

TO LOVE THE BABE THAT MILKS ME: INFANTICIDE AND RECONCEIVING THE MOTHER

LUCY JANE LANG*

*"We must integrate into our in-itself-for-itself the
given of an original relationship with our mother . . .
in which, at one time, we received life rather than
death from the other."*¹

*"[I]n light of the extended period of time little Lazaro
was subjected to the tortuous abuse leading to his
death, the ultimate sentence is warranted in this
case. . . . Is it so ordered."*²

I. INTRODUCTION

Ana Cardona is currently awaiting execution on Florida's death row for the brutal abuse and murder of her three-year-old son. After her trial, the court found as fact that:

During an eighteen-month period . . . Cardona beat, choked, starved, confined, emotionally abused and systematically tortured Lazaro. The child spent much of the time tied to a bed, left in a bathtub with the hot or cold water running, or locked in a closet. To avoid changing Lazaro's diaper for as long as possible, Cardona would wrap duct tape around the child's diaper to hold in the excrement. Cardona blamed Lazaro for her descent "from riches to rags," and referred to him as "bad birth."³

* Candidate for J.D., Columbia Law School, 2006. I am grateful to Professors Carol Sanger and Cindy Halpern for their ideas and support. Thanks to the Journal staff and editors for their hard work in bringing this Article to its final form, and finally to Tina and Theresa Lang.

¹ Luce Irigaray, *Daughter and Woman*, in *To Be Two* 30, 33 (Monique M. Rhodes trans., 2001).

² *Cardona v. State*, 641 So. 2d 361, 365-66 (Fla. 1994), *cert. denied*, 513 U.S. 1160 (1995).

³ *Id.* at 362.

The court went on to explain that Cardona hit the child on the head with a baseball bat before abandoning him in the bushes near Miami Beach, where he died slowly over the course of the next four days before his disfigured body was found.⁴

This Article first argues that the existence of infanticide⁵ in the United States reflects the extent to which women are not free to choose whether or not to become mothers, due to hidden cultural pressures and a lack of alternatives, and then offers an alternate framework for understanding motherhood.⁶ This argument does not intend to justify crimes of infanticide or to devalue the suffering of children; rather, it calls attention to the fact that women are socially and legally expected to have and raise their own children. By providing a theoretical framework for understanding the possibility that not all women choose to have children, this Article issues a call to reframe our conception of motherhood and to provide viable options for women who cannot or do not want to raise their own children.⁷ Through the application of a theory of suffering, this Article argues that the United States criminal justice system is remiss in prosecuting infanticidal mothers under standard homicide statutes and should rather adopt specific infanticide statutes that recognize the distinctions between infanticide and other homicides. While such statutes would not necessarily reflect diminished culpability for the criminal act, differentiating infanticide from other forms of murder could protect women from public vilification as “murderers”⁸ and from lengthy, unpredictable sentences.⁹

⁴ *Id.*

⁵ “Infanticide” in this Article refers to the general category of the killing of a young child and is separated, per the legal literature, into the categories of neonaticide, filicide, and abuse-related infanticide. See *infra* Part V.

⁶ Motherhood has only recently begun to attract the attention of academic literature. See Rima D. Apple & Janet Golden, Introduction: Mothers, Motherhood, and Historians, in Mothers and Motherhood: Readings in American History xiii, xiii-xvii (Rima D. Apple & Janet Golden eds., 1997) (arguing that “[f]ew textbooks or college courses have paid much attention to the phenomenon of mothering, the meaning of motherhood, or the lives of mothers [I]t is only recently that historians have begun to examine mothers and motherhood as distinct from and yet a part of family history and women’s history”).

⁷ See generally Carol Sanger, Separating From Children, 96 Colum. L. Rev. 375 (1996). Sanger argues that “the present scheme of regulation sustains social understandings regarding mother-child separation with little attention to the circumstances of mothers’ lives that prompt their decisions to separate in the first place. Instead, maternal separations are quickly marked as evidence of self-interest and assumed antithetical to the welfare of children.” *Id.* at 377.

⁸ For a particularly bizarre example of the public outcry over infanticidal mothers, see Little Angels in Heaven, at <http://leelah.tripod.com/> (last modified Jan. 14, 2005).

⁹ See, e.g., Christine A. Fazio & Jennifer L. Comito, Rethinking the Tough Sentencing of Teenage Neonaticide Offenders in the United States, 67 Fordham L. Rev.

Despite the many instances of mothers who treat their children with shocking brutality, women are inundated with positive notions about motherhood and encouraged to enter the "cult of motherhood."¹⁰ Women are taught that having and raising children is the ultimate female task, a form of self-imposed suffering that fundamentally distinguishes women from men.¹¹ This Article seeks to dispel the mythology that motherhood is necessarily a choice and rather suggests that motherhood may be a form of unchosen suffering imposed upon women by various cultural and legal constraints. Employing Cynthia Halpern's two theories of suffering,¹² this Article argues that although motherhood manifests itself as a form of positive suffering for many women, the historical existence of women who injure or kill their children suggests that motherhood can also be experienced as negative suffering.¹³

Infanticide and its treatment in the law illustrate the entrenchment of the American presumption that motherhood is *per se* a choice. Considering the different forms of infanticide currently recognized in American legal scholarship, this Article explores the extent to which infanticidal mothers are not deviant mothers, but simply mothers who experience their motherhood as negative suffering in contrast to the positive suffering women are taught to expect. Part II establishes the framework of two theories of suffering proposed by Halpern, while Part III explains the relevance of theories of suffering to theories of motherhood. Part IV explores the importance of the theory of negative suffering for reconceptualizing mothering. Part V sheds light on our concept of motherhood by tracing how negative suffering manifests itself differently in cases of neonaticide, filicide, and abuse-related infanticide. Part VI

3109, 3137 (1999) (noting the wide range of sentences applied to infanticide cases, ranging from a slap on the wrist to capital punishment).

¹⁰ Christine A. Littleton, Reconstructing Sex Equality, in Feminist Legal Theory: Foundations 248, 258 (D. Kelly Weisberg ed., 1993).

¹¹ See, e.g., Robin West, Jurisprudence and Gender, 55 U. Chi. L. Rev. 1, 2 (1988) (arguing that modern legal theory has neglected to take women's experiences into account because, unlike the accepted norm of the autonomous individual, "[w]omen are not essentially, necessarily, inevitably, invariably, always, and forever separate from other human beings: women, distinctively, are quite clearly 'connected' to another human life when pregnant").

¹² Cynthia Halpern, Two Concepts of Suffering (2004) (unpublished manuscript on file with author).

¹³ Interestingly, rates of infanticide bear no correlation to murder rates, but do show a statistical correlation to suicide rates—a fact some scholars believe reflects that infanticide is caused not by aggression against the victim as "other," but instead against the mother as self. In this sense, through the act of killing her child, the infanticidal mother kills her maternal self. Cheryl L. Meyer & Michelle Oberman, Mothers Who Kill Their Children: Understanding the Acts of Moms from Susan Smith to the "Prom Mom" 45 (2001).

proposes recommendations for acknowledging how motherhood might constitute a form of negative suffering.

Examination of infanticide as the extreme case of the negatively suffering mother clearly demonstrates that our cultural construction of motherhood in positive terms is inadequate for addressing the complicated political and legal landscape into which mothers presently are forced. This Article intends to restructure American restraints on mothers as a legal category by arguing for an understanding of motherhood as both positive and negative suffering. While theory necessarily entails some uncertainty due to its inability to fully describe all mothers' experiences, a theory of motherhood that centers on choice and suffering can nonetheless broaden our cultural and political understandings of women.

II. TWO THEORIES OF SUFFERING

Cynthia Halpern's two conceptions of suffering, posited as a critical reflection on Sir Isaiah Berlin's "Two Concepts of Liberty,"¹⁴ provide fertile grounds for an analysis of motherhood and choice. Integral to this notion is a broad sense of the nature of choice: "I can choose between wines for dinner, or between houses, but that is not the same sort of choice I make as when I choose to suffer for my child, or for my God."¹⁵ Suffering that is chosen in this deep sense is positive suffering, while suffering that is inflicted on the sufferer for someone else's purposes is negative suffering.¹⁶ The forms that positive and negative suffering take are, of course, historically contingent.¹⁷ At this moment and place in history, motherhood

¹⁴ Sir Isaiah Berlin, *Two Concepts of Liberty*, in *Liberty* 166-217 (Henry Hardy ed., Oxford University Press 2002).

¹⁵ Halpern, *supra* note 12, at 3.

¹⁶ *Id.* at 4.

¹⁷ Halpern states,

I take it for granted that all moral and political actions take place in historical time and space, in cultural and social context, and in language and beyond language; I am stipulating that these elements vary contextually, historically and culturally, and these can be specified more or less simply or completely as we go along. Suffering takes place in bodies and minds, both individual and collective, in dimensions that can be categorized as metaphorical and actual, or symbolic and material, and conflicts between faith and reason occur in language and thought and in history, material, immaterial and intellectual. I am not interested in defending the existence of any entities or events, only in theorizing about [what] is brought to the table by us in talking about such things.

Id. at 4-5.

is experienced as both forms, but is generally represented in public discourse under the rubric of positive suffering.¹⁸

The dichotomy between these forms of suffering is contingent on the individuals who experience them. Positive suffering is chosen or accepted because it has purpose for the sufferer. Negative suffering, however, is inflicted on the sufferer by people or circumstances that are outside the sufferer's control. As Halpern states:

Negative suffering is not chosen and it may be meaningless to its victims, either because it is understood as natural, with no moral valence, or because it is incomprehensible, or is willfully evil, the intentional infliction of injury, violence, and death by others for their own reasons. It is not so obvious what sorts of suffering fall into these categories, and this is the value of the distinction. The sorting helps clarify what is at stake.¹⁹

The stakes in the alignment between motherhood and suffering are the political and legal interventions that justify and perpetuate the ways in which motherhood is experienced.²⁰ What of the woman who does not choose the suffering of motherhood, who experiences pain in pregnancy and childbirth, or who is emotionally disinterested or unable to mother, yet who is nonetheless expected to act under the normative value system that presents all motherhood as freely chosen? This is the woman with whom this Article is concerned: she who acts in accord with her experience of motherhood as negative suffering and is subsequently punished by a law that is structured under the presumption that all motherhood is chosen, positive suffering.

¹⁸ I recognize the extent to which this argument is also premised on certain race and class contingencies. Public discourse in non-white, non-middle class communities may have an appropriate vocabulary for articulating motherhood as negative suffering. (Consider Ana Cardona referencing her child as "bad birth" because she blamed him for her economic decline. *Cardona v. State*, 641 So. 2d 361, 362 (Fla. 1994), *cert. denied*, 513 U.S. 1160 (1995)). This Article argues against the vocabulary employed by the modern American hegemonic power that creates and enacts our political and legal structure. Therefore, for the purposes of this Article, I approach the concept of motherhood as premised on largely white, middle-class, public, and rhetorical norms. Whether or not Cardona was able to articulate her experience as negative suffering, she lacked access to resources that would allow her to shed her motherhood, such as abortion and adoption, due to the dominant discourse's social construction of motherhood as positive.

¹⁹ Halpern, *supra* note 12, at 5.

²⁰ The other obvious concern in rethinking the nature of motherhood is the experience of the child in its relationship both to the actions and emotions of the mother and to the structural constraints to which both mother and child are subject. This concern, while important, is tangential to this Article.

III. SUFFERING AND MOTHERHOOD

There are many parallels between theories of suffering and theories of motherhood that have gone unnoticed in political and legal theory. One of the ways that history grants agency is through the recognition of individuals' and communities' suffering: the stories of soldiers who suffer in times of war, martyrs who suffer for freedom, scholars and teachers who suffer for truth. To conceive of motherhood as suffering is an attempt to grant mothers agency within a theoretical structure that has long denied this power. Tracing the theoretical similarities between suffering and motherhood enhances an understanding of the need to broaden the conception of motherhood within the law and the historical record.

A. Motherhood, Suffering, and Expressibility

The relationship between suffering and the experience of motherhood is reflected in their common inexpressibility. Suffering is necessarily resistant to language,²¹ and since pain occurs in the interior of another person's body or mind, it cannot be accurately articulated from one person to another. The separation between sentient bodies disables the capacity to express the experience of being in both physical and emotional pain; the best humans can do to share their pain is to try to approximate it through language.

Suffering as a sensory phenomenon has inherent characteristics that demonstrate its inability to be articulated. Unlike many other sensory experiences, there is no object other than pain itself in the experience of physical suffering. When humans have feelings or fears, they are feelings or fears *for* someone or *of* something. Pain, on the contrary, is neither *of* nor *for* an exterior object. While other emotional and perceptual states of the lived human experience consistently demonstrate the capacity to interact outside the bounded limits of the human body, pain in its solitary sentience has no external reference point.²²

Suffering's ability to destroy language lies in its capacity to reduce verbal expression. While suffering cannot be adequately expressed through language, it also eventually eliminates the ability to use language coherently. In times of intense suffering, the self begins to focus not on itself as an agent, but increasingly on the pain that it feels.²³ This leads to

²¹ Cynthia Halpern, Suffering, Politics, Power: A Genealogy in Modern Political Theory 9 (2002).

²² Elaine Scarry, The Body in Pain: The Making and Unmaking of the World 5 (1985).

²³ *Id.* at 54. This is well-reflected by the phenomenon of pain in childbirth. As pain increases during the period of labor, the mother may forget her own identity, concentrating instead on the object of her physical suffering: the child that is being removed from her

the monopolization of language by complaints of suffering.²⁴ As suffering worsens, the coherence of language collapses, thereby reducing the sufferer to the use of sounds or cries rather than learned language.²⁵ Through these sounds, other selves become less able to comprehend the specific experience of the sufferer.

The inability to adequately express pain leads to necessary and complex inquiries into both how we define the boundaries between selves and how we contextualize mothering. These inquiries test the boundaries of human knowledge of the sentient bodies of others. Halpern suggests that this is because

[p]hilosophically, pain . . . is what is quintessentially, axiomatically, beyond knowing. We cannot feel another's pain, nor can we adequately describe our own, or even identify the consciousness that suffers as our own. It is profoundly subjective and also the ownmost of our selves, experienced nevertheless as an otherness that cannot be encapsulated or sufficiently communicated.²⁶

It is precisely because discrete selves cannot feel each other's pain that humans can cause each other to suffer without internalizing what it means to experience that suffering.

This dichotomy between the self and the other is particularly interesting in the context of motherhood. It is often argued that mothers transcend the norms of suffering and do, in fact, suffer when their children suffer. Many women express feelings of pain, both physical and emotional, at the thought of their children's suffering. In addition, women are frequently reminded that motherhood is a unique and powerful experience that escapes language.²⁷

body. This provides a convenient metaphor for the parallel between motherhood and suffering. For many women, as the child grows, the mother continues to experience the external object (the child) as paramount in importance to herself.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Halpern, *supra* note 21, at 9.

²⁷ For an informal reflection of cultural associations between inexpressibility and motherhood, peruse any number of mother-oriented Web sites. See, e.g., Joys of Motherhood, at <http://parenting.ivillage.com/mom/joys/topics/0,,4r19,00.html> (last visited April 7, 2005).

B. Motherhood, Suffering, and Power

The challenge of articulating or representing suffering, such as motherhood, also bears a paradoxical relationship to power. In a modern political context, the capacity to represent experience through language is intimately associated with the wielding of power: attorneys are hired to “represent” people in court, individuals who lack power are considered “without representation,” and we call our lawmakers “representatives.” In order to have power, the modern individual must be represented.²⁸ What does it mean, then, that pain cannot be represented either through language, discourse, or other traditional means of expression? Considering periods of suffering, war, and genocide, it is clear that the infliction of suffering holds immense power, despite the inability to express suffering adequately.

Contrary to other social manifestations of power, such as laws or behavioral expectations, suffering is powerful precisely *because of* its inexpressibility. We fear suffering because we cannot understand it, thereby granting the threat of suffering all the power of the unknown. The context of the inexpressibility of motherhood deepens the assertion that suffering is inexplicable. As in theories of suffering, degrees and distinctions mark mothers’ relationships with their children, but mothers consistently refer to the failure of language to represent that relationship.²⁹

Mothers’ metaphorical and actual underrepresentation makes it necessary to determine how this underrepresentation is related to power. While obvious historical injustices demonstrate the ways in which mothers have been systematically denied power,³⁰ the inexpressibility of the relationships they foster may grant power to motherhood. Motherhood, like suffering, challenges language because it is interior to the particular bodies of the selves in question. This lack of representability is compounded by the extent to which both suffering and motherhood are linked to life and death. Suffering destroys expression because pain brings the body to the point of death, while the pain of motherhood does the same in demonstrating the body’s capacity to create life.

²⁸ Scarry, *supra* note 22, at 207 (explaining that “[i]n discussions of power, it is conventionally the case that those with power are said to be ‘represented’ whereas those without power are ‘without representation’”).

²⁹ A non-mother, I recently had a lengthy conversation at a dinner party with two mothers who told me repeatedly that they couldn’t capture what it means to be a mother in language and that I would understand when I had my own children.

³⁰ Consider for example the history of coverture, the denial of the franchise, and employment discrimination.

C. Motherhood, Suffering, and Experience

Many mothers, so goes our modern application of the discourse of positive suffering, make decisions that do not consider their own suffering, but rather the suffering of their children.³¹ Unlike the classic liberal individual presupposed by jurisprudence, mothers are not always physically separate from other human beings and do not always make decisions as individuals.³² They are not individuals in the modern liberal sense.³³ Mothers' identities in the liberal state, as the subject of its laws, are unique, so traditional legal categories may be inapplicable.

The parallel between these two inexpressible human functions, suffering and motherhood, is thus underscored by their reliance on

³¹ The complexity of this relationship is reflected in the experiences of mothers in times of great suffering. Maternal discourse on the Holocaust, for example, consistently indicates the extra suffering that comes with being a mother in a suffering world. The choices between life and death made by individuals in the face of great and prolonged pain are deeply intertwined with their inexplicable love for their children and the inexpressible ties between their sentience and that of their children. A Birkenau camp survivor relates an incident in which

[m]others of children were allowed to present themselves for selection. But after a six-month stay in Birkenau they knew that this meant leaving their children to face death alone. Only two of about six hundred mothers of young children appeared for selection; all the others decided to stay with their children to the end. . . . One young mother sedated her small baby and tried to smuggle him out wrapped in a bundle. But the baby's cry gave her away. I worked in the children's block, [and] some of their mothers came to me before the selection to ask my advice—what would I do? I tried not to give them a straight answer: "How could I know? I don't have a child of my own." But after they persisted, I said: "I think if I had a small child I would stay with him." They nodded: their decision was the same; they just wanted my approval. For years the heavy burden of responsibility weighed on me: the mothers were young, they could have survived and begun new families. But after my daughter was born, I was reassured: I would not have left her alone when she most needed my embrace.

Ruth Bondy, Women in Theresienstadt and the Family Camp in Birkenau, in Women in the Holocaust 310, 324-25 (Dalia Ofer & Lenore J. Weitzman eds., 1998). The consistency of mothers' choices to die with their children rather than attempt to survive and start new families demonstrates the extent to which mothers do not fit the mold of the autonomous liberal individual.

³² West, *supra* note 11, at 1 (articulating the "separation thesis" assumed by modern moral and political philosophers and criticizing its oversight of women due to their potential to be mothers).

³³ Consider Robin West's claim: "To the considerable degree that our potentiality for motherhood defines ourselves, women's lives are relational, not autonomous. As mothers we nurture the weak and we depend upon the strong. More than do men, we live in an interdependent and hierarchical natural web with others of varying degrees of strength." Robin West, The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory, 3 *Wis. Women's L. J.* 81, 141 (1987).

experience. Halpern observes that "[s]uffering, like infancy, is experience itself."³⁴ The actual result of suffering echoes infancy in its very character as well, in both the sounds and the dependency it produces. Both experiences are complicated because they collapse the boundary between subject and object. For sufferers, subjecthood is destroyed by the objects of their pain and the fact that what consumes them resists the objects of language and representation. For the mother, the subjecthood of her child consumes her own subjecthood, turning her into an object that functions through the protection of another self.

The pain of pregnancy and childbirth further problematizes the difficulty of negotiating the territory between subject and object for mothers. Simone de Beauvoir addresses these challenges to a mother both as a body and as an individual by explaining:

Pregnancy is above all a drama that is acted out within the woman herself. She feels it as at once an enrichment and an injury; the fetus is a part of her body, and it is a parasite that feeds on it; she possesses it, and she is possessed by it; it represents the future and, carrying it, she feels herself vast as the world; but this very opulence annihilates her, she feels that she herself is no longer anything. A new life is going to manifest itself and justify its own separate existence, she is proud of it; but she also feels herself tossed and driven, the plaything of obscure forces. It is especially noteworthy that the pregnant woman feels the immanence of her body at just the time when it is in transcendence: it turns upon itself in nausea and discomfort; it has ceased to exist for itself . . . [I]n the mother-to-be the antithesis of the subject and object ceases to exist; she and the child with which she is swollen make up together an equivocal pair overwhelmed by life.³⁵

Like motherhood, suffering is also "above all a drama that is acted out within."³⁶ It is the self-centered sentient experience that allows both to elude expression.

The subject/object delineation is, however, maintained in certain ways in both the experience of motherhood and that of suffering. When an individual experiences suffering, she feels not the object which causes the pain, but the response of the body.³⁷ A knife that cuts through flesh or the gas that chokes a body are not what the sufferer feels. What is felt instead is

³⁴ Halpern, *supra* note 21, at 7.

³⁵ Simone de Beauvoir, *The Second Sex* 553 (H. M. Parshley ed. & trans., Vintage Books 1952).

³⁶ *Id.*

³⁷ Scarry, *supra* note 22, at 53.

the flesh around the knife or the contraction of the lungs around the gas. The body defies itself, rather than being defied by the weapon.³⁸ This "double experience of agency" is the result of the contrast between the internal feeling of agency and the external cause of pain and sometimes the experience of internal pain in the absolute absence of an external cause.³⁹ The sufferer is performed upon from both outside and within.⁴⁰ Similarly, the mother lacks the experience of being inside her child, whether born or not, yet she suffers for her child. The two remain separate beings, and the reverberations of the child's suffering are experienced by the mother.⁴¹ This is what makes negative suffering such a powerful tool when used against mothers.

Suffering in childbirth converts the body of the mother itself into a weapon of torture. She is tortured by her body in the process of giving birth, and she tortures the child by the very act of bringing it into a world that promises suffering. The boundaries that are transcended in this process give rise to an "almost obscene conflation of private and public."⁴² This element of the experience of suffering parallels motherhood in significant ways. The loneliness of being in pain, confined within the solitary body and experiencing its sentience privately and inexplicably, destroys the private self. This is evident in the traditional function of the mother, who exists within the private sphere as the result of public norms.⁴³ Motherhood is linked to suffering in a unique way that has necessary political implications. Just as mothers have historically grappled with the boundaries of the public and the private, so too are sufferers subject to the challenges of these limits.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ This double agency of motherhood led all but two of the six hundred mothers at Birkenau to die beside their children rather than to survive themselves and let their children die. See Bondy, *supra* note 31, at 324. De Beauvoir argues that inexpressibility undermines the notion that mothers act out of pity or self-referentiality because "if it is so difficult to say anything specific about her . . . it is because she is All. She is All, that is, on the plane of the inessential; she is all the Other. And, as the other, she is other than herself, other than what is expected of her." De Beauvoir, *supra* note 35, at 223.

⁴² Scarry, *supra* note 22, at 53.

⁴³ Ann Ferguson, *On Conceiving Motherhood and Sexuality: A Feminist Materialist Approach*, in *Feminist Social Thought: A Reader* 38, 41 (Diana Tietjens Meyers ed., Routledge 1997).

IV. MOTHERHOOD AS POSITIVE AND NEGATIVE SUFFERING

Political suffering is the broad category of suffering to which individuals are subjected by the state or a state-affiliated faction. Insofar as motherhood is culturally constructed as woman's role and encouraged by the state both socially and legally, motherhood constitutes a form of political suffering. Motherhood, however, can be distinguished from other contemporary forms of political suffering. For example, one can argue that the law is a form of political suffering that we impose on ourselves for our own good. We suffer its restraints because they are necessary for order. Law can also be viewed, however, as a form of negative suffering that is inflicted on some by others.⁴⁴ Because mothers have largely been absent from the process of creating the law throughout history, laws surrounding motherhood should be viewed as laws that fall into the category of negative suffering. Because men have made the law, "[t]o be born woman, before signifying to be humanity's reproducer, means to incarnate woman's to be with the other-man, together with man's to be."⁴⁵ In other words, men have constructed women into the role of mother, creating a binary relationship between the male neutral norm and the female reproductive function, leaving no space for women as anything other than "humanity's reproducer[s]."⁴⁶

Motherhood as political suffering is unique in this regard. Halpern argues that modern liberal theory lacks an adequate explanation for conceptualizing suffering, positing that "liberty includes the liberty to suffer willingly . . . [a notion that] is not usually encompassed in liberal notions of liberty, nor has it been sufficiently explored in the literature."⁴⁷ While this is certainly the case for most forms of political suffering, the absence of women's voices in the construction of conceptions of motherhood has resulted in motherhood's failure to make the same shift: liberal notions of liberty *expect* mothers to suffer willingly and neglect the possibility that motherhood, like law or war, might be experienced as negative suffering.

⁴⁴ See Halpern, *supra* note 12, at 19. The same can be said of war, one of the other major modern and historical forms of political suffering. While we choose the suffering of war to some degree (insofar as we send soldiers to fight and die for something they believe in), there is an important sense in which it is negative suffering when it is imposed on an unwilling opposition or when our own soldiers are coerced into participating. "When we wage war, we undergo suffering for the sake of values that we have decided are overriding enough to justify the infliction of great suffering, loss and violent death on ourselves and others." *Id.* at 20.

⁴⁵ Irigaray, *supra* note 1, at 33.

⁴⁶ *Id.*

⁴⁷ Halpern, *supra* note 12, at 16.

Because the liberal model presupposes the autonomous individual, it presumes that all suffering will be inflicted contrary to the subject's choice. Just as that model neglects the extent to which women are not necessarily autonomous individuals,⁴⁸ it presumes that they will welcome the suffering imposed by having and rearing children. Classic liberalism has created a juxtaposition between the negatively suffering man and the positively suffering woman.

The negatively suffering maternal body lives constrained by disciplines not of her own construction. She is Foucault's "docile body," constructed to act and produce as the state decides.⁴⁹ The concern is not a failure to grant mothers liberty to choose to suffer, as in the case of most liberal restraints on suffering, but rather a failure to grant mothers the liberty to choose *not* to suffer.

This argument is made in the broadest possible sense. It is obviously applicable to the realm in which we are most accustomed to debating "choice": the ever-raging debate over the right to an abortion. While many American women do have access to choice in this sense, many do not. Their choice of whether to have a child is clearly constrained by legal and economic realities that may manifest themselves in a lifetime of negative suffering. Similarly, these constraints are reflected in debates over the right to birth control, who pays for contraception, and access to gynecological health care. Many women at the center of these debates experience motherhood as negative suffering, which they do not choose, because they lack the resources and power to avoid having sex, to procure and utilize contraception, and to access alternatives to raising their children, such as adoption.

Furthermore, the choice to mother is not simply a biological reality that women face, but is also a deep-seated psycho-social mandate that results from social, familial, and political pressures to become mothers. Even for women who carefully monitor their birth control and have access

⁴⁸ West, *supra* note 11, at 14.

⁴⁹ See Michel Foucault, Discipline and Punish: The Birth of the Prison 135-69 (Alan Sheridan trans., Vintage Books 1995) (1975):

The historical moment of the disciplines was the moment when an art of the human body was born, which was directed not only at the growth of its skills, nor at the intensification of its subjection, but at the formation of a relation that in the mechanism itself makes it more obedient as it becomes more useful, and conversely. What was then being formed was a policy of coercions that act upon the body, a calculated manipulation of its elements, its gestures, its behaviour. . . . A 'political anatomy', which was also a 'mechanics of power', was being born; it defined how one may have a hold over others' bodies, not only so that they may do what one wishes, but so that they may operate as one wishes, with the techniques, the speed and the efficiency that one determines. Thus discipline produces subjected and practised bodies, 'docile' bodies.

Id. at 137-38.

to alternatives to motherhood, becoming a mother is often not experienced as a choice, but rather as a directive. The majority of women played with dolls as children, were chastised when they behaved in a non-nurturing manner, and have been spoken to about their future children with the presumption that these children will someday exist.⁵⁰ The possibilities of never having children at all, having an abortion, or putting a child up for adoption are frowned upon because of a general social disdain for women who separate from their children. As Carol Sanger explains, "[s]eparating from children also threatens the welfare of those for whom the institution of motherhood provides an important sense of identity (many mothers) and an important source of comfort (everyone else)."⁵¹

Of course some women do choose to mother, despite their awareness of the sacrifices it entails: "[t]he point of the category of positive suffering is that people do choose to do painful and unpleasant things, willingly, either because they need or desire the further outcomes or effects of the process, or because they experience the suffering they endure as meaningful, worthwhile or sanctified."⁵² I do not mean to undervalue this choice or the necessity of the work that mothers do. The work of mothering is deeply meaningful to be sure, and many women certainly experience motherhood as positive suffering.

The challenge, however, is to the women who do not have such experiences. The normative claims made about motherhood, that it is the height of a woman's duty and pleasure and that it is the best decision she will ever make, render defunct the ability to choose not to accept motherhood. One mother who gave away her child explained:

I did not like the mother role. As long as I continued in it, I was doing something that aroused in me boredom, anxiety, depression, anger, and at times a fear I would lose my sanity; it aroused in me also a deep fear that I would do violence to my child; at its best it turned me into a highly responsible, joyless, rather rigid person. Out of such things, great relationships are not made. I am not the best person to raise my child. Only a powerful myth can make me think that I am.⁵³

⁵⁰ See generally Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 Colum. L. Rev. 181 (2001). Franke asserts that "[r]eproduction has been so taken for granted that only women who are not parents are regarded as having made a choice—a choice that is constructed as nontraditional, nonconventional, and for some, non-natural." *Id.* at 187.

⁵¹ Sanger, *supra* note 7, at 388.

⁵² Halpern, *supra* note 12, at 18.

⁵³ Shirley Glubka, *Out of the Stream: An Essay on Unconventional Motherhood*, 9 Feminist Stud. 223, 229-30 (1983).

Reflecting on the reality of this woman who did not feel at liberty to choose not to be a mother, Sanger has pointed out that "it was motherhood itself that created . . . [her] troubled state."⁵⁴ This is evidence of motherhood as negative suffering: a state that is not chosen by a woman with agency, but rather is inflicted externally. In addition to facing legal and economic restraints on their choices, women are subjected to a culturally "powerful myth"⁵⁵ that disables the liberty to choose.

V. INFANTICIDAL MOTHERS: EVIDENCE OF NEGATIVE SUFFERING

Infanticide provides the most extreme proof of the fact that not all women willingly choose the suffering motherhood entails. Criminal categories illustrate the boundaries of social norms. Masculinist presumptions within the criminal justice system reflect and perpetuate norms of social behavior and deviance.⁵⁶ That more men than women are imprisoned contributes to the perception that women who commit crimes are "doubly deviant" and "doubly damned."⁵⁷ This phenomenon is particularly true for mothers, as a particular subset of women who are held to higher standards than their childless counterparts. "[T]he social coding of criminal violence by women as *deviant*, rather than simply blameworthy or even reprehensible, goes hand in hand with normative restrictions on appropriate female [behavior],"⁵⁸ one of the most important of which is motherhood.⁵⁹

⁵⁴ Sanger, *supra* note 7, at 432.

⁵⁵ Glubka, *supra* note 53, at 230.

⁵⁶ See, e.g., Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. Pa. L. Rev. 2151 (1995) (describing criminal law's preoccupation with the male perspective and how it affects women).

⁵⁷ Chimene I. Keitner, *Victim or Vamp? Images of Violent Women in the Criminal Justice System*, 11 Colum. J. Gender & L. 38, 39 (2002). This problem is exacerbated by the fact that there is little concern about women offenders in the field of criminology, despite plentiful studies seeking to understand male offenders. See, e.g., Carol Smart, *Law, Crime, and Sexuality* 16-17 (1995). It has been argued that this absence is the result of the fact that women commit fewer crimes than men. Interestingly, however, the two crimes in which female offenders outnumber males are shoplifting and killing their children. Janet Ford, *Susan Smith and Other Homicidal Mothers—In Search of Punishment that Fits the Crime*, 3 Cardozo Women's L.J. 521, 522 (1996).

⁵⁸ Keitner, *supra* note 57, at 40 (emphasis in original).

⁵⁹ For example, consider the nature of a first-year law student's education as it regards motherhood. The only appearance of mothers in the first-year curriculum, aside from their occasional presence in Constitutional Law cases, is within the confines of the criminal law. In fact, first-year criminal law has constructed a category of cases under the title

The extent to which infanticidal women are currently considered criminals and deviants reflects the contemporary liberal construction of motherhood as positive suffering, since women who killed their children were not always considered criminals or social deviants. In some parts of ancient Greece, infanticide was legally condoned as a means of bettering society by choosing only healthy infants.⁶⁰ Plato and Aristotle defended the practice.⁶¹ Despite early condemnation by Jewish scholars and Christian church leaders, it was not until the Middle Ages that infanticide began to be legally considered homicide.⁶² In early modern English courts, twenty-five percent of murder cases were infanticide cases.⁶³ During the Medieval period, most women tried for infanticide were acquitted on the grounds of insanity or poverty.⁶⁴ "Infanticide was seen as a more sensible form of birth control than abortion, which risked the mother's life and killed a child before knowing it was healthy or was a boy or would be desired at the time of birth."⁶⁵ Throughout history, population control and economic hardship have offered explanation and defense for infanticide.⁶⁶

Some countries currently recognize infanticide as its own kind of crime, distinct from homicide. England, for example, statutorily codified the belief that infanticidal mothers are *per se* suffering a medical disorder in

"Omissions" that is virtually entirely concerned with mothers. This subcategory of criminal law is about inaction rather than action, imposing strict liability for the absence of the usually required *actus reus* under the law. "Omissions" is almost entirely composed of mothers who are tried for "failure to protect" their children from abuse, usually by the father or another adult male figure. See, e.g., Sanford H. Kadish & Stephen J. Shulhofer, Criminal Law and its Processes: Cases and Materials, 182-202 (7th ed. 2001). It bears noting that there are no cases either taught in the criminal law curriculum or readily available on LexisNexis which hold a father liable for the failure to protect his child from the mother or another abuser. Similarly, in trials against mothers for infanticide and neonaticide, there are no companion cases against the fathers who failed to protect those children. In this regard, "omission" is a category of crimes that is effectively concentrated solely on motherhood, constructing mothers as a category of criminal deviants.

⁶⁰ Ian F. Brockington, Motherhood and Mental Health 430 (1996).

⁶¹ *Id.*

⁶² See Peter C. Hoffer & N.E.H. Hull, Murdering Mothers: Infanticide in England and New England 1558-1803 xiii (1981).

⁶³ See *id.*

⁶⁴ Brenda Barton, When Murdering Hands Rock the Cradle: An Overview of American Incoherent Treatment of Infanticidal Mothers, 51 SMU L. Rev. 591, 595 (1998).

⁶⁵ Sanger, *supra* note 7, at 392 (citing Hoffer & Hull, *supra* note 62, at 154-56).

⁶⁶ Judith E. Macfarlane, Neonaticide and the "Ethos of Maternity": Traditional Criminal Defenses and the Novel Syndrome, 5 Cardozo Women's L.J. 175, 178 (1998).

the Infanticide Act of 1922.⁶⁷ Amended in the Infanticide Act of 1938, the current law states:

Where a woman by any wilful [sic] act or omission causes the death of her child being a 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 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, then, notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder, she shall be guilty of felony, to wit of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of the child.⁶⁸

Thus in England, to this day, if a woman kills a child less than a year old, the offense of murder is mitigated and the charge lessened to manslaughter. American courts, by contrast, historically have been less compassionate towards women who commit infanticide.⁶⁹ It is peculiar that the United States has not implemented some version of England's Infanticide Act, considering that so much of the American criminal justice system reflects English legal standards.⁷⁰

Unlike courts in other countries such as England, Australia, New Zealand, Hong Kong, and Canada,⁷¹ American courts do not consider infanticide a separate class of crime at all. In the United States, women who kill their children are prosecuted under local homicide statutes, legally

⁶⁷ Infanticide Act, 1922, 12 & 13 Geo. 5, c. 18, 1(1) (Eng.), cited in Shannon Farley, *Neonaticide: When the Bough Breaks and the Cradle Falls*, 52 Buff. L. Rev. 597, 604 n.52 (2004).

⁶⁸ Infanticide Act, 1938, 1 & 2 Geo. 6, c. 36 § 1(1) (Eng.). The first law directly addressing neonaticide was the 1623 Stuart Bastardy Act, which presumed that any unexplained death of an illegitimate child was caused by its mother. This crime was punishable by death, although two possible defenses arose: the "benefit of linen" defense, which derived from the use of purchased linens prior to the baby's birth as proof that she intended for the child to live, and the "want of help" defense in which the mother claimed she was unable to find help while giving birth, resulting in the accidental death of the baby. Farley, *supra* note 67, at 603-04.

⁶⁹ Barton, *supra* note 64, at 597.

⁷⁰ Farley, *supra* note 67, at 609.

⁷¹ See, e.g., Infanticide, R.S.C., ch. C-46, § 233 (1985) (Can.); Crimes Act, 1900 § 22A (Austl.) available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/legis/nsw/consol%5fact/ca190082/s22a.html?query=%5e+infanticide> (last visited May 8, 2005). See also Fazio & Comito, *supra* note 9, at 3137.

treated just as if the victim were an adult.⁷² There is no presumption of mental illness,⁷³ so mental illness must be asserted as a positive defense and proven in order to function as a mitigating circumstance.⁷⁴ Even in some cases where courts find mental illness, courts are still bound to the penal sentence that would be imposed in the case of any other guilty verdict.⁷⁵ In this regard, "American society lacks a conscious awareness of infanticide as a domestic problem."⁷⁶

This lack of awareness reflects not only the criminal law's refusal to address the distinct challenges of female offenders, but a much larger question of society's unwillingness to view motherhood as potentially negative suffering. Having constructed motherhood as a normative positive value rather than permitting the relationship to reflect the very real sense in which it is not always chosen, ought we not expect that some women will act out against the constraints it imposes? As Halpern states:

Suffering inflicted by some people on others serves as the paradigmatic sort of suffering that matters most, morally and politically. In fact, the largest and most crucial sorts of suffering inflicted on some by others deliberately involve the domains of the political *per se*, the domain of the law, in which the state deliberately inflicts suffering on individuals who have been convicted of crimes.⁷⁷

The law's treatment of infanticidal women imposes further negative suffering, then, on women who have already experienced their maternal role

⁷² James J. Dvorak, *Neonaticide: Less Than Murder?*, 19 N. Ill. U. L. Rev., 173, 179 (1998).

⁷³ See Fazio & Comito, *supra* note 9, at 3150. The lack of a mental illness presumption is largely the result of the fact that infanticide is prosecuted under general homicide statutes in which there is a presumption of intent that demonstrates a culpable *mens rea*.

⁷⁴ For a thorough discussion of the ways in which American courts have treated the mental illness defense in infanticide cases, see Fazio & Comito, *supra* note 9, at 3142-46 (explaining the legal tests used to prove insanity, findings of guilty but mentally ill, postpartum psychosis as a defense, and the disparate sentences in which these defenses result, ranging from a "slap on the wrist" to the death penalty).

⁷⁵ See Barton, *supra* note 64, at 600 (discussing the twelve states that have instituted a "guilty but mentally ill" verdict as an alternative to the insanity defense, insuring that "the defendant receives the penal sentence that would be imposed if she were found guilty; however, psychiatric care is usually given after sentencing").

⁷⁶ Michelle Oberman, *Mothers Who Kill: Coming to Terms With Modern American Infanticide*, 34 Am. Crim. L. Rev. 1, 20 (1996).

⁷⁷ Halpern, *supra* note 12, at 24.

as negative suffering, despite its social construction as positive suffering: such women are indeed “doubly damned.”

Infanticide is a broad category, all of the subsets of which are worthy of inquiry in the context of negative suffering. Infanticide is typically separated into three sub-categories: neonaticide, filicide, and abuse-related death.

A. Neonaticide

Neonaticide, the killing of a child within the first twenty-four hours after its birth, is demonstrative of a particular kind of suffering. Neonaticide is distinguished from filicide, the murder of a child older than one day, based on differences of motives and demographic characteristics. For example, neonaticidal mothers are generally younger and less likely to be married than are filicidal mothers.⁷⁸ Further, neonaticidal mothers generally do not have a history of depression, while seventy-one percent of filicidal mothers have pre-existing serious depression.⁷⁹

Many feminist criminologists and scholars have recently begun to advocate the adoption of specialized statutes for what is now recognized as Neonaticide Syndrome, a psychological disorder that prompts women to kill their children immediately after or shortly following birth.⁸⁰ Other feminists have focused on the need to stop prosecuting neonaticidal minors in the adult court system, under adult homicide laws.⁸¹ All of these well-intentioned efforts illustrate the need to explain away a woman's ability to commit this crime. Indeed, “[i]t is common to dismiss the act as something so bizarre and extraordinary that only a mad woman could do it.”⁸²

The medicalization of neonaticide reflects a general societal desire to view women who commit these crimes as being sick, not deviant. Professor Phillip Resnick coined the term Neonaticide Syndrome in 1970 to refer to the common circumstances and experiences amongst women who kill their babies immediately after birth.⁸³ Although no American court has

⁷⁸ Farley, *supra* note 67, at 599.

⁷⁹ *Id.*

⁸⁰ See, e.g., *id.* at 597 (arguing that Neonaticide Syndrome should be legally recognized by the courts and that subjecting offenders to murder sentences fails to provide them with effective treatment and, although they are already unlikely to offend again, they may develop other criminal tendencies during prison terms); Barton, *supra* note 64, at 604; Macfarlane, *supra* note 66, at 222.

⁸¹ See, e.g., Fazio & Comito, *supra* note 9, at 3162.

⁸² Ford, *supra* note 57, at 534.

⁸³ Phillip J. Resnick, Murder of the Newborn: A Psychiatric Review of Neonaticide, 126 Am. J. Psychiatry 1414, 1414 (1970).

yet admitted expert testimony on Neonaticide Syndrome, an American court referred to a woman's behavior as constituting Neonaticide Syndrome for the first time in 1996.⁸⁴ Although much public attention has been paid to incidences of neonaticide committed by white middle- and upper-middle-class women,⁸⁵ it actually occurs across race, ethnicity, and class lines.⁸⁶ Generally, neonaticidal women are young, often teenagers, who almost always denied their pregnancies throughout the nine months.⁸⁷ They tend to hide their pregnancies from friends and family and convince themselves they are not pregnant to the point of repressing many physical signs of the pregnancy.⁸⁸

Neonaticidal women are often conscious of their pregnancies, but repress their awareness of their conditions because they do not know how to proceed or they feel they do not have choices.⁸⁹ It is well-documented that neonaticidal women tend to gain minimal weight during their pregnancies and sometimes actually continue to menstruate.⁹⁰ Such women often lack the financial as well as the psychological resources to take action to address their pregnancies.⁹¹ These women frequently come from religious or social communities that condemn both premarital sex and abortion, contributing to their feelings of shame and the sense that there is no way out.⁹² Many neonaticidal women report unpleasant feelings about sexuality dating back to their childhoods.⁹³ Despite media claims that such women "concealed" their pregnancies, a more accurate explanation is to say that these women denied their pregnancies, both to the people around them and to themselves.⁹⁴ It is unsurprising that regions in which there is limited access

⁸⁴ *People v. Wernick*, 674 N.E.2d 322 (N.Y. 1996).

⁸⁵ Recall the recent case of Amy Grossberg, a woman from an affluent Delaware family, who gave birth in a motel room with her boyfriend present, shook the baby to death, and left him in a dumpster. See, e.g., Barton, *supra* note 64, at 610 (discussing the Grossberg case).

⁸⁶ Macfarlane, *supra* note 66, at 176.

⁸⁷ Meyer & Oberman, *supra* note 13, at 43.

⁸⁸ *Id.* at 53.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 54.

⁹³ *Id.* at 57.

⁹⁴ Consider the case of Julie Quinn who, at thirty years old, denied her pregnancy and was surprised when she suddenly gave birth to a baby alone in her bathtub, leading her to put the baby under a pile of blankets in a closet. Four days later she told her boyfriend that

to abortions have higher rates of neonaticide than regions in which abortions are comparatively easy to obtain.⁹⁵

In this regard, neonaticide is not a premeditated act or a crime of anger, but rather a reaction to a moment of panic.⁹⁶ Suddenly faced with the reality of a baby whose existence the mother has denied for nine months, she feels what many women describe as a dissociative or out-of-body experience.⁹⁷ In fact, many women who commit neonaticide report no memory of the birth at all.⁹⁸ In general, the babies are killed through relatively non-violent means—most by strangulation or suffocation.⁹⁹ Rachel Anglum “hugged her newborn to death,”¹⁰⁰ Marianne Biancuzzo gave birth over the toilet and left her baby there, causing it to drown,¹⁰¹ and Melissa Drexler, the so-called “Prom Mom,” strangled her baby.¹⁰²

These women are clearly suffering from the constraints surrounding ideas about motherhood. The positive depiction of motherhood in mass culture renders these women incapable of acting to address the impending birth of their babies. They are fearful and ashamed—not only because they are pregnant, but because they are pregnant with a child they do not want. Not wanting the child is perhaps the greatest transgression.¹⁰³ Women are inculcated with the notion that becoming pregnant is always a gift, and to experience it otherwise is to be a failure. Their pregnancies are a form of negative suffering because their bodies bear a burden they did not choose. Because they do not see motherhood as a choice, their acts against their children are ultimately acts against themselves, annihilating the thing that would make them a mother.¹⁰⁴ Most of these women experience deep

she had been pregnant and had put the baby in the closet. She was convicted of first-degree reckless homicide and sentenced to twenty-five years in prison. *Id.* at 51.

⁹⁵ *Id.* at 61.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 50.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 39.

¹⁰² *Id.* at 20.

¹⁰³ See generally Franke, *supra* note 50.

¹⁰⁴ See Oberman, *supra* note 76, at 78-79:

In a rather literal sense, the fetus poses an overwhelming threat to the woman's identity. Once the fetus is born, she no longer will be simply a woman, she will be a mother. If she

remorse when they are caught and are shocked when their actions are articulated.¹⁰⁵ This is motherhood as negative suffering in its deepest sense.

The recognition of Neonaticide Syndrome reflects a serious interest in and concern about women who commit these crimes. The fact that their mental states are markedly different from those of most other murderers has led feminists to seek lesser sentences when such women are prosecuted for murder. By pathologizing the crime, however, the call to recognize neonaticide as a different crime than murder reflects deep-seated cultural norms about motherhood. The presumption implicit in recent neonaticide literature as well as in England's infanticide statute is that only a crazy woman would kill her child—a normal mother loves her child; a deviant mother kills her child. This illustrates one of the ways in which the legal community continues to construct motherhood as a form of positive suffering. Neonaticide Syndrome is not a long-lasting psychological disorder, but a coping mechanism that arises in response to adverse circumstances. Mothers who commit neonaticide, despite some degree of culpability, are products of an idea about mothering that eliminates their agency.

The treatment of neonaticide as a syndrome, whether or not it is an accurate portrayal of the mothers' mental states, demonstrates society's deep desire to pathologize women who act outside the bounds of traditional mothering norms. The law lacks a coherent mechanism for handling these cases, further illustrating society's tendency to ignore the phenomenon. Simply recognizing neonaticide as a category distinct from other homicides would suffice in accommodating the unique commonalities among neonaticidal women without pathologizing the crime as a means of explaining it away. Unfortunately, neonaticidal women's crimes are currently shoehorned into whatever local homicide statute seems appropriate. This results in vastly disparate sentences, ranging from first- or second-degree murder, to varying degrees of involuntary manslaughter, to negligent homicide.¹⁰⁶

B. Filicide

Crimes of filicide, the killing of a child older than one day, have implications comparable to neonaticide. However, filicides are generally

rids herself of the fetus or baby, she still will be a woman, and she will have kept her identity intact.

¹⁰⁵ Meyer & Oberman, *supra* note 13, at 55.

¹⁰⁶ Macfarlane, *supra* note 66, at 194.

more violent deaths than are neonaticides,¹⁰⁷ and the older a victim of infanticide is, the more violent the means of death tends to be.¹⁰⁸

The circumstances of filicidal crimes vary immensely, as do the law's responses. One of the primary distinctions among filicidal acts, for example, turns on the mother's intent. One category of filicidal mothers consists of women who did not purposely kill their children. Recent psychological work has validated the existence of postpartum depression, which can range in degree from mild "baby blues" to severe postpartum psychosis.¹⁰⁹ 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.¹¹⁰ Postpartum depression has occasionally succeeded as an affirmative defense against filicide, but it remains uncommon.¹¹¹ Women who fall into this category tend to be viewed as "good mothers" who simply did something awful in a momentary craze. The irony is that although they are sometimes relatively sympathetic cases, the law prosecutes such mothers as it does any other homicide. Much like in the case of neonaticide, filicidal mothers are presumed to have experienced motherhood as positive suffering and behaved deviantly, instead of recognizing them as women who may have experienced motherhood as unchosen, negative suffering.

A second category of filicidal mothers consists of women who purposefully killed their children.¹¹² Treating this as a separate category is

¹⁰⁷ *Id.*

¹⁰⁸ Meyer & Oberman, *supra* note 13, at 45.

¹⁰⁹ Barton, *supra* note 64, at 602.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 604-05.

¹¹² For an interesting fictional mystery, consider the scholarship surrounding Shakespeare's *Lady Macbeth*. Some scholars believe that Lady Macbeth's deeply disturbed nature is the result of having once killed her child, citing her lines:

I have given suck and know
How tender 'tis to love the babe that milks me—
I would, while it was smiling in my face,
Have pluck'd my nipple from his boneless gums
And dash'd the brains out had I so sworn as you
Have done to this.

William Shakespeare, *Macbeth* act 1, sc.7, *quoted in* Scott McAteer, *Lady MacBeth and the Loss of a Child* 8, at http://www.ld.swin.edu.au/journal/s_mcateer_submission.pdf (last visited April 7, 2005). The historical Lady Macbeth did at some point have a child, although not with Macbeth. Scholars contend that Shakespeare's Lady Macbeth reacts to her guilt at having killed her child by seeking to become the mother of Scotland. See Karin Thomson, *Psychoanalytical Criticism of Macbeth*, Shakespeare Institute, available at

somewhat artificial because it is impossible to argue that any filicidal mother did not *intend* to kill her child unless the death were accidental; rather, for these women, extraneous psychological circumstances such as Neonaticide Syndrome or postpartum depression mitigate their culpability.

A third category of filicidal mothers consists of the many women who do not fall into either of the other two psychological groups. These are women who evidence severe psychological suffering, yet are treated the same as all other murderers in the eyes of the public and the law.¹¹³ These women generally do not have a history of abusing their children, but nonetheless become convinced that their children must be killed. This is the appropriate category for many filicides that are related to religious conviction, where mothers may believe they must kill their children to protect them from damnation or to exorcise demons from their bodies.¹¹⁴ Filicidal women of this ilk tend to articulate their crimes as having been in the best interest of their children, however irrational their beliefs.¹¹⁵ These mothers, unable to maintain the pristine picture of motherhood, collapse under various pressures (psychological and otherwise) and make what they often believe to be the ultimate mothering decision: to kill their children to prevent or terminate the child's suffering. These beliefs, often imagined rather than real, do not vindicate their acts, which are clearly in discord with certain social standards. It does, however, suggest one way in which they are unlike other murderers: it underscores the extent of negative suffering these women experience and, by extension, the failure of the criminal law to properly account for the construction of motherhood.

<http://shakespeare-online.com/essays/macbethessays.html> (last visited Dec. 17, 2004). Might Lady Macbeth too have been negatively suffering the constraints put upon her by the construction of motherhood? I thank Stephen Lang for calling this debate to my attention.

¹¹³ Recall the infamous case of Susan Smith, who strapped her three-year-old and thirteen-month-old sons into their car seats and rolled the car into a lake in 1994. Smith attempted to plead guilty in exchange for a life sentence on multiple occasions, but was forced by the prosecutor to go to trial. Smith never argued that she had not purposely intended to kill her children, or that she was mentally ill at the time of the crime, despite a history of childhood sexual abuse, suicide attempts, and depression. The jury found her guilty in two and a half hours, but chose life imprisonment instead of the death penalty. See Ford, *supra* note 57, at 521.

¹¹⁴ Teresa Lynn Cheek told her husband one morning that she was going to "get the devil out of" their son. After he left for work she stabbed the son in the heart and set fire to his body to drive out the demons. See Meyer & Oberman, *supra* note 13, at 85.

¹¹⁵ See, e.g., *id.* (where Cheek's motivation was to save her son from "eternal damnation").

C. Abuse-related Death

The final category of infanticide encompasses cases of abuse-related deaths: a child experiences a lifetime of physical abuse that ultimately culminates in his or her death, as was the case for Lazaro Cardona.¹¹⁶ This area has received relatively little notice, and only extreme cases generate media attention. Paradoxically, women who commit infanticide through abuse often exhibit less intentionality than their filicidal counterparts. Such women often do not intend to kill their children at all, but rather “only” intend to perpetually injure them. By contrast, filicidal mothers intend to kill their children but typically have not previously injured them.¹¹⁷ Abusive mothers are, ironically, usually convicted of involuntary manslaughter or a comparable offense, not the far more serious offenses of murder or voluntary manslaughter that neonaticidal and filicidal mothers face.¹¹⁸ Abusive mothers are much more likely than other infanticidal women to be substance abusers¹¹⁹ and to be victims of financial or housing hardships.¹²⁰

Ana Cardona is an archetypal example of this category of maternal suffering.¹²¹ Similar to many women who abuse their children, Cardona

¹¹⁶ For the purposes of this Article, I have excluded the category of death by maternal neglect. The line between neglect and abuse is often difficult to determine, and neglectful mothers generally demonstrate extreme evidence of disturbance. Death by neglect, however, is no less an illustration of motherhood as negative suffering, as it is often comparable to the outright denial of motherhood that occurs in women who experience Neonaticide Syndrome. Women who neglect their children to a fatal point are so unwilling to accept their roles as mothers that they simply disregard the existence of their child.

¹¹⁷ See Meyer & Oberman, *supra* note 13, at 129.

¹¹⁸ See *id.*

¹¹⁹ Awilda Lopez, who had a history of cocaine abuse, pled guilty to the abuse-related death of her daughter (who had been born addicted to crack) after years of inflicting serious abuse, including: breaking her daughter's fingers, sodomizing her with a hairbrush, forcing her to drink ammonia and eat her feces, confining her to a dark room for long periods of time, and fracturing her shoulder. The child died after she was pushed against a wall and hit her head, and she was left unresponsive in a bed for two days. *Id.* at 123-26.

¹²⁰ See, e.g., Cardona v. State, 641 So. 2d 361, 363 (Fla. 1994), *cert. denied*, 513 U.S. 1160 (1995) (where the trial court found that “Cardona was under the influence of extreme mental or emotional disturbance due to her ‘fall from riches to rags’”).

¹²¹ A distinguishing factor, however, between Cardona and the majority of other infanticidal mothers is her lesbianism. Some scholars have attributed her death sentence to juries' lack of sympathy for lesbian defendants in general, arguing that it is easier for juries to justify killing a masculine woman than a “normal” woman. See, e.g., Richard Goldstein, Queer on Death Row: In Murder Cases, Being Gay Can Seal a Defendant's Fate, *The Village Voice*, March 13, 2001, available at <http://www.villagevoice.com/news/0111,goldstein,23066,1.html>.

experienced a lifetime of abuse and mental instability.¹²² She was heavily addicted to cocaine and struggled with addiction throughout her life.¹²³ Cardona, like nearly sixty percent of incarcerated women in the United States, was abused as a child.¹²⁴ Despite these arguably mitigating circumstances, “it became clear that Ana Cardona was going to be held up to our community as a monster—that the ultimate goal of this prosecution was to put a mother in the electric chair.”¹²⁵ Cardona was viewed as the ultimate deviant mother and eventually sentenced to death by the jury’s vote of eight to four. She was, indeed, seen as a monster and will be subjected to the punishment that society reserves for ridding itself of individuals who do not conform to its most stringent norms. Although infanticide is not itself a statutorily criminal act, Cardona’s status as a deviant mother conveniently forced her into the homicide statute that called for the death penalty.

Without expressing excessive sympathy for abusive mothers, it is nonetheless necessary to consider the context of the abuse. Some argue that a mother’s violence against her child is more closely related to the social controls to which women are subjected than it is to violent anger against the child.¹²⁶ In this sense, the “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.”¹²⁷ Similarly, abusive mothers

¹²² Victor L. Streib, Death Penalty for Lesbians, 1 Nat’l J. Sexual Orientation L. 104, 113 (1995).

¹²³ *Id.*

¹²⁴ Nora V. Demleitner et al., Sentencing Law and Policy: Cases, Statutes, and Guidelines 488 (2004) (stating that almost sixty percent of female state prisoners have a history of physical or sexual abuse or both. Additionally, studies of female delinquents report that nearly half have been sexually abused as children). See also Dorothy Otnow Lewis et al., A Follow-Up of Female Delinquents: Maternal Contributions to the Perpetuation of Deviance, 30 J. Am. Acad. Child & Adolescent Psychiatry 197 (1991). Further, the proportion of women prisoners who have suffered sexual abuse as children is between two and three times higher than that of the general public. Jane A. Siegel & Linda M. Williams, The Relationship Between Child Sexual Abuse and Female Delinquency and Crime: A Prospective Study, 40 J. Res. on Crime & Delinq. 71, 71 (2003), available at http://www.pineforge.com/isw4/overviews/pdfs/Siegel_Williams.pdf. See also U.S. Dept. of Justice, Prison and Jail Inmates Report High Rates of Physical and Sexual Abuse Before Their Confinement, Apr. 11, 1999, available at <http://www.ojp.usdoj.gov/bjs/pub/press/parip.pr>.

¹²⁵ Keitner, *supra* note 57, at 47.

¹²⁶ Ford, *supra* note 57, at 534.

¹²⁷ Dorothy E. Roberts, Motherhood and Crime, 79 Iowa L. Rev. 95, 126 (1993).

suffer from the constructed notion that they must have children and raise them themselves, regardless of how constrained they feel or how obviously unsuited they are for maintaining the health and well-being of their children.

VI. IMPLICATIONS: RECONCEIVING THE MOTHER

The tremendous import of legal theory is its capacity to alter both how law is made and how law is thought about; both considerations are relevant in the context of motherhood. From a pragmatic perspective, it is necessary to broaden the legal restrictions that dictate when a woman has the choice to opt out of motherhood. This includes education at a very basic level: encouraging women and girls to feel enfranchised to resist sex, teaching women and men about the necessity of birth control, and providing support systems for women who face pregnancies for which they are unprepared. Politically speaking, it also requires an expansion of health care regimes to include birth control and public access to low-cost contraception. In addition to preventing an initial pregnancy, women who feel themselves unable to raise their children must be provided with alternatives, such as easy access to adoption without stigma and affordable, safe, legal abortions.

While these practical suggestions may seem difficult to implement, the far greater challenge is to alter the ways in which we perceive motherhood generally. This demands public discourse recognizing: (1) the suffering entailed by care-giving work; (2) shared caring by family and community members to counter the presumption that having a child is solely the responsibility of its mother; and (3) in particular, the de-stigmatization of a woman's choice to not be a mother. This requires an acceptance of women who choose to never have children and women who have children and feel the need to separate from them.

With regard to infanticide law, the United States must recognize what many other common law nations have recognized: cases of infanticide have particular commonalities that distinguish them from other kinds of homicide.¹²⁸ The creation of infanticide statutes that dictate particular sentences for infanticidal offenders would recognize the nature of these differences as well as the suffering experienced by these mothers. Such statutes could standardize the treatment of these women, subject to judicial discretion, and potentially ensure that they are differentiated from the murderers and homicidal maniacs with whom they are currently associated. Although it may be problematic to construct statutes with a presumption of

¹²⁸ See *supra* notes 67-76 and accompanying text (describing how countries such as England, Australia, New Zealand, Hong Kong, and Canada recognize infanticide as a different crime than homicide).

mental illness, as the English statute does,¹²⁹ it is possible to include language recommending psychological treatment for infanticidal offenders without pathologizing the cause of their crimes. Statutes explicitly dedicated to the prosecution of infanticidal offenders would at once punish a woman for her crime and recognize its distinctive nature. This mere recognition of a mother's negative suffering would contribute to the reconceptualization of motherhood.

VII. CONCLUSION

History and contemporary culture have contributed to constructing a particularized notion of motherhood: one associated with pink nurseries, expensive strollers, and enduring, self-sacrificing love. For many mothers—those who choose motherhood—this is an accurate depiction of their identities as mothers. For others, however, the pervasiveness of this image and its manifestation in the law denies them the choice of whether or not to become a mother, functionally forcing them to produce children they did not choose to have. This Article argues for a reconceptualization of that image that takes into account the absence of choice experienced by many women who do not in fact want children. A theory of motherhood as positive and negative suffering has the potential to enhance the way that society thinks not only about mothers, but about all women.

Considering the novel notion that suffering is experienced in two distinct ways and to varying degrees, we can begin to re-imagine motherhood not as an imperative, but rather as a choice. Choice is at the heart of this theory, seeking to locate itself within the maternal and non-maternal female body, enfranchising women whose voices have been absent from both the historical record and the law. Granted choice, not all women would opt for motherhood and perhaps many fewer would react against it in panic or in anger. Let us recognize that motherhood can be negative suffering and that “[s]uffering needs to be placed at the center of our political deliberations.”¹³⁰ Centering suffering into the concerns about how we make the law and, most importantly, how the law makes us, we will be able to grant agency to women in choosing or not choosing motherhood, creating space for the concept of the mother to be reborn.

¹²⁹ Infanticide Act, 1938, 1 & 2 Geo. 6, c. 36 § 1(1) (Eng.) (codifying the belief that infanticidal mothers are *per se* suffering from a medical disorder).

¹³⁰ Halpern, *supra* note 12, at 21.