Journal of Criminal Law and Criminology

Volume 93
Issue 2 *Winter*

Article 6

Winter 2003

Beyond Accommodation: Reconstructing the Insanity Defense to Provide an Adequate Remedy for Postpartum Psychotic Women

Jessie Manchester

0091-4169/03/9302-0713
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 93, Nos. 2-3
Printed in U.S.A.

BEYOND ACCOMMODATION: RECONSTRUCTING THE INSANITY DEFENSE TO PROVIDE AN ADEQUATE REMEDY FOR POSTPARTUM PSYCHOTIC WOMEN

JESSIE MANCHESTER*

I. INTRODUCTION

Victorian psychologist Dr. Henry Maudsley wrote in 1892 when questioning why mothers kill their children: "[a] mother, worn down by anxiety and ill-health," can become "very low-spirited and desponding" and "imagin[ing] perhaps that her soul is lost, or that her family are coming to poverty," might "one day, in a paroxysm of despair, kill[] her children in order to save them from misery on earth, or because she is so miserable that she knows not what she does."[1]

On the morning of June 20, 2001 Andrea Pia Yates was feeding her children cereal for breakfast when her husband Rusty left for work in Clearwater, Texas.[2] However, the morning was hardly typical, as Yates drowned her five children in the family bathtub and then calmly called the police and her husband to tell them that something was wrong with the children.[3] As she drank a Diet Coke, Yates told

---

* Candidate for Juris Doctor, Northwestern University School of Law, 2003.

[1] HENRY MAUDSLEY, RESPONSIBILITY IN MENTAL DISEASE 187 (5th ed. 1892). *See generally* Trevor Howard Turner, *Henry Maudsley*, *in* THE DICTIONARY OF NATIONAL BIOGRAPHY: MISSING PERSONS 453-54 (C.S. Nicholls ed., 1993). Dr. Maudsley was well known for his lunacy work in England. He published many articles on mental health and was well known for his lectures. *Id.* at 453. He also was the joint editor of the *Journal of Mental Science* from 1863 to 1878. *Id.* In 1907, Maudsley contributed 30,000 pounds to establish a hospital to treat early mental illness, which resulted in the 1914 foundation of the Maudsley hospital (that still exists today). *Id.*

[2] Transcript of Andrea Yates's Police Interview (June 20, 2001), HOUS. CHRON., Feb. 22, 2002 at A 34.

[3] Timothy Roche, *The Yates Odyssey: Andrea Yates Wanted Lots of Kids and a Solid Family Life but Lost It All One Murderous Morning. As Her Trial Begins, the Defense Will Try to Prove She is Insane. But that Begs the Question: Could the Tragedy Have Been*

police officers who arrived at her house that her children were not "developing correctly" and that she had "not been a good mother to them."[4] Perhaps, as Dr. Maudsley phrased it, Yates had become "so miserable that she knows not what she does,"[5] as is suggested from Yates' substantial mental illness history.[6] Since 1999, Yates had been hospitalized four times, attempted suicide twice, and her doctor for a time had prescribed Haldol, a medication designed to control hallucinations and other psychotic symptoms.[7]

The media onslaught surrounding the Yates case is typical of American press coverage involving mothers who kill their children.[8] Unlike almost any other criminal defendants, mothers who murder their children evoke sympathy, confusion, and abhorrence.[9] Society is torn between wanting to protect the helpless child and recognizing that perhaps the very act of child murder suggests that the mother was severely ill or demented and therefore deserving of sympathetic sentencing.[10] In modern American society, childcare and other household tasks, still remain ultimately the woman's responsibility.[11] Thus, when mothers kill children, the women's typical role as child nurturers and primary child care givers is contradicted and chal-

---

Averted?, TIME, Jan. 28, 2002, at 44, 50. On June 20, Andrea "called 911 and then her husband," Rusty. *Id.* She told her husband, "It's time. I finally did it," and hung up the phone asking him to come home. *Id.* Rusty Yates called back to ask Andrea what was wrong and she told him that, "It's the kids." *Id.* When Rusty asked which one, Andrea replied all five. *Id.*

[4] *Id.* at 50; *see also* Brad Hunter, *Devil' Drove Mom to Murder*, N.Y. POST, Jan. 21, 2002, at 9.

[5] MAUDSLEY, *supra* note 1, at 187.

[6] *See* Anne Belli Gesalman, *Signs of a Family Feud: The Trial of Andrea Yates Tests the Insanity Defense as Relatives Try to Cope with an 'Unspeakable' Crime,* NEWSWEEK, Jan. 21, 2002, at 41, 41. Yates had a history of severe emotional distress, postpartum depression and postpartum psychosis. *Id.*

[7] *Id.* Yates also believed she was possessed by the devil. Roche, *supra* note 3, at 50. After she was arrested, she told doctors that she wanted her head shaved with the numbers 666 across her scalp. *Id.* at 50. Since her arrest, however, she has been put back onto Haldol and other the antipsychotic drugs, and has told her husband Rusty Yates that, "It's like a fog being lifted." *Id.*

[8] *See, e.g.*, Michelle Oberman, *Mothers Who Kill: Coming to Terms with Modern American Infanticide*, 34 AM. CRIM. L. REV. 1, 2-5 (1996).

[9] *Id.*

[10] Oberman points out that there is great ambivalence in American society and other cultures as to how to punish infanticide offenders and that "[r]egardless of whether one is inclined for or against sympathy for women who kill their children, there are dangers inherent in this unarticulated impulse to exceptionalize infanticide." *Id.* at 49.

[11] ARLIE HOCHSCHILD, THE SECOND SHIFT 3-4 (1989).

lenged.[12] Societal ambivalence towards mothers who kill is reflected in the disparate sentencing of maternal infanticide offenders, ranging from the death penalty to more lenient sentences of one to two years in prison.[13]

A number of other countries have passed infanticide statutes that mandate consideration of a woman's mental state in infant murder cases that occur within a year after a woman gave birth.[14] But American courts have not adopted similar statutes.[15] In all states, mothers who kill their children are prosecuted under homicide statutes.[16] Many researchers have pointed out the inconsistency in the American courts in responding to infanticides, and some have suggested statutory reform similar to those statutes adopted in other countries.[17] In the United States, courts continue to evaluate postpartum depression defenses and other mental illnesses under the existing insanity defense.[18] The prevailing insanity defense test[19] applied across United States jurisdictions is extremely narrow and makes proving legal insanity exceptionally difficult for even the most severely postpartum psychotic women.[20] Therefore, the Yates case is most significant because it demonstrates the pressing need for insan-

---

[12] *See generally* VERTA TAYLOR, ROCK-A-BY-BABY: FEMINISM SELF-HELP AND POSTPARTUM DEPRESSION (1996).

[13] *See, e.g.*, State v. Hopfer, 679 N.E.2d 321 (Ohio Ct. App. 1996) (seventeen-year-old Hopfer was sentenced to fifteen years to life for placing her newborn infant in a trashcan); Laura Reece, Comment, *Mothers Who Kill: Postpartum Disorders and Criminal Infanticide*, 38 UCLA L. REV. 699, 700-02 (1991) (citing Nancy Zeldis, *Post-Partum Psychosis—A Rare Insanity Defense*, N.Y.L.J., Sept. 19, 1988, at 1, col. 1-2, col. 3) (pediatric nurse Ann Green was acquitted by reason of insanity in 1988 of two counts of second degree murder and one count of attempted murder for suffocating two of her infants and attempting to kill the third).

[14] *See* Oberman, *supra* note 8, at 18 (provides list of countries that have infanticide statutes); England, for example, enacted an infanticide statute in 1922 and 1938 that automatically reduces the charge from murder to manslaughter if a woman kills a child within a year of birth. *See id at 15; infra* note 150.

[15] Diane Jennings, *Accused Mother's Defenses Limited: Mental State Tough to Show in Court*, DALLAS MORNING NEWS, June 24, 2001 at 1A.

[16] Oberman, *supra* note 8, at 20.

[17] ANIA WILCZYNSKI, CHILD HOMICIDE 163 (1997).

[18] *See generally* MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE (1994).

[19] *See infra* notes 167-229 and accompanying text (detailed discussion of the insanity defense test implemented in the United States).

[20] See, for example, CHERYL L. MEYER & MICHELLE OBERMAN, MOTHERS WHO KILL THEIR CHILDREN: UNDERSTANDING THE ACTS OF MOMS FROM SUSAN SMITH TO THE "PROM MOM" 70-72 (2001), for a general discussion of why the existing insanity defense test is difficult for some postpartum psychotic women to meet.

ity defense reform to address the realities of postpartum psychosis and other mental illnesses.[21]

Most state jurisdictions currently use a version of the narrow *M'Naghten* insanity test[22] developed under English common law in 1843 to assess whether defendants have met the burden of establishing a complete insanity defense to murder.[23] Despite extensive criticism of the *M'Naghten* test and state attempts at reform, most states reverted back to a narrow insanity defense in the aftermath of John Hinckley, Jr.'s acquittal for reason of insanity after he attempted to assassinate President Ronald Reagan.[24]

Some scholars have suggested that a statutory remedy is necessary to address the unique circumstances typically surrounding infanticide crimes.[25] However, a gender-specific, carve-out exception to promote consistent sentencing of infanticide offenders is unnecessary and could potentially perpetuate inequality for women.[26] A statutory remedy in infanticide cases would generalize female offenders based upon assumed mental incapacity after childbirth and would ignore re-

---

[21] Assessing the application of the insanity defense to all mentally ill defendants is beyond the scope of this article. This article focuses specifically on the application of the insanity defense to postpartum psychotic women. For a general discussion of the insanity defenses' inadequate application to all, see Sally Villareal, *When Dealing with Mentally Disturbed, Courts should Take Defendant's Illness Into Account*, THE DAILY U. STAR [SW. TEX. ST. U.], Jan. 30, 2002, *available at* http://www.universitystar.com/02/01/30/viewpoints.html (last checked April 13, 2003); *see generally* Brian E. Elkins, *Idaho's Repeal of the Insanity Defense?: What are We Trying to Prove*, 31 IDAHO L. REV. 151 (1994).

[22] The *M'Naghten* test provides "that to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from 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 he was doing what was wrong." M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843). See *infra* notes 104-26 and accompanying text, for a detailed discussion of the *M'Naghten* rules.

[23] RITA J. SIMON & DAVID E. AARONSON, THE INSANITY DEFENSE: A CRITICAL ASSESSMENT OF LAW AND POLICY IN THE POST-HINCKLEY ERA 49 (1988).

[24] PERLIN, *supra* note 18, at 27.

[25] *See, e.g.*, Sandy Meng Shan Liu, Comment, *Postpartum Psychosis: A Legitimate Defense for Negating Criminal Responsibility?*, 4 SCHOLAR 339, 389 (2002). The author argues that "a statute must be created to treat infanticide cases and postpartum psychosis on the basis of an explicit justification and consider factors involving individual blameworthiness on a case-by-case basis." *Id. See, e.g., also* Amy L. Nelson, *Postpartum Psychosis: A New Defense?*, Comment, 95 DICK. L. REV. 625 (1991). Nelson suggests that, because varying insanity statutes result in inconsistent results in similar infanticide cases, "it is necessary to address postpartum psychosis separately" and perhaps create a separate statute. *Id.* at 650.

[26] For a general discussion of gender inequality in the law, see, for example, Dorothy Roberts, *The Meaning of Gender Equality in Criminal Law*, 85 J. CRIM. L. & CRIMINOLOGY 1 (1994); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987).

cent scholarship that has suggested that there are as many as five distinct motives why women kill their children.[27]

This comment argues that the best solution for ensuring that postpartum psychotic women can adequately present evidence of their mental illness is for states to return to a broader insanity test.[28] A broader insanity test would allow the judges and the jury greater leeway in assessing whether women diagnosed with postpartum psychosis meet the statutory requirements of the state's homicide laws.[29] Returning to an insanity defense test based on the American Law Institute (ALI) test developed in 1962[30] would create a more flexible means for assessing the culpability of postpartum psychotic infanticide offenders.[31] This comment asserts that there are three main reasons why United States jurisdictions should return to a version of the ALI insanity test.[32] First, the *M'Naghten* test for legal insanity is antiquated and does not reflect modern understanding of human psychiatry.[33] The *M'Naghten* test is particularly obsolete when applied to postpartum psychotic women, because the test was developed

---

[27] *See* MEYER & OBERMAN, *supra* note 20, at 36-38.

[28] A broader insanity test would provide a more flexible standard. Many scholars who have assessed the criminal law when applied to female offenders have argued that flexible standards will most effectively incorporate the needs of female offenders. *See, e.g.*, Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151 (1995).

[29] Since most states reverted back to a version of the *M'Naghten* rules after the Hinckley acquittal in 1982, various state reports have noted the detriment of constructing a narrower defense. The state of Maryland conducted a study (the Perkins study) which found that eliminating the volitional prong from the insanity defense could exclude a "class of psychotic patients whose illness is clearest in symptomatology, most likely biologic in origin, most eminently treatable and potentially most disruptive in penal detention." GOVERNOR'S TASK FORCE TO REVIEW THE DEF. OF INSANITY, EXECUTIVE DEP'T, STATE OF MD., REPORT OF THE GOVERNOR'S TASK FORCE TO REVIEW THE DEFENSE OF INSANITY 25 (1983). For a detailed discussion of the volitional prong of the insanity test, see *infra* notes 184-89 and accompanying text.

[30] Many states enacted a version of the ALI test prior to the Hinckley acquittal in 1982. *See* John L. Diamond, *An Ideological Approach to Excuse in Criminal Law*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 9 (1999). The American Law Institute's Model Penal Code provides: "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 either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law." MODEL PENAL CODE § 4.01(1) (1985).

[31] *See* Reece, *supra* note 13, at 756. She notes that postpartum psychosis may fit a cognitive or volitional insanity standard, but that broad interpretations of these standards are potential "measures to adapt the criminal homicide law itself to the perspective of women." *Id.*

[32] See *infra* notes 229-339 and accompanying text for a detailed discussion of these arguments.

[33] *See infra* notes 229-46 and accompanying text.

within Victorian England when women's status within the law was vastly different than today.[34] Second, the test is too narrow because it confines the legal insanity test to a consideration of whether the individual knew the difference between right or wrong and not other aspects of mental illness that are equally relevant.[35] Finally, the failure of United States jurisdictions to adopt an insanity test that incorporates postpartum psychotic women reflects the criminal justice system's perpetual inability to accommodate female criminal offenders.[36]

Part II of this comment provides the historical background of infanticide and traces the development of postpartum depression research.[37] Part III analyzes the development of the insanity defense in the United States and the original *M'Naghten* case on which this test was modeled.[38] This section also assesses the status of women in Victorian England and indicates why the *M'Naghten* standard is obsolete when applied today.[39] Finally, Part IV explains why the insanity defense test should be broadened and looks at specific postpartum psychotic infanticide cases that illustrate the *M'Naghten* test's insufficiency.[40]

II. BACKGROUND

A. POSTPARTUM DEPRESSION OVERVIEW

Understanding why the current insanity defense is too narrow to adequately incorporate postpartum depression defenses requires a basic understanding of the mental illness known as postpartum depression.[41] Moreover, recent research supports the assertion that the

---

[34] *See* JOAN PERKIN, VICTORIAN WOMEN 73-74 (1993).

[35] *See infra* notes 247-58 and accompanying text.

[36] Feminists have argued that the law is inherently unequal and not accommodating to women. *See, e.g.*, Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1284 (1991) ("An account of sex inequality under law in the United States must begin with what white men have done and not done because they have created the problem and benefited from it, controlled access to addressing it, and stacked the deck against its solution.").

[37] *See infra* notes 41-101 and accompanying text.

[38] *See infra* notes 102-23 and accompanying text.

[39] For a detailed account of women's evolution in the law, see *infra* notes 124-163.

[40] *See infra* notes 227-336 and accompanying text.

[41] Since the mass media attention surrounding the Yates case and similar trials, many news articles and websites have suggested ways for women who believe they are suffering from postpartum depression to find help. For example, one such way is through the internet,

clinical aspects of postpartum depression, particularly seen in postpartum psychosis cases, may help to explain why women kill their children in some cases, and that these conditions could potentially serve to mitigate sentences in infanticide cases.[42] Depressive symptoms relating to childbirth occurred as early as the fourth century B.C., when Hippocrates described a "severe case of insomnia and restlessness that began on the sixth day in a woman who bore twins."[43] However, the documentation of postpartum depression only escalated during the last ten years.[44] Researchers separate postpartum depression into three different categories during the postpartum period in relation to the degree of the women's symptoms, including postpartum blues, postpartum depression, and postpartum psychosis.[45]

Women experience postpartum blues most frequently.[46] Studies have estimated that approximately 25% to 85% of women have experienced postpartum blues symptoms, including irritability, diminished appetite, crying, mood swings, anxiety, and disorientation, sometime during the first two weeks after giving birth.[47] The number of women diagnosed with postpartum blues, however, ranges between 26% to 85%, depending upon the standards used in diagnosis.[48] Postpartum blues typically begin "within a few days of delivery and last from a few hours to a few days," but rarely continue past twelve days.[49]

The second category is postpartum depression, a "clinical depression occurring during the weeks and months following childbirth."[50] Psychiatrists diagnose postpartum depression according to

---

such as at the Depression after Delivery website, *available at* http://www.depressionafterdelivery.com.

[42] Velma Dobson & Bruce Sales, *The Science of Infanticide and Mental Illness*, 6 PSYCHOL. PUB. POL'Y & L. 1098, 1109 (2000).

[43] *See* SHARON L. ROAN, POSTPARTUM DEPRESSION: EVERY WOMAN'S GUIDE TO DIAGNOSIS, TREATMENT & PREVENTION 24 (1997), *quoted in* Michael J. Davidson, *Feminine Hormonal Defenses: Premenstrual Syndrome and Postpartum Psychosis*, 2000 ARMY LAW. 5, 9 n.63 (2000).

[44] Julie Deardorff, *A 2nd Look at a Mother's Crime; A Woman Who Says Postpartum Depression Moved Her to Kill Her Children in 1985 Gains Support as She Fights for Clemency*, CHI. TRIB., June 24, 2001, at A1.

[45] Dobson & Sales, *supra* note 42, at 1104.

[46] *Id.* (citations omitted).

[47] *Id.* (citations omitted).

[48] MICHAEL O'HARA, POSTPARTUM DEPRESSION: CAUSES AND CONSEQUENCES 10 (1995).

[49] Dobson & Sales, *supra* note 42, at 1104.

[50] *Id.* at 1105.

standard mental health criteria or the Diagnostic and Statistical Manual of Mental Disorders (DSM IV).[51] Postpartum depression is characterized by "loss of interest in usually pleasurable activities, loss of appetite, sleep disturbance, fatigue, difficulties in making decisions, excessive guilt, and suicidal thoughts."[52] Researchers have estimated that as many as 5% to 20% of women experience postpartum depression after childbirth, and it usually emerges within the first six months after giving birth.[53] Other studies have further defined the symptoms as including anxiety and nervousness, compulsive thoughts, an inability to concentrate, "loss of interest in sexual activities, and an absence of feelings for the baby."[54]

A very small percentage of the women who develop postpartum depression will experience postpartum psychosis, the most severe of the three categories.[55] Approximately 0.2% of childbearing women will have psychotic episodes in which they will have "hallucinations or delusions, severe depression, and thought disorder."[56] The psychosis typically emerges within the first two weeks after birth and usually requires hospitalization.[57] The rarity of postpartum psychosis is apparent from looking at the number of diagnoses during a specific year.[58] In 1992, for example, there were about 4,084,000 live births in the United States and about 40% were "complicated by a mild mood disturbance" or postpartum depression, approximately 10% of women had major depression, and 0.2 % became psychotic.[59]

The most revealing portrayal of postpartum psychosis is through personal experience narratives.[60] In 1987, for example, Dagmar Celeste gave an address at a postpartum depression conference in Columbus, Ohio in which she described a personal postpartum psychotic

---

[51] O'HARA, *supra* note 48, at 3; *see* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 386 (4th ed. 1998) [hereinafter DSM IV].

[52] Dobson & Sales, *supra* note 42, at 1105.

[53] MEYER & OBERMAN, *supra* note 20, at 77.

[54] VERTA TAYLOR, ROCK-A-BY-BABY: FEMINISM SELF-HELP AND POSTPARTUM DEPRESSION 2 (1996).

[55] MEYER & OBERMAN, *supra* note 20, at 77.

[56] Dobson & Sales, *supra* note 42, at 1106 (citations omitted).

[57] *Id.*

[58] O'HARA, *supra* note 48, at 2.

[59] *Id.* O'Hara points out that "these percentages add up to a great deal of suffering each year by women and their families."

[60] Since Andrea Yates was incarcerated after drowning her five children, the media has been flooded with personal accounts of postpartum depression. For example, the Oprah Winfrey show recently held a show entitled "what your mother never told you about motherhood; women share their experiences after childbirth." April 1, 2003 at 2003 WL 5120579.

episode.[61] On one occasion, she told the audience, while she was seated in the baby's room, "all hell broke loose."[62] She said that "the mobile above the baby's bed started to follow me around the house, and the phone began to ring . . . . My speech turned into riddles and rhymes, my body could not sit, I was terrified, and I felt like my soul was in immediate danger."[63] Celeste was subsequently diagnosed and hospitalized with postpartum psychosis after the birth of her sixth child. She had also been under extreme stress due to attempting to finish her college degree, caring for five children, and helping her husband campaign for a bid for lieutenant governor, all while pregnant with her sixth child.[64]

Verta Taylor's study between 1985 and 1989 is another example of research on postpartum depression over the last fifteen years that has increased understanding of postpartum depression causes.[65] In order to gain an understanding of the illness, she conducted interviews with fifty-two women who believed they were suffering from postpartum depression.[66] She concluded that the pressures Celeste experienced from her daily household responsibilities were potentially a contributing factor to her stress and depression.[67] The necessity of having to care for children, along with the house, marriage, and paid employment can greatly contribute to the stress of new motherhood and drastically increase the chances that a woman would experience some form of postpartum depression.[68] Other studies have also indicated that stress and disappointment relating to the lack of help women received after their baby was born could contribute to postpartum depression.[69]

---

[61] TAYLOR, *supra* note 54, at 43.

[62] *Id.*

[63] Doctors have noted that a common symptom of a woman experiencing a postpartum psychotic episode is believing her child is possessed by the devil or is some evil animal. Dr. Susan Hickman, a psychotherapist, has commented that postpartum psychotic women sometimes suffer "bizarre delusions" and might believe their children are animals. Hallye Jordan, *Couple Seeks New Laws to Deal with Postpartum Depression*, L.A. DAILY J., Mar. 21, 1988, at 2, col. 1.

[64] *See* TAYLOR, *supra* note 54, at 43.

[65] *See, e.g., id.* at 56-58.

[66] *Id.* at 11.

[67] See HOCHSCHILD, *supra* note 11, for a general discussion of women's multiple responsibilities.

[68] *See* TAYLOR, *supra* note 54, at 42-43.

[69] O'HARA, *supra* note 48, at 169 (In his study of over 200 women, he concluded that "overall, childbearing women were disappointed in the amount of support that they received from all sources after their babies were born." *Id.*).

Researchers have further examined other possible postpartum depression causal factors.[70] Some studies have suggested that hormonal shifts relating to "pregnancy, childbirth, menstruation, and menopause" are most likely the cause of postpartum depression.[71] However, the entire medical community has not recognized postpartum depression as a separate disorder, as identified by the DSM IV. In the most current edition of the DSM, published in 1998, the American Psychiatric Association (APA) incorporates postpartum qualities within the general mental illness category by indicating that some of these symptoms develop during the postpartum period.[72] Thus, although the DSM IV refers to a "postpartum onset specifier," the manual includes postpartum depression within the general "mood disorders" category by stating the symptomatology of postpartum depression does "not differ from the symptomatology in nonpostpartum mood episodes and may include psychotic features."[73] The DSM IV contains a mood disorders sections that classifies these disorders as those that "have a disturbance in mood as the predominant feature."[74] Nevertheless, psychiatrists generally believe that postpartum psychosis does not have enough unique attributes to justify a separate listing in the DSM IV.[75]

Various feminist scholars have argued against further delineation of postpartum depression in the DSM because they may "reflect culturally biased attitudes toward women" and suggest that all women experience some form of a postpartum depression after childbirth.[76] However, others have argued that one of the difficulties in having postpartum psychosis recognized as a legitimate defense to infanticide is the APA's reluctance to separately delineate the condition.[77]

While American courts have continued to grapple with the feasibility of postpartum depression as a defense to infanticide since the first woman raised this defense in 1951,[78] several postpartum depres-

---

[70] *See* Harold Winn, *Postpartum Mental Disorders*, *in* 6 GYNECOLOGY AND OBSTETRICS (John J. Sciarra ed., 1983).

[71] TAYLOR, *supra* note 54, at 29.

[72] *See* OBERMAN & MEYER, *supra* note 20, at 71; DSM IV, *supra* note 52, at 386.

[73] DSM IV, *supra* note 51, at 386.

[74] *Id.* at 317.

[75] O'HARA, *supra* note 48, at 3.

[76] TAYLOR, *supra* note 54, at 48.

[77] *See* Debora K. Dimino, *Postpartum Depression: A Defense for Mothers Who Kill Their Infants*, 30 SANTA CLARA L. REV. 231 (1990).

[78] *See* People v. Skeoch, 96 N.E.2d 473 (Ill. 1951); *see also infra* notes 265-75 and accompanying text (for a detailed discussion of this case).

sion groups and national figures have attempted to educate the public on the concept of postpartum depression.[79] Both Depression After Delivery and Postpartum Support International were established in the 1980s in reaction to medical doctors who failed to recognize postpartum depression as a tangible illness.[80] Even such an infamous figure as Princess Diana once mentioned in a 1995 television interview that she had suffered such severe "postnatal depression" that she could not get out of bed to perform her duties as "wife, mother, and princess of Wales" for several months after the birth of her children.[81] As postpartum depression research continues and more doctors recognize the nuances of this condition, American courts still lag behind in reassessing the insanity defense and its impact in postpartum psychotic cases.[82]

The typical media attention that surrounds cases where mothers kill their children suggests that infanticide cases are aberrant, but, in reality, infanticide has occurred throughout history and is pervasive across cultures for varying reasons.[83] Thus, the next section examines infanticide's roots and addresses the need for insanity defense reform as one way of addressing infanticide in modern culture.[84]

B. INFANTICIDE

While Babylonian and Chaldean records dating from approximately 4000 to 2000 B.C.[85] provide the earliest descriptions of infanticide, numerous anthropological studies have concluded that infanticide has occurred within populations all over the world for centuries.[86] One anthropologist, for instance, asserted that infanticide was the "most widely used method of population control during much

---

[79] TAYLOR, *supra* note 54, at 5.

[80] These were support groups designed to educate the women and public on the realities of postpartum depression. *Id.* at 5, 55.

[81] *Id.* at 3.

[82] For a recent study that examines the link between postpartum psychosis, infanticide, and medical perception of postpartum psychosis, see Norman J. Finkel et al., *Commonsense Judgments of Infanticide Murder, Manslaughter, Madness, or Miscellaneous?*, 6 PSYCHOL. PUB. POL'Y & L. 1113 (2000).

[83] *See* MARVIN HARRIS, CANNIBALS AND KINGS: THE ORIGINS OF CULTURES 22-23 (1977), *cited in* Susan Scrimshaw, *Infanticide in Human Populations: Societal and Individual Concerns*, *in* INFANTICIDE: COMPARATIVE AND EVOLUTIONARY PERSPECTIVES 439, 440 (Glenn Hausfater & Sarah Blaffer Hrdy eds., 1984) [hereinafter INFANTICIDE].

[84] *See infra* notes 85-101 and accompanying text.

[85] MEYER & OBERMAN, *supra* note 20, at 3.

[86] *See, e.g.*, Martin Daly & Margo Wilson, *A Sociobiological Analysis of Human Infanticide*, *in* INFANTICIDE, *supra* note 83, at 487, 490-91.

of human history."[87] Daly and Wilson have also argued that human infanticide is widespread, and that it is typically pardoned in those societies where it makes "adaptive sense" for it to occur.[88] In 1970, forensic psychiatrist Philip Resnick was the first to categorize infanticide cases based on the age when the child was killed.[89] He categorized neonaticide as the killing of an infant just after birth or very close to the time of birth, infanticide as the killing of a child up to one year old, and filicide as the killing of a son or daughter older than one year.[90] Although Resnick's methodology has been criticized as outdated and "not specifically focused on women,"[91] his classification system still provides a general guideline that assists in assessing variances between modern day infanticide, neonaticide, and filicide cases.[92]

The difference between neonaticide and infanticide is an important distinction that American courts should incorporate when sentencing and addressing mothers who kill their children.[93] Mothers who commit neonaticide, the killing of a child within twenty-four hours of birth, typically exhibit certain characteristics that separate them from other infanticide offenders.[94] Studies have documented that neonaticide offenders are often single young women who deny their pregnancy and kill their newborn infants in an effort to avoid the social and parental pressure against an illegitimate child.[95] While the concept of "neonaticide syndrome" is a legal concept and not a "psychiatric or psychological one" it articulates the view that mothers who kill their children within the first twenty-four hours of birth of-

---

[87] *See* HARRIS, *supra* note 83, at 22-23.

[88] Daly & Wilson, *supra* note 86, at 487-502.

[89] LITA LINZER SCHWARTZ & NATALIE K. ISSER, ENDANGERED CHILDREN: NEONATICIDE, INFANTICIDE, AND FILICIDE 1 (2000).

[90] *Id.*

[91] MEYER & OBERMAN, *supra* note 20, at 20.

[92] Resnick was the main psychiatrist who testified for the defense in the Yates trial. He said in testimony that Yates' psychosis made her believe that her children "were permanently and irreparably harmed and the only thing she could do to save them from eternal damnation was to take their lives." *Psychiatrist: Yates Thought She Was Saving Kids*, NEWSDAY, Mar. 6, 2002, at A15.

[93] Few neonaticide offenders are diagnosed with postpartum psychosis and are therefore out of the general realm of this comment.

[94] *See* Christine A. Fazio & Jennifer L. Comito, Note, *Rethinking the Tough Sentencing of Teenage Neonaticide Offenders in the United States*, 67 FORDHAM L. REV. 3109, 3132-33 (1999).

[95] *Id.* at 3133 (citing C. M. Green & S. V. Manohar, *Neonaticide and Hysterical Denial of Pregnancy*, 156 BRIT. J. PSYCHIATRY 121, 122 (1990)).

ten share characteristics – including denial, hiding the pregnancy, and giving birth in an "isolated setting."[96] Various studies in the 1990s documented the denial of the neonaticidal mother in more detail.[97]

The distinction between infanticide and neonaticide cases is important in examining how different jurisdictions sentence mothers who kill their children.[98] Michelle Oberman and Cheryl Meyer published the most recent study that assessed criminal cases in the United States where mothers killed their children.[99] They examined 219 cases of maternal filicide and separated the cases into five categories: "filicide related to an ignored pregnancy," "abuse-related filicide," "filicide due to neglect," "assisted/coerced filicide," and "purposeful filicide and the mother acted alone."[100] These distinctions are important because they indicate that all women who commit infanticide are not suffering from postpartum psychosis.[101]

III. INSANITY DEFENSE BACKGROUND

Although England did not codify the insanity test in the *M'Naghten* rules until 1843, various cultures have excused mentally ill individuals from criminal responsibility.[102] For example, the ancient Romans recognized a *non compos mentis* (no power of mind) concept that assisted in assessing criminal culpability.[103] And prior to codifying the *M'Naghten* rules, England had grappled with various other ways to incorporate insanity within the criminal court, including the infamous "wild beast" test.[104]

The *M'Naghten* test was developed within nineteenth century England and was eventually adopted in the United States as the basis for federal and most state insanity defense tests.[105] In 1843, Daniel

---

[96] SCHWARTZ & ISSER, *supra* note 84, at 84.

[97] *See* WILCZYNSKI, *supra* note 17, at 39, 49-52; Barbara Ehrenreich, *Where Have All the Babies Gone?*, LIFE, Jan. 1998, at 68. though assessing the sentencing for neonaticide offenders is outside the scope of this comment that focuses upon the use of insanity defense for postpartum psychotic cases, Fazio & Comito, *supra* note 94, at 3117-20, makes useful recommendations for assessing sentencing for neonaticide offenders.

[98] *See infra* notes 85-97 and accompanying text.

[99] *See* MEYER & OBERMAN, *supra* note 20.

[100] *Id.* at 36-38.

[101] *See* Finkel, *supra* note 82, at 1120.

[102] *See* Finger v. State, 27 P.3d 66, 71-72 (Nev. 2001).

[103] SCHWARTZ & ISSER, *supra* note 89, at 103.

[104] See *infra* note 306 and accompanying text for a description of the wild beast test.

[105] *See* RICHARD MORAN, KNOWING RIGHT FROM WRONG: THE INSANITY DEFENSE OF DANIEL MCNAUGHTAN 1 (1981).

M'Naghten shot Edward Drummond, the private secretary to Prime Minister Sir Robert Peel.[106] M'Naghten believed that Drummond was the prime minister.[107] Drummond died five days later and M'Naghten was charged with first-degree murder.[108] One of M'Naghten's counselors, Alexander Cockburn, argued that his client was "the victim of a fierce and fearful delusion" that made him believe that the Tories were his enemies.[109] Cockburn argued further that M'Naghten intended to kill the Prime Minister and erroneously believed that Drummond was the Prime Minister.[110] M'Naghten himself stated at his trial, "The Tories in my native city have compelled me to do this. They follow [and] persecute me wherever I go, and have entirely destroyed my peace of mind."[111] After numerous witnesses testified that he was insane, M'Naghten was eventually acquitted and sent to spend his life in a lunatic asylum.[112]

The *Times of London*, however, reported that "the assassin walked close up to Mr. Drummond, and, showing a determination not to fail in the perpetration of the foul deed which he contemplated, actually put the muzzle of the pistol into the back of the unsuspecting gentleman."[113] This interpretation suggests that M'Naghten was not suffering from a delusion, but intended to kill Drummond.

The public and the Queen of England thought the sentence of insanity was too moderate.[114] All fifteen common law judges were called to attend a hearing in the House of Lords to debate the purposes of an insanity defense and to develop a more concrete rule.[115] In a letter, Queen Victoria expressed her outrage at the lenient sentence, asserting:

---

[106] *Id.*; Linda C. Fentiman, *"Guilty but Mentally Ill": The Real Verdict is Guilty*, 26 B.C. L. REV. 601, 607 (1985).

[107] MORAN, *supra* note 105, at 1.

[108] *Id.*

[109] *The Queen against Daniel M'Naughton*, *in* 4 REPORTS OF STATE TRIALS 875 (John E. P. Wallis ed., 1892), *cited in* MORAN, *supra* note 105, at 1.

[110] Katharine Drew, *Diminished Capacity as a Result of Intoxication and Addiction: The Capacity to Mitigate Punishment and the Need for Recognition in Texas Death Penalty Litigation*, 5 TEX. WESLEYAN L. REV. 1, 11 (1998).

[111] MORAN, *supra* note 105, at 10 (citing *The Queen against Daniel M'Naghten*, *supra* note 109, at 875).

[112] *Id.* at 116.

[113] *Id.* at 7 (quoting THE TIMES OF LONDON, Jan. 21, 1843).

[114] Fentiman, *supra* note 106, at 607.

[115] *See id.*; MORAN, *supra* note 105, at 2 (citing T.C. HANSARD, *Insanity and Crime*, *in* 67 PARLIAMENTARY DEBATES 714-44 (1843)).

> The law may be perfect, but how is it that whenever a case for its application arises, it proves to be of no avail? We have seen the trials of Oxford and MacNaughtan [sic] conducted by the ablest lawyers of the day . . . and they allow and advise the Jury to pronounce the verdict of Not Guilty on account of Insanity, –whilst everybody is morally convinced that both malefactors were perfectly conscious and aware of what they did![116]

Thus, from the public and Queen's reaction in 1843, the common law judges created the *M'Naghten* rules.[117] The *M'Naghten* rules require that an individual must clearly prove that "at the time of the committing of the act," he or she was "labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act" he or she was committing, and if he or she was aware, he or she "did not know" that the act was wrong.[118]

English newspapers noted that Daniel M'Naghten's case was most likely based on a political motive.[119] The *Standard* newspaper, for example, asserted that, regardless of whether M'Naghten was sane or insane, it was the assassin's "hatred of Toryism" that made him shoot Drummond.[120] Further, the paper reported that "if McNaughtan [sic] be insane, then it is the festering of anti-Tory rhetoric in an unsound mind that led to the murder of Edward Drummond."[121] The *M'Naghten* test emerged following M'Naghten's acquittal because of pressure from the public and the Crown to make the insanity test narrower, so that in cases similar to M'Naghten's, the individual would not be so easily acquitted for reason of insanity.[122] Therefore, under the stricter *M'Naghten* rules, M'Naghten himself would most likely "be judged sane and legally culpable by the standards of the rules which bear his name."[123]

In creating the *M'Naghten* insanity test, the English court did not consider how the test would impact women. During Victorian times, women were considered subservient citizens and had relegated status within the law.[124] In 1843, stereotypes regarding women's sexuality,

---

[116] Royal Archives, A 14/8, *reprinted in* MORAN, *supra* note 105, at 21.

[117] Fentiman, *supra* note 106, at 607.

[118] M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843).

[119] *See infra* notes 123-25 and accompanying text.

[120] MORAN, *supra* note 105, at 13 (quoting STANDARD, Jan. 26, 1843, at 1 col. 6).

[121] *Id.* at 13.

[122] *Id.* at 111.

[123] *Id.* at 109.

[124] *Cf.* MacKinnon, *supra* note 36, at 1284. MacKinnon has noted that women have had "second-class citizenship" under the law throughout its development.

inferiority, and hysterical tendencies abounded.[125] According to law, when women married, their husband retained rights over the children and all of his wife's property unless they had prearranged a different agreement.[126] There were also outlandish notions regarding female sexuality, and women who expressed pleasure in sexual tendencies were deemed atypical and often viewed as potentially "insane."[127] For example, William Acton, a British expert on venereal disease, wrote in 1857 "the majority of women (happily for society) are not very much troubled with sexual feeling of any kind."[128] Acton, however, "admit [ted]" the "sexual excitement terminating even in nymphomania, a form of insanity that those accustomed to visit lunatic asylums must be fully conversant with" but noted that "with these sad exceptions, there can be no doubt that sexual feeling in the female is in the majority of cases in abeyance."[129]

Furthermore, there were very distinct theories regarding Victorian women and criminality at this time.[130] If a woman committed a crime within her husband's presence, excluding murder and high treason, "the law presumed that she was coerced by him and was therefore innocent."[131] Notably, women in Victorian England made up 17% of the daily average local and convict prison population (which is more than the amount of less than 4% of the population recorded in 1991).[132] When women were charged with crimes, their sentences and public perception were closely related to the "carefully constructed notions of ideal womanhood" that pervaded Victorian

---

[125] *See* PERKIN, *supra* note 34, at 1; LUCIA ZEDNER, WOMEN, CRIME, AND CUSTODY IN VICTORIAN ENGLAND 11 (1991). Dr. Gover, for example, a medical officer at Millbank prison, wrote a letter to the chairman of the prison commissioners Sir Edmund Du Cane that "as regards women, it is advisable as far as possible to avoid associating together those who are laboring under the same form of mental defect or disease, and this particularly applies to women who are partially or wholly imbeciles. When a number of such women are placed together, the result is, in many cases, a development of the hysterical tendency or element to a point which is injurious, and which renders the subject of it difficult of managements." ZEDNER, *supra* note 125, at 284 (citations omitted).

[126] PERKIN, *supra* note 34, at 73.

[127] *Id.* at 51-52.

[128] VICTORIAN WOMEN: A DOCUMENTARY ACCOUNT OF WOMEN'S LIVES IN NINETEENTH-CENTURY ENGLAND, FRANCE AND THE UNITED STATES 177, Erna Olafson Hellerstein et al. eds., 1981) [hereinafter VICTORIAN WOMEN] (quoting WILLIAM ACTON, THE FUNCTIONS AND DISORDERS OF THE REPRODUCTIVE ORGANS 208-12 (8th American ed. 1894)).

[129] *Id.*

[130] *See* ZEDNER, *supra* note 125, at 11.

[131] PERKIN, *supra* note 34, at 74.

[132] ZEDNER, *supra* note 125, at 1.

English society.[133] Victorians easily justified the lower number of female criminals, because it contrasted sharply with the image of the ideal Victorian woman as maternal, feminine, and morally superior.[134] Reverend W. D. Morrison, a prison chaplain of H.M. prison in Wandsworth, accounted for fewer female criminals based upon women's maternal instinct. He wrote in 1891:

> The care and nurture of children has been their lot in life for untold centuries; the duties of maternity have perpetually kept alive a certain number of unselfish instincts; these instincts have become part and parcel of woman's natural inheritance, and, as a result of possessing them to a larger extent than man, she is less disposed to crime.[135]

Morrison also noted that "it would be an infinitely superior state of things if society did not require women's work beyond the confines of the home and the primary school."[136]

New England and English cultures before and during the Victorian era had already begun to recognize infanticide and to construct remedies within the justice system.[137] English settlers to Massachusetts and Connecticut brought the crime of infanticide to New England when they settled there.[138] Even early accounts of infanticide suggested that women who killed their children were potentially suffering from postpartum depression or mental illness.[139] For example in 1638, Dorothy Talbye was hung in Boston for killing her child, and a Puritan magistrate recorded the event.[140] Although she belonged to the Church of Salem and was of "good esteem for godliness" she still found herself "falling at difference with her husband, through melancholy or spiritual delusions" and "she sometimes attempted to kill him and her children."[141] Although the magistrate's words suggested he thought she was delusional and potentially mentally ill, the magistrate made no suggestion that she should be excused from the crime or that her sentence should be mitigated.[142]

---

[133] *Id.* at 11.

[134] *Id.* at 40-41.

[135] WILLIAM DOUGLAS MORRISON, CRIME AND ITS CAUSES 152 (1891).

[136] *Id.* at 157.

[137] PETER C. HOFFER & N.E.H. HULL, MURDERING MOTHERS: INFANTICIDE IN ENGLAND AND NEW ENGLAND 1558-1803 33-35 (1981).

[138] *Id.* at 33.

[139] For a further discussion of Hoffer & Hull's study and a general development history of infanticide statutes in seventeenth and eighteenth century England and New England, see Oberman *supra* note 8, at 9-17.

[140] HOFFER & HULL, *supra* note 137, at 40.

[141] *Id.*

[142] *Id.* at 41.

At times during the colonial period in England and New England, various laws that punished women for having "bastard" children provided a motive for infanticide.[143] For example, in 1624 the English Parliament passed the "Act to Prevent the Destroying and Murdering of Bastard Children."[144] This law made it a capital offense to hide the birth of an illegitimate child.[145] In 1849, the last woman was hung in England for infanticide.[146] Since then, England constructed infanticide laws, culminating in the 1922 and 1938 (repealing and replacing the 1922 act) Infanticide Acts.[147] The English Infanticide Act of 1938 established that women who commit infanticide within a year after childbirth are potentially suffering from postpartum psychosis and automatically reduced the charges for neonaticide and infanticide from murder to manslaughter.[148]

The Infanticide Acts reflected the assumption that after childbirth women suffered from a type of lunacy or mental condition specifically related to their recent experience of becoming mothers.[149] In Victorian England, the condition was labeled as "puerperal mania" and women were considered to be "seriously mentally debilitated" after childbirth and thus the general public was "primed to excuse the new mother as not fully responsible for her actions."[150] Puerperal insanity represented about ten percent of females admitted to asylums.[151] This form of insanity relating to childbirth was viewed typically as a legitimate defense for numerous crimes, including infanticide.[152]

In addition to assumed postpartum depression after childbirth, women were viewed as more susceptible to most mental deficiencies in Victorian England.[153] This concept was reflected in the number of

---

[143] *Id.* at 53.

[144] Act to Prevent the Destroying and Murdering of Bastard Children, 1623, 21 Jam. 1, c. 27 (Eng.), *reprinted in* HOFFER & HULL, *supra* note 137, at 19-20.

[145] Oberman, *supra* note 8, at 9.

[146] *Id.*

[147] SCHWARTZ & ISSER, *supra* note 89, at 84.

[148] *See* Infanticide Act, 1938, 1 & 2 Geo. 6, c. 36 (Eng.).

[149] *See* ZEDNER, *supra* note 125, at 89; Elaine Showalter, *Victorian Women and Insanity*, *in* MADHOUSES, MAD-DOCTORS AND MADMEN (Andrew Scull ed., 1981). Even William Thackeray's wife Isabella became suicidal after the birth of their third child, and Thackeray attempted to find an asylum to leave his wife in during the 1840s. *Id.* at 314.

[150] Showalter, *supra* note 149, at 88.

[151] *Id.*

[152] ZEDNER, *supra* note 125, at 323.

[153] *Id.* at 264.

women who were placed in asylums during the Victorian era after Parliament passed legislation requiring sufficient asylum treatment for pauper lunatics (those "lunatics" whose care came completely or mostly from public funds).[154] By 1871, women constituted more than half of the pauper lunatics in England,[155] and by the end of the nineteenth century, all asylums including lunatic, public and private asylums had more women than men.[156] Lunacy in Victorian England was also connected with class, income, and poverty level.[157] Thus, the lunacy reform act in 1845 that expanded the number of pauper or poor lunatics requiring care greatly expanded the number of women institutionalized.[158] Indeed, certain types of insanity were directly related to malnutrition resulting from poverty.[159] Mothers of large families, for example, often were diagnosed with "lactational insanity" because they nursed their babies for extended periods to save money and avoid further pregnancy.[160]

The idea that women were more susceptible to mental deficiencies that might lead to crime was often expressed during the Victorian era.[161] Henry Maudsley, for instance, gave a lecture in 1870 where he noted that women had a variety of biological and hormonal characteristics that could contribute to female crime.[162] Maudsley asserted that "cases have occurred in which women, under the influence of derangement of their special bodily functions, have been seized

---

[154] Showalter, *supra* note 149, at 315.

[155] *Id.* at 315-16.

[156] *Id.* at 316.

[157] *Id.*

[158] *Id.* at 316.

[159] *Id.* at 317.

[160] *Id.*

[161] *See generally* MORRISON, *supra* note 135.

[162] ZEDNER, *supra* note 125, at 87 (citing HENRY MAUDSLEY, *Lecture Three—On the Relations of Morbid Bodily States to Disordered Mental States, in* BODY AND MIND: AN INQUIRY INTO THEIR CONNECTION AND MENTAL INFLUENCE 79-89 (1870)); *see also* Showalter, *supra* note 149, at 322 (quoting T.S. CLOUSTON, CLINICAL LECTURES ON MENTAL DISEASES 581-82, (5th ed. 1898)). T.S. Clouston believed that women's biological functions were closely related to their predilection for insanity. He wrote,

> The risks to the mental functions of the brain from the exhausting calls of menstruation, maternity, and lactation, from the nervous reflex influences of ovulation, conception and parturition, are often enormous if there is much original predisposition to derangement, and the normally profound influences on all the brain functions of the great eras of puberty and the climacteric period are too apt, in these circumstances, to upset the brain stability.

Id.

with an impulse, which they have or have not been able to resist, to kill or to set fire to property or to steal."[163]

A. INSANITY DEFENSE DEVELOPMENT IN THE UNITED STATES

The United States adopted the *M'Naghten* insanity test in all but two states and used this as the primary test for legal insanity until 1954.[164] Alabama was one of the few states that developed a variance to the *M'Naghten* test in *Parsons v. State* (1877).[165] In this case, the court established the irresistible impulse test because it considered the *M'Naghten* test too narrow.[166] The court asked: "may there not be insane persons, of a diseased brain, who, while capable of perceiving the difference between right and wrong, are, as a matter of fact, so far under *the duress of such disease* as to destroy *the power to choose* between right and wrong?"[167] Thus, in addition to the right or wrong test established in *M'Naghten*, the Alabama court created another test that did not focus solely upon knowing whether an action was right or wrong, but upon whether the individual was able to "adhere in action to the right and abstain from the wrong."[168] Several other United States jurisdictions supplemented the *M'Naghten* test with an "irresistible impulse" component thereafter, including the District of Columbia in 1929.[169]

In 1954, however, the District of Columbia constructed a variant to the insanity defense in *Durham v. United States*.[170] This case involved an individual who had a long history of hospitalizations due to mental illness and psychiatric problems and was prosecuted for burglary.[171] Judge Bazelon, considering the individual's frequent psy-

---

[163] ZEDNER, *supra* note 125, at 87 (citing HENRY MAUDSLEY, RESPONSIBILITY IN MENTAL DISEASE (1874)).

[164] MORAN, *supra* note 105, at 2. (New Hampshire and Alabama were the two states that adopted different approaches).

[165] Parsons v. State, 2 So. 854, 859 (Ala. 1887).

[166] The court determined that if the *M'Naghten* rule

> declared by the English judges be correct, it necessarily follows that the only possible instance of excusable homicide, in cases of delusional insanity, would be where the delusion, if real, would have been such as to create, in the mind of a reasonable man, a just apprehension of imminent peril to life or limb.

Id. at 865-66.

[167] *Id.* at 859.

[168] *Id.*

[169] *See, e.g.*, Smith v. United States, 36 F.2d 548, 550 (D.C. Cir. 1929).

[170] 214 F.2d 862 (D.C. Cir. 1954).

[171] *Id.* at 864.

chotic episodes and hospitalizations commented that: "Our collective conscience does not allow punishment where it cannot impose blame."[172] Thus, the court established that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."[173]

The court reasoned that the "legal and moral traditions of the western world require that those who, of their own free will and with evil intent . . . commit acts which violate the law, shall be criminally responsible for those acts."[174] Hence, it added that the "traditions" also require that those whose acts result from mental disease cannot have moral blame attach and therefore cannot be criminally responsible.[175] Although the *Durham* rule signified a substantial change in insanity defense jurisprudence, no other court adopted the D.C. Court of Appeals' approach.[176] Opponents of the *Durham* rule believed it was too broad and gave psychiatrists too much leeway to explain the psychological background of criminal defendants.[177] However, the holding in *Durham* established by the D.C. Circuit was later struck down in *United States v. Brawner*.[178] In *Brawner*, the court adopted the American Law Institute (ALI) test. [179]

After *Durham v. United States*, many American jurisdictions adopted the ALI test, established in 1962.[180] The test indicated that: "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 either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirement of the law."[181] The ALI test therefore added both a cognitive (intellectual)

---

[172] *Id.* at 876 (citing Holloway v. United States, 148 F.2d 665, 666-67 (D.C. Cir. 1945)). Judge Bazelon further pointed out that the jury's inquiry should not be limited to just a consideration of whether the defendant knew his or her actions were right or wrong: "The jury's range of inquiry will not be limited to, but may include, for example, whether an accused, who suffered from a mental disease or defect did not know the difference between right and wrong, acted under the compulsion of an irresistible impulse . . . ." *Id.*

[173] *Id.* at 874-75. For a general discussion of the difference between the ALI test and the *M'Naghten* rules, see Diamond, *supra* note 30, at 9 and Elkins, *supra* note 21, at 162-70.

[174] *Durham*, 214 F.2d at 876.

[175] *Id.* at 876.

[176] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 298, 317 (2d ed. 1995).

[177] *Id.* at 323.

[178] 471 F.2d 969 (1972).

[179] *Id.*

[180] MODEL PENAL CODE § 4.01(1) (1985).

[181] MORAN, *supra* note 105, at 19.

and volitional ("ability to choose or control") prong[182] to the test, while the *M'Naghten* rules only incorporated a cognitive aspect to the insanity defense test.[183] The two-pronged ALI test, which broadened *M'Naghten* by changing the language from "know" to "appreciate," made it easier for individuals to meet the legal definition of insanity.[184] Since the *M'Naghten* test does not define "know," the jury is left to "determine the meaning based on the expert testimony received at trial."[185] This has sparked debate throughout discussions of the insanity defense.[186] By 1981, the model penal code/ALI test was used in all federal circuits, excluding one.[187]

Other states attempted to create verdicts and methods to address the mentally ill in addition to the ALI test. [188] Michigan established the guilty but mentally ill (GMI) verdict in 1975. The GMI verdict allows a judge or jury to find a defendant guilty but mentally ill if they find that the defendant was guilty of the offense beyond a reasonable doubt, that the defendant did not meet the test for legal insanity (which was based upon the *M'Naghten* rule in Michigan), and that the defendant was mentally ill at the time the offense was committed.[189] The GMI verdict, while still utilized in some jurisdictions today, has been criticized and viewed as a "compromise verdict" be-

---

[182] See John Dent, Note, *Postpartum Psychosis and the Insanity Defense*, 1989 U. CHI. LEGAL F. 355 (1989), for a general discussion of the volitional prong and how the American Law Institute test differed from the *M'Naghten* test. The volitional prong means a "defendant can claim insanity if the mental disease or defect rendered her unable to conform her conduct to the requirements of the law, even if she could substantially appreciate the criminality of her conduct," therefore broadening the test beyond just a consideration of whether or not the defendant knew their conduct was right or wrong. *Id.*

[183] INGO KEILITZ & JUNIUS P. FULTON, THE INSANITY DEFENSE AND ITS ALTERNATIVES: A GUIDELINE FOR POLICY MAKERS 7 (1984).

[184] Christine Ann Gardner, *Postpartum Depression Defense: Are Mothers Getting Away with Murder*, 24 NEW ENG. L. REV. 953, 968 (1990).

[185] RITA J. SIMON & DAVID E. AARONSON, THE INSANITY DEFENSE: A CRITICAL ASSESSMENT OF LAW AND POLICY IN THE POST-HINCKLEY ERA 14 (1988). There is a difference between "know" and "appreciate." "Know" has been interpreted to "mean either an actual understanding that the act committed was a crime, or it can mean the inability to perceive that the act was morally wrong." Henry T. Miller, Comment, *Recent Changes in Criminal Law: The Federal Insanity Defense*, 46 LA. L. REV. 337, 352 (1985). On the other hand, some have argued that "appreciate" is broader definition of know, and certain judges have used the term interchangeably. *Id.* at 352-53 (citing A. GOLDSTEIN, THE INSANITY DEFENSE 60, 61 (1967)).

[186] *See* SIMON & AARONSON, *supra* note 185, at 14.

[187] PERLIN, *supra* note 18, at 17.

[188] *See, e.g.*, MICH. COMP. LAWS ANN. § 768.36 (West 1982).

[189] *Id.*

cause it allows jurors to believe the defendant will get medical treatment once imprisoned but will still keep the defendant incarcerated.[190] Some researchers have argued that the purpose of state legislation that establishes GMI verdicts is often to assist prosecutors in convicting defendants who would likely be acquitted under traditional insanity tests.[191] While the GMI verdict is supposed to allow defendants to get treatment once incarcerated,[192] Michigan, for example, approves treatment for mental illness only as is "psychiatrically indicated," and studies have shown that not all defendants convicted under the GMI verdict will in fact receive treatment.[193] The GMI verdict reform has been called "at best, cosmetic, and, at worst, meretricious" precisely because treatment is not guaranteed under this verdict, and the verdict merely reflects society's "ambivalence" on how to address the mentally ill.[194] Furthermore, numerous professional organizations have opposed the GMI verdict, including the American Psychiatric Association and the American Bar Association, as relating to treatment reasons.[195]

The most dramatic impact on insanity defense jurisprudence that continues to resonate occurred in 1982, when John Hinckley, Jr. was acquitted by reason of insanity for attempting to assassinate President Reagan.[196] The American public was outraged that John Hinckley, Jr. (whose assassination attempt had been televised) was acquitted. A major backlash against the insanity defense erupted.[197] An ABC news poll reported that 76% of the American public did not think justice was done; 90% did not think Hinckley should go free even if he recovered from mental illness—even though 78% also believed he

---

[190] SIMON & AARONSON, *supra* note 185, at 190.

[191] KEILITZ & FULTON, *supra* note 183, at 42.

[192] Drew, *supra* note 110, at 24.

[193] Fentiman, *supra* note 106, at 628.

[194] PERLIN, *supra* note 18, at 95.

[195] SIMON & AARONSON, *supra* note 185, at 200.

[196] United States v. Hinckley, 525 F.Supp. 1342 (D.D.C. 1981), *clarified by* 529 F.Supp. 520 (D.D.C. 1982), *aff'd*, 672 F.2d 115 (D.C. Cir. 1982). "Acquittal" does not mean that the defendant is set free. Jurisdictions have interpreted not guilty by reason of insanity in varying ways. The Supreme Court determined in *Jones v. United States*, 463 U.S. 354, 355 (1983), that a verdict of "not guilty by reason of insanity" could mean a sentence of lifetime commitment in a mental institute. However, other insanity acquittees may spend less time in confinement because of increased use of anti-psychotic medication. *See* Fentiman, *supra* note 106, at 613.

[197] SIMON & AARONSON, *supra* note 187, at 1.

would go free after treatment.[198] The U.S. Attorney General asked for an end to a "doctrine that allows so many persons to commit crimes of violence, to use confusing procedures to their own advantage, and then to have the door opened for them to return to the society they victimized."[199] Various members of Congress followed public sentiment and criticized the insanity defense.[200] Congressman Myers called the insanity defense a "safe harbor" for criminals who "bamboozle a jury . . . into thinking they should not be held responsible."[201] In response to the Hinckley acquittal and public outrage, Congress enacted the 1984 Insanity Defense Reform Act [IDRA] that weakened the ALI two-prong test and once again aligned the insanity defense more closely with the *M'Naghten* rules.[202] The IDRA language demonstrates the difference between the new Act and the ALI test:

> It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.[203]

The IDRA had major consequences on the insanity defense across all jurisdictions. It changed the insanity defense from the ALI test, because the Act eliminated the volitional element that had broadened the insanity defense and allowed an individual to be found not guilty by reason of insanity if the individual could not "conform his conduct to the requirements of the law."[204]

The IDRA also dramatically shifted the burden of proof in insanity defense cases.[205] Before the IDRA, the burden of proof in all federal courts and about half of the state courts was on the prosecution to prove beyond a reasonable doubt a defendant's sanity.[206] After IDRA was passed, the burden of proof in insanity defense cases was placed on the defendant to prove his or her insanity by "clear and convincing

---

[198] Steven V. Roberts, *High U.S. Officials Express Outrage, Asking for New Law on Insanity Plea*, N.Y. TIMES, June 22, 1982, at B6.

[199] *Id.*

[200] PERLIN, *supra* note 18, at 17-24.

[201] *Id.* at 18.

[202] SIMON & AARONSON, *supra* note 185, at 49.

[203] 18 U.S.C. § 20(a) (Supp. II 1984) (current version at 18 U.S.C. § 17(a) (2002)).

[204] SIMON & AARONSON, *supra* note 185, at 49.

[205] PERLIN, *supra* note 18, at 96.

[206] Miller, *supra* note 185, at 356 n.127.

evidence."[207] The "clear and convincing evidence" standard was notably more stringent than the "preponderance" of the evidence standard that was previously used in those jurisdictions where the burden was on the defendant to prove insanity.[208] In his research on insanity defense jurisprudence, Michael Perlin commented that there "is no question that Congress recognized the heaviness" of the clear and convincing evidence burden that IDRA placed on the defendant.[209] Congress' acknowledgement of this harsh burden is suggested from the House Judiciary's decision not to pass IDRA out of committee, because it was "a radical departure . . . not justified by the evidence of problems with the current operation of the defense."[210] Research has suggested that judges do, in fact, interpret this burden more harshly than they formerly interpreted the "preponderance of the evidence standard," and that the majority of judges interpret the "clear and convincing evidence standard" to mean that a defendant must show with seventy to eighty percent of the evidence that they meet the legal definition of insane.[211]

States followed the lead of the federal courts after IDRA was passed.[212] Twelve states adopted a guilty but mentally ill verdict, seven states narrowed their existing insanity defense test, sixteen shifted the burden of proof to favor the government, twenty-five tightened release standards upon when an individual found not guilty by reason of insanity could be released from treatment and observation, and three adopted legislation to eradicate the insanity defense completely, but retain an absence of *mens rea* exception to homicide laws.[213] Still other jurisdictions recognized a diminished capacity defense that is a partial defense to murder rather than the full insanity defense. The diminished capacity defense typically refers to "mental conditions, less than insanity, that impact on the defendant's ability,

---

[207] 18 U.S.C. § 20(b) (Supp. II 1984) (current version at 18 U.S.C. § 17(b) (2002)). This is the nature of an affirmative defense; the defendant bears the burden of proof, not the plaintiff. For a further discussion of the application of this standard to the insanity defense, see C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence or Constitutional Guarantees?*, 35 VAND. L. REV. 1293 (1982).

[208] PERLIN, *supra* note 18, at 97 (citing Julian N. Eule, *The Presumption of Sanity: Bursting the Bubble*, 25 UCLA L. REV. 637, 670 (1978)).

[209] *Id.*

[210] *Id.*

[211] *See* McCauliff, *supra* note 207, at 1328-29.

[212] PERLIN, *supra* note 18, at 27.

[213] *Id.*

or inability to control his own behavior."[214] Several state legislatures have recognized the diminished capacity defense as a means of addressing mental ailments or other factors within an individual defendant's case as a way of potentially mitigating punishment.[215] The defense of diminished capacity has been acknowledged in thirty-one states.[216] The diminished capacity defense can potentially reduce a charge to manslaughter and can negate the specific intent necessary in a particular crime.[217] Thus, after the Hinckley acquittal and the subsequent passage of the IDRA, the majority of states moved away from the ALI test for insanity and back to variations of the stricter *M'Naghten* rule.[218] Some states even adopted the *M'Naghten* rule by formal legislation.[219] Other states adopted the *M'Naghten* rule by judicial decision.[220]

While IDRA reflects the public's sentiment over the insanity defense, in reality the insanity defense is rarely used.[221] One study has shown that during the ten years after Hinckley's acquittal, less than one insanity plea was used for every 100 felony indictments.[222] Out of 586,063 felony indictments, only 5302 insanity pleas were entered.[223] Only 22.7% of these insanity pleas were successful.[224] The insanity defense, therefore, is successful in only a fraction of one percent of all cases. Nonetheless, American society is obsessed with the potential inadequacies of this defense.[225] At least three states, including Utah, Montana, and Idaho, have abolished the insanity defense.[226]

---

[214] Drew, *supra* note 110, at 3.

[215] See *id.* at 6-7 n.22, for a list of state statutes.

[216] *Id.* at 4 n.11.

[217] DONALD ALEXANDER DOWNS, MORE THAN VICTIMS: BATTERED WOMEN, THE SYNDROME SOCIETY, AND THE LAW 4 (1996).

[218] HENRY J. STEADMAN ET AL., BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM 149 (1993).

[219] See Drew, *supra* note 110, at 10-11 n.41, for a comprehensive list of state statutes.

[220] *Id.*

[221] STEADMAN ET AL., *supra* note 218, at 150.

[222] *Id.* at 170. This study included the jurisdictions of California, Georgia, Montana, New Jersey, New York, Ohio, Washington and Wisconsin.

[223] *Id.* at 150.

[224] *Id.*

[225] PERLIN, *supra* note 18, at 3-4.

[226] *See* Daniel J. Nusbaum, Comment, *The Craziest Reform of them All: A Critical Analysis of the Constitutional Implications of "Abolishing" the Insanity Defense*, 87 CORNELL L. REV. 1509, 1515 (2002); Emily S. Pollock, Comment, *Those Crazy Kids: Providing the Insanity Defense in Juvenile Courts*, 85 MINN. L. REV. 2041, 2054 n.61 (2001).

IV. ARGUMENT

A. INSANITY DEFENSE: ANTIQUATED AND BASED ON MALE STANDARD

The first reason why the insanity defense test should be broadened, especially in light of current judicial handling of postpartum psychosis cases, is because the *M'Naghten* standard is obsolete and was formulated within the precepts of Victorian England, when women had relegated status under the law.[227] Psychiatrists have long recognized that the *M'Naghten* test is "scientifically outdated," because it incorporates only the cognitive aspects of mental disability in spite of further developments in modern psychiatric theory.[228] The *M'Naghten* test considers whether the individual was able to know that her actions were legally wrong[229] and thus fails to account for irrational impulses and delusions that are common characteristics of many mental illnesses.[230] Furthermore, psychiatrists have pointed out that the *M'Naghten* insanity test reflects the "prevailing intellectual and scientific ideas of the times"[231] and emerged from an "immutable philosophical and moral concept, which assumes an inherent capacity in man to distinguish right from wrong and to make necessary moral decisions."[232]

The *M'Naghten* test, however, is not only antiquated because it was developed over a century ago, but also because it was created in response to a particular political assassination.[233] Daniel M'Naghten was likely not even "mentally ill" in the modern sense, because there was strong evidence that his assassination attempt of the Prime Minister was politically motivated.[234] Indeed, even Victorian psycholo-

---

[227] See *supra* notes 116-63 and accompanying text for background.

[228] DRESSLER, *supra* note 176, at 321.

[229] In the Yates trial, the prosecution's expert witness psychiatrist Dr. Park Dietz testified that Yates was mentally ill, but failed the *M'Naghten* test because she knew that drowning her children was wrong. Leigh Hopper, *Yates Case Exposes Holes in Insanity-Plea Laws*, HOUSTON CHRONICLE, March 11, 2002 at A1, A10.

[230] Laura Reider, Comment, *Toward a New Test for the Insanity Defense: Incorporating the Discoveries of Neuroscience into Moral and Legal Theories*, 46 UCLA L. REV. 289, 304-05 (1998).

[231] PERLIN, *supra* note 18, at 81.

[232] Ralph Brancale, *More on McNaughten: A Psychiatrist's View*, 65 DICK. L. REV. 277 (1961).

[233] *See supra* notes 105-23 and accompanying text.

[234] *See* MORAN, *supra* note 105, at 4.

gists suspected that M'Naghten was not mentally debilitated.[235] Dr. Henry Maudsley, for example, recognized that M'Naghten had "transacted business a short time before" the shooting and had "shown no obvious symptoms of insanity in his ordinary discourse and conduct."[236]

Modern scholars have also criticized the *M'Naghten* test, because it was created in reaction to a political assassination.[237] Scholar Richard Moran has pointed out that many researchers have overlooked the fact that Daniel M'Naghten's crime was a "political act" and that "[l]egal scholars have displayed a marked tendency to accept uncritically McNaughten's [sic] alleged insanity."[238] When M'Naghten's case is scrutinized within the political climate of Victorian England, Moran argues that the court arrived at its insanity verdict in reaction to the political climate. The insanity verdict "undercut the rationality and legitimacy" of M'Naghten's political cause because it removed him from society and confined him to a mental hospital.[239]

The *M'Naghten* rules are particularly outmoded when applied to women's issues such as postpartum psychosis.[240] In Victorian England, women were perceived as particularly susceptible to mental deficiency, an unfounded hypothesis replete with obvious gender bias.[241] This gender–biased view was based upon an essentialist standard that assumed the law was made solely for application to white males.[242] Indeed, cultural defenses and defenses such as battered women's syndrome are increasingly accepted in various jurisdictions, thus suggesting that the law is becoming less essentialist.[243] Broadening the insanity defense is a simple measure that would recognize that

---

[235] *See* MAUDSLEY, *supra* note 1, at 95.

[236] *Id.*

[237] *See generally* MORAN, *supra* note 105.

[238] *Id.* at 4.

[239] *Id.* at 6. Further, Moran asserts that finding M'Naghten guilty by reason of insanity was just necessary to make M'Naghten an "unattractive role model" to "discourage others from committing similar crimes." Finally, a guilty verdict could have resulted in a public hanging and might have made M'Naghten into a martyr for sacrificing his life for his political views. *Id.*

[240] *See infra* notes 260-311 and accompanying text.

[241] *See supra* notes 124-63 and accompanying text.

[242] *See* MacKinnon, *supra* note 36.

[243] See Laura E. Reece, Comment, *Women's Defenses to Criminal Homicide and the Right to Effective Assistance of Counsel: The Need for Relocation of Difference*, 1 UCLA WOMEN'S L.J. 53 (1991) [hereinafter Reece, *Women's Defenses*], for a general discussion of cultural defenses.

the essentialist *M'Naghten* rules are no longer adaptive to modern realities and would reflect the interests of postpartum psychotic women.[244]

The second reason the *M'Naghten* test should be broadened is because the test is too narrow and does not reflect modern understanding of mental capacity.[245] Since its adoption, critics have recognized that an insanity defense test that relies upon only one aspect of the human brain is impracticable.[246] Dr. Henry Maudsley claimed that:

> It is obvious that the knowledge of right and wrong is different from the knowledge of an act being contrary to the law, because, by reason of insanity, he believes it to be right, because, under the influence of insane delusion, he is a law unto himself, and deems it a duty to do it.[247]

In 1892, Maudsley also examined the extension of the insanity defense to the United States and commented that in America "it would seem that matters have been little better than they are in this country, the practice of the courts, like that of the British Courts, having been diverse and fluctuating."[248] Thus, the more modern criticisms of this test in the United States are hardly surprising.[249]

Since its adoption, American psychiatrists have disliked the *M'Naghten* test for its "apparent absolutism," an absolutism that can force doctors to conform their testimony to fit the legal definition, which in turn can severely limit the evidence psychiatrists may proffer to a jury, including a full discussion of the defendant's mental history.[250] Since the 1960s, psychiatrists have criticized the *M'Naghten* test for its misconception of human behavior. The test assumes that individuals have "an inherent capacity" to "distinguish right from wrong and to make necessary moral decisions."[251] Others have noted that the *M'Naghten* rules were developed based upon a standard that "bore little resemblance to what was known about the human mind."[252] Modern psychiatrists have emphasized the importance of

---

[244] See *infra* notes 260-311 and accompanying text for application to specific postpartum psychosis cases.

[245] See Brancale, *supra* note 232, for a general discussion of the major problems that still resonate throughout the debate of the *M'Naghten* test.

[246] DRESSLER, *supra* note 176, at 320-21.

[247] MAUDSLEY, *supra* note 1, at 98.

[248] *Id.* at 102.

[249] *See infra* notes 250-59 and accompanying text.

[250] DRESSLER, *supra* note 176, at 320-21.

[251] Brancale, *supra* note 232, at 277.

[252] PERLIN, *supra* note 18, at 82.

volitional capacity in assessing mental illness.[253] However, opponents of the ALI test[254] argue that it is too broad, because there is no certainty as to whether psychiatrists can "provide reliable data" on the volitional prong.[255] Nevertheless, returning to a broader test would at least enable the jury to focus upon pertinent testimony regarding a postpartum psychotic woman's prior depressive history, instead of upon whether or not the defendant knew her actions were wrong.[256]

While insanity defense jurisprudence and court application of the *M'Naghten* rules have been labeled "incoherent" when examined on a whole,[257] they are particularly inconsistent when applied to postpartum psychosis cases.[258] The antiquated and overly narrow aspects of the *M'Naghten* insanity test, however, are most apparent from analyzing specific cases involving postpartum psychotic women.[259]

B. ANTIQUITY REFLECTED: APPLICATION TO POSTPARTUM PSYCHOTIC WOMEN

Recent cases have produced widespread media and public comment that suggests how defective most state insanity tests are when applied to postpartum psychotic cases.[260] The narrow and antiquated *M'Naghten* rules have had particular complications on the use of postpartum psychosis as a defense to infanticide.[261] Inconsistent sentencing is therefore reflective of the ambivalence and variances in insanity defenses available to women who are diagnosed with postpartum psychosis.[262]

---

[253] DRESSLER, *supra* note 176, at 321.

[254] It is important to keep in mind the ALI test has both a volitional and a cognitive prong.

[255] DRESSLER, *supra* note 176, at 322.

[256] A broader test would help the jury to compare the legal definition of insanity with the reality of the defendant's mental disease.

[257] *See* PERLIN, *supra* note 18, at 81-82.

[258] *See infra* notes 260-311 and accompanying text.

[259] *Id.*

[260] This comment focuses on the application of the insanity defense when women were diagnosed with the most extreme form of postpartum depression, postpartum psychosis, or where there was sufficient evidence presented at trial suggesting that the woman suffered from a psychotic episode at the time of committing the act.

[261] *See infra* notes 255-99 and accompanying text.

[262] *See* Deborah W. Denno, *Gender, Crime, and the Criminal Law Defenses*, 85 J. CRIM. L. & CRIMINOLOGY 80 (1994).

Although juries have acquitted women who have entered an insanity defense based on postpartum psychosis in certain jurisdictions,[263] a broader test should ensure that juries across jurisdictions are sufficiently able to analyze evidence that a woman was suffering from postpartum psychosis. Indeed, the first woman who attempted to use a postpartum psychosis defense in the United States was acquitted in 1951 based upon the *M'Naghten* rule.[264] In *People v. Skeoch*, the defendant went crying and sobbing to her neighbor's door to ask for help, because there was something wrong with her baby.[265] The neighbor returned to the defendant's apartment and found the baby lying on the bed with a plastic diaper tied around its neck and covering its mouth.[266] The defendant claimed that a robber had taken her money and watch; she had fainted and when she revived her child had been strangled.[267] The defendant subsequently confessed to killing the six-day-old child by tying a diaper around the child's neck after it was fussing and crying.[268] The court noted that prior to giving birth, the defendant wrote to her parents saying, "Sometimes I feel like turning on the gas and forgetting everything."[269] The defendant's husband testified that after his wife gave birth "she talked very little, appeared to be concentrating on something, would not speak unless she was spoken to, and was very quiet and depressed."[270] Both a neurologist and psychiatrist testified that the defendant was likely insane and "suffering from post partum psychosis with infanticide, a mental disorder which frequently occurs with delivery of a child."[271] Based upon this evidence, the Supreme Court of Illinois reversed the defendant's murder conviction.[272]

In the California case of *People v. Massip*, Sheryl Lynn Massip suffered from hallucinations, suicidal thoughts, and severe depression after the birth of her son.[273] Massip had attempted to seek medical help for her mental state prior to the offense.[274] Her obstetrician

---

[263] *See* People v. Skeoch, 96 N.E.2d 473, 475-76 (Ill. 1951).
[264] *Id.* at 475-76.
[265] *Id.* at 473-74.
[266] *Id.* at 474.
[267] *Id.*
[268] *Id.*
[269] *Id.*
[270] *Id.* at 475.
[271] *Id.*
[272] *Id.* at 475-76.
[273] People v. Massip, 271 Cal. Rptr. 868, 869 (Cal. Ct. App. 1990).
[274] *Id.*

thought she was suffering from a nervous breakdown and prescribed tranquilizers.[275] Massip said she heard voices that told her to "put [her child] out of his misery" because he was the devil.[276]About a month after his birth, Massip drove over her baby and killed him during a severe delusion.[277] She originally told her husband that the baby had been kidnapped and provided a description of the kidnapper, but later admitted at the police station that she had killed their son.[278] At trial, she entered pleas of not guilty and not guilty by reason of insanity.[279] The jury found her guilty of second-degree murder and determined that Massip was sane at the time she committed the offense.[280] Massip moved for a new trial based upon the sanity findings.[281] The *Massip* case garnered much attention when the trial court judge subsequently reduced the charge to voluntary manslaughter and entered a new finding that Massip was not guilty by reason of insanity.[282]

California adopted the *M'Naghten* insanity defense rule by legislation in 1988.[283] The jury found Massip guilty and sane under the *M'Naghten* rule, because they believed she knew the difference between right and wrong at the time of the event.[284] Despite the evidence that Massip was suffering from postpartum psychosis at the time of the act, the jury still found Massip guilty under the *M'Naghten* test.[285] While some have argued that postpartum psychosis can satisfy the cognitive aspect of the *M'Naghten* test because it can "deprive a defendant of her ability to distinguish right from wrong at the time of the act,"[286] others suggest that the *M'Naghten* rule poses obstacles for women attempting to use the insanity defense. Those jurisdictions utilizing the *M'Naghten* rule present these obstacles because it is always arguable the extent to which a party would know her action was wrong.[287] The jurisdiction's interpreta-

---

[275] *Id.*

[276] Eric Lichtblau, *Mother Convicted of Killing Infant Son with Her Car*, L.A. TIMES, Nov. 18, 1988, at A3.

[277] *Massip*, 271 Cal. Rptr. at 869.

[278] *Id.*

[279] *Id.*

[280] *Id.*

[281] *Id.*

[282] *Id.*

[283] CAL. PENAL CODE § 25 (West 1988).

[284] See *supra* notes 102-63 for a detailed discussion of the *M'Naghten* rule's background.

[285] *Massip*, 235 Cal. Rptr. at 875-76.

[286] *See* Dent, *supra* note 182.

[287] MEYER & OBERMAN, *supra* note 20, at 71.

tion of the word "knowledge" contained in the *M'Naghten* rule and how much psychiatric testimony is allowed within a particular case to determine the boundaries of this word will therefore largely control whether a woman with postpartum psychosis reaches the legal definition of insane in those jurisdictions that utilize the *M'Naghten* test.[288] In spite of an assertion that individuals suffering from postpartum psychosis could "fare equally well" under both the ALI and *M'Naghten* tests if experts agreed,[289] the discrepancies between verdicts for postpartum psychosis cases in state jurisdictions utilizing different tests suggest otherwise.

The *M'Naghten* test is too narrow to adequately incorporate postpartum psychotic women within its bounds.[290] Similar to Sheryl Lynn Massip who was found guilty under an insanity test based upon the *M'Naghten* rule, the mother in *Clark v. State* who wrapped her infant in a blanket and abandoned the child in the desert was found guilty of murder.[291] Two psychiatrists and one psychologist testified that she was suffering from severe postpartum psychosis that made her legally insane at the time of the offense.[292] Despite the testimony and evidence that Clark was suffering from postpartum psychosis, she was found guilty under the *M'Naghten* test, because the jury determined that she could still determine the difference between right and wrong when she committed the act.[293] In this case, the court adopted the *M'Naghten* rule and found the defendant guilty.[294]

Idaho, however, recognized the inadequacy of the *M'Naghten* rule when applied to postpartum depression cases when it adopted the ALI test in *State v. White*.[295] In *White*, a woman was changing her three-month old child when her "mind snapped" and she "threw [him] on the floor."[296] The baby died later from a skull fracture that caused a blood clot on the infant's brain.[297] Three doctors testified

---

[288] Kimberly Waldron, *Postpartum Psychosis As an Insanity Defense: Underneath a Controversial Defense Lies a Garden Variety Insanity Defense Complicated by Unique Circumstances for Recognizing Culpability in Causing*, 21 RUTGERS L.J. 669, 688 (1990).

[289] *See* Dent, *supra* note 182.

[290] *See* DRESSLER, *supra* note 176, at 321.

[291] Clark v. State, 588 P.2d 1027 (Nev. 1979).

[292] *Id.* at 1029.

[293] Brenda Barton, Comment, *When Murdering Hands Rock the Cradle: An Overview of America's Incoherent Treatment of Infanticidal Mothers*, 51 SMU L. REV. 591, 598 (1998).

[294] *Clark*, 588 P.2d at 1029-30.

[295] State v. White, 456 P.2d 797, 803 (Idaho 1969).

[296] *Id.*

[297] *Id.* at 798.

regarding the defendant's sanity at the time of the incident.[298] One expert doctor testified that, at the time of the act, White was "capable of distinguishing between right and wrong."[299] This same doctor, however, on cross examination acknowledged that despite her ability to distinguish between right and wrong, the defendant's throwing her child on the ground was a "symptom of emotional illness," and she was therefore not "capable of conforming her conduct to the requirements of the law as a result of this illness."[300] Another doctor testified that at the time of the incident defendant had "*neither* the capacity to distinguish right from wrong *nor* the capacity to conform her conduct to the requirements of the law."[301] After the jury found the defendant not guilty by reason of insanity based upon the existing *M'Naghten* rule, the state appealed to determine the future appropriate guidelines regarding the insanity defense in Idaho.[302] The court recognized that, when the *M'Naghten* rule was established in 1843, it was based upon other antiquated notions about insanity, including the wild beast test created in eighteenth century England, and was out of date and "embodie[d] conclusions about human psychology" that derived from before 1843.[303] The Idaho court also recognized that the *M'Naghten* rule appeared to be a "product more of political necessity than of judicial reason."[304] The court further criticized the *M'Naghten* rule because it was too narrow, since it only questioned cognitive aspects of a person's decisions and did not consider volitional aspects: "whether the person is able to decide to do or not to do something and has the capacity to conform to that decision by controlling conduct accordingly."[305] Based upon its conclusions regarding the inadequacies of the *M'Naghten* rule, Idaho adopted the ALI rule.[306] Idaho abolished the insanity defense altogether after the Hinckley acquittal, most likely to remain consistent with the federal crackdown on the insanity defense.[307] But, the court's reasoning in

---

[298] *Id.*

[299] *Id.* at 799.

[300] *Id.*

[301] *Id.*

[302] *Id.*

[303] *Id.* at 801. *See also* Arnold's Case, 16 State Trials 695 (1724) (created the "wild beast test" that considered whether the defendant "doth not know what he is doing no more than . . . a wild beast").

[304] *White*, 456 P.2d at 801.

[305] *Id.*

[306] *Id.* at 803.

[307] *See* Elkins, *supra* note 21, at 154-55.

State v. White noted how the *M'Naghten* rule was inadequate in assessing the punishment and insanity of a postpartum psychotic woman supports the necessity of reforming the insanity defense.[308]

Andrea Yates faced the death penalty under Texas law based upon a *M'Naghten* test of insanity.[309] Despite two suicide attempts, being diagnosed with postpartum psychosis, and being taken off drugs to regulate her psychosis just two weeks before the killings,[310] she received life in prison under the current insanity test in Texas.[311]

C. FAILING THE FEMALE OFFENDER: MAINTAINING THE *M'NAGHTEN* RULES

The final reason that federal and state jurisdictions should broaden the insanity defense is because failing to do so perpetuates the criminal justice system's continual failure to adapt to female offenders. It has been well-documented that gender is one of the most likely "predictors of crime."[312] Studies have indicated, for instance, that men commit 87.5% of all homicides and most of the violent felonies while crimes against children are the most "prevalent violent crime of women."[313] These figures are reflected in other data looking at specific years.[314] For instance, men constituted eighty-eight percent of those arrested for committing violent crime in 1992.[315] Thus, that the criminal law is essentially, "from top to bottom, preoccupied with male concerns and male perspectives" is neither surprising nor "debatable."[316]

Feminist theorists have constructed various approaches regarding how female offenders should be incorporated within criminal

---

[308] *White*, 456 P.2d at 801-04. *See supra* notes 229-61 and accompanying text.

[309] TEX. PENAL CODE § 12.31 (Vernon 2000).

[310] *NPR Morning News* (NPR Radio Broadcast, Jan. 7, 2002) (transcript, *available at* 2002 WL 3186672).

[311] Carol Christian, *Jury Gives Yates Life Term with No Parole for 40 Years*, HOUS. CHRON., March 16, 2002, at 1.

[312] *See* Denno, *supra* note 262, at 80 n1. She cites numerous studies that indicate this concept, including James W. Messerschmidt, *Masculinities and Crime: Critique and Reconceptualiziation of Theory* 1 (1993); David F. Greenberg, *The Gendering of Crime in Marxist Theory, in* CRIME AND CAPITALISM: READINGS IN MARXIST CRIMINOLOGY 405, 405 (David. F. Greenberg ed., 1993); Kenneth E. Moyer, *Sex Differences in Aggression, in* SEX DIFFERENCES IN BEHAVIOR 335, 335 (Richard C. Friedman et al. eds., 1974).

[313] SCHWARTZ AND ISSER, *supra* note 89, at 2.

[314] Denno, *supra* note 262, at 86 n.21(citing FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 234 tbl. 42 (1992)).

[315] *Id.*

[316] *See* Schulhofer, *supra* note 28, at 2151.

laws, including an assimilationist, accommodationist, and acceptance approach.[317] The assimilationist approach essentially holds that the criminal law does not need to change to effectively address female offenders, but rather women must adjust to fit the law.[318] Accommodation theory, when applied to the female criminal offender, does acknowledge differences between men and women, but like the assimilationist approach it does "not insist that the male-dominated system change" instead noting that "special treatment should be established for the difference in women."[319] Therefore, under this theory, "special" defenses for women would be considered an accommodationist approach and creating a specific statutory provision for postpartum psychosis would represent a special accommodation.[320] The final acceptance theory is the most flexible and incorporates both male and female perspectives within the criminal justice system and places emphasis on the individual criminal defendant and the realities of his or her life at the center of assessing "criminal culpability."[321] Under this construction, broadening the insanity defense fits within the acceptance approach, because it would allow the jury to more accurately assess the individual's mental capacity.[322]

These three theories represent the difficulty in shaping laws that adjust to and incorporate the female perspective.[323] Stephen Shulhofer has noted that the real "feminist challenge" in criminal law is to "adapt male-oriented criminal laws and practices" to address the needs of "victims and offenders who are normally left out of the picture."[324]

Many have criticized the effort to propound a gender-specific defense based on a postpartum psychosis carve-out exception.[325] For example, the battered women's defense has been highly criticized for creating an almost entirely gender-based carve-out.[326] Denno asserted that a "gender-based standard for punishment or defenses would most likely incorporate gender difference in the prevalence or prediction of

---

[317] *See* Reece, *supra* note 13, at 755-56.

[318] *Id.*

[319] *Id.*

[320] *Id.*

[321] *See id.*; Littleton, *supra* note 26, at 1306.

[322] *See infra* notes 251-97 and accompanying text.

[323] Schulhofer, *supra* note 28, at 2151.

[324] *Id.*

[325] *See infra* notes 312-22 and accompanying text.

[326] Denno, *supra* note 262, at 125.

crime."[327] There have been attempts at gender-specific defenses for males, including the xyy chromosome syndrome and high testosterone levels.[328] While many argue for a "gender neutral" criminal justice system,[329] an entirely "gender neutral" criminal justice system is most likely a figment of imagination because the laws were constructed upon a male standard.[330] Others are wary of recognizing differences between male and female criminal offenders because a "difference" approach potentially "emphasizes differences between men and women" and thereby treats male and female offenders differently.[331] Those who advocate the sameness approach in criminal law suggest that recognizing differences between genders perpetuates sexism and negative stereotypes of women.[332] Indeed, Dorothy Roberts warns that defenses based on women's illnesses "risk misdiagnosing the causes of some women's crimes" and that women should not have to argue that they are insane because the "law does not recognize the stifling social conditions that contributed to their criminal acts."[333] Roberts suggests that using postpartum depression defenses to explain infanticide "reflects society's reluctance to address women's problems unless they are explained as illnesses."[334] In the case of infanticide, recent scientific studies have criticized infanticide statutes such as the English statute that automatically assume that women who kill their children within one year are mentally ill and therefore reduce the sentence.[335] Dobson and Sales, for example, concluded (based on an extensive case study that examined the mental illnesses of women in infanticide cases), that all women who commit infanticide are not necessarily mentally ill.[336]

V. CONCLUSION

The best way to enable postpartum psychotic women and severely mentally ill individuals to present evidence regarding their

---

[327] *Id.* at 123.

[328] *Id.* at 126-34.

[329] *Id.* at 160-61.

[330] *See infra* notes 124-36.

[331] *See* Roberts, *supra* note 26, at 2.

[332] *Id.*

[333] *Id.* at 10-11.

[334] *Id.* at 11.

[335] Dobson & Sales, *supra* note 42, at 1100-02 (citations omitted).

[336] *Id.* at 1102-04 (citations omitted).

mental history[337] is to return to an insanity test based on the American Law Institute test.[338] Despite incessant criticism of the *M'Naghten* insanity test since its creation over 150 years ago in Victorian England, the majority of U.S. jurisdictions are still using this less-than-adequate method.[339] The *M'Naghten* test was based upon a male standard to address a political crime within an era when women's relationship to the law was remarkably different than it is today.[340]

The goal of tests promulgated within criminal courts ultimately is to create a functional remedy and guide that can accurately assess criminal responsibility and culpability.[341] Returning to an insanity defense test based upon the American Law Institute test that incorporates a volitional and cognitive prong, will allow juries to consider the true complexities of mental illness and reflect upon whether women charged in infanticide cases are truly guilty of murder, and whether they have formed the requisite intent under traditional homicide statutes.[342] This country can no longer base its insanity defense upon a standard that was created in reaction to a political crime in Victorian England, since criminal laws apply to both male and female offenders.[343] The law must be reformed and shaped to allow female offenders to adequately assert their defenses.[344] Redefining the insanity defense would help to remedy the current disparate sentencing across jurisdictions while avoiding a statutory construction that would apply only to women.[345] Although a separate infanticide statute could be beneficial (in the sense that it recognizes a postpartum psychosis as a legitimate condition that could provide an explanation for why women would commit infanticide),[346] a universal infanticide

---

[337] *See* DRESSLER, *supra* note 176, at 322.

[338] *See infra* notes 180-87 and accompanying text.

[339] *See infra* notes 164-226 and accompanying text.

[340] *See infra* notes 240-256 and accompanying text.

[341] See DRESSLER, *supra* note 176, at 300, for a general discussion of penological theory. It is "morally obtuse to punish a person for committing an act if her internal capacity to control herself was severely undermined by mental illness." *Id.*

[342] *See infra* notes 16-20 and accompanying text.

[343] *See infra* notes 295-324 and accompanying text.

[344] *See* Reece, *supra* note 13, at 754-57.

[345] See *infra* notes 295-324 and accompanying text for a discussion of problems of a gender specific carve-out statute.

[346] *See* Tricia L. Schroeder, Comment, *Postpartum Psychosis as Defense for Murder*, 21 W. ST. U. L. REV. 267, 293 (1993). Schroeder urges the medical community to recognize postpartum depression possibly through a statute, although warns that statutes could open loopholes.

statute would make broad assumptions about women and mental illness and is reminiscent of theories regarding women's defective mental state articulated during the Victorian era.[347]

Finally, the media attention surrounding the Andrea Yates case again suggests how crucial it is that postpartum depression is detected and prevented before any woman resorts to infanticide.[348] Although a statutory remedy that automatically reduces criminal charges in infanticide cases is not the best method for treating cases where women kill their children, there are some statutory steps that could occur on the state and federal level to prevent further infanticide cases.[349] For example, Congress is currently considering the Melanie Stokes Postpartum Depression Research and Care Act that would create a plan for managing postpartum depression and for screening.[350] Although legislation is wrought with obstacles (such as determining which agency would screen postpartum depression cases) legislation could force American society to recognize postpartum depression.[351]

Most importantly, women like Andrea Yates (who once lived in a Greyhound bus with her husband and three children—her fourth child born later—while also caring for her father with Alzheimer's) need community support.[352] An editorial from a San Antonio, Texas newspaper written before the jury deliberated Yates' fate noted that, if there is blame for the death of the Yates children, it should be "borne by many, including Yates' husband; the friends and family who failed to get her help; and the mental health system itself."[353]

"The medical community will be on its way to finding answers to the postpartum question when it realizes that the postpartum period is unique and must be treated as such . . . . Once these disorders are recognized as unique problems unlike any others, women will be able to seek out and get help before it is too late."

Id.

[347] *See* Cate Hemingway, *Boxing Women: Regulation, Women and Mental Health*, 2 CARDOZO WOMEN'S L.J. 109, 127 (1995).

[348] For a discussion on the importance of prevention and detection of postpartum depression, see MEYER & OBERMAN, *supra* note 20, at 168-77.

[349] Jennifer Huget, *Postpartum Depression: No Easy Answers*, WASHINGTON POST, Jan. 22, 2002, at 1.

[350] *Id.*

[351] *Id.*

[352] *See* Roche, *supra* note 3, at 46.

[353] *Execution Wrong Sentence for Yates*, SAN ANTONIO EXPRESS NEWS, Jan. 15, 2002, at 6B.

Jurors took only three and a half hours to reject Yates' insanity defense and find her guilty of murder.[354] Although jurors sentenced her to life in prison and not to the death penalty, the jury's decision stemmed from their consideration of psychiatric testimony addressing whether or not Yates knew her actions were wrong.[355] Yates' conviction, despite her extensive psychotic mental history, makes the need for insanity defense reform urgent.[356] Otherwise, the law will continue to force women suffering from postpartum psychosis to shape their defenses around archaic standards and will perpetuate the criminal justice system's neglect of female offenders.

---

[354] Carol Christian & Lisa Teachey, *Yates Found Guilty: Jury Takes 3 ½ Hours to Convict Mother in Children's Deaths*, HOUS. CHRON., Mar. 13, 2002, at A1.

[355] *Id.*

[356] Texas Legislator Garnet Coleman plans to introduce a bill in the next Texas legislative session that would reform the Texas insanity defense statute. *See* Mike Tolson & Todd Ackerman, *Jury Gives Yates Life Term With No Parole for 40 Years; A Catalyst for Change in Law on Insanity*, HOUS. CHRON., Mar. 16, 2002, at 1.