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WHEN WOMEN KILL NEWBORNS: THE RHETORIC OF VULNERABILITY

SUSAN AYRES

Neonaticide, the act of killing a newborn, is a global problem. This chapter presents two pairs of vignettes as a way to explore jurisprudence regarding women who commit acts of violence and to argue for the application of a rhetoric of vulnerability as informed by the pre-Socratic concept of *kairos*, or right-timing and due measure.

The case study approach illustrates the debate about whether women and men should be viewed with equality (sameness) or difference (specificity). In the context of neonaticide, some theorists urge that women who kill must be viewed the same as men (as having agency and responsibility) in order for women to claim their humanity and citizenship.¹ Other theorists urge that women who kill newborns should be viewed different from men (as victims lacking agency) in order to qualify for a lesser offense such as manslaughter, which is the approach taken by England and over twenty other countries that have enacted Infanticide Acts (providing for the lesser offense of manslaughter when a woman is charged with killing her child).² This theoretical debate about sameness versus difference spans various disciplines from law to psychology to sociology, but has practical legal implications not only in criminal law, but in family law and the workplace.

The first part of this chapter presents vignettes that illustrate the different approaches taken by the United States and England in cases of neonaticide. The first pair of vignettes contrasts teenagers accused of killing newborns; the second pair contrasts adult women accused of killing newborns. In addition to illustrating two broad socio-legal approaches to

¹ Candace Kruttschnitt and Kristin Carbone-Lopez, "Moving Beyond the Stereotypes: Women's Subjective Accounts of Their Violent Crime," *Criminology* 44 (2006): 326; Belinda Morrissey, *When Women Kill: Questions of Agency and Subjectivity* (London: Routledge, 2003), 24, 28-29.

² Michelle Oberman, "A Brief History of Infanticide and the Law," *Infanticide: Psychosocial and Legal Perspectives on Mothers Who Kill*, ed. Margaret G. Spinelli (Washington, D.C.: American Psychiatric Publishing, Inc.), 2003, 9.

infanticide, both pairs of vignettes illustrate the sameness versus difference treatment of women, and both implicate the paradox inherent in these two different approaches. Zillah Eisenstein articulates the paradox as follows: “When woman is treated the same as man, she challenges man’s representation of specificity and is also denied her own specificity; when she is treated as ‘different,’ she is made the ‘other.’”³

The second part of this chapter describes the rhetoric of vulnerability as articulated by feminist legal scholar Martha Fineman.⁴ Vulnerability provides an alternative to skirt the paradox of the sameness-difference debate made in arguments for women’s equality. The rhetoric of vulnerability, which emphasizes the universal aspects of dependence, implicates the responsibility of the state to remedy vulnerability. This chapter argues that the rhetoric of vulnerability may be considered as an example of the practical wisdom of *kairos*, the Sophist concept that builds on the concepts of right-timing and due measure.

The third part of this chapter re-examines neonaticide through the *kairic* rhetoric of vulnerability, arguing for changes in state assets to provide options for unwanted pregnancy (right-timing), and in the criminal justice system’s laws and defenses regarding neonaticide (due measure).

Vignettes of Mothers Who Kill Newborns

When the media reports stories of abandoned or killed newborns, society typically assumes the mother was a teenager who experienced an unwanted pregnancy. However, studies report that the median age of women accused of neonaticide is around nineteen, so the mother may well be an adult woman, possibly the mother of older children. The following vignettes illustrate these two broad categories of teenagers and adult women accused of killing newborns.

Teenaged Girls Who Kill Newborns

Nicole Beecroft, from Minnesota, was seventeen years old the summer before her senior year in high school when she learned she was pregnant. She concealed her pregnancy from her family and was turned away from a pregnancy clinic when she sought an abortion because the clinic

³ Zillah Eisenstein, *The Female Body and the Law* (Berkeley: University of California Press, 1998), 199.

⁴ Martha Fineman, “The Vulnerable Subject: Anchoring Equality in the Human Condition,” *Yale Journal of Law and Feminism* 20 (2008): 1-23.

considered abortion a sin. She briefly considered dropping her baby off at a hospital, but did not understand the provisions for legalized abandonment under the state's Safe Haven law. Instead, she continued to conceal her pregnancy and gave birth alone. She went into a panic when the baby was born and stabbed the baby about one hundred times. When her friend told an adult that Nicole had given birth, it was too late. The baby was found in a trash bin during a search of the house. After a bench trial, Beecroft was found guilty of first degree murder and given a mandatory sentence of life without the possibility of parole. Her case was reversed and remanded by the Minnesota Supreme Court, which found that state actors had interfered with Beecroft's expert testimony.⁵

Compare Nicole Beecroft's case to a similar case in England. Whereas in the United States, women who conceal pregnancy and kill their newborns are charged with murder (they are treated the same as other defendants who kill), in England and over twenty other countries, women who conceal pregnancy and kill their newborns are charged with a lesser form of murder, a manslaughter offense called infanticide.⁶ Generally women convicted of infanticide do not serve prison sentences at all, but rather, receive counseling and supervision. In fact, in the past ten years, none of the fifty-nine women convicted of infanticide in England have served any prison time.⁷

In a case factually similar to Beecroft's, an unnamed sixteen-year-old in Hampshire, England stabbed her newborn to death. After the baby was found in a trash bin at a railway station, the teenager pleaded guilty to the lesser offense of infanticide and received a twelve-month community supervision and youth rehabilitation order. In presenting her case, the prosecutor said that the teenager had no criminal intent, but that her actions were driven by panic and emotional and physical shock because she was unaware of pregnancy. The judge who sentenced her commented, "The law recognizes it is important for the court to act in a constructive way and mercifully rather than concentrate on the punishment."⁸

These two vignettes illustrate the paradox of the sameness/difference approaches. In the American case, Beecroft was treated the same as men

⁵ Transcript of Record, *State of Minnesota v. Nicole Marie Beecroft*, File No. 82-K1-07-2492 (Washington County District Court, Tenth Judicial District, April 27, 2007-December 1, 2008), *Beecroft v. Minnesota*, 813 N.W.2d 814 (2012).

⁶ Oberman, "Brief History," 3, 9.

⁷ Andrew Robinson, "Mother Who Hid Stillborn Baby's Body Walks Free," *Yorkshire Post*, December 17, 2010. 2010 WLNR 25020433.

⁸ Press Association News, "Girl, 16, Stabbed Newborn to Death," October 12, 2010, 10/12/10 PAWIRE 16:28:32.

who kill, and received a mandatory sentence of life without the possibility of parole. However, the sentence designated and subordinated her gender and her ability to exercise agency. The question Beecroft's case presents is whether we should view a minor who attempted to terminate an unwanted pregnancy, but who was turned away by a pregnancy agency, as a responsible agent deserving life without the possibility of parole? While the United States Supreme Court is considering the constitutionality of sentences of life without parole for minors who commit murder, the rhetoric that most American neonaticide cases focus on, however, is not the specificity of the mother, but the death of an innocent newborn.

In comparison, the English case of the unnamed sixteen-year-old accused of abandoning her newborn in the trash at the railway station applies a difference approach. The teenager was treated differently than a man in being found guilty of infanticide. Theorists such as Belinda Morrissey might argue that the prosecutor's statements designated her as an "other," a victim lacking in agency. The question her case presents is whether we should view all women accused of killing newborns as lacking any intent or agency. Do sentences under the Infanticide Act hold women accountable or responsible for their actions? Indeed, the English Infanticide Act is based on a presumption that a woman is guilty of the lesser offense of manslaughter because she is acting as a result of a postpartum mental imbalance.⁹ She does not have to show that the mental imbalance *caused* her to kill the newborn, just that she suffered from the postpartum mental imbalance. The rhetoric in England focuses on compassion for a woman who has "labored alone or in a frightening environment with no access to proper medical care."¹⁰ Although the public commonly expects mothers who have committed neonaticide to be teens or young women, this is not always the case, as the next set of vignettes demonstrates.

Adult Women Who Kill Their Newborns

Dana Deegan was a twenty-five-year-old Native American woman, living on a reservation in North Dakota with her common-law husband and three children aged five and under. She had been brutally physically and

⁹ Oberman, "Brief History," 8-9.

¹⁰ Judith Duffy, "A Newborn Baby Is Found Dead in a Pond. Another Was Dumped in a Park. So Who Are the Mothers and Why Are They Abandoning Their Own Children?" *Sunday Herald* (Glasgow), September 11, 2005. 2005 WLNR 14345860.

sexually abused as a child and as an adult by both her father and husband. She lived in poverty, and her husband spent money on drugs. When Deegan became pregnant a fourth time, she denied the reality of her pregnancy and sought no prenatal care. Because she was depressed and overwhelmed, she did not believe she was pregnant. Instead, she denied the pregnancy, or “put the pregnancy out of her mind,” according to the psychiatrist who examined her. When she went into labor, she gave birth alone in a dissociative state, an out-of-body sensation she had experienced before as a girl when she had been sexually abused. After giving birth, she abandoned the baby in her home. She returned several weeks later and put the dead body in a suitcase out in a field, where a worker discovered the suitcase. Eight years later, DNA evidence implicated Deegan, who confessed and accepted a plea bargain for second degree murder. She was sentenced under federal guidelines for 121 months—or about ten years. The judgment was affirmed on appeal by the eighth circuit in an opinion containing a fifty-nine page dissent.¹¹

Dana Deegan’s case may be contrasted with a factually similar case of Allison Johnson in South York, England. Allison Johnson was a thirty-three-year-old woman who had five other children. In June of 2000, authorities discovered that she had abandoned two newborn babies by putting them in laundry baskets in her garage. (She was turned in to authorities by her sister who suspected that Johnson might be secretly disposing of newborns.) Johnson pleaded guilty to infanticide and was given a three year community rehabilitation order with psychiatric counseling. In sentencing her, the judge considered that “she had been a good and caring mother to her other children.” He also observed that she was divorced at the time and under stresses of her mother’s illness and had her own financial problems. Moreover, the judge stated that she was not “wicked . . . [and that she did not] offer any obvious risk of reoffending and [could] be safely managed in the community.” The judge concluded, “Some psychological condition must have caused you to act as you did.”¹²

Similar to the first set of vignettes about teen mothers, this second set demonstrates the paradox inherent in the sameness/difference approach to treating women who kill their newborns. While American law treated Deegan the same as a man (as a responsible agent who killed her newborn), her specificity as a woman who had been repeatedly abused

¹¹ *United States v. Deegan*, 605 F.3d 625 (2010).

¹² Judge’s comments taken from two articles by Emma Dunlop published in the *Yorkshire Post* on June 13, 2002, “Sister Had to Tell Police of Suspicions over Babies’ Fate” and “Baby Killer Who Hid Body is Spared Jail,” wppw WLNLR 3497189, 2002 WLNLR 3481030.

since the time she was a child, and who suffered denial and dissociation, was not emphasized. Instead, the rhetoric surrounding the case focused on the death of an innocent victim. For instance, in a flurry of postings on a Law Prof Blog on *Sentencing Law and Policy* after Deegan's judgment was affirmed on appeal, one professor posted the following on May 26, 2010: "The obligation of a mother to care for her young children is the most basic obligation known to the human race. If the law cannot enforce that, there is nothing it CAN enforce"; "if society [sic] cannot set its face against infanticide, it has just flat-out lost its moral bearings. It is impossible to imagine a victim more innocent or defenseless than a baby."

Thus, these vignettes illustrate that in the United States, the mother is treated like other defendants accused of murder—or maybe worse because she has killed a defenseless baby. Indeed, feminists note that American women who commit crimes, especially crimes that intersect with family law, receive disproportionately harsher treatment than men.¹³ For instance, Deegan's punishment of ten years' imprisonment seems excessive, but was based on federal sentencing guidelines. In contrast, in the English case, Johnson was treated differently than a man; however, the presumption that she acted because of hormonal imbalance after giving birth constructed her as a victim and denied the possibility that she exercised agency in abandoning not one, but two newborns in subsequent pregnancies. Johnson's punishment of three years' community rehabilitation and counseling seems inadequate to insure that she was held accountable and responsible for her actions.

As these vignettes demonstrate, the criminal justice systems in United States and England have very different ways of charging and punishing neonaticide. In the United States, judges and jurors continue to convict women who kill newborns of murder and impose harsh sentences, as shown by the legal treatment of Beecroft and Deegan. In contrast, by the nineteenth century, English juries became unwilling to convict women who killed newborns under the concealment statutes and later murder statutes.¹⁴ The creation of the English Infanticide Act in 1922 (amended in 1938) can thus be viewed as a practical response to juries' and judges' reluctance to hold women responsible for murder.¹⁵ So, even though the

¹³ Naomi Cahn, "Moral Arguments and the Dilemmas of Criminalization," *DePaul Law Review* 49 (2000): 822.

¹⁴ Mark Jackson, *New-Born Child Murder: Women, Illegitimacy, and the Courts in Eighteenth-Century England* (Manchester: Manchester University Press, 1996), 113-18.

¹⁵ The same legal development may be traced in Canada, as Kramar and Watson demonstrate in their historical analysis of the 1948 Canadian Infanticide Act

United States has not followed suit by enacting infanticide laws that would mitigate the killing of newborns from murder to manslaughter, the next section of this chapter argues that the rhetoric of vulnerability provides an alternative to the paradox of the sameness/different debate. Moreover, the rhetoric of vulnerability is *kairic* in its pragmatic wisdom that emphasizes the unequal circumstances and disparities of power for women who suffer unwanted pregnancy that must be taken into account by the state in responding to such vulnerabilities.

The Rhetoric of Vulnerability

Vulnerability has been touted lately as a promising theoretical framework to examine various socio-legal problems such as humanitarian emergencies, animal law, and workplace discrimination. In her 2008 article on the vulnerable subject, Martha Fineman applies Peadar Kirby's concept of vulnerability in order to fashion a more responsive state and egalitarian society. She uses the term "vulnerable" not in a negative sense of disability, but in the positive sense "for its potential in describing a universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility."¹⁶ We are all vulnerable to change, to "harm, injury, and misfortune from internal and external forces," consequently, vulnerability is a "post-identity" analysis because vulnerability is inherent in the human condition.¹⁷ Moreover, although Fineman does not analyze the rhetoric of vulnerability through the lens of *kairos*, her project shares many characteristics with the rhetorical concept of *kairos*. This parallel highlights the pragmatic wisdom of Fineman's project.

Although Fineman's previous scholarship argued for a notion of substantive equality, her recent project rejects the concept of individuals as liberal autonomous subjects. She now claims that "notions of independence, autonomy, and self-sufficiency...are empirically unrealistic and unrealizable,"¹⁸ especially in the regime of the family where

(Kirsten Johnson Kramar and William D. Watson, "Canadian Infanticide Legislation, 1948 and 1955: Reflections on the Medicalization/Autopoiesis Debate," *Canadian Journal of Sociology* 33 (2008): 23. Available at 2008 WLNR 25855007).

¹⁶ Fineman, "Vulnerable Subject," 8. Fineman refers to the work of Peadar Kirby, *Vulnerability and Violence: The Impact of Globalisation* (London: Pluto Press, 2006).

¹⁷ *Ibid.*, 9.

¹⁸ *Ibid.*, 11.

“structural family disadvantages associated with caretaking still typically burden women more than men, even after decades of feminist equality reform.”¹⁹ Thus, Fineman has made a pragmatic shift from the rhetoric of substantive equality to the rhetoric of vulnerability because she finds it “more theoretically promising.”²⁰ Instead of describing individuals as liberal autonomous subjects, Fineman draws upon the work of Kirby and others who “have offered a model of interdependence in which the liberal subject is enmeshed in a web of relationships and perceived as dependent upon them.”²¹

One important aspect of the vulnerability analysis is that it avoids the paradox inherent in the sameness-difference debate. Fineman emphasizes dependence and vulnerability as a universal condition and thus side-steps the problem of whether women should be viewed as autonomous agents and treated the same as men, or as victims and treated differently than men. The theoretical framework of vulnerability rejects the question about whether women can be viewed as autonomous citizens because “the benefits of citizenship are unevenly distributed through existing social and cultural structures . . . [T]here is no level playing field.”²² Thus, Fineman shifts the frame to decenter autonomy and replace it with vulnerability.²³

Another important aspect of the vulnerability analysis is its implications for social institutions. Fineman argues that assets conferred by the state to provide individuals with resilience should be regulated to ensure that they are equitable; indeed, the state should be held accountable in responding to vulnerability.²⁴ State assets include physical assets (physical or material goods), human assets (health, education, employment), and social assets (family, social groups, unions). Additionally, the criminal justice system may also be considered a state asset.²⁵ In making her argument that the state must be held responsible for ensuring access and equal opportunity, Fineman points to Canada and other Western countries that have accepted the obligation of government “to guarantee fundamental social goods.”²⁶

¹⁹ Martha Fineman, “Equality: Still Illusive After All These Years,” *Gender Equality: Dimensions of Women’s Equal Citizenship*, eds. Linda C. McClain and Joanna L. Grossman (Cambridge: Cambridge University Press, 2009), 254.

²⁰ *Ibid.*, 255.

²¹ Fineman, “Vulnerable Subject,” 11.

²² Fineman, “Equality,” 257.

²³ *Ibid.*, 261.

²⁴ Fineman, “Vulnerable Subject,” 14-15.

²⁵ *Ibid.*, 15.

²⁶ Fineman, “Equality,” 261.

Rhetorically, Fineman's project has much in common with the pre-Socratic concept of *kairos*, as discussed below.

The Rhetoric of Vulnerability as Kairos

The rhetoric of vulnerability may be examined for aspects of *kairos*, a pre-Socratic concept having many different meanings and components. Contemporary rhetoricians have revived an interest in *kairos* and its rich and complex dimensions. For example, Phillip Sipiora lists various meanings of *kairos* in ancient Greece to include “‘symmetry,’ ‘propriety,’ ‘occasion,’ ‘due measure,’ ‘fitness,’ ‘tact,’ ‘decorum,’ ‘convenience,’ ‘proportion,’ ‘fruit,’ ‘profit,’ and ‘wise moderation.’”²⁷ Likewise, James Kinneavy describes the complex concept of *kairos* as “not easily reduced to a simple formula,” but having various dimensions, such as ethical, epistemological, rhetorical, aesthetic, and civic educational dimensions.²⁸

Despite these various dimensions, *kairos* may be reduced to the two concepts of right-timing and proper measure.²⁹ Right-timing means the “right time” to do something, not the linear or absolute time of *chronos*, but a qualitative time, such as the right time to harvest grapes,³⁰ or to culture pearls.³¹ *Kairos* implicates timing in general, especially the three features of a right time, a time of crisis, and a time of opportunity.³²

The second aspect of *kairos*, proper measure, relates to justice and ethics. As Kinneavy explains, “One of the most significant ethical components of *kairos* had to do with its close relation to justice, particularly in the Pythagoreans. Justice was defined as giving to each

²⁷ Phillip Sipiora, “Introduction: The Ancient Concept of Kairos,” *Rhetoric and Kairos: Essays in History, Theory, and Praxis*, eds. Phillip Sipiora and James S. Baumlin (Albany: State University of New York Press, 2002), 1.

²⁸ James Kinneavy, “Kairos: A Neglected Concept in Classical Rhetoric,” *Rhetoric and Praxis: The Contribution of Classical Rhetoric to Practical Reasoning*, ed. Jean Dietz Moss (Washington, D.C.: The Catholic University of America Press, 1986), 85-92.

²⁹ *Ibid.*, 85.

³⁰ John E. Smith, “Time and Qualitative Time,” *Rhetoric and Kairos: Essays in History, Theory, and Praxis*, eds. Phillip Sipiora and James S. Baumlin (Albany: State University of New York Press, 2002), 52.

³¹ Amélie Frost Benedikt, “On Doing the Right Thing at the Right Time: Toward an Ethics of Kairos,” *Rhetoric and Kairos: Essays in History, Theory, and Praxis*, eds. Phillip Sipiora and James S. Baumlin (Albany: State University of New York Press, 2002), 227.

³² Smith, “Time and Qualitative Time,” 52.

according to merit...Justice, therefore, was determined by circumstances.”³³ The justice of *kairos* may also be illustrated by Plato’s emphasis on “virtue as the mean between two extremes.”³⁴ Timing and proper measure are often inseparable, as Amélie Frost Benedikt comments about the ethical dimension of *kairos*: “the right action at the wrong time is not kairic. Neither is the wrong action at the right time kairic.”³⁵ Instead, Benedikt believes that the ethical component of *kairos* requires that we “take stock of the entire situational context” in order to determine “the *right* moment for an action.”³⁶

The rhetoric of vulnerability, which imposes social responsibility on the state, shares common features with the ethical dimension of *kairos*. According to Sipiora, Isocrates was the first to incorporate “the theoretical and pragmatic importance of *kairos* to rhetoric and social responsibility—the ultimate goal of Isocratean *paidei*, or school.”³⁷ This pragmatic ethics incorporated the concept of right timing in the sense that a citizen must anticipate and respond to exigencies, and respond with practical wisdom in a given situation.³⁸ Thus, rather than applying “universals or ideals,” the socially responsible citizen responded with flexibility to a contingent universe.³⁹ This same principal applies to the rhetoric of vulnerability, which requires practical wisdom to respond to the exigency of vulnerability, often a time of crisis. The rhetoric of vulnerability is kairic in its emphasis on the responsibility of the state to fashion a more responsive and egalitarian society by providing vulnerable citizens with assets for resilience and by conferring state assets in a timely and equitable manner. Like *kairos*, vulnerability is a rhetoric of possibility.⁴⁰

Reconsidering Neonaticide through a Rhetoric of Vulnerability

Neonaticide’s primary cause is unwanted pregnancy, and the act of neonaticide occurs in a moment of vulnerability or crisis, such as the panic Beecroft faced, or the dissociation Deegan experienced, at the moment of

³³ Kinneavy, “Kairos,” 87.

³⁴ *Ibid.*, 88.

³⁵ Benedikt, “On Doing the Right Thing,” 227.

³⁶ *Ibid.*, 229.

³⁷ Sipiora, “Introduction,” 5.

³⁸ *Ibid.*, 9-10.

³⁹ *Ibid.*, 11, 13.

⁴⁰ John Poulakos, “Rhetoric, the Sophists, and the Possible,” *Communication Monographs* 51 (1984): 221, 223-24.

childbirth. In previous work I have described the *kairos* of unwanted pregnancies, which are “like other psychological crises” because they “contain a continuum of *kairic* points of possible decision” in which a mother may acknowledge the pregnancy and select a plan, or may deny the existence of the pregnancy.⁴¹ In this chapter, I extend that analysis to argue that society’s response to the vulnerability of unwanted pregnancy and neonaticide may also be analyzed through the lens of *kairos*.

A rhetoric of vulnerability would examine Beecroft’s vulnerability as a teenager (and not an adult),⁴² and her vulnerability in maneuvering through social institutions in seeking an abortion. Likewise, the rhetoric of vulnerability would focus on Deegan’s vulnerability as an abused wife living in poverty with three young children, and living in a community lacking important social resources, such as a battered women’s shelter. These vulnerabilities demonstrate the need to “imagine responsive structures whereby state involvement actually empowers a vulnerable subject.”⁴³

The following analysis considers social responses based on the dual aspects of *kairos*: first, “right-timing” to provide human and social assets for the vulnerability of unwanted pregnancy; and second, “proper measure” to ensure that the criminal justice system provides equitable and fair treatment of mothers accused of neonaticide.

Right-Timing: Social Assets Providing Options for Unwanted Pregnancy

One practical implication of the rhetoric of vulnerability is the state’s responsibility to provide assets for resilience. In terms of unwanted pregnancy, a *kairic* response would include providing options discussed below, such as anonymous birth, legalized abandonment, adoption, and abortion. This would offer women and teens such as Nicole Beecroft, who unsuccessfully sought an abortion and briefly considered abandonment, a legal alternative to avoid the tragic outcome of neonaticide and a sentence of life without the possibility of parole.

⁴¹ Susan Ayres, “Kairos and Safe Havens: The Timing and Calamity of Unwanted Birth,” *William and Mary Journal of Women and the Law* 15 (2009): 279.

⁴² Fineman, “Vulnerable Subject,” 11. Fineman notes that the liberal subject must be presented as an adult, whereas the vulnerable subject can be in any developmental stage.

⁴³ *Ibid.*, 19.

Anonymous birth remains a foreign concept to most Americans, yet France has had anonymous birth for many years and Austria recently instituted it. In these countries which allow anonymous birth, a pregnant woman about to give birth may register at the hospital without using her own name, but instead as “Mother X,” and she may give birth safely with attendants. The newborn is considered legally abandoned, and may be placed for adoption.⁴⁴ Anonymous birth provides a safer alternative to giving birth unattended, as did the women in the vignettes, and many other women facing unwanted pregnancy.

A related option found in the United States and a handful of other countries, such as Germany, Italy, and Japan, is the use of baby flaps or the legalized abandonment of infants. This option allows a parent to anonymously abandon a newborn in a special incubator-like receptacle or at a recognized agency, such as a hospital or fire department.⁴⁵ Unfortunately, a primary obstacle to legalized abandonment is a lack of social awareness. Although anonymous abandonment is legal in all fifty states, many of these laws were enacted without funding provisions, and as a result, most states provide no public awareness or education about legal abandonment of newborns.⁴⁶ For example, although Beecroft considered legalized abandonment, she did not understand that she could anonymously drop off her newborn at the hospital; rather, she believed she needed to fill out paperwork required for adoption. Since she was concealing her pregnancy, she did not believe filling out paperwork was a viable option for her.

Likewise, another option for unwanted pregnancy is access to abortions for teens and women who desire to terminate unwanted pregnancy. A *kairic* rhetoric of vulnerability encourages states to put assets into access to abortion and adoption, public awareness of existing safe haven laws, and to enact other options such as anonymous birth. Such a *kairic* response would give women facing unwanted pregnancy the option “do the right thing at the right time.”⁴⁷

Finally, a spectrum of other state assets could provide more resilience for emotional and physical trauma related to unwanted pregnancy. This might include battered women’s shelters for women, like Dana Deegan, who was abused while pregnant, yet had no shelter at the reservation where she lived. It might also include therapy and counseling for women

⁴⁴ Ayres, “Kairos and Safe Havens,” 244-47.

⁴⁵ *Ibid.*, 239-40, 250.

⁴⁶ *Ibid.*, 252.

⁴⁷ Benedikt, “On Doing the Right Thing,” 233.

who abandon or kill newborns, which is the norm in countries such as England. As one clinical psychologist indicated, “when we talk about abandoned babies, there are abandoned mothers, too.”⁴⁸ Finally, a kairic rhetoric of vulnerability would encourage the reallocation of resources in order to provide more funding to women stricken by poverty, such as Dana Deegan, who felt overwhelmed by a fourth pregnancy.

Proper Measure: The Criminal Justice System as a State Asset

Criminal laws are an expression of moral outrage, and society generally punishes more harshly the offenders it views as more culpable, and punishes less harshly the offenders it views as more sympathetic. The rhetoric of vulnerability emphasizes the unequal circumstances and disparities of power for many women who have unwanted pregnancies. For instance, Beecroft was a minor who was turned away when she sought an abortion, and Deegan was an abused spouse who lived in poverty on a reservation without a battered women’s shelter. Nonetheless, under current American law, these vulnerabilities carried little weight in determining sentences for murder of a newborn.

In contrast, English law and culture gives more weight to the vulnerabilities of unwanted pregnancy and neonaticide. In sentencing both the unnamed sixteen-year-old Hampshire girl and Allison Johnson, the English courts took into account the vulnerabilities that caused their acts, and recognized the need for a more therapeutic justice. The mother of another English woman, Caroline Beale, who was charged for murder and detained in the United States after allegedly committing neonaticide, commented negatively about American system. Mrs. Beale stated, “I pity any American girl that comes into this situation because the American laws are medieval and they should be changed.”⁴⁹ As discussed above, England’s infanticide laws were enacted when juries refused to convict women of murder because society viewed these women more sympathetically, or as more vulnerable. On the other hand, American society does not share this sentiment, so state legislatures will be unlikely to enact infanticide laws until there is social impetus to do so. The moment is not kairic, but perhaps the rhetoric of vulnerability can effect change.

⁴⁸ Duffy, “A Newborn Baby Is Found Dead in a Pond,” Quoting Dr. Lorraine Sherr.

⁴⁹ Mrs. Beale was quoted in an article by Jo Butler, “Woman Who Hid Dead Body Spared Prison Term,” *Scotsman*, March 5, 1996, 1996 WLNR 2324395.

Aside from enacting a new offense, such as an infanticide statute, another possible response by the criminal justice system is to allow new or re-tooled defenses to murder when a woman kills a newborn. Some theorists, such as Michael Perlin, have argued for the availability of a neonaticide syndrome.⁵⁰ Neonaticide syndrome evidence would support a defense, similar to the battered woman's defense, that a woman such as Deegan, who killed her newborn did not do so intentionally, but as a result of psychological denial of her pregnancy and psychological dissociation during the child's delivery. This would provide a defense to intentional murder charges.

Another possibility is the defense found in the Model Penal Code of "extreme mental or emotional distress," which mitigates murder to manslaughter when the defendant acts under extreme mental or emotional distress that would have caused a reasonable person standing in the defendant's shoes to commit the act.⁵¹ Arguably, a woman such as Deegan, who gives birth alone after suffering an unwanted pregnancy that she has denied, and who has been so abused in her life that she experiences dissociation during the birth, may be a prime candidate for this mitigating defense. Likewise, a teenager such as Beecroft, who lacks maturity to navigate social services such as abortion providers, but who has tried to cope with an unwanted pregnancy, might also be a candidate for the mitigating defense of extreme mental or emotional distress, especially if she endures childbirth alone and panics once the baby is delivered. Of course, the Supreme Court's upcoming decision regarding sentences of life without parole for minors who commit murder would also impact cases such as Beecroft's.

A kairic rhetoric of vulnerability would encourage the criminal justice system to respond to the vulnerability of neonaticide with justice and due measure. For example, one practical implication involves the revision of American criminal statutes to provide for an Infanticide Act or legally recognized defenses when a woman is charged with murdering her newborn. Another implication concerns a more therapeutic jurisprudence to offer counseling and therapy for these vulnerable defendants.

An example of a kairic response to the vulnerability of unwanted pregnancy and neonaticide occurred in Cyprus several years ago when a twenty-year-old domestic worker, who had left Romania because she was

⁵⁰ Michael L. Perlin, "'She Breaks Just Like a Little Girl': Neonaticide, the Insanity Defense, and the Irrelevance of 'Ordinary Common Sense,'" *William and Mary Journal of Women and the Law* 10 (2003): 24.

⁵¹ Russell L. Weaver, John M. Burkoff, and Catherine Hancock, *Criminal Law: A Contemporary Approach* (St. Paul: West, 2011), 34.

in the socially untenable position of being pregnant and unmarried, killed her newborn in Cyprus. Both the father of the child and Romanian society had rejected her. So, she arrived in Cyprus a few days before her due date. Then, she “gave birth alone to a baby boy and strangled him with her own hands, placed the body in a bag, and threw it out of window of a house where she lived and worked.”⁵² Like other women suffering unwanted pregnancy, she lacked resources to cope with her vulnerabilities.

She was criminally charged with infanticide, an offense carrying up to life imprisonment, but hers was the first infanticide case ever heard by courts in Cyprus. It was a test case for the application of *kairic* right-timing and due measure. Ultimately, the Cyprus court gave her a probated sentence of two years’ hospital supervision. In crafting the sentence, the Cyprus court specifically turned to English law, not American law, to reject the maximum sentence of life imprisonment.

An important question is why Cyprus chose the English approach, which a news article described as providing “[c]ompassion, rather than extended jail time.”⁵³ The answer must lie in a constellation of legal and social factors; however, it demonstrates the practical wisdom of vulnerability. Instead of analyzing whether a woman who kills a newborn should be treated the same as or different than a man who commits murder, this approach focuses on the universal condition of the vulnerable subject-object binary. The rhetoric of vulnerability side-steps the paradox inherent in the sameness-difference debate about the treatment of women. It allows for a case-by-case approach that provides a compassionate response to vulnerability.

The result in this Cyprus case of neonaticide exemplifies the advice the Sophist philosopher Isocrates gave centuries before to the King of Cyprus in *To Nicocles*. Isocrates advised: “Do nothing in anger, but simulate anger when the occasion [*kairos*] demands it. Show yourself stern by overlooking nothing which men do, but kind by making the punishment less than the offense.”⁵⁴

⁵² Marianna Pissa, “Infanticide Mother Placed Under Supervision,” *Cyprus Mail*, August 2, 2008, 2008 WLNR 15446623.

⁵³ *Ibid.*

⁵⁴ Sipiōra, “Introduction,” 11.