1-1-1990

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Debora K. Dimino

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POSTPARTUM DEPRESSION: A DEFENSE FOR MOTHERS WHO KILL THEIR INFANTS

I. INTRODUCTION

Children have always held a sacred place in our society—representing the future, hope, and a generation’s beginning. Euripides summarized this feeling when he asked, “[w]hat greater grief can there be for mortals than to see their children dead?”

With that in mind, consider the following situation: A healthy, twenty-four year old woman decides that she and her husband want to have a child. There is no history of psychiatric problems in her family nor her husband’s family. Her doctor assures her that, considering her medical history, age, and excellent physical condition, she should not have any problems with a pregnancy.

The woman proceeds to get pregnant, has a normal pregnancy, and, ultimately, a healthy child. Two days after giving birth, both mother and child are allowed to go home. The woman expresses some apprehension about taking the child home, but her doctor assures her that she should not be worried because all new mothers are initially apprehensive about their ability to take care of an infant.

While at home, soon thereafter, the woman starts having “bad thoughts”—thoughts of hurting the baby and hurting herself. She is continually crying for no apparent reason, is unusually quiet, withdrawn, and becomes emotionally upset over trivial matters. Her husband notices that his wife is different since she returned from the

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hospital, and he informs their doctor of his concern. Once again, the doctor says not to worry and assures the husband that these feelings are normal for new mothers and that they will pass in time. These thoughts do not pass, and, instead, they become increasingly persistent. Ultimately, the woman is so confused and delusional that her sense of reality is lost, and she begins to think of the child as the devil.

When the baby is two weeks old, the mother hears him crying. She goes into his room and sees the devil in her child's crib, spouting fire from his mouth. She immediately takes a pillow and smothers the fire to kill the devil. In so doing, the mother believes that she is actually saving her child from the devil, although her perception of reality is warped and thoughts of her child may be completely replaced by or confused with her delusions. What she has unknowingly done, in fact, is suffocate her child, killing him in a matter of seconds. The mother is then charged with first degree murder.

This situation is a startling example of opposing feelings at work in a woman's mind after childbirth. On the one hand, the woman loves and wants her child very much and will do anything to protect it, yet, at the very same time, she is compelled to take its life. What happened? The answer is that this woman is suffering from severe postpartum depression, an area of psychiatric medicine that has been largely ignored by the legal and medical communities in the United States for the past sixty years.

3. The phrase “postpartum depression” will be used in this comment to refer to the most severe syndrome of postpartum depression. Most scientists agree that there are three distinct categories within what is commonly referred to as postpartum depression. The first is the most common, occurring in fifty to eighty percent of all women after childbirth, and is known as the “baby blues.” The second form occurs in eight to twelve percent of all women, is more severe than the first, and is termed “postpartum depression.” “What’s becoming conventional is for the term ‘postpartum depression’ to describe the middle range—clinical depression that is not psychotic.” Mansnerus, Disturbing Questions on the Darkest Side of Postpartum Blues, N.Y. Times, Oct. 12, 1988, § B, at 1, col. 1. The last form, which is the most severe form of this illness is puerperal psychosis, or the psychosis which occurs after childbirth. See generally W. Brown, Psychological Care During Pregnancy and the Postpartum Period 117-36 (1979); Lee, Postpartum Emotional Disorders, 30 Med. Trial Tech. Q. 286 (1984). It is this last, severe form of postpartum depression that this comment will focus on.

4. Research in the area of postpartum depression began in the early 1800's and rapidly developed in both the United States and Europe. J. Hamilton, Postpartum Psychiatric Problems 126-35 (1962). Initially, doctors treated women suffering from postpartum depression through bleeding and physical restraint. Id. at 127. However, by the mid-1800's, as scientists began discovering more about this disorder, doctors used opium and Indian hemp to cure the postpartum depression experienced by many women. Id. As research in this area continued to develop, scientists began hypothesizing on ways to classify this disorder. In France and England, scientists believed postpartum depression to be a category of mental illness with char-
Experts estimate that fifty to eighty percent of all women experience some form of depression after childbirth, but only one to two per 1000 women experience its most severe form, puerperal psychosis. This latter form is the most dangerous, both to the mother and the child, because both suicidal and infanticidal thoughts are present, making the woman dissociated, delusional, and confused. The overall effect is to cause a woman to lose her "sense of reality." Despite its severe and traumatic effects on women after childbirth, puerperal psychosis is not recognized in California as a psychosis sufficient to fall within the insanity defense. As such, women who suffer from this debilitating mental impairment are tried as if no mental impairment existed, subjecting these disturbed women to the possibility of life in prison or even death for acts over which characteristics distinguishing it from other varieties of mental illness. Id. at 128-30. However, a differing view of postpartum depression developed in the United States at this time. In 1926, the authors Strecker and Ebaugh concluded that since postpartum depression cases could be classified within standard categories of psychiatric illness, the term "puerperal psychosis" was superfluous and should be discarded from psychiatric terminology. Id. at 132. Hence, research in the United States virtually stopped around 1926, while similar research in Europe continued.

One reflection of America's disregard of this disorder is seen in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders which does not classify postpartum disorders in their own, distinct category. See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (3d ed. 1980) [hereinafter DSM-III]. The 1962 publication of Postpartum Psychiatric Problems, by James Alexander Hamilton, was the first book written in America since 1926 dealing with postpartum depression. Despite a somewhat renewed interest in this area, research in America has been sparse and stagnant, and "the history of postpartum psychiatric problems suggests that reassessment of this field is long overdue." J. Hamilton, Postpartum Psychiatric Problems 135 (1962). Legislation "aimed at assisting peace officers in identifying suspects in child abuse or death cases who may be suffering from postpartum psychosis" was recently approved by the California Assembly, suggesting that this "reassessment" has already begun. Jordan, Assembly Approves Postpartum Psychosis Bill, L.A. Daily J., July 21, 1989, at 3, col. 2.


9. Lee, supra note 3, at 293.

10. Mansnerus, supra note 3, at 6, col. 1.

11. Trigoboff, supra note 5, at 1, col. 3.

they had no control.

This comment addresses the problem of conflicting judicial holdings in cases where a woman kills her child as a result of suffering from postpartum depression. Part II provides a medical and legal background of postpartum depression and examines the case history of its use as a defense. The comment next discusses some of the problems created through inconsistent utilization of a postpartum depression defense in our states' criminal justice systems. Part IV analyzes the differing approaches taken by state courts and the complete lack of legislative guidance for these courts in this area of law. Finally, legislation is offered for the clarification of the crime of infanticide as a distinct crime and for the establishment of a postpartum depression defense, akin to the insanity defense, in cases of infanticide in California. The proposal offers a model for all state legislatures to develop guidelines for courts evaluating a mother's criminal actions towards her child while suffering from postpartum depression, in order to determine if those actions fall within the state's insanity defense.

II. BACKGROUND

The depressed state a woman exhibits following childbirth has been a recognized phenomenon for centuries. Hippocrates first described postpartum depression and the symptoms associated with it in the early fourth century. He speculated that lochial discharge could be carried toward the head resulting in agitation, delirium, and attacks of mania and, further, “when blood collects at the breast of women, it indicates madness.” Unfortunately, today we are not much closer to understanding the basis for these disorders or their cure or treatment.

13. Id. § 25 (Deering 1985).
14. Lochial is defined as “a discharge from the uterus and vagina following delivery.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1328 (1971).
15. W. Brown, supra note 3, at 127. See also J. Hamilton, supra note 4, at 126.
16. There are many theories on the causes of postpartum depression. However, research in this area has been inconclusive, and there are no established or universally accepted causes or predisposing factors. Some researchers have speculated that hormonal changes after childbirth account for a mother's increased vulnerability to psychiatric illness in the weeks and months following childbirth. M. Sandler, supra note 8, at 80-89; W. Brown, supra note 3, at 122, while others postulate that the stresses of childbirth and the new responsibilities associated with motherhood account for this phenomena. M. Sandler, supra note 8, at 69. Still others claim that age is a relevant factor and that “single women and first-time mothers are more vulnerable to postpartum psychiatric disorders.” Mansnerus, supra note 3, at 1. Finally, some researchers believe that mothers with a previous occurrence of postpartum depression are at higher risk of having a relapse with a subsequent pregnancy. Lee, supra note 3, at 290. See
Much of the early research on postpartum emotional disorders was conducted in Europe, where infanticide\textsuperscript{17} was commonplace in society.\textsuperscript{18} Unwed mothers would often kill their children shortly after birth in an attempt to hide their pregnancy and avoid social disgrace. Hence, the first legislation dealing with this area of law was passed in England in 1623, and was confined to bastard children as victims.\textsuperscript{19} The crime of murder of children born in wedlock, considered distinctly different from the crime of murdering illegitimate children, was treated as any other crime of homicide until the early twentieth century.\textsuperscript{20}

England has had legislation dealing with the crime of infanticide, covering both children born in and out of wedlock, for over sixty years. The Infanticide Act of 1922, which was later amended in 1938,\textsuperscript{21} establishes that if a mother kills her child within the first twelve months of pregnancy, the criminal charge brought against her will automatically be reduced from murder to involuntary manslaughter.\textsuperscript{22} This "automatic" reduction was a legislative response to

\textsuperscript{generally M. Sandler, supra note 8, at 25-90 (comprehensive discussion of various factors and hypotheses in regards to the causation of postpartum depression).}

\textsuperscript{17. See supra note 8.}


\textsuperscript{19. O'Donovan, supra note 18, at 259.}

\textsuperscript{20. The distinction between the killing of a legitimate child, one born in wedlock, and the killing of an illegitimate child, one born out of wedlock, is also seen in other European and Asian countries. For example, in Italy there is a distinct crime of "infanticide for reasons of honor." Under this law, "whoever causes the death of a child immediately after its birth . . . in order to save his own honor or that of a close relative shall be punished by imprisonment for from three to ten years." \textit{Italian Penal Code}, 23 AMERICAN SERIES OF FOREIGN PENAL CODES 193 (E. Mise & A. Maitlin trans. 1978). However, the crime of homicide is distinct from this crime: "whoever causes the death of a human being shall be punished by imprisonment for not less than twenty-one years." \textit{Id.} at 192. Additionally, many other Asian and European nations legally recognize a disturbed mental state in a woman following childbirth and have passed infanticide statutes recognizing such. \textit{See Finland, 27 AMERICAN SERIES OF FOREIGN PENAL CODES} 71 (M. Joulsen trans. 1987); \textit{Sweden, 17 AMERICAN SERIES OF FOREIGN PENAL CODES} 17 (T. Sellin trans. 1972). \textit{See generally Penal Code of the Federal Republic of Germany, 28 AMERICAN SERIES OF FOREIGN PENAL CODES} 177 (J. Darby trans. 1987); \textit{Austria, 12 AMERICAN SERIES OF FOREIGN PENAL CODES} 66-67 (N. West & S. Shuman trans. 1966); \textit{Korean Criminal Code, AMERICAN SERIES OF FOREIGN PENAL CODES} 109 (G. Mueller trans. 1960).}

\textsuperscript{21. The Infanticide Act of 1938 reformed the 1922 Act in two distinct ways. First, it altered the definition of the victims of infanticide from "newly born" to "under the age of twelve months." Secondly, the 1938 Act "extended the medicalisation of the crime through the addition of the language about 'the effect of lactation.'" O'Donovan, supra note 18, at 261.}

\textsuperscript{22. The Infanticide Act of 1938 states:}

\textit{Where a woman by any willful act or omission causes the death of her child}
the recognition of the existence of postpartum depression, which causes a deranged mental state in a mother following childbirth. Should a woman be found guilty of infanticide under this Act, sentencing is placed in the judge’s discretion, which usually results in probation or hospitalization.

In contrast, the United States has no legislation dealing specifically with the crime of infanticide; the killing of a child by its mother is treated like any other crime of homicide. Additionally, neither the medical nor the legal community “officially” recognizes a deranged mental state of a woman following childbirth. The American Psychiatric Association “tends to set guidelines for the legal profession” by publishing a Diagnostic and Statistical Manual of Mental Disorders (DSM-III) which classifies various mental conditions and their associated symptoms. However, DSM-III currently “recognizes no more or less stress in a woman in the postpartum period than any other woman of her age under stress.”

Despite the failure of the medical community to recognize postpartum depression as a distinct category of illness, physicians frequently continue to diagnose this condition. The ambivalence of the medical community is of little value to the legal community, which looks to the medical profession for guidance in the area of defining and distinguishing psychiatric disorders. Moreover, the legal com-
munity receives little guidance from the American public in defining and distinguishing psychiatric disorders, due to the differing views of the usefulness of the insanity defense in the American criminal justice system.\textsuperscript{33}

One result of the lack of guidance for the legal community in this area of law is that different tests of insanity are accepted in various states; the predominant tests being the American Law Institute test, the M'Naughten test, the irresistible impulse test, and the Durham "product" test.\textsuperscript{33} Inconsistent holdings inherently arise when applying these differing tests of insanity from state to state, as opposed to following one uniform guideline. Additionally, the problem of establishing judicial consistency in cases of infanticide is worsened by the nonexistence of legislation specifically dealing with the crime committed. Without specific laws to guide them, courts are forced to decide these cases on an ad hoc basis, making it difficult to establish guiding, consistent precedent.

Nonetheless, when dealing with the crime of infanticide the


32. Many of these opposing views are based upon the inherent moral conflict posed by the concept of punishing someone who did not intend their acts. "To label as criminals those so severely disturbed that they could not appreciate the wrongfulness of their acts offends the moral tenets of the criminal law and, we [APA] submit, would offend the moral intuitions of the community." \textit{Id.} at 137. These views are based on the concept that "psychiatry and the law are antithetical as to purpose and function." Note, supra note 31, at 460. While the mental health system is devoted to therapeutic rehabilitation, the criminal justice system is punitive, and for the most part unconcerned with therapeutic rehabilitation. Note, supra note 31, at 460.

33. These four tests are used in the United States to measure insanity. The first is the American Law Institute test, which states that "a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." \textit{Model Penal Code} \S\ 4.01, at 66 (Proposed Official Draft 1962).

The second test utilized to measure insanity is the M'Naughten test, which is used in a majority of states today. The M'Naughten test does not hold a person criminally responsible if, at the time of the act, he was laboring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of his act. W. LAFAYE & A. SCOTT, HORNBOOK ON CRIMINAL LAW \S\ 4.2, at 311 (2d ed. 1986).

The third test of insanity is the irresistible impulse test, which, simply stated, means that the person has a mental disease which keeps him from controlling his conduct. \textit{Id.} at 320.

The fourth test used to measure insanity is the Durham "product" test, which establishes that a person is innocent if the unlawful act he committed was a product of a mental disease or defect. \textit{Id.} at 323. For a more comprehensive examination of these differing tests of insanity, see generally \textit{ABA and APA Proposals}, supra note 31 and Note, \textit{supra} note 31.
American criminal justice system generally takes one of three approaches. The first approach is for the district attorney to choose not to prosecute these women at all for lack of evidence or the inability to prove the mother's sanity at the time of the crime.\textsuperscript{34} The second approach is for the court to refuse to accept postpartum depression as a valid defense and instead convict the women of varying degrees of murder.\textsuperscript{35} The third approach courts may take is to accept postpartum depression as a valid defense, and sentence the mother to probation and/or commit her to psychiatric help.\textsuperscript{36} This final approach deals with the mother in much the same way as a legally insane defendant.

A. No Charges Brought

Some prosecutors refuse to bring charges against a mother who kills her child shortly after giving birth for lack of evidence or the inability to prove the sanity of the woman at the time of the incident. In these cases, it is more of a practical decision by the district attorney not to prosecute these women than a judgment by the courts on the issue of the validity of using puerperal insanity as a defense to murder. For example, evidence of a woman's impaired reasoning and deranged state of mind while suffering from puerperal psychosis is readily displayed by her unusual hallucinations and severe depression. Additionally, evidence of malice aforethought is directly rebutted by the woman's own actions prior to the child's death, such as her taking classes on how to care for her child and how to be a "good mother." This conflicting evidence contributes to the prosecution's inability to prove the woman's sanity at the time of the alleged crime, and hence their decision to not press charges against the woman.

One case in which the prosecution took this approach involved Michele Remington, who, in 1987, gave birth to her first child, Joshua.\textsuperscript{37} Remington had no history of psychiatric problems, was excited about her pregnancy, and looked forward to motherhood.

After giving birth, Remington was not allowed to take Joshua home because the child had trouble during delivery. During this time

\textsuperscript{34} See infra notes 37-45 and accompanying text.
\textsuperscript{35} See infra notes 46-85 and accompanying text.
\textsuperscript{36} See infra notes 86-110 and accompanying text.
\textsuperscript{37} Donahue: Postpartum Depression (ABC television broadcast, August ____ , 1988) (transcript #021788 on file at Santa Clara Law Review office). This case never went to trial so the author has based her facts solely upon this transcript and the interview therein.
apart from her baby, Remington began to feel "cheated" because, while other new mothers were allowed to take their children home after birth, she was not. This "normal" feeling began to overwhelm her, so much so that when Joshua finally came home three weeks later, Remington's feelings of being "cheated" were so magnified that she became unusually depressed, was unable to sleep, and had to force herself to eat. "She [Remington] wasn't doing anything." 

Unexpectedly during this "depressed" state, Remington took a family gun, shot and killed her six week old baby, and then turned the gun on herself. While recovering in the hospital thereafter, Remington was diagnosed as suffering from severe postpartum depression. The district attorney in Bennington, Vermont, failed to acknowledge this as a viable defense and charged Remington with the first degree murder of her infant son. Nonetheless, one week later all charges were dropped because the prosecution was unable to find experts willing to testify to establish Remington's sanity at the time of the shooting.

The case of Theresa Pearson failed to make it to trial for similar reasons. Pearson, who had no history of psychiatric problems, became delusional after giving birth to a daughter, Carly. Despite her prior excitement about having the child, Pearson began experiencing persistent feelings of despair and regret over the birth of her baby. Immediately thereafter, Pearson was diagnosed as suffering from severe postpartum depression and was placed in a psychiatric unit at a local hospital because of the serious threat she posed to both herself and her child.

Seemingly recovered, Pearson was released from the hospital about a month later with instructions to continue her medication and her visits to her doctor. To be safe, however, Pearson's family was instructed not to leave Pearson alone with her baby for long periods of time. Nevertheless, Pearson attempted to kill her baby soon after her release and was readmitted to the psychiatric unit. While hospitalized, Pearson remained delusional and confused and told a nurse

38. Id. at 6 (statement by Michele Remington).
39. Id. (statement of Jeff Remington, husband of Michele Remington).
40. Id. at 5.
41. See generally Littleton v. Good Samaritan Hosp., 39 Ohio St. 3d 86, 529 N.E.2d 449 (1988). This civil suit for wrongful death and malpractice was brought by the executrix for Carly Pearson against the hospital and psychologist who treated Carly's mother, Theresa Pearson. Theresa Pearson killed Carly after being released from hospitalization while suffering from severe postpartum depression.
42. Id. at 87, 529 N.E.2d at 450.
that she planned to inject the baby with something to kill her—a statement she later withdrew, claiming she did not want to hurt the baby. Hence, Pearson was released again.

Upon returning home, Pearson was left alone with Carly long enough to administer a deadly overdose of aspirin. Despite Carly's death, criminal charges were never brought against Pearson due to her medically established and well recognized mental problems after Carly's birth.

Both of the foregoing cases represent decisions by district attorneys not to proceed with charges against the mother, despite her criminal actions. Prosecutors faced with defendants who have obvious mental impairments such as these, which manifest themselves in harmful actions toward both the mother and the child, are willing to accept the proposition that the woman was not legally sane at the time of the incident. Thus, prosecutors make a practical decision not to pursue bringing charges against these women.

B. Refusal to Accept Defense

When a mother's harmful actions are not self-directed but rather are directed only at her child, the majority of courts that deal with the crime of infanticide do not recognize postpartum depression as a mental impairment sufficient to establish an insanity defense. This is due in part to the lack of knowledge of this illness, its symptoms, causes, and treatments, and its overall lack of recognition in the United States.

43. Id. at 88, 529 N.E.2d at 451.
44. Id. at 90, 529 N.E.2d at 453.
45. Although a criminal case never ensued, a civil suit was brought by Carly's administratrix against the hospital and psychologist. See Littleton, 39 Ohio St. 3d 86, 529 N.E.2d 449 (1988). A similar civil case involving postpartum depression is Murray v. St. Mary's Hosp., 280 A.D. 803, 113 N.Y.S.2d 104, (1952). This case was brought by the husband of a woman who committed suicide shortly after giving birth by jumping from a window of her room in the defendant hospital. This woman was suffering from severe postpartum psychosis following the delivery of her child and was unattended at the time of the incident.

A suit was filed against the hospital and doctor who treated the woman, and the appellate court held that the hospital was under a duty to use reasonable care to prevent its patients from injuring themselves. Further, the appellate court held that the doctor's lack of knowledge about his patient's mental condition caused him to not take precautions that he might otherwise have taken. On remand to the trial court, both the hospital and the doctor were held potentially liable for damages. Id. at 803-05, 113 N.Y.S.2d 104-06. It must be noted, however, that this civil case utilized a different burden of proof than that of the criminal cases discussed in this comment. This civil case used a "preponderance of evidence" standard, Black's Law Dictionary 1064 (5th ed. 1979), which is a much lower burden of proof than the "beyond a reasonable doubt" standard, id. at 147, utilized in the criminal cases herein.
1. Complete Rejection of Defense to Murder

Courts in the United States have refused to recognize postpartum depression as a defense similar to insanity in varying degrees since it was first asserted as a defense. The majority of these courts have refused to accept postpartum depression as a complete defense to murder. In *State v. White*, an early case to take this approach, a nineteen year old mother was convicted of voluntary manslaughter of her infant daughter because the court rejected her unique defense under Idaho’s insanity test.

In this case, Janet White, a healthy mother of two children, was changing her three month old infant, when, as she later said, “my mind snapped, and I threw her on the floor” whereupon the child died an hour later from a skull fracture. After her baby’s death, White exhibited further unusual behavior, appearing withdrawn and showing no remorse over the death of her child. Upon questioning White the police became suspicious and took her into custody. She was examined and diagnosed as suffering from severe postpartum depression whereupon she was hospitalized.

White was charged with voluntary manslaughter, to which she claimed the defense of insanity. At trial, varying expert testimony on her medical condition and state of mind at the time of the crime was presented. The doctor who had initially examined her testified that White was suffering from severe postpartum depression, a condition which had afflicted her continually since the birth of her first child. This testimony, however, was rebutted by the state’s expert who claimed that White was sane, and, further, that the “snapping” of White’s mind “was a rationalization for the act [killing the child]”, and he “doubted whether she went into a psychotic depressive reaction at the time of the incident.”

White was convicted and appealed, but the appellate court upheld her conviction because the jury instructions used by the trial judge were sufficient to establish the grounds for Idaho’s insanity test.

47. Idaho used the American Law Institute test to measure insanity. See supra note 33 and accompanying text.
49. Id. at 154-55, 456 P.2d at 798-99.
50. Id. at 154, 456 P.2d at 798 (White had her second child only eleven months after her first, which “aggravated [her] existing postpartum depression.” Id.).
51. Id. at 154, 456 P.2d at 798.
52. Id. (emphasis added). See generally supra note 16 (illustrating the varying degrees of acceptance of postpartum depressive syndromes by the medical community).
test,\textsuperscript{53} providing that a jury could reasonably conclude that White was sane at the time of the incident. Although elaborating on White’s mental capacity as a result of an abusive childhood and broken family setting, the court nonetheless refused to recognize her unique defense and affirmed the trial court decision.\textsuperscript{54}

Similarly, the court in the highly publicized case of \textit{Commonwealth v. Comitz}\textsuperscript{55} refused to accept postpartum depression as a complete defense to murder. In this case, Sharon Comitz threw her four week old son, Garret, off a bridge and into an icy stream.\textsuperscript{56} She then proceeded to tell the police that Garret had been kidnapped from her car while it was parked at a shopping center. However, police eventually uncovered evidence implicating Comitz in her son’s death, and Comitz was charged with first and third degree murder. She initially entered a plea of not guilty to each offense, but agreed to plead guilty with the defense of mental illness to the charge of third degree murder.

Throughout the trial, the court noted Comitz’s history of depressions associated with childbirth. Following the birth of her first child, Nicole, Comitz suffered from severe postpartum depression and commented that she could not be left alone with Nicole because she was afraid she was going to kill her.\textsuperscript{57} Comitz recovered shortly thereafter and was able to resume a normal relationship with her daughter. While pregnant with Garret, however, Comitz once again became depressed and expressed concern over her depression, telling a friend that she was afraid that “what happened to Nicole [afraid she would kill her] would happen to the new baby.”\textsuperscript{58} Despite this evidence, the jury found Comitz to be criminally responsible for her acts.

Following testimony and argument at sentencing, the trial court determined that Comitz was not “severely mentally disabled”\textsuperscript{59} and sentenced her to a term of eight to twenty years imprisonment,\textsuperscript{60} exemplifying the traditional American legal system’s refusal to accept

\begin{itemize}
\item \textsuperscript{53} \textit{White}, 93 Idaho at 156, 456 at 802.
\item \textsuperscript{54} \textit{Id.} at 160, 456 P.2d at 804. The appellate court concentrated on evaluating the instructions used at the trial level. Upon reviewing these instructions and their application to the facts of this case, the appellate court held that these instructions were proper and affirmed the decision of the trial court. \textit{Id.} at 155-60, 456 P.2d at 799-804.
\item \textsuperscript{55} 365 Pa. Super. 599, 530 A.2d 473 (1987).
\item \textsuperscript{56} \textit{Id.} at 601, 530 A.2d at 474.
\item \textsuperscript{57} \textit{Id.} at 602-03 n.3, 530 A.2d at 474-75 n.3.
\item \textsuperscript{58} \textit{Id.} at 603, 530 A.2d at 474-75.
\item \textsuperscript{59} \textit{Id.} at 602, 530 A.2d at 474.
\item \textsuperscript{60} \textit{Id.}
\end{itemize}
postpartum depression as a defense sufficient to fall within the insanity defense.

2. Rejection of Defense to Attempted Murder

In addition to rejecting postpartum depression as a complete defense to murder, courts have also taken a strong stance on rejecting the defense in cases where a mother is unsuccessful in killing her child and charged with attempted murder.\textsuperscript{61} One case exemplifying this approach is Clark v. State.\textsuperscript{62}

One evening, for no apparent reason, Pamela Sue Clark wrapped her baby in a blanket and abandoned it in the desert. Clark later told her husband that the baby was kidnapped. When the police arrived, Clark explained how someone had grabbed her from behind, knocked her unconscious, and when she awoke, the baby was gone. However, the police noted that there were no signs of forced entry or visible injuries to Clark, and she appeared unusually calm and unemotional. Three days later, Clark admitted she abandoned her baby and directed the police to where she left the child, whereupon the child was immediately retrieved.

Clark was charged with attempted murder and her defense was insanity. The psychiatrist who examined her testified "that severe postpartum depression rendered [Clark] legally insane at the time of the crime."\textsuperscript{63} Members of Clark's family, however, testified that her conduct was normal immediately \textit{preceding} the crime, and it was only \textit{after} the alleged crime that they "noticed a change in her personality."\textsuperscript{64} Based upon this testimony, the jury concluded that the evidence was inadequate to overcome the presumption of Clark's sanity.

The appellate court affirmed the decision, noting that the jury could reasonably find Clark's evidence to be insufficient to dispel the presumption of sanity.\textsuperscript{65} Another factor which was important to the jury was the element of time. Although the jury might have believed that Clark could not control her \textit{immediate} responses to her child because she suffered from postpartum depression, the jury had diffi-

\textsuperscript{61} Unsuccessful attempts at murdering children during a state of puerperal psychosis may be related to child abuse and neglect. \textit{See} W. Brown, \textit{supra} note 3, at 131-32 (discussion of possible effects of postpartum psychiatric problems on infants); M. Sandler, \textit{supra} note 8, at 112-19.

\textsuperscript{62} 95 Nev. 24, 588 P.2d 1027 (1979).

\textsuperscript{63} \textit{Id.} at 27, 588 P.2d at 1029.

\textsuperscript{64} \textit{Id.}

\textsuperscript{65} \textit{Id.} at 28-29, 588 P.2d at 1030.
ulty believing a mother could drive many miles to a deserted road and abandon her baby, without having time to reflect on the situation and control her actions.

The majority opinion in the United States today is in accordance with these cases, rejecting postpartum depression as a complete defense.66

3. Defense as a Mitigating Factor at Sentencing

Some courts have taken a strong stance in rejecting postpartum depression as a complete defense to varying degrees of murder when presented with fact patterns that do not clearly demonstrate the requisite legal definition of insanity. However, other courts have taken a compromise approach in order to alleviate the inherent concerns presented when a mentally disturbed woman, suffering from this condition, is held criminally responsible. Instead of accepting postpartum depression as a complete defense to murder, these courts use postpartum depression as a mitigating factor at sentencing.

One such case was *Faunteroy v. United States.*67 In 1980, Tijuana Faunteroy was convicted of involuntary manslaughter after being charged with killing her two month old son by failing to feed the child. One of Faunteroy’s arguments at trial was that because she suffered from postpartum depression, she was unable to breast feed the baby adequately. This argument was rejected by an expert witness for the state who testified that “the effects of postpartum depression on a mother would not influence whether an infant digested his food in that a baby could obtain sufficient nutrition if it were fed adequate amounts [of milk], regardless of the mother’s depression.”68 Additionally, testimony was given at trial indicating that Faunteroy was urged to seek medical help for the baby because he looked undernourished,69 yet Faunteroy failed and refused to take any medical action.

Faunteroy was convicted, but the jury noted her apparent postpartum depression as being a factor in her inability to breast feed the

66. The state courts throughout the United States have traditionally been very conservative in their approach to this area of law, denying the existence of such a medical or legal defense. *See, e.g.*, State v. White, 93 Idaho 153, 456 P.2d 797 (1969), Commonwealth v. Comitz, 365 Pa. Super. 599, 530 A.2d 473 (1987), and Clark, 95 Nev. 24, 588 P.2d 1027 (1979). However, the trend seems to be moving away from this traditional approach to a more tolerant view of the validity of postpartum depression as a defense to infanticide. *See infra* notes 86-110 and accompanying text.

67. 413 A.2d 1294 (D.C. 1980).
68. *Id.* at 1296.
69. *Id.* at 1297.
child, one of the main reasons for the child’s death. The jury, however, did not excuse her actions on these grounds.\textsuperscript{70} Relying upon the testimony given at trial, the jury refused to accept her postpartum depression as a complete defense, although they recognized it as a mitigating factor in convicting her of involuntary manslaughter and not murder.\textsuperscript{71}

Another case which considered postpartum depression as a mitigating factor occurred in West Virginia.\textsuperscript{72} Kathleen Householder was successful in using postpartum depression to plead guilty to a reduced charge of involuntary manslaughter, after initially being charged with murder.\textsuperscript{73}

As in many of the previously discussed cases, Householder originally reported to the police that her two week old daughter was kidnapped. Further, Householder made emotional appeals on local television for the child’s return. However, she soon began offering police several versions on how the child disappeared. Eventually, Householder told police that she was unusually annoyed by, and frustrated with, the noise her children were making, so she uncontrollably threw a rock and struck her two week old daughter. After throwing the rock, Householder claimed she lost control of her actions, put the baby in a plastic trash bag, and drove to the Shenandoah River, where she threw the bag with the child into the water.\textsuperscript{74} Householder was diagnosed as suffering from severe postpartum depression during this incident, and despite her severe criminal actions, she was successful in using this condition to plea bargain to a reduced charge and sentence.\textsuperscript{75}

A recent case to use postpartum depression as a mitigating factor was \textit{State v. Holden},\textsuperscript{76} wherein seventeen year old Shelia Diane Holden told police that her daughter, Dekavia, was kidnapped. Holden claimed that while she was walking at a nearby pond, two men snatched Dekavia from her arms and drove away in a large white automobile. Holden showed police the pond and, although they could not find any tire tracks, police did find Dekavia’s body floating some twenty feet away.

Holden gave police a description of her assailants and continued
her story for about a month, at which time she confessed that she
had thrown the baby into the water. Holden claimed she killed the
baby because the baby’s father and his family disliked Dekavia and
acted as if she were “in the way.” 77

Additionally, Holden said something kept telling her to “throw
the baby into the water, and everything would be all right.” 78 At
trial an expert testified that Holden suffered from auditory hallucina-
tions which censured her and talked about Dekavia. 79 Nonetheless,
Holden testified that after throwing the baby into the pond she
“started to . . . jump in” 80 and get Dekavia out, but stopped and
thought “I’ll just let her go.” 81 This rationalization, demonstrating
Holden’s perception of reality, was a key point used by the prosecu-
tion to prove Holden’s sanity.

Holden’s extensive, abusive history was examined by the court
and she was shown to suffer from many problems including postpar-
tum depression and abused spouse syndrome. 82 As a result of these
problems, the defense’s expert witness characterized Holden as being
“psychologically paralyzed.” 83 Nonetheless, the trial judge failed to
find that her psychological condition impaired her actions and found
her guilty of second-degree murder. He did, however, consider
Holden’s many problems, including postpartum depression, as miti-
gating factors at sentencing. 84 This decision was affirmed by the ap-
pellate court. 85

The foregoing cases represent the majority view of courts in the
United States not to accept the defense of postpartum depression as
sufficient to constitute an insanity defense. This rejection of the de-
fense, however, has been accomplished in various degrees. Many
cases in which the defense of postpartum depression arises are flatly
rejected because they do not present fact patterns clearly falling

77. Id. at 692, 365 S.E.2d at 627.
78. Id.
79. Id. at 693, 365 S.E.2d at 628.
80. Id. at 692, 365 S.E.2d at 627.
81. Id. at 692, 365 S.E.2d at 627.
82. Abused spouse syndrome is also known as the battered wife syndrome and is defined as “a pattern of severe physical and psychological abuse inflicted upon a woman by her mate.” Bascegli, A Cry For Help: An Analysis of Wife Abuse, 13 J. PSYCHIATRY & L. 165, 175 (1986) (comprehensive examination of wife abuse).
84. Id. at 694, 365 S.E.2d at 628-29. Although postpartum depression was seen as a
mitigating factor, this along with other mitigating factors was insufficient to outweigh the ag-
grivating factors found by the trial judge, and Holden was sentenced to life imprisonment to
be served as a committed youthful offender. Id.
85. Id. at 698, 365 S.E.2d at 631.
within the "legal" definition of insanity.

Other cases, however, have facts demonstrating unusual and clearly "abnormal" behavior, which is nonetheless insufficient to fall within a legally accepted category of defense. In these cases, some courts choose to take an alternate approach by allowing postpartum depression to be used as a mitigating factor at sentencing. This approach considers some of the concerns presented in sentencing a mentally disturbed woman to severe or prolonged imprisonment based in large part upon the lack of judicial recognition of her mental disorder, while still giving the judge the discretion to determine an appropriate and fair sentence. As such, this approach lies within the sole discretion of the trial judge and its utilization can be neither guaranteed nor consistent.

C. Acceptance of Defense

1. Not Guilty by Reason of Insanity

While some courts use postpartum depression only as a mitigating factor at sentencing, a few liberal courts have recently accepted postpartum depression as a legitimate defense to murder under the not guilty by reason of insanity verdict. For example, in Massachusetts Le Le Hung Ling, a twenty-three year old mother of two, was found not guilty by reason of insanity, in part, by using postpartum depression as a defense to killing her four month old daughter.8 Ling had no recollection whatsoever of having possession of, or giving birth to, a daughter; she only remembered her two year old son.

When questioned by police about the events that occurred the night her baby daughter was killed, Ling only mentioned checking her son’s crib and going out for some food.87 At no time, however, did Ling mention having a daughter. When Ling’s husband arrived home, he found his daughter sleeping next to his son, cold and stiff. The baby girl was covered with numerous bites and hematomata88 about her face, eyes, nose, and swollen head. He immediately took the baby to the emergency room, where the baby was pronounced dead on arrival and the police were summoned.

Immediately thereafter, Ling was sent to a maximum security

86. Rosengard, Infanticide of a Female Oriental Neonate, 8 Am. J. Forensic Psychiatry 21, 28-32 (1987). The name of the woman involved in this case was omitted in this report.
87. Id. at 22.
88. Hematomata is defined as "a tumor or swelling containing blood." Webster's Ninth Collegiate Dictionary 563 (1983).
facility where she exhibited complete amnesia for the events concerning the alleged murder of her baby, and "her denial [of the existence of her daughter and the events surrounding the baby's death] continued in the extreme."\(^8\) As time passed Ling "appeared to be increasingly lost in a fugue state, a twilight sleep, and, in a postpartum depression."\(^9\) Additionally, it was discovered that Ling was previously hospitalized for "workup and treatment of postpartum depression"\(^9\) following the birth of her first child.

Upon examination, Ling told psychiatrists a complicated story about having a sister who had a baby girl, who wanted to kill her baby. After sixteen months of treatment, however, psychiatrists determined that Ling did not have a sister, and it was actually Ling herself, using another personality, to portray the murderer.\(^9\) In light of these findings, Ling was found not guilty by reason of insanity and committed to indefinite hospitalization with periodic review.\(^8\)

Similarly, other states have found women suffering from postpartum depression to be not guilty of murdering their children by reason of insanity. The case of People v. Green\(^9\) is one such example. Ann Green, who worked as a pediatric nurse at New York Hospital, caring for over 1000 newborns since 1967, was charged with two counts of murder and one count of attempted murder. Green smothered her first newborn in 1980 and her second baby in 1982, but she was not suspected of any wrongdoing until she tried to kill her third child in 1985.\(^9\) All three incidents occurred within twenty-four hours of the infants being taken home from the hospital, each in good health, and each incident was originally attributed to other factors such as crib death.

Green claims that she did not intend to hurt any of her children and supports this contention with the fact that she voluntarily gave her youngest child to a relative shortly after she attempted to kill him in order to protect him from additional harm. Further, Green

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89. Rosengard, supra note 86, at 26.
90. Rosengard, supra note 86, at 30. "Fugue" is defined as "a pathological disturbance of consciousness during which the patient performs acts of which he appears to be conscious but of which on recovery he has no recollection." Webster's Third New International Dictionary 918 (1986).
92. Rosengard, supra note 86, at 31.
95. Id.
points to the fact that she underwent voluntary sterilization in 1986 to avoid any similar future episodes.  

At trial, Green told the New York Supreme Court that she did not recognize her hands as those holding the pillows over her infants' faces. The jury believed Green's testimony, and in September 1988, Ann Green was found not guilty, on all counts, by reason of insanity.

In addition to the aforementioned trial court decisions, two appellate courts were willing to hear arguments on using postpartum depression as a valid insanity defense to murder. In so doing, they reversed lower court decisions refusing to accept such evidence.

One case in which the appellate court took this approach was People v. Skeoch, the earliest reported case to deal with postpartum depression as a defense to murder in the United States. In 1951, Dorothy Skeoch was convicted of murder after a trial by jury and was sentenced to the penitentiary for a term of fourteen years. Her defense was insanity.

Skeoch told police a story of a man breaking into her apartment, stealing her watch, demanding money, and threatening to take her child if she did not comply with his demands. Skeoch claimed upon hearing these threats that she fainted and when she regained consciousness her wrist watch was removed and her baby was lying with a diaper tied around its neck and mouth. When the police questioned Skeoch and searched her apartment, they found her watch hidden in a suitcase, whereupon Skeoch admitted that she killed the child.

The testimony at trial described a behavioral change in Skeoch following the birth of her child. Prior to the child's birth, Skeoch led a healthy, "normal" life and was deemed an excellent student who "possessed a very good reputation as a truthful and law-abiding citizen." However, after going to the hospital for the birth of their child, Skeoch's husband testified that he observed a change in his wife; she talked very little, and she was withdrawn, depressed, and

98. 408 Ill. 276, 96 N.E.2d 473 (1951).
99. Id. at 277, 96 N.E.2d at 474.
100. Id. at 277-78, 96 N.E.2d at 474.
101. Id. at 278, 96 N.E.2d at 474.
her mind “seemed to be somewhere else.” Additionally, the court noted that although Skeoch had no prior history of psychiatric problems, she was feeling unusually depressed just prior to her child’s birth and declared, “Sometimes I feel like turning on the gas and forgetting everything.” A neurologist and a psychiatrist both testified that Skeoch was insane as a result of suffering from postpartum psychosis. Notwithstanding this testimony, the trial court found Skeoch sane and convicted her of murder.

The appellate court subsequently reversed and remanded the case for a new trial because it found that the presumption of Skeoch’s sanity was overcome by the evidence presented at trial. The appellate court held that, overall, the evidence was sufficient to raise a reasonable doubt of her sanity at the time of the incident, and the case was reversed for a new trial in accordance with this holding.

Another case in which the appellate court was willing to admit evidence displaying insanity by virtue of suffering from postpartum depression was People v. Lynch. Margaret Ann Lynch was found guilty at the trial court level of first degree murder of her infant daughter, after the child died of malnutrition. Lynch appealed this decision, raising the insanity defense.

Lynch gave birth to a baby girl who weighed seven pounds, two ounces, and one month later the baby was found dead, weighing four pounds, six ounces. Lynch was questioned by police, gave her statement, and was arraigned thereafter for first degree murder. The following day, Lynch was again questioned and a confession was elicited which revealed that she deliberately withheld food from the baby.

At trial, a doctor testified that Lynch was suffering from postpartum depression after the birth of her daughter and gave evidence regarding her deranged state of mind. Lynch did not raise the defense of insanity at trial, so this evidence was not allowed. The appellate court, however, held that this evidence was “material and relevant” to the case and should therefore be allowed. Hence, the

102. Id. at 279, 96 N.E.2d at 474-75.
103. Id. at 279, 96 N.E.2d at 474.
104. Id. at 280, 96 N.E.2d at 475.
105. Id. at 281, 96 N.E.2d at 475-76.
107. Id. at 9, 208 N.W.2d at 656.
108. Id. at 9-10, 208 N.W.2d at 656-57.
109. Id. at 10, 208 N.W.2d at 657. The court noted that this confession was elicited as a result of cunning police work.
110. Id. at 15, 22, 208 N.W.2d at 659, 663.
matter was reversed and a new trial was ordered, wherein the jury would be instructed on the lesser offense of manslaughter, utilizing the evidence obtained at Lynch's earlier trial.

The previous cases represent the propensity of a few liberal trial and appellate courts to accept postpartum depression as a valid insanity defense to murder. Although these courts represent the minority of courts in the United States, their's are also some of the more recent decisions dealing with this area of law. Further, the last two cases demonstrate the willingness of appellate courts to recognize postpartum depression as a sufficient defense to murder, given compelling testimony and evidence establishing this defense. Nevertheless, this remains a volatile area of law, without a clear trend or accepted position being taken by courts to deal with this issue.

2. California Cases

California courts have decided two of the most recent cases dealing with the issue of postpartum depression as a defense to murder [infanticide]. The first occurred in 1983, in the case of People v. Thompson, in which Angela Thompson plead guilty to drowning her nine month old son, Michael, in the bathtub. She defended her actions by claiming she suffered from postpartum psychosis.

Although Thompson had no psychiatric problems prior to childbirth, she experienced severe postpartum psychosis and had attempted suicide after the birth of her first child. After her second pregnancy, Thompson again experienced severe postpartum psychosis and became very delusional. Thompson thought her husband was Jesus Christ and her baby was the devil. In her warped sense of reality, Thompson thought that she could kill the devil if she drowned her baby. Further, Thompson believed that since her husband was Jesus Christ, he would raise the baby from the dead three days after its death. In so doing, Thompson believed the world would know that her husband was Jesus Christ. Based upon the foregoing facts, Thompson was found not guilty by reason of in-

111. California uses a bifurcated trial system whenever a defendant invokes the insanity defense. As such, the defendant is tried in two distinct stages. At the initial or guilt stage, a defendant is conclusively presumed sane and tried as any other criminal defendant. If the defendant is found not guilty during this stage, he or she is released. However, if the defendant is found guilty, he or she is immediately tried on the issue of sanity by the same or a new jury, at the discretion of the court. CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA CRIMINAL LAW: PROCEDURE AND PRACTICE 1152-53 (1986). See generally CAL. PENAL CODE § 25(c) (Deering 1985).
112. No. CR 13994 (Cal. Sup. Ct., Yolo County, 1983).
113. Donahue: Postpartum Depression, supra note 37 and accompanying text.
sanity and was required to serve 180 days in a mental institution. The second California case, *People v. Massip* represents the most recent decision in the United States at the trial court level using postpartum depression as a defense to murder. Sheryl Lynn Massip was twenty-four years old and happily married when unexpectedly, she tried to throw her six month old son, Michael, in the path of an oncoming car. Being unsuccessful, Massip hit the child on the head with a blunt instrument, drove the child about five miles from home, placed him in the middle of the road, and ran him over. Massip then took the boy's body and placed it in a neighbor's trash can.

Originally, Massip told police that the child was kidnapped by a woman with red hair and a gun, but she later confessed to her husband that she had killed Michael. Massip claimed that she heard voices telling her to "put [the child] out of his misery" because he was the devil. Massip's violent disposition towards Michael directly contravened her earlier desire to be a good mother, as shown in her previous attempts to seek medical help for Michael's frequent crying and her taking a class on infant care. Despite these contradictory actions, the jury refused to accept Massip's defense and Massip was found guilty of second degree murder of her infant son and faced sixteen years to life imprisonment. However, in an "unprecedented" decision at sentencing, the trial judge reduced Massip's second degree murder conviction to voluntary manslaughter and then "essentially negate[d] that conviction and ruled that Massip was not guilty by reason of insanity." Massip no longer faces imprisonment, but instead now faces the possibility of psychiatric commitment. The prosecution is appealing this decision as an abuse of the judge's discretion in overruling the jury's findings, and this area of law remains unsettled in California.

114. Donahue: Postpartum Depression, supra note 37, at 2.
115. No. C64940 (Cal. Super. Ct., Orange County, Dec. 23, 1988). The facts of this case are unreported, since it was only decided at the trial level. Hence, the author has relied upon the newspaper articles cited herein, to recite the facts of this case.
117. Id., at 3, col. 2. See also Trigoboff, supra note 5, at 1, col. 3.
118. Lichtblau, supra note 116, at 3, col. 3.
119. Lichtblau, supra note 116, at 3, col. 3.
120. Lichtblau, supra note 116, at 3, col. 3 and 35, col. 2.
122. Id.
123. Id.
C. Cases Currently Pending

There are currently two cases pending which involve a mother who is accused of killing her child and the mother claims insanity by virtue of suffering from postpartum depression. One of these cases dramatically exemplifies the overwhelming effect of severe postpartum depression on a woman after childbirth and is currently awaiting trial in New York.\(^{124}\)

This case involves LucreNZia Gentile, a forty-three year old woman with no history of psychiatric disorders, who desired to have a child despite having an infertility problem which prevented her from conceiving children naturally. As such, Gentile spent $20,000 to artificially conceive a baby boy\(^ {125}\) and eventually was characterized as a "good mother."\(^ {126}\) Nevertheless, two months later on April 29, 1988, Gentile unexplainedly drowned her son in a bathtub.\(^ {127}\)

Originally, Gentile had told police that the boy was kidnapped by two men who had asked her for directions while she was driving, but upon further police questioning Gentile broke down and admitted that she had killed her baby. The New York grand jury has charged Gentile with manslaughter in the first degree with the defense of mental impairment, and her trial is currently pending psychiatric examination by the state and is expected to begin in early 1990.\(^ {128}\)

The second case currently pending in which postpartum depression is being raised as a defense to murder, is in San Diego, California, and can be characterized as a tragedy that could have been prevented.\(^ {129}\) In September 1986, Lorenza Penguelly killed her five month old daughter, Sara, by throwing her into the San Diego Harbor. While at the harbor before the incident, Penguelly had pleaded with by-passers to take her child, but no one complied. As a result, the child was found floating in the harbor the next day.\(^ {130}\)

Although Penguelly had no history of mental illness, she had experienced mental problems prior to Sara’s birth and went to the

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\(^{124}\) Mansnerus, \textit{supra} note 3, at 6, col. 4.


\(^{126}\) Id.

\(^{127}\) Id.

\(^{128}\) Telephone interview with John DePaola, attorney for LucreNZia Gentile (Sept. 1, 1989).


\(^{130}\) Id.
San Diego social services department for help. Penguelly explained to social services how she previously tried to drown her first child, Carlos, and currently thought of hurting her unborn child. Penguelly was diagnosed as suffering from severe postpartum depression, hospitalized, and instructed not to return to her child until her condition had changed. Penguelly was released a few days later, despite a Department of Social Services report showing that there had not been any significant change in her condition.

Friends and relatives stated that there was a significant change in Penguelly, both physically and emotionally, during this time. Penguelly was withdrawn and unresponsive, despite previously being a happy, healthy person. Penguelly was arrested in October 1986. On October 5, 1988, Penguelly’s information was dismissed pursuant to Penal Code section 995 due to her alleged incompetence at her preliminary hearing. As such, Penguelly was released to a state psychiatric hospital for further evaluation to determine when she would be competent to stand trial. Her case is still pending, and no trial date has been set.

The outcome of these two cases, as well as any future cases, depends upon the courts’ willingness to accept postpartum depression as a valid defense to murder. Fortunately, the above cases in New York and California both have “precedent” dealing with this issue, albeit conflicting decisions at the trial level. Thus, these states have some background in dealing with this area of law. Unfortunately, this area of law remains unguided by legislation throughout the United States and judicially unsettled.

III. Problem

There are a number of legal obstacles facing women who claim insanity by virtue of suffering from postpartum depression in defense of killing their children. First, these women face a general lack of acceptance by the legal community of the defense of postpartum depression, coupled with the medical community’s conflicting “acceptance” of this disorder. Second, the crime of infanticide is not enumerated by any state legislature in the United States and, thus, falls

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131. Id.
132. Id.
133. Id.
135. People v. Penguelly, CR 85667 (San Diego Sup. Ct., pending).
136. Id.
within the general provisions of homicide.137 Women who commit infanticide are prosecuted under homicide statutes and must defend themselves against murder charges. Additionally, because postpartum depression may be these women’s only defense to their actions, the courts and legislatures are, in essence, leaving women suffering from postpartum depression without a defense.

California does not recognize puerperal psychosis as a mental impairment sufficient to meet its insanity defense despite the impairment’s ability to alter a woman’s sense of reality and her ability to distinguish right from wrong.138 As such, a woman suffering from puerperal psychosis meets the criteria established in the M’Naughten test of insanity,139 yet she is, nonetheless, subjected to the possibility of life in prison or even death for her uncontrollable acts. Without specific legislation dealing with the crime of infanticide and the mental state of a woman following childbirth, courts will decide these cases on an ad hoc basis, leading to conflicting decisions and a lack of guiding judicial precedent. Precise legislation is required to deal with the crime of infanticide and the mental state of a woman following childbirth.

IV. ANALYSIS

A. Automatic Insanity Presumption

The first step in revising and clarifying the crime of infanticide and the defense of postpartum depression is the rejection of an automatic presumption of insanity. The very character of mental disorders and insanity make such a classification difficult, as exemplified by the varying tests of insanity used today.140 Insanity is not a “concrete” term, but rather it may be defined in various ways and may be attributable to different causes.141 As such, an automatic measure would be insufficient to account for these differences.

As noted earlier, England’s Infanticide Act of 1938 attempts to resolve some of the difficulties in classifying mental disorders after childbirth by establishing an automatic reduction in criminal charges brought against a woman during the first twelve months following

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137. See supra note 25 and accompanying text.
138. See generally Lee, supra note 3, at 293; Mansnerus, supra note 3, at 6, col. 1.
139. See supra note 33 and accompanying text.
140. See supra note 33 and accompanying text.
141. One author suggests that due to the many different causes and treatments of mental disorders, “psychiatric laws are so inexact as to be incapable of explaining behavior with sufficient accuracy to be useful in a court of law.” Tyrell, Insanity: A Crazy Defense, 35 MED. TRIAL TECH. Q. 48, 64 (1988).
This approach was originally taken to improve the English legal system's disposition of infanticide cases, which prior to 1922 was unguided and variable. In establishing a "guideline" enabling courts to attain similar holdings, judicial consistency and precedent could be established. The Infanticide Act's effect, however, has been more detrimental to the English legal system than beneficial, due to its faulty construction.

The most basic problem with England's Infanticide Act is that it does not measure a woman's sanity nor does it measure her guilt. Rather, the Act merely establishes a time frame within which an accused murderer's guilt will be mitigated. No physical or mental examination is required; instead a deranged mental state of the woman is assumed. Further, any "deterrent" effect the Act may have been created for is dispelled by the fact that more than sixty women have been convicted of killing their babies under this Act during the past decade, yet none have gone to prison. The Act satisfies its purpose of creating consistent judicial disposition of these cases, but neglects examining both legal and medical aspects of the asserted insanity defense.

Similarly, a prosecutor's refusal to bring any charges against an infanticidal woman suffering from postpartum depression attains the same results as that of the Infanticide Act; the woman is not imprisoned for her criminal actions. Neither of these approaches examines the woman's mental state or satisfies the goals of either the criminal justice system—to punish those who intended their unlawful acts—or the mental health community—to provide therapeutic rehabilitation. Instead, a blanket assumption is made prior to trial, without any medical examinations or testimony, which assumes that the woman suffered from a mental deficiency causing her to kill her child. Hence, the act of a mother killing her child within twelve months.

142. See supra notes 22-23 and accompanying text.

143. There are many criticisms of the Infanticide Act's construction. For example, one author states:

As the [the Infanticide Act's] wording makes clear, it is to the process of giving birth, the effect on the mother's body . . . that the statute refers. The idea behind this is that physical processes, whether they are called chemistry or hysteria, can influence behavior in such a way as to reduce criminal responsibility. There is no apparent consistency to this theory; for if a woman who has given birth within twelve months kills adults or other children, the Infanticide Act does not apply. This suggests statutory acknowledgement that social role change may produce psychosis. But other members of the household, such as fathers, who may also be affected by role change, cannot rely on the Act.

O'Donovan, supra note 18, at 262.

144. Trigoboff, supra note 5, at 24.
months after its birth is used as an automatic measure of insanity, while in the cases where no charges are brought, these women avoid the criminal justice system altogether.

Adopting an automatic test would literally allow women to get away with murder. For example, a sane, healthy woman could kill her child anytime within its first year of life out of hatred or because she had second thoughts about parenthood, and she would not be subject to prosecution for murder.

Conversely, an automatic measure would be beneficial to establishing valid defenses. This approach would allow a mandatory presumption on the issue of sanity, assuming all woman to be insane following childbirth. Although such a presumption enables a woman suffering from puerperal psychosis to easily establish her defense, it also unnecessarily allows a woman not suffering from this mental impairment to make an easy case for such a defense. Thus, this approach would create a virtual fraud in the legal system.

If an automatic approach were applied to the hypothetical case presented in the introduction, the woman would automatically be deemed “insane” and would not be charged with murder; she would only face charges for the lesser crime of involuntary manslaughter. The woman would not need medical testimony to convince the court of her deranged state of mind, but would instead have an easy, automatic defense. In this case, the presumption of insanity would be correct.

However, making a correct presumption of insanity would not always happen. Unfortunately, this defense could easily be misused by women who intentionally kill their children. Hence, an automatic approach would not meet the purpose behind enacting such legislation: to recognize a legal, valid defense of postpartum depression.

In sum, an automatic measure of insanity is inappropriate to meet the purposes of claiming the defense of postpartum depression. Instead, specific guidelines establishing what conduct falls within this disorder are needed to enable a court to evaluate a mother’s actions during a puerperal state with accuracy.

B. Complete Rejection of Defense

While an automatic measure of insanity would allow too many false defenses to be used, a complete rejection of this defense would prevent any genuine defenses from ever being made. Nonetheless, as noted earlier, this is the approach taken by the majority of courts in the United States today.

In cases such as Commonwealth v. Comitz, where a docu-
mented medical history for severe postpartum depression was found, a woman was sentenced to imprisonment for eight to twenty years. The jury completely refused to accept postpartum depression as a valid defense to murder and, thus, a mentally disturbed woman was imprisoned for acts which she did not intend to commit. This directly contradicts the purpose of our criminal justice system to punish those who knowingly commit unlawful acts so that they do not do them again. Such a deterrence rationale is not satisfied by imprisoning women who lack the ability to distinguish right from wrong.

On the other hand, many argue that the repeating factor of mothers claiming that their child had been kidnapped when, in reality, they themselves had killed or attempted to kill the child shows that these women could differentiate between right and wrong. Further, some prosecutors argue that these actions show premeditation for the crime and cite evidence to support their contention.

This evidence is rebutted by experts who claim that such explanations by the mother are a common feature of this syndrome and have no bearing on a woman's conscious ability to distinguish reality. The woman's claim that the child was kidnapped is done at a time when a woman is in a "dissociated state" in which her thoughts are separated from her feelings, and details are forgotten. Hence, the kidnapping story becomes a rationalization of the events which she had no control over and may not remember. The Green case exemplifies how a woman suffering from this mental impairment can "forget" the details of her child's death.

In the hypothetical case presented in the introduction, the woman did not believe that killing her child was wrong. In fact, this

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146. Many argue that a jury cannot adequately distance themselves from the facts of a case in which a mother has killed her child. Berg, supra note 97, at 5. Often, a jury will have a natural sympathy for the helpless infant victim, which can overwhelm their ability to remain impartial. As a result, experts say that a jury must be "bowled over by evidence that the mother didn't know what she was doing" in order to find her insane. This creates a higher burden of proof on a mentally disturbed woman, and is fundamentally unfair. Berg, supra note 97, at 5.
147. See supra note 32 and accompanying text.
148. Moss, supra note 125, at 22, col. 2.
149. Moss, supra note 125, at 22.
150. Moss, supra note 125, at 22.
151. People v. Green, No. 1273/86 (N.Y. Sup. Ct. Sept. 30, 1988). In the Green case, Green claimed that she did not recognize her hands as those holding the pillows over her child's face, and thus could not be responsible for her child's death. Zeldis, supra note 95, at 2, col. 3.
woman believed that her actions were not only right but required in order to save her child. Clearly, absent her suffering from postpartum depression, this woman would never take or even consider such actions.

Nevertheless, in applying the approach of complete rejection of this defense, this woman would be committed to imprisonment for actions which she did not intend. The “deterrence” rationale of the criminal justice system would not be served and instead a “moral tenet” of this system would be violated by punishing those who did not intend their actions.

C. California’s Approach

Although California has dealt with this issue twice, there is no true precedent in this area of law. The first case, People v. Thompson, a 1983 trial court decision, accepted postpartum depression as a legitimate defense to murder, similar to insanity, and would therefore seem to be the “precedent” in this area of law. However, in 1984, California changed its substantive rule measuring insanity, although the procedural aspects have remained the same. While there is a case directly on point in California, the law in this area was subsequently overruled, and this case is no longer applicable.

The second case, People v. Massip, the most recent case to deal with this issue in the United States, also fails to clarify this area of law. This 1988 trial court decision, admittedly deemed “unprecedented,” accepts postpartum depression as a complete defense to murder. The sentencing judge recognized the need for his finding despite the lack of precedent by saying: “I know people will say I’ve overstepped my bounds. But the more I thought about it, the more I realized I didn’t have any choice but to find her insane . . . She [Massip] was bonkers.”

Both of these decisions are trial court decisions, and are traditionally not given any weight as guiding precedent. Additionally, even if they may be treated as precedent, this precedent is subject to

152. ABA and APA Proposals, supra note 31, at 137.
153. No. CR 13994 (Cal. Super. Ct., Yolo County, 1983) (this was the only case on point prior to the 1984 change in California’s insanity test).
156. Lichtblau, supra note 121, at 18, col 4.
158. Lichtblau, supra note 121, at 18, col 5.
change in the near future. The Massip decision may be reversed upon appeal because it lacks judicial precedent, legislative guidance, and may be deemed an abuse of judicial discretion. Further, these cases, like all of the cases dealing with postpartum depression in the United States, are ad hoc decisions and may be overruled easily by persuasive prosecutorial arguments.

Given the need to allow genuine claims to be established which show a woman's inability to distinguish between right and wrong, California should not completely reject postpartum depression as a defense to infanticide. Women suffering from this disorder have a mental impairment which alters their sense of reality so that they cannot distinguish between right and wrong. Hence, they fall within the M'Naughten test for insanity.

Likewise, California should not completely accept postpartum depression as an automatic measure of insanity, due to the ease with which false claims may be asserted. Instead, California should adopt legislation which takes a compromise approach between the two extremes of completely accepting or completely rejecting the defense. California should recognize postpartum depression as a valid defense to infanticide while, at the same time, establishing safeguards to ensure that the defense is not abused.

V. PROPOSAL

In order to ensure that a mentally disabled woman is not held criminally responsible for her uncontrollable actions, California must enact legislation dealing with infanticide and the mental state of a woman following childbirth. California Penal Code sections 25 and 187 should be amended to read as follows:

California Penal Code section 25.5: [Postpartum Psychosis Defined]

(a) The defense of insanity by virtue of suffering from postpartum psychosis may be used in any criminal prosecution for Infanticide as defined by Penal Code Section 187.5.

(b) Postpartum psychosis is defined as a mental impairment sufficient to cause a woman to lose her ability to distinguish between right and wrong, which occurs in a woman after giving birth.

(c) In any criminal prosecution for Infanticide, this defense shall be found by the trier of fact after a subjective determination is made, based upon medical examinations and testimony

159. Lichtblau, supra note 121, at 18.
relating to the accused's state of mind, as to the existence of postpartum psychosis, defined in (b). Relevant criteria in such a determination include, but are not limited to: prior postpartum psychiatric disorders, behavioral changes, auditory hallucinations, drastic mood swings, depression, frequent crying, time of onset of symptoms, time period between childbirth and infanticidal act, and recovery.

(d) Should the trier of fact find that the accused suffered from postpartum psychosis using the criteria of (c), the accused will be charged with involuntary manslaughter. Further, the trial judge shall have the discretion to use postpartum psychosis as a mitigating factor in sentencing the defendant to either probation or hospitalization with periodic review.

California Penal Code section 187.5: [Infanticide defined]

(a) Infanticide is the unlawful killing of a human being less than one year old.

(b) Every person guilty of infanticide shall be charged with murder, in accordance with Penal Code Section 189 and punished in accordance with Penal Code Section 190.

(c) This section shall not apply to any person who commits an act or omission which results in the death of an infant if the act or omission was committed by the biological mother of the infant while she was suffering from postpartum psychosis as defined in Penal Code Section 25.5.

This legislation solves the problems discussed previously in this comment. First, it defines infanticide as a distinct crime, apart from the general provisions on homicide. This is necessary because to deny recognition of infanticide as a separate and distinct crime is to invite juries to decide these cases on an ad hoc basis, with a strong bias toward conviction for murder. For example, in Massip a jury convicted a woman of second degree murder, for which she faced sixteen years to life imprisonment, despite being presented with overwhelming evidence that Massip was "bonkers." Further, public sympathy for these helpless infants often makes disposition of these cases inconsistent without legislative guidance. This dispositional inconsistency is demonstrated in Comitz and Skeoch, where inconsistent verdicts were found despite similar fact patterns.

160. See supra note 146 and accompanying text.
161. Lichtblau, supra note 121, at 18, col. 5.
Second, this legislation establishes guidelines on how legally to determine the existence of postpartum depression in cases of infanticide. A uniform guide is needed due to the conflict present in the medical community over the existence and genuineness of postpartum psychiatric disorders. Relevante criteria may include prior psychiatric problems, unexplained mood swings, hallucinations, time of onset, recovery, if noted, and the time interval between the birth of the child and the alleged murder. This evidence should be presented through medical testimony at trial after a complete psychiatric examination and evaluation. Further, the ultimate determination on the issue of sanity should be made by the jury, whose basic function is to weigh and make a decision based upon the facts presented at trial.

Third, once a woman is shown to have suffered from postpartum depression through sufficient medical examination and testimony, the crime charged should be reduced from murder to involuntary manslaughter. Should a woman be unsuccessful in establishing a postpartum depression defense after killing her child, she would still be charged with murder. In this case, her trial would be the same as any other homicide case.

Lastly, the trial judge is given the discretion to use this disorder as a mitigating factor at sentencing, with usual sentencing being either probation or hospitalization. This approach is justified and reasonable given the excellent recovery rate which women suffering from postpartum depression display which dispels any threat these women might pose to society after the incident. Likewise, the threat these women might pose to their future children is dispelled through effective utilization of medical treatment to avoid the harmful effects of postpartum depression.

164. See supra notes 26-30 and accompanying text.

165. ABA and APA Proposals, supra note 31, at 147. As the authors put it: Juries must routinely use common sense and experience to make legal and moral judgments in light of uncertain knowledge... a verdict on insanity is not just a judgment about the medical facts, but whether those and other facts lead jurors to believe that a person should not be held responsible for his actions. It is not the psychiatrists' province to tell us who is blameworthy and who is not—that is society's judgment, expressed through a jury which hears evidence and arrives at its verdict.

ABA and APA Proposals, supra note 31, at 147 (citing letter by Leonard S. Rubenstein, attorney for the Mental Health Law Project).

166. J. HAMILTON, supra note 4, at 120 (postpartum depressive disorders, although varying in duration, are usually self-limiting).

167. Successful treatment of severe postpartum depression is currently being accomplished by doctors in England. Angela Thompson is an example of how a woman can have a normal pregnancy and maintain a healthy relationship with her child, despite a prior incident of severe postpartum depression which caused her to kill her younger child, if given the appro
The discretion exemplified by the sentencing judge in the Massip case goes beyond the discretion suggested in this comment. In that case, the judge used his discretion not only to reduce the charge brought against Massip, but also to overturn a jury's finding of sanity. Lacking any legal precedent to do so, the judge deemed his decision "extraordinary relief" and commented, "this is new ground that we've plowed today . . . I don't know of another court that came to the decision like the one I did."

The discretion suggested herein does not allow a judge to overturn a jury's findings of fact, but instead urges the judge to use his discretion to uphold the jury's overall findings of fact, using postpartum depression as a mitigating factor at sentencing, once the jury determines guilt. Although the judge in Massip attained the same end as that suggested herein, the means used to attain that end overstepped the bounds of a trial judge. As such, this decision is subject to being easily overruled for lack of guiding precedent.

Applying this proposed approach to the hypothetical case in the introduction, the woman would undergo a medical examination and if, after testimony at trial, a jury determined that she suffered from postpartum depression, she would be charged with involuntary manslaughter. On the other hand, should the medical testimony reveal that she did not suffer from postpartum psychosis, she would be charged with murder. Given the facts presented in this hypothetical case, the woman would be charged with involuntary manslaughter.

Once the crime to be charged is determined, a jury would decide upon a verdict as in all other homicide cases. However, if a woman was found guilty of involuntary manslaughter because she suffered from postpartum depression, then the judge would have discretion to determine the woman's sentence using postpartum depression as a mitigating factor. Ideally, this woman would be hospitalized or put on probation, and would not be required to serve a prison term. Absent this finding, however, the woman would be treated as in any

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168. Lichtblau, supra note 121, at 18, col. 1.
169. Lichtblau, supra note 121, at 18, cols. 1-2. The trial judge in this case, the honorable Robert R. Fitzgerald, has come under tremendous public scrutiny for his disposition of the Massip case. He received over sixty letters, some of which "sharply attacked his position and called for his ouster." Lichtblau, Psychiatric Exam Ordered for Mother Who Killed Her Baby, L.A. Daily J., Feb. 4, 1989, at 31, col. 4.
170. The civil implications of this approach are not discussed in this comment. To see how some courts have dealt with the civil issues surrounding postpartum psychosis, see supra notes 41, 45 and accompanying text.
other homicide case.

This approach satisfies the goals of both the criminal law system and the mental health community. Mothers whose intentional acts harm their child are punished with imprisonment, while women suffering from postpartum depression are hospitalized for their uncontrollable acts.

VI. CONCLUSION

Postpartum depression is a mental disorder which has inconsistent acceptance in both the medical and legal communities. Consequently, the defense of postpartum depression to murder is not accepted by the majority of courts in the United States. There is no uniformity in this area of law. While the majority of courts dealing with this defense reject it, a growing number of courts recognize postpartum depression as a valid defense to infanticide. These decisions are unguided by legislation specifically dealing with this area of law and thus are decided on an ad hoc basis.

In order to ensure uniformity in this area of law, legislation is needed to enumerate both the crime of infanticide and the mental state of a woman following childbirth. In order to meet the purpose behind the insanity defense itself, this legislation should neither completely reject nor completely accept postpartum depression as a valid defense to murder. By taking a middle approach, courts will be able to use their discretion to evaluate a case while at the same time having an automatic charge reduction once this disorder is proven. In this way, the criminal justice system and the mental health community can best serve their purposes of justice and fairness.

Debora K. Dimino

171. There has been a great deal of disagreement between the two professions [legal system and mental health science] on the general philosophic question whether psychiatry and the law are antithetical as to purpose and function. For some, the most basic purpose of the law is the formulation and imposition of moral values; mental health science, on the other hand, seeks only to arrive at verifiable, value-neutral diagnostic and therapeutic conclusions. Some view the purpose of the mental health practitioner strictly in therapeutic terms; while the legal system (i.e., the criminal justice system) is viewed as punitive and essentially unconcerned with therapeutic rehabilitation.

Note, supra note 31, at 460.