Postpartum Psychosis and the Insanity Defense

John Dent
John.Dent@chicagounbound.edu

Follow this and additional works at: http://chicagounbound.uchicago.edu/uclf

Recommended Citation

This Comment is brought to you for free and open access by Chicago Unbound. It has been accepted for inclusion in University of Chicago Legal Forum by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
Postpartum Psychosis and the Insanity Defense

John Dent†

In April of 1987, Sheryl Lynn Massip killed her six-week old son by striking him over the head with a blunt instrument and then driving a car over him. At her trial eighteen months later, she argued that her actions resulted from postpartum psychosis, a severe mental disorder afflicting some mothers in the months following childbirth. A California jury rejected her insanity plea and convicted her of second-degree murder. The trial judge, however, set aside the jury verdict, reduced the charge to voluntary manslaughter, and then found her not guilty by reason of insanity.

While the defense of temporary insanity is generally available in criminal prosecutions, its usefulness to the class of defendants consisting of women who have killed their babies within months of birth is questionable. This is due in part to the rigorous standard of proof imposed by some jurisdictions on defendants claiming temporary insanity. Certain jurisdictions require that, in order to prevail in the defense, the defendant must prove by a preponderance of the evidence that she did not know the nature of her actions when she caused the death at issue. But for the small class of homicide defendants with whom this comment is concerned, even proving the influence over the defendant of a recognized psychological disorder with known symptoms and a relatively particularized period of occurrence may not suffice to meet this burden. Ironically, the evidence presented in support of the insanity claims of these defendants consists of results from psychological analyses—exams that might often prevent the very crimes for which these defendants are charged.

† B.A. 1984, University of California, Los Angeles; J.D. Candidate 1990, University of Chicago.
1 Eric Lichtblau, Baby-Death Conviction Thrown Out; Judge Rules Massip Was Insane When She Ran Over Son, LA Times 1 (Dec 24, 1988).
3 Lichtblau, LA Times at 1 (cited in note 1).
4 See generally Wayne R. LeFave and Austin W. Scott, Jr., Criminal Law, § 4.1 at 304-410 (West, 2d ed 1986).
This comment uses California as a model jurisdiction to examine the particular problems facing postpartum psychosis victims who try to build an insanity defense upon evidence of the disease. California has rejected modern insanity tests in favor of a more restrictive traditional test incorporating an exacting standard of proof. The law in California typifies the national skepticism toward the insanity defense, a skepticism that has increased dramatically in the last decade.

Part I of this comment will examine the contours of the insanity defense in California and describe the frequency and symptoms of postpartum psychosis. Part II will summarize the successes and failures of the insanity defense when claimed by women allegedly suffering from the psychosis. In response to the unique problems of proof encountered by these women, Part III proposes reducing the burden of proof imposed on such defendants.

I. INTRODUCTION TO THE INSANITY DEFENSE AND POSTPARTUM PSYCHOSIS

A. The Insanity Defense: A Historical Overview

At common law, the “M'Naghten test” has governed the insanity defense for over a century. Under this test, a showing of insanity has two components. First, the defendant must prove that she was unable to appreciate the nature of her act or to differentiate between right and wrong at the time of the act. This is the “cognitive” prong of the M'Naghten standard. Second, she must show that this inability was the result of a “mental disease or defect.” This component of the test is left largely to the intuition of the jury; moreover, because jury instructions typically do not define or explain what constitutes a “mental disease,” it seems that “any mental abnormality, be it psychosis, neurosis, organic brain disorder, or congenital intellectual deficiency (low IQ or feeblemindedness), will suffice if it has caused the consequences described in the second part of the test.”

---

6 Id at 304.
6 The court in M'Naghten stated that a criminal defendant can be excused of criminal responsibility for his actions if:
   at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.”
Daniel M'Naghten's Case, House of Lords, 10 Cl & F 200, 210, 8 Eng Rep 718 (1843).
7 LaFave and Scott, Criminal Law, § 4.2(b)(1) at 312-13 (cited in note 4).
One hundred and twenty years after the introduction of the *M’Naghten* test, the American Law Institute ("ALI") rejected the common law standard in its Model Penal Code. The drafters made two major changes intended to broaden the scope of the insanity defense beyond that of *M’Naghten*. Rather than requiring an absolute inability to determine right from wrong, the Model Penal Code requires only that the defendant lack "substantial capacity to appreciate the criminality of his conduct." The Code additionally provides an alternative "volitional" test to the *M’Naghten* "cognitive" prong for "cases in which mental disease or defect destroys or overrides the defendant’s power of self-control." Under the volitional prong, a defendant can claim insanity if the mental disease or defect rendered her unable to conform her conduct to the requirements of the law, *even* if she could substantially appreciate the criminality of her conduct.

The Model Penal Code’s formulation of an insanity test was tremendously influential and widely adopted either by statute or by judicial decision. The popularity of the Code’s more lenient standard, however, was short-lived. The movement away from it began in 1981, following John Hinckley’s attempt to assassinate...
President Reagan. Hinckley was acquitted by a verdict of not guilty by reason of insanity ("NGRI"),\(^3\) prompting calls to reform or abolish the insanity defense.\(^4\) Many of the courts and legislatures that previously had adopted the ALI test modified or abandoned it. Congress expressly re instituted the M'Naghten standard in cases involving federal offenses.\(^5\) Some jurisdictions kept the

---

\(^3\) United States v Hinckley, Crim. No. 81-306 (D DC 1982). The decision is unreported. For a summary of the facts and issues, see United States v Hinckley, 525 F Supp 1342 (D DC 1981), and 672 F2d 115 (DC Cir 1982), affirming the trial court decision; both decisions concern pretrial motions.

\(^4\) For a summary of some of the legislative, judicial, and academic reactions to the insanity defense after the Hinckley trial, see David Wexler, Redefining the Insanity Problem, 53 Geo Wash L Rev 528 (1985).

See also United States v Torniero, 570 F Supp 721, 722-23 (D Conn 1983), in which the government argued that the insanity defense serves no legitimate purpose of the criminal justice system, and that the practical consequences of the defense include the unsupervised release of some dangerous individuals from any form of governmental control or restraint; the sapping of public confidence in the nation's courts; the presentation of expert testimony in a setting that robs psychiatrists and other specialists of their credibility and undermines the value of their professional judgments; and the proliferation of endless new varieties of mental illness, asserted as defenses in ever more unlikely cases. Although the court found the government's concerns genuine, it held that the relief sought was "sweeping and unprecedented" and could not be granted.

Some commentators suggest abolishing the insanity defense but continuing to allow evidence of abnormal mental condition for the sole purpose of negating criminal intent. See, for example, Norval Morris, Madness and the Criminal Law (University of Chicago Press, 1982).

\(^5\) 18 USC § 17 (1984) provides:

§ 17. Insanity defense
(a) Affirmative defense.—It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

(b) Burden of proof.—The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

Section 17 was passed in 1984 as Public Law 98-473. To support the elimination of the volitional prong, the legislative history cites approvingly the testimony of Richard J. Bonnie, Professor of Law at the University of Virginia:

[T]here is no scientific basis for measuring a person's capacity for self-control or for calibrating the impairment of such capacity . . . . Whatever the precise terms of the volitional test, the question is unanswerable—or can be answered only by "moral guesses." To ask it at all, in my opinion, invites fabricated claims, undermines equal administration of the penal law, and compromises its deterrent effect.

The Insanity Defense, Hearings before the Committee on the Judiciary, United States Senate, 97th Cong, 2d Sess (1982), cited in 1983 USCCAN 3182, 3408-09.

The statute has two notable features. First, the mental disease or defect must be "severe." "[N]onpsychotic behavior disorders or neuroses such as an 'inadequate personality,' 'immature personality,' or a pattern of 'antisocial tendencies' do not constitute the defense." 1983 USCCAN at 3411. Second, the defendant must prove insanity by "clear and convincing evidence," a standard beyond even that requiring a preponderance of the evidence. The Committee stated that "a more rigorous requirement than proof by a preponderance of the
"substantial capacity" test, but eliminated the volitional prong. Others incorporated the oft-criticized "guilty but mentally ill" verdict. And Montana, Idaho, and Utah abolished the insanity defense altogether.

California also embraced, then rejected the ALI standard. Before 1979, California followed the common law M'Naghten test. The California Supreme Court had developed, as an overlay
to the *M'Naghten* standard, the doctrine of diminished capacity. Unlike insanity, diminished capacity is not a complete defense; rather, it reduces the grade of a homicide charge from murder to manslaughter on the theory that the defendant lacked the ability to form the requisite intent to murder.\(^2\) In 1979, the California Supreme Court adopted the Model Penal Code's insanity test.\(^2\) But three years later, reacting to the Hinckley acquittal and the controversial diminished capacity defense of Dan White,\(^2\) Californians passed a voter initiative that reinstituted the *M'Naghten* standard and specifically abolished the doctrine of diminished capacity.\(^2\) California thus requires today that to claim insanity a de-

\(^*\) See *People v Wells*, 33 Cal 2d 330, 202 P2d 53 (1949); *People v Gorshen*, 51 Cal 2d 716, 336 P2d 492 (1959); and *People v Conley*, 64 Cal 2d 310, 411 P2d 911, 914, 49 Cal Rptr 815 (1966) ("[i]t has long been settled that evidence of diminished mental capacity . . . can be used to show that a defendant did not have a specific mental state essential to an offense").

\(^1\) The court adopted the ALI test without waiting for legislative action because of the ALI test's "manifest superiority":

> [T]he continuing inadequacy of *M'Naghten* as a test of criminal responsibility cannot be cured by further attempts to interpret language dating from a different era of psychological thought . . . . It is time to recast *M'Naghten* in modern language, taking account of advances in psychological knowledge and changes in legal thought.


\(^2\) White successfully reduced his murder charge to manslaughter by claiming that high levels of sugar in his bloodstream—the result of eating too much junk food—had rendered him incapable of forming an intent to murder. *People v White*, Cr 19961 (Super Ct, San Fran) (unreported decision), aff'd on procedural grounds, 117 Cal App 3d 270, 172 Cal Rptr 613 (1981). For a summary of the case and the resulting public outcry, see Comment, *The Diminished Capacity Defense in California; An Idea Whose Time Has Gone?*, 3 Glendale L Rev 311 (1979).

\(^*\) California Penal Code § 25 provides:

> § 25. Diminished capacity, insanity; evidence; amendment of [this] section

(a) The defense of diminished capacity is hereby abolished. In a criminal action, as well as any juvenile court proceeding, evidence concerning an accused person's intoxication, trauma, mental illness, disease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged.

(b) In any criminal proceeding, including any juvenile court proceeding, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense.

(c) Notwithstanding the foregoing, evidence of diminished capacity or of a mental disorder may be considered by the court only at the time of sentencing or other disposition or commitment.

(d) The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-
fendant must show that she is unable either to distinguish right from wrong or to understand the nature of her act.

B. Postpartum Psychosis

Postpartum psychosis is one end of a spectrum of behaviors generically described as “postpartum depression” ("PPD"). This spectrum can be divided into three classes of behaviors. The most common of these is the so-called “baby blues,” a mild depression and anxiety experienced by roughly half of all new mothers in the first week after childbirth. A less common, intermediate reaction, called chronic depressive syndrome, is characterized by more acute and long-lasting depression. It strikes approximately 3% to 20% of mothers and can last over a year. The rarest and most extreme

thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.


Unlike both the traditional M'Naghten formulation and the Model Penal Code approach, the California insanity test does not require a “mental disease or defect.” This is consistent with the formulation that had been used by California courts before Drew, 583 P2d 1318. According to its literal reading, the statute requires that the defendant be unable both to distinguish right from wrong and to understand the nature of her act. The traditional M'Naghten formulation requires only one or the other. In People v Skinner, 39 Cal 3d 765, 704 P2d 752, 217 Cal Rptr 685 (1985), however, the California Supreme Court read the “and” as an “or,” ruling that the California voters had intended only to reinstitute the M'Naghten test rather than to change M'Naghten itself:

Had it been the intent of the drafters of Proposition 8 or of the electorate which adopted it both to abrogate the more expansive ALI-Drew test and to abandon that prior fundamental principle of culpability for crime, we would anticipate that this intent would be expressed in some more obvious manner than the substitution of a single conjunctive in a lengthy initiative proposition.

Id at 776. The court also noted that any other reading might raise constitutional problems. Id.

Kruckman and Asmann-Finch, Postpartum Depression at xiii (cited in note 2). Kruckman and Asmann-Finch compiled a list of over 650 medical journal articles and books on postpartum depression, finding that “[m]ost research and treatment of postpartum depression has focused on the more serious psychotic reactions.” Id at xxviii. This voluminous literature “shows the overwhelming emphasis on biological explanations based on the global hormonal changes occurring postpartum.” Id.

Some studies suggest the incidence of “baby blues” in new mothers may be as high as 80%. Id at xxxi. Symptoms include frequent and prolonged crying, irritability, poor sleep, mood changes, and a sense of vulnerability that may continue for several weeks. Id at xv.

Symptoms include despondency, tearfulness, feelings of inadequacy, guilt, anxiety, irritability, and fatigue. Id.

The frequency of this intermediate form of postpartum depression is particularly uncertain because it has been studied only recently. Id at xv. The literature often uses the general term "postpartum depression" to describe this particular class. See, for example, Michael Garvey and Gary Tollefson, Postpartum Depression, 29 J Reproductive Medicine 113 (1984).
form of the syndrome is postpartum psychosis, which strikes roughly one in a thousand mothers. Psychosis usually appears within the first three months, and most often within the first two weeks after birth. The symptoms are similar to those of any psychotic reaction: confusion, fatigue, agitation, alterations in mood, feelings of hopelessness and shame, delusions or auditory hallucinations, hyperactivity, and rapid speech or mania.

Both chronic depressive syndrome and postpartum psychosis are observable and treatable. One medical journal recommends that "a brief review of the most common symptoms of depression, . . . should be undertaken as part of a routine postpartum visit." Following diagnosis, such symptoms can be treated with common antidepressants or, if more serious symptoms appear, with electroconvulsive treatment or major tranquilizers.

II. LEGAL RECOGNITION OF POSTPARTUM PSYCHOSIS

California appellate courts have yet to address postpartum psychosis. Although courts in other jurisdictions have admitted evidence of postpartum psychosis for over 38 years, they have done so without addressing the validity of the medical condition itself. Rather, courts, when confronted with the issue, generally have accepted the theoretical validity of the defense and admitted evidence of the psychosis.

---

29 Kruckman and Asmann-Finch, Postpartum Depression at xv (cited in note 2).
30 Id at xiv.
31 Garvey and Tollefson, 29 J Reproductive Medicine at 113 (cited in note 28).
32 Id.
33 Id.
34 Id at 114-15.
35 See, for example, People v Skeoch, 408 Ill 276, 96 NE2d 473, (1951) (holding that evidence of postpartum psychosis was sufficient to raise a reasonable doubt as to the defendant's sanity).
36 See, for example, State v White, 93 Idaho 153, 456 P2d 797, (1969); Clark v Nevada, 588 P2d 1027, 95 Nev 24 (1979); Commonwealth v Comitz, 530 A2d 473, 365 Pa Super 599 (1987); State v Holden, 365 SE2d 626, 321 NC 689 (1988). In each of these cases, evidence of postpartum psychosis was admitted in support of an insanity defense. Not one of these courts, however, questioned the admissibility of the evidence or the validity of the condition itself.
37 Under the traditional M'Naghten test, a defendant must establish that her inability to appreciate the difference between right and wrong resulted from a "mental disease or defect." Generally, evidence of a syndrome can be admitted if the syndrome is "sufficiently established to have gained general acceptance in the particular field in which it belongs." Frye v United States, 293 F 1013, 1014 (DC App 1923). But see State v Kelly, 478 A2d 364, 381 n 19, 97 NJ 178 (1984) (declining to take judicial notice of battered spouse syndrome).
38 The general acceptance requirement of Frye has yet to pose a problem in the postpartum psychosis context. California's statutory M'Naghten formulation does not include the
Under the *M'Naghten* and the ALI formulations, postpartum psychosis in theory should absolve a defendant of criminal responsibility. Postpartum psychosis satisfies *M'Naghten's* cognitive prong in that it can deprive a defendant of her ability to distinguish right from wrong at the time of her act. One expert testifying in *State v White*, an Idaho case, reached this conclusion.\(^3\) Postpartum psychosis also satisfies the volitional prong of the ALI formulation, as it can deny a defendant the ability to conform her activities to the requirements of the law. Both experts testifying in *White* asserted this to be the case.\(^3\) If these conclusions are correct, and assuming that experts at a given trial concur, postpartum psychosis victims should fare equally well under either the *M'Naghten* or the ALI standard.\(^4\)

Regardless of the test used, however, several practical problems can prevent postpartum psychosis from providing a foundation for a successful insanity defense in the full range of cases where it is invoked. For example, juries may fear that they are "letting the defendant off" by finding her not guilty by reason of insanity.\(^4\) Most insanity acquittees are hospitalized after acquittal; postpartum psychosis acquittees, in contrast, theoretically require no treatment, since the syndrome will have disappeared in the years between the killing and the trial.\(^4\) Accordingly, a defendant acquitted as NGRI because of postpartum psychosis would go free having received neither punishment nor treatment, exacerbating a jury’s fear that it is letting the defendant go "scot free."

In addition, postpartum psychosis presents more serious problems of proof at trial than do other insanity defenses. Defendants claiming forms of temporary insanity such as postpartum psy-

---

\(^{30}\) Id.

\(^{39}\) Experts, however, will not always agree, as illustrated in *White*, where one expert found both the volitional and cognitive tests satisfied, while the other found only the volitional prong satisfied. With the additional prong upon which to base their defense, defendants in jurisdictions using the ALI formulation should have an increased chance for acquittal.


\(^{43}\) California Penal Code § 1026(a) specifies that insanity acquittees be confined to a state mental hospital "unless it shall appear to the court that the sanity of the defendant has been recovered fully."
chosis may not be able to invoke the legal presumptions which favor and are available to the permanently insane. There is also a problem of jury perception. Since postpartum psychosis occurs within the first three months after childbirth, its symptoms will have long disappeared by the time the murder trial begins. It is extremely difficult to convince a jury that the rational defendant before it was insane at the time of the crime. In the trial of Sheryl Massip, for example, the jury found malice aforethought despite strong psychological evidence to the contrary. And in Clark v Nevada, the appellate court concluded that substantial evidence of the mother's calm manner before and after the killing was sufficient to uphold her conviction.

Finally, postpartum psychosis more often than not goes undiagnosed and untreated because adequate postnatal care is available to only a small percentage of women. Adequate postpartum care is considered essential to any woman's recovery from childbirth; a psychological evaluation can be a standard feature of such care. Moreover, while postpartum psychosis is relatively simple to diagnose and treat, the manifestations of the psychosis are difficult to ignore. Several commentators have noted that "[a] non-

---

43 Specifically, the presumption of insanity at the time of the crime may not be invoked:
Proof that defendant was afflicted with a permanent insanity, as distinguished from a temporary or transient insanity, prior to the commission of the crime charged will . . . dispel the presumption of sanity and raise a presumption that his insanity continued to exist until the time of the commission of the crime.
In re Dennis, 51 Cal 2d 666, 335 P2d 657, 661 (1959) (emphasis added). In Clark v Nevada, 95 Nev 24, 588 P2d 1027 (1979), the defendant "alleged temporary, not permanent, insanity and consequently the jury found her evidence, whether controverted or uncontroverted . . . was nevertheless insufficient to dispel the presumption." Id at 1030.

44 See pp 361-62. This problem may be common to other forms of temporary insanity, and the solution proposed here may therefore be equally applicable to these contexts. This comment, however, does not address such other forms of temporary insanity, the durations of which may be less readily definable.

45 The judge considered the jury's finding so clearly contrary to the evidence that he took the highly unusual step of overturning a criminal conviction. Lichtblau, LA Times at 1 (cited in note 1).
47 588 P2d at 1030.
48 Psychological follow-up has been recommended as a standard element of any postpartum care program, one that is "of primary prevention of mental health problems." Michael Harris, Paediatric Communications With the Post-Partum Patient, 1976 Med J of Australia, 417, 420 (1976). Such evaluation requires no hospitalization or expert psychological care; it can be performed over the telephone by nursing staff. See, for example, the program described in Nancy Donaldson, Fourth Trimester Follow-Up, 1977 Am J Nursing 1176 (1976). Nurses can then refer a patient to psychiatric care if she shows signs of depression or serious psychotic behavior.
49 Id.
pregnant patient who manifested these physiologic changes [that is, the normal effects of childbirth] would immediately be a candidate for intensive care. Women who receive either no or inadequate postpartum care are at greater risk of suffering from postpartum psychosis and, paradoxically, will probably lack the psychological evidence necessary to meet their burden of proof in any ensuing trial.

III. A PROPOSED APPROACH TO THE DEFENSE OF POSTPARTUM PSYCHOSIS: ALTER THE BURDEN OF PROOF

There are a number of possible approaches to the problems of proof under the insanity defense in the context of postpartum psychosis. One is to enact legislation, such as that currently pending in the California Senate, providing public education and special training to help law enforcement and correctional officials identify postpartum psychosis sufferers. While this proposal is commendable, and may help prevent infanticides, it does little to help the postpartum psychosis defendant accused of committing a criminal act, as it altogether fails to address the problems of proving insanity at trial.

A second alternative is the creation of a distinct category of crimes committed by postpartum psychosis sufferers. Great Britain, for example, created such a separate class of crimes. In 1938, a statute was enacted in Great Britain mitigating the punishment of mothers who killed their children as a result of “the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child.” The statute defines this crime as

---

60 Carole Ann McKenzie, Mary Elizabeth Canaday, and Elizabeth Carroll, Comprehensive Care During the Postpartum Period, 17 Nursing Clinics of North America 23, 28 (1982).

61 In Clark, for example, the defendant introduced evidence of a psychiatric examination, but because this examination occurred over a year after the homicide, the court ruled that it was properly entitled to lesser weight. Clark, 588 P2d at 1029.


63 The bill was introduced in 1988 by Senator Robert Presley (D-Riverside), who also created a task force of specialists to study the problem in 1987. The bill’s focus on education rather than law reform was intentional. Michael Pinkerton, a deputy state attorney general who served on Presley’s task force explained: “I believe that current laws can adequately handle the issue—under our insanity and diminished capacity defenses—if people understand the disorder.” Id. California, however, no longer recognizes a diminished capacity defense. See note 23.

64 The Infanticide Act (Statutes in Force—Criminal Law: 39:4-1 (1938)) provides:

(1) Where a woman by any wilful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omis-
"infanticide," a separate class of homicide, and reduces its degree from murder to manslaughter.

Although this approach recognizes that a postpartum killing may not constitute murder, adoption in the United States would pose several problems. First, a reduction in grade is logically inconsistent with most criminal homicide codes. For example, in California, murder is defined according to the traditional common law standard of malice aforethought; manslaughter is characterized as a killing that is voluntary—in "heat of passion" or upon provocation—or involuntary—in the commission either of a nonfelonious but an unlawful act, or of a lawful act performed in an unlawful manner, or resulting from a lack of "due caution or circumspection." According to this description, putting a child on the street pavement and running him or her over with a car is clearly murder. The act is not the result of heat of passion or provocation, and it would be absurd to characterize the driver as acting "without due caution or circumspection." Such an act instead shows "an abandoned and malignant heart," and hence constitutes

---

sion the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder, she shall be guilty of felony, to wit of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of the child.

(2) Where upon the trial of a woman for the murder of her child, being a child under the age of twelve months, the jury are of opinion that she by any wilful act or omission caused its death, but that at the time of the act or omission the balance of her mind was disturbed by her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then the jury may, notwithstanding that the circumstances were such that but for the provisions of this Act they might have returned a verdict of murder, return in lieu thereof a verdict of infanticide.

(3) Nothing in this Act shall affect the power of the jury upon an indictment for the murder of a child to return a verdict of manslaughter, or a verdict of guilty but insane . . . .

---

California Penal Code § 187 defines murder as "the unlawful killing of a human being, or a fetus, with malice aforethought." Section 189 classifies felony murder and specific other murders as first degree; all other murders are of the second degree.

California Penal Code § 192 provides:

§ 192. Manslaughter; voluntary, involuntary, and vehicular . . .
Manslaughter is the unlawful killing of a human being without malice. It is of three kinds:
(a) Voluntary—upon a sudden quarrel or heat of passion.
(b) Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection . . . .
the implied malice sufficient for murder.\textsuperscript{57} Under California's statutory scheme, the commission of the act is either murder or the behavior of an insane person.\textsuperscript{58}

The British solution is subject to a second, more fundamental objection. Although it purportedly does not foreclose an insanity acquittal, it effectively gives the jury the "correct disposition" by creating a crime fit specifically for this category of factual scenarios. The existence of the crime of infanticide permits the jury to characterize the mother as cracking under the pressure of raising a newborn and, in recognition of this impaired mental state, to mitigate her punishment while still holding her criminally responsible.\textsuperscript{59} As the above discussion shows, however, a mother who kills while suffering from postpartum psychosis is not less criminally responsible than a murderer; she is not criminally responsible at all.\textsuperscript{60}

A solution that better suits our legal system and more closely accommodates the nature of the defendant's condition reduces the burden of proof imposed upon defendants who claim that they acted while suffering from postpartum psychosis. States are free to choose how heavy a burden of proof to place on the defendant.\textsuperscript{61} Currently, states, in choosing their standards for NGRI acquittal, select one from at least three options: (1) the defendant is required simply to raise a reasonable doubt as to her sanity; (2) she must

\textsuperscript{57} California Penal Code § 188 states:

[M]alice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."

\textsuperscript{58} Similarly, § 210.2 of the Model Penal Code defines murder as purposeful or knowing killing, or a reckless act with extreme indifference to human life. Section 210.3 defines manslaughter as a reckless act, or a purposeful or knowing act committed under extreme mental or emotional disturbance. The definition of negligent homicide in § 210.4 is self-explanatory. All the mental states are to be determined from the actor's position. See Model Penal Code, Explanatory Comments § 210.2 (at 20) and § 210.3 (at 49). Sheryl Massip's act could hardly be characterized as "reckless" or "negligent." As an alternative to the characterization under the California statutory scheme, however, her act might be labeled as purposeful, though under extreme emotional disturbance.

\textsuperscript{59} The punishment for infanticide, which by definition occurs under circumstances that but for the statute would constitute murder, is equivalent to that for manslaughter. See note 54.

\textsuperscript{60} Additionally, the British statute only applies to homicide prosecutions. It therefore provides no defense for other violent crimes that a postpartum psychosis victim might commit, such as assaulted.

\textsuperscript{61} The United States Constitution does not prohibit states from requiring defendants to prove that they were insane when they committed a criminal act. See pp 368-73 for a discussion of constitutional limitations.
prove by a preponderance of the evidence that she was insane; or
(3) she must prove by clear and convincing evidence that she was
insane. Because of the unique problems of proof in the postpartum
psychosis context, states should adopt standards which impose a
lower burden of proof on defendants in this context than on de-
fendants claiming other forms of insanity.

A. Burden of Proof and the Insanity Defense

At common law it is presumed that all defendants are sane.
The court in M'Naghten described this presumption in the follow-
ing manner:

[E]very man is presumed to be sane, and to possess a suf-
ficient degree of reason to be responsible for his crimes,
until the contrary be proved to [the jury's] satisfaction.62

Under the M'Naghten standard, in other words, a defendant car-
rries the burden of proving that he was insane at the time of his
criminal act. This allocation of the burden of proof became, as did
the M'Naghten insanity test, part of the common law.63

In 1895, however, the Supreme Court ruled in Davis v United
States64 that requiring the defendant to prove his insanity by a
preponderance of the evidence was impermissible in the federal
courts. Such an approach, the Court reasoned, allowed the jury to
convict a defendant when it reasonably doubted his sanity, and
therefore had a reasonable doubt as to his criminal responsibil-
ity.65 The result of a preponderance standard was “in effect to require
[the defendant] to establish his innocence by proving that he is not
guilty of the crime charged.”66

The Davis holding is important in two respects. It did not re-
ject the presumption of sanity outright. Absent this presumption,
the prosecution would have to affirmatively prove sanity in every
case, even if the issue was not raised. Such a task “would seriously
delay and embarrass the enforcement of the laws against crime,

62 M'Naghten, 10 Cl & F at 210.
63 “The law presumes that every one charged with crime is sane, and thus supplies in
the first instance the required proof of capacity to commit crime.” Davis v United States,
160 US 469, 486 (1895).
64 160 US 469, 471 (1895).
65 The defendant “is entitled to an acquittal of the specific crime charged if, upon all
the evidence, there is reasonable doubt whether he was capable in law of committing crime.”
Id at 484.
66 Id at 487.
and in most cases be unnecessary.\textsuperscript{7} The defendant therefore can at least be required to raise a reasonable doubt as to his sanity.\textsuperscript{8} At that point, however, the prosecution must assume the burden of proving sanity; it cannot require the defendant to produce further evidence to prove insanity by a preponderance.\textsuperscript{9}

The Court also did not decide \textit{Davis} on constitutional grounds.\textsuperscript{10} The holding instead rested on "principles fundamental in criminal law . . . the recognition and enforcement of which are demanded by every consideration of humanity and justice."\textsuperscript{11} Accordingly, the result of \textit{Davis} applied only as a rule of decision for the federal courts\textsuperscript{12} and did not address the issue of limits on state power to impose the burden of proof of insanity on a criminal defendant.

Fifty-four years later, the Court addressed this question in \textit{Leland v Oregon}.\textsuperscript{13} In \textit{Leland}, the Court upheld an Oregon statute requiring a criminal defendant claiming insanity to prove it beyond a reasonable doubt, rejecting the argument that such a burden violated due process.\textsuperscript{14} Because the presumption of sanity was rational, it was, according to the Court, constitutionally permissible.\textsuperscript{15} Justice Frankfurter dissented, likening the decision to "medieval law."\textsuperscript{16} Although he objected to the reasonable doubt standard, he admitted that a presumption of sanity should operate at some level,\textsuperscript{17} and did not explicitly agree with the majority's conclusion that a preponderance standard was impermissible. Instead, he contrasted Oregon's reasonable doubt standard with the preponderance standard used at the time by twenty other states, im-

\textsuperscript{7} Id at 486.
\textsuperscript{8} "[W]here the case made by the prosecution discloses nothing whatever in excuse or extenuation of the crime charged, the accused is bound to produce some evidence that will impair or weaken the force of the legal presumption in favor of sanity." Id.
\textsuperscript{9} Id.
\textsuperscript{10} \textit{Patterson v New York}, 432 US 197, 203 (1977) ("\textit{Davis} was not a constitutional ruling . . . ").
\textsuperscript{11} \textit{Davis}, 160 US at 493.
\textsuperscript{12} As noted some years later by the Court, \textit{Davis} "obviously establishes no constitutional doctrine, but only the rule to be followed in federal courts." \textit{Leland v Oregon}, 343 US 790, 797 (1952).
\textsuperscript{13} Id.
\textsuperscript{14} Id at 798-99.
\textsuperscript{15} Id at 799, citing \textit{Tot v United States}, 319 US 463 (1943) (striking down a presumption in which "the fact . . . required to be presumed had no rational connection with the fact which, when proven, set the presumption in operation").
\textsuperscript{16} \textit{Leland}, 343 US at 803 (Frankfurter dissenting).
\textsuperscript{17} Id at 804.
plying that such a preponderance standard was acceptable.\(^7\)

_Leland_ settled the quantum of proof issue until the Court's landmark decision, _In re Winship_,\(^7\)\(^9\) constitutionalized the reasonable doubt standard in criminal prosecutions.\(^8\) The Court, referring directly (and exclusively) to _Davis_ and to Frankfurter's dissent in _Leland_, concluded that "it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required."\(^8\)\(^1\) Because the Court in _Winship_ used the reasoning from _Davis_ and the _Leland_ dissent to determine that the reasonable doubt standard was constitutionally required, one could infer that the results which that reasoning produced in _Davis_ and _Leland_ were likewise constitutionally required.

This reading of _Winship_ was bolstered by a later case, _Mullaney v Wilbur_,\(^8\)\(^2\) which struck down a Maine statute requiring a defendant to prove heat of passion or sudden provocation in order to reduce a murder charge to manslaughter.\(^8\)\(^3\) The Court noted that because the state "affirmatively shifted the burden of proof to the defendant . . . the defendant [was] required to prove the critical fact in dispute."\(^8\)\(^4\) And since a defendant might not always be able to prove such critical facts for practical reasons unrelated to his guilt or innocence, the shift contemplated in the Maine statute operated to "increase further the likelihood of an erroneous murder conviction."\(^8\)\(^5\)

The Court in _Mullaney_ highlighted two points that are of particular significance in the insanity context. First, the Court explicitly rejected the argument that the defendant should carry the bur-
den simply because he has better access to information about his mental state. Second, it also disagreed with the contention that the state should not have to "prove a negative," that is, prove that the defendant did not have a certain mental state. As this reasoning appeared to suggest that the prosecution had to bear the burden of proof on every element, even those that might be particularly difficult, some commentators thought Mullaney signalled the fall of Leland.

The general holding in Mullaney, however, has proved difficult to grasp. Its narrow holding is easier to identify: The prosecution must prove the absence of the heat of passion on sudden provocation beyond a reasonable doubt when the defendant raises the issue. Yet, in a seemingly contradictory holding in Patterson v New York, the Court upheld a New York statute designating "extreme emotional disturbance" as an affirmative defense to murder. Extreme emotional disturbance is essentially a reformulation of the "heat of passion" defense used in Mullaney. Addressing the apparent contradiction with Mullaney, the Court in Patterson noted that "[t]here is some language in Mullaney that has been understood as perhaps construing the Due Process Clause to require the prosecution to prove beyond a reasonable doubt any fact affecting 'the degree of criminal culpability,'" but dismissed that interpretation, saying that "[t]he Court did not intend Mullaney to have such far-reaching effect."

Whatever the theoretical inconsistencies between Mullaney and Patterson, it appears today that Mullaney does not reach the  

---

86 "[A]lthough intent is typically considered a fact within the knowledge of the defendant, this does not, as the Court has long recognized, justify shifting the burden to him." 421 US at 702.
87 "Nor is the requirement of proving a negative unique in our system of criminal jurisprudence. Maine itself requires the prosecution to prove the absence of self-defense beyond a reasonable doubt." Id.
88 See, for example, Note, Constitutional Limitations on Allocating the Burden of Proof of Insanity to the Defendant in Murder Cases, 56 BU L Rev 499, 500 (1976).
89 "We therefore hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." Mullaney, 421 US at 704.
91 "This defense is a considerably expanded version of the common-law defense of heat of passion on sudden provocation." Id at 202.
92 Id at 215 n 15. Justice Powell, author of the Court's opinion in Mullaney, dissented in Patterson, calling the majority's approach "indefensibly formalistic." Id at 224 (Powell dissenting). He interpreted Mullaney to hold that the prosecution must bear the burden of proof for any element that makes a "substantial difference in punishment of the offender and in the stigma associated with the conviction" and that has historically constituted an element of the crime. Id at 228.
insanity defense.\textsuperscript{93} Patterson largely stopped whatever momentum Winship and Mullaney might have generated toward overturning Leland. As a result, two circuits have upheld the constitutionality of the federal insanity statute,\textsuperscript{94} despite its use of a "clear and convincing" standard.\textsuperscript{96}

The line of cases from Davis through Patterson does not impose constitutional restrictions on states in choosing whether and to what extent to shift the burden of proof of insanity to the defendant. Davis and its progeny do, however, put forth policy considerations as guidelines for shifting the burden. Two tests for permissible burden-shifting have emerged from these considerations: the "rational connection" test and the "relative convenience" test.\textsuperscript{95}

The rational connection test is premised on the same rationale as that in Winship: The State must minimize the risk, within reason, of convicting innocent defendants.\textsuperscript{97} Suppose that, to convict a defendant, a state must prove three elements, A, B, and C. The rational connection test permits the state to create a presumption of C—that is, shift the burden of proof of C to the defendant—whenever proving A and B makes C sufficiently likely.\textsuperscript{98} The stronger the correlation between elements A, B, and C, the more stringent the standard of proof that can be imposed on the defendant. In effect, as the strength of connection required increases, the risk of convicting innocent defendants simultaneously increases.

The relative convenience test considers the parties' relative access to information concerning the element to be proved. Justice

\textsuperscript{93} Then-Justice Rehnquist's concurring opinion in Mullaney makes exactly this point: I agree with the Court that In re Winship does require that the prosecution prove beyond a reasonable doubt every element which constitutes the crime charged against a defendant. I see no inconsistency between that holding and the holding of Leland v. Oregon.

Mullaney, 421 US at 705 (Rehnquist, J. concurring) (citations omitted).

\textsuperscript{94} See note 15.

\textsuperscript{95} United States v Amos, 803 F2d 419 (8th Cir 1986); United States v Freeman, 804 F2d 1574 (11th Cir 1986). Ironically, this federal standard is precisely the standard rejected in Davis, a decision central to the Winship decision.

\textsuperscript{96} Harold A. Ashford and D. Michael Risinger, Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview, 79 Yale L J 165, 166 (1969). Although the Court has not subscribed to Ashford and Risinger's constitutional arguments, it has cited this article as providing a framework for the burden of proof analysis. See, for example, Mullaney, 421 US 702-03 n 31.

\textsuperscript{97} "We submit that a standard of precision approaching 99%, and certainly greater than 90%, should be required before a presumption can be constitutionally sustained consistent with notions of due process." Ashford and Risinger, 79 Yale L J at 183 (cited in note 96).

\textsuperscript{98} Id at 184.

\textsuperscript{99} United States v Freeman, 804 F2d 1574 (11th Cir 1986).

\textsuperscript{90} Ashford and Risinger, 79 Yale L J at 183.
Cardozo developed the test’s most famous formulation:

For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance . . . or, if this at times be lacking, there must be in any event a manifest disparity in convenience of proof and opportunity for knowledge.  

Thus, the test measures how easily a defendant can rebut the presumption considered by the connection test, without comparing the prosecution and defendant’s relative ease of access to information. The harder it is for a defendant to rebut the presumption (regardless of how difficult it would have been for the prosecution to establish the presumed fact), the greater the danger that innocent defendants will be convicted.

B. A Proposed Burden of Proof for Postpartum Psychosis

The unique circumstances under which postpartum psychosis arises, and the problems of proof it presents, suggest that defendants claiming this insanity defense should carry a reduced burden of proof. California currently imposes on the defendant the burden of proving insanity by a preponderance of the evidence. Although this burden is perfectly constitutional, it renders an insanity defense illusory for postpartum psychosis defendants. To account for the special context of postpartum psychosis, the burden of proof in jurisdictions like California should be modified to read as follows:

---

99 Morrison v California, 291 US 82, 90 (1933) (citations omitted). Morrison involved a California statute that prohibited aliens from owning farmland. The statute required the state to prove possession of the land and the defendant, in order to gain acquittal, to prove citizenship (or eligibility for citizenship). Justice Cardozo ruled that a shift in the burden of proof may be acceptable “where the balance of convenience can be redressed without oppression to the defendant through the same procedural expedient.” Id at 91. For the shift involved in the case, however, “[t]here [could] be no escape from hardship and injustice, outweighing many times any procedural convenience, unless the burden of persuasion in respect of racial origin [was] cast upon the people.” Id at 96.

100 Ashford and Risinger explain:

One thing not relevant in this inquiry is whether the defendant’s burden is five or five thousand times lighter than that lifted from the prosecution. The percentage of innocent defendants that will be convicted pursuant to a presumption will in no way be affected by the difficulty which the prosecution might have in proving its case absent the presumption.

Ashford and Risinger, 79 Yale L J at 186 (cited in note 96).

101 Id.

102 Cal Penal Code § 25(b).

103 See pp 368-73.

104 See pp 363-65.
In any criminal proceeding, including any juvenile court proceeding, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act, or, if the accused person is a mother who committed the act within three months of giving birth, when she raises a reasonable doubt as to whether she was capable of knowing or understanding the nature and quality of her act, and that he or she was incapable of distinguishing right from wrong at the time of the commission of the offense.

An analysis under the rational connection test reveals that the presumption of sanity cannot apply equally to all defendants claiming insanity. Ordinarily, the presumption of sanity is so strong that it does not compel proof of any independent facts; in other words, the state can invoke the presumption of sanity without proving any elements of a particular crime. By contrast, in a case involving a mother who commits a criminal act (such as murder) within three months of giving birth to a child is less likely to be sane at the time of the crime than a defendant identical in all respects but one—that of having recently given birth. The presumption of sanity in this situation is not as strong; the state should therefore not impose as heavy a burden of proof on the postpartum psychosis defendant.

As discussed earlier, it is more difficult for a postpartum psychosis defendant to rebut the presumption of sanity than it is for other defendants. The relative convenience analysis thus suggests that because the danger of convicting innocent defendants is unjustifiably increased, a reduced standard of proof is needed. Once a reasonable doubt is raised, the prosecution may be able to

---

106 See pp 361-62 for a discussion of the symptoms and frequency of postpartum psychosis.

107 One commentator has argued that the state has an affirmative duty to provide a prompt psychiatric evaluation as soon as possible after an offense. Because a defendant's mental condition can change rapidly, failure to provide such an examination may effectively deny the defendant access to the insanity defense, and therefore violate due process. Note, Due Process Concerns With Delayed Psychiatric Evaluations and the Insanity Defense: Time Is of the Essence, 64 BU L Rev 861 (1984). This argument applies with added force in the postpartum psychosis context, where the defendant's mental condition may change dramatically within days of the offense, and supplies another reason to lower the burden on the defendant (and correspondingly raise the burden on the state).
prove sanity by using available medical testimony since mothers for whom medical data is available most likely received adequate postpartum care.\footnote{Many defendants, of course, will not have received adequate postpartum care. The state’s corresponding inability to counter the raised doubt with contemporaneous medical testimony creates an incentive for the state to provide adequate postpartum care, possibly reducing the initial occurrence of postpartum psychosis. At the very least, it creates an incentive to provide immediate psychological evaluation upon arrest.}

This proposed approach reduces the risk of convicting innocent defendants without simultaneously increasing the probability that sane and cognizant defendants will go free. Although the proposed standard reduces the burden of proof on women who recently gave birth, it does not dispose of the presumption of sanity altogether. The statistical frequency of postpartum psychosis suggests that a woman who has very recently given birth is less likely to be sane than a woman who has not; in recognition of this fact, the state should require of the former group of women a lesser burden of proof. Such women, however, are nonetheless ordinarily sane, and the legal presumption of sanity should continue to operate, though with a reduced burden of rebuttal on the defendant. Because the fact that the defendant recently gave birth is taken into account in the reduced burden of proof, the defendant claiming insanity by reason of postpartum psychosis will not be freed by the proposed standard from the requirement of introducing further evidence to meet the reduced burden.\footnote{Such evidence could take the form of medical testimony or, if such testimony is unavailable, observations by family members or acquaintances that the defendant behaved in a manner consistent with postpartum psychosis. In Skeoch, for example, testimony from the defendant’s husband and a psychiatrist was held sufficient to raise a reasonable doubt as to the defendant’s sanity. People v Skeoch, 408 Ill 276, 96 NE2d 473, 475 (1951).}

**CONCLUSION**

Under both the M’Naghten and ALI insanity tests, a defendant can theoretically claim postpartum psychosis as the basis for an insanity defense. But temporary insanity generally and postpartum psychosis in particular pose unique problems of proof inapplicable to other insanity defendants. The common law presumption of sanity therefore operates with less force in the postpartum psychosis context. Imposing the same burdens of proof on postpartum psychosis defendants as on other insanity defendants therefore violates the traditional policy considerations that guide such an imposition. The burden of proof imposed on such defendants should therefore be reduced.