A Crime of Its Own? A Proposal for Achieving Greater Sentencing Consistency in Neonaticide and Infanticide Cases

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Introduction

MOTHER-CHILD RELATIONSHIPS are considered intimate by nature,[1] and maternal infanticide—the murder of an infant by its mother—and its subset of neonaticide—when the killing occurs within twenty-four hours of a child's birth—are uncommon in the United States relative to other murders today.[2] Yet, infanticide has a

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1. For example, writer Ayelet Waldman created controversy when she stated in a *New York Times* article that she loved her husband more than her children. Bob Thompson, *'Bad Mother's' Day*, WASH. POST, May 5, 2009, at C1. "Neonaticides consist of behaviors by women that are absolutely at odds with normative conceptions of motherhood and maternity commonly held by society." Judith E. Macfarlane, Note, *Neonaticide and the "Ethos of Maternity": Traditional Criminal Law Defenses and the Novel Syndrome*, 5 CARDOZO WOMEN'S L.J. 175, 208 (1998). Perhaps even feminists might not identify with mothers who harm their children. Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 137 (1993). It is therefore often difficult to defend these defendants, especially in front of juries. *See* State v. Biegenwald, 594 A.2d 172, 222–23 (N.J. 1991) ("Likewise, infanticide, foeticide, and uxoricide have the potential to divert jurors from their duty to assess the defendant to their desire to avenge the victim."); Michael L. Perlin, *"She Breaks Just Like a Little Girl": Neonaticide, the Insanity Defense, and the Irrelevance of "Ordinary Common Sense"*, 10 WM. & MARY J. WOMEN & L. 1, 10–11 (2003).

2. *See* Margaret G. Spinelli, *Maternal Infanticide Associated with Mental Illness Prevention and the Promise of Saved Lives*, 161 AM. J. PSYCHIATRY 1548, 1548 (2004). There are an estimated 250 neonaticides reported in the United States each year. LITA LINZER SCHWARTZ & NATALIE K. ISSER, ENDANGERED CHILDREN: NEONATICIDE, INFANTICIDE, FILICIDE 72 (2000). In regards to infanticide, it is more difficult to know exact numbers because "[a]bsent the fortuitous presence of an eyewitness, infanticide . . . would largely go unpunished." United States v. Woods, 484 F.2d 127, 133 (4th Cir. 1973); *see also* Lynne Marie Kohm & Thomas Scott Liverman, *Prom Mom Killers: The Impact of Blame Shift and Distorted Statistics on Punish-*

long history and occurs worldwide.[3] Infanticide was quite common in colonial America, during which time an estimated one-third of all killings were infanticides.[4] Many infanticides are driven by gender preferences in countries that limit births and favor males.[5] Others, like those common in Ancient Greece,[6] target unwanted, vulnerable, or disabled children.[7]

When neonaticide occurs in the United States today, the factual pattern is consistent to the point of being archetypal: a young woman[8] denies her pregnancy until she finds herself in labor;[9] mentally and

ment for Neonaticide, 9 WM. & MARY J. WOMEN & L. 43, 53–57 (2002) (discussing the lack of accurate statistics tracking infanticide).

3. Susan C.M. Scrimshaw, *Infanticide in Human Populations: Societal and Individual Concerns*, *in* INFANTICIDE: COMPARATIVE AND EVOLUTIONARY PERSPECTIVES 439, 439 (Glenn Hausfater & Sarah Blaffer Hrdy eds., 1984).

> Infanticide has been practiced over a wide span of time and in many different cultures . . . .
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> . . . . Japanese farmers spoke of infanticide as 'thinning out,' as they did with their rice fields. . . . Eskimos left babies out in the snow, while in the Brazilian jungle, undesired infants were left under the trees. In London in the 1860s, dead infants were a common sight in parks and ditches.

Id. (citation omitted).

4. Perlin, *supra* note 1, at 10. *But see* Kohm & Liverman, *supra* note 2, at 51 ("During the puritanical colonial times, infanticide was thought to be one of the more brutal crimes, and many women who murdered their children were executed.").

5. For a discussion of infanticide of female babies as a means of population control in India, see Mohit Sahni, *Missing Girls in India: Infanticide, Feticide and Made-to-Order Pregnancies? Insights From Hospital-Based Sex-Ratio-at-Birth Over the Last Century*, PLoS ONE (May 21, 2008), http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0002224. In China, see Amy Hampton, Comment, *Population Control in China: Sacrificing Human Rights for the Greater Good?*, 11 TULSA J. COMP. & INT'L L. 321, 340–41 (2003). The cross-cultural nature of infanticide has prompted one commentator to evaluate cultural defenses for infanticides in the United States. Michele Wen Chen Wu, Comment, *Culture Is No Defense for Infanticide*, 11 AM. U. J. GENDER SOC. POL'Y & L. 975, 1018–20 (2003).

6. Scrimshaw, *supra* note 3, at 439.

7. *See, e.g.*, Aquila Mazzinghy Alvarenga, *Who Cares About the Rights of Indigenous Children? Infanticide in Brazilian Indian Tribes*, 22 HASTINGS WOMEN'S L.J. 17, 26–27 (2011).

8. In his case study, Psychiatrist Phillip J. Resnick found that 89% of the neonaticidal mothers were under twenty-five years old. He also discovered that 81% were single, 17% were psychotic, and only 8.5% suffered from serious depression. Phillip J. Resnick, *Murder of the Newborn: A Psychiatric Review of Neonaticide*, 126 AM. J. PSYCHIATRY 1414, 1415 (1970); *see also* Michelle Oberman, *Mothers Who Kill: Coming to Terms With Modern American Infanticide*, 8 DEPAUL J. HEALTH CARE L. 3, 28 (2004) ("Most women . . . accused of neonaticide are young and single.").

9. In her study of forty-seven cases of maternal neonaticide, Michelle Oberman found that

> the women [all] 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

otherwise unprepared for the child, she either abandons the baby or commits some other action leading the baby's death.[10] Infanticide cases share certain similarities with the neonaticide paradigm described above. Common factors causing maternal neonaticide and infanticide are postpartum depression,[11] unpreparedness for parenting,[12] youth of the mother, or mental illness.[13]

Yet, despite the strong factual similarities common to most instances of neonaticide and infanticide, these cases produce significant sentencing inconsistencies, ranging from two years imprisonment to the death penalty.[14] Furthermore, these crimes are frequently

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> hours, they realized that they were in labor. They endured the full course of labor and delivery without making any noise.

Oberman, *supra* note 8, at 29–30.

10. *Id.* at 30.

11. Christine Ann Gardner, Note, *Postpartum Depression Defense: Are Mothers Getting Away With Murder?*, 24 New Eng. L. Rev. 953, 966 (1990).

12. Ania Wilczynski, Child Homicide 79 (1997).

13. Oberman, *supra* note 8, at 39-45. Similar psychiatric findings have been made in English and Australian cases. Wilczynski, *supra* note 12, at 81–85. One study of English infanticide cases noted that 64.3% of female offenders utilize psychiatric pleas (versus only 30% of male offenders). *Id.* at 118–19; *see also* Ania Wilczynski, *Mad or Bad? Child-killers, Gender and the Courts*, 37 Brit. J. Criminology 422 (1997). Resnick's study, quoted above, found that women who commit neonaticide were significantly less likely to suffer from psychosis and depression than those who murder their children later. Resnick, *supra* note 8, at 1415.

14. *E.g.*, United States v. Gibson, 17 C.M.R. 911, 916 (A.F.B.R. 1954) (mother convicted of neonaticide sentenced by court-martial to be dishonorably discharged, to forfeit all pay and allowances, and to be confined to hard labor for 13 years—reduced to five years by convening authority); People v. Ehlert, 811 N.E.2d 620, 621 (Ill. 2004) (affirming conviction of neonaticidal mother convicted of first-degree murder and sentenced to 30 years in prison before her conviction was reversed for insufficiency of evidence); People v. Sims, 750 N.E.2d 320, 322 (Ill. App. Ct. 2001) (affirming conviction of neonaticidal mother sentenced to life imprisonment, avoiding death sentence in a capital murder trial); State v. Smith, 608 N.E.2d 1259, 1260, 71 (Ill. App. Ct. 1993) (affirming the 60 year imprisonment of a mother convicted of first-degree murder for infanticide); Davidson v. State, 558 N.E.2d 1077, 1081–83, 1092 (Ind. 1990) (affirming two consecutive sentences of 60 years each for two infanticides committed by the mother); Commonwealth v. Dupre, 866 A.2d 1089, 1096 (Pa. 2005) (reviewing a neonaticidal mother's "sentence of life imprisonment without parole and a consecutive aggregate six months to nineteen years incarceration . . . ."); Capps v. State, 478 S.W.2d 905, 906–07 (Tenn. Crim. App. 1972) (affirming a two year prison sentence for a mother convicted of voluntary manslaughter for her act of infanticide) (overruled on other grounds); Berry v. State, 233 S.W.3d 847, 850–51 (Tex. Crim. App. 2007) (infanticidal mother's sentence reformed from death to life imprisonment); Routier v. State, 112 S.W.3d 554, 557 (Tex. Crim. App. 2003) (affirming a mother's death sentence for the murder of her six year old son); *see also* Beth E. Bookwalter, Note, *Throwing the Bath Water Out with the Baby: Wrongful Exclusion of Expert Testimony on Neonaticide Syndrome*, 78 B.U. L. Rev. 1185, 1194 (1998) ("The legal confusion surrounding the crime of neonaticide often creates disparate results in factually similar cases."). Such sentencing disparities "can

overcharged and under-convicted.[15] On the federal level, neonaticide and infanticide may be sentenced in accordance with the Federal Sentencing Guidelines for murder—guidelines that, when initially promulgated, were influenced by sentences for completely dissimilar murder cases.[16] Because neonaticide and infanticide do not factually conform to the average statutory definitions of murder or manslaughter,[17] the mismatch produces irregular sentences when those statutes are inappropriately applied. The lack of consistent statutory guidance in these cases poses a challenge both to prosecutors charging defendants and defense lawyers defending them, as well as to judges in sentencing defendants.[18]

In pursuit of achieving greater sentencing consistency in maternal neonaticide and infanticide cases, this Article proposes the statutory separation of these crimes from general murder and manslaughter, as is currently done in England.[19] While certain instances of neonaticide and infanticide may be classified as quintessential murder or manslaughter cases,[20] this Article argues that the availability of an infanticide statute would more consistently dispose of the paradigm infanticide and neonaticide cases. This proposed infanticide statute, which would necessarily encompass neonaticide as well,

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never be the stuff of fairness. They signal something seriously wrong." Eileen Foley, *Women Who Kill Their Babies*, TOLEDO BLADE, May 23, 2002, at A15.

15. Oberman, *supra* note 8, at 96.

16. *See, e.g.*, United States v. Deegan (*Deegan I*), 605 F.3d 625, 637 (8th Cir. 2010) (Bright, J., dissenting) ("[N]eonaticide does not now, nor has it ever, come within the 'run-of-the-mine' guidelines for second-degree murder . . . .").

17. *See, e.g.*, *id.*

18. For example, in a strongly worded dissent regarding the majority's reversal of a first-degree murder conviction in a maternal neonaticide case, one Illinois judge remarked,

> [f]or all practical purposes, it is now legal in Illinois for a parent to murder his or her newborn infant. With today's decision, the majority sends the clear signal that, when a parent is charged with murdering a newborn baby, this court will not apply the standard of review in the same manner as we would in any other criminal case. We will draw previously unheard of inferences and presumptions in favor of the defendant and will reward the defendant for attempting to cover up the crime.

Ehlert, 811 N.E.3d at 633 (Thomas, J., dissenting); *see also* Oberman, *supra* note 8, at 96 (noting that these crimes are often overcharged and under-convicted).

19. *See infra* Part III.A; Christine A. Fazio & Jennifer L. Comito, Note, *Rethinking the Tough Sentencing of Teenage Neonaticide Offenders in the United States*, 67 FORDHAM L. REV. 3109 (1999) (arguing for a separate neonaticide provision in state manslaughter penal codes so that teenage mothers committing these crimes can be adjudicated in juvenile court).

20. For example, consider those committed with intent while fulfilling the other statutory elements of murder. *See infra* notes 78–80 and accompanying text.

need not be based on medical justifications as was done in England.[21] Instead, the proposed legislation would respond to the problem of sentencing inconsistency alone, without the necessity for implicating medical justifications. The exact sentencing structure of such a statute, however, is beyond the scope of this Article.[22]

It should be noted that, while neonaticide and infanticide may be committed by an outsider or by either parent—with the term "filicide" denoting the killing of one's own child[23]—this article will focus on the maternal neonaticides and infanticides composing the paradigm cases described above. This is a tragic category that affects the entire family, including the father of the child.[24] Given the frequently consistent facts common to most maternal neonaticide and infanticide cases,[25] and the divergent sentencing results that those cases produce,[26] these are the cases that require particular attention.

Part I begins by considering the definitions and characteristics of neonaticide and infanticide, as well as the important preventative efforts aimed at their elimination. Part II examines the current treat-

21. *See infra* note 144 and accompanying text.

22. Any penalties could be statutorily established based on further considerations, perhaps using a sliding scale to reflect the nuanced factual differences among these cases. The first step in formulating new legislation, however, is to analyze its advantages and disadvantages, which is what this article seeks to do.

23. Resnick, *supra* note 8, at 325. Other categories of child killings include those committed by women who are not the child's mother and those committed by men. Regarding the former, c*ompare* United States v. Woods, 484 F.2d 127, 128–29 (4th Cir. 1973) (affirming a life sentence for a woman convicted of first-degree murder for killing her foster son), Commonwealth v. Boykin, 298 A.2d 258, 259–60 (Pa. 1972) (affirming a female caretaker's conviction and ten-year prison sentence for the voluntary manslaughter of an infant in her care), *and* Commonwealth v. Lettrich, 31 A.2d 155, 158 (Pa. 1943) (affirming a life sentence for first-degree murder committed by the infant's aunt), *with* cases cited in *supra* note 14. For an excellent analysis of the differences between filicides and "stranger danger," see WILCZYNSKI, *supra* note 12, at 171–79. Dr. Wilczynski suggests that non-familial infanticide offenders may receive higher sentences when their crimes include a sexual assault—much more likely to be true in non-familial cases. *Id.* at 178. Regarding child killings committed by men, *compare* Reeder v. State, 97 So. 73, 75–77 (Ala. 1923) (affirming a male defendant's conviction and life sentence for the first-degree murder of his newborn child), *and* State v. Pederson, 857 P.2d 658, 659 (Idaho Ct. App. 1993) (same), *with* cases cited in *supra* note 14. One commentator has noted that the judicial perception of infanticide, at least in England, holds that "men are bad, women are mad." WILCZYNSKI, *supra* note 12, at 117. In an English study, child-killers were determined more likely to be female. The opposite finding was made in an Australian study. *Id.* at 103–04. Regardless, the notable number of female offenders of these crimes is unusual, given that women generally commit only a small proportion of violent crimes. *Id.* at 104.

24. For an account of a father's pain upon discovering his wife's murder of their five children, see SUZANNE O'MALLEY, ARE YOU THERE ALONE? 7 (2004).

25. *See supra* notes 8–13 and accompanying text.

26. *See supra* note 14 and accompanying text.

ment of neonaticide and infanticide as instances of "murder" and "manslaughter," and the resulting sentencing inconsistencies. Finally, Part III proposes legislation treating neonaticide and infanticide separately from murder and manslaughter, considering countries that have done so, and concluding that such an approach may effectively redress much sentencing inconsistency in the United States.

I. Background

Before turning to the consequences of infanticide's common categorization as either "murder" or "manslaughter," it is helpful to first consider the relevant terminology and the nature of the acts at issue, as well as the important preventative efforts commonly aimed at eliminating their commission. It should be noted that most of the arguments surrounding neonaticide apply to infanticide with equal force.[27]

A. Terminology

As explained above, although different parts of the world utilize different definitions of infanticide,[28] this Article uses the common definition of infanticide as the killing of any infant below the age of one.[29] The killing can be deliberate, can result from the placement of

27. England's Infanticide Act, for example, applies to mothers whose victims were under the age of one, thus necessarily encompassing newborns. Infanticide Act, 1938, 1 & 2 Geo. 6, c. 36, § 1 (U.K.). No distinction is made between neonaticide and infanticide. *Id.*

28. "A fundamental conceptual difficulty encountered in studying infanticide is one of definition. The contemporary terms used, besides infanticide, include[ ] 'willful child murder' and other variations. Infancy also ha[s] various legal definitions, as historically the common law did not distinguish between murder of adults and that of newborns or adolescents." Ian C. Pilarczyk, *'So Foul a Deed': Infanticide in Montreal, 1825–50*, 30 L. & HIST. REV. 575, 576 (2012). Black's Law Dictionary defines infanticide, or neonaticide, as the killing of a newborn, usually by a parent, while filicide refers generally to the murder of a newborn child. BLACK'S LAW DICTIONARY 661, 793 (9th ed. 2009). Others, however, have used the term "infanticide" more broadly to refer to the killing of a young child. *See* Elizabeth Rapaport, *Women As Perpetrators of Crime: Mad Women and Desperate Girls: Infanticide and Child Murder in Law and Myth*, 33 FORDHAM URB. L.J. 527, 534 (2006) (defining infanticide as the murder of a child under the age of five by any perpetrator).

29. Pilarczyk, *supra* note 28, at 576 n.3. *But see* Brenda Barton, Comment, *When Murdering Hands Rock the Cradle: An Overview of America's Incoherent Treatment of Infanticidal Mothers*, 51 SMU L. REV. 591, 593 (1998) ("Although 'human infanticide' has been defined in a variety of ways, it is generally understood to mean the murder of a child under the age of discretion. Despite the fact that the term 'infanticide' implies the murder of an infant, no bright-line age rule exists. Neonaticide, the only type of infanticide that fits a bright-line age test, defines cases where infants are murdered within twenty-four hours after birth." (citations omitted)). In England, the legal definition of infanticide is the killing of an infant under the age of 12 months by his mother under specified circumstances. WILCZYN-

the child in a dangerous situation with little hope of survival, lowered levels of support, or high likelihood of accident, or can result from excessive punishment.[30] Several infamous infanticides have gripped the American media, including those perpetrated by Susan Smith[31] and Dr. Deborah Green.[32]

Neonaticide, a term coined in the 1970s by Psychiatrist Dr. Phillip J. Resnick, describes the killing of a child within twenty-four hours of the birth.[33] There are many examples of neonaticide in the media.[34] In December 1990, for example, twenty-year-old Stephanie Wernick gave birth to a baby boy in the bathroom of a college dormitory.[35] There, she asphyxiated him, then secured an unwitting friend's help to dispose of the body.[36] A jury acquitted her of first and second-degree manslaughter, but convicted her of criminally negligent homicide.[37] Wernick received a prison sentence of one and one-third to four years.[38] In June 1997, Melissa Drexler (later dubbed "Prom Mom" by the media) gave birth at her high school prom, disposed of her newborn in a restroom dustbin, then subsequently returned to the dance.[39] She was convicted of aggravated manslaughter and sentenced to fifteen years in prison, but was released after serving three.[40]

SKI, *supra* note 12, at 8; *see also* Infanticide Act, 1938, 1 & 2 Geo. 6, c. 36, § 1 (U.K.) (treating cases as infanticides where the child is under one year old).

30. Barton, *supra* note 29, at 594.

31. After driving her children into a lake and leaving them to drown, Susan Smith enlisted the police's help in locating them, claiming that they had been abducted. LINDA RUSSELL & SHIRLEY STEPHENS, MY DAUGHTER SUSAN SMITH 11–13 (2000); *see also* Rick Bragg, *Focus on Susan Smith's Lies and a Smile*, N.Y. TIMES, July 25, 1995, at A11. On treatment by the media generally, see Erwin Chemerinsky & Laurie Levenson, *Ethical Quandaries Created by the Widespread Use of Legal Pundits Can Only Be Addressed by a Voluntary Code of Ethics*, 22 L.A. L. 28 (2000).

32. Dr. Deborah Green, a medical doctor and homemaker, set her house on fire with her children inside. ANN RULE, BITTER HARVEST 477 (1999). More recently, Casey Anthony was acquitted of murdering her child. Lizette Alvarez, *Casey Anthony Not Guilty in Slaying of Daughter*, N.Y. TIMES, July 5, 2011, at A1.

33. Resnick, *supra* note 8, at 1414; *see also* Lucy Jane Lang, Note, *To Love the Babe That Milks Me: Infanticide and Reconceiving the Mother*, 14 COLUM. J. GENDER & L. 114, 132 (2005).

34. *See infra* notes 36–42 and accompanying text.

35. People v. Wernick, 674 N.E.2d 322, 323 (N.Y. 1996).

36. *Id.*

37. *Id.* at 322–23.

38. Barton, *supra* note 29, at 607 n.141.

39. Carla Koehl, *Tragedy at the Prom*, NEWSWEEK, June 23, 1997, at 64.

40. Debbe Magnusen, *From Dumpster to Delivery Room: Does Legalizing Baby Abandonment Really Solve the Problem?*, 22 J. JUV. L. 1, 2 n.7 (2002).

These two highly publicized examples of neonaticide conform to the common factual scenario noted by Dr. Resnick.[41]

There are several key differences between neonaticide and infanticide. Most obviously, neonaticide necessarily occurs within twenty-four hours of a child's birth, while victims of infanticide are older children.[42] Also, while mothers who kill older children are frequently psychotic, depressed, or suicidal, Dr. Resnick found that mothers who kill their newborns usually are not.[43] However, the factual consistencies that often do exist between neonaticide and infanticide, i.e., commission by the victim's mother under distraught circumstances and without intent, distinguish both from murder and manslaughter.[44] The lack of legal recognition of these distinctions intensifies sentencing inconsistencies.

B. Preventive Efforts

To date, there have been many important efforts aimed at preventing neonaticide and infanticide, though they have been unsuccessful in entirely eliminating these crimes. A common focus of those efforts has been on addressing unwanted parenthood.

The most wide-sweeping legislation to prevent neonaticide and infanticide has been state "safe haven" laws.[45] Safe haven laws allow

41. *See* Resnick, *supra* note 8, at 1415; *see also* Fazio & Comito, *supra* note 19, at 3149 (describing common characteristics of neonaticide offenders); Amy D. Wills, Comment, *Neonaticide: The Necessity of Syndrome Evidence When Safe Haven Legislation Falls Short*, 77 TEMP. L. REV. 1001, 1011–12 (2004) (suggesting the possibility of a neonaticide syndrome).

42. Resnick, *supra* note 8, at 1414.

43. *Id.* at 1415. These characteristic and motivational differences led Dr. Resnick to categorize neonaticide separately from infanticide. Megan C. Hogan, *Neonaticide and the Misuse of the Insanity Defense*, 6 WM. & MARY J. WOMEN & L. 259, 261 (1999).

44. *See* State v. Milke, 865 P.2d 779, 787 (Ariz. 1993) (finding the parent/child relationship as a circumstance that separates infanticide from the 'norm' of first-degree murders and using that relationship in partial support of a finding of heinousness and depravity); People v. Kirby, 194 N.W. 142, 149 (Mich. 1923) (Sharpe, J., dissenting) ("Cases of infanticide, so far as they appear in court reports, are rare, and present questions peculiar to them alone.").

45. Today, all states have enacted safe haven laws. Susan Ayres, *Kairos and Safe Havens: The Timing and Calamity of Unwanted Birth*, 15 WM. & MARY J. WOMEN & L. 227, 231 (2009); *see also* Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753, 754 n.5 (2006). *See generally, e.g.*, *In re* Jack Doe, 883 N.Y.S.2d 430, 432 (N.Y. Fam. Ct. 2009) ("Clearly, then, the intent of the Abandoned Infant Protection Act [also known as the 'Safe Haven Law'] to reduce the incidence of neonaticide is being advanced on two fronts. First, there is the de facto limited 'decriminalization' of child abandonment when the child is a newborn who has been brought to a designated 'Safe Haven.' In addition, the public information campaign mandated by the Legislature now promotes the 'Safe Haven' as an option to parents who are unable to care for their newborn infants."). The notion of

parents to abandon, without penalty, very young children at designated public locations.[46]

There are common statutory limitations on such legalized parental abandonment, including that the child must be below a certain age[47] and must be left in a permissible location.[48] Most states have enacted safe haven laws in such a way as to curb out-of-state abandonment of children, so that no one state is overwhelmed with another's abandoned children.[49] Although safe haven laws have been unsuccessful at eliminating neonaticide and infanticide completely,[50] they encourage the reduced occurrence of both[51] and might prove even more effective if better advertised.[52]

Other attempts to reduce neonaticide and infanticide aim at retroactively reviewing various governmental agencies' interactions with the mothers who passed through their systems before killing their young children.[53] By "reviewing the past to prevent in the future,"[54]

legalized infant abandonment is not new. *See* Dannelli v. Dannelli's Adm'r, 67 Ky. (4 Bush) 51, 54–55 (Ky. 1868).

46. *See, e.g.*, GA. CODE ANN. § 19-10A-4 (2012); N.M. STAT. ANN. § 24-22-3(A) (2012).

47. *See, e.g.*, MONT. CODE ANN. § 40-6-417(2) (2011) (requiring that child be under 30 days old when surrendered).

48. *See, e.g.*, ARK. CODE ANN. § 9-34-202(a) (2012) (requiring that child be left with a medical provider or law enforcement agency); MINN. STAT. § 145.902(1)(a) (2012) (requiring that child be left with a licensed hospital, health care provider, or ambulance service).

49. Lucinda J. Cornett, Note, *Remembering the Endangered "Child": Limiting the Definition of "Safe Haven" and Looking Beyond the Safe Haven Law Framework*, 98 KY. L.J. 833, 849 (2010); Jessica Valenti, *Not Wanting Kids Is Entirely Normal*, THE ATLANTIC (Sept. 19, 2012), http://www.theatlantic.com/health/archive/2012/09/not-wanting-kids-is-entirely-normal/262367 (explaining that a rewrite of Nebraska's original safe harbor law was necessary, in part, to prevent those outside the state from bringing their children into Nebraska to secure safe harbor services).

50. Jennifer R. Racine, *A Dangerous Place for Society and Its Troubled Young Women: A Call for an End to Newborn Safe Haven Laws in Wisconsin and Beyond*, 20 WIS. WOMEN'S L.J. 243, 251 ("[R]eckless abandonment and neonaticide continue to occur at a steady rate today despite the enactment of safe haven laws.").

51. Cornett, *supra* note 49, at 838 ("The legislative message is clear: we promise not to prosecute you if you promise not to leave your baby where it will likely die."). A French study similarly suggests that safe haven laws provide an alternative to neonaticide and infanticide. Catherine Bonnet, *Adoption at Birth: Prevention Against Abandonment or Neonaticide*, 17 CHILD ABUSE & NEGLECT 501 (1993) (reporting the results of a 1980's study in France wherein 22 female subjects were interviewed to understand the psychodynamics of giving up one's child—18 of the subjects took advantage of the French law permitting anonymous and cost-free delivery, then the adoption of the baby; four were shocked by the birth and committed neonaticide).

52. Ayres, *supra* note 45, at 271–77; *see also* Stacie Schmerling Perez, *Combating the "Baby Dumping" Epidemic: A Look at Florida's Safe Haven Law*, 33 NOVA L. REV. 245, 267 (2008).

53. WILCZYNSKI, *supra* note 12, at 185–91.

Child Death Review Teams ("CDRT") identify the victims and causes of infanticides after they happen, in order to improve agencies' future prevention efforts when encountering at-risk mothers.[55] Dr. Wilczynski, in her study discussed above, supports this type of review for improving agencies' interactions with at-risk mothers.[56]

It has been suggested that, in order to be successful, preventative measures must be tailored to the contributing causes of infanticide.[57] For example, preventative measures may include redressing the disproportionate parenting responsibilities placed on women, "since women tend to kill in a context of having too much responsibility for child-care and men in a context of not having enough."[58] In her study, Dr. Wilczynski suggests increasing societal support for families[59] and those who are mentally ill.[60] All of these tools would help certain mothers in difficult situations, perhaps preventing their commission of neonaticide or infanticide.[61]

However, preventative measures targeting neonaticide and infanticide are difficult to construct for several reasons. First, the psychological issues associated with these crimes are not easily identifiable before the infanticide or neonaticide occurs. For example, many women who commit neonaticide are in denial about their pregnancy in the first place.[62] Second, even those parents who do not commit infanticide or neonaticide may manifest filicidal characteristics.[63] Nonetheless, if particular preventative measures reduce the occurrence of neonaticide and infanticide, they should be pursued.

54. *Id.* at 185.

55. *See id.* at 185–91.

56. *Id.* at 191 ("Such teams represent a vital step towards the prevention of child fatalities.").

57. *Id.* at 215 ("Preventative measures . . . must be designed to address [ ] the multiple causes of child-killing. . . .").

58. *Id.*

59. WILCZYNSKI, *supra* note 12, at 216–20.

60. *Id.* at 219.

61. *Id.*

62. *Id.* at 49–52.

63. Susan Hatters-Friedman & Phillip J. Resnick, *Parents Who Kill*, PSYCHIATRIC TIMES (May 11, 2009), http://www.psychiatrictimes.com/display/article/10168/1412694?pageNumber=2.

II. Current Treatment by Courts

In the United States, neither neonaticide nor infanticide constitutes a separate offence from homicide.[64] Lack of statutory separation has produced widely inconsistent charging in neonaticide and infanticide cases, ranging from unlawful disposition of a body to first-degree murder.[65]

Neonaticides and infanticides are typically charged under state murder and manslaughter statutes.[66] For example, in one sample of forty-two defendants in neonaticide cases, twenty-nine were charged with murder.[67] In another sample of eight neonaticide cases, one defendant was convicted of first-degree murder, two of second-degree murder, three of involuntary manslaughter, one of negligent homicide, and one for "unspecified" murder.[68] This frequent treatment of neonaticide and infanticide as either murder or manslaughter merits further review at the state level, as well as the federal level given the occasional federal jurisdiction in such cases.

A. Treatment in State Courts

Criminal law traditionally falls within the domain of the states,[69] placing the vast majority of neonaticide and infanticide cases in state courts. To varying extents, many states have adopted the Model Penal Code, developed by the American Law Institute, which grades homi-

64. United States v. Gibson, 17 C.M.R. 911, 934 (A.F.B.R. 1954); *see also* Diane Fanning, *Neonaticide: A Distinct Crime or Just Another Murder?*, FORBES (Nov. 22, 2011), http://www.forbes.com/sites/crime/2011/11/22/neonaticide-a-distinct-crime-or-just-another-murder/ ("All these cases in the U.S. have been approached as homicides from the onset because there are no specific neonaticide or infanticide laws here.").

65. Oberman, *supra* note 8, at 31. One Chicago defense lawyer also noted a pattern of "over-charging and under-convicting" in neonaticide cases. *Id.* at 96 (quoting an interview with Jeffrey Urdangen, criminal defense attorney, in Chicago, Ill. (Oct. 15, 1995)).

66. *See, e.g.*, Jones v. State, 29 Ga. 594, 607 (Ga. 1860) (noting that infanticide "is clear murder"); Commonwealth v. Hall, 78 N.E.2d 644, 647 (Mass. 1948) (quoting R. v. Hughes, (1857) 7 Cox C.C. 301, 302) ("But it has never been doubted that if death is the direct consequence of the malicious omission of the performance of a duty (as of a mother to nourish her infant child) this is a case of murder. If the omission was not malicious and arose from negligence only, it is a case of manslaughter."); State v. Collington, 192 S.E.2d 857 (S.C. 1972) (mother charged with murder for committing neonaticide); State v. McGuire, 490 S.E.2d 912, 915 (W. Va. 1997) (neonaticidal defendant charged with murder). *But see* State v. DePiano, 926 P.2d 494, 495–96 (Ariz. 1996) (en banc) (attempted killing of a child charged as two counts of intentional or knowing child abuse, which carries a much stiffer sentence).

67. Oberman, *supra* note 8, at 31.

68. Macfarlane, *supra* note 1, at 194.

69. *See* Rachel E. Barkow, *Our Federal System of Sentencing*, 58 STAN. L. REV. 119, 119 (2005).

cide offenses according to state of mind.[70] Similarly, the common law underlying many other state criminal codes defines murder as the unlawful killing of another human being with malice aforethought.[71] Modern state statutes generally provide distinctions between first and second-degree murder,[72] with first-degree murder typically codified as a killing committed either with premeditation or during an enumerated felony,[73] and second-degree murder being all others.[74]

Some commentators have noted that when neonaticides and infanticides are charged as murder, they often fail to meet all of the

70. *See* MODEL PENAL CODE § 210 (1962) (explanatory note). A homicidal killing constitutes murder when "committed purposely or knowingly," or when "committed recklessly under circumstances manifesting extreme indifference to the value of human life," *id.* § 210.2(1)(a)–(b). Manslaughter is a killing "committed recklessly" or "under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse." *Id.* § 210.3. Negligent homicide is a killing "committed negligently." *Id.* § 210.4. The Code's comments have suggested an awareness of the unique nature of neonaticide that may make those cases better suited to manslaughter rather than murder charges:

> [W]e think it plain that the case for a mitigated sentence does not depend on a distinction between impulse and deliberation; the very fact of long internal struggle may be evidence that the actor's homicidal impulse was deeply aberrational, far more the product of extraordinary circumstances than a true reflection of the actor's normal character, as, for example, in the case of . . . many infanticides . . . .

MODEL PENAL CODE § 201.6, cmt. at 70 (Tent. Draft No. 9, 1959). However, this comment was included only in a 1959 tentative draft of the Model Penal Code and does not appear in later editions. *See generally* MODEL PENAL CODE (1962).

71. Sean J. Kealy, *Hunting the Dragon: Reforming the Massachusetts Murder Statute*, 10 B.U. PUB. INT. L.J. 203, 206 (2001). In other words, with the intent to kill, inflict great bodily harm, commit a felony, or act with knowledge of probable death or grievous bodily harm. *Id.* at 208.

72. *Id.* at 253; *see also, e.g.*, IDAHO CODE ANN. § 18-4003.

73. Kealy, *supra* note 71, at 253.

74. *Id.* at 253. In one case of neonaticide, the court offered this distinction between first- and second-degree murder:

> If the defendant, with a sedate and deliberate mind, anterior or subsequent to the act of parturition conceived the design to take the life of her new-born infant, and in pursuance of such formed design did take its life in the manner alleged in the indictment, and such infant was wholly produced from the body of its mother alive, and was in existence by actual birth at the time the injuries causing death were inflicted, then she would be guilty of murder with express malice. If, however, the design to take its life was formed and executed when her mind, by reason of physical or mental anguish, was incapable of cool reflection, and she was not sufficiently self-possessed to consider and contemplate the consequences about to be done, but, yielding to a sudden, rash impulse, she conceived and perpetrated the fatal deed after the infant had been wholly produced from her body and had an existence by actual birth, then she was guilty of murder in the second degree.

Wallace v. State, 7 Tex. Ct. App. 570, 572 (Tx. Ct. App. 1880).

statutory elements of the murder charge.[75] For example, intent may be hard to prove given the impulsive nature of these killings. Another common challenge in charging neonaticide cases as murder is proving that the victim was born alive.[76] This requirement, not at issue in murder cases generally, is specifically necessary in the instance of a neonaticide because stillborn births occasionally occur and "one cannot kill [someone] already dead."[77] Accordingly, for both of the above reasons, murder convictions for neonaticides and infanticides have been reversed on insufficiency of evidence grounds.[78]

Common law legal defenses have not consistently disposed of these cases in state courts.[79] Nonetheless, the defense of insanity,[80]

75. Oberman, *supra* note 8, at 95.

76. As in any other murder case, this element must be proved beyond a reasonable doubt. *See, e.g.*, Shedd v. State, 173 S.E. 847, 847–49 (Ga. 1934) (finding insufficient evidence to establish that the child was born alive and discussing corpus delicti in infanticide cases generally); State v. Collington, 192 S.E.2d 856, 857–58 (S.C. 1972) (finding sufficient evidence to establish that the child was born alive and discussing corpus deliciti in infanticide cases generally). For more background on the concept of corpus delicti, see State v. Aten, 927 P.2d 210, 218–19 (Wash. 1996) ("'Corpus delicti' literally means 'body of the crime.' In a homicide case, the corpus delicti consists of two elements the State must prove at trial: (1) the fact of death and (2) a causal connection between the death and a criminal act. The corpus delicti can be proved by either direct or circumstantial evidence.").

77. Singleton v. State, 35 So. 2d 375, 378 (Ala. Ct. App. 1948). To establish a live birth, "[r]ough and rule of thumb tests were applied by the earlier cases, and the question of the viability of the child seems to have revolved around whether the child breathed and had a circulation independent of its mother." *Id.*; *see also* Catherine L. Goldenberg, Comment, *Sudden Infant Death Syndrome as a Mask for Murder: Investigating and Prosecuting Infanticide*, 28 Sw. U. L. Rev. 599, 611–12 (noting the difficulty of determining foul play in cases where the child might have instead died from sudden infant death syndrome). Finally, it is well-established that evidence of previous instances of infanticide or child abuse are admissible in court to establish intent and an absence of mistake or accident. *See, e.g.*, United States v. Harris, 661 F.2d 138, 142 (10th Cir. 1981); United States v. Woods, 484 F.2d 127, 133 (4th Cir. 1973); State v. Hassett, 859 P.2d 955, 964 (Idaho Ct. App. 1993).

78. *See, e.g.*, Singleton v. State, 35 So. 2d 375, 381 (Ala. Ct. App. 1948); Weaver v. State, 132 So. 706, 708 (Ala. Ct. App. 1931); Denham v. Commonwealth, 40 S.W.2d 384, 384 (Ky. 1931); State v. Voges, 266 N.W. 265, 266 (Minn. 1936); Taylor v. State, 66 So. 321, 321 (Miss. 1914); Brown v. State, 49 So. 146, 147 (Miss. 1909); Josef v. State, 30 S.W. 1067, 1068–69 (Tx. Crim. App. 1895); State v. Johnson, 83 P.2d 1010, 1016–18 (Utah 1938); State v. Merrill, 78 S.E. 699, 702 (W. Va. 1913); State v. Osmus, 276 P.2d 469, 484 (Wyo. 1954). *But see* State v. Shephard, 124 N.W.2d 712, 722 (Iowa 1963).

79. *See supra* note 14.

80. Depending on the jurisdiction, one of several tests determines whether a defendant may use an insanity defense at trial. Most states utilize the *M'Naughten* standard. Adam Caine, Comment, *Fallen From Grace: Why Treatment Should Be Considered for Convicted Combat Veterans Suffering From Post Traumatic Stress Disorder*, 78 UMKC L. Rev. 215, 222 (2009). *M'Naughten* permits acquittal by reason of insanity when the defendant, during the commission of the crime, either did not know the nature and quality of her act or did not know the act was wrong. Shannon Farley, Comment, *Neonaticide: When the Bough Breaks and the Cradle Falls*, 52 Buff. L. Rev. 597, 610 (2004). *See also, e.g.*, Clark v. State, 588 P.2d 1027,

which entitles a defendant to an acquittal, has been used frequently and successfully.[81] One study of infanticide cases revealed that one-third of the cases studied had successfully argued an insanity defense, versus the less than one percent successfully argued in all felony cases.[82] The success rate of insanity defenses in infanticide cases decreased, however, following the infanticide committed by Susan Smith, who was reviled for pursuing an insanity defense by a public who already found her unsympathetic.[83] Nonetheless, defendants continue to raise insanity defenses in many infanticides[84] despite their mixed success.[85]

Postpartum depression plays an important role in many insanity defenses against murder charges following the killing of a child by his or her mother. Postpartum depression is a reactive depression involving feelings of hopelessness, inadequacy, anxiety, and moodiness that affects ten to twenty percent of women after giving birth, sometimes for as long as a year.[86] Evidence shows that the amount of support that a mother receives from her family "may be more determinative of [who develops postpartum] depression than are demographic and biological factors."[87]

1029 (Nev. 1979). Another test for insanity is the American Law Institute Test, which acquits a defendant if she can show that she "lacked the substantial capacity to appreciate the criminality . . . of her conduct or to conform her conduct to the requirements of the law." Farley, *supra* note 80, at 610. For an example of the use of the American Law Institute Test in an infanticide case, see State v. White, 456 P.2d 797, 800 (Idaho 1969).

81. *See, e.g.*, State v. Skeoch, 96 N.E.2d 473, 475–76 (Ill. 1951) (prosecution unable to satisfy burden of proof required to rebut defendant's claim of insanity); Commonwealth v. Thomas, 435 A.2d 901, 903 (Pa. Super. Ct. 1981) (noting that appellant had been found not guilty of murder at trial by reason of insanity). Judge Cardozo supported the insanity defense for infanticide when he wrote,

> A mother kills her infant child to whom she has been devotedly attached. She knows the nature and quality of the act; she knows that the law condemns it; but she is inspired by an insane delusion that God has appeared to her and ordained the sacrifice. It seems a mockery to say that, within the meaning of the statute, she knows that the act is wrong.

People v. Schmidt, 110 N.E. 945, 949 (N.Y. 1915).

82. Perlin, *supra* note 1, at 28–29.

83. *Id.* at 29.

84. *See, e.g.*, Russell D. Covey, *Temporary Insanity: The Strange Life and Times of the Perfect Defense*, 91 B.U. L. Rev. 1597, 1600 (2011).

85. For an example of the difficulty of facilitating psychological defenses for infanticidal mothers, see Commonwealth v. Dupre, 866 A.2d 1089, 1103–04 (Pa. Super. Ct. 2004).

86. Michele Connell, Note, *The Postpartum Psychosis Defense and Feminism: More or Less Justice for Women?*, 53 Case W. Res. L. Rev. 143, 145–46 (2002).

87. *Id.* at 146.

Although commonly employed in developing an insanity defense,[88] "[e]vidence of postpartum disorders can [also] be used to determine competency to stand trial, to challenge the voluntary act requirement of a criminal offense, to negate the mental state for the crime charged, to establish manslaughter . . . and to determine the appropriate sentence."[89] However, the admissibility of evidence of a defendant's postpartum depression—even its more serious form, postpartum psychosis[90]—has not resolved sentencing inconsistency in these cases. For example, in a study of twenty-four cases employing postpartum psychosis as a defense, eight women were acquitted, eight received probation, ten were sentenced to between three and twenty years of imprisonment, and two received life sentences.[91] This wide range of sentences is stark.

Commentators have also called for the legal recognition of Neonaticide Syndrome,[92] which would allow expert witnesses to testify about the universal characteristics of neonaticide in court in support of a defense theory.[93] Although state courts have often declined to recognize this syndrome,[94] one dissent argued that its admissibility should be considered, and urged the use of the *Frye* test to determine whether courts should allow testimony on the syndrome to clarify the defendant's capacity to know and appreciate the nature and consequences of her conduct at the time she killed her newborn.[95]

88. Laura E. Reece, Comment, *Mothers Who Kill: Postpartum Disorders and Criminal Infanticide*, 38 UCLA L. REV. 699, 738 (1991); *see also* State v. Young, No. 9904019648, 2003 WL 1847262, at *2–3 (Del. Super. Ct. Apr. 9, 2003) (noting the availability of the defense of postpartum psychosis); Anne Damante Brusca, Note, *Postpartum Psychosis: A Way Out for Murderous Moms?*, 18 HOFSTRA L. REV. 1133, 1149–69 (1990).

89. Reece, *supra* note 88, at 717. *See generally id.* at 717–47.

90. Lang, *supra* note 33, at 136. ("Approximately only one in one thousand women suffering from postpartum depression develops postpartum psychosis, and one out of every twenty women suffering from postpartum psychosis tries to kill herself or her children.").

91. Daniel Maier Katkin, *Postpartum Psychosis, Infanticide, and Criminal Justice*, *in* POSTPARTUM PSYCHIATRIC ILLNESS 279–80 (James Alexander Hamilton & Patricia Neel Harberger eds., 1992).

92. Judith E. Macfarlane, for one, has rigorously argued for the recognition of such a syndrome. *See* Macfarlane, *supra* note 1, at 180. *But see infra* note 95.

93. Macfarlane, *supra* note 1, at 181.

94. Molly Karlin, *Damned If She Does, Damned If She Doesn't: De-Legitimization of Women's Agency*, *in* Commonwealth v. Woodward, 18 COLUM. J. GENDER & L. 125, 159 (2008) (noting that no court "has accepted neonaticide syndrome as a basis for an affirmative defense").

95. People v. Wernick, 632 N.Y.S.2d 839, 842-43 (N.Y. App. Div. 1995) (Friedmann, J., dissenting), *aff'd* 674 N.E.2d 322 (N.Y. 1996). The *Frye* test probes whether the reliability of scientific evidence derived from a novel procedure is generally accepted by those in a position to know. *Wernick*, 674 N.E.2d at 326–27 (Simons, J., dissenting). Not all psychiatrists, however, support the legal recognition of Neonaticide Syndrome. *See, e.g.*, Phillip J.

Finally, commentators have noted the partial defense of the Model Penal Code's Extreme Mental and Emotional Disturbance ("EMED") doctrine's applicability to neonaticide and infanticide cases, on the theory that mental or emotional disturbance contributes to these cases.[96] EMED essentially reduces murder to manslaughter when there exists a reasonable excuse for a mental or emotional disturbance that contributed to the killing.[97] The Model Penal Code's standard for extreme mental or emotional disturbance is more flexible than that of traditional provocation, thereby being more defendant-friendly.[98]

All of these defenses have been inconsistently recognized in cases involving neonaticide and infanticide.[99] While some defenses are recognized, others are not, and the lack of a consistent approach to these defenses contributes to the inconsistencies encountered in such cases.

B. Treatment in Federal Courts

Charging inconsistencies exasperate sentencing inconsistencies on both interstate and intrastate levels.[100] Although criminal law falls within the domain of the states, criminal cases are occasionally tried in

Resnick & Susan Hatters-Friedman, Book Review, 54 PSYCHIATRIC SERVICES 1172 (2003) (reviewing INFANTICIDE: PSYCHOSOCIAL AND LEGAL PERSPECTIVES ON MOTHERS WHO KILL (Margaret G. Spinelli ed., 2003)) ("Macfarlane also argues for the unsubstantiated 'neonaticide syndrome,' which thus far the courts have wisely rejected. No act alone should be allowed to define an illness. For example, 'homicidal insanity,' a form of 'moral insanity,' was a defense in the 1800s. It was ultimately rejected as having no valid scientific basis." (citations omitted)).

96. *See, e.g.*, Janet Ford, Note, *Susan Smith and Other Homicidal Mothers—In Search of the Punishment That Fits the Crime*, 3 CARDOZO WOMEN'S L.J. 521, 532 (1996); Reece, *supra* note 88, at 731–32. The reason for applying EMED to neonaticide and infanticide may be similar to the reasoning driving England's Infanticide Act, which "presumes that all women are ill if they kill their infants within the first twelve months of life." Barton, *supra* note 29, at 596. *See also supra* note 79.

97. MODEL PENAL CODE § 210.3(1)(b) (1980). Specifically, murder is manslaughter by defense of EMED when a homicide "is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." *Id.*

98. Reece, *supra* note 88, at 731.

99. *See, e.g.*, Jessie Manchester, Comment, *Beyond Accommodation: Reconstructing the Insanity Defense to Provide an Adequate Remedy for Postpartum Psychotic Women*, 93 J. CRIM. L. & CRIMINOLOGY 713, 742 (2003).

100. *See, e.g.*, Deegan I, 605 F.3d 625, 637 (8th Cir. 2010) (Bright, J., dissenting) ("[N]eonaticide does not now, nor has it ever, come within the 'run-of-the-mine' guidelines for second-degree murder."). For an argument that federal sentencing should be more consistent with state sentencing, see Barkow, *supra* note 69, at 136.

federal courts.[101] These federal cases have their own set of sentencing inconsistency issues arising from the application of the Federal Sentencing Guidelines.

There is no federal infanticide statute for murder, just as there is none in state court. Therefore, defendants must be charged pursuant to either the federal murder statute,[102] the federal manslaughter statute,[103] or some other miscellaneous criminal federal statute. Congress enacted 18 U.S.C. § 1111,[104] the federal murder statute, in order to "enlarge the common law definition of murder."[105] Included in this definition is the killing of a fetus.[106]

Federal murder is classified into differing degrees. Murder in the first-degree includes "every murder perpetrated by . . . any [ ] kind of willful, deliberate, malicious, and premeditated killing . . . ."[107] Under federal law, all other murders are those in the second degree.[108] Accordingly, premeditation is the distinguishing element between first-degree and second-degree murder.[109] There is some uncertainty in federal courts, however, about the precise legal definition of premeditation.[110] Nonetheless, to support premeditation (and thus a charge of first-degree murder), federal courts generally require a showing

101. For example, neonaticides and infanticides are tried on the federal level if the killing was committed on an Indian Reservation, as in the Eighth Circuit Court of Appeals case of United States v. Deegan. 18 U.S.C. § 1153 (2006); *see also, e.g.*, *Deegan I*, 605 F.3d at 625.

102. 18 U.S.C. § 1111.

103. *Id.* § 1112(a).

104. *Id.* § 1111.

105. United States v. Spencer, 839 F.2d 1341, 1343 (9th Cir. 1988) (quoting SPECIAL JOINT COMM. ON THE REVISION OF THE LAWS, REVISION AND CODIFICATION OF THE LAWS, ETC., H.R. REP. NO. 2, at 25 (1st Sess. 1908)).

106. *Id.*

107. 18 U.S.C. § 1111(a). In its entirety, the statute defines first-degree murder as:

> [E]very murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed.

Id.

108. *Id.*

109. United States v. Begay, 567 F.3d 540, 545 (9th Cir. 2009) ("Premeditation is the essential element that distinguishes first-degree from second-degree murder.").

110. United States v. Shaw, 701 F.2d 367, 393 (5th Cir. 1983). *See generally* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 14.7(a) at 477 (2d ed. 2003) ("It is not easy to give a meaningful definition of the word[ ] 'premeditate' . . . as . . . used in connection with first degree murder.").

that the defendant acted with "a 'cool mind' that is capable of reflection, and . . . did, in fact, reflect, at least for a short period of time before his act of killing."[111] Federal manslaughter is the unlawful killing of a human being without malice aforethought,[112] and is either voluntary[113] or involuntary.[114]

Congress has promulgated the Federal Sentencing Guidelines in order to achieve sentencing consistency in federal criminal cases.[115] The Guidelines consist of sentencing ranges that are "the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions."[116] In other words, the Guidelines were generated using statistics analyzing actual sentences that district court judges ordered for particular crimes.

Given their rarity, federal neonaticide and infanticide cases could not have influenced the Federal Sentencing Guidelines for murder in any meaningful way.[117] In fact, federal neonaticide and infanticide

111. *Shaw*, 701 F.2d at 393.

112. 18 U.S.C. § 1112(a). Malice aforethought essentially means having an intent to kill, an intent to inflict great bodily harm, an intent to commit a felony, or awareness of a high risk of death. Kealy, *supra* note 71, at 206–08.

113. In other words, manslaughter committed "[u]pon a sudden quarrel or heat of passion." 18 U.S.C. § 1112(a).

114. Manslaughter perpetrated while "[i]n the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death." *Id.*

115. Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 20 (2003); *see also* S. REP. NO. 98-225, at 38–39 (1983).

116. Gall v. United States, 552 U.S. 38, 46 (2007). However, not all of the Guideline sentences are derived using this empirical approach, including the sentences recommended for drug offenses. *See, e.g.*, Whitman Knapp, *The War on Drugs*, 5 FED. SENT'G REP. 294, 295 (1993); Eric J. Miller, *Role-Based Policing: Restraining Police Conduct "Outside the Legitimate Investigative Sphere,"* 94 CALIF. L. REV. 617, 632–33 (2006). Importantly, "the Sentencing Commission departed from the empirical approach when setting the Guidelines range for drug offenses, and chose instead to key the Guidelines to the statutory mandatory minimum sentences that Congress established for such crimes." *Gall*, 552 U.S. at 46 n.2. Also not empirically founded, the death penalty was made available for gun murders committed during federal drug trafficking crimes, 18 U.S.C. § 924(a)(5), as well as during "drive-by shooting[s]," *id.* § 36. The Sentencing Commission is also particularly tough on child pornography. *See, e.g.*, Ian N. Friedman & Kristina W. Supler, *Child Pornography Sentencing: The Road Here and the Road Ahead*, 21 FED. SENT'G REP. 83, 83–84 (2008).

117. United States v. Deegan (*Deegan II*), 634 F.3d 428, 428 (8th Cir. 2010) (Murphy, J., dissenting from denial of rehearing en banc) ("[T]he fact [is] that the United States Sentencing Commission has generally had a large database of previous offenses to consider in formulating guidelines. In this case . . . that may not have been true for the offense of neonaticide despite the assurances given to the district court before it imposed sentence.").

cases necessarily fall outside the "heartland"[118] of murders contemplated by the Sentencing Guidelines and tried in federal courts because they are simply too few. The significance of this has indeed decreased from the past, when imposition of the Sentencing Guidelines was mandatory and departures were only permitted in cases that were determined to fall outside the heartland.[119] In *United States v. Booker*,[120] however, the Supreme Court held that 18 U.S.C. § 3553(b)(1), the federal statute making the Sentencing Guidelines mandatory, was inconsistent with the requirements of the Sixth Amendment.[121] Therefore, the section was severed from the Sentencing Reform Act of 1984, making the Sentencing Guidelines entirely discretionary, and reducing the importance of whether a case falls within the heartland of the Guidelines.[122] Nonetheless, district courts today still must "give serious consideration to the extent of any departure from the Guidelines . . . ."[123]

This is problematic because neonaticide and infanticide defendants likely receive different penalties under the Sentencing Guidelines than they would have received had the Sentencing Guidelines contemplated the unique facts of their cases. If, for this reason, a judge departs from the Sentencing Guidelines in such cases, sentencing inconsistencies will still remain, due to lack of statutory guidance.

In sum, the legal approach to neonaticide and infanticide cases is hardly uniform on either the state or federal level. Prosecutors bring varying charges against these defendants, defendants use differing defense strategies, and as a result, courts impose disparate sentences.

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118. *See* Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1490 (2004) (explaining that a "heartland" of like cases was established by the Sentencing Commission for determining sentences under the Federal Sentencing Guidelines).

119. Koon v. United States, 518 U.S. 81, 92 (1996). Until 2005, 18 U.S.C. § 3553(b) permitted deviation from the Sentencing Guidelines only if the sentencing court found "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission." *Id.*

120. 543 U.S. 220 (2005).

121. *Id.* at 226–27.

122. *Id.* at 245.

123. Gall v. United States, 552 U.S. 38, 46 (2007). The Supreme Court has acknowledged that district courts have a unique vantage point to best determine whether or not a case properly falls within the heartland of the Guidelines. *Koon*, 518 U.S. at 98–99. The courts of appeals, however, do retain the power to review district court sentencing decisions for reasonableness. D. Michael Fisher, *Still in Balance? Federal District Court Discretion and Appellate Review Six Years After* Booker, 49 DUQ. L. REV. 641, 650 (2011).

III. Sentencing Consistency Offered by Separate Neonaticide and Infanticide Legislation

Several proposals have been made to consistently resolve neonaticide and infanticide cases in the courts,[124] without much success.[125] As a means of reform, this article proposes statutorily separating neonaticide and infanticide from other crimes. Regardless of whether the policy of such reform eventually aims to achieve greater leniency or harshness for offenders, statutory separation would be the most effective method for achieving consistent administration of justice within this subset of criminal law.

A. Model Infanticide Legislation in England

Many countries have separate infanticide statutes.[126] England's Infanticide Act[127] serves as the quintessential example of such legislation, although Canada,[128] New Zealand,[129] and some states of Australia,[130] for example, have also enacted similar legislation.

Many organizations in jurisdictions with infanticide statutes have analyzed whether infanticide legislation should be repealed, amended, or retained.[131] Following those evaluations, separate infan-

124. *See supra* Part II.A (describing proposals for the judicial acceptance of Neonaticide Syndrome, insanity defenses, and the Model Penal Code's Extreme Mental and Emotional Disturbance ("EMED") doctrine).

125. *Id.*

126. Oberman, *supra* note 8, at 24 ("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.").

127. Infanticide Act, 1938, 1 & 2 Geo. 6, c. 36, § 1 (U.K.).

128. Criminal Code, R.S.C. 1985, c. C-46, § 233 (Can.). The Canadian infanticide statute was based on England's legislation. It states:

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

Id. For more background on Canada's statute, see April J. Walker, *Application of the Insanity Defense to Postpartum Disorder-Driven Infanticide in the United States: A Look Toward the Enactment of an Infanticide Act*, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 197, 205–07 (2006).

129. Crimes Act 1961, § 178 (N.Z.).

130. WILCZYNSKI, *supra* note 12, at 151 n.4; *see also, e.g.*, N.S.W. LAW REFORM COMM'N, PARTIAL DEFENCES TO MURDER: PROVOCATION AND INFANTICIDE (REPORT 83) (1997), *available at* http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP3.

131. These have included the 1993 NSW Law Reform Commission in Australia, the Law Reform Commission of Canada, the 1984 Criminal Law Revision Committee in En-

ticide statutes were retained by each country evaluated.[132] The Criminal Law Revision Committee in England even supported expanding the scope of England's Infanticide Act to include killings that result from a mental disturbance arising from "circumstances consequent upon the birth," such as "environmental and other stresses."[133] The Royal College of Psychiatrists' Working Party on Infanticide concurred, also finding that the Act's scope should be expanded.[134] The success of these statutes abroad supports the advisability of their introduction in the United States.

Interest in initial infanticide legislation in England arose in the late Eighteenth Century,[135] due to the frequent refusal by juries to convict women of murder for acts of infanticide on account of the mandatory death sentence accompanying murder.[136] Instead, juries preferred the much lesser charge of concealment of birth.[137] This was especially true when defendants were servants, seduced or raped by their masters or their masters' associates.[138] Even when a woman was convicted of murder, the sentence was often commuted,[139] undermining England's justice system.

The Infanticide Act of 1922[140] was eventually enacted in England. The Act separated the offense of infanticide from murder, reducing it to the level of manslaughter.[141] It applied when a woman caused the death of her newborn by any willful act or omission, if "at the time of the act or omission she had not fully recovered from the effect of giving birth to such child, [and] by reason thereof the balance of her

gland, and the House of Lords Select Committee on Murder and Life Imprisonment in England. WILCZYNSKI, *supra* note 12, at 155.

132. *Id.*

133. Katherine O'Donovan, *The Medicalisation of Infanticide*, CRIM. L. REV. 259, 263 (1984).

134. Velma Dobson & Bruce Sales, *The Science of Infanticide and Mental Illness*, 6 PSYCH. PUB. POL. & L. 1098, 1108 (2000). The Law Reform Commission of Canada, however, determined that the underlying rationale of the Infanticide Act was redundant, and concluded that the codification of infanticide as a separate legal entity should be abolished. *Id.*

135. WILCZYNSKI, *supra* note 12, at 150. For a history of infanticide in England, see Rapaport, *supra* note 28, at 547–57.

136. WILCZYNSKI, *supra* note 12, at 150.

137. *Id.*

138. *Id.*

139. *Id.*

140. Infanticide Act, 1922, 12 & 13 Geo. 5, c. 18 (U.K.).

141. *Id.*

mind was then disturbed."[142] The hormonal shifts that occur after the delivery of a child were cited as the Act's underlying justification.[143]

However, the scope of the Act was initially unclear. After its enactment, two subsequent English cases[144] held that the Infanticide Act did not apply to infants aged thirty-five days and three weeks, respectively.[145] The Infanticide Act of 1938[146] was therefore enacted to amend the 1922 Act by widening the scope of infanticide under the Act by including only newly born children to those less than twelve months of age.[147] The justification for this expansion was to recognize the woman's disturbed balance of mind due to "the effect of lactation" following childbirth.[148]

The Infanticide Act of 1938 is still in force in England and Wales today. It states:

> Where a woman by any wilful act or omission causes the death of her child . . . under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child . . . she shall be guilty . . . of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence manslaughter of the child.[149]

While jurisdictions with infanticide legislation, including England, do not always convict defendants under those statutes,[150] infanticide acts remain a standardized method by which to resolve infanticide cases. In one sample of thirteen English infanticide cases, for example, although only two women were initially charged with infanticide, all thirteen were ultimately convicted under the Infanticide Act.[151] Of those ultimately convicted under the Act, three were initially charged with murder because of either an absence of evidence supporting infanticide or a positive statement by the woman's doctor that the infanticide charge was not supportable.[152] Often, psychiatric

142. O'Donovan, *supra* note 133, at 261. For further background on the English infanticide legislation, see Gardner, *supra* note 11, at 985–88.

143. Infanticide Act, 1922, 12 & 13 Geo. 5, c. 18, § 1.

144. R. v. O'Donaghue, (1924) 20 Cr. App. R. 132; R. v. Hale, The Times, 22 July 1936.

145. Wilczynski, *supra* note 12, at 151.

146. Infanticide Act, 1938, 1 & 2 Geo. 6, c. 36, § 1.

147. *Id.*

148. *Id.*

149. Infanticide Act, 1938, 1 & 2 Geo. 6, c. 36, § 1.

150. Wilczynski, *supra* note 12, at 151.

151. *Id.* However, one Australian study found that slightly more infanticidal women were convicted of manslaughter than infanticide. *Id.* at 152.

152. *Id.* at 151.

reports given in these cases resulted in convictions for infanticide instead of murder.[153] Therefore, the availability of the Infanticide Act guided the sentencing in most of these cases as if the defendants had committed manslaughter, thus rectifying the prior problem of jury nullification that had been undermining the justice system, while simultaneously producing more consistent sentences.

A separate but related point concerns deterrence. One of the most important purposes of criminal punishment is deterrence, which is not effectively accomplished by charging and sentencing these defendants under murder and manslaughter statutes.[154] While deterrence is typically achieved by criminal laws that impose punitive sanctions compelling people to obey the law,[155] women gripped by psychosis or social pressures regarding motherhood will not react to traditional deterrence efforts.[156]

In terms of producing sentencing consistency, women's sentences have been relatively consistent under English infanticide legislation. Initially, there was "an even split between custodial and non-custodial disposals, to the almost total abandonment of prison sentences by the late 1950s."[157] Now, women convicted of infanticide in England usually receive probation orders, commonly with psychiatric treatments attached.[158] In one sample of cases disposed of under the Act, four women received probation orders, four women received probation orders including psychiatric treatment, one received a supervision order, and two received unrestricted hospital orders.[159] These even numbers reflect the general sentencing patterns for infanticide defendants not only in England, but also in Hong Kong and Australia,[160]

153. *Id.*

154. *See* James J. Dvorak, Comment, *Neonaticide: Less Than Murder?*, 19 N. ILL. U. L. REV. 173, 189 (1998) ("The presumption of a disturbed state of mind in infanticide acts easily leads to rehabilitation as a proper form of punishment. This presumption also appears to lead to the conclusion that deterrence by imprisonment is not applicable."); Jose Gabilondo, *Irrational Exuberance About Babies: The Taste for Heterosexuality and Its Conspicuous Reproduction*, 28 B.C. THIRD WORLD L.J. 1, 68 (2008) ("Deterrence based on legal punishment fails since infanticide tends to be 'a spontaneous crime, reflecting a loss of control rather than a cool-headed calculation.'" (quoting Oberman, *supra* note 8, at 14)).

155. Cheryl L. Evans, *The Case for More Rational Corporate Criminal Liability: Where Do We Go From Here?*, 41 STETSON L. REV. 21, 26 (2011) ("One of the basic tenets of criminal law is deterrence. Criminal law exists, in part, to deter bad behavior.").

156. *See supra* notes 64–65 and accompanying text.

157. WILCZYNSKI, *supra* note 12.

158. *Id.*

159. *Id.* at 154.

160. *Id.*

which have also enacted infanticide legislation.[161] The Infanticide Act in England serves as a model for separate infanticide legislation and offers the promise of achieving sentencing consistency for neonaticide and infanticide cases in the United States.

B. Drafting Infanticide Legislation for the United States

While the exact sentencing structure of a potential infanticide statute in the United States is beyond the scope of this Article, the English statute, as well as other international models, is nonetheless instructive. Drafting separate infanticide legislation—both at the state and federal level—raises several legal and policy issues, including questions regarding the appropriate scope of such a statute, the legal basis for such legislation, and debate as to its necessity.

Foreign infanticide statutes often apply only to maternal perpetrators, and are justified by the physical and emotional consequences associated with giving birth and nursing.[162] However, some commentators have expressed sociological concerns about focusing on the emotional factors associated with giving birth. They aver that such a focus may arguably create excuses for women who commit homicide and undermine women generally by suggesting they are unstable and hormonal.[163] There is also the problem of portraying women as psychotic and irrational.[164] On the other hand, as was done in foreign jurisdictions, these social costs must be weighed against achieving the fair and consistent administration of justice.[165] The proposed American infanticide legislation need not, for these reasons, rest on medical reasons alone, but instead on the sentencing inconsistencies resolved by such separate legislation.

161. Wills, *supra* note 41, at 1001; *see also supra* Part III.A.

162. *See supra* Part III.A.

163. WILCZYNSKI, *supra* note 12, at 226; Abigail Wong, *Filicide and Mothers Who Suffer From Postpartum Mental Disorders*, 10 MICH. ST. J. MED. & L. 571, 587–88 (2006). One article expresses concern regarding the leniency a woman might be afforded in the military criminal justice system because of her monthly menstrual cycle. Michael J. Davidson, *Feminine Hormonal Defenses: Premenstrual Syndrome and Postpartum Psychosis*, ARMY LAW., July 2000, at 5, 13–17. American courts have generally disfavored menstrual-related defenses. Brusca, *supra* note 88, at 1135 n.7.

164. *See, e.g.*, Christine M. Belew, Comment, *Killing One's Abuser: Premeditation, Pathology, or Provocation?*, 59 EMORY L.J. 769, 807 (2010) (noting that one outcome of accommodations for women who kill their abusers has been that battered women are portrayed as irrational and dysfunctional).

165. WILCZYNSKI, *supra* note 12, at 22.

Another common criticism of separate infanticide legislation targets the medical assumptions underlying such legislation[166] and asks whether the mental disturbance in infanticide cases is, in fact, caused by childbirth or lactation.[167] Critics may point to findings by the American Psychological Association, which—after denying any link between childbearing and psychological illness for the first three editions of its Diagnostic and Statistical Manual of Mental Disorders ("DSM") manual for doctors[168]—currently limits its acknowledgement of the risk of infanticide from postpartum depression to the onset of symptoms within four weeks of birth.[169] Furthermore, studies of maternal infanticides suggest various motives, only some of which are related to medical causes, such as postpartum psychosis and depression.[170] For example, some commentators have pointed to the external, situational pressures unique to motherhood.[171]

However, an American infanticide statute need not rest on medical justifications.[172] It can be established on legal constructs alone. In California, for example, a showing of heat of passion supports downgrading murder charges to voluntary manslaughter.[173] Such a legally-constructed classification can be similarly established in cases of neonaticide and infanticide by virtue of separating them from other kill-

166. *See, e.g.*, *id.* at 226 ("The infanticide legislation is distasteful at an ideological level since it is . . . based on a lesser degree of mental disturbance than that recognised elsewhere in criminal law.").

167. *See* Kirsten Johnson Kramar & William D. Watson, *Canadian Infanticide Legislation, 1948 and 1955: Reflections on the Medicalization/Autopoiesis Debate*, 33 CAN. J. SOC. 237, 239 (2008) ("[T]he biological theory . . . that women in childbirth, especially in difficult circumstances, were prone to temporarily lose reason or self-control, was a lay, rather than a psychiatric, theory." (citation omitted)).

168. Davidson, *supra* note 163, at 10.

169. Sara Anthis, *Postpartum Depression and New York's Child Welfare Policy in Neglect Cases*, 12 BUFF. WOMEN'S L.J. 33, 34 (2004); *see also* Davidson, *supra* note 163, at 5; Spinelli, *supra* note 2 (explaining that "[c]ontemporary neuroscientific findings support the position that a woman with postpartum psychosis who commits infanticide needs treatment rather than punishment and that appropriate treatment will deter her from killing again" and concluding that "absence of formal DSM-IV diagnostic criteria for postpartum psychiatric disorders promotes disparate treatment under the law.").

170. *See, e.g.*, *supra* Part II.A; Dobson & Sales, *supra* note 134, at 1109.

171. *See, e.g.*, Covey, *supra* note 84, at 1634.

172. *But see* WILCZYNSKI, *supra* note 12, at 150 (quoting J.A. Osborne, *The Crime of Infanticide: Throwing Out the Baby with the Bathwater*, 6 CANADIAN J. FAM. L. 47, 58 (1987)) ("However, the medical rationale for the [English infanticide] legislation was 'simply more conventional, conservative and less contentious than the reasons for the courts' lenient treatment of murdering mothers.'" (citation omitted)).

173. CAL. PENAL CODE § 192 (West 2008); *see also* People v. Steele, 47 P.3d 225, 239 (Cal. 2002).

ings through legal constructs, without relying on the potential medical causes of neonaticide and infanticide as a justification.

Another example of a criminal charge crafted to reflect distinct facts is vehicular homicide—a homicide caused during the operation of a motor vehicle.[174] Many state criminal codes make vehicular homicide a separate offense from murder in recognition of the consistency of its factual pattern that is distinct from other killings.[175] Separate infanticide legislation would similarly recognize the factual consistency of these neonaticide and infanticide cases and their distinction from other killings.[176]

It is important, finally, to underscore that infanticide legislation need not necessarily apply to every case involving the killing of a child by his or her mother. If evidence supported a first-degree murder charge, infanticide legislation would not preclude such a charge or conviction.[177] As in England, furthermore, an American Infanticide Act could remain entirely unavailable for mothers who kill children over the age of one,[178] justified either by the medical reasons confronting new mothers, or by a legal construct recognizing the heightened factual similarities in cases involving victims under the age of one.[179] Either way, infanticide legislation would provide an option to treat the subset of factually similar infanticide cases more coherently and consistently.

Conclusion

The uniqueness of neonaticide and infanticide makes it difficult to prevent these cases before they happen, as well as to attain consistent sentencing in their aftermath. Accordingly, there have been serious sentencing inconsistencies among mothers convicted of these acts, as well as between those convicted on the state level and on the federal level. Additional sentencing inconsistencies occur under the Federal Sentencing Guidelines for murder, even though neonaticide and infanticide fall outside of the heartland of murders considered by the Guidelines. In pursuit of greater sentencing consistency, this article has proposed statutorily separating neonaticide and infanticide

174. *See, e.g.*, CAL. PENAL CODE § 192(c)(3) (West 1998); United States v. Gomez-Leon, 545 F.3d 777, 781, 785–86 (9th Cir. 2008) (noting that defendant had served two years in prison for vehicular manslaughter under the California vehicular manslaughter statute).

175. *See Gomez-Leon*, 545 F.3d at 785–86.

176. *See supra* Part I.

177. *See supra* Part III.A.

178. WILCZYNSKI, *supra* note 12, at 8.

179. For possible legal constructs, see *supra* notes 171–75 and accompanying text.

from other crimes to achieve greater sentencing consistency, as is currently done in England.

Although several proposals have been made in an effort to deal, both prospectively and retrospectively, with neonaticide and infanticide, statutory separation of these acts from murder and manslaughter is the most effective way to finally achieve sentencing consistency in the United States. In the meantime, in the dearth of such a statute, the only consistency in this subset of criminal law will be its unpredictability.