

Chapter 2

Precedent for Leniency

Maternal filicide cases run counter to deeply ingrained views of motherhood and femininity; however, child homicide by mothers has not always been considered a crime worthy of a murder charge (Dobson and Sales 2000). Illegitimacy, preference for male offspring, physical disabilities, population control, eugenics, religious beliefs, and poverty have been used to explain its occurrence throughout history¹ (Meyer et al. 2001). Prosecution of maternal filicide also has a rich history of ambivalence and inconsistent approaches. For example, the seventeenth-century English courts “condemned the act of child murder, but did not energetically suppress it” (Hoffer and Hull 1984). And although viewpoints changed over time and the punishment of mothers became more common, conviction rates remained low in cases wherein the victim was very young.

This precedent for leniency was set many years ago as nations began passing legislation on behalf of maternal offenders with the assumption that childbirth is a time of unique biological change which may lead to mental disturbance (Dobson and Sales 2000). In 1647, Russia became the first government to enact a law reducing the violation of killing of an infant by his or her mother from murder to a lesser charge. Other countries also seemed to favor reduced culpability for mothers (Dobson and Sales 2000; Oberman 1996). Public opinion was also shifting, and the crime was attributed to the shame of a single mother or her presumed derangement caused by childbirth (Mendlowicz et al. 1998). Courts were hesitant to convict these mothers under common homicide laws and typically recommended less severe sentences because they were often assuaged by the mother’s shame of illegitimacy, poverty, or desertion by family and/or the child’s father (Dobson and Sales 2000). Execution became much less common as sentences of bread and water diets for 1 year, 15-year penance terms, and public whippings

¹ Filicide dates back to ancient civilizations such as Mesopotamia, Greece, and Rome, and among the Vikings, Irish Celts, Gauls, and Phoenicians (Meyer et al. 2001).

were increasingly recommended (Ballinger 2000; Brockington 1996; Kirkwood 2003; Kumar and Marks 1992). Sentences of execution were more often reserved for those women who failed to conform to traditional expectations of sexuality, respectability, domesticity, and motherhood (Ballinger 2000; Kirkwood 2003).

The sentiment that filicide cases, particularly those involving very young victims, were unique and separate from other child homicides was formalized by the English Parliament in the 1922 Infanticide Act. This act provided a partial explanation for infanticide offenders by assuming that they suffered from puerperal (postpartum) psychosis,² the most severe form of mental disorder associated with childbirth (Oberman 1996). In 1938, a modified Infanticide Act replaced the 1922 version and expanded the age of the victim from a newborn child to a child less than 12 months old. Lactation was added as a medical basis for a mental disturbance, most likely due to the exhaustion and hormone fluctuations that may accompany nursing. Eventually, lactational insanity was discredited, though public sympathy toward maternal offenders continued. England's Infanticide Act and similar legislation established in many other countries³ gave formal legal recognition to the common belief that a woman who has given birth may have an altered and disturbed mental state for up to a year following the delivery of the child (Spinelli 2003). Additionally, a firm legislative foundation was laid for a biological explanation for infanticide (Friedman and Resnick 2007; Spinelli 2003). Today, punishment under infanticide laws has been significantly reduced or eliminated. In Canada, no mother convicted of infanticide has served more than 5 years in prison (Walker 2006), and the overwhelming majority of infanticidal mothers in England have received probation and counseling rather than prison sentences (Spinelli 2003).

Although other countries have identified special provisions for these offenders based on the causal relationship between pregnancy, childbirth, and subsequent maternal mental illness, the USA makes no such distinction (Dobson and Sales 2000; Kumar and Marks 1992; Resnick 1970). Mothers who kill their children, regardless of the victim's age, are prosecuted under existing homicide laws (Dobson and Sales 2000; Kumar and Marks 1992; Resnick 1970). American medical and legal experts do not agree on the nature of postpartum mental disorders and their capacity to cause a mother to kill her child(ren) (Spinelli 2003). Postpartum disorders do exist, but severe cases such as postpartum psychosis are rare (Schwartz and Isser 2006). Even so, the presence of postpartum disorders in any given filicide case does not necessarily indicate that the woman is unable to control her behavior and/or did not appreciate the difference between right and wrong (Schwartz and Isser 2006). Thus, prosecutors have charged women with a

² Puerperal (postpartum) psychosis is an abrupt onset of severe psychiatric disturbance that occurs shortly following birth. It is estimated to occur in 1–4 women per 1,000 deliveries. Symptoms include hallucinations, delusions, loss of reality, illogical thoughts and behavior, and possible suicidal or homicidal tendencies (Chaudron and Pies 2003; Schwartz and Isser 2006).

³ These countries included Australia, Austria, Brazil, Canada, Colombia, Finland, Germany, Greece, Hong Kong, India, Italy, Japan, Korea, New Zealand, Norway, the Philippines, Sweden, Switzerland, Turkey, and the UK (Friedman and Resnick 2007).

variety of crimes including murder in the first, second, or third degree, manslaughter, gross abuse of a corpse, and concealment of death (Schwartz and Isser 2000).

However, past studies of filicide cases in this country indicate that even in the absence of US infanticide legislation, society continues to be ambivalent toward mothers who kill their children, especially when the children are young (Marks and Kumar 1993; Oberman 1996; Shelton et al. 2010; Stangle 2008). Variability in conviction and sentencing, as well as this country's history of leniency, has been highlighted in several studies (Oberman 1996; Shelton et al. 2010; Spinelli 2001). Oberman (1996) noted that women who kill their children are often overcharged as a statement to the public but are underconvicted because of societal assumptions that they are "insane" (Perlin 2003) or "crazy" (Oberman 1996).

Analyses of insanity defenses in the USA reflect that a maternal filicide offender's chances of successfully raising this defense in her case are far greater than those of any other criminal defendant (Bourget and Bradford 1990; d'Orban 1979; McKee and Shea 1998). d'Orban (1979) reported that 27 % of the maternal filicide defendants in their study were found Not Guilty by Reason of Insanity (NGRI). Bourget and Bradford (1990) reported that 15.4 % of maternal filicide cases in their sample resulted in legally insane verdicts. These results indicate that insanity verdicts are much more frequent in maternal filicide cases than in general criminal cases, wherein defendants are found insane only 1 % of the time (McKee 2006).

Even in cases where a mental disorder is not noted, it appears that courts continue to take into account the stresses of a mother during her postpartum period and often take pity on her or use rationalization and denial to explain her homicidal actions (Kaye et al. 1990; Perlin 2003). Such actions indicate that there is a belief that mothers should be treated with leniency "simply because they are mothers" (Stangle 2008). And, because jurors arrive in the courtroom fully loaded with stereotypes and myths, cases involving a mother killing her child stir up notions of femininity, childbirth, and depression (Finkel 1995a, b, 1996, 1997; Finkel and Groscup 1997; Finkel and Sales 1997; Perlin 1990; Silver 1995).

Shelton et al. (2010) analyzed 45 cases of neonaticide and found only one offender who was diagnosed with psychosis, yet sentencing of the offenders remained relatively lenient. The authors presented several socially constructed factors to explain society's ambivalence and inconsistent legal response to non-psychotic neonaticide offenders, including the mother's reduced culpability, her "redeemable" qualities, and the age of the victim (Shelton et al. 2010).

Women throughout history have harmed their children for many reasons, some of which reveal clear and lucid intent (Stangle 2008). However, despite its rather common occurrence, society's opinions about mothers who kill their children vacillate between outrage and ambivalence. Faulty assumptions regarding the hormonal side effects of childbirth and misconceptions about female aggression or violence are likely the major contributors to the disparity in legal outcomes and society's inconsistent responses (Shelton et al. 2010; Stangle 2008). On one end of the continuum, society feels that justice must be served for the loss of an innocent child. On the other hand, even in cases without evidence of extensive mental health issues, society believes that something must be terribly wrong with a mother who kills her own child(ren) (West 2007).



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