

# SUSAN SMITH AND OTHER HOMICIDAL MOTHERS — IN SEARCH OF THE PUNISHMENT THAT FITS THE CRIME

## I. INTRODUCTION

On July 28, 1995, a South Carolina jury rejected the idea of sentencing a young mother to death for drowning her two sons.<sup>1</sup> Many described it as a heinous crime which caused fourteen-month old Alex and three-year old Michael to die in a horrific manner. The night of the incident, twenty-three year old mother, Susan Smith, strapped her two sons into the car, with windows rolled up, doors shut tight, and caused it to roll into John D. Long Lake in Union, South Carolina.<sup>2</sup> A *New York Times* op-ed article noted that if she had killed two adult strangers, or if she had killed another person's children, she would have received the death penalty.<sup>3</sup> Her defense lawyer agreed that she was not insane, that she knew right from wrong and that what she was doing that night would kill her sons.<sup>4</sup> Yet, the pulse of the community remained sympathetic to its neighbor, and a jury of her peers decided not to give her South Carolina's most severe penalty. Were they right to do so? This Note argues that, in fact, they were, and that, in many circumstances in which a mother murders her child, there exist mitigating factors.

### A. Dearth of Research on Female Offenders

Although studies in criminology concerning male offenders are plentiful,<sup>5</sup> little exists about female offenders.<sup>6</sup> The reasons most generally understood for such a dearth of information are the low rates of offenses, of violent crimes, and of recidivism compared

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<sup>1</sup> For a concise account of events, see Rick Bragg, *Carolina Jury Rejects Execution For Woman Who Drowned Sons*, N.Y. TIMES, July 29, 1995, at A1, A8.

<sup>2</sup> *Id.*

<sup>3</sup> Paul Mones, *Life and Death and Susan Smith*, N.Y. TIMES, July 28, 1995, at A27.

<sup>4</sup> Rick Bragg, *Arguments Begin in Susan Smith Trial*, N.Y. TIMES, July 19, 1995, at A10.

<sup>5</sup> Ilene Nagel & Barry L. Johnson, *The Role of Gender in a Structured Sentencing System*, 85 J. CRIM. L. & CRIMINOLOGY 181 (1994); John H. Laub & Janet L. Lauritsen, *The Precursors of Criminal Offending Across The Life Course*, 58 FED. PROBATION 51, 54 (1994).

<sup>6</sup> CAROL SMART, LAW, CRIME AND SEXUALITY 16, 17 (1995); Kathy Laster, *Infanticide: A Litmus Test for Feminist Criminological Theory*, in GENDER, CRIME AND FEMINISM 149 (Ngairé Naffine ed., 1995); Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 907 n.3 (1993); RONALD BARRI FLOWERS, WOMEN AND CRIMINALITY, 91, 193 (1987).

to that of male offenders.<sup>7</sup> Criminology in the United States has deemed male offenders to be a far more urgent topic of study. Other reasons proposed for this lack of study are the dominance by males in the criminology field, and the societal devaluation of women which makes them unimportant subjects of study.<sup>8</sup> Unfortunately, this has all resulted in a presently unsatisfactory understanding of female offenders and the crimes they commit.<sup>9</sup> Yet, women do rival men in two areas: shoplifting (or non-violent property crimes) and murdering their children.<sup>10</sup>

It is noteworthy that much of the literature on mothers who kill their children is found outside the United States. With exception to post-partum induced murders,<sup>11</sup> virtually no legal theory on the topic exists in the United States. The absence of a legal theory that specifically addresses homicidal mothers suggests that our current justice system finds existing legal doctrine adequate to cover this crime. This Note will argue that maternal filial homicide requires consideration of other factors that have been ignored by traditional doctrine.<sup>12</sup> In the absence of a legal theory, there are few guidelines in the justice system which respond to mothers who kill their children. In fact, this country appears to have accepted the notion that we will probably never know why Susan Smith committed this act.<sup>13</sup> Her own defense attorney, David Bruck, stated that the defense had "shed 'all the light we had' on the question of why Susan Smith killed her children."<sup>14</sup>

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<sup>7</sup> Raeder, *supra* note 6, at 930; FLOWERS, *supra* note 6, at 91, 193.

<sup>8</sup> FLOWERS, *supra* note 6, at 91.

<sup>9</sup> See Raeder, *supra* note 6, at 912 (explaining that insufficient attention has been paid to female criminality); FLOWERS, *supra* note 6, at 193. Note that the U.S. Department of Justice does not collect statistics showing the number of mothers who kill their children as compared to fathers. See F.B.I., U.S. DEP'T OF JUS., 1993 UNIFORM CRIME REP., Table 2.12 - Murder Circumstances by Relationship, at 20.

<sup>10</sup> Ania Wilczynski & Allison Morris, *Parents Who Kill Their Children*, 1993 CRIM. L. REV. 31, 33 n.10 [hereinafter Wilczynski & Morris]. These statistics are actually British, but reflect the United States' statistical data showing greater representation of women perpetrators in both non-violent property crimes and filial homicides. See F.B.I., U.S. DEP'T OF JUS., 1993 UNIFORM CRIME REP., Table 35 - Total Arrest Trends, Sex, 1989-93, at 224.

See also Lisa Addison, *Inconceivable Killers*, SAN ANTONIO EXPRESS-NEWS, June 4, 1995, WL 5563478; Margie Boule, *Face It: Sometimes Mothers Kill Their Children*, PORTLAND OREGONIAN, July 25, 1995, at C1. Both articles show equal rates of filial homicides among mothers and fathers.

<sup>11</sup> See generally Laura E. Reece, Comment, *Mothers Who Kill: Postpartum Disorder and Criminal Infanticide*, 38 UCLA L. REV. 699 (1991).

<sup>12</sup> See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 (1990) (stating that some features of law may not only be non-neutral, but also very "male" oriented).

<sup>13</sup> Jack Warner, *Analysis: Smith Case Put to Rest with Southern Graciousness*, ATLANTA CONST., Aug. 6, 1995, at B1.

<sup>14</sup> *Id.*

In Great Britain, although women commit approximately eleven percent of total violent crimes, they commit approximately fifty percent of filial homicides.<sup>15</sup> The United States has not collected statistics precisely on point. However, as in Great Britain, women in the United States, who represent over half of the population, commit only thirteen percent of violent crimes,<sup>16</sup> yet are responsible for approximately fifty percent of child abuse related injuries and deaths.<sup>17</sup> Furthermore, the U.S. Justice Department conducted a survey which tracked 9,576 murder convictions in 1988.<sup>18</sup> Of the murders committed by parents of the victim, fifty-five percent were committed by the mother.<sup>19</sup> This suggests that the killing of one's children, or filial homicide, is a women's issue, and a matter appropriate for feminist inquiry.

### B. Structure of Note

Part II of this Note reviews various categories of filial homicide and the different sentences they command in the United States justice system.<sup>20</sup> Not all categories are thoroughly discussed. For example, infanticide, a parent killing an infant, in many ways qualifies as its own distinct topic. Much of the study of infanticide concerns issues of post-partum psychosis and the insanity defense, issues which veer too far from the topic at hand.<sup>21</sup> This Note focuses on killings resulting from child abuse by comparing premeditated with non-premeditated killings. The main emphasis, however, will be placed on willful and premeditated murders, and how some cases within this category are not necessarily "cold-blooded." When mothers kill their children, they are sometimes "hot-blooded" despite the intentional nature of the crime.<sup>22</sup>

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<sup>15</sup> Wilczynski & Morris, *supra* note 10, at 32-33.

<sup>16</sup> F.B.I., U.S. DEP'T OF JUST., 1993 UNIFORM CRIME REP., Table 35 - Total Arrest Trends, Sex, 1989-93, at 224.

<sup>17</sup> FLOWERS, *supra* note 6, at 113; NAT'L CTR. FOR MISSING AND EXPLOITED CHILDREN, DECEASED CHILD PROJECT REP., 22 (1994) [hereinafter NCMEC].

<sup>18</sup> See Susan Cambell, *Smith Case Not Without Explanation*, HARTFORD COURANT, Nov. 5, 1994, at A1. See also Shelly Reese, *Why Do Mothers Kill? Experts Say Society Bears Some Blame*, CIN. ENQUIRER, Aug. 8, 1995, at A1 (corroborating the approximate fifty percent figure for mothers).

<sup>19</sup> Reese, *supra* note 18, at A1.

<sup>20</sup> This is not meant to be a definitive or exhaustive list, but rather an overview of the varying situations that underlie the killing of one's child.

<sup>21</sup> See generally Reece, *supra* note 11, at 699.

<sup>22</sup> See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW, 472, 490 (2d ed. 1995) (describing the difference between hot-blooded and cold-blooded killings). The distinction between "cold-blooded" and "hot-blooded" has legal consequences for determining the severity of punishment. "Hot-blooded" (impulsive and provoked) killings receive less severe treatment. *Id.*

Part III discusses traditional views of punishment in Anglo-American law, and the problems with its application to maternal filial homicide. Part IV reviews related concerns of a feminist jurisprudence by narrowing in on the "woman question."<sup>23</sup> This Note argues that a homicidal mother may be able to prove mitigating factors, even in the event of intent and premeditation.<sup>24</sup> In conclusion, this Note seeks to achieve a more just and structured legal response to mothers who kill their children.

## II. OVERVIEW — CATEGORIES OF FILIAL HOMICIDE<sup>25</sup>

### A. *Infanticide*

Infanticide is defined as a mother's killing of her infant shortly after its birth.<sup>26</sup> This area includes killings related to post-partum depression, or puerperal psychosis.<sup>27</sup> It also includes economically and socio-psychologically motivated killings, particularly at times when women had little access to birth control or abortion, and when illegitimacy was more highly stigmatized.<sup>28</sup> As indicated earlier, infanticide contains many legal factors distinct from the matters of instant concern. Much current-day infanticide concerns issues relating to the insanity defense.<sup>29</sup> In contrast, the subject matter here assumes the mother's legal sanity and guilt, and only attempts to ascertain factors to be considered in determining the punishment.

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<sup>23</sup> Bartlett, *supra* note 12, at 831, 837. Bartlett designs the "woman question" to identify and challenge a legal doctrine which excludes or disadvantages women or other groups.

<sup>24</sup> Cf. Raeder, *supra* note 6, at 908-09 (arguing for sentencing guidelines that address the dissimilar patterns of criminality among women and also consider "factors that are integral to the lives of many female offenders").

<sup>25</sup> This discussion does not include homicides resulting from the omission or failure to protect one's child. For a feminist perspective on this topic, see Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 109-15 (1993). This Note also does not cover unusual situations, such as Munchausen by Proxy, or fatal religious practices by parents. The issues concerning these situations veer too far from the current topic to warrant a separate legal analysis. For a discussion of Munchausen by Proxy, see *People v. Phillips*, 175 Cal. Rptr. 703 (Cal. Ct. App. 1981), or *Commonwealth v. Robinson*, 565 N.E.2d 1229 (Mass. App. Ct. 1991), which concern mothers who induced fatal medical symptoms in their children as a means of gaining sympathy for themselves and their children. For a discussion of fatal religious practices, see Judith I. Scheiderer, Note, *When Children Die as a Result of Religious Practices*, 51 OHIO ST. L.J. 1429 (1990).

<sup>26</sup> BLACK'S LAW DICTIONARY 778 (6th ed. 1990).

<sup>27</sup> Puerperal psychosis is a genital and reproductive organ infection related to childbirth and causing severe mental disorder. TABER'S CYCLOPEDIA MEDICAL DICTIONARY 165 (14th ed. 1977).

<sup>28</sup> See generally PETER C. HOFFER & N.E.H. HULL, MURDERING MOTHERS: INFANTICIDE IN ENGLAND AND NEW ENGLAND 1558-1803 (1981).

<sup>29</sup> See generally Reece, *supra* note 11.

### B. Child Abuse Resulting in Death

Another category of filial homicide is child abuse resulting in death.<sup>30</sup> The difficulty in applying severe penalties for this type of filial homicide lies in the fact that courts find most of these killings to be unintended.<sup>31</sup> The vast majority of homicidal child abusers receive the reduced charge of manslaughter rather than murder.<sup>32</sup> The irony is that many of these homicides contain facts far worse than some of the premeditated killings by parents who have not previously abused their children. In the latter, a child may experience just a brief moment of horror, while in an abusive setting, the child most likely has experienced a lifetime of hurt, dread, and demoralization, ending in death.<sup>33</sup> In response, seven states classify death resulting from a pattern of parental child abuse as murder in the first degree, often without a showing of intent or premeditation.<sup>34</sup> The remaining states handle this situation in varying ways, with some charging the abusive parent with felony murder.<sup>35</sup> Some situations, however, support only a charge of involuntary manslaughter if the prosecution cannot prove premeditation.<sup>36</sup> Death resulting from child abuse may, in some cases, ex-

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<sup>30</sup> See generally Angela M. Stewart, Note, *Murder By Child Abuse*, 26 WILLAMETTE L. REV. 435 (1990); Paul H. Taylor, Note, *Child Abuse Resulting in Death - Arkansas Amends its First Degree Murder Statute*, 10 U. ARK. LITTLE ROCK L.J. 785 (1988).

<sup>31</sup> Stewart, *supra* note 30, at 438-39. See also Taylor, *supra* note 30, at 786-87 (explaining the difficulty courts have in finding premeditation and deliberation in fatal child abuse cases).

<sup>32</sup> Stewart, *supra* note 30, at 438.

<sup>33</sup> E.g., Julie Irwin, *That boy had such a hard life' Before his Fatal Beating, 8-year-old Jerry Howell Endured Poverty, Homelessness and Pain*, CIN. ENQUIRER, Mar. 12, 1995, at A1 (regarding Rhonda Brown, an abusive and neglectful mother who accidentally hit her son so hard as to cause serious injury, and then drove a car over his body, while he was still alive, to make the injury appear as a hit and run auto accident). See also, e.g., Frank Bruni, *Alisa's Story: A Girl Trapped, Neglected, Tormented, Dead*, N.Y. TIMES, Nov. 25, 1995, at A1 (concerning another mother who consistently beat and tortured her daughter which, allegedly, led to the six year old girl's accidental death).

<sup>34</sup> Stewart, *supra* note 30, at 442 & n.86 (listing Arkansas, Minnesota, Mississippi, Oklahoma, Oregon, Tennessee, and Washington). E.g., Beth Warren, *Ducker's Defiance Draws 18 Years*, THE TENNESSEAN, Nov. 10, 1995, at 1A. Tennessee tested its first case under a statute enacted in 1988 with a mother charged with the heat related deaths of her children after leaving them strapped for hours in a sweltering car. However, the jury did not find her guilty of murder, but convicted her of aggravated child abuse.

<sup>35</sup> See, e.g., *People v. Roark*, 643 P.2d 756 (Colo. 1982); *Miller v. State*, 379 So. 2d 421 (Fla. Dist. Ct. App. 1980); *State v. O'Blasney*, 297 N.W.2d 797 (S.D. 1980); Stewart, *supra* note 30, at 438 & n.40 (describing Florida's and Utah's statutes which expressly enumerate fatal child abuse in their felony murder statutes).

<sup>36</sup> Note, for example, the current case in Ohio of Jolynn Ritchie who originally could only be charged with involuntary manslaughter for allegedly killing her four year-old daughter while excessively disciplining her. Janice Haidet & Stacy St. Clair, *Why No Murder Charge? Samantha's Relatives Unhappy, Confused*, DAYTON DAILY NEWS, Aug. 8, 1995, at 1B. Later, direct evidence showing purposeful homicide permitted a charge of murder. Rob Modic, *Brooks Changes Plea Now Could Testify Against Jolynn Ritchie*, DAYTON DAILY NEWS, Sept. 15, 1995, at 1A.

emply a situation in which an impulsive and unintended murder is actually more culpable and dangerous than a planned and intended killing of one's child.<sup>37</sup>

### C. *Cold and Callous Murder of One's Child*

An Oregon jury found Diane Downs guilty of shooting her three children; the purported motive was to regain a lover who did not want to be a father to her children.<sup>38</sup> A New York trial court convicted Alice Crimmins of manslaughter for killing her daughter in a fit of rage, and of first degree murder for killing her son, presumably because he witnessed the daughter's homicide.<sup>39</sup> However, the appellate court overturned this latter conviction for insufficient evidence.<sup>40</sup> In Ohio, Rhonda Brown, after slapping her son and causing him grave injury, drove over him with her car while he was still alive, and left him by the roadside to make her act look like the result of a hit-and-run accident.<sup>41</sup>

These cases generally involve a perpetrating parent who meets common criteria of sociopathy.<sup>42</sup> The *Diagnostic and Statistical Manual of Mental Disorders* lists sociopathic character traits (referred to as "antisocial personality disorder"), which includes a lack of empathy and remorse for others' pain and emotions, a peculiar tendency toward thrill-seeking behavior, a concern with material things and money over the welfare of others, and a long-standing history of rule violation.<sup>43</sup> This category of sociopathic (also referred to as "psychopathic") mothers may prove to be one situation in which homicidal mothers should be treated the same as any other common criminal. They are arguably the most dangerous grouping discussed in this Note because they are generally not inhibited by the internal restraints of moral standards and empathy possessed by most other individuals.

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<sup>37</sup> Cf. DRESSLER, *supra* note 22, at 473. Dressler discusses assisted suicides to show that some planned and premeditated murders arouse more sympathy than some impulsive killings.

<sup>38</sup> For a concise account of events, see Elisabeth Bumiller, *The Mother & The Mystery Elizabeth Diane Downs Gave Life And Is Now Accused Of Taking It*, THE WASH. POST, June 12, 1984, WL 2033387. One child died and two others were left disabled from the shooting.

<sup>39</sup> *People v. Crimmins*, 343 N.E.2d 719 (N. Y. Ct. App. 1975).

<sup>40</sup> *Id.*

<sup>41</sup> Irwin, *supra* note 33.

<sup>42</sup> See Bea Goodrich, *Dr. Hare's 'Without Conscience' Dissects Psychopaths Among Us*, BANGOR DAILY NEWS, Mar. 8, 1994, WL 5524634 (providing a general discussion of sociopathy and referring to Diane Downs as an example of a psychopathic mother); Lynn Smith & Elizabeth Mehren, *What Makes Some Mothers Kill Their Children*, MONTREAL GAZETTE, Nov. 7, 1994, at B1 (focusing on the anti-social element of murdering mothers).

<sup>43</sup> DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 645-50 (4th ed. 1994) [hereinafter DSM-IV].

#### D. The "Susan Smith" Category

The fourth category of filial homicide is the least explicable. It can, perhaps, be labeled the "Susan Smith" category, showing no pattern of prior violence or abuse toward her children, nor any signs of psychosis or biological disorder.<sup>44</sup> This category may involve intent or premeditation, but this is overshadowed by something more. The act is a culmination of a disturbed and emotionally disordered life which results in the tragic murder by a mother of her children. This Note concentrates on this category as a combined product of social ills, psychological abuse, and the perpetrator's own wrongdoing.

#### E. Cultural and Sociological Homicides

This category may, indeed, prove identical to the "Susan Smith" category. It is probably premature, however, to collapse them at this juncture. An example of a cultural homicide is Fumiko Kimura, a Japanese-born mother, who attempted to drown herself and her two children in the ocean upon learning of her husband's infidelity.<sup>45</sup> She survived, but her two children died.<sup>46</sup> Her sentence was five years probation with mandatory psychotherapy.<sup>47</sup> The cultural defense asserted that Kimura was performing the Japanese ritual of *oya-ko-shinju* which guides a woman to take herself and her children to the afterlife when she fails as a wife and, therefore, as a mother.<sup>48</sup>

It is difficult to find examples of current day sociological homicides, but one fictional example is Toni Morrison's *Beloved*, in which a slave mother escapes from her plantation.<sup>49</sup> Upon being found, she kills her infant daughter in order to protect her child from living a dreaded life of enslavement.<sup>50</sup> A true 1831 case relates the tragedy of a slave woman who poisoned her infant.<sup>51</sup> In reviewing the case, A. Leon Higginbotham, Jr. "presumes that the mother's motivation was to protect her child from slavery's cruelty

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<sup>44</sup> Bragg, *supra* note 4.

<sup>45</sup> *People v. Kimura*, No. A-091133 (Super. Ct. L.A. County Apr. 24, 1985) cited in Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053, 1108 n.333, 1116 (1994).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1107; but see *People v. Bui*, cited in Chiu, *supra* note 45, at 1118 (Japanese father stabbed himself and his sons upon discovering his wife's infidelity, but did not receive a mitigated sentence for the same cultural defense).

<sup>49</sup> TONI MORRISON, *BELLOVED* (1987).

<sup>50</sup> *Id.*

<sup>51</sup> *Roberts*, *supra* note 25, at 134 & n.204, citing *Jane (a slave) v. The State*, 3 Mo. 45 (1831).

and that her homicidal act may have actually been an effort to fulfill her maternal duty of care."<sup>52</sup>

Both the cultural and sociological kinds of homicides share a potential to evoke *sympathy* for the offender as a victim of her culture, while also placing a psychiatric label upon the perpetrator (psychotic, depressed, "mad").<sup>53</sup> Also, both would tend to receive reduced sentences because of the state of mind, or *mens rea*, which negates the presence of a wicked heart despite the willful and premeditated nature of the act.<sup>54</sup> Finally, both arguably are subject to legal definition without due consideration for the mother's experience or input as to what exactly prompted her to commit such an atrocity.<sup>55</sup>

### III. TRADITIONAL GUIDING THEORIES OF CRIMINAL PUNISHMENT

A legal inquiry should first attempt to apply existing principles of punishment, and then assess whether there are any problems in relation to how it fits the crime. To begin this inquiry, it is best to remind oneself of the philosophical bases and justifying aims of punishment and responsibility in Anglo-American law.<sup>56</sup>

#### A. *Why Punish the Guilty?*

The most basic question is why we as a society punish law-breaking at all.<sup>57</sup> Most responses to this question are guided by both utilitarian and retributive theories.<sup>58</sup> Although writers often oppose these two theories,<sup>59</sup> the two philosophies generally work together in justifying an institution of punishment.<sup>60</sup> Utilitarian-

<sup>52</sup> *Id.* at 135.

<sup>53</sup> Elizabeth Tobin, *Law and Literature: Imagining the Mother's Text: Toni Morrison's Beloved and Contemporary Law*, 16 HARV. WOMEN'S L.J. 233 (1993) (arguing that the law ignores the mother's experience of her desperate circumstances which drives her to homicide; instead she is labeled mad); see also Chiu, *supra* note 45, at 1116 (describing the outpouring of sympathy extended to the defendant mother who caused the drowning deaths of her two children).

<sup>54</sup> See Tobin, *supra* note 53.

<sup>55</sup> See *id.*; see also Bartlett, *supra* note 12, at 831, 863 (describing one form of legal method as examining the experience of the subject to assist the formulation of legal doctrine).

<sup>56</sup> See H.L.A. HART, PUNISHMENT & RESPONSIBILITY 113-22 (1968).

<sup>57</sup> *Id.* at 1-3. Hart distinguishes this question from why punish the perpetrator (questions of distribution). *Id.* at 8-13. He argues that one may deter the wrongdoer just as effectively by punishing his family; alternatively the justice system may deter all of society by making an example of an innocent person. *Id.* at 12. This question is not germane to the present undertaking, for there is no issue that the parent should be criminally punished for the crime of filial homicide.

<sup>58</sup> *Id.* at 233-37 (explaining the distribution of punishment as guided by both retributive and utilitarian justifications).

<sup>59</sup> *Id.*

<sup>60</sup> DRESSLER, *supra* note 22, at 9, 38.

ism measures utility by the net good to society.<sup>61</sup> In this regard it argues for deterrence and reform as the twin aims of punishment.<sup>62</sup> Retribution theory, however, focuses more on the act, and measures punishment according to what the perpetrator *deserves*, or what is commonly referred to as “just desserts.”<sup>63</sup> Compared to proponents of retributive justice, a utilitarian may object to severe punishment for even the most heinous of crimes if it is in excess to what is necessary for deterrence and reform.<sup>64</sup> Still, a hybrid of the two theories argues that denunciation of the criminal is useful to channel public outrage, increase social cohesion, and encourage conformity of individual citizens to the law.<sup>65</sup>

Inherent to this blend of “just deserts” and utilitarianism is not only the degree of harm caused, but the blameworthiness of the perpetrator. There is no question regarding the harm and suffering imposed by their mothers upon the child victims. Neither is there any question that a mother who murders her child is blameworthy. The issue is how much the guilty should be punished.

Based upon the above traditional perspectives, one may ask the following questions: If a mother is stunned and genuinely horrified by her own actions, is it necessary for the state to impose the longest or most severe penalties when she, herself, is her own worst punishing agent? Also, how dangerous is the mother to society-at-large? Generally, society considers random, repeated, and cold-blooded killers as the most dangerous to society. How much does a murdering mother’s profile conform to this description? Is she likely to kill again under unpredictable circumstances? The utility of severe or prolonged penal punishment in some of these cases may prove to be futile. From the perspective of channeling public outrage and increasing social cohesion, does the mother arouse any countervailing sympathy? These are all questions to consider while in search of the punishment that fits the crime.

*B. Falling Through the Cracks — The Common Law Definition of Murder and Maternal Filial Homicide*

Anglo-American law has aimed to grade different levels of homicide according to the severity of act and sentence. Homicides that were willful, deliberate and premeditated were separated from

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 38-40.

<sup>63</sup> *Id.* at 11, 40.

<sup>64</sup> *Id.* at 38-40.

<sup>65</sup> *Id.* at 13.

those that were willful but provoked.<sup>66</sup> Hence, the crime of murder became distinct from manslaughter.<sup>67</sup> Murder, itself, later became graded into first, second, and, in some states, third degrees of severity.<sup>68</sup>

Generally, state laws include the homicides that are willful, deliberate, and premeditated under first degree murder, thereby warranting the state's most severe penalty.<sup>69</sup> Willful generally means intentional.<sup>70</sup> Premeditation is thinking about killing beforehand.<sup>71</sup> The concept is misleading, for courts have held that one may form a premeditative state of mind in an instant,<sup>72</sup> a duration of time generally thought of as too short for reflection. It is, rather, the deliberation component that brings the notion of "cold-bloodedness" to first degree murder.<sup>73</sup>

To deliberate is to "measure and evaluate the major facets of a choice or problem."<sup>74</sup> Deliberation is characterized by unhurried, careful reflection.<sup>75</sup> While premeditation concerns the *quantity*, or length of time of the thought given just prior to the homicide, deliberation concerns the *quality* of such thought.<sup>76</sup> The problem with existing doctrine is that it may sometimes prove difficult to distinguish between brooding and tortured rumination (which is "hot-blooded") from "cold-blooded" deliberation.<sup>77</sup> Some states, such as Illinois and Indiana, no longer use the concepts of premeditation and deliberation because they are too difficult to apply; instead, their statutes focus on intent to kill or do great bodily harm.<sup>78</sup>

An additional problem occurs when applying the ungraded common law definition of murder. In the case of Susan Smith, the jury was bound by South Carolina law, which adopts this common law definition as "the killing of another with malice aforethought."<sup>79</sup> Therefore, unless intentional murder is committed "in

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<sup>66</sup> *Id.* at 467.

<sup>67</sup> *Id.*

<sup>68</sup> *See, e.g.*, 18 PA. CONS. STAT. ANN. § 2502 (1983).

<sup>69</sup> DRESSLER, *supra* note 22, at 469.

<sup>70</sup> *Id.* at 472.

<sup>71</sup> *Id.* at 474.

<sup>72</sup> Commonwealth v. Carrol, 194 A.2d 911, 916 (Pa. 1963) (stating, "no time is too short" to form a premeditation to murder); "brief" can be an "instant," *see* DRESSLER, *supra* note 22, at 474.

<sup>73</sup> DRESSLER, *supra* note 22, at 473.

<sup>74</sup> People v. Morrin, 187 N.W.2d 434, 449 (Mich. Ct. App. 1971).

<sup>75</sup> DRESSLER, *supra* note 22, at 473.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 473.

<sup>78</sup> Taylor, *supra* note 30, at 787, nn.13 & 14.

<sup>79</sup> S.C. CODE ANN. § 16-3-10 (Law. Co-op. 1993); DRESSLER, *supra* note 22, at 468. Dressler defines malice as one of four mental states: (1) intent to kill, (2) intent to inflict

the heat of passion," which requires an external and immediately provoking event, no reduction to manslaughter is possible.<sup>80</sup> In other words, the common law doctrine makes it very difficult to characterize a brooding plan, such as Susan Smith's, as grounds for reducing her charge to either manslaughter or a lesser degree of murder. The only line of mercy available to the jury was to spare her the death penalty.

Notwithstanding the common law definition of murder, American justice has usually found it difficult to impose the most severe penalties available in the absence of this cold and calculated element of deliberation. Deliberating killers have had opportunity to turn away from their act throughout their deliberations, yet have chosen to go forward with the killing.<sup>81</sup> Furthermore, they are generally not deterred by legal or moral sanctions, and therefore not likely to benefit from reform.<sup>82</sup> This profile stands in stark contrast to the remorseful and self-flagellating Susan Smith, whose act, although it involved premeditation, arguably lacked deliberation.

C. *The Partial Defense of "Extreme Mental and Emotional Disturbance" ("EMED") and Its Application to Homicidal Mothers*

The Anglo-American justice system has permitted certain circumstances to reduce a criminal charge. An act that would otherwise be first degree murder but for a mitigating factor is reduced to a lesser charge, or, in the case of insanity, entirely excused.<sup>83</sup> One partial defense that merits particular attention for purposes of this discussion is the Extreme Mental and Emotional Disturbance

grievous bodily injury, (3) extremely reckless disregard for another's life, or (4) intention to commit a felony during which a death results.

<sup>80</sup> For a description of the common law requirements of a provocation defense, see DRESSLER, *supra* note 22, at 490.

The South Carolina Code on Murder and Manslaughter states as follows: § 16-3-10. "Murder" defined.

"Murder" is the killing of any person with malice aforethought, either express or implied. (S.C. CODE ANN. § 16-3-10 (Law. Co-op. 1993)). § 16-3-50. Manslaughter.

A person convicted of manslaughter, or the unlawful killing of another without malice, express or implied, must be imprisoned not more than thirty years or less than two years. (S.C. CODE ANN. § 16-3-50 (Law. Co-op. 1993)).

<sup>81</sup> *People v. Morrin*, 187 N.W.2d 434, 449 (Mich. Ct. App. 1971).

<sup>82</sup> See generally Goodrich, *supra* note 42; DRESSLER, *supra* note 22, at 472.

<sup>83</sup> Total excuse for insanity is premised upon the notion that the perpetrator's mental condition negatives the required *mens rea* element of the crime, and therefore the state is unable to meet its burden by proving every element of the crime beyond a reasonable doubt. Insanity will not be addressed, as stated earlier, for the mothers discussed in this Note are presumed to be both sane and blameworthy for their act. Its inclusion here is merely for the sake of overview of mitigating factors recognized by the American system of justice. See generally DRESSLER, *supra* note 22, at ch. 25.

("EMED") doctrine adopted by the Model Penal Code.<sup>84</sup> The Model Penal Code reduces murder to manslaughter 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."<sup>85</sup>

At common law, a provoking event, in order to serve an extenuating function, needed to be external and immediate, with no opportunity for a "cooling-off" period.<sup>86</sup> With EMED, however, the provoking event need neither be external nor immediate.<sup>87</sup> Like the common law, EMED has objective criteria in requiring a reasonable excuse for the emotional disturbance.<sup>88</sup> Unlike the common law, EMED has a subjective component in determining reasonableness from the viewpoint of the actor.<sup>89</sup> As such, EMED may be characterized as an expanded codification of the common law provocation defense.<sup>90</sup>

If provocation need not be external and immediate under the EMED doctrine, then the identification of such internal and long standing emotional stresses may be employed to invoke this partial defense for some mothers who kill their children. The fact that these stresses are often socially and externally induced provides further support for their reasonableness as provocative or as extremely disturbing events. This is no "twinkie defense,"<sup>91</sup> but a de-

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<sup>84</sup> SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES, CASES AND MATERIALS*, at 1226 (5th ed. 1989) (citing the MODEL PENAL CODE § 210.3(1)(b)(1980)).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 441-44.

<sup>87</sup> *Id.* at 1226 (citing the Model Penal Code § 210.3(1)(b) which provides the definition of extreme emotional disturbance).

<sup>88</sup> *Id.* at 465 (citing MODEL PENAL CODE and COMMENTARIES, Comment to § 210.3 at 72-73 (1980)).

<sup>89</sup> *Id.* at 462-63.

<sup>90</sup> DRESSLER, *supra* note 22, at 342. Note that "extreme mental and emotional disturbance" ("EMED") is similar to the controversial diminished capacity doctrine. See KADISH & SCHULHOFER, *supra* note 84, at 464-65. The Model Penal Code, however, distinguishes the doctrines by commenting that EMED has an objective component in requiring that there exist a "reasonable explanation or excuse" for the extreme emotional disturbance. See *id.* (citing Model Penal Code and Commentaries, Comment to § 210.3 at 72-73 (1980)). Diminished capacity, by contrast, relies upon an entirely subjective standard, thereby allowing a mental disorder to reduce a crime to a lesser offense regardless of the reasonableness of the perpetrators emotional disturbance which provoked the homicide. In this regard, the Model Penal Code comments that the mentally disordered person may still act with moral depravity, "and there surely will be cases where the actor's mental condition, although recognized as disturbed or abnormal, should be regarded as having no just bearing on his liability for intentional homicide." *Id.*

<sup>91</sup> Robert Lindsey, *Dan White, Killer of San Francisco Mayor, A Suicide*, N.Y. TIMES, Oct. 22, 1985, at A18 (reporting on the successful use of the diminished capacity defense which

scription of stresses for which there is a reasonable excuse and which may influence the commission of criminal acts. This suggests that EMED, or a similar defense, ought to be available to a homicidal mother which, if successfully defended, would reduce her charge to either a lesser degree of murder or to manslaughter. This proposition will be discussed in greater detail in Part IV-D.

*D. How Mothers Are Punished under the Current Justice System*<sup>92</sup>

The U.S. Department of Justice does not break down parental data into maternal and paternal filial homicides. However, its statistics show that women generally receive lighter sentences for murder and voluntary manslaughter, with the average sentence in state and federal courts approximating fifteen and one-half years for women, as opposed to twenty and one-half years for men.<sup>93</sup> Does this mean that more genuinely mitigating circumstances arise for women than men?

The National Center for Missing and Exploited Children ("NCMEC") found from a ten-year study that the acts of homicidal mothers were significantly less violent than those of homicidal fathers.<sup>94</sup> Myrna Raeder studied many sources suggesting there exists more lenient sentencing of women offenders than that for men.<sup>95</sup> However, she also suggests that this sentence disparity disappears when considering similarity of offender characteristics (e.g., possession of a lethal weapon or role in the conspiracy amount of drugs).<sup>96</sup> Another report based on individual state data also showed more lenient sentences for women than men despite similar charges.<sup>97</sup> However, the data also showed that, despite the similar charges, the nature of offenses committed by women tended to be less violent.<sup>98</sup>

Federal Judge Weinstein has openly criticized the federal guidelines to sentencing, stating that they "fail to take account of the 'endemic sociological and psychological realities' facing 'sub-

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reduced a double murder charge to manslaughter based upon the perpetrator's prolonged and excessive consumption of "junk" food). Note that California has since repudiated this application of the diminished capacity doctrine. DRESSLER, *supra* note 22, at 342.

<sup>92</sup> This Note expresses no opinion regarding the death penalty. The reader should assume that a jurisdiction may reserve the death penalty for its most heinous crimes.

<sup>93</sup> U.S. DEP'T OF JUST. SOURCEBOOK 1992, Table 5.60 - Average length of felony sentences imposed by State courts, and Table 5.24 - Average sentence length imposed on offenders sentenced to incarceration in U.S. District Courts. These statistics exclude death penalty and life sentences.

<sup>94</sup> NCMEC, *supra* note 17, at 49-50.

<sup>95</sup> Raeder, *supra* note 6, at 916, 930-31.

<sup>96</sup> *Id.* at 931.

<sup>97</sup> FLOWERS, *supra* note 6, at 84.

<sup>98</sup> *Id.*

servient women."<sup>99</sup> Other writers have proposed a chivalry theory which suggests that male judges are motivated to save female offenders from a harsh prison life because women are weaker, less responsible for their crimes, and more easily rehabilitated than men.<sup>100</sup>

Whatever the reason for women receiving more lenient sentences than men, the above data tend to show that judges extend more sympathy to female offenders. What is this sympathy factor? May this sympathy serve as a prod to logic, nagging the reason to analyze a situation in a more accurate and just light?

To begin an understanding of this sympathy factor, recall the earlier observation that if Susan Smith had killed another's children, she probably would have received the death penalty.<sup>101</sup> By contrast, why would it not be morally and legally worse to kill one's own child than another's child? A child relies on the mother as his or her caregiver, and to violate such trust and responsibility is arguably more blameworthy and causes the greater social harm.<sup>102</sup> In fact, the position of trust and confidence a parent has over a young child has served as an aggravating factor in sentencing.<sup>103</sup> Not only does the child depend on the mother's caregiving, but so does society.<sup>104</sup> Women are expected to give birth to and raise the next generation.<sup>105</sup>

In contrast, killing a stranger suggests a propensity to kill randomly and with less or no provocation. Therefore, killing a stranger may indicate a more unpredictable and uncontained threat to the community.<sup>106</sup> Killing one's own child is generally not a random act of violence, particularly when the mother is the killer.<sup>107</sup>

<sup>99</sup> Daniel Wise, *Sentence Reduction Given Abused Woman*, N.Y. L.J., Oct. 23, 1992, at 1 (regarding a drug possession charge with intent to distribute). Notice that Judge Weinstein's criticism of the Federal Guidelines is consistent with the feminist legal method espoused by Katharine T. Bartlett which examines whether a law excludes or disadvantages women. See Bartlett, *supra* note 12.

<sup>100</sup> Raeder, *supra* note 6, at 917-18; see also FLOWERS, *supra* note 6, at 83 (describing the chivalry based theory of sympathy toward female offenders).

<sup>101</sup> Mones, *supra* note 3.

<sup>102</sup> This could arguably be true from both the utilitarian and retributive standards of blameworthiness. See generally DRESSLER, *supra* note 22, ch. 2.

<sup>103</sup> *State v. Holden*, 365 S.E.2d 626, 629 (N.C. 1988) (regarding the drowning death of a three-month-old infant by her teenage mother).

<sup>104</sup> See Laster, *supra* note 6, at 159 (describing social control theory developed by the feminist scholar, Heidensohn, which outlines social expectations of women, and the consequences of such expectations).

<sup>105</sup> See Roberts, *supra* note 25, at 137 (commenting that even feminists have difficulty identifying with criminal mothers because of deeply rooted images of motherhood).

<sup>106</sup> See DRESSLER, *supra* note 22, at 42-43 (stating that risk of future harm by defendant is a factor of punishment).

<sup>107</sup> NCMEC, *supra* note 17, at 49-50 (showing statistics that fathers who kill are more likely than mothers to have a history of arrests for violent crimes).

It is an act, however, viewed with horror and disbelief. It is common to dismiss the act as something so bizarre and extraordinary that only a mad woman could do it.<sup>108</sup>

One feminist line of thought which may explain some of this sympathetic sentiment argues that a mother's violence against her children may be motivated more by social control of women than by violent rage against her child. Dorothy E. Roberts explains that "[a] mother's abuse of her children relates to all mothers' peculiar vulnerability. By using children as hostages, society makes children the immediate source of mothers' subordination. If children are the chains that keep women from freedom, it is not surprising that mothers sometimes strike at those chains."<sup>109</sup>

The vulnerability of motherhood sometimes tends to raise this sympathy factor. Yet, such sympathy raises genuine counter-deterrence concerns.<sup>110</sup> Such concerns do not go unexpressed: "Great news for young mothers who want to kill their kids: [o]ff your offspring in South Carolina and you might be out of jail in time to start a new family."<sup>111</sup> We shall return to the counter-deterrence argument in Part IV-E.

Although sympathy may benefit women in terms of the shorter sentences they serve, three problems exist with relying entirely on sympathy to justify mitigating circumstances: (1) the attitude underlying sympathy may be disparaging, finding defects entirely within the mother;<sup>112</sup> (2) the sympathetic sentiment is not necessarily informed by the mother's experience of how she came to the point of killing her child;<sup>113</sup> and (3) the sympathy felt for the perpetrator is not clearly understood or explicit.<sup>114</sup> Without a clearer construction, the sympathy may be misplaced upon all kinds of mothers, no matter how dangerous they are to society. On the other hand, lacking a clearer construction may also lead to an over-

<sup>108</sup> Reese, *supra* note 18.

<sup>109</sup> Roberts, *supra* note 25, at 126.

<sup>110</sup> KADISH & SCHULHOFER, *supra* note 84, at 464 (quoting the Model Penal Code Commentaries, "the factors that call for mitigation . . . are the very aspects of an individual's personality that makes us most fearful of his future conduct"); *but see* HART, *supra* note 56, at 40-44 (suggesting that excusing conditions are meant for lawbreakers who would not be deterred by the threat of severe penalties in any event).

<sup>111</sup> Bill Thompson, *Death Penalty: It's Just Too Much To Ask*, FORT WORTH STAR-TELEGRAM, July 30, 1995, at 5.

<sup>112</sup> *See* Steven V. Roberts, *The Murderer Who Was Too Pathetic To Kill*, U.S. NEWS & WORLD REP., Aug. 7, 1995, at 89 (exemplifying the tone of disparagement and sympathy).

<sup>113</sup> Bartlett, *supra* note 12, at 863 (espousing a formulation of a law based in part on the experience of the individuals most affected by it).

<sup>114</sup> Note that one purpose of the revision of federal sentencing guidelines was to eradicate any arbitrary or whimsical considerations that may cause sentencing practices to be unfair and inconsistent. *See* Raeder, *supra* note 6, at 906 (describing one aim of the guidelines as assuring gender-neutral sentencing).

sight of mercy, when in fact, such is due. The following section discusses this matter, and considers alternative legal theories to the "pity factor."

#### IV. MOTIVES, PROFILES, AND FEMINIST JURISPRUDENCE

Feminist jurisprudence may contribute to more accurate and less disparaging ways of thinking about mothers who kill their children, thereby enabling a more just punishment.<sup>115</sup> By "accurate," the author means placing responsibility where it belongs. By "just," the author means that the punishment is proportional to the responsibility. By asking the "woman question,"<sup>116</sup> this Note hopes to better achieve the traditional justifying aims of utilitarian deterrence and reform, plus retributive justice.

##### A. *The Questions That Feminist Jurisprudence Asks*

Mary Anne Case summarizes the questions asked by feminist jurisprudence: (1) what is wrong with the world; (2) how much does the law have to do with creating, reinforcing and maintaining what is wrong; (3) what would the ideal world look like; and (4) how can law help us to get to that ideal?<sup>117</sup> Katharine Bartlett, based on her thorough review of feminist legal methods, would narrow and sharpen the above questions to: (1) what elements of existing legal doctrine exclude or disadvantage women;<sup>118</sup> and (2) what can we learn from the facts and experiences of women's lives that would uncover "certain forms of injustice that [may] otherwise go unnoticed and unaddressed?"<sup>119</sup> This Note discusses the following issues with this framework in mind.

##### B. *Is Gender Relevant as a Factor in Considering Punishment of a Filial Homicide?*

As indicated earlier, statistics show more leniency to mothers than fathers who commit the same crime.<sup>120</sup> Is the relationship

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<sup>115</sup> See SMART, *supra* note 6, at 169 (arguing that the law is a reflection of male-defined reality, removed from the experience of women); see also Laster, *supra* note 6, at 155 (describing how murdering mothers were found mad rather than bad by medical doctors); see also Roberts, *supra* note 112, at 89 (explaining that the public looks for some "extreme emotional dimension" to explain murdering mothers).

<sup>116</sup> See Bartlett, *supra* note 12, at 831, 837.

<sup>117</sup> Symposium, *What is Feminist Legal Theory?: Feminism, Sexual Distinctions, and the Law*, 18 HARV. J.L. & PUB. POL'Y 369 (1994).

<sup>118</sup> Bartlett, *supra* note 12, at 837.

<sup>119</sup> *Id.* at 863.

<sup>120</sup> See *supra* notes 93-95, and accompanying text.

between a mother and a child so different from that between a father and a child, that the law should treat them differently?

Generally, mothers spend more time with their children than do fathers, and are society's designated caregivers.<sup>121</sup> Hence, the opportunity for abuse and murder is far greater for mothers.<sup>122</sup> Fathers may escape the potential for harming their young by simply leaving the family household and children with their mother. Dorothy E. Roberts points out that "[w]hat is confounding is that so many women continue to be good mothers: women who continue to sacrifice their own lives' ends, spend their last dollar unselfishly on their children, live in desperation, and remain in violent homes because they refuse to give up being a mother."<sup>123</sup>

Furthermore, the younger the child who is killed, the more likely the killer is the mother.<sup>124</sup> This lends support to a hypothesis that when mothers kill their children, it is usually related to caregiving stress.<sup>125</sup> As Roberts so aptly states, "[s]ociety assigns women the enormous responsibility of child rearing. Society not only does not pay women for this labor, but degrades it as well."<sup>126</sup> In contrast, the older the child who is killed, the more likely the killer is the father.<sup>127</sup>

In addition, fathers are more likely than mothers to kill their children more violently, dispose of the bodies with less care, and more likely to sexually molest the child before killing him or her.<sup>128</sup> In striking contrast, the National Center for Missing and Exploited Children ("NCMEC") found mothers to dispose of the children's bodies in a distinctively "womb-like" manner.<sup>129</sup> For instance, some of the victims were submerged in water, others were found carefully wrapped in plastic, and others were found in "enclosed shelters of nature."<sup>130</sup> Furthermore, all the children's bodies were found close to the family home (within ten miles).<sup>131</sup>

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<sup>121</sup> Roberts, *supra* note 25, at 111 n.80.

<sup>122</sup> Susan Campbell, *Smith Case Not Without Explanation*, HARTFORD COURANT, NOV. 5, 1994, at A1; Roberts, *supra* note 25, at 111 n.80.

<sup>123</sup> Roberts, *supra* note 25, at 101.

<sup>124</sup> NCMEC, *supra* note 17, at 31, 32, 49-50; David Van Biema, *Parents Who Kill*, TIME, Nov. 14, 1994, at 50.

<sup>125</sup> NCMEC, *supra* note 17, at 35 (Figure 17 comparing ages of children killed by mothers as much younger than the ages killed by fathers).

<sup>126</sup> Roberts, *supra* note 25, at 96.

<sup>127</sup> NCMEC, *supra* note 17, at 35 (Figure 17 showing the older the child, the more likely the father is the killer).

<sup>128</sup> *Id.* at 50.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

Fathers, by contrast, were likely to dispose of their children's bodies an average of 350 miles from the site of abduction.<sup>132</sup>

The differences in the manner of killings suggest that a homicide committed by a father against his child is more likely to fall under the sociopathic or callous category of filial homicides discussed in Part II. Recall that the *Diagnostic and Statistical Manual of Mental Disorders* lists sociopathic traits as including, *inter alia*, little empathy or remorse for another's pain and emotions.<sup>133</sup> The homicides committed by fathers against their children suggest such a lack of empathic involvement with the children they killed.

### C. Profiles and Psychology of Mothers Who Kill Their Children

Various and scattered reports exist on traits common to homicidal mothers.<sup>134</sup> These reports are general and, naturally, do not apply to every homicidal mother. Still, a commonly reported profile describes a woman usually in her twenties, who grew up or currently lives in poverty, is under-educated, has a history of abuse (both physical and sexual), remains isolated from social supports, has depressive and suicidal tendencies, and is usually experiencing rejection by a male-lover at the time of the murders.<sup>135</sup> Alice Steinbach has referred to this latter characteristic as the "man-angle."<sup>136</sup> The mother may find herself enmeshed with her children and showing an impaired ability to define her boundaries as separate from those of her offspring.<sup>137</sup> Depression in a mother is often

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<sup>132</sup> *Id.* at 22.

<sup>133</sup> DSM-IV, *supra* note 43, at 645-50.

<sup>134</sup> See Raeder, *supra* note 6, at 909-14 (providing a comprehensive profile of the average female offender); see also Roberts, *supra* note 25, at 111 (showing overwhelming evidence of a link between mothers' abuse and abuse of their children); see also Reese, *supra* note 18 (relating the fatal factors of poverty, single parenthood, lack of education, and social isolation); see also Barbara Ehrenreich, *Susan Smith: Corrupted by Love?*, TIME, Aug. 7, 1995, at 78 (suggesting that some women are raised to value romantic love from a man at the expense of parental love); see also Maureen O'Donnell, *Getting Inside the Mind of Parents Who Kill Kids*, CHI. SUN TIMES, June 18, 1995, at 21 (discussing the significant history of depression and suicidal tendencies); see also Joe Jackson, *Experts See Grim Pattern When Mothers Murder Local 8-Year-Old's Death in 1980 is Tragically Similar To Susan Smith Case*, VIRGINIAN-PILOT, Nov. 20, 1994, at A1 (identifying depression, enmeshment with the children, and failed romances as fatal factors); see also Van Biema, *Parents Who Kill*, TIME, Nov. 14, 1994, at 50; see also Wendy Hundley, *Study: Maternal Killers Share Traits*, DAYTON DAILY NEWS, Nov. 5, 1994, at 4A (examining youth and suicidal tendencies); see also Alice Steinbach, *Why Mothers Kill*, BALTIMORE SUN, Dec. 12, 1994, at 1D (examining low socio-economic backgrounds, history of sexual abuse, and rejection by a man); see also FLOWERS, *supra* note 6, at 113 (providing a typical profile of child-abusing mothers).

<sup>135</sup> *Id.*

<sup>136</sup> Steinbach, *supra* note 134.

<sup>137</sup> See O'Donnell, *supra* note 134, at 21 (citing George Rekers who assisted with the psychiatric evaluation of Susan Smith). The psychiatric explanation for inadequate development of psychological boundaries between a mother and child is best explained by what is known in the field as object relations theory. Briefly, adults with impaired early develop-

correlated with this blurring of boundaries.<sup>138</sup> A woman's biological ties, her strong role expectations to be a mother,<sup>139</sup> her significantly greater caregiving responsibilities,<sup>140</sup> her isolation in carrying out those responsibilities,<sup>141</sup> and her greater tendency toward depression and self-destruction<sup>142</sup> are more likely to result in her becoming trapped in enmeshment with her children.<sup>143</sup> During a homicidal episode, therefore, a mother may view a child as a mere extension of herself rather than as a separate being. A mother's suicidal inclinations may often transform into filial homicide. In other words, killing her children may be much like killing herself.

Such a psychological process often leads to psychotic depression, which indicates a significant break with reality.<sup>144</sup> Although it is well acknowledged that depression is often a part of the profile of mothers who kill their children,<sup>145</sup> and although depression was unequivocally acknowledged by both the prosecution and defense in the Susan Smith case,<sup>146</sup> the question of how depressed, and how impaired Susan Smith was by her emotions has never been clearly examined.<sup>147</sup> The reported psychiatric testimony, which focused on Susan Smith's history of abuse and tendency toward self-destructive behavior, never mentioned whether Susan Smith was guided by psychotic thoughts when she planned her children's (and her own, according to the psychiatric testimony) deaths.<sup>148</sup>

The presence of this "enmeshed" and severely depressed state of mind could qualify as an "extreme mental or emotional disturbance, for which there is a reasonable explanation or excuse."<sup>149</sup>

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mental relationships will experience difficulty in distinguishing their own thoughts, emotions, and needs from those with whom they are close. See generally HAROLD I. KAPLAN & BENJAMIN J. SADOCK, *COMPREHENSIVE TEXTBOOK OF PSYCHIATRY*, vol. 1, at 380-85 (5th ed. 1989).

<sup>138</sup> *Id.*

<sup>139</sup> O'Donnell, *supra* note 134; see also Roberts, *supra* note 25, at 128-29 (describing the biological inevitability of motherhood).

<sup>140</sup> See Roberts, *supra* note 25, at 96, 111, 129 (describing the burdensome task of motherhood).

<sup>141</sup> *Id.* at 128-29.

<sup>142</sup> *Id.* at 128 & n.165.

<sup>143</sup> See O'Donnell, *supra* note 134; KAPLAN & SADOCK, *supra* note 137.

<sup>144</sup> Psychotic depression, as described in the DSM-IV, occurs when depression becomes so severe, that an individual believes in bizarre events. DSM-IV, *supra* note 43, at 377-78.

<sup>145</sup> See Jackson, *supra* note 134.

<sup>146</sup> See Warner, *supra* note 13.

<sup>147</sup> Bragg, *supra* note 4; Rick Bragg, *Psychiatrist for Susan Smith's Defense Tells of a Woman Desperate to be Liked*, N.Y. TIMES, July 22, 1995, at A6. The defense decided not to pursue an insanity plea, and never argued the possibility of a psychotic depression at the time she murdered her children.

<sup>148</sup> See Bragg, *supra* note 147.

<sup>149</sup> KADISH & SCHULHOFER, *supra* note 84, at 1226 (quoting the Model Penal Code, § 210.3(1)(b)).

The enmeshment also explains, in part, the many instances in which the mother's intention to kill her children is accompanied with the mother's intent to die with them.<sup>150</sup> The source of this type of extreme emotional disturbance is due to the mother's intrapsychic make up, but it is also caused by social forces as well, forces which shall be discussed further in the following section.

#### D. *The Mitigating Factors of Motherhood*

This section will first discuss and then summarize the mitigating factors that should permit an EMED defense, or at least receive consideration at a sentencing hearing.

Susan Smith claimed she wanted to die and remained on suicide watch in jail for quite some time.<sup>151</sup> No one had any doubt that she was a serious suicide risk.<sup>152</sup> This is a common thread among many mothers who kill their children, since they often experience profound remorse for what they did.<sup>153</sup> Police officials reported that they observed Susan Smith's remorse as among the worst they have seen in a suspect.<sup>154</sup> Furthermore, the primary detective involved in the case commented that had Susan Smith not confessed, the investigation would probably never have been able to amass enough evidence to charge her with the crime.<sup>155</sup> Thus, Susan Smith had an opportunity to escape her punishment, yet chose not to do so. The jury recognized this fact and considered it a reason to spare her the death sentence.<sup>156</sup>

The significance of this remorse and her desire to die may be evaluated according to the basic utilitarian and retributive theories of punishment.<sup>157</sup> Is prolonged incarceration redundant when the perpetrator is her harshest punishing agent? From the perspective of punishment as deterrence, the perpetrator's self-punishment

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<sup>150</sup> This was purported by Susan Smith's psychiatric testimony. See Bragg, *supra* note 147.

<sup>151</sup> Rick Bragg, *Susan Smith Verdict Brings Relief to Town*, N.Y. TIMES, July 30, 1995, at A16; see also Bragg, *supra* note 1.

<sup>152</sup> Warner, *supra* note 146 (showing that both the defense and the prosecution experts found Susan Smith profoundly depressed).

<sup>153</sup> See, e.g., Rick Bragg, *Mother Was Remorseful, Witness Says*, N.Y. TIMES, July 21, 1995, at A10 (regarding Susan Smith); Beth Warren, *Ducker's Defiance Draws 18 Years; Judge Sees Little Remorse for Dead Sons*, THE TENNESSEAN, Nov. 10, 1995, at 1A (regarding Jennie Bain Ducker, who, despite the title of the article, displayed enormous remorse for her causing the death of her children during her trial which was both reported and televised on Court-TV).

<sup>154</sup> Bragg, *supra* note 153.

<sup>155</sup> Rick Bragg, *A Killer's Only Confidant. The Man Who Caught Susan Smith*, N.Y. TIMES, Aug. 4, 1995, at A10.

<sup>156</sup> *Dateline: We, the Jury; Five Members of the Susan Smith Jury Comment on the Trial* (NBC television broadcast, Aug. 1, 1995).

<sup>157</sup> HART, *supra* note 56, at 233-37.

makes it less likely that she will commit another crime.<sup>158</sup> From the perspective of retribution, the public's outrage is, to some degree, cumulative to the perpetrator's own self-outrage.

Compare this mental attitude to the sociopathic mothers such as Diane Downs or Rhonda Brown who more than likely experience little remorse over the loss of their children, and who could kill again.<sup>159</sup> Neither of them have ever admitted to their crimes, despite eye-witness testimony against these women.<sup>160</sup> Not only do they pose a threat to their own children, but they pose a threat to society at large, for they are probably uninhibited toward harming anyone who seriously thwarts their goals or desires.<sup>161</sup>

Is prior abuse a mitigating factor? Should society view a woman's history of abuse differently than that of a man's? How much of the woman's perspective and experience should define how we view the impact of abuse?<sup>162</sup> Surely, Susan Smith's prior sexual abuse by her step-father and her prior witness to her own father's suicide played a central part in her defense,<sup>163</sup> and these factors probably did spare her the death penalty.<sup>164</sup> Victimization as defense, however, usually does not look beyond the individual defendant's personal history. Susan Smith, however, has experienced an abuse that transcends her own personal predicament. Put another way, if prior abuse is to be used as a defense, the weight it carries for women may be greater than the weight it carries for men. To have it any other way would be to treat unequals as equals.<sup>165</sup> If women are more powerless in society, more dependent on the emotional and financial care of men, and more vulnerable to physical and sexual abuse because of their weaker physical stature and because of their lesser status in society, then the victim-

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<sup>158</sup> North Carolina, for example, includes in its statutory mitigating factors a voluntary acknowledgment of wrongdoing. See *State v. Holden*, 365 S.E.2d 626, 628 (N.C. 1988).

<sup>159</sup> Recall that the sociopathic personality rarely feels remorse for their wrongdoings, nor empathy for others' suffering. DSM-IV, *supra* note 43, at 650. See also Goodrich, *supra* note 42.

<sup>160</sup> See Bumiller, *supra* note 38 (noting that Diane Downs' daughter testified to her mother's crime); Rhonda Brown's son testified to the beating death of his brother. *Mom Dumped Boy, 8, Brother Says*, DAYTON DAILY NEWS, July 3, 1995, at 2B.

<sup>161</sup> Recall, for example, that a trial court, motivated by the son witnessing his mother's smothering death of his sister, convicted Alice Crimmins for the first degree murder of her son. The appeals court, however, overturned the conviction for lack of evidence. *People v. Crimmins*, 41 A.D.2d 933 (N.Y. App. Div. 1973).

<sup>162</sup> See generally SMART, *supra* note 6 (review of history of feminist jurisprudence).

<sup>163</sup> Rick Bragg, *Defending Smith, Stepfather Says He Also Bears Blame*, N.Y. TIMES, July 28, 1995, at A10.

<sup>164</sup> *Dateline: We, the Jury; Five Members of the Susan Smith Jury Comment on the Trial* (NBC television broadcast, Aug. 1, 1995).

<sup>165</sup> Cf. Roberts, *supra* note 25, at 130 (contending that a mother's abuse of her children is different from a husband's abuse of his wife).

ization defense should figure more prominently, if at all, in a female offender's defense.<sup>166</sup>

There are characteristics of homicidal mothers that prove ambiguous. They are aspects that may show either an aggravating or mitigating factor depending upon its context. The "man-angle,"<sup>167</sup> referred to in the profile of mothers who kill, *supra*, represents one of these ambiguous characteristics. Whether or not it is a mitigating or aggravating factor depends upon whether you ask a Susan Smith or a Diane Downs. For a sociopathic mother, a romance may be worth killing for, if that is the means to the end.<sup>168</sup> However, for women who experience the profound social value that a man's opinion carries, rejection may cause shame and dejection which observers may confuse as criminal selfishness. Consider that psychiatric testimony at Susan Smith's trial insisted that her act was a failed suicide attempt and not motivated by a plan to obtain the man she was dating.<sup>169</sup> This rejection results not only in a social and emotional loss, but also in economic loss, as women depend so much on men for their own and their children's livelihood.<sup>170</sup> Unfortunately, these losses may start a downward cycle culminating in the mother's severe depression and the taking of her child's life.

Another common and ambiguous thread is the "big lie." The "big lie" is what the homicidal mother tells the police, family, neighbors, and *sometimes herself* about what happened to the children. Susan Smith told everyone that a black man stole her car and kidnapped her kids, and continued this story for nine days, even after the chief detective on the case contacted the press and the Federal Bureau of Investigation (FBI).<sup>171</sup> Jolynn Ritchie in Ohio told the police that her four year-old daughter was missing, and remained loyal to this story while the FBI and hundreds of volunteers engaged in a massive search.<sup>172</sup> In fact, Ms. Ritchie knew the entire time where her daughter's body lay, and did not confess until more than a week after the police found her daugh-

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<sup>166</sup> See generally Raeder, *supra* note 6 and accompanying text.

<sup>167</sup> Steinbach, *supra* note 134.

<sup>168</sup> This comment relies on descriptions of the sociopathic personality in the DSM-IV, *supra* note 43.

<sup>169</sup> Bragg, *supra* note 147; Steinbach, *supra* note 134 (interviewing a psychologist commenting that "girls grow up to be women basing their self-worth and value on how men see them"). See also Ehrenreich, *supra* note 134. See also SMART, *supra* note 6, at 169 (showing how men define the reality upon which women rely).

<sup>170</sup> Raeder, *supra* note 6, at 915 n.44 (describing the feminization of poverty and single motherhood).

<sup>171</sup> Rick Bragg, *Sheriff Says Prayer and a Lie Led Susan Smith to Confess*, N.Y. TIMES, July 18, 1995, at A1, A10.

<sup>172</sup> Eileen Dempsey & Jill Riepenhoff, *Mom Charged in Daughter's Death Loses Other Kids*, COLUMBUS DISPATCH, Aug. 6, 1995, at 3C.

ter's body.<sup>173</sup> Diane Downs consistently urges that a "shaggy-haired" stranger shot her and her children.<sup>174</sup> Alice Crimmins also never renounced her story that kidnappers climbed into the window of her house and abducted her children.<sup>175</sup>

Is the "big lie" an aggravating or mitigating factor? Again, the answer depends upon the mother who told the lie. Those involved in the Susan Smith case thought that the lie seriously hurt her case by indicating her greater concern for self-preservation than for her children's welfare.<sup>176</sup> Furthermore, the community naturally feels a sense of betrayal whenever any homicidal mother watches while others frantically search for her children.<sup>177</sup> However, there are other theories and perspectives about these lies. Local psychologists from Ohio, a state which has had its spate of murdering mothers, all of whom carried at first a fictitious story that betrayed the public,<sup>178</sup> suggested that the denial is not necessarily a callous and self-serving act, but a more "profound denial" of having committed such an unspeakable crime.<sup>179</sup> It is possible that the mothers have temporarily convinced themselves that they did not do it as a means of protecting their psyche.<sup>180</sup> The key word, however, is "temporary." For if such mothers permanently convinced themselves that they never committed this crime, this psychological protection could enable them to commit other horrible crimes while shielding themselves from resulting remorse. A writer who has studied women on death row corroborates the psychological defense of denial, reporting that they can hardly believe they did it.<sup>181</sup>

A North Carolina court in *State v. Holden*, however, did not even consider that a homicidal mother's lie may have suggested a profound denial of her act.<sup>182</sup> Instead, the court held that a mildly retarded seventeen year-old mother, Shelia Holden, with a severe history of past and present abuse, nevertheless had sufficient

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<sup>173</sup> *Id.*

<sup>174</sup> Bumiller, *supra* note 38.

<sup>175</sup> *People v. Crimmins*, 343 N.E.2d 719 (N.Y. Ct. App. 1975).

<sup>176</sup> *See* Bragg, *supra* note 171.

<sup>177</sup> *See* Mary McCarty, *Experts Ponder Mother's Deception Theory: Parent's Profound Denial of 'Traumatic Act'*, DAYTON DAILY NEWS, Aug. 5, 1995, at 11A (concerning Jolynn Ritchie's deception to the public).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* Also note that denial is a psychological defense mechanism widely observed and recognized in psychiatry. *See* DSM-IV, *supra* note 43, at 751-53.

<sup>181</sup> Susan Campbell, *Smith Case Not Without Explanation*, HARTFORD COURANT, Nov. 5, 1994, at A1.

<sup>182</sup> 365 S.E.2d 626 (Sup. Ct. N.C. 1988).

mental capacity because she was able to form a false story.<sup>183</sup> "After the drowning, defendant had the presence of mind to fabricate a story implicating someone else. This evidence of planning, weighing of options, and covering her own tracks tended to negate defendant's claim that she was unable to appreciate her situation or the nature of her conduct."<sup>184</sup> The defendant asked for a mitigated sentence based on her low mental capacity, not a total excuse based on insanity, as the judge's language suggests.<sup>185</sup> The judge also interpreted the fabrication as proof of cognitive abilities sufficient to hold her responsible for the crime.<sup>186</sup> Alternatively, such a fabrication could have represented an automatic (perhaps reflexive) psychological preservation.<sup>187</sup> The judge arguably held such fabrications to higher cognitive capacities than are required to form such a story. In any event, a further inquiry into whether Shelia Holden's lie was a result of denial, rather than a sign of more culpable behavior, may have better served justice.

The appeals court acknowledged Shelia Holden's abuse history and her current oppressive social stresses as a mitigating factor.<sup>188</sup> The court properly relied upon the following facts: Shelia Holden was born of a thirteen year-old mother who was raped by her step-father;<sup>189</sup> her mother constantly reminded Shelia that she was a product of rape;<sup>190</sup> her mother and other family members often told her that she should have never been born;<sup>191</sup> her husband raped Shelia during her pregnancy and pounded her in the stomach in an effort to cause her to miscarry;<sup>192</sup> and after the baby was born, her husband and his family repeatedly blamed her for getting pregnant, yet would not permit her to give the baby up for adoption.<sup>193</sup> None of these factors reduced her charge to a lesser sentence because of the countervailing finding that Shelia was pur-

<sup>183</sup> *Id.* at 626-27. Defendant pled to second degree murder. The sentence was not part of the plea bargain, therefore the defense was appealing from a judgment of sentence.

<sup>184</sup> *Id.* at 630. Defendant originally reported that her daughter was kidnapped.

<sup>185</sup> *Id.* The cognitively oriented *M'Naghten* test of insanity is currently the most widely used in the United States' justice system. DRESSLER, *supra* note 22, at 319. It states, that a person is insane if the defendant "laboring under such a defect of reason, arising from a disease of the mind, that she: (1) did not know the nature and quality of the act that she was doing; or (2) if she did know it, she did not know that what she was doing was wrong. . . ." *Id.*

<sup>186</sup> *State v. Holden*, 365 S.E.2d at 630.

<sup>187</sup> *See McCarty*, *supra* note 177. Also note that denial is a psychological defense mechanism observed and recognized in psychiatry. *See DSM-IV*, *supra* note 43, at 751-53.

<sup>188</sup> *State v. Holden*, 365 S.E.2d at 628.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *State v. Holden*, 365 S.E.2d at 628.

portedly conniving enough to tell a lie about the baby's death, a lie to which she admitted early on in the criminal process.<sup>194</sup> The court in *Holden* weighed and evaluated the aggravating and mitigating factors of this case in a manner that perhaps ignores the social and psychological elements which affect mothers in the defendant's position.<sup>195</sup> This court's analysis may be an example of "how the law fails to take into account the experiences and values that seem more typical of women than of men . . . or how existing legal standards and concepts might disadvantage women."<sup>196</sup>

In summary, a criminal law that adequately considers the issues unique to homicidal mothers should alert a judge or jury to the existence of the following mitigating factors: (1) the degree of remorse; (2) prior physical and sexual abuse; (3) the genuineness of a psychological denial of the act; and (4) the influence of "endemic psychological and psychological realities facing subservient women."<sup>197</sup>

EMED, or a similar defense, in the presence of these enumerated mitigating factors, ought to be available to a homicidal mother. If successfully defended, these mitigating factors would reduce her charge from murder to manslaughter. Alternatively, a judge or jury should consider these same mitigating factors at a sentencing hearing following a conviction of murder. In most cases, it will follow that courts should compel psychological treatment where the homicidal mother is truly suffering from such emotionally provoking events severe enough to have prompted a homicide.<sup>198</sup>

### E. Concerns Regarding Counter-Deterrence

The above discussion of mitigating factors may raise the concerns addressed by Professor Morse and the Model Penal Code Commentaries that such sympathy may have a counter-deterrent

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<sup>194</sup> *Id.* at 627-28.

<sup>195</sup> See McCarty, *supra* note 177 (commenting on denial); DSM-IV, *supra* note 43, at 751-53 (referring to denial as a psychological defense mechanism); Wise, *supra* note 99, at 1 (discussing Judge Weinstein's comments about "subservient women").

<sup>196</sup> Bartlett, *supra* note 12, at 837. Cf. Judge Weinstein's reasoning, *supra* note 99, at 1, with that of the court in *Holden*, 365 S.E.2d at 627-28, regarding a female drug offender. See also *supra* Part III-D.

<sup>197</sup> The fourth factor is a quote by Federal Judge Weinstein. See *supra* note 99, at 1. Note that these mitigating factors are in addition to the standard factors considered by most courts which include history of no prior violent offenses.

<sup>198</sup> Related to this suggestion is the "guilty but mentally ill" verdict adopted by some states which requires psychiatric treatment in addition to incarceration. For an example of its application, see *Commonwealth v. Comitz*, 530 A.2d 473 (Pa. Super. Ct. 1987).

effect upon crime.<sup>199</sup> Granting lenient sentences to defendants who have problems could increase the probability that callous criminals will elude conviction with a meritless defense, or else could insufficiently deter criminals whose emotional problems cause them to commit dangerous crimes.<sup>200</sup>

To assuage these fears, mitigating factors should not receive consideration unless we as a society are confident that the perpetrator who receives mercy is less dangerous than the one who does not. Specifically, three responses exist to address these concerns. First, the court is still responsible for distinguishing meritless defenses from legitimate ones. The extent to which courts do this effectively determines the extent to which other criminals will be deterred from falsely bringing themselves within the scope of mitigating conditions.<sup>201</sup> Courts may express reasonable concern that they would not be able to distinguish between the mother who deserves mercy and one who does not. The purpose of this Note is to identify more precisely the situations that call for mitigation.

Second, the state should permit an EMED defense in order to evaluate the blameworthiness of the defendant. If blameworthiness is lessened by internally provoking events and our sympathy for the defendant is aroused, this often indicates that the defendant is less deterrable by legal sanctions than in the absence of such extreme emotional disturbance.<sup>202</sup>

More importantly, such defendants may also be less dangerous than those killers who have not acted under extreme emotional disturbance. Professor Arenella corroborates this notion by stating that the provocation defense "does not weaken its social control function because liability is reduced only in those cases in which objective factors suggest that the offender is *not only less culpable but less dangerous than the unprovoked killer.*"<sup>203</sup> Recall that EMED is an expanded codification of the common law provocation defense.<sup>204</sup> Therefore, according to Professor Arenella's analysis, any homici-

<sup>199</sup> Stephen J. Morse, *Diminished Capacity: A Moral and Legal Conundrum*, 2 INT'L J.L. & PSYCHIATRY 271, 296 (1979) (expressing concern for the loss of deterrent effect caused by a diminished capacity defense); KADISH & SCHULHOFER, *supra* note 84, at 464 (quoting the Model Penal Code Commentaries: "[T]he factors that call for mitigation . . . are the very aspects of an individual's personality that makes us most fearful of his future conduct.").

<sup>200</sup> See KADISH & SCHULHOFER, *supra* note 84, at 464 (quoting the Model Penal Code Commentaries).

<sup>201</sup> HART, *supra* note 56, at 42.

<sup>202</sup> See M. Zeegers, *Diminished Responsibility: A Logical, Workable and Essential Concept*, 4 INT'L J.L. & PSYCHIATRY 433, 442 (1981); see HART, *supra* note 56, at 40-44.

<sup>203</sup> Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 853 (1977) (emphasis added).

<sup>204</sup> See *supra* Part III-C.

dal mother who can establish such a defense may not possess the kind of mental abnormality which "reveals a character deficiency that might make [a perpetrator] dangerous in the future."<sup>205</sup>

Third, EMED has its roots not only in intrapsychic phenomenon, but in socially oppressive forces as well. As such, any excess over a just punishment may achieve nothing more than "blaming the victim."<sup>206</sup> For instance, if defendants like Susan Smith or Sheila Holden were more vulnerable to abuse and exploitation because they were female, and if such abuse contributed to the kind of internal stress that led to a filial homicide, then the social vulnerability of women should concern not only the criminologist,<sup>207</sup> but the courts and juries as well. Severe sentences may represent a societal displacement of responsibility that detracts attention from the social factors contributing to the origin of these particular crimes.

A corollary to this latter proposition is suggested by the findings that many female offenders are of traditional backgrounds and have traditional values and goals.<sup>208</sup> At one time, writers proposed a theory that women's liberation would unleash a new, aggressive female offender, and that such liberated viewpoints would trigger women to commit crimes at rates and with violence equaling that of men.<sup>209</sup> On the contrary, there is no evidence of any link between liberated feminist ideology and criminality in women; rather, the demographics of female prisoners describe a more uneducated and poorer class of women with traditional values, a sector less likely to be guided by feminist doctrine. These women are more likely guided by prevailing gender-biased social mores.<sup>210</sup> Some crimes, in fact, have diminished with the adoption of feminist-guided measures. As a case in point, and as alluded to earlier, infanticide has diminished significantly since the wider availability of birth control, medical care, and abortions, and the decrease of stigma relating to illegitimacy.<sup>211</sup> Would maternal filial homicide also decrease with the adoption of certain social changes?

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<sup>205</sup> Arenella, *supra* note 203, at 853.

<sup>206</sup> See generally WILLIAM RYAN, *BLAMING THE VICTIM* (1976). The phrase, "blaming the victim," was coined by Ryan to identify how American society prefers to place the blame for poverty on its victims rather than on the inequalities of society.

<sup>207</sup> See SMART, *supra* note 6, at 47 (stating that criminology needs feminism more than feminism needs criminology).

<sup>208</sup> See generally Raeder, *supra* note 6, Part VIII at 969.

<sup>209</sup> FLOWERS, *supra* note 6, at 86 (referring to books hypothesizing this trend toward a more violent female offender).

<sup>210</sup> See Raeder, *supra* note 6, at 910 n.13; Laster, *supra* note 6, at 153-54 (stating that the prevalence of infanticide decreases in relatively more "emancipated" societies).

<sup>211</sup> See generally HOFFER & HULL, *supra* note 28.

## V. CONCLUSION

The above discussion supports a merciful view of mothers who kill their children under certain circumstances, even in the event of premeditation and awareness of the harm they are causing. What kinds of sentences should these homicidal mothers receive? An "extreme mental or emotional disturbance" defense should be available to them if some of the mitigating factors discussed in Part IV-D are present. The factors discussed are summarized as follows: (1) the degree of remorse; (2) prior physical or sexual abuse; (3) a genuine psychological denial of the act; and (4) the influence of "endemic sociological and psychological realities" facing "subservient women."<sup>212</sup> If successfully defended, this would reduce a murder charge to manslaughter. Alternatively, courts should consider the same mitigating factors at a sentencing hearing following a murder conviction. Courts should also compel psychological treatment in most situations.

Mothers like Susan Smith share some matters in common with mothers who raise the cultural defense, such as Kimura, who was granted leniency for practicing a murderous Japanese ritual upon her children.<sup>213</sup> The difference is that it is our own culture which corners mothers into the double-binding trap of demanding that women serve as primary caregivers on one hand, while on the other hand, using motherhood to force women into oppressive roles.<sup>214</sup>

However, mothers who kill because of an underlying callous sociopathy will usually warrant punishment to the fullest extent of the law, for murdering their children is to them much the same as eliminating any other obstacle in their lives.<sup>215</sup> Murdering their own children is arguably much the same as murdering a stranger or another's children.

Maternal filial homicide, *except* in the case of sociopathic mothers, presents a different crime than if the mothers killed a stranger or another's child.<sup>216</sup> It is probably a different crime than paternal filial homicide. Carrying, bearing and nursing the child,

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<sup>212</sup> Wise, *supra* note 99, at 1 (quoting Federal Judge Weinstein's opinion in *United States v. Gaviriz*, CR 89-901).

<sup>213</sup> Chiu, *supra* note 45.

<sup>214</sup> Roberts, *supra* note 25, at 140-41.

<sup>215</sup> See DSM-IV, *supra* note 43, at 646. ("Persons with [Antisocial Personality Disorder] disregard the wishes, rights, or feelings of others. They are frequently deceitful and manipulative in order to gain personal profit or pleasure. . .").

<sup>216</sup> See Roberts, *supra* note 25, at 96-100 (describing the special social and legal burdens of mothering); Raeder, *supra* note 6, at 926 (arguing that the revised federal guidelines now have a harsher effect upon women since they no longer consider women's unique situations).

spending more time caregiving, and meeting social expectations that women be caring nurturers, are all factors that influence a mother's bond with the child differently than that of the father.<sup>217</sup> This proposition is supported by the statistics discussed in Part III that suggest a homicide committed by a father is usually more callous and violent than one committed by a mother.<sup>218</sup> Depression, past abuse, and the absence of any prior violent history may serve as yardsticks to measure mitigating factors of homicidal fathers as well as mothers. However, the above statistics strongly suggest that these mitigating factors will be less prevalent among fathers who kill their children than among mothers.<sup>219</sup>

Finally, as generally discussed in Part IV, the sociological and psychological backgrounds of some women render them more easily dominated and victimized, with fewer resources and options than men.<sup>220</sup> Therefore, in most cases, the impact and prevalence of abusive histories will probably be more severe for women than for men, and hence be a mitigating factor to weigh more heavily when sentencing mothers. This statement is not intended to minimize the abuse histories of individual men, but to emphasize that these themes will probably appear more often among female offenders.

In summary, with the exception of callous and coldly deliberated filial homicides, for a mother who kills her children, mitigating circumstances usually exist that often do not exist for a father or other person who kills his children. Women who are overburdened as caregivers, who receive little or no help from fathers, who possess inadequate resources, who have impaired access to maternal supports, and who rely on men for their self worth, are more likely to kill their own children than those who do not labor under such burdens. Yes, these women should be punished. However, the punishment they receive should not replace or detract from the efforts required to address the social problems that generated much of the problem in the first place.

*Janet Ford*

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<sup>217</sup> See Raeder, *supra* note 6, at 926.

<sup>218</sup> NCMEC, *supra* note 17, at 50.

<sup>219</sup> *Id.*

<sup>220</sup> See generally SMART, *supra* note 6.

