



ORIGINAL ARTICLE

Pathologization, Law, and Gender in Cases of Infanticide in Spain and the Netherlands in the Mid-Twentieth Century: A Comparative Perspective

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Abstract

This article compares how gender and pathologization were entangled in the laws on infanticide in Spain and the Netherlands in 1930–1960, as well as in court practices. Both countries knew lenient laws for women who killed their newborn babies. These laws themselves did not assume that these women were suffering from a mental disorder, even though they referred to emotional state. In Spain, where the notion of honor was more important in the law, from the 1940s a debate was held about the relationship between mental illness and infanticide laws in the context of the Franco regime's emphasis on pronatalism. While in Spain the institutional monopoly of the generalist forensic physician as preferred expert excluded psychiatrists, in the Netherlands forensic psychiatrists were more influential, and their role increased from the 1950s. The article argues that regardless of many differences in forensic and political culture in both countries infanticidal women were pathologized: in Spain mostly via some interpretations of the infanticide law, and in the Netherlands via forensic psychiatry. However, pathologization, we show, involved many lay actors such as lawyers, legal scholars, and probation services.

The crime of infanticide—we here take this term as referring to newborn child homicide, or technically “neonaticide”—has received much attention from historians, mostly regarding its prosecution in the early modern period and the nineteenth century. Historical scholarship has shown particular interest in the “humanitarian” impulse from the late eighteenth century: the trend toward a more lenient treatment of the female suspects in these cases, who were often unmarried and desperate mothers, abandoned by the baby's father.

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In many countries the death penalty for this crime was either abolished in the nineteenth century, or means were sought to evade it and to acquit the female suspects. One of those means was the use of medical and later psychiatric expertise to potentially exonerate these “pitiful” women.

Although this process varied in different countries, most of the literature discusses the law and prosecution practices in England, where the role of doctors and the issue of these female suspects’ mental condition came to play an important role from the nineteenth century onward. From around 1820 the “puerperal insanity” defense—the argument that the suspect had been suffering from insanity caused by childbirth and was hence unaccountable—came to be accepted as a means to avoid the death penalty for infanticidal women.¹ The acceptance of this new medical defense can be explained not only by the growing role of forensic psychiatry in England in the nineteenth century but also by the English accusatorial system, in particular its jury, which reflected popular sympathy for the plight of unmarried mothers. Most importantly, no specific lenient laws for infanticide existed until 1922, so the puerperal insanity defense could serve to avoid sentencing women to death for murder. In 1922 a new British infanticide law allowed for a lesser punishment for the crime of infanticide—now set apart from murder—if a mother had killed her “newly-born child” at a time when “she had not fully recovered from the effect of giving birth to such child, and by reason thereof the balance of her mind was then disturbed.” In the twentieth-century English legal system, some kind of pathologization of women’s minds was present, leading to a sympathetic and lenient treatment of female suspects of infanticide.² In fact, the 1940s Canadian law followed the British law’s reference to women’s abnormal mental condition during infanticide, even though after 1955 no experts were needed anymore to establish this condition.³ So leniency via pathologization could take different forms: stress on mental issues in the infanticide law, the involvement of psychiatrists, or the application of a lay conception of insanity.

Hardly any historical research has been conducted into the role of women’s pathologization in cases of infanticide in the mid-twentieth century in other countries,⁴ whereas it is particularly this period for which we may expect

¹ Mark Jackson, “The Trial of Harriet Vooght: Continuity and Change in the History of Infanticide,” in *Infanticide. Historical Perspectives on Child Murder and Concealment, 1550–2000*, ed. Mark Jackson (Aldershot: Ashgate, 2002), 1–17, here 10. Hilary Marland, *Dangerous Motherhood. Insanity and Childbirth in Victorian Britain* (Basingstoke: Palgrave Macmillan, 2004), 3; Hilary Marland, “Getting Away with Murder? Puerperal Insanity, Infanticide and the Defense Plea,” in *Infanticide Historical Perspectives on Child Murder and Concealment, 1550–2000*, ed. Mark Jackson (Aldershot: Ashgate, 2002), 168–92. Tony Ward, “Legislating for Human Nature: Legal Responses to Infanticide, 1860–1938,” in *Infanticide Historical Perspectives on Child Murder and Concealment, 1550–2000*, ed. Mark Jackson (Aldershot: Ashgate, 2002), 249–69.

² Rachel Dixon, *Infanticide. Expert Evidence and Testimony in Child Murder Cases, 1688–1955* (London: Routledge, 2022); Ania Wilczynski, “Mad or Bad? Child-Killers, Gender and the Courts,” *British Journal of Criminology* 37, no. 3 (1997): 419–36; Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law* (Oxford: Oxford University Press, 2012), 210.

³ Kirsten Johnson Kramar, *Unwilling Mothers, Unwanted Babies: Infanticide in Canada* (Vancouver: UBC Press, 2004), 72–96.

⁴ Exceptions: Kramar, *Unwilling Mothers, Unwanted Babies*; Silvia Chiletto, “Infanticide and Mental Illness: Theories and Practices Involving Psychiatry and Justice (Italy, 19th–20th Century),” *Histoire*,

changes in the legal and medical treatment of women. The twentieth century saw the rise and increasing influence of psychiatry and women's emancipation. Moreover, we need to examine countries with different legal systems than the English accusatorial jury system and with different infanticide laws, which do not explicitly refer to the woman's mental condition. Therefore, this article compares the infanticide laws and their prosecution practices in two countries with different cultures, political and legal systems than England: Spain and the Netherlands. Both countries had inquisitorial systems without a jury in the mid-twentieth century.⁵ And these countries already had separate, more lenient, infanticide laws in the early nineteenth century.

However, the Netherlands and Spain also differ in regard to culture and politics. Spain in the mid-twentieth century witnessed the establishment of the Francoist dictatorship (1939–75) after the 1936 military coup and civil war (1936–39), which implied the abrogation of civil rights of women, as well as policies promoting natalism (inspired by fascist policies in Italy), the state's promotion of women's pre-marriage chastity, understood as the core of women's honor, and of wedlock-motherhood as Catholic and patriotic duties.⁶ In contrast, the Netherlands were a stable, established democracy except for the period of the Nazi occupation (1940–45). From the 1950s, governmental policy and social organization came to increasingly rely on technocrats, (psy)experts, and professionals.⁷ The Dutch population was for the most part Protestant, albeit with a large minority of Catholics and a smaller minority of atheists. Compared to Spain in the mid-twentieth, honor took a less central position in regard to gender, but Dutch women's emancipation only really took off from the 1970s, even though the interwar period had briefly testified to the rise of the modern woman.⁸ Directly after World War II a conservative backlash against women was felt, but from the 1950s several laws were implemented that also legally emancipated women. Generally, historians have characterized

Médecine et Santé 6 (2014): 17–31; Karen Brennan, "'A Fine Mixture of Pity and Justice,' The Criminal Justice Response to Infanticide in Ireland, 1922–1949," *Law and History Review* 31, no. 4 (2013): 793–841; Karen Brennan, "Murderous Mothers & Gentle Judges: Paternalism, Patriarchy, and Infanticide," *Yale Journal of Law and Feminism* 30, no. 1 (2018): 139–96; Daniel Grey, "Women's Policy Networks and the Infanticide Act 1922," *Twentieth Century British History* 21, no. 4 (2020): 441–63.

⁵ The Spanish legal system had a jury until 1939; it was reinstalled in 1995.

⁶ Mary Nash, "Pronatalism and Motherhood in Franco's Spain," in *Maternity and Gender Policies: Women and the Rise of the European Welfare States, 1880s–1950s*, eds. Gisela Bock and Patricia Thane (New York: Routledge, 1991), 160–77; Salvador Cayuela, *La biopolítica en la España franquista* (Murcia: Universidad de Murcia, 2011).

⁷ Johannes Blom, "Een harmonisch gezin en individuele ontplooiing. Enkele beschouwingen over veranderende opvattingen over de vrouw in Nederland sinds de jaren dertig," *BMGN* 108, no. 1 (1993): 28–50, here 39.

⁸ Marjan Schwegman, "Tussen traditie en moderniteit: Nederlandse vrouwen tijdens het interbellum," in *Bericht uit 1929. Het veelzijdige gezicht van de Nederlandse samenleving ten tijde van de oprichting van het PTT Museum*, eds. A. Jespers and B. Koevoets (The Hague: Stichting Het Nederlandse PTT Museum, 1990), 32–46.

the 1950s and 1960s in the Netherlands as decades that witnessed both social emancipation as well as continuity, also in regard to ideas on motherhood.⁹

Our research focuses on the mid-twentieth century, specifically on the period 1930–60 (regarding Spain, 1937–60) to gauge the effects of the Franco regime's emphasis on Catholicism, pronatalism, and motherhood in comparison with the Netherlands, which lacked such a stringent religious and gendered biopolitics. Moreover, in exactly these decades Dutch forensic psychiatry strengthened its foothold. We use 1960 as a cut-off point because from the 1960s both countries witnessed gradual social change, such as the movement for emancipation and democratization in the Netherlands and Spanish debates within Catholicism about marriage and motherhood prompted by the Second Vatican Council (1962–65).¹⁰ In short, we compare Spain and the Netherlands since they both have different laws on infanticide and a different legal system than England, as well as because of the Franco regime's imposition of strict Catholic and conservative regulations for women. We thus aim to contribute to the history of “forensic culture”—the study of the practices of forensic science, medicine, and psychiatry with attention for culture, media, gender, political ideology, and legal system—, a field in need of more systematic, international comparison.¹¹ In our comparison we include (the lack of) political and societal debate on infanticide law and focus on possible leniency through pathologization in the institutionalization of the legal system, the formulation of infanticide laws, procedural law (especially regarding diminished responsibility), the role and actual involvement of forensic doctors and psychiatrists, and sentencing in practice.

Pathologization

Our analysis is directed by the concept of (gendered) pathologization. Historians, sociologists, and philosophers have widely used the notions of medicalization and pathologization to refer to the process by which a phenomenon comes to fall under the purview of the discipline of medicine, with the help of categories such as disease or disorder.¹² Several historians and sociologists argue that medical experts have particularly pathologized women.¹³ From

⁹ Blom, “Een harmonisch gezin,” 50. Johannes Blom, “‘De jaren vijftig’ en ‘De jaren zestig’?,” *BMGN* 112, no. 4 (1997): 517–28.

¹⁰ James Kennedy, *Nieuw Babylon in aanbouw. Nederland in de jaren zestig* (Amsterdam: Boom, 1995); Agata Ignaciuk, “Love in the Time of El Generalísimo: Debates about the Pill in Spain Before and After *Humanae Vitae*,” in *The Schism of '68: Catholicism, Contraception and Humanae Vitae in Europe, 1945–1975*, ed. Alana Harris (Cham: Palgrave Macmillan, 2018), 229–50; Mónica García Fernández, *Dos en una sola carne. Matrimonio, amor y sexualidad en la España franquista (1939–1975)* (Granada: Comares, 2022).

¹¹ Willemijn Ruberg, “Introduction,” in *Forensic Cultures in Modern Europe*, eds. Willemijn Ruberg, Lara Bergers, Pauline Dirven and Sara Serrano Martínez (Manchester: Manchester University Press, 2023), 1–24, here 19.

¹² Joan Busfield, “The Concept of Medicalisation Reassessed,” *Sociology of Health & Illness* 39, no. 5 (2017): 759–74.

¹³ Susan E. Bell and Anne E. Figert, “Gender and the Medicalization of Healthcare,” in *The Palgrave Handbook of Gender and Healthcare*, eds. Ellen Annandale and Ellen Khulmann (London: Palgrave, 2012), 127–42, here 127.

the second half of the nineteenth century physicians and psychiatrists in Europe and the United States increasingly identified women's supposedly weaker physiques, and the female conditions of menstruation, pregnancy, childbirth, lactation, and menopause as causing illness, hysteria, and insanity.¹⁴ Forensic doctors and later psychiatrists used these theories in the courtroom, and thus scholars have identified the forensic arena as a place for the reproduction of discourses pathologizing women as "mad" or "sad," rather than qualifying them as "bad."¹⁵

Regarding infanticide specifically, historian Dana Rabin claims that in the eighteenth century the medical idea that infanticide was caused by insanity turned women who committed infanticide into "passive victims of male seducers and redefined them as insane," and that "this redefinition nullified their intention and their criminal and moral responsibility."¹⁶ Similarly to what was stated for hysteria, Elaine Showalter argued that the diagnosis of puerperal insanity was another instance of the "female malady," that is, of the cultural and psychiatric perceptions according to which improper feminine behavior was conflated with mental pathology.¹⁷

A closer look at empirical case studies by historians, though, may question this narrative of gendered medicalization—also for the case of infanticide. Historian Tony Ward disagrees with the idea that psychiatrists were instrumental in the inclusion of insanity into the British Infanticide Act, rather pointing to legal scholars' influential discussions on criminal liability.¹⁸ Ward argues that the debates on the 1922 law did not refer to puerperal insanity and that it was unclear whether psychiatrists were needed to establish this mental condition, since often a lay conception of insanity was used. Thus, Ward finds the notion of "medicalization" inappropriate.¹⁹ The same has been forwarded by Kirsten Johnson Kramar for the context of Canada, where the British Infanticide Act was enacted in the 1940s.²⁰ In mid-twentieth-century Ireland, as well, "medicalization" was absent. Karen Brennan studied Irish women convicted for infanticide in the period 1950–2015, with most cases dating from the 1950s and 1960s. Brennan found that women sentenced for infanticide in Ireland in 1950–75 received exceptionally lenient sentences.²¹ Yet in sentencing practice very little use was made of medical dispositions, even though a disturbance in the balance of the mind caused by the effects of childbirth or lactation was

¹⁴ Lisa Appignanesi, *Sad, Mad and Bad: Women and the Mind Doctors from 1800* (London: Virago Press, 2008).

¹⁵ Wilczynski, "Mad or Bad?," 424.

¹⁶ Dana Rabin, "Bodies of Evidence, States of Mind: Infanticide, Emotion and Sensibility in Eighteenth-Century England," in *Infanticide Historical Perspectives on Child Murder and Concealment, 1550–2000*, ed. Mark Jackson (Aldershot: Ashgate, 2002), 73–92, here 80.

¹⁷ Elaine Showalter, *The Female Malady: Women, Madness, and English Culture, 1830–1980* (New York: Penguin Books, 1985), 59. Also see Nancy Theriot, "Diagnosing Unnatural Motherhood: Nineteenth-Century Physicians and 'Puerperal Insanity,'" *American Studies* 30, no. 2 (1989): 69–88.

¹⁸ Ward, "Legislating for Human Nature," 264.

¹⁹ Tony Ward, "The Sad Subject of Infanticide: Law, Medicine and Child Murder, 1860–1938," *Social & Legal Studies* 8, no. 2 (1999): 163–80, here 170–74.

²⁰ Kramar, *Unwilling Mothers, Unwanted Babies*, 83, 87.

²¹ Brennan, "Murderous Mothers & Gentle Judges," 163.

included in the infanticide law. In the interpretation by Irish courts a specific diagnosed mental illness was not required; Brennan argues that the medical mitigation framework was based on a lay understanding of mental disturbance.²² The Irish infanticide law might have represented this crime as an irrational act, still, Brennan argues, it did not imply “a true pathologization of the offender.” Rather Brennan speaks of “a blend of the mad/sad constructions of female criminality.”²³ Brennan explains the low sentencing by referring to patriarchal Irish society, which rewarded women for acting out of shame of unmarried motherhood, thus demonstrating to be “good” women. Compassionate treatment made patriarchal society seem less harsh and lenient sentencing helped to divert attention from the wider socio-economic causes of this crime.²⁴

From this literature it first becomes clear that both law and forensic psychiatry can “pathologize” women, but that empirical analyses of both juridical and medical discussions and court practices are necessary to find out whether and how women who were accused of infanticide were pathologized and what role medical experts and other professionals had in that process of pathologization. We show that—regardless of the inquisitorial system that Spain and the Netherlands had in common—there were many differences between these two countries in regard to the wording and contents of the infanticide law, the position of forensic doctors in the legal system, and the involvement of forensic psychiatrists. In both countries the laws themselves did not assume that the woman who had just given birth and killed her baby was suffering from a mental disorder, even though these laws referred to her emotional state. However, in Spain this was increasingly debated in the context of the Franco regime. Turning to court practices in the second half of this article, we describe how in the entire period, Dutch psy-experts were more frequently summoned in cases of infanticide than in Spain that relied on generalist forensic physicians. Particularly in the 1950s, psychiatrists pathologized Dutch mothers accused of infanticide. Thus, we argue in Spain leniency came about through the law of infanticide itself, whereas in the Netherlands this process materialized both via the law and via the performance of psychiatrists as expert witnesses. Strikingly, however, this did not lead to many differences in sentencing, which in both countries was lenient. This leniency also entailed pathologization, which was often encased in lay terms, resulting in the same construction of “pitiful” women and testifying to the strength and resilience of gender images in the face of differences in law, legal systems, and forensic psychiatry.

Sources

For tracing juridical and medical discussions on infanticide and its relation to mental disorder, we have built on the main legal, medical, and psychiatric textbooks and journals of each country, as well as the internal guidelines for legal interpretation from the Spanish prosecutors. Regarding court practices, in total, our comparable sample (including case law, newspapers reports, and

²² *Ibid.*, 162.

²³ *Ibid.*, 167.

²⁴ *Ibid.*, 182–83.

complete case files) of infanticide cases where the mother of the child (younger than 10 days old) was accused, consists of 116 Spanish and 67 Dutch cases. We were able to reconstruct basic information on the suspect and the sentence for nearly all of these cases. For a majority of the cases our primary sources offer more details on the context of the case and the (lack of) involvement by experts. For the Netherlands we have used seven case files from the archives from the lower courts (*arrondissementsrechtbanken*) in Haarlem and Utrecht, and the higher court of appeal (*gerechtshof*) in Amsterdam.²⁵ The crimes in these cases took place in bigger and smaller cities and villages in the provinces of North Holland and Utrecht. The Dutch newspapers cover nearly all infanticides in all Dutch provinces in this period.²⁶ For Spain, we researched eighty-two court archival files from six different provinces (Madrid, Ávila, Toledo, Guadalajara, Girona, and Tarragona), twenty-nine archival files and published judgments from the Supreme Court, and reports from newspapers from other three provinces (Barcelona, Burgos, and Las Palmas de Gran Canaria).²⁷ From those files that were traceable in registers, we have consulted all the files available (Madrid, Ávila, Tarragona, and Girona) or random samples (Toledo and Guadalajara). In short, cases from both cities and countryside are part of our Dutch and Spanish samples. The cases are somewhat unevenly distributed over the period: for Spain the focus has been on the Franco regime, including a few cases from the territories under Francoist rule during the civil war. For the Netherlands, our sample includes more cases from the 1930s to ascertain the extent to which forensic psychiatry had already been involved. In the 1940s less Dutch cases of infanticide were prosecuted, which can be attributed to World War II. Nevertheless, the total number of cases studied, and the diversity of our primary sources, provide for rich documentation.²⁸

Mental Disorder in Infanticide Laws and Medico-Legal Discussions on Infanticide

Spanish honor and Dutch fear in infanticide laws

As various historians have shown, some newborn child homicides have received a comparatively lower punishment than other homicides in most

²⁵ For the Netherlands access to court files after circa 1940 is difficult: not all archives grant permission to view these archives, and for cases in which the sentence was acquittal or less than 1 year imprisonment, the case files have been destroyed. However, for these latter cases we still have information from the newspapers.

²⁶ Dutch cases have been found in newspapers by using a keyword search in the digital database Delpher.

²⁷ Supreme Court files were found in the Archivo Histórico Nacional, published judgments in the online repository of the CENDOJ, and newspaper reports in the online repositories Biblioteca Virtual de Prensa Histórica, Jable: Archivo de Prensa Digital, Hemeroteca Digital de l'Arxiu Històric de la ciutat de Barcelona.

²⁸ Statistics suggest that some Spanish archival records are incomplete or not traceable. Sara Serrano Martínez, "The Infanticide Article under Franco, 1937, 1963. 'Leniency', judicial discretion and forensic knowledge" (PhD thesis, Utrecht University, 2023), 277–84. We have also traced Spanish investigations of newborn child murder that began as investigations of parricide, considering all files of parricide available from Girona, and a random selection from the other provinces.

European legislations since the nineteenth century: a more lenient penalty was envisioned for this crime when it was committed by the mother (and in some countries, by other close relatives) due to fear, honor, or, simply, if the child was illegitimate. The causes of the legal shift toward leniency have received various explanations. Overall, historians have proposed it was due to a new Enlightened emphasis on humanitarianism and sympathy for the plight of unmarried women, under the assumption that she had been seduced and abandoned by a man,²⁹ thus reflecting and reproducing modern gender and sexuality norms.³⁰ Although countries of the common law tradition introduced this change in the early twentieth century, European countries of the Romano-Germanic tradition (apart from France³¹) had granted such mitigation already in their nineteenth-century processes of codification of criminal law. Spain and the Netherlands were not an exception to this trend.

In both countries, infanticide articles in the penal code were more lenient than the general laws on murder and manslaughter. They were predicated on the motive of the crime, but this was closely related to the civil status of the baby's mother. Starting with the 1822 penal code, all Spanish penal codes, including those in force in the Francoist dictatorship (1939–75), included a special article for the subset of homicides of a new-born child committed by the child's mother or maternal grandparents with the aim of concealing the mother's dishonor [*para ocultar su deshonra*] (articles 416 and 410 in the 1932 and 1944 codes, respectively). That article entailed a significantly lowered penalty, of minimum 6 months and 1 day and maximum 4 years and 2 months (1932 penal code, before the Franco regime) or 6 years (1944 penal code, in the Franco regime),³² compared to the penalty that was set for other kinds of intrafamilial homicides (called "parricide": 20–30 years in the 1932 penal

²⁹ Sheena Sommers, "Remapping Maternity in the Courtroom. Female Defenses and Medical Witnesses in Eighteenth-Century Infanticide Proceedings," in *The Body in Medical Culture*, ed. Elizabeth Klaver (Albany: State University of New York Press, 2009), 37–59, here 40. Thomas Laqueur, "Bodies, Details, and the Humanitarian Narrative," in *The New Cultural History*, ed. Lynn Hunt (Berkeley: University of California Press, 1989), 177–79.

³⁰ Kristin Ruggiero, "Honor, Maternity, and the Disciplining of Women: Infanticide in Late Nineteenth-Century Buenos Aires," *Hispanic American Historical Review* 72, no. 3 (1992): 353–73, 354; Sol Calandria, "Matar a la madre: Infanticidios, honor y género en la provincia de Buenos Aires (1886–1921)" (PhD thesis: Universidad Nacional de La Plata, 2019), 66, 77; Nora E. Jaffary, "Maternity and Morality in Puebla's Nineteenth-Century Infanticide Trials," *Law and History Review* 39, no. 2 (2021): 299–319; Silvia Chiletto, "Infanticide and the Prostitute: Honour, Sentiment and Deviancy between Human Sciences and the Law," in *Italian Sexualities Uncovered, 1789–1914*, eds. Valeria Paola Babini, Chiara Beccalossi and Lucy Riall (Basingstoke: Palgrave MacMillan 2015), 143–61, here 147–48.

³¹ James M. Donovan, "Infanticide and the Juries in France, 1825–1913," *Journal of Family History* 16, no. 2 (1991): 157–76.

³² From May 1942 to the coming into force of the 1944 penal code, the Francoist government raised the penalty for infanticide article to a minimum of 2 years, 4 months and 1 day and maximum 8 years. The lowering of the penalty in 1944, however, had retroactive effects. See Serrano Martínez, "The Infanticide Article under Franco," 47–93.

code and 20–30 years or death in the 1944 penal code).³³ The 1932 and 1944 formulations of the article did not specify the age of the newly born child, while the previous codes had set the maximum age at 3 days old.

The main difference between the Spanish and the Dutch laws on infanticide was the Spanish emphasis on honor and the extension of this law to the child's mother or maternal grandparent. The Dutch laws only addressed the mother herself and did not emphasize honor as the Spanish laws did. In the Netherlands, the new penal code of 1886 referred to neonaticide in two articles (290 and 291) on child manslaughter and child murder, punishable with a maximum sentence of 6 and 9 years, respectively. It only applied to the mother, who, "out of fear of the discovery of her delivery," kills her child on purpose during or directly after birth. It was not specifically defined how old the baby should be.³⁴ When the decision to kill the baby to prevent the discovery of her delivery was made before labor started it was considered child murder, after labor as child manslaughter.³⁵

The Dutch laws on infanticide—which remain unchanged until this day, by contrast to the Spanish³⁶—were formulated in 1886 in the spirit of evangelical Christianity, which tried to "save" women in the second half of the nineteenth century, and to reform men.³⁷ The image of this mother was the unmarried servant girl who was to be protected as a victim of irresponsible men in a society in which unmarried motherhood was dishonorable and economically harsh. The Dutch formulation of the law did not refer explicitly to honor as in Spain. Even though one author wrote that this provision implicitly excluded sexually promiscuous evil women by supposing they would not be acting out of fear of the discovery of birth,³⁸ the distinction between unmarried and married women, and between honorable and dishonorable women did not matter. The only relevant element was the presence or absence of the woman's fear of discovery of birth. As the author of a legal textbook from 1947–49 explained, "[t]he law does not distinguish between different reasons for the fear of being discovered: most often this fear will lie in the imminent shame, but different reasons are now also admissible:

³³ To be exact, 20 years and 1 day. "Código Penal." *Gazeta de Madrid*, November 5, 1932, here 830 and 842; "DECRETO de 23 de diciembre de 1944 por el que se aprueba y promulga el 'Código Penal, texto refundido de 1944', según la autorización otorgada por la Ley de 19 de julio de 1944," *Boletín Oficial del Estado* January 13, 1945, 436 and 457.

³⁴ "onder de werking van vrees voor ontdekking van hare bevalling."

³⁵ Jan Zeldenrust, *Gerechtigde geneeskunde* (Leiden: Stafleu's wetenschappelijke uitgeverij, 1966), 201–11.

³⁶ The Spanish infanticide article was abrogated in 1995: "Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal," *Boletín Oficial del Estado* November 24, 1995.

³⁷ For an overview of the historiography on infanticide in the Netherlands, see Willemijn Ruberg, "Travelling Knowledge and Forensic Medicine: Infanticide, Body and Mind in the Netherlands, 1811–1911," *Medical History* 57, no. 3 (2013): 359–76.

³⁸ [no author] *De artikelen van het nieuwe strafwetboek, die voor de geneeskundigen meer bijzonder van belang zijn te achten. Rapport aan den geneeskundigen raad van Noordholland* (Amsterdam: Brinkman & Van der Meulen, 1882), 35–36.

a woman can for instance have been threatened by her husband if she gives birth to another child.”³⁹

Thus, honor had historically been at the basis of the infanticide laws of both countries, but had become less explicit in the Dutch laws, which foregrounded fear and only hinted at the imminent shame. Still, the spirit of the Dutch law still reminded of honor. This similarity between the Dutch and Spanish laws of infanticide, was, indeed, recognized by a contemporary Spanish jurist in 1946.⁴⁰ Moreover, we argue, both Dutch and Spanish infanticide articles focused on the perpetrator’s motive as the basis for leniency, by contrast to countries where lenient infanticide laws referred to the objective situation of illegitimacy, like Germany.⁴¹ It was precisely this focus on the criminal motive of infanticide, on women’s (and, in Spain, maternal grandparents’) subjective and mental states, that opened a door for debates about psychiatric pathology.

Infanticide laws and mental disorder: a historically contested issue

In Europe, the relationship between infanticide and mental illness became a topic of significant interest for alienists in the nineteenth century, but it was never exempt from controversy. Particularly the notions of “puerperal insanity,” “puerperal psychosis,” or “post-partem madness” were discussed. Spanish psychiatrists of the turn of the twentieth century discussed this theme in similar terms to French, Dutch, and Italian psychiatrists.⁴² Yet, the 1915 state exam that medical doctors had to pass to obtain a position in Spanish courts as forensic experts included the topic of “puerperal insanity” [*locura puerperal*], and in later decades it referred to “psychopathological reactions of endotoxic origin” or the “psychosis of gestation.”⁴³ Moreover, the

³⁹ “De wet maakt geen onderscheid naar de redenen van vrees voor de ontdekking van de bevalling. Meestal zal die vrees haar grond vinden in de te wachten schande, doch ook andere redenen zijn nu toelaatbaar; een vrouw kan bijv. door haar echtgenoot bedreigd zijn voor het geval dat zij weder aan een kind het leven geeft.” T. J. Noyon and G. E. Langemeijer, *Het wetboek van strafrecht verklaard* (Gouda: Quint, 1947–1949), 10 (quote), 102.

⁴⁰ Antonio Quintano Ripollés, *Comentarios al Código Penal*, vol. II (Madrid: Revista de derecho privado, 1946), 239.

⁴¹ Kerstin Michalik, “The Development of the Discourse on Infanticide in the Late Eighteenth Century and the New Legal Standardization of the Offense in the Nineteenth Century,” in *Gender in Transition: Discourse and Practice in German-Speaking Europe, 1750–1830*, eds. Ulrike Gleixner and Marion W. Gray (Michigan: The University of Michigan Press, 2006), 51–71.

⁴² [no author] Primer Certamen Frenopático Español celebrado en los días 25, 26, 27 y 28 de setiembre de 1883 en el manicomio “Nueva-Belen” (Barcelona: “La Academia” de E. Ullastres, 1883); Manuel Ruiz Maya, *Psiquiatría penal y civil* (Madrid: Plus-ultra, 1931). Infanticide was also associated with “melancholic psychosis”: Isabel Jimenez Lucena and María José Ruiz Somavilla, “La política de género y la psiquiatría española de principios del siglo XX,” in *Interacciones ciencia y género. Discursos y prácticas científicas de mujeres*, eds. María José Barral, Carmen Magallón, Consuelo Miqueo and María Dolores Sánchez (Barcelona: Icaria, 1999), 185–206, here 195.

⁴³ “Reacciones psicopatológicas ... de origen endotóxico,” “psicosis de la gestación.” “Programa para el primer ejercicio de las oposiciones al Cuerpo de Médicos forenses y de las Prisiones preventivas,” *Gazeta de Madrid* September 30, 1915, 828; “Cuestionario para las oposiciones a Médicos Forenses de Madrid y Barcelona,” *Gazeta de Madrid* July 6, 1933, 121; “Transcribiendo el programa

records of psychiatric hospitals show that these diagnostic categories were still used in Spanish hospitals in the 1930s and 1940s.⁴⁴ In the early 1960s, Spanish jurists mentioned these diagnoses as relevant to explain some infanticides.⁴⁵ While debated, the notion of puerperal mental disorders circulated and held credibility in Spain.

In the Netherlands, it was doubted that this medical notion could be used in the courtroom. Legal scholar Jan Verdam noted in 1909 that many doctors did not believe a pathological mental condition during a woman's delivery could be proven to exist.⁴⁶ A Dutch infanticide case from 1929 corroborated this standpoint: the psychiatrists who were called as expert witnesses testified that these so-called "puerperal psychoses" were known from medical literature but difficult to apply to forensic psychiatry; one doctor mentioned that she had never encountered such a case in her practice as expert witness.⁴⁷ Besides the diagnosis of puerperal insanity, moreover, other diagnostic categories such as "degeneration" or "imbecility" could also have served for court practice (and did, in both countries) even if they were not paradigmatically connected to infanticide in psychiatric literature.⁴⁸ In brief, both among the specific categories of puerperal disorders and beyond, psychiatric knowledge circulating in Spain and the Netherlands offered concepts to apply to infanticide cases.

However, how these diagnoses were used and debated for infanticide, and related to infanticide laws, was also subject to disagreement in both countries. First, legal scholars discussed whether the law itself referred to mental disorders. The central formulation of the Dutch law was "fear of the discovery of her delivery." Although some late nineteenth-century commentators read this as referring to a highly abnormal mental condition, most authors disagreed with this interpretation. It was generally regarded to refer to a special emotional condition of the mother. As Verdam remarked in 1909, in contrast to the German criminal law which spoke of the mother's unusual mental state caused by birth, the Dutch law did not imply a psychiatric condition.⁴⁹ Similarly, legal scholars in Spain initially held that the Spanish formulation of the article of infanticide did not refer to any mental disorder, but rather

que ha de regir los ejercicios de oposición al Cuerpo Nacional de Médicos Forenses, formado por el Tribunal calificador," *Boletín Oficial del Estado* December 13, 1949, 5185.

⁴⁴ Celia García Díaz, "Mujeres, locura y psiquiatría: La sala 20 del Manicomio Provincial de Málaga" (PhD thesis, Universidad de Málaga, 2019), 172.

⁴⁵ José María Stampa Braun, "Criminología del infanticidio," in *Estudios de derecho público y privado ofrecidos al Prof. Dr. D. Ignacio Serrano y Serrano*, vol. 2 (Valladolid: Universidad de Valladolid, 1965), 162–63; José María Rodríguez Devesa, *Derecho penal español. Parte especial*, vol. 1 (Valladolid: Castilla, 1963), 52.

⁴⁶ Jan Verdam, *Kinderdoodslag en kindermoord (art. 290–292 W.v.S.)* (Amsterdam: M.J. Portielje, 1909), 30–32. See Ruberg, "Travelling Knowledge and Forensic Medicine," 369–71.

⁴⁷ Noord-Hollands Archief Haarlem (hereafter NHA), Archief Gerechtshof Amsterdam, case no 173, inv. no. 161, March 27, 1929.

⁴⁸ Chiletto, "Infanticide and Mental Illness," 17–31.

⁴⁹ Verdam, *Kinderdoodslag en kindermoord*, 103–4; 108–9.

only to a plain criminal motive, the motive of saving a compromised honor, which typically coexisted with emotions.⁵⁰

Yet, in the context of changes in the legal and political systems after the Spanish Civil War (1936–39), the relationship between the infanticide article and insanity became a hot topic of discussion in Spanish legal circles. In 1945, the Francoist Supreme Court pronounced a judgment arguing that the effects of labor on women's minds were implicitly taken into account in the law's reference to an honor motive in infanticide. The key issue at stake in this case was whether the killing of an 8-day-old baby could qualify as infanticide under the Spanish law, or whether instead it should be punished as intra-familial homicide (parricide), as the prosecutor argued in his appeal. The Supreme Court judges ruled that the infanticide article was normally applied, in Spain and elsewhere, only in cases in which the victim was maximum 3 days old, because "that time is enough for the perpetrator to recover from the state of excitement that comes with labor, and to recover reasoning and freedom."⁵¹ In this way, the magistrates took as a key premise in their reasoning that labor per se caused such disruptions on women's minds, and used this factual premise to arrive at the conclusion that the case under revision was not a case of infanticide as defined in the Spanish infanticide law.

A few legal scholars took this opinion as the authoritative way to interpret the law. For example, the criminal law professor Juan del Rosal argued that the Supreme Court's interpretation of the infanticide article was in line with the criminological evidence about the causes of infanticide. Del Rosal cited in this regard the works of the Italian criminologist Vincenzo Mellusi, who argued that infanticide happened in cases in which women had a "narrowed consciousness" and a state of "general brain weakness" caused by childbirth and the postpartum.⁵² However, several jurists, after 1945, continued to assert that the infanticide article in Spain only referred to honor, and that the concurrence of any emotions and mental disorders (either permanent or temporary) ought to be taken as separate circumstances. For instance, Antonio Quintano Ripollés claimed that the Spanish infanticide article referred to a cold psychological motive—the aim of concealing the mother's dishonor—in contrast to what happened in countries where the law referred to emotional states or psychiatric conditions.⁵³ Whether the physiological effects of

⁵⁰ José Vicente y Caravantes, *Código penal reformado: comentado novísimamente, precedido de una breve reseña histórica del Derecho penal de España* (Madrid: Librerías de Ángel Calleja, 1851), 383; Eugenio Cuello Calón, *El nuevo Código Penal español*. Libro Segundo. Parte Primera (Barcelona: Bosch, 1930), 595–605; "Intervenciones de los profesores Truyló y Stampa," *Diario de Burgos*, August 28, 1953, 3.

⁵¹ "en ese plazo existe el suficiente tiempo para que la culpable pueda reaccionar del estado de excitación que va unido al parto, y recuperar la reflexión y libertad." ECLI: ES:TS:1945:48.

⁵² "estrecheces en el campo de la conciencia" and "debilidad cerebral general." Juan del Rosal, *Estudios penales* (Madrid: Instituto Nacional de Estudios Jurídicos, 1948), 99. On Mellusi's views, see Chiletto, "Infanticide and Mental Illness"; Calandria, "Matar a la madre," 115.

⁵³ Quintano Ripollés, *Comentarios*, 240; Antonio Quintano Ripollés, *Tratado de la parte especial del derecho penal*, vol. 1, *Infracciones contra las personas* (Madrid: Revista de Derecho Privado, 1962), 430–31.

childbirth described by the Supreme Court could be truly considered pathological was moreover subject to discussion as well.⁵⁴ Thus, although there were disagreements, with the 1945 case and its subsequent debates, the idea that the infanticide article intrinsically implied a mental derangement caused by childbirth was put on the table in Spain.

In short, in both countries psychiatrists debated the diagnosis of “puerperal insanity” but the notion was not generally accepted as it was in English court cases in the first decades of the twentieth century. Still, both the Spanish and the Dutch lenient infanticide laws left open a margin for pathologization, due to their focus on the perpetrator’s motive and emotions.

An instrumental pathologization: diminished responsibility instead of lenient infanticide laws

In Franco’s Spain this openness in the law’s wording led to a pathologized interpretation of the infanticide article, according to which the effects of childbirth on women’s minds could serve as part of the basis for the law’s leniency. Albeit this was not a unanimously shared opinion, some jurists indeed articulated it to advocate for the abrogation of the Spanish infanticide article. Like other critiques to the lenient infanticide law, the political and cultural contexts in Spain deeply shaped these arguments.

Spanish jurists under Franco vehemently debated the limitations of the infanticide article and its potential revisions.⁵⁵ Critiques of the article proliferated since the mid-1940s, and gained momentum especially from the 1950s. Some of them derived from the renewed emphasis on pronatalism and Catholic marriage that was typical of the dictatorship.⁵⁶ For example, Spanish commentators appealed to the need to protect the Catholic family and the value of babies’ life in terms of population numbers, thus dovetailing with the Francoist regime’s emphasis on pronatalism.⁵⁷

While most critics of the infanticide article proposed to raise its penalty or to remove the article from the penal code, some jurists in the Franco regime also believed there was a third option to improve the Spanish law regarding infanticide: to replace the article’s reference to honor with a reference to mental disorder. Jurists voiced this view in the early 1960s, following the doubts and debates on pathologization of the late 1940s and 1950s. A prosecutor, for example, argued in 1960 that the infanticide article ought to be removed because the general clauses in the penal code referring to mental derangement sufficed for providing a fair

⁵⁴ José María Codón and Ignacio López Sáiz, *Psiquiatría Jurídica Penal y Civil* (Burgos: Imprenta Aldecoa, 1951), 250–59.

⁵⁵ E.g., Casimiro Chaves Chaves, *Delito de infanticidio. Artículo 410 del Código Penal* (Madrid: Ciudad de los Muchachos, 1955). For a more detailed discussion of the Francoist-period legal debates about infanticide, see Serrano Martínez, “The Infanticide Article under Franco,” 94–144.

⁵⁶ Nash, “Pronatalism and Motherhood”; Gloria Román Ruiz, “‘Custodios de la moral’. Control socio-moral y sanción popular en el mundo rural altoandaluz tras la posguerra,” *Pasado y Memoria. Revista de Historia Contemporánea* 21 (2020): 131–54.

⁵⁷ Serrano Martínez, “The Infanticide Article under Franco,” 127–30.

penalty in these cases—thus implying that leniency toward perpetrators of infanticide was only acceptable if there was diminished responsibility.⁵⁸ Other jurists advocated for a new article that referred to “the mental disturbance suffered due to childbirth.”⁵⁹

In the Netherlands, in contrast, critiques to the infanticide law were absent. The main explanations for this difference can be found first in the fact that—in contrast to Spain—the criminal code in general remained unchanged in the Netherlands, and this also applied to the specific laws on infanticide. In the Netherlands, the revised articles of child murder and child manslaughter, as part of the new criminal code of 1886, had led to some minor debate regarding their interpretation, such as what the exact time limits were pertaining to the words “during or shortly after birth,” but not to discussion about possible revision.⁶⁰ In the first half of the twentieth century no new writings appeared. In legal textbooks from the 1940s and 1950s, reference was still made to the publications from the late nineteenth century and the first decade of the twentieth century.⁶¹ This lack of debate testifies to the uncontroversial nature of these laws, but perhaps the low incidence of cases of infanticide (often between one and four a year on average) also led to the perception of this crime as not very urgent. By contrast, Spanish critiques and commentaries to the infanticide article were mostly included in broader commentaries to the new Francoist penal code of 1944. Second, jurists’ perceptions of what the policies of the dictatorship were and should be had a profound impact on their interpretations of the infanticide article.

Pathologization and Experts in Court Practice

The 1930s and 1940s: more psychiatrists in the Netherlands than in Spain

In the 1930s and 1940s, the role of psychiatrists in infanticide cases was larger in the Netherlands than in Spain, and specialists in psychiatry were summoned in Dutch cases, but absent in the Spanish ones. In Spain, an examination of the suspect’s mental health was only done in three cases in the period 1939–49, two of which were dismissed for lack of responsibility due to mental illness.⁶² Yet, forensic physicians and general practitioners performed these

⁵⁸ Enrique Ruiz Vadillo, “Contribución al estudio de la reforma del Código Penal” (PhD thesis). Extracto (Madrid: Revista de Derecho Judicial, 1962), 59.

⁵⁹ “la alteración psíquica sufrida con ocasión del parto.” Juan del Rosal, Manuel Cobo, Gonzalo R. Mourullo, Derecho Penal Español (Parte Especial), “*Delitos contra las personas*” (Madrid: Silverio Aguirre, 1962), 291.

⁶⁰ Noyon and Langemeijer, *Het wetboek van strafrecht*, 11, 102–4. Only J. M. van Bemmelen and W. F. C. van Hattum, *Hand- en Leerboek van het Nederlandse strafrecht*, Part II (The Hague: Martinus Nijhoff, 1954), 198 argue that the distinction between child murder and child manslaughter is unnecessary, since the fear of discovery can already be very strong long before the delivery starts.

⁶¹ See Noyon and Langemeijer, *Het wetboek van strafrecht*; Van Bemmelen and van Hattum, *Hand- en Leerboek*, 192–98.

⁶² Archivo Histórico Provincial de Ávila, Audiencia Provincial de Ávila, Signatura 37491; Archivo General de la Administración (AGA) (07) 001_36, 41/07228; AGA (07) 001_14, 41/00745.

examinations, not psychiatrists. In Spain the court permanently hired a general forensic physician, who was often also responsible for questions regarding mental health.⁶³

Formally, the absence of psychiatric examinations from the typical investigation of infanticide cases properly met all the requirements of the law. The Spanish law of criminal procedure left the request of psychiatric examinations to the discretion of investigating judges, who oversaw the investigation, and of public prosecutors, who, once the judge considered that the investigation had finished, had to supervise the investigation file and could either agree with the judge's decision to stop the investigation or order new investigation acts. Yet, although they were not obliged to resort to psychiatric examinations, both judges and prosecutors were legally bound to request a psychiatric examination if they found any sign indicating that a suspect might be mentally deranged.⁶⁴ Still, this was very rarely the case.

On the other hand, in Spain there were eight cases (out of sixty-nine trials from the 1940s, 11.6%) in which the defense argued for the application of an attenuation or exemption of criminal responsibility based on the alleged existence of a mental disorder, but, in the cases for which we have data about both the investigation and trial, there was no examination of the suspect by an expert.⁶⁵ This practice aligned with what the Spanish Supreme Court had done in the above-mentioned 1945 case. There, the Supreme Court argued that the infanticide article was limited to the first 3 days after childbirth, because it implied the effects of childbirth on women's minds. But this was not all that ruling did: at the same time, the magistrates believed that the lower court's description of the mental state of the perpetrator—without any reference to expert evidence or diagnoses—qualified as an incomplete temporary mental disorder and thus the penalty was mitigated.⁶⁶ In that case, the temporary mental disorder circumstance was applied without experts involved or references to psychiatric diagnoses, and this is what lawyers in several other cases wanted to attain as well. Despite the Supreme Court's example, though, these defenses were only successful in one case.⁶⁷ In another case, the defense lawyer did involve experts (those attached to the court, two forensic physicians), as witness for the trial only. The doctors claimed, conclusively, that "they believe that, after a childbirth with such a loss of blood, it is possible that the accused killed her child, but this is not natural; when they examined her 17 days later, they could see that the childbirth fever provoked

⁶³ Juan Jiménez Muñoz, *Historia legislativa del Cuerpo de Médicos Forenses* (Valladolid: Universidad de Valladolid, 1995).

⁶⁴ "Ley de Enjuiciamiento Criminal," *Gazeta de Madrid*, October 5, 1882, 17.

⁶⁵ AGA (07) 001_28, 41/06319; AGA (07) 001_31, 41/06750; AGA (07) 001_31, 41/06730; AGA (07) 001_13, 41/00688; AGA (07) 001_36, 41/07209 (ECLI: ES:TS:1949:803); Arxiu Històric Provincial de Tarragona (AHPT), Unitat instal·lació 3524, Unitat correlativa 182; ECLI: ES:TS:1948:1224; Archivo Histórico Provincial de Guadalajara Audiencia Provincial de Guadalajara J-0002509. For calculating percentages for Spain only the sub-sample for which we had full information was studied.

⁶⁶ ECLI: ES:TS:1945:488.

⁶⁷ ECLI: ES:TS:1948:1224.

a psychological disorder in her.”⁶⁸ However, the court in charge rejected this defense line arguing that the experts had only provided the diagnosis “a posteriori” but had not uttered anything during the investigation. The court stated that that version of the facts was not compatible with proven facts such as that the accused had been going out of her house after childbirth, instead of remaining, ill, at home. Thus, in this case, in part the provincial judges ended up rejecting the defense’s account since the diagnosis had not been proclaimed in the context of a pre-trial investigation, which suggests that the role of experts in proving a pathological account of infanticide was under negotiation in practice. Besides, as this judgment shows, lay knowledge about what disorders implied was also relevant for judges’ decisions on psychiatric matters.

In the Dutch inquisitorial system, the investigating judge could freely appoint experts. In general, no experts were permanently attached to the court, such as in Spain. Nevertheless, often the same physicians and psychiatrists were called in.⁶⁹ In the period 1930–60 increasingly psychiatrists were involved as expert witnesses in cases of infanticide. When we look at the cases in which mothers (alone or together with accomplices) were accused of killing their newborn babies, in the period 1930–49 in at least 16% of the cases psychiatrists were called upon, in 1940–49 in at least 27% of cases, and in 1950–59 this percentage had risen to 60%.⁷⁰

Women convicted of infanticide, just like other defendants, could be given “TBR” (*Ter Beschikkingstelling van de Regering*, or detention on behalf of the government), meaning the judge could compose a verdict that both included a prison sentence and treatment in a psychiatric institution. TBR was an important element of the so-called “Psychopath Laws” from 1928, which marked the beginnings of the institutionalization of Dutch forensic psychiatry and entailed the option of partial accountability. Despite the existence of the TBR system, in only a minority of Dutch cases of infanticide suspects were found to be diminished responsible or irresponsible and/or given TBR. Of the mothers accused of infanticide 11% was acquitted; 13% received a prison sentence of 0–6 months; 32% a prison sentence of 6 months to 1 year; 15% a prison sentence of 1–2 years; and 13% a TBR sentence in addition to a prison sentence. Two women were placed in an asylum. Fathers or grandparents who killed newborn babies received much higher sentences (a vast majority over 2 years imprisonment). The more lenient laws on infanticide for mothers thus had their effect. In fact, in 1954 legal scholars noted that in the previous years, sentences had been structurally lower than the maximum penalty for this offence.⁷¹ So even when psychiatrists examined the minds of perpetrators of neonaticide, this

⁶⁸ “creen que después de un parto tan sangriento es posible que la procesada diera muerte a su hijo pero no es lo natural, la fiebre del parto le produjo un trastorno psíquico que al reconocerle observó trastorno a los diez y siete días.” AHPT, Unitat instal·lació 3524, Unitat correlativa 182.

⁶⁹ Jan Zeldenrust, “Hedendaagse aspecten van de gerechtelijke geneeskunde,” in *Wetenschap contra Misdaad*, (no editor) (The Hague: Martinus Nijhoff, 1951), 49–78, here 61.

⁷⁰ Since not all newspaper articles mention whether a psychiatrist was involved, and for some cases we only have newspapers as source, these percentages could be higher.

⁷¹ Van Bemmelen and van Hattum, *Hand- en Leerboek*, 196.

did not necessarily lead to a conclusion of diminished responsibility or irresponsibility, since most women were regarded as responsible.

Moreover, although courts more frequently appointed psychiatric experts in the Netherlands than in Spain, if Dutch defendants of infanticide conformed to the typical image (a lonely and scared mother who gives birth and panics) and they fulfilled the requirements for the law on child murder or manslaughter, a psychiatrist does not seem to have been needed, similarly to what happened in most cases in Spain. For instance, in 1947 a 32-year-old married woman from Amsterdam, whose four children had been taken from her by the Guardianship Council (*Voogdijraad*), was convicted of having drowned her baby, whom she had conceived with another man after her husband had joined the German SS during the World War II. The Protestant Probation Services composed an extensive report on her personal history, which emphasized her desperation and poverty after her husband and later her lover had left her. The author speculated that the birth of her last child had probably threatened her personal freedom too much; her “natural sensuality,” which was stronger than in most women, and her wish to have sex again with a man were more influential than taking care of the baby. The reporter considered her “perfectly normal” both mentally and physically but found that this woman had been made into a criminal by the very sad circumstances of her life. Therefore, psychiatric examination was not deemed necessary.⁷² Interestingly, this female suspect had stated during the police investigation that she had not felt in her right mind, that everything in her head “whirled.” Therefore, during the trial her lawyer had asked a gynecologist who testified as expert witness whether it was possible that “a woman got so confused during her delivery that she does not know what she is doing,” which he confirmed. Nevertheless, the judge felt no need to call in a psychiatrist as expert witness. The woman was sentenced to 2 years imprisonment.⁷³

This Dutch case resembles the vast majority of the Spanish cases in its outcome and use of lay assessments of the suspects’ character. In Spain, though, these character evaluations came from different sources. Francoist infanticide investigations revolved primarily around testimonies about the morality and reputation of the suspect of infanticide, if this was the baby’s mother. These investigations used to finish with the request for birth certificates and reports about the suspect’s morality and behavior to local authorities and police agents. These reports were not mandatory but had already been frequently used before the Franco regime.⁷⁴ They were not specific to infanticide investigations, but in the context of these investigations reports on “public morality” often became central, serving to evaluate whether the accused could have killed the child to protect her dishonor (and demonstrating a

⁷² NHA, Arrondissementsrechtbank Amsterdam (hereafter AA) (access no. 489); date of trial May 28, 1947; inv. no. 80; case no. 1875. Probation report made by Protestantsch Christelijke ReclasseeringsVereeniging, Amsterdam, March 28, 1947.

⁷³ NHA, AA (access no. 489); date of trial May 28, 1947; inv. no. 80; case no. 1875.

⁷⁴ Rubén Pérez Trujillano, “Gitanos, moros y negros ante los tribunales. Colonialismo y racismo institucional durante la Segunda República Española (1931–1936),” *Historia Constitucional* 21 (2020): 420–72.

pervasive network of moral control of women⁷⁵). For example, a mayor argued that a suspect of infanticide presented “a behavior that does not meet morality and good customs, [since] she has fallen into the depravity of sexual pleasure.”⁷⁶ This typical sequence of investigative acts therefore did not normally include an expert psychiatric examination of the suspect, but was strongly based on the authority of police and state functionaries.

“Public morality” at first sight was less important in Dutch infanticide cases, yet at closer inspection honor did play a role. Although in the Netherlands inquiries into the moral behavior of the female suspects, for instance by asking neighbors or sometimes a mayor, were still made, by the 1930s this role had increasingly been taken up by probation services. From the 1930s (Catholic or Protestant) probation services became influential in the Dutch legal system, both in the pre-trial investigation phase and after the completion of the prison sentence to help with re-integration. Their employees, initially mostly consisting of lay volunteers, composed reports on the behavior and character of the suspects. Their inspectors did extensive research into family background, including emotional, medical, and sexual aspects, and could also provide advice to the investigating judge to either request a further psychiatric report or refrain from inviting an expert on the mind. The woman’s reputation was thus important in both Spain and the Netherlands. However, in the Dutch cases these morality reports were not produced in all cases, as in Spain, moreover they were less important for the final verdict, since the Dutch infanticide article did not hinge on honor and since the Dutch legal investigation was more directed at witness testimony regarding the crime itself than at establishing the suspect’s reputation.

To conclude, in the 1930s and 1940s, the role of psychiatrists in infanticide cases was larger in the Netherlands than in Spain, but nevertheless not standard practice. The focus of the specific laws on infanticide meant that fear of the discovery of delivery was most important to establish, and this often precluded further investigations on the mind. The presence of the TBR system makes the Netherlands stand out compared to Spain, and a minority of Dutch defendants also received treatment besides punishment. Yet, the percentage of acquittals in both countries was roughly the same. In Francoist courts from 1937 to 1949, 9.6% of the mothers accused of killing their newborns (eight of eighty-three) were totally acquitted; 16.9% (fourteen of eighty-three) were convicted of other crimes (illegal inhumation, neglect, abortion, child abandonment); 50.6% (forty-two of eighty-three) were convicted under the infanticide article, and 4.8% (four of eighty-three) under the harsher parricide article with sentences of 30, 25, and 20 years.⁷⁷ Besides the differences in

⁷⁵ Concepción Mir Curcó, *Vivir es sobrevivir. Justicia, orden y marginación en la Cataluña de postguerra* (Lleida: Editorial Milenio, 2000), 153–54.

⁷⁶ “una conducta en desacuerdo con la moral y buenas costumbres habiéndose entregado a la depravación del placer sexual.” Arxiu Històric de Girona, Audiència Provincial de Girona, 133/1.

⁷⁷ ECLI: ES:TS:1949:737; AHPT, Unitat instal·lació 3524, Unitat correlativa 182; AGA (07) 001_36, 41/07209; ECLI: ES:TS:1948:1224. Besides, 9.6% (eight of eighty-three) cases were dismissed, 4.8% (four of eighty-three) of suspects fled, two suspects were found unaccountable (2.4%), in another case there are no data regarding the outcome.

inclusion of psychiatric expertise and the possibility of psychiatric treatment, the Spanish conviction for parricide instead of infanticide, which was absent in the Netherlands, is also noticeable. In the 1950s, the contrast between the involvement of psy-experts in the Netherlands, and their absence in Spain would be even more striking.

The 1950s: a major role for forensic psychiatry and psychology in the Netherlands

In 1958, a Spanish newspaper included a report on a Dutch infanticide case where a married couple had been accused (and confessed to) having killed not only their last newborn, but also three of their other children before. The Spanish journalist adopted a moralistic tone, referring to the case as a “monstruous parricide.”⁷⁸ According to Dutch press reports, the couple were examined by psychiatrists, who found them both accountable but indicated that the father had “a weak personality structure and [was] easily malleable” while the mother was a “primitive person ... living in a small world.”⁷⁹ There was a stark contrast between the Dutch focus on psychiatric evidence and the moralistic stance of the Spanish report. In fact, Dutch newspapers in 1960–89 often depicted female suspects of infanticide as irrational or ill.⁸⁰ This difference in news reporting also reflects the contrast between court practices, which showed a growing medicalization of infanticide proceedings in the Netherlands and a continuation of the 1940s pathologization without experts in Spain.

As was already the case in the 1940s, in Spain several defense lawyers argued that the accused had suffered from a temporary mental disorder, but they did not appoint any experts to prove this—which in turn suggests that, like in the previous decades, psychiatric examinations were not done *ex officio* by investigating courts either. Indeed, this happened more often than in the previous decade, in six (out of twenty-seven; 22.2%) of our Spanish trials from the 1950s. In one of these cases the defense lawyer appointed experts. These were not psychiatrists, but two forensic physicians.⁸¹ In short, like in the 1940s, in the 1950s Spanish lawyers continued to request the application of the temporary mental disorder article without explicit references to expert evidence.

By contrast, in the Netherlands the 1950s witnessed a remarkable growth in the influence of both psychiatrists and psychologists in Dutch cases of

⁷⁸ “Cuádruple infanticidio de un matrimonio holandés,” *Diario de Barcelona*, November 20, 1958, 18.

⁷⁹ “een zwakke persoonlijkheidsstructuur en is gemakkelijk kneedbaar”; “primitief natuursmens dat leeft in een klein wereldje.” “Officier eist tien jaar tegen beide echtgenoten,” *De Tijd/De Maasbode*, May 29, 1959.

⁸⁰ Willemijn Ruberg and Siska van der Plas, “‘An Astonishing Human Failure’. The Influence of Gender on the Image of Perpetrators of Infanticide in the Courtroom and Crime Reporting in the Netherlands, 1960–1989,” *The History of the Family. An International Quarterly* 28, no. 1 (2023): 17–36, here 15. Before 1960, Dutch newspaper reports on cases of infanticide were often short and factual.

⁸¹ AHPT, Unitat instal·lació 3171, Unitat correlativa 543.

infanticide. In this period, forensic psychiatry became even more institutionalized.⁸² In the courtroom psychiatrists became more visible as expert witnesses as well: in cases where the mother was accused, psychiatrists were present in at least 60% of the cases. Moreover, from the 1950s, Dutch psychologists were involved as experts in addition to psychiatrists and from 1958 a psychologist became permanently attached to the Amsterdam court. In terms of the contents of the psychiatric and psychological reports, the influence of psychoanalysis became prominent. The extensive expert reports probed the unconscious motives of the perpetrator, the familial background, marital relations, sexual behavior, and cold motherhood, or the absence of motherly instincts.⁸³

For example, in a court case in 1958 two psychiatrists and one psychologist wrote reports, building on the reports produced by probation services. The suspect was a 32-year-old widow, who already had three children when she became pregnant by a lover, who had initially promised to marry her, but had then disappeared. She gave birth to their child alone, and during interrogation stated that when she saw that the baby resembled her former lover, she killed the child out of rage. The report by probation services, which had professionalized in the 1950s,⁸⁴ extensively sketched the suspect's family background, especially her relationship with her tyrannical mother. The family, living in a strict Protestant village, was "cold, affect-poor," and sexuality was a taboo. These facts elucidated, in the view of probation services, the lack of motherly love displayed by the suspect. Her shame for her pregnancy out of wedlock was explained by extensive reference to the Protestant norms of the village, that she had internalized. The psychiatric report described her as insecure, immature, "hysteroid," cold, "not completely harmonic in her erotic urges," which, it was said, might count as mitigating circumstances. The psychiatrists declared that the suspect had not experienced a period of "lowered consciousness" directly after birth. Psychiatrist Theunissen claimed that there was no mental disturbance and thus no diminished accountability. However, the report by psychologist In 't Veld was more ambivalent, leaving the question of accountability open. In addition to having performed an IQ test, the results of which were normal, the psychologist in this case had used insights from psychoanalysis. The final verdict in the case did not mention the expert reports of the psychiatrists and psychologist explicitly, and the judges held the perpetrator accountable, convicting her to 2 years imprisonment for child-manslaughter.⁸⁵

Spanish cases, by contrast, lacked psychologists' participation, except for one case that reached the Spanish Supreme Court in 1959, in which this court recognized the authority and usefulness of psychology.⁸⁶ Still, this did

⁸² Timo Bolt, Jacomien Gijzeman and Joost Vjselaar, *Ter observatie opgenomen. Pieter Baan Centrum 1949–2019* (Amsterdam: Boom, 2019).

⁸³ Willemijn Ruberg, "Infanticide and the Influence of Psychoanalysis on Dutch Forensic Psychiatry in the Mid-Twentieth Century," *History of Psychiatry* 32, no. 2 (2021): 234–36.

⁸⁴ Bolt, Gijzeman and Vjselaar, *Ter observatie opgenomen*, 145.

⁸⁵ NHA, AA, inv. no. 465, 1958.

⁸⁶ ECLI: ES:TS:1959:1107; Juan del Rosal, "Valoración psicológica del móvil del infanticidio (S. 8 de mayo de 1959)," *Anuario de Derecho penal y Ciencias penales* 12, no. 3 (1959): 585–89.

not translate into direct involvement of experts in psychology in court. The explanations of the divergence between the Netherlands and Spain in the 1950s can be found both in the institutionalization of forensic medicine and in political culture. First, in Spain the presence of a forensic physician, permanently attached to the court, who could also deal with psychiatry, hindered the involvement of additional experts, including psychiatrists and psychologists. The Corps of Forensic Physicians continued to monopolize the practice of expertise in criminal proceedings. Second, Dutch forensic psychiatry and psychology strongly developed in the late 1940s and 1950s, also by engaging more with psychoanalysis. As historian Silvia Lévy has shown, adherence to psychoanalysis found ideological obstacles in the intellectual climate of the Francoist dictatorship. This implied, explains Lévy, that—even though psychoanalytic criminology continued to be published in Francoist scientific journals and publications—, “its application in the judicial field was marginal.”⁸⁷ Our analysis of infanticide cases confirms this. Third, what might explain the influence and authority of Dutch forensic psychiatrists in the 1950 was the overall and strong respect for experts’ authority in this decade. Professors of psychiatry and psychology such as Rümke, Buytendijk, and Pompe were seen as the intellectual elite, as spiritual guidesmen, in the Netherlands in 1950–70.⁸⁸

Conclusion

This article set out to analyze how gender and pathologization were related in the lenient laws on infanticide in Spain and the Netherlands in 1930–60 as well as in their application in practice. Pathologization may take different forms, varying from an emphasis on mental issues in the wording of the law to the accommodation for or actual involvement of forensic doctors and psychiatrists.

In Spain the protection of the woman’s and her family’s honor was central in the wording of the law. The Dutch law, by contrast, revolved around the mother’s fear of her delivery being discovered. Neither of these laws referred to mental disorders, only to emotions. Thus, they not only connected honor and emotions to women and in this way gendered infanticide, these lenient infanticide laws in both countries also left open a margin for pathologization, due to their focus on the perpetrator’s motive and emotions. In Spain, from the 1940s a debate was held about the relationship between mental illness and infanticide laws in the context of the Franco regime. Pathologization was therefore discussed in Spain, even though in practice psychiatrists were not involved as expert witnesses.

Although in the 1930s and 1940s Dutch forensic psychiatrists had already been present in a minority of Dutch infanticide trials, in the 1950s their

⁸⁷ “su aplicación en el campo judicial fue residual.” Silvia Lévy Lazcano, “Psicoanálisis y defensa social en España (1923–1959)” (PhD thesis, Universidad Complutense de Madrid, 2018), 285.

⁸⁸ Ido Weijers, “De slag om Dennendal. Een terugblik op de jaren vijftig vanuit de jaren zeventig,” in *Een stille revolutie? Cultuur en mentaliteit in de lange jaren vijftig*, ed. Paul Luykx en Pim Slot (Hilversum: Verloren, 1997), 45–65, here 49.

roles increased significantly, while their Spanish counterparts continued to be marginal. Several political, cultural, and institutional factors may help explain this difference. In Spain the institutional monopoly of the generalist forensic physician as preferred expert continued to exclude psychiatrists; by contrast forensic psychiatry and psychology began to flourish in the Netherlands. In the Netherlands, therefore, especially from the 1950s, forensic psychiatrists contributed to the pathologization of women accused of infanticide. However, we have also shown that the phrasing of the infanticide laws itself, even though not explicitly mentioning mental illness, by their mentioning of emotions and motives, did not preclude the pathologization of female suspects. It is, therefore, important to broaden the notion of pathologization to the law.

Moreover, the boundaries between scientific expert and lay knowledge were porous. First, in Spain, it was accepted by the Supreme Court that transitory mental disorders could be proven without expert evidence, a possibility that defense lawyers used in practice when dealing with infanticide accusations. In the Netherlands, as well, in some instances psychiatrists were not needed, since the (lay) probation services, or the judges, found they had sufficient knowledge to assess the suspect's mental state. Second, knowledge of the relationship between infanticide and the mind was also made by legal scholars, as is testified by the many critiques written in Spain by judges, lawyers, and university professors, particularly directed at the lenient character of the infanticide laws, which they saw as going against the Francoist and Catholic aim of pronatalism. In fact, in both countries often defense lawyers introduced, developed, or attacked the notion of "puerperal insanity" or other forms of unaccountability. Furthermore, much knowledge on the personality of the perpetrator did not necessarily pertain to the mind, but to their morality, health, or personal and family circumstances. In Spanish cases of infanticide, judges often built on morality reports of the female suspects, and in the Netherlands from the 1930s these kinds of reports were made by probation services, which by the 1950s had professionalized. These were, in fact, a continuation of older practices of taking the suspect's reputation into account. In the Netherlands these probation reports formed an important source for the reports written by psychiatrists and psychologists, thus demonstrating how old and new ways of knowledge unproblematically merged.

This result dovetails with the work of scholars such as Ward and Brennan, who argue—for England and Ireland respectively—that the law's definition of the mothers' mental state, as well as its judicial interpretation in court cases, was a lay one. However, our research highlights the involvement of more actors in making this lay knowledge on the mind, such as lawyers, legal scholars, and probation services. Thus, leniency through female pathologization materialized in different ways in Spain and the Netherlands and did not necessarily include psychiatric experts. Still, sentences in both countries were often lenient, evidencing the tenacity of a concept of gender, that was already entangled with pathologization: the sad/mad woman.

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