Medical Issues

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MONSTROUS MOTHERING: UNDERSTANDING THE CAUSES OF AND RESPONSES TO INFANTICIDE

Arlie Loughnan and Mike O'Connor*

The deliberate killing of a child by its mother is abhorrent and is associated in the minds of many with mental illness and in particular with postnatal depression. However, at least 50% of perpetrators are neither "mad" nor "bad", and mothers who kill children are not "unhinged" by pregnancy or childbirth. We propose a different explanation: "blind rage" or "overwhelmed syndrome", whereby parents, stressed to breaking point by sleep deprivation or incessant baby crying, respond by lethally harming their child contrary to previous behaviour. The roots of this blind rage may be found in psychosocial disturbances, including the mother's own unsatisfactory experience of parenting which has caused attachment disorders. The legal framework guiding decisions to prosecute and structuring sentencing decision-making following conviction should acknowledge the exceptional stress experienced by such mothers postnatally. Health professionals including midwives and obstetricians should increase their vigilance and arrange referrals for mothers at risk of causing harm or committing infanticide.

Keywords: *infanticide; filicide; postnatal depression; psychotic illness; sentencing.*

"Anger at a child. How shall I learn to absorb the violence and make explicit only the caring?"

Adrienne Rich[1] (1929–2012).

INTRODUCTION

The crime of infanticide by a biological mother is difficult to understand. In law, infanticide typically requires that the biological mother kill the child within 12 months of birth and that at the time of the defendant's act or omission, the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth or lactating. Under s 22A of the *Crimes Act 1900* (NSW) the offence carries a maximum penalty of 25 years in prison. New South Wales is one of a number of States around the common law world to provide for a stand-alone offence of infanticide, that also functions as a partial defence to a charge of murder.

Mothers who commit infanticide have been considered either "mad" or "bad" but there is a relatively small overall contribution by psychotic illness (approximately 10% overall and perhaps up to 50 % in filicides ie, children killed after 24 hours of birth). In Australian society the morbidity risk of psychotic illness is 3.45 per 1,000 persons aged 18–45 years and prevalence of psychopathy is only 1.2%.[2] Up

* Professor Arlie Loughnan: University of Sydney. Professor Mike O'Connor: University of Western Sydney.

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Correspondence to: celticdr@bigpond.net.au.

[1] A Rich, *Of Woman Born: Motherhood as Experience and Institution* (WW Norton, 1995).

[2] A Sanz-García et al, "Prevalence of Psychopathy in the General Adult Population: A Systematic Review and Meta-analysis" (2021) 12 Front Psychol 661044.

to 4% of mothers with untreated postpartum psychosis will commit infanticide.[3] In a Finnish study of filicides the rate of psychosis and psychotic depression was found in 51% of convicted mothers and 76% of the mothers were deemed not responsible for their actions by reason of insanity.[4] Another study by Friedman et al of 39 women deemed to be insane after committing filicide revealed that 5% were victims of incest and 49% had been abandoned by their mothers.[5] On the other hand, mothers who murder their children within 24 hours of birth (neonaticides) are less commonly mentally ill and may present no danger to society.[6] Resnik et al studied the differences between women who committed neonaticide and those who committed filicide and found that only 17% of neonaticides but two-thirds of filicides were associated with psychotic illness.[7] Chronic mental illness, such as a history of schizophrenia, is a substantial risk factor for infanticide,[8] whereas mothers who are not psychotic have less risk of acting on their thoughts of harming their baby.[9] In a small Australian series by Buist there were six neonaticides of which one mother was psychotic, two were involved in abuse and domestic violence, and one involved complex mental health issues with cultural and isolation factors.[10] The common factors in parents who commit filicide are the presence of significant life stressors; social isolation and lack of social support; and a history of abuse in childhood.[11]

But what drives women to such extreme behaviour? Historically, the mothers charged with infanticide were considered to be "unhinged" by reason of pregnancy, childbirth, or lactation, although there is little supportive scientific evidence for this explanation even at the time the specifical offence/defence was created.[12] While these ideas led to the development of infanticide as a separate crime from homicide, whereby the alternate offence of infanticide resulted in a sentence akin to manslaughter by virtue of a "disturbance of mind", we suggest that it is necessary to think again about the causes of infanticide and reassess the legal response to a mother's act of killing her young child.

Infanticide by "Sane" Mothers

In recent years, more attention has been given to women who commit infanticide but are not mentally ill. Marks and Kumar[13] found that women who killed children less than six months old were more likely to be "battering mothers" rather than mentally ill, however most infant murders of infants over the age of six months were killed by mentally ill mothers.[14] There is some suggestion that critical times for

[3] LL Altshuler et al, "Course of Mood and Anxiety Disorders During Pregnancy and the Postpartum Period" (1998) 59(Supp 2) J Clin Psychiatry 29.

[4] A Kauppi et al, "Maternal and Paternal Filicides: A Retrospective Review of Filicides in Finland" (2010) 38(2) J Am Acad Psychiatry Law 229.

[5] SH Friedman et al, "Child Murder Committed by Severely Mentally Ill Mothers: An Examination of Mothers Found Not Guilty by Reason of Insanity" (2005) 50(6) J Forensic Sci 1466.

[6] A Buist, "Are Mothers Convicted of Infanticide Mentally Ill?" (2018) 20(3) *RANZCOG "O&G" – O&G Magazine* <https://www.ogmagazine.org.au/20/3-20/are-mothers-convicted-of-infanticide-mentally-ill/>.

[7] PJ Resnick, "Murder of the Newborn: A Psychiatric Review of Neonaticide" (1970) 126(10) Am J Psychiatry 1414.

[8] C Meyer and MG Spinelli, "Medical and Legal Dilemmas of Postpartum Psychiatric Disorders" in MG Spinelli (ed), *Infanticide: Psychosocial and Legal Perspectives on Mothers Who Kill* (American Psychiatric Publishing, 2003) 167–183.

[9] K Wisner et al, "Postpartum Disorders. Phenomenology, Treatment Approaches and Relationship to Infanticide" in MG Spinelli (ed), *Infanticide: Psychosocial and Legal Perspectives on Mothers who Kill* (American Psychiatric Publishing, 2003) 35–60.

[10] Buist, n 6.

[11] D Bourget et al, "A Review of Maternal and Paternal Filicide" (2007) 35(1) J Am Acad Psychiatry Law 74.

[12] A Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law* (OUP, 2012).

[13] MN Marks and R Kumar, "Infanticide in England, and Wales" (1993) 33 Med Sci Law 329.

[14] Marks and Kumar, n 13.

infanticide include mealtimes and bedtime,[15] when parent/child conflict increases.[16] It is recognised that mothers may kill when a child fails to respond to demands to stop crying.[17] Mothers may experience feeling of persecution when their babies do not sleep, will not feed and cannot settle.[18] Approximately 5–10% of children with crying bouts are resistant to soothing, or are inconsolable.[19] Uncontrollable infant crying engenders feelings of failure, guilt, a wish to punish and, occasionally, homicidal thoughts in the mother.[20] The most primitive way to absolve oneself from the responsibilities of motherhood is to murder the child.[21]

A further important stress to mothers is sleep deprivation which, as it well-known, has been employed elsewhere as an effective means of torture.[22] New mothers commonly would obtain only four hours of sleep per night and after two weeks this can lead to impairments in cognitive function as well as attention and memory which is equivalent to that produced by 48 hours of sleeplessness.[23] Longer periods of sleep deprivation result in hallucinations and paranoia.[24] This is not surprising as Walker demonstrated that sleep deprivation in otherwise healthy individuals results in a pattern of brain activity similar to that in many psychiatric conditions.[25] The brain regions which regulate sleep are the same anatomic areas implicated in psychiatric mood disorders.[26] Sleep deprivation has been associated with irritability and affective volatility.[27]

The majority of parents can rein in their angry impulses towards their offspring.[28] In one small study by Levitzky and Cooper,[29] of 23 parents and their children suffering from infant colic, 70% of mothers admitted to having "explicit aggressive fantasies" involving their child and a quarter admitted to thoughts of infanticide. Adrienne Rich, a well-recognised United States poet, in a reflection of her own parenting of three sons, described feelings of anger which required strenuous control.[30] It is axiomatic that there is a spectrum of parenting skills ranging from highly mature and efficient to immature and ineffectual.[31]

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[15] JA Barr and CT Beck, "Infanticide Secrets: Qualitative Study on Postpartum Depression" (2008) 54(12) Can Fam Physician 1716.

[16] KSY Chew et al, "The Epidemiology of Child Homicide in California, 1981 through 1990" (1999) 2(3) Homicide Stud 151. M Oberman, "A Brief History of Infanticide and the Law" in MG Spinelli (ed), *Infanticide: Psychosocial and Legal Perspectives on Mothers Who Kill* (American Psychiatric Publishing, 2003) 3–18.

[17] C Alder and K Polk, *Child Victims of Homicide* (CUP, 2001).

[18] AJ Shaw, *Clinical Understandings of a Mother's Murderous Rage towards Her Infant: A Hermeneutic Literature Review* (Psychotherapy Masters Thesis, Auckland University of Technology, 2017) <https://core.ac.uk/download/pdf/84071257.pdf>.

[19] IS James-Roberts et al, "Bases for Maternal Perceptions of Infant Crying and Colic Behaviour" (1996) 75 Arch Dis Child 375.

[20] CH Kempe, "Paediatric Implications of the Battered Baby Syndrome" (1971) 46 Arch Dis Child 28; IS James-Roberts et al, n 19; RG Barr, "Preventing Abusive Head Trauma Resulting from a Failure of Normal Interaction between Infants and Their Caregivers" (2012) 109(Suppl 2) Proc Natl Acad Sci USA 17294. Crying is not simply an aversive stimulus; rather, it functions both to attract positive caregiving responses (feeding and changing) and to provoke frustration, anger, and abuse, especially when inconsolable.

[21] Shaw, n 18.

[22] J Leach, "Psychological Factors in Exceptional, Extreme, and Torturous Environments" (2016) 5 Extrem Physiol Med 7.

[23] HP Van Dongen et al, "The Cumulative Cost of Additional Wakefulness: Dose-response Effects on Neurobehavioral Functions and Sleep Physiology from Chronic Sleep Restriction and Total Sleep Deprivation" (2003) 26 *Sleep* 117.

[24] Leach, n 22.

[25] M Walker, *Why We Sleep* (Scribner, 2017) 149.

[26] Walker, n 25.

[27] JA Horne, "Sleep Function, with Particular Reference to Sleep Deprivation" (1985) 17 Ann Clin Res 199.

[28] KK Christoffel et al, "Should Child Abuse and Neglect be Considered When a Child Dies Unexpectedly?" (1985) 139(9) Am J Dis Child 876.

[29] S Levitzky and R Cooper, "Infant Colic Syndrome – Maternal Fantasies of Aggression and Infanticide" (2000) 39(7) Clin Pediatr (Phila) 395.

[30] Rich, n 1.

[31] H Breiner et al, (eds), *Parenting Matters: Supporting Parents of Children Ages 0-8* (National Academies Press, 2016) <https://www.ncbi.nlm.nih.gov/books/NBK402020/>; NOTE: The other contributor to this book: The National Academies of Sciences,

Parents with poorer skill sets may manage difficult offspring poorly, particularly if they lack the support of their own parents.

There is evidence that elevated levels of cortisol in stressed humans are associated with reduced maternal motivation and result in maladaptive parenting behaviour.[32] Stress is a major risk factor for postpartum depression, child neglect and abuse and aversion to infant crying.[33] For pregnant women with depression/anxiety disorders there is evidence that their newborn children demonstrate high cortisol levels compared with the newborn of psychologically normal mothers. Altered stress responses seem to persist in the offspring of these depressed/anxious women.[34] One study in 2016 demonstrated that the offspring of depressed mothers retained elevated levels of cortisol for up to six years following birth compared with control children. Their mothers showed disproportionate degrees of negative parenting.[35] Anxiety disorders are the second most common disorders among all Australian children (6.9%), and the most common among girls (6.1%).[36]

A child who suffers from a chronic anxiety disorder will experience disruptions in peer, academic, and family functioning.[37] In other words, these children have an inability to respond constructively to the normal stresses of daily life. If one then adds to the mixture of stresses by "parachuting" a newborn baby into the family, it is perhaps unsurprising that the extra stresses associated with normal neonatal care are sufficient to "break the camel's back" and lead in a small percentage of cases in lethal solutions. An anxiety disorder can include reckless behaviour.[38]

"Blind Rage" Mothering

Whereas the conventional wisdom was that women who kill their children were either "mad, bad or sad",[39] we propose an alternate category of "blind rage" or "overwhelmed mothering". This term describes persons whose actions are recklessly defiant and can occur in persons who have shown no previous signs of aggressive behaviour. Simon first proposed a new category for DSM III in 1987 which he called "Berserker/Blind Rage" syndrome.[40] This, he suggested, included (1) violent overreaction to physical, verbal, or visual insult, (2) amnesia during the actual period of violence, (3) abnormally great strength, and (4) specifically targeted violence. This description mirrors the criminal behaviour of mothers who kill their children in a fit of uncontrolled rage.

Engineering, and Medicine – Division of Behavioral and Social Sciences and Education – Board on Children, Youth, and Families – Committee on Supporting the Parents of Young Children.

[32] LC Hibel et al, "Parenting Stressors and Morning Cortisol in a Sample of Working Mothers" (2012) 26(5) J Fam Psychol 738.

[33] H Adamakos et al, "Maternal Social Support as a Predictor of Mother-Child Stress and Stimulation" (1986) 10 Child Abuse and Neglect 463; A Besser et al, "Childbearing Depressive Symptomatology in High-risk Pregnancies: The Roles of Working Models and Social Support" (2002) 9 *Personal Relationships* 395; DA Wolfe, *Child Abuse: Implications for Child Development and Psychopathology* (Sage Publications, 1987).

[34] TG O'Connor et al, "Prenatal Anxiety Predicts Individual Differences in Cortisol in Pre-adolescent Children" (2005) 58(3) Biol Psychiatry 211.

[35] Y Apter-Levi et al, "Maternal Depression Across the First Years of Life Compromises Child Psychosocial Adjustment; Relations to Child HPA-axis Functioning" (2016) 64 *Psychoneuroendocrinology* 47.

[36] Australian Institute of Health and Welfare, *Australia's Children with Mental Illness* (25 February 2022) <https://www.aihw.gov.au/reports/children-youth/australias-children/contents/health/children-mental-illness>.

[37] T Chou et al, "DSM-5 and the Assessment of Childhood Anxiety Disorders: Meaningful Progress, New Problems, or Persistent Diagnostic Quagmires?" (2015) 2(1) Psychopathol Rev 30; AA Hughes et al, "Somatic Complaints in Children with Anxiety Disorders and Their Unique Prediction of Poorer Academic Performance" (2008) 39 Child Psychiatry Hum Dev 211; LS Pagani et al, "Links between Life Course Trajectories of Family Dysfunction and Anxiety During Middle Childhood" (2008) 36 J Abnorm Child Psychol 41; TL Verduin and PC Kendall, "Peer Perceptions and Liking of Children with Anxiety Disorders" (2008) 36 J Abnorm Child Psychol 459.

[38] LR Mujica-Parodi et al, "From Anxious to Reckless: A Control Systems Approach Unifies Prefrontal-Limbic Regulation across the Spectrum of Threat Detection" (2017) 11 Front Syst Neurosci 18.

[39] T Ward, "The Sad Subject of Infanticide: Law, Medicine, and Child Murder, 1860-1938" (1999) 8(2) S & LS 163.

[40] A Simon, "The Berserker/Blind Rage Syndrome as a Potentially New Diagnostic Category for the DSM-III" (1987) 60 Psychol Rep 131.

Both animal[41] and, to a lesser extent, human[42] studies point to a neural plasticity in the pregnant female brain. This leads to enhanced psychological and behavioural sensitivity to infants, including increased vigilance for perceived danger in the third trimester as well increased sensitivity towards the newborn child which cements positive mother/child relationships. If this neural plasticity fails for any reason, then some mothers may experience parenting difficulties which compromise the attachment and threaten the capacity of mothers to provide a secure environment for their children.[43]

Women who lose control and become "berserk" may kill in a dissociative state and have no memory of the violence. The antecedents for such behaviour may be found in distant attachment disorders arising from their own childhood.[44] An absence or deficiency in the normal mother/child attachment or bonding has been recognised as a principal factor in infanticide.[45] Disrupted attachment patterns in early childhood, especially between six and nine months, detrimentally affect capacity to form healthy relationships across a life span.[46] This includes parent/child relationships. Attachment may be imperfect or absent. When a child experiences stressful occasions, the quality of mothering determines the degree of security which the child senses. Therefore, the mothering may be sensitive and loving; insensitive and rejecting; insensitive and inconsistent or disorganised and insecure.[47] If a mother has been maltreated as a child, then the risk of disorganised attachment in her child triples to 44%.[48] For such women pregnancy may trigger negative attributions towards her foetus.[49] A study by Barone et al found that unresolved, insecure entangled and helpless representations of attachment relationships were commonplace in the 23 women convicted of filicide compared with normal women or those with mental illness.[50]

The Legal Response to Infanticide

Infanticide was a practice of killing unwanted children – of various ages, and by men and women,[51] long before it became as legally proscribed conduct. Historians suggest that the practice of infanticide was a familiar part of pre-modern and early modern social life.[52] The English statute of 1624, *An Act to prevent the Destroying and Murthering of Bastard Children*, reflected the earliest attempts to distinguish infanticide (neonaticide) from homicide but it nevertheless attracted the death penalty.[53] In the 18th and 19th centuries English law recognised a particular frailty in puerperal mothers who killed their

[41] PJ Brunton and JA Russell, "The Expectant Brain: Adapting for Motherhood" (2008) 9(1) Nat Rev Neurosci 11; YM Elyada and A Mizrahi, "Becoming a Mother – Circuit Plasticity Underlying Maternal Behavior" (2015) 35 Curr Opin Neurobiol 49; KM Hillerer et al, "The Maternal Brain: An Organ with Peripartal Plasticity" [2014] Neural Plast 574159; JS Lonstein et al, "Common and Divergent Psychobiological Mechanisms Underlying Maternal Behaviors in Non-human and Human Mammals" (2015) 73 Horm Behav 156; JL Pawluski et al, "Neuroplasticity in the Maternal Hippocampus: Relation to Cognition and Effects of Repeated Stress" (2016) 77 Horm Behav 86.

[42] JE Swain et al, "Neural Substrates, and Psychology of Human Parent-Infant Attachment in the Postpartum" (2004) 55 Biol Psychiatry 153S.

[43] P Kim, "Human Maternal Brain Plasticity: Adaptation to Parenting" (2016) 153 New Dir Child Adolesc Dev 47.

[44] L Barone et al, "Mothers who Murdered Their Child: An Attachment-based Study on Filicide" (2014) 38 Child Abuse Negl 1468.

[45] C Rees, "Childhood Attachment" (2007) 576(544) Br J Gen Pract 920.

[46] C Doyle and D Cicchetti, "From the Cradle to the Grave: The Effect of Adverse Caregiving Environments on Attachment and Relationships Throughout the Lifespan" (2017) 24(2) Clin Psychol 203.

[47] D Benoit, "Infant-Parent Attachment: Definition, Types, Antecedents, Measurement, and Outcome" (2004) 9(8) Paediatr Child Health 541.

[48] C Cyr et al, "Attachment Security and Disorganization in Maltreating and High-risk Families: A Series of Meta-analyses" (2010) 22(1) Dev Psychopathol 87.

[49] K Røhder et al, "Maternal-Fetal Bonding among Pregnant Women at Psychosocial Risk: The Roles of Adult Attachment Style, Prenatal Parental Reflective Functioning, and Depressive Symptoms" (2020) 15(9) PLoS One e0239208.

[50] Barone et al, n 44.

[51] S Shahar, *Childhood in the Middle Ages* (Routledge, 1992).

[52] Shahar, n 51, 126–127.

[53] P Hoffer and NEH Hull, *Murdering Mothers: Infanticide in England and New England 1558–1803* (New York University Press, 1984).

children because of psychological changes due to pregnancy, childbirth, and lactation, as well as the vulnerable social and economic circumstances in which unwed mothers found themselves.[54] The offence of infanticide or a successful defence of infanticide against a charge of murder attracted a reduced sentence in recognition of the mitigating circumstances.

Infanticide entered the statute books in England and Wales in the early 20th century, although the creation of a specific infanticide provision had first been proposed in the 1880s, and there had long been significant public and political debate about the appropriate legal response to women who killed their newborn children.[55] Although it is now regarded as a merciful amendment to the law, against a backdrop in which the death penalties for women convicted of the murders of their young children were not typically carried out, infanticide was introduced in significant part to prevent the criminal law being brought into disrepute.[56] In the criminal law, the offence/defence is distinctive in that it is restricted by type of defendant and type of victim: only mothers who kill a very young biological child may plead it or be convicted of it.[57] With the passage of the *Infanticide Acts 1922* and *1938* (England and Wales), all killings of newborn children by mentally incapacitated mothers were taken outside the reach of both the offence of murder and the defence of insanity. In England and Wales, the infanticide provision operates to substitute liability for infanticide in place of murder (or manslaughter) where the "balance" of the defendant woman's mind was disturbed at the time of the act or omission leading to the death of her child under the age of 12 months.[58]

Infanticide laws were introduced in three Australian States, New South Wales, Victoria, and Tasmania, in the mid-20th century (and later in Western Australia). It is noteworthy that an infanticide provision does not exist in Scotland, the United States and several Australian States and Territories including Queensland, South Australia, and the Northern Territory.[59] Like the infanticide provision in operation in England and Wales, Australian laws have three distinctive legal features. The first is that the mens rea or fault element of the offence/defence is not evident on the face of the infanticide provision. But in recent decades it has become clear that the inclusion of the term "wilful" in the infanticide provision meant the mens rea is either intent or recklessness.[60] The second distinctive legal feature of infanticide relates to the relationship between the requirement that the defendant woman's mind be "disturbed" and the actus reus of killing, the external element of the offence. As a number of commentators note, the connection required is merely temporal: the infanticide law does not specify that a defendant woman's mental disturbance must cause her to kill her child.[61] This creates what Nigel Walker has referred to as a "virtual presumption" that the woman actor was not fully responsible by reason of mental illness.[62] The third distinctive legal feature of infanticide relates to the precise significance of its actus reus or external element, the act of killing. The external element of infanticide is more than a mere threshold for liability. As one of us has suggested elsewhere, the act of killing her child over-determines a defendant woman's criminal responsibility. That is, by eliding a distinction between the descriptive aspects of infanticide (a woman kills her infant at the same time as having a mind disturbed by childbirth or lactation) and

[54] A Loughnan, "The 'Strange' Case of the Infanticide Doctrine" (2012) 32(4) OJLS 685.

[55] Loughnan, n 12, Ch 8; D Seaborne Davies, "Child-killing in English Law" (1937) 1 MLR 203.

[56] Seaborne Davies, n 55, 215.

[57] Infanticide is both a charge and a plea – it is both a stand-alone homicide offence and a partial defence to a charge of murder or manslaughter. I have argued elsewhere that this means that the infanticide doctrine itself is most accurately understood as either/both partially exculpatory and partially inculpatory: see Loughnan, n 12.

[58] *Infanticide Act 1938* (England and Wales), as amended by *Coroners and Justice Act 2009* (England and Wales).

[59] M Craig, "Perinatal Risk Factors for Neonaticide and Infant Homicide: Can We Identify Those at Risk?" (2004) 97(2) J R Soc Med 57; C Ingram, *"How Is This Not Murder?" Infanticide and the Law in Australian History* (2 October 2018) Australian Policy and History <https://aph.org.au/2018/10/how-is-this-not-murder-infanticide-and-the-law-in-australian-history/>.

[60] *R v Gore (Lisa Therese) (Deceased)* [2007] EWCA Crim 2789.

[61] H Allen, *Justice Unbalanced: Gender, Psychiatry, and Judicial Decisions* (Open University Press, 1987).

[62] N Walker and S McCabe, *Crime, and Insanity in England* (Edinburgh University Press, 1967) Vol 1, 135. Based on my analysis of the social type, the infanticidal woman, I suggest that infanticide operates via an implicit assumption that the defendant woman's actus reus of killing is caused or determined behaviour: see Loughnan, n 12.

its evaluative aspects (this action under these conditions warrants partial liability), the act of killing becomes an instantiation of abnormality and a finding of partial rather than full responsibility follows.[63]

In recent years, infanticide provisions have been subject to significant critique,[64] and, in some instances, to reform of the law. These reforms have both restricted the scope of infanticide (through abolition in one jurisdiction) and expanded it (through reform in other jurisdictions). These apparently contradictory developments in the law testify to the contradictory status of infanticide in the current era, in which the laws encode a veneer of leniency for all mothers who kill their children, but in practice, are reserved for a small set of cases.[65]

In Victoria, infanticide has not only been retained, but the scope of the offence/defence has been expanded. Infanticide was first reviewed in the 1990s when the Victorian Law Reform Commission (VLRC) concluded that it should be retained because "the killing of a young child by its natural mother constitutes a distinctive form of human tragedy which should be reflected in the offence for which the accused is convicted".[66] In 2004, the VLRC reviewed infanticide again and again recommended that the offence/defence should be retained but reformulated to indicate that suffering from a disturbance of mind as the result of either not having recovered from the effect of giving birth or any disorder consequent on childbirth.[67] The VLRC also recommended that the upper age limit of the child should be extended to two years, on the basis that "extending the age might ensure that all the deserving cases are given access to infanticide".[68] Further, the VLRC recommended that the lenient sentencing regime attached to infanticide be extended to incorporate killings of any other children killed at the same time as the youngest child.[69] This last recommendation met with considerable opposition, and it was not incorporated into the amendments passed by Parliament.

In 2013 the New South Wales Law Reform Commission (NSWLRC) recommended that the statutory offence/defence of infanticide should be retained albeit that the provision regarding lactation as a reason for mental health impairment be removed. The NSWLRC acknowledged that the biological connection between the effects of childbirth and lactation lacks scientific support and "relies on discredited ideas in behavioural science".[70] The Commission acknowledged that the infanticide provisions regarding "substantial mental impairment" in s 22A of the *Crimes Act* would not always be appropriate in certain sets of circumstances but remained of the view that the statutory offence/defence remained an appropriate and compassionate response in criminal law.[71] Following the recommendations of the NSWLRC, and as a result of reforms in 2020, the offence/defence of infanticide now refers to the defendant's mental health impairment, rather than to her disturbance of mind, and, in addition, no longer refers to lactation, as "lactational insanity" is not recognised as a medical condition (see s 22A of the *Crimes Act*).[72]

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[63] See further Loughnan, n 12, 214–216.

[64] See, eg, Victorian Law Reform Commission, *Defences to Homicide: Final Report*, Report No 94 (2004) 256–258.

[65] See further A Loughnan, "The Use and Non-use of Infanticide Provisions in Australian Criminal Laws" in K Brennan and E Milne (eds) *100 Years since the Infanticide Act 1922* (Hart Publishing, 2023) (forthcoming).

[66] Cited in Victorian Law Reform Commission, n 64, xii.

[67] Victorian Law Reform Commission, n 64, Recommendations 47 and 48.

[68] Victorian Law Reform Commission, n 64, [6.41]. This recommendation was incorporated into the *Crimes Act 1949* (Vic) in 2005: see *Crimes (Homicide) Act 2005* (Vic).

[69] See Victorian Law Reform Commission, n 64, [6.41] Recommendation 49.

[70] New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report No 138 (2013).

[71] New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System*, Report No 135 (2012) (which concluded that the "statutory offence/defence of infanticide affords an appropriate and compassionate criminal law response to the complex and tragic set of circumstances that may result in a mother killing her infant" [5.49]). For the empirical profile of infanticide in Australia, see L Bartels and P Easteal, "Mothers Who Kill: The Forensic Use and Judicial Reception of Evidence of Postnatal Depression and Other Psychiatric Disorders in Australian Filicide Cases" (2013) 37 Melb Univ L Rev 297.

[72] New South Wales Law Reform Commission, n 70, Recommendations 4.1 and 5.1 respectively.

How should the lack of scientific explanation for an infant death be used in the prosecution of infanticide? The *R v Folbigg* case exemplifies the dilemma of the Crown in alleging that there was no scientific explanation for the multiple infant deaths other than manslaughter or homicide.[73] In 2003, Kathleen Folbigg was convicted of the homicides of her four children, who died between 1989 and 1999.[74] Although three of the children were less than 12 months old at the time they died, and Folbigg had been diagnosed with depression following the first of the children's deaths, she was not charged with infanticide, and it was not pleaded by her defence team, as Folbigg maintained that each of the children died of natural causes. At trial, the prosecution relied on numerous entries from Folbigg's diary that were alleged to reveal her consciousness of guilt as well as forensic evidence that demonstrated the low likelihood of deaths absent human intervention. The later discovery that two of the four children and the convicted mother had a potentially lethal gene causing fatal cardiac arrhythmias was only identified in 2012,[75] about nine years after the initial conviction and sentence. Folbigg's appeals to the Court of Appeal, and the High Court, against her convictions were dismissed.[76] Following a petition initiated by the University of Newcastle Legal Centre, and having marshalled significant support from leading medical experts, Folbigg's convictions were the subject of a special inquiry held in 2019.[77] The inquiry concluded that new expert medical evidence (which related to the children's genetic susceptibility to cardiac arrest) did not raise a reasonable doubt about Folbigg's guilt. At the time of writing and following a call by Folbigg's lawyers for another coronial inquest into the deaths of her four children following advances in the relevant scientific research,[78] another special inquiry into Folbigg's convictions is currently under way.[79] In advance of the outcome of this inquiry, we suggest that this difficult case seems to indicate that Crown prosecutors should exercise caution when using tendency or coincidence arguments given that forensic experts are mostly unable to identify alternative genetic explanations for infant deaths.[80]

Moving away from that particular case to the issue of the legal response to infanticide more generally, if the driving force for the act of infanticide is an episode of blind rage, then the offence/defence could apply to both mothers (and fathers) and have its explanation in the defendant's own imperfect childhood rearing including attachment disorders. In a sense, if an overwhelmed mother commits infanticide in blind uncontrolled rage, this differs little from the mens rea of intent to kill or cause grievous bodily harm, found in many homicide convictions. The criminal law is concerned with the rational or cognitive dimension of human action, regarding factors such as emotion as a matter of motive rather than intent.[81] However, anger is taken into account in relation to murder with extreme provocation available as a partial defence to reduce the charge of murder to manslaughter.[82] While infanticide already operates

[73] *R v Folbigg* (2005) 152 A Crim R 35; [2005] NSWCCA 23.

[74] Folbigg was charged with three counts of murder, one count of manslaughter and an additional charge of maliciously inflicting grievous bodily harm with intent in relation to one of the children was died subsequently.

[75] M Nyegaard et al, "Mutations in Calmodulin Cause Ventricular Tachycardia and Sudden Cardiac Death" (2012) 91(4) Am J Hum Genet 703.

[76] *Folbigg v The Queen* [2007] NSWCCA 371; *Folbigg v The Queen* [2005] HCA Trans 657.

[77] See New South Wales Department of Communities and Justice, *Report of the Inquiry into the convictions of Kathleen Megan Folbigg* (2019); *Folbigg v Attorney-General (NSW)* (2021) 391 ALR 294; [2021] NSWCA 44.

[78] R Brown, "Kathleen Folbigg's Lawyers Request Inquest into Deaths of Her Four Children", *Australian Broadcasting Corporation*, 5 March 2022 <https://www.abc.net.au/news/2022-03-05/kathleen-folbigg-lawyers-want-inquest-into-childrens-deaths/100885100>.

[79] See Attorney-General Mark Speakman, "Kathleen Megan Folbigg" (Press Release, 18 May 2022) <https://www.dcj.nsw.gov.au/news-and-media/media-statements/2022/kathleen-megan-folbigg--statement-by-attorney-general-mark-speak.html>.

[80] "There is a limit to what can reasonably be done to exclude other causes of death. For example, there are dozens of minor genetic mutations causing potentially fatal cardiac arrhythmias (e.g., long QT syndrome). There can be mitochondrial DNA deletions or other mutations causing sub-microscopic abnormalities to heart. The emotional weight of the case ('it is easy to smother babies') outweighs the fact that the same pattern could occur in older children or young adults and the conclusion we would all come to would be an inherited arrhythmic disorder": *R v Matthey* (2007) 17 VR 222; [2007] VSC 398.

[81] See D Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 2020) [3.4.4.3].

[82] *Crimes Act 1900* (NSW) s 23(1). The *Crimes Amendment (Provocation) Act 2014* (NSW) substantially altered the law by completely substituting *Crimes Act 1900* (NSW) s 23 and creating a partial defence of "extreme provocation": Judicial Commission

like manslaughter, as it is an alternative to murder and introduces sentencing discretion, we suggest that more can be done both in framing the decision to prosecute and in structuring sentencing decision-making to recognise the reduced culpability of mothers who kill their young children. This seems vital in the context of what appears to be increased punitiveness in the operation of the law of infanticide. We discuss this in the next section.

Does the Punishment Fit the Crime of Infanticide?

In the current era, it seems that there is reduced legal and social tolerance for the act of infanticide and this reduced tolerance is reflected in increased punitiveness in individual cases. In the current era, against the background of increased access to abortion services, and highly moralised climate around childrearing,[83] infanticide defendants and their acts seem less likely to attract compassion and understanding. In the words of the Law Reform Commission for Western Australia:

> Unlike their pre-20th century counterparts, contemporary women generally have various options – such as legal abortion – to deal with an unwanted pregnancy and many more contraceptive means of preventing pregnancy. The social stigma attached to unmarried mothers is also less evident and governments in Australia recognise that single mothers will often require financial support. Further, new mothers are closely monitored by healthcare professionals who are alert to symptoms of post-natal depression and readily refer at-risk women for psychological counselling.[84]

As this indicates, in the current era, women are regarded as having choice around reproduction, and assistance from the State, meaning that the protection provided by infanticide laws is less necessary and less desirable. The provision of access to abortion and other options changes the social context in which infanticide laws operate, removing one of the features of the legal landscape that was present at the time the laws were enacted in Australia.

In 2018 the Queensland Sentencing Advisory Council considered the sentencing for criminal offences arising from the death of a child. Their consultations with summit community leaders and focus groups suggested that the most important purpose of sentencing was punishment. It was considered that a substantial penalty reflected community's abhorrence for child homicide and should deter others from committing such offences in the future.[85] The Council acknowledged that the community expectations of sentencing for manslaughter of a child were greater than current levels of seven to nine years in custody. The Council responded to this community concern by recommending that there be an additional aggravating factor applied to sentencing which would take account of the defencelessness of the child aged less than 12 years, their vulnerability and specific aggravating factors such as the degree of violence used in the death. This would support courts in setting a higher sentence than would have hitherto been the case. The average custodial sentence for manslaughter of a child in Queensland is 6.8 years compared with 8.3 years for an adult victim. In the Australian Capital Territory, New South Wales, Tasmania, and Victoria manslaughter carries a maximum penalty of 25 years.

The New South Wales position is that "the killing of children cannot be excused by the existence of stress factors which often confront parents raising young children".[86] Lee CJ said that "courts have always regarded assault by parents upon little children resulting in death, as grave and serious cases of manslaughter".[87] Infanticide is rarely used in the New South Wales criminal justice system. Statistics

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of New South Wales, *Criminal Trial Courts Bench Book – Defences* <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/provocation.html>.

[83] See for discussion E Milne, *Criminal Justice Responses to Maternal Filicide: Judging the Failed Mother* (Routledge, 2021) Ch 3.

[84] Law Reform Commission of Western Australia, *Project 97: A Review of the Law of Homicide* (2007) 110.

[85] Queensland Sentencing Advisory Council, *Sentencing for Criminal Offences Arising from the Death of a Child: Final Report* (October 2018) <https://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0005/587669/Sentencing-for-criminal-offences-arising-from-the-death-of-a-child-Final-report.pdf>.

[86] *R v Vaughan* (1991) 56 A Crim R 355.

[87] *R v Vaughan* (1991) 56 A Crim R 355, 359.

show that between January 2006 and June 2017, there had only been one conviction. That offender received a suspended sentence.[88]

Against this background, it seems that a more nuanced understanding of the possible explanations for infanticide – in the mother's own experience of mothering – offers a way of further contextualising infanticide defendants and informing prosecutorial decision-making as well as grounding claims for mitigation when it comes to the legal response to infanticide. In particular, the arguments advanced in this column should encourage expert medical professionals interviewing women charged with infanticide to inquire into the woman's own experience of mothering. For courts sentencing defendants convicted of infanticide, appreciating that childhood trauma may be augmented by a less obvious issue of insecure attachment may assist in determining the approach taken to sentencing. In addition, lessons may be learned for the possible psychological and psychiatric treatment of women charged with and convicted of infanticide.

Conclusion

Is harsher punishment for infanticide the solution? The likelihood that a long custodial sentence would deter a murderous irrational mother "brought to her knees" by constant sleep deprivation or uncontrollable infant crying is remote. Rather, the approach should be to identify at-risk mothers and increase social support, especially crisis counselling and intervention programs. For instance, in previous times the support of a new mother would have largely been borne by her mother who might even move into the home to provide her daughter with strong domestic help and psychological support as she learnt how to manage a newborn baby. Hawkes[89] described this as the "grandmother hypothesis" and observed that in tribal Tanzanian societies the support of a grandmother increased her grandchildren's survival. Similar outcomes were observed in 17th and 18th century Quebec and in Finland.[90] By contrast, in modern Australian society 35% of nuclear families do not have the support of grandparents.[91] This isolated state of existence for so many new mothers seems to create a "perfect storm" for parenting crises and psychological distress. It may be timely to consider that any parent is capable of killing their child given the right set of extreme stresses. In Sanjeev Anand's words:

> Once the law recognizes that biological mothers who kill their children may commit these acts because of the effects of mental disorders caused by social stresses, the law must also acknowledge that all parents are susceptible to such influences.[92]

[88] Judicial Commission of NSW, *Sentencing Bench Book* (2022) <https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/manslaughter.html>; for analysis, see Loughnan, n 65.

[89] K Hawkes et al, "Grandmothering, Menopause and the Evolution of Human Life Histories" (1998) 95 Proc Natl Acad Sci USA 1336.

[90] J Lambert, "Living near Your Grandmother Has Evolutionary Benefits", *National Public Radio*, 7 February 2019 <https://www.npr.org/sections/goatsandsoda/2019/02/07/692088371/living-near-your-grandmother-has-evolutionary-benefits>.

[91] J Baxter, *The Modern Australian Family* (Australian Government, Australian Institute of Family Studies, 2016) <https://aifs.gov.au/sites/default/files/families-week2016-final-20160517_0.pdf>.

[92] S Anand, "Rationalizing Infanticide: A Medico-legal Assessment of the Criminal Code's Child Homicide Offence" (2010) 47(3) Alta LR 705.