International Misconceptions: The Insanity Defense in Filicide Cases — Israel as a Case Study

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Introduction

Filicide is an ancient phenomenon.[1] It occurs in all cultures and embodies the norms and nuances of each culture throughout history. In ancient times the murder of children was considered legal practice in Greece, Mesopotamia, and Rome in order to limit the natural growth and improvement of the race.[2] Archaeological findings also show that the sacrifice of children was a common custom among peoples such as the Vikings, the Irish Celts, Gaul and Finks, and ancient Canaanite societies.[3]

Historians who have studied the phenomenon of filicide tend to link it to a series of factors, including: poverty, overpopulation, inheritance laws, practices related to illegitimate birthrate and other religious beliefs regarding disability, eugenics, and maternal madness.[4] The murder of newborn babies was carried out for various reasons: worship, contraception practice for fertility control, improving the breed, shame and fear of punishment for adultery or illegitimacy. An analysis of the historical and cultural background will be described below which indicates that poverty, at the individual or social levels, plays an important role on whether the child will be permitted to live or not. In historical literary works, however, the motive is dominated by emotions — anger, jealousy, shame, revenge — that reflect the era and culture in which they were written.[5]

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[1]Cheryl L. Meyer & Michelle Oberman, Mothers Who Kill Their Children 1 (2001).

[2]Ibid.

[3]Mordechai A. Ravilo, *On Paternal Rule in Roman and Hebrew Law*, Dini Israel 5, 85' 115 (1973).

[4]Meyer & Oberman, *supra* note 1.

[5]Linda Linzer Schwartz & Natalie K. Isser, Child Homicide: Parents Who Kill 1 (2007).

This long and varied list of explanations for this phenomenon of filicide shows that it wears different faces in different cultures.[6]

Filicide is not a random and unpredictable crime; it reflects the society in which it occurs and is usually carried out by mothers and fathers who cannot function as a parent in situation dictated by place and time in which they live. The commonality of poverty, social stigma, dowry, and disability for example. Circumstances change, but the common social cause is a constant reflection in filicide.

This article discusses the insanity defense in the case of a parent who committed filicide. This article will begin by reviewing the history of the insanity defense, its characteristics and components via comparative law through the United States of America, specifically the types of tests used in the different states. It will then discuss the history of the insanity defense in Israel through a chronological examination of the developments in Israeli legislation, from 1899 to the present time. In addition to reviewing relevant cases in Israel in which the insanity defense was claimed, this article will shed light on the gap between the public's misconception that a parent who has committed filicide "must be insane" and the reality of fact and law disproving that notion by the scarcity in which the insanity defense is accepted in filicide cases.

I. *The Insanity Defense in the United States*

The 50 states in the U.S. exercise different tests to determine if the defendant was sane at the time the crime was committed; if found to be insane, they will not be held criminally responsible for their actions. Although each test is different in some respect — all of them attempt to answer the same two questions: did the defendant suffer from a mental disease or defect at the time they committed the crime? And how did that disease or defect affect their cognitive ability or self-control in that situation?

The two main tests that are used in the U.S. are the "M'Naghten Test" and the "American Law Institute Test" (ALI Test). The third lesser used test is the "Irresistible Impulse Test" which permits the acquittal of defendants who could not control their actions despite knowing that they were committing a crime. Five states[7] exercise a combination of the Irresistible Impulse test and the M'Naghten test — this combination was the foundation of the ALI test.[8] The table below demonstrates the differences between the three:[9]

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[6]MEYER & OBERMAN, *supra* note 1, at 1–2.

[7]Colorado, New Hampshire, New Mexico, New York, Virginia.

[8]G. Alan Tarr, Judicial Process and Judicial Policymaking, Sixth Edition (2014), 178.

[9]PHILIP P. PURPURA, CRIMINAL JUSTICE: AN INTRODUCTION (1997), 67.

Test	Legal Standard of Mental Illness	Burden of Proof
M'Naghten	Did not know what he/she was doing or did not know it was wrong	Varies: Balance of probabilities on the defense Beyond reasonable doubt on the prosecutor
Irresistible Impulse	Could not control his/her conduct	Varies: Balance of probabilities on the defense Beyond reasonable doubt on the prosecutor
ALI	Lacks substantial capacity to appreciate the wrongfulness of his/her conduct or to control it	Beyond reasonable doubt on the prosecutor

Four states[10] do not allow an insanity defense. Almost an equal number of states exercise the M'Naghten Test and the ALI Test while others also allow a GBMI[11] verdict following use of the M'Naghten test and five states exercise a combination of the Irresistible Impulse test and the M'Naghten test.[12]

a. *The M'Naghten Test*

The M'Naghten test[13] is the standard test that is applied in most of the states in the United States. The test defines a person as insane if:

> At the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind as to not

[10]Kansas, Montana, Idaho, and Utah.

[11]A "Guilty But Mentally Ill" (GBMI) verdict is issued in cases in which the defendant falls short of the insanity defense requirements but the court recognizes that the defendant is in need of psychiatric treatment. Such will be sentenced alongside the guilty verdict. The defendant will then receive said treatment until their recovery. However, if the time of the recovery is shorter than the prison term sentenced — the conviction is held and the defendant will carry the sentence to term. *See* Megan C. Hogan, *Neonaticide and the Misuse of the Insanity Defense*, 6 WM. & MARY J. WOMEN & L. 259, 266 (1999).

[12]New Hampshire is the only state that uses the Durham Rule. According to the rule, a criminal defendant cannot be convicted of a crime if the act was the result of a mental disease or defect at the time of the incident. *See The Insanity Defense Among the States* at http://criminal.findlaw.com/criminal-procedure/the-insanity-defense-among-the-states.html (last viewed Dec. 29, 2018) (for a state by state analysis).

[13]Daniel M'Naghten was charged with murder in 1843, England. He thought he was being persecuted by the government and shot the secretary of state to death, while believing he was shooting the prime minister. The test states that if the jury should think the prisoner a person capable of distinguishing right from wrong with respect to the act of which he stands charged, then he is a responsible agent. *R. v. McNaughten*, 1843 WL 5869 (HL 1843).

> 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.[14]

The test does not check whether the defendant could tell between good and bad, but whether he/she knew that the act that he/she committed was bad. Criticizers of the test claim that it only tests the defendant's cognitive ability or intellectual understanding without weighing the volatile ability of the defendant to control their actions or their emotions. Thus, for example, a person who can know that their actions are bad but cannot control their actions will not be considered insane by this test.[15]

b. *The ALI Test / The Criminal Code Test*

The criminal code test was developed in 1955 by the American Law Institute and states the following:

> 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 the law.[16]

This test differentiates between psychopathic behavior (also referred to as sociopathic) and psychotic behavior.

Psychopathic behavior (or sociopathic) is not a mental disease or defect but rather a form of selfish behavior that manages the person's interaction with their environment. This form of behavior leads the person to take advantage of and cause pain to others in order to get their way. The psychopath demonstrates a lack of empathy for the rights of others. They can adapt their behavior to the law but consciously choose not to do so; they are not considered to be mentally ill, they are simply morally challenged. The psychopath knows the difference between good and bad but displays apathy

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[14]BARBARA R. KIRWIN, THE MAD, THE BAD AND THE INNOCENT: THE CRIMINAL MIND ON TRIAL 22 (1997).

[15]On the differences of the Insanity defense tests: "Because M'Naghten focuses on whether mental disorder undermines one's knowledge of wrongfulness, that test is better at capturing the essence of insanity than any of the other formulations. The Volitional Test doesn't work because compulsion should not be an excuse and because, even if it should be, resistible impulses are impossible to distinguish from impulses that are not resisted. The Appreciation Test is flawed because it is too broad and does not distinguish between people with and without significant mental disorder. The Rationality Test is also too broad or, if defined narrowly in terms of formal thought disorder, does not adequately identify all people who have difficulty accessing reasons for avoiding criminal action." Christopher Slobogi, *The Integrationist Alternative to the Insanity Defense: Reflections on the Exculpatory Scope of Mental Illness in the Wake of the Andrea Yates Trial*, 30 AM. J. CRIM. L. 315, 332 (2002).

[16]RALPH SLOVENKO, PSYCHIATRY AND CRIMINAL CULPABILITY 24 (1995).

and indifference towards it.[17] This behavior does not diminish their responsibility for the crime.

On the other hand, psychotic behavior characterizes a person who suffers from illusions or hallucinations and experiences such a drastic break from reality that they know not the nature of their actions or their consequences. Because of this, they are not aware that their actions are criminal and bad, and therefore there may be no value in prosecuting them. A psychotic person is insane because they suffer from a mental disease affecting their ability to understand the wrongfulness of their actions.[18] The criminal code test here is the closest of the tests to article 34h of the Israeli Penal Law today.

c. *The Differences Between the M'Naghten Test and the ALI Test*

There are three differences between the M'Naghten and the ALI test.[19] Firstly, the ALI test uses the term "appreciate" while the M'Naghten test uses the term "to know". Knowing demands a deeper level of understanding of the criminal behavior. Secondly, the ALI test requires a significant lack of ability to appreciate the behavior, while the M'Naghten test requires a total lack of ability. Thirdly, both tests include the intellectual-cognitive ingredient, but the ALI test also includes the voluntary aspect.

d. *Temporary Insanity Defense*

This defense is not permitted in all the states.[20] Contrary to the media's and defense attorneys' views, insanity does not appear out of nowhere, and if a mental disease does exist, then there were

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[17]"Psychopaths should be held responsible for their crimes because, regardless of how they feel about their crime, they are aware that their actions are illegal and not condoned by the rest of society." Hogan, *supra* note 11, at 269.

[18]*See also* CrimA. 1162/72 The State of Israel v. Amos Benyamini, 27(1) PD 208 [1972] (Isr.). In which the Supreme Court ruled that there should be a clear distinction between Psychopathy, displayed by a lack of morals and civil responsibility and Mental Illness, accompanied by Psychotic episodes.

[19]Hogan, *supra* note 11, at 270.

[20]The temporary insanity defense is a recognized, viable defense in some 44 states. Two states — Colorado and Arizona — bar defendants from asserting temporary insanity as a defense. Colorado courts have interpreted Colorado statutes to preclude insanity claims based on "mental disease or defect" that are "temporary in nature." Arizona similarly modified its insanity defense to exclude any "momentary, temporary conditions arising under the pressure of the circumstances" as well as "depravity or passion growing out of anger" in a person who "does not suffer from a mental disease or defect." Four more states — Idaho, Kansas, Montana, and Utah — do not recognize insanity as a defense at all. *See* Russell D. Covey, *Temporary Insanity: The Strange Life and Times of the Perfect Defense*, 91 Boston University L. Rev. (2011), 1606–1607.

symptoms present before the eruption and the commission of the crime.[21]

Modern psychiatric science continues to recognize the potentially disruptive effects of childbirth on women's mental health. Conditions such as postpartum psychosis frequently are blamed for infanticidal conduct.[22] Yet, a person suffering from a mental disease is not fit to make a choice, as oppose to a sane person, who can make a choice but simply makes the wrong one. Society's tendency to sympathize with a certain defendant does not take away from the fact that said defendant could have made the distinction between good and bad, made a choice and now must suffer the consequences of their actions. Juries in the U.S. rarely acquit a defendant based on the temporary insanity defense.[23] However, the diverse history of this defense,[24] combined with the public's curiosity surrounding it, shows how it is rooted in the public's perception of insanity and mental illness.

e. *Insanity Defense in Filicide Cases in the United States*

The filicide cases in which the insanity plea was accepted in the U.S. are few and far between. It is noteworthy that most research done in this context focuses on maternal filicide when the victim was under 1 years old, yet many other circumstances beyond this stereotype do exist. The defense claims range from postpartum depression to attempts in establishing a doctrine in English law (and article 303 of the Israeli Penal Law[25]), that is lenient with the mother accused of killing her child reducing the charge and/or sentence in accordance with the timing of raising the claim. A noteworthy Research done in 2012. Combined the legal databases in order to

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[21]Kirwin, *supra note* 14, at 122.

[22]Elizabeth Rapaport, *Mad Women and Desperate Girls: Infanticide and Child Murder in Law and Myth*, 33 FORDHAM URB. L.J. 527, 554–55 (2006).

[23]Research has shown the attempting to use the insanity defense fails in 3 out of 4 cases. *See* GARY B. MELTON, JOHN PETRILA, NORMAN G. POYTHRESS & CHRISTOPHER SLOBOGIN, PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL ILLNESS PROFESSIONALS AND LAWYERS 187 (2d ed. 1997).

[24]Covey, *Supra note* 20 at 1600.

[25]Article 303 of the Israeli Penal Law states: "Infanticide: 303(a) If a woman by an act or omission maliciously caused the death of her child that had not reached the age of twelve months, and if the balance of her mind was disturbed at the time of the act or omission because she was not fully recovered from the effect of giving birth or because of the effect of nursing after the birth, then — even though the offense, according to its circumstances, constitutes murder or manslaughter — she is liable to five years imprisonment.

(b) Nothing in this section shall derogate from a Court's power to convict a person, who is charged with murdering a child aged less than twelve months, of the offense of manslaughter, or of concealment of birth, or to find that she does not bear criminal responsibility under section 19 because of insanity or because of a defect in her mental faculties. Israeli Penal Law 5737-1977.

examine whether there is a trend in the legal results in these cases. This table demonstrates the results:[26]

M'Naughten (n=26) or Model Penal Code (n=7) Standards	State	Outcome
M'Naughten states		
Adams[27]	Louisiana	Convicted
Anderson	California	Convicted
Anfinson	Iowa	Convicted
Cavanaugh	California	NGRI
Clark[28]	Nevada	Convicted
Comitz[29]	Pennsylvania	Convicted
Dean	Ohio	Convicted
Diaz	Texas	NGRI
Dupre	Pennsylvania	Convicted
Ferguson	California	Convicted
Fuelling	California	NGRI
Gambill	Indiana	Convicted (GBMI)
Gindorf	Illinois	Convicted (GBMI)
Green	New York	NGRI
Laney	Texas	NGRI
Massip	California	NGRI
Maxon	Texas	NGRI
Molina	California	NGRI
Reilly	Pennsylvania	Convicted
Sanchez	Texas	NGRI
Schlosser	Texas	NGRI
Thompson, A	California	NGRI
Thompson	Ohio	Convicted
Wilhelm	New York	Convicted
Yates	Texas	NGRI
Young	Ohio	Convicted
Model Penal Code states		
Currie	Michigan	Convicted
Householder	West Virginia	Convicted
March	Connecticut	Convicted
Mitchell[30]	Kentucky	Convicted (GBMI)
Pixley	District of Columbia	NGRI

[26]Melissa L. Nau, Dale E. McNiel, & Rene'e L. Binder, *Postpartum Psychosis and the Courts*, 40 J. AM. ACAD. PSYCHIATRY L. 318, 318–25 (2012). It is apparent that in all of the 34 examined cases the victim was under the age of one. NGRI, not guilty by reason of insanity; GBMI, guilty but mentally ill.

[27]*State v. Adams*, 39 So. 3d 848 (La. Ct. App. 1st Cir. 2010).

[28]*Clark v. State*, 95 Nev. 24, 588 P.2d 1027 (1979).

[29]*Com. v. Comitz*, 365 Pa. Super. 599, 530 A.2d 473 (1987).

[30]*Mitchell v. Com.*, 781 S.W.2d 510 (Ky. 1989).

M'Naughten (n=26) or Model Penal Code (n=7) Standards	State	Outcome
Remington	Vermont	NGRI
White[31]	Idaho	NGRI
No insanity defense		
Tiffany	Idaho	Convicted

1. *Massip*

In 1987, Sheryl Massip killed her six-week-old son. She first threw him into oncoming traffic, then hit him on the head, and finally ran him over with her own car.[32] Prior to these actions, Massip had suffered from hallucinations, severe depression, and thoughts about suicide.[33] She initially claimed that the child had been kidnapped, but later admitted to killing him. Although a California jury found her guilty of second-degree murder, the judge presiding over the case overturned the verdict two months later and entered an acquittal on insanity grounds.[34] He required Massip to undergo at least one year of outpatient therapy to treat her postpartum psychosis, even though her symptoms had disappeared given the span of time between the death of her son and the trial. On the prosecution's appeal, the appellate court upheld the judge's finding of insanity on the basis of postpartum psychosis.[35]

2. *Yates*

In 2001, Andrea Yates[36] drowned her five children six months after the birth of her youngest child. Yates had suffered from a history of postpartum illness, beginning with voices she heard soon after the birth of her first child telling her to stab her baby. Her severe postpartum depression after the birth of her fourth child in 1999 led to two suicide attempts and a subsequent hospitalization. After the birth of her fifth child, she became almost catatonic and was hospitalized again but discharged soon after. Her physician discontinued her antipsychotic doses. Two weeks later, Yates committed the drownings and then called both her husband and the police.[37] Although Yates raised an insanity defense based on a postpartum psychosis

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[31] *State v. White*, 93 Idaho 153, 456 P.2d 797 (1969). Idaho abolished the insanity defense in 1982. Before then, it used the model penal code standard.

[32] *People v. Massip*, 271 Cal. Rptr. 868 (App. 4th Dist. 1990).

[33] Ibid.

[34] Ibid.

[35] Ibid.

[36] Slobogi, *supra* note 15, at 315.

[37] *Yates v. State*, 171 S.W.3d 215 (Tex. App. Houston 1st Dist. 2005).

diagnosis, a Texas jury found her guilty of five counts of murder, ultimately rejecting the death penalty in favor of a life sentence.[38]

To conclude, in the United States, the insanity defense is rarely used and unlikely to succeed, despite popular beliefs to the contrary. Infanticidal mothers seem to fare slightly better than other defendants who pursue insanity acquittals.[39] The lack of explanation of the anomaly of a mother killing her child combined with mental illness provides the basis for a bid to avoid prosecution, lessen the severity of the offense charged or the offense of conviction, or to mitigate the punishment.[40]

II. *The Insanity Defense in Israel*

a. *Article 34h of the Penal Law*

The insanity plea in Israel has been repeatedly examined in legal writings and by the courts. This part focuses attention on the insanity plea in filicide cases only. To do so, this article will review the historical development in Israeli legislation and its analysis and how was applied or not applied in filicide cases over the last few decades.

b. *The origins of the article*

To understand the meaning and development of this article we must review its sources. I will therefore start with its original source, Queensland Australia in the year 1899. The British empire ruled over colonies in Australia, Africa, and the Middle-East. At the time Queensland was a semi-independent colony. A few years after legislating the Penal Code[41] it was adopted by the British colonial office in London as the main modal for the codification of the criminal law in the colonies under its rule. For the first few decades of the twentieth century it was systematically enforced on colonies and residential areas throughout the British Empire.[42]

The path of that criminal code passed through different continents and it took several more decades until the code reached Israel. In 1904, it was legislated as the penal code for Nigeria. In 1925, it was used as a draft for phrasing the criminal code for the East-African colonies prepared in the colonial office in London. In 1928 an early

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[38]Ibid, p. 222. *See also* Phillip J. Resnick, *The Andrea Yates Case: Insanity on Trial*, 55 CLEV. ST. L. REV. 147 (2007).

[39]Michael Perlin, *The Borderline Which Separated You from Me: The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1421 n.309 (1997).

[40]Phillip J. Resnick, *Child Murder by Parents: A Psychiatric Review of Filicide*, 126 AM. J. PSYCHIATRY 325 (1969). *See also* Phillip J. Resnick, *Murder of the Newborn: A Psychiatric Review of Neonaticide*, 126 AM. J. PSYCHIATRY 1414 (1970).

[41]Queensland Criminal Code Act, 1899.

[42]Yoram Shachar, *The Origins of The Criminal Code Ordinance 1936*, Eioney Mishpat 7, 75 (1995).

version of the same draft was sent to Cypress and was also legislated there. The Israeli Penal Law springs directly from the Cypress Penal Code.[43] The insanity restriction in its original formula appeared in article 27 of the Queensland criminal code of 1899 and states the following:

> A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is in such a state of mental disease or mental infirmity as to deprive him of capacity to control his actions, or of capacity to know that he ought not do the act or make the omission.

It is apparent that in the original version the legislator acknowledges two tests: (1) the cognitive-intellectual test, could the person understand what they did was wrong, and (2) the voluntary test, could they have controlled their actions. This phrasing is different than the phrasing in the penal code that contains 2 levels to the cognitive-intellectual test — but why?

In 1928, when the Cypriot draftsman received a draft, he chose to omit the voluntary test because it did not suit the nature of the country Cypress.[44] Article 27 then became article 14 of the Cypress penal code stating the following:[45]

> A person is not criminally responsible for an act or an omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing or of knowing that he ought not to do the act or make the omission.
>
> But a person may be criminally responsible for an act or omission, although his mind is affected by disease if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.

This article contains the cognitive-intellectual test only, but now in two levels: (1) did the person understand what they were doing? and (2) did they know what they were doing is wrong?[46]

Another condition is the demand for a correlation between the

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[43]When the Penal Code arrived in Israel, around the year 1928, it was after passing several stops along its Journey changing its character and wording and its sources originated in India, England, Sudan and Nigeria. Also regarding killing offenses are French ottoman law was adopted. For further expansion on this, *Ibid*, at 76.

[44]This is how it was explained by the Cyprus lawmaker in a comparative chart they made to represent the changes they Incorporated in the penal code. Under the explanation of removing the irresistible impulse test they wrote: "unsuitable locally". *See* C.O. 67/222, Cyp. 22601/27.

[45]Criminal Code Ordinance No.74 of 1936. Published in Supplement No.1 to the Palestine Gazette Extraordinary No. 652 of 14th December 1936.

[46]Professor Feller explains the two levels of the cognitive test. On the first level he says: "what is mentioned here is a lack of capability to understand the physical meaning of their act or in other words the meaning of their act considering Nature's reality. Let It Be noted here, that this is not about some form of a mistake regarding

disease and its influence and the crime. It was this formula of the article that became the foundation for article 14 in the Israeli penal code of 1936. This how it was translated into the penal code-its heading was "insanity" and stated the following:[47]

> a man will not hold criminal responsibility due to an act or an omission if while committing the act or the omission they were incapable of understanding what they were doing or know that they were prohibited from committing the act or the omission due to a mental illness affecting their clarity of mind or do to a lack of mental capacity. However, a person may be held criminally responsible for an act or an omission even if his clarity of mind was affected by a mental disease, or he is suffering a lack of mental capacity if the disease or the lack of mental capacity doesn't truly cause the above-mentioned results regarding the act or the omission.

Its Hebrew phrasing raises the question: what did the translator mean when they wrote "or avoid doing it"? Examining the article's past and future raises the question of whether this was an attempt to insert the voluntary test back into the Israeli Penal Code or simply a matter of wrongful translation? In the article's original version from Queensland there was requirement for the voluntary test. Did the Israeli translator mean to bring it back after the Cypriot draftsman took it out? The wording is clear "or to avoid doing it", which is the same phrasing used in 1994 to set the voluntary test in the current 34h (2) of the penal code.[48]

c. *An Analysis of Article 34h*

The main difference between article 34h, the previous wording of the insanity defense in the Penal Code of 1936, and the Penal Law before Amendment 39 is in its duality regarding the cognitive abilities of the defendant — their ability to understand the essence of their actions and their wrongdoing and both to the effect of the

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the physical nature of the act, but rather the mental capability to grasp it's meaning". On the second level Professor Feller says: "here also, we are discussing a person's mental capability to understand the meaning of their behavior, only this time the moral value of it in light of social reality. This is not a matter of mistaking the social level of the act, or not knowing the act is forbidden, or not accepting the moral-social value of the act. There is also no option of prosecuting a person for the wrongfulness of their act for they are incapable of distinguishing good and bad do to the complications of their mental illness. Therefore, they lack the capacity to understand the true moral meaning of their act according to society's ideas". S.Z. FELLER, ELEMENTS OF CRIMINAL LAW, VOL. 1665 (1984).

[47] *Supra* note 45.

[48] Mental incompetence: 34H. No person shall bear criminal responsibility for an act committed by him, if — at the time the act was committed, because of a disease that adversely affected his spirit or because of a mental impediment — he lacked any real ability —

(1) to understand what he did or the wrongful nature of his act; or

(2) to abstain from committing the act.

mental disease on the voluntary ability to avoid committing the act. Another characteristic of the insanity defense in Israeli law, as opposed to several other liberal Judicial Systems in the world, is the extent of its application. It only applies to mental defects that completely prohibit the defendant's ability to avoid committing the illegal act and not a mental defect that had only a dramatic effect on his ability to do so.

The Fulfillment of the insanity defense depends upon the combination of several elements. There are three prerequisites, two tests and one circumstantial connection. The three prerequisites are: (1) that "at the time of the act", (2) "the defendant suffered a mental disease or mental defect", and (3) that "they lacked total ability in regard to the tests".

The two tests are: the cognitive test, in article 34h(1) regarding the defendant's ability to understand what they are doing. The ability to understand the physical nature of the act or understand the wrongfulness of their actions and that the act itself is wrong both legally and morally. Second is the voluntary test in article 34h (2) regarding the defendant's ability to avoid committing the act even when understanding the wrongfulness of it. Lastly, the circumstantial connection between the defendant's mental illness and the act needs to be examined.

d. *The Burden of Proof*

The insanity defense claim can be raised in three legal contexts. The first, during the trial in order to determine whether the accused is capable to stand trial. The second, regarding the question of criminal responsibility as discussed in this article. The third, regarding the sentencing.

Now we must address the question of criminal responsibility. After Amendment 39 to the Israeli Penal Law, article 34h(2) determined that the burden of proof to dismiss the insanity defense is not on the prosecution, as long as there is no evidence for its existence. However, if the defense raises doubt regarding its existence then the prosecution holds the burden to dismiss the insanity defense beyond any reasonable doubt.[49]

e. *Using the Insanity Defense in Filicide Cases*

This part will review the use of the insanity defense in Israel. Contrary to public opinion, stating there is no doubt that a parent who murdered their child is insane, there is not a single court ruling where a parent who committed filicide was found exempt from criminal responsibility due to the insanity defense.

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[49]CrimA 8287/05 Beharteza v. State of Israel, Section 14, (Published by Nevo Nov.8th 2011) (Isr).

1. *Sanderovich — 1968*

Yehuda Sanderovich walked into a police station and announced that he had just murdered his 15 year old retarded son Jacob who was staying at home, on vacation from the institution where he would usually reside. When asked to explain his actions, Sanderovich described that a week prior to the murder, Jacob tried to strangle his sister and ever since then the idea of killing him and thus relieving Jacob's own suffering emerged in his mind.[50] Sanderovich first strangled Jacob with his bare hands then tied a rope around his neck, placed him in the tub and stabbed him in the chest with a kitchen knife. Despite all of that, Jacob did not die but did suffer many injuries that led to him being hospitalized and operated on for the next 3 weeks.

The District Court convicted Sanderovich of attempted murder,[51] and sentenced him to four years in prison. Sanderovich appealed the verdict and the severity of the punishment to the Supreme Court. The Supreme Court determined that this was not a "mercy killing" thus rejecting that line of defense. The court rejected the defense's arguments about Sanderovich's insanity due to the lack of evidence that he suffered a psychotic breakdown during the attempted murder.[52] The Supreme Court, while denying the appeal regarding the conviction and accepting it regarding the punishment, ruled that a person can behave normally yet have a mental illness. The Supreme Court also ruled that it is enough to prove that the father was mentally ill 6 weeks prior to the act and was found mentally ill 2 weeks after the act, to reach the conclusion that he was in fact mentally ill during the act.

2. *Davidovich — 1992*

On the morning of March 22, 1992 Marina Davidovich did not send her 7 and 3-year-old daughters to school. Instead, she filled up the tub with water and placed her daughters in it to bathe together. She then proceeded to push their heads down into the water for a prolonged period, and as a result both girls died of drowning.

During the arraignment, Davidovich confessed to all the facts of the indictment excluding the question of responsibility and intent. She was charged with two counts of premeditated murder. The defense argued that she did not hold criminal responsibility for her actions since at the time of the act she was insane and incapable of knowing that she should not act the way she did due to a mental disease affecting her sanity. In order to establish the insanity defense

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[50]CrimA 219/68 Sanderovich v. Attorney General 22(2)PD 286 (1968) (Isr).

[51]According to article 222 of the criminal law order of 1936 that was used then as the Israeli Penal Law only came into effect in 1977. *Supra* note 45.

[52]*See supra* note 50.

(according to the then version of the article) the requirement was "proof that the mental disorder, that took place during the act reached the level of a mental disease" and that her criminal act was done under the influence of the mental disease.[53]

The case was tried in the District Court almost a year and a half after amendment 39 to the Israeli Penal Law was submitted to the legislator. The amendment added the voluntary test to the insanity defense.[54] At the time of her trial, Davidovich did not fulfill the conditions of the insanity defense when examining her behavior through the cognitive test. Yet she was found not guilty due to reason of insanity when 2 of the 3 judges also used the voluntary test to determine that she is within the bounds of the insanity defense. Why was this decided prior to entering the new amendment into the Penal Law? Possibly for 2 main reasons. First, the considerable difficulty of the Court deciding the judgment of a mother who murdered her children, derived of the difficulty to settle the ideal of motherhood with the brutal murder. Second, perhaps the fact that it was not hard to guess "which way the wind was blowing" regarding Amendment 39.[55]

It was found that Davidovich committed the act while insane and under the influence of her disease, and therefore she held no criminal responsibility. She was sent to the psychiatric ward for hospitalization and 7 years later she was released. This verdict is the only one in existence where the Israeli Court accepted the insanity defense in a filicide case.

3. *Anonymous- 2006*

Anonymous was born into a difficult family, her parents used violence on their children and she experienced attempts of sexual exploitation her by several men, including her own father. After suffering a previous miscarriage, she gave birth to her son who she raised as a single mother. According to social care reports, anonymous tried to take care of her baby but was depressed and exhausted, and she began to be fearful that her he will be taken away from her. Psychiatric evaluations described her as having a borderline personality with elements of depression, and in need of supervision and at risk of suicide.

In 2001 anonymous murdered her 1-year-old son. She first tried to set a gas balloon on fire, then she set blankets on fire and finally since the previous attempts did not work, she took a knife and

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[53]CrimA 870/80 Yehuda Ben Zecharia Ladani v. the State of Israel, PD 36(1), 029 (1981) (Isr), at 33–34.

[54]Proposed Amendment to the Penal Law (Preliminary Part and General Part) 1992, bill number 2098.

[55]The verdict was given in May 1993 while the amendment was submitted in January 1992 and finally accepted in 1994, coming into effect in August 1995.

stabbed her son 3 times in his upper abdomen damaging his internal organs and proceeded to cover his face with a pillow.

Subsequently, anonymous was convicted of murder in the District Court which sentenced her to life in prison. The Court mentioned that this was the tragedy of a young woman who has suffered a difficult upbringing while trying to build her own life, but subcommand to the pressure and murdered her own son. In an appeal regarding the sentence, on the basis of reduced responsibility due to reason of insanity,[56] the Supreme Court decided that a committee of 3 psychiatrists will give their professional opinion on the matter at hand. After deliberation the appeal was accepted, and the case was returned to the District Court for re-sentencing. The new sentence given to anonymous was 15 years.[57]

4. *Brill — 2013*

Karina Brill was the mother of 7-year-old Igor and 5 year old Mira. Until 2013 they lived in Russia, in March of that year she moved to Israel with her children. During the following months she would experience many difficulties settling into her new life in Israel while raising the children. During the month of August, under circumstances unknown, she became violent with Igor leaving a bruise on his neck. The instructor in the summer camp Igor was attending notice the mark and upon questioning, the child told her that his mother hurt him. Following that statement, the instructor contacted Brill who confirmed Igor's statement and asked for help. She was addressed to Social Services who began treating her. Despite said treatment, about a month later in September, Brill tried to commit suicide by taking a knife to her own neck. A few days later, Brill and her children were staying with a friend's house in Jerusalem and

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[56]Insanity can also be raised as a post-conviction claim in order to reduce the severity of the sentence. Article 300A of the Israeli Penal Law states:

> Reduced penalty300A. Notwithstanding the provisions of section 300, a penalty lighter than that prescribed in it may be imposed, if the offense was committed in one of the following cases:
>
> (a) in a situation, in which — because of a severe mental disturbance or because of a defect in his intellectual capability, the defendant's ability to do one of the following was severely restricted, even though not to the point of the complete incapacity said in section 34H:
>
> (1) to understand what he was doing or that his act is wrong; or
>
> (2) to refrain from committing the act;
>
> (b) in a situation, in which, under the circumstances of the case, the defendant's act diverged by little from the scope of reasonability, as required under section 34P, for the application of the exceptions of self-defense, necessity or duress under sections 34J, 34K and 34L;
>
> (c) When the defendant was in a state of severe mental distress, because of severe or continued tormenting of himself or of a member of his family by the person whose death the defendant caused.

[57]CrimA 7215/06 Anonymous v. the State of Israel (published by Nevo, Oct. 25, 2007) (Isr).

throughout the weekend she repeated that she really wanted help with her situation. After confessing to her friend that she attempted to commit suicide and showing her the scar on her neck, the friend contacted Social Services and asked for their help. When Brill realized what was happening, she became angry and fearful that her children will be taken away. Shortly after, she spoke to a representative from Social Services who coordinated a meeting with her. The meeting was to be held in Brill's house the very next morning at 7 a.m.

That afternoon her sister Nadia came to stay with them after the friend contacted her about Brill's situation. Seeing her sister's state of mind, Nadia decided to stay and sleep over. Brill had many conversations with her and expressed her fears of Social Services, she told Nadia she will not let anyone take her children away and that she planned to harm them and herself. Nadia tried to calm her down before the meeting and thinking that she had succeeded because they all went to sleep.

The next morning around 7 a.m. Brill came to the decision to murder her children and commit suicide. She took a large kitchen knife, slashed her own wrist, and then went into the room where the children were sleeping on a bunk bed. She slashed Mira's neck who woke up screaming in Russian "mom don't do it!" she then climbed the ladder of the bunk bed slashing Igor's throat repeatedly with intent to murder him while he was sitting on his bed. Hearing their cries, Nadia woke up and rushed to the children's room. Brill noticed Nadia in the room and started slashing her own neck again. Nadia grabbed Mira's arm' who was standing in the room bleeding and pulled her running towards the front door. Brill jumped off the bunk bed ladder chasing them. During the chase, Nadia's grip on Mira was loosened and Nadia exited the house by herself with Brill shutting the door behind her and locking it. Throughout the event Brill injured the children, stabbing them in multiple places on their bodies causing many lacerations. Shortly after both children collapsed, bleeding.

If Brill was to be found responsible for her actions she would serve her punishment and if not she will be directed to receive medical care under hospitalization. The defense claimed Brill committed the act in a state of insanity, unable to realize the wrongfulness of her actions and incapable of telling the difference between good and bad or avoiding committing the act. The defense claimed she was diagnosed by a psychiatrist with manic-depression and obsessive-compulsive disorder. According to the psychiatrist, throughout the act Brill was incapable of understanding and judging reality or avoiding committing the act and so is not responsible for her actions.

The Court reasoned that several actions committed by Brill demonstrate her ability to understand the wrongfulness of her ac-

tions and her ability to avoid committing them. Her behavior alone testifies to her situation and her acting in full consciousness during each part of the act. The defense was unable to contradict the Court. After careful consideration of all the information before it, the Court was convinced beyond a reasonable doubt that Brill was capable of understanding the wrongfulness of her actions and avoiding them but knowingly chose to commit them. In other words, Brill was not incapacitated and could understand the wrongfulness of her actions or avoid doing them. Thus, she did not prove she is eligible for the insanity defense. She was convicted of premeditated murder of her two young children and sentenced to two consecutive life sentences.[58]

III. *Conclusion*

This article examined the insanity defense in filicide cases, first reviewing comparative American law: the different tests used in different states to determine whether a defendant was insane and therefore not criminally responsible. This shows that there is no course of study demonstrating a useful use of this defense in filicide cases; on the contrary most were convicted despite raising this defense.

This article then reviewed Israeli law regarding the insanity defense in filicide cases; tracing the origins of law as far back as 1899 Queensland to Israel of 1994. In doing so, it uncovered the use of the different tests; first the cognitive test with the voluntary test, then removing the voluntary test only to add it back into legislation almost a hundred years later. Next, in reviewing Israeli filicide cases where the insanity defense was raised, this article uncovered that contrary to public's opinion a parent who kills their child is not necessarily insane.

Quoting District Court Judge Raz-Levy in the matter of a father convicted with attempted murder of their daughter:[59]

> It is hard to explain the defendant's actions in terms of behavior referred to as "normal". Certainly, to the reasonable man, this extreme act of attempting to murder their child is conceived as "insane" although, it is not enough for a certain act to be perceived as insane in order to establish a lack of criminal responsibility due to the insanity of the perpetrator"

The insanity defense in filicide cases is mostly raised, and more often accepted, when it is raised during the arguments for punishment and not as a preliminary defense.

The time has come to view parents who murder their children not

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[58]CrimC (Jer) 26449-10-13 the State of Israel v. Karina Brill, (Published by Nevo, Feb. 2, 2015) (Isr).

[59]CrimC (BS) 13729-09-12 the State of Israel v. Anonymous (Published by Nevo, Feb. 20, 2014) (Isr).

as an extraordinary phenomenon, so far and rare that the perpetrator "must" be insane. We must look directly in the eye of this phenomenon and realize that it has existed since the beginning of time transpiring in different cultures, east to west, more and less advanced. It is a result of social pressures, social perceptions, misguided assumptions of possessiveness regarding the children and vindictiveness regarding the partner. It is sometimes a result of difficulties in handling the birth and the period thereafter. And sometimes even a severe psychotic outbreak.

There is no doubt that our power as a society lays in our values, our protective values, the basis of our justice system, the basis of our personal conscious. A change in the way that we, as a society, perceive and condemn the next filicide will lead to true change. A change in social perception will lead to a change in judicial perception, and to a greater expression of the difference consideration in punishment which is so important in these cases, because unlike the reward consideration meant to punish the perpetrator, the prevention consideration asks to save the next victim. For "if not we, the court, cry out to the heavens for the four and a half months old infant that one day was here and then one day was lost, who will cry for him?"[60]

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[60]CrimA 75/04 Anonymous v. the State of Israel, PD 58(6), 70 (2004) (Isr).