The Development of the Discourse on Infanticide in the Late Eighteenth Century and the New Legal Standardization of the Offense in the Nineteenth Century

Kerstin Michalik

The history of infanticide—the crime of killing newborn children—provides an important perspective on the transformation of gender that took place during the *Sattelzeit.* The ideological bases of the criminal standardization of the offense in the first half of the nineteenth century grew out of late-eighteenth-century precedents. The significant transitions in the laws governing the crime during the *Sattelzeit* had far-reaching consequences. Legal innovations concerning infanticide during this era were rooted in the discourse of difference and in particular in the changing constructions of the nature of man and woman and of their places in society.

The nineteenth-century changes had repercussions lasting until quite recently. Paragraph 217 of the German Criminal Code, which remained in force until 1 April 1998, was based on the Criminal Code of the Reich of 1871, which had adopted the exact wording of the Prussian Criminal Code of 1851. Paragraph 217 punished an unmarried mother who "kills her illegitimate child during or immediately after the birth" with a prison sentence of at least three years; less severe cases brought sentences between six months and five years. In contrast, a married woman who killed her newborn child was punished according to paragraphs 211 or 212 for first- or second-degree murder, which could result in a lifetime prison sentence.

The nineteenth-century law concerning infanticide thus differentiated significantly between legitimate and illegitimate children as victims of the crime. It punished perpetrators who killed babies born out of wedlock less severely than those who murdered babies born to married parents. In the first half of the nineteenth century, changes in the punishment for the crime reflect transitions in the gender order; such cases were argued on the basis of both the "nature of the female organism" and the contemporary understanding of the process of giving birth. The paragraph on infanticide led to judicial confusion, because the illegitimacy of the child had no connection with the official basis for the preferential treatment—the female organism. This chapter documents ways in which powerful late-eighteenth-century gender constructions became the foundation of nineteenth-century marriage and family law as well as the basis of jurisdiction in infanticide cases.

The chapter first summarizes the legal foundations for infanticide cases and outlines eighteenth-century public discussion about the crime. The research focuses on Prussia, where the most far-reaching legislative initiatives regarding the crime of infanticide were carried out under the Enlightenment absolutist regime of Frederick the Great. The shifts in sociopolitical thought that determined the approach to the crime in the late eighteenth century become especially clear in the context of the Prussian measures and their attendant discussions. Second, the chapter demonstrates the emergence of a new interpretation of child murder from a discussion about infanticide that culminated in the 1880s. With regard to the concept of the character of the sexes, this new view on child murder fostered not only a new regimentation of female sexuality but also the increased ostracism of single mothers. Third, by using the example of the revisions of the Prussian General Law Code, the chapter explains how ideological constructions employed in the reconstruction of gender in the nineteenth century influenced legal norms that remained definitive until the end of the twentieth century.

Legislation and Public Discourse in the Context of the Enlightenment: Infanticide as a Social Problem

Infanticide was a frequent offense in the early modern era. It accounted for almost half of all recorded crimes involving death in Prussia in the eighteenth century. Almost half of all executions involved child murderesses.[1] The basis for the jurisdiction in child mur-

der cases was the Penal Code of the High Court of Emperor Charles V (the Carolina of 1532), which called for the penalty of death through drowning for the killing of a newborn regardless of legitimacy.[2] However, punishment of the sword largely replaced drowning over the course of the seventeenth century.

By the late 1800s, governments had begun to seek means to reduce the number of infanticides. With this objective, Prussian authorities intensified the application of the death penalty for the "godless mothers" who committed the act and also made secret births subject to serious punishment.[3] The latter measure concerned only single women, who represented the majority of the perpetrators—"slovenly females" who became the object of lawmakers' special attention since the sin of extramarital intercourse was regarded as the main source of child murder. The law required parents, landlords, and employers to report unmarried pregnant women to the authorities.[4]

At the beginning of the century, Prussian lawmakers had regarded increases of penalty and arrests as suitable methods for deterring and preventing infanticide; however, the attempt to come to terms with the crime changed significantly under the influence of the Enlightenment. The misdeed was no longer considered solely a result of the free (but malicious) will of the perpetrator but instead came to be viewed as a result of social influences. With Enlightenment ideas impacting the theory of criminal law, efforts to prevent infanticides became increasingly based on new insights into the social causes of crimes. The idea of crime prevention assumed increasing importance. In the rhetoric of Enlightenment critics of the existing criminal law, this method replaced the older idea of deterrence through punishment. Accordingly, the punishment of crimes could be considered an act of justice only if lawmakers had done everything possible to eliminate the crime's social causes.[5]

In the context of eighteenth-century efforts to reform the criminal law system, infanticide in particular gained a central focus. Analyzing the motives of child murderesses, reformers concluded that most of the offenders had killed their newborn children either out of dread of the disgrace of extramarital motherhood or out of fear of poverty. Thus, the crime held special interest in treatises of the Enlightenment statesmen and philosophers who had wrestled with the theory and application of criminal law since the middle of the century. Frederick the Great had denounced as early as the 1740s the established punishments for extramarital sexual intercourse, believing that having "to choose

between the loss of their honor and their poor body fruit"[6] could lead women to the crime of child murder. Philosophers such as Beccaria, Voltaire, and Hommel declared themselves opposed to the discriminatory laws designed to punish "disgraceful women and whores" and demanded the construction of foundling hospitals to counteract the material motives of child murderesses.[7]

However, the prevention of infanticide was not an end in itself. The drive to find means to eradicate the crime was not based primarily on humanistic values. The crime aroused special attention in the age of mercantilism because of demographic concerns. The conviction that governments had a prime responsibility to foster population growth caused leaders to become increasingly alarmed at the killing of newborn children. Voltaire, who stigmatized the execution of an eighteen-year-old alleged child murderess as "inhuman" and "unjust" in view of doubtful legal bases, further argued that her execution resulted in the loss of a community member who still might have been able to bear citizens for the state.[8] While Enlightenment philosophers considered infanticide the leading reform issue in criminal law, as an economic and demographic problem it had already been the object of discussion among practitioners of the "state sciences" since the middle of the eighteenth century. In this context, relief actions for single pregnant women—such as the construction of birthing hospitals to enable discreet delivery of babies and preserve the mothers' honor—did not constitute primarily humanitarian gestures but instead were considered reciprocal compensation for the "contributions" that the women had made to the state.[9]

Thus, it was no coincidence that Frederick the Great of Prussia was especially interested in the calls for legal initiatives to prevent infanticide. He strove in particular to combat the social causes of infanticides. On the one hand, Frederick, one of the earliest representatives of Enlightened absolutism, showed himself especially open to the reform goals of the Enlightenment; on the other hand, the Prussian state was a model of mercantilistic population policy that fostered, for reasons of power politics, strong initiatives to counteract the perceived depopulation of the land. As the king of Prussia had already pointed out in his considerations of criminal law in the 1740s, it was most important to impede those "terrible Medeas" who suffocated the "next generation" because the crime robbed the state simultaneously of two subjects—the murdered infant and, in the case of a criminal capital punishment, the mother.[10] To avoid such population losses, reformers were

also ready to make certain far-reaching concessions with regard to moral policy. To eliminate the "completely unnatural prejudice of disgrace"[11] from the heads of single mothers, Prussia in 1765 abolished the sexual offense penalties for extramarital intercourse.[12] Furthermore, new laws provided that a wife who had committed adultery would be punished only on the explicit demand of her husband in the context of a petition for divorce.[13]

The Prussian General Law Code of 1794 (Allgemeines Preußisches Landrecht) further extended efforts to the prevent infanticides. This new code contained extensive civil regulations for the improvement of the legal and economic standing of single mothers and illegitimate children. Not only to ensure financial security but also, as justifications of the laws explained, to "weed out deep-rooted concepts of honor and disgrace,"[14] the code guaranteed women extensive reimbursement and maintenance claims against impregnators. For all unmarried women except prostitutes and adulteresses, compensation included the repayment of all costs incurred during the birth, the baptism ceremony, and the confinement as well as necessary expenditures during the pregnancy or after the birth (II, 1 §§ 1027–36). "Guiltless" women who had become pregnant under the promise of marriage were granted the name, the social standing, and all rights of an innocently divorced wife, including financial compensation and a legitimate status for the child (II, 1 §§ 1044–52). Even if the child had not been conceived under the promise of marriage, the woman was still entitled to a financial indemnification (II, 1 § 1073).

Furthermore, the law provided that every illegitimate child had a right to food and education supplied by its father, regardless of the mother's legal claims. The most important reform regarding the bases of legal proof in maintenance suits was made by the invalidation of the "manifold infidelity plea." In a reversal of common, established principles, the alleged father's objection that the mother might have maintained sexual contacts with other men neither freed the putative father of financial obligations to the mother nor made the maintenance claim of the child invalid. On the contrary: if evidence showed that the mother had had relations with several men, the child's state-appointed guardian could decide whether to hold the father named by the mother or her "pimps" collectively responsible for the payments (II, 1 § 1036; II, 2 § 619). To ensure support for the child, even the father's parents were held liable before the mother's parents (II, 2 § 628). Not only was the status of single mothers improved, but legal discrimination against

illegitimate children was at least diminished by the fact that the General Law Code contained reforms both in the law of inheritance and in the right of legitimacy (II, 1 § 1044; II, 2 § 592, 597, 651).

New research in legal history has interpreted the Prussian legal reforms, particularly the Edict of 1765, as a milestone on the way to a milder punishment of child murderesses.[15] The significant increase in penalties contained in the Prussian edict shows, however, that the discussion of the social causes of infanticide was not at all accompanied by a changed assessment of the wrongfulness of the deed or a demand for a milder punishment for child murderesses. Nor had Frederick the Great intended to make such changes. The death penalty by sword was maintained. Furthermore, several special regulations broadened the basis of evidence for cases of child murder, a development that ran contrary to common law principles, which had previously determined the interpretation of the law by Prussian courts. The death penalty could now be imposed in cases that had formerly been punished with prison sentences.[16] Until 1765 "extraordinary" penalties—as a rule, prison sentences of up to ten years but not the death penalty—were imposed if the death of the newborn had not been caused by direct violent actions but rather by neglect. Such cases previously had not been formally regarded as infanticide. The 1765 edict on infanticide explicitly negated the distinction between active killing and death by neglect and in both cases required the execution of guilty women.

Furthermore, the sentence for certain cases with weak evidence was intensified, usually imposing fortress labor for life instead of for up to ten years, as had been customary. These regulations sought to undermine all possible defenses, with the state considering this new severity justified because it had done everything possible to eliminate the causes of the offense. The Prussian General Law Code of 1794 was also based on this principle. It embodied only insignificant modifications with regard to the rules of punishment and contained customary harsh punishments explicitly justified by extensive preventative measures.[17]

Over the course of the eighteenth century, both the Enlightenment critique of criminal law and the concern about demographics contributed to a decidedly revised view of the perpetrators and the deed. The emphasis on the social causes of criminal offenses had led to a changed perspective on infanticide, which came to be regarded not as a result of individual sinful behavior but rather as a result of social and economic problems, the elimination of which were considered the state's duty. Unmarried pregnant women were looked on less as

"slovenly females" and more as potential mothers who not only should be shielded from punishment and public disgrace but who should, along with their children, become the object of state welfare. Although Prussia's more tolerant attitude toward single mothers and illegitimate children resulted mainly from an interest in increasing the population, the Enlightenment conception of marriage as primarily a contractual relationship constituted another important factor. Emphasis on reason and natural rights had brought about the secularization of marriage and prepared the way for a pluralistic, nonbinding moral philosophy that focused on the marriage law less from moral and ethical perspectives than from utilitarian needs of the state. Marriage was considered, above all, a means to serve reproductive goals, and this instrumental view also resulted in more liberal judgments of single mothers and illegitimate children.

The attitude toward infanticide that had formed under the influence of the Enlightenment would not last long, however. During the final decades of the eighteenth century, infanticide became the object of a broader public discussion that developed entirely new concerns.

Modesty and Bewilderment: New Interpretations in the Context of the Concept of the Character of the Sexes

The reduction of state sanctions for extramarital intercourse in Prussia by no means occurred without criticism. Church representatives had already begun resisting during the 1760s, concerned about the preservation of Christian sexual morality and regarding the elimination of the "disgrace" of unwed motherhood as a sin against both God and the sanctity of marriage. During the following decade, when circles of the educated bourgeoisie such as doctors, educators, theologians, civil servants, and jurists also began to occupy themselves with the subject of infanticide, widespread secular arguments appeared in opposition to the reforms designed to improve the situation of single mothers. The discussion then began to reach far beyond the confines of Prussia.[18] A catalyst for the broad debate was the publication of a prize-winning essay written in response to the question, "What are the most effective means of preventing infanticide?"[19]

As one may suspect from the wording, the prize question was not primarily focused on the goal of preventing infanticide. The author had already concluded that "all of these already known and unsuccessful means" for preventing infanticide "must be rejected, partly because

they are ineffective, partly because they are not philosophically sound, and partly because they are godless." Such measures ultimately "open the door to lewdness" and increase "attractions to illegitimate relationships." Because of these value-laden concerns, many authors were moved not by the goal of fighting the crime but rather by a growing anxiety about what they viewed as the accompanying harmful effects on morality and ethics in general. They were concerned with what they regarded as the dignity of marriage. The subject of infanticide became part of a broader discussion on the relationship between sexual behavior and societal well-being. Discussants also generally feared what they viewed as the inherent dangers of the Enlightenment-inspired reforms.[20] Nothing less than the foundations of state and society seemed to be in question, since observers feared in part that the "lessening, or complete abolition, of shame and punishment" as a method to combat infanticide "would be the same as if a patient were shot through the heart in order to make sure he was freed from his illness."[21]

A few respondents advocated strengthening the laws punishing sexual offenses and denounced everything that Enlightenment critics had advocated since the middle of the century, claiming that such changes encouraged infanticide. Most discussants, however, approved of the abolition or modification of church and state penalties for sexual offense and particularly of the spectacle of public humiliation and punishment. At the same time, many participants argued that while dispensing with the "arbitrary" and public disgrace remained appropriate, "social and moral" shame nevertheless constituted a "necessary corollary of the honor of matrimony."[22] Most commentators regarded this shame as an appropriate result of social norms but often justified the maintenance of legal sanctions on the basis of nature of the female sex. Critics claimed that disrepute arose either from a conception of honor rooted in an essential female modesty or from physiological reasons connected to the irrevocable loss of physical virginity.[23] Hence, these observers criticized the Prussian legislation for having clung to the illusion that it could save "the virgin honor . . . of the fallen maiden."[24]

The disgrace of extramarital motherhood, which Frederick the Great had characterized as an "unnatural prejudice," was now reinterpreted as an innate characteristic based on modesty, an "essential attribute of woman's nature."[25] This new interpretation not only was intended to invalidate the measures designed to prevent infanticide but also demonstrated the emerging interest in a fortified regulation of

female sexuality in the context of the emerging discourse on the character of the sexes during the last third of the eighteenth century.[26]

The interpretation of the problem of infanticide was thus based on two central conceptions: the decency and modesty of the female sex and the sanctity and dignity of marriage. The latter was rooted in a new late-eighteenth-century understanding of the nature and character of masculinity and femininity. Reformers hoped to utilize these concepts to establish the positions of men and women in social and political life. If, in the context of this new gender order, womanhood was defined by marriage, family, and propagation, then not only extramarital sexual intercourse but also illegitimate motherhood assumed new, negative connotations. Moreover, female "indecency" stood in extreme contrast to the normative ideals of woman's nature based on her sexual characteristics, including decency, virtue, and modesty.

Perhaps more than any other subject, infanticide generated a discourse about woman's vocation. Many observers blamed infanticide on "modesty that came too late"[27] or on a "false understanding of honor and shame."[28] Others argued that the crime would have disappeared had disgraced women behaved "in accordance with the destiny assigned by nature to the female sex."[29] Correspondingly, reformers urged that women be educated to be chaste, well mannered, and modest. Such measures would be more effective than would the abolition of penalties for sexual offense. The "dishonor" brought by the "loss of female virginity" should become an "inner embarrassment."[30] The "modern" civil variant of the regulation of sexuality was based on the internalization of a socially required sense of shame rather than on external regulations.[31] Demands for impediments to divorce or for more severe punishments for female adulterers[32] show how far some authors deviated from the real topic of the discussion.

The new political impetus, with its focus on morals and ethics, fundamentally changed the quality of the discussion on infanticide in the late eighteenth century and stimulated not only increasing opposition to measures for the prevention of infanticides but also discussion about the nature and details of the crime and its perpetrators. The pursuit of the real root of the crime—the rational search for social causes—began increasingly to fade, supplanted by objectives that were not based on the goal of social reform but instead worked against these ideals.

The "typical" child murderess, who in male imaginations of the last third of the eighteenth century wandered like a ghost not only through the works of the Sturm und Drang literary movement but also through

many publications devoted to fighting the crime, was innocent and had been seduced—a passive, weak creature. In her "defenseless innocence,"[33] she stood no chance of resisting the "active cunning"[34] of the male sex. The seduction motive explained the deviation from the desired norm and served as virtually empirical proof of the decency and modesty intrinsic to the female sex. Furthermore, the representation of child murderesses as mentally confused creatures who had acted without clear awareness of their actions followed the desire to bring the murdering mothers into harmony with the understood natural vocation of woman. Women of the 1780s who killed infants were represented as swaying between conditions of passionate excitement and complete unconsciousness. The fear of disgrace largely bore responsibility for this state, and the crime thus had not resulted from rational motives. Fright had prompted the mental confusion under which women, impregnated outside marriage and "almost against their knowledge and will," became murderers.[35] The substitution of social explanations for the crime with the idea of mental confusion explained why the natural inclination toward motherhood had so little effect in these circumstances and enabled observers to understand "how an otherwise compassionate and sensitive creature . . . could deliberately" take her child's life.[36] While most protagonists of this new version of the crime found the motives of the women at least recognizable—although only as the trigger of the dazedness and confusion—doctors developed a tendency to interpret infanticide as not only a psychological but also a physiological phenomenon. They concluded either that the birth pain was the decisive factor[37] or that the "true cause for the murder of one's own body fruit" was derived from the "physique and . . . the emotional state of the fair sex."[38]

The hope of preventing infanticide through legal reform was bound to diminish against the background of such psychological and biological interpretations. The new interpretation of infanticide was, on the one hand, the product of the contemporary concept of the natural characteristics of the sexes. On the other hand, this view could be used as an argument against changes designed to improve of the situation of single mothers. In light of the new notion of a woman's vocation as marriage, reform impulses encountered increasing resistance. Because infanticide was constructed less as a socially caused act and more as a deed with a definite motive and purpose, the prevention of infanticide by means of improved conditions for single mothers had to appear hopeless.

In the debate of the 1780s, the spectrum of the discussants still included both radical Prussian reformers and fanatical guardians of virtue. However, the interest in morality and ethics clearly gained a stronger and stronger position in the discourse and thus influenced the selection of the essays considered worthy of prizes. Supporters of Frederick the Great's policies of reform were losing ground. The side that in the end dominated, including the award-winning Professor Johann Gottlieb Kreuzfeld, was convinced that the consequences of the elimination of the disgrace of extramarital motherhood were "more terrible" for state and society "than the evils which were to be cured." Kreuzfeld and those who shared his view therefore preferred to tolerate a few "unnatural child murderesses" than to have many "whores" in the state,[39] thereby illustrating the nineteenth-century direction of movement for family and criminal legislation in the German states.

Civil Marriage and Family Law and the Flawed Reasoning of Unwed Mothers in Criminal Law

Although the debate of the 1780s proved to have little effect in terms of preventative measures, it did bring about other kinds of changes. The topic of the deterrence of infanticide had been disappearing slowly from public discussion since the late 1780s and had completely faded by the beginning of the nineteenth century. Lawmakers' interests turned increasingly toward an entirely different goal by the turn of the century: the reform of criminal regulations, especially those aimed at moderating the threat of punishment for child murderesses. This topic had not appeared in the discussion resulting from the eighteenth-century essay contest.[40]

All criminal codes enacted between 1830 and 1860 recognized infanticide as a special situation and assigned substantially milder punishments to it than to other crimes of death. Deviating from all legal precedent, almost every new legal code limited the evidence to be considered in cases of death of illegitimate children. German common law had previously classified infanticide as a subcategory of "murder of relatives," without regard to the civil status of the child. The General Prussian Law of 1799 defined child murder simply as the "killing of a newborn child" (II, 20 § 887) and formally distinguished it from the first-degree murder of relatives, but the penalty remained execution by the sword.[41] The Prussian Criminal Code of 1851, which became the basis of the Criminal Code of the Reich of 1871, however, privileged the

deliberate killing of an illegitimate newborn child, establishing a punishment of five to twenty years of imprisonment, while the murder of a child born in wedlock still resulted in the death penalty.

The mitigation of punishment for the killing of illegitimate children that took place in the nineteenth century has been judged in legal history to be a triumph of enlightened humanism and a direct consequence of the insights about the social causes of the crime, which had grown out of the broad discussion of the Enlightenment. In this interpretation, sympathy for the single mother or the extenuating circumstances of the imputed motives for the crime—fear of the disgrace of extramarital motherhood or fear of poverty—resulted in the unique classification of infanticide involving illegitimate children.[42]

Sources of legal history for the first half of the nineteenth century show, however, that criminal law reform had causes other than the Enlightenment. The reason for the mitigation of punishment was a new construction of "the nature of the female organism and the process of giving birth"—that is, the alleged diminished mental state of the woman in the process of giving birth. For example, an 1828 Prussian bill declared that "the increased irritability of the mind, affected by the act of giving birth, and the diseased change, which was seizing the nervous system," had to be taken into consideration "as reasons for the milder view on infanticide," since doing so would "either produce the resolve to murder or enhance it."[43]

With the alleged diminished sanity of women in the act of childbirth an element of the debate on infanticide of the 1780s, the physiological explanation of the crime—at that time still a minority position—gained credence astonishingly quickly. This rationale for the mitigation of punishment had already appeared in draft reforms around the turn of the century,[44] although as late as the 1790s this interpretation had achieved no consensus. Not only jurists but also forensic doctors rejected such a view, remaining convinced that "consciousness and the ability to deliberate and make decisions, hence freedom of will and soundness of the mind," were not impeded in the process of giving birth and that infanticide "in general could not be excused by a condition of bewilderment . . . , which [some] wish to compare to a state of temporary insanity."[45]

During the first half of the nineteenth century, psychological interpretations of the crime replaced social explanations. This process occurred in the context of the growing acceptance of a new construction of gender difference that gained the status of scientific discourse.

A "psychophysiological" dualism of sexes[46] posited the order of the sexes in terms of physical anatomy and helped answer the question of how a woman could commit infanticide, an act that seemed contradictory to the natural female character as nurturing mother. The assumption of a physiologically reduced mental stability offered an explanation in anatomical terms for even the killing of one's offspring.

The physiological interpretation of the differentiation of sexes alone, however, does not suffice to explain the new criminal law regulations. How does one understand, for example, that all German criminal codes except those of Bavaria (1861) and Brunswick (1840) applied the physiological interpretation only in cases of unmarried women or of women who killed their illegitimate children?

The 1780s discussion of infanticide is central to an understanding of the special treatment of single women in criminal law. The new distinctions between types of infanticide were related to the ideological premises that had led to resistance to relief actions for single mothers in the late eighteenth century. However the unique historical context of the *Vormärz* era embodied a new concept of gender relations and a new bourgeois ideology of marriage and family that accompanied the development of civil society. The concept of marriage as a purely moral and virtually sacred institution—the essential basis of state and society—left no room for acceptance of illegitimacy and stood in sharp contrast to the Enlightenment era's secular, contractual model of marriage. A corollary of the bourgeois ideology of family was a renewed and intensified punishment for sexual relations outside of wedlock, which had ramifications not only for civil laws governing extramarital relationships but also in the realm of criminal law.

Changes in Prussian criminal statutes correlated with the new codification of the law of marriage and family of the French *code civil.* Under French law, the mitigation of punishment for killing children born out of wedlock occurred parallel to and in conjunction with the abolition of the regulations designed to prevent infanticide. After early-nineteenth-century revisions of the relevant laws—justified with the argument that they had brought about "very harmful consequences" and "tempted single women to impudence"[47]—a series of reversals followed. First in the 1820s but more decisively during the 1840s, changes in the statutes governing alimony and bastardy eroded the rights of single mothers and illegitimate children. The changes rested on the new understanding of the nature of marriage as an institution on which the state itself was based. Under the legal reforms of

C. F. Savigny, this notion became the basis of the marriage law, with decisive consequences for the legal position of single mothers and illegitimate children. Simultaneously with a conservative revision of the divorce law, reformers attempted rigorously to restrict indemnity and alimony claims, arguing that such changes would restore "morality in general and the . . . dignity of matrimony."[48] The alleged negative consequences of the Prussian Law Code's regulations for single mothers and illegitimate children provided the reasoning behind the reform of the bastardy law. Reformers not only claimed that the code undermined the "honor of the female sex" and "good morals" but also argued that the "almost exclusive" focus on preventing infanticide had "privileged lewdness by making it a lucrative trade for the female sex."[49]

To preserve the "honor of the female sex," "good morals," and the "sanctity of marriage," the law of 24 April 1854 abolished the Prussian General Law Code's regulations designed to improve the social and economic situation of single mothers and their children. In comparison to the regulations of eighteenth-century German common law, the new law brought about severe negative changes for mother and child.

The 1854 law limited indemnity payments only to impregnated women who were officially engaged (§ 2) or who were victims of criminal acts (§ 1). Furthermore, the women could no longer receive the rights of a guiltless divorced wife: their only possible claim was financial reimbursement, with the result that the child was no longer considered legitimate. The reforms abolished the Prussian General Law Code's provision of financial reimbursement for women who had not been promised marriage. Especially significant was the reintroduction of the "chronic infidelity plea" (§ 9/1), which, contrary to common legal practice, placed the burden of proof on the women. In addition, the new law allowed a "plea of bad reputation," a completely new concept. Women branded with chronic infidelity pleas and "persons charged with a bad reputation with regard to sexual relations" (§ 9/2) forfeited all rights of indemnification, including costs related to pregnancy and birth. All that was required to gain the "bad reputation" was the testimony of several men who would "boast the woman's inclination for sexual relations."[50] No proof was required. Furthermore, all mothers of illegitimate children—even those women who had become pregnant as a result of rape—were classified as having "bad reputations."

The abolition of the law code's financial and social security for single mothers directly affected the illegitimate children. The new law

allowed alimony claims only in cases where the mother was entitled to reimbursement (I § 13), which meant that a legal obligation to provide maintenance was restricted to instances in which the child had been conceived to an officially engaged couple or as a consequence of a criminal offense. Moreover, the father's parents could no longer be held liable for the child's maintenance, making it more difficult to collect on the claims. The new law still provided for the possibility of a father voluntarily accepting paternity, but in cases that would lead to a financial liability, a legal document was required (II § 13). Under the law, a child born outside of wedlock had no legal father even if proof of fatherhood existed.

The Prussian reform of the alimony law and the bastardy law represented but one example of a widespread phenomenon. As Isabel V. Hull points out, these legal reforms represented the consequences of a common set of new definitions of sexuality, gender, and private and public life that became the basis for Germany's emerging civil society.[51] The drafters of civil family law, who claimed to pursue their goals in the name of higher moral values, acknowledged that the aggravation of the social situation of single mothers in a time of pauperism and mass poverty could, in fact, encourage infanticide. During discussions on the planned amendment of the law in the Privy Council, however, these officials argued that such concerns should be subordinated to "higher moral perspectives," even if the restriction of support could lead to the "neglect of illegitimate children" and could "itself lead to child murder."[52] Since, from a moral political point of view, the killing of illegitimate children at least could now be tolerated, the child murderess could also be seen in a new light. With the notion that she killed her newborn out of shame rather than poverty, lawmakers were inclined to judge her as morally more tolerable than the "impudent prostitutes" who went to court to entangle respectable husbands and fathers in dirty maintenance suits.[53] In the debate over revision of the criminal law, the "modesty" and "decency" of child murderesses also served as grounds for the elimination of regulations designed to prevent secret pregnancies and births. Lawmakers had reached the conclusion that a concealed pregnancy itself was not suspicious but rather represented the expression of an honorable "moral urge to veil" on the part of the illegitimately pregnant woman. This characteristic, they held, had roots in the nature of female modesty.[54]

Multiple factors led to the creation of the special classification of the crime of infanticide, making it a less severe offense when committed by

single mothers. In addition to the moral understanding of women as modest rather than vicious, such factors included the abolition of maintenance claims for illegitimate children and the expressed fear that the "civil claims would perhaps seldom succeed against the illegitimate father."[55]

In this context, the eighteenth-century Enlightenment goal of reducing punishment for the perpetrators of infanticide went into effect under quite changed premises. Now, because measures for the prevention of infanticide for sociopolitical considerations no longer formed part of the discussion and because the abolition of unmarried women's claims against the fathers of their children was explicitly considered an instrument for disciplining the female sex, a milder punishment could appear justified as a compensatory means. While the eighteenth-century "discussion on prevention" still influenced lawmakers as they developed the special classification of the crime, the mitigation of punishment was rationalized by the revised understanding of the object of the crime—the child. Because of its illegitimate status, the newborn was considered less worthy of legal protection. Lawmakers used similar reasoning in relation to the discussion on abortion in the framework of the criminal law. They proposed milder punishments for the abortion of illegitimate children and argued conversely that a married woman "should be punished more strictly for also harming the rights of the legitimate father."[56]

Thus, the special legal status of infanticide that until recently remained a part of the legal code resulted from the early-nineteenth-century ideology of civil marriage and family, although sociopolitical issues in the context of excess population and pauperism may have played a part in the revised statutes on illegitimacy in the post-*Sattelzeit* era. The erosion of the status of illegitimate children under civil law and the corresponding mitigation of punishment for their killing should not be considered a sudden sociopolitical reaction to the *Vormärz* or to the social question of the nineteenth century. The ideas of the philosopher Immanuel Kant show, for example, that the ideological bases had already been articulated in the late eighteenth century as a part of the discourse surrounding the reformatting of the gender system. In his "Metaphysics of Morals" (1798), Kant had clearly summed up those elements of the debate of the 1780s that would prevail in the nineteenth century. He based his renunciation of the death penalty on the ineffectiveness of deterrence for unmarried child murderesses since the perpetrator had killed to preserve her honor. She had

been led to commit the deed by a sense of "true honor" that represented both a duty and a "natural state" for the female sex. Furthermore, legislation could not eradicate the ignominy of an illegitimate birth. Kant had already observed the inferior right of protection for the illegitimate child:

> The illegitimate child was born outside of the law (since legitimacy would require marriage) and thus [the child was] outside the protection [of the law]. It has illegally crept into society (like forbidden goods) so the community might ignore its existence (because it legally was not supposed to exist in this manner). [The community might] therefore also ignore its destruction.[57]

Conclusion

The redefinition of gender during the transitional era of the late eighteenth and early nineteenth centuries contributed substantially to the new legal status of the crime of infanticide. Since the mid–eighteenth century, Enlightenment thinkers had sought ways to prevent the killing of newborn infants, but the emphasis in the discourse began to shift by the 1780s. In the late eighteenth century, the era of the polarization of the "character of sexes," a discourse among elites resulted in a revised interpretation of the crime that rested on a new construction of womanhood and a redefinition of family. The psychological and biological explanation of gender, based on the belief in a specific female nature, began to gain credence during the 1780s. By the first decades of the nineteenth century, this construction of femininity came to prevail in the context of an altered social order and a new, middle-class-defined gender system. As these values became institutionally embodied and contributed to the new legal establishment of the civil ideology of marriage and family, they also became the basis of the new codification of the civil and criminal laws governing extramarital intercourse and illegitimate children.

The discourse concerning the legal status of infanticide indicates the extent to which breaks, transitions, and continuities in the construction of gender transformed legal standards and daily life. Although the discourse about infanticide had, by the beginning of the nineteenth century, only minimally affected the legal situation, specific elements of the discussion from the late eighteenth century pointed the way for the laws that followed in later decades. The new, nineteenth-century

codification of the paragraph on infanticide, with its peculiarities and contradictions, can be explained only in the context of the evolving understanding of femininity, masculinity, and family during the *Sattelzeit.*

Notes

This article draws in part from Kerstin Michalik, *"Kindsmord": Sozial- und Rechtsgeschichte der Kindstötung im 18. und beginnenden 19. Jahrhundert am Beispiel Preußen* (Pfaffenweiler, 1997).

1. See the tables and lists for the late eighteenth century in von Hymnen, *Beyträge zur juristischen Literatur in den preußischen Staaten* (Berlin, 1775–85), esp. vols. 1–8 (1775–85). On the frequency and development of infanticide in various imperial and Hanseatic cities since the late sixteenth century, see Richard van Dülmen, *Frauen vor Gericht: Kindsmord in der frühen Neuzeit* (Frankfurt, 1991), 58–75.

2. *Peinliche Gerichtsordnung Kaiser Karls V. von 1532,* ed. Gustav Radbruch and Arthur Kaufmann, 6th ed. (Stuttgart, 1984), Art. 131, I.

3. Allgemeines Edict wegen des Kinder-Mordes, worin die Straffe des Sacks verordnet wird, 30 August 1720, in *Corpus Constitutionum Marchicarum,* ed. Christian Otto Mylius (Berlin, 1737–50), vol. 2, § 3, no. 42, cols.1 21–24.

4. Mandat, daß niemand liederliche Weibs-Personen hausen, und jeder Hauß-Wirth es anzeigen solle, wenn wegen Schwangerschaft lediger Personen Verdacht ist, 10 April 1710, in ibid., vol. 2, pt. 3, no. 25, cols. 39–42.

5. Highly influential in this context was the work of French Enlightenment author Montesquieu, *De l'esprit des Lois* (Geneva, 1748), which had a particularly strong influence on Frederick the Great. Another important work was Cesare Beccaria's *Dei delitti et delle pene* (Monaco, 1764).

6. Friedrich II, "Über die Gründe, Gesetze einzuführen oder abzuschaffen" (Dissertation sur les raisons d'établir ou d'abroger des lois) (Berlin, 1749), in *Die Werke Friedrich des Großen,* ed. Gustav Berthold Volz (Berlin, 1913), 8:34.

7. Cesare Beccaria, *Über Verbrechen und Strafen,* ed. Wilhelm Alff (Frankfurt, 1966), 128; Voltaire, *Commentaire sur le livre des délits et des peines de M. le Marquis de Beccaria,* 2nd ed. (London, 1773), 9; Karl Ferdinand Hommel, *Des Herren Marquis von Beccaria unsterbliches Werk von Verbrechen und Strafen* (Breslau, 1778), 29:168.

8. Voltaire, *Commentaire,* 9.

9. See, for example, Joseph von Sonnenfels, *Grundsätze der Policey, Handlung, und Finanz,* 5th ed. (Vienna, 1787), 1:91, 271; Johann Heinrich Gottlieb von Justi, *Gesammelte Politische und Finanz-Schriften über wichtige Gegenstände der Staatskunst, der Kriegswissenschaft und des Kameral- und Finanzwesens* (1766; Aalen, 1970), 3:395; Johann Heinrich Gottlieb von Justi, *Grundsätze der Policeywissenschaft,* 3rd ed. (Göttingen, 1782), 90.

10. Friedrich II, "Über die Gründe, Gesetze einzuführen," 34.

11. Friedrich II, "Letter to Voltaire from October 11, 1777," in *Oeuvres de Frédéric le Grand,* ed. Johann David Erdmann Preuß (Berlin, 1853), 23:410.

12. Edikt wider den Mord neugebohrner unehelicher Kinder, Verheimlichung der Schwangerschaft und Niederkunft, Berlin, 8 February 1765, in *Novum Corpus Constitutionum Prussico Brandenburgensium Praeicipu Marchicarum,* ed. Christian Otto Mylius (Berlin, 1751–1806), vol. 3, no. 13, cols. 583–96.

13. Ibid., vol. 4.1., no. 6, cols. 53–54; no. 65, cols. 511–12.

14. See Carl Gottlieb Svarez on the motives for the regulations on the "legal consequences of extramarital intercourse" (*Entwurf eines allgemeinen Gesetzbuches für die Preußischen Staaten* [Berlin, 1786], pt. 1, § 3, 150).

15. See, for example, Wilhelm Wächtershäuser's standard reference on the history of law, *Das Verbrechen des Kindesmordes im Zeitalter der Aufklärung: Eine rechtsgeschichtliche Untersuchung der dogmatischen, prozessualen und rechtssoziologischen Aspekte,* ed. Ekkehard Kaufmann and Heinz Holzhauer (Berlin, 1973), 3:141.

16. Edict of 1765, § 1, cols. 583–86.

17. See the annotations to § 720, infanticide, in Svarez, *Entwurf eines allgemeinen Gesetzbuches,* pt. 3, § 3, 338.

18. In most German states, the only reform until the late 1780s had been the termination of church penitence. In the area of punishments for sexual offenses, only a few states enacted very restricted modifications prior to the end of the eighteenth century. The only foundling hospital in German-speaking territory, established in 1763 in Kassel, was closed by 1787.

19. *Rheinische Beiträge zur Gelehrsamkeit* 2 (July 1780): 84–88.

20. Isabel Hull, *Sexuality, State, and Civil Society in Germany, 1700–1815* (Ithaca, 1996), 215, 257.

21. [Wilhelm Gottfried Plouquet], *Nachtrag zu den Abhandlungen über die beste ausführbare Mittel, dem Kindermorde Einhalt zu thun* (Tübingen, 1785), 15.

22. See Johann Gottlieb Kreuzfeld's essay in *Drei Preisschriften über die Frage: Welches sind die besten ausführbarsten Mittel dem Kindermorde abzuhelfen, ohne die Unzucht zu begünstigen?* (Mannheim, 1784), 119.

23. See, for example, [Johann David Michaelis], "Des Herren Ritter von Michaelis Zusatz zu seinem Mosaischen Recht: Warum hat Mose in seinem Gesetz nichts vom Kindermord?" *Göttingisches Magazin der Wissenschaften und Litteratur* 4 (1785): 95.

24. Johann Georg Krünitz, "Kinder-Mord," in *Oekonomische Encyclopädie oder allgemeines System der Staats-, Stadt-, Haus-, und Landwirtschaft und der Kunstgeschichte* (Berlin, 1786), 37:787.

25. [Johann Heinrich Pestalozzi], "Ueber Gesetzgebung und Kindermord: Wahrheiten und Träume, Nachforschungen und Bilder" (Frankfurt, 1783), in *Sämtliche Werke,* ed. Arthur Buchenau, Eduard Spranger, and Hans Stettbacher (Berlin, 1930), 9:27.

26. Karin Hausen, "Family and Role-Division: The Polarization of Sexual Stereotypes in the Nineteenth Century—An Aspect of the Dissociation of Work and Family Life," in *The German Family: Essays on the Social History of the Family in Nineteenth- and Twentieth-Century Germany,* ed. Richard J. Evans and W. R. Lee (London, 1981), 51–83.

27. Franz May, *Vorbeugungsmittel wider den Kindermord. Für Seelsorger, Eltern und Polizeiverwalter, Wundärzte und Geburtshelfer* (Mannheim, 1781), 11.

28. Pfeil in *Drei Preisschriften,* 23.

29. [Karl Georg von Raumer], *Versuch über die Mittel wider den Kindermord: Auf Veranlassung der Mannheimer Preisfrage, von einem Kriminalrichter* (Berlin, 1782), 15.

30. Ibid., 53.

31. See Isabel Hull, "Sexualität und bürgerliche Gesellschaft," in *Bürgerinnen und Bürger: Geschlechterverhältnisse im 19. Jahrhundert,* ed. Ute Frevert (Göttingen, 1988), 56.

32. See, for example, [Julius Friedrich Knüppeln], *Freymüthige Gedanken, Wünsche, und Vorschläge eines vaterländischen Bürgers über den Kindermord, und die Mittel, denselben zu verhindern* (Germania [Stendal], 1783), 60, 74.

33. Johann Caspar Velthusen, *Beyträge über Kindermord, Lotterieseuche, und Prachtaufwand* (Vienna, 1785), 31.

34. Karl Müller, *Mittel wider den Kindermord: Eine Beantwortung der Mannheimer Preisaufgabe* (Halle, 1781), 79.

35. *Fragmente über die Frage, welches sind die besten ausführbaren Mittel, dem Kindermorde Einhalt zu thun?* (Frankfurt, 1782), 14.

36. "Ueber den Kindermord: Von einem gelehrten und durch seine gemeinnützigen Schriften berühmten Arzt und Menschenfreund," *Gazette de Santé* 2 (1783): 306.

37. "Ueber den Kindermord," *Magazin für gerichtliche Arzneikunde* 1 (1782): 34.

38. Franz Heinrich Birnstiel, *Versuch, die wahre Ursache des Kindermords aus der Natur- und Völkergeschichte zu erforschen, und zugleich darauf einige Mittel zur Verhinderung dieses Staatsverbrechens zu schöpfen* (Frankfurt, 1785), 3.

39. Kreuzfeld in *Drei Preisschriften,* 107, 118.

40. Except for the fundamental discussion about the death penalty stimulated by the Italian criminal law philosopher Beccaria, which included consideration of infanticide, no voices advocated a milder punishment for child murderesses in the age of the Enlightenment. Some opposition to the death penalty had existed during the discussion on the prize question; however, the starting point for the criticism had been not the inadequacy but the ineffectiveness of the punishment. Where the death penalty had been abolished, alternative ideas about punishment were oriented not by humanitarian concerns but primarily by interest in deterrence.

41. The traditional legal position was also confirmed in principle in the law codifications of other late-eighteenth-century strongholds of the Enlightenment. Both the Josephine civil code and the Criminal Code for the Toskana of 1787 still regarded child murder as a type of first-degree murder of relatives or generally treated infanticide as premeditated murder.

42. See Wächtershäuser, *Verbrechen des Kindesmordes,* whose theses also were uncritically adopted by social historians.

43. *Motive zu dem, von dem Revisor vorgelegten, Ersten Entwurfe des Criminal Gesetzbuches für die preußischen Staaten* (Berlin, 1829), vol. 3, pt. 2, 179.

44. See, for example, C. U. D. Eggers, *Entwurf eines peinlichen Gesetzbuches für die Herzogtümer Schleswig und Holstein* (Kiel, 1808), §§ 605–7.

45. Georg Jacob Friedrich Meister, *Practische Bemerkungen aus dem Criminal- und Civilrecht durch Urtheile und Gutachten der Göttingischen Juristen-Fakultät erläutert* (Göttingen, 1795), 2:134.

46. Claudia Honegger, *Die Ordnung der Geschlechter: Die Wissenschaft vom Menschen und das Weib, 1750–1850* (Frankfurt, 1991), 199.

47. *Motive zu dem,* vol. 3, pt. 2, 169.

48. Beratungen der Gesetzes Kommission zu dem von dem Ministerium der Gesetz-Revision vorgelegten Entwurf betreffend die Folgen des unehelichen Beischlafes, 29 May 1845, in *Quellen zur preußischen Gesetzgebung des 19. Jahrhunderts,* ed. Werner Schubert and Jürgen Regge (Vaduz, 1987), pt. 2, 6/2:1233–43.

49. C. F. Savigny, *Motive zu dem Entwurf eines Gesetzes, die aus der außerehelichen Geschlechts-Gemeinschaft entspringenden Rechte und Verbindlichkeiten betreffend* (Berlin, 1845), 2.

50. Ibid., 18, 261.

51. Hull, *Sexuality,* 371–73.

52. Beratungen des Königlichen Staatsministeriums zu dem Entwurf zu dem Gesetze betreffend die aus einer unehelichen Geschlechtsgemeinschaft entspringenden Rechte und Verbindlichkeiten, 9 December 1845, in *Quellen zur preußischen Gesetzgebung,* pt. 2, 6/2:1257–61.

53. *Gesetz-Revision-Pensum XV: Motive zu den vom Revisor vorgelegten Entwurf des Tit. 1. Th. II. des Allgemeinen Landrechts mit Ausschluß des 7ten Abschnitts* (Berlin, 1830), 482–83.

54. *Motive zu dem,* 172–73.

55. Ibid., 174.

56. Theodor Goltdammer, *Die Materialien zum Straf-Gesetzbuche für die Preußischen Staaten* (Berlin, 1852), 2:30.

57. Immanuel Kant, "Rechtslehre," in Immanuel Kant, "Die Metaphysik der Sitten," in *Werkausgabe,* ed. Wilhelm Weischedel (Frankfurt, 1982), 8:458–59.