

DAMNED IF SHE DOES, DAMNED IF SHE DOESN'T: DE-LEGITIMIZATION OF WOMEN'S AGENCY IN *COMMONWEALTH V. WOODWARD*

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"Mothers are *never* innocent."¹

When Deborah Eappen left for work on the morning of February 4, 1997, her eight-month-old child, Matthew, was alive and in the care of his au pair of three months, British nineteen-year-old Louise Woodward.² When she next saw Matthew, he was in the hospital,³ the victim of severe head trauma.⁴ Five days later he was dead.⁵

The death of a child is always a disturbing event and a manifest injustice. Even where an objective analysis would fail to find fault, the tragic nature of the occurrence will lead to a search for blame.⁶ This

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¹ Marie Ashe, *Postmodernism, Legal Ethics, and Representation of "Bad Mothers,"* in *MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD* 142, 156 (Martha Albertson Fineman & Isabel Karpin eds., 1995) (citing Nancy Chodorow & Susan Contratto, *The Fantasy of the Perfect Mother*, in *RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS* 79, 89-92 (Marilyn Yalom & Bernie Thorne eds., 1988)) (emphasis added).

² *Commonwealth v. Woodward*, 694 N.E.2d 1277, 1281 (Mass. 1998).

³ See CourtTVNews, *The Nanny Murder Trial*, Highlights from Week 2, <http://www.courttv.com/trials/woodward/week2.html> (last visited Oct. 2, 2008) (citing testimony of Deborah Eappen on direct examination).

⁴ *Woodward*, 694 N.E.2d at 1281.

⁵ *Id.*

⁶ For example, when a child is diagnosed with a fatal genetic illness, such as Tay-Sachs or Canavan disease, many parents initially experience a period of self-blame or blame of the spouse. Other parents have instituted wrongful birth suits, in effect blaming their

phenomenon is intensified in the courtroom, as the adversarial process demands the placement of blame.⁷ Yet how blame is dispersed is often informed by far more than the evidence put before the jury. Although the parties before the court may not so acknowledge, deep-seated social understandings can also play a role in the distribution of blame.⁸ The trial that ensued from the death of Matthew Eappen was no exception.

This Article will evaluate many of the social and legal factors that influence the distribution of blame when a child dies. It proceeds on the assumption that the standards of criminal law are intended in part to align legal culpability with causation—that is, the defendant's proximal responsibility for the occurrence of the act.⁹ Specifically, this Article explores the disparate social criticism and legal treatment of infanticidal mothers as compared with other caretakers who kill, and concludes that, in affording non-mothers “excuses” that are not permitted for mothers, both society and courts have disregarded traditional standards required for murder and manslaughter convictions, such as proof of intent and knowledge per that of the reasonable person.¹⁰ As a result, when faced with a female defendant charged with killing a child in her care, both the public and the legal system fail to give proper regard to the defendant's choices, and thus fail to accord her the appropriate level of blame. Furthermore, the objectification of the female defendant, particularly when she is a mother, as a symbol for a large subset of women may deny her the ability to explain her own story in the courtroom. I have referred to these effects—the tendency to ignore the actual responsibility of a particular defendant in light of a pervasive cultural counternarrative and the application of different standards of culpability to different groups of women—as the “de-legitimization of women's agency.”

physician for the failure to test in utero for the condition. See Michael Winerip, *Fighting for Jacob*, N.Y. TIMES, Dec. 6, 1998, at 6.

⁷ ROBERT A. FERGUSON, *THE TRIAL IN AMERICAN LIFE* xii (2007) (“Blame is the natural coin of the legal process as it proceeds . . .”).

⁸ *Id.* at xi-xiii.

⁹ See Paul K. Ryu, *Causation in Criminal Law*, 106 U. PA. L. REV. 773, 804 (1958) (discussing the concept of causation in Anglo-American jurisprudence and arguing that prevailing theories “fail[] to recognize the purposive element which plays a decisive role in evaluating the causal relationship between a criminal act and its result”).

¹⁰ See *infra* Part III.

Louise Woodward was indicted for Matthew's death.¹¹ She was found guilty of second degree murder by a jury of nine women and three men and was sentenced, under Massachusetts law, to the mandatory term of life imprisonment.¹² The defense moved for post-judgment relief, and on November 10, 1997, the trial judge vacated the sentence and reduced the jury's verdict from second degree murder to involuntary manslaughter.¹³ He sentenced Woodward to 279 days in prison, which she had served in full during the trial and post-conviction process.¹⁴ Less than nine months after Matthew's death, Louise Woodward was a free woman.¹⁵

While Woodward fought her battle in the courtroom, Deborah Eappen "face[d] the court of public opinion."¹⁶ In the wake of the death of her son, Eappen received hate mail and threatening telephone calls.¹⁷ She was also excoriated in the press,¹⁸ on the radio,¹⁹ and on the Internet.²⁰

¹¹ Commonwealth v. Woodward, 694 N.E.2d 1277, 1281 (Mass. 1998). Woodward was indicted on March 5, 1997 by a grand jury in Middlesex County and held without bail pending trial. *Id.*

¹² *Id.*

¹³ Commonwealth v. Woodward, 7 Mass. L. Rptr. 449, 1997 WL 694119, at *8 (Super. Ct. 1997), *aff'd*, 694 N.E.2d 1277 (Mass. 1998).

¹⁴ Woodward, 694 N.E.2d at 1281.

¹⁵ *Id.*

¹⁶ Elizabeth Mehren, *From British Au Pair to Global Media Darling, Trials: Reporters Focus on Louise Woodward, While Matthew Eappen's Parents Face the Court of Public Opinion*, L.A. TIMES, Nov. 18, 1997, at E3.

¹⁷ Corky Siemaszko, *Many Put Blame on Working Mom*, N.Y. DAILY NEWS, Oct. 31, 1997, at 4.

¹⁸ See, e.g., *id.* See also Erica Jong, Editorial, *Monster Moms*, BOSTON GLOBE, Dec. 11, 1997, at A27 (noting the N.Y. Daily News headline "Mommy Guiltiest?"); Barbara Yost, Commentary, *Working Moms Wear Scarlet Letter*, SO. FLA. SUN-SENTINEL, Nov. 10, 1997, at 25A. Eappen was also judged in the international news media. See, e.g., Peter Canellos, *The Woodward Case: Legacies of a Public Trial*, GLOBE & MAIL (Toronto), June 20, 1998, at D9; *Whose Hand Rocks the Cradle?*, IRISH TIMES, Nov. 1, 1997, at 60 [hereinafter *Whose Hand*].

¹⁹ See Siemaszko, *supra* note 17.

²⁰ Ed Hayward, *Backers of Nanny, Eappens Wage War on Web*, BOSTON HERALD, Mar. 9, 1998, at 1.

Deborah Eappen and her husband, Sunil, had hired Woodward in order for Eappen to continue her ophthalmology practice part-time; she worked three days a week and returned home in the afternoons to nurse Matthew.²¹ Although Woodward's defense rested on a stalwart claim of innocence,²² and many of her defenders suggested that Eappen, not Woodward, was guilty of abusing Matthew,²³ the primary criticism of Eappen revolved around her choice to go back to work.²⁴ By leaving her child with a nanny in order to resume her career, Eappen became "a public symbol of maternal neglect and yuppie greed,"²⁵ who at least indirectly caused the tragedy by leaving him in incapable hands²⁶ and at worst "deserved to have her baby die[.]"²⁷ One man carried a banner outside the courthouse before Woodward's testimony which read, "Don't Blame the Nanny[;] Blame the Mother."²⁸ Indeed, "[i]t was as if Eappen had shaken Matthew to death, not the nanny."²⁹

²¹ See Jong, *supra* note 18.

²² See CourtTVNews, *The Nanny Murder Trial, Highlights from Week 3*, <http://www.courtstv.com/trials/woodward/week3.html> (last visited Oct. 2, 2008) (testimony of Louise Woodward) [hereinafter *Trial*, Week 3].

²³ See Diane Purkiss, *The Children of Medea: Euripedes, Louise Woodward, and Deborah Eappen*, 11 *CARDOZO STUD. L. & LITERATURE* 53 (1999) (analyzing ancient myths that may have contributed to the argument that "a mother like [Eappen] was likely to have killed her own child"); see also Mehren, *supra* note 16.

²⁴ See, e.g., Christopher B. Daly, *Murder Trial Fuels Working Parents' Fears*, *WASH. POST*, Oct. 11, 1997, at A1; Jong, *supra* note 18; Siemaszko, *supra* note 17; Yost, *supra* note 18.

²⁵ Daly, *supra* note 24.

²⁶ *Id.*

²⁷ Jong, *supra* note 18.

²⁸ Siemaszko, *supra* note 17.

²⁹ *Id.*; see also Linda Kelly, *The Fantastic Adventures of Supermom and the Alien: Educating Immigration Policy on the Facts of Life*, 31 *CONN. L. REV.* 1045, 1048 (1999) ("In the public's verdict, working mother Deborah Eappen, not Louise Woodward, was responsible for Matthew's death.").

The anti-feminist backlash³⁰ in popular culture surrounding the issue of blame for the death of Matthew Eappen was exacerbated by the legal maneuverings at trial. As Woodward claimed that someone else was responsible for the head injuries that led to Matthew's death,³¹ the attention drawn to the parents was neither unusual nor unexpected.³² Woodward's focus on Eappen's style of mothering, as she related to the press,³³ could, at least in part, explain the public focus on Deborah, rather than Sunil Eappen.

The media circus, however, may have only been indicative of the socio-cultural understandings that informed the legal outcomes. The findings that Judge Zobel used to support his memorandum and order reducing the verdict and vacating the sentence³⁴ demonstrate the failure of the legal system to account for Woodward's agency in the choices that she made. Furthermore, as his decision reopened the issue of blame, he allowed common social constructions of motherhood to implicitly negate Deborah Eappen's choices as a mother. By evaluating how infanticidal mothers are generally treated by the legal system side by side with the law's treatment of Woodward and society's treatment of Eappen, this Article demonstrates that, while Woodward was held to an easier standard than most infanticidal

³⁰ Maureen Downey, Editorial, *Saturday Talk: Talking Issues Q & A on Working Women with Ali P. Crown: The Latest Wrinkle in the Mommy Wars*, ATLANTA J. & CONST., Nov. 1, 1997, at 12A ("This is an explicitly anti-feminist movement that says feminists broke down the goodness of traditional families." (quoting Ali P. Crown, director of the Emory Women's Center)). *But see* Julian F. Wagner, Editorial, *Saturday Talk Online*, ATLANTA J. & CONST., Nov. 8, 1997, at 12A (rejecting that characterization and instead suggesting that "working women are angry that [Deborah Eappen] may not have taken the same precautions and care in choosing her offspring's child care that they did").

³¹ *See* Bill Hutchinson, *The Louise Woodward Verdict: Nanny Sentenced to Life in Prison*, BOSTON HERALD, Nov. 1, 1997, at 2 (quoting Woodward at sentencing: "I don't know what happened to [Matty]. I'm not responsible for his death."); *see also infra* notes 113-16 and accompanying text.

³² Parents are responsible for sixty-one percent of killings of children under age five in the United States, with that number almost equally divided between mothers and fathers. Elizabeth Rapoport, *Mad Women and Desperate Girls: Infanticide and Child Murder in Law and Myth*, 33 FORDHAM URB. L.J. 527, 536 (2006).

³³ *See infra* notes 114-22 and accompanying text; *see also* Maria Alvarez, *Killer Nanny Says Baby's Parents Miserly*, N.Y. POST, June 21, 1998, at 12. "Miserly" and "motherly" are usually seen as mutually exclusive; women who spend money on their children are often perceived as better mothers. *See* SHERYL J. GRANA, WOMEN & (IN)JUSTICE 72 (2002).

³⁴ *Commonwealth v. Woodward*, 7 Mass. L. Rptr. 449, 1997 WL 694119 (Super. Ct. 1997), *aff'd*, 694 N.E.2d 1277 (Mass. 1998).

mothers, Eappen—who was not accused of infanticide—was held to the toughest of standards.

Part I of this Article examines Massachusetts law in *Commonwealth v. Woodward* and analyzes the provisions that permitted the trial and sentencing to play out as they did. Part II then explores Deborah Eappen's role as the scapegoat in light of the evidence and press coverage with regard to cultural understandings of motherhood. This part asks whether the birth of a child renders female equality a dead letter in social, and ultimately legal, terms. Part III considers how Judge Zobel's interpretation of Woodward's culpability undermines women's decision-making by comparing the defense and outcome in *Woodward* to the same in cases involving maternal infanticide and neonaticide. Finally, Part IV suggests implications for these analyses on other areas of law and embraces the use of individual narrative, as in a feminist storytelling, as a step toward future socio-legal change.

I. JUDICIAL DISCRETION AND NOTIONS OF MALICE

Legally speaking, the outcome in *Woodward* was made possible by the interplay of three factors.³⁵ The first was Judge Zobel's decision to deny the prosecution's request to allow the jury to consider the lesser-included offense of involuntary manslaughter.³⁶ The second factor was Massachusetts' definition of murder, particularly its inclusion of "third prong malice."³⁷ The third was Massachusetts Rule of Criminal Procedure 25(b)(2),³⁸ which permits the trial court wide latitude to set aside the jury's verdict in favor of a new trial or to impose a different judgment on any offense charged in the indictment or complaint.³⁹

³⁵ Public pressures may have also factored into the trial judge's decision, but this claim is difficult to substantiate. Innate understandings of gender and motherhood, however, may have affected the judge's ruling. See *infra* Part II.

³⁶ This was held to be error on appeal. See *Commonwealth v. Woodward*, 694 N.E.2d 1277, 1281 (Mass. 1998).

³⁷ See Christopher S. Skinner, *Jury Instructions and the Law of Homicide*, in TRYING MURDER AND OTHER HOMICIDE CASES IN MASS. app. A (2004).

³⁸ MASS. R. CRIM. P. 25(b)(2).

³⁹ See *Woodward*, 694 N.E.2d at 1284.

A. The “All-or-Nothing Doctrine”:⁴⁰ Harmless Error

Woodward was indicted for murder on March 5, 1997 in Middlesex County.⁴¹ According to the Doctrine of Lesser-Included Offenses, in a subsequent trial, the jury could be instructed on this charge as well as on any lesser-included offense.⁴² Although various tests have been offered to determine whether a lesser offense qualifies as one included in the higher charge,⁴³ in *Woodward* it was clear that involuntary manslaughter was included in the charge of murder, as the prosecution’s theory of murder was based on implied malice, rather than specific intent.⁴⁴ Since a jury could find that Woodward lacked the requisite malice for murder but nonetheless killed Matthew, involuntary manslaughter was properly a lesser-included offense.⁴⁵

The All-or-Nothing Doctrine, permitted only in some jurisdictions,⁴⁶ “is the sanctioned failure to instruct on non-charged but lesser-included offenses.”⁴⁷ Where this doctrine is invoked, the parties prefer the “high stakes game of chance”⁴⁸ of conviction on the higher

⁴⁰ Catherine L. Carpenter, *The All-or-Nothing Doctrine in Criminal Cases: Independent Trial Strategy or Gamesmanship Gone Awry?*, 26 AM. J. CRIM. L. 257, 257 (1999); see also Patrick D. Pflaum, *Justice is Not All or Nothing: Preserving the Integrity of Criminal Trials Through the Statutory Abolition of the All-or-Nothing Doctrine*, 73 U. COLO. L. REV. 289 (2002).

⁴¹ See *Woodward*, 694 N.E.2d at 1277.

⁴² See Carpenter, *supra* note 40, at 263-72.

⁴³ See *id.* at 265-71.

⁴⁴ See Brief for the Commonwealth at 47-48, *Commonwealth v. Woodward*, 694 N.E.2d 1277 (Mass. 1998) (No. SJC-07635), 1998 WL 35031499 (noting that, although the consequences of Woodward’s conduct may have been unintended, her conduct was nonetheless intentional, and thus arguing that Woodward “was not entitled to an instruction on accident where the evidence suggests only that Matthew’s death was an accidental by-product of her intentional conduct.”); see also *Woodward*, 694 N.E.2d at 1286 n.14 (noting that the jury was instructed only on third prong malice); Carpenter, *supra* note 40, at 293.

⁴⁵ Carpenter, *supra* note 40, at 293.

⁴⁶ *Id.* at 274. Massachusetts sanctions the all-or-nothing strategy. *Id.* at 294.

⁴⁷ *Id.* at 263.

⁴⁸ *Commonwealth v. Woodward*, 7 Mass. L. Rptr. 449, 1997 WL 694119, at *7 (Super. Ct. 1997), *aff’d*, 694 N.E.2d 1277 (Mass. 1998); see also Joe Fitzgerald, *Wait of the World; Search for Blame Ends with Defense Lawyers*, BOSTON HERALD, Nov. 4, 1997, at 6

charge or acquittal.⁴⁹ Commentators have noted that this strategy may be appealing to defendants who claim that another party is responsible for the crime, as it forces the jury to confront that issue rather than concern itself with standards of recklessness or intent.⁵⁰ Furthermore, where the defense is confident regarding the strength of its case, it may prefer not to undercut this advantage by permitting the prosecution to reduce its burden regarding intent or some other element required for the greater but not the lesser charge.⁵¹

In *Woodward*, the Commonwealth requested a jury instruction on the lesser-included charge of involuntary manslaughter. The defense opposed, noting that the Doctrine of Lesser-Included Offenses permits the prosecution to overcharge the defendant initially while creating a veritable safety net for conviction by increasing the likelihood of conviction. It argued that the Commonwealth was attempting to do so here.⁵² Since Woodward's defense was based on a claim of innocence rather than on mitigating factors,⁵³ the defense contended that in order to "avoid the conviction of an innocent person of any offense," the court should reject the requested manslaughter instruction.⁵⁴ This argument suggests that the inclusion of a lesser offense will lead the jury to convict of a crime not proven beyond a reasonable doubt, simply by virtue of the multiplicity of options.⁵⁵ Ultimately, the defense's argument was rooted in the concept that

("It was no longer about justice. It was now high-stakes poker with Louise's lawyers arrogantly upping the ante.").

⁴⁹ The All-or-Nothing Doctrine is traditionally permitted only where "neither side objects." Pflaum, *supra* note 40, at 289. The Supreme Judicial Court of Massachusetts determined that the trial judge's deferral to the defense preference for the All-or-Nothing Doctrine in light of the prosecution's objection in *Woodward* offended the mutuality of right due the parties. See Carpenter, *supra* note 40, at 295.

⁵⁰ See Carpenter, *supra* note 40, at 291-94.

⁵¹ Cf. *id.* at 292-93.

⁵² Brief for Defendant-Appellee at 24, *Commonwealth v. Woodward*, 694 N.E.2d 1277 (Mass. 1998) (No. SJC-07635), 1998 WL 35031501.

⁵³ See Trial, Week 3, *supra* note 22 (testimony of Louise Woodward).

⁵⁴ *Commonwealth v. Woodward*, 694 N.E.2d 1277, 1284 n.9 (Mass. 1998).

⁵⁵ Pflaum, *supra* note 40, at 291. The United States Supreme Court has, in fact, concluded the near-opposite, at least in the death penalty context: the failure to instruct on the lesser offense or offenses increases the likelihood that the defendant will be convicted of a crime for which the evidence was insufficient. *Beck v. Alabama*, 447 U.S. 625, 638-43 (1980); see also Carpenter, *supra* note 40.

the level of risk borne by the defendant is a matter of trial strategy.⁵⁶ Reasoning that trial strategy is traditionally the province of defense counsel,⁵⁷ the judge instructed the jury on first and second degree murder only.⁵⁸

On appeal, the Supreme Judicial Court of Massachusetts held that the rejection of the lesser-included offenses had been error but the majority deemed it harmless in light of the judge's reduction of the verdict under Rule 25(b)(2).⁵⁹ By contrast, the dissent found that this error "created a deep structural flaw in the trial, resulting in a sense of unease that permeated the proceedings that followed, and which was exacerbated by the nature of the sentencing proceedings following the verdict reduction."⁶⁰ In order to understand the effect noted by the dissent, and more particularly the negative implications for women's choice created by this error, it is necessary to examine Massachusetts homicide law in light of the evidence presented as well as the discretionary power granted to the trial court under Rule 25(b)(2).

B. Homicide Law in Massachusetts and the Third Prong Malice Test

Under Massachusetts law, "murder is the unlawful killing of a human being with malice."⁶¹ In addition to malice, murder in the first

⁵⁶ See Pflaum, *supra* note 40, at 291-92. Pflaum cites, *inter alia*, *Barnett v. Godinez*, 61 F.3d 905 (7th Cir. 1995) (unpublished table decision), in which the court rejects the defendant's claim to ineffective assistance of counsel based on trial counsel's decision not to request a jury instruction on the lesser-included offense of robbery to the State's higher charge of armed robbery. The Court there stated that "the decision of whether to request an instruction on a lesser-included offense is a matter of trial strategy" and noted that counsel's tactical decisions "are accorded enormous deference."

⁵⁷ The trial judge found support for this proposition in *Commonwealth v. Roberts*, 555 N.E.2d 588, 592 (Mass. 1990) (where the defendant had been convicted of armed robbery, finding no error in the trial judge's refusal to instruct on the lesser-included offense of larceny, as defense counsel had "agreed that such an instruction should not be given"). In that case, the defendant claimed that he had acted in self defense from a sexual assault. *Id.* See *Woodward*, 694 N.E.2d at 1282 n.7. The Supreme Judicial Court of Massachusetts found the judge's decision in *Woodward* error but considered the error harmless in light of the verdict reduction. *Id.* at 1284.

⁵⁸ *Woodward*, 694 N.E.2d at 1282.

⁵⁹ *Id.* at 1282, 1284.

⁶⁰ *Id.* at 1299 (Greaney, J., dissenting).

⁶¹ MASS. GEN. LAWS ch. 265 § 1 (2000).

degree requires that the crime have been committed with either "deliberate premeditation" or "extreme atrocity or cruelty";⁶² Woodward was charged under the latter theory.⁶³ Second degree murder is "[m]urder which does not appear to be in the first degree,"⁶⁴ which courts have interpreted as an unlawful killing with malice but lacking the second criterion of premeditation or extreme atrocity or cruelty.⁶⁵

In Massachusetts, "'malice' is the 'essential element' of murder";⁶⁶ absent malice, an unlawful killing is reduced to manslaughter.⁶⁷ Massachusetts courts have determined that "malice" is characterized by three prongs, only one of which need be satisfied in order for malice to be established: 1) "an intent to cause death," 2) "an intent to cause grievous bodily harm," or 3) "an intentional act which, in circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood of death."⁶⁸ The prosecution in Woodward relied on this third prong of malice to support the murder charge; in fact, no "intent" instruction, under either the first or second prong, was submitted to the jury.⁶⁹

In its appellate brief, the defense argued that the third prong malice test is an insufficient basis for a murder conviction.⁷⁰ Indeed, the test does not require proof of the defendant's state of mind; rather, it rests on the "reasonable person" standard.⁷¹ Further, the defense asserted that the inclusion of the third prong of malice in the definition of murder makes

⁶² § 1; *Commonwealth v. Skinner*, 556 N.E.2d 1014, 1016 (Mass. 1990) ("Deliberate premeditation is a distinct element of the crime of murder in the first degree."); *see also Skinner*, *supra* note 37.

⁶³ *Woodward*, 694 N.E.2d at 1282.

⁶⁴ MASS. GEN. LAWS ch. 265 § 1.

⁶⁵ *See Skinner*, *supra* note 37.

⁶⁶ *Id.* § 2.2.1.

⁶⁷ *Commonwealth v. Judge*, 650 N.E.2d 1242, 1246 (Mass. 1995) ("Without malice, an unlawful killing can be no more than manslaughter."); *Skinner*, 556 N.E.2d at 1017 ("[Malice] is what distinguishes murder from manslaughter."); *Skinner*, *supra* note 37.

⁶⁸ *Skinner*, *supra* note 37, § 2.2.1.

⁶⁹ *See Brief for Defendant-Appellee*, *supra* note 52, at 26.

⁷⁰ *Id.*

⁷¹ *Id.*; *see also Skinner*, *supra* note 37.

Massachusetts an outlier, given the vast number of other Anglo-American jurisdictions that would grade such a crime as manslaughter.⁷²

To that end, the Supreme Judicial Court noted that “a fine line distinguishes murder based on the third prong of malice from the lesser included offense of involuntary manslaughter,”⁷³ ultimately distinguishing the two by the degree of risk (or, to use the language of the statute, the likelihood of death) that a reasonable person would have perceived under the circumstances due to her conduct.⁷⁴ As such, the court noted that the “plain and strong likelihood of death” required for a finding of malice under the murder standard is reduced for involuntary manslaughter to “a high degree of likelihood that *substantial harm* will result to another.”⁷⁵

The Supreme Judicial Court recognized that the jury’s verdict of second degree murder under the third prong malice test was not unwarranted by the evidence.⁷⁶ Matthew’s autopsy demonstrated that he had suffered a skull fracture and had died as a result of brain swelling and hemorrhage.⁷⁷ Prosecution experts attributed this “severe head trauma”⁷⁸ to

⁷² See Brief for Defendant-Appellee, *supra* note 52, at 26. However, the defense brief fails to provide any examples or substantive comparison of Massachusetts homicide law with “the weight of authority in American jurisdictions and in England[,]” which it claims is contrary. *Id.* at 26-27.

⁷³ Commonwealth v. Woodward, 694 N.E.2d 1277, 1286 (Mass. 1998).

⁷⁴ *Id.*

⁷⁵ *Id.* (quoting Commonwealth v. Welansky, 55 N.E.2d 902 (Mass. 1944)) (emphasis added).

⁷⁶ See Woodward, 694 N.E.2d at 1287.

⁷⁷ See CourtTVNews, The Nanny Murder Trial, Highlights from Week 1, <http://www.courtstv.com/trials/woodward/week1.html> (last visited Jan. 3, 2009) [hereinafter Trial, Week 1]. According to the Commonwealth’s brief to the appellate court:

In addition to the substantial damage to his eyes, at the time he arrived at the hospital Matthew suffered from a two and a half inch skull fracture to the lower back of his head. He had hemorrhaging in muscles of the lower back as well as the neck area, indicating that his head had been hyperextended backwards, rapidly and forcefully. In addition, he had a large subdural hematoma, or an accumulation of blood beneath the dural membrane covering the brain, on the upper right side of his head. The accumulation of blood was so large that it was pushing the brain over to the left side and causing the brain to swell. The combination of these injuries indicated that Matthew had been shaken severely and his head forcefully slammed against a fixed hard object within minutes to a few hours of his arrival at the hospital.

a combination of violent shaking and a “severe blow of the head against a blunt surface”⁷⁹ Indeed, Woodward admitted on the stand to shaking Matthew “slightly” before calling the police but only after noticing that he looked “off-color . . . kind of blue,”⁸⁰ and to “pop[ping] him on the floor[.]”⁸¹ but the prosecution emphasized that this type of mild roughness was insufficient to cause the grievous injuries that Matthew had sustained.⁸² Rather, the prosecution in its opening asserted that Woodward had “slammed the baby into a hard object and shook him, causing his death—actions that anyone would know would result in death.”⁸³

The defense contended that Matthew had sustained the skull fracture three to four weeks prior to his death and had died as a result of “intercranial pressure caused by a rebleeding of the prior injury.”⁸⁴ In contrast to the severe amount of force necessary to bring about the initial injury, or injury on February 4 under the prosecution’s theory, defense experts noted that, as “rebleeding . . . occurs more easily in babies than in adults and adolescents,” the rebleed could well have been stimulated

Brief for the Commonwealth at 11, *Commonwealth v. Woodward*, 694 N.E.2d 1277 (Mass. 1998) (No. SJC-07635), 1998 WL 35031499. The autopsy also revealed a wrist fracture that had been sustained approximately two-and-a-half to four weeks prior to Matthew’s death. See Trial, Week 1, *supra*.

⁷⁸ See Trial, Week 1, *supra* note 77 (quoting Dr. Joseph Madsen, a pediatric neurosurgeon who operated on Matthew on February 4, 1997 and who served as an expert witness for the prosecution).

⁷⁹ *Id.*

⁸⁰ See Trial, Week 3, *supra* note 22.

⁸¹ See *id.* Woodward later testified that the police may have misunderstood her use of the word “pop,” a British term which means “lay” or “place.” See CourtTVNews, The Nanny Murder Trial, Highlights from Week 4, <http://www.courttv.com/trials/woodward/week4.html> (last visited Oct. 2, 2008) [hereinafter Trial, Week 4].

⁸² Brief for the Commonwealth, *supra* note 77, at 11. Dr. Patrick Barnes, pediatric radiologist, testified that Matthew’s injuries could not have resulted from “a gentle shaking or from being tossed onto a bed”; rather he found the injuries “suggestive of non-accidental trauma.” See Trial, Week 1, *supra* note 77.

⁸³ Trial, Week 1, *supra* note 77.

⁸⁴ See Trial, Week 3, *supra* note 22 (citing testimony of Dr. Alisa Gean, neuroradiologist and head trauma expert for the defense). See also Brief for Defendant-Appellant at 3-4, *Commonwealth v. Woodward*, 694 N.E.2d 1277 (Mass. 1998) (No. SJC-07635), 1998 WL 35031496.

without shaking.⁸⁵ Defense experts further concluded that Matthew lacked many of the telltale markers of shaken baby syndrome (such as neck injuries),⁸⁶ while prosecution experts found signs that they claimed could only be indicative of shaken baby syndrome: Dr. Lois Smith testified that “[t]he combination of the retinal hemorrhages and this fold [behind the eye] indicate . . . shaken baby syndrome and really rule out any other causes.”⁸⁷

The jury credited the prosecution’s experts and found Woodward guilty of second degree murder.⁸⁸ In so finding, they determined beyond a reasonable doubt that the prosecution’s version of the facts was true, that “Matthew Eappen died because Defendant shook him and battered him against an unyielding object.”⁸⁹ No intent instructions were given; the jury was instructed only on third prong malice.⁹⁰ Consequently, applying that test, the jury concluded that Woodward intentionally shook and slammed Matthew, and that a reasonable person would have known that shaking and slamming an eight-month-old in such a manner would create a “plain and strong likelihood” of his death.⁹¹

As the jury learned, medical literature states that “[t]he act of shaking leading to shaken baby syndrome is so violent that individuals observing it would recognize it as dangerous and likely to kill the child.”⁹²

⁸⁵ Trial, Week 3, *supra* note 22 (citing testimony of Dr. Gean).

⁸⁶ See *id.* (noting testimony by neurosurgeon Dr. Ayub Ommaya and pediatric neurosurgeon Dr. Ronald Uscinski).

⁸⁷ See Trial, Week 1, *supra* note 77 (quoting Dr. Lois Smith, ophthalmologist).

⁸⁸ *Commonwealth v. Woodward*, 694 N.E.2d 1277, 1277 (Mass. 1998).

⁸⁹ *Commonwealth v. Woodward*, 7 Mass. L. Rptr. 449, 1997 WL 694119, at *1 (Super. Ct. 1997), *aff’d*, 694 N.E.2d 1277 (Mass. 1998).

⁹⁰ *Woodward*, 694 N.E.2d at 1286 n.14; see also Brief for Defendant-Appellee, *supra* note 52, at 26.

⁹¹ *Woodward*, 694 N.E.2d at 1286 n.14. Of course, as the jury rendered only a general verdict of second degree murder, Trial, Week 4, *supra* note 81 (providing audio clip of verdict), its findings are necessarily a matter of speculation. It is unusual for a court to require specific findings in criminal cases, see *United States v. Yakobowicz*, 427 F.3d 144, 152 (2d Cir. 2005) (“[I]n criminal cases . . . general verdicts are strongly preferred.”), as the general verdict is thought to protect jury independence and the right of the jury to nullify. Diane E. Courselle, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. REV. 203, 210-24 (2005).

⁹² American Academy of Pediatrics, *Shaken Baby Syndrome: Rotational Cranial Injuries—Technical Report*, 108 PEDIATRICS 206, 206 (2001).

This assumption was undisputed at trial.⁹³ Therefore, with regard to Woodward's state of mind, the issue was not whether Woodward perceived the degree of risk inherent in her conduct.⁹⁴ Either she shook him and hit him against a hard surface, where a reasonable person would have known the danger of such conduct, or she was the victim of circumstance, perhaps not quite "as gentle as [she] could have been"⁹⁵ but in no way aware that he was suffering from a skull fracture and at risk for a rebleed—that is, that her actions could lead to his death—hence ultimately not responsible.⁹⁶ The jury found the former. The judge disagreed.

C. Rule 25(b)(2) and Judicial Fact-Finding

According to Massachusetts Rule of Criminal Procedure 25(b)(2),

[if] a verdict of guilty is returned [by the jury], the judge may on motion set aside the verdict and order a new trial, or order the entry of a finding of not guilty, or order the entry of a finding of guilty of any offense included in the offense charged in the indictment or complaint.⁹⁷

⁹³ The defense did not present any evidence challenging shaken baby syndrome (SBS) as a medical condition or its causes; rather, it disputed the diagnosis of SBS in this instance. *See, e.g.,* Trial, Week 3, *supra* note 22 (citing testimony of forensic neuropathologist Dr. Jan Leestma for the defense).

⁹⁴ *Commonwealth v. Woodward*, 694 N.E.2d 1277, 1286 (Mass. 1998).

⁹⁵ *See* Trial, Week 3, *supra* note 22 (quoting Woodward on direct examination).

⁹⁶ In reducing the verdict, the judge noted that the defendant's lack of knowledge of the victim's pre-existing condition is irrelevant where intentional force is nonetheless applied. *Commonwealth v. Woodward*, 7 Mass. L. Rptr. 449, 1997 WL 694119, at *7 (Super. Ct. 1997), *aff'd*, 694 N.E.2d 1277 (Mass. 1998). "The victim's hidden physical weakness does not exonerate the perpetrator." *Id.* The judge's melding of the defense's rebleed theory with the finding of an intentional act by Woodward has implications, however, for the displacement of blame from Woodward to Eappen. *See infra* Part III.

⁹⁷ MASS. R. CRIM. P. 25(b)(2). Commentators have characterized the discretion granted trial courts under this rule as "remarkable" and "unparalleled." *See* Benjamin B. Tymann, *Populism and the Rule of Law: Rule 25(b)(2) of the Massachusetts Rules of Criminal Procedure and the Historical Relationship Between Juries and Judges in the Commonwealth's Trial Courts*, 34 SUFFOLK U. L. REV. 125, 125-26 (2000).

This authority derives from state statute.⁹⁸ The Supreme Judicial Court remarked that these postconviction powers “reflect the evolution of legislative policy promoting judicial responsibility to ensure that the result in every criminal case is consonant with justice.”⁹⁹ To that end, the court noted that the trial court retains discretion to grant a new trial or reduce a jury’s verdict even where the verdict is legally supported by the evidence if the judge feels that the new trial or reduction is in “the interest of justice.”¹⁰⁰ In fact, in rendering his memorandum and order reducing the verdict and vacating the sentence, Judge Zobel admitted that “[t]he verdict . . . was not against the weight of the evidence.”¹⁰¹ However, he observed that in reaching a verdict of guilty in the second degree, the “jury spurned, as not worthy of belief, professional opinions emanating from a corps of highly-qualified, authoritative experts . . .” in order to avoid reasonable doubt.¹⁰² Although he noted that “[a] judge may not grant a new trial merely because had he been the fact-finder the case would have come out

⁹⁸ MASS. GEN. LAWS ch. 278 § 11 (2007). According to Massachusetts law,

If a motion for a directed verdict of not guilty is denied and the case is submitted to the jury and a verdict of guilty is returned, the judge may on a renewed motion for a directed verdict of not guilty pursuant to the Massachusetts Rules of Criminal Procedure set aside the verdict and order a new trial, or order the entry of a finding of guilty of any offense included in the offense charged in the indictment or complaint.

Id.

⁹⁹ *Woodward*, 694 N.E.2d at 1284.

¹⁰⁰ *Commonwealth v. Millyan*, 503 N.E.2d 934, 944 (Mass. 1987). Massachusetts is the only state that permits the post-trial alteration of a jury verdict that is supported by the evidence. *See Tymann, supra* note 97, at 127. In the context of Rule 25(b)(2), the Massachusetts high court has determined that a judicial reversal of a verdict will be “in the interest of justice” where the verdict goes “against the weight of the evidence” or where “its integrity [is] suspect.” *Commonwealth v. Doucette*, 559 N.E.2d 1225, 1226 (Mass. 1990) (citing *Commonwealth v. Preston*, 471 N.E.2d 340 (Mass. 1984) and *Commonwealth v. Cornish*, 574 N.E.2d 948 (Mass. App. Ct. 1989)).

¹⁰¹ *Commonwealth v. Woodward*, 7 Mass. L. Rptr. 449, 1997 WL 694119, at *2 (Super. Ct. 1997), *aff’d*, 694 N.E.2d 1277 (Mass. 1998).

¹⁰² *Id.*

differently,”¹⁰³ this language strongly suggests that he, exercising his power under Rule 25(b)(2), did exactly that.¹⁰⁴

In considering the defense’s motion for a new trial or, in the alternative, for acquittal or a reduction in verdict and/or sentence, the judge remarked that he was “entitled to consider testimony that the jury may have disbelieved.”¹⁰⁵ Consequently, he determined that the jury was incorrect in attributing Matthew’s death to shaken baby syndrome; he credited the defense theory that Matthew was possibly suffering from a weeks-old head wound and found that Woodward’s mild “roughness was sufficient to start (or re-start) a bleeding that escalated fatally.”¹⁰⁶ Thus, although Judge Zobel had disclaimed the notion that his role was to act as fact-finder,¹⁰⁷ in rejecting the jury’s evaluation of the medical evidence, thanks to the wide

¹⁰³ *Id.*

¹⁰⁴ One can certainly speculate that Judge Zobel permitted the all-or-nothing strategy because he knew that he had the power to remedy a too-harsh verdict pursuant to Rule 25(b)(2). Imagining this scenario from an ex ante perspective, such an intent by the judge would have undermined the risk inherent (and, indeed, crucial to) that strategy, as the parties would have labored under the impression that a murder conviction was possible. Had the prosecution been aware that the judge intended to reduce a jury verdict of murder from the start (and had Woodward considered changing her plea to “guilty”), a plea agreement to manslaughter may have been possible.

It is not clear that the Massachusetts legislature intended, by Rule 25(b)(2), to endorse use of the power due to a preformed hidden judicial agenda. Indeed, the policy promoted by such action is troubling given the public’s interest in transparency in the legal system. See Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1165-66 (2000) (discussing the necessity for transparency in many aspects of the judiciary and arguing that “transparency is a prerequisite of legitimate, democratic government”). For an argument that Judge Zobel had no such hidden agenda in *Woodward*, see Symposium, *The Death Penalty, Religion, and the Law: Is Our Legal System’s Implementation of Capital Punishment Consistent with Judaism or Christianity?*, 4 RUTGERS J. L. & RELIGION 1 (2002) (remarks of Professor Barry Scheck, who served as Woodward’s lead counsel).

¹⁰⁵ *Woodward*, 1997 WL 694119, at *5 (citing *Commonwealth v. Keough*, 431 N.E.2d 915 (1982)). See also Lillian L. Cheng et al., *Post-Trial Events*, MASS. SUPER. CT. CRIM. PRAC. MANUAL § 23.3 (2006) (noting that “the judge may assess credibility”); Juliane Balliro & Brett J. Vottero, *Events at the End of Trial*, MASS. SUPER. CT. CRIM. PRAC. MANUAL § 20.3.3 (2006) (“[T]he trial judge is permitted—in fact expected—to consider the weight of the evidence.”).

¹⁰⁶ *Woodward*, 1997 WL 694119, at *6.

¹⁰⁷ See *supra* text accompanying note 104.

discretion permitted by Rule 25(b)(2), Judge Zobel usurped the role of the jury.¹⁰⁸

Furthermore, by finding that Matthew suffered a rebleed from a prior skull fracture, the judge's ruling reopened the question of blame.¹⁰⁹ Since Judge Zobel found that Woodward could not have known that "mild roughness" could lead to Matthew's death, the verdict reduction to involuntary manslaughter thus rendered the individual responsible for the initial injury Matthew's true killer.¹¹⁰ Thus this new verdict added fuel to the fire, for the public had already found a scapegoat: Dr. Deborah Eappen.¹¹¹

II. BLAMING DEBORAH EAPPEN

During and after the trial, as a result of the prosecution's claim that Woodward had violently shaken Matthew and slammed him into a hard object and the corresponding jury verdict of second degree murder, Eappen was attacked in the media for leaving her child alone with Woodward rather than caring for him herself.¹¹² But due to the defense's contention that Matthew had suffered prior head trauma and the involuntary manslaughter verdict validating this theory, Eappen herself was then implicated as his possible killer. Ultimately, the two notions intertwined, such that Eappen was deemed a bad mother, and hence responsible, simply by being a mother who permitted her child to fall into harm's way. Whether she herself struck the physical blow proved irrelevant; the only choice that mattered was her choice to become a working mother. Part A in what follows discusses the evidence presented both in and out of court that may have diverted blame

¹⁰⁸ See Tymann, *supra* note 97, at 141-43. While awaiting Judge Zobel's ruling, the popular press referred to him as "the 13th juror." Wagner, *supra* note 30.

¹⁰⁹ See Editorial, *American Justice on Trial: The Recent Case of the British Au Pair Who Was Convicted of Killing a Baby Can Only Erode Public Confidence in the U.S. Judicial System*, ORLANDO SENTINEL, Nov. 12, 1997, at A16.

¹¹⁰ Since the jury delivered only a general verdict, *see supra* text accompanying note 91, it is possible that the jury accepted the defense's notion that Matthew's head wound was weeks old, but convicted Woodward because they believed that she had caused it. This version of events seems unlikely though, as the prosecution did not present this theory of the crime. *Commonwealth v. Woodward*, 694 N.E.2d 1277, 1282 (Mass. 1998) ("The Commonwealth presented evidence that the cause of Matthew's death was severe head trauma inflicted on February 4, 1997, while he was in the sole custody of Woodward.").

¹¹¹ See *supra* notes 16-29 and accompanying text.

¹¹² *Id.*

onto Eappen, while Part B explores the social understandings of motherhood that ultimately overwhelmed the debate and negated Eappen's own choices and their effect on the level of culpability she would publicly bear for her child's death.

A. The Evidence and the Press

The defense never explicitly stated that either parent had caused Matthew's prior injuries. Rather, Woodward on direct examination speculated that Matthew may have tumbled on the stairway while her back was turned and hit his head,¹¹³ and she told the British press that Matthew's two-year-old brother, Brendan, may have caused the fatal injury.¹¹⁴ However, according to newspapers, the defense suggested that Matthew's multiple injuries—the skull and wrist fractures—were signs of “chronic abuse,” which, in light of Woodward's strong denials of wrongdoing, implied that one of Matthew's parents was responsible.¹¹⁵ Furthermore, Woodward insinuated to the press that one or both of the Eappens was responsible. Regarding Woodward's appearance on the BBC, a reviewer commented, “There was no attempt to do anything other than to give Ms. Woodward a platform to implicate Sunil and Deborah Eappen in their baby's death.”¹¹⁶

But, if so, why did public blame fall on Deborah Eappen alone, rather than on the couple equally? Perhaps an answer can be found in Woodward's evaluation of Eappen's style of mothering. She commented that Eappen criticized her for using too many diapers, suggesting that Eappen preferred the boys to “sit[] in their own urine” rather than waste

¹¹³ See Trial, Week 3, *supra* note 22 (citing testimony of Louise Woodward on direct examination).

¹¹⁴ See Alvarez, *supra* note 33; see also *Her Story*, BOSTON HERALD, June 21, 1998, at 5 (quoting Louise Woodward in an interview with U.K. tabloid *The Daily Mail*: “I don't hate Deborah Eappen . . . I can understand that it's easier for [Deborah and Sunil] both to blame me than to blame someone like their little boy for Matty's death.”).

¹¹⁵ See Daly, *supra* note 24.

¹¹⁶ Carol Malone, Editorial, SUNDAY MIRROR (U.K.), June 28, 1998, available at http://findarticles.com/p/articles/mi_qn4161/is_19980628/ai_n14475154. Woodward stated on the BBC, “The mentality is that somebody has to pay. You know, and that seemed to be the problem, that, well, if the parents didn't do it, who did?” See Peggy Hernandez, in *BBC Interview, Au Pair Shades Denial of “Being Rough,”* BOSTON GLOBE, June 23, 1998, at B3. Media outlets interpreted this statement as an implication that the Eappens were to blame. See *id.*

"twenty cents each."¹¹⁷ She also drew attention to Eappen's desire that she feed Matthew the breastmilk that Eappen had pumped, bottled, and frozen, which required Matthew to remain hungry while the milk thawed.¹¹⁸ Diane Purkiss suggests that Eappen's frozen breastmilk may have been seen as unnatural. In addition, Eappen's continued breastfeeding—which presumably included late night feedings—may have contributed to her level of stress as a working mother, leading her to "snap one night."¹¹⁹ Woodward furthered this theory by emphasizing Eappen's stress level in statements to the press¹²⁰ and by describing to a British newspaper a dream she purportedly had, in which she walked through her hometown of Elton, England alongside a mythical canal afloat with the bodies of babies.¹²¹ "The mothers walk calmly along the side of the canal and I can't do anything to save the babies," Woodward recounted.¹²²

Ultimately, however, blame for Matthew's head injury was not at the center of the debate.¹²³ Rather, Woodward was exonerated and Eappen vilified based on Eappen's choice to return to the workplace with two small children at home. "[W]henver anything happens to the child, if the mother is working, the mother is automatically to blame . . . it's never Dad's problem," remarked a university professor.¹²⁴ Even on the stand, Eappen

¹¹⁷ See *Her Story*, *supra* note 114; see also Alvarez, *supra* note 33.

¹¹⁸ See Purkiss, *supra* note 23, at 55.

¹¹⁹ *Id.* at 56.

¹²⁰ Peggy Hernandez & Doreen Iudica Vigue, *Amid Town's Doubts About Parents, Woodward Talks*, BOSTON GLOBE, June 21, 1998, at B4 (quoting Woodward in an interview with U.K. newspaper *The Daily Mail*: "Debbie got stressed easily. She was working full time and breast-feeding Matthew. She was a rather intense person who sometimes bawled me out for the tiniest little thing. Once she shouted at me for not rinsing the plates before I put them in the dishwasher."). At the very least, Woodward was guilty of hyperbole: Eappen was only working three days a week. See Jong, *supra* note 18.

¹²¹ Jules Crittenden, *Louise Says Babies Haunt Her Dreams*, BOSTON HERALD, June 21, 1998, at 1.

¹²² *Id.*

¹²³ See Liza N. Burby, *Planned Parenting: Finding Sitters Isn't Child's Play*, NEWSDAY, Nov. 8, 1997, at B2 (quoting Pauline McGee-Egan: "[P]eople are not looking for where the blame is—on the person responsible for bringing about the fracture of an infant's skull.").

¹²⁴ See Daly, *supra* note 24 (quoting Caryl Rivers, Boston University professor of journalism and author of several books on the relationship between culture and the media.

faced “grueling questions” regarding her choice to leave Matthew at home with a nanny.¹²⁵ One reporter noted that “[i]t was clear from the outset that Matthew’s 41-year-old working mother, not the au pair agency or government policy, would be judged daily in the courtroom.”¹²⁶

In one respect, class and wealth may have been a factor in this criticism; Eappen worked by choice rather than out of need. “[Mom] gets special blame if she doesn’t ‘have’ to work,” noted a commentator.¹²⁷ “It’s that old pin money thing, and it’s dreary to realize women who pursue careers to enrich their lives still too often wear the scarlet letter.”¹²⁸ Indeed, much of the criticism centered on the dual-career nature of the Eappen household, which was tied to the perception of the Eappens as cheap.¹²⁹ That Woodward was seen as a member of the working class, accused by her upper-middle class employers, further contributed to the conflict.¹³⁰ However, the condemnation of Eappen cannot be explained by class bias alone. Welfare mothers, who were forced into the workplace by the

See, e.g., CARYL RIVERS, SLICK SPINS AND FRACTURED FACTS: HOW CULTURAL MYTHS DISTORT THE NEWS (1996)); see also Siemaszko, *supra* note 17.

¹²⁵ Lundy R. Langston, *Women in the New Millennium: The Promises of the Past Are Now the Problems for the Millennium*, 6 CARDOZO WOMEN’S L.J. 1, 20 (1999).

¹²⁶ See *Whose Hand*, *supra* note 18. The defense asked Eappen questions about her stress level, her work/life balance, and whether she was “too busy” to call home, and introduced an index card with her pager and telephone numbers as an exhibit. See *id.*

¹²⁷ Yost, *supra* note 18. See also GRANA, *supra* note 33, at 71-74.

¹²⁸ Yost, *supra* note 18. The class conflict was illustrated by a sign outside the courthouse: “One Less Baby, One More Volvo.” See Canellos, *supra* note 18.

¹²⁹ The Eappens were condemned for “exploiting” Woodward, whom they paid \$115 for 45 hours of work per week. They also paid her travel expenses and a fee to EF Au Pair, the agency that placed her with them. See Canellos, *supra* note 18; see also Yost, *supra* note 18. Woodward herself criticized the Eappens for keeping the house too cold and Deborah Eappen for complaining about Woodward’s overuse of diapers for the boys. See Alvarez, *supra* note 33.

¹³⁰ See Purkiss, *supra* note 23, at 62 (noting that, due to the class distinction between Woodward and the Eappens, “[s]ome likened Woodward’s trial to that of a black man accused of raping a white woman in the Old South”); see also Editorial, *An Endless Trial*, BOSTON GLOBE, Nov. 15, 1997, at A14.

Welfare-to-Work program¹³¹ not long after *Woodward*, have also been labeled as "monster[s]."¹³²

In addition to class bias, many other factors may have contributed to the blame given to Deborah Eappen and taken from Woodward. These factors most certainly included Woodward's youthful appearance,¹³³ her British citizenship,¹³⁴ the interracial nature of the Eappen marriage,¹³⁵ and the media coverage,¹³⁶ all of which contributed to the criticism leveled by the defense against the Eappens in their attempt to shift blame away from Woodward. Eappen's own age also may have played a part in the criticism levied against the Eappens: at forty-one, some may have believed her too old to fit into the role of a new mother.¹³⁷ As an older mother, Eappen

¹³¹ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (requiring states to affirmatively reduce the number of persons receiving government aid in order to continue receiving federal funds).

¹³² *Whose Hand*, *supra* note 18 (quoting Diane Eyer, author of *MOTHERGUILT* (1996)); see also Jong, *supra* note 18. For an example of the welfare-mother-as-bad-mother phenomenon, see Marie Ashe, "Bad Mothers" and Welfare Reform in Massachusetts: The Case of Claribel Ventura, in *FEMINISM, MEDIA, AND THE LAW* 203 (Martha A. Fineman & Martha T. McCluskey eds., 1997).

¹³³ FERGUSON, *supra* note 7, at 292 ("Baby-faced and dressed in simple attire to match, Woodward [at trial] seemed a child herself.").

¹³⁴ *Id.* at 294 (noting that a national rivalry between England and the United States emerged during trial); cf. Carey Goldberg, *In a Startling Turnabout, Judge Sets Au Pair Free*, N.Y. TIMES, Nov. 11, 1997, at A1 (noting the general festivity in England upon the reduction of Woodward's sentence); Tunku Varadarajan & James Bone, *Louise Woodward is Set Free*, TIMES (London), Nov. 11, 1997, at 1 (describing the celebration in Woodward's British hometown when the sentence reduction was announced). The British expressed doubts as to whether Woodward was receiving fair treatment under the American justice system. See FERGUSON, *supra* note 7, at 294-95; Carey Goldberg, *A Murder Trial About More Than a Nanny*, N.Y. TIMES, Oct. 24, 1997, at A18.

¹³⁵ See *An Endless Trial*, *supra* note 130 (noting that the interracial aspect of the Eappen marriage may have contributed to the social tensions underlying the trial); Purkiss, *supra* note 23, at 62 (noting that, as an Indian in white America, Sunil Eappen may have been branded a foreigner).

¹³⁶ See FERGUSON, *supra* note 7, at 291-96 (suggesting that the extensive television coverage of the trial may have increased sympathy for the "teary-eyed" Woodward, and noting that video transmission of the trial overseas did not begin until the close of the prosecution's case); Carey Goldberg, *Trial of Au Pair Reveals Unease in U.S. Society*, N.Y. TIMES, Nov. 10, 1997, at A14.

¹³⁷ Some have questioned whether older parents have the capacity to care for young children. See Alvin Rosenfeld, M.D., Letter to the Editor, *The Older Mother*, N.Y. TIMES, Jan. 3, 1994, at A22 (calling for empirical research). Women over forty who seek to

sharply contrasted with Woodward, who, at nineteen, could have been Deborah Eappen's own child. Yet Eappen's age placed on her a dual standard. As an older mother she was expected to have greater maturity and thus to be more prone to reasoned decision-making.¹³⁸ In this way, she was seen as responsible for Woodward's mistakes—again, as though she were Woodward's own mother.¹³⁹ At the same time, she may have been seen as inherently unfit to mother due to her age. Both of these ideas, rooted in cultural expectations and concepts of motherhood, likely contributed to the social backlash against Eappen for her choice to work. Eappen's deviant choices—to become a mother at a late age and to be a working mother—could not be negated by Woodward's intervening act against Matthew.

B. Working Mother/Good Mother: Culturally Irreconcilable

The majority of blame on Deborah Eappen stemmed from her choice to return to work following her sons' births. As Matthew's mother, Deborah Eappen was, in contradictory terms, deemed both inherently responsible for his death as well as incapable of having dealt him the physical blow.¹⁴⁰ These concepts are rooted in cultural understandings and

become pregnant have also been criticized because, compared to younger women, they have a greater risk of conceiving children with chromosomal abnormalities, Katherine T. Pratt, *Inconceivable? Deducting the Costs of Fertility Treatment*, 89 CORNELL L. REV. 1121, 1191 (2004) (noting that the child of a forty-year-old woman has a one percent chance of having Down's syndrome), and older women are more likely to seek reproductive assistance, which often leads to the miscarriage or termination of one or more embryos. See Sherri A. Jayson, "Loving Infertile Couple Seeks Woman 18-31 to Help Have Baby. \$6,500 Plus Expenses and a Gift": Should We Regulate the Use of Assisted Reproductive Technologies by Older Women?, 11 ALB. J. SCI. & TECH. 287, 304, n.114 (2001).

¹³⁸ See, e.g., Corinne Sweet, *When Mum's the Last Word*, HERALD (Glasgow), Jan. 20, 2001, at 12.

¹³⁹ See Purkiss, *supra* note 23, at 56, 61 (noting that Eappen "failed to 'mother' Woodward," who presented as the third child in the Eappen household).

¹⁴⁰ See, e.g., Langston, *supra* note 125, at 20 (remarking that there were "no allegations" that Eappen actually "caused" Matthew's death); Purkiss, *supra* note 23, at 57 (suggesting and quickly rejecting the notion that "Eappen went from a nurturing breast-feeding mother to a stressed out child abuser in minutes"). See also Kathleen Parker, *We Are All Guilty in Murder*, DENVER POST, Nov. 5, 1997, at C7 (stating that "Woodward is probably guilty of manslaughter," but also blaming Eappen for passing her child-rearing duties off on an au pair and, in so doing, failing to protect her child. "The news isn't that one au pair lost control and killed a baby; the news is that more don't."); *Whose Hand*, *supra* note 18, (noting that even Woodward's defenders were satisfied of her guilt, but they asked further, "[W]ho else is to blame[?]"); Yost, *supra* note 18 (reminding readers, in light of the "debate" over "the wisdom of the Eappens' judgment," that "[c]areers don't kill children.

expectations of motherhood, many of which are based on beliefs about biology.¹⁴¹

Much of the criticism of Eappen was founded on the notion that a child belongs with his mother. "No matter how you cut it, the best caregiver for an infant is his mother," wrote one editorialist.¹⁴² This idea has underscored the role of women in the modern legal system as early as the 1800's in the custody arena.¹⁴³ Yet myths about motherhood have been traced back much farther—to ancient Greek and Roman tragedy in particular¹⁴⁴—and have dictated an image of "mother" as warm,¹⁴⁵ nurturing,¹⁴⁶ and selfless above all.¹⁴⁷ Carol Sanger has attributed this

People do." See generally Michael Perlin, *"She Breaks Just Like a Little Girl": Neonaticide, the Insanity Defense, and the Irrelevance of "Ordinary Common Sense,"* 10 WM. & MARY J. WOMEN & L. 1, 6 (2003) (discussing society's devout belief in maternal goodness).

¹⁴¹ See Elise Bruhl, *Motherhood and Contract: Always Crashing in the Same Car*, 9 BUFF. WOMEN'S L.J. 191, 193 (arguing that "[m]otherly selflessness . . . derive[s] much of its force from the biology of childbirth, breast-feeding, and early childcare . . ."). See also Marie Ashe & Naomi R. Cahn, *Child Abuse: A Problem for Feminist Theory*, 2 TEX. J. WOMEN & L. 75, 81 (1993) (commenting that the "bad mother" is often a "step"-mother, i.e., one who lacks a biological connection to the child); see generally Purkiss, *supra* note 23. Lundy Langston also notes that the issue of how to treat biological difference, particularly motherhood, in the quest for equality is one that has divided various feminist groups. See Langston, *supra* note 125, at 3-15.

¹⁴² Parker, *supra* note 140. She comments further, "As we recognize that staying home isn't an option for everyone, let's also admit it could be an option for many more, were we willing to postpone material gratification as other generations have done," apparently suggesting that women who have the means to stay home, such as Eappen, should do so. *Id.* See also Bruhl, *supra* note 141, at 197 (noting that "[i]f attackers of maternal contracts express certainty about anything, it is that the best child care is provided by the mother herself").

¹⁴³ See MICHAEL GROSSBERG, *A JUDGMENT FOR SOLOMON: THE D'HAUTEVILLE CASE AND LEGAL EXPERIENCE IN ANTEBELLUM AMERICA* (1996).

¹⁴⁴ See Purkiss, *supra* note 23 (referring primarily to Euripedes' *Medea* and the retelling by Seneca, as well as briefly to the character Clytemnestra in Aeschylus's *Oresteia*).

¹⁴⁵ *Id.* at 60.

¹⁴⁶ See Abigail Wong, *Filicide and Mothers Who Suffer From Postpartum Mental Disorders*, 10 MICH. ST. U. J. MED. & L. 571, 580 (2006).

¹⁴⁷ *Id.* See also GRANA, *supra* note 33 (noting that "[t]he motherhood mystique implies an exalted state—mothers on a pedestal. But of course, the only way off a pedestal is down.").

understanding partially to Freud¹⁴⁸ but mostly to society's willingness to accept the child's point of view in evaluating the mother; children "may feel injured anytime they get less of their mother's time."¹⁴⁹ In this way, children are not the most accurate source of authority, as they may view simple separation as abandonment.¹⁵⁰ Indeed, this phenomenon seems to have occurred in the *Woodward* case—society deemed Eappen's return to work as a veritable abandonment of her motherly duties.

Eappen was also perceived to have failed in the role of mother as understood by the term "to mother." The verb itself carries dual connotations: it means both to bear a child and to nurture.¹⁵¹ By leaving Matthew with Woodward while she returned to work, Eappen outsourced half of her duty as "mother." In addition, the fear that "mothering" duties can be performed by others may have bolstered some of the criticism of Eappen.¹⁵² Outsourcing the mothering role to nannies simply "creates a class of paid Mothers"¹⁵³ who will not exhibit the same inherent characteristics (warmth, caring, etc.) toward the child as the true mother; furthermore, the act of outsourcing itself labels the true mother as selfish¹⁵⁴ and lacking in motherly qualities.¹⁵⁵ For example, mothers who do not maintain full custody of their children, whether for career, financial, or

¹⁴⁸ Carol Sanger, *Mother From Child: Perspectives on Separation and Abandonment*, in *MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD* 27, 30 (Carolyn G. Heilbrun & Nancy K. Miller eds., 1995) ("Freudian culture has established mothers as all-powerful beings with regard to their children, responsible not just for raising them but for how they turn out as well.").

¹⁴⁹ *Id.* at 32.

¹⁵⁰ *Id.* at 31 ("[W]ith regard to middle-class families, there is nothing worse a mother can do than to leave her child. Her absence itself is understood as the injury.").

¹⁵¹ M.M. Slaughter, *The Legal Construction of "Mother,"* in *MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD* 73, 73 (Carolyn G. Heilbrun & Nancy K. Miller eds., 1995). By contrast, "to father" refers only to the act of contributing sperm towards conception. *Id.*

¹⁵² Purkiss, *supra* note 23, at 57-59 (noting the threat that Eappen's frozen breastmilk posed to the connection between breastfeeding and mothering and that, in the sixteenth-century witch trials, "suspicion often fell on women who fed other women's children.").

¹⁵³ See Slaughter, *supra* note 151, at 81.

¹⁵⁴ *Id.* See also Parker, *supra* note 140.

¹⁵⁵ See Purkiss, *supra* note 23.

other reasons, are viewed as inherently “unfit” or unnaturally “selfish.”¹⁵⁶ In this manner, a cycle of “compulsory motherhood,” as in full-time mothering, emerges that holds women “hostage to their children.”¹⁵⁷

Eappen was also seen as culpable as a result of her own anger at *being* attacked.¹⁵⁸ Critics felt that she should have been mourning the loss of her son rather than placing blame or defending herself.¹⁵⁹ The role of nurturer includes the duty to take care of others in any and all circumstances; “[a] really macho mother-woman is not supposed to complain or to demand any emotional nurturing for herself.”¹⁶⁰ In this way, Eappen’s self-defense against personal attack may have been viewed as a cry for sympathy when many were already disposed to view her as the perpetrator.

This brief overview demonstrates some of the ways that society places a burden on mothers that it does not place equally on other shoulders. In addition, the Freudian notion that mothers are always responsible ensures that they will be criticized regardless of the choices they make.¹⁶¹ By situating mothers in this untenable position, society ensures that their choices—and perhaps even their legal testimony—will not be accorded proper weight, for they may be deemed “guilty” of bad mothering purely by failing to fit the maternal mold. This is especially true when any injury occurs. In this way, society ensures that the “guilt” impulse of the maternal instinct—a self-imposed blame—can be seized upon by outside parties (such as the defense here), to the detriment of the mother. Judge Zobel’s analysis of Woodward’s state of mind and consequent lesser guilt through his memorandum and order reducing the verdict and vacating the sentence, as compared with legal outcomes in maternal infanticide cases, suggests that this burden extends from social imaginings through the judicial sphere.

¹⁵⁶ See PHYLLIS CHESLER, *MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY* 166 (1987).

¹⁵⁷ See Slaughter, *supra* note 151, at 98.

¹⁵⁸ See Purkiss, *supra* note 23, at 61 (noting Eappen’s failure to “sink into properly maternal postures of responsibility and regret” because she was “bent on destroying [Woodward]”).

¹⁵⁹ *Id.*

¹⁶⁰ CHESLER, *supra* note 156, at 207 (a woman’s “goodness” and her right to male protection have been based on her ability to take care of others, both emotionally and economically, under the most adverse conditions).

¹⁶¹ See Sanger, *supra* note 148.

III. JUDICIAL STANDARDS OF CHILD KILLING AND THE LESSER BURDEN ON NON-MOTHERS

A. Evaluating Woodward's State of Mind: The "Frustration Excuse"

Although the judge's power to discard the jury's evaluation of the medical evidence¹⁶² may be the most remarkable feature of Rule 25(b)(2),¹⁶³ more troubling in terms of gender theory is Judge Zobel's recharacterization of Woodward's state of mind as inconsistent with third prong malice despite the jury's determination that her state of mind met this standard. Due to the judge's refusal to submit a manslaughter charge to the jury under the All-or-Nothing Doctrine, the jury was not permitted to consider the option that Woodward killed Matthew without malice. But let us examine what this means in practical terms.

Had the jury been allowed to consider manslaughter and credited the prosecution theory that Matthew died of shaken baby syndrome plus a battering against a hard object, finding that she did so without malice would mean either 1) that she committed these acts unintentionally (that is, an accidental shaking and dropping), or 2) that she committed the acts intentionally but a *reasonable person* would not have known that they could lead to Matthew's death, that is, the death of a healthy eight-month-old. Now consider the manslaughter option in conjunction with the defense theory: same as above, yet unbeknownst to Woodward, Matthew was an exceptionally fragile child. Phrased in this manner, the second scenario posed above works with the defense theory, as the judge found: a reasonable person would not have known that gentle roughness would lead to Matthew's death if she did not know he was already suffering from a severe brain injury. Accordingly, the judge proffered the following hypothesis for the situation leading to Matthew's death:

I believe that the circumstances in which Defendant acted were characterized by confusion, inexperience, frustration, immaturity and some anger, but not malice (in the legal sense) supporting a conviction for second degree murder. Frustrated by her inability to quiet the crying child, she was "a little rough with him," under

¹⁶² See *supra* notes 97-108 and accompanying text.

¹⁶³ See Tymann, *supra* note 97, at 141-43.

circumstances where another, perhaps wiser, person would have sought to restrain the physical impulse.¹⁶⁴

Two portions of this analysis appear questionable. First, if a “wiser” person would not have acted in the manner that Woodward did, does this imply that a reasonable person would have been aware of the danger? If so, then her conduct was sufficient to support malice “in the legal sense.” One might argue that that the judge’s determination that Woodward’s “physical impulse” was not the wisest course does not necessarily mean that he also found her conduct to have created a “plain and strong likelihood of death,” as required by Massachusetts homicide law.¹⁶⁵ Yet it nonetheless suggests that a reasonable person would have refrained from such rough treatment of an infant, and Woodward, therefore, did not act reasonably. Judge Zobel himself states that “[t]he victim’s hidden physical weakness does not exonerate the perpetrator.”¹⁶⁶

Second, the judge takes no notice of the fact that, in cases of child homicide where the defendant is the child’s own mother, the “frustration excuse” has been unavailing.¹⁶⁷ This factor, of course, should not dictate a harsher punishment in Woodward’s case. Yet it begs the question: where a jury was convinced of a violent act, and the judge was convinced of a lesser, but still violent act, why did the judge permit Woodward’s frustration to negate her choice of conduct while mothers in similar circumstances must face the consequences of their own poor choices?

B. Distinguishing Defenses for Mothers and Non-Mothers

Equal application of the law dictates that, for two defendants prosecuted for the same crime, the same test for culpability should be applied regardless of the relationship of the defendant to the child victim. Yet in the prosecution of mothers accused of infanticide or filicide¹⁶⁸ as

¹⁶⁴ *Commonwealth v. Woodward*, 7 Mass. L. Rptr. 449, 1997 WL 694119, at *6 (Super. Ct. 1997), *aff’d*, 694 N.E.2d 1277 (Mass. 1998) (quoting Louise Woodward on direct examination).

¹⁶⁵ See *Skinner*, *supra* note 37, § 2.2.1.

¹⁶⁶ *Woodward*, 1997 WL 694119, at *7.

¹⁶⁷ See *infra* Part III.B.

¹⁶⁸ *Black’s Law Dictionary* defines infanticide, or neonaticide, as the killing of a newborn, usually by a parent, while filicide refers generally to the murder of a child by his parent. BLACK’S LAW DICTIONARY 661, 793 (8th ed. 2004). Others, however, have used the term “infanticide” more broadly to refer to the killing of a young child. See Rapoport, *supra*

compared with non-mothers accused of killing children in their care, a distinction emerges: biological defenses related to childbearing may, and should, mitigate the verdicts and sentences given to infanticidal mothers.¹⁶⁹ With childbearing as the key factor, no such mitigation is appropriately available to non-mothers such as Woodward. Nonetheless, the outcome in *Woodward* implies that these defenses may be available to non-mothers like Louise Woodward, even though she lacked the biological justification and failed to present an affirmative defense. By ignoring the distinction between Woodward and infanticidal defendants with biological mental disorders resulting from childbirth, Judge Zobel denied the legitimacy of Woodward's decisions.

Although highly-publicized trials such as those of Susan Smith¹⁷⁰ and Andrea Yates¹⁷¹ drew significant public attention to the issue of filicidal moms, both cases demonstrate a strong factual dissimilarity from *Woodward*: Smith and Yates *intended* to kill their children.¹⁷² As discussed above, even under the jury's determination, the third prong malice standard left unclear whether Woodward knew that her conduct could kill Matthew. Furthermore, Yates was suffering from postpartum psychosis¹⁷³ and Smith's defense team argued that she was suicidal, although in Smith's case the jury disagreed.¹⁷⁴ This disparity highlights a defense that is appropriately

note 32, at 536 (defining infanticide as the murder of a child under the age of five). For the sake of clarity, this Article adopts the definitions set forth in *INFANTICIDE: PSYCHOSOCIAL AND LEGAL PERSPECTIVES ON MOTHERS WHO KILL*. In this text, "filicide," most broadly, means the killing of a child under age five, "infanticide," more narrowly, is defined as murder of a child under the age of one, and "neonaticide," the narrowest subcategory, refers to the killing of a child by a parent in the first twenty-four hours of life. Michelle Oberman, *A Brief History of Infanticide and the Law*, in *INFANTICIDE: PSYCHOSOCIAL AND LEGAL PERSPECTIVES ON MOTHERS WHO KILL* 3, 4, 12 (Margaret G. Spinelli ed., 2003) [hereinafter *MOTHERS WHO KILL*]; Margaret G. Spinelli, *Introduction* to *MOTHERS WHO KILL*, at xv, xx.

¹⁶⁹ See *infra* notes 186-92 and accompanying text.

¹⁷⁰ *State v. Smith*, Nos. 94-GS-44-906, 94-GS-44-907, 1995 WL 467562, at *1 (S.C. App. 10, 1995) (regarding an evidentiary issue).

¹⁷¹ *Yates v. State*, 171 S.W.3d 215 (Tex. Ct. App. 2005).

¹⁷² Perlin, *supra* note 140, at 20-22.

¹⁷³ Cheryl L. Meyer & Margaret G. Spinelli, *Medical and Legal Dilemmas of Postpartum Psychiatric Disorders*, in *MOTHERS WHO KILL*, *supra* note 168, at 167, 174-77. For additional discussion of Andrea Yates' mental status, see Phillip J. Resnick, *The Andrea Yates Case: Insanity on Trial*, 55 CLEV. ST. L. REV. 47 (2007).

¹⁷⁴ Perlin, *supra* note 140.

available to infanticidal mothers (although often unsuccessful) yet not appropriately transferred to non-mothers: insanity due to postpartum depression.

Although Abigail Wong notes that most cases of filicide are *not* the result of mental illness, she also importantly notes that the American “legal system treats filicidal mothers as regular murderers,” permitting them few mitigation defenses and holding a generally skeptical view towards postpartum depression as a cognizable mental illness.¹⁷⁵ Verdicts and sentences in cases of maternal infanticide have spanned the spectrum.¹⁷⁶ Michael Perlin suggests that this inconsistency may be the result of two ideas at work: the higher verdicts reflect a tendency to be “especially punitive towards [infanticidal mothers] because they have violently violated our precepts of motherhood,”¹⁷⁷ while, at the same time, the lesser verdicts—usually due to insanity pleas—reflect “our desire to maintain an inviolate image of ‘mother love.’”¹⁷⁸

As in *Woodward*, cases of infanticide where the mother is charged often turn on the issue of cause of death. Especially where the victim is a newborn, medical evidence may not unequivocally show that the infant’s death was a homicide as opposed to a stillbirth,¹⁷⁹ death by SIDS,¹⁸⁰ or other natural causes.¹⁸¹ Unlike in *Woodward*, however, guilty verdicts in those cases are generally affirmed¹⁸² as long as some evidence independent of a

¹⁷⁵ See Wong, *supra* note 146, at 574.

¹⁷⁶ *Id.* at 538.

¹⁷⁷ See Perlin, *supra* note 140, at 6.

¹⁷⁸ *Id.*

¹⁷⁹ See, e.g., *Harless v. Commonwealth*, No. 2003-SC-0883-MR, 2006 WL 435425 (Ky. Feb. 23, 2006) (circumstantial evidence that the infant was born alive was sufficient to uphold the defendant’s conviction and life sentence for the murder of her newborn).

¹⁸⁰ Sudden Infant Death Syndrome, also known as SIDS, is responsible for the death of approximately one in one thousand children under the age of one each year. *Buchanan v. State*, 69 P.3d 694, 697-98 (Nev. 2003) (testimony of Dr. Vernon McCarty and Dr. Ellen Clark).

¹⁸¹ See, e.g., *Berry v. State*, 233 S.W.3d 847, 854 (Tex. Crim. App. 2007) (evidence was sufficient to support a conviction for capital murder where experts disagreed as to whether death had resulted from homicide or natural causes).

¹⁸² See, e.g., *id.*; *Harless*, 2006 WL 435425, at *5; *Commonwealth v. Dupre*, 866 A.2d 1089 (Pa. Super. Ct. 2005) (affirming conviction for murder, aggravated assault, simple assault, endangering the welfare of a child, concealing the death of a child, criminal conspiracy to conceal the death of a child, abuse of a corpse, and criminal conspiracy to

confession has supported the state's theory.¹⁸³ Yet, where the defendant mother's state of mind is at issue, courts have been more hesitant to ascribe to her the requisite intent.¹⁸⁴

At least one court has held that a parent-child relationship between the defendant and the victim fulfills the malice requirement necessary to support a higher criminal charge.¹⁸⁵ By contrast, the English legal system

hinder apprehension or prosecution, where the defendant admitted to giving birth in a bathtub and allowing the baby to drown); *Buchanan*, 69 P.3d 694 (affirming the defendant's conviction of the first degree murder of two of her children despite the disagreement of experts regarding the cause of the children's death). The defendant in *Buchanan* was also charged with first degree murder in the death of a third child but was acquitted on that count. *Id.* at 705. For the guilty verdicts, she was sentenced to two consecutive terms of life in prison with no possibility of parole. *Id.*

¹⁸³ The *corpus delicti* rule demands that the state present "independent evidence which shows both (a) proof of injury, death or loss, according to the nature of the crime; and (b) proof of criminal means or agency as to the cause of the injury, death or loss." *Bailey v. State*, 925 A.2d 503, at *3 (Del. Apr. 9, 2007) (unpublished table decision). The rule functions to assure that a "crime" has been committed "by somebody." *Id.* In *Bailey*, external evidence corroborating the defendant's statements that she left the newborn at the doorstep of its father's house, in freezing weather, where the newborn's body was never found, was sufficient to establish the *corpus delicti* of first degree murder by abuse or neglect. *See also State v. Nieves*, 87 P.3d 851 (Ariz. Ct. App. 2004) (reversing the defendant's conviction and life sentence for the first degree premeditated murder of her ten-month-old where the state failed to establish *corpus delicti* independent of the defendant's confession).

¹⁸⁴ *See, e.g., People v. Ehlert*, 811 N.E.2d 620 (Ill. 2004) (affirming the appellate court's reversal of the defendant's conviction for the first degree murder of her newborn because the evidence was insufficient to prove that the child's death resulted from the defendant's criminal agency); *People v. Anderson*, 91 Cal. Rptr. 2d 563 (Ct. App. 1999) (depublished) (reducing conviction from second degree murder to involuntary manslaughter where the evidence did not support a finding of malice). The defendant in *Anderson* was also convicted of felony child abuse, which the appellate court upheld, for failing to attend to another of her children in the thirty-two hours following his birth. *Id.* at 565-66.

New York courts have also rejected the opportunity to craft an exception to *People v. Molineux*, 61 N.E. 268 (1901), for infanticide cases, which would have permitted the prosecution to present evidence of unrelated infanticides allegedly committed by the defendant to corroborate the instant charge. *See People v. Winters*, 840 N.Y.S.2d 901 (County Ct. 2007) (upholding dismissal of the indictment); *see also People v. O'Dell*, No. 100-03, 2003 WL 22939465 (N.Y. County Ct. Dec. 8, 2003) (where the defendant faced three counts of infanticide, denying the prosecution's motion to introduce evidence surrounding the death of the defendant's first-born, for which she had not been charged, as unduly prejudicial).

¹⁸⁵ *See State v. Milke*, 865 P.2d 779, 786-87 (Ariz. 1993) (en banc) (parent-child relationship between the defendant and the victim can support a finding of heinousness and depravity).

maintains a separate statutory charge for infanticide, which arises from the notion that, due to hormonal irregularities from childbirth, "women are biologically irrational" for up to a year subsequent.¹⁸⁶ The British, then, have created a *per se* lesser standard of judgment for infanticide as opposed to child homicide by other caretakers.¹⁸⁷ More than twenty other nations have similar statutes.¹⁸⁸ Although one might argue that these statutes devalue the choices of mothers who are *not* suffering from postpartum-related illness, such statutes still require the jury to find that the defendant was suffering from a postpartum-related disorder.¹⁸⁹ Thus, defendant-mothers who would not, under a general homicide statute, have had an insanity or similar defense would not be able to claim the protections of an

¹⁸⁶ See Wong, *supra* note 146, at 574. Section 1 of the British Infanticide Act provides:

(1) Where a woman by any wilful 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 having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, 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.

(2) Where upon the trial of a woman for the murder of her child, being a child under the age of twelve months, the jury are of opinion that she by any wilful act or omission caused its death, but that at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then the jury may, notwithstanding that the circumstances were such that but for the provisions of this Act they might have returned a verdict of murder, return in lieu thereof a verdict of infanticide.

Infanticide Act, 1938, 1 & 2 Geo. 6, c. 36, § 1 (Eng.) (amended 1938) [hereinafter Infanticide Act].

¹⁸⁷ See Judith Macfarlane, *Criminal Defense in Cases of Infanticide and Neonaticide*, in *MOTHERS WHO KILL*, *supra* note 168, at 133, 137 (noting that "no woman found guilty of infanticide has been incarcerated in England for over 50 years").

¹⁸⁸ Oberman, *supra* note 168, at 9. These nations include Austria, Canada, Colombia, Finland, Greece, India, Italy, Korea, New Zealand, New South Wales, and the Philippines. Macfarlane, *supra* note 187, at 137.

¹⁸⁹ See Infanticide Act, *supra* note 186; see also Oberman, *supra* note 168, at 9.

infanticide statute.¹⁹⁰ Importantly, infanticide statutes prevent defendant-mothers from being subjected to the higher standard of judgment that might be applied either due to a general tendency to be especially harsh toward those mothers who abrogate their maternal role,¹⁹¹ or, as in certain United States jurisdictions, due to specific legal presumptions of malice applied where the defendant is a parent.¹⁹²

It might be argued that infanticide statutes are discriminatory toward non-mother defendants. Yet, since postpartum mental illnesses are biological disorders that can only exist in mothers,¹⁹³ tailoring legislation to that end simply enables women who would present postpartum-related defenses to do so without confronting the twin hurdles of *Frye*¹⁹⁴ and *Daubert*.¹⁹⁵ Furthermore, as research has demonstrated that the thought content of a woman suffering from postpartum illness most often relates to her own child or children,¹⁹⁶ it is appropriate to limit this legislation to apply only to mothers who kill their own children.¹⁹⁷

In the United States, mothers who kill their children as a result of postpartum mental disorders are generally charged under state homicide

¹⁹⁰ But see Oberman, *supra* note 168, at 9 (noting that postpartum mental disturbance is "relatively easy to demonstrate" under the Infanticide Act).

¹⁹¹ See *supra* Part II.

¹⁹² See *State v. Milke*, 865 P.2d 779, 786-87 (Ariz. 1993) (en banc).

¹⁹³ Deborah Sichel, *Neurohormonal Aspects of Postpartum Depression and Psychosis*, in *MOTHERS WHO KILL*, *supra* note 168, at 61-63 (treatments and preventive strategies indicate "that a distinct neurobiology is associated with [postpartum] disorders"); Katherine L. Wisner et al., *Postpartum Disorders: Phenomenology, Treatment Approaches, and Relationship to Infanticide*, in *MOTHERS WHO KILL*, *supra* note 168, at 35, 45-47 (discussing abnormal hormone levels in women suffering from postpartum depression and psychosis).

¹⁹⁴ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

¹⁹⁵ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); see also Macfarlane, *supra* note 187, at 133, 157-60 (discussing the *Frye* and *Daubert* tests); Meyer & Spinelli, *supra* note 173, at 180-81 (advocating the recognition of postpartum syndromes in United States courts).

¹⁹⁶ Wisner et al., *supra* note 193, at 42 (referencing studies).

¹⁹⁷ See *State v. Young*, No. 9904019648, 2003 WL 1847262, at *2 (Del. Super. Ct. Apr. 9, 2003) (rejecting the use of a postpartum psychosis defense in a non-infanticide case).

statutes.¹⁹⁸ In these cases, evidence of an involuntary act, diminished capacity, or insanity can be presented to negate the *mens rea* element of the relevant statute.¹⁹⁹ Each of these defenses requires a showing that a “mental disease, disability, or defect” affected the defendant’s state of mind in a particular way at the time of crime.²⁰⁰

Louise Woodward was not a mother suffering from postpartum illness; she did not claim to suffer from any “mental disease, disability, or defect,” and thus she did not present an affirmative defense on that basis. Rather, she claimed complete innocence on the grounds of *actus reus* and identity.²⁰¹ In the memorandum and order reducing the verdict and vacating the sentence, Judge Zobel found that Woodward acted out of “confusion.”²⁰² Mere “confusion,” where it does not result from a “mental disease, disability, or defect,” is not sufficient grounds for an affirmative defense.²⁰³ Nonetheless, by noting Woodward’s “confusion,” Judge Zobel suggested that “confusion” demonstrated by a young female defendant, in tandem with other factors (namely “fright” and “bad judgment”),²⁰⁴ is adequate to comprise an affirmative defense. At the very least, he implied that confusion cannot coexist with malice,²⁰⁵ notwithstanding the fact that

¹⁹⁸ Macfarlane, *supra* note 187, at 137-38.

¹⁹⁹ *Id.* at 142 (discussing the differences between these defenses).

²⁰⁰ The insanity defense, under the *M’Naghten* test, requires the defendant to prove that she did “not know right from wrong” or “fail[ed] to appreciate the nature and quality of her actions.” *Id.* The involuntary act defense requires the defendant to prove that her conduct “was not a product of her deliberate effort.” *Id.* And to defend by diminished capacity, the defendant must show that “she was incapable of forming the intent . . . required by the [relevant] statute.” *Id.*

²⁰¹ D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281, 1311 n.152 (2004); Trial, Week 3, *supra* note 22.

²⁰² Commonwealth v. Woodward, 7 Mass. L. Rptr. 449, 1997 WL 694119, at *6 (Super. Ct. 1997), *aff’d*, 694 N.E.2d 1277 (Mass. 1998).

²⁰³ Macfarlane, *supra* note 187, at 142.

²⁰⁴ Woodward, 1997 WL 694119, at *6.

²⁰⁵ *Id.* (“I view the evidence as disclosing confusion, fright, and bad judgment, rather than rage or malice . . .”).

many courts, upholding the convictions of infanticidal mothers for murder, have implicitly held otherwise.²⁰⁶

In his reduction of the verdict to involuntary manslaughter, Judge Zobel emphasized Woodward's immaturity as a factor weighing in favor of reduction.²⁰⁷ Age and immaturity have also been at issue in teenage neonaticide cases.²⁰⁸ As in maternal infanticide cases in general, verdicts and sentences for teenage neonaticide offenders have been mixed.²⁰⁹ In analyzing these teens, experts have identified neonaticide syndrome, "a mental state of pathological denial in which [the teens] truly believe they are not pregnant."²¹⁰ Although some may characterize neonaticidal teens' actions in concealing the pregnancy and birth and disposing of the baby as "intentional," it may be argued that their mental illness, in addition to their youth and immaturity, negates the behavior.²¹¹ Due to a lack of consensus in the medical community²¹² as well as the strict standards for admission of

²⁰⁶ See, e.g., *Bailey v. State*, No. 7, 2006, 2007 WL 1041748, at *5 (Del. Apr. 9, 2007) (upholding the conviction of first degree murder by abuse or neglect where the defendant left her newborn on a doorstep in freezing weather because she "thought it was the safest place [she] could take [him]").

²⁰⁷ *Woodward*, 1997 WL 694119, at *6.

²⁰⁸ Beth E. Bookwalter, *Throwing the Bathwater Out with the Baby: Wrongful Exclusion of Expert Testimony on Neonaticide Syndrome*, 78 B.U. L. REV. 1185, 1193-97 (1998); Christine A. Fazio & Jennifer L. Comito, *Rethinking the Tough Sentencing of Teenage Neonaticide Offenders in the United States*, 67 FORDHAM L. REV. 3109, 3133-36 (1999).

²⁰⁹ Bookwalter, *supra* note 208, at 1194-97 (comparing *State v. Hopfer*, 679 N.E.2d 321 (Ohio Ct. App. 1996) (defendant sentenced to fifteen years to life imprisonment for murder), *State v. Buffin*, 511 So. 2d 1255 (La. Ct. App. 1987) (defendant sentenced to two years hard labor), and *People v. Wernick*, 674 N.E.2d 322 (N.Y. 1996) (defendant sentenced to one to four years in state prison and released on bail during the pendency of her appeal)); see also Fazio & Comito, *supra* note 208, at 3142-46; Lucy Jane Lang, *To Love the Babe That Milks Me: Infanticide and Reconceiving the Mother*, 14 COLUM. J. GENDER & L. 114, 135 (2005); Oberman, *supra* note 168, at 14.

²¹⁰ Bookwalter, *supra* note 208, at 1190-91.

²¹¹ Fazio & Comito, *supra* note 208, at 3109; see generally Bookwalter, *supra* note 208, at 1190-93; but see Laura J. Miller, *Denial of Pregnancy*, in MOTHERS WHO KILL, *supra* NOTE 168, AT 81, 82 (explaining that denial can, but does not always, occur as the result of, or in connection with, a psychiatric illness).

²¹² Macfarlane, *supra* note 187, at 163; see also Margaret G. Spinelli, *Neonaticide: A Systematic Investigation of 17 Cases*, in MOTHERS WHO KILL, *supra* note 168, at 105, 117 (noting that "neonaticide remains a subject of both psychiatric and judicial debate" and calling for further study).

syndrome evidence in United States courts,²¹³ however, no such court has accepted neonaticide syndrome as a basis for an affirmative defense.²¹⁴ Thus, young neonaticidal mothers who would be prosecuted under the lesser charge of infanticide in other Western countries cannot even bring an affirmative psychiatric defense to murder based on this syndrome in the United States.²¹⁵

Like infanticidal mothers who bring psychiatric defenses generally, these young mothers may differ from Woodward on the basis of biology. In addition, neonaticidal teens can be distinguished from Woodward on the issue of choice. Although Woodward was only nineteen, she was certainly old enough to be a mother herself, and she chose to take on a childcare position.²¹⁶ By contrast, teenage girls who commit neonaticide have most likely become pregnant by accident or through poor judgment and want to rid themselves of the nurturing role before taking it on.²¹⁷ In *Woodward*, the

²¹³ Macfarlane, *supra* note 187, at 161-64 (noting the “rigidity with which the legal system views mental illness” (quoting Evelyn Attia et al., *Postpartum Psychoses*, in *POSTPARTUM MOOD DISORDERS* 99, 110 (Laura J. Miller ed., 1999)). For the prevailing standards of admission of scientific evidence in United States courts, see *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993) (under the Federal Rules of Evidence, scientific evidence need not be “generally accept[ed]” in order to be admissible, but the trial judge should act as gatekeeper to “ensur[e] that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.”). The Court in *Daubert* noted that the Federal Rules of Evidence had superseded *Frye v. United States*, 293 F. 1013, 1013 (D.C. Cir. 1923) (“[T]he thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.”).

²¹⁴ See *Wernick*, 674 N.E.2d at 323-26 (rejecting expert testimony regarding neonaticide syndrome); Macfarlane, *supra* note 187, at 151-54 (discussing *Wernick*); see also *id.* at 161-64 (analyzing neonaticide syndrome under *Frye* and *Daubert* and finding the unavailability of an affirmative defense for mothers who suffer from mental illness at the time they commit the crime “patently unjust”).

²¹⁵ Some have argued that the various states should adopt infanticide statutes similar to England’s. See, e.g., Fazio & Comito, *supra* note 208, at 3148-68; Lang, *supra* note 209, at 140-41.

²¹⁶ Woodward was placed with the Eappens by EF Au Pair, a professional agency. FERGUSON, *supra* note 7, at 293; Daly, *supra* note 24.

²¹⁷ See Fazio & Comito, *supra* note 208, at 3133-36 (discussing the psychology of neonaticidal teens); see also Lang, *supra* note 209, at 116 (“[M]otherhood may be a form of unchosen suffering imposed on women by various cultural and legal constraints.”). Many teens may not see abortion as an option or may not functionally have that option due to state parental consent laws. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (upholding the constitutionality of Pennsylvania’s parental consent requirement for minors seeking abortions under the “undue burden” standard). States with parental consent provisions include Alabama, Arizona, Arkansas, Georgia (parental notice

requirement only), Idaho, Indiana, Kentucky, Louisiana, Maine, Maryland (the last state permitting physician discretion for minors who demonstrate maturity, minors who do not live with their parents, best interests of the minor, and potential physical or emotional harm to the minor), Massachusetts, Missouri, Montana (parental notice requirement only), North Carolina, North Dakota, Ohio, (parental notice or consent requirement) Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota (parental notice requirement only), Tennessee, Texas, Utah, Virginia, West Virginia (parental notice requirement only), Wisconsin, and Wyoming. *See, respectively*, ALA. CODE § 26-21-3 (1992 & Supp. 2006); ARIZ. REV. STAT. ANN. § 36-2152 (2003 & Supp. 2006); ARK. CODE. ANN. § 20-16-801 (2005 & Supp. 2007); GA. CODE ANN. § 15-11-112 (2005 & Supp. 2007); IDAHO CODE ANN. § 18-609A (2004 & Supp. 2007); IND. CODE ANN. § 16-34-2-4 (LexisNexis 1993 & Supp. 2006); KY. REV. STAT. ANN. § 311.732 (LexisNexis 2007); LA. REV. STAT. ANN. § 40:1299.35.5 (2001); ME. REV. STAT. ANN. tit. 22, § 1597-A (1964 & Supp. 2006); MD. CODE ANN., HEALTH-GEN. § 20-103 (LexisNexis 2008); MASS. ANN. LAWS ch. 112, § 12S (LexisNexis Supp. 2007), MO. ANN. STAT. § 188.028 (West 2004 & Supp. 2007); MONT. CODE ANN. § 50-20-204 (2007); N.C. GEN. STAT. § 90-21.7 (2005); N.D. CENT. CODE § 14-02.1-03.1 (2004); OHIO REV. CODE ANN. § 2919.121 (LexisNexis 2009); OKLA. ST. ANN. 63 § 1-740.2 (2008); 18 PA. STAT. ANN. § 3206 (West 2000 & Supp. 2007); R.I. GEN. LAWS § 23-4.7-6 (2009); S.C. CODE ANN. § 44-41-31 (2002 & Supp. 2006); S.D. CODIFIED LAWS § 34-23A-7 (2004 & Supp. 2007); TENN. CODE ANN. § 37-10-303 (2005 & Supp. 2006); TEX. OCC. CODE ANN. § 164.052(a)(19) (Vernon Supp. 2007); UTAH CODE ANN. § 76-7-304.5 (Supp. 2007); VA. CODE. ANN. § 16.1-241 (2009); W. VA. CODE, § 16-2F-3 (2008); WIS. STAT. § 48.375 (2008); WYO. STAT. ANN. § 35-6-118 (2008). In those states requiring parental consent, an "adequate judicial bypass procedure" must be available. *Casey*, 505 U.S. at 899; *see also* 1 AM. JUR. 2D *Abortion and Birth Control* § 28 (2007).

Other teens may not realize that they are pregnant or seek abortion services until they are too far along to terminate the pregnancy legally, as some states prohibit abortion after a certain gestational age except where continuation of the pregnancy endangers the mother's life or health. *See, e.g.*, GA. CODE ANN. § 16-12-141 (2007); IND. CODE ANN. § 16-34-2-1 (LexisNexis 1993 & Supp. 2006); IOWA CODE ANN. § 707.7 (West 2003); 18 PA. CONS. STAT. ANN. § 3211 (West 2000 & Supp. 2007). Pregnant teens may also have difficulty finding an abortion provider within the requisite time frame due to state laws permitting refusal of services due to religious or moral convictions, or, in certain states, without reason at all. *See, e.g.*, IOWA CODE ANN. § 146.1 (West 2005); MICH. COMP. LAWS ANN. § 333.20181 (West 2001 & Supp. 2007); S.C. CODE ANN. § 44-41-20 (2002 & Supp. 2006); S.D. CODIFIED LAWS § 34-23A-5 (2004 & Supp. 2007); TENN. CODE ANN. § 39-15-201 (2006); TEX. OCC. CODE ANN. § 164.052(a)(18) (Vernon Supp. 2007); VA. CODE ANN. § 18.2-74 (2004).

An eleventh-hour administrative rule promulgated by the Bush administration may make it even more difficult for pregnant teenagers to access abortion services. *See* Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 45 C.F.R. § 88 (2008). The rule provides, *inter alia*, that various health-related entities may not take negative employment action against an individual for his refusal "to perform or assist in the performance of . . . a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions." *Id.* The Obama administration has published notice of

judge took the position that Woodward was a child herself, incapable of making mature decisions. He found her to be “inexperience[d],”²¹⁸ notwithstanding that she had received child care training from a professional agency²¹⁹ and that her position with the Eappens was, in fact, not her first experience with child care.²²⁰ His findings therefore supplemented the blame Eappen already bore by implying that she had hired a child to care for one.²²¹ Thus his memorandum and order indicated not only that Eappen may be the true killer, but also that she was criminally negligent.

The judge further suggested that Woodward’s “frustration” and “anger” due to her “inability to quiet the crying child” resulted in her roughness with Matthew.²²² Most child killings are the result not of the intent to kill but of abuse where “the violence inflicted upon them far exceeds any safe or measured expression of anger, frustration, or

its intent to rescind the rule. Rescission of the Regulation Entitled “Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law,” 74 Fed. Reg. 10207-01 (proposed Mar. 10, 2009) (to be codified at 45 C.F.R. § 88).

²¹⁸ *Commonwealth v. Woodward*, 7 Mass. L. Rptr. 449, 1997 WL 694119, at *6 (Super. Ct. 1997), *aff’d*, 694 N.E.2d 1277 (Mass. 1998).

²¹⁹ The United States Information Agency (USIA) places certain regulations on the au pair industry, including a requirement that all au pairs be trained in child safety. For current USIA regulations, see 22 C.F.R. § 62.31 (2008); *but see* Brian MacQuarrie, *Au Pair Agency Comes Under Scrutiny, Company Battles Assertions It Misled Au Pairs, Gave Poor Training*, BOSTON GLOBE, Nov. 21, 1997, at B1 (observing that the safety instruction provided by EF Au Pair around the time of the *Woodward* trial had been criticized as inadequate and that, according to the family with which Woodward was placed by the agency prior to her placement with the Eappens, when she first arrived at their home she “did not know how to change a diaper”).

²²⁰ See Trial, Week 3, *supra* note 22 (citing testimony of Louise Woodward).

²²¹ See FERGUSON, *supra* note 7 (finding that suggestion already implicit in criticism of the Eappens). Interestingly, no explicit suggestions were made in the press that Eappen herself should have trained Woodward. Rather, media sources suggested that Eappen had failed to properly screen her. See Burby, *supra* note 123. Apparently in response to *Woodward*, a bill was introduced in the Massachusetts legislature shortly after the trial which laid down regulations for the au pair industry, including training and certification requirements for au pairs. See Frank Phillips, *Au Pair Bill Advances, But Sponsor Scoffs*, BOSTON GLOBE, June 23, 1998, at B3. The bill failed in the Senate, but as of January 2009, a similar bill was under consideration in the House. See H.B. 167, 186th Gen. Ct., Reg. Sess. (Mass. 2009).

²²² *Woodward*, 1997 WL 694119, at *6.

discipline.”²²³ In similar cases of child homicide where the defendant is a caregiver, involuntary manslaughter verdicts are not unusual, not because the intent to commit the act was lacking, but rather because the fact-finder cannot believe “the person acted with such violence that they knew or should have known their conduct would seriously injure the child.”²²⁴ As the amount of force necessary to kill a child by shaken baby syndrome was undisputed by the parties, it would have been impossible for the jury to accept the prosecution’s diagnosis *and*, had they been so instructed, find Woodward guilty of only manslaughter. By Massachusetts’ standards, such a finding would have amounted to jury nullification—a rejection of the reasonable person standard of third prong malice in favor of a subjective standard. The judge was thus forced to accept the defense’s medical theories in order to reduce the verdict to manslaughter. As a result, Woodward’s choice to shake Matthew, if she did, was invalidated by the judge’s refusal to apply the reasonable person standard.

IV. MOVING FORWARD: FEMINIST STORYTELLING AND GIVING CHOICE ITS DUE

In an interview in *TIME Magazine*, Deborah Eappen recounted her experience as a working mother of a murdered child. “I just feel like, how did Louise become the hero and I become the villain? What is the real issue here? It is child abuse and child murder. I strive in a lot of different directions in life, and now suddenly that striving to be good seems to be bad.”²²⁵

The preceding analysis demonstrates how the choices made by both Louise Woodward and Deborah Eappen—the former to become an au pair, and perhaps to commit a violent act, and the latter to become a mother and a working mother—were negated in a high-profile trial, and rendered worthless when challenged by pervasive social understandings and legal jockeying. An Irish newspaper wrote, “If O.J. Simpson put race in the U.S. on trial, then 19-year-old Louise Woodward put American motherhood on the stand.”²²⁶

²²³ Rapoport, *supra* note 32, at 537.

²²⁴ Charles A. Phipps, *Responding to Child Homicide: A Statutory Proposal*, 89 J. CRIM. L. & CRIMINOLOGY 535, 562 (1999).

²²⁵ Deborah Eappen & Terry McCarthy, *One Mother’s Story: “How Did Louise Become the Hero and I Become the Villain?”* TIME, Nov. 24, 1997, at 57.

²²⁶ *Whose Hand*, *supra* note 18.

Perhaps the next question, then, is: who won? Woodward walked out of the courtroom a free woman, but she remains a convicted child-killer. Subsequent to the criminal trial, the Eappens won damages in a wrongful death civil action against Woodward, who defaulted,²²⁷ but their child is dead.²²⁸ One newspaper wrote that “[t]he biggest loser . . . has been the American system of justice,”²²⁹ since, after all, neither party was happy with the outcome and “[t]he public . . . may never know who is to blame.”²³⁰ But what is to become of notions of motherhood after the storm of public debate? Will the same questions, the same suspect condemnations, be repeated if another *au pair* kills a child while the mother works?

²²⁷ *Au Pair Must Pay Damages*, HOUSTON CHRONICLE, Nov. 20, 1998, at A30. The parties subsequently settled, agreeing that any profits that Woodward received as a result of her notoriety due to Matthew Eappen's death would be donated to children's charity UNICEF, which was chosen by Woodward; the Eappens' goal was to ensure that Woodward did not personally profit from her role in the tragedy. See Patricia Nealon, *Eappens, Woodward Settle Suit, Any Earnings from Sale of Au Pair's Story Go to Charity*, BOSTON GLOBE, Jan. 30, 1999, at A1.

²²⁸ At least one physician who reviewed the medical evidence subsequent to the trial substantiated the cause of death as SBS in conjunction with a battering, as the prosecution had claimed. Robert Reece, *Medical Evidence in the Context of Child Abuse Litigation*, 36 NEW ENG. L. REV. 607, 609 (2002) (“I am here to tell you that [Louise Woodward] did it.”). However, some recent literature has debated the very existence of SBS. See Matthew D. Ramsey, *A Nuts and Bolts Approach to Litigating the Shaken Baby or Shaken Impact Syndrome*, 188 MIL. L. REV. 1, 30 (2006) (suggesting that litigators should educate themselves on the medical controversy surrounding SBS in light of commentary by medical professionals stating that “we need to reconsider the diagnostic criteria, if not the existence, of shaken baby syndrome”) (quoting J.F. Geddes & John Plunkett, *The Evidence Base for Shaken Baby Syndrome*, 328 BRIT. MED. J. 719 (2004)); Genie Lyons, Comment & Note, *Shaken Baby Syndrome: A Questionable Scientific Syndrome and a Dangerous Legal Concept*, 2003 UTAH L. REV. 1109 (2003). One of the key prosecution witnesses at trial, Dr. Patrick Barnes, now regularly testifies for defendants against SBS diagnoses. Mary Carmichael, *The Agonizing, Complicated, Lingering Questions of Shaken Baby Syndrome*, BOSTON GLOBE, Feb. 11, 2007, at 22 (noting that much is still unknown about SBS, even ten years after Matthew Eappen's death).

²²⁹ Editorial, *American Justice on Trial: The Recent Case of the British Au Pair Who Was Convicted of Killing a Baby Can Only Erode Public Confidence in the U.S. Judicial System*, ORLANDO SENTINEL, Nov. 12, 1997, at A16.

²³⁰ *Id.*

A. Feminist Storytelling as Theoretical Solution

Storytelling as a distinct movement first came into mainstream legal discourse in the late 1980's,²³¹ both in response to the law's tendency toward abstraction and to correct social and cultural misconceptions arising from the law's failure to acknowledge the views of subordinated, or outsider, groups.²³² Espoused vigorously by feminist scholars²³³ and critical race theorists,²³⁴ storytelling offers an opportunity to challenge the social and legal status quo through the presentation of outsider narratives.²³⁵

The image of "motherhood" presented during the *Woodward* trial demonstrated, in narrative terms, the dominant perspective on motherhood. This narrative may have been created through the storytelling of the majority²³⁶ or merely through the propagation of myth and historical pattern.²³⁷ Nonetheless, once in place, the dominant perspective takes on

²³¹ See, e.g., Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1988) [hereinafter Delgado, *Storytelling for Oppositionists*]; Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989). For an early treatise on the value of stories generally, see ROBERT COLES, *THE CALL OF STORIES: TEACHING AND THE MORAL IMAGINATION* (1989).

²³² Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1023 (1991); Delgado, *Storytelling for Oppositionists*, *supra* note 231, at 2437-38.

²³³ See, e.g., Abrams, *supra* note 232; Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 NOVA L. REV. 355 (1989).

²³⁴ See, e.g., Delgado, *Storytelling for Oppositionists*, *supra* note 231; cf. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (advocating observation of the actual experiences of underprivileged minorities as a way to learn about the law).

²³⁵ Abrams, *supra* note 232, at 1023 ("[Some] use experience to reveal the exclusivity or rigidity of a dominant rule or perspective."); Ashe, *supra* note 233, at 376 (Feminist critique, to the extent that it seeks to expose "ambivalences," "will succeed . . . only to the degree that its own discourse departs from or ruptures through the dominant rhetoric . . ."); Delgado, *Storytelling for Oppositionists*, *supra* note 231, at 2413 ("The stories of outgroups aim to subvert [the] ingroup reality."); Scheppele, *supra* note 231, at 2077-84.

²³⁶ Richard Delgado, *On Telling Stories In School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665, 666 (1993) [hereinafter Delgado, *On Telling Stories*] ("[M]ajoritarians tell stories too. But the ones they tell—about merit, causation, blame, responsibility, and racial justice—do not seem to them like stories at all, but the truth.").

²³⁷ Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 8 (1983); see also Delgado, *Storytelling for Oppositionists*, *supra* note 231, at 2439 ("Reality is not fixed, not a given. Rather, we construct it through conversations, through our lives together.").

normative significance,²³⁸ and stories that accord with its tenets seem “not . . . like stories at all, but the truth.”²³⁹

Deborah Eappen, as a working mother, was an “outsider” in relation to the dominant narrative of motherhood. Eappen’s failure to fit within the confines of that common understanding effectively silenced her and negated her ability to tell her own story.²⁴⁰

Storytelling challenges the dominant perspective through its presentation of counterstories.²⁴¹ Counterstories consist of the experiential narratives of individual members of the outgroup,²⁴² in this case, women or mothers. According to Richard Delgado, the purpose of counterstories “is to reveal the contingency, partiality, and self-serving quality of the stories on which we have been relying to order our world.”²⁴³ By telling stories that focus on individual experience and that defy the dominant “stock” story,²⁴⁴ women can challenge the complacency of the dominant group in order to set the stage for a new, more inclusive public story.²⁴⁵

As storytelling attempts to demonstrate the lack of absolute truth in the dominant perspective,²⁴⁶ so too does its use of individual experience in

²³⁸ See Cover, *supra* note 237, at 7-9; Delgado, *On Telling Stories*, *supra* note 236, at 666.

²³⁹ Delgado, *On Telling Stories*, *supra* note 236, at 666.

²⁴⁰ In *Zig-Zag Stitching and the Seamless Web*, Marie Ashe denounces the silencing effect of the dominant male legal discourse on women. She states: “It has seemed to me that the major attributes of legal discourse concerning women and mothers are these: it originates in men; it defines women with certainty; it attempts to mask the operations of power; it silences other discourse. I take as given: Law that silences any discourse is without warrant.” Ashe, *supra* note 233, at 358. See also Scheppele, *supra* note 231, at 2080 (noting that “there are few things more disempowering in law than having one’s own self-believed story rejected, when rules of law . . . are applied to facts that are not one’s own, when legal judgments proceed from a description of one’s own world that one does not recognize”).

²⁴¹ Delgado, *On Telling Stories*, *supra* note 236, at 666; Matsuda, *supra* note 234, at 324-25.

²⁴² Abrams, *supra* note 232, at 975-76; Delgado, *Storytelling for Oppositionists*, *supra* note 231, at 2435-37; Scheppele, *supra* note 231, at 2075-84; see also Kathryn M. Stanchi, *Feminist Legal Writing*, 39 SAN DIEGO L. REV. 387, 428-34 (2002) (discussing the significance of first- and second-person point of view in feminist legal writing).

²⁴³ Delgado, *On Telling Stories*, *supra* note 236, at 666; see also *id.* at 670-71.

²⁴⁴ Delgado, *Storytelling for Oppositionists*, *supra* note 231, at 2416.

²⁴⁵ *Id.* at 2413-17.

²⁴⁶ See *supra* notes 234-40 and accompanying text.

that endeavor lend support to recognition of personal choice. Indeed, the focus on women's individual experience encompasses a refusal to allow women to be labeled or categorized.²⁴⁷ Within the stock story, Deborah Eappen became a symbol and so ceased to be an individual in the eyes of both society and the law. By returning to a narrative of individual female experience, feminist storytelling may permit a new understanding of women's agency to combat older, stereotyped narratives, such as that surrounding motherhood.

One might argue that consideration of personal choice by individualizing the decision-maker is impossible under the Massachusetts third prong malice standard. In a general sense this is true, as the rule sets an objective standard by requiring comparison to the conduct of a reasonable person. Under Massachusetts law, this standard applies to all defendants, mothers and non-mothers alike. No lesser charge, such as infanticide, is available to mothers suffering from postpartum depression or other mental disorders related to the biology of motherhood, and certainly no special mitigation is available under law to non-mothers. The mitigating factors considered by Judge Zobel—"confusion, inexperience, frustration, immaturity and some anger"²⁴⁸—should not have been applied to Woodward. Woodward, as compared with teenage neonaticide defendants to whom these factors may be appropriately applied, had significantly greater autonomy and training, and she had not put forth an affirmative defense. In finding that these factors weighed in favor of verdict and sentence reduction in Woodward's case, Judge Zobel failed to give appropriate weight to Woodward's own decisions. If the same factors are not relevant in neonaticide cases, then their use as mitigation in *Woodward* is even less appropriate. Thus, while the media failed to give regard to Eappen's choices, the judge's final memorandum and order negated Woodward's.

In finding that Woodward's personal characteristics at the time of the crime mandated reducing the verdict and sentence, Judge Zobel seems to have discarded the reasonable person standard in his evaluation of Woodward in favor of a more subjective standard. Therefore, it appears that Judge Zobel did in fact consider individual experience in his analysis of Woodward as a defendant. Yet, the most apparent problem with an approach that considers the personal experience of a defendant is its

²⁴⁷ Ashe, *supra* note 233, at 376 (arguing that feminists must reject abstraction as well as "simplistic and violent categorizations").

²⁴⁸ Commonwealth v. Woodward, 7 Mass. L. Rptr. 449, 1997 WL 694119, at *6 (Super. Ct. 1997), *aff'd*, 694 N.E.2d 1277 (Mass. 1998).

traditionally disparate application: in American courtrooms, mothers are often held to the highest of standards, perhaps even higher than that of the "reasonable person," while mitigating factors were used to negate this burden for Woodward, a non-mother.²⁴⁹ Even if this standard were applied equally, where would it leave the justice system? Would objective standards cease to be applicable at all? Would a separate standard be applied to women? The latter prospect would appear to be a renewal of the "reasonable woman" standard, which has been proposed and rejected in tort law,²⁵⁰ and additionally would raise equal protection concerns. Furthermore, although some feminists have celebrated "women's culture" as such,²⁵¹ arguments rooted in innate differences of gender and biology have at times backfired.²⁵² Indeed, the separate standard for mothers is one such example.

This dilemma can be reconciled through the use of a social solution in a legal framework. Regardless of whether Massachusetts or other states adopt infanticide provisions in their criminal codes, state homicide laws must be applied equally as written to mothers and non-mothers, permitting affirmative defenses based on maternal biology where appropriate. However, storytelling, and in this case feminist storytelling, can be utilized by counsel in the course of trial to explicate the parties' individual stories. These individual stories can then counteract the prevailing socio-cultural myths that encompass the seemingly normative dominant perspective and that, as such, might otherwise frustrate a fair adjudication. In this way, a mother or non-mother defendant can be evaluated from an objective and equal standard on her own merits, rather than as a representative of a group to which she may barely belong.²⁵³

²⁴⁹ See *supra* Part III.

²⁵⁰ Compare *Little Rock & Ft. S. Ry. Co. v. Tankersly*, 54 Ark. 25 (1890) (in a negligence action, the female plaintiff should be judged by the standard of a person similarly situated, such as a woman similarly dressed, and thus should be held to a higher standard of care) with *Ocheltree v. Scollon Prods. Inc.*, 335 F.3d 325, 333 (4th Cir. 2003) (the evaluation of a sexual harassment claim by a "reasonable person in [the female plaintiff]'s situation" does not necessitate viewing from a female perspective).

²⁵¹ See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

²⁵² See Joan C. Williams, *Deconstructing Gender*, in *FEMINIST JURISPRUDENCE* 41 (Leslie Friedman Goldstein ed., 1992). Radical feminists have argued along similar lines. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) ("[C]onstruing gender as a difference . . . obscures and legitimizes the way gender is imposed by force.").

²⁵³ See Christine Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751, 766 n.73 (1989) (reviewing CATHARINE A. MACKINNON, *FEMINISM*

It may be argued, according to a view conscious of feminist narrative, that in the *Woodward* case Eappen's choices were fully considered and punished accordingly: she chose to work and therefore should bear the responsibility for the consequences. However, the analysis in Part II above demonstrates that mothers are in fact held to an impossible standard: they are never "innocent" when it comes to the well-being of their children. Eappen was not only condemned as "guilty" for her failure to fit into the expected role of stay-at-home mom, she also failed to exhibit the proper emotional responses to Matthew's death and to public accusation. In order to have full effect, feminist storytelling thus must serve not only to present Eappen's individual story but also to counteract the dominant narrative that undercuts the individual narrative.

In light of the strength of the majoritarian story, Eappen likely would have faced criticism regardless of her choice to work. In this way, she was denied the agency to exonerate herself in her son's death. Had she been freed from society's stock story through explication and analysis of her counternarrative, Eappen's individual story would have been heard.

B. Effecting Legal Change

In a criminal courtroom, the legal impetus is always to distribute blame.²⁵⁴ Even if the subjective analysis offered by feminist storytelling would allow women to recapture their own voices in the social arena, a trial functions within strict procedural parameters.²⁵⁵ How, then, can feminist storytelling function as a solution to the denial of female agency within not only a social framework, but a legal one as well?

Robert Ferguson maintains that, in a trial, counsel work within the procedural boundaries of the courtroom by crafting narratives and counternarratives of the events and the key players.²⁵⁶ In the *Woodward* trial, defense counsel portrayed Louise Woodward as caring, vulnerable, and younger than her years.²⁵⁷ The prosecution, accordingly, presented a

UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987)) (arguing that "[w]hen legal categories do not match our experience as women, the categories must expand, contract or move—not us.").

²⁵⁴ See FERGUSON, *supra* note 7.

²⁵⁵ See *id.* at 11.

²⁵⁶ *Id.* at 14-15.

²⁵⁷ See *id.* at 292 (noting that the "baby-faced" Woodward was dressed in "simple" attire for the courtroom, such that she "seemed a child herself."); see also Trial, Week 4,

counternarrative that emphasized Woodward's age and autonomy.²⁵⁸ Similarly, both sides presented narratives surrounding Deborah Eappen. The defense portrayed her as the alternate object of (potential) blame,²⁵⁹ while the prosecution aimed to counteract that portrayal with its own account.²⁶⁰ Alone, these narratives may provide fodder for avoidance of the reasonable person standard by the finder of fact. Yet it seems disingenuous to suggest that jurors²⁶¹ and judges alike are not exposed to and potentially influenced by the narratives that take place outside the courtroom.²⁶² Furthermore, to the extent that narratives accord with dominant perspectives—such as those in *Woodward* that highlighted the stereotypes of good mothers and bad mothers—jurors and judges may be more likely to adopt them.²⁶³ And as these stereotypes and understandings are socially and

supra note 81 (citing the summation of defense attorney Andrew Good, which stated that Woodward was a “child lover” and a “victim of circumstance”).

²⁵⁸ See Trial, Week 4, *supra* note 81 (citing the summation of prosecutor Gerard Leone, Jr., which characterized Woodward as “irresponsible,” “frustrated,” and “an aspiring little actress”).

²⁵⁹ See *Whose Hand*, *supra* note 18 (noting that the defense asked Eappen questions about her stress level, her work/life balance and whether she was “too busy” to call home, and introduced an index card with her pager and telephone numbers as an exhibit); *but see* Trial, Week 4, *supra* note 81 (describing the summation of defense attorney Barry Scheck, who “reminded jurors that the case was not an attack on . . . the Eappens’ lifestyle as busy working parents”).

²⁶⁰ See Trial, Week 3, *supra* note 22 (direct testimony of Dr. Deborah Eappen for the prosecution, who described watching Matthew on life support).

²⁶¹ The jurors in the *Woodward* case were sequestered only during deliberations, so they may have been exposed to media coverage surrounding the case, in spite of warnings from the judge. See Ralph Ranalli, *In Massachusetts, Sequestered Juries Becoming a Thing of the Past*, BOSTON GLOBE, May 15, 2000, at B1. Following her release, Woodward herself accused the media of “tainting” the jury pool. Doreen Iuidica Vigue & Peggy Hernandez, *Woodward Gets Subdued Reception Back Home, Proclaims Innocence, Criticizes Justice System in the U.S.*, BOSTON GLOBE, June 19, 1998, at B1.

²⁶² See Scheppele, *supra* note 231, at 2082-83 (“Judges and jurors are not witnesses to the events at issue; they are witnesses to stories about the events.”).

²⁶³ Cf. *id.* at 2080 (“The resolution of any individual case in the law relies heavily on the court’s adoption of a particular story, one that makes sense, *is true to what the listeners know about the world*, and hangs together.”) (emphasis added).

culturally pervasive, they may be subconsciously ingrained in the fact-finder, perhaps even prior to trial.²⁶⁴

A practical solution to combating these normative understandings might begin with explicit acknowledgment of them, perhaps in summation. This statement may assist in counteracting the effect that prevailing social attitudes may have on the fact-finder, including the potential rendering of the participants as symbols that accord with cultural norms. Indeed, some scholars have argued that storytelling is useless without accompanying or at least embedded analysis.²⁶⁵ Of course, courts generally preclude counsel from introducing extraneous matters in closing arguments.²⁶⁶ But it is not necessary for counsel to refer to specific media coverage, or even to media coverage at all. Rather, counsel should draw the fact-finder's attention to the presence of misleading stereotypes and overly conventionalized understandings that may not match the actual situation before the court and thus should not and cannot inform the fact-finder's decision.²⁶⁷ As long as

²⁶⁴ For a discussion of judicial conceptions of women, see Regina Graycar, *Telling Tales: Legal Stories About Violence Against Women*, 8 CARDOZO STUD. L. & LITERATURE 297, 308-10 (1996). Of course, stereotypes of women apply not just within the legal system, but more generally: "[K]nowledge of what a woman is, and can do, derives as much from stereotypes, ideology, folklore, prejudice, and intractable misconceptions as it does from efforts to understand how women experience their subjectivity and agency in concrete specifiable circumstances." LORRAINE CODE, WHAT CAN SHE KNOW? FEMINIST THEORY AND THE CONSTRUCTION OF KNOWLEDGE 177 (1991).

²⁶⁵ See, e.g., Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (arguing that "[e]ffective communication requires bridging the gap between the viewpoints of speaker and listener, rather than simply presenting the speaker's views without regard to the standpoint of the listener."); Lindsey Martin-Bowen, Comment, *Words From a Teller of Tales: Can Storytelling Play an Effective Role in Feminist Jurisprudence?*, 66 U. MO.-KAN. CITY L. REV. 95, 128 (1997).

²⁶⁶ See Kenneth J. Rampino, Annotation, *Propriety and Prejudicial Effect of Prosecutor's Remarks as to Victim's Age, Family Circumstances, or the Like*, 50 A.L.R.3D 8 (2008).

²⁶⁷ Of course, this should be tactfully done. One might imagine that a jury would not react well to being accused of harboring innate prejudice.

It should be noted that defense attorney Barry Scheck, in closing, "reminded jurors that the case was not an attack on . . . the Eappens' lifestyle as busy working parents." See Trial, Week 4, *supra* note 81. However, such a "reminder" is hollow where it is offered by an attorney who has previously crafted a narrative around that supposition. See *Whose Hand*, *supra* note 18. The acknowledgment of normative understandings that this Article envisions would require presentation by the party seeking to undermine those notions. Furthermore, recognition of the socio-cultural bases for these assumptions should be made explicit as well.

counsel remains within these boundaries, the broad relevance standard for summation should permit these statements.²⁶⁸

In *Woodward*, it was not the jury but the judge who appears to have been influenced by socio-cultural notions of motherhood.²⁶⁹ Even absent Rule 25(b)(2), the power wielded by judges is enormous.²⁷⁰ As one scholar notes, within our legal system “[n]o other figure possesses this kind of control.”²⁷¹ Especially where Rule 25(b)(2) permits revision by the judge of a lawful jury verdict, explicit recognition of the social forces at work prior to this verdict will imbue the proceedings with additional transparency. Had the trial participants been informed of the dominant narrative surrounding women and motherhood, perhaps Judge Zobel would have been less likely to disregard the jury’s findings in favor of his own, given that his

²⁶⁸ See *Frank J. McGarr, Prosecution Summations*, 6 AM. JUR. TRIALS 873 § 22 (2007) (“The basic limit on the content of argument is the concept of relevance.”). Furthermore, in *United States v. LeFevre*, the court held that, although it was unprofessional conduct for the prosecutor to “intentionally to refer to or argue on the basis of facts outside the record,” the rule did not apply to “matters of common knowledge based on ordinary human experience.” 483 F.2d 477 (3d Cir. 1973). As this Article has posited that the “good mother/bad mother” standard is a matter of common understanding, acknowledgment of this fact should fall within the purview of *LeFevre*.

²⁶⁹ According to Charles Fried, it is not the judge’s role to impart his own understanding of social constructions on the trial participants. Says Fried:

What we can expect of the judge, then, are two things: knowledge of the law and a steady disposition to judge only in accordance with it What about knowledge of the world, of human nature—what about justice? These can be seductions from the proper role of the judge and what we rightly—or have a right to—expect of him. I say seductions because they are partial—dangerously, seductively partial. Knowledge of the world and of human nature are sometimes assumed and specified by the law. Its vocabulary of intent, cause and effect, for instance, depend on that knowledge, but that knowledge is relevant only as it is specified by law. If law says that [a] person’s responsibility depends only on his being a cause of an effect irrespective of his intention, then that is the only way in which knowledge may come into judging.

Charles Fried, *A Meditation on the First Principles of Judicial Ethics*, 32 HOFSTRA L. REV. 1227, 1231 (2004).

²⁷⁰ FERGUSON, *supra* note 7, at 34 (“[J]udicial power in any given moment is absolute.”); see also Fried, *supra* note 269, at 1229.

²⁷¹ FERGUSON, *supra* note 7, at 36; Fried, *supra* note 269.

memorandum and order reducing the verdict and vacating the sentence betrays a mindset in line with that narrative.²⁷²

Regardless of the narratives put forth by the parties, their attorneys, and the media, Rule 25(b)(2) imbues a judge with the power to reduce the verdict or sentence if he so chooses "in the interest of justice."²⁷³ Yet, judicial power comes with an important check: "adverse publicity and subsequent complaint."²⁷⁴ Prior acknowledgment in the courtroom of factors that could affect impartial decision-making, such as the socio-cultural norms discussed in this Article, will render a Rule 25(b)(2) opinion that converges too closely with those factors suspect in the eyes of the public.²⁷⁵ This additional scrutiny will serve as a check against corruption and mistake in the judiciary, which will in turn ensure more just rulings for female defendants and those women who might otherwise capture the blame.

This Article posits that the social understanding of motherhood inheres from ideas about pregnancy, genetics, and the biological processes of reproduction. Louise Woodward was not a mother, but she could have been, and she took on a mother-like role. Although outside the scope of this Article, it would be useful to explore whether the same expectations apply

²⁷² See *supra* notes 101-04 and accompanying text. Judge Zobel was outspoken regarding the public pressures on him; he states, in the memorandum and order reducing the verdict and vacating the sentence:

Judges must follow their oaths and do their duty, heedless of editorials, letters, telegrams, picketers, threats, petitions, panelists, and talk shows. In this country, we do not administer justice by plebiscite. A judge, in short, is a public servant who must follow his conscience, whether or not he counters the manifest wishes of those he serves; whether or not his decision seems a surrender to the prevalent demands.

Commonwealth v. Woodward, 7 Mass. L. Rptr. 449, 1997 WL 694119, at *1 (Super. Ct. 1997), *aff'd*, 694 N.E.2d 1277 (Mass. 1998). Yet, a refusal to bend to public or political pressure has no bearing on innate bias. Deborah Eappen herself suggested that the judge may have been influenced by public opinion or bias in an article which ran in the *Boston Herald* shortly after Woodward's release. See Ed Hayward, *Eappen Mom Says Judge Spurred On By His Ego*, BOSTON HERALD, Nov. 17, 1997, at 4.

²⁷³ See *supra* text accompanying note 97.

²⁷⁴ FERGUSON, *supra* note 7, at 35.

²⁷⁵ See generally Fried, *supra* note 24, at 1232 ("[T]he judge should do only what he can explain and justify" Note, however, that Fried argues that the verdict reduction in *Woodward* was lawful, although not necessarily just, due to the grant of authority under Rule 25(b)(2)). *Id.*

to non-biological mothers. Areas of potential study include society's reverence for genetics as demonstrated in custody battles (preferring a biological parent over a non-biological caretaker who may have stronger emotional ties to the child),²⁷⁶ the legal difficulties in becoming an adoptive parent and the law's treatment of parenting as a privilege, rather than a right, when biology is no longer involved,²⁷⁷ and the controversy surrounding custody disputes in cases where paid surrogates renege on their contractual obligations,²⁷⁸ as in the famed case *In re Baby M*.²⁷⁹ How does the good mother/bad mother paradigm fit into a system in which not all mothers are connected to their children by biological and/or genetic ties?²⁸⁰ Do the socio-cultural expectations of "motherhood" still attach, and if they do, are those expectations as rigid if the child dies?²⁸¹

Commonwealth v. Woodward illustrates how social understandings of motherhood deny agency to both mothers and non-mothers when harm befalls children. Ultimately, justice requires that the guilty be held responsible, but *Woodward* teaches us how social expectations can subvert

²⁷⁶ For a discussion of this issue as it relates to same-sex parents, see Suzanne B. Goldberg, *Family Law Cases as Law Reform Litigation: Unrecognized Parents and the Story of Alison D. v. Virginia M.*, 17 COLUM. J. GENDER & L. 307 (2008).

²⁷⁷ See 2 AM. JUR. 2D *Adoption* § 5 (2008). On the difficulties of adopting internationally, see, e.g., Catherine M. Bitzan, *Our Most Precious Resource: How South Korea is Poised to Change the Landscape of International Adoption*, 17 MINN. J. INT'L L. 121, 137 n.104 (2008) (discussing South Korea's adoption laws); Geoffrey A. Fowler & Elizabeth Bernstein, *China Weighs Rules Restricting Adoptions*, WALL ST. J., Dec. 20, 2006, at D1 (discussing strict parental qualifications for adopting in China).

²⁷⁸ See Bruhl, *supra* note 141, at 212-20.

²⁷⁹ 109 N.J. 396 (1988).

²⁸⁰ Note that in the British legal system, a non-biological mother would not be able to claim the protections of the Infanticide Act. See Infanticide Act, *supra* note 186.

²⁸¹ A comparative study might look to *People v. Steinberg*, 79 N.Y.2d 673 (1992). Joel Steinberg killed his adopted daughter, Lisa, while Hedda Nussbaum, his partner and Lisa's de facto adoptive mother, lay in a drug-induced haze. See Timothy Clifford, *Nussbaum Charges Axed, Hedda to Tell Jury of Events*, NEWSDAY (New York), Oct. 27, 1988, at 3. See also Naomi Weiss & Bonnie Johnson, *A Love Betrayed, A Brief Life Lost*, PEOPLE, Feb. 13, 1989, at 82. Nussbaum was not prosecuted for her failure to protect Lisa due both to her physical incapacity at the time and to her own status as a battered woman under the spell of a Svengali. *Id.* An assessment of the social and legal treatment of Nussbaum as compared with Eappen may shed light on the extent to which biology and genetics play a role in the responsibility attributed to mothers when caretakers cause injury to their children.

the very meaning of “guilt” and thus can frustrate the achievement of justice. In the court of public opinion, “[m]others are never innocent,”²⁸² but in a court of law, they are entitled to the presumption.

²⁸² Ashe, *supra* note 1.