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Deconstructing Infanticide

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Deconstructing Infanticide

Abstract

The offence of infanticide is allegedly based in debunked and sexist ideas about women and pregnancy. This article demonstrates that this offence is both necessary and beneficial regardless of its alleged basis. This article outlines the elements of infanticide and examines the legislative history from Medieval England to its adoption in Canada before discussing contemporary discourses on infanticide with a particular focus on the application of modern medical science. This work argues there are two issues with the current offence: (1) the requirement of a “disturbed mind” in the accused resulting from childbirth or lactation; and (2) the lack of a required causal connection between the “disturbed mind” and the offence. Reforming the offence in this way would reduce the breadth of the offence and improve the ways in which women are dealt with by the criminal justice system.

This article is helpful for readers seeking to learn more about:

- criminal law, infanticide, homicide, murder, Canadian legal history, English legal history, medical science, law reform

Topics in this article include:

- causality, defence of mental disorder, criminal offences, criminal defences, Canada, England, medical science, psychiatric science, postpartum disorders, childbirth, lactation, external stressors, Criminal Code section 233, Chief Justice McLachlin, Old Bailey

Authorities cited in this article include:

- Criminal Code, RSC 1985, c C-46
- Stuart Bastard Neonaticide Act, 1624 (UK), 21 JA I, c 27
- Infanticide Act, 1938 (UK), 1 & 2 Geo VI, c 36
- Malicious Shooting and Stabbing Act (1803) 43 Geo III, c 58
- R v Krieger, 2006 SCC 47
- R v Guimont (1999), 141 CCC (3d) 314 (QCA)
- R v Coombs, 2003 ABQB 818
- R v LB (2008), 237 CCC (3d) 215 (Ont Sup Ct)
- R v LB, 2011 ONCA 153
- R v Effert, 2011 ABCA 134
- R v Smith (1976), 24 Nfld & PEIR 161 (Nfld Dist Ct)

Keywords

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DECONSTRUCTING INFANTICIDE

ERIC VALLILLEE*

INTRODUCTION

Chief Justice Beverley McLachlin once called the infanticide offence one of “the earliest attempts to regulate procreation.”¹ In Canada, the infanticide offence² applies when a woman suffering from a “disturbed mind” causes the death of her newborn child.³ The *Criminal Code* does not define “disturbed mind,” but the offence dictates that this mindset must arise from the effects of childbirth or lactation.⁴ Unlike other mental states that mitigate criminal responsibility, there is no causal connection required between the “disturbed mind” and the offence—it need only be present in the accused at the time of the offence.

The language and nature of the *Criminal Code* offence pose important questions: does the offence suggest that women are weaker than men or more susceptible to psychological interference? Does the offence discriminate against fathers of newborns, who may be the primary caregiver and who may possess a “disturbed mind”? Is the infanticide provision necessary?

This article demonstrates that the infanticide offence is necessary in Canadian criminal law. First, this article explains the elements of the offence. Second, it examines the legislative history of infanticide. Third, it provides an overview of the historical and modern debates regarding infanticide. Fourth, it examines the current state of medical science and its application to infanticide. Finally, this article discusses the current state of infanticide and suggested areas for reform.

I. ELEMENTS OF THE OFFENCE

*R v Smith*⁵ clarified the seven elements of section 233:

- (a) The accused is female;
- (b) The deceased was born alive;
- (c) The accused caused the death of her child;
- (d) The death of the child was caused by a wilful act or omission of the accused;
- (e) The child was newly-born (under 12 months of age);⁶

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¹ BM McLachlin J (as she then was), “Crime and Women—Feminine Equality and the Criminal Law” (1991) 25 UBC Law Rev 1 at 2 [McLachlin].

² RSC 1985, c C-46, s 233 [*Criminal Code*].

³ *Ibid.*

⁴ *Ibid.*

⁵ (1976), 24 Nfld & PEIR 161 (Nfld Dist Ct) at para 29 [*Smith*].

⁶ *Criminal Code*, *supra* note 2, s 2.

- (f) The accused was not fully recovered from the effects of giving birth to the child;
- (g) By reason of childbirth or the consequent effects of lactation the accused's mind was disturbed.⁷

Infanticide serves as both a lesser offence and partial defence to murder. The lesser offence of infanticide carries a maximum penalty of five years in prison.⁸ Similarly, if the accused is convicted of murder but successfully advances the defence, the maximum penalty is five years in prison.⁹ In effect, infanticide shields a mother from the possibility of imprisonment for life. The *actus reus* of the offence requires that an act or omission causes the death of the infant, while the *mens rea* requires that this act or omission be intentional.

II. LEGISLATIVE HISTORY

In Medieval England, the murder of newborns was equivalent to any other murder at common law.¹⁰ However, in 1624 the English Parliament passed the *Stuart Bastard Neonaticide Act*.¹¹ This legislation created a presumption that if an unmarried woman's child died, and the woman had concealed her pregnancy, the woman was guilty of having murdered that child.¹² In order to rebut this presumption, the accused was required to produce a witness who could testify that the baby was stillborn. The overwhelming majority of women who were charged could not meet this requirement.¹³ Those convicted were put to death.¹⁴ The language of the *Neonaticide Act* was archaic, but its meaning was plain:

I. Whereas, many lewd women that have been delivered of bastard children, to avoid their shame, and to escape punishment, do secretly bury or conceal the death of their children, and after, if the child be found dead, the said woman do allege, that the said child was born dead; whereas it falleth out sometimes (although hardly it is to be proved) that the said child or children were murdered by the said women, their lewd mother, or by their assent or procurement.

II. For the preventing therefore of this great mischief, be it enacted by the authority of this present parliament, That if any woman after one month next ensuing the end of this session of parliament be delivered of any issue of her body, male or female, which being born alive, should by the laws of this realm

⁷ *Smith, supra* note 5 at para 14.

⁸ *Criminal Code, supra* note 2, s 237.

⁹ *Ibid.*

¹⁰ Constance B Backhouse, "Desperate Women and Compassionate Courts: Infanticide in Nineteenth Century Canada" (1984) 34 UTLJ 447 at 448 [Backhouse].

¹¹ McLachlin, *supra* note 1 at 2-3; *Stuart Bastard Neonaticide Act*, 1624 (UK), 21 JA I, c 27 [*Neonaticide Act*].

¹² Backhouse, *supra* note 10 at 449.

¹³ *Ibid.*

¹⁴ *Neonaticide Act, supra* note 11.

be a bastard, and that she endeavour privately, either by drowning or secret burying thereof, or any other way, either by herself or the procuring of others, so to conceal the death thereof, as that it may not come to light, whether it were born alive or not, but be concealed: in every such case the said mother so offending shall suffer death as in case of murder, except such mother can make proof by one witness at the least, that the child (whose death was by her so intended to be concealed) was born dead.¹⁵

Due to social pressures, which are discussed in the sections that follow, the *Neonaticide Act* was repealed in 1803.¹⁶ The repealing act removed the legal presumption. Under the new law, the trial of a woman charged with killing her illegitimate newborn would “proceed and be governed by . . . the Rules of Evidence . . . [and] Presumptions as are by Law used and allowed to take place in respect to other Trials for Murder.”¹⁷ The repealing act created a new offence—concealing the birth of an illegitimate child—that entailed a lesser penalty than murder.¹⁸

In 1922 the British Parliament passed the *Infanticide Act*, which was amended to its current form in 1938.¹⁹ In 1948, Canada created its own version of the offence, substantially modeled after the British offence, but with a lesser maximum penalty of five years in prison.²⁰ The Canadian offence reads:

233. A female person commits infanticide when by a wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth or the child her mind is then disturbed.²¹

III. HISTORICAL DEBATE

Leniency for women charged with infanticide has been debated for centuries.²² This is not surprising, given the difficult circumstances faced by many women charged with infanticide in the seventeenth and eighteenth centuries:

The social and economic consequences of unmarried motherhood at the time were dire. Many of the women prosecuted for infanticide were domestic servants who had become pregnant by their employer or by their employer's son, and the situation these women faced was particularly hopeless. If their pregnancy was discovered, not only would they face severe social ostracism and lose all prospects of marriage, but they would also lose their job and then be

¹⁵ *Ibid.*

¹⁶ McLachlin, *supra* note 1 at 4.

¹⁷ Harold Nuttal Tomlins, *A Digest of the Criminal Statute Law of England*, Part the First, (London: Henry Butterworth, 1819) at 345 [Tomlins].

¹⁸ McLachlin, *supra* note 1 at 4.

¹⁹ *Infanticide Act*, 1938 (UK), 1 & 2 Geo VI, c 36 [*Infanticide Act*].

²⁰ McLachlin, *supra* note 1 at 5.

²¹ *Criminal Code*, *supra* note 2, s 233.

²² McLachlin, *supra* note 1 at 3–4.

unable to secure other domestic work, work which would be made even more necessary by the presence of a child. It was the horrible but inescapable result of such conditions that young women were driven to terminate the lives of their newborn.²³

Historical records of the Central Criminal Court in London, known as the “Old Bailey,” indicate the fate of these women depended, at least to some extent, on the mood of the jury rather than on the law itself.²⁴ Between 1674 and 1699 there were 65 trials for the murder of newborns at the Old Bailey.²⁵ The first such trial was for two unnamed women who were tried jointly, though they were separately charged for the killing of their illegitimate newborns.²⁶ Because the children were illegitimate, the women were required to rebut the presumption that the children were born alive. Neither woman could produce a credible witness to testify that the children were stillborn. Consequently, both women were convicted and sentenced to death.²⁷ Of the 65 trials, 36 resulted in convictions and 28 resulted in acquittals. The outcome of one trial is unknown due to a missing page in the official records.²⁸

Some of the acquittals were clear cases of jury nullification.²⁹ One such case involved a woman charged with the murder of her newborn.³⁰ The *actus reus* was not at issue; the woman had admitted to burying her newborn in hot coals.³¹ However, it was alleged that she did not possess the requisite *mens rea* due to *non compos mentis*, or insanity.³² The evidence at trial suggested that the accused had been depressed:

. . . she was observed for some time before to be some what discomposed and distempered in her mind; the ground of which is Variously reported but not certainly known, but was so far taken notice off, that those that were about her were feareful at any time to leave her alone, and it had been well if they had continued true to their own feares.³³

To establish *non compos mentis*, English common law required the accused to be “entirely unable to understand the difference between right and wrong.”³⁴ No

²³ *Ibid* at 3.

²⁴ *The Proceedings of the Old Bailey: London’s Central Criminal Court, 1674 to 1913*, online: *Old Bailey Proceedings Online*, online: <<http://www.oldbaileyonline.org>> [Old Bailey Proceedings].

²⁵ *Ibid*.

²⁶ *Ibid*, case reference no t16740909-2, *Trial of Young Wenches* (1674).

²⁷ *Ibid*. The statutory presumption is found in the *Neonaticide Act*, *supra* note 11, which applied to this case given the court’s finding of the two infants’ illegitimacy.

²⁸ Old Bailey Proceedings, *supra* note 24.

²⁹ Jury nullification is the term used to describe situations in which a jury refuses to apply the law, and simply renders the verdict based on their collective conscience instead. See *R v Krieger*, 2006 SCC 47 at 27.

³⁰ Old Bailey Proceedings, *supra* note 24, case reference no t16750115-1.

³¹ *Ibid*.

³² *Ibid*.

³³ *Ibid*.

³⁴ Old Bailey Proceedings, *supra* note 24, Trial Verdicts, online: <<http://www.oldbaileyonline.org/static/Verdicts.jsp>>.

evidence was adduced at trial beyond the mother's abnormal temperament, yet she was acquitted. The acquittal suggests the jury chose to spare her life and ignore the law.

By the mid-to-late 1700s, English society was ever more reluctant to execute young women and mothers. As a result, courts and juries increasingly circumvented or ignored the *Neonaticide Act*.³⁵ Between 1730 and 1774, only one of 61 infanticide trials at the Old Bailey saw the statute mentioned at all.³⁶ In 1758 and 1792 respectively, Nova Scotia and Prince Edward Island passed their own statutes outlawing the concealment of the birth of a stillborn child.³⁷ Both statutes were modeled after the *Neonaticide Act* and outlawed the same conduct. At the same time the British North American colonies enacted these statutes, Great Britain repealed the *Neonaticide Act*.³⁸

In 1803, Great Britain replaced the *Neonaticide Act* with a new offence: concealment.³⁹ Concealment carried a punishment of up to two years in prison, a drastic shift from the previous punishment of death.⁴⁰ McLachlin J credits this leniency to two social phenomena: the then-widespread prevalence of infanticide, and an increasingly widespread belief that killing a newborn was “somewhat less heinous than other forms of murder.”⁴¹

The law in British North America still required mothers of illegitimate children to rebut a presumption that their child was born alive; however, the Angelique Pilotte case indicated a trend toward public leniency. In 1817, Pilotte hid her pregnancy from her employer and fellow domestic servants. She gave birth in a field near her place of work. It was never proved whether Pilotte killed her child. However, absent a witness to rebut the presumption that the child was born alive, Pilotte was convicted of concealment and sentenced to death.⁴² Public outrage led to a royal pardon that commuted her sentence to one year of imprisonment.⁴³

In Britain, another century passed before the next major overhaul of infanticide legislation occurred with the introduction of the *Infanticide Act* in 1922.⁴⁴ Rather than being convicted of murder, women could now be convicted of an offence called “infanticide.”⁴⁵ The 1938 amendment to the legislation clarified that the offence only applied where a child was under the age of 12 months.⁴⁶ In 1948, Canada added section 233, the current infanticide offence, to the *Criminal Code*.

Both the British and Canadian versions of infanticide make reference to the “disturbed mind” of new mothers resulting from childbirth and lactation. Therefore, the creation of these offences is referred to as the “medicalization of infanticide.”⁴⁷

³⁵ McLachlin, *supra* note 1 at 3–4.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ Tomlins, *supra* note 17.

³⁹ *Malicious Shooting and Stabbing Act* (1803) 43 Geo III, c 58, commonly referred to as “*Lord Ellenborough’s Act*”.

⁴⁰ *Ibid.*, s IV.

⁴¹ McLachlin, *supra* note 1 at 4.

⁴² Backhouse, *supra* note 10 at 451–52.

⁴³ *Ibid.*

⁴⁴ *Infanticide Act*, *supra* note 19.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ McLachlin, *supra* note 1 at 4.

However, whether a medical basis is scientifically valid remains an open question. One commentator claims that, “the [offence of infanticide] was the product, not of nineteenth century medical theory about the effects of child-birth, but of judicial effort to avoid passing death sentences which were not going to be executed. But medical theory provided a convenient reason for changing the law.”⁴⁸

IV. MODERN DEBATE

Section 233 requires that the accused possess a “disturbed mind” due to the effects of childbirth or lactation. However, no causal connection is required between this “disturbed mind” and the offence, unlike other mental states that mitigate legal responsibility.⁴⁹ The Quebec Court of Appeal⁵⁰ and the Ontario Court of Appeal⁵¹ have confirmed that no causal connection is required:

Unlike other mental states that may mitigate criminal responsibility, infanticide does not require any causal connection between the disturbance of the mother's mind and the decision to do the thing that caused her child's death Because the mother's mental "disturbance" is not connected to the decision to kill, that "disturbance" is better considered as part of the *actus reus* and not a *mens rea* component of the crime of infanticide.⁵²

Furthermore, the definition of a “disturbed mind” has been the subject of significant judicial debate. In the 2009 trial of Katrina Effert, Veit J described the “disturbed mind” as follows: “[t]he meaning of the word ‘disturbed’ is important in this case . . . it doesn't mean mentally ill . . . [i]t means just what ordinary people mean when they say it.”⁵³ In *R v Coombs*, Veit J confirmed that mental illness was not a requirement, stating that psychiatric evidence of anger alone could be enough to “disturb” the mind.⁵⁴ Furthermore, Veit J concluded that “the level of mental disturbance required [for infanticide] has been set by Parliament at a very low threshold, certainly far below that required for an individual to be regarded as not criminally responsible.”⁵⁵

In contrast, Herold J in *R v LB*⁵⁶ warned of “leav[ing] the threshold too low” when determining what constitutes a disturbance of the mind.⁵⁷ His approach to the test was as follows:

⁴⁸ Katherine O'Donovan, “The Medicalisation of Infanticide” [1984] CrimLR 259 at 261.

⁴⁹ *Ibid* at 55.

⁵⁰ *R v Guimont* (1999), 141 CCC (3d) 314 (QCA).

⁵¹ *R v LB*, 2011 ONCA 153.

⁵² *Ibid* at para 59.

⁵³ Sanjeev Anand, “Rationalizing Infanticide: A Medico-Legal Assessment of the Criminal Code’s Child Homicide Offence” (2010) 47:3 Alta L Rev 705 at 711 [Anand], citing Karen Kleiss, “Defence urges infanticide verdict - Accused baby killer's fate in hands of jury”, *Edmonton Journal* (19 June 2009) B3.

⁵⁴ 2003 ABQB 818 at para 85 [*Coombs*].

⁵⁵ *Ibid* at para 37.

⁵⁶ (2008), 237 CCC (3d) 215 (Ont Sup Ct).

⁵⁷ *Ibid* at para 55.

Rather than trying to formulate the test, I would simply say that the test I have tried to apply in my analysis is that the disorder must not be so minimal that finding it crosses the threshold cheapens or disrespects the memory of the innocent victim. On the other hand, it must not be so severe as to be almost indistinguishable from a section 16 defence [of not criminally responsible], nor should it inject into the mix something which Parliament apparently decided to exclude, the element of causation.⁵⁸

The conclusions of Veit and Herold JJ illustrate a clear division regarding what constitutes a “disturbed mind.” Veit J focuses on the accused and advocates for leniency, while Herold J focuses on the victim and the need to protect prospective victims.⁵⁹ Canadian jurisprudence remains undecided as to which approach is correct.

This debate was brought to the forefront of public consciousness during the Katrina Effert case. Katrina Effert was 19 years old when she became pregnant. She hid the pregnancy from friends, family, and the baby’s father.⁶⁰ She eventually gave birth alone in the basement of her parents’ home. Within a few hours of the birth she strangled the baby with a pair of underwear and threw him into the neighbour’s yard.⁶¹ Effert was subsequently charged with second-degree murder.⁶²

The Katrina Effert case was unusual in that it lasted for five years (2006–2011). The case consisted of two trials and two separate appeals to the Alberta Court of Appeal, which were both successful. After the first trial, Effert was convicted of second-degree murder. On appeal, that verdict was set aside due to errors in the jury charge and sent back to the trial court.⁶³ The second jury also convicted Effert of second-degree murder. On appeal, the conviction of second-degree murder was substituted for a conviction of infanticide.⁶⁴ McFadyen and Slatter JJA wrote the following in their decision:

The death of a child is always extremely upsetting and a difficult matter to adjudicate dispassionately, even for those who are engaged in the administration of criminal justice on a full-time basis. Such cruel and unnatural acts are hard to comprehend, particularly when they are committed by the child's mother, whose instincts should be to protect and nurture.

Nonetheless, as my colleagues have noted, Parliament has created a special offence, infanticide, which recognizes that the moral blameworthiness of the act is reduced when it is committed by a new mother whose mind was disturbed at the time of the killing⁶⁵

⁵⁸ *Ibid* at para 59.

⁵⁹ *Ibid* at para 56.

⁶⁰ *R v Effert*, 2011 ABCA 134 at para 2.

⁶¹ *Ibid*.

⁶² *Ibid*.

⁶³ *Ibid* at para 3.

⁶⁴ *Ibid* at para 31.

⁶⁵ *Ibid* at paras 33–34.

During the Effert case, public debate ranged from the mundane (“Revisiting Canada’s infanticide law”)⁶⁶ to the sensational (“Baby killer Katrina Effert walks”).⁶⁷ This debate highlights the substance of the issue: the shocking nature of the offence must be balanced against the need to recognize the underlying mental disorder.

V. THE MEDICAL-PSYCHIATRIC PERSPECTIVE

This section discusses current medical science relating to post-childbirth effects on a new mother’s mind. The relevant question is not whether childbirth and lactation rob a mother of her ability to distinguish right from wrong; instead, the question is whether modern science can support the proposition within section 233 that childbirth and lactation cause a “disturbed mind,” and, if so, to what degree.

In 1922, the infanticide offence was “medicalized” by reference to the effects of childbirth and lactation.⁶⁸ However, as has been described, the primary reason for this was a shift in public opinion, not science. Professors Kirsten Kramer and William Watson suggest that, although the 1922 legislation did not “reflect contemporary psychiatric orthodoxy,”⁶⁹ subsequent legislation “facilitated the [actual] medicalization of infanticide . . . between its passage and the present day, whatever the intentions and knowledge-base of the legislators.”⁷⁰

At the time of infanticide’s medicalization, “puerperal psychosis” was a recognized psychiatric category denoting a “condition implausibly associated with infanticide.”⁷¹ The condition of “exhaustion psychosis,” which was associated with poverty, was available to explain infanticide as well, although both conditions were only briefly and temporarily considered orthodox in any circles. Neither condition has been recognized for over half a century.⁷²

Today, medical science identifies three postpartum mood and mental disorders.⁷³

(1) Baby blues: the “baby blues” are a mild and transitory mood disorder affecting anywhere between 25–80 per cent of new mothers and caused by hormonal fluctuations following childbirth. Symptoms include tearfulness and increased irritability.

(2) Postpartum depression: where a patient suffers from postpartum depression, psychiatric medicine considers the patient to be “mentally ill.”

⁶⁶ “Revisiting Canada’s infanticide law”, *Edmonton Journal* (12 November 2006), online: <<http://www.canada.com/edmontonjournal/news/sundayreader/story.html?id=60527175-b3dc-4002-a27d-e9cf2f1ddd62>>.

⁶⁷ Tony Blais, “Baby killer Katrina Effert walks”, *Toronto Sun* (9 September, 2011), online: <<http://www.torontosun.com/2011/09/09/baby-killer-katrina-effert-walks>>.

⁶⁸ See page 11.

⁶⁹ Kirsten Johnson Kramer & William D. Watson, “Canadian Infanticide Legislation, 1948 and 1955: Reflections on the Medicalization/Autopoiesis Debate” (2008) 33:2 *Can J Sociology* 237 at 240.

⁷⁰ *Ibid.*

⁷¹ *Ibid* at 245.

⁷² *Ibid.*

⁷³ Anand, *supra* note 53 at para 25.

Approximately 15 per cent of women are affected by this disorder after giving birth. Symptoms include “despondency, anxiety, and an inability to cope with the baby.”

(3) Postpartum psychosis: postpartum psychosis is rare, occurring in 0.2 per cent of women after giving birth. Symptoms include hallucinations and delusions.⁷⁴

On the low end of the spectrum is the “baby blues.” Few commentators would suggest that leniency is warranted for mothers with this condition. However, it must be emphasized that section 233 only requires the presence of a “disturbed mind” at the time of the offence. It is possible that the “baby blues” might meet this threshold, given that the court has acknowledged that anger could constitute a “disturbance of the mind.”⁷⁵ Whether this is desirable is a question of policy, not science. On the high end of the spectrum is postpartum psychosis. This disorder certainly meets the threshold required for a “disturbed mind,” and it likely meets the threshold required for the defence of mental disorder.⁷⁶ Finally, in the centre of the spectrum is postpartum depression. This disorder may or may not meet the threshold for a “disturbed mind.”

Medical science demonstrates that postpartum disorders are real and, in some cases, significant. Therefore, a separate legal regime for those suffering from postpartum disorders is rational. However, the current legal regime does not accurately reflect the medical science. Section 233 of the *Criminal Code* requires the presence of a “disturbed mind” that is *caused* by the effects of lactation or childbirth. Modern science finds that postpartum disorders are *caused* by social, psychological, and stress factors, rather than by hormonal changes.⁷⁷ Section 233 does not reflect modern medical science.

VI. DISCUSSION & CONCLUSION

Should infanticide be removed from Canadian law? In 1984, the Law Reform Commission of Canada (Commission) released a working paper recommending the repeal of infanticide.⁷⁸ This recommendation was based on two points: medical science provides “little evidence to support the underlying rationale of the infanticide provision,” and the infanticide provision “is legally redundant.”⁷⁹ In addition, the

⁷⁴ *Ibid.*

⁷⁵ *Coombs, supra* note 54 at para 37.

⁷⁶ A not criminally responsible verdict is rendered in Canadian law where the accused, at the time that the offence was committed, suffered from a mental disorder that made them incapable of appreciating the nature or quality of their act or omission, or of knowing that it was wrong: Kent Roach, *Criminal Law*, 5th ed (Toronto: Irwin Law, 2012) at 280.

⁷⁷ Anand, *supra* note 53 at para 29, citing a primary survey conducted by the author of eight independent, peer-reviewed journal articles: Peter John Dean, “Child Homicide and Infanticide in New Zealand” (2004) 27 *Int J L Psychiatry* 339 at 346.

⁷⁸ Judith A Osborne, “The Crime of Infanticide: Throwing Out The Baby With The Bathwater” (1987) 6:1 *Can J Fam L* 47 at 47.

⁷⁹ *Ibid* at 48, citing Law Reform Commission of Canada, *Working Paper #33: Homicide* (Ottawa: Minister of Supply and Services Canada, 1984) at 77.

Commission proposed a flexible penalty for intentional homicide (as opposed to dividing intentional homicide into first degree murder, second degree murder, and infanticide). By doing so, postpartum disorders would become a mitigating factor taken into account at sentencing.⁸⁰ Further, the Commission noted that accused women may advance the defence of mental disorder and seek diversion into the mental health system.⁸¹

There are several problems with the Commission's proposal. First, the infanticide offence was enacted due the reluctance of juries to ascribe the same level of moral culpability to infanticide as is ascribed to murder. A legal system that fails to provide juries with the ability to show leniency will result in jury nullifications. In Canada, leniency is available at the sentencing stage. However, a jury plays no role in sentencing. In order to avoid jury nullification, a separate offence is needed to condemn the actions of the accused without labeling them murderers.

Second, the Commission's proposal fails to recognize that the defence of mental disorder requires a substantially higher threshold than the current infanticide law. In order to advance the defence of mental disorder, the accused must demonstrate that her disorder made her "incapable of appreciating the nature and quality of [the offence], or of knowing that it was wrong."⁸² Conversely, infanticide requires that the accused demonstrate a "disturbed mind." Were the offence of infanticide to be removed, women suffering from postpartum disorders would be required to meet the higher threshold of the defence of mental disorder. Fewer women would be capable of satisfying this higher threshold, raising the possibility of unjust convictions and jury nullification. Legal reform should lower the likelihood of jury nullification. The Commission's proposal has the effect of raising the likelihood of jury nullification.

Further, mothers who successfully advance the defence of mental disorder would enter the mental health system, rather than the penal system. As part of the mental health system, mothers would be subject to one of three outcomes:

- (1) The provincial review board (Board) would be required to grant an absolute discharge if, after a hearing, the Board found that the woman was "not a significant threat to the safety of the public." In such case, the woman would no longer be subject to the Board's authority and would in essence be "free to go."⁸³
- (2) The Board could grant a conditional discharge if, after a hearing, the Board believed the woman was not a significant threat so long as she followed prescribed conditions. In such cases, the woman would not be required to live in hospital but would be subject to outpatient monitoring and mandatory annual hearings at the Board.⁸⁴

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Criminal Code*, *supra* note 2, s 16.

⁸³ Centre for Addiction and Mental Health, "The Forensic Mental Health System in Ontario", online: <http://www.camh.ca/en/hospital/health_information/the_forensic_mental_health_system_in_ontario/Pages/forensic_mhontario_orb.aspx#thecourtfound>.

⁸⁴ *Ibid.*

(3) The Board could issue a detention order if, after a hearing, it believed the woman would be a significant threat to the public if released. Another Board hearing would not generally be available until one year after the date of the order.⁸⁵

Indeterminate detention is unnecessary given that postpartum disorders are temporary in nature. An accused's postpartum disorder will have likely passed by the time her trial has concluded. However, a Department of Justice study of homicide offenders who successfully advanced the defence of mental disorder found that the average period of detention was four years.⁸⁶ This average is based upon only 41 per cent of the sample because 59 per cent remained under the review board's jurisdiction at the conclusion of the study.⁸⁷ The study suggests that the defence of mental disorder can potentially expose mothers to unnecessarily long periods of review, detention, and probation-like oversight.

The need for an infanticide offence is clear. However, the language and elements of section 233 require a significant overhaul. The language of section 233 should be changed to reflect the medical science. Postpartum disorders may contribute to infanticide, but the disorders are caused by external stressors rather than by hormonal factors. For this reason, the references in section 233 to the effects of childbirth and lactation should be removed.

Advancing a modernized partial defence of infanticide would be similar to advancing the defence of mental disorder, although these defences must remain distinct from each other. The defence of mental disorder requires that the mother lacked the ability to understand her actions as wrong at the time they were committed. Infanticide should not require the same standard. Instead, a modernized partial defence of infanticide should require the following: (1) that the mother be clinically diagnosed with a post-childbirth psychological disorder, and (2) that it be shown the disorder substantially reduced her ability to make a reasonable decision about the care of her newborn child. What constitutes "substantially" should be a question of fact left to the jury. This is similar to the defence of mental disorder, but it requires a lower threshold.

The debate over whether the law should offer leniency to those guilty of infanticide continues. Medical science now acknowledges that there are degrees of mental disturbance arising from childbirth, and these mental disturbances may impact the moral culpability of a mother who has killed her child. As a matter of morality, the law should allow for leniency in instances where there is a scientific basis. Furthermore, leniency is necessary to allow juries greater flexibility and to discourage circumvention of the law.

⁸⁵ *Ibid.*

⁸⁶ AG Crocker et al, *Description and processing of individuals found not criminally responsible on account of mental disorder for serious violent offences* (Ottawa: Research and Statistics Division, Justice Canada, 2013) at 21–22.

⁸⁷ *Ibid* at 2.