

# BOOK REVIEW

## DISGUST AND THE DROWNINGS IN TEXAS: THE LAW MUST TACKLE EMOTION WHEN WOMEN KILL THEIR CHILDREN

THE PASSIONS OF LAW. Susan A. Bandes,\* editor. New York: New York University Press, 1999. 300 pages. \$45.00 (cloth), \$22.50 (paper).

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### ABSTRACT

In this Book Review, Elizabeth Bangs examines the role of emotion in the legal and societal reactions to Andrea Yates drowning her five children. Reviewing the collection of essays contained in *The Passions of Law*, Bangs argues that we must begin to honestly consider the roles of disgust and compassion in the American legal system. Acknowledging the differing emotional reactions to the drownings in Texas, Bangs suggests that the more appropriate emotional response for the legal system is compassion rather than disgust. After analyzing court decisions in postpartum depression cases and letters to the editor written in the aftermath of the Yates tragedy, Bangs concludes that the law must acknowledge and minimize the role that disgust plays in the legal system.

*Editor's Note: After this Book Review was written, Andrea Yates was convicted for the murders of three of her children. A jury deliberated for forty minutes before sentencing her to life in*

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*prison, rejecting the imposition of the death penalty. Yates will be eligible for parole in forty years. Whether the jury's verdict and sentence reflect compassion or disgust is a judgment that we will leave to the reader.*

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*Good Lord, how could a mother drown her babies?<sup>1</sup>  
Nobody is quite sure with whom to side, and in excruciatingly emotional cases like these, it is hard not to side with someone: the helpless baby or the poor mother who must have been crazy to do such a horrible thing and now has to live with it.<sup>2</sup>*

#### I. INTRODUCTION

On June 20, 2001, Houston, Texas mother Andrea Yates called the police to her home and told them that she had just drowned her five children, aged six months to seven years, in the family bathtub. Expressing ourselves through the popular press, American society erupted with emotion. We idealize the mother-child bond<sup>3</sup> and were deeply shaken that something could go so awry in that relationship that it would lead a mother to kill her own children.<sup>4</sup> But our emotional reactions were by no means universal. Rather, while some called for harsh punish-

1. Sherri Winston, *What Drove a Mother to Madness?*, S. FLA. SUN-SENTINEL, July 1, 2001, at E1.

2. Comment, *Mothers Who Kill: Postpartum Disorders and Criminal Infanticide*, 38 UCLA L. REV. 699, 749 (1991).

3. See Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 96 (1993) (“[N]o woman achieves her full position in society until she gives birth to a child. Being a mother is women’s major social role. . .”).

4. See Opinion, *Battling Demons: What Happens to Parents that Leads Them to Hurt Their Children?*, HERALD AM., July 1, 2001, at D2 (“There is something so elementally wrong, so perverse and contrary to the most basic laws of nature in the vision of a mother systematically putting to death her own beautiful children, that the story is not settling in the public imagination.”).

ment for Andrea Yates, others expressed deep sympathy for her.<sup>5</sup>

We also tried to figure out what twisted emotion would cause Andrea Yates to do such a thing. Her neighbors and family described her, in the days after the killings, as a loving mother. Her caring, nurturing emotions must have been displaced with something terrible, whether anger, fear, or horror. It is hard to imagine which emotions she feels today, as she sits in jail under a suicide watch. Prosecutors have charged her with multiple counts of capital murder and are seeking the death penalty. Designated to deal with this morass of human emotion is the law, "conventionally regarded as a bastion of 'reason' conceived of as the antithesis of emotion, as operating to rein in the emotionality of the behavior that gives rise to legal disputes."<sup>6</sup> But the law, of course, does not exist independently of highly emotional human beings.

In *The Passions of Law*,<sup>7</sup> editor Susan A. Bandes has compiled a series of essays tackling the issue of whether the law is appropriately equipped to handle such emotional events; in particular, whether the law should take more or less account of emotion in the decision-making process. In this Book Review, I explore what *Passions* can teach us about our emotional response to Andrea Yates' acts of maternal infanticide.<sup>8</sup> Professor Bandes' collection of essays begins with the assumption that because "the law has no choice but to traffic in emotions, it needs to understand and evaluate them."<sup>9</sup> Bandes organizes the essays

5. Compare Debbie Thompkins, Mailbag, PEOPLE MAG., July 30, 2001, at 4 ("Andrea Yates did this [drowning her child] not once, not twice, but five times. Postpartum or not, this woman is a murderer. We don't tolerate someone insane killing other people's children. Why should we tolerate someone killing her own?") with Nancy Hayden, Mailbag, PEOPLE MAG., July 30, 2001, at 4 ("The real heart-break here is . . . that this 'meek and easygoing' woman went along with this demanding, self-centered man and had a fifth child when she was clearly not mentally capable. Rusty Yates should be the one to stand trial. As for Andrea, I pray she receives the love, care and support she has been denied for so long.").

6. See, e.g., Richard A. Posner, *Emotion versus Emotionalism in Law*, in THE PASSIONS OF LAW (Susan A. Bandes ed., 1999) [hereinafter PASSIONS], at 309, 309. See also ROBIN WEST, CARING FOR JUSTICE 24 (1997) ("where 'care' does make a difference in a case, it is more often associated with a sort of emotionalism or sentimentality . . . that is assumed to be anathema to the workings of justice").

7. PASSIONS, *supra* note 6.

8. I use the term "maternal infanticide" to include all murder of children by their mothers, both neonaticide and filicide, regardless of the age of the children. See WEBSTER'S II NEW RIVERSIDE UNIV. DICT. 626 (1988) (defining infant as a "person under the legal age of majority").

9. Susan A. Bandes, *Introduction*, in PASSIONS, *supra* note 6, at 1, 7.

around three primary emotion groups: disgust and shame; remorse and vengeance; and love, forgiveness, and cowardice. I focus on what Bandes' authors have to say about disgust and its corollary — shame — as I analyze the reactions to Andrea Yates. In addition to the essays, I draw on news accounts of the Yates killings, and, to a lesser extent, other similar, recent events. Because, obviously, the case of Andrea Yates has not yet reached the courts or the law review literature, I rely on published opinions and articles dealing with other instances of maternal infanticide. Because the law, when responding to criminal acts with disgust, serves as the voice of society, I try to defer to the voice and reaction of society. In doing so, I often use the pronouns “we” and “our” to refer to a societal response to maternal infanticide.

## II. BACKGROUND

### A. *Maternal Infanticide and Postpartum Depression*

Societies have not treated instances of maternal infanticide consistently over time or across different geographical regions. Some primitive and medieval societies condoned the practice as a sensible means of achieving population control, “avoid[ing] . . . social stigma (particularly illegitimacy) [and] costs of care, [and] eliminat[ing] handicapped offspring . . . .”<sup>10</sup> Attitudes toward maternal infanticide changed in early colonial America, however, when “strict religious beliefs made it worse than even the most brutal crimes, and many women who killed their infants were executed.”<sup>11</sup> Since the mid-1700s, our society has changed course again, showing increasing sympathy to women accused of killing their children.<sup>12</sup>

At least some percentage of maternal infanticide cases are attributed to severe postpartum depression. Today, one in a thousand new American mothers will develop postpartum psychosis, the worst form of postpartum depression, the condition

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10. Note, *The Child Abuse Amendments of 1984: Congress is Calling North Carolina to Respond to the Baby Doe Dilemma*, 20 WAKE FOREST L. REV. 975, 978 n.24 (1984), quoted in Note, *Postpartum Depression Defense: Are Mothers Getting Away with Murder?*, 24 NEW ENG. L. REV. 953, 955-56 & n.23 (1990) [hereinafter *Getting Away with Murder*].

11. *Getting Away with Murder*, *supra* note 10, at 956 (citing ANN JONES, WOMEN WHO KILL 50 (1980)).

12. *Id.* (citing JONES, *supra* note 11, and PETER HOFFER & N.E.H. HULL, MURDERING MOTHERS: INFANTICIDE IN ENGLAND AND NEW ENGLAND, 1558-1803, *passim* (1981)).

generally known as the “baby blues.”<sup>13</sup> The “baby blues” is a “feeling of letdown” experienced by fifty to seventy-five percent of all new moms. It can provoke “impatience, irritability, restlessness, and anxiety.” Symptoms are “brief[ ] . . . and usually disappear on their own.”<sup>14</sup> Ten percent of new mothers develop postpartum depression, a condition that can occur up to a year after childbirth. In addition to the usual symptoms of depression, postpartum depression can be characterized by the woman’s overconcern for the baby and her fear of harming the baby or herself.<sup>15</sup> Finally, postpartum psychosis usually develops within two to three weeks of childbirth and causes hallucinations, delusions (often with religious overtones), and suicidal or homicidal thoughts.<sup>16</sup>

The rate of postpartum depressive conditions is higher in the United States than in other areas of the world, “like China, Jamaica, and some parts of Africa — where, not coincidentally, well-entrenched social rituals or government support cast a kind of protective balm over the raw days following birth.”<sup>17</sup> In her acclaimed novel, *The Red Tent*,<sup>18</sup> Anita Diamant describes the special tent to which women of Biblical times retreated for menstruation and childbirth:

The baby healed quickly, as did Leah during her first month as a new mother inside the shelter of the red tent. She was pampered by her sisters, who barely let her feet touch the earth . . . . Bilhah fed my mother honeyed milk and cake. She

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13. Lauren Slater, *Beginning and End: Why are We Surprised that Childbirth Might Lead to Tragedy?*, N.Y. TIMES MAG., July 8, 2001, at 11.

14. The “baby blues” is a common reaction that 50-75% of new mothers experienced after delivery. *Baby Blues*, Depression After Delivery, Inc., at <http://www.depressionafterdelivery.com/babyblues.htm> (last visited Jan. 13, 2002).

15. One in ten new mothers experiences various degrees of PPD within days of the delivery. *Postpartum Depression*, Depression After Delivery, Inc., at <http://www.depressionafterdelivery.com/depression.htm> (last visited Jan. 13, 2002). “[R]ecent research indicates that poor, single women are twice as likely as middle-class, married women to become depressed in the months before and after birth.” *Women and Depressive Episodes: Postpartum Blues, Depression, and Psychosis*, Women’s Health Interactive, at [http://www.womens-health.com/health\\_center/mental/depress\\_post.html](http://www.womens-health.com/health_center/mental/depress_post.html) (last visited Jan. 13, 2002). Postpartum depression recurs in up to thirty percent of women. *Id.*

16. Postpartum Psychosis (PPP), the most severe but rarest postpartum disorder, occurs in 1 out of 1000. *Postpartum Psychosis*, Depression After Delivery, Inc., at <http://www.depressionafterdelivery.com/psychosis.htm> (last visited Jan. 13, 2002).

17. Slater, *supra* note 13. But Slater also reports that in other parts of Africa, such as among the Kung of the Kalahari Desert, as many as one percent of infants are killed. *Id.*

18. ANITA DIAMANT, *THE RED TENT* (1997).

washed Leah's hair with perfumed water, and she massaged her feet.<sup>19</sup>

Similarly, when a mother was ill after giving birth, "[t]ime and time again Inna and Rachel packed her womb with wool and herbs to staunch the bleeding. They wet her lips with water and strong, honeyed brews. They sang healing hymns and burned incense to keep her spirit from flying out of the tent."<sup>20</sup>

Diamant's description of the ancient rituals stands in sharp contrast to today's "drive-through deliveries." As the *Los Angeles Times* has reported,

Women can no longer count on being cared for by their own mothers, grandmothers or even friends when they return home. For the exhausted woman who has had a thirty-hour labor, who may not be able to walk . . . or who has two or three other kids . . . , the hospital is the only source of respite and assistance.<sup>21</sup>

But hospital stays for uncomplicated deliveries have dropped from four days in 1970 to an average of twenty-four hours (and sometimes as short as twelve hours) in the mid-1990s.<sup>22</sup> Critics clamored for legislation mandating minimum hospital stays, but the focus was on the health of babies, who were at higher risk for jaundice and severe dehydration when released from the hospital so soon.<sup>23</sup> If any of the activists were pushing for longer hospital stays in order to enable doctors to keep any eye out for postpartum depression or, more significantly, to head it off by giving mothers increased support and education, the popular press did not take account of it.

Perhaps as a result of our high incidence of severe postpartum depression, the homicide rate for American infants and toddlers has been nearly twice the rates of twenty-three other industrial countries during the last two decades.<sup>24</sup> Although the killing of older children by women like Andrea Yates and Susan Smith, who drowned her two sons by rolling her car into a South

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19. *Id.* at 44, 67.

20. *Id.* at 60.

21. Suzanne Gordon, *A 'Quicker and Sicker' Rebellion*, L.A. TIMES, July 23, 1995, at M5.

22. Sandra G. Boodman, *Discharged Too Soon?*, WASH. POST, June 27, 1995, at Z10.

23. *Id.*

24. *Getting Away with Murder*, *supra* note 10, at 958 (citing Murray A. Strauss, *State and Regional Differences in U.S. Infant Homicide Rates in Relation to Sociocultural Characteristics of the States*, 5 BEHAV. SCI. & L. 61 (1987)).

Carolina lake with the boys strapped in their car seats,<sup>25</sup> attracts great public attention, infants are at the highest risk.<sup>26</sup> As in both the Smith and Yates cases, mothers are particularly likely to kill their children “in a distinctively ‘womb-like’ manner,” such as drowning, aggravating the tangled mess of emotion in these cases.<sup>27</sup>

### B. *The Yates Killings*

Andrea and Russell (“Rusty”) Yates lived outside Houston, Texas, with their five children. The four boys ranged in age from two to seven years; the only girl was six months old. Andrea had quit her job as a nurse to home-school the children.<sup>28</sup> She also cared for her seriously ill father.<sup>29</sup> Although she may have suffered from some mental illness earlier, Andrea sank into a deep depression after the birth of the fourth child two years ago. She was treated with antidepressants, as well as a powerful anti-psychotic medication. *Newsweek* reported that, “[t]o medical experts, this suggests that she was possibly delusional.”<sup>30</sup>

In June 1999, Andrea tried to kill herself by overdosing on pills prescribed for her father.<sup>31</sup> But suddenly, according to Rusty, “she just snapped out of it, she was like herself again, all of a sudden.”<sup>32</sup> Despite the risk that the depression would return, the Yateses did nothing to prevent future pregnancies. Rusty has told reporters “both of us really went into our marriage saying we’ll just have as many kids as come along. And that’s what we wanted.”<sup>33</sup>

The birth of their fifth child, the baby girl, coincided with the death of Andrea’s father. The depression returned, and Andrea

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25. See, e.g., GEORGE A. PETERS, *SUSAN SMITH: VICTIM OR MURDERER* (1995).

26. *Getting Away with Murder*, *supra* note 10, at 958 (citing Strauss, *supra* note 24, at 11). Experts believe that parental neonaticide is underreported, because some killings are instead blamed on “crib death,” or Sudden Infant Death Syndrome. *Id.* at 959 (citing Lester Adelson, *Slaughter of the Innocents*, 264 *NEW ENG. J. MED.* 1345, 1348 (1961), and Stuart Asch, *Crib Deaths: Their Possible Relationship to Post-Partum Depression and Infanticide*, 35 *J. MT. SINAI HOSP.* 214 (1968)).

27. Note, *Susan Smith and Other Homicidal Mothers — In Search of the Punishment that Fits the Crime*, 3 *CARDOZO WOMEN’S L. J.* 521, 537 (1996) [hereinafter *Susan Smith and Others*] (citing NAT’L CTR. FOR MISSING AND EXPLOITED CHILDREN, *DECEASED CHILD PROJECT REP.* 50 (1994)).

28. Evan Thomas, *Motherhood and Murder*, *NEWSWEEK*, July 2, 2001, at 20.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

did not respond as well to the medication.<sup>34</sup> When Andrea summoned them to the house after the drownings, police found the house so dirty and unkempt that they could not locate a clean glass for a glass of water.<sup>35</sup> Family members described her as "listless" in the period leading up to the killings, and said she had stopped feeding the children properly.<sup>36</sup> She apparently tried to kill herself a second time, with a knife.<sup>37</sup>

Andrea would later tell police that she had been contemplating killing the children for some time.<sup>38</sup> She had come to believe that she was a bad mother and the children were hopelessly damaged.<sup>39</sup> On June 20, in the hour between the time Rusty left for work and the time her mother-in-law was due to arrive to help care for the children, Andrea drowned each of the four younger children in the bathtub, then laid them out on the bed, wrapped in sheets. When the oldest child witnessed her killing the baby, he ran. Andrea caught up with him, wrestled him back to the bathroom, and drowned him as well. She left him in the bathtub, then called the police and her husband.<sup>40</sup>

Police charged Yates with the multiple murder of the two oldest boys and the murder of the baby.<sup>41</sup> Both charges made her eligible for the death penalty, which Houston prosecutors said they would seek.<sup>42</sup> Prosecutors said they would also present

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34. *Id.*

35. *Id.*

36. Ruth Rendon, *Brother: Yates thought drownings 'best thing'*, HOUS. CHRON., July 14, 2001, at 1 ("Andrea was feeding [six-month-old] Mary, and all she was feeding her was breadcrumbs and mashed potatoes. She knew better than that, but apparently in her mind she didn't even know what to do at that point. She was so dysfunctional.") (alteration in original).

37. *Id.*

38. Thomas, *supra* note 28.

39. *Id.* There are examples of quite rational women killing their children to protect them. See *Susan Smith and Others*, *supra* note 27, at 527-28 (discussing Toni Morrison's *Beloved* and a true 1831 case, in which African-American women kill their children to protect them from slavery) (citing *Jane (a slave) v. The State*, 3 Mo. 45 (1831)).

40. Thomas, *supra* note 28.

41. I have not been able to definitively determine why Yates was not charged in all the deaths. The most plausible explanation is efficiency; if the prosecution thinks it can get the death penalty on those two charges, it will not waste its time proving additional charges. See, e.g., Pam Easton, *Death Penalty Sought for Texas Mom*, ASSOC. PRESS, 2001 WL 26177791 (Aug. 9, 2001) ("In Texas, prosecutors typically forgo multiple capital murder charges because one conviction is generally sufficient for the maximum penalty.").

42. Lisa Teachey, *DA will seek to put Yates on death row*, HOUS. CHRON., Aug. 9, 2001, at 1.



evidence of the deaths of the two younger boys, but they apparently did not indicate that Yates would be charged in their deaths.<sup>43</sup> Yates pleaded not guilty by reason of insanity, and the judge ordered a hearing before a jury in order to determine if she was competent to stand trial.<sup>44</sup> On September 22, 2001, a Houston jury found that Yates was competent.<sup>45</sup>

### III. THE LAW OF DISGUST

Disgust is a particularly useful lens through which to explore the public reaction to Andrea Yates. Not only has disgust historically played a significant role in our criminal law, but maternal infanticide is likely to strike us as a particularly disgusting crime. Nevertheless, as upsetting as the drownings were, we have not universally been disgusted by Andrea Yates' actions. Bandes' authors are engaged in a debate about the proper role of disgust in our justice system. Ultimately, our conflicting emotional reactions to the drownings in Houston lend support to the arguments that the role disgust plays in criminal law should be both acknowledged and minimized.

#### A. *The Definition of Disgust*

In the book's first essay, Martha C. Nussbaum defines disgust as "a rejection of a possible contaminant. The core objects of disgust are reminders of mortality and animality, seen as contaminants to the human."<sup>46</sup> Dan M. Kahan's definition is similar: disgust "embodies the appraisal that the object is low and contaminating, and the judgment that we must insulate ourselves from it lest it compromise our own status."<sup>47</sup> Professor Nussbaum observes that "[d]isgust properties are traditionally associated with women . . . . Taboos surrounding sex, birth, menstruation – all these express the desire to ward off something that is too physical, that partakes too much of the secretions of the body."<sup>48</sup>

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43. *Id.*

44. *Id.*

45. Julie Cart, *Houston Mother Ruled Competent to Stand Trial*, L.A. TIMES, Sept. 23, 2001, at A34.

46. Martha C. Nussbaum, "Secret Sewers of Vice": *Disgust, Bodies, and the Law*, in PASSIONS, *supra* note 6, at 19, 26.

47. Dan M. Kahan, *The Progressive Appropriation of Disgust*, in PASSIONS, *supra* note 6, at 63, 64.

48. Nussbaum, *supra* note 46, at 30. Interestingly, I think the theory of disgust can explain the "protective balm" that protects women after childbirth in some cul-

Andrea Yates' killing of her children has all the hallmarks of a crime we would find particularly disgusting under Professor Nussbaum's definition. First, any mother who kills her small child will provoke disgust as it reminds us of our base, animal nature. We are all familiar with the stories of zookeepers who remove baby animals from their mothers for fear that the mothers, deliberately or accidentally, will kill the babies. We are disgusted by maternal infanticide because wild animals kill their young; humans do not. Second, a neonaticide, such as the drowning of the Yates infant girl, provokes disgust because of its close connection in time to birth and breastfeeding. And third, the "womb-like" nature of drowning in bathwater gives this killing a particularly disgusting quality.

Acknowledging the disgust properties of Andrea Yates' actions may make it easier to attribute them to postpartum depression. We can view postpartum depression as one biological outcome of childbirth, as part of a single animalistic process out of our control. Psychologist Lauren Slater explains the hormonal affect of childbirth:

[O]nce the placenta is expelled: estrogen, that lubricating elixir, plummets in the minutes, the hours, after birth. Progesterone, too, takes a tumble while the anterior pituitary gland, responsible for lactation, swells to twice its normal size . . . . [I]n expelling [the baby, you also] expelled the royal purple parachute that floated you and yours through the nine months. Suddenly it's gone. And you come crashing down.<sup>49</sup>

For some women, that crash will result in postpartum depression. If we can recognize the biological connection between childbirth and depression, then perhaps Andrea Yates will be spared the harshest punishment.<sup>50</sup>

But this animalistic process of childbirth, so out of our control, also explains why "misogyny has typically seen the female as

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tures, such as described in *The Red Tent*, as well as the comparatively harsh treatment new mothers receive today. In more ancient or primitive cultures, disgust required that menstruating and laboring women be isolated from the men, so that men would not be contaminated. All women shared in the contamination, and so they all stayed in the tent caring for each other. Today, we decontaminate by giving birth in cold, sterile hospital settings. And we send new mothers home quickly, forcing them to return to their normal lives, in an attempt to deny the existence of the disgusting processes.

49. Slater, *supra* note 13.

50. See WEST, *supra* note 6, at 13 ("the existence of a biological root of an undesirable behavior counsels the *need* . . . for legal or social intervention") (emphasis in original).

the site of the disgusting . . . .”<sup>51</sup> Slater rightly fears that if we explore Andrea Yates’ postpartum depression, maybe even let it excuse her actions, then “it’s all too easy . . . to imagine the pendulum swinging too far in the other direction — until all new mothers’ normal mood variations are seen as sickness and women return to their Victorian status as womb-based beings of ooze and grease biologically incapable of reason.”<sup>52</sup> As explored above, part of the reason we find maternal infanticide so disgusting is its close connection to the disgust properties that characterize childbirth. If disgust is given a prominent voice in our criminal justice system, it may make it easier, instead of harder, to punish Andrea Yates harshly. As an example, a New York court has found that postpartum depression, “while alone not a sufficient basis to render [a mother] *per se* a neglectful parent, is a factor that may be properly considered in a finding of neglect . . . .”<sup>53</sup> In that case, *In the Matter of Alena O.*, the court, rather than finding a way to help the ill mother, used her illness against her.

Like Slater, I am not sure how much the law should acknowledge postpartum depression and allow it to excuse women’s actions. I do not want to launch down the slippery slope, at the bottom of which all women are expected to go crazy after childbirth. Instead, I want the law to foster an environment in which women who are suffering from mental illness are offered and are willing to seek treatment.

### B. *The Role of Disgust*

Bandes opens *Passions* with a debate between Professors Nussbaum and Kahan about the role that disgust should play in shaping our law and jury verdicts. As I noted above, they share a similar definition of disgust. Where the two scholars differ is in viewing disgust as “an instinctive and unthinking aversion [or] a thought-pervaded evaluative sentiment.”<sup>54</sup>

Professor Kahan defends disgust on the basis of two theories, adopted from William Miller.<sup>55</sup> As an initial matter, recog-

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51. Nussbaum, *supra* note 46, at 33.

52. Slater, *supra* note 13.

53. *In the Matter of Alena O.*, 220 A.D.2d 358, 360 (N.Y. Sup. Ct. App. Div. 1995). Despite a rash of law review articles about postpartum depression in the late 1980s and early 1990s, most of which predicted that women would “get away with murder,” there is strikingly little case law on the subject.

54. Kahan, *supra* note 47, at 64.

55. See WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* (1997).

nizing that “[d]isgust is regarded as a paradigmatically *illiberal* sentiment,” he “aim[s] . . . to redeem disgust in the eyes of those who value equality, solidarity, and other progressive values.”<sup>56</sup> His first theory is the moral indispensability thesis, in which disgust “marks out moral matters for which we can have no compromise,” such as child abuse.<sup>57</sup> The second theory, the conservation thesis, recognizes that “*all* societies inevitably make use of disgust,” so that “by disclaiming disgust, we’ll only be denying ourselves a resource to fight those who, with no embarrassment, are willing to use it to advance illiberal causes.”<sup>58</sup>

As I suggested earlier, Andrea Yates’ drowning of her children is a prime candidate for harsh punishment based on Kahan and Miller’s moral indispensability thesis. Commentators have predicted that “[w]omen who kill their babies [will be] abhorred by society. Society views killing one’s own child as the ultimate social transgression.”<sup>59</sup> Our courts impose on mothers particular duties because of the “relationship of trust or confidence” that exists between mother and child.<sup>60</sup> Professor Dorothy Roberts has explained that we are socially conditioned to see women like Andrea Yates as “the other,” as disgusting: “[e]ven feminists may find it difficult to identify with criminal mothers . . . . Perhaps feminist reluctance to identify with criminal mothers is attributable partially to the way all women have so deeply internalized the dominant images of motherhood.”<sup>61</sup>

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56. Kahan, *supra* note 47, at 63

57. *Id.* at 64 (quoting MILLER, *supra* note 55, at 196). Other disgusting acts, according to Kahan and Miller include rape, torture, genocide, predatory murder, and maiming. *Id.*

58. *Id.* at 64-65 (emphasis in original).

59. *Mothers Who Kill*, *supra* note 2, at 747. See also Note, *Neonaticide and the Misuse of the Insanity Defense*, 6 WM. & MARY J. WOMEN & L. 259, 265 (1999) (“Society cannot let its sympathy for the defendant’s plight allow us to distort the criminal justice system. We cannot forget that these mothers have committed crimes, and, unless they are truly insane, they must be held accountable for their crimes.”).

60. See *State v. Holden*, 365 S.E.2d 626, 629 (N.C. 1988).

61. Roberts, *supra* note 3, at 137. See also Note, *Postpartum Psychosis: A Way Out for Murderous Moms?*, 18 HOFSTRA L. REV. 1133, 1166-67 (1990) [hereinafter *A Way Out*] (noting that the difficulty with a postpartum psychosis insanity defense to murder is “overcoming the natural feelings of a jury that a mother who kills her child must be a terrible, rotten person . . . . If the jury is not bowled over by evidence that the mother didn’t know what she was doing[,] then the image of the helpless baby will overwhelm everything.” (quoting Russel, *Guilty or Innocent? Postpartum Psychosis A Troubling Defense*, PA. L.J. REP., Feb 27, 1989, at 12, col. 1.)) (internal quotations omitted).

In some cases, the disgust properties inherent in maternal infanticide, or other child abuse by mothers, do dominate the legal process. In Southern California, for example, two months after the Yates children were drowned, a judge sentenced a mother to the maximum possible prison term for turning her child over to friends, who then abused the little girl until she was near death.<sup>62</sup> At the sentencing hearing, the judge accused the mother of “violating the ‘fundamental nature’ of motherhood.”<sup>63</sup> “The only person in the world who could protect [this child] was [her] mother,” the judge said. “For whatever reason, [her] mother chose to abandon [her].”<sup>64</sup> Judge Richard A. Posner, in his contribution to *Passions*, defends such disgust-based reasoning in the context of maternal abuse of children in particular. He believes that “[d]isgust[,] when sufficiently widespread[,] is as solid a basis for legal regulation as tangible harm.”<sup>65</sup> And maternal infanticide, he argues, produces such widespread disgust. It would be unnatural to have any other rule: “To offer an argument addressing why parents should not be allowed to kill their infant children seems to miss the point; it would be like arguing to someone who finds sex disgusting that there is no reason for his disgust.”<sup>66</sup>

To some degree, the law’s treatment of women who kill their children plays out the disgust-based logic. Prior to 1991, no woman who had killed her child while suffering from postpartum depression had received the death penalty.<sup>67</sup> Yet even before prosecutors announced they would seek the death penalty against Andrea Yates, commentators predicted that she would likely be sentenced to death.<sup>68</sup> Professor Roberts reports that courts treat “women who commit crimes as mothers the harshest for violating the traditional role” because they “not only break

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62. Scott Gold, *Mother Gets 7 Years in Neglect*, L.A. TIMES, Aug. 15, 2001, at B8.

63. *Id.*

64. *Id.* Cf. Susan Daye, Editorial, *Mom’s Heinous Acts Premeditated Murder*, GREENSBORO (N.C.) NEWS & REC., July 20, 2001, at A14 (“Mrs. Yates did not snap. She committed premeditated murder. She ended the lives of those who trusted her most.”).

65. Posner, *supra* note 6, at 318.

66. *Id.*

67. *Mothers Who Kill*, *supra* note 2, at 753.

68. See Interview with Kent Schaffer, criminal defense attorney, “Rivera Live!”, CNBC, July 5, 2001, 2001 WL 23992485 (“I think you can be pretty certain that they will ask for the death penalty, they will get a capital murder indictment . . . And — and you can almost rest assured that if she’s convicted of capital murder in Houston, Texas, for a multiple murder of children, the death penalty’s extremely likely.”).

the law, but by breaking the law they transgress their own female nature and their primary social identity as a mother or potential mother."<sup>69</sup> In April 1991, nine women were on death row in the United States for killing their children.<sup>70</sup> Those women include Christina Riggs, sentenced to death despite a long history of depression, and Francis Elaine Newton, sentenced to death for killing her husband and child in order to collect insurance money.<sup>71</sup> Riggs is apparently the only one of those nine women to offer an insanity defense for her actions.<sup>72</sup>

In addition to the prosecutors, who announced that they would seek the death penalty for Andrea Yates,<sup>73</sup> a number of citizens (who could be considered part of the future jury pool) called out for her to receive the maximum punishment possible. As one reader wrote to the editors of the *Houston Chronicle*, "[G]ood mothers do not kill their children. Her good deeds cannot justify or cancel out the killings . . . . Consequences for such behavior need to be retained."<sup>74</sup> I find such a sentiment alarming because, as Professor Roberts has argued and I discuss in greater depth below, a heightened disgust-based reaction to women who kill their children "reinforces mothers' privatized responses to their vulnerability by viewing motherhood's burdens as natural or private problems"<sup>75</sup> and may make it harder for us to provide them the help they so desperately need.<sup>76</sup>

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69. Roberts, *supra* note 3, at 107 (citing Kathleen Daly, *Structure and Practice of Familial-Based Justice in Criminal Court*, 21 LAW & SOC'Y REV. 267, 285 (1987)).

70. See Mike Tolson, *What now for Andrea Yates?*, HOUS. CHRON., July 1, 2001, at 1. See also *Butler v. State*, 608 So. 2d 314 (Miss. 1992) (reversing Butler's conviction); Comment, *When Murdering Hands Rock the Cradle: An Overview of America's Incoherent Treatment of Infanticidal Mothers*, 51 SMU L. REV. 591, 608-09 (1998) [hereinafter *Murdering Hands*] (discussing the cases of Darlie Routier in Texas and Sabrina Butler in Mississippi, both of whom received the death penalty for killing their children).

71. See Tolson, *supra* note 70. See also *Riggs v. State*, 3 S.W.3d 305 (Ark. 1999); *Newton v. Texas*, No. 70770, 1992 WL 175142 (Tex. Crim. App. June 17, 1992).

72. See Tolson, *supra* note 70 ("Obtaining capital punishment for a mother with known psychiatric problems who has killed her children, regardless of the number, is almost unheard of . . . . The only exception in modern times was Christina Riggs . . . .").

73. See Thomas, *supra* note 28.

74. Cullen Bentley, *Viewpoints, Deeds' consequences*, HOUS. CHRON., July 7, 2001, at 35A.

75. Roberts, *supra* note 3, at 130.

76. Compare Mark Steyn, Comment, *It's all about her, isn't it? Andrea Yates killed her children, but to our pundits she's a really harassed housewife, not a multiple murderer*, NAT'L POST, July 3, 2001, at A12 ("By her own admission, Andrea Yates . . . killed all five of her children. Not in a burst of gunfire, but by methodically drowning them in the bathtub . . . . What we're dealing with here is a sickness. Not

That we are disgusted not just by women who kill their children, but also by postpartum depression more generally, explains why the rash of articles and television shows addressing the illness disappeared after just a few weeks. Our disgust makes us more unwilling to acknowledge the illness as one natural outcome of childbirth and, in turn, to offer treatment. The shame engendered by that disgust in women who are ill makes it more difficult for them to seek treatment. As shown by the case of Paula Thompson, discussed in depth below, however, when the law deals openly with postpartum depression, it can create room for compassion and treatment, rather than harsh punishment.

Kahan suggests in a footnote that the moral indispensibility thesis, which “‘marks out moral matters for which we can have no compromise,’”<sup>77</sup> has a deterrent aspect. He argues that individuals are less likely to engage in criminal acts if society has “taught its members to detest those who have perpetrated such atrocities.”<sup>78</sup> But Toni M. Massaro calls Kahan’s contention into question, pointing out that “criminal law deals *primarily* with the people who buck society’s most powerful, morally fraught, and prevalent norms, not those people who have internalized the norms and mind them. . . .”<sup>79</sup> Criminals are those who do not feel shame, the emotion felt by objects of disgust.<sup>80</sup> Or, in the complex case of Andrea Yates, they may be prompted by a twisted sense of too much shame.<sup>81</sup> She told police she had been failing as a mother. That sense of shame apparently overwhelmed any shame she thought she would feel being branded as “evil.”<sup>82</sup>

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Andrea’s, but everybody else’s.”) with Michael Jones, Viewpoints, *Compassion for living*, HOUS. CHRON., July 7, 2001, at 35 (“The only thing that sickened me more than the news of the five children being killed was reading the letters in Viewpoints that called for ‘justice’ and directed blame at either the mother or the father. . . . It is unfortunate that in response to a tragedy, we rise in anger, try to find someone to blame and demand justice in order to reassure ourselves that it will not happen to us.”).

77. See Teachey, *supra* note 42.

78. Kahan, *supra* note 47, at 69 n.23.

79. Toni M. Massaro, *Show (Some) Emotions*, in *PASSIONS*, *supra* note 6, at 80, 91. Taking account of the weight that can be given to disgust-based reactions to crime may help us understand more fully the positions taken in the traditional debate between proponents of rehabilitation and proponents of punishment (emphasis in original).

80. See *id.* at 84 (“shame is linked with the awareness of an inadequacy [or] strangeness”).

81. See Thomas, *supra* note 28, and accompanying text.

82. “Rivera Live!,” *supra* note 68.

The prevalence of disgust-based reactions to Andrea Yates, despite evidence of her serious mental illness and previous suicide attempts, lends support to Kahan's second thesis, that disgust is inevitable. His two suggestions for progressive appropriation of disgust have considerable appeal. The first, and more common approach, is "to reshape our 'emotional economy' so that we'll come to see racists, sexists, and homophobes" as the truly disgusting.<sup>83</sup> We have seen some of this in the reaction to the Yates murders. In an effort to justify leniency for Andrea, many have portrayed Andrea's husband Russell, who seems to have left his wife barefoot and repeatedly pregnant despite her increasingly serious mental illness, as the truly disgusting party in the family drama.<sup>84</sup>

Kahan's second approach is to have both liberals and conservatives rely explicitly on disgust, in judicial decision-making and legal philosophy, so that we can "root . . . out the illiberal sensibilities that the judge's decision embod[ies]."<sup>85</sup> The Southern California case in which the judge sentenced the mother to the maximum for neglecting her daughter because she had violated the "fundamental nature" of motherhood is an ideal example. The mother, Lisa Sheppard, defended turning over her daughter to the friends who then abused her on the ground that she had been unable to care for the child while living in a mobile home park with no heat or running water.<sup>86</sup> "She did not have the basic skills to take care of her children," her attorney told the court.<sup>87</sup> Although Sheppard's explanation was disputed,<sup>88</sup> the judge's comments suggest that his sentence was based as much on his disgust as on the facts. Permitting judges and juries

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83. Kahan, *supra* note 47, at 70-71.

84. See, e.g., Arnold W. Douthit, Editorial, *Father shares blame*, SAN ANTONIO EXPRESS-NEWS, June 26, 2001, at 6B ("This tragedy could have been mitigated or possibly prevented had Andrea Yates' husband not treated her as a broodmare."); David L. Hagan, Letter, L.A. TIMES, June 26, 2001, at B12 ("Why, then, would a loving husband not do what was necessary to avoid a fifth pregnancy, barely a year later? . . . [S]omething was terribly wrong with this picture long before the killings."); Bill Stanley, Editorial, *Husband failed her*, SAN ANTONIO EXPRESS-NEWS, July 7, 2001, at 10B ("The husband should be tried as an accessory. He had sufficient evidence that his wife was not emotionally prepared to have another child after she attempted suicide, yet he impregnated her with a fifth child.").

85. See Bentley, *supra* note 74.

86. See Gold, *supra* note 62.

87. *Id.*

88. See *id.* (reporting that Sheppard's sister described Sheppard "as a manipulative woman who dabbled in methamphetamines").



to give that disgust voice, as in the Sheppard case, affords observers an opportunity to determine if the outcome was just.

### C. *The Rejection of Disgust*

Contrary to Kahan's two theses and the predictions of Judge Posner and Professor Roberts, however, we show remarkable sympathy toward women who have killed their children. Christina Riggs is a rare exception.<sup>89</sup> Women who offer an insanity defense may be found guilty of their crimes,<sup>90</sup> but do not receive the death penalty. Furthermore, we do not treat all women who violate the norms of motherhood in the same way. "Women who claim to have heard voices; women who attempt suicide after committing murder; and serial infanticidal mothers" are likely to be found not guilty by reason of insanity.<sup>91</sup> By contrast, "women who fabricate misleading stories regarding the whereabouts of their babies bear a [greater] likelihood of receiving long terms of incarceration."<sup>92</sup>

In the case of Andrea Yates, my unscientific study of letters to the editors of newspapers across the nation show that more often than not readers want leniency for Andrea Yates. These shows of sympathy have themselves provoked considerable disgust,<sup>93</sup> with one reader writing to a Virginia newspaper that "[w]e have really sunk to a new low when people attempt to make our sadness and outrage over the murder of five young children seem

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89. See *supra* note 71.

90. See Tolson, *supra* note 70 (reporting that verdicts of not guilty by reason of insanity are rare but that an insanity plea may mitigate punishment).

91. *Murdering Hands*, *supra* note 70, at 616 (citing Daniel Maier Katkin, *Postpartum Psychosis, Infanticide, and Criminal Justice*, in *POSTPARTUM ILLNESS, A PICTURE PUZZLE* 279 (James A. Hamilton & Patricia N. Harberger eds., 1992)). See also *A Way Out*, *supra* note 61, at 1166 (reporting that of mothers who relied on postpartum psychosis as a defense, one-half were found not guilty by reason of insanity, one-fourth received light sentences, and one-fourth received long prison sentences) (citing Martin Berg, *Postpartum Psychosis Defense Gaining*, *L.A. DAILY J.*, Oct. 7, 1998, at 5, col. 1).

92. *Murdering Hands*, *supra* note 70, at 616 (citing Katkin, *supra* note 91, at 280).

93. In an angry and sarcastic column appearing in the *Los Angeles Times*, Norah Vincent took feminists to task for "letting mommy dearest off the hook." Norah Vincent, *Blame Anybody Except She Who Did It*, *L.A. TIMES*, July 11, 2001, at B13. Reading the column, it is difficult to discern if Vincent is more angry at Yates for "systematically drown[ing] her children in a bathtub one morning," or at those who are reluctant to blame Yates because, she says, "[e]verything [women] do . . . is eminently understandable given the stresses and strains, the utter holocaust of being a woman in Amerika [sic], or worse, a wife at home with the kids." *Id.*

wrong.”<sup>94</sup> Nevertheless, numerous readers and commentators have persisted in expressing concern that “[i]t’s as if we have lost the ability to be compassionate. . . . [T]o demand death for her is the easy, shallow, let’s-not-think-about-our-problems route.”<sup>95</sup> As Robin West has also suggested, judgment without compassion “seems to be fundamentally immoral.”<sup>96</sup>

These letters and columns echo Professor Nussbaum’s primary argument that disgust, an “irrational” emotion,<sup>97</sup> should play no part in legal decision-making. Disgust “is usually based on magical thinking,” she explains, “rather than on real danger.”<sup>98</sup> In this case, that means that Andrea Yates should not be punished more harshly because she killed her children or for the womb-like manner in which she committed the crime. Disgust should not be the aggravating factor. In fact, if “real danger” is the proper factor to take into account,<sup>99</sup> then Andrea Yates probably deserves less punishment than other killers. University of Texas law professor and death penalty expert Jordan Steiker told the *Houston Chronicle* that “[d]eath rows are not filled with family-murderers . . . . Their harm is enormous, but they are not regarded as dangerous.”<sup>100</sup> Though potentially a risk to any future children she might bear and certainly a risk to herself, there is no indication thus far that Andrea Yates would pose any risk to the rest of society.

If we instead punish her more harshly, Professor Nussbaum would argue, because her crime “seems worse than another,” we are using our disgust “as a device . . . to deny our own capacities for evil.”<sup>101</sup> Similarly, in his contribution to *Passions*, Jeffrie G. Murphy observes that retributive judgments may “involve the

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94. Ellen Schnabel, Letters to the Editor, *Anguish over child killings isn’t limited to mothers*, THE VIRGINIAN-PILOT & STAR LEDGER, July 20, 2001, at B10.

95. E.R. Shipp, Editorial, *Hold the Lynch Mob for Tex. Mom*, N.Y. DAILY NEWS, June 26, 2001, at 31. See also Kathy Keller, Viewpoints, *The burning questions*, HOUS. CHRON., July 7, 2001, at 35 (“How could such an intelligent vibrant woman be reduced to such a state of anguish? Did Andrea Yates lose her identity? Did she have friends, leisure activities and make personal choices?”); Marie J. Bill, Viewpoints, *Heaven’s little angels*, HOUS. CHRON., July 7, 2001, at 35 (“My heart goes out to both of the parents, but especially to the mother.”).

96. WEST, *supra* note 6, at 40.

97. Nussbaum, *supra* note 46, at 21.

98. *Id.* at 27.

99. *Id.* (“Disgust is problematic in a way that indignation is not, because it concerns contamination rather than damage; because it is usually based on magical thinking rather than on real danger . . . .”).

100. Tolson, *supra* note 70.

101. Nussbaum, *supra* note 46, at 22.

vice of hypocrisy: our demanding that others receive their just deserts when we ourselves are no better."<sup>102</sup> In particular, Nussbaum is concerned that disgust discourages us from saying, "there, but for . . . go I."<sup>103</sup> I have been struck, in the aftermath of Andrea Yates' arrest, by the willingness of other women to admit that Andrea Yates might not be all that unusual. As Anna Quindlen wrote in her *Newsweek* column:

There is a part of my mind that imagines the baby, her starfish hands pink beneath the water, or the biggest boy fighting back, all wiry arms and legs, and then veers sharply away, aghast, appalled . . . And then there is the entirely imaginable idea of going quietly bonkers in the house with five kids under the age of 7.<sup>104</sup>

Another woman wrote that "the more I read about Andrea Yates, the more convinced I became that she is hardly more monstrous than I am."<sup>105</sup>

We are demonstrating an ability *not* to see Andrea Yates as an animalistic other, as disgusting. In a *New York Times* column, Bob Herbert described Andrea Yates as "a soccer mom. . . . Suddenly the nation has a mass killer it can empathize with, identify with, care for, even love."<sup>106</sup> That ability is remarkable considering the sentiment of the contributors to *Passions* who suggest

102. Jeffrie G. Murphy, *Moral Epistemology, the Retributive Emotions, and the "Clumsy Moral Philosophy" of Jesus Christ*, in *PASSIONS*, *supra* note 6, at 149, 159.

103. Nussbaum, *supra* note 46, at 52.

104. Anna Quindlen, *The Last Word, Playing God on No Sleep; Isn't motherhood grand? Do you want the real answer or the official Hallmark-card version?*, *NEWSWEEK*, July 2, 2001, at 62.

105. Cheryl Brundage, *Outlook, Yates family's tragedy holds up a mirror to us all*, *HOUS. CHRON.*, July 1, 2001, at 4.

106. Bob Herbert, *Empathy for a Killer*, *N.Y. TIMES*, July 5, 2001, at 17. As an interesting note, beyond the scope of this Book Review, Herbert raises the possibility that the public might not show so much sympathy if Yates had been from a different racial or class background. *Id.* See also Roberts, *supra* note 3, at 106 ("Courts may assume that white middle-class mothers are both more amenable to nonjudicial social controls and more needed in the home by their children than other groups of mothers."). Similarly, one reader wrote to the *Greensboro News and Record* that "[h]ad a man committed this kind of crime, he would rightfully be tagged a monster . . . . In a CNN/Talkback Poll, 51 percent gave Yates a pass. Why? Is her crime less revolting because of her gender? Apparently so . . . . Men who kill should pay the ultimate price, and so should women." John Callicutt, *Ideas, Women Deserve Equal Chance at Execution*, *GREENSBORO (N.C.) NEWS & REC.*, July 1, 2001, at H2. It is unclear whether Callicutt is correct that women are treated less harshly than men. Compare WEST, *supra* note 6, at 163 (arguing that when "parents . . . willfully hurt or abandon children, . . . the legal consequences are different, and gendered: women injure their children much LESS often than men, and receive far harsher consequences for doing so") with *Susan Smith and Others*, *supra* note 27, at 536 ("statistics show more leniency to mothers than fathers who commit the same crime").

that we are particularly unlikely to overcome our disgust in cases of maternal infanticide.

Professor Roberts suggests that “it is not surprising” that mothers would harm those children, “[i]f children are the chains that keep women from freedom. . . .”<sup>107</sup> She observes that violence against children is also connected with “self-destructive behavior, such as depression, addiction, and suicide,” in part because motherhood “has become an increasingly isolated experience.”<sup>108</sup> Motivated by the ability to see Andrea Yates as not totally unlike themselves, isolated and unsupported, commentators and others who have written letters to the editor express concern that disgust-based punishment may prevent us from reaching out to women at risk and providing them help and support before (or even after) a tragedy occurs. “[S]he was already dead in a way when she killed her children, and there is no way we can punish her more,” one woman has written. “There is no way the others will escape the terror of this experience or the punishment of bearing it. What is needed is not to think of how we can inflict more pain and more terror, but how we can help this woman and the many others like her who are ignored and allowed to drift down into depression without anyone to care until it is too late.”<sup>109</sup>

Regarding women who kill their children with disgust is anti-social and unproductive, Nussbaum cautions, and “must be surmounted on the way to a genuine and constructive social sympathy.”<sup>110</sup> Massaro agrees that the “voice of much modern rhetoric about criminal offenders — dripping with ‘shame on you’s,’ outrage, and disgust — places very little emphasis on the emotional or physical effect of punishment on offenders,” that is, the possibility of rehabilitation.<sup>111</sup>

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107. Roberts, *supra* note 3, at 126.

108. *Id.* at 128 (citing Richard A. Cloward & Frances F. Piven, *Hidden Protest: The Channeling of Female Innovation and Resistance*, 4 *SIGNS* 651, 651-52 (1979), and NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING* 5 (1978)). See also *Susan Smith and Others*, *supra* note 27, at 539 (“A mother’s suicidal inclinations may often transform into filial homicide. In other words, killing her children may be much like killing herself.”).

109. Danielle J. Kurz, Review & Outlook, *Punishment Does Not Solve Problem*, *THE RECORD* (Bergen County, NJ), July 8, 2001, at O3; see also WEST, *supra* note 6, at 9 (“our capacity for care should be at the center of our public and legal . . . virtues, and specifically it should be central to the meaning of legal justice”).

110. Nussbaum, *supra* note 46, at 28-29.

111. *Id.*

In sharp contrast to the rhetoric of disgust, such as that demonstrated by the judge who sentenced Lisa Sheppard for abusing her daughter, is another Southern California judge, who just weeks after Andrea Yates' arrest was faced with sentencing an Orange County woman for attempting to drown her twin babies. The judge sentenced the defendant to probation, rather than prison time. "This is not a child abuse case. This is a postpartum depression case," the judge told Paula Thompson. "We want to walk you through this nightmare you've been through."<sup>112</sup> In addition to the probation, Thompson was required to undergo psychiatric care and limited to only supervised visits with the twins and their older brother.<sup>113</sup>

What is particularly surprising about Paula Thompson's receiving probation is that it would have been easy for the sentencing judge to be carried away by the disgust sentiment raging over Andrea Yates. Thompson herself would have made the connection easy for the judge, as she carried a magazine with Yates on the cover into the hearing.<sup>114</sup> But the judge recognized that the more important connection was the relationship she herself had developed with Thompson during the criminal proceedings, allowing her to reach out and offer Thompson much-needed support.<sup>115</sup>

Disgust, explains Professor Massaro, can create such an epidemic of cruelty. "The well-documented ways in which group dynamics can quickly transform even fairly cool, moderate feelings into extreme and highly dangerous ones is a sobering caution against official celebration of . . . the already hot emotions of hatred or disgust."<sup>116</sup> The fear is that if disgust is given a privi-

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112. Chelsea J. Carter, *Judge gives mother probation in postpartum depression case*, A.P. NEWSWIREs, July 7, 2001.

113. *Id.*

114. *Id.*

115. Cf. WEST, *supra* note 6, at 52. One might suspect that women would be less disgusted by a case of postpartum depression. After all, women gathered together in the red tent to share the periods of menstruation and childbirth. See DIAMANT, *supra* note 18, at 24-25 ("Rachel bled her first blood . . . . The women sang all the welcoming songs to her while Rachel ate date honey and fine wheat-flour cake, made in the three-cornered shape of woman's sex . . . . Adah rubbed Rachel's arms and legs, back and abdomen with aromatic oils until she was nearly asleep."). A number of women, quoted elsewhere in this Book Review, responded to Andrea Yates with sympathy, having suffered from postpartum depression themselves. But it is easy to imagine women reacting harshly, either because they were not afflicted with the illness or because they were able to overcome it without posing any risk to their children.

116. Massaro, *supra* note 79, at 98.

leged place in the law, then it can just as easily be given a privileged place in society in general. It encourages a lynch mob mentality,<sup>117</sup> with society ready and willing to go after an Andrea Yates, a Lisa Sheppard, or a Paula Thompson itself, without waiting for the slow progress of the judicial system or accepting a result not motivated by disgust.<sup>118</sup>

#### IV. CONCLUSION

Ultimately, I think, the best lesson of *Passions* is Toni Massaro's: human emotion is simply too complex and conflicted to "sensibly oppose or defend resort to *any* emotion, as a categorical matter, in criminal law."<sup>119</sup> Almost everyone reacts with intense emotion to the story of Andrea Yates and her five children. But that emotional reaction is unpredictable. The disgust response would need to be nearly universal to support the arguments of Judge Posner and Professor Kahan. But it was not. In this case, I have more sympathy with the use of sympathy as an emotion in the law. And considering the arguments of Professors Nussbaum and Massaro, I believe that will usually be the case. But the sympathy and empathy shown to Andrea Yates by so many people, including myself, is an emotion that is not necessarily any more thoughtful and self-reflective than disgust.<sup>120</sup> And it is clearly no more universally felt. Where I do agree with Professor Kahan is in concluding that we should encourage judges and juries to voice their emotional reactions and considerations. Contrary to the view of the law as neutral arbiter, the law trafficks in emotion and will respond emotionally. If that response is made public, we can better determine if the law's emotional reaction reflects society's in general.

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117. See Murphy, *supra* note 102, at 154 ("[T]he road from contempt to cruelty [is] a short one.").

118. See Gary O. Myran, Viewpoints, *Texans are ready to kill*, HOUS. CHRON., July 7, 2001, at 35 ("Our so-called tough-on-crime attitude reveals a primitive desire to seek revenge.").

119. Massaro, *supra* note 79, at 104 (emphasis in original).

120. See, e.g., WEST, *supra* note 6, at 75 ("Nurturance untempered by the consistency demanded by justice shades into racism, nationalism, tribalism, or speciesism — in short, into facism.").