

POSTPARTUM DEPRESSION AND THE INSANITY DEFENSE:

A POOR MOTHER'S TWO WORST NIGHTMARES

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The term “postpartum depression” is generally used to describe a mental disturbance that can surface sometime after a woman gives birth.¹ Although this disturbance has been used as the basis for the insanity defense within the criminal justice system, determining who actually meets the test for legal insanity is still a major dilemma for many mothers who are charged with murder or manslaughter.² Because postpartum depression possesses similar, but also different, characteristics as mental illnesses, it raises numerous policy and social issues for the courts.

Similar to all other mental illnesses that are scrutinized by the courts, postpartum depression can only excuse a mother's actions if it meets the jurisdictional test for legal insanity.³ The problem is that most jurisdictions will not recognize postpartum depression as a mental disorder under the insanity defense because it does not meet the volitional or the cognitive elements of the test.⁴ The majority of mothers who are charged with murder or manslaughter

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1. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000) [hereinafter APA].

2. See ROB BROWN ET AL., POSTPARTUM DEPRESSION: THE CONVERGENCE OF MEDIA COVERAGE AND COMMUNITY ACTIVISM IN INFLUENCING PUBLIC HEALTH POLICY 12-13 (2001), *available at* <http://www.uic.edu/sph/phtpg/Content/Documents/LinksResources/CaseStudyLibrary/Y10/PostpartumDepression.pdf>.

3. *Id.*

4. Cristie L. March, *The Conflicted Treatment of Postpartum Psychosis Under Criminal Law*, 32 WM. MITCHELL L. REV. 243, 255 (2005). (There are two cognitive tests used by states: the M'Naughtan test, “which requires a showing that, at the time of the criminal offense, the mental disease or disorder in question prevented the defendant from knowing the nature or quality of her act, or knowing the wrongfulness of her act”; and the American Law Institute (ALI) test, “by which the defendant is considered insane if, at the time of the offense, as a result of mental disease or defect he lacked substantial capacity either to appreciate the criminality/wrongfulness of his conduct or to conform his conduct to the requirements of the law.”). *Id.* at 254-255. The volitional or irresistible impulse test requires a showing that the defendant is unable to control his or her actions because of a mental disease. CATHERINE MARION, CONGRESSIONAL RESEARCH SERVICE: THE LIBRARY OF CONGRESS, THE INSANITY DEFENSE: AN OVERVIEW AND LEGISLATIVE PROPOSALS CRS-2-3 (1982).

are those who do not receive postpartum depression screenings, whose diagnosis are overlooked, or who lack postnatal social support from family members.⁵ Generally, these are mothers living in poverty.⁶

Jurisdictions that do not recognize postpartum depression as a mental disorder under the insanity defense perpetuate the disparate impact on women living in poverty. Women living in poverty lack the necessary education about postpartum depression, have limited access to clinics and physicians, and are unable to afford quality screenings to help prevent postpartum depression before a serious crime takes place.

Part I of this article provides an overview of postpartum mood disorders, mainly focusing on postpartum depression, including the causes of postpartum depression, the risk factors associated with postpartum depression, and the treatment options available for mothers suffering from postpartum depression.

Part II of this article presents the origins of the insanity defense in criminal law dating back to the famous 19th century M'Naughtan case. It will discuss the complexities of postpartum depression as an insanity defense within the criminal justice system by looking at the difference in outcomes of four postpartum depression cases throughout history that have used the insanity defense: *People v. Skeoch*,⁷ *State v. White*,⁸ *People v. Massip*,⁹ and *State v. Yates*.¹⁰

Part III of this article analyzes the disparate impact on women living in poverty that exists due to the narrow insanity defense tests. This section will shed light on some of the means by which women living in poverty are disadvantaged – from the lack of education on postpartum disorders, to limited healthcare access, to affordability of healthcare. Furthermore, this section will describe the relationship that exists between postpartum depression and women living in poverty. It will suggest that broader insanity defense standards that include postpartum mood disorders as a mental illness serves the best interest of all parties involved.

Finally, part IV of this article introduces Ee Lee's story,¹¹ and discusses the connection that exists in her case between poverty and postpartum depression. Additionally, this section will analyze Lee's situation as another

5. See e.g., *People v. Skeoch*, 96 N.E.2d 473, 474-75 (Ill. 1951); *State v. White*, 456 P.2d 797, 798-99 (Idaho 1969); *People v. Massip*, 271 Cal. Rptr. 868, 868-69 (Cal. Ct. App. 1990); *Yates v. State*, 171 S.W.3d 215, 216-18 (Tex. App. 2005).

6. See Janet W. Rich-Edwards, et al., *Sociodemographic Predictors of Antenatal and Postpartum Depressive Symptoms Among Women in a Medical Group Practice*, J. EPIDEMIOLOGY & COMMUNITY HEALTH 221 (2006).

7. 96 N.E.2d 473 (Ill. 1951).

8. 456 P.2d 797 (Idaho 1969).

9. 271 Cal. Rptr. 868 (Cal. Ct. App. 1990).

10. 171 S.W.3d 215 (Tex. App. 2005).

11. WI Circuit Court Access – the Consolidated Court Automation Programs (CCAP), available at <http://wcca.wicourts.gov/index.xsl?sessionId=CF556B3C76425E42665AE0EE3547E1AC.r> ender1 (last visited Apr. 13, 2009) [hereinafter CCAP].

postpartum depression homicide case warranting a broader insanity defense test under Wisconsin criminal law.

I. OVERVIEW OF POSTPARTUM MOOD DISORDERS

A. *Three Types of Postpartum Disorders*

Postpartum mood disorders are distinctly categorized into three types: postpartum blues (baby blues), postpartum depression, and postpartum psychosis.¹² Postpartum blues is a mild postpartum mood disorder “generally regarded as a fleeting phenomenon characterized by sad or labile mood and tearfulness lasting from a few hours to a few days.”¹³ Postpartum depression “constitutes those affective disorders whose severity falls in between the blues and psychosis.”¹⁴ Postpartum psychosis is the most severe disorder “...incapacitating [the mother]...[and] usually require[ing] hospitalization.”¹⁵ This article mainly focuses on postpartum depression since its range is wide enough to encompass both postpartum blues and psychosis.

Postpartum depression affects ten to fifteen percent of all women who give birth.¹⁶ A woman can experience postpartum depression as early as within the first four weeks after giving birth.¹⁷ The American Psychiatric Association¹⁸ has set the description of a major postpartum depressive episode to include “a period of at least two weeks of depressed mood or loss of interest in almost all activities, and changes in appetite, weight, sleep, psychomotor activity, energy, ability to think, ability to concentrate, and ability to make decisions; or recurrent thoughts of death or suicidal ideation, plans or attempts.”¹⁹ It has also been reported that a woman who becomes depressed after giving birth will reject her baby and show hostility towards him or her.²⁰ About twenty-five to fifty percent of women who experience postpartum depression have these types of depressive episodes for six months or longer.²¹

12. MICHAEL O'HARA & ELLEN ZEKOSKI, POSTPARTUM DEPRESSION: A COMPREHENSIVE REVIEW 17 (1988).

13. *Id.*

14. *Id.*

15. *Id.*

16. Jennifer M. Wilen & Kyle O. Mounts, *Women with Depression—“You Can't Tell by Looking”*, 10 MATERNAL & CHILD HEALTH J. 183 (2006), available at <http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1592154>.

17. CHERYL TATANO BECK, POSTPARTUM DEPRESSION: CASE STUDIES, RESEARCH, AND NURSING CARE 4 (1999).

18. The American Psychiatric Association publishes the Diagnostic and Statistical Manual of Mental Disorders (DSM) that lists different categories of mental disorder and the criteria for diagnosing them. *Id.*

19. *Id.*

20. KATHARINE DALTON, DEPRESSION AFTER CHILDBIRTH: HOW TO RECOGNIZE AND TREAT POSTNATAL ILLNESS 29 (Oxford Univ. Press 1980).

21. BECK, *supra* note 17, at 7 (internal citations omitted).

B. *Causes of Postpartum Depression*

The cause of postpartum depression is debatable. Theories support the conclusions that biologic, psychosocial, and situational life-stress are the causes of postpartum depression.²² The psychosocial and situational life-stress theories are less complicated, focusing on the "unique life adjustments to parenthood and the vulnerability of new mothers."²³ But, on the biological theory, reports have conflicted as to the actual basis.²⁴ Some studies point to the dramatic hormonal and endocrine changes caused by the "shift[ing] levels of progesterone, estrogen, prolactin, and thyroid within a woman's body that occur after delivery of the baby, as one possible explanation for the depression."²⁵ Studies have also found a significant association between thyroid dysfunction and postpartum depression in mothers.²⁶ Still, other research has indicated that neurotransmitter dysfunction may be the cause of postpartum depression.²⁷ Whatever the theory may be, they all can interfere with a woman's mental stability.²⁸

C. *Risk Factors for Postpartum Depression*

Predictors of postpartum depression can include prenatal depression, childcare stress, life-stress, lack of social support, prenatal anxiety, maternity blues, marital satisfaction, and history of previous depression.²⁹ The presence of such risk factors does not guarantee that a mother will experience postpartum depression, while the absence of any of these risk factors does not make certain that postpartum depression will not occur.³⁰ Prenatal depression is identified as the strongest predictor of postpartum depression.³¹ If the mother experiences any type of depression during her pregnancy, no matter what trimester, she will be more likely to retain this depression after giving birth.³² Additionally, a woman who experiences postpartum blues within the first few days after giving birth will most likely also experience postpartum depression.³³

D. *Treatment Options for Postpartum Depression*

Treatment has been made available to women suffering from postpartum depression through various means depending on the type and severity of the

22. *Id.* at 5.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. APA, *supra* note 1.

29. BECK, *supra* note 17, at 9.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

depression.³⁴ “Antidepressants, electroconvulsive therapy (ECT), individual or group psychotherapy, and interpersonal psychotherapy,” are all options that have been used to treat postpartum depressive women.³⁵

Although these treatments are helpful once a woman has been diagnosed with postpartum depression, they fail to address the more important underlying problem which requires preventing postpartum depression from initially occurring.³⁶ The need for preventive care is essential to stop postpartum depression from even developing. One method of preventive care available for postpartum depressive patients is psychosocial treatment.³⁷ Studies have indicated that women who attended psychosocial sessions composed of social and vocational training do not experience as much emotional distress compared to women who had not attended the sessions.³⁸ One study in Japan looked at the effect of prenatal education about postpartum depression on the occurrence of the mood disorder with Japanese mothers.³⁹ Two groups of women were studied—one group consisted of women who attended the educational sessions on postpartum depression, while the second group did not attend.⁴⁰ The educational sessions emphasized the following preventive measures: “avoiding an overload of domestic/work tasks, planning ahead of time with family how they can help new mothers to rest and sleep after the baby is born, and identifying potential sources of psychiatric support.”⁴¹ The study concluded that early contact with a psychiatrist was the best way to identify the treatment needed for the diagnosed depression.⁴² Mothers in the attendee group were referred to psychiatrists more rapidly than the nonattendee group; and as a result, mothers in the nonattendee group were significantly more depressed than the mothers who attended the sessions.⁴³ This trend is helpful in understanding how critical it is for pregnant women to obtain prenatal education on postpartum mood disorders.

II. POSTPARTUM DEPRESSION IN CRIMINAL LAW

A. *The Insanity Defense*

Of all the problems involved in the subject of mental unsoundness as a defense to crime, the greatest difference of opinion and the most

34. *Id.* at 21.

35. *Id.*

36. *Id.*

37. *Id.* at 25.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

discussion on the part of courts and commentators has centered about the legal 'tests' of insanity – i.e., the degree of mental unsoundness which must be shown to excuse a defendant from criminal responsibility.⁴⁴

For over a century, many states have used the M'Naughtan rules as a guide on which to base their insanity defense.⁴⁵ The M'Naughtan rules came as a result of the 1843 Daniel M'Naughtan trial.⁴⁶ In 1843, Daniel M'Naughtan shot and killed a man in the open streets of London whom he believed to be the prime minister.⁴⁷ Subsequently, M'Naughtan was arrested and charged with murder in the first degree.⁴⁸ During his trial, his attorneys presented several lay witnesses and expert testimonies on M'Naughtan's continuous delusions and on the disease of insanity.⁴⁹ The most persuasive testimony was from an expert who examined M'Naughtan four weeks following the assassination.⁵⁰ The testimonies were so strong that the judge stopped the case, the solicitor general conceded, and the jury only deliberated for two minutes in the jury box coming to a verdict of not guilty on the grounds of insanity.⁵¹ M'Naughtan was acquitted and admitted into an insane asylum.⁵² Queen Victoria was disappointed with the outcome of M'Naughtan's trial and urged the legislature to require the judges to follow the law of the land.⁵³ At the House of Lords, the majority opinion was delivered.⁵⁴ Only one judge dissented from the following opinion:

A person is presumed sane unless it can be "clearly proven that, at the time of the committing of the act, the party accused was labouring 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."⁵⁵

To this day, this opinion guides many states – excusing the defendant by mental defect only if he did not know what he was doing or that what he was doing was wrong.⁵⁶

44. HENRY WEIHOFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* 14 (1933).

45. SHAFEEK S. SANBAR, *LEGAL MEDICINE* 624 (7th ed. 2007).

46. RICHARD MORAN, *KNOWING RIGHT FROM WRONG: THE INSANITY DEFENSE OF DANIEL McNAUGHTAN* 23 (1981).

47. *Id.* at 7.

48. *Id.* at 1.

49. *Id.* at 16-18.

50. *Id.* at 18.

51. *Id.* at 17-18.

52. *Id.* at 23.

53. *Id.* at 21.

54. *Id.* at 22-23.

55. *Id.* at 23.

56. RITA JAMES SIMMONS, *THE JURY & THE DEFENSE OF INSANITY* 9 (1999).

B. *Postpartum Depression as an Insanity Defense*

Postpartum depression becomes a legal issue only after a mother takes the life of her child or children, thus involving her in the criminal justice system.⁵⁷ This situation occurs when postpartum depression is left untreated, leading to unintended consequences not only for the mother, but more commonly for the defenseless child.⁵⁸ These consequences can range from simple child neglect, to child abuse, to infanticide,⁵⁹ the murder or killing of a newly born or young child.⁶⁰ The Friedman, Horwitz, and Resnick study showed that "among children under five years of age in the United States who were murdered in the last quarter of the 20th century, sixty-one percent were killed by their own parents."⁶¹ Of this sixty-one percent, thirty percent of these children were killed by their mothers.⁶² Furthermore, their research cited the 1969 review of world psychiatric literature done by Dr. Phillip Resnick on filicide⁶³/infanticide.⁶⁴ His review uncovered common characteristics of depression, psychosis, prior use of psychiatric services, and suicidality that were shared among mothers who committed filicide/infanticide.⁶⁵

Within the criminal justice system, postpartum depression is not a complete defense to any crime.⁶⁶ Yet, defense attorneys should argue a postpartum depression case under the insanity defense so as to ensure that the mother will receive rehabilitation for the disorder rather than incarceration for the crime. This strategy is favored because under the insanity defense, when a defendant is found insane, he/she is excused of criminal responsibility by being placed in rehabilitation.⁶⁷

Unfortunately, a large amount of these cases are unsuccessful in making an insanity defense claim in front of a jury.⁶⁸ The main reason being that

57. See BROWN, *supra* note 2.

58. See DALTON, *supra* note 20, at 29; BECK, *supra* note 17, at 4.

59. See DALTON, *supra* note 20, at 29.

60. See infanticide. Dictionary.com. Webster's Revised Unabridged Dictionary. MICRA, Inc. <http://dictionary.reference.com/browse/infanticide> (accessed: Feb. 1, 2009).

61. Susan Hatters Friedman, M.D., et al., *Child Murder by Mothers: A Critical Analysis of the Current State of Knowledge and a Research Agenda*, 162 AM. J. OF PSYCHIATRY 1578 (2005).

62. *Id.* at 1578.

63. The act of murdering a son or a daughter. See filicide. Dictionary.com. Webster's Revised Unabridged Dictionary. MICRA, Inc. <http://dictionary.reference.com/browse/filicide> (accessed: Feb. 1, 2009).

64. *Id.*

65. Friedman, *supra* note 61.

66. See BROWN, *supra* note 2.

67. *Id.* at 13.

68. See Melissa McNamara, *Andrea Yates Found Not Guilty by Reason of Insanity; will be Committed to State Mental Hospital*, CBS News, July 26, 2006, available at <http://www.cbsnews.com/stories/2006/07/26/national/main1837248.shtml> [hereinafter *Not Guilty*] (an earlier jury found Yates guilty despite her plea of innocence by reason of insanity); see *Ruling Gives Yates a Chance for Treatment, Husband says*, CNN.com, Jan. 7, 2005, available at <http://www.cnn.com/2005/LAW/01/07/children.drowned/index.html> (jury

postpartum depression, as a mood disorder, cannot satisfy the elements set out under the insanity defense in most jurisdictions.⁶⁹ The insanity defense test in many states still follows the narrow rules set out in M'Naughtan, which only has a cognitive focus.⁷⁰ Applying the M'Naughtan test to postpartum depression cases generates guilty verdicts. First, it is difficult to prove that a mother charged with murder or manslaughter was *insane*, or "labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act [s]he was doing."⁷¹ Depression is not categorized as a defect or disease of the mind, but rather as a temporary mental disturbance.⁷² Second, even if it is proven that a mother was insane, it would be difficult to prove that she was not able to distinguish between right and wrong at the time the crime was committed.⁷³ In the following cases, almost all the mothers involved knew what they were doing and that what they were doing was wrong.⁷⁴

Analyzing postpartum depression cases under a separate test known as the irresistible impulse test also generates a guilty verdict. The irresistible impulse test suggests that the defendant is unable to control his or her actions because of a mental disease.⁷⁵ Although postpartum mood disorders can "significantly impair a woman's mental stability, it [may not] rise to the level of an irresistible impulse," part of the volitional element required for the insanity defense to apply.⁷⁶ Furthermore, postpartum mood disorders do not meet the cognitive test of the insanity defense – that the person did not know what he was doing was wrong.⁷⁷ Early cases of postpartum depression were successful

rejected her plea of not guilty by reason of insanity); *People v. Massip*, 271 Cal. Rptr. 868, 869 (Cal. Ct. App. 1990) (the jury returned a verdict of guilty finding that Massip was sane at the time of the incident); *People v. Skeoch*, 96 N.E.2d 473, 473 (Ill. 1951) (Skeoch was convicted of murder and sentenced to the Illinois penitentiary for fourteen years).

69. See BROWN, *supra* note 2, at 12-13. (For example, under Wisconsin's insanity defense, a person is excused of criminal responsibility only if "at the time of such conduct as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law." Wis. STAT. § 971.15(1) (2009). The insanity defense is an affirmative defense, which shifts the burden onto the defendant, making it more difficult to prove that she did not have the substantial capacity to appreciate the wrongfulness of her conduct, or to conform her conduct to the law. *Gibson v. State*, 55 Wis. 2d 110, 197 N.W.2d 813 (1972)).

70. CATHERINE MARION, CONGRESSIONAL RESEARCH SERVICE: THE LIBRARY OF CONGRESS, THE INSANITY DEFENSE: AN OVERVIEW AND LEGISLATIVE PROPOSALS CRS-2-3 (1982).

71. MORAN, *supra* note 46, at 23.

72. APA, *supra* note 1.

73. See Brown, *supra* note 2, at 12.

74. *People v. Skeoch*, 96 N.E.2d 473, 473-74 (Ill. 1951) (Skeoch confessed that she had killed her baby and that the story of the colored man was untrue. She admitted to tying the diaper around the baby's neck and mouth because the baby was being fussy. When she realized what she did, she conjured up the false story); *People v. Massip*, 271 Cal. Rptr. 868, 869 (Cal. Ct. App. 1990) (Massip later admitted to killing her baby at the police station).

75. MARION, *supra* note 70, at CRS-3.

76. March, *supra* note 4, at 255.

77. *Id.*

using an insanity defense, but as more postpartum cases begin to appear, courts and the public become more critical of postpartum depression cases brought under the insanity defense fearing mothers might fake their insanity in order to avoid responsibility for the crime committed.⁷⁸

C. *The History of Postpartum Depression as an Insanity Defense*

Postpartum depression was first raised under the insanity defense in *People v. Skeoch* in 1951.⁷⁹ *People v. Skeoch* is a clear illustration of how stressors, such as poverty, can lead to postpartum depression, and can eventually result in infanticide.⁸⁰ On August 18, 1949, at about 9:40 P.M., Dorothy Skeoch went to her neighbor's apartment asking for help because something was wrong with her baby.⁸¹ The neighbor went back with Skeoch and found a lifeless baby lying on the bed with a diaper wrapped around its mouth and neck.⁸² Skeoch told her neighbor that a "colored" man had come into her apartment demanding money and had taken her watch.⁸³ The police and doctor were called, and it was determined that the baby died from strangulation.⁸⁴ Skeoch told the police the same story she told her neighbor. She added that she had fainted while the man was in her apartment, and when she regained consciousness, she found her baby with a diaper wrapped around its neck.⁸⁵ After the police recovered Skeoch's watch from a suitcase, Skeoch confessed that she had actually killed her baby, and that the story of the colored man was untrue.⁸⁶ She admitted to tying the diaper around the baby's neck and mouth because the baby was being fussy, and when she realized what she did, she conjured up the false story.⁸⁷ Skeoch also confessed to killing her baby due to serious financial problems with her husband, bad relationships with her parents, and her husband's inability to keep a job.⁸⁸ A jury found her guilty of murder and sentenced her to the Illinois penitentiary for fourteen years.⁸⁹

During Dorothy Skeoch's trial, an expert in neurology and psychiatry testified on her behalf.⁹⁰ He opined that Skeoch was suffering from a mental disorder, specifically postpartum psychosis, at the time she took her daughter's

78. Michael L. Perlin, "The Borderline Which Separated You from Me": *The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1408, 1412 (1997) (citing Amy Westfeldt, *Insanity Defense Rare, Very Hard to Prove*, Rocky Mtn. News (Colo.), Feb. 11, 1996, at 42A (quoting Dr. Neal Blumberg)).

79. 96 N.E.2d 473 (Ill. 1951).

80. *Id.* at 475-76.

81. *Id.* at 473-74.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 475-76.

89. *Id.* at 473.

90. *Id.* at 475.

life, and that such a disorder often occurred following the birth of a child.⁹¹ Signs of Skeoch's mental illness before she gave birth supported this argument. In a letter to her parents she wrote she was despondent and that "sometimes I feel like turning on the gas and forgetting everything."⁹² On appeal the Supreme Court of Illinois reversed the conviction and remanded it for a new trial.⁹³ The court held that the state failed to offer any evidence that might have proven that Skeoch was sane at the time she committed the crime.⁹⁴

D. Court Rulings after *People v. Skeoch*

People v. Skeoch opened the doors of the courtroom for the use of the insanity defense in other postpartum infanticide cases. One famous case, *State v. White*, involved Janet White and her three month old daughter.⁹⁵ On the afternoon of February 18, 1967, White was changing her daughter, when she all of a sudden threw her baby on the floor.⁹⁶ White picked up her daughter and placed her back in her crib.⁹⁷ The baby died of blood clotting caused by a skull fracture to the left side of her head.⁹⁸ At trial, the main issue explored was White's sanity at the time she threw her daughter on the floor.⁹⁹ Although there was disagreement between two expert witnesses as to whether or not White could have distinguished right from wrong at the time of the incident, she was found not guilty of voluntary manslaughter by reason of insanity.¹⁰⁰ Instead of adhering to the M'Naughtan rules, the Idaho trial court instructed the jury to use the test of criminal responsibility set forth in the American Law Institute's Model Penal Code.¹⁰¹

91. *Id.*

92. *Id.* at 474.

93. *Id.* at 475-76.

94. *Id.*

95. 456 P.2d 797 (Idaho 1969).

96. *Id.* at 798.

97. *Id.*

98. *Id.*

99. *Id.* at 799.

100. *Id.*

101. *Id.* at 802. The test of criminal responsibility set forth in the ALI Model Penal Code states the following:

Section 4.01. Mental Disease or Defect Excluding Responsibility.

(1) 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 [or to conform his conduct] to the requirements of law.

(2) As used in this Article, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."

Id. at 800.

White's case is similar to Skeoch's in that both women were married at a young age, became mothers at a young age, and had to rely on their husbands for financial support while they took care of the household.¹⁰² At age nineteen, White had already given birth to her second child.¹⁰³ Implicates can be drawn that White may have already been depressed from the birth of her first child, and her current depressive state was simply a continuation from that birth.¹⁰⁴

Not all states followed in Idaho and Illinois' lead. States such as California, in the case of *People v. Massip*, continued into the 1990s to ignore postpartum depression in criminal law by failing to incorporate it into their insanity defense statutes.¹⁰⁵ *People v. Massip* shows how postpartum depression fails yet again to satisfy the insanity defense test. Shortly after giving birth to her son, Michael, Sheryl Massip became overwhelmed with caring for him.¹⁰⁶ Massip felt worthless as she tried to alleviate the illness her son experienced.¹⁰⁷ On April 29, 1987, Massip took her son out for a walk to try to stop his crying, but ended up putting him under the tire of her car and driving over him.¹⁰⁸ Massip told her husband that Michael had been kidnapped, but at the police station she admitted to killing the baby.¹⁰⁹ Michael was later discovered in a garbage can.¹¹⁰ Massip entered dual pleas of not guilty to second-degree murder and not guilty to second-degree murder by reason of insanity.¹¹¹ The jury returned a verdict of guilty, with findings that Massip was sane at the time of the incident.¹¹² After hearing Massip's motion for a new trial, the judge substituted his own finding of insanity for the jury's finding of sanity, entered a reduced verdict of voluntary manslaughter, and ordered Massip to participate in an outpatient treatment program.¹¹³

People v. Massip illustrates the complexities of relying on postpartum depression in the courtroom. Court rulings are inconsistent and the defense will often discriminate against women who suffer from such an atrocious mental disturbance.

One of the most talked about postpartum depression cases of our time is that of Andrea Yates. Its popularity stems from the simple fact that Yates, who lived a normal life with a loving husband, drowned not one, but all five of her young children.¹¹⁴ Additionally, Yates faced the death penalty as she stood

102. *Id.* at 798.

103. *Id.*

104. *Id.*

105. See *People v. Massip*, 271 Cal. Rptr. 868 (Cal. Ct. App. 1990).

106. *Id.* at 868-69.

107. *Id.* at 869.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *State v. Yates*, 171 S.W.3d 215, 216 (Tex. App. 2005); see also *Not Guilty*, *supra* note 68.

trial.¹¹⁵ In March of 2002, the jury found Yates guilty of murdering her five children, ages six months to seven years old.¹¹⁶ Despite evidence of two suicide attempts, a postpartum psychosis diagnosis, and the discontinuation of her psychosis medication by her doctor just two weeks prior to the killing of her five children, she received life in prison under the current insanity test in Texas.¹¹⁷ A Texas appeals court in early 2005 reversed the capital murder convictions of Andrea Yates and the case was ordered for retrial.¹¹⁸ In 2006, Yates was found not guilty by reason of insanity and was committed to a state mental hospital.¹¹⁹

E. Why Postpartum Depression as an Insanity Defense is Unsatisfactory

When it comes to the use of the insanity defense for postpartum depression cases, the public is a bit skeptical.¹²⁰ "Studies of cases of infanticide over the past 450 years indicate 'that community sentiment changes across the span, resembling a roller coaster – moving from a lenient-to-moderate period to a severe period, then changing to a very lenient period, which continues well into this century.'"¹²¹ This community sentiment trend can be observed in the above mentioned postpartum depression cases. For example, the jury in *State v. White* was more sympathetic to Janet White,¹²² than the jury in *Texas v. Yates* was to Andrea Yates. And had the jury not been erroneously instructed in the earliest case, *People v. Skeoch*, a jury verdict of not guilty may have also been entered for Skeoch.¹²³ One juror sitting on the Yates' case rejected the insanity

115. *Andrea Yates Case: Texas Mother Gets Life in Prison*, CNN.com, Dec. 31, 2007, available at <http://www.cnn.com/2007/US/law/12/11/court.archive.yates1/index.html?iref=newssearch>.

116. *Id.*

117. *Not Guilty*, *supra* note 68.

118. *Id.*

119. *Id.*

120. See generally, Associated Press, *4 Yates Jurors: Confession, Photos Key to Verdict*, WASH. POST, Mar. 18, 2002, at A18 [hereinafter *4 Yates Jurors*].

121. Susan Ayres, "[N]ot a story to pass on": *Constructing Mothers Who Kill*, 15 HASTINGS WOMEN'S L.J. 39, 72 (2004), (citing Norman J. Finkel et al., *Commonsense Judgments of Infanticide Murder, Manslaughter, Madness, or Miscellaneous*, 6 PSYCHOL. PUB. POL'Y & L. 1113, 1115 (2000)).

122. See *State v. White*, 456 P.2d 797, 799 (Idaho 1969) (under the instructions given by the judge, the jury found White not guilty of voluntary manslaughter by reason of insanity).

123. *People v. Skeoch*, 96 N.E.2d 473, 475 (Ill. 1951) ("the court erroneously instructed the jury that 'in order to find the defendant not guilty on the ground of insanity, such insanity must be so clearly proven as to raise a reasonable and well-founded doubt of defendant's guilt when the whole evidence is taken together.' An almost identical instruction was condemned by this court in *People v. Krauser*, 315 Ill. 485, 517, where we observed: 'The use of the words "clearly proven," in the instruction, was erroneous. So was the use of the word "well-founded" in connection with reasonable doubt. * * * The law gives the defendant the right to an acquittal if there is a reasonable doubt of his guilt. If a reasonable doubt actually exists, it is sufficient whether well or ill-founded.'").

defense saying "[Yates] knew exactly what she was doing, and she knew it was wrong."¹²⁴

Empirical research indicates that the public does not buy the mental illness defense for illegal behavior, nor is the public confident in medicine's ability to diagnose mental illness.¹²⁵ The public believes that people who use the insanity defense are getting away with murder because these people can easily fake their insanity in order to avoid criminal responsibility.¹²⁶ Furthermore, the basis behind the fear of faking insanity lies in the inability of the defense to prove through observable evidence that the defendant is really insane.¹²⁷ Yet, this fear is unfounded because there has been no evidence that false insanity has ever been a problem for the criminal justice system.¹²⁸

III. THE DISPARATE IMPACT

A. *Postpartum Depression and Women Living in Poverty*

Research concerning the relationship between women living in poverty and postpartum depression is limited, but such research is essential to the development of sound policies for the criminal justice system. According to the 2006 U.S. Census Bureau, over 5.5 million or 22.2% of females in the U.S. lived in poverty compared to 4.3 million or 17.8% males.¹²⁹ The percentage of ethnic minorities living in poverty is almost triple that of the majority Whites.¹³⁰ According to the Women's Health USA 2004 report issued by the Health Resources and Services Administration of the U.S. Department of Health and Human Services, "[t]he earnings of White females were greater than those of both Black and Hispanic females by 15.8 and 38.6 percent, respectively."¹³¹

Postpartum depression affects ten to fifteen percent of women who give birth, and for women living in poverty, this percentage jumps up to twenty-eight percent.¹³² A research report published in the *Journal of Epidemiology and Community Health* looked at whether race/ethnicity, age, finances, and

124. 4 *Yates Jurors*, *supra* note 120.

125. Perlin, *supra* note 78, at 1403, 1412.

126. *Id.* at 1408 (citing Amy Westfeldt, *Insanity Defense Rare, Very Hard to Prove*, *Rocky Mtn. News* (Colo.), Feb. 11, 1996, at 42A (quoting Dr. Neal Blumberg)).

127. *Id.* at 1408.

128. *Id.* at 1409 (citing Elizabeth Goldstein, *Asking the Impossible: The Negligence Liability of the Mentally Ill*, 12 J. CONTEMP. HEALTH L. & POL'Y 67, 75 (1995)).

129. U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2006 12 (2007), available at <http://www.census.gov/prod/2007pubs/p60-233.pdf>.

130. *Id.* The 2006 U.S. Census also indicated that four million female householders with no husbands (28.3%) were living in poverty. *Id.*

131. U.S. DEPT. OF HEALTH AND HUMAN SERVICES, WOMEN'S HEALTH USA 2004 CHPT. I (2004), available at <http://mchb.hrsa.gov/whusa04/pages/ch1.htm>.

132. Wilen & Mounts, *supra* note 16.

partnership status were associated with antenatal and postpartum depression symptoms.¹³³ The report concluded that “[p]overty [was] a major predictor of major depression, with incidence rates two to three times higher among lowest socioeconomic groups.”¹³⁴ The report also indicated that financial hardship was a risk factor of whether or not women had experienced prior depressive symptoms, suggesting that poverty actually precedes postpartum depression, rather than the alternative that depression leads to poverty.¹³⁵ Poverty is a risk factor for postpartum depression because women living in poverty are often burdened with additional stressors such as financial difficulties, unemployment, and low education.¹³⁶ Furthermore, a study done by Susan Hatters Friedman, Sarah McCue Horwitz, and Phillip Resnick indicated that mothers both inside and outside the United States who committed filicide or infanticide led lives with a common pattern of “powerlessness, poverty, and alienation.”¹³⁷ Although their study revealed that common characteristics of poverty, powerlessness, and alienation were present among the women studied, the area of maternal filicide was actually lacking in research with very little known about its predictors.¹³⁸

B. *A Narrow Insanity Defense Disparately Impacts Women Living in Poverty*

The general public often lumps postpartum depression in with the catch-all “new mother issues” used to describe what many mothers experience after birth.¹³⁹ The general public’s misconception tends to put postpartum depression on a severity level equivalent to these other issues which is inaccurate since postpartum depression is much more severe.¹⁴⁰ The reality is that not all women suffer from postpartum depression right after giving birth.¹⁴¹ The composition of new mother issues and postpartum depression are distinguishable in the following ways: new mother issues consist of childbearing issues, work and motherhood balancing dilemmas, and the difficulties new mothers face in rearranging their lives to accommodate the new baby;¹⁴² whereas, postpartum depression centers around mental instability,¹⁴³ which can become a life

133. Rich-Edwards, *supra* note 6, at 221.

134. *Id.*

135. *Id.* at 226.

136. *See id.*

137. Friedman, *supra* note 61, at 1582.

138. *Id.*

139. Amie Newman, *Speaking up About Postpartum Depression*, RH Reality Check, Nov. 6, 2007, <http://www.rhrealitycheck.org/blog/2007/11/06/speaking-up-about-postpartum-depression> (last visited Apr. 20, 2009).

140. *See generally, id.*

141. Wilen & Mounts, *supra* note 16.

142. *See* IndiaParenting.com, New Mom Issues, http://www.indiaparenting.com/pregnancy/data/preg33_07.shtml (last visited Jan. 30, 2008); *see also* Newman, *supra* note 139.

143. APA, *supra* note 1.

threatening issue if untreated.¹⁴⁴ As a result, such misconceptions can put women suffering from postpartum depression in infanticide cases at a disadvantage because such cases are tried in front of a jury comprised of people with these misconceptions.

From a legal perspective, not only is the public against these women when it comes to asserting a defense for postpartum depression, but in theory, so are the many jurisdictions that still maintain the narrow M'Naughtan insanity defense test. Not surprisingly, the women who will be most affected are those who are unable to obtain preventive healthcare.¹⁴⁵ The Wisconsin Medical Journal states that "[p]romoting awareness and providing information about postpartum depression, along with the implementation of a screening and referral protocol, can reduce the high rates of under-diagnosis associated with this disorder and can help women obtain the evaluation and treatment necessary at this critical time."¹⁴⁶ Additionally, the aforementioned Japanese study concluded that the best way to determine whether there is a need for treatment of postpartum depression is to have early contact with a psychiatrist.¹⁴⁷ Given that these are the most effective ways to reduce the risk of depression among new mothers, mothers living in poverty are disparately impacted because they will be uneducated on this disorder, will have limited access to screenings for early diagnosis, and usually cannot afford quality screenings.

1. Women Living in Poverty are Uneducated about Postpartum Depression

Prenatal and pregnancy education for new mothers is highly recommended by doctors because it can help prevent and prepare a new mother for pregnancy and the effects afterwards.¹⁴⁸ Dr. Sarah Allen, Chairwoman of the Postpartum Alliance of Illinois, explained that it is difficult to treat women with postpartum depression because they are "confused about where to get help" and they "lack the education" to seek and receive help.¹⁴⁹ Mothers living in poverty tend to be less educated about mood disorders than middle or upper class mothers.¹⁵⁰ This in turn affects whether these mothers get screened for postpartum depression, how they raise their children, and what sorts of stressors they will encounter. Additionally, there is a higher prevalence of depressive symptoms among mothers who are less educated and untreated.¹⁵¹

144. See DALTON, *supra* note 20, at 29; see BECK, *supra* note 17, at 4.

145. See Rich-Edwards, *supra* note 6.

146. Jennifer Perfetti, et al., *Postpartum Depression: Identification, Screening, and Treatment*, 103 WISC. MED. J. 56 (2004).

147. BECK, *supra* note 17, at 25.

148. Perfetti, *supra* note 146, at 56; see BECK, *supra* note 17, at 25.

149. Amy Smith, *Postpartum depression affects millions*, available at http://mesh.medill.northwestern.edu/mnschicago/archives/2004/06/postpartum_depr_2.html (last visited Oct. 15, 2007).

150. Esther K. Chung, et al., *Maternal Depressive Symptoms and Infant Health Practices Among Low-Income Women*, 113 PEDIATRICS e523, e523 (2004).

151. Rich-Edwards, *supra* note 6, at 223.

As a result, mothers living in poverty are more susceptible to postpartum depression. Such susceptibility could in turn increase the likelihood that a mother living in poverty might engage in criminal activity or commit infanticide.

2. Women Living In Poverty Have Little or No Access to Clinics or Physicians Who Can Diagnose Postpartum Depression

Screenings are the best method of ensuring proper treatment of postpartum depression.¹⁵² When access to clinics and physicians that conduct such screenings are limited, women in poverty-stricken areas are at a disadvantage. Research shows that “[w]hile the United States may have cutting-edge medical technologies, many people lack access to such advanced care, limiting any positive health impact.”¹⁵³ A study at the University of California indicated that the disparities in access and utilization of quality healthcare may be a reflection of the disproportionate number of culturally competent health professionals and their distribution in the community relative to the need.¹⁵⁴ Government reports issued in January of 2007 specifically stated that minorities, the poor, and the uninsured in the United States are missing out on the preventive screening and counseling they need.¹⁵⁵ Although, the government reports focused on diabetes, obesity, cancer, and asthma, postpartum depression screenings can also fall into the preventive care category because it is an illness that can be prevented if discovered.¹⁵⁶

3. Screenings are not always affordable or effective

Even if women living in poverty had access to screenings and physicians, a narrow insanity defense test would still disparately impact them since screenings are not always affordable or effective.¹⁵⁷ In a situation where a low

152. Smith, *supra* note 149.

153. Victoria Colliver, *We Spend Far More, But Our Health Care is Falling Behind – Australia, Canada, Germany, New Zealand, U.K. Spend Less and Do Better Job*, *Studies Say*, S.F. CHRON., July 10, 2007, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2007/07/10/MNGNUQTQJB1.DTL>.

154. Michael R. Cousineau & Gregory D. Stevens, *Disparities in Health in the United States*, at 3-4, available at <http://www.usc.edu/programs/healthcollaborative/pdf/DisparitiesConceptPaper.pdf> (last visited Nov. 14, 2007).

155. Associated Press, *Millions Miss Out on Preventive Health Screenings*, reprinted in ARIZ. DAILY STAR, Jan. 12, 2007, <http://www.azstarnet.com/allheadlines/164269.php> [hereinafter *Millions*].

156. See Perfetti, *supra* note 146, at 56; see BECK, *supra* note 17, at 25.

157. See Dwenda K. Gjerdingen et al., *Postpartum Depression Screening: Importance, Methods, Barriers, and Recommendations for Practice*, 20 J. AM. BD. FAM. MED. 280 (2007), available at <http://www.jabfm.org/cgi/content/full/20/3/280>; see BARBARA CIARAMITARO, *HELP FOR DEPRESSED MOTHERS* 115 (1st ed. 1978); see Sylva Berkley-Zander, *Certified Nurse-Midwives' Beliefs About and Screening Practices for Postpartum*

Secondly, adopting a broad insanity test would demonstrate that the criminal justice system encourages rehabilitation for individuals with recognized mental disorders, and not just punishment. Postpartum depression has been recognized as an illness since the fourth century B.C.,¹⁷⁹ and the rates of postpartum depression are high enough that it requires legislative action.

The criminal justice system can work in many ways to provide punishment, rehabilitation, retribution, and deterrence for its citizens. For insanity and postpartum depression cases, rehabilitation should be encouraged because individuals who have such an illness cannot and will not be treated by incarceration alone. Although many would view incarceration as sufficient, one must remember that these are individuals who are suffering from mental disorders. Incarcerating them would in no way deter other individuals with the same mental defect from committing similar crimes since it is their capacity to think before committing a crime that is unstable.¹⁸⁰ They might not be able to control their actions, even if they know that the conduct is wrong. Additionally, these women would not be a danger to society as a whole considering that their crimes are isolated incidents toward their child. As a result, rehabilitation would better ensure that the individual convicted of a crime receives the necessary medical attention and treatment needed for recovery.

IV. EE LEE'S STORY

Ee Lee's story is important to the understanding of the effects of poverty on postpartum depression cases. It highlights the disparity in the legal system that exists for poor women with postpartum depression compared to middle or upper-class women with postpartum depression.

A. *The Woman and Mother*

Ee Lee's story necessitates a look at the history and background of the Hmong in America. The Hmong are an ethnic minority group originally from the highlands of Laos.¹⁸¹ During the Vietnam War, the Hmong were recruited to be a part of the "CIA-trained militia that helped dismantle communist supply lines."¹⁸² The United States promised safety for the Hmong if it was defeated.¹⁸³ But after the United States lost the war to the Communist Vietnamese, it pulled out of Vietnam and left the Hmong people in Laos.¹⁸⁴ Throughout the decade

179. March, *supra* note 4, at 246.

180. APA, *supra* note 1.

181. See generally, JANE HAMILTON-MERRITT, TRAGIC MOUNTAINS: THE HMONG, THE AMERICANS, AND THE SECRET WARS FOR LAOS, 1942-1992 4-5 (Ind. Univ. Press 1999).

182. Kate McGeown, *Laos' Forgotten Hmong*, BBC NEWS, July 2, 2003, available at <http://news.bbc.co.uk/2/hi/asia-pacific/3031116.stm>.

183. Hmong Resettlement Task Force – Fresno California, History of the Hmong Resettlement Task Force, available at <http://www.centralcallegal.org/hrtf/history/index.html>.

184. *Id.*

following the Vietnam War, the United States has accepted and resettled a limited number of Hmong immigrants.¹⁸⁵ Since resettling in the United States, Hmong families continue to be the most impoverished Asian ethnic group in America, holding the lowest average per-person income of any ethnic group.¹⁸⁶ Approximately eighty percent of Hmong immigrants live below the poverty line.¹⁸⁷ The history and current status of Hmong in America is crucial to the understanding of how postpartum depression has affected an impoverished woman's life.

Ee Lee (Lee) was 23 years old at the time of the incident.¹⁸⁸ Currently, Lee's immigration status is unknown,¹⁸⁹ but like most Hmong Americans, Lee possibly resettled in the United States as a refugee after the Vietnam War. Lee grew up in California and moved to Madison, Wisconsin after marrying her husband, a factory worker.¹⁹⁰ In June of 2007, they had two children together, a two year old boy and a six week-old daughter.¹⁹¹ Since her arrival in Madison six years ago, Lee and her family had been living with her in-laws in a shared home.¹⁹²

B. *The Crime*

Lee gave birth to Anastasia Vang on June 3, 2007.¹⁹³ On June 26, 2007, Lee and her in-laws brought Anastasia to Meriter Hospital for some minor bruising that the mother-in-law noticed on Anastasia's face and body.¹⁹⁴ During her stay at Meriter, Anastasia was given a head CT scan which produced negative evidence of "bleeding, skull fracture, or brain parenchymal injury."¹⁹⁵ After the scan, Anastasia was put in the care of Dr. Knox at the University of Wisconsin Children's Hospital.¹⁹⁶ Noticing the bruises on Anastasia, Dr. Knox questioned Lee and her in-laws.¹⁹⁷ Dr. Knox noted that "the bruising in this

185. *Id.*

186. Press Release, Southeast Asia Resource Action Center, Not the "Model Minority" (May 4, 2003), available at <http://www.searac.org/pr-2000-census.html> (according to the 2000 U.S. Census Bureau).

187. Kristina Canizares, *A Community of Farmers: Hmong American Community*, Oxfam America, Feb. 5, 2003, available at http://www.oxfamamerica.org/whatwedo/where_we_work/united_states/news_publications/art4163.html.

188. *Mother Charged in Abuse, Death of Baby*, Channel 3000, July 18, 2007, available at <http://www.channel3000.com/news/13693123/detail.html> [hereinafter *Mother Charged*].

189. *Id.*

190. *DA: Mother Abused, Killed 6-week-old Girl*, Channel 3000, July 14, 2007, available at <http://www.channel3000.com/news/13680843/detail.html> [hereinafter *DA*].

191. *Id.*

192. *Id.*

193. State of WI Circuit Court Criminal Complaint 1 (2007) [hereinafter *Complaint*].

194. *Id.* at 2.

195. *Id.* at 3.

196. *Id.* at 2.

197. *Id.*

infant is highly concerning for child physical abuse.”¹⁹⁸ It was at this point that Dr. Knox referred the case to Dane County Human Services for formal safety planning.¹⁹⁹ Dane County Human Services arrived that day and arranged a safety plan which allowed Anastasia to return back home “as long as two adult care providers agreed to be present and awake with the child at all times 24 hours per day.”²⁰⁰

On July 11, 2007, before Anastasia could return for her two week follow-up with Dr. Knox, she was found dead in her home and immediately brought to Meriter Hospital.²⁰¹ “Court documents stated that Lee admitted to repeatedly pinching the baby, hitting her with a flyswatter, and eventually slamming Anastasia’s head on a bedroom table.”²⁰² In the criminal complaint, an investigation indicated that Lee pinched Anastasia often and wherever she could and when the bruises would fade, Lee would pinch her again.²⁰³ Lee admitted that the blows to Anastasia’s head were a result of her slamming Anastasia’s head on her bedroom table twice using all of her might.²⁰⁴ Lee stated that she did this approximately two weeks before Anastasia’s death.²⁰⁵ Lee additionally admitted that on the date of Anastasia’s death, she rolled up a blanket and stuffed part of it into Anastasia’s mouth, while using the other part to cover Anastasia’s nose.²⁰⁶ Lee left Anastasia in this condition for approximately twenty-five minutes while she changed and used the bathroom.²⁰⁷ Upon returning to where Anastasia was laying, Lee noticed that Anastasia was not breathing.²⁰⁸ Lee told the detectives that she administered CPR for five minutes.²⁰⁹ After having no success, Lee brought Anastasia to her mother-in-law.²¹⁰

C. *The Public Response*

Lee was taken into custody two days after the discovery of Anastasia’s body for suspicion of physical abuse to a child and homicide.²¹¹ Lee made her first court appearance on Friday, July 13, 2007.²¹² The public’s response to Anastasia’s death is important to the analysis of what the District Attorney

198. *Id.* at 3.

199. *Id.*

200. *Id.*

201. *Id.* at 3-4.

202. *Mother Charged*, *supra* note 188.

203. Complaint, *supra* note 193, at 6.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. DA, *supra* note 190.

212. *Id.*

(DA) chose to charge Lee with. When a DA charges an individual alleged of committing a crime, the DA should take into account the seriousness of the offense, the likelihood of conviction, and the types of consequences that will occur for the defendant as a result of the charges.

When the media covered Lee's story, they painted her as a murderer who intentionally killed her six week old daughter.²¹³ No media coverage mentioned the possibility of postpartum depression having any effect on Lee.²¹⁴ Comments posted to online media web pages best portray the public's disapproval and disgust toward the behavior of Lee.²¹⁵ Anticipating such responses from the public, the DA charged Lee with four felony counts of child abuse under Wisconsin law.²¹⁶ Wisconsin's sentencing structure is bifurcated, which means any person convicted of a felony after December 31, 1999, or a misdemeanor after February 1, 2003, will be sentenced to a period of confinement followed by a period of extended supervision, based on the classification of their crime.²¹⁷ First, Lee was charged with two counts of Child Abuse-Intentionally Cause Harm,²¹⁸ which are class H felonies under Wisconsin Statutes section 948.03(2)(b).²¹⁹ For a class H felony, Lee could receive a sentence of up to six years;²²⁰ three years confinement²²¹ and three years extended supervision.²²² Lee was also charged with one count of First Degree Recklessly Endangering Safety,²²³ which is a class F felony under section 941.30(1).²²⁴ For a class F felony, Lee could receive a sentence of up to twelve years and six months;²²⁵ seven years and six months confinement²²⁶ and five years extended supervision.²²⁷ Lastly, Lee was charged with one count of First Degree Intentional Homicide,²²⁸ which is a class A felony under section 940.01(1)(a).²²⁹ For a class A felony, Lee could be sentenced to life imprisonment.²³⁰ The determination of the extended supervision period for a

213. See *id.*; see also *Mother Accused of Killing Baby*, 15 News WMTV, Nov. 9, 2007, available at <http://www.nbc15.com/home/headlines/8463102.html> [hereinafter *Mother Accused*].

214. *Mother Accused*, *supra* note 213.

215. *Id.*

216. CCAP, *supra* note 11; see also DA, *supra* note 190.

217. Wis. STAT. § 973.01 (2006).

218. CCAP, *supra* note 11.

219. Wis. STAT. § 948.03(2)(b); see also CCAP, *supra* note 11.

220. Wis. STAT. § 939.50(3)(h).

221. § 973.01(2)(b)(8).

222. § 973.01(2)(d)(5).

223. CCAP, *supra* note 11.

224. Wis. STAT. § 941.30(1); see also CCAP, *supra* note 11.

225. Wis. STAT. § 939.50(3)(f).

226. § 973.01(2)(b)(6m).

227. § 973.01(2)(d)(4).

228. CCAP, *supra* note 11.

229. Wis. STAT. § 940.01(1)(a); see also CCAP, *supra* note 11.

230. Wis. STAT. § 939.50(3)(a).

person who is punishable under a class A felony is left up to the discretion of the court.²³¹ In addition to the DA's charges, the judge set Lee's cash bail at \$50,000.²³²

D. Analysis

The presence of postpartum depression in Lee's case is obvious. According to postpartum depression research²³³ and based on media stories and Lee's criminal complaint, Lee seemed to have possessed all the qualities of a mother who was suffering from postpartum depression at the time of Anastasia's death.²³⁴ Katharine Dalton writes in her book that "[r]ejection of the baby and hostility towards him, is [a] problem which may arise in postnatal depression."²³⁵ Furthermore, the onset of postpartum depression is usually within the first four weeks after delivery.²³⁶ Lee confessed to detectives that right when she brought Anastasia home, she immediately began pinching Anastasia.²³⁷ Lee's hostility toward Anastasia continued and worsened until Anastasia's death in July.²³⁸ Dalton indicates that although in the past, it used to be thought that a mother's inability to love her newborn could lead to her depressive state, in actuality, the opposite is true.²³⁹ It is really the depression that takes over the mother, interfering with the mother's love for her baby.²⁴⁰ Through an interpreter, Lee told investigators that from what she is able to comprehend, she can, and only has love for one child.²⁴¹ Because she already has a two year old son, her love could only be devoted to him.²⁴² Dalton adds that "[t]he feelings of rejection also give rise to unpleasant feelings of guilt, so that it becomes a deep secret, and may be hidden from those nearest and dearest to her. It calls for careful consideration and sympathetic handling by the husband and other members of the family."²⁴³ In Lee's case, she told investigators that since she came to live with her in-laws, she felt inadequate, like she could not take care of her family, that she had been under a lot of stress, and that she regretted causing injury to her baby.²⁴⁴ Lee additionally

231. § 973.014(1)(g).

232. DA, *supra* note 190.

233. BECK, *supra* note 17, at 4; DALTON, *supra* note 20, at 29.

234. See DA, *supra* note 190; see also *Mother Accused*, *supra* note 213; Complaint, *supra* note 193.

235. DALTON, *supra* note 20, at 29.

236. BECK, *supra* note 17, at 4.

237. Complaint, *supra* note 193, at 6.

238. *Id.* at 5-6.

239. DALTON, *supra* note 20, at 29.

240. *Id.*

241. Complaint, *supra* note 193, at 7.

242. *Id.*

243. DALTON, *supra* note 20, at 30.

244. Complaint, *supra* note 193, at 5.

stated during further interviewing, that everyone was doing “mean things” to her and she did not have anyone to do it to but Anastasia.²⁴⁵

In November of 2007, Lee was found mentally incompetent to stand trial, since she could not understand the legal proceedings that were against her.²⁴⁶ The court halted all legal proceedings while Lee received the necessary treatment to help her understand.²⁴⁷ Lee is a perfect example of a woman living in poverty who is now suffering from the effects of postpartum depression. Her impoverished state is identified by her background as a Hmong American immigrant and by her indigent status in the criminal justice system, qualifying her for a public defender.²⁴⁸ Had Lee received the necessary care and screening before and after her pregnancy, the tragic death of Anastasia may have been prevented. The first time Anastasia was brought to the hospital, doctors only recognized that there may child abuse, but they never questioned the possibility of postpartum depression coming into play.²⁴⁹ All Lee can do now is wait to stand trial. Whether the defense of postpartum depression will be brought up under Wisconsin’s narrow insanity defense, and accepted by the jury and judge, is still unknown.

This article proposes that Lee’s case be treated as a postpartum depression case, allowing Lee’s defense attorneys to advance an insanity defense. It also proposes that the court not solely rely on the criminal act that took place, but also take into consideration Lee’s background and all the circumstantial factors that may have caused Lee to kill her own child. This article proposes that the court consider the consequences of incarceration and whether it will wholly resolve a situation like Lee’s. Should incarceration not fully accomplish the goals set out by Congress, the court should seek out all possible rehabilitative measures needed by Lee.

V. CONCLUSION

Scholars, physicians, and courts have agreed that postpartum depression in the criminal justice system is an issue that can no longer be ignored.²⁵⁰ Both women and children need protection from this mental illness that incarceration alone cannot provide.²⁵¹ There is a need to end infanticide, but that need stems from the core issue of preventing mothers from having to experience

245. *Id.* at 7.

246. *Ee Lee Found Mentally Incompetent*, Suab Hmong Radio, Nov. 9, 2007, available at http://shrdo.com/index.php?option=com_content&task=view&id=80&Itemid=2.

247. *Id.*

248. CCAP, *supra* note 11.

249. Complaint, *supra* note 193, at 3.

250. See March, *supra* note 4, at 243; see Michelle Oberman, “Lady Madonna, Children at Your Feet”: Tragedies at the Intersection of Motherhood, Mental Illness and the Law, 10 WM. MITCHELL L. 33 (2003); see Laura E. Reece, Comment, *Mothers Who Kill: Postpartum Disorders and Criminal Infanticide*, 38 UCLA L. REV. 699 (1991); see Meagan Parrish, *A Hidden Disease in Our Culture*, Isthmus – The Daily Page (Madison, Wis.), Sept. 20, 2007, available at <http://www.thedailypage.com/isthmus/article.php?article=8514>.

251. March, *supra* note 4, at 260-63.

income woman cannot afford the proper screening, she is already at a disadvantage for receiving quality healthcare because she will likely opt for the least expensive method of healthcare.¹⁵⁸ Or, she may even opt for no screening at all if she is unaware of the effects of postpartum depression.¹⁵⁹ Additionally, a successful and effective screening requires more than one visit with the physician, which usually means more money that these women do not have.¹⁶⁰

Although screening may be recognized as the best way to diagnose postpartum depression, it also seems to be the only way of detecting postpartum depression. As a result, it may not always be effective since there seems to be no alternative method to check the accuracy of the diagnosis. Additionally, "[m]ost women who are depressed after giving birth receive little or no treatment for their depression either because they are too ashamed to admit to their 'unnatural' feelings or because their doctors minimize the importance of their complaints."¹⁶¹ One study done at the University of Connecticut School of Nursing showed that only two-thirds of nurses who are formally trained about postpartum depression are confident that they would recognize postpartum depression.¹⁶² Furthermore, because only a little more than half of the surveyed nurses reported that they were familiar with available screening tools, there is a possibility that their use of the tools may produce inaccurate results.¹⁶³

C. *The Disparate Impact on Women Living in Poverty Warrants a Broad Insanity Defense Test*

Because mothers living in poverty are uneducated on postpartum depression,¹⁶⁴ have limited access to clinics to get screened for postpartum depression,¹⁶⁵ and are unable to afford quality screenings,¹⁶⁶ they are at a disadvantage compared to higher income women. Consequently, criminal conduct, specifically infanticide, can occur as a result of undiagnosed and untreated postpartum depression.¹⁶⁷

Many fear that broadening the insanity defense to include postpartum depression will create and may have already created a slippery slope where mothers can be excused of their criminal activity simply by claiming

Depression: A Descriptive Study, SCH. NURSING SCHOLARLY WORKS 9 (2006), available at http://digitalcommons.uconn.edu/cgi/viewcontent.cgi?article=1040&context=son_articles.

158. See generally, Berkley-Zander, *supra* note 157.

159. See Smith, *supra* note 149; see Chung, *supra* note 150, at e523-29.

160. Gjerdingen, *supra* note 157, at 280-88.

161. CIARAMITARO, *supra* note 157, at 115.

162. Berkley-Zander, *supra* note 157, at 11.

163. *Id.*

164. Chung, *supra* note 150, at e523-29.

165. Colliver, *supra* note 153; Millions, *supra* note 155.

166. See Gjerdingen, *supra* note 157, at 280-288; see CIARAMITARO, *supra* note 157, at 115; see Berkley-Zander, *supra* note 157, at 9.

167. See DALTON, *supra* note 20, at 29; see BECK, *supra* note 17, at 4.

insanity.¹⁶⁸ Critics of a broad insanity defense also believe that excusing the wrongdoer in infanticide cases is simply an act of condoning the crime.¹⁶⁹ Additionally, those not favoring a broad insanity defense test contend that "each case and the illness of each mother must be scrutinized under a strict insanity test such as M'Naughtan, in order to make a proper determination of sanity."¹⁷⁰ Still, others feel that women suffering from postpartum depression should not be treated any differently than women suffering from clinical depression.¹⁷¹ They feel that reducing the charges of postpartum women would give these women "preferential treatment, which is not afforded to non-childbearing individuals with depression."¹⁷²

Contrary to what these critics may believe, adopting a broad insanity test that includes postpartum depression has two important implications. First, the criminal justice system is not ignorant to disorders that limit mental capacity specifically affecting women, and second, the criminal justice system encourages rehabilitation, and not just punishment. Maintaining a justice system that is deferential to mental disorders specifically affecting women is important. A narrow insanity test would only further impact women who not only have to bear the burden of pregnancy, but who also have to deal with postnatal mental disorders that men never experience.¹⁷³ Furthermore, insanity may come in many shapes and forms. Postpartum depression has been recognized as a disorder affecting a woman's mental capacity after giving birth.¹⁷⁴ Insanity should no longer be limited to the M'Naughtan test. M'Naughtan is outdated because it only focuses on a single aspect of human nature: knowledge.¹⁷⁵ Times have changed. The field of psychiatry is now able to identify that volitional conduct can also determine a person's actions.¹⁷⁶ In addition, M'Naughtan fails to take into account the varying degrees of incapacity.¹⁷⁷ It only suggests that the defendant either knows right from wrong, or that she does not.¹⁷⁸ Such narrow insanity tests that still follow M'Naughtan need to be reformed in order to adapt to these changing times to ensure that mothers convicted of crimes reflecting their state of mind at the time the crime was committed are not only punished, but more importantly, rehabilitated.

168. Christine Ann Gardner, *Postpartum Depression Defense: Are Mothers getting Away with Murder?*, 24 NEW ENG. L. REV. 988 (1990).

169. *Id.* at 989.

170. *Id.*

171. Velma Dobson & Bruce Sales, *The Science of Infanticide and Mental Illness*, 6 PSYCH. PUB. POL. & L. 1098, 1107 (2000).

172. *Id.*

173. See APA, *supra* note 1.

174. *Id.*; see also March, *supra* note 4, at 255.

175. MARION, *supra* note 70, at CRS-3.

176. *Id.*

177. *Id.*

178. *Id.*

postpartum depression. Only when the core problem is addressed, will infanticide cease to exist.

Adopting a broad insanity defense that defines postpartum depression as a mental illness will give women living in poverty, who suffer from the depression, a means of rehabilitation. Because women living in poverty are at a disadvantage when it comes to obtaining postpartum depression education, having access to clinics and physicians, and affording quality screenings to help prevent postpartum depression, their chances of committing a crime are increased.

Although the physical changes that occur as a result of childbirth should not be the sole determining factor of why a woman kills her baby, each case should be allowed the proper scrutiny. A woman's prior depressive history can be an excellent predictor of her postnatal depressive disorder, but in the cases of women living in poverty, where there are no prior diagnoses, a depressive history would be unattainable. It would be unfair to say that only the most severely mentally ill mothers lose their capacity to make choices or express will. Even though postpartum depression is not the most severe mental illness amongst the three postpartum mood disorders, the APA's Diagnostic and Statistical Manual of Mental Disorders describes postpartum depressive episodes to include "changes in...psychomotor activity,...ability to think, ability to concentrate, and ability to make decisions; or recurrent thoughts of death or suicidal ideation, plans or attempts."²⁵² All these changes are severe enough to cause the person undergoing these changes to commit acts that violate the law. Additionally, inadequate social support from family members after a mother gives birth can perpetuate and enhance a mother's depressive disorder – a factor that is highly overlooked in postpartum depression cases.²⁵³

Furthermore, tests such as M'Naughtan have long been biased against women suffering from postpartum depression. Now it is most biased against those women who are poor and suffering from postpartum depression. This strict scrutiny test only looks at whether the person who committed the crime knew what he or she was doing, or knew that what he or she was doing was wrong at the time of the offense,²⁵⁴ in order to determine whether one was sane at the time of the crime.

It is true that when a crime has been committed the criminal must be brought to justice, but having a narrow insanity defense test does not fulfill this purpose. Justice for all not only encompasses the livelihood and safety of society, but it also includes the livelihood and safety of the criminal defendant. This means that an insanity defense test which supports not only punishment, but also rehabilitation for the ill-minded, would be most favorable and fair to all; victim, society, and offender.

252. BECK, *supra* note 17, at 4.

253. See generally, Newman, *supra* note 139.

254. SIMMONS, *supra* note 56, at 9.