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OYA-KO SHINJU: DEATH AT THE CENTER OF THE HEART

Taimie L. Bryant*

In Western culture, the tragedy of Medea is a powerful vehicle for questioning the idea that a truly loving mother would not commit infanticide. The tragedy of Medea is the tragedy of all women whose lives are defined and constrained by the actions and choices of the men around them. Once obedient to father and brother, Medea was compelled by the gods to betray them and her country in order to help another man, Jason, secure the golden fleece. However, despite her continued love and support of Jason, neither Medea nor her sorcery could bind the loyalty of the man who had benefited so often from her assistance. When Jason forsook her for the daughter of a powerful king, Medea took revenge by arranging the bride's death. Medea knew that Jason would seek retribution and that she would have to flee her husband's country. Already exiled from the land of her birth, Medea feared that, wherever she and her sons went, her helpless sons would be taken as slaves. Believing it better that they die by the hand of their mother than the merciless hand of a stranger, Medea steeled herself and killed them.

There are many parallels between Medea's decisions and those of Fumiko Kimura, a Japanese woman living in California who drowned her two young children shortly after learning of her husband's longstanding infidelity.¹ As in the story of Medea, Fumiko singularly devoted herself to her husband.² Like Medea, Fumiko's decision to kill her children was tinged with revenge against her husband and despair for her children's future. And, like Medea, Fumiko believed she was entitled to bring death to the beings to whom she had brought life.

Nevertheless, there are at least three major differences between

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1. According to a Los Angeles Times article, Mrs. Kimura had learned ten days earlier that her husband had been involved with another woman for three years. L.A. Times, Feb. 24, 1985, Part I, at 3, col. 1.

2. *Id.* at 30, col. 1.

the story of Medea and the acts of Fumiko Kimura on that January day in 1985. First, Fumiko intended to die with her children; their deaths were a part of her own. In fact, Mrs. Kimura would have drowned with her children had she not been pulled from the ocean and resuscitated by passers-by.³ Second, Fumiko did not avenge herself through a direct attack on her husband's mistress. While she may have anticipated that the mistress would feel tremendous guilt and remorse upon learning of Fumiko's suicide and the death of the children, Fumiko attempted to use her own death as well as the children's in revenge. The third point of difference is that Medea had to contend only with the displeasure of the gods; Fumiko Kimura had to answer to the California criminal justice system.

Mrs. Kimura was arrested for the murder of her children, but she ultimately pleaded no contest to two counts of voluntary manslaughter. She was sentenced to one year in prison (which she had already served in pre-trial detention) and five years probation with counseling.⁴ According to a *Los Angeles Times* report, the central factor in the reduction of Mrs. Kimura's crime from murder to voluntary manslaughter was the district attorney's reliance on psychiatric testimony that Mrs. Kimura lacked the mental state necessary for murder at the time she killed her children.⁵

Mrs. Kimura's crime was reduced on the basis of an ostensibly culture-free argument. However, the circumstances which explain why Mrs. Kimura lost the capacity to engage in the rational thought necessary to be guilty of murder, and to prevent the tragedy that engulfed her, are traceable to norms and values present in the Japanese socio-cultural context. Indeed, the case received considerable attention both within and outside the Japanese community because it raised the distinction between parent-child suicide (*oyako shinju*) and infanticide (*kogoroshi*) in Japan.⁶

The Kimura case has also generated discussion about the idea of a "cultural defense" in criminal proceedings.⁷ There are at least two distinct ways of thinking about a cultural defense. One is to question whether the perceptions and understandings of an act in

3. L.A. Times, June 14, 1988, Part II, at 3, col. 1.

4. L.A. Times, Nov. 22, 1985, Part II, at 1, col. 4.

5. *Id.* at 8, col. 1.

6. The Los Angeles Times ran a series of articles beginning with the incident itself in January 1985 through the legal proceedings, which concluded in November of that year. There was also a follow-up story in 1988. L.A. Times, *supra* note 4. The Kimura case has also been the subject of two law review articles. Parker, *Law and Language in Japan and in the United States*, 34 OSAKA U. L. REV. 47 (1987); Sheybani, *Cultural Defense: One Person's Culture Is Another's Crime*, 9 LOY. L.A. INT'L & COMP. L.J. 751 (1987). On the topic of women who kill their newborns, see generally Laura Elana Reece, *Mothers Who Kill: Postpartum Disorders and Criminal Infanticide* (forthcoming *UCLA Law Review*; manuscript on file with the author).

7. Sheybani, *supra* note 6.

the defendant's culture should be incorporated into an evaluation of whether the individual understood that her act breached a moral norm of the dominant, prosecuting society. Sheybani, an advocate of limited use of cultural data in criminal prosecutions, argues that explicit consideration of the cultural component of Mrs. Kimura's actions would have been preferable to legal reasoning that purported to rest solely on seemingly culture-neutral psychiatric and legal analysis.⁸

Another use of the cultural argument would make it relevant to ask whether the offender would have been treated leniently by the legal system of her home culture. Four thousand people in the Japanese community of Los Angeles signed petitions in support of lenient treatment of Mrs. Kimura's case, claiming that she would have been treated leniently by the Japanese legal system had she committed the same acts there.⁹

This article is not concerned directly with arguments for or against the use of a cultural "defense" to criminal liability. Rather, I examine the claim that Mrs. Kimura would have been treated leniently by the legal system in Japan. If so, what does "lenient treatment" involve in the Japanese legal context? Is the socio-cultural distinction between *oya-ko shinju* (parent-child suicide) and *kogoroshi* (infanticide) legally significant? Once categorized as *oya-ko shinju*, does the parent escape conviction, escape punishment or receive less punishment?

This article also explores the extent to which the concept of *oya-ko shinju* is properly characterized as *haha-ko shinju* ("mother-child"/"center of the heart"). For example, would it have been important to the categorization of Mrs. Kimura's case in Japan that it was Mrs. Kimura and not Mr. Kimura who committed the act? Finally, this article considers whether the legal disposition of parental infanticide cases devalues children's lives by furthering the ideology of parental control. These issues are explored through an analysis of Japanese social science data and of four specific cases of homicide prosecutions.

I. THE SOCIO-LINGUISTIC BACKGROUND

Despite similarities between *oya-ko shinju* and instances of apparent parent-child suicide or infanticide in other countries (let alone Greek mythology), there is an argument that parent-child suicide as it occurs in Japan is uniquely Japanese.¹⁰ Just as there are

8. Sheybani, *supra* note 6, at 783.

9. Sherman, *Legal Clash of Cultures*, NAT'L L.J., Aug. 5, 1985, at 1, col. 1.

10. Social scientist Hiroshi Wagatsuma argues that *oya-ko shinju* is unique to Japan. Wagatsuma, *Child Abandonment and Infanticide: A Japanese Case*, in CHILD ABUSE AND NEGLECT: CROSS-CULTURAL PERSPECTIVES 120 (J. Korbin ed. 1981).

differences between the circumstances, motives, and behavior of Medea and Fumiko, there are differences in the way such acts by parents are perceived and understood in different societies. Others may debate whether those differences justify the Japanese claim to uniqueness.

At the very least, the Japanese do have an elaborate layperson's vocabulary for death, suicide, homicide, and infanticide. For example, the term that is translated as parent-child suicide (*oya-ko shinju*) is so linguistically and conceptually distinct from infanticide (*kogoroshi*) that the characters with which *oya-ko shinju* is written do not contain any reference to death or killing. Literally translated, the term is composed of two sets of characters: "parent-child" and "center of the heart." Similarly, the concept of an entire family dying together in response to some tragedy of their existence is captured by the term *ikka shinju*, literally translated as "one family"/"center of the heart." On the other hand, the words for suicide (*jisatsu*, literally "self kill"), infanticide (*kogoroshi*, literally "child kill"), and homicide (*satsugai*, literally "kill injury") all contain the Chinese character for "kill" (*satsu*).¹¹ Two features of this linguistic diversity are particularly striking. First, there is no comparably euphemistic or honorific term for children taking the lives of their parents; there is no such term as *ko-oya shinju*, literally "child-parent"/"center of the heart."¹² Secondly, the terms "homicide"

Medical sociologist Inamura Hiroshi argues that it occurs in other societies but that other languages do not contain the specific terminology Japanese has. INAMURA, KOGOROSHI: SONO SEISHINBYORI [INFANTICIDE: EMOTIONAL ILLNESS] 32 (1978). [Editor's note: Citations to Japanese authors follow the Japanese convention of last name first unless an author has adopted the English convention, as has Wagatsuma.]

11. I leave to linguists a more extensive exegesis of the terms *shinju* and *satsu*. Other possible readings of the characters for *shinju* include "within the heart" or "in the midst of emotion." The compound *shinju* is its own entity such that Japanese do not think of it as a combination of two separate characters. It is only in the enterprise of describing the term to non-Japanese speakers that one gets involved in the complexities of various permutations of the meanings of the characters. I translate *shinju* as "center of the heart" because it is used only in those circumstances where there is shared identity between the people who die. It is not used when one person kills the other in the heat of emotional passion. That some homicides committed in the heat of passion may subsequently be categorized as mutual decisions to die is an important but separate issue from the fact that the definition involves an implied or express willingness to die together. It is the shared identity at the "center of the heart" that results in the acceptability, or even desirability, of shared death.

12. Japanese children do sometimes kill their parents out of humanitarian concerns. Although mitigating circumstances may result in some judicial leniency, killing lineal ascendants is usually treated much more severely than other cases of homicide. In fact, under Criminal Code Section 200, murders of lineal ascendants are to be punished by life imprisonment or the death penalty. Other murders fall under Criminal Code section 199, which provides for a minimum penalty of 3 years. The relevant Criminal Code sections are quoted below in note 37. Criminal Code section 200 was held to be unconstitutional by the Supreme Court in the case of *Aizawa v. Japan*. Saikosai (Supreme Court), Japan, 27(3) Keishū 256. Judgment of April 14, 1973. Nev-

and "center of the heart" are mutually exclusive: a killing is perceived completely differently depending on the category to which it is assigned. It is not the same as distinguishing between a "tragic but understandable" case of infanticide and a "horrifying" case of infanticide. In Japanese, infanticide is conceptually wholly separate from death at the "center of the heart" even though both involve the taking of a child's life. Death at the "center of the heart" may involve two events, the death of the child and the death of the parent, but it is conceptualized as one act in which the identity of the child as a victim is collapsed into the identity of the parent as a victim. Conceptually, there has been one death; parent and child are one and the same victim of tragic circumstances. The child is not seen to be victimized *in turn* by his/her victimized parents. Only in the case of infanticide is the child seen to be victimized by his/her parents.

This merging of the parent and child's identity results in a focus on the parent's motives; the child's experience is only a peripheral inquiry. For the Japanese, the question becomes one of whether the parent was a victim of a tragedy that justified taking his/her life (and, incidentally, that of the child) or whether the parent was not sufficiently justified in his/her actions. The child's experience of being killed comes into consideration only with respect to the parent's reasons for killing, the parent's choice of method, and the parent's mental health. Indeed, Isomura Eiichi goes so far as to suggest that Japanese people more readily accept parental killing of children because the euphemism of "parent-child/center of the heart" beautifies or romanticizes the act.¹³

The social context of parent-child suicide has been explored by authors who have examined wide ranging features of Japanese society. Kawanishi and others contend that Buddhism contributes to tolerance of *oya-ko shinju* because transmigration of the soul would allow the child to have another (better) life.¹⁴ In promoting surrender of ego in order to be at one with the universe, adherence to Buddhism facilitates sharing death with another so that the boundaries of separate selves can be eliminated. However, Kawanishi focuses most of her attention on the social psychological explanation for the concept of *oya-ko shinju*: ego extension between parent and

ertheless, section 200 remains in the current Criminal Code, and research by an academic research committee (Research Committee) reveals that murders of parents and parents-in-law do, in fact, result in more severe penalties than murders of other people. Research Committee on Female Crime, Japan, *A Study on the Victims of Homicide Committed by Females*, in *VICTIMOLOGY IN COMPARATIVE PERSPECTIVE* 287 (K. Miyazawa & M. Ohya eds. 1986).

13. Isomura Eiichi, *Shinju ko* [*Perspectives on "Shinju"*], in *JISATSU* [SUICIDE] 188 (K. Ohara ed. 1971).

14. Kawanishi, *Japanese Mother-Child Suicide: The Psychological and Sociological Implications of the Kimura Case*, 8 *UCLA PAC. BASIN L.J.* — (1990).

child such that the parent fails to distinguish between self-annihilation and annihilation of the child.

II. PATTERNS OF OCCURRENCE AND CAUSATION

Existing literature and statistics on parent-child suicide and parental infanticide are deficient because few researchers have investigated the phenomenon systematically, and also because the subject of parents' killing their children is intrinsically difficult to research. For example, there is one study in which Japanese and foreigners residing in Japan were asked their opinions about Japanese mothers who kill their children.¹⁵ Almost 83% of the Japanese respondents, as compared to 52% of the foreign respondents, said that it was not acceptable under any circumstances. The foreigners' responses reflected much more respect for what they understood to be an aspect of Japanese society that they either accepted as being appropriate within the Japanese social context or could not judge from their position as foreigners.

Unfortunately, the term used for "mothers' killing their children" was "infanticide" (*kogoroshi*) and not "parent-child suicide" (*oya-ko shinju*). If the latter term had been used, the Japanese respondents might have replied with greater conceptual tolerance. Even so, the fact that the Japanese respondents might have been more tolerant of the idea in the abstract does not mean that they would be tolerant of any particular act of *oya-ko shinju*. Nor does it mean that the legal system would deal leniently with a particular case categorized as *oya-ko shinju* simply because there is greater social tolerance for the phenomenon. The petition four thousand people signed in support of Mrs. Kimura assumes that the Japanese legal system fully incorporates the perceived social legitimacy of *oya-ko shinju*. As the cases and statistical material will demonstrate, the courts' decisions rested more directly on normative role expectations of the offenders as mothers or fathers, wives or husbands, rather than on merely the intent of the parent to die with his or her child.

The results of the study illustrate another serious problem if the American judicial system were to recognize cultural "defenses." The cultural defense could be applied too readily by those overly concerned about cultural relativism or lacking in the sophistication necessary to identify the factors that would have been important in the foreign cultural context. The study suggests that non-Japanese applying a cultural defense to a Japanese parent who kills his/her

15. Sasaki, *Kogoroshi no rekishiteki fudo to shakaishinri* [Historical and Social Psychological Characteristics of Infanticide], in KOGOSHI, OYAGOROSHI NO HAIKEI [BACKGROUND ON INFANTICIDE AND PATRICIDE] 13 (K. Nakatani ed. 1982).

child abroad might be more tolerant and lenient than would be the Japanese public or legal system.

Researchers face the serious difficulty of a lack of adequate statistics on trends in the incidence and causes of infanticide and parent-child suicide. Criminal convictions for infanticide do not account for all incidents. One can only speculate as to the number of reported "accidental" deaths of children that are actually cases of intentional killing. Even where intentional killing is identified, it is difficult to know whether the parent intended joint homicide/suicide or only homicide. Moreover, changes in conviction rates may reflect changes in attitudes toward the incident rather than actual numbers of incidents.

As Kurisu Eiko, a professor of medicine at the University of Tokyo, points out, news reports are no more reliable sources of numerical data than statistics on convictions.¹⁶ From the number of infanticides reported in the press, one might conclude that infanticide was relatively rare until the early 20th century. In fact, the seemingly sudden increase in parental killing of children between 1926 and 1932 may well have been more a function of heightened concern about children's welfare that resulted in more newspaper coverage.¹⁷

Despite these difficulties in assessing trends in parental infanticide, researchers have concluded that there was an actual increase in parental infanticide after World War II, followed by a decline in the 1960's and somewhat more stability in numbers of incidents per year since then.¹⁸ According to the 1988 White Paper on Crime published by the Ministry of Justice, there was a 9.3% decrease between 1978 and 1987 in killings of children under the age of one.¹⁹ This does provide some indication of a decrease because the first year after birth is the most vulnerable for children,²⁰ but the White Paper does not provide statistics on the homicides of children of other age groups. Looking specifically at parent-child suicide as opposed to infanticide, sociologist Iga concluded that such suicides occurred "almost once every day in Japan in the 1950's" but that such suicides presently constitute only 2% of all suicides.²¹ Despite the difficulties of comparing a daily rate of suicide in the past with a

16. Kurisu, *Kogoroshi no haikai no suii* [*Trends in Infanticide*], in KOGOROSHI, OYAGOROSHI NO HAIKEI [BACKGROUND ON INFANTICIDE AND PATRICIDE], *supra* note 15, at 72-73.

17. *Id.*

18. Kurisu, *supra* note 16, at 44; MAMORU IGA, *THE THORN IN THE CHRYSANTHEMUM: SUICIDE AND ECONOMIC SUCCESS IN MODERN JAPAN* 18 (1986); Inamura, *supra* note 10, at 3.

19. MINISTRY OF JUSTICE, (Japan), HANZAI HAKUSHO (1988 WHITE PAPER ON CRIME) 80 (1988).

20. Research Committee, *supra* note 13, *passim*.

21. Iga, *supra* note 18, at 18.

percentage of suicides in the present, Iga characterizes parent-child suicide as declining in absolute numbers. Nevertheless, although 2% seems to be a small figure, the total number of such suicides may be high since the suicide rate itself is relatively high, particularly among women.²²

Despite this lack of coherent statistical data from the nation as a whole, Japanese researchers have examined small sets of data and have concluded that, in addition to the decrease in incidence since the 1950's, the factors that trigger infanticide or parent-child suicide have changed significantly in recent years. Traditionally, motivating factors were primarily economic problems like bankruptcy, unemployment, and crippling debt, concern about the future of a child with physical or mental handicaps, parental neurosis, and parental despair in the wake of divorce, separation, or desertion.²³ The more recent pattern is described by Nakatani Kinko, a law professor and specialist on legal regulation of the family, as the confluence of various factors that isolate the mother in the home.²⁴ She found greater numbers of nuclear families without support from extended kin, a higher survival rate of babies with birth defects, the failure of private or public development of support services for these children and their families, and a declining age at marriage such that there are more immature couples having children. Professor Tamura Kinji agrees that more pressure is placed on many contemporary Japanese wives and mothers because their husbands are often uninvolved with their families, medical advances have resulted in the survival of more babies with physical and mental defects, and there is less co-residence with extended family members.²⁵ Support for this argument emerges from an academic research committee's [hereinafter Research Committee] findings that mother-child suicide was much more likely in families where the father was indifferent to the daily lives of his family members.²⁶

These factors help to explain why maternal infanticide is so much more common than paternal infanticide. About two-thirds of cases of parents' killing their children involve mothers rather than fathers.²⁷ There are various possible explanations for this, including the possibility that fathers are simply more successful at disguising

22. *Id.* at 17.

23. Nakatani, *Kogoroshi ni taisuru ho no yakuwari* [*The Function of Law with Respect to Infanticide*], in 3 *GENDAI KAZOKUHO TAIKEI* [OUTLINE OF MODERN FAMILY LAW] 368; Research Committee, *supra* note 12, at 277-83.

24. Nakatani, *supra* note 23, at 369; Research Committee, *supra* note 23.

25. Jameson, *Japan's Parent-Child Suicide Phenomenon Blamed on Social Change*, *The L.A. Times*, Mar. 8, 1981, Part 1A, at 1, col. 1.

26. Research Committee, *supra* note 12, at 277.

27. Inamura, *supra* note 10, at 26; a study by Asahi News found that 66.2% of joint suicides that were counted during the period of 1946-1972 (838 cases) were mother-child suicides. The percentage attributable to mother-child suicide had declined

infanticide as accidental deaths. This seems unlikely, particularly since mothers spend more time with their children. Moreover, the gap is too great to be explained so simply. One researcher suggests that there are more maternal infanticides because women suffer from "hysteria" more often than men.²⁸ However, as Kawanishi points out, maternal infanticide is perhaps more prevalent because Japanese culture and society work in so many ways to encourage mothers to intertwine their identities with those of their children. Professor Shimamura Tadayoshi also supports this conclusion, and further notes that Japanese mothers who work outside the home are much less likely to commit maternal infanticide/suicide.²⁹ It is also significant that mothers have much greater daily contact with their children than do fathers, and mothers who work outside the home have far fewer opportunities to interact consistently with them. Finally, Inamura found that an intention to kill more than one family member and the motive of revenge (*fukushu*) against the husband (for infidelity or pursuit of divorce) were not uncommon features of maternal infanticide.³⁰ While Sasaki's research suggests that a husband's infidelity is a somewhat less frequent cause of mother-child suicide than it was in the past, it remains a significant category, nonetheless.³¹

The Research Committee went further than other researchers in categorizing different types of maternal infanticide.³² The Research Committee distinguished between killings of legitimate and illegitimate neonates and other children under the age of 10. They found that mothers who kill their illegitimate newborns usually suffer from serious problems in coping with life's problems and requirements.³³ They may change jobs frequently, for example. Their primary motives are poverty and fear of shame associated with having an illegitimate child. Mothers who kill their legitimate newborns, on the other hand, tend to be motivated primarily by already existing poverty that would be exacerbated by having more children.³⁴ The researchers found that women who killed their legitimate newborns had often been forced to shoulder a disproport-

slightly from the period 1927-1935 (1,735 cases) during which 70% of joint suicides were classified as mother-child suicides. Wagatsuma, *supra* note 10, at 130.

28. Isomura *supra* note 13, at 176.

29. Professor Shimamura Tadayoshi, as reported in an interview by Jameson, *supra* note 25, at 2, col. 2.

30. Inamura, *supra* note 10, at 11, 12. Former Chief Medical Examiner of Tokyo, Dr. Masahiko Katori, contends that "many mothers commit shinju with their children to rebuke their husbands by insinuation, hoping that the husband's social position will be destroyed and that he will lose his job. Both consequences are, in fact, likely." Interview by Jameson, *supra* note 25, at 3, col. 3.

31. Sasaki, *supra* note 15, at 25, table 5.

32. Research Committee, *supra* note 12.

33. Research Committee, *supra* note 12, at 277.

34. *Id.*

tionate amount of family responsibilities because of their husbands' indifference and neglect. In the case of infants and children under the age of ten, the researchers found two different patterns in the more recent data they analyzed: first, increasing fatigue associated with raising young children without assistance, and second, anxiety over the child's future because of some physical or mental defect. Both patterns are associated with greater degrees of isolation in the modern Japanese social context. Like Professor Sasaki, these researchers found that the primary motive has changed from poverty in the years following World War II to "mothering neurosis" or defects in the child.³⁵

III. THE LEGAL TREATMENT OF *OYA-KO SHINJU*

If the social definition of *oya-ko shinju* as parent-child "suicide" were fully incorporated into the legal system, one would expect incomplete attempts that resulted in only the child's death to be treated as failed suicide attempts. Helping someone commit suicide is a criminal offense in Japan,³⁶ but neither suicide nor attempted suicide is a criminal offense. Thus, one would expect to see cases proved to be *oya-ko shinju* leave the legal system without punishing the parent who attempted the suicide. Nevertheless, the mere classification of the case as *oya-ko shinju* does not result in automatic exculpation.

Parental infanticide cases are prosecuted as cases of homicide, which Japanese law defines as the intentional killing of another person, either by act or omission.³⁷ Infanticide prosecutions are

35. Sasaki bases this conclusion on a review of mother-child suicide cases handled by the medical examiner's office of the Tokyo Police Department during the period from 1962 to 1975. Sasaki, *supra* note 15, at 24-25. See also Research Committee, *supra* note 12, at 277.

36. Criminal Code Section 202. See *infra* note 37.

37. Killings that result from negligence are treated under different criminal code sections. George M. Koshi discusses the definition of homicide and includes examples of the distinctions between negligent and intentional killings and between act and omission in intentional killing. G. Koshi, *THE JAPANESE LEGAL ADVISOR* 138 (1970).

Only Code provisions concerning homicide are relevant to this discussion of *oya-ko shinju* because, by definition, they are intentional killings. Death resulting from intentional injuries or negligent acts is treated under other sections of the criminal code. The relevant Criminal Code sections as translated by Eibun-Horei-Sha, Inc. (EHS; Codes Translation Institute, Inc.), are the following:

199. A person, who kills another, shall be punished with death or penal servitude for life or not less than three years.

200. A person, who kills his lineal ascendant or a lineal ascendant of his spouse, shall be punished with death or penal servitude for life.

201. A person, who makes preparations for the purpose of committing a crime mentioned in the preceding two [sections], shall be punished with penal servitude for not more than two years; provided, however, that penalty may be remitted, when extenuating circumstances exist.

202. A person, who instigates or assists another to commit suicide or kills another

brought under Criminal Code section 199, which provides that “[a] person, who kills another, shall be punished with death or penal servitude for life or not less than three years.”³⁸ However, there are ways in which the penalties can be reduced. Criminal Code section 39 states that “an act of a person of unsound mind is not punishable” and that the “penalty may be reduced for an act done by a weak-minded person.”³⁹ If mitigating circumstances are proved, imprisonment can be reduced to as little as nine months.⁴⁰ Also, judges have discretion to reduce the sentence by incorporating time spent in detention awaiting trial.⁴¹ Finally, if the sentence was imprisonment for three years or less, execution of the sentence can be suspended for up to five years.⁴² At the end of the suspension period, the prosecutor’s office decides whether to execute the sentence.⁴³ If the convicted offender meets all conditions of the suspension period, such as probation or counseling, and is not convicted of another crime, s/he will not be imprisoned. The Research Committee found that 70% of women convicted for homicide receive suspended sentences.⁴⁴

Central to all prosecutions for homicide is the extent to which the defendant lacked the mental capacity to commit a crime intentionally or was so mentally disabled at the time as to justify mitigating the penalty under Criminal Code section 39. Thus, all the cases involve expert testimony as to the mental state of the defendant as defined by Western legal and mental health concepts.⁴⁵ The Code provisions generate the conceptual and linguistic frame within which cases are decided, and, as the cases to follow will demonstrate, much of the socio-cultural content of the cases is obscured by the courts’ use of legal and mental health terms into which the socio-cultural elements have been collapsed.

A. Prosecutorial Charging Decisions

It is not clear how parental infanticide cases are handled at the

at the request or with the consent of the latter, shall be punished with penal servitude or imprisonment for not less than six months nor more than seven years.

203. Attempts of the crimes mentioned in [section] 199, [section] 200 and the preceding [section] shall be punished. KEIHŌ, *The Penal Code of Japan*, Law No. 45, April 24, 1907, 2 EHS Law Bulletin Series (EHS) No. 2400, at PA 40-41 (EHS trans. 1988).

38. *The Penal Code of Japan*, *supra* note 37, at PA 40.

39. *Id.* at PA 11.

40. Research Committee, *supra* note 12, at 283.

41. Criminal Code Section 21. *The Penal Code of Japan*, *supra* note 37, at PA 6.

42. Criminal Code Section 25. *Id.* at PA 7.

43. Criminal Code Sections 25 and 26 set out the circumstances under which the sentence will not be executed. *Id.* at PA 7-9.

44. Research Committee, *supra* note 12, at 284.

45. Japanese do not conceptualize mental health in the way that Westerners do. See, e.g., DAVID REYNOLDS, *THE QUIET THERAPIES: JAPANESE PATHWAYS TO PERSONAL GROWTH* (1980).

initial level involving a charging decision by the prosecutor. A prosecutor has discretion to suspend prosecutions, an intermediary category between dropping the charges altogether and filing an indictment.⁴⁶ A suspended prosecution indicates the prosecution's decision to forego prosecution despite a high probability of conviction. In fact, Professor Daniel Foote states that Japanese prosecutors do not hesitate to make it known explicitly that they believe the accused is guilty but that they are "letting him/her off."⁴⁷ Thus, a suspended prosecution results in a label of "probably guilty," a label that is more stigmatizing than an arrest followed by release but less stigmatizing than an actual conviction. Although prosecutors suspend prosecution in about 38% of cases referred to them, research by Goodman suggests that prosecutors rarely suspend prosecutions in infanticide cases no matter how sympathetic the facts.⁴⁸ The prosecutors interviewed by Goodman stated that parental infanticide cases should not be suspended because the offense is too serious but that they expect leniency at the judicial level in the form of suspended sentences in the more sympathetic cases.⁴⁹

On the other hand, the Research Committee surveyed prosecutions of female homicide defendants during two different time periods and concluded that only 30-40% of females arrested for homicide are indicted.⁵⁰ Because most victims of female homicide are children, the fact that the Research Committee's data concerns homicides rather than specifically infanticides does not fully explain the difference between Goodman's and the Research Committee's predictions of prosecution.⁵¹

Goodman and the Research Committee draw their conclusions from very different data. Goodman interviewed prosecutors who may have been thinking about a particular type of infanticide case, or explaining their own experience or preference in handling infanticide cases, or expressing their notion of the ideal way of handling such cases. The Research Committee's conclusions are based on their interpretation of statistical data as to what actually happened in the cases reviewed.

The two studies could also be consistent if in large numbers of

46. For discussions of the Japanese system of prosecutorial discretion see George, *Discretionary Authority of Public Prosecutors in Japan*, in *LAW AND SOCIETY IN CONTEMPORARY JAPAN: AMERICAN PERSPECTIVES* 263-89 (J. Haley ed. 1988); Goodman, *The Exercise and Control of Prosecutorial Discretion in Japan*, 5 *UCLA PAC. BASIN L.J.* 16 (1986); Foote, *Prosecutorial Discretion: A Response*, 5 *UCLA PAC. BASIN L.J.* 96 (1986).

47. Foote, *supra* note 46, at 102.

48. Goodman, *supra* note 46, at 39; Foote, *supra* note 46, at 102 (38% suspended prosecution rate).

49. Goodman, *supra* note 46, at 39.

50. Research Committee, *supra* note 12, at 273.

51. Research Committee, *supra* note 12, at 291.

homicide arrests, the prosecutor decides not to prosecute because of lack of evidence or because the case turns out to be something other than homicide. For example, death through negligence is treated under a different section in the Criminal Code, and a suspended prosecution may seem preferable.⁵² In other words, one could find a low indictment rate generally in cases of parentally-caused deaths because of insufficient evidence or lack of intent, and yet still find a high rate of prosecution in intentional killing cases where there is sufficient evidence to convict; the possibility of a suspended prosecution would exist for categories of killings other than intentional killing. Unfortunately, neither the Goodman nor the Research Committee's study is reported in sufficient detail to determine exactly what is happening at the time of the initial charging decision by the prosecutor, but at least it is clear that a prosecutor's sympathy for a parent's motives and circumstances does not always or even regularly result in release from prosecution. Many of these cases are taken to the next level of legal disposition: judicial determination of culpability.

B. Judicial Decisions

One might expect to see a distinction between *oya-ko shinju* and infanticide emerge in the court's analysis of the defendant's mental state at the time of the act.⁵³ The Research Committee found that in all types of maternal infanticide, at least half of the offenders intended to commit suicide.⁵⁴ In the case of infanticides of children over one year-old but under the age of twenty, almost 70% of mothers in the most recent data set intended to commit suicide.⁵⁵ Nevertheless, all that is known from statistical analyses of convictions for homicide is that a parent may be convicted of homicide even if it is a case of *oya-ko shinju*, rather than infanticide without intent to accompany the children in death. Parents who kill their children are not excused merely on the finding that the death of their children was incidental, or even necessary to, their own attempted suicide. In fact, Kurisu categorized 36% of cases of parents' convicted for killing their children between 1950 and 1971

52. This is illustrated by two cases reported by Goodman. In the first, there was no prosecution when an infant died because of the mother's negligence. In the second, a mother was prosecuted for homicide after she intentionally smothered her slightly deformed newborn because she was pessimistic about the child's future. Goodman, *supra* note 46, at 38-39.

53. There is no jury system in Japan, so it is judges who decide the issue of culpability as well as sentence. Judges handling criminal matters sit alone or in panels of three depending on the nature of the crime. In the cases reported here, there were panels composed of three judges.

54. Research Committee, *supra* note 12, at 277-283.

55. Research Committee, *supra* note 12, at 281.

as *oya-ko shinju*.⁵⁶

Similarly, the Research Committee found that convictions for homicide occur even in those cases of intended joint suicide, although they did find greater leniency in sentencing. Apparently, believing one's child to be a part of one's self is not seen to be so irrational a construct that it determines that one is of "unsound" mind, although it does appear relevant in the sentencing decision. However, even with respect to sentencing, the impact of a proved intent to kill oneself along with the child is limited. Of particular note is the Research Committee's finding that even without the mitigating factor of the mother's intended suicide, mothers convicted for killing their own children are given relatively light sentences.⁵⁷

In addition to the issue of suicide, the Research Committee analyzed several significant factual characteristics of homicides by women to determine which seemed to result in a more severe legal outcome. In order of descending degrees of correlated severity of outcome, those characteristics are the following: the victim was a parent, the victim was a husband or lover, the victim was unrelated to the offender, the offender had difficulty living within her means, the offender expected some gain from the murder, there was more than one victim, the offender was sexually unfaithful, the offender was charged with other crimes, the victim was a relative, the offender changed jobs frequently.⁵⁸ In other words, the Research Committee found that, all other variables being equal, a profligate spender would expect a more severe outcome than a woman who murdered a relative other than her parents or a spouse. Killing an unrelated person will elicit more severe legal consequences than killing one's own child.

The Research Committee also examined the characteristics associated with greatest leniency or mitigating effect. In order of descending leniency, those characteristics include the following: the victim was an illegitimate newborn, the victim was a legitimate newborn, the act was a product of mental/emotional disorder, the victim suffered physical or mental disorders, the presence of poverty, the victim provoked the act.⁵⁹ It is striking that homicide of an illegitimate newborn, a case in which there was no provocation, elicits greater leniency than a homicide provoked by the victim. The Research Committee also found leniency accorded to parents who killed their children even when there was no intent to commit suicide in addition to the homicide.

56. Kurisu, *supra* note 16, at 48.

57. Research Committee, *supra* note 12, at 291-92.

58. Research Committee, *supra* note 12, at 286-287.

59. *Id.*

IV. TWO CASES OF MATERNAL INFANTICIDE

It is difficult to assess how these factors intersect to affect any given judicial decision because there are so few published reports of prosecuted infanticides.⁶⁰ However, two cases of maternal infanticide decided by the Tokyo District Court in 1988 are particularly striking for their comparative value. The human stories behind the prosecutions contain many similarities and yet the legal outcomes are quite different. Although the difference would seem to be due simply to the court's application of Criminal Code section 39, which completely exculpates those who were of "unsound mind" but only reduces the penalty for those of "weak mind" at the time of the act, the reasons the judges found an "unsound mind" in one case and only a "weak mind" in the other are not simple at all.

In the first, Case A, the defendant, Hanako,⁶¹ killed her three-year old daughter by pushing her off the roof of an 11 story building. The Tokyo District Court held that the defendant was not guilty of homicide because she was unable to make a rational decision to kill at the time of the act.⁶² The court found a three month history of emotional instability that became progressively worse, ultimately driving her to attempt *oya-ko shinju*.

In the published report of the decision, the court provides a sympathetic review of the young mother's problems. In many respects she appears to have been the ideal young Japanese wife and mother. Although she worked for a while before marriage, Hanako became a so-called "professional housewife" (*senryo shufu*) immediately upon her marriage to a young "salaryman."⁶³ Not long after marriage she had a daughter, and the couple seems to have led a relatively happy life together. In 1987, about three and a half years after marriage, Hanako began to experience various physical ailments like low grade fevers, ringing in her ears, and menstrual irregularity. Doctors could not find anything wrong with Hanako, but she continued to experience increasingly debilitating symptoms.

60. In my search of case reports over the last 10 years, I found only seven reports of judicial opinions in alleged *oya-ko shinju* cases.

61. This is not the defendant's real name. The Supreme Court stopped publishing lower court opinions in 1984. The description of this case is based on a report in HANREI TAIMUZU [THE LAW TIMES REPORT] [hereinafter HANTA], an authoritative source for such case material, but a source that disguises the names of the parties to the lawsuit.

62. Judgment of Mar. 10, 1988, Chisai (Tokyo District Court), Japan, 668 HANTA 226.

63. The term "salaryman" refers to an employee with permanent employment status in his company. Young men with "lifetime employment" are particularly desirable marriage partners because of the security their employment provides. Depending on the stability of the company itself, Hanako could be considered to have married well and to have less negative stress in her life than young women married to men without lifetime employment.

Finally, she returned to her parents' home where she continued pursuing medical treatment and spending time at nearby hot springs. Her foster mother⁶⁴ pointed out that Hanako's husband was a healthy male who would find a girlfriend if Hanako did not recover her health. When doctors and friends suggested that Hanako's problems were more psychological than physical, she became convinced that she had an incurable mental disorder that would cause continuing hardship to her family. Soon Hanako lost all hope of recovery and decided to take her life. The court found that Hanako decided to take her daughter's life as well, because leaving her daughter behind would only burden her husband.

Within a week of starting to contemplate suicide, Hanako wrote a will and left with the couple's daughter. From about 10:00 to 11:30 that night, Hanako rode in cabs and walked the streets searching for an appropriate building. Having found one, she took her daughter inside and held her until about 4:30 a.m. Then, as dawn approached, she suddenly decided to get the whole thing over before daybreak. She took her daughter to the roof where she pushed the child to her death. However, when it came to throwing herself off the roof, Hanako suffered a failure of will.

The court accepted expert testimony that Hanako suffered from a "classic" case of "endogenous depression" that resulted in her lack of criminal intent at the time of the act.⁶⁵ By that time she had become progressively enmeshed in hopelessness and could imagine only death as release from her problems. The court pointed to Hanako's will, its length and repeated apologies to her husband, as evidence of the depth of her depression. The court also rejected the prosecutor's argument that Hanako's having behaved normally until shortly before the incident indicated sufficient mental capacity to know what she was doing. The court relied on expert testimony to conclude that victims of endogenous depression may not lose control until the last stages and can appear quite capable up to that point. Ultimately, the Tokyo District Court found Hanako not guilty of any crime because of "unsound mind" under section 39.

Four months later the Tokyo District Court decided the second case, Case B, in which the defendant, Hiroko, killed her two children, a son aged 9 and a daughter aged 13, because she believed

64. The term in the text is *yobo*, which could be either adoptive or foster mother.

65. The court distinguishes between reactive depression (*hannosei utsubyo*) and endogenous depression (*naisei utsubyo*) in order to determine which category of Criminal Code section 39 applies. See *supra*, note 39 and accompanying text. The former is a type of depression that arises from reaction to stimulus in the environment. The latter arises from internal causes and, in the court's opinion, is much more debilitating than the former.

that she had infected her entire family with AIDS.⁶⁶ She also inflicted wounds on her husband, but he managed to forcibly subdue her. The court received expert testimony that the mother was not of sound mind when the act was committed, but the court concluded that there was sufficient evidence that Hiroko nevertheless retained the ability to choose not to kill her children.⁶⁷ The court found her guilty of homicide and sentenced her to five years in prison.⁶⁸

According to the published report, Hiroko believed that she had contracted AIDS from a man who kissed her while they danced at a disco several years before. Years after that evening at the disco, when news of AIDS became prominent in the Japanese media, Hiroko became convinced that she was infected with the disease.⁶⁹ She suffered symptoms doctors could not diagnose, and, although she tested negative for AIDS, she was convinced that either the test result was a false negative, or she had contracted a new type of AIDS that the test missed. Hiroko believed that she had infected other family members because they also experienced health problems. She interpreted her son's bout with pneumonia, her daughter's complaints of fatigue, and her husband's chronic neck pains and difficulty sleeping as signs of their having contracted AIDS.

Hiroko resolved to kill herself and her family the night of April 28, 1987. She chose the night before a national holiday so as to create less of a nuisance for friends and relatives.⁷⁰ In addition to

66. Judgment of July 28, 1988, Chisai (Tokyo District Court), 683 HANTA 213. "Hiroko" is not the defendant's real name.

67. The court focuses on the distinction between two terms, *shinshinkojaku* and *shinshinsoshitsu*, which carry different legal consequences under section 39 of the Criminal Code. The former refers to mental weakness or impaired mental condition such that the court may reduce the penalty if the defendant is convicted. The latter refers to absolute inability to distinguish between right and wrong and results in a verdict of not guilty. The fact that the boundary between the two is so difficult to determine is the greatest source of room for judicial interpretation.

68. Hiroko was found guilty of murder under section 199 of the Criminal Code. Convictions for murder under that section alone carry a minimum sentence of 3 years. The court could have sentenced Hiroko to three years and subtracted the time spent awaiting trial. The court could also have suspended the sentence or suspended the execution of the sentence for a period of time. Given these alternatives, the court's decision may well indicate the degree of culpability it assigned to Hiroko's actions.

69. Hiroko's obsessive worry about AIDS was an exaggerated form of a fear that was sweeping Japan at the time she killed her children. The first reported case of AIDS in Japan in 1985 resulted in considerable reaction against foreigners because the disease was assumed to be brought into Japan by foreigners despite the fact that the majority of AIDS victims in Japan were infected by imported blood. Hysteria was fanned by news reports and by reactions such as some public bath owners' attempts to ban foreigners from their establishments. Concern about AIDS reached such great proportions so quickly that an AIDS reporting bill was passed by the Diet in December of 1988. The Japan Times, Jan. 17, 1989.

70. The opinion does not clarify what nuisance Hiroko hoped to avoid, but it is

her will, Hiroko wrote letters to friends to clear up any outstanding business between them and to her brother to renounce her inheritance from her mother. However, she could not bring herself to attempt "family suicide" until the next night. On the night of April 29th, Hiroko attempted to strangle her son with her husband's necktie, but she stopped when he woke up and asked her what she was doing to him. She returned to bed where she dozed off and on until about 4:00 in the morning.

Hiroko concluded that if she couldn't strangle even her youngest child, she would have to resort to stabbing her family to death. After writing a note of warning to those who would discover the bloody, AIDS-infected bodies, she slipped into her daughter's room with a knife and bath towel to cover her daughter's face. According to the court, her daughter awoke when she was first attacked, but the daughter's cries for help and pleas for her mother to stop were to no avail. Despite those cries for help, Hiroko managed to kill her son in the same manner before her husband stopped her. Although she inflicted injuries on her husband, too, he was able to prevent her from killing him or herself. Finally, when she saw the police handling the bloody bodies of her children, Hiroko suddenly realized that the blood must not be contaminated if others would touch it without precautions.

The court held that the defendant was capable of rational decision making because she had behaved normally up to the time of the attack. On the day of the killings she had done her housework as usual and had gone to work. She had asked both children if their books were ready for school the next day, and she had helped her daughter prepare for school. The court found that the letters to friends and family as well as the note cautioning others about the AIDS-infected blood demonstrated rationality.

The court laid great stress on the fact that Hiroko had stopped choking her son when he awoke during the earlier attempt; it saw this as proof that she could stop when she saw him suffering. Moreover, the fact that she brought bath towels with her to cover her children's faces when she stabbed them indicated to the court that Hiroko knew she might be deterred by the sight of their suffering. Finally, the court emphasized the painful way in which the children had died. The court found that both children had been awakened and had died excruciating deaths at the hands of a person they had trusted profoundly.

The court concluded its discussion of the facts and decision

likely that Hiroko anticipated their being called for questioning and having to take care of various matters connected with her family's death. She may have wanted to spare them having to miss work either due to the initial shock or due to these demands on their time.

with a sharp statement of outrage that a parent could be so selfish as to kill her children without regard for their separate lives and identities. In the court's view, Hiroko had treated her children as property she could choose to destroy. The court found her guilty of the homicide of her children and sentenced her to five years in prison.

The legal outcomes of these cases are at opposite ends of the spectrum of infanticide/*oya-ko shinju* cases. The Research Committee on female crime in Japan found that women who kill their own children are infrequently convicted and, when convicted, are rarely required to serve time in prison. According to that research, the decision of the court in Case A was much more typical of prosecutions of infanticide than Case B. Case B was atypical in that the Research Committee found that the majority of women convicted for killing their own children are given a suspended sentence. About 70% of those killing their minor children (under 20 years old) receive suspended sentences.⁷¹

The Research Committee examined two sets of data: 130 women convicted of homicide in 1955 all over Japan, and 325 women convicted of homicide between 1976 and 1980 by district courts in the Tokyo metropolitan area and surrounding prefectures. Only one defendant in the 1955 sample who killed her child between the ages of one and twenty received an unsuspended sentence greater than three (but less than six) years. No defendants in that sample year received a longer unsuspended sentence. In the 1976 to 1980 sample only eight defendants received sentences greater than three years.⁷² Because we do not know how many indictments result in convictions, we cannot determine whether the lack of conviction in Case A was unusual. However, given the Committee's statistics on sentences, we can conclude that the outcome of Case B was unusually severe.

These cases, decided by the Tokyo District Court within four months of each other, contain many similarities.⁷³ In each case the

71. Research Committee, *supra* note 12, at 284.

72. Inamura's analysis of statistics from 1969 is consistent with the results of the Research Committee's research. 76% of cases of neonaticide were prosecuted, and 94% of those received suspended sentences. Three offenders received unsuspended sentences of less than three years, and one offender received an unsuspended sentence of more than three years. 32% of those receiving suspended sentences received sentences of three years suspended for three years. Inamura found a slightly higher rate of prosecutions of infanticide. 79% of the cases were prosecuted, and more offenders received unsuspended sentences than in the cases involving newborns. 81% of the offenders received suspended sentences, 39% of which were for three years, suspended for three years. Three offenders received unsuspended sentences of three years or less, and three offenders received unsuspended sentences of more than three years. Inamura did not analyze the legal outcomes for prosecutions of the homicides of older children. Inamura, *supra* note 10, 98.

73. These two cases were decided by different three-judge panels in the same court. Although some of the difference in outcome may be the result of the judges' reacting

mother became progressively obsessed with the possibility of incurable illness and its consequences for her family. Each sought medical treatment for some time before giving up hope of recovery. Each wrote a will before carrying out a plan for killing her children and herself. Although the court found Hanako lacking criminal intent to commit homicide, her act can be seen as no less deliberate than Hiroko's. Hanako went to the trouble of choosing a tall building away from her own home, and she took an entire night to deliberate her decision. Why is it, then, that the Tokyo District Court points to such preparation as proof of rationality sufficient to convict Hiroko while discounting evidence of similar preparation by Hanako?

In some respects the mother who stabbed her children appears more deserving of acquittal than the mother who pushed her child off the roof. Unlike the mother who pushed her child off the roof and then did not jump, the mother who stabbed her children was prevented from carrying out any plan she may have had to kill herself. Whereas Hanako killed her child shortly after her foster mother made a sharp remark, Hiroko's act seems devoid of selfish revenge. Indeed, there is no motive given for Hiroko's act other than her anxiety over AIDS. The court did not convict her because it found a malicious motive, rather because it found her rational enough to have prevented the tragedy. The court emphasized the fact that she was able to stop choking her son and that she used bath towels in order to avoid looking at her children's faces. Yet later in the report, the court raises the possibility that Hiroko stopped choking her son because she thought that she wasn't strong enough to succeed using that method. The fact that Hiroko did not want to watch her children suffer, or risk being deterred because of their suffering, may reveal the depth of her love for them and the sincerity of her belief that killing them was the best and most loving thing she could do. Hiroko was anxious about her children's lives as AIDS victims; the only reason reported for Hanako's killing her daughter was so as not to burden her husband with the care of their daughter.

As discussed at the outset, an important factor in understanding the difference in the two outcomes is the fact that the court was required to analyze the defendants' actions in terms of the provisions of Criminal Code section 39. Section 39 distinguishes between different types of mental impairment that result either in a finding of not guilty or a reduction in the penalty. The content of those different types is based on Western-derived legal and psychiatric

differently to cases of parental infanticide, the degree of difference in outcome and the fact that courts strive for consistency of outcome suggest that that is not a complete explanation for the different determinations.

concepts. Either one young mother's symptoms matched more closely the required standards while the symptoms of the other mother who feared AIDS did not, or the court simply used the distinction in order to justify a decision it reached on other grounds. Given the language of the Code provisions, it is understandable that the intent to commit suicide with one's children, a socially tolerated phenomenon, was of much less apparent significance in the printed report than other factors. Indeed, conformity to the social norm of taking one's children with one in death could be evidence of sound mind; only in a culture where that concept is aberrational could a parent who acts on that concept be found of "unsound mind."

It is difficult to avoid concluding that the court was overly influenced by Hiroko's failure to conform as closely as Hanako to the Japanese social norms of "good housewife and wise mother." Hiroko worked at a snack shop after her marriage, a questionable job for a married woman. Moreover, she was married at the time she went to the disco, albeit she went with two female friends. The court gives no credence to her fear about AIDS as evidence of "unsound mind," noting that her rationality was proved by her suddenly losing that fear upon seeing others handling her children's blood.

However, analysis of the two decisions reveals other potentially significant differences between the two cases. One is the court's focus in each case of the pain suffered by the children. In deciding Case A, the court remarks more than once that the child died an instantaneous death. By contrast, the court in Case B draws out the anguish of a child who dies with the conscious realization that his own mother is killing him. And yet, having decided that the children's pain was a significant factor, the court's reasoning is not very sophisticated. How can the court measure the pain suffered by the child as she fell from the tall building after having been pushed from the roof by her mother? How can the court know what conversation she had with her mother before her mother shoved her to her death? Does a belief that a three year-old is less capable of anticipatory fear than the nine year-old and the thirteen year-old account for a difference in sympathy for the victim? Is the difference between seconds and minutes of excruciating pain a suitable distinction to account for the difference between a not guilty verdict and a conviction with a five year sentence?

These issues are not fully explored in the court's opinions, and there are so few published reports of prosecuted infanticide cases that it is not possible to formulate an exhaustive list of factors that affect legal outcomes. However, the list of mitigating factors the Research Committee found in their analysis of several hundred cases does shed some light on potentially significant differences between the circumstances of Case A and Case B. The victim in Case

A was much younger, and there was only one child involved. While both mothers were found to have debilitating mental conditions, only the mother who pushed her child from the roof was found to be so severely debilitated as to warrant exculpation under section 39.⁷⁴

Data from interviews with attorneys and judges in Japan confirm that judges are sensitive to whether the method used was particularly brutal, whether there was any illness on the part of the victim, the age of the victim, and the number of victims involved. Courts are also impressed by such factors as the defendant's age, the defendant's degree of repentance, the family's willingness to take him/her back into the home, and the defendant's employer's readiness to continue employment.

Neither the interview data nor the published works on the subject suggest that the credibility of the subsequent parental suicide attempt affects the outcome. The fact that the mother who pushed her child was not restrained from jumping and that the mother who stabbed her children was forcibly restrained seem to have little bearing on the outcome. Also, the possibility that the mother who pushed her child may have been reacting to the remark that her husband would find a lover whereas the other mother had no motive but concern for her children's welfare does not seem to have been central to the difference in outcome. Nevertheless, those who were interviewed did acknowledge that where the court can empathize with the parent's motive, the parent receives a milder punishment.

Ironically, Mrs. Kimura's case may have been analyzed by the legal system in Los Angeles very much as it would have been analyzed by the legal system in Japan: overt attention to legal concepts of mental health, the use of psychiatric evidence, and an implicit uneasiness about the content and application of cultural elements of her case.⁷⁵ As in these two cases of maternal killings, the socio-cultural significance of the facts of Mrs. Kimura's life and the particular act of attempted *oya-ko shinju* would have been important to the outcome of her case. Undoubtedly, Mrs. Kimura shared with the young mother Hanako many characteristics associated with being a "good wife and mother." Newspaper accounts of Mrs.

74. This is a difficult factor to assess. Although the court's finding of greater debilitation may be a conclusory judgment that allows the court to justify the imposition of a penalty in Case B and not in Case A, it is possible that Hanako was in fact more convincingly psychologically debilitated—or that her expert witnesses were more convincing. It also seems possible that depression is a more readily accepted reason for debilitation than a phobia connected to AIDS.

75. Even if the outcomes were similar and the American disposition can be fairly characterized as lenient, it is a separate question as to whether the outcome would have been lenient by Japanese standards. I return to that question after reviewing other cases of parental infanticide.

Kimura's life before and after the act of attempted joint suicide describe her as a devoted wife and mother, the kind of traditional Japanese wife who would wash her husband's feet when he returned from work. She was so devoted that she failed to develop links with the outside community that might have provided an emotional safety net when she learned of her husband's infidelity. Moreover, the fact that her suicide was attempted as much for revenge as escape from miserable circumstances would not have been significant. Like the mother who pushed her child from the roof, Mrs. Kimura's act could be interpreted as revenge just as easily as it could be interpreted as an escape from the shame and humiliation associated with her husband's infidelity. Both Inamura and former medical examiner of Tokyo Katori Masahiko contend that parent-child suicide for the purpose of revenge is not uncommon,⁷⁶ and the reasons for an attempted suicide do not appear to be dissected carefully in order to reach a conclusion about whether the act was appropriate.

It is unclear whether that is because revenge through suicide is tolerated or whether suicide generally is tolerated. However, what is clear is that, having decided to take one's life, it is considered reprehensible to leave one's children behind. When asked how a mother could knowingly and willingly subject her child to the physical pain of death, respondents in Japan pointed to the far greater pain of being left behind in a society where few will take on the responsibilities of caring for another's child. This emerged as a factor much more frequently than the concept of shared identity. Sociologist Iga Mamoru writes that "*oya-ko shinju*" represents the belief that the child is not an individual human being but a family member, that the child is the parent's possession, and that it is more merciful to kill children than to leave them in the cruel world without parental protection. The mother who commits suicide without taking her child with her is blamed as an *oni no yo na hito* ("demon-like" person).⁷⁷ Iga relates the following incident in order to illustrate the commonly held view that the emphasis on the family as the primary unit rather than the individual is a key factor in *oya-ko shinju*.

Several years ago, a married university professor in Tokyo murdered his pregnant student mistress. When the scandal was revealed, he was not remorseful but professed that "she loved me, and therefore she was happy to be killed by me." Nonetheless, he was compelled to resign from his post. A few days later, he committed suicide. His wife and two children died with him, too. Why was the death of his wife necessary, considering that the man was unfaithful to her? Why were the children killed?

76. See *supra* note 30.

77. Iga, *supra* note 18, at 18.

The explanation is that shame and insecurity subsequent to the breadwinner's dishonorable death were inevitable in light of the Japanese emphasis on family name and family ties and of the antipathy shown toward relatives of one who violates social norms.⁷⁸

As Iga discusses the incident, it becomes clear that the father killed his entire family in "joint suicide." Fathers kill their children less often than do mothers, and, when they do, they often kill the entire family in response to economic difficulty like bankruptcy or heavy indebtedness.⁷⁹ The question we turn to now is whether the Japanese legal system treats men differently than women when they kill their children.

The Research Committee that researched female homicides claimed that the reason women who kill are treated more leniently than men is that women's victims are usually family members (with whom there is inescapable contact) and that the offenders themselves have been victimized for a considerable period of time.⁸⁰ The Research Committee concludes that, in general, men who kill are treated less leniently than women who kill because men usually kill under circumstances and for reasons with which society is less sympathetic.⁸¹ The question is whether in specific cases of men killing their children they receive treatment comparable to that of women who kill their children.

V. TWO CASES OF PATERNAL INFANTICIDE

The few published cases of fathers killing their own children support the Research Committee's conclusion. The following two cases may not be typical because we do not have accounts of all prosecutions. However, they do illustrate particular incidents of paternal infanticide with circumstances and decisions similar to those of maternal infanticide.

The first is the case of a father who killed his autistic eleven-year-old daughter.⁸² The defendant, Taira, began experiencing considerable stress due to promotions at work that carried increasingly more responsibility. In March of 1984 Taira grew particularly anxious about his ability to do his job. Although he took tranquilizers, he experienced little relief. He often awoke in the middle of the night, troubled about his career and the fate of his family.

The Osaka District Court found that on the evening of June 13, 1984, Taira finished his work as usual, returned home, and ate

78. *Id.* at 130.

79. *See supra* notes 23-27 and accompanying text.

80. Research Committee, *supra* note 12, *passim*.

81. *Id.* at 273, 283, 290-291.

82. Judgment of July 29, 1984, Chisai (Osaka District Court), Japan, 1984 *Kakyo Saiban Reishu* [Lower Court Opinions] 714.

dinner with his family. He expressed no particular agitation or depression. However, that night he awoke as usual and lay awake worrying about his career. His thoughts turned to Natsuko, the couple's autistic daughter. Taira resolved to kill himself and Natsuko because to leave her behind would burden his wife. He also worried for her future given her disability.

Taira wrote a will before cutting his left wrist with a box cutter. Sometime later he strangled Natsuko with a cloth belt. Taira's wife discovered him after he had killed Natsuko, but Taira tried to prevent her from calling the police, saying, "I killed Natsuko. Let me die. That's best. . . . Are you going to make me live in disgrace?"

The court found that those statements indicated that Taira knew the significance of his crime and anticipated the criticism that would ensue if he survived. The court held that there was too much evidence of rational decision-making to find Taira of "unsound mind" at the time he killed Natsuko: he killed only Natsuko (and not his son), he took care not to awaken his family while writing the will or committing the murder, and the will itself did not reflect any loss of rationality. In his will, Taira apologized to his wife and explained his intention to kill Natsuko. The fact that Taira stated to a criminal investigator that if he were to commit suicide he would take Natsuko with him was used by the court to support its finding that Taira's killing Natsuko was a rational decision that emerged from his "usual" personality. Moreover, Taira had not appeared to be particularly agitated even after the crime when the police arrived on the scene.

The court also found that the victim was growing up in good health despite her relatively minor autism. The court noted that Natsuko depended on her father and that Taira had the duty to care for her as his daughter. In accordance with these findings and the court's findings that Taira was rational before, during and after the act of killing Natsuko, the court found Taira guilty. However, the court sentenced Taira to the minimum of three years' penal servitude and suspended the execution of the sentence for four years. The court also included the 330 days that Taira had served in pre-trial detention. In other words, the court was as lenient as it could be short of finding Taira not guilty.

Why was the court so generous with a defendant who had been found guilty of killing his healthy 11 year-old daughter? One factor the court found significant was his mildly depressed, anxious state. While he was not completely emotionally incapacitated, Taira suffered an impaired ability to make appropriate decisions. The language of mitigation is strikingly different from the court's earlier language in finding Taira guilty. An important aspect of that

change of tone is that Taira's anxiety and depression arose from his diligence at work, an admirable trait pushed too far.

The court was also impressed by Taira's expressions of regret, as evidenced by his daily chanting of Buddhist sutras and prayers for Natsuko's soul. The court noted that Taira would never be able to escape his feelings of guilt even though his wife, the victim's mother, had been able to forgive him. Apparently Taira's employer also testified that the company was willing to find him new work. The court concluded its decision by encouraging Taira to mourn for the victim and to rebuild his life at work and with his family.

The opinions of community and family members were extremely important in another case of paternal infanticide. The father in this case was convicted of murdering his 15 year-old son and was given a three year sentence suspended for 5 years.⁸³ The father, Akio, graduated from a prestigious law department and managed a company in Tokyo. Unfortunately, the company went bankrupt just as Akio's son, Kenichiro, was about to enter a prestigious university-affiliated junior high school in Tokyo. Due to financial difficulties, Kenichiro was sent to live with his maternal uncle's family. He was brought back to Tokyo when his parents moved into his maternal grandmother's house. Grandmother continued to live upstairs where she also taught flower arranging and tea ceremony. Kenichiro and his family lived downstairs. Akio was extremely serious about his own work and left Kenichiro's education to his wife. According to the court, Kenichiro developed an intense dependency on his mother and was never able to develop cooperative social skills. Perhaps due to his many changes of schools, Kenichiro was regularly bullied at school, and he developed a strong sense of victimization.⁸⁴ Serious difficulties with Kenichiro developed when he was in middle school. By then he was resistant to going to school, and he started blaming his mother for his failings with friends. He did manage to make a few friends, but he started shoplifting and engaging in vandalism. Kenichiro's absences from school increased, and his anger toward his mother erupted in such behaviors as cursing and throwing objects at her. He bitterly blamed his parents for his troubles because they had caused him to change schools so frequently.

83. Judgment of Nov. 30, 1981, Chisai (Tokyo District Court), Japan, 462 HANTA 180.

84. "Bullying" can be quite severe in Japan, even leading to suicide or murder by the child's classmates. Osamu Mihashi writes that children seen as strangers or outsiders or as "unclean" are the most likely victims. Mihashi, *The Symbolism of Social Discrimination*, 28(4) CURRENT ANTHROPOLOGY 519 (1987). As is noted in the report, Kenichiro's frequent change in schools may well have contributed to his being bullied, and the bullying may have been a significant source of the difficulty he experienced at home and at school.

Finally, in 1980, Kenichiro's mother took him to a psychologist who said that nothing specific appeared wrong but to bring him back if he continued to refuse to go to school. The situation worsened. During that summer, Kenichiro fought with his mother, and, in the course of a family argument, he hit her. It was at that point that Akio began to take a greater interest in his son and attempted to rectify a rapidly deteriorating home environment. However, Kenichiro's violence worsened and spread to his grandmother, his father, the family dog, and the neighbors. When he awoke in the morning he would pound on the walls, throw things around his room, and cut the curtains. If he did not like the food served, he would upset the table. Once he concocted a disgusting mixture of food and threatened his mother with a box knife until she ate it. He broke his grandmother's tea ceremony equipment, and on more than one occasion he cut the telephone line.

Once more his parents asked for assistance outside the home. This time they went to the local education board's consultation service and to the police.⁸⁵ They asked the advice of a friend studying psychology and of a superior at Akio's company. They were told consistently that there was nothing they could do. Kenichiro's mother became increasingly exhausted, anxious, and depressed about her son's behavior. Eventually she began taking tranquilizers, and Kenichiro's father had to assume the dominant role in looking after Kenichiro. Akio repeatedly took time off from his work, and he, too, grew increasingly exhausted with Kenichiro's demands and violence. Circumstances reached the breaking point when Akio's mother-in-law pleaded with him to do something because she feared for her life. At one point Akio and his wife even contemplated their own joint suicide as a means of causing Kenichiro to straighten up his life. However, Akio came to believe that his son would only cause more pain to others if he lived. Finally, having resolved to kill himself and Kenichiro, Akio strangled Kenichiro one night while he slept.

The court found that, although Akio and his wife might have been more persistent in their efforts to seek outside help, they had done what they could to help Kenichiro straighten out his life. The court was impressed with Akio's willingness to assist at home once he realized how serious the situation had become. Moreover, the court noted that he had a good reputation at work and that his company backed him completely. The court also stated explicitly that Akio's credibility was enhanced by his social standing and the fact that he had no previous criminal record. Akio expressed deep regret and prayed for Kenichiro on a daily basis. He had so much

85. It is not uncommon for Japanese to consult with police about family matters, although the frequency of that practice must vary considerably from place to place.

community support that 2600 people signed petitions in support of a lenient judicial decision. In consideration of the extreme circumstances under which Akio and his family had lived for so long and the degree of his unrelieved exhaustion, the court softened the conviction for homicide by giving Akio the minimum penalty of three years imprisonment, suspended for five years.

The fact that it was the father who killed his children does not seem to have been an important feature of these decisions. Both of these fathers were given more lenient penalties than the mother who killed her children for fear they were infected with AIDS. It is striking that there was so much community support for both fathers in these cases. The fact that so many people went so far to support a lenient outcome was a significant factor in the legal outcome in both cases.⁸⁶ This plus the fact that these fathers had another avenue besides parenting for proving their social value may have made it somewhat easier for the fathers in these cases. However, there is no evidence that the courts expected a different standard of behavior from these offenders simply because they were fathers rather than mothers.

VI. CONCLUSION

An examination of parental infanticide in Japan does not permit an easy answer to the question of whether such cases are treated "leniently." If a socio-cultural definition of *oya-ko shinju* as parent-child suicide were fully incorporated into the legal treatment of parental infanticide, it would seem that cases of proved intent to kill the child as part of one's suicide attempt would not be prosecuted. The fact that these cases are prosecuted suggests at least two possibilities: legal treatment is inconsistent with the socio-cultural definition of *oya-ko shinju*, or legal treatment is consistent with a socio-cultural definition of *oya-ko shinju* that is more complex than a monolithic notion of suicide (there are excusable or justifiable suicides as well as inexcusable or unjustifiable suicides). It is quite possible that both are at work here. The Japanese do not think that all cases of *oya-ko shinju* warrant lenient treatment, and the legal system treats some cases more harshly than others for a variety of rea-

86. The fact of so much community input in the decisions gives one pause, particularly since the dead children cannot speak to their side of the story or the circumstances of the event. While judicial decisions should bear some relationship to social norms which can be expressed through such petitions, there is a point at which petitions, if given too much weight, result in decision by mob vote. While there are some parallels to community input in the form of a jury system, there are important differences in terms of such things as the procedures through which the community's representatives influence judicial decisions and the knowledge any one letter-writer has about the whole situation.

sons such as the individual beliefs and perspectives of the prosecutors and judges involved.

Difficulty in assessing "leniency" is partially due to problems in defining the frame of reference. At the prosecutorial level, release or suspended prosecution would be more lenient outcomes than indictment, and yet there is data that suggests a high rate of indictment. However, that may reflect the prosecutor's view that greater leniency is most appropriately administered by judges than prosecutors, rather than a general attitude among prosecutors that such cases should not be treated as leniently as they could be.

At the judicial level, a finding of not guilty through acceptance of the argument that the act was a failed suicide attempt or through a finding of lack of criminal intent or of unsound mind would be the most lenient outcome at that stage, and yet there is evidence that a more severe outcome, conviction with a suspended sentence, is at least as likely as exculpation. Relative to the possible legal outcomes, therefore, it would seem that such cases are not treated with extraordinary leniency.

On the other hand, considering the maximum penalty of death under Criminal Code section 199, the fact that most convictions fall at the low end of years of imprisonment combined with a high rate of suspended sentences suggests that parental infanticide cases are treated more leniently than they might be. Despite the court's outrage in the case of the mother who killed her children in the belief they had AIDS, the mother was sentenced to "only" five years in prison.

Whether relatively short and suspended sentences in this context reflect leniency depends also on the prevalence of short and suspended sentences generally in the disposition of criminal cases in Japan. Although the Japanese criminal justice system is characterized as having a high conviction rate, actual prison time served is comparatively low.⁸⁷ This would suggest that the disposition of parental infanticide cases is quite similar to that of other criminal cases. And yet, according to research by the Research Committee, lenient treatment is accorded parents who kill their children under circumstances and for reasons with which a Japanese person would sympathize.

Whatever leniency there is does not stem directly from a distinction between parent-child "suicide" and parental infanticide; a finding of intended suicide will not in and of itself result in a different outcome than a case of intentional infanticide where the parent fully intends to survive the child. Since a high degree of psychological identification between parent and child is encouraged in Japan,

87. According to the 1988 White Paper on Crime, 93.3% of criminal convictions result in suspended sentences. MINISTRY OF JUSTICE, *supra* note 19 at 121.

identification in this context of death is not in itself a sign of mental unsoundness sufficient to satisfy the standard for exculpation under Criminal Code section 39. Nor does a proved intent to die with the child appear to have much impact on sentencing, either.

Other socio-cultural concepts and values are much more significant in determining guilt and in sentencing. The degree to which the parent complies with other norms and values associated with his or her roles in society appear to be important, for example. The parent's attempt to minimize the pain suffered, the parent's remorse, the family and community's willingness to accept the offender's return are examples of factors that appear at least as important to outcome as the legally significant factors of mental state at the time of the act. Even if somewhat obscured by the court's having to characterize the facts in terms of Criminal Code section 39's distinction between "unsoundness" of mind and "weakness" of mind, many socio-cultural facets of "culpability" and "rationality" emerge in the court's analysis of the evidence within the legal framework of section 39 and in its justification for a particular sentence.

If the disposition of parental infanticide cases in the Japanese criminal justice system is fairly characterized as lenient with respect to those offenders who adhere closely to cultural norms and values, does the legal system thereby further parental control to a point that insufficiently protects children from the possibility of infanticide? Phrased differently, if the legal system imposed more and harsher penalties on parents convicted of infanticide would the social legitimacy of *oya-ko shinju* be reduced? Law professor Nakatani Kinko believes that there is this kind of connection between utilization of the law and the message of the law.⁸⁸ She argues, for example, that social attitudes toward illegitimate children can be corrected partially through the elimination of discriminatory laws and differential treatment of infanticides of illegitimate and legitimate newborns.⁸⁹ She supports greater restrictions on abortion on the theory that readily available abortion promotes parental devaluation of their offsprings' lives, and she advocates legislation specifically directed at reducing child abuse.⁹⁰

However, even if as Nakatani believes, the law can have a direct and lasting impact on social attitudes concerning the protection of children, there is a fundamental problem with conceptualizing *oya-ko shinju* as an abuse of children from which they need protection. Iga would argue that parents' sense of entitlement and responsibility to take their children with them in suicide is the negative

88. Nakatani, *supra* note 23, *passim*.

89. *Id.* at 378-379.

90. *Id.*

flipside of an otherwise positive value: the family as one cohesive unit, rather than a collection of individuals. Iga does find *oya-ko shinju* deplorable and tragic, but he looks for solutions that make the family as a whole less fragile rather than bolstering the position of children within families.⁹¹

Recent interviews with judges, attorneys, and mediators in Japan reveal a heightened awareness of the possibility and occurrence of child abuse, but it may take time to displace the public's preoccupation with the opposite problem: teenage abuse of parents.⁹² The central question with respect to *oya-ko shinju* is whether it will be considered a form of child abuse at all. As long as leaving children to be cared for by others is viewed as irresponsible and unloving, it is likely that *oya-ko shinju* will be seen as positively protective of children. As long as Japanese society fails to provide for children left behind either because such children are shunned or because social services are not available, it will seem irresponsible and unloving to leave them behind.

91. An example of this approach in Iga's work is his approval of legislation that restricts the interest rate loan sharks may charge, thereby reducing the economic despair that drives some fathers to kill their families. Iga sees such legislation as protective of families, not specifically of children. Iga, *supra* note 18, at 181.

92. Family court mediators and judges interviewed during the summer of 1989 indicate that reports of child abuse are increasing in the press as well as in cases brought to the family court.