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**WOMEN'S DEFENSES TO CRIMINAL
HOMICIDE AND THE RIGHT TO
EFFECTIVE ASSISTANCE OF COUNSEL:
THE NEED FOR RELOCATION OF
DIFFERENCE**

Laura E. Reece*

*The more the existing social reality of inequality is reflected in law — the more accurate the rule — the more the inequality is reinforced.*¹

INTRODUCTION

Women are marginalized in our criminal law, and the minimal attention women do receive focuses on women as victims.² Victimization even colors the infrequent academic treatment of female criminal homicide defendants:³ for example, battered women who

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1. MacKinnon, *Toward Feminist Jurisprudence*, 34 STAN. L. REV. 703, 732 (1982) (Book Review) (footnote omitted).

2. Serving as a filtering device, gender roles have frequently obscured researchers' interpretations of women's behavior in relation to the field of criminal justice. Victimologists, for example, have sometimes referred to women's presumed physical and emotional weaknesses in their analyses of female victimization

Portrayals of women involved with the criminal justice system . . . frequently function to reinforce the view of women as dependant, emotional, and in need of manly support. Furthermore, they help determine how women will be perceived and treated by guards, judges, juries, police, and (too often) analysts of the criminal justice system.

Rafter & Sanko, *Introduction*, in JUDGE, LAWYER, VICTIM, THIEF: WOMEN, GENDER ROLES, AND CRIMINAL JUSTICE 1, 2 (1982).

3. "The academic literature on women and murder is suprisingly sparse The major treatises on women and crime devote little attention to homicide, and nowhere in

kill are said to suffer passively from a "learned helplessness."⁴ This conceptual omission of women as aggressive criminal defendants is hardly a fluke.⁵ As Catharine MacKinnon observes, "Both sexists and feminists have difficulty explaining women who resist [by responding aggressively], but for different reasons: the first because nonsubmission is so unnatural, the second because resistance is so expensive. Both solve this difficulty by envisioning women as victims."⁶

Although understandable, this focus on victimization is extremely harmful to female criminal defendants on several levels.⁷ The pervasive idea of women as passive and vulnerable leaves little room in our criminal law for the woman who acts to victimize someone else, especially a male someone else. Either she is perceived as an innocent victim or as a murderous wicked witch.⁸ Juries respond in kind: Ann Jones has found that criminal conviction

that literature will one find a systematic description of the patterns and trends of homicides by or against women." Wilbanks, *Murdered Women and Women Who Murder*, in JUDGE, LAWYER, VICTIM, THIEF: WOMEN, GENDER ROLES, AND CRIMINAL JUSTICE, *supra* note 2, at 151, 155.

4. Battered woman syndrome hinges on the concept of victimization of women. See L. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS (1989); A. BROWNE, WHEN BATTERED WOMEN KILL 122 (1987); Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L. J. 191 (1991) (criticizing the portrayal of battered women as passive victims).

5. "The female killer seems to be an anomaly: men are expected to be aggressive and violent, but women are not. On the other hand, the female victim is *not* an anomaly; because women are viewed as vulnerable and passive, we are not surprised when females are victimized." Wilbanks, *supra* note 3, at 160.

6. MacKinnon, *supra* note 1, at 720. In MacKinnon's view, to be a woman is to be acted upon. See generally C. MACKINNON, FEMINISM UNMODIFIED (1987).

7. Victimization does not necessarily imply innocence.

[S]tereotypes about rape and battering victims . . . include assumptions about a victim's weakness and desire for injury. Rape victims are often viewed as precipitating their own victimization: somehow they ask or desire to be raped and thereby entice the rapist to his act. Battering victims are similarly assumed to have elicited, even secretly desired, the attack and thus to deserve their beatings.

Rafter & Sanko, *supra* note 2, at 5 (footnote omitted).

8. Andrea Dworkin postulates that women and men are trained through fairy tales to view women as "good" if they are passive, "sleeping" females such as Snow White and Sleeping Beauty, and as "bad" if they are active instead of acted upon, i.e., the Wicked Witch Stepmother. A. DWORKIN, WOMAN HATING 31-49 (1974). See also Rafter & Sanko, *supra* note 2, at 5-7 (discussing "the evil woman theory" and "the bad little girl theory"). The problem is compounded when characteristics viewed as "other" are present in the woman: women of color, impoverished women, disabled women, and lesbians all do not necessarily conform to the white middle class Sleeping Beauty ideal. "Other" women might fall short of the "good" ideal woman before they even commit an aggressive action. See Allard, *supra* note 4, at 194.

and sentencing of women defendants through history tend to be either extraordinarily harsh or extremely light.⁹

The most serious problem female criminal defendants encounter is the law itself. "[L]aw, made by men, for men, and amassed down through history on their behalf, codifies masculine bias and systematically discriminates against women by ignoring the woman's point of view."¹⁰ The criminal law traditionally discounts the perspective of women, not only in application, but also in development. First, men have historically dominated the criminal homicide ranks, committing roughly eighty-five to ninety percent of the homicides; they simply kill far more frequently than do women.¹¹ Second, the skewed criminal offender population combines with the predominance of men in creating, shaping, and implementing law.¹² The result is a strikingly male-centered criminal homicide law structure.¹³

9. See A. JONES, *WOMEN WHO KILL* 189-90 (1980). Jones draws a further conclusion that the ultimate decision about whether the woman was a victim or witch hinged on class distinctions: "The true *lady* — idle, respectable, proper, and useless — could do no wrong. The *woman*, however, might be capable of almost anything; she could not be punished too severely." *Id.* at 207 (emphasis added). See also Docherty, *Female Offenders*, in *THE LEGAL RELEVANCE OF GENDER* 170, 184 (1988) (While "females are less likely, in general, to be imprisoned, none the less certain women receive more severe disposals than men, particularly when their offence steps over the boundaries of sex-role expectations."); Alvord, *Punishment For Women Who Kill Said More Severe*, *San Diego Union*, May 28, 1990, at B1, col. 1 ("Women accused of killing in San Diego County face penalties that are more severe than those meted out to their male counterparts . . . the punishment sought does not match the crime."); Roberts, *No Easy Task: Balancing Scales of Justice for Battered Women in Prison*, *N.Y. Times*, Mar. 4, 1991, at A15, col. 1. "Judges are simply being harder on women . . . The rate of incarceration is much higher than for men." *Id.* (quoting Tracy Huling, Director of Public Policy for the Correctional Association of New York).

10. A. JONES, *supra* note 9, at 311.

11. In 1987, 14,629 (87.5%) of the homicides were committed by men, only 2,085 (12.5%) involved women. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, *UNIFORM CRIME REPORTS* (1987). See Taylor, *Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 *UCLA L. REV.* 1679, 1680-81 (1986).

12. Male jurisprudence scholars have focused on male nature to develop what is really a "masculine jurisprudence." West, *Jurisprudence and Gender*, 55 *U. CHI. L. REV.* 1, 3 (1987).

13. The law of homicide has focused on the control and punishment of male violence for two reasons: First, the great majority of criminal defendants have been male; second, criminal law has been developed by male common-law judges, codified by male legislators, enforced by male police officers, and interpreted by male judges and juries. Female homicide defendants thus have encountered legal categories that do not accommodate their behavior and have been tried and sentenced by courts that ignore or misunderstand their actions and motivations.

Taylor, *supra* note 11, at 1681-82 (footnotes omitted).

Male bias in existing criminal homicide law might have little impact if women and men committed similar crimes in similar ways. But women not only kill less frequently than do men, women do not necessarily kill with the same methods or motivations as do men.¹⁴ Most of the randomly violent, crime-related homicides are committed by male offenders. For example, men are more likely to kill strangers,¹⁵ get into homicidal brawls, kill rape victims, or kill in gang and drug wars. In contrast, the small number of women who commit homicide kill intimates: usually their husbands, boy-friends, or children.¹⁶ Laurie Taylor claims: "Female homicide is so different from male homicide that women and men may be said to live in two different cultures Only [the male homicide culture] is reflected in current criminal law."¹⁷

The substantive criminal law mirrors male homicide patterns and consequently discriminates against female criminal defendants.¹⁸ Unless a female criminal defendant commits a crime like a man, she may be stripped of substantive doctrine to mitigate or excuse her crime, unlike a male defendant who fits the paradigm on which law was initially based. For example, today in California a murder charge may be reduced to voluntary manslaughter if the defendant shows he acted out of passion and provocation.¹⁹ The paradigmatic example traditionally given was a man finding his wife in bed with another man.²⁰ This type of spontaneous anger result-

14. In part because most women are generally physically weaker than most men, the method of killing may vary: a woman could probably not physically overpower and kill a man with brute force, but most men could easily overpower and rape, beat, strangle, or smother a woman. This point may seem obvious but the ramifications are important. The methods of homicide must necessarily vary. If a man and a woman are angry enough to kill one other, the man could kill the woman with his hands — the woman would have to find a weapon to fend him off or kill him. Consequently, women are less likely to become homicidal "in the heat of passion," and more likely to be victimized by male brutality.

15. Although both men and women kill family members, female homicides include a significantly higher percentage of intrafamilial homicide. See Wilbanks, *supra* note 3, at 166-67. See also *infra* note 16.

16. See Taylor, *supra* note 11, at 1679-81 & n.10 (perhaps 70% of homicides committed by women are intrafamilial).

17. *Id.* at 1683.

18. "[T]here is no doubt that the criminal justice system does discriminate on the grounds of sex," moreover, "[d]iscrimination is at its most overt when the female is involved in offences which challenge traditional stereotypes of acceptable female behaviour." Docherty, *supra* note 9, at 170, 185. Arguably, discrimination occurs at the prosecutorial stage also: "the law has been a bastion of male values and it is likely that male prosecutors would be morally outraged by women who act outside their traditional roles." Alvord, *supra* note 9, at B6, col. 1.

19. CAL. PENAL CODE § 192 (West 1988).

20. See Taylor, *supra* note 11, at 1692-97.

ing in homicide is more consistent with male criminal behavior than with female behavior.²¹ Indeed, even when women *do* act like men, they find themselves disadvantaged. Some courts refused to apply the passion and provocation standard to a woman who found her husband in bed with another woman.²²

Not only are women denied defenses available to men, they are also denied the opportunity to use the reality of women's lives to establish a defense. A female homicide defendant must attempt to collapse her experience into the male homicide structure. But the forced fit is inadequate and awkward.²³ Battered woman syndrome, postpartum disorders,²⁴ rape trauma syndrome,²⁵ and other defense theories for women reflect the reality of a woman's life.²⁶ These

21. That "[j]ealousy is the rage of a man" was an observation in one of the first passion and provocation cases. *Regina v. Mawgridge*, 84 Eng. Rep. 1107, 1115 (1707). See generally Taylor, *supra* note 11.

22. See, e.g., *Reed v. State*, 123 Tex. Crim. 348, 59 S.W.2d 122 (1933). But for more contemporary approaches to passion and provocation doctrine, see *People v. Berry*, 18 Cal. 3d 509, 556 P.2d 777, 134 Cal. Rptr. 415 (1976); *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (some courts are moving towards more flexible standards to allow the fact-finder to determine if circumstances mitigate the crime to voluntary manslaughter).

23. For an excellent discussion of the problems of fitting female criminal homicide defendants into traditional passion and provocation doctrine and imperfect self-defense, see Taylor, *supra* note 11.

24. Postpartum psychosis or postpartum depression may occur after childbirth and precipitate an infanticide. See *infra* note 57 and accompanying text.

25. Rape trauma syndrome is a disorder suffered by a rape victim involving flashbacks, temporary memory loss, an inability to interact with intimates, and other emotional and mental problems triggered by the experience of rape. See generally *Cling, Rape Trauma Syndrome: Medical Evidence of Non-Consent*, 10 WOMEN'S RTS. L. REP. 243 (1988). Use of rape trauma syndrome in court occurs primarily in rape prosecutions to explain delayed reporting or scattered recollection of the victim. *McCord, The Admissibility of Expert Testimony Regarding Rape Traume Syndrome in Rape Prosecutions*, 26 B.C.L. REV. 1143 (1985). This Article considers rape trauma syndrome in a slightly different context: when the rape victim kills her rapist.

26. Although this Article focuses on battered woman syndrome, postpartum disorders, and rape trauma syndrome, these theories do not exhaust the potential defenses for women. Premenstrual syndrome has met with skepticism in America, although the defense is valid in England. See generally *D' Emilio, Battered Woman's Syndrome and Premenstrual Syndrome: A Comparison of Their Possible Use as Defenses to Criminal Liability*, 59 ST. JOHN'S L. REV. 558 (1985); *Oakes, PMS: A Plea Bargain In Brooklyn Does Not a Rule of Law Make*, 9 HAMLINE L. REV. 203 (1985); *Riley, Premenstrual Syndrome as a Legal Defense*, 9 HAMLINE L. REV. 193, 202 (1985) ("[M]any PMS sufferers may have been imprisoned because the law does not recognize PMS as a valid defense. This injustice must be corrected. Premenstrual syndrome is real. Its effects on women can be catastrophic and must be taken into account by the criminal justice system."); *Taylor & Dalton, Premenstrual Syndrome: A New Criminal Defense?* 19 CAL. W.L. REV. 269 (1983); *Wallach & Rubin, The Premenstrual Syndrome and Criminal Responsibility*, 19 UCLA L. REV. 210 (1971). Other potential theories might include defenses based on depression stemming from hysterectomies, menopause, mastectomies, or multiple abortions. See *Goleman, Beliefs on Depression in Women Contradicted*,

theories, however, do not fit into traditional notions of substantive criminal law. This Article refers to homicide defense theories grounded in a woman's concrete experience as "women's defenses."²⁷

Feminist legal theory has not been applied to women and criminal homicide law very extensively. Yet the application of traditional criminal homicide law doctrine to women, the creation of "special defenses" for women, and the lack of incorporation of the female perspective into the criminal homicide structure itself raise serious problems that feminist legal theory must address. Existing feminist legal theory can be divided into assimilation, accommodation, and acceptance theories.²⁸ Assimilation is a simplified version of "symmetrical" equality doctrine: women can be just like men if men give them a chance.²⁹ Women should strive to be just like men, and men should allow them to be just like men. The entry barriers to the male-dominated world should be broken down, but the male-dominated world itself need not change. *Women* must change.³⁰ Moreover, they will only be protected by the law if they do change. In the context of criminal homicide law, assimilation is the attempt to force-fit female defendants into traditional substantive criminal homicide law.

Accommodation theory is "asymmetrical" in the sense that it recognizes differences between women and men, and recognizes that

N.Y. Times, Jan. 9, 1990, at B5, col. 3 (noting that women may suffer depression after childbirth, hysterectomy, mastectomy, and menopause, and the risks associated with postpartum depression and post-mastectomy depression are the most serious); *Study Analyzes Women's High Depression Risk*, L.A. Times, Dec. 6, 1990, at A25, col. 1 ("Women are twice as likely as men to suffer from major depression, for reasons more often cultural than biological" such as "[p]overty, unhappy marriage, reproductive stress and sexual and physical abuse"; "Depression afflicts about 7 million American women, leads to 30,000 suicides annually and costs society an estimated \$16 billion a year.").

27. Professor Christine Littleton finds the "first strand" of the feminist critique of equality the assertion that "equality analysis defines as beyond its scope precisely those issues that women find crucial to their concrete experience as women." Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1306 (1987). Certainly being battered, being raped, and giving birth are among women's concrete experiences as women. Professor Littleton's analysis applies in the context of homicide defenses for women: such women's defenses are not a part of "equality analysis" as criminal defendants. There is no corresponding male experience, so how can a woman argue for "equal" treatment?

28. *Id.* at 1292-97.

29. *Id.* at 1291-97.

30. This attitude locates social difference in women. See *infra* note 31. Placing the locus of difference in women also places the burden of assimilation squarely on women. Failure to assimilate is simply "failure," not sex discrimination.

the differences should not have to change. But like assimilationists, accommodationists also do not insist that the male-dominated system change. Instead, special treatment should be established for the difference in women. Professor Christine Littleton notes that this theory does not step beyond assimilation theory in the sense that it also locates the difference in women.³¹ The original male-centered system can remain in place, but clumsy "add-ons" can be established here and there in the system to accommodate the differences in women. In the criminal homicide law context, special women's defenses reflect an accommodationist approach. Professor Littleton likens accommodation to placing a footstool at the base of a podium when the speaker happens to be a woman.³²

Acceptance theory provides an adjustable podium.³³ The difference between women and men is relocated to the system itself, which incorporates both the female and male perspectives. Women are not the "odd ones out" anymore, but legitimate participants in a system that fully and costlessly represents the female point of view.³⁴

Acceptance theory would provide a criminal homicide structure that costlessly places the individual criminal homicide defendant and her life at the center of the assessment of her criminal culpability. Our "legal system works to strip the female homicide defendant of what her act meant to her in the context of her life and force it into a male-centered homicide structure to be judged in view of male-focused notions of culpability."³⁵ The only way a female homicide defendant has a fair opportunity to present her case is through expression of the concrete experience of her life.³⁶

The makeup of any given criminal homicide defendant varies according to sex, race, ethnicity, socio-economic class, sexual orien-

31. Professor Christine Littleton argues that the "second strand" of equality analysis is location of difference in the woman: "Difference, which is created by the relationship of women to particular and contingent social structures, is taken as natural (that is unchangeable and inherent), and it is located solely in the woman herself." Littleton, *supra* note 27, at 1306.

32. *Id.* at 1314.

33. *Id.*

34. *Id.*

35. Reece, *Mothers Who Kill: Postpartum Disorders and Criminal Infanticide*, 38 UCLA L. REV. 699, 755 (1991).

36. Feminist methodology focuses on the concrete realities of women's lives. "As Catharine MacKinnon notes, the 'methodological secret' of feminism is that it is built on 'believing women's accounts,' on recognizing women's experience as central." Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 25 (footnote omitted) (quoting from C. MACKINNON, *supra* note 6, at 5).

tation, physical and mental capability, and other characteristics.³⁷ Recent criticism of feminist thought exposes essentialist assumptions about women's experience.³⁸ An essentialist critique can and should be applied to the criminal homicide law: the current homicide structure takes the white male as the "essential" defendant. Every characteristic that varies from the essential white male results in a layer of discrimination based on the degree of difference.³⁹ A spectrum of life experiences resulting from these differences may be relevant to a criminal defense. Thus, an intersectional analysis⁴⁰ is central to both the presentation of a complete defense and the fair assessment of criminal culpability. The possession of a characteristic considered "alternative" or "other" by our majoritarian white male culture disadvantages a criminal defendant, and possession of multiple "other" characteristics multiplies the disadvantages.⁴¹ A female criminal defendant suffers one layer of harm by being fe-

37. This Article chooses femaleness as the point of departure for difference analysis. However, a man could be "other" and similarly disadvantaged by the white male legal system if, for example, he is homosexual, *see* Littleton, *supra* note 27, at 1308, or of color, or homeless, and so on. The analysis this Article pursues can be applied equally well in these cases.

38. [W]hite middle-class privilege has found friendly places to lodge at the very root of much feminist thinking — for example, in the assumption that gender identity exists in isolation from race and class identity; in the assumption behind contrasting the situation of "women" with (for example) the situation of "Blacks" or "Jews"; in the assumption that the meaning of gender identity and the experience of sexism are the same for all women "as women" . . . certain apparently innocent concepts and methodological strategies in much feminist inquiry lead quietly but inexorably to putting the lives of white middle-class women at the logical center of such inquiry.

E. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* x (1988). *See also* D. FUSS, *ESSENTIALLY SPEAKING* (1989).

39. Criticism of essentialism in feminist thought has focused on various aspects of exclusion. *See, e.g.,* Harris, *Race and Essentialism and Feminist Legal Theory*, 42 *STAN. L. REV.* 581 (1990) (the exclusion of race); Green, *Homeless and Battered: Women Abandoned By a Feminist Institution*, 1 *UCLA WOMEN'S L. J.* 169 (1991) (exclusion based on socio-economic class); Leonard, *A Missing Voice in Feminist Legal Theory: The Heterosexual Assumption*, 12 *WOMEN'S RTS. L. REP.* 39 (1990) (the exclusion of lesbians). *See generally* A. LORDE, *SISTER OUTSIDER* (1984); M. MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990).

40. Intersectional implies that the combination of two (or more) "other" characteristics in a single individual results in a life experience that differs from individuals with some, but not all, shared "other" characteristics. *See* Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 *U. CHI. LEGAL F.* 139 (Black women have life experiences that differ from Black men, and from white women).

41. *See* Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 *WOMEN'S RTS. L. REP.* 7 (1989).

male, a woman of color suffers two layers of disadvantage, a lesbian of color is three times disadvantaged, and so on. A fair criminal law structure would accept these layers of difference, and incorporate the different perspectives into the substantive law.

This Article suggests that only the acceptance theory paradigm offers a way to rid the criminal law structure of bias against women, especially those who possess multiple "other" characteristics. The assimilationist approach excludes the female perspective from the substantive criminal law and deprives a female criminal defendant of a substantive way to express her case that is not fully remedied by the accommodationist approach of creating special "women's defenses." Part I will address the assimilationist nature of the criminal homicide structure and the exclusionary biases inherent in the system: this is the problem of trying to "force-fit" a woman's perspective into the current substantive criminal law. Part II explores the unfairness of an accommodationist approach through an analysis of what the right to effective assistance of counsel means to a female criminal homicide defendant trying to raise a special "women's defense." Part III addresses the need for an acceptance approach to the criminal homicide law and tentatively explores ways to relocate difference within the criminal law framework itself in an effort to eliminate layered discrimination against female criminal homicide defendants.

I. THE FAILURE OF ASSIMILATION: FORCING THE FEMALE CRIMINAL HOMICIDE DEFENDANT INTO THE CRIMINAL HOMICIDE LAW STRUCTURE

A. *The Problem of Force-Fitting Women's Experience Into Current Substantive Criminal Law*

Aside from the accommodation offered by special women's defenses,⁴² the criminal law embodies a thoroughly assimilationist approach because women are assumed to fit within the male-focused criminal law doctrine. This Article refers to criminal law that is codified or firmly entrenched in traditional doctrine or common law as "substantive criminal law." In contrast, recently-developed women's defenses are not part of the established doctrinal or codified law as yet and are not consistently accepted in jurisdictions across the country. While the partial success of women's defense theories indicates some level of accommodation, the substantive criminal law itself still reflects a highly assimilationist state.

42. See *infra* Part II.

Historically, the few women who committed crime were considered masculine.⁴³ If, as Catharine MacKinnon suggests, to be a woman is to be acted upon, then a woman acting must be male.⁴⁴ The first major study of female criminal offenders found that "as women were biologically programmed *not* to commit crimes, if a woman was what they termed a 'born' criminal, then she must be biologically closer to the male."⁴⁵ And so she was treated accordingly — like a male.

Substantive criminal law fails to account adequately for homicides committed by women that do not fit the traditional male-patterned homicide. A woman's acts might be understandable in light of mitigating facts, yet may fall outside of substantive criminal law doctrines such as passion and provocation,⁴⁶ self-defense,⁴⁷ insanity,⁴⁸ and so-called diminished capacity.⁴⁹ She is forced to engineer a way to present her reality within the confines of a structure that excludes her life experience. For example, if the criminal defendant acted in a traditionally male rage of passionate jealousy, *his* offense is mitigated in the eyes of the law and he is less culpable. But traditional substantive criminal law does not adequately ad-

43. Consider, for example, that William Shakespeare found it necessary to have Lady Macbeth literally "unsex" herself in order to be able to commit a murder: "Come, you spirits/ That tend on mortal thoughts, unsex me here,/ And fill me from the crown to the toe topful/ Of direst cruelty! Make thick my blood,/ . . . Come to my woman's breasts,/ And take my milk for gall, you murth'ring ministers . . ." W. SHAKESPEARE, *Macbeth*, in *THE RIVERSIDE SHAKESPEARE* 1316 (1974).

44. C. MACKINNON, *supra* note 6. See also A. JONES, *supra* note 9, at xvi.

45. Docherty, *supra* note 9, at 170, 171 (emphasis in original).

46. Showing that a homicide was committed in a subjectively experienced passion after an objectively reasonable provocation mitigates the homicide from murder to manslaughter. See, e.g., CAL. PENAL CODE § 192 (West 1988).

47. Self-defense is a justification defense allowing the use of physical force to protect oneself from an apparent threat of injury or death. See generally J. DRESSLER, *UNDERSTANDING CRIMINAL LAW* 191-213 (1987).

48. A criminal homicide defendant may claim insanity as a defense. Jurisdictions with a "cognitive prong" in the insanity statute focus on the defendant's ability to appreciate the nature or quality of one's actions; in contrast, jurisdictions with a "volitional prong" encompass a defendant who simply could not control an irresistible impulse to act. See *id.* at 299-302. After the attempted assassination of former President Reagan by John Hinckley, most jurisdictions abandoned the less restrictive volitional prong for the cognitive prong. See P. LOW, J. JEFFERIES & R. BONNIE, *THE TRIAL OF JOHN W. HINCKLEY, JR.: A CASE STUDY IN THE INSANITY DEFENSE* (1986).

49. "Diminished capacity" has meant different things in different jurisdictions, but generally diminished capacity refers to the lack of an ability to form the mental state required for the crime charged. See generally J. DRESSLER, *supra* note 47, at 319-28. Diminished capacity also may refer to a judicially-expanded interpretation of a required mental state, or a simple negation of the mental state. See Reece, *supra* note 35, at 732-36.

dress the issue of whether a battering victim who unvictimizes herself by killing her batterer is culpable of murder.⁵⁰

Some scholars have attempted to fit the characteristics of a battered woman into traditional substantive criminal law.⁵¹ Laurie Taylor asserts that battered woman syndrome is just a variation on traditional passion and provocation doctrine.⁵² She argues that while the provocation by battering is obvious, the "passion" fueling the homicidal response is slow-burning or delayed. When the woman ultimately kills her spouse, it is worthy of the same mitigation that passion and provocation doctrine provides: from murder to voluntary manslaughter.

Other authors have focused on utilizing self-defense theory.⁵³ One commentator asserts that a redefinition of justified self-defensive force⁵⁴ would provide a battered woman with a legal defense if she "engages in conduct to defend herself from the batterer-aggressor (a) at any time after the threat, (b) to the extent necessary for self protection, (c) after she has experienced one cycle of violence, and (d) after she has requested help from the proper authorities and been turned away."⁵⁵ Still other authors try to fit battered woman

50. This is particularly true if the battered woman killed while her abuser's back was turned or he slept. While traditional notions of culpability might suggest that this method of killing is particularly cold-blooded, the reality of the battered woman (and indeed of all women physically smaller or weaker than male counterparts) suggests that she must resort to finding means to equalize physical strength and capability.

51. Feminist jurisprudence barely uses the current substantive criminal law as a point of departure: "legal categories or doctrines are 'merely raw material— to be cut and pasted, stretched, arranged, and sewn together to fit [women's] experience.' By positing such an alternative framework for addressing legal issues, feminism poses a direct challenge to 'business as usual' for law." Littleton, *supra* note 36, at 25 (footnote omitted) (quoting Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751, 766 n.73 (1989)).

52. See Taylor, *supra* note 11.

53. Efforts have focused on achieving widespread admissibility of expert testimony on battered woman syndrome, particularly with regard to the "reasonableness" of the defendant's action. See Jordan & Schneider, *Representations of Women Who Defend Themselves Against Physical or Sexual Assault*, 4 WOMEN'S RTS. L. RPTR. 149 (1978); Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. RPTR. 195 (1986).

54. "Redefinition" is required because the current self-defense theory is premised on an objectively reasonable spontaneous response to an attack or an objectively reasonable fear of serious bodily injury or death. The Supreme Court of Washington found self-defense jury instructions male-biased because the implication to the jury was the self-defense must be "objectively reasonable" in a confrontation between two men, not one between a small woman on a crutch and a man. *State v. Wanrow*, 88 Wash. 2d 221, 559 P.2d 548 (1977).

55. P. Rodriguez, *Male Self-Defense: A Battered Woman's Perspective* 74 (1989) (unpublished political science honors thesis on file with the *UCLA Women's Law Jour-*

syndrome into diminished capacity — an endangered species of criminal law with problems of its own.⁵⁶

Evidence of postpartum disorders used in criminal infanticide trials suffers from an additional handicap: because postpartum psychosis occurs so rarely, only a few scholars have addressed the issue at all.⁵⁷ Arguably, a postpartum psychotic woman who kills her infant can claim an insanity defense in jurisdictions with a cognitive prong in the insanity statute.⁵⁸ But this effort is substantially hindered by the fact that postpartum disorders are not considered a separate category of psychiatric disorder by the American Psychiatric Association.⁵⁹ A woman suffering from postpartum depression probably cannot claim that she was insane under a cognitive prong, although she might be acquitted in a jurisdiction with a volitional prong.⁶⁰ If the woman is in a jurisdiction that recognizes diminished capacity,⁶¹ she could use her postpartum disorder to show she was not fully responsible for her actions. The only other alternative is showing that she did not have the requisite mental state for the crime charged; for example, because she was postpartum psychotic, she did not see her child as her baby but as a devil she was commanded to kill.⁶² Or, because she was postpartum depressed she did not premeditate and deliberate her infant's death, she simply dropped her screaming child in frustration.⁶³

nal). See Schneider, *Equal Rights To Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.- C.L. L. REV. 623 (1980).

56. See Randolph, *The Diminished Capacity Defense For Battered Women: An Alternative Political Approach*, 70 WOMEN LAWYERS J. 23 (1984). See also *supra* note 49; *infra* notes 61, 64.

57. See generally Reece, *supra* note 35. "Postpartum disorders" includes postpartum psychosis and postpartum depression. Postpartum psychosis occurs in .01 to .02% of new mothers; postpartum depression occurs in 20% of new mothers. *Id.* at 711-12.

58. See *supra* note 48.

59. Splitting up the postpartum disorders into subcategories of major depression and atypical psychoses arguably fragments the "identity" of postpartum disorders and obscures diagnosis. See Reece, *supra* note 35, at 709. The male-dominated psychiatric profession itself may systematically exclude women's perspective. See generally P. CHESLER, *WOMEN AND MADNESS* (1972).

60. See *supra* note 48.

61. Diminished capacity may not be available in California anymore. See J. DRESSLER, *supra* note 47, at 326-27. However, a California appellate court recently held that the abolition of diminished capacity did not prohibit mental state negation. See *People v. Molina*, 202 Cal. App. 3d 1168, 249 Cal. Rptr. 273 (1988) (woman who became psychotic and stabbed her infant did not have the requisite mental state for second degree murder conviction).

62. Appellant's Opening Brief at 3, *People v. Massip*, No. GOO76660, Case No. C-64940 (Cal. Ct. App., July 21, 1989).

63. *State v. White*, 93 Idaho 153, 456 P.2d 797 (1969).

Rape trauma syndrome may be introduced at trial as a defense to homicide, but reported cases appear to be scarce.⁶⁴ Evidence of rape trauma syndrome is primarily used in rape prosecutions to explain why a rape victim did not immediately report the rape or could not initially identify her rapist.⁶⁵ It can be used in the homicide context if a rape victim kills her rapist: rape trauma syndrome as a form of post-traumatic stress disorder should mitigate her offense. Arguably, a woman could be defended along self-defense lines if she kills her rapist while he is attacking her. If she kills him after the violence, however, she cannot necessarily rely on a self-defense theory because a jury might be unlikely to believe that she had a reasonable apprehension of imminent danger.⁶⁶ She is placed in a similar situation to the battered woman who is perhaps not

64. See, e.g., *People v. Mathews*, 91 Cal. App. 3d 1018, 154 Cal. Rptr. 628 (1979). The defendant encountered a man who had raped her in a gang rape and feared for her life. She tried to shoot him, but instead shot and killed a third party. She was convicted of voluntary manslaughter, and lost her appeal. Justice Reynoso dissented:

The gravamen of the defense was the "rape trauma syndrome" caused by a gang rape. . . . During the trauma, lasting approximately six and one-half hours, defendant's life was threatened[,] she was forced to perform acts of oral copulation[,] she was sodomized and acts of sexual intercourse were performed against her will. The three men participated. At the end, she was deposited on the street near her home. When a friend took her home, she was hysterical and confused[,] she was vomiting and she was suffering from a swollen lip and jaw. Some weeks later, after the rape, defendant saw Ghormley, one of the rapists. The continuing "rape trauma syndrome" caused by the gang rape was of such intensity [that] she had an overwhelming fear. Believing that Ghormley was armed and fearing for her life, she shot at him. By misfortune she hit and killed Silva, an innocent party.

. . . . The defense theory was that defendant Mathews acted in self-defense and mistakenly shot Silva. While the emphasis at trial was placed on the "rape trauma syndrome," a partial defense based on diminished capacity, self-defense was clearly a principle defense. Such a defense was "closely and openly" connected with the facts of the case.

Id. at 1028-29, 154 Cal. Rptr. at 634-35 (Reynoso, J., dissenting). Justice Reynoso's characterization of rape trauma syndrome as "a partial defense based on diminished capacity" and his implicit separation of rape trauma syndrome from self-defense theory reflects the general state of confusion about rape trauma syndrome used as a defense to homicide similar to that surrounding battered woman syndrome. See *supra* notes 50-56 and accompanying text.

65. See *supra* note 25.

66. Self-defense theory relies on the use of equal force. While a rape victim fears for her life, she may be justified in using deadly force. But if the attack is over and the woman is no longer in "reasonable" danger of death, traditional self-defense theory arguably cannot be used by the rape victim who kills her rapist. See J. DRESSLER, *supra* note 47, at 191-205. However, a woman who has been raped may experience a reasonable fear for her life if she encounters her rapist again, particularly if she suffers from rape trauma syndrome. See, e.g., *supra* note 64.

battered at that instant but has been victimized in the past and feels threatened by future violence.⁶⁷

B. *Assimilationist Representation in Actual Prosecutions*

Interviews with public defenders, assistant district attorneys, criminal investigators, and law professors revealed strikingly scant knowledge about women criminal defendants generally, and particularly about representing or prosecuting women accused of criminal homicide.⁶⁸ The first few minutes of the interviews were inevitably spent on trying to conjure up the concept of a woman prosecuted for homicide coupled with the availability of a "special defense." One female assistant district attorney finally said in frustration, "we don't deal with these types of things unless it's thrown at us in court. It's just very rare."⁶⁹ Consequently, the interviews exposed a lack of interest, a lack of knowledge, and a general skepticism about women's defenses. These attitudes were consistent across sex.⁷⁰ The profession's perceptions reflect what the traditional criminal law teaches: very little concern or awareness about female killers.

When Los Angeles County public defenders were asked how they utilized battered woman syndrome as a defense, the general

67. See, e.g., *supra* note 64. The facts underlying *Barts v. Joyner*, 865 F.2d 1187 (11th Cir. 1989), provide another example of such a situation. Scarlett Barts lived with Billy and Virginia Floyd; although she was not related to them, she considered them her parents. One afternoon Billy Floyd was killed. Barts told police that Floyd had come into the bathroom and started kissing her, and she struggled with him until he left. She admitted shooting him when he came back again. Long after the homicide, a second degree murder conviction, and time in prison, Barts was finally able to tell a psychologist that she had been raped by Floyd and that afternoon she thought he was attempting to rape her again. Because her rape trauma syndrome had prevented her from communicating with her attorneys and had made her incompetent to stand trial, Barts was granted a new trial. She was acquitted. See *Florida v. Barts*, No. 33-83-18-CF-A (Fla. Cir. Ct. Dec. 13, 1985); 865 F.2d at 1188-91.

68. Three Los Angeles County public defenders, three assistant district attorneys, two criminal investigators, and two law professors were interviewed. The information generated from these interviews is not meant to represent a complete survey, but rather serve to suggest some of the approaches taken and problems encountered by some participants in the criminal justice system. The names of the currently practicing assistant district attorneys and the public defenders have been withheld to preserve their anonymity.

69. Telephone interview with Assistant District Attorney #1, Los Angeles County (Apr. 26, 1990).

70. Male and female public defenders and district attorneys were interviewed, but consistently gave the same responses. If anything, the women seemed more skeptical about the defenses. These attitudes probably can be explained by the socialization women attorneys undergo in law school. If so, arguably a female attorney may not really be socially "female" but male in gender. See *infra* notes 88-94 and accompanying text.

response was they did not know, but if they had such a case, they would consult with other lawyers and psychiatrists to craft the best defense.⁷¹ One public defender was put off at the question: "on a self-defense theory, of course. That's all it is anyway."⁷² All the public defenders interviewed were careful to indicate that they would raise all the codified or common law defense theories they could and avoid relying on the battered woman syndrome theory alone.⁷³

One public defender postulated that prosecutors considered battered woman syndrome a "humbug," a "PD trick" or "manufactured defense" conjured up by desperate public defenders.⁷⁴ He explained that public defenders are trained that it is unethical to manufacture a defense and that such defense theories require substantial factual support in the form of medical records and witnesses. But the opportunity to present a women's defense so rarely comes up that in his ten years as a public defender, he had never raised such a defense, and had only defended a woman for homicide once.⁷⁵

While district attorneys call battered woman syndrome a sham, they eagerly embrace rape trauma syndrome. "Do I believe in rape trauma syndrome as a defense to homicide? I would not even *charge* her!" exclaimed one assistant district attorney.⁷⁶ How is one situation so much more credible than the other? One theory is that the victimization of the woman is more tangible and complete in the context of a forcible rape. The time frame is shortened and the coercion has just occurred. But perhaps a more plausible

71. One female public defender said that use of a "abused woman syndrome" defense was so rare that she only knew of one case in her entire experience. She also said she would not know exactly how to handle one, but would research available defenses if she had such a case. Telephone interview with Deputy Public Defender #2, Los Angeles County (Apr. 16, 1990).

72. Telephone interview with Deputy Public Defender #1, Los Angeles County (Apr. 12, 1990).

73. One public defender added to this general statement, "it's very rare to only raise one defense theory anyway" when dealing with a case which does not fall neatly into an established defense theory. Telephone interview with Deputy Public Defender #2, Los Angeles County (Apr. 16, 1990).

74. Deputy Public Defender #1's evaluation of the prosecutor's viewpoint is supported by Assistant District Attorney #2's assessment of battered woman syndrome and postpartum disorders: "I think they're B.S." Telephone interview with Assistant District Attorney #2, Los Angeles County (Apr. 26, 1990).

75. Telephone interview with Deputy Public Defender #1, Los Angeles County (Apr. 12, 1990).

76. Telephone interview with Assistant District Attorney #2, Los Angeles County (Apr. 26, 1990).

theory is that prosecutors want to bolster the validity of rape trauma syndrome because they use it themselves in rape prosecutions. Neither interpretation focuses on the perspective of the woman herself; instead, both focus on how her situation outwardly and "objectively" appears. If the prosecutor were really looking at the homicidal act from the woman's perspective, no distinction could be drawn between battered woman syndrome and rape trauma syndrome, especially since battering frequently includes forcible rapes.⁷⁷

Clearly, women's defense theories receive inconsistent treatment in practice: practitioners seem vague about where such defense theories fit — and *if* such theories fit — in the criminal law. The conceptualization and presentation of a women's defense theory seems to depend entirely upon the individual lawyer's resourcefulness. An attorney must be quite skillful to work a woman's special facts into substantive criminal law: for example, by using a traditional mental state analysis to show that she did not have the requisite intent to kill. But the trend does seem to be moving away from the traditional assimilationist approach toward accommodation as demonstrated by increasingly overt reliance on "crafting" a special women's defense theory, and advancing a riskier yet more factually accurate women's defense theory. Accommodation of female defendants by allowing special defenses may be a preferable approach over forcing female assimilation into traditional homicide law, but as Part II suggests, accommodating women by carving out exceptions to the law does not cure all the problems faced by female criminal homicide defendants.

Ultimately, the problem with force-fitting women's experience into current substantive criminal law doctrine is the inflexible homicide structure itself coupled with inconsistency and uncertainty in the legal profession about applying traditional substantive criminal law to women who kill. Although the lawyer may have no duty to represent a defendant as an individual acting from a specific set of

77. Dr. Lenore Walker, Executive Director of the Domestic Violence Institute and a leading authority on battered woman syndrome, reports:

Sexual abuse often plays a major role in the cases of battered women who kill. Some have been raped with such force that their genitals and internal organs have been torn or irreparably damaged. . . . In one study of those who had attempted or completed homicide of their abusers, 87 percent of the 90 women evaluated had been sexually abused by those men. Several had been so brutalized that they were unable to have sex again.

L. WALKER, *supra* note 4, at 124.

life experiences, the application of traditional criminal law doctrine in defense of a female homicide defendant inevitably submerges relevant facts about the woman and her reality. Leaving out relevant evidence of a real life experience such as battering — as traditional criminal homicide law mandates — deprives a female homicide defendant of any meaningful opportunity to present a complete defense.

II. THE INADEQUACY OF ACCOMMODATION: THE DEPRIVATION OF A FEMALE HOMICIDE DEFENDANT'S CONSTITUTIONAL RIGHTS

A. *Women's Defenses as Accommodation*

The use of battered woman syndrome in a defense to criminal homicide was the first attempt to establish an accommodationist alternative to the assimilationist criminal homicide law. In order to more accurately reflect the reality of women's lives, "women's defenses" that did not fit within the traditional criminal law yet reflected some relevance to the defendant's mental state began appearing in courtrooms. Recognition of a woman's reality should operate to mitigate or justify a woman's crime in the same sense that passion and provocation doctrine mitigates a male-centered crime, or self-defense justifies an act, or insanity absolves the defendant of criminal responsibility. But defense theories such as battered woman syndrome do not fit neatly into substantive law so currently such defense theories are considered "extras" by the legal profession. Whether the reality of a female criminal homicide defendant's world is fairly reflected at her trial depends on the jurisdiction, the judge, the jury, and her lawyer.⁷⁸

The burgeoning case law in the area still grants only second class citizen status to women's defenses such as battered woman syndrome. First, some jurisdictions do not even recognize battered woman syndrome at all. Second, even jurisdictions that recognize it sometimes place special restraints on the utilization of the defense. For example, in some jurisdictions a woman may raise a battered woman syndrome defense *unless* she kills her spouse while he

78. The only tie the woman herself has to the end product of justice is her lawyer. If her attorney tells her story as she herself would, she has had a voice. But in all probability her story will inevitably drown in the rigid male structure. Feminists do not forget the "layered reality" a woman homicide defendant confronts. "The ultimate meaning of being a woman in a male-dominated society must be to have the meaning of your acts inaccessible — even to yourself? — except through the mediation of forms and forces you do not control." MacKinnon, *supra* note 1, at 714.

sleeps. Third, the true "validity" of the defense rests ultimately with the jury or judge anyway — if they do not believe such a defense exists, then for all practical purposes it does not. To complicate matters, the facts a female criminal defendant may offer to explain what her act meant to her in the context of her life may be perceived by the jury and judge as either valid or invalid depending upon whether the woman is seen as a victim or a "murderous wom[a]n [getting] off scot free."⁷⁹ Opponents of battered woman syndrome fear it as giving "a woman a license to kill"⁸⁰ her batterer; proponents characterize "[t]his anxious reaction against women" as "blaming the victim."⁸¹ The case of a postpartum psychotic woman killing her infant stirs even deeper emotions: is allowing the defense granting a wicked mother the license to kill her (perhaps unwanted) helpless infant, or does the defense properly recognize that no mother but a crazy mother would betray the deepest of human bonds to kill her baby?

Because battered woman syndrome as a defense is considered a "special defense" by courts, it has met with varying degrees of success throughout the country. That means that some women are in jail right now because the court that happened to try them did not accept the same theory that acquitted other women.⁸² The same is true of women who raised a postpartum disorder theory at trial: roughly half were acquitted and half convicted.⁸³ The current random approach to women who kill reflects thoroughly uncertain and inconsistent justice resulting in violations of constitutional rights.

B. *Women's Defenses to Criminal Homicide and Denial of the Right to Effective Assistance of Counsel*

The most explicitly demonstrable violation of a female homicide defendant's constitutional rights is the abridgment of the sixth amendment right to effective assistance of counsel. It is also a clear illustration of the the failure of the accommodation model to provide complete sexual equality. The standard for ineffectiveness of counsel claims may not at first glance seem a perpetrator of sex discrimination. But it operates to deprive a woman of the assurance that she will receive "effective" representation. The key to determining whether counsel is effective is whether representation fol-

79. A. JONES, *supra* note 9, at 310.

80. *Id.* at 309.

81. *Id.* at 314.

82. See Roberts, *supra* note 9.

83. Reece, *supra* note 35, at 701-02.

lowed the norm in a traditionally male-dominated legal profession, a norm which also invariably hinges on the traditionally male-dominated substantive criminal law. Because under an accommodationist model a special women's defense is necessarily not contained in the traditional substantive criminal law, counsel is not ineffective for failing to raise the defense. This in turn reinforces the illegitimacy of the women's defense. The signals courts have sent the legal profession are clear: counsel is not ineffective — the defense itself is ineffective.

The Supreme Court found in *McMann v. Richardson* that the sixth amendment "right to counsel is the right to *effective* assistance of counsel."⁸⁴ In *Strickland v. Washington*⁸⁵ the Court set the current test for ineffectiveness of counsel. The petitioner must prove both that "counsel's representation fell below an objective standard of reasonableness"⁸⁶ (the "performance prong") and that there is a reasonable probability that the outcome of the case would have been different but for counsel's unprofessional errors. The problem for women is that the "objective standard of reasonableness" translates to "what either the male-centered substantive criminal law or the male-dominated legal profession has traditionally recognized as sufficient representation of male defendants."⁸⁷

1. The Problem of Reasonable Representation

Both female and male attorneys schooled in the traditionally male-dominated criminal law and trained in traditionally male-oriented law schools may reflect a male-oriented "reasonable lawyer" standard.⁸⁸ Whether or not the lawyer realizes she is acting to perpetuate male domination of criminal law, routine application of the

84. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (emphasis added).

85. 466 U.S. 668 (1984).

86. *Id.* at 688.

87. Although "reasonable attorneys" should not fail to represent adequately a woman defendant because her case involves a special defense, "reasonableness" in the legal profession reflects standards which ignore the female perspective. The norms of the profession reflect the low percentage of female offenders in the overall criminal population and the low level of awareness and application of women's defense theories.

88. Women, schooled like men to good citizenship, accept the law's male bias as objective justice; women lawyers, judges, and jurors, taught the same rules, usually uphold the same male standard. And whether that male standard constitutes conscious sex discrimination or the innocent side of a shared male point of view, the result for women is the same: they are deprived at every step of equal protection under the law; and even those women who receive fair and equal treatment are likely to be thought of as having gotten away with something.

A. JONES, *supra* note 9, at 311.

male-formulated frameworks to women defendants achieves this end. The law requires every lawyer to respect *stare decisis*; tampering with established law is frivolous, unethical, ineffective, even malpractice. So lawyers follow the well-beaten track of precedent.⁸⁹ It is not only the safest path, it is the law.

Feminist scholars have shown that law schools train students from a firmly male perspective.⁹⁰ Class teaching techniques, course casebooks and textbooks and the law itself teach that the male view is the right view — the objective, reasonable, and just standard.⁹¹ The developing lawyer learns that the law is fair and neutral, and believes that materials not covered are not omissions, but irrelevant subjects. Will it be on the bar? If the answer is no, the course is “fluff” and the viewpoint is superfluous.⁹² So frantic law students learn the traditional male language of law, regardless of their own gender⁹³ or outlook.⁹⁴

89. Lines of precedent fully developed before women were permitted to vote, continued while women were not allowed to learn to read and write, sustained under a reign of sexual terror and abasement and silence and misrepresentation continuing to the present day are considered valid bases for defeating “unprecedented” interpretations or initiatives from women’s point of view.

C. MACKINNON, *Toward Feminist Jurisprudence*, in *TOWARD A FEMINIST THEORY OF THE STATE* 238 (1989).

90. See generally 38 J. LEGAL EDUC. 1–93 (1988) (Symposium: Women in Legal Education — Pedagogy, Law, Theory, and Practice). Law schools also teach from a thoroughly white perspective. See Crenshaw, *Foreward: Toward A Race-Conscious Pedagogy in Legal Education*, 11 NAT’L BLACK L.J. 1 (1989). Moreover, “[s]hould [minority students] step outside the doctrinal constraints, not only have they failed in their efforts to “think like a lawyer,” they have committed an even more stigmatizing *faux pas*: they have taken the discussion far afield by revealing their emotional preoccupation with their racial identity.” *Id.* at 5.

91. See, e.g., Bender, *A Lawyer’s Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 15–27 (1988); Coombs, *Crime in the Stacks, or A Tale of a Text: A Feminist Response to a Criminal Law Textbook*, 38 J. LEGAL EDUC. 117, 118–131 (1988); Erickson, *Sex Bias in Law School Courses: Some Common Issues*, 38 J. LEGAL EDUC. 101, 104–16 (1988). See C. MACKINNON, *supra* note 6, at 72 (“They tell us no, it’s not a male standard, it is just *the* standard. If you protest that, they say measure up or get out.”).

92. See Erickson, *supra* note 91, at 103 (women’s studies courses are frequently omitted or treated as “fringe” courses in law school curriculums).

93. Catharine MacKinnon argues that:

[W]omen, in sex discrimination law and in the experience of lawyering, do not exist as we, as women, see ourselves. In these spheres we do not find women from women’s point of view. We do not have women for ourselves, women for all women, women as members of a community of interest of women, women measured by standards that reflect the experience and aspirations of women as such.

C. MACKINNON, *supra* note 6, at 71 (1987). The early exclusionary focus of legal training contributes significantly to why the legal profession assumes the “gender-neutrality

This reinforced behavior places women criminal homicide defendants in the worst possible position. While on the one hand women as women do not fit nicely into the established framework of criminal law, the chances of getting a trial which meaningfully reflects their experience is severely limited by professional unawareness of difference or unwillingness to breach norms to represent a woman in the context of her reality. If counsel in fact braves this route and does not supplement the "special defense" with traditional substantive defense theory, she may be declared ineffective. Courts have tended to reward adherence to traditional criminal law by not censuring those lawyers who fail to raise a women's defense theory, and proclaiming ineffective those lawyers who raise a women's defense theory exclusively.

2. Through the Looking Glass and Back: The Cases

Courts look to professional perceptions and expectations regarding women's defenses in determining what is ineffective and what is not: the performance prong of the *Strickland* standard requires a comparison of the representation in question to accepted professional norms. But ironically, the accepted professional norms hinge on what courts have determined is a valid and essential defense. So the two male-defined standards work mutually to reinforce one another: courts looking through the looking glass at the legal profession looking through the looking glass.⁹⁵

Battered woman syndrome used as a defense to criminal homicide is the most widely recognized of women's defenses. Because battered woman syndrome is relatively the most developed of women's defenses, the case law regarding ineffectiveness standards sets the tone for women's defenses generally.

Ineffectiveness standards courts have set regarding battered woman syndrome reinforce and legitimate the male perspective: that battered woman syndrome is not essential to an effective criminal defense but merely an extra. Three types of cases illustrate the

of social institutions, as well as the notion that practices must distinguish themselves from 'business as usual' in order to be seen as unequal." Professor Littleton identifies this social assumption as the "third strand" of feminist critique of equality. See Littleton, *supra* note 27, at 1307. Why society at large is blind to general sex-biased practices is undoubtedly a (male) culturally-based dynamic.

94. See generally López, *Training Future Lawyers to Work With the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305 (1989).

95. "Discrimination in society becomes nondiscrimination in law. Law is a real moment in the social construction of these mirror-imaged inversions as truth." C. MACKINNON, *supra* note 89, at 238.

attitude of the courts: when a lawyer fails to raise battered woman syndrome as a defense; when a lawyer relies exclusively on a battered woman syndrome theory; and the more subtle case involving incomplete development of a woman's defense once actually raised.

a. Failure to Raise Battered Woman Syndrome as a Defense

Defense counsel is responsible for investigating the facts of the case and educating herself about the relevant law. A failure to investigate the facts and relevant law constitutes ineffective representation.⁹⁶ The facts of the woman's case in all probability will reveal whether a defense such as battered woman syndrome applies to the defendant. A simple inquiry into relevant case law should reveal the availability of the defense. Yet failure to raise a battered woman syndrome defense is routinely declared competent defense attorney behavior.

In *Meeks v. Bergen*, the Sixth Circuit squarely addressed the issue of whether Lorraine Meeks was "denied adequate assistance of counsel at trial due to counsel's failure to introduce expert testimony of the battered wife syndrome."⁹⁷ Lorraine Meeks was battered by her husband through ten years of marriage. On the day in question her husband threatened to kill her with a knife "to finish the job that I didn't do yesterday"⁹⁸ when he had knocked her unconscious. Meeks tried to lock him out of the bedroom but when that failed resorted to throwing gasoline at him and igniting him. Meeks' defense attorney did not raise a battered woman defense at her trial, and Meeks was convicted of second degree murder. On appeal, the Sixth Circuit held that Meeks was not denied ineffective assistance of counsel. The court essentially deferred to counsel's judgment, although noting that he was of the incorrect "opinion that the battered wife defense was only applicable where the wife was the aggressor"⁹⁹ as opposed to acting in self-defense. The court found that the *Strickland* performance prong was not satisfied because counsel made a "strategic decision" not to assert a battered woman syndrome defense.¹⁰⁰

96. See *Strickland*, 693 F.2d at 1252-58. See Calhoun, *How To Thread the Needle: Toward A Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 440 (1988).

97. 749 F.2d 322, 324 (8th Cir. 1984).

98. *Id.*

99. *Id.* at 328.

100. *Id.* See also *McBrayer v. State*, 259 Ga. 513, 383 S.E.2d 879 (1989) (Defendant appealed conviction of murder of her former husband/ batterer, contending ineffective

The Sixth Circuit noted that *Strickland* suggests that where there is more than one possible defense and defense counsel "conducts a substantial investigation into the possible defenses," the result is "virtually unchallengeable."¹⁰¹ Significantly, the Sixth Circuit pointed out that according to the standards articulated in *Strickland*, counsel might still be effective if she in fact failed to conduct a reasonable investigation into each plausible line of defense: "strategic choices made after less than complete investigations are reasonable precisely to the extent that reasonable professional judgment supported the limitation on investigation."¹⁰² This observation makes it possible for a court to ignore individual defense attorney failures to pursue a battered woman syndrome defense theory by pointing to the legal community's minimization of battered woman syndrome as a plausible defense. This interpretation of "reasonable professional judgment" translates to "no professional judgment necessary regarding available women's defenses."

If a woman's defense attorney is not considered ineffective for failure to raise a battered woman syndrome defense on behalf of a woman who killed her batterer, counsel is surely not ineffective for failure to raise the defense for a woman who acted criminally under duress from her batterer, or so the courts have consistently found. In *Missouri v. Dulany*, Ann Marie Dulany appealed her conviction of two counts of capital murder in part based on a claim of ineffectiveness of counsel for failure to raise a battered woman syndrome defense.¹⁰³ Dulany was a prostitute and girlfriend of Ronnie Conn, who killed his aunt and uncle by burning them. Conn took Dulany to his aunt's and uncle's house and before going in the house told her, "Whatever happens just happens."¹⁰⁴ Conn argued with his uncle about property left by Conn's mother and struck him. Conn threatened to kill his uncle. Conn ordered Dulany at various times to search for gagging materials, to hold a gun temporarily on the couple, and to carry items to Conn's truck. Conn tied his aunt and uncle up on their bed, threw roofing cement on them, and lit the bed on fire. Dulany was convicted of two counts of capital murder and sentenced to two consecutive life sentences without possibility of parole for fifty years. Dulany argued on appeal that she acted

assistance of counsel for failure to request jury instructions on battered woman syndrome. The court affirmed her conviction.).

101. 749 F.2d at 328.

102. *Id.*

103. 781 S.W.2d 52 (Mo. 1989).

104. *Id.* at 53.

under Conn's "absolute control of her"¹⁰⁵ as a battering victim, and that she was ineffectively represented by counsel who failed to show at trial that she was a battered woman acting out of an (obviously legitimate) fear for her own life. The Missouri Supreme Court rejected her entire argument with one terse phrase: "Duress is no defense to capital murder."¹⁰⁶ Her conviction was affirmed.¹⁰⁷

b. Exclusively Raising a Battered Woman Syndrome Defense

Aside from positively affirming counsel for failure to raise a material defense, courts actually reprimand counsel who have made an oddly similar "strategic decision" to rely exclusively on a battered woman syndrome defense. The signal is clear: you are safe if you avoid the defense, and risk being found ineffective if you rely on it.

Rita Felton was battered throughout her twenty-three year marriage. Her husband battered her during "the course of her six pregnancies . . . he beat her, held her down and threatened to burn her with a blowtorch. [Occasionally she would wake up to him] choking her . . . On various occasions he threatened to kill her. She was forced to commit sexual acts which she considered degrading."¹⁰⁸ He also abused the children. Rita shot her husband with his rifle. Rita's defense attorney exclusively raised a battered woman syndrome defense. In *State v. Felton*,¹⁰⁹ the Supreme Court of Wisconsin held that defense counsel was ineffective because he "focused entirely upon self-defense as it applied to a battered spouse, as Rita Felton clearly had been over the course of the years."¹¹⁰ The court clearly considered the failure to utilize traditional substantive criminal law doctrine ineffective representation: battered woman syndrome should be used as a supplement only.

105. *Id.* at 57.

106. *Id.*

107. *Id.* at 58. The Supreme Court denied certiorari in a case involving a woman who kidnapped and killed the victim, but testified that she had "acted at the direction and under the control of her husband [who] had physically and sexually abused her [and] she was willing to do anything to avoid further abuse." *Neelley v. Alabama*, 109 S. Ct. 821, 825 (1989) (Marshall, J., dissenting). Judith Ann Neelley was sentenced to death. Although she did not raise an ineffectiveness claim on appeal, Justice Marshall himself noted the possibility that she received ineffective assistance of counsel. *Id.* at 822.

108. *State v. Felton*, 110 Wis. 2d 485, 489, 329 N.W.2d 161, 163 (1983).

109. *Id.* at 485, 329 N.W.2d at 161.

110. *Id.* at 505, 329 N.W.2d at 170.

Similarly, in *Larson v. State*,¹¹¹ Glenda Larson was convicted of first degree murder after killing her alcoholic husband who had abused her for four years. The Supreme Court of Nevada held that defendant's counsel was ineffective because of his decision to raise a battered woman syndrome defense exclusively. The court held: "Without commenting on the availability of a "battered wife defense" in Nevada, we conclude that counsel's . . . perception of Glenda's chances at trial [was skewed] and greatly diminished his ability to effectively provide his client with essential . . . counsel."¹¹² In applying the *Strickland* standard, the court found that counsel's performance "fell below an objective standard of reasonableness" and resulted in 'prejudice' to his client."¹¹³

c. Start-Stopping a Women's Defense Theory: Failure to Completely Develop the Defense

The general lack of in-depth knowledge about potential women's defense theories contributes to another problem: briefly mentioning a women's defense theory such as battered woman syndrome or postpartum disorders early in the trial but then failing to follow up the line of defense. Defense attorneys may have numerous reasons for not working to establish such a defense. Perhaps the lawyer believed that the jury responded negatively to the initial theory. Perhaps the lawyer got nervous about what she perceived as taking a big risk. Perhaps the lawyer did not know exactly how to raise a particular women's defense theory, so she simply abandoned it.

In *Commonwealth v. Comitz*,¹¹⁴ Sharon Comitz appealed her sentence following a guilty but mentally ill plea for the drowning of her one month old son Garret. Comitz had suffered from postpartum depression after the birth of her first child, and had developed postpartum psychosis following the birth of Garret. In her appeal of her eight- to twenty-year prison sentence, she claimed that she had been ineffectively represented because her counsel failed to "familiarize themselves with and present the known scientific facts concerning atypical dissociative reactions in [sic] postpartum psychosis"¹¹⁵ and also failed to support her guilty but mentally ill plea with postpartum psychosis in their motion to modify sentence. The

111. 104 Nev. 691, 766 P.2d 261 (1988).

112. *Id.* at 693, 766 P.2d at 262 (footnote omitted).

113. *Id.* at 694, 766 P.2d at 263.

114. 365 Pa. Super. 599, 530 A.2d 473 (1987).

115. *Id.* at 605, 530 A.2d at 475.

court found that she had been effectively represented and affirmed her sentence. Basing its opinion on an implicit notion of "reasonableness," the court found Comitz's claim lacking in "arguable merit" and concluded that "in any event, the course chosen by defense counsel had a reasonable basis designed to effectuate appellant's interests."¹¹⁶

If Sharon Comitz's attorneys indeed failed to familiarize themselves adequately with postpartum psychosis and failed to present adequately postpartum psychosis as a defense at her sentencing hearing, what help was even mentioning such a "defense" on her behalf? A deficiently supported allegation of psychotic behavior hurts a female defendant more than helps her. For example, Comitz claimed on appeal that her defense attorneys actually motivated the sentencing judge to establish a longer sentence by the vague suggestion that she was psychotic, rather than specifically arguing for a extremely short sentence based on the fact that episodes of postpartum psychosis are limited to the postpartum period and typically violence is directed at only the newborn or the mother herself, not the community at large.¹¹⁷

C. *The Violation of Other Constitutional Rights*

While the deprivation of the female homicide defendant's right to effective assistance of counsel is a demonstrable constitutional violation, other constitutional violations suffered by the female defendant are less immediately visible. Courts consistently deny women not only their right to effective assistance of counsel, but also substantive and procedural due process, equal protection, and the right to present a complete defense. However, the usual argument that a woman is denied fifth and fourteenth amendment due process of the law produces a "Catch-22" in this case. Although it is empirically true that the woman is denied a potential defense, and thus denied a traditional element of due process, the argument itself is a syllogism: a woman cannot be denied due process of "law" *if it is the "law" itself* denying her due process.¹¹⁸ Violation of equal protection of the "law" is similarly difficult to establish given the oper-

116. *Id.* at 606, 530 A.2d at 476.

117. *Id.* at 612-13, 530 A.2d at 479-80.

118. As Catharine MacKinnon explains:

Feminists understand the context of inequality in which a woman would shoot her husband under the circumstances. Courts, which seldom apply women's perspective, especially to men, better understand why a man would rape his wife under the circumstances. Referring to "a Constitution that ranted inconveniently about equal rights" does not

ative framework. Arguably, women criminal defendants are denied equal protection of the "law" in the sense that the law, built from the male perspective,¹¹⁹ ignores women's experience.¹²⁰ But, of course, to the extent that the law ignores women's experience generally, it can perceive no denial in ignoring women's experience in these particular contexts.

The rights of battered women, postpartum-disordered women, or rape victims who commit homicide are further violated when — because a court excludes evidence supporting a women's defense theory such as the testimony of the defendant herself or an expert witness — as criminal defendants they do not receive a "meaningful opportunity to present a complete defense."¹²¹ In *Rock v. Arkansas*¹²² the Supreme Court found that a criminal defendant has the constitutional right to present evidence at her trial that is relevant to her defense. In *Rock*, a woman was arrested for killing her husband with his gun in a scuffle. She could not remember the details of the shooting until after a hypnosis session, when she recalled that the safety on the gun had malfunctioned and the gun had gone off when her husband hit her arm. The gun was at that point inspected and found defective. The trial court excluded the evidence of Rock's hypnosis and recollection at her trial, and she was convicted of manslaughter and sentenced to ten years imprisonment and a \$10,000 fine. The Supreme Court held that Rock was entitled to present the evidence of her recollection under hypnosis because it was material to her criminal defense, particularly because excluding it "had a significant adverse effect on petitioner's ability to testify" in her own defense.¹²³ Arguably, evidence of battering or postpartum disorder are essential to the defense of a female homicide defendant. But these questions are not even reached if her legally "effective" counsel fails even to introduce at trial the concrete conditions of a female defendant's life.

Until the substantive criminal law adopts the perspective of women according to an acceptance theory, women will suffer from

solve this problem. I am unconvinced that the Constitution is not a part of the basis for it.

MacKinnon, *supra* note 1, at 731 (footnote omitted).

119. See *supra* notes 11–18 and accompanying text.

120. See MacKinnon, *supra* note 1, for an argument that equal protection analysis results in different outcomes for women and men in the context of self-defense doctrine.

121. *Crane v. Kentucky* 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1986), *cert. denied*, 484 U.S. 834 (1987)).

122. 483 U.S. 44 (1987).

123. *Id.* at 57.

layers of discrimination.¹²⁴ The harm caused by the failure of the criminal law to account substantively for women's experience is far more pervasive than has yet been exposed. Right now the battle focuses tightly on establishing women's defenses like battered woman syndrome as legitimate "special defenses."¹²⁵ But it ultimately is not enough to fight for only the recognition of the legitimacy of "special defenses" for women. Establishing special defenses for women resolves the skewed perspective of the law only superficially. By explicitly carving out exceptions just for women, the legal profession seems to suggest that the law itself is objectively fair and that women get extra paternalistic treatment. Until the availability of defenses to crime *substantively*¹²⁶ and equally reflects female and male perspectives, the problem of discrimination is perpetuated. Until then, because the validity of the current women's defenses such as battered woman syndrome has not been affirmed by codifi-

124. Professor Christine Littleton finds it crucial to go beyond "[m]apping the contours of mismatch between legal categories and women's experience." Littleton, *supra* note 36, at 30. She raises two questions. First, "what would this [battered woman syndrome] legal landscape look like if women had constructed it for ourselves?" *Id.* (footnote omitted). Second, "[w]hat strategies might move us in the direction of the tentative ideal while minimizing the dangers of [jeopardizing] partial reform?" *Id.* at 31. Arguably, the first question is more realistically: What would the legal landscape look like if women could reconstruct it right now using our own concrete experience as a starting point? The law would not be what it is now if women *had* constructed it for ourselves. But our frame of reference must necessarily be the already male-centered law, and the task at hand is injecting women's experience into the current doctrine. Professor Littleton's acceptance theory of equality goes a long way towards abstractly answering her own first question. Rephrasing the first question may partially answer the second question, which brings all too sharply into focus where women are right now in establishing equal treatment in criminal law. How can women take the little victories so far but pursue broader reform along acceptance theory lines? This "problem of transition," although not the focus of this Article, is clearly relevant to how women can achieve the right to effective representation in homicide cases. The status of battered woman syndrome and other women's defenses may be so tentative right now that additional demands to codify the defense in an effort to secure constitutional rights might jeopardize the burgeoning availability of the defense at this point. *See infra* notes 145-47 and accompanying text. But ultimately, "You do not teach someone to count only up to eight. You do not say nine and ten and beyond do not exist. You give people everything or they are not able to count at all. There is a real revolution or none at all." A. DWORKIN, *supra* note 8, at 15 (quoting Pericles Korovessis, from an interview in *LIBERATION*, June 1973).

125. This term is used to suggest that women's defenses fall outside the traditional criminal law, represent special treatment the law offers women because they are different from men, and may or may not work successfully.

126. Substantive law which is codified or firmly entrenched in the common law, *see* text accompanying *supra* note 42, may be distinguished from "special defense" status because substantive criminal law provides *essential* means of defense, not risky strategies.

cation or widespread uniform acceptance, some women will continue to be denied serious constitutional rights.

III. THE NEED FOR ACCEPTANCE: RELOCATING DIFFERENCE TO THE CRIMINAL HOMICIDE STRUCTURE

A. *The Larger Problem: Otherness and Acceptance*

Proving that the accommodationist model is harmful because it deprives a criminal homicide defendant of constitutional rights is just one way of saying that the law is exclusionary even when it appears to include different perspectives so long as the perspective is still labeled "different." But this problem is not experienced just by women, or just by any single group. The exclusionary focus of law victimizes all persons whom our society views as "other." There is no legally recognizable language through which to express most forms of this exclusion. For example, Professor Kimberlé Crenshaw argues that Black women are deprived of constitutional rights because discrimination suffered as a Black woman — not just as a Black and not just as a woman, but singularly as a Black woman — is not recognized by the Supreme Court as a cause of action.¹²⁷ This inability to see the intersection of "other" characteristics is a pattern that permeates our current law. The assimilationist and accommodationist models fail not only for "women," but for all "others." The individual who possesses one or more "other" characteristics inevitably falls further from the white male mainstream and further from the protections of the law. A person has a gender, a race, a class, a sexual orientation, a religion, and other concrete aspects of her identity. She suffers because the criminal justice system fails to recognize those characteristics that make her an individual.¹²⁸ The failure to acknowledge an individual's life experience occurs precisely because the law itself "objectively" ignores those differences. Yet, if difference is recognized within the current system, it operates only to exclude her from the protections of the law, and the more layers of difference, the less protected by the law.

Battered woman syndrome offers an illustration of this irony. While battered woman syndrome defense is an "accommodation"

127. See Crenshaw, *supra* note 40. See also ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE (G. Hull, P. Scott & B. Smith eds. 1982); P. GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA (1984).

128. See generally J. NOONAN, PERSONS & MASKS OF THE LAW (1976). Noonan criticizes the "mask" that law imposes on individuals: "By mask I mean a legal construct suppressing the humanity of the participant in the process." *Id.* at 20.

for some women, arguably the defense functions as "assimilation" for women with multiple "other" characteristics whose experience must be "force-fit" into such a special defense. Sharon Allard argues that Black women cannot use the battered woman syndrome theory successfully because the cultural stereotypes of "passive" battered women and "aggressive" Black women prevent judges and juries from seeing Black women as battering victims.¹²⁹ Lisa Green suggests that battered homeless women are not viewed as battered women in need of protection.¹³⁰ Similarly, although lesbian battering has recently been recognized as a serious issue, judges and juries appear reluctant to view battered lesbians as battered women.¹³¹ On September 7, 1989, Annette Green was found guilty of second degree murder of her lesbian lover. Although she attempted to raise a battered woman syndrome defense, the jury rejected her claim.¹³²

The myth that law's "objectivity" ensures justice is shattered when real life experiences reflect real harms.¹³³ Certain groups suffer from the very fact that "objectivity" excludes any subjective element of difference from the assessment of justice and criminal responsibility. The exclusion of the female perspective from criminal law, and the exclusion of the perspective of "others" from defense theories that theoretically include the female perspective highlight the problem of cloaking a preference for white male majoritarian norms in a noble sheath of "objective" justice. This problem can be remedied by moving towards an acceptance paradigm that relocates difference to the criminal law structure.

129. Allard, *supra* note 4.

130. Green, *supra* note 39.

131. See NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING (K. Lobel ed. 1986).

132. *Scratch That Defense*, Nat'l L.J., Sept. 25, 1989, at 6, col. 1.

133. Liberal jurisprudence that the law should reflect nature or society and left jurisprudence that all law does or can do is reflect existing social relations are two guises of objectivist epistemology. If objectivity is the epistemological stance of which women's sexual objectification is the social process, its imposition the paradigm of power in the male form, then the state appears most relentless in imposing the male point of view when it comes closest to achieving its highest formal criterion of distanced aperspectivity.

C. MACKINNON, *supra* note 89, at 248.

B. *Determining Moral Culpability for Homicide: An Acceptance Approach*

Our criminal homicide structure is premised on the moral culpability of the defendant.¹³⁴ If the defendant is not considered a moral agent, he is not held criminally responsible for his actions; if the criminal defendant is considered less morally culpable, then he is held guilty to a lesser degree. For example, a person found to be legally insane is not considered a moral agent and therefore is acquitted; a person who kills in the heat of passion after adequate provocation is considered less morally culpable and therefore is guilty of a lesser included offense: voluntary manslaughter.¹³⁵

Our criminal homicide structure was not created by some omniscient being. These notions of moral culpability evolved from human thought — the same men who created our law, our cultural stereotypes and prejudices have had a large role in determining what culpability means.¹³⁶ Moral culpability seems to be rooted primarily in religion and moral philosophy. Feminist scholars have challenged both the development of religion¹³⁷ and the current practice of religion¹³⁸ as male-centered. Postmodernist philosophers similarly have challenged philosophy, engaging in dialogues that “are all deconstructive in that they seek to distance us from and make us skeptical about beliefs concerning truth, knowledge, power, the self, and language that are often taken for granted within and serve as legitimation for contemporary Western culture.”¹³⁹

134. See generally Pillsbury, *Evil and the Law of Murder*, 24 U.C. DAVIS L. REV. 437 (1990).

135. *Id.* at 451.

136. Carol Gilligan has shown that women respond to moral dilemmas according to an “ethic of care” which differs significantly from male responses. See C. GILLIGAN, *IN A DIFFERENT VOICE* (1982). The consequences of Gilligan’s work for traditional notions of criminal culpability have been much debated. See, e.g., M. PRITCHARD, *Caring and Justice in Moral Development*, in *ON BECOMING RESPONSIBLE* (1991); Schulhofer, *The Gender Question in Criminal Law*, 7 SOC. PHIL. & POL’Y 105 (1990).

137. See, e.g., R. EISLER, *THE CHALICE AND THE BLADE* (1987); M. STONE, *WHEN GOD WAS A WOMAN* (1976); M. DALY, *BEYOND GOD THE FATHER: TOWARD A PHILOSOPHY OF WOMEN’S LIBERATION* (1973).

138. See, e.g., A. DWORKIN, *RIGHT-WING WOMEN* 23–35 (1978) (“[A woman] disclaims responsibility for her own inventiveness and credits the Holy Spirit, clearly male, thus soothing the savage misogyny of those who cannot bear for any woman to be both seen and heard.” *Id.* at 25.) (“A submissive nature is the miracle for which religious women pray.” *Id.* at 26.) (“[A] desire to do Christ’s will [brings a woman] into conformity with the expressed will of her husband.” *Id.* at 28.)

139. Flax, *Postmodernism and Gender Relations in Feminist Theory*, in *FEMINISM/POSTMODERNISM* 39, 41 (L. Nicholson ed. 1990). See also J. LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (1984); Jameson,

Postmodernists decry the acquisition of an unchanging moral "truth" or that "[r]eason itself has transcendental and universal qualities."¹⁴⁰ Postmodernism therefore challenges our traditional view of moral culpability and suggests that no single, "objective" notion of morality or even culpability should operate as "an objective, reliable, and universal foundation"¹⁴¹ underlying our criminal homicide structure.

In view of these challenges, the fundamental underpinnings of our criminal law structure must be questioned. If, as acceptance theory suggests, the concept of "moral culpability" were expanded to costlessly include the possibility of different perspectives, the criminal law would also reflect a more encompassing view of criminal responsibility.¹⁴²

For example, voluntary manslaughter is defined as a lesser included offense of murder — originally because killing out of jealousy was an understandable reaction to seeing one's wife in bed with a lover. If this paradigm supports an acceptable and understandable scenerio that mitigates a homicide from murder to manslaughter, then "other" equally acceptable and understandable reactions to factual situations ought to be included in our definitions of voluntary manslaughter. If sexual jealousy can mitigate a homicide, physical abuse, rape, or a postpartum disorder should at least equally mitigate a homicide simply because the reaction is understandable in that situation.

C. *The Language That Binds Us*

Combatting insidious "layers" of discrimination based on difference — from the notions of culpability at the heart of our criminal law to the actual definitions of crimes — must begin with

Postmodernism, or the Cultural Logic of Late Capitalism, 146 NEW LEFT REV. 53 (1984).

140. Flax, *supra* note 139, at 41.

141. *Id.* For postmodernist discourse in the context of feminism, see Bordo, *Feminism, Postmodernism, and Gender-Scepticism*, in FEMINISM/POSTMODERNISM, *supra* note 137, at 133; Di Stefano, *Dilemmas of Difference: Feminism, Modernity, and Postmodernism*, in FEMINISM/POSTMODERNISM, *supra* note 137, at 63.

142. Catharine MacKinnon finds the question of culpability for female killers problematic: "To the extent these women [who killed] acted, broke the constraint of their situation, they are criminally culpable; to the extent their actions are a product of the ways they have been acted upon, they are not culpable, or less so." MacKinnon, *supra* note 1, at 734. The very tension that MacKinnon identifies, however, may suggest a paradigm for more fairly describing the criminal culpability of female homicide defendants: accountability should depend upon not simply the crime itself, but also upon the oppressive circumstances surrounding the woman's action.

exposure and confrontation. The difficulty with this lies in the layers: we continue to have serious problems "exposing and confronting" even basic layers reflecting only one level of "otherness," such as the need for injecting the female perspective into criminal homicide law. Acceptance of any level of difference at all is a victory.

The problem with any claim of discrimination in our legal system is that the frame of reference is always the white male majoritarian establishment we try to resist by bringing a claim. Catharine MacKinnon charges sex discrimination doctrine with viewing women in two ways: either as men, or as men view women. Sex discrimination law "substantively embraces masculinity, the male standard for men, and applies it to women [or] views women as men view women: in need of special protection, help, or indulgence."¹⁴³ Once again, the law reflects assimilation or accommodation, but not acceptance. So challenging the current substantive criminal homicide structure as discriminatory is all but fruitless if done on its own assimilationist or accommodationist terms. Treating a female criminal homicide defendant "the same" as a male defendant or giving her "special treatment" is doing justice under our sex discrimination doctrine.

If we cannot "expose and confront" the basic need for incorporating different perspectives in the criminal homicide law, how can we hope to convince anyone of the discrimination occurring on a more complex level? The question we should really ask is: How can the magnitude of the problem ever be communicated *except* through pointing out the discrimination occurring at all levels? The likelihood of achieving a substantial integration of the female perspective into the criminal homicide law seems slight if the only motivating force is to "equalize" the treatment of female and male criminal offenders when "equality" means what current sex discrimination doctrine suggests. But showing a real constitutional rights violation requiring a change in the substantive criminal law structure to cure the problem demands a change in perspective.

The only way to challenge successfully a pervasive and invisible injustice is to "expose" it by rendering it visible. Peeling back a single layer of discrimination so superficially reveals the real underlying problem that remedial measures are likely to be misguided and diluted. But tearing violently straight to the core of the discrimination is a frightening concept in our culture. The mainstream

143. C. MACKINNON, *supra* note 6, at 71.

cannot accept such a radical form of change. Slow, demonstrably correct social movement gets general public approval. So where does that leave feminism? Focusing slowly and surely on methodology to implement change.¹⁴⁴ We know it is discrimination. But in the sad reality of male-centered society, that knowledge in a vacuum only alienates us. How can we prove it to them, on their terms?

D. *Necessary Transitions: Speaking Feminism in a Sexist Language?*

Professor Christine Littleton raises a crucial question: "What strategies might move us in the direction of the tentative ideal while minimizing the dangers of partial reform?"¹⁴⁵ The fear of jeopardizing the small gains women have achieved in the criminal law combined with the fear of gaining unsatisfactory half-baked reform in the future makes crafting a careful path to achieve reformatory measures crucial. At this point, injecting the female criminal defendant's perspective into the substantive criminal homicide law structure probably is the closest we could hope to approximate what the "legal landscape [would] look like if women had constructed it ourselves."¹⁴⁶

But neither the assimilation theory nor the accommodation theory can support a restructuring of homicide law to include women's perspective. Assimilation does not even challenge the current law as sexist, but demands that women be treated as men. Accommodation recognizes difference, but permits the difference to be located in the woman. A "special defense" just for battered women, or just for rape victims, or just for new mothers is exactly what accommodation theory requires. The existing law is fair if women receive special protection — that is, some women, sometimes, in some jurisdictions, with some juries, some judges, and some lawyers.

Acceptance theory demands a reintegration of the female perspective into the criminal homicide law itself. This relocates the difference to the criminal law and relieves female criminal defendants of bearing the burden of the "difference" alone. Significantly,

144. As Professor Mari Matsuda suggests, "Timing is an element of jurisprudential inquiry; how much can we hope to attain at this moment. When is it time to assert a new principle of law? When is it time to openly defy law? When is it time to sit and wait?" Matsuda, *supra* note 41, at 10.

145. Littleton, *supra* note 36, at 23, 31.

146. *Id.* at 30. See *supra* note 124.

the cost of the currently misplaced burden involves the life and liberty of female criminal homicide defendants. Clearly, the only direction our reformatory efforts should take is along acceptance lines.

As suggested above, attacking the treatment of female criminal defendants on due process or equal protection grounds may be futile in practical terms because the law itself is the discriminatory tool. While we may challenge singular rules or statutory provisions as discriminatory on the basis of sex, we cannot challenge the structure of the law itself as sexist. We have no language to voice such a challenge in except the language of the law itself. It may be that the way to implement the changes women require in the law is through a process of "translation": speaking of female oppression to men and male-identified women in male terms. Persuasion of the male viewpoint might require stripping back the layers of discrimination through application of legal terms. By showing in concrete, constitutional and male terms that a woman is denied the right to effective assistance of counsel, a "visible" constitutional violation is proven: something that should be less easy to ignore.¹⁴⁷

147. Demonstrating the "visible" need for relocation of difference to the substantive criminal homicide law must catalyze reconstruction. This ideally will enable the female criminal homicide defendant to express her relevant life experience without the constraints the current law imposes. Attaining this goal may seem farfetched. However, pending cases may offer the opportunity to accomplish an expansion of restricted perspectives in the criminal homicide law. One example of a case that challenges both the assimilation of traditional substantive criminal law and the accommodation of women's defenses is the California case of *People v. Massip*, 221 Cal. App. 3d 558, 271 Cal. Rptr. 868, *review granted*, 789 P.2d 1212, 274 Cal. Rptr. 369 (1990). *Massip* involves the criminal prosecution of a woman who killed her infant while suffering from postpartum psychosis. Although a jury convicted Massip of second degree murder and found her sane, the judge found her guilty of voluntary manslaughter and then acquitted her on the basis of insanity. On appeal, the government argued that the judge improperly found Massip guilty of voluntary manslaughter since she did not act with passion and provocation. The California Court of Appeal held that the judge could have properly found Massip guilty of voluntary manslaughter if he found an *actual absence of malice*. The case is now before the California Supreme Court. *Id.* See also Hager, *Justices to Review Murder Case of Mother with "Baby Blues,"* L.A. Times, Oct. 12, 1990, at A31, col. 1.

If affirmed, this case could expand the traditional rigid passion and provocation framework to include other mitigating circumstances that should operate to reduce such homicides from murder to manslaughter. This doctrinal expansion would eliminate parts of both the assimilationist and accommodationist approaches to female criminal homicide defendants: a woman's perspective is not doctrinally excluded, so there is no need for claiming a special defense if she may now substantively express her case through a claim of voluntary manslaughter. See Reece, *supra* note 35, at 730 & n.159. The *Massip* interpretation of voluntary manslaughter not only would include female defendants, but also could potentially make room in voluntary manslaughter law for "others" to express their realities. An "actual absence of malice" standard is much

CONCLUSION

Until the perspective of different criminal defendants is integrated with the substantive criminal law, the discrimination perpetuates in ways we may not even realize. Courts only reinforce prevailing skepticism about battered woman syndrome, rape trauma syndrome, and postpartum disorders by denying that failure to raise such a defense deprives a woman of her constitutional right to effective assistance of counsel. But meanwhile, the dictate that a women's defense theory is not critical to the effective representation of a female criminal homicide defendant places the criminally aggressive woman right back into the category where society is most comfortable with her: victim.

closer to the culpability concerns that lie at the foundation of the homicide structure, and it is apparently not tied to any one perspective about what constitutes a mitigating circumstance. Of course, this one expansion in one state's voluntary manslaughter law would not end the need for injecting the perspective of "others" into the substantive criminal law. But it certainly would be an excellent start.