"She Breaks Just Like a Little Girl": Neonaticide, the Insanity Defense, and the Irrelevance of "Ordinary Common Sense"

Michael L. Perlin
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THE INSANITY DEFENSE, AND THE IRRELEVANCE OF
"ORDINARY COMMON SENSE"

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Some day, someone will probably propose dividing all law cases
into two categories: those that make the national news and those
that do not. Commentators have written extensively about the
impact of famous cases (is there anyone now reading this article
who is not flashing on O.J.?) in different contexts including, (1) how
the publicizing of a case may affect its verdict,2 (2) how the public
heuristically uses the vivid case as a representative of all cases,3 (3)
how the public heuristically assumes that a specific tactic or
defense raised in one case is frequently used in other cases,4 and (4)

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1. See, e.g., Daniel Filler, From Law to Content in the New Media Marketplace, 90 CAL.
L. REV. 1739, 1759-60 (2002) (citations omitted) ("And when breaking legal news occurs as it did in Bush v. Gore, in the O.J. Simpson trial, and more recently in the Andrea Yates child-murder trial—many stations, including the news networks, bumped other content and dedicated extensive time to these legal proceedings.").
The line between reality and fiction is often hopelessly blurred. See generally RICHARD
SHERWIN, WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR
CULTURE (2000) (discussing the consequences of merging legal and popular culture). See also
Wayne R. LaFave, Essay, The Fourth Amendment as a "Big Time" TV Fad, 53 Hastings
L.J. 265, 265 (2001) ("At a party recently, a woman was overheard to say: 'My husband and
I love watching The Practice.' It always gives us something to talk about we hadn't thought
much about before, I don't know, like the Fourth Amendment."). (quoting Julie Salamon,
Television Review: Justice and Lawyers Who May Not Comb Their Hair, N.Y. TIMES, Nov. 14,
2000, at E8).

2. See, e.g., Wendy Davis, The O.J. Effect, Since the Simpson Trial, Juries Have Been
Reluctant to Acquit Celebrities, LEGAL AFF. Oct. 2002, at 18, 19 ("Since the Simpson verdict,
juries have repeatedly defied the predictions of legal observers by throwing the book at
high-profile defendants: Andrea Yates, the mentally ill Texas woman who drowned her five
children . . . ").

3. See, e.g., Craig M. Bradley & Joseph L. Hoffmann, Public Perception, Justice, and the
case is so aberrant that it does not even represent a very useful piece of empirical evidence
[as to how the criminal justice system can be improved].").

4. See, e.g., Michael L. 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, 1404 (1997) (citations omitted)[hereinafter Perlin,
Borderline]("And of course, the Dan White 'Twinkle defense' continues to be seen as some
kind of norm in insanity cases."). Interestingly, at least one recent study of infanticide
emphasized that the use of a defendant's mental status to mitigate responsibility in such
circumstances "is no Twinkle defense . . . ." Janet Ford, Suean Smith and Other Homicidal
Mothers—In Search of the Punishment That Fits the Crime, 3 CARDOZO WOMEN'S L.J. 521,
how a verdict in a famous case can lead to changes in the substantive law.\textsuperscript{5}

But, to the best of my knowledge, little has been written about the ways that the publicity given to one case involving a specific mental condition has led to a significant sea change in the ways that subsequent jurors decide cases involving defendants with a similar mental condition.\textsuperscript{6}

I believe that our treatment of defendants with postpartum psychosis\textsuperscript{7} who commit neonaticide\textsuperscript{8} is an important example of this last category, and I wish to explore some preliminary ideas about that category of cases. Consideration of this numerically-unimportant but politically-significant subset will illuminate much about what is morally corrupt and what is incoherent about our insanity defense policies.

I have devoted much of my academic career to attempting to unpack and respond to a series of myths that have developed about the insanity defense, and that continue to dominate our insanity defense discourse.\textsuperscript{9} There is no question in my mind that the vast majority of ‘incorrect’ insanity verdicts (that is, where the jury ‘gets

\begin{itemize}
  \item \textsuperscript{5} See, e.g., Michael L. Perlin, \textit{The Jurisprudence of the Insanity Defense} 138-42 (1994) [hereinafter \textit{Perlin, Jurisprudence}](discussing the relationship between John W. Hinckley’s insanity acquittal and the adoption of the Insanity Defense Reform Act of 1984). No one ever asks the reverse question: “Had Hinckley been convicted, would that have proven that the insanity defense system ‘worked?’” See id. at 265, n.7 (quoting, Richard Rogers, \textit{The American Psychological Association’s Position on the Insanity Defense: Empiricism Versus Emotionalism}, 42 Am. Psychologist 840, 840 (1987) (“[Calls to abolish the insanity verdict] reflected a tenuous logic: if the verdict was wrong, then the standard [must have been] wrong.”)).
  \item \textsuperscript{6} There was no question that John Hinckley, by way of contrast, was mentally ill. The controversy centered on his diagnosis and the relationship between that mental illness and his responsibility for the crime. See Richard J. Bonnie, et al., \textit{A Case Study in the Insanity Defense: The Trial of John W. Hinckley, Jr.} 28-31 (2d ed. 2000).
  \item \textsuperscript{7} For a comprehensive definition of postpartum psychosis, see Brenda Barton, \textit{When Murdering Hands Rock The Cradle: An Overview of America’s Incoherent Treatment of Infanticidal Mothers}, 51 SMU L. Rev. 591, 602-03 (1998). See infra Part II.
  \item For a discussion on the ways that neonaticide is differentiated from other forms of infanticide, see Cheryl Meyer & Michelle Oberman, \textit{Mothers Who Kill Their Children: Understanding the Acts of Moms from Susan Smith to the “Prom Mom”} 20-31 (2001) [hereinafter \textit{Mothers Who Kill}].
\end{itemize}
it wrong') involve cases in which defendants who meet the substantive test for responsibility are nonetheless convicted. On the other hand, I am also convinced that there are three numerically minute but socially significant mini-universes of cases in which defendants who were, in fact, responsible were nonetheless found not guilty by reason of insanity as a kind of nullification device, a group of cases I refer to as "empathy outliers." The first, and most important of these categories are some cases of neonaticide.

Most neonaticide cases are unknown to the general public outside of the immediate geographic area where the killing took place. On the other hand, both the Susan Smith and the Andrea...

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10. For an array of cases, see Michael L. Perlin, The Hidden Prejudice: Mental Disability on Trial 237-38 (2000) [hereinafter Perlin, Hidden]. See also Perlin, Myths, supra note 8, at 617. On the significance of "wrong verdicts" in the development of other emotionally-charged areas of the law, see Perlin, OCS, supra note 9, at 8.

11. See Perlin, Borderline, supra note 4, at 1415, 1420-21. "Yet, as long as seventy-five years ago, William A. White responded to these charges: '(I)n my personal experience I have never known a criminal to escape conviction on the plea of insanity where the evidence did not warrant such a verdict (except in jury nullification cases)." Id., at 1415 (quoting William A. White, Insanity and the Criminal Law 3 (1923)).

At least one commentator has questioned the impact that the verdict in the O.J. Simpson case—viewed by some as a sort of nullification verdict—has had on subsequent high-profile, 'celebrity' cases:

While juries have always had the power to nullify—to acquit despite evidence that strongly supports a conviction—the phrase 'jury nullification' gained fresh currency after the Simpson trial. Most references don't compliment happy-to-acquit juries, who find themselves accused of either going wild or being swayed by a high-priced defense lawyer. These examples are anecdotal—six acquittals out of thousands of cases—but they were invoked so often in the national press that the phenomenon became a cultural touchstone. Concern about making that error has apparently influenced jurors ever since. Since the Simpson verdict, juries have repeatedly defied the predictions of legal observers by throwing the book at high-profile defendants: Andrea Yates, the mentally ill Texas woman who drowned her five children; Louise Woodward, the Boston nanny convicted in 1997 of killing the baby in her charge; and Marjorie Knoller and Robert Noel in the San Francisco mauling-dog case . . . . These convictions amount to the opposite of conventional jury nullification, but they are a related form of defiance.

Davis, supra note 2, at 18-19.


13. This is not to say that no neonaticidal mothers are insane. See, e.g., People v. Massip, 271 Cal. Rptr. 868 (App. 1990), transferred & vacated, 4 Cal. Rptr. 2d 762, 824 P.2d 588 (1992); State v. Hudson, 1999 WL 77844 (Tenn. Crim. App. Feb. 19, 1999). See also Michael L. Perlin, Mental Disability Law: Civil and Criminal 283-84 n.995 (2d ed. 2002) (citing cases) [hereinafter Perlin, Mental Disability Law]. On those areas in which defendants appear to be over-acquitted on insanity grounds, see Perlin, Borderline, supra note 4, at 1420-21, discussed infra at text accompanying notes 96-97.

14. What percentage of the general public, for example, is familiar with the case of Laura Hudson or the case of Sharon Klafta? See Hudson, 1999 WL 77844; State v.
Yates cases—neither neonaticides (a category limited to killings within the first twenty-four hours of a baby’s life)—held us in thrall, and served as the vivid heuristic for a national “debate” on neonaticide, and its relationship to “mother love,” abortion rights, permissive childraising, and, even, President Clinton’s impeachment trial. Kris Franklin’s apt observation about the laws of sodomy—“Sodomy decisions are fascinating because they broadcast not only legal theorizing, but also a political stance”—is equally applicable here.

Lost in all of this is a series of questions of importance and interest to lawyers, policy makers, and other informed citizens who do not rely on “talk TV” to inform their political view. The question that I wish to address is the relationship between the neonaticidal defendant and the insanity defense. This question also

15. For an excellent overview of the Smith case, see Ford, supra note 4.
17. On why some cases are self-selected by the media for over-attention, see MOTHERS WHO KILL, supra note 8, at 47.
18. On the role of the vividness heuristic in mental disability law, see PERLIN, HIDDEN, supra note 10, at 10. See also Michael L. Perlin, “The Executioner’s Face Is Always Well-Hidden”: The Role of Counsel and the Courts in Determining Who Dies, 41 N.Y.L. SCH. L. REV. 201, 231 (1996) (citations omitted) (“We know how, as a result of the vividness heuristic, one salient case can lead to the restructuring of an entire body of jurisprudence.”).
21. For a discussion on public attitudes to the case of Rebecca Hopfer, see Barton, supra note 7, at 611. See also State v. Hopfer, 679 N.E.2d 321, 328-29 (Ohio App. 2d 1996).
22. See, e.g., Karin Lewicki, Can You Forgive Her?: Legal Ambivalence Toward Infanticide, 8 S. CAL INTERDISC. L.J. 683, 687 (1999)(discussing obsession with trial coverage as illustrated in Susan Smith’s, O.J. Simpson’s, and President Clinton’s trials); Michele Goodwin, The Black Woman in The Attic: Law, Metaphor And Madness in Jane Eyre, 30 RUTGERS L.J. 597, 599 n.6 (1999) (“Recent examples of legal literary drama would include the Independent Prosecutor’s Referral to Congress on the Impeachment of President William Jefferson Clinton, abstracts from the infamous O.J. Simpson civil and criminal trials, and the police reports from the Susan Smith infanticide case.”).
24. On the significance of the “media frenzy” in highly-publicized neonaticide cases, see MOTHERS WHO KILL, supra note 8, at 19.
immediately leads to many ‘second generation’ questions: Does the
defense apply? Should it? Should there be a special or separate
insanity-type defense for such cases? How do jurors respond?25
What can we learn from all of this? Does the jurisprudence of such
cases differ from the jurisprudence of other sorts of ‘syndromic’
behavior in insanity defense cases (e.g., battered spouse syndrome,
rape trauma syndrome)? Has the application of the insanity defense
in such cases changed since the Susan Smith and Andrea Yates
cases? I cannot answer all of these questions, but I wish to at least
raise them, with the hopes that they will remain “on the table” as
this debate continues.

We may take it as a given that our insanity defense
jurisprudence is incoherent.26 This incoherence is made even less
rational and normative in cases where the defense is based on
postpartum depression or other postpartum psychosis. This
category of cases reflects and refracts a trompe d’oeil illusion that
must be addressed: whether we look at postpartum depression and
psychosis cases as a reflection of the etiology of mental illness, or as
a reflection of societal attitudes towards one population susceptible
to jarringly conflicting stereotypes (mothers with mental disabilities
who act violently towards their new-born children).

The incoherence of our insanity defense jurisprudence is
especially troubling in cases involving women who kill their small
children. For decades, this cohort was one of the mini-universes in
which juror empathy (or, perhaps, juror disbelief that a mother could
criminally kill her infant or young child) led to insanity acquittals,
even in cases in which evidence of non-responsibility was limited (I
have referred to this cohort in the past as “empathy outliers”).27
Since the Susan Smith case (and the societal outrage that this case
unleashed toward that specific defendant), jurors—using a warped
and self-referential type of “ordinary common sense” (OCS)28—have
become increasingly punitive toward all defendants charged with
the death of their small children, even in cases that are in no way
like (factually or clinically) the Smith case, and even in cases in
which the evidence of non-responsibility is overwhelming. This
radical shift in position flows partially from how sanism pervades

25. For a discussion on how public misperceptions of the inflated use of the insanity
defense contaminates neonaticide discourse, see MOTHERS WHO KILL, supra note 8.

26. See, e.g., Michael L. Perlin, "For the Misdemeanor Outlaw": The Impact of the ADA
on the Institutionalization of Criminal Defendants with Mental Disabilities, 52 ALA. L. REV.
193, 202 (2000); Perlin, Borderline, supra note 4, at 1424; PERLIN, JURISPRUDENCE, supra

27. Perlin, Borderline, supra note 4, at 1421; PERLIN, JURISPRUDENCE, supra note 5, at 193.

28. See Perlin, OCS, supra note 9, at 6.
our mental disability law jurisprudence and partially from the conflicts in stereotypes that are present in such cases. It is impossible to understand this area of the law without a full recognition of these factors.

This area of the law is especially incoherent even when compared to insanity defense cases involving other 'syndromic' behavior. On one hand, we are especially punitive towards such defendants because they have violently violated our precepts of motherhood. On the other, we are more willing to find some of these defendants not guilty by reason of insanity than we are in cases involving almost any other kind of insanity pleader (again, almost in a way that imitates nullification verdicts) as a reflection of our desire to maintain an inviolate image of "mother love." The shift here is primarily a result of the media response to the Susan Smith case. I argue further that it is impossible to understand this area of the law without a full consideration of the malignant and corrosive impact of "ordinary common sense," sanism and pretextuality on this area of the law.

Thus, in Part I, I discuss the research on neonaticide, and highlight how it reflects our massive societal ambivalence about the underlying social issues. In Part II, I discuss the range of mental disorders manifested by neonaticidal mothers. In Part III, I consider the application of the insanity defense to these cases, focus on the "empathy outlier" phenomenon, and then look at the extent how the public construction of such cases has changed in the aftermath of Susan Smith and Andrea Yates. In Part IV, I explain

29. See, e.g., PERLIN, MENTAL DISABILITY LAW supra note 13, §§ 9A-9.3 to 9.3e, at 264-84.
30. For a recent helpful overview, see Irwin Horowitz et al., Jury Nullification: Legal and Psychological Perspectives, 66 BROOK L. REV. 1207 (2001). See also Andrew D. Leipold, Rethinking Jury Nullification, 82 VA. L. REV. 253 (1996). I discuss this in an insanity defense context in Perlin, Myths, supra note 9, at 706 n.501, and in Perlin, OCS, supra note 9, at 40-46.
31. See Lusk, supra note 19, at 95:
   Basically, it is our belief that society, in its desire to preserve an illusion of 'mother love', is hesitant to carefully scrutinize the mother-child relationship and recognize realistically that the most reasonable target for a mother's frustration and anger is her child. Instead, to preserve our illusions about 'mother love', we categorize women who murder their children as 'insane.' (citing Oberman, supra note 12 (quoting Henry J. Steadman, et al., The Use of the Insanity Defense, in A REPORT TO Gov. HUGH L. CAREY ON THE INSANITY DEFENSE IN NEW YORK, 37, 68-69 (1978))).
32. See generally Perlin, OCS, supra note 9.
34. See PERLIN, HIDDEN supra note 10, at 59-75; Perlin, Half-Wrecked, supra note 33, at 5.
35. See Perlin, Borderline, supra note 4, at 1420-21 (citation omitted).
“ordinary common sense” (OCS), sanism and pretextuality, and relate these factors to this jurisprudence. In Part V, I conclude that the dissonance created in such cases is so profound that it has distorted this jurisprudence beyond any level of coherence, and it has thwarted our desperate desires to impose a comforting level of OCS on this area of the law.

My title of this article comes from the refrain of Bob Dylan’s song *Just Like a Woman*:

She makes love just like a woman, yes she does,
And she aches just like a woman,
But she breaks just like a little girl.

*Just Like a Woman* is a song not without political controversy in the Dylan oeuvre. It was criticized by Marion Meade in 1971 as a “complete catalogue of sexist slurs.” The critics Robert Shelton and Tim Riley disagree. Shelton argues persuasively that the song reflects Dylan “ironically toying with [sexist] platitudes.” Riley—presciently, given the topic I am discussing here—concludes, “It straddles an almost inconceivably thin line between compassion and scorn, forgiveness and retribution.” To a great extent, that “thin line” is a perfect metaphor for the issues we are discussing today.

PART I. NEONATICIDE AND AMBIVALENCE

All trial lawyering in jury cases involves and demands storytelling. The effective trial lawyer paints a picture for the jury using a schema with which jurors can identify. This is obviously

37. Id.
39. SHELTON, supra note 38, at 323.
41. Id.
43. "[J]urors' determination[s] of 'what really happened' will often be strongly influenced by the degree to which the concrete detailed stories told by the parties at trial match the instances or prototypes in the jurors' relevant schemas." Albert J. Moore, Trial By Schema: Cognitive Filters in the Courtroom, 37 UCLA L. REV. 273, 292 (1989). See also Nancy
easier in some cases than in others (intuitively, it is easier to create a story with which jurors can empathize if one is representing an abused child with a disability rather than, for example, a contract killer). Storytelling, however, can hit a roadblock when the story is dissonant with the jurors' self-referential and non-reflective "ordinary common sense" (OCS)\(^4\) ("I see it that way, therefore everyone sees it that way; I see it that way, therefore that's the way it is").\(^4\) In criminal procedure, by way of example, "OCS presumes two self-evident truths: 1) everyone knows how to assess an individual's behavior, and 2) everyone knows when to blame someone for doing wrong."\(^4\)

Not surprisingly, many of the greatest areas of OCS-caused dissonance emerge in cases involving family relationships ("If Joe was that bad, . . . why didn't the defendant divorce him? Why didn't she just leave him?");\(^4\) sexual assault ("Look at the way she was dressed; she was asking for it")\(^4\) and mental illness ("If he had just tried harder, he really could have gotten better").\(^4\) Areas such as

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44. See, e.g., Perlin, OCS, supra note 9, at 22-33; PERLIN, HIDDEN, supra note 10, at 16-20.
48. See, e.g., HUBERT S. FEILD & LEIGH B. BIENEN, JURORS AND RAPE 54 (1980) (noting that, of a 1066-person sample, eleven percent believed that "if a woman was raped, she was asking for it," and sixty-six percent believed a woman's appearance or behavior could provoke rape).
See also J.M. Balkin, The Rhetoric of Responsibility, 76 VA. L. REV. 197, 238 (1990) ("Hinckley prosecutor suggested to jurors, "if Hinckley had emotional problems, they were largely his own fault"); State v. Duckworth, 496 So.2d 624, 635 (La. Ct. App. 1986) (holding that juror who felt defendant would be responsible for actions as long as he "wanted to do them" could not be excused for cause); K. GOULD, ET AL., CRIMINAL DEFENDANTS WITH TRIAL DISABILITIES:
these are treasure troves of self-righteousness, narrow thinking, and "atrophied [ ] moral development." These characteristics are reflected in attitudes towards the cases about which I am writing in this article: a universe that is statistically infinitesimal, but charged with social significance.

We are "morbid[ly] fascinat[ed]" with neonaticide cases. Here, our stereotypes of motherhood, of mental illness, of "good girls" and "bad girls," and of madness and badness all commingle in a dissonant melange of conflicting images. Until we confront the extent of this dissonance, we can never hope to extract any meaningful doctrinal strands from this counterintuitive legal jumble.

Infanticide (and, specifically, neonaticide) was, in many cases, "condoned, encouraged, or mandated by law" until the fourth century, and has been practiced in most cultures—Judaism being the one major exception—until the present day. Its ubiquity is...
recorded in "mythological, philosophical, religious, and historical texts...". In early England, as many as twenty-five percent of all killings were infanticides; in colonial America, that number was estimated to be thirty-three percent.

It is far less common today. Nonetheless, cases, especially those subject to saturation publicity, serve as "projective tests" that reflect our massive societal ambivalence about motherhood, sexuality, social norms, and interpersonal relationships, and our shock when individuals act in a way "wholly alien" from our OCS, especially when the defendant presents herself as a "nice, middle class [Caucasian, implied] girl." With a review of the relevant literature, a number of points become clear:

1. The idea that a mother can kill her newborn consciously and with full criminal responsibility is inconceivable to many jurors, as it conflicts so radically and drastically with their OCS schemas of motherhood and "mother love" or the "cultural myth of the good mother." In many cases, this translates to a crime that "only a mad woman could do." The alienation jurors feel in such cases of infants were the Jewish scholars.

62. Macfarlane, supra note 20, at 177. For full historical surveys, see Liu, supra note 16, at 350-52; Mothers Who Kill, supra note 8, at 1-7; Lusk, supra note 19, at 101-03.

63. Barton, supra note 7, at 594.


65. Neither of the two most famous infanticide cases of the current era—that of Susan Smith and that of Andrea Yates—involves neonaticide. On the other hand, publicity has been disproportionate in cases of other middle-class, Caucasian girls and women, and there is little in the public discourse that seems to differentiate between these two different categories of killings. See, e.g., Macfarlane, supra note 20, at 176 (discussing "the sensationalized 'poster girls' of neonaticide,"). See also id. at 178, discussing "[Melissa] Drexler, the suburban mother of the "Prom Baby." See generally Mothers Who Kill, supra note 8, at 47 (discussing cases of, inter alia, Drexler and Amy Grossberg and stating that "[Because they were relatively affluent, attractive young white girls from seemingly 'good' families, their crimes are shocking and therefore deemed newsworthy").

66. See Perlin, Borderline, supra note 4:

[T]he insanity defense has always been a symbol and a screen. It has always served as a litmus test for how we feel about a host of social, political, cultural and behavioral issues that far transcend the narrow questions of whether a specific defendant should be held responsible for what—on its surface—is a criminal act, or how responsibility should be legally calibrated, or of the sort of institution in which a successful insanity acquitted should be housed.

Id. at 1377.

67. Macfarlane, supra note 20, at 248.

68. Cf. Lusk, supra note 19, at 94 (citations omitted) ("Now, families realize that 'even nice girls do it' outside the obligations of marriage . . . ").

69. Id. at 180.


71. Ford, supra note 4, at 535 (citation omitted).
may well flow from the way that mother love is seen as a “moral imperative,” or, perhaps because the “infanticidal mother . . . damages the community by preemptively accusing it of abandonment.” The myth of motherhood, so ingrained in the way in which the ambitions, desires, and needs of women are viewed and accommodated, cannot include in its account a state of mind so abominable, unnatural, and depraved that a child could be imperiled by its own mother.

2. In some cases, though, jurors use very different schemas. When women are judged harshly by jurors (not to mention the public), that judgment is often a function of the extent to which she personally varies from the social stereotype of the “good mother” and exhibits behavior that is perceived simply as “unnatural.” Women who failed to conform to assumed gender characteristics in this context have been simply perceived as “bad.”

3. Notwithstanding these radically different attitudes towards defendants in such cases, and notwithstanding the fact that neonaticides “cut across all economic classes and cultural strata,” there are points in common in almost all neonaticide cases:

- Neonaticidal crimes are “crime[s] of desperation.”
- The mothers are generally young, single, immature, socially isolated, in total (or near-total) denial of their pregnancy.

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72. See Macfarlane, supra note 20, at 223.
73. Lewicki, supra note 22, at 686.
74. Macfarlane, supra note 20, at 248.
75. Liu, supra note 16, at 377 (citing LITA LINZER SCHWARTZ & NATALIE K. ISSER, ENDANGERED CHILDREN: NEONATICIDE, INFANTICIDE, AND FILICIDE 3 (2000)).
76. Macfarlane, supra note 20, at 226 (referring to divergence from the antenatal bond).
77. SCHWARTZ & ISSER, supra note 75, at 3.
79. MOTHERS WHO KILL, supra note 8, at 13.
80. Thirty-six of thirty-seven in one recent sample studied. See id. at 48.
81. Oberman, supra note 12, at 24; MOTHERS WHO KILL, supra note 8, at 53; Lita Linzer Schwartz & Natalie Isser, Neonaticide: An Appropriate Application for Therapeutic Jurisprudence?, 19 BEHAV. SCI. & L. 703, 706 (2001); Morris Brozovsky & Harvey Falit, Neonaticide: Clinical and Psychodynamic Considerations, 10 J. AM. ACAD. CHILD PSYCHIATRY 673, 679 (1971); Macfarlane, supra note 20, at 197. For a discussion on the way that many such defendants sought to hide their pregnancies from their families, see Macfarlane, supra note 20, at 187. See also MOTHERS WHO KILL, supra note 8, at 49 (on fear of disclosure); Lusk, supra note 19:

Neonaticidal mothers may report mistaking labor pains for gas pains or flu symptoms. They give birth alone, often in bathroom stalls or bathrooms, perhaps because they do not anticipate a birth. The birth of a baby comes as a
in a state of profound "emotional detachment."\footnote{98}

- The mothers virtually all suffer from some sort of mental disorder. Even in cases where there is no mental disorder, at the very least, the mothers' behavior is marked by "fear, depression, [and] panic,"\footnote{99} as well as "shame and guilt,"\footnote{100} often followed by "abject remorse."\footnote{101}
- All had, at the most, "attenuated . . . relationships to the men who impregnated them."\footnote{102}
- Although there are a variety of sociocultural and economic causes for neonaticide,\footnote{103} there are some markers shared by most neonaticidal defendants. Not all, but a significant number of the neonaticidal mothers in question, "grew up or currently live[s] in poverty, [are] under-educated, [have] a history of abuse (both physical and sexual), remain[] isolated from social supports, [have] depressive and suicidal tendencies, and [are] usually experiencing rejection by a male lover at the time of the murder[s]."\footnote{104}

4. Our societal ambivalence about these mothers is overwhelming.\footnote{105} Infanticide cases reflect society's mixed responses of "anger, empathy, and a profound yet unarticulated sense that these cases differ from other forms of homicide,"\footnote{106} or, conversely

\footnote{Ibid. at 97-98 (citations omitted).
92. Lusk, supra note 19, at 99.
94. MOTHERS WHO KILL, supra note 8, at 44.
95. Id. at 54.
97. Id.
99. Lewicki, supra note 22, at 709-10 (quoting, in part, Cheryl I. Harris, Myths of Race and Gender in the Trials of O.J. Simpson and Susan Smith-Spectacles of Our Times, 35 Washburn L.J. 225, 226 (1996) ("Infanticide is a crime knit up inextricably with society's most basic relationships, and as such is a crime inevitably defined by framework[s] of rules of social control through which certain beliefs and images are privileged, legitimated and ratified and myths are given power").
100. Oberman, supra note 12, at 20.
“abhorrence, rage and disbelief.” This ambivalence can be measured along several different socially-constructed scales. Michelle Oberman, for instance, observes that, in medieval Europe, married infanticidal women often escaped prison, whereas unmarried infanticidal women “generally received capital sentences that were carried out in excruciating manners.” Oberman’s analysis of contemporary infanticide laws underscores how this ambivalence has continued:

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

5. Almost all neonaticide cases show what Michelle Oberman refers to as:

[Patterned circumstances that lead to the infants’ death . . .

[the women experienced severe cramping and stomach pains, which they often attributed to a need to defecate. They spent hours alone, most often on the toilet, often while others were present in their homes. At some point during these hours, they realized that they were in labor. They endured the full course of labor and delivery without making any noise.

Neonaticidal behavior is thus “absolutely at odds with normative conceptions of motherhood and maternity commonly held by society.” As a result of all this, our attitudes towards such cases reflect a dialectic of condemnation and mercy, and our reactions “tend to be at one extreme or another.” Legal disposition of such cases reflect this ambivalence. Although surveys differ, it appears that the insanity defense is successful in one-third to one-half of all such cases (and contrast this with data showing that the insanity

91. Macfarlane, supra note 20, at 225.
92. Oberman, supra note 12, at 8 (citation omitted).
93. Id. at 19.
94. Id. at 24-25.
95. Macfarlane, supra note 20, at 208.
96. Oberman, supra note 12, at 5.
98. See, e.g., Barton, supra note 7, at 606-09 (discussing cases).
99. Daniel Katkin, Postpartum Psychosis, Infanticide, and Criminal Justice, in
defense is successful in a fraction of one percent of all criminal cases); the remainder are split between those involving relatively light sentences and those with puzzlingly lengthy sentences. This ambivalence is reflected both in the wide charges brought (ranging from "unlawful disposition of a body . . . to first-degree murder"), and in eventual case dispositions. Again, Michelle Oberman succinctly quotes a Chicago defense lawyer on the pattern of "over-charging and under-convicting" in neonaticide cases. This pattern perfectly captures the underlying ambivalence.

PART II. POSTPARTUM ILLNESSES

Most mothers who kill their infant children (especially those who commit neonaticide, that is, who kill them in the first twenty-four hours of their lives) suffer from some sort of postpartum mental disorder. This observation is nothing new; it was recognized as early as the time of Hippocrates. There is a range of postpartum disorders, ranging from "maternity blues," to postpartum psychiatric illness: a picture puzzle 275, 279 (James Hamilton & Patricia Harberger eds., 1992); Brusca, supra note 97, at 1166. Cf. Macfarlane, supra note 20, at 195 (only one of a sample of eight cases involved an insanity defense). On the incidence of insanity defense pleas and success rates in all felony cases, see for example, Perlin, Borderline, supra note 4, at 1395-96 (citations omitted) ("Researchers have demonstrated that the public grossly overestimates both the frequency and the success rate of the insanity defense plea. This overestimation is a product of the media publicity accorded to certain notorious criminal cases, virtually none of which involved defendants actually found NGRI.").

100. PERLIN, JURISPRUDENCE, supra note 5, at 108.

101. Brusca, supra note 97, at 1166 (discussing varying reactions to the postpartum psychosis defense); MOTHERS WHO KILL, supra note 8, at 195 n. 56 (discussing a life sentence imposed in a Cincinnati case). Jennie Lusk has questioned whether this disparity is a function of differences in "race and class." Lusk, supra note 19, at 104 (citation omitted). Compare Gordan, supra note 64, at 102 (one-third of all infanticidal murder defendants in the United Kingdom released on bail pending trial).

102. Macfarlane, supra note 20, at 185.


104. Oberman, supra note 12, at 81.

105. See MOTHERS WHO KILL, supra note 8, at 76-79.

depression, to the most severe, postpartum psychosis.\textsuperscript{107} "Maternity blues" are common (and considered ‘normal’), and their impact is usually seen as "trivial, fleeting,"\textsuperscript{108} and affect eighty-five percent of all new mothers.\textsuperscript{109} Postpartum depression, which is more severe, affects ten to fifteen percent of all mothers, and is characterized by “irritability, anxiety, fatigue, lack of love for the child, and a sense of guilt and inadequacy related to the inability to function as a mother.”\textsuperscript{110} Postpartum psychosis, on the other hand, is characterized by a “severe break with reality and a severely impaired ability to function due to hallucinations or delusions, usually related to the newborn baby.”\textsuperscript{111} This disorder affects relatively few women,\textsuperscript{112} and is often marked by the presence of Brief Psychotic Disorder\textsuperscript{113} and/or Depersonalization Disorder.\textsuperscript{114}

Postpartum psychosis is marked by denial.\textsuperscript{115} Women with this mental disorder deny they are pregnant,\textsuperscript{116} and it is the ubiquity of this denial that has led at least one commentator to urge the creation of a separate category: neonaticide syndrome.\textsuperscript{117}

\textsuperscript{107} Brusca, supra note 97, at 1139-44.
\textsuperscript{108} Id. at 1141.
\textsuperscript{109} See Pitt, Maternity Blues, 122 Brit. J. Psychiatry 431, 433 (1973); Mothers Who Kill, supra note 8, at 77.
\textsuperscript{110} Brusca, supra note 97, at 1143 (citing, inter alia, Sydney Brandon, Depression After Childbirth, 284 Brit. Med. J. 613, 613 (1982)).
\textsuperscript{111} Liu, supra note 16, at 355 (citing, inter alia, Ann L. Dunnewold, Evaluation and Treatment of Postpartum Emotional Disorders 41 (1997)). See also Liu, supra note 16, at 355-56 (“Hearing auditory hallucinations in which voices urge them to kill their children, new mothers typically exhibit strange behavioral tendencies in which they isolate themselves from others, stop speaking, suffer severe sleep deprivation, and/or undergo extreme emotional volatility.”).
\textsuperscript{112} See Mothers Who Kill, supra note 8, at 12 (1 out of 2000).
\textsuperscript{113} See Macfarlane, supra note 20, at 205-07 (“Thus, the diagnostic criteria for Brief Psychotic Disorder are the presence of one or more of the following symptoms: 1) delusions; 2) hallucinations; 3) disorganized speech (e.g., frequent derailment or incoherence); 4) grossly disorganized or catatonic behavior.”)
\textsuperscript{114} See id.: Thus, the criteria for Depersonalization Disorder include: 1) persistent or recurrent episodes of the individual feeling like they are watching their body or mind from outside; 2) intact reality testing during the depersonalization episode; and 3) the depersonalization results in “clinically significant distress or impairment in social, occupational, or other important areas of functioning.”
\textsuperscript{115} Id. at 207-08.
\textsuperscript{116} Mothers Who Kill, supra note 8, at 39-60.
\textsuperscript{117} See Macfarlane, supra note 20, at 216-34.
Such a syndrome would consist of evidence introduced by the testimony of expert witnesses of common patterns of behavior in cases of neonaticide, such as denial of pregnancy, and self-deluding rationalization of the physical manifestations of pregnancy. The evidence introduced would thus serve to explain the behavior of a particular defendant within a recognized and documented pattern of behavior and clinically verified symptoms.118

This strategy was specifically rejected by the New York Court of Appeals in People v. Wernick,119 notwithstanding the fact that such a syndrome appears to fit squarely within Professor Steven Morse’s definition—"[a] syndrome, in medical terminology, is the collection or configuration of objective signs (e.g., fever) and subjective symptoms (e.g., pain) that together constitute the description of a recognizable pathological condition."120

I will now turn to the insanity defense to consider its application to cases involving defendants with these mental disorders.

PART III. THE INSANITY DEFENSE

I have been writing about the insanity defense for more than three decades121 (even since before I began to practice law) and turned to it as a serious focus for my scholarship some fourteen years ago.122 Although I have sought to explain the subtle doctrinal differences between the major insanity defense tests123 and the even more subtle distinctions between the positions taken by major moral philosophers on the meaning of such terms as "rationality,"124 I have chosen, instead, to focus most of my attention on the myths

118. Id. at 180.
119. 674 N.E.2d 322, 324 (N.Y. 1996) ("No threshold evidentiary foundation whatsoever was offered that acknowledged the validity or existence of defense counsel’s postulate to warrant these experts using this kind of extrapolated material to bolster their expert opinions").
122. See, e.g., Perlin, Myths, supra note 9; Perlin, OCS, supra note 9.
123. See PERLIN, JURISPRUDENCE, supra note 5, at 73-96.
124. See id. at 128-32; Perlin, Myths, supra note 9, at 666 (discussing positions of Steven Morse and Michael Moore).
that have developed about the insanity defense,\textsuperscript{125} the ways that the defense has become contaminated by heuristic reasoning\textsuperscript{126} and the false use of OCS,\textsuperscript{127} and the ways that sanism and pretextuality have ultimately poisoned and corrupted this area of the law.\textsuperscript{128}

I have done this because I believe that the core question we must address here is one that has been constant over the centuries (perhaps millennia)—"why do we feel the way that we do about these people?"\textsuperscript{129}—and that, if we fail to come to grips with that question, we are in danger of reducing this entire enterprise to an interesting and highly intellectualized parlor game.

I have now written extensively in my attempts to answer this question, and am comfortable with my preliminary conclusions.\textsuperscript{130} Yet, as I continue to do research and to think about this area of the law, there have always been a few strands of the jurisprudence that, somehow, looked different, including cases, by way of example, that involve "syndromic" behaviors (frequently, behaviors with identifiably cultural or behavioral bases).\textsuperscript{131} These cases have

\begin{footnotes}
\item[125] See Perlin, Jurisprudence, supra note 5, at 105-14.
\item[126] See id. at 271-84.
\item[127] See id. at 305-10.
\item[128] This is not to say that these 'subtle distinctions' are not important (nor to say that the scholars who write eloquently and passionately and persuasively about them are expending time on inconsequential problems). Simply, my sense is that unless we come to grips with the questions on which I have chosen to focus, we cannot make authentic 'progress' in reconstructing the jurisprudence in this area. See Perlin, Myths, supra note 9, at 641:

As I will subsequently demonstrate, it is futile to be terribly concerned with the question of which school of moral philosophy "wins" or which set of scientific data is soundest or which database of empirical evidence is most persuasive. For the empiricist, the scientist and the moral philosopher all base their arguments on one important but unarticulated premise: that fact-finders are capable of being rational, fair and bias-free in their assessment of insanity defense cases, and it is only the absence of a missing link—the additional, irrefutable data as to NGRI demographics, the newest discovery in brain biology, the exact calibration of moral agency in the allocation of responsibility—that stands in the way of a coherent and well-functioning system. Yet, there is virtually no evidence that the addition of any (or all) of these extra factors really would make any such difference.

Id. at 641.
\item[129] See Perlin, Hidden, supra note 10, at 223-24.
\item[130] See, e.g., Perlin, Hidden, supra note 10; Perlin, Myths, supra note 9; Perlin, OCS, supra note 9; Perlin, Borderline, supra note 4.
\item[131] See Perlin, Mental Disability Law, supra note 13, § 9A-9.3, at 264. On the specific question of the implications of accepting evidence of "female hormonal disorders" as a legal defense, see Huang, supra note 104, at 362-67. When I first wrote about this question thirteen years ago, I considered it from this perspective:

In the past decade, there has been an explosion of interest, research, and study of groups such as battered spouses and Vietnam veterans—groups whose members frequently exhibit so-called "syndromic" behaviors. While there has
involved individuals with premenstrual stress syndrome,\textsuperscript{132} Vietnam stress syndrome,\textsuperscript{133} battered woman's syndrome,\textsuperscript{134} the disorder of pathological gambling,\textsuperscript{135} and a host of other syndrome-based defenses,\textsuperscript{136} including, \textit{inter alia}, postpartum depression.\textsuperscript{137}

How do jurors respond to such cases? A broad-based examination of insanity defense cases demonstrates, beyond any doubt, that when jurors err, they are globally more likely to commit the error of the false negative: overwhelmingly, they reject the insanity defense in cases of defendants who authentically should have been found to have met the standard for criminal nonresponsibility.\textsuperscript{138} There are many reasons for this (reasons that I have sought to explore exhaustively in other work),\textsuperscript{139} but what connects all these reasons is our fear that a factually-guilty person will "escape" punishment.\textsuperscript{140} We adhere resolutely to this \textit{idée fixe} in spite of uncontradicted (indeed, \textit{uncontradictable}) evidence that: (1) the insanity defense is rarely successful,\textsuperscript{141} (2) a failed insanity defense translates into significantly longer prison sentences than

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been significant scholarship devoted to the individual substantive syndromes, there has been virtually no attention paid to the legal implications of their use in insanity defense cases. For a rare example, see [sic] McCord, \textit{Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases,} 66 OR. L. REV. 19, 64-69 (1987). On the question of the public's negative view toward defendants asserting such syndromes in insanity defense cases, see [Phillip J.] Resnick, \textit{[Perceptions of Psychiatric Testimony: A Historical Perspective on the Hysterical Invective,} 14 BULL. AM. ACAD. PSYCHIATRY & L. 203, 208 (1986):

Today, the public views the following diagnoses as unjustly 'getting criminal off': dissociative reaction, the "Twinkie" defense, post-Vietnam stress disorder, temporal lobe epilepsy, premenstrual syndrome, and pathological gambling. The closer a defendant is to normality, the more public opinion is outraged by insanity acquittals. People are unwilling to excuse conduct that appears to have a rational criminal motive.

Perlin, \textit{Myths,} supra note 9, at 616-17 n.75.

\textbf{132.} See \textbf{Perlin, Mental Disability Law,} supra note 13, § 9A-9.3a, at 266-70.


\textbf{134.} See \textit{id.} § 9A-9.3c., at 275-79.


\textbf{136.} See \textit{id.} § 9A-9.3e., at 181-84.


\textbf{138.} For a representative sample, see \textbf{Perlin, Hidden,} supra note 10.

\textbf{139.} I believe one of the important reasons for this phenomenon is the inability of jurors to empathize with most insanity pleaders. \textbf{See Perlin, Myths,} supra note 9, at 697-700.

\textbf{140.} \textbf{See} Perlin, \textit{supra} note 26, at 236; Perlin, \textit{Borderline,} supra note 4, at 1423.

\textbf{141.} \textbf{Perlin, Jurisprudence,} supra note 5, at 108-09.
those imposed on otherwise-like defendants for like crimes,\textsuperscript{142} (3) a successful insanity defense translates into longer terms of institutionalization in maximum security confinement (albeit in a forensic "hospital" rather than in a prison),\textsuperscript{143} and (4) evidence of successfully malingered insanity defenses is rare to the point of being virtually nonexistent.\textsuperscript{144}

Notwithstanding all of this, however, there remain three statistically insignificant, but politically and culturally important, mini-universes of insanity defense cases in which it appears that jurors have acquitted defendants who do not necessarily meet the substantive insanity standard.\textsuperscript{145} These are cases—"nullification verdicts" of a sort\textsuperscript{146}—that I have called "empathy outliers."\textsuperscript{147} Unlike the typical insanity-pleading defendant (who fills jurors with fear and loathing), these defendants puzzle jurors: "How could this defendant have committed such an inexplicable and irrational crime? She must have been crazy!" These cases fall into:

[T]hree general categories of defendants: who not only did not appear to be 'insane' under the prevailing substantive test, but seemed to be the recipients of jury sympathy: (1) mothers committing infanticide;\textsuperscript{148} (2) law enforcement officials; and (3) a category labeled as the [we]-can-feel-sorry-for-you people—individuals with whom the jurors could empathize.\textsuperscript{149} Over a ten year period, over two-thirds of all insanity acquittees in one jurisdiction fell into "categories of classes not necessarily predisposed to commit additional crimes."\textsuperscript{150}

\textsuperscript{142} Id. at 107-09.
\textsuperscript{143} Id. at 109-10.
\textsuperscript{144} Id. at 111-12.
\textsuperscript{145} Perlin, Myths, supra note 9, at 701.
\textsuperscript{146} See Perlin, Borderline, supra note 4, at 1421. I have suggested that these cases may also reflect a kind of prosecutorial nullification: "prosecutors, like other citizens, 'feel sorry' for this tiny sub-group of insanity pleaders, and choose to allow such defendants to 'evade' responsibility." Perlin, Myths, supra note 9, at 704.
\textsuperscript{147} PERLIN, JURISPRUDENCE, supra note 5, at 192. See also Oberman, supra note 12, at 42 (discussing this in this precise context).
\textsuperscript{148} There are very few examples in the reported case law literature of the actual proffered use of postpartum psychosis as the basis for an insanity defense. See Daniel Katkin, Postpartum Psychosis, Infanticide, and the Law, 15 CRIME, L. & SOC'Y 109, 119 (1991) ("postpartum psychosis has been offered as a legal defense in a small number of infanticide cases"). For a well-known case in which such an effort was unsuccessful, see People v. Wernick, 674 N.E.2d 322, 324 (N.Y. 1996), discussed supra at text accompanying note 119. Wernick is criticized on these grounds in Bookwalter, supra note 103.
\textsuperscript{149} Perlin, Myths, supra note 9, at 701; See also Perlin, Borderline supra note 4, at 1420-21.
\textsuperscript{150} Perlin, Myths, supra note 9, at 701 n.480, (citing Scott Sherman, Guilty But Mentally Ill: A Retreat From the Insanity Defense, 7 AMER. J.L. & MED. 237, 261 (1981)). See also Richard Pasewark et al., The Insanity Plea in New York State, 1965-1976, 51 N.Y.Sr. B.J. 186, 224 (1979) (of thirty-nine female NGRI's in sample, eighteen had been tried for
Some claim that we view postpartum defendants as "insane because 'society seems unwilling to critically examine its belief in the concept of 'mother love,' because institutionalized sexism, masquerading as 'judicial chivalry,' allows us to accept 'certain cultural transgressions' more readily from women than from men."151

For decades, we had accommodated ourselves to this anomaly (especially, perhaps, because the defendant most likely to be the recipient of juror largesse was more likely to have a higher socio-economic status),152 and we accept the fact that postpartum syndrome, like other syndromes, in the right case may, in fact, be a legitimate basis for an insanity defense.153 And there is no question that the vast majority of these defendants suffer from some sort of mental disability.154

When I wrote The Jurisprudence of the Insanity Defense155 in 1993, I had no sense that this was about to change. The "infamous"156 case of Susan Smith, however, radically altered the way that we came to construct all of these cases. Smith told us the "big lie" and betrayed the greater community157—not by killing her children, but by appealing to our sympathy and empathy and then kicking us in our unconscious and leaving us with a "sense of betrayal."158 Suddenly, the Smith case, a made-for-the-media circus,159 radically and dramatically altered the way we thought about infanticide and neonaticide cases (even if the latter category shared nothing in common with the facts of the Smith case).160 Instead of talking about whether the insanity defense should apply to such killings,161 we debate whether this was a capital punishment-worthy case (a scenario tracked eerily five years later in the Andrea

infanticide; of 239 acquittees in sample, four were police officers; the third over-represented group was composed primarily of "previously respectable, middle class individuals").

151. Perlin, Myths, supra note 9, at 702 (quoting Pasewark et al., supra note 150, at 224) (internal citations omitted).
152. Oberman, supra note 12, at 45.
153. Barton, supra note 7, at 604-05; Macfarlane, supra note 20, at 205.
154. Mothers Who Kill, supra note 8, at 93.
155. See Perlin, Jurisprudence, supra note 5.
156. Mothers Who Kill, supra note 8 at 68.
157. Ford, supra note 4, at 543.
158. Id. (discussing the outrage felt by those who had attempted to locate Smith's 'missing' children).
159. See Mothers Who Kill, supra note 8, at 39 (discussing "rabid media coverage" of the Smith case).
160. Smith's children were fourteen months and three years old at the time she killed them. See Ford, supra note 4, at 521.
161. There is no question that Susan Smith was mentally ill, though likely not insane. See Mothers Who Kill, supra note 8, at 72.
I am convinced that we did not want to execute Susan Smith for the homicides of her infant children, but for making fools of us—conning us into feeling sorry for her. Furthermore, by the time of the Yates trial, juror “disgust” at such a vile act trumped any prior feelings of outlier empathy, and contaminated any attempts to reach an objective and just verdict.

Although scholars such as Robert Goldstein warned us years before the Susan Smith case of the ‘she-must-be-crazy fallacy,’ and although scholars such as Michelle Oberman had, in the immediate wake of Susan Smith, noted that the insanity defense was inappropriate in some infanticide cases, the Smith case, like John Hinckley’s insanity case, irrevocably shifted the debate. Linda Chavez, by way of example, referred to infanticidal mothers as “monster-women.” Commentators writing in the post-Susan Smith years warned direly of the potentiality of insanity defense abuses and raise the shopworn specter that defendants are

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Perhaps one could argue that the greater use of existing capital statutes in states with greater criminal justice populism makes abolition that much more unthinkable; but one could also argue that greater use of capital punishment is more likely to produce . . . controversial cases, like the recent capital prosecution of Andrea Yates in Texas . . . .

Id. at 120 (citation omitted).

A question that we might have to face in such a case — were a jury to deliberate on the question of capital punishment — is whether evidence as to mental status that had been introduced in support of mitigation would be inappropriately construed by jurors as evidence in support of aggravation. See Atkins v. Virginia, 122 S. Ct. 2242, 2252 (2002) (“Reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury”).

163. Cf. Michael L. Perlin, The Supreme Court, the Mentally Disabled Criminal Defendant, and Symbolic Values: Random Decisions, Hidden Rationales, or “Doctrinal Abyss?”, 29 ARIZ. L. REV. 1, 98 (1987) (discussing defendants whose insanity defense pleas are unsuccessful (“They have made a ‘play’ for our unconscious, and have come up short”)).


166. Oberman, supra note 12, at 31-33.

167. See PERLIN, JURISPRUDENCE, supra note 5, at 17-24, 279-80.


"getting away with murder;' as a result, the insanity defense has become as unattractive an option for these defendants as for all other defendants with mental disabilities post-Hinckley. Consider in this context the pre-Susan Smith but post-Hinckley North Carolina case of State v. Holden. There, the trial court found that a seventeen year old mother with mental retardation and a history of severe past and present abuse was responsible for killing her three month old child because she was able to form a false story. The judge reasoned that, if she could fabricate a story, she had cognitive abilities sufficient to hold her responsible for the crime. Of course, the ability to fabricate a story is not evidence that one does not meet the insanity standard; although there may be a connection between the two, there is nothing in the law to suggest this kind of dyadic choice. Interestingly, here, the defendant had not even pled insanity, but had asked for a mitigated sentence based on her diminished mental capacity. Nonetheless, the trial judge mistakenly construed this request as an argument asserting insanity.

173. Id. at 626-30. The defendant eventually pled guilty to second-degree murder.
174. Id. at 630.
175. Id.
176. See id. at 627-29:
Defendant, who was conceived when her thirteen-year-old mother was raped by her stepfather, was constantly reminded of her incestuous origins and made to feel responsible for turmoil within the family. Defendant's mother often told defendant that she wished she had never been born, that she wanted to kill her, and that she was in the way. Defendant's own complaints of sexual molestation by a family member were ignored.
Defendant began her relationship with David Johnson when she was thirteen. Johnson subjected her to constant physical and emotional abuse, beating her face and abdomen with his fists and threatening to molest the children. During both of defendant's pregnancies Johnson raped her repeatedly in an attempt to harm both her and the unborn child. Defendant's mother and Johnson incessantly berated defendant for becoming pregnant a second time. They told her that no one wanted the baby yet refused to allow defendant to put Dekavia up for adoption. After [child's] birth, much verbal abuse within the family centered on defendant's parental inadequacies. She became convinced that she was not capable of caring for the children competently. During stressful periods, defendant would hear voices censuring her and talking about [child]. These auditory hallucinations were very active on the day of the drowning.

Id. at 627-29.
Holden is a textbook case of how a trial judges’ sanism\(^\text{177}\) can contaminate an infanticide case.\(^\text{178}\)

 Mothers diagnosed with postpartum psychosis pleading the insanity defense in neonaticide cases have little in common with those diagnosed with postpartum depression who plead the defense in infanticide cases, but the post-Susan Smith paradigm shift has conflated and confounded these cases and these mental disabilities. Our anger at Susan Smith has so pervaded our criminal justice system that we deny the profundity of the mental illness suffered by many of the neonaticidal mothers.\(^\text{179}\) In the words of one observer, “How did we become so mean?”\(^\text{180}\) As a result, justice continues to suffer.

 There is little to cull from the reported case law in this area.\(^\text{181}\) As I have already noted, in the post-Susan Smith era, the New York Court of Appeals affirmed a neonaticide conviction, concluding that the trial court did not err in precluding expert testimony on neonaticide syndrome,\(^\text{182}\) concluding that “neo-naticide syndrome did not meet the threshold of general scientific acceptability.”\(^\text{183}\) On the other hand, the Tennessee Court of Criminal Appeals remanded

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177. See infra Part IV. See generally PERLIN, HIDDEN supra note 10, at 50-55.
179. On the issues of whether the use of the insanity defense is “a benefit or detriment to the cause of women,” see Huang, supra note 106, at 346-48.
180. See Lewicki, supra note 22, at 710:

Questions of the potential culpability of the community frequently appear wherever an incident occurs...Also striking is some of the aftermath of the case of Amanda Wallace, an insane woman who killed her son within days of his re-release to her by the Illinois Department of Children and Family Services. Wallace was first sentenced to death, the charge later being commuted to life in prison. Following the initial sentencing, a psychologist who had known Ms. Wallace since she was seven remarked ‘it’s absolutely ridiculous to even think of executing someone like Amanda Wallace. She is ill. What is society’s excuse. How did we become so mean?’ Don Terry, Mother Sentenced to Life in a Killing That Shook Chicago, N.Y. TIMES, July 26, 1996, at A14. Later, Patrick Murphy, the Cook County Public Guardian said, ‘everyone in the system failed Joey Wallace, including me .... She is very, very insane. But we’re all getting off scot-free. She’s going to spend the rest of her life in prison.’ Id.

Lewicki, supra note 22, at 710 n.57.

181. There is also not much that is new. See State v. Richmond, 7 So. 459 (La. 1890), for a decision rejecting expert testimony on “puerperal mania” in an infanticide case.
183. Id. at 325. But Cf. Morse, supra note 120 (defining “syndrome”).
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a first-degree murder conviction, ordering the trial judge to enter a verdict of not guilty by reason of insanity,\textsuperscript{184} reasoning that the State had failed to prove that the appellant was "capable of appreciating the wrongfulness of her conduct and conforming her conduct to the requirements of the law."\textsuperscript{185} In a California case where a defense witness had testified that the defendant was suffering from "a kind of neonaticide dissociative syndrome,"\textsuperscript{186} the appellate court reduced the jury's verdict of second-degree murder to manslaughter, because of "insufficient evidence of malice."\textsuperscript{187} That is essentially all there is. Certainly, there is no body of law from which we can extrapolate any overarching legal principles.

PART IV. SANISM, PRETEXTUALITY, AND ORDINARY COMMON SENSE

My explanation for why this happens is premised, to a significant degree, on the extent to which sanism and pretextuality continue to contaminate the criminal justice system.\textsuperscript{188} I define sanism as:

an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry. It infects both our jurisprudence and our lawyering practices. Sanism is largely invisible and largely socially acceptable. It is based predominantly upon stereotype, myth, superstition, and deindividualization, and is sustained and perpetuated by our use of alleged "ordinary common sense"

\begin{itemize}
\item \textsuperscript{185} Id. at *8: There was uncontested testimony in this case that defendant's behavior included the act of laying a crucifix on her pregnant sister's stomach confirming that the child was the son of Satan, [her] conversation with the Devil at a bar, her staying up all night to color and sleeping throughout the day, her fascination with becoming the queen of a motorcycle club and her face-to-face conversation with God.
\item \textsuperscript{186} People v. Anderson, 91 Cal. Rptr. 2d 563, 568 (Cal. App. 4th 1999).
\item \textsuperscript{187} Id. at 571-72.
\item \textsuperscript{188} See Perlin, Half-Wracked, supra note 33, at 26: I have begun to write regularly—relentlessly, I might even say—about sanism and pretextuality, so as to seek to expose their pernicious power, the ways in which two factors infect judicial decisions, legislative enactments, administrative directives, jury behavior, and public attitudes, the ways that these factors undercut any efforts at creating a unified body of mental disability law jurisprudence, and the ways that these factors contaminate scholarly discourse and lawyering practices alike.
\end{itemize}
I define “pretextuality” as the ways in which courts:

accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (and frequently meretricious) decisionmaking, specifically where witnesses, especially expert witnesses, show a high propensity to purposely distort their testimony in order to achieve desired ends. This pretextuality is poisonous; it infects all participants in the judicial system, breeds cynicism and disrespect for the law, demeans participants, and reinforces shoddy lawyering, blasé judging, and, at times, perjurious and/or corrupt testifying.

All aspects of mental disability law are pervaded by sanism and by pretextuality, no matter whether the specific presenting topic is involuntary civil commitment law, right to refuse treatment law, the sexual rights of persons with mental disabilities, or any aspect of the criminal trial process. I have written extensively about the ways that sanism and pretextuality pervade our insanity defense policies, and I am convinced that it is impossible to remotely understand how that jurisprudence has developed without a full consideration of the malignant and corrosive impact of these factors. Pretextuality in mental disability law is “reflected consciously, in the reception and privileging of ‘moral’ testimony that flouts legislative criteria, and unconsciously, in the use of heuristic devices in decisionmaking, and in the application of sanist attitudes toward such decisions.”

Underlying much of sanism and pretextuality is our meretricious use of OCS, a “powerful unconscious animator of legal decision making.” [W]here defendants do not conform to ‘popular images of “craziness,”’ the notion of handicapping mental disability is flatly and unthinkingly rejected.” In arguing why it is essential

189. Perlin, Half-Wracked, supra note 33, at 4-5 (internal citations omitted).
190. Id. at 5 (internal citations omitted).
191. See PERLIN, HIDDEN, supra note 10, at 79-112.
192. See id. at 125-56.
193. See id. at 157-74.
194. See id. at 205-58.
195. See, e.g., id. at 223-44.
197. Perlin, OCS, supra note 9, at 22-23. See supra text accompanying notes 44-46.
198. Id. at 24. (quoting Harold Lasswell, Foreward to RICHARD ARENS, THE INSANITY DEFENSE xi (1974)).
to understand OCS if we are to understand why insanity defense attitudes have developed as they have, I have written:

Not only is it "prereflective" and "self-evident," it is susceptible to precisely the type of idiosyncratic, reactive decisionmaking that has traditionally typified insanity defense legislation and litigation. It also ignores our rich, cultural, heterogenic fabric that makes futile any attempt to establish a unitary level of OCS to govern decision making in an area where we have traditionally been willing to base substantive criminal law doctrine on medieval conceptions of sin, redemption, and religiosity.199

I believe that it is our reliance on OCS—a self-referential, non-reflective, self-absorbed way of seeing the world at large and the legal system in particular—that helps to illuminate much of what happens when we decide neonaticide cases or when we discuss in the public media how we feel about such cases.200 We seek to simplify our information-processing tasks by engaging in heuristic thinking and by taking refuge in a false OCS. Both of these limiting and narrowing devices cut us adrift from critical thinking and both offer overly-pat solutions for complex behavior. OCS, simply put, is an "incomplete and imperfect tool by which to assess criminality," especially in cases that conjure up so many vivid stereotypes as do infanticide or neonaticide cases. I have characterized our use of OCS in confrontation clause and confessions case in this manner "[J]ust as OCS cannot be employed as the tool by which confessions or confrontation clause cases can be charted, neither is it applicable to insanity defense law jurisprudence, where human behavior is very often opposite to what OCS would suggest."202 I believe that this is even more so in infanticide or neonaticide cases. Certainly, our predictable patterns of "over-indicting and under-convicting" reflects the rankest sort of pretextuality in this context.

Through the typification heuristic, "people characterize a current experience via reference to past stereotypic behavior."204 Through the vividness heuristics, we learn that "a single, vivid, 

199. Id. at 29 (internal citations omitted).
200. On the ways that media depictions of such cases "los[e] sight" of factual data. See Schwartz & Isser, supra note 77, at 712.
201. PERLIN, JURISPRUDENCE, supra note 5, at 291.
202. Id. at 294.
203. See supra text accompanying note 103.
204. See Perlin, Borderline, supra note 4, at 1417 (citing Mark Snyder et al., Social Perception and Interpersonal Behaviors: On the Self-Fulfilling Nature of Social Stereotypes, 35 J. PERS. & SOC. PSYCHOL. 656, 657 (1977)).
memorable case overwhelms the mountains of abstract, colorless data on which rational choices should be made. In these ways, we highlight the worst-case anecdote, and make that a template for all behavior (and all expected outcomes). We use such cognitive-simplifying heuristic devices to reinforce pre-existing stereotypes, and allows us to willfully blind ourselves to the “gray areas” of human behavior. OCS is the ultimate form of self-referentiality, and its use estops us from looking at issues from external and/or alternative points of view. Writing recently about juror behavior in insanity defense cases, Jennifer L. Skeem and Stephen L. Golding thus underscored that juror concepts of “commonsense justice” (a close relative of OCS) are likely to result in “legally incorrect or even highly prejudicial [case judgments].”

This morass leads us to impose a dyadic straightjacket on neonaticidal defendants. They are either crazy or they are evil. Pretextually, we overcharge these defendants because we wish to tell the public that they are evil, and we will not let them “get away with it,” but we then under-convict them because we realize that they are, if not insane, “crazy.” We either empathize (perhaps, in some cases, overempathize) or we engage in our own version of denial: we deny that such defendants may, in fact, be mentally ill (perhaps using false OCS to rationalize in a sanist way: “I didn’t succumb to the ‘baby blues’; if she did, she must have a weak moral character. She’s no crazier than I”). The reasoning of the trial judge


208. PERLIN, HIDDEN, supra note 10, at 20.


211. Oberman, supra note 12, at 43. On the significance of the “mad/bad” dichotomy in this context, see MOTHERS WHO KILL, supra note 8, at 69-70.


213. Oberman, supra note 12, at 81.
in the North Carolina case of State v. Holden—that the defendant must be responsible because she had the cognitive ability to fabricate a story after she killed her child—is a perfect exemplar of this reasoning. This is also totally in line with the prosecutorial gambit that argues to the jury, in efforts to rebut insanity, that the defendant was “intelligent enough to feign mental illness.”

Dr. Caryl Boehnert has suggested that individuals who commit crimes that fall below the “community tolerance threshold,” and thus would not trigger a concomitantly high level of community outrage, are more readily found not guilty by reason of insanity. Dr. Daniel Schwartz has suggested that the success of an insanity plea frequently hinges on a defendant’s “likeability.” Before Susan Smith, neonaticidal defendants did not trigger such a high level of “community outrage” and were seen as more likeable (perhaps because when we saw their pictures on television or in the press, we did not characterize them as people we recognized as hardened killers) than most other criminal defendants. In subsequent years, that has changed.

In an extraordinarily insightful student note, Judith Macfarlane has explained why testimony in neonaticide cases is subversive, “because it questions society’s existing morals by countering conventional myths and misconceptions of human nature.” This insight must be considered carefully and thoughtfully if we are ever to make any progress in reforming this area of the law.

In short, we have seen a major change in our construction of neonaticide cases. Infanticide cases had, until relatively recently, been statistically over-represented in terms of the numbers of insanity defenses pled. By way of example, one study of infanticide cases revealed that one-third of the cohort studied involved successful insanity defense pleas, while that number is

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214. See supra notes 172-78 and accompanying text.
218. Macfarlane, supra note 20, at 214.
219. Id. (quoting Susan Murphy, Assisting the Jury in Understanding Victimization: Expert Psychological Testimony on Battered Woman Syndrome and Rape Trauma Syndrome, 26 COLUM. J. L. & SOC. PROBS. 277, 281 (1992)).
220. See Katkin, supra note 99, at 279.
221. Id.
a fraction of one percent when all felony cases are considered.\textsuperscript{222} This changed dramatically following the case of Susan Smith. The schema that we had earlier created—the forlorn, almost pathetic young woman who commits a crime so inexplicable that it must have been the product of her mental illness\textsuperscript{223}—was eradicated and replaced by a picture of, again in the words of Linda Chavez, "monster women."\textsuperscript{224} In each case, jurors demonstrated their sanism,\textsuperscript{225} by using a fatally-flawed faux OCS.\textsuperscript{226} Authentic and reflective common sense has become irrelevant to the disposition of neonaticide cases.

\section*{PART V. CONCLUSION}

While mental disability law jurisprudence and insanity defense jurisprudence are incoherent, neonaticide jurisprudence is especially incoherent. We take refuge in a sanism-drenched, false and distorted OCS, and we use this to inherently rationalize self-contradictory and pretextual social policies and legal decisions. We do this blindly and with little consideration for the implications of what we do.

Several commentators have offered attractive, thoughtful suggestions as to how this problem might be, optimally, remediated.\textsuperscript{227} Jennie Lusk, for example, has made these recommendations: to "further investigate the medical origins of neonaticide," to "encourage

\begin{itemize}
\item 222. See Perlin, Jurisprudence, supra note 5, at 108.
\item 223. I use this phrase ("product of her mental illness") consciously and carefully. This, of course, was the insanity test made famous in Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), overruled by, United States v. Brawner, 471 F.2d 969, 981 (D.C. Cir. 1972). See Perlin, Jurisprudence, supra note 5, at 86-89 (explaining how Durham was the "first modern break from the M'Naghten approach" to the insanity defense, and discussing the ensuing criticism by judges and some commentators). I believe, to some extent, that jurors in pre-Susan Smith infanticide cases were intuitively using a Durham-like formula in these cases.
\item 224. Mothers Who Kill, supra note 8, at 168.
\item 225. For a specific consideration of this phenomenon in the death penalty context, see Michael L. Perlin, The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of "Mitigating" Mental Disability Evidence, 8 Notre Dame J. L. Ethics & Pub. Pol'y 239 (1994).
\item 226. See e.g., Perlin, Borderline, supra note 4, at 1425; Perlin, supra note 49, at 43.
\item 227. Susan Hickman and Donald Levine argue that the "taboo" on discussing and thinking about neonaticidal behavior is "lifting" for three reasons: the proliferation of support groups, academic conferences, and expanded media coverage. See Susan Hickman & Donald Levine, Postpartum Disorders and the Law, in Postpartum Psychiatric Illness: A Picture Puzzle, supra note 99, at 282, 294-95. See also id. at 285 ("With the new and open attention directed toward postpartum psychosis illness, it is likely that the incidence of the disasters of infanticide and suicide, and the incidence of erratic case dispositions, will decrease markedly"). I hope the coming years offer some data to support these authors' optimism.
\end{itemize}
neonaticidal mothers to share their birth, dating, and labor experiences in sex education programs,” to “use social science studies to aid in identifying a population at risk for committing neonaticide,” to “consider the societal implications of our impulse to shun neonaticidal mother[s],” and to “reform crime policy for neonaticidal mothers.”

On the latter point she urges three specific reforms: the creation of a “nenonaticide statute applicable to juveniles,” the requirement of “proofs of neonaticidal circumstances similar to those provided by common law for the 'benefit of linen' defense” (“[i]n the 17th century, mothers were less likely to be prosecuted after an otherwise suspicious infant death if they had prepared for the birth, (the common law defense known as 'benefit of linen’)”), and the continuation of requiring “stringent proof both of intent and actus reus in all murders.”

Finally, Lita Schwartz and Nancy Isser have considered neonicide from the perspective of therapeutic jurisprudence (TJ). They conclude that TJ should lead trial courts to consider

228. Lusk, supra note 19, at 126-28.
229. Id. at 127-28.
230. Id. at 128.
231. Id. at 110.
232. Id. at 128. Lusk also asks a set of important psychological and behavioral questions:

Comparing the psychological evaluations of a larger group of neonaticidal mothers might help in identifying a profile: are they, as some studies suggest, markedly passive? Attached to their fathers or in fear of losing attachment with their mothers? Do many of them maintain a relationship of any duration with the father of the child, has the father disappeared long before the birth, and if so, does his absence contribute to the death of the child? How do their psychological scores of neonaticidal mothers compare with each other? What happens in the years after a neonaticide? How do neonaticidal mothers mature? Do they have psychological crises or depression when next they become pregnant? Do they appear pregnant, experience menstruation during pregnancy? Is the next pregnancy more normal?

Id. at 127.

233. Therapeutic jurisprudence presents a new model by which we can assess the ultimate impact of case law and legislation that affects mentally disabled individuals, studying the role of the law as a therapeutic agent, recognizing that substantive rules, legal procedures and lawyers’ roles may have either therapeutic or anti-therapeutic consequences, and questioning whether such rules, procedures, and roles can or should be reshaped so as to enhance their therapeutic potential, while not subordinating due process principles.

Perlin, supra note 26, at 228. See generally THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (David B. Wexler ed. 1990); ESSAYS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds. 1991); LAW IN A THERAPEUTIC KEY: RECENT DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds. 1996); THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW (Bruce J. Winick ed. 1997).
"alternatives to imprisonment," and legislators "to enact laws that would encourage the judiciary to examine mitigating circumstances and to exercise thoughtful judgment." 234

I applaud these recommendations, and largely concur with them. But, my sense is that we are as a society still far from being ready to make these changes. We remain, tragically, the prisoner of cultural, behavioral and social myths and stereotypes that have the ultimate effect of blunting any efforts at crafting a coherent and thoughtful jurisprudence in this area of the law. 235 There is little evidence that we should be optimistic about spontaneous social or political change in this area, especially after the Andrea Yates trial.

Recall that when I explained the derivation of my title, I quoted the rock critic Tim Riley, who argued that Dylan's song, *Just Like a Woman*, "straddles an almost inconceivably thin line between compassion and scorn, forgiveness and retribution." 236 Think again of the lyric that I used—"she breaks just like a little girl" —in the context of this paper, consider the "fit," and then think of the bridge to the song:

And your long-time curse hurts
But what's worse
Is this pain in here
I can't stay in here
Ain't it clear ... 237

I don't think Bob was thinking of neonaticide cases when he wrote this song thirty-seven years ago. But it's there: the curse, the pain, the claustrophobic desperation. Maybe—just maybe—we can make some modest progress in, again using Riley's words, changing "scorn" and "retribution" to "compassion" and "forgiveness." 238

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234. Schwartz & Isser, supra note 77, at 715. Here they draw on the work of Christopher Slobogin and Mark Fondacaro, see Christopher Slobogin & Mark Fondacaro, *Rethinking Deprivations or Liberty: Possible Contributions from Therapeutic and Ecological Jurisprudence*, 18 BEHAV. SCI. & L. 499 (2000), on the models for justification of imprisonment as a "starting point for legislators and judges alike." Schwartz & Isser, supra note 77, at 715.

235. See Perlin, OCS, supra note 9, at 4-5 (insanity defense is a prisoner of myths about the connection between mental illness, crime, and punishment).

236. RILEY, supra note 38, at 139.

237. DYLAN, supra note 34, at 231.

238. RILEY, supra note 38, at 139.