The Postpartum Psychosis Defense and Feminism: More or Less Justice for Women

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INTRODUCTION

Andrea Yates faced the death penalty for drowning her five children in her bathtub in Houston in June 2001. The details that emerged concerning the killings are horrific; a picture of a family tragedy that few can imagine or understand. The police had been called to the house the morning of the murders by the mother and found the children, aged six months to seven years, dead in the bathtub and spread out in the bedroom. Andrea Yates had a history of mental illness, medications, psychiatric hospitalizations, and suicide attempts. She pled not guilty by reason of insanity, claiming that she was suffering from postpartum psychosis when she killed her children. With precedent as an indicator, Andrea Yates faced penalties ranging from acquittal to the death penalty. A jury of eight women
and four men convicted Andrea Yates after just three and one-half hours of deliberation; she was sentenced to life in prison.\(^3\)

The wide range of verdicts in similar cases indicates society’s and the legal system’s ambivalence about postpartum psychosis as a criminal defense.\(^4\) The ambivalence results not only from society’s desire to hold people accountable, but also from the conflict between traditional notions of motherhood and the tragedy of filicide. The variety of outcomes also illustrates the difficulty that the legal system, from judges to juries, has in adjudicating female-specific defenses in a purportedly gender-neutral manner.

Today, the dialectic about what equality means and how best to achieve it plays out in the courts, in legislatures, and in academia as society wrestles with the question of whether there can be legal equality in the face of biological differences.\(^5\) In this setting, when the discussion of sex equality has evolved to recognizing that, in most cases, gender differences are irrelevant,\(^6\) the courts and feminist groups struggle to deal with the remaining cases in which biological differences between men and women are relevant.\(^7\)

This Note explores the controversy over the use of postpartum psychosis as a criminal defense and examines the interplay between feminists and a legal system ill-equipped to recognize and draw lines when the question is one of gender. Part I describes the psychiatric condition of postpartum psychosis. Part II discusses the current insanity defense standards and recent cases in which the postpartum psychosis defense has been used to varying degrees of success. Part II also identifies problem areas, such as expert testimony and medical research, that make the insanity defense in any of its current forms inadequate for arriving at justice for women suffering from postpartum psychosis.

Part III discusses why this female-specific defense is controversial among feminists. It explains the mainstream feminist theo-

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6 Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (noting that “the sex characteristic frequently bears no relation to [the] ability to perform or contribute to society”).

7 Law, supra note 5, at 969 (“The development of constitutional doctrine in the past fifteen years has also failed to reconcile the idea of equality with the reality of biological difference.”).
ries and their approaches to female-specific legal standards. Part III also explores cases in which the Supreme Court has found it permissible to make gender-based distinctions and how these decisions have influenced the concept of equality for women. Finally, Part IV argues that some feminist theories actually hinder equality and justice in the area of biological differences. It proposes that a legislative solution creating a separate postpartum defense is the only way to arrive at equal justice for mothers who commit filicide while suffering from postpartum psychosis. This legislative solution would recognize the indisputable differences between men and women and allow for a legal standard designed specifically to recognize the unique character and nature of this disease.

I. POSTPARTUM PSYCHOSIS – A PSYCHIATRIC CONDITION

Before examining cases that have employed the postpartum psychosis defense, it is important to highlight the differences among the “baby blues,” postpartum depression, and postpartum psychosis. This distinction is crucial to understanding why postpartum psychosis can be singled out for different legal treatment while the other two illnesses cannot. Based on current medical research, postpartum psychosis is the only condition that should qualify for special legal treatment. “Baby blues” and postpartum depression, while medically recognized, would not meet the threshold of legal insanity in the majority of cases because they typically do not impair a mother’s ability to tell right from wrong. It is also important to emphasize, as a rebuttal to those concerned with an overly broad insanity standard, that postpartum psychosis is a narrowly defined medical category that includes relatively few women.

The “baby blues”, or “blues”, occurs in fifty to seventy percent of women in the first six to eight weeks after birth; symptoms include crying, general depression, and fatigue. The “blues” does not impair a mother’s judgment and is probably not a disorder or disease. Postpartum depression occurs in ten to twenty percent of women and may persist for one year. It is categorized as a type

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8 For a discussion of the causes of the various stages, see Kimberly Waldron, Postpartum Psychosis as an Insanity Defense, 21 Rutgers L.J. 669, 671-73 (1990).
10 O’Hara, supra note 9, at 206-09. For a recent study on postpartum depression and treatments, see Katherine L. Wisner et al., Postpartum Depression, 347 NEW ENG. J. MED. 194 (2002).
of reactive depression and involves feelings of hopelessness, inadequacy, anxiety, and moodiness.  Although studies are few, the level of support that the mother receives from the father and family is more determinative of the depression than are demographic and biological factors.

Postpartum psychosis occurs in one to two of every one thousand births and can lead to suicide or infanticide. It involves a major deviation from the normal processes of thinking, behavior, and emotion. Emotional reactions may be inappropriate to the circumstances, and actions may not be related to facts. For example, a mother may say that she sees the room upside down, express concern that a small pimple on her child's face is a misplaced testis, or fear that the hospital staff is part of a conspiracy to kill the baby. Anxiety can lead to panic attacks; a mother often has obsessive thoughts about harming the baby by putting it in the oven, drowning it, cutting off its body parts, or dropping it from an elevated surface. Hospitalization is necessary for the protection of both the mother and the child.

Postpartum psychosis traditionally has not had its own diagnostic category because it has not been viewed as distinguishable from non-postpartum psychoses. Postpartum psychosis was thought to be the same as a psychosis that a man or a woman who had not recently given birth suffers. However, the fact is that women suffering from postpartum psychosis have been shown to be more delusional, disoriented, and agitated with greater frequency than men or women suffering from psychosis unrelated to childbirth.

II. THE INSANITY DEFENSE AS APPLIED TO POSTPARTUM PSYCHOSIS

Daniel Maier Katkin studied twenty-four cases in which postpartum psychosis was employed as a defense. Of those cases, eight women were acquitted, four were given probation, ten were

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1 O'Hara, supra note 9, at 210.
2 Id. at 214.
3 KATHARINA DALTON, DEPRESSION AFTER CHILDBIRTH 84-90 (1996). These examples come from stories that postpartum patients shared with Dr. Dalton.
4 VERTA TAYLOR, ROCK-A-BY BABY: FEMINISM, SELF-HELP, AND POSTPARTUM DEPRESSION 42 (1996). See also DALTON, supra note 13, at 86 ("Characteristically there may be sudden changes from normal lucidity to extremely bizarre actions and statements.").
5 DALTON, supra note 13, at 85.
6 O'Hara, supra note 9, at 217.
7 Id. at 218. See also Katkin, supra note 4, at 275 (stating that the occurrence of postpartum violence is "not merely a few isolated incidents, but a recurring pattern of the destruction of planned-for, wanted children by their own mothers with no apparent motive and under circumstances that suggest transitory mental illness").
sentenced to between three and twenty years, and two were sentenced to life in prison.18 The disparity in outcomes indicates the difficulty that juries have in reconciling a mother’s normal behavior with a sudden onset of delusional and psychotic behavior. In addition, postpartum psychosis is difficult to prove under current insanity defense standards because the medical community is not in agreement about the diagnosis. As a result, expert testimony is often confusing.

A. An Overview of Insanity Standards and Illustrative Cases

The historical premise for the insanity defense is that a defendant should not be held responsible for a crime if the defendant did not have a blameworthy state of mind at the time of committing the act.19 Jurisdictions within the United States apply different standards to determine legal sanity. The states have developed numerous specialized legal terms to define insanity; those legal terms differ substantially from their psychiatric counterparts.20 The two legal standards that are currently in use are the M’Naghten test and the American Law Institute provision (also known as the Model Penal Code provision).

To prove insanity, the M’Naghten test requires that the defendant be suffering from a defect in reason because of a disease of the mind so that at the time of the crime the defendant did not know the nature or quality of his act. Alternatively, if he did know the nature or quality of his act, then he did not know that it was wrong.21 This test is often criticized for failing to recognize degrees of incapacity and for relying too heavily on expert testimony.22 In the benchmark case of United States v. Freeman,23 the United States Court of Appeals for the Second Circuit outlined the various deficiencies of the M’Naghten test, including that its non-recognition of varying degrees of control is “grossly unrealistic”

18 Katkin, supra note 4, at 279-80.
23 357 F.2d 606 (2d Cir. 1966). For further discussion, see Cynthia G. Hawkins-Leon, “Literature as Law”: The History of the Insanity Plea and a Fictional Application within the Law & Literature Canon, 72 TEMP. L. REV 381, 398 (1999).
and that it places "tight shackles" on expert psychiatric testimony. 24

Both of these weaknesses in the M'Naghten test are particularly detrimental to proving postpartum psychosis. First, postpartum psychosis is characterized by its sudden onset and dissipation. The mother may have varying degrees of sanity throughout the postpartum period. 25 This makes it difficult to prove whether the mother, who generally acts normally prior to the killing, knew right from wrong at the moment of the murder. Second, medical experts do not agree on the causes of postpartum psychosis so that their testimony may appear to the jury to be unreliable or inconsistent. For example, in the opening to his chapter on postpartum psychosis, Dr. Brockington states: "It would be ideal to start this chapter with a definition, but this is one of the greatest difficulties." 26 Thus, with even a working definition still under discussion, it is difficult for defense experts to meet the stringent "disease of the mind" requirements set forth in the M'Naghten test.

The Supreme Court of Nevada followed the M'Naghten test in Clark v. State. 27 In that case, a mother was convicted of attempting to murder her two-week-old daughter by wrapping her in a blanket and abandoning her in the bushes at the side of a road. Two psychiatrists and one psychologist testified as to Clark's "severe post partum [sic] depression" that rendered her legally insane at the time of the abandonment. 28 However, Clark's family members testified that she was acting normally on the day of the abandonment. 29 The fact that Clark was unemotional and calm when questioned by the police and made up a story that the child was kidnapped weighed more heavily with the jury than did the expert medical testimony. 30

The M'Naghten test also was followed in Commonwealth v. Comitz. 31 In that case, the defendant drove with her one-month-old infant to an overpass in Pennsylvania and dropped him into a stream. She originally reported to the police that the baby was kidnapped. The defendant had suffered postpartum depression after the birth of her first child and was taking antidepressant medication at the time of the murder. 32 Comitz pled guilty but

24 357 F.2d at 618-19.
25 Katkin, supra note 4, at 275.
28 Id. at 1029.
29 Id.
30 Id.
32 Id. at 475.
mentally ill to third-degree murder. The trial court accepted that she was mentally ill but did not excuse her conduct. On appeal, the Superior Court of Pennsylvania noted that the “appellant’s mental condition has been the focus of attention in this matter.” The appellate court said that, despite the evidence of the defendant’s mental condition, the trial court was not required to excuse her conduct. The sentence of eight to twenty years was affirmed.

Despite expert testimony and the defendants’ strange conduct, neither Comitz nor Clark could meet the M’Naghten insanity standard. The fact that the mothers created kidnapping stories after the killings weighed heavily under M’Naghten to show that they knew right from wrong. However, since one of the characteristics of postpartum psychosis is its sudden onset and dissipation, the fact that the mother, after the killing, knew to contact the police should not be determinative of the knowledge of right and wrong at the time of the killing.

The American Law Institute (ALI) formulation for the insanity defense is more flexible than the M’Naghten rule. The ALI provision creates a two-prong test whereby the defendant must prove that “as a result of mental disease or defect he lack[ed] substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.” The defendant only has to prove one of the two prongs: either that she lacked substantial capacity to appreciate the wrongfulness of her actions, or that she could not conform her conduct to the requirements of the law.

This formulation is favorable to criminal mothers because the “substantial capacity” language recognizes that impairment can come in varying degrees. By using the word “substantial” to modify “capacity,” the rule differs from M’Naghten in not requiring total incapacity. In Freeman, the United States Court of Appeals for the Second Circuit noted that the rule “reflects awareness that from the perspective of psychiatry absolutes are ephemeral and gradations are inevitable.” “Appreciate” is also a broader stan-

33 Id. Under the Pennsylvania “guilty but mentally ill” verdict, the court has discretion to excuse the defendant’s conduct based on an evaluation of mitigating factors and to impose any sentence “which may lawfully be imposed on any defendant convicted of the same offense.” 42 PA. CONS. STAT. ANN. § 9727 (West 2001).
34 Comitz, 530 A.2d at 474.
35 Id. at 478.
36 DALTON, supra note 13, at 84-90.
37 MODEL PENAL CODE § 4.01 (1962).
38 United States v. Freeman, 357 F.2d 606, 622 (2nd Cir. 1966).
Under the ALI rule, the ability to intellectually "know" that conduct is wrong is conjoined with an understanding of the moral and legal significance of the conduct.

Some jurisdictions, such as Idaho, have rejected the M'Naghten rule in favor of the ALI standard. In State v. White, Janet White was charged with and acquitted of voluntary manslaughter based on an insanity defense. In the emergency room, she told the doctors that the baby would not stop crying, her mind had snapped, and she threw the baby on the ground. The main issue at trial was the disagreement among the experts as to White's sanity. Dr. Levy, testifying for the prosecution, concluded that White's "snapping" was a rationalization for the killing and doubted whether "she went into a psychotic depressive reaction . . . because it would have had a longer duration." However, Dr. Levy admitted on cross-examination that throwing the baby on the floor was a symptom of emotional illness.

In contrast, Dr. Pullen, the defense doctor who treated the defendant for three months at the state hospital where she was admitted, testified that Mrs. White was suffering from acute schizophrenia. He stated that "mental illness of this type can long exist, surface suddenly, and fade away." The Idaho Supreme Court affirmed the acquittal. In its decision, the court declared that the M'Naghten rule was outdated, of dubious judicial origin, and deficient in several respects. The court adopted the American Law Institute standard.

Unfortunately, there are not many postpartum psychosis cases from jurisdictions that have adopted the ALI standard. However, the White decision supports the idea that a more flexible insanity standard could facilitate successful insanity pleas for mothers suffering from postpartum psychosis.

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39 Waldron, supra note 8, at 690. See also John Dent, Postpartum Psychosis and the Insanity Defense, 10 U. CHI. LEGAL F. 355, 356-58 (1989) (discussing the movement away from more lenient insanity standards following John Hinckley's acquittal by reason of insanity for the assassination attempt on President Ronald Reagan).
41 Id. at 798-99.
42 Id.
43 Id. at 799.
44 Id.
45 Id. at 801-02.
46 Id.
47 Id.
B. The Problem of Evidence and Testimony

As a practical matter, postpartum psychosis is difficult to prove, particularly when the mother has had no previous psychiatric problems. The temporary nature of the psychosis makes psychiatric testing after the fact speculative as psychiatrists try to figure out the mother's mental conditions retrospectively. An increased sensitivity to the symptoms of serious depression and possible psychosis on the part of law enforcement could lead to psychiatric testing that is more temporally proximate to the crime and therefore more probative in an insanity defense.

Expert as well as acquaintance testimony is important to prove this defense and to make the jury understand that a normally loving person "just snapped." Unfortunately, the testimony of family members can be difficult to gather because postpartum psychosis and even severe depression seem to go unnoticed and undiagnosed. Abnormal behavior can be overlooked or attributed to hormones and fatigue. As Dr. Dalton points out: "It is no good asking a new mother if she has such fears [of harming her child], as she will immediately refute the idea, knowing that if she confesses her baby will be taken into care." Those new mothers who manifest symptoms while in the hospital usually are discharged with the expectation that being at home in familiar surroundings will alleviate the depression.

In a study conducted in Ohio, a majority of the fifty-two women who reported having emotional problems within the first year of birth were not diagnosed formally by a doctor or psychiatrist, despite having the required periodic examination following childbirth by their gynecologists. In fact, less than twenty percent of the women even discussed the depression with their doctor or pediatrician. These statistics illustrate the difficulty of finding doctors and family members to testify that they noticed something amiss before the homicide. Without this crucial testimony, a postpartum psychosis defense likely will fail.

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48 For a discussion of the difficulties in proving the postpartum insanity defense, see Katkin, supra note 4, at 282-94.
49 Dent, supra note 39, at 363.
50 Id.
51 DALTON, supra note 13, at 95.
52 Id. at 186.
53 TAYLOR, supra note 14, at 41.
54 Id.
C. The Dearth of Medical Research and Study

The proof problem is further aggravated by the meager amount of research and case studies on women suffering from postpartum psychosis in the United States. The United Kingdom, coincidentally one of the first countries to adopt an infanticide law, has conducted the most studies and has special psychiatric units where mentally ill mothers and their children can recover. This is in contrast to the 1926 decision of the American Psychiatric Association and the American Medical Association, which eliminated postpartum psychosis from the list of mental disorders because "no distinct syndrome existed which showed a connection between a psychiatric disorder and childbirth." 56

The Diagnostic and Statistical Manual of Mental Disorders (DSM), the bible of U.S. psychiatric medicine, first recognized postpartum psychosis in its fourth edition in 1994. 57 Prior to that time, the DSM simply contained a cross-reference under "postpartum psychosis" to see "schizophrenic disorder, brief reactive psychosis, major affective disorders, [or] organic brain syndrome." 58 Michael O'Hara argues that the exclusion of postpartum psychosis from the DSM impeded research in the U.S. because it was difficult to identify women who had just given birth and were receiving psychiatric treatment. 59 Dr. Brockington agrees that the influence of the DSM on postpartum psychosis research "has been adverse" and has made it more difficult to identify postpartum cases for epidemiological research. 60

This lack of research can have important consequences at trial or on appeal. For example, in the Comitz case, the Superior Court was addressing whether the trial court erred by not excusing

55 O’Hara, supra note 9, at 220.
57 See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 386 (4th ed. 1994) ("Infanticide is most often associated with postpartum psychotic episodes that are characterized by command hallucinations to kill the infant or delusions that the infant is possessed."); see also Junichi Nomura & Tadaharu Okano, Endocrine Function and Hormonal Treatment of Postpartum Psychosis, in POSTPARTUM PSYCHIATRIC ILLNESS, supra note 4, at 176, 176 ("[T]he nosology and the etiology of postpartum psychosis are not yet clear, and we have difficulty in finding its proper place in the modern classification of mental diseases.").
58 AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 491 (3d ed. 1980).
59 O’Hara, supra note 9, at 222 ("In the United States it is virtually impossible to link obstetrical and psychiatric records as is routinely done in Europe."). See also BROCKINGTON, supra note 26, at 208-09 ("The absence of the imprimatur of the World Health Organization and the American Psychiatric Association has depressed research and the provision of services.").
60 BROCKINGTON, supra note 26, at 208.
Comitz’s behavior. In light of the conflicting expert testimony as to whether Comitz was psychotic at the time of the killing, the court turned to the third edition of the DSM for definitions. At that time, postpartum psychosis was listed as an “atypical dissociative disorder.” In discounting the weight of the medical evidence, the court stated that, “‘atypical dissociative disorder’ lacks precise definition and, in fact, includes any one of several different mental states.” The fact that postpartum psychosis had not been defined or researched adequately led the court to question its validity and weakened the defendant’s insanity argument.

III. THE COURTS AND BIOLOGY: FEMINIST CONCERNS REGARDING A FEMALE-SPECIFIC DEFENSE

A Wall Street Journal article lamented that Andrea Yates is the “new feminine icon” and stated that from a legal standpoint “the Yates case transcends gender.” Sally Satel argued that either Andrea Yates was psychotic or she was not, and whether or not she is male or female should make no difference. However, it should make a difference. The fact is that no man can suffer from postpartum psychosis because no man can bear a child. While the general principles of jurisprudence advocate a neutral application of justice, to argue that the Yates case “transcends gender” is to miss the basic point that Andrea Yates’ defense depends upon a female-specific psychiatric condition.

Whether to support legal standards that recognize, even in some narrowly defined biological instances, differences between men and women is controversial among feminists. For example, some feminists favor maternity leave as the proper recognition of women’s special needs in the workplace, while others oppose sex-specific leave policies because they recreate and perpetuate traditional stereotypes. In the criminal law context, feminists debate whether female-specific defenses such as the battered woman syndrome and postpartum psychosis advance or hinder women’s rights.

Id. at 478.
Id.
Id.
Martha Minow, Adjudicating Differences: Conflicts Among Feminist Lawyers, in CONFLICTS IN FEMINISM 149, 150 (Marianne Hirsch & Evelyn Fox Keller eds., 1990).
See, e.g., Anne M. Coughlin, Excusing Women, 82 CAL. L. REV. 1, 1-14, 71-87 (1994) (tracing the development of the battered woman syndrome defense, the research of its creator Lenore Walker, and the reasons that the defense has overwhelmingly negative implications for
A. The Sameness Theory

Assimilationist theory was the first feminist legal theory and proposed that women and men should be treated exactly the same, regardless of biological differences.\textsuperscript{68} Assimilationist theory, also known as the sameness approach or formal equality, evolved from the Supreme Court’s decision in \textit{Reed v. Reed}.\textsuperscript{69} In that case, the Court held that Idaho could not deny women the right to administer estates. Because there were no demonstrable differences between men and women, there was no justification for arbitrarily treating the sexes differently.\textsuperscript{70} Feminists seized on this decision as an opportunity to show that in most cases, women were the “same” as men so that discrimination could not be justified.\textsuperscript{71}

Today, sameness proponents argue that the best way to insure that female differences are not used against women is to ignore the differences as legally relevant.\textsuperscript{72} It is clear that sameness theory has advanced women’s causes, particularly in the employment field.\textsuperscript{73} For example, in \textit{City of Los Angeles Department of Water and Power v. Manhart},\textsuperscript{74} the Supreme Court held that the Department’s practice of having female employees pay 15% more in monthly contributions to the retirement fund because of women’s longer life expectancy violated Title VII of the Civil Rights Act of 1964. The Court stated that “[i]t is now well recognized that employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males or females. Myths and purely habitual assumptions about a woman’s ability to perform certain kinds of work are no longer acceptable reasons” for not employing qualified women.\textsuperscript{75}

When the sameness doctrine attempts to deal with biological differences such as pregnancy, there is a tension between the re-
sults and people's everyday experience with gender differences. For example, in Gedulig v. Aiello, the Supreme Court examined California's state-sponsored disability insurance system for private employees. This program did not recognize normal pregnancy as a covered disability. Four women brought a claim that this system violated the Equal Protection Clause of the Fourteenth Amendment. The Court reasoned: "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." Therefore, the exclusion of normal pregnancies from coverage was not sex discrimination but a classification based on a physical disability. Reasoning that the insurance program did not exclude anyone based on gender, the Court stated that "it does not follow that every legislative classification concerning pregnancy is a sex-based classification." The Court found no equal protection violation.

In General Electric Co. v. Gilbert, the Supreme Court examined a class action suit brought under Title VII challenging a disability plan similar to the one at issue in Gedulig. The Court held that discrimination based on pregnancy is not sex discrimination because the distinction being drawn was between pregnant women and nonpregnant persons. Two years after Gedulig, the Court seemed unwilling to reiterate the "pregnancy is not sex-based" rationale. Rather, the Court produced another tenuous distinction between pregnant women and all other nonpregnant persons, which, by definition, includes all men at all times. When confronted with biological differences, the Court staunchly reasoned to a gender-neutral conclusion, even though the results were a nonsensical reflection of reality.

The Pregnancy Discrimination Act of 1978 (PDA), an amendment to Title VII, was Congress's response to the Court's decisions in Gedulig and Gilbert. Although the Act was, in some sense, a reaction to the sameness doctrine gone too far, the Act exemplified the doctrine by treating pregnancy the same as any other disability. The Act states that "women affected by preg-

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77 Id. at 490.
78 Id. at 496-97.
79 Id. at 496 n.20.
80 429 U.S. 125 (1976).
81 Id. at 136-40. For further discussion of this decision, see Joyce Gelb & Marian Lief Palle, Women and Public Policies: Reassessing Gender Politics 163-68 (1996).
nancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes." 83 Assimilationist advocate Wendy Williams notes that the PDA was passed in the context of laws that forced pregnant women to resign or to lose accrued seniority. 84 From that perspective, the PDA was improving the treatment of women by mandating that they be treated the same as others.

These cases illustrate the failure of the sameness doctrine to deal adequately with biological differences between men and women. By ignoring biology to remain consistent with its ideals, the sameness doctrine conflicts with reality. Sylvia A. Law points out that "[t]his is a difference that is based in reality and not 'merely definitional.'" 85 She adds that "an equality doctrine that denies the reality of biological differences in relation to reproduction reflects an idea about personhood that is inconsistent with people's actual experience of themselves and the world." 86 A feminist theory that cannot accommodate relevant biological differences within its doctrine, especially when women's lives are at stake in a criminal trial, is not furthering the cause of women.

B. The Difference Theory

Criticism of the sameness doctrine led to the development of other feminist theories. One of the perceived shortcomings of the sameness doctrine is that in order to become equal, women have to become like men, thereby sacrificing their womanhood. 87 Cultural feminism, or the difference approach, proposes that men and women be treated equally, but that social, biological, and psychological differences be accommodated. This doctrine developed from an effort to reconcile the demands of motherhood and pregnancy with the idea of formal equality. 88 Special rights and accommodations for women affirm that men and women are different and that those differences are properly reflected in the law. 89

Noted difference advocate Carol Gilligan writes that male and female viewpoints differ and that there are cultural and biological reasons for this. Her study showed that the maturation of boys and girls led to different expectations and values based on gender. For

85 Law, supra note 5, at 965.
86 Id. at 955.
87 Leath Storey, supra note 72, at 152-54.
88 See Grant Bowman & Schneider, supra note 68, at 251-54.
89 See Leath Storey, supra note 72, at 152.
example, men tended to be concerned with hierarchy and power, while women valued personal relationships and nurturing. According to Gilligan, trying to "equalize" these differences is irrational. The strength of this approach is that it does not require women to "assimilate" to traditional male norms; the weakness is that it may perpetuate traditional notions and limitations on women's abilities. As illustrated below, asserting difference in the legal context has won some cases for women, but it also has been employed against women.

In California Federal Savings & Loan Association v. Guerra, a receptionist for California Federal took maternity leave and was subsequently discharged. The California Fair Employment and Housing Act required employers to provide leave and reinstatement to employees disabled by pregnancy. The Department of Fair Employment and Housing charged California Federal with violating state law, and California Federal brought an action seeking Title VII preemption of the state claim.

Feminist groups filed opposing briefs as to whether or not women should be given "special" treatment for pregnancy. The Equal Rights Advocates argued that California's policy reflected "real differences in the procreative roles of men and women," while the ACLU argued that pregnancy did not justify any special treatment. Although California Federal previously had a four-month maternity leave policy, it argued that because the Pregnancy Discrimination Act required the same treatment for pregnant women as for others suffering from a disability, they could no longer offer a special maternity leave.

The Supreme Court rejected this reasoning, finding that the Act established a floor below which no employer could go but did not establish a ceiling. The California law was consistent with the goals of the Pregnancy Discrimination Act because it helped ensure that women would not lose their jobs as a consequence of

91 Id. at 25.
92 Law, supra note 5, at 967-68.
94 Id. at 274.
95 Id.
96 Grant Bowman & Schneider, supra note 68, at 253.
97 Minow, supra note 66, at 151. See also Herma Hill Kay, Equality and Difference: The Case of Pregnancy, in Feminist Jurisprudence, supra note 71, at 27, 33-34 (discussing the briefs filed by NOW and the equal rights groups).
98 479 U.S. at 284-92.
99 Id. at 290-92.
pregnancy.¹⁰⁰ The Court stated that the California statute does not “compel California employers to treat pregnant workers better than other disabled employees; it merely establishes benefits that employers must, at a minimum, provide to pregnant workers.”¹⁰¹ This decision was considered a victory for difference feminists because the Court upheld a policy that gave women a special benefit for pregnancy.¹⁰²

In another case that pitted difference theorists against same-
ness theorists, two professors of women’s history testified on op-
posing sides of an employment discrimination case. In Equal Em-
ployment Opportunity Commission v. Sears, Roebuck & Co.,¹⁰³ the
EEOC alleged that Sears was discriminating against women when
hiring for commission sales jobs. The main issue involved the ex-
planation for a gender disparity in the commission sales force.¹⁰⁴

The statistics of the gender disparity offered by the EEOC established a prima facie case, and Sears used a women’s historian to explain that the disparity was a result of women’s lack of interest in the sales commission jobs rather than a result of Sears’ discriminatory hiring.¹⁰⁵

Sears’ historian Rosalind Rosenberg argued that the inherent differences in interests between men and women accounted for the dearth of women in the sales positions.¹⁰⁶ Rosenberg testified that “[m]any of the jobs that men and women perform in the labor force today are modern equivalents of traditional men and women tasks.”¹⁰⁷ She also testified that women generally prefer non-
commission sales jobs because they are less stressful and allow for more social interaction.¹⁰⁸

The EEOC argued that the correct assumption was one of equal interest.¹⁰⁹ EEOC historian Alice Kessler-Harris rebutted Rosenberg’s lack of interest argument. Kessler-Harris argued that

¹⁰⁰ Id. at 288.
¹⁰¹ Id. at 291.
¹⁰² Leah Storey, supra note 72, at 157.
¹⁰³ 839 F.2d 302 (7th Cir. 1988).
¹⁰⁴ Id. at 319-22.
¹⁰⁵ Id. at 313.
¹⁰⁹ Sears I, 628 F. Supp. at 1314.
looking to history gave a distorted view of women's true interests because employers and society routinely discriminated against women, thereby creating the existing disparity.\(^{110}\) Kessler-Harris argued that "[t]o allow the tale told by Sears to pass unchallenged as women's view of their history would encourage others to use it to rationalize an unequal past."\(^{111}\) Kessler-Harris presented testimony about women welders and crane operators during both World Wars to illustrate that women cannot be presumed to have traditional interests. The district court discounted this testimony because it focused on "small groups of unusual women and their demonstrated abilities . . . and not on the majority of women or their interests at the time of this case."\(^{112}\)

While going to lengths in a footnote to state that "few sweeping generalities" can be made about men and women,\(^{113}\) the district court found that Sears proved that "men and women tend to have different interests and aspirations," and that those differences explained the sales commission disparity.\(^{114}\) The district court found Rosenberg's testimony more convincing because "[s]he offered the more reasonable conclusion that differences in the number of men and women in a job could exist without discrimination by the employer."\(^{115}\) The United States Court of Appeals for the Seventh Circuit affirmed the district court's decision in favor of Sears.\(^{116}\)

In the \textit{Sears} decision, the courts found that an employment disparity was more "reasonably" explained by inherent differences in interest than by sex discrimination. This is the exact rationale that the sameness proponents fear and exemplifies the danger created by recognizing differences. The "lack of interest" argument attributes women's preferences for traditionally female work to social forces and biology rather than to workplace segregation.\(^{117}\) It reinforces the notion that "'[t]here is a natural order of gender and work that even 'an Act of Congress' cannot overcome'" and that this is an obstacle to equality.\(^{118}\)

\(^{110}\) \textit{Id.}  
\(^{111}\) Kessler-Harris, supra note 107, at 599.  
\(^{112}\) \textit{Sears} \textit{I}, 628 F. Supp. at 1313-14.  
\(^{113}\) \textit{Id.} at 1308 n.43.  
\(^{114}\) \textit{Id.} at 1305.  
\(^{115}\) \textit{Id.} at 1315.  
\(^{116}\) EEOC v. Sears, Roebuck, & Co., 839 F.3d 302, 360 (7th Cir. 1988).  
\(^{118}\) \textit{Id.} (citing EEOC v. Mead Foods, Inc., 466 F. Supp. 1, 3 (W.D. Okla. 1977)).
Wendy Williams points out additional problems with special treatment for women. First, history has shown that special treatment is a double-edged sword that can lead to both favorable and unfavorable treatment. For example, she notes that prior to the Pregnancy Discrimination Act, special rules for pregnancy usually meant that women were forced to quit or take a leave of absence when they became pregnant. Second, this special protection is reserved for women while ignoring the inequities that other groups suffer. Finally, Williams argues that women’s freedom is actually limited, rather than enhanced, when a state takes an interest in the “well-being of the race.” She fears that these types of policies could lead to abortion restrictions and protection of fetuses, for example. These fears are not unfounded and hearken back to the days of *Muller v. Oregon*, in which the Supreme Court affirmed the right of the state to regulate women’s working hours. The Supreme Court took judicial notice of the following: that “healthy mothers are essential to vigorous offspring,” that a woman’s maternal functions place her at a disadvantage, and that it is important to maintain the home. Summarizing its rationale, the Court stated that the reason for protecting women rests “in the inherent difference between the two sexes, and in the different functions in life which they perform.”

In relation to the postpartum psychosis defense, the sameness theory would oppose any separate defense specifically for psychotic mothers and would favor using current legal standards, inadequate as they are, to evaluate those cases. The difference theorists might favor a separate defense for mothers, with the risk that women would be presumed crazy and out of control due to premenstrual syndrome and pregnancy in addition to postpartum psychosis. Neither approach offers an analytical framework conducive to meeting the needs of women and the needs of the justice system. The cases discussed above indicate that the courts are willing to struggle with equality. The cases also indicate that the sameness and difference discussion has surpassed its utility by failing to solve the dilemma presented by biological distinctions. Part IV presents a new framework with which an equality discus-

119 Williams, supra note 84, at 170.
120 Id. at 168.
121 Id. at 170.
122 Id.
123 208 U.S. 412 (1908).
124 Id. at 419-22.
125 Id. at 423.
sion could move forward and recognize a gender-specific defense such as postpartum psychosis.

IV. ARRIVING AT EQUALITY AND JUSTICE FOR MOTHERS WHO KILL

Judges and appellate courts have realized in some cases that a jury was unable to understand the psychiatric evidence or was too overcome by horror to form a proper verdict for a mother who killed a helpless child. For example, in Gambill v. State, the defendant was found guilty but mentally ill for drowning her five-year-old son. Prior to the killing, she had religious visions and accused her friends of being devils. After she killed her son, she believed that she was with Jesus and approached a stranger completely naked. On appeal, the Indiana Supreme Court affirmed the verdict but reduced the sentence from sixty to forty years. The court noted that there was "overwhelming testimony that the Appellant was gravely mentally ill at the time of the drowning. . . . All of the experts testified to the diagnosis of paranoid schizophrenia." More dramatically, in People v. Massip, the trial judge set aside the jury's finding of sanity. In that case, there was testimony that the mother had suicidal thoughts and hallucinations. Believing that she was tired, she went to her mother's for the weekend, and her obstetrician prescribed tranquilizers. Two days later, she took her son for a walk and threw him in front of an oncoming car. The car swerved, and the baby was spared. Later that day, the mother placed her son under the wheels of her car and ran him over. She placed him in a trashcan and reported him kidnapped. She later stated that she saw her son as a doll and not as a person. Sheryl Massip was found sane and convicted by the jury of second-degree murder. In a controversial decision, the trial judge reduced the jury's verdict to voluntary manslaughter and set aside the finding of sanity. The decision was affirmed on appeal.

These are two examples of cases in which a judge or appellate court recognized the weight of the psychiatric evaluations and the testimony of acquaintances. As Part II illustrated, however, deci-

126 675 N.E.2d 668 (Ind. 1996).
127 Id. at 678.
128 Id.
129 Id.
131 Id. at 869.
132 Id.
133 Id.
134 Id. at 876.
The current insanity standards do not meet the needs of the women suffering from postpartum psychosis, and although courts are willing to overrule juries, this judicial activism is not a dependable solution to the problem. While the goal is not to have all mothers acquitted, the sentences and verdicts should reflect the fact that in most cases there is definite evidence of grave mental illness.

A. A Legislative Proposal

A different legal insanity standard for a mother who kills her child is an appropriate solution to meet the demands of equality and justice. From the equality view, it would allow women to have equal justice because women would be judged against a standard created for them for a condition that is specific to them. Gender neutrality cannot be invoked in the law when the biological reality is that genders are different and when that biological reality is relevant. Remembering that the deterrence and retributive goals of the criminal justice system are meaningless when directed against those who cannot control their conduct, the justice advantage is that fewer women would be sent to jail for crimes committed under circumstances that raise serious questions as to their sanity.

The following standard would make postpartum psychosis a viable insanity defense:

1. Affirmative defense: The defendant can raise the affirmative defense of insanity based on postpartum psychosis if:
   a.) the killing of the defendant’s child occurred within one year of the mother giving birth to that child or another child, and
   b.) an expert psychiatrist appointed by the court determines that there is a reasonable doubt as to the defendant’s sanity.

2. Elements: The defendant must prove, to the extent determined by state law, that:
   a.) she was suffering from postpartum psychosis, and
   b.) there was a causal connection between the psychosis and the killing, and
   c.) she did not know right from wrong, or, if she did know right from wrong, then she must prove that because

135 Waldron, supra note 8, at 679.
of the psychosis, she had lost the ability to choose between right and wrong.

This standard is a modification of the Irresistible Impulse Test, an insanity rule created after M’Naghten to address cases in which a person committed a crime while in a delusional state. The Irresistible Impulse Test is a workable and appropriate standard from which to form a postpartum psychosis standard because in almost every postpartum case, the mother stated that she was hearing voices, being commanded by God, or hallucinating. The standard is not overly broad; it will force the defendant to prove insanity to a legal standard in order to be acquitted.

The new rule creates a procedure which requires an unbiased psychiatric opinion before the defense can be raised. The defense can also only be invoked if the killing took place during a twelve-month postpartum period. This temporal proximity requirement is consistent with the idea that childbirth and the onset of psychosis are interrelated.

After meeting the initial requirements, the defendant must convince the jury that she was psychotic, that the crime and the psychosis were connected, and that she either did not know right from wrong or that if she did, that she could not control herself. These elements must be proven to the standard set by state law. As noted in Finger v. Nevada, the state can make the defense more or less restrictive based on its burden of proof standard. The most restrictive method would be to have the defendant prove insanity beyond a reasonable doubt, while the least restrictive would require that she prove insanity by a preponderance of the evidence.

A legislative solution is not unprecedented. England, Canada, and Australia have infanticide provisions that reduce murder to manslaughter if the mother kills the child within one year of birth. Australia’s Infanticide Act of 1922 covers children under one year and assumes that a woman’s mind is disturbed by childbirth and lactation. England’s Infanticide Act of 1938, an amendment to the original act of 1922, assumes that a woman who kills her infant within the first year of its life has not recovered from giving birth.

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136 For further discussion of the Irresistible Impulse Test, see the early case of Parson v. State, 2 So. 854 (Ala. 1887). See also Hawkins-Leon, supra note 23, at 393-95.
137 See also FED. R. EVID. 706 (allowing court-appointed experts in federal court). Justice Frankfurter, joined by Justice Black, proposed the idea of a “standing disinterested expert agency” in his dissent from Leland v. Oregon, 343 U.S. 790, 804 (1952) (Frankfurter, J., dissenting). The majority held that requiring a defendant to prove his insanity beyond a reasonable doubt did not violate his due process rights.
139 McSherry, supra note 21, at 304.
and reduces the charge to infanticide or manslaughter.\textsuperscript{140} The law does not require any causal connection between the disorder and the crime, so that it practically constitutes a per se defense to any killing that occurs within one year of birth.\textsuperscript{141} While a per se defense with no causal requirement may seem extreme, these statutes nonetheless indicate that countries with respectable legal systems are recognizing postpartum psychosis defenses.

It is also not unprecedented to establish a gender-specific standard within legislation. Employment law provided the catalyst for courts to use a “reasonable woman standard” in Title VII sexual harassment cases. For example, in Ellison v. Brady,\textsuperscript{142} the court used a “reasonable woman” test to determine whether the sexually harassing behavior of a co-worker was severe and pervasive enough to meet the requirements of the Title VII prima facie case. The court stated that by using a “reasonable person” standard, the court “run[s] the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common.”\textsuperscript{143} The court realized that using a “reasonable person” standard could institutionalize already existing harassment.

In the criminal law area, the Supreme Court of Washington held that a jury instruction that set forward an objective standard using the pronoun “he” in a self-defense case violated the female defendant’s right to equal protection.\textsuperscript{144} The court emphasized that by persistently using the masculine gender and a reasonable person standard, the instruction mandated that the jury judge the petite female defendant with a broken leg who stabbed a 6’4” intoxicated male by a standard that did not afford her the same protection that a male defendant would have under the same circumstances. The court stated that the female defendant’s actions must be judged “in light of her own perceptions of the situation” because to do otherwise would be to deprive her of equal protection.\textsuperscript{145}

These cases indicate that women's perspectives are gradually being incorporated into the law as courts recognize that the statutes often reflect a masculine viewpoint. In that context, a statutory insanity defense incorporating a female-specific medical condition should be attainable.

\textsuperscript{140} Waldron, supra note 8, at 679. See also Dent, supra note 39, at 356-58.
\textsuperscript{141} Waldron, supra note 8, at 679.
\textsuperscript{142} 924 F.2d 872, 879 (9th Cir. 1991).
\textsuperscript{143} Id. at 878. See also Rabidue v. Osceola Refining Co., 805 F.2d 611, 623-28 (6th Cir. 1987) (Keith, J., dissenting).
\textsuperscript{144} State v. Wanrow, 559 P.2d 548, 558-59 (Wash. 1977).
\textsuperscript{145} Id.
B. Response to Criticisms

Before responding to criticisms leveled against this type of gender-specific defense, it is necessary to dispel a common myth that those acquitted by reason of insanity are released immediately. This is simply not the case. In most states, statutes provide that an acquittee be committed to a mental institution upon conclusion of the case. In some instances, the period of time in the mental institution will, in fact, be longer than the potential jail term. In *Jones v. United States,* the defendant proved his insanity by a preponderance of the evidence to be acquitted of petit larceny charges. The maximum jail time was one year. After his acquittal, he was committed to a mental institution for an indefinite period of time. The Supreme Court rejected his argument that there is any correlation between the potential length of a prison sentence and the period of time spent in a mental institution. The Court stated clearly that the "purpose of commitment following an insanity acquittal . . . is to treat the individual's mental illness and to protect him and society from his potential dangerousness. The committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous." Therefore, even those women who are acquitted under a postpartum psychosis defense will be in a mental institution until they can convince the review board that they are sane.

Political will is also a requirement for any new legislation. Politicians overwhelmingly focus on the community reaction to insanity defense legislation, discounting or ignoring the practical and theoretical implications. State legislatures have passed laws imposing the death penalty for murdering a child but have not created a statute for a postpartum psychosis defense, perhaps due to the incomplete medical studies or the public attention that accompanies these murders. However, if legislators seriously investigated the postpartum psychosis defense, they might find more public sympathy than expected and encourage in-depth medical research. The trend in state legislatures since *United States v.*

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146 See, e.g., D.C. CODE ANN. § 24-301(d)(1)(2001); see also State v. March, No. CR1866304, 2001 Conn. Super. LEXIS 1140 (Conn. Super. Ct. Apr. 26, 2001) (refusing to release a mother from a mental institution ten years after she drowned her son).
148 Id. at 369.
149 Id. at 368.
151 Barton, *supra* note 22, at 608-10 (noting that Texas, New Jersey, and Mississippi have imposed the death sentence on defendants for killing children).
Hinckley\textsuperscript{152} has been to either eliminate the insanity defense entirely or to modify it to a guilty but mentally ill standard.\textsuperscript{153} Perhaps the Yates case, which has also captured the nation’s attention, will reverse this trend.

Some feel that a gender-specific defense will “discriminate against men, who cannot bear children but suffer equally the effects of post-birth stress.”\textsuperscript{154} However, this defense discriminates against men only to the same extent that nature discriminates against men by not allowing them to bear children. By definition and by epidemiological studies, postpartum psychosis has a clear temporal connection with childbirth. All people are vulnerable to a mental illness, but women are more vulnerable following childbirth than the rest of the population is throughout life, even after accounting for significant triggering events such as physical illness and adverse life occurrences. A study conducted in Manchester, England showed that admissions to the psychiatric ward for postpartum psychiatric problems were eighteen times greater than admissions at non-postpartum times.\textsuperscript{155} While many fathers share in the post-birth stress of a newborn infant, the medical fact remains that they cannot suffer from postpartum psychosis.

Some feminists, including Wendy Williams, argue that by “insisting upon our differences at these crucial junctures, [we are] promot[ing] and reinforc[ing] the us-them dichotomy that permits [judges] to resolve matters of great importance and complexity by the simplistic, reflexive assertion that women and men are ‘simply not similarly situated.’”\textsuperscript{156} These are legitimate concerns, particularly from the sameness feminists’ point of view. However, as discussed in Part III, the sameness theory offers no adequate method for addressing biological differences between men and women. Ignoring biological realities that are putting women behind bars cannot be justified in the name of equality. This is a complex issue, but allowing juries to have a “knee jerk” reaction when confronted with the culturally distasteful fact of a mother

\textsuperscript{152} 525 F. Supp. 1342 (D.D.C.), aff’d, 672 F.2d 115 (D.C. Cir. 1982) (finding Hinckley not guilty by reason of insanity for attempted assassination of President Reagan).

\textsuperscript{153} See, e.g., Damante Brusca, supra note 56, at 1156. The guilty but mentally ill standard is an alternative verdict to not guilty by reason of insanity or guilty. In most states, it means that the defendant is sentenced as any other guilty party but is given special psychiatric treatment while in prison. For further discussion of the guilty but mentally ill verdict, see Christopher Slobogin, The Guilty but Mentally Ill Verdict: An Idea Whose Time Should Not Have Come, 53 GEO. WASH. L. REV. 494 (1985). For a discussion of why eliminating the insanity standard may be considered unconstitutional, see Finger v. Nevada, 27 P.3d 66 (Nev. 2001).

\textsuperscript{154} Barton, supra note 22, at 617.

\textsuperscript{155} BROCKINGTON, supra note 26, at 222.

\textsuperscript{156} Williams, supra note 84, at 164.
killing her children is no more justified than ignoring the biological differences completely.

Patricia Pearson argues that special treatment for women, be that in the American battered woman syndrome or the British infanticide defense, will result in fewer rights for women.\textsuperscript{157} She believes that “accommodat[ing] a collective sense that women should be treated lightly for certain crimes” will be used as an excuse to trample women’s rights.\textsuperscript{158} She notes the example that “[p]ostpartum psychosis was widely used in the nineteenth century in England as a reason why women shouldn’t vote.”\textsuperscript{159}

To suggest that defendant mothers will be treated “lightly” is the exact type of statement that creates what Catharine MacKinnon calls “law-and-society’s hall of mirrors where sex equality law remains otherwise trapped.”\textsuperscript{160} If the current standard by which women are being judged is resulting in injustice, then correcting that standard does not mean that women are treated more leniently than men. It means that they are treated equally. As the United States Court of Appeals for the Ninth Circuit noted in Ellison, a “reasonable woman” standard does not grant a higher level of protection; it merely puts women on “equal footing with men.”\textsuperscript{161} Regarding Pearson’s “trampling the rights” concern, it is an oversimplification to compare voting rights to a woman facing capital punishment. Pearson’s argument leads to the conclusion that same-sex advocates will insist on “equality” at the expense of women’s liberty. It is difficult to imagine a greater “trampling of rights” than to be convicted of murder because the insanity standard was unfair.

In his article dealing with the insanity defense, John Dent suggests lowering the standard of proof required when postpartum psychosis is claimed.\textsuperscript{162} He proposes that, because of the difficulties in proving postpartum psychosis, the defendant should only be required to raise a reasonable doubt as to her sanity. This was in contrast to the majority of jurisdictions that require the defendant to prove insanity by a preponderance of the evidence or by clear and convincing evidence.\textsuperscript{163}

\textsuperscript{157} Patricia Pearson, When She Was Bad: Violent Women and the Myth of Innocence 91 (1997).
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} Catharine A. MacKinnon, Toward Feminist Jurisprudence, in Feminist Jurisprudence, supra note 71, at 610, 613.
\textsuperscript{161} 924 F.2d 872, 879 (9th Cir. 1991).
\textsuperscript{162} Dent, supra note 39, at 367-68.
\textsuperscript{163} Id. See also 18 U.S.C. § 17 (2000) (making the existence of severe mental disease or defect an affirmative defense to be proven by the defendant by clear and convincing evidence.
While this idea sounds enticing, it is too close to simply "lowering the bar" for women to give them easier access to the insanity plea and is inconsistent with the idea that women do not have to work within already existing structures to achieve equality. "Lowering the bar" is a quick solution that does not address the underlying issues of the feminist debate. A legislative solution is preferable because it serves a three-fold purpose. First, on the practical level, it moves the insanity defense into the realm of realistic possibilities for mothers who kill their children. Second, on the political level, it increases public awareness and encourages medical research. Finally, on the theoretical level, it helps to move the discussion of women's rights beyond the sameness and difference debate.

CONCLUSION

A female-specific defense grounded in a biological difference is consistent with the idea first proffered by Catharine MacKinnon in *Feminism Unmodified: Discourses on Life and Law*, in which she disagrees with measuring women's equality against a norm that has been established by men. She argues that sex equality cannot be defined for women by a male point of view in an already existing social reality. The insanity defenses under which men are judged do not have to be the norm, and women do not have to be seen as seeking "special" treatment. Rather, the proper approach is to argue that the legal system is recognizing reality and creating a gender-specific defense that relies on conditions that are biologically applicable to only one gender: "These defenses recognize that gender is one of the few distinguishing characteristics in the criminal law that allows some individuals to have defenses that other could never have." The postpartum psychosis defense is not unequal to men, because men do not bear children or the concomitant risk of mental illness.

Arguing that the dichotomous approach of sameness versus difference forces women into the no-win situation of either rejecting difference or recognizing it at the expense of equality, Joan Scott posits the question: "What are the relevant categorical dif-

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164 Catherine A. MacKinnon, *Not by Law Alone, in Feminism Unmodified*, supra note 73, at 22.
165 MacKinnon, supra note 160, at 610, 613.
If anything should be recognized as a difference, it should be pregnancy and conditions related to it, a fundamental biological difference unrelated to social status or power structures. It is possible to recognize that pregnancy is the touchstone of women's separateness and that boundaries drawn along the line of pregnancy and related conditions, including postpartum psychosis, are not a step backward for the feminist movement but a step forward to a clearer strategy for advancement.

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167 Scott, supra note 106, at 143.

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