

October 2015

Mothers Who Kill: Coming to Terms With Modern American Infanticide

Michelle Oberman

Follow this and additional works at: <https://via.library.depaul.edu/jhcl>

Recommended Citation

Michelle Oberman, *Mothers Who Kill: Coming to Terms With Modern American Infanticide*, 8 DePaul J. Health Care L. 3 (2004)

Available at: <https://via.library.depaul.edu/jhcl/vol8/iss1/3>

This Article is brought to you for free and open access by the College of Law at Digital Commons@DePaul. It has been accepted for inclusion in DePaul Journal of Health Care Law by an authorized editor of Digital Commons@DePaul. For more information, please contact digitalservices@depaul.edu.

MOTHERS WHO KILL: COMING TO TERMS WITH MODERN AMERICAN INFANTICIDE*

*Michelle Oberman***

I. INTRODUCTION

On a surprisingly routine basis, Americans are exposed to evidence of contemporary incidents of infanticide.¹ Occasionally, stories of infanticide become headline news, spread across the nation's papers day after agonizing day. Susan Smith's confession to drowning her two children by driving her car into a South Carolina pond is but one recent example. More often, though, coverage is limited to a fleeting mention

* Reprinted with permission of the publisher, *American Criminal Law Review* ©1996

** Associate Professor, DePaul University College of Law. J.D., M.P.H., 1988, University of Michigan; B.A., 1983, Cornell University. Heartfelt thanks are due to the many readers who commented upon early drafts of this Article. Among these are the participants at Cornell University's Program in Ethics and Public Life's Young Scholar Workshop, with special thanks to Kathryn Abrams, Katharine Baker, Bernardine Dohrn, Dorothy Roberts, and Henry Shue. The following readers provided critical insights and suggestions from a variety of perspectives: John Decker, Harold Krent, Stephen Landsman, Jane Larson, Larry Marshall, Sallyanne Payton, Michael Perlin, Nancy Press, Jane Rutherford, Stephen Schulhofer, Steven Siegel, Jeffrey Urdangen, Mark Weber, and Melissa Whelan, and members of the Chicago Area Feminist Law Colloquium. Heather Fields, J.D., 1996, DePaul University, worked with me over the course of her three years at DePaul, providing me with assistance that far surpassed the call of duty. My research assistants Candice Bowen, Dawn Best, Bethany Hengsbach, and Geri Thomas willingly undertook the laborious tasks associated with helping me pull together the grim research findings on which this article is based. The supportive attitude and helpful feedback of the editors at the *AMERICAN CRIMINAL LAW REVIEW* eased the painful process of revision. Finally, I thank Dean John Roberts and the DePaul Faculty Research Fund for the generous support that made this Article possible. Special thanks also to Quijote and Ursula.

Editor's Note: For the appendix, please view the original article in the *American Criminal Law Review*.

¹ Infanticide refers to the homicide committed by a mother against her infant child. From the time of the earliest laws against infanticide, the term has pertained only to women who kill their children. See Katherine O'Donovan, *The Medicalisation of Infanticide*, 1984 *CRIM. L. REV.* 259, 259 (stating that the first infanticide statute applied only to women). In many countries, the gender-specific crime of infanticide is codified as a distinct form of homicide. See *infra* notes 67 through 72 and accompanying text. In the United States, however, state criminal codes do not differentiate between infanticide and other forms of homicide, and thus, the issue of gender-specificity does not arise. Nevertheless, for purposes of this Article, infanticide refers solely to children killed by their mothers.

in the local news: missing infant found in trash; mother charged with murder; teen mother delivers baby into toilet; eighteen-year-old accused of drowning her toddler. Despite the commonplace nature of these incidents, we are so mystified and horrified by the stories of mothers killing their offspring that we perceive each story as isolated, as disconnected from--rather than consistent with--what we know about human society. So we are surprised to learn that in the United States and throughout the world, the population under one year of age is at great risk of death from homicide.² Their killers are more likely to be their own mothers than anyone else.³

To the extent that Americans are familiar with the term infanticide, they associate the phenomenon with developing nations struggling with the twin burdens of poverty and "overpopulation." It seems strange to associate this term with the thousands of American infants who are killed each year by their mothers. Additionally, although the word infanticide would seem to refer to the killing of infants, there is no established age limit for victims of this crime.⁴ Clearly there are significant differences between the circumstances surrounding a mother's killing of a three-year-old child, and that of a three-month-old, or for that matter, her killing of a three-minute-old baby. And yet, other than drawing an arbitrary chronological line, there is no readily apparent principle by which one might distinguish amongst these cases. Moreover, drawing a line at one year of age, for example, eclipses the important similarities linking cases involving older victims to those involving children under the age of one. When evaluated from the perspective of the circumstances surrounding the

² In fact, in England, this age group runs the single highest risk of death by homicide. Ania Wilczynski & Allison Morris, *Parents who Kill Their Children*, 1993 CRIM. L. REV. 31, 32. Furthermore, in the United States, between 1980 and 1985, homicide was the leading cause of injury-related death for children below age one. N. Prabha Unnithan, *Children as Victims of Homicide: Part I--Historical and Anthropological Research*, CRIM. JUST. ABSTRACTS 146 (Mar. 1991) (discussing research on historical, anthropological, and biological factors relating to infanticide). According to the U.S. Advisory Board on Child Abuse and Neglect, "[m]ore babies and young children die at the hands of their parents than in car accidents, house fires, falls or drownings." *At Least 2,000 Children Under Age 5 Die of Abuse Each Year*, U.S. Study Says, CHI. TRIB., Apr. 27, 1995, at 21, zone N [hereinafter *At Least 2,000*].

³ Wilczynski & Morris, *supra* note 2, at 33.

⁴ This may be observed in infanticide statutes from around the world, which pertain to victims of a surprisingly broad range of ages. For example, British infanticide laws apply to any homicides committed by a mother against her child within the child's first year of life, while New Zealand's infanticide statute includes any child killed by its mother before age ten. Compare *Infanticide Act*, 1938, 2 Geo. 6, ch. 36 (Eng.), with *Criminal Act of 1961*, in SPENCE & GARROW'S CRIMINAL LAW 135 (W.S. Spence, ed., 1962) [hereinafter *New Zealand Criminal Act of 1961*]. See *infra* notes 67 through 73 and accompanying text for a discussion of the scope of infanticide statutes from around the world.

mothers who kill their children, as well as from the perspective of the nature of the criminal justice system's disposition of these cases, the differences due to the victim's age seem far less significant than one might expect.⁵

I first became aware of America's infanticide problem several years ago when I received a phone call about a case involving a fourteen-year-old girl who claimed she never knew she was pregnant, yet was charged with murder after delivering a baby into a toilet.⁶ Her lawyer called to enlist my help in locating experts who might testify on her behalf. Shortly thereafter, the lawyer called back to say that I could discontinue my search, because the case was not going to trial. The prosecutor had announced his intention to subpoena the girl's male eighth grade classmates, many of whom claimed to have had sex with her. Faced with the prospect of this public humiliation, the girl had opted to plead guilty to involuntary manslaughter.

This girl, whose name I never learned, has haunted me. Without exactly knowing why, I found myself gathering stories like hers--seemingly inexplicable accounts of girls and women who, by killing their offspring, violate our most cherished notions of life, safety, and trust, and shatter the stereotype that universally casts mothers as the altruistic protectors of their children.⁷ Once I began looking, I found signs of these stories everywhere.

These cases came to evoke a profound ambivalence in me. On the one hand, the killings seemed uniquely horrific, unprovoked, and incomprehensible. Yet the more I thought about them, the less I knew where to direct my anger. Although the babies died at their mothers' hands, many others should be implicated in their deaths--the fathers,

⁵ Likewise, a focus on the circumstances surrounding the perpetrators of infanticide reveals the gendered nature of this offense. Although fathers, boyfriends, baby-sitters, strangers, and others may kill children, killings by mothers arise out of different circumstances--those of a primary caretaker. Because they reflect the mother's response to biological and sociocultural experiences surrounding pregnancy, labor, and delivery, the killings of infants in the first twenty-four hours of life are gendered phenomena. See *infra* notes 85 through 104 and accompanying text (describing these circumstances). Killings that occur after the first day of life, however, are gendered primarily because of society's allocation of caretaking duties to mothers. Thus, although I refer to infanticide as a crime committed by mothers, it is possible to imagine a parent, grandparent, or step-parent of either gender fulfilling the role of mother, and in that capacity, under the circumstances described herein, committing the crime of infanticide. See *infra* notes 297 through 323 and accompanying text (detailing the circumstances surrounding infanticide).

⁶ For a fuller description of this case, see Michelle Oberman, *The Control of Pregnancy and the Criminalization of Femaleness*, 7 *BERKELEY WOMEN'S L.J.* 1, 2-4 (1992) [hereinafter Oberman, *Control*].

⁷ Ania Wilczynski, *Images of Women Who Kill Their Infants: The Mad and the Bad*, 2 *WOMEN & CRIM. JUST.* 71, 73 (1991).

grandparents, friends, schools and workplaces, and society as a whole. As puzzling as it was undeniable, I often found myself empathizing with these killers.

In an effort to come to terms with both the commonplace nature of these killings and the ambivalence they evoked in me, I undertook a systematic collection of infanticide cases. Over the course of several years, I searched media data bases and had friends in small towns send me news clippings. I found hundreds of cases, most of which received only a brief mention in the press. Those cases that the media discussed in any detail became my data base.

Read together rather than as isolated occurrences, these cases provide a canvas, painted in admittedly broad strokes, that depicts a vivid picture of modern American infanticide. These stories emerge as distinctly patterned in nature, with marked similarities in the lives of the mothers at the time of their infants' deaths. But the pattern does not stop there; as my collection of stories grew, I discovered that my empathy for these women was shared by the judges and juries who determined the fates of the girls and women charged with killing their offspring. The rhetoric of moral outrage expressed by society at large and by judges and juries in individual cases is accompanied by an equally strong tendency to view these crimes as arising out of external circumstances, and therefore to resist equating these homicides with murder.

What does not emerge from this review of cases is an explanation for why we treat infanticide differently from any other type of homicide. And yet, this result is not at all unique to modern American culture. The same pattern of condemnation for the act and mercy for the actor can be observed at various points in Western history, and in various cultures today.

In order to place modern American infanticide cases in context, Section II of this Article provides a brief historical and cross-cultural perspective on the punishment of infanticide. The section focuses in detail on the tension between the demand for condemnation and the impulse toward mercy as revealed in the evolution of infanticide laws over the course of four hundred years of British legal history. Section III provides a detailed description of infanticide in the United States in the late twentieth century. After exploring the various patterns emerging from contemporary cases, this section illustrates the persistently ambivalent response toward punishing those convicted of infanticide.

Ironically, in both historical and contemporary societies, the tendency to treat infanticide as less heinous than other forms of murder seldom is acknowledged, let alone explained. Section IV describes the

problematic legacy of this ambivalence and undertakes a direct exploration of the ways in which infanticide cases tend to be exceptional. Focusing on the circumstances surrounding most infanticide cases reveals with greater clarity the legitimate justifications for partially excusing these homicides and reveals society's contributory role in tolerating and even perpetuating infanticidal situations. Therefore, Section V of this Article proposes two normative responses to infanticide. The first response is to explore ways in which society diminish what is fundamentally a preventable modern epidemic. The second response is to articulate a coherent criminological resolution to these cases.

A brief word about methodology is necessary. I had descriptive, analytic, and normative goals in writing this Article. Ideally, I would have found a rich literature in the areas of history, anthropology, demography, sociology, psychology, medicine, and criminal justice that would have provided the descriptive foundation for this Article, enabling me to focus on the analytical and normative aspects of the subject. Unfortunately, the literature on contemporary American infanticide is remarkably scant, whatever the academic discipline, forcing me to undertake documenting and describing the problem, as well as attempting to analyze and resolve it. In order to accomplish this task, I utilized a broad range of methodologies that seemed best suited to depicting the phenomenon of modern infanticide. As a result, this Article draws on a variety of traditions--historical, cross-cultural, narrative, sociological, and medical--as well as the more conventional doctrinal analysis of the law. My hope is that this Article will generate sufficient curiosity about the subject that persons more expert in these traditions than myself will undertake further studies and analysis, thereby enriching our understanding of, and our ability to eradicate, modern American infanticide.

II. AMBIVALENCE ABOUT INFANTICIDE ACROSS TIME AND PLACE

There is every reason to believe that infanticide is as old as human society itself and that no culture has been immune to it.⁸ Infanticide was legal throughout the ancient civilizations of Mesopotamia, Greece, and Rome, and was justified by reasons ranging from population

⁸ PETER C. HOFFER & N.E.H. HULL, *MURDERING MOTHERS: INFANTICIDE IN ENGLAND AND NEW ENGLAND 1558-1803*, at 3 (1981) (describing infanticide practices among hunting and gathering cultures, including one where 38 out of 96 female children born were killed) (citing E.A. WRIGLEY, *POPULATION AND HISTORY* 42-43 (1969)).

control to eugenics to illegitimacy.⁹ Although Constantine declared infanticide a crime in 318 A.D., all indications are that throughout much of the history of Western civilization, infanticide remained commonplace.¹⁰

⁹ Historian William Langer notes that "[i]n ancient times, at least, infanticide was not a legal obligation. It was a practice freely discussed and generally condoned by those in authority and ordinarily left to the decision of the father as the responsible head of the family." William L. Langer, *Infanticide: A Historical Survey*, 1 *HIST. CHILD. Q.* 353, 354 (1974); see also Kathryn L. Moseley, *The History of Infanticide in Western Society*, 1 *ISSUES L. & MED.* 345, 346-51 (1986) (exploring the social and personal motivating factors leading to infanticide from a historical perspective).

¹⁰ Langer, *supra* note 9, at 355; see also Moseley, *supra* note 9, at 352 (discussing infanticide of female and disabled children during the early Middle Ages). Although it is difficult to estimate infanticide's prevalence, historians have documented its persistence through a variety of genres. Demographic studies relying on civil, church, and hospital records yield information about sex-selective infanticidal practices as well as infanticide's widespread incidence. Barbara A. Kellum, *Infanticide in England in the Later Middle Ages*, 1 *HIST. CHILD. Q.* 367, 368-69 (1974); Richard Trexler, *Infanticide in Florence: New Sources and First Results*, 1 *HIST. CHILD. Q.* 98, 100-01 (1973).

For example, in a normal population, a ratio of 105-106 baby boys are born for every 100 girls. Nicholas D. Kristof, *A Mystery From China's Census: Where Have Young Girls Gone?*, *N.Y. TIMES*, June 17, 1991, at A1. During the first year of life, male babies are more vulnerable to infection and disease than are female babies; therefore, by age one there should be an equal number of boys and girls. Trexler, *supra*, at 101-02. As a result, whenever a community reveals sex ratios that diverge significantly from the norm, there is reason to suspect infanticide. *Id.* at 101-02; Kellum, *supra*, at 368-69. Modern demographers utilize this same reasoning to document the extent of sex-selective infanticide in modern China and India. Thomas Poffenberger, *Child Rearing and Social Structure in Rural India: Toward a Cross-Cultural Definition of Child Abuse and Neglect*, in *CHILD ABUSE AND NEGLECT: CROSS-CULTURAL PERSPECTIVES*, 71, 78-79 (Jill E. Korbin ed., 1981); Kristof, *supra*, at A1; Michael Weisskopf, *China's Birth Control Policy Drives Some to Kill Baby Girls*, *WASH. POST*, Jan. 8, 1985, at A1. Thus, data from fifteenth century Florence indicating 114.6 boys per every 100 girls, with the ratio jumping to 124.56 boys per 100 girls in upper class families, Trexler, *supra*, at 100-01; 100 boys per every 87 girls in 1971 in Punjab, Poffenberger, *supra*, at 79; and 111.3 boys per every 100 girls in 1990 in China, Kristof, *supra*, at A1, all demonstrate a pervasive practice of infanticide.

Other evidence of infanticide's prevalence comes from occasional references to infanticide found in historical documents. For example, medieval handbooks of penance describe the sin of "overlying" a child by laying on top of it and suffocating it. Kellum, *supra*, at 369. This sin is included in a list of the venial or minor sins, such as failing to be a good samaritan or quarreling with one's wife. *Id.* at 368. From the ninth to the fifteenth century, the standard penance for overlying was three years, one of these on bread and water, compared with five years, three of these on bread and water, for the accidental killing of an adult. *Id.* at 369. Scholars consider this casual mention and lenient treatment of infanticide to be evidence of its relatively commonplace nature. Mosley, *supra* note 9, at 356.

In eighteenth and nineteenth century France, England, and Russia, growing public awareness of the problem of abandoned newborns, both dead and alive, led to the creation of "foundling homes." See RACHEL G. FUCHS, *POOR AND PREGNANT IN PARIS: STRATEGIES FOR SURVIVAL IN THE NINETEENTH CENTURY* (1992) (detailing history of

There are a host of factors that give rise to infanticide. Other than the perpetrator's relationship to the victim, there may not be a tremendous amount in common between a mother who kills her female child in one culture and a mother who kills her illegitimate offspring in another. Nevertheless, across a startling expanse of time and place, one remarkably consistent observation may be made: infanticide is not treated like other homicides. Despite the moral condemnation of infanticide, there is considerable evidence that societies have refused to punish it as they do other homicides. When societies enforce laws against infanticide, they do so in a selective or even targeted manner. In the modern era, many societies have elected to codify the distinctive treatment of infanticide in specific statutes, the overwhelming majority of which articulate lesser penalties for homicides committed by mothers against children. The following two subsections will illustrate both the *de facto* and *de jure* mechanisms by which societies have exceptionalized infanticide.

A. Infanticide and the Pattern of Lenience: A Study in British Legal History

From the time of the Roman Empire, laws against infanticide have been under-enforced.¹¹ Despite the solidification of a moral norm condemning infanticide in Western Europe from the Middle Ages through the early seventeenth century, prosecutions and convictions for the crime remained relatively rare.¹² Although the overall pattern of lenience in prosecuting infanticide may have been due in part to sympathy for the defendants, it also derived from the difficulty of

Parisian women who delivered and abandoned their babies at the largest foundling home in France); Langer, *supra* note 9, at 357-59 (providing a brief history of the foundling homes). By the mid-eighteenth century, most large European towns established homes devoted to caring for abandoned children and providing an alternative to infanticide for those mothers who could not afford to raise their children. Langer, *supra* note 9, at 358. Although they were notoriously bad at saving infants' lives, these homes were so popular that, ultimately, they became too costly to maintain. For example, in France in 1833

[t]he number of babies left with the foundling hospitals reached the fantastic figure of 164,319. Authorities were all but unanimous in the opinion that the introduction of the tours had been disastrous Thereupon the tours were gradually abolished until by 1862 only five were left. Instead, the government embarked upon a program of outside aid to unwed mothers.

Id. at 359.

¹¹ The breakdown of the Roman Empire returned to local jurisdictions the task of law enforcement. Historians have noted the paucity of infanticide prosecutions and speculated that the local law enforcement officials were "generally unwilling to prosecute an 'innocent' woman for the murder of her child, especially if she was married." Moseley, *supra* note 9, at 355.

¹² HOFFER & HULL, *supra* note 8, at 4-6.

distinguishing murder from infant mortality. Infant mortality was commonplace in this period, as a result of both natural causes and improper medical treatment.¹³

In medieval Europe, married women so often escaped prosecution for infanticide that one historian concludes that "[t]hey could kill their infants with relative impunity."¹⁴ The same was not true for unmarried women, who often were singled out by the law.¹⁵ Although infanticide prosecutions remained uncommon, unmarried women who were convicted of infanticide generally received capital sentences that were carried out in excruciating manners.¹⁶

¹³ Constance B. Backhouse, *Desperate Women and Compassionate Courts: Infanticide in Nineteenth-Century Canada*, 1984 U. TORONTO L.J. 447, 449. This became a serious impediment to convictions in England, where the law required the state to prove both that the newborn had been born alive and that the mother had intentionally caused the baby's death. The state's case could be aided if there was evidence of violence on the corpse, or if there were witnesses who could testify that the baby had been born alive. However, decomposition of the body often concealed any signs of violence, and secret delivery made the availability of witnesses unlikely. HOFFER & HULL, *supra* note 8, at 9.

¹⁴ Moseley, *supra* note 9, at 357. During the witchcraft inquisition, some women, especially married women, escaped prosecution because the crime of infanticide was widely attributed to witches. For a fascinating historical account of the witchcraft inquisition in Europe, see ANNE L. BARSTOW, *WITCHCRAZE: A NEW HISTORY OF THE EUROPEAN WITCH HUNTS* (1994). Witches were thought to exercise enormous power over newborns. One historian of the Middle Ages notes that "[i]nfanticide was far and away the most common social crime imputed to the aged witches of Europe by the demonologists." Trexler, *supra* note 10, at 103. A second source found that "[a] full quarter of all the indictments brought against witches in England from the fourteenth through the eighteenth century was for bewitching infants." HOFFER & HULL, *supra* note 8, at 28.

As was the case with most of the accusations brought against witches, there was little evidence linking the accused to the crime. BARSTOW, *supra*, at 23- 29. Although it is possible that some of the infants died at the hands of these women, it is far more likely that the majority of these accusations were made in order to avoid casting blame on the child's parents. Historian Richard Trexler, in his comprehensive study of infanticide in medieval Florence, concludes that the selective punishment of infanticide, aided by allegations of witchcraft, reveals a society that had internalized a norm condemning infanticide, even though it attributed its commission exclusively to those who were outsiders, guilty of sexual immorality and social deviance.

The law and conscience of Europe in the sixteenth century vented its force upon old women and unwed mothers. There was no attention given to married women and their spouses. How could one prove infanticide within the walls of the family home? ... It was more reasonable to assume that witches passed through locked doors in the dead of night to suffocate infants than to believe that man and wife ... would do such a thing.

Trexler, *supra* note 10, at 105.

¹⁵ Many of the earliest statutes outlawing infanticide refer solely to the crime of bastardy neonaticide--infanticide committed by an unmarried woman. See *infra* note 23 (providing the text of *An Act to Prevent the Destroying and Murthering of Bastard Children*, 1623, 21 Jam. 1, ch. 27 (Eng.)).

¹⁶ Medieval sources recount stories of women who, following conviction, were tied into sacks, along with a dog or a cock, and then thrown into a river. Langer, *supra* note 9, at 356. One city's court and prison records from 1513 to 1777 document punishments

In seventeenth and eighteenth century Europe, several factors combined to generate pressure toward a more vigorous enforcement of laws against infanticide. By the start of the seventeenth century, rapid population growth and increasing poverty led to the perception of a growing social disorder.¹⁷ In response to that fear, crimes involving sexual offenses such as bastardy and fornication, which formerly had been tried in church courts and punished by a moderate penance, became secularized.¹⁸

Those who supported the regulation of sexual and reproductive behavior through the criminal law recognized that, to the extent that infanticide went unpunished, women who were guilty of crimes of sexual "deviance" could evade punishment by disposing of the "evidence."¹⁹ Thus, if a jurisdiction wished to insure obedience to laws regulating illicit sexual and reproductive behavior, they also had to insure the strict enforcement of laws punishing infanticide. Therefore, it is unsurprising that in England, where the laws governing sexual misconduct were most severe, the Parliament passed legislation aimed at increasing the rate of infanticide convictions.²⁰ Because the British used the law in a conscious effort to reverse the tendency toward lenient treatment of infanticide defendants, and because lawmakers continually failed in these efforts,²¹ this legal history provides ample evidence of the ambivalence generated by this crime.

1. The Jacobean Law of 1623: A Presumption of Guilt In British Infanticide Cases

In 1623, Parliament passed An Act to Prevent the Destroying and Murdering of Bastard Children, or as it came to be known, the

ranging from burial alive to drowning and decapitation for 87 women executed for the crime of infanticide; all but four were unmarried. Id.

¹⁷ HOFFER & HULL, supra note 8, at 12-13; Langer, supra note 9, at 355, 357.

¹⁸ These laws were particularly harsh in England, where the crimes were punished by public whippings and imprisonment. For example, in 1576 Parliament passed a "poor law" that punished impoverished parents of bastard children. Mothers of these children were pressed to identify the men who fathered their illegitimate children, and fathers were required to pay support to the local parish for the child. Noncompliance by either parent resulted in whippings or prison. HOFFER & HULL, supra note 8, at 13.

¹⁹ The stigma and humiliation associated with crimes of sexual deviance were so great that they may have led women to conceal illegitimate pregnancies and commit infanticide rather than acknowledge their conditions and endure prosecution. HOFFER & HULL, supra note 8, at 17. In fact, two historians of the era note a distinct correlation between the heightening of sanctions against bastardy and the rise in the number of indictments for infanticide. Id. at 18.

²⁰ See infra notes 22 through 24 and accompanying text.

²¹ See infra notes 27 through 50 and accompanying text.

Jacobean Law of 1623.²² The law focused exclusively on the concealment of the death of "bastard" children by "lewd" women, or infanticides committed by unmarried women. Although this may reflect a belief that mothers of legitimate children had no reason to wish them dead, or at least had husbands who would limit their ability to conceal pregnancy and infanticide, it also may be seen as evidence that the infanticide law was responsive to the difficulties in punishing crimes of sexual deviance. The Act made it a capital offense to conceal the birth of an illegitimate child--whether still- or live-born--by a secret disposition of its dead body. The law essentially reversed the presumption of innocence by providing that, unless the defendant could prove by eyewitness testimony that the baby had been stillborn, the jury must find her guilty of murder.²³ Few women accused could meet this evidentiary test. After all, the entire purpose of concealing a pregnancy would be defeated by inviting a witness. Thus, given high infant mortality rates, the law had the effect of "sentencing innocent women to death in the many cases where a woman attempted to conceal her childbirth but the foetus was stillborn or died of natural causes."²⁴

²² 1623, 21 Jam. 1, ch. 27 (Eng.). Similar, if not identical, versions of this act were incorporated into law in much of New England and Canada. See HOFFER & HULL, *supra* note 8, at 59-63 (regarding the 1692, 1699, and 1710 adoptions of the Jacobean law in Massachusetts, Connecticut, and Virginia, respectively); Backhouse, *supra* note 13, at 449 (regarding Nova Scotia and Prince Edward Island statutes of 1758 and 1792, respectively).

²³ The statute read:

An act to prevent the destroying and murdering of bastard children.

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 alledge, 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 mothers, 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 ... be delivered of any issue of her body, male or female, which being born alive, should be the laws of this realm be a bastard, and that she endeavor 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.

An Act to Prevent the Destroying and Murdering of Bastard Children, 1623, 21 Jam. 1, ch. 27 (Eng.), reprinted in HOFFER & HULL, *supra* note 8, at 20.

²⁴ Backhouse, *supra* note 13, at 450. It was the rare circumstance to find the Jacobean Law of 1623 applied to married women, and when it was, acquittal usually ensued. HOFFER & HULL, *supra* note 8, at 85 (a "servant, nurse, and wife" acquitted of murder in 1781 after she had wounded her newborn while untangling the umbilical cord). In 1803, the Jacobean Law of 1623 was repealed, and by 1828, with the death penalty provision

The years immediately following the enactment of the Jacobean Law of 1623 witnessed a dramatic increase in the conviction rates of those prosecuted for infanticide. In their comprehensive empirical study of infanticide in England from 1558 to 1803, Professors Hoffer and Hull compare conviction rates for both ordinary homicide and infanticide. One part of their study reviewed homicide and infanticide prosecutions in the Essex assize by contrasting the forty-eight years prior to the passage of the 1623 statute with the twenty-eight years following its passage.²⁵ Although they found no demonstrable change in homicide indictment rates, they discerned a 225% increase in the rates of infanticide indictments.²⁶

Despite the law's effectiveness in obtaining convictions, the threat of conviction and punishment had seemingly little deterrent effect on the prevalence of infanticide. Evidence indicates that the crime remained relatively commonplace throughout eighteenth and nineteenth century England, much as it was in the rest of Europe.²⁷ Moreover, after the first several decades of applying this law, juries reverted to the familiar pattern of lenience, even in those cases involving unmarried women who were guilty of concealment.²⁸

The trend away from conviction and toward lenience was facilitated by the adoption of several defenses that could be invoked against the charge of infanticide by virtue of concealment. The most common defense was based on a woman's preparation for the birth of the child, otherwise known as "benefit-of-linen."²⁹ This defense virtually guaranteed acquittal to any defendant who could demonstrate that she had made linen for her infant before its birth.³⁰ "Want-of-help" was a second defense that was invoked to diminish culpability, or in some cases, to secure acquittal. This defense permitted a woman to

eliminated and the statute focusing solely on concealment, application was freely extended to married women. Backhouse, *supra* note 13, at 454.

²⁵ HOFFER & HULL, *supra* note 8, at 23-25.

²⁶ *Id.* at 18. Hoffer and Hull's study also demonstrates that the severe punishment of infanticide was reserved for those defendants whose crimes fit the statute. Their data indicate a guilty rate of 72.7% for women tried for infanticide whose acts fit the statute--unmarried women who concealed pregnancy--as compared to a 33.3% conviction rate for those who did not fit the statute--married suspects and/or older child victims. *Id.* at 25.

²⁷ Langer, *supra* note 9, at 355-57.

²⁸ See *infra* notes 32 through 33 and accompanying text.

²⁹ HOFFER & HULL, *supra* note 8, at 69.

³⁰ *Id.* at 69. The authors note that in six cases where the mothers of dead newborn bastards pleaded "benefit-of-linen," five were acquitted. For obvious reasons, the defense was most effective in cases in which there was no sign of violence on the corpse. *Id.*

argue that the infant's death had occurred despite her efforts to secure assistance.³¹

Armed with these defenses, British juries once again began to resist convicting women of infanticide. By the early eighteenth century, juries were as likely to favor the defendant as seventeenth century juries had been to convict.³² Conviction rates for bastard neonaticide between 1714 and 1722 were not only lower than in the years immediately following passage of the Jacobean Law, but were "as far below 50% as the rate for the period between 1614 and 1622 was above 50%."³³

2. Nineteenth Century British Infanticide Law Reform

From the 1720s to the early 1800s, the pattern of under-enforcement and jury nullification of the concealment law led British lawmakers, who already were troubled by the law's anomalous and unfair nature, to call for its repeal.³⁴ Finally, in 1803 Parliament passed a revised infanticide statute.³⁵ The new law made infanticide subject to the same rules of evidence as all other homicides. Thus, the

³¹ The "want-of-help" defense took various forms: "[p]rior arrangement with a midwife, cries for help drowned out by passing carriages, a mistakenly locked door, a sudden illness preventing the solicitation of assistance, or a fall on the way to obtain help." *Id.* at 69. Likewise, juries were increasingly inclined to view a woman's failure to tie off an umbilical cord or to stop the fall of a child onto a hard floor or into a privy as evidence not of "murderous intent," but rather, of "a lack of skill or self-possession." *Id.* at 69-70.

³² *Id.* at 71.

³³ *Id.* Hoffer and Hull also reviewed murder conviction rates from eighteenth century Massachusetts, comparing jury outcomes in infanticide cases with outcomes in murder trials with adult victims. Their review shows that

[w]hen ... doubts [about premeditation] disturbed eighteenth-century infanticide juries, they resolved them in favor of acquittal at a rate even greater than the combined percentages of murder of adults ending in acquittals and verdicts of murder reduced to manslaughter. These statistics lead to the conclusion that the eighteenth-century juries were more lenient in infanticide cases than in murders involving adult victims.

Id. at 77-78.

³⁴ Perhaps the most powerful plea was made in 1772 by Edmund Burke and Charles James Fox, two members of the House of Commons, who argued that in the case of women having bastard children, the common [and] statute laws were inconsistent; that the common law subjected to a fine, to a month's imprisonment, and the flagellation; that this institution necessarily rendered the having of a bastard child infamous; that the dread of infamy necessarily caused concealment; that the statute law, in opposition to all this, made concealment capital; that every mother, who had not at least one witness to prove, that her child, if it was dead, was born dead, or died naturally, must be hanged; that nothing could be more unjust, or inconsistent with the principles of all law, than first to force a woman through modesty to concealment, and then to hang her for that concealment

HOFFER & HULL, *supra* note 8, at 85-86 (quoting PARLIAMENTARY HISTORY OF ENGLAND, 17: 1771-1774, at 452-53 (London, 1813)).

³⁵ 43 Geo. 3, ch. 58, § 3 (1803) (Eng.).

prosecution had a duty to establish that the victim had been born alive. Contemporary forensic medicine proved ill-equipped to determine live birth on autopsy and, as a result, the live birth requirement greatly hindered findings of guilt.³⁶ The 1803 statute provided for up to two years in prison in those cases where women had concealed their illegitimate pregnancies but live birth could not be determined.³⁷ This lesser offense became the overwhelming preference of juries in infanticide trials, in part because infanticide carried with it a capital sentence.³⁸ As one historian of the era notes, "the courts regularly returned verdicts of not guilty despite overwhelming evidence to the contrary."³⁹

Rather than correcting the problem of nullification, the 1803 law furthered the tendency toward lenience, particularly when, in 1828, Parliament expanded the law to apply the crime of concealment to all women, as opposed to just "lewd" women.⁴⁰ Faced with seemingly ordinary women who had committed indisputably immoral acts, the courts began to entertain for the first time defenses premised upon the defendant's temporary insanity. Beginning in the mid-nineteenth century, medical experts came to believe that the "disruptive effects of

³⁶ There were several controversial and ultimately discredited methods that doctors used to determine live birth. The best known was the Swammerdam test, which was based on Jan Swammerdam's 1667 discovery that fetal lungs float on water after respiration has occurred. Unlike their European counterparts, who concluded that it was impossible to infer live birth from floating lungs, British doctors adhered to this test well into the eighteenth century. By the mid-nineteenth century, however, "even English physicians were conceding that a conviction for murder should not hinge upon whether lung tissue sank or 'swam'." George K. Behlmer, *Deadly Motherhood: Infanticide and Medical Opinion in Mid-Victorian England*, 34 *J. HIST. MED. & ALLIED SCI.* 403, 410 (1979).

³⁷ 43 Geo. 3, ch. 58, § 4 (1803) (Eng.). In England in 1828, a new law permitted a direct trial for the crime of concealment without a prior murder trial. An Act for Consolidating and Amending the Statutes in England Relative to Offences against the Person, 1828, 9 Geo. 4, ch. 31, § 14 (Eng.); see also An Act for Consolidating and Amending the Statutes in Ireland Relating to Offences against the Person, 1829, 10 Geo. 4, ch. 34, § 17 (Eng.) (extending the same statute to Ireland). Similar statutes were passed in the New England colonies. HOFFER & HULL, *supra* note 8, at 90-91; see also Paul A. Gilje, *Infant Abandonment in Early Nineteenth-Century New York City: Three Cases*, 8 *SIGNS* 580, 582 (1983) (citing Massachusetts, Pennsylvania, and New York statutes criminalizing concealment).

³⁸ Behlmer, *supra* note 36, at 412. One British jurist, testifying in the 1860s to the Commission on Capital Punishment, stated that "almost every case tried for concealment was a case of murder." O'Donovan, *supra* note 1, at 261 (citing Commission on Capital Punishment, 21 *BRITISH PARLIAMENTARY PAPERS* (1866)).

³⁹ Backhouse, *supra* note 13, at 448. As Section III of this Article demonstrates, this resistance to convicting these defendants of murder remains commonplace today. See *infra* notes 105 through 128 and accompanying text.

⁴⁰ 1828, 9 Geo. 4, ch. 31, § 14 (Eng.).

birth on mental health" could lead a mother to kill her newborn.⁴¹ Two psychological disorders, "puerperal mania" and "lactational insanity" were thought to cause occasional infanticidal thoughts and actions in newly delivered and/or nursing mothers.⁴² Although some Victorians objected to the widespread use of this "merciful legal fiction," juries and judges generally were willing to believe that the "physiological and psychological trauma of child-birth" was responsible for most infanticidal behavior.⁴³

Toward the end of the nineteenth century, this lenience again became the subject of public debate. The growing concentration of people living in urban squalor was linked to an increased visibility of infanticide.⁴⁴ Public officials expressed growing outrage over the crime and frustration over juries' reluctance to punish it.⁴⁵ Disraeli decried the fact that infanticide was "practiced as extensively and as legally in

⁴¹ Behlmer, *supra* note 36, at 413.

⁴² *Id.* at 413. The medicalized explanation for infanticide was not limited to England. In France, infanticide defendants whose newborns had been killed in particularly violent ways explained that their actions were due to "a fureur manique or folie passagere due to the atrocious pains of the last moments of labor." James M. Donovan, *Infanticide and the Juries in France, 1825-1913*, 16 *J. Fam. Hist.* 157, 169 (1991).

⁴³ Behlmer, *supra* note 36, at 413. In our own era, evidence of the preference of a medicalized explanation of infanticide is manifest in numerous statutes from various cultures, and also in the academic world's virtually exclusive focus on postpartum psychosis in the otherwise sparse literature on modern infanticide. See *infra* note 141 (listing postpartum psychosis articles). Professor Michael Perlin, an expert on the insanity defense, refers to infanticide defendants as "empathy outliers," owing to their frequent success in establishing an insanity defense despite the fact that the overwhelming majority of defendants who raise these defenses are unsuccessful. MICHAEL L. PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* 192 (1994).

⁴⁴ During this era, Thomas Malthus posited that human fertility would exceed the power of the earth to provide sustenance, that premature death of some type would thus affect a large part of mankind, and that "[t]he vices of mankind are active and able ministers of depopulation." GLANVILLE WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 34-35 (1957) (quoting THOMAS MALTHUS, *AN ESSAY ON THE PRINCIPLE OF POPULATION*, 139-40 (Bonar's 1926) (London 1798)). From this premise, Malthus concluded that poverty and its ills were inherent in the social order. *Id.* So prevalent was infanticide that "[o]ne may safely assume that in the eighteenth and nineteenth centuries the poor, hardly able to support the family they already had, evaded responsibility by disposing of further additions." Langer, *supra* note 9, at 357.

⁴⁵ Professor Langer documents a number of journalistic accounts from coroners, who said that police thought no more of finding a dead child than of finding a dead cat or dog; doctors, who said that women in lower ranks left their babies in the care of 'killer nurses' who made short shrift of their charges by generous doses of opiates; politicians, who described a seeming "carnival of infant slaughter"; and newspapers that reported dead babies found in ditches, parks, and cesspools and noted the crime "is positively becoming a national institution." *Id.* at 360-61.

England as it is on the banks of the Ganges."⁴⁶ One justice testified to the Commission on Capital Punishment in 1866:

It is in vain that judges lay down the law and point out the strength of the evidence [J]uries wholly disregard them and eagerly adopt the wildest suggestions which the ingenuity of counsel can furnish Juries will not convict whilst infanticide is punished capitally.⁴⁷

The sympathetic response of nineteenth century juries to infanticide defendants may have reflected a sense that the mandatory death penalty was too harsh a punishment in light of the circumstances surrounding the crime. This crime was overwhelmingly committed by poor women, many of whom were seduced and then left alone to face the consequences of pregnancy and an illegitimate infant.⁴⁸ As Adrienne Rich notes, "[t]he Victorian period abounds with cases of the seduction (read 'rape') of servant girls by their employers; if they refused sex, they would be fired, and many were fired anyway for getting pregnant."⁴⁹ Thus, there was a common sentiment expressed by those asked to convict these women of murder that one of the guilty parties, and perhaps the primary one, was missing from the trial.⁵⁰

⁴⁶ ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* 262 (1976). On the other side of the Atlantic, the incidence of infanticide and infant abandonment were equally dramatic: 483 dead infants found in Philadelphia streets in one four year period between 1860 and 1900. *Id.* From 1861 to 1871, 939 "foundlings" were reported in New York City alone. Lawrence M. Friedman, *Crimes of Mobility*, 43 *STAN. L. REV.* 637, 655 (1991).

⁴⁷ D. Seaborne Davies, *Child Killing in English Law*, 1937 *MOD. L. R.* 202, 219 (quoting Judge Keating's testimony before the Commission on Capital Punishment, 21 *BRITISH PARLIAMENTARY PAPERS* 103 (1866)). Judges also were reluctant to convict and they "not merely tacitly acquiesced in the methods used by lawyers to circumvent the law but frequently played an active part in these conspiracies."

⁴⁸ Donovan, *supra* note 42, at 169; see also Friedman, *supra* note 46, at 655 (describing a common scenario where young servant girls could not afford to raise unwanted children, and would be fired if they disclosed their conditions to their employers); Langer, *supra* note 9, at 357-60 (describing the prevalence of infanticide among the poor, who could not afford to raise another child).

⁴⁹ RICH, *supra* note 46, at 262.

⁵⁰ One study of French infanticide cases during this era cites several experts who concluded that many of the accused women were acquitted because the jurors felt that it was unfair that the females alone should bear the responsibility for the crimes. This was because the men who had impregnated the women ... often abandoned them and bore no legal responsibility for the consequences of their lust. Therefore, jurors frequently believed that the male seducers were at least partly responsible for the infanticides.

Donovan, *supra* note 42, at 169.

3. De Jure Lenience: Great Britain's Twentieth Century Infanticide Statute

Eventually, this debate led to the repeal of the 1803 infanticide act in favor of a law that, for the first time, attempted to articulate a justification for lenience in cases of infanticide. The new statute was proposed by a series of British judicial commissions. The commissions claimed that efforts to try infanticide under homicide laws inevitably led juries and judges to nullify the law, and that this reluctance to convict was making a mockery of the criminal justice system.⁵¹

The resulting British Infanticide Act of 1922 is premised upon the belief that a woman who commits infanticide may do so because "the balance of her mind [i]s disturbed by reason of her not having fully recovered from the effect of giving birth to the child."⁵² As a result, the statute provided that those defendants whose minds were so disturbed, "notwithstanding that the circumstances were such that but for the Act the offence would have amounted to murder," shall be guilty only of manslaughter.⁵³ The definition of "disturbance" of the mind is more fluid and capacious than the modern insanity defense, thus making this defense available to virtually all women accused of killing their young children.⁵⁴

⁵¹ "It has been convincingly argued that the Act 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." O'Donovan, *supra* note 1, at 261; see also NIGEL WALKER, *CRIME AND INSANITY IN ENGLAND*, VOL. I, 128-32 (1968) (describing objections to the law and efforts at reform).

⁵² The text of the law reads:

Where a woman ... causes the death of her child ... under twelve months of age, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect ... of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder, she shall be guilty of felony, to wit of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of the child.

Infanticide Act, 1938, 2 Geo. 6, ch. 36 (Eng.). The 1922 Act originally was limited to "newly born" children, but was amended in 1938 in response to a case that held that the law did not extend to a woman who killed her 35-day-old child. The amended law included any child under the age of 12 months and extended the defense of lactation-related hormonal imbalance. WALKER, *supra* note 51, at 131-32.

⁵³ Infanticide Act, 1938, 2 Geo. 6, ch. 36 (Eng.).

⁵⁴ For example, one study of 89 British women who killed their children between 1970 and 1975 demonstrated the efficiency of the infanticide statute, as compared with other homicide laws, in obtaining convictions. P.T. d'Orban, *Women Who Kill Their Children*, 134 *BRIT. J. PSYCHIATRY* 560, 566-67 (1979). Sixty subjects whose victims exceeded the age of one year were charged with murder, yet only two were convicted of this offense. *Id.* The vast majority of these defendants were convicted of manslaughter on grounds of diminished responsibility or lack of intent to kill. *Id.* Five were acquitted altogether. In contrast, of 24 subjects charged with infanticide, 23 were convicted. Of the

Although manslaughter may be punished with life imprisonment in England, actual sentencing practices under the infanticide statute have been far more lenient. So many of those convicted receive probationary sentences that one leading scholar of the British criminal justice system concluded that the practical impact of the Infanticide Act has been "the virtual abandonment of prison sentences as a means of dealing with a crime involving the taking of human life."⁵⁵

Interestingly, the most fundamental criticism of the Infanticide Act is not the law's lenience, but rather its quasi-scientific basis. Professor Osborne echoed the sentiments of many when she concluded that the Act did not recognize the existence of a link between childbirth and infanticide, but created it.⁵⁶ Even at the time of the Act's passage, it was unclear whether the Act was based on an actual belief that women who killed their children were mentally ill, or whether "a medical model was adopted to justify moderation in the imposition of punishments."⁵⁷ In recent decades, as various English law reform groups have reconsidered the Infanticide Act,⁵⁸ both supporters and critics of the Act agree that "there is little or no evidence for an association between lactation and mental disorder," and that mental disorder is "probably no longer a significant cause of infanticide."⁵⁹

Despite the widespread consensus that mental disorders are not the sole cause of infanticidal behavior, those reviewing the British law

23 convicted, 18 received probationary sentences (seven with a condition that they receive psychiatric treatment), two were sentenced to imprisonment (one for 18 months and the other for two and one half years), one was conditionally discharged, one received a nominal one day sentence, and another was diagnosed as suffering from postpartum depression and admitted to a mental hospital. *Id.*

⁵⁵ WALKER, *supra* note 51, at 133.

⁵⁶ Judith A. Osborne, *The Crime of Infanticide: Throwing Out the Baby With the Bathwater*, 6 *REV. CAN. D. FAM.* 47, 55 (1987); see also WALKER, *supra* note 51, at 128 (describing the difficulties of fashioning a legal approach to infanticide); O'Donovan, *supra* note 1, at 259-62 (same).

⁵⁷ Daniel Maier-Katkin & Robbin Ogle, *A Rationale for Infanticide Laws*, 1993 *CRIM. L. REV.* 903, 911.

⁵⁸ Professor Osborne lists three committees: The Committee on Mentally Abnormal Offenders; The Royal College of Psychiatrists' Working Party on Infanticide; and The Criminal Law Revision Committee. Osborne, *supra* note 56, at 57.

⁵⁹ O'Donovan, *supra* note 1, at 263 (describing the findings and proposals of The Criminal Law Revision Committee's Fourteenth Report and the Butler Report). Of course, contemporary science does recognize the medical phenomena of postpartum psychiatric disorders. See *infra* notes 140 through 154 and accompanying text (discussing postpartum psychosis). While it is not known precisely what percentage of women who kill their children suffer from postpartum psychosis, both psychiatric research and analyses of mortality statistics suggests that it is only rarely the cause of infanticide. Wilczynski & Morris, *supra* note 2, at 35.

have not called for its repeal. This remains so in spite of the availability of a diminished responsibility defense.⁶⁰ In fact, one law reform committee that has studied the Infanticide Act recommended retaining the law precisely because the mental health act was not broad enough to cover most women convicted of infanticide.⁶¹ Moreover, two of the three committees studying the law recommended that its medicalized definition of disturbance of the mind be broadened by adding socio-economic considerations to the list of factors that might precipitate infanticide. The Fourteenth Report of the Criminal Law Revision Committee recognized that mental disturbance could arise from the effects of giving birth or from the socio-economic "circumstances consequent upon birth," and recommended that the latter phrase be included in the statute.⁶²

Ultimately, the determination to retain a quasi-medical justification for treating infanticide differently from other homicides emerges as further evidence of the ambivalence infanticide generates.⁶³ The decision not to repeal the infanticide law despite widespread criticism of its underlying logic reflects ongoing support for the view that infanticide is a distinct form of homicide that constitutes a lesser offense than murder.

B. Contemporary Infanticide Statutes: A Cross-Cultural Pattern of Lenience Toward Infanticide

Western history reveals that, in spite of the moral turbulence infanticide generates, communities have withheld harsh punishment from most mothers who kill their infant offspring. A cross-cultural anthropological survey of contemporary infanticidal practices is beyond the scope of this Article. Nevertheless, it is important to situate Western infanticide within the broader context of cross-cultural

⁶⁰ WALKER, *supra* note 51, at 134-36 (describing applications of the insanity defense in England).

⁶¹ In 1978, the Working Party on Infanticide of the Royal College of Psychiatrists "recommended that unless the mandatory life sentence for murder is abolished Infanticide should remain as a separate offence." d'Orban, *supra* note 54, at 570.

⁶² O'Donovan, *supra* note 1, at 263 (citing CRIMINAL LAW REVISION COMMITTEE, FOURTEENTH REPORT, OFFENCES AGAINST THE PERSON, 1980, Cmnd. 7844, at ¶ 105) (emphasis added). The Committee on Mentally Abnormal Offenders recognized that "the operative factors in child killing are often the stress of having to care for the infant, who may be unwanted or difficult, and personality problems." *Id.* (quoting REPORT OF THE COMMITTEE ON MENTALLY ABNORMAL OFFENDERS, 1975, Cmnd. 6244, at 245).

⁶³ As one study of current dispositions in British infanticide cases concluded, "women who kill their own infant children constitute a distinct class of offender in the English system The Infanticide Act emerged from a policy decision to promote leniency for women who murder their own children." Maier-Katkin & Ogle, *supra* note 57, at 911.

infanticidal practices. In anthropologist Susan Scrimshaw's study of infanticide in human populations, she notes that infanticide takes on many forms across human societies and includes "behavior ranging from deliberate to unconscious which is likely to lead to the death of a dependent, young member of the species."⁶⁴ Studying infanticide's prevalence is complicated because societal definitions of infanticide vary according to normative cultural practices, as do beliefs regarding the beginning of life; therefore, the starvation-induced death of a toddler, for example, may not be considered infanticide in some cultures.⁶⁵ Likewise, the underlying causes of and justifications for infanticide are numerous and varied, including the age-old preference for sons that contributes to female infanticide in modern China; poverty; and concerns with witchcraft and sorcery that lead some cultures to sanction the killing of disabled newborns, twins, premature and breech birth babies, and/or babies born to mothers who died during childbirth.⁶⁶

Despite the variable construction of infanticide across cultural lines, the extent to which numerous contemporary societies differentiate infanticide from murder and resist punishing its perpetrators as murderers demonstrates the continuity and pervasiveness of this practice throughout Western history. A survey of contemporary infanticide laws from cultures around the world reveals the manner in which many modern societies have continued this historical pattern. Evidence of the differential treatment of infanticide readily is observed in the numerous statutes that provide distinct definitions and lesser penalties for the crime of infanticide as opposed to other homicides.⁶⁷

⁶⁴ Susan Scrimshaw, *Infanticide in Human Populations: Societal and Individual Concerns*, in *INFANTICIDE: COMPARATIVE AND EVOLUTIONARY PERSPECTIVES* 439, 442 (Glenn Hausfater & Susan B. Hrdy, eds., 1984).

⁶⁵ See generally Carolyn F. Sargent, *Born to Die: Witchcraft and Infanticide in Bariba Culture*, 27 *ETHNOLOGY* 79, 80 (1988) (studying how urban Bariba continued to kill newborns believed to be "witch babies" as a response to traditional ideas about good, evil, and the social order).

⁶⁶ See, e.g., Sharon K. Hom, *Female Infanticide in China: The Human Rights Specter and Thoughts Towards (An)other Vision*, 23 *COLUM. HUM. RTS. L. REV.* 249 (1992) (regarding sex-selective infanticide in modern China); Sargent, *supra* note 65, at 79-93 (describing the practice of infanticide in Bariba culture as a response to signs at birth that were perceived to demonstrate that a newborn was a "witch baby"); Scrimshaw, *supra* note 64, at 442 (charting the broad range of religious and cultural beliefs contributing to infanticide in varying societies).

⁶⁷ As an empirical matter, it is difficult to ascertain the manner in which a nation punishes infanticide without considering that country's entire law of homicide. Although this research would be both useful and fascinating, it would be extraordinarily difficult to

Many nations around the world have statutes specific to infanticide; all but one of these makes infanticide a less severe crime than ordinary homicide.⁶⁸ The majority of these statutes provide maximum sentences that are considerably less than the standard penalties for manslaughter and murder.⁶⁹ Although the various statutes all refer to the crime of "infanticide," the definition of this crime is somewhat ambiguous. At a minimum, infanticide refers to mothers who kill infants to whom they have given birth.⁷⁰ Aside from this fact, however, the laws vary in breadth and leniency. Several jurisdictions limit the applicability of infanticide depending upon the defendant's marital status. For example, in Austria and the Philippines, the

compile. Therefore, I have restricted this search to those nations with statutes explicitly governing the crime of infanticide.

⁶⁸ Luxembourg specifically provides a more severe penalty for killing a child than for other homicides. PROVOCATION, DIMINISHED RESPONSIBILITY AND INFANTICIDE, New South Wales Law Reform Commission Discussion Paper, August 31, 1993, at 129. The following have criminal codes that recognize infanticide as a specific, less culpable form of homicide: Austria, NEW YORK UNIV., THE AMERICAN SERIES OF FOREIGN PENAL CODES, PENAL ACT CONCERNING FELONIES AND GROSS AND PETTY MISDEMEANORS 66 (Norbert D. West & Samuel I. Shuman, trans., 1966) [hereinafter AUSTRIAN PENAL CODE]; Colombia, New York Univ., The American Series of Foreign Penal Codes, The Colombian Penal Code 106 (Phanor Eder, trans., 1967) [hereinafter Colombian Penal Code]; Finland, New York Univ., The American Series of Foreign Penal Codes, The Penal Code of Finland 71 (Matti Jousten, trans., 1987) [hereinafter Finnish Penal Code]; Greece, New York Univ., The American Series of Foreign Penal Codes, The Greek Penal Code 148 (Nicholas B. Lolis, trans., 1950) [hereinafter Greek Penal Code]; India, The Law of Crimes 855 (Ratanlal Ranchhoddas & Dhirajlal Keshavlal Thakore, trans., 1966) [hereinafter Indian Penal Code]; Italy, New York Univ., The American Series of Foreign Penal Codes, The Italian Penal Code 193 (Edward M. Wise & Allen Maitlin, trans., 1978) [hereinafter Italian Penal Code]; Korea, New York Univ., The American Series of Foreign Penal Codes, The Korean Criminal Code 109 (Paul Ryu, trans., 1960) [hereinafter Korean Penal Code]; New Zealand, New Zealand Criminal Act of 1961, supra note 4, at 135; The Philippines, The Revised Penal Code Annotated 355 (Jose Nolleto, ed., 1988) [hereinafter Philippine Penal Code]; Turkey, New York Univ., The American Series of Foreign Penal Codes, The Turkish Criminal Code 145 (Orhan Sepici & Mustafa Ovacik, trans., 1965) [hereinafter Turkish Penal Code]; New South Wales, Western Australia, and Tasmania, Provocation, Diminished Responsibility and Infanticide, supra at 120, 127.

⁶⁹ For example, in Colombia, parricide (the killing of one's parent) is punishable by 15 to 20 years' imprisonment, while infanticide is punishable by two to six years' imprisonment. COLOMBIAN PENAL CODE, supra note 68, at 105-06. In Italy, parricide is punishable by 24 to 30 years, and infanticide is punishable by three to 10 years. ITALIAN PENAL CODE, supra note 68, at 193. In Korea, parricide is punishable by death or life imprisonment, and infanticide is punishable by imprisonment not exceeding 10 years. KOREAN CRIMINAL CODE, supra note 68, at 109.

⁷⁰ Some also include adoptive mothers, and several include other family members such as fathers and grandparents. See, e.g., KOREAN PENAL CODE, supra note 68, at 109 (including lineal ascendants); PHILIPPINE PENAL CODE, supra note 68, at 355 (including maternal grandparents); TURKISH PENAL CODE, supra note 68, at 145 (including husband, son, father, grandparent, adoptive parent, and brother).

punishment for killing an illegitimate child is far less severe than that for killing a legitimate one.⁷¹ Additionally, Korea and Italy specify that their laws apply to those who commit infanticide in order to save their honor--surely a tacit reference to maternal marital status.⁷²

The notion of permitting greater lenience in the case of an unmarried mother is somewhat unexpected in view of Western society's historical tendency to punish "outsider" mothers, while permitting more "conventional" mothers to avoid the law. It seems at least possible, however, that the assumption that the laws in fact are more generous toward unmarried mothers is not borne out in reality. The focus on illegitimacy, like the focus on medical factors in the British law, may be viewed as a legislative effort to explain why infanticide occurs, as well as to provide a justification for not punishing it as stringently as other forms of homicide. By ascribing to unmarried mothers a motive for this crime, however, these statutes may serve to cast more suspicion on unmarried defendants while permitting married defendants facing generic homicide charges to enjoy a greater benefit of the doubt. Moreover, the dichotomy between legitimate and illegitimate births reflects only the law on the books in these various nations; infanticide prosecutions against married mothers may well remain a rarity.

With regard to the infants' age, the statutes range from those that govern only deaths occurring immediately after birth to those that apply to any death prior to age ten.⁷³ The majority of the statutes explicitly or implicitly follow the British model and pertain to any infant killed within its first twelve months of life.

⁷¹ In Austria, the law provides for 10 to 20 years' imprisonment as opposed to life imprisonment, AUSTRIAN PENAL CODE, *supra* note 68, at 66, and in the Philippines, the punishment is reduced from one to six years to one to three years, PHILIPPINE PENAL CODE, *supra* note 68, at 355.

⁷² Article 578 of the Italian Penal Code is titled "Infanticide for Reasons of Honor" and begins "in order to save his own honor or that of a close relative" ITALIAN PENAL CODE, *supra* note 68, at 193. Article 251 of the Korean Criminal Code begins "in order to avoid disgrace" KOREAN PENAL CODE, *supra* note 68, at 109.

⁷³ The Italian statute provides for "the death of a child immediately after its birth," ITALIAN PENAL CODE, *supra* note 68, at 193, while the New Zealand statute provides for "the death of any child ... under the age of ten years," New Zealand Criminal Act of 1961, *supra* note 4, at 158. The New Zealand law is truly an outlier. It not only applies to any child killed before age ten, but it does so on the basis of the quasi-medical justifications found in the British statute. *Id.* It is somewhat mind-boggling to imagine a woman claiming that she killed her nine-year-old child as a result of a disturbance of the mind due to childbirth or lactation, unless, of course, she has recently given birth to another child. Still, the law may have been drafted to insure that these particular defendants, if found guilty, would be spared the manslaughter penalty of life imprisonment, and instead would receive the statutory maximum sentence for infanticide of three years.

The infanticide statutes from around the world evidence a shared sense that it is both legally and morally wrong for a mother to kill her infant. At the same time, they evince an equally powerful consensus that, both in terms of its genesis and in terms of maternal culpability, infanticide is a far different crime from other homicides.

III. INFANTICIDE, AMERICAN STYLE: OUTRAGE AND AMBIVALENCE IN CONTEMPORARY AMERICAN CASES

This brief overview of historical and contemporary cross-cultural responses to women who kill their children reveals a persistent pattern of moral condemnation coupled with ambivalence about punishment and a tendency toward mercy. This section will demonstrate that the contemporary American response to infanticide is entirely consistent with this pattern. The process of identifying the American response to infanticide is challenging. Unlike England, the United States lacks a series of legislative initiatives against infanticide. Instead, twentieth century American infanticide is punished under general homicide statutes.⁷⁴ Furthermore, American society lacks a conscious awareness of infanticide as a domestic problem.

Unlike in other societies throughout history, it is, at first blush, difficult to fathom the reasons for the persistence of infanticide in our affluent society. Professor Langer, a social historian, reasons that

[o]nly since the Second World War has the contraceptive pill, the intrauterine device, and the legalization of abortion removed all valid excuses for unwanted pregnancy or infanticide. To the extent that these problems still exist, at least in western society, they are due primarily to carelessness, ignorance, or indifference.⁷⁵

Yet, even if we are uncertain as to what causes an American mother to kill her child, and even if we are hesitant to view this homicide as evidence of a larger problem of infanticide, a close look at the American response to cases where mothers kill their children reveals our tacit understanding that these cases are more than isolated occurrences perpetrated by careless, ignorant, or indifferent women. Read together, the cases of modern American infanticide demonstrate a

⁷⁴ See, e.g., *Jones v. Washington*, 836 F. Supp. 502 (N.D. Ill. 1993), *aff'd*, 32 F.3d 570 (7th Cir. 1994) (discussing the habeas corpus claims of a woman convicted of murder for killing her child); *Illinois v. Ehlert*, 654 N.E.2d 705 (Ill. App. Ct.), appeal denied, 660 N.E.2d 1274 (Ill. 1995) (same); *Illinois v. Doss*, 574 N.E.2d 806 (Ill. App. Ct. 1991) (same); *Vaughan v. Virginia*, 376 S.E.2d 801 (Va. Ct. App. 1989) (same).

⁷⁵ Langer, *supra* note 9, at 362.

familiar, patterned nature. Our society, like others before it, responds to infanticide with anger, empathy, and a profound yet unarticulated sense that these cases differ from other forms of homicide.

A. Latent Signs of a Modern Epidemic

Outside of homicide statistics documenting homicide rates for infants and children, very little is known about the nature and extent of contemporary infanticide.⁷⁶ Perhaps the largest problem in studying American infanticide is finding a systematic method for gathering evidence of its occurrence. Underdetection is a perennial problem in estimating the incidence of infanticide; given the frequently serendipitous nature of discovery of the crime (e.g., the body is left exposed, rather than buried), there is little reason to believe that even a small percentage of the cases are discovered.⁷⁷ Evidence of modern American infanticide emerges primarily through autopsy examinations. This measure is a fallible one, due to the limited number of autopsies performed on infants and the failure of medical examiners to detect signs of abuse that might have precipitated infant deaths.⁷⁸

Despite the difficulties inherent in obtaining a precise measure of infanticide, one gains a sense of its nature by collecting and reviewing reports of identified cases. As is true for all crimes, the

⁷⁶ Unnithan, *supra* note 2, at 146.

[A] search of the literature ... indicates that, while child homicide has been more frequently addressed than in the past, it still receives less attention than other forms of homicide and other types of child abuse and neglect. For example, Psychological Abstracts listed 1,264 entries on 'child abuse' in the last [twenty] years, but only a handful dealt specifically with child homicide.

Id.

⁷⁷ See generally Lester Adelson, *Slaughter of the Innocents: A Study of Forty-Six Homicides in Which the Victims Were Children*, 264 *NEW ENG. J. MED.* 1345, 1348 (1961) (noting that failure to perform autopsies results in mislabeling homicides as "crib deaths"); Janine Jason et al., *Underrecording of Infant Homicide in the United States*, 73 *AM. J. PUB. HEALTH* 195 (1983) (attributing a sudden drop in homicide rates of infants from 1967 to 1969 to changes in reporting classifications and revision of the standard death certificate); George A. Little & John G. Brooks, *Accepting the Unthinkable*, 94 *PEDIATRICS* 748, 748 (1994) (addressing the evidence that about 5% of cases diagnosed as SIDS actually are the result of deliberate human actions); Murray A. Straus, *State and Regional Differences in U.S. Infant Homicide Rates in Relation to Sociocultural Characteristics of the States*, 5 *BEHAV. SCI. & L.* 61, 63 (1987) (recognizing that official causes of death of children may underestimate the true incidence of homicide for children).

⁷⁸ The U.S. Advisory Board on Child Abuse and Neglect reported that "[i]t has been estimated that 85% of childhood deaths from abuse and neglect are systematically misidentified as accidental, disease-related or due to other causes." U.S. ADVISORY BD. ON CHILD ABUSE AND NEGLECT, *A NATION'S SHAME: FATAL CHILD ABUSE AND NEGLECT IN THE UNITED STATES*, Washington, D.C.: Department of Health and Human Services xxviii (5th Report 1995) [hereinafter *FATAL CHILD ABUSE*] (citations omitted).

discretionary and variable nature of investigation and subsequent prosecution renders it impossible to estimate prevalence based upon the number of cases in which charges are filed.⁷⁹ Furthermore, even a study of reported infanticide cases yields no information about those that ended either in verdicts that were not appealed or in plea-bargains prior to trial.⁸⁰ Nevertheless, in gathering evidence of infanticide cases, one may identify a phenomenon and demonstrate that it occurs with considerable frequency by showing that the cases bear marked similarities.

With these goals in mind, I compiled a data base of cases and news reports describing infanticides by searching in the LEXIS and NEXIS data bases. I focused my research on cases reported between approximately 1988 and 1995.⁸¹ I make no claims that the ninety-six that I have chosen to study constitute a statistically valid representation of infanticide cases during the relevant time frame.⁸² The set of cases that I analyze are among the best documented instances of American infanticide--I am certain that there are many more cases that my searches failed to detect. I excluded hundreds of cases that contained such scant detail that I could not trace the circumstances of the pregnancy, the crime, or its disposition.

Read together, these cases yield two main findings. First, an extraordinarily high number of infants are killed within twenty-four hours of birth. In medical circles, these cases are known as

⁷⁹ For an excellent description of the limitations inherent in estimating the incidence of a crime from prosecution rates, see Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1025-31 (1991).

⁸⁰ Of the cases in my sample, only two of 96 were reported to have ended in a plea. This number, however, most likely underrepresents plea bargains, as many of the cases provided no information regarding outcome. In several cases the state indicated a willingness to engage in plea negotiations. See, e.g., Robert Modic, *Hopfer Guilty: Teen Sentenced to 15 Years to Life*, DAYTON DAILY NEWS, June 23, 1995, at A1 [hereinafter Modic, *Guilty*] (reporting conviction of mother for killing her newborn and quoting prosecutor as saying, "the state was always willing to discuss the case"); see also Robyn Lansdowne, *Infanticide: Psychiatrists in the Plea Bargaining Process*, 16 MONASH U. L. REV. 41, 48-49 (1990) (finding evidence of a pervasive pattern of plea bargaining in Australian infanticide prosecutions).

⁸¹ The majority of cases were retrieved via multiple search queries run in the CURNWS file on NEXIS. These findings were supplemented by articles sent to me by friends and family who found various accounts reported in their local papers.

⁸² Virtually every article in the sparse academic literature on modern infanticide struggles with the problem of quantification and statistical relevance. Ultimately, it seems that the best one can do is to study a sampling of cases, noting that they may not in fact be representative. See, e.g., Wilczynski, *supra* note 7, at 73.

"neonaticides,"⁸³ and they constitute almost half of the cases in my sample. The circumstances that surround neonaticides are remarkably consistent and, on the whole, entirely distinguishable from the fact patterns associated with the homicide deaths of older infants and children. As a result, my analysis is divided into two groups--neonaticide and infanticide--depending upon the age of the victim. Second, in spite of the factual differences between neonaticide and infanticide, society's response to both of these crimes reflects a profound sense of confusion, ambivalence, and general unwillingness to equate these homicides with murder.

B. Neonaticide

Dr. Philip Resnick identified the phenomenon of "neonaticide" in a 1970 article in which he described a series of cases involving women who killed their newborns within twenty-four hours of childbirth.⁸⁴ Using Resnick's definition of neonaticide, I selected forty-seven cases of neonaticide reported in the media between the years 1988 and 1995. Journalistic reports provide unsatisfying, incomplete answers to the haunting question of why these deaths occur. Nevertheless, the accounts yield considerable information about both the fact patterns and the range of legal dispositions reflected in modern neonaticide cases.

1. *Neonaticide Described*

At first blush, the girls and women accused of neonaticide have little in common with one another. They come from every race, ethnicity, and socio-economic class.⁸⁵ They live in big cities and small towns, in housing projects and suburban luxury homes. Some are new immigrants who have only recently learned English.⁸⁶ Others are from

⁸³ Resnick defines "neonaticide" as the killing of a neonate on the day of its birth. Phillip Resnick, *Murder of the Newborn: A Psychiatric Review of Neonaticide*, 126 AM. J. PSYCHIATRY 1414, 1414 (1970).

⁸⁴ Id.

⁸⁵ Although the articles that provide the basis for our research did not provide specific demographic information on the subjects, the articles included many tacit references to these factors. Many of the women in our neonaticide sample lived in apartments with several other immediate family members. See, e.g., Brief for Appellant at 7, *Jones v. Washington*, 32 F.3d 570 (7th Cir. 1994) (unpublished opinion) (noting that Barbara Jones lived in a three bedroom apartment with 11 other family members). Moreover, none of the articles reported that the subjects were homeowners; most either lived with their parents or in rented housing. Very few articles mention the race or ethnicity of the subjects.

⁸⁶ See, e.g., Ron Soble, *Woman Convicted of Killing Baby in Toilet*, LOS ANGELES TIMES, May 30, 1992, at B1 (noting that the woman accused of this crime, a farm worker in the Saticoy onion fields, was illiterate and did not speak any English).

families that have been in the United States for generations. Their ages range widely across the span of women's reproductive years.⁸⁷ Many of the women are of seemingly limited intellectual ability, with low I.Q.s or poor school records.⁸⁸ Yet almost as many are above average; many reports describe quiet, studious, college-bound honor students.⁸⁹

Despite these superficial variations, the individuals accused of neonaticide share many important underlying similarities. Most of the women accused of neonaticide are young and single. The modal age of my sample was only seventeen.⁹⁰ The vast majority live either with their parent(s), guardian(s), or other relatives.⁹¹ Only two of the forty-seven subjects lived alone.⁹² When one considers their financial resources, as distinct from those of their parents, virtually all are independently poor.

One particularly striking similarity is the attenuated nature of the women's relationships to the men who impregnated them. Virtually none of the women were married to or lived with their male partners at the time of the neonaticide.⁹³ In part, this may reflect the relatively young age of this population and the fact that many still lived with their parent(s). Additionally, when asked about their relationships with their male partners, many of the women described highly unstable liasons. This was particularly true of the high school-aged women, who

⁸⁷ The ages of the women in my neonaticide sample ranged from 15 to 39. See appendix, Age Data.

⁸⁸ Information regarding educational level was found in only 19 of the 47 cases in my sample. Of these subjects, 11 women/girls had not completed their high school education. See appendix, Coding Result Totals.

⁸⁹ Of the 19 women/girls for whom educational level was indicated in the articles, seven had achieved an educational level of high school or college. See, e.g., Jim Carlton & Sonni Efron, O. C. Schoolgirl May Not Have Meant Baby To Die, LOS ANGELES TIMES, Nov. 30, 1989, at A1 (describing an incident of neonaticide involving a 15-year-old honor student). Given their ages, it is likely that most of the women/girls in the neonaticide sample were in school. However, this information was not included in many of my sources.

⁹⁰ The mode represents the most commonly appearing figure within a group of numbers. The mean age of the subjects in the neonaticide sample is 21, while the median age is 20. See appendix, Age Data.

⁹¹ Of the 37 women for whom living situation could be ascertained, more than half, 24 women/girls, lived with their parents. Nine of the subjects lived with other relatives or roommates. See appendix, Coding Table Results.

⁹² See appendix, Coding Table Results.

⁹³ Marital status of the subjects was reported in 43 of the neonaticide cases. Of these cases, 35 subjects were single. Only four subjects were married. Additionally, in only two cases of the 40 cases that included information regarding the living situation of the subjects did the woman/girl live with her boyfriend/partner. See appendix, Coding Table Results.

commonly reported that the relationship was a one- or two-week romance that ended before they even knew they were pregnant.⁹⁴

An even more fundamental similarity among these cases is the accused woman's seemingly self-imposed silence and isolation during pregnancy. Very few of the accused women told their families or friends that they were pregnant.⁹⁵ Many of the other women and girls who did disclose their pregnancies did not disclose them to people with whom they were intimate, such as their male partners, their parents, relatives, or friends.⁹⁶

The most profound similarities arising from modern neonaticide cases involve the patterned circumstances that lead to the infants' deaths.⁹⁷ All of the neonaticide cases I identified presented the same basic facts: the women experienced severe cramping and stomach pains, which they often attributed to a need to defecate. They spent hours alone, most often on the toilet, often while others were present in

⁹⁴ It is difficult to make too many generalizations about the nature of these relationships, however, because the articles and cases tell us remarkably little about the men who fathered these babies. In fact, an overwhelming majority of the articles, 32 out of 47, fail even to mention the fathers. See appendix, Coding Table Results.

⁹⁵ Of the 32 cases that discussed whether or not the subjects disclosed the fact of their pregnancy, only three women/girls reported that they did not conceal their pregnancy at all. See appendix, Coding Table Results.

⁹⁶ Of the 32 cases that noted whether or not the woman/girl had concealed the fact that she was pregnant, 19 of the articles reported that no one, including the accused woman/girl in many cases, was aware of the pregnancy. Nine of the 32 subjects concealed their pregnancy only from their parents. See appendix, Coding Table Results.

⁹⁷ In a recent New York case involving neonaticide, the defendant attempted to raise the defense of "neonaticide syndrome." *New York v. Wernick*, 632 N.Y.S.2d 839, 840 (1995). An expert was prepared to describe this syndrome as a phenomenon wherein a woman denies that she is pregnant, and then, at the moment she gives birth, is overcome with a reactive psychosis due to the mental and physical shock of the birth. *Id.* The defense was not permitted to go forward because of the attorney's failure to establish it as accepted medical knowledge. *Id.* at 840-41. In the course of the debate over this defense, however, it became readily apparent that this defense, like the rape trauma syndrome and the battered woman's syndrome, quickly would be used against defendants. Anticipating the defense expert's testimony that the defendant suffered from this syndrome, the prosecution called an expert who testified that the defendant's behavior actually was atypical of neonaticide syndrome, and that she therefore was not psychotic at the time she delivered her baby. *Id.* at 843 (Friedman, J., dissenting).

The fact patterns in the neonaticide cases identified by my research are considerably more varied than this "syndrome," which seems to represent a subset of cases involving the denial of pregnancy. For discussions about denial of pregnancy, see Laura Miller, *Psychotic Denial of Pregnancy: Phenomenology and Clinical Management*, 41 *HOSP. & COMMUNITY PSYCHIATRY* 1233, 1233-36 (1990) (discussing psychotic denial of pregnancy treatment and case studies and comparing them with nonpsychotic denial) (1990); A. Spielvogel & J. Wile, *Treatment and Outcomes of Psychotic Patients During Pregnancy and Childbirth*, 19 *BIRTH* 131, 132-33 (1992) (discussing women "with delusions or psychotic denial about pregnancy").

their homes. At some point during these hours, they realized that they were in labor. They endured the full course of labor and delivery without making any noise.

After delivering the baby, the women's actions range from exhaustion to utter panic. Many of the women temporarily lost consciousness, leaving the baby to drown in the toilet.⁹⁸ Others left the baby in the water while they frantically cleaned the messy remains of the delivery from the floors and walls of the bathroom. Still others immediately pulled the baby from the toilet and actively contended with their situations. In several cases, the women threw their babies out of bathroom windows.⁹⁹ More commonly, the women suffocated or strangled the babies in order to prevent them from crying out.¹⁰⁰ A few of the women silenced the baby with blows to its head or stab wounds inflicted with scissors.¹⁰¹

The women disposed of their babies' bodies in a number of ways, demonstrating a range in understanding of what had transpired. One girl simply took the bundle to bed with her, and fell asleep holding it.¹⁰² Many more placed the bundle somewhere in or near their homes--more often than not, in the trash.¹⁰³ The women did not necessarily endeavor to hide the baby's body, as a significant number of these cases came to the attention of the authorities when someone discovered the bundle in passing.¹⁰⁴

⁹⁸ Nine of the 44 cases that included information regarding the method of the crime reported that the infant drowned in the toilet in which the mother had given birth. In two other cases the baby drowned in the bathtub. Five subjects simply did not attend to the infant, leaving it either on the bathroom floor or someplace else unattended. See appendix, Coding Table Results.

⁹⁹ Four of the 44 cases that reported the method by which the infant was killed reported that the women/girls threw the baby out of the bathroom window. See appendix, Coding Table Results.

¹⁰⁰ Sixteen out of the 44 cases that noted the method by which the infant was killed reported that the subject suffocated her baby, either with a towel, plastic bag, or her hand. See appendix, Coding Table Results.

¹⁰¹ Two of the women/girls stabbed the infant to death, typically in an effort to cut the umbilical cord. Only one case reported death of the infant due to bludgeoning. Thus, in only three cases did the subject utilize violent means to kill her infant. See appendix, Coding Table Results.

¹⁰² See *infra* text accompanying note 269.

¹⁰³ See, e.g., Wernick, 632 N.Y.S.2d at 840 (finding that the mother wrapped her baby in a garbage bag and had a friend throw it away for her).

¹⁰⁴ Of the 44 cases in which information was available regarding the discovery of the crime, 17 involved an "accidental discovery." In 11 of these cases, the crime was discovered only after the subject sought medical treatment. See appendix, Coding Table Results.

2. *Neonaticide in the Criminal Justice System*

Neonaticide elicits a surprisingly wide range of responses as the cases work their way through the criminal justice system. This range extends from the investigative phase in a possible case of neonaticide, where it is evident that criminal charges are not always brought, to the sentencing phase, where punishment ranges from probation to life imprisonment.¹⁰⁵

The range of criminal charges brought against the neonaticide defendants in my sample varies from unlawful disposal of a body, a misdemeanor, to first degree murder. Of the forty-two accounts that reported the specific criminal charges brought against the accused women, only twenty-nine revealed murder charges. An additional and perhaps unsurprising observation is that prosecutors were more likely to seek the most severe criminal sanctions when the newborns' bodies were mutilated in some fashion.¹⁰⁶

The process of gathering definitive information regarding the outcomes of the neonaticide cases is challenging due to the fact that many such cases probably ended in pre-trial plea bargains, many others are still pending trial, and still others simply do not receive media coverage. Moreover, appeals of neonaticide decisions are rare; therefore, there are few reported opinions in modern neonaticide cases.¹⁰⁷ As a result, I was able to ascertain the dispositions of only seventeen of the neonaticide cases in my sample. Because the outcomes in the other cases are unknown, there is a significant risk of inaccuracy in attempting to make inferences based upon the sub-sample of cases that proceeded to trial. It nevertheless is instructive to note the range of sentences imposed upon those who either pled guilty or were convicted of infanticide-related charges. The sentences imposed

¹⁰⁵ In any criminal investigation, prosecutorial discretion permits a range of factors to influence the decision to indict, as well as the crime with which the defendant is charged. For example, research suggests that the decision to prosecute a suspected rapist may be influenced by the state's perception of the victim's credibility, because this affects the chances of obtaining a guilty verdict. See Lisa Frohmann, *Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections*, 38 SOC. PROBS. 213, 213 (1991) (citing four separate studies).

¹⁰⁶ See appendix, Coding Result Tables.

¹⁰⁷ There were only six reported appeals in my sample: *Jones v. Washington*, 836 F. Supp. 502 (N.D. Ill. 1993), *aff'd*, 32 F.3d 570 (7th Cir. 1994) (habeas appeals following a murder conviction in state court); *Ohio v. Hopfer*, No. 15345, 1996 WL 391756 (Ohio Ct. App. July 12, 1996); *Illinois v. Ehlert*, 654 N.E.2d 705 (Ill. App. Ct.), appeal denied, 660 N.E.2d 1274 (Ill. 1995); *Illinois v. Doss*, 574 N.E.2d 806 (Ill. App. Ct. 1991); *Vaughan v. Virginia*, 376 S.E.2d 801 (Va. Ct. App. 1989); *Pennsylvania v. Reilly*, 549 A.2d 503 (Pa. 1988). The scarcity of appeals in these cases may reflect an acknowledgment that the outcomes are relatively lenient.

ranged from intensive therapy, parenting classes, and probation to incarceration for thirty-four years. Convictions were reported in only fifteen of the forty-seven cases. Thus, despite the fact that at least twenty-nine of the defendants were charged with murder, far fewer were convicted. Still, at least ten of the fifteen women whose convictions were reported presently are serving prison sentences.¹⁰⁸

3. Ambivalence About Neonaticide: A Case Study

The broad range of charges brought against these defendants and the widely ranging dispositions of their cases reflect America's confused response to neonaticide. An additional indication of ambivalence emerges from the public debate surrounding well-publicized neonaticide cases.

A recent Ohio case illustrates all three of these factors. In August 1994, seventeen-year-old Rebecca Hopfer gave birth to an infant in the bathroom of her home, which she shared with both of her parents.¹⁰⁹ Following the delivery, she wrapped the baby in a towel, concealed the bundle in plastic bags, and placed it in the garbage. Two days later, she told a friend what she had done, and the prosecution was set in motion.

The case was on a roller-coaster long before it went to trial. Because of her age, Hopfer initially was arraigned in juvenile court. The judge, however, found that "the safety of the community requires ... [that she] be placed under legal restraint, including, if necessary, the period beyond her majority" and determined that she should be tried as an adult.¹¹⁰ Public sympathy for Hopfer in response to the decision to try her as an adult was overwhelming. One reporter summarized the collective community sentiment: "What are they thinking?" people wondered. 'Wasn't this a classic example of an adolescent's poor

¹⁰⁸ For evidence of this same trend in another jurisdiction, see Wilczynski, *supra* note 7, at 85, n.2:

Given that between 1982 and 1987 in England and Wales only 44 women were convicted of the murder, manslaughter or infanticide of their children under 12 months, and yet it is estimated that at least four children (mostly under 12 months) in Britain die from abuse or neglect each week, it is likely that at least some women who kill their children are not convicted.

(citation omitted).

¹⁰⁹ Rob Modic, *A Friend: Hopfer Admitted Killing; Teen's Testimony Details Phone Call*, DAYTON DAILY NEWS, June 14, 1995, at A1 [hereinafter Modic, *A Friend*].

¹¹⁰ Wes Hills, *Judge Sends Teen to Adult System; Hopfer Case Goes to Grand Jury*, DAYTON DAILY NEWS, Nov. 18, 1994, at A1 (quoting Montgomery County Juvenile Court Judge Michael B. Murphy).

decision-making in a crisis?"¹¹¹ The case went to a grand jury, which indicted Hopfer on charges of abuse of a corpse and first degree murder. She was released on home arrest in time for Thanksgiving.¹¹²

Hopfer's release on home arrest precipitated a reversal in public sentiment, as many speculated that she had received preferential treatment because she was white, suburban, and middle-class.¹¹³ Over the course of the months between the indictment and the trial, the community debated the Hopfer case in a manner that one reporter referred to as "a 10-month community talk show."¹¹⁴

The scope of these debates, as recorded in the local news media, is somewhat surprising. Letter writers and reporters paid little attention to Hopfer's actions or to the circumstances surrounding the crime. Nor did they address questions about the baby's father and whether he should be regarded as responsible or culpable.¹¹⁵ No one speculated about the parents, teachers, or doctors who saw Hopfer on a regular basis yet claimed they never noticed the signs of pregnancy. Instead, this case became the focal point for a broad-scaled debate about responsibility and moral decay. Hopfer's pregnancy was seen alternately as the result of permissive sexual norms, parental failure to discipline, or inadequate sex education. Some attributed the baby's killing to legalized abortion; others to the failure to teach children the difference between right and wrong.¹¹⁶

A local cable television station took advantage of the community's fascination and confusion by providing live coverage of the trial. The two-week trial escalated and intensified the dialogue. Expert witnesses disagreed over whether the baby was asphyxiated by the umbilical cord, and therefore not born alive, or whether it lived for two to six hours inside the plastic bags before it suffocated.¹¹⁷ The jury heard testimony from Hopfer's former best friend, who claimed that Hopfer told her that the baby had cried.¹¹⁸ Then Hopfer testified that

¹¹¹ Kevin Lamb, Trial Touched on Some Emotional Issues, DAYTON DAILY NEWS, June 23, 1995, at B1.

¹¹² Id.

¹¹³ Id.

¹¹⁴ Id.

¹¹⁵ In fact, the only article about the baby's father appeared after the verdict. Even though his identity was known, the press made no mention of him until the day Hopfer was found guilty. The article begins, "[h]e's the mystery person in the sad and confusing case of Rebecca Lynn Hopfer." Wendy Hundley, Hopfer Baby's Dad Still in Shock, DAYTON DAILY NEWS, June 24, 1995, at A1.

¹¹⁶ Lamb, *supra* note 111, at B1.

¹¹⁷ Cheryl L. Reed, Expert Says Baby Lived 2-6 Hours, DAYTON DAILY NEWS, June 17, 1995, at A1.

¹¹⁸ Modic, A Friend, *supra* note 109, at A1.

the baby was born expressionless and did not cry because its umbilical cord was wrapped tightly around its neck. She was unable to loosen or cut the cord and, believing that the baby was dead, she wrapped it in towels and bags and said a prayer for it.¹¹⁹

The closing arguments were emotional. Defense attorneys argued that Hopfer had been demonized by the trial, and claimed that "[s]he's a jewel.... Some of you would be proud to have her as a daughter."¹²⁰ Prosecutors used a plastic garbage bag to act out the manner in which Hopfer allegedly took the baby's life.¹²¹ The jury convicted Hopfer on both counts, and the judge issued the mandatory sentence: fifteen years to life.¹²²

The debate over Hopfer's culpability did not end with the verdict. Defense attorneys filed an appeal and succeeded in freeing Hopfer on an appeal bond, which permits her to remain under house arrest pending the appeal of her conviction. In granting the bond, the Ohio Appeals Court wrote that

[a]lthough this court does not customarily grant bail to persons convicted of murder, this appeal does not involve a typical murder case.... It does not diminish the gravity of the crime of murder to say that this particular murder, without (prior criminal history), is not impressive evidence that Hopfer poses a danger to others or to the community.¹²³

¹¹⁹ Rob Modic, Hopfer Denial: Baby Dead at Birth, She Says, DAYTON DAILY NEWS, June 20, 1995, at A1.

¹²⁰ Modic, Guilty, supra note 80, at A1.

¹²¹ One journalist captured the moment as follows:

Franceschelli slowly pulled a fresh plastic trash bag from a box taken as evidence from Hopfer's home. In the silence of the courtroom, he snapped it open with a flick of his hands. He knelt, taking the package of blood-stained towels that once enveloped Hopfer's baby and slid it into the bag. The jury leaned forward to watch.

Franceschelli took the end of the bag and began to twist it at the opening, once, twice, three times around, and then knotted the end just as the bag had been found by investigators As he looked up at the jurors, knotted bag in one hand, he said: "That's purposeful. That's intent. That's the taking of a life of an innocent baby."

Id.

¹²² Id. One can only speculate about the impact that Ohio's statutory sentencing guidelines had on the penalty Hopfer received. The amount of community support for a merciful resolution well might have led a judge not bound by such guidelines to mete out a lesser sentence. Perhaps the most articulate critique of sentencing guidelines, albeit at the federal level, is found in Charles Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938 (1988). Ogletree argues that the laudable goals of the U.S. Congress have been undermined by the Sentencing Commission: "the Sentencing Commission's obsession with justice in the aggregate, with identical treatment regardless of individual differences, will eviscerate our more refined notions of individual justice, and the belief that 'justice is blind' will yield to the reality that, in fact, blind justice is injustice. Id. at 1960.

¹²³ Rob Modic, Hopfer Free for Appeal, Judges Rule, DAYTON DAILY NEWS, July 1, 1995, at A1.

Not surprisingly, the decision to free a convicted murderer pending an appeal intensified the debate over Hopfer's blameworthiness. Many wrote letters to the Dayton Daily News decrying Hopfer's special treatment.¹²⁴ Many more responded by questioning whether the case should ever have gone to trial¹²⁵ and by defending the court's treatment of Hopfer.¹²⁶ Although the outcome of Hopfer's appeal remains pending, the decision is unlikely to resolve the ambivalence surrounding this crime.¹²⁷ It is not unheard of for a homicide committed by a minor to generate public debate about the blameworthiness of the family, the community, and society at large.¹²⁸

¹²⁴ See, e.g., Ruth L. Pennington, Letter to the Editor, DAYTON DAILY NEWS, July 17, 1995, at A6 ("Whether Hopfer is guilty or innocent, she has been found guilty in a court of law, and she should be treated as such."); Michael A. Scott, Letter to the Editor, DAYTON DAILY NEWS, July 17, 1995, at A6:

There have been several cases right here in the Miami Valley in which young mothers have been accused and convicted of killing their children Why is it that these girls were not afforded the same special treatment as Hopfer? ... Could it be because her parents have influence and money? Could it be because Hopfer is white?

¹²⁵ See, e.g., Randi Potasky, Letter to the Editor, DAYTON DAILY NEWS, July 17, 1995, at A6 ("The only real crime here was ignorance.... No one paid enough attention to this girl to even realize that she was pregnant.... The only thing this girl deserves is some mental-health treatment.").

¹²⁶ See, e.g., David Cream, Letter to the Editor, DAYTON DAILY NEWS, July 19, 1995, at A10 ("It seems to me that the 'outpouring of community sympathy' toward Hopfer is responsible for the court's leniency."). One exceptionally thoughtful editorial writer noted that Hopfer's special treatment was justified, and that the real problem with the case was that the court's lenience was unlikely to be extended to teens of a different race and social class than the judges:

Certainly, Ms. Hopfer is no ordinary murder convict. Whether black, white, poor or affluent, the circumstances of her crime are unusual and don't suggest that she is a threat to society.

It is an indisputable tragedy that a teen who appears to have had a promising future would come face-to-face with the prospect of a long prison term.

But it is an indisputable tragedy whether it happens to a suburban teen, such as Ms. Hopfer, or an inner-city teen by any other name. Ms. Hopfer isn't the first young adult to come before Montgomery County courts worthy of compassion.

Caroline Brewer, Editorial, Hopfer Shown Exceptional Kindness, DAYTON DAILY NEWS, July 1, 1995, at A10.

¹²⁷ On July 12, 1996, the Ohio Appellate Court affirmed Hopfer's conviction, and Hopfer began serving her 15-year sentence. *Ohio v. Hopfer*, No. 15345, 1996 WL 391756 (Ohio Ct. App. July 12, 1996). Her attorneys are appealing the case to the Ohio Supreme Court.

¹²⁸ See, e.g., Grim Reality Check on Youth Crime, CHI. TRIB., Jan. 31, 1996, at 14, zone N (editorial on the proper treatment of 10- to 12-year-old killers, noting in part that the Illinois legislature had reduced the minimum age for imprisonment from 13 to 10); Gary Marx, Brother's Testimony Opens Trial in Eric's Death, CHI. TRIB., Oct. 18, 1995, at 1, zone N (covering trial of 10- and 11-year-olds charged with first degree murder for dropping a five year-old from a 14th story window).

Nevertheless, it is difficult to imagine that the community would have nearly this level of sympathy had Hopfer murdered her best friend, rather than her baby.

C. Infanticide

Although the ambivalence surrounding neonaticide cases may be surprising, it is not incomprehensible. As the Hopfer case demonstrates, juries and judges might be sympathetic toward the neonaticide defendant for a number of reasons. In contrast, when a mother kills her child after the first day of its life, there is little reason to expect a similar response. At a visceral level, the horror of infanticide seems to grow as the victim's age increases.¹²⁹ Thus, there is a strong temptation to regard the killings of infants after the first twenty-four hours of life as ordinary murders and to distinguish neonaticide alone as uniquely problematic.

To do so would be to tell a half-truth at best, for there are similarities between neonaticide and infanticide--and among the various forms of infanticide--that extend far beyond the fact that all of the perpetrators share the status of mother. The most important of these similarities is that, despite the increased sense of horror and outrage, when infanticide cases reach the criminal justice system, they generate almost exactly the same dialectic of condemnation and mercy associated with neonaticide.¹³⁰ Therefore, in spite of the wide variety of fact patterns and the limited extent to which one can generalize about these homicides, the infanticide cases fall squarely within the scope of this Article and must be considered together with neonaticide. In this section, I will describe certain commonalities present in modern infanticide cases and discuss the confusion and ambivalence that accompanies their dispositions.

¹²⁹ Philosopher Michael Tooley discusses society's tendency to place a higher value on the lives of persons as they grow beyond infancy. His analysis begins by focusing on attitudes toward severely disabled newborns. He notes that 55% of Australians who were surveyed believed it was morally permissible to "allow life to be painlessly terminated in the case of babies who [were] either 'mentally abnormal' or 'physically seriously deformed,'" yet it is virtually unheard of to advocate the same for a "mentally abnormal" or "physically seriously deformed" adult. MICHAEL TOOLEY, ABORTION AND INFANTICIDE 311 (1983). From this, Tooley deduces an underlying rationale reflecting a belief that infants do not enjoy the same moral status as adults. This leads Tooley to posit that "[i]f it is correct [that] ... infanticide is not to be treated as a crime in the case of infants suffering from certain defects, and, even in the case of normal infants, [then it] is not wrong to the same degree as the killing of a normal adult human being." *Id.* at 311-12.

¹³⁰ See *infra* notes 194 through 240 and accompanying text.

1. *Infanticide Described*

The circumstances surrounding infanticide deaths, unlike those surrounding neonaticide deaths, are quite varied. In many ways, infanticide cases bear seemingly little resemblance to one another, and even less resemblance to neonaticide. In order to describe the patterns associated with contemporary American infanticide, it is first necessary to define the population encompassed by this term. Although the word infanticide would seem to refer to the killing of infants, there is no established age limit for victims of this crime. Many countries have infanticide statutes, yet even these do not have consistent definitions of the crime.¹³¹ While there are significant differences between the circumstances surrounding a mother's killing of a ten-year-old child and that of a six-month-old, there is no readily apparent principle by which one might distinguish between the two situations other than drawing an arbitrary line. Moreover, drawing a line at one year of age, for example, would hide the important similarities linking cases involving older victims to those involving children under the age of one. The differences due to the victim's age seem far less significant than one might expect when considering the circumstances giving rise to the crime and the criminal justice system's disposition of these cases. As a result, I have chosen not to set a definitive chronological line at which a mother's killing of her child should no longer be considered "infanticide."

Even beyond issues of the victim's age, it is difficult to generalize about infanticide cases. The women in my sample of forty-nine cases, drawn from the same span of years as the neonaticide cases, reflect a broad range of backgrounds.¹³² They are far more likely to be

¹³¹ Recall that the British infanticide statute pertains to mothers who kill their children within the child's first year of life, while New Zealand's law includes any child killed by its mother before age ten. Infanticide Act, 1938 2 Geo. 6, ch. 36 (Eng.); New Zealand Criminal Act of 1961, *supra* note 4, at 158. See *supra* notes 67 through 73 and accompanying text (discussing the scope of infanticide statutes from around the world).

¹³² The most dispositive factor limiting my sample is that I excluded all cases in which the mother killed her child along with her partner, as well as those in which the partner killed the child, but the mother was named as an accomplice. I opted to include only women who killed their children while acting alone because of my sense that these crimes were qualitatively different from those involving other adults. Cases involving children who died from abuse and neglect perpetrated either by the mother's partner, or by the mother together with her partner, trigger a broad set of issues involving intimacy and violence that are somewhat, although not entirely, tangential to this Article. For a thorough analysis of the overlap between domestic violence and maternally-inflicted child abuse, and a critical evaluation of the trend toward holding mothers criminally accountable for their failure to protect their children from an abusive partner, see Mary E. Becker, *Double Binds Facing Mothers in Abusive Families: Social Support Systems*,

married or living with a partner than those who commit neonaticide, and many of them have more than one child.¹³³ The modal age of the mothers in my sample, twenty-one, is higher than that of the neonaticidal mothers.¹³⁴ The ages of the infanticide victims in my sample range from six weeks to eight years, with the modal age being five months. Although deaths by suffocation predominate, the causes of death range from chronic neglect to overt acts of aggression.¹³⁵ Several of the women were accused of killing more than one of their children, either in the same incident or over the course of time.¹³⁶

Despite their many dissimilarities, women who commit infanticide all manifest, to a greater or lesser extent, consistent vulnerabilities in terms of mental health status, economic stability, and social support. Most of the women in my sample were poor and socially isolated. At the time of their crimes, only five of the women accused of infanticide were employed outside of their homes. In virtually all of the cases, the women were the full-time caretakers for their children.¹³⁷ Thus, the vast majority of these women were

Custody Outcomes, and Liability for Acts of Others, 2 U. CHI. L. SCH. ROUNDTABLE 13 (1995).

¹³³ Of the cases that included information regarding the subject's living situation, 22 of the 41 subjects lived with their significant other, 16 with their husband, and six with their boyfriend or partner. Twenty-six cases reported that the woman had other children. In 14 cases, the woman lived alone with her children. See appendix, Coding Table Results.

¹³⁴ See appendix, Coding Table Results. This is consistent with the findings of other researchers on this topic. See d'Orban, *supra* note 54, at 561 (stating that mothers committing neonaticide averaged 21 years of age, youngest of any category in d'Orban's study).

¹³⁵ Two of the cases reported that the infant/child was starved to death, while one reported the mother running a six-week-old child over with her car. Larry King Live: A Mother Tells Why She Killed Her Son (CNN television broadcast, Nov. 17, 1994) [hereinafter Larry King Live] (Michael Jackson sitting in for Larry King, interviewing Sheryl Lynn Massip and her defense attorney, Milton Grimes).

¹³⁶ For example, Susan Smith confessed to killing both children in what she described as a failed suicide/homicide attempt. Rick Bragg, *Carolina Jury Rejects Execution for Woman who Drowned Sons*, N.Y. TIMES, July 29, 1995, § 1, at 1. At the other extreme, in September 1995, Waneta Hoyt was convicted of killing five of her children over the course of six years, all of whom were originally thought to have died of SIDS. William Kates, *Mom Convicted Of Killing 5 Kids Gets Prison Terms, Denies Guilt At Sentencing*, THE RECORD, Sept. 12, 1995, at A4; see also JOYCE EGGINTON, *FROM CRADLE TO GRAVE: THE SHORT LIVES AND STRANGE DEATHS OF MARYBETH TINNING'S NINE CHILDREN* (1989) (describing in depth the case of Marybeth Tinning, eventually convicted for the ninth death of one of her children).

¹³⁷ This fact is striking in light of current statistics indicating that 52.2% of single mothers of children under age six work outside the home, 61.7% of married women with children under age six are employed outside the home, and 58.8% of married women with children aged one or younger are working outside the home. See U.S. DEPARTMENT OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES 1995*, at 406 (indicating the employment status of women by marital status and presence and age of children).

economically dependant upon either their partner's income or public assistance.¹³⁸

The issues of mental health status and social isolation are more complex. At a common sense level, it may seem self-evident that "[m]others in our society simply do not kill their children unless they are seriously disturbed individuals, usually psychotic."¹³⁹ Indeed, many women who commit infanticide do so while suffering from an identifiable mental disability that renders them temporarily or permanently incapable of caring for themselves and/or their children without considerable outside assistance. It is critical to note at the outset that it is not the fact of mental illness or disability alone, but rather the combination of a vulnerable mental health status and social isolation that leads to infanticide. My analysis begins by addressing issues of mental health status, and then explores the intersection of social isolation, mothering, and mental health.

Infanticide cases can be classified according to the mental health status of the mother. I have classified these cases into four categories based on mental health vulnerabilities associated with infanticide: postpartum psychosis, chronic mental disability, affective disorders with postpartum onset, and addiction-related disorders. These classifications are not necessarily mutually exclusive--for example, a woman may be both mentally disabled and addicted--but for purposes of this discussion, I will address each category separately.

a. Infanticide and Postpartum Psychosis

Out of every one thousand women who give birth, one or two will suffer from postpartum psychosis.¹⁴⁰ Postpartum psychosis has received considerable attention from the medical and legal communities, and the vast majority of academic articles on the subject of infanticide relate to this disorder.¹⁴¹ Postpartum psychosis represents

¹³⁸ Although it is difficult to ascertain socioeconomic status on the basis of newspaper reports and legal records, there was only one obviously middle-class woman in the sample. See Larry King Live, *supra* note 135 (noting that Sheryl Massip killed her six-week-old son by driving over him with her Volvo).

¹³⁹ Amy L. Nelson, Comment, Postpartum Psychosis: A New Defense?, 95 DICK L. REV. 625, 625 (1991) (quoting report prepared for sentencing hearing in *Pennsylvania v. Comitz*, 530 A.2d 473 (Pa. Super. Ct. 1987)).

¹⁴⁰ Debora K. Dimino, Comment, Postpartum Depression: A Defense for Mothers Who Kill their Infants, 30 SANTA CLARA L. REV. 231, 233 (1990).

¹⁴¹ See, e.g., A. Kathleen Atkinson & Annette U. Rickel, Depression in Women: The Postpartum Experience, 5 ISSUES IN MENTAL HEALTH NURSING 197, 205 (1983) (summarizing postpartum psychosis studies conducted from 1957 to the present); Michael W. O'Hara, Postpartum 'Blues,' Depression, and Psychosis: A Review, 7 J. PSYCHOSOMATIC OBSTETRICS & GYNECOLOGY 205 (1987) (providing a comprehensive

the far end of a spectrum of psychiatric ailments that may be triggered by childbirth.¹⁴² The timing of onset varies, but symptoms usually appear within the first three months after delivery, and most often within the first two weeks.¹⁴³ Some experts believe that postpartum psychosis is more commonly experienced by women with a prior history of mental illness and that it is less likely to occur in mentally healthy women.¹⁴⁴ All agree that a mother who experiences postpartum

study of postpartum psychosis). Indeed, the only mention of infanticide in the law review literature is found in the various articles addressing postpartum psychosis as a criminal defense. See, e.g., Anne Damante Brusca, Note, *Postpartum Psychosis: A Way Out for Murdering Moms?*, 18 *HOFSTRA L. REV.* 1133 (1990) (contending that current insanity statutes should be relied on in pleading postpartum depression as a defense, and when insanity is not found, arguing that evidence of postpartum psychosis should be a mitigating factor in sentencing); John Dent, Comment, *Postpartum Psychosis and the Insanity Defense*, 1989 *U. CHI. LEGAL F.* 355 (using California law as a model and proposing a reduced burden of proof for those defendants asserting the postpartum psychosis defense); Dimino, Comment *supra* note 140, at 231-64 (proposing legislation to make infanticide a distinct crime and postpartum depression a defense similar to insanity); Nelson, Comment, *supra* note 139, at 625-50 (concluding that more education of judiciary and the public about postpartum depression is best way to deal with the issue).

¹⁴² Postpartum disorders range from mild, fleeting anxiety and depression to hormonally-induced psychosis. By far the most common form of postpartum mental health ailment is mild postpartum depression, commonly known as the "baby blues." This fleeting form of depression, beginning on the third to the tenth day after delivery, and lasting at most several days, occurs with such frequency that it is regarded as normal. Irvin D. Yalom et al., "Postpartum Blues" Syndrome: A Description and Related Variables, 18 *ARCHIVES GEN. PSYCHIATRY* 16, 16 (1968) (estimating that between 5% and 80% of women experience some postpartum psychiatric disorder). While postpartum depression is widely recognized in medical and lay literature as a phase consisting of "unhappiness," "irritability," and "exhaustion," current scientific understanding indicates that the rate and the quality or intensity of postpartum depression is utterly indistinguishable from the incidence of transient depression rates within society at large. Maier-Katkin & Ogle, *supra* note 57, at 906. In other words, the "baby blues" are not that different from the "going to work blues" suffered on Sunday nights by most of the population, and in late August by law professors and students. *Id.*

¹⁴³ LAURENCE KRUCKMAN & CHRIS ASMANN-FINCH, *POSTPARTUM DEPRESSION: A RESEARCH GUIDE AND INTERNATIONAL BIBLIOGRAPHY* XV (1986). The earliest estimate for possible onset of symptoms is the third day postpartum, since many theories attribute the ailment in some measure to hormonal fluctuations following childbirth. See generally Christine A. Gardner, Note, *Postpartum Depression Defense: Are Mothers Getting Away with Murder?*, 24 *NEW ENG. L. REV.* 953, 960-66 (1990) (discussing the definition, causes, and symptoms associated with postpartum depression).

¹⁴⁴ Atkinson & Rickel, *supra* note 141, at 205 (citing several studies finding that women with other mental illnesses were more likely to develop postpartum psychosis); d'Orban, *supra* note 54, at 562 (finding that 41% of women studied in postpartum psychosis study previously had been treated for psychiatric illness); Gardner, Note, *supra* note 143, at nn.88-89 (citing Dr. Stuart Asch, *Crib Deaths: Their Possible Relationship to Post-Partum Depression and Infanticide*, 35 *J. MT. SINAI HOSP.* 214, 215 (1968); Marianne Yen, *Women Who Kill Their Infants: A Bad Case of the 'Baby Blues'?*, *WASH. POST*, May

psychosis after the birth of her first child is at higher risk for recurrence with her second childbirth.¹⁴⁵

Although experts are divided on the etiology of postpartum psychosis,¹⁴⁶ there is general agreement on the symptoms associated with this disorder. Postpartum psychosis is characterized by a dramatic break with reality accompanied by "a grossly impaired ability to function, usually because of hallucinations or delusions."¹⁴⁷ One of the primary markers of postpartum psychosis is delusional fantasies related to the newborn. Most women report auditory hallucinations, in which voices urge them to kill the child.¹⁴⁸ In addition to having psychotic hallucinations, women suffering from postpartum psychosis characteristically display other unusual behavioral tendencies. They tend to isolate themselves, they stop speaking to others, and they are observed talking to themselves in an agitated fashion. They are severely sleep-deprived and emotionally labile.¹⁴⁹

Women who kill their infants during an episode of postpartum psychosis tend to manifest these characteristics at an extreme level. For example, consider the case of Sheryl Massip, a California woman who was charged with killing her six-week-old son. At her 1987 murder trial, the evidence showed that she threw her son into oncoming traffic, picked him up and carried him to her garage, hit him over the head with a blunt object, and then finally killed him by running him over with her car.¹⁵⁰

10, 1988, at A3; *The Darkest Side of Postpartum Depression*, THE SUNDAY NEWS (Auckland, New Zealand), May 31, 1987, at E3.

¹⁴⁵ Yalom et al., *supra* note 142, at 26; see also Gardner, Note, *supra* note 143, at 964 (noting that "in the cases in which women have killed their infants and claimed insanity as a defense, every infant killed was a second child").

¹⁴⁶ AMERICAN PSYCHIATRIC ASSOCIATION, THE AMERICAN PSYCHIATRIC ASSOCIATION'S DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) [hereinafter *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS*] (containing the psychiatric profession's official classification of mental disorders, but not listing postpartum psychosis as a distinct psychiatric ailment; instead, considering postpartum psychosis to be a variety of mental illness that happens to occur in the postpartum phase).

¹⁴⁷ O'Hara, *supra* note 141, at 217.

¹⁴⁸ Mary E. Lentz, *A Postmortem of the Postpartum Psychosis Defense*, 18 CAP. U. L. REV. 525, 532 (1989). Some report a belief that the child is a phantom, or was "conceived from unnatural processes such as impregnation by the devil." *Id.*

¹⁴⁹ See d'Orban, *supra* note 54, at 567 (noting depression, irritability, exhaustion, and apathy as symptoms displayed by many women in the study); O'Hara, *supra* note 141, at 217-18 (noting inability to function, hallucinations, delusions, confusion, and agitation as symptoms of postpartum psychosis).

¹⁵⁰ Eric Lichtblau, *Appeal Argued in Postpartum Case*, LOS ANGELES TIMES, May 24, 1990, at B1.

The events that preceded her son's death reflect Massip's deteriorating psychological condition. Her lawyer noted that

[f]or two weeks, Sheryl Massip's family recognized something was wrong with her. Her husband, five days before she killed her child, sent her away to her mother's home to spend a night, to get some rest, because they thought that would solve the problem. She came back, he sent her away again. On the 27th of April, the Monday before she killed her child, she came home from spending the night with her mother, and she went to the doctor and said, "Doctor, what's wrong with me? I'm hallucinating. I can't sleep. Something is wrong with me. Help me." He looked at her and said, "Oh, you're just suffering from baby blues," [and] gave her a couple of Mellarils ... [w]hich aggravated her psychotic state.¹⁵¹

Massip's story is fairly typical of postpartum psychosis-related infanticides. She continued to manifest severely disordered thinking after she killed her child, telling investigators that a black object, who "wasn't really a person," with orange hair and white gloves, had kidnapped the baby.¹⁵² By definition, postpartum psychosis is brief in duration and, even if untreated, symptoms virtually always disappear within several months of onset.¹⁵³ Therefore, by the time of her trial, Massip was no longer psychotic. The jury found Massip guilty of second degree murder, and Massip was jailed. Two months later, the judge overturned the verdict and acquitted Massip on insanity grounds.¹⁵⁴

There is no doubt that during her psychotic episode Massip was incapable of caring for her infant. Nevertheless, it is critical to note the many missed opportunities for intervention. Massip gave notice of her inability to cope to her husband, mother, and physician. None of them took the time to evaluate in a serious fashion the gap between her present abilities and the caretaking tasks she was required to perform when left alone with her child. Had any one of these three people recognized Massip's needs, he or she could have identified a myriad of ways in which to assist her. Therefore, it is evident that Massip's son's death was not simply the result of her mental illness, but also of her social network's failure to provide her with any meaningful support.

¹⁵¹ Larry King Live, *supra* note 135 (interviewing Milton Grimes, criminal defense attorney for Sheryl Massip).

¹⁵² *Id.*

¹⁵³ O'Hara, *supra* note 141, at 220.

¹⁵⁴ Larry King Live, *supra* note 135 (interviewing Milton Grimes, criminal defense attorney for Sheryl Massip).

b. Infanticide by Mothers with Chronic Mental Disabilities

Although a diagnosis of postpartum psychosis may help us to understand why a mother committed infanticide, only a small percentage of infanticides are committed by women suffering from this ailment. One study surveyed eighty-nine women charged with infanticide during a six year period and found that, at most, twenty-four of the women were mentally ill, and fewer still suffered from postpartum psychosis.¹⁵⁵ Thus, even within the narrow category of women who commit infanticide while suffering from a mental illness, postpartum psychosis accounts for only a portion of the cases. Nevertheless, to the extent that postpartum psychosis makes infanticide comprehensible, so too does a diagnosis of a severe chronic mental disability.

In order to discuss infanticides committed by women who are chronically mentally disabled yet living and parenting independently, a clear definition of mental disability is needed. There is no consensus, however, on what constitutes a mental disability. Rather than focusing on a medical categorization, I use the term "chronically mentally disabled" to refer to those mothers whose mental disabilities were sufficiently pronounced that, at the time they killed their children, the state was on notice that they had marginal ability, at best, to care for a child without assistance.

These cases are uniquely frustrating in that hindsight reveals many missed opportunities for intervention.¹⁵⁶ There were only four infanticide cases in my sample that involved women who suffered from medically-diagnosed chronic mental disabilities. Two discussed these mental health issues in particularly rich detail, illustrating the range of women falling into this category. One mother was schizophrenic; the other was mildly mentally retarded, suffered from manic depression, and had attempted suicide several times.¹⁵⁷ Both women lost custody of

¹⁵⁵ d'Orban, *supra* note 54, at 560-62.

¹⁵⁶ The case of six-year-old Elisa Izquierdo is representative of this phenomenon. Although she apparently was abused by her step-father as well as her mother, and I therefore have not included her in my sample, the media coverage of the case bears witness to the frustration borne of the difficulty in allocating blame. New York state's child protective services long had been wary of Elisa's mother's ability to parent, and yet they scarcely followed up on the case after reuniting Elisa with her mother. David Van Biema, *Abandoned to Her Fate; Neighbors, Teachers, and the Authorities All Knew Elisa Izquierdo Was Being Abused. But Somehow Nobody Managed to Stop It*, *TIME*, Dec. 11, 1995, at 32; Marc Peyser & Carla Power, *The Death Of Little Elisa*, *NEWSWEEK*, Dec. 11, 1995, at 42.

¹⁵⁷ The second of these cases, involving a woman named Simone Ayton, is discussed in detail *infra*, at notes 308 through 318 and accompanying text. There is a rich literature on the support mechanisms that can assist parents with mental disabilities to raise children. For a general description of them, see Linda Dowdney & David Skuse, *Parenting*

their babies shortly after birth, when state child protection agencies found that they were unable to care for the children. Many months later, the babies were returned to their mothers. In both cases, the state failed to provide the mother with any assistance or supervision, and in both cases, the children were dead within a matter of days.

The first of these cases is particularly poignant, as it involves Amanda Wallace, a schizophrenic woman whose mental illness was so pronounced that, from the day of his birth, her son had been almost constantly in the care of the Illinois Department of Children and Family Services.¹⁵⁸ Because of a series of bureaucratic errors, the agency released Joseph Wallace three and half years later to the unsupervised custody of his mother for the first time. Several days later, he was found hanged in her apartment. When the state originally brought murder charges against Amanda Wallace, she was found legally incompetent to stand trial. She was then institutionalized, and a judicially-appointed committee conducted an official inquiry into the various state agencies that had failed to protect the child.¹⁵⁹ In 1995, state psychiatrists found Wallace fit to stand trial, and she was convicted of murder.¹⁶⁰ The state's decision to seek the death penalty astonished many observers. A psychologist who knew Ms. Wallace since she was seven years old remarked, "[i]t's absolutely ridiculous to even think of executing someone like Amanda Wallace. She is ill.

Provided by Adults with Mental Retardation, 34 J. CHILD PSYCHOL. & PSYCHIATRY 25 (1993).

¹⁵⁸ Starting at age 11, after she survived years of abuse and several suicide attempts, Amanda Wallace was institutionalized in a state mental facility. She was in her late twenties, still living in a state mental hospital, when her son Joseph was conceived and delivered. For a full description of the Amanda Wallace case, see REPORT OF THE INDEPENDENT COMMITTEE TO INQUIRE IN TO THE PRACTICES, PROCESSES, AND PROCEEDINGS IN THE JUVENILE COURT AS THEY RELATE TO THE JOSEPH WALLACE CASES, Oct. 1, 1993 [hereinafter JOSEPH WALLACE COMMITTEE REPORT] (on file with the author).

¹⁵⁹ The committee's report is a stark condemnation of the state of Illinois' dysfunctional bureaucracy:

Over a period of 3-1/2 years, five judges in Cook and Kane Counties presided over the Joseph Wallace cases. Four of those judges and at least a score of Assistant State's Attorneys, guardians ad litem (including Assistant Public Guardians), and DCFS caseworkers actively or passively participated in sentencing Joseph to the unsupervised custody of a very dangerous mother. The fact that Joseph did not die earlier was strictly fortuitous. The Wallace cases reveal so many errors in judgment by so many people that statistical inference compels the conclusion that the system itself is responsible for the human error. This conclusion does not let any of the foregoing participants off the hook; it merely adds to the list of responsible people who inhibit meaningful systemic change.

Id.

¹⁶⁰ Don Terry, Mother Sentenced to Life in Killing that Shook Chicago, N.Y. TIMES, July 26, 1996, at A14.

What is society's excuse. How did we become so mean?"¹⁶¹ After the judge announced a life sentence without parole, Patrick Murphy, the Cook County Public Guardian, remarked that "[e]veryone in the system failed Joey Wallace, including me.... She is very, very insane. But we're all getting off scot-free. She's going to spend the rest of her life in prison."¹⁶²

The Wallace case illustrates the complicated nexus between a parent's mental illness and the threat to a child's well-being. Amanda Wallace never was well enough to undertake the tasks of raising Joseph alone. Society was aware of her limitations as a parent long before she gave birth to her first child. Its attempts to intervene, however, were incomplete and inadequate. As a result, although Wallace's son's death was tragic and horrifying, it was not a surprise. And although Wallace's actions were the immediate cause of her son's death, it is far from easy to establish who is to blame.

c. Infanticide as a Manifestation of an Affective Disorder with Postpartum Onset

In addition to women with easily identifiable mental disorders who commit infanticide, a larger category of women kill their children in seemingly unprovoked displays of violence. These homicides tend to be impulsive, disproportional reactions to some emotionally stressful event in the mother's life. Psychiatrist Laura Miller, an expert in treating postpartum mental disorders, refers to this phenomenon as a manifestation of "affective disorders with postpartum onset."¹⁶³ Dr. Miller notes that the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) recognizes mood disorders following pregnancy by using generic diagnoses, accompanied with a "postpartum onset" qualifier.¹⁶⁴ The DSM-IV limits this category to episodes with an onset within four weeks after birth.¹⁶⁵ In contrast, Dr. Miller's experience with these disorders has led her to conclude that they are not solely biological in nature, but that they often arise out of a woman's response to the "sociocultural and economic" influences in her environment. As a result, symptoms may persist long after the birth of a child.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Interview with Dr. Laura Miller, University of Illinois Hospital, in Chicago, Ill. (Jan. 11, 1996).

¹⁶⁴ DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, *supra* note 146, at 386.

¹⁶⁵ *Id.* at 387.

Of the forty-seven infanticide cases in my data base, at least three might be viewed as falling into this category.¹⁶⁶ These cases are dissimilar in terms of the circumstances of the children's deaths, but similar in terms of the circumstances of the women's lives, both prior and subsequent to childbirth. In spite of the incomplete nature of the newspaper accounts of these cases, two common themes emerge. First, these women had histories of considerable physical, emotional, and sexual abuse.¹⁶⁷ Second, at the time they committed infanticide, these women lived alone with their children and had little or no outside financial or emotional support.

The legacy of abuse is a complex one.¹⁶⁸ Although it is clear that many survivors of abusive childhoods go on to become perfectly competent parents, a growing body of evidence indicates that the majority of parents who are abusive were themselves abused as children.¹⁶⁹ Low self-esteem, poor impulse control, depression, anxiety, and antisocial behavior, including aggression and substance abuse, are among the personality characteristics observed in survivors of abuse.¹⁷⁰ It is not difficult to envision how these particular characteristics might complicate parenting. By definition, parenting requires tremendous feats of patience, energy, endurance, and maturity. If one combines the

¹⁶⁶ Because newspaper coverage is incomplete, I have not included several additional cases that appear to fall into this category.

¹⁶⁷ Eight of the cases in my sample falling into this category mention that the woman was abused as a child or an adult. See appendix, Coding Table Results.

¹⁶⁸ There is a growing literature exploring the tendency of survivors of abusive childhoods to replicate abusive family patterns as adults. For a summary of this literature, see *FATAL CHILD ABUSE*, supra note 78.

¹⁶⁹ *Id.* at 13 (finding that "the average abusive parent is in his or her mid-twenties, lives near or below the poverty level, often has not finished high school, is depressed and unable to cope with stress, and has experienced violence first hand"); see also Nora Dougherty, *The Holding Environment: Breaking the Cycle of Abuse*, 64 *SOC. CASEWORK* 283 (1983) (describing a treatment program for abusive and neglecting parents, who often were themselves denied a nurturing environment in their early lives); Brandt Steele, *Reflections on the Therapy for Those Who Maltreat Children*, in *THE BATTERED CHILD* 382-84 (Ray E. Helfer & Ruth S. Kempe eds., 1987) (stating that an important source of childcare behavior is patterns acquired from one's own childhood experience). But see Susan L. Smith, *Significant Research Findings in the Etiology of Child Abuse*, 65 *SOC. CASEWORK* 337, 344 (1984) (stating that research does not substantiate the "overwhelming conclusion of earlier writings" that indicated that a majority of abusive parents were themselves victims during childhood).

¹⁷⁰ See Sally Cantor, *Inpatient Treatment of Adolescent Survivors of Sexual Abuse*, in *CHILD SURVIVORS AND PERPETRATORS OF SEXUAL ABUSE* 24, 25-26 (Mic Hunter ed., 1995) (discussing findings about the dangers of repeated abuse, including substance abuse, self mutilation, suicidal tendencies, and eating disorders); Ruth S. Kempe, *A Developmental Approach to the Treatment of an Abused Child*, in *THE BATTERED CHILD*, supra note 169, at 362 (listing poor self-esteem, social isolation, dependent relationships, and poor coping abilities as long term effects of child abuse).

preexisting vulnerabilities of a woman who has been abused with the challenges of parenting in socially isolated and economically vulnerable circumstances, it is unsurprising that some of these mothers abuse and even kill their children.¹⁷¹

Perhaps the most striking of these cases in my sample involves Guinevere Garcia, an Illinois woman who spent five years on death row before her sentence was commuted to life imprisonment in January 1996.¹⁷² From the time that she was six years old, Garcia was raped repeatedly by an older male relative with whom she lived.¹⁷³ Her mother, who also had been raped by this man, committed suicide when Garcia was eighteen months old.¹⁷⁴ Garcia began drinking heavily at age eleven. Between ages eleven and nineteen, she suffered numerous traumas, including being gang-raped and being forced into a sham marriage with an undocumented man.¹⁷⁵

At age nineteen, Garcia gave birth to a daughter and was struggling to support herself and her daughter by prostitution and nude dancing.¹⁷⁶ By the time her daughter was eleven months old, Garcia became terrified that she would lose custody and that her daughter would be raised in a home environment similar to the one she and her mother had lived in.¹⁷⁷ One day, overwhelmed by these fears, she smothered her daughter.¹⁷⁸ The police did not discover the crime until they came to interview Garcia two years later regarding two fires that had occurred in her apartment building.¹⁷⁹ She told the police that she had set the fires on the first and second anniversaries of her daughter's

¹⁷¹ Studies have noted a correlation between child abuse fatalities and household isolation, whether in rural or urban areas. Abusive behavior not only is more likely to occur when the primary caretaker receives no parenting support from neighbors, friends, and relatives--it is less likely to be discerned and thereby prevented by others. *FATAL CHILD ABUSE*, supra note 78, at 125-26 (citing National Research Council, *Understanding Child Abuse* (Washington, D.C., 1993); Smith, supra note 169, at 338).

¹⁷² Eric Zorn, *Prison in Life; For Garcia, Commutation May be Ultimate Punishment*, *CHI. TRIB.*, Jan. 17, 1996, at 1, zone N.

¹⁷³ Kathryn Kahler, *Women on Death Row: A Chilling Sign of the Times*, *PLAIN DEALER*, May 26, 1993, at A1.

¹⁷⁴ Zorn, supra note 172, at 1, zone N.

¹⁷⁵ *Id.*

¹⁷⁶ John Carlin, *Wife on Death Row Spurns Clemency Plea*, *THE INDEPENDENT*, Oct. 1, 1996, at 11.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Illinois v. Garcia*, 651 N.E.2d 100, 115 (Ill. 1995) (Freeman, J., concurring in part and dissenting in part).

death.¹⁸⁰ Garcia confessed to having killed her daughter and led the police to the spot where she had buried her daughter's body.¹⁸¹

Not all of the women whose infanticides fall into this category killed their children with the deliberateness manifested by Garcia. Many of these cases involve impulsive actions such as suffocating or fatally beating a crying child.¹⁸² A few involve women who were struggling with depression and who intended to kill themselves as well as their children.¹⁸³ Read together, these cases all involve women who simply lacked the internal and external resources that enable other mothers to withstand the pressures associated with being the sole caretaker for an infant or child. These cases reflect a disturbed mother's spontaneous or irrational and disproportionately violent response to the very real challenges of parenting in isolation.

d. Addiction-Related Infanticide

The final category of infanticide involves women who are substance abusers and whose crimes are an indirect result of their addictions. Of course, substance abuse may be a contributing factor in all of the other categories of infanticide as well.¹⁸⁴ The effect of addiction upon a woman's capacity to parent is always harmful in that the addiction, by definition, renders the parent both less attuned to, and less able to respond to, her child's needs.¹⁸⁵ When a parent is addicted to an illegal substance, there is the additional complication of financing

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² For a discussion of one such case, the Latrena Pixley case, see *infra* notes 205 through 220 and accompanying text.

¹⁸³ See Joe Chidley, "I have put my faith in God," *MACLEAN'S*, July 31, 1995, at 41 (indicating that, at the time of her crime, Susan Smith was being treated with Prozac for depression).

¹⁸⁴ For example, there is considerable evidence indicating that a high percentage of women who are addicts suffered violent and abusive childhoods and developed drug habits in order to cope with the symptoms of this abuse. See, e.g., Michelle Oberman, *Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 *HASTINGS L.J.* 505, 512 (1992) [hereinafter Oberman, *Sex, Drugs*] (noting that between 70% and 100% of all female drug abusers are victims of incest or sexual violence).

¹⁸⁵ Shoni K. Davis has constructed a profile of the chemically dependent woman and explains that her addiction (as well as the problems that contributed to the addiction such as childhood trauma and financial problems) impairs her ability to parent. She generally will have problems with parental self-concept, maternal attitudes, bonding, and frustration tolerance. Shoni K. Davis, *Chemical Dependency in Women: A Description of its Effects and Outcome on Adequate Parenting*, 7 *J. SUBSTANCE ABUSE TREATMENT* 225, 226-27 (1990).

and securing a steady supply of the drug.¹⁸⁶ As a result, it is not surprising to find that as many as 50% of child abuse and neglect cases referred to juvenile court involve allegations of parental substance abuse.¹⁸⁷

There are numerous stories of women whose children died, either directly or indirectly, as a result of the women's addictions. The most common scenarios seem to involve cases like that of Pamela Rother, who was sentenced to ten years' imprisonment for the crime of felony child neglect after her two-month-old infant starved to death.¹⁸⁸ An expert witness testified that Rother, who lived alone with her daughter in "a dilapidated and unkempt trailer," was delusional and paranoid, and that her deep psychological problems were aggravated by her addiction to methamphetamine.¹⁸⁹

There is a growing literature describing the psycho-social problems relating to drug addiction in women. Unlike male addicts, who tend to describe their substance abuse as recreational, female addicts tend to describe their addictions as therapeutic--as coping mechanisms that enable them to bear the overwhelmingly difficult circumstances in their lives.¹⁹⁰ Indeed, the life circumstances of most addicts are, by any objective measure, challenging.¹⁹¹ Moreover, once they have children, these women are not miraculously transformed into "supermoms." They still face the same demons that led them to anesthetize themselves in the first place, and still need help to quit, but now they also need child care, more money, more patience, and self-control.¹⁹²

¹⁸⁶ Oberman, *Sex, Drugs*, supra note 184, at 513 (noting that addicted women often obtain their drugs in exchange for sex).

¹⁸⁷ J. Michael Murphy et al., *Substance Abuse and Serious Child Mistreatment: Prevalence, Risk, and Outcome in a Court Sample*, 15 *CHILD ABUSE & NEGLECT* 197, 207 (1991).

¹⁸⁸ Paul Elias, *Woman Gets 10 Years in Baby's Death*, *LOS ANGELES TIMES*, Oct. 26, 1995, at B1.

¹⁸⁹ *Id.* In a similar case, a Chicago woman whose daughter starved to death was charged with first degree murder. Allegedly, the mother had sold her baby's formula coupons from the federal Women, Infants and Children program in order to support her cocaine habit. Phillip J. O'Connor, *Public Guardian Rips DCFS Over Deaths of 2 Kids*, *CHI. SUN-TIMES*, Jan. 25, 1996, at 61.

¹⁹⁰ Beth G. Reed, *Developing Women-Sensitive Drug-Dependence Treatment Services: Why So Difficult?*, 19 *J. PSYCHOACTIVE DRUGS* 151, 152 (1987).

¹⁹¹ In my earlier work on pregnancy and substance-abusing women, I noted that addicted women "often report extreme levels of depression and anxiety, in addition to very low self-esteem.... [They] are often involved in abusive relationships.... [T]his vulnerability to physical abuse may stem from a history of being abused as children." Oberman, *Sex, Drugs*, supra note 184, at 512-13.

¹⁹² See Davis, supra note 185, at 226-27 (describing a profile of the chemically dependent woman in which childhood trauma, psychological characteristics,

Social isolation also plays a role in the infanticide deaths of the children of addicted mothers. These children commonly are neglected while the parent is either on drugs or in search of drugs. Family, friends, and the state often are fully aware of this neglect long before the child is physically harmed. Tragically, however, the failure to intervene seems to be a consistent theme in these cases. In fact, in several of the seven cases in my sample that involved evidence of maternal substance abuse, the state department of child protection already was on notice of the potentially abusive situation, but failed to intervene in time to save the child's life.¹⁹³

2. Ambivalence in Punishing Infanticide: The "Mad" and the "Bad"

Unlike in the neonaticide cases, there is considerable uniformity in the criminal charges brought against women suspected of infanticide. The vast majority of the women in these cases were charged with first degree murder. Nevertheless, the case outcomes are remarkably varied. At one end of the spectrum, at least two women convicted of infanticide have been sentenced to death, while at the other end, there are several women who were convicted, but released without a prison sentence.¹⁹⁴

Although the outcomes are varied, the cases tend to reflect a pattern of lenience.¹⁹⁵ This pattern has been noticed by criminal law experts, who have come to view infanticide defendants as "empathy outliers"--defendants "to whom jurors have appeared to be inordinately (and, perhaps, even inappropriately) sympathetic," in spite of the

socioeconomic factors, and pregnancy issues impinge on the capacity to parent); Kelly Kelleher et al., Alcohol and Drug Disorders among Physically Abusive and Neglectful Parents in a Community-Based Sample, 84 AM. J. PUB. HEALTH 1586 (1994) (comparing frequency of substance use disorders and symptoms between adults reporting child abuse and neglect and match controls); Dianne O. Regan et al., Infants of Drug Addicts: At Risk for Child Abuse, Neglect, and Placement in Foster Care, 9 NEUROTOXICOLOGY & TERATOLOGY 315 (1987) (comparing pregnant drug-dependent women and comparable drug-free women and suggesting that failure to resolve the conflicts resulting from childhood sexual trauma and/or the use of illicit drugs to cope with these feelings appears to disrupt the ability of women to parent their own children); Lynn Singer et al., Increased Psychological Distress in Post-Partum Cocaine-Using Mothers, 7 J. SUBSTANCE ABUSE 165 (1995) (describing psychological distress as reported postpartum by poor women who used cocaine during pregnancy).

¹⁹³ See, e.g., Nathan McCall, Child's Death a Tragedy in Waiting, Neighbors Say, Wash. Post, Apr. 10, 1991, at D1 (describing the routine visits of Washington, D.C. social workers to the apartment of Judith Coleman in response to reports by neighbors that Coleman was abusing her children).

¹⁹⁴ For a sense of the breadth of case outcomes for women charged with infanticide, see appendix, Coding Table Results.

¹⁹⁵ See appendix, Coding Table Results.

increasingly limited reach of the insanity defense.¹⁹⁶ This phenomenon was reported in a New York study of the insanity defense that concluded:

[w]hile from psychiatric reports, it is apparent that some of these mothers were grossly insane at the time of the infanticidal acts (e.g., believed child was turning into evil beings), there are others whose primary difficulty seemed to be one of personal inadequacy and, more specifically, an inadequacy in the wife-mother-homemaker roles, with resulting stress. Basically, it is our belief that society, in its desire to preserve an illusion of "mother love", is hesitant to carefully scrutinize the mother-child relationship and recognize realistically that the most reasonable target for a mother's frustration and anger is her child. Instead, to preserve our illusions about "mother love", we categorize women who murder their children as "insane".¹⁹⁷

Yet, it also is clear that not all infanticide defendants are treated with lenience. Instead, it seems that the criminal justice system and the media cast these diverse defendants as either crazy women, who are punished leniently, if at all, or evil women, who are punished rather harshly.

Others have identified the criminal justice system's general tendency to polarize female defendants by portraying them as either "mad" or "bad."¹⁹⁸ It is hypothesized that "the reasons for women's crimes are sought within the discourse of the 'irrational' and the 'pathological' " because violent criminal activity is not consistent with stereotypically feminine behavior.¹⁹⁹ One study of images of infanticidal women found that this dichotomization was particularly evident in these cases. Professor Wilczynski of Cambridge University studied a sample of twenty-two British cases, and found that in virtually all the cases, "the women were clearly viewed as either 'mad' or 'bad' ":

[i]n 14 cases, the women were seen as "mad" and as fulfilling the female stereotype of having mental or psychiatric problems. These

¹⁹⁶ PERLIN, *supra* note 43, at 192.

¹⁹⁷ Henry J. Steadman et al., *The Use of the Insanity Defense*, in *A REPORT TO GOV. HUGH L. CAREY ON THE INSANITY DEFENSE IN NEW YORK* 37, 68-69 (1978) (prepared under the direction of William A. Carnahan, Deputy Commissioner and Counsel).

¹⁹⁸ Wilczynski, *supra* note 7, at 72.

¹⁹⁹ *Id.*; see generally Susan M. Edwards, *Neither Mad nor Bad: The Female Violent Offender Reassessed*, 9 *WOMEN'S STUDIES INT. FORUM* 79, 79 (1986) (stating that women who are "suspects, defendants or offenders" are "dealt with in accordance with the degree to which their criminal and social behavior deviates from appropriate gender role expectations").

offenders were viewed as essentially good women and mothers, for whom something had gone tragically wrong. Their responsibility was, therefore, lessened, and hence they were treated sympathetically.... In the other eight cases the women were perceived as "bad" and as having behaved in a way inconsistent with the female stereotype (e.g., as neglectful, uncaring or sexual). They were seen to have committed "wicked" acts for which they were totally responsible and were treated punitively. All were given prison sentences. There did not appear to be anything between these two extremes.²⁰⁰

The cases falling into the "mad" category of infanticidal mothers do not necessarily involve women who meet the legal definition of criminally insane.²⁰¹ Rather, "madness" refers to an intuitive understanding, evidenced by those who pass judgment upon the defendant, that she was crazy.²⁰² The vast majority of the women in my study who were perceived and portrayed as "crazy" by the media, the lawyers, and the judges or juries did not plead an insanity defense, nor were they psychotic.

The broad scope of madness in infanticide cases is illustrated by the case of Latrena Pixley, a nineteen-year-old woman who admitted that she suffocated her six-week-old baby "because no one was helping ... take care of it."²⁰³ In her statement to the police, Pixley said that on the morning of her baby's death, she made breakfast for her one-year-old son, but had no baby formula in the house to feed her crying newborn.²⁰⁴ She fed the baby a bottle of water, but the baby continued

²⁰⁰ Wilczynski, *supra* note 7, at 74.

²⁰¹ Wilczynski notes that "[i]n most cases of infanticide ... the mental illness is usually not of sufficient severity that it would be recognized by the law in any other context (e.g., as sufficient basis for a plea of diminished responsibility)." *Id.* at 76 (citing d'Orban, *supra* note 54, at 570). Only one of the women in my sample clearly met the legal standard for insanity, and she was found unfit to stand trial. Two other women pled and were acquitted on insanity grounds after proving that they killed their children while suffering from postpartum psychosis. See appendix, Coding Table Results. Although the limited sample size affects the significance of this success rate, this success rate actually is remarkably high in light of statistics suggesting that the insanity defense is raised in only 1% of all felony cases, and results in acquittal (not guilty for reasons of insanity) in only 26% of these cases. Lisa A. Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 BULL. AM. ACAD. PSYCHIAT. LAW 331 (1991).

²⁰² See Nelson, Comment, *supra* note 139, at 625 (noting that in absence of a serious mental illness, most women do not kill their children).

²⁰³ Gabriel Escobar, *Mother Charged in Killing, Infant's Body Found in SE Trash Bin*, WASH. POST, June 21, 1992, at B1.

²⁰⁴ Paul Duggan, *Leniency in Baby's Death; Judge Gives D.C. Mother Weekends in Jail*, WASH. POST, June 5, 1993, at A1.

crying.²⁰⁵ She went to a neighbor's to use the phone, but the neighbor was not home.²⁰⁶ When she returned, the baby was still crying.²⁰⁷ She picked her up and began to rock her. When the baby failed to stop crying, Pixley put a blanket over the baby's face.²⁰⁸

Afterwards, Pixley wrapped her dead baby in the blanket and placed the body in a trash bin.²⁰⁹ Later that day, her boyfriend came home. She made him dinner, and they went out to visit with his family.²¹⁰ A relative later recalled that the conversation that evening was about what a shame it was that young mothers in the District of Columbia were killing their babies.²¹¹ Apparently, no one asked about Pixley's newborn's whereabouts. The next morning, after making breakfast for her boyfriend and her one-year-old son, Pixley began crying and told her boyfriend that she had killed the baby.²¹² He did not believe her, but went out to check the trash, whereupon he found the baby's body, and called the police.²¹³

Pixley was charged with first degree murder, but pled guilty to second degree murder, which carried with it a possible prison term of fifteen years to life. At her sentencing hearing, the state asked the judge to impose the maximum sentence, arguing that "it is impossible to imagine any more depraved and heinous behavior than that of Latrena Pixely.... Ms. Pixley is a murderer and should be treated like a murderer."²¹⁴ The defense presented expert testimony that Pixley suffered from postpartum depression. Although this term was never defined, the description of Pixley's behavior falls far short of a diagnosis of postpartum psychosis.²¹⁵ Instead, the defense expert testified that Pixley was extremely depressed, and that her depression was both pregnancy-related and an outgrowth of her deprived background: Pixley was a high school dropout who had been emotionally and physically abused as a child of two drug-addicted parents.²¹⁶

²⁰⁵ Catherine Toups, Mother Gets Weekends in Jail for Killing Infant, WASH. TIMES, June 5, 1993, at A10.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*; Duggan, supra note 204, at A1.

²⁰⁹ Duggan, supra note 204, at A1.

²¹⁰ *Id.*

²¹¹ Toups, supra note 205, at A10.

²¹² Duggan, supra note 204, at A1.

²¹³ *Id.*; Toups, supra note 205, at A10.

²¹⁴ Toups, supra note 205, at A10.

²¹⁵ For a description of this disorder, see supra notes 140 through 154 and accompanying text.

²¹⁶ Duggan, supra note 204, at A1.

Judge George Mitchell followed the defense attorney's recommendation and imposed a sentence of weekends in jail for three years. In sentencing Pixley, he remarked that people seem more inclined to "understand these psychological phenomenons [sic] [when they occur] in high-level people, but it becomes un-understandable in a poor person sometimes. I don't want to be victimized by that kind of thinking.... I want to treat all people the same, whether they be poor, rich or whatever."²¹⁷

Given that the law generally does not reduce the penalties for homicide when a defendant establishes that she was depressed,²¹⁸ the judge's claim that he was treating all people alike is ironic. Nevertheless, it demonstrates that, having classified the defendant as mad, it became permissible to treat her with extraordinary lenience.

Unlike the "mad" infanticide defendants, those who are viewed as "bad" are portrayed as "ruthless, selfish, cold, callous, neglectful of their children or domestic responsibilities, violent or promiscuous."²¹⁹ In addition to being tried for infanticide, the media "tries" these women for all "crimes" relating to their lack of maternal altruism.²²⁰

For example, consider Sabrina Butler's story. Butler was indicted for capital murder in the death of her nine-month-old son.²²¹ At around midnight on April 12, 1989, Butler noticed that her son was not breathing, and brought him to a local hospital.²²² The baby was pronounced dead on arrival, and the doctors suspected that child abuse may have led to his death.²²³ An autopsy revealed that death occurred as a result of an infection following from a perforation in the small intestine. Doctors inferred that a "substantial blunt force to the

²¹⁷ *Id.*

²¹⁸ For an overview of criminal law defenses related to a defendant's mental state, see PAUL H. ROBINSON, CRIMINAL LAW DEFENSES §§ 161, 171, 173 (1984 & Supp. 1996).

²¹⁹ Wilczynski, *supra* note 7, at 78.

²²⁰ Note that this categorization may be seen in the media, long before the trial occurs. For example, Jennie Bain, a 20-year-old single woman living in a trailer park in Tennessee was indicted for first degree murder in the deaths of her two children, ages 23 months and one year. According to the news accounts, she left the children unattended in her parked car for eight to 10 hours on a Saturday evening while she was inside a motel room partying with some friends. When she returned to the car in the morning, the boys had died of dehydration and suffocation. The father of Bain's children was a truck driver who was infrequently present in the lives of Jennie and her children. The first line of one article covering the story reads, "Jennie Bain just wanted to have fun." Charles Laurence, Parent First, Child Last: The Mother Who Left Her Two Babies to Die in a Hot Car is the Latest Child Neglect Case to Shake America, DAILY TELEGRAPH (London), June 9, 1995, at 21.

²²¹ *Butler v. Mississippi*, 608 So. 2d 314, 315 (Miss. 1992).

²²² *Id.* at 316.

²²³ *Id.*

abdomen" caused the perforation.²²⁴ The police were summoned, and Butler was questioned through the night by several detectives.

Butler gave numerous conflicting stories about the circumstances of the prior evening, first telling the authorities that the baby had been left with a babysitter, then admitting that the baby was with her throughout the day.²²⁵ Butler was similarly vague about how she discovered that her baby was not breathing. It is not clear whether she found the baby dead, or whether it stopped breathing while she was with it. Her stories include the fact that she went out for a brief jog around the block at around 10:00 p.m., and that she was expecting a male visitor that evening, although the timing of both of these events remains uncertain.²²⁶

As a result of these inconsistent stories and the ambiguities surrounding the baby's death, Butler's public defender sought funds from the court to hire a psychiatrist and an investigator.²²⁷ The judge denied both of these requests, asserting that an investigator was not legally necessary, and that sufficient information about the defendant was obtained from the brief psychiatric evaluation conducted by the state's psychiatrist, who found her competent to stand trial.²²⁸ The judge likewise denied defendant's request for a manslaughter instruction.²²⁹ The jury convicted Butler of killing her son while engaged in the commission of felonious child abuse, and sentenced her to death.²³⁰

Everything about the case against Butler called out for explanation, especially in view of the penalty she received. There were questions concerning what led to the baby's death, what role Butler played in the baby's death, and what Butler's background was. Even the Mississippi Supreme Court, which ultimately granted Butler a new trial on procedural grounds, rejected defense claims of error based on the trial court's refusal to provide funds for a psychiatric evaluation.²³¹ Interestingly, Butler was acquitted upon retrial after the judge heard expert testimony that Butler could not have caused the infant's death,

²²⁴ *Id.*

²²⁵ *Id.* at 316-17.

²²⁶ *Id.*

²²⁷ *Id.* at 321.

²²⁸ *Id.*

²²⁹ *Id.* at 319.

²³⁰ *Id.* at 318. On appeal, the Mississippi Supreme Court overturned the conviction and remanded for retrial because the prosecutor, in violation of the Fifth Amendment, asked the jury to infer guilt from the fact that Butler did not testify at trial. *Id.*

²³¹ *Id.* at 321. The Mississippi Supreme Court remanded for retrial on the basis of only one error: that the prosecutor asked the jury to infer guilt from the defendant's failure to testify.

which was attributable to either cystic kidney disease or sudden infant death syndrome.²³²

Although it is useful to observe the binary pattern of madness and badness in considering the broad range of penalties assigned to infanticide cases, upon closer inspection, the categories are not particularly descriptive or discrete. First, despite the association between the perceived madness of a particular defendant and lenient treatment, the concept of madness is so nebulous as to be meaningless. So little is reported about the women's mental status and capacity that one gets the sense that the defendant's actual mental health is almost beside the point in these cases, and that madness is simply a way for judges or juries to explain actions they view as otherwise inexplicable, and to justify the mercy shown to those defendants whom they find sympathetic. The cases in my sample in which infanticide defendants received particularly harsh sentences (life imprisonment or death) predominantly involved poor women and/or women of color. Although my data is insufficiently complete to permit an analysis of the extent to which maternal race and class affects case outcome, it is quite likely that the harsh treatment visited upon poor women of color in other areas of the criminal justice system also is manifested in infanticide cases.²³³

Second, a more critical scrutiny of the cases reveals that, particularly in high profile cases, the categorization process is not an immutable one. Instead, the infanticide defendant's image may alternate between "mad" and "bad," and ultimately, the jury's decision may reflect a sense that the woman is both mad and bad. In other words, the dialectic of madness and badness is simply another manifestation of jury ambivalence about allocating blame in infanticide cases. Thus, the shifting characterizations of an infanticide defendant

²³² 56 Inmates Executed in 1995, Most Since 1957; U.S. Total is Expected to Rise Further with 3,000 on Death Row, *BALT. SUN*, Jan. 2, 1996, at A3.

²³³ The exceptionally severe punishment visited upon poor women of color by the criminal justice system is discussed in the following works: Annette Appell, *On Fixing "Bad Mothers" and Saving Their Children: Four Stories* (June 26, 1996) (unpublished manuscript on file with author); Oberman, *Control*, *supra* note 6; Oberman, *Sex, Drugs*, *supra* note 184; Dorothy E. Roberts, *Motherhood and Crime*, 79 *IOWA L. REV.* 95 (1993) [hereinafter Roberts, *Motherhood*]; Dorothy E. Roberts, *Punishing Drug Addicts who have Babies: Women of Color, Equality, and the Right of Privacy*, 104 *HARV. L. REV.* 1419 (1991). See also Anna Lowenhaupt Tsing, *Monster Stories: Women Charged With Perinatal Endangerment*, in *UNCERTAIN TERMS* 282 (Faye Ginsburg & Anna Lowenhaupt Tsing eds., 1990) (neonaticide study suggesting different outcomes for young white women, whose actions often went unpunished, as opposed to older women and all women of color, who received stringent punishment).

from bad to mad, and sometimes back again, reflects a systemic struggle to devise an appropriate punishment for her.²³⁴

Perhaps the quintessential "bad" infanticidal mother is Susan Smith, whom the media relentlessly portrayed as bad, even when the jury ultimately voted to spare her life. In the fall of 1994, after having led the nation on a phony manhunt for a mysterious black man who she claimed had kidnapped her children, Susan Smith shocked the nation by confessing that she strapped her two children into their car seats, and then rolled the car into a pond. In the immediate aftermath of Smith's confession, crowds screamed for her death.²³⁵ And yet, as the case went to trial, David Smith, Susan Smith's former husband, released a book detailing Susan's sexual exploits, explaining that "his only motive is to ensure that public sympathy remain with the boys rather than Susan."²³⁶ He won that battle, as 63% of Americans surveyed by the Princeton Survey Research Associates favored the death penalty in her case.²³⁷

But upon closer examination of this rough classification, we see familiar signs of strain and ambivalence. David Smith felt compelled to write his book, in part, because he feared that public sympathy was shifting toward Susan. Indeed, soon after the immediate shock of the story wore off, some commentators began to view Susan Smith as an extraordinarily troubled young woman who had intended to take her own life, not just those of her children. These stories portrayed an image of madness at odds with the original images of Smith's evil nature.²³⁸ When it finally came time for the jury to rule, it seemed to view her as both mad and bad rather than choose between these two images. They saw her life in context--the abusive step-father, the social isolation, the limited options, her failure to reach out for help, her

²³⁴ The attempt by jurors to resolve the mad or bad dilemma concerning the mother who kills her child, and as a result determine the appropriate punishment for her, also was evidenced in the case of Rebecca Hopfer. See *supra* notes 109 through 128 and accompanying text.

²³⁵ See, e.g., Linda Ellerbee, *Smith will live--Does white make right?*, HOUSTON CHRON., Aug. 6, 1995 (Outlook), at 6 (stating that Susan Smith should have received the death penalty).

²³⁶ Gail Wescott, *The Reckoning*, PEOPLE, Aug. 7, 1995, at 73.

²³⁷ Brad Warthen, Editorial, *Jury's Wisdom Beats 'Dittohead Justice'*, DENVER POST, Aug. 10, 1995, at B11. In one of its cover stories on Susan Smith, NEWSWEEK magazine called her a "promiscuous, sexually exploitive adult ... [who] ended her marriage to the poor boy who loved her and gambled on a rich boy who didn't. When it all came apart she committed an act of savagery that defies understanding." Tom Morgenthau, *Condemned to Life*, NEWSWEEK, Aug. 7, 1995, at 19.

²³⁸ Perhaps the most thoughtful essay on the subject was written by Barbara Ehrenreich, *Susan Smith: Corrupted By Love?*, TIME, Aug. 7, 1995, at 78.

vindictive, immature behavior,²³⁹ and despite having been carefully death-qualified,²⁴⁰ they refused to sentence her to death.

IV. THE LEGACY OF AMBIVALENCE ABOUT INFANTICIDE

The preceding sections point to a widespread pattern of ambivalence about whether, how, and whom to punish for the crime of infanticide. This pattern seems to be consistent throughout much of Western culture and history. Therefore, this Article could end here with the simple conclusion that, like other societies, modern American society differentiates infanticide from murder. Because it seems that the United States is not alone in its ambivalent response to this crime, it might be argued that our impulse toward mercy is somehow "natural" and, therefore, not necessarily objectionable.

As is the case with other societies, the impulse toward exceptionalizing infanticide cases is just that--an impulse. There is no dialogue about the sources of our ambivalence, nor is there any formalized justification for the generally sympathetic treatment these defendants receive. For those inclined to be sympathetic with these defendants, there might be a sense of taboo in recognizing the tendency toward lenience--as if it is so lacking in legitimacy that it must be overcome. For those opposed to such sympathetic treatment, articulating this phenomenon as a pattern only reconfirms what they already suspected: that without any apparent explanation, these crimes get special treatment.²⁴¹ Regardless of whether one is inclined for or

²³⁹ See Mona Charen, *The Lessons of the Susan Smith Verdict; Children are Like Property*, DAYTON DAILY NEWS, Aug. 7, 1995, at A6 (arguing that society views strangers who mistreat children more harshly than mothers who mistreat their own children); Mike Dorning, *Abusive Stepfather Testifies for Smith; He Says He Must Share in Her Guilt, Pleads for Her life*, CHI. TRIB., July 28, 1995, at 4, zone N (describing how Susan Smith's step-father admitted to abusing her as a child and pleaded for leniency on her behalf); Robert Scheer, *Small-Town Values Like Hiding Terrible Secrets*, PALM BEACH POST, Aug. 6, 1995, at F1 (discussing how moral corruption is often hidden, as exemplified by the sexual abuse to Susan Smith at the hands of her step-father); Alice Steinbach, *Why Mothers Kill: Two women confessed to murdering their children, and now the question remains: How could they?*, BALT. SUN, Dec. 12, 1994, at D1 (discussing characteristics common to women who kill their children).

²⁴⁰ See Eric Zorn, *'Witherspooning' May be the Death of Susan Smith*, CHI. TRIB., July 20, 1995 at 1, zone N (discussing how 16 potential jurors were kept off the jury in the Smith trial because they would not impose the death penalty on her); see also David C. Baldus, *Keynote Address: The Death Penalty Dialogue Between Law and Social Science*, 70 IND. L.J. 1033 (1995) (discussing the relationship between social science research and death penalty decision making).

²⁴¹ See, e.g., Brusca, *Note*, supra note 141, at 1133 (arguing that infanticide is excusable only when the defendant meets the pre-existing insanity defense); Gardner,

against sympathy for women who kill their children, there are dangers inherent in this unarticulated impulse to exceptionalize infanticide. There are at least four pernicious results that follow from the failure to acknowledge or explain why infanticide is different from other forms of homicide.²⁴² After describing the various dangers inherent in treating these cases differently without acknowledging how or why, this section undertakes a direct exploration of the ways in which these cases are exceptional.

A. Exploring the Legacy of Ambivalence

The failure to explain or justify treating infanticide cases as exceptional may yield a host of unfounded and problematic inferences. First, one might interpret the reluctance to punish infanticide as an indication that society values the lives of children less than those of adults. In fact, this line of cases could be seen as evidence to support the argument made by abortion opponents that a society that tolerates abortion devalues not only fetal life, but life in general.²⁴³ The fallacy in this reasoning lies in the fact that, generally speaking, most states penalize the killing of a child at least as harshly as the killing of an adult. In fact, in American death penalty jurisprudence, the killing of a child under a certain statutorily prescribed age, by definition, renders the defendant eligible for the death penalty.²⁴⁴ Moreover, research suggests that when men kill their children, there is no pattern of ambivalence or mercy in terms of the punishment they receive.²⁴⁵

Note, *supra* note 143, at 953 (arguing that postpartum depression should not receive special recognition under the law).

²⁴² See *infra* notes 243 through 249 and accompanying text.

²⁴³ In her study of a series of neonaticide prosecutions, Anna Tsing notes that

[v]alue statements from the abortion debate have emerged in practically every case I have found in which a white high school or college student has been charged with perinatal endangerment. For those who oppose abortion, the connection is simple. As the sheriff who arrested one college student put it, 'This was just a nine month abortion to her. She's been told it's legal and she stretched it all the way.'

Tsing, *supra* note 233, at 290.

²⁴⁴ See, e.g., 720 ILL. COMP. STAT. 5/9-1(b)(7) (West 1994) (declaring that murder of an individual under 12 years of age makes certain defendants eligible for the death penalty).

²⁴⁵ P.T. d'Orban's study of women who killed their children found that "[e]ighty per cent received a noncustodial sentence." d'Orban, *supra* note 54, at 569. He contrasts these results with sentences received by 29 battering fathers who killed their children. *Id.* (citing P.D. Scott, *Parents Who Kill Their Children*, 13 *MED. SCIENCE & L.* 120 (1973a)). "In Scott's study, 86% of the fathers were given a prison sentence, only one Probation Order was made (without a treatment condition), and none of the men received a medical disposal." *Id.*

Additional evidence of our lack of mercy for nonmothers who kill children is found in the fact that we readily punish the killing of infants, and even fetuses, when the

A second danger inherent in the unarticulated impulse toward exceptionalizing infanticide is that it threatens to undermine the credibility and integrity of the law. At the very least, the wide range of responses to infanticide in the United States reflects an arbitrary and incoherent approach to the crime. The range of outcomes points to the inescapable conclusion that society not only is unsure about how severely to punish women who kill their children, but that at times, it is unsure whether to punish them at all. To the extent that society punishes law-breakers in order to deter criminal activity, the unjustified and sporadic tendency toward lenience in these cases risks undermining deterrence. More importantly, the reluctance to penalize those who break this particular law indirectly calls into question the legitimacy of punishing those who break other laws.²⁴⁶

Third, the effect of this ambivalence is to create a set of cases involving women defendants that are treated differently from similar cases involving men. Those critical of the frequently lenient outcomes in these cases may argue that the law is "sexist" and displays an antiquated chivalry in this reluctance to convict and punish women. Despite the fact that, as a general matter, there is little evidence that the law treats women defendants differently from men, because the lenience in these particular cases is neither explained nor justified based on gender, it is difficult to respond to these claims.²⁴⁷ Moreover,

perpetrators are not mothers. See, e.g., La. Rev. Stat. Ann. § 14:32.5 (West 1986 & Supp. 1996):

A. Feticide is the killing of an unborn child by the act, procurement, or culpable omission of a person other than the mother of the unborn child. The offense of feticide shall not include acts which cause the death of an unborn child if those acts were committed during any abortion to which the pregnant woman or her legal guardian has consented or which was performed in an emergency as defined in R.S.40:1299.35.12. Nor shall the offense of feticide include acts which are committed pursuant to usual and customary standards of medical practice during diagnostic testing or therapeutic treatment.

²⁴⁶ Recall that this was precisely the concern that led Parliament to enact the modern British Infanticide Act. See *supra* note 51 and accompanying text.

²⁴⁷ There is considerable debate about gender differences in the enforcement of criminal law. In many cases, women are sentenced more harshly than are men who commit comparable crimes. For a comprehensive exploration of the criminal justice system's differential treatment of women, see Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151 (1995). Ania Wilczynski and Allison Morris summarize this research in their article on parents who kill their children, noting that

[a] continuing debate in both conventional and feminist criminological writings is whether or not women are dealt with more leniently than men throughout the criminal justice system. There is little agreement. The closest there seems to be to a consensus is the answer: it depends (for example, on the offence, the offender's race or class and so on). Wilczynski & Morris, *supra* note 2, at 31. Although it nevertheless is possible that the ambivalence about punishing infanticide reflects vestiges of paternalism, it seems likely

history teaches that there is reason for caution and skepticism whenever the law determines that women should be treated differently from men—even if such determination arises out of an ostensibly benevolent impulse.²⁴⁸ As Professor Coughlin observes, exceptionalizing women threatens to deny them the "same capacity for self-governance that is attributed to men."²⁴⁹

Fourth and finally, because there is no explanation for why we treat infanticide differently, or even an acknowledgment that we do so, there is no opportunity to view these cases as interrelated. Indeed, the unexamined impulse toward lenience has obscured the very patterned nature of these cases. The intensity and exclusivity of our focus on the wisdom of punishing the defendant channels society's attention away

that this impulse arises out of the gendered structure of parenting. In other words, because the tasks of mothering differ dramatically from those of fathering, the system differentiates between mothers and fathers who kill their children. See *infra* notes 297 through 323 and accompanying text (exploring the structure of motherhood as it relates to infanticide). There is a long line of U.S. Supreme Court cases illustrating the double-edged sword of laws ostensibly designed to protect women. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding exclusion of women from mandatory draft registration); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding law that limited the number of hours women could work daily); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873) (upholding state's refusal to grant married woman a license to practice law). The pernicious effect of such laws was memorialized by Justice Brennan, who noted that "[t]raditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (striking down federal law that automatically granted housing and medical benefits to married men in the military, but required married women to demonstrate husband's dependence in order to receive the benefits).

²⁴⁸ There is a long line of U.S. Supreme Court cases illustrating the double-edged sword of laws ostensibly designed to protect women. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding exclusion of women from mandatory draft registration); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding law that limited the number of hours women could work daily); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873) (upholding state's refusal to grant married woman a license to practice law). The pernicious effect of such laws was memorialized by Justice Brennan, who noted that "[t]raditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (striking down federal law that automatically granted housing and medical benefits to married men in the military, but required married women to demonstrate husband's dependence in order to receive the benefits).

²⁴⁹ Anne Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 6 (1994). Professor Coughlin elaborates on this point, noting that

if women achieve leniency by exploiting, rather than challenging and revising, the existing categories of excuse, they not only leave the theory of criminal responsibility intact, they also leave intact the competing life stories that the theory constructs and makes available for excused actors and responsible human beings to experience. The experience of the responsible actor is one that resonates powerfully in our culture and, by securing excuse, women assure that it is one that will continue to be denied to them.

Id. at 25.

from the remarkably patterned circumstances that surround these crimes. Thus, despite the patterned nature of these circumstances, each case generates the same tired dialogue regarding the defendant's culpability and the merit and utility of punishment. Society becomes trapped in this ongoing dialogue and, therefore, never comes to grips with the role played by families and communities in contributing to these infants' deaths. Simply put, the failure to articulate the justifications for exceptionalizing infanticide leads to the failure to identify circumstances latent in society that contribute to and perpetuate this crime.

B. Identifying the Sources of Ambivalence

The only way to avoid the problems arising out of the unexamined impulse toward exceptionalizing infanticide is to attempt to identify and acknowledge the reasons for our ambivalence about infanticide. This process requires that we reexamine the various forms of modern American infanticide in order to understand exactly what makes these cases seem different.

At its foundation, the response to infanticide is ambivalent because society simultaneously expresses moral outrage at the offense and treats the offenders with lenience. This ambivalence reflects a difficulty, not with condemning the act, but rather with condemning the actor. The problem with infanticide lies not in the crime itself, but rather, in isolating the blameworthy party in these cases.²⁵⁰ Thus, the facts surrounding the women's lives and their infants' deaths lead us to treat these cases as exceptional.

In order to begin exploring the circumstances surrounding the lives of the women who commit infanticide, it is necessary to return to the distinction between neonaticide and infanticide. As I noted in describing the two types of infanticide, there are significant factual differences between infanticides occurring within the first twenty-four hours after birth and those occurring thereafter. Therefore, this section will begin with an exploration of the circumstances surrounding neonaticide and will then turn to a discussion of infanticide stories.

²⁵⁰ This is consistent with historical accounts of the resistance to punishing infanticide. See *supra* notes 34 through 50 and accompanying text (regarding Victorian juries' reluctance to punish the infanticide defendant due to their sense that one of the guilty parties was missing).

a. Getting Beyond the "Gory Part": Understanding the Sources of Neonaticide

In considering how best to explore the circumstances surrounding the lives of those who commit neonaticide, I found myself struck by the eerie consistencies in the stories. Surprisingly accurate representations of these stories are found in contemporary literature²⁵¹ and in film.²⁵² Although the use of narrative in legal scholarship has generated considerable controversy, it is certain that narratives help to provide a more nuanced understanding of a given situation to those outside of it.²⁵³ Moreover, the patterned nature of neonaticide cases lends itself to narrative, as the seemingly incomprehensible nature of the crime cries out for explanation. I was fortunate enough to find a woman willing to share her story with me.

i. A Neonaticide Narrative

In November 1991, a suburban Chicago high school senior was arrested and charged with first degree murder in the death of her newborn daughter. I became aware of A.'s²⁵⁴ case as a result of my involvement with a similar case in Illinois.²⁵⁵ I followed A.'s case over the months preceding trial, eventually meeting her lawyer and working peripherally with him as he prepared A.'s defense. I attended the trial in May 1992, in which A. was convicted of involuntary manslaughter and given a probationary sentence. In September 1995, A. agreed to meet with her former lawyer and me to talk about her recollection of

²⁵¹ See, e.g., BARBARA KINGSOLVER, *ANIMAL DREAMS* (1990) (although the narrator refers to the incident as a miscarriage, the circumstances surrounding the "birth" are similar to neonaticide in that the teenage pregnant girl told no one that she was pregnant, delivered her six-month-old baby in the bathroom, failed to obtain medical assistance, and secretly disposed of the body).

²⁵² See, e.g., *JUST ANOTHER GIRL ON THE IRT* (Paramount 1992) (depicting a high school student's conflicts over how to resolve her unplanned pregnancy and illustrating the manner in which denial becomes a daily coping mechanism; an impulsive decision to abandon a newborn becomes a comprehensible, if not a reasonable, response to an unattended delivery).

²⁵³ For an excellent evaluation of narrative's unique role in legal scholarship, see Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991).

²⁵⁴ A. agreed to speak with me only on the condition that the utmost efforts be taken to maintain her anonymity. She explained to me that, ever since the trial, all that was private about her has become public. She feels extraordinarily vulnerable to public scrutiny and judgment, and worries constantly that people recognize and despise her. Therefore, I have elected to use the initial A., which is not her first initial, but evokes the sense of public branding experienced both by Hester Prynne in Nathaniel Hawthorne's *The Scarlet Letter*, and by this woman. NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (Alfred A. Knopf 1992) (1850) (fictional tale of adultress sentenced to wearing the letter "A").

²⁵⁵ For a description of this case, see Oberman, *Control*, *supra* note 6, at 2-4.

the circumstances that led up to the terrifying events of November 1991.²⁵⁶

At the time of our meeting, A. was twenty-one years old and living with her grandparents in Chicago. She was extremely reluctant to speak about the incident, and indicated that in the years since the trial, she had not discussed that time in her life with anyone. Despite the fact that A. thinks about what happened "almost constantly," neither her family nor her best friend has ever asked her about what happened, nor attempted to explore where things went wrong.²⁵⁷

The story A. told unfolded haltingly and nonchronologically, almost as if we were circling around her pregnant seventeen-year-old self from a distance, then quietly and slowly moving increasingly closer. We began by talking about how she came to live with her uncle and his fiancé, which is where she lived throughout most of her pregnancy and where her baby was delivered. A.'s parents were divorced when A. was young. A. lived primarily with her mother, but frequent personality clashes led to A.'s temporary residence with her father and step-mother, and also with her grandparents. When she was fourteen, the situation at home became particularly tense. A.'s mother became involved in a relationship, and A. frequently was left to babysit her eleven-year-old and two-year-old sisters. After months of fighting, A. went to live with her grandparents.²⁵⁸

A. describes her grandparents as being "of a different generation." Having immigrated to this country years before, they remain balanced between two cultures, with perhaps the larger part of their ways reflecting the reserved demeanor common to their country of origin. A. was then, and remains today, an exceptionally quiet person, with few close friends. She spent most of her time with her best friend, S., a classmate of hers. She frequently slept over at S.'s house, and had relatively little contact with her mother.²⁵⁹

In the summer between her sophomore and junior years of high school, when A. was sixteen, she went to live at S.'s house for several months. She recalls that S.'s mother was concerned because A.'s mother did not know where A. was living and never called to see how A. was doing. Finally, S.'s mother called A.'s mother, told her that A. had been living with them, and asked for some financial support. This apparently was not forthcoming, and A. moved back to her grandparents' house. At some point shortly thereafter, A.'s uncle asked

²⁵⁶ Interview with A., Chicago, Ill. (Sept. 21, 1995).

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

her to come live with him and his fiancé. A. was upset and nervous about this, as this uncle was an intimidating man regarded by everyone in the family as having a fierce temper. Nevertheless, A. felt pressured to accept his offer and, in the early spring of her junior year, she moved in.²⁶⁰

By the time she moved into her uncle's house, A. was pregnant. During the winter of her junior year, A. had had a brief relationship with B., who was her second boyfriend. B. attended a different school, and they had met each other through a mutual friend. Although they were sexually intimate on several occasions, there was little emotional relationship between them. When A.'s period was late, she told B. that she suspected she might be pregnant. B. responded by breaking off the relationship.²⁶¹

The early months of her pregnancy were filled with doubt, denial, and confusion. A. recalls living day-to-day, believing that her condition was not real or that it would somehow go away. She was terrified to tell any of the adults in her life that she suspected she was pregnant. She felt it would be impossible to tell her uncle or her grandparents because they never communicated with her about anything but the most superficial matters. What most terrified her was the thought of telling her mother, since she feared that her mother would hate her for this and banish A. from her life. Although she had occasional contact with her father and her step-mother, their interactions were distracted and brief, and A. was afraid that they, too, would hate her.²⁶²

A.'s fears were based in part upon her family's reaction to her teenage cousin Leslie's pregnancy during the previous year. Leslie was treated with ridicule and was considered a failure by the entire family. On occasion, relatives would warn A. not to become a "fuck up" like Leslie. Additionally, A. recalled a conversation with her mother when she was fifteen, in which she asked her mother how she would respond if A. got pregnant. Her mother first inquired whether she was, and then responded that, if A. became pregnant, she would "kick her ass and throw her out and send her and her baby to live with her boyfriend." Finally, A. was afraid to reveal her pregnancy because B. was African-American. A. is Latina, and because her family often made racist generalizations against African-Americans, she feared that her family would be doubly angered if they learned who had fathered her baby.²⁶³

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

As her pregnancy advanced, A. began to hope that someone would notice. She recalls that her face swelled with the pregnancy, and that her chest and hips grew considerably. A. is not a heavyset person, but she tended to wear loose clothing, which continued to fit her throughout the pregnancy. She reports that others commented on her chest size, and that she occasionally noticed her uncle and his fiancé staring at her chest. Once a girlfriend in gym class said to her, "You know, from far away, you look like you're pregnant. But up close, it's different."²⁶⁴

When A.'s family failed to acknowledge her condition, A. began "dropping hints." A. recalls asking her mother whether she thought A. was getting fat. Her mother paid little attention to this, although A. remembers that on one occasion late in her pregnancy, her mother responded to A.'s inquiry by touching her belly, feeling its roundness, and then simply telling her she was fine. A. tried other hints as well. She recalls repeatedly telling her mother and her father and step-mother that she needed to find a job, a house to live in, and a salary so that she could get insurance. No one picked up on these remarks, other than to ask what her hurry was.²⁶⁵

Throughout the pregnancy, A. discussed her pregnancy only with her friend S. "It was like our little secret," A. remarked wryly, although she often wished that someone would find out. Once, while hanging out in S.'s bedroom with S. and S's boyfriend, A. lifted up her shirt and exposed her belly. S. told her to pull her shirt down. "Someone's gonna find out," she warned A. A. recalls hoping that someone would notice, and would call her family and just tell them, "You know, A. is pregnant."²⁶⁶

Despite the fact that she "just kept wishing and hoping someone would say something," no one ever did until late in her pregnancy, when A.'s mother took her to a school nurse to get a booster shot. The nurse looked at A. and asked her whether she had made arrangements for the baby. A. recalls shrugging and looking away in shyness and shock, because this was the first time any adult had acknowledged her pregnancy. The nurse said nothing further, and A. left the examining room. Her mother noticed that A. seemed shaken up, and said to her, jokingly, "What happened in there? You look like someone told you were pregnant or something." A. did not know how to respond, so she said nothing.²⁶⁷

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

From the fifth through the ninth months of her pregnancy, A. worked with her father at a local warehouse. She spent considerable time with her father and her step-mother, and on the day that she went into labor, she was at their home. She told them that she was having terrible cramps, and they asked her if she wanted to stay with them. It was her friend S.'s birthday, though, and A. wanted to return to her uncle's so that she could see S. On the bus ride home, A. became increasingly uncomfortable. Upon arriving at her uncle's home, she withdrew to her bedroom and labored alone until the early morning hours of the next day, when she went into the bathroom and delivered the baby into the toilet.²⁶⁸

A. did not want to talk with me about the "gory part" of her story--about what happened and how she felt during those long hours in the bathroom. What I know, then, is what she testified to at trial. Although her uncle and his girlfriend were in their bedroom, which adjoined the bathroom, A. made no noise during the labor and delivery. She later told police officers that she was afraid of her uncle, and did not cry out because she did not want him to find her. As soon as the baby was delivered, A. got up from the toilet and, leaving the baby in the water, began cleaning the blood she had lost during the delivery from the bathroom floor and walls. After several minutes, she took the baby out of the toilet and placed it on a towel on the floor. The baby did not cry or move, and A. realized it was dead. She wrapped the baby inside the towel and returned to her bedroom, where she fell asleep cradling the bundle against her body.²⁶⁹

Later in the day, S. called A. to see why she hadn't come by to celebrate S.'s birthday. A. told S. what had happened, and S. told her parents. Toward evening, the police arrived at A.'s house and asked her uncle if they could question A. Moments later, A. was arrested for the homicide death of her daughter.²⁷⁰

At trial, the state accused A. of deliberately concealing her pregnancy and intentionally drowning the baby. The jury nevertheless refused to convict A. of first degree murder, and instead found A. guilty only of involuntary manslaughter.²⁷¹ The judge sentenced her to probation, including one thousand hours of community service.²⁷²

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ Illinois law defines involuntary manslaughter as follows:

[a] person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he

After the judge announced his sentence, A. was stunned and unemotional. She recalls feeling overwhelmed by the pressure of the trial and sentencing, by the result, and by the thought that it was now over. A.'s mother, who had attended the trial and sentencing, thought that A. should have been more emotional at the outcome. She told A. that she should be "grateful" at the result. A. responded quietly, "I'm sad. I just had a baby." Her mother and uncle left her at the courthouse to take the bus home. As they left, her mother shouted back at her, "It's not my fault--I'm not the one that slept with B."²⁷³

ii. The Road to Neonaticide

A.'s story leaves many puzzling questions unanswered. In order to understand why this entire nightmare occurred, it is necessary to examine the various factors that contributed to A.'s actions and reactions throughout the extended crisis. This analysis begins with questions about A. herself, then extends to her family and support system, and finally reaches issues of the broader community she lived in.

Although there are many possible starting points for considering how A.'s predicament came to be, perhaps the most obvious place to begin is with the act of unprotected intercourse. There is nothing exceptional about A.'s having had intercourse without contraception. In fact, particularly for girls who are just becoming sexually active, the failure to contracept is the norm.²⁷⁴ Moreover, the fact that A. was sexually active tells us nothing about her level of maturity. As I have summarized elsewhere, psycho-social research consistently reveals that "for girls, adolescence is a time of acute crisis, in which self-esteem, body image, academic confidence, and the willingness to speak out decline precipitously."²⁷⁵ This self-doubt manifests itself in many venues, including adolescent sexuality.²⁷⁶ As a result, many girls

performs them recklessly, except in the case in which the cause of death consists of the driving of a motor vehicle, in which case the person commits reckless homicide.

720 ILL. COMP. STAT. 5/9-3(a) (West 1994).

²⁷² Interview with A., *supra* note 256.

²⁷³ *Id.*

²⁷⁴ Michelle Oberman, *Turning Girls into Women: Re-evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, nn.270, 278 (1994) [[hereinafter Oberman, *Turning Girls*].

²⁷⁵ *Id.* at 22.

²⁷⁶ *Id.* at 65-66:

Girls express longing for emotional attachment, romance, and respect. At the same time, they suffer enormous insecurity and diminished self-image. These two factors are clearly interrelated--the worse girls feel about themselves, the more they

become sexually active not out of feelings of autonomy and maturity, but rather out of a sense that sex will bring them greater security.

Just as many girls seek sexual relations in order to obtain the emotional and social validation they need, they frequently are harmed by another uniquely adolescent phenomenon: the difficulty in appreciating the long-range consequences of their actions.²⁷⁷ A. did not necessarily "will" her pregnancy, nor did she even anticipate it; instead, she experienced it with shock and denial.

By virtue of pregnancy, a teenage girl is not miraculously transformed into a mature woman, aware of her alternatives and able to make comprehensive, long-term plans for the pregnancy and beyond.²⁷⁸ Some girls may possess this capacity--they probably had it before they conceived--but most pregnant girls do not attempt to develop these abstract plans on their own. Instead, upon discovering that they are pregnant, most girls seek the assistance of a parent, friend, or counselor.²⁷⁹ Equipped with this support, the girls decide to have the baby and either raise the child or give it up for adoption, or they obtain an abortion.

As we know, A. did not seek support and did not pursue any of these options. Instead, she shared her secret with someone who was

look to males for ratification of the women that they are becoming.... Girls negotiate access to the fulfillment of these emotional needs by way of sex.

²⁷⁷ One tragic but unsurprising result of this is that teens between the ages of 15 and 19 suffer not only high rates of unplanned pregnancies, but also the highest rates of sexually-transmitted diseases and the fastest growing rates of new cases of HIV of any age group in the United States. Karen Hein et al., Comparison of HIV+ and HIV- Adolescents: Risk Factors and Psychosocial Determinates, 95 *PEDIATRICS* 96 (1995); Steven Shelov et al., Sexuality, Contraception, and the Media, 95 *PEDIATRICS* 298 (1995); Robert M. Siegal et al., The Prevalence of Sexually Transmitted Disease in Children and Adolescents, 95 *PEDIATRICS* 1090 (1995); James E. Strain, Jacobi Address-- Pediatrics: Where Do We Go From Here?, 95 *PEDIATRICS* 924 (1995).

²⁷⁸ For a critical evaluation of the mature minor doctrine and the confusion and ambiguity surrounding the law's understanding of adolescent maturity, see Michelle Oberman, Minor Rights and Wrongs, 24 *J. LAW MED. & ETHICS* 118 (1996).

²⁷⁹ A substantial proportion of pregnant minors voluntarily consult with a parent regardless of the existence of a notification requirement. See, e.g., Torres et al., Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services, 12 *FAM. PLAN. PERSP.* 284, 287-88, 290 (1980) (stating that 51% of minors discussed abortion with parents in the absence of a parental consent or notification requirement), cited in *Hodgson v. Minnesota*, 497 U.S. 417, 464-65 (1990) (Marshall, J., concurring in part, concurring in the judgment in part, and dissenting in part). Minors 15 years old or younger are even more likely voluntarily to discuss the abortion decision with their parents. *Id.* at 290 (finding that 69% of such minors voluntarily discuss abortion with parents), cited in *Hodgson*, 497 U.S. at 464-65.

equally ill-equipped to devise a long-term plan.²⁸⁰ A.'s behavior reflected a uniquely short-term calculation wherein the immediate costs associated with acting on any of the alternatives available to her, including seeking the advice of an adult, seemed far higher than the costs of simply postponing any decision. Thus, she found herself paralyzed, and she lived from day-to-day, much as she did before she became pregnant.²⁸¹

In order to make sense of A.'s short-term calculation, it is important to explore what A. feared would follow from taking action regarding her pregnancy. As noted above, A. feared that her family would abandon her if they found out she was pregnant.²⁸² A.'s family held traditional social, cultural, and religious values regarding teenage sexuality and disapproved of teenage pregnancy as well as abortion.²⁸³ Thus, despite the fact that A. lived in a society relatively permissive about sexuality, pregnancy, and childbearing by unmarried women, she felt that her pregnancy posed a direct and serious threat to her immediate social network.²⁸⁴

²⁸⁰ Recall the Hopfer case, described *supra* at notes 109 through 128 and accompanying text. In Hopfer, like A.'s case, the defendant told her best friend that she was pregnant. The girlfriend, who ultimately reported Hopfer to the police, testified that Hopfer had told her that she was pregnant several months earlier, but that their conversation never reached the issue of what Hopfer planned to do about the pregnancy.

²⁸¹ In his article on neonaticide, psychiatrist Phillip Resnick noted that this phenomena occurs among passive, less mature girls:

[w]omen who seek abortions are activists who recognize reality early and promptly attack the danger. In contrast, women who commit neonaticide often deny that they are pregnant or assume that the child will be stillborn. No advance preparations are made either for the care or the killing of the infant.

Resnick, *supra* note 83, at 1416.

²⁸² See *supra* note 263 and accompanying text (regarding A.'s conversations with her mother and other family members about out-of-wedlock births).

²⁸³ In a recent article, Latina writer Sandra Cisneros sheds light on the manner in which such a background might shape a girl's attitude toward her body and her incipient sexuality:

I am overwhelmed by the silence regarding Latinas and our bodies. If I, as a graduate student, was shy about talking to anyone about my body and sex, imagine how difficult it must be for a young girl in middle school or high school, living in a home with ... no information other than misinformation from the girlfriends and the boyfriend. So much guilt, so much silence, and such a yearning to be loved; no wonder young women find themselves having sex while they are still children, having sex without sexual protection, too ashamed to confide their feelings and fears to anyone.

Sandra Cisneros, *Guadalupe the Sex Goddess*, Ms., July/August 1996, 43, 44-45.

²⁸⁴ There are several reasons for believing that A.'s fear and her decision to avoid making a decision are frighteningly common tendencies among adolescents. Certainly, we know that teens commonly fear the repercussions that might follow should their parents find out that they are sexually active. It is largely in response to the negative consequences that might follow from this fear that the law facilitates minors' access to family planning, treatment for sexually transmitted diseases, and abortion. See *Bellotti v. Baird*, 443 U.S.

In a curious way, one might find evidence to support A.'s fear in the fact that no one noticed her pregnancy. Although in A.'s case, as in virtually all of the discussions of neonaticide, the media and the criminal justice system viewed A. as having "concealed" her pregnancy, no one ever questioned how she managed to accomplish this.²⁸⁵ The fact that those most intimately involved in the lives of women who commit neonaticide claim not to have noticed that the women were pregnant tells us something about them and about their relationship to the women.

A. was neither morbidly obese nor inventive--she simply grew bigger and bigger, and nobody commented on her condition. A. was worried that, once she had her baby, there would be nowhere for her to live. Given her shifting living arrangements, this fear was not at all irrational. A.'s remarks indicate reason to believe that several, if not all,

622 (1979) (declaring unconstitutional a law requiring a minor girl seeking an abortion to obtain the consent of both parents before the procedure could be administered); *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977) (granting minors privacy rights, including those related to procreation and contraception). But cf. *Peck v. Califano*, 454 F. Supp. 484 (D. Utah 1977) (holding that restrictions on minor's ability to be surgically sterilized are constitutional); *Voe v. Califano*, 434 F. Supp. 1058 (D. Conn. 1977) (same).

Throughout the 1980s, I served as a volunteer counselor at various Planned Parenthood clinics. During that time, I was struck by the number of teenage girls who, upon happily learning that they were pregnant, asked whether we would be notifying their parents. I always responded that their medical status was entirely confidential, but that their families would most certainly discover that they were pregnant sooner or later. Still, even the girls who were not worried about their ability to care for a child dreaded having their parents find out that they had had sex. Many girls shared the belief that, if and when they disclosed their pregnancy, they would be kicked out of their homes.

²⁸⁵ The media descriptions of neonaticide often attribute the defendant's success in concealing her pregnancy to the fact that she wore loose clothing or was somewhat obese. Several of the articles indicate that the defendants invented explanations for their changing body shape--telling others that they had a tumor, or that they had recently gained weight due to a job in an ice cream parlor or to prescription oral contraceptives. See, e.g., *Illinois v. Ehlert*, 654 N.E.2d 705, 707 (Ill. App. Ct.), appeal denied, 660 N.E.2d 1274 (1995) (stating that the defendant told her hairdresser, who testified as a defense witness, that she had a cancerous tumor and "she had been unable to get the hospital to have it removed" when the hairdresser told defendant that she looked pregnant).

Nevertheless, the vast majority of neonaticide cases in my sample involved defendants whose pregnant bodies had been visible to many different people. There were many whose parents passed them in the halls of their homes and saw them at meal times, whose classroom teachers and gym coaches watched them over the course of semesters, whose teammates showered with them in locker rooms, and whose boyfriends saw them and even slept with them in narrow twin beds of college dormitory rooms. See Tsing, *supra* note 233, at 286-88 (describing the 1985 case of Donna Sloan, who left her boyfriend asleep in her dormitory room twin bed while she delivered a full-term newborn in the dormitory bathroom); Janine DeFao, *Woman is Charged in Baby Case*, SACRAMENTO BEE, Jan. 10, 1996, at B1 (noting that the defendant's husband said he did not know she was pregnant, perhaps because she was overweight).

of the adults in her immediate family suspected that A. was pregnant, yet found it easier not to mention it.²⁸⁶

Whether they chose not to intervene out of politeness, uncertainty, embarrassment, or a fear that, once the issue was identified, they would be forced to become more involved in A.'s life, their failure to reach out meant that A. lived in a world of silence and isolation--a world not of her own making. The deafening silence of those around her had the effect of reaffirming A.'s strategy of passivity and denial. Her refusal to acknowledge her pregnancy and her vain efforts to prompt others to take the initiative in addressing her situation were mirrored by the responses of those around her.

The final questions that haunt A.'s story stem from A.'s failure to act. Given her conviction that her family would not welcome this new addition, she might have elected to terminate the pregnancy, to arrange for the baby to be adopted, or to move out and become a single parent. A., however, was extraordinarily ambivalent about the pregnancy itself. To the extent that she felt unnoticed and unloved by her family (and there is every reason to believe that this was the case), A. may have viewed the baby as a potential source of unconditional love.²⁸⁷

A second possible reason for A.'s inaction has to do with the numerous factors that limit the accessibility and attractiveness of all of the available options. Given that A. could not imagine her family adjusting to the fact that she was pregnant, and that she was convinced that having the baby would shatter the fragile bonds that held her

²⁸⁶ Interview with A., *supra* note 256. In addition to A.'s mother's occasional cryptic references to pregnancy, A. had a conversation with her step-mother sometime after her arrest in which A.'s step-mother told her that she and her father had noticed that A.'s "stomach was getting bigger." Her step-mother added that she noticed that A. used to fall asleep with some frequency while at their home, and that her father reported that A. had napped while at work. Her step-mother reminded her of a time, several months earlier, when she had said to A., "You know, girls can get pregnant the first time they have sex." She told A. that she had been trying to broach the conversation, but that A. had not responded so she did not push her. A.'s step-mother also told her that, when they asked her to stay at their house on the day that she was in labor, it was because they suspected that A.'s "time" had come.

²⁸⁷ Some recent studies among African-American teens indicate that, for poor Black adolescents, teenage pregnancy and parenting are viewed as developmentally appropriate and as rites of passage into adulthood. Kari Sandven & Michael D. Resnick, *Informal Adoption Among Black Adolescent Mothers*, 60 *AM. J. ORTHOPSYCHIATRY* 210, 211 (1990); see also Evelyn Landry et al., *Teen Pregnancy in New Orleans: Factors that Differentiate Teens who Deliver, Abort, and Successfully Contracept*, 15 *J. YOUTH & ADOLESCENCE* 259 (1986) (explaining study indicating that many black teens became pregnant because they wanted to have a child).

family network intact, adoption and single parenting did not seem like real possibilities to her.

A.'s failure to consider adoption as a potential solution to her dilemma is not atypical, particularly for a young woman with her background. First, less than 3% of all adolescents resolve an unplanned pregnancy by opting to relinquish their children.²⁸⁸ Second, the girls and young women who do give their children up for adoption can generally be described as those young women who have the information necessary to do so; have made rather definitive decisions about their future in terms of education and employment (and, thus, see raising a child as an obstacle to the completion of those goals); and have the clear and definitive support of family or friends (specifically in that the family's cultural background and beliefs do not forbid such a choice). Thus, most of the young women who fit this profile are relatively well-to-do Caucasian girls with supportive families who are committed to the girl's future success.²⁸⁹

Clearly, A.'s situation does not match the general profile of the young woman who chooses adoption for her child. It is not evident that A. even considered adoption as an option. As unbelievable as this may sound to some, acquiring information about how to give up a child for adoption is not easily obtained in general (as I discovered while trying to find the information myself), let alone in a community that discourages it as a solution. Moreover, A. had no definitive plans for her future. She refused to accept that the pregnancy was real and that she had to choose a means of handling the dilemma. Finally, A. did not have the support of her family or a stable living situation.

The assertion that A.'s behavior regarding adoption was not unusual is further supported by evidence about teens' attitudes concerning adoption. When teens were asked how they would resolve a pregnancy, only 23% indicated that they definitely or probably would relinquish their child, whereas 40% said they would not. Studies show that, among pregnant teens, "adoption is the least discussed option,"

²⁸⁸ Kerry J. Daly, *Adolescent Perceptions of Adoption: Implications for Resolving an Unplanned Pregnancy*, 25 *YOUTH & SOC.* 330, 330 (1994).

²⁸⁹ See Christine A. Bachrach et al., *Relinquishment of Premarital Births: Evidence from National Survey Data*, 24 *FAM. PLAN. PERSP.* 27, 27 (1992) (according to 1982 and 1988 National Survey of Family Growth data, the decision to relinquish a child is positively associated with being a caucasian girl with a well-educated mother, being in school at the time of conception, and having no labor force experience); Rosalind J. Dworkin et al., *Parenting or Placing: Decisionmaking by Pregnant Teens*, 25 *YOUTH & SOC.* 75, 76-77 (1993) (citing studies showing that placement for adoption is associated with sociodemographic characteristics such as race, class, and education level, with poorer, minority girls being less likely to place their children).

and only 13% of the girls interviewed "indicated that they knew how to go about placing a baby up for adoption."²⁹⁰

Abortion, on the other hand, might have been an option. A woman who successfully obtains an abortion has overcome numerous obstacles--obstacles that may range from financial and geographic to psychological and religious. In order to obtain the most affordable and least medically risky abortion, a woman must acknowledge that she is pregnant within the first twelve weeks and decide to terminate her pregnancy within that time.²⁹¹ As Resnick noted in his article, the girls who commit neonaticide tend to lack the maturity and responsibility to take the necessary actions of locating an abortion clinic, gathering the necessary funds, and transporting themselves to and from the clinic.²⁹² If the girl is a minor, she also may face the intimidating problem of mandatory parental notification, depending on her state of residence.²⁹³ Even if state law does not require parental notification, there is such extensive misinformation among minors about their rights to confidentiality that they often assume that their parents will be told about any reproductive health care they request.²⁹⁴ Of course, these barriers are overcome by those girls and women who become pregnant and who ultimately obtain abortions. But the fact that many obtain abortions does not minimize the significance of the barriers. Those

²⁹⁰ Daly, *supra* note 288, at 330.

²⁹¹ Although it sounds rather obvious, this actually may be the biggest hurdle for neonaticidal girls. As I have noted, they are consumed with denial of their pregnancy and denial of the inevitable need to take action. Many come from families that, in addition to opposing premarital sex and contraception, view abortion as murder. As a result, the pregnant girl may be ambivalent or even opposed to abortion, and therefore the abortion option may generate enormous internal dissonance. Thus, a course of action that may seem logical and easy is rendered less so when viewed through the psychological lens of one whose entire social network and cultural identity may be threatened by it.

²⁹² Resnick, *supra* note 83, at 76. After the first trimester, the woman will require an inpatient procedure, which is much harder to come by and far more costly. For a description of the limitations on access to abortion, see Carole A. Corns, Note, *The Impact of Public Abortion Funding Decisions on Indigent Women: A Proposal to Reform State Statutory Constitutional Abortion Funding Provisions*, 24 U. MICH. J. L. REF. 371, 384-88 (1991).

²⁹³ See *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (upholding constitutionality of mandatory parental notification provisions for minors seeking abortions); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983) (same); *Planned Parenthood Ass'n of Kansas v. Ashcroft*, 462 U.S. 476 (1983) (same); *H.L. v. Matheson*, 445 U.S. 959 (1980) (same).

²⁹⁴ See *supra* note 284 (describing the author's experiences volunteering at Planned Parenthood); see also Tina L. Cheng et al., *Confidentiality in Health Care: A Survey of Knowledge, Perceptions, and Attitudes Among High School Students*, 269 JAMA 1404 (1993) (concluding that a majority of adolescents have health concerns that they wish to keep confidential, and that a high percentage of these adolescents indicate that they would not seek health services because of these concerns).

women who commit neonaticide represent some small fragment of the number of women who find the barriers to abortion too steep.²⁹⁵

In light of this analysis, A.'s failure to obtain an abortion is not surprising. Likewise, her failure to make plans for the baby, either through parenting or adoption, is viewed more easily as a part of her general failure to take action--a failing that was reinforced by her family and by all of those who surrounded A. There simply was no one around who cared enough about A. to make sure that the horrible, inevitable disaster did not come to pass.

This story certainly is incomplete. There were family members at trial whose sympathetic demeanor may have contributed to the favorable verdict. There was testimony from witnesses who spoke on A.'s behalf, such as her employer from a high school vocational program, who testified to her quiet, yet extremely responsible and competent manner, and an emergency room nurse, who testified to A.'s distressed state upon admission, during which time she repeatedly asked for her baby. Yet even the basic facts suffice to permit an understanding of the challenges inherent in assessing culpability in such a case.

The language of murder statutes varies across jurisdictions, but these laws generally center on the defendant's intent to kill or intent to do serious bodily injury.²⁹⁶ Although it is possible to view A.'s failure to take action during her pregnancy as tantamount to an intent to harm or kill her baby, this interpretation is far from dispositive. One might just as easily reason that, having never truly acknowledged her pregnancy and the need to take action, by definition, A. never formulated an intent to harm the child. The circumstances surrounding this crime, extending back for long months prior to the child's death and encompassing the roles played by others in A.'s life, complicate the process of determining responsibility and allocating blame. Because A.'s background and story are typical of the neonaticide cases in my

²⁹⁵ The major barriers are financial and geographic. A recent Florida case involving a 20-year-old woman named Kawana Ashley serves as a grim reminder of these barriers. Ashley could not afford a mid-trimester abortion and was determined to terminate the pregnancy. Finally, when she was seven months pregnant, Ashley obtained a handgun and shot herself in the stomach in order to end the pregnancy. The state charged her with third degree murder, but eventually a judge threw out the murder charges, only allowing a charge of manslaughter to stand. See, e.g., David Barstow & Tim Roche, Life Appeared to Hold Few Options, ST. PETERSBURG TIMES, Sept. 9, 1994, at B1-B2 (noting that Ashley was unemployed and ill-equipped to handle a newborn); Craig Pittman, Abortion it may be, Murder, no, ST. PETERSBURG TIMES, Jan. 24, 1995, at A1 (noting that the death of the baby was caused by its premature birth, not the bullet wound directly).

²⁹⁶ See *infra* notes 367 through 379 and accompanying text (describing first degree murder charges as they apply to neonaticide).

sample, her story helps to illuminate the ambivalence these cases generate when they reach the criminal justice system.

b. Exploring the Circumstances Surrounding Infanticide

As Section III of this Article described, the defendants in modern infanticide cases tend to be perceived as either mad or bad.²⁹⁷ Yet, because these defendants only infrequently plead insanity, this dichotomy reveals far more about the source of jury sympathy than it does about the women's actual mental health status.²⁹⁸ The tendency toward mercy in these cases reflects not so much a legal conclusion as an intuitive sense that the mother had diminished capacity. This sense permits juries and judges to reach a merciful ruling without ever expressly acknowledging the circumstances in the woman's life that contributed to her supposed diminished capacity.

By all accounts, we are not a society that recoils from holding accountable individuals of limited mental capacity who commit crimes.²⁹⁹ Thus, there is a puzzle in our tendency to forgive infanticide defendants their crimes. I believe the answer to this puzzle lies in our tacit awareness of and sensitivity to the circumstances that surround infanticide--the circumstances of motherhood.

Although there are at least four basic infanticidal scenarios, reflecting a spectrum of mental health vulnerabilities, there is one constant across all of these situations: all of these cases involve women who, at the time of their children's deaths, were their primary caretakers. As much as these cases are about mental health vulnerabilities, they also are about motherhood. Many commentators have written about the structure of motherhood, the half-truths of the cultural myths of bliss surrounding it, and society's resistance to acknowledging the burdens and difficulties of mothering.³⁰⁰ The work

²⁹⁷ See *supra* notes 194 through 240 and accompanying text (discussing the mad/bad dichotomy).

²⁹⁸ *Id.*

²⁹⁹ See PERLIN, *supra* note 43, at 192 (referring to infanticide defendants as "empathy outliers" in order to make the point that, for the most part, the American criminal justice system does not excuse criminals on the grounds of mental capacity). The Supreme Court has held that evidence of a defendant's mental capacity is relevant to his culpability. *Penry v. Lynaugh*, 492 U.S. 302, 304 (1989). Perlin notes that "[e]mpirical inquiries, however, illuminate society's degree of ambivalence about this proposition." PERLIN *supra* note 43, at 213. Scholars express concerns that such evidence may suggest to a jury that the defendant continues to pose a risk to society. Moreover, "fact-finders demand that defendants conform to popular, common-sensical visual images of 'looking crazy.'" *Id.* at 214. Thus, when they do not conform to such popular images, the jury often will opt for capital punishment regardless of the defendant's actual mental capacity. *Id.* at 213- 15.

³⁰⁰ For several thorough and informative overviews of this subject, see MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER*

associated with parenting tends to fall overwhelmingly upon mothers. In her landmark article, *Volunteers and Draftees: The Struggle for Parental Equality*, Professor Czpanskiy explores the division of labor within the home by utilizing a military metaphor: fathers volunteer for service, whereas mothers are conscripted.³⁰¹ She notes that "[t]he average father living with his child spends less than ten minutes a day caring for his child, while the average mother spends several hours," and that "[t]hese figures do not change significantly in families where both parents are fully employed outside the home."³⁰² Moreover, "in over 80% of families with two parents and young children, mothers do far more child care and housework than do fathers."³⁰³

The deaths in infanticide cases result in part from this division of labor, and from society's fervent commitment to the notion that it is normal and healthy for mothers to care for their babies in isolation in the home during the early months and years of their babies' lives.³⁰⁴

TWENTIETH CENTURY TRAGEDIES (1995); Katharine K. Baker, *Taking Care of our Daughters*, 18 *CARDOZO L. REV.* (forthcoming 1997) (reviewing *FINEMAN*, *supra*); Mary E. Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 *S. CAL. REV. L. & WOMEN'S STUD.* 133, 193-94, 203-23 (1992) [hereinafter *Becker, Maternal Feelings*]; M. Rivka Polatnick, *Why Men Don't Rear Children: A Power Analysis*, in *MOTHERING: ESSAYS IN FEMINIST THEORIES* (Joyce Trebilcot ed., 1983); and Carol Sanger, *M is for the Many Things*, 1 *S. Cal. Rev. L. & Women's Stud.* 15 (1992). The persistence of a norm of compulsory maternal altruism generates a societal expectation that mothers are fully accountable for their children's well-being. The stress that accompanies the fulfillment of that expectation is extraordinary, even for a woman with considerable emotional and financial support. Adrienne Rich's work on motherhood describes the pernicious effect of these expectations:

[w]hatever the known facts ... it is still assumed that the mother is "with the child." It is she, finally, who is held accountable for her children's health, the clothes they wear, their behavior at school, their intelligence and general development.... Even when she herself is trying to cope with an environment beyond her control--malnutrition, rats, lead-paint poisoning, the drug traffic, racism--in the eyes of society the mother is the child's environment. The worker can unionize, go out on strike; mothers are divided from each other in homes, tied to their children by compassionate bonds; our wildcat strikes have most often taken the form of physical or mental breakdown.

RICH, *supra* note 46, at 53. The cumulative evidence of infanticide in modern America provides ample evidence of these maternal "wildcat strikes."

³⁰¹ Karen Czpanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 *UCLA L. REV.* 1415 (1991).

³⁰² *Id.* at 1435.

³⁰³ *Id.* at 1452. This extra load of work, particularly when undertaken by women who are fully employed outside of the home, has been termed "the second shift." ARLIE HOCHSCHILD, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989). When results of major studies are averaged together, the extra workload of a working mother amounts to an extra month of 24 hour days each year. Czpanskiy, *supra* note 301, at 1452.

³⁰⁴ As the authors of an article on depression in postpartum women conclude,

Consider the impact of the structure of motherhood on women in each of the four categories of mental health vulnerabilities associated with infanticide. It is obvious that women suffering from postpartum psychosis, with its characteristic symptoms of sleep disturbances, hallucinations, delusions, violent behavior, and frequent mood shifts, cannot tend to their infants' needs without assistance.³⁰⁵ Recall Sheryl Massip, whose husband recognized that she needed help and sent her to stay with her mother for a night.³⁰⁶ Nevertheless, when she returned home from her mother's in the morning, she once again was expected to be her baby's full-time caretaker.

This expectation was not unique to the Massip family. There is a false dichotomy inherent in societal assumptions about motherhood--one is either wholly capable of assuming the tasks of motherhood, or wholly incapable. The Massips knew that the latter choice--acknowledging that Sheryl was incapable of mothering--brought with it severe censure. Sheryl would have been stigmatized as a bad mother. Both she and her husband would have had to alter their expectations of parenthood dramatically, either by arranging for the father to become the primary caretaker, or by finding (and paying) someone else to care for their child. Hence there were overwhelming social, economic, and interpersonal incentives for everyone involved to pretend that Sheryl was capable of caring for her infant alone, for hours at a time, even though her mother, her doctor, her husband, and ultimately the judge all recognized that she never should have been entrusted with that task.

Infanticides committed by women who are chronically mentally disabled, yet living and parenting independently, present very similar issues. Even without a specific definition of mental disability, it is self-evident that some women, by virtue of their mental health status, are less equipped than others to adapt to the challenge of motherhood. The case of Simone Ayton provides an example of this.³⁰⁷ At the time she killed her infant son, Ayton was a mildly retarded, manic depressive woman with cerebral palsy, living alone without financial or emotional

our cultural myths of 'blissful motherhood' and parenthood as 'doing what comes naturally' keep us from acknowledging how difficult and potentially painful the adjustment to parenthood can be.... [W]e are a society which provides increasingly little opportunity to learn parenting skills and roles before parenthood and few available supports once parenthood is reached.

Atkinson & Rickel, *supra* note 141, at 215.

³⁰⁵ See *supra* notes 140 through 154 and accompanying text for a detailed description of postpartum psychosis.

³⁰⁶ See *supra* notes 150 through 154 and accompanying text.

³⁰⁷ Laurence Hammack, *Woman Accused of Murder; 7-Month-Old Son Died in Bathub*, ROANOKE TIMES & WORLD NEWS, Dec. 6, 1994, at A1 [hereinafter Hammack, *Accused*].

support from either the baby's father or her family.³⁰⁸ When her son was twenty-two days old, Ayton brought him to a community hospital, where he was diagnosed as suffering from dehydration and fever.³⁰⁹ She claimed he would not eat because he did not like her. This triggered a custody hearing, at which the judge ordered the child placed in foster care based upon his finding that Ayton was "emotionally unable to care for the child."³¹⁰

Ayton spent the next several months working to meet the state's requirements for reunification with her child. She ultimately earned the support of her caseworkers, and her child was returned to her custody.³¹¹ Less than two months later, Ayton's son was dead.³¹² Ayton first told authorities that she had been bathing her son when he slipped from her arms and fell into the water.³¹³ Later, she admitted to a detective that she was frustrated with the child's crying, so she held him under the water until he stopped struggling.³¹⁴

It is difficult to view Ayton as solely responsible for her son's death. At the very least, one might be inclined also to blame the state for returning Ayton's son to her without supervision. After the fact, however, state officials insisted that they had no other option under the law, and that they made similar decisions to release children to their parents every day.

Here again, one sees the effect of the binary structure of motherhood: either Ayton was fully capable of mothering in complete isolation, or she was wholly incapable of so doing. Either option is absurdly extreme. It seems at least plausible that Ayton, who was able to live and function independently, could have parented her son if she had had such help, as through an assisted living situation or even a day care program.³¹⁵ Yet, because the work of parenting is entirely

³⁰⁸ Laurence Hammack, Roanoke Mom Admits Drowning Son; Pleads No Contest to Infant's Murder, ROANOKE TIMES & WORLD NEWS, Apr. 8, 1995, at A1 [hereinafter Hammack, Roanoke Mom].

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ Hammack, Accused, *supra* note 307, at A1.

³¹⁴ *Id.*

³¹⁵ There is a rich literature describing support systems that enable parents with mental disabilities to cope with and even excel at child-rearing. Linda Dowdney & David Skuse, Parenting Provided by Adults with Mental Retardation, 34 J. CHILD PSYCHOL. & PSYCHIATRY & ALLIED DISCIPLINES 25-47 (1993); see also Mona Hughes, Group Offers Problem-Solving Guide With Equipment for Disabled Parents, ORLANDO SENTINEL, Feb. 15, 1996, at I2 (describing a Berkeley, California organization called "Through the Lookingglass," which specializes in clinical and support services, including training and research, for families with disabilities).

privatized, there are no readily available intermediate options between full custody and no custody. As a result, an entirely foreseeable and preventable death occurred.

Ayton was charged with first degree murder and chose to plead guilty to a reduced charge of second degree murder.³¹⁶ In the sentencing hearing, her attorney urged the judge to spare Ayton a lengthy sentence, arguing that Ayton was not solely responsible for her son's death. The judge reduced the standard forty year sentence to eighteen years.³¹⁷

This same ambivalence also is generated by the cases involving infanticidal women who suffer from affective disorders with postpartum onset.³¹⁸ Of all infanticide cases, these cases involving women who kill their children in seemingly unprovoked displays of violence would seem to be the least likely to engender a sympathetic response. Yet there is an increasing sense of ambivalence about these cases as well. This ambivalence arises as those who are judging these women come to understand the sociocultural and economic influences on these women's lives and the way that these women's pasts impair their capacity to respond appropriately to the pressures associated with being the sole caretaker for an infant.

For example, recall the Pixley case, in which the judge implicitly defended his lenient sentence for a defendant who suffocated her infant on the basis of the defendant's socioeconomic status and abusive childhood.³¹⁹ Although he did not condone her act, he found too simplistic the notion that a nineteen-year-old woman who had endured years of abuse at her parents' hands, and who, on scant income, spent her days and nights caring for two children under age two, was solely to blame when she silenced her screaming, hungry baby with a blanket.³²⁰

Perhaps the most ironic source of ambivalence in infanticide cases involves women who kill their children while suffering from an addiction-related disorder. Given the "war on drugs" and the societal tendency to view addiction as a disfavored lifestyle choice rather than an illness, one might expect that judges and juries would not be particularly sympathetic to women who killed their children while they

³¹⁶ Hammack, Roanoke Mom, *supra* note 308, at A1.

³¹⁷ Laurence Hammack, Motherhood Ends In Prison, *ROANOKE TIMES & WORLD NEWS*, Sept. 16, 1995, A1.

³¹⁸ See *supra* notes 163 through 183 and accompanying text for a description of this category of cases.

³¹⁹ See *supra* notes 203 through 218 and accompanying text.

³²⁰ Duggan, *supra* note 204, at A1.

were using drugs.³²¹ In reality, though, women who kill their children while abusing drugs tend to have lives that are so desperate that their children's deaths come to seem almost foreordained.³²² The more aware a judge or jury is of the circumstances surrounding these women's lives and their children's deaths, the less likely it is that they will find that these women intentionally brought about the deaths of their children.³²³

Infanticide deaths are caused not simply by the mother's sudden and/or severe mental disturbance, but also by the failure of those around her to recognize that the mother was ill and that she desperately needed relief from the twenty-four hour a day care that her infant was demanding of her. Our ambivalence in punishing these women comes not so much from our sensitivity to issues of diminished capacity as from our awareness that the mothers had precious few options. At the time they killed their children, all of these women were emotionally, intellectually, socially, and/or financially unable to cope with the demands of motherhood in isolation--motherhood as it is structured in modern American society.

V. TOWARD RECONCILIATION: A COHERENT APPROACH TO INFANTICIDE

A critical analysis of circumstances surrounding infanticide helps to explain what might otherwise seem to be an incomprehensible act. Likewise, the sense of pathos these stories generate helps to explain the perennial ambivalence that accompanies official efforts to sanction these women. Indeed, it seems that much of the ambivalence

³²¹ For discussions of substance abuse as a "disease," see Gordis Enoch, *Critical Issues in Alcoholism Research*, 30 *INT'L J. ADDICTIONS* 497 (1995); Gordis Enoch, *The National Institute on Alcohol Abuse and Alcoholism: Past Accomplishments and Future Goals*, 19 *ALCOHOL HEALTH & RESEARCH WORLD* 5 (1995); Douglas Frans, *Social Work, Social Science, and the Disease Concept: New Directions for Addiction Treatment*, 21 *J. SOC. & SOC. WELFARE* 71 (1994); and Harvey Siegal, *The Strengths Perspective of Case Management: A Promising Inpatient Substance Abuse Treatment Enhancement*, 27 *J. PSYCHOACTIVE DRUGS* 67 (1995).

³²² See *supra* notes 184 through 193 and accompanying text for a discussion of the psycho-social status and life circumstances that correlate with drug addiction in women.

It is important to note that the majority of cases involving an infant's death at the hand of a substance abusing mother also involve the mother's male partner. These cases generally involve child abuse as well as neglect. For purposes of this study, however, I am considering only those cases in which the mother alone is accused of her infant's demise. These cases tend to involve neglect, rather than abuse. At Least 2,000, *supra* note 2, at 21.

³²³ An example of this is the case of Pamela Rae Stewart, a pregnant woman so intimidated by her partner's abusive behavior that she failed to obtain prompt medical care, despite the fact that she was hemorrhaging. Oberman, *Sex, Drugs*, *supra* note 184, at 505-06.

associated with allocating blame for infanticide grows out of a tacit communal awareness that the tasks of motherhood can be oppressively difficult. Therefore, the legacy of these stories is one of profound uncertainty about culpability--uncertainty that is manifested in the inconsistent treatment these cases receive in the media, and more importantly, in the criminal justice system.

In this section, I will explore culpability in two distinct manners. First, I undertake a broad-scaled analysis of the societal factors that contribute to infanticide and propose structural reforms that, if implemented, could help to prevent these deaths. Second, given that these reforms are long-term in nature and unlikely to take effect any time soon, I propose an alternative construction of the crimes of neonaticide and infanticide under current American law.

A. The Structural Components of Neonaticide and Infanticide

Discussing the factors that lead women to the edge of desperation necessarily invites a critical analysis of the structure of motherhood--an analysis that extends far beyond the scope of this Article.³²⁴ Yet, without at least noting the societal mechanisms that contribute to infanticide, any attempt at legal reform only deepens the legal system's involvement in the dialectic of moral outrage and legal mercy, while leaving unaltered the various factors that contribute to the persistence of these crimes.

In Southeast Asia, infanticide is widely acknowledged as a by-product of cultural norms that devalue females. Deep-seated practices such as dowry contribute to a distinct preference for sons, who will bring money into the family upon marriage, as opposed to daughters, who not only leave their families of origin upon marriage, but who take considerable wealth with them when they leave.³²⁵ Those who have endeavored to reduce female infanticide in these societies have recognized the manner in which these cultural practices create incentives to kill baby girls. Therefore, anti-infanticide policies in these cultures have undertaken, albeit with limited success, to protect and promote the status of girls and women and have endeavored to

³²⁴ For several excellent discussions of the institution of motherhood and the law, see FINEMAN, *supra* note 300; Baker, *supra* note 300; Becker, *Maternal Feelings*, *supra* note 300; Czapanskiy, *supra* note 301; Roberts, *Motherhood*, *supra* note 233; Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 *AM. U. J. GENDER & L.* 1 (1993); and Sanger, *supra* note 300.

³²⁵ See John Van Willigen & V.C. Channa, *Law, Custom, and Crimes Against Women: The Problem of Dowry Death in India*, 50 *HUM. ORGANIZATION* 369 (1991) (describing the custom of dowry as it operates in modern India).

dismantle systems such as dowry that perpetuate female subordination.³²⁶

In this country, infanticide occurs against a similar cultural backdrop of normative behavior surrounding sex, pregnancy, and motherhood. Just as the stories surrounding neonaticide and infanticide are distinct, so, too, are the societal norms contributing to each. As in the preceding sections, my analysis will begin with the societal contribution to neonaticide, and then turn to the structures underlying infanticide.

1. The Culture of Neonaticide: Self-Esteem, Sex, and Pregnancy

Although infanticide can be seen in part as a horrifying by-product of the structure of motherhood, it is far more difficult to isolate the structural factors that contribute to neonaticide. Indeed, many of the factors that contributed to neonaticide in past centuries would seem to be greatly diminished today. The twentieth century has witnessed a considerable expansion of options for women with regard to pregnancy and single motherhood. First, the common law sanctions relating to nonmarital children have been reversed.³²⁷ Many speculate that a primary motivation for neonaticide throughout history was the stigma of illegitimacy. This stigma permanently attached to the unmarried mother and her child, thereby diminishing their status in society generally, and limiting their access to employment, housing, and subsequent marriage.³²⁸ Second, the past century has witnessed the expansion of child support laws to include men who fathered children out of wedlock. Despite the fact that these laws are notoriously under-

³²⁶ See *id.* at 374 (noting that the "criminalization of dowry may have been a politically useful symbol, but it has not curtailed the practice"). Sharon K. Hom's article on female infanticide in China provides another example of the law's limited capacity to reverse the incentives that contribute to a society's devaluation of female children. Hom, *supra* note 66, at 271; see also Susan Greenhalgh & Jiali Li, *Engendering Reproductive Policy and Practice in Peasant China: For a Feminist Demography of Reproduction*, 20 *SIGNS* 601 (1995) (examining the demographic consequences of reproductive politics inherent in China's one-child policy).

³²⁷ The U.S. Supreme Court recognized children born outside of wedlock as "persons" under the Equal Protection Clause in 1968. *Levy v. Louisiana*, 391 U.S. 68, 70 (1968); *Glonn v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73, 75-76 (1968). In subsequent decades, the Court slowly has expanded the legal rights of nonmarital children. Nevertheless, at least one contemporary source demonstrates the continuing legacy of discrimination against children born outside of wedlock. MARTHA T. ZINGO & KEVIN E. EARLY, *NAMELESS PERSONS: LEGAL DISCRIMINATION AGAINST NON-MARITAL CHILDREN IN THE UNITED STATES* (1994).

³²⁸ For a description of the legal harms historically inflicted upon children born outside of wedlock, see HARRY D. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* (1971); AND ZINGO & EARLY, *supra* note 327, at 15-27.

enforced, unmarried mothers have the same legal entitlement to child support as do married mothers.³²⁹ Finally, the advent of effective contraception, accompanied by safe and legal abortion, has undeniably reduced the impulse toward neonaticide.³³⁰

The persistence of neonaticide therefore remains somewhat of a puzzle. The neonaticide stories hint more at individual and familial dysfunction than at broader societal disjuncture. At the individual level, the girls involved in neonaticide cases possess so little self-esteem that they are incapable of acting to protect themselves. Their insecurity almost certainly contributes to their becoming pregnant in the first place, and it leads to their paralysis once pregnant. Diminished self-esteem is commonplace for adolescent girls and seems to be a product of the socialization process by which girls grow into women.³³¹ Its manifestations include a growing reluctance to speak out and take initiative, and a desire to be perceived as "feminine" or compliant.³³² These characteristics help place in context the passivity of the girls who commit neonaticide.

Although less is known about the families of the girls who commit neonaticide, it seems likely that they, too, play a considerable role in contributing to these crimes. Even if society has halted the legal discrimination against children born out of wedlock, there still is considerable shame and guilt associated with a teenager's pregnancy. The fear that these girls consistently express--that they will be exiled from their families as a result of their pregnancy--speaks volumes about family expectations. In an era when the majority of adolescents are

³²⁹ Cf. *Levy*, 391 U.S. at 70 (granting same rights to children born out of wedlock as those born to married parents, under the Equal Protection Clause); *Glonn*, 391 U.S. at 75-76 (same).

³³⁰ One brief study attempts to prove this by using statistics gathered from the National Center on Vital Statistics. David Lester, *Roe v. Wade Was Followed by a Decrease in Neonatal Homicide*, 267 *JAMA* 3027 (1992). Of course, it is important to remember that legalizing abortion does not guarantee access to abortion. See *supra* notes 291 through 295 and accompanying text (regarding the barriers to abortion). Note also that the extent to which abortion may be viewed as a successful strategy for preventing infanticide obviously depends on whether one views abortion as murder. From the perspective of those who equate abortion with murder, its legalization provides a false cover for what might otherwise be viewed as infanticide. From this perspective, we still have relatively high rates of infanticide, some legal, and some illegal.

³³¹ One survey found that, among elementary school children, 60% of girls and 69% of boys felt happy with themselves, but by high school, the numbers had dropped to 29% of girls and 46% of boys. Although both boys and girls experience difficulty in adolescence, girls consistently feel worse about themselves. Oberman, *Turning Girls*, *supra* note 274, at 56.

³³² *Id.* at 57.

sexually active,³³³ it remains the case that the majority of parents would prefer their daughters to be "good girls."³³⁴ Thus, there is considerable pressure associated with confronting one's parents with the news that one not only has had sex, but also is pregnant.

At a somewhat more abstract level, these cases show evidence of families that are remarkably disinterested in their children's lives. Those who commit neonaticide lack relationships with open, caring, reliable adults--adults who will recognize the signs of pregnancy, confront the girls about their situations, and initiate the difficult conversations about the alternative resolutions to pregnancy, including motherhood. This isolation from loved ones, even within the home, clearly constitutes a structural factor that contributes to neonaticide.

At a societal level, there are both symbolic and pragmatic factors that contribute to neonaticide. The repeal of common law discriminatory provisions against nonmarital children has not been accompanied by a whole-hearted embrace of the practice of single parenting. Indeed, society is rife with negative societal characterizations of single mothers, welfare mothers, and teenage mothers.³³⁵ Contemporary social pundits now recommend that the United States revive "illegitimacy" as a concept and use stigma as a tool in the battle against teenage pregnancy.³³⁶ Even President Clinton,

³³³ See *Teenage Pregnancy Myths Debunked*, NEWS (The Alan Guttmacher Institute, New York, N.Y. and Washington, D.C.), June 7, 1994, at 2 (most teenagers, regardless of race, income, gender, or religious affiliation, begin to have sex in their middle-to-late teens). For a fascinating exploration of the myths and realities surrounding teenage sexual activity, pregnancy, and related policy-making, see KRISTIN LUKER, *DUBIOUS CONCEPTIONS: THE POLITICS OF TEENAGE PREGNANCY* (1996).

³³⁴ The persistence of slang terms like slut, for which there are no male equivalents, is but one indication that the double standard for sexual behavior is alive and well. Oberman, *Turning Girls*, *supra* note 274, at 15- 19.

³³⁵ This is perhaps best exemplified by the series of responses to Vice President Dan Quayle's condemnation of fictional television character Murphy Brown for being a single mother. Despite the initial ridicule generated by his remarks (the character was impregnated by her ex-husband, and thus, the pro-life Quayle's opposition to her becoming a single mother seemed to be an ironic endorsement of abortion), over time, many have voiced their support for his position. See Barbara Dafoe Whitehead, *Dan Quayle Was Right*, *THE ATLANTIC MONTHLY*, April 1993, at 47 (describing the Dan Quayle/Murphy Brown debate and arguing that single motherhood and divorce are harmful to children). For a thorough critique of these views, see Judith Stacey, *The New Family Values Crusaders: Dan Quayle's Revenge*, *THE NATION*, July 25, 1994, at 119.

³³⁶ These commentators seldom explain how they think single women should resolve their pregnancies. Their political conservatism usually makes it taboo to mention abortion, yet the reality is that many of the men who impregnate them are neither willing nor able to support the child. See, e.g., Charles Krauthammer, *Defining Deviancy Up: The New Assault on Bourgeois Life*, *THE NEW REPUBLIC*, Nov. 22, 1993, at 20 (discussing the problem of single mothers, but offering no alternative suggestion). For a thoughtful

in his 1995 State of the Union address, claimed that "[t]he epidemic of teen pregnancies and births where there is no marriage" is "our most serious social problem."³³⁷ Certainly, these characterizations contribute to the sense of shame and anxiety these girls experience as they face (or rather, deny) their options.

In addition to the impact of society's perception of single mothers, social policies have concrete ramifications that limit these girls' options. Recall A.'s principal concerns upon learning that she was pregnant.³³⁸ In addition to her fears about her family's response, she was overwhelmed by worries about money, insurance, housing, and work.³³⁹ These very practical concerns are dictated by a society that ties health insurance to the workplace, tolerates shortages of affordable housing, and privatizes the costs of child care. Without a full-time job, A. could not afford child care, insurance, or a place to live. Had her family kicked her out, she and her baby easily could have become homeless.³⁴⁰ A.'s concerns only would have been amplified had her story occurred today, amidst the ongoing efforts at welfare reform, including proposals allowing states to deny welfare payments to teenage mothers who are not in school or living with an adult.³⁴¹ Coupled with the lack of family support and the costliness of abortion, these proposals might be viewed as a veritable prescription for neonaticide.³⁴²

Although these varied factors--individual vulnerability, family dysfunction, and societal rhetoric and structures--are wide-ranging, everything we know about neonaticide points to a nuanced set of

critique of proposals to "restigmatize" unwed motherhood, see Katha Pollitt, Subject to Debate, *THE NATION*, Dec. 12, 1994, at 717.

³³⁷ Charles Krauthammer, A Social Conservative Credo, *PUBLIC INTEREST*, Fall 1995, at 15-16. For a fascinating exploration of the social (mis)construction of the "epidemic" of teenage pregnancy, see generally LUKER, *supra* note 333 (demonstrating that the rates of teenagers bearing children have not risen since the 1950s, but noting that the rates of teen mothers who marry has declined).

³³⁸ See *supra* notes 256 through 273 and accompanying text.

³³⁹ *Id.*

³⁴⁰ For a profoundly disturbing collection of the accounts of homeless families, see JONATHAN KOZOL, *RACHEL AND HER CHILDREN: HOMELESS FAMILIES IN AMERICA* (1988).

³⁴¹ The Welfare reform debate, poverty, and some useful numbers, *WASH. TIMES*, Aug. 24, 1996, at A12 [hereinafter Welfare Reform] (noting that the 1996 welfare legislation essentially eliminates Aid to Families with Dependent Children (AFDC) and replaces the program with federal block grants).

³⁴² See Cynthia A. Bailey, Workfare and Involuntary Servitude--What You Wanted to Know But Were Afraid to Ask, 15 *B.C. THIRD WORLD L.J.* 285, 312-16 (1995) (discussing welfare reform and single mothers without child care); Corns, Note, *supra* note 292, at 384-88 (discussing the impact on poor women of the lack of funding for abortions).

causes. Therefore, defining preventive policies for neonaticide, like for infanticide, leads back to an analysis of family and community. Neonaticide is not so much about a lack of economic resources as it is about a lack of communication and community. As is the case with infanticide, neonaticide is not merely an individual problem; it is a reflection of an atomized society that places little value on the mental and physical well-being of its most vulnerable constituents. Those who would prevent neonaticide must begin by identifying and remedying girls' vulnerability long before they become pregnant.

2. The Culture of Infanticide: Motherhood in Isolation and Poverty

The isolation of mothers and infants is just one of the many consequences of the gradual fragmentation of the extended family. Although there are both benefits and detriments to living in close proximity to extended family members, certainly one of the benefits is the considerable assistance available from family members upon the birth of a child. In the United States today, many new mothers lack any such community. Of course, there is enormous variation in terms of community, and it is impossible to generalize about the experiences of new mothers given the diversity of maternal experiences across class, race, and ethnic lines.³⁴³ Nevertheless, a large number of women in the United States today are not merely the primary, but essentially the only, caretakers of their infants.³⁴⁴ Even when intact, the nuclear family structure presupposes this division of labor, and current figures indicate that at least one-third of American children live in single parent families.³⁴⁵

The tasks associated with caring for an infant are extraordinarily demanding. When performed by one parent, twenty-four hours a day, seven days a week, throughout the early months and years of a child's life, this work is arguably the most difficult labor any human ever engages in. In a journalistic account of the first year of her son's life, writer Anne Lamott provides a rare glimpse into the fused joys and struggles of motherhood. As a single, self-employed parent in her mid-thirties, Lamott was somewhat vulnerable to isolation and financial worries, but she was surrounded by a supportive network of family and friends. In her diary, Lamott records the exhaustion she experienced during her son's first four months.

³⁴³ This point is perhaps best illustrated in Carol Stack's classic study of African-American family structure in impoverished neighborhoods. CAROL B. STACK, *ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY* (1975).

³⁴⁴ See supra notes 297 through 323 and accompanying text.

³⁴⁵ More Americans marry later, get divorced, census shows, *DALLAS MORNING NEWS*, Mar. 13, 1996, at A5.

He's so fine all day, so alert and beautiful and good, and then the colic kicks in. I'm okay for the first hour, more or less, not happy about things but basically okay, and then I start to lose it as the colic continues. I end up incredibly frustrated and sad and angry. I have had some terrible visions lately, like of holding him by the ankle and whacking him against the wall, the way you "cure" an octopus on the dock.³⁴⁶

Despite Lamott's closely-knit community, she frequently found herself alone late at night with a screaming baby.

I wonder if it is normal for a mother to adore her baby so desperately and at the same time to think about choking him or throwing him down the stairs. It's incredible to be this fucking tired and yet to have to go through the several hours of colic every night. It would be awful enough to deal with if you were feeling healthy and upbeat. It's a bit much when you're feeling like total dog shit. When he woke me up at 4:00 this morning to nurse, I felt like I was dying.³⁴⁷

The fact that the work of mothering routinely is undertaken by the female half of the population without financial compensation serves to minimize the strenuousness of this work. Indeed, even calling motherhood "work" seems somehow subversive and taboo. As a result, new mothers may view their physical and emotional exhaustion as a personal failing, rather than as the result of their having undertaken an overwhelmingly difficult task. It is therefore all the more challenging for these women to seek assistance and confide in others that they need help.

The isolation of mothers is reinforced by the paucity of nonpunitive community support services for parents and children. The bulk of state child advocacy agencies are punitive in nature, designed to identify children "at risk" of abuse or neglect and remove them from their homes.³⁴⁸ Although there is an obvious and indisputable need for child protection agencies that intervene to remove children from dangerous environments, there is an equally compelling need for

³⁴⁶ ANNE LAMOTT, OPERATING INSTRUCTIONS 36 (1994).

³⁴⁷ *Id.* at 59.

³⁴⁸ Annette Appell, an attorney with Northwestern University's Center for Children and Family Justice, notes that, although the enabling acts of many state child protection agencies require the agencies to strive toward family preservation and reunification, in recent years law and policy have shifted away from this priority. In Illinois, for example, the family preservation policy was blamed for several notorious deaths from child abuse, and as a result, the agency is now bound by a "best interests" standard, rather than the former statutory mandate of family preservation. Interview with Annette Appell, in Chicago, Ill. (Aug. 23, 1995).

agencies that exist primarily to offer support to parents.³⁴⁹ Not only are there very few such agencies, but a parent who seeks support from existing child protection agencies runs a risk of being punished, rather than assisted.³⁵⁰

In the Chicago area, I was able to locate two private, not-for-profit, nonpunitive parental support organizations: Parents Anonymous and Child Abuse Prevention Services. The former consists of eight city-wide support groups, each comprised of approximately ten

³⁴⁹ Anne Lamott describes the assistance she received from one such agency in the following passage from her journal:

Last night was death. Vietnam. He was colicky from 10:00 till nearly 1:00. At midnight I broke under the strain and called this organization called Pregnancy to Parenthood. They help stressed-out parents and have a twenty-four-hour switchboard that I think is to prevent child abuse. I felt humiliated calling and was crying quite hard, and Sam was crying quite hard, and I told the person on the line that I didn't think I was going to hurt him but that I didn't think I could get through the night. So the person rang the clinical director at home, spliced my call through, and we talked for over an hour. Sam eventually went to sleep. She recommended I go on a wheat-free, dairy-free diet to see if it helps. Mostly she was just there for me in the middle of the night. We talked until I was okay again. Sam woke up a few hours later and nursed peacefully.

LAMOTT, *supra* note 346, at 71. One poignant example of this involves Denise Perrigo, who in 1992 called a community volunteer center in Syracuse, New York, seeking a referral for a question she had about breast-feeding. Lisa Levitt Ryckman, A simple question leads to jail, CHI. TRIB., Feb. 9, 1992, at 16, zone C. She wanted to know whether it was normal for a woman to become sexually aroused while nursing her two-year-old daughter. Rather than referring her to the La Leche League, a breast-feeding support group, (which incidentally would have informed her that this response was completely normal, and that, although most American women stop nursing by age one, the international average is 4.2 years), the agency reported Ms. Perrigo to a child abuse hotline. *Id.* The county Department of Social Services took Perrigo's daughter into custody, and Perrigo was jailed under charges of criminal child abuse. Experts were hired to investigate the case, and Perrigo's daughter was placed in foster care. *Id.* Despite the department's family reunification policy, the child's grandparents were rejected as foster parents because "they did not believe any abuse had taken place." *Id.* It took eight months and a private attorney before Perrigo recovered custody. *Id.*

³⁵⁰ One poignant example of this involves Denise Perrigo, who in 1992 called a community volunteer center in Syracuse, New York, seeking a referral for a question she had about breast-feeding. Lisa Levitt Ryckman, A simple question leads to jail, CHI. TRIB., Feb. 9, 1992, at 16, zone C. She wanted to know whether it was normal for a woman to become sexually aroused while nursing her two-year-old daughter. Rather than referring her to the La Leche League, a breast-feeding support group, (which incidentally would have informed her that this response was completely normal, and that, although most American women stop nursing by age one, the international average is 4.2 years), the agency reported Ms. Perrigo to a child abuse hotline. *Id.* The county Department of Social Services took Perrigo's daughter into custody, and Perrigo was jailed under charges of criminal child abuse. Experts were hired to investigate the case, and Perrigo's daughter was placed in foster care. *Id.* Despite the department's family reunification policy, the child's grandparents were rejected as foster parents because "they did not believe any abuse had taken place." *Id.* It took eight months and a private attorney before Perrigo recovered custody. *Id.*

parents.³⁵¹ Part of a national network that advocates against corporal punishment, each self-help group meets weekly so that members can share stories and seek advice. Members use only their first names; the law, however, requires the reporting of members who describe behavior that indicates the possibility of child abuse or neglect.³⁵² This necessity, along with the powerful cultural taboos against acknowledging a need for help in parenting, makes it challenging to recruit members and to encourage them to rely upon the support group for comfort.³⁵³ The second agency, Child Abuse Prevention Services, runs several support groups that differ from Parents Anonymous only in that they are facilitated by a professional counselor, rather than a trained volunteer parent. In addition, this agency sponsors a twenty-four hour "Parental Stress" hotline, which receives an estimated 5,500 calls annually.³⁵⁴

Although these organizations represent a powerful positive force, clearly they cannot fulfill the emotional, social, and financial support needs of millions of isolated parents in the greater Chicago vicinity. Neither of these groups can offer what is perhaps the most basic of services: the availability of an alternate caretaker who might provide a brief respite to an exhausted parent. The child care shortage has received considerable media attention, yet many fail to recognize the spiral of problems created by this shortage. A parent who cannot find work that pays enough to cover the costs of day care cannot afford to work outside of her home. And a parent who lacks income cannot afford to hire someone to assist her in caring for her child when she needs a break.³⁵⁵ It is both natural and inevitable that a parent will need to take breaks from her child, and in light of the foregoing, it is perhaps unsurprising to find that many parents simply leave their children unsupervised from time to time. In Illinois, over 80% of the Illinois

³⁵¹ PARENTS ANONYMOUS: STATEWIDE NEWS 11, Fall 1995 (on file with the author).

³⁵² Interview with Maureen Blaha, Executive Director of Parents Anonymous, in Chicago, Ill. (Oct. 8, 1995).

³⁵³ *Id.*

³⁵⁴ Telephone interview with Claire Dunham, Counselor at Child Abuse Prevention Services, in Chicago, Ill. (July 8, 1995).

³⁵⁵ One of the counselors at Child Abuse Prevention Services related to me an anecdote that illustrates the widely-felt need for respite care. Her church, which is located in a Chicago neighborhood that borders both Cabrini-Green, one of the city's poorest neighborhoods, and Chicago's wealthier Old Town neighborhood, decided to provide a charitable "drop-off" afternoon day care service. They posted notices about their service in the Cabrini-Green housing projects, and within several days, they had to begin turning away inquiries because the program had reached capacity. The organizers were upset because rather than serving the poorer women in their vicinity, they had been swamped by babies from Old Town mothers, who had heard about the program by word of mouth and were thrilled at the idea of taking an occasional break. *Id.*

Department of Children and Family Services' caseload consists of mothers who left their children unattended.³⁵⁶

The difficulties associated with parenting are not created by poverty alone, but in a fragmented community, money can buy a parent some respite. It may be that economic supports to mothers, of the sort common throughout Europe, are part of a solution.³⁵⁷ Yet, because part of the impetus toward infanticide derives from social and emotional isolation, child allowances and maternity stipends are incomplete solutions at best. Without dramatically increasing the number of nonpunitive resources for parents, we will fail to address the problems inherent in the solitary burdens associated with motherhood. This is not to suggest that the solution to infanticide is to resurrect foundling homes or to train and employ thousands of professional caretakers to take the place of mothers.³⁵⁸ The isolation of mothers is not an individual problem, but rather, a structural one.³⁵⁹

³⁵⁶ Interview with Benjamin Wolfe, Staff Attorney, Illinois ACLU, in Chicago, Ill. (Sept. 2, 1994).

³⁵⁷ Originally intended as wage supplements, and later as a mechanism for encouraging births in countries concerned about declining population growth, family allowances exist as a statutory benefit in 67 countries, including every industrialized country except the United States. Sheila B. Kamerman & Alfred J. Kahn, Notes on Policy and Practice: Income Transfers and Mother-Only Families in Eight Countries, 57 SOC. SERVICE REV. 448, 459-60 (1983). Although they have failed to effect population increases, the allowances play a significant role in the incomes of single-parent, female-headed families, constituting between 13% and 27% of family income for mothers not working outside of the home, and between 10% and 24% for those with outside employment. *Id.*

³⁵⁸ Professor John McKnight's essay on "Professionalized Service and Disabling Help" discusses the danger of developing solutions without recognizing the systemic nature of these social problems:

[a] study of children who became state wards exemplifies the process. The children were legally separated from their families because their parents were judged to be unable to provide adequate care for the children. Therefore, the children were placed in professional service institutions.... Quite correctly, officials who were involved in removing the children from their homes agreed that a common reason for removal was the economic poverty of the family. Obviously, they had no resources to deal with poverty. But there were many resources for professionalized institutional service. The service system met the economic need by institutionalizing an individualized definition of the problem. The negative side effect was that the poverty of the families was intensified by the resources consumed by the "caring" professional services. In counterproductive terms, the servicing system "produced" broken families.

JOHN MCKNIGHT, *THE CARELESS SOCIETY: COMMUNITY AND ITS COUNTERFEITS* 44 (1995).

³⁵⁹ For example, recall the circumstances surrounding the suffocation death of Latrena Pixley's six-week-old child. See *supra* notes 203 through 218 and accompanying text. At the time of her baby's death, Pixley was an unemployed high school dropout with two children under the age of one. She lived in a small apartment, without a telephone, and although she had a live-in boyfriend and a family, they were so detached from the realities

Any anti-infanticide policy must begin by recognizing the way in which existing policies and structures contribute to the problem. For example, consider the impact on single mothers of the ongoing efforts at dismantling welfare.³⁶⁰ Ostensibly designed as an effort to encourage mothers to seek paid employment, both the federal and state governments have drastically reduced economic support to single women and their children.³⁶¹ Even the most conservative figures estimate that these policies will result in an increase of at least one million American children living in poverty.³⁶² Few discuss the impact on the mothers. Unless accompanied by a dramatic increase in subsidized day care, poor women will be forced to choose between leaving their children inadequately supervised to earn money working outside of their homes and sacrificing this potential income while trying to survive on limited government assistance in order to keep their children supervised.³⁶³ This trade-off carries with it a subtext of incipient desperation.

B. Rethinking the Crime of Infanticide Under Modern American Law

The magnitude of reforms required to alter the cultures of infanticide and neonaticide is daunting in scope. It is therefore important, in the interim, to revisit the current legal responses to these crimes and to identify necessary short-term reforms.

The American approach to infanticide varies by jurisdiction, but essentially consists of zealous prosecution in accordance with the maximum penalties permitted under homicide laws. The states rely upon juries and judges to take into account the women's stories when determining culpability. This often leads to the defendant being found

of Pixley's life that they did not even notice the baby's absence until Pixley informed them that she had killed her baby. *Id.* Pixley's isolation was by no means extraordinary. Indeed, similar conditions were evident in virtually all of my infanticide cases.

³⁶⁰ See Welfare Reform, *supra* note 341, at A12.

³⁶¹ *Id.*

³⁶² The nonpartisan Urban Institute estimates that the actual number of children impoverished by the 1996 law will be closer to 3,500,000. Richard Merlyn Cook, A Terrible Price, BANGOR DAILY NEWS, Aug. 8, 1996. Regarding the July 1996 welfare legislation, Senator Daniel P. Moynihan remarked, "[i]n our confusion we are doing mad things The premise of this legislation is that the behavior of certain adults can be changed by making the lives of their children as wretched as possible." Clarence Page, Fearing the Best and Worst of Welfare Reform, CHI. TRIB, Aug. 4, 1996, at 19, zone C.

³⁶³ For a discussion of welfare reform and single mothers without child care, see Bailey, *supra* note 342, at 312-16; Carla M. Da Luz & Pamela C. Weckerly, Will the New Republican Majority in Congress Wage Old Battles Against Women?, 5 UCLA WOMEN'S L.J. 501 (1995); and Sherri Kimmel, Champions of Family and Community, PENN. LAWYER, May-June 1995, at 12.

either not guilty or guilty of a lesser offense than that charged.³⁶⁴ As we have seen, even if she is convicted, the defendant stands a good chance of receiving a relatively lenient sentence.

The impetus toward lenience has resulted in an incoherent body of case law-- an incoherence driven not by difficulties in determining the defendant's guilt, but rather by jury and judicial sensibilities regarding the defendant's blameworthiness.³⁶⁵ In making plain the patterns underlying these cases and their resolutions, and in evaluating the complex factors that contribute to these children's deaths, we recognize that cases involving mothers who kill their children not only are unsettling, but also are distinctly unlike more "meditated" homicides. Hence, the widespread consensus that it is morally wrong for a mother to take the life of her infant is met with an equally widespread resistance to equating such a homicide with murder.

There are both common law and statutory mechanisms by which we might resituate the crime of infanticide as other than first degree murder. Nevertheless, if this is accomplished without an accompanying explanation for why this crime should be treated differently, it will perpetuate all of the problems of "exceptionalism" identified earlier.³⁶⁶ In order to explore these normative solutions in context, I will first discuss neonaticide, and then turn to infanticide.

1. Neonaticide as Involuntary Manslaughter

Over the course of this project, many of my assistants, colleagues, and friends have listened to the multiple accounts of neonaticide, and have begun clipping and saving the stories themselves, reacting to each story with ever-increasing sorrow and frustration at the tragic waste of lives. I have noticed that many of them make an odd sort of "Freudian slip" when referring to a woman accused of killing her child--they call her the "victim." In a sense, these women can be seen as victims, and their actions understood as an almost inevitable, or at least comprehensible, response to an oppressive environment. There is a spirit of mercy that inspires this recasting of victim and perpetrator, a moral impetus that demands not that we forgive the defendant, but rather that we recognize the source of her crime and permit that to temper our judgment of her.

³⁶⁴ See, e.g., A.'s story, *supra* notes 256 through 273 and accompanying text.

³⁶⁵ Recall Perlin's "empathy outlier" analysis, in which he notes the select categories in which juries seem to over-apply the insanity defense, despite the fact that these defendants do not conform to our pre-reflective and allegedly "common-sensical" views of the mentally disabled as "madmen" or "beasts." PERLIN, *supra* note 43, at 192-93.

³⁶⁶ See *supra* notes 247 through 249 and accompanying text.

One might attempt to give legal effect to this moral recasting by arguing that neonaticide be viewed as a crime of self-defense. In a rather literal sense, the fetus poses an overwhelming threat to the woman's identity. Once the fetus is born, she no longer will be simply a woman, she will be a mother. If she rids herself of the fetus or baby, she still will be a woman, and she will have kept her identity intact.³⁶⁷ Strictly speaking, this defense stands little chance of success. Self-defense is a limited legal defense that was devised to address cases in which the defendant believed herself to be threatened in an imminent and life-threatening manner.³⁶⁸ Thus, the woman accused of killing her newborn would need to convince the trier of fact that the fetus was an aggressor who unjustifiably threatened harm to her, and that her response was reasonable.³⁶⁹

To engage this argument further requires a thorough jurisprudential discussion of the underlying purposes of criminal law that exceeds the scope of this Article. Although there are philosophical and legal arguments that challenge the assumption that neonaticide should be considered immoral and illegal, it remains the case that neonaticide defendants frequently are charged with murder.³⁷⁰ This being so, rather than discussing whether they should be charged at all, it seems far more pressing to explore the applicability of murder

³⁶⁷ The same reasoning also applies to the cases of infanticide, in which one might hypothesize that the woman kills her children in order to free herself of her identity as "mother" and to recover her own identity.

³⁶⁸ The law of self-defense requires the defendant to establish that: (1) an aggressor unjustifiably threatens harm to the actor; and (2) the actor engages in conduct harmful to the aggressor (a) when and to the extent necessary for self-protection, and (b) that is reasonable in relation to the harm threatened. ROBINSON, *supra* note 218, at § 132.

There is some debate over the validity of psychological self-defense, but at the present, these claims remain long shots. For an example, see Charles Ewing's proposal that we permit a psychological self-defense theory. Charles P. Ewing, *Psychological Self-Defense: A Proposed Justification for Battered Women Who Kill*, 14 L. & HUM. BEHAV. 579 (1990). For a critique of Mr. Ewing's position, see Stephen J. Morse, *The Misbegotten Marriage of Soft Psychology and Bad Law: Psychological Self-Defense as a Justification for Homicide*, 14 L. & HUM. BEHAV. 595 (1990).

³⁶⁹ A related argument that has been unsuccessfully raised in a neonaticide case is that of necessity. See *Illinois v. Doss*, 574 N.E.2d 806 (Ill. App. 1991) (discussing case of 15-year-old defendant who was unaware that she had been pregnant and who claimed that killing her newborn was necessary to avoid disgrace of unwed pregnancy).

³⁷⁰ Philosopher Michael Tooley contends that killing a neonate is not intrinsically wrong, because newborns are not persons. He explains that neonates are not persons because their behavior does not indicate the existence of higher mental capacities, such as the capacity for thought, rational deliberation, or self-consciousness. Moreover, he argues that scientific evidence about neurophysical structures in neonates also proves they are not persons. This is because data indicates that the neuronal circuitry thought to underlie higher mental functions is not present at birth, but actually develops over a long period of postnatal development. TOOLEY, *supra* note 129, at 407.

charges, as opposed to lesser offenses, to women who commit neonaticide.

First degree murder ordinarily implies an element of intent on the part of the murderer.³⁷¹ Although the precise language varies among jurisdictions, murder codes generally require that the defendant possess an intent to kill or an intent to do serious bodily injury, or else that the state demonstrate that the death occurred while the defendant was committing a felony or engaging in conduct so extremely reckless as to reflect a "depraved heart."³⁷² For example, consider the Model Penal Code's murder provision, which provides that criminal homicide constitutes murder when:

- a) it is committed purposely or knowingly; or
- b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life.³⁷³

As the previous discussions of neonaticide demonstrate, most neonaticide defendants do not plan to kill their babies. Quite to the contrary, everything about the circumstances surrounding labor and delivery in these cases speaks to the sudden and impulsive nature of the mother's response. Although one might argue that the defendant was negligent in her failure to anticipate the impending birth of a child, and in her failure to take precautions to insure the baby's survival, this hardly can be seen as premeditated murder.³⁷⁴ At best, this failing makes her reckless. The cases in which recklessness is so extreme as to constitute murder involve defendants whose behavior is so calculated to produce harm that it is otherwise inexplicable. We call these "depraved-heart murders":³⁷⁵

firing a bullet into a room occupied, as the defendant knows, by several people; ... shooting into the caboose of a passing train or into a moving automobile; playing a game of "Russian roulette" with another person; ... driving a car at very high speeds along a main street.³⁷⁶

³⁷¹ See LAFAVE & SCOTT, CRIMINAL LAW 603 (2nd ed. 1986) (tracing the evolution of the "malice aforethought" standard).

³⁷² *Id.*

³⁷³ Model Penal Code § 210.2 (1962).

³⁷⁴ It is, of course, possible to imagine a neonaticide that demonstrates sufficient intentionality to constitute murder. Typically, however, neonaticide defendants' behavior is reflexive and unplanned. Moreover, the legal standard required to elevate a homicide to murder is not negligence, but extreme recklessness. *Id.*

³⁷⁵ LAFAVE & SCOTT, *supra* note 371, at 617.

³⁷⁶ *Id.* at 619-20. LaFave and Scott also cite a 1956 case from England for the proposition that shaking an infant so long and so vigorously that it cannot breathe should be considered a depraved-heart murder. *Id.* (citing *Regina v. Ward*, 1 Q.B. 351 (1956)). If this were widely considered to be murder, then neonaticide arguably might be analogized

In order to accommodate neonaticide under modern murder codes, one must equate an unattended birth--the most commonplace and natural event in human history-- with the pathological behavior of the depraved-heart murderer. So doing has the curious effect of criminalizing the birth process when it takes place without medical supervision.³⁷⁷ This marks a significant deviation from present law and from the reality that many thousands of women successfully deliver their babies outside of the health care system, for reasons ranging from personal preference to poverty to exceptionally speedy labors.³⁷⁸ Are we to consider these deliveries as cases of attempted murder?

Although neonaticide defendants frequently are accused of first degree murder, they seldom are convicted of this crime. As one Chicago criminal defense lawyer observed, there is a pattern of "over-charging and under-convicting" in neonaticide cases.³⁷⁹ The result, as was seen in the second section of this Article, is that the majority of these cases plead out before trial, and that those that proceed to trial are more likely to result in convictions for the lesser crime of involuntary

as murder also; however, the level of control and deliberateness demonstrated by the baby-shaker is vastly different from the actions taken by many neonaticide defendants. See Joanne Wasserman, *The Anger that Kills: Doctors are Seeing a Rise in Fatalities and Brain Damage Caused by Shaking*, N.Y. DAILY NEWS, Jan. 23, 1996, at 37 (quoting several experts on the shaken baby syndrome). Dr. Margaret McHugh explains that "a gentle shaking would not explain [the] retinal bleeding and brain hemorrhaging." *Id.* Lucinda Suarez, of the Queens district attorney's office, notes that "[t]his is tremendous force Medical experts compare it to the velocity and force of a high-speed car crash." *Id.* Nevertheless, one expert remarks that, "despite the medical evidence, it's difficult to get juries to convict those accused of shaking babies." *Id.*

³⁷⁷ In her fascinating study of American women charged with endangering their newborns during or due to unassisted childbirth, anthropologist Anna Tsing finds that

[u]nassisted childbirth, it seems, earns women a characterization as calculating criminals.... In most of the cases I have studied, I found the events surrounding the childbirth open to varied interpretations. Often the cause of death of the infant was unclear, with no evidence of trauma Many of the women charged claimed they did not know they were in labor; some were unaware they were pregnant. Yet rather than leading to a discussion of these ambiguities, the fact that a woman gave birth alone was seen as evidence or cause of her criminal neglect of the newborn.

Tsing, *supra* note 233, at 282-83. A recent case from Columbia, South Carolina illustrates Tsing's thesis. Sheriff Tommy Mims arrested Ms. Connie Williams after she delivered a baby in the bathroom of a Sumter County youth club in December 1996. Although there was no evidence that Williams took any steps to kill the child, it seems that the child died in the bathroom. Mims explained that "Williams was charged with murder ... because she didn't get medical assistance during the delivery." Police say woman killed baby girl: Died after Birth in Sumter Bathroom, *THE STATE* (Columbia, S.C.), Jan. 7, 1996, at B3.

³⁷⁸ In 1993, of 4,000,280 total births in the United States, 40,000 were not in the hospital. 44 MONTHLY VITAL STATISTICS REPT. 71 (Sept. 21, 1995).

³⁷⁹ Interview with Jeffrey Urdangen, criminal defense attorney, in Chicago, Ill. (Oct. 15, 1995).

manslaughter. Indeed, when one evaluates the range of factual situations governed under the broad rubric of involuntary manslaughter, it is immediately apparent that this crime is far more applicable to neonaticide than murder.

Most states' criminal codes do not define involuntary manslaughter with great specificity, although all American jurisdictions undertake to punish it.³⁸⁰ At common law, manslaughter was broadly defined to govern unlawful killings that did not involve malice aforethought.³⁸¹ Over time, several categories of manslaughter arose, including what is commonly known as involuntary, "unlawful-act," or "misdemeanor" manslaughter.³⁸² Despite the fluctuating homicide nomenclature, involuntary manslaughter generally exists as a less severe offense than voluntary manslaughter or murder, and is applicable in circumstances where the defendant's conduct lacked a murderous intent, but involved a high degree of risk of death or serious bodily injury to the victim.³⁸³

This definition applies to neonaticide in that the pregnant woman who fails to acknowledge her condition and to plan for her impending delivery poses a distinct risk to her offspring's well-being. Even if her behavior prior to the birth is both legal and unintentional, it can be argued that, once the baby is born, the woman's failure to seek assistance is either criminally negligent or reckless because a parent has a legal duty to furnish medical care for her child.³⁸⁴

Of course, the applicability and availability of this lesser homicide provision does not guarantee that neonaticide defendants will not be charged with and convicted of murder. Moreover, even if it were the case that all neonaticide defendants, including those charged with murder, ultimately were convicted of manslaughter, this would be an absurd manner of dispensing justice. One defense lawyer in a

³⁸⁰ LAFAVE & SCOTT, *supra* note 371, at 668.

³⁸¹ JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 450 (1994) [hereinafter DRESSLER, *UNDERSTANDING*].

³⁸² *Id.*

³⁸³ *Id.* at 450, 483-86; LAFAVE & SCOTT, *supra* note 371, at 669. The Model Penal Code eliminates the unlawful act doctrine, and recasts involuntary manslaughter as "criminally negligent homicide." Model Penal Code § 210.4.

³⁸⁴ "[A] number of reported cases have concerned criminal negligence or recklessness in omitting to furnish medical care for helpless, sick or injured persons to whom the defendant owes a duty of care." LAFAVE & SCOTT, *supra* note 371, at 671. The definition of criminal negligence includes one or both of the following principles:

(1) the defendant's conduct, under the circumstances known to him, must involve a high degree of risk of death or serious bodily injury, in addition to the unreasonable risk required for ordinary negligence; and (2) whatever the degree of risk required ... the defendant must be aware of the fact that his conduct creates this risk.

Id. at 669.

neonaticide case in which the client was tried for murder, but only convicted of involuntary manslaughter, remarked, "[a]lthough we may take comfort from the fact that these defendants seldom receive the maximum allowable penalties under the law, this is most certainly an unfair and arbitrary, as well as a costly and time-consuming manner to handle these cases."³⁸⁵

It is precisely the random, arbitrary nature of neonaticide cases that lends appeal to the notion of creating a distinct statute to govern this crime. Although the recognition of a separate crime for women who kill their children inherently exceptionalizes women, there is no denying that such a statute would be the best way to insure a uniform application of the law. The challenge, therefore, lies in drafting a law that would incorporate the dominant lenient response to neonaticide without simultaneously treating women, by virtue of their biology, as less than full citizens.³⁸⁶

One manner of accomplishing this goal lies in amending existing involuntary manslaughter statutes. Many criminal codes list specific circumstances under which a homicide will constitute involuntary manslaughter. For example, the Illinois statute provides that "[i]n cases involving reckless homicide, being under the influence of alcohol or any other drug ... at the time of the alleged violation shall be presumed to be evidence of a reckless act unless disproved by evidence to the contrary."³⁸⁷ Thus, an involuntary manslaughter statute might be amended to include the following provision:

In cases involving a woman who causes the death of her newborn child under the age of twenty-four hours, during which time the balance of her mind is disturbed by reason of the effect of giving birth or of circumstances consequent upon the birth, the alleged violation shall be presumed to be evidence of no more than a reckless or negligent act unless disproved by evidence to the contrary.

This proposal may be criticized on several grounds. First, there is the somewhat anachronistic "balance of the mind" language borrowed from the British Infanticide Act.³⁸⁸ Modern criminal law does little to acknowledge that defendants who are not insane may nevertheless demonstrate diminished mental capacity, whether temporary or permanent, and thus the very concept of a temporary

³⁸⁵ Interview with Jeffrey Urdangen, *supra* note 379.

³⁸⁶ See Coughlin, *supra* note 249, for a well-articulated argument regarding the hazards of laws that excuse women for their actions on the basis of gender differences.

³⁸⁷ 720 ILL. COMP. STAT. 5/9-3(b) (West 1994).

³⁸⁸ See *supra* note 52 and accompanying text.

mental imbalance is out of keeping with contemporary American law.³⁸⁹ Yet, the lenient impulse in neonaticide cases results from just such a recognition. The "balance of the mind" language is designed to acknowledge the extraordinary mental and physical trauma inherent in an unattended labor and delivery, particularly when this follows months of denial of pregnancy. The use of this language also operates as a limiting factor, permitting the state to obtain murder convictions against women whose actions were not the result of temporary mental imbalance, but rather, reflected a knowing and purposeful intention to kill their newborns.

Second, a statute so narrowly defined is somewhat awkward. Certainly, there is a tendency in legislating to allow juries great latitude in identifying reasonable conduct and, therefore, criminal codes generally consist of broadly-defined standards of behavior and mental states rather than specific factual provisions.³⁹⁰ Nevertheless, there are myriad examples of criminal codes that identify objective excusing components with great specificity.³⁹¹ The need for such detailed description is amply demonstrated by the widely ranging outcomes observed in these cases.

Finally, this proposal may be seen as a new effort to "medicalize" women's responses to burdens placed upon them by virtue of their subordinated status in society. The resort to scientific or quasi-scientific explanations for women's criminal behavior helps cloak the social and structural constraints on women, forcing women to attempt to excuse their illegal actions as crazy, rather than permitting them to reveal these actions as rational responses to a crazy environment.³⁹²

³⁸⁹ In his comprehensive study of the insanity defense, Professor Michael Perlin concludes that "[w]hile we have grudgingly allowed a few defendants to seek exculpation through the insanity defense, we usually limit it to defendants 'utterly and obviously' beyond the reach of the criminal law." PERLIN, *supra* note 43, at 29-30.

³⁹⁰ Professor Dressler notes that excuse theory is hard to legislate:

[u]nder an excuse theory, what conduct society deems harmful is not at issue. Rather, the issue is whether the actor lived up to a standard of how 'reasonable' people act. Although a legislature may properly codify an objective excusing component, it is more plausible to leave its definition ... to jurors, who represent that objective standard.

Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 *J. CRIM. L. & CRIMINOLOGY* 421, 447 (1982) [hereinafter Dressler, *Rethinking*].

³⁹¹ See, e.g., Model Penal Code § 5.01 & cmt. (defining criminal attempt to include behavior "constituting a substantial step in a course of conduct planned to culminate in [the] commission of the crime," and then providing a detailed list of activities that constitute substantial steps).

³⁹² For two fascinating discussions on the dangers inherent in pathologizing women's behavior, see SUSAN SHERWIN, *NO LONGER PATIENT: FEMINIST ETHICS AND HEALTH CARE* 179-200 (1992) and Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 *U. PA. L. REV.* 379 (1991).

Furthermore, by offering a scientific explanation for neonaticide, this proposal courts the risks identified by Professor Coughlin--it is gender-specific, and therefore exceptionalizes women, potentially rendering them less than fully accountable for their actions surrounding labor and delivery.³⁹³ Although this argument is no doubt true, it is not necessarily dispositive. It requires no stretch of the imagination to argue that, during the process of labor and delivery, a woman's focus becomes so intensely internalized that she should not be regarded as fully competent. Support for this proposition might be found in federal and state regulations pertaining to the sterilization of Medicaid patients. Specifically, these laws stipulate that informed consent to an elective sterilization surgery may not be obtained while the patient to be sterilized is in labor or childbirth.³⁹⁴ At least one court has noted that "the clear implication of this requirement is that certain circumstances, such as labor ... can impair an individual's ability to consent in a fully informed manner."³⁹⁵

Ultimately, one might respond to this entire constellation of arguments by noting that, just as there are harms in adopting such a statute, so too are there harms in not adopting a statute. Both approaches are limited and potentially harmful to women. Therefore, if we are practically limited to these two models, as Professor Margaret Radin observed, "the answer must be pragmatic. We must look carefully at the nonideal circumstances in each case and decide which horn of the dilemma is better (or less bad), and we must keep re-deciding as time goes on."³⁹⁶

It is clear that the lenient impulse in neonaticide cases is integrally related to the ambivalence evoked in us by the horror of these women's experiences in childbirth. To insist that these women's actions

³⁹³ See supra note 249 (quoting Professor Coughlin on the dangers of exceptionalizing women).

³⁹⁴ 42 C.F.R. § 50.204(e)(1) (1995); N.Y. Comp. Codes R. & Regs. tit 18, § 505.13(e)(2)(ii)(a) (1995). These regulations require that, absent a premature delivery or emergency abdominal surgery, any consent to an elective sterilization by Medicaid patients must be given at least 30 but no more than 180 days before the procedure is performed. 42 C.F.R. § 50.203 (d) (1995); N.Y. Comp. Codes R. & Regs. tit. 18 § 505.13 (e)(1)(v) (1995).

³⁹⁵ *Butler v. Medical Ctr. of Del., Inc.*, No. 91C-06-205, 1993 Del. Super. LEXIS 65, at *7 (Del. Super. Ct. Mar. 10, 1993). This proposal is entirely in keeping with the spirit of adoption contracts and the common law resolution of many cases involving surrogate mothers, wherein women are permitted to avoid their contractual promises because of their feelings in the aftermath of labor and delivery. See Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 442-45 (1996) (discussing various legal safeguards that insure birth mothers' consent to adoption).

³⁹⁶ Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1700 (1990).

be regarded and judged "equally," in some abstract sense, to the actions of men is as absurd as it is impossible.³⁹⁷

2. *Infanticide as Manslaughter*

The varied stories of women who commit infanticide, like those of neonaticide defendants, tend to reflect impulsive rather than conscious actions. Regardless of which of the four subcategories of infanticide is involved, the vast majority of infanticide cases demonstrate none of the deliberate, intentional behavior associated with murder.³⁹⁸

Although some infanticide defendants are insane at the time of their crimes, many suffer from mental disturbances that fall short of the legal definition of insanity.³⁹⁹ It is unnecessary, however, to broaden the definition of insanity in order to provide a partial defense for these women. The common law contains a more accurate and effective response--one that both acknowledges the desperation that led to the homicide, and at the same time, treats the defendants as autonomous, blameworthy actors. The "heat of passion" doctrine creates a partial excuse to a murder charge, permitting a defendant who acknowledges having killed her infant to argue that she is, at most, guilty of voluntary manslaughter.⁴⁰⁰

³⁹⁷ For an exceptionally coherent explanation of the folly of pursuing a goal of abstract equality, see Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201 (1987).

³⁹⁸ See *supra* notes 140 through 193 and accompanying text (describing each subcategory of infanticide).

³⁹⁹ See appendix, *Infanticide Codes, Issues Existing Prior to Commission of the Crime, mental illness.*

The infanticide defendant whose crime was committed during an episode of postpartum psychosis, and who therefore plainly was incompetent at the time of her offense, may nevertheless find it difficult to establish an insanity defense, as she almost always will be fully recovered by the time of her trial. Nelson, Comment, *supra* note 139, at 633-36. Because postpartum psychosis is strictly time-delimited, once the postpartum phase has passed, the woman returns to her former mental health status; in other words, she is no longer psychotic, nor even mentally ill. Dent, Comment, *supra* note 141, at 363.

⁴⁰⁰ I have omitted from my study the many cases in which a mother kills her child entirely unintentionally, for example, by causing a car accident in which her baby dies. These acts, assuming they involve defendants who manifested no criminal intent, are entirely distinct from infanticide cases. Even if evidence suggests that the mother may bear some fault, for example as a result of her failure to use a safety restraint (such as an infant car seat or a safety belt), states consistently have refused to hold the mother civilly liable, let alone criminally responsible for the infant's death. See, e.g., *State Farm Mutual Auto. Ins. Co. v. Donna Jean Holland*, 380 S.E.2d 100 (1989) (holding that a driver could not win summary judgment in a wrongful death suit on the grounds that the parents of the child-victim had not put the child in a seatbelt); see generally Christopher R. Drahozal, Note, *Liability for Nonuse of Child Restraints*, 70 IOWA L. REV. 945 (1985) (arguing that courts should impose liability on parents who do not put their children in seatbelts).

Throughout history, "heat of passion" has lacked a consistent rationale and has been invoked "largely for reasons of the heart and of common sense, not the reasons of pure juristic logic."⁴⁰¹ This sentiment fits neatly into the pattern of lenience so consistently manifested in infanticide cases. The heat of passion defense originally was developed in order to distinguish the intentional killings committed during sixteenth century "drunken brawls and breaches of honor" from premeditated murders.⁴⁰² In more recent centuries, it has served as a legal mechanism for differentiating and partially excusing homicides that "involve relatives, lovers, and friends, as both perpetrators and victims."⁴⁰³

In order to raise a "heat of passion" defense, a defendant must establish that she committed an intentional homicide, and that she did so under extenuating circumstances which mitigate, though they do not justify or excuse, the killing. The principal extenuating circumstance is the fact that the defendant, when [s]he killed the victim, was in a state of passion engendered in h[er] by an adequate provocation (i.e. a provocation which would cause a reasonable [wo]man to lose h[er] normal self-control.)⁴⁰⁴

A rigid reading of this defense may lead one to doubt whether it ever applies to a crime like infanticide. Indeed, at common law "adequate provocation" was a matter of law, and defendants were restricted to strictly-delineated categories.⁴⁰⁵ Today, however, the categorial approach has been replaced by an "objective standard," which requires juries to determine whether the reasonable person would have been sufficiently impassioned by the provocation to kill.⁴⁰⁶

The language of provocation commonly associated with this defense also might lead one to question whether an infant could pose a sufficient threat to allow its killer to raise this defense. There are two responses to this concern. First, although the term "heat of passion" traditionally has been used to refer to rage, some cases have pointed out that other intense emotions--such as fright or terror or 'wild

⁴⁰¹ Dressler, *Rethinking*, supra note 390, at 423 (citing *D.P.P. v. Camplin*, 67 Crim. App. 14, 27 (1978)).

⁴⁰² *Id.* at 426.

⁴⁰³ *Id.* at 421-22. According to Professor Joshua Dressler, [f]rom an early time in Anglo-American common law, such killings have been treated differently from the meditated variety. The latter constituted murder. The former was denominated as the lesser crime of manslaughter. Today it remains a lesser crime than murder in England, 49 of the 50 states in this country, and in other portions of the world.

Id. at 422.

⁴⁰⁴ LAFAVE & SCOTT, supra note 371, at 653.

⁴⁰⁵ DRESSLER, *UNDERSTANDING*, supra note 381, at 490.

⁴⁰⁶ *Id.* at 491-92.

desperation'--will do.⁴⁰⁷ In fact, the Model Penal Code dispenses with "provocation" altogether, and instead requires that the defendant be "under the influence of extreme mental or emotional disturbance."⁴⁰⁸ More importantly, scholars have been careful to note that the "heat of passion" defense is not so much about the actions of the provoker, but rather about the reasonableness of the defendant's response to her circumstances.⁴⁰⁹ As a result, the challenge for the infanticide defendant is to explain why circumstances led her to lose her self-control.

Convincing a jury that her loss of self-control was a reasonable response to the turmoil caused by her child would be an impossible task for most infanticide defendants. Although even the "reasonable" mother or parent loses self-control with some frequency, and may scream or even hit her child, she does not kill her child.⁴¹⁰ It is critical to recognize, however, that the law does not require that the mother's action in killing her child be reasonable. If a mother acted reasonably in killing her child, she would not be guilty of a crime.⁴¹¹ LaFave and Scott explain the distinction between self-defense and a heat of passion defense by noting that

[w]hat is really meant by "reasonable provocation" is provocation which causes a reasonable man to lose his normal self-control; and, although a reasonable man who has thus lost control over himself would not kill, yet his homicidal reaction to the provocation is at

⁴⁰⁷ *Id.*

⁴⁰⁸ The Model Penal Code's manslaughter provision applies with even greater ease to infanticide defendants, as it eliminates the "heat of passion" language and introduces a subjective component to the defense. Model Penal Code § 210.3. The Model Penal Code, which has been adopted by a substantial minority of jurisdictions, states that criminal homicide constitutes manslaughter when it is "committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." *Id.*

⁴⁰⁹ See Dressler, *Rethinking*, supra note 390, at 443 (noting that "[t]he defense is theoretically applicable even if the victim was not a provoker").

⁴¹⁰ A recent nationwide Gallup poll indicated that "[n]early 1 in 20 parents disciplined their children so severely that they were committing physical abuse." Joseph A. Kirby, *Survey: 1 in 20 Parents Committing Child Abuse, Gallup Numbers Much Higher Than U.S. Data*, CHI. TRIB., Dec. 7, 1995, at 22, zone N.

⁴¹¹ As Dressler notes, the law governing voluntary manslaughter differentiates between criminal and noncriminal responses to circumstances that, by definition, are emotionally extenuating:

[t]he actor's moral blameworthiness is found not in his violent response, but in his homicidal violent response. He did not control himself as much as he should have, or as much as common experience tells us he could have, nor as much as the ordinary law abiding person would have.

Dressler, *Rethinking*, supra note 390, at 467.

least understandable. Therefore, one who reacts to the provocation by killing his provoker should not be guilty of murder. But neither should he be guilty of no crime at all. So his conduct falls into the intermediate category of voluntary manslaughter.⁴¹²

Bearing this in mind, the heat of passion defense plainly is applicable as a partial defense to murder charges in many infanticide cases. There is no guarantee, however, that judges will permit these defendants to raise it.⁴¹³ Therefore, it is once again important to consider the possibility of amending murder statutes to provide a partial defense in the case of infanticide. This could be accomplished by adding infanticide-related provisions to existing criminal codes. In so doing, however, it is critical to bear in mind the Constitutional prohibitions against gender discrimination⁴¹⁴ and to consider the extent to which infanticide truly is a gender-specific crime.

Unlike neonaticide, which is integrally related to the biological experiences of pregnancy, labor, and delivery, infanticide is tied to the culturally-dictated experiences of primary caretaking. In our culture, this work overwhelmingly is performed by women, and thus, throughout this Article, I have referred to infanticide as a crime committed by mothers, and have distinguished these homicides from those committed by a mother's partner or others who do not perform the work associated with primary caretaking for a child. Nevertheless, with the exception of postpartum psychoses, it is conceivable that the infanticidal subcategories described in this Article might apply to an

⁴¹² LAFAVE & SCOTT, *supra* note 371, at 654-55.

⁴¹³ In one recent case, a defendant charged with murdering her newborn attempted to raise a "heat of passion" defense. The judge refused to give the instruction, and the defendant was convicted of first degree murder. On appeal, the court upheld the refusal to permit a heat of passion defense, because none of the examples listed by the state statute fit this crime:

An accused is guilty of second-degree murder when she commits first-degree murder, but is able to prove either that she was acting under a sudden and intense passion resulting from serious provocation, or she believed the circumstances, if they existed, justified the killing. There is no evidence of either mitigating factor in this case.

The only recognized categories of serious provocation that, if proved, would reduce a killing from first- to second-degree murder are substantial physical injury or assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse. None of these categories is present here. Further, the supreme court has explicitly held that a young child cannot cause the serious provocation required of second-degree murder.

Illinois v. Doss, 574 N.E.2d 806, 809 (Ill. App. 1991) (citations omitted).

⁴¹⁴ The following line of cases illustrate the Constitutional limitations on *prima facie* gender-based distinctions: *United States v. Virginia*, 116 S. Ct. 2264 (1996); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Personal Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979); *Craig v. Boren*, 429 U.S. 190 (1976); *Reed v. Reed*, 404 U.S. 71 (1971).

adoptive mother, or a grandmother, or even a father, who finds herself or himself permanently in the position of an isolated primary caretaker for a child.⁴¹⁵ Therefore, rather than utilizing gender-specific language, infanticide should be acknowledged within criminal codes as a homicide committed by one who maintains the permanent status of primary caretaker (as opposed to those who undertake the time-delimited work of baby-sitting).

As an example, the Illinois homicide statute provides that:

A person commits the offense of second degree murder when he commits the offense of first degree murder ... and either of the following mitigating factors are present:

- (1) At the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by the individual killed ...; or
- (2) At the time of the killing he believes the circumstances to be such that, if they existed, would justify ... the killing under [self-defense] ..., but his belief is unreasonable.⁴¹⁶

In order to insure that primary caretakers charged with infanticide could raise a partial defense to murder charges, this statute would need to be amended by adding a subsection such as the following:

- (3) The defendant is on trial for the killing of her or his child, and at the time of the killing, the defendant was in a state of extreme emotional disturbance as a result of psychological, social, or socioeconomic circumstances consequent upon her or his status as the child's permanent primary caretaker.

This provision is by no means a guaranteed defense against murder charges arising out of infanticide. Indeed, the defendant would bear the difficult burden of persuading the trier of fact that her state of extreme emotional disturbance was reasonably explained by the circumstances surrounding her status as primary caretaker.⁴¹⁷

⁴¹⁵ It is critical, in moving to gender-neutral language, to differentiate between the adult cast in a temporary baby-sitting role, who kills a crying baby during a football game, and the adult who is permanently cast as "mother," who retains the residual and constant obligation to care for her baby. For two enlightening discussions of mothering as a practice, rather than a status, see FINEMAN, *supra* note 300, and SARA RUDDICK, *MATERNAL THINKING: TOWARD A POLITICS OF PEACE* (1989).

⁴¹⁶ 720 ILL. COMP. STAT. ANN. 5/9-2(a) (West 1994). The statute further specifies that serious provocation is to be determined from the viewpoint of a reasonable person. 720 ILL. COMP. STAT. ANN. 5/9-2(b).

⁴¹⁷ Recall that Model Penal Code § 210.3 limits this partial defense to homicides

Therefore, although one might criticize this approach as creating an expansive loophole against murder charges, in effect, it should be no larger than existing community norms permit it to be. In addition, this narrowly defined defense is subject to many of the same criticisms as is the provision regarding neonaticide.⁴¹⁸ Ultimately, however, I believe that the abstract "costs" of such a statute easily are outweighed by the benefits it offers in terms of providing a consistent and just resolution to these cases.

VI. CONCLUSION

History reveals three basic societal postures toward women who kill their children--denial, punishment, or prevention. Ignoring infanticide is probably the most popular approach, as societies throughout history have found it less costly simply to look the other way when poor women, or even poor families, find themselves unable to support another mouth to feed.⁴¹⁹ The punitive approach also has made frequent but brief appearances in recent centuries, supported by those who argue that infanticide, like any other violent crime, must be swiftly and severely punished.⁴²⁰ Yet societies that have demanded harsh punishment for these defendants find that it eludes them.⁴²¹ As noted, broad-scale efforts at preventing infanticide have been relatively short-lived, due not to their failure, but rather to the extraordinarily high cost of their success.⁴²²

In our own era, American public policy is fairly seen as an amalgam of the first two of these strategies. We so studiously ignore the frequency and similarity of infanticide and neonaticide cases that the suggestion that America has an infanticide problem sounds utterly absurd. And, when faced with a woman who has killed her child, we charge her with the most severe crime applicable to her act. This approach permits us to feel rather civilized compared to societies in the

committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under circumstances as he believes them to be.

Model Penal Code § 210.3 (emphasis added).

⁴¹⁸ See *supra* notes 388 through 395 and accompanying text.

⁴¹⁹ Langer, *supra* note 9, at 354.

⁴²⁰ The Department of Health and Human Services, Administration for Children and Family Services, recently issued a report calling for harsher penalties for parents who abuse their children. *FATAL CHILD ABUSE*, *supra* note 78, at 43, 67-71.

⁴²¹ See *supra* notes 11 through 33 (describing England's struggle to force juries to convict and punish infanticide defendants).

⁴²² See *supra* note 10.

past. For example, one commentator notes that [d]espite the outcry [of nineteenth century Europeans against infanticide], infanticide continued in England and throughout Europe. It persisted because the same conditions that led a mother in 1580 to murder her child were still in existence in 1880--social ostracism and financial concerns. However, at least the upper and middle classes are now deeply offended by this occurrence.⁴²³

After my review of the subject, I am far from convinced that the American middle and upper classes are in fact deeply offended by infanticide. But even assuming this to be true, conditions present in 1580 and 1880 remain prevalent today. We must change the law that isolates and blames only the mothers for this terrible crime. We must begin to identify the myriad ways in which our society tolerates and perpetuates infanticidal situations. We must acknowledge the role that all of us play in driving these women to the edge of despair, where, with our blessing and our curse, they take the lives of children who should, by right, have inherited our future.

⁴²³ Moseley, *supra* note 9, at 361 (emphasis added).

