Rethinking the Tough Sentencing of Teenage Neonaticide Offenders in the United States

Christine A. Fazio

Jennifer L. Comito

Follow this and additional works at: https://ir.lawnet.fordham.edu/flr

Part of the Law Commons

Recommended Citation
Available at: https://ir.lawnet.fordham.edu/flr/vol67/iss6/8

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
RETHINKING THE TOUGH SENTENCING OF TEENAGE NEONATICIDE OFFENDERS IN THE UNITED STATES

Christine A. Fazio
Jennifer L. Comito

INTRODUCTION

After a young mother kills her newborn, the American media sensationalizes the story, condemning the mother and demanding harsh punishment for the young woman. Prosecutors tell the press that the young mother affirmatively decided not to tell her family that she was pregnant, not to give birth in a hospital, and to kill the baby when it was born. In most cases of neonaticide, however, it is questionable whether the teen makes a conscious choice. She might deny her pregnancy due to fear and panic of her parents' and teachers' reactions, intense shame, or her desire to ignore the situation and get on with her life. In denial, the teen neither receives prenatal care, nor plans

1. Recently, prosecutors have responded to public demand for harsh treatment of teenage neonaticide offenders. In the past few years, the media's coverage of neonaticide and the public's corresponding dismay have exploded. For example, in Tucson, Arizona, after 19-year-old Marianne Biancuzzo was accused of drowning her newborn in a toilet, a police officer stated to a local newspaper: "It's an outrageous type of crime and totally unacceptable. We want to give the message to people contemplating this type of action that it will be thoroughly investigated and aggressively prosecuted . . . ." Marie McCullough, In Newborn Killings, a New Profile, Phila. Inquirer, Nov. 23, 1997, at A21 (quoting Tucson Police Lt. Rick Middleton). There was also a media blitz that demanded the death penalty for Amy Grossberg, who killed her newborn in a Delaware motel room in November 1996. See Full-Birth Abortion, Wash. Times, Dec. 1, 1996, at 37, available in <http://home.revealed.net/celeste/Full-BirthAbortion.html>.

2. See Full-Birth Abortion, supra note 1, at 37.

3. Neonaticide was first defined by Dr. Phillip J. Resnick in 1970 as "the killing of a neonate on the day of its birth." Phillip J. Resnick, Murder of the Newborn: A Psychiatric Review of Neonaticide, 126 Am. J. Psychiatry 1414, 1414 (1970). Interestingly, Black's Law Dictionary does not include the term. Black's does, however, define "infanticide" as "[t]he murder or killing of an infant soon after its birth. The fact of the birth distinguishes this act from 'feticide' or 'procuring abortion,' which terms denote the destruction of the fetus in the womb." Black's Law Dictionary 778 (6th ed. 1990). Black's also defines "prolicide" as "the destruction of the human offspring." Id. at 1213.

4. In some cases, the girl is pregnant due to sexual abuse or rape, compounding her intense feelings of shame. See, e.g., Geoffrey Knox, A Revolution Brewing in Women's Health, Open Soc'y News, Spring 1999 4, at 4 ("[I]n Nigeria, . . . [t]he murder or killing of an infant soon after its birth. The fact of the birth distinguishes this act from 'feticide' or 'procuring abortion,' which terms denote the destruction of the fetus in the womb." Black's Law Dictionary 778 (6th ed. 1990). Black's also defines "prolicide" as "the destruction of the human offspring." Id. at 1213.

for the birth. The problem does not go away, of course, and the teen is forced to face what she has denied for nine months when she gives birth. Shocked and frightened, the teen either violently kills the baby by suffocation or stabbing, leaves the baby to drown in the toilet, or abandons the baby where it dies of exposure. In fear and shame, she covers up what she did, usually by disposing the baby in the trash or outdoors.

This Note addresses the common characteristics of teenagers who commit neonaticide and the types of sentencing and penalties these neonaticide offenders receive. It compares sentences in the United States with those meted out in other countries, such as England, that have infanticide statutes. This Note argues that states should adopt a specific neonaticide provision in state manslaughter penal codes, similar to England’s infanticide statute, so that the crime of neonaticide is distinguished from murder. In this way, teenage neonaticide offenders are more likely to be adjudicated in the juvenile court, where the purpose is rehabilitation, and not the adult criminal court, where the purpose is primarily punitive.

Part I addresses the purpose of juvenile court and looks at the “get tough” standard that has resulted in more juveniles being tried in adult criminal court. Part II provides background to neonaticide by addressing the history of neonaticide and the evolutionary and psychological characteristics that are common to neonaticide offenders. Part III examines infanticide statutes in other countries and the results

---

See infra Part II.B.2.

7. For instance, one study of 47 neonaticides found that all of the neonaticide cases presented the same basic facts:

[T]he 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 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. More commonly, the women suffocated or strangled the babies in order to prevent them from crying out. A few of the women silenced the babies with blows to its head or stab wounds inflicted with scissors.


8. After killing the infant, the mother typically hides the baby. See C.M. Green & S.V. Manohar, Neonaticide and Hysterical Denial of Pregnancy, 156 Brit. J. Psychiatry 121, 122 (1990).

9. Neonaticide is considered a crime no greater than manslaughter under the English Infanticide Act. See English Infanticide Act; see also infra note 211 and accompanying text (discussing the English Infanticide Act); infra note 217 (discussing similar statutes in Canada and Australia).

10. See infra note 211.

11. See infra Part I.C-D.

12. See infra Part I.A.
of convictions under those statutes. In other countries, the sentencing of women charged with neonaticide consistently involves probation, counseling, and community service. Consequently, women are rarely sent to prison for neonaticide. This part then compares the highly variable, and often very punitive, sentencing of teenage neonaticide offenders in the United States. Part IV argues that in the United States, teenage neonaticide offenders should not be tried for murder but for a crime no greater than manslaughter. One way to accomplish this is for states to enact statutes similar to the English infanticide law that treat neonaticide as a homicide separate from murder. The result will be that teenage neonaticide offenders will more likely be tried in juvenile court rather than in adult criminal court. In this way, this part suggests, judges may mandate offenders to rehabilitative treatment instead of sentencing them to a long stay in prison.

I. Juvenile Law

There is ample treatment of the history of juvenile justice in the legal literature. In addition, analyses of the utility, philosophy, and future of juvenile justice abound. This part discusses the adult criminal court system, provides an overview of the development and purposes of the juvenile court, and addresses the types of sentences imposed in the juvenile court. This part also briefly examines the vari-

13. See infra notes 220-24 and accompanying text.
14. In most American jurisdictions a juvenile, defined as "one who has not reached the age of eighteen," is prosecuted in the juvenile court. See Gordon A. Martin, Jr., The Delinquent and the Juvenile Court: Is There Still a Place for Rehabilitation?, 25 Conn. L. Rev. 57, 60 (1992). He cannot be "found guilty," but is rather "adjudicated delinquent." Id. A juvenile so adjudicated may then be placed in the custody of a state authority, or agency, which will attempt treatment. See id.
ous ways in which juvenile justice policy has been criticized. Finally, this part reviews the "get tough" policy and states' juvenile transfer statutes, which have resulted in more teens being tried in adult criminal court.

A. Adult Criminal Court

The criminal justice system enforces the law by punishing those found guilty of offenses. At least two theories inform this process: the doctrine of criminal responsibility and the concept of punishment. This is an oversimplification, however, because punishment, or more accurately sentencing, may include alternative sentences such as probation or rehabilitation. These alternatives are lesser deprivations of liberty aimed at reintegrating the offender into society for the benefit of society at large.

Changes in criminal justice policy seem to reflect shifts in societal beliefs about the ultimate goals of punishment. Historically, terror was the deterrence method of choice for penal policymakers. For example, in the American Colonies that adopted the English common law, all convicted felony offenders were sentenced to death. The

17. See Thomas & Bilchik, supra note 15, at 440 (describing two ideological camps both critical of juvenile justice, the "due process liberals" and the "crime control conservatives").

18. The term "criminal justice system" is also referred to as "the adult criminal court" and "criminal court," to distinguish it from the juvenile court system.


20. As Dressler observes:

[T]he principles of criminal responsibility, which are at the core of the criminal law, seek to identify the point at which it is fair to go from the factual premise, "D caused or assisted in causing X (a social harm) to occur," to the normative judgment, "D should be punished for having caused or assisted in causing X to occur."

Id. at 3.


22. See Dressler, supra note 19, at 15.

23. See Franklin D. Roosevelt, Looking Forward 208 (1933) ("[T]here is no doubt that probation, viewed from the selfish standpoint of protection to society alone, is the most efficient method that we have.").


25. See Kadish & Schulhofer, supra note 21, at 119 ("[O]ur penal policy is seen to move in three main stages. In the earliest the salient feature is a crude utilitarianism aiming at the reduction of crime through the weapon of terror." (quoting Leon Radzinowicz & J.W. Cecil Turner, A Study of Punishment I: Introductory Essay, 21 Can. B. Rev. 91, 91 (1943))).

26. In the seventeenth century Providence Plantations (now Rhode Island), treason, murder, manslaughter, witchcraft, burglary, buggery, sodomy, arson, and rape
goal of crime prevention through deterrence has been modified over time, in varying degrees, by the belief that rehabilitation of offenders is possible and useful. 27

Since the 1970s, penal policy has shifted toward the punitive and retributive model and away from the rehabilitative and reformatory model, 28 exemplified by tough sentencing policies and drug laws. 29 The policy shift toward tougher laws and sentences is reflected in the juvenile court system as well. 30 For the juvenile court system, however, which was originally conceived as a rehabilitation oriented system to assist children, 31 such a shift has resulted in dramatic changes, including the increased number of juveniles being transferred for adjudication as adults in the criminal court. 32

B. Juvenile Court: Historical Background

In the nineteenth century, courts applied English common law standards of criminal responsibility to children. 33 Under the common law, a child above the age of seven could be tried and punished as an


27. See, e.g., People v. Corapi, 42 Misc. 2d 247, 250 (N.Y. App. Term. 1964) ("The barbarities and cruelties of an early day, when society took over the function of revenge on those individuals who broke its laws, in time gave way to the belief that punishment should be imposed as a deterrent.").

28. See infra Part I.E.


30. See infra Part I.E.

31. See infra Part I.C.

32. See infra notes 94-96 and accompanying text.

33. See Burns, supra note 16, at 337 n.10 (noting that under the common law children under seven lacked criminal capacity, children from seven to thirteen were rebuttably presumed to lack criminal capacity, and children fourteen and older had adult capacity to commit crimes); Paul Lerman, Delinquency and Social Policy: A Historical Perspective, in 3 Crime & Justice in American History: Delinquency & Disorderly Behavior 23, 23 (Eric H. Monkkonen ed., 1991) ("As might be expected, the colonists used the law of their native land as a basis for forming an American response to wayward youth.").
adult. For example, in a 1806 Tennessee case, a twelve-year-old girl was tried for the axe-killing of her father. The court considered "the tender years" of the defendant and stated the "law on this point" to be as follows:

If a person of fourteen years of age does an act, such as stated in this indictment, the presumption of law is that the person is doli capax. If under fourteen and not less than seven, the presumption of law is that the person cannot discern between right and wrong. But this presumption is removed, if from the circumstances it appears that the person discovered a consciousness of wrong.

The Industrial Revolution brought millions of immigrant workers and their children to the urban United States. As a result of changes in traditional roles for women and the concentration of the working poor near industrial centers, many children were left to fend for themselves in the city streets. Progressive reformers started the "Child Saving Movement," in part to erect a legal framework that responded to children and family issues caused by economic and social upheaval. The juvenile court system was conceived as a means to protect such children, with a focus on treatment rather than punishment.

34. See State v. Doherty, 2 Tenn. (2 Overt.) 79 (1806) (finding twelve-year-old girl not guilty of murder, after arraignment and indictment in the criminal court, with only a cursory discussion of capacity).
35. See id.
37. See Doherty, 2 Tenn. at 88.
38. For instance:

By the 1830s and 1840s, much of the urban seacoast population was composed of Irish and Germans who had been encouraged to immigrate as a result of food shortages and political repression. Once in the United States, they were channeled into low paying industrial work and poorly housed in expensive but squalid slums.

40. See Burns, supra note 16, at 336-37 nn.8-10 (citing Dean J. Champion & G. Larry Mays, Transferring Juveniles to Criminal Courts: Trends and Implications for Juvenile Justice 35 (1991)); see also Feld, supra note 16, at 822-23 & nn.5-7 (citing to articles discussing changes in family structure and function as the result of economic modernization and the Progressive response thereto). See generally Julian W. Mack, The Juvenile Court, 23 Harv. L. Rev. 104, 122 (1909) (discussing the "palliative [and] curative" work of the juvenile courts).
41. But see Lerman, supra note 33, at 25-26 (discussing how, under the 1899 Illinois juvenile court statute, "distinctions among dependents, neglected children, status youth, and criminal offenders were often blurred... [so that] a youth... [could] be held in detention or sent to a state training school if he was destitute; or if he was homeless[.]. . . or if he had improper parental care").
informed by the philosophy of parens patriae.43 By adjudicating children in a system isolated from adult criminal court, it was thought that the interests of the child would be served by means of non-adversarial procedures and flexible sentencing.44

Illinois was the first state to enact a juvenile court statute in 1899.45 By 1925, all but two states had passed similar statutes.46 The first state laws designating a separate forum47 for juveniles effected a collapsing of civil and criminal jurisdictions into one court of civil jurisdiction.48 Prior to the establishment of juvenile courts, cases involving delinquent children49 were heard by the criminal courts, and cases involving status-type offenses (vagrant and neglected children)50 were heard by the civil courts. The shift from criminal to civil jurisdiction for ju-

---

42. The system was not always used as conceived. During the Progressive era, delinquency charges against female offenders often reflected racial stereotypes about immigrants and Victorian sexual mores. One example is the case of fifteen-year-old Deborah Horwitz, who was committed to a state girls’ reformatory because of her sexual “adventures,” based on evidence that included photographs taken of her hatless and with the top button of her high-necked blouse undone. See Schlossman & Wallach, supra note 15, at 262-63.

43. Black’s Law Dictionary defines parens patriae as literally “parent of the country,” refer[ring] traditionally to [the] role of state as sovereign and guardian of persons under legal disability, such as juveniles . . . . It is the principle that the state must care for those who cannot take care of themselves, such as minors . . . [and] originates from the English common law . . . . In the United States, the parens patriae function belongs with the states.

Black’s Law Dictionary 1114 (6th ed. 1990); see also State ex rel. Caillouet v. Marmouget, 35 So. 529, 532 (La. 1903) (stating that in a juvenile action, the judge “takes the place of a father or the friend of a family, and decrees what, in his judgment, is best calculated to secure the morals of the child and her safety from evil associates”).

44. See Feld, supra note 16, at 848.


48. See State v. Taylor, 43 So. 54, 55 (La. 1907) (“The powers conferred on the judge holding a session of juvenile court are by the very terms of the act intended to be ‘clearly distinguished from the powers exercised in the administration of the criminal law.’ The care of dependent and neglected children is purely a civil matter.”); see also Feld, supra note 16, at 825 (“In separating child from adult offenders, the juvenile court system also rejected the jurisprudence and procedure of adult criminal prosecutions.”).

49. The term “delinquent child” has been defined as “any child under the age of 17 years who violates any law of this state . . . or who is incorrigible . . . [who] absents itself from its home . . . .” Robison v. Wayne Circuit Judges, 115 N.W. 682, 683 (Mich. 1908).

50. Children could be remanded to jails or alternate institutions. See State v. Shattuck, 45 N.H. 205, 206 (1864) (observing that boys under age 17 and females of any age could, at the judge’s discretion, be sentenced to the House of Reformation rather than prison); see also Lita R. Holden, Juvenile Law, 73 Denv. U. L. Rev. 843, 845-46 & nn.21-25 (1996) (discussing due process debate over juvenile status offender classification).
C. Original Purpose of the Juvenile Courts

The mission of the early juvenile justice system was to assist neglected and delinquent children. Children were thought to be malleable subjects for treatment and rehabilitation. Thus, a juvenile court with an emphasis on inquiry rather than punishment could serve the best interests of the child. Further, a civil-inquiry style of proceedings and alternatives to jail sentences served the purpose of rehabilitation. In addition to the idea of the State acting as a surrogate father to the juvenile who offended or was

---

51. The juvenile courts also had jurisdiction over offenses committed against children, such as parental abuse and neglect. See Hunt v. Wayne Circuit Judges, 105 N.W. 531, 539 (Mich. 1905) (discussing "the inherent power of the court . . . [to] exercise the removal of the child from a bad to a better environment" (citation omitted)).

52. See State ex rel. Caillouet v. Marmouget, 35 So. 529, 531 (La. 1903) (commenting that the purpose of an ordinance providing commitment to a detention home for vagrant juveniles was to "save children from their immature judgment from evil and from evil influences"); Robison, 115 N.W. at 685-86 (nullifying the Detroit Juvenile Court Act of 1907 on the grounds that the Act defined juvenile proceedings in a manner echoing criminal court proceedings to such an extent that the absence of procedural due process rendered the act unconstitutional, and noting, in dicta, that to so find is "regrettable in view of its beneficent purpose" which was to care for "unfortunate, delinquent, or neglected children"); Holden, supra note 50, at 843 nn.4-5 (discussing the "best interests" philosophy underlying juvenile court systems).

53. See Hunt, 105 N.W. at 539 ("The law recognizes, as the physical and the social senses recognize, the requirements of nurture and of education, mental and moral. Infancy imports wardship. It implies control, direction, restraint, supervision."); Scott & Grisso, supra note 16, at 142 ("Juvenile offenders, because they were young and malleable, were believed to be ideally suited to a regime grounded in rehabilitation.").

54. See State v. Taylor, 43 So. 54, 55 (La. 1907) (commenting on the purpose of a statute defining the power of the state with reference to the "care, treatment, and control" of juveniles, and noting that the statute "gives the juvenile court jurisdiction, not to try, convict, and punish, but to inquire into the matter and to determine 'what order for the commitment and custody and care of the child, the child's own good and the best interest of the state may require' ").


57. See infra note 60 and accompanying text.
offended against, juveniles were considered "incapable of rational
decision-making." Juvenile proceedings were designed to be
clinical, non-adversarial, rehabilitative, and solicitous, rather than pu-
nitive, adversarial, and judgment-oriented. The juvenile courts re-
jected the adult criminal court's technical demands along with the idea
of jail sentences for juveniles.

Rehabilitation remained the focus of juvenile legislation until the
late 1960s. For example, judges were granted discretion in remand-
ing juvenile offenders to special programs and to "promote the reha-
bilitation of those who in the opinion of the sentencing judge show
promise of becoming useful citizens." And vestiges of rehabilita-
tion-oriented juvenile law still remain in modern state statutes. A
Massachusetts law entitled "Protection and Care of Children, and
Proceedings Against Them" directs liberal construction of the rele-
vant sections to ensure "that the care, custody and discipline of the
children brought before the court shall approximate as nearly as possi-
ble that which they should receive from their parents, and that . . .
they shall be treated, not as criminals, but as children in need of aid,
encouragement and guidance."

D. Sentencing in the Juvenile Court

As discussed above, the purpose of juvenile court proceedings is
rehabilitation rather than punishment. For instance, after a child is
taken into custody, most states require a hearing to determine if the
child is to remain in custody after the arrest. Criteria include: "(1)
the need to protect the child, (2) the likelihood that the child presents
a serious danger to the public, and (3) the likelihood that the child will

58. See Taylor, 43 So. at 55 ("[T]he [jurisdiction of the] 'juvenile court' may be
exercised . . . on the petition of any citizen setting forth that the child is neglected,
dependent, or delinquent, and is in need of the care and protection of the court
. . . . ").

59. Scott & Grisso, supra note 16, at 143 n.26 (quoting Martin R. Gardner, The
Right of Juvenile Offenders to be Punished: Some Implications of Treating Kids as
Persons, 68 Neb. L. Rev. 182, 191 (1989)).

60. See In re Gault, 387 U.S. 1, 16 & n.18 (1967).

61. See id. at 16-17.

62. See Burns, supra note 16, at 338 (noting "[t]he juvenile system and its parens
patriae philosophy remained relatively stable from its inception in 1899 through 1966"
and pointing out that the Supreme Court decided its first juvenile law case with the
Kent decision (citing Kent v. United States, 383 U.S. 541 (1966))).

No. 81-2979, at 1 (1949)).


65. Id. But see Feld, supra note 16, at 886 (criticizing the leniency of the rehabilita-
tive model and noting that juvenile courts administering light sentences come under
attack when juvenile offenders commit new crimes upon release).

66. See supra Part I.C.

67. See Larry J. Siegel & Joseph J. Senna, Juvenile Delinquency: Theory, Practice
return to court for adjudication.”\textsuperscript{68} Furthermore, the purpose of the disposition phase (known as “sentencing” in the adult criminal system) is to treat the individual offender rather than to punish.\textsuperscript{69} After adjudication (similar to a finding of guilt in the adult criminal system), most jurisdictions require a separate dispositional hearing where the court decides the treatment based on the “child’s offense, prior record, and family background.”\textsuperscript{70}

New York’s juvenile procedure serves as an example of sentencing procedures in the juvenile courts. In New York, following the determination that the child has committed a designated felony act, but prior to the dispositional hearing, the judge orders a probation investigation and diagnostic assessment.\textsuperscript{71} This investigation delves into the juvenile’s history, including previous conduct, family situation, psychological reports, school adjustment, and previous social assistance.\textsuperscript{72} The diagnostic assessment includes psychological tests and psychiatric interviews to determine mental capacity, emotional stability, and mental disability, as well as a clinical assessment of what situational factors may have contributed to the act.\textsuperscript{73} Where feasible, experts may testify as to the risk the juvenile may present to herself or others.\textsuperscript{74} Finally, a victim impact statement can also be considered if relevant.\textsuperscript{75} If, after the dispositional hearing, the court determines the child requires supervision, treatment, or confinement, the court shall enter a finding.\textsuperscript{76} In making a finding, the court must “consider the needs and best interests of the [child] as well as the need for protection of the community.”\textsuperscript{77}

\textsuperscript{68} Id. at 330.
\textsuperscript{70} Siegel & Senna, supra note 67, at 331.
\textsuperscript{71} See N.Y. Fam. Ct. Act § 351.1 (McKinney 1999). Designated felonies include: murder in the first and second degree, kidnapping in the first degree, arson in the first degree, assault in the first degree, manslaughter in the first degree, rape and sodomy in the first degree, aggravated sexual abuse, some kidnappings in the second degree, arson in the second degree, and robbery in the first degree for a 13-, 14-, or 15-year-old; burglary in the second degree, robbery in the second degree for a 14- or 15-year-old; assault in the second degree or robbery in the second degree for a 14- or 15-year-old who has committed a prior felony; and a felony committed by a child between the ages of seven and 16 if the court found that she committed two prior felonies. See id. § 301.2(8).
\textsuperscript{72} See id. § 351.1(1). Following a determination of a designated felony, the court must order a probation investigation and a diagnostic assessment. See id. For any other delinquent act, the court shall order a probation investigation and may order a diagnostic assessment. See id. § 351.1(2).
\textsuperscript{73} See id. § 351.1(1).
\textsuperscript{74} See id.
\textsuperscript{75} See id. § 351.1(4).
\textsuperscript{76} See id. § 352.1(1). Adjudication at the dispositional hearing is based on a preponderance of the evidence. See id. § 350.3(2).
\textsuperscript{77} Id. § 352.2(2)(a). For designated felony acts, the court will order a disposition required under § 352.2 that includes restrictive placement. See id. § 353.3. The court can determine, however, that restrictive placement is not necessary by considering:
Even if, after reviewing the probation investigation report, the judge determines that restrictive placement of the juvenile is necessary, the juvenile still receives a shorter sentence than if she had been tried in adult court. Often, the juvenile will be subject to detention up to her eighteenth or twenty-first birthday, depending on state law.\textsuperscript{78}

If the teen were, in fact, tried in adult criminal court, she could be faced with a far lengthier sentence. For instance, in New York, a thirteen-, fourteen-, or fifteen-year-old who is charged with murder is likely to be tried in adult criminal court.\textsuperscript{79} If convicted of murder, then the teen, known as a juvenile offender, can be sentenced to a term of five to nine years up to life in prison.\textsuperscript{80} Additionally, for a manslaughter conviction, the juvenile offender is sentenced to three and one-third to ten years for a class B felony, or two and one-third to seven years for a class C felony.\textsuperscript{81} Teens older than sixteen are sentenced as adults.\textsuperscript{82} They can, therefore, face twenty-five years to life in prison if convicted for murder, six to twenty-five years for a violent class B felony, or four and one-half to fifteen years for a violent class C felony.\textsuperscript{83}

Teenagers under nineteen who are tried in adult court in New York may be able to seek youthful offender status.\textsuperscript{84} While youthful offender status is not available for class A felonies, e.g., murder,\textsuperscript{85} the

\begin{enumerate}
\item[(a)] the needs and best interests of the [child];
\item[(b)] the record and background of the [child] \ldots ;
\item[(c)] the nature and circumstances of the offense, including whether any injury was inflicted \ldots ;
\item[(d)] the need for protection of the community; and
\item[(e)] the age and physical condition of the victim.
\end{enumerate}

\textit{Id.} § 353.5(2). With an order for restrictive placement in the case of a child who has committed a designated class A felony (e.g., murder), the child is placed with the division of youth for an initial period of five years and the child must be confined to a secure facility for 12 to 18 months and then a nonsecure facility for 12 additional months. \textit{See id.} § 353.5(S)(a). If the child committed a designated felony act other than a class A felony, the child is placed with the division of youth for an initial period of three years, and is initially confined in a secure facility for six to 12 months and then a residential facility for six to 12 months. \textit{See id.} § 353.5(S)(a). The placement can be extended up until the child's twenty-first birthday. \textit{See id.} § 353.5(S)(d).

\textsuperscript{78} For instance, if neonaticide were treated in New York as a designated class A felony act, the teen could be sentenced with the division of youth for five years, and any extensions to restrictive placement may not go beyond the teen's twenty-first birthday. \textit{See id.} For designated felony acts, the court will order a disposition required under § 353.5 that includes restrictive placement. The court can determine, however, that restrictive placement is not necessary by considering the mitigating factors listed above. \textit{See supra} note 77.

\textsuperscript{79} \textit{See N.Y. Penal Law} § 30.00(2) (McKinney 1998).
\textsuperscript{80} \textit{See id.} §§ 60.10, 70.05.
\textsuperscript{81} \textit{See id.} § 70.05
\textsuperscript{82} \textit{See id.} § 60.10(2) (directing that a person who commits a felony after having reached the age of 16 is sentenced under the adult criminal statutes unless adjudicated a juvenile offender under New York Penal Law § 720.20 or a previous or predicate felony offender under §§ 70.04; 70.06, 70.08, or 70.10).
\textsuperscript{83} \textit{See id.} §§ 70.00, 70.02.
\textsuperscript{84} \textit{See N.Y. Crim. Proc. Law} § 720.10 (McKinney 1995).
\textsuperscript{85} \textit{See id.} § 720.10(2)(a)(i).
teen could be adjudged a youthful offender under New York law for other felonies, and, therefore, the penalty she would face would be limited to no more than four years of incarceration.\textsuperscript{86} Furthermore, because the sentence to be imposed upon a youthful offender is equivalent to a Class E felony under the New York Penal Law,\textsuperscript{87} the court also has the option not to mandate incarceration but instead can sentence the youth to probation.\textsuperscript{88}

E. Transformation of the Juvenile Court: The "Get Tough" Standard

1. Background

With the increase in violent youth crime beginning in the 1970s,\textsuperscript{89} juvenile justice has come under increased public scrutiny. After the Supreme Court's decision in \textit{In re Gault},\textsuperscript{90} which extended procedural due process rights to juvenile proceedings\textsuperscript{91} but expressed doubt over

\textsuperscript{86} See id. § 720.20(1)(a); N.Y. Penal Law § 60.02.
\textsuperscript{87} See N.Y. Penal Law § 60.02(2) (directing that the sentence must be one to be imposed upon a conviction of a class E felony).
\textsuperscript{88} See id. § 60.02 & practice commentary. Under Article 65 of the New York Penal Code, the judge can sentence the teen to probation if he or she decides: institutional confinement for the term authorized by law is not appropriate; the defendant is in need of guidance, training, and assistance which can be effectively administered through probation supervision; and "such disposition is not inconsistent with the ends of justice." N.Y. Penal Law § 65.00.
\textsuperscript{90} 387 U.S. 1 (1967).
\textsuperscript{91} See id. at 55 (protecting the juvenile's constitutional privilege against self-incrimination); id. at 56 (granting juveniles a limited right to confront witnesses, and stating that sworn testimony is required where there is no valid confession "adequate to support the determination of the Juvenile Court"). For an examination of cases following the \textit{Gault} decision that discuss due process in juvenile proceedings, see Feld, \textit{ supra} note 16, at 826-31.
the usefulness of rehabilitation, juvenile law began to take on the retributive aspect of the current system. A loss of faith in rehabilitation, and an emphasis on the retributive and punitive aspects of justice, continues to motivate recent changes in the criminal justice system and the juvenile system as well. The current focus of juvenile justice is on protection from the harm caused to society by juvenile offenders. It is believed that this will be achieved by prosecuting juveniles who commit "adult" crimes in the criminal courts.

Transfer statutes allow the courts to remand juvenile offenders to the adult criminal courts. There are three methods to achieve transfer of juveniles to the criminal court system: judicial waiver, prosecutorial waiver, and legislative or mandatory waiver. All fifty states and the District of Columbia currently have enacted statutory provisions for the transfer of juveniles to criminal court. Most states

---

92. See Gault, 387 U.S. at 18-19 nn.23-25 (discussing the failure of the juvenile court system to adequately treat juveniles); id. at 17 (“[T]he highest motives and most enlightened impulses led to a peculiar system for juveniles . . . . The constitutional and theoretical basis for this . . . is . . . debatable.”).


94. See Martin, supra note 14, at 58; Scott & Grisso, supra note 16, at 145-48 (“In the post-Gault period, policymakers grappled with the challenge of constructing a retributive system that recognized the youth and immaturity of juvenile offenders.”). See generally Feld, supra note 16, at 821-22 (discussing the change in juvenile sentencing practices toward a "justice model").

95. See Burns, supra note 16, at 339 & n.26 (“The purpose of the transfer proceedings . . . [is t]o protect the public in those cases where rehabilitation appears unlikely and . . . society would be better served by the criminal process by reason of the greater security which may be achieved or the deterring effect which that process is thought to accomplish.” (quoting In re Mack, 260 N.E.2d 619, 620-21 (Ohio Ct. App. 1970))); Scott & Grisso, supra note 16, at 148.

96. See Burns, supra note 16, at 338 & n.22 (noting that the transfer procedure has existed since 1899); id. at 339 & n.27 (observing the significant increase in transfers with the onset of the “get tough” policy, and citing a study that found approximately 176,000 juvenile cases were transferred to adult courts nation-wide, as compared to fifteen per year, or around one percent).

97. See Stacey Sabo, Note, Rights of Passage: An Analysis of Waiver of Juvenile Court Jurisdiction, 64 Fordham L. Rev. 2425, 2425-28 (1996) (containing a thorough treatment of the three types of transfer statutes and listing which states have enacted such statutes).

98. See Charles Patrick Ewing, When Children Kill: The Dynamics of Juvenile Homicide 114 (1990) (“Today, all jurisdictions in the United States provide for the prosecution of some juveniles as adults.”); see, e.g., Alaska Stat. § 47.12.030 (Michie 1998) (waiving juvenile court jurisdiction over minors at least 16 who commit felonies against a person, arson, traffic violations, and fish and game violations); id. § 47.12.100 (directing that the juvenile court hold a hearing to determine whether the minor is amenable to treatment under the juvenile statute, and if not, the minor may be prosecuted as an adult); Ariz. Rev. Stat. Ann. § 13-501 (West Supp. 1998) (waiving juvenile court jurisdiction over juveniles 15, 16, or 17 years old who are accused of seven enumerated offenses including first and second degree murder, forcible sexual assault, armed robbery, and other violent felonies or any felony committed by a chronic felony offender); Cal. Welf. & Inst. Code § 707 (West 1998) (describing hearing procedures to determine whether the juvenile is fit to be dealt with under the juvenile
provide for both discretionary and mandatory waiver of juvenile juris-
court, considering the age of the juvenile (16 or older) and the crime committed: including murder, attempted murder, rape by force, arson, assault with a firearm, etc.); Conn. Gen. Stat. Ann. § 46b-127 (West 1995) (mandating transfer to adult criminal court for children 14 or older who have been charged with a capital felony or class A or B felony, committed after such child reached the age of 14); Fla. Stat. Ann. §§ 985.225, 985.226 (West Supp. 1999) (mandating that a child be treated by the court as an adult where the child is indicted by a grand jury for an offense punishable by death or life imprisonment, or where the child is 14 or older and has been previously adjudicated for three felonies including one felony of violence against a person or use of a firearm, and allowing a voluntary waiver of juvenile court jurisdiction on demand by the child, or on motion by the state attorney where the child is 14 or over and has previously been adjudicated for murder or other violent crimes); 705 Ill. Comp. Stat. Ann. 405/5-4 (West 1993) (directing that juveniles 17 and older may be prosecuted in criminal court for any offense committed after the seventeenth birthday, but mandating transfer to criminal court for minors 15 or older who are accused of a forcible felony in connection with gang activity, if previously adjudicated delinquent for a felony offense); Ind. Code Ann. § 31-30-1-4 (Michie 1997) (directing that the juvenile court, in a discretionary waiver hearing, may waive jurisdiction of a child 14 or older to criminal court, where probable cause exists to believe the child committed a delinquent act, waiver would be in the best interest of the child and the community, and the state has established that the child is not amenable to rehabilitation); Kan. Stat. Ann. § 38-1636 (e)(1)-(2) (Supp. 1998) (directing the court to consider, in determining whether or not to prosecute as an adult, the necessity of protection of the community and whether the offense was committed in an aggressive, premeditated manner); Me. Rev. Stat. Ann. tit. 15, § 3101(4) (West 1998) (directing the juvenile court to consider, in a proceeding to determine the appropriateness of "bind-over" to criminal court, whether the offense was committed in a violent, premeditated manner, the "emotional attitude and pattern of living" of the juvenile, public safety and its need for protection, and whether future offenses would be deterred by prosecution as an adult); Md. Code Ann., Cts. & Jud. Proc. §§ 3-804, 3-817(c) (1995) (allowing juvenile court waiver of jurisdiction over a child under 15, charged with an act which would be punishable by death or life imprisonment if committed by an adult, but not until the court has determined by a preponderance of the evidence that the child is an "unfit subject for juvenile rehabilitative measures," and further directing that the court consider the age, mental and physical condition of the child and the public safety); Mass. Ann. Laws ch. 119, § 61 (Law. Co-op. 1994) (noting that a transfer hearing can be held when the child is 14 or older, committed an offense which if the child were an adult would be punishable by imprisonment, and had previously been committed to the division of youth); Minn. Stat. Ann. § 260.125 (West 1998) (providing six factors to determine if the public safety is served in transfer of juvenile to adult court, including child's prior record, level of planning of the alleged offense, and use of a firearm); Miss. Code Ann. § 43-21-157 (1993) (providing that a transfer is proper if the child is over 13 and commits a crime that the criminal court would have had jurisdiction over if committed by an adult); N.H. Rev. Stat. Ann. § 169-B:24-27 (1998) (discussing when transfer is appropriate on motion of the court, the county attorney, or the minor); N.J. Stat. Ann. §§ 2A:4A-25, 2A:4A-26 (West Supp. 1998) (discussing situations when the child should be transferred out of juvenile court); N.M. Stat. Ann. § 32-1-29 (Michie 1989) (same); N.Y. Penal Law § 30.00(2) (McKinney Supp. 1999) (stating 13-, 14-, and 15-year-olds are criminally responsible for murder, and felony murder if the juvenile is criminally responsible for the predicate felony, with list of enumerated crimes for which a 14- or 15-year-old is criminally responsible, including first-degree manslaughter); N.C. Gen. Stat. § 7A-608 (1998) (describing situations in which a juvenile may be transferred to criminal court); Ohio Rev. Code Ann. § 2151.26 (Anderson 1998) (same); Tex. Fam. Code Ann. § 54.02 (West 1996 & Supp. 1999) (same); Utah Code Ann. § 78-3a-601 (1996) (same); Va. Code Ann. §§ 16.1-269.1, 16.1-270 (Michie 1996 & Supp. 1998) (requiring transfer hearing for child 14 or older who is charged
In discretionary waiver laws, either the judge elects\textit{sua sponte} to waive juvenile court jurisdiction pursuant to a hearing, or the prosecutor or juvenile moves to transfer the proceedings to criminal court.\textsuperscript{100} In mandatory waiver laws, the statute sets out crimes and age brackets that automatically trigger a transfer hearing, or, alternatively, simply strip the juvenile court of its jurisdiction and permit the prosecutor to proceed directly in the criminal court.\textsuperscript{101}

2. Mandatory Waiver Laws

A majority of states currently have legislative waiver statutes,\textsuperscript{102} i.e., statutes that typically specify crimes over which, if charged, a juvenile court has no jurisdiction. Such laws operate ipso facto to deprive the juvenile court of jurisdiction.\textsuperscript{103} Some states have laws that do not automatically relieve the juvenile court of jurisdiction, but require a hearing before jurisdiction shifts to the criminal court. In this case, however, the hearing is mandatory, and the factors that the court considers make it virtually a foregone conclusion that the case will be transferred to the criminal court.\textsuperscript{104}
The enumerated crimes listed in mandatory transfer laws are almost exclusively reserved for violent felonies, use of deadly weapons, drugs and gang-related offenses, and capital offenses in general. For example, Illinois, Indiana, New Jersey, and Montana specifically refer to gang-related felonies in their mandatory transfer statutes. Alaska, Arizona, Colorado, Indiana, Maryland, and Nevada include specific reference to deadly weapons offenses or armed robbery in their mandatory transfer laws. Connecticut, Delaware, Florida, and Maryland include reference to capital felonies. Arson is listed as a crime that automatically triggers adult proceedings in Alaska, Montana, and New York. Chronic felony offenders, offenders with prior felony charges, and violent felony offenders are automatically adjudicated in adult criminal court in Alaska, Arizona, Colorado, Florida, and Minnesota. Rape is a crime that automatically triggers adult proceedings in many states, including Maryland, Montana, and New York.

Probable cause, the child is not mentally ill, and the interests of the community require the child be legally restrained.

105. See, e.g., Ariz. Rev. Stat. Ann. § 13-501(A) (listing, among others, first or second degree murder and forcible sexual assault); Del. Code. Ann. tit. 10, § 1010(a) (1998) (listing crimes of first or second degree murder and kidnapping, a judgment of non-amenability to rehabilitation, and a previous adjudication of delinquency under a felony charge, as determinants for a child of any age to be automatically subject to adult criminal court jurisdiction; and listing first degree conspiracy, rape, arson, robbery, or drug charges for automatic waiver of juvenile jurisdiction over a child 16 or older); N.Y. Penal Law § 30.00(2) (McKinney Supp. 1999) (listing kidnapping, arson, first degree assault, first degree manslaughter, first degree rape, aggravated sexual abuse, sodomy, robbery, and burglary, as crimes that, if committed by a child 14 or older, mandate proceeding against such child as an adult; and listing second degree murder, charged against a child 13 or older, as mandating proceeding against such child as an adult).


109. See Alaska Stat. § 47.12.030(a)(2); Mont. Code Ann. § 41-5-206(1)(b)(ii) (limiting mandatory transfer in the case of arson and other enumerated crimes to juveniles 17 or older); N.Y. Penal Law § 30.00(2).


Discretionary (judicial) waiver statutes typically list factors that judges must consider in the context of a juvenile jurisdiction transfer hearing. Discretionary (judicial) waiver statutes typically list factors that judges must consider in the context of a juvenile jurisdiction transfer hearing. The factors commonly considered include those that are meant to determine the "fitness" of a juvenile for rehabilitation under the juvenile court system. For example, California directs the juvenile court to consider degree of criminal sophistication, amenability to rehabilitation, and previous delinquent history in determining fitness. And the District of Columbia requires a juvenile court to consider evidence of the child's age, the nature and extent of prior delinquency, the child's mental condition, and available rehabilitation facilities in making a determination whether rehabilitation is possible before a child's majority. Similarly, many states have laws that direct their respective courts to consider prior contacts with the juvenile system or whether the child is a repeat offender.

Other factors appearing most commonly in the judicial waiver statutes include amenability to treatment, maturity of the offender, danger to the public, whether the offense is committed in a premed-
itated and willful manner, and the availability of treatment facilities deemed adequate within the system.

F. Goals of Juvenile Statutes

Many state juvenile justice statutes include a statement of purposes and goals. Alaska, for example, declares that the purpose of its juvenile delinquency statute is to "protect the community . . . and equip juvenile offenders with the skills needed to live responsibly and productively," to prevent repeat juvenile criminal behavior, and to provide consistent consequences for crimes committed by juveniles.

Other state statutes purport that the juvenile justice system is designed to "take into consideration the best interests of the juvenile" and provide "appropriate treatment" to reduce the rate of recidivism. Delaware's law similarly states that in the juvenile court, "the nature of the hearing and all other proceedings shall be in the interest of rather than against the child." It is clear from these examples and the statutes themselves that protection of the community and prevention of recidivism, along with the best interests of the child, are primary goals of juvenile statutes.

Having defined the history and purpose of juvenile courts, part II looks at neonaticide, from both evolutionary and psychological perspectives, along with the background of a typical neonaticide offender.

II. Background to Neonaticide

To understand why American society must rethink the sentencing of teens who commit neonaticide, it is helpful to examine the history and evolutionary development of neonaticide, as well as the psychological characteristics of such offenders. This part demonstrates that most neonaticide offenders share common characteristics.

120. See, e.g., Miss. Code Ann. § 43-21-157(5)(d) (noting "[w]ether or not the alleged offense was committed in an aggressive, violent, premeditated or wilful [sic] manner"); Tenn. Code Ann. § 37-1-34(b)(4) (noting "whether the offense was committed in an aggressive and premeditated manner"); Wyo Stat. Ann. § 14-6-237(b)(ii) (noting "[w]hether the alleged offense was committed in an aggressive, violent, premeditated or willful manner").


123. See id.


A. Historical Perspective of Neonaticide

Neonaticide, the killing of a newborn in the first twenty-four hours of its life,\(^{127}\) has been practiced and accepted in many cultures for thousands of years.\(^{128}\) Historically, the interests of newborns have been balanced against the needs of others within society.\(^{129}\) Some cultures viewed infanticide as a method of caring for older children in the family because newborns were often a drain on limited resources.\(^{130}\) Others killed defective newborns as a sacrificial right or in the interest of their quality of life.\(^{131}\) In migratory societies, most women could care for only one child, so in multiple births, infanticide was deemed necessary to maintain the balance of care between mother and child.\(^{132}\)

Anthropological studies demonstrate that infanticide was an encouraged and regularly practiced method of controlling population in pre-Christian society.\(^{133}\) According to these studies, mothers often let

\(^{127}\) See Barbara Ehrenreich, Where Have All the Babies Gone?, Life, Jan. 1998, at 68, 69 (defining neonaticide as "the killing of an infant within 24 hours of birth").

\(^{128}\) As Barbara Ehrenreich observed:
Infanticide does not, of course, represent some unprecedented breakdown in morality. For thousands of years, in almost every culture, infanticide—and especially neonaticide . . . has been the family planning method of choice, if only because the alternatives were both dangerous and unreliable. . . . Roman law gave fathers the power to determine which of their babies would live; the ancient Assyrians countenanced infanticide while making abortion a capital crime punishable by impaling. As recently as 1899, the police reported finding 55 tiny corpses in Philadelphia alone.

\(^{129}\) Id. Humans practiced infanticide as early as the Great Ice Age, roughly 70,000 years ago. See Owen D. Jones, Evolutionary Analysis in Law: An Introduction and Application to Child Abuse, 75 N.C. L. Rev. 1117, 1195 (1997). Infanticide was common among ancestral hunter-gatherers, horticulturalists, and agrarian societies. See id.

\(^{130}\) Greeks and Romans widely and openly practiced infanticide, often by abandoning infants in wild areas. See id.

\(^{129}\) See Edward Saunders, Neonaticides Following Secret Pregnancies: Seven Case Reports, 104 Pub. Health Rep. 368, 369 (1989). As Susan Scrimshaw observed:
The ancient Greeks destroyed weak, deformed, or unwanted children; the Chinese wanted many sons and few daughters and did not let some infants, particularly daughters, survive. Japanese farmers spoke of infanticide as "thinning out," as they did with their rice fields. In India, many daughters were not allowed to live. Eskimos left babies out in the snow, while in the Brazilian jungle, undesired infants were left under the trees. In London in the 1860s, dead infants were a common sight in parks and ditches.


\(^{131}\) See Saunders, supra note 129, at 369.

\(^{132}\) See also Kathryn L. Moseley, The History of Infanticide in Western Society, 1 Issues L. & Med. 345, 345-61 (1986) (discussing the early history of infanticide including the common practice of killing handicapped newborns).

\(^{133}\) See Saunders, supra note 129, at 369.
their newborns die when its prospects for survival were low.\textsuperscript{134} If the mother saw abnormal signs in the infant, was burdened with older children, was beset by war and famine, or was without a husband, she would kill the newborn.\textsuperscript{135} Indeed, "[p]arental investment [was such] a limited resource [that] mammalian mothers [had to] 'decide' whether to allot it to their newborn or to their current and future offspring. If a newborn [was] sickly, or if its survival [was] not promising, they [either] cut their losses and favor[ed] the healthiest in the litter or [would] try again later on."\textsuperscript{136}

Christianity changed attitudes toward child killing, but moral disapproval of premarital pregnancy encouraged the continuation of the practice.\textsuperscript{137} In the fourth century, Roman Emperors made infanticide a crime.\textsuperscript{138} In seventeenth-century England, Parliament passed legislation criminalizing neonaticide.\textsuperscript{139} Under this law, if an unmarried woman’s baby died at birth after a concealed pregnancy, the woman was legally presumed guilty of murder.\textsuperscript{140} To rebut this presumption of guilt and prove her innocence, the woman had to find a witness to give evidence that the baby was born dead.\textsuperscript{141} The British colonies in the seventeenth century also severely punished women for committing neonaticide, but the Puritan values of that time inadvertently encouraged such practices. For instance, destroying a bastard child was considered a sin in Massachusetts,\textsuperscript{142} but state laws extended the servitude bonds for girls who bore a bastard child, and subjected girls to public whippings for premarital sex.\textsuperscript{143} Accordingly, women felt pressured to kill their offspring to avoid such consequences. Massachusetts and Virginia also enacted laws similar to England, which presumed an unmarried woman was guilty of murder if her baby died at birth.\textsuperscript{144} And penalties were harsh: until the end of the seven-

\textsuperscript{134} See Saunders, supra note 129, at 369.
\textsuperscript{135} See Steven Pinker, Why They Kill Their Newborns, N.Y. Times, Nov. 2, 1997 (Magazine), at 52.
\textsuperscript{136} See id. Even today, being young and single while pregnant, especially when giving birth alone without any planning or prenatal care, is not a positive sign for successful motherhood. See id. at 54.
\textsuperscript{137} See Osborne, supra note 133, at 49.
\textsuperscript{138} See Jones, supra note 128, at 1196. Even though a crime, infanticide nevertheless continued. See id. In the early Middle Ages, people maintained a moral distinction between infanticide, which was prohibited, and exposure (where the parent abandoned the baby), which was not. See id.
\textsuperscript{139} See Osborne, supra note 133, at 49 (discussing the Stuart Bastard Neonaticide Act of 1624, 21 Jac. I, c.27).
\textsuperscript{140} See id.
\textsuperscript{141} See id.
\textsuperscript{142} See Ann Jones, Women Who Kill 44 (1980).
\textsuperscript{143} See id.
\textsuperscript{144} See id. at 45.
In the eighteenth century, while no longer subject to public whipping, a single woman who became pregnant would still be stigmatized for life. For instance, a servant would be forced out of her job, and the only alternative employment open to her would be menial, exploitative, or socially deviant. These jobs did not provide sufficient income to support both mother and child. Therefore, the stigmatization and forced isolation of unmarried, pregnant women made neonaticide an often "obvious and necessary last resort." By the nineteenth century, judges and jurors in England and Canada became more sympathetic to the social and economic realities that drove these women to kill their own babies. In England and Canada, where a guilty verdict meant a mandatory death sentence, judges would often dismiss cases against neonaticide offenders or juries would acquit. Judges and juries were not convinced that the women charged were as malignant as other types of murderers. This was due to a belief that the infant was not sufficiently developed to contemplate its own approaching death or to suffer pain in an appreciable degree. Further, it was perceived that the death left no gap in the family circle because no one knew the baby.

B. Evolutionary and Psychological Perspective of Neonaticide

Although the number of neonaticides has been significantly reduced by sex education and the legalization of birth control and abortion, they continue to occur today. Therefore, to adequately

145. See id. at 45, 49. The last public hanging of a woman for neonaticide in the United States occurred in Massachusetts on 1778; thereafter, the compulsory death penalty was replaced with an optional prison term. See id. at 60.
146. See Constance B. Backhouse, Desperate Women and Compassionate Courts: Infanticide in Nineteenth Century Canada, 34 U. Toronto L.J. 447, 448 (1984) (stating that unmarried women who became pregnant became disgraces to their families, were cut off from families and friends, and were left to fend for themselves usually making money by prostitution); Osborne, supra note 133, at 49.
147. See Osborne, supra note 133, at 49.
148. See id. at 50.
149. See id. at 51.
150. See id. at 51; see also Backhouse, supra note 146, at 461-62 (stating neonaticide cases in Canada in the 1860s were generally dismissed, or the defendant was acquitted).
151. See Backhouse, supra note 146, at 463.
152. See id.
153. See id. Furthermore, poverty and diseases resulted in high rates of infant mortality in the nineteenth century. Because the death of newborns was so common, the killing of a child by a poor and desperate woman seemed less reprehensible. See Osborne, supra note 133, at 52.
154. See, e.g., Robyn Lansdowne, Infanticide: Psychiatrists in the Plea Bargaining Process, 16 Monash U. L. Rev. 41, 60 (1990) (discussing how illegitimacy is no longer a social stigma, better birth control methods are now available, and poverty is "alleviated by state support"); Steven E. Pitt & Erin M. Bale, Neonaticide, Infanticide, and
address this problem in the criminal justice system, one must understand neonaticide, how our evolutionary history plays a role in the continuation of the neonaticide problem, and the psychological characteristics of neonaticide offenders. Such an understanding can help develop a neonaticide syndrome defense in the United States, assist prosecutors and legislators in understanding how such an offense should be treated in the criminal system (especially as it applies to juveniles), and increase education of society at large.

Approximately thirty to forty neonaticides occur each year in the United States. These estimates, however, are based only on known cases, and it is likely that the actual number of neonaticides is higher.

The methods of neonaticide listed in order of greatest frequency are “suffocation, strangulation, head trauma, drowning, exposure, and stabbing.” One common scenario occurs when a girl gives birth to a newborn on the toilet and the newborn drowns.

1. Evolutionary Perspectives

As commentators have observed, the “[l]aw has . . . largely ignored what [biology and sociology] have revealed: Many complex human behaviors that [the] law seeks to regulate, such as those involving aggression, risk-taking, deception, and sexuality, have evolutionary origins in the deep ancestral past—origins that remain relevant today.” As discussed earlier, neonaticide has been a commonly practiced form of population control for centuries. Therefore, legal analysts and the criminal bar should examine the evolutionary characteristics of neonaticide in determining how to properly treat neonaticide offenders.

One common evolutionary explanation for infanticide is that the infant’s death improved the chances of survival of either the mother

Filicide: A Review of the Literature, 23 Bull. Am. Acad. Psychiatry & L. 375, 380 (1995) (noting that neonatal homicide rates are lower since Roe v. Wade, but neonaticide may be higher in rural areas where abortion is not socially acceptable or available).


156. See id.; see, e.g., Resnick, supra note 3, at 1419 (estimating that the incidence of neonaticide in this country is in the hundreds or even thousands).


158. See infra note 264 and accompanying text; see also Oberman, supra note 7, at 4 (discussing a 14-year-old who never knew she was pregnant until giving birth on the toilet).

159. Jones, supra note 128, at 1121.

160. See supra Part II.A.

161. In general, “[a]ll organisms, including people, are products of the historical process of differential survival and reproduction that Charles Darwin called natural selection.” Martin Daly & Margo Wilson, A Sociobiological Analysis of Human Infanticide, in Infanticide: Comparative and Evolutionary Perspectives 487, 487 (Glenn Hausfater & Sarah Blaffer Hrdy eds., 1984).
In one study of seventy pre-industrial societies, anthropologists found that eighteen of them did not allow one or both infants in a set of twins to survive because it would have been difficult to successfully rear both children due to economic, technological, and ecological factors. "The adaptive functions of parental solicitude toward offspring seem obvious. Parental care makes a clear and direct contribution to parental fitness," and each instance of parental care "involves an enormous commitment of time and resources that might have earned higher fitness returns elsewhere."

Another evolutionary theory used to explain infanticide is "discriminative parental solicitude" ("DPS") theory, which suggests that parents will invest their limited resources and energies in offspring most capable of turning that investment into reproductive success, i.e., the offspring survives to adulthood. The DPS theory suggests that parents will allocate their resources among infants, and the existence of the following factors increases the likelihood of infanticide: (1) the child's ill health, small size, or deformity; (2) the youth of the child; (3) the youth of the mother because she has more reproductive years remaining than older mothers; and (4) limited availability of resources. According to the theory, the above factors hold true for societies that have regularly practiced infanticide. For instance, in one study of sixty pre-industrial societies, twenty-one of thirty-five so-

---

162. See Scrimshaw, supra note 129, at 446.
163. See id.
164. Daly & Wilson, supra note 161, at 488 (defining parental fitness as the ability of a parent to survive and raise future children that will also survive and reproduce).
165. Id.
166. See Jones, supra note 128, at 1149, 1176. Dr. Owen Jones analyzed the evolutionary characteristics of infanticide in his research on the evolution of human biology and its impact on child abuse. See id. at 1160-70 (discussing his model of how to incorporate evolutionary analysis in reviewing a particular legal goal). Although this Note does not perform an evolutionary analysis of neonaticide, the topic certainly warrants future analysis, especially as defense attorneys explore the possibility of a neonaticide syndrome defense. The four steps in Dr. Jones' model are: (1) the identification stage, to determine what is the legal goal and how evolutionary analysis will further that goal; (2) the information stage, to determine what evolutionary theories and predictions exist; (3) the integration stage, to determine whether evolutionary theories conflict; and (4) the application stage, to determine how evolutionary theories can help to generate new legal strategies and future research. See id. at 1160-1241.
167. This factor refers to the fact that babies are more likely to be killed than toddlers or older children.
168. See Jones, supra note 128, at 1182. Other theories addressed in the Jones article include the exploitation theory, the resource competition theory, and the reproductive access theory. See id. at 1175-81. Daly and Wilson label the factors linked to infanticide using cost-benefit questions: (1) what is the offspring's relationship to the parents; (2) what is the need of the offspring; and (3) what alternative uses might a parent make of the resources it must invest in the offspring. See Daly & Wilson, supra note 161, at 489-93. They predicted that a maternal incapacity to cope with the demand of child rearing is a prevalent rationale for infanticide. See id. at 492.
169. See Jones, supra note 128, at 1200-08 & nn.271-300 (studies show infanticidal mothers are young, single, and poor).
cieties killed or abandoned deformed or ill children, and older mothers were more likely to raise a deformed child than a young mother was. In another study of infanticide in Canada from 1961 to 1979, it was found that parental homicide decreases as the child's age increases, the mothers involved were often unmarried, and infanticidal mothers were younger than were the mothers in general.

Today, with better forms of birth control and other alternatives such as adoption and abortion, infanticide is no longer necessary for population control. Nevertheless, it was quite common until the late 1800s. Evolution moves slowly and it will take time for the adaptive characteristics of our mothers to disappear from our inbreeding. Therefore, further research is needed to study the evolutionary characteristics of teens who commit neonaticide and the possible instinctual basis for the behavior.

2. Psychological Perspectives

Neonaticide usually involves a single young girl "who has concealed her pregnancy and gives birth alone in a state of denial and panic." Statistics on neonaticide show that the women are typically young, poor, unmarried, and socially isolated. Most of these women share psychological characteristics that lead to the killing of their newborns, including fear of condemnation from parents and friends, extreme de-

170. See Daly & Wilson, supra note 161, at 492.
171. See id. at 495-97. The study was conducted in Canada to determine if the killing of children was consistent with Daly and Wilson's cost-benefit questions, which is similar to the DPS evolutionary theory of infanticide. See id. The study examined 1059 cases of minors being killed between 1961 and 1979 of which the victim was less than one year old in 158 cases. See id. The results were as follows: 93% of cases were infants versus 59% were one year old victims; "only 39.5% of 38 mothers committing infanticide [in Canada during 1977 to 1979] were legally married"; and 15.7% of infanticidal mothers "were 17 years old or less compared to 3.1% of all new mothers in Canada in the same period." Id. at 496-97.
172. For instance, as late as 1833, over 164,000 babies were left at foundling hospitals in France in a legalized form of infanticide. See Jones, supra note 128, at 1197. Foundling hospitals became popular in Europe in the 1700s with the idea that parents would leave babies in hospitals instead of killing them. The number of babies left was so enormous, however, that their survival became rare. In fact, leaving a baby at a foundling hospital in essence was legalized infanticide. See id.
173. As Daly and Wilson put it:
In societies such as our own, where infanticide is condemned in all circumstances, cases occur nonetheless, and it appears that the infanticidal parties are sensitive to these same predictors of fitness. The psychology that occasionally permits such drastic failures of parental inclination nevertheless exhibits an adaptive logic and is interpreted readily, therefore, as a product of natural selection.
Daly & Wilson, supra note 161, at 502.
175. See Oberman, supra note 7, at 23-24; see also Resnick, supra note 3, at 1415 (noting the same conclusion after studying 34 neonaticide offenders).
nial of the pregnancy, and lack of ability to act to address their problem.\textsuperscript{176}

According to psychological experts, neonicide usually results from an unwed girl's fear of revealing her pregnancy to her mother because of shame or punishment.\textsuperscript{177} Typically, such women deny being pregnant and do not realize their pregnancy until moments before the baby is born.\textsuperscript{178} These women usually have no premeditated plans to kill the baby before birth, but panic when it happens.\textsuperscript{179}

Studies in the 1990s have shown that denial of pregnancy is very common. Denial has been described as a mechanism that reduces unpleasant feelings and beliefs by means of disavowing aspects of reality and typically exists when there is some stressful threat to the individual.\textsuperscript{180} Experts have conducted many case studies concerning the denial of pregnancy.\textsuperscript{181} For example, in one study of twenty-seven subjects, eleven of them did not know they were pregnant until the onset of labor.\textsuperscript{182} In another study of adoption at birth in France, four out of twenty-two subjects had denied their pregnancy such that they

\textsuperscript{176} See infra notes 177-96 and accompanying text.

\textsuperscript{177} See Resnick, supra note 3, at 1416. As a note, some experts in neonicide have interpreted Dr. Resnick's analysis as stating that the main motivation for neonicide is the undesirability of the newborn, and not mental illness. See, e.g., Mauro V. Mendelowicz et al., A Case-Control Study on the Socio-Demographic Characteristics of 53 Neonaticidal Mothers, 21 Int'l J.L. & Psychiatry 209, 213-14 (1998) (reporting on a study of 53 neonicide cases between 1900 and 1995 in Rio de Janeiro). In comparing mothers who committed neonicide with a control group of mothers with normal births, the researchers found statistically significant factors to be younger age, unmarried status, lack of education, no previous children, and no previous induced abortion for the neonicide subjects. See id. at 214-18. They concluded that the main motivation driving a mother to kill her newborn is the undesirability of the newborn. See id. at 218. As discussed in this part, however, while the mothers may not be psychotic or psychologically ill at childbirth, their denial, fear, and isolation are all substantial factors in the resulting death.

\textsuperscript{178} See, e.g., infra note 182 and accompanying text.

\textsuperscript{179} See Green & Manohar, supra note 8, at 122. For instance, in two case studies, Dr. Brozovsky and Dr. Falit observed the following:

Both perpetrators—one 14, the other 15—feared abandonment by their mothers. This fear was heightened when they became pregnant, and the girls dealt with their condition by massive denial. When they were no longer able to deny the reality with the birth of the child, they became acutely disorganized and murdered their infants.


\textsuperscript{182} See id. (citing C. Brezinka et al., Denial of Pregnancy: Obstetric Aspects, 15 J. Psychosomatic Obstetrics & Gynecology 1, 1-8 (1994)). This denial is understandable, because nearly all the subjects reported irregular menstruation-like bleeding during their pregnancy. See id.
were taken by surprise at childbirth.\footnote{183} And a study of eighteen neonaticide cases in England found that the women denied their pregnancy to themselves and others, hoping the whole problem would "somehow just 'go away.'"\footnote{184} Denial of pregnancy is more common among teenagers because they often prolong the interval between suspecting and confirming that they are pregnant.\footnote{185} Indeed, with the increased use of birth control, which can result in regular menstrual bleeding even during pregnancy, some teens, understandably, do not recognize that they are pregnant.\footnote{186}

This denial often prevents the teen from emotionally bonding with her fetus.\footnote{187} Indeed, "[t]his is a foreign body going through her, not a baby, and the bonding never occurs. . . . She doesn't think of it as her child, but as an object to get rid of."\footnote{188} Therefore, the massive denial\footnote{189} that causes the mother to fail to

\footnotesize{
\begin{itemize}
\item 183. See id. (citing C. Bonnet, Adoption at Birth: Prevention Against Abandonment or Neonaticide, 17 Child Abuse & Neglect 501, 501-13 (1993)).
\item 184. Wilczynski, supra note 174, at 49. In another study, Dr. Margaret G. Spinelli, Director of the Maternal Mental Health Program at Psychiatric Institute, interviewed 15 women charged with first or second degree murder after alleged infanticides, 10 of which were neonaticides. See Infanticide: Crime? Disorder? (visited Oct. 8, 1998) <http://156.111.80.209/n13/Infant.htm>. Dr. Spinelli found similar backgrounds and symptoms for all including suffering childhood traumas, dissociative disorder, denial of pregnancy, and long-standing mood disorders. See id. Labor and delivery were unassisted and carried out in secret. See id. “Unable to recall the actual delivery, the mothers were often unable to be witness in their own defense.” Id.
\item 185. See Kaplan & Grotowski, supra note 181 (citing D. Bluestein & C.M. Rutledge, Determinants of Delayed Pregnancy Testing Among Adolescents, 35 J. Fam. Prac., 406, 406-410 (1992)).
\item 186. See supra note 182; infra note 189 (regarding menstrual bleeding during pregnancy).
\item 188. Id. (quoting Dr. Phillip J. Resnick, Psychiatry Professor at Case Western Reserve Medical School). The emotional response called bonding is more complex than the public believes. See Pinker, supra note 135, at 52. “A new mother will first coolly assess the infant and her current situation and only in the next few days begin to see it as a unique and wonderful individual. Her love will gradually deepen in ensuing years.” Id.
\item 189. Several psychiatrists proposed that an adjustment disorder called “maladaptive denial of physical illness” be added to the Diagnostic and Statistical Mental Disorders (DSM-IV). See Strauss, supra note 180, at 1168. Psychiatrists define this disorder as persistent denial of having a physical disorder in response to symptoms, signs, or diagnosis of a physical illness that exposes the individual to a significantly higher risk of serious physical illness or death. See id. at 1169. Some psychiatrists have suggested that this new diagnosis include denial of physical conditions such as pregnancy because such denial can lead to a mother’s failure to receive prenatal care and to neonaticide. See Laura J. Miller, Maladaptive Denial of Pregnancy, 148 Am. J. Psychiatry 1108, 1108 (1991); see also Johann Kinzl & Wilfried Biebl, Disavowal of Pregnancy: An Adjustment Disorder, 148 Am. J. Psychiatry 1620, 1620-21 (1991) (suggesting that denial of pregnancy be included in this new diagnosis because the denial of pregnancy is an adjustment disorder in which the mother denies her pregnancy to reduce unpleasant affects). In response, the psychiatrists diagnosing the new adjust-
\end{itemize}
}
bonds with her baby may explain why a mother can kill her newborn.¹⁹⁰

One psychiatrist has suggested that passivity is the single personality factor that most separates women who commit neonaticide from those who seek abortion.¹⁹¹ For instance, non-passive women who choose to have an abortion are aware of their pregnancy and are capable of making sound, reasoned decisions.¹⁹² In contrast, passive individuals who commit neonaticide often deny they are pregnant and do not prepare for either the birth or the killing of the infant.¹⁹³ Instead, when “reality is thrust upon them, they respond by murdering the child or failing to act to prevent its death.”¹⁹⁴ These passive individuals are usually young, immature girls who submit to sexual relations

ment disorder agreed to include denial of pregnancy in the maladaptive denial of physical illness disorder. See David H. Strauss et al., Dr. Strauss and Associates Reply, 148 Am. J. Psychiatry 1108, 1108 (1991). It is unclear, however, if “maladaptive denial of physical illness and pregnancy” is truly recognized by psychologists and whether it could be used as a defense in a neonaticide criminal proceeding. See American Psychiatric Association, Diagnostic And Statistical Manual of Mental Disorders 623-27 (4th ed. 1994) (listing of subtypes under adjustment disorder which does not include “maladaptive denial of physical illness”). Nevertheless, defense attorneys should be aware of the proposed disorder when arguing a neonaticide defense.

Maladaptive denial of pregnancy can be distinguished from psychotic denial of pregnancy among chronically mentally ill women and pregnancy kept secret from others but not actually denied by the mother. For a discussion of psychotic denial of pregnancy, see Laura J. Miller, Psychotic Denial of Pregnancy: Phenomenology and Clinical Management, 41 Hosp. & Community Psychiatry 1233 (1990). Denial of pregnancy by women who are not psychotic is characterized by evanescent awareness of pregnancy that is quickly eliminated from consciousness, lack of emotional response to pregnancy, and a high incidence of lack of somatic changes (e.g., no significant increase in weight and continuation of cyclic vaginal bleeding). See id. at 1235. Typically, family members and friends also are unaware of the pregnancy. See id. In contrast, women with psychotic denial go back and forth between denial and acceptance of pregnancy, undergo the typical body changes associated with pregnancy, and others around them are aware of the pregnancy. See id. ¹⁹⁰. See supra Part II.B.1 (addressing evolutionary characteristics of neonaticide). It is expected that besides denial, the evolutionary and biological features of women also result in no bonding when the mother is more interested in preserving herself or existing or future offspring.


¹⁹². See Pitt & Bale, supra note 154, at 379.

¹⁹³. See Saunders, supra note 129, at 370.

¹⁹⁴. Id. Other psychiatrists, including Dr. Resnick, have endorsed Gummersbach’s observation that passivity is the single personality factor that most clearly separates women who commit neonaticide from those who obtain abortions. See Mendlowics, supra note 177, at 211 (“Women who seek abortion are activists who recognize reality early and promptly attack the danger. In contrast, women who commit neonaticide often deny that they are pregnant or assumed that the child will be stillborn.”); see also Oberman, supra note 7, at 71 (addressing studies that have found that these girls have so little self-esteem that they are incapable of acting to protect themselves, which “contributes to their becoming pregnant in the first place, and it leads to their paralysis once pregnant”).
rather than initiate them, become pregnant for the first time, have no previous criminal record, and have rarely attempted abortions.\textsuperscript{195} Another psychiatrist’s research found that those who kill their babies usually come from “unstable family environments; have probably been physically, emotionally, or sexually abused; are usually socially isolated; and have not been emotionally engaged with the father of the baby.”\textsuperscript{196}

\begin{quote}
[A common characteristic of the women] evaluated was that they were strikingly disconnected from their feelings and their circumstances . . . . The concept of pregnancy is so dangerous or threatening to them that they split it off to another part of their mind. It’s much like children who have been abused who say that they could watch themselves being abused. . . . The mothers would recall watching themselves give birth.\textsuperscript{197}
\end{quote}

The above examination of psychological attributes of neonaticide offenders strongly suggests that a neonaticide syndrome does, in fact, exist. Passivity, fear, denial of pregnancy, and the shock and pain of giving birth alone are common characteristics of neonaticide.\textsuperscript{198} Despite the existence of these common characteristics, however, the treatment of neonaticide offenders among different countries varies greatly. Part III examines this treatment.

\section*{III. Neonaticide Convictions in the United States Compared to Other Countries}

Infanticide statutes, as those adopted in many other western countries, encourage prosecutors to charge neonaticide offenders with manslaughter rather than murder.\textsuperscript{199} To date, no state in the United States has enacted an infanticide statute.\textsuperscript{200} Women and teenagers that have allegedly killed their babies at birth in the United States are typically charged with murder.\textsuperscript{201} These women may never go to trial, however, because they may plea down to manslaughter.\textsuperscript{202} Unfortu-

\begin{thebibliography}{9}
\bibitem{195} See Saunders, supra note 129, at 370 (citing V.J. Hirschmann & E. Schmitz, \textit{Structural Analysis of Female Infanticide}, 8 Psychotherapy 1, 1-20 (1958)).
\bibitem{197} Id. (quoting Dr. Margaret Spinelli).
\bibitem{198} This Note has only explored in a cursory way the evolutionary and psychological effects that may contribute to neonaticide. A full article or note could be dedicated to just performing the evolutionary model suggested by Dr. Jones in part II.A or the psychological influences that contribute to teenage neonaticide. Nevertheless, as state legislatures, prosecutors, and defense attorneys continue to deal with neonaticide cases, the psychological and evolutionary influences raised in this Note should be compelling reasons to treat neonaticide as a crime no greater than manslaughter so as to allow teens to be adjudicated in the juvenile court.
\bibitem{199} See infra note 218 and accompanying text.
\bibitem{200} See Wilczynski, supra note 174, at 163.
\bibitem{201} See infra note 237 and accompanying text.
\bibitem{202} See Oberman, supra note 7, at 26 (stating that many cases settle out of court).
\end{thebibliography}
nately, the charges, convictions, and sentences in neonaticide cases vary widely in the United States. Some women have been found guilty of murder and sentenced to fifteen to thirty-four years of imprisonment, while others have been convicted of criminal negligence and sentenced to probation. Unlike the United States, other countries have infanticide statutes as part of their penal codes. In these countries, the statute directs prosecutors to charge women who commit neonaticide with a homicide no higher than manslaughter; in addition, the actual conviction and sentence these women usually receive results in no jail time. Even when the prosecutor initially charges the woman with murder, infanticide may be used as a defense, resulting in a lighter sentence. Countries that have infanticide statutes have greater consistency in sentencing offenders. This part provides a detailed discussion of the statutes and sentences received in other countries as compared to the United States.

A. The Treatment of Neonaticide in Other Countries

Australia, New Zealand, Hong Kong, Canada, England and several other European countries have infanticide statutes. In 1922, the English Parliament passed the Infanticide Act, which applied to newly born children; the Act was amended in 1938 to include infants under twelve months of age. The statute provides that a woman is

203. See infra note 236 and accompanying text.
204. See infra note 236 and accompanying text.
205. See infra notes 211-17 and accompanying text.
206. See infra note 218 and accompanying text.
207. See infra note 218 (discussing how infanticide is used as a defense in Australia).
208. See infra notes 220-27 and accompanying text.
209. See infra notes 211-17 and accompanying text.
210. Infanticide Act of 1922, 12 & 13 Geo. 5, ch. 18 (Eng.).
211. Infanticide Act of 1938, 1 & 2 Geo. 6, ch. 36 (Eng.). The full text of the Act is as follows:

(1) Where a woman by any wilful act or omission causes the death of her child being a 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 having 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, 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.

(2) Where upon the trial of a woman for the murder of her child, being a child under the age of twelve months, the jury are of opinion that she by any wilful act or omission caused its death, but that 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 giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then the jury may, notwithstanding that the circumstances were such that but for the provisions of this Act they might have returned a verdict of murder, return in lieu thereof a verdict of infanticide.
guilty of infanticide if she causes the death of her child when "the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth."\textsuperscript{212} This offense is punished "as if she had been guilty of the offence of manslaughter."\textsuperscript{213}

The origins of the English statute are twofold. Its policy basis was the public's concern about the harsh criminal treatment of young, single, and low-income women.\textsuperscript{214} Its legal justification, however, focused on psychiatric issues that could occur during the birthing process; this was intended to provide the courts with a less contentious medical reason to justify the lenient treatment of these women.\textsuperscript{215} As one commentator has observed, "[A] temporary disturbance in the mother's balance of mind could be assumed to flow from the physical effects of the birth. Particularly if she was unattended [while giving birth], the woman might well be in considerable distress and shock at

\begin{itemize}
\item (3) Nothing in this Act shall affect the power of the jury upon an indictment for the murder of a child to return a verdict of manslaughter, or a verdict of guilty but insane.
\end{itemize}

\textit{Id.}
\textsuperscript{212} See supra note 211.
\textsuperscript{213} See supra note 211.
\textsuperscript{214} See Wilczynski, supra note 174, at 150; see also Osborne, supra note 133, at 51 (observing that in Canada, where the mandatory death sentence was suppose to be applied in a conviction for murder, juries regularly returned a verdict of "not guilty" even though there was overwhelming evidence to the contrary). Other reasons for jury sympathy were that infant mortality was high in the early twentieth century, juries recognized that the mother was trying to hide her shame of an illegitimate birth, doctors lacked proof as to whether the baby's death was of natural causes or at the hands of the mother, and juries did not want to sentence the mother to death. See Osborne, supra note 133, at 52-53.

The Infanticide Act of 1922, 12 & 13 Geo. 5, ch. 18 (Eng.), has an interesting background. In England, the Stuart Bastard Neonaticide Act of 1624 created a presumption of guilt if an unmarried woman concealed her pregnancy and the baby died; to rebut this presumption, the woman had to find a witness to give evidence that the baby was born dead. See Lansdowne, supra note 154, at 43. Because of lack of compliance with the statute, it was repealed in 1803. See id. Prosecutors have since been required to prove that the baby was born alive and that the mother killed it. See id. at 44. An alternative to a murder conviction was the enactment in England of a statute that made a separate offense for the concealment of birth, which was punishable by two years of imprisonment. See id. (referring to the Offences Against the Person Act, 1828 (Eng.)). Many commentators argued, however, that it was unfair to force juries to find an incorrect verdict to avoid the mandatory death sentence. See id. The Infanticide Act of 1922 was enacted as a means to give jurors a basis to convict a woman who kills her newborn of a homicide that would not result in a murder conviction. See id. at 45.

\textsuperscript{215} See Wilczynski, supra note 174, at 150. By having a medical reason to explain why women kill their newborns, courts could feel more comfortable granting such women a very lenient sentence. See Lansdowne, supra note 154, at 45 (stating that the "promoters of reform were as much, if not more, concerned with social conditions such as poverty, abandonment by the father, and social disgrace as with the effect on the woman's state of mind [as the result] of giving birth").
this time, although not mentally disturbed.\textsuperscript{216} Similar laws were enacted in Australia, New Zealand, Canada, and Hong Kong.\textsuperscript{217}

\textsuperscript{216} Lansdowne, \textit{supra} note 154, at 46

\textsuperscript{217} The following three states in Australia developed statutes similar to the English Infanticide Act: New South Wales, Victoria, and Tasmania. The Victorian Crimes Act of 1958 reads as follows:

\begin{quote}
Offence of Infanticide. (1) Where a woman by any wilful act or omission causes the death of her child, being a 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 having 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, then, notwithstanding that the circumstances were such that but for this section the offence would have amounted to murder, she shall be guilty 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.

(2) Where upon the trial of a woman for the murder of her child, being a child under the age of twelve months, the jury are satisfied that she by any wilful act or omission caused its death, but that 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 giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then the jury may, notwithstanding that the circumstances were such that but for the provisions of this section they might have returned a verdict of murder, return in lieu thereof a verdict of infanticide.

(3) Nothing in this Act shall affect the power of the jury upon a charge of murder of a child to return a verdict of manslaughter, or a verdict of not guilty on the ground of insanity, or a verdict of concealment of birth.
\end{quote}

Crimes Act, 1958, § 6 (Vict.); \textit{see also} Crimes Act, 1900, as amended, § 22A N.S.W. (same). The Tasmania law is as follows:

\begin{quote}
Any woman who, by any wilful act or omission, causes the death of her newly born child, being at the time not fully recovered from the effect of giving birth to such child, and the balance of her mind, by reason thereof, disturbed, is guilty of a crime, which is called infanticide, although the offence would, but for this section, have amounted to murder.
\end{quote}

Criminal Code Act, 1924, § 165A (Tas.). Section 216 of the Criminal Code of Canada states:

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


\begin{quote}
Where a female person is charged with infanticide and the evidence establishes that she caused the death of her child but does not establish that, at the time of the act or omission by which she caused the death of the child, (a) she was not fully recovered from the effects of giving birth to the child or from the effect of lactation consequent on the birth of the child, and (b) the balance of her mind was, at that time, disturbed by reason of the effect of giving birth to the child or of the effect of lactation consequent on the birth of the child, she may be convicted unless the evidence establishes that the act or omission was not wilful.
\end{quote}

\textit{Id.} § 590; \textit{see also} Crimes Act, 1961, § 178 (N.Z.) (providing similar language as Canada’s § 590); Oberman, \textit{supra} note 7, at 18 n.68 (providing a list of other countries and territories that recognize infanticide as a less culpable form of homicide: Austria, Finland, Greece, India, Italy, Korea, Philippines, Turkey, and Western Australia).
In jurisdictions with infanticide statutes, prosecutors typically reduce the charge from murder to infanticide at the early stage of the prosecution. Consequently, these women usually are convicted of infanticide instead of murder, and are given sentences that often do not include incarceration. For instance, in England and Australia, women convicted under the Infanticide Act generally receive lenient sentences, consisting of a probation order with psychiatric treatment attached. In a case study of eighteen neonaticides in England, only one offender was sentenced to incarceration. This girl, whose baby survived, kept the baby and resisted social services’ attempts to intervene, a fact that might have triggered her sentence to youth custody. In another study of fifty-six women convicted of killing their infants in England and Wales during the years 1982 to 1988, thirty-six of these women were convicted of infanticide, twenty for manslaughter.

218. See Wilczynski, supra note 174, at 153. In Wilczynski’s study, two-thirds of the women were prosecuted for infanticide and not murder, whereas in other cases with a potential diminished responsibility defense, all were prosecuted for murder. See id. In only three infanticide cases were the women initially charged with murder because of lack of evidence to support infanticide. See id. The charging of women in Australia has mixed results. In the Victorian case of R. v. Hutty, (1953) V.L.R. 338, 339-40, the court recommended that women only be charged with infanticide rather than murder where appropriate. In Victoria, the common practice is to reduce charges to infanticide at an early stage of the criminal justice process. See Wilczynski, supra note 174, at 153. Nevertheless, the practice in New South Wales is to prosecute the woman for murder and use infanticide as a defense to reduce the charge. See id. In the Lansdowne study of five women who killed their babies in 1976 to 1980 in New South Wales, the women were all charged with murder and then pleaded guilty to the lesser charge of infanticide. See Lansdowne, supra note 154, at 48. “[T]he compelling reason for the prosecution to prefer infanticide to be used as a defense is that it allows the prosecutor to maintain a superior bargaining position. A charge of murder encourages the defendant to plead guilty to the lesser offence of infanticide rather than face trial...” Id. at 49.

219. See Wilczynski, supra note 174, at 153 (“In England there has been a steady shift in sentencing patterns since the creation of the offence in 1922, from an even split between custodial and non-custodial disposals, to the almost total abandonment of prison sentences by the late 1950s.” (citation omitted)); infra notes 220-27 and accompanying text.

220. See Wilczynski, supra note 174, at 153-54.

221. See id. at 48, 142. In Wilczynski’s English sample of cases during 1983 and 1984, eight of the 11 women convicted of infanticide received probation orders, in four cases with a condition of psychiatric treatment. See id. at 154. One woman received a supervision order and two received unrestricted hospital orders. See id. In NSW, Australia, the sentence in all three of the infanticide cases between 1990 and 1994 was a bond (in one case with supervision). See id. In a study by P.T. d’Orban of 89 women charged with killing their children in England and Wales from 1970 to 1975, nine of the 11 neonaticide subjects were granted bail. See P.T. d’Orban, Women Who Kill Their Children, 134 Brit. J. Psychiatry 560, 560, 566 (1979). Ten of the 11 neonaticide offenders were ultimately convicted of infanticide; eight were subject to probation, one to probation on condition of psychiatric treatment, and the other two were either conditionally discharged, received an extradition order, or received a one day prison sentence. See id. at 566-67.

222. See Wilczynski, supra note 174, at 142.
ter, and one for murder. Of these fifty-six women, forty-five were sentenced to probation, four were remanded to a hospital, and only seven were sent to prison. Similar light sentences were found in Hong Kong. A study done there showed that in six cases of neonaticide, five of the offenders were convicted of infanticide (similar to English Infanticide Act), and one was acquitted for lack of evidence. None of the five received a prison sentence: two received hospital orders, one received probation on condition of outpatient psychiatric treatment, and two received probation.

Some have questioned the medicalization of the English infanticide statute, due to the lack of a proven scientific basis demonstrating that a woman giving birth suffers severe psychological lapse. Many commentators on the English law, however, do seem to favor the results—namely, the lenient sentences for these women. Consequent

---


224. See id. One prison sentence was for seven years, and the others were for terms less than three years. See id. In another study of 21 killings of newborns in England between 1982 and 1985, the majority of the woman pleaded guilty to infanticide. See R.D. Mackay, The Consequences of Killing Very Young Children, 1993 Crim. L. Rev. 21, 22 (using records from the Crown Prosecution Service regarding 47 infanticides under one year of age in England and Wales during years 1982 to 1985). Of 34 cases in which the prosecutor proceeded with, six cases involved neonaticide. For three of the neonaticide cases which involved schoolgirls (two had stabbed the victim with scissors and the third killed the victim by asphyxiation), each were charged with infanticide to which they pleaded guilty and received a three-year supervision order. See id. at 24. In the other three cases of neonaticide, two were charged with infanticide and pleaded guilty, while the third was charged with murder but pleaded guilty to infanticide. See id. There were other cases that the prosecutor did not proceed with as a homicide. In one neonaticide case, the woman was charged with concealment of birth and in four cases, the case was dismissed due to lack of evidence of a live birth. See id. at 23, 26. In addition, in another three cases of neonaticide and three cases of concealment of birth, the prosecutor decided that it was not in "the public interest to proceed." See id. at 26-27. The facts in one of the public interest cases were as follows:

A 17-year-old secretly gave birth at home and wrapped a scarf tightly around the child's head. She claimed that at no time did the child move or cry. A psychiatric report stated that she must have been in a state of near panic during the birth and that she probably had limited awareness of her actions. . . . [I]n view of D's age it was decided not to proceed.

Id. It is unclear from the study how the prosecutor distinguished between pleas to infanticide that resulted in no jail time and the decision not to pursue the case in the "interest of justice."

225. See Wilczynski, supra note 174, at 154.


227. See id. at 189-90.

228. See infra notes 425-27 and accompanying text.

229. See infra note 433 and accompanying text.

230. The sentencing policy for infanticide is very remarkable for an offence of homicide. As in historical times, there are clearly many varied and complicated reasons why the infrantcilical offender is perceived sympathetically.
B. Case Examples in the United States

In contrast to other countries, no United States jurisdiction has an infanticide statute. As a result, prosecutors will often charge a woman who commits neonaticide with murder. To obtain a conviction, the prosecutor must prove the child was born alive, namely, that the infant was breathing and had a separate existence from the mother after being extruded from the birth canal, and that the accused was the criminal agent causing the infant's death. In the United States, the conviction rate for mothers committing neonaticide for murder is generally low, most likely due to the fact that these women do not fit the societal stereotype of murderers. Nevertheless, the sentences vary widely, from probation to many years of incarceration.

One study of forty-seven neonaticide cases in the United States between the years 1988 and 1995 found that the convictions of the defendants varied widely from unlawful disposal of a body (a misdemeanor) to first-degree murder. Further, the sentencing ranged anywhere from intensive therapy, parenting classes, and pro-

These include stereotypical beliefs that women and mothers are "normally" incapable of violence, and recognition of the connection between child-birth and mental disorder []. There may also be a sense of collective guilt about the social pressures which can lead women to kill their offspring. A further possible factor is that infants are not perceived as being as "human" as older children: this is illustrated by the fact that among the [English] sample cases, the victim was less likely to be referred to by someone as "it" in the file as she became older (comparing the age groups under one day, one day - one year, and over one). Female [infanticide] also touches on the deep-seated fear and mystery surrounding the female reproductive system. For example, the image of the "ambiguous mother" who gives life but also takes it away is a powerful theme in folk stories around the world.


See supra text accompanying note 200.

See infra note 237 and accompanying text.

See State v. McGuire, 490 S.E.2d 912, 918 n.11 (W. Va. 1997); Resnick, supra note 3, at 1418. The State has to establish beyond a reasonable doubt that the baby had an independent circulation and respiration system prior to its death. See McGuire, 490 S.E.2d at 918 n.11. If the jury finds beyond a reasonable doubt that the baby was born alive, then the jury must determine that the State has proved beyond a reasonable doubt that the defendant committed the offense charged or any lesser included offense. See id.; see also Singleton v. State, 35 So. 2d 375, 378 ( Ala. Ct. App. 1948) (discussing the state's burden of proving that the child was born alive).

See Pitt & Bale, supra note 154, at 384.

See infra note 236 and accompanying text.

See Oberman, supra note 7, at 26.
bation to a prison sentence of thirty-four years. In the study, twenty-nine of the defendants were charged with murder, nine with manslaughter, one with criminal homicide, two with unlawful disposal of the body, and five were unknown. With regard to convictions, seven offenders were convicted of murder, one was found guilty of murder but insane, four were convicted of manslaughter, and one with criminal homicide. The convictions of twenty-six of the cases were unknown. With regard to sentencing, four received some form of probation, counseling or community service, two were sentenced to one to five years, one sentenced to five to seven years, one sentenced to ten to fifteen years, and one was sentenced to fifteen to twenty years. One is under home arrest, one is diagnosed as mentally ill, six are awaiting appeal or retrial, and the sentences of thirty of the cases are unknown. In general, the study shows that while the prosecutor is likely to pursue a murder conviction, the actual convictions and sentencing result in a lesser charge. The study also demonstrates the wide variability of convictions and sentencing in the United States.

Some cases have resulted in somewhat harsher sentences for teenagers committing neonaticide. For example, in People v. Doss, a fifteen-year-old appealed her conviction of first-degree murder and sentence of twenty years in prison. The girl claimed that she had not been aware that she was pregnant until eight months into the pregnancy, as she had bleeding throughout the pregnancy that resembled menstruation. She originally stated that she dropped the baby on a pair of scissors, but later claimed that she unintentionally stabbed the baby while trying to cut the umbilical cord. The Appellate Court of Illinois affirmed her conviction, finding that the law did

---

236. See id.
237. See id. at 26, 93-94, 100. It should be noted, however, that because the study focused on journalistic reports and many of the outcomes of the 47 cases were unknown, Professor Oberman stresses that there is a risk of inaccuracy in making inferences from the study; the study is instructive in showing the wide variation of sentencing in the United States. See id. at 22, 26.
238. See id. at 94, 98 (based on convictions that were consistent with original charges; the numbers do not include pleas or verdicts of a lesser offense).
239. See id. at 94, 100.
240. See id. at 94-95, 100
241. See id.
243. See id. at 808.
244. See id. at 807-08. Dr. Vernon Cook, a physician who specialized in obstetrics and gynecology, testified as an expert for Diana Doss in this case. See id. at 808. According to Dr. Cook, "[Y]oung women may initially have irregular menstrual cycles for up to two years. Many women experience bleeding throughout pregnancy which may appear to be menstrual periods. Further, it is possible for a woman to be unaware of her own pregnancy." Id.
245. See id. at 807. The defendant's mother found the baby on top of the trash can and took the baby and her to the hospital, but the baby died of the stab wounds. See id.
246. See id. at 808-09.
not require that the accused had the specific intent to kill or do great bodily harm, but merely that the accused voluntarily and willfully committed an act that had a natural tendency to destroy another's life.\textsuperscript{247} The court found that her deliberate attempt to dispose of the unwanted child indicated the death was not accidental.\textsuperscript{248} The court refused to reduce her conviction to involuntary manslaughter on the ground that the \textit{mens rea} was unintentional.\textsuperscript{249}

In \textit{Moffit v. Arkansas},\textsuperscript{250} a seventeen-year-old appealed her manslaughter conviction and ten-year sentence for smothering her new born infant.\textsuperscript{251} The Arkansas Court of Appeals affirmed the conviction, finding that her attempt to hide the baby's birth and death demonstrated consciousness of guilt.\textsuperscript{252} Further, the court held that the lower court did not err in denying the teen's request that the case be transferred to juvenile court.\textsuperscript{253} The court stated that because the defendant was charged with first-degree murder and that act, if proven, constituted an act of violence, removal to juvenile court was

\begin{itemize}
  \item \textsuperscript{247} See id. at 808.
  \item \textsuperscript{248} See id. at 808-09.
  \item \textsuperscript{249} See id. at 809. In another Illinois case, a 19-year-old who committed neonaticide was sentenced to 34 years for first degree murder and five years for concealment of a homicide. See United States ex rel. Jones v. Washington, 836 F. Supp. 502, 504 (N.D. Ill. 1993). The appeals court did recognize that the length of the sentence was excessive, but stated that the court could not address this and it must be addressed in a petition for clemency. See id. at 510. In addressing the excessiveness of the sentence, the court stated:
  \begin{quote}
    At the time Jones gave birth she was nineteen years old and lived in a three-bedroom apartment with eleven other people. She had dropped out of high school and had a limited education. When she gave birth, Jones was undoubtedly under considerable stress, since she was alone in the bathroom of her mother's apartment and no one knew that she was pregnant. Jones did not have a previous criminal record and, during the trial, was portrayed by her family and friends as a shy teenager who cared deeply for her son Darryl.
  \end{quote}
  Id. Both \textit{Doss} and \textit{Jones} demonstrate that sentences for neonaticide offenders can be quite lengthy, considering these are young women (really only teenagers) with no prior criminal records.

  \item \textsuperscript{251} Id. at *6.
  \item \textsuperscript{252} See id. at *7-*8.
  \item \textsuperscript{253} See id. at *10. The factors to consider in Arkansas to decide whether a case should be transferred to juvenile court include the seriousness of the alleged offense, "whether violence was allegedly used, and whether the alleged offense is part of a pattern of adjudicated offenses, along with the [offender's] prior history, character traits, mental maturity, and any other factors that reflect upon the juvenile's prospects for rehabilitation." Id. at *8.
\end{itemize}
inappropriate. The court also affirmed the trial court's denial to grant the defendant youthful offender status.

Other courts have administered more lenient treatment toward teens who commit neonaticide. In re B.L.M. involved a case in which a fifteen-year-old tried in family court had been adjudicated delinquent for committing acts that, if she were an adult, would have constituted the offense of reckless abandonment of a child. And in In re Sophia M. a fourteen-year-old had been charged with the murder of her infant child, but the lower court only found her guilty of voluntary manslaughter. A psychiatrist who testified on behalf of Sophia found her to possess a maturity level of only an eleven or twelve-year-old, and that Sophia was probably in a disassociative state during the birth due to extreme fright and panic. The lower court followed the probation department's recommendation; Sophia was "adjudged a ward of the court [and] ordered to remain in her mother's home, to remain in therapy, to attend school regularly, and to complete 100 hours of community service work." In Vaughan v. Virginia, the Court of Appeals overturned the defendant's conviction of first-degree murder and remanded the case back to the trial court to retry the defendant for involuntary man-

---

254. See id. at *9-*10; see also infra notes 360-67, 386-90 and accompanying text (discussing factors in removal to juvenile court and criticism of the "male gender" considerations used to develop those factors).

255. See Moffitt, 1993 Ark. App. LEXIS 171, at *13. The trial court found it would not be in the interests of the state or the defendant to resort to alternative sentencing as a youthful offender, and the appeals court said there is no error in this decision. See id.


257. See id. at 700. "B.L.M. claimed she was not aware [that] she was pregnant until she gave birth, and that the baby did not show signs of life." Id. at 701. B.L.M. placed the baby in the trash can. See id. B.L.M.'s mother heard the baby whimpering and took it to the hospital, where it died that night. See id. A doctor testified that the infant was born prematurely and had a lung problem, giving it only a one percent chance to survive. See id. But the doctor also observed that the cause of the death was both the baby's prematurity and its exposure to the elements. See id. The sentencing of B.L.M. was not mentioned in the case.

258. 234 Cal. Rptr. 698 (Ct. App. 1987).

259. See id. at 698. In a tape-recorded interview, Sophia told the police that she gave birth alone in the bathroom. See id. at 699. She covered the baby's mouth to stifle its cries so her mother would not hear, placed the baby in a grocery bag, and dropped the bag over the back fence. See id. During the trial the doctor could not conclude whether the baby was born alive. See id.

260. See id. at 699. The court affirmed the voluntary manslaughter conviction, finding that the prosecution did introduce evidence that creates a reasonable inference that the death could have been caused by a criminal agency even though there was an equally plausible noncriminal explanation of the event. See id. at 700-01. Further, based on her tape-recorded statements, the court found that there was sufficient evidence to prove that the girl had the intent to kill. See id. at 702.

261. See id. at 698.

slaughter.263 The evidence revealed that when the sixteen-year-old had given birth, the baby landed in the toilet bowl.264 After the girl removed the baby from the toilet and laid it on the floor, it cried for several minutes and then stopped.265 Later in the day, the girl placed the baby in the dumpster.266 The court observed that in Virginia, to obtain a murder conviction, the prosecutor must prove that the accused maliciously omitted to perform her duty of care; if, however, no malice is shown but the defendant is criminally negligent, then the offense is manslaughter.267 The court found the evidence inadequate to prove that the girl acted with malice.268 The court made the following observations about the prosecutor’s case: (1) evidence that the teen made no plans for adoption did not demonstrate malice or premeditation because she could have decided to keep the baby; (2) evidence that the teen had babysat was not a credible source of showing malice, as babysitting does not teach a young girl how to give birth; and (3) the fact that the girl disposed of the baby did not show malice or premeditation because disposing of the body is consistent with shame and of fear in incurring anger from her parents.269

C. Public Perception of Neonaticide Offenders in the United States

Not only do United States courts have wide discrepancies in their treatment of neonaticide offenders as compared to other countries, but the public attitude toward these teens has varied as well. One highly publicized case of a seventeen-year-old demonstrates the public debate about what is the proper punishment for teens who commit neonaticide.270 Because of her age, Rebecca Hopfer, who concealed the birth of her baby in the garbage, was initially arraigned in juvenile court.271 The judge, however, stated that for the safety of the community, she must be placed under legal restraint and tried as an adult.272 Public sympathy for Hopfer was overwhelming.273 After she was indicted by the grand jury on charges of first-degree murder and was released on house arrest, the public debated whether she had received preferential treatment because she was white, suburban, and middle class.274 The trial was covered on television and Rebecca was con-

263. See id.
264. See id. at 802.
265. See id.
266. See id. at 803.
267. See id. at 806. The court observed that a mother has a legal duty to attend to her newborn baby, and the sole fact that she has recently experienced childbirth does not excuse her from a legal duty to care for the baby. See id. at 804.
268. See id. at 807.
269. See id.
270. See Oberman, supra note 7, at 27-30.
271. See id. at 27.
272. See id.
273. See id.
274. See id.
victed of first degree murder and sentenced fifteen years to life.\textsuperscript{275} The public debate continued during the appeals process after she was freed under house arrest while awaiting the appeals decision.\textsuperscript{276} Some raised issues as to whether she received special treatment because she was white while others argued the real crime here was ignorance and the fact no one paid enough attention to this girl to notice she was pregnant.\textsuperscript{277} Nevertheless, the appeals court affirmed her conviction and she has begun serving her sentence.\textsuperscript{278}

In the past few years, the media has focused much attention on neonaticide. For instance, some advocated the death penalty for Amy Grossberg, after her newborn was found in a dumpster outside a hotel room in Delaware in 1996.\textsuperscript{279} Even more recently, there was significant press coverage surrounding Melissa Drexler, who gave birth in the bathroom of her high school during her senior year prom in New Jersey last year.\textsuperscript{280} Ms. Drexler ultimately pleaded guilty to aggravated manslaughter, which will result in a jail sentence of ten to fifteen years.\textsuperscript{281} The New Jersey prosecutor stated that there had been twelve neonaticides in the past fifteen years in New Jersey, all but one resulting in plea bargains and similar sentences as received by Ms. Drexler.\textsuperscript{282} While the prosecutors recognized the emotional stress on these teens and took note of the fact that they denied their pregnancies, they nevertheless sought lengthy sentences.\textsuperscript{283}

On the other hand, England and other countries have a much less critical view toward neonaticide offenders. For example, Caroline Beale, an English woman visiting New York in 1994, killed her newborn by suffocation.\textsuperscript{284} She displayed the classic signs of a neonaticide offender: she denied her pregnancy and made no preparation for the birth of the child.\textsuperscript{285} She spent eight months on Riker's Island before being released on bail.\textsuperscript{286} The English public demanded that the United States release her back to England.\textsuperscript{287} They perceived Beale as a tragic victim who deserved sympathy and was in need of psychiat-

\textsuperscript{275} See id. at 28; State v. Hopfer, 674 N.E. 2d 1187 (Ohio 1997).
\textsuperscript{276} See Oberman, supra note 7, at 29.
\textsuperscript{277} See id. at 29 nn.124-25; see also Brienza, supra note 196, at 13 (discussing Professor Oberman's surprise with the range of punishment neonaticide offenders receive).
\textsuperscript{278} See Oberman, supra note 7, at 29 n.127.
\textsuperscript{279} See Full-Birth Abortion, supra note 1, at 37.
\textsuperscript{281} See id. One of the twelve cases involving neonaticide which did go to trial in New Jersey resulted in the offender receiving a 30 year sentence. See id.
\textsuperscript{282} See id.
\textsuperscript{283} See id.
\textsuperscript{284} See Wilczynski, supra note 174, at 164.
\textsuperscript{285} See id.
\textsuperscript{286} See id.
\textsuperscript{287} See id.
ric help.\textsuperscript{288} In contrast, the American press portrayed her as a cold-blooded killer.\textsuperscript{289} The American prosecutor emphasized Beale's deviousness in her concealment of the child's body, and was in favor of treating Beale harshly.\textsuperscript{290} The English, however, view concealment of the baby as simply a part of the "neonaticide syndrome."\textsuperscript{291} In March 1996, the prosecutor accepted Beale's plea to manslaughter, and she returned to England to serve five years of probation on condition of psychiatric care.\textsuperscript{292}

Without an infanticide statute, teen neonaticide offenders in the United States are subject to varying sentences, some of which can result in many years in prison, trials in adult court instead of juvenile court, and subjection to harsh criticism by the American public and media. Part IV argues that the best way to address these inconsistencies and to carry out justice is through the passage of neonaticide statutes in state criminal laws.

IV. Why States Should Enact Neonaticide Provisions
As Part of the Manslaughter Provisions in
State Penal Codes

This part addresses why states should consider enacting neonaticide provisions similar to England's Infanticide Act as part of the manslaughter provisions in state penal codes. This part argues that legislators and lawyers need to focus more attention on "typical" female crimes and address whether the "get tough" legislation for juveniles is appropriate in the case of young neonaticide offenders. Given the psychological and evolutionary characteristics that lead to neonaticide, this part proposes that states look into alternative forms of punishment for these young women.

A. Neonaticide Offenders Do Not Have the Requisite Mens Rea
to Commit Murder

Based on the common characteristics of neonaticide offenders, these young women should not be prosecuted for murder in the criminal court, but rather, they should be adjudicated under the juvenile system. This section reviews the characteristics of neonaticide offend-
This section argues that because of the common psychological and evolutionary characteristics of neonaticide offenders, teens who commit neonaticide are likely not to have the requisite mens rea to commit murder. This section also addresses why a neonaticide statute is appropriate given the burdens associated with the pursuit of a diminished capacity or extreme emotional disturbance defense, as demonstrated by studies conducted in England and Australia.

1. Common Characteristics of Neonaticide Offenders

Neonaticide offenders tend to be young, passive women who have low self-esteem, feel unloved and alone, have no previous criminal records, and deny their pregnancy for the length of its term. The teenager often gives birth alone, and typically has received no prenatal information from a doctor or family member. When the teen is confronted with her baby, she fears its cry and suffocates or kills it in some manner so that her parents will not discover it. Sometimes the girl may neglect the baby and it dies of exposure.

Although the mother is usually the agent that caused the infant's death, making the offense a homicide; the extreme stress of the situation along with other factors discussed below, does not support a conviction for murder. In the case of teenage neonaticide, the killing was neither intentional nor premeditated. The teen is not necessarily "insane" at the moment of giving birth, but her senses are impaired by tremendous pain, fear, and confusion. Therefore, neonaticide should not be treated as murder but at most as manslaughter.

2. Mens Rea Considerations

In the highly stressful situations surrounding the birth of a baby of a neonaticide offender, the mother does not “intentionally” kill her

293. See supra Part II.B.2 (discussing psychological perspectives of neonaticide); Wilczynski, supra note 174, at 30 (stating that neonaticide usually involves a single, young girl who has concealed her pregnancy and gives birth alone in a state of panic and denial).

294. See supra notes 177-79 and accompanying text; see also Wilczynski, supra note 174, at 50 (stating that a typical woman who later commits neonaticide continues her routine and does not seek medical attention during pregnancy).

295. See supra notes 7, 157 and accompanying text.

296. See supra note 8 and accompanying text.

297. See Vaughan v. Virginia, 376 S.E.2d 801, 804 (Va. Ct. App. 1989) (noting it is only a homicide as long as the prosecutor can prove the child was born alive and had a separate existence apart from the mother).

298. See supra notes 174-79 and accompanying text.

299. See Dressler, supra note 19, at 101 ("Except in rare circumstances, a person is not guilty of an offense unless he performs a voluntary act (or omits an act that is his legal duty to perform) that causes social harm . . . with a mens rea (literally a 'guilty mind').").

300. See id. at 105 ("At common law, a person 'intentionally' causes the social harm of an offense if: (1) it is his desire (i.e. his conscious object) to cause the social harm;
child. Because she typically is in complete denial of her pregnancy,\textsuperscript{301} she certainly lacked any knowledge or intent to plan its death.\textsuperscript{302} So when the teen gives birth in a panic,\textsuperscript{303} then acts rashly by killing her baby, her culpability lies somewhere between criminal negligence and manslaughter, i.e., recklessness.\textsuperscript{304} The rash killing of a newborn as a means of self-protection is also something of an instinctual act.\textsuperscript{305} The evolutionary characteristics of a mother, which predispose her to consider what is in the best interest of her survival and that of future offspring,\textsuperscript{306} must be considered. These evolutionary characteristics suggest that the neonaticide offense is not equated with cold-blooded murder, but is more an instinctual “panic-driven” act done to protect the mother’s future interests.

Some courts have pointed to the fact that the mother disposed of the baby’s body after its death as evidence of the mother’s “intent to kill.”\textsuperscript{307} Disposing of the child’s body, however, is simply part of the neonaticide phenomenon; it is consistent with the mother’s expression of her shame and fear, and does not show premeditated intent.\textsuperscript{308} It is because some courts do not understand the characteristics of neonati-
cide that they will be quick to judge the disposal of the body to indicate that the girl planned to kill her newborn at birth.  

Finally, a teenager does not have the same knowledge of sex, pregnancy, and birth as an adult, so the teenager should be judged under a different standard of proving mens rea than an adult. That is why teenage neonaticide offenders are best served if adjudicated in the juvenile court system and not treated as an adult charged with murder.

3. Diminished Capacity or Extreme Emotional Disturbance Defenses Are Not Sufficient to Address Neonaticide Offenders

One can argue that there is no need for a special neonaticide provision in the penal codes because mitigating factors already exist to reduce the conviction from murder to manslaughter: extreme emotional disturbance and diminished capacity defenses. The infanticide statutes in England, Canada, and other countries, however, place a lesser burden of proof on the mother to prove she was mentally incompetent than what is required under a diminished capacity defense. In England, for instance, the infanticide statute includes a presumption of diminished capacity for an alleged offender who caused the death of her newborn in the midst of a post-birth trauma:

The standard employed [under the Infanticide Act] is clearly much lower than the traditional standard for exculpation through mental disorder in England—that is, the M'Naghten rule; and there is no requirement of causality. The defendant is not required to prove that her condition precipitated the homicidal act, but only that she

---

309. See, e.g., supra note 248 and accompanying text (discussing case where disposal of newborn indicates the death of newborn was not accidental).
310. See infra Part IV.B.4.
311. See infra Part IV.B.4.
312. See Maier-Katkin & Ogle, supra note 223, at 904 (addressing reasons why some are calling for rescission of infanticide statutes). For a discussion on diminished capacity and extreme emotional disturbance defenses, see Brenda Barton, Comment, When Murdering Hands Rock the Cradle: An Overview of America's Incoherent Treatment of Infantical Mothers, 51 SMU L. Rev. 591, 601-05 (1998). Barton also notes that only a few states recognize the two defenses, again making it very difficult for a teenage neonaticide offender to reduce a murder charge to manslaughter. See id. at 601, 618.
313. See Maier-Katkin & Ogle, supra note 223, at 905 ("[T]he [Infanticide] Act does not require psychotic or severe mental illness to be proven, but only a disturbance of the balance of the mind.").
314. See Wilczynski, supra note 174, at 162 (discussing how the Royal College of Psychiatrists and others have analyzed the infanticide statutes and found that the mental abnormality for infanticide is much less than what is required for diminished capacity); see also Barton, supra note 312, at 596 ("England's Infanticide Act presumes that all women are ill if they kill their infants within the first twelve months of life.").
experienced psychiatric distress, which once alleged will be hard to disprove.\[315\]

One report on the English Infanticide Act noted that there were two advantages of not rescinding the Infanticide Act and, thereby, limiting a woman’s only defense to proving diminished responsibility: (1) the infanticide act permitted a prosecutor to charge infanticide rather than murder; and (2) the prosecutor would concede the mental disturbance element required under the infanticide act thereby eliminating the woman’s need to prove the mental disturbance.\[316\] The degree of abnormality under the infanticide act is much less than what is normally required to prove diminished responsibility.\[317\] Unlike a woman who pleads insanity or diminished responsibility, the woman charged with infanticide does not need to prove her act was the result of an abnormal disorder.

All that she need produce is evidence that at the time the balance of her mind was disturbed by the birth . . . not that the disturbance was sufficiently severe to deprive her of knowledge of the nature and quality of her act, or knowledge of its wrongfulness, or the capacity to control herself.\[318\]

In other words, a woman charged with infanticide does not need to prove she was so incapacitated that she did not know right from wrong, but only must show that the stressful birth resulted in the subsequent killing of her newborn.\[319\] The result of this reduced burden is that the conviction will be no more serious than manslaughter and the sentence received will be much lighter.

Furthermore, studies comparing the sentencing of women convicted of manslaughter based on a diminished capacity or extreme emotional disturbance defense show that such women receive much harsher sentences (usually including jail time) when compared to women convicted of infanticide.\[320\] For instance, a 1990 New South Wales study found that women convicted of manslaughter were more likely to re-
ceive a custodial sentence than women convicted of infanticide. Similarly, a study regarding the implementation of diminished capacity provisions in England identified a steady decline in the percentage of offenders receiving hospital care (down from fifty-two percent in 1964 to twenty-four percent in 1979) and at the same time an increase in incarceration (up from thirty-nine percent in 1964 to fifty-seven percent in 1979). Therefore, the advantage of a neonaticide provision is the likelihood that teens will receive probation and psychological treatment and other rehabilitative sentences rather than punitive sentences such as incarceration.

It is interesting to compare the results of studies where women in Australia went to trial for murder claiming an infanticide defense, with the results in the United States where infanticide is not a recognized defense. In Australia, psychiatrists are not necessarily required to make a connection between a mental disturbance and the act of giving birth. The courts in effect rely on the temporal sequence of birth followed by illness. In other words, the act of killing a newborn immediately after a stressful birth is sufficient to meet the psychological test under the infanticide statute. In the United States, however, it is more difficult for a neonaticide offender to avoid a murder conviction at trial. For example, in United States v. Gibson, an Air Force nurse was charged with premeditated murder, convicted of murder (but not "with premeditation"), and sentenced to thirteen years of hard labor. The defense brought in several expert witnesses to show that the accused was not mentally responsible for the act of killing her newborn. One psychiatrist stated that the accused suffered from a gross stress reaction caused by the situation around her, emotional and physiological shock, psychological glandular changes, intense pain associated with childbirth, and a great loss of blood, all of which "made [the] accused act instinctively without any

---

321. See id. In Lansdowne's study, five of the infanticide cases were sentenced to probation for periods of three to five years usually conditioned on the woman receiving psychiatric care. Five of the seven women convicted of manslaughter, including two by virtue of diminished responsibility, were given custodial sentences. See Lansdowne, supra note 154, at 59.

322. See Maier-Katkin & Ogle, supra note 223, at 910.

323. As Brenda Barton explained:

 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.

Barton, supra note 312, at 597.

324. See Lansdowne, supra note 154, at 52.

325. See id. at 53.


327. See id at 916.

328. See id. at 921-23.
thought or judgement." The psychiatrist further stated that the accused was suffering from "toxic psychosis or transient gross stress reaction, disintegration of personality." A second defense expert witness, a clinical psychologist, administered a series of tests, concluding there was a "high probability" that at the time of the alleged offense, the accused had a mental defect, disease, or derangement, and was unable to know right from wrong at the time of giving birth. Finally, a third psychiatrist also testified that the accused was suffering from a gross stress reaction in a hysterical type of personality.

In England or Australia, the above psychological testimony would be more than sufficient evidence for the government to charge, or for a jury to convict, the accused of infanticide, especially because the trauma of giving birth alone is almost a "given" under the infanticide statutes. And once so convicted, the accused would have been sentenced to probation and psychological treatment. In Gibson, however, the prosecutor's expert (a medical officer specializing in psychiatry) agreed the accused could be considered a hysterical personality, but he disagreed that she was unable to distinguish between right or wrong. The appeals court concluded there was no error in the trial court finding the accused mentally responsible for the death of her newborn and affirmed the murder conviction. As Gibson...
shows, without neonaticide statutes in the United States, it is very difficult for a defendant to show she was not mentally culpable for the act, or that she did not have the requisite mens rea for murder.  

Another reason for lengthy sentences in the United States is that no state has recognized the "neonaticide syndrome" as an affirmative defense. Therefore, women have a high burden of proof to show psychotic lapse in order to receive a lighter sentence, or to receive a manslaughter rather than a murder conviction, under a diminished capacity defense. For instance, in People v. Wernick, the New York Court of Appeals affirmed the lower court's refusal to recognize the defendant's "neonaticide syndrome" defense. The trial court precluded the defendant's witnesses from testifying that she suffered from a "neonaticide syndrome." The main reason for the preclusion, however, was that the defendant chose not to participate in a hearing to determine the scientific reliability of the neonaticide syndrome. Thus, the court did not actually rule out the possibility of a neonaticide defense. Courts and lawyers should continue to research

336. With a neonaticide statute or similar provision in state penal codes, emotional stress and hysteria would be adequate to demonstrate that the infanticide statute should apply to a case like Gibson, and a fact finder will more likely convict for infanticide than for murder. Cf: Barton, supra note 312, at 598 (discussing Commonwealth v. Reilly, 549 A.2d 503 (Pa. 1988), where a mother was adjudged guilty of murder under the M'Naghten test even though she had experts testify that she suffered a brief reactive psychosis and did not know the nature and quality of her act).

337. For infanticidal mothers, the American Psychiatric Association recognizes postpartum disorders as a Diagnostic and Statistical Mental Disorder. Since most discussions of postpartum disorders address mothers who kill their babies after 24 hours of birth, this Note does not explore that area. For law journal articles discussing postpartum disorders, see Debora K. Dimino, Postpartum Depression: A Defense for Mothers Who Kill Their Infants, 30 Santa Clara L. Rev. 231, 234-35 (1990); Barton, supra note 312, at 602-05; Lori A. Button, Comment, Postpartum Psychosis: The Birth of a New Defense, 6 Cooley L. Rev. 323, 324-27 (1989); Jennifer L. Grossman, Note, Postpartum Psychosis—A Defense to Criminal Responsibility or Just Another Gimmick?, 67 U. Det. L. Rev. 311, 320-27 (1990).


339. Id. at 325-26.


341. See id. at 840 (citing Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), which requires that before an expert can testify about "the existence of a mental disease or syndrome, the party seeking the introduction of such testimony must establish that the disease or syndrome is generally accepted in the field of psychiatry or psychology and that it would assist the jury in rendering a verdict."). It is important to note that the Wernick case did not rule out the possibility of a "neonaticide syndrome" affirmative defense. The court here denied the defense because Wernick's attorneys did not agree to a Frye hearing to decide if such testimony could be admissible. See id. at 840-41.

Nevertheless, Wernick's experts were still able to inform the jury that the defendant had denied her pregnancy, that such denial occurs in almost all cases in which women kill their children after birth, and that in a significant number of neonaticide cases, the women did not know they were pregnant. See id. at 840. The expert witnesses were also not precluded from referring to relevant literature and experiences in expressing opinions about the defendant's mental state before, during, and after the crime. See
neonaticide so that a neonaticide defense can be available to such offenders.

B. The “Get Tough” Policy Is Inappropriate as Applied to Teenage Neonaticide Offenders

This section examines the current “get tough” juvenile justice policy as it manifests in laws that transfer or waive juvenile court jurisdiction for certain offenders. This examination demonstrates that the “get tough” policy is inappropriate in the context of teenage neonaticide offenders. This section identifies some common traits in states’ juvenile statutes regarding goals, offenders, and offenses. Whatever may be one’s position regarding the effectiveness of the “get tough” policy as a means to deal with juvenile crime, it is not a fitting response to the offense of neonaticide.

1. General Provisions of Juvenile Statutes State the Goal of “Best Interest”

Many state juvenile justice statutes include a statement of purposes and goals, such as the protection of the community, rehabilitation of juvenile offenders, prevention of juvenile recidivism, and consistency in treatment of juvenile offenders. These goals are clearly furthered by a neonaticide statute. Not only would a properly drafted neonaticide statute result in consistency in charging and sentencing, but it would also promote rehabilitation through the placement of the teenage offender into the juvenile system.

Further, some statutes’ professed goal of preventing repeat offenses by juveniles is inapposite when applied to neonaticide offenders. While this objective might result in deterring typical repeat offenders through the threat of adult criminal court prosecution, neonaticide offenders are not characteristically repeat offenders. Therefore, a neonaticide statute could protect these teens from being swept up in policy decisions that were designed to respond to a different type of juvenile offender.

The “best interest” language found in many juvenile statutes implies that these goals should be pursued with rehabilitation of the juvenile in mind. As neonaticide offenders are amenable to

\[\text{id. at 841-42. Wernick was convicted of criminal negligence probably because she had such expert witnesses. Nevertheless, not all defendants can afford expert witnesses.}\]

\[\text{342. See supra Part I.F.}\]

\[\text{343. See infra note 415 and accompanying text (discussing how neonaticide offenders are unlikely to be repeat offenders).}\]

\[\text{344. See infra note 415 and accompanying text.}\]

\[\text{345. See supra Part I.F.}\]

\[\text{346. Many transfer statutes list the amenability of the juvenile to rehabilitation in the juvenile system as a criteria for the judge to consider in making a jurisdiction decision. See, e.g., Idaho Code § 20-508(8)(f) (1997) (listing the factor of “likelihood that the juvenile will develop competency and life skills to become a contributing}\]
rehabilitation, are not characteristically repeat offenders, and do not pose a threat to public safety, it is logical that the juvenile courts, by the very terms of their statutes, should be the proper venues for adjudication of neonaticide offenders.

2. Enumerated Crimes Statutes Are Designed to Deal with Violent Repeat Offenders, Not Neonaticide Offenders

The significance of the state mandatory waiver laws to juvenile neonaticide offenders is that such laws could operate to sweep these young offenders into the adult criminal system without the chance for a judicial hearing in which mitigating factors would come into play. For instance, Maryland's state code includes a provision mandating adult criminal court jurisdiction for an offender aged sixteen or older and charged with intentional manslaughter or second-degree murder. A neonaticide statute, however, could assure juvenile court jurisdiction for a sixteen or seventeen-year-old charged with neonaticide in Maryland.

Furthermore, the characteristics of the offenders involved in typically enumerated crimes, as discussed earlier, do not tend to match a "profile" of the juvenile neonaticide offender. Nor, for that matter, does neonaticide fit into the lists of enumerated crimes in any consistent and convincing way. The automatic transfer statutes typically focus on violent felony charges and gang-related charges, frequently targeting repeat offenders for transfer to adult criminal court. Discretionary waiver laws, which direct judges and prosecutors to determine the proper jurisdiction for juvenile offenders, also

\[\text{\textsuperscript{347}}\text{See infra notes 440-41 and accompanying text (addressing how other countries' responses to neonaticide do not involve incarceration).}\]

\[\text{\textsuperscript{348}}\text{See infra note 415 and accompanying text.}\]

\[\text{\textsuperscript{349}}\text{See supra Part II.B.2 (observing that neonaticide offenders are passive women who fearfully deny their pregnancy, and react in a panic, killing the baby after a tremendously stressful birth done without any assistance); see also supra notes 195, 249 and accompanying text (noting that offenders usually have no criminal record).}\]

\[\text{\textsuperscript{350}}\text{See supra Part I.E.2 (discussing factors for judges to consider in making transfer ruling).}\]


\[\text{\textsuperscript{352}}\text{See supra Part I.}\]

\[\text{\textsuperscript{353}}\text{See supra Part II.B.2. (discussing psychological characteristics of neonaticide offenders).}\]

\[\text{\textsuperscript{354}}\text{See supra note 105 and accompanying text.}\]

\[\text{\textsuperscript{355}}\text{See supra Part I.E.2.}\]

\[\text{\textsuperscript{356}}\text{See Sabo, supra note 97, at 2436-39.}\]
tend to focus on violent, repeat offenders who are not amenable to treatment in the juvenile system. There is no evidence, however, that teenage neonaticide offenders typically have been involved in prior crimes or are violent individuals.

3. Discretionary Waiver Statutes Show that Juvenile Court Is the Proper Venue for Teenage Neonaticide Offenders

As discussed in part I, discretionary (judicial) waiver statutes typically list factors that judges must consider in the context of a juvenile jurisdiction transfer hearing. The factors include the juvenile's amenability to rehabilitation, previous delinquent history, the emotional maturity of the offender, and the degree of public threat posed by the offender. These factors clearly point to the appropriateness of juvenile court jurisdiction over teenage neonaticide offenders. Neonaticide offenders are classically non-recidivist offenders, amenable to treatment, are emotionally immature, pose no danger to the public, and commit the offense in the trauma and confusion of the post-delivery period, without premeditation. A properly drafted neonaticide statute would preclude the necessity of such a hearing, which would clearly serve the interest of judicial economy.

Further, the creation of a neonaticide statute would greatly alleviate the potential shortsightedness of prosecutors. Murder is specifically included in most juvenile transfer statutes. In addition, murder is an included offense in transfer statutes that provide for discretionary or mandatory waiver of jurisdiction for violent offenses, offenses against a person, or capital felony offenses. Therefore, virtually all of the juvenile transfer statutes include murder as a triggering offense. As long as no provision specifically names neonaticide, it is more likely that a prosecutor will charge offenders with murder, overlooking the circumstances of the neonaticide offender. A neonaticide pro-

357. See supra Part I.E.3.
358. See supra Part II.B.2 (inferring from literature and other data and studies that no evidence exists showing that teenage neonaticide offenders are violent individuals or have a history of prior crime).
359. See supra Part I.E.3.
360. See id.
361. See infra note 415 and accompanying text.
362. See infra notes 440-41 and accompanying text.
363. See supra note 175 and accompanying text.
364. See supra note 7.
366. See, e.g., Tex. Fam. Code Ann. § 54.02(a)(2)(A) (West 1996 & Supp. 1999) (allowing juvenile court to waive its original jurisdiction if a child 14 years old or older is alleged to have committed first-degree felony).
367. See supra text accompanying note 200.
vision would bring attention to the circumstances of the classic teenage neonaticide offender, educate the public and prosecutors, and assist prosecutors in properly charging neonaticide offenders. A neonaticide provision would also serve the interests of judicial economy by reducing removal motions and appeals based on improper jurisdiction. Of course, a murder charge would still be available where appropriate. A properly drafted neonaticide statute, then, would reduce the amount of transfer hearings and removal actions, ensure the proper venue for teenaged neonaticide offenders, contribute to consistency in charging and sentencing, and allow juvenile and criminal courts to focus their energies on violent recidivist offenders.

4. Criticism of the “Get Tough” Standard

Statistics show that a small number of recidivist juvenile offenders commit the largest portion of juvenile crime. In addition, these repeat offenders are thought those most likely to evolve into lifetime criminals. There is evidence that the majority of juvenile offenders “outgrow” their “delinquency phase” and become upstanding members of society. These observations on juvenile crime may have their roots in the developmental tendency of adolescents to act out in rebellion. There is also evidence indicating that adolescents are unable to reason and make decisions as adults, to “think things through” to their final results. Such findings provide some support for a modified mens rea standard for adolescents.

If this is true, then one problem with the current tendency to punish adolescents as adults may be the application of an adult perception of maturity/immaturity to children and adolescents. Under the “adult” standard, if an adolescent commits an “adult” crime, she

368. See supra Part II.B.2.
369. See Scott & Grisso, supra note 16, at 154 n.66 (discussing Marvin Wolfgang’s finding that six percent of the juvenile population committed over two-thirds of the serious crimes attributed to juveniles (citing Marvin Wolfgang et al., Delinquency in a Birth Cohort 89 (1972))).
370. See id.
371. See id. at 155.
372. See id. at 155-56 (“[T]he tendency of adolescents to engage in antisocial behavior can be understood as linked to the gap experienced by contemporary youth between early biological maturity and late social maturity and independence.” (citing Terrie Moffitt, Adolescent-Limited and Life Course Persistent Antisocial Behavior: A Developmental Taxonomy, 100 Psychol. Rev. 674, 686-87 (1993))).
373. See id. at 156-60 (discussing reasoning in adolescents and their tendency to focus on short-term results, noting that the differences between young children and adults are greater than between adolescents and adults in terms of decision-making ability, and commenting on how the increased cognitive skills of adolescents have provided childrens’ rights advocates with arguments for competency).
374. See Alex Kotlowitz, The Unprotected, New Yorker, Feb. 8, 1999, at 43, 48 (“We attribute intentions to kids that are adult-like.” (quoting Thomas Grisso, clinical psychologist and head of the Department of Forensic Training and Research, University of Massachusetts Medical School)).
should be tried in adult court and given the same sentence as a similarly situated adult. Likewise, if an adolescent is found to be "impatient," she may be eligible for more lenient treatment or enhanced protection. The first situation judges the maturity or immaturity of the offense, and not the offender, while the second standard judges only the qualities of the offender herself. What neither situation takes into account is the fact that adolescents and children alike are not miniature, impaired adults, but are cognitively different from adults, making the application of adult standards to juveniles problematic. Some evidence of the inappropriateness of applying an adult standard where juveniles are concerned is provided by the response by children to intense interrogation by adults. Since truth is a concept differently understood by children and adults, adults can impose their assumptions on the results of interrogation, and derive "truths" from the child's answers that are in fact objectively false.

Furthermore, the adult concept of maturity/immaturity as a basis for capacity can be unfairly applied, leading to a no-win situation for a juvenile offender. This is because a determination of immaturity and diminished capacity can lead to a general loss of rights, whereas a determination of maturity can lead to adjudication and punishment under an adult standard, which is an unrealistic standard for an im-

---

375. See infra Part IV.C (discussing various state statutes that apply the adult crime/adult adjudication standard).
376. See Bellotti v. Baird, 443 U.S. 622, 634 (1979) (holding that the immaturity of children justifies the application of a different constitutional standard to children than to adults).
378. For a discussion of the difficulty in applying a "maturity" standard, see Wendy Anton Fitzgerald, Maturity, Difference, and Mystery: Children's Perspectives and the Law, 36 Ariz. L. Rev. 11, 87 (1994) ("The flaw in the maturity standard is that our search for maturity in children is a search for an adult perspective.").
379. See generally Scott & Grisso, supra note 16, at 172-76 (discussing developmental differences between adolescents, adults, and very young children, and arguing for a reduced criminal responsibility standard for adolescent offenders).
380. See id. at 156-57 (examining the developmental influences that shape the choices of juveniles and make them different from adult decisional processes).
381. See Kotlowitz, supra note 374, at 43 (discussing the events leading up to the confessions obtained by police from two boys, aged seven and eight, for the murder of a neighborhood girl, who police claimed was killed by the boys throwing rocks at her, in order to steal her bicycle).
382. See supra note 374 and accompanying text.
383. See Fitzgerald, supra note 378, at 86-87.
384. See id. at 87.
385. See supra Part I.E.3 (discussing maturity as a factor for juvenile courts to weigh in a transfer hearing).
mature adolescent who may be fundamentally incapable of reasoning as an adult.

Another problem with the "get tough" standard of adjudication and punishment of juvenile offenders is its lack of relation to offenses typically committed by female adolescents. 386 This is not a chauvinistic conspiracy, but a practical response by lawmakers 387 to the fact that most crimes are committed by and against males. 388 The criminal law has traditionally been designed to contain male violence. 389 In the case of adolescents, this means gangs, drugs, and guns. "Get tough" rhetoric and policies may respond nicely to juvenile delinquency associated with gang violence, dangerous weapons crimes, and drug offenses. These policies, however, whatever one thinks of them, do not make much sense in light of female adolescent neonaticide offenders. 390

Some justification for the application of a "get tough" policy to teenaged neonaticide offenders might be found in societal perceptions of motherhood. 391 Since the state has an interest in protecting the lives of babies 392 who are innocent of any crimes, some may wish to deal harshly with the neonaticide offense to deter other potential offenders or simply to punish the deserving offender. 393 The question remains, however, in the context of teenage neonaticide, where the offender is herself a child, can she truly violate the sanctity of the mother-child bond? 394

State laws in areas other than juvenile law have long recognized the need to protect children because of their different status from adults. In the tort law area, for example, courts are cognizant of the special

386. See supra Part IV.B.3 (noting the incompatibility of state juvenile transfer laws and the issue of female neonaticide offenders).
387. See Stephen J. Schulhofer, The Feminist Challenge in Criminal Law, 143 U. Pa. L. Rev. 2151, 2154-57 (1995) (noting that criminal law is a system consisting of rules "conceived and enforced by men, for men, and against men," but that this is "not exclusively an artifact of cultural bias in reporting and charging behavior" in light of the fact that criminal offenders and victims alike are disproportionately male).
388. See id. at 2184-96 (noting that women are committing an increasing proportion of crimes, and are facing increasingly serious charges).
389. But see id. notes 369-89 and accompanying text (discussing female neonaticide offenders and the "get tough" standard).
390. Sanctity of motherhood arguments have also provided ammunition for feminists and advocates of child protection laws. See, e.g., Reva B. Siegel, Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880, 103 Yale L.J. 1073, 1109-10 n.126 (1994) ("The demand for rights in household labor was advanced in tandem with a demand for equal rights in child custody, in the pursuit of which antebellum feminists freely and passionately invoked women's role as mothers.").
392. But see infra notes 433-35 and accompanying text (noting that infanticide statutes deter neonaticide through rehabilitation).
393. Biological ability to bear a child is not the same as emotional maturity.
demands entailed in caring for injured children, and the inability of children to comprehend the significance of their legal circumstances.

C. A Neonaticide Provision Will Lead to More Neonaticide Cases Being Heard in Juvenile Court

By the enactment of neonaticide provisions in state penal manslaughter codes, teenagers who commit neonaticide are more likely to be adjudicated in juvenile court. As discussed previously, many state statutes require that teenagers indicted for murder be tried in an adult criminal court. For instance, in New York, a thirteen-year-old who commits murder is presumptively considered an adult for the purposes of prosecution, and, therefore, is tried in adult court. With a neonaticide provision in state penal codes, however, the crime would be considered in the first instance as manslaughter, and these young mothers would likely be tried in juvenile court. In fact, before a prosecutor could transfer the teen to adult court, a hearing on whether the juvenile court should waive its jurisdiction would be required.

By being tried in juvenile court, a disposition of infanticide could subject the girl to probation, home arrest, or detention in a secure or non-secure facility. As addressed earlier, the purpose of the juvenile court is rehabilitation and not punishment; the purpose of the disposition phase is to treat the offender rather than punish.

395. See, e.g., Murray v. City of New York, 30 N.Y.2d 113, 120 (1972) ("The impediment may reasonably be presumed to attend infancy.").
396. See, e.g., Moffit v. Arkansas, No. CACR 92-444, 1993 Ark. App. LEXIS 171, at *4 (Ark. Ct. App. Mar. 17, 1993) (trying a 17-year-old in adult criminal court); Ohio v. Hopfer, 679 N.E.2d 321, 328-39 (Ohio Ct. App. 1996) (discussing a 17-year-old neonaticide offender who was transferred from juvenile to adult criminal court and convicted of murder and sentenced to 15 years to life); Barton, supra note 312, at 609-10 (stating that the leniency for teens, including those charged with a homicide after committing neonaticide, is disappearing in many state courts).
397. See N.Y. Penal Law § 30.00(2) (McKinney Supp. 1999).
398. See, e.g., Kent v. United States, 383 U.S. 541 (1966) (holding that children are entitled to minimal due process and fair treatment before a juvenile court can waive its jurisdiction and transfer child to adult court). With a neonaticide statute, prosecutors would retain their discretion to pursue a murder indictment if the facts support such. The typical neonaticide offender, however, presents common characteristics so that pursuing an infanticide indictment will be appropriate in most cases. For instance, the English Infanticide Act only provides that a woman can be guilty of infanticide if her mind was disturbed by having given birth. See supra note 211. The prosecutor can still pursue a murder charge. Provision three of the statute further provides: "Nothing in this Act shall affect the power of the jury upon an indictment for the murder of a child to return a verdict of manslaughter, or a verdict of guilty but insane." Infanticide Act of 1938, 1 & 2 Geo. 6, ch. 36 (Eng.). Under an infanticide statute, the prosecutor will probably need to show premeditation or some other indicia to pursue a murder charge.
399. See supra Part I.D.
400. See supra Part I.
401. See Small, supra note 69, at 120.
For instance, the following situation could occur for a teenage neonaticide offender if charged in the New York Family Court. At the dispositional hearing, the judge will review a probation investigation report which will include a history of the juvenile. Given neonaticide offenders frequently do not have criminal records, usually are not problem students at school, and are not people who harm others, this report is likely to recommend that incarceration is not necessary. In addition, the diagnostic assessment will include the situational factors that contributed to the mother killing her baby at birth—her denial of the pregnancy, lack of medical treatment, and the shock and fear of giving birth alone. Thus, it is likely that a judge would consider that the teen be subject to community service, probation, and counseling instead of jail time. Even if the judge, however, does find that the killing of a newborn necessitates restrictive placement, the length of the sentence in juvenile court is far less than if the teen had been tried in adult court. The juvenile will be subject to detention up to her twenty-first birthday.

As discussed in part I, the sentences for a teen convicted in adult criminal court are far longer than dispositions received in juvenile court. For example, in New York, which has no neonaticide provision, a thirteen- to fifteen-year-old girl accused of killing her newborn would likely be tried for murder in the criminal court. If she received a murder conviction, she could be sentenced from five years to life. For a girl sixteen or older, she could be sentenced as an adult and, accordingly, could face fifteen years to life for a murder conviction. It is clear that by trying these teens in adult court, substantially greater sentences are given.

For those teenagers that are under nineteen and tried in adult court in New York, a neonaticide statute would enable them to seek youthful offender status. Under a neonaticide statute, the most a teenage neonaticide offender can be convicted of would be manslaughter. Therefore, under the New York Penal Law, she could be adjudged a youthful offender and the penalty she would face would be one and one-third to four years of incarceration. In this way, there would be fewer “outliers,” where offenders less than nineteen years old are given harsh ten to twenty year sentences. Furthermore, because the

402. See supra Part I.D.
403. See supra note 72 and accompanying text.
404. See supra Part II.B.2 (psychological characteristics of neonaticide offenders); supra Part III.B (sample cases in the United States).
405. See supra note 73 and accompanying text.
406. See supra Part II.B.2.
407. See supra notes 78-83 and accompanying text.
408. See supra note 78.
409. See supra notes 78-88 and accompanying text.
410. See supra note 80 and accompanying text.
411. See supra note 83 and accompanying text.
412. See supra notes 85-88 and accompanying text.
sentence to be imposed upon a youthful offender is equivalent to a Class E felony under the New York Penal Law, the court also has the option not to mandate incarceration, but instead could hand down a sentence of probation.\footnote{See supra note 88 accompanying text. If neonaticide were treated as a Class C felony, the judge will have discretion to find that the teen is in need of training and assistance which can be provided through probation, not incarceration.}

Given that most neonaticide offenders have no criminal records,\footnote{See Mackay, supra note 224, at 22 (discussing a study of 47 infanticides in England and Wales during 1982 to 1985, in which the vast majority of females had no previous convictions as opposed to the five males in the study in which all but one had a criminal record); supra notes 195, 249 and accompanying text.} are not dangerous to others, and do not repeat the killing of a second baby,\footnote{See Pitt & Bale, supra note 154, at 384. There is no evidence that these teens need to be incarcerated. “While no wide-reaching recidivism study has ever been undertaken, probation has been the principal penological strategy for a very long time, and no statistical or even anecdotal evidence has been brought forward to suggest that the protection of the community requires that infanticidal mothers be incarcerated.” Maier-Katkin & Ogle, supra note 223, at 913.} there is no need to protect the public from such persons. What is needed in these cases is counseling on responsibility, parenting, sex education, self-esteem, and more.\footnote{See, e.g., Barton, supra note 312, at 618-19 (discussing how society bears responsibility to educate and counsel teens). “Education is . . . a key to prevention of infanticide.” Id. at 618; see also Wilczynski, supra note 174, at 216-17 (recommending improved education for students and community on sex, contraception, childcare, and parenthood).}

These teens can also provide service to society by helping deter future neonaticide offenses through community service. Moreover, if these teens tend to be shy and have no history of violence,\footnote{See, e.g., supra note 249 (describing Jones as a shy teenager with no prior criminal record).} there is grave concern regarding incarcerating these teens with violent offenders. Furthermore, there is no social utility in incarcerating such girls for the protection of society, since they are not dangerous and pose no actual threat.\footnote{See Wilczynski, supra note 174, at 222 (English/Australian study shows that it is possible to deal with at least one class of homicide offenders in a way other than long term prison sentences; the damaging impact of prison on the offender outweighs judicial retributive and rehabilitative aims).}

D. Arguments Against Special Neonaticide Statutes or Provisions

Critics have presented a variety of arguments against the need for infanticide statutes as adopted in England and other countries. One feminist argument contends that because the infanticide statutes apply only to women and not men, they stereotype women as irresponsible and hormonally disturbed.\footnote{See Lansdowne, supra note 154, at 41 (discussing feminist objection to the infanticide statute).} In England, for instance, studies show that men receive longer sentences for killing newborns, and that the courts tend to treat them punitively with an emphasis on retribution.
and deterrence.\textsuperscript{420} Female neonaticide offenders, however, vastly outnumber males.\textsuperscript{421} Additionally, the unique characteristics of women must be considered.\textsuperscript{422} While men may share some social and economic characteristics of a mother who commits neonaticide, it is the woman who must carry the fetus for nine months, is subject to hormonal change,\textsuperscript{423} represses her pregnancy, never receives prenatal care or guidance, is shocked and afraid during birth where she has no one to help her, and is emotionally and physically drained after giving birth.\textsuperscript{424}

Others argue that the medical principles underlying infanticide statutes are unfounded.\textsuperscript{425} Studies have shown that social and psychological factors are more likely to lead a mother to kill her newborn than medical disturbances.\textsuperscript{426} For instance, the current statutes do not apply if a mother, who after giving birth is still impacted by the hormonal changes or hysteria of the birth process, kills another one of her children.\textsuperscript{427} In England, despite evidence by the Royal College of Psychiatrists that the medical basis for the infanticide statute is not founded, the Criminal Law Revision Committee ("CLRC") has argued for either a retention of, or an amendment to, the current statute.\textsuperscript{428} The CLRC has suggested that the English statute be amended

\textsuperscript{420} See Wilczynski, supra note 174, at 122.
\textsuperscript{421} See Resnick, supra note 3, at 1415 (addressing study of 37 neonaticides in which 34 were committed by mother, two by father, and one by both mother and father). Indeed, "it is rare for a father to kill a newborn infant." \textit{Id.} at 1417.
\textsuperscript{422} See, e.g., Maier-Katkin & Ogle, supra note 223, at 906 ("As only women are able to experience pregnancy and childbirth, illnesses associated with these phenomena must inevitably be unique to women.").
\textsuperscript{423} See Wilczynski, supra note 174, at 123.
\textsuperscript{424} See supra Part II.B.2; see also Oberman, supra note 7, at 71 ("Diminished self-esteem is commonplace for adolescent girls and seems to be a product of the socialization process by which girls grow into women."). Teenage pregnancy is still not socially acceptable. Teens feels considerable shame and guilt associated with being pregnant. \textit{See id.} There is considerable pressure for a teen in confronting her parent with the fact that she is pregnant. \textit{See id.} This fear and shame is a response that only a woman, and not a man, can feel.
\textsuperscript{425} See Osborne, supra note 133, at 55 (stating that infanticide statutes "were enacted not to recognize legally the connection between childbirth and infanticide, but to create it") (emphasis in original). For criticism of the medical weakness of infanticide statutes, see Walker, supra note 229, at 135-36. \textit{But see} Maier-Katkin & Ogle, supra note 223, at 906-07 (stating there is evidence that there is a link between childbirth and mental disorder such that the medical principles underlying infanticide statutes are not a myth). New mothers do experience depression. \textit{See id.} In a study in the City of Edinburgh from 1970 to 1981, it was found that the rate of psychiatric admissions with a diagnosis of psychosis was almost 22 times higher during the 30 days after giving birth than the average monthly rate before pregnancy, and for first time mothers, the rate was 35 times higher. \textit{See id.} at 907.
\textsuperscript{426} See Wilczynski, supra note 174, at 155-57.
\textsuperscript{427} See Katherine O'Donovan, \textit{The Medicalisation of Infanticide}, 1984 Crim. L. Rev. 259, 262.
\textsuperscript{428} See Mackay, supra note 224, at 21 (discussing how after the Select Committee of the House of Lords on Murder and Life Imprisonment suggested that the defense of diminished responsibility could be used instead of infanticide, the Criminal Law
to include the social and emotional stresses on the mother consequent of the birth, which are so heavy as to result in the balance of her mind being disturbed. In other words, even if most women who commit neonaticide do not suffer from psychosis, these young, unmarried women were suffering from the psychological stresses of having an illegitimate child, which arguably is contemplated by the infanticide statutes. In addition, as discussed earlier, the burden of proving infanticide as a defense is far less than the burden to prove some sort of psychosis in an extreme emotional disturbance or diminished capacity defense. Plus, the rates of incarceration are higher when convicted of manslaughter over infanticide. And many people have agreed that long prison sentences are not necessary for neonaticide offenders.

A final argument against the neonaticide statutes is that the state has an interest in deterring future neonaticide offenses, and certainly does not want to give mothers a licence to kill their newborns. But even under an infanticide statute, the women are still charged a felony. The point of the statute is for courts to consider the characteristics of neonaticide offenders and to recognize that the women did not have the requisite intent to be guilty of murder.

Revision Committee recommended that the present law be amended so that infanticide also covers “environmental or other stresses”); see also Osborne, supra note 133, at 57 (explaining how the Report of the Committee on Mentally Abnormal Offenders (the “Butler Report”) suggested “that the purposes of an offence of infanticide were met by the legal concept of diminished responsibility which is available in England.” Both the Royal College of Psychiatrists Working Party on Infanticide and the Criminal Law Revision Committee’s Report on Offences Against the Person disagreed with the Butler Report and recommended instead that the infanticide statute remain, but be extended in its scope.).

429. See O’Donovan, supra note 427, at 263. The CLRC noted that a wide range of organizations supported the Infanticide Act’s retention, including the Royal College of Psychiatrists, the National Council of Women, the Law Society, the Police Federation, and the Senate of the Inns of Court. See Maier-Katkin & Ogle, supra note 223, at 910; see also Grossman, supra note 337, at 316 & n.38 (stating that the CLRC had suggested that the Act be revised to move away from an association between hormonal change and mental disorder to looking at factors such as poverty, failure of bonding, and environmental stresses as further indicia of the mental disturbance).

430. See Maier-Katkin & Ogle, supra note 223, at 909 (stating that the English “Infanticide Act does not presume that all women who kill their children are mentally ill;” it merely allows in psychiatric evidence for mitigation purposes). “Whether the policy of mitigation is wise or necessary may be open to challenge, but the fact that it can be justified in psychiatric terms seems clear beyond question.” Id.

431. See supra notes 313-19 and accompanying text.

432. See supra notes 321-22 and accompanying text.

433. See, e.g., Mackay, supra note 224, at 21 (observing that the English Parliament made no recommendation on whether to change the infanticide statute). “434. See Maier-Katkin & Ogle, supra note 223, at 910 (citing Walker, supra note 229, at 133 who says that the infanticide statute results in “virtual abandonment of prison sentences” for a crime dealing with the taking of a human life).”

435. See supra note 211.

436. See supra Part IV.A.2.
Furthermore, these women are highly unlikely to repeat these crimes after receiving probation. The argument that society cannot deter future neonaticide offenses through lenient sentences is not supported by the facts. The incidences of neonaticide have decreased world-wide, and such decreased rates have occurred both in countries with infanticide statutes and the United States, because of the availability of birth control and abortion.

In any event, neonaticide is not a premeditated homicide; it is a compulsive and rash act that occurs immediately after birth when the girl confronts what she has denied for nine months. Incarcerating one girl for this act will not result in deterring another girl from committing neonaticide; if one does not plan for an act to occur, one cannot be deterred from such act. Methods to punish neonaticide offenders can be accomplished through means other than incarceration. Teens can be deterred from denying their pregnancy and encouraged to accept responsibility when it occurs through education on sex, pregnancy, and childbirth.

**Conclusion**

States should adopt neonaticide statutes as part of their manslaughter provisions to ensure that teenage mothers who commit neonaticide, and who can make a showing of typical neonaticide-offender characteristics, are tried as juveniles. By enacting such laws, states will guarantee consistent and appropriate sentences that focus on rehabilitation. The English Infanticide Act serves as a good model. Under a neonaticide statute modeled on the English law, a teenage

---

437. See supra note 415 and accompanying text.

438. See, e.g. Hoffer & Hull, supra note 133, at xviii (stating that over 25% of murder cases in early modern English courts that were studied were infanticide); Saunders, supra note 129, at 369 ("Child homicide rates for the United States [today] are currently among the highest in the world."). Compare Saunders, supra note 129, at 369 (discussing seven neonaticides during 14 month period in 1987-88 in Iowa alone), with Lansdowne, supra note 154, at 59 (discussing five cases of infanticides up to one year in age in New South Wales in years 1982-84); and Ian Wilkey et al., Neonaticide, Infanticide and Child Homicide, 22 Med. Sci. L. 31, 31-33 (1982) (discussing 11 bodies of newborns found in Queensland, Australia over a ten-year period from 1969 to 1978).

439. See supra Part II.B.2.

440. See Maier-Katkin & Ogle, supra note 223, at 913 (stating that the history of the law's response to infanticide suggests that it is unlikely legal sanctions will deter infanticide).

441. See id. at 912; see also Lansdowne, supra note 154, at 60 (in discussing Australian infanticide statute, "the [lenient] sentencing pattern is a compelling reason for the retention of the offence").

442. It is important to note that most critics of the English Infanticide Act focus on its lack of a medical basis and not on the leniency of the resulting punishment. See Maier-Katkin & Ogle, supra note 223, at 911 ("Womens who kill their own infant children constitute a distinct class of offender . . . . They tend to be punished in the community rather than in prison.").
mother who commits neonaticide is likely to be charged with manslaughter rather than murder. Therefore, there is a greater possibility that she will be tried in juvenile court and not in adult criminal court. In this way, the “get tough” statutes remain in place for violent repeat juvenile offenders, but neonaticide offenders, who pose no threat to the public, appropriately remain in the juvenile system. The purpose of the juvenile court is to act in the best interests of the offender, as well as to protect the public. Therefore, courts may find that the best response in the case of juvenile neonaticide offenders is a probationary sentence conditioned on counseling and community service.

Requiring teenage neonaticide offenders to perform community service can deter future neonaticide offenses. Offenders can peer-counsel other girls on sex, abstinence, birth control, adoption, and abortion. In this way, the offender is punished by re-telling, and thus re-living, the tragic events of her offense. Only through education, and not by incarceration, can other teens be deterred from committing neonaticide.