Comments

When Murdering Hands Rock The Cradle: An Overview of America's Incoherent Treatment of Infanticidal Mothers

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I. INTRODUCTION

ON June 6, 1996, Melissa Drexler, an eighteen year old high school senior at Lacey Township High School in New Jersey, attended her high school prom. Her prom experience, however, was markedly different from that of her classmates. Drexler, a 5-foot-7-inch, 130 pound girl who no one knew was pregnant, allegedly delivered a newborn baby in a bathroom stall during the prom.[1] She then presumably cleaned herself, rejoined her classmates, and danced to a song she personally requested of the disk jockey. Later, a janitor found blood in the bathroom and a dead baby boy's body in a trash can.[2] An autopsy revealed that the baby was born alive and died of suffocation.[3] Drexler, indicted for murder, now awaits trial.[4] Although prosecutors are not seeking the death penalty, Drexler could face up to thirty years in prison.[5]

While factually unique, Melissa Drexler's story is not isolated. Less than two weeks before Drexler allegedly murdered her infant, a seventeen year old Pennsylvania girl gave birth to an infant, and hid it in her gym bag for a two-hour ride home.[6] Upon arriving home, the mother left the gym bag in the garage, and the baby died of asphyxia. The infant's mother, Melissa Seaner, pleaded guilty to manslaughter and was sen-

1. *See Charges Weighed Against Woman Who Discarded Her Newborn at Prom*, CHI. TRIB., June 10, 1997, at 10; *see also Dateline: Death at the Prom* (NBC television broadcast, June 29, 1997).

2. *See Now Prom Mom Stands Indicted*, NEWSDAY, Sept. 18, 1997, at A50.

3. *See id.*

4. *See The Today Show: New Jersey Teen Accused of Killing Newborn Not Eligible for Death Penalty* (NBC television broadcast, Sept. 18, 1997). Drexler's trial was set to begin on January 20, 1998, in Monmouth County, New Jersey. *See Judge Won't Relocate Trial of Prom Teen in Baby Death*, THE RECORD (Northern New Jersey), Jan. 17, 1998, at A3. Drexler's attorneys unsuccessfully argued a request to change venue, however, the motion postponed the trial. *See id.* No new trial date has been set. *See id.*

5. *See The Today Show*, *supra* note 4.

6. *See* Brendan Schurr, *Teen-age Mother Admits Slaying Newborn Was Found Dead in Gym Bag in Garage of Home*, PITTSBURGH-POST GAZETTE, Aug. 12, 1997, at A16.

tenced to four years in prison.[7]

Homicidal mothers are not all teenagers. For example, in 1995, Dr. Deborah Green, a mature Kansas City medical doctor and suburban housewife, set fire to her house with her children still inside.[8] Dr. Green, who never questioned the condition of her children until more than an hour after firefighters arrived, was adjudged guilty of murder.[9] Another example is Susan Smith, the South Carolina woman who begged the nation to help her find her two abducted boys. The country was stunned to find that there was no abductor; Susan Smith had driven her children into a lake.[10]

While there are no clear answers to why mothers kill their children, there is also no clear, coherent approach to their punishment. In fact, few guidelines exist in our justice system to respond to an infanticidal mother. Part II of this Comment defines the crime of infanticide and traces its lengthy development. Part III introduces current and asserted possible for defenses to the crime for mentally impaired, murderous mothers. The Comment discusses disparate sentencing and incoherent treatment in Part IV. Finally, Part V covers modern infanticide issues, and Part VI evaluates possible solutions to the dilemmas posed by the treatment of homicidal mothers.

II. THE CRIME OF INFANTICIDE

A. DEFINING HUMAN INFANTICIDE AND THE INFANTICIDAL MOTHER

Although "human infanticide" has been defined in a variety of ways, it is generally understood to mean the murder of a child under the age of discretion.[11] Despite the fact that the term "infanticide" implies the murder of an infant, no bright-line age rule exists. Neonaticide, the only type of infanticide that fits a bright-line age test, defines cases where infants are murdered within twenty-four hours after birth.[12] Unambiguous, how-

7. *See* John Curran, *4 Years for Teen Who Let Baby Die*, THE RECORD (Northern New Jersey), Oct. 24, 1997, at A2. Seaner could be eligible for parole in over nine months. *See id.* At the hearing, the judge rejected Seaner's claims that the pregnancy resulted from rape, and thus, that Seaner suffered from post-traumatic stress disorder. *See id.*; *see also* Marie McCullough, *Profile of Mothers Who Dump Babies Changing U.S.*, THE DALLAS MORNING NEWS, Dec. 6, 1997, at 45A.

8. *See* Mark Anderson, *Green's Crimes Shatter Suburban Veneer*, KANSAS CITY STAR, Apr. 27, 1996, at 1.

9. *See* Tony Rizzo, *Investigators Seeing More Parents Who Kill, Setting Fire to Murder Can Be Motivated by Anything, They Say*, KANSAS CITY STAR, Apr. 19, 1996, at A20.

10. *See generally* Janet Ford, Note, *Susan Smith and Other Homicidal Mothers—In Search of the Punishment That Fits the Crime*, 3 CARDOZO WOMEN'S L.J. 521 (1996); Rick Bragg, *Carolina Jury Rejects Execution for Woman Who Drowned Sons*, N.Y. TIMES, July 29, 1995, at A4; Christopher Sullivan, *"Something Went Wrong"—Town in S.C. Baffled*, CHARLESTON GAZETTE, Nov. 5, 1994, at 1A.

11. *See* PETER C. HOFFER & N.E.H. HULL, MURDERING MOTHERS: INFANTICIDE IN ENGLAND AND NEW ENGLAND 1558-1803 xiii (1981). In Tudor homicide trials, the age of discretion was eight years old; other definitions used nine years old. *See id.*

12. Dr. Phillip Resnick has specifically defined neonaticide as the killing of a newborn child on the day of its birth. *See* Phillip J. Resnick, *Murder of a Newborn: A Psychiatric*

ever, is the fact that infanticide laws have pertained only to women, from the inception of the term.[13] Infanticide can include any of the following behaviors: deliberate killing, placing the child in a dangerous situation with little hope of survival, lowered levels of support, "accidents," and excessive physical punishment.[14]

An infanticidal mother is more problematic to define than the crime itself because homicidal mothers do not fit a specific profile. While homicidal mothers are often young, uneducated, immature, and victims of abuse, cases in which mature, educated, non-abused mothers kill are also common. In fact, some homicidal mothers kill the children they so desperately sought to conceive.[15]

B. History of Infanticide

"If we are surprised by the idea of a mother extinguishing the very life she brought into being, that is because 'we have very little sense of history.'"[16] The historical presence of infanticide is alarming. In the early modern English courts, twenty-five percent of all murder cases were infanticides.[17] Ancient Greeks killed weak, deformed, or unwanted children.[18] The Chinese and Indians often did not let female infants survive in order to maintain a more favorable male to female ratio.[19] Undesired Brazilian infants were left under trees;[20] Eskimos left babies out in the snow.[21] In fact, the crime of infanticide has roots dating back to Greco-Roman antiquity, where deformed infants often fell victim to infanticide in order to better society, and parents were generally not prohibited from killing their own children.[22]

Review of Neonaticide, 126 Am. J. Psychiatry 1414 (1970). For purposes of this Comment, the term infanticide will also encompass neonaticide.

13. *See* Katherine O'Donovan, *The Medicalisation of Infanticide*, 1984 Crim. L. Rev. 259.

14. *See* Glenn Hausfater & Sarah Blaffer Hrdy, Infanticide: Comparative and Evolutionary Perspectives 442 (1984).

15. "It happens in families where there's no history of violence and where there's a long history of violence. It crosses racial lines [and] socioeconomic lines . . . . It's a horror that we as a society are going to be confronted with again and again." David Van Biema, *Parents Who Kill*, Time, Nov. 14, 1994, at 50 (quoting Robert Hazelwood, a former FBI behavioral scientist).

16. Suzanne Cassidy, *Mothers Killing Their Kids "Old and Shocking and Awful"*, Sunday Patriot News (Harrisburg, PA), May 21, 1995, at B8 (quoting Daniel Maier-Katkin, infanticide expert and Dean of the School of Criminology and Criminal Justice at Florida State University).

17. *See* Hoffer & Hull, *supra* note 11, at xviii. In seventeenth-century Plymouth, Massachusetts, a woman was executed for the murder of her infant. Three of eleven executions for infanticide during this period in Massachusetts involved women. Also, 90% of all murderous assaults by women were directed at infants. *See id.*

18. *See* Hausfater & Hrdy, *supra* note 14, at 439.

19. *See id.*

20. *See id.*

21. *See id.*

22. *See* Cynthia Bouillon-Jensen, *History of Infanticide*, *in* 3 Encyclopedia of Bioethics 1200 (Warren Thomas Reich ed., 1995). In fact, Roman fathers had mortal power of their children and were even allowed to execute a grown son. *See* John Bos-

The crime of infanticide is also present in religious history. Among the first to condemn the killing of infants were the Jewish scholars.[23] Around the fourth century, church leaders from Christian religions pressured their leaders to enact laws protecting newborns, representing perhaps the first true opposition to infanticide.[24] Despite the changes, infanticide was not recognized as legal homicide until the Middle Ages.[25] One striking point of the Medieval period's recognition of homicide was the emergence of acquittals for married women on pleas of insanity or poverty.[26] "By law it was considered a serious crime, yet in practice it was generally excused."[27]

Motive gained importance during the Renaissance period of the sixteenth and seventeenth centuries, which witnessed an increase in infanticide cases.[28] The law created a presumption that a child was born alive unless a mother could rebut the presumption.[29] Motive was often the deciding factor. Pleaded motives included temporary insanity, dissociation, and even depression during labor and delivery.[30] The most noted motive involved mothers trying to conceal illegitimate children.[31] Regarding the motive of insanity, madness was often asserted not to excuse a mother, but rather to avert the death penalty.[32] "Temporary insanity was neither a defense nor a road to pardon in the seventeenth century, but in the next 100 years it gradually became a successful plea to a charge of infanticide."[33]

The eighteenth and nineteenth centuries generally brought greater leniency on infanticidal mothers. Juries more readily accepted new defenses such as "benefit of linen" and "want of help."[34] The "benefit of

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WELL, THE KINDNESS OF STRANGERS: THE ABANDONMENT OF CHILDREN IN WESTERN EUROPE FROM LATE ANTIQUITY TO THE RENAISSANCE 58-59 (1988).

23. *See* Bouillon-Jensen, *supra* note 22, at 1201. Jews believed that human life was sacred from the moment of birth. *See id.*; *see also* IAN BROCKINGTON, MOTHERHOOD AND MENTAL HEALTH 430-31 (1996).

24. *See id.* Constantine, the first Christian emperor, issued the first secular law concerning the killing of children. *See id.*; *see also* R. Kumar & Maureen Marks, *Infanticide and the Law of England and Wales*, *in* POSTPARTUM PSYCHIATRIC ILLNESS, A PICTURE PUZZLE 258 (James A. Hamilton & Patricia N. Harberger eds., 1992). For a further historical background, see *id.* at 257-72.

25. *See* Bouillon-Jansen, *supra* note 22, at 1202.

26. *See* Catherine Damme, *Infanticide: The Worth of an Infant Under Law*, 22 MEDICAL HISTORY 1-24 (1978). Unmarried mothers found guilty of infanticide, on the other hand, were accused of being witches and punished severely. *See* Bouillon-Jensen, *supra* note 22, at 1202.

27. Bouillon-Jensen, *supra* note 22, at 1202.

28. *See id.* at 1203.

29. *See* HOFFER & HULL, *supra* note 11, at 146.

30. *See id.*

31. *See id.* at 145. This motive, however, cannot be the sole reason because 95% of illegitimate children were not killed and older, legitimate children sometimes were. *See id.*

32. *See id.* at 146. Courts also asked pardons for lunatics and others incompetent since birth. *See id.*

33. *Id.* In 1668, a woman fell into a temporary frenzy, killed her infant, and later confessed. Her marital state and honest reputation led the jury to accept her claim of temporary insanity. *See id.* at 146-47.

34. *See* Bouillon-Jensen, *supra* note 22, at 1204.

linen" defense almost guaranteed acquittal based on the presumption that if a woman had made linen for her baby before the baby's birth, she lacked the intent to kill.[35] The "want of help" plea was more vague, using falls, accidents, unheeded cries for help, and illness to effectively sway jurors.[36] Thus, the use of defenses by accused infanticidal mothers is not a new development.

C. ENGLAND'S INFANTICIDE ACT

England is the forerunner among countries that statutorily recognize and favor mothers who kill their young children for psychological reasons. The popular belief among the English that a woman capable of killing her baby necessarily suffered from a medical disorder was codified in England's Infanticide Act of 1922.[37] The Act of 1922 was too ambiguous, however, necessitating a new or amended law.[38] The Infanticide Act of 1938 resolved these ambiguities, stating:

> Where a woman by any wilful act or omission causes the death of her child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, she is by statute guilty of the offence of infanticide even though but for the statute the offence would have been murder. The punishment is as if the woman had been guilty of manslaughter of the child.[39]

This Act continues to be the law in England today.[40] England's Infanticide Act presumes that all women are ill if they kill their infants within the first twelve months of life.[41]

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35. *See id.*

36. *See id.*

37. *See* Infanticide Act of 1922, 12 & 13 Geo. 5, ch. 18, § 1(1). The Act stated:

> Where any woman by any willful act or omission caused the death of her newborn child, but at the time of the act or omission she had not fully recovered from the effect of giving birth to such child, and by reason thereof the balance of her mind was disturbed, she shall, notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder, be guilty of a 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 that child.

Id.

38. The Infanticide Act of 1922 failed to define "newly-born" child; therefore, there was no stipulated limit. *See* Kumar & Marks, *supra* note 24, at 262.

39. Infanticide Act of 1938, 1 & 2 Geo. 6, ch. 36, § 1(1).

40. *See* Gary Slapper, *Mothers and Madness; Law*, THE TIMES OF LONDON, Mar. 19, 1996, *available in* 1996 WL 6482063. *See generally* Daniel Maier Katkin & Robbin Ogle, *A Rationale for Infanticide Laws*, 1993 CRIM. L. REV. 903. For additional discussion of British history on treatment of infanticide cases, see Michelle Oberman, *Mothers Who Kill: Coming to Terms with Modern American Infanticide*, 34 AM. CRIM. L. REV. 1, 7-18 (1996).

41. "The infanticide law assures a link between childbirth and lactation . . . and disturbance and balance of mind, but it does not require proof of any physiological basis for either the offence or for the occurrence of illness." Kumar & Marks, *supra* note 24, at 269.

D. Infanticide's Development in American Law

American courts historically were very harsh in their treatment of infanticide. The Puritans considered it a greater sin to destroy illegitimate children than to birth them.[42] By 1692, Massachusetts mandated death for any woman who murdered an illegitimate child.[43] Many women lost their lives as a consequence of this law presuming guilt, while other criminals, guilty of more defined crimes, escaped death.[44] "Now that birth control is more or less routine, infanticide seems an unrelated and horrifying event; but to colonial women, who had no alternative and whose offspring were very likely to die in infancy anyway, infanticide might be a desperate kind of birth control after the fact."[45]

Unlike England, infanticide in America generally is not considered a separate class of crime. Infanticidal mothers, therefore, usually are charged under murder or manslaughter statutes. Because American mothers in most jurisdictions lack a presumption of mental illness, evidence of mental illness must be asserted and proven in order to escape or mitigate harsh sentences. By using only general homicide statutes, one leading commentator has observed that "[A]merican society lacks a conscious awareness of infanticide as a domestic problem."[46]

III. THE ROLE OF INSANITY AS A DEFENSE

A. Insanity Tests in America

In the United States, courts have historically utilized one of the following tests to determine insanity: the M'Naghten Test; the "irresistible impulse" test; the American Law Institute's (ALI) Model Penal Code test; or other tests such as the "product" or Durham test, and the federal statutory definition test.[47]

First, many courts continue to adhere to the M'Naghten rule for insanity. The rule determines whether defendants knew and understood the nature and quality of their acts, and if they did know, whether they knew that what they were doing was wrong.[48] The rule has consistently

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42. *See* Ann Jones, Women Who Kill 44 (1980).

43. *See id.* at 45. Under this law, any woman who concealed the death of her illegitimate child, whether born alive or not, was to suffer death unless one witness could prove it was born dead. *See id.*

44. *See id.* at 49-50. Moreover, the Puritans believed: "Murder an unbaptized infant . . . and you murder its soul, for the unbaptized have no place in heaven." *Id.* at 50.

45. *Id.* at 51.

46. Oberman, *supra* note 40, at 20.

47. *See* Joshua Dressler, Understanding Criminal Law 316 (2d ed. 1995). A few jurisdictions do not provide a general insanity defense. *See, e.g.*, Idaho Code § 18-207 (1996); Mont. Code Ann. § 46-14-102 (1996); N.D. Cent. Code § 12.1-04.1-0 (1985); Utah Code Ann. § 76-2-305 (Supp. 1990).

48. *See* M'Naghten's Case, 10 Cl. & Fin. 200, 210, 8 Eng. Rep. 718, 722 (H.L. 1843) (Full Reprint).

> That to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such defect of reason, from disease of the mind, as not to

faced criticism because it fails to define "know," fails to recognize degrees of incapacity, relies heavily on expert testimony, and is generally viewed as outdated.[49] A final criticism, vigorously argued for mothers suffering from postpartum depression, is that the test is too narrow to accommodate undeterrable homicidal mothers to whom punishment would be inappropriate.[50]

The M'Naghten test has sometimes been used, albeit unsuccessfully, to decide insanity claims of mothers accused of murdering their infants. For instance, it was used to analyze the insanity claim of Heather Clark, who wrapped her baby in a blanket and abandoned it in the desert.[51] At Clark's trial for attempted murder, two psychiatrists and one psychologist testified that Clark suffered from severe postpartum depression, rendering her legally insane at the time of the crime.[52] The jury weighed the evidence and determined that, under the M'Naghten test, Clark knew the nature and quality of her acts and had the capacity to determine right from wrong when she committed the crime.[53]

Another example of an infanticidal mother being adjudged guilty under the M'Naghten test is found in the case of *Commonwealth v. Reilly*.[54] In this case, the defendant-mother refused to admit that she was pregnant because she feared eviction from the house where she was staying.[55] After giving birth alone, Reilly killed her baby by inflicting blows to its head and body.[56] Two mental health experts testified that she "did not know the nature and quality of her act," did not know her acts were wrong, and had suffered a brief reactive psychosis.[57] Although this testimony suggested insanity under M'Naghten, further testimony indicated that the psychosis developed after the birth and that Reilly was "in touch with reality" at the time of the killing.[58] Reilly was found guilty of third degree murder and sentenced to a prison term of not less than thirty-six months but no more than ten years.[59]

A second test for determining insanity, known as the "irresistible impulse" test, broadened M'Naghten by adding a third prong requiring volitional capacity.[60] Basically, the "rule requires a verdict of not guilty by

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know the nature and quality of the act he was doing; or, if he did know it, that he did not know what he was doing was wrong.

Id.

49. *See* DRESSLER, *supra* note 47, at 320-21.

50. *See id.* at 321.

51. *See* Clark v. State, 588 P.2d 1027 (Nev. 1979).

52. *See id.* at 1028. Cross-examination revealed that Clark had only been examined by the psychologist after the attempted murder; the psychiatrists examined her over a year later. *See id.*

53. *See id.* There was substantial evidence to support the jury's conclusion. *See id.*

54. 549 A.2d 503 (Pa. 1988).

55. *See id.* at 504.

56. *See id.*

57. *Id.* at 505.

58. *Id.*

59. *See id.*

60. *See* DRESSLER, *supra* note 47, at 321. Professor Dressler states the test thus:

reason of insanity if it is found that the defendant had a mental disease [that] kept [her] from controlling [her] conduct."[61] Although popular at its inception, the "irresistible impulse" test faces many of the same criticisms as M'Naghten.[62] Perhaps due to this criticism, the "irresistible impulse" test was never followed by a majority of states.[63]

The American Law Institute Test (Model Penal Code Test) is a revised version of the M'Naghten test and the "irresistible impulse" test. The ALI test states that a person who has a mental defect or disease at the time of the offense is not responsible for the offense if she lacked substantial capacity to: (1) "appreciate the criminality . . . of [her] conduct;" or (2) "to conform [her] conduct to the requirements of law."[64]

The Product (Durham) Test is another test used, in part, to determine insanity.[65] This test excuses a defendant's conduct by reason of insanity if her unlawful act was the product of a mental disease or defect.[66] The Product Test is premised on the New Hampshire case of *State v. Pike*.[67] No state adheres to the Product Test today, but it continues to have an impact on the insanity debate.

In 1984, the United States Congress enacted a statutory definition of insanity known as the "federal" test for insanity. This federal law excuses a defendant if, "at the time of the commission of the acts constituting the offense, . . . as a result of a severe mental disease or defect, [she] was unable to appreciate the nature and quality or the wrongfulness of [her] acts."[68] The defendant must prove her incapacity by clear and convincing evidence.[69]

> [A] person is insane if, at the time of the offense: (1) she acted from an irresistible and uncontrollable impulse; (2) she lost the *power to choose* between the right and wrong, and to avoid the act in question, as that [her] free agency was at the time destroyed; or (3) the [defendant's] will . . . has been otherwise than voluntarily so completely destroyed that [her] actions are not subject to it, but are beyond [her] control.

Id. (citations omitted).

61. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 320 (2d ed. 1986).

62. For a discussion of the criticisms, see generally DRESSLER, *supra* note 47, at 321-22; *see also* LAFAVE & SCOTT, *supra* note 61, at 321-22.

63. *See* LAFAVE & SCOTT, *supra* note 61, at 320 n.95.

64. MODEL PENAL CODE § 4.01(1) (1995). The rule not only expresses a broader construction of M'Naghten by substituting the word "appreciate" for "know," but the rule also uses the word "conform" to avoid any implication of irresistible impulse. *See* JOHN KAPLAN & ROBERT WEISBERG, CRIMINAL LAW 901 (2d ed. 1991).

65. The D.C. Circuit created the Durham Test, but it is no longer used in that court. *See* Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), *overruled by* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972).

66. *See* DRESSLER, *supra* note 47, at 323.

67. 49 N.H. 339 (1869); *see* LAFAVE & SCOTT, *supra* note 61, at 323-24. Although it never officially adopted the Product Test, New Hampshire continues to adhere to the idea that even if a defendant is found guilty, the unlawful act may not have resulted from that mental illness; therefore, the defendant is criminally responsible for the act. *See* State v. Abbott, 503 A.2d 791, 794 (N.H. 1985).

68. 18 U.S.C. § 17(a) (1994).

69. *See* 18 U.S.C. § 17(b) (1994).

B. A Finding of Guilty But Mentally Ill

Twelve states have adopted a guilty but mentally ill (GBMI) verdict as an alternative to the insanity defense.[70] A GBMI verdict ensures that the defendant receives the penal sentence that would be imposed if she were found guilty; however, psychiatric care is usually given after sentencing.[71] If a defendant is cured during the term of her sentence, the prison sentence must be completed.[72] Since women with postpartum psychosis are not a danger to society outside the period of the illness, a GBMI verdict might constitute an appropriate remedy. Case law, however, shows that courts usually reject the assertion of GBMI pleas in cases involving infanticidal mothers.

A plea of GBMI led to harsh results for Sharon Comitz, who threw her baby into a stream, causing him to die of exposure or suffocation.[73] Comitz was sentenced to eight to twenty years in prison because the trial court found that she was not "severely mentally disabled,"[74] despite evidence that she suffered from a history of postpartum depression. The irony is that the GBMI verdict was designed to help defendants in Comitz's position; but here, her punishment was equally, if not more, harsh.

Another example of an unsuccessful attempt at a GBMI verdict is the recent case against Laura Gambill, an Indiana mother convicted of drowning her five-year-old son.[75] In this case, the Indiana Supreme Court upheld a jury verdict that Gambill appreciated the wrongfulness of the crime, despite contrary evidence from four expert witnesses.[76] The Indiana Supreme Court also upheld the state constitutionality of the GBMI verdict, stating: "[t]he 'guilty but mentally ill' verdict serves the state's interest in securing convictions justly obtained and in obtaining treatment for those convicted defendants who suffer mental illness."[77] To

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70. *See* Alaska Stat. §§ 12.47.030-12.47.050 (Michie 1986); Del. Code Ann. tit. 11, § 401(b) (1996); Ga. Code Ann. § 17-7-131(b)(1)(D) & (2) (1992); Ill. Rev. Stat. ch. 720, 516-2(c) (1993); Ind. Code Ann. §§ 35-36-2-3(4), 35-36-2-5 (West 1986); Md. Code Ann., Health-Gen. I § 12-110 (1994); Mich. Comp. Laws Ann. § 768.36 (1997); Miss. Code Ann. § 99-13-9 (1972); N.M. Stat. Ann. § 31-9-3 (Michie 1978); Pa. Stat. Ann. tit. 18, § 314 (West 1983); S.C. Code Ann. § 17-24-20 (Law Co-op. 1989); S.D. Codified Laws § 23-A-7-2, 23-A-7-16 (Michie 1985); *see also* Debra T. Landis, Annotation, *"Guilty But Mentally Ill" Statutes: Validity and Construction*, 71 A.L.R. 4th 702, 702-797 (1990); Kurt M. Bumby, *Reviewing the Guilty but Mentally Ill Alternative: A Case of the Blind "Pleading" the Blind*, 21 J. Psychiatry & L. 191 (1993).

71. *See* Dressler, *supra* note 47, at 332. Criticisms of the GBMI alternative include that it is difficult for a jury to differentiate between mental illness and insanity; it is unnecessary; it fails to ensure that the defendant will receive psychiatric care; and it may lead juries to compromise by giving GBMI verdicts when not guilty by reason of insanity verdicts are appropriate. *See id.* at 332-33.

72. *See id.*

73. *See* Commonwealth v. Comitz, 530 A.2d 473, 474 (Pa. Super. Ct. 1987).

74. *Id.*

75. *See* Gambill v. State, 675 N.E.2d 668 (Ind. 1996); see *id.* at 670-72 for a factual account of the crime and an account of Gambill's mental condition.

76. *See id.* at 672.

77. *Id.* at 677 (quoting Taylor v. State, 440 N.E.2d 1109, 1112 (Ind. 1982)).

Gambill, facing a forty-year prison sentence for the conviction, the GBMI alternative was perhaps no alternative.

C. Diminished Capacity as a Partial Defense

In addition to the GBMI verdict, diminished capacity[78] is an alternate plea to insanity, in which a defendant's abnormal mental condition may mitigate or eliminate culpability.[79] In other words, an abnormal mental condition may negate an element of a charged offense, even though the condition will constitute a successful insanity defense.[80] It is important to note the difference between insanity and diminished capacity. An insanity finding usually results in commitment of the defendant.[81] A finding of diminished capacity may result in a not guilty verdict for the charged offense, though a conviction of some lesser offense is possible.[82] One version of diminished capacity, the mens rea form, negates an element of the crime.[83] Another version is the true defense theory, which mitigates murder to manslaughter.[84] The diminished capacity defense automatically mitigates a criminal homicide to manslaughter, but it is only recognized in a few states and only applies to murder charges.[85] Because a diminished capacity defense, in either form, may negate an element of the infanticidal mother's crime or spare her from life in prison, assertion of the defense may emerge more frequently in future cases.

The groundwork for using the diminished capacity defense may lie in the Model Penal Code, which provides that a homicide that would otherwise be murder is manslaughter if it is committed as a result of "extreme mental or emotional disturbance for which there is no reasonable explanation or excuse."[86] The extreme mental or emotional distress (EMED) provision has two purposes: "(1) it codifies in expanded form the common law 'sudden heat of passion' doctrine; and (2) it permits, but does not require, courts in states that adopt the EMED language to recognize a partial responsibility defense."[87] Thus, it is difficult to apply the EMED provision in the context of diminished capacity. It is also unclear how many states incorporate such a provision.[88] Despite the difficulties, EMED and diminished capacity should not be discounted as possible so-

78. The doctrine of diminished capacity is also referred to as diminished responsibility, partial responsibility, and partial insanity. *See* LaFave & Scott, *supra* note 61, at 368.

79. *See* Dressler, *supra* note 47, at 335.

80. *See id.*; *see also* LaFave & Scott, *supra* note 61, at 368.

81. *See* LaFave & Scott, *supra* note 61, at 369.

82. *See id.*

83. *See* Dressler, *supra* note 47, at 335.

84. *See id.*

85. *See id.*

86. Model Penal Code § 210.3(1)(b) (1995).

87. Dressler, *supra* note 47, at 342.

88. *See id.* At least two states, Oregon and Hawaii, clearly recognize the EMED provision. *See id.*; *see also* State v. Counts, 816 P.2d 1157 (Or. 1991); State v. Dumlao, 715 P.2d 822 (Haw. Ct. App. 1986).

lutions for dealing with infanticidal mothers.[89]

D. Postpartum Psychosis as a Defense

1. Postpartum Disorders Defined

Postpartum depression can be divided into three classes. First, postpartum depression, also known as the "baby blues," is a mild depression and anxiety condition. In fact, more than two-thirds of all mothers have the "baby blues," which start about four to five days after childbirth[90] and last no more than two weeks.[91] The "baby blues" are caused by hormonal changes and psychological factors such as an overwhelming sense of responsibility or an anticlimax after giving birth.[92] A woman suffering from the "baby blues" may feel misery, mental confusion, crying spells, and irritability.[93] The "baby blues" cures itself within two to three days.[94]

Second, severe postpartum depression occurs in ten to fifteen percent of women and persists for weeks.[95] Symptoms include tiredness, difficulty sleeping, appetite loss, anxiousness, and restlessness.[96] This type of postpartum depression is more likely to develop in women with strained relationships, personality disorders, or financial problems; it may also develop in first-time mothers, single parent mothers, or sufferers of anxiety or depression.[97] This problem also cures itself or can be cured by antidepressant drugs.[98]

Finally, postpartum psychosis, the rarest and most extreme form of postpartum depression, can have deadly consequences. Only one in one thousand new mothers suffering from postpartum depression develop this psychosis.[99] For every twenty women suffering from postpartum psychosis, one will try to kill herself or her children.[100] Serious symptoms of the psychosis include confusion, agitation, sleep deprivation, hallucinations, delusions, and bizarre behavior.[101] "Since psychosis tends to run in families, its appearance after childbirth probably results from the triggering of

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89. For the criticisms surrounding the utilization of the EMED provision, see Dressler, *supra* note 47, at 342-45. For commentary advocating the use of the EMED partial defense with homicidal mothers, see Ford, *supra* note 10, at 531-33, 540-48.

90. *See* American Medical Association, Encyclopedia of Medicine 810 (Charles B. Clayman ed., 1989) [hereinafter Encyclopedia of Medicine].

91. *See Postpartum Disorders: The Harvard Mental Health Letter*, Sept. 1, 1997, *available in* 1997 WL 9498015 [hereinafter *Harvard Letter*].

92. *See* Encyclopedia of Medicine, *supra* note 90, at 810.

93. *See id.*

94. *See id.*

95. *See id.*

96. *See id.*; *see also Harvard Letter*, *supra* note 91.

97. *See* Encyclopedia of Medicine, *supra* note 90, at 810-11.

98. *See id.* at 811.

99. *See generally* Daniel Maier Katkin, *Postpartum Psychosis, Infanticide, and Criminal Justice*, *in* Postpartum Psychiatric Illness, A Picture Puzzle (James A. Hamilton & Patricia N. Harberger eds., 1992).

100. *See id.*

101. *See* Ronald Sullivan, *Jury, Citing Mother's Condition, Absolves Her in Two Babies' Death*, N.Y. Times, Oct. 1, 1988, at 29, col. 2.

latent emotional conflicts by the stress of the birth."[102]

Other postpartum disorders exist. For example, postpartum panic disorder describes discrete periods of severe anxiety and panic attacks during the period following birth.[103] Symptoms include panic attacks, dependence on others, depression, and obsessional ideas.[104] This unusually mild disorder is normally dealt with by the family, rather than with professional help.[105] In fact, "[w]ith correct diagnosis and sensible handling the prognosis is excellent."[106] Another disorder is postpartum obsessive compulsive behavior.[107] First documented in 1993, signs include: obsessive thoughts of harming the baby, depression, fear of being left alone with the baby, and extreme overprotectiveness of the baby.[108] A third disorder is Munchausen's syndrome by proxy, a rare psychological disorder in which a mother is driven to harm her child to gain personal attention and sympathy.[109] Experts estimate that there are only 250 confirmed cases of Munchausen's syndrome by proxy worldwide.[110]

2. *Recognition of Postpartum Disorders by the American Psychiatric Association*

In 1994, for the first time in history, the American Psychiatric Association recognized postpartum onset specified as a mental condition.[111] Although given less than a page and one half of coverage in *Diagnostic and Statistical Mental Disorders* (*DSM IV*), the disorder is tied to other disorders, including Major Depressive, Manic, or Mixed Episode of Major Depressive Disorder, Bipolar I or II Disorder, and Brief Psychotic Disorder.[112] This condition is only recognized if onset is within four weeks after delivery of a child.[113] The *DSM IV* specifically ties infanticide to postpartum onset specified, stating "[i]nfanticide is most often as-

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102. ENCYCLOPEDIA OF MEDICINE, *supra* note 90, at 811.

103. *See* James A. Hamilton et al., *The Problem of Terminology*, *in* POSTPARTUM PSYCHIATRIC ILLNESS, A PICTURE PUZZLE (James A. Hamilton & Patricia N. Harberger eds., 1992); *see also* A. Metz et al., *Postpartum Panic Disorder*, 49 J. CLIN. PSYCHIATRY 278-79 (1988).

104. *See* BROCKINGTON, *supra* note 23, at 158. The disorder is often found in first time mothers, but it is not limited to them. *See id.*

105. *See id.* at 159.

106. *Id.*

107. *See* Sara Kirschenbaum & Patricia Webb, *More than Blue*, MOTHERING, Mar. 22, 1995, at 72.

108. *See id.*; *see also A Question of Health, The Test No Woman Can Afford to Miss*, BOSTON HERALD, June 18, 1993, at 40.

109. *See* William Miller, *Woman Pleads Guilty to Killing Her Infant Son Experts Say Disorder Drove Her to Harm Children*, SPOKESMAN REVIEW, Feb. 18, 1995, at A1. Stephanie Pasicznyk, a Spokane mother who pleaded guilty to second degree murder of her infant, had previously taken her infants to the hospital countless times. *See id.* Experts believe that Pasicznyk used her children to gain attention for herself; therefore, she suffered from Munchausen's syndrome by proxy. *See id.*

110. *See id.*

111. *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 386 (4th ed. 1994) [hereinafter DSM IV].

112. *See id.*

113. *See id.*

sociated with postpartum psychotic episodes that are characterized by command hallucinations to kill the infant or delusions that the infant is possessed, but it can also occur in severe postpartum mood episodes without such specific delusions or hallucinations."[114]

Recognition of a disorder by the American Psychiatric Association and acceptance by the medical community is often crucial to the acceptance of a new defense by courts. For example, a New York appellate court recently upheld a trial court's refusal to allow expert testimony that the defendant suffered from neonaticide syndrome in *People v. Wernick*.[115] The *Wernick* court reasoned that the defendant failed to establish that neonaticide syndrome is generally accepted in the field of psychiatry and that it would assist the jury in rendering a verdict.[116] The *Wernick* court noted that defense counsel not only failed to request a hearing to determine whether neonaticide is generally accepted in the scientific community, but also opposed such a hearing when the issue was raised by the People.[117] Thus, a proper hearing on the issue of neonaticidal syndrome could have led the court to a different conclusion, had the syndrome been recognized in the *DSM IV*.

3. *Postpartum Psychosis as a Defense*

Numerous commentators have argued both for and against the recognition of postpartum psychosis as a separate defense to infanticide.[118] Such a defense, however, is not novel. As early as the 1950s, courts accepted evidence of postpartum psychosis to support an insanity defense.[119] In *People v. Skeoch*, the Supreme Court of Illinois overturned a defendant's conviction of murdering her baby because of the prosecution's failure to prove her sanity beyond a reasonable doubt.[120] In *Skeoch*, expert evi-

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114. *Id.*

115. 632 N.Y.S.2d 839 (N.Y. App. Div. 1995). The court did, however, allow testimony regarding defendant's claim of insanity. *See id.* at 840.

116. *See id.* at 841.

117. *See Wernick*, 632 N.Y.S.2d at 841.

118. *See* Anne Damante Brusca, Note, *Postpartum Psychosis: A Way Out for Murderous Moms?*, 18 HOFSTRA L. REV. 1133, 1168-70 (1990); Lori A. Button, Comment, *Postpartum Psychosis: The Birth of a New Defense?*, 6 COOLEY L. REV. 323 (1989); Debora K. Dimino, Comment, *Postpartum Depression: A Defense for Mothers Who Kill Their Infants*, 30 SANTA CLARA L. REV. 231, 265-60, 264 (1990); Christine Ann Gardner, Note, *Postpartum Depression Defense: Are Mothers Getting Away With Murder?*, 24 NEW ENG. L. REV. 953, 988-89 (1990); Jennifer L. Grossman, Note, *Postpartum Psychosis—A Defense to Criminal Responsibility or Just Another Gimmick?*, 67 U. DET. L. REV. 311, 343-44 (1990); Amy L. Nelson, Comment, *Postpartum Psychosis: A New Defense?*, 95 DICK. L. REV. 625, 649-50 (1991); Laura E. Reece, Comment, *Mothers Who Kill: Postpartum Disorders and Criminal Infanticide*, 38 UCLA L. REV. 699, 754-57 (1991); Barbara E. Rosenberg, Comment, *Postpartum Psychosis as a Defense to Infant Murder*, 5 TOURO L. REV. 287, 303-07 (1989).

119. *See, e.g.*, State v. Holden, 365 S.E.2d 626, 628 (N.C. 1988); Commonwealth v. Comitz, 530 A.2d 473, 474-75 (Pa. Super. Ct. 1987); Clark v. Nevada, 588 P.2d 1027, 1029 (Nev. 1979); State v. White, 456 P.2d 797, 798-99 (Idaho 1969); People v. Skeoch, 96 N.E.2d 473 (Ill. 1951). None of these cases, however, questioned the validity of the postpartum psychosis condition itself.

120. *See Skeoch*, 96 N.E.2d at 475-76.

dence regarding Skeoch's suffering of postpartum psychosis was used to rebut her confession of guilt.[121] Specifically, a qualified doctor testified that Skeoch suffered from postpartum psychosis at the time of the offense, but that she was normal at trial.[122]

Postpartum psychosis publicly came to light in the 1988 California case of Sheryl Massip. Massip allegedly attempted to kill her infant before finally running over him with her car.[123] After a two month trial, Massip's jury deliberated six and one half days before finding her guilty of second degree murder.[124] Notwithstanding the jury's verdict, the trial judge found that Massip suffered from postpartum psychosis at the time of the killing, that her condition met the legal test of insanity, and that she was therefore not guilty.[125]

Postpartum psychosis was also successfully asserted in the case of Ann Green, a pediatric nurse accused of killing two of her newborn babies and attempting to kill a third.[126] Green testified that "she had seen hands she did not recognize holding pillows over the newborns' faces."[127] The New York trial court found Green not guilty by reason of insanity and committed her to a state mental hospital for psychiatric evaluations as an outpatient.[128] Other cases, such as that of Michele Remington,[129] have yielded similar results. The cases of Massip and Green exemplify the success of postpartum psychosis as a defense. Nevertheless, the defense itself is often unwelcomed by the trier of fact. Defense attorneys arguing postpartum psychosis, therefore, face the difficult task of proving that a defendant, sane at trial, suffered an uncontrollable condition for a short time following childbirth.

IV. DISPARATE SENTENCING IN INFANTICIDE CASES

A. THE "SLAP ON THE WRIST" CASES

Due to a lack of evidence or inability to prove the mother's state of mind, some prosecutors decline to bring charges against a mother who kills her child. Furthermore, judges are known to provide leniency to

121. *See id.* at 475.
122. *See id.*
123. *See* People v. Massip, 271 Cal. Rptr. 868, 869 (Cal. Ct. App. 1990), *review granted and opinion superseded by* 798 P.2d 1212 (Cal. Ct. App. 1990); Reece, *supra* note 118, at 699-700 and accompanying notes; Debra Cassens Moss, *Postpartum Psychosis Defense*, A.B.A. J., Aug. 1, 1988, at 22 (on the day Massip ran over her infant with her car, she heard voices telling her that her son was the devil).
124. *See Massip*, 271 Cal. Rptr. at 869.
125. *See id.*
126. *See* People v. Green, No. 1273-86 (N.Y. Sup. Ct. Sept. 30, 1988); Sullivan, *supra* note 101, at 29.
127. *Greene*, No. 1273-86; *see* Sullivan, *supra* note 10, at 1A. *See also* Gail Diane Cox, *Postpartum Defense: No Sure Thing*, NAT'L L.J., Dec. 5, 1988, at 3; *The Dark Side of the "Baby Blues,"* N.Y. TIMES, Oct. 12, 1988, at C1, col. 1.
128. *See* Sullivan, *supra* note 101, at 29.
129. *See* State v. Remington, No. 587-4-87 BCR (Vt. Dist. Ct. Jan. 26, 1988) (finding defendant not guilty by reason of insanity because she suffered from postpartum psychosis, but pursued outpatient therapy).

mothers found guilty of killing their infants. For instance, Superior Court Judge George Mitchell infuriated District of Columbia prosecutors by sentencing Latrena Pixley, who admittedly smothered her baby, to serve 156 weekends in jail.[130]

Sometimes a homicidal mother escapes punishment because there is insufficient evidence that her baby was born alive. This was the case with Helen Lane, whose newborn baby was found in a garbage bag wrapped in a monogrammed towel.[131] Despite conclusive evidence that Lane told no one she was pregnant and placed the baby in the bag after delivery, her conviction was overturned because it could not conclusively be determined whether the baby was born alive.[132]

Other cases exist where homicidal mothers, who are no less guilty than other mothers who have been sentenced to life imprisonment, basically receive a slap on the wrist. For instance, Rebecca Guerra, a single mother who admitted to suffocating her son and was subsequently found guilty, was sentenced to one year in jail and four years probation.[133] Additionally, cases involving teen-age infanticidal mothers often yield light sentences.[134] Other cases have resulted in nonpunishment on appeal due to legal technicalities. For example, in *People v. Molina*,[135] a conviction was reversed because the jury was not instructed about voluntary and involuntary manslaughter. This finding occurred despite the fact that Molina admitted to stabbing her baby to death, was found guilty of second degree murder, and was sentenced to serve up to fifteen years in a mental hospital.[136] Likewise, in *Butler v. Mississippi*, the Mississippi Supreme Court reversed the conviction and subsequent death penalty

130. *See* Paul Duggan, *Leniency Runs Out for Woman Who Killed Baby, Violated Probation*, WASH. POST, May 17, 1996, at D1. Judge Mitchell originally sentenced Pixley to five to 15 years in prison, but suspended the sentence in reliance on arguments by defense counsel that she suffered from postpartum depression. *See id.* Pixley later violated parole by committing credit card fraud, appearing again in Judge Mitchell's court. *See id.* Judge Mitchell reinstituted the suspended sentence and sent Pixley to jail. *See id.*; *see also* Amy Koval, *Judge Orders Killer Mom Imprisoned*, WASH. TIMES, May 17, 1996, at C6. But in January 1997, Judge Mitchell suspended the remainder of Pixley's sentence, put her on five years probation, and ordered her to live in a halfway house for the next two years. The decision has been repeatedly criticized. *See, e.g.*, *No Justice for the Dead Baby*, WASH. TIMES, Feb. 1, 1997, at C9.

131. *See* Lane v. Commonwealth, 248 S.E.2d 781 (Va. 1978).

132. *See id.* at 784; *see also* State v. Doyle, 287 N.W.2d 59 (Neb. 1980) (noting dead human infant was found on premises of appellant, whom neighbors said looked pregnant up until the time in question, but evidence was inconclusive as to whether the child was born alive).

133. *See Mother Who Killed Infant Son Given One-Year Jail Sentence*, ARIZONA DAILY STAR, Nov. 28, 1995, at 2B.

134. *See, e.g.*, *infra* notes 163-65 and accompanying text; *but see infra* notes 166-86 and accompanying text (discussing the cases of teenagers Amy Grossberg and Rebecca Hopfer).

135. People v. Molina, 249 Cal. Rptr. 273, 277 (Cal. Ct. App. 1988).

136. *See id.*; *see also* People v. Lynch, 208 N.W.2d 656 (Mich. Ct. App. 1973) (overturning conviction of mother guilty of killing her child through malnutrition, and granting a new trial because the jury was not instructed that voluntary or involuntary manslaughter could be found).

sentence of Sabrina Butler because of a prosecution error during trial.[137]

B. Acceptance of Mitigating Circumstances to Obtain Lighter Sentencing

Mitigating circumstances may allow infanticidal mothers to receive lighter sentences. For example, in the case of Peggy Barsness, who left her infant unattended all weekend "with the full realization that that would result in her death,"[138] the jury returned two guilty verdicts for second degree intentional murder and second degree culpable negligence manslaughter.[139] The usual sentence for such a finding is 216 months in prison; however, Barsness's sentence was mitigated to 180 months.[140] The court cited two factors for the mitigation: (1) mental impairment; and (2) "major [postpartum] depression at the time of the offense."[141]

C. Harsh Sentencing Mandated by Law

1. Maximum Sentencing for Murder

When courts refuse to hear defenses and relevant mitigating factors, the results can be extreme. For instance, in *State v. Holden*, the Supreme Court of North Carolina upheld a conviction for the second degree murder of an infant by a seventeen year-old mother.[142] The trial judge heard evidence of the defendant's immaturity and limited mental capacity, but found that the aggregating factors outweighed the mitigating factors.[143] Though her defense factors were stronger than similarly situated mothers who often receive probation, Holden was sentenced to life imprisonment.[144]

Some states, such as Texas, are especially stringent in their treatment of murdering mothers. In 1985, nineteen year-old Leanne Marie Pitts smothered her eight day old son and waited four hours before calling the

137. *See* Butler v. Mississippi, 608 So. 2d 314 (Miss. 1992); *see also infra* notes 160-62 and accompanying text.

138. State v. Barsness, 473 N.W.2d 325, 326 (Minn. 1991).

139. *See id.* at 326-27. Barsness "did not claim mental illness as a defense . . . [but] did seek to introduce evidence of [postpartum] depression and [IQ] as bearing on the issue of intent." *Id.* at 326.

140. *See id.* at 327.

141. *Id.* Note, however, that the jury can mitigate sentences on its own. In People v. Wernick, 632 N.Y.S.2d 839 (N.Y. App. Div. 1995), a college student found guilty of killing her newborn baby in a college dormitory was acquitted by a jury of the more serious charges of first or second degree manslaughter, and instead was found guilty of criminally negligent homicide. *See* Pete Bowles, *6 Years Later, Off to Jail, Sent Away For Killing Baby*, Newsday, Dec. 3, 1996, at A16. Six years after the killing, Wernick is now serving a one-and-one-third to four-year prison term. *See id. See also supra* notes 115-17 and accompanying text (concerning the mental conditions defendant Wernick pleaded).

142. *See* State v. Holden, 365 S.E.2d 626, 631 (N.C. 1988).

143. *See id.* at 629. In fact, the defendant had the emotional maturity of a twelve or thirteen year-old, diminished intellectual capacity, a troubled family background, an IQ of 70, and pleaded guilty. *See id.* at 627-30. A clinical psychologist testified that the "defendant suffered from (1) abused spouse syndrome, (2) [postpartum] depression, (3) borderline intellectual functioning, and (4) mixed personality disorder. . . ." *See id.* at 628.

144. *See id.* at 629.

police.[145] Pitts "was later convicted of murder and sentenced to [sixty-three] years in prison."[146] In 1995, Marcie Moon, another Texas mother, was sentenced to life in prison for suffocating her newborn baby in hopes of a reconciliation with her husband.[147] A less publicized case, yet one with a similarly rigid outcome, is the case of Olga Torres, who shot and killed one son and attempted to kill another.[148] Torres's defense attorneys argued that their client was legally insane at the time of the killing.[149] The jury returned a verdict of guilty on one count of murder and one count of attempted murder.[150] Despite evidence of severe depression, Torres is serving a forty-five year prison sentence.[151]

2. *Recent Invocation of the Death Penalty in Infanticide Cases*

In February of 1997, in the highly publicized case of Darlie Routier,[152] a Texas mother adjudged guilty of stabbing her two sons to death in her home on June 6, 1996, while her husband slept, the court ordered the ultimate sentence—death by lethal injection.[153] Routier, who continues to maintain her innocence, claims that an intruder entered the house, fatally stabbed her two young boys, and then wounded her.[154] In deciding Routier's sentence of lethal injection, jurors unanimously decided that Routier posed a threat to society and that there was nothing in her background or the circumstances of the crime that warranted sparing her life.[155]

Routier was prosecuted under a relatively new Texas statute that makes it a capital offense to kill a child under the age of six.[156] In drafting the new law, the Texas Legislature "cite[d] the need for greater protection for children who were still in the home and too young to have

145. *See* T.J. Milling, *Science Seeks Roots of Infanticide*, HOUSTON CHRONICLE, Oct. 15, 1995, at 37.

146. *Id.*

147. *See id.*

148. *See* Liz Stevens, *When Mothers Kill: A Troubled South Texas Woman Who Shot Her Two Sons Grapples With the Aftermath of the Crime and Leaves Society Wondering "How Can This Happen?,"* FORT WORTH STAR-TELEGRAM, Nov. 17, 1996, at 1.

149. *See id.* Torres's attorneys admitted that they were taking a risk in pleading the insanity defense since only one percent of all insanity pleas are successful. *See id.* Furthermore, being adjudged not guilty by reason of insanity does not always allow the defendant to go free in Texas, as many of the "successful" defendants return to a maximum-security state facility. *See id.*

150. *See id.*

151. *See id.*

152. Like most high profile cases, Routier's face covered newspapers, magazines, and television screens. Furthermore, a gag order was imposed on those close to the case after the defendant was indicted by a grand jury. *See How the Case Against Darlie Routier Unfolded*, DALLAS MORNING NEWS, Feb. 2, 1997, at 32A.

153. *See* Steve Scott, *Routier Sentenced to Die*, DALLAS MORNING NEWS, Feb. 5, 1997, at 1A, 17A.

154. *See* Steve Scott, *Routier Convicted of Murdering Son*, DALLAS MORNING NEWS, Feb. 2, 1997, at 1A, 32A.

155. *See* Scott, *supra* note 153, at 17A.

156. *See* TEX. PENAL CODE ANN. § 19.03(a)(8) (Vernon 1998).

adult contacts who could help them."[157] Other states have taken a similar stance[158] and one state, New Jersey, has even broadened the scope of such a statute. Specifically, the New Jersey Legislature has invoked eligibility of the death penalty for any murderer convicted of killing a child under fourteen.[159]

Another infanticide case where the death penalty was invoked is that of Sabrina Butler, a Mississippi mother adjudged guilty of killing her child and sentenced to death by lethal injection.[160] Rather than the existence of a specific statute making it a capital offense to kill a child under a certain age, the conviction was premised on a Mississippi statute that makes the killing of a child "while engaged in the commission of felonious child abuse and/or battery of a child" a capital offense.[161] Although the Supreme Court of Mississippi reversed the verdict based on a prosecution error,[162] it evinces yet another manner in which infanticidal mothers can be sentenced to die for their crimes.

D. Lack of Juvenile Laws as Mitigation Tools for Teenage Homicidal Mothers

1. Reasons for and Treatment of Teenage Infanticide

The blame for most teenage infanticide cases stems from the fact that teenagers rarely feel secure enough to seek help from parents, doctors, teachers, or available social services. Thus, they often act out of desperation.[163] Infanticide cases exist in situations where the mothers are as young as fourteen. For instance, in 1987, a fourteen year-old found guilty of voluntary manslaughter was declared a ward of the court and sentenced to probation.[164] Teenage infanticide cases are scarcely reported and have historically resulted in the lightest of sentences.

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157. Michael Saul & Steve Scott, *Prosecutors Prepare to Offer Arguments for Death Penalty*, Dallas Morning News, Feb. 2, 1997, at 1A, 30A.

158. *See, e.g.*, Del Code Ann. tit. 11, § 4209(e)(1)(5) (1995).

159. N.J. Stat. Ann. § 11-3c(4)(k) (West Supp. 1997); *see also infra* notes 166-79 and accompanying text (discussing the Amy Grossberg case under New Jersey law).

160. *See* Butler v. State, 608 So. 2d 314, 315 (Miss. 1992) (reversing lower court conviction because of comments made by the prosecution on defendant's failure to testify).

161. Miss. Ann. Stat. § 97-3-19(2)(f) (West Supp. 1997).

162. *See Butler*, 608 So. 2d at 318-19. In closing arguments, the prosecutor indirectly commented on Butler's failure to testify, which clearly violated state and federal constitutional rights not to testify against oneself in a criminal case. *See* U.S. Const. amend. V; Miss. Const. art. 3, § 26.

163. *See* Ann Koenig, *How Did Two Teen Moms Miss the Safety Net?*, Lancaster New Era, July 11, 1993, at B1. Within three months in Lancaster, Pennsylvania, two teen mothers, ages sixteen and seventeen, were charged with murdering their newborn sons. The killings occurred despite the fact that Lancaster County had numerous programs for teenage parents. *See id.*

164. *See* People v. Sophia M., 234 Cal. Rptr. 698 (Cal. Ct. App. 1987). Specifically, Sophia was ordered to remain in her mother's home, attend school and therapy, and to complete 100 hours of community service. *See id.* During the crime, Sophia ripped her child's umbilical cord with her hands, put the live baby in a shoe box, and abandoned the box in a field near her school. *See id.* at 699. Sophia did not assert postpartum depression as a defense, rather, she relied on her immaturity. *See id.*

Today, however, leniency for teens is disappearing in many courts. Instead, teenage mothers are now receiving adult punishments for infanticide crimes.[165] A recent line of cases, starting with the case of Amy Grossberg, demonstrates the need for mitigation considerations with these mothers.

2. *Amy Grossberg: A Case Study*

A recent Delaware case has once again brought to light the problem of teenage pressures leading to infanticide. This case is unique in that it involved both a teenage mother and a teenage father. Amy Grossberg and Brian Peterson were high school sweethearts who had continued their relationship almost uninterrupted while at separate colleges in the Northeast.[166] Both were members of affluent families; they were talented, likable, successful, and happy kids.[167]

After hiding her pregnancy for nine months, Grossberg allegedly called Peterson at 12:45 a.m. on November 12, 1996, to tell him she might be in labor.[168] Peterson then allegedly drove from his college to pick up Grossberg and took her to a motel several hours later.[169] After Grossberg gave birth to a six pound, two-ounce baby boy, they checked out and Peterson drove Grossberg back to her dorm room without the infant.[170] They allegedly left the newborn baby in a hotel dumpster.[171] Grossberg passed out the following afternoon and was taken to a hospital where doctors discovered that she had given birth within the last twelve hours.[172] Police questioned Peterson and he revealed the location of the dead infant.[173]

An autopsy showed that the infant was born healthy, but died from multiple fractures and from having been shaken.[174] Grossberg and Peterson were charged with murder,[175] and both pleaded not guilty.[176] Defense theories will likely include that the scared, teenage parents accidentally crushed the baby's skull during delivery or that the baby was not born alive.[177] Prosecutors have stated that they will seek the death

165. *See* People v. Doss, 574 N.E.2d 806 (Ill. App. Ct. 1991) (affirming a first degree murder conviction of a fifteen year-old mother).

166. *See* Bill Hewitt et al., *Mortal Choices Accused of Killing Their Baby, Two Teens Face Terrible Questions and a Possible Death Penalty*, PEOPLE, Dec. 9, 1996, at 62.

167. *See* Elizabeth Gleick & Elaine Rivera, *Three Kids, One Death They Were Happy and Well-Off. Why Did Two Teens Dump Their Baby, Possibly After Crushing Its Skull?*, TIME MAGAZINE, Dec. 2, 1996, at 69.

168. *See* Marc Peyser, *Death in a Dumpster*, NEWSWEEK, Dec. 2, 1996, at 92.

169. *See id.*

170. *See id.*

171. *See id.*

172. *See* Gleick & Rivera, *supra* note 167, at 69.

173. *See* Hewitt et al., *supra* note 166, at 62.

174. *See id.*

175. *See* Gleick & Rivera, *supra* note 167, at 69.

176. *See* Rudy Larini, *Slaying of Infants Far From Unusual, Bergen Suspects Fit Much of Profile*, THE STAR-LEDGER (Newark, N.J.), Dec. 30, 1996, at 1.

177. *See* Peyser, *supra* note 168, at 92.

penalty for both parents.[178] Trial has been set for May 4, 1998.[179]

3. *Rebecca Hopfer: A Case Study*

The recent Ohio case of Rebecca Hopfer, a seventeen year-old adjudged guilty of killing her newborn baby after its birth, demonstrates the conflicting interests between punishing teenagers for the crime of murder and protecting that same teenager. Like many other neonaticide cases, Hopfer concealed her pregnancy. She gave birth while alone at home, wrapped the baby in a towel and placed it in a garbage bag, cleaned up the bathroom, and threw the baby in the trash.[180] Public debate surrounding the case focused on the irresponsible actions of today's teenagers. "Hopfer's pregnancy was seen alternately as the result of permissive sexual norms, parental failure to discipline, or inadequate sex education."[181] Hopfer was initially arraigned in the juvenile court.[182] The juvenile court transferred jurisdiction and Hopfer was tried as an adult.[183] Hopfer was adjudged guilty of murder and sentenced to fifteen years to life in prison.[184] Hopfer unsuccessfully pleaded sixteen points of error to the Ohio Court of Appeals, but her sentence was affirmed.[185] The Ohio Supreme Court refused to hear Hopfer's appeal.[186]

V. MODERN INFANTICIDAL PROBLEMS

A. Role of Socioeconomic Factors

Although no specific profile of an infanticidal mother exist, socioeconomic factors often contribute to the stress in the mother's life. In fact, "[r]ates of infant killing have shown a tendency to rise and fall depending on prevailing economic and social forces."[187] It appears that the American welfare system is not equipped to properly handle this burden. "Of the mothers who kill their children, over half have already come to the

178. *See* Hewitt et al., *supra* note 166, at 62. The death penalty is rarely used in cases involving teenagers, however, so it is likely that prosecutors are pursuing this option in hopes of striking a plea bargain. *See id.*

179. *See* Matthew Futterman, *Judge Delays Grossberg Trial Until May '98, New Attorneys in Baby-Killing Case Need Time*, Star-Ledger (Newark, N.J.), Sept. 4, 1997, at 24.

180. For a complete synopsis of the infant's death, see State v. Hopfer, 679 N.E.2d 321, 328-29 (Ohio Ct. App. 1996); *see also* Oberman, *supra* note 40, at 27-30.

181. Oberman, *supra* note 40, at 28. For other emotional arguments surrounding the case, see Kevin Lamb, *Trial Touched on Some Emotional Issues*, Dayton Daily News, June 23, 1995, at B1.

182. *See Hopfer*, 679 N.E.2d at 329.

183. *See id.* The juvenile court found that the safety of the community was at risk if Hopfer was not incarcerated beyond her twenty-first birthday and that the totality of surrounding circumstances supported a finding that Hopfer was not amenable to treatment. *See id.* at 330.

184. *See id.* at 329; Hopfer refused to plead guilty to a lesser charge that would have assured her a prison release after two years. *See* Rob Modic, *Hopfer Refused Offer*, Dayton Daily News, July 6, 1997, at 1B.

185. *See Hopfer*, 679 N.E.2d at 349.

186. Modic, *supra* note 184, at 1B.

187. Bouillon-Jensen, *supra* note 22, at 1205.

attention of the state welfare authorities."[188]

Another socioeconomic factor affecting diagnosis of infanticidal mothers involves insurance companies. In a modern society where insurance companies are pressuring doctors to send new mothers home expediently, new mothers with postpartum depression are perhaps escaping diagnosis. This undiagnosed depression can lead to psychosis and eventually infanticide. Fortunately, state legislatures across the country are approving measures requiring insurance companies to provide at least forty-eight hours of coverage for new mothers,[189] perhaps saving many infants' lives nationwide. But mothers who are committed to mental hospitals are sometimes released too early under pressure from the insurance companies. Consequently, infanticide can still occur despite treatment, and hospitals often escape liability.[190]

B. Misdiagnosis of Infant Murder with Sudden Infant Death Syndrome (SIDS)

An alarming fact in the tragedy of infanticide is that the crime often goes unnoticed because the deaths are frequently confused with sudden infant death syndrome (SIDS). SIDS is a mysterious illness that strikes babies without warning, causing them to stop breathing and die.[191] One problem with diagnosis is that doctors must rely on partial testimony from parents who describe their children as suffering "spells in which they suddenly [stop] breathing and [turn] blue."[192]

Based primarily on a 1972 report by Dr. Alfred Steinschneider, both the medical profession and the public came to accept the belief that apnea monitors prevent SIDS.[193] Dr. Steinschneider's paper sparked the belief that SIDS could run in families and that it was relatively common.[194] In fact, Steinschneider's 1972 report has provided ammunition for defense attorneys and has hampered prosecutors for the past twenty years.[195] Nobody knows how many cases of serial infanticide were over-

188. Eve Zibart, *The Medea Syndrome: Women Who Murder Their Young*, Cosmopolitan, Aug. 1, 1996, at 176.

189. *See* Julie Forster, *Moms' Wails Prevail; Nine States OK Laws Extending Maternity Stays*, West's Legal News, Apr. 18, 1996, at 2013.

190. *See* Littleton v. Good Samaritan Hosp., 529 N.E.2d 449 (Ohio 1988) (holding that the treating doctor and hospital were not liable for releasing mother, a patient in the mental ward, who later killed her infant).

191. *See* Encyclopedia of Medicine, *supra* note 90, at 952.

192. Charles B. Hickey et al., *SIDS Researcher Sidestepped Critics: Medical Records Don't Support Dr. Alfred Steinschneider's Claim That Waneta Hoyt's Babies Suffered Severe Breathing Problems in the Hospital*, Post-Standard (Syracuse N.Y.), May 6, 1996, at A1.

193. *See* Alfred Steinschneider, *Prolonged Apnea and the Sudden Infant Death Syndrome: Clinical Laboratory Observations*, 50 Pediatrics 646 (1972).

194. *See* Hickey et al., *supra* note 192.

195. *See* Todd Lighty et al., *Upstate Study of SIDS Hides Homicides, Research Suggesting SIDS Runs in Families Derailed the Investigation of Six Chicago Area Infant Homicides*, Post-Standard (Syracuse, NY), May 7, 1996, at A1.

looked during the nearly two decades Steinschneider's ideas were widely accepted.

Steinschneider's report, once heavily relied upon, has now been called into question throughout the medical profession.[196] Criticism first surfaced when the subjects of Dr. Steinschneider's report, five children in a single family who allegedly died of SIDS after they suddenly stopped breathing,[197] were actually found to have been murdered. The infanticidal mother in Dr. Steinschneiders's report, a New York woman named Waneta Hoyt, confessed to the killings twenty years after the last of the dead infants was laid to rest.[198] At the time of the deaths, no foul play was suspected and medical inquiries never focused on the possibility of homicide.[199] This significant oversight occurred despite nurses' concerns that the babies only suffered life threatening spells when at home with their mother.[200] After twenty years of freedom from suspicion, Hoyt was found guilty of five counts of murder and is currently serving seventy-five years to life in prison.[201]

Like Hoyt, Marybeth Tinning is a serial infanticidal mother who also avoided detection for years. Although suspected of killing seven of her eight children, Tinning has only been convicted of killing the last.[202] The fact that one of Tinning's children was adopted undermines the theory that the children somehow carried a "death gene" that predisposed them to SIDS.[203] Doctors and others were suspicious as to the causes of the children's deaths, but it was not until the ninth child died that Tinning was accused of infanticide.[204] A jury found Tinning guilty of depraved indifference murder. Tinning is now serving a prison sentence of twenty years to life.[205]

Unfortunately, the cases of Hoyt and Tinning are not isolated from

196. For instance, Dallas forensic pathologist Dr. Linda Norton has stated, "[a]s long as you have this bogus thing hanging out there where you've got medical literature showing that SIDS runs in some families, you get these prosecutors who don't even like to attempt to try them." *See id.*

197. *See* Steinschneider, *supra* note 193.

198. *See* Lighty et al., *supra* note 195, at A1.

199. *See* People v. Hoyt, 620 N.Y.S.2d 520, 521 (N.Y. App. Div. 1994). Each of Hoyt's children died as infants between 1965 and 1971, but it was not until 1992 that their deaths were treated as possible homicides and investigation began. *See id.* at 520 n.1.

200. *See* Lighty et al., *supra* note 195.

201. *See id.*

202. Elizabeth Rhodes, *Killing Her Own, The Case of Marybeth Tinning May Focus More Attention on a Taboo Subject: Infanticide*, SEATTLE TIMES, Apr. 25, 1989, at B1. Tinning's first child unquestionably died of meningitis. The other eight children died of more suspicious causes. Their official causes of death include the following: Joseph and Barbara, Reye's syndrome; Timothy and Mary Frances, SIDS; Nathan, acute pulmonary edema; Jonathan, cardiopulmonary arrest, cause unknown; Michael, viral pneumonia (later disputed because doctors said his condition was too mild to be fatal); and Tami Lynne, suffocation. *See id.*

203. *See id.*

204. *See id.*

205. *See* People v. Tinning, 536 N.Y.S.2d 193, 194 (N.Y. App. Div. 1988). At trial, Tinning's statement about the deaths of her last three children were admissible. She stated, "I smothered each with a pillow because I'm not a good mother." *Id.* at 195.

other cases of infanticide.[206] In 1994, a twenty-three year-old Houston woman confessed to killing three of her children, but only after she was charged with attempting to strangle the fourth.[207] It often is not until an infant can conclusively be said to have died of infanticide that the previous deaths of infants of the same mothers are investigated.[208] It must finally be noted that even an isolated infant homicide by one mother, who has other healthy children, can be misdiagnosed as SIDS. There is no requirement that the mother partake in serial infanticide. Most recently, Dr. Thomas Truman, a former research fellow at Massachusetts General Hospital, announced a finding of evidence in that hospital's records that dozens of cases of SIDS, involving dozens of mothers, may have actually been cases of infanticide.[209] Such research assuredly will spark further debate on SIDS and misdiagnosed homicides.

C. Cultural Effects on Infanticide

As noted earlier, various countries and cultures treat the killing of infants and children by their mothers differently. Some underdeveloped nations even condone the killing as a means of birth control or a parental choice to choose the healthiest, most promising offspring.[210] The United Nations estimates that hundreds of thousands of baby girls are disposed of every year in China.[211] In other countries, children under age one are

206. Like the Hoyt case, the deaths of five children in the family of Deborah Gedzius are detailed in medical literature. Dr. Eugene Diamond outlined how all five children had apnea, thus all died of SIDS between the ages of six weeks and two years. After the publication, a sixth child died at ten weeks. *See* Lighty et al., *supra* note 195, at A1. Ironically, neither the Chicago police nor the Cook County medical examiner took a closer look at the unusual series of child deaths until Gedzius's 33 year-old husband was found dead. *See id.* After reviewing records, Dr. Mary Jumbelic, assistant medical examiner in Chicago, concluded that all six children were homicide victims. *See id.* Still faced with Steinschneider's research and failure to obtain a confession, prosecutors closed the investigation. *See id.* The fuming uncle of the three murdered children called Steinschneider's 1972 paper a "license to kill." *See id.* For an interesting summary of historical serial infanticide cases, see Brockington, *supra* note 23, at 435-36.

207. *See Young Mother Admits Killing Three Infants*, San Antonio Express-News, Sept. 23, 1995, *available in* 1995 WL 9503183. Though the woman, Claudette Kibble was suspected in the deaths of the infants, nothing could be proven until her confession. *See id.*

208. *See* Virgil Tipton, *Area Has Instances of Mothers Killing Children*, St. Louis Post-Dispatch, Nov. 5, 1994, at 6A. It was not until Tammy Corbett's third child died of suffocation that authorities investigated the earlier deaths of two of her infants. Corbett is now serving a life sentence for the murders. *See id.* Paula Sims told authorities that her second infant had been abducted and killed in the same way as she said her first child had a year before. She later admitted to smothering both infants. Sims is serving life without parole after pleading guilty to both murders. She blamed the murders on postpartum depression. *See id.*

209. *See* Richard A. Knox, *Suspicions Surface in Cases Termed "Sudden Infant Death,"* Boston Globe, Sept. 9, 1997, at A1. Specifically, the report indicates that as many as 56 out of 156 cases of "near-miss" asphyxiation among infant patients at Massachusetts General Hospital may have involved parental abuse. *See id.*

210. *See* Hausfater & Hrdy, *supra* note 14, at 461.

211. *See* Zibart, *supra* note 188. Even today, evidence exists in China that family planning policies have resulted in a practice of killing female infants; census data indicates that as many as 600,000 female infants have been killed in one year. *See Where Have All The*

murdered at a rate four times the rest of the population.[212] Recently, two major cases demonstrating the cultural differences between England, the United States, and Japan surfaced.

First, the cultural differences in treatment of infanticide between England and the United States publicly came to light in the case of Carolyn Beale. Beale, a British woman on vacation in the United States, was accused of suffocating her newborn baby and trying to smuggle the baby past airport security in New York.[213] Asserting a psychological defense, Beale said she could not remember the thirty hours between the birth of the infant and her arrest.[214] After serving seventeen months in a U.S. prison, Beale returned to a hospital in England to undergo a year of treatment.[215] One striking point of this case is that if Beale had suffocated her child in England, rather than in the United States, she would have avoided prison time. "Instead, under Great Britain's Infanticide Act, she probably would have been hospitalized immediately for a comprehensive psychiatric examination, and then would have pleaded guilty to manslaughter and have been hospitalized for psychiatric treatment."[216] In the United Kingdom and other countries in Western Europe, murderous mothers, suffering from depression, are presumed ill.[217] No such presumption exists in the United States. In fact, a charge analogous to Beale's could even constitute second-degree murder, depending on the particular jurisdiction.[218]

Differences between the treatment of mothers in the U.S. and Japan also recently emerged with the Michigan case of Itsumi Koga. Koga, according to police, threw her newborn son in a pond near her apartment.[219] Koga stood trial in the United States for first degree murder.[220]

Little Girls Gone? In Rural China No One Knows, INTERNATIONAL HERALD TRIBUNE, June 18, 1991, at n.1, col. 2.

212. *See* Zibart, *supra* note 188. These countries are Great Britain, Japan, Germany, France, and the Scandinavian countries. *See id.*

213. *See* JoJo Moyes, *Mother May Not Face Murder Trial*, INDEPENDENT (London), May 19, 1995, at 6. Experts determined that Beale was suffering from existing clinical depression as well as postpartum depression at the time of the murder. *See id.*

214. *See id.*

215. *See* Beth Holland, *2 Lands, 2 Laws On Baby Murders/British Courts More Tolerant Than U.S.*, NEWSDAY, Mar. 10, 1996, at A34.

216. *Id.* (quoting Michael Dowd, Beale's Manhattan attorney).

217. *See id.* Under England's Infanticide Act, this presumption of illness makes manslaughter the top penalty for infanticide. Michael Dowd, a Manhattan attorney, said, "There hasn't been a custodial sentence in England in 50 years." *Id.* For example, in December 1996, a twenty-two year-old florist smothered her newborn and hid his body in a freezer for weeks. *See* Gale Scott, *Experts say 'Prom Mom' Type Cases Are not a New Occurrence*, STAR LEDGER (Newark, NJ), Sept. 21, 1997, at 48. The mother agreed to get psychiatric help and received a suspended sentence. *See id.*

218. *See* Holland, *supra* note 215 (quoting Dowd: "We're called the leader of the free world; we can't do this? I think the law in the United States doesn't take into consideration the realities that we understand now about psychiatric illnesses during pregnancy . . . I think in this case the UK [United Kingdom] is ahead of us.").

219. *See* Doug Durfee & Ron French, *Murder Trial Jars Local Japanese*, DETROIT NEWS, July 21, 1996, at B1.

220. *See* Ron French, *In Oakland County: Lawyers for Mother Reject Plea Offer*, DETROIT NEWS, July 31, 1996, at D3.

Koga's sentence included seven months in a state mental hospital and five years probation for involuntary manslaughter.[221] The Japanese community expressed outrage over the handling of the case. In Japan, Koga would not have stood trial or faced punishment; instead, she would have been ordered to stay at her parents' house to recover.[222] Moreover, the tragedy could have been altogether avoided if Koga had given birth in Japan. Under Japanese traditions, Koga's mother would have cared for her for a month following the birth.[223]

VI. EVALUATION OF POSSIBLE SOLUTIONS TO ASSIST SUFFERING, INFANTICIDAL MOTHERS

"There is something wrong with a system of justice [that] charges a mother suffering from [postpartum] depression . . . with the same degree of culpability in a homicide as a thug who mows down a store owner deliberately in a robbery."[224] It is unfair that a scared teenager can face the death penalty for neonaticide in one state for the same crime, but an adult may get just a slap on the wrist in another state. Of course, disparate outcomes are to be expected from different juries, but this Comment has noted judges, such as those in the Pixley and Massip cases, who have ignored the juries' findings.[225] Perhaps judges are making such drastic moves because the law provides few alternatives. These cases are rarely appealed, so precedent is lacking. Moreover, legislation on infanticide is virtually nonexistent.

A rational basis for the disparate treatment of homicidal mothers does not exist. The wide and disparate range of penalties for convicted homicidal mothers, however, could stem from the division in the psychiatric community about postpartum disorders and the emotional outrage when an infant is killed at the hands of its mother. Nevertheless, there is a likely pattern of treatment in factually similar cases. For example, the following are most likely to be found insane: women who claim to have heard voices; women who attempt suicide after committing murder; and serial infanticidal mothers.[226] To the contrary, women who fabricate misleading stories regarding the whereabouts of their babies bear a stranger likelihood of receiving long terms of incarceration.[227]

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221. *See Japanese Mother Sent to Mental Hospital For Killing Infant*, DEUTSCHE PRESSE-AGENTUR, Oct. 10, 1996.

222. *See* French, *supra* note 220.

223. *See* Laura Berman, *Translating a Tragedy: Interpreter Serves as a Bridge Between East and West in Infanticide Trial*, DETROIT NEWS, Sept. 2, 1996, at D1.

224. Pete Waldmeir, *Judge Criticizes System's Handling of Koga Case*, DETROIT NEWS, Aug. 4, 1996, at B1 (quoting United States District Judge Avern Cohn in publicly criticizing the prosecutor in the Itsumi Koga case for charging the mother with first-degree murder); *see supra* notes 219-223 and accompanying text discussing the Koga case.

225. *See supra* note 130 and accompanying text (discussing judicial actions in the Pixley case); *supra* note 125 and accompanying text (discussing judicial action in the Massip case).

226. *See* Maier Katkin, *supra* note 99, at 279.

227. *See id.*

According to Daniel Maier-Katkin, "[t]he challenge facing American jurisdictions is to establish a rationale for more humane treatment of a group of offenders whose emotional condition can be characterized as troubled, whose misbehavior borders on self-destructiveness, and for whom the traditional legal values of deterrence, retribution, and incapacitation are of questionable appropriateness."[228] State legislatures are undoubtedly hesitant to create laws that include postpartum psychosis as a separate defense when the medical profession is producing incomplete studies on the disorder. Recognition of postpartum psychosis in the *DSM-IV*, however, is a much needed first step toward legislation. Because such laws are in all likelihood years away, it is necessary to evaluate what is currently being done to provide adequate sentencing for these mothers and the rationales for those sentences.

A. Postpartum Psychosis Defense

The most positive aspect of a postpartum psychosis defense is that it offers a just legal option for a woman who truly suffered from the disorder at the time of the killing. Furthermore, a separate postpartum psychosis defense would promote uniformity in decisions and sentencing for mothers suffering from the affliction.

There are also ample negative aspects to recognizing postpartum psychosis or severe depression as a separate defense because it creates a slippery slope to finding culpability. For instance, pre-menstrual syndrome, post-traumatic stress disorder, and addictive gambling would also arguably merit a separate defense under this reasoning. Moreover, other conditions could also be asserted as a defense, including depression, suffering from divorce, death in the family, physical illness, or even post-birth stress on fathers. Accepting postpartum psychosis as a defense to infanticide also invites arguments to extend the defense to other crimes. For instance, a woman who had recently given birth could argue that postpartum psychosis caused her to rob a bank, commit fraud, or even murder an adult. The defense could be a way for new mothers to escape culpability for crimes even if a recent birth is merely coincidental. A final negative argument is that such a defense discriminates against men, who cannot bear children but suffer equally the effects of post-birth stress.

Postpartum psychosis as a factor in mitigating sentencing is a compromise, but it too suffers from the same arguments against recognizing postpartum psychosis as a defense. It creates a slippery slope for mitigating factors, unfairly favors women, and offers an escape from harsher punishment. But, if a murdering mother's mental impairment does not rise to the level of insanity, the jury should at least hear evidence of postpartum psychosis as a way to lessen sentencing under statutory guidelines. Under this view, a mother afflicted with postpartum psychosis who murders her

228. *Id.* at 280.

child can be sentenced to receive mental help rather than continual mental suffering behind bars.

B. The Use of Insanity Arguments

The insanity defense, when factually applicable, is the legal argument for an infanticidal mother who is found to be insane at the time of her infant's murder. The problem is that when different jurisdictions use different tests, different results occur. This disparity leads to inconsistent judicial outcomes throughout the country. A mother may be legally insane at the time of the murder under one state's definition, but may not be in another. The problems with the insanity defense, however, are no different from problems in application of the insanity defense in other areas of the law. Despite these problems, if an infanticidal mother's conduct rises to the level of insanity, her conduct will be excused by law and she will be rehabilitated rather than incarcerated. For this reason, insanity has proven successful as a defense for infanticidal mothers in the past, and in the absence of alternative defenses, will continue in the future.

C. Diminished Capacity as a Partial Defense

As a partial defense, diminished capacity is often underutilized in the area of infanticide. Under such a partial defense, postpartum psychosis or EMED could be asserted. Although unavailable in most jurisdictions, diminished capacity as a partial defense provides a worthwhile argument for infanticidal mothers. When the infanticidal mother's conduct falls short of insanity, even though she demonstrated symptoms of insanity, diminished capacity could be invoked to lessen a murder charge to manslaughter. A manslaughter charge provides a lesser sentence, and therefore, more hope of rehabilitating the infanticidal mother's condition. More important, however, the idea of diminished capacity provides jurors and judges with a medium somewhere between guilt and total innocence of the crime.

D. Education: An Uncontroversial Solution

Finally, educating the public about postpartum disorders is an uncontroversial solution. The general public, and ultimately jurors, have little—if any—knowledge of what these disorders entail and are therefore unable to weigh expert testimony properly. Education is also a key to prevention of infanticide. In a world in which mothers are sent home from the hospital in a matter of days, family members must be able to recognize signs that a mother may be suffering from a post-birth malady. These suffering women must be identified and helped in order to avoid tragedy.

We are failing as a society to educate citizens, especially women, about the options for dealing with an unwanted pregnancy. More specifically, we are failing to prevent tragedies by teenage mothers like Amy Gross-

berg. Pregnant teenagers today, as well as adults, have more options than ever before to deal with unwanted pregnancies. Unfortunately, many teenagers fail to use these resources and kill their babies at birth simply from fear and ignorance of the other options available to them. As a society, we arguably bear a responsibility to educate and counsel these teens.

VII. CONCLUSION

Often unbelievable, and usually inexcusable, infanticide in America is a crime that refuses to go away. Whether it is a high profile case such as the recent Grossberg case in Delaware, or a baby killed immediately after birth and never missed or reported, infanticide is murder. Infanticidal mothers have faced and continue to face, inconsistent and disparate treatment. The same murder by the same mother could receive different treatment depending on the jurisdiction's laws, particular jury, or even the beliefs of a particular judge. Due to the inconsistency of judicial outcomes and the absence of legislative guidelines, a mother found guilty of infanticide today might as well flip a coin to predict her punishment.