women's position in relation to power and wealth".[200] Thus, apart from reinforcing, and potentially fostering, sexist attitudes to female criminality, the failure to address the socio-economic and cultural context of infanticide in the 1949 statute meant that the real reasons for this crime were denied, or at the very least disguised.[201] However, an express recognition of the socio-economic explanation for

[200] See Smith, *Trial by Medicine*, p.149.
[201] See Kramar, *Infanticide in Canada*, p.95, who makes a similar point with respect to the Canadian legislation.

infanticide would have been impossible; such a radical move would have most likely ensured the defeat of this legislation in Parliament.[202]

As previously noted, the infanticide law was essentially a legal mechanism by which to formally provide for lenient treatment of women who killed their infants by avoiding the practical difficulties entailed in dealing with these cases under ordinary murder provisions.[203] The key reason for this reform was practical.[204] The supposed medical basis adopted provided an apparently convincing and sound rationale for facilitating different treatment of this category of killer, but it was not the reason for treating these offenders leniently;[205] nor, it is argued here, was it how lenient provision was to be made for infanticide offenders in practice. Reformers showed so little interest in the medical aspect of the Bill it is arguable that they viewed it only as a minor matter in this reform. The key issue was to ensure that women could be treated more leniently by the law and that compassion could be provided in a formal and legitimate manner.[206] Reformers were not interested in the medical aspect of the Bill because it required no explanation: it was clear to all what the language was supposed to cover and what the new law was intended to achieve.

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[202] During the debates preceding the enactment of the 1938 Act a suggestion was made to extend the proposal to refer to socio-economic distresses, but this was rejected on the basis that the law would not be passed if it were so extended; see Ward, "The Sad Subject of Infanticide" at 173. See also Brennan, "Beyond the Medical Model" at 531; and J. Osborne, "The Crime of Infanticide: Throwing Out the Baby with the Bath Water" (1987) 6 *Canadian Journal of Family Law* 58.
[203] Brennan, "Beyond the Medical Model" at 533–534.
[204] Brennan, "A Fine Mixture of Pity and Justice".
[205] Brennan, "Beyond the Medical Rationale" at 533–534. See generally, O'Donovan, "The Medicalisation of Infanticide" at 261; Osborne, "The Crime of Infanticide".
[206] Brennan, "A Fine Mixture of Pity and Justice".

TABLE A. CENTRAL STATISTICS OFFICE: ANNUAL ABSTRACTS: NUMBER OF INDICTABLE OFFENCES KNOWN TO THE POLICE (MURDER OF PERSONS AGED ABOVE ONE YEAR; NUMBER OF INFANTS AGED ONE YEAR AND UNDER; CONCEALMENT OF BIRTH), 1927–1949.

Year	Total Number of Crimes Known to the Police:		
	Murder of Persons Aged over One Year	**Murder of Infants Aged One Year and Under**	**Concealment of Birth**
1927	9	19	41
1928	12	10	49
1929	8	13	50
1930	6	10	48
1931	10	7	58
1932	9	4	38
1933	9	10	38
1934	3	4	38
1935	8	9	29
1936	10	6	44
1937	6	6	32
1938	9	5	34
1939	5	5	36
1940	7	5	36
1941	7	2	33
1942	7	1	39
1943	10	3	39
1944	7	1	30
1945	3	3	39
1946	7	1	25
1947	3	0	25
1948	11	6	27
1949	1	5	28
Total	167	135	856