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Cover Page Footnote

Elizabeth Rapaport, Dickason Professor of Law, University of New Mexico. My research on infanticide and child homicide began when I was a Visiting Scholar enjoying the hospitality of the Center for the Study of Law & Society Center at the School of Law, University of California, Berkeley, in 2002-2003. I am particularly grateful for the assistance of the law librarians at Boalt Hall, and to the law librarians at UNM School of Law, and most especially to Lorraine Lester. I was fortunate to have able and diligent research assistance from Brigid Connelly, of the University of Connecticut School of Law, and Erin Kutinac, of the University of New Mexico School of Law. I am grateful for helpful discussions of earlier drafts of this article presented at the University of Delaware, the University of Connecticut School of Law, and the annual meetings of the Association for the Study of Law, Culture and the Humanities and of the Law & Society Association in 2005. Sharon Derrick, Ph.D., Injury Surveillance Coordinator, Disease Control and Medical Epidemiology, Harris County Public Health and Environmental Services, graciously assisted me in understanding some of the complexities of child fatality accounting in Texas and the United States generally.

MAD WOMEN AND DESPERATE GIRLS: INFANTICIDE AND CHILD MURDER IN LAW AND MYTH

ELIZABETH RAPAPORT*

“Can a mother forget the baby at her breast and have no compassion for the child she has borne?”¹

Scarlet the Cat of Brooklyn, NY: “In a motherly show of courage, a cat raced into a burning building to rescue her five kittens, one by one. And then with her eyes blistered shut and her paws burned, she made a head count of her young ones, touching each one with her nose to make sure they were all safe.”²

In the United States, unlike the United Kingdom and many other countries, there is no distinctive legislation addressing the killing of infants and young children by their mothers. While our British cousins embarked upon a course of special legislation in 1922 that evolved into a policy of partial decriminalization and medicalization of maternal infanticide,³ the

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1. *Isaiah* 49:15 (New International Version).

2. Sarah Christian, *Feline Risks Life to Save Five Kittens*, ASSOCIATED PRESS, Apr. 1, 1996.

3. Infanticide Act, 1922, 12 & 13 Geo. 5, c. 18, § 1 (Eng.), *amended by* Infanticide Act, 1938, 1 & 2 Geo. 6, c. 36, § 1 (Eng.).

United States has no distinct law or even settled policies on infanticide. As a result, outcomes in cases raising similar mental health defenses can vary radically, from medical diversion to capital punishment.⁴ Yet, in the United States, as in the United Kingdom, two figures, or archetypes, dominate representations of infanticide in popular media and in scholarship: the mad woman and the desperate girl.⁵ In the United Kingdom, settled law and policy reflect the conception of maternal infanticide as the work of women who are victims of biology gone awry, and of women and girls who, due to immaturity or adverse circumstances, are not able to accept the maternal role.⁶ In the United States, lacking

4. For example, consider the cases of Andrea Yates, Ellen Feinberg, and Christina Riggs, three severely depressed women who killed their children. Yates and Feinberg were also psychotic at the time of their crimes according to the prosecution's psychiatric experts. Yates was convicted of capital murder and sentenced to life for drowning her five young children in 2001. *See infra*. The conviction was reversed in *Yates v. State*, 171 S.W.3d 215, 222 (Tex. App. 2005). Prosecutors are contesting the reversal. *See* Andrew Tilghman, *Appeals Court Won't Review Its Yates Ruling; Prosecutors Vow to Continue the Fight; Mother Who Killed Her Five Children Could Get New Trial*, HOUS. CHRON., Apr. 9, 2005, at B3 (discussing how the conviction turned on the testimony of Dr. Park Dietz, who found that Yates was sane under Texas law, although psychotic). Ellen Feinberg stabbed her two sons, six and ten years of age, killing one and grievously injuring the second in Champaign, Illinois in 2002. Steve Bauer, *Fate Hinges on Mental Health*, NEWS GAZETTE (Champaign, Ill.), Dec 4, 2002. Defense and state psychiatrists agreed that Feinberg was insane under Illinois law. She was found not guilty by reason of insanity. Dr. Dietz, the state's expert, found that Feinberg suffered from severe depression and was psychotic when she stabbed her sons. Steve Bauer, *A Mother's Madness*, NEWS GAZETTE (Champaign, Ill.), Dec 8, 2002 [hereinafter Bauer, *Mother's Madness*]. Christina Riggs was sentenced to death in 1999 for the murder of her two children, aged two and five. *Riggs v. State*, 3 S.W.3d 305, 311 (Ark. 1999). She was executed in Arkansas in 2000. Death Penalty Information Center, Searchable Database of Executions, <http://www.deathpenaltyinfo.org/executions.php> (last visited Jan. 25, 2006). Suicidally depressed, Riggs "didn't want to die and leave [her] kids behind . . ." *Riggs*, 3 S.W.3d at 311. She killed them but failed in her attempted suicide. *Id.* at 307-08.

5. *See* Michelle Oberman, *Mothers Who Kill: Coming to Terms with Modern American Infanticide*, 34 AM. CRIM. L. REV. 1, 22-29, 42-49 (1996) [hereinafter Oberman, *Mothers Who Kill*] (providing an outstanding treatment of the issues of law and law reform raised by teenage neonaticide). The question of justice for mentally ill women who kill their children came to the fore again in 2002 in the Yates case. *See generally* Deborah W. Denno, *Who is Andrea Yates? A Short Story About Insanity*, 10 DUKE J. GENDER L. & POLICY 1 (2003) (providing an excellent treatment of the Yates case and the issues of law and law reform it raises); Ania Wilczynski, *Images of Women Who Kill Their Infants: The Mad and the Bad*, 2 WOMEN & CRIM. JUST. 71 (1991) (an influential article developing the theme that women who kill their infants are sorted into dichotomous categories, mad and bad, both of which reflect gender stereotypical distortions of the defendants and their cases).

6. In the 1970s, British reformers sought and failed to expand the protection of the Infanticide Act to explicitly include women and girls overwhelmed by poverty or their own immaturity or lack of coping skills. *De facto*, however, British practice had expanded in that direction and continued to expand, treating such women and girls as females thwarted in their development as mothers by social and psychological limitations or adversity. *See*

settled law, the dynamic in high profile infanticide cases such as those of Andrea Yates⁷ in Houston, and Susan Smith⁸ in South Carolina, often propel prosecutors to seek severe sentences and to exploit the counter-narrative of evil. While both explanations—evil and biology—have cultural resonance, the biological explanation may have more traction. Prosecutors have learned that infanticide defendants have powerful allies in prevalent conceptions of motherhood.⁹ That a mature woman could be both a sane and lethal mother is not an easy sell. Indeed, prosecutors have difficulty convincing juries that lethal fathers are evil as well,¹⁰ but cases about fathers rarely attract the notoriety that cases about mothers spawn.

The mad woman and the desperate girl are beguiling stereotypes that distort the social facts of infanticide and child homicide in the United States. Men commit more homicides of infants and children than women.¹¹ Why, then, do treatments of infanticide in the popular media, and in legal and forensic scholarship, amplify the role of women and mute the role of men? Why is the mental health of male killers of relatively little interest, despite the fact that the population of fathers who kill includes substantial

generally R. D. Mackay, *The Consequences of Killing Very Young Children*, 1993 CRIM. L. REV. 21, 21.

7. *Yates*, 171 S.W.3d at 215.

8. Susan Smith was convicted of capital murder and sentenced to life for drowning her two sons. The Smith verdict was met with mixed reactions. See Rick Bragg, *Carolina Jury Rejects Execution for Woman Who Drowned Sons*, N.Y. TIMES, July 29, 1995, §1, at 1 [hereinafter Bragg, *Carolina Jury*].

9. Probing the social and legal construction of motherhood has been central to the work of critical feminism. Among the seminal contributions are MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 7 (1993); and Carol Sanger, *M is for Many Things*, 1 S. CAL. REV. L. & WOMEN'S STUD. 15 (1992). This literature disentangles and demystifies the role of biology, culture, and law in prevalent conceptions of motherhood.

10. See Charles A. Phipps, *Responding to Child Homicide: A Statutory Proposal*, 89 J. CRIM. L. & CRIMINOLOGY 535, 536-40 (1999). Goaded by the frustrations prosecutors experience when juries balk at finding parents of both sexes and other caretakers guilty of intentional killing in child abuse deaths, Phipps advocates legislation creating a felony murder offense, predicated on child abuse. The effect of such legislation would be to relieve the prosecution of the burden of proving intent to kill or recklessness in order to secure a murder conviction. *Id.* at 584-93.

11. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *HOMICIDE TRENDS IN THE U.S.: INFANTICIDE*, available at <http://www.ojp.usdoj.gov/bjs/homicide/children.htm> [hereinafter BJS, *INFANTICIDE*] (last visited Jan. 25, 2006). Over a twenty-five year period, from 1976 to 2002, mothers accounted for thirty percent and fathers for thirty-one percent of homicides of children under five years of age. Male acquaintances—the boyfriends and lovers of mothers—however, accounted for an additional twenty-three percent of homicides of children under five years of age. *Id.*

numbers of men suffering from psychosis and severe depression?¹² The majority of homicides of infants and children are committed in the course of child abuse by parents and other household intimates who do not suffer from severe mental illness.¹³ Why is our attention attracted to the cases where a biological explanation is offered for maternal lethality and not the larger class of child abuse homicides committed by both sexes?¹⁴ When the subject is infanticide and child murder, in sum, mothers who kill are brought to the foreground, the role of men is obscured, and the focus is not on intra-family violence, but rather on the piquant question, “Is the mother mad or bad?”¹⁵

My answer to the questions propounded above, in brief, is that infanticide, from the dawn of the criminalization of this ancient practice to the present, has been less about the protection of children than the regulation of women. We profess our commitment to children, but our practice reveals an unimpressive record of child protection and abiding anxieties about female sexuality and motherhood. Our attention slides from the nominal subject—protecting children—to the interesting subject of motherhood. Thus, while the legal regime in the United Kingdom recognizes the links between maternal mental illness and child homicide, it does not provide a beacon that can lead us to a comprehensive policy addressing infanticide and child homicide. We must wean ourselves from our excessive preoccupation with female deviance and attend to other causes of child homicide if we are to craft effective prevention policies and just criminal law responses.

I begin this article with a comparison between the stereotype-dominated understanding of infanticide and child homicide in the United States and the statistical landscape it obscures. I then turn to the history of the crime of infanticide, a history which confirms that a fascination with deviant women has long dominated the story of infanticide. The article concludes

12. Phillip J. Resnick, *Child Murder by Parents: A Psychiatric Review of Filicide*, 126 AM. J. PSYCHIATRY 325 (1969) [hereinafter Resnick, *Child Murder*]. In this path-breaking work in the late 1960s, Phillip J. Resnick, M.D. found that a significant number of infant and child homicides are committed by fathers with severe mental health problems. Despite this well-known and seminal work, more recent scholars have largely ignored male parents who kill their infants and children. See Phillip J. Resnick, *Murder of the Newborn: A Psychiatric Review of Neonaticide*, 126 AM. J. PSYCHIATRY 1414 (1970) [hereinafter Resnick, *Murder of the Newborn*].

13. David Finkelhor, *The Homicides of Children and Youth: A Developmental Perspective*, in OUT OF THE DARKNESS: CONTEMPORARY PERSPECTIVES ON FAMILY VIOLENCE 17, 24-26 (Glenda Kaufman Kantor & Jana L. Jasinski eds., 1997).

14. See Phipps, *supra* note 10, at 542. The exception is scholarship that reflects the perspective of prosecutors. See *id.* at 536-37.

15. Wilczynski, *supra* note 5, uses this telling phrase in the title of her article.

with the exploration of what I call the “Good Mother Defense.” That exploration reveals the extent to which the fate of a woman tried for child homicide hinges on whether the jury sees her as a good mother, rather than on the prosecutors’ ability to prove the elements of the crime charged.

I. INFANTICIDE AND CHILD HOMICIDE IN THE UNITED STATES IN MYTH AND FACT, WITH AN ILLUSTRATIVE LOOK AT TEXAS

In 1997, a young Dallas County matron named Darlie Routier was convicted in the stabbing death of two of her young sons, aged five and six, and sentenced to death.¹⁶ The Routier case did not achieve the degree of sustained national and international notoriety attained by that of Andrea Yates, the Houston mother who drowned all five of her children in 2001,¹⁷ or Susan Smith, the South Carolina mother who rolled her car and with it her two young sons into a lake in 1996, then accused a fictional black stranger of kidnapping her children.¹⁸ The eyes of Texas, however, were fixed on Darlie Routier, as hers was one of that class of maternal infanticide and child homicide cases that had the potential to captivate media audiences: those committed by middle class, married, typically white, women.¹⁹ Unlike Yates, Routier did not defend on grounds of insanity, but instead, denied her guilt. Why, Texas mused, did Routier erupt in slaughter in the midst of her prosperous suburban life, anchored in a successful marriage? How could Routier, even though her skirts were short,²⁰ kill her children? Although answers to these questions proved elusive, the state of Texas sought and obtained capital justice for the slain children. Prosecutors proclaimed at her trial,

16. See *Routier v. State*, 112 S.W.3d 554, 557 (Tex. Crim. App. 2003). Routier was convicted of the capital murder of a child under six, her five-year-old son Daman. The evidence also supported the stabbing and killing of her six-year-old son Devon, with which she was not charged. See *id.*

17. *Yates v. State*, 171 S.W.3d 215, 216-17 (Tex. App. 2005).

18. Bragg, *Carolina Jury*, *supra* note 8, at 1.

19. See John W. Gonzalez, *A Human Tragedy/Trial to Open in Deaths of Two Children*, HOUS. CHRON., Jan. 5, 1997, at A1 [hereinafter Gonzalez, *Human Tragedy*]. The Ellen Feinberg case is another example of such a regional sensation; Feinberg is herself a physician and is married to another physician. See Bauer, *Mother’s Madness*, *supra* note 4.

20. See Gonzalez, *Human Tragedy*, *supra* note 19 (criticism of Routier’s taste was a theme in the publicity surrounding her case which took note of Routier’s body piercings and tattoos); see also John W. Gonzalez, *Routier Gave Baby Sitter Drugs, Humiliated Kids, Witnesses Say*, HOUS. CHRON., Feb. 4, 1997, at A13 [hereinafter Gonzalez, *Baby Sitter*] (quoting a witness saying that “Routier dressed ‘very tacky—everything was showing’”). Readers of this article may draw their own conclusions about Routier’s style by viewing the 2003 television documentary about her case. See *48 Hours Mystery: Precious Angels, A Shocking Crime* (CBS television broadcast Aug. 20, 2003).

If you kill our children, we will come after you[.] . . . When you take the life of a child in the state of Texas, you better get ready to pay the price[.]²¹

I ask you to have as much compassion as she had for her children[.] . . . I ask you to tell the nation that in Texas we protect our children. If you harm our children, you will feel the full extent of our laws.²²

These boasts, or promises, reflect Texas law, which has ample statutory grounds for severe treatment of child homicide. The murder of a child under six may on that account be prosecuted as capital murder.²³ Texas law also supplies a means of sentencing someone to life or as much as ninety-nine years imprisonment if he or she intentionally or knowingly engages in conduct that causes serious injury to a child; thus, someone who cannot be successfully prosecuted for murder because he or she lacked intent to kill can be severely punished under Texas law for child abuse that resulted in the death of the child.²⁴ Should the issue of insanity surface in a Texas child homicide case, the defendant is confronted with a particularly forbidding version of the M’Naghten or cognitive test; the sole question upon which the defendant’s legal responsibility turns is whether he or she knew the act of killing was wrong.²⁵ There need be no inquiry into, or proof as to whether mental disease or defect rendered the defendant incapable of either controlling his or her actions or appreciating the nature of the crime, as would be the case in more liberal jurisdictions.²⁶ Thus, in the case of Andrea Yates, a woman acknowledged by both defense and prosecution to be gravely mentally ill, it was possible for a jury to find her sane under Texas law even if they believed her own tormented account of

21. Ralph Winingham, *Routier Given Death—Killer Mom Stoic as Sentence Read*, SAN ANTONIO EXPRESS-NEWS, Feb. 5, 1997, at A1 (District Attorney Greg Davis, addressing the jury in the penalty phase of the capital trial).

22. John W. Gonzalez, *Jury Orders Death Penalty for Routier: 27-Year-Old Homemaker Shows Very Little Emotion*, HOUS. CHRON., Feb 5, 1997, at A1 (Assistant District Attorney Sherri Wallace, asking jury to sentence “evil-hearted” Routier to death).

23. TEX. PENAL CODE ANN. § 19.03(a)(8) (Vernon 2005) (if the victim is under six years of age, a murder is eligible for prosecution as capital murder). Texas is one of at least ten states that treats murder of a child as a circumstance permitting capital punishment.

24. See TEX. PENAL CODE ANN. §§ 12.32, 22.04 (Vernon 2005) (a person commits the felony in the first degree, Injury to a Child, if he intentionally or knowingly causes serious injury to child fourteen years of age or younger).

25. TEX. PENAL CODE ANN. § 8.01 (Vernon 2005); see Denno, *supra* note 5, at 12-17 (outlining the M’Naghten test and the Texas version of the test).

26. For a history and survey of the tests used in insanity law in the United States, see Deborah Giorgi-Guarnieri et al., *AAPL Practice Guideline for Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense*, 30 J. AM. ACAD. PSYCHIATRY & L. S1, S4-S9 (Supp. 2002).

her struggle to save her children from Satan.²⁷

In the wake of the Yates trial in 2002, Texas media gave extensive coverage to a small, shocking spate of child homicides committed by middle class, married mothers. Unlike Yates, whose sole taste of legal mercy was a life sentence where death could have been imposed, two of these women, Lisa Diaz²⁸ and Deanna Laney, were acquitted by reason of insanity,²⁹ and the third, Dena Schlosser, was initially found incompetent to stand trial.³⁰ Two of these mothers, Laney³¹ and Schlosser,³² like Yates, were intensely religious and obedient to command hallucinations. The third, Lisa Ann Diaz, suffered from the delusion that death would release her and her children from imagined disease.³³ All three cases, like that of Andrea Yates, were lurid, brutal, and reeked of madness. Schlosser severed her infant daughter's arms in a tortured, idiosyncratic submission to a charismatic preacher and a verse in the bible.³⁴ Laney bashed the heads of her six and eight-year-old sons with a rock in response to divine "signs."³⁵ Although it is possible that the leniency accorded these women is in some part a reaction to the outcry against illiberal Texas law in the

27. Yates condemned herself as possessed by Satan, and therefore a bad mother who had ruined her children. Denno, *supra* note 5, at 42-43. She killed them so that their early deaths would gain them entrance to heaven; had they grown to maturity, their responsibility for the evil in them for which she was responsible would have damned them. *Id.* Yet Yates knew she had done legal wrong; she herself called the police to notify them of her crimes.

28. Glenna Whitley, *Psycho Mom*, DALLAS OBSERVER, Jan. 20, 2005. Diaz, a Latina, otherwise fits the high notoriety profile: Although she was the product of privation, her second marriage, to Angel Diaz, a well-educated quality control manager, allowed her to become a suburban stay-at-home wife and mom. *See id.*

29. Rick Casey, *Mad Moms, Insane Law*, HOUS. CHRON., Dec. 19, 2004, at B1.

30. Thomas Korosec, *Accused Mother Not Fit for Trial*, HOUS. CHRON., Feb. 15, 2005, at B1.

31. Lee Hancock, *Driven by a VOICE . . .*, DALLAS MORNING NEWS, Apr. 18, 2004, at 1H. Laney had no known history of mental illness, but psychiatrists, including Dr. Deitz, agreed she was insane when she killed her children. Laney "believed God had chosen her and Ms. Yates to be witnesses foretold in the book of Revelation . . . and would preach God's word." *Id.*

32. Jennifer Emily, *Dad's "Lack of Emotion" in Baby's Death in Psychiatric Report*, DALLAS MORNING NEWS, Feb 11, 2005, at 1A [hereinafter Emily, *Lack of Emotion*] (recounting Dena Schlosser's psychiatric history and the circumstances of her crime); *see also* Jennifer Emily, *Mom Thanked God After Attack*, DALLAS MORNING NEWS, Dec.16, 2004, at 4B.

33. Whitley, *supra* note 28.

34. Emily, *Lack of Emotion*, *supra* note 32. The bible verse, from Matthew, was: "If thy right hand offend thee, cut it off, and cast it from thee: for it is profitable for thee that one of thy members should perish, and not that thy whole body should be cast into hell." Thomas Korosec, *Mom to Officer: "I Felt Like I Had To"*; *New Details Emerge in Case: Psychiatrist to Weigh Woman's Mental State*, HOUS. CHRON., Dec. 15, 2004, at B4.

35. Whitley, *supra* note 28.

wake of the Yates case,³⁶ deranged mothers had received leniency in Texas long before Andrea Yates became a synonym for injustice to this class of defendants in Texas and elsewhere in the United States.³⁷

The Laney, Diaz, and Schlosser cases provide Texas with a distorted prism through which to view the landscape of infanticide, just as the Yates case and the even more media-genic Susan Smith case misdirected the nation at large. Notorious cases such as these nurture myths, or misconceptions, about infanticide.³⁸

One myth is that infants and small children are safe in the bosoms of their families. Notorious trials foster the comforting notion that infanticidal killers are rare instances of madness or abject moral failure so exotic as to defy understanding by the good, good-enough, and not-so-good parents that make up the public and trial juries. In fact, children under five years of age are exposed to considerable homicide risk at home. While the incidence of homicide of victims under five years of age is a subject of dispute, even estimates at the conservative end of the range challenge the notion that the youngest Americans are safe at home.³⁹ There is no disputing that the

36. See, e.g., Rick Casey, *Devils on the Head of a Pin*, HOUS. CHRON., Apr. 7, 2004, at A17; Rick Casey, *Yates Wins: Shrink Was Delusional*, HOUS. CHRON., Jan. 7, 2005, at B1; see also Casey, *supra* note 29, at B1.

37. Two well-publicized cases were those of Evonne Rodriquez and Juana Leija. Rodriquez, a schizophrenic, was acquitted by reason of insanity for killing her four-month-old son in 1997. Todd Ackerman, *Confined Patient Pregnant Again*, HOUS. CHRON., Nov. 8, 2004, at A1. Leija attempted to drown six of her seven children in Buffalo Bayou. Four were saved by passersby and two drowned. She received a ten year probationary sentence in recognition of mental illness exacerbated by an abusive husband. Rosanna Ruiz, *Woman Who Threw Children in Bayou is Mending Her Life*, HOUS. CHRON., July 4, 2001, at A29.

38. The term "infanticide" has disparate and overlapping connotations, one of which is the killing of a newborn or infant by its mother or parent. Other usages do not involve any limitation on the relationship of the perpetrator to the victim, nor do they limit the age of the child strictly to infancy. This article adopts the more comprehensive usage. See, e.g., BJS, INFANTICIDE, *supra* note 11 (the U.S. Department of Justice, defines "infanticide" as the homicide of a child less than five years of age by any perpetrator). Including young children in the "infanticide" category is useful because infants and young children face a similar magnitude of risk and source of risk of homicide. The focus of this article is on homicide of infants and young children by their parents and other household intimates.

39. Estimates of the number of child homicides vary. U.S. Department of Justice annual statistics may be taken as establishing the lower bound; BJS reports between 550 and slightly less than 800 infanticides homicides of children under five per annum over the ten year period from 1991 to 2000. See BJS, INFANTICIDE, *supra* note 11. The number of homicides of all victims ranged from around 15,500 to 24,700 over the same period. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HOMICIDE TRENDS IN THE U.S.: HOMICIDE VICTIMIZATION, 1950-2002, <http://www.ojp.usdoj.gov/bjs/homicide/tables/totalstab.htm> (last visited Feb. 25, 2006). The U.S. Department of Health and Human Services estimates that approximately one thousand children under five perished by child abuse and neglect in 2001. See ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVICES, CHILD MALTREATMENT 2001:

majority of infanticides are perpetrated by the parents of the victims, and that the step-parents, lovers of parents, other family, and other caretakers fill out the cast of lethal agents.⁴⁰ In contrast, children between five and twelve years of age are the least likely age group to die by homicide,⁴¹ but the source of risk is the same for younger and older children: the majority of older children who perish by homicide are victims of their parents and other household intimates.⁴² Teenagers, who are at high risk of homicide, die at the hands of other teens and young adults.⁴³

A second misconception is that infanticide is a woman's crime and indeed a mother's crime. Parents are responsible for infanticidal killings in the majority of cases; almost equal numbers of mothers and fathers kill victims under five years of age—thirty and thirty-one percent respectively.⁴⁴ Boyfriends and lovers—"male acquaintances" in the parlance of the US Department of Justice's Bureau of Justice Statistics—

FATALITIES, available at <http://www.acf.hhs.gov/programs/cb/pubs/cm01/chapterfive.htm> (last visited Feb. 25, 2006). Another report estimates this population to be at least two thousand. See ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVICES, A NATION'S SHAME: FATAL CHILD ABUSE AND NEGLECT IN THE UNITED STATES: A REPORT OF THE U.S. ADVISORY BOARD ON CHILD ABUSE AND NEGLECT 9 (1995) [hereinafter, ADVISORY BOARD, CHILD ABUSE]. Some experts argue that underreporting is more extensive. See generally Bernard Ewigman et al., *The Missouri Child Fatality Study: Underreporting of Maltreatment Fatalities Among Children Younger Than Five Years of Age, 1983 Through 1986*, 91 PEDIATRICS 330 (1993); Phillip W. McClain et al., *Estimates of Fatal Child Abuse and Neglect, United States, 1979 through 1988*, 91 PEDIATRICS 338 (1993). At the upper bound of estimation, the homicide risk of young children exceeds that of adults. See ADVISORY BOARD, CHILD ABUSE, *supra* at 8. The public's ignorance of the extent of abuse and neglect fatalities can be attributed to poor investigative and accounting practices of law enforcement and medical and child protection agencies. *Id.* at 8-9; see also Finkelhor, *supra* note 13, at 23 (noting a second reason for underestimation, namely, ambiguity about whether cases of negligent maltreatment meet the standards for criminal homicide). There are plausible explanations for why the true rate of infanticidal crime is uncertain, contested, and the subject of such widely varying estimates. Homicides of young children are difficult to distinguish from accidental deaths (was the child pushed or did she fall?) and from death by natural processes (was the baby suffocated or stillborn or die of sudden infant crib death?). Police and child protection investigations are in many cases perfunctory, of poor quality, or absent. There are also questions about appropriate criteria to be used in determining whether to count child maltreatment deaths as homicides in cases where homicide charges were not pursued.

40. BJS, INFANTICIDE, *supra* note 11 (reporting that between 1976-2002, only three percent of homicide victims under five years of age were known to have been killed by strangers).

41. Finkelhor, *supra* note 13, at 26 (noting that the majority of homicide victims five to twelve years of age are killed by family members).

42. *Id.* at 26-27.

43. *Id.* at 19.

44. BJS, INFANTICIDE, *supra* note 11 (therefore, in total, parents were responsible for sixty-one percent of infanticides).

are responsible for an additional twenty-three percent of infanticides.⁴⁵ Men predominate in the homicide of children less than one year of age, as they do with the older under-fives.⁴⁶ Only newborns and children under one week in age are at greatest risk from their mothers.⁴⁷

The third myth or distortion is an exaggerated notion of the prevalence of severe mental illness in the population who commit infanticide.⁴⁸ The post-Yates Texas trio had psychiatric histories that inevitably raise questions about whether families, doctors and social agencies could have acted to avert these homicides and alleviated the suffering of these afflicted women.⁴⁹ Similarly, those who followed the Yates case learned that Andrea Yates was diagnosed as a schizophrenic with psychotic features, had attempted suicide, and had suffered from bouts of postpartum psychosis.⁵⁰ Likewise, the sentencing phase of Susan Smith's death penalty trial revealed that Smith had been molested as a teenager by her

45. *Id.* (According to BJS, in total eighty-two percent of infanticides were committed by males).

46. See Mary D. Overpeck et al., *Risk Factors for Infant Homicide in the United States*, 339 NEW ENG. J. MED. 1211, 1211 (1998) (reporting a survey of relevant literature and noting that the majority of perpetrators of homicides of infants older than one week are male).

47. See L. Paulozzi, Centers for Disease Control & Prevention, *Variation in Homicide Risk During Infancy—United States, 1989-98*, 51 MORBIDITY & MORTALITY WKLY. REP. 187, 189 (2002), available at <http://www.cdc.gov/mmwr/PDF/wk/mm5109.pdf> (reporting that of those child fatalities treated as homicides by the CDC, “89% of the known perpetrators of infants killed in the first week of life were female, usually the mother”). Paulozzi found that, between 1989 and 1998, 9.1 percent of homicides of children under one year of age occurring during the first week of life. *Id.* at 187-88.

48. Resnick, *Child Murder*, *supra* note 12, at 328-30. Resnick identified five “motives” for parental child murder in his seminal work; three of these are: unwanted infant, accidental death resulting from child beating, and revenge upon a spouse. *Id.* These three categories have failed to inspire the same subsequent research attention as the two other categories, both involving mental illness: severe depression and psychosis. See *id.* Two of the categories, child beating and spousal revenge, prefigure a more contemporary perspective, which sees child abuse and therefore child fatalities as integral to problems of family violence. See ADVISORY BOARD, CHILD ABUSE *supra* note 39, at 14-15. The authors of the prosecution-oriented report dispute the assumption that abusive parents who kill are usually mentally ill, and indeed find persuasive that the extreme force employed in many abuse cases suggests that many abusive parents are conscious of risk of death. *Id.* To recognize the importance of domestic violence in the landscape of child homicide, however, does not necessarily lead to a punitive perspective. See generally Evan Stark & Anne H. Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 INT’L J. HEALTH SERVICES 97 (1988). It is also integral to feminist work, such as that of Stark and Flitcraft, who emphasize the importance of poverty alleviation, female empowerment, and the ill effects of at least tacit acceptance of men as inherently violent. *Id.*

49. See *supra* notes 28-37 and accompanying text.

50. See generally Denno, *supra* note 5, at 26-36.

stepfather,⁵¹ that she suffered from severe and recurrent depression,⁵² (and that her mother had refused to allow treatment when depression surfaced in the wake of the molestation,⁵³ and that she, like Yates, had attempted suicide.⁵⁴ While delusional psychosis and severe depression are very real features of the infanticide landscape, prevalent in parents of both sexes who kill, the largest fraction of infanticides are “child abuse” or “abuse and neglect” fatalities.⁵⁵ These are homicides by parents and members, or familiars, of the household that have the characteristics that, if proven, would constitute a range of offenses from criminally negligent homicide to first degree and capital murder. The majority of these deaths are not the product of an intent to kill.⁵⁶ They result from negligent or reckless failure to provide care, or with even greater frequency, the infliction of violence on the frail and vulnerable bodies of infants and young children.⁵⁷ These children die because the violence inflicted upon them far exceeds any safe or measured expression of anger, frustration, or discipline, not for the first time, in many or most cases, but for the final and fatal time. Although mentally ill parents like Yates pose grave risks to children and are sometimes severely punished despite their afflictions, the majority of those who kill infants and small children are sane by the standards of the most liberal jurisdictions in the United States.

Turning to the phenomenon of teenage neonaticide, just as with mature women, it is the middle class teenager that captivates the public, rather than the larger class of such crimes committed in poverty. Neonaticide in any social class is typically an instrumental act, however fraught the circumstances may be for the teenager or young woman who refuses motherhood.⁵⁸ Among the most publicized of such cases in recent years are those of two New Jersey teenagers, Melissa Drexler and Amy Grossberg. Melissa Drexler suffocated her newborn in the bathroom of a banquet hall while attending her senior prom in New Jersey, disposed of

51. Rick Bragg, *In South Carolina, a Mother's Defense, and Life, Could Hinge on 2 Choices*, N.Y. TIMES, July 16, 1995, §1, at 12 [hereinafter Bragg, *Mother's Defense*].

52. *Id.*

53. Rick Bragg, *Arguments Begin in Susan Smith Trial*, N.Y. TIMES, July 19, 1995, at A10 [hereinafter Bragg, *Arguments Begin*].

54. *Id.*

55. Finkelhor, *supra* note 13, at 24; *see also* ADVISORY BOARD, CHILD ABUSE *supra* note 39, at 8-9.

56. *See* Finkelhor, *supra* note 13, at 24.

57. *See id.* at 23-25. Finkelhor estimates that only a third of the homicides of children under one are what he labels “infanticides,” i.e., the killing of unwanted children or children who are victims of mentally ill or incompetent, disorganized, or overwhelmed caretakers. *Id.* at 24-25.

58. *See generally* Resnick, *Murder of the Newborn*, *supra* note 12.

the body in the trash, and returned to the dance floor.⁵⁹ She earned the sobriquet of “Prom Mom,” pled to aggravated manslaughter, received a sentence of fifteen years in prison, and served two years prior to release.⁶⁰ Amy Grossberg and Brian Peterson killed their newborn, which was conceived in their senior year in high school.⁶¹ Peterson was sentenced to serve two years in prison and Grossberg two-and-a-half years in prison in plea agreements. Both these young women concealed their pregnancies (in Drexler’s case from her boyfriend as well as her family and friends) and were unable or unwilling to acknowledge that they would in the normal course give birth and become mothers.⁶² The media reflected the two competing narratives of teenage neonaticide with cultural traction:⁶³ that these young people were depraved and licentious, and that these not-yet-women were overwhelmed because they lacked the maternal resources that grown women have. The depravity account may have gained conviction if it was not inspired by the social status of the teenagers.⁶⁴ Although there have been some severe sentences in teenage neonaticide cases, the institutional response tends to be rather mild.⁶⁵

In Texas, the consequences for teens and young women tend toward greater severity.⁶⁶ Under Texas law, persons as young as fourteen can be

59. Ronald Smothers, *Guilty Plea by Mother, 20*, in *Prom Death*, N.Y. TIMES, Aug. 21, 1998, at B1.

60. Karen Demasters, “*Prom Mom*” Released, N.Y. TIMES, Dec. 2, 2001, at 6.

61. Karl Vick, *Young Love and Dead Baby Tear at the Heart of Delaware*, WASH. POST, Nov. 22, 1996, at A1.

62. Abby Goodnough & Bruce Webber, *The Picture of Ordinary; Before Prom Night, a Suspect Was the Girl Next Door*, N.Y. TIMES, July 2, 1997, at B1.

63. Media portraits of these teens sometimes reflected both views. See, e.g., Elizabeth Gleick, *Three Kids, One Death; They Were Happy and Well-Off. Why Did Two Teens Dump Their Baby, Possibly After Crushing Its Skull?*, TIME, Dec. 2, 1996, at 69; see also Oberman, *Mothers Who Kill*, *supra* note 5, at 27-30 (discussing the ambivalence teen neonaticide cases induce in society).

64. Vick, *supra* note 61. Grossberg and Peterson were from a privileged family in a privileged community. Both, for example, were described as living in a “gabled tract mansion.” *Id.* Drexler may have appeared to many who followed her case to be more privileged than she in fact was. The Prom Mom was lower middle class. She hoped to pursue a course in fashion design after graduation from vocational high school. Her sobriquet may have suggested more social ease and cachet. See Goodnough & Webber, *supra* note 62.

65. See Oberman, *Mothers Who Kill*, *supra* note 5, at 25-30.

66. A question that can be raised but cannot easily be answered is the extent to which infanticidal teens and young women escape prosecution because of the sympathetic response of street-level bureaucrats, such as police. See Michelle Oberman, *Understanding Infanticide in Context: Mothers Who Kill, 1870-1930 and Today*, 92 J. CRIM. L. & CRIMINOLOGY 707, 733 (2002) (discussing this phenomenon in late nineteenth and early twentieth century Chicago). The question of the survival of this practice is beyond the scope of this study.

certified for trial as adults for serious felonies,⁶⁷ and face an array of sentences that include life for capital murder,⁶⁸ and ninety-nine years for serious injury of a child.⁶⁹ Texas juvenile prosecutors will not brook medical diversion unless a psychological evaluation establishes that the teen mother did not comprehend the nature of her act.⁷⁰ Absent mitigation, such as rape, incest, mental illness, or retardation, juvenile prosecutors are likely to seek certification for trial as an adult in a neonaticide case and, if unsuccessful, to seek a conviction in juvenile court that carries a determinate sentence as high as forty years.⁷¹ The juvenile court has the power in cases it deems appropriate to deny certification and deny a determinate sentence.⁷² The court may prefer to adjudicate the teen as a delinquent.⁷³ The effect of either adjudication as a delinquent or a sentence of a term a years by the juvenile court is that the release date of the teen then falls to the discretion of Texas Youth Commission (TYC).⁷⁴ For a first degree felony the offender must serve three years.⁷⁵ But with this *proviso*, the mission of the juvenile justice regime remains rehabilitative. Thus, while TYC has the power to send a teen convicted of neonaticide to adult prison to continue serving her sentence, it equally has the power to release a rehabilitated teen at jeopardy for a decades-long determinate sentence after a short incarceration. Texas law, culture and practice may make it unlikely that a teen convicted of neonaticide would escape incarceration and be subject only to probation or diversion; but, if the teen avoids certification, criminal sanctions may well approximate the leniency of other jurisdictions.

Prosecutors report that the incidence of teen neonaticides prosecuted in Texas is very small.⁷⁶ Some confirmation of this judgment is to be found

67. TEX. PENAL CODE ANN. § 8.07(a)(6) (Vernon 2005); *see generally* ROBERT O. DAWSON, TEX. JUVENILE PROB. COMM'N, TEXAS JUVENILE LAW 139 (6th ed. 2004).

68. The murder of a child under six years of age is a crime that is eligible for capital punishment. TEX. PENAL CODE ANN. § 19.03(a)(8), (b) (Vernon 2005).

69. TEX. PENAL CODE ANN. §§ 12.32, 22.04 (Vernon 2005).

70. Telephone Interview with Kris Moore, Harris County Assistant Dist. Attorney, Juvenile Div., in Houston, Tex. (June 29, 2005).

71. Telephone Interview with Kris Moore, Harris County Assistant Dist. Attorney, Juvenile Div., in Houston, Tex. (July 7, 2005); Telephone Interview with Donna Schardt, Dallas County Assistant Dist. Attorney, in Dallas, Tex. (July 7, 2005).

72. *See generally* DAWSON, *supra* note 67, at 422-54.

73. *Id.*

74. *Id.*

75. *Id.* at 441.

76. *See* Telephone Interview with William Hawkins, Harris County Assistant Dist. Attorney, Juvenile Div., in Houston, Tex. (June 29, 2005) (William Hawkins could recall only one such case in his four-and-a-half years as a juvenile prosecutor in Harris County); *see also* Telephone Interview with Gary Arie, Dallas County Assistant Dist. Attorney,

in the paucity of reports of teen neonaticides in the three major Texas metropolitan newspapers⁷⁷ over a period of twelve years.⁷⁸ A fifteen-year-old was sentenced to three years youth custody for the crime of intentionally causing serious bodily injury to a child for the blunt trauma killing of her child then left in a trash bin.⁷⁹ An eighteen-year-old was sentenced to ten years for injury to a child and child endangerment for the killing of her son and leaving him in a trash bag in her bedroom.⁸⁰ A sixteen-year-old was sentenced to forty-five years for killing her newborn son.⁸¹

The failure of neonaticidal teenagers to mother may titillate and disturb, as much perhaps because these young girls are sexually active as because they coped so disastrously with resulting pregnancies. Such cases, however, do not challenge or unsettle our investment in women's biologically-based virtue in natural mothers. A reassuring explanation is at hand: due to their youth, these girls have not matured to the point of being women and mothers.

Although the cases to which the media and the public are drawn involve married, middle class, and typically white women, and relatively privileged white teenage girls, the most likely victims of infanticide and child homicide are children of color,⁸² born to unmarried mothers, who first gave

Juvenile Div., in Dallas, Tex. (July 13, 2005); Telephone Interview with Kris Moore, *supra* note 70 (Kris Moore concurred, as did Gary Arie, who speculated that the Texas Baby Moses statute, TEX. FAM. CODE ANN. § 262.302 (Vernon 2005), effective 2001, reduced such crimes and noted that teenage homicides of all sorts are dramatically fewer in recent years).

77. The three newspapers were the *Dallas Morning Herald*, the *Houston Chronicle*, and the *San Antonio Express-News*.

78. The period studied was from January 1, 1993 through May 23, 2005.

79. Steve Olafson, *Girl Sentenced in Newborn's Death; Two Relatives Arrested*, HOUS. CHRON., Jan. 20, 1999, at A25.

80. Pete Slover, *Teen Jailed in Baby's Death Hid Pregnancy, Parents Say Newborn Boy Was Found Suffocated in Garbage Bag*, DALLAS MORNING NEWS, Oct. 29, 1997, at 1A.

81. Diane Jennings, *More Visible, Not More Common; Women Killing Children Nothing New, but 'We're Hearing About More'*, DALLAS MORNING NEWS, Aug. 4, 2002, at 6J (three neonaticides by adult women were also reported in the three metropolitan dailies in the same time period); see *Infant's Birth to be Focus of Mother's Murder Trial*, DALLAS MORNING NEWS, Oct. 6, 1993, at 32A (Susan Bienek was sentenced to nine years for leaving her newborn child to die in a storage shed); see also Pam Easton, *1 Mom Linked to 2 Abandoned Babies; Boy Found Dead in Trash Bin 5 Years Ago Related to Girl Left in Ditch*, HOUS. CHRON., Aug. 10, 2003, at A34; Thom Marshall, *Mother Won't Plead Insanity in Infant's Smothering Death*, HOUS. CHRON., Feb. 17, 2004, at A9 (Kenisha Berry, who abandoned a newborn to die and was discovered to have killed another newborn, dubbed "Baby Hope," five years earlier, was sentenced to die, although the second victim survived).

82. BJS, INFANTICIDE, *supra* note 11; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HOMICIDE TRENDS IN THE U.S.: INFANTICIDE: INFANTICIDE RATES PER 100,000 POPULATION BY RACE OF VICTIM, *available at*

birth as teenagers, with little education, who have had further children, and who live with men who are not the fathers of their children.⁸³ From these cases and these social conditions we tend to avert our collective gaze, even as our attention is drawn to maternal mayhem and madness in a more privileged strata of society—to white married women and teenage girls destined for matron status.

The following table presents the results of a survey of the coverage of infanticide and child homicide⁸⁴ in the three largest metropolitan daily papers in Texas over a twelve year period.⁸⁵

TABLE: CHILD HOMICIDE IN THE TEXAS PRESS 1993-2005

| NAME | RELATIONSHIP SEX TO VICTIM | NO. OF ARTICLES |
|---------------------|-------------------------------|--------------------|
| Alexander, Kimberly | F Mother | 21 |
| Benaissa, Sabrina | F Mother | 42 |
| Berry, Kenisha | F Mother | 7 |
| Bienek, Susan | F Mother | 4 |
| Brown, Katrina | F Mother | 3 |
| Bush, Amy McKay | F Mother | 9 |
| Camacho, Angela | F Mother | 46 |

<http://www.ojp.usdoj.gov/bjs/homicide/tables/kidsratestab.htm> (last visited Jan. 25, 2006) (BJS reports that although the rate of homicide of black children under five years of age has declined in recent years, it remains substantially higher than that of white children—7.4 per 100,000 versus 2.2 per 100,000); Finkelhor, *supra* note 13, at 18 (rates among Hispanics exceed those of whites but are lower than rates among blacks). It has been often observed that rates of homicide of children less than one-year-old do not vary as much internationally as do other homicide rates. *Id.* at 24. While the U.S. rate of homicide of children under the age of one year old exceeds those of all other industrial nations, the gap becomes much wider for the one to four year-old age group. *See id.* at 18 tbl. 2.1. 1995 World Health Organization statistics rank the U.S. first in this age group, with twice the rate of the second-ranked industrial nation. *Id.* It appears that high rates of black and Hispanic infanticide and child homicide account for U.S. predominance in this area over other industrial nations that may lack large poverty populations. *Id.* at 18 tbl. 2.1, 24.

83. Overpeck et al., *supra* note 46, at 1212-13 (provides this profile); *see generally* Stark & Flitcraft, *supra* note 48 (exploring the links between female poverty and domestic violence, both that which is inflicted by men on both women and children and that which is inflicted by women on children).

84. The stories collected are those with child victims no older than twelve. The majority of child victims were no more than five years old. Stories involving older children and teenagers typically present distinct fact patterns, such as sexual assault and raging attacks that may destroy an entire family.

85. *See supra* notes 77-78.

| NAME | SEX | RELATIONSHIP TO VICTIM | NO. OF ARTICLES |
|------------------------------|-----|---------------------------|--------------------|
| Carter, Kristy | F | Mother | 5 |
| Cornelius, Tina Marie | F | Mother | 26 |
| Diaz, Lisa | F | Mother | 46 |
| Disabella, Angela | F | Mother | 3 |
| Evans, Demetria | F | Mother | 5 |
| Garcia, Guadalupe | F | Mother | 4 |
| Hamilton, Sharonda | F | Mother | 18 |
| Hampton, Tameika | F | Mother | 8 |
| Harris, Kimberly | F | Mother | 9 |
| Harrison, Lynette | F | Mother | 2 |
| Hernandez, Yesenia | F | Mother | 14 |
| Huynh, Linda | F | Mother | 5 |
| Ivy, Amy | F | Mother | 9 |
| Katta, Nirmala | F | Mother | 10 |
| Kibble, Claudette | F | Mother | 22 |
| Laney, Deanna | F | Mother | 85 |
| Leija, Juana | F | Mother | 11 |
| Lewis, Ora | F | Mother | 11 |
| Maddux, Tracy | F | Mother | 2 |
| Medellin, Germaine Janine | F | Mother | 7 |
| Moren, Jessica | F | Mother | 2 |
| Nzeakor, Stacy | F | Mother | 16 |
| Padron, Yvonne Nichole | F | Mother | 4 |
| Pearson, Samantha | F | Mother | 5 |
| Perez, Dee Etta | F | Mother | 13 |
| Peterkin, Ana Marie | F | Mother | 5 |
| Phipps, Karen | F | Mother | 5 |
| Pumphrey, Hope | F | Mother | 11 |
| Rodriguez, Evonne | F | Mother | 30 |
| Romero, Mary Isabel | F | Mother | 1 |

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| NAME | SEX | RELATIONSHIP TO VICTIM | NO. OF ARTICLES |
|------------------------|-----|------------------------|-----------------|
| Routier, Darlie | F | Mother | 472 |
| Schlosser, Dena | F | Mother | 51 |
| Smith, Lisa Marie | F | Mother | 14 |
| Tolliver, Hazel | F | Mother | 3 |
| Torres, Olga | F | Mother | 9 |
| Vernege, Loretta | F | Mother | 4 |
| Yates, Andrea | F | Mother | 544 |
| Zamorano, Angelita | F | Mother | 1 |
| Adams, Timothy | | | |
| Wayne | M | Father | 11 |
| Aguilera, Jose | | | |
| Guadalupe | M | Boyfriend | 14 |
| Arocha, Joe | | | |
| Dominguez | M | Father | 1 |
| Barnes, Patrick Nelson | M | Father | 2 |
| Battaglia, John | M | Father | 75 |
| Bush, John | M | Father | 16 |
| Carter Jr., Bobby Dale | M | Stepfather | 5 |
| Decorats, Phillippe | | | |
| Fournier | M | Father | 1 |
| Dehoyos, Danny | M | Father | 15 |
| Duncum, Joe Ross | M | Father | 3 |
| Gonzales, Jose | M | Stepfather | 3 |
| Guzman, Benito | M | Father | 4 |
| Holiday, Raphael | M | Father of one victim | 1 |
| Hughes, Melvin James | M | Father | 3 |
| Land III, Jesse Alvin | M | Father | 1 |
| Lopez, Leon Eric | M | Father | 1 |
| Lugo, Francisco Javier | M | Mom's friend? | 4 |
| Mabry, Tremaine | M | Father | 8 |
| Maddux, Clayton | M | Father | 2 |

| NAME | SEX | RELATIONSHIP TO VICTIM | NO. OF ARTICLES |
|----------------------------|-----------|---------------------------------|--------------------|
| Markley, Jerome | M | Father | 8 |
| Moren, Bruce | M | Father | 2 |
| Nakedhead, Tom | M | Mom's boyfriend | 3 |
| Nasir, Mohammad | M | Father | 6 |
| Ochoa, Abel | M | Father | 15 |
| Pierott, Kenneth | M | Mom's boyfriend | 17 |
| Pumphrey, Jason | M | Stepfather | 11 |
| Rodriguez Raymond | Jr., M | Father | 7 |
| | | Father of at least 2 victims | 2 |
| Rubio, John | M | | 51 |
| Rumsey, Timothy | M | Father | 17 |
| Savage, Michael | M | Father | 3 |
| Skinner, Jon | M | Stepfather | 3 |
| Smallwood Jr., James D. | M | Father | 4 |
| Tejeda, Jesus | M | Stepfather's brother | 9 |
| Tejeda, Juan | M | Stepfather | 14 |
| Thornton II, James | M | Father | 16 |
| Williams, Jeremy Fritz | M | Father | 5 |

The table provides the name, sex and relationship between victim and accused in each case, as well as the number of times any of the three dailies printed stories about the accused.⁸⁶ This survey suggests that the homicides of poor child victims surface, then fade fairly quickly back into the sea of misery from which they emanated, while stories about middle-

86. If an item appeared in more than one edition of a paper, it was counted only once. An *Associated Press* item that appeared in more than one of the three newspapers was counted as many as three times because the story was carried in a second or third news market. Items appearing in the Round Up section of the *San Antonio Express-News* covering out-of-area stories otherwise not covered in the newspaper were also counted. *Dallas Morning News* briefs were counted if they were the unique mention of the item in the newspaper for that day; *Dallas Morning News* "Quick" section stories were not counted. Mentions in end-of-year brief summaries of notable stories were counted. Editorials were counted, but letters to the editor were not. Because information about race was not available for each man or woman, race is not indicated in the table.

class women killers gain sustained attention. The stories about minority child homicides that have legs are those with bizarre facts, such as the south Texas case intimating witchcraft, spirit possession, and the ritual killing of three children.⁸⁷ The only story about a white male killer to rival the level of coverage of white women killers involved the tale of an accountant who shot his two children in an act of vengeance against an estranged wife.⁸⁸ Poor white child killers of either sex are consigned to the same oblivion as poor blacks and Hispanics.⁸⁹

If the protection of children were our primary concern, we would concentrate attention on the conditions that produce severe child abuse and the children who may be living at risk.⁹⁰ A sound child protection policy would necessarily be directed at stemming the formation of high-risk households by combating teen pregnancy and the truncated education of girls living in poverty, and at promoting effective ameliorative services for women with children struggling in these conditions.⁹¹ It would recognize the roots of child homicide in child abuse and that child abuse is often part and parcel of lives and households plagued by intra-family violence.⁹² Sound criminal law policy would certainly also accord mental health defenses to mothers and fathers who kill their children in the grip of psychosis and suicidal depression.⁹³ Equally, the implications for child safety of severe mental illness in parents, whether postpartum or otherwise, whether in mothers or fathers, would receive greater attention from organized medicine and social service providers of all stripes.

87. Mariano Castillo, *Dad's Trial Delayed for Exam; Decapitation Suspect to See Psychiatrist*, SAN ANTONIO EXPRESS-NEWS, Oct. 29, 2003, at 1B (recounting some of the bizarre facts in a treble homicide committed by John Allen Rubio and his common law wife Angela Camacho).

88. Steve McGonigle, *Trial Will Begin Monday for Man Accused of Killing Two Daughters; Domestic Violence History, Mental Problems Among Issues*, DALLAS MORNING NEWS, Apr. 21, 2002, at 35A.

89. See Table: Child Homicide in the Texas Press 1993-2005, *supra* note 85. Evonne Rodriguez was the subject of the largest number of stories about killers not identified as middle class. The stories about her are devoid of information about status, occupation, or income. She was acquitted by reason of insanity for killing her four-month-old infant in 1997, but came in for a second round of coverage when she became pregnant again while incarcerated at a state mental hospital. See, e.g., John Makeig, *Mom Who Killed Infant Is Pregnant Again; Woman in Custody Since 1997 Drowning*, HOUS. CHRON., July 20, 1999, at A13.

90. See Overpeck et al., *supra* note 46, at 1212-15; see generally Finkelhor, *supra* note 13.

91. See Overpeck et al., *supra* note 46, at 1215.

92. See generally Stark & Flitcraft, *supra* note 48.

93. The prominence of men and women so afflicted in the population who kill children was brought to the fore thirty-five years ago in the much-cited work of Dr. Phillip Resnick. See Resnick, *Child Murder*, *supra* note 12.

There are doubtless multiple, entwined causes or explanations for the lack of efficacious child protection policies. The statistical concentration of lethal child abuse among the poor⁹⁴ may enervate any sense of urgency in the more fortunate strata of society. The sheer size of the impoverished population,⁹⁵ and the limited resources made available to address the needs of this population, may hobble effective policy and action. In Texas, for example, scandal has rolled through a number of communities where child protective services knew or should have known of children at risk who died tragically at the hands of parents and caretakers.⁹⁶ As with all varieties of family violence, child abuse homicide does not arouse fear in the general public of the sort that lead to persistent demands for attention to public safety because the threat is perceived as confined to the family circle of the abuser.⁹⁷ The brutal mother, father, or live-in boyfriend does not galvanize fear about danger to the community at large as does, for example, the pedophile lurking near the schoolyard or other criminal predator who is a stranger to the victim.⁹⁸ Reluctance to pierce the veil of family privacy

94. See Finkelhor, *supra* note 13, at 25.

95. The U.S. Census Bureau reports that 12.7 percent of the population, or thirty-seven million people were living in poverty in 2004. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2004, at 9 (2005), available at <http://www.census.gov/prod/2005pubs/p60-229.pdf>.

96. Texas newspapers are replete with articles about the failure of Child Protective Services (CPS) to protect at-risk children. For example, a court-ordered report produced a "scathing critique" of Child Protective Services in Bexar County. See Tom Bower, *Child Agency Urged to Partly Privatize; Programs to Recruit Foster Parents, Finalize Adoptions Targeted*, SAN ANTONIO EXPRESS-NEWS, Aug. 28, 2004, at 3B; see also Tom Bower, *Diamond's Sad Legacy; Court-Ordered Report Rips Agency That Failed Little Girl*, SAN ANTONIO EXPRESS-NEWS, Aug. 27, 2004, at 1A. In 2004, the *Houston Chronicle* reported severely underfunded and overtaxed services state-wide. See Polly Ross Hughes, *No Unity on Fixing Children's Services; Some Contend More Money Won't Solve All Problems*, HOUS. CHRON., Nov. 1, 2004, at A1. The Dallas Morning News reports the third high profile case within a month of a child abuse fatality whose parents had had previous contact with CPS. See Holly Yan, *Girl, 5, Injured; 2 Held; Dallas Police Say Hospitalized Child Showed Signs of Abuse*, DALLAS MORNING NEWS, Aug. 19, 2004, at 1B. At least since the well-publicized case, *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the public has been made aware that child protective services all over the country are severely strained by their caseloads, and that the consequences can be tragic.

97. See, e.g., D. Seaborne Davies, *Child-Killing in English Law*, 1 MOD. L. REV. 203, 221 (1937) (noting that in the policy debate before the 1866 Capital Punishment Commission, some witnesses expressed Bentham's point "that the killing of a child by its mother did not create the same feeling of alarm in society as other forms of murder"); see also NIGEL WALKER, CRIME AND INSANITY IN ENGLAND: VOLUME I: THE HISTORICAL PERSPECTIVE 128 (1968) (noting that Fitzjames Stephen was among those who took this position before the Commission, arguing both that the infanticide "causes no [public] alarm, because it is a crime committed only by mothers upon their newly born children").

98. See generally Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A*

with intrusive state regulation may play a role. While not gainsaying any of these sources of inattention, I would like to make a case that the history of the crime of infanticide is one in which the regulation of women, not the protection of children, is the driving, constant element.

In pre-Christian Europe, infanticide was not a crime.⁹⁹ Early modern Europe and England introduced infanticide legislation to regulate the sexuality of the inferior classes and in particular the women of these classes.¹⁰⁰ In the nineteenth century, the protection of children emerged as a novel additional aim of such legislation.¹⁰¹ Further, with the normalization of the sentimental bourgeois family as at least the nominal ideal for all classes in the modern state,¹⁰² the most charged figure in the infanticide drama ceased to be the lewd working girl and instead became the woman at the pinnacle of female status—the married, middle-class mother. This figure debuted in the nineteenth century. The anxieties that attach to infanticides by such women appear to have at least as much to do with the protection of cherished views about motherhood as with the protection of children.

II. THE HISTORY OF INFANTICIDE IN EUROPE, FOCUSING ON ENGLAND

A. The Ancient World and the Modern State

Infanticide of newborns was not a crime in the law and custom of pre-Christian Europe.¹⁰³ A father as head of household had the privilege of deciding whether to raise a child or allow the child to die.¹⁰⁴ This was the law of Greece and the law of Rome before her emperors embraced

Study of Capital Domestic Murder in the Post-Furman Era, 49 SMU L. REV. 1507 (1996) (examining some issues surrounding the criminal law's response to homicides with stranger victims versus homicides with intimate partner victims that also arise in the arena of crimes against children).

99. Kathryn L. Moseley, *The History of Infanticide in Western Society*, 1 ISSUES L. & MED. 345, 349-51 (1986).

100. PETER C. HOFFER & N. E. H. HULL, *MURDERING MOTHERS: INFANTICIDE IN ENGLAND AND NEW ENGLAND, 1558-1803*, at 11-25 (1981).

101. See George K. Behlmer, *Deadly Motherhood: Infanticide and Medical Opinion in Mid-Victorian England*, 34 J. HIST. MED. & ALLIED SCI. 403, 403-07 (1979).

102. See Susan Moller Okin, *Women and the Making of the Sentimental Family*, 11 PHIL. & PUB. AFF. 65, 88 (1981).

103. See generally Carol J. Clover, *The Politics of Scarcity: Notes on the Sex Ratio in Early Scandinavia*, 60 SCANDINAVIAN STUD. 147 (1988) (on the law and practice of infanticide in pagan Europe, arguing the practice was universal and took its largest toll on female infants).

104. Moseley, *supra* note 99, at 349.

Christianity in the fourth century A.D.¹⁰⁵ Infanticide was also lawfully practiced in Europe before the Roman Conquest and among those Europeans never subject to Roman control.¹⁰⁶ As in most other parts of the world, Europeans practiced infanticide for many reasons including lack of economic resources,¹⁰⁷ preference for male children,¹⁰⁸ and out of a desire to eliminate illegitimate children¹⁰⁹ and children thought to be the bringers of misfortune.¹¹⁰

Christianity followed Jewish law in forbidding infanticide.¹¹¹ Constantine declared the erstwhile right of fathers to reject a child to be a crime.¹¹² In due course, the church forbade infanticide throughout Christian Europe.¹¹³ The practice of infanticide of newborns, however, remained vigorous for all the reasons that had fueled it prior to Christianization despite church condemnation.¹¹⁴ In the Europe of the Middle Ages, the punishment of infanticide was, practically speaking, the domain of the church as the regulator of family life.¹¹⁵ The “overlying” or smothering of infants sharing the family bed with their parents was the most prominent and vexing problem the church combated.¹¹⁶ Both man and wife were subject to rebuke for overlying.¹¹⁷ In early modern Europe, beginning in the sixteenth century, two profound, linked changes occurred in the law of infanticide. Infanticide along with a great deal else that had been regulated by the church became the business of the state.¹¹⁸ The crime of infanticide was born, and defined as one committed by *unmarried* women.¹¹⁹ Thus, what had been a privilege of fathers became a crime of

105. *Id.* at 351-52.

106. Clover, *supra* note 103, at 162-64.

107. Moseley, *supra* note 99, at 349.

108. *Id.* at 351; *see also* Clover, *supra* note 103, at 160-62.

109. Moseley, *supra* note 99, at 351.

110. *Id.* at 345-46.

111. William L. Langer, *Infanticide: A Historical Survey*, 1 HIST. CHILDHOOD Q. 353, 355 (1974).

112. *Id.*

113. *See id.*

114. *Id.*; *see* Clover, *supra* note 103, at 164; Richard C. Trexler, *Infanticide in Florence: New Sources and First Results*, 1 HIST. CHILDHOOD Q. 98, 99 (1974).

115. *See generally* Barbara A. Kellum, *Infanticide in England in the Later Middle Ages*, 1 HIST. CHILDHOOD Q. 367 (1974) (on church practice and penances for infanticide); Trexler, *supra* note 114.

116. *See* Langer, *supra* note 111, at 356; *see also* Kellum, *supra* note 115, at 369 (writing that in the later Middle Ages “the three year penance for overlying became standard”).

117. Trexler, *supra* note 114, at 108-09 (noting that in some places, the penance typically was the public humiliation of acknowledging the sin).

118. HOFFER & HULL, *supra* note 100, at 11-12; Trexler, *supra* note 114, at 103, 105.

119. Katherine O’Donovan, *The Medicalisation of Infanticide*, 1984 CRIM. L. REV. 259,

unmarried mothers.¹²⁰

Early modern Europe experienced population growth and economic change that pushed many out of agrarian life.¹²¹ England and other countries confronted a growing mobile population of the poor no longer subject to village and church social control.¹²² The more fortunate classes were frightened by the unruliness and the perceived sexual license of the poor, who were beyond the reach of traditional formal and informal controls.¹²³ In this new dispensation there was little tolerance in the wage economy for working women with illegitimate children.¹²⁴ If a pregnant woman could not or would not marry the father of her child, she could expect to lose her current employment as well as her prospects of future employment.¹²⁵ Her circumstances became dire; she could support neither herself nor her child.¹²⁶ Moreover, the marriage prospects of the unmarried mother who worked as a domestic servant or in the factory system were inferior to those of her agrarian foremothers, in part because men of her class were also economically insecure.¹²⁷ But more dramatically, generations of working women were systematically sexually exploited.¹²⁸ Neither chastity nor marriage to the father of the child were options where sexual access to working women was a privilege of social rank. This formula—economic insecurity, sexual exploitation, and ostracism of the fallen—put illegitimate children at risk of infanticide for hundreds of years.

The state responded to the perceived crisis—the growing menace to social morality posed by the licentious poor—by regulating sexual conduct, formerly the domain of the church, through the criminal law. In due course, a punitive poor law regime was devised.¹²⁹ The parents of bastards were fined.¹³⁰ Women who refused to name the father, and men who failed

259-60; *see also* Davies, *supra* note 97, at 213-14.

120. *See* HOFFER & HULL, *supra* note 100, at 98, 101-107 (arguing that unmarried women were the target of enforcement of infanticide law in England and the American colonies in the early modern period).

121. *Id.* at 8, 12-13.

122. *See id.* at 12-13.

123. *Id.*

124. *See id.* at 115; *see also* Constance B. Backhouse, *Desperate Women and Compassionate Courts: Infanticide In Nineteenth Century Canada*, 34 U. TORONTO L. J. 447, 448 (1984) (detailing similar settings in Canada).

125. *See* Behlmer, *supra* note 101, at 418.

126. HOFFER & HULL, *supra* note 100, at 115.

127. *See id.* at 13, 115.

128. *See* Langer, *supra* note 111, at 357; *see also* Backhouse, *supra* note 124, at 457.

129. HOFFER & HULL, *supra* note 100, at 11-17 (on the social changes that led to the Poor Law of 1576, its provisions, and its impact).

130. *Id.* at 13.

to support their illegitimate offspring, were subject to corporal punishment and imprisonment.¹³¹ In England—there were very similar laws on the continent of Europe¹³²—the capstone of this regime was a 1623 statute enacted by Parliament, the Act to Prevent the Destroying and Murthering of Bastard Children,¹³³ which punished with death any unmarried woman—styled a “lewd” woman—who concealed the death of her bastard child.¹³⁴ Such concealment was to be punished “as murther”¹³⁵ regardless of whether the child “were borne alive or not,”¹³⁶ unless the mother could produce a witness that the child was stillborn.¹³⁷ Thus, the statute relieved the prosecution of the burden of proving either that the defendant mother had killed the child or even that the child was born alive.¹³⁸ It shifted the burden to the defendant to prove stillbirth or face conviction.¹³⁹

131. *Id.*

132. See Trexler, *supra* note 114, at 103.

133. Act to Prevent the Destroying and Murthering of Bastard Children, 1623, 21 Jac., c. 27, §§ 1-2 (Eng.)

“Whereas many lewd Women have been delivered of Bastard Children, to avoid their Shame, and to escape punishment, do secretly bury or conceal the Death of their Children, and after, if the Child be found dead, the said Women do alledge, that the said Child was born dead; whereas it falleth out sometimes (although hardly it is to be proved) that the said Child or Children were murdered by the said Women, their lewd Mothers, or by their Assent or Procurement: For the Preventing therefore of this great Mischief, be it enacted by the Authority of this present Parliament, That if any Woman after One Month next ensuing the End of this Session of Parliament be delivered of any Issue of her Body, Male or Female, which being born alive, should by the Laws of this Realm be a Bastard, and that she endeavour privately, either by drowning or secret burying thereof, or any other Way, either by herself or the procuring of others, so to conceal the Death thereof, as that it may not come to Light, whether it were born alive or not, but be concealed: In every such Case the said Mother so offending shall suffer Death as in Case of Murther, except such Mother can make Proof by One Witness at the least, that the Child (whose Death was by her so intended to be concealed) was born dead.”

134. Act to Prevent the Destroying and Murthering of Bastard Children, §1.

135. *Id.* §2

136. *Id.* §2. The state would have been at a grave disadvantage from a forensic point of view in proving a live birth with the scientific resources of the time, but for the unusual advantage conveyed by the statute of not having to prove that the child was born alive. The state would have had been unable to discharge the standard burden under the law of homicide of a live birth in an many infanticide cases, absent a witness. See Behlmer, *supra* note 101, at 410; Oberman, *Mothers Who Kill*, *supra* note 5, at 11-12. To this day, the difficulty of such determinations hampers infanticide prosecutions of newborns and infants. See Jennie Lusk, *Modern New Mexican Neonaticide: Tranquilizing with This Jewel/The Torments of Confusion*, 11 TEX. J. WOMEN & L. 93, 110 (2001).

137. Act to Prevent the Destroying and Murthering of Bastard Children, §2; see also O’Donovan, *supra* note 119, at 259.

138. See O’Donovan, *supra* note 119, at 259.

139. See *id.*

Notwithstanding this regime, high rates of infanticide of both legitimate and illegitimate children persisted because the social causes of infanticide endured.¹⁴⁰ The targets of vigorous prosecution, however, were the unwed mothers.¹⁴¹ Infanticide—or the concealment of a shameful and criminal bastard stillbirth—was treated as a capital crime when practiced by unmarried women of the working classes. Concurrently, the state for the most part respected the privacy of married people to make decisions about family size and composition in accord with the ancient privilege, now more discreetly exercised than in the pre-Christian era.

During the seventeenth century, women were indeed executed in England for the murder or concealment of their dead bastard children.¹⁴² This ferocity began abating by the end of the seventeenth century;¹⁴³ thereafter, judges and juries proved ever more unwilling to impose the full rigor of the statute upon desperate girls, left to pay the piper by libertines and absconding lovers.¹⁴⁴ The 1623 Act provided only one means for a woman who had concealed the death of her illegitimate child to escape execution. If she could come forward with a witness that the child was stillborn, she was discharged.¹⁴⁵ For the next two centuries the development of non-statutory defenses and finally statutory reforms checked the execution of mothers of illegitimate children.¹⁴⁶ A number of defenses evolved that spared women whom eighteenth century juries were unwilling to hang.¹⁴⁷ The availability of these defenses diminished the advantages to the state of prosecuting under the 1623 Act. The rules governing an infanticide prosecution came to resemble in practice an ordinary homicide prosecution in that the crown was obliged to persuade the jury that the defendant acted with premeditation or at least intent to destroy her living child.

Some women pleaded “benefit-of-linen,” meaning that they had

140. See Langer, *supra* note 111, at 355-57.

141. HOFFER & HULL, *supra* note 100, at 22-25 (noting a dramatic increase in both prosecutions and convictions of mothers of bastards after the passage of the 1623 statute, and the animus against female promiscuity).

142. See *id.* at 24-26.

143. *Id.* at 65, 71.

144. See Behlmer, *supra* note 101, at 410-13 (on the science of determining live birth in the eighteenth century); see generally Davies, *supra* note 97 (on the history of English law of infanticide child homicide).

145. Act to Prevent the Destroying and Murthering of Bastard Children, 1623, 21 Jac., c. 27, §§ 1-2 (Eng.).

146. HOFFER & HULL, *supra* note 100, at 65-66; Oberman, *Mothers Who Kill*, *supra* note 5, at 11-14; see also Behlmer, *supra* note 101, at 412 (the last execution of a women for infanticide in England occurred in 1849).

147. See Oberman, *Mothers Who Kill*, *supra* note 5, at 14.

prepared to take care of their babies by making or buying linen.¹⁴⁸ If credited, this defense established that the mother expected to accept the child and to care for it. Women also pleaded “want-of-help,” meaning that they were unable because of unforeseen adversity to obtain the help of a midwife or others.¹⁴⁹ They also defended themselves on the grounds that their baby’s death was an accident due to their ignorance or incapacitating weakness during childbirth.¹⁵⁰ Women could defend themselves on the grounds that they were temporarily insane, which was effective if they could also successfully assert benefit of linen.¹⁵¹ In addition to the development of defenses that relied on lack of premeditation or intent, the burden of proving that the child was born alive was *in practice* shifted back to the prosecution.¹⁵² These dilutions of the infanticide statute were sometimes convenient pegs for outright nullification by juries and judges who were unprepared to expose even women they believed guilty of deliberate destruction of their illegitimate offspring to capital punishment.¹⁵³ The 1623 law aimed to punish female transgression by making women pay dearly for their sexual immorality; when that punitive, ostracizing impulse was spent, the English jury no longer saw a shameless strumpet in the dock but a desperate girl caught in a shameless system.¹⁵⁴ It appears that infanticide itself, absent the need to smite fallen women, was insufficient to warrant such severe treatment in the eyes of the eighteenth century English public.¹⁵⁵ As antagonism to working class female sexual transgression abated, pressure for reform of the 1623 statute mounted; Lord Ellenborough’s Act of 1803 repealed the 1623 statute.¹⁵⁶

Some reformers were motivated by the harshness of the infanticide laws,¹⁵⁷ but others were motivated by anxiety that the law’s majesty suffered from the blatant gap between the draconian 1623 law and the nullifying verdicts rendered by jurors with the tacit support of the bench.¹⁵⁸

148. HOFFER & HULL, *supra* note 100, at 68-69.

149. *Id.* at 69.

150. *Id.* at 69-70.

151. *Id.* at 70.

152. O’Donovan, *supra* note 119, at 260 (citing WILLIAM BLACKSTONE, 4 COMMENTARIES *198).

153. *See* Davies, *supra* note 97, at 213-23. In time, juries would not convict, and judges would not sentence to death, and the crown would commute rather than execute if there were a conviction. *Id.*

154. *See* HOFFER & HULL, *supra* note 100, at 67-71.

155. *See id.* at 71.

156. Lord Ellenborough’s Act, 1803, 43 Geo. 3, c. 58, § 3 (Eng.).

157. HOFFER & HULL, *supra* note 100, at 86-87.

158. *Id.* at 87 (noting that the reform bill’s author, Lord Ellenborough, was motivated by such nullifying tendencies); *see also* Davies, *supra* note 97, at 214.

After 1803, the burden of proving live birth was lodged with the prosecution, eliminating that singular advantage the prosecution enjoyed under the seventeenth century statute. But in another respect, a special regime for the punishment of mothers of bastards was retained. Under the 1803 Act, the mother of a bastard tried for infanticide, if acquitted, could be convicted of a lesser charge, the misdemeanor of concealment of birth, punishable by up to two years imprisonment.¹⁵⁹ In 1828, however, an act of Parliament reformed the law so that all women, including married women, were equally prosecutable for the crime of concealment.¹⁶⁰

The 1828 legislation marks a sea change in the history of infanticide law. Henceforward, the respectable married woman and the mother of a bastard were subject to the same *de jure* regime, aimed at protecting child life and punishing transgressive mothers. There are at least two possible explanations for this equalization of susceptibility of all women—at least *de jure*—to investigation, regulation, and punishment. It has been observed that nineteenth century British elites were becoming more invested in children and their welfare than their predecessors had been.¹⁶¹ A second related explanation is that as child welfare became a more prominent concern, alongside the deplorable sexual morals of the lower classes, the hypocrisy of categorically exempting the respectable from prosecution became blatant.¹⁶² I propose a third explanation, a complement to those of the enhanced status of children and dawning awareness of hypocrisy: a heightened preoccupation with the maternal role against which the virtue of the female sex was increasingly to be measured.¹⁶³

The moral meaning and emotional charge of the crime of infanticide evolved over the course of several hundred years. In the seventeenth century, infanticide legislation and prosecutions were responsive to anxiety about and hostility towards female sexual transgression. In the nineteenth century, anxiety about women deviating from motherhood norms came to the fore, although such concerns did not entirely displace those about female sexual decorum. In the seventeenth century juries were at least sometimes willing to hang a bad girl whose execution under the 1623 statute did not require proof that she had actually killed her child. In the course of the eighteenth century, juries became increasingly sympathetic to

159. Lord Ellenborough's Act, §§ 3-4.

160. Offences Against the Person Act, 1828, 9 Geo. 4, c. 31, §§ 1, 14 (Eng.).

161. Behlmer, *supra* note 101, at 403-07.

162. See Langer, *supra* note 111, at 360 ("By the mid-century the matter [of infanticide] had become one of public scandal.").

163. See generally Moller Okin, *supra* note 102, who wrote about the emergence of the maternal ideal in the weave of female virtue in the bourgeois family.

the plight of desperate, unwed working women. In contrast, the figure that most engages the contemporary public is the married woman who commits infanticide. Every trial as well as every decision about whether to prosecute or divert confronts the question, “Is she mad or bad?”¹⁶⁴ In the United States, both explanations are possible. In Great Britain, the law has normalized a pathological view of maternal infanticide.¹⁶⁵ In the United States, we have neither elected to follow this path nor to reject it.

We in the United States have not followed the British in their pathological turn; we do not treat maternal infanticide as biological defect, medically excused as a matter of law. Nonetheless, I suggest that biologically-based disorder, whether triggered by the processes of birth itself, as with postpartum psychosis present in the Yates case,¹⁶⁶ or other deep-seated disease, such as severe depression, as in the Susan Smith case,¹⁶⁷ is the preferred explanation, and the most comforting explanation, in the United States as well. It is more soothing to the anxiety about female compliance with mothering norms to see infanticide as the product of disease, biological failure, than of moral failure. While a punitive reaction can be cathartic and can allay anxiety, concluding that, for example, Andrea Yates is a very sick woman offers far more relief.¹⁶⁸ It is better to learn that from time to time that maternal instinct and commitment are overwhelmed by terrifying illnesses than that they are too casually implanted to resist conventional temptations, such as money, ease, and romance.

B. British Infanticide Law in the Twentieth and Twenty-First Centuries

It is instructive to consider the history of pathologizing infanticide in Britain. It appears that during the life of the 1623 Act, some women charged with infanticide were found to be insane.¹⁶⁹ There were also seventeenth and eighteenth century instances of married child murderesses

164. See generally Wilczynski, *supra* note 5.

165. See Mackay, *supra* note 6, at 29; see also WALKER, *supra* note 97, at 133 (noting that between 1961 and 1965, nine out of ten women convicted of infanticide were “either committed to mental hospitals or put on probation”).

166. Denno, *supra* note 5, at 26-36.

167. Bragg, *Mother's Defense*, *supra* note 51.

168. One veteran psychiatrist who had treated Yates in 1999 testified that she considered Yates “among the five sickest people” she had ever treated. Carol Christian, *Doctor: Yates' Illness Severe; Did Not Know Actions Were Wrong*, HOUS. CHRON., Mar. 6, 2002, at A1.

169. Behlmer, *supra* note 101, at 412-13; see also HOFFER & HULL, *supra* note 100, at 146-50.

being excused due to insanity.¹⁷⁰ However, it was not until the nineteenth century that infanticide became deeply entwined with the insanity question.¹⁷¹ Interestingly, this fusion or conjuncture occurred at the historical moment in which married women became susceptible to prosecution for concealment. In Great Britain both the desperate girl and the married mum have benefited from the pathological turn. Both today receive a form of medical diversion.

The British have had an infanticide statute since 1922 under which postpartum disturbance is at least a partial defense to a charge of infanticidal murder, reducing the charge from murder to manslaughter.¹⁷² In 1938 the statute was amended to set the limit of its application to children under a year old;¹⁷³ to accomplish or rationalize this extension, “effect of lactation” was included in the revised statute as a ground of mental disturbance in mothers.¹⁷⁴ This overcame the otherwise awkward fact that postpartum illness waxes immediately upon birth and in the great majority of cases is very short-lived.¹⁷⁵ The reform made clear that, henceforth, mothers of older infants were to be shielded from murder indictments. That science has not found a connection between mental illness and lactation has apparently not proved an impediment to the operation of this statutory regime. The 1938 statute has been interpreted in practice to permit virtually any woman who kills her child less than one year old to have the benefit of the partial defense regardless of her actual mental condition.¹⁷⁶ In Britain, infanticidal mothers are constructively mad;¹⁷⁷ no

170. See WALKER, *supra* note 97, at 127.

171. Behlmer, *supra* note 101, at 412-14 (tracing the roots in Victorian medicine of the notion, later enshrined in English statutes, that new mothers are subject to forms of temporary insanity, such as “puerperal mania” and “lactational insanity”).

172. Infanticide Act, 1922, 12 & 13 Geo. 5, c. 18, § 1 (Eng.) (reading, in part, “[w]here a woman . . . causes the death of her newly-born child, but at the time of the act or omission she had not fully recovered from the effect of giving birth to such child, and by reason thereof the balance of her mind was then disturbed . . .” the infanticide offense will be reduced from murder to manslaughter).

173. Infanticide Act, 1938, 1 & 2 Geo. 6, c. 36, § 1 (Eng.); see O’Donovan, *supra* note 119, at 261-63 (discussing the motivation for amending the act).

174. O’Donovan, *supra* note 119, at 261-62. The stimulus for the reform was the case *R v. O’Donoghue*, (1927) 20 Cr. App. R 132. See *id.* at 262. The 1922 statute was silent on the maximum age of a child whose mother could find shelter under the statute. *Id.* at 261. In *O’Donoghue*, the judge ruled that the age of her child, thirty-five days, put her outside the protection of the statute. *Id.* at 262.

175. Amy L. Nelson, *Postpartum Psychosis: A New Defense?*, 95 DICK. L. REV. 625, 634 (1991).

176. Mackay, *supra* note 6, at 29. The effect of an infanticide charge under the 1938 Act is that the prosecution concedes mental disturbance and thus the defendant need not prove it, nor does the jury consider medical evidence. *Id.*

177. Ania Wilczynski & Allison Morris, *Parents Who Kill Their Children*, 1993 CRIM. L.

serious proof of mental illness or that mental illness caused the crime is required.

Contemporary Britain has moved further in the direction of medicalizing maternal infanticide since 1938.¹⁷⁸ In the 1970s, reformers attempted to amend the law once again in order to recognize explicitly social stressors of motherhood, in addition to biologically-based, childbearing-related disorders as grounds for reduction of charge from murder to manslaughter.¹⁷⁹ This initiative did not bear fruit despite the fact that, *de facto*, social factors are accepted as sufficient to warrant diversion or mitigation in British cases.¹⁸⁰ British mothers convicted of killing infants, and to a lesser but marked extent young children,¹⁸¹ are not sent to prison but instead are required to undergo hospital or outpatient treatment.¹⁸²

The British have settled law and policy, a canonical answer to the question of whether the mother who kills her child is mad or bad. Legal doctrine in the United States, in contrast, is not liberal in excusing, or partially excusing, mothers who kill; it has been justly criticized for failing to accord mental health defenses reliably to mothers suffering from postpartum psychosis and other grave disorders. Yet, we, like the British, are preoccupied with the question of maternal dysfunction to the detriment of a more comprehensive approach to child homicide. A more comprehensive approach would hark back to Resnick's pioneering work. Recall that Resnick found a high incidences of serious mental disorders in both men and women child killers and recognized the prominence of childabuse as a cause of homicide of children.¹⁸³

Despite the relative lack of formal, doctrinal support for mental health defenses for mothers who kill children in the United States, an examination

REV. 31, 35 (“[R]esearch shows that about half of the women who plead guilty to or are convicted of infanticide are not suffering from any identifiable mental disorder at all.”).

178. WALKER, *supra* note 97, at 133 (reporting that by the early 1960s, out of seventy-two women guilty of infanticide, only one was sent to prison, and for a term of six months or less).

179. *See* Mackay, *supra* note 6, at 21.

180. *See* Wilczynski & Morris, *supra* note 177, at 35.

181. *Id.* at 33-34; *see also* Mackay, *supra* note 6, at 29 (noting that women who killed children older than twelve months, if not subject to medical diversion, could escape murder prosecution or conviction by the reduction of charge to diminished capacity manslaughter and related mitigations).

182. Wilczynski & Morris, *supra* note 177, at 34 (reporting that between 1982 and 1989, only nine percent of women suspected of child homicide were imprisoned, almost half were made subject to hospital orders, and more than two-fifths were given probation orders); *see also* Ania Wilczynski, *Mad or Bad? Child-Killers, Gender and the Courts*, 37 BRIT. J. CRIMINOLOGY 419, 422 (1997) (a more recent study of forty-eight cases, reporting that 87.5 percent of filicidal women received hospital orders or non-custodial supervisory sentences).

183. *See* Resnick, *Child Murder*, *supra* note 12, at 328-33.

of a few well-known cases suggests that the trials of women who kill turn upon whether their lawyers can successfully deploy what I will call “the Good Mother Defense.”

III. THE GOOD MOTHER DEFENSE

The Good Mother Defense is not a recognized complete defense but rather a strategy for achieving the best practicable result, whether it is acquittal or diminution of the level of offense or mitigation of punishment. It may work in tandem with an insanity defense, and is in fact a species of mental health defense. The Good Mother Defense trades on the tendency of jurors to find madness or something akin to it the most plausible, and least unsettling, explanation for the death of a child at the hands of a virtuous woman.

The insanity defense is rarely used and unlikely to succeed, despite popular beliefs to the contrary.¹⁸⁴ Infanticidal mothers seem to fare slightly better than other defendants who pursue insanity acquittals.¹⁸⁵ Yet mental illness, and the question—“Was she mad?”—permeates cases where an insanity plea is not even entered. Whenever the prosecution in a maternal infanticide or child homicide case is in the unenviable position of lacking a plausible motive, where such comprehensible motives as greed, revenge, or a pattern of brutality towards the victim are apparently absent, the prosecution confronts the disposition to find in madness an explanation—or explanation for the lack of explanation—of the anomaly of a mother killing her child. Mental illness therefore functions as a defense in such cases in an informal, or *de facto*, and expanded sense: mental illness provides the basis for a bid to avoid prosecution, lessen the severity of the offense charged or the offense of conviction, or mitigate punishment.¹⁸⁶

In notorious cases, prosecutors may insist on trials and pursue severe punishments even in the face of powerful evidence of mental illness. Prosecutors may act out of deference to the perceived demand that these

184. See GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 188 (2d ed. 1997) (estimates from a number of states put the successful rate of insanity pleas at approximately twenty-five percent); see also Denno, *supra* note 5, at 11 & n.87.

185. See MICHAEL PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* 193 (1994) (there is some evidence that infanticidal mothers fare somewhat better than other insanity defendants); Michael Perlin, “*The Borderline Which Separated You from Me*”: *The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 *IOWA L. REV.* 1375, 1421 n.309 (1997).

186. The Juana Leija case, discussed *supra* note 37, is an example of a case that is well known in Houston, where prosecutors accepted a plea bargain for a probationary sentence, either from compassion or to avoid an insanity acquittal.

killer mothers be subjected to public justice¹⁸⁷ or because a trial presents an attractive platform for their own ambitions.¹⁸⁸ Most infanticides by parents do not present these pressures or opportunities because they fail to attract sustained public attention. They may surface in the local newspaper and disappear after a few sparse stories about the tragic or sordid act of child killing, without benefit of a follow-up story recounting the legal disposition of the case.¹⁸⁹ The ideal candidate for notorious infanticide case status is a married, middle-class white woman.¹⁹⁰ It is the failure of these mothers to protect and nurture their children that is grist for the media mill and public fascination.¹⁹¹ Mentally ill fathers do not fascinate.¹⁹² Infanticides in deficient, irregular households—that is to say, children assaulted by single mothers living in poverty, or by their boyfriends—do not fascinate.¹⁹³ Although rates of infanticide among blacks are high,¹⁹⁴ nor do black mothers who kill fascinate.¹⁹⁵ It is those who are perceived to be at the pinnacle of the female hierarchy, who set the standards of motherhood against which others are found wanting, who fascinate when they fall from these heights.¹⁹⁶ In these cases, prosecutors and the public wrestle with an acute version of the question of infanticide: how could *she*, sustained as she is by the race, class, and marital characteristics that define female excellence, fail so spectacularly at motherhood, the paramount expression of female excellence? Such women are candidates for the Good Mother Defense.

The Good Mother Defense is a defense strategy, not a formal plea or legally recognized defense. The idea is, when confronted with a good

187. Telephone Interview with Joe Owmbly, Harris County Assistant Dist. Attorney, in Houston, Tex. (Dec. 30, 2002). For example, Joe Owmbly, the Harris County assistant district attorney who led the prosecution of Yates, believes that in a notorious case such as *Yates* the public demands a trial, and that therefore a prosecutor must present the case to a jury. *Id.*

188. See Rick Bragg, *Keeping Mother's Trial in Hometown Could be Crucial*, N.Y. TIMES, July 13, 1995, at A18 [hereinafter Bragg, *Trial in Hometown*]; *Verdict Gets Mixed Reaction in Union*, HERALD-JOURNAL (Spartanburg, S.C.), July, 29, 1995.

189. See Table: Child Homicide in the Texas Press 1993-2005, *supra* note 85, and text accompanying notes 86-89.

190. *See id.*

191. *See id.*

192. *See id.*

193. *See id.*

194. See BJS, INFANTICIDE, *supra* note 11. The rate of homicide of black children under the age of five, although in decline since the late 1990s, remains at least three times as high as the rate for white children. *See id.*; *see also supra* note 82.

195. See Table: Child Homicide in the Texas Press 1993-2005, *supra* note 85, and text accompanying notes 86-89.

196. *See id.*

mother in the dock, a jury will find mitigation in madness. In a capital case (an eventuality rendered much more likely if there is more than one victim)¹⁹⁷ the best achievable outcome may be life imprisonment. The good mother defense trades on the disposition to accept that a woman who kills her children, if a good mother, is mad even if she cannot qualify for the stringently defined insanity defense. But deployment of the defense must contend with standards for “the good mother” that may defeat otherwise apt defendants.¹⁹⁸ The defense is therefore parlous for both the defendant and the state. Let us examine the operation of this defense in three notorious capital cases, two of which achieved national and international notoriety—those of Susan Smith and Andrea Yates—and a Dallas case notorious in Texas, that of Darlie Routier. Yates and Smith admitted killing their children while Routier denied she had done so. The Yates and Smith cases resulted in life sentences; Darlie Routier is on death row.

Andrea Yates and Susan Smith

In 2001, Andrea Yates methodically drowned all five of her children in the bathtub of her suburban Houston home in the span of an hour; the youngest child was six months old and the oldest was seven years old.¹⁹⁹ Andrea Yates, a college-educated nurse²⁰⁰ and the wife of a NASA engineer,²⁰¹ was a stay-at-home mom.²⁰² She was, at the time of her crimes, and at the time of her trial, severely mentally ill,²⁰³ although just how mentally ill was disputed.²⁰⁴ The decision to prosecute Yates was severely criticized by mental health and feminist advocates who called attention to her grave mental condition.²⁰⁵ The state justified prosecution by appealing both to the enormity of the crime and the deterrent value of

197. SAMUEL R. GROSS & ROBERT MAURO, *DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* 45-50 (1989) (finding that the circumstance of multiple victims was most heavily correlated with a capital sentence).

198. See *supra* note 9 and accompanying text.

199. Mike Glenn et al., *Mom of 5: “I Killed My Kids;” Children May Have Died in Tub*, HOUS. CHRON., June 21, 2001, at A1.

200. See Denno, *supra* note 5, at 7-8 (providing Yates’ life history).

201. S. K. Bardwell et al., *Mom Details Drownings of 5 Kids*, HOUS. CHRON., June 22, 2001, at A1.

202. *Id.*

203. Denno, *supra* note 5, at 27-34 (reprising Andrea Yates’ mental health history).

204. Most notably, Yates’ degree of mental illness was disputed by the state’s psychiatric expert, Dr. Park Dietz. See *id.* at 37-47 (providing painstaking exposition and critique of Dietz’ contribution to the Yates case).

205. Lisa Teachey, *Several Groups Rally Behind Drive to Assist Yates*, HOUS. CHRON., Aug. 28, 2001, at A15.

conviction.²⁰⁶ The state maintained that although concededly mentally ill, Yates was legally sane under Texas law, and she was therefore morally responsible for her actions.²⁰⁷ The case presented dueling mental health experts, most notably Parks Dietz for the prosecution, and Philip Resnick for the defense.²⁰⁸ The trial revealed horrifying details of a very sick woman sinking in the midst of her unresponsive family and ineffective medical intervention.²⁰⁹ Treating psychiatrists and expert witnesses for both state and defense told the painful story: the suicide attempts, the postpartum psychosis, the warnings that such psychosis might return with her last pregnancy.²¹⁰ Andrea Yates testified that although she planned the killing of her children, she did it because the children were not “developing correctly”²¹¹ and would be damned as a consequence if they lived to adulthood,²¹² and that this was her fault because she was not a good mother.²¹³ She also told several psychiatrists that she was possessed by the devil and heard satanic voices in her head telling her to kill the children.²¹⁴

In 1994, Susan Smith strapped her fourteen-month-old and three-year-old sons into their car seats and sent the car plunging down a ramp into a lake near her small-town South Carolina home.²¹⁵ Smith precipitated her notoriety by broadcasting pleas for the safe return of her two children,

206. Carol Christian & Lisa Teachey, *Yates Found Guilty; Jury Takes 3 ½ Hours to Convict Mother in Children’s Deaths*, HOUS. CHRON., Mar. 13, 2002, at A1 (“[Prosecutor] Owmbly began the closings by saying Yates should be convicted as a deterrent to similar crimes.”).

207. Denno, *supra* note 5, at 37-47. This was the substance of Dr. Dietz’s testimony. *Id.*

208. *Id.* at 47-49 (Denno recounts the perspective of the defense psychiatrists, most prominent among whom was Dr. Philip Resnick. Resnick described Yates’ motives as “‘altruistic,’ . . . that she believed that she was sending her children to heaven and, in setting herself up for execution, ridding the world of Satan.”).

209. Carol Christian, *Witness Tracked Decline of Yates; Friend Testifies on Lack of Care*, HOUS. CHRON., Mar. 1, 2002, at A1 [hereinafter Christian, *Witness Tracked Decline*]. Debbie Holmes, a former nurse colleague and close friend of Yates, gave revealing and affecting testimony. Holmes repeatedly begged Rusty Yates, Andrea’s husband, to seek medical help. Holmes describes Yates in the weeks before the homicides as virtually mute, expressionless, increasingly thin and thus “looked like a cancer patient,” not bathing and, wandering aimlessly through the house, and being inattentive to her children. *Id.*

210. *See* Denno, *supra* note 5, at 27-34, 37-49.

211. *Transcript of Andrea Yates’ Confession*, HOUS. CHRON., Feb. 21, 2002, <http://www.chron.com/disp/story.mpl/special/drownings/1266294.html>.

212. *See* Christian, *Witness Tracked Decline*, *supra* note 209.

213. *Transcript of Andrea Yates’ Confession*, *supra* note 211.

214. Denno, *supra* note 5, at 37-38, 47-48.

215. Rick Bragg, *Police Say Woman Admits to Killings as Bodies of 2 Children Are Found Inside Her Car*, N.Y. TIMES, Nov. 4, 1994, at A1 [hereinafter Bragg, *Woman Admits to Killings*].

whom she claimed were taken by a black carjacker.²¹⁶ Nine days later she confessed that the black man was pure invention and that she had drowned her children.²¹⁷ She was excoriated as a scheming liar who cannily exploited American racism to deflect blame.²¹⁸

Smith was a married woman in the process of divorcing her husband.²¹⁹ Her class position is ambiguous. Her parents were blue collar,²²⁰ but her mother married a local notable.²²¹ She was a high school graduate²²² and a secretary.²²³ Her husband was an assistant manager at a Winn Dixie supermarket.²²⁴

The state's case against Smith was that she killed her children to improve her romantic chances with a lover who rejected her because he did not wish to take on the role of stepfather of another man's children.²²⁵ Smith's lawyers kept the prosecution and an avid public guessing about whether an insanity plea would be entered,²²⁶ thus raising the issue of her mental condition, but in the end she did not enter an insanity plea.²²⁷ But there were many dramatic revelations about Susan Smith that turned an antagonistic hometown public mortified by her notoriety and horrified by her crimes into staunch opponents of capital punishment.²²⁸ Susan Smith, in the hands of her able defense attorneys, morphed from a promiscuous schemer into a childlike victim whose overburdened psyche could not bear the weight of the injustices life had heaped on her fragile young

216. *Id.*

217. *Id.*

218. Ronald Smothers, *Town, Feeling Betrayed, Reviles Woman Accused of Killing Sons*, N.Y. TIMES, Nov. 5, 1994, §1, at 1.

219. Bragg, *Woman Admits to Killings*, *supra* note 215.

220. Rick Bragg, *Life of a Mother Accused of Killing Offers No Clues*, N.Y. TIMES, Nov. 6, 1994, §1, at 1 [hereinafter Bragg, *Life of a Mother*].

221. *Id.*; *see also Report: Susan Smith Reported Stepfather for Sexual Molestation*, HERALD (Rock Hill, S.C.), Nov. 27, 1994, at 3B (describing stepfather Beverley Russell as a stockbroker and tax consultant, Republican state executive committeeman, and a member of the advisory board of the Christian Coalition).

222. Bragg, *Life of a Mother*, *supra* note 220.

223. Rick Bragg, *Insanity Plea Expected in Boys' Drownings*, N.Y. TIMES, Nov. 9, 1994, at A18 ("Her \$17,000 salary as a secretary . . . was augmented by child support. In a mill town in the Deep South, \$17,000 a year is middle class.").

224. Bragg, *Woman Admits to Killings*, *supra* note 215.

225. Bragg, *Arguments Begin*, *supra* note 53.

226. *See* Bragg, *Mother's Defense*, *supra* note 51; Rick Bragg, *Prosecutor of Susan Smith Offers a Small Compromise*, N.Y. TIMES, July 15, 1995, §1, at 6 [hereinafter Bragg, *Prosecutor of Susan Smith*].

227. Bragg, *Arguments Begin*, *supra* note 53.

228. Bragg, *Trial in Hometown*, *supra* note 188 (describing Union, South Carolina residents as at first viewing Susan as "evil incarnate").

shoulders.²²⁹

The facts that emerged were sordid, but in the end produced sympathy.²³⁰ Her husband was unfaithful.²³¹ Her stepfather had molested her.²³² Her wealthy boyfriend spurned her because she lacked the breeding and education he wanted in a wife.²³³ She had a history of depression.²³⁴ The defense theory of the case was that Susan Smith drowned her children not with premeditation or even intentionally, but in a swirl of “suicidal confusion.”²³⁵ Smith, the defense argued, was in crisis; her chronic depression had progressed to an acutely suicidal pitch.²³⁶

During the penalty phase of both trials, prosecutors were faced with a motive deficit in asking their juries to believe that these women were among the worst of the worst—murderers who deserved death. The Smith case is even more instructive than the Yates case in highlighting the difficulty a prosecutor can face in prosecuting infanticides. The prosecutors in the Smith case argued that Smith²³⁷ was a self-centered woman who found her children burdensome. The state portrayed the defendant as seeking to improve her romantic and marital prospects by disencumbering herself of her young sons.²³⁸ These accusations, however, suffered from a banal lack of heft as an explanation of child murder. The Yates prosecution contended with the fact that not a scintilla of evidence of the slightest disreputable conduct on Yates’ part at home or abroad—excepting, of course, the murder of her children—had been put in evidence

229. Bragg, *Arguments Begin*, *supra* note 53. From their opening the defense portrayed Susan Smith as “child-like and overwhelmed by depression.” *Id.*

230. Rick Bragg, *Susan Smith Verdict Brings Relief to Town*, N.Y. TIMES, July 30, 1995, §1, at 16.

231. Twila Decker & Cliff LeBlanc, *Smith Divorce May Fuel Trial; Prosecution and Defense Mine Infidelity Evidence*, STATE (Columbia, S.C.), July 15, 1995, at A1.

232. *Mother Held in Killings Was Abused, Papers Say*, N.Y. TIMES, Feb. 21, 1995, at A14.

233. Rick Bragg, *Smith Jury Hears of 2 Little Bodies, and a Letter, in the Lake*, N.Y. TIMES, July 20, 1995, at A16 [hereinafter Bragg, *Smith Jury*]. Tom Findlay rejected Smith both because he did not want her ready-made family and because her mill worker background made her an unsuitable mate for one in his privileged status. *See id.*

234. Bragg, *Mother’s Defense*, *supra* note 51.

235. Al Dozier, *Smith Courtroom Drama Begins*, HERALD (Rock Hill, S.C.), July 19, 1995, at 18A (quoting defense attorney Judy Clarke).

236. Bragg, *Arguments Begin*, *supra* note 53.

237. *Id.* The prosecution portrayed Smith as a “selfish, malicious killer who sacrificed her children for the love of the son of a rich industrialist.” *Id.*; *see also Defense May Use Abuse Claim*, HERALD (Rock Hill, S.C.), May 20, 1995, at 3B (reporting that the state will portray Smith “as a self-centered schemer who used sex to manipulate men, and who killed her children because she felt they were getting in the way”).

238. Bragg, *Arguments Begin*, *supra* note 53.

or alleged in media reports.²³⁹

Neither the Smith or the Yates prosecution was able to dispute copious testimony that, bracketing the admitted fact that each had killed her children, each was a good mother—a doting mother in Smith’s case,²⁴⁰ and a consummately dutiful mother in Yates’ case.²⁴¹ The enormity of their crimes defies the explanation that a sane woman chafing at the demands of motherhood would resolve her unhappiness by slaughtering her children. The banality of the prosecution’s human or motivational explanation could not withstand the comfort-giving polysyllogism that the defense strives to evoke in the jury:

Susan loved her children.

[Therefore] Susan would not harm them.

[Therefore] she must have been crazy.

Darlie Routier

In 1996, Darin Routier awakened to screams and cries for help from his wife Darlie.²⁴² He bolted down the stairs of his suburban Dallas home to find two of his three sons, aged five and six, dying from stab wounds.²⁴³ His wife had also been stabbed;²⁴⁴ she said she and the boys were attacked by an intruder as they lay sleeping in the family’s first floor living room.²⁴⁵ Darlie was in due course charged, convicted, and sentenced to death for the

239. Prosecutor Joe Owmbly expressed frustration with his inability to find evidence that would support his own intuition that Andrea Yates coveted a more comfortable, less demanding life. Telephone Interview with Joe Owmbly, *supra* note 187. At trial, prosecutors had asked for a capital conviction on the grounds that there was deterrence value in convicting the mentally ill but legally sane defendant. Prosecutor Williford said in closing at the guilt and innocence phase of the trial, “To find her not guilty by reason of insanity is to say that we no longer have self-accountability in our society.” Christian & Teachey, *supra* note 206. At the penalty phase of the trial, prosecutors did not press for the death penalty. Carol Christian, *Jury Gives Yates Life Term with No Parole for 40 Years*, HOUS. CHRON., Mar. 16, 2002, at A1. Prosecutor Joe Owmbly believes it was right to prosecute capitally, to ask the jury to decide between life and death, and for the jury to opt for life. Telephone Interview with Joe Owmbly, *supra* note 187.

240. Rick Bragg, *Smith Defense Portrays Life of ‘Chaos,’* N.Y. TIMES, July 27, 1995, at A14.

241. Yates, a competitive swimmer and excellent student, gave up a career in nursing to marry Russell Yates. She became a stay-at-home, home-schooling mom in submission to her husband and their common fundamentalist faith. See Denno, *supra* note 5, at 7-8, 31.

242. Michael Saul, *Kin Relate Account of Rowlett Slays; 5-Year-Olds Cries Saved Mom, Relative Says*, DALLAS MORNING NEWS, June 11, 1996, at 19A [hereinafter Saul, *Kin Relate Account*].

243. *Id.*

244. *Id.*

245. *Id.*

murder of five-year-old Damon.²⁴⁶ Darlie Routier has never admitted guilt.²⁴⁷ Trauma-induced memory loss, she claims, has severely limited her recall of the attack.²⁴⁸ Her husband²⁴⁹ and family have vehemently defended her,²⁵⁰ denying that so good a person and loving a mother could harm her children.

Before the commencement of the trial, the state of Texas knew the Routier family intimately. Darlie and Darin Routier were young—twenty-six and twenty-eight respectively—when the murders took place.²⁵¹ They had small town, blue-collar antecedents.²⁵² They had been married for eight years²⁵³ and had three children,²⁵⁴ the youngest of which, eight-month-old Drake²⁵⁵ slept unharmed through the attack on his brothers, as did his father.²⁵⁶ Darin owned a successful small business.²⁵⁷ After the birth of their third child, Darlie stayed home with the children in their lavish suburban Dallas home.²⁵⁸ The young couple was extravagant.²⁵⁹ They were generous neighbors,²⁶⁰ open-handed and brash in their enjoyment of their early success.²⁶¹ As a result of their free spending, they were badly in debt.²⁶² Darlie's family was stout, even belligerent, in her

246. She was tried capitally for the murder of the younger of the two dead boys; the aggravating factor elevating to a capital charge being death of a child under six. The Texas Court of Criminal Appeals affirmed in 2003. *See Routier v. State*, 112 S.W.3d 554, 557 (Tex. Crim. App. 2003).

247. *How the Case Against Darlie Routier Unfolded*, DALLAS MORNING NEWS, Feb. 2, 1997, at 32A [hereinafter *Case Unfolded*].

248. *Id.*

249. *Id.* For example, Darin Routier proclaimed that his love for his wife had grown since their sons' death. *Id.*

250. *Prosecutor Admits He Lost His Cool*, HOUS. CHRON., Jan. 26, 1997, at 2. So relentless were Routier's family that a frustrated Dallas County assistant district attorney called the heckling family "trailer trash" on camera during the trial during an interview outside the courtroom. *Id.*

251. Michael Saul, *Parents are Left Looking for Answers; Rowlett Couple Speak About Boys' Slayings*, DALLAS MORNING NEWS, June 15, 1996, at 1A.

252. Barbara Kessler & Jason Siskles, *Rowlett Police Detail Evidence in Slayings*, DALLAS MORNING NEWS, June 20, 1996, at 1A.

253. *Id.*

254. *See id.*

255. *Id.*

256. Saul, *Kin Relate Account*, *supra* note 242.

257. Kessler & Siskles, *supra* note 252.

258. *Id.*

259. *Id.*

260. Douglas Holt, *Mother's Arrest Relieves, Shocks Rowlett Residents*, DALLAS MORNING NEWS, June 19, 1996, at 1A.

261. *See* Kessler & Siskles, *supra* note 252.

262. *A Rowlett Mother Accused of Killing Two of Her Sons Remained Jailed*, SAN ANTONIO EXPRESS-NEWS, July 6, 1996, at 5B.

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defense: so good a mother could not have killed her children.²⁶³ Texas was also treated to some salacious tidbits about Darlie Routier. She was a flashy dresser,²⁶⁴ had breast implants,²⁶⁵ body piercings²⁶⁶ and tattoos,²⁶⁷ and frequented with her girlfriends a club featuring male strippers.²⁶⁸ “Trashy” Darlie media accounts and testimony would multiply at the trial.²⁶⁹

The state’s theory of the case was that selfish,²⁷⁰ vain,²⁷¹ and materialistic²⁷² Darlie had grown weary of the demands of being at home with three small children,²⁷³ angry about the realities of the family’s worsening financial position,²⁷⁴ and angry also at her inability to lose the weight she had but on with her third pregnancy.²⁷⁵ She had therefore killed her children to relieve the drain on financial resources and the irksome labor of caring for the boys.²⁷⁶

Fearing that pre-trial publicity has poisoned the Dallas County jury pool, Routier’s court appointed attorneys secured a change of venue to the small town of Kerrville southwest of Dallas.²⁷⁷ The Routiers hired a prominent Dallas defense attorney²⁷⁸ to supplant the publicly-appointed lawyers who

263. For example, see Steve Scott, *Routier Relatives Violated Gag Order, Prosecutors Say*, DALLAS MORNING NEWS, July 26, 1996, at 25A.

264. Gonzalez, *Human Tragedy*, *supra* note 19.

265. *Id.*

266. *Id.*

267. *Id.*

268. Steve Scott, *Routier Defense May Face Tough Jury in Kerrville*, DALLAS MORNING NEWS, Oct. 21, 1996, at 1A.

269. Steve Scott, *Only Routier’s Blood Found, Analysts Testify*, DALLAS MORNING NEWS, Jan. 22, 1997, at 1A. The loaded term “trailer trash” did not surface in print until a confrontation between prosecutors and the Routier family outside the courtroom led one prosecutor to riposte, in a widely reported incident, “Do I have to interview in front of this trailer trash?” *See id.*; *see also supra* note 250.

270. Steve Scott, *Detective Says Routier Never Denied Slayings; Amnesia May Explain Her Comments, Psychiatrist Says*, DALLAS MORNING NEWS, Jan. 31, 1997, at 1A [hereinafter Scott, *Detective Says*].

271. *See id.*; *see also* Kelley Shannon, *Prosecutor Says Mother Killed Sons, Staged Crime*, AUSTIN AM. STATESMAN, Jan. 7, 1997, at B1. Months after her third child was born, “She was no longer the glamorous, blond center of attention,” Assistant District Attorney Greg Davis pronounced in his opening statement. *Id.*

272. Scott, *Detective Says*, *supra* note 270.

273. John W. Gonzalez, *Routier’s Suicide Thoughts, Depression Over Money Woes Described*, HOUS. CHRON., Jan. 18, 1997, at A29 [hereinafter Gonzalez, *Suicide Thoughts*].

274. *Id.*

275. *Id.*

276. *See* Scott, *Detective Says*, *supra* note 270; Shannon, *supra* note 271.

277. Stefani G. Kopenec, *Rowlett Mother Takes to Airwaves to Proclaim Her Innocence*, ASSOCIATED PRESS, Dec. 5, 1996; *see also Case Unfolded*, *supra* note 247.

278. Steve Scott, *Routier Considers Hiring Lawyer Mulder*, DALLAS MORNING NEWS,

had the trial moved to Kerrville.²⁷⁹ The defense team tried unsuccessfully to move the trial from rural and conservative Kerrville back to Dallas.²⁸⁰ Despite this rebuff, the defense team was cautiously optimistic in anticipation of the verdict in the guilt and innocence phase of the trial.²⁸¹ The defense believed that they had established reasonable doubt:²⁸² they believed they had undermined the circumstantial case that Darlie perpetrated the murders.²⁸³ Further, they believed that the state could not overcome its failure to produce any plausible motive for the destruction of the children in the face of testimony from family, friends and Darlie herself that she was a good mother.²⁸⁴ As one member of the trial team put it, “It makes no sense that this lady would change from a good mother, a doting mother, to a psychotic killer.”²⁸⁵ She, however, was found guilty of the murder of her children.²⁸⁶

Unlike Smith and Yates, Routier denied she had killed her children. As a consequence, it was the state, not the defense, that was in a position to exploit some evidence that she was depressed and suicidal, the kind of evidence that the defense in the Yates and Smith cases had been able to use to mitigate blame.²⁸⁷ Financial retrenchment and lost glamour fueled depression and suicidal thoughts.²⁸⁸ Despondency loosened her moral inhibitions.²⁸⁹ It appears that the Routier defense was never able to do what the Smith defense achieved: to neutralize bad facts about the defendant’s character that might well influence jury members to see the defendant not only as a bad woman but a bad mother.

The Smith defense took stories about Susan’s promiscuousness²⁹⁰ and pursuit of a wealthy boyfriend and wove them into a narrative of an

Sept. 5, 1996, at 28A.

279. *Case Unfolded*, *supra* note 247.

280. *Id.*

281. See Steve Scott & Michael Saul, *Routier Tells Prosecutor He’s Lying; Jury to Resume Deliberations in Mom’s Murder Trial Today*, DALLAS MORNING NEWS, Feb. 1, 1997, at 1A.

282. *Id.*

283. *Id.*

284. *Id.*; Ralph Winingham, *Defense Uses Emotion in Trial of Rowlett Mom*, SAN ANTONIO EXPRESS-NEWS, Jan. 27, 1997, at 8A.

285. Scott & Saul, *supra* note 281.

286. *Case Unfolded*, *supra* note 247.

287. John W. Gonzalez, *Diary Reveals Suicidal Routier Weeks Before the Killing*, HOUS. CHRON., Jan. 25, 1997, at A1. For example, it was the prosecution that introduced passages of her diary to establish suicidal instability and depression, over protests by the defense that the diary passages would be taken out of context of the diary in its entirety. *Id.*

288. See Gonzalez, *Suicide Thoughts*, *supra* note 273.

289. See *id.*

290. Bragg, *Smith Jury*, *supra* note 233.

immature woman suffering from chronic depression, driven to suicidal desperation by childhood and adolescent trauma,²⁹¹ a cold mother,²⁹² a sexually exploitive stepfather,²⁹³ an unfaithful,²⁹⁴ overbearing husband,²⁹⁵ and a rejecting boyfriend.²⁹⁶ The defense not only explained Smith's deficiencies but explained them in such a way as to leave intact the picture of Smith as a loving mother. The defense story was that Susan went to Smith Lake to take her own life, taking the boys because she could not bear to leave the boys motherless in this cruel world. When Susan bolted from the car—when her body resisted the destruction her mind had planned—she may well not have been cognizant of the fact that her sons were in the car, trapped and doomed.

During both the guilt phase and the penalty phase of the Routier trial, a mounting litany of trashy Darlie testimony undermined the good mother defense. The Routier defense allowed the trashy Darlie story to unfold unchallenged and unintegrated into a defense narrative. Perhaps the defense thought that being a good mother was a sufficient antidote to these bad facts. In any event, they did not address the problem the Smith defense understood: a good mother is, at least *prima facie*, a good woman; she possesses the middle-class virtues of fidelity and chastity, modesty and decorum. Deviations from the ideal of *wife* as well as mother had to be explained or the good mother designation was in peril of being supplanted by an incompatible label, like “trash.” Whatever the role, if any, these bad facts may have played in the jury's verdict at the guilt and innocence phase of the trial, the prosecution recycled and built upon them in the penalty phase of the trial. The defense went into the penalty phase in any case hampered by the awkward position, familiar in capital trials, of asking for mercy from a jury that believed the defendant had lied about her guilt.

At the penalty phase of the trial, the jury learned some new bad facts about Darlie. An erstwhile friend testified that Routier feared the police would find her store of sex toys when they searched the house.²⁹⁷ The jury heard testimony that she was a “tacky dresser,”²⁹⁸ and did not wear a bra or

291. *Id.*

292. Bragg, *Arguments Begin*, *supra* note 53.

293. Rick Bragg, *Defending Smith, Stepfather Says He Also Bears Blame*, N.Y. TIMES, July 28, 1995, at A10.

294. Decker & LeBlanc, *supra* note 231.

295. See Al Dozier, *Defense Paints Harsh Picture of David Smith*, HERALD (Rock Hill, S.C.), July 27, 1995, at 6A.

296. Bragg, *Arguments Begin*, *supra* note 53.

297. Gonzalez, *Suicide Thoughts*, *supra* note 273.

298. Ralph Winingham, *Routier Sentence Next for Jurors—Final Arguments Presented; Prosecutors Seeking Death Penalty for Homemaker*, SAN ANTONIO EXPRESS-NEWS, Feb. 4,

underwear.²⁹⁹ The prosecution also directly attacked Routier as a mother, bringing forth testimony that she cursed at the boys,³⁰⁰ had on one occasion smeared cake on the face of Devon at a birthday party,³⁰¹ was not a careful supervisor of the boys in the house and the neighborhood,³⁰² and had offered marijuana to a teenage babysitter.³⁰³

In the Routier case, the prosecution succeeded in pulling Darlie off the good mother pedestal from which prosecutors were unable to dislodge Yates and Smith in the penalty phase of their trials. Routier was laboring under two burdens faced by neither: lack of admission of guilt and lack of ability to make mental troubles work for her. It was the prosecution that deployed that evidence to help create for the jury a scenario in which a mother might kill, that of a selfish woman in the grip of irrational resentments that loosened ego controls. In two of these death penalty cases, juries were moved by pity for good mothers who had done the unthinkable under the sway of grievous maladies; in the third, the verdict was that the defendant was not a good mother.

CONCLUSION

Perhaps one day we will be able to wean ourselves from our fascination with maternal virtue and pay honest heed to children at risk, whether because of the mental illness or privations of their parents and household intimates. If and when we do, we will be breaking with centuries of censorious confusion between the goals of promoting maternal virtue and punishing female vice, and that of protecting children.

1997, at 1B.

299. *Id.*

300. Steve Scott, *Prosecutors Paint Routier as a Bad Parent*, DALLAS MORNING NEWS, Feb. 4, 1997, at 1A [hereinafter Scott, *Prosecutors Paint Routier*].

301. *Id.*

302. Gonzalez, *Baby Sitter*, *supra* note 20.

303. Scott, *Prosecutors Paint Routier*, *supra* note 300.