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## NOTES

### CHOOSING LIFE: PROPOSING IMMUNITY FOR MOTHERS WHO ABANDON THEIR NEWBORNS

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#### INTRODUCTION

On January 26, 2000, a baby boy was discovered approximately 200 feet outside of Community North Hospital's entrance in Indianapolis, Indiana.<sup>1</sup> Doctors, unable to revive the baby's frozen body, declared the infant dead in the emergency room.<sup>2</sup> It appeared that someone had cared for the baby boy—he was wearing a piece of red felt as a diaper and a small gold angel pendant.<sup>3</sup> Strangers who attended the newborn's funeral named him Baby Ephraim.<sup>4</sup> Homicide investigators expressed outrage as the search for Baby Ephraim's mother began.<sup>5</sup>

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1. Kevin O'Neal & Bill McCleery, *Infant's Body Found Frozen in Hospital Lot*, INDIANAPOLIS STAR, Jan. 27, 2000, at A1.

2. *Id.*

3. Diana Penner, *Statute Aims to Protect Newborns From Harm*, INDIANAPOLIS STAR, June 19, 2000, at B1.

4. *Id.*

5. Two quotes from investigators for the Marion County Sheriff's Department demonstrate outrage towards the act and the mother. "I believe the baby was dropped here for whatever ridiculous, ludicrous reason," said Maj. Mike Turk, homicide investigator [with the Marion County Sheriff's Department]. "You just wonder how another human being could possibly do that." O'Neal & McCleery, *supra* note 1, at A1. Several days later, the following quote appeared in the same newspaper:

"It just blows my mind that anybody would do it," said [Detective Skip] Pollard [with the Marion County Sheriff's Department], a father of two and grandfather of three.

"When you're standing there in that emergency room looking at that baby, your first urge is to go out and choke somebody."

Stephen Beaven, *Frustration Rises in Effort to Identify Baby Left to Freeze*, INDIANAPOLIS STAR, Feb. 1, 2000, at A1. Police in other states have also expressed outrage at similar incidents. One Arizona police officer, in commenting on a mother who was accused of drowning her newborn in a toilet, said: "It's an outrageous type of crime and totally unacceptable. We want to give the message to people contemplating this type of action that it will be thoroughly investigated and

Largely in response to Baby Ephraim's abandonment and subsequent death, the Indiana General Assembly, during its 2000 session, amended Indiana's child abandonment statute to provide a defense for a mother who leaves her less than thirty-day-old baby with an emergency medical services provider.<sup>6</sup> The Indiana General Assembly addressed abandoned newborns again in 2001. The legislature amended Indiana Code section 31-34.2.5-1. The amendment allows an emergency medical services provider to take custody of an infant younger than *forty-five* days old without a court order if the parent voluntarily leaves the child and does not express an intent to return for the child.<sup>7</sup> Interestingly, the criminal statute provides a defense to prosecution to the charge of abandonment for a child, *thirty* days old or less, who is left with an emergency medical services provider.<sup>8</sup>

Indiana Code section 31-34-2.5-1(c) states in relevant part: "Any person who in good faith voluntarily leaves a child with an emergency medical services provider is not obligated to disclose the parent's name or their name."<sup>9</sup> Indiana Code section 31-34-2.5-2 addresses a common criticism of anonymous abandonment of children—that some newborns given to emergency medical services providers may actually have been abducted. It states in relevant part: "[N]ot later than forty-eight (48) hours after the local child protection service has taken custody of the child, [the protection service shall] contact the Indiana clearinghouse for information on missing children established by [Indiana Code section] 10-1-7-3 to determine if the child has been reported missing."<sup>10</sup>

Across the country, fifteen states, including Indiana, enacted legislation in 2000 to address the problem of abandoned children.<sup>11</sup> An additional ten states introduced abandoned infant legislation that did not pass during the 2000 legislative session.<sup>12</sup> Twenty-two states introduced abandoned infant laws in 2001.<sup>13</sup>

This Note proposes a change to Indiana's child abandonment statute,

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aggressively prosecuted . . . ." Marie McCullough, *In Newborn Killings, A New Profile*, PHILA. INQUIRER, Nov. 23, 1997, at A21.

6. See IND. CODE § 35-46-1-4(c) (Supp. 2000).

7. *Id.* § 31-34-2.5-1.

8. *Id.* § 35-46-1-4.

9. *Id.*

10. *Id.* § 31-34-2.5-2.

11. NAT'L CONF. OF STATE LEGS., *Abandoned Infant Legislation 2000-2001*, at <http://www.ncsl.org/programs/cyf/ABSL2001.htm> (last updated Aug. 8, 2001) (Alabama, California, Colorado, Connecticut, Florida, Indiana, Louisiana, Michigan, Minnesota, New Jersey, New York, Ohio, South Carolina, Texas, and West Virginia).

12. *Id.* (Delaware, Georgia, Illinois, Kansas, Kentucky, Missouri, North Carolina, Oklahoma, Pennsylvania, and Wisconsin).

13. *Id.* (Alaska, Arizona, Arkansas, Georgia, Hawaii, Idaho, Illinois, Kentucky, Maryland, Massachusetts, Mississippi, Montana, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Virginia, Washington, and Wisconsin).

comparing Indiana's statute to those in other states. Some states,<sup>14</sup> such as Indiana, provide a defense or an affirmative defense for mothers who leave their newborns with emergency medical personnel. Other states provide such mothers immunity from prosecution.<sup>15</sup> This Note argues that Indiana should further amend its child abandonment statute to provide immunity from prosecution for mothers who abandon a child, forty-five days old or less, with an emergency medical services provider. With immunity from prosecution, mothers who feel abandonment is their only option upon giving birth, could ensure their child's safety and placement for adoption while maintaining anonymity.

Part I of this Note addresses the problem of abandonment in Indiana and across the United States. Part II provides background to abandonment and infanticide/neonaticide cases and identifies characteristics that are common to women who abandon their children or kill their newborns. Part III examines Indiana's 2000 amendment to the child abandonment statute.

Part IV addresses current Indiana law regarding the rights of mothers and putative fathers who are unidentified when adoption proceedings take place. Finally, Part V discusses the public policy concerns supporting a change to Indiana's child abandonment statute. Along with reforming the statute, the key to encouraging mothers to choose to leave their children in a safe environment is a continuing public relations campaign with the goal of educating mothers so that fewer abandonments will occur.

## I. THE PROBLEM OF INFANT ABANDONMENT

Unfortunately, stories similar to Baby Ephraim's are far too common in Indiana and throughout the United States. This Part discusses the current statistics on infant abandonment in Indiana, including recent cases. It then details the dangerous circumstances in which mothers have abandoned infants in Indiana. Finally, in light of national statistics concerning infant abandonment, this Part analyzes the difficulties inherent in collecting accurate and meaningful statistics about infant abandonment and mothers who abandon.

### A. *Infant Abandonment in Indiana*

Infant abandonment is a problem in Indiana. At least twenty-one babies have been abandoned in Indiana between 1990 and 2000, not including those babies who are left in the hospital after birth.<sup>16</sup> For example, in November 2000, a woman in Anderson, Indiana, was arrested after leaving her five-month-old baby girl on a doorstep with a note that read "congratulations."<sup>17</sup> In December 2000,

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14. See *infra* note 129 and accompanying text.

15. See *infra* note 123 and accompanying text.

16. Penner, *supra* note 3.

17. Paul Baylor, *Police Arrest Mother After Baby Left on Porch*, HERALD BULL. ONLINE EDITION, Nov. 15, 2000 (on file with author). The article also indicated that the mother wanted one of the occupants of the house to have the baby because the occupant was dating the baby's father. *Id.*

a woman in South Bend, Indiana, abandoned a newborn baby in the entrance of an apartment building.<sup>18</sup> In January 2001, police officers in Rome City, Indiana, found a dead baby in a gym bag while raiding a home for methamphetamine.<sup>19</sup>

More disturbing, perhaps, than the *number* of babies that have been abandoned in Indiana are the circumstances under which these infants have been abandoned.<sup>20</sup> For example, an article in *The Indianapolis Star* stated that of the four babies who were abandoned in the Indianapolis area in the last six years, only one survived.<sup>21</sup> The abandonments in which the infants were found alive<sup>22</sup> nonetheless involved obvious elements of risk.<sup>23</sup> The circumstances that newborns encounter when abandoned put them at high risk of serious harm or death. The Indiana General Assembly did respond to this serious problem by amending the child abandonment statute,<sup>24</sup> but this Note proposes that the Indiana General Assembly did not go far enough to protect newborns at risk of being abandoned. Many other states have also addressed this problem, and several have provided immunity from prosecution for a mother who leaves her newborn

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18. Bryon Coppens, *Woman Claims Baby's Hers*, S. BEND TRIB., Dec. 24, 2000, at A1. The mother subsequently turned herself into the police. The mother was not arrested, but the case was forwarded to the Saint Joseph County prosecutor. *Id.* The baby was found to be in good health and was believed to be between three and seven days old when he was abandoned. The mother delivered the baby at home, and while the father was identified, he was not involved in the abandonment. The mother had not received prenatal care. *Id.*

19. *Infant's Body Found Inside Gym Bag*, INDIANAPOLIS STAR, Jan. 19, 2001 (on file with author).

20. Some assert that a majority of abandoned infants are not abandoned alive. "In American suburbia, teenagers have been known to leave their unwanted progeny in Dumpsters [sic] and public bathrooms. Most commonly, they suffocate their babies while stifling a cry." Evan Thomas, *Motherhood and Murder*, NEWSWEEK, July 2, 2001, at 20, 22.

21. Beaven, *supra* note 5.

22. See *supra* notes 17-18 and accompanying text.

23. For example, many abandoned babies are left near a dumpster. In addition to the danger of exposure to cold temperatures and inclement weather, an unsuspecting individual throwing away trash could crush the child. The child left on the doorstep in Anderson, Indiana, also faced a risk of exposure to cold or could have been attacked by an animal. The above are merely examples of the many kinds of harm that can happen to a newborn who is left alone and defenseless outside. Moreover, the calculation of risk of harm from external sources does not take into account other risk factors such as lack of nutrition, disease, or infection that can result from the circumstance of the birth.

24. The amendment states in relevant part:

It is a defense to prosecution based on an alleged act under this section that: (1) the accused person left a dependent child who was, at the time the alleged act occurred, not more than thirty (30) days of age with an emergency medical provider who took custody of the child under IC 31-34-2.5 when: (A) the prosecution is based solely on the alleged act of leaving the child with the emergency medical services provider; and (B) the alleged act did not result in bodily injury or serious bodily injury to the child . . .

IND. CODE § 35-46-1-4(c) (Supp. 2000).

with an emergency medical services provider.<sup>25</sup>

*B. National Statistics and Difficulties in Their Collection*

One of the difficulties in trying to assess the problem of newborn abandonment is that often the mother who abandons her baby is the only one who knew about her pregnancy.<sup>26</sup> If the baby is never found, it cannot be included in any statistical enumeration.<sup>27</sup> Further, unlike adult disappearances, when a newborn is abandoned, the mother is often the only one who knows and the newborn is not likely to be reported as missing.

Despite the inherent secrecy surrounding abandonment, organizations and researchers are able to estimate the scope of the abandonment problem.

Nobody knows how many infants are thrown away in the nation's woods and wastebaskets every year. An unpublished survey of news reports conducted by the Department of Health and Human Services counted 65 "discarded infants" in 1991, eight of them dead. In 1998, the number was 105, with 33 dead.<sup>28</sup>

The Child Welfare League of America placed the number of infants abandoned in 2000 at seventy.<sup>29</sup>

Even if a newborn is found, another piece of the puzzle is still missing. Finding an abandoned newborn does not guarantee that the mother will be found. Without knowing the identity of the mother and the circumstances that drove her to abandon her child, it is difficult to assess the statistics in a truly meaningful way. Some researchers, though, have identified common characteristics of

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25. See *infra* note 126 and accompanying text.

26. "[B]ecause so few are ever located, little is known about mothers who dump their newborns. They're usually, but not always, in their teens. They may, but may not, have drug problems . . . . They likely, but not necessarily, have hidden their pregnancy from others, and even themselves." Lynda Hurst, *Saving Babies From the Trash*, TORONTO STAR, Mar. 5, 2000, at NE6.

27. "[E]stimates . . . are based only on known cases, and it is likely that the actual number of neonaticides is higher." Christine A. Fazio & Jennifer L. Comito, Note, *Rethinking the Tough Sentencing of Teenage Neonaticide Offenders in the United States*, 67 FORDHAM L. REV. 3109, 3130 (1999) (footnote omitted).

28. *Safe Places for "Discarded Babies,"* USA TODAY, Feb. 8, 2000, at 15A. "[T]here is strong evidence that both homicides and fatal cases of child abuse are undercounted." Mary D. Overpeck et al., *Risk Factors for Infant Homicide in the United States*, 339 NEW ENG. J. MED. 1211, 1211 (1998) (footnotes omitted).

29. Kim Ode, *Where No Business is Good Business: Minnesota's Safe Place for Newborns Program Reports No Abandoned Babies Since April Debut*, STAR TRIB. (Minneapolis-St. Paul), Oct. 8, 2000, at 6E. This article notes that the number includes only babies abandoned in "dangerous places." Another difficulty lies in the lack of uniform reporting procedure for abandonment. "There is no credible research about how many infants are abandoned each year in the United States. Many abandonments are never reported." Stephen Beaven, *Texas Law to Curb Baby Abandonment Guides Indiana Plan*, INDIANAPOLIS STAR, Feb. 20, 2000, at A1.

mothers who abandon.

## II. CHARACTERISTICS OF MOTHERS WHO ABANDON

In order for the Indiana General Assembly to accurately address the problem of infant abandonment, it is necessary to examine the various theories advanced for why women abandon or kill their infants, especially their newborns. Also, it is helpful to examine characteristics common to these women. With this information, the law can more adequately address the problem and tailor a suitable solution.

Because infant abandonment often results in the baby's death due to the many risk factors involved when a newborn is left without adequate protection from the elements, it is often categorized as infanticide or neonaticide. *Black's Law Dictionary* defines "infanticide" as "[t]he act of killing a newborn child, esp[ecially] by the parents or with their consent."<sup>30</sup> In some jurisdictions, "infanticide" is a term of art meaning the killing of a child less than one year old by the child's mother when "the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth or by reason of the effect of lactation consequent upon the birth of the child."<sup>31</sup> Indiana has not adopted this definition, and, consequently, it is not referenced in this Note. *Black's Law Dictionary* does not define "neonaticide," but some journals and other scholarly literature define it as "the killing of a neonate on the day of its birth."<sup>32</sup> Because many journals use "infanticide" and "neonaticide" interchangeably, the terms are used interchangeably in this Note. Infanticide is not a new phenomenon; in fact, evidence of infanticide can be found in ancient times.<sup>33</sup> Despite its long history, theories are still being advanced as to why infanticide occurs and how to prevent it from happening to another baby.

In his inaugural address on January 20, 2001, President George W. Bush said, "[W]hatever our views of its cause, we can agree that children at risk are not at fault. Abandonment and abuse are not acts of God, they are failures of love."<sup>34</sup> For legislators to properly address the problem of newborn abandonment and predict who might abandon in the future, it is important to discern characteristics of women who have abandoned their babies or killed their infants.

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30. BLACK'S LAW DICTIONARY 781 (7th ed. 1999). For a comprehensive look at infanticide in America, see Michelle Oberman, *Mothers Who Kill: Coming to Terms With Modern American Infanticide*, 34 AM. CRIM. L. REV. 1 (1996).

31. Ania Wilczynski & Allison Morris, *Parents Who Kill Their Children*, 1993 CRIM. L. REV. 31, 34 (citing Infanticide Act of 1938, 1 and 2 Geo. 6, c. 36, § 1, sched. 6 (Eng.)).

32. Oberman, *supra* note 30, at 22 n.83 (citing Phillip Resnick, *Murder of the Newborn: A Psychiatric Review of Neonaticide*, 126 AM. J. PSYCHIATRY 1414, 1414 (1970)). Oberman defines "neonaticide" as the act of killing a child within twenty-four hours of birth. *Id.* at 22.

33. See, e.g., Thomas, *supra* note 20, at 22-23.

34. President George W. Bush, Inaugural Address (Jan. 20, 2001), available at <http://www.cnn.com/ALLPOLITICS/inauguration/2001/transcripts/template.html> (on file with the *Indiana Law Review*).

The statistics, though meager, nonetheless indicate a pattern of traits for female neonaticide offenders.

There are many reasons that statistics regarding characteristics of mothers<sup>35</sup> who abandon newborns shortly after birth are sparse.<sup>36</sup> First, as discussed earlier, it is difficult to determine the exact number of infants who are abandoned because it is believed that many abandoned infants are never found. Second, even if an abandoned infant is found, there is no guarantee that the mother will be found.<sup>37</sup>

Despite the inherent difficulty in trying to categorize mothers who abandon their newborn infants,<sup>38</sup> some common traits have emerged. First, mothers who abandon their newborns are often unmarried teenagers.<sup>39</sup> Most disturbing about

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35. "Homicides during the first week of life are most likely to be perpetrated by the mother." Overpeck et al., *supra* note 28, at 1211 (footnotes omitted). "[I]n the United States and throughout the world, the population under one year of age is at great risk of death from homicide. Their killers are more likely to be their own mothers than anyone else." Oberman, *supra* note 30, at 3 (footnotes omitted).

36. "A number of factors probably lead to an underascertainment of infant homicides. Five percent . . . of known homicides . . . occurred during the first day of life, but the actual number of infants killed on the day of birth could be higher, since some births may have been kept secret." Overpeck et al., *supra* note 28, at 1214; *see also* Oberman, *supra* note 30, at 21.

37. Baby Ephraim's mother has not been located even though he was found wearing a gold angel charm that was pinned to the sheet in which he was wrapped. Initially, investigators thought this distinctive piece of jewelry would help identify him. However, as of this writing, Baby Ephraim's mother has not been located. Beaven, *supra* note 5.

38. Another problem with trying to characterize women who abandon their infants or who are accused of neonaticide is that neonaticide cannot be limited to one particular race, educational level, or socio-economic class.

At first blush, the girls and women accused of neonaticide have little in common with one another. They come from every race, ethnicity, and socio-economic class. They live in big cities and small towns, in housing projects and suburban luxury homes. Some are new immigrants who have only recently learned English. Others are from families that have been in the United States for generations. Their ages range widely across the span of women's reproductive years. Many of the women are of seemingly limited intellectual ability, with low I.Q.s or poor school records. Yet almost as many are above average; many reports describe quiet, studious, college-bound honor students. Oberman, *supra* note 30, at 23 (footnotes omitted).

39. Women neonaticide offenders are typically "young, poor, unmarried and socially isolated." Fazio & Comito, *supra* note 27, at 3132 (footnotes omitted). "[B]ecause so few [abandoned babies] are ever located, little is known about mothers who dump their newborns. They're usually, but not always, in their teens." Hurst, *supra* note 26. "State studies using linked birth and death certificates have consistently shown that the following maternal characteristics are risk factors for both unintentional and intentional infant deaths: a young age, a low level of education, late initiation of prenatal care, and previous births." Overpeck et al., *supra* note 28, at 1211. "The strongest predictive factors . . . were a maternal age of 19 years or younger, 12 years of education or less, single marital status, black or American Indian race, a first prenatal visit after

this fact<sup>40</sup> is that teenage girls are developing physically sooner than they have in the past, which can lead to increased pressure to become sexually active.<sup>41</sup> While it is true that not all teenage sexual activity results in pregnancy, not all pregnancy results in birth,<sup>42</sup> and not all birth results in abandonment, it is important to note that women who are sexually active and who may subsequently abandon their babies may be younger than in the past.

Sexual activity among teenagers is nothing new.<sup>43</sup> A 1995 study found that 48.1% of all never-married<sup>44</sup> women between fifteen to nineteen years old have had sexual intercourse.<sup>45</sup> Teenage women between the ages of fifteen and nineteen who have had sexual intercourse generally had *some* relationship with their first sexual partner, but in the majority of cases the relationship was not a marriage or engagement.<sup>46</sup> Further, it is common for girls who are just beginning

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the sixth month of pregnancy or no prenatal care, and a gestation of less than 28 weeks . . . ." *Id.* at 1212. "Most of the women accused of neonaticide are young and single." Oberman, *supra* note 30, at 23.

40. "Just as many girls seek sexual relations in order to obtain the emotional and social validation they need, they frequently are harmed by another uniquely adolescent phenomenon: the difficulty in appreciating the long-range consequences of their actions." Oberman, *supra* note 30, at 58 (footnote omitted).

41. For a complete discussion of early physical development in girls, see Michael D. Lemonick, *Teens Before Their Time*, TIME, Oct. 30, 2000, at 66. Lemonick states that although the average age of first menstruation has remained steady since the 1960s at 12.8 years, there has been a drop in average age for the outward physical changes of puberty. *Id.* at 68.

42. "Fifty-five percent [of teenagers who become pregnant] gave birth, 29 percent had abortions and the rest miscarried." *Teen-pregnancy Rate Hit Record Low in '97*, INDIANAPOLIS STAR, June 13, 2001, at A10.

43. *See id.* Although sexual activity among teenagers does seem to be common, the percentage of teenagers who have engaged in sexual intercourse declined slightly in the 1990s, and the teenage pregnancy rate was at a record low in 1997. *Id.* The declining number of teens who are engaging in sexual intercourse may be related to the growing popularity of abstinence pledges among teens.

44. Only the statistics of never-married teenage women are being considered in this Note because the majority of mothers who abandon are unmarried teenagers. *See* Oberman, *supra* note 30, at 23; Overpeck et al., *supra* note 28, at 1212-14. Additionally, there is an "expectation that marriage incorporates sexual intimacy . . . ." STATISTICAL HANDBOOK ON THE AMERICAN FAMILY 138 (Bruce A. Chadwick & Tim B. Heaton eds., 2d ed. 1999) [hereinafter HANDBOOK].

45. A further examination of the fifteen to nineteen year old age group finds that 36.8% of teenage women between fifteen and seventeen years old have had sexual intercourse and 67.4% of teenage women between eighteen and nineteen years old have had sexual intercourse. HANDBOOK, *supra* note 44, at 141. If the statistics are broken down by year of age, there is a startling increase in the percentage of teenage women who have had sexual intercourse. At age fifteen, 21.4% of teenage women have had sexual intercourse; at age sixteen, the percentage rises to thirty-eight percent; at age seventeen, the percentage rises to 49.6%; at age eighteen, the percentage rises to 62.7%; and, at age nineteen, the percentage rises to 72.4%. *Id.*

46. The percentages of the types of relationships that teenage women between the ages of



to become sexually active not to use contraception.<sup>47</sup>

Another common characteristic of neonaticide offenders is low self-esteem.<sup>48</sup> Beyond youth and low self-esteem, one of the main characteristics of mothers who abandon is that the mothers kept the pregnancy a secret<sup>49</sup> from others. “Very few of the [women accused of neonaticide] told their families or friends that they were pregnant.”<sup>50</sup> The reasons for keeping a pregnancy a secret are numerous, but usually the woman is in denial,<sup>51</sup> is ashamed,<sup>52</sup> or fears punishment.<sup>53</sup>

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fifteen to nineteen had with their partners when they first had voluntary intercourse are defined as follows: 2.8% “just met”; 10.5% were “just friends”; 9.7% “went out once in a while”; 72.7% were “going steady”; 2.8% were “engaged”; 1.5% were married; and 0.1% were with a family member, with someone with whom the woman was living, or another situation. *Id.* at 148. These statistics show that over ninety-five percent of the teenage women were not engaged or married to their first sexual partners.

47. Oberman, *supra* note 30, at 57. Of unmarried women between the ages of fifteen to twenty-nine years old who had sexual intercourse within the last twelve months, only 32.2% of the women indicated that their male partner had used a condom for disease prevention “every time” they had sexual intercourse. HANDBOOK, *supra* note 44, at 154. An astounding 29.3% of the women indicated that their male partner never used a condom for disease prevention. *Id.* Although these statistics are not a good predictor of pregnancy risk because of the plethora of other methods to prevent pregnancy, they are important in assessing risky behavior. Further, the statistics appear to include women who did not take alternate means of contraception to prevent the possibility of pregnancy.

48. Oberman, *supra* note 30, at 71. “[T]he girls involved in neonaticide cases possess so little self-esteem that they are incapable of acting to protect themselves. Their insecurity almost certainly contributes to their becoming pregnant in the first place, and it leads to their paralysis once pregnant.” *Id.* “Neonaticide offenders tend to be young, passive women who have low self-esteem [and] feel unloved and alone. . . .” Fazio & Comito, *supra* note 27, at 3149.

49. Dr. Roberta Hibbard, director of the child protection program for Indiana University Medical Center, identified two common factors among mothers who abandon: the mother is often “very young,” and the mother often has “kept the pregnancy a secret.” O’Neal & McCleery, *supra* note 1.

Some studies have found that mothers are the perpetrators in the majority of cases only in the case of homicides during the first week of life. A possible explanation is that the mother is trying to hide the pregnancy and birth . . . . 95 percent of infants killed during the first day of life were not born in a hospital, as compared with 8 percent of all infants killed during the first year of life—a finding that is consistent with this explanation.

Overpeck et al., *supra* note 28, at 1214.

50. Oberman, *supra* note 30, at 24.

51. “[N]eonaticide usually results from an unwed girl’s fear of revealing her pregnancy . . . because of shame or punishment.” Fazio & Comito, *supra* note 27, at 3133 (footnote omitted).

52. “Even if society has halted legal discrimination against children born out of wedlock, there is still considerable shame and guilt associated with a teenager’s pregnancy . . . .” *Id.* at 71.

53. “Certainly, we know that teens commonly fear the repercussions that might follow should their parents find out that they are sexually active . . . . Many girls shared the belief that, if and

The degree of shame in the loss of virginity before marriage<sup>54</sup> is unclear. Statistics show that seven percent of adult males and twenty-one percent of adult females who have had sexual intercourse list the reason for having first voluntary sexual intercourse as “wedding night.”<sup>55</sup> In 1996, 33.5% of Americans said that premarital sex was “always or almost always wrong.”<sup>56</sup> Of the youngest people surveyed, those between eighteen and twenty-four years old, 22.5% said that premarital sex was “always or almost always wrong.”<sup>57</sup> According to these statistics, it would appear that sexual intercourse before marriage is common and not regarded by most Americans as wrong.

On the other hand, a sexual double standard has been persistent in modern America. The primary example of the sexual double standard is the perpetuation of terms such as “whore” and “slut” which refer to females who engage in sexual intercourse without an equivalent term for males.<sup>58</sup> Males, on the other hand, are often praised for their sexual prowess and experience.<sup>59</sup>

Despite the seeming lack of shame in the loss of virginity before marriage, there does seem to be a continuing shame attributed to unwed motherhood, especially to unwed *teenage* motherhood. Public statements condemning unwed motherhood and teenage motherhood have come from both a Republican Vice President and a Democratic President. One of the best examples of public disapproval of unwed motherhood in the early 1990s came with Vice President Dan Quayle’s verbal condemnation of the television character Murphy Brown’s single motherhood.<sup>60</sup> Similarly, President William Jefferson Clinton addressed teenage pregnancy and non-marital children in his 1995 State of the Union Address when he stated: “We’ve got to stop the epidemic of teen pregnancies and births where there is no marriage . . . .”<sup>61</sup> President Clinton then noted that approximately one million teenagers in the United States would become pregnant

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when they disclosed their pregnancy, they would be kicked out of their homes.” *Id.* at 59 n.284.

54. The statistics on the loss of virginity only take into account consensual sexual intercourse. Shame is compounded when a girl becomes pregnant due to rape or sexual abuse. Fazio & Comito, *supra* note 27, at 3109 n.4 (citing Geoffrey Knox, *A Revolution Brewing in Women’s Health*, OPEN SOC’Y NEWS, Spring 1999, at 4). In 1999 in Indiana, a Nigerian woman alleged that she became pregnant because she was raped in her home country. Ruth Holladay, *Mother Made a Mistake, but She’s Already Been Punished*, INDIANAPOLIS STAR, Feb. 20, 2000, at B1. For more about this woman, see *infra* note 107.

55. HANDBOOK, *supra* note 44, at 147.

56. *Id.* at 157.

57. *Id.*

58. Michelle Oberman, *Turning Girls Into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 15-19 (1994).

59. *Id.*

60. See, e.g., Dan Quayle, Editorial, *Addressing Breakdown of Family Must Be Priority for Both Parties*, EVANSVILLE COURIER, Dec. 17, 1993, at 19A.

61. *What Clinton Says He’ll Do: State of the Union—1995*, S.F. EXAMINER, Jan. 25, 1995, at A16.

in 1995.<sup>62</sup> “Epidemic” is a powerful word which connotes a severe problem. Statements such as these demonstrate that a public stigma attached to unwed teenage motherhood and unwed motherhood in general may still exist.

Although somewhat difficult to believe, some teenage women may become pregnant and not even realize it, either because of severe denial or because they are immature<sup>63</sup> and unable to fully comprehend all of the telling physical symptoms of pregnancy.

Denial of pregnancy is more common among teenagers because they often prolong the interval between suspecting and confirming that they are pregnant. Indeed, with the increased use of birth control, which can result in regular menstrual bleeding even during pregnancy, some teens, understandably, do not recognize that they are pregnant.<sup>64</sup>

There are two main problems with denial.<sup>65</sup> First, denial can prevent the mother from bonding with the baby while pregnant.<sup>66</sup> Second, if the woman is in denial when she begins to deliver the baby, she may be scared and not realize what is happening<sup>67</sup> or be unaware<sup>68</sup> of what to do with the resulting child.<sup>69</sup>

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62. *Id.*

63. A common psychological characteristic of teenage neonaticide offenders is the “lack of ability to act to address their problem.” Fazio & Comito, *supra* note 27, at 3133 (footnote omitted).

64. *Id.* at 3134 (footnotes omitted).

65. “Denial has been described as a mechanism that reduces unpleasant feelings and beliefs by means of disavowing aspects of reality and typically exists when there is some stressful threat to the individual.” *Id.* at 3133 (footnote omitted).

66. *Id.* at 3134.

67. “[A] fourteen year old girl . . . claims to have been unaware that she was pregnant . . . . Throughout the day that she delivered the baby, she experienced what she thought were severe menstrual cramps.” Michelle Oberman, *The Control of Pregnancy and the Criminalization of Fetal Death*, 7 BERKELEY WOMEN’S L.J. 1, 2 (1992).

68. Teenage women especially may be unaware of how to care for a newborn baby because of lack of knowledge resulting from a lack of life experience. For example, one fourteen-year-old girl explained that she put her newborn baby in a toilet after giving birth because “she thought the baby ‘would be safe in the water because it had been in liquid inside of her.’” *Id.* at 3.

69. After the shock and trauma of the birth, the mother is confronted with the harsh reality of the baby.

After delivering the baby, the women’s actions range from exhaustion to utter panic. Many of the women temporarily lost consciousness, leaving the baby to drown in the toilet. Others left the baby in the water while they frantically cleaned the messy remains of the delivery from the floors and walls of the bathroom. Still others immediately pulled the baby from the toilet and actively contended with their situations. In several cases, women threw their babies out of bathroom windows. More commonly, the women suffocated or strangled their babies to prevent them from crying out. A few of the women silenced the baby with blows to its head or stab wounds inflicted with scissors.

Oberman, *supra* note 30, at 25 (footnotes omitted).

In most cases of neonaticide, . . . it is questionable whether the teen makes a conscious choice. She might deny her pregnancy due to fear and panic of her parents' and teachers' reactions, intense shame, or her desire to ignore the situation and get on with her life. . . . The problem does not go away, of course, and the teen is forced to face what she has denied for nine months when she gives birth. Shocked and frightened, the teen either violently kills the baby . . . or abandons the baby where it dies of exposure. In fear and shame, she covers up what she did, usually by disposing the baby in the trash or outdoors.<sup>70</sup>

Many teenage women who are in denial that they are pregnant are shocked when they go into labor.<sup>71</sup> As a result, they often give birth at home because they do not realize what is happening.

[N]eonaticide cases . . . present[] the same basic facts: the women experience[] severe cramping and stomach pains, which they often attribute[] to a need to defecate. They spen[d] hours alone, most often on the toilet, often while others [are] present in their homes. At some point during these hours, they realize[] that they [are] in labor. They endure[] the full course of labor and delivery without making any noise.<sup>72</sup>

According to a comprehensive study in the *New England Journal of Medicine*,<sup>73</sup> there is evidence that a home birth can lead to an increase in infanticide.<sup>74</sup> "Ninety-five percent of infants killed on the first day of life were not born in a hospital . . . . From 1989 through 1991, 71 percent of all homicides on the first day of life involved infants born at a place of residence."<sup>75</sup> Another study showed that "an extraordinarily high number of infants are killed within twenty-four hours of birth."<sup>76</sup> Further, a third study indicated that in 1999, forty-two percent of parental infanticides involved children who were less than one year old.<sup>77</sup>

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70. Fazio & Comito, *supra* note 27, at 3109-10 (footnotes omitted).

71. "In [a] study of adoption at birth in France, four out of twenty-two subjects had denied their pregnancy such that they were taken by surprise at childbirth." *Id.* at 3133-34 (footnote omitted).

72. Oberman, *supra* note 30, at 24-25.

73. Overpeck et al., *supra* note 28. The study did not include "[fifty-two] deaths caused by neglect, abandonment, or exposure but classified as unintentional. . . ." *Id.* at 1212. To that extent, this study may not be helpful in understanding mothers who abandon because many of their children, as discussed earlier, die from exposure. The study is helpful by analogy because it looks at deaths classified as intentional. Certainly some situations, such as another putting a newborn in a duffel bag after its birth, could be classified as intentional.

74. *Id.*

75. *Id.*

76. Oberman, *supra* note 30, at 22.

77. Thomas, *supra* note 20, at 24.

To effectively address the problem of abandonment, the solution must focus on the causes of abandonment.<sup>78</sup> Shaping a solution for abandonment and the way abandonment is treated in the criminal law<sup>79</sup> requires the analysis of two factors: the characteristics of mothers who abandon, and the best means of preventing abandonment. Currently, abandonment is a felony in Indiana.<sup>80</sup> However, criminal punishment does not address the underlying problems of the teenage mothers who abandon.

### III. THE INDIANA CODE'S REGULATION OF NEWBORN ABANDONMENT

This Part examines and exposes the deficiencies of current Indiana law regarding newborn abandonment in light of the common characteristics of mothers who abandon or kill their newborns or infants. A close reading of the relevant statute reveals that "defense to prosecution"—a key term of the 2000 amendment—is not defined in the statute or Indiana case law. Finally, this section establishes that, under Indiana law, an infant does not actually have to be injured for the mother to be charged and explains the ramifications for mothers who deliver their babies at home before abandoning them with an emergency medical services provider.

Under Indiana law, abandonment of a dependent is a form of dependent neglect and charged as a felony.<sup>81</sup> Neglect of a dependent may involve physical

78. "Although the babies died at their mothers' hands, many others should be implicated in their deaths—the fathers, grandparents, friends, schools and workplaces, and society as a whole." Oberman, *supra* note 30, at 4.

79. Some feminist scholars believe that women are treated especially harsh or are seen as mentally ill for their personal decisions regarding reproduction.

[R]easons for women's crimes are sought within the discourse of the "irrational" and the "pathological": for example, mental illness, menstruation, poor socialisation. . . .

Although socio-economic problems are considered to some extent, this is usually only in the context of demonstrating that the offence was a symptom of the woman's inability to cope with such stresses, rather than it was a *rational* response to them.

Ania Wilczynski, *Images of Women Who Kill Their Infants: The Mad and the Bad*, 2 WOMEN & CRIM. JUST. 71, 72 (1991) (emphasis in the original).

[W]e see a government that sits in judgment on the reproductive decisions made by certain women . . . . The criminal justice system's responses reflect a belief that some of these women should not be having sexual intercourse, others should not be bearing children . . . . The penalties . . . punish women for . . . conceiving and reproducing.

Oberman, *supra* note 67, at 2.

80. IND. CODE § 35-46-1-4 (Supp. 2000).

81. Someone "who knowingly or intentionally . . . (2) abandons . . . the dependent [or] (3) deprives the dependent of necessary support . . . commits neglect of a dependent, a Class D felony." *Id.* § 35-46-1-4(a). "[T]he offense is: (1) a Class C felony if it is committed under subsection . . . (a)(2), or (a)(3) and results in bodily injury; (2) a Class B felony if it is committed under subsection . . . (a)(2), or (a)(3) and results in serious bodily injury. . . ." *Id.* § 35-46-1-4(b).

abandonment<sup>82</sup> or depriving the dependent of necessary support.<sup>83</sup> Often, in the case of newborn abandonment, both are included in the offense. “‘Support’ means food, clothing, shelter, or medical care.”<sup>84</sup> Indiana’s 2000 child abandonment statute provides a defense to the charge of abandonment for a mother who leaves her newborn with an emergency medical services provider when “the prosecution is based solely on the alleged act of leaving the child with the emergency medical services provider.”<sup>85</sup>

An initial problem with the 2000 abandonment statute is that it did not define “defense to prosecution” or “defense.” Neither “defense to prosecution” nor “defense” were included in the definitions for Article 46.<sup>86</sup> The Indiana Supreme Court and the Indiana Court of Appeals have examined other defenses, such as insanity,<sup>87</sup> mistake of fact,<sup>88</sup> and selective prosecution<sup>89</sup> to explain the defendant’s burden of proof and, more importantly, the elements of the defense. In some instances, such as in the mistake of fact defense,<sup>90</sup> elements of the defense are indicated in the statute granting the defense,<sup>91</sup> highlighting that at times the legislature does choose to elaborate on elements of particular defenses. In the absence of such statutory elaboration, the Indiana Court of Appeals and the Indiana Supreme Court establish or interpret the elements and the burden of proof for various defenses.<sup>92</sup>

Arguably, if the legislature were serious about providing such a defense, it would have spelled out the elements and burden of proof for the defense in the text of the statute. However, because the elements and burden of proof for “defense to prosecution” are not set out in the abandonment statute, individuals must wait for the Indiana courts to interpret or explain this defense. Of course, the Indiana courts will have the opportunity to interpret the defense only if a mother raises the issue in her prosecution. In so doing, the mother must file a motion to dismiss<sup>93</sup> and state the defense as a “ground for dismissal.”<sup>94</sup> However, if the dismissal is not granted, the defendant will go to trial and be at the mercy

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82. *Id.* § 35-46-1-4(a)(2).

83. *Id.* § 35-46-1-4(a)(3).

84. *Id.* § 35-46-1-1.

85. *Id.* § 35-46-1-4(c)(a).

86. *See id.* § 35-46-1-1.

87. *See Van Orden v. State*, 469 N.E.2d 1153, 1159 (Ind. 1984) (explaining that defendant has burden of proof for an insanity defense).

88. *See Lechner v. State*, 715 N.E.2d 1285, 1286-87 (Ind. Ct. App. 1999) (explaining elements and defendant’s burden of proof for defense of mistake of fact and citing applicable statutes and case law to define mistake of fact defense).

89. *See Dix v. State*, 639 N.E.2d 363, 366 (Ind. Ct. App. 1994) (stating three elements of defense of selective prosecution).

90. *See Lechner*, 715 N.E.2d at 1286-87.

91. *See* IND. CODE §§ 35-41-3-7, 35-42-4-3(c) (Supp. 2000).

92. *See supra* notes 87-88 and accompanying text.

93. *See* IND. R. CRIM. P. 3.

94. *Id.*

of the trier of fact in what would likely be a high-profile trial.

An additional problem with the statutory language, “defense to prosecution,” is that it connotes that prosecutors are without discretion to prosecute women who leave their newborns with an emergency medical services provider. However, the executive director of the Indiana Prosecuting Attorney’s Council stated that he did not think prosecutors would bring charges against a mother who left her baby with an emergency medical services provider.<sup>95</sup> Therefore, the effect of the statute is unclear. If mothers will not be prosecuted, there is no need to provide for a defense.

The statute is also unclear as to what kinds of abandonment are covered by the defense. The wording of the statute implies that the defense applies only to *physical* abandonment and not to abandonment for lack of support.<sup>96</sup> It is easy to imagine teenage mothers who give birth at home not providing their infants with medical attention or food before taking them to emergency medical services providers. In fact, lack of medical attention or food for the infant may be the reason that a teenage mother chooses to abandon her child with an emergency medical services provider in the first place. Under the statute, it is unclear whether a mother would have a defense for the lack of support provided to the infant during and after the home birth.<sup>97</sup> An infant born at home would likely be

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95. Penner, *supra* note 3. There is some evidence that prosecutors have chosen not to prosecute mothers who leave their newborns with an emergency medical services provider.

Steve Johnson, executive director of the Indiana Prosecuting Attorney’s Council . . . briefed county prosecutors from across the state, and predicted that mothers who make a clear effort to keep their babies safe won’t be prosecuted.

Technically, the new law creates a legal defense for parents who give up their babies, as long as the babies show no signs of abuse or neglect, to police, firefighters, paramedics and hospital emergency room medical staff.

“If a mother truly does follow the provisions of the law, I think it’s very unlikely a prosecutor will file charges,” Johnson said. “If the baby’s safe—I think that’s all they care about.”

*Id.* This informal amnesty program is very similar to a program in Mobile, Alabama.

“Prevention is a far better alternative than prosecution,” said John Tyson, Jr., Mobile County district attorney, who helped create what he says is the first program of its kind in the United States. The Alabama District Attorneys Association joined Tyson last fall, agreeing not to press abandonment charges where such a program exists.

Edith Stanley, *Program Addresses Infant Abandonment*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 29, 2000, at A11.

If it is true that prosecutors are not going to prosecute women who abandon their unharmed child with an emergency medical services provider, then the Indiana General Assembly, the ultimate authority of the public policy of the state, should codify this into law, rather than leave it to informal amnesty programs or policies of county prosecutor’s offices.

96. *See supra* note 24.

97. In 1992, the Indiana Court of Appeals held that “necessary support” for the purposes of the offense of neglect of a dependent was based upon a knowing or intentional deprivation of necessary support. *Ricketts v. State*, 598 N.E.2d 597, 600 (Ind. Ct. App. 1992). “Necessary

in need of medical attention just based on the circumstances of the birth.<sup>98</sup>

Further, according to the statistics previously cited, a teenage mother who abandons her baby is less likely to have received prenatal care than a mother in other circumstances, thus increasing the odds that her newborn could have medical problems. The statistics also show that mothers who abandon their infants tend to have less than twelve years of education.<sup>99</sup> Beyond the consideration of formal education, a teenager also lacks the life experience of an adult. This lack of education and experience could increase the possibility that the mother would not be able to identify medical problems of the newborn and provide assistance to the baby. For example in 2001, an Indianapolis teenager was convicted of criminal recklessness in the death of her newborn.<sup>100</sup> According to the mother, the child was blue at birth. After the mother's attempts at resuscitation failed, she wrapped the infant in towels and placed it in a duffel bag.<sup>101</sup> According to the prosecution, the baby smothered to death over a period of five hours while lying in the bag.<sup>102</sup>

Compounding the difficulty of addressing a newborn's medical problems is the probability that the mother was in denial. Moreover, the shock of the birth itself could leave the mother in an irrational mental state. "A fourteen year old's failure to recognize the onset of labor and to know how to deliver her own baby is not a sign of a mental deficiency or criminality."<sup>103</sup> The circumstances surrounding the pregnancy and the birth itself could mean that the mother may not be able to provide the necessary medical care for the new baby.<sup>104</sup> To meet the knowledge requirement of the statute, the state must show that the mother "was 'subjectively aware of a high probability that [s]he placed the child in a

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support" includes "essential, indispensable or absolutely required food, clothing, shelter[,] and medical care; i.e., food, clothing, shelter, and medical care without which the dependent's life or health is at risk or endangered." *Id.*

98. See Oberman, *supra* note 30, at 82.

Even if [the mother's] behavior prior to the birth is both legal and unintentional, it can be argued that, once the baby is born, the woman's failure to seek assistance is either criminally negligent or reckless because a parent has a legal duty to furnish medical care for her child.

*Id.*

99. "[A] teenager does not have the same knowledge of sex, pregnancy, and birth as an adult, so the teenager should be judged under a different standard of proving mens rea than an adult." Fazio & Comito, *supra* note 27, at 3151 (footnote omitted).

100. Vic Ryckaert, *Mother Faces 3 Years for Newborn's Death*, INDIANAPOLIS STAR, July 27, 2001, at B5.

101. *Id.*

102. Vic Ryckaert, *Teen Mother Awaits Verdict in Neglect Case*, INDIANAPOLIS STAR, July 26, 2001, at B4.

103. Oberman, *supra* note 67, at 5.

104. *Id.* "[I]t is hard to discern what a reasonable standard of care should be for delivering babies when one is fourteen, lacking education about human reproduction, and totally unaware that she is pregnant." *Id.* at 3.



dangerous situation.”<sup>105</sup>

A teenage mother who abandons her baby with an emergency medical services provider does not necessarily abandon a child seriously in need of medical attention. However, based on the statistics compiled about the babies who are abandoned and the mothers who abandon them, it seems probable that a case could be made that the abandoned baby lacked support in the form of medical attention. Under the statute as it is currently written, the mother would not have a defense for lack of support. Because of this discrepancy, it is unclear whether the defense added in the 2000 amendment would be a defense at all for a teenage mother who abandons her infant in a hospital after a home birth. In this sense, the statute does not address the problem.

The *effect* of the statute may be to punish mothers who leave their babies in need of medical attention and to not punish those who abandon babies not in need of medical attention. However, the statute does not provide guidelines for determining what constitutes a lack of medical attention. “[T]here must be something in a criminal statute to indicate where the line is to be drawn between trivial and substantial things so that erratic . . . convictions for trivial acts and omissions will not occur. It cannot be left to juries, judges, and prosecutors to draw such lines.”<sup>106</sup> Because newborns abandoned by teenage mothers present a high statistical probability for having medical problems constituting lack of support under the Indiana Code, it would appear that the majority of teenage mothers granted a defense for abandonment by leaving their child with an emergency medical services provider would gain no defense at all.

Furthermore, the defendant can be convicted of neglect of a dependent even if the dependent is not actually injured.<sup>107</sup>

[T]he defendant does not have to actually injure the dependent to be convicted, just “place[] the dependent in a situation that may endanger his life or health.” This has been interpreted to mean “expose the dependent to a danger which is actual and appreciable.” While most cases do involve injuries to the dependent, defendants have been convicted when no actual injuries to the dependent occurred.<sup>108</sup>

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105. *Sanders v. State*, 734 N.E.2d 646, 650 (Ind. Ct. App. 2000) (quoting *Smith v. State*, 718 N.E.2d 794, 806 (Ind. Ct. App. 1999)).

106. *State v. Downey*, 476 N.E.2d 121, 123 (Ind. 1985).

107. For example, in 2000, a young woman who came to the United States from Nigeria was convicted of neglect after leaving her baby in a trash bin shortly after the child’s birth. Vic Ryckaert, *Teen Guilty of Felony Child Neglect*, INDIANAPOLIS STAR, July 29, 2000, at B1. The baby survived and the woman was charged with attempted murder, but the judge in the case ruled that the prosecution had not proved beyond a reasonable doubt that the defendant intended to kill the baby. *Id.*

108. Kenneth D. Dwyer, Note, *Indiana’s Neglect of a Dependent Statute: Uses and Abuses*, 28 IND. L. REV. 447, 454 (1995) (alteration in original) (footnotes omitted). For cases where a defendant was convicted despite the fact that the dependent was not actually injured, see:

*Sample v. State*, 601 N.E.2d 457 (Ind. Ct. App. 1992) (mother convicted for failure to

In 2000, the Indiana Supreme Court articulated the standard of care for a parent whose dependent is in need of medical attention. The court stated: “When there are symptoms from which the average layperson would have detected a serious problem necessitating medical attention, it is reasonable for the jury to infer that the defendant knowingly neglected the dependent.”<sup>109</sup>

Prosecutors are elected officials that come and go depending on the election results. Just because a prosecutor in a given county decides not to prosecute in a given year does not mean that a newly elected prosecutor in a subsequent year could not decide to prosecute mothers for abandoning their newborns in an emergency room. Finally, a prosecutor’s statement to the media that he will not prosecute for a given offense is not binding.

Sound public policy demands certainty in the law. Considering the multiple interpretations of the statute discussed here, it is not difficult to imagine that teenage mothers who are considering abandoning a newborn would be confused, even if she knew the statute was on the books. Confusion, in addition to stress and emotional anguish, could cause the mother to abandon her baby in a dumpster rather than choosing safety and the best interests of the child.

#### IV. CURRENT LAW IN INDIANA REGARDING THE RIGHTS OF MOTHERS AND PUTATIVE FATHERS WHO ARE UNIDENTIFIED WHEN ADOPTION PROCEEDINGS TAKE PLACE

One of the biggest concerns with granting immunity and anonymity to mothers who abandon their newborns with emergency medical services providers is whether the mother and father of the infant have given the requisite consent to the subsequent adoption of the child. Indiana has established law for dealing with mothers and fathers whose identity is unknown when the child is placed for adoption. Obviously, the problem of an unknown parent is more acute when dealing with fathers because *generally* the mother is known in an adoption proceeding. However, in the case of an adoption proceeding involving an abandoned baby, the mother may not be known.

In Indiana, a mother’s consent to the adoption of her child is not necessary if she abandons the child.<sup>110</sup> The requisite consent for adoption is inferred from

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obtain prompt medical care for her four-month-old infant after the child fell and fractured her skull even though the child’s physician testified that the delay itself did not constitute an actual and appreciable threat to the child’s life or health); *Johnson v. State*, 555 N.E.2d 1362 (Ind. Ct. App. 1990) (mother convicted when she delayed obtaining medical care for her burned seventeen-month-old infant because there was a risk of severe infection even though the delay did not actually cause any harm).

*Id.* at 454 n.77.

109. *Mitchell v. State*, 726 N.E.2d 1228, 1240 (Ind. 2000) (footnote omitted) (citing *Hill v. State*, 535 N.E.2d 153, 155 (Ind. Ct. App. 1989)).

110. *In re Adoption of Thomas*, 431 N.E.2d 506, 512 (Ind. Ct. App. 1982).

The parent’s careless . . . failure to perform his parental duties is a significant element of the offense of abandonment . . . . Such neglect is to be considered regardless of any

the abandonment of the infant. If the mother does not disclose her name or the name of the child pursuant to Indiana Code section 31-34-2.5-1, the mother “is not required to be notified” of hearings regarding the child.<sup>111</sup> If a mother changes her mind after abandoning the baby at the hospital, it is likely the mother will not regain legal custody of her child.<sup>112</sup> Because the mother is the one abandoning the child and because historically it has not been as difficult to identify the mother, the legislature has adequately provided for the rights of the mother in an adoption proceeding after the mother has abandoned the infant.

The rights of the father are more complicated because often the father cannot easily be identified. First, the father may not know the child exists because the mother may not have informed him about the pregnancy or the birth of the child. Second, the mother may not know who the father is for any number of reasons.<sup>113</sup> Third, the mother may lie and say that she does not know the father, or may lie to the actual father and say the child is not his. All of these problematic identification factors contribute to paternal rights being more complicated than maternal rights. Perhaps the biggest concern about anonymous abandonment of newborns is that the father’s rights will be terminated without his notice or consent.

The Indiana General Assembly’s delineation of putative father rights are applicable in the case of the adoption of an infant abandoned anonymously by the mother. The Indiana Code defines “putative father” as

a male of any age who is alleged to be or claims that he may be a child’s father but who: (1) is not presumed to be the child’s father . . . and (2) has not established paternity of the child: (A) in a court proceeding; or (B) by executing a paternity affidavit . . . before the filing of an adoption petition.<sup>114</sup>

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actual intention or settled purpose by the parent to relinquish his proprietary claim to his child . . . . Abandonment imports any conduct on the part of the parent which evinces an intent or settled purpose to forego all parental duties and relinquish all parental claims to the child. In abandonment cases, it is only necessary that the intention or settled purpose of the parent exist as to non-performance of his required parental duties and obligations.

*Id.*

111. IND. CODE § 31-34-21-4(f) (Supp. 2001).

112. *Id.* § 31-34-21-5.6 (Supp. 2001).

Reasonable efforts to reunify a child with the child’s parent . . . are not required if the court finds . . . (5) The child is an abandoned infant, provided that the court: (A) has appointed a guardian ad litem or court appointed special advocate for the child; and (B) after receiving a written report . . . and after a hearing, finds that reasonable efforts to locate the child’s parents . . . would not be in the best interests of the child.

*Id.*

113. Those reasons may include rape, sex with multiple partners, and sex with partners whose identity is unknown to the mother.

114. IND. CODE § 31-9-2-100 (1998).

Indiana imposes a duty on the father to register with the Putative Father Registry in order to receive notice that the child is being placed for adoption.<sup>115</sup> In the case of a father who is unaware that he has fathered a child, the burden to register becomes an even more important issue.

It is unfortunate but true that a man may be unaware that he has fathered a child. It is equally true, and equally unfortunate, that the mother and her family can prevent the man from learning of the pregnancy. Yet a man must accept some responsibility in the matter. Due process does not require that every possible biological father be given notice of adoption proceedings—only that the notice scheme not omit many responsible fathers . . . . The fact that a man does not know or fails to learn that he has fathered a child reduces the likelihood that he will step forward to establish a responsible parent-child relationship.<sup>116</sup>

The primary reason for the strict requirements of registry is the well being of the child.

[A] child should not be made to suffer when a putative father is ignorant of his parenthood due to his fleeting relationship with the mother and her unwillingness to notify him about the pregnancy. The child should also not be made to suffer when a putative father makes no inquiry regarding the possibility of a pregnancy.<sup>117</sup>

The legislature already has procedures in place that allow for the quick adoption of children. More important, the legislature has provided means for determining the best interests of the child. A mother who abandons her child with an emergency medical services provider relinquishes her parental rights. If a father has not registered with the Putative Father Registry according to the rules set forth in the Indiana Code and the mother has not voluntarily provided the father's name, the father will not be given notice of the adoption proceedings. In this sense, the father is not losing his parental rights simply because the mother abandons the baby with an emergency medical services provider. The Indiana General Assembly has already provided for the case of an unknown father. The fact that a mother abandons a child with an emergency medical services provider does not require different treatment in relation to the putative father's rights.

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115. "A putative father who fails to register . . . waives notice of an adoption proceeding. The putative father's waiver under this section constitutes an irrevocably implied consent to the child's adoption." *Id.* § 31-19-5-18. The father has a limited period of time within which to register with the Putative Father Registry. "If a putative father fails to register with the Registry within 30 days of the child's birth or the date of the filing of the petition for the child's adoption, whichever occurs later, the State's obligation to provide this child with a permanent, capable and loving family becomes paramount." *Jones v. Maple*, 734 N.E.2d 281, 287 (Ind. Ct. App. 2000).

116. *B.G. v. H.S.*, 509 N.E.2d 214, 217 (Ind. Ct. App. 1987) (citation omitted).

117. *Jones*, 734 N.E.2d at 287.

## V. PUBLIC POLICY CONCERNS

Saving the lives of newborns by allowing mothers to leave infants with emergency medical services providers implicates several public policy concerns that can be furthered by granting the mother immunity. First, the state has an interest in facilitating the adoption of children. Second, it is the legislature's responsibility to dictate public policy. The final and most important public policy concern is the state's interest in the welfare of children.

### A. *The State's Interest in Facilitating the Adoption of Children*

The State of Indiana has demonstrated its interest in facilitating the adoption process. It has provided a small window of time for the putative father to register and has made it difficult for a mother to change her mind about abandoning her child. Additionally, "the state has a strong interest in providing stable homes for children, and early, permanent placement with adoptive families furthers the interests of both the child and the state."<sup>118</sup> By applying the policies and procedures already in place with abandoned children, the state can facilitate the adoption of children abandoned in emergency rooms. At the same time, mothers who abandon their children with emergency services providers can do what they believe is in the best interest of their children.

### B. *The Legislature is the Proper Authority to Dictate Public Policy*

The legislature is the proper authority to dictate public policy—not prosecutors, agencies or courts.<sup>119</sup> "States frequently make differing policy decisions and pass laws accordingly. It is not [the court's] role to consider legislative judgment or to weigh policy decisions . . . ."<sup>120</sup> It seems that the courts would be obliged to follow the determinations of the legislature, and not the informal amnesty guarantees provided by prosecutorial discretion.

### C. *The State's Interest in Protecting Children*

The primary concern of the courts in an adoption proceeding is the best

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118. *B.G.*, 509 N.E.2d at 217. In 2000, the Indiana Court of Appeals reaffirmed the duty of the putative father to step forward and register or risk not receiving notice of the potential adoption.

During the first months of his son's life, [the putative father's] only connection to the infant was biological. That he now asserts that he was willing to be a custodial parent, had he only known, adds nothing to his argument, even if we accept the dubious proposition that a willingness so abstract and amorphous has some legal significance. *Jones*, 734 N.E.2d at 286 (quoting *Robert O. v. Russell K.*, 604 N.E.2d 99, 103-04 (N.Y. 1992)).

119. The Indiana courts have yet to consider a charge of abandonment for a mother who abandoned her infant with an emergency medical services provider.

120. *Spencer v. O'Connor*, 707 N.E.2d 1039, 1045 (Ind. Ct. App. 1999); *see also Hovey v. Foster*, 21 N.E. 39, 41 (Ind. 1889) (public policy is a matter of legislative discretion); *McFarland v. McFarland*, 40 Ind. 458, 461 (1872) (the duty to make law is for the legislature, not the courts).

interest of the child.<sup>121</sup> Similarly, the primary focus of a state allowing immunity for mothers who abandon their newborns should be saving the life of the child. “We’ve got to do something that will make us think more of the children, because they’re paying with their lives.”<sup>122</sup> Indiana has an interest in protecting its children. The mother abandoning her child with an emergency medical services provider does so because she feels that abandoning the child is in the best interest of the child. The interest in the welfare of children, shared by the state and the mother who chooses to leave her baby with an emergency medical services provider, can be furthered without punishing the mother for the abandonment.

### CONCLUSION

Indiana should provide immunity from prosecution for abandonment to mothers who abandon their newborns within forty-five days of birth to an emergency medical services provider. California, Minnesota, Ohio, and South Carolina have adopted a similar immunity provision.<sup>123</sup> Immunity from prosecution would provide a mother an opportunity to freely choose to act in the best interest of her child. Indiana should also draft statutes in a manner that promotes certainty in the law.

A continuing public relations campaign informing the public about the change in the child abandonment statute would lead to increased education and a better chance for intervention before the birth.<sup>124</sup> Teenagers must be aware of the option of abandonment to a medical services provider before giving birth.<sup>125</sup>

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121. “The best interests of the child are the primary concern in an adoption proceeding.” *B.G.*, 509 N.E.2d at 217; *see also* *P.D. v. D.H.*, 661 N.E.2d 873, 877 (Ind. Ct. App. 1996); *Unwed Father v. Unwed Mother*, 379 N.E.2d 467, 472 (Ind. Ct. App. 1978).

122. 20/20: *The Innocent Ones* (ABC television broadcast, Aug. 10, 2000), transcript available at [http://www.abcnews.go.com/onair/2020/transcripts/2020\\_000810\\_projectcuddle\\_trans.html](http://www.abcnews.go.com/onair/2020/transcripts/2020_000810_projectcuddle_trans.html) (on file with the *Indiana Law Review*).

123. *See* NAT’L CONF. OF STATE LEGS., *supra* note 11.

124. Minnesota’s safe harbor movement has increased education. “Hospitals . . . [state] that their ob-gyn departments are getting more calls from women saying that they’re pregnant, it’s a secret, and they need some help.” Ode, *supra* note 29.

125. In Indiana, it may be difficult for teenagers to learn of the option available to them. James Hmurovich, the director of Indiana’s Division of Family and Children, was quoted as saying, “[I]n publicizing [the defense to prosecution for child abandonment], officials also must be careful to stress that women . . . can avoid a baby crisis . . . . We don’t want to make it seem that our society thinks it’s acceptable to abandon a child . . . . We want this to be our safety net . . . .” Penner, *supra* note 3. Perhaps one place to start in planning the publicity campaign would be to target the Indiana counties with the highest rate of teen pregnancy. In 1997 those counties were: Blackford, Cass, Clay, Crawford, Decatur, DeKalb, Elkhart, Fayette, Howard, Jackson, Jay, Jennings, Lake, LaPorte, Marion, Marshall, Miami, Noble, Orange, Scott, Spencer, Washington, and Vanderburgh. THE NATIONAL CAMPAIGN TO PREVENT TEEN PREGNANCY, *Fact Sheet: Teen Pregnancy and Childbearing in Indiana*, at <http://www.teenpregnancy.org/usa/in2.htm> (last visited Sept. 6, 2001).

Connecticut, Florida, New Jersey, and South Carolina have legislation in place to educate the public about the abandoned baby legislation either through a media campaign or some other form of public notice.<sup>126</sup> The trauma of giving birth, especially at home, can cause the woman to act in an arguably “unintentional”<sup>127</sup> manner that can lead to harm to her infant.<sup>128</sup> Thus, the mother must be aware of the safe abandonment option before giving birth.

There is evidence that legislation granting mothers a defense to prosecution if they abandon their children with an emergency medical services providers is helping to save lives. Although states that have such legislation in place have not yet had many women choose to invoke the defense, with one exception women are not abandoning their children in unsafe situations either.<sup>129</sup> By settling the law in this area in favor of immunity from prosecution for abandonment in

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On the other hand, the counties with the lowest rate of teenage pregnancy should be targeted because the sense of shame that can lead to abandonment could be stronger in those counties. The counties with the lowest teenage birth rates in 1997 were as follows: Adams, Boone, Brown, Dearborn, Delaware, Dubois, Franklin, Hamilton, Hancock, Hendricks, Jasper, Johnson, Knox, LaGrange, Monroe, Ohio, Porter, Posey, Putnam, Tippecanoe, Tipton, Union, and Warrick. *Id.*

126. NAT’L CONF. OF STATE LEGS., *supra* note 11.

127. Due to the trauma of home birth, especially when the mother is in denial or unaware that she is pregnant, many argue that a mother who kills her newborn does not have the requisite mental state to form intent. “[W]hen the teen gives birth in a panic, then acts rashly by killing her baby, her culpability lies somewhere between criminal negligence and manslaughter, i.e., recklessness.” Fazio & Comito, *supra* note 27, at 3150 (footnotes omitted). Even disposing of the body does not show knowledge of guilt. *Id.* This is further proof that the education and the knowledge of the option of choosing life for the baby needs to be addressed with the pregnant woman before giving birth. If a woman is aware that she can leave the child with an emergency medical services provider after the birth, she may not be in such a state of panic immediately following childbirth because she knows there is an option available to her.

[M]ost neonaticide defendants do not plan to kill their babies. Quite to the contrary, everything about the circumstances surrounding labor and delivery in these cases speaks to the sudden and impulsive nature of the mother’s response. Although one might argue that the defendant was negligent in her failure to anticipate the impending birth of a child, and in her failure to take precautions to insure the baby’s survival, this hardly can be seen as premeditated murder. At best, this failing makes her reckless.

Oberman, *supra* note 30, at 80 (footnote omitted).

128. At least two authors have proposed a “neonaticide syndrome defense” which would require the woman accused to produce “evidence that at the time the balance of her mind was disturbed by the birth . . . not that the disturbance was sufficiently severe to deprive her of knowledge of the nature and quality of her act, or knowledge of its wrongfulness, or the capacity to control herself.” Fazio & Comito, *supra* note 27, at 3152 (footnote omitted).

129. See NAT’L CONF. OF STATE LEGS., *supra* note 11. The experiences of four states, Alabama, New Jersey, New York and Texas, are profiled. Although none of those states have adopted immunity from criminal prosecution for mothers who abandon their newborns, their results can be proof that a clearly defined statute can help save lives. *Id.*

limited circumstances and by educating<sup>130</sup> and promoting the law as an option to save babies' lives, Indiana can codify the public policy of the state and help mothers in desperate situations to allow their children the opportunity to be adopted instead of being left alone in dangerous settings.

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130. For example:

Since we found that infants are most likely to be killed during the first few months of life, the identification of risk factors and interventions must take place during pregnancy, at the time of delivery, and in the immediate postpartum period . . . . The identification of risk factors for infant homicide may also be appropriate in prenatal clinical settings . . . . However, these interventions have not been evaluated for their effect on the abuse of infants after pregnancy.

Overpeck et al., *supra* note 28, at 1215 (footnotes omitted). Further, there is evidence that intervention and education do help reduce child neglect. "[H]ome visitation by trained nurses during pregnancy . . . reduced rates of state-verified cases of child abuse and neglect among first-born children of unmarried adolescents of low socioeconomic status." *Id.*