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## Mommy Dearest?: Postpartum Psychosis, The American Legal System, And The Criminalization Of Mental Illness

Allison Dopazo

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# Mommy Dearest?: Postpartum Psychosis, The American Legal System, And The Criminalization Of Mental Illness

Allison Dopazo\*

*Children are often regarded as the most sacred beings in all of society—appealing to our collective sense of human dignity and protecting the most vulnerable. Mothers fiercely protecting their young children from perceived dangers is ostensibly a natural and moral response. This notion of the loving mother is in stark contrast to filicide, or the act of a parent murdering their child. It is a bedrock principle of the American criminal-justice system that a defendant is not responsible for their actions if the defendant was “laboring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing or, if he did know it, that he did not know what he was doing was wrong.”<sup>1</sup> Given the bleak reality of filicide, how should American criminal law treat mothers who commit the heinous crime of killing their child when the mother was suffering from a postpartum disorder at the time of the crime? This essay will detail women’s lived experiences of postpartum disorders, describe the current American criminal law approach to defendants who are mentally ill, and propose changes to American criminal procedure to reflect postpartum disorders’ effect on a mother’s mental state.*

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\* To all who have survived gender-based violence, may your strength never be forgotten.

<sup>1</sup> M’Naughten’s Case, 10 Clark & Fennelly 200, 201 (1843).

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## I. THE HISTORY OF FILICIDE

*“It was the seventh deadly sin. My children weren’t righteous. They stumbled because I was evil. The way I was raising them, they could never be saved. They were doomed to perish in the fires of hell.”*

– Andrea Yates<sup>2</sup>

Examining filicide as a historical practice can help us compare and contrast the treatment of filicide defendants under foreign laws versus under American criminal law. Furthermore, psychological and sociological analysis of the act of filicide can inform our understanding of how we should treat filicide defendants under American criminal law.

Filicide is the most common violent crime committed by women.<sup>3</sup> Historically, filicide was practiced as a means of sacrifice, birth control, and eugenics.<sup>4</sup> It was also done out of shame or fear of punishment for adultery.<sup>5</sup> Although filicide is now universally illegal, filicide was widespread throughout human history. The earliest known example of filicide was practiced in the Upper Paleolithic times when tribal cultures enacted social policies to limit the birth of disabled infants.<sup>6</sup> In China, female infants were commonly killed based on their sex.<sup>7</sup> Individuals in ancient Carthage sacrificed children to the gods and supernatural forces.<sup>8</sup> In ancient Greece, newborn infants were commonly left outside to die from exposure.<sup>9</sup> During the 1930s, almost every mother in a specific Bolivian village killed her newborn infant “when prospects of raising a

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<sup>2</sup> Andrew Gumbel, *Mercy? Not in Texas*, HAMILTON SPECTATOR (Ontario, Canada), Mar. 14, 2001, at B1. Andrea Yates infamously murdered her five children by drowning them in a bathtub on Jun. 20, 2001. At the time, she was suffering from postpartum depression, postpartum psychosis, and schizophrenia.

<sup>3</sup> LITA LINZER SCHWARTZ & NATALIE ISSER, ENDANGERED CHILDREN NEONATICIDE, INFANTICIDE, AND FILICIDE 2-3 (2000).

<sup>4</sup> L. Minturn & J.H. Davis, *Infanticide as a Terminal Abortion Procedure*, 17 BEHAV. SCI. RES. 70, 75-85 (1982).

<sup>5</sup> *Id.* at 77.

<sup>6</sup> A.M. CARR-SAUNDERS, THE POPULATION PROBLEM: A STUDY IN HUMAN EVOLUTION 168, 216 (1922).

<sup>7</sup> *Chinese Women Drowns Granddaughter in Quest for Grandson*, AGENCE FRANCE-PRESSE (Aug. 9, 2001).

<sup>8</sup> LARRY S. MILNER, HARDNESS OF HEART / HARDNESS OF LIFE: THE STAIN OF HUMAN INFANTICIDE (2000).

<sup>9</sup> SARAH BLAFFER HRDY, MOTHER NATURE: A HISTORY OF MOTHERS, INFANTS, AND NATURAL SELECTION 299-310 (1999).

child with a suitable father were extremely poor.”<sup>10</sup> In summary, throughout human history, filicide has been the rule, not the exception.

Various explanations for the existence of filicide as a historical practice have been proposed. Charles Darwin in *The Descent of Man* proposed that filicide was a check on over-population.<sup>11</sup> At the same time, evolutionary biologists suggested that the “parental investment theory” best explains the existence of filicide.<sup>12</sup> This theory posits that filicidal parents kill their children to control reproduction outcomes by manipulating resource allocation.<sup>13</sup> Other studies assert that psychological stressors—for example, financial hardship, housing difficulties, marital difficulties, substance abuse, children considered “difficult,” and social isolation—are the motive to commit filicide.<sup>14</sup>

## II. THE EPIDEMIOLOGY OF FILICIDE

*“For in my paranoia, I was certain that my husband (who really is one of the world’s greatest men and husbands) was out to get me. I thought he wanted to divorce me and take our child. I thought he was probably sabotaging our efforts to get help. This man, who I trust more than anyone in the world, I felt I could not trust.”*

– Anonymous Woman<sup>15</sup>

Filicide is divided into five categories based on the offender’s intent.<sup>16</sup> First, in altruistic filicide, the parent believes that he or she is relieving real or imagined suffering by killing the child and that dying is in the child’s best interest.<sup>17</sup> Among all forms of filicide, altruistic filicide is the most

<sup>10</sup> Louise Branson, *If You’re A Woman and This Doesn’t Melt Your Heart . . . You’re Not Alone*, THE SCOTSMAN, Jan. 6, 2000, at 14.

<sup>11</sup> J.B. Labov et al., *Current Problems in the Study of Infanticidal Behavior of Rodents*, 60 Q. REV. OF BIOLOGY 1 (1985).

<sup>12</sup> Grant T. Harris et al., *Children Killed by Genetic Parents Versus Stepparents*, 28 EVOLUTION OF HUMAN BEHAV. 85 (2007).

<sup>13</sup> *Id.* at 89.

<sup>14</sup> M.K. Krischer et al., *Motives for Maternal Filicide: Results from a Study with Female Forensic Patients*, 30 INT. J. OF L. AND PSYCH. 191, 191-200 (2007).

<sup>15</sup> Forde R., Peters S., & Wittkowski A., *Recovery from Postpartum Psychosis: A Systematic Review and Metasynthesis of Women’s and Families’ Experiences*, ARCHIVES OF WOMEN’S MENTAL HEALTH 597, 604 (2020) (quote from a new mother experiencing postpartum psychosis who reported “shock” being her overwhelming feeling at the onset of her psychosis).

<sup>16</sup> P.J. Resnick, *Child Murder by Parents: A Psychiatric Review of Filicide*, 126 AM. J. OF PSYCHIATRY 325 (1969).

<sup>17</sup> *Id.* at 327.

common.<sup>18</sup> Second, in acutely psychotic filicide, the parent kills the child in response to psychosis and not because of a rational motive.<sup>19</sup> Third, unwanted child filicide occurs when a parent kills a child perceived to be a hindrance.<sup>20</sup> Fourth, fatal maltreatment, or accidental filicide, involves the unintentional death of a child resulting from parental abuse or neglect.<sup>21</sup> Lastly, spouse revenge filicide is the killing of a child by a parent to make the other parent suffer.<sup>22</sup>

Currently, the United States has the highest rate of child murder—8/100,000—among all developed nations; that amounts to five hundred children being murdered by their parents every year.<sup>23</sup> Moreover, about three percent of all homicide arrests in the United States involve parents who have killed their children.<sup>24</sup> In the U.S., filicides are believed to account for roughly two-thirds of fatal child abuse cases.<sup>25</sup>

Regarding filicide victimology, most of the victims—seventy-two percent—were six-years-old or younger.<sup>26</sup> About one-third of filicide victims were infants under one-year-old.<sup>27</sup> Surprisingly, thirteen percent of filicide victims were adults between the ages of eighteen and forty.<sup>28</sup> All in all, children are at the greatest risk of dying by filicide during infancy, especially during the first few months of life, because they are utterly reliant on their caregiver for all of their needs.<sup>29</sup>

Regarding filicide offenders, fathers were just as likely to kill their children as mothers.<sup>30</sup> However, female offenders were notably younger than their male counterparts.<sup>31</sup> Likewise, female offenders more often kill younger victims than did filicidal fathers.<sup>32</sup> Furthermore, younger filicidal mothers were more often poor, had limited financial resources, were under

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 328.

<sup>20</sup> *Id.* at 329.

<sup>21</sup> *Id.* at 330.

<sup>22</sup> *Id.* at 331.

<sup>23</sup> Susan Hatters Friedman et al., *Child Murder by Mothers: A Critical Analysis of the Current State of Knowledge and a Research Agenda*, 162 AM. J. OF PSYCHIATRY 1578, 1578 (2012).

<sup>24</sup> Timothy Y. Mariano et al., *Toward a More Holistic Understanding of Filicide: A Multidisciplinary Analysis of 32 Years of U.S. Arrest Data*, 236 FORENSIC SCI. INT'L 46, 46 (2014).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 47.

<sup>27</sup> *Id.* at 49.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 51.

<sup>30</sup> *Id.* at 52.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 48.

psychological stress, and lacked familial or community support.<sup>33</sup> Nevertheless, older filicidal mothers often suffered from a mental illness and lacked criminal histories.<sup>34</sup> On the other hand, filicidal fathers were often motivated to kill their children out of anger, jealousy, marital difficulties, and most had not previously sought psychiatric help.<sup>35</sup> Also, fathers were more likely than mothers to kill their spouses during the commission of the filicidal act.<sup>36</sup> Additionally, fathers were more likely to use violent means to commit filicide—including firearms, stabbing, and hitting—than did mothers.<sup>37</sup> In total, the mean age of offenders was thirty-two-years-old.<sup>38</sup> Finally, while most offenders and victims were White, Black offenders and victims were significantly represented compared to their percentage of the American population.<sup>39</sup>

The strongest predictive factors of maternal filicide are maternal age of nineteen years or younger, education of twelve years or less, poverty, single marital status, and late or absent prenatal care.<sup>40</sup> Furthermore, studies of maternal filicide offenders in the U.S. noted high rates of psychosis, depression, a history of abuse, addiction, prior instances of suicidality, prior use of psychiatric services, and decreased intelligence.<sup>41</sup>

Likewise, one-half of international filicide offenders had a severe mental illness, such as psychosis, depression, and suicidality.<sup>42</sup> Studies of international filicide offenders also noted that histories of child abuse and domestic abuse were prevalent among offenders.<sup>43</sup> Other studies noted the prevalence of child-related factors, such as frequent crying.<sup>44</sup> International mothers who committed filicide were often socioeconomically disadvantaged and had the primary responsibility of their child's care.<sup>45</sup>

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<sup>33</sup> See Ralph A. Hicks & Daniel C. Gaughan, *Understanding Fatal Child Abuse*, 19 CHILD ABUSE & NEGLECT 855 (1995).

<sup>34</sup> See Harris et al., *supra* note 12.

<sup>35</sup> See Sara G. West et al., *Fathers Who Kill Their Children: An Analysis of the Literature*, 54 J. OF FORENSIC SCI. 463 (2009).

<sup>36</sup> See *id.*; see also Harris et al., *supra* note 12.

<sup>37</sup> West et al., *supra* note 35.

<sup>38</sup> See Mariano et al., *supra* note 24.

<sup>39</sup> *Id.* at 48.

<sup>40</sup> See Mary D Overpeck et al., *Risk Factors for Infant Homicide in the United States*, 399 N. Engl. J. Med. 1211 (1998).

<sup>41</sup> See Friedman et al., *supra* note 23, at 1578.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

### III. POSTPARTUM DISORDERS AND THEIR DESTRUCTIVE IMPACT ON WOMEN

*“It was a horrible feeling. I felt like her milk was dirty and I used to forget. My memory went, I would forget everything . . . I do not know how many bottles I threw away ‘cause I was so paranoid of making the baby sick. I was paranoid about everything.”*

– Anonymous Woman<sup>46</sup>

The American Psychiatric Association has recognized postpartum mood disorders in the Diagnostic and Statistical Manual of Mental Disorders, acknowledging the correlation between infanticide and symptoms of mental illness as defined by postpartum onset within four weeks of birth.<sup>47</sup>

When delusions are present, they often concern the newborn infant (e.g., the newborn is possessed by the devil, has special powers, or is destined for a terrible fate). In both psychotic and nonpsychotic presentations, there may be suicidal ideation, obsessional thoughts regarding violence to the child, lack of concentration, and psychomotor agitation . . . [Filicide] is most often associated with postpartum psychotic episodes that are characterized by command hallucinations to kill the infant or delusions that the infant is possessed, but it can occur in severe postpartum mood disorders without such specific delusions or hallucinations.<sup>48</sup>

Postpartum disorders include postpartum depression and postpartum psychosis.<sup>49</sup> Experts estimate that approximately fifty to eighty percent of new mothers experience some form of postpartum depression after childbirth.<sup>50</sup> Specifically, postpartum depression is characterized by irritability, mood swings, significant appetite changes, and severe

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<sup>46</sup> Forde et al., *supra* note 15 (an anonymous woman suffering from postpartum psychosis describes her paranoia and difficulty bonding with her child).

<sup>47</sup> American Psychiatric Association, *Desk Reference to The Diagnostic Criteria From DSM-5*, at 112.

<sup>48</sup> AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 386 (4th ed. 1994).

<sup>49</sup> *Id.*

<sup>50</sup> Barry Lewis, *A New Model Law Offers Hope: Postpartum Disorders and the Law*, 42 M.A.R. CHAMPION 20, 21 (2018).

emotionality changes.<sup>51</sup> Most notably, postpartum depression causes the new mother to experience feelings of intense inadequacy and anxiety concerning her ability to care for her new child.<sup>52</sup> Accordingly, mothers with postpartum depression see themselves as “bad mothers,” heightening their thoughts of suicidal ideation or of harming their child.<sup>53</sup> Of all mothers who experience postpartum depression, one-sixth of those mothers will experience severe depression, characterized by mood swings, eating disorders, insomnia, paranoia, and suicidal ideations.<sup>54</sup> Cases of postpartum depression may include symptoms from any combination of four subgroups: (1) depression, (2) anxiety, (3) panic disorder, and (4) obsessive-compulsive disorder.<sup>55</sup> Recovery with treatment typically takes between six to twelve months.<sup>56</sup> In contrast, without treatment, one-quarter of women with postpartum depression will not recover.<sup>57</sup>

Postpartum psychosis, the most severe of the postpartum disorders, affects two mothers for every one thousand births.<sup>58</sup> A mother who has postpartum psychosis is typically in a psychotic state caused by the myriad of chemical imbalances in the mother’s body after birth.<sup>59</sup> This form of psychosis is characterized by a severe break with reality and a severely impaired ability to function due to hallucinations or delusions, often about her child.<sup>60</sup> Postpartum psychosis is especially dangerous to the mother and child because the woman is dissociated, delusional, and confused.<sup>61</sup> Additionally, the mother is likely to have both suicidal and infanticidal thoughts while experiencing this form of psychosis.<sup>62</sup> New mothers with postpartum psychosis often exhibit strange behavioral tendencies in which they isolate themselves from others, become mute, suffer from severe sleep deprivation, and experience extreme emotional volatility.<sup>63</sup> Left

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<sup>51</sup> ANN L. DUNNEWOLD, EVALUATION AND TREATMENT OF POSTPARTUM EMOTIONAL DISORDERS 1 (1997).

<sup>52</sup> CHERYL L. MEYER ET AL., MOTHERS WHO KILL THEIR CHILDREN: UNDERSTANDING THE ACTS OF MOMS FROM SUSAN SMITH TO THE “PROM MOM” 5 (2001).

<sup>53</sup> See DUNNEWOLD, *supra* note 51.

<sup>54</sup> CHARLES PATRICK EWING, FATAL FAMILIES: THE DYNAMICS OF INTRAFAMILIAL HOMICIDE 95-96 (1997).

<sup>55</sup> DR. SUSAN BENJAMIN FEINGOLD, HAPPY ENDINGS, NEW BEGINNINGS: NAVIGATING POSTPARTUM DISORDERS (2015).

<sup>56</sup> See EWING, *supra* note 54.

<sup>57</sup> *Id.* at 21.

<sup>58</sup> *Id.* at 96.

<sup>59</sup> *Id.*

<sup>60</sup> See DUNNEWOLD, *supra* note 51.

<sup>61</sup> Debora K. Dimino, *Postpartum Depression: A Defense for Mothers Who Kill their Infants*, 30 SANTA CLARA L. REV. 231, 234 (1990).

<sup>62</sup> MERTON SANDLER, MENTAL ILLNESS IN PREGNANCY AND THE PUERPERIUM 114 (1978).

<sup>63</sup> See MEYER ET AL., *supra* note 52.

untreated, postpartum psychosis has a four percent risk of filicide within the child's first year of life and a five percent risk of suicide.<sup>64</sup>

A typical example of how postpartum depression and psychosis may lead to filicide is illustrated in the case of Andrea Yates. In her youth, Andrea Yates was a valedictorian and eventually became a bright, young registered nurse.<sup>65</sup> She was joyfully in love with her husband, and the couple even announced that they “would seek to have as many babies as nature allowed.”<sup>66</sup>

While Yates' future seemed idyllic, it was anything but. Years later, Yates, her husband, and their four children lived in a converted Greyhound bus that was only three hundred fifty square feet.<sup>67</sup> Yates was the children's primary caretaker and even became their homeschool teacher because her husband was fearful of outside influences.<sup>68</sup> Despite the exhaustion that comes with raising young children, Yates appeared to be a loving mother by all accounts.<sup>69</sup> She was often seen walking with her children to the local park and even made heart-shaped coupon books cashable for hugs and games on Valentine's Day for her children.<sup>70</sup>

After her fourth child's birth, Yates began to experience symptoms of depression.<sup>71</sup> Yates has an extensive family history of mental illness, in which nearly all of her family members have been diagnosed with some form of depression.<sup>72</sup> Soon after her fourth child's birth, she attempted to commit suicide by overdosing on her father's Alzheimer's medication.<sup>73</sup> After her first failed suicide attempt, she tried to commit suicide again by slitting her throat with a steak knife.<sup>74</sup> After several more failed suicide attempts, Yates was hospitalized and diagnosed with severe postpartum depression and psychosis.<sup>75</sup>

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<sup>64</sup> Emilie Le Beau Lucchesi, *When Giving Birth Leads to Psychosis, Then to Infanticide*, THE ATLANTIC (Sept. 6, 2018), <https://www.theatlantic.com/family/archive/2018/09/postpartum-psychosis-infanticide-when-mothers-kill-their-children/569386/>.

<sup>65</sup> Gumbel, *supra* note 2.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Margery Eagan, *Yates Shatters Maternal Myth of Competence*, BOSTON HERALD, Sept. 11, 2001.

<sup>69</sup> *Id.*

<sup>70</sup> Lee Hancock, *Documents Reveal Yates' History of Mental Illness*, SEATTLE TIMES, Sept. 3, 2001, at A2.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *See* Eagan, *supra* note 68.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

Yates told her therapist that she heard voices that told her to stab those around her.<sup>76</sup> Yates also explained that she attempted to commit suicide because she deemed it better to end her own life than to endanger those around her.<sup>77</sup> Yates' condition improved slightly, but her doctors warned her to consider not having any more children because having more children "will surely guarantee further psychotic depression."<sup>78</sup> Nevertheless, her husband was determined to have a large family, and the couple conceived and welcomed a fifth child.<sup>79</sup>

Four months after her fifth child's birth, Yates fell into postpartum depression and psychosis once again, becoming completely mute and only sleeping one hour per night.<sup>80</sup> Her psychosis and paranoia were so severe that her doctor sought to have Yates involuntarily committed, but Yates was discharged a few weeks later.<sup>81</sup>

Yates was hospitalized once again when she was found kneeling beside a bathtub filled with water, baffled as to why she filled the bathtub in the first place.<sup>82</sup> One month later, her postpartum depression and psychosis symptoms quickly escalated, causing her to become catatonic and mute.<sup>83</sup> During this time, Yates worried obsessively that she was a bad mother and that her children would also become failures because of her.<sup>84</sup> Finally relenting to the voices in her head, on Jun. 20, 2001, Yates drowned all five of her children in the bathtub, one by one.<sup>85</sup>

#### IV. LEGAL TESTS FOR INSANITY

*"I started becoming delusional after I stopped nursing Michael. I thought somehow that he represented the Devil . . . The morning the baby died, I got a phone call from a woman selling magazines. Right before she hung up, I thought she said 'All right, Angela.'" I had been praying and asking for God for guidance, and thought that God was telling me to drown my baby. I filled the tub, put the baby in the water, and held him down until he*

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> See Hancock, *supra* note 70.

<sup>82</sup> See Eagan, *supra* note 68.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

*drowned. He was an easy baby, a good baby, he was perfect.”*

– Angela Thompson<sup>86</sup>

Under the tenets of free will and personal responsibility, the American legal system recognizes that when an individual is incapable of having the requisite criminal intent when the act was performed, a just and fair society cannot hold that person criminally liable.<sup>87</sup> Thus, evidence of insanity is admissible only if related to a material element of the criminal offense. A defendant is entitled to an acquittal only if the level of their mental illness completely negates a necessary element of the charged offense.<sup>88</sup> Nevertheless, the foundation question of what constitutes criminal insanity is left up to each jurisdiction to decide.

In the United States, most jurisdictions used the M’Naghten rules to evaluate a defendant’s insanity plea.<sup>89</sup> Under this test, the defendant is not criminally responsible if he was laboring under such a defect of reason from disease of the mind at the time of committing the act as not to know the nature and quality of his act or, if he did know it, he did not know what he was doing was wrong.<sup>90</sup> Furthermore, the defendant’s mental illness must be so debilitating that it affects the defendant’s ability to appreciate his surroundings either because the defendant cannot understand what he is doing or he cannot appreciate that his action is unauthorized by law.<sup>91</sup>

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<sup>86</sup> Tricia Schroeder, *Postpartum Psychosis as a Defense to Murder?*, 21 W. S.T. U. L. R.E.V. 267, 283 (1993); Anne Damante Brusca, *Postpartum Psychosis: A Way Out for Murderous Moms?*, 18 HOFSTRA L. R.E.V. 1133, 1164 (1990). Angela Thompson gave birth to a daughter and soon began experiencing trouble sleeping. Soon after, Thompson began to believe that she no longer needed sleep and started having religious hallucinations. As her psychosis became more severe, she unsuccessfully tried to throw herself off of a bridge and, as a result, was hospitalized. After she was discharged, Thompson appeared to be behaving normally and resumed her everyday activities. However, her hallucinations of the devil and demonic creatures returned after the birth of her son two years later. As a result, Thompson was utterly obsessed with the devil and remained in a catatonic state.<sup>86</sup> One afternoon when her husband returned from work, Thompson greeted him and calmly told him that their nine-month-old son, Michael, was dead. Thompson drowned her son in the bathtub because she believed God told her that her son was the devil, and, if she killed her child, her husband would raise him from the dead three days later so the world would recognize her son as Jesus Christ.

<sup>87</sup> Jonas R. Rappeport, *The Insanity Plea Scapegoating the Mentally Ill—Much Ado About Nothing?*, 24 S. Tex. L.J. 687, 690 (1983).

<sup>88</sup> Laura E. Reece, *Mothers Who Kill: Postpartum Disorders and Criminal Infanticide*, 38 UCLA L. Rev. 699, 750 (1991).

<sup>89</sup> *Daniel M’Naghten’s Case*, 8 Eng. Rep. 718, 718 (1843).

<sup>90</sup> Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* 429, 436 (1986); Marcia Baran, *Postpartum Psychosis: A Psychiatric Illness, A Legal Defense to Murder or Both?* 10 HAMLINE J. PUB. L. & POL’Y 121, 133-134 (1989).

<sup>91</sup> RALPH SLOVENKO, *PSYCHIATRIC AND CRIMINAL CULPABILITY* 110, 119 (1995).

Medical and legal professionals have criticized the M’Naghten test for only considering whether the defendant could recognize the difference between right and wrong and excluding the volitional aspect of behavior—precisely, a defendant’s capacity to make decisions and to conform to those decisions in controlling his conduct.<sup>92</sup> Furthermore, the M’Naghten test does not differentiate between the various degrees of mental illness, which are recognized by modern medicine.<sup>93</sup> Specifically, in the case of postpartum disorders, a mother who can distinguish between right and wrong, but is incapable of controlling or conforming her conduct to what is right to due a postpartum disorder, fails to meet the requirements of criminal insanity under the M’Naghten test.<sup>94</sup>

In most American jurisdictions, a person who faces criminal trial is presumed sane until proven otherwise.<sup>95</sup> The defense can rebut this presumption by introducing evidence that demonstrates that the defendant was criminally insane during the commission of the crime.<sup>96</sup> Once evidence rebutting the presumption of sanity is presented, the presumption is destroyed.<sup>97</sup> After, the burden shifts onto the prosecution to prove the defendant’s sanity beyond a reasonable doubt as a necessary element of the crime charged.<sup>98</sup>

Other jurisdictions in the United States use the “Irresistible Impulse” test to determine whether a defendant is criminally insane.<sup>99</sup> Under this test, a defendant who has a mental illness that kept him from controlling his conduct, despite the defendant knowing what he was doing was wrong at the time of the act, is considered criminally insane.<sup>100</sup> A defendant successfully pleading insanity under the Irresistible Impulse test must suffer from a mental condition that creates an overwhelming compulsion that urges him to commit illegal acts.<sup>101</sup>

To illustrate the distinction between the M’Naghten test and the Irresistible Impulse test, consider the case of Andrea Yates, who drowned

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<sup>92</sup> See Rappeport, *supra* note 87.

<sup>93</sup> See SLOVENKO, *supra* note 91.

<sup>94</sup> JAMES Q. WILSON, MORAL JUDGEMENT: DOES THE ABUSE EXCUSE THREATEN OUR LEGAL SYSTEM 36-38 (1997).

<sup>95</sup> RICHARD MORAN, KNOWING RIGHT FROM WRONG: THE INSANITY DEFENSE OF DANIEL MCNAUGHTAN 23 (1981).

<sup>96</sup> Janet Ford, *Susan Smith and Other Homicidal Mothers—In Search of the Punishment that Fits the Crime*, 3 CARDOZO WOMEN’S L.J. 521, 543-544 (1996).

<sup>97</sup> *Id.*

<sup>98</sup> *Davis v. United States*, 160 U.S. 469, 473-474 (1895); *People v. Skeoch*, 96 N.E.2d 473, 475 (Ill. 1951); ROBERT F. SCHOPP, JUSTIFICATION DEFENSES AND JUST CONVICTIONS 24 (1998).

<sup>99</sup> See LaFave & Scott, *supra* note 90.

<sup>100</sup> *Id.*

<sup>101</sup> See SLOVENKO, *supra* note 91.

her five children in a bathtub. Under the M’Naghten test, Yates would be considered sane because she could recognize the difference between right and wrong. For example, Yates waited for her husband to leave for work to fill up the bathtub because she thought that he would prevent her from completing the murders.<sup>102</sup> Similarly, Yates put the family dogs in the crate so that they would not interfere with her plan to kill her children.<sup>103</sup> However, Yates would likely be considered criminally insane under the Irresistible Impulse test. As evidenced above, Yates knew that what she was doing was wrong, but she could not resist the voices in her head commanding her to kill her children.<sup>104</sup>

In comparison, other states follow the *Durham* test, which presupposes that insanity is established by a body of symptoms.<sup>105</sup> A defendant will be considered criminally insane under the *Durham* test if the defendant would not have committed the criminal act but for the existence of a mental disease or defect.<sup>106</sup> Among all of the previous tests, the *Durham* test is perceived as the least restrictive test and has been criticized as overly expansive and ambiguous.<sup>107</sup>

In comparison, the American Law Institute Model Penal Code test considers both the cognizance of the actor’s wrongdoing and the voluntariness of the act by combining elements from the M’Naghten test, the Irresistible Impulse Test, and the *Durham* test.<sup>108</sup> Section 4.01 of the Model Penal Code states: “A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality (wrongfulness) of his conduct or to conform to the requirements of the law.”<sup>109</sup> Nevertheless, an abnormality manifested by repeat criminal conduct does not qualify as a “mental disease or defect” under this test.<sup>110</sup>

In response to the over-inclusive Model Penal Code test for insanity, President Reagan signed the Insanity Defense Reform Act of 1984 into law.<sup>111</sup> The Act dealt a swift and deafening blow to the Model Penal Code test by removing the volitional component that a defendant lacked the

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<sup>102</sup> Gumbel, *supra* note 2.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> See SLOVENKO, *supra* note 91; see also LaFave & Scott, *supra* note 90.

<sup>106</sup> *Durham v. United States*, 214 F.2d 862, 863 (D.C. Cir. 1954).

<sup>107</sup> See LaFave & Scott, *supra* note 90.

<sup>108</sup> JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 624 at n.1 (3d. ed. 2003).

<sup>109</sup> Model Penal Code § 4.01.

<sup>110</sup> See LaFave & Scott, *supra* note 90; Colleen Kelly, *The Legacy of Too Little, Too Late: The Inconsistent Treatment of Postpartum Psychosis as a Defense to Infanticide*, 19 J. CONTEMP. HEALTH L. POL’Y 247 (2002).

<sup>111</sup> DRESSLER, *supra* note 108.

capacity to conform their conduct to the law.<sup>112</sup> This change exculpated defendants only if they could not appreciate “the nature and quality or wrongfulness of their acts as a result of severe mental disease,” thereby making it significantly harder for defendants to obtain a verdict of not guilty by reason of insanity.<sup>113</sup> Further, before the Act, the government had the burden of proving the defendant’s sanity beyond a reasonable doubt.<sup>114</sup> After the Act’s passage, that burden was shifted to the defendant, who now had the burden of proving insanity by clear and convincing evidence at the federal level.<sup>115</sup>

#### V. POSTPARTUM DISORDERS AS THE BASIS FOR AN INSANITY DEFENSE

*“I worried about interaction. I worried that I’d never get better from the depression because it was very cyclical. I really, really worried about the impact on [my baby] because I’d read about mums who have mental health problems affecting their kids, I worried about the genetic side of it. What did not I worry about? I worried for my marriage, all sorts of stuff like that really. I worried for the future really—being ill, thinking am I always, at that point because, I did think that I was never going to get better, so that was my main sort of fear.”*

– Anonymous Woman<sup>116</sup>

Since the 1980s, U.S. courts have permitted mothers with postpartum psychosis to assert the insanity defense in homicide cases.<sup>117</sup> Likewise, both postpartum psychosis and postpartum depression are admissible in sentencing hearings as mitigation evidence on the basis of diminished capacity.<sup>118</sup>

Asserting a postpartum disorder as the basis for an insanity defense creates several legal challenges. First, the juror or fact finder may have a bias concerning motherhood, mental illness, and the nature of filicide,

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Forde et al., *supra* note 15 (describing new mother in the throes of postpartum depression feeling out of control and worrying that “things will never get better”).

<sup>117</sup> Melissa L. Nau et al, *Postpartum Psychosis and the Courts*, 40 J. of the Am. Acad. of Psychiatry & the L. 318, 319 (2012).

<sup>118</sup> *Id.*

which will directly impact the mother's fate.<sup>119</sup> Most notably, jury instructions typically do not define what constitutes a "mental disease," which invites the juror to apply their preconceived notions of motherhood and mental illness to the case at hand.<sup>120</sup> Second, mothers who committed filicide while suffering from a postpartum disorder are likely to recover by the time their cases go to trial.<sup>121</sup> In contrast, defendants who assert the insanity defense for every other mental illness excluding postpartum disorders are typically still mentally ill during their trial.<sup>122</sup> Although a defendant asserting the insanity defense only needs to prove that they were criminally insane during the commission of the criminal act, and not at the subsequent trial, the defendant's behavior at the trial surely affects the jurors' perception of the defendant's mental illness.<sup>123</sup>

Defendant mothers with postpartum psychosis are considered criminally insane in only some jurisdictions in the U.S. because even the most psychotic defendants can arguably distinguish right from wrong. For example, it would be challenging for a mother who has postpartum psychosis to qualify as criminally insane in a jurisdiction following the M'Naghten rule because the mother likely understands that killing her child is wrong.<sup>124</sup> The same defendant would likely be considered criminally insane under the Irresistible Impulse test because even though the mother understood that murdering her child was wrong, she was acting under the command of her hallucinations.<sup>125</sup> Likewise, the same defendant would also be considered criminally insane under the Durham test because the mother would not have murdered her child but for the mother experiencing postpartum disorders after giving birth.<sup>126</sup> Lastly, the Model Penal Code test yields the most inconsistent results in evaluating whether a defendant's postpartum psychosis qualifies her as mentally insane because the test does not define "mental disease or defect."<sup>127</sup>

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<sup>119</sup> MEYER ET AL., *supra* note 52.

<sup>120</sup> *Id.* Typically, the mental disease will be deemed sufficient if the disease caused the criminal act. *Id.*

<sup>121</sup> R. Kumar & Maureen Marks, *Infanticide and the Law in England and Wales*, in POSTPARTUM PSYCHIATRIC ILLNESS: A PICTURE PUZZLE 257, 259 (1992).

<sup>122</sup> Susan A. Hickman & Donald L. LeVine, *Postpartum Disorders and the Law*, in POSTPARTUM PSYCHIATRIC ILLNESSES: A PICTURE PUZZLE 282, 287 (1992).

<sup>123</sup> *Id.*

<sup>124</sup> *See* LaFave & Scott, *supra* note 90.

<sup>125</sup> *Id.*

<sup>126</sup> *See* SLOVENKO, *supra* note 91; *see also* LaFave & Scott, *supra* note 90.

<sup>127</sup> Model Penal Code § 4.01

VI. A CASE STUDY OF THE GUILTY BUT MENTALLY ILL VERDICT AS  
AN UNCONSCIONABLE  
RESPONSE TO THE INSANITY DEFENSE REFORM ACT OF 1984

*“That would be the number one reason for me not telling anyone. ‘Cause I was utterly convinced if I told the doctor I am thinking of throwing my baby out of the window . . . they are going to think ‘Oh my god that poor baby.’ And you know you hear that from the paper that they were taken away and that’s it. I did not tell a soul.”*

–Anonymous Woman<sup>128</sup>

In response to calls to reform the Insanity Defense Act of 1984, twenty states have enacted a “guilty but mentally ill” verdict.<sup>129</sup> In these states, a jury may select guilty, not guilty, not guilty by reason of insanity, or guilty but mentally ill as their verdict.<sup>130</sup> In general, a Defendant who receives a guilty but mentally ill verdict is sentenced in the same way as if they were found guilty and mentally sane.<sup>131</sup> A mother who commits filicide and is found guilty but mentally ill is not free from criminal liability. Instead, the court, in its discretion, may impose any sentence on her as could be imposed on a defendant adjudicated guilty of the same crime but not mentally ill.<sup>132</sup> The following section will analyze the effect of the guilty but mentally ill verdict in the case of Debra Lynn Gindorf.

On March 28, 1985, twenty-year-old Debra Lynn Gindorf decided to commit suicide and wanted to take her two children with her.<sup>133</sup> She crushed Unisom sleeping pills and fed them to herself, her twenty-three-month-old daughter, Christina, and three-month-old son, Jason.<sup>134</sup> She gave Jason a baby bottle of formula mixed with the sleeping pills, and she

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<sup>128</sup> Forde et al., *supra* note 15 (a mother suffering from postpartum depression and psychosis describes her decision not to seek medical treatment for her symptoms in fear that her child would be removed from her home).

<sup>129</sup> Natalie Jacewicz, *Guilty But Mentally Ill Doesn’t Protect Against Harsh Sentences*, NPR (Aug. 2, 2016)

<https://www.npr.org/sections/health-shots/2016/08/02/486632201/guilty-but-mentally-ill-doesnt-protect-against-harsh-sentences#:~:text=In%20light%20of%20John%20Hinckley,by%20reason%20of%20insanity%20plea.>

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Monique Garcia, *Mom’s Life Sentence is Cut*, CHI. TRIBUNE (May 2, 2009)

[https://www.chicagotribune.com/news/ct-xpm-2009-05-02-0905010363-story.html.](https://www.chicagotribune.com/news/ct-xpm-2009-05-02-0905010363-story.html)

<sup>134</sup> *Id.*

gave Christina a bottle of juice mixed with the pills.<sup>135</sup> Meanwhile, Gindorf poured herself a glass of Southern Comfort laced with the pills.<sup>136</sup> The two children soon became sick to their stomachs and vomited. Gindorf quickly tucked them into bed and finally laid down herself.<sup>137</sup> Gindorf woke up the next morning, as the sleeping pills' dose was not enough to kill her and soon found her children both dead.<sup>138</sup> Gindorf tried to take her own life once again, but her attempts were ultimately unsuccessful.<sup>139</sup> On March 29, 1985, at 6:30 p.m. Gindorf went to the local police station and turned herself in.<sup>140</sup>

Gindorf was soon charged with six counts of murder for her two children's deaths.<sup>141</sup> At her trial, two experts testified that Gindorf was suffering from severe mental illnesses at the time of the crime, including major psychotic depression, post-traumatic stress disorder due to previous physical and mental abuse by her husband, and borderline personality disorder.<sup>142</sup> A defense expert in psychology explained that the combination of major depression and an underlying personality disorder might cause extreme episodes of psychosis.<sup>143</sup> The prosecution's own psychology expert testified that Gindorf was suffering from severe mental illness during the commission of the crime.<sup>144</sup> Nevertheless, the state's expert asserted that, despite her mental illness, Gindorf was able to discern right from wrong and conform her conduct to the requirements of the law.<sup>145</sup> Illinois, the state of Gindorf's trial, followed the Model Penal Code at the time, so Gindorf was not considered mentally insane under this two-component test.<sup>146</sup> Accordingly, Gindorf was found guilty but mentally ill and was sentenced to the mandatory term of natural life in prison.<sup>147</sup>

Since Gindorf's trial, many independent psychology experts have reviewed her case and determined that Gindorf was suffering from postpartum psychosis at the time of her crime and attempted suicide.<sup>148</sup>

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Ginny Skalski, *Woman Who Killed her Children Seeks Clemency*, NW INDIANA TIMES (Apr. 26, 2004), [https://www.nwitimes.com/article\\_d8af7747-1287-5ec9-9592-871aea1b1f09.html](https://www.nwitimes.com/article_d8af7747-1287-5ec9-9592-871aea1b1f09.html).

<sup>142</sup> *Id.*

<sup>143</sup> 512 N.E.2d 770 (Ill. App. Ct. 1987).

<sup>144</sup> See Skalski, *supra* note 141.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> Sara Olkon, *Postpartum Case Gives Jailed Moms Hope*, CHI. TRIBUNE (May 12, 2009),

Witness testimony from the time immediately before the crime also supports this diagnosis.<sup>149</sup> Neighbors commented that Gindorf appeared to be depressed shortly before her son's, Jason, birth.<sup>150</sup> Additionally, her neighbors noticed two months before the murders that Gindorf's depression worsened significantly after Jason's birth, noting that Gindorf isolated herself and no longer wanted to spend time with her children.<sup>151</sup> The neighbor's testimonies coincide with recent research on postpartum psychosis, which suggests that women with postpartum psychosis are most at risk of harming their children within the first few months after birth.<sup>152</sup>

Despite the mounting evidence that Gindorf was suffering from a mental illness, most likely postpartum psychosis at the time of her crimes, she was sentenced to life in prison.<sup>153</sup> The court was allowed to impose this harsh sentence on her because a defendant found guilty but mentally ill is not relieved of criminal responsibility.<sup>154</sup> This premise is based on the premise that a defendant who is found guilty but mentally ill is no less culpable for the charged offense than a defendant who commits the same crime and does not have a mental illness.<sup>155</sup> Nevertheless, a defendant who is found guilty but mentally ill may also require psychiatric treatment in addition to their imprisonment.<sup>156</sup>

Simply put, the verdict of guilty but mentally ill violates several bedrock principles of American criminal law. Most importantly, it is a central tenet to the U.S. criminal justice system that a person who intentionally and willingly commits a crime should be held accountable. On the other hand, a person who commits a crime involuntarily, as a result of mental illness, is not culpable.<sup>157</sup> However, the verdict of guilty but mentally ill does not distinguish between the two categories of defendants, which results in both the mentally sane and the mentally ill defendants being subjected to the same criminal sentences.<sup>158</sup> Specifically, during Gindorf's sentencing, the judge relied heavily on lay witness testimony to conclude that Gindorf "did not exhibit qualities of an insane person to

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<https://www.chicagotribune.com/news/ct-xpm-2009-05-12-0905110463-story.html>.

<sup>149</sup> *Id.*

<sup>150</sup> *People v. Gindorf*, 512 N.E.2d 770, 773 (Ill. App. Ct. 1987).

<sup>151</sup> *Id.*

<sup>152</sup> Velma Dobson, *The Science of Infanticide and Mental Illness*, 6 PSYCH. PUB. POL'Y AND L. 1098, 1102 (2000).

<sup>153</sup> *See* Olkon, *supra* note 148.

<sup>154</sup> *See* Jacewicz, *supra* note 129.

<sup>155</sup> *Gindorf*, 512 N.E.2d at 782.

<sup>156</sup> *See* Jacewicz, *supra* note 129.

<sup>157</sup> *See generally* Michele Connell, Note, *The Postpartum Psychosis Defense and Feminism: More or Less Justice for Women?*, 53 CASE W. RES. 143, 146-47 (2002).

<sup>158</sup> *Id.* at 166 n. 153.

those who came into contact with her days before the incident.”<sup>159</sup> Nevertheless, the trial court concluded that Gindorf was “suffering from a mental disorder, in that she had a substantial disorder of thought, mood, and behavior, which affected her at the time of the incident . . . .”<sup>160</sup> The glaring contraction between the trial court’s finding Gindorf mentally ill and her life-term sentence are only possible through the existence of the guilty but mentally ill verdict.

## VII. CRIMINAL PROCEDURE REFORMS THAT UPHOLD AMERICAN CRIMINAL LAW DOCTRINES ON CRIMINAL CULPABILITY

*“My family said I wasn’t well and that I needed to take tablets but they never explained to me why or what that illness was . . . . No leaflets, no information, and well the attitude was quite, you know, take the tablets and do not say nothing.”*

– Anonymous Woman<sup>161</sup>

The first course of action to do justice for women suffering from postpartum depression is to abolish the guilty but criminally ill verdict. The American Bar Association’s Criminal Justice Mental Health Standards has long recommended for the guilty but mentally ill verdict to be abolished.<sup>162</sup> Indeed, prison is not the best place for these mothers to receive the medical and psychiatric treatment they desperately need. Further, the guilty but mentally ill verdict does not guarantee that the defendant will receive psychiatric care, as the prisoner’s treatment plan is left to the discretion of the local department of corrections.<sup>163</sup>

A second alternative is to create a distinct category of crimes committed by women suffering from postpartum depression or psychosis. For example, England passed the Infanticide Act of 1938.<sup>164</sup> The Act reduced the charge from murder to manslaughter for a woman who killed

<sup>159</sup> *Gindorf*, 512 N.E.2d at 778.

<sup>160</sup> *Id.* at 774-75.

<sup>161</sup> Forde et al., *supra* note 15 (a new mother suffering from postpartum depression describes her experiences with medical professions, who did not explain her postpartum depression to her, and her resulting feelings of powerlessness and shame).

<sup>162</sup> See generally *Criminal Justice Standards on Mental Health*, ABA (Aug. 8, 2016), [https://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/mental\\_health\\_standards\\_2016.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/mental_health_standards_2016.authcheckdam.pdf).

<sup>163</sup> Connell, *supra* note 157, at 166 n. 153.

<sup>164</sup> The Infanticide Act (Statutes in Force—Criminal Law: 39:4-1 (1938)) [hereinafter “The Infanticide Act”].

her infant under the age of one “if the balance of her mind was disturbed by reason of her not fully covered from the effect of giving birth to a child or by reason of the effect of lactation.”<sup>165</sup> Instead, she would be charged with infanticide and sentenced as if she was guilty of manslaughter.<sup>166</sup> Theoretically, the murder offense’s downgrading was based on the concepts of puerperal and lactational insanity.<sup>167</sup>

In addition to England, Austria, Australia, Canada, and New Zealand have also adopted similar statutes.<sup>168</sup> In Australia, a discretionary sentence for women who become “temporarily deranged” due to the effect of childbirth may offer a humane means of dealing with the problem of filicide.<sup>169</sup> In the same way, Canadian criminal law treats a homicidal mother as a more significant threat to herself than to others, so they are more likely to recommend mental health treatment.<sup>170</sup> Accordingly, women who commit infanticide in these countries often receive only probation or referral to mental health treatment rather than incarceration.<sup>171</sup> The fact that the aforementioned countries have enacted similar statutes demonstrates that there would be some legal precedent for the U.S. adopting a similar statute and proves that postpartum psychosis is not solely endemic to American mothers.

Indeed, one clear advantage of the Infanticide Act is that the Act specifically carves out a place in the law for mothers. Nevertheless, enactment of the Act may lead to illogical and inconsistent punishments for filicide offenders. Most notably, the legislation does not require that the mother have a formally diagnosed mental illness.<sup>172</sup> Under this legal scheme, a nondepressed and nonpsychotic mother who commits infanticide may be shown greater leniency than a psychotic and depressed mother who kills her fifteen-year-old child.

On the other hand, the Act may be under-inclusive because the Act is limited to child victims under one year of age.<sup>173</sup> To illustrate the importance of the filicide victim’s age in the English criminal justice system, a recent study found that the mean age of filicide victims of

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<sup>165</sup> MARGARET SPINELLI, *INFANTICIDE: PSYCHOLOGICAL AND LEGAL PERSPECTIVES ON MOTHERS WHO KILL* 185-197 (1st ed. 2003).

<sup>166</sup> See *The Infanticide Act*, *supra* note 164.

<sup>167</sup> See SPINELLI, *supra* note 165.

<sup>168</sup> *Id.*

<sup>169</sup> New South Wales Law Reform Commission, Report No. 82, *Partial Defenses to Murder Diminished Responsibility* § 2.6 (1997).

<sup>170</sup> See MEYER ET AL., *supra* note 52.

<sup>171</sup> See *id.*

<sup>172</sup> See *The Infanticide Act*, *supra* note 164.

<sup>173</sup> *Id.*

mothers found not guilty by reason of insanity was three years old.<sup>174</sup> Likewise, only one-third of filicide victims are under one-year-old.<sup>175</sup>

In addition to the aforementioned logical inconsistencies, the English Infanticide Act is not entirely consistent with American criminal law. Postpartum disorders are unique to women, so the sex-specific defense would not apply to every individual. Accordingly, some feminist scholars worry that creating a sex-specific defense will encourage sexism and promote the notion that women should not be accorded full responsibility for their actions due to the inherent weakness of the female sex.

Further, reducing the charged offense from murder to manslaughter for women who murder their children in the throes of postpartum psychosis is not entirely consistent with the aforementioned charges' requisite mental states. According to common law, murder is defined as a killing with "malice aforethought," otherwise known as an intentional murder with a malignant heart.<sup>176</sup> In contrast, manslaughter, a lesser offense than murder, can be categorized into voluntary and involuntary manslaughter.<sup>177</sup> Voluntary manslaughter is a killing committed in the "heat of passion" or upon provocation.<sup>178</sup> In contrast, involuntary manslaughter is a killing committed in the commission of a non-felonious but illegal act or a lawful act that might produce death in an unlawful manner, or without due caution and circumspection.<sup>179</sup>

Under the common law approach to murder and manslaughter, it would not be logically consistent to charge Debra Gindorf, for example, with manslaughter for her children's killings. Clearly, Gindorf was neither provoked nor did she act in the heat of passion during the crimes. Moreover, it would be absurd to describe the murder of Gindorf's children as "without due caution and circumspection." Instead, under the American common law approach, Gindorf's action would be better characterized as an intentional act with malice aforethought. Accordingly, under American criminal law, Gindorf would be charged with murder, which provides that Gindorf's only possible means of exculpation would be a finding of insanity due to her postpartum psychosis. In summary, while some may find the outcomes under the Infanticide Act to be more equitable, the Act

<sup>174</sup> Susan H. Friedman et al., *Child Murder Committed by Severely Mentally Ill Mothers: An Examination of Mothers Found Not Guilty by Reason of Insanity*, 50 J. FORENSIC SCI. 1, 4 (2005).

<sup>175</sup> Timothy Y. Mariano et al., *Toward a More Holistic Understanding of Filicide: A Multidisciplinary Analysis of 32 Years of U.S. Arrest Data*, 236 FORENSIC SCI. INT. 46, 46-53 (2014).

<sup>176</sup> Rollin Perkins, *A Re-Examination of Malice Aforethought*, 43 YALE L. J. 537, 537 (1934).

<sup>177</sup> Florida Statute §782.07 Manslaughter (2020).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

could not be adopted in the United States because it is facially inconsistent with the designated states of mental culpability for manslaughter and murder.

A third solution for the adjudication of filicide defendants that is more consistent with American criminal law would be to amend the burden of proof imposed upon defendants who plead not guilty by reason of insanity. As previously discussed, each state may choose what test, for example, the M'Naghten test or the Model Penal Code test, they apply to determine whether the defendant was "insane" during the crime. Similarly, states also decide what burden of proof to impose upon defendants who plead not guilty by reason of insanity.<sup>180</sup> The possible burdens of proof include reasonable doubt, a preponderance of the evidence, and clear and convincing evidence.<sup>181</sup> Notably, the burden imposed directly dictates how inclusive the criminal code is to the mentally ill. Because of the difficulties in proving that a mother had postpartum psychosis when she committed filicide, states should amend the requisite burden of proof for the aforementioned defendants to the reasonable doubt standard. Specifically, if the defendant raises a reasonable doubt about whether she was capable of understanding the quality of her actions and could not distinguish right from wrong at the time of the crime, a plea of not guilty by reason of insanity should be entered.

As a whole, this approach reduces the risk of convicting innocent mothers who were suffering from severe postpartum depression or psychosis when they committed filicide. As previously discussed, criminal defendants are presumed sane until proven otherwise. Notably, mothers who have given birth within the last three months are far less likely to be sane than women in general.<sup>182</sup> Accordingly, the presumption of sanity for these women is not as strong, so their burden of proof should be reduced to reasonable doubt. Equally important, this burden of proof would not eliminate the presumption of sanity for mothers who commit filicide. Instead, the presumption of sanity would still be in effect, but the defendant would have a reduced burden to rebut that presumption. Therefore, states should adopt the reasonable doubt standard for defendants who plead not guilty by reason of insanity to make the defendant's burden of proof commensurate with the all too common reality of postpartum depression and psychosis.

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<sup>180</sup> See *Kahler v. Kansas*, 140 S. Ct. 1021, 1025 (2020) (noting the different approaches taken by different states).

<sup>181</sup> See *id.*

<sup>182</sup> John Dent, *Postpartum Psychosis and the Insanity Defense*, 1989 UNIV. OF CHIC. LEGAL F. 355, 374 (1989).