Gloria Lourenço. (AN) CA.CT4.0.492 (1908)

Murdering Mothers

Infanticide, Madness, and the Law, Rio de Janeiro, 1890-1940

BY CASSIA ROTH

In 1923, the Rio de Janeiro public prosecutor charged twenty-five-year-old Portuguese immigrant Maria de Jesus for the crimes of both abortion and infanticide.[1] Maria stated that she had miscarried a five-month-old fetus at the Eunice Hotel where she worked as a maid. She then disposed of the cadaver by cutting off its head, flushing the body down the toilet, and throwing the head into the backyard. The police investigation found that Maria had recently given birth and that the child was full term. The prosecutor pressed charges despite the legal discrepancies inherent in accusing Maria of both abortion, which implied the expulsion of a dead fetus, and infanticide, which required a live birth and then death.

The prosecutor condemned Maria by highlighting her lack of maternal instincts. "The accused, demonstrating not to possess any vestiges of maternal sentiment…killed the fruit of her womb…" In her statement Maria emphasized her confused mental state

O CODIGO PENAL

INTERPRETADO

SEGUNDO AS FONTES, A DOUTRINA E A JURISPRUDENCIA E COM REFERENCIAS AOS PROJECTOS DE SUA REVISÃO

PARTE ESPECIAL

PELO

ADVOGADO

Dr. João Vieira de Araujo

Deputado federal, ex-magistrado e lente cathedratico de direito criminal e militar na Faculdade do Recife

VOLUME II

RIO DE JANEIRO

IMPRENSA NACIONAL

1902

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1. An earlier version of this article was presented at the Brazilian Studies Association (BRASA) Conference in London, UK on August 20-23, 2014. All translations are mine unless otherwise noted.
(AN) CT, Cx.1978 N.1036 (1923).

after the delivery. Her defense lawyers also highlighted her altered mental capabilities. The presiding judge pronounced the prosecutor's argument without basis (*improcedente*) and absolved Maria de Jesus of all charges. The judge argued that the court could not charge Maria for both abortion and infanticide at the same time, and Maria de Jesus went free. I argue that Maria's fate demonstrates a larger legal trend in infanticide cases in the Rio de Janeiro courts: the persistent gap between the letter of the law codified in the crime of infanticide (Article 298 of the 1890 Penal Code, in effect until 1940) and its application in infanticide trials. Maria de Jesus is just one of the many women who allegedly practiced infanticide that was found not guilty or was absolved.

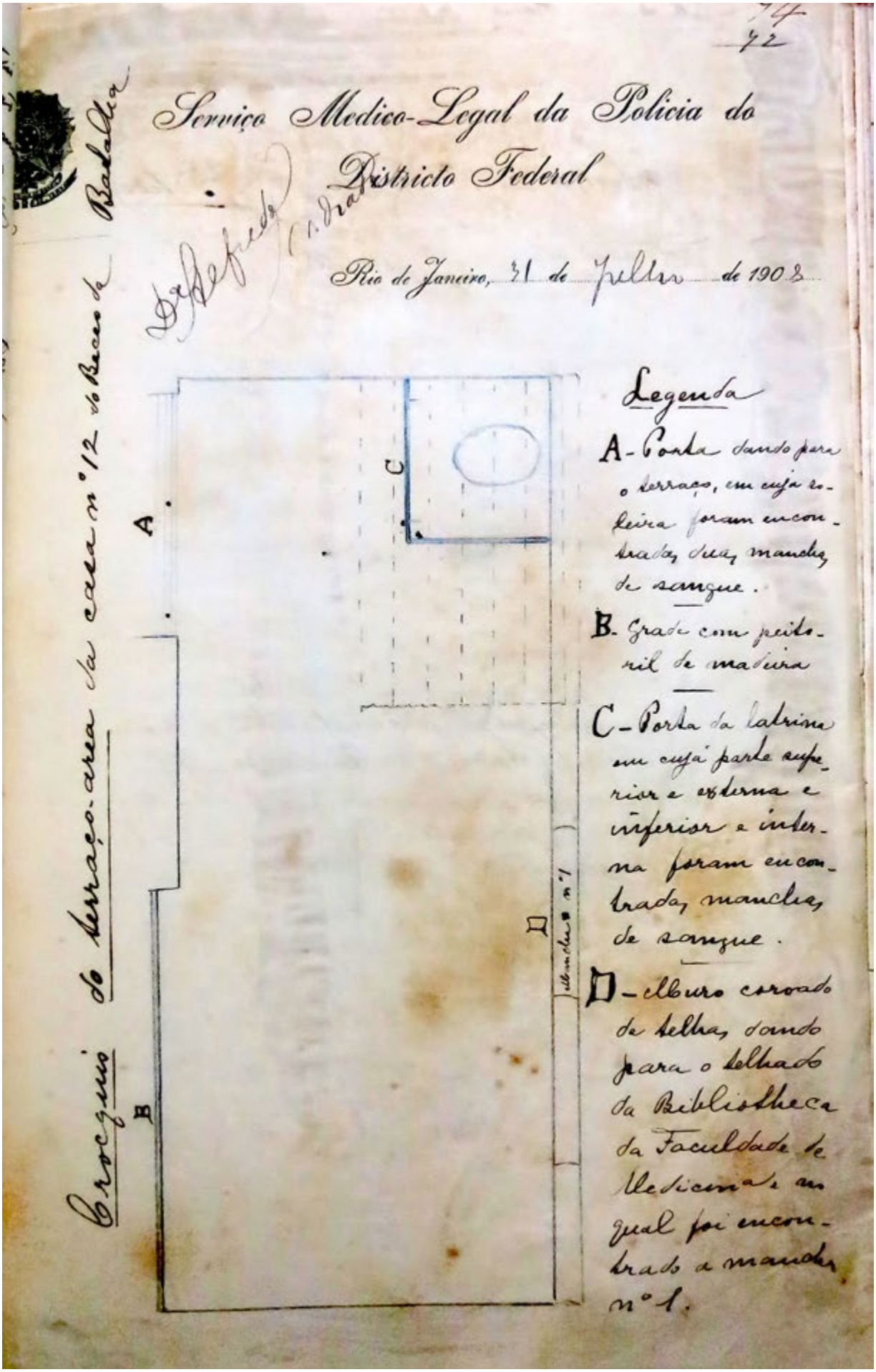
This legal breach, which existed on multiple levels, worked in favor of women who practiced infanticide. Most basically, the judicial system's inefficiencies prevented these cases from going to trial. Turn-of-the-twentieth-century Brazil hoped to erase its history of slavery and monarchy through the modernization of the legal system.[2] But these attempts were frustrated by an overworked and understaffed court system.[3] More specifically, when the courts did prosecute women for infanticide, the jury acquitted the women.

In fact, juries either found women not guilty or acquitted them for acting in an altered mental state, an idea included in Article 27§4 of the 1890 Penal Code. While the medical and legal professions harshly condemned infanticide, and the 1890 Penal Code criminalized women for the practice, the application of the law proved more irregular in its understanding of responsibility. The law required that infanticide be punished, yet I suggest that its custodians were reluctant to do so. Punishment came from the gossip and denunciation that led to a police investigation and the social shame that followed the trial.

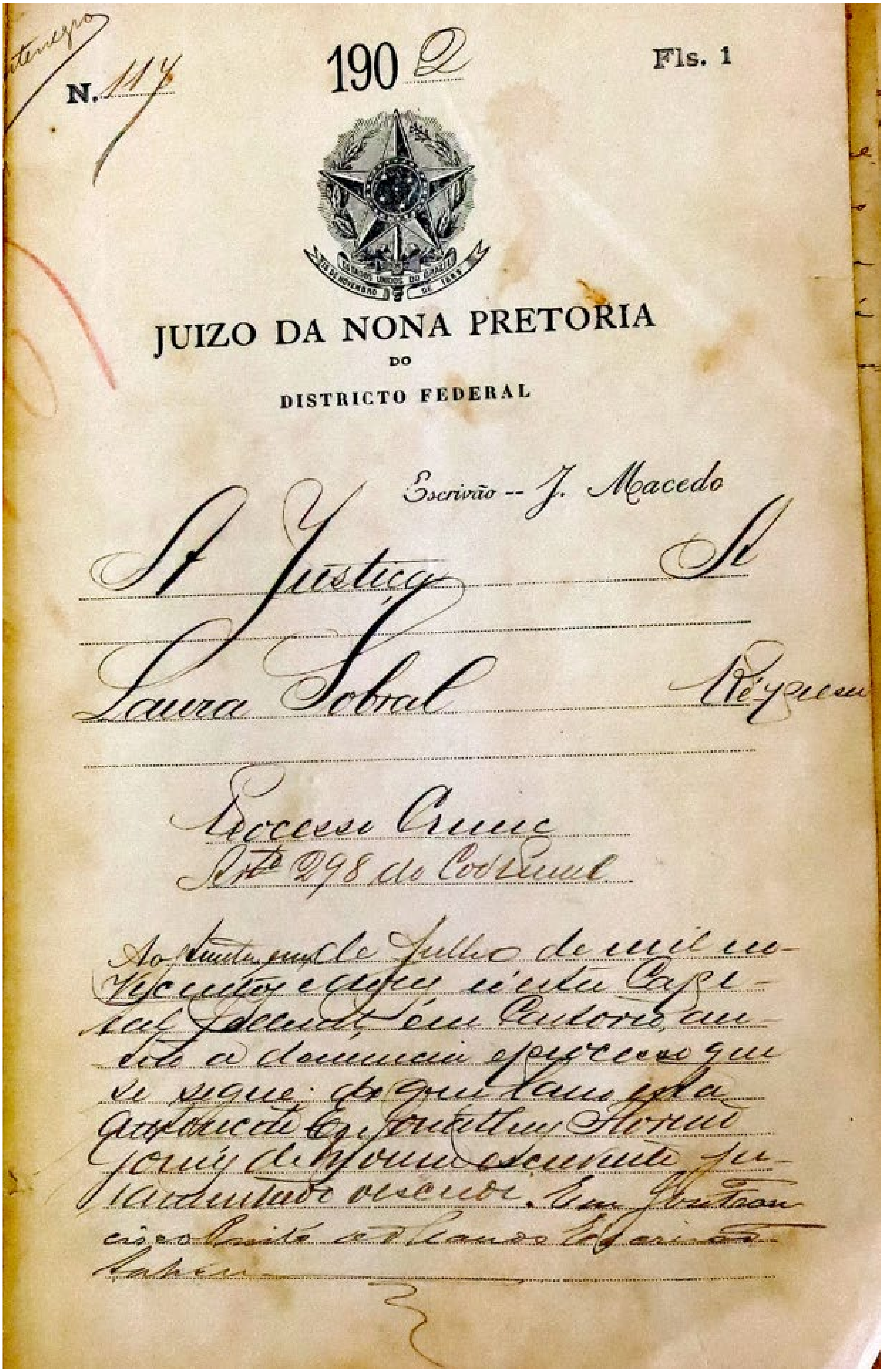
To understand the nature of this breach between law and practice, we must examine the legal definition of infanticide in the 1890 Penal Code. Article 298 declared "To kill a newborn, this is, an infant, in the first seven days of its life, by employing direct and active methods, or by denying the victim the care necessary for the maintenance of life and to prevent its death."[4] Prison time ranged from 6 to 24 years. The law also referred to honor. A woman charged under the first paragraph of Article 298 faced reduced prison time: between 3 to 9 years. "If the crime was perpetrated by the mother to hide her own dishonor." The "defense of honor"—here the dishonor brought on by a child born out of wedlock—was an explicit part of infanticide law in the 1890 Penal Code.[5] It reduced the prison time. But this clause was not as important as the idea of mental instability in the application of the law.

The Penal Code indirectly allowed for the complete decriminalization of infanticide through the positivist-influenced Article 27§4. The article said: "The following [persons] are not criminals: Those who are found to be in a state of complete deprivation of the senses and intellect (*privação de sentidos e inteligência*) in the act of committing the crime."[6] People who were "mentally disturbed" when they committed the crime could be absolved. Now an act's "criminality" depended on the person and their mental state. This is how a woman found guilty of committing infanticide but found acting under a disturbance of the senses was subsequently absolved of the crime. The momentary "deprivation of the senses" argument, accepted by the jury, was the manner in which women often escaped punishment for infanticide. They were found guilty of killing their newborn child but were absolved on acting in this altered state. Women were most often not held responsible for killing their newborn child, and thus the honor clause—or the reduction in prison time—was unnecessary. The Penal Code through Article 27§4 created a space for infanticide to go unpunished, and the practice of the law took full advantage of this gap. The defense's utilization of this clause for acquittals was not specific to infanticide, however. Men accused of "crimes of passion," or the murder of their wives, were also absolved under this article.[7] However, jurists

2. Amy Chazkel, Laws of Chance: Brazil's Clandestine Lottery and the Making of Urban Public Life (Durham, NC: Duke University Press, 2011), 27.
3. This inefficiency is not particular to fertility control cases. See Ibid., 5, 90, 254. Keith S. Rosenn argues that "bureaucratic red tape" dates back to the colonial period in Brazil. "Brazil's Legal Culture: The Jeito Revisited," Florida International Law Journal 1, no. 1 (Fall 1984): 10, 35–37.
4. João Vieira de Araujo, *O Codigo Penal interpretado,* vol. 2 (Rio de Janeiro: Imprensa Nacional, 1902), 2.
5. This phrase is taken from Sueann Caulfield, *In Defense of Honor: Sexual Morality, Modernity, and Nation in Early-Twentieth Century Brazil* (Durham, NC: Duke University Press, 2000).
6. In 1922, this was modified to read "disturbance of the senses," (*perturbação de sentidos*) which proved a "useless modification," as it did not change the application of the law. This change was Decreto N.4780, 27 Dezembro 1923, Art. 38. Antonio José da Costa e Silva, Codigo Penal dos Estados Unidos do Brasil commentado, vol. 1 (São Paulo: Companhia Editora Nacional, 1930), 194.
7. Susan K. Besse, "Crimes of Passion: The Campaign Against Wife Killing in Brazil, 1910-1940," *Journal of Social History* 22, no. 4 (Summer 1989): 653–66; Magali Gouveia Engel, "Paixão, crime e relações de gênero (Rio de Janeiro, 1890-1930)," Topoi, no. 1 (2000): 153–77; Rachel Soihet, *Condição feminina e formas de violência: mulheres pobres e ordem urbana*,



A map of where Gloria Lourenço's infant was found. (AN) CA.CT4.0.492 (1908)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JUIZO DA NONA PRETORIA

DO

DISTRICTO FEDERAL

Escrivão -- J. Macedo

A Justiça A.

Laura Sobral Ré presa

Processo Crime

Art. 298 do Cod. Penal

Laura Sobral. (MJ) RG.13243 Cx.1403 (1902)

criticized the use of Article 27§4 in crimes of passion cases but supported its utilization in infanticide trials.[8]

This research is based on 18 infanticide trials under the 1890 Penal Code. Only nine cases made it to a jury trial. Five of the cases never went to trial due to bureaucratic delays. Three were incomplete and one, the case of Maria de Jesus, was declared unfounded (*improcedente*). Of the nine that did go to trial, in four cases, the jury found the woman not guilty of committing infanticide.[9] In three cases, the woman was found guilty of infanticide but absolved for acting in a mentally altered state.[10] In only one case was the young girl found guilty of infanticide and *not* found acting in a mentally altered state.[11] Because the public prosecutor charged her under the honor clause of Article 298 and asked for the lightest sentence, Helena Teixeira spent the minimal time in prison, three years. In Rio de Janeiro infanticide cases, women were most likely to be found not guilty or absolved.

To convince the jury of a woman's criminal responsibility, the prosecution relied on two strategies: honor and motherhood. The prosecution either sympathetically emphasized with a woman's efforts to hide her dishonor or harshly condemned the infanticide as a rejection of the woman's maternal instincts. For example, in the 1892 trial of Celina de Souza, the prosecutor declared that Celina was a "criminal woman (*parturiente*)…a barbaric, cruel and inhumane woman, that robbed the life of her own newborn child."[12] She was charged with Article 298 without the honor clause. While the judge issued an arrest warrant, Celina disappeared and the case never went to trial. The district police chief in Laura Sobral's 1902 infanticide trial argued that she threw her newborn child into a neighboring yard both to "conceal her shame," and "due to [her] lack of maternal affections."[13] The public prosecutor agreed with the district police chief. Laura had acted "in the certain intention of hiding her dishonor." She was charged under the honor clause of Article 298. But the jury found her not guilty of killing her child.

In the scandalous 1908 trial of Gloria Lourenço da Silva, in which Gloria confessed to decapitating and dismembering her newborn child, although one she declared a stillbirth, the public prosecutor condemned Gloria for her lack of maternal instincts.[14] He argued that Gloria "practiced the infanticide, revealing an unedited ferocity. The evidence of the crime practiced by the accused is complete and reveals the cynicism with which she proceeded…" But the prosecution still charged her under the honor clause. The jury found Gloria guilty of infanticide to hide her dishonor, but that she had acted in a momentary lapse of reason. She was absolved.

Similar to the prosecution, the defense utilized notions of honor in an effort to reduce possible prison time, but they also relied heavily on the idea of a disturbance of the senses, employing Article 27§4. Laura Sobral's defense lawyer declared that she was unaware that she had been pregnant and that she had lost consciousness during the birth. When she awoke, she found the dead infant next to her.[15] Her lawyer argued that "The patient was in the complete impossibility to render assistance to the newborn because she was alone and without reason when the unhappy child was born…" Gloria Lourenço's defense lawyer had the difficult position of defending a woman who had allegedly decapitated and dismembered her newborn child. He argued that the child had only been mutilated after its death, when Gloria had acted under "a complete perturbation, or even, a privation of the senses and of reason."

The defense's use of the loss of reason, encapsulated in Article 27§4 of the 1890 Penal Code, and, more importantly, the jury's acceptance of this argument, had serious implications for the re-definition of infanticide in the 1940 Penal Code, still in effect today. The crime of infanticide changed to include the concept of post-partum madness or what was earlier defined as a momentary loss of reason as the only circumstance under which the crime could be committed. Article 123 of the 1940 Code stated

1890-1920 (Rio de Janeiro: Forense Universitária, 1989), 279, 287, 299–300.
8. For critiques see Besse, "Crimes of Passion," 658; Engel, "Paixão, crime e relações de gênero," 168–169. For support in infanticide cases see, da Costa e Silva, Codigo Penal, 1:198; Galdino Siqueira, Direito Penal brazileiro, 2nd ed., vol. 1 (Rio de Janeiro: Livraria Jacyntho, 1932), 350.
9. (MJ) RG.13243 Cx.1403 (1902); (MJ) RG.13244 Cx.1403 (1903); (AN) CA.CT4.0.376 (1907); (MJ) RG.4382 Cx.577 (1910).
10. (AN) CA.CT4.0492 (1908); (TJRJ) Cx.01.722.639-9 Pos.7.G6.S5.1438 (1911); (MJ) RG.13245 Cx.1403 (1904).
11. (TJRJ) Cx.01.803.478-01 Pos.G4.S8.2336 (1912).
12. (AN) 0I.0.PCR.3075 (1892).
13. (MJ), RG.13243 Cx.1403 (1904).
14. (AN) CA.CT4.0492 (1908).
15. (MJ) RG.13243 Cx.1403 (1902).

"To kill, under the *influence of the post-partum state*, one's own child, during or immediately after the birth." The prison time ranged from one to six years. In other words, after 1940, only a mother acting in a "post-partum state," implying irrationality, could commit infanticide. Otherwise it would be considered homicide. While scholars have successfully argued that the 1940 redefinition of the crime of infanticide reduced it to a *mother* acting in a state of post-partum irrationality, they have not demonstrated the legal practice behind that change.[16] Jurists in their re-writing of the Penal Code eliminated the main caveat that defense lawyers used to absolve their clients. By redefining the crime of infanticide as occurring *only* in a state of post-partum irrationality, the 1940 Penal Code erased the one avenue women had for being acquitted. After 1940, it was possible for more women to be condemned. Post-partum madness was explicitly part of the crime and thus could not be used as an exception.

The 1940 Code also erased the honor clause for infanticide. But this had less of an impact on the actual sentencing of women in the 1890 Code than the idea of post-partum irrationality. In only one case was the woman, Helena, found guilty of committing infanticide and not found as acting in a state of deprivation.[17] Thus, in only this case did the honor clause reduce the amount of time the woman spent in prison. While the honor clause hypothetically allowed for a reduction in the sentence, infanticide cases rarely arrived at guilty verdicts. While the honor clause played a role in forming the views of the court and the public, in terms of judicial decisions, the woman's mental state was more important. The removal of the honor clause in the 1940 Code reflects the less important position it played in judicial decisions under the earlier 1890 Code.

So what does this tell us about legal practice and gender roles during Brazil's modernization process? Scholars have demonstrated the importance of women's honor in forming the family, the basis of the "new" Brazilian nation.[18] The medical and legal professions viewed women's honor—based on their sexuality (or their fidelity within marriage and their virginity outside of it)—as so important it must be written into law. However, in infanticide trials honor played a less important role than medical discourses on women's behavior, such as the idea of post-partum madness. If we expand out discussion beyond infanticide to include abortion, we find that honor also did not play a major role in legal decisions under the 1890 Penal Code. Although the conservative ruling elite dominated public discussions of honor, an important gap existed between perceptions of Brazil's social norms and their reality.

16. Fabíola Rohden, *A arte de enganar a natureza: contracepção, aborto e infanticídio no início do século XX* (Rio de Janeiro: Editora Fiocruz, 2003), 140.

17. (TJRJ) Cx.01.803.478-01 Pos.G4.S8.2336 (1912).

18. Susan K. Besse, *Restructuring Patriarchy: The Modernization of Gender Inequality in Brazil, 1914-1940* (Chapel Hill, NC: University of North Carolina Press, 1996); Caulfield, *In Defense of Honor*; Martha de Abreu Esteves, *Meninas perdidas: os populares e o cotidiano do amor no Rio de Janeiro da Belle Époque* (Rio de Janeiro: Paz e Terra, 1989); Soihet, *Condição feminina e formas de violência.*

Cassia Paigen Roth is a Ph.D. Candidate in History with a Concentration in Gender Studies at UCLA. Her dissertation highlights how the intersection of medicine, state formation, and women's reproductive experiences was central to Brazilian modernization. Cassia argues that turn-of-the-century Rio de Janeiro saw the creation of a criminal culture surrounding pregnancy and childbirth, which situated poor women on the margins of the one role the Brazilian state considered appropriate for women: motherhood. The discourse on what constituted normative motherhood—based on class and race—influenced how the state criminalized fertility control and treated pregnancy in general. She received the Penny Kanner Dissertation Research Award in 2014.