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ORIGINAL ARTICLE

Infanticide and American criminal justice (1980–2018)

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Abstract

Maternal infanticide, or the murder of a child in the first year of life by its mother, is a subject both compelling and repulsive. The victim is innocent, but the perpetrator may be a victim too. In the USA, mentally ill women who commit infanticide may receive long prison sentences or even the death penalty. England, Canada, Australia, and more than 20 European countries have "infanticide laws," which provide more humane treatment and psychiatric care for mentally ill mothers who kill. One of the reasons for the sentences in the USA lies in our archaic insanity defense. In addition, the psychiatric community does not recognize perinatal illness as a formal diagnosis. Furthermore, general forensic psychiatrists who testify in the courtroom have little knowledge of perinatal illness. I suggest that it is time to invite psychiatrists and psychologists as clinicians and scientists to partner with our legal representatives in the courtroom in order to determine laws based on psychiatric facts and not conjecture. The voices of perinatal mental health advocates must continue to be heard in all courtrooms of the USA.

Keywords Infanticide · Neonaticide · Postpartum psychosis · Insanity defense

Maternal infanticide, or the murder of a child in the first year of life by its mother, is a subject both compelling and repulsive. The killing of an innocent infant elicits sorrow, anger, and horror. Yet the perpetrator of this act is often a victim too, and that recognition makes for a more paradoxical response. On the one hand is the image of a defenseless infant, killed by the person he or she depended on for survival. On the other hand is the image of a mother, insane and imprisoned for a crime unthinkable to many (Spinelli 2002, 2004).

The UK, Australia, Canada and 21 European countries have Infanticide Laws that provide treatment for mentally ill mothers who kill a child in the first year of life (Oberman 2004). In the USA, there are no such laws and sentences may include life in prison or infrequently the death penalty despite mental illness.

Postpartum Support International (PSI) was the first organization to recognize the injustice of the system in the USA. In the 1980s, Dr. Susan Hickman, board member of PSI, was the first perinatal clinician to provide expert testimony in the defense of these women in the courtroom. Jane Honickman, founder of PSI, started the first Pen Pal network for the incarcerated women.

I was privileged to consult with Dr. Hickman about my first case of infanticide before she passed away in 1997. I was introduced to the case when I received a call from Professor Channi Kumar, Head of Perinatal Psychiatry at London's Institute of Psychiatry at the Maudsley and the Royal Bethlem Hospital. Dr. Kumar asked if I would evaluate a British woman who had been incarcerated at the Riker's Island jail in Queens, New York. The woman, CD was charged with homicide for killing her baby in a Manhattan hotel. She was arrested at the Kennedy Airport security checkpoint when her dead baby was discovered under her coat. She was taking her home to London. Ironically, if CD had arrived at Heathrow Airport with her dead baby psychiatrists would have met her to escort her to a psychiatric hospital.

I hesitated to visit the notorious Riker's Island complex, but I would not refuse Dr. Kumar who had been my teacher and mentor for 10 years. I became familiar with infanticide laws in the UK during a clerkship on Dr. Kumar's mother and baby unit at the Bethlem Hospital. I knew that the UK had infanticide laws to mitigate responsibility and provide treatment for these women. I naïvely expected similar legislation in the US.

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CD was facing a sentence of life in prison. I contacted a lawyer who would take the case pro bono. Both Professors Channi Kumar and Ian Brockington came to New York to petition for CD's release. After 7 months of negotiations and court appearances, CD went home to England where she received several years of psychiatric treatment. The unfair punishment of mothers with mental illness by our court system moved me to continue in this field. Over the past 24 years, I have continued to evaluate and testify for more than 35 women who have committed infanticide.

As I reflect on the years of successes and failures in the courtroom, I would like to share my thoughts and concerns about the current state of infanticide in the US. I suggest that reasons for our contrasting views with other developed countries are the failings of both American psychiatry and the US criminal justice system.

The insanity of the insanity defense

Because psychosis does not fulfill the legal definition of insanity in the USA, the American Criminal Justice System uses tests to determine if the accused was "insane at the time of the crime," and therefore, not responsible for the offense. The test most commonly used in the USA is the M'Naghton rule, a test of cognition (M'Naghton Case, https://www.lawteacher.net/cases/r-v-m-naghten.php?vref=1).

This definition of insanity was determined in 1843 during the trial of Daniel M'Naghton, a man afflicted with paranoid schizophrenia. Queen Victoria ordered the judges of the Central Criminal Court to come up with a definition for insanity. The judges arbitrarily composed their definition that "it must be clearly proved that, at the time of committing the act, the party accused… did not know he was doing what was wrong" (M'Naghton Case, https://www.lawteacher.net/cases/r-v-m-naghten.php?vref=1). Almost 175 years later, that impromptu definition from judges without psychiatric training decides the fate of mentally ill defendants in most of the USA. To put this in perspective, in 1844, psychiatry used bloodletting to treat mental illness (Garrick 2010). Today we use medications.

The M'Naghten Rule lacks the scientific foundations that psychiatry has achieved in the past centuries. The fact that psychiatric experts in the courtroom must attempt to assign reason to a state of irrationality is problematic. How can a psychotic person whose illness alters the ability to reason be held to a cognitive standard of "right or wrong" when the person's ill mind cannot function at this level of reason? How can justice be served by applying logic to the inherently illogical state of psychosis? Can we, should we, use the 175-year-old M'Naghten test based on "cognition" if cognitive impairment is associated with psychosis (Wisner et al. 1994, Lewandowski et al. 2011)? Can nineteenth-century law meet the standards of twenty-first-century neuroscience?

Perhaps the most notable case of infanticide and filicide that demonstrates the unfortunate use of M'Naghton occurred In June 2001 (Spinelli 2004). During an episode of postpartum psychosis, Andrea Yates felt the presence of Satan directing her to drown her children in the bathtub of her Houston, Texas home. Satan dictated that drowning them was the only way to save them from the fires of hell. If she ended their lives, they would go to heaven. It makes sense that any good mother would want to save her children from endless pain and suffering. With this fundamental understanding, she prepared them for their journey to heaven by placing them according to age—each one's arm around the younger for protection.

Ms. Yates was tried for capital murder with the possibility of the death penalty. In the case of Andrea Yates, the expert psychiatric witness for the prosecution testified that she knew right from wrong at the time of her crime. The forensic psychiatric expert for the defense suggested that she knew that she was "morally" right to save her children when she was psychotic, but "legally" wrong because she knew that the law said it was wrong. Although her decision at the time was based on Satan's instructions, the jury was left to interpret and decided that she knew what she was doing was wrong! Despite a serious psychosis, she was found "not insane," but guilty of homicide and sentenced to life in prison. Because of erroneous testimony by the prosecution's expert witness, the conviction was appealed and reversed 5 years later. In a new trial, she was found "not guilty by reason of insanity," and remanded to a forensic psychiatric facility.

The M'Naghton test of "right and wrong" begs scientific inquiry. The statute presumes that the subjective reality of psychosis is the same as our reality by applying logic to the illogical state of the defendant's insanity. Furthermore, contemporary psychiatric literature describes cognitive impairment associated with psychotic states (Lewandowski et al. 2011). Was each psychiatrist able to unravel the network of her psychotic thoughts in order to assemble reasonable but opposite conclusions? Were her cognitive abilities such that she could apply reason to her decision?

Adding insult to scientific injury, the "Deific Decree" provides an exception to the "right or wrong" rule in the USA (Leong 2008). If the defendant does not pass the M'Naghton test, but was directed by God to commit the crime, she is not guilty. Under this doctrine derived from People vs. Schmidt in 1915, Justice Benjamin Cordoza created the "Deific Decree" exception that "if ... there is an insane delusion that God has appeared to the defendant and ordained the commission of a crime, ... it cannot be said of the offender that he knows the act to be wrong." The defendant is, therefore, not guilty by reason of insanity.

In 2001, when Andrea Yates's command to drown her children came from Satan, it was concluded that she was sane because anyone who follows Satan's commands knows that it is wrong. In 2004, when Deana Laney was commanded by God to stone her children to death, she was found not guilty by reason of insanity. Despite the fact that both cases were tried in the same county of Tyler, Texas, and were represented by the same psychiatric experts for the prosecution and defense, Laney was found not guilty by reason of insanity and remanded to a psychiatric hospital while Andrea Yates was found guilty of murder. More than100 years of the Deific Decree doctrine begs the question, " Can we separate the insane from the sane by whether or not the neurochemicals in their brain speak to them through God or Satan?"

Diagnosis and the DSM V

The fact that there are no formal DSM diagnostic criteria for postpartum psychosis is a fault of psychiatry. The diagnosis of postpartum disorder (Psychosis with Childbirth) was included in the second edition of the 1968 Diagnostic and Statistical Manual of Mental Disorders, Second Edition (DSM-II) (APA 1968). It was not mentioned in the 1980 publication of the DSM-III (APA 1980) or the 1987 publication of the DSM-III-R (APA 1987). The word postpartum was stricken from the official psychiatric nomenclature of the DSM for 14 years (1980–1994), creating a generation of American psychiatrists who disregarded the existence of perinatal mental illness (Spinelli 2016).

During that time, American medical school curriculums did not include perinatal psychiatric illness. I was a fourth-year medical student in 1987. If I wanted education and training in perinatal psychiatry, I had to go abroad. I went to London to be trained by Dr. Kumar.

Recent editions of the DSM (DSM-IV and DSM-5) (APA 1994, 2013) continue to deny a formal diagnostic classification for postpartum disorders. The specifier "peripartum onset" may be added to other diagnoses if the onset occurs during pregnancy or within the first 4 weeks of childbirth.

The fact that postpartum psychosis is denied the status of "diagnosis" in psychiatry is an injustice that weakens its diagnostic credibility in the criminal court for mentally ill women. When a Bronx District Attorney used the fact that postpartum psychosis is not a formal DSM-5 diagnosis to discredit my testimony, I realized the high cost of such an omission. Postpartum psychosis is a rare and serious illness that remains unsanctioned despite the complicated clinical presentation that at times may distinguish it from non-postpartum psychosis (Sit et al. 2006).

Furthermore, the absence of formal diagnostic criteria for psychosis flies in the face of biology. It disregards the neurohormonal triggering factors of childbirth. It discounts recent findings such as a dysregulation of the immune system (Bergink et al. 2013) and genetic similarities (Jones and Craddock 2007) in bipolar women with postpartum psychosis.

In my recent case of infanticide, Lisette Bamenga, a New York City public school teacher, was arrested for killing her 6-month-old baby Violette and her 3-year-old son Kenny. When I met with Ms. Bamenga in prison, she described the vision and voices that she experienced on the day that she killed her children. Ms. Bamenga had undiagnosed and untreated bipolar disorder since adolescence and she was psychotic at the time she killed her children. Although the population rate of postpartum psychosis is 1–2/1000, it increases to 30% in bipolar women without a family history of postpartum psychosis and 74% in women with a first-degree relative with postpartum psychosis (Robertson et al. 2005). Ms. Bamenga's grandmother had a postpartum psychosis and attempted to throw her infant out of the window.

Another common problem in these cases is the testimony of the expert psychiatric witnesses for the prosecution. In Ms. Bamenga's case, he was a forensic psychologist whose primary role as a psychologist was performing forensic evaluations and testifying in court. He did not have a clinical practice and had no experience in perinatal psychiatry. He normalized Ms. Bamenga's bipolar diagnosis by labeling her hypomanic episodes as "seasonal mood disorder" despite classic bipolar symptoms and severe postpartum onset. He described her psychotic symptoms as dissociation and had no knowledge of the clinical manifestations of postpartum psychosis (Spinelli 2016).

In the US court, the Daubert Standard is a rule that demands that the expert be knowledgeable enough to provide scientific testimony that is based on reasoning or methodology that is scientifically valid and can properly be applied to the facts at issue (Shapiro et al. 2015). Forensic psychiatrists who testify for the prosecution should have reasonable training in perinatal psychiatry and have knowledge of the contemporary perinatal literature.

A thoughtful trial judge found Ms. Bamenga guilty of the lesser charge of manslaughter due to her psychosis. During the month between the verdict and sentencing, Justice Martin Marcus accepted letters with requests for leniency. I remain grateful to the 50 friends and colleagues from around the world, members of Postpartum Support International, and The Marce Society who wrote letters. Excerpts from letters to Judge Marcus provided current understanding of perinatal psychiatry. They asked that Judge Marcus "consider this severe form of postpartum illness in the sentencing recommendation…" "Facilitate her receiving optimum treatment and thereby set a critically important precedent for treating, rather than incarcerating, these women in the US." Another psychiatrist wrote, "I respectfully ask you….to consider that she is a patient with a treatable illness rather than a criminal." Justice Marcus held the letters as he spoke

to Ms. Bamenga from the bench and sentenced her to 8 years in prison, of which four had already been served. The membership of PSI and Marce made a considerable change in Ms. Bamenga's sentencing outcome. We have demonstrated that our voices can reach the courtrooms. Although the outcome of Ms. Bamenga's case was not perfect, the court's intelligent decision represents a shift toward progress and demonstrates that the expertise of clinicians and researchers is respected in the courtroom. I remain grateful to these clinicians.

Future changes in American infanticide outcomes

The work of PSI continues to focus on these tragedies. PSI board member Dr. Susan Feingold of Illinois is congratulated for her work on a new Illinois law PA 100-0574 (www.postpartum.net/ professionals/legislation/, 2018). With this law, Illinois has made history. The new law is the first in the nation to recognize postpartum illnesses as a mitigating factor in sentencing for crimes committed when women are suffering from postpartum depression and postpartum psychosis.

PSI has organized a comprehensive Legal Task Force of interested members to prioritize infanticide as a distinct problem area that must be addressed. The projects addressed include compiling a list of US Attorneys interested in education on defense of maternal infanticide cases, continuing legal education on maternal infanticide and creating an infanticide tool kit for attorneys as first responders. The task force will provide education for mental health providers as expert witnesses, create an expert witness list and create a best practices protocol when encountering infanticide. PSI will continue to provide legislative advocacy.

My hope is that forensic psychiatrists challenge the court on M'Naghton case law, which does not meet standards of contemporary neuroscience. The courts should be encouraged to fulfill the Daubert Standard accepting only experts with true knowledge and experience in perinatal psychiatry.

In order to address the DSM diagnostic criteria, perinatal psychiatrists must organize a workforce group for the next edition of the DSM. The group should bring the peer-reviewed literature to the forefront of the psychiatric community and support formal criteria for a diagnosis of postpartum psychosis and other perinatal disorders.

Over the past years, we as individual perinatal clinicians have attempted to make changes as each case of infanticide is presented in the courtroom. In my own experience I have found that teaching judges and juries about the biological and scientific foundations of postpartum psychosis has been successful. Our peer-reviewed literature has described the neurohormonal implications of the postpartum period as a major cause of psychosis for some women. Use the courtroom as a classroom. Take the mystery out of psychiatric testimony.

Many attorneys have said that the 1843 M'Naghton test cannot be changed because "case law" cannot be altered. Why are scientific facts supported in psychiatry, but not in our legal system? Perhaps it is time to invite psychiatrists and psychologists as clinicians and scientists to partner with our legal representatives in the courtroom in order to determine laws based on psychiatric facts and not conjecture. The voices of perinatal mental health advocates must continue to be heard in all courtrooms of the USA.

Compliance with ethical standards

Conflict of interest Author declare that they have no conflicts of interest.

Ethical approval The article does not contain studies with human participants or animals performed by any authors.

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