Neonaticide and the Misuse of the Insanity Defense

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On December 17, 1990, around 6 a.m., 20-year-old Stephanie Wernick was in her dormitory bathroom. Jeannette, a girl on Wernick's dorm floor, entered the bathroom and Wernick asked her for a tampon. Ten minutes later Jeannette returned to the bathroom and Wernick told Jeannette she was having a heavy period and asked her for a sanitary napkin. About twenty minutes later, Jeannette and her friend Laura were in the hallway outside the bathroom when they heard what they thought was a baby's cry coming from inside the bathroom. The girls rushed into the bathroom and underneath the stall door, saw a pool of blood at Wernick's feet. In a calm voice, Wernick told the girls, "I'm fine, I'm fine. Everything is okay."

Concerned, the girls ran to Wernick's room and woke her roommate, Jody, and explained what they had seen. Jody went to the bathroom to check on Wernick. Wernick told Jody that she was fine and just was having a heavy period. Jody returned to the bedroom.

A maid then entered the bathroom, saw the blood, and asked Wernick if she was alright. Wernick gave the same response—she was okay, she just was having a heavy period. Jody returned to the bathroom with a towel, soap, and a sanitary napkin. Wernick told Jody she was going to take a shower and asked her to set the items by the sink. As Jody started to leave the bathroom, Wernick said, "Oh, can you throw out my clothes? They're all bloody. They're in that white plastic bag on the floor outside." Jody took the bag, which she later recalled felt heavy, down the hall to the garbage room.

Jody and Wernick both returned to their room and went back to sleep. A little while later, another custodian found the garbage bag Jody had thrown out and discovered a dead baby boy in the bag. The custodian called the paramedics; however, they were not able to revive the baby. While trying to administer CPR, the paramedics found seven wads of toilet paper lodged in the baby's throat. The police questioned Wernick about the murder and she denied any knowledge of the baby. As Wernick was being brought to the hospital that morning, however, she confessed to giving birth to the little boy.

NEONATICIDE

Infanticide is the act of a parent killing her child. Neonaticide is the term used to describe the act of a parent killing her baby within twenty-four hours of giving birth to the baby, whereas filicide refers to a parent killing her child after the first twenty-four hours. Experts distinguish between neonaticide and filicide because the nature and circumstances of the crimes, the mental states of the mothers, and the motivations for the killings vary markedly between the two time frames. The focus of this Note is specifically on neonaticide.

Number of Neonaticides Committed

Estimates vary, but mothers commit between 150 and 300 neonaticides each year in the United States. These figures, however, do not include the number of undiscovered neonaticides. Neonaticide cases could go undiscovered either because the death is inaccurately determined to be accidental or because the mother is able to conceal completely the birth and killing of the baby.

The number of neonaticides committed each year has increased steadily. Regardless of the exact number of neonaticides committed each year, the coverage these crimes receive in the media reflects society's varied reactions to such crimes. Reactions range from shock, to anger, to sympathy for the mothers. This Note, through an examination of the insanity defense, explores possible reasons for these killings.

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2. See Phillip J. Resnick, Murder of the Newborn: A Psychiatric Review of Neonaticide, 126 AM. J. PSYCHIATRY 1414, 1415 (1970). Infanticide can be committed by either parent, however, the emphasis of this Note is on killings committed by the mother.
3. See id. at 1414.
5. See Michael Weissenstein, Are Killings of Newborns on Rise? Experts Divided on Touchy Topic, CONTRA COSTA TIMES, Nov. 30, 1997, at A13. This finding is disputed by some. For example, the Department of Justice has found that the number of neonaticides is currently decreasing. See id.
Who Commits Neonaticide

Only a few studies have been conducted on neonaticide, and usually only as a smaller subgroup of a study on infanticides. These studies compiled some of the general characteristics of the mothers. The mothers are typically under twenty-five, single, and free from any form of psychiatric illness.

The leading study on neonaticide, published in 1970, was conducted by Phillip J. Resnick. Resnick distinguished neonaticides from all other forms of infanticides based on the characteristics and motivations of the murdering mothers.

Another study, conducted by P.T. d'Orban, examined eleven neonaticide cases and compared those cases to a larger group of infanticide cases. D'Orban found that all of the neonaticide mothers were single, the neonaticide mothers were the youngest group, with a mean age of twenty-one, and only one of ten neonaticide mothers had previously suffered from a psychiatric illness. That same study found that "neonaticides scored lowest on indices of family, social and psychiatric disturbance."

The characteristics of neonaticide mothers differ greatly from the filicide mothers who kill their children after the first twenty-four hours. Resnick found that in contrast to the neonaticide mothers, the majority of filicide mothers were over twenty-five, married, psychotic, and suffering from serious depression.


7. See d'Orban, supra note 6, at 570 (summarizing the findings of a study conducted of infanticide mothers); Resnick, supra note 2, at 1414 (analyzing neonaticide mothers as distinct from filicide mothers); Rachel Simon, Fear of Shame Carries Far Too High a Price in the Grossberg Case, PHILADELPHIA INQUIRER, July 24, 1998, at A29 (describing the case of Amy Grossberg, a teenage mother who killed her baby with the help of her boyfriend).

8. See Resnick, supra note 2, at 1414.

9. See id. at 1415. Resnick found that 89% of the neonaticide mothers were under twenty-five, 81% were single, 17% were psychotic, and only 8% suffered from serious depression. See id.

10. See d'Orban, supra note 6, at 565.
11. See id. at 570.
12. Id.
13. See Resnick, supra note 2, at 1414. Resnick found that only 23% of the filicide mothers were twenty-five or younger, only 12% were single, 66% were psychotic, and 71% were suffering from serious depression. See id.
Manner of Death

The neonaticide deaths are generally violent, resulting from some aggressive act by the mother, rather than by passive neglect or abandonment. The most common methods of neonaticide, after suffocation, are "strangulation, head trauma, drowning, exposure, and stabbing." One study found that in five of the seven cases studied, death resulted from drowning or exposure. D'Orban found that in all the neonaticide cases studied, the mothers made some attempt to conceal the death.

Motivation

Studies indicate the main reason neonaticide mothers kill their babies is not because the mothers are psychotic, but simply because the children are unwanted and the mother wants to avoid the shame of giving birth to her child. Neonaticide is not a new crime, but in the past, particularly in lesser developed countries, the motivation was often economic. Today, however, poverty does not appear to be a major factor. Rather, shame and desperation appear to be the main motivations for the killings.

Two types of neonaticide mothers have been identified: (1) immature mothers, and (2) strong-minded mothers. The most common type "consists of sexually and emotionally immature women, under strong social or parental pressure against an illegitimate child, who make no premeditated plans to kill the infant but panic following birth." The second, less common, profile

14. See d'Orban, supra note 6, at 565. Further, Resnick found that the "need to stifle the baby's first cry makes suffocation the method of choice for mothers attempting to avoid detection." Resnick, supra note 2, at 1415.
15. Resnick, supra note 2, at 1415.
16. See Saunders, supra note 6, at 368 (study of seven neonaticides committed in Iowa during a 14-month period).
17. See d'Orban, supra note 6, at 566.
18. See d'Orban, supra note 6, at 570; Logan, supra note 6, at 248; Mendlowicz et al., supra note 6, at 217; Resnick, supra note 2, at 1414; Faye Bowers, Behind the Tragedy of Discarded Babies, CHRISTIAN SCI. MONITOR, June 18, 1997, at 27; Jonathan Gaw, Tragic Tale of Killing of a Newborn Infant Hearing, L.A. TIMES, Sept. 28, 1992, at B1; Simon, supra note 7, at A29; Michael Weissenstein, When Babies Die Tragically, FORT WORTH STAR TELEGRAM, Nov. 17, 1997, at B1; Que, supra note 4, at 15A.
19. See Bowers, supra note 18, at 37.
20. See id.
21. See id.
22. Green & Manohar, supra note 6, at 125 (describing the characteristics of neonaticide mothers).
of neonaticide mothers is of "strong-minded women who plan the
death of the baby before it is born, with little moral concern for
their actions."\(^{23}\)

D'Orban found that "neonaticide is committed predominantly
by young women of immature personality who do not suffer from
psychiatric illness; they kill their newborn children for social
reasons, usually in order to avoid the stigma of illegitimate child-
birth."\(^{24}\) Another study which examined neonaticide cases in Brazil
found that in almost all of the cases, the victims were illegitimate
children.\(^{25}\) That study also found that shame seems to be a primary
factor, motivating women to conceal their pregnancies and kill their
newborns.\(^{26}\)

Mothers who kill their newborns generally are trying to protect
their own interests, "which range from avoiding the stigma of
having a child out of wedlock or from an extramarital affair to
economic reasons."\(^{27}\) Mothers who kill their older children are
mostly psychotic, but most neonaticide mothers kill their babies
simply because the child is not wanted.\(^{28}\) More often, married
neonaticide mothers kill their newborns to avoid detection of
extramarital paternity,\(^{29}\) whereas unmarried mothers are generally
first-time mothers attempting to avoid the stigma of having an
illegitimate child.\(^{30}\) These first-time mothers "often deny that they
are pregnant or assume that the child will be stillborn."\(^{31}\) In many
cases, the mother makes no advance preparation for the care or
killing of the baby, but "[w]hen reality is thrust upon [her] by the
infant's first cry, [she] respond[s] by permanently silencing the
intruder."\(^{32}\) From the studies of neonaticide mothers, it appears
that many of the neonaticide mothers are young, single, first-time
mothers who feel they cannot tell their parents about their

\(^{23}\) Id.
\(^{24}\) D'Orban, supra note 6, at 570.
\(^{25}\) See Mendlewicz et al., supra note 6, at 216 (reporting that in fifty-one of the fifty-
three cases, the victims were illegitimate children).
\(^{26}\) See id. ("Shame associated with illegitimacy may play an important role in forcing
women to try to conceal their pregnancies even at the cost of killing the newborn child.").
\(^{27}\) Gaw, supra note 18 (quoting Resnick).
\(^{28}\) See Weissenstein, supra note 18; see also Resnick, supra note 2, at 1414-15 (finding
that when comparing neonaticides with filicides the "unwanted child" motivation constituted
83% of neonaticides, but only 11% of filicides).
\(^{29}\) See Resnick, supra note 2, at 1415.
\(^{30}\) See id. at 1416.
\(^{31}\) Id.
\(^{32}\) Id.
pregnancies and who kill their babies rather than face the responsibility of revealing the birth and caring for the child.

History of Neonaticide

Neonaticide is not new. "Among non-Christian peoples (with the exception of the Jews) infanticide has from time immemorial been the accepted procedure for disposing not only of deformed or sickly infants, but of all such newborns as might strain the resources of the individual family or the larger community." Times have changed, however. Unmarried mothers are no longer chased out of town upon revealing their pregnancies. Today, women have options available to them at all stages of the pregnancy: contraception prior to conception; abortion following conception; and adoption or other support services following the birth. With all of these options available, why are women today still murdering their newborns? Certainly unwanted births still occur and it will always be difficult for an unmarried, pregnant teenager to tell her parents she is pregnant and face the stigma of an illegitimate birth. Are these factors enough to cause these women to commit murder? Must these women be insane to commit such a crime?

This Note examines how the insanity defense is being misused as a means of giving a lesser, or no, sentence to neonaticide mothers. This misuse of the insanity defense harms the criminal justice system by allowing sane, guilty defendants to go free. In

33. See Simon, supra note 7.
35. Id. at 356. As for discussing the disparate treatment of married and unmarried neonaticide mothers:

[T]he authorities contented themselves with the imposition of penance in the case of married women, who were condemned to live for at least a year on bread and water. The unwed mothers and the presumed witches, however, were to bear the brunt as examples and admonitions. A girl known to have committed infanticide in any form might be absolved by pleading insanity, but was otherwise condemned to suffer the death penalty, usually in the most diabolical imaginable manner. Medieval sources tell of women being tied in a sack, along with a dog, a cock, or some other ungenial companion and thrown into the river for a supreme struggle for life.

Id.
addition, this misuse clouds the definition of insanity and generates a lack of confidence by society in the criminal justice system. The insanity defense serves a valid purpose. There are criminal defendants who are truly insane and should not be held criminally responsible for their actions. If the misuse of the insanity defense continues, however, these defendants may not get the help they need.

Moreover, if these murdering mothers are sane, they should be held responsible for their actions. Arguably, these mothers do not pose a general threat to society; nevertheless, other goals of the criminal justice system will be satisfied by punishing them. These goals include retribution for the killing, vindication of the dead baby's rights, and deterrence of others. Even if society believes these mothers deserve lesser sentences, this end should be achieved through legislation, not by perverting the criminal justice system through misuse of the insanity defense.

INSANITY DEFENSE GENERALLY

Introduction

Every crime has two elements: (1) the actual criminal act, the *actus reus*, and (2) the intent to commit the criminal act, the *mens rea*. American society believes that a person is not guilty of a crime unless her intention is also guilty. Both elements, the act and the intent, must be present for a defendant to be found guilty of a crime. The insanity defense serves to negate the second element—*mens rea*.

The criminal justice system attempts to hold individuals accountable for their criminal actions. American society requires, however, that an individual be able to tell right from wrong before holding her responsible for those actions. In addition to this ability to tell right from wrong, society also considers other factors when determining whether someone should be held legally responsible. Some of these factors, which also could be described as the goals of the criminal justice system, include affixing moral blame, seeking justice, protecting innocent victims, and deterring not only

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37. See id.
38. See id.
39. See id.
40. See KIRWIN, supra note 1, at 7.
41. See id.
future acts of the defendant, but also of other potential defendants.42

Insanity in this context is a legal, rather than a psychiatric, term.43 A criminal defendant is presumed to be sane.44 Insanity, therefore, is an affirmative defense and must be proven by the defendant.45 If a defendant is able to prove she is insane, then one of two rulings is made. Depending on the jurisdiction, the defendant is declared either “not guilty on the grounds of insanity,” or “guilty, but insane.”46 If the defendant is declared “not guilty on the grounds of insanity,” then she will be examined to determine whether she is still insane, and, if so, she will be treated at a mental institution and may be released as soon as she is cured.47 If the defendant is found to be “guilty, but insane,” then she will be treated at a mental institution until she is cured.48 If the time it takes for her to be cured, however, is less than that of the total sentence for the crime, then the conviction stands and the defendant must serve the remaining time.49

Approximately one quarter of the states have a “guilty but mentally ill” verdict (GBMI).50 This verdict is described as an intermediate verdict that is available when the defendant’s mental illness does not satisfy the test for insanity, but the state recognizes that the defendant is in need of mental treatment in addition to incarceration.51

The question of whether a person is good or evil is different from whether she is accountable for her actions.52 The system looks at the individual’s actions constituting the particular crime in question, determines whether that person’s actions were intentional, and holds her accountable for those intentional acts.53 Absent a mental illness, “[a] person’s upbringing and genetic inheritance are immaterial to the question of whether, in a given situation, she intended to act.”54

43. See Kirwin, supra note 1, at 19.
44. See Slovenko, supra note 36, at 134.
45. See id.
47. See id.; Slovenko, supra note 36, at 181.
48. See Slovenko, supra note 36, at 181.
49. See McQuade, supra note 46, at 684.
50. See Slovenko, supra note 36, at 169.
51. See id. at 171.
52. See Elliot, supra note 42, at 68.
53. See id. at 70.
54. Id. at 69.
For example, a man may have grown up in an abusive environment and witnessed his father beat his mother on numerous occasions. When that boy grows up and later follows his father's example and beats his own wife, one could argue that his actions are the result of him having grown up in an abusive environment. Although his actions may have been influenced by his upbringing, he still intended to act when he beat his own wife and, therefore, should be held accountable. Another example is the case of a poor mother who steals food to feed her children. "We might want to be more forgiving toward such people, and more sympathetic toward their plight, but this does not mean that we should not hold them responsible."\textsuperscript{55}

Carl Elliot describes the "straight rule of responsibility" as follows: a "person should be held morally responsible for all and only his intentional actions."\textsuperscript{66} Mental illness, or legal insanity, is one means by which an individual can act without intent and, therefore, not be held responsible for her actions.\textsuperscript{67} "People are shaped by their education, background, experience, health, and all the influences of their lifetime. At the same time, every individual has some capacity for choice. The law espouses the concept of free will circumscribed by the insanity defense."\textsuperscript{68} The insanity defense then, is not merely a judgment about mental illness, but in essence it is "an expression of a belief that a person should or should not be held responsible for his or her actions."\textsuperscript{69}

\textit{Legal Standards}

Jurisdictions use various tests to determine whether the defendant was insane at the time of the crime and, therefore, should not be held criminally responsible for her actions. Although the tests vary in some respects, each test attempts to determine the following two issues: "(a) whether the accused had a mental disease or defect at the time of the offense, and (b) how the mental disease or defect affected [the defendant's] cognition or control."\textsuperscript{60} The two main tests currently used are the M'Naghten test and the American Law Institute (ALI) test.\textsuperscript{61}

\textsuperscript{55} Id. at 70.
\textsuperscript{56} Id. at 31.
\textsuperscript{57} See id.
\textsuperscript{58} SLOVENKO, supra note 36, at 4.
\textsuperscript{59} Id. at 13.
\textsuperscript{60} Id. at 67.
\textsuperscript{61} See MARTIN BLINDER, PSYCHIATRY IN THE EVERYDAY PRACTICE OF LAW 444 (3d ed. 1992).
M'Naghten Test

The M'Naghten test is the standard used in the majority of United States jurisdictions. The M'Naghten standard defines an individual as insane if:

at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong.

The M'Naghten rule does not question whether the defendant generally knows the difference between right and wrong, but instead asks whether the defendant knew that her specific act was wrong. In the M'Naghten case, the judge instructed the jury, "if you should think the prisoner a person capable of distinguishing right from wrong with respect to the act of which he stands charged, then he is a responsible agent."

The M'Naghten rule has been criticized because it examines cognition or intellectual understanding without considering control or emotion. For example, an individual could know that her actions are wrong, but could not be able to control them. Under the M'Naghten rule, this person would not be considered insane.

American Law Institute (ALI) Test

The test developed by the American Law Institute in 1955 is the second most common test used in the United States. The ALI test states:

“A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality

62. See id. (table of standards by state); SLOVENKO, supra note 36, at 17, 24. The test originated in England in 1843. M'Naghten was a defendant who thought he was being persecuted by the Tories and shot Edward Drummond, the Secretary to the Prime Minister, under the mistaken belief that Drummond was Sir Robert Peel, the Prime Minister. See id.
63. KIRWIN, supra note 1, at 22.
64. See SLOVENKO, supra note 36, at 20.
65. Id. at 17.
66. See id. at 20.
67. See BLINDER, supra note 61, at 444; SLOVENKO, supra note 36, at 24.
(wrongfulness) of his conduct or to conform his conduct to the requirements of the law.\textsuperscript{68}

The ALI definition specifically excludes psychopathic, also referred to as sociopathic, behavior.\textsuperscript{69} In many cases, the psychiatrist examining the defendant must determine whether the defendant is psychotic and thereby insane, or simply psychopathic and not insane. It should be noted that the defendant could be neither—she could simply be a normal person who happened to commit a very bad crime.

Psychopathy, or sociopathy, is “not a mental disease or defect, but a global attitude of selfishness that governs a person’s interactions with others.”\textsuperscript{70} This attitude “ultimately leads to exploitation and the inflicting of pain on others in order to get one’s way.”\textsuperscript{71} Psychopaths demonstrate “disregard for, and violation of, the rights of others.”\textsuperscript{72} They “are able to conform their behavior to the law, but simply choose not to.”\textsuperscript{73} Their behavior is such that some people have concluded that, in essence, psychopaths are evil people.\textsuperscript{74}

Psychopaths basically lack a conscience.\textsuperscript{75} They are “not mentally ill; they are ‘morally challenged.’ They know the difference between right and wrong; they just don’t care.”\textsuperscript{76}

Although it is certainly a mental disorder, sociopathy does not reduce culpability for a crime. The sociopath knows right from wrong, and will commit the crime because his internal “policeman” is absent—but will not if there is an “external” policeman watching. When caught—even caught red-handed—a sociopath tends to shift the blame to others, to “circumstances,” or offer rationalizations for the behavior.\textsuperscript{77}

Psychopaths should be held responsible for their crimes because, regardless of how they feel about their crime, they are aware that their actions are illegal and not condoned by the rest of society.

\textsuperscript{68} SLOVENKO, supra note 36, at 24.
\textsuperscript{69} See id. at 104.
\textsuperscript{70} KIRWIN, supra note 1, at 83.
\textsuperscript{71} Barbara Kirwin, The Coed Baby Killer, COSMOPOLITAN, Sept. 1, 1997, at 23 (discussing Kirwin’s psychological examination of Stephanie Wernick, the mother described in the introduction of this Note).
\textsuperscript{72} KIRWIN, supra note 1, at 93.
\textsuperscript{73} Id.
\textsuperscript{74} See id. at 83.
\textsuperscript{75} See RONALD MARKMAN & DOMINICK BOSCO, ALONE WITH THE DEVIL: FAMOUS CASES OF A COURTROOM PSYCHIATRIST 91 (1989).
\textsuperscript{76} KIRWIN, supra note 1, at 32.
\textsuperscript{77} MARKMAN & BOSCO, supra note 75, at 91.
This standard should apply to all individuals, psychopathic or not. Consider, for example, an individual who thinks marijuana should be legalized but knows that it is illegal. If she is caught in possession of it, she should be held accountable for her actions because she knew that society regarded her conduct as criminal.

Psychopathic behavior essentially refers to repeated criminal behavior or antisocial conduct. Therefore, repeated criminal activity is not in itself a mental defect that relinquishes one from responsibility.

A psychopathic individual must be distinguished from one who is psychotic. A psychotic individual is one who suffers from delusions and hallucinations and has experienced a break with reality so extreme that she no longer knows the nature and consequences of her actions. Because this individual no longer understands that her actions are wrong or criminal, she should not be held criminally responsible for her actions. Psychotics are insane because they suffer from a mental disease that has affected their ability to know right from wrong.

The M'Naghten and ALI tests differ in three ways. First, the ALI test uses the term “appreciate” rather than “know”; appreciation requires a deeper understanding of the wrongfulness of one's conduct. For example, a four-year-old may know not to touch a stovetop, but may not really appreciate the fact that the stove is hot and could burn her. The second difference between the two tests is that the ALI test only requires that the defendant lack the “substantial capacity” to appreciate the wrongfulness of her act, whereas the M'Naghten test requires a total lack of such capacity. Therefore, a defendant is less likely to be found insane under the M'Naghten test than under the ALI test. The final difference between the two tests is that the ALI test includes a volitional component. If the defendant's mental illness causes him to lack the “substantial capacity . . . to conform his conduct to the requirements of the law,” then he could be found to be insane. The M'Naghten test focuses on cognition only, that is, whether the

78. See SLOVENKO, supra note 36, at 104.
79. See id.
80. See Kirwin, supra note 1, at 23.
81. See id.
82. See id.
83. See SLOVENKO, supra note 36, at 24.
84. See id.
85. See id.
86. Id.
defendant knew her conduct was wrong.\footnote{87} The ALI test considers both cognition and control.\footnote{88}

**Diminished Capacity**

A defense allowed in approximately one third of the states is that of diminished capacity.\footnote{89} This defense lowers, but does not negate, criminal responsibility for one's actions.\footnote{90} A court could find that although the defendant was not suffering from a mental disease that rendered him insane at the time of his offense, the defendant's "emotional and psychological state constituted a sort of diminished capacity that affected his criminal intent and should be taken into consideration in terms of his sentencing."\footnote{91} The evidence of diminished capacity can also be used to negate specific intent.\footnote{92} For example, a defendant with diminished capacity could be found guilty of manslaughter, but not first degree murder, if it is determined that her mental defect rendered her incapable of premeditation, deliberation, or malice.\footnote{93}

The majority of jurisdictions permit expert testimony on the *mens rea* element of the crime, without requiring the defendant to enter an insanity plea.\footnote{94} In those instances, the evidence on the mental state of the defendant would go toward refuting the specific intent element of the crime.\footnote{95} Even in jurisdictions that do not have a specific diminished capacity defense, courts often will take the defendant's personal situation and the circumstances of the crime under consideration in determining punishment.\footnote{96} For example, a woman who hires someone to murder her battering husband should be punished for her crime, but a court may give her a lesser sentence to reflect the mitigating circumstances of her crime and the fact that she may not pose a future threat to society.\footnote{97}

\footnote{87}{ See id. at 68.}
\footnote{88}{ See id.}
\footnote{89}{ See id. at 152.}
\footnote{90}{ See ELLIOT, supra note 42, at 17.}
\footnote{91}{ KIRWIN, supra note 1, at 251.}
\footnote{92}{ See SLOVENKO, supra note 36, at 151.}
\footnote{93}{ See id. at 152.}
\footnote{94}{ See id. at 157.}
\footnote{95}{ See id. at 44.}
\footnote{96}{ See id. at 154.}
\footnote{97}{ See id.}
Heat of Passion

Another defense which can lower culpability is the heat of passion defense. 98 This defense can negate premeditation, deliberation, and malice, thereby reducing a murder charge to manslaughter. 99 The classic example of when the heat of passion defense is used is when a husband comes home to find his wife in bed with another man, enters into a jealous rage, and kills either his wife, the other man, or both. 100 Although the husband was sane and should be held responsible for his actions, society believes he is less culpable for his actions because he was justifiably overcome by such intense emotion. 101

Compulsion and Duress

In some instances, society does not hold a person responsible for her actions even though she was sane at the time she committed the crime. 102 Her actions can be said to be either justified or excused. 103 If her actions are justified, then her actions were morally acceptable. 104 An example of a justified action would be self-defense. If a person’s action is excused, then her action was morally wrong, but society has determined that the actor should not be held accountable. 105 In other words, something about her situation contributed to her making a bad choice; therefore, she should not be judged harshly. 106 Insanity, diminished capacity, and heat of passion are all examples of defenses for which the defendant’s criminal actions are excused.

Sometimes a person’s actions are excused if that person acted under compulsion or duress. If one’s actions are compelled, they are said to be involuntary. 107 In constrast, when acting under duress, there is at least some element of volition. 108 The person has made

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98. See MARKMAN & BOSCO, supra note 75, at 121.
99. See id.
100. See, e.g., Aiken v. State, 168 S.E. 34, 38 (Ga. 1933) (discussing the use of the heat of passion defense when the defendant husband shoots and kills his wife and her lover after finding them having sexual relations).
101. See MARKMAN & BOSCO, supra note 75, at 121.
102. See ELLIOT, supra note 42, at 46-50.
103. See id. at 47.
104. See id.
105. See id.
106. See id.
107. See id. at 46.
108. See id.
the choice to act wrongly as a means of avoiding some harm.\footnote{109} It is thought, however, that in some instances the person ought to face harm herself rather than commit the action resulting in the harm of another, such as death.\footnote{110} It also is thought that if the person having to make a choice under duress is responsible for getting herself into that situation, then that person should not be excused from being forced to make a wrongful decision once in that situation.\footnote{111}

**INSANITY DEFENSE IN NEONATICIDE CASES**

*Infanticide Act—England*

In England, the highest charge a mother can receive for killing her child is manslaughter.\footnote{112} In 1922, the British Infanticide Act (Infanticide Act) was passed. It created a presumption that a mother who kills her child is insane on the theory that "the balance of her mind is disturbed by reason of her not having fully recovered from the effect of giving birth to the child."\footnote{113} D'Orban found that in ninety percent of maternal filicides, the British court's verdict formally recognized that psychiatric disorder was thought to be responsible for the offense.\footnote{114} A presumption of insanity based on one's conduct alone creates a circular diagnosis problem. This presumption means that a person's actions define her mental status. Her behavior is used to diagnose her mental disorder, and the disorder is then used as an excuse for her behavior.\footnote{115} The problem arises when society allows the existence of a mental disorder to be a *per se* excuse for criminal activity. "[O]rdinarily we exonerate the mentally ill from responsibility for their actions not simply because they are mentally ill, but because of the particular way in which their disorders have affected their thinking."\footnote{116}

\footnote{109. See id.} \footnote{110. See id. at 25.} \footnote{111. See id. at 50.} \footnote{112. See Interview by Jacki Lyden with Maribeth Emerson, Dr. Margaret Spinelly, Daniel Irma, and Margaret Carson, *All Things Considered* (NPR radio broadcast, June 27, 1997) (discussing recent cases of neonaticide).} \footnote{113. Michelle Oberman, *Mothers Who Kill: Coming to Terms with Modern American Infanticide*, 34 *Am. Crim. L. Rev.* 1, 15 (1996) (quoting the British Infanticide Act of 1922 (amended 1938)).} \footnote{114. See d'Orban, supra note 6, at 560.} \footnote{115. See ELLIOT, supra note 42, at 62.} \footnote{116. Id. at 63.}
This problem often arises when the crime is considered egregious. For example, in the case of a serial killer who mutilates the bodies of her victims, society often assumes that the killer must be suffering from some sort of mental disease to have committed such horrible crimes. Society uses a given mental disorder to describe this sort of conduct, rather than determining whether the killer really was suffering from some sort of mental disease that caused her actions.

Rather than determining if an actual mental illness exists on a case-by-case basis, the British courts examine the mother’s act alone and presume that a mother who kills her child must be insane.117 The Infanticide Act also does not take into account the differences between neonaticide and filicide cases.118 Yet as indicated previously, the circumstances and motivations differ greatly between neonaticides and filicides.119

The Infanticide Act appears to be both an attempt to explain a crime that may be hard for society to understand and a means of circumventing the normal criminal justice system by providing for lesser punishment of these maternal killers. “[E]ven at the time of the Act’s passage, it was unclear whether the Act was based on an actual belief that women who kill their children were mentally ill, or whether ‘a medical model was adopted to justify moderation in the imposition of punishments.”120

The Infanticide Act does not offer much protection to newborns. One study found that in England and Wales, children less than one year old are four times as likely to become victims of homicide than either older children or the general population.121

British law also differentiates between mothers and fathers who commit infanticide. “The law appears to assume a physiological basis for diminished responsibility in this context. No such legislation exists for fathers who kill their children.”122 In England, the mothers found to have killed their newborns have a greater than fifty percent chance of not even being indicted for the killing.123 Even if the mother is indicted, she is likely to be convicted only of

117. See Mendlowicz et al., supra note 6, at 212 (explaining that the Infanticide Act, by definition, creates a presumption of insanity).
118. See id. at 211.
119. See id.; see also supra notes 3, 8-13 and accompanying text.
120. Oberman, supra note 113, at 16.
121. See Marks & Kumar, supra note 6, at 329 (describing results of study conducted of infanticide in England).
122. Id. (discussing the disparate treatment of neonaticide mothers and fathers).
123. See id.
infanticide and receive only probation. In a study of killings of children less than one year old by one of the parents, it was found that eighty-four percent of the convicted fathers received prison sentences, whereas only nineteen of the mothers did.

The data suggest that for both men and women, sentencing was a function of the sex of the perpetrator and not related to the overt violence of the offense. It appears that while men were more likely to kill their infants in a more mutilatively violent way than women, irrespective of how the child was killed, men received more severe punishments than women.

The Infanticide Act acknowledges the fact that the act of childbirth can be an extremely stressful and overwhelming experience, and it seems to conclude that the act of childbirth renders all women temporarily insane. As a result, these women are not to be held responsible for any actions committed in proximity to the birth.

The United States does not have a statute comparable to the British Infanticide Act, but the same end goal of excusing these murderers still is sought in the United States. The vehicle for achieving this goal in the United States is the insanity defense.

General Test

Regardless of which insanity standard is used, each test requires, as a threshold matter, that the defendant have a mental disease or defect. There are two steps in determining whether

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124. See id. at 334.
125. See id. at 336.
126. Id.
127. Consider the following discussion of d'Orban's study:
There is some recognition by the law in this country [England], embodied in the Infanticide Act, that motherhood places uniquely demanding strains on the capacity of some women to contain their murderous impulses. Justification for this recognition lies partly in the view that physiological changes accompanying parturition [childbirth] may place women at an increased risk of mental illness. It is true that psychoses occur more frequently in women shortly after childbirth. However, only 24 of the 89 women in D'Orban's study were classified by him as "mentally ill," and only 14 of these were psychotic. Furthermore, only 224 (8%) of the women categorized as "mentally ill" subsequently received infanticide verdicts whereas 21/65 (32%) of the other women did so. D'Orban concludes that, "contrary to medico-legal tradition, puerperal [related to childbirth] psychotic illness is a relatively rare cause of maternal filicide."

Id. at 338.
129. See SLOVENKO, supra note 36, at 52.
someone is insane and, therefore, should not be held responsible for her criminal actions. The first step requires finding out whether the person was mentally ill at the time she committed the crime.\textsuperscript{130} If the answer to that question is yes, then one must determine "how much did this person's mental disease interfere with her ability to know what she was doing, what the consequences would be, and that the actions were wrong."\textsuperscript{131} This second question may vary somewhat depending on which insanity test the jurisdiction uses, but all insanity tests require that at the time of the crime the defendant be suffering from some sort of mental disease and that the mental disease caused the person's actions.\textsuperscript{132}

A person can be suffering from a mental disease at the time of the crime, but if that disease did not somehow impair her ability to know right from wrong or control her actions, then she is not insane and must be held accountable for her actions.\textsuperscript{133} In other words, the mental illness must be causally connected to the crime.\textsuperscript{134} The mental illness or defect is relevant only if it impairs cognition or control at the time of the crime.\textsuperscript{135}

Dr. Barbara R. Kirwin provides an example of a mentally ill person to whom the insanity defense did not apply. This young man knew what he was doing when he set fire to his grandmother's house after she denied his request for money:

This young man's mental illness was chronic and well documented. No one disputed that he was psychologically impaired. Nevertheless, the M'Naghten Rule revolves around knowing right from wrong. It is improbable that his express intention was to kill his grandmother and young cousin, or severely burn his relatives and the family home. In his rage and frustration at having been denied his wishes, he could focus only on wanting to punish them and teach them a lesson. But he was capable of formulating a plan that included trapping his family and permitting his own escape. He knew what gasoline could do; he knew the danger of fire. He lied to the police and firemen at the scene, an indication that he was aware he had done something illegal. Under M'Naghten, his insanity defense failed and he was convicted of arson.\textsuperscript{136}

\begin{footnotes}
\item[130] See Kirwin, supra note 1, at 58.
\item[131] Id.
\item[132] See Slovenko, supra note 36, at 52.
\item[133] See id. at 119.
\item[134] See id.
\item[135] See id.
\item[136] Kirwin, supra note 1, at 58-59.
\end{footnotes}
Therefore, a defendant can be suffering from a mental disease and still be held criminally responsible for a given crime. If the mental disease did not cause the crime or prevent the defendant from knowing that what she was doing was wrong, then she was not insane at the time of the crime and should be held responsible for that crime.

**Categorizing Mental Illness**

In federal criminal cases, the Federal Rules of Evidence govern the introduction of expert testimony relating to a defendant’s mental condition at the time of the crime. The Federal Rules do not require the expert to specify or categorize the mental illness from which the defendant was suffering, nor do they allow the expert to testify as to the ultimate sanity issue. For example, the expert can testify as to the symptoms of a given mental disease and then testify which symptoms the defendant demonstrated, but the expert cannot make the conclusion that the defendant was insane at the time of the crime and therefore should not be held responsible for the crime. That final task is for the fact finder.

One reason that the expert cannot testify as to the ultimate insanity issue is that the expert cannot really know the defendant’s state of mind at the time of the crime. Regardless of which insanity standard is applied, the expert’s “testimony must describe the offender’s state of mind at the time of the commission of the offense. It is necessary to project back from the time of the examination to the offense.” This is difficult to do. For example, in neonaticide cases, the mental examination is made after the mother is charged with the crime. It would be difficult for the expert to determine with certainty whether the mother’s stress level and heightened mental state at the time of the examination are the result of the birth or from the killing and being charged with the killing. A post-crime examination will not conclusively determine whether the mental condition caused the act, or whether the mental condition was caused by the act, particularly when there is no evidence of mental defect prior to the commission of the crime.

Another problem with categorizing mental diseases and attempting to diagnose the defendant after the crime is that the diagnosis “leads to a false assumption that disorders of a common

137. See Fed. R. Evid. 702; Slovenko, supra note 36, at 116.
139. See id. at 137-38; Fed. R. Evid. 704.
140. Slovenko, supra note 36, at 136.
name show an absolute sameness, or that the disorders have a distinct symptomatology.\textsuperscript{141} For example, not all schizophrenics suffer the same symptoms to the same degree. Moreover, the degree to which a defendant was suffering from a particular mental disease can have a bearing on culpability. A defendant could have been suffering from a mental disease, but still have appreciated the criminality of her actions.

Experts do, however, try to fit the defendant into a particular diagnosis in an attempt to help the fact finder understand the defendant's state of mind at the time of the crime. Nevertheless, regardless of how the psychiatric community would classify the defendant, "what is and what is not mental illness in the test of criminal responsibility depends on our sense of both justice and protection of society."\textsuperscript{142} Society's views change over time. "The way society labels a particular cluster of mental characteristics corresponds to how it feels about the individual, and society is constantly changing its mind to accommodate competing policy interests."\textsuperscript{143}

\textit{Diagnostic and Statistical Manual of Mental Diseases}

The \textit{Diagnostic and Statistical Manual of Mental Diseases (DSM)} is published by the American Psychiatric Association and is the standard manual used by psychiatrists when diagnosing patients.\textsuperscript{144} When psychiatrists testify as to a defendant's mental condition, their testimony is usually presented using terms found in the DSM. However, the "DSM was prepared for clinical, not legal purposes . . . [The] purposes of diagnosis for the clinician are treatment and research, not accountability."\textsuperscript{145} Therefore, not every condition listed as a diagnosis in the DSM constitutes a mental illness or defect for the purpose of the insanity defense.\textsuperscript{146} For example, nicotine dependence is listed as a diagnosis in the DSM,\textsuperscript{147} but the justice system is not likely to excuse a defendant from responsibility for a crime because she is addicted to cigarettes. The DSM even contains its own disclaimer: "Even when diminished

\begin{footnotesize}
\textsuperscript{141} Id. at 65.
\textsuperscript{142} Id. at 117.
\textsuperscript{143} Id. at 131.
\textsuperscript{144} See id. at 55. The DSM has been through various revisions. The DSM-I was published in 1952, DSM-II in 1968, DSM-III in 1980, DSM-III-R in 1987, and the latest version, DSM-IV, was published in 1994. See id.
\textsuperscript{145} Id. at 58.
\textsuperscript{146} See id. at 55.
\textsuperscript{147} See id.
\end{footnotesize}
control over one's behavior is a feature of the disorder, having the
diagnosis in itself does not demonstrate that a particular individual
is (or was) unable to control his or her behavior at a particular
time." Therefore, the DSM provides a useful, "common basis for
assessing accountability, but the law is not limited to it in defining
mental illness." 149

Temporary Insanity

Before discussing what constitutes a mental illness that could
cause someone to be insane, it is important to note that there is no
such thing as temporary insanity. 150 Although media and defense
attorneys would like society to believe otherwise, "people don't 'just
snap.'" 151 If the criminal is truly insane, the symptoms of mental
illness are there long before the criminal act. 152 "[P]sychoic
illnesses are progressive diseases of gradual deterioration in
functioning," 153 and "nearly every homicide committed by an insane
individual has been preceded by some signs of irrationality." 154 If
a person is truly suffering from a mental disease, a requirement of
every insanity standard, the criminal act will not represent the
onset of the disease—it is instead a manifestation of the disease.

Mental disease should not be confused with heat of passion.
The two defenses describe two different mental states. When
someone is suffering from a mental disease and that disease causes
her actions, that person either does not know the difference
between right and wrong or was unable to control her actions. 155
This is very different from the heat of passion experienced when
finding your spouse in bed with another person and becoming so
enraged that you kill the other person. Society may be willing to
excuse both kinds of conduct, but the defendants in these two
situations possess different mental states. 156

Dr. Ronald Markman describes the case of a battered wife with
a very passive personality who murdered her husband in his sleep
and then dialed 911:

148. Id. at 59.
149. Id. at 59.
150. See Kirwin, supra note 1, at 93, 192.
151. Id. at 25.
152. See id. at 122.
153. Id.
154. Id. at 24.
155. See supra text accompanying notes 40-59 (discussing the rationale behind criminal
defenses based on mental incapacity).
156. See Kirwin, supra note 1, at 24.
[S]he [was not] legally insane at the time she shot him. There simply was not enough mental impairment to blind her to how wrong the act was. In other words, she may have been at wits' end and had not really known what to do, given her personality, but she still knew it was wrong to kill her husband. She wasn't out of control. After all, she was able to properly inform others of the act immediately thereafter.

Laura may have been experiencing extreme fear of her husband, and killing him was certainly inconsistent with her personality, but there simply was no evidence of a legally significant mental breakdown. She was able to form the intent to kill and to harbor malice. In short, though I felt tremendous sympathy for her and her plight, I felt she was mentally capable of committing second-degree murder.\textsuperscript{157}

A person who is mentally ill is not capable of making a choice. Because she cannot distinguish right from wrong, there really is no choice for her to make. In contrast, a sane person, faced with the same choices, is capable of choosing and just may make a poor choice to commit the crime. Society may sympathize with some defendants, but because they were capable of distinguishing right from wrong, they should be held accountable for their choice.

\textbf{FROM WHAT MENTAL ILLNESS DO THESE MURDERING MOMS SUFFER?}

Again, there are two basic elements that must be proven for an insanity defense to be successful: (1) the defendant must have been suffering from a mental illness at the time she committed the crime, and (2) that mental illness must have caused the defendant to not know or appreciate that what she was doing was wrong or rendered her unable to control her actions.\textsuperscript{158}

Once the baby's body is found, proving that the mother was responsible for killing the baby is generally not difficult because the method of killing usually makes it self-evident that the killing occurred at the hands of the mother.\textsuperscript{159} Assuming that the prosecution can prove that the death was intentional and not accidental, the prosecution's case is often very strong. In many cases, the

\textsuperscript{157}. \textit{Markman \& Bosco}, supra note 75, at 153.
\textsuperscript{158}. \textit{See supra} notes 60-88 and accompanying text (describing the test for insanity under the M'Naghten and ALI standards).
\textsuperscript{159}. \textit{See supra} notes 14-17 and accompanying text (describing the manner of death).
defendant's only defense will be to plead insanity. In order to prove that a mother was insane when she killed her baby, the defense must prove that the mother was actually suffering from some mental illness. From what mental illness, if any, is it that these mothers purportedly are suffering that causes them to murder their children?

_Dissociation and Denial_

There has been much dispute about what mental illness, if any, affects these mothers. Some experts claim these mothers enter a state of denial in which they claim to not even know that they are pregnant, and as a result they become psychotic during the birth. Dr. Margaret Spinelly stated that the mothers “don’t consciously hide it, they dissociate from it.” The problem with this theory is that many of the defendants do not just deny the pregnancy, but they take actual steps to conceal the pregnancy from their families by wearing baggy clothing and giving birth in secret. Spinelly describes the mothers’ actions as a “dissociative experience,” in which the mothers describe watching themselves kill the babies and place them in plastic bags. One study conducted of neonaticide defendants found that all nine of the mothers examined “tested positively for dissociative disorders in which people see themselves doing actions in a dreamlike state.” The same study, however, also found that all nine of the subjects had no prior history of social pathology.

Dissociation is a term that is often used in an insanity defense when the defendant describes an “out-of-body-like” experience in which she “sees herself committing the crime.” Dissociation is described as:

states where normal connections between things are absent or loosened . . . . [D]isorders in which a person does not perceive the self as an integrated whole, present experiences and past memories are not linked together . . . or the person does not feel related to what is going on around him . . . . [These feelings are]

160. See supra text accompanying note 45.
161. See Que, supra note 4 (statement of Dr. Neal Kaye).
163. See Que, supra note 4 (statement of Dr. Margaret Spinelly).
164. Lyden, supra note 112 (statement of Dr. Margaret Spinelly).
165. See id.
often stress related and may come on suddenly or gradually and may be transient or long lasting (chronic).\textsuperscript{166}

The essential feature of dissociation is a "disturbance or alteration in the normally integrative functions of identity, memory, or consciousness."\textsuperscript{167} If the dissociation affects one's identity function, the resulting effect may manifest itself as multiple personality disorder.\textsuperscript{168} If the dissociation affects one's perception of reality, it may be classified as depersonalization disorder.\textsuperscript{169} Finally, if the memory function is affected, it may be termed as psychogenic amnesia or psychogenic fugue.\textsuperscript{170}

The proximate cause of dissociation "is almost always an encounter with an overwhelming emotional situation or pain beyond the coping mechanism of the conscious self. It may occur in someone with no previous history of mental illness, and is usually, a single, isolated episode."\textsuperscript{171}

The person who commits an offense—and it is often a serious one—while in a dissociative state, later neither remembers nor believes what he has done, and in any event truly wishes he had not done it. This wish is not simply post-facto remorse or a self-serving consequence of his having been apprehended, but springs from deep within. In other words, the criminal act does not really fit into the accused's makeup, and is not performed out of his conscious desires.

A dissociative state may also occur following a premeditated crime which had unexpectedly dire consequences, such as the candy-store robbery that results in the death of the proprietor. Such a dissociation merely disconnects memory traces from consciousness, and rarely alters behavior: the offender may bury the murder weapon while disclaiming, even to himself, his ever having used it.

A man who commits homicide during a dissociative state is probably not capable of either premeditation, formation of intent, or malice. His liability would increase, however, with

\textsuperscript{166} MCQUADE, supra note 46, at 136 (Supp. 1996).
\textsuperscript{167} SLOVENKO, supra note 36, at 73.
\textsuperscript{168} See id.
\textsuperscript{169} See id.
\textsuperscript{170} See id.
\textsuperscript{171} BLINDER, supra note 61, at 465.
evidence of some penetration into conscious awareness and control (as evinced by incriminating statements and behavior before and after the act), or with evidence that the dissociative state was more a reaction to the offense than it was a state of mind bringing it about. In short, a psychiatric defense is eminently appropriate if a man kills because he is deranged, but not if he is deranged because he has killed.172

Therefore, it is possible that "in a dissociative state, an individual may act with little or no conscious awareness or intent."173 Nevertheless, the question becomes whether the defendant was acting in a dissociative state at the time she committed the crime or whether the dissociative state was a reaction to her crime. Also, even if the defendant were acting in a dissociative state, does that mean she had no conscious awareness or intent, or is it possible there was "some penetration into conscious awareness and control"174—enough to hold her responsible? Because the defendant is not examined until after the crime, it is difficult for the examining psychiatrist to determine whether the defendant was acting in a dissociative state at the time of the crime and whether that state caused her to commit the crime.

Another psychiatrist, Dr. Randi Zoot, describes what he calls "neonaticide dissociative disorder."175 This "disorder perpetuates a state of denial so strong that the mother does not realize she is pregnant or has gone into labor and can accidentally kill the child."176 An examination of the circumstances of these killings, however, casts doubt on whether they can be characterized as accidental.177 How does strangling a baby with one's bare hands or

172. Id. at 466-67.
173. SLOVENKO, supra note 36, at 38.
174. BLINDER, supra note 61, at 466.
175. T. Shawn Taylor, Woman with Disorder Gets Probation in Infant's Death, CHI. TRIB., Apr. 7, 1998, at A1 (discussing case of a 21-year-old woman who killed her newborn daughter and claimed she was suffering from "neonaticide dissociative disorder").
176. Id.
177. For instance, Marianne Biancuzzo drowned her newborn daughter in the toilet, wrapped the baby's head in a plastic bag and then wrapped the baby and the placenta in a flannel shirt and shoved everything into a three pound coffee can which she then hid under the bathroom sink. See Kristen Cook, Teens Who Kill Babes at Birth Not Unusual, ARIZ. DAILY STAR, Nov. 24, 1997, at B1.
Linda Chu gave birth to her baby girl in her dorm room, strangled the baby and then shoved her daughter's body into a trash chute. See Cook, supra.
Melissa Drexler delivered her baby boy in a high school bathroom during her prom. Drexler hid her son's body in a trash can and then returned to the dance floor. A maintenance worker spotted blood on the floor of the bathroom. When Drexler was first
with the umbilical cord, stuffing toilet paper down the baby's throat, or stuffing a baby in a garbage bag and throwing the baby in a dumpster happen by accident?

In many of the neonaticide cases, when the insanity defense is used, the defense often claims that the defendant was in denial about her pregnancy. Experts dispute whether this state of denial is an actual mental disorder or the result of self-deception. Society is more inclined to hold a person accountable for her actions in the case of self-deception than if her delusions arose from completely involuntary conditions. Nevertheless, "even if a person bears little responsibility for acquiring his beliefs, he still chooses whether or not to act on them." So, in the case of a mother who is in denial concerning her pregnancy, even up until the time of the actual birth, she has a choice concerning what to do once the baby is born and she can no longer deny the pregnancy. Psychiatrist Steven Pitt describes this state of denial as a defense mechanism. He states that the mothers "see the baby as an object, not a human being."

asked about the blood, she said it was not hers. Then she said she was having a heavy menstrual period. After her son's body was discovered, she admitted giving birth to the baby. An autopsy revealed that the baby had been asphyxiated and strangled. See Jennifer Farrell & Angela Coulumbis, Guilty Plea Is Expected in Death of Baby at Prom, PHILADELPHIA INQUIRER, July 8, 1998, at B1; Knox, supra; Lyden, supra note 112.

Amy Grossberg delivered her son in a motel room. With the help of her boyfriend, Brian Peterson, Grossberg bashed her son's skull in and left his body in a trash bin. See Chavez, supra note 4, at 15A; Cook, supra.

Rebecca Hopfer's newborn daughter was found dead in a double plastic bag at a trash collection center. See Knox, supra.

Audrey Iacona's son was found wrapped in a bloody towel inside two plastic kitchen garbage bags. See Knox, supra.

Carolyn Johnson's baby was found abandoned in a trash bin. See Knox, supra.

Jennifer Pyles's baby was found stuffed in a garbage bag inside the trunk of a car. See Knox, supra.

Patricia Riedel's newborn was found alive in a trashcan near her home. See Knox, supra.

Melissa Seamer's dead baby was found stuffed inside a gym bag hidden in her parents' garage. See Marie McCullough, More Babies Killed by Middle-Class Moms, MIAMI HERALD, Nov. 27, 1997, at C9.

Selva Silva gave birth to her son into a toilet while at a slumber party. Silva strangled her son and dumped his body in a trash bin. See Cook, supra.

Heidi Sonnenberg gave birth to her daughter on her parents' bathroom floor. Sonnenberg then cut the umbilical cord with nail clippers, wrapped her daughter in a towel, and stashed the baby's body in her dresser drawer. See Stephen Hunt, Mental Illness Scares Woman, SALT LAKE TRIB., Sep. 15, 1998, at B1.

178. See ELLIOT, supra note 42, at 93-94.
179. See id. at 93-94.
180. Id. at 94.
181. See Cook, supra note 177.
182. Id. (quoting Steven Pitt).
One defendant, Twyana Davis, who dumped her baby in the trash after giving birth in her college dorm room, has been described as suffering from this denial disorder: “like many women in her situation, Davis went into a psychological fog about her condition, up through the actual delivery on her dorm room floor.” At trial, Davis claimed to have been in a state of denial, not realizing that she was pregnant. In an interview following the crime, however, Davis stated that while pregnant, she “watched research material and got videotapes and books and read up on childbirth.” If she did not know she was pregnant, why would she bother to conduct research on childbirth?

Although it is possible that an individual mother could have been suffering from a mental illness that caused her to murder her newborn baby or that prevented her from knowing that killing her baby was wrong, a “fallacy exists that mothers who kill their children must be mentally ill.” In a study conducted of seven neonaticide cases which occurred in Iowa during a fourteen month period, Dr. Edward Saunders found that “[i]n no case report was there an indication that the mothers were mentally ill.” Furthermore, Resnick also found no evidence of a so-called “neonaticide syndrome.” He concluded that in most neonaticide cases, the motive is simply to eliminate the problem.

Postpartum Psychosis

Defense attorneys in neonaticide cases also have attempted to claim that the defendant was suffering from postpartum psychosis at the time of the killing. Susan Hickman, a psychologist, has stated that “women who kill their newborns have probably experienced an untreated postpartum disorder in a previous pregnancy or
The problem with Hickman's theory is that most neonaticide mothers are first-time mothers and have not experienced a prior pregnancy or delivery. Not only is postpartum psychosis an extremely rare disorder, it does not set in until at least the third day after the delivery. Therefore, postpartum psychosis could not explain a murder that occurred within twenty-four hours of the birth.

**Wernick and Brief Reactive Psychosis**

Stephanie Wernick was charged with criminally negligent homicide for the murder of her newborn. The case went to the highest appellate level in New York, a jurisdiction that still uses the Frye test for the admissibility of expert testimony. Wernick raised the insanity defense, "claiming that she lacked the substantial capacity to know and to appreciate the nature and consequences of her conduct or that such conduct was wrong." Wernick's attorneys claimed she was suffering from "neonaticide syndrome" when she killed her baby. On appeal from the trial court, the mid-level appellate court held that expert testimony on "neonaticide syndrome" was not admissible without evidence that it was generally accepted in the relevant scientific community. The court stated that general acceptance of this syndrome could be "established through texts and scholarly articles on the subject, expert testimony, or court opinions." Using this standard, the court held that the defense had not established "neonaticide

191. Anna Cekola, Mother Faces Trial in Death of Newborn, L.A. TIMES, Jan. 21, 1997, at A3 (discussing the case of Jackie Lynn Anderson, a 38-year-old woman who murdered her newborn son after giving birth in her mother's bathroom; Anderson's mother later found the dead baby in a cardboard box in the trunk of Anderson's car).
192. See Mendelowicz et al., supra note 6, at 211; Resnick, supra note 2, at 65.
195. The Frye Test requires that "[b]efore an expert may testify about the existence of a mental disease or syndrome, the party seeking the introduction of such testimony must establish that the disease or syndrome is generally accepted in the field of psychiatry or psychology and that it would assist the jury in rendering a verdict."
196. Id.
197. See id.
198. See id.
199. Id.
syndrome” as a generally accepted syndrome in the psychological community. The court allowed Wernick’s psychiatrists to testify that she was in denial about her pregnancy and that she suffered from brief reactive psychosis during the birth; however, they were not allowed to describe her symptoms as a syndrome. The court allowed the psychiatrists to testify as to the specific defendant, Wernick; however, they could not refer to a profile explaining why mothers kill their babies. The finding was affirmed when the case went to the highest appellate level in New York.

The defense claimed specifically that Wernick was suffering from “brief reactive psychosis” following a “pathological denial” of pregnancy. The defense gave the catch-all phrase of neonaticide syndrome to describe Wernick’s denial of the pregnancy and her “brief reactive psychosis.” The defense also claimed that her neonaticide syndrome caused her to lack the “substantial capacity to know and to appreciate the nature and consequences of her conduct or that such conduct was wrong.”

Brief reactive psychosis is defined as:

[An isolated episode of psychotic symptoms of sudden onset precipitated by major stress such as the loss of a loved one or the psychological trauma of combat, of brief duration—from a few hours to several weeks, with eventual full return to premorbid level of functioning. It is characterized by delusions, hallucinations, disorganized or catatonic behavior, incoherence, confusion, emotional turmoil, marked loosening of associations, inappropriate affect, and bizarre speech and behavior.]

Experts disagree as to whether brief reactive psychosis is an actual mental defect. Brief reactive psychosis has been described as a “fancy psychiatric term for ‘just snapping.’” This mental condition is often used in insanity defenses but is not considered to be a true mental disease by the American Psychiatric Association. Barbara Kirwin, a psychologist who examined Wernick following the murder, stated that she had never seen anyone diagnosed with

200. See id. at 841.
201. See id. at 841-42.
202. See id.
204. See Wernick, 651 N.Y.S.2d at 394; Wernick, 632 N.Y.S.2d. at 840.
205. See Wernick, 632 N.Y.S.2d at 840.
206. Id.
207. BLINDER, supra note 61, at 31.
208. KIRWIN, supra note 1, at 150.
209. See id. at 93; Kirwin, supra note 71, at 23.
brief reactive psychosis, "except for the purposes of an insanity defense." The condition was officially dropped from the most recent edition of the *Diagnostic and Statistical Manual of Mental Diseases, DSM-IV*, in 1994.

Even if the psychiatric community recognized brief reactive psychosis as a mental illness, the diagnosis does not seem to match Wernick's actual conduct during the killing. Not only was Wernick not in some daze or fog, but she very coherently responded to her friends' offers of help by saying she was just having her period. She then proceeded to place her son in a garbage bag along with her bloody clothes and asked her roommate to carry the garbage bag containing the body of her son out to the dumpster. These sound less like the actions of someone suffering from a mental illness who had no idea that she was killing her baby and more like the actions of a cold-blooded killer who was doing everything she could to rid herself of a problem.

Wernick underwent a psychiatric evaluation shortly after the murder. "[S]he was discharged with one of the mildest possible diagnoses: 'adjustment disorder with disturbance of conduct.'" Wernick's attorneys also claimed that she suffered from amnesia as a result of this neonaticide syndrome. Yet, not only did Wernick confess to a paramedic shortly after the murder that she had given birth to her son, in a psychological examination of Wernick following the murder she did not claim to not remember putting her son into the garbage bag and asking her friend to dispose of the body. Wernick's test scores during this examination showed no signs of mental illness, depression, or thought disorder. During the examination, Wernick "never once expressed regret for her actions, or grief for her baby. [Wernick's] consistent theme was the effect of the murder rap on her." Kirwin found that Wernick "scored impressively in ego strength and resilience. Such personalities are not prone to panic in emergencies and are known for their unusual capacity to face ordeals."

Wernick was not diagnosed with brief reactive psychosis at any of the three hospitals where she was treated after she killed her baby.

213. *See* id. at 67-68.
215. *See* id.
216. *See* id.
217. *Id.*
218. Kirwin, *supra* note 1, at 78.
son. Nor were any of the experts at Wernick's trial able to testify that Wernick demonstrated the features essential to a diagnosis of brief reactive psychosis. Kirwin found that "when she murdered her baby, [Wernick's] behavior did not match the requirements for the diagnosis, which include rapid emotional shifts, overwhelming confusion, and inarticulate speech. On the morning she killed her baby, [Wernick] was calm and deliberate." Kirwin found that Wernick bore all the selfish, goal-centered traits characteristic of a true psychopath. So, was Wernick mentally ill or just guilty?

It is important to note that even if someone is suffering from a kind of mental condition or psychological reaction to a stressful event, that condition alone is not enough to make that person insane and not responsible for their actions. Only if that person is suffering from an actual mental illness that made them incapable of realizing that what they were doing was wrong should that person be relieved of responsibility for their crime. Even if Wernick had been in a state of denial during the pregnancy, that does not necessarily mean that she did not know what she was doing when she placed her baby in the garbage bag.

Even if there is such a thing as neonaticide syndrome, the question remains whether it is really something about which juries need to hear expert testimony and whether the presence of this syndrome should negate culpability. It seems unnecessary to require an expert to explain to a jury that a young, single, first-time mother fears telling her family that she is pregnant and does whatever it takes to prevent them from finding out. It is hard to believe that this fear and the attempt to avoid the shame that society attaches to illegitimate childbirths is really a mental illness.

219. See id. at 93.
220. See id. at 93-94.
221. Kirwin, supra note 71, at 23.
222. See id.
223. See supra notes 60-88 and accompanying text (outlining the requirements of and the rationale behind the insanity defense).
224. See id.
that prevents these mothers from realizing that killing their babies is wrong.

**Designer Defenses**

Dr. Barbara Kirwin has coined the phrase "designer defense" to describe

a psychological defense used in an insanity plea which is carefully fabricated to fit all the pertinent facts of the case, and then tailored to individual characteristics of the defendant that might appeal to a jury—all regardless of whether any bona fide incapacitating mental illness exists. The nature of a particular designer defense is determined by what sympathy-evoking excuses are in vogue at the time of the trial. All designer defenses propound the idea of defendant as victim . . . 225

Dr. Kirwin states that inventive expert witnesses have "found a way of circumventing the diagnostic limitations of DSM-IV." 226 Syndromes are created which merely describe "symptoms, traits, and behaviors [that] are observed to occur together in an individual." 227 Examples of these syndromes include: adopted child syndrome, battered woman syndrome, Vietnam syndrome, and sexual abuse syndrome. 228 These syndromes are then presented to juries through the use of expert testimony thereby lending credibility in the minds of the jury members to the existence of such syndromes. Claiming that the defendant suffered from one of these syndromes "can be a far more simple, stylish, and comprehensible explanation for [a] horror than saying she simply chose to do evil. The jurors can thus justify their own willing suspension of disbelief." 229

**Quick Recovery**

Two circumstances are often considered in determining whether someone was truly insane when she committed the crime: (1) "recovery time" and (2) "knowing the wrong." 230 The first

225. KIRWIN, supra note 1, at 115; see also id. at 97-130 (giving examples of cases in which a designer defense was used).
226. Id. at 115-16.
227. Id. at 116.
228. See id. at 116.
229. Id. at 112.
230. KIRWIN, supra note 1, at 173.
circumstance, recovery time, is how quickly she recovered from her supposed mental disease. For example, if the mother was “able to give a lucid and coherent statement to detectives just an hour after [the] killing,” one would question whether the mother was really suffering from a psychological delirium at the time of the killing.

The second circumstance is whether the defendant demonstrated any behavior that would indicate she knew her actions were wrong. For example, did she make any attempt to hide the crime and prevent detection, or did she call 911 to report the crime?

“If a person called 911 after killing someone and said he just rid the world of demons, he is probably ill.” From my experience, I would tend to say just the opposite—such a person is probably a shrewd psychopath playing the only card he’s got. If he was so psychotic that he believed he rid the world of demons and didn’t know it was wrong, why would he report it to 911? If he regained his sanity so quickly after the crime as to have full awareness of his criminality and turn himself in to the police, I would be doubly suspect.

If an individual is truly insane and, therefore, did not know that her actions were wrong, why would she bother to cover up the crime, i.e. hide or dispose of the body, or call 911 to report her crime? The individual’s actions following the crime may provide evidence of her mental state during the crime and demonstrate an awareness of the wrongfulness of her crime.

What Happens If These Defenses Are Successful?

Because the “not guilty by reason of insanity” defendants often are held in custody longer than defendants who are merely found guilty of the same crime and sentenced to prison, the insanity defense rarely is used by defense attorneys even when the defendant is truly insane. This is not the case, however, with neonatocide defendants. Because the mothers seem to recover at amazing speeds, the mothers often are considered sane again by the

231. See id.
232. Id.
233. See id.
234. Id. at 170-71.
235. See MARKMAN & BOSCO, supra note 75, at 56.
time of the trial and thus are never incarcerated even for purposes of medical treatment for their alleged mental illnesses.\footnote{236} 

So what should happen to neonaticide defendants? Barabara Kirwin found that the recidivism rate for neonaticide is "practically nil" and that "women who commit neonaticide do not present a threat to society."\footnote{237} There are, however, other reasons for sentencing a defendant besides deterring that particular individual from killing again. What about being punished for the harm they have already caused to a helpless newborn? What about the other goals of the criminal justice system such as vindication of the victim's rights, justice, punishment, and deterrence of others? 

Michelle Oberman suggests that "most teenagers who kill newborns, while responsible for their actions, deserve consideration because of their youth and the psychological effects of hiding or denying their pregnancies."\footnote{238} Perhaps society believes these mothers deserve lesser sentences than other murderers, but the means for providing this leniency should not be misuse of the insanity defense. The mothers should first be found guilty of the crimes that they have committed, and then any possible mitigating circumstances should be taken into consideration during the sentencing phase only. Psychiatric examinations and testimony should not be distorted and syndromes should not be concocted to get the end result the defense attorneys, and perhaps society, believes is just.

Dr. Ronald Markman discusses a case in which the defendant was found not guilty of raping two little girls because the prosecution had produced insufficient evidence.\footnote{239} The defendant could not be tried again on the same charge, even if the prosecution was able to acquire more evidence, because he had been tried and acquitted.\footnote{240} The prosecution's only chance of having the defendant incarcerated was to have the defendant committed as mentally ill.\footnote{241} Markman was asked to testify for the prosecution at the defendant's commitment hearing concerning the defendant's mental condition. Even though many people, including Markman, thought the defendant had likely committed the crimes, Markman did not think the defendant was mentally ill and refused to testify to that
fact at the commitment hearing. He refused to testify even though the defendant would be free to walk the streets, were he not committed.

My responsibility within the system is to provide psychiatric information that I can support within the boundaries of my profession and the requirements of the law. I can only report what I see and hear as a physician—and only within the limits of the answers to the questions the system asks me. What the system does with those answers is sometimes deeply disturbing. But distorting what I know to be the medical truth is no way to cure the system.

If society thinks these neonaticide defendants automatically deserve softer sentences, then the proper channel is the legislatures—the criminal justice system should not be perverted to reach a so-called “just end.” “[I]f merely committing a crime brands one as mentally ill, why do we need psychiatrists? Let the crime determine the medical diagnosis.”

Michelle Oberman has developed a proposal for dealing with these neonaticide cases:

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

This is already the case in the American justice system. The prosecution already has to prove each element of murder: malice, premeditation, deliberation, and intent. There is no need to make a special guilt-determination category for these killers. The fact finders should be allowed to do their jobs and determine if each element is satisfied based on the facts of each case, as they do in all other homicide cases.

Oberman goes on to point out a possible criticism of her own proposal:

242. See id.
243. Id. (emphasis added).
244. Id.
245. Oberman, supra note 113, at 82-83.
246. See SLOVENKO, supra note 36, at 35.
[T]his proposal may be seen as a new effort to "medicalize" women's responses to burdens placed upon them by virtue of their subordinated status in society. The resort to scientific or quasi-scientific explanations for women's criminal behavior helps cloak the social and structural constraints on women, forcing women to attempt to excuse their illegal actions as crazy, rather than permitting them to reveal those actions as rational responses to a crazy environment. 247

Since when is murdering someone who is not wanted in your life a rational response? If the child was ten and the mother did not feel like supporting or caring for the child anymore would it be a rational response for her to kill that 10-year-old child? Of course not. Neither is it rational for these neonaticide mothers to kill their newborns simply because they are unwanted.

CONCLUSION

Why is society so quick to excuse the murders committed by these mothers? Perhaps it is because the act seems so irrational that it usually is assumed to be the result of a disturbed mind. 248 Just because it is hard to believe that a mother could murder her own child does not relieve that mother from responsibility for her crime.

Does society excuse these murders because it does not really view the newborn as a human being? Is it that the only person who will really miss the baby at this early point in its life is the same person who killed it? What about the mother of a one-year-old who shakes her baby to death to get it to stop crying? Is she insane? No, she is a sane mother under the typical pressures of motherhood who lost control. Society may be able to sympathize with her; nevertheless, she should still be held accountable.

Even if others are to blame—society for attaching so much stigma to illegitimate births, the boy for getting the girl pregnant, the parents and teachers for not noticing the girl was pregnant—it is still the girl who took the action and killed the baby. We must, as individuals, stop placing the blame on others for our own actions and realize that it is a tough world in which we live. We are each ultimately responsible for our own actions.

248. See Mendlowicz et al., supra note 6, at 209.
Some crimes are so horrid that we often believe that the defendant must have been mentally ill to have committed such a crime. "Our society is leaning awfully close to the idea that you have to be mentally ill in some way to commit a crime. This is not so. Most crimes—even grisly murders—are not committed by mentally ill people, but by people just like you and me." Society must come to terms with the fact that perfectly sane people are capable of horrible crimes. We cannot allow the crime to define the illness, but rather, we must determine whether the defendant was not capable of determining right from wrong because of an actual mental illness and, for that reason, should not be held responsible for her actions.

Insanity and mental illness are conditions that must be determined on a case-by-case basis. Deciding whether an individual is accountable should depend on that defendant's particular circumstances and how her mental condition, if she is actually suffering from a mental condition, affected her thinking during the time she committed the criminal act.

"Forensic psychology and psychiatry must come to terms with evil and separate it from mental illness...." In each case, the defendant must be examined to determine: (1) whether the defendant was suffering from a mental disease, and (2) whether that mental disease affected her ability to know that her actions were wrong or render her unable to control her actions. Society cannot let its sympathy for the defendant's plight allow us to distort the criminal justice system. We cannot forget that these mothers have committed crimes, and, unless they are truly insane, they must be held accountable for their crimes.

Megan C. Hogan

249. Markman & Bosco, supra note 75, at 68-69.
250. See Elliot, supra note 42, at 2.
251. Kirwin, supra note 1, at 87.