School of Law & Social Sciences

Department of Law

GENDER JUSTICE AND THE LAW

LAW-5-GJL-1

TEACHING MATERIALS

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MODULE DETAILS

MODULE TITLE	GENDER JUSTICE AND THE LAW
LEVEL	5
MODULE REFERENCE NUMBER	LAW/5/GJL
CREDIT VALUE	20 CAT POINTS
STUDENT STUDY HOURS	112
CONTACT HOURS	48
PRIVATE STUDY HOURS	152
PRE-REQUISITE LEARNING (if applicable)	None
CO-REQUISITE MODULES (if applicable)	None
COURSE	LAW
YEAR AND SEMESTER	2017-18 Semester 2
MODULE COORDINATOR	Caron Thatcher
MC CONTACT DETAILS	0207 815 7049 (LSBU) Mobile 07956 522579 thatchc@sbu.ac.uk K220 Keyworth Building
TEACHING TEAM & CONTACT	Caron Thatcher
SUBJECT AREA	Law
SUMMARY OF ASSESSMENT METHOD	Research Report [40%] Essay [60%]
EXTERNAL EXAMINER APPOINTED FOR MODULE	Russell Hewitson University of Northumbria

Short Description

Drawing upon feminist and other associated theories, this Module explores a number of legal topics which have important consequences for women and their relationship with the law.
Using feminist theories and writing as the central tool of analysis the Module encourages students to develop an appreciation of the social, economic and political contexts in which the law and feminist theories operate.
The Module recognises the importance of combining theory and practice and seeks to explore those connections by embedding theory within a practical legal framework; for example, by exploring the impact of feminist and associated theories in the areas of Domestic Violence, Rape and Pornography.

Aims of the Module

(a) To investigate legal topics in their social context using feminist, as well as critical legal and critical race, tools of analysis.
(b) To develop students understanding of legal and feminist theoretical perspectives so as to empower students in the development of their intellectual profile as a legal scholar.
(c) To build upon the knowledge students have acquired in core legal topics such as property, crime, contract, tort and legal skills in order to begin to engage students in a deeper, critical, examination of those areas.
(d) Through courtroom observation, to encourage students to apply their knowledge of the interaction between women and the law in order for them to appreciate the subtle social, economic and political contexts within which the law operates.
(e) To encourage students to develop their own creativity in relation to feminist theories and the law through preparation of a report and an essay.
(f) To recognise the experiences that students and tutors bring to the course and to build on the foundation of those experiences in order to stimulate a critical and creative analysis of feminism and the law.
(g) To provide students with opportunities to widen the scope of their legal study through the adoption of a comparative law approach

Learning Outcomes

Students successfully completing the Module will be able to demonstrate:-

Knowledge and Understanding

(a) A clear understanding of feminist perspectives on specified areas of the law.

(b) The ability to assess the implication of legal rules and proposed reforms in those areas for certain groups within society

(c) The ability to reflect on their own experiences and perceptions of feminist theories

(d) That they have developed their own creativity in regard to feminism and the law

(e) A clear understanding of the interaction between feminist legal theories, feminist practices and the law and in so doing be able to identify different moral, philosophical and political theories to the study and practice of law.

Intellectual Skills

Legal Skills

Students successfully completing this Module will be able to demonstrate a ability to:

(a) Critically analyse conflicting interpretations of statutes and cases via the principles of statutory interpretation and the doctrine of precedent. The student will be able to analyse the specific impact that these principles have on the rights of women within the law.

(b) Critically analyse the law and law reform proposals in their social, political, economic and moral contexts.

(c) Reason critically and argue effectively about the legal issues studied in the Module, recognising alternative points of view, the importance of theory to practical legal development and offering reasoned opinions supported by authority or evidence.

Practical Skills

Communication skills

Through participation in large and small group sessions, most particularly by the presentation of papers in small group sessions, to communicate ideas effectively and appropriately both orally and in writing.

Read and understand technical legal materials and technical theoretical materials.

Appreciate through participation in small group sessions the techniques and strategies appropriate for debate and advocacy.

IT Skills

Participate in one or more on-line seminars
Complete pre-seminar tests and participate in on-line discussions via the VLE.

Produce a word processed Research Report and Essay.

Carry out effective web based research.

Communicate via email with the course tutor, particularly through the submission of pre-small group session material.

Transferable Skills

Students successfully completing this Module will have demonstrated an ability to:-

(a) Carry out independent research using a variety of media
(b) Plan and execute their research through the production of a research report and an essay
(c) Demonstrate their ability to set their priorities in terms of relevance and importance of either the case observed, or the material identified, to the production of the report and essay
(d) Plan and manage their work recognising the importance of setting priorities to meet deadlines
(e) Work autonomously by completing an extended programme of independent study
(f) Comply with the stands of scholarly practice
(g) Undertake group based work in seminars and in the production of the research report and /or the essay.

4.5 TEACHING AND LEARNING PATTERNS

Weeks 1 – 10: One 2 hours large group session per week
One 2 hours small group session per fortnight

Weeks 10-15: Private study and submission of Court Report/Essay

Ten weekly two hour lectures (or equivalent) and five fortnightly 2 hours seminars. The lecture series includes a dedicated session with the Law Librarian, and a courtroom observation session both of which provide the foundation for the students to complete their Research Report and Essay.

Students are provided with a lengthy and detailed course handout indicating the structure and content of each large group session. The handout indicates relevant case law, and sets out in full all relevant statutory provisions.
Whilst lectures are the primary vehicle for the provision of structure and outline on key topics, they are not intended to provide students with all the information necessary for successful completion of the course.
At the end of each lecture the student should have not only a clearer understanding of the material covered, but also a grasp of what has been left unanswered and thus what needs to be addressed in private study and small group session preparation.
Within the constraints of the time available in lectures, emphasis is also placed on the development of a dialogue between staff and students through broadly Socratic techniques.
The lecture material provides students with structured reading on each topic and a selection of past examination questions.
Small group sessions are structured to ensure that students have developed a satisfactory understanding of the relevant law under consideration; can critically analyse the relevant law; and are aware of the need for and proposals for reform of the area of law under consideration.

INDICATIVE SYLLABUS CONTENT

The Module explores the construction of reason and reasonableness within the law, legal methods, equality, difference and justice through an examination of recent feminist histories, legal/political theories, developing feminist and critical legal theories, specific legal topics of relevance to women and relevant legislation/case laws.

5. ASSESSMENT METHOD:

2,000 word Court Research Report [40%]
4,000 word Essay [60%]
SUBMISSION DATES: Court Report : 7th March 2017 – Coursework: 2nd May 2017

The production of the Research Report will require students to attend a Research session with the Law Librarian and to carry out court based observation.
Additionally, students will be required to carry out library and IT based research.

The production of the Essay will require students to engage with library and IT based research of primary sources, journal articles, Law Commission papers and a consideration of literature in other jurisdictions.

The Module recognises the value of small group work in assessing feminist legal problems and analysis and encourages students to undertake such work prior to the large group sessions and seminars. As a direct consequence of this recognition, students are encouraged to deploy the skills acquired within their small group sessions to the submission of the Research Report and/or Essay in this Module.

The marking criteria adopted will give credit for evidence of critical analysis of (a) feminist legal theoretical perspectives (b) independent research (c) cogency of argument (d) evidence of awareness of the broad contextual matters having bearing on the subject in comparable jurisdictions.

6. LEARNER SUPPORT MATERIAL

The Module has a broad content and is fortunate that there is a textbook that covers the range of material considered in the Module:

Core Reading:

Rosemary Hunter et al "Feminist Judgments: From Theory to Practice", Hart, 2010. Amazon New £23.25 : Used from £18.20 - You **MUST** purchase this book.

Hillaire Barnett "Sourcebook on Feminist Jurisprudence" Cavendish l999. available on Amazon (Used) from £3.24 (New £79.77). You MAY purchase this book.

Additional Reading:

Rosemary Barberet "Women Crime and Criminal Justice – A Global Inquiry" Routledge, 2014. ISBN: 978-0-415-85635-5 Amazon £21.67 (new)

McGlynn and Munro "Rethinking Rape Law" Routledge 2011 - Amazon £21.76 (new)

Francis Heidensohn "Gender and Justice – New Concepts and Approaches" Willan, 2006. Available on Amazon £24.69

Aileen McColgan "Women under the Law: The false promise of human rights" Longman 2000.

Richardson & Sandland "Feminist Perspectives on Law and Theory" Cavendish, 2000.

Anne Bottomley (ed) "Feminist Perspectives on the Foundation Subjects of Law" Cavendish l996

Feminist Legal Studies Journal (available on line via LISA electronic journals link)

THE ON-LINE SEMINAR:

All students will take part in an on-line seminar during this Module. We have run on-line seminars for this Module for a number of years and feedback from students to this innovation has been very positive. The on-line seminar requires students to think about their communication skills, to make necessary adjustments so as to be heard/understood and to respect the different communication skills of others. The on-line seminar requires all students to participate. Students will find detailed

information regarding the on-line seminar in the Small Group Sessions part of the Teaching Materials .

7. FEEDBACK

There are numerous opportunities for students to gain **feedback** on their performance in this module. Seminar questions are set so as to encourage research, thinking and participation. Students will receive feedback during those sessions. Students will also undertake a research observation exercise and complete a research report. That report will be marked and returned to students with appropriate **feedback** provided so that students may gain an insight into their current level of performance before completing their final, essay, assessment.
At the end of the Module students will be invited to a personal **FEEDBACK** session with a member of the GJL teaching team. Students will have an opportunity to discuss their own performance on the module and will be guided on areas where they require further development.
Both pieces of assessed work in this Module are deemed to be in place of an exam and on that basis **the Case Report and the Extended Essay are NOT given back to students**. Feedback sheets will be provided to students.

8. Introduction to Studying the Module

Overview of the Main Content

The Module critically examines a number of different legal topics of specific relevance to women, drawing upon feminist and other theories of the law. It uses theories to challenge core assumptions about the neutrality and coherence of the law, and to assess the impact of those assumptions upon women in specified legal contexts. As such, the Module considers how the law works 'in reality' and the extent to which the law can be used as a vehicle for social change; with women at the centre of that change. The Module enhances the student's knowledge of theory through a practical application of feminist (and other) legal theories in context of the topics studied.
Given the above the Module will explore feminist legal and political histories in the context of the following topics:

1. Pornography
2. Prostitution
3. Domestic Violence
4. Rape

5. Abortion and Reproductive Rights

9. DIRECTED SELF LEARNING – Etivities

In addition to time spent in class you will need to engage in self-study time preparing for and reviewing classes. On the GJL VLE site you will find e-learning resources and activities to support and direct your study. These e-learning resources will also support your revision, allow you to assess your progress on the module and provide engagement with your peers and members of the GJL team.

Etivities have a direct connection to your Large and Small Group learning. This symbol is used in this module guide to alert you to an etivity on a case/topic you are studying.

Typically etivities may require students to do some or one of the following:

- Listen to a podcast
- Research a case (or cases)
- Analyse a statute
- Read and Analyse an article
- Watch a program or a film
- Read an extract from a novel
- Research and read on-line news reports
- Complete an on-line quiz

Having undertaken the etivity that forms the task, students are then required to reflect upon the task and to come to the seminar prepared to discuss their findings with members of their GJL study group.

10. Employability

Students taking this Module will develop their legal knowledge, their practical legal skills, their research ability, and their ability to think critically both within and around the subject of the law. The development of their intellectual and practical, legal, skills is crucial to their future employability whether as lawyers or in some other area of work. The skills and thinking developed here will help students to develop their own, critical, awareness of their training/academic needs so as to enhance their future employability

11.The Programme of Teaching, Learning and Assessment

ASSESSMENT METHOD:

One compulsory report and one compulsory essay.

The report will be based on courtroom observation and analysis and will be 2,000 words in length. The report will carry 40% of the overall mark.

The extended essay will carry 60% of the overall mark and will be 4,000 words in length. The essay will require students to undertake library and IT based research of primary sources, journal articles, Law Commission papers and a consideration of literature in other jurisdictions.

This module recognises the value of small group work in assessing feminist legal problems and analysis and encourages students to undertake such work prior to the large and small group sessions As a direct consequence of this recognition, students will be asked to form GJL study groups so that they may deploy the skills acquired within their Study Group to the submission of the report and essay in this course.

The marking criteria adopted will give credit for evidence of critical analysis of (a) feminist legal theoretical perspectives (b) independent research (c) cogency of argument (d) evidence of awareness of the broad contextual matters having bearing on the subject in comparable jurisdictions.

The Assessments:

Students will note that time has been set aside during the run of the Module for them to spend a day at court observing a trial. Guidance is given in the Large Group Session materials contained in the Teaching Materials as to the methods of observation to be deployed.

12.STUDENT EVALUATION

Students performed well in the 2015-16 session with 6 students securing First Class marks, 15 securing Class 2:1 marks, 8 securing Class 2:2 marks and 9 securing marks in the Third Class/fail range.

Student evaluation showed that 100% of students thought the Module was good. 100% of students thought that the lectures were good. 94% of students said that the seminars were good. 94% of students said that the VLE was useful. 90% of students thought that the Module Guide contained all of the core information they required and 95% of students rated 'other materials' supplied by the team as useful.

Students also thought that the feedback they had received during the module had helped them to understand the strengths and weaknesses in their assignments. Students were complimentary about the delivery/content of lectures and seminars. Students said that 'the lectures were well explained, very engaging and easy to follow', 'everything about the module was straight forward'. In relation to what they thought they had gained from the module students said "I gained knowledge,

maturity and an understanding of life overall'."A good understanding of feminist theories" "A broader perspective and insight on issues relating to the law".

The mark average for the second coursework shows an improvement on last year, whereas the average mark for the first coursework shows a decline. This year the students were a little strategic in their decision as to which court to observe a case in and several small groups of students found themselves at the same trial. They then found it difficult to put a different spin on the case so as to enable their work to stand out. Students are always reminded that they should not attend a trial with more than 3 of their colleagues.
The decision to move the first element of assessment to mid-semester is continuing to pay off with students being able to complete their Court Observation Report and receive feedback on that before embarking on their final coursework essay. This provides an opportunity to resolve queries and give appropriate feedback before students embark on their coursework essay.
The continuing provision of examples of excellent student work has helped students at the upper end to focus more clearly on their coursework preparation. It is disappointing to see 6 students in the third class category.

13.Learning Resources

Details of core resources can be found on page 8 of this Module Guide.

Other books, journals and articles are referred to in the Reading List for each lecture. You will also be given access to additional articles by the Module Coordinator via the VLE site.

14.Frequently Asked Questions

Why should I study the Gender Justice and the Law Module?

Students who have an interest in broadening their understanding of legal, feminist and critical theories as well as undertaking challenging research will find that this Module is a good vehicle for their intellectual development. It is a comparative Module and draws upon some of the newer, exciting, developments in legal thinking in comparable jurisdictions around the world.

What does the Module actually cover?

It explores the relationship between gender justice and the law by challenging some of the fundamental assumptions upon which the law is built.

The Module provides you with an introduction to feminist/legal/political theories and then builds upon those by considering specific legal topics such as equality/discrimination and sexual harassment/ and issues that have had a

fundamental effect on the lives of women globally – trafficking for the purposes of pornography/prostitution, domestic violence and rape. The emphasis is very much on a critical evaluation of the content of core theories of law, substantive law and case law.

Is it just about women?

No. The core theme of the Module is an examination of the way that the law in theory and practice treats women, but it is also a Module that challenges core assumptions of the law that apply equally to men and, of the course, in the context of race. The Module explores its core themes within an international human rights perspective.

I'm a man is this a Module that I should study?

The Module is equally applicable to both men and women. In fact numerous male students have performed very well in this Module, with a good number securing first class marks. For example in the 2008/09 session one male student produced fabulous work and was awarded a mark of 84% (the highest mark ever achieved in the Module). In the 2013/14 session a male secured a good first class mark.

I'm not sure about all this feminist theory stuff it's all a bit extreme isn't it?

Not really. Feminist legal theory is simply a method by which women lawyers, academics and activists have been able to think about and challenge the core assumptions about women and the law. There are many different types of feminists and many different feminist theories of the law; some may be more palatable than others. In this Module we look at a number of different feminist (and other) theories using the writings of women in the UK and in comparable jurisdictions around the world. This means that there is a good deal of balance in the materials that students' cover.

What teaching methods are used in these Modules?

Two-hour large group sessions every week – where a Socratic approach may be adopted (i.e. the lecturer asks you questions and invites your views). Fortnightly two hours small group sessions, where students will take part in role-playing exercises, prepare and present small group session papers, and undertake practical legal research.

The teaching is also supported by the on-line seminar, Etivities and the GJL study groups. Students are encouraged to discuss issues raised by the Module with each other and the course tutors.

How important are the Large and Small Group Sessions? Why should I bother to attend?

They are very important!

The Large Group Sessions are designed to introduce you to the issues that the Module covers. In most cases the LGS will outline a particular topic, examine the key points in the development of the relevant law, and provide a critique. The emphasis will be on current legal and theoretical developments and reforms. The LGS session also provides you with an opportunity to ask questions related to the topic under consideration. Developments in the law that occur after the printing of the Module Guide will also be covered in the LGS. From time to time the lecturer will indicate that certain topics, although listed in the Module Guide, are not going to be specifically covered in the LGS time. This means that you should read up on those topics in your own private study time. If you have questions arising out of this reading, ask at the next LGS.

The SGS provides you with the opportunity to further your knowledge and understanding of the areas that you are covering in the Module. The SGS is designed to provide you with practical exercises and to engage you with theories concerning gender and justice. The SGS allows you the opportunity to thoroughly ground your understanding of the issues that the Module raises. These will, in turn, feed into the research report and the extended essay that you will submit for assessment

Will the Small Group Sessions help me to complete my extended essay?

The SGS provide an opportunity for you to assess your understanding of the subject, to engage in critical debate with other students concerning the topics under consideration and to develop transferable skills by taking part in role play exercises. Each SGS provides you with an opportunity to:

- Test your knowledge and understanding of the substantive law
- Develop and demonstrate your ability to carry out research
- Test and develop your analytical skills
- Develop your oral communication skills
- Resolve any difficulties you may have in understanding and applying the relevant law/theories.

The reading indicated on each LGS sheet is intended to provide you with a basis for your research. In addition you should carry out research using original sources, such as cases and statutes in the library and LRC. Feel free to introduce material encountered in your wider reading where relevant.

It is widely acknowledged that students learn far more effectively when they are active participants than when they are passive observers. If you come to small group sessions ill-prepared, simply waiting to discover the 'right answer' from fellow

students or your tutor, you will not only miss out on the fun of role playing and engaging in analytical discussion, but you will be at a disadvantage in terms of the development of transferable skills and preparation for your extended essay.

When preparing for the SGS make a note of those issues that you find particularly difficult to understand and remember to raise them with the tutor when it is appropriate to do so.

How should I use the Module Guide?

You should bring the Module Guide and Teaching Materials with you to every class. The LGS is delivered on the assumption that you have the guide/materials in front of you. The lecturer will not stop to dictate extracts from Judgments, particular theoretical perspectives, case law or statutory provisions – they are set out for you in the guide and the power point presentations for each LGS will be available on the GJL BB site.

It follows that during the LGS more time can be spent on discussion and analysis rather than the transmission of information. The best advice is to read through the relevant section of the Teaching Materials BEFORE the LGS so that you are at least familiar with the type of issues that will be discussed. You will note that there are blank pages at the end of each LGS session. This is to enable you to make notes in the LGS as you see fit. As indicated, the Teaching Materials also contain your SGS materials and your SGS tutor will allocate tasks to various members of the group as appropriate.

What happens if the law changes during the course of the year?

If there are significant changes to the law as the Module progresses these will be brought to your attention. You should aim to keep as up to date as you can.

What books should I buy?

The core text book for the Module is Rosemary Hunter's "Feminist Judgments". We also recommend that you buy Hilliare Barnett's Sourcebook on Feminist Jurisprudence (it is very expensive so look for very cheap 2nd hand copies on Amazon). Both books support your GJL studies but and also support studies in other options such as Law and Politics/Medical Law and Ethics. There are other good texts on the market. In fact, Barnett has a small *"Introduction to Feminist Jurisprudence"* book. Additionally, we have recommended the book by *Heidersohn* on Gender and Justice. This is a book focused on criminal justice and gender theory it is worth having a look at this book to see if you feel it will provide you with some useful additional support.

Finally we have recommended Barbaret's recently published book on "Women, Crime and Criminal Justice – a Global Inquiry". Again, this is a book that is worth considering, particularly as it has an global focus on gender and human rights.

Students are encouraged to visit bookshops to explore the range of books available before buying any books to support the Hunter book. Students are also reminded that they will be required to read a number of articles relevant to the issues in this Module and, as such, the extended essay must reflect more than basic book-based learning.

This Module encourages the use of IT by students but my computing skills are a bit limited. How do I get help?

In this Module you will attend a Skills Workshop, given by the Law Librarian. Should you need further support after the workshop you should contact the LRC who provide IT courses/individual support for students.

Can the markers really spot plagiarism when they have so many answers to mark?

Yes! Assessments are double marked/moderated and markers are very familiar with articles and other sources available on the internet and elsewhere on the subjects we cover. Moreover, **all assessments must be submitted into the TURNITIN system** to avoid plagiarism.

It is important to understand that TURNITIN is a comprehensive database that can easily spot plagiarism in your work, both from articles and/or from the work of other students in the current year group and in past year groups. It can also detect work handed in at any other University.
The consequences of plagiarism are very serious, particularly if you intend to practice Law in the future. If we make a finding of plagiarism against a student we are obliged to report that finding to the professional bodies. The professional bodies then decide whether to admit the student as a member. Without membership you cannot practice law.

Also bear in mind that if you are subject to a plagiarism finding you may have to repeat the work. You can only repeat plagiarised work for a capped mark of 40% and your overall degree grade may be substantially affected by a plagiarism finding.

In serious cases of plagiarism **the University has the right to terminate a student's studies**. The University did exactly that to **a Law student** in July 2011.

So what do I do if I find an article that seems very relevant to my assessment?

You need to show that you have read the article, understood it, and thought about its contents. This usually involves you providing evidence of the general thrust of the article, without repeating all of the points made therein verbatim in your answer. Do not paraphrase, it is a waste of your time. Reference quotes from articles/books and then **reflect and critically analyse them.**

How do I get a good mark in the assessment?

The emphasis in this Module is on quality of writing, critical evaluation, originality of thought, research, construction of argument and presentation. You will not get much credit for simply reworking basic points found in the obvious textbooks or regurgitating your lecture/seminar notes. You have a fairly free hand in terms of going off to search for material (e.g. we do not restrict you to an analysis of English law – although there are many areas studied here where such an analysis is warranted – we encourage an international approach to your research). There will be no single 'right' answer. You must demonstrate an ability to critically consider the issues raised by the question that you have chosen to research.

What feedback can I expect on my assessed work?

We will provide you with feedback in seminars, in a one to one session, on the GJL Discussion Forum and also via your written assessments.
Where appropriate, and with consent, the student who achieves the best mark for their work in this Module will have his or her essay distributed to future students so that everyone can see what the examiners regard as a good piece of work.

What should I do if I feel I am losing my grip on the subject?

Given the pace at which material is covered, it is essential that you keep up with the Module. If you feel you are getting out of your depth do not wait until the end of the course in the hope that you can catch up. Speak to the Module tutor, tell her what your problem is and ask her advice. If you show that you are serious about trying to do well in a subject staff will be prepared to give you some extra assistance.

If I have any suggestions for ways that the Module could be improved (within the confines of what has been validated by the University) will anyone listen?

Yes. Speak to the Module co-ordinator or send her an email. The Modules are refined every year in light of experience and we would welcome your suggestions.

What should I do if I think this Module is really good?

Tell the Head of Department (Andy Unger) and/or the Craig Barker the Dean of the School of Law & Social Sciences.

15.House Rules for Large Group Sessions

Taping

It is OK for you to tape record Large Group Sessions given by Caron Thatcher provided that you agree to certain ground rules:

- Do not cause annoyance to other students when setting up your machines
- Do not jump up to replace tapes half way through the lecture
- Do not copy and re-sell the tapes

If you want to tape a LGS given by any other member of staff, or a guest lecturer, please ask them first.

Latecomers

Students who arrive later than 15 minutes after the usual start time of the LGS should wait until the break before entering the LGS room. Students will be asked to adhere to this rule as late entrants to the LGS room disturb both fellow students and the flow of the lecture.

Questions

Please do ask questions relating to matters of general interest to the class in the LGS. The lecturer will deal with as many as time allows.

16.USING IT IN THIS MODULE

There is a very useful VLE site for this Module. The site contains a number of articles that you will be asked to download and read, or alternatively to read on-line during this Module. Additionally, the site has a discussion forum where students and staff can discuss issues raised by the Module, Etivities and readings that students have considered or found whilst researching.

The VLE site will contain each power point presentation given during the process of the Module. The lecturer will ensure that each presentation is made available on the VLE after the LGS.

The site also contains an electronic copy of this Module Guide, together with copies of previous extended essay questions.

All students are encouraged to make good use of the VLE site. Any student who is unfamiliar with the Moodle VLE is asked to contact the Module co-ordinator immediately either in person or via email.

The VLE site will be used for the On-Line Small Group Session. Any student who has concerns/queries regarding the On-Line Small Group Session should contact the Module Coordinator or speak directly to the Module Tutor.

Websites

Increasingly the internet is becoming a good source of information for law students. The LRC is available to you as a resource, so make use of it. If you need extra training to research using the internet, you should contact the LRC. You will need to know how to use search engines, print out pages that look useful and save to USB's so that the information can be re-used.

Module Timetable GJL 2017-18 (SEM 2)

DATE	WEEK	LECTURE TOPIC	LGS/SGS
Week commencing		**K313 13.00-15.00**	**K313 15.00-17.00**
29th Jan	1	Storytelling and Legal Process	**LGS ONLY**
5th Feb	2	**Skills workshop all students to Library**	Group 1 SGS (Storytelling)
12th Feb	3	**Reason & Law**	**Group 2** **SGS1** Storytelling
19th Feb	4	**Research Week – all students attend court today**	
26th Feb	5	Domestic Violence	**SGS 2** Reason & Law
5th March	6	Rape and the Criminal Process	SGS 3 Domestic Violence
12th March	7	Pornography	**SGS 4** Domestic Violence
19th March	8	Prostitution	**SGS 5** Rape
Monday 26th March – Monday 16th April Easter Break			
16th April	9	Abortion Lecture	
23rd April	10	**Online Seminars** Group1 Pornography Prostitution Abortion	**Online Seminars** Group 2 Pornography Prostitution Abortion
Coursework 2 submission (Essay) Date TBA			
			

Large Group Session Materials

LARGE GROUP SESSION 1

INTRODUCTION/STORYTELLING

1. Structure of the Course

Module Guide/Teaching Materials

Large Group Sessions

Small Group Sessions

On Line Seminar

Feedback – Individual feedback sessions

VLE Resources

Etivities and GJL Study Groups

2. Core Themes of the Course

Equality' (Sameness) v Difference - Reason/reasonableness
Constructing legal knowledges and 'new' challenges from feminist theories/(counter) storytelling.

Applying theory to practical legal circumstances: Rape, Domestic Violence, Pornography, Prostitution, Abortion.

3. Essays/Research Reports and feedback

4. Legal Truths:

Questions: Is the law Neutral?
Can we achieve Certainty in the law?

Is Neutrality/Certainty in the Law desirable?

5. (Counter) Storytelling

Outsider Jurisprudence – A challenge to 'mainstream' or 'established' jurisprudence.

Questions: Who are the outsiders?
Is everyone an outsider?
Are outsiders 'outside' all the time?

(counter) Storytelling - A recognition that 'stories' are told within mainstream law and develop/are accepted as legal 'truths'.

Questions:

- What are Counterstories?
- Who tells Counterstories?
- Do Counterstories 'count'?
- How can a consideration of storytelling help us to understand the relationship between outsiders and the law?

- In the Courtroom, how are counterstories told and are they understood?
- Who are the outsiders in Court?
- If the stories of outsiders are to be preferred what happens when the two litigants are both outsiders?

Materials which will help you consider the issues raised by Counter-storytelling and Outsider Jurisprudence include:

- Mari Matsuda "Affirmative Action and Legal Knowledge Planting Seeds in Plowed up Ground" Harvard Women's LJ 185 (1988)
- Naomi Cahn "Inconsistent Stories" Georgetown LJ Vol 81 2475 (1993)
- Kimberle Crenshaw "Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color" Stanford L Rev Vol 43 1241 (1991)
- Bell Hooks "Feminist Theory – From Margins to Centre" Boston South End Press (1984)

What's next? Preparation for the SGS:

Students are required to complete some tasks in advance of the SGS.

Before the first SGS ALL students will need to complete a short assignment. Relevant information can be found in the Small Group Sessions part of the Teaching Materials.

Essential Reading:

In advance of the first SGS all students must read:

- Kim Lane Scheppele "Forward: Telling Stories" Michigan Law Rev. 87 (53) (1989) [See Appendix 1]

- Jesse Elvin "The continuing use of problematic sexual stereotypes in judicial decision-making" Feminist Legal Studies Journal, Vol 18, No.3 (2010) **available on the GJL VLE**

Extended reading : Rosemary Hunter's "Feminist Judgments" Chapters 1, 2 & 3

LARGE GROUP SESSION 2

Reason and the Law

1. FEMINIST LEGAL THEORIES

History and background – Classical Legal Theories/Feminist Legal Theories/Modern Legal Theories

Catherine MacKinnon "Feminism, Marxism, Method & The State: Toward a Feminist Jurisprudence" Vol 8 Signs p.635 (1983) and "Toward a Feminist Theory of the State" Cambridge, Harvard Uni Press (1989)

Liberalism and Reason:

False claims of objectivity, truth and universality?

Rosi Bradotti "Ethics Revisited: Women and/in Philosophy" in C. Pateman "Feminist Challenges" Allen & Unwin (1986)

J. Grimshaw "Feminist Philosophers: Women's Perspectives on Philosophical Traditions", Brighton, Wheatsheaf, (1986)

G. Lloyd "The Man of Reason: Male and Female in Western Philosophy" London, Methuen (1984)

D. Coole "Women in Political Theory" Brighton, Wheatsheaf (1988)

Carole Pateman "The Theoretical Subversiveness of Feminism" in "Feminist Challenges" Allen and Unwin (1986)

Susan Okin "Justice and Gender in the Family" New York, Basic Books (1990).

2. Standards of Reason:

"In the magic of my blackness…I can turn myself invisible. I can render myself completely undetectable to most eyes even if I jump up and down and wave and shout I have trouble getting them to see just one of me. For example, if I spill soup in a restaurant, they tend to see hundreds of me; if I have a baby, I tend to have a population explosion; if I move into a neighbourhood, I come as the forward

phalax of an invading army; if I have an opinion its attributed to 'you people'.

[Patricia J. Williams "A Rare Case of Mulheadedness and Men" in Toni Morrison "Race-ing Justice, En-gendering power: Essays on Anita Hill, Clarence Thomas and the Construction of Social Reality" Chatto, l993]

Bebb v Law Society [1914] 1 CH 286
Turley v Alders Department Store [1980] IRLR 4
Webb v EMO Air Cargo Ltd [1993] 1 WLR 49 (HL) Case No. C-32/93; [1994] IRLR 482

3. The Reasonable Man/Person?

Robert Unikel "Reasonable Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence" Northwestern Uni L. Rev. Vol 97 No. 1 (1992)

Nancy S. Ehrenreich "Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law" [1990] 99 Yale LJ 1177

4. Legal Beginnings

The United Kingdom:

Vaughan v Menlove [1837] 132 Eng Rep 490
Blyth v Birmingham Waterworks Co [1856] 156 Eng Rep 1447

Hilary Allen "One Law for All Reasonable Persons? 16 Int'l Jo Soc and law 419-422 (1988)

Steward v Cleveland Guest Engineering Ltd [1994] IRLR 440

Leo Flynn "Interpretation and Disputed Accounts in Sexual Harassment Cases" Feminist Legal Studies Jo. Vol IV No.1 (1996)

The Equality Act 2010
http://www.legislation.gov.uk/ukpga/2010/15/body

See also Equality and Human Rights Commission Guidance :
http://www.equalityhumanrights.com/advice-and-guidance/new-equality-act-guidance/

Woman wins Sex Discrimination case after miscarriages (7th June 2013) http://www.bbc.co.uk/news/uk-northern-ireland-22805132

Jeremiah v Ministry of Defence [1980] QB 87
Peake v Automative Products Td [1982] ICR 490
Pearce v Governing Body of Mayfield Secondary School [2003] UKHL 34

The United States:

Harris v Forklift Systems Inc 114 Sup Ct (1992)

Jane L. Dolkart "Hostile Environment Sexual Harassment: Equality Objectivity and the Shaping of Legal Standards" Emory Law Jo. Vol 34 (1994)

Bradwell v State of Illinois [1872] US (16 Wall) 130
Rabidue v Osceola Refining company [1986] 805 F.2d 611 6th cir.

Sexual Harassment – UK/EU development

The Hostile Work Environment:

Meritor Savings Bank v Vinson 477 US 57 (1986)

Bundy v Jackson 641 f2d

Henson v City of Dundee 924 F2d 872 9th cir (1992)

Sabino Guittierrez v California Acrylics Inc & Maria Martinez (unreported) May 1993

Unwelcomeness

B. Glenn George "The Back Door: Legitimising Sexual Harassment Claims" Boston Uni L. Rev 73 No.1 Jan (1993)
Susan Estrich "Rape" Camb Mass Harvard Uni Press (1988)
Mary Jo Shaney "Note: Perceptions of Harms: The Consent Defense in Sexual Harassment Cases" 71 Iowa Law Rev 1109 (1986)

Swentek v US Air Inc 830 Fd 552 4th cir (1987)

5. A Challenge from the Reasonable Woman?

Naomi Cahn "The Looseness of Legal Language: The Reasonable Woman Standard in Theory and Practice" Cornell LR Vol 77, 1401 (1992)

State v Wanrow (1977) 599 p.2d 548 Wash

Kathryn Abrams "Gender Discrimination and the Transformation of Workplace Norms" 42 Vand L. Rev 1183 (1989)

6. Standards and Universalism:

Jane L. Dolkart "Hostile Environment Harassment: Equality, Objectivity and the Shaping of legal Standards" 43 Emory LJ 151 200 (1994)
Caroline Forell "Essentialism, Empathy and the Reasonable Woman" Uni Illinois Law Rev. Vol 4 (1994)
Patricia J. Williams "The Alchemy of Race and Rights" Cambridge Harvard Uni Press (1991)
Martha Minow "Making all the Difference" New York, Cornell University Press (1990)
Angela Harris "Race and Essentialism in Feminist Legal Theory" 42 Stan Law Rev 681 (1990)
Lucinda M. Finley "A Break in the Silence: Including Women's issues in a Torts Course" 1 Yale Jo Law and Feminism 41, 64 (1989)
Mari Matsuda "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method" 11 Women's Rights Law Rep, 7 (1989)

Essential Reading 

Any of the articles indicated above PLUS

Hunter - Chapter 23
Barnett – Chapters 3, 5 7 & 8

Robert Unikel "Reasonable Doubts….." [See Appendix 2]

Karon Monaghan QC "The Legal Construction of Sex: Where's Gender? Where are the Women?" – Extract from K. Monaghan "Equality Law" 2nd edn – lecture delivered at LSBU October 2012. Available on the GJL VLE site.

Maureen Spencer "Book Review – Joan C.Willliams 'Reshaping the Work-Family debate'" Feminist Legal Studies Jo. Vol. 19, No.2, August, 2011

Monti G "A Reasonable Woman Standard in Sexual Harassment Litigation" Feminist Legal Studies Jo. Vol l9 No.4 (1999)

Naomi Cahn "Inconsistent Stories" Georgetown LJ Vol81 2475 (1993)

Additional Sources

The articles referenced below are intended to give you an insight into available material. It is not intended that you should read every article!

Linda Clarke Harassment, sexual harassment, and the Employment Equality (Sex Discrimination) Regulations 2005. Industrial Law Journal I.L.J. (2006) Vol.35 No.2 Pages 161-178

Harriet Samuels "A Defining Moment: A Feminist Perspective on the Law of Sexual Harassment in the Workplace in Light of the Equal Treatment Amendment Directive". Feminist Legal Studies Jo. Vol 12, No.2, 2004 Pg 181-211.

Annick Masselot "The New Equal Treatment Directive" Feminist Legal Studies Jo. Vol. 12, No.1, 2004, Pg 92-104

Macdonald LAC "Equality, Diversity and Discrimination" CIPD, London, 2004.

Jane L. Dolkart "Hostile Environment Sexual Harassment: Equality Objectivity and the Shaping of Legal Standards" Emory Law Jo. Vol 34 (1994) – can be read or downloaded from Westlaw

Ann Juliano "Did she ask for it? The Unwelcomeness Requirement in Sexual Harassment Cases" Cornell Law Rev 97 1588 (1992) – can be read or downloaded from Westlaw

Catherine A. MacKinnon "Sexual Harassment: Its First Decade in Court" in "Feminism Unmodified: Discourses on Life and Law" Cambridge Harvard Uni Press (1987)

Large Group Session 3

SKILLS WORKSHOP

In place of the usual lecture, we have arranged for GJL students to attend a dedicated skills workshop at the Skills Centre. The skills workshop will be tutored by the Law Librarian. It will involve an introduction to Information Technology and relevant research data bases.

Students are asked to note that the purpose of this workshop is to introduce you to the range of opportunities for computer based research in this area of the Law. The workshop will not teach you how to use the computers (the staff at the Skills Centre can help you with that, and can provide you with information sheets which tell you how to access the computers and the various databases), but the session will give you an introduction to using the technology quickly and efficiently.

The Law Librarian will also give you tips on researching via Westlaw and Lexis Nexis. These are probably the most costly computer database held by the University and also (naturally) the best. Between them they contain the full text of reported and unreported cases from the UK, Europe, the Commonwealth and the USA. Through these databases you can also access the full text of articles in the New Law Journal, Law Society Gazette, Estates Gazette and some others. Additionally you can search for law review articles from the USA/Canada. These databases, together with Lawtel, will prove extremely useful to all students when conducting research for the Research Report and Essay.

Students will also be given an introduction to locating relevant information via the internet and the use of the internet as a research tool, together with details of the correct citation method for internet based research.

During this Module there will be a practical opportunity for you to demonstrate your IT skills through the submission of some seminar materials via email, downloading of some seminar materials from the internet, the on-line seminar and completion of etivities.

Your attendance at this workshop forms part of the attendance requirements of this course, hence attendance is compulsory and a register of attendance will be taken

The session will last between 1-2 hours.

LARGE GROUP SESSION 4

RESEARCH

Students will be aware that they must complete a Court Research Report (coursework) during this Module. That coursework will be submitted during the run of the Module. It will be marked and feedback provided to students before they complete their second coursework (the essay).

There will be **no formal LGS this week** in order to give students the opportunity to attend at either the Central Criminal Court or a local **Crown/Magistrates Court** to observe the progress of a criminal law case. Inner London Crown Court, Newington Causeway, London SE1 or Blackfriars Crown Court, Pocock Street, London SE1 are within 10 minutes walking distance of the University.

Please note that when observing a case you should ensure that you see both the defence and prosecution advocate cross examining a witness.

Please note: **During the 2012 it became clear that taking notes during court proceedings is no longer possible**. Therefore **DO NOT TAKE NOTES while you are in the court room**. Once you exit the court room make a note of what was said, who said it, the impact/purpose of what was said, and what, if anything the Judge/Jury said during the time you observed the case.

In your research project you are required to:

1. Outline the case observed; including details of the defendant, any witnesses, the name of the court, whether Magistrates/Crown Court, who cross examined, what the case was about.
2. Demonstrate an understanding of the roles of the various participants in the case.
3. Critically consider the stories being told in the case.
4. Consider whether counterstories are being told? If so, how and with what degree of impact?
5. Consider whether mainsteam stories are being told? If so, how and with what degree of impact?
6. Consider which of the stories you have heard are the most convincing? Why?
7. Could anything have been said by either side which might

have made a difference to your assessment in No.6 above?

8. Finally, drawing upon the articles you have read and your experience attending court, critically consider what value counterstorytelling has in a practical legal setting.

Please remember that the Research Report is a piece of assessed coursework carrying 40% of the marks in this Module.

The **maximum** word limit for the Research Report is 2,000.

In the Appendices at the end of this Module Guide you will find a sample research report written by a former student. This is provided to you as an example of excellent work. It will also help you to focus on the issues that you need to identify when you are at court.

READ the sample research report BEFORE you undertake your own research.

LARGE GROUP SESSION 5

Applying Theory to Fact – Domestic Violence

1. **Should we be troubled by domestic violence? What has it got to do with us?**

   - International Human Rights Laws – International Convention on Civil and Political Rights, Convention on the Elimination of all forms of Discrimination against Women
   - "The cost of Domestic Violence" – DTI study September 2004 (UK) (Sylvia Walaby) http://www.equalities.gov.uk/PDF/Cost%20of%20domestic%20violence%20%28Walby%29%20Sep%2004.pdf

2. **Defining Domestic Violence**

   UK Government Definition – "Safety and Justice: The Government's Proposals on Domestic Violence" Cmnd 5847, June 2004.
   "Any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality".

   UN Declaration on the Elimination of Violence Against Women Article 1
   "The term 'violence against women' means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or in private life" .

3. **Historic, social and political background to the development of DV initiatives in the UK**

   - 1 DV incident every minute of every day in the UK
   - 2 women killed per week

- 50% female murder victims, killed by husbands or partners
- 90% of DV incidents – children in same room or room nearby
- 35 assaults on average before women report assault to police

4. **Civil/Criminal law protections? Is there a need for a Domestic Violence law?**

- **Case Scenario 1: A man repeatedly threatens a woman (his wife/partner) with violence.**

  Civil Law protections – Injunction/Non-Molestation Order/Exclusion Order

  Criminal Law protections – Assault by words alone? R v Constanza 1997 2 Cr App R 392. Can silence constitute an assault? R v Ireland and Burstow 1997 3 WLR 650

- **Case Scenario 2: A woman wants a man (husband/partner) to keep away (temporarily or permanently) from a house that he owns**

  Private Property/Ownership rights/civil law protections/remedies

- **Case scenario 3: A man who is the former husband/partner of a woman stalks her by spying on her, watching her from his car, taking photographs of her, listening into her telephone calls, and making repeated, unwanted, calls to her at her place of work and home**

  Protection from Harassment Act l997
  Francisco v Diedrick (1998) TLR 218

5. **Domestic Violence Courts**

   98 Specialist Domestic Violence Courts in England and Wales
   UK Government National Action Plan (March 2005) Aim to improve case outcomes and bring more offenders to justice

6. **Police and Prosecution Domestic Violence Prevention Initiatives**

   Police receive over 1,300 calls per day – 570,000 calls each year (Stanko, 2000).

40.2% of all domestic violence crime reported to police (British Crime Survey 2006)

2003 Her Majesty's Inspectorates of Constabulary and Crown Prosecution Service – joint inspection. Aim to improve work between Police and CPS.

43 police forces have Domestic Violence Officers.
National Guidelines for investigating DV crimes (established 2004)
National Training Scheme for police officers
Impartiality of police officers - Police with proven history of Domestic Violence against wife/partner 'not deemed suitable for police work'.

- **Case Scenario 4: A woman has reported an assault on her by a man (husband/partner), but she now refuses to give evidence against him at court**

Section 23 Criminal Justice Act l988: Prosecution without calling victim at trial.

Public Interest Test and Domestic Violence

The Youth Justice and Criminal Evidence Act l999. Special Measures for vulnerable or intimated witnesses: Screens, live link, empty pubic gallery, remove wigs and gowns.

April 2008 – CPS Aide-Memoire on Charging in Domestic Violence Cases. Aim – to provide a uniform approach to handling DV cases and to reduce the high number of discontinued DV cases.

Full Code Test: 1. Evidential Test 2. Public Interest Test
Gathering evidence of the victim: Corroboration, 999 tape, CCTV, Photographs
Gathering evidence of the offender: Previous convictions? Conduct/demeanour at arrest? Admissions? Any sign of injury on him?

7. Homicide and Domestic Violence

An Historical Overview:

Provocation: S.3 of the Homicide Act l957 where it is defined Provocation in the following terms:

- "Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked whether by things done or by things said or by both together to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury, and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have had on a reasonable man".


Further Thinking..... Did S.3 stop victims of domestic violence from utilising provocation as a defence?

R V DUFFY (1949) 1 ALL ER 932

"Provocation is some act, or series of acts, done which would cause in any reasonable person, and actually cases in the accused, a sudden and temporary loss of self control, rendering the accused so subject to passion as to make him or her for the moment, not master of his mind".

Gender inequality at the heart of the statute?

Case Scenario 1: A man kicks his wife to death because she 'nagged' him.

- R v Joseph McGrail (Birmingham Crown Court) l991 [Manslaughter - 1 year suspended sentence]
- R v Beatanbeau 2001 [20 months suspended sentence]

Case Scenario 2: A man stabs his wife to death after she told him she didn't love him anymore

- R v Leslie Humes 2003 [Manslaughter - 7 Years imprisonment]

Case Scenario 3: A <u>woman</u> pours petrol over her sleeping husband and sets him alight after he tells her that he will kill her when he awakes in the morning

- R v Ahluwalia l992 4 All ER 889
- R v Sarah Thornton (1996) 2 ALL ER 1023

Case Scenario 4: A woman stabs her violent partner to death after hearing him tell his friends that they can gang rape her

- R v Humphreys [1995] 4 All ER 1008

Additional – relevant – cases:

 **Susan Edwards ' R v Zoora Shah" in Feminist Judgments pp.273-292**

R v Tara May Fell (2000) Lawtel on Battered Women' Syndrome
R v. Smith (Morgan) [2001] 1 AC 146
R V Janet Catherine Carlton [2003] LTL 7.2.2003
R v Catherine Mary Keaveney [2004] 22.4.2004

<u>The Battered Woman Syndrome</u>

USA – developed mainly by psychologists
Leonore Walker "Terrifying Love: Why Battered Women Kill and how Society Responds" 1989
Learned Helplessness theory
The Cycle Theory of Violence
Ibn-Tamas v Moduleed States DC 1979 (lst US case to admit BWS evidence)

 Further thinking..... Are there any dangers associated with the adoption of 'syndromes' to explain the behaviour of domestic violence victims?

8. Reform

Law Commission Paper 'Partial Defences to Murder'. www.lawcom.gov.uk 20th August 2004

Law Commission Paper 'Murder Manslaughter and Infanticide' November 2006

27th October 2009 – House of Lords reject amendment to Coroner's and Justice Bill (99 votes to 84) stopping new law aimed at repealing provocation as a defence in infidelity cases. Allowing provision for reduction from murder to manslaughter in DV homicide cases based on 'Fear of Serious Violence'.

Coroners and Justice Act 2009

Section 56 - Abolition of common law defence of provocation

1) The common law defence of provocation is abolished and replaced by sections 54 and 55.
2) Accordingly, the following provisions cease to have effect—

(a) section 3 of the Homicide Act 1957 (c. 11) (questions of provocation to be left to the jury);

(b) section 7 of the Criminal Justice Act (Northern Ireland) 1966 (c. 20) (questions of provocation to be left to the jury).

Replaced by:

Section 54 - Partial defence to murder: loss of control

(1) Where a person ("D") kills or is a party to the killing of another ("V"), D is not to be convicted of murder if—

(a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,

(b) the loss of self-control had a qualifying trigger, and

(c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.

(2) For the purposes of subsection (1)(a**), it does not matter whether or not the loss of control was sudden.**

(3) In subsection (1)(c) the reference to "the circumstances of D" is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.

(4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.

(5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

(6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.

(7) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.

(8) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder does not affect the question whether the killing amounted to murder in the case of any other party to it.

Section 55 - Meaning of "qualifying trigger"

(1) This section applies for the purposes of section 54.

(2**) A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies.**

(3) This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.

(4) This subsection applies if **D's loss of self-control was attributable to a thing or things done or said** (or both) which—

(a) constituted circumstances of an extremely grave character, and

(b) **caused D to have a justifiable sense of being seriously wronged.**

(5) This subsection applies if D's loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4).

(6) In determining whether a loss of self-control had a qualifying trigger—

(a) **D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence;**

(b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence;

(c) **the fact that a thing done or said constituted sexual infidelity is to be disregarded.**

(7) In this section references to "D" and "V" are to be construed in accordance with section 54.

Sexual Infidelity - Not good enough by itself but with an additional element is it a defence to murder? See ***R v Clinton (Jon-Jacques)*** [2012] EWCA Crim 2 and also Vera Baird "Infidelity Plus – the new defence against murder? The Guardian 23rd Jan 2012 http://www.guardian.co.uk/commentisfree/2012/jan/23/infidelity-plus-defence-murder

Further Thinking.....Does the new law on loss of self control create an imbalance of fairness against male defendants? Reading the following case might help: **The Queen V Ronald Edwards [2011] EWCA Crim 1461**

ESSENTIAL READING 

Hunter Part IV (241-272 and 273-307)
Hillaire Barnett - Chapter 9
Nicola Wake "Loss of Control – Beyond Sexuality Infidelity" Journal of Criminal Law, 2012, 76(3), 193-197 **Available on the GJL BB site**
"The Canadian Supreme Court and Domestic Violence – R v Ryan" 2013 Ronagh McQuigg. Feminist Legal Studies Journal 2013
Cases as above (from your Criminal Law case book)

PLUS any of the following articles:

Andrew Ashworth "Homicide: Coroners and Justice Act 2009 s.54 - loss of control - qualifying trigger" – Case Commentary – Criminal Law Review,(2012) CLR 539

"Anger and Fear as Justifiable preludes for loss of self control". Susan M. Edwards, Jo Criminal Law, 2010, 74(3), pp 223-241.

"The Coroners and Justice Act 2009 – Partial Defences to Murder – Loss of Control", Alan Norrie, CLR, 2010, No.4, pp 275-289.

"Reforming Provocation – perspectives from the Law Commission and the Government". Dr. Anna Carline (2009) 2 Web JCLI.

"Abolishing provocation and reframing self defence - The Law Commission's options for reform" Susan S.M. Edwards. CLR Mar 2004.

"Responding to Victim Withdrawal in DV cases" Louise Ellison, Crim LR. 2003 – Available on Blackboard
"Legal Defences and Expert Testimony on the Battered Woman Syndrome: A Focus on Self Defence". Juliette Casey. Scots law Times. 2003 – Available on Blackboard

FURTHER READING:

"Safety and Justice: The Government's Proposals on Domestic Violence" Cm 5847 June 2003.
"Domestic Violence a Guide to Civil Remedies and Criminal Sanctions" Home Office, February 2003. www.dca.gov.uk
"The Day to Count: A snapshot of the impact of Domestic Violence in the UK" Elizabeth Stanko. London. 2004. www.domesticviolencedata.org.uk
P. Hutchenson NLJ 14th Aug '92 Vol. No. 6564 p 1159
P Hutchenson NLJ 13th Sept '91 Vol 141 No.6519 p.1223
G. Langdon-own "Leeds Shows the way in tackling Domestic Violence" The Times 20th June 2000.
Olga Tsoudis "Do Social Sanctions Matter in Domestic Violence? A Pilot Study" Web Jo. Current Legal Issues. (2) 2000
G. Gibson "Tightening the Noose" The Times 2nd November 1999
D. Yarwood "Domestic Abuse Research" Family Law 1999 Vol 29 pgs 113-115
J. Horder "Sex Violence and Sentencing in Domestic Provocation Cases" 1982 CLR P.32

M. Wasik “Cumulative Provocation and Domestic Killing” 1982 CLR P.32
S. Edwards “The Extent of the Problem – how widespread is Domestic Violence?” in S. Edwards “Policing and Domestic Violence” Sage l989
House of Commons Home Affairs Committee Report “Domestic Violence” Feb 1993
Law Commission “Family Law, Domestic Violence and Occupation of the Matrimonial home” HMSO l992
M. Shaffer “The Battered Woman’s Syndrome Revisited: Some Complicating Thoughts 5 years after R v Lavallee (1990)” 47 U.Toronto LJ 1-33 Winter 1997

Large Group Session 6

Rape and the Criminal Justice System

Introduction

Rape Myths & the impact of storytelling in rape law

Davis v North Carolina (1966) 382 US 737 in Kim Lane Schepple "Foreword: Telling Stories" Michigan Law Review Vol 8. P.2057
Steward MW, Dobbin SA & Gatowski SI (1996) "Definitions of Rape: Victims, Police and Prosecutors "No. 4 Feminist Legal Studies 159 p.392.
David Pannick QC The Times (Law Supplement) 2000

Rape and the Criminal Law
The case of John Worboys - the prison service and CPS (see the GJL Forum)

Sexual Offences Act 1956 ss(1) & (2) & 43
Sexual Offences Amendment Act 1976 s.1
Criminal Justice & Public Order Act 1993 S.142
Triable on Indictment only

A man commits rape if:

(a) he has sexual intercourse with a person (whether vaginal or anal)

who at the time of the intercourse does not consent to it, and

(b) at the time he knows that the person dose not consent to the intercourse or is reckless as to whether that person consents to it.

Actus Reus – Stanton (1844) 1 Car & Kir 415; Hughes (18841) 0 C & P 752 and Sexual Offences Act S.44

Mens Rea - Khan (1990) 1 WLR 13; Satnam (1984) 78 CR App R 149; Breckenridge (1983) 79 CR App R 244; Gardiner (1994) CLR 455; McFall (1994) CLR 226

Sentencing – Rape : Maximum = life imprisonment S.37 SOA 1956
Attempted Rape : Maximum = life imprisonment S.38 SOA & Sch 2

Consent:

Sexual Offences (Amendment) Act 1976 – no definition of consent
Common Law approach
Olugboja (1982) QB 320
Criminal Law Revision Committee
Ruth Hall & Lisa Longstaff "Defining Consent" (1997) NLJ June 6, p.840.
Human Rights Act 1998 S.6(2) – see also Salabiaku v France (1988)

Satnam v Kewel S (1983) 78 CAR 149

Mistake - DPP v Morgan (1976) AC 215
Canadian Criminal Code S.272.2 states that mistake is not available as defence if D did not take reasonable steps in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

Rape & Marriage:

R v R [1991]
S.W. v UK [ECHR] 22nd November 1995
Article 7(1) ECHR
Attorney General's Reference (No.86 of 2006) Sub Nom R v J (2006) EWCA Crime 2077

Australian case – 81 year old husband stands trial for rape of wife 50 years earlier http://www.theaustralian.com.au/business/legal-affairs/husband-for-rape-trial-after50years/story-e6frg97x-1226375606974

Reform:

Sexual Offences Act 2003 – extends actus reus to now include penetration of mouth/anus (S.1(1)(a)).

Mens Rea – Legislation has dropped requirement that defendant should know of or be reckless as to the absence of consent. Replaced by a crime of negligence. S.1(2) Genuine belief in consent to be evaluated objectively *in all the circumstances. [Abolishes Morgan defence]*

S.47 defines consent : "A person consents if he agrees by choice, and has the freedom and capacity to make that choice"

Helbron Committee Report 1975 Cmnd 6352
"Setting the Boundaries – Reforming the law on sexual offences" Home Office July 2000
www.homeoffice.gov.uk/cpd/sou/sexoff99.htm
Human Rights Act (implemented 2nd October 2000)

Report of the Advisory Group on the Law of Rape (1975) Cmnd paper 6352 "It would be unfortunate if a tendency were to arise to say to a jury that a belief, however unreasonable, that the woman consented, entitled the accused to acquittal".
Corroboration
Removing the requirement to warn the jury
S.32 CJPOA l994
Makanjuola [1995] 3 All ER 730

Procedural Developments:

Home Office Report "Speaking up for Justice
www.homeoffice.gov.uk/sufj.pdf
But see R v B (Attorney-General's Reference No.3 of l999) 2000 (Lawtel) and TLR 16/6/00

Rape Conviction Rates

Baroness Vivien Stern, Government review of Rape complaints handling in England and Wales. The Stern Review, Published MARCH 2010.
http://www.equalities.gov.uk/stern_review.aspx - also available on BB
Methods of Calculation – Attrition -6% conviction rate – Prosecution = 60% conviction rate.
Liz Kelly et al "A Gap or a Chasm? Attrition in Reported Rape Cases" Home Office, Report No. 293, Feb 2005

Conviction Rates 2007-08 6.5% across England and Wales (fall of .5% from 2006).
Fawcett Society (2007) – Research: Rape conviction rates a postcode lottery.
Natalie Taylor "Juror Attitudes and Biases in sexual assault cases"Trends and issues in Crime and Criminal Justice, No. 344, Australian Institute of Criminology. August 2007.

Juries, deliberation and sexual stereotyping in rape cases

Sexual History Provisions

NB: **See the articles by Neil Kibble and others referenced** in **'Essential Reading'**
Victims vs Defendants: whose rights are to be preferred?
Youth and Criminal Evidence Act 1999, R v A (No.2) (2002) 1 AC 45
The impact of Human Rights issues – see Osman v UK (1998) 14 EHRR 53
Ralston Edwards Case : victim complaining to ECHR that her right not to be subjected to degrading treatment was infringed at trial.

The role of the CPS – R v DPP ex Parte C (2000) Lawtel : on failure of CPS to consult victim prior to discontinuing prosecution

Rape Trauma Syndrome

Outline of the Syndrome's origins (see Burgess & Holstrom)
Phase 1 – Acute Phase
Phase 2 – Long Term Reorganisation Process
Use of the RTS in the USA: Henson v State of Indiana (1989) demonstrates limitations on the use of RTS for women.
R v Meah: D. Meah and Another (1986) 1 All ER 935 on civil damages/RTS (see also Meah v McCreamer 1984 & 1985 (No.2)
Miles v Cain (1989) The Times 14th Dec '89 on civil damages /RTS
Linda Griffiths v Arthur Williams [1995] LTL 21/11/95 - £50,000 damages following rape not excessive.

Rape - Warfare – International Criminal Law perspectives

Bosnia, Ruwanda, Abu Ghraib (Iraq).

See: Article 7 Statute of Rome (Statute of the International Criminal Court) 1998

"Rethinking Rape as a Weapon of War'. Doris E. Buss, Feminist Legal Studies Journal, Vol 17, No.2, August 2009.

MacKinnon, C., "Rape, genocide and women's human rights" Uni Nebraska Press, 1994.

‘Rape as Torture? Catherine MacKinnon and Questions of Feminist Strategy”. Clare McGlynn, Feminist Legal Studies Journal, Vol 16, No.1, April 2008.

MacKinnon, C., Are Women Human? And Other International Dialogues (Cambridge, Mass.: Harvard University Press, 2006)

Human Rights Watch Report ‘Looser Rein, Uncertain Gain” – Investigation into human rights in Saudi Arabia, HRW, 2010.

The Quatif Rape Case - http://www.msnbc.msn.com/id/15836746/ns/world_news-mideast_n_africa/t/rape-case-calls-saudi-legal-system-question

Deli Gang rape of Joyti Singh http://edition.cnn.com/2017/05/05/asia/india-gang-rape-death-penalty/index.html

ESSENTIAL READING 

Hunter “Feminist Judgments” Pages 205-227

Clare McGlynn “Rape Torture and the European Convention on Human Rights” International and Comparative Law Quarterly [2009] 565-595 (**available on Blackboard**)

Neil Kibble “Case Comment – R v Harris” [2010], CLR Vol 1, pp 54-61

“Judicial Discretion and the Admissibility of Prior Sexual History Evidence under S.41 Youth Justice and Criminal Evidence Act 1999: Sometimes sticking to your guns means shooting yourself in the foot: Part 2” Neil Kibble, CLR 2005, APR, 263-274

“Judicial perspectives on the Operation of S.41 and the Relevance and Admissibility of Prior Sexual History Evidence: Four Scenarios: Part 1” Neil Kibble CLR 2005 MAR 190-205

“Section 41 Youth Justice and Criminal Evidence Act l999: Fundamentally flawed or fair and balanced?” Neil Kibble, Archbold News 2004, 8, 6-9.

"The Sexual History Provisions: Charting a course between inflexible legislative rules and wholly untrammelled judicial discretion?" Neil Kibble. Crim LR April 2004

"Sexual History Evidence – Beware the Backlash" Jennifer Temkin, CLR 2003, APR 217-242

"Untangling sexual history evidence: a rejoinder to Professor Temkin". Di Birch. Crim LR June 2003. 370-383

Dr. K. Stevenson "Observations on the Law Relating to Sexual Offences: The historic scandal of women's silence" Web Jo Current Legal Issues (1999) 4

L. Ellison "Cross Examination in Rape Trials" Crim LR Sept (1998) 605.

S. Estrich "Rape" Yale LJ 1087 (1986)
William Wilson "Rape" Jo. Social Welfare and Family Law Sept '92, No. 5. 445

Large Group Session 7

Pornography
Sexual Violence Against Women?

Pornography – a multi-billion £ enterprise

Modern developments – the internet – cyber porn
Child Pornography – the scale of the 'problem'. Sexual Offences Act 2003 ss48-50. Sentencing Guidelines (Sentencing Advisory Panel)

Sexual Offences Act 2003 – S.47 – 51 – Provisions on the Abuse of Children through Pornography; including inciting arranging or facilitating child pornography.

Criminal Justice and Immigration Act 2008 S.63 and S.64

R v Coutts [2005] 1 WLR 1605 (Court of Appeal judgment)
R v Porter (Ross) [2007] 2 All ER 625 – indecent photographs of children – custody/control of deleted images on computer

Pornography & Sexual Violence: Two competing schools of thought: 1 x direct causal link between pornography and violence against women, 1 x no causal link and banning of pornography = censorship.

Pornography as sex discrimination

Looking back: Moving Forward?

3 different views of pornography

- Liberal: North American Presidential Commission 1970
  Williams Report l979
- Conservative: Moral right/family values
- Feminists: Robin Morgan "Porn is the theory, rape is the practice"[in "Going Too Far" Random Hse l977]

  Susan Brownmiller, Andrea Dworkin, Catherine MacKinnon - Anti-Censorship Feminists
  Carol Vance "Pleasure and Danger, Exploring female Sexuality" - rejects Dworkin's analysis.

Links Between Pornography and Sexual Violence:

- USA: Dworkin and MacKinnon - Minneapolis Ordinance .v. First Amendment (Anti-censorship) civil libertarians.
  See also: Sylvaine Colombo "The Legal Battle for the City: Anti-Pornography Municipal Ordinances and Radical Feminism" Fem LS Jo. Vol. II, No.1. Feb 1994


Further thinking..... Who is to decide what pornography is and on what basis?

Studies Linking Pornography and Sexual Violence:

- Ted Bundy/Marquis de Sade (a case for censorship?)
- Donnerstein, Linz and Penrod 'The Question of Pornography"
- Neil Malamuth "Pornography and Sexual Aggression" Orlando Academic
  Press 1984 : Looking at the rape myth acceptance scale.
- Stephen Childress [see further reading]


Further thinking.....If the viewers of pornography are de-sensitized to rape is that a strong argument for banning all pornography?

Evidence from Europe/Other regions:

- Denmark/Sweden [Berl Kutchinsky]
- Germany [Polizeiliche Friminalstaatistik l990]
- Japan [Court J. "Sex and Violence: A Ripple Effect" in N. Malamuth 1984 (above)]

Pornography and the question of Harm:

- What is Harm? R .v. Brown [1993] 2 All ER 75
- Is Harm only physical - is pornography an incitement to sexual hatred? Racial Hatred?

- Pornography and warfare - Modern examples: Iraq?

Essential Reading 

Hunter "Feminist Judgments" Commentary on R v Brown pp 241-254

Clare McGlynn and Ericka Rackley "Criminalising extreme pornography: a lost opportunity". Criminal Law Review, (2009) No.4, pp 245-260

Andrew D. Murray "The reclassification of extreme pornographic images". Modern Law Review, MLR (2009) Vol 72 No.1 pp 73-90

Alisdair Gillespie "The Sexual Offences Act 2003: Tinkering with Child Pornography" CLR (2004) May pp 351-368

"Paying the Price – A Consultation Paper" 2004 – available on Blackboard
"Partial Regulatory Impact Assessment" Home Office paper 2004 available on Blackboard
Emily Jackson "The problem with Pornography: A Critical survey of the Current Debate" Feminist Legal Studies Jo. Vol III No.1. Feb l995
William Wilson "Is Hurting People Wrong?" Jo. Social Welfare and Family Law. No.5 l992
Steven Childress "Reel Rape Speech? Violent Pornography and the politics of Harm". [Review Essay] Law & Society Review. Vol. 25 No.1 (l991) P. 179.

Further Reading (any of the articles listed below):

David Sapsted "30 Years in Jail for killer necrophiliac" Telegraph on-line 5.2.2004.
"Young men download illegal porn" BBC New on-line. 25.7.2003
"Is Porn good for Society?" BBC News on-line. 14.5.2002
"Pornography and Sexual Violence: Evidence of the Links" Everywoman Press l988
"Consent No Defence to S/M Assaults" Jo. Criminal Law. Nov l992 P.381

Marianne Giles “Consent in Assault and Wounding Cases” Solicitors Journal 5th June 1992
Beverley Brown “Pornography and Feminism: Is Law the Answer?” Critical Quarterly Vol 34 No. 2 p.71 l992
Susan Etta Keller “Viewing and Doing: Complicating Pornography’s Meaning” Georgetown Law Jo. Vol 81 No.6 July l993.
Deborah Cameron “Pornography - What is the Problem?” Critical Quarterly Vol 34 No.2 p.3 l992
Gavin McFarlane “The Limits of Obscenity” NLJ Jan 24. 1992
A. Assister “Pornography Feminism and the Individual” Pluto l989
A. Dworkin “Pornography: Men Possessing Women” Women’s Press l98l
S. Griffin “Pornography & Silence” Women’s Press l988
Cass R. Sunstein “Pornography and the First Amendment” Duke Law Jo. September l986
R. Delgado and J. Stefancic “Pornography and Harm to Women: No Empirical Evidence?” Ohio State Law Jo. Fall l992
Catherine MacKinnon “Feminism Unmodified” Harvard Uni Press l987
Edward Donnerstein, Daniel Linz and Stephen Penrod “The Question of Pornography: Research Findings and Policy Implications” New York Free Press l987.
L B Alexander & SA Rubin “Regulating Pornography the Feminist Influence “ 18 Comm & L 73-94 D 1996
J Hussain “Feminists and Pornography - The Other Viewpoint” 6 Cornell Jo. Law and Public Policy 164-9 Fall l996
Smart C & B “Women, Sexuality and Social Control” Routledge, l978.

LARGE GROUP SESSION 8

Prostitution, Women's Bodies and the Law

Before attending this session you should consider the link below from the Home Affairs Select Committee on Prostitution. Several prostitutes/campaigners gave evidence before the committee in 2017.

https://www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/inquiries/parliament-2015/prostitution/

Historical Perspectives:

- Prostitution is not a recent phenomenon: (see Carol Pateman "The Sexual Contract", Polity Press. 1988): In the temples, prostitution in ancient babylonian times – destitute women sold their bodies for food for themselves and their children.

Early Campaigns:

- Josephine Butler (Ladies National Association) campaign to repeal Contagious Diseases Acts (1864, 1866, 1869).

- Police powers under CDAs and Habeas Corpus (see L. Mahood "The Magdalenes: Prostitution in the l9th century" Routledge l990).

- Unpopularity of Butler's campaign amongst some feminist women (eg. Millicent Fawcett). (See Carol Smart & J. Brophy "Locating Law: a discussion on the place of law in feminist politics" in Smart/Brophy "Women in Law: Explorations in Law, Family and Sexuality" Routledge l985).

Prostitution and War:

- Difficulties understanding female sexuality outside institution of prostitution (see L. Bland "In the name of protection: the policing of women in the lst world war" (in Smart/Brophy

ibid). Noting also that the definition of Veneral Disease is gender specific and that restrictions on civil rights of prostitutes were designed to protect the military.

Prostitution and Criminal Law

- Wolfenden Report (Homosexual Offences and Prostitution) Cmnd 247
  (1957) HMSO – recognised need to keep prostitution off the streets.
  Lead to greater criminalisation of prostitutes?

  S.1(1) Street Offences Act 1959:

  "It shall be an offence for a common prostitute to loiter, or solicitor, in a street or a public place for the purpose of prostitution".

The law before May 2003:

- Who/What is the **common prostitute?**

  Woman can be labeled a CP if she has been cautioned twice for loitering/soliciting and being found to be doing so on a third occasion.

- In 1994 – 7,039 women prosecuted under S.1(1) Street Offences Act l959
- Other Offences – Keeping a Brothel (Sexual Offences Act l956 s.33)
  Being a Common Prostitute and behaving in a riotous Manner in a public place (Vagrancy Act 1824 ss.3 &4)

Case Law Examples

- R v de Munck (1918) 1KB 635 – attempting to procure 14 year old daughter to become prostitute.

- DPP v Shaw (1961) 2 All ER 451
- R v Webb (1964) 1 QQB 357
- R v Bull (1994) 4 All ER 411
- R v McFarlane (1994)2 All ER 283

- Criminal Justice Act 1991 (changes in sentencing practices)
  (see "Imprisonment for Prostitutes" R. Leng (1992) 142 New LJ 270.)

The Law after May 2003:

Schedule 1 Sexual Offences Act 2003 – now equalizes the position of men and women under the law relating to soliciting. Schedule makes it clear that the term woman contained in the old legislation (Street Offences Act) should be removed and the term Person put in its place. R v Bull no longer applicable.

S.14 Policing and Crime Act 2009 – Paying or promising to pay for prostitution is a crime
S.16 Policing and Crime Act 2009 – Loitering or soliciting on the street remains a crime.
Prostitution in private is not an offence **unless** more than 1 prostitute working with others.

 Further thinking..... Consider S.16 of the PCA 09. Are the distinctions between public and private prostitution important?

S.53(A) SOA 2003 – paying for prostitution is now a strict liability offence.

The Ipswich Murders – changing the state's focus on prostitution ?

International approaches: Is Prostitution 'Sex Work'?

Neatherlands, Germany, New Zealand all tolerate prostitution

Sweden, Norway and Iceland all make it illegal to **buy** sex. Note it is not illegal to **sell** sex.

<u>International Crime - Trafficking in women and children</u>

Government Proposals – decriminalization of brothels, targeting pimps and organized crime.

UK S.57-60 SOA 2003 – New offences on trafficking. Sentencing maximum 14 years imprisonment.

Attorney General's Ref (Nos. 129 and 132 of 2006) 2 Cr App R (2007)
Serious Organised Crime and Police Act 2005

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Pornography and Child Prostitution (2002), United Nations.
Convention against Transnational Organised Crime (2000), United Nations.

Crime Reduction initiatives on prostitution – www.crimereduction.homeoffice.gov.uk/res_indi.htm#2009

Follow the link below to an article and video link discussion on Buying Sex
http://www.huffingtonpost.co.uk/ruth-jacobs/prostitution-laws_b_4851224.html

Report on sexual exploitation and prostitution and its impact on equality – Mary Honeyball – European Parliament 4th February 2014
http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0071+0+DOC+XML+V0//EN

Prostitution and European Law

Adoui and Cornuaille (Joined cases 115 and 116/81) (1982) E.C.R.1665

Essential Reading 

Hillaire Barnett – generally

Statutory provisions indicated above plus:

"Human Trafficking in 2008: blowing away some myths". Sally Ramage, Criminal Lawyer (2008) No. 184 pp 8-11

"Human trafficking, human rights and the Nationality Immigration and Asylum Act 2002" Tom Obokata European Human Rights LR (2003) No.4, 410-422

"Human Trafficking – a modern form of Slavery? Sandhya Drew" European Human Rights LR (2002) Issue 4 pp 481-492

Leo Flynn "The body politic(s) of EC Law" in TK Hervey & D. O'Keeffe "Sex Equality Law in the European Union" (John Wiley 1996)

"Imprisonment for Prostitutes" R. Leng (1992) 142 New LJ 270

Honeyball Report (see link in notes above)

Further Reading:

Neil Malamuth and Gert Hald "Self-perceived effects of Pornography consumption". Archives of Sexual Behaviour, (2008) Vol 27, No. 4.

S. Kappeler "The International Slave Trade in Women, or Procurers, Pimps and Punters" (1990) Law and Critique p.219.

Mary Jo Frug "A Postmodern Feminist Legal Manifesto (An Unfinished Draft" (1992) 105 Harvard L Rev 1045.

Catherine MacKinnon "Feminism Unmodified: Discourses on Life and Law" (Harvard Uni Press) 1987.

Large Group Session 9

Women's Bodies and the Law
Abortion & Reproductive Rights

The World Abortion Law Map

http://worldabortionlaws.com/map/

Introduction

Definition of Abortion:

"Any deliberate procedure that removes, or induces the expulsion of a living or dead embryo or fetus" [Comptons English Dictionary]

The Historical Background

USA:

Skinner v Oklahoma [1942] expanding the constitutional status of reproductive choice
Roe v Wade [1973] 93 S.Ct 705
Webster v Reproductive Health Services [1989] 57 USLW 5023
Ronald Dworkin "Life's Dominion" l993 Harper Collins

UK:

Abortion as a crime – Blackstone "Commentaries on the Laws of England" concluded that abortion was "A heinous misdemeanour"

S.6 Offences Against the Person Act 1983
"Whosoever with intent to procure the miscarriage of any woman, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony"

1846 – Criminal Law Committee – Law should provide an exception whereby procuring a miscarriage would not be punishable provided it was done in good faith with the intention of saving the life of the woman

S.58 Offences Against the Person Act 1861
"Every woman being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent and whatsoever, with intent to procure the miscarriage of any woman, whether she be or not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent shall be guilty of an offence, and being convicted thereof shall be liable to imprisonment."

NB: no explicit mention of an exception for therapeutic abortions, but see R v Bourne [1938] 3 ALL ER 615

S1(1) & (2) Infant Life (Preservation) Act 1929
"Any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother shall be guilty of an offence"

1939 – Home Office and Ministry of Health Inter-Department Committee recommend law to be amended to make it unmistakably clear that a medical practitioner is acting legally when in good faith he/she procedures the abortion of a pregnant woman in circumstances where to continue pregnancy would endanger or seriously impair her life.

Abortion Act l967 – **NB: Abortion Act does not extend to Northern Ireland**
Human Fertilisation & Embryonic Act 1990 – amended S.1(1) Abortion Act l967
Kelly v Kelly [(1997) TLR 5/6/97 – Father's rights viz foetus
Ministry of Defence v O'Hare (1997) LTL 11.7.97 - Compensation guidelines viz Ministry's policy of obliging women in armed forces to choose between dismissal from job and having abortions.
R v Secretary of State for Health & Schering Health Care Ltd/Family Planning Association ex parte John Smeaton (on behalf of the Society for the Protection of Unborn Children) (2002) Crim LR 665 – Supplying/using morning after pill not a criminal offence

Abortion in Northern Ireland

Position is as it was in Britain before 1967
Law governed by:

- Offences Against Person Act 1861 (making all abortions illegal)

- Infant Life Preservation Act 1929 (governing child destruction)
- Bourne judgement 1938 (allowing abortion in extreme circumstances of risk to mental or physical health)

Human Rights and Abortion Rights in NI:
AG x X [1992] ILRM 401 – Costell J, NI High Court, imposing an injunction on a pregnant woman stopping her from travelling to the UK for termination of her pregnancy. Court said that they were not in breach of European Convention on basis that Right to Life of the unborn was to be adequately protected.
Reversed on Appeal – Irish Supreme Court "The true construction on the right to life here is that when there is a real and substantial risk to the mother's survival…at least throughout the pregnancy, then it may not be practicable to vindicate the right to life of the unborn".

November 1992 – Public votes on changes to Constitution – 2/3rds reject amendment allowing abortion to save mother's life, or to prevent her own self destruction. 62% of voters accepted there should not be a limit on the freedom to travel.

D v Ireland [2003] – lst challenge under HRA to Irish abortion laws. judgment awaited. Claim that state has breached Articles 3 and 8 of the ECHR.

Savita Halappanavar – Galway Hospital – April 2013

5th December 2013 – NI Justice Minister (David Ford) to consult on changing law to allow terminations in fatal foetal abnormality cases.

The availability of Abortion - European Comparisons

9 countries – abortion on request in early pregnancy
2 countries – specify rape and socio-medical/economic reasons as basis for request
3 countries – liberalisation prevented because of religious opposition

Tysiąc v. Poland (Application no. 5410/03) ECtHR 2007

Abortion up to 24 weeks of pregnancy is norm, where there is risk to life. Abortion on request is available in some countries up to 12 weeks or pregnancy.

A Woman's Choice?

"Abortion in Poland: a new human rights ruling" Barbara Hewson. Conscience 28.2 (Summer 2007): p34(2).

Sally Sheldon "Who is the Mother to make the judgement: Constructions of Woman in English Abortion Law" [1993] 1 FLS Vol.2

R Lee & D Morgan "Birthrights" [1991] London: Routledge.

Paton v British Pregnancy Advisory Service Trustees [1979] 1 QB 276
Jefferson v Griffin Spalding County Hospital [1981]

Feminist Perspectives on Abortion/Law

Private Rights and Abortion – Catherine MacKinnon "Privacy v Equality: Roe v Wade" in Mackinnon's "Feminism Unmodified" Harvard Uni Press l987

Morality and Choice – Susan Himmelweit "More than a woman's right to choose" (l988) 29 Feminist Review 38

A question of equality? – Frances Olsen "Unravelling Compromise" (1989) 103 Hard Law Rev .105

Abortion and Human Rights

Jepson v. Chief Constable, [2003] EWHC 3318
Compatibility S.1(1)(d) Abortion Act 1967 – allows abortion for foetal abnormality & Human Rights Act l998 (Article 2 European Convention on Human Rights)
Mrs Thi-Nho Vo v France [Application No.53924/00] Judgment given 8th July 2004 – No violation of Article 2.
"The central question raised by the application is whether the absence of a criminal remedy within the French legal system to punish the unintentional destruction of a foetus constituted a failure on the part of the State to protect by law the right to life within the meaning of Article 2 of the Convention…..
It is not only legally difficult to seek harmonisation of national laws at Community level, but because of lack of consensus, it would be inappropriate to impose one exclusive moral code"

ESSENTIAL READING 

Hillaire Barnett

Any of the cases/ articles mentioned above

Vo v France – Available on Blackboard

FURTHER READING

"Nadine Dorries Abortion Proposals heavily defeated in Commons" Guardian on-line
7th September 2011
http://www.guardian.co.uk/world/2011/sep/07/nadine-dorries-abortion-amendment-defeated

Barbara Hewson "The Law of Abortion in Northern Ireland" Public Law (2004) Summer pp235-245.
"Family Planning Association NI – Judicial Review" 2003 NIQB 48, QBD NI

Barnard "An Irish Solution" [1992] New Law Journal 526

Dworkin "Life's Dominion: An Argument about Abortion and Euthanasia" 1993

Linton "Planned Parenthood v Casey: The Flight from Reason in the Supreme Court" (1993) 13 St Louis University Law Review 15. (Available on Westlaw)

Schlotzauer & Laing "The Ethics of Selective Termination Cases: Opening the Door to Abortion Extortion" (1999) 20 Journal of Legal Medicine 441. (Available on Westlaw)

Small Group Session Materials

SMALL GROUP SESSION 1

Introduction/Storytelling

Students should note that they are required to read the following articles in advance of this session:

The article by Kim Lane Scheppele

(1) Notes/Module materials from PET and Contract Law

BEFORE YOU ATTEND THIS SESSION YOU MUST COMPLETE THE ON-LINE ASSIGNMENT:

An on-line assignment has been set up for you on the GJL VLE site. You will find the Assignment in the **Assignments file** on the site.

Please note that the aim of the assignment is to engage you with materials that feed directly into the research report which you will write as part of your first assessment in this Module. No marks are given for the assignment but since it enables you to complete your first assessment, and we will provide you with relevant FEEDBACK, the assignment is compulsory. Please ensure that once you have completed your assignment you send a copy to Caron Thatcher Email: thatchc@lsbu.ac.uk

SGS EXERCISE NO. 1 - A bit of fun!

SGS Exercise 2 – THE SCHEPPELE ARTICLE

Having read the article by Scheppele and completed the short assignment on the VLE you are asked to bring the article and your notes to this first session so that you may participate in a number of fun exercises relating to the article that you have read.

Small Group Session 2

Reason and the Law

Question 1

What is Feminist Jurisprudence? In your answer you should provide examples from each of the writers you have read as part of your preparation for the seminar. Your answer must be emailed to the SGS tutor (at least three days before the SGS). Feedback will be provided.

Question 2

Write a critique of **Unikel's article**. In particular, consider his views on the reasonable woman and reasonable person standards and assess *whether he is correct in his assessment that one of these standards is preferable to the other.*
Some students will be asked to present their critiques to fellow students during this session.

Question 3

To what extent and in which ways can the developing standards of human conduct based on the reasonable person and reasonable woman help women achieve justice within the law? Consider this question by reflecting upon and evaluating the article by **Karon Monaghan QC – <u>available on the GJL VLE site.</u>**

Students are asked to note that in ADDITION to the Essential Reading material (which they must read in advance of this session) they should draw upon their understanding of reason/reasonableness in Tort, Contract, Criminal and Property Law when considering these questions and preparing their answers for the seminar discussion.

SMALL GROUP SESSSION 3

DOMESTIC VIOLENCE

Question 1

Critically consider the changes to the law by way of the Coroners and Justice Act 2009, sections 53,54 and 55 (outlined in the DV Lecture material). In particular, think about whether the reforms equalise the position of men and women under the criminal law relating to murder/manslaughter?
You will be expected to consider relevant statutory provisions and case law during the group discussions on this question.
You must ensure that you read the articles by Alan Norrie and Susan Edwards which are available on the GJL BB site (and in the Feminist Judgments book) along with the case of R v Clinton and at least one article relating to that case BEFORE attending this seminar.

Question 2

In the past, violence against women, particularly violence occurring in the home or between intimate partners, was viewed as a private matter, not as an issue of civil or political rights. Now however, by applying the legally accepted definitions of torture to the violence that women face everyday around the world, the international community has explicitly recognized violence against women as a human rights violation involving state responsibility". *Amnesty International, Women's Human Rights.*

Critically evaluate this statement drawing upon relevant statutory/case law provisions as well as feminist theoretical and policy contributions to this debate.

Question 3

Research and prepare answers to the following questions:

1. Will the Battered Woman Syndrome continue to be a useful tool in explaining the conduct of women who kill?
2. Should the Battered Woman Syndrome should be a defence in law (consider other jurisdictions when you are researching this point)?
3. To what extent do current legislative regulations reflect the reality of the battered woman's experience?

SMALL GROUP SESSION 4

RAPE AND THE CRIMINAL JUSTICE SYSTEM

QUESTION 1

"Critics have long argued that judges have failed to control the use of irrelevant and prejudicial sexual history evidence in sex offence trials, and that the only effective solution to the problem is to impose tight legislation constraints on judicial discretion or eliminate it altogether".

Neil Kibble 'Judicial Perspectives on the operation of S.41 and The Relevance and Admissibiity of Prior Sexual History Evidence: Four Scenarios (Part 1)' Criiminal Law Review, 2005, March, 190-205.

Critically consider this statement in light of government initiatives to improve conviction rates in this area, drawing upon your knowledge of relevant legal measures and also feminist theoretical discourses.

QUESTION 2

It is argued that conviction rates for rape are low and that victims rarely find justice within the criminal court system. Is this inevitable given the nature of rape cases or can and should the state do more to ensure conviction rates improve – bearing in mind the state's obligation to provide a fair trial for defendants?

Research the issues above and come to the online seminar prepared to discuss your findings.

QUESTION 3

Come to the session having researched and considered the idea that rape, in times of war, should not be considered a crime but part of the usual tactics of battle.

ON LINE SMALL GROUP SESSION 5

PORNOGRAPHY & PROSTITUTION

Students are asked to note that this session will take place on line via the GJL VLE site.

The on line seminar will take place in the normal seminar and lecture slots and the Module tutor will allocate time slots to the relevant seminar groups.

It is the responsibility of each student to ensure that they have the Java Plug In downloaded onto their computer so that they can participate in the session. Students using computers in the LRC should not have any difficulties logging on.

All students should check before the start of their session that they can access the on-line session.

The etiquette for on-line participation is set out below. Of particular importance is the requirement that you do not (a) speak over others on-line (in short, wait your turn!); and (b) you do not make comments that are juvenile. This is a 'normal' seminar in a different format. Make sure that you do not engage in inappropriate conduct simply because you are not face to face with fellow students/staff. Anyone breaching these criteria will be asked to explain themselves to the Module Co-ordinator.

Additional Guidance – Participating in On-Line Seminars

1. The better prepared you are for your online seminar, the more you'll get out of it.

The whole point of attending a seminar is to learn something new, test your own knowledge and develop your critical understanding of the issues at hand. Online seminars are no different, and you should be prepared to contribute and take away as much useful information as you can. You will not be able to do this if you come to the on-line session without having prepared by reading the relevant material.

2. Make sure your computer is working properly. By their nature, all online seminars rely on technology. Make sure that you have joined the on-line seminar via the on the VLE site. If you have any doubts about how to do this email thatchc@lsbu.ac.uk.

3. DON'T ARRIVE LATE! This means that you have to be in attendance (on-line) at the time that your seminar would normally start. If you arrive late for the seminar you will have missed substantial parts of the conversation and it may take some time for you to catch up.

4. Introduce yourself to everyone who is attending the on-line seminar as soon as you log in.

5. **Be aware that participation in the seminar is compulsory**. You are required to have read the relevant material and to come to the on-line seminar ready to discuss the questions associated with that article. If you have not read the material then the usual rule applies; you are not welcome at the seminar.

6. NOTES! Just as you would at an in-class seminar, take notes during the seminar to enhance the course material, as an aide-memoir, or to highlight issues that you wish to raise.

7. Ask questions. The point of an online seminar is that it should be as near as possible to an in-class seminar, so take the opportunity to question the tutors and other participants.

Session Rules:

(a) Arrive on time

(b) Wait until another person has finished making a point before you jump in with yours. We will have a large number of people contributing to this session so there is a need for us all to exercise some care in managing our contributions. Bear this rule in mind and you shouldn't go far wrong.

(c) Do not use abusive or offensive language. As in class based seminars, the usual rules of conduct apply and anyone engaging in abusive of offensive language will be asked to leave the session and will be reported to the Head of Law.

(d) **Everyone is to ask at least one question and make one contribution during the session.**

(e) Do not hog the session by repeatedly asking questions.

(f) Remember that your contribution must be in formal speech rather than text/chat room shorthand.

(g) Be polite. You may challenge other people's ideas so long as you have a sound academic basis for doing so.

(h) Have fun. This is a fun method for enhancing your learning.

(i) Remember to provide us with your written feedback via email after the event so that we can report your responses to our external examiner and develop the sessions for students in future years.

Finally, please be aware that once you log in your name will appear on the session notes so we will know who has attended and who hasn't. If you are

absent you MUST inform Caron Thatcher via email of the reasons for your absence – thatchc@lsbu.ac.uk.

On Line Small Group Session Questions:

Question 1

"Within the existing ideological framework of current liberal legal systems, it is a fundamental principle that individuals' freedom should not be restricted unless such restraint is necessary to prevent harm to others. Clearly the definition of harm is not static and is subject to re-negotiation in order to encompass newly perceived injuries…..yet this harm principle has proved peculiarly resistant to pornography".
[Emily Jackson "The Problem with Pornography: A Critical Survey of the Current Debate" Feminist LS Jo. Vol. III, No.1, Feb 1995]

Critically assess this statement and prepare your answer bearing in mind current debates on the issues of Harm/Consent and the links between pornography and sexual violence.

Question 2

The scale of international trafficking in women and children dictates that there should be firm sanctions against it. Consider S.57-60 SOA 2003 and assess whether UK goes far enough in providing protection for women/children and appropriate punishment for traffickers.

Students should take the opportunity not only to consider the relevant legislation in order to discuss this question but they should also consider some of the many articles available on the human trade in trafficking for the purposes of prostitution and pornography and international conventions relating to these areas.

Question 3

Assume that the Government is proposing to criminalise the purchasing of sex in its most recent paper on Prostitution. You are asked to prepare a paper in relation to these proposals either supporting or criticizing them.

In preparing for this task students should research not only the approach in the UK but also those taken in other international jurisdictions e.g. New Zealand and Sweden.

SMALL GROUP SESSION 6

ABORTION

During this SGS you will be divided into two groups. Each group will be tasked to provide a presentation either FOR or AGAINST the arguments raised by the question outlined below.

Please note that you will NOT be allocated your groups before the SGS and you must therefore prepare your presentation on the basis that you could be arguing for either side.

PRESENTATION QUESTION

"Since abortions are allowed in the case of rape, the foetus cannot be regarded as a full human being. If then, pregnancy is forced on other unwilling mothers it is not because the child is a human being whose life is sacrosanct. Why then are such mothers not automatically allowed to have abortions? One plausible explanation is that the child is being used as an instrument of punishment to the mother, and that talk of the sanctity of life is being used to disguise that fact". (J. Richards)

Critically consider the importance placed upon the right of the life of the foetus and the maternal right to autonomy in Abortion laws in England, American, Eire and Europe.

In order to prepare for this presentation you should consider the range of legislation and case law discussed during the LGS. In particular you should read the Judgment of the European Court in the case of Vo v France which can be downloaded from the W&L VLE site.

APPENDIX 1

Michigan Law Review
August 1989

Legal Storytelling

*2073 FOREWORD: TELLING STORIES

Kim Lane Scheppele

Why is there such a rush to storytelling? Why has narrative become such an important and recurring theme in legal scholarship these days? [FN1]

Perhaps it is the post-Kuhnian pragmatism about truth that has spread from the history of science throughout the academy. [FN2] If science has what appears to be fads and fashions, then can other knowledge be more certain? Or perhaps it is a response to 'argument by anecdata' [FN3] that Ronald Reagan made so popular, countering numbing statistics showing that all was not right with the happy stories of individuals who didn't fit the patterns. Or perhaps it's that law has always been concerned with narratives, with the individual plaintiff and the individual defendant in the individual case, so that theoretical attention to narrative was bound to emerge eventually.

The concern for narrative that the present issue reveals has a more easily identifiable origin, though the other forces probably matter too. The last twenty years or so have seen a great opening of the legal profession*2074 to those who were formerly outsiders. The legal community once comprised almost entirely of white men, has, however partially, hesitantly and reluctantly, begun to admit women, people of color, and those with life experiences far different than those of the lawyers whose ranks they now join. As the world of law schools, legal practice, and legal teaching has become more diverse, it should not be surprising that legal scholarship is showing signs of diversity as well. The conference on legal narrative that gave rise to the volume is one product of that diversity. And though narrative is not uniquely the province of those who seek to challenge established ways of thinking in law, many of the authors in this volume use stories to highlight and celebrate diversity.

The hefty issue that you now have in your hands has, despite its bulk, a sort of urgency about it, an urgency that comes from the fact that so many of these Articles

draw from deep experience. The Articles contained here speak with many voices and draw on many powers. Some are not like law review articles you have ever seen before; others may look more traditional, but they carry unconventional messages. Some experiment with format, with subject matter, with the boundaries of legal discourse. Some speak to the heart more than to the head. Some want to provoke, to unsettle, to challenge 'the way we do things around here.' Almost all want to challenge the 'we.'

These Articles break taboos. The Articles by Patricia Williams and Clark Cunningham speak with the power of 'I.' They will engage you in a conversation with this named author, this real person, whose struggles and thoughts are revealed in the words on the page. And they use this power of 'I' to make larger points about social arrangements, about conventional wisdom and its unwiseness, about how things might be. Other Articles, those by Richard Delgado and Derrick Bell, tell stories that are not true, though readers will recognize the realness in them. They ask readers to imagine, and in imagining to experience, the worlds created in the words, to save the pain of having to live them. Still other Articles, those by Mari Matsuda, David Luban, and Milner Ball, report the official court-approved versions of stories, and then reveal the unofficial versions, available to but rejected by courts. They show in the telling of alternative stories how selective narratives come to have the power of truth, though there may be other versions that lead to other conclusions, other ways of seeing. The Article by Joseph Singer engages the practice of teaching, and shows how stories can be used to enlist empathy and understanding from students whose own experiences do not ordinarily lead them to challenge the official views. There are also Articles that challenge the ***2075** premises of the rest of the issue, reminding all that in the proliferation of stories, it matters how one chooses among them, and that one needs criteria other than narrative force to do that. Toni Massaro and Steven Winter argue that narrative alone, for all its power, is not enough.

This issue testifies to the attractiveness of, and limits to, storytelling as a force in law. But whose stories are told? Who listens? And who responds? This symposium explores these questions, challenging traditional practices and exploring new ones in the telling of stories in the law. One important lesson that can be learned from this issue is that narrative is a way of organizing, coping with, even acting on the world. Stories carry power because they have the ability to convey truths even if the stories themselves are not the only ways of seeing the world. Stories re-present experience, and can introduce imagination and new points of view.

To make sense of law and to organize experience, people often tell stories. And these stories are telling.

I. THE STORY OF THIS SYMPOSIUM

Once upon a time, [FN4] Richard Delgado sent a letter to the major law reviews suggesting a symposium on legal narrative.

> We believe that stories, parables, chronicles, and narratives are potent devices for analyzing mindset and ideology--the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal discourse takes place. . . . [T]he main cause of Black and brown subordination is not so much poorly crafted

or enforced laws or judicial decisions. Rather, it is the prevailing mindset through which members of the majority race justify the world as it is, that is with whites on top and Blacks at the bottom. Ideology makes current social arrangements seem natural and fair. [FN5]

Along with this dire diagnosis, Delgado proposed a remedy. 'The cure is storytelling,' he announced, 'counterhegemonic' storytelling to 'quicken and engage conscience.' [FN6]

Kevin Kennedy, the editor-in-chief of the Michigan Law Review, and Lee Bollinger, dean of the University of Michigan Law School, discussed the idea and agreed that the Review would devote a special issue to questions of legal narrative and its 'counterhegemonic' power. Calls went out to potential storytellers; enthusiastic responses encouraged the Review's editors to proceed. And with all the speed of ***2076** a group that has only one year to make a difference, Review editors solicited manuscripts, selected a set, and invited the participants to come to Michigan's campus in April, only ten months after Delgado's original letter was sent.

But how to run a conference on a topic and with a method designed to challenge ordinary ways of doing things? The business-as-usual format with serial speakers presenting prepackaged papers was not going to match the radical ambitions of the conference organizers or the writers. The emphasis on different points of view called for a format that encouraged interaction and dialogue among participants. Kevin Kennedy asked me to help, because I teach a course on legal narrative and the legal construction of facts at the University of Michigan Law School. I asked Eric Rabkin, a professor of English at Michigan and an extraordinary teacher of writing, literature, and literary theory, to suggest a format. Rabkin proposed having the writers, Review editors, and others who wanted to participate in the conference meet in small editing groups to read, discuss, and provide feedback on the papers. [FN7] All the conveners would meet together at the beginning and the end, first to agree on some collective ambitions for the issue and later to discuss how each paper grew and dovetailed with the others after all the structured dialogue, in multiple editing groups with different casts of characters, over two days of meetings.

At first the Review editors, and later the participants, were skeptical. And the logistical problems raised by trying to match in small groups sets of people who had had a chance to read closely particular papers in advance were staggering. But in the end, with constant adjustments in the original plan being made as objections were being constantly raised, the conference proceeded in small group discussion sessions, [FN8] punctuated by trips to local restaurants and breaks for bits ***2077** of sleep and exercise.

It would be a wild exaggeration to claim there was agreement at the end about just how to think about the role of narrative in legal discourse. If anything, differences among some of the conference participants were sharpened by the time everyone met in a large group at the end of the conference. Some worried about the coercive power of stories; others claimed that stories were noncoercive. Some insisted on the importance of theory; others wanted to undermine the prestige of theory. Some changed their minds, and their drafts, as a result of hearing others' stories and insights; others found their drafts weathering the discussion with no need for repair.

And so on.

But what almost all the writers shared was a concern with the point of view of outsiders, those whose perspectives had been excluded in the law's construction of an official story for the particular case. Almost all agreed on the value of polyphony, and the conference generated a great deal of it.

II. THE 'CONSTITUTIVE WE' AND THE VOICES OF OUTSIDERS

Much of legal scholarship these days is written in consensual terms to an audience it constitutes as 'we.' In the first sentences of the preface of Law's Empire, for example, Ronald Dworkin writes: 'We live in and by the law. It makes us what we are . . .. We are subjects of law's empire, liegemen to its methods and ideals, bound in spirit while we debate what we must therefore do.' [FN9] And Robert Cover begins Nomos and Narrative with: 'We inhabit a nomos--a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void.' [FN10]

And lest you think this is just a rhetorical device used by those, like Dworkin and Cover, who are looking for a coherent set of values in the law in which 'we' can believe, those who find that the law is fraught with contradiction are not free from 'we' either. To take a couple of examples from the Critical Legal Studies literature, here is the first sentence of an article by Peter Gabel: 'Legal reasoning is an ***2078** inherently repressive form of intepretive thought which limits our comprehension of the social world and its possibilities.' [FN11] And an excerpts from the opening paragraph of an article by Frances Olsen: 'Our historical experience with censorship warns us to be wary of state protection; our experience with domestic violence warns us to be wary of privacy.' [FN12]

Now these may be somewhat different 'we's and 'our's and 'us's in the different excerpts, [FN13] but they reveal something quite striking about contemporary legal scholarship. [FN14] Contests over the meaning, the reach, or the significance of law these days are often framed as debates between 'we' and an invisible but ever-present 'they.' 'They' are the outsiders, the ones who do not believe, who are not included, who do not understand, who are beyond the boundaries of community. Wherever there is a 'constitutive we,' there is also an excluded 'they.'

This is, of course, nothing new. The use of the 'constitutive we' in the American legal tradition is prominent in the founding documents of American government, law and nationhood. 'We hold these truths to be self-evident,' begins the Declaration of Independence. [FN15] 'We the People,' begins the Constitution. [FN16] These were texts of revolutionary times, when the assertion of a 'we' was first an act of defiance, and then an act of construction. Constituting a 'we' was an essential part of separating 'us' from a firmly excluded and rejected 'them.'

'We' talk does not just appear at founding moments, when the construction of a new community is urgent, however. 'We' talk is a persistent feature of legal discourse, even once a legal system is up and ***2079** running. [FN17] There are several reasons why this may be so. One is that in some versions of a liberal political regime, the

government relies for its legitimacy on the consent of those who are to be subject to its laws. And it matters, then, who is included among the consenters for it is only against consenters that the laws may be legitimately enforced. 'We' are those who consent; 'they' are outside the reach of 'our' laws. [FN18] Another reason for the persistence of 'we' talk in law may have to do with the relative insularity of the legal profession. Those who are trained in law learn to speak a specialized language. When talking about the law with others who are similarly trained, lawyers become the 'we' who know the laws, excluding the 'they' who do not. [FN19] And the adversarial nature of legal practice in common-law legal systems also encourages a 'we-they' attitude to emerge. 'We' are the forces of justice in the world who are on the right side of this case; 'they' are the opponents who want to thwart 'us' at every turn. Legal discourse is in an important way, then, dependent on a variety of 'we-they' subdiscourses for its internal structure.

But there is another important 'we-they' structure in legal discourse, one that this issue of the Michigan Law Review has as its theme. It is the implicit contrast between those whose self-believed [FN20] stories are officially approved, accepted, transformed into fact, and those whose self- believed stories are officially distrusted, rejected, found to be untrue, or perhaps not heard at all. [FN21] Those whose stories are believed have the power to create fact; those whose stories are not believed live in a legally sanctioned 'reality' that does not match their perceptions. 'We,' the insiders, are those whose versions count as facts; 'they,' the outsiders, are those whose versions are discredited ***2080** and disbelieved. This can happen on an individual level, where specific persons find their truths not to be inevitable, or on a collective level, where whole groups of persons find their truths to be dismissed. In either instance, fundamental issues of legitimacy are raised.

How are people to think about the law when their stories, the ones they have lived and believed, are rejected by courts, only to be replaced by other versions with different legal results? The legal theorist may be able to fall back on a consent story, to say that these people did or plausibly could have committed themselves to the process in which the facts were found and judgments given, even if they find themselves in disagreement over the particular findings of fact in a particular case. But there are few things more disempowering in law than having one's own self-believed story rejected, when rules of law (however fair in the abstract) are applied to facts that are not one's own, when legal judgments proceed from a description of one's own world that one does not recognize.

The resolution of any individual case in the law relies heavily on a court's adoption of a particular story, [FN22] one that makes sense, is true to what the listeners know about the world, and hangs together. [FN23] But some liberal models of legal legitimacy rely solely on consent to abstract laws, or perhaps even consent to the basic structure of a legal system or a government, to justify the application of the laws in particular instances. [FN24] These models of legitimacy do not require that somehow people's particular points of view are taken into account at all, either because justice isn't thought to operate at a level that specific, [FN25] or because the situation in which consent is initially given does not generally include enough information for someone to have a point of view different from that of others [FN26] or because the specific points of ***2081** view people bring with them into concrete cases are too full of self-interest to provide a compelling normative account of how

the case should be resolved. [FN27] A considerably abstracted consent is enough. But consent to basic structures or abstract legal rules is not enough to ensure the experience of justice on the ground in concrete cases.

The experience of justice is intimately connected with one's perceptions of 'fact,' just as it is connected with one's beliefs and values. Beliefs and values do not exist in a world of pure abstraction, but rather always operate with and on specific assumptions about and perceptions of the state of the world. A judgment that murder is wrong, for example, already comes with the presupposition that some sorts of very specific factual occurrences count as murder and others do not. (And it also comes with a view that some cases are problematic for the classification scheme, existing as they do at the blurry boundaries of the concept of murder.) People might agree in the abstract that there should be legal rules condemning and punishing murder, but if a woman killing her husband counts as a murderer while a man killing his wife in otherwise identical circumstances does not, then some, at least, are apt to feel their sense of justice has been violated. And it is not because those whose sense of justice has been violated and those who think the judgment is fair disagree about abstract rules or basic structures that provide for the condemnation of murder. They disagree, at a minimum, about what features of the world are to be considered relevant to a particular description and how observations and evidence, themselves already and inevitably conceptualized, are to be further mapped into specialized descriptive categories. [FN28] They may also disagree about what is to count as evidence, about the accuracy of particular bits of information or about the correctness of taking certain ***2082** points into account in the description. But the most troublesome problem for an account of the legitimacy of law involves the sometimes irreconcilable differences among people in their widely varying accounts of the same event.

Social theorists have long known that people differently situated in the social world come to see events in quite distinct and distinctive ways. [FN29] How people interpret what they see (or what people see in the first place) depends to a very large extent on prior experiences, on the ways in which people have organized their own sense-making and observation, on the patterns that have emerged in the past for them as meaningful in living daily life. And so it should not be surprising that people with systematically different sorts of experiences should come to see the world in systematically different ways. The varying descriptions composed by people with varied experiences reveal that 'perceptual fault lines' [FN30] run through apparently stable community that appear to have agreed on basic institutions and structures and on general governing rules. Consent comes apart in battles of description. [FN31] Consent comes apart over whose stories to tell. And legal earthquakes are always just about to happen when there are serious perceptual fault lines that run through the legal construction of facts.

Stories may diverge, then, not because one is true and another false, but rather because they are both self-believed descriptions coming from different points of view informed by different background assumptions about how to make sense of events. In law, the adoption of some stories rather than others, the acceptance of some accounts as fact and others as falsehood, cannot ever be the result of matching evidence against the real world to figure out which story is true. Despite the popularity of correspondence theories of language, [FN32] courts cannot do what would be necessary to determine whether words corresponded to things and hence were being

used properly. In law, both at trial and on appeal, all courts have is stories. Judges and jurors are not witnesses to the events at issue; they are witnesses to stories about ***2083** the events. [FN33] And when litigants come to court with different stories, some are accepted and become 'the facts of the case' and others are rejected and cast aside. Some of what is cast aside may indeed be false (and some of what is accepted may be too). But some of the rejected stories may be accurate versions of events that grow from experiences different from the experiences of those who are doing the choosing.

This issue on legal narrative provides evidence of the presence and persistence of perceptual fault lines in contemporary American legal culture. Milner Ball traces the dominant story of origin of the American republic, and shows how the versions of American Indians present a very different picture. Patricia Williams reveals in a moving personal account what the experience of harm from racial discrimination feels like, although courts say no harm is done. Mari Matsuda presents compelling evidence that racist hate speech does have strong effects on those to whom it is directed, that it is patterned and organized, that it is not in experience what courts have said it is in theory. David Luban contrasts two quite different accounts of the demonstrations for racial equality held in Birmingham, Alabama, in 1963. Joseph Singer uses imaginative hypotheticals in teaching to get students who have never had the experience to imagine what it is like to be workers thrown out of jobs by a plant closing. Clark Cunningham wonders whether legal discourse is so different from ordinary discourse that a lawyer cannot really 'represent' a client's views in legal language at all. Derrick Bell and Richard Delgado create fictional events to provide vivid accounts of racial discrimination, to pierce the self-justification that those in the 'we' engage in to explain their actions, and to construct visions that might supplant usual ways of thinking.

All of these Articles attest to the very real presence of perceptual fault lines, different descriptions of events that grow from different experiences and different resonances. And most of these perceptual fault lines described in these Articles occur at the boundaries between social groups, between whites and people of color, between the privileged and the poor, between men and women, between lawyers and nonlawyers. And the Articles also make clear that the 'we' constructed in legal accounts has a distinctive selectivity, one that tends to ***2084** adopt the stories of those who are white and privileged and male and lawyers, while casting aside the stories and experiences of people of color, of the poor, of women, of those who cannot describe their experiences in the language of the law. 'They' are the outsiders, and this volume engages in what Mari Matsuda calls 'outsider jurisprudence,' [FN34] telling the stories that are omitted from mainstream legal discourse.

The papers in this volume show that the stories of outsiders are systematically ignored. But why are certain perspectives excluded from legal narrative? In asking this question, I share some of the theoretical concerns expressed in the Articles by Steven Winter and Toni Massaro. Winter shows how narrative provides a compelling way to make sense of the world because it invariably draws on concepts and categories with which people have first-hand experience. Massaro asks how judges should choose among competing stories when the stories diverge and empathy gives us uncertain guidance. Both Winter and Massaro examine the mechanisms that lead some stories to seem more compelling and to be chosen over others.

In the next Part, I will explore some of the other mechanisms that tend to exclude 'outsiders' stories.' One obvious answer suggests itself. Given that the perceptual fault lines occur at the boundaries between groups where there is much social tension these days, excluding outsiders' stories may be a direct act of racism, of sexism, of intolerance of difference. It may be an overt act of power, a response by those in control to keep those without power in their place. But many of the practices that put people of color and other outsiders at a disadvantage are more subtle, harder to see, and harder still to correct.

The exclusions of outsiders' views happens not only in explicit acts of hostility and rejection, but also implicitly in the details of legal practice, at the places where abstract rules are applied to concrete cases and at the places where courts invoke apparently neutral procedures. And it is at places where the perceptual fault lines shift and buckle, revealing the multiplicity of voices that the law generally quiets, that legal institutions reveal the strain under which they operate and the ordinary legal habits that guide legal practice. As I will try to show in the next Part, outsiders' stories are often excluded by the daily operation of apparently harmless legal habits.

***2085** III. LEGAL HABITS

Storytelling can be seen as a deeply patterned activity. English speakers know when they hear 'once upon a time' that a story is about to begin. 'And they lived happily ever after' is clearly an ending. Vladímir Propp has demonstrated that a whole tradition of Russian folktales followed a relatively simple, predictable structure. [FN35] And literary structuralists of all sorts demonstrate over and over again how, despite the enormous superficial variation in the content, style, and tone of stories, deep structures reappear. [FN36]

Legal storytelling is no less patterned than other sorts of storytelling; indeed, it may be even more structured because it is embedded in a larger institutional framework that routinizes solutions to unusual events and that values regularity and predictability. But unlike rules of law, which are explicitly taught and tested in law schools, the craft of legal storytelling is generally left to the practitioner to learn and develop without formal and systematic training. And though this craft is constrained by rules of evidence and the demands of legal relevance, there are few formal legal rules providing guidance on how the lawyer or judge should structure stories. [FN37]

Yet, it matters a great deal how stories are framed. The same event can be described in multiple ways, each true in the sense that it genuinely describes the experience of the storyteller, but each version may be differently organized and give a very different impression of 'what happened.' And different legal consequences can follow from the choice of one story rather than another.

Narratives may differ because they take a different cut through events, beginning and ending at a different place or taking a different point of view throughout. But they may also be different because the elements which go to make up the narrative are framed differently in the first place. While some important legal consequences flow from how the narrative is structured overall, other important legal consequences are

attendant upon the choice among alternative descriptions ***2086** for discrete elements of the story. I will examined discrete descriptions first and whole narratives in the sections to follow.

Let's start by taking one example where two different terms are applied to the same event: A 1977 Maryland rape attack involved a woman, identified only as Pat, who gave a ride home to Eddie Rusk, a man she met at a singles bar. Pat claimed that Rusk 'lightly choked' her. This action, however, could have also been a 'heavy caress.' [FN38] Both descriptions might be given to the same physical movements of the defendant in placing his hands at the woman's neck, but the description of 'choking' leads far more easily to the conclusion that the woman was raped than does the description that she was being 'caressed.' Neither version is evidently false, and yet the two competing descriptions lead judgment in different directions. In the Maryland Court of Appeals, Chief Justice Murphy's opinion upholding the conviction quoted the woman's words that the defendant 'started lightly to choke me' [FN39] and found that the jury could reasonably have believed her version 'with particular focus upon the actual force applied by Rusk to Pat's neck.' [FN40] In the dissent in that court, Justice Cole wrote, 'there is no suggestion by her that he bruised or hurt her in any manner, or that the 'choking' was intended to be disabling.' [FN41] But heavy caressing, light choking, actual force applied, or 'choking' (which put in quotes like this is probably meant to be read as 'so-called choking') could describe the same event, seen from different points of view.

Or take another situation where the witnesses produced different accounts: In 1958 in North Carolina, a black man confessed to raping and murdering a white woman. The defendant, Elmer Davis, said that he had been interrogated 'most all the time during the day and most all the time during the night' during the sixteen days he was held by the police before he confessed. [FN42] The detective captain denied that there was around-the-clock interrogation because there were no detectives ***2087** working on the 11:00 P.M. to 7:00 A.M. shift and so Davis couldn't possibly have been questioned all night. [FN43] All three of the detectives assigned to the Davis case during the 3 p.m. to 11 p.m. shift, however, testified that they might have asked Davis questions after dark. [FN44] These conflicting descriptions about the extent of the questioning might lead one to believe that someone was lying. Perhaps the detectives were coming back after the evening shift to interrogate Davis all night and were lying about it at trial. Perhaps Davis was exaggerating the extent of the questioning to make it seem that the police were unduly pressuring him. But perhaps both descriptions referred to the same physical occurrences. Davis, who was sitting in jail for sixteen days and who, in all probability, was not wearing a watch, [FN45] could have easily thought that he was being interrogated around the clock because the detectives asked him questions when it was light and when it was dark. Davis could have had a difficult time telling exactly when he was being questioned and, with nothing other than the alternation of light and dark and the twice-daily appearance of food to mark out his days, Davis could understandably have felt that the interrogation went on at all hours of the day and night. The detectives, being quite aware of the actual clock time when Davis was interrogated during each twenty-four hour period, could have understandably concluded that Davis was not questioned all day and all night. And the two descriptions might lead to very different legal consequences. If Davis were interrogated day and night, the court might conclude that his original confession was coerced. But if Davis were found to have been questioned only at

regular hours, the case for a coercive effect would be less compelling. Just such differences in descriptions of 'what happened' were central to the Court's judgments in the case. Chief Justice Warren's opinion overturning Davis' conviction describes Davis as having been 'interrogated repeatedly,' which was taken as evidence that police were overbearing. [FN46] Justice Clark's dissent, arguing that the conviction and death sentence should ***2088** be upheld, referred to 'sporadic interrogation,' [FN47] which was not thought to be that coercive. Repeated and sporadic interrogation may have described the same events, seen from different points of view, but they had quite different legal force.

Given how closely the legal results follow on the adoption of one description rather than another when both are arguably accounts of the same physical event, it matters a great deal how descriptions are framed in legal arguments in the first place, and how single descriptions are selected as 'what happened.' But despite the enormous literature on how judges and lawyers interpret the law, much less attention has been paid in the jurisprudential literature to how judges and lawyers interpret facts. And the construction and selection of descriptions of events in the social world is not just the process of gathering up facts the way one might gather up stones on a beach. The process of making a bit of information, an insight, or a description of experience into a 'fact' is itself an important part of what it means to engage in the practice of lawyering or judging and, while it is governed by legal rules in some limited ways, this activity is largely the product of legal habit. Gifted practitioners know without reflection how to make accounts into legal narratives the way native speakers of a language know how to express thoughts in grammatical sentences. But that does not mean that those who can do it know how to describe systematically what they have done. Those trained in the law learn to see the world of particular ways, and the particular ways come to be seen unproblematically as the only truth there is. There seems to be no question or choice about it. It just is.

What are some of the assumptions involved in the construction of facts in legal stories? What legal habits lead some versions and some accounts to be favored over others? A complete answer to these questions cannot be given without a great deal more investigation and a great deal more evidence than I can present in a foreword, but, from what I have seen in my work on this subject thus far, [FN48] I can suggest some candidates.

A. Law and the Objectivist Theory of Truth

Most people, when pressed, subscribe to what might be called the objectivist theory of truth. The objectivist theory of truth holds that there is a single neutral description of each event which has a privileged ***2089** position over all other accounts. This single, neutral description is privileged because it is objective, and it is objective because it is not skewed by any particular point of view. Its very 'point-of-viewlessness' [FN49] gives it its power.

For example, in the Rusk case, the point-of-viewless answer to the question of whether Pat was choked or caressed might involve an account of the degree of force actually applied to Pat's neck as it might be seen by a neutral observer. Choking as an activity is associated with force; [FN50] caressing as an activity is not. [FN51] So the

presence of force would allow the neutral observer to determine which description is most appropriate. If there is no actual observer to the event in question, other trace evidence can substitute. Were there bruises? Did Pat's neck show the marks that Rusk would have made if he had really choked her? To tell caressing from choking, an objectivist account would focus on those observable differences that would allow someone not involved in the event to tell whether force has been applied. What Rusk thought he was doing or what Pat felt he was doing would be details outside the point-of-viewless account.

Or, on the other example, the point-of-viewless answer to the question of whether Davis had been questioned 'most all the time during the day and most all the time during the night' would involve investigating the clock times that Davis was asked questions by the detectives. If Davis were never interrogated after 11:00 P.M. or before 7:00 A.M., then 'most all the time during the night' would not be a good description of his meetings with the detectives. And if he were only interrogated twice per day for an hour each time by the detectives, then 'most all the time during the day' would not be such a good description either. What the experience felt like to Davis or to the detectives would be irrelevant to the point-of-viewless account.

If one task of the law is to find truth [FN52] then, on the objectivist account, the task of the law is to locate this privileged description, the one that enables the audience to tell what really happened as opposed ***2090** to what those involved thought happened. Truth can be found by removing the self- serving accounts of those who stand to gain in the process of being partial. Truth, in this view, is what remains when all the bias, all the partiality, all the 'point-of-viewness' is taken out and one is left with an objective account free of the special claims of those who stand to gain. And though legal advocates may emphasize partial versions, [FN53] judges or juries are thought to be able to sort through those partial accounts to find the bits that are 'really true.' [FN54]

But how does one know truth when one finds it? Truth isn't a property of an event itself; truth is a property of an account of the event. As such, it has to be perceived and processed by someone, or else it couldn't be framed in language to count as an account at all. On the objectivist view, the potential 'someones' who might observe and report are interchangeable; as long as they approach the task of description in the proper spirit, the description does not depend on who the observers are. But, as Nelson Goodman remarks, the case against 'perception without conceptualization, the pure given, absolute immediacy, the innocent eye, substance as substratum, has been so fully and frequently set forth . . . as to need no restatement here.' [FN55] Observers, even those not directly involved in a dispute, bring with them a conceptual scheme already formed, a set of presuppositions and expectations, that influences what they see and report. Getting a group of observers to come up with the same description simply shows that one has found a group that shared the same conceptual scheme at the start and followed the same instructions for observation. The 'neutral observer's' point of view is no less a point of view than any other. It may be more widely shared in a social setting than other perceptions, and it may be systematically different from the perceptions ***2091** of those immediately involved, but it is not point-of- viewless. [FN56]

If the objectivist view is not point-of-viewless, then is the account it privileges still

worth the reverence the law accords it? A great deal depends on just what the observer's point of view includes and excludes and what consequences such a view has. If the objectivist account is one point of view among many (and not point-of-viewless as against other point-of-viewful accounts), then one needs some other account explaining why it should be privileged, if indeed it is to be. One might begin such an account by saying that the objectivist view includes those things that should be included and excludes those things that should have no bearing on the legal outcome. And here is where the fate of the stories of outsiders might be considered relevant to a discussion of the point of view the law should take. If objectivist accounts systematically leave out the stories of outsiders and those stories should be considered, then perhaps objectivist accounts should not be privileged.

What do our two objectivist accounts leave out in Rusk and in Davis? In Rusk, looking for the degree of physical force already makes important and controversial assumptions. For one thing, it assumes that intentional accounts are irrelevant. Looking at objective force in this situation drops out both Pat's understanding of what it felt like to her and Rusk's account of what he might have intended. Doctrinally, this is a very curious thing to do in a criminal case. And then there is the question: Force, as seen by whom? Rusk may have intended to caress Pat; Pat may have felt choked. He may not have seen force in what happened between them, while she did. Men and women with systematically different experiences of force perceive where force begins very differently. Women see force as starting much earlier than men do, before it turns to physical and observable violence. [FN57] And any apparently objective standard of force cannot be neutral as between these two very different accounts. [FN58]

In Davis, watching the clock also misses some crucial information. ***2092** If Davis felt that the detectives were frequently interrogating him in the day and at night (and he was supported in this because the questioning occurred when it was light and when it was dark), then considering only clock times would miss this crucial aspect of Davis' experience. Davis, after all, was not likely to see his situation the same way that the detectives saw it. For one thing, Davis was black and living in a state with a history and practice of severe and overt racism. Being questioned by the hostile white police [FN59] was a serious business and knowing he was being held in connection with the rape and murder of a white woman, when the likely result of being found guilty was execution, made his situation all the more dire. [FN60] He didn't know how long he was going to be held and questioned, questioned, questioned. He was frightened and didn't see any way out. [FN61]

Rusk and Davis, however, are unusual cases. In each, the outsiders (a woman in an acquaintance-rape case, [FN62] a black defendant in a racist climate) did in fact find that their views won out in the end. Rusk's conviction was upheld on appeal. Davis' confession was found to be coerced. This is not what one would expect if the objectivist accounts held sway, where actual force and clock time worked to undermine the outsiders' stories; nor is it what one would expect from the discussion above about the general exclusion of outsiders' perspectives from the law. What is going on here?

In each of these cases, the outsiders' stories were persuasive because other forces managed to overcome the general legal habit of using objectivist accounts. And what

were these other forces? For one thing, doctrine worked to the advantage of both outsiders here. In the rape case, one part of the relevant legal standard was whether the woman ***2093** was 'so terrified by threats as to overpower her will to resist.' [FN63] This put the focus on the woman's feeling of terror, and made her account relevant to judging whether the legal standard was met. In the confessions case, the issue was whether the confession was made voluntarily. This, also, involved considering the situation from the defendant's point of view. [FN64] Both fear and voluntariness pose challenges for an objectivist account; both raise questions of whether what might look like consent was what was felt as consent. Though one can tell a great deal about people's feelings from observing their actions, not all feelings show themselves clearly. And so, when the doctrinal requirements direct the attention of judges and juries to the point of view of the outsiders in these cases, it matters when outsiders say that the feelings do not match the observations.

But that was not all that was going on here. Doctrine might have allowed the results, but it did not compel them. A black man whose case arrived at the Supreme Court in 1966 and a woman whose case arrived in the Maryland Court of Appeals in 1981 had social forces working for them also. The Civil Rights Movement had by 1966 achieved substantial success in calling attention to the racially discriminatory practices of southern police departments. [FN65] Federal judges were clearly on notice that the treatment of blacks in southern criminal cases was appalling, and that federal constitutional remedies were needed to keep state courts in check. This certainly did not mean that federal courts always supported the cause of the Civil Rights Movement. [FN66] But it may have made it easier for the Supreme Court, in some circumstances at least, to hear and respond to the voices of blacks. Similarly, the Women's Movement had by 1981 succeeded in putting rape reform on the agendas of most state legislatures and had achieved reform of the laws in many states. [FN67] And though this certainly did not by any means signal automatic victory for the forces of feminism, it may have once again allowed courts to hear and respond to the voices of women. [FN68]

But two individual cases like this do not a general practice make. ***2094** It is hard for institutions to change old habits. And the vigorous dissents that both of these cases produced (as well as the fact that each high court overturned at least one other court below) testify to the controversial, transient nature of the solutions found and the perspectives adopted.

I raise these two cases to show that the objectivist theory of truth, however powerful a hold it may have on legal reasoning, is not all the law recognizes, even now. There are places where the stories of outsiders can break through the objectivist barricades. But these two cases show, too, just how much it takes to get an outsider's view to provide the winning account. In each case, doctrine directing courts to pay attention to particular points of view combined with massive social movements making more real those points of view at a social level produced some small victories, over vigorous, angry, and nearly successful dissents.

B. The Boundaries of Legal Narrative

When does a story begin? At the beginning, one might plausibly answer. But one of

the important characteristics of stories is that they have no natural beginning, in the sense of having only one particular place and time at which the story can begin. [FN69] Stories can always be constructed differently, though many are told in situations where there are such powerful background assumptions that a particular version seems to be the only version. This is just as true of legal stories as it is of any other sort of story. But in legal stories, 'where one begins' has a substantial effect because it influences just how the story pulls in the direction of a legal outcome. 'Where one begins' also has a great deal to do with the sympathy given the stories of outsiders. Where one ends the story also makes a similar difference. The boundaries of legal narrative are not fixed, but in many cases they might as well be. Those who are experienced legal storytellers often do not perceive themselves as having a choice; they just work with what is 'obviously' the way to tell this particular story. The boundaries of legal narratives are shaped powerfully by legal habit, a habit that has worked to the disadvantage of outsiders.

The traditional legal strategy of story-beginning looks to when 'the trouble' began, and fans out in the direction of legally relevant ***2095** facts. [FN70] 'The trouble' is that the set of events giving rise to the lawsuit and the legal statement of facts usually focuses narrowly on what made those events happen. So, for example, in Rusk, the standard legal storytelling strategy would direct attention to the events on the night Pat claimed she was raped. The beginning would be set at the time and place that she and Rusk first met. And details of the events occurring between them from that beginning point until they parted company later that evening would provide the boundaries of the legal story. Similarly, in Davis, judging the voluntariness of the confession would require beginning the story at the time of Davis' arrest and detention by the Charlotte police and would end when he confessed. The beginning seems obvious. As does the end.

But of course, these are not the only possible boundaries. In Rusk, the account given in the intermediate appeals court majority opinion started predictably with the setting in which Pat met Rusk. [FN71] But Judge Wilner, dissenting in that court and voting to uphold the rape conviction, began his narrative somewhere else, with the judicial equivalent of a wide-angel opening shot of the larger terrain on which this individual rape occurred. He noted that rape attacks were on the rise, that most victims responded with verbal rather than physical resistance, and that law enforcement agencies throughout the country warned women not to fight back against their attackers. [FN72] Against this background, Pat's actions in not physically struggling looked very different than they did in an account starting with when 'the trouble' began that night.

In Davis, too, the story in the lower courts upholding Davis' conviction fixed the narrative boundaries with the rape/murder at the beginning and the confession at the end, some with flashbacks to the point where he had escaped from prison right before the crime in question occurred. [FN73] But the story did not have to begin this way. Working from the same record, Chief Justice Earl Warren began his account of the Davis case like this:

Elmer Davis is an impoverished Negro with a third or fourth grade education. His level of intelligence is such that it prompted the comment by the court below, even while deciding against him on his claim of involuntariness, ***2096** that there is a moral question whether a person of Davis' mentality should be executed. Police first

came in contact with Davis while he was a child when his mother murdered his father, and thereafter knew him through his long criminal record, beginning with a prison term he served at the age of 15 or 16. [FN74]

In each of these cases, the wide-angle beginning puts the event before the court in a broader context than legal narratives usually invoke. And it is not surprising that in each of these 'wide-angel' versions, the stories of outsiders are given more sympathy than they are given in versions beginning with an account of 'the trouble.'

Why is this? Outsiders often have a different history, a different set of background experiences and a different set of understandings than insiders. (And just as all insiders' experiences are not all alike, neither are outsiders' experiences all of a piece.) So, when taken out of their context, outsiders' actions often look bizarre, strange, and not what the insider listening to the story would do under similar circumstances. And without knowing more about how the situation fits into a context other than the 'obvious,' insider's one, courts may find it hard to rule for outsiders. In the rape case, Pat didn't struggle to get away. It is probably hard for most men (who, after all, tend to be the judges) to imagine not fighting back when attacked unless their passivity results from a weakness of will or a failure of nerve, neither of which are remediable in law. But the beginning of Judge Wilner's narrative showing that most women do not physically struggle when attacked, and that women are advised not to struggle by police, provides a context within which Pat's actions may be understood by those who have not shared her background and experiences. Similarly, Chief Justice Warren's account succeeds in showing that Davis was at a great disadvantage in dealing with the police, allowing Warren to break through the usual assumptions that the relevant standard to apply was what the judge or juror (or the 'reasonable man') would have done under the circumstances. Davis became a real person with a distinctive past, and not some person on average or the law's vision of the typical rational actor. Warren might have been able to be even more effective in providing a wide-angle view helpful to outsiders had he documented the racism that existed in the North Carolina legal system at the time and the well-founded fear Davis had. Warren's perspective may not have provided a wide-enough angle since it only involved this particular case and not the structural conditions giving rise to the differential treatment of blacks and whites in many similar cases.

Now wide-angle descriptions may not always, or even frequently, ***2097** work to the advantage of outsiders. [FN75] But these examples show us how they might work in some circumstances. The claims of outsiders are often not heard in law because the experiences and reactions and beliefs and values that outsiders bring to the law are not easily processed in the traditional structures of legal narratives. Drawing the boundaries of legal stories closely around the particular event at issue may exclude much of the evidence that outsiders may find necessary to explain their points of view. But standards of legal relevance, appearing to limit the gathering of evidence neutrally to just 'what happened' at the time of 'the trouble,' may have the effect of excluding the key materials of outsiders' stories. And this apparently harmless legal habit has effects that are not at all harmless.

IV. RETHINKING LEGAL NARRATIVES

I have tried to show in this foreword how the 'we/they' structures of legal discourse have led to the exclusion of outsiders' stories. And I have further argued that some apparently neutral legal habits, such as preferring objectivist accounts to other point-of-viewful accounts of events and framing stories narrowly around 'the trouble' at issue, work to silence the accounts of outsiders (though sometimes doctrine may aid them). But what can be done from here?

In rethinking legal narratives, the first step is to realize that the presence of different versions of a story does not automatically mean that someone is lying and that a deviant version needs to be discredited. Stories can be told many ways, and even stories that lead to very different legal conclusions can be different plausible and accurate versions of the same event. It may make sense, then, to think that the presence of these different, competing versions of a story is itself an important feature of the dispute at hand that courts are being called upon to resolve.

In some cases, different participants come to see 'what happened' differently. Rather than choosing one point of view over another, courts might recognize that the existence of multiple, self-believed, plausible accounts is an important fact of the case that deserves some attention. If a dispute occurs across a perceptual fault line where people with different backgrounds, understandings and expectations have a disagreement, then the presence of different versions is a clue that there is more at stake here than the violation of a particular legal rule. ***2098** Whole world views may have come into collision and it does not serve courts well to simply suppress one of them. [FN76]

Courts can exacerbate and reinforce the differences and disagreements that invariably exist in a pluralistic society by clining to the views that there is only one true version of a story and that there is only one right way to tell it. Listening to the stories of outsiders does even more than provide a necessary corrective to monolithic and domineering majority stories; it also provides a way for courts to build into the structure of legal reasoning the pluralism that it is the business of the courts to protect and the respect for persons that it is the business of the courts to enforce.

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[FN1]. In addition to this special issue of the Michigan Law Review, there have been other symposia on the law-and-literature theme recently. See, e.g., Symposium: Law and Literature, 39 MERCER L. REV. 739 (1988); Symposium: Law and Literature, 60 TEXAS L. REV. 373 (1982); INTERPRETING LAW AND LITERATURE (S. Levinson & S. Mailloux eds. 1988). In addition, a rash of recent individual articles has appeared on law review pages. See, e.g., in a much larger literature, López, Lay

Lawyering, 32 UCLA L. REV. 1 (1984); Sherwin, A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling, 87 MICH. L. REV. 543 (1988); West, Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory, 60 N.Y.U. L. REV. 145 (1985); see also D. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); K. BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS (1988). The work of the founders of the law-and- literature movement, in which the legal narrative theme sounds prominently, is an almost mandatory citation in articles with this perspective. See J. B. WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETCIS OF THE LAW (1985); J. B. WHITE, THE LEGAL IMAGINATION (1973); J. B. WHITE, WHEN WORDS LOSE THEIR MEANING (1984); Cover, The Folktales of Justice: Tales of Jurisdiction, 14 CAP. U. L. REV. 179 (1985); Cover, The Supreme Court, 1982 Term--Foreword: Nomos and Narrative, 97 HARV. L. REV. 4 (1983) [hereinafter Cover, Nomos and Narrative]; Cover, Violence and the Word, 95 YALE L.J. 1601 (1986), for some of the inspiration that drives the movement.

[FN2]. T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

[FN3]. I owe the phrase to Don Herzog who has used it in conversation.

[FN4]. June 1, 1988, to be precise.

[FN5]. Letter from Richard Delgado to Kevin Kennedy (June 1, 1988).

[FN6]. Id. at 2.

[FN7]. Eric Rabkin and his colleague Macklin Smith have been experimenting with different formats for helping people to meet together to discuss work in progress and to assist each other in the process of writing. The format we adopted for this conference is adapted from these methods, which are more fully discussed in E. RABKIN & M. SMITH, TEACHING WRITING THAT WORKS (forthcoming) (on file with author).

[FN8]. The small groups in which the discussions took place had a complicated structure. Each participant, whether author, Review staffer, or general participant (and a number of Michigan Law School faculty participated) was assigned to an editing group of three or four members, each of which had one author in it. First, each editing group met to discuss and write comments on the paper of an author who was not present in that group but who was present at the conference. This allowed each group to consider a paper the way readers of this issue actually would: as an interested audience who did not have the author immediately present to ask for

clarifications or elaborations. Later, informal conversation between these editing groups and the authors whose papers were discussed in this way gave each writer oral feedback in addition to the written feedback. The original editing groups then met again, this time to discuss the paper of the author who was a member of that group. By this time, each group had had a chance to build solidarity and had had experience discussing a paper already. And this group also had as part of the material they could consider the comments of the group that had discussed that author's paper first. Each author, now in a group whose participants he or she knew fairly well already, was then able to discuss his or her own paper and the comments it had generated from other participants. Because this format meant that the authors didn't have an opportunity to discuss their papers directly with each other (since each was in a different editing group), there was an additional session in which the authors met together to talk about the overlapping subject matter and the structure of individual papers. After nearly two days of focused discussion of these papers in small groups, everyone met to talk about the papers, the topic, and the issue.

[FN9]. R. DWORKIN, LAW'S EMPIRE vii (1986).

[FN10]. Cover, Nomos and Narrative, supra note 1, at 4.

[FN11]. Gabel, Reification in Legal Reasoning, in MARXISM AND LAW 262 (P. Beirne & R. Quinney eds. 1982) (emphasis added).

[FN12]. Olsen, Statutory Rape: A Feminist Critique of Rights Analysis, 63 TEXAS L. REV. 387, 387-88 (1984) (footnote omitted; emphasis added).

[FN13]. I am not meaning to include here the uses of 'we' to include the writer and readers in a common journey through a text. References like 'we can see in this argument that . . .' and 'in the next section of this article, we will find that . . .' seem to me to be doing something else. They are joining writer and reader in a temporary alliance in the joint project of getting through a text. They are not examples of the 'constitutive we,' creating an alliance of fate or of belief or of community that goes beyond the text, as the Dworkin, Cover, Gabel, and Olsen examples do. Nor does the use of 'we' to indicate a collective author constitute a 'constitutive we.' The Supreme Court often uses 'we' this way, but the reference is clearly to an institution of multiple individuals, not some group created by the use of 'we.'

[FN14]. Of course, some of those writing in jurisprudence do explicitly recognize the assumptions which are masked by the 'constitutive we.' See, e.g., M. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 318 (1988) ('an ever-changing 'us'').

[FN15]. The Declaration of Independence para. 2 (U.S. 1776).

[FN16]. U.S. CONST. preamble.

[FN17]. Karl Llewellyn was well aware of this tendency when he wrote:

Nowhere more than in law do you need armor against . . . ethnocentric and chronocentric snobbery--the smugness of your own tribe and your own time: We are the Greeks; all others are barbarians. . . . Law, as against other disciplines is like a tree. In its own soil it roots, and shades one spot alone.

K. LLEWELLYN, THE BRAMBLE BUSH 44 (1960).

[FN18]. A more complete discussion of the relation between consent, legitimacy of a regime of laws, and obligation to obey the laws can be found in K. L. Scheppele & J. Waldron, Contractarian Methods in Political and Legal Evaluation (unpublished manuscript on file with author).

[FN19]. For one example of what happens when these two discourses collide, see Sarat & Felstiner, Law and Strategy in the Divorce Lawyer's Office, 20 LAW & SOCY. REV. 93 (1986).

[FN20]. The term is Erving Goffman's. Lies are 'self-disbelieved' statements, since what makes a statement a lie is not only whether the statement is false, but also whether the teller believes it to be false. E. GOFFMAN, STRATEGIC INTERACTION 7 (1969). Similarly, then, a self-believed story is one that the teller takes to be true.

[FN21]. This 'we-they' structure is not wholly independent of the other 'we-they' structures described above. Those whose self-believed stories find their way into law may well be those who are more plausibly represented as having consented to a legal regime and who are able to express their stories in language more amenable to legal argument.

[FN22]. See K. L. SCHEPPELE, LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW 86-108 (1988), for an argument that interpretation of law and interpretation of fact are not separate processes, but instead accomplished together in the process of justifying a decision.

[FN23]. See L. BENNETT & M. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM (1981) for a description of what makes stories persuasive at trial.

[FN24]. For Locke, for example, consent was given to the form of a government

rather than to the specific application of laws. See J. LOCKE, Second Treatise of Government, in TWO TREATISES OF GOVERNMENT (P. Laslett rev. ed. 1963) (3d ed. 1698). And consent for John Rawls means agreement on the basic institutions of a society, and nothing nearly as specific as individual laws, let alone particular facts or particular points of view. See J. RAWLS, A THEORY OF JUSTICE (1971).

[FN25]. Most efforts at understanding legal legitimacy operate at the level of the whole system and are reluctant even to claim that something so specific as that an individual law should be just for consent to be inferred. See J. RAWLS, supra note 24, at 350-55.

[FN26]. One effect of Rawls' 'veil of ignorance,' id. at 136-42, is that people do not have enough information to be able to develop different points of view, not just about preferences and self-interest, but perhaps even more importantly, about how to see the social world around them in the first place. This is not a necessary feature of contractarian thought, however. It is possible for a model of consent to have much more sociological fidelity and still be fully contractarian. For a case to this effect, see K. L. Scheppele & J. Waldron, supra note 18.

[FN27]. Contractarianism often captures the problem of conflicting accounts by asking people to see a situation from another person's point of view. As with the Golden Rule, we are asked to imagine what it would feel like to be in another person's position. But this is meant to capture an impersonal (or interpersonal) view of the situation, not a richly variegated sense of the ways in which different people may see things differently from different social vantage points. 'From this interpersonal standpoint, a certain amount of how things look from another person's point of view, like a certain amount of how they look from my own, will be counted as bias.' Scanlon, Contractualism and Utilitarianism, in UTILITARIANISM AND BEYOND 117 (A. Sen & B. Williams eds. 1982).

[FN28]. Judgments of relevance and problems of mapping are not usually idiosyncratic judgments, independent of rules. The injunction to 'decide like cases alike' is itself a rule that may be represented as the product of prior consent. But just what counts as 'alike' for the purposes of particular cases is often very much a local judgment that cannot be well captured in rules at the level of generality at which consent judgments are usually implied in liberal political thought. See C. GEERTZ, Local Knowledge: Fact and Law in Comparative Perspective, in LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 167 (1983).

[FN29]. See generally P. BERGER & T. LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY (1966); K. MANNHEIM, IDEOLOGY AND UTOPIA (1936); A. SCHUTZ & T. LUCKMANN, THE STRUCTURES OF THE LIFE-WORLD (1973).

[FN30]. For a more complete discussion of 'perceptual fault lines,' see Scheppele, The Re-vision of Rape Law, 54 U. CHI. L. REV. 1095, 1108-13 (1987).

[FN31]. For one particularly striking example of this, notice the battle between pro-choice and pro-life forces on abortion over whether to use 'fetus' or 'the unborn child' to describe something that or someone who has no neutral name--nor even an uncontested pronoun.

[FN32]. For a first-rate introduction to problems and puzzles in the philosophy of language, see S. BLACKBURN, SPREADING THE WORD: GROUNDINGS IN THE PHILOSOPHY OF LANGUAGE (1984).

[FN33]. Jerome Frank noticed this, and realized that, in legal storytelling, '[s]ince the actual facts of a case do not walk into court, but happened outside the court-room, and always in the past, the task of the trial court is to reconstruct the past from what are at best second-hand reports of the facts.' J. FRANK, Modern Legal Magic, in COURTS ON TRIAL 37 (1949). Frank also noticed that since jurors and judges are witnesses to stories, they themselves introduce another layer of interpretation of the facts. The facts are, in this process, 'twice refracted.' J. FRANK, Facts Are Guesses, in COURTS ON TRIAL 22 (1949).

[FN34]. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 MICH. L. REV. 2320, 2323-26 (1989).

[FN35]. V. PROPP, MORPHOLOGY OF THE FOLKTALE (1968).

[FN36]. See, e.g., S. CHATMAN, STORY AND DISCOURSE (1978); E. RABKIN, NARRATIVE SUSPENSE (1970); R. SCHOLES, STRUCTURALISM IN LITERATURE (1974); Winter, The Cognitive Dimension of the Agon Between Legal Power and Legal Meaning, 87 MICH. L. REV. 2225 (1989).

[FN37]. One such formal standard is the 'clearly erroneous' rule, which provides a way for appellate courts to overturn the judgments of lower courts when lower courts have reached a clearly erroneous conclusion about specific facts. But a thoughtful and detailed study of the uses of the clearly erroneous rule shows that it is not one standard but many, giving appellate courts substantial flexibility in reviewing lower courts' findings of fact and not providing explicit guidance in a rigorous way. See Cooper, Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review, 63 NOTRE DAME L. REV. 645 (1988).

[FN38]. Judge Thompson's intermediate appellate opinion in Rusk v. State, 43 Md.

App. 476, 406 A.2d 624, 628 (1979) stated, 'At oral argument it was brought out that the 'lightly choking' could have been a heavy caress.' See also the discussion of this case in S. ESTRICH, REAL RAPE 63-66 (1987), and Scheppele, supra note 30, at 1105.

[FN39]. State v. Rusk, 289 Md. 230, 235, 242 A.2d 720, 722 (1981).

[FN40]. 289 Md. at 246, 424 A.2d at 728.

[FN41]. 289 Md. at 258, 424 A.2d at 734 (Cole, J., dissenting).

[FN42]. This case appeared in the Supreme Court as Davis v. North Carolina, 384 U.S. 737 (1966). The record in the case included a transcript of an evidentiary hearing held by the federal district court to determine the voluntariness of Davis' confession on a habeas petition. Davis' testimony about the extent of his questioning appeared in the record as Transcript of Hearing upon Writ of Habeas Corpus, at 238, Davis v. North Carolina, 384 U.S. 737 (1966) (No. 65-815) [hereinafter Habeas Transcript].

[FN43]. Testimony of Detective Captain W. W. McCall, Habeas Transcript, supra note 42, at 354.

[FN44]. Testimony of Detective Gardner, id. at 329; Testimony of Detective Holmberg, id. at 343; Testimony of Detective Porter, id. at 346.

[FN45]. Davis had escaped from prison just before he allegedly raped and murdered Mrs. Foy Bell Cooper. The statement of facts in the North Carolina Supreme Court provides much detail about Davis' attire at the time of his arrest, commenting on his 'reddish brown shoes and dark clothing,' on the shoe box he was carrying and on the billfold found in his possession which belonged to someone else. There is no mention of a watch, which he would have had to have acquired following his escape from prison, and which would undoubtedly have been noticed by the police. See State v. Davis, 253 N.C. 86, 90, 116 S.E.2d 365, 367 (1960).

[FN46]. Davis v. North Carolina, 384 U.S. 737, 739 (1966).

[FN47]. 384 U.S. at 754 (Clark, J., dissenting).

[FN48]. Scheppele, Facing Facts in Legal Interpretation, REPRESENTATIONS, Spring 1990 (forthcoming); see also K. L. SCHEPPELE, supra note 22; Scheppele,

supra note 30.

[FN49]. The term is Catharine MacKinnon's. See MacKinnon, Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence, 8 SIGNS 635, 638-39 (1983).

[FN50]. The Oxford English Dictionary defines 'choke' as '[t]o suffocate by external compression of the throat; to throttle, strangle.' 3 OXFORD ENGLISH DICTIONARY 154 (2d ed. 1989).

[FN51]. The Oxford English Dictionary defines 'caress' as 'to treat affectionately or blandishingly; to touch, stroke or pat endearingly.' 2 Id. at 897.

[FN52]. Though finding truth is not the only goal of legal procedures, it certainly is one important consideration in assessing the adequacy of legal practice. If truth were the only goal, it would be quite difficult to make sense of the privilege against self-incrimination and many rules of evidence that exclude from a courtroom information that those outside the courtroom would take to be important and relevant in determining what happened. See Nessen, The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts, 98 HARV. L. REV. 1357 (1985).

[FN53]. The job of a lawyer is to re-present her client's views in such a way that the client's 'story' comes across as compelling to a judge or to a jury. See Clark Cunningham's article in this issue for a perceptive discussion of the limits of re-presentation. An advocate knows that her job isn't to present 'the truth,' but rather to present her client's version in the best possible light without actually lying. Jerome Frank saw this process as evidence that courts were really interested not in finding truth, but rather in judging competing stories. See J. FRANK, The 'Fight' Theory Versus the 'Truth' Theory, in COURTS ON TRIAL 80 (1949). Still, when asked about truth, I suspect that most advocates would say that there is one truth to the matter at issue and that it can be found by removing 'bias.'

[FN54]. Each side's presentation of the most helpful version of a story is not the only thing that makes it difficult for courts to get at a point-of- viewless description. Many bits of information that may be helpful in determining the truth may be excluded from legal description because they are not legally relevant or because they are not allowed to be considered for other reasons. We can see examples of the exclusion of informative but legally irrelevant information in this issue in the Articles by Milner Ball, David Luban, Mari Matsuda, and Patricia Williams.

[FN55]. N. GOODMAN, WAYS OF WORLDMAKING 6 (1978) (footnotes omitted).

[FN56]. Perhaps the best defense of this general position is W. JAMES, Pragmatism's Conception of Truth, in PRAGMATISM AND THE MEANING OF TRUTH 95 (1978).

[FN57]. See S. ESTRICH, supra note 38, at 58-71.

[FN58]. There is a further important question here, which has to do with the reliability of the perceptions of those involved. Suppose the rapist were a man who didn't know his own strength. He may not have realized just how much force he was applying in the course of what he saw as ordinary lovemaking when he almost killed his partner. Or suppose the victim were a woman who was particularly frightened of physical contact. Any touching would then be perceived as threatening. My suspicion is that the recurring drive toward objective standards comes from the worry that the disputants' perceptions cannot be trusted or that they may very well be seriously unrealistic. But I am trying to show here that there is also danger in objective standards, for they drop out important experiential information which cannot be observed.

[FN59]. In the brief submitted by North Carolina to the Supreme Court, the state did not even try to deny the language the police used in dealing with Davis. 'Surely, Davis was not such a sensitive person, after all his years in prison, that 'cussing' and being called 'Nigger' constituted any degree of fear or coercion.' Brief for Respondent, at 8, Davis v. North Carolina, 384 U.S. 737 (1966) (No. 65-815).

[FN60]. The execution rate in North Carolina for those indicated on first- degree murder charges around the time of Davis' case was 43% for black defendants charged with killing white victims and 15% for white defendants charged with killing white victims, with the differences being even greater in comparison on crimes different from the one Davis was charged with. S. GROSS & R. MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 28 n.8 (1989). In addition, nearly 90% of those executed for rape between 1930 and 1979 were black. Id. at 27 n.4. See Furman v. Georgia, 408 U.S. 238, 364 (1972) for the evidence that the Supreme Court found persuasive on the racism implicit in the administration of existing death penalty statutes.

[FN61]. In his testimony at the evidentiary hearing, Davis said, 'I signed that paper [the confession] to get away from [those] people over there because I was scared of them.' Habeas Transcript, supra note 42, at 252.

[FN62]. For a picture of the difficulty women have in getting rapes successfully prosecuted, see Scheppele, supra note 30, at 1096-99.

[FN63]. Hazel v. State, 221 Md. 464, 469-70, 157 A.2d 922, 925 (1959).

[FN64]. Davis v. North Carolina, 384 U.S. 737, 741 (1966).

[FN65]. A. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT 2 (1984).

[FN66]. See generally Luban, Difference Made Legal: The Court and Dr. King, 87 MICH. L. REV. 2152 (1989).

[FN67]. S. ESTRICH, supra note 38, at 80.

[FN68]. The reform of rape laws did not automatically lead to women's points of view being adopted, even when the states shifted from focusing on her consent to focusing on his force. In fact, the evidence shows many courts went on seeing their cases the same way. See Scheppele, supra note 30, at 1102-04 (diagnosing the problem), 1108-13 (discussing the cause).

[FN69]. This case is made very effectively in A. DANTO, NARRATION AND KNOWLEDGE (1985). For an excellent analysis in the legal literature, see Kelman, Interpretive Construction in the Substantive Criminal Law, 33 STAN. L. REV. 591 (1981).

[FN70]. This 'reactive lawyering' paradigm is well described in B. ACKERMAN, RECONSTRUCTING AMERICAN LAW 46-71 (1984).

[FN71]. Rusk v. State, 43 Md. App. 476, 406 A.2d 624, 625 (1979).

[FN72]. 406 A.2d at 635 (Wilner, dissenting).

[FN73]. Davis v. North Carolina, 339 F.2d 770, 773-78 (4th Cir. 1964); Davis v. North Carolina, 310 F.2d 904, 905-06 (4th Cir. 1962); Davis v. North Carolina, 221 F. Supp. 494, 495-98 (E.D.N.C. 1963); Davis v. North Carolina, 196 F. Supp. 488, 491-93 (E.D.N.C. 1961); State v. Davis, 253 N.C. 86, 116 S.E.2d 365, 366-69 (1960).

[FN74]. Davis v. North Carolina, 384 U.S. 737, 742 (1966).

[FN75]. One of the chief effects of the law-and-economics movement has been to

expand the scope of legal description. See B. ACKERMAN, supra note 70, at 53, for a discussion of these effects. The law-and-economics movement has not generally been associated with the claims of people of color, of women, or of other outsiders.

[FN76]. For a similar argument, see G. CALABREST, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 87-114 (1985).

APPENDIX 2

"REASONABLE" DOUBTS: A CRITIQUE OF THE REASONABLE WOMAN STANDARD IN AMERICAN JURISPRUDENCE

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I. INTRODUCTION

The quest for objectivity is ongoing in American jurisprudence. [FN1] Only through the implementation and application of objective standards and procedures can the American legal system achieve its ultimate goal of promoting individual equality while adequately preserving community harmony. [FN2] The quest for objectivity has produced a number of important theoretical constructs to aid courts and legislators in deinstitutionalizing and combating existing legal and social inequities. One such construct is the concept of "reasonableness" which permeates American jurisprudence. [FN3]

While the basic principles and ideals underlying the concept of "reasonableness" have remained relatively constant, [FN4] the specific vehicles for implementing this concept have not. [FN5] First, the "reasonable man" and then the "reasonable person" standard gained acceptance among courts, commentators, and lawmakers in their attempt to inject objectivity into the law. [FN6] In response to the actual and perceived failure of those standards to incorporate women's views and ideals into the judicial decision making process sufficiently, however, some courts and legal scholars have advocated and utilized a "reasonable woman" standard. [FN7]

This Comment examines the concept of "reasonableness" generally and the reasonable woman standard in particular. Part II analyzes the theoretical underpinnings of the "reasonableness" principle. It traces the development of different vehicles used to implement that principle: from the archaic reasonable man standard to the facially gender-neutral reasonable person standard to the recently conceived reasonable woman standard. Part III examines the legal and theoretical suitability of a reasonable woman standard in light of the American model of jurisprudence that

emphasizes neutrality and formal legal equality. Part IV discusses ***327** the reasonable woman standard's linguistic flaws. Part V evaluates the standard's impracticability in light of male judges' and jurors' inability to discern the qualities of a reasonable woman without resorting to gender stereotypes. Finally, in Part VI, this Comment concludes with an explanation of how the concept of "reasonableness" could best be implemented through a modified reasonable person standard that is not subject to the flaws of either the traditional reasonable person standard or the reasonable woman standard.

II. EVOLUTION OF THE REASONABLE WOMAN STANDARD

It is difficult to pinpoint the precise origin of the legal concept of "reasonableness," but it is certain that the principle dates back at least one hundred and forty years. [FN8] From its modest beginnings, "reasonableness" has gained a prominent position in almost every area of American law. A general survey reveals that the concept of "reasonableness" is a standard of decision making in administrative law, [FN9] bailment law, [FN10] constitutional law, [FN11] contract law, [FN12] criminal law, [FN13] tort law, [FN14] and the law of trusts. [FN15]

This Part examines the theoretical appeal of the reasonableness principle in American jurisprudence and traces the evolution of the specific legal standards that have embodied that principle. It begins by analyzing the theoretical foundations of the reasonableness principle. It then describes the reasonableness principle's initial embodiment in the inherently male-biased reasonable man standard, detailing the eventual rejection of that archaic standard in favor of the supposedly gender-neutral reasonable person standard. Finally, this Part concludes with a discussion ***328** of the current movement toward the establishment of a reasonable woman standard.

A. "Reasonableness" as a Neutral Mediator

Objectivity is a fundamental precept of American jurisprudence. [FN16] The basic utility and broad appeal of the principle of reasonableness derive primarily from its objectivity. [FN17] The American legal system's concern for objectivity stems from an attempt to reconcile the basic contradiction between an individual's desire for freedom to act, on the one hand, and the individual's desire for security from the effects of others' actions, on the other hand. [FN18] One commentator describes this contradiction as follows:

> We want freedom to engage in the pursuit of happiness. Yet we also want security from harm. The more freedom of action we allow, the more vulnerable we are to damage inflicted by others. Thus, the contradiction [implicit in the political theory of liberalism] is between the principle that individuals may legitimately act in their own interest . . . and the principle that they have a duty to look out for others and to refrain from acts that hurt them. . . . [T]he only way to achieve security is to give power to the state to limit freedom of action. The contradiction between freedom . . . and security therefore translates into the contradiction between individual rights and state powers. [FN19]

Given the importance of both interests--freedom to act, on the one hand, and security from the effects of others' actions, on the other hand--resolution of this contradiction is an extremely delicate and dangerous task. If the resolution too heavily favors freedom, disorder and conflict result. [FN20] If the resolution too heavily favors security, individual autonomy is stifled. [FN21] Thus, an objective mechanism for evaluating conduct is necessary in order to achieve a beneficial balance between the two ***329** extremes. [FN22]

The concept of "reasonableness" effectively establishes the boundary between an acceptable exercise of individual freedom and an unacceptable interference with the rights of others. [FN23] Assuming that, "as part of the social contract, individuals implicitly agree to conform their conduct to community standards (in return for others' doing the same)," [FN24] the state, through the legal system, defines conduct that violates those standards as inherently unreasonable. [FN25] In this manner, "reasonableness" aids the legal system in its attempt to reconcile the tension between individual autonomy and community harmony by providing an objective means of superimposing community standards upon individual behavior. Thus, the reasonable individual is "a personification of a community ideal of reasonable behavior, determined by the fact finder's social judgment." [FN26] This personification "possesses and exercises those qualities of attention, knowledge, intelligence and judgment" that society believes are "required of its members for the protection of their own interests and the interests of others." [FN27] So defined, the "reasonableness" principle in general, and the reasonable individual in particular, constrain judicial decision making by forcing judges to consider the societal consensus embodied in the concept of reasonableness when deriving results. [FN28]

In addition, the reasonableness principle is theoretically appealing because its application requires judicial neutrality. [FN29] Since "reasonableness" is designed to maximize the freedom of all individuals (or groups) by minimizing the intrusive exercise of that freedom by any one individual (or group), [FN30] it is logically incoherent to utilize "reasonableness" for the protection of a particular individual's (or group's) freedom to pursue its own interests and express its own norms at the expense of another's ***330** such freedom. [FN31] If "reasonableness" were used in this non-neutral fashion, both the purposes that underlie the principle and the community norms that give that principle content would be undermined:

> This is so because all acts by any one group (or individual) are inevitably harmful to others. One side's freedom can always be seen as the other side's loss of security, one side's equal treatment can seem like the other's unequal treatment, one group's pursuit of its own interest can always be called intolerance of any other group that is affected by that pursuit. [FN32]

Hence, the effectiveness of the reasonableness principle in achieving objectivity depends upon its fundamental neutrality and refusal to differentiate among and between individuals (or groups). [FN33] By requiring judicial neutrality in the application of the concept of "reasonableness"--and thereby both explicitly and implicitly refusing to favor one individual's (or group's) interests--this concept furthers the law's goal of objectivity by maximizing the freedom of each individual, because it prevents the excessive exercise of that freedom by any single individual.

In summary, the principle of reasonableness serves as a mechanism by which courts

can distinguish--through the objective application of prevailing social norms--protected exercises of individual freedom from regulable interferences with collective security. Furthermore, the reasonableness principle ideally requires the courts to draw that line neutrally, so as to avoid protecting one individual's freedom at the expense of another's. However, as the following discussion will illustrate, in devising specific legal standards that purport to apply the reasonableness principle, courts have frequently subverted both its objective aspect and its neutral aspect by tailoring these standards to reflect the social norms and ideals of particular classes of individuals. [FN34] Such use of the reasonableness principle augments, rather than reconciles, the tension between individual freedom and community harmony.

B. The Reasonable Man

The reasonableness principle was initially embodied in the archaic reasonable man standard. [FN35] In theory, the reasonable man standard was ***331** fundamentally gender neutral--the term "man" being used in the generic sense to mean "person" or "human being." [FN36] In practice, however, the reasonable man standard reflected "a society in which women were not considered equal to men." [FN37] Hence the reasonable man standard was rarely, if ever, applied evenly to women and to men.

Women "were not regarded as persons under the law; [they] were regarded as chattel, as property." [FN38] As such, women were "disenfranchised and subjected to the discriminations of the common law." [FN39] Blackstone's description of the status of women in eighteenth century England clearly reveals this traditional common-law view:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage. . . . [Y]et there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion . . . . The husband also, by the old law, might give his wife correction. For, as he is to answer for her misbehavior, the law thought it reasonable to instruct him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children. [FN40]

In light of this societal belief that women were intellectually and rationally "lesser beings," [FN41] it is hardly surprising that courts were reluctant to evaluate women's conduct according to the standard of a reasonable man. The case of Daniels v. Clegg [FN42] provides an excellent ***332** illustration of this point.

In Daniels, the court was concerned with the degree of diligence required of a twenty-year-old woman. [FN43] Rather than utilize the common-law reasonable man standard, the court equated the young woman's conduct with that of a child. Writing for a unanimous court, Chief Justice Christiancy stated:

> The incompetency indicated by her age or sex,--without evidence (of which there is none) of any unusual skill or experience on her part,--was less in degree, it is true, than in the case of a mere child; but the difference is in degree only, and not in principle. [FN44]

As Daniels demonstrates, neither the courts nor society generally believed that women possessed the same degree of competency expected of a reasonable man.

[FN45] For all intents and purposes, "a reasonable woman did not exist" [FN46] at common law. In light of this historical fact--that women were not fully "persons" in the eyes of the law--the reasonable man standard operated, in practice, much more as a "reasonable male" standard than as a truly gender neutral "reasonable human being" or "reasonable person" standard. [FN47]

Since the reasonable man standard established one group's norms and ideals as dominant, [FN48] it effectively undermined the desired neutrality of the reasonableness principle. [FN49] The reasonable man standard did not, therefore, properly establish an objective standard by which to balance individual freedom with community security. [FN50]

***333** C. The Reasonable Person

For almost two centuries, the legal landscape remained fundamentally male-dominated. The judiciary persisted in its unwillingness to remedy the legal and constitutional neglect of women, and, as a result, it continued to apply the reasonable man standard in a nonneutral, and hence nonobjective, way. [FN51] By the mid 1970s, however, a general climate of political and social reform challenged the central tenets of this gender-biased legal ideology. Eventually, the reasonable man standard disintegrated, and the quest began for a more truly neutral standard.

Feminism experienced a popular resurgence during the mid- to late 1960s, marked by the creation of a National Commission on the Status of Women and the addition of a ban on sex discrimination to the 1964 Civil Rights Act. [FN52] As the feminist movement gained political influence and social acceptance over the next two decades, traditional notions of women as "property" or as "lesser beings" were increasingly challenged, and women began to attain formal legal status as "persons." [FN53]

Nowhere were the changing legal attitudes toward women more evident than in the Supreme Court's equal-protection analysis, [FN54] where the Court consistently invalidated statutes that "relied upon the simplistic, outdated assumption that gender could be used as a 'proxy for other, more germane bases of classification.'" [FN55] Justice Stevens' remarks in the 1977 case of Los Angeles Department of Water & Power v. Manhart, [FN56] concerning the relevancy of sex in the employment context, reflect the legal system's views on gender distinctions at the time:

> Before the Civil Rights Act of 1964 was enacted, an employer could fashion his personnel policies on the basis of assumptions about the differences between ***334** men and women, whether or not the assumptions were valid. It 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 inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less. [FN57]

Thus, the courts were heavily influenced by the atmosphere of reform that existed at the time and increasingly began to reject artificial gender distinctions that had been the basis of the previously dominant reasonable man standard.

Against this new legal and cultural backdrop, courts began reassessing the male-dominated standards and rules that had previously pervaded American jurisprudence. [FN58] In particular, many courts and legal scholars, recognizing the reasonable man standard's inherent sexism, began to utilize a formally gender-neutral reasonable person standard in applying the reasonableness principle. [FN59] The case of Rabidue v. Osceola Refining Co. [FN60] provides an excellent illustration of the courts' application of the reasonable person standard in the sexual discrimination context.

In Rabidue, a female employee brought a Title VII action in which she claimed that her supervisor created a hostile and abusive work environment when he directed vulgar language at her and displayed sexually oriented posters in both a private office and in common work areas. [FN61] The court held that the supervisor's conduct had not unreasonably interfered with the woman plaintiff's ability to work and, consequently, could not be considered sexual discrimination. Judge Krupansky, writing for the majority, relied heavily on the reasonable person standard:

To accord appropriate protection to both plaintiffs and defendants . . ., the trier of fact, when judging the totality of the circumstances . . ., must adopt the perspective of a reasonable person's reaction to a similar environment under essentially like or similar circumstances. Thus, in the absence of conduct which would interfere with that hypothetical reasonable individual's work performance and affect seriously the psychological well-being of that reasonable person under like circumstances, a plaintiff may not prevail on asserted charges of sexual harassment . . . regardless of whether the plaintiff ***335** was actually offended by the defendant's conduct. [FN62]

This statement illustrates an attempt to balance individual freedom and collective security through an application of the "reasonableness" principle within the specific context of sexual discrimination. [FN63] In effect, the judge established "reasonableness" as an objective boundary between protected and excessive exercises of freedom. The specific standard that the judge utilized in applying that principle, however--the reasonable person standard-- had an important and definite impact on where the boundary was actually drawn.

There were a number of standards available to the court in applying the concept of "reasonableness" in this instance, each reflecting a different balance between individual autonomy and collective security. If the court had applied the reasonableness principle through a reasonable man standard--relying exclusively on male norms for its definition--then it would almost certainly have held that the supervisor's conduct was a protected exercise of freedom. The court would have reached this conclusion by considering the rights of the supervisor to engage in such conduct, without considering the woman's right to be free from such conduct. If, on the other hand, the court had applied the reasonableness principle through a reasonable woman standard--relying exclusively on female norms for its definition [FN64]--the court would likely have held that the supervisor's conduct was an excessive exercise of freedom. In doing so, the court would have considered only the rights of the woman to be free from such conduct, without considering the supervisor's right to conduct himself in that manner. In fact, however, the court applied the principle through a reasonable person standard--incorporating both male and female norms in its definition. Hence, the court considered both the supervisor's and the woman's rights in determining whether the supervisor's conduct was protected. [FN65]

By refusing to establish one group's ideals as dominant and, instead, relying on prevailing social norms for its definition, the reasonable person standard approximates the objectivity and neutrality that are ideally required by the concept of "reasonableness." [FN66] Unlike either the reasonable man standard or the reasonable woman standard, the reasonable person standard does not preordain an outcome. It is for precisely these reasons that Judge Krupansky chose to utilize the reasonable person standard in applying the reasonableness principle in Rabidue. [FN67]

Yet, while the gender-neutral reasonable person standard was (and is) designed to be both objective and fundamentally neutral, many courts ***336** and legal scholars became enormously dissatisfied with that standard's actual utility in combating the system of gender inequality marked by the legal system's former reliance on the gender-biased reasonable man standard. This dissatisfaction was the catalyst for a movement to develop a reasonableness standard that would, in effect, force the courts to recognize the female viewpoint.

D. The Reasonable Woman

While, in theory, the reasonable person represents a formally gender-neutral standard for judicial decisionmaking, many courts and legal scholars have questioned that standard's neutrality in practice. These critics contend that although the reasonable person standard "neutered, made 'politically correct,' and sensitized" the language of the law in an attempt to protect it from "allegations of sexism," the law "did not change its content and character." [FN68] Given that the reasonable person standard evolved from the reasonable man standard, which represented solely male norms and ideals, it "still embodies many of the biases and male perspectives inherent in the legal system as a whole." [FN69] The inherent bias of the standard is exacerbated " because most judges are men, who have experienced the traditional forms of male socialization," [FN70] and are, consequently, instinctively predisposed to accept the male perspective. [FN71] As a result, the unique female perspective is virtually ignored in judicial decision making. Thus, critics maintain that a "facially neutral reasonable person standard simply makes it too easy for courts to overlook women's viewpoint, creating the false impression that that viewpoint is already subsumed within the general test." [FN72]

In an attempt to combat the gender bias that they feel is inherent in the reasonable person standard, critics have proposed a reasonable woman standard. These critics feel that courts should utilize such a standard in cases where a woman's conduct and/or perceptions are material. [FN73] In such cases, use of a reasonable woman standard is particularly necessary because it is in these legal disputes that the influence of ***337** gender bias would be most prejudicial and damaging. [FN74] Furthermore, in those instances where a woman's actions or reactions are at issue, recognition of a unique female perspective is necessary to assure equitable results. [FN75]

Because it relies exclusively on female norms for its definition, the reasonable woman standard is designed to "protect women from the offensive behavior that results from the divergence of male and female perceptions of appropriate conduct."

[FN76] Nowhere is this idea more important than in sexual harassment cases, where a woman's viewpoint is, typically, extremely relevant and significant. [FN77] In his influential dissent in Rabidue, Judge Keith explained the rationale behind the reasonable woman standard in the sexual harassment context:

In my view the reasonable person perspective fails to account for the wide divergence between most women's view of appropriate sexual conduct and those of men. . . . I would have courts adopt the perspective of the reasonable victim which simultaneously allows courts to consider salient sociological differences as well as shield employers from the neurotic complainant. Moreover, unless the outlook of the reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men. [FN78]

Thus, in those contexts where a wide divergence between men's and women's views exists, use of the reasonable woman standard prevents courts ***338** from systematically ignoring the women's perspective, thereby assuring more equitable and accurate results.

While the reasonable woman standard is intuitively appealing in theory, courts have been slow to utilize the standard in practice. Within the last fifteen years, however, the reasonable woman standard has gained legal force through a number of criminal self-defense [FN79] and hostile work environment sexual harassment [FN80] cases. [FN81] In the self-defense context, ***339** the 1977 case of State v. Wanrow [FN82] is particularly influential.

In Wanrow, the Washington Supreme Court reversed a conviction for first degree murder because the trial court's jury instructions regarding self- defense had erroneously held the female defendant to "an objective standard of 'reasonableness' . . . [which suggested] that the respondent's conduct must be measured against that of a reasonable male individual finding himself in the same circumstances." [FN83] This misleading standard, which was designed to evaluate conduct in a confrontation between two men, "constitute d a separate and distinct misstatement of the law and, in the context of this case, violate d the defendant's right to equal protection of the law." [FN84] The jury should have been directed to "consider the woman's actions in the light of her own perceptions of the situation, including those perceptions which were the product of our nation's 'long and unfortunate history of sex discrimination.'" [FN85] The court concluded:

Until such time as the effects of that history are eradicated, care must be taken to assure that our self-defense instructions afford women the right to have their conduct judged in light of the individual physical handicaps which are the product of sex discrimination. To fail to do so is to deny the right of the individual woman involved to trial by the same rules which are applicable to male defendants. [FN86]

Thus, the Wanrow court recognized, for the first time, both the failure of existing standards sufficiently to represent the female viewpoint and the practical importance of creating a new standard that would adequately incorporate the unique feminine perspective.

In the area of hostile work environment sexual harassment, the 1991 case of Ellison v. Brady [FN87] is similarly influential. In Ellison, the Ninth Circuit Court of Appeals

considered a situation in which a female worker received a series of "bizarre" love letters from a male co-worker. In finding that the co-worker's conduct constituted sexual harassment, the court refused to apply the reasonable person standard utilized in Rabidue. [FN88] The Ellison court stated: "If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a discriminatory practice was common, and victims of harassment would have no remedy." [FN89] The court recognized that " a complete understanding of the victim's view requires, among other things, an analysis of the different ***340** perspectives of men and women" because " c onduct that many men consider unobjectionable may offend many women." [FN90] Thus, because "a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women," [FN91] the court held "that a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." [FN92]

The Wanrow and Ellison decisions demonstrate that, just as the archaic reasonable man standard established male norms as dominant, the reasonable woman standard established female views and ideals as dominant in an attempt to offset the male bias purportedly endemic to the legal system. [FN93] The goal of gender equality in the law is both noble and desirable. This Comment argues, however, that the reasonable woman standard is both legally inappropriate and practically ineffective as a means of achieving gender equality, for three reasons. First, the standard is inconsistent with the principle of formal equality that underlies the legal system as a whole and the reasonableness principle in particular. [FN94] Second, the reasonable woman standard further institutionalizes existing gender hierarchy by utilizing gender-specific language. Such language recognizes the moral and legal relevance of gender, reinforcing a view of women as an oppressed group requiring a unique set of legal rules and standards for their protection. [FN95] Third, the standard is impractical, as male judges and jurors are unable to discern the qualities of a reasonable woman without resorting to gender stereotypes. [FN96] In light of these theoretical, linguistic, and practical difficulties with the reasonable woman standard, this Comment proposes that courts should utilize a modified reasonable person standard that incorporates the female perspective into judicial decisionmaking without falling prey to the difficulties described above. [FN97] Such a standard would be legally appropriate and consistent with the dominant model of formal equality. Moreover, this standard might have the concomitant effect of transforming gender stereotypes over time. [FN98]

***341** III. THEORETICAL/LEGAL DIFFICULTIES WITH THE REASONABLE WOMAN STANDARD

This Part examines the legal suitability of the reasonable woman standard in light of the American model of jurisprudence that emphasizes neutrality and formal equality. [FN99] First, it discusses the fundamental precepts of individualism and traces the development of those precepts from their origins in the writings of John Locke and Thomas Hobbes to their incorporation into modern Equal Protection doctrine. It then

examines the reasonable woman standard's theoretical inconsistency with these individualistic principles.

A. Individualism and the American Legal System

The dominant legal and political ideology in the United States is individualism. [FN100] Individualism is a theoretical construct that treats each person as a separate and distinct Module; it "dissociates the individual person from any context of family, religion, or class and invests in him, as an individual, certain 'natural' or 'inalienable' rights." [FN101] Furthermore, individualism "conceptualizes equality as a personal right rather than as a social policy; it exalts equality of treatment over equality of effect." [FN102]

Equal treatment requires that like individuals be treated alike--that is, judged by identical standards and bound by identical rules. For example, under an equal treatment regime, black individuals must be subjected to legal or social burdens and entitled to legal or social benefits on the same terms as white individuals. This is so because equal treatment regards each person as an individual rather than solely as a member of a particular racial group. [FN103] In fact, " equal treatment is the touchstone of the individualistic theory of rights." [FN104]

This individualistic theory derives primarily from the reductionist philosophy of John Locke and Thomas Hobbes. [FN105] Both regarded people ***342** as essentially equal for the purpose of defining the relationship between the individual and the state. From this is derived the requirement that the state treat all people equally.

Hobbes regarded human beings as by nature equal in physical strength and in mental ability. [FN106] As a result of this equality in the state of nature, Hobbes contended that individuals were inevitably on a collision course with one another:

> From this equality of ability arises equality of hope in the attaining of our ends. And therefore if any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies; and in the way to their end, which is principally their own conservation, and sometimes their delectation only, endeavor to destroy or subdue one another. [FN107]

The result of this behavior is a situation that Hobbes describes as the war of all against all. [FN108] Each individual, in an attempt to exercise her own freedom and maximize her own welfare, must compete with every other individual for finite resources. [FN109] Such a competition results in scarcity and insecurity and deprives the community as a whole of the ability to pursue loftier goals. [FN110] According to Hobbes, the only escape from this volatile condition is for free and equal individuals to agree, through a social contract, to concentrate political power in the hands of an absolute sovereign who will create and maintain civil order. [FN111]

Hobbes's political theory relies on the notion that human beings are distinct and independent individuals. The conflict between individuals pursuing personal, rather than collective, goals creates the need for political authority. [FN112] Furthermore, it is only the willingness of those same individuals to limit their own autonomy that enables the authority to ***343** exist. This individualistic quality of Hobbesian thought

was described by Elizabeth Wolgast:

In Hobbes's picture of equal autonomous agents, people can be likened to molecules of gas bouncing around inside a container. Each molecule proceeds independently, is free to go its own way, although it occasionally bumps into others in its path. As molecules have their energy, people are driven by their passions, and their relations with one another reflect both their love [of] Liberty and [love of] Dominion over others. No atom helps or moves aside for another; that wouldn't make sense. They are a collection of unrelated Modules. [FN113]

Thus, the notion of persons as separate and autonomous individuals, coequal with one another, is central to Hobbes's views on social competition and the origins of political authority.

Like Hobbes, John Locke assumes initial equality among individuals in a prepolitical state of nature. However, while Hobbes offers an elaborate argument justifying his belief in natural equality, Locke treats equality as a self-evident truth. [FN114] Describing "the state all men are naturally in," Locke wrote that it is:

[A] state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another; there being nothing more evident than that creatures of the same species and rank, promiscuously born to all the same advantages of nature and the use of the same faculties, should also be equal one amongst another without subordination or subjection. [FN115]

The foregoing passages illustrate that although Locke and Hobbes agree on the basic principle of natural equality, Locke takes equality as a given while Hobbes attempts to justify his belief in equality through a complex, descriptive analysis.

Furthermore, while Hobbes's equality is premised on a rough physical and mental parity among people, Locke's initial equality recognizes the existence of inherent differences between individuals:

Though I have said above that all men by nature are equal, I cannot be supposed to understand all sorts of equality. Age or virtue may give men a just precedence; excellence of parts and merit may place others above the common level. . . and yet all this consists with the equality which all men are in, in respect of jurisdiction or dominion over one another, which was the equality I there spoke of as proper to the business in hand, being that equal right that every man has to his natural freedom, without being subjected to the will or authority of any other man. [FN116]

The "natural rights to life, liberty, and property which humans possess in Locke's state of nature are possessed equally by all." [FN117] Locke goes on to argue, however, that as money is introduced into the state of ***344** nature and the "inherent trait of human nature, the boundless desire for possessions," [FN118] is permitted to operate, inequality inevitably results. [FN119] It is in this "second stage of the state of nature," where men are no longer equal, that "a course of action is required to safeguard unequal property." [FN120] Locke posits that it is in this stage that individuals will agree to enter civil society and establish government in an attempt to protect property and regulate or eliminate scarcity. [FN121]

It is clear that Locke's political theory, like Hobbes's, is fundamentally individualistic. It starts with the basic premise that each person is a separate and

autonomous individual who will, in the absence of political authority, naturally seek to maximize his own personal welfare. [FN122] As one commentator explained:

It starts with free and equal individuals none of whom have any claim to jurisdiction over others . . . . It acknowledges that these individuals are self-interested and contentious enough to need a powerful state to keep them in order, but it avoids the Hobbesian conclusion that the state must have absolute and irrevocable power. [FN123]

Thus, both Hobbes and Locke specifically isolate the individual as the primary actor in civil society. It is this recognition of persons as individual actors rather than as members of larger societal groups that is at the core of the modern individualistic thought.

In addition to its focus on humans as individuals, Locke's political theory is significant for its emphasis on the rule of law. Locke theorized that,

[B]ecause no political society can be, nor subsist, without having in itself the power to preserve the property, . . . and there is only political society, where every one of the members hath quitted this natural power, resigned it up into the hands of the community . . . [the] community comes to be umpire . . . [in] all the differences that may happen between any members of that society concerning any matter of right." [FN124]

In order to protect propertied individuals (whom Locke regarded as the critical group in civil society) from nonpropertied individuals, from each other, and from an arbitrary government, Locke maintained that the community had to mediate disputes according to formal rules. [FN125] Furthermore, ***345** to achieve its goal, Locke posited that these rules must be neutral. One scholar explained the Lockean notion of formal legal equality:

To Locke, the rule of law meant that every civilized community had to adjudicate disputes through appeals to 'settled standing rules, indifferent and the same to all parties.' Judges and administrators had a duty to treat similar cases in similar ways, evenly and impartially, with no trace of preference or favoritism. In law and administration, justice meant neutral, impartial, nonpreferential, equal treatment. [FN126]

Thus, according to Locke, the creation of neutral rules and the unbiased administration of those rules is necessary for the effective regulation of civil society.

This Lockean ideal of formal equality, when linked with the principle of individualism shared by both Hobbes and Locke, forms the construct of interchangeability. The concept of interchangeability posits that "individual members of different groups are inherently no different from one another by virtue of their group identity. Given the necessary training and experience, a constituent of one racial, ethnic, or sexual group can take the place of another." [FN127] This principle views people as essentially fungible. In light of this view, it would be "a violation of an individual's right to equality to treat him or her differently from members of another group, even if the two groups manifest normative differences." [FN128] This is so because where individuals are effectively interchangeable, any basis for differentiation among and between those individuals is inherently artificial. Such artificial distinctions deprive an individual of his or her natural right to be treated as

an autonomous and equal actor. Thus, according to individualism, the "appearance of equality embodied in uncompromised equal treatment takes precedence over the goal of equality of effect as a social reality." [FN129]

Interchangeability is central to individualistic theory. [FN130] Derived from the writings of Hobbes and Locke, it has dominated American political and legal thought throughout its history. [FN131] The individualistic ***346** model has been particularly influential in the American judicial system. It has served as the primary mediating principle through which American courts have interpreted the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act. [FN132] Consequently, "American constitutional and statutory civil rights opinions repeatedly propound an individualistic definition of equality." [FN133]

The influence of this individualistic orientation is particularly evident in decisional law concerning gender-based distinctions. In the gender context, where group lines are easily drawn, there is a natural predisposition to analyze discriminatory policies in terms of their potential effects on men or women in general. However, the American legal system is primarily concerned with the specific effects of alleged discrimination on discrete individuals rather than on groups. [FN134] As a result, the Supreme Court has consistently held gender-based classifications to be presumptively illegitimate because such classifications define individuals solely in terms of their group membership and fail to consider each person's ***347** individual attributes. [FN135] There are a number of important decisions that illustrate this point.

In Los Angeles Department of Water & Power v. Manhart, [FN136] the Court held that an employer had violated Title VII by requiring its female employees to make larger contributions to a pension fund than male employees in order to obtain the same monthly benefits upon retirement. [FN137] Discussing the legal relevance of the reasons for the contribution disparity in the pension fund policy (that women, as a class, live longer than men), Justice Stevens, writing for the Court, stated:

> The question . . . is whether the existence or nonexistence of 'discrimination' is to be determined by comparison of class characteristics or individual characteristics. A 'stereotyped' answer to that question may not be the same as the answer that the language and purpose of [Title VII] command. . . . The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. . . . Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply. [FN138]

This decision clearly indicates the Court's interpretation of Title VII as applying to individuals rather than groups.

Similarly, in Craig v. Boren, [FN139] the Court invalidated a state statute that established a higher legal drinking age for males than for females. The statute was based on statistics showing that a disproportionate number of eighteen to twenty-one year old males were involved in drunk driving accidents. [FN140] The Court reasoned that such statistics were insufficient to justify the discriminatory statute because they focused on group characteristics rather than considering individual attributes. [FN141] Writing for the Court, Justice Brennan described the Court's historical opposition to gender distinctions:

Reed v. Reed has also provided the underpinning for decisions that have invalidated statutes employing gender as an inaccurate proxy for other, more germane bases of classification. Hence, 'archaic and overbroad' generalizations . . . could not justify use of a gender line in determining eligibility for certain governmental entitlements. Similarly, increasingly outdated ***348** misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas' were rejected as loose- fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy. [FN142]

The Court then struck down the statute.

Like Manhart, the Court's decision in Craig demonstrates its unwillingness to condone regulatory policies that incorporate overbroad gender classifications. The Court is adamant in its declaration that such policies are inconsistent with the principle that rules and standards must focus solely on the individual.

As these decisions reveal, the individualistic model of equality at the core of American legal and political thought dominates the judicial system's approach to gender-based classifications. Since, according to this model, human beings must be viewed as distinct individuals rather than merely as members of a particular group, and since individuals are essentially fungible, establishing rules and standards that differentiate between persons on the basis of group affiliations violates each individual's right to equal and impartial treatment. Hence, "sex-specific policies or actions are invalid under this perspective because they reflect invidious motivation and result in dissimilar treatment for similarly situated individuals." [FN143] As the following discussion indicates, the reasonable woman standard is inherently inconsistent with the individualistic model embraced by the courts.

B. Individualism and the Reasonable Woman

Individualism--the idea that people should be treated by the law as if they were essentially fungible--informs not only the American legal system's notion of equality (as suggested by the foregoing discussion [FN144]) but also the legal system's notion of "reasonableness." As suggested in Part I, the individualistic model is central to the concept of "reasonableness." The reasonableness principle accepts the basic Hobbsean/Lockean proposition that equal individuals in a state of nature cannot exercise complete freedom of action without interfering with each other's rights. [FN145] In an attempt to mediate this inevitable conflict, "reasonableness" establishes an objective boundary between acceptable exercises of individual freedom and unacceptable interferences with the rights of others. This boundary is determined by looking to prevailing social norms. [FN146] In order to perform this function effectively, "reasonableness" must be facially neutral, so as to avoid protecting one individual's or ***349** group's interests at the expense of another's. [FN147] Thus, " b y seemingly allowing individuals to pursue their self-interest unless and until they interfere with the interest of others, . . . 'reasonableness' seems to overcome this conflict between the individual and the group, protecting collective security without threatening individual freedom." [FN148] The reasonableness principle's ability to mediate this conflict is, however, strongly influenced by the particular standard that is used to implement the principle. [FN149]

While the reasonableness principle is designed to reflect the individualistic model of equality, the reasonable woman standard utilized by some courts in criminal self-defense and hostile work environment sexual harassment cases is fundamentally inconsistent with this model. [FN150] The standard conflicts with the basic principle of equality in two primary respects. First, because it relies exclusively on a specific group's (women's) norms for its definition, the reasonable woman standard inappropriately adopts a group-rights, rather than an individual-rights, perspective. Second, the reasonable woman standard is, by definition, nonneutral. It establishes female values and perceptions as dominant and, therefore, violates the principle of formal equality by arbitrarily differentiating between individuals. This discussion first illustrates how the reasonable woman standard utilizes a group-rights perspective and discusses why the standard is inherently nonneutral. It then explains how such a noneutral, group focused standard is at odds with the basic principles of individualism.

1. The Reasonable Woman Standard Adopts a Group-Rights Perspective--In opposition to the individual-rights perspective mandated by individualism, the reasonable woman standard adopts a pluralistic group-rights perspective in evaluating conduct. This standard treats each woman primarily as a member of a particular gender group and ***350** establishes that group's norms as the measure of appropriate conduct. [FN151] A practical example of this pluralistic approach is the sexual harassment case of Radtke v. Everett. [FN152] In Radtke, the court stated:

> [B]ecause of their historical vulnerability in the work force, women are more likely [than men] to regard a verbal or physical sexual encounter as a coercive and degrading reminder that the woman involved is viewed more as an object of sexual desire than as a credible coworker deserving of respect. Such treatment can prevent women from feeling, and others from perceiving them, as equal in the workplace.
>
> We hold, therefore, that a female plaintiff states an actionable claim for sex discrimination caused by hostile-environment sexual harassment under the state Civil Rights Act where she alleges conduct of a sexual nature that a reasonable woman would consider to be sufficiently severe. . . . [FN153]

This language illustrates the manner in which courts treat women as a group with generalized interests and perceptions in utilizing the reasonable woman standard. Such a group focus is inconsistent with individualism's requirement that each person be regarded as an individual with individual qualities and attributes. [FN154] It also ignores the impact of wrongful conduct on the individual, focusing instead on the impact of that conduct on the group. [FN155] Additionally, the group focus is harmful to the goal of gender equality. [FN156] Finally, the rationale for adopting a reasonable woman standard can be applied to adopting a separate standard for any minority group--it is a slippery slope. [FN157]

It is clear that the reasonable woman standard treats women as a generalized group. Some legal scholars maintain, however, that a group-rights perspective is both acceptable and, in fact, preferable to an individual-rights perspective because it recognizes the group associations that influence and define each person. [FN158] These scholars argue that womanhood is an integral characteristic of any woman; it shapes her perceptions of the world and establishes her notions of self: to ignore this basic characteristic ***351** is to ignore social reality. [FN159] These critics contend that

a reasonableness standard that fails to recognize a woman's gender group affiliations provides an imperfect mechanism for courts to derive proper results.

Although this group-rights perspective possesses some intuitive appeal, it is, upon closer examination, both unnecessary and undesirable. Initially, group-rights advocates misunderstand the basic premise of individualism. Defenders of the group-rights perspective assume that individualism regards human beings as purely atomistic, unconnected individuals who do not possess and are, consequently, unaffected by any group membership. This assumption is inaccurate, however. As suggested initially by Locke's recognition of individual differences in a state of natural equality, [FN160] individualism recognizes the notion of a self partially constituted by group connection. [FN161] Thus, contrary to the contention of group-rights advocates, individualism does not completely dissociate individuals from their group memberships. [FN162] Individualism simply regards persons primarily as individuals with particular group affiliations, whereas the group-rights perspective views persons primarily as group-members. [FN163] Hence, the argument that a group-rights perspective is preferable to an individual-rights perspective, on the grounds that the group-rights perspective recognizes group affiliations that shape personality, must fail. Individualism recognizes that group membership influences the individual; but individualism premiates the individual, not the group, identity.

A second problem with the group-rights perspective reflected by the reasonable woman standard is that the standard inappropriately ignores the impact of wrongful conduct on the individual by focusing exclusively ***352** on that conduct's impact on the gender group of which the individual is a member. When a particular person is harmed by the malicious actions of another, it is that person (himself or herself) who has been injured rather than the entire male or female population. [FN164] For example, where a woman is the victim of rape or sexual harassment, it is she, and not womankind in general, who has been wronged and who demands and requires vindication. [FN165] A group- rights perspective fails to recognize this fact.

One commentator explained:

> An individual-rights perspective calls for vindicating [the victim's personal rights], while a group-rights approach subsumes the victim's rights under a diffuse claim of affront to all womankind. This group-rights approach, if carried to its logical extreme, would make each of us a victim of every criminal act--every robbery, assault, murder--thus vitiating the rights of the actual victim. [FN166]

The reasonable woman standard, which views each woman solely as a member of a gender group, thus fails to account for the harm suffered by the individual woman and instead only recognizes an illusory harm to womankind as a whole.

Finally, the group-rights perspective is counterproductive because it precludes recognition of gender equality, a primary goal of both the legal system as a whole and the reasonable woman standard in particular. [FN167] By focusing solely on a person's group affiliations, the group-rights approach not only condones, but actually encourages, the differentiation of individuals according to gender. [FN168] Given that women are both historically and constitutionally disadvantaged, [FN169] such differentiation merely maintains "gender hierarchy and, more fundamentally, treats women and men as statistical abstractions rather than as persons with individual

capacities, inclinations and aspirations--at enormous cost to women and not insubstantial cost to men." [FN170] Individualism, on the other hand, divorces each person from his or her gender group and treats him or her as a separate and distinct individual coequal with every other member of society. [FN171] Thus, individualism is an invaluable theoretical framework ***353** through which oppressive gender distinctions may be challenged. [FN172]

In addition to adopting a group-rights perspective with respect to gender issues, the reasonable woman standard also establishes a dangerous precedent for the application of a group-rights perspective to any issue in which a minority group's views or perceptions are material. As discussed earlier, judicial advocates of the reasonable woman standard argue that the formally equal reasonable person standard is fundamentally biased towards the norms and ideals of the historically dominant male and, therefore, effectively excludes the viewpoint of traditionally subordinate groups such as women. [FN173] As such, these advocates maintain that a reasonable woman standard that relies exclusively on female norms for its definition must be utilized where a woman's conduct and/or perceptions are at issue in order to assure that the unique female perspective is fairly represented. Judge Beezer's statement in Ellison v. Brady [FN174] illustrates this point:

A complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women. . . . We adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women. [FN175]

This rationale for the reasonable woman standard significantly alters the degree of specificity required by courts in applying the reasonableness principle. Given that it is premised on a judicial determination that the reasonable person fails to incorporate specific minority norms into its definition (and that such norms should be adequately represented), the reasonable woman standard establishes a powerful precedent for the application of the reasonableness principle through standards that reflect the perspectives of the particular minority groups involved in each case. [FN176] Thus, the reasonable woman standard establishes a slippery slope for the creation of a limitless number of specific reasonableness standards.

Harris v. International Paper Co. [FN177] illustrates the impact of the reasonable woman standard's precedent. In Harris, three black employees ***354** brought an action under the Maine Human Rights Act in which they claimed a hostile and abusive work environment was created when their fellow employees consistently directed racial epithets at them with the tacit approval of the employer's agents, supervisors, and foremen. [FN178] Utilizing the reasonable woman standard as a springboard, the court held that the fellow employee's conduct constituted racial discrimination because such conduct would have offended a "reasonable black person." [FN179] Chief Judge Carter, writing for the court, explained:

To give full force to this basic premise of antidiscrimination law [that conduct must be evaluated from the victim's perspective], and to Lipsett's [Lipsett v. University of Puerto Rico, 864 F.2d 881, 898 (1st Cir.1988)] recognition of the differing perspectives which exist in our society, the standard for assessing the unwelcomeness and pervasiveness of conduct and speech must be founded on a fair concern for the

different social experiences of men and women in the case of sexual harassment, and of white Americans and black Americans in the case of racial harassment. . . . Black Americans are regularly faced with negative racial attitudes, many unconsciously held and acted upon, which are the natural consequences of a society ingrained with cultural stereotypes and race-based beliefs and preferences. . . . Since the concern of Title VII and the MHRA is to redress the effects of conduct and speech on their victims, the fact finder must "walk a mile in the victim's shoes" to understand those effects and how they should be remedied. In sum, the appropriate standard to be applied in this hostile environment racial harassment case is that of a "reasonable black person." [FN180]

Thus, in Harris, the precedent established by the reasonable woman standard encouraged the court to develop a specific "reasonable black person" standard to incorporate the perspective of that particular minority group.

As suggested by Harris, the judicial policies underlying the development of the reasonable woman standard dictate the creation of a multitude of highly specific reasonableness standards incorporating the norms and ideals of particular groups into the decisionmaking process. Even if these standards were established only for those groups that could be legitimately classified as "suspect" [FN181] or "quasi-suspect," [FN182] the required ***355** number would be dizzying. For example, reasonableness standards would have to be designed to reflect the perspectives of specific racial groups (for example, the "reasonable black person," [FN183] "reasonable Hispanic person," [FN184] or "reasonable white person" [FN185]), ethnic groups (for example, the "reasonable Italian person" [FN186] or "reasonable Filipino person" [FN187]), religious groups (for example, the "reasonable Jewish person" [FN188]), and groups of similar sexual preference (for example, the "reasonable gay person" [FN189]).

Furthermore, because each person is inevitably a member of more than one group (for example, the "Caucasian" and "female"), in order for reasonableness standards adequately to reflect the entire spectrum of group norms relevant to any situation, those standards must be drawn to include all of a person's significant group associations. For example, a "reasonable black woman" standard, a "reasonable Asian, gay man" standard, or a "reasonable Russian, Jewish woman" standard may be required in certain circumstances, depending on the particular group affiliations of the person or persons involved. Consequently, a potentially infinite number of specifically designed reasonableness standards is required in order adequately to incorporate each individual's relevant group connections. [FN190]

This multitude of reasonableness standards is undesirable for two reasons. First, such standards rely on a group-rights perspective and are therefore at odds with the principles of individualism. Specialized reasonableness standards define individuals exclusively in terms of their specific group affiliations. For example, a "reasonable black woman" standard treats the individual for which it is designed as the member of both a particular racial group ("black") and a particular gender group ("woman"). By classifying individuals in this manner, these reasonableness standards arbitrarily differentiate between ideally fungible individuals. [FN191] Such differentiation both violates the concept of interchangeability which is central to individualism and implicitly allows discriminatory actions by recognizing the legal and social

importance of ***356** group membership. [FN192]

Second, specialized reasonableness standards are judicially impractical. As discussed previously, "reasonableness" is designed to mediate the fundamental conflict between individual freedom and collective security by superimposing community standards on individual behavior. [FN193] In order to perform this function effectively, however, the specific standard used to apply the reasonableness principle must enable the factfinder (judge or juror) to determine the relevant community standard. This becomes increasingly difficult as the number of reasonableness standards increase. For example, it would be extremely difficult, if not impossible, for a white male factfinder to discern the qualities of a "reasonable Muslim woman" or a "reasonable Asian, gay man." Thus, the creation of highly specialized reasonableness standards seriously complicates the factfinder's task of identifying the applicable social norm and, consequently, undermines the reasonableness principle's ability to regulate individual conduct effectively.

As demonstrated by the foregoing discussion, because a group-rights perspective fails to regard and treat persons as separate and equal individuals, effectually interchangeable with one another, it is fundamentally inconsistent with the individualistic principles that are at the core of American legal and political theory. [FN194] The reasonable woman standard adopts a group-rights perspective not only through its inherent focus on a person's gender group membership, but also through its implicit assumption that "reasonableness" must be applied in a manner that reflects the totality of a person's group affiliations. Consequently, the reasonable woman standard is theoretically and legally inappropriate.

2. The Reasonable Woman Standard Violates Formal Equality.--The reasonable woman standard--relying exclusively on one group's (women's) norms for its definition, and establishing those norms as dominant--is also at odds with the principle of formal legal equality that is central to individualism. The Lockean notion of equality at the core of modern individualistic thought requires that disputes between individuals be resolved through the application of "settled standing rules, indifferent and the same to all parties." [FN195] The individualistic model also proposes that each individual has a personal right to "neutral, impartial, nonpreferential, equal treatment." [FN196] The reasonable woman standard is inherently inconsistent with this proposition in two respects: It is nonneutral, and it differentiates between parties.

First, the reasonable woman standard is, by definition, nonneutral. ***357** Judicial neutrality requires that courts "[refuse] to ground judicial decisions on personal preferences for particular perspectives or political judgments about the importance of certain group interests." [FN197] However, it is precisely these types of "personal preferences" and "political judgments" that are at the heart of the reasonable woman standard. As explained in Part I, the reasonable woman standard is premised on a judicial determination that the interests of women as a group require special legal protection in light of the legal system's historic male bias. [FN198] The reasonable woman standard is therefore specifically designed to effectuate this judicial policy by categorically excluding the male perspective and establishing female norms as the sole measure of appropriate conduct in certain circumstances. [FN199] Thus, by explicitly attempting to promote the interests and ideals of a particular group

(women), the reasonable woman standard violates the individualistic principle of neutrality.

Second, the reasonable woman standard is not "indifferent and the same to all parties." [FN200] The individualistic notion of interchangeability posits that because individuals are inherently no different from one another by virtue of their group identity, it is a violation of an "individual's right to equality to treat him or her differently from members of another group, even if the two groups manifest normative differences." [FN201] The reasonable woman standard does just that. It only applies where a woman's perceptions are at issue. [FN202] Where the relevant perceptions are those of a man, an alternative reasonable man standard, which relies exclusively on male norms for its definition, is required. [FN203] Thus, the judicial paradigm established by the reasonable woman standard mandates that individuals be treated differently based on their gender group affiliations. This paradigm violates each individual's personal right to equal treatment and undermines the individualistic principle of formal equality. [FN204]

Advocates of the reasonable woman standard contend, however, ***358** that such different, nonneutral treatment is not only legally appropriate, but socially desirable given the respective positions of women and men within the American legal system. These advocates argue that individualism does not require formally equal treatment for all individuals, it merely requires equal treatment for all similarly situated individuals, and, given their long history of legal and political subordination, women are by no means similarly situated with men. [FN205] Thus, proponents of the reasonable woman standard maintain that such a standard does not violate the individualistic principle of formal legal equality. These proponents further argue that only through the adoption of legal standards and rules that focus on equality of effect [FN206] can true gender equality be achieved. The reason for this is that rules that exalt equality of treatment are "unable to ameliorate the material conditions of inequality characterizing our society." [FN207]

While this argument does possess a great deal of persuasive force, it is insufficient to justify the reasonable woman standard for two primary reasons. First, advocates of the reasonable woman standard inappropriately focus on the relative positions of groups, rather than individuals, in resolving the issue of "similar situation." As discussed earlier, the reasonable woman standard treats each woman primarily as a member of a gender group rather than as a separate and distinct individual. [FN208] As such, the reasonable woman standard is premised on broad generalizations that women as a group have been historically subordinated and that women as a group share similar views of appropriate conduct, rather than on specific determinations as to whether the particular woman at issue has actually experienced such historic subordination or whether that woman actually shares the group's presumed views. Such a generalization, because it fails to recognize each woman's fundamental right to be treated as an autonomous and equal individual, is both legally impermissible [FN209] and theoretically inconsistent with the individual- rights perspective ***359** central to individualism. [FN210] Furthermore, as illustrated by the following statement, such generalizations reinforce the gender hierarchies that they are designed to combat:

By dealing with women not as unique human beings but on the basis of statistical generalizations, [gender-dependent laws disadvantaging women] are an essential dimension of a pervasive social system that has the effect and even function of

confining and acculturating individual women as women to sharply limited social roles and subordinate social status. . . . Even gender dependent laws disadvantaging men should be subject to a heavier burden of justification. To the extent such laws are predicated, as many are at least in part, on a normative view of social roles proper to men, they imply a further view in which women, too, properly occupy an ordained niche. Moreover, such laws involve much the same costs as the laws discussed in the preceding paragraph: they attach significance to gender and serve to acculturate men and women to distinct social roles. [FN211]

Thus, the argument that the reasonable woman standard is justified because men and women are not similarly situated impermissibly, and dangerously, relies on a group-rights perspective which violates each individual's right to equal treatment as an individual.

Second, given that it focuses specifically on gender, the conclusion that women, as a class, are not "similarly situated" to men precludes the attainment of true sexual equality. In order to understand this point, it is important to identify the theoretical bases of claims of equality or inequality.

Inequality, by definition, involves difference with respect to some specified attribute and/or condition. [FN212] Given that human beings are both alike and different in innumerable respects, the claim that people are similar or dissimilar, equal or unequal, requires that a specific characteristic or group of characteristics be isolated as a basis for comparison. [FN213] The number of potentially relevant characteristics is infinite. [FN214] ***360** One commentator explained the difficulties in utilizing any of these infinite characteristics to evaluate equality:

> Furthermore, we have no agreed-upon way of specifying when differences constitute inequalities. A difference is only a difference until some normative judgment is placed upon it. A century ago black skin was not only different from white skin; it was also inferior. Today white skin and black skin are recognized as different but not unequal, except in the amount of melanin contained in the epidermal cells. In some quarters today people still argue whether anatomical differences in genital structure constitute mere differences or inequalities. . . . A difference may be natural; a difference that disadvantages someone on grounds that we consider irrelevant and discriminatory is one which we call an inequality. [FN215]

Thus, to say that two individuals (or groups) are unequal is merely to say that those individuals (or groups) are different with respect to some arbitrarily chosen attribute or condition.

Proponents of the reasonable woman standard isolate gender as the specific characteristic relevant for comparison. [FN216] While these proponents may claim that they are actually focusing on historic vulnerability and legal subordination as the relevant characteristics, neither the form of the reasonable woman standard itself nor the language used to justify that standard support this claim. If historic vulnerability and legal subordination are truly the relevant criteria, then the appropriate standard is that of a "reasonable victim" or a "reasonable historically vulnerable and disempowered person." Such neutral standards would effectively perform the same function as the sex-linked reasonable woman standard. [FN217] In utilizing the term "woman," however, the reasonable woman standard explicitly uses gender as a proxy

for the gender- neutral conditions that ***361** actually justify the classification. [FN218] Thus, by claiming that women are not "similarly situated" with men, rather than claiming that historically vulnerable persons are not "similarly situated" with non-historically vulnerable persons, advocates of the reasonable woman standard reinforce the notion that men and women are inherently different and should, therefore, be subject to different and unequal rules. [FN219]

Thus, given that it utilizes a group-rights perspective and legitimizes invidious gender classifications, the claim that women are not "similarly situated" with men and are therefore entitled to special legal standards and rules is not sufficiently powerful to justify the reasonable woman standard's fundamental inconsistency with the individualistic model of equality at the core of American jurisprudential thought.

IV. LINGUISTIC DIFFICULTIES WITH THE REASONABLE WOMAN STANDARD

The reasonable woman standard is intended to ameliorate the conditions of inequality characteristic of the American legal system as a whole and of the reasonable person standard in particular. [FN220] By specifically ***362** establishing female norms and ideals as the sole measure of appropriate conduct in hostile work environment sexual harassment and criminal self-defense cases, the reasonable woman standard attempts to overcome the male bias that has historically marked courts' application of the reasonableness principle. [FN221] Yet, while gender inequality poses a real and important problem, the reasonable woman standard actually aggravates this problem in an attempt to solve it. In order to understand how this is so, it is initially important to understand the influence of language in shaping and/or reinforcing societal attitudes.

Traditional thought concerning the role of language in human cognition regarded language as "a kind of marker of our image of reality." [FN222] With the development of modern linguistic theory, however, the view of language as simply a mirror of "social reality" was seriously questioned. In the early 1950's, ethnolinguist Edward Sapir recognized that although environment and social experience strongly influence language, language likewise influences experience:

> Language is a guide to "social reality." . . . [I]t powerfully conditions all our thinking about social problems and processes. Human beings do not live in the objective world alone, nor alone in the world of social activity as ordinarily understood, but are very much at the mercy of the particular language which has become the medium of expression for their society . . . . The fact of the matter is that the "real world" is to a large extent unconsciously built up on the language habits of the group. [FN223]

Benjamin Lee Whorf, Sapir's student, expounded on this theory. [FN224] Building on Sapir's findings that "because language as a 'social product' significantly induces certain modes of observation and interpretation, it exerts a powerful influence on cognitive behavior and social structuring and shapes the way people think about and perceive the world," [FN225] Whorf posited that language not only influences perceptions of reality, but actually determines those perceptions. This "Sapir-Whorf

hypothesis" [FN226] has been verified by a number of empirical linguistic studies that have established "tangible relationships between the use of a given language and definite behavior of human beings." [FN227] Thus, while it is unclear " w hether language creates reality or simply lends direction to it, the way we use language certainly characterizes much of the way we think about people and things in the real world." [FN228]

The relationship between language and social reality is particularly ***363** significant with respect to societal attitudes concerning gender. Since the way in which language is used influences the way in which people perceive reality, sexist language perpetuates and fosters sexist thinking. A number of important studies support this conclusion. In her book Language and Woman's Place, [FN229] Robin Lakoff examined the relationship between use of language and social inequities. She concluded that the bulk of contemporary speech is both theoretically and practically hostile toward women as a class. [FN230] Similarly, Mary Ritchie Key researched the causes and effects of traditional American linguistic behavior. [FN231] Noting that " masculinity and femininity are behavioral constructs which are powerful regulators of human affairs," [FN232] Key advocated the development and use of an "androgynous" language. [FN233] Similarly, Casey Miller and Kate Swift [FN234] have "compiled compelling semantic and historical evidence that linguistic biases operate to perpetuate society's conventional perceptions of women." [FN235]

In light of this recent understanding of the importance of language in creating and perpetuating gender bias, modern courts have begun to reject legal constructs such as the reasonable man standard which explicitly utilize gender- specific language. Karl Llewellyn observed that legal categories and concepts, once established, rigidify and solidify, taking on "an appearance of . . . inherent value which has no foundation in experience." [FN236] This phenomenon derives from "the tendency of the crystallized legal concept to persist after the fact model from which the concept was once derived has disappeared or changed out of recognition." [FN237] The reasonable man standard provides an excellent illustration of this point. [FN238] That standard not only reflected a society in which women ***364** were neither politically or legally equal, but actually helped to maintain those conditions of inequality. Ronald Collins explained:

> Because the ordinary words we use reflect our cultural understandings and transmit them to future generations, language that is gender biased carries with it culture's preconceptions and prejudices. As the longevity of the reasonable man standard demonstrates, women have traditionally been abstracted from the thought process of the Anglo-Saxon system of jurisprudence. . . . [Jurists who use this standard] are perpetuating, in [place of an otherwise objective reality] the "socially determined reality" handed down to us from the common law, which portrays female qualities as the antithesis of reasonableness. [FN239]

Thus, as the reasonable man standard demonstrates, gender-specific language in general, and gender-specific legal concepts in particular, not only reflect the dominant social reality but actually help to shape that reality by institutionalizing gender as a morally and legally relevant factor in judicial decisionmaking.

It is this capacity of language to shape individual and societal attitudes that makes the reasonable woman standard particularly dangerous. While it is designed to combat

the societal and legal male bias reflected in and reinforced by the reasonable man standard, the reasonable woman standard, by continuing to use language that is gender specific, merely perpetuates this male bias. This is so because, as noted previously, men have been and continue to be the referent against which all comparisons are made. [FN240] Consequently, legal categories or concepts that isolate a particular minority group essentially classify that group as "different" or "inferior." [FN241] Such a classification effectively precludes the affected group from attaining true legal equality: "'Difference' is stigmatizing because the assimilationist ideal underlying our society's conception of equality presumes sameness. Thus, the recognition of difference threatens our conception of equality, and the proclamation or identification of difference can serve as a justification for existing inequalities." [FN242] Furthermore, where those legal categories or concepts explicitly isolate a ***365** particular gender group, they implicitly recognize the legal relevance of gender, thereby further institutionalizing the existing gender hierarchy.

The reasonable woman standard produces precisely this deleterious result. By utilizing the gender-specific term "woman," rather than a gender-neutral term such as "person" or "victim," the reasonable woman standard inherently condones the distribution of legal benefits and burdens on the basis of gender. It explicitly mandates that women be evaluated according to an entirely different standard of conduct than similarly situated men. [FN243] By isolating gender as the specific basis for judicial differentiation of individuals, the reasonable woman standard, like the reasonable man standard that preceded it, enhances the moral and legal relevance of gender and, consequently, reinforces the existing conditions of gender inequality. Similarly, the reasonable woman standard, by explicitly isolating women as a group requiring unique legal rules, implicitly suggests that women are fundamentally "unlike" men and are inherently incapable of being evaluated by universally applicable standards of conduct. [FN244] Since male norms have traditionally been and continue to be the ideal, [FN245] such separation and differentiation "carries the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection." [FN246] Such stereotypes have historically been the basis for "special protection" legislation that created sex-specific rules purportedly to assist women but that, in fact, helped perpetuate paternalistic stereotypes about them. [FN247]

As the foregoing discussion illustrates, the use of gender-specific language operates to preserve the negative biases and attitudes towards women that currently pervade society. Although utilizing a reasonable woman standard may be effective in alerting judges and jurors to the necessity of evaluating particular situations from a woman's point of view, it is unclear whether the benefits of using such a standard will outweigh the costs of allowing gender- based language to reinforce conventional perceptions of women. Furthermore, as the next Part indicates, the reasonable woman standard may not even be particularly effective in forcing judges and jurors to evaluate conduct from the woman's perspective.

***366** V. PRACTICAL DIFFICULTIES WITH THE REASONABLE WOMAN STANDARD

In addition to the theoretical and linguistic difficulties discussed in Parts III and IV that undermine the reasonable woman standard's ability to combat broader conditions of gender inequality ingrained in the American legal system, [FN248] there are serious practical difficulties with the reasonable woman standard. These practical difficulties limit the standard's utility in specific cases. As discussed in Part I, the reasonable woman standard is designed to "protect women from the offensive behavior that results from the divergence of male and female perceptions of appropriate conduct" [FN249] by forcing the factfinder in a particular legal dispute to rely exclusively on female norms in evaluating the conduct at issue. [FN250] The effectiveness of the reasonable woman standard thus depends on the factfinder's presumed ability both to identify and to apply female norms in a specific context. [FN251] For example, in a fact pattern similar to the one in Ellison v. Brady, [FN252] the application of the reasonable woman standard provides a "complete understanding of the victim's view" [FN253] only if the jury is able to determine accurately how a reasonable woman would feel and respond upon receiving a series of "bizarre" love letters from a male co-worker. Thus, in order to incorporate effectively the female viewpoint into the judicial decisionmaking process and, consequently, to protect the rights of individual women litigants, the reasonable woman standard implicitly requires that judges and jurors be able to assess accurately the response of "reasonable" women in every relevant circumstance. [FN254] In the absence of such an accurate determination, the reasonable woman standard provides no practical benefit over the purportedly male-biased reasonable person standard. [FN255]

***367** The unfortunate reality of the American judicial system is that most jurors and, more importantly, most judges are still men "who have experienced the traditional forms of male socialization," [FN256] and, therefore, are unable to understand accurately the female viewpoint central to the reasonable woman standard. These judges and jurors have little or no experience from which to discern the qualities of a reasonable woman or to determine how a "reasonable woman" would feel or react in a given situation. [FN257] As such, these factfinders will either have to project their male norms onto the "reasonable woman" or they will have to resort to dangerous gender stereotyping. [FN258]

Thus, just as a white person would be unable to understand completely the perspective of an African American person, or as a Catholic individual would be unable to appreciate fully the perspective of a Jewish individual--given the unique social and cultural experiences that define each ethnic and religious group--a man would not be able fully and accurately to appreciate the unique perspective of a woman, given the specific traits and experiences that define each gender group. [FN259] Since the reasonable woman standard implicitly requires the identification and subsequent application of the female viewpoint, the inherent inability of male factfinders to appreciate the unique female perspective suggests that the reasonable woman standard does not, and cannot, adequately achieve its goal of incorporating female norms and ideals into the judicial decisionmaking process. [FN260]

***368** Proponents of the reasonable woman standard contend, however, that it is precisely this unique female perspective that not only justifies, but indeed mandates, the use of a gender-specific reasonableness standard. These proponents argue that because women's experiences are, in fact, "sex- specific, sex-linked and sex-charged," [FN261] a gender-neutral standard that does not recognize specific female perceptions

and ideals is inherently male-biased and, as a result, egregiously unjust. [FN262] Thus, advocates of the reasonable woman standard maintain that only through the application of a reasonableness standard that relies exclusively on female norms for its definition can the courts "account for the wide divergence between most women's views of appropriate sexual conduct and those of men." [FN263] These proponents further argue that even if the reasonable woman standard does not fully or accurately incorporate the female perspective into the legal system, it, at the very least, forces the courts to recognize that such a unique female perspective exists. [FN264] Such a recognition, by itself, would be a significant and positive departure from the legal system's present refusal to acknowledge the female viewpoint.

While this argument is highly persuasive, it is insufficient to justify a distinct reasonable woman standard because, first, the reasonable woman standard does not assure that female norms are accurately represented, and second, it reinforces, rather than combats, gender stereotypes.

While it is, by definition, objective, the reasonable woman standard does not specifically define appropriate conduct or proscribe certain results in particular factual circumstances. Consequently, "even under [such] an 'objective' [reasonable woman] standard, judges will have to ***369** make close judgment calls about when they think women ought to be offended and when not." [FN265] Since male judges and jurors cannot identify with either the physical traits or social experiences that define a "reasonable woman" and, therefore, are unable to understand how such a woman would feel or react in a particular situation, [FN266] these discretionary judgment calls "may reflect less an effort to see beyond the male perspective, than an attempt to evoke a woman who is, in Henry Higgins's words, 'more like a man.'" [FN267] As a result, the reasonable woman standard fails to assure a greater reliance on the female perspective than does the gender-neutral reasonable person standard. [FN268]

Similarly, while the reasonable woman standard may force the courts to recognize the existence of a unique female perspective, that recognition reinforces the precise gender stereotypes that the standard is designed to combat. Advocates of the reasonable woman standard do not regard the recognition and incorporation of female norms into the judicial decisionmaking process as an end in itself, but rather regard such recognition and incorporation as merely the means for achieving the desired end of true gender equality. [FN269] Consequently, where recognition of a distinct female viewpoint will merely serve to reinforce the traditional gender stereotypes upon which the current system of inequality is based, such recognition is highly undesirable.

The reasonable woman standard has exactly this deleterious effect. Since, as discussed previously, male factfinders have no intimate understanding of female norms and ideals, [FN270] they must rely on personal biases and ingrained stereotypes of female responses in order to evaluate conduct from the perspective of a reasonable woman. [FN271] Furthermore, by establishing the female perspective as totally separate and distinct from other perspectives, instead of incorporating that perspective into a broader and more general perspective shared, to some degree, by all persons, the reasonable woman standard undermines the effort to establish the moral irrelevance of gender. [FN272] As one scholar noted, "substituting a ***370** reasonable woman standard to judge the conduct of women, but not going further to question the

inclusiveness of the norms informing the reasonable person standard, implies that women's experiences and reactions are something for women only, rather than normal human responses." [FN273]

VI. CONCLUSIONS AND PROPOSED SOLUTION

As illustrated by the foregoing discussion, the reasonable woman standard, like the male-biased reasonable man standard that preceded it, is a legally inappropriate, practically ineffective, and socially undesirable vehicle for implementing the reasonableness principle. Initially, and most importantly, because the reasonable woman standard explicitly focuses on a person's gender group membership [FN274] and implicitly requires that "reasonableness" be applied in a manner that reflects the totality of a person's group affiliations, [FN275] the standard effectively adopts a group-rights perspective. Such a perspective is fundamentally inconsistent with the individualistic principle of formal equality that underlies the American legal system as a whole [FN276] and the reasonableness principle in particular. [FN277] Furthermore, in light of the capacity of language to shape individual and societal attitudes, [FN278] the reasonable woman standard's use of gender-specific terminology merely operates to preserve the negative biases and attitudes towards women that currently pervade society. [FN279] Finally, the reasonable woman standard is practically nonadvantageous, as male judges and jurors are unable to discern and comprehend the qualities and ideals of a "reasonable woman" without resorting to harmful gender stereotypes. [FN280]

Since the reasonable woman standard falls prey to these legal, theoretical, linguistic and practical difficulties, there is still a need for a truly objective and neutral reasonableness standard that adequately incorporates female norms and ideals into the judicial decisionmaking process, but without formally isolating women as a separate and distinct group requiring special legal protection. [FN281] This Comment proposes that the courts adopt a modified reasonable person standard [FN282] similar to the one ***371** suggested by both the American Law Institute's Model Penal Code [FN283] and the recently issued Equal Employment Opportunity Commission Guidelines. [FN284]

The modified reasonable person standard would, and must, take into account the central characteristics and significant group associations of the individual in question. [FN285] In applying the modified reasonable person standard, "the trier of fact may not simply construct a hypothetical reasonable person and imagine how that individual would have acted" or reacted in the isolated incident or event at issue. [FN286] Rather, the factfinder must evaluate the reasonableness of an individual's conduct and/or perceptions in light of that individual's vital beliefs, ideals, and physical attributes. [FN287] Thus, where a woman's actions or understandings are at ***372** issue, the modified reasonable person standard would, as a matter of law, require the judge or juror to consider female norms and ideals in making a "reasonableness" determination. [FN288]

Furthermore, unlike the more simplistic reasonable person standard utilized in Rabidue, [FN289] which fails to recognize or highlight women's viewpoints in any

meaningful sense [FN290] and, consequently, makes it easy for courts to overlook that viewpoint, [FN291] the modified reasonable person standard would require that where a woman's conduct or perceptions are at issue, jury instructions must acknowledge and reflect the female perspective. This acknowledgement may require the court simply to change the pronouns in the jury instruction from he to she, and from his to her where appropriate, [FN292] or may necessitate more extensive instructions challenging specific myths about women. [FN293] This use of jury instructions to incorporate female norms and ideals into the judicial decisionmaking process would combat the biases and male perspectives inherent in the legal system just as, if not more, effectively than would a separate and distinct reasonable woman standard. [FN294]

In addition, the use of such jury instructions in concert with a formally gender-neutral reasonable person standard is legally and theoretically preferable to the gender-specific reasonable woman standard, first, ***373** because it is a formally neutral standard of general applicability, and second, because it does not utilize gender-specific language. [FN295]

Because the modified reasonable person standard is a formally neutral standard of general applicability, it is fundamentally consistent with the individualistic model of formal equality that underlies the American legal system. [FN296] First, the modified reasonable person standard, unlike the reasonable woman standard, refuses to establish one group's views as dominant. Second, the modified reasonable person standard refuses to treat all women primarily as members of a gender group. Unlike the reasonable woman standard, the modified reasonable person standard regards each woman primarily as a separate and distinct individual possessing certain significant group affiliations. [FN297] In this manner, the modified reasonable person standard adopts the individual-rights perspective ***374** central to individualism [FN298] and effectively protects each individual's personal right to formally equal treatment. [FN299]

Likewise, because it does not expressly utilize gender-specific language, the modified reasonable person standard challenges, or, at the very least, refuses to recognize, the moral and legal relevance of gender. Unlike the reasonable woman standard, which by its phrasing inherently condones the distribution of legal benefits and burdens on the basis of gender, [FN300] the modified reasonable person standard refuses to differentiate between ideally fungible individuals on the basis of gender. [FN301] By explicitly refusing to isolate gender as a morally or legally relevant basis for comparison, the modified reasonable person standard implicitly challenges both paternalistic notions of women as a group requiring special legal protection and conventional perceptions of women as "different" from or "inferior" to men. [FN302]

***375** In the end, it may be that there can be no true gender neutrality, no perfect justice, in a society replete with unjustified and inappropriate gender distinctions. However, if we, as a society premised on the notion that each person is an individual possessing a personal right to equal treatment, do not wish to validate or perpetuate deleterious gender classifications by codifying them, such gender-specific legal constructs as the reasonable woman standard must be rejected in favor of formally gender-neutral standards. Such gender- neutral standards should be, and must be, sufficiently flexible to allow the factfinder to recognize and consider an individual's

significant group associations, but such standards must, first and foremost, treat each person primarily as an individual, rather than as merely a member of a gender group. Only when the courts formulate and adopt such truly gender-neutral standards can the legal system begin to break down the legal and social barriers that restrict each sex to its predefined role and to combat the existing conditions of gender inequality.

[FN1]. See OLIVER W. HOLMES, JR., THE COMMON LAW 46-47 (1945).

[FN2]. See infra notes 16-22 and accompanying text.

[FN3]. See infra notes 23-28 and accompanying text.

[FN4]. See infra notes 29-34 and accompanying text.

[FN5]. See infra notes 35-98 and accompanying text.

[FN6]. See infra notes 35-67 and accompanying text.

[FN7]. See infra notes 68-98 and accompanying text.

[FN8]. The phrase "prudent and reasonable man" is used in Blyth v. Birmingham Waterworks Co., 156 Eng. Rep. 1047, 1049 (Ex. Ch. 1856) (Alderson, B.J.).

[FN9]. See 2 AM. JUR. 2D Administrative Law § 686 (1962).

[FN10]. See ARMISTEAD M. DOBIE, HANDBOOK ON THE LAW OF BAILMENTS AND CARRIERS 35-36 (1914); WILLIAM F. ELLIOTT, A TREATISE ON THE LAW OF BAILMENTS AND CARRIERS 30-31 (1914); C. SMITH & R. BOYER, SURVEY OF THE LAW OF PROPERTY 463 (2d ed. 1971).

[FN11]. The term is used in a recent concurring opinion of Justice Marshall in Rogers v. Moduleed States, 422 U.S. 35, 44 (1975). Justice Marshall refused to apply the objective standard in construing the First Amendment. See id. at 44-48.

[FN12]. See JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 12 (1970); ARTHUR L. CORBIN, CORBIN ON CONTRACTS § § 645-46 (1951).

[FN13]. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW, 573-74, 578-81, 687 n.45 (1972); ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 55, 67-68, 71 (3d ed. 1982).

[FN14]. See JOHN G. FLEMING, THE LAW OF TORTS 107-13 (5th ed. 1977); 2 FOWLER V. HARPER ET AL., THE LAW OF TORTS § § 16.2-16.8 (2d ed. 1982) [hereinafter HARPER ET AL.]; W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 174-75 (5th ed. 1984) [hereinafter PROSSER & KEETON]; CLARENCE MORRIS & C. ROBERT MORRIS, MORRIS ON TORTS 49-72 (2d ed. 1988).

[FN15]. See GEORGE G. BOGERT & GEORGE T. BOGERT, HANDBOOK OF THE LAW OF TRUSTS 337-39 (5th ed. 1973). See also Johnson v. Clark, 518 F.2d 246, 251 (10th Cir.1975).

[FN16]. See, e.g., HOLMES, supra note 1, at 46-47.

[FN17]. See Leslie Bender, A Lawyer's Primer on Feminist Theory and Tort, 38 J. LEGAL EDUC. 3, 20-21 (1988); Nancy S. Ehrenreich, Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law, 99 YALE L.J. 1177, 1181 (1990).

[FN18]. See Duncan M. Kennedy, The Structure of Blackstone's Commentaries, 28 BUFF.L.REV. 205, 211-13 (1979); Gary Peller, The Metaphysics of American Law, 73 CAL.L.REV. 1151, 1201-04 (1985).

[FN19]. Joseph W. Singer, The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld, 1982 WIS.L.REV. 975, 980 (1982).

[FN20]. The excessive exercise of freedom by any one individual or group of individuals inevitably interferes with another individual's or group's ability to exercise its freedom in a similarly unrestricted manner. For example, one person's freedom to drive a car without any traffic restrictions will inevitably clash with another person's ability to exercise a similar freedom, because the two cars will crash into each other.

[FN21]. Where regulations on freedom are excessive or absolute, individuals are prevented from engaging in even that conduct that does not interfere with the rights of other individuals. For example, if the government completely prohibits all driving in an attempt to avoid traffic fatalities, the social costs of this regulation might well exceed its benefits.

[FN22]. As one commentator noted:

The reasonable man's development by the courts is generally thought to have been necessitated by the difficulty of applying a constantly changing standard based on individual capabilities and limitations, and the need of those who live in society to expect and require that all others behave, to some minimal extent, in a prescribed way.

Osborne M. Reynolds, Jr., The Reasonable Man of Negligence Law: A Health Report on the "Odious Creature", 23 OKLA.L.REV. 410, 414 (1970) (footnote omitted). Hence, a reasonable individual might well trade both complete freedom to drive recklessly and complete freedom from the reckless driving of others, for the intermediate regulation offered by traffic laws.

[FN23]. See Ehrenreich, supra note 17, at 1181.

[FN24]. Id.

[FN25]. Id.

[FN26]. PROSSER & KEETON, supra note 14, at 175 (footnote omitted).

[FN27]. Elmo Schwab, The Quest for the Reasonable Man, 45 TEX. BUS. J. 178, 178 (1982).

[FN28]. Ehrenreich, supra note 17, at 1181. See also Bender, supra note 17, at 20-21.

[FN29]. See Ehrenreich, supra note 17, at 1190; Victoria M. Mather, The Skeleton in the Closet: The Battered Women Syndrome, Self-Defense, and Expert Testimony, 39 MERCER L.REV. 567, 573 (1988).

[FN30]. See supra notes 23-28 and accompanying text.

[FN31]. See supra notes 18-22 and accompanying text.

[FN32]. Ehrenreich, supra note 17, at 1221 (footnote omitted).

[FN33]. See Mather, supra note 29, at 573. As Dean William Prosser noted in defining the principle for purposes of tort law: "The standard of conduct which the community demands must be an external and objective one, rather than the individual

judgement, good or bad, of the particular actor; and it must be, so far as possible, the same for all persons, since law can have no favorites." PROSSER & KEETON, supra note 14, at 173-74 (footnotes omitted).

[FN34]. See infra notes 35-98 and accompanying text.

[FN35]. One of the earliest references to the phrase is found in Sir William Jones' 1781 work on the law of bailments: "Thus the omission of care, which every prudent man takes of his own property, is the determinate point of negligence." WILLIAM JONES, AN ESSAY ON THE LAW OF BAILMENTS 7 (Garland Publishing 1978) (1781) (emphasis added). In tort law, where its use has been the most common, the phrase is first found in Vaughan v. Menlove, 132 Eng. Rep. 490 (C.P. 1837). In referring to the general personage of the reasonable man, the court stated: "Instead . . . of saying that the liability for negligence should be co-extensive with the judgement of each individual, . . . we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe." Id. at 493 (Tindall, C.J.) (emphasis added).

[FN36]. See Bender, supra note 17, at 22.

[FN37]. Ronald K.L. Collins, Language, History and the Legal Process: A Profile of the "Reasonable Man", 8 RUT.-CAM. L.J. 311, 317 (1977) (footnote omitted).

[FN38]. Women and the "Equal Rights" Amendment: Hearings Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. (1972).

[FN39]. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE MODULEED STATES 24 (1941).

[FN40]. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441-44 (Tucker, ed. 1803).

[FN41]. Collins, supra note 37, at 316. In Bradwell v. Illinois, Justice Bradley permitted the state of Illinois to deny Myra Bradwell the privilege of practicing law despite her qualifications. His opinion included the following discourse on women:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The harmony, not to say identity, of interests and views which belong or should belong to the family institution is repugnant to the idea of a woman adopting a

distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman has no legal existence separate from her husband, who was regarded as her head and representative in the social state. . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.
83 U.S. (16 Wall.) 130, 141-42 (1872).

[FN42]. 28 Mich. 32 (1873).

[FN43]. Id. at 34.

[FN44]. Id. at 42 (emphasis added).

[FN45]. Id. at 41-42.

[FN46]. A. P. HERBERT, UNCOMMON LAW 6 (4th ed. 1928). Herbert stated:
[I]n all [the] mass of authorities which [bear] upon this branch of the law there is no single mention of a reasonable woman . . . . [S]uch an omission, extending over a century and more of judicial pronouncements, must be something more than a coincidence; . . . among the innumerable tributes to the reasonable man there might be expected at least some passing reference to a reasonable person of the opposite sex.
Id. at 5.

[FN47]. As one commentator explained:
The original phrase "reasonable man" failed in its claim to represent an abstract, universal person. Even if such a creature could be imagined, the "reasonable man" standard was postulated by men, who, because they were the only people who wrote and argued the law, philosophy, and politics at that time, only theorized about themselves. When the standard was written into judicial opinions, treatises and casebooks, it was written about and by men. The case law and treatises are full of examples explaining how the "reasonable man" is the "man on the Clapham Omnibus" or "the man who takes the magazines at home and in the evening pushes the lawnmower in his shirt sleeves." When the authors of such works said "reasonable man," they meant "male," "man" in a gendered sense.
Bender, supra note 17, at 22.

[FN48]. See Collins, supra note 37, at 318-22.

[FN49]. See supra notes 29-33 and accompanying text.

[FN50]. See supra notes 16-28 and accompanying text.

[FN51]. See DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 20 (1989).

[FN52]. See Bender, supra note 17, at 14-15; Rhode, supra note 51 at 53-80.

[FN53]. See Rhode, supra note 51 at 81-92.

[FN54]. U.S. CONST. amend. XIV, § 1.

[FN55]. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 726 (1981) (quoting Craig v. Boren, 429 U.S. 190, 198 (1976)). The following is a representative sample of cases that invalidated certain statutes using an equal protection analysis: Kirchberg v. Feenstra, 450 U.S. 455 (1981) (statute granted only husbands the right to manage and dispose of jointly owned property without the wife's consent); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980) (statute required a widower, but not a widow, to show he was incapacitated from earning to recover benefits for a spouse's death under worker's compensation laws); Orr v. Orr, 440 U.S. 268 (1979) (only men could be ordered to pay alimony following divorce); Craig v. Boren, 429 U.S. 190 (1976) (women could purchase "nonintoxicating" beer at a younger age than could men); Stanton v. Stanton, 421 U.S. 7 (1975) (women reached majority at an earlier age than did men); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (widows, but not widowers, could collect survivors' benefits under the Social Security Act); Frontiero v. Richardson, 411 U.S. 677 (1973) (the determination of whether the spouse of a member of the Armed Forces was a dependant, was based upon the gender of the member of the Armed Forces claiming dependency benefits); Reed v. Reed, 404 U.S. 71 (1971) (statute preferred men to women as administrators of estates).

[FN56]. 435 U.S. 702 (1978).

[FN57]. Id. at 707 (citation omitted).

[FN58]. See Bender, supra note 17, at 21-23.

[FN59]. See id. at 21. For examples of this application in the law of torts see, e.g., HARPER ET AL. at § § 16.2-16.8; PROSSER & KEETON, supra note 14, at 174 n.5; STUART SPEISER ET AL., THE AMERICAN LAW OF TORTS § 9:1, at 994-95 (2d ed. 1985), and cases cited therein. In the law of sexual discrimination see, e.g., King v. Board of Regents of Univ. of Wisconsin Sys., 898 F.2d 533 (7th Cir.1990);

Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir.1986); Comment, Employer: Beware of "Hostile Environment" Sexual Harassment, 26 DUQ.L.REV. 461 (1988), and cases therein. In the law of criminal self-defense see, e.g., State v. Gallegos, 719 P.2d 1268 (N.M. Ct. App. 1986); State v. Leidholm, 334 N.W. 2d 811 (N.D. 1983); Kit Kinports, Defending Battered Women's Self-Defense Claims, 67 OR.L.REV. 393, 408-20 (1988); Mather, supra note 29, at 569-74, and cases therein.

[FN60]. 805 F.2d 611 (6th Cir.1986).

[FN61]. Id. at 615.

[FN62]. Id. at 620.

[FN63]. See supra notes 23-28 and accompanying text.

[FN64]. See infra notes 68-98 and accompanying text.

[FN65]. Rabidue v. Osceola Ref. Co. 805 F.2d 611, 620 (6th Cir.1986).

[FN66]. See supra notes 23-33 and accompanying text.

[FN67]. Rabidue, 805 F.2d at 620.

[FN68]. Bender, supra note 17, at 22.

[FN69]. Kathee R. Brewer, Note, Missouri's New Law on "Battered Spouse Syndrome:" A Moral Victory, A Partial Solution, 33 ST. LOUIS U. L.J. 227, 251 (1988).

[FN70]. Kathryn Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 VAND.L.REV. 1183, 1203 (1989).

[FN71]. Id.

[FN72]. Ehrenreich, supra note 17, at 1219 n.153. See also Bender, supra note 17, at 23 (stating that "reasonable person" implies reasonableness by male standards).

[FN73]. Krista J. Schoenheider, Comment, A Theory of Tort Liability for Sexual Harassment in the Workplace, 134 U.PA.L.REV. 1461, 1486-88 (1986).

[FN74]. This is so because men and women frequently possess very different views of the same or similar conduct. In the sexual harassment context, for example, the Ninth Circuit noted:

[B]ecause women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.

Ellison v. Brady, 924 F.2d 872, 879 (9th Cir.1991) (citation omitted).

[FN75]. Id. at 879-81.

[FN76]. Comment, Sexual Harassment Claims of Abusive Work Environment Under Title VII, 97 HARV.L.REV. 1449, 1459 (1984) [hereinafter Sexual Harassment Claims].

[FN77]. See infra note 80.

[FN78]. Rabidue v. Osceola Refining Co., 805 F.2d 611, 626 (6th Cir.1986) (citations omitted) (Keith, J., dissenting). The majority and dissenting opinions in Rabidue are analogous to the "equal treatment" and "special treatment" positions, respectively, over which feminist scholars have been debating for years. The Rabidue majority assumes that applying the same standard to women as men is not problematic, just as equal treatment advocates define justice as the application of completely sex-blind rules. In contrast, the dissent, like the special treatment advocates, seems more concerned with validating women's perceptions and achieving concrete gains for women than about complying with a sex-blind ideal of abstract equality. For a more detailed discussion of the equal treatment/special protection debate, see CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 4-10 (1979); Lucinda M. Finley, Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate, 86 COLUM.L.REV. 1118 (1986); Linda J. Krieger & Patricia N. Cooney, The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality, 13 GOLDEN GATE U.L.REV. 513 (1983); Wendy W. Williams, Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984).

[FN79]. See, e.g., Dinkens v. State, 546 P.2d 228 (Nev. 1976); State v. Bailey, 591

P.2d 1212 (Wash. Ct. App. 1979). The reasonable woman standard has also been utilized in Battered Wife Syndrome cases. For a detailed discussion of the Battered Wife Syndrome, see, e.g., Michael A. Buda & Teresa L. Butler, The Battered Wife Syndrome: A Backdoor Assault on Domestic Violence, 23 J. FAM. L. 359 (1984-85); Kinports, supra note 59, at 396-408; Mather, supra note 29, at 547-56; Elizabeth M. Schneider, Equal Rights to Trial for Women: Sex Bias and the Law of Self-Defense, 15 HARV. C.R.C.L. L.REV. 623 (1980); Brewer, supra note 69, at 229-30; Comment, Rendering Each Woman Her Due: Can a Battered Woman Claim Self-Defense When She Kills Her Sleeping Batterer?, 38 KAN.L.REV. 169 (1989).

[FN80]. See, e.g., Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir.1990); Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir.1988); Yates v. Avco Corp., 819 F.2d 630 (6th Cir.1987); Smolsky v. Consolidated Rail Corp., 780 F.Supp. 283 (E.D. Pa. 1991); Jenson v. Eveleth Taconite Co., 139 F.R.D. 657 (D.Minn. 1991); Austen v. State of Hawaii, 759 F.Supp. 612 (D.Haw. 1991); Robinson v. Jacksonville Shipyards, Inc., 760 F.Supp. 1486 (M.D. Fla. 1991); Tindall v. Housing Auth. of City of Fort Smith, 762 F.Supp. 259 (W.D. Ark. 1991); Radtke v. Everett, 471 N.W.2d 660 (Mich. Ct. App. 1991); Hughes v. City of Albuquerque, 824 P.2d 349 (N.M. Ct. App. 1991).

Courts have recognized two types of sexual harassment: "quid pro quo" and "hostile work environment." In quid pro quo harassment, the employer conditions employment advancement or employment benefits on sexual favors. Hostile work environment harassment occurs when the workplace is sexually offensive or abusive. Sandra R. McCandless & Lisa P. Sullivan, Two Courts Adopt A New Standard to Determine Sexual Harassment, NAT'L L.J., May 6, 1991 at 1, 1.

Since the Supreme Court's decision in Meritor Sav. v. Vinson, 477 U.S. 57 (1986), a plaintiff may establish a violation of Title VII by proving that sex discrimination created a hostile work environment. The Court stated: "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." Id. at 64.

To state a hostile work environment claim in most jurisdictions a plaintiff must show: (1) that he or she was subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (2) that the conduct was unwelcome; and (3) that the conduct was sufficiently severe or pervasive as to alter the conditions of the employee's employment and create a hostile work environment. Jordan v. Clark, 847 F.2d 1368, 1373 (9th Cir.1988), cert. denied, 488 U.S. 1006 (1989).

The Equal Employment Opportunity Commission's guidelines state that "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a) (1991) (emphasis added).

[FN81]. It should be noted that some legal scholars have advocated the use of the reasonable woman standard in other legal contexts as well. For example, some scholars have suggested that the reasonable woman standard should be used in evaluating whether handgun advertising is unfair or deceptive: "Since women may be

less aware of the correct usage of guns and less familiar with the handling of concealed weapons, arguably the 'reasonable woman' standard for deception might be less stringent than the reasonable person standard, and deception may be more easily found." Debra Dobray & Arthur J. Waldrop, Regulating Handgun Advertising at Women, 12 WHITTIER L.REV. 121, 123 (1991).

[FN82]. 559 P.2d 548 (Wash. 1977).

[FN83]. Id. at 559.

[FN84]. Id. at 558-59.

[FN85]. Id. at 559 (quoting Frontiero v. Richardson, 411 U.S. 677, 684 (1973)).

[FN86]. Id. at 559.

[FN87]. 924 F.2d 872 (9th Cir.1991).

[FN88]. Id. at 878-80.

[FN89]. Id. at 878.

[FN90]. Id.

[FN91]. Id. at 879.

[FN92]. Id. (emphasis added) (footnotes omitted).

[FN93]. Proponents of the reasonable woman standard contend that the focus on female norms and ideals is justified because men and women are, in reality, not similarly situated within the legal system. For a detailed discussion of this contention, see infra notes 205-19 and accompanying text.

[FN94]. See infra notes 100-219 and accompanying text.

[FN95]. See infra notes 222-47 and accompanying text.

[FN96]. See infra notes 249-73 and accompanying text.

[FN97]. See infra notes 282-99 and accompanying text.

[FN98]. See infra notes 300-02 and accompanying text.

[FN99]. See infra notes 100-43 and accompanying text.

[FN100]. See Krieger & Cooney, supra note 78, at 551-52.

[FN101]. Id. (emphasis in original). See also J.R. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY 293 (1978) (stating that "each individual . . . is entitled to claim the full and unalienable rights of man").

[FN102]. Krieger & Cooney, supra note 78, at 554.

[FN103]. For a discussion of the manner in which such formal equality combats existing conditions of inequality, see infra notes 167-72 and accompanying text.

[FN104]. Krieger & Cooney, supra note 78, at 552.

[FN105]. Id. at 551. Thomas Hobbes "is widely, and rightly, regarded as the most formidable of English political theorists; formidable not because he is difficult to understand but because his doctrine is at once so clear, so sweeping, and so disliked." C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE 9 (1962).

It should be noted that while the political philosophies of Hobbes and Locke have been the most influential, thinkers such as Montesquieu, Adam Smith, James Harrington, John Stuart Mill, and others have also had an impact upon American political theory and practice. James C. Foster, The Roots of American Notions About Equality, in ELUSIVE EQUALITY: LIBERALISM, AFFIRMATIVE ACTION, AND SOCIAL CHANGE IN AMERICA 12 (James C. Foster & Mary C. Segers eds., 1983) [hereinafter ELUSIVE EQUALITY].

[FN106]. Nature has made men so equal in the faculties of body and mind; as that though there be found one man sometimes manifestly stronger in body or of quicker mind than another, yet, when all is reckoned together, the difference between man and man is not so considerable as that one man can thereupon claim to himself any benefit

to which another man may not pretend as well as he. For as to the strength of body, the weakest has strength enough to kill the strongest. . . . And as to the faculties of the mind . . . I find yet a greater equality among men than that of strength.
THOMAS HOBBES, LEVIATHAN 94 (W.G. Pogson Smith ed., 1909) (1651).

[FN107]. Id. at 95.

[FN108]. Id.

[FN109]. Id.

[FN110]. Id.

[FN111]. Foster, supra note 105, at 16.

[FN112]. This is so because, as discussed previously, where individuals are completely free to pursue individual goals and compete without restriction for finite resources, conflict and disorder inevitably result. See supra notes 18- 21 and accompanying text. This conflict creates the pressing need for a political authority that will regulate conduct and, consequently, will prevent, or at least mediate, conflicts between individuals. See Foster, supra note 105, at 16.

[FN113]. ELIZABETH H. WOLGAST, THE GRAMMAR OF JUSTICE 4-5 (1987) (footnotes omitted).

[FN114]. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 309 (Peter Laslett ed., 1965) (1690).

[FN115]. Id.

[FN116]. Id. at 346.

[FN117]. Foster, supra note 105, at 17.

[FN118]. C.B. Macpherson, Introduction to JOHN LOCKE, SECOND TREATISE OF GOVERNMENT xix (C.B. Macpherson ed., 1980) (1690).

[FN119]. This is so because money is a durable medium of exchange. Under a barter system in which individuals trade, for example, meat for vegetables, people would only be able to take what they need to survive because any excess would spoil. Money, however, does not spoil and can be hoarded. Consequently, money will cause people to violate the fundamental natural principle "take only what you need" and scarcity will result.

[FN120]. Macpherson, supra note 118, at xi.

[FN121]. Id.

[FN122]. Id.

[FN123]. Id.

[FN124]. LOCKE, supra note 114, at 46.

[FN125]. Id.

[FN126]. Foster, supra note 105, at 17-18 (quoting LOCKE, supra note 114, at 367) (citations omitted).

[FN127]. Krieger & Cooney, supra note 78, at 555.

[FN128]. Id. at 555-56.

[FN129]. Id. at 554.

[FN130]. POLE, supra note 101, at 293 ("The individualist principle dissociates people from the context of family, religion, class, or race and when linked with the idea of equality in the most affirmative sense . . . it assumes the co-ordinate principle of interchangeability.").

[FN131]. As one commentator noted:

The cultural chemistry between the work of these two British philosophers and the founding of a new nation on the vast North American continent resulted in an enduring ideological bond, a bond which exists to this day. In an almost uncanny way American political culture continues to reproduce Hobbes's and Locke's political

theories.
Foster, supra note 105, at 11. It is interesting to note that John Locke's doctrine has frequently been cited as an important theoretical foundation of the American Revolution itself. See, e.g., JOHN DUNN, THE POLITICAL THOUGHT OF JOHN LOCKE 6-7 (1969); Macpherson, supra note 118, at xxi.

In fact, the interchangeability principle central to individualism has been the theoretical foundation of such important legislative initiatives as the Civil Rights Act of 1964 and the Equal Rights Amendment. See RHODE supra note 51, at 65-68; Ellen F. Paul, Sexual Harassment as Sex Discrimination: A Defective Paradigm, 8 YALE L. & POL'Y REV. 333, 336 (1990).

[FN132]. As noted by Judge Stephens in his dissent in Ellison v. Brady,

Nowhere in section 2000e of Title VII, the section under which the plaintiff in this case brought suit, is there any indication that Congress intended to provide for any other than equal treatment in the area of civil rights. The legislation is designed to achieve a balanced and generally gender neutral and harmonious workplace which would improve production and the quality of the employees' lives. In fact, the Supreme Court has shown a preference against systems that are not gender or race neutral, such as hiring quotas. See City of Richmond v. J.A. Croson Co., [488 U.S. 469 (1989)].

924 F.2d 872, 884 (9th Cir.1991). See also Paul Brest, The Supreme Court, 1975 Term - Foreword: In Defense of the Antidiscrimination Principle, 90 HARV.L.REV. 1, 1, 21 (1976); Ruth Colker, Anti-Subordinate Above All: Sex, Race, and Equal Protection, 61 N.Y.U.L.REV. 1003, 1058 (1986); Owen M. Fiss, Groups and the Equal Protection Clause, in EQUALITY AND PREFERENTIAL TREATMENT 84-154 (M. Cohen et al. eds., 1976); Krieger & Cooney, supra note 78, at 552 n.123.

[FN133]. Krieger & Cooney, supra note 78, at 552 n.123. For example, writing for the majority in Shelley v. Kraemer, 334 U.S. 1, 22 (1948), Justice Vinson noted that "[t]he rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The Rights established are personal rights. . . . Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." Similarly, in Connecticut v. Teal, 457 U.S. 440 (1982), the Court stated that "Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired. . . . Every individual employee is protected against both discriminatory treatment and 'practices that are fair in form, but discriminatory in operation.'" Id. at 455-56 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)). Finally, in University of California Regents v. Bakke, 438 U.S. 265 (1977), the Court explained that "[i]ndeed, in a broader sense, an underlying assumption of the rule of law is the worthiness of a system of justice based on fairness to the individual. As Justice Frankfurter declared in another connection, '[j]ustice must satisfy the appearance of justice.'" Id. at 319 n.53 (quoting Offut v. United States, 348 U.S. 11, 14 (1954)). These opinions demonstrate the Court's reliance on the individualistic model in deriving results. See also Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579 (1978); Teamsters v. Moduleed States, 431 U.S. 324, 342 (1977); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279 (1976); Oyama v. California, 332 U.S. 633 (1948); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); McCabe v. Atchison, Topeka

& Santa Fe Ry., 235 U.S. 151, 161-62 (1914).

[FN134]. See supra notes 132-33 and accompanying text.

[FN135]. See Ehrenreich, supra note 17, at 1184. For examples of statutes that have been invalidated by the Court on these grounds see supra note 247.

[FN136]. 435 U.S. 702 (1978).

[FN137]. Id. at 703-05.

[FN138]. Id. at 708 (emphasis added). The decision in Manhart was bolstered by the Court's ruling in Arizona Governing Comm. v. Norris, 463 U.S. 1073 (1983), in which the Court invalidated Arizona's voluntary pension plan, under which the state offered its employees the option of receiving retirement benefits from one of several companies selected by it, all of which paid women lower monthly retirement benefits than men who had made the same contributions. For further discussion of the Norris case, see infra note 209.

[FN139]. 429 U.S. 190 (1976).

[FN140]. Id. at 200-04.

[FN141]. Id. at 204.

[FN142]. Id. at 198-99.

[FN143]. Colker, supra note 132, at 1005-06.

[FN144]. See supra notes 132-42 and accompanying text.

[FN145]. See supra notes 106-21 and accompanying text.

[FN146]. See Ehrenreich, supra note 17, at 1181.

[FN147]. See supra notes 23-33 and accompanying text.

[FN148]. See Ehrenreich, supra note 17, at 1182. Some critics may contend that the "reasonableness" principle is fundamentally at odds with individualism because it focuses on the values of the communityas a whole rather than on the values of the particular individual. This argument misunderstands the basic premise of individualism. Individualism does not require the law and the legal system to evaluate each person according to his or her own individual characteristics or viewpoints, but rather requires that each person be treated as a distinct individual, inherently equal to all other individuals in civil society. If individualism required that each person judged only his or her own ideals, the conflict of interests which both Hobbes and Locke spoke of would be irreconcilable. However, because individualism merely requires that each person be treated as a separate and equal being, the imposition of neutral community standards is both allowable and desirable because it enables the law to mediate the conflict of interests while protecting the individual's personal right to equal treatment. Thus, the "reasonableness" principle, so long as it is facially neutral, is quite compatible with the individual model of equality.

[FN149]. See supra notes 63-65 and accompanying text.

[FN150]. See supra notes 68-93 and accompanying text.

[FN151]. See supra notes 63-98 and accompanying text.

[FN152]. 471 N.W.2d 660 (Mich. Ct. App. 1991).

[FN153]. Id. at 664.

[FN154]. This is so because to view and, consequently, treat each individual as though he or she were merely a member of a particular gender group is effectively to ignore that individual's status as a separate and distinct individual with specific characteristics that may vary quite significantly from the group norm. See Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 (1978). This failure to recognize a person's fundamental individuality is inherently at odds with the central tenets of individualism and the individualistic model of formal equality. See infra notes 158-63 and accompanying text.

[FN155]. See supra notes 164-66 and accompanying text.

[FN156]. See supra notes 167-72 and accompanying text.

[FN157]. See supra notes 173-93 and accompanying text.

[FN158]. See CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982); Colker, supra note 132, at 1003; Donna Greschner, Feminist Concerns with the New Communities: We don't Need Another Hero, in LAW AND THE COMMUNITY: THE END OF INDIVIDUALISM 119-50 (Allan C. Hutchinson & Leslie J.M. Green eds., 1989).

[FN159]. One scholar explained:

On descriptive grounds, they [cultural feminists] argue that connectedness and care, as a metaphysics and an ethics, more accurately reflect a woman's experiences than liberalism's paradigm of separate persons relating to each other through the mechanism of abstract rights. More importantly, on prescriptive grounds they argue that women's nurturing capacities and the care model should not just be valued, they should become the model for a far larger set of human interactions.

Greschner, supra note 158, at 127.

[FN160]. See supra note 116 and accompanying text.

[FN161]. See C. Edwin Baker, Sandel on Rawls, 133 U.PA.L.REV. 895, 897- 905 (1985); Will Kymlicka, Liberalism and Community, 18 CANADIAN J. OF PHIL. 181 (1988); Denise Reaume, Is There a Liberal Conception of the Self?, 9 QUEEN'S L.J. 352 (1984).

[FN162]. For example, individualism does not regard a woman as merely an individual indistinguishable from every other individual in society. Rather, individualism regards a woman as an individual with her own unique characteristics and attributes, included among which is her femaleness. See supra notes 116-29 and accompanying text.

[FN163]. Cf. Isaac D. Balbus, Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law, 11 LAW & SOC'Y REV. 571, 578 (1977) ("[A legal] form that defines individuals as individuals only insofar as they are severed from the social ties and activities that constitute the real ground of their individuality necessarily fails to contribute to the recognition of genuine individuality.").

[FN164]. Paul, supra note 131, at 360-61.

[FN165]. See Brest, supra note 132, at 48 ("[G]roup membership is always a proxy for the individual's right not to be discriminated against. Similarly, remedies for race-specific harms recognize the sociological consequences of group identification and affiliation only to assure justice for individual members. . . ." (emphasis added)).

[FN166]. Id.

[FN167]. See supra notes 68-75 and accompanying text.

[FN168]. See supra notes 76-93 and accompanying text.

[FN169]. See supra notes 37-47 and accompanying text.

[FN170]. Williams, supra note 78, at 329-30. See also Barbara A. Brown et al., The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 YALE L.J. 871, 889-93 (1971).

[FN171]. See supra notes 100-29 and accompanying text.

[FN172]. One scholar explained the importance of this aspect of individualism to the feminist movement:

Feminism cannot disregard this teaching. The notion of separate, equal selves with the capacity of choice and change gives us a critical space, it gives us a lever to help move the accumulated weight of centuries of patriarchy. . . . [H]ere is where the language of feminism intersects with liberalism. . . . We may begin, as do the commutarians with a situated self, but our aim is to renegotiate our identities.

Greschner, supra note 158, at 141.

[FN173]. See supra notes 68-72 and accompanying text.

[FN174]. 924 F.2d 872 (9th Cir.1991).

[FN175]. Id. at 878-79.

[FN176]. See infra notes 181-90 and accompanying text.

[FN177]. 765 F.Supp. 1509 (D.Me. 1991).

[FN178]. Id. at 1517-21.

[FN179]. Id. at 1516.

[FN180]. Id. at 1515-16 (footnotes omitted).

[FN181]. Traditionally "suspect" classes include race, see, e.g., Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Brown v. Board of Educ., 347 U.S. 483 (1954), ethnic origin, see, e.g., Hernandez v. Texas, 347 U.S. 475 (1954); Korematsu v. Moduleed States, 323 U.S. 214 (1944); Hirabayashi v. Moduleed States, 320 U.S. 81 (1943), alienage, see, e.g., In re Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971), and legitimacy, see, e.g., Trimble v. Gordon, 430 U.S. 762 (1977); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968).

[FN182]. Sex is the only clear "quasi-suspect" class. See, e.g., Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979); Kahn v. Shevin, 416 U.S. 351 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973). However, there is support for the claim that both age, see Vance v. Bradley, 440 U.S. 93 (1979); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976), and intelligence, see City of Cleburne, Texas v. Cleburne Living Ctr., 473 U.S. 432 (1985); James V. Dick, Note, Equal Protection and Intelligence Classifications, 26 STAN.L.REV. 647 (1974), are similarly "quasi-suspect" classes.

[FN183]. See Harris v. International Paper Co., 765 F.Supp. 1509, 1515- 16 (D.Me. 1991).

[FN184]. See Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1250 (6th Cir.1985).

[FN185]. See Calcotte v. Texas Educ. Found., Inc., 458 F.Supp. 231 (W.D. Tex. 1976).

[FN186]. See Cariddi v. Kansas City Chiefs Football Club, 568 F.2d 87 (8th Cir.1977).

[FN187]. See Torres v. County of Oakland, 758 F.2d 147 (6th Cir.1985).

[FN188]. See Compston v. Borden, Inc., 424 F.Supp. 157 (S.D. Ohio 1976).

[FN189]. See Wright v. Methodist Youth Servs., Inc., 511 F.Supp. 307 (N.D. Ill.

1981).

[FN190]. It must be noted that the need for such specifically designed "reasonableness" standards is not specifically mandated by the courts utilizing the reasonable woman standard, but is merely an illustration of the current logic that both explicitly and implicitly underlies the standard.

[FN191]. See supra notes 127-29 and accompanying text.

[FN192]. See infra notes 208-19 and accompanying text.

[FN193]. See supra notes 23-28 and accompanying text.

[FN194]. See supra notes 100-43 and accompanying text.

[FN195]. LOCKE, supra note 114, at 367.

[FN196]. Foster, supra note 105, at 18.

[FN197]. Ehrenreich, supra note 17, at 1190.

[FN198]. See supra notes 68-75 and accompanying text.

[FN199]. See supra notes 76-93 and accompanying text.

[FN200]. LOCKE, supra note 114, at 367.

[FN201]. Krieger & Cooney, supra note 78, at 555-56.

[FN202]. See supra notes 76-81 and accompanying text.

[FN203]. See Schoenheider, supra note 73, at 1488 n.156. Some may argue that, in light of the individualistic model, the reasonable woman standard should be utilized in all cases, thereby subjecting all individuals to the same measure of appropriate conduct. While this approach would allow the reasonable woman standard to comply with some of the mandates of individualism, it is legally inappropriate for two

reasons. First, such a universal application is theoretically inconsistent with the basic rationale for the reasonable woman standard, namely that each person is entitled to the application of a standard that reflects the norms of his or her gender group. Second, such an application may violate equal protection by subjecting men to a standard that explicitly excludes their group's perspective. See Buda & Butler, supra note 79, at 378- 80; Mather, supra note 29, at 572-74.

[FN204]. This is so because, as discussed earlier, the individualistic model of formal equality requires that the courts/government utilize formally equal rules and standards to regulate and evaluate conduct. When courts establish two or more different standards to evaluate similar conduct, they explicitly violate this requirement. See supra notes 124-29 and accompanying text.

[FN205]. See MACKINNON, supra note 78, at 4-10; Krieger & Cooney, supra note 78, at 547-55.

[FN206]. Ronald Dworkin has observed that the concept of equality can be viewed in two very distinct ways. The first is to view the right to equality as a right of equal treatment (this is the view adopted by individualism). The second is to view equality as the right to treatment as an equal, which focuses on equality of effect rather than equality of treatment. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 227 (1978).

[FN207]. Krieger & Cooney, supra note 78, at 553.

[FN208]. See supra notes 151-57 and accompanying text.

[FN209]. Arizona Governing Comm. v. Norris, 463 U.S. 1073 (1983), illustrates this point. In Norris, a class action suit was brought challenging the constitutionality of Arizona's voluntary pension plan, under which the state offered its employees the option of receiving retirement benefits from one of several companies selected by it, all of which paid women lower monthly benefits than men who had made the same contributions. Relying on the precedent established in Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978), the Court held that the pension plan constituted sex discrimination because it implicitly relied on a generalization that women, as a class, live longer than men:

This underlying assumption--that sex may be properly used to predict longevity--is flatly inconsistent with the basic teaching of Manhart: that Title VII requires employers to treat their employees as individuals, not "as simply components of a racial, religious, sexual, or national class." 435 U.S. at 708. Manhart squarely rejected the notion that, because women as a class live longer than men, an employer may adopt a retirement plan that treats every individual woman less favorably than every individual man.

Norris, 463 U.S. at 1083.

[FN210]. See supra notes 124-29 and accompanying text.

[FN211]. Michael J. Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 COLUM.L.REV. 1024, 1052-53 (1979).

[FN212]. Bette N. Evans, Thinking Clearly About Equality: Conceptual Premises and Why They Make a Difference, in ELUSIVE EQUALITY, supra note 105, at 103.

[FN213]. Id. As Wendy Williams explained:

Men and women, blacks and whites are different. If they were not they would not exist as categories. The focus . . . should be on whether the differences should be deemed relevant in the context of particular employment rules. For purposes of eating peas, a knife is not functionally the same as a fork; but if both utensils are silver, the difference is irrelevant to a thief.

Williams, supra note 78, at 357.

[FN214]. Evans, supra note 212, at 103.

[FN215]. Id. at 103, 111.

[FN216]. See supra notes 76-98 and accompanying text. The arbitrariness of this gender focus was noted by Judge Stephens:

It is clear that the authors of the majority opinion intend a difference between the "reasonable woman" and the "reasonable man" in Title VII cases on the assumption that men do not have the same sensibilities as women. This is not necessarily true. A man's response to circumstances faced by women and their effect upon women can be and in given circumstances may be expected to be understood by men. It takes no stretch of the imagination to envision two complaints emanating from the same workplace regarding the same conditions, one brought by a woman and the other by a man. Application of the "new standard" presents a puzzlement which is born of the assumption that men's eyes do not see what a woman sees through her eyes. 924 F.2d 872, 884 (9th Cir.1991) (Stephens, J., dissenting).

For a discussion of how women are "similarly situated" to men for purposes of securing employment, see Ruth B. Ginsburg, Gender and the Constitution, 44 U.CIN.L.REV. 1 (1975); Richard A. Wasserstrom, Racism, Sexism, and Preferential Treatment: An Approach to the Topics, 24 UCLA L.REV. 581 (1977).

[FN217]. In fact, such generic standards would not only incorporate the female perspective, but would have the additional benefit of incorporating the perspectives of blacks, Hispanics, Native Americans, and other historically disadvantaged groups without the creation of additional "reasonableness" standards. As discussed in Part II-

A, creation of such standards is extremely undesirable. As Judge Stephens put it:

While women may be the most frequent targets of this type of conduct that is at issue in this case [offensive or bothersome sexual letters in the workplace], they are not the only targets. I believe that it is incumbent upon the court in this case to use terminology that will meet the needs of all who seek recourse under this section [2000e] of Title VII. Possible alternatives that are more in line with a gender neutral approach include "victim," "target," or "person."

924 F.2d at 884 (Stephens, J., dissenting).

[FN218]. This focus on gender is obvious in the judicial decisions that have relied on the reasonable woman standard, see, e.g., Ellison v. Brady, 924 F.2d 872, 878-80 (9th Cir.1991); Radtke v. Everett, 471 N.W.2d 660, 664-65 (Mich. Ct. App. 1991), and in the scholarly articles that have advocated such a standard, see, e.g., Abrams, supra note 70, at 1205; Sexual Harassment Claims, supra note 76, at 1459.

[FN219]. On this point, one commentator stated:

Given the difficulty of administering a rule based on a distinction between 'factual' and 'normative' generalizations about women, and given the extent to which even gender-dependent laws based on a factual generalization about women weaken the effort to establish the principle of the moral irrelevance of gender, all gender-dependent laws disadvantaging women ought to be subject to a heavier burden of justification. The principle of the moral irrelevance of gender is better served thereby.

Perry, supra note 211, at 1053. Professor Wendy Williams expounded on this point:

The first proposition essential to this analysis is that sex-based generalizations are generally impermissible whether derived from physical differences such as size and strength, from cultural role assignments such as breadwinner or homemaker, or from some combination of innate and ascribed characteristics, such as the greater longevity of the average woman compared to the average man. Instead of classifying on the basis of sex, lawmakers and employers must clarify on the basis of the trait or function or behavior for which sex was used as a proxy. Strength, not maleness, would be the criterion for certain jobs; economic dependency, not femaleness, the criterion for alimony upon divorce. The basis for this proposition is a belief that a dual system of right inevitably produces gender hierarchy and, more fundamentally, treats women and men as statistical abstractions rather than as persons with individual capacities, inclinations and aspirations--at enormous cost to women and not insubstantial cost to men.

Williams, supra note 78, at 329-30.

[FN220]. See supra notes 68-98 and accompanying text.

[FN221]. See supra notes 35-72 and accompanying text.

[FN222]. ADAM SCHAFF, LANGUAGE AND COGNITION 145-46 (O. Wojtasiewicz trans. 1973).

[FN223]. Id. at 57.

[FN224]. See BENJAMIN L. WHORF, LANGUAGE, THOUGHT AND REALITY (J. Carroll ed., 1970).

[FN225]. Collins, supra note 37, at 321.

[FN226]. See SCHAFF, supra note 222, at 55.

[FN227]. Id. at 71.

[FN228]. Collins, supra note 37, at 321. See also Peller, supra note 18, at 1167-70 (language is a socially constructed and facile manipulator of our understanding rather than a neutral descriptive tool).

[FN229]. ROBIN LAKOFF, LANGUAGE AND WOMAN'S PLACE (1975).

[FN230]. Id. at 1-50.

[FN231]. MARY R. KEY, MALE/FEMALE LANGUAGE (1975).

[FN232]. Id. at 22.

[FN233]. Id. at 139-47.

[FN234]. CASEY MILLER & KATE SWIFT, WORDS AND WOMAN (1976).

[FN235]. Collins, supra note 37, at 322.

[FN236]. Karl Llewellyn, A Realistic Jurisprudence--The Next Step, 30 COLUM.L.REV. 431, 453 (1930). As one scholar explained:

In law, the proper use of words is always a matter of paramount importance. In fact, verbal precision is a hallmark of the legal trade. Those in the profession know well that because what is said often has a pronounced effect on what is eventually done, mastering language is essential to effective lawyering. Unfortunately, but not accidentally, the words chosen by these masters of language are not always as precise

as they seem and have too often obscured the practical significance of their use. Collins, supra note 37, at 311-12.

[FN237]. Llewellyn, supra note 236, at 454. Llewellyn used as an example the legal concept of "master-servant." This locution actively resisted change even as social reality shifted to the new industrial labor relationship between employer and employee. Id. For a discussion of the "reasonable man" locution, see Dolores A. Donovan & Stephanie M. Wildman, Is the Reasonable Man Obsolete?: A Critical Perspective on Self-Defense and Provocation, 14 LOY.L.A.L.REV. 435, 464 (1981).

[FN238]. As some commentators have explained: "By analogy, the objective reasonable man standard in provocation and, to a lesser extent, in self-defense has resisted alteration in accord with the emerging social reality of women, minority group members, and individuals not in the mainstream of middle-class values." Donovan & Wildman, supra note 237 at 464.

[FN239]. Collins, supra note 37, at 322-23.

[FN240]. See supra notes 35-72 and accompanying text. See also Collins, supra note 37, at 313-20; Finley, supra note 78, at 1155-57.

[FN241]. See Collins, supra note 37, at 322-23. This institutionalization of women's "inferiority" is particularly evident in language such as that used in State v. Wanrow, 559 P.2d 548 (Wash. 1977). In Wanrow, the court stated that, "care must be taken to assure that our self-defense instructions afford women the right to have their conduct judged in light of the individual physical handicaps which are the product of sex discrimination." Id. at 559 (emphasis added). The use of the term "physical handicaps" suggests that the court, while attempting to secure fair and equitable results for the female litigant, regards women as fundamentally "disadvantaged" or "handicapped." It is precisely this type of language that perpetuates the notion that women are weaker than men and require "special protection."

[FN242]. Finley, supra note 78, at 1154.

[FN243]. See supra notes 73-93 and accompanying text.

[FN244]. See Collins, supra note 37, at 322-23.

[FN245]. See supra notes 35-72 and accompanying text.

[FN246]. Orr v. Orr, 440 U.S. 268, 283 (1979).

[FN247]. For examples of such legislation, see Goesaert v. Cleary, 335 U.S. 464 (1948) (upholding a state statute that forbade women from becoming bartenders unless their husbands or fathers were bartenders); Muller v. Oregon, 208 U.S. 412 (1908) (sustaining an Oregon law that provided that "no female" shall be employed in any factory or laundry "more than ten hours during any one day").

[FN248]. See supra notes 100-247 and accompanying text.

[FN249]. Sexual Harassment Claims, supra note 76, at 1459.

[FN250]. See supra notes 73-93 and accompanying text.

[FN251]. See Abrams, supra note 70, at 1202-04.

[FN252]. 924 F.2d 872 (9th Cir.1991). This case is discussed supra at notes 87-88 and accompanying text.

[FN253]. 924 F.2d at 878.

[FN254]. If judicial factfinders are not, in fact, effectively able to make such accurate assessments, then the reasonable woman is useless in practice, as judges and jurors are forced to make "reasonableness" determinations in the precise manner, and relying on the same considerations, that they did when using a reasonable man or a reasonable person standard.

[FN255]. It should be noted that proponents of the reasonable woman standard implicitly acknowledge this argument in their criticism of the reasonable person standard. As discussed in Section I, these proponents contend that the reasonable person standard is fundamentally male-biased and, consequently, that a gender-specific reasonable woman standard is required to overcome this bias. It is this male bias, however, that similarly undermines the effectiveness of the reasonable woman standard itself. It is male judges' and jurors' inability to understand or apply the female perspective that forces factfinders using the reasonable person standard (purportedly) to resort to male norms; but similarly, factfinders using the reasonable woman standard are forced to resort to male stereotypes of female behavior.

[FN256]. Abrams, supra note 70, at 1203.

[FN257]. As noted in Sandra R. McCandless & Lisa P. Sullivan, Two Courts Adopt New Standard to Determine Sexual Harassment, NAT'L L.J., May 6, 1991, at 18, 19:

Some people believe, for example, that the reasonable-woman standard may be paternalistic and dangerous to enforce. The dissenting opinion in Ellison called the standard "ambiguous" and "inadequate." Indeed, even the majority opinion in Ellison alluded to what may be the most obvious problem with the reasonable-woman standard--that it may be difficult for a male co-worker to see things from a reasonable woman's perspective. Similarly, it may be very difficult to ask male jurors to place themselves in a reasonable woman's position when attempting to determine whether or not sexual harassment has occurred.

[FN258]. As one commentator explained:

We do not have a working concept of female objectivity untainted by the male viewpoint. . . . [And yet a] woman's reaction in a situation in which a man threatens her, particularly her spouse or boyfriend, will be intrinsically and significantly different than that of a man in a similar situation.

Mather, supra note 29, at 573 (citations omitted).

[FN259]. In evaluating the practical difficulties associated with the reasonable woman standard, this Comment assumes the truth of the basic premise of the argument in favor of the new standard: that there are legally relevant differences between men and women. See supra notes 205-07 and accompanying text.

[FN260]. Advocates of the reasonable woman standard may argue that even though men are unable to understand the female perspective without help, such a perspective could be accurately communicated by the use of expert testimony. Such testimony might include, for example, that of similarly situated women or of medical and/or psychological experts.

This argument is unpersuasive. First, the use of expert testimony is fundamentally inconsistent with both the "reasonableness" principle and with the American jury system. As discussed in Part I, "reasonableness" establishes an objective boundary between the acceptable exercise of individual freedom and the unacceptable interference with the rights of others. This principle relies on prevailing social norms for its definition. In the American jury system, these social norms are presumed to be within the common knowledge of every citizen, thus allowing all citizens to adjudicate disputes among and between their peers. Where a particular norm requires expert testimony in order to be understood, it obviously fails to be within the common knowledge of every citizen. Such is the case with the reasonable woman standard. While that standard might be commonly understood by women, it cannot be by men. Responding to this situation by creating a need for expert testimony is an inappropriate solution to the problems of the reasonable woman standard.

Second, expert testimony is insufficient to overcome male factfinders' inherent inability to understand the female perspective. As discussed in this Part, men have no personal knowledge of either the physical traits or social experiences that define a woman and condition her responses in particular situations. The mere introduction of third-party evidence as to how a woman might feel or react does not allow a man to

understand the true nature of those feelings or reactions. Thus, expert testimony would not enable men fully to comprehend or appreciate the female perspective. Without such comprehension the reasonable woman standard does nothing more than force male factfinders to rely on personal biases or stereotypes to determine how a woman would respond.

[FN261]. Mather, supra note 29, at 573.

[FN262]. See Ellison v. Brady, 924 F.2d 872, 878 (9th Cir.1991); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 626 (6th Cir.1986) (Keith, J., concurring in part, dissenting in part); State v. Wanrow, 559 P.2d 548, 559 (Wash. 1977); Sexual Harassment Claims, supra note 76, at 1459.

[FN263]. Rabidue, 805 F.2d at 626.

[FN264]. See Ehrenreich, supra note 17, at 1219 n.153.

[FN265]. Paul, supra note 131, at 359.

[FN266]. See supra notes 256-60 and accompanying text.

APPENDIX 3

The sample essay and court report in this Module Guide are provided to you by way of illustration. They are NOT to be copied and used for the purposes of your own coursework submission in this Module or in any other Module on this degree. Please also note that whilst the references for this essay appear at the end of the document, in downloading the document the reference numbering has disappeared.

Sample Essay: Matthew Palazon - Women and the Law 2 (2008 1st Class Hons student)
Extended Essay: Provocation/Domestic Violence

'Provocation was designed by men for men, and has always been of more use to husbands than to the few wives who have tried to use it.'

This is the proposition that will be examined in respect of the application of the defence, its historical lineage and the new Government proposals for reform. This essay will begin by considering the feminist and critical legal theories which provide a basis for understanding and analysing the law on provocation. It will then look at the defects of the law prior to the Government's new proposals in relation to the theoretical debate and will conclude by considering the benefits and deficiencies of the proposed reform, including whether an imbalance would be created against men.

Provocation is defined by s 3 of the Homicide Act 1957 and it is a partial defence which operates to reduce a charge of murder to one of manslaughter where: on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

On a straightforward reading of the Statute there is no reason (other than the difficulties surrounding the application of the reasonable man test) that the defence should not apply equally to both sexes. However, difficulties arise from its historical development. The defence was originally a creature of the common law and accordingly there has been a great deal of sometimes contradictory judicial interpretation since its conception in the mid 16th Century. It is exactly because of the age of the defence that it has been inextricably linked with patriarchy and power. The very basis of patriarchy rests upon a number of assumptions and presuppositions. That is, the oppositional dualism of nature and culture, and its socialised association to gender. Whilst historically men have been associated with culture, logic, objectivity, and rational thought so women have been forcibly associated with the converse qualities and deemed to be ruled by nature to such an extent that they are biologically unsuitable to participation in public affairs. Moreover, the qualities deemed to be naturally occurrent in women exist within a structured hierarchy where every corresponding male quality is considered superior and more valued in social dealings. Consequently, for the majority of the "civilised" centuries women have existed within a cultural dichotomy which separates the public and the private into two almost mutually independent spheres; the home being the domain of a woman (until the man returns) and the public sphere belonging rightfully to men. JS Mill notes that the state has historically enforced the subordination of women to men on the grounds of giving legal sanction to already existing power relationships on the basis that these relationships are natural, right and proper. Moreover, he notes that women who have been economically and legally dependent upon their husbands are socialised to believe that 'it is the duty of women, and… that it is their nature to live for others: to make complete abnegation of themselves, and to have no life but in their affections.' Thus, 'the private, regarded in legal ideology as unsuitable for legal regulation is ordered according to an ideology of love.' However, what there is in essence is a form of contract. A great deal of liberal thought centres around the notion of contract. Society is explained through the idea of a social contract and since the promulgation of capitalism contract law is a central part of everyday life. What is assumed in the relationship between men and women is that the part of family production which rightfully belongs to women is that of the private sphere which is unregulated and unpaid. Accordingly,

women, their domestic work, their bodies and their sexuality are controlled by the man in the relationship who appropriates all that is hers through the inequality of family contract. In short, 'underlying a complicated reality is the belief that women's natures are such that they are properly subjected to men and their proper place is in the private domestic sphere.' The liberal notion of the public and the private spheres is characterised by the belief that there is 'a realm of private morality which is, in brief and crude terms, not the law's business' and that this realm is and should be the home since 'the house of everyone is his castle'. The basis of this concept is that the social contract, for which men surrendered their personal rights to retribution, was entered into to protect personal property, property being the basis of all relationships. In fact, Sullivan notes that the protection of property was the only accepted provoking act in the 17th century. This comprising of an assault on oneself, kinsman or friend (since a man has a proprietary right in his own body), or the sight of an Englishman unlawfully deprived of his liberty (for similar reasons), or seeing a man in the act of adultery with his wife. As Lord Holt stated in R v Mawgridge the defence of provocation applied most emphatically to the husband of an adulteress:

When a man is taken in adultery with another man's wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter; for jealousy is the rage of man, and adultery is the highest invasion of property. Thus the historical basis of the defence of provocation has practically no relevance to women since it developed in relation to property right's (of which women had none) and in respect of a man's honour. What is interesting is that the formulation by Lord Holt sets the defence as justificatory rather than exculpatory, as there is no reference to a sudden loss of control, but rather it is the husband's rightful expression of his indignation. 'It was a case of hot-blooded yet controlled vindication of one's honour rather than spontaneous, uncontrolled fury.' In fact, it was not until 'the eighteenth and nineteenth centuries [that] a conception of anger as a condition incompatible with the exercise of reason achieved prominence.' It goes someway to evidence the imbalance within the law that a sudden confession of adultery was not overruled as a ground for provocation until 1946 when in Holmes v DPP the court stated that 'as society advances it ought to call for a higher measure of self-control in all cases.' The status on of women as property is one very compelling explanation for the

existence of domestic violence. The historical standpoint in regards to marriage was that husband and wife became one person upon marriage (and that one person was the man), thus, the wife being the property of the man, was required to act as the man wished. Any perceived misbehaviour on her part was, as per the pattern of thinking at that time, an insult to his honour and embarrassing to him in his public dealings, moreover he was legally accountable for her actions. There was therefore a lawful right to administer moderate castigation to one's wife so long as the punishment did not kill or deform her and the whip used was no thicker than the husband's thumb. 'Thus the husband's rights of coercion went hand in hand with his rights of possession.' The consequence of this is that 'long after society abandoned its formal approval of spousal abuse tolerance of it continued and continues in some circles to this day.' Another of the main issues which have caused problems for women in respect of provocation is the reasonable man standard. There are numerous problems with the concept of reasonableness. Historically it can be seen that women were excluded from all areas of civil life, including the law. Accordingly, the standards of justice the law values, such as objectivity and liberalness, are a product of the men who created it. In conjunction with this, a devaluing of the posited binary opposites associated with women has led to a legal system which is unsympathetic to the female experience and which is instrumental in the subjugation of women. A clear example of this is the Persons Case where the court held that women were not "persons" for the purposes of the British North America Act. This is reflective of the historical fact that women 'were not regarded as persons under the law; [they] were regarded as chattel, as property.' Consequently, the courts were reluctant to apply the reasonable man standard to women, as in Daniels v Clegg where the court refused to apply it on the basis that in view of a woman's characteristics the degree of diligence required of her was less "than in the case of a mere child'. In fact:

In light of this historical fact – that women were not fully "persons" in the eyes of the law – the reasonable man standard operated, in practice, much more as a "reasonable male" standard than as a truly gender neutral "reasonable human being" or "reasonable person" standard. The result is that whilst supposed feminine character traits such as subjectivity have been devalued, masculine values and norms such as objectivity and reasonableness have been re-branded and repackaged as axiomatic legal truths. The message is clear -

only those traits associated with the male viewpoint, such as objectivity and "the man on the Clapham omnibus" will guarantee legal neutrality – and the female viewpoint which often demands some element of subjectivity is a reminder to the judiciary that women are simply not suited to the public sphere. The reality is that the law is not neutral and when tests such as the reasonableness test have been applied to women, women have effectively been judged on whether they have acted as reasonable man would have done. It has only recently begun to be accepted within the law that women may react differently than men to the same experience. In rape cases for instance, it has been difficult for the courts to understand that even where a woman submits to a sexual encounter out of fear, she still may not consent to the conduct and in fact both sexes may have very different understandings of the situation. The law, Scheppelle notes, operates according to an objectivist theory of truth which deems that there is "a single neutral description of each event which has a privileged position over all other accounts." The aim of legal theory is to make the law point-of-viewless so that the people are removed from the problem and what is left is the abstract truth. However this ignores the fact that different people shape their opinions of what is right and wrong, what is real or false, and what is the truth, on their own experiences and on the type of society in which they have lived. Therefore, those who have had very different experiences in respect of the life they have led, their interactions with the state (e.g. the courts, police), and the way they relate to the prevailing hegemony will have very different accounts of the same event. The conflict here arises from the fact that the law's favouring of point-of-viewlessness is inherently contradictory to its aim since, although it claims to favour an objective and neutral standard, that standard is closely associated to the norms and values of those who created the legal policy to begin with. That is the white, middle class, heterosexual male. Consequently it is very difficult for those who have had different life experiences to convey, what they whole-heartedly believe to be the truth, to a legal system based on the truth of one section of society, and accordingly it is difficult for lawyers to translate the experiences of "outsiders" to a format that will be understood and get a just result in our legal system. The truths of those members of society is simply outside the boundaries of legal narrative. This desire to find an abstract truth has had severe effects on a woman's ability to use the defence of provocation since:

when taken out of their context, outsiders' actions often look bizarre, strange, and not what the insider listening to the story would do under similar circumstances. And without knowing more about how the situation fits into a context other than the 'obvious,' insider's one, courts may find it hard to rule for outsiders. The reforms of the 1957 Act were introduced during a period where the women's movement was still finding its feet. It would still take 10 years to decriminalise homosexuality and abortion, and equal rights campaigners were still focusing on sameness as a tool for obtaining some semblance of equality. It is understandable, therefore, that objections to the reforms on the grounds that they did not address the female experience are sparse if non-existent. The equal-but-different standpoint is a much more mature concept, which has had the benefit of a great deal of academic debate and social science research. Whilst the 1957 Act provided a statutory definition of provocation, it gave no explanation of the meaning to be given to the component tests, preferring to leave this to the judges and the common law. However, since the formulation of the statutory definition simply reintroduced that which was overruled in Holmes v DPP, without significant alteration to the substance of the defence, it was held by the judiciary that there was substantial body of common law which was still valid and continued to apply. Accordingly, the law on provocation continued to operate with remnants of its patriarchal origins enshrined within the common law. This has meant that over the last 50 years women have found it disproportionately difficult to rely on the defence of provocation. One of the most resilient anachronisms carried over by the common law is derived from the judgement of the court in R v Duffy which required that the provocation 'would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self control'. The criticisms arising around this requirement are of the necessity of suddenness in the loss of control and the requirement for the loss of control to be objectively reasonable. As noted previously in this essay, a sudden loss of control has been interpreted to be evidenced by a quick tempered angry reaction on the basis that this emotion is incompatible with the exercise of reason. However, having regard to the fact that the values and norms of the law are typically synonymous with the male viewpoint, it is suggested that, rather than hot temper indicating a loss of control, 'lack of self control became accepted as typically expressed in "hot temper".' Thus rather than anger being one

possible cause of a loss of self control it became the only cause which has prompted the Law Commission to conclude that 'the defence of provocation elevates the emotion of sudden anger above emotions of fear, despair, compassion and empathy.' The requirement of a sudden loss of control as expressed by the courts engenders serious difficulties for women in general and women who are victims of domestic violence in particular. The gendered response to provocation required by the courts of women is simply not the most readily available to them. The court expects an immediate reaction characterised by a sudden loss of temper. However, this ignores the importance of power relationships between members of each gender which have a huge impact on the behavioural responses of women. In cases of domestic abuse, there are a wide range of reasons that an abused woman will stay with her abusive partner. Some of the most relevant to this topic are: economic dependency, fear of future violence, cultural restraint, or fear for the safety of children (as contradictory as that may seem); although perhaps the most salient and compelling reason is simply fear of the man's strength. It is precisely for this reason that many women do not attack their abusers in the heat of the moment because they are acutely aware that they are not strong enough to overpower him. When this feeling of powerlessness is combined with an inability to extricate themselves from the violent environment (for whatever reason), the result is most likely to be an overwhelming feeling of isolation and despair. It is difficult for people to argue contrary to this since domestic abuse is defined as 'behaviour that seeks to secure power and control for the abuser to undermine the safety, security and self-esteem and autonomy of the abused person'. Consequently sufferers of domestic violence exist in a state of anticipatory fear which conditions and informs their response to the behaviour of their abusers. Thus in cases such as R v Ahulwalia (at first trial), where Mrs Ahluwalia was told by her husband that he was going to bed and when he woke up he was going to kill her, her actions in using force against him seem premeditated and disproportionate. Accordingly on appeal in this case, although approving Duffy, the court held that the phrase sudden did not mean immediate but that there could be a series of provoking events which burned away within the defendant until they reached a point where they were forced to act. However the court also stated that the longer the period between the provocation and the retaliatory act, the more likely the court would find that the

act was premeditated. This is a corollary of the fact that this time period is deemed as a cooling of period and is an absurd presumption based on the elevated status of anger. Thus, in the case of Ahluwalia, the court, in trying to incorporate the female experience, widened the defence for both men and women, with the unfortunate consequence that there was still a presumption against the female response. Women are not only disadvantaged by the suddenness requirement, but also by the application of the reasonable man standard. The second part of the test for provocation requires that, having established that the defendant did in fact lose his self control, this loss of self control was reasonable. The contention this has created is a complex issue. The reasonable man in all other areas but in the criminal law indicates an ethical and normative standard it is a standard of appropriate behaviour that the law demands of all citizens regardless of personal attributes or individual inclination. It therefore seems contradictory to include in a defence that is a concession to 'the frailty of human nature' a question which involves asking a jury to consider whether the reasonable man, (a paragon of virtue) would be provoked to commit an illegal act. The original legal position, consequent upon the objective test, was that no external characteristics should be considered in determining the reasonableness of the provocation on the defendant. This has obvious implications for women, in that it excludes consideration of gender, depression, and a history of violence. Moreover, it reduces the nature of domestic violence simply to actual violence and suggests that only if domestic abuse manifests as a psychological disease can it be taken into account. However, the subjective situation in which a battered woman has existed is completely relevant to the reasonableness of her actions. 'One of the effects of the experience of personal violence is that the victim is always in a state of anticipation of the provoker's capacity for future violence. This knowledge and experience affects her assessment of risk and management of risk.' 'Under the common law the "mode of resentment" was a rule of law.' There was a requirement that the retaliatory means had to be proportionate to the provocation and there was a presumption that the use of weapons was generally disproportionate although 'a less serious view was taken of weapons "already in the hand."' Thus in Oneby's Case, the fact that the father had only used a small club to beat the boy led the court to assert that there could have been no design to do any great harm to the boy, let alone kill him. This rule,

although only now applicable in self defence, has its roots in the idea of the defence of a man's honour, since in judging the appropriate response of two men the use of a lethal instrument could have been very useful in determining the reasonableness of their actions. However, considering that it is now not such a rare occurrence for women to kill their male partners of for children to kill their fathers this presumption that the use of a weapon is unreasonable continues to support unjust decisions. This is because, although there is no longer a proportionality requirement in the formulation of provocation, the use of a weapon is still instinctually considered to be more shocking and more indicative of premeditation. However, this ignores the disparity between the physical strength of men and women. Women may use a weapon to 'arm themselves against the a priori disproportionate force of men in order to achieve a notional equality between un-equals.' Thus the actions of a woman who uses a weapon are reasonable once contextualised. In contrast:

when men kill women, using body force such as strangulation, instead of this force being regarded as excessive when used against a person of smaller frame and when that person is also disabled from using physical force through social conditioning, the law construes body force as a mitigating factor. In response to this, Susan Edwards has noted that:

Weapons and body force have different consequences for the construction of intention… when men kill spouses they are less likely to be convicted of murder if they use body force than if the use weapons 47 per cent to 56 per cent… [but] when women kill, they almost exclusively use weapons. Thus the proportionality presumption in provocation and the proportionality requirement in self defence severely disadvantage an abused woman who assesses the risk of physical violence on the basis of her knowledge of the pattern of abuse she has come to anticipate. In an attempt to incorporate the female response to provocation some judges have widened the definitions wherever possible. In Ahluwalia the court widened the meaning of sudden to include a "slow-burn" reaction, in R v Sarah Thornton the court conceded that a loss of control was not necessary at the time of provocation provided that it was present at the time the fatal blow was struck, and in R v Humphries the appeal succeeded because the cumulative effect of many years of abuse were taken into account. However, despite the best efforts of a few judges there has been an incommensurability problem

between the reasonable man test, which excludes the examination of subjective elements, and the ability to determine whether a defendant's actions were, in fact, reasonable. Whilst at one stage the law held that characteristics other than age and sex could affect a person's capacity for self control and were therefore relevant to an examination of the defendant's conduct the law has now, following Attorney general for Jersey v Holley, returned to the decision that these characteristics are only relevant in so far as the affect the gravity of the provocation. Thus the defendant is still required to have an objectively reasonable response; however there is a concession that the degree of provocation can be subjectively affected. Thus the male response to provocation is still privileged and what is more, the provocation may be very trifling one-off conduct such as teasing a man about his impotence. A number of judges, notably Lord Taylor CJ in Thornton have criticised the approach of the law on the basis that that 'the nexus between what might be considered a characteristic of the reasonable man and the defendant's capacity for self-control… [is not] one that can be ignored'. In regard to battered women his lordship noted that: The severity of such a syndrome and the extent to which it may have affected a particular defendant will no doubt vary and it is for the jury to consider… it may form an important background to whatever triggered the actus reus. A jury may more readily find there was a sudden loss of control triggered by even a minor incident, if the defendant had endured abuse over a period, on the 'last straw' basis. The Government's current plans for reform, as expressed in the 2008 consultation paper, are to abolish the common law defence of provocation and to introduce a completely new partial defence to murder regarding loss of control resulting from fear of violence, and to allow words or conduct to constitute adequate provocation only in exceptional circumstances. The proposals alter the focus of the defence so that the primary reason for reducing a charge of murder will no longer be based upon anger. It has been suggested by a number of judges, reported by the BBC, that the reforms are unnecessary, that the current law has been stretched to accommodate women (and are now adequate), that the new proposals will catch only a limited number of circumstances that were not already covered, and that the proposals are overtly and politically feminist. This essay has already shown that these assertions are only partially, if at all, true. That in fact the law of provocation is gendered and has always been so. This has

been evidenced by the difficulty judges have faced in attempting to bring women within the definition of the provocation defence. Although judges have widened the meaning of sudden to include a "slow burn reaction, expanded the time lapse requirement before which provocation as a defence is negated, and attempted to consider cumulative provocation, the effect has been to evidence the fact that the law does not work rather than to improve it. The Law commission itself has noted that 'as a result of the courts stretching the requirement of "loss of self control" in order to accommodate battered woman's syndrome cases, there is no clear test for distinguishing a "provoked" killing from a "revenge" killing.' Consequently at least some from of reform is necessary. The questions to be asked of the Government's proposed reform are: do the new proposals actually correct those imbalances identified by feminist writers? And if they do, and even if they do not, do they tip the scales in favour of women therefore creating an imbalance against men? The most onerous requirements of the current defence, in terms of the female experience, are "suddenness", the "reasonable man test" and the fact that the defence it defined in such a way that when a woman uses a weapon to combat power inequalities this is perceived as unreasonably disproportionate. The Government states that one of its aims is to 'remove the existing common law requirement for loss of self-control in these circumstances to be "sudden". This they will give effect to in the new s 2 which would simply abolish the common law defence of provocation. However, it should be noted that the aim of removing the suddenness requirement is not expressly stated and since this requirement was a common law creation in the first place there seems to be no reason that the courts might not create a similar requirement under a different name This is especially so considering that their aim in creating the original test was to support a causative link between the provocation and the retaliatory act. In reality, it is probable that in implementing the new defence the court would still find that that the longer the period between a fear of serious violence and the retaliatory act, the more likely that the two were unrelated. In regard to the test of reasonableness (for the purposes of this defence) the proposals do present some measure of improvement. The new formulation is whether 'a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D might have reacted in the same or in a similar way.' The relevant circumstances to be

considered are defined as ‘all of D’s circumstances other than those whose only relevance to D’s conduct is that they bear on D’s general capacity for tolerance or self-restraint.’ Thus the test is twofold, first requiring that the defendant’s actions are considered objectively within the context of the subjective circumstances, whilst secondly limiting that subjectivity so that is not extended to the defendant’s general capacity, but only to her as regards the provocation. Or to put it another way, the subjective element is not to excuse the ‘exceptionally excitable or pugnacious’. This formulation is a great improvement and will allow the court to consider the full extent of the effects of domestic abuse on the victim’s response and may even go someway to addressing the perceived disproportionateness of women using weapons. Despite these proposed improvements it is suggested that the law may still be overly sympathetic to the male experience. Susan Edwards posits that on the basis of the historical context of provocation it is a fallacy to conceive anger as incompatible with the exercise of reason and that in fact to do so is simply ‘socially mediated approbation for provocation’. She suggests, similarly to the observations of JS Mill noted previously in this essay, that allowing anger as valid trigger for provocation gives legal sanction to something that already happens rather than being a concession of the law to a biological inevitability. The assertion is that ‘motives are the reasons for action not the causes of action’ In fact:

To say his motive in murdering his wife was his jealousy is to explicate the circumstances which make him the type of jealous person who would murder his wife - - that murdering his wife is one possible method available to him for doing jealousy. In this way, the event is formulated as the agent’s possible method for doing whatever the formulation of the motive requires as a course of action. Consequently the Government’s proposal to allow, as a triggering event of the loss of control, words and / or acts where there is a ‘justifiable sense of being seriously wronged’ raises very serious concerns even if this is limited to ‘an exceptional happening’. How a person, or in fact the jury, is to determine what constitutes such a situation in which a justifiable sense of being wronged is unclear. Also it is similarly unclear as to what will constitute an exceptional happening. ‘The problem with this formulation is that it will continue to allow indignation, moral righteousness and hubris to preside as acceptable excuses/ justifications for killing. After all who is to say what is justifiable?’

Accordingly cases where men have killed their wives for nagging or needling may continue to be classified as manslaughter. Moreover, the requirement of a serious wrong has echoes of the old common law requirement for the provocation to be gross, which historically has meant a male version of what is gross provocation. Despite the new proposals offering some improvement to the present law, it seems overly optimistic to suggest that they completely redress the imbalance against women, or indeed tip the scales in the other direction. There are a number of extra factors which have affected the effectiveness of the current provocation defence, which may continue to be detrimental to any woman using the new defence. Cultural judgements and the perception of judges can have a huge impact upon a case, particularly where 'the words or conduct of the wife are raised as the basis for a plea of provocation… [here] matrimonial behaviour becomes the focus as the centre of responsibility for her husband's actions.' Historically cases have shown that when words or conduct are raised as a trigger for provocation the wife is often put on trial in a similar way to those who allege rape or sexual harassment. Thus the woman is considered less credible, or more blameworthy, if her behaviour deviates from the male ideal. In the case of rape this might be making assumptions about the woman's preferred choice of clothing or her sexual promiscuity. In the case of provocation 'leaving one's husband, having an affair, not taking care of the child(ren), nagging one's husband, lack of appreciation for the husband's work on behalf of the family are all not manifested by the ideal woman', and consequently illustrate some blameworthiness on the part of that woman when she (apparently) drives her husband to domestic homicide. Dobash and Dobash have found that the man in the relationship was most likely to become physically violent 'at the point when the woman could be seen to be questioning his authority or challenging the legitimacy of his behaviour … or at points where she asserted herself in some way.' In this sense it is suggested that the link between patriarchy, private ordering and domestic violence becomes apparent since 'these men regarded the women as personal property and became violent whenever they showed any independence, particularly when that involved other males.' This type of patriarchal behaviour has been echoed in the language used by judges in numerous cases. 'The judge assists in reducing the responsibility of the offender (most commonly a man) by "trying the victim", sympathizing with the

plight of the husband, and voicing moral assessments', whilst the account of abuse by the woman is doubted or trivialised. In fact in Sarah Thornton's case the judge commented that 'this lady would have tried the patience of a saint' and revealed his prejudice, or at least ignorance of the effects of domestic abuse, in stating that 'there are… many unhappy, indeed miserable, husbands and wives. It is a fact of life… But on the whole it is hardly reasonable, you may think to stab them fatally, when there are other alternatives available like walking out or going upstairs.' Thus the combination of male biased tests within the defence of provocation and the patriarchal assumptions of some husbands and many judges, have functioned to prevent the defence of provocation being available to women. Moreover, there is little in the new proposals to prevent this from happening in the future. In fact it may continue to be the case that juries are influenced by the moral assessments of judges and encouraged to find provocation when the judge prompts them to do so. In conclusion, the Government's new proposals offer some measure of improvement. However their effectiveness will be determined by the way that judges and juries interpret them. I think it is safe to say that simply by removing anger as the main trigger for provocation, the Government has not created an imbalance against men, since to do so would require the entire current legal system, prevailing hegemony, and doctrinal rules to be reformulated in a matriarchal style.

In short: "Whatever the formal structure of the law, ultimately the success or failure of a provocation defence depends on ingrained cultural judgement, and the hidden agenda of this partial defence as it operates in practice in spousal homicide, [as] one of female responsibility, whether as victim or offender".

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APPENDIX 4

Matthew Palazon – lst Class (Hons) Student – 2008/09 Women and the Law 1 Court Observation Report.

The sample essay and court report in this Module Guide are provided to you by way of illustration. They are NOT to be copied for the purposes of your own coursework submission in this Module or in any other Module on this degree.

Court Observation

Case Number: T20087225
Defendant: Enright, Liam Patrick
Counsel for Defence: Louise McCullough
Counsel for Prosecution: Kenneth Dow
Judge: Judge Fraser
Court: Inner London Crown Court
Charge/s: Burglary, Battery

The defendant's story: Mr Enright is white, British, poorly educated, unemployed and in receipt of benefits. He received a letter from the Job Centre stating that unless he found work immediately certain consequences would ensue in relation to his benefits. Not having a CIS card he could not look for construction work via the usual avenues. Accordingly, he had taken to going to small residential construction sites and asking for work in person. Having exhausted such sites near his home, on the 25/03/08 he went by bicycle to an area which he had heard might have some work. Seeing what he thought were signs of construction work (doors, rubble and roofing tiles in the front yard, and a drilling noise) he approached the house, knocked and entered after hearing a female voice saying "come, come". He claims that he waited in the hallway near an open door until a female (Mrs Z) came down stairs and asked him to identify himself. At this point, he produced the Job Centre letter. Whilst he was trying to explain his presence Mr Z came in and attacked him for no good reason. He was then restrained and it was at this point he called the police for assistance.

The Prosecution's story: Mr and Mrs Z are Polish and speak limited English (they required a translator in court). They claim that there was no drilling noise and that signs of construction work were not apparent. They also claim that Mr Enright was not invited in and they did not immediately know of his presence. Mr Z says that when he entered the hallway there was no one there and that he could hear rustling noises from the back room. He also says that rubble bags had been opened and his briefcase was moved from one end of the room to the

other near the door which Mr Enright appeared to be coming out of. Mr Z states that the scuffle resulted as a consequence of Mr Enright trying to escape. Once he had restrained Mr Enright he called the police.

Telling Stories: This story occurs at a perceptual fault line. There are language and cultural barriers between the parties. There is also a difference in class and wealth, that is to say that Mr Enright relying entirely on benefits is in the lowest possible class . In court Mr Enright had trouble forming coherent sentences due to his grasp of English. Mrs Z stated that at the time of the incident she could not understand what he was saying. There was clearly a chasm of understanding between them.

If an insider is white, male and middle-class, Mr Enright is both an insider and an outsider. The law will have sympathies towards the behaviour of his gender and yet, because of his class and education, his behaviour will perhaps at times be different than that of the reasonable man as the law understands it. In this sense the perceptual fault line may also extend to the jury, who in deciding upon what evidence to accept will obviously apply their own norms which again may vary from those of Mr Enright.

Boundaries of Legal Narrative: The accounts given by the parties may be true different accounts of the same events. The facts of the case do not necessarily conflict. For example, it may have looked like Mr Enright was leaving the back room, despite the fact that he just happened to be standing in front of the door in a certain way. Mr Enright, in moving closer to the front-door, also may have looked like he was attempting to escape, despite having no inclination to do so.

Mainstream Stories: The prosecution are telling mainstream stories. They suggest that Mr Enright took his bike to the premises as a getaway vehicle and that he had no intention of looking for work. They claim that producing the letter was simply a clever "plan B" implemented once the burglary had gone awry. They say that signs of construction work were not apparent and the noises Mr Enright heard were fictional, including the invitation to come in. The counsel for prosecution (a white, middle-class male) invites the jury to look at abstract notions of truth. To consider who was a more reliable witness, Mr Z or Mr Enright, in one sense encouraging the jury to apply stereotypes. He invites the jury to consider whether the average person, would have entered a house in these circumstance and concludes that as they would not have, Mr Enright must have entered with the sole purpose of stealing. The impact this had was that it caused the jury to doubt Mr Enright's intentions, despite his story, because his norms did not align with the abstract paragon.

Counter Stories: The defence are telling counter stories. They suggest that Mr Enright did hear some noises, although he cannot be sure on reflection that they were coming from within the house. Counsel for defence (a white, middle-class female) invites the jury to take a more subjective approach to the evidence. She says "put yourself in his shoes". She says they should think that the method of looking for work was legitimate on the basis that he did not have

a CIS card and to think that the signs of building work in front of the house, although not prominent to some, would have been prominent for Mr Enright as he was particularly "desperate" [this word was stressed]. She also asked the jury to consider whether Mr Enright was in fact the criminal mastermind that the prosecution suggested he was, alluding, as contradictions, to his (limited) intelligence and readiness to present the Job Centre letter. The effect this had was to legitimise Mr Enright's actions and to therefore explain his behaviour and validate his version of events.

The Most Convincing Story: The defence's story seemed the most convincing, this may have been because of the combination of subjective and objective arguments. Subjectively Mr Enright did not seem sophisticated enough to lie consistently. His actions when taken in context seemed reasonable in relation to his social position. Objectively his story was affirmed by the facts that neither Mr nor Mrs Z saw him in any area of the house other than the downstairs landing and he also called the police for assistance himself.

I suppose that I might have reached a different conclusion if arguments of subjectivity had not been raised. Products of objectivity, such as the reasonable man standard assume that everyone has the same basic qualities. Personally, I feel that Mr Enright's intelligence is a significant factor here. If judged objectively everyone is deemed to have the same basic standard of intelligence, which prescribes various forms of behaviour. I believe it was apparent that Mr Enright did not conform to this standard and he was clearly frustrated with himself for not being able to explain his actions better. In fact in court when asked why he had not mentioned the "drilling sound" during the police interview, he said that he was frustrated and forgot. He also said that he was confused as he thought that once the police came they would understand his story. In short, his inability to transform his version of events into appropriate legal language was very apparent.

Counter storytelling: Counter storytelling is extremely valuable in a practical legal setting. The experiential values that someone holds shapes not only their understanding of the world, but influences the course of action that they take in relation to that understanding. Mr Enright was objectively a dishonest and adept criminal, however subjectively he was a simple, imprudent man doing what he thought best in relation to his problems. Counter storytelling allows for the legitimisation of outsider views and it contextualises the actions of these people so that they can be understood in a formal legal environment.

Counter storytelling, particularly in the context of a criminal trial decided by jury, can widen the boundaries of legal narrative. Such cases hang on what evidence 12 ordinary people consider both relevant and honest. If by explaining the norms and values of the outsider one can encourage those people to imagine that inconsistency does not necessarily mean that someone is lying, then you can completely change the outcome of a case. In short, it can divert the jury from the notion of abstract justice and consistent stories. Furthermore, by breaking down the idea that "they" inexplicably act differently

to “us”, the jury are encouraged to think more inclusively and consider what they would have done if they had the same social characteristics and problems.

It can be seen though that there are some areas of the law where counter storytelling would be redundant. In negligence, the law is so firmly based on objective standards of justice that it would be impossible to convince a judge that there are other stories that deserve to be heard.

Word Count:1,499

APPENDIX 5

LONDON SOUTH BANK UNIVERSITY
SCHOOL OF LAW AND SOCIAL SCIENCES

LLB FULL TIME
GENDER JUSTICE AND THE LAW

60% of the Module Mark

PLEASE READ THE FOLLOWING CAREFULLY BEFORE ATTEMPTING THIS ASSESSMENT

The assessment

Please choose any ONE of the following essays to write:-

Question 1

"Lord Judge CJ wrongly asserts that sexual infidelity (a 'non-qualifying' trigger) can be left to the jury when the *potential* 'qualifying' triggers (for example, goading D about his suicide plans, D's fear of raising his children, etc.) available are too mild to stand on their own as constituting 'circumstances of an extremely grave character'. Lord Judge CJ takes the view that sexual infidelity can be considered as one of the circumstances that might have caused a person of normal restraint to lose control." Baker and Zhao "*Contributory qualifying and non-qualifying triggers in the loss of control defence: a wrong turn on Sexual Infidelity*" Jo Criminal Law, 2012.
Drawing upon relevant statutory/case law provisions as well as feminist theoretical and policy considerations, explain and evaluate Baker and Zhao's analysis.

Question 2:

"For liberals, freedom of expression is one of the fundamental tenets of individual autonomy. It is a basic principle of liberalism that the extreme
views of minorities should be permitted in the interests of truth.
The free flow of ideas, however unpalatable, is assumed to be conducive to rational argument and informed choice. This argument is regularly

applied to pornography". Emily Jackson "The Problem with Pornography". Feminist Legal Studies Jo. Vol III No.1 [1995]

Explain and evaluate the above statement in light of case law, statutory reforms and current debates in this area.

Question 3:

In Sweden the state has criminalised the purchasing of prostitution services but decriminalised the selling of it. For them, prostitution is regarded as an aspect of male violence against women, and this approach reflects the high priority that the Swedish government has given to tackling prostitution and human trafficking.

Assume that you are the UK's minister of state responsible for considering new law in this area. Prepare a report explaining and evaluating the implications of such an approach being adopted in the UK, reflecting upon the development of UK law in this area, together with current UK government thinking on prostitution/human trafficking; compare the approaches taken elsewhere and the ability of the Swedish model to tackle the increasing problem of human trafficking for the purposes of prostitution into the UK and elsewhere.

Question 4:

"Critics have long argued that judges have failed to control the use of irrelevant and prejudicial sexual history evidence in sex offence trials, and that the only effective solution to the problem is to impose tight legislative constraints on judicial discretion or eliminate it altogether". Neil Kibble 'Judicial Perspectives On The Operation Of S.41 and The Relevance and Admissibility of Prior Sexual History Evidence: Four Scenarios: Part 1'. Criminal Law Review, 2005, March, 190-205.

Explain and evaluate this statement in light of government initiatives to improve conviction rates in this area. Drawing upon your knowledge of relevant legal measures and also feminist theoretical discourses, you must consider whether the current policy initiatives in this area are flawed.

Question 5:

"Since abortions are allowed in the case of rape, the foetus cannot be regarded as a full human being. If then, pregnancy is forced on other unwilling mothers it is not because the child is a human being whose life is sacrosanct. Why then are such mothers not automatically allowed to have abortions? One plausible explanation is that the child is being used as an instrument of punishment to the mother, and that talk of the sanctity of life is being used to disguise the fact". (J. Richards)

Explain and evaluate this statement in light of recent considerations of this issue; reflecting upon the 'competing' interest of the right to life of the foetus and the maternal right to autonomy.

Question 6:

"A facially neutral reasonable person standard simply makes it too easy for courts to overlook women's viewpoint, creating the false impression that that viewpoint is already subsumed within the general test."
Robert Unikel "Reasonable" Doubts: A critique of the reasonable woman standard in American jurisprudence". Northwestern University Law Review. 1992.

Explain and evaluate this statement, reflecting upon relevant case law, new statutory provisions, European Directives and, in particular, drawing upon relevant literature relating to the issue of sexual harassment.

2. Presentation instructions

All submitted work must comply with these presentation requirements – failure to comply may result in work not being marked.

(a) The word limit for this coursework is 4000 words. Footnotes will not count towards word count totals but must only be used for referencing – not the provision of additional text. Bibliographies will not count towards word totals. Unless specifically required in the assessment instructions appendices are not permitted, other than those required under 5(h) below.
(b) A word count total must be provided on each course work submitted. An inaccurate word count may be dealt with as cheating (an attempt to obtain an unfair advantage). See the cheating and plagiarism guidelines in the LLB Course Guide for further details.

(c) If the word limit is exceeded any work beyond the word limit will not be marked and will thus not be awarded credit.
(d) Coursework must be submitted in word-processed form, double-spaced, and correctly paginated.
(e) Standard referencing guidelines must be followed – these can be found in the Course Guide.
(f) **All coursework must be submitted via TURNITIN and the Moodle site - there are no exceptions to this requirement.**

3. Assessment criteria

This assessment seeks to assess the following module outcomes:

(a) This assessment seeks to assess the following areas of knowledge and understanding:

Feminist and mainstream legal theories, statutory and case laws relating to issues of (in) justice within the context of gender i.e. domestic violence, rape, pornography, prostitution, sexual harassment and abortion.

(b) This assessment seeks to assess the following legal skills:

I. ability to analyse and solve problems related to feminist theory and the law by applying primary sources of law and other legal/political materials to factual situations;

II. ability to analyse statutes and cases;

III. ability to reason and argue effectively about issues relating to feminist legal thinking recognising alternative points of view, and offering reasoned opinions supported by authority or evidence.

(c) This assessment seeks to assess the following transferable skills:

I. to identify and apply different moral, philosophical and political theories to the study and practice of law.

II. to analyse and critically evaluate conflicting social, political and moral factors that have shaped the development of English law;

III. research original material in both hard copy and from electronic sources.

(d) This assessment seeks to assess the following communication skills:

I. ability to produce a word-processed document with appropriate referencing and pagination;

II. ability to communicate effectively and persuasively in written English.

(e) Credit will be awarded for this assessment based on the following criteria:

I. demonstrable ability to critically deconstruct specific areas of statutory and case law

II. ability to analyse and apply feminist legal theories of the law to traditional legal theories

III. clarity and structure of argument;

IV. reasoned conclusion;

V. research and presentation.

4. Guidance

(a) In attempting this assessment candidates are expected to find their own sources.

(b) In attempting this assessment candidates should be aware of these common errors and should try to avoid them:

I. Providing a detailed, descriptive history of the development of 'rights for women' under English law
II. Lengthy repetition of the facts of cases;
III. Lengthy references to cases without any explanation as to how this develops the argument;
IV. Uncritical repetition of arguments found in textbooks or consultation papers.
V. Applying only case and statutory laws to any given question without addressing the theoretical basis of the law and feminist theories as advanced within the module.

5. Submission instructions

(a) Date for submission: TUESDAY 5TH MAY 2015 before 13.00hrs

(b) Return date: **This coursework is in lieu of an examination and will be retained by the University.**

(d) Candidates must indicate their seminar group and seminar tutor on their coursework submission.

(e) Candidates must retain a copy of the assessment submitted. Further copies of assessed work may be required by the Course Director or Exam Board.

(g) The submitted assessment must be the candidate's own work. All quotations must be credited and properly referenced. Paraphrasing is still regarded as plagiarism if a candidate fails to acknowledge the source for the ideas being expressed. Candidates are referred to the cheating and plagiarism guidelines in the Course Guide.

6. Feedback

Following the publication of marks for the module, candidates may make an appointment with the module coordinator to discuss their mark and receive feedback on their performance in the assessment.

Please note:

Examples of work submitted may be copied (with student identifiers removed) and distributed to all candidates in order to provide examples of good practice. Please state clearly on your assessment if you are not willing for it to be copied and distributed for this purpose.

SCHOOL OF LAW AND SOCIAL SCIENCES
LAW DEPARTMENT
GENDER JUSTICE AND THE LAW
Marking Criteria

Starred first class 80%+

In the context of: (a) the level at which the module is being assessed; and (b) the University's policies on the assessment of candidates with special needs, work awarded credit in this band will normally display many of the following features:

- Complete coverage of the assessment criteria, evidencing comprehensive knowledge, a confident and deep understanding of the subject, and excellence in analysis and evaluation of the relevant material;
- No significant errors or omissions.
- Excellence in the exposition of opinion, supported by reasons, based on evidence or authority
- Originality of exposition or treatment of the issues
- Excellent integration and structuring of materials
- Very good use of English –few if any grammatical errors

First class 70% to 79%

In the context of: (a) the level of the award to which the work contributes (UG), and (b) the level at which the module is being assessed, work awarded credit in this band will normally display many of the following features:

- Complete coverage of the assessment criteria, evidencing (as appropriate to the assessment set) largely comprehensive knowledge, a confident understanding of the subject, and very good analysis and evaluation of the relevant material;
- No significant errors or omissions.
- Very good exposition of opinion, supported by reasons, based on evidence or authority
- Very good integration and structuring of materials
- Very good use of English –few if any grammatical errors

Upper second class 60% to 69%

In the context of: (a) the level of the award to which the work contributes (UG), and (b) the level at which the module is being assessed, work awarded credit in this band will normally display many of the following features:

- Substantial coverage of the assessment criteria, evidencing (as appropriate to the assessment set) a sound knowledge of the area being assessed, a good understanding of the subject, and good analysis and evaluation of the relevant material;
- Only minor errors or omissions.

- Good exposition of opinion, supported by reasons, based on evidence or authority
- Good integration and structuring of materials
- Good use of English – only minor grammatical errors and spelling mistakes.

Lower second class 50% to 59%

In the context of: (a) the level of the award to which the work contributes (UG), and (b) the level at which the module is being assessed, work awarded credit in this band will normally display many of the following features:

- Generally sound in terms of coverage of assessment criteria, evidencing (as appropriate to the assessment set) an adequate knowledge of the area being assessed, a basic understanding of the subject, and a largely competent analysis and evaluation of the relevant material;
- One or two major omissions in terms of content coverage.
- Competent exposition of opinion, supported by reasons, based on evidence or authority
- Competent integration and structuring of materials
- Appropriate use of English, with only a few significant errors in spelling and grammar.

Third class 40% to 49%

In the context of: (a) the level of the award to which the work contributes (UG), and (b) the level at which the module is being assessed (3), work awarded credit in this band will normally display many of the following features:

- Satisfactorily meets the minimum requirements of the assessment criteria, evidencing (as appropriate to the assessment set) a basic knowledge of the area being assessed, failure to understand some key points being assessed, weakness in the analysis and evaluation of the relevant material;
- Numerous errors, omissions and/or unnecessary detail
- Weaknesses in, or lack of evidence of, the candidate's ability to express opinion, supported by reasons, based on evidence or authority
- Significant flaws in the integration and structuring of material
- Poor use of English – weak grasp of grammar – some incoherent statements.

NB: A candidate who has not directly addressed an assessment question, or has addressed a related question but not that which has been set by the examiner may not be awarded credit falling within this band unless there is sufficient evidence that the minimum learning outcomes have been achieved.

Threshold fail 35-39%

In the context of: (a) the level of the award to which the work contributes (UG), and (b) the level at which the module is being assessed, work awarded credit in this band will normally display many of the following features:

- Narrowly fails to meet the minimum requirements of the assessment criteria, evidencing (as appropriate to the assessment set) some key weaknesses regarding knowledge of the area being assessed, failure to understand or engage with the main points of the assessment, significant weaknesses in the analysis and evaluation of relevant material;
- Numerous errors, omissions and/or unnecessary detail.
- Significant weaknesses in, or lack of evidence of, the candidate's ability to express opinion, supported by reasons, based on evidence or authority
- Very significant flaws in the integration and structuring of material
- Poor use of English – weak grasp of grammar – a significant number of incoherent statements.

NB: A candidate who has not directly addressed an assessment question, or has addressed a related question but not that which has been set by the examiner may not be awarded credit falling within this band unless there is sufficient evidence that the candidate has made a significant (albeit unsuccessful) attempt at achieving the minimum learning outcomes.

Threshold (not normally compensatable) fail 30%-34%

In the context of: (a) the level of the award to which the work contributes (UG), and (b) the level at which the module is being assessed, work awarded credit in this band will normally display many of the following features:

- Fails to meet the minimum requirements of the assessment criteria, evidencing (as appropriate to the assessment set) significant key weaknesses regarding knowledge of the area being assessed, serious failure to understand or engage with the majority of the points being assessed, very significant weaknesses in (or no) analysis and evaluation of relevant material;
- Numerous errors, omissions and/or unnecessary detail.
- Very significant weaknesses in, or lack of evidence of, the candidate's ability to express opinion, supported by reasons, based on evidence or authority
- Little evidence of ability to integrate and structure material appropriately
- Very poor use of English – very weak grasp of grammar – a significant number of incoherent statements.

NB: A candidate who has not directly addressed an assessment question, or has addressed a related question but not that which has been set by the examiner may not be awarded credit falling within this band unless there is sufficient evidence that the candidate has made a significant (albeit unsuccessful) attempt at achieving the minimum learning outcomes.

Irredeemable fail 0%-29%

In the context of: (a) the level of the award to which the work contributes (UG), and (b) the level at which the module is being assessed, work awarded credit in this band will normally display many of the following features:

- Clearly fails to meet the minimum requirements of the assessment criteria in any meaningful way, evidencing (as appropriate to the assessment set) very significant key weaknesses regarding knowledge of the area being assessed, very serious failure to understand or engage with the majority of the points being assessed, absence of analysis and evaluation of relevant material;
- Insufficiency of material – what is provided may be correct but it may be too brief.
- Failure to apply relevant law in any meaningful way to the question set
- Significant irrelevancies and non-sequiturs.
- Failure to integrate and structure material appropriately
- Major deficiencies in written English.

Notes

1. Knowledge = relevant knowledge in terms of the syllabus and the assessment criteria.

2. Assessment criteria = testing the achievement of specific module outcomes to a minimum standard and beyond.

3. The assessment criteria will invite students to achieve more than the minimum standards set by the module outcomes. The module outcomes only define the pass/fail standard.

Short Description

Drawing upon feminist and other associated theories, this Module explores a number of legal topics which have important consequences for women and their relationship with the law.
Using feminist theories and writing as the central tool of analysis the Module encourages students to develop an appreciation of the social, economic and political contexts in which the law and feminist theories operate.
The Module recognises the importance of combining theory and practice and seeks to explore those connections by embedding theory within a practical legal framework; for example, by exploring the impact of feminist and associated theories in the areas of Domestic Violence, Rape and Sexual Harassment.

Aims of the Module

(h) To investigate legal topics in their social context using feminist, as well as critical legal and critical race, tools of analysis.
(i) To develop student's understanding of legal and feminist theoretical perspectives so as to empower the student in the development of his or her intellectual profile as legal scholar.
(j) To build upon the knowledge students have acquired in core legal topics such as property, contract, tort and legal skills in order to begin to engage students in a deeper, critical, examination of those areas.
(k) Through courtroom observation, to encourage students to apply their knowledge of the interaction between women and the law in order for them to appreciate the subtle social, economic and political contexts within which the law operates.
(l) To encourage students to develop their own creativity in relation to feminist theories and the law through preparation of a report and an essay.
(m) To recognise the experiences that students and tutors bring to the course and to build on the foundation of those experiences in order to stimulate a critical and creative analysis of feminism and the law.
(n) To provide students with opportunities to widen the scope of their legal study through the adoption of a comparative law approach

Learning Outcomes

Students successfully completing the Module will be able to demonstrate:-

Knowledge and Understanding

(f) A clear understanding of feminist perspectives on specified areas of the law.

(g) The ability to assess the implication of legal rules and proposed reforms in those areas for certain groups within society

(h) The ability to reflect on their own experiences and perceptions of feminist theories

(i) That they have developed their own creativity in regard to feminism and the law

(j) A clear understanding of the interaction between feminist legal theories, feminist practices and the law and in so doing be able to identify different moral, philosophical and political theories to the study and practice of law.

Intellectual Skills

Legal Skills

Students successfully completing this Module will be able to demonstrate an ability to:

(d) Analyse and evaluate conflicting interpretations of statutes and cases by a critical analysis of the principles of statutory interpretation and the doctrine of precedent. The student will be able to analyse and evaluate the specific impact that these principles have on the rights of women within the law.

(e) Analyse and evaluate the law and law reform proposals in their social, political, economic and moral contexts.

(f) Reason critically and argue effectively about the legal issues studied in the Module, recognising alternative points of view, the importance of theory to practical legal development and offering reasoned opinions supported by authority or evidence.

Practical Skills

Communication skills

Through participation in large and small group sessions, most particularly By the presentation of papers in small group session, to communicate ideas effectively and appropriately both orally and in writing.

Read and understand technical legal materials and technical theoretical materials.

Appreciate through participation in small group sessions the techniques and strategies appropriate for advocacy.

IT Skills

Participate in one or more on-line seminars
Complete pre-seminar tests and participate in on-line discussions via the Blackboard VLA.

Produce a word processed Research Report and Essay.

Carry out effective web based research.

Communicate via email with the course tutor, particularly through the submission of pre-small group session material.

Transferable Skills

Students successfully completing this Module will have demonstrated an ability to:-

(h) Carry out independent research using a variety of media
(i) Plan and execute their research through the production of a research report and an essay
(j) Demonstrate their ability to set their priorities in terms of relevance and importance of either the case observed, or the material identified, to the production of the report and essay
(k) Plan and manage their work recognising the importance of setting priorities to meet deadlines
(l) Work autonomously by completing an extended programme of independent study
(m) Comply with the stands of scholarly practice
(n) Undertake group based work in seminars and in the production of the research report and /or the essay.

4.5 TEACHING AND LEARNING PATTERNS

Weeks 1 – 10: One 2 hours large group session per week
One 2 hours small group session per fortnight

Weeks 10-15: Private study and submission of extended essay

Ten weekly two hour lectures (or equivalent) and five fortnightly 2 hours seminars. The lecture series includes a dedicated session with the Law Librarian, and a courtroom observation session both of which provide the foundation for the students to complete their Research Report and Essay.

Students are provided with a lengthy and detailed course handout indicating the structure and content of each large group session. The handout indicates relevant case law, and sets out in full all relevant statutory provisions.

Whilst lectures are the primary vehicle for the provision of structure and outline on key topics, they are not intended to provide students with all the information necessary for successful completion of the course.
At the end of each lecture the student should have not only a clearer understanding of the material covered, but also a grasp of what has been left unanswered and thus what needs to be addressed in private study and small group session preparation.
Within the constraints of the time available in lectures, emphasis is also placed on the development of a dialogue between staff and students through broadly Socratic techniques.
The lecture material provides students with structured reading on each topic and a selection of past examination questions.
Small group sessions are structured to ensure that students have developed a satisfactory understanding of the relevant law under consideration; can critically analyse the relevant law; and are aware of the need for and proposals for reform of the area of law under consideration.

INDICATIVE SYLLABUS CONTENT

The Module explores the construction of reason and reasonableness within the law, legal methods, equality, difference and justice through an examination of recent feminist histories, legal/political theories, developing feminist and critical legal theories, specific legal topics of relevance to women and relevant legislation/case laws.

5. ASSESSMENT METHOD:

2,000 word Court Research Report [40%]
3,000 word Essay [60%]

The production of the Research Report will require students to attend a Research session with the Law Librarian and to carry out court based observation. Additionally, students will be required to carry out library and IT based research.

The production of the Essay will require students to engage with library and IT based research of primary sources, journal articles, Law Commission papers and a consideration of literature in other jurisdictions.

The Module recognises the value of small group work in assessing feminist legal problems and analysis and encourages students to undertake such work both prior to the large group session. As a direct consequence of this recognition, students are encouraged to deploy the skills acquired within their small group sessions to the submission of the Research Report and/or Essay in this Module.

Group based work can be undertaken by up to four students by arrangement with the course co-ordinator. Group work will receive one mark; each member of the group is given that mark. It is to be recognised that a higher standard of work is expected of those participating in group, as opposed to individual, work.

The marking criteria adopted will give credit for evidence of (a) feminist legal theoretical perspectives (b) independent research (c) cogency of argument (d) evidence of awareness of the broad contextual matters having bearing on the subject in comparable jurisdictions.

6. LEARNER SUPPORT MATERIAL

The Module has a broad content and is fortunate that there is a textbook which covers the range of material considered in the Module:

Core Reading:

Rosemary Hunter et al "Feminist Judgments: From Theory to Practice", Hart, 2010.
Available on Amazon (new) from £21.80

Hillaire Barnett "Sourcebook on Feminist Jurisprudence" Cavendish l999.
available on Amazon (Used) from £25.00

Additional Reading:

Francis Heidensohn "Gender and Justice – New Concepts and Approaches" Willan, 2006. Available on Amazon £24.69

Aileen McColgan "Women under the Law: The false promise of human rights" Longman 2000.

Richardson & Sandland "Feminist Perspectives on Law and Theory" Cavendish, 2000.

Anne Bottomley (ed) "Feminist Perspectives on the Foundation Subjects of Law" Cavendish l996

Feminist Legal Studies Journal (available on line via LISA electronic journals link)

ON-LINE SEMINAR:
All students will take part in an on-line seminar during this Module. We have run on-line seminars for this Module for a few years and feedback from students to this innovation has been very positive. The on-line seminar requires students to think about their communication skills, to make necessary adjustments so as to be heard/understood and to respect the different communication skills of others. The on-line seminar encourages all students to participate. Students will find detailed information regarding the on-line seminar in the Small Group Sessions part of this Module Guide.

7. Feedback

At the end of the Module students will be invited to a personal **FEEDBACK** session with a member of the GJL teaching team. Students have the opportunity to discuss their own performance on the module and will be guided on areas where they require further development.

Both pieces of assessed work in this Module are deemed to be in place of an exam and on that basis **the Case Report and the Extended Essay are NOT given back to students**. However, students are more than welcome to see either piece of assessment, to receive **FEEDBACK** on their performance from a meber of the GJL teaching team, and to take a photocopy of the feedback sheet if they wish.

8. Introduction to Studying the Module

Overview of the Main Content

The Module critically examines a number of different legal topics of specific relevance to women, drawing upon feminist and other theories of the law. It uses theories to challenge core assumptions about the neutrality and coherence of the law, and to assess the impact of those assumptions upon women in specified legal contexts. As such, the Module considers how the law works 'in reality' and the extent to which the law can be used as a vehicle for social change; with women at the centre of that change. The Module enhances the student's knowledge of theory through a practical application of feminist (and other) legal theories in context of the topics studied.

Given the above the Module will explore feminist legal and political histories in the context of the following topics:

6. Pornography
7. Prostitution
8. Domestic Violence
9. Rape
10. Abortion and Reproductive Rights

11. Importance of Student Self-Managed Learning Time

12. Employability

Students taking this Module will develop their legal knowledge, their practical legal skills, their research ability, and their ability to think critically both within and around the subject of the law. The development of their intellectual and practical, legal, skills is crucial to their future employability whether as lawyers or in some other area of work. The skills and thinking developed here will help students to develop their own, critical, awareness of their training/academic needs so as to enhance their future employability.

11.The Programme of Teaching, Learning and Assessment

ASSESSMENT METHOD:

One compulsory report and one compulsory essay.

The report will be based on courtroom observation and analysis and will normally be between 1,500-2,000 words in length. The report will carry 40% of the overall mark.

The extended essay will carry 60% of the overall mark and will be between 2,500-3,000 words in length. The essay will require students to undertake library and IT based research of primary sources, journal articles, Law Commission papers and a consideration of literature in other jurisdictions.

This course recognises the value of small group work in assessing feminist legal problems and analysis and encourages students to undertake such work prior to the large group session. As a direct consequence of this recognition, students are encouraged to deploy the skills acquired within their small group sessions to the submission of the report and essay in this course.

Group based work can be undertaken by up to four students by arrangement with the course co-ordinator. Group work will receive one mark; each member of the group is given that mark. It is to be recognised that a higher standard of work is expected of those participating in group, as opposed to individual, work.

The marking criteria adopted will give credit for evidence of (a) feminist legal theoretical perspectives (b) independent research (c) cogency of argument (d) evidence of awareness of the broad contextual matters having bearing on the subject in comparable jurisdictions.

The Assessments:

Students will note that time has been set aside during the run of the Module for them to spend a day at court observing a trial. Guidance is given in the Large Group Session materials contained in this Module Guide as to the methods of observation to be deployed.

Students are reminded that whilst they are free to attend court with other students they must ensure that they take their own notes of the hearing, and do not share those notes with others. Moreover, they are reminded that this Court Report and the Extended Essay (see below) must be their own work and they should not (unless they have agreed with the Module Director to undertake Group Work) share their work with other students.

12.STUDENT EVALUATION

This is the first year that this Module will run and hence no student evaluation data is available.

13.Learning Resources

Details of core resources can be found on page 6 of this Module Guide.

Other books, journals and articles are referred to in the Reading List for each lecture. You will also be given access to additional articles by the Module Coordinator via the Blackboard site.

14.Frequently Asked Questions

Why should I study the Gender Justice and the Law Module?

Students who have an interest in broadening their understanding of legal, feminist and critical theories as well as undertaking challenging research will find that this Module is a good vehicle for their intellectual development. It is a comparative Module and draws upon some of the newer, exciting, developments in legal thinking in comparable jurisdictions around the world.

What does the Module actually cover?

It explores the relationship between gender justice and the law by challenging some of the fundamental assumptions upon which the law is built.

The Module provides you with an introduction to feminist/legal/political theories and then builds upon those by considering specific legal topics such as equality/discrimination and sexual harassment/ and issues that have had a fundamental effect on the lives of women globally – trafficking for the purposes of pornography/prostitution, domestic violence and rape. The emphasis is very much on a critical evaluation of the content of core theories of law, substantive law and case law.

Is it just about women?

Nope. The core theme of the Module is an examination of the way that the law in theory and practice treats women, but it is also a Module that challenges core assumptions of the law that apply equally to men and, of the course, in the context of race.

I'm a man is this a Module that I should study?

The Module is equally applicable to both men and women. In fact numerous male students have performed very well in this Module, with a good number securing first class marks. For example in the 2008/09 session three male students secured high first class marks for the Women and the law 2 Module, with one producing fabulous work and achieving a mark of 84% (the highest mark ever achieved in the Module).

I'm not sure about all this feminist theory stuff it's all a bit extreme isn't it?

Not really. Feminist legal theory is simply a method by which women lawyers, academics and activists have been able to think about and challenge the core assumptions about women and the law. There are many different types of feminists and many different feminist theories of the law; some may be more palatable than others. In this Module we look at a number of different feminist (and other) theories using the writings of women in the UK and in comparable jurisdictions around the world. This means that there is a good deal of balance in the materials that students' cover.

What teaching methods are used in these Modules?

Two-hour large group sessions every week – where a Socratic approach may be adopted (i.e. the lecturer asks you questions and invites your views). Fortnightly two hours small group sessions, where students will take part in role-playing exercises, prepare and present small group session papers, and undertake practical legal research.

The teaching is also supported by the on-line seminar and the on-line discussion board that can be found on the Gender Justice and the Law (GJL) Blackboard Site. Students are encouraged to discuss issues raised by the Module with each other and the course tutors on that board.

How important are the Large and Small Group Sessions? Why should I bother to attend?

They are very important!

The Large Group Sessions are designed to introduce you to the issues that the Module covers. In most cases the LGS will outline a particular topic, examine the key points in the development of the relevant law, and provide a critique. The emphasis will be on current legal and theoretical developments and reforms. The LGS session also provides you with an opportunity to ask questions related to the topic under consideration. Developments in the law that occur after the printing of the Module Guide will also be covered in the LGS. From time to time the lecturer will indicate that certain topics, although listed in the Module Guide, are not going to be specifically covered in the LGS time. This means that you should read up on those topics in your own private study time. If you have questions arising out of this reading, ask at the next LGS or on the GJL blackboard discussion board.

The SGS provides you with the opportunity to further your knowledge and understanding of the areas that you are covering in the Module. The SGS is designed to provide you with practical exercises and to engage you with theories concerning gender and justice. The SGS allows you the opportunity to thoroughly ground your understanding of the issues that the Module raises. These will, in turn, feed into the research report and the extended essay that you will submit for assessment

Will the Small Group Sessions help me to complete my extended essay?

The SGS provide an opportunity for you to assess your understanding of the subject, to engage in critical debate with other students concerning the topics under

consideration and to develop transferable skills by taking part in role play exercises. Each SGS provides you with an opportunity to:

- Test your knowledge and understanding of the substantive law
- Develop and demonstrate your ability to carry out research
- Test and develop your analytical skills
- Develop your oral communication skills
- Resolve any difficulties you may have in understanding and applying the relevant law/theories.

The reading indicated on each LGS sheet is intended to provide you with a basis for your research. In addition you should carry out research using original sources, such as cases and statutes in the library and LRC. Feel free to introduce material encountered in your wider reading where relevant.

It is widely acknowledged that students learn far more effectively when they are active participants than when they are passive observers. If you come to small group sessions ill-prepared, simply waiting to discover the 'right answer' from fellow students or your tutor, you will not only miss out on the fun of role playing and engaging in analytical discussion, but you will be at a disadvantage in terms of the development of transferable skills and preparation for your extended essay.

When preparing for the SGS make a note of those issues that you find particularly difficult to understand and remember to raise them with the tutor when it is appropriate to do so.

Why is the Module Guide so long?

The Module Guide aims to provide you with a complete study package for the GJL Module. The Guide contains a plan for each LGS, complete with case references, extracts from key theoretical perspectives, legal judgments and statutory provisions. It also contains your SGS worksheets and suggested readings.

How should I use the Module Guide?

You should bring the Module Guide with you to every class. The LGS is delivered on the assumption that you have the guide in front of you. The lecturer will not stop to dictate extracts from Judgments, particular theoretical perspectives, case law or statutory provisions – they are set out for you in the guide and the power point presentations for each LGS will be available on the GJL BB site.

It follows that during the LGS more time can be spent on discussion and analysis rather than the transmission of information. The best advice is to read through the relevant section of the Module Guide BEFORE the LGS so that you are at least familiar with the type of issues that will be discussed. You will note that there are blank pages at the end of each LGS session. This is to enable you to make notes in the LGS as you see fit. As indicated, the Module Guide also contains your SGS materials and your SGS tutor will allocate tasks to various members of the group as appropriate.

What happens if the law changes during the course of the year?

If there are significant changes to the law as the Module progresses these will be brought to your attention. You should aim to keep as up to date as you can.

What books should I buy?

The core text book for the Module is Rosemary Hunter's "Feminist Judgments". We also recommend that you buy (collectively) Hilliare Barnett's Sourcebook on Feminist Jurisprudence (it is very expensive so look for 2nd hand copies on Amazon). Both books support your studies here and also in Law and Politics/Medical Law and Ethics. There are other good texts on the market. In fact, Barnett has a small *"Introduction of Feminist Jurisprudence"* book. Additionally, I have recommended the book by Aileen McColgan *"Women under the Law: the False Promise of Human Rights"*. This is a very good book and raises some current legal/feminist/political issues. It serves as a good prop to Barnett's book.

I have also recommended *Heidersohn'*s book on Gender and Justice. This is a book focused on criminal justice and gender theory it is worth having a look at this book to see if you feel it will provide you with some useful additional support.

Students are encouraged to visit bookshops to explore the range of books available before buying any books to support the Barnett book. Students are also reminded that they will be required to read a number of articles relevant to the issues in this Module and, as such, the extended essay must reflect more than basic book-based learning.

This Module encourages the use of IT by students but I don't know how to email or how to surf the internet – how do I get help?

In this Module you will attend a Skills Workshop, given by the Law Librarian. Should you need further support after the workshop you should contact the LRC who provide IT courses/individual support for students.

The assessments allow students to prepare and submit work in groups of up to four, how does that work?

Students are encouraged to work in small groups throughout this Module and the submission of group work is a direct reflection of that approach. Students who are to undertake group work must consult with the Module co-ordinator before doing so. Students who complete group work will be expected to submit an essay that truly reflects the input of all members of the group. Given this, it is expected that the work will be of a high standard. It is incumbent upon students in the group to ensure that each member participates equally. Difficulties can be discussed with the Module co-ordinator. The work submitted by the group will receive one mark and each student in the group will receive that mark. If an extension if required for the group work, perhaps because of the sickness of one member of the group, each of the students in the group should make an application for an extension to be granted to them.

The work you submit must be your own (even if it is a collaborative piece of work with others in the group). You must ensure that it is presented in a way that shows you have applied your own thoughts to the issues. In short, ensure that you, and others in your group, are not simply regurgitating other people's ideas and phrases. Make sure that you are familiar with the University Guidelines on plagiarism (In particular Regulation 13 of the Academic Regulations 2010 available via the student gateway on the LSBU website) and the information on that in your LLB Course Guide.

If in any doubt at all give full credit for the source of our ideas and information, indicating the passages in your work that the referencing applies to. You must put directly copied material in "quotation marks"! You must attach to your essay the front sheet of any article/section from a book that you use.

Do not paraphrase material, it leads to plagiarism.

So what do I do if I find an article that seems very relevant to my assessment?

You need to show that you have read the article, understood it, and thought about its contents. This usually involves you providing evidence of the general thrust of the article, without repeating all of the points made therein verbatim in your answer.

Can the markers really spot plagiarism when they have so many answers to mark?

Yes! Assessments are double marked/moderated and markers are very familiar with articles and other sources available on the internet and elsewhere on the subjects we cover. Moreover, all assessments now have to be submitted into the TURNITIN system to avoid plagiarism.

It is important to understand that TURNITIN is a comprehensive database that can easily spot plagiarism in your work, both from articles and/or from the work of other students in the current year group and in past year groups. It can also detect work handed in at any other University.

The consequences of plagiarism are very serious, particularly if you intend to practice Law in the future. If we make a finding of plagiarism against a student we are obliged to report that finding to the professional bodies. The professional bodies then decide whether to admit the student as a member. Without membership you cannot practice law.

Also bear in mind that **if you are subject to a plagiarism finding you may have to repeat the work (often for a capped mark). The consequence of this is that you will not graduate along with your colleagues next summer as the re-takes are in August. Moreover, since you can only repeat for a capped mark of 40% your overall degree grade can be substantially affected by a plagiarism finding.**

One more thing – in serious cases of plagiarism the University has the right to terminate a student's studies. The University did exactly that to a Law student in July 2011.

Do not plagiarise your work.

How do I get a good mark in the assessment?

The emphasis in this Module is on quality of writing, originality of thought and research, construction of argument and presentation. You will not get much credit for simply reworking basic points found in the obvious textbooks or regurgitating your lecture/seminar notes. You have a fairly free hand in terms of going off to search for material (e.g. we do not restrict you to an analysis of English law – although there are many areas studied here where such an analysis is warranted – we encourage an international approach to your research). There will be no single 'right' answer. You must demonstrate an ability to critically consider the issues raised by the question that you have chosen to research.

What feedback can I expect on my assessed work?

The extended essay and report will **not** be returned to you as they are both submitted in place of an examination, but you can obtain a copy of the comments sheet and discuss the report and essay with the Module co-ordinator and tutor. Where appropriate, and with consent, the student who achieves the best mark for their work in this Module will have his or her essay distributed to future students so that everyone can see what the examiners regard as a good piece of work.

What should I do if I feel I am losing my grip on the subject?

Given the pace at which material is covered, it is essential that you keep up with the Module. If you feel you are getting out of your depth do not wait until the end of the course in the hope that you can catch up. Speak to the Module tutor, tell her what your problem is and ask her advice. If you show that you are serious about trying to do well in a subject most staff will be prepared to give you some extra assistance.

If I have any suggestions for ways that the Module could be improved (within the confines of what has been validated by the University) will anyone listen?

Yes. Speak to the Module co-ordinator or send her an email. The Modules are refined every year in light of experience and we would welcome your suggestions.

What should I do if I think this Module is really good?

Tell the Head of Department (Andy Unger) and/or the Dean of the Faculty, Mike Molan.

15.House Rules for Large Group Sessions

Taping

It is OK for you to tape record Large Group Sessions given by Caron Thatcher provided that you agree to certain ground rules:

- Do not cause annoyance to other students when setting up your machines
- Do not jump up to replace tapes half way through the lecture
- Do not copy and re-sell the tapes

If you want to tape a LGS given by any other member of staff, or a guest lecturer, please ask them first.

Latecomers

Students who arrive later than 15 minutes after the usual start time of the LGS should wait until the break before entering the LGS room. Students will be asked to adhere to this rule as late entrants to the LGS room disturb both fellow students and the flow of the lecture.

Questions

Please do ask questions relating to matters of general interest to the class in the LGS. The lecturer will deal with as many as time allows.

16.UsING IT IN THIS MODULE

Blackboard

There is a very useful Blackboard (BB) site for this Module. The site contains a number of articles that you will be asked to download and read, or alternatively to read on-line during this Module. Additionally, the site has a discussion board where students and staff can discuss issues raised by the Module and readings that students have considered or found whilst researching.

The BB site has a large group session section that will contain each power point presentation given during the process of the Module. The lecturer will aim to ensure that each presentation is made available on BB after the LGS.

The site also contains an electronic copy of this Module Guide, together with copies of previous extended essay questions.

All students are encouraged to make good use of the BB site. Any student who is unfamiliar with BB is asked to contact the Module co-ordinator immediately either in person or via email.

The BB site will be used for the On-Line Small Group Session on Rape. Any student who has concerns/queries regarding the On-Line Small Group Session should contact the Module Coordinator or speak directly to the Module Tutor.

Websites

Increasingly the internet is becoming a good source of information for law students. The LRC is available to you as a resource, so make use of it. You may find the following of use, but bear in mind that URLs are subject to change as is the free access provided by some operators. If you need extra training to research using the internet, you should contact the LRC. You will need to know how to use search engines, print out pages that look useful and save to USB's so that the information can be re-used.

Accessing useful websites is easy via the BB site. You can access a whole range of useful law reports, statutory instruments and journals using the link in the content part of GJL site.

17. Module Timetable GJL 2011-12

DATE	WEEK	SUBJECT	LGS/SGS
26th Sept	1	Storytelling and Legal Process	LGS
3rd Oct	2	Reason and the Law	SGS Group 1 Storytelling
Could put Karon Monaghan in here			
10th Oct	3	Research	NO SGS
17th Oct	4	Skills Workshop	SGS Group 2 Storytelling
24th Oct	5	Domestic Violence	SGS Group 1 Reason and Law
31st Oct	6	Rape and the Criminal Process	SGS Group 2 Reason and Law
7th Nov	7	Pornography	SGS Group 1 Domestic Violence
21ST Nov	8	Prostitution	SGS ALL GROUPS **RAPE ON LINE SEMINAR**
28th Nov	9	Abortion	SGS Group 1 Pornography and Prostitution
5th Dec	10	SGS Group 2 Pornography and Prostitution	SGS Groups 1 + 2 Abortion (in Lecture room K207/8)
12th Dec	11	**FEEDBACK SESSIONS**	

12th December 2011

STUDENT-TUTOR FEEDBACK MEETINGS AND PREPARATION FOR COURSEWORK SUBMISSIONS

Short Description

Drawing upon feminist and other associated theories, this Module explores a number of legal topics which have important consequences for women and their relationship with the law.
Using feminist theories and writing as the central tool of analysis the Module encourages students to develop an appreciation of the social, economic and political contexts in which the law and feminist theories operate.
The Module recognises the importance of combining theory and practice and seeks to explore those connections by embedding theory within a practical legal framework; for example, by exploring the impact of feminist and associated theories in the areas of Domestic Violence, Rape and Sexual Harassment.

Aims of the Module

(o) To investigate legal topics in their social context using feminist, as well as critical legal and critical race, tools of analysis.
(p) To develop student's understanding of legal and feminist theoretical perspectives so as to empower the student in the development of his or her intellectual profile as legal scholar.
(q) To build upon the knowledge students have acquired in core legal topics such as property, contract, tort and legal skills in order to begin to engage students in a deeper, critical, examination of those areas.
(r) Through courtroom observation, to encourage students to apply their knowledge of the interaction between women and the law in order for them to appreciate the subtle social, economic and political contexts within which the law operates.
(s) To encourage students to develop their own creativity in relation to feminist theories and the law through preparation of a report and an essay.
(t) To recognise the experiences that students and tutors bring to the course and to build on the foundation of those experiences in order to stimulate a critical and creative analysis of feminism and the law.
(u) To provide students with opportunities to widen the scope of their legal study through the adoption of a comparative law approach

Learning Outcomes

Students successfully completing the Module will be able to demonstrate:-

Knowledge and Understanding

(k) A clear understanding of feminist perspectives on specified areas of the law.

(l) The ability to assess the implication of legal rules and proposed reforms in those areas for certain groups within society

(m) The ability to reflect on their own experiences and perceptions of feminist theories

(n) That they have developed their own creativity in regard to feminism and the law

(o) A clear understanding of the interaction between feminist legal theories, feminist practices and the law and in so doing be able to identify different moral, philosophical and political theories to the study and practice of law.

Intellectual Skills

Legal Skills

Students successfully completing this Module will be able to demonstrate an ability to:

(g) Analyse and evaluate conflicting interpretations of statutes and cases by a critical analysis of the principles of statutory interpretation and the doctrine of precedent. The student will be able to analyse and evaluate the specific impact that these principles have on the rights of women within the law.

(h) Analyse and evaluate the law and law reform proposals in their social, political, economic and moral contexts.

(i) Reason critically and argue effectively about the legal issues studied in the Module, recognising alternative points of view, the importance of theory to practical legal development and offering reasoned opinions supported by authority or evidence.

Practical Skills

Communication skills

Through participation in large and small group sessions, most particularly By the presentation of papers in small group session, to communicate ideas effectively and appropriately both orally and in writing.

Read and understand technical legal materials and technical theoretical materials.

Appreciate through participation in small group sessions the techniques and strategies appropriate for advocacy.

IT Skills

Participate in one or more on-line seminars
Complete pre-seminar tests and participate in on-line discussions via the Blackboard VLA.

Produce a word processed Research Report and Essay.

Carry out effective web based research.

Communicate via email with the course tutor, particularly through the submission of pre-small group session material.

Transferable Skills

Students successfully completing this Module will have demonstrated an ability to:-

(o) Carry out independent research using a variety of media
(p) Plan and execute their research through the production of a research report and an essay
(q) Demonstrate their ability to set their priorities in terms of relevance and importance of either the case observed, or the material identified, to the production of the report and essay
(r) Plan and manage their work recognising the importance of setting priorities to meet deadlines
(s) Work autonomously by completing an extended programme of independent study
(t) Comply with the stands of scholarly practice
(u) Undertake group based work in seminars and in the production of the research report and /or the essay.

4.5 TEACHING AND LEARNING PATTERNS

Weeks 1 – 10: One 2 hours large group session per week
One 2 hours small group session per fortnight

Weeks 10-15: Private study and submission of extended essay

Ten weekly two hour lectures (or equivalent) and five fortnightly 2 hours seminars. The lecture series includes a dedicated session with the Law Librarian, and a courtroom observation session both of which provide the foundation for the students to complete their Research Report and Essay.

Students are provided with a lengthy and detailed course handout indicating the structure and content of each large group session. The handout indicates relevant case law, and sets out in full all relevant statutory provisions. Whilst lectures are the primary vehicle for the provision of structure and outline on key topics, they are not intended to provide students with all the information necessary for successful completion of the course.

At the end of each lecture the student should have not only a clearer understanding of the material covered, but also a grasp of what has been left unanswered and thus what needs to be addressed in private study and small group session preparation.
Within the constraints of the time available in lectures, emphasis is also placed on the development of a dialogue between staff and students through broadly Socratic techniques.
The lecture material provides students with structured reading on each topic and a selection of past examination questions.
Small group sessions are structured to ensure that students have developed a satisfactory understanding of the relevant law under consideration; can critically analyse the relevant law; and are aware of the need for and proposals for reform of the area of law under consideration.

INDICATIVE SYLLABUS CONTENT

The Module explores the construction of reason and reasonableness within the law, legal methods, equality, difference and justice through an examination of recent feminist histories, legal/political theories, developing feminist and critical legal theories, specific legal topics of relevance to women and relevant legislation/case laws.

5. ASSESSMENT METHOD:

2,000 word Court Research Report [40%]
3,000 word Essay [60%]

The production of the Research Report will require students to attend a Research session with the Law Librarian and to carry out court based observation. Additionally, students will be required to carry out library and IT based research.

The production of the Essay will require students to engage with library and IT based research of primary sources, journal articles, Law Commission papers and a consideration of literature in other jurisdictions.

The Module recognises the value of small group work in assessing feminist legal problems and analysis and encourages students to undertake such work both prior to the large group session. As a direct consequence of this recognition, students are encouraged to deploy the skills acquired within their small group sessions to the submission of the Research Report and/or Essay in this Module.

Group based work can be undertaken by up to four students by arrangement with the course co-ordinator. Group work will receive one mark; each member of the group is given that mark. It is to be recognised that a higher standard of work is expected of those participating in group, as opposed to individual, work.

The marking criteria adopted will give credit for evidence of (a) feminist legal theoretical perspectives (b) independent research (c) cogency of argument (d) evidence of awareness of the broad contextual matters having bearing on the subject in comparable jurisdictions.

6. LEARNER SUPPORT MATERIAL

The Module has a broad content and is fortunate that there is a textbook which covers the range of material considered in the Module:

Core Reading:

Rosemary Hunter et al "Feminist Judgments: From Theory to Practice", Hart, 2010.
Available on Amazon (new) from £21.80

Hillaire Barnett "Sourcebook on Feminist Jurisprudence" Cavendish l999.
available on Amazon (Used) from £25.00

Additional Reading:

Francis Heidensohn "Gender and Justice – New Concepts and Approaches" Willan, 2006. Available on Amazon £24.69

Aileen McColgan "Women under the Law: The false promise of human rights" Longman 2000.

Richardson & Sandland "Feminist Perspectives on Law and Theory" Cavendish, 2000.

Anne Bottomley (ed) "Feminist Perspectives on the Foundation Subjects of Law" Cavendish l996

Feminist Legal Studies Journal (available on line via LISA electronic journals link)

ON-LINE SEMINAR:
All students will take part in an on-line seminar during this Module. We have run on-line seminars for this Module for a few years and feedback from students to this innovation has been very positive. The on-line seminar requires students to think about their communication skills, to make necessary adjustments so as to be heard/understood and to respect the different communication skills of others. The on-line seminar encourages all students to participate. Students will find detailed information regarding the on-line seminar in the Small Group Sessions part of this Module Guide.

7. Feedback

At the end of the Module students will be invited to a personal **FEEDBACK** session with a member of the GJL teaching team. Students have the opportunity to discuss their own performance on the module and will be guided on areas where they require further development.

Both pieces of assessed work in this Module are deemed to be in place of an exam and on that basis **the Case Report and the Extended Essay are NOT given back to students**. However, students are more than welcome to see either piece of assessment, to receive **FEEDBACK** on their performance from a meber of the GJL teaching team, and to take a photocopy of the feedback sheet if they wish.

8. Introduction to Studying the Module

Overview of the Main Content

The Module critically examines a number of different legal topics of specific relevance to women, drawing upon feminist and other theories of the law. It uses theories to challenge core assumptions about the neutrality and coherence of the law, and to assess the impact of those assumptions upon women in specified legal contexts. As such, the Module considers how the law works 'in reality' and the extent to which the law can be used as a vehicle for social change; with women at the centre of that change. The Module enhances the student's knowledge of theory through a practical application of feminist (and other) legal theories in context of the topics studied.

Given the above the Module will explore feminist legal and political histories in the context of the following topics:

11. Pornography
12. Prostitution
13. Domestic Violence
14. Rape
15. Abortion and Reproductive Rights

13. Importance of Student Self-Managed Learning Time

14. Employability

Students taking this Module will develop their legal knowledge, their practical legal skills, their research ability, and their ability to think critically both within and around the subject of the law. The development of their intellectual and practical, legal, skills is crucial to their future employability whether as lawyers or in some other area of work. The skills and thinking developed here will help students to develop their own, critical, awareness of their training/academic needs so as to enhance their future employability.

11.The Programme of Teaching, Learning and Assessment

ASSESSMENT METHOD:

One compulsory report and one compulsory essay.

The report will be based on courtroom observation and analysis and will normally be between 1,500-2,000 words in length. The report will carry 40% of the overall mark.

The extended essay will carry 60% of the overall mark and will be between 2,500-3,000 words in length. The essay will require students to undertake library and IT based research of primary sources, journal articles, Law Commission papers and a consideration of literature in other jurisdictions.

This course recognises the value of small group work in assessing feminist legal problems and analysis and encourages students to undertake such work prior to the large group session. As a direct consequence of this recognition, students are encouraged to deploy the skills acquired within their small group sessions to the submission of the report and essay in this course.

Group based work can be undertaken by up to four students by arrangement with the course co-ordinator. Group work will receive one mark; each member of the group is given that mark. It is to be recognised that a higher standard of work is expected of those participating in group, as opposed to individual, work.

The marking criteria adopted will give credit for evidence of (a) feminist legal theoretical perspectives (b) independent research (c) cogency of argument (d) evidence of awareness of the broad contextual matters having bearing on the subject in comparable jurisdictions.

The Assessments:

Students will note that time has been set aside during the run of the Module for them to spend a day at court observing a trial. Guidance is given in the Large Group Session materials contained in this Module Guide as to the methods of observation to be deployed.

Students are reminded that whilst they are free to attend court with other students they must ensure that they take their own notes of the hearing, and do not share those notes with others. Moreover, they are reminded that this Court Report and the Extended Essay (see below) must be their own work and they should not (unless they have agreed with the Module Director to undertake Group Work) share their work with other students.

12.STUDENT EVALUATION

This is the first year that this Module will run and hence no student evaluation data is available.

13.Learning Resources

Details of core resources can be found on page 6 of this Module Guide.

Other books, journals and articles are referred to in the Reading List for each lecture. You will also be given access to additional articles by the Module Coordinator via the Blackboard site.

14.Frequently Asked Questions

Why should I study the Gender Justice and the Law Module?

Students who have an interest in broadening their understanding of legal, feminist and critical theories as well as undertaking challenging research will find that this Module is a good vehicle for their intellectual development. It is a comparative Module and draws upon some of the newer, exciting, developments in legal thinking in comparable jurisdictions around the world.

What does the Module actually cover?

It explores the relationship between gender justice and the law by challenging some of the fundamental assumptions upon which the law is built.

The Module provides you with an introduction to feminist/legal/political theories and then builds upon those by considering specific legal topics such as equality/discrimination and sexual harassment/ and issues that have had a fundamental effect on the lives of women globally – trafficking for the purposes of pornography/prostitution, domestic violence and rape. The emphasis is very much on a critical evaluation of the content of core theories of law, substantive law and case law.

Is it just about women?

Nope. The core theme of the Module is an examination of the way that the law in theory and practice treats women, but it is also a Module that challenges core assumptions of the law that apply equally to men and, of the course, in the context of race.

I'm a man is this a Module that I should study?

The Module is equally applicable to both men and women. In fact numerous male students have performed very well in this Module, with a good number securing first class marks. For example in the 2008/09 session three male students secured high first class marks for the Women and the law 2 Module, with one producing fabulous work and achieving a mark of 84% (the highest mark ever achieved in the Module).

I'm not sure about all this feminist theory stuff it's all a bit extreme isn't it?

Not really. Feminist legal theory is simply a method by which women lawyers, academics and activists have been able to think about and challenge the core assumptions about women and the law. There are many different types of feminists and many different feminist theories of the law; some may be more palatable than others. In this Module we look at a number of different feminist (and other) theories using the writings of women in the UK and in comparable jurisdictions around the world. This means that there is a good deal of balance in the materials that students' cover.

What teaching methods are used in these Modules?

Two-hour large group sessions every week – where a Socratic approach may be adopted (i.e. the lecturer asks you questions and invites your views). Fortnightly two hours small group sessions, where students will take part in role-playing exercises, prepare and present small group session papers, and undertake practical legal research.

The teaching is also supported by the on-line seminar and the on-line discussion board that can be found on the Gender Justice and the Law (GJL) Blackboard Site. Students are encouraged to discuss issues raised by the Module with each other and the course tutors on that board.

How important are the Large and Small Group Sessions? Why should I bother to attend?

They are very important!

The Large Group Sessions are designed to introduce you to the issues that the Module covers. In most cases the LGS will outline a particular topic, examine the key points in the development of the relevant law, and provide a critique. The emphasis will be on current legal and theoretical developments and reforms. The LGS session also provides you with an opportunity to ask questions related to the topic under consideration. Developments in the law that occur after the printing of the Module Guide will also be covered in the LGS. From time to time the lecturer will indicate that certain topics, although listed in the Module Guide, are not going to be specifically covered in the LGS time. This means that you should read up on those topics in your own private study time. If you have questions arising out of this reading, ask at the next LGS or on the GJL blackboard discussion board.

The SGS provides you with the opportunity to further your knowledge and understanding of the areas that you are covering in the Module. The SGS is designed to provide you with practical exercises and to engage you with theories concerning gender and justice. The SGS allows you the opportunity to thoroughly ground your understanding of the issues that the Module raises. These will, in turn, feed into the research report and the extended essay that you will submit for assessment

Will the Small Group Sessions help me to complete my extended essay?

The SGS provide an opportunity for you to assess your understanding of the subject, to engage in critical debate with other students concerning the topics under consideration and to develop transferable skills by taking part in role play exercises. Each SGS provides you with an opportunity to:

- Test your knowledge and understanding of the substantive law
- Develop and demonstrate your ability to carry out research
- Test and develop your analytical skills
- Develop your oral communication skills

- Resolve any difficulties you may have in understanding and applying the relevant law/theories.

The reading indicated on each LGS sheet is intended to provide you with a basis for your research. In addition you should carry out research using original sources, such as cases and statutes in the library and LRC. Feel free to introduce material encountered in your wider reading where relevant.

It is widely acknowledged that students learn far more effectively when they are active participants than when they are passive observers. If you come to small group sessions ill-prepared, simply waiting to discover the 'right answer' from fellow students or your tutor, you will not only miss out on the fun of role playing and engaging in analytical discussion, but you will be at a disadvantage in terms of the development of transferable skills and preparation for your extended essay.

When preparing for the SGS make a note of those issues that you find particularly difficult to understand and remember to raise them with the tutor when it is appropriate to do so.

Why is the Module Guide so long?

The Module Guide aims to provide you with a complete study package for the GJL Module. The Guide contains a plan for each LGS, complete with case references, extracts from key theoretical perspectives, legal judgments and statutory provisions. It also contains your SGS worksheets and suggested readings.

How should I use the Module Guide?

You should bring the Module Guide with you to every class. The LGS is delivered on the assumption that you have the guide in front of you. The lecturer will not stop to dictate extracts from Judgments, particular theoretical perspectives, case law or statutory provisions – they are set out for you in the guide and the power point presentations for each LGS will be available on the GJL BB site.

It follows that during the LGS more time can be spent on discussion and analysis rather than the transmission of information. The best advice is to read through the relevant section of the Module Guide BEFORE the LGS so that you are at least familiar with the type of issues that will be discussed. You will note that there are blank pages at the end of each LGS session. This is to enable you to make notes in the LGS as you see fit. As indicated, the Module Guide also contains your SGS materials and your SGS tutor will allocate tasks to various members of the group as appropriate.

What happens if the law changes during the course of the year?

If there are significant changes to the law as the Module progresses these will be brought to your attention. You should aim to keep as up to date as you can.

What books should I buy?

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Do not paraphrase material, it leads to plagiarism.

So what do I do if I find an article that seems very relevant to my assessment?

You need to show that you have read the article, understood it, and thought about its contents. This usually involves you providing evidence of the general thrust of the article, without repeating all of the points made therein verbatim in your answer.

Can the markers really spot plagiarism when they have so many answers to mark?

Yes! Assessments are double marked/moderated and markers are very familiar with articles and other sources available on the internet and elsewhere on the subjects we cover. Moreover, all assessments now have to be submitted into the TURNITIN system to avoid plagiarism.

It is important to understand that TURNITIN is a comprehensive database that can easily spot plagiarism in your work, both from articles and/or from the work of other students in the current year group and in past year groups. It can also detect work handed in at any other University.

The consequences of plagiarism are very serious, particularly if you intend to practice Law in the future. If we make a finding of plagiarism against a student we are obliged to report that finding to the professional bodies. The professional bodies then decide whether to admit the student as a member. Without membership you cannot practice law.

Also bear in mind that **if you are subject to a plagiarism finding you may have to repeat the work (often for a capped mark). The consequence of this is that you will not graduate along with your colleagues next summer as the re-takes are in August. Moreover, since you can only repeat for a capped mark of 40% your overall degree grade can be substantially affected by a plagiarism finding.**

One more thing – in serious cases of plagiarism the University has the right to terminate a student's studies. The University did exactly that to a Law student in July 2011.

Do not plagiarise your work.

How do I get a good mark in the assessment?

The emphasis in this Module is on quality of writing, originality of thought and research, construction of argument and presentation. You will not get much credit for simply reworking basic points found in the obvious textbooks or regurgitating your

lecture/seminar notes. You have a fairly free hand in terms of going off to search for material (e.g. we do not restrict you to an analysis of English law – although there are many areas studied here where such an analysis is warranted – we encourage an international approach to your research). There will be no single 'right' answer. You must demonstrate an ability to critically consider the issues raised by the question that you have chosen to research.

What feedback can I expect on my assessed work?

The extended essay and report will **not** be returned to you as they are both submitted in place of an examination, but you can obtain a copy of the comments sheet and discuss the report and essay with the Module co-ordinator and tutor. Where appropriate, and with consent, the student who achieves the best mark for their work in this Module will have his or her essay distributed to future students so that everyone can see what the examiners regard as a good piece of work.

What should I do if I feel I am losing my grip on the subject?

Given the pace at which material is covered, it is essential that you keep up with the Module. If you feel you are getting out of your depth do not wait until the end of the course in the hope that you can catch up. Speak to the Module tutor, tell her what your problem is and ask her advice. If you show that you are serious about trying to do well in a subject most staff will be prepared to give you some extra assistance.

If I have any suggestions for ways that the Module could be improved (within the confines of what has been validated by the University) will anyone listen?

Yes. Speak to the Module co-ordinator or send her an email. The Modules are refined every year in light of experience and we would welcome your suggestions.

What should I do if I think this Module is really good?

Tell the Head of Department (Andy Unger) and/or the Dean of the Faculty, Mike Molan.

15.House Rules for Large Group Sessions

Taping

It is OK for you to tape record Large Group Sessions given by Caron Thatcher provided that you agree to certain ground rules:

- Do not cause annoyance to other students when setting up your machines
- Do not jump up to replace tapes half way through the lecture
- Do not copy and re-sell the tapes

If you want to tape a LGS given by any other member of staff, or a guest lecturer, please ask them first.

Latecomers

Students who arrive later than 15 minutes after the usual start time of the LGS should wait until the break before entering the LGS room. Students will be asked to adhere to this rule as late entrants to the LGS room disturb both fellow students and the flow of the lecture.

Questions

Please do ask questions relating to matters of general interest to the class in the LGS. The lecturer will deal with as many as time allows.

16.UsING IT IN THIS MODULE

Blackboard

There is a very useful Blackboard (BB) site for this Module. The site contains a number of articles that you will be asked to download and read, or alternatively to read on-line during this Module. Additionally, the site has a discussion board where students and staff can discuss issues raised by the Module and readings that students have considered or found whilst researching.

The BB site has a large group session section that will contain each power point presentation given during the process of the Module. The lecturer will aim to ensure that each presentation is made available on BB after the LGS.

The site also contains an electronic copy of this Module Guide, together with copies of previous extended essay questions.

All students are encouraged to make good use of the BB site. Any student who is unfamiliar with BB is asked to contact the Module co-ordinator immediately either in person or via email.

The BB site will be used for the On-Line Small Group Session on Rape. Any student who has concerns/queries regarding the On-Line Small Group Session should contact the Module Coordinator or speak directly to the Module Tutor.

Websites

Increasingly the internet is becoming a good source of information for law students. The LRC is available to you as a resource, so make use of it. You may find the following of use, but bear in mind that URLs are subject to change as is the free access provided by some operators. If you need extra training to research using the internet, you should contact the LRC. You will need to know how to use search

engines, print out pages that look useful and save to USB's so that the information can be re-used.

Accessing useful websites is easy via the BB site. You can access a whole range of useful law reports, statutory instruments and journals using the link in the content part of GJL site.

17. Module Timetable GJL 2011-12

DATE	WEEK	SUBJECT	LGS/SGS
26th Sept	1	Storytelling and Legal Process	LGS
3rd Oct	2	Reason and the Law	SGS Group 1 Storytelling
Could put Karon Monaghan in here			
10th Oct	3	Research	NO SGS
17th Oct	4	Skills Workshop	SGS Group 2 Storytelling
24th Oct	5	Domestic Violence	SGS Group 1 Reason and Law
31st Oct	6	Rape and the Criminal Process	SGS Group 2 Reason and Law
7th Nov	7	Pornography	SGS Group 1 Domestic Violence
21ST Nov	8	Prostitution	SGS ALL GROUPS **RAPE ON LINE SEMINAR**
28th Nov	9	Abortion	SGS Group 1 Pornography and Prostitution
5th Dec	10	SGS Group 2 Pornography and Prostitution	SGS Groups 1 + 2 Abortion (in Lecture room K207/8)
12th Dec	11	**FEEDBACK SESSIONS**	

12th December 2011

STUDENT-TUTOR FEEDBACK MEETINGS AND PREPARATION FOR COURSEWORK SUBMISSIONS

Large Group Session Materials

LARGE GROUP SESSION 1

INTRODUCTION/STORYTELLING

6. Structure of the Course

Module Guide
Large Group Sessions

Small Group Sessions

On Line Seminar

Feedback – Individual feedback sessions

Blackboard Resources

Etivities & discussion forums on Blackboard

7. Core Themes of the Course

'Equality' (Sameness) v Difference - Reason/reasonableness
Constructing legal knowledges and 'new' challenges from feminist theories/(counter) storytelling.

Applying theory to practical legal circumstances: Rape, Domestic Violence, Pornography, Prostitution, Abortion.

8. Examination Essays/Research Reports and feedback

9. Legal Truths:

Questions: Is the law Neutral?
Can we achieve Certainty in the law?

Is Neutrality/Certainty in the Law desirable?

10. (Counter) Storytelling

Outsider Jurisprudence – A challenge to 'mainstream' or 'established' jurisprudence.

Questions: Who are the outsiders?
Is everyone an outsider?
Are outsiders 'outside' all the time?

(counter) Storytelling - A recognition that 'stories' are told within mainstream law and develop/are accepted as legal 'truths'.

Questions:

- What are Counterstories?
    - Who tells Counterstories?
    - Do Counterstories 'count'?
    - How can a consideration of storytelling help us to understand the relationship between outsiders and the law?
    - In the Courtroom, how are counterstories told and are they understood?
    - Who are the outsiders in Court?
    - If the stories of outsiders are to be preferred what happens when the two litigants are both outsiders?

Materials which will help you consider the issues raised by Counter-storytelling and Outsider Jurisprudence include:

- Mari Matsuda "Affirmative Action and Legal Knowledge Planting Seeds in Plowed up Ground" Harvard Women's LJ 185 (1988)
- Naomi Cahn "Inconsistent Stories" Georgetown LJ Vol 81 2475 (1993)
- Kimberle Crenshaw "Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color" Stanford L Rev Vol 43 1241 (1991)
- Bell Hooks "Feminist Theory – From Margins to Centre" Boston South End Press (1984)

What's next? Preparation for the SGS:

Students are required to complete some tasks in advance of the SGS.

Before the first SGS ALL students will need to complete a short assignment on the Blackboard Women and Law site. Relevant information can be found in the Small Group Sessions part of this Module Guide.

Reading:

In advance of the first SGS and in order to complete the assignment and prepare the Defence for the Duck, all students must read:

Kim Lane Scheppele "Forward: Telling Stories" Michigan Law Rev. 87 (53) (1989) [See Appendix 1]

Jesse Elvin "The continuing use of problematic sexual stereotypes in judicial decision-making" Feminist Legal Studies Journal, Vol 18, No.3 (2010) [See Appendix 2]

The story of Farmer Duck – summary in SGS Outline

- Hunter "Feminist Judgments" Chapters 1, 2 & 3
- Review your Property Law/Equity & Trusts/Contract law course notes/text book.
- Any of the articles indicated in this LGS

LARGE GROUP SESSION 2

Reason and the Law

7. FEMINIST LEGAL THEORIES

History and background – Classical Legal Theories/Feminist Legal Theories/Modern Legal Theories

Catherine MacKinnon "Feminism, Marxism, Method & The State: Toward a Feminist Jurisprudence" Vol 8 Signs p.635 (1983) and "Toward a Feminist Theory of the State" Cambridge, Harvard Uni Press (1989)

Liberalism and Reason:

False claims of objectivity, truth and universality?

Rosi Bradotti "Ethics Revisited: Women and/in Philosophy" in C. Pateman "Feminist Challenges" Allen & Unwin (1986)

J. Grimshaw "Feminist Philosophers: Women's Perspectives on Philosophical Traditions", Brighton, Wheatsheaf, (1986)

G. Lloyd "The Man of Reason: Male and Female in Western Philosophy" London, Methuen (1984)

D. Coole "Women in Political Theory" Brighton, Wheatsheaf (1988)

Carole Pateman "The Theoretical Subversiveness of Feminism" in "Feminist Challenges" Allen and Unwin (1986)

Susan Okin "Justice and Gender in the Family" New York, Basic Books (1990).

8. Standards of Reason:

"In the magic of my blackness…I can turn myself invisible. I can render myself completely undetectable to most eyes even if I jump up and down and wave and shout I have trouble getting them to see just one of me. For example, if I spill soup in a restaurant, they tend to see hundreds of me; if I have a baby, I tend to have a population explosion; if I move into a neighbourhood, I come as the forward

phalax of an invading army; if I have an opinion its attributed to 'you people'.

[Patricia J. Williams "A Rare Case of Mulheadedness and Men" in Toni Morrison "Race-ing Justice, En-gendering power: Essays on Anita Hill, Clarence Thomas and the Construction of Social Reality" Chatto, l993]

Bebb v Law Society [1914] 1 CH 286
Turley v Alders Department Store [1980] IRLR 4
Webb v EMO Air Cargo Ltd [1993] 1 WLR 49 (HL) Case No. C-32/93; [1994] IRLR 482

9. The Reasonable Man/Person?

Robert Unikel "Reasonable Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence" Northwestern Uni L. Rev. Vol 97 No. 1 (1992)

Nancy S. Ehrenreich "Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law" [1990] 99 Yale LJ 1177

10. Legal Beginnings

The United Kingdom:

Vaughan v Menlove [1837] 132 Eng Rep 490
Blyth v Birmingham Waterworks Co [1856] 156 Eng Rep 1447

Hilary Allen "One Law for All Reasonable Persons? 16 Int'l Jo Soc and law 419-422 (1988)

Steward v Cleveland Guest Engineering Ltd [1994] IRLR 440

Leo Flynn "Interpretation and Disputed Accounts in Sexual Harassment Cases" Feminist Legal Studies Jo. Vol IV No.1 (1996)

The Equality Act 2010
http://www.legislation.gov.uk/ukpga/2010/15/body

The United States:

Harris v Forklift Systems Inc 114 Sup Ct (1992)

Jane L. Dolkart "Hostile Environment Sexual Harassment: Equality Objectivity and the Shaping of Legal Standards" Emory Law Jo. Vol 34 (1994)

Bradwell v State of Illinois [1872] US (16 Wall) 130
Rabidue v Osceola Refining company [1986] 805 F.2d 611 6th cir.

Sexual Harassment – UK/EU development

The Hostile Work Environment:

Meritor Savings Bank v Vinson 477 US 57 (1986)

Bundy v Jackson 641 f2d

Henson v City of Dundee 924 F2d 872 9th cir (1992)

Sabino Guittierrez v California Acrylics Inc & Maria Martinez (unreported) May 1993

Unwelcomeness

B. Glenn George "The Back Door: Legitimising Sexual Harassment Claims" Boston Uni L. Rev 73 No.1 Jan (1993)
Susan Estrich "Rape" Camb Mass Harvard Uni Press (1988)
Mary Jo Shaney "Note: Perceptions of Harms: The Consent Defense in Sexual Harassment Cases" 71 Iowa Law Rev 1109 (1986)

Swentek v US Air Inc 830 Fd 552 4th cir (1987)

11. A Challenge from the Reasonable Woman?

Naomi Cahn "The Looseness of Legal Language: The Reasonable Woman Standard in Theory and Practice" Cornell LR Vol 77, 1401 (1992)

State v Wanrow (1977) 599 p.2d 548 Wash

Kathryn Abrams "Gender Discrimination and the Transformation of Workplace Norms" 42 Vand L. Rev 1183 (1989)

12. Standards and Universalism:

Audre Lorde "Age, Race, Class and Sex: Women Redefining Difference" in "Sister Outsider" (1984)
Jane L. Dolkart "Hostile Environment Harassment: Equality, Objectivity and the Shaping of legal Standards" 43 Emory LJ 151 200 (1994)
Lucinda M. Finley "A Break in the Silence: Including Women's issues in a Torts Course" 1 Yale Jo Law and Feminism 41, 64 (1989)
Mari Matsuda "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method" 11 Women's Rights Law Rep, 7 (1989)
Patricia J. Williams "The Alchemy of Race and Rights" Cambridge Harvard Uni Press (1991)
Martha Minow "Making all the Difference" New York, Cornell University Press (1990)
Caroline Forell "Essentialism, Empathy and the Reasonable Woman" Uni Illinois Law Rev. Vol 4 (1994)
Angela Harris "Race and Essentialism in Feminist Legal Theory" 42 Stan Law Rev 681 (1990)

Essential Reading 

Any of the articles indicated above PLUS

Hunter - Chapter 23

Barnett – Chapters 3, 5 7 & 8

Robert Unikel "Reasonable Doubts….." [See Appendix]

Maureen Spencer "Book Review – Joan C.Willliams 'Reshaping the Work-Family debate'" Feminist Legal Studies Jo. Vol. 19, No.2, August, 2011

Monti G "A Reasonable Woman Standard in Sexual Harassment Litigation" Feminist Legal Studies Jo. Vol l9 No.4 (1999)

Naomi Cahn "Inconsistent Stories" Georgetown LJ Vol81 2475 (1993)

J. Houghton-Jones “Sexual Harassment” Cavendish, London (1995)

Additional Sources

Linda Clarke Harassment, sexual harassment, and the Employment Equality (Sex Discrimination) Regulations 2005. Industrial Law Journal I.L.J. (2006) Vol.35 No.2 Pages 161-178

Harriet Samuels “A Defining Moment: A Feminist Perspective on the Law of Sexual Harassment in the Workplace in Light of the Equal Treatment Amendment Directive”. Feminist Legal Studies Jo. Vol 12, No.2, 2004 Pg 181-211.

Annick Masselot “The New Equal Treatment Directive” Feminist Legal Studies Jo. Vol. 12, No.1, 2004, Pg 92-104

Macdonald LAC “Equality, Diversity and Discrimination” CIPD, London, 2004.

Jane L. Dolkart “Hostile Environment Sexual Harassment: Equality Objectivity and the Shaping of Legal Standards” Emory Law Jo. Vol 34 (1994) – can be read or downloaded from Westlaw

Ann Juliano “Did she ask for it? The Unwelcomeness Requirement in Sexual Harassment Cases” Cornell Law Rev 97 1588 (1992) – can be read or downloaded from Westlaw

Catherine A. MacKinnon “Sexual Harassment: Its First Decade in Court” in “Feminism Unmodified: Discourses on Life and Law” Cambridge Harvard Uni Press (1987)

Large Group Session 3

SKILLS WORKSHOP

In place of the usual lecture, we have arranged for GJL students to attend a dedicated skills workshop at the Skills Centre. The skills workshop will be tutored by the Law Librarian. It will involve an introduction to Information Technology and relevant research data bases. This will include the Internet and the CD Roms. You will have a machine to work at during the session and so will have hands-on tuition.

Students are asked to note that the purpose of this workshop is to introduce you to the range of opportunities for computer based research in this area of the Law. The workshop will not teach you how to use the computers (the staff at the Skills Centre can help you with that, and can provide you with information sheets which tell you how to access the computers and the various databases), but the session will give you an introduction to using the technology quickly and efficiently.

The Law Librarian will also give you tips on researching via Westlaw and Lexis Nexis. These are probably the most costly computer database held by the University and also (naturally) the best. Between them they contain the full text of reported and unreported cases from the UK, Europe, the Commonwealth and the USA. Through these databases you can also access the full text of articles in the New Law Journal, Law Society gazette, Estates Gazette and some others. Additionally you can search for law review articles from the USA/Canada. These databases, together with Lawtel, will prove extremely useful to all students when conducting research for the Research Report and Essay.

Students will also be given an introduction to locating relevant information via the internet and the use of the internet as a research tool, together with details of the correct citation method for internet based research.

During this Module there will be a practical opportunity for you to demonstrate your IT skills during this Module through the submission of

some seminar materials via email, downloading of some seminar materials from the internet and the on-line seminar.

Your attendance at this workshop forms part of the attendance requirements of this course, hence attendance is compulsory and a register of attendance will be taken

The session will last between 1-2 hours.

LARGE GROUP SESSION 4

RESEARCH

Students will be aware that they must complete a research project (coursework) during this Module.

There will be **no formal LGS this week** in order to give students the opportunity to attend at either the Central Criminal Court or a local **Crown/Magistrates Court** to observe the progress of a case. Inner London Crown Court, Newington Causeway, London SE1 or Blackfriars Crown Court, Pocock Street, London SE1 are within 10 minutes walking distance of the University.

Please note that when observing a case you should ensure that you see both the defence and prosecution advocate cross examining a witness. You should ensure that you make a good note of what was said, who said it, the impact/purpose of what was said, and what, if anything the Judge/Jury said during the time you observed the case.

In your research project you are required to:

3. Outline the case observed; including details of the defendant, any witnesses, the name of the court, whether Magistrates/Crown Court, who cross examined, what the case was about.
4. Demonstrate an understanding of the roles of the various participants in the case.
9. Critically consider the stories being told in the case.
10. Consider whether counterstories are being told? If so, how and with what degree of impact?
11. Consider whether mainsteam stories are being told? If so, how and with what degree of impact?
12. Consider which of the stories you have heard are the most convincing? Why?
13. Could anything have been said by either side which might have made a difference to your assessment in No.6 above?
14. Finally, drawing upon the articles you have read and your experience attending court, critically consider what value counterstorytelling has in a practical legal setting.

Please remember that the Research Report is a piece of assessed coursework carrying 40% of the marks in this Module.

The **maximum** word limit for the Research Report is 2,000.

This is a word limit not a goal.

In the Appendices at the end of this Module Guide you will find a sample research report written by a former student. This is provided to you as an example of excellent work. It will also help you to focus on the issues that you need to identify when you are at court.

READ the sample research report BEFORE you undertake your own research.

LARGE GROUP SESSION 5

Applying Theory to Fact – Domestic Violence

9. Should we be troubled by domestic violence? What has it got to do with us?

- International Human Rights Laws – International Convention on Civil and Political Rights, Convention on the Elimination of all forms of Discrimination against Women
- "The cost of Domestic Violence" – DTI study September 2004 (UK) (Sylvia Walaby) http://www.equalities.gov.uk/PDF/Cost%20of%20domestic%20violence%20%28Walby%29%20Sep%2004.pdf

10. Defining Domestic Violence

UK Government Definition – "Safety and Justice: The Government's Proposals on Domestic Violence" Cmnd 5847, June 2004.
"Any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality".

UN Declaration on the Elimination of Violence Against Women
Article 1
"The term 'violence against women' means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or in private life" .

11. Historic, social and political background to the development of DV initiatives in the UK

- 1 DV incident every minute of every day in the UK
- 2 women killed per week
- 50% female murder victims, killed by husbands or partners
- 90% of DV incidents – children in same room or room nearby
- 35 assaults on average before women report assault to police

12. Civil/Criminal law protections? Is there a need for a Domestic Violence law?

- **Case Scenario 1: A man repeatedly threatens a woman (his wife/partner) with violence.**
  Civil Law protections – Injunction/Non-Molestation Order/Exclusion Order

Criminal Law protections – Assault by words alone? R v Constanza 1997 2 Cr App R 392. Can silence constitute an assault? R v Ireland and Burstow 1997 3 WLR 650

- **Case Scenario 2: A woman wants a man (husband/partner) to keep away (temporarily or permanently) from a house that he owns**

Private Property/Ownership rights/civil law protections/remedies

- **Case scenario 3: A man who is the former husband/partner of a woman stalks her by spying on her, watching her from his car, taking photographs of her, listening into her telephone calls, and making repeated, unwanted, calls to her at her place of work and home**

Protection from Harassment Act l997
Francisco v Diedrick (1998) TLR 218

13. Domestic Violence Courts

98 Specialist Domestic Violence Courts in England and Wales
UK Government National Action Plan (March 2005) Aim to improve case outcomes and bring more offenders to justice

14. Police and Prosecution Domestic Violence Prevention Initiatives

Police receive over 1,300 calls per day – 570,000 calls each year (Stanko, 2000).
40.2% of all domestic violence crime reported to police (British Crime Survey 2006)

2003 Her Majesty's Inspectorates of Constabulary and Crown Prosecution Service – joint inspection. Aim to improve work between Police and CPS.

43 police forces have Domestic Violence Officers.
National Guidelines for investigating DV crimes (established 2004)
National Training Scheme for police officers
Impartiality of police officers - Police with proven history of Domestic Violence against wife/partner 'not deemed suitable for police work'.

- **Case Scenario 4: A woman has reported an assault on her by a man (husband/partner), but she now refuses to give evidence against him at court**

Section 23 Criminal Justice Act l988: Prosecution without calling victim at trial.

Public Interest Test and Domestic Violence

The Youth Justice and Criminal Evidence Act l999. Special Measures for vulnerable or intimated witnesses: Screens, live link, empty pubic gallery, remove wigs and gowns.

April 2008 – CPS Aide-Memoire on Charging in Domestic Violence Cases. Aim – to provide a uniform approach to handling DV cases and to reduce the high number of discontinued DV cases.

Full Code Test: 1. Evidential Test 2. Public Interest Test
Gathering evidence of the victim: Corroboration, 999 tape, CCTV, Photographs
Gathering evidence of the offender: Previous convictions?
Conduct/demeanour at arrest? Admissions? Any sign of injury on him?

15. Homicide and Domestic Violence

An Historical Overview:

Provocation: S.3 of the Homicide Act l957 where it is defined Provocation in the following terms:

- "Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked whether by things done or by things said or by both together to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury, and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have had on a reasonable man".

Further Thinking..... Did S.3 stop victims of domestic violence from utilising provocation as a defence?

R V DUFFY (1949) 1 ALL ER 932

"Provocation is some act, or series of acts, done which would cause in any reasonable person, and actually cases in the accused, a sudden and temporary loss of self control, rendering the accused so subject to passion as to make him or her for the moment, not master of his mind".

Gender inequality at the heart of the statute?

Case Scenario 1: A man kicks his wife to death because she 'nagged' him.

- R v Joseph McGrail (Birmingham Crown Court) l991 [Manslaughter - 1 year suspended sentence]
- R v Beatanbeau 2001 [20 months suspended sentence]

Case Scenario 2: A <u>man</u> stabs his wife to death after she told him she didn't love him anymore

- R v Leslie Humes 2003 [Manslaughter - 7 Years imprisonment]

Case Scenario 3: A <u>woman</u> pours petrol over her sleeping husband and sets him alight after he tells her that he will kill her when he awakes in the morning

- R v Ahluwalia l992 4 All ER 889
- R v Sarah Thornton (1996) 2 ALL ER 1023

Case Scenario 4: A woman stabs her violent partner to death after hearing him tell his friends that they can gang rape her

- R v Humphreys [1995] 4 All ER 1008

Additional – relevant – cases:

 **Susan Edwards ' R v Zoora Shah" in Feminist Judgments pp.273-292**
R v Tara May Fell (2000) Lawtel on Battered Women' Syndrome
R v. Smith (Morgan) [2001] 1 AC 146
R V Janet Catherine Carlton [2003] LTL 7.2.2003
R v Catherine Mary Keaveney [2004] 22.4.2004

<u>The Battered Woman Syndrome</u>

USA – developed mainly by psychologists
Leonore Walker "Terrifying Love: Why Battered Women Kill and how Society Responds" 1989
Learned Helplessness theory
The Cycle Theory of Violence
Ibn-Tamas v Moduleed States DC 1979 (lst US case to admit BWS evidence)

 Further thinking..... Are there any dangers associated with the adoption of 'syndromes' to explain the behaviour of domestic violence victims?

16. Reform

Law Commission Paper 'Partial Defences to Murder'. www.lawcom.gov.uk 20th August 2004

Law Commission Paper 'Murder Manslaughter and Infanticide' November 2006

27th October 2009 – House of Lords reject amendment to Coroner's and Justice Bill (99 votes to 84) stopping new law aimed at repealing provocation as a defence in infidelity cases. Allowing provision for reduction from murder to manslaughter in DV homicide cases based on 'Fear of Serious Violence'.

Coroners and Justice Act 2009

Section 56 - Abolition of common law defence of provocation

1) The common law defence of provocation is abolished and replaced by sections 54 and 55.
2) Accordingly, the following provisions cease to have effect—

(a) section 3 of the Homicide Act 1957 (c. 11) (questions of provocation to be left to the jury);

(b) section 7 of the Criminal Justice Act (Northern Ireland) 1966 (c. 20) (questions of provocation to be left to the jury).

Replaced by:

Section 54 - Partial defence to murder: loss of control

(1) Where a person ("D") kills or is a party to the killing of another ("V"), D is not to be convicted of murder if—

(a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,

(b) the loss of self-control had a qualifying trigger, and

(c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.

(2) For the purposes of subsection (1)(a**), it does not matter whether or not the loss of control was sudden.**

(3) In subsection (1)(c) the reference to "the circumstances of D" is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.

(4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.

(5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

(6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.

(7) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.

(8) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder does not affect the question whether the killing amounted to murder in the case of any other party to it.

Section 55 - Meaning of "qualifying trigger"

(1) This section applies for the purposes of section 54.

(2**) A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies.**

(3) This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.

(4) This subsection applies if **D's loss of self-control was attributable to a thing or things done or said** (or both) which—

(a) constituted circumstances of an extremely grave character, and

(b) **caused D to have a justifiable sense of being seriously wronged.**

(5) This subsection applies if D's loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4).

(6) In determining whether a loss of self-control had a qualifying trigger—

(a) **D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence;**

(b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence;

(c) **the fact that a thing done or said constituted sexual infidelity is to be disregarded.**

(7) In this section references to "D" and "V" are to be construed in accordance with section 54.

Further Thinking.....Does the new law on loss of self control create an imbalance of fairness against male defendants? Reading the following case might help: **The Queen V Ronald Edwards [2011] EWCA Crim 1461**

ESSENTIAL READING 

Hunter Part IV (241-272 and 273-307)
Hillaire Barnett - Chapter 9
Cases as above (from your Criminal Law case book)

PLUS any of the following articles:

"Anger and Fear as Justifiable preludes for loss of self control". Susan M. Edwards, Jo Criminal Law, 2010, 74(3), pp 223-241.

"The Coroners and Justice Act 2009 – Partial Defences to Murder – Loss of Control", Alan Norrie, CLR, 2010, No.4, pp 275-289.

"Reforming Provocation – perspectives from the Law Commission and the Government". Dr. Anna Carline (2009) 2 Web JCLI.

"Abolishing provocation and reframing self defence - The Law Commission's options for reform" Susan S.M. Edwards. CLR Mar 2004.

"Responding to Victim Withdrawal in DV cases" Louise Ellison, Crim LR. 2003 – Available on Blackboard
"Legal Defences and Expert Testimony on the Battered Woman Syndrome: A Focus on Self Defence". Juliette Casey. Scots law Times. 2003 – Available on Blackboard

FURTHER READING:

"Safety and Justice: The Government's Proposals on Domestic Violence" Cm 5847 June 2003.
"Domestic Violence a Guide to Civil Remedies and Criminal Sanctions" Home Office, February 2003. www.dca.gov.uk
"The Day to Count…… A snapshot of the impact of Domestic Violence in the UK". Elizabeth Stanko. London. 2004. www.domesticviolencedata.org.uk
P. Hutchenson NLJ 14th Aug '92 Vol. No. 6564 p 1159
P Hutchenson NLJ 13th Sept '91 Vol 141 No.6519 p.1223
G. Langdon-own "Leeds Shows the way in tackling Domestic Violence" The Times 20th June 2000.
Olga Tsoudis "Do Social Sanctions Matter in Domestic Violence? A Pilot Study" Web Jo. Current Legal Issues. (2) 2000

G. Gibson “Tightening the Noose” The Times 2nd November 1999
D. Yarwood “Domestic Abuse Research” Family Law 1999 Vol 29 pgs 113-115
J. Horder “Sex Violence and Sentencing in Domestic Provocation Cases” 1982 CLR P.32
M. Wasik “Cumulative Provocation and Domestic Killing” 1982 CLR P.32
S. Edwards “The Extent of the Problem – how widespread is Domestic Violence?” in S. Edwards “Policing and Domestic Violence” Sage l989
House of Commons Home Affairs Committee Report “Domestic Violence” Feb 1993
Law Commission “Family Law, Domestic Violence and Occupation of the Matrimonial home” HMSO l992
M. Shaffer “The Battered Woman’s Syndrome Revisited: Some Complicating Thoughts 5 years after R v Lavallee (1990)” 47 U.Toronto LJ 1-33 Winter 1997

Large Group Session 6

Rape and the Criminal Justice System

Introduction

Rape Myths & the impact of storytelling in rape law

Davis v North Carolina (1966) 382 US 737 in Kim Lane Schepple "Foreword: Telling Stories" Michigan Law Review Vol 8. P.2057
Steward MW, Dobbin SA & Gatowski SI (1996) "Definitions of Rape: Victims, Police and Prosecutors "No. 4 Feminist Legal Studies 159 p.392.
David Pannick QC The Times (Law Supplement) 2000

Rape and the Criminal Law

Sexual Offences Act 1956 ss(1) & (2) & 43
Sexual Offences Amendment Act 1976 s.1
Criminal Justice & Public Order Act 1993 S.142
Triable on Indictment only

A man commits rape if:

(a) he has sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse does not consent to it, and

(b) at the time he knows that the person dose not consent to the intercourse or is reckless as to whether that person consents to it.

Actus Reus – Stanton (1844) 1 Car & Kir 415; Hughes (18841) 0 C & P 752 and Sexual Offences Act S.44

Mens Rea - Khan (1990) 1 WLR 13; Satnam (1984) 78 CR App R 149; Breckenridge (1983) 79 CR App R 244; Gardiner (1994) CLR 455; McFall (1994) CLR 226

Sentencing – Rape : Maximum = life imprisonment S.37 SOA 1956
Attempted Rape : Maximum = life imprisonment S.38 SOA & Sch 2

Consent:

Sexual Offences (Amendment) Act 1976 – no definition of consent
Common Law approach
Olugboja (1982) QB 320

Criminal Law Revision Committee
Ruth Hall & Lisa Longstaff "Defining Consent" (1997) NLJ June 6, p.840.
Human Rights Act 1998 S.6(2) – see also Salabiaku v France (1988)

Satnam v Kewel S (1983) 78 CAR 149

Mistake - DPP v Morgan (1976) AC 215
Canadian Criminal Code S.272.2 states that mistake is not available as defence if D did not take reasonable steps in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

Rape & Marriage:

Attorney General's Reference (No.86 of 2006) Sub Nom R v J (2006) EWCA Crime 2077

Reform:

Sexual Offences Act 2003 – extends actus reus to now include penetration of mouth/anus (S.1(1)(a)).

Mens Rea – Legislation has dropped requirement that defendant should know of or be reckless as to the absence of consent. Replaced by a crime of negligence. S.1(2) Genuine belief in consent to be evaluated objectively *in all the circumstances. [Abolishes Morgan defence]*
S.47 defines consent : "A person consents if he agrees by choice, and has the freedom and capacity to make that choice"

Helbron Committee Report 1975 Cmnd 6352
"Setting the Boundaries – Reforming the law on sexual offences" Home Office July 2000
www.homeoffice.gov.uk/cpd/sou/sexoff99.htm
Human Rights Act (implemented 2nd October 2000)

Report of the Advisory Group on the Law of Rape (1975) Cmnd paper 6352 "It would be unfortunate if a tendency were to arise to say to a jury that a belief, however unreasonable, that the woman consented, entitled the accused to acquittal".

Corroboration
Removing the requirement to warn the jury
S.32 CJPOA l994
Makanjuola [1995] 3 All ER 730

Procedural Developments:

Home Office Report "Speaking up for Justice
www.homeoffice.gov.uk/sufj.pdf
But see R v B (Attorney-General's Reference No.3 of l999) 2000 (Lawtel)

and TLR 16/6/00

Rape Conviction Rates

Baroness Vivien Stern, Government review of Rape complaints handling in England and Wales. The Stern Review, Published MARCH 2010.
http://www.equalities.gov.uk/stern_review.aspx - also available on BB
Methods of Calculation – Attrition -6% conviction rate – Prosecution = 60% conviction rate.
Liz Kelly et al "A Gap or a Chasm? Attrition in Reported Rape Cases" Home Office, Report No. 293, Feb 2005 (Available on Blackboard)
Conviction Rates 2007-08 6.5% across England and Wales (fall of .5% from 2006).
Fawcett Society (2007) – Research: Rape conviction rates a postcode lottery.
Natalie Taylor "Juror Attitudes and Biases in sexual assault cases". Trends and issues in Crime and Criminal Justice, No. 344, Australian Institute of Criminology. August 2007.

Sexual History Provisions

Victims vs Defendants: whose rights are to be preferred?
Youth and Criminal Evidence Act 1999, R v A (No.2) (2002) 1 AC 45
The impact of Human Rights issues – see Osman v UK (1998) 14 EHRR 53
Ralston Edwards Case : victim complaining to ECHR that her right not to be subjected to degrading treatment was infringed at trial.

The role of the CPS – R v DPP ex Parte C (2000) Lawtel : on failure of CPS to consult victim prior to discontinuing prosecution

Rape Trauma Syndrome

Outline of the Syndrome's origins (see Burgess & Holstrom)
Phase 1 – Acute Phase
Phase 2 – Long Term Reorganisation Process
Use of the RTS in the USA: Henson v State of Indiana (1989) demonstrates limitations on the use of RTS for women.
R v Meah: D. Meah and Another (1986) 1 All ER 935 on civil damages/RTS (see also Meah v McCreamer 1984 & 1985 (No.2)
Miles v Cain (1989) The Times 14th Dec '89 on civil damages /RTS
Linda Griffiths v Arthur Williams [1995] LTL 21/11/95 - £50,000 damages following rape not excessive.

Rape - Warfare – International Human Rights

Bosnia, Ruwanda, Abu Ghraib (Iraq).

See: Article 7 Statute of Rome (Statute of the International Criminal Court) 1998

"Rethinking Rape as a Weapon of War'. Doris E. Buss, Feminist Legal Studies Journal, Vol 17, No.2, August 2009.

MacKinnon, C., "Rape, genocide and women's human rights" Uni Nebraska Press, 1994.

'Rape as Torture? Catherine MacKinnon and Questions of Feminist Strategy". Clare McGlynn, Feminist Legal Studies Journal, Vol 16, No.1, April 2008.

MacKinnon, C., Are Women Human? And Other International Dialogues (Cambridge, Mass.: Harvard University Press, 2006)

Human Rights Watch Report 'Looser Rein, Uncertain Gain" – Investigation into human rights in Saudi Arabia, HRW, 2010.

The Quatif Rape Case - http://www.msnbc.msn.com/id/15836746/ns/world_news-mideast_n_africa/t/rape-case-calls-saudi-legal-system-question

ESSENTIAL READING 

Hunter "Feminist Judgments" Pages 205-227

Clare McGlynn "Rape Torture and the European Convention on Human Rights" International and Comparative Law Quarterly [2009] 565-595 (**available on Blackboard**)

Neil Kibble "Case Comment – R v Harris" [2010], CLR Vol 1, pp 54-61

"Judicial Discretion and the Admissibility of Prior Sexual History Evidence under S.41 Youth Justice and Criminal Evidence Act 1999: Sometimes sticking to your guns means shooting yourself in the foot: Part 2" Neil Kibble, CLR 2005, APR, 263-274

"Judicial perspectives on the Operation of S.41 and the Relevance and Admissibility of Prior Sexual History Evidence: Four Scenarios: Part 1" Neil Kibble CLR 2005 MAR 190-205

"Section 41 Youth Justice and Criminal Evidence Act l999: Fundamentally flawed or fair and balanced?" Neil Kibble, Archbolds News 2004, 8, 6-9.

"The Sexual History Provisions: Charting a course between inflexible legislative rules and wholly untrammelled judicial discretion?" Neil Kibble. Crim LR April 2004

"Sexual History Evidence – Beware the Backlash" Jennifer Temkin, CLR 2003, APR 217-242

"Untangling sexual history evidence: a rejoinder to Professor Temkin". Di Birch. Crim LR June 2003. 370-383
.
William Wilson "Rape" Jo. Social Welfare and Family Law Sept '92, No. 5. 445

L. Ellison "Cross Examination in Rape Trials" Crim LR Sept (1998) 605.

S. Estrich "Rape" Yale LJ 1087 (1986)
Dr. K. Stevenson "Observations on the Law Relating to Sexual Offences: The historic scandal of women's silence" Web Jo Current Legal Issues (1999) 4

FURTHER READING:

K. Scothill "The Changing Face of Rape" Jo. Criminology. Autumn '91 p. 383
C. Amiss "Women Deserving Refuge" The Times 14th July 1998
Marianne Giles "The Sexual Offences Amendment Act 1992) Sols. Jo. Aug l4th 1992
J. Melville "Acts of Violence: Sexual Violence Against Women is Nothing New" New Statesman & Society May 17th '91
J. Horder "Cognition, Emotion and Criminal Culpability" Law Quarterly Rev July '90 p.469
J. Barton "The Story of Marital Rape" Law Quarterly Review April '92 p. 260
Green Paper : "Court Procedures – Speaking up for Justice – Report of the inter-departmental working group on the Treatment of Vulnerable or Intimidated witnesses in the Criminal Justice System." (1997/98)

Large Group Session 7

Pornography
Sexual Violence Against Women?

Introduction:

Pornography – a multi-billion £ enterprise

Modern developments – the internet – cyber porn
Child Pornography – the scale of the 'problem'. Sexual Offences Act 2003 ss48-50. Sentencing Guidelines (Sentencing Advisory Panel)

Sexual Offences Act 2003 – S.47 – 51 – Provisions on the Abuse of Children through Pornography; including inciting arranging or facilitating child pornography.

Criminal Justice and Immigration Act 2008 S.63 and S.64

R v Coutts [2005] 1 WLR 1605 (Court of Appeal judgment)
R v Porter (Ross) [2007] 2 All ER 625 – indecent photographs of children – custody/control of deleted images on computer

Pornography & Sexual Violence: Two competing schools of thought: 1 x direct causal link between pornography and violence against women, 1 x no causal link and banning of pornography = censorship.

Pornography as sex discrimination

Looking back: Moving Forward?

3 different views of pornography

- Liberal: North American Presidential Commission 1970
  Williams Report l979
- Conservative: Moral right/family values
- Feminists: Robin Morgan "Porn is the theory, rape is the practice"[in "Going Too Far" Random Hse l977]
  Susan Brownmiller, Andrea Dworkin, Catherine MacKinnon - Anti-Censorship Feminists
  Carol Vance "Pleasure and Danger, Exploring female Sexuality" - rejects Dworkin's analysis.

Links Between Pornography and Sexual Violence:

- USA: Dworkin and MacKinnon - Minneapolis Ordinance .v. First Amendment (Anti-censorship) civil libertarians.
  See also: Sylvaine Colombo "The Legal Battle for the City: Anti-

Pornography Municipal Ordinances and Radical Feminism" Fem LS Jo. Vol. II, No.1. Feb 1994

 Further thinking..... Who is to decide what pornography is and on what basis?

Studies Linking Pornography and Sexual Violence:

- Ted Bundy/Marquis de Sade (a case for censorship?)
- Donnerstein, Linz and Penrod 'The Question of Pornography"
- Neil Malamuth "Pornography and Sexual Aggression" Orlando Academic Press 1984 : Looking at the rape myth acceptance scale.
- Stephen Childress [see further reading]

 Further thinking.....If the viewers of pornography are de-sensitized to rape is that a strong argument for banning all pornography?

Evidence from Europe/Other regions:

- Denmark/Sweden [Berl Kutchinsky]
- West Germany [Polizeiliche Friminalstaatistik l990]
- Japan [Court J. "Sex and Violence: A Ripple Effect" in N. Malamuth 1984 (above)]

Pornography and the question of Harm:

- What is Harm? R .v. Brown [1993] 2 All ER 75
- Is Harm only physical - is pornography an incitement to sexual hatred? Racial Hatred?
- Pornography and warfare - Modern examples: Iraq?

Essential Reading 

Hunter "Feminist Judgments" Commentary on R v Brown pp 241-254

Clare McGlynn and Ericka Rackley "Criminalising extreme pornography: a lost opportunity". Criminal Law Review, (2009) No.4, pp 245-260

Andrew D. Murray "The reclassification of extreme pornographic images". Modern Law Review, MLR (2009) Vol 72 No.1 pp 73-90

Alisdair Gillespie "The Sexual Offences Act 2003: Tinkering with Child Pornography" CLR (2004) May pp 351-368

"Paying the Price – A Consultation Paper" 2004 – available on Blackboard
"Partial Regulatory Impact Assessment" Home Office paper 2004 available on Blackboard
Emily Jackson "The problem with Pornography: A Critical survey of the Current Debate" Feminist Legal Studies Jo. Vol III No.1. Feb l995
William Wilson "Is Hurting People Wrong?" Jo. Social Welfare and Family Law. No.5 l992
Steven Childress "Reel Rape Speech? Violent Pornography and the politics of Harm". [Review Essay] Law & Society Review. Vol. 25 No.1 (l991) P. 179.

Further Reading (any of the articles listed below):

David Sapsted "30 Years in Jail for killer necrophiliac" Telegraph on-line 5.2.2004.
"Young men download illegal porn" BBC New on-line. 25.7.2003
"Is Porn good for Society?" BBC News on-line. 14.5.2002
"Pornography and Sexual Violence: Evidence of the Links" Everywoman Press l988
"Consent No Defence to S/M Assaults" Jo. Criminal Law. Nov l992 P.381
Marianne Giles "Consent in Assault and Wounding Cases" Solicitors Journal 5th June 1992
Beverley Brown "Pornography and Feminism: Is Law the Answer?" Critical Quarterly Vol 34 No. 2 p.71 l992
Susan Etta Keller "Viewing and Doing: Complicating Pornography's Meaning" Georgetown Law Jo. Vol 81 No.6 July l993.
Deborah Cameron "Pornography - What is the Problem?" Critical Quarterly Vol 34 No.2 p.3 l992
Gavin McFarlane "The Limits of Obscenity" NLJ Jan 24. 1992
A. Assister "Pornography Feminism and the Individual" Pluto l989
A. Dworkin "Pornography: Men Possessing Women" Women's Press l98l
S. Griffin "Pornography & Silence" Women's Press l988
Cass R. Sunstein "Pornography and the First Amendment" Duke Law Jo. September l986
R. Delgado and J. Stefancic "Pornography and Harm to Women: No Empirical Evidence?" Ohio State Law Jo. Fall l992
Catherine MacKinnon "Feminism Unmodified" Harvard Uni Press l987
Edward Donnerstein, Daniel Linz and Stephen Penrod "The Question of Pornography: Research Findings and Policy Implications" New York Free Press l987.
L B Alexander & SA Rubin "Regulating Pornography the Feminist Influence " 18 Comm & L 73-94 D 1996
J Hussain "Feminists and Pornography - The Other Viewpoint" 6 Cornell Jo. Law and Public Policy 164-9 Fall l996
Smart C & B "Women, Sexuality and Social Control" Routledge, l978.

LARGE GROUP SESSION 8

Prostitution, Women's Bodies and the Law

Historical Perspectives:

- Prostitution is not a recent phenomenon: (see Carol Pateman "The Sexual Contract", Polity Press. 1988): In the temples, prostitution in ancient babylonian times – destitute women sold their bodies for food for themselves and their children.

Early Campaigns:

- Josephine Butler (Ladies National Association) campaign to repeal Contagious Diseases Acts (1864, 1866, 1869).

- Police powers under CDAs and Habeas Corpus (see L. Mahood "The Magdalenes: Prostitution in the l9th century" Routledge l990).

- Unpopularity of Butler's campaign amongst some feminist women (eg. Millicent Fawcett). (See Carol Smart & J. Brophy "Locating Law: a discussion on the place of law in feminist politics" in Smart/Brophy "Women in Law: Explorations in Law, Family and Sexuality" Routledge l985).

Prostitution and War:

- Difficulties understanding female sexuality outside institution of prostitution (see L. Bland "In the name of protection: the policing of women in the lst world war" (in Smart/Brophy ibid). Noting also that the definition of Veneral Disease is gender specific and that restrictions on civil rights of prostitutes were designed to protect the military.

Prostitution and Criminal Law

- Wolfenden Report (Homosexual Offences and Prostitution) Cmnd 247 (1957) HMSO – recognised need to keep prostitution off the streets. Lead to greater criminalisation of prostitutes?

  S.1(1) Street Offences Act 1959:

  "It shall be an offence for a common prostitute to loiter, or solicitor, in a street or a public place for the purpose of prostitution".

The law before May 2003:

- Who/What is the **common prostitute?**

Woman can be labeled a CP if she has been cautioned twice for loitering/soliciting and being found to be doing so on a third occasion.

- In 1994 – 7,039 women prosecuted under S.1(1) Street Offences Act l959

- Other Offences – Keeping a Brothel (Sexual Offences Act l956 s.33)
  Being a Common Prostitute and behaving in a riotous Manner in a public place (Vagrancy Act 1824 ss.3 &4)

Case Law Examples

- R v de Munck (1918) 1KB 635 – attempting to procure 14 year old daughter to become prostitute.

- DPP v Shaw (1961) 2 All ER 451
- R v Webb (1964) 1 QQB 357
- R v Bull (1994) 4 All ER 411
- R v McFarlane (1994)2 All ER 283

- Criminal Justice Act 1991 (changes in sentencing practices)
  (see "Imprisonment for Prostitutes" R. Leng (1992) 142 New LJ 270.)

The Law after May 2003:

Schedule 1 Sexual Offences Act 2003 – now equalizes the position of men and women under the law relating to soliciting. Schedule makes it clear that the term woman contained in the old legislation (Street Offences Act) should be removed and the term Person put in its place. R v Bull no longer applicable.

S.14 Policing and Crime Act 2009 – Paying or promising to pay for prostitution is a crime
S.16 Policing and Crime Act 2009 – Loitering or soliciting on the street remains a crime.
Prostitution in private is not an offence **unless** more than 1 prostitute working with others.


Further thinking..... Consider S.16 of the PCA 09. Are the distinctions between public and private prostitution important?

S.53(A) SOA 2003 – paying for prostitution is now a strict liability offence.

The Ipswich Murders – changing the state's focus on prostitution ?

International approaches:

Neatherlands, Germany, New Zealand all tolerate prostitution

Sweden, Norway and Iceland all make it illegal to **buy** sex. Note it is not illegal to **sell** sex.

International Crime - Trafficking in women and children

Government Proposals – decriminalization of brothels, targeting pimps and organized crime.

UK S.57-60 SOA 2003 – New offences on trafficking. Sentencing maximum 14 years imprisonment.

Attorney General's Ref (Nos. 129 and 132 of 2006) 2 Cr App R (2007)
Serious Organised Crime and Police Act 2005

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Pornography and Child Prostitution (2002), Moduleed Nations.
Convention against Transnational Organised Crime (2000), Moduleed Nations.

Crime Reduction initiatives on prostitution –
www.crimereduction.homeoffice.gov.uk/res_indi.htm#2009

Prostitution and European Law

Adoui and Cornuaille (Joined cases 115 and 116/81) (1982) E.C.R.1665

Essential Reading 

Hillaire Barnett – generally

Statutory provisions indicated above plus:

"Human Trafficking in 2008: blowing away some myths". Sally Ramage, Criminal Lawyer (2008) No. 184 pp 8-11

"Human trafficking, human rights and the Nationality Immigration and Asylum Act 2002" Tom Obokata European Human Rights LR (2003) No.4, 410-422

"Human Trafficking – a modern form of Slavery? Sandhya Drew" European Human Rights LR (2002) Issue 4 pp 481-492

Leo Flynn "The body politic(s) of EC Law" in TK Hervey & D. O'Keeffe "Sex Equality Law in the European Union" (John Wiley 1996)

"Imprisonment for Prostitutes" R. Leng (1992) 142 New LJ 270

Further Reading:

Neil Malamuth and Gert Hald "Self-perceived effects of Pornography consumption". Archives of Sexual Behaviour, (2008) Vol 27, No. 4.

S. Kappeler "The International Slave Trade in Women, or Procurers, Pimps and Punters" (1990) Law and Critique p.219.

Mary Jo Frug "A Postmodern Feminist Legal Manifesto (An Unfinished Draft" (1992) 105 Harvard L Rev 1045.

Catherine MacKinnon "Feminism Unmodified: Discourses on Life and Law" (Harvard Uni Press) 1987.

Large Group Session 9

Women's Bodies and the Law
Abortion & Reproductive Rights

Introduction

Definition of Abortion:

"Any deliberate procedure that removes, or induces the expulsion of a living or dead embryo or fetus" [Comptons English Dictionary]

The Historical Background

USA:

Skinner v Oklahoma [1942] expanding the constitutional status of reproductive choice
Roe v Wade [1973] 93 S.Ct 705
Webster v Reproductive Health Services [1989] 57 USLW 5023
Ronald Dworkin "Life's Dominion" l993 Harper Collins

UK:

Abortion as a crime – Blackstone in "Commentaries on the Laws of England" concluded that abortion was "A heinous misdemeanour"

S.6 Offences Against the Person Act 1983
"Whosoever with intent to procure the miscarriage of any woman, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony"

1846 – Criminal Law Committee – Law should provide an exception whereby procuring a miscarriage would not be punishable provided it was done in good faith with the intention of saving the life of the woman

S.58 Offences Against the Person Act 1861
"Every woman being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent and whatsoever, with intent to procure the miscarriage of any woman, whether she be or not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent shall be guilty of an offence, and being convicted thereof shall be liable to imprisonment."

NB: no explicit mention of an exception for therapeutic abortions, but see R v Bourne [1938] 3 ALL ER 615

S1(1) & (2) Infant Life (Preservation) Act 1929
"Any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother shall be guilty of an offence"

1939 – Home Office and Ministry of Health Inter-Department Committee recommend law to be amended to make it unmistakably clear that a medical practitioner is acting legally when in good faith he/she procedures the abortion of a pregnant woman in circumstances where to continue pregnancy would endanger or seriously impair her life.

Abortion Act l967 – **NB: Abortion Act does not extend to Northern Ireland**
Human Fertilisation & Embryonic Act 1990 – amended S.1(1) Abortion Act l967
Kelly v Kelly [(1997) TLR 5/6/97 – Father's rights viz foetus
Ministry of Defence v O'Hare (1997) LTL 11.7.97 - Compensation guidelines viz Ministry's policy of obliging women in armed forces to choose between dismissal from job and having abortions.
R v Secretary of State for Health & Schering Health Care Ltd/Family Planning Association ex parte John Smeaton (on behalf of the Society for the Protection of Unborn Children) (2002) Crim LR 665 – Supplying/using morning after pill not a criminal offence

Abortion in Northern Ireland

Position is as it was in Britain before 1967
Law governed by:

- Offences Against Person Act 1861 (making all abortions illegal)
- Infant Life Preservation Act 1929 (governing child destruction)
- Bourne judgement 1938 (allowing abortion in extreme circumstances of risk to mental or physical health)

Human Rights and Abortion Rights in NI:
AG x X [1992] ILRM 401 – Costell J, NI High Court, imposing an injunction on a pregnant woman stopping her from travelling to the UK for termination of her pregnancy. Court said that they were not in breach of European Convention on basis that Right to Life of the unborn was to be adequately protected.
Reversed on Appeal – Irish Supreme Court "The true construction on the right to life here is that when there is a real and substantial risk to the mother's survival…at least throughout the pregnancy, then it may not be practicable to vindicate the right to life of the unborn".

November 1992 – Public votes on changes to Constitution – 2/3rds reject amendment allowing abortion to save mother's life, or to prevent her own self destruction. 62% of voters accepted there should not be a limit on the freedom to travel.

D v Ireland [2003] – lst challenge under HRA to Irish abortion laws. judgment awaited. Claim that state has breached Articles 3 and 8 of the ECHR.

The availability of Abortion - European Comparisons

9 countries – abortion on request in early pregnancy
2 countries – specify rape and socio-medical/economic reasons as basis for request
3 countries – liberalisation prevented because of religious opposition

Tysiąc v. Poland (Application no. 5410/03) ECtHR 2007

Abortion up to 24 weeks of pregnancy is norm, where there is risk to life.
Abortion on request is available in some countries up to 12 weeks or pregnancy.

A Woman's Choice?

"Abortion in Poland: a new human rights ruling" Barbara Hewson.
Conscience 28.2 (Summer 2007): p34(2).

Sally Sheldon "Who is the Mother to make the judgement: Constructions of Woman in English Abortion Law" [1993] 1 FLS Vol.2

R Lee & D Morgan "Birthrights" [1991] London: Routledge.

Paton v British Pregnancy Advisory Service Trustees [1979] 1 QB 276
Jefferson v Griffin Spalding County Hospital [1981]

Feminist Perspectives on Abortion/Law

Private Rights and Abortion – Catherine MacKinnon "Privacy v Equality: Roe v Wade" in Mackinnon's "Feminism Unmodified" Harvard Uni Press l987

Morality and Choice – Susan Himmelweit "More than a woman's right to choose" (l988) 29 Feminist Review 38

A question of equality? – Frances Olsen "Unravelling Compromise" (1989) 103 Hard Law Rev .105

Abortion and Human Rights

Jepson v. Chief Constable, [2003] EWHC 3318
Compatibility S.1(1)(d) Abortion Act 1967 – allows abortion for foetal abnormality & Human Rights Act l998 (Article 2 European Convention on Human Rights)
Mrs Thi-Nho Vo v France [Application No.53924/00] Judgment given 8th July 2004 – No violation of Article 2.
"The central question raised by the application is whether the absence of a criminal remedy within the French legal system to punish the unintentional destruction of a foetus constituted a failure on the part of the State to protect by law the right to life within the meaning of Article 2 of the Convention…..

It is not only legally difficult to seek harmonisation of national laws at Community level, but because of lack of consensus, it would be inappropriate to impose one exclusive moral code"

ESSENTIAL READING 

Hillaire Barnett

Any of the cases/ articles mentioned above

Vo v France – Available on Blackboard

FURTHER READING

"Nadine Dorries Abortion Proposals heavily defeated in Commons" Guardian on-line 7th September 2011
http://www.guardian.co.uk/world/2011/sep/07/nadine-dorries-abortion-amendment-defeated

Barbara Hewson "The Law of Abortion in Northern Ireland" Public Law (2004) Summer pp235-245.
"Family Planning Association NI – Judicial Review" 2003 NIQB 48, QBD NI

Barnard "An Irish Solution" [1992] New Law Journal 526

Dworkin "Life's Dominion: An Argument about Abortion and Euthanasia" 1993

Linton "Planned Parenthood v Casey: The Flight from Reason in the Supreme Court" (1993) 13 St Louis University Law Review 15. (Available on Westlaw)

Schlotzauer & Laing "The Ethics of Selective Termination Cases: Opening the Door to Abortion Extortion" (1999) 20 Journal of Legal Medicine 441. (Available on Westlaw)

Small Group Session Materials

SMALL GROUP SESSION 1

Introduction/Storytelling

Students should note that they are required to ***read the following articles in advance*** *of this session:*

(2) the article by Kim Lane Scheppele
(3) Notes/Module materials from PET and Contract Law

BEFORE YOU ATTEND THIS SESSION YOU MUST COMPLETE THE ON LINE ASSIGNMENT:

An on-line assignment has been set up for you on the GJL Blackboard site. You will find the Assignment in the **Assignments file** on the site.

Please note that the aim of the assignment is to engage you with materials that feed directly into the research report which you will write as part of your first assessment in this Module. No marks are given for the assignment but since it enables you to complete your first assessment the assignment is compulsory. Feedback will be given. Please ensure that once you have completed your assignment you email a copy of it to: thatchc@lsbu.ac.uk

SGS EXERCISE NO. 1 – THE SCHEPPELE ARTICLE

Having read the article by Scheppele and completed the short assignment on Blackboard you are asked to bring the article and your notes to this session so that you may participate in a number of fun exercises relating to the article that you have read.

SGS EXERCISE NO.2 THE TRIAL OF FARMER DUCK

Preparation for the Trial of Farmer Duck

A mock trial of the Duck will take place during the seminar.
Counsel for the Duck and the Farmer are to present their cases utilising the law as it stands and all students are to prepare and hand in a defence on behalf of the duck at the end of the SGS. That defence must consider how the Duck's account of the oppression it suffered can properly be considered by the Court. In short, all students (whether writing or presenting) must consider the law applicable to the Duck's circumstances and also the extent to which counterstorytelling would help the court to understand the Duck's case.

Plaintiff: The Farmer
Defendant: The Duck
Jurisdiction: In the High Court of South London

Participants: Farmer, Duck, Counsel for the Farmer, Counsel or the Duck, Judge, various witnesses, court officials/observers – students will be allocated roles in the LGS and should come prepared to participate in this role Play

Summary of the Case:

The Plaintiff's Case:

The Farmer brings this action against the Duck for unlawful eviction from the farm and for the return of his property. He maintains that the Duck has no right to remain on the land and that the Duck has broken his contract of employment with the Farmer.

He wants you to ensure that he gets his farm back and that the Duck does not acquire any rights in relation to it.

The Defendant's Case:

The Duck maintains that the Farmer has oppressed it for years. It says that there was no contract of employment. The Duck states that it tended the land and it did chores around the farmhouse for a substantial period of time out of a sense of duty, and because the Farmer was too lazy to do the work himself. The farmer spent most of his time in bed while the Duck worked hard on the farm, taking care of it and the other animals who also lived on it. Because of this the Duck has a proprietary right to remain on the farm. The Duck has witnesses (sheep, cows, and hens) who will support its defence.

Small Group Session 2

Reason and the Law

Question 1

What is Feminist Jurisprudence? In your answer you should provide examples from each of the writers you have read as part of your preparation for the seminar. Your answer must be emailed to the SGS tutor (at least three days before the SGS). Feedback will be provided.

Question 2

Write a critique of **Unikel's article**. In particular, consider his views on the reasonable woman and reasonable person standards and assess *whether he is correct in his assessment that one of these standards if preferable to the other.*

Some students will be asked to present their critiques to fellow students during this session.

Question 3

To what extent and in which ways can the developing standards of human conduct based on the reasonable person and reasonable woman help women achieve justice within the law?

Students are asked to note that in ADDITION to the Essential Reading material (which they must read in advance of this session) they should draw upon their understanding of reason/reasonableness in Tort, Contract, Criminal and Property Law when considering these questions and preparing their answers for the seminar discussion.

Question 4

Can the idea of unwelcomeness be justified in sexual harassment cases?

SMALL GROUP SESSSION 3

DOMESTIC VIOLENCE

Question 1

Consider whether the provisions of S.23 of The Criminal Justice Act l988 provides appropriate protection for the victims of domestic violence, or if they negate the victim's choice as to prosecution? Also consider whether, in light of the scale and impact of domestic violence, community concerns viz prosecution of wrong doers should outweigh individual fears of retaliation?

You must read S.23 of the CJA '88 and identify any relevant case law. Also look at the Crown Prosecution Service's website. What is their approach to the prosecution of offenders in circumstances where the victim does not wish to give evidence?

Some students will be asked to present their findings and critiques to the seminar participants.

Question 2

Critically consider the recent changes to the law on Provocation. In particular, think about whether the reforms equalise the position of men and women under the criminal law relating to murder/manslaughter?
You will be expected to consider relevant statutory provisions and case law during the group discussions on this question.
You must ensure that you read the articles by Alan Norrie and Susan Edwards which are available on the GJL BB site (and in the Feminist Judgments book) BEFORE attending this seminar.

Question 3
In light of the changes to the law on Provocation research and prepare answeres to the following questions:

4. Will the Battered Woman Syndrome continue to be a useful tool in explaining the conduct of women who kill?
5. Should the Battered Woman Syndrome should be a defence in law (consider other jurisdictions when you are researching this point)?
6. To what extent do current legislative regulations reflect the reality of the battered woman's experience?

[ON LINE] SMALL GROUP SESSION 4

RAPE AND THE CRIMINAL JUSTICE SYSTEM

Students are asked to note that this session will take place on line via the GJL Blackboard site.

The on line seminar will take place in the normal seminar slot and the Module tutor will allocate time slots to the relevant seminar groups.

It is the responsibility of each student to ensure that they have the Java Plug In downloaded onto their computer so that they can participate in the session. Students using computers in the LRC should not have any difficulties logging on.

All students should check before the start of their session that they can access the on-line session.

The etiquette for on-line participation is set out below. Of particular importance is the requirement that you do not (a) speak over others on-line (in short, wait your turn!); and (b) you do not make comments that are juvenile. This is a 'normal' seminar in a different format. Make sure that you do not engage in inappropriate conduct simply because you are not face to face with fellow students/staff. Anyone breaching these criteria will be asked to explain themselves to the Module Co-ordinator.

Additional Guidance – Participating in On-Line Seminars

1. The better prepared you are for your online seminar, the more you'll get out of it.

The whole point of attending a seminar is to learn something new, test your own knowledge and develop your critical understanding of the issues at hand. Online seminars are no different, and you should be prepared to contribute and take away as much useful information as you can. You will not be able to do this if you come to the on-line session without having prepared by reading the relevant material.

2. Make sure your computer is working properly. By their nature, all online seminars rely on technology. Make sure that you have joined the on-line seminar via the collaboration section on the BB site. If you have any doubts about how to do this email thatchc@lsbu.ac.uk.

3. DON'T ARRIVE LATE! This means that you have to be in attendance (on-line) at the time that your seminar would normally start. If you arrive late for the seminar you will have missed substantial parts of the conversation and it may take some time for you to catch up.

4. Introduce yourself to everyone who is attending the on-line seminar as soon as you log in.

5. Be aware that participation in the seminar is compulsory. You are required to have read the relevant material and to come to the on-line seminar ready to discuss the questions associated with that article. If you have not read the material then the usual rule applies; you are not welcome at the seminar.

6. NOTES! Just as you would at an in-class seminar, take notes during the seminar to enhance the course material, as an aide-memoir, or to highlight issues that you wish to raise.

7. Ask questions. The point of an online seminar is that it should be as near as possible to an in-class seminar, so take the opportunity to question the tutors and other participants.

Session Rules:

(a) Arrive on time

(b) Wait until another person has finished making a point before you jump in with yours. We will have a large number of people contributing to this 2 hour session so there is a need for us all to exercise some care in managing our contributions. Bear this rule in mind and you shouldn't go far wrong.

(c) Do not use abusive or offensive language. As in class based seminars, the usual rules of conduct apply and anyone engaging in abusive of offensive language will be asked to leave the session and will be reported to the Head of Law.

(d) **Everyone is to make at least one contribution and ask one question during the session.**

(e) Do not hog the session by repeatedly asking questions.

(f) Remember that your contribution must be in formal speech rather than text/chat room shorthand.

(g) Be polite. You may challenge other people's ideas so long as you have a sound academic basis for doing so.

(h) Have fun. This is a fun method for enhancing your learning.

(i) Remember to provide us with your written feedback via email after the event so that we can report your responses to our external examiner and develop the sessions for students in future years.

Finally, please be aware that once you log in your name will appear on the session notes so we will know who has attended and who hasn't. If you are absent you MUST inform Caron Thatcher via email of the reasons for your absence – thatchc@lsbu.ac.uk.

On Line Small Group Session Questions:

QUESTION 1

"Critics have long argued that judges have failed to control the use of irrelevant and prejudicial sexual history evidence in sex offence trials, and that the only effective solution to the problem is to impose tight legislation constraints on judicial discretion or eliminate it altogether".

Neil Kibble 'Judicial Perspectives on the operation of S.41 and The Relevance and Admissibiity of Prior Sexual History Evidence: Four Scenarios (Part 1)' Criiminal Law Review, 2005, March, 190-205.

Critically consider this statement in light of government initiatives to improve conviction rates in this area, drawing upon your knowledge of relevant legal measures and also feminist theoretical discourses.

Question 2

It is argued that conviction rates for rape are low and that victims rarely find justice within the criminal court system. Is this inevitable given the nature of rape cases or can and should the state do more to ensure conviction rates improve – bearing in mind the state's obligation to provide a fair trial for defendants?

Research the issues above and come to the online seminar prepared to discuss your findings.

QUESTION 2

Come to the session having researched and considered the idea that rape, in times of war, should not be considered a crime but part of the usual tactics of battle.

SMALL GROUP SESSION 5

PORNOGRAPHY & PROSTITUTION

Question 1

"Within the existing ideological framework of current liberal legal systems, it is a fundamental principle that individuals' freedom should not be restricted unless such restraint is necessary to prevent harm to others. Clearly the definition of harm is not static and is subject to re-negotiation in order to encompass newly perceived injuries…..yet this harm principle has proved peculiarly resistant to pornography".
[Emily Jackson "The Problem with Pornography: A Critical Survey of the Current Debate" Feminist LS Jo. Vol. III, No.1, Feb 1995]

Critically assess this statement and prepare your answer bearing in mind current debates on the issues of Harm/Consent and the links between pornography and sexual violence.

Question 2

In light of recent debates, can we now say that Pornography IS an incitement to sexual hatred?

Question 3

The scale of international trafficking in women and children dictates that there should be firm sanctions against it. Consider S.57-60 SOA 2003 and assess whether UK goes far enough in providing protection for women/children and appropriate punishment for traffickers.

Students should take the opportunity not only to consider the relevant legislation in order to discuss this question but they should also consider some of the many articles available on the human trade in trafficking for the purposes of prostitution and pornography and international conventions relating to these areas.

Question 3

Assume that the Government is proposing the decriminalization of brothels and the targeting of pimps and organized crime in its most recent paper on Prostitution. You are asked to prepare a paper in relation to these proposals either supporting or criticising them.

Students will be divided into two groups and allocated a role in either group during the LGS. Students in each group will have the opportunity to discuss their papers

together before a representative of each group presents the groups view to the whole class. In preparing for this task students should research not only the approach in the UK but also those taken in other international jurisdictions e.g. New Zealand and Sweden.

SMALL GROUP SESSION 6

ABORTION

During this SGS you will be divided into two groups. Each group will be tasked to provide a presentation either FOR or AGAINST the arguments raised by the question outlined below.

Please note that you will NOT be allocated your groups before the SGS and you must therefore prepare your presentation on the basis that you could be arguing for either side of the argument.

PRESENTATION QUESTION

"Since abortions are allowed in the case of rape, the foetus cannot be regarded as a full human being. If then, pregnancy is forced on other unwilling mothers it is not because the child is a human being whose life is sacrosanct. Why then are such mothers not automatically allowed to have abortions? One plausible explanation is that the child is being used as an instrument of punishment to the mother, and that talk of the sanctity of life is being used to disguise that fact". (J. Richards)

Critically consider the importance placed upon the right of the life of the foetus and the maternal right to autonomy in Abortion laws in England, American, Eire and Europe.

In order to prepare for this presentation you should consider the range of legislation and case law discussed during the LGS. In particular you should read the Judgment of the European Court in the case of Vo v France which can be downloaded from the W&L blackboard site.

STUDENT STUDY HOURS	112
CONTACT HOURS	48
PRIVATE STUDY HOURS	152
PRE-REQUISITE LEARNING (if applicable)	None
CO-REQUISTITE MODULES (if applicable)	None
COURSE	LAW
YEAR AND SEMESTER	2016/17 – Sem 2
MODULE COORDINATOR	Caron Thatcher
MC CONTACT DETAILS	Room K220 Tel: (020) 7815 7049 Mobile: 07956522579 Email: thatchc@lsbu.ac.uk
TEACHING TEAM & CONTACT SUBJECT AREA	**Caron Thatcher** Law
SUMMARY OF ASSESSMENT METHOD	1 Court Report and 1 Essay
EXTERNAL EXAMINER APPOINTED FOR MODULE	Russell Hewitson University of Northumbria

Welcome to your Gender Justice and the Law studies

In this module you will explore theoretical and practical aspects of the law so as to develop your critical and evaluative skills.

You commence your studies with an Introductory Lecture that sets out the core themes of the module, in particular, the theoretical theme of Storytelling within the law. This theme is central to the completion of your Court Observation Research Report and each topic that you will study in this module.

What can you expect from us?

- An interesting and lively approach to your legal studies.
- 'Real world' experience by attending a Crown Court trial and completing a research report
- A dedicated legal skills session to enhance your research knowledge and capabilities.
- Feedback on your Research Report.
- A personal tuition and feedback meeting before the completion of your final assessment.
- The development of your critical evaluative, reasoning and intellectual skills.

What we expect from you:

- Engagement with all aspects of the module
- Timely attendance
- Completion of all seminar work.
- Research and reading beyond the bare minimum
- Engagement with your study group.

We hope that you will enjoy your Gender Justice and the Law studies and we look forward to sharing knowledge and experience of the law in this area with you.

Large Group Session Materials

LARGE GROUP SESSION 1

INTRODUCTION/STORYTELLING

11. Structure of the Course

Module Guide/Teaching Materials

Large Group Sessions

Small Group Sessions

On Line Seminar

Feedback – Individual feedback sessions

VLE Resources

Etivities and GJL Groups

12. Core Themes of the Course

'Equality' (Sameness) v Difference - Reason/reasonableness
Constructing legal knowledges and 'new' challenges from feminist theories/(counter) storytelling.

Applying theory to practical legal circumstances: Rape, Domestic Violence, Pornography, Prostitution, Abortion.

13. Essays/Research Reports and feedback

14. Legal Truths:

Questions: Is the law Neutral?
Can we achieve Certainty in the law?
Is Neutrality/Certainty in the Law desirable?

15. <u>(Counter) Storytelling</u>

Outsider Jurisprudence – A challenge to 'mainstream' or 'established' jurisprudence.

Questions: Who are the outsiders?
Is everyone an outsider?
Are outsiders 'outside' all the time?

(counter) Storytelling - A recognition that 'stories' are told within mainstream law and develop/are accepted as legal 'truths'.

Questions:

- What are Counterstories?
- Who tells Counterstories?
- Do Counterstories 'count'?
- How can a consideration of storytelling help us to understand the relationship between outsiders and the law?
  - In the Courtroom, how are counterstories told and are they understood?
  - Who are the outsiders in Court?
  - If the stories of outsiders are to be preferred what happens when the two litigants are both outsiders?

Materials which will help you consider the issues raised by Counter-storytelling and Outsider Jurisprudence include:

- Mari Matsuda "Affirmative Action and Legal Knowledge Planting Seeds in Plowed up Ground" Harvard Women's LJ 185 (1988)
- Naomi Cahn "Inconsistent Stories" Georgetown LJ Vol 81 2475 (1993)
- Kimberle Crenshaw "Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color" Stanford L Rev Vol 43 1241 (1991)
- Bell Hooks "Feminist Theory – From Margins to Centre" Boston South End Press (1984)

<u>What's next? Preparation for the SGS:</u>

Students are required to complete some tasks in advance of the SGS.

Before the first SGS ALL students will need to complete a short assignment. Relevant information can be found in the Small Group Sessions part of these Teaching Materials (per SGS 1)

Reading:

In advance of the first SGS and in order to complete the assignment and prepare the Defence for the Duck, all students must read:

Kim Lane Scheppele "Forward: Telling Stories" Michigan Law Rev. 87 (53) (1989) [See Appendix 1]

Jesse Elvin "The continuing use of problematic sexual stereotypes in judicial decision-making" Feminist Legal Studies Journal, Vol 18, No.3 (2010) **available on the GJL VLE**

The story of Farmer Duck – summary in SGS Outline

- Hunter "Feminist Judgments" Chapters 1, 2 & 3

- Review your Property Law/Equity & Trusts/Contract law course notes/text book.

EXTENDED READING:

- Any of the articles indicated in this LGS

LARGE GROUP SESSION 2

Reason and the Law

13. FEMINIST LEGAL THEORIES

History and background – Classical Legal Theories/Feminist Legal Theories/Modern Legal Theories

Catherine MacKinnon "Feminism, Marxism, Method & The State: Toward a Feminist Jurisprudence" Vol 8 Signs p.635 (1983) and "Toward a Feminist Theory of the State" Cambridge, Harvard Uni Press (1989)

Liberalism and Reason:

False claims of objectivity, truth and universality?

- Rosi Bradotti "Ethics Revisited: Women and/in Philosophy" in C. Pateman "Feminist Challenges" Allen & Unwin (1986)
- J. Grimshaw "Feminist Philosophers: Women's Perspectives on Philosophical Traditions", Brighton, Wheatsheaf, (1986)
- G. Lloyd "The Man of Reason: Male and Female in Western Philosophy" London, Methuen (1984)
- D. Coole "Women in Political Theory" Brighton, Wheatsheaf (1988)
- Carole Pateman "The Theoretical Subversiveness of Feminism" in "Feminist Challenges" Allen and Unwin (1986)
- Susan Okin "Justice and Gender in the Family" New York, Basic Books (1990).

14. Standards of Reason:

"In the magic of my blackness…I can turn myself invisible. I can render myself completely undetectable to most eyes even if I jump up and down and wave and shout I have trouble getting them to see just one of me. For example, if I spill soup in a restaurant, they tend to see

hundreds of me; if I have a baby, I tend to have a population explosion; if I move into a neighbourhood, I come as the forward phalax of an invading army; if I have an opinion its attributed to 'you people'.

[Patricia J. Williams "A Rare Case of Mulheadedness and Men" in Toni Morrison "Race-ing Justice, En-gendering power: Essays on Anita Hill, Clarence Thomas and the Construction of Social Reality" Chatto, l993]

Bebb v Law Society [1914] 1 CH 286
Turley v Alders Department Store [1980] IRLR 4
Webb v EMO Air Cargo Ltd [1993] 1 WLR 49 (HL) Case No. C-32/93; [1994] IRLR 482

15. The Reasonable Man/Person?

Robert Unikel "Reasonable Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence" Northwestern Uni L. Rev. Vol 97 No. 1 (1992)

Nancy S. Ehrenreich "Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law" [1990] 99 Yale LJ 1177

16. Legal Beginnings

The United Kingdom:

Vaughan v Menlove [1837] 132 Eng Rep 490
Blyth v Birmingham Waterworks Co [1856] 156 Eng Rep 1447

Hilary Allen "One Law for All Reasonable Persons? 16 Int'l Jo Soc and law 419-422 (1988)

Steward v Cleveland Guest Engineering Ltd [1994] IRLR 440

Leo Flynn "Interpretation and Disputed Accounts in Sexual Harassment Cases" Feminist Legal Studies Jo. Vol IV No.1 (1996)

The Equality Act 2010
http://www.legislation.gov.uk/ukpga/2010/15/body

See also Equality and Human Rights Commission Guidance :
http://www.equalityhumanrights.com/advice-and-guidance/new-equality-act-guidance/

Woman wins Sex Discrimination case after miscarriages (7th June 2013)
http://www.bbc.co.uk/news/uk-northern-ireland-22805132

Jeremiah v Ministry of Defence [1980] QB 87
Peake v Automative Products Td [1982] ICR 490
Pearce v Governing Body of Mayfield Secondary School [2003] UKHL 34

The United States:

Harris v Forklift Systems Inc 114 Sup Ct (1992)

Jane L. Dolkart "Hostile Environment Sexual Harassment: Equality Objectivity and the Shaping of Legal Standards" Emory Law Jo. Vol 34 (1994)

Bradwell v State of Illinois [1872] US (16 Wall) 130
Rabidue v Osceola Refining company [1986] 805 F.2d 611 6th cir.

Sexual Harassment – UK/EU development

The Hostile Work Environment:

Meritor Savings Bank v Vinson 477 US 57 (1986)

Bundy v Jackson 641 f2d

Henson v City of Dundee 924 F2d 872 9th cir (1992)

Sabino Guittierrez v California Acrylics Inc & Maria Martinez (unreported) May 1993

NB: Unwelcomeness

B. Glenn George "The Back Door: Legitimising Sexual Harassment Claims" Boston Uni L. Rev 73 No.1 Jan (1993)

Susan Estrich “Rape” Camb Mass Harvard Uni Press (1988)
Mary Jo Shaney “Note: Perceptions of Harms: The Consent Defense in Sexual Harassment Cases” 71 Iowa Law Rev 1109 (1986)

Swentek v US Air Inc 830 Fd 552 4th cir (1987)

17. A Challenge from the Reasonable Woman?

Naomi Cahn “The Looseness of Legal Language: The Reasonable Woman Standard in Theory and Practice” Cornell LR Vol 77, 1401 (1992)

State v Wanrow (1977) 599 p.2d 548 Wash

Kathryn Abrams “Gender Discrimination and the Transformation of Workplace Norms” 42 Vand L. Rev 1183 (1989)

18. Standards and Universalism:

Jane L. Dolkart “Hostile Environment Harassment: Equality, Objectivity and the Shaping of legal Standards” 43 Emory LJ 151 200 (1994)
Caroline Forell “Essentialism, Empathy and the Reasonable Woman” Uni Illinois Law Rev. Vol 4 (1994)
Patricia J. Williams “The Alchemy of Race and Rights” Cambridge Harvard Uni Press (1991)
Martha Minow “Making all the Difference” New York, Cornell University Press (1990)
Angela Harris “Race and Essentialism in Feminist Legal Theory” 42 Stan Law Rev 681 (1990)
Lucinda M. Finley “A Break in the Silence: Including Women’s issues in a Torts Course” 1 Yale Jo Law and Feminism 41, 64 (1989)
Mari Matsuda “When the First Quail Calls: Multiple Consciousness as Jurisprudential Method” 11 Women’s Rights Law Rep, 7 (1989)

Essential Reading 

Any of the articles indicated above PLUS

Hunter - Chapter 23

Barnett – Chapters 3, 5 7 & 8

Robert Unikel "Reasonable Doubts….." [See Appendix 2]

Karon Monaghan QC "The Legal Construction of Sex: Where's Gender? Where are the Women?" – Extract from K. Monaghan "Equality Law" 2nd edn – lecture delivered at LSBU October 2012. Available on the GJL VLE site.

Maureen Spencer "Book Review – Joan C.Willliams 'Reshaping the Work-Family debate'" Feminist Legal Studies Jo. Vol. 19, No.2, August, 2011

Monti G "A Reasonable Woman Standard in Sexual Harassment Litigation" Feminist Legal Studies Jo. Vol l9 No.4 (1999)

Naomi Cahn "Inconsistent Stories" Georgetown LJ Vol 81 2475 (1993)

Additional Sources

Linda Clarke Harassment, sexual harassment, and the Employment Equality (Sex Discrimination) Regulations 2005. Industrial Law Journal I.L.J. (2006) Vol.35 No.2 Pages 161-178

Harriet Samuels "A Defining Moment: A Feminist Perspective on the Law of Sexual Harassment in the Workplace in Light of the Equal Treatment Amendment Directive". Feminist Legal Studies Jo. Vol 12, No.2, 2004 Pg 181-211.

Annick Masselot "The New Equal Treatment Directive" Feminist Legal Studies Jo. Vol. 12, No.1, 2004, Pg 92-104

Macdonald LAC "Equality, Diversity and Discrimination" CIPD, London, 2004.

Jane L. Dolkart "Hostile Environment Sexual Harassment: Equality Objectivity and the Shaping of Legal Standards" Emory Law Jo. Vol 34 (1994) – can be read or downloaded from Westlaw

Ann Juliano "Did she ask for it? The Unwelcomeness Requirement in Sexual Harassment Cases" Cornell Law Rev 97 1588 (1992) – can be read or downloaded from Westlaw

Catherine A. MacKinnon "Sexual Harassment: Its First Decade in Court" in "Feminism Unmodified: Discourses on Life and Law" Cambridge Harvard Uni Press (1987)

Large Group Session 3

SKILLS WORKSHOP

In place of the usual lecture, we have arranged for GJL students to attend a dedicated skills workshop at the Skills Centre. The skills workshop will be tutored by the Law Librarian. It will involve an introduction to Information Technology and relevant research data bases focusing on the themes of the GJL module.

Students are asked to note that the purpose of this workshop is to introduce you to the range of opportunities for computer based research in this area of the Law. The workshop will not teach you how to use the computers (the staff at the Skills Centre can help you with that, and can provide you with information sheets which tell you how to access the computers and the various databases), but the session will give you an introduction to using the technology quickly and efficiently.

The Law Librarian will also give you tips on researching via Westlaw and Lexis Nexis. These are probably the most costly computer database held by the University and also (naturally) the best. Between them they contain the full text of reported and unreported cases from the UK, Europe, the Commonwealth and the USA. Through these databases you can also access the full text of articles in the New Law Journal, Law Society Gazette, Estates Gazette and some others. Additionally you can search for law review articles from the USA/Canada. These databases, together with Lawtel, will prove extremely useful to all students when conducting research for the Research Report and Essay.

Students will also be given an introduction to locating relevant information via the internet and the use of the internet as a research tool, together with details of the correct citation method for internet based research.

During this Module there will be a practical opportunity for you to demonstrate your IT skills through the submission of some seminar materials via email, downloading of some seminar materials from the internet, the on-line seminar and completion of etivities.

Your attendance at this workshop forms part of the attendance requirements of this course, hence attendance is compulsory and a register of attendance will be taken

The session will last between 1-2 hours.

LARGE GROUP SESSION 4

RESEARCH

Students will be aware that they must complete a Court Research Report (coursework) during this Module. That coursework will be submitted during the run of the Module. It will be marked and feedback provided to students before they complete their second coursework (the essay).

There will be **no formal LGS this week** in order to give students the opportunity to attend at either the Central Criminal Court or a local **Crown/Magistrates Court** to observe the progress of a criminal law case. Inner London Crown Court, Newington Causeway, London SE1 or Blackfriars Crown Court, Pocock Street, London SE1 are within 10 minutes walking distance of the University.

Please note that when observing a case you should ensure that you see both the defence and prosecution advocate cross examining a witness.

Please note: During the 2012 it became clear that taking notes during court proceedings is no longer possible. Therefore **DO NOT TAKE NOTES while you are in the court room**. Once you exit the court room make a note of what was said, who said it, the impact/purpose of what was said, and what, if anything the Judge/Jury said during the time you observed the case.

In your research project you are required to:

5. Outline the case observed; including details of the defendant, any witnesses, the name of the court, whether Magistrates/Crown Court, who cross examined, what the case was about.
6. Demonstrate an understanding of the roles of the various participants in the case.
15. Critically consider the stories being told in the case.
16. Consider whether counterstories are being told? If so, how and with what degree of impact?

17. Consider whether mainsteam stories are being told? If so, how and with what degree of impact?
18. Consider which of the stories you have heard are the most convincing? Why?
19. Could anything have been said by either side which might have made a difference to your assessment in No.6 above?
20. Finally, drawing upon the articles you have read and your experience attending court, critically consider what value counterstorytelling has in a practical legal setting.

Please remember that the Research Report is a piece of assessed coursework carrying 40% of the marks in this Module.

The **maximum** word limit for the Research Report is 2,000.

In the Appendices at the end of this Module Guide you will find a sample research report written by a former student. This is provided to you as an example of excellent work. It will also help you to focus on the issues that you need to identify when you are at court.

READ the sample research report at the end of these teaching materials BEFORE you undertake your own research.

LARGE GROUP SESSION 5

Applying Theory to Fact – Domestic Violence

17. Should we be troubled by domestic violence? What has it got to do with us?

- International Human Rights Laws – International Convention on Civil and Political Rights, Convention on the Elimination of all forms of Discrimination against Women
- "The cost of Domestic Violence" – DTI study September 2004 (UK) (Sylvia Walaby) http://www.equalities.gov.uk/PDF/Cost%20of%20domestic%20violence%20%28Walby%29%20Sep%2004.pdf

18. Defining Domestic Violence

UK Government Definition – "Safety and Justice: The Government's Proposals on Domestic Violence" Cmnd 5847, June 2004.
"Any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality".

UN Declaration on the Elimination of Violence Against Women Article 1
"The term 'violence against women' means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or in private life" .

19. Historic, social and political background to the development of DV initiatives in the UK

- 1 DV incident every minute of every day in the UK
- 2 women killed per week
- 50% female murder victims, killed by husbands or partners
- 90% of DV incidents – children in same room or room nearby
- 35 assaults on average before women report assault to police

20. Civil/Criminal law protections? Is there a need for a Domestic Violence law?

- **Case Scenario 1: A man repeatedly threatens a woman (his wife/partner) with violence.**

  Civil Law protections – Injunction/Non-Molestation Order/Exclusion Order

  Criminal Law protections – Assault by words alone? R v Constanza 1997 2 Cr App R 392. Can silence constitute an assault? R v Ireland and Burstow 1997 3 WLR 650

- **Case Scenario 2: A woman wants a man (husband/partner) to keep away (temporarily or permanently) from a house that he owns**

  Private Property/Ownership rights/civil law protections/remedies

- **Case scenario 3: A man who is the former husband/partner of a woman stalks her by spying on her, watching her from his car, taking photographs of her, listening into her telephone calls, and making repeated, unwanted, calls to her at her place of work and home**

  Protection from Harassment Act l997
  Francisco v Diedrick (1998) TLR 218

21. Domestic Violence Courts

98 Specialist Domestic Violence Courts in England and Wales
UK Government National Action Plan (March 2005) Aim to improve case outcomes and bring more offenders to justice

22.Police and Prosecution Domestic Violence Prevention Initiatives

Police receive over 1,300 calls per day – 570,000 calls each year (Stanko, 2000).
40.2% of all domestic violence crime reported to police (British Crime Survey 2006)

2003 Her Majesty's Inspectorates of Constabulary and Crown Prosecution Service – joint inspection. Aim to improve work between Police and CPS.

43 police forces have Domestic Violence Officers.
National Guidelines for investigating DV crimes (established 2004)
National Training Scheme for police officers
Impartiality of police officers - Police with proven history of Domestic Violence against wife/partner 'not deemed suitable for police work'.

- **Case Scenario 4: A woman has reported an assault on her by a man (husband/partner), but she now refuses to give evidence against him at court**

Section 23 Criminal Justice Act l988: Prosecution without calling victim at trial.

Public Interest Test and Domestic Violence

The Youth Justice and Criminal Evidence Act l999. Special Measures for vulnerable or intimated witnesses: Screens, live link, empty pubic gallery, remove wigs and gowns.

April 2008 – CPS Aide-Memoire on Charging in Domestic Violence Cases. Aim – to provide a uniform approach to handling DV cases and to reduce the high number of discontinued DV cases.

Full Code Test: 1. Evidential Test 2. Public Interest Test
Gathering evidence of the victim: Corroboration, 999 tape, CCTV, Photographs

Gathering evidence of the offender: Previous convictions? Conduct/demeanour at arrest? Admissions? Any sign of injury on him?

23.Homicide and Domestic Violence

An Historical Overview:

Provocation: S.3 of the Homicide Act l957 where it is defined Provocation in the following terms:

- "Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked whether by things done or by things said or by both together to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury, and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have had on a reasonable man".


Further Thinking..... Did S.3 stop victims of domestic violence from utilising provocation as a defence?

R V DUFFY (1949) 1 ALL ER 932

"Provocation is some act, or series of acts, done which would cause in any reasonable person, and actually cases in the accused, a sudden and temporary loss of self control, rendering the accused so subject to passion as to make him or her for the moment, not master of his mind".

Gender inequality at the heart of the statute?

Case Scenario 1: A man kicks his wife to death because she

'nagged' him.

- R v Joseph McGrail (Birmingham Crown Court) l991 [Manslaughter - 1 year suspended sentence]
- R v Beatanbeau 2001 [20 months suspended sentence]

Case Scenario 2: A <u>man</u> stabs his wife to death after she told him she didn't love him anymore

- R v Leslie Humes 2003 [Manslaughter - 7 Years imprisonment]

Case Scenario 3: A <u>woman</u> pours petrol over her sleeping husband and sets him alight after he tells her that he will kill her when he awakes in the morning

- R v Ahluwalia l992 4 All ER 889
- R v Sarah Thornton (1996) 2 ALL ER 1023

Case Scenario 4: A woman stabs her violent partner to death after hearing him tell his friends that they can gang rape her

- R v Humphreys [1995] 4 All ER 1008

Additional – relevant – cases:

Susan Edwards ' R v Zoora Shah" in Feminist Judgments pp.273-292

R v Tara May Fell (2000) Lawtel on Battered Women' Syndrome
R v. Smith (Morgan) [2001] 1 AC 146
R V Janet Catherine Carlton [2003] LTL 7.2.2003
R v Catherine Mary Keaveney [2004] 22.4.2004

<u>The Battered Woman Syndrome</u>

USA – developed mainly by psychologists
Leonore Walker "Terrifying Love: Why Battered Women Kill and how Society Responds" 1989
Learned Helplessness theory

The Cycle Theory of Violence

Ibn-Tamas v Moduleed States DC 1979 (lst US case to admit BWS evidence)

Further thinking..... Are there any dangers associated with the adoption of 'syndromes' to explain the behaviour of domestic violence victims?

24.Reform

Law Commission Paper 'Partial Defences to Murder'. www.lawcom.gov.uk 20th August 2004

Law Commission Paper 'Murder Manslaughter and Infanticide' November 2006

27th October 2009 – House of Lords reject amendment to Coroner's and Justice Bill (99 votes to 84) stopping new law aimed at repealing provocation as a defence in infidelity cases. Allowing provision for reduction from murder to manslaughter in DV homicide cases based on 'Fear of Serious Violence'.

Coroners and Justice Act 2009

Section 56 - Abolition of common law defence of provocation

1) The common law defence of provocation is abolished and replaced by sections 54 and 55.
2) Accordingly, the following provisions cease to have effect—

(a) section 3 of the Homicide Act 1957 (c. 11) (questions of provocation to be left to the jury);

(b) section 7 of the Criminal Justice Act (Northern Ireland) 1966 (c. 20) (questions of provocation to be left to the jury).

Replaced by:

Section 54 - Partial defence to murder: loss of control

(1) Where a person ("D") kills or is a party to the killing of another ("V"), D is not to be convicted of murder if—

(a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,

(b) the loss of self-control had a qualifying trigger, and

(c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.

(2) For the purposes of subsection (1)(a**), it does not matter whether or not the loss of control was sudden.**

(3) In subsection (1)(c) the reference to "the circumstances of D" is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.

(4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.

(5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

(6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.

(7) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.

(8) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder does not affect the question whether the killing amounted to murder in the case of any other party to it.

Section 55 - Meaning of "qualifying trigger"

(1) This section applies for the purposes of section 54.

(2**) A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies.**

(3) This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.

(4) This subsection applies if **D's loss of self-control was attributable to a thing or things done or said** (or both) which—

(a) constituted circumstances of an extremely grave character, and

(b) **caused D to have a justifiable sense of being seriously wronged.**

(5) This subsection applies if D's loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4).

(6) In determining whether a loss of self-control had a qualifying trigger—

(a) **D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence;**

(b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence;

(c) **the fact that a thing done or said constituted sexual infidelity is to be disregarded.**

(7) In this section references to "D" and "V" are to be construed in accordance with section 54.

Sexual Infidelity - Not good enough by itself but with an additional element is it a defence to murder? See ***R v Clinton (Jon-Jacques)*** [2012] EWCA Crim 2 and also Vera Baird "Infidelity Plus – the new defence against murder? The Guardian 23rd Jan 2012 http://www.guardian.co.uk/commentisfree/2012/jan/23/infidelity-plus-defence-murder

Further Thinking.....Does the new law on loss of self control create an imbalance of fairness against male defendants? Reading the following case might help: **The Queen V Ronald Edwards [2011] EWCA Crim 1461**

International Perspectives on Violence against Women

This part of the lecture focus on the broader context of domestic and will be given by a guest lecturer.

ESSENTIAL READING 

Hunter Part IV (241-272 and 273-307)
'Bridging the Divide': An Interview with Professor Rashida Manjoo, UN Special Rapporteur on Violence Against Women – Feminist Legal Studies Journal, 18th November 2016, Vol. 23, Issue 3.
Hillaire Barnett - Chapter 9
Nicola Wake "Loss of Control – Beyond Sexuality Infidelity" Journal of Criminal Law, 2012, 76(3), 193-197 **Available on the GJL BB site**
"The Canadian Supreme Court and Domestic Violence – R v Ryan" 2013 Ronagh McQuigg. Feminist Legal Studies Journal 2013
Cases as above (from your Criminal Law case book)

PLUS any of the following articles:

Andrew Ashworth "Homicide: Coroners and Justice Act 2009 s.54 - loss of control - qualifying trigger" – Case Commentary – Criminal Law Review,(2012) CLR 539

"Anger and Fear as Justifiable preludes for loss of self control". Susan M. Edwards, Jo Criminal Law, 2010, 74(3), pp 223-241.

"The Coroners and Justice Act 2009 – Partial Defences to Murder – Loss of Control", Alan Norrie, CLR, 2010, No.4, pp 275-289.

"Reforming Provocation – perspectives from the Law Commission and the Government". Dr. Anna Carline (2009) 2 Web JCLI.

"Abolishing provocation and reframing self defence - The Law Commission's options for reform" Susan S.M. Edwards. CLR Mar 2004.

"Responding to Victim Withdrawal in DV cases" Louise Ellison, Crim LR. 2003 – Available on Blackboard
"Legal Defences and Expert Testimony on the Battered Woman Syndrome: A Focus on Self Defence". Juliette Casey. Scots law Times. 2003 – Available on Blackboard

EXTENDED READING:

"Safety and Justice: The Government's Proposals on Domestic Violence" Cm 5847 June 2003.
"Domestic Violence a Guide to Civil Remedies and Criminal Sanctions" Home Office, February 2003. www.dca.gov.uk
"The Day to Count…… A snapshot of the impact of Domestic Violence in the UK". Elizabeth Stanko. London. 2004. www.domesticviolencedata.org.uk
P. Hutchenson NLJ 14th Aug '92 Vol. No. 6564 p 1159
P Hutchenson NLJ 13th Sept '91 Vol 141 No.6519 p.1223
G. Langdon-own "Leeds Shows the way in tackling Domestic Violence" The Times 20th June 2000.
Olga Tsoudis "Do Social Sanctions Matter in Domestic Violence? A Pilot Study" Web Jo. Current Legal Issues. (2) 2000
G. Gibson "Tightening the Noose" The Times 2nd November 1999
D. Yarwood "Domestic Abuse Research" Family Law 1999 Vol 29 pgs 113-115
J. Horder "Sex Violence and Sentencing in Domestic Provocation Cases" 1982 CLR P.32
M. Wasik "Cumulative Provocation and Domestic Killing" 1982 CLR P.32
S. Edwards "The Extent of the Problem – how widespread is Domestic Violence?" in S. Edwards "Policing and Domestic Violence" Sage l989
House of Commons Home Affairs Committee Report "Domestic Violence" Feb 1993
Law Commission "Family Law, Domestic Violence and Occupation of the Matrimonial home" HMSO l992

M. Shaffer “The Battered Woman’s Syndrome Revisited: Some Complicating Thoughts 5 years after R v Lavallee (1990)” 47 U.Toronto LJ 1-33 Winter 1997

Large Group Session 6

Rape and the Criminal Justice System

Introduction

Rape Myths & the impact of storytelling in rape law

Davis v North Carolina (1966) 382 US 737 in Kim Lane Schepple "Foreword: Telling Stories" Michigan Law Review Vol 8. P.2057
Steward MW, Dobbin SA & Gatowski SI (1996) "Definitions of Rape: Victims, Police and Prosecutors "No. 4 Feminist Legal Studies 159 p.392.
David Pannick QC The Times (Law Supplement) 2000

Rape and the Criminal Law

Sexual Offences Act 1956 ss(1) & (2) & 43
Sexual Offences Amendment Act 1976 s.1
Criminal Justice & Public Order Act 1993 S.142
Triable on Indictment only

A man commits rape if:

(a) he has sexual intercourse with a person (whether vaginal or anal)

who at the time of the intercourse does not consent to it, and

(b) at the time he knows that the person dose not consent to the intercourse or is reckless as to whether that person consents to it.

Actus Reus – Stanton (1844) 1 Car & Kir 415; Hughes (18841) 0 C & P 752 and Sexual Offences Act S.44

Mens Rea - Khan (1990) 1 WLR 13; Satnam (1984) 78 CR App R 149; Breckenridge (1983) 79 CR App R 244; Gardiner (1994) CLR 455; McFall (1994) CLR 226

Sentencing – Rape : Maximum = life imprisonment S.37 SOA 1956
Attempted Rape : Maximum = life imprisonment S.38 SOA & Sch 2

Consent:

Sexual Offences (Amendment) Act 1976 – no definition of consent
Common Law approach
Olugboja (1982) QB 320
Criminal Law Revision Committee
Ruth Hall & Lisa Longstaff "Defining Consent" (1997) NLJ June 6, p.840.
Human Rights Act 1998 S.6(2) – see also Salabiaku v France (1988)

Satnam v Kewel S (1983) 78 CAR 149

Mistake - DPP v Morgan (1976) AC 215
Canadian Criminal Code S.272.2 states that mistake is not available as defence if D did not take reasonable steps in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

Rape & Marriage:

R v R [1991]
S.W. v UK [ECHR] 22nd November 1995
Article 7(1) ECHR
Attorney General's Reference (No.86 of 2006) Sub Nom R v J (2006) EWCA Crime 2077

Australian case – 81 year old husband stands trial for rape of wife 50 years earlier
http://www.theaustralian.com.au/business/legal-affairs/husband-for-rape-trial-after50years/story-e6frg97x-1226375606974

Reform:

Sexual Offences Act 2003 – extends actus reus to now include penetration of mouth/anus (S.1(1)(a)).

Mens Rea – Legislation has dropped requirement that defendant should

know of or be reckless as to the absence of consent. Replaced by a crime of negligence. S.1(2) Genuine belief in consent to be evaluated objectively *in all the circumstances. [Abolishes Morgan defence]*
S.47 defines consent : "A person consents if he agrees by choice, and has the freedom and capacity to make that choice"

Helbron Committee Report 1975 Cmnd 6352
"Setting the Boundaries – Reforming the law on sexual offences" Home Office July 2000
www.homeoffice.gov.uk/cpd/sou/sexoff99.htm
Human Rights Act (implemented 2nd October 2000)

Report of the Advisory Group on the Law of Rape (1975) Cmnd paper 6352 "It would be unfortunate if a tendency were to arise to say to a jury that a belief, however unreasonable, that the woman consented, entitled the accused to acquittal".

Corroboration

Removing the requirement to warn the jury
S.32 CJPOA l994
Makanjuola [1995] 3 All ER 730

Procedural Developments:

Home Office Report "Speaking up for Justice
www.homeoffice.gov.uk/sufj.pdf
But see R v B (Attorney-General's Reference No.3 of l999) 2000 (Lawtel) and TLR 16/6/00

Rape Conviction Rates

Baroness Vivien Stern, Government review of Rape complaints handling in England and Wales. The Stern Review, Published MARCH 2010.
http://www.equalities.gov.uk/stern_review.aspx - also available on BB
Methods of Calculation – Attrition -6% conviction rate – Prosecution = 60% conviction rate.
Liz Kelly et al "A Gap or a Chasm? Attrition in Reported Rape Cases" Home Office, Report No. 293, Feb 2005 (Available on Blackboard)

Conviction Rates 2007-08 6.5% across England and Wales (fall of .5% from
2006).
Fawcett Society (2007) – Research: Rape conviction rates a postcode lottery.
Natalie Taylor "Juror Attitudes and Biases in sexual assault cases". Trends
and issues in Crime and Criminal Justice, No. 344, Australian Institute of Criminology. August 2007.

Juries, deliberation and sexual stereotyping in rape cases

Sexual History Provisions

NB: See the articles by Neil Kibble and others referenced in **'Essential Reading'**
Victims vs Defendants: whose rights are to be preferred?
Youth and Criminal Evidence Act 1999, R v A (No.2) (2002) 1 AC 45
The impact of Human Rights issues – see Osman v UK (1998) 14 EHRR 53
Ralston Edwards Case : victim complaining to ECHR that her right not to be subjected to degrading treatment was infringed at trial.

The role of the CPS – R v DPP ex Parte C (2000) Lawtel : on failure of CPS to consult victim prior to discontinuing prosecution

Rape Trauma Syndrome

Outline of the Syndrome's origins (see Burgess & Holstrom)
Phase 1 – Acute Phase
Phase 2 – Long Term Reorganisation Process
Use of the RTS in the USA: Henson v State of Indiana (1989) demonstrates limitations on the use of RTS for women.
R v Meah: D. Meah and Another (1986) 1 All ER 935 on civil damages/RTS (see also Meah v McCreamer 1984 & 1985 (No.2)
Miles v Cain (1989) The Times 14th Dec '89 on civil damages /RTS
Linda Griffiths v Arthur Williams [1995] LTL 21/11/95 - £50,000 damages following rape not excessive.

Rape - Warfare – International Criminal Law perspectives

Bosnia, Ruwanda, Abu Ghraib (Iraq).

See: Article 7 Statute of Rome (Statute of the International Criminal Court) 1998

"Rethinking Rape as a Weapon of War'. Doris E. Buss, Feminist Legal Studies Journal, Vol 17, No.2, August 2009.

MacKinnon, C., "Rape, genocide and women's human rights" Uni Nebraska Press, 1994.

'Rape as Torture? Catherine MacKinnon and Questions of Feminist Strategy". Clare McGlynn, Feminist Legal Studies Journal, Vol 16, No.1, April 2008.

MacKinnon, C., Are Women Human? And Other International Dialogues (Cambridge, Mass.: Harvard University Press, 2006)

Human Rights Watch Report 'Looser Rein, Uncertain Gain" – Investigation into human rights in Saudi Arabia, HRW, 2010.

The Quatif Rape Case - http://www.msnbc.msn.com/id/15836746/ns/world_news-mideast_n_africa/t/rape-case-calls-saudi-legal-system-question

ESSENTIAL READING 

Hunter "Feminist Judgments" Pages 205-227

Clare McGlynn "Rape Torture and the European Convention on Human Rights" International and Comparative Law Quarterly [2009] 565-595 (**available on Blackboard**)

Neil Kibble "Case Comment – R v Harris" [2010], CLR Vol 1, pp 54-61

"Judicial Discretion and the Admissibility of Prior Sexual History Evidence under S.41 Youth Justice and Criminal Evidence Act 1999: Sometimes sticking to your guns means shooting yourself in the foot: Part 2" Neil Kibble, CLR 2005, APR, 263-274

"Judicial perspectives on the Operation of S.41 and the Relevance and Admissibility of Prior Sexual History Evidence: Four Scenarios: Part 1" Neil Kibble CLR 2005 MAR 190-205

"Section 41 Youth Justice and Criminal Evidence Act l999: Fundamentally flawed or fair and balanced?" Neil Kibble, Archbolds News 2004, 8, 6-9.

"The Sexual History Provisions: Charting a course between inflexible legislative rules and wholly untrammelled judicial discretion?" Neil Kibble. Crim LR April 2004

"Sexual History Evidence – Beware the Backlash" Jennifer Temkin, CLR 2003, APR 217-242

"Untangling sexual history evidence: a rejoinder to Professor Temkin". Di Birch. Crim LR June 2003. 370-383

Dr. K. Stevenson "Observations on the Law Relating to Sexual Offences: The historic scandal of women's silence" Web Jo Current Legal Issues (1999) 4

L. Ellison "Cross Examination in Rape Trials" Crim LR Sept (1998) 605.

S. Estrich "Rape" Yale LJ 1087 (1986)
William Wilson "Rape" Jo. Social Welfare and Family Law Sept '92, No. 5. 445

Large Group Session 7

Pornography
Sexual Violence Against Women?

Introduction:

Pornography – a multi-billion £ enterprise

Modern developments – the internet – cyber porn
Child Pornography – the scale of the 'problem'. Sexual Offences Act 2003 ss48-50. Sentencing Guidelines (Sentencing Advisory Panel)

Sexual Offences Act 2003 – S.47 – 51 – Provisions on the Abuse of Children through Pornography; including inciting arranging or facilitating child pornography.

Criminal Justice and Immigration Act 2008 S.63 and S.64

R v Coutts [2005] 1 WLR 1605 (Court of Appeal judgment)
R v Porter (Ross) [2007] 2 All ER 625 – indecent photographs of children – custody/control of deleted images on computer

Pornography & Sexual Violence: Two competing schools of thought: 1 x direct causal link between pornography and violence against women, 1 x no causal link and banning of pornography = censorship.

Pornography as sex discrimination

Looking back: Moving Forward?

3 different views of pornography

- Liberal: North American Presidential Commission 1970 Williams Report l979
- Conservative: Moral right/family values
- Feminists: Robin Morgan "Porn is the theory, rape is the practice"[in "Going Too Far" Random Hse l977]

Susan Brownmiller, Andrea Dworkin, Catherine MacKinnon - Anti-Censorship Feminists
Carol Vance "Pleasure and Danger, Exploring female Sexuality" - rejects Dworkin's analysis.

Links Between Pornography and Sexual Violence:

- USA: Dworkin and MacKinnon - Minneapolis Ordinance .v. First Amendment (Anti-censorship) civil libertarians.
  See also: Sylvaine Colombo "The Legal Battle for the City: Anti-Pornography Municipal Ordinances and Radical Feminism" Fem LS Jo. Vol. II, No.1. Feb 1994


Further thinking..... Who is to decide what pornography is and on what basis?

Studies Linking Pornography and Sexual Violence:

- Ted Bundy/Marquis de Sade (a case for censorship?)
- Donnerstein, Linz and Penrod 'The Question of Pornography"
- Neil Malamuth "Pornography and Sexual Aggression" Orlando Academic
  Press 1984 : Looking at the rape myth acceptance scale.
- Stephen Childress [see further reading]


Further thinking.....If the viewers of pornography are de-sensitized to rape is that a strong argument for banning all pornography?

Evidence from Europe/Other regions:

- Denmark/Sweden [Berl Kutchinsky]
- Germany [Polizeiliche Friminalstaatistik l990]
- Japan [Court J. "Sex and Violence: A Ripple Effect"

in N. Malamuth 1984 (above)]

Pornography and the question of Harm:

- What is Harm? R .v. Brown [1993] 2 All ER 75
- Is Harm only physical - is pornography an incitement to sexual hatred? Racial Hatred?
- Pornography and warfare - Modern examples: Iraq?

Essential Reading 

Hunter "Feminist Judgments" Commentary on R v Brown pp 241-254

Clare McGlynn and Ericka Rackley "Criminalising extreme pornography: a lost opportunity". Criminal Law Review, (2009) No.4, pp 245-260

Andrew D. Murray "The reclassification of extreme pornographic images". Modern Law Review, MLR (2009) Vol 72 No.1 pp 73-90

Alisdair Gillespie "The Sexual Offences Act 2003: Tinkering with Child Pornography" CLR (2004) May pp 351-368

"Paying the Price – A Consultation Paper" 2004 – available on Blackboard
"Partial Regulatory Impact Assessment" Home Office paper 2004 available on Blackboard
Emily Jackson "The problem with Pornography: A Critical survey of the Current Debate" Feminist Legal Studies Jo. Vol III No.1. Feb l995
William Wilson "Is Hurting People Wrong?" Jo. Social Welfare and Family Law. No.5 l992
Steven Childress "Reel Rape Speech? Violent Pornography and the politics of Harm". [Review Essay] Law & Society Review. Vol. 25 No.1 (l991) P. 179.

Further Reading (any of the articles listed below):

David Sapsted “30 Years in Jail for killer necrophiliac” Telegraph on-line 5.2.2004.
“Young men download illegal porn” BBC New on-line. 25.7.2003
“Is Porn good for Society?” BBC News on-line. 14.5.2002
“Pornography and Sexual Violence: Evidence of the Links” Everywoman Press l988
“Consent No Defence to S/M Assaults” Jo. Criminal Law. Nov l992 P.381
Marianne Giles “Consent in Assault and Wounding Cases” Solicitors Journal 5th June 1992
Beverley Brown “Pornography and Feminism: Is Law the Answer?” Critical Quarterly Vol 34 No. 2 p.71 l992
Susan Etta Keller “Viewing and Doing: Complicating Pornography’s Meaning” Georgetown Law Jo. Vol 81 No.6 July l993.
Deborah Cameron “Pornography - What is the Problem?” Critical Quarterly Vol 34 No.2 p.3 l992
Gavin McFarlane “The Limits of Obscenity” NLJ Jan 24. 1992
A. Assister “Pornography Feminism and the Individual” Pluto l989
A. Dworkin “Pornography: Men Possessing Women” Women’s Press l98l
S. Griffin “Pornography & Silence” Women’s Press l988
Cass R. Sunstein “Pornography and the First Amendment” Duke Law Jo. September l986
R. Delgado and J. Stefancic “Pornography and Harm to Women: No Empirical Evidence?” Ohio State Law Jo. Fall l992
Catherine MacKinnon “Feminism Unmodified” Harvard Uni Press l987
Edward Donnerstein, Daniel Linz and Stephen Penrod “The Question of Pornography: Research Findings and Policy Implications” New York Free Press l987.
L B Alexander & SA Rubin “Regulating Pornography the Feminist Influence “ 18 Comm & L 73-94 D 1996
J Hussain “Feminists and Pornography - The Other Viewpoint” 6 Cornell Jo. Law and Public Policy 164-9 Fall l996
Smart C & B “Women, Sexuality and Social Control” Routledge, l978.

LARGE GROUP SESSION 8

Prostitution, Women's Bodies and the Law

Historical Perspectives:

- Prostitution is not a recent phenomenon: (see Carol Pateman "The Sexual Contract", Polity Press. 1988): In the temples, prostitution in ancient babylonian times – destitute women sold their bodies for food for themselves and their children.

Early Campaigns:

- Josephine Butler (Ladies National Association) campaign to repeal Contagious Diseases Acts (1864, 1866, 1869).

- Police powers under CDAs and Habeas Corpus (see L. Mahood "The Magdalenes: Prostitution in the l9th century" Routledge l990).

- Unpopularity of Butler's campaign amongst some feminist women (eg. Millicent Fawcett). (See Carol Smart & J. Brophy "Locating Law: a discussion on the place of law in feminist politics" in Smart/Brophy "Women in Law: Explorations in Law, Family and Sexuality" Routledge l985).

Prostitution and War:

- Difficulties understanding female sexuality outside institution of prostitution (see L. Bland "In the name of protection: the policing of women in the lst world war" (in Smart/Brophy ibid). Noting also that the definition of Veneral Disease is gender specific and that restrictions on civil rights of prostitutes were designed to protect the military.

Prostitution and Criminal Law

- Wolfenden Report (Homosexual Offences and Prostitution) Cmnd 247
  (1957) HMSO – recognised need to keep prostitution off the streets.
  Lead to greater criminalisation of prostitutes?

  S.1(1) Street Offences Act 1959:

  "It shall be an offence for a common prostitute to loiter, or solicit in a street or a public place for the purpose of prostitution".

The law before May 2003

- Who/What is the **common prostitute?**

  Woman can be labelled a CP if she has been cautioned twice for loitering/soliciting and being found to be doing so on a third occasion.

- In 1994 – 7,039 women prosecuted under S.1(1) Street Offences Act l959

- Other Offences – Keeping a Brothel (Sexual Offences Act l956 s.33)
  Being a Common Prostitute and behaving in a riotous Manner in a public place (Vagrancy Act 1824 ss.3 &4)

Case Law Examples

- R v de Munck (1918) 1KB 635 – attempting to procure 14 year old daughter to become prostitute.

- DPP v Shaw (1961) 2 All ER 451
- R v Webb (1964) 1 QQB 357
- R v Bull (1994) 4 All ER 411
- R v McFarlane (1994)2 All ER 283

- Criminal Justice Act 1991 (changes in sentencing practices) (see “Imprisonment for Prostitutes” R. Leng (1992) 142 New LJ 270.)

The Law after May 2003:

Schedule 1 Sexual Offences Act 2003 – now equalizes the position of men and women under the law relating to soliciting. Schedule makes it clear that the term woman contained in the old legislation (Street Offences Act) should be removed and the term Person put in its place. R v Bull no longer applicable.

S.14 Policing and Crime Act 2009 – Paying or promising to pay for prostitution is a crime
S.16 Policing and Crime Act 2009 – Loitering or soliciting on the street remains a crime.
Prostitution in private is not an offence **unless** more than 1 prostitute working with others.


Further thinking..... Consider S.16 of the PCA 09. Are the distinctions between public and private prostitution important?

S.53(A) SOA 2003 – paying for prostitution is now a strict liability offence.

The Ipswich Murders – changing the state’s focus on prostitution ?

International approaches: Is Prostitution ‘Sex Work’?

Neatherlands, Germany, New Zealand all tolerate prostitution

Sweden, Norway and Iceland all make it illegal to **buy** sex. Note it is not illegal to **sell** sex.

International Crime - Trafficking in women and children

Government Proposals – decriminalization of brothels, targeting pimps and organized crime.

UK S.57-60 SOA 2003 – New offences on trafficking. Sentencing maximum 14 years imprisonment.

Attorney General's Ref (Nos. 129 and 132 of 2006) 2 Cr App R (2007)
Serious Organised Crime and Police Act 2005

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Pornography and Child Prostitution (2002), United Nations.
Convention against Transnational Organised Crime (2000), United Nations.

Crime Reduction initiatives on prostitution – www.crimereduction.homeoffice.gov.uk/res_indi.htm#2009

Follow the link below to an article and video link discussion on Buying Sex
http://www.huffingtonpost.co.uk/ruth-jacobs/prostitution-laws_b_4851224.html

Report on sexual exploitation and prostitution and its impact on equality – Mary Honeyball – European Parliament 4th February 2014
http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0071+0+DOC+XML+V0//EN

Prostitution and European Law

Adoui and Cornuaille (Joined cases 115 and 116/81) (1982) E.C.R.1665

Essential Reading 

Hillaire Barnett – generally

Statutory provisions indicated above plus:

"Human Trafficking in 2008: blowing away some myths". Sally Ramage, Criminal Lawyer (2008) No. 184 pp 8-11

"Human trafficking, human rights and the Nationality Immigration and Asylum Act 2002" Tom Obokata European Human Rights LR (2003) No.4, 410-422

"Human Trafficking – a modern form of Slavery? Sandhya Drew" European Human Rights LR (2002) Issue 4 pp 481-492

Leo Flynn "The body politic(s) of EC Law" in TK Hervey & D. O'Keeffe "Sex Equality Law in the European Union" (John Wiley 1996)

"Imprisonment for Prostitutes" R. Leng (1992) 142 New LJ 270

Honeyball Report (see link in notes above)

EXTENDED Reading:

Neil Malamuth and Gert Hald "Self-perceived effects of Pornography consumption". Archives of Sexual Behaviour, (2008) Vol 27, No. 4.

S. Kappeler "The International Slave Trade in Women, or Procurers, Pimps and Punters" (1990) Law and Critique p.219.

Mary Jo Frug "A Postmodern Feminist Legal Manifesto (An Unfinished Draft" (1992) 105 Harvard L Rev 1045.

Catherine MacKinnon "Feminism Unmodified: Discourses on Life and Law" (Harvard Uni Press) 1987.

Large Group Session 9

Women's Bodies and the Law

Abortion & Reproductive Rights

Introduction

Definition of Abortion:

"Any deliberate procedure that removes, or induces the expulsion of a living or dead embryo or fetus" [Comptons English Dictionary]

The Historical Background

USA:

Skinner v Oklahoma [1942] expanding the constitutional status of reproductive choice
Roe v Wade [1973] 93 S.Ct 705
Webster v Reproductive Health Services [1989] 57 USLW 5023
Ronald Dworkin "Life's Dominion" l993 Harper Collins

UK:

Abortion as a crime – Blackstone "Commentaries on the Laws of England" concluded that abortion was "A heinous misdemeanour"

S.6 Offences Against the Person Act 1983
"Whosoever with intent to procure the miscarriage of any woman, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony"

1846 – Criminal Law Committee – Law should provide an exception whereby procuring a miscarriage would not be punishable provided it was done in good faith with the intention of saving the life of the woman

S.58 Offences Against the Person Act 1861
"Every woman being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent and whatsoever, with intent to procure the miscarriage of any woman, whether she be or not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent shall be guilty of an offence, and being convicted thereof shall be liable to imprisonment."

NB: no explicit mention of an exception for therapeutic abortions, but see R v Bourne [1938] 3 ALL ER 615

S1(1) & (2) Infant Life (Preservation) Act 1929
"Any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother shall be guilty of an offence"

1939 – Home Office and Ministry of Health Inter-Department Committee recommend law to be amended to make it unmistakably clear that a medical practitioner is acting legally when in good faith he/she procedures the abortion of a pregnant woman in circumstances where to continue pregnancy would endanger or seriously impair her life.

Abortion Act l967 – **NB: Abortion Act does not extend to Northern Ireland**
Human Fertilisation & Embryonic Act 1990 – amended S.1(1) Abortion Act l967
Kelly v Kelly [(1997) TLR 5/6/97 – Father's rights viz foetus
Ministry of Defence v O'Hare (1997) LTL 11.7.97 - Compensation guidelines viz Ministry's policy of obliging women in armed forces to choose between dismissal from job and having abortions.
R v Secretary of State for Health & Schering Health Care Ltd/Family Planning Association ex parte John Smeaton (on behalf of the Society for the Protection of Unborn Children) (2002) Crim LR 665 – Supplying/using morning after pill not a criminal offence

Abortion in Northern Ireland

Position is as it was in Britain before 1967
Law governed by:

- Offences Against Person Act 1861 (making all abortions illegal)
- Infant Life Preservation Act 1929 (governing child destruction)
- Bourne judgement 1938 (allowing abortion in extreme circumstances of risk to mental or physical health)

Human Rights and Abortion Rights in NI:
AG x X [1992] ILRM 401 – Costell J, NI High Court, imposing an injunction on a pregnant woman stopping her from travelling to the UK for termination of her pregnancy. Court said that they were not in breach of European Convention on basis that Right to Life of the unborn was to be adequately protected.
Reversed on Appeal – Irish Supreme Court "The true construction on the right to life here is that when there is a real and substantial risk to the mother's survival…at least throughout the pregnancy, then it may not be practicable to vindicate the right to life of the unborn".

November 1992 – Public votes on changes to Constitution – 2/3rds reject amendment allowing abortion to save mother's life, or to prevent her own self destruction. 62% of voters accepted there should not be a limit on the freedom to travel.

D v Ireland [2003] – lst challenge under HRA to Irish abortion laws. judgment awaited. Claim that state has breached Articles 3 and 8 of the ECHR.

Savita Halappanavar – Galway Hospital – April 2013

5th December 2013 – NI Justice Minister (David Ford) to consult on changing law to allow terminations in fatal foetal abnormality cases.

The availability of Abortion - European Comparisons

9 countries – abortion on request in early pregnancy
2 countries – specify rape and socio-medical/economic reasons as basis for request
3 countries – liberalisation prevented because of religious opposition

Tysiąc v. Poland (Application no. 5410/03) ECtHR 2007

Abortion up to 24 weeks of pregnancy is norm, where there is risk to life. Abortion on request is available in some countries up to 12 weeks or pregnancy.

A Woman's Choice?

"Abortion in Poland: a new human rights ruling" Barbara Hewson. Conscience 28.2 (Summer 2007): p34(2).

Sally Sheldon "Who is the Mother to make the judgement: Constructions of Woman in English Abortion Law" [1993] 1 FLS Vol.2

R Lee & D Morgan "Birthrights" [1991] London: Routledge.

Paton v British Pregnancy Advisory Service Trustees [1979] 1 QB 276
Jefferson v Griffin Spalding County Hospital [1981]

Feminist Perspectives on Abortion/Law

Private Rights and Abortion – Catherine MacKinnon "Privacy v Equality: Roe v Wade" in Mackinnon's "Feminism Unmodified" Harvard Uni Press l987

Morality and Choice – Susan Himmelweit "More than a woman's right to choose" (l988) 29 Feminist Review 38

A question of equality? – Frances Olsen "Unravelling Compromise" (1989) 103 Hard Law Rev .105

Abortion and Human Rights

Jepson v. Chief Constable, [2003] EWHC 3318
Compatibility S.1(1)(d) Abortion Act 1967 – allows abortion for foetal abnormality & Human Rights Act l998 (Article 2 European Convention on Human Rights)
Mrs Thi-Nho Vo v France [Application No.53924/00] Judgment given 8th July 2004 – No violation of Article 2.

"The central question raised by the application is whether the absence of a criminal remedy within the French legal system to punish the unintentional destruction of a foetus constituted a failure on the part of the State to protect by law the right to life within the meaning of Article 2 of the Convention…..
It is not only legally difficult to seek harmonisation of national laws at Community level, but because of lack of consensus, it would be inappropriate to impose one exclusive moral code"

ESSENTIAL READING 

Hillaire Barnett

Any of the cases/ articles mentioned above

Vo v France – Available on Blackboard

EXTENDED READING

"Nadine Dorries Abortion Proposals heavily defeated in Commons" Guardian on-line
7th September 2011
http://www.guardian.co.uk/world/2011/sep/07/nadine-dorries-abortion-amendment-defeated

Barbara Hewson "The Law of Abortion in Northern Ireland" Public Law (2004) Summer pp235-245.
"Family Planning Association NI – Judicial Review" 2003 NIQB 48, QBD NI

Barnard "An Irish Solution" [1992] New Law Journal 526

Dworkin "Life's Dominion: An Argument about Abortion and Euthanasia" 1993

Linton "Planned Parenthood v Casey: The Flight from Reason in the Supreme Court" (1993) 13 St Louis University Law Review 15. (Available on Westlaw)

Schlotzauer & Laing “The Ethics of Selective Termination Cases: Opening the Door to Abortion Extortion” (1999) 20 Journal of Legal Medicine 441. (Available on Westlaw)

Small Group Session

Materials

SMALL GROUP SESSION 1

Introduction/Storytelling

*Students should note that they are required to **read the following articles in advance** of this session:*

(4) the article by Kim Lane Scheppele
(5) Notes/Module materials from PET and Contract Law

BEFORE YOU ATTEND THIS SESSION YOU MUST COMPLETE THE ON LINE ASSIGNMENT:

An on-line assignment has been set up for you on the GJL VLE site. You will find the Assignment in the **Assignments file** on the site.

Please note that the aim of the assignment is to engage you with materials that feed directly into the research report which you will write as part of your first assessment in this Module. No marks are given for the assignment but since it enables you to complete your first assessment, and we will provide you with relevant FEEDBACK, the assignment is compulsory. Please ensure that once you have completed your assignment you save a copy of it on the BB site so that it can be assessed online.

SGS EXERCISE NO. 1 – THE SCHEPPELE ARTICLE

Having read the article by Scheppele and completed the short assignment on the VLE you are asked to bring the article and your notes to this session so that you may participate in a number of fun exercises relating to the article that you have read.

SGS EXERCISE NO.2 THE TRIAL OF FARMER DUCK

Preparation for the Trial of Farmer Duck

A mock trial of the Duck will take place during the seminar.
Counsel for the Duck and the Farmer are to present their cases utilising the law as it stands and <u>all students are to prepare and hand in a defence on behalf of the duck at the end of the SGS</u>. That defence must consider how the Duck's account of the oppression it suffered can properly be considered by the Court. In short, all students (whether writing or presenting) must consider the law applicable to the Duck's circumstances and also the extent to which counterstorytelling would help the court to understand the Duck's case.

Plaintiff: The Farmer
Defendant: The Duck
Jurisdiction: In the High Court of South London

Participants:Farmer, Duck, Counsel for the Farmer, Counsel or the Duck, Judge, various witnesses, court officials/observers – <u>students will be allocated roles in the LGS and should come prepared to participate in this role Play</u>

Summary of the Case:

<u>The Plaintiff's Case:</u>

The Farmer brings this action against the Duck for unlawful eviction from the farm and for the return of his property. The Farmer maintains that the Duck has no right to remain on the land and that the Duck has broken his contract of employment with the Farmer. As far as the Farmer is concerned this is a case about contractual/Property rights and nothing else. The Farmer wants you to ensure that he gets his farm back and that the Duck does not acquire any rights in relation to it.

<u>The Defendant's Case:</u>

The Duck maintains that the Farmer has oppressed it for years. It says that there was no contract of employment. The Duck states that it tended the land and it did chores around the farmhouse for a substantial period of time out of a sense of duty, and because the Farmer was too lazy to do the work himself. The farmer spent most of his time in bed while the Duck worked hard on the farm, taking care of it and the other animals that also lived on it. Because of this the Duck has a proprietary

right to remain on the farm. The Duck has witnesses (sheep, cows, and hens) who will support its defence.

Small Group Session 2

Reason and the Law

Question 1

What is Feminist Jurisprudence? In your answer you should provide examples from each of the writers you have read as part of your preparation for the seminar. Your answer must be emailed to the SGS tutor (at least three days before the SGS). Feedback will be provided.

Question 2

Write a critique of **Unikel's article**. In particular, consider his views on the reasonable woman and reasonable person standards and assess *whether he is correct in his assessment that one of these standards if preferable to the other.*

Some students will be asked to present their critiques to fellow students during this session.

Question 3

To what extent and in which ways can the developing standards of human conduct based on the reasonable person and reasonable woman help women achieve justice within the law? Consider this question by reflecting upon and evaluating the article by Karon Monaghan QC – available on the GJL VLE site.

Students are asked to note that in ADDITION to the Essential Reading material (which they must read in advance of this session) they should draw upon their understanding of reason/reasonableness in Tort, Contract, Criminal and Property Law when considering these questions and preparing their answers for the seminar discussion.

SMALL GROUP SESSSION 3

DOMESTIC VIOLENCE

Question 1

Critically consider the changes to the law by way of the Coroners and Justice Act 2009, sections 53,54 and 55 (outlined in the DV Lecture material). In particular, think about whether the reforms equalise the position of men and women under the criminal law relating to murder/manslaughter?
You will be expected to consider relevant statutory provisions and case law during the group discussions on this question.
You must ensure that you read the articles by Alan Norrie and Susan Edwards which are available on the GJL VLE site (and in the Feminist Judgments book) along with the case of R v Clinton and at least one article relating to that case BEFORE attending this seminar.

Question 2

In the past, violence against women, particularly violence occurring in the home or between intimate partners, was viewed as a private matter, not as an issue of civil or political rights. Now however, by applying the legally accepted definitions of torture to the violence that women face everyday around the world, the international community has explicitly recognized violence against women as a human rights violation involving state responsibility". *Amnesty International, Women's Human Rights.*

Critically evaluate this statement drawing upon relevant statutory/case law provisions as well as feminist theoretical and policy contributions to this debate.

Question 3
Research and prepare answers to the following questions:

7. Will the Battered Woman Syndrome continue to be a useful tool in explaining the conduct of women who kill?
8. Should the Battered Woman Syndrome should be a defence in law (consider other jurisdictions when you are researching this point)?

9. To what extent do current legislative regulations reflect the reality of the battered woman's experience?

SMALL GROUP SESSION 4

RAPE AND THE CRIMINAL JUSTICE SYSTEM

QUESTION 1

"Critics have long argued that judges have failed to control the use of irrelevant and prejudicial sexual history evidence in sex offence trials, and that
the only effective solution to the problem is to impose tight legislation constraints on judicial discretion or eliminate it altogether".

Neil Kibble 'Judicial Perspectives on the operation of S.41 and The Relevance
and Admissibiity of Prior Sexual History Evidence: Four Scenarios (Part 1)'
Criiminal Law Review, 2005, March, 190-205.

Critically consider this statement in light of government initiatives to improve
conviction rates in this area, drawing upon your knowledge of relevant legal
measures and also feminist theoretical discourses.

QUESTION 2

It is argued that conviction rates for rape are low and that victims rarely find justice
within the criminal court system. Is this inevitable given the nature of rape cases or

can and should the state do more to ensure conviction rates improve – bearing in mind the state's obligation to provide a fair trial for defendants?

Research the issues above and come to the online seminar prepared to discuss your findings.

QUESTION 3

Come to the session having researched and considered the idea that rape, in times of war, should not be considered a crime but part of the usual tactics of battle.

ON LINE SMALL GROUP SESSION 5

PORNOGRAPHY & PROSTITUTION

Students are asked to note that this session will take place on line via the GJL VLE site.

The on line seminar will take place in the normal seminar and lecture slots and the Module tutor will allocate time slots to the relevant seminar groups.

It is the responsibility of each student to ensure that they have the Java Plug In downloaded onto their computer so that they can participate in the session. Students using computers in the LRC should not have any difficulties logging on.

All students should check before the start of their session that they can access the on-line session.

The etiquette for on-line participation is set out below. Of particular importance is the requirement that you do not (a) speak over others on-line (in short, wait your turn!); and (b) you do not make comments that are juvenile. This is a 'normal' seminar in a different format. Make sure that you do not engage in inappropriate conduct simply because you are not face to face with fellow students/staff. Anyone breaching these criteria will be asked to explain themselves to the Module Co-ordinator.

<u>Additional Guidance – Participating in On-Line Seminars</u>

1. The better prepared you are for your online seminar, the more you'll get out of it.

The whole point of attending a seminar is to learn something new, test your own knowledge and develop your critical understanding of the issues at hand. Online seminars are no different, and you should be prepared to contribute and take away as much useful information as you can. You will not be able to do this if you come to the on-line session without having prepared by reading the relevant material.

2. Make sure your computer is working properly. By their nature, all online seminars rely on technology. Make sure that you have joined the on-line seminar via the on the VLE site. If you have any doubts about how to do this email thatchc@lsbu.ac.uk.

3. DON'T ARRIVE LATE! This means that you have to be in attendance (on-line) at the time that your seminar would normally start. If you arrive late for the seminar you will have missed substantial parts of the conversation and it may take some time for you to catch up.

4. Introduce yourself to everyone who is attending the on-line seminar as soon as you log in.

5. **Be aware that participation in the seminar is compulsory**. You are required to have read the relevant material and to come to the on-line seminar ready to discuss the questions associated with that article. If you have not read the material then the usual rule applies; you are not welcome at the seminar.

6. NOTES! Just as you would at an in-class seminar, take notes during the seminar to enhance the course material, as an aide-memoir, or to highlight issues that you wish to raise.

7. Ask questions. The point of an online seminar is that it should be as near as possible to an in-class seminar, so take the opportunity to question the tutors and other participants.

Session Rules:

(a) Arrive on time

(b) Wait until another person has finished making a point before you jump in with yours. We will have a large number of people contributing to this session so there is a need for us all to exercise some care in managing our contributions. Bear this rule in mind and you shouldn't go far wrong.

(c) Do not use abusive or offensive language. As in class based seminars, the usual rules of conduct apply and anyone engaging in abusive of offensive language will be asked to leave the session and will be reported to the Head of Law.

(d) **Everyone is to ask at least one question and make one contribution during the session.**

(e) Do not hog the session by repeatedly asking questions.

(f) Remember that your contribution must be in formal speech rather than text/chat room shorthand.

(g) Be polite. You may challenge other people's ideas so long as you have a sound academic basis for doing so.

(h) Have fun. This is a fun method for enhancing your learning.

(i) Remember to provide us with your written feedback via email after the event so that we can report your responses to our external examiner and develop the sessions for students in future years.

Finally, please be aware that once you log in your name will appear on the session notes so we will know who has attended and who hasn't. If you are absent you MUST inform Caron Thatcher via email of the reasons for your absence – thatchc@lsbu.ac.uk.

On Line Small Group Session Questions:

Question 1

"Within the existing ideological framework of current liberal legal systems, it is a fundamental principle that individuals' freedom should not be restricted unless such restraint is necessary to prevent harm to others. Clearly the definition of harm is not static and is subject to re-negotiation in order to encompass newly perceived injuries…..yet this harm principle has proved peculiarly resistant to pornography".
[Emily Jackson "The Problem with Pornography: A Critical Survey of the Current Debate" Feminist LS Jo. Vol. III, No.1, Feb 1995]

Critically assess this statement and prepare your answer bearing in mind current debates on the issues of Harm/Consent and the links between pornography and sexual violence.

Question 2

The scale of international trafficking in women and children dictates that there should be firm sanctions against it. Consider S.57-60 SOA 2003 and assess whether UK goes far enough in providing protection for women/children and appropriate punishment for traffickers.

Students should take the opportunity not only to consider the relevant legislation in order to discuss this question but they should also consider some of the many articles available on the human trade in trafficking for the purposes of prostitution and pornography and international conventions relating to these areas.

Question 3

Assume that the Government is proposing to criminalise the purchasing of sex in its most recent paper on Prostitution. You are asked to prepare a paper in relation to these proposals either supporting or criticizing them.

In preparing for this task students should research not only the approach in the UK but also those taken in other international jurisdictions e.g. New Zealand and Sweden.

SMALL GROUP SESSION 6

ABORTION

During this SGS you will be divided into two groups. Each group will be tasked to provide a presentation either FOR or AGAINST the arguments raised by the question outlined below.

Please note that you will NOT be allocated your groups before the SGS and you must therefore prepare your presentation on the basis that you could be arguing for either side.

PRESENTATION QUESTION

"Since abortions are allowed in the case of rape, the foetus cannot be regarded as a full human being. If then, pregnancy is forced on other unwilling mothers it is not because the child is a human being whose life is sacrosanct. Why then are such mothers not automatically allowed to have abortions? One plausible explanation is that the child is being used as an instrument of punishment to the mother, and that talk of the sanctity of life is being used to disguise that fact". (J. Richards)

Critically consider the importance placed upon the right of the life of the foetus and the maternal right to autonomy in Abortion laws in England, American, Eire and Europe.

In order to prepare for this presentation you should consider the range of legislation and case law discussed during the LGS. In particular you should read the Judgment of the European Court in the case of Vo v France which can be downloaded from the W&L VLEsite.

APPENDIX 1

Michigan Law Review
August 1989

Legal Storytelling

*2073 FOREWORD: TELLING STORIES

Kim Lane Scheppele

Why is there such a rush to storytelling? Why has narrative become such an important and recurring theme in legal scholarship these days? [FN1]

Perhaps it is the post-Kuhnian pragmatism about truth that has spread from the history of science throughout the academy. [FN2] If science has what appears to be fads and fashions, then can other knowledge be more certain? Or perhaps it is a response to 'argument by anecdata' [FN3] that Ronald Reagan made so popular, countering numbing statistics showing that all was not right with the happy stories of individuals who didn't fit the patterns. Or perhaps it's that law has always been concerned with narratives, with the individual plaintiff and the individual defendant in the individual case, so that theoretical attention to narrative was bound to emerge eventually.

The concern for narrative that the present issue reveals has a more easily identifiable origin, though the other forces probably matter too. The last twenty years or so have seen a great opening of the legal profession*2074 to those who were formerly outsiders. The legal community once comprised almost entirely of white men, has, however partially, hesitantly and reluctantly, begun to admit women, people of color, and those with life experiences far different than those of the lawyers whose ranks they now join. As the world of law schools, legal practice, and legal teaching has become more diverse, it should not be surprising that legal scholarship is showing signs of diversity as well. The conference on legal narrative that gave rise to the volume is one product of that diversity. And though narrative is not uniquely the province of those who seek to challenge established ways of thinking in law, many of the authors in this volume use stories to highlight and celebrate diversity.

The hefty issue that you now have in your hands has, despite its bulk, a sort of urgency about it, an urgency that comes from the fact that so many of these Articles

draw from deep experience. The Articles contained here speak with many voices and draw on many powers. Some are not like law review articles you have ever seen before; others may look more traditional, but they carry unconventional messages. Some experiment with format, with subject matter, with the boundaries of legal discourse. Some speak to the heart more than to the head. Some want to provoke, to unsettle, to challenge 'the way we do things around here.' Almost all want to challenge the 'we.'

These Articles break taboos. The Articles by Patricia Williams and Clark Cunningham speak with the power of 'I.' They will engage you in a conversation with this named author, this real person, whose struggles and thoughts are revealed in the words on the page. And they use this power of 'I' to make larger points about social arrangements, about conventional wisdom and its unwiseness, about how things might be. Other Articles, those by Richard Delgado and Derrick Bell, tell stories that are not true, though readers will recognize the realness in them. They ask readers to imagine, and in imagining to experience, the worlds created in the words, to save the pain of having to live them. Still other Articles, those by Mari Matsuda, David Luban, and Milner Ball, report the official court-approved versions of stories, and then reveal the unofficial versions, available to but rejected by courts. They show in the telling of alternative stories how selective narratives come to have the power of truth, though there may be other versions that lead to other conclusions, other ways of seeing. The Article by Joseph Singer engages the practice of teaching, and shows how stories can be used to enlist empathy and understanding from students whose own experiences do not ordinarily lead them to challenge the official views. There are also Articles that challenge the ***2075** premises of the rest of the issue, reminding all that in the proliferation of stories, it matters how one chooses among them, and that one needs criteria other than narrative force to do that. Toni Massaro and Steven Winter argue that narrative alone, for all its power, is not enough.

This issue testifies to the attractiveness of, and limits to, storytelling as a force in law. But whose stories are told? Who listens? And who responds? This symposium explores these questions, challenging traditional practices and exploring new ones in the telling of stories in the law. One important lesson that can be learned from this issue is that narrative is a way of organizing, coping with, even acting on the world. Stories carry power because they have the ability to convey truths even if the stories themselves are not the only ways of seeing the world. Stories re-present experience, and can introduce imagination and new points of view.

To make sense of law and to organize experience, people often tell stories. And these stories are telling.

I. THE STORY OF THIS SYMPOSIUM

Once upon a time, [FN4] Richard Delgado sent a letter to the major law reviews suggesting a symposium on legal narrative.

> We believe that stories, parables, chronicles, and narratives are potent devices for analyzing mindset and ideology--the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal discourse takes place. . . . [T]he main cause of Black and brown subordination is not so much poorly crafted

or enforced laws or judicial decisions. Rather, it is the prevailing mindset through which members of the majority race justify the world as it is, that is with whites on top and Blacks at the bottom. Ideology makes current social arrangements seem natural and fair. [FN5]

Along with this dire diagnosis, Delgado proposed a remedy. 'The cure is storytelling,' he announced, 'counterhegemonic' storytelling to 'quicken and engage conscience.' [FN6]

Kevin Kennedy, the editor-in-chief of the Michigan Law Review, and Lee Bollinger, dean of the University of Michigan Law School, discussed the idea and agreed that the Review would devote a special issue to questions of legal narrative and its 'counterhegemonic' power. Calls went out to potential storytellers; enthusiastic responses encouraged the Review's editors to proceed. And with all the speed of ***2076** a group that has only one year to make a difference, Review editors solicited manuscripts, selected a set, and invited the participants to come to Michigan's campus in April, only ten months after Delgado's original letter was sent.

But how to run a conference on a topic and with a method designed to challenge ordinary ways of doing things? The business-as-usual format with serial speakers presenting prepackaged papers was not going to match the radical ambitions of the conference organizers or the writers. The emphasis on different points of view called for a format that encouraged interaction and dialogue among participants. Kevin Kennedy asked me to help, because I teach a course on legal narrative and the legal construction of facts at the University of Michigan Law School. I asked Eric Rabkin, a professor of English at Michigan and an extraordinary teacher of writing, literature, and literary theory, to suggest a format. Rabkin proposed having the writers, Review editors, and others who wanted to participate in the conference meet in small editing groups to read, discuss, and provide feedback on the papers. [FN7] All the conveners would meet together at the beginning and the end, first to agree on some collective ambitions for the issue and later to discuss how each paper grew and dovetailed with the others after all the structured dialogue, in multiple editing groups with different casts of characters, over two days of meetings.

At first the Review editors, and later the participants, were skeptical. And the logistical problems raised by trying to match in small groups sets of people who had had a chance to read closely particular papers in advance were staggering. But in the end, with constant adjustments in the original plan being made as objections were being constantly raised, the conference proceeded in small group discussion sessions, [FN8] punctuated by trips to local restaurants and breaks for bits ***2077** of sleep and exercise.

It would be a wild exaggeration to claim there was agreement at the end about just how to think about the role of narrative in legal discourse. If anything, differences among some of the conference participants were sharpened by the time everyone met in a large group at the end of the conference. Some worried about the coercive power of stories; others claimed that stories were noncoercive. Some insisted on the importance of theory; others wanted to undermine the prestige of theory. Some changed their minds, and their drafts, as a result of hearing others' stories and insights; others found their drafts weathering the discussion with no need for repair.

And so on.

But what almost all the writers shared was a concern with the point of view of outsiders, those whose perspectives had been excluded in the law's construction of an official story for the particular case. Almost all agreed on the value of polyphony, and the conference generated a great deal of it.

II. THE 'CONSTITUTIVE WE' AND THE VOICES OF OUTSIDERS

Much of legal scholarship these days is written in consensual terms to an audience it constitutes as 'we.' In the first sentences of the preface of Law's Empire, for example, Ronald Dworkin writes: 'We live in and by the law. It makes us what we are . . .. We are subjects of law's empire, liegemen to its methods and ideals, bound in spirit while we debate what we must therefore do.' [FN9] And Robert Cover begins Nomos and Narrative with: 'We inhabit a nomos--a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void.' [FN10]

And lest you think this is just a rhetorical device used by those, like Dworkin and Cover, who are looking for a coherent set of values in the law in which 'we' can believe, those who find that the law is fraught with contradiction are not free from 'we' either. To take a couple of examples from the Critical Legal Studies literature, here is the first sentence of an article by Peter Gabel: 'Legal reasoning is an ***2078** inherently repressive form of intepretive thought which limits our comprehension of the social world and its possibilities.' [FN11] And an excerpts from the opening paragraph of an article by Frances Olsen: 'Our historical experience with censorship warns us to be wary of state protection; our experience with domestic violence warns us to be wary of privacy.' [FN12]

Now these may be somewhat different 'we's and 'our's and 'us's in the different excerpts, [FN13] but they reveal something quite striking about contemporary legal scholarship. [FN14] Contests over the meaning, the reach, or the significance of law these days are often framed as debates between 'we' and an invisible but ever-present 'they.' 'They' are the outsiders, the ones who do not believe, who are not included, who do not understand, who are beyond the boundaries of community. Wherever there is a 'constitutive we,' there is also an excluded 'they.'

This is, of course, nothing new. The use of the 'constitutive we' in the American legal tradition is prominent in the founding documents of American government, law and nationhood. 'We hold these truths to be self-evident,' begins the Declaration of Independence. [FN15] 'We the People,' begins the Constitution. [FN16] These were texts of revolutionary times, when the assertion of a 'we' was first an act of defiance, and then an act of construction. Constituting a 'we' was an essential part of separating 'us' from a firmly excluded and rejected 'them.'

'We' talk does not just appear at founding moments, when the construction of a new community is urgent, however. 'We' talk is a persistent feature of legal discourse, even once a legal system is up and ***2079** running. [FN17] There are several reasons why this may be so. One is that in some versions of a liberal political regime, the

government relies for its legitimacy on the consent of those who are to be subject to its laws. And it matters, then, who is included among the consenters for it is only against consenters that the laws may be legitimately enforced. 'We' are those who consent; 'they' are outside the reach of 'our' laws. [FN18] Another reason for the persistence of 'we' talk in law may have to do with the relative insularity of the legal profession. Those who are trained in law learn to speak a specialized language. When talking about the law with others who are similarly trained, lawyers become the 'we' who know the laws, excluding the 'they' who do not. [FN19] And the adversarial nature of legal practice in common-law legal systems also encourages a 'we-they' attitude to emerge. 'We' are the forces of justice in the world who are on the right side of this case; 'they' are the opponents who want to thwart 'us' at every turn. Legal discourse is in an important way, then, dependent on a variety of 'we-they' subdiscourses for its internal structure.

But there is another important 'we-they' structure in legal discourse, one that this issue of the Michigan Law Review has as its theme. It is the implicit contrast between those whose self-believed [FN20] stories are officially approved, accepted, transformed into fact, and those whose self- believed stories are officially distrusted, rejected, found to be untrue, or perhaps not heard at all. [FN21] Those whose stories are believed have the power to create fact; those whose stories are not believed live in a legally sanctioned 'reality' that does not match their perceptions. 'We,' the insiders, are those whose versions count as facts; 'they,' the outsiders, are those whose versions are discredited ***2080** and disbelieved. This can happen on an individual level, where specific persons find their truths not to be inevitable, or on a collective level, where whole groups of persons find their truths to be dismissed. In either instance, fundamental issues of legitimacy are raised.

How are people to think about the law when their stories, the ones they have lived and believed, are rejected by courts, only to be replaced by other versions with different legal results? The legal theorist may be able to fall back on a consent story, to say that these people did or plausibly could have committed themselves to the process in which the facts were found and judgments given, even if they find themselves in disagreement over the particular findings of fact in a particular case. But there are few things more disempowering in law than having one's own self-believed story rejected, when rules of law (however fair in the abstract) are applied to facts that are not one's own, when legal judgments proceed from a description of one's own world that one does not recognize.

The resolution of any individual case in the law relies heavily on a court's adoption of a particular story, [FN22] one that makes sense, is true to what the listeners know about the world, and hangs together. [FN23] But some liberal models of legal legitimacy rely solely on consent to abstract laws, or perhaps even consent to the basic structure of a legal system or a government, to justify the application of the laws in particular instances. [FN24] These models of legitimacy do not require that somehow people's particular points of view are taken into account at all, either because justice isn't thought to operate at a level that specific, [FN25] or because the situation in which consent is initially given does not generally include enough information for someone to have a point of view different from that of others [FN26] or because the specific points of ***2081** view people bring with them into concrete cases are too full of self-interest to provide a compelling normative account of how

the case should be resolved. [FN27] A considerably abstracted consent is enough. But consent to basic structures or abstract legal rules is not enough to ensure the experience of justice on the ground in concrete cases.

The experience of justice is intimately connected with one's perceptions of 'fact,' just as it is connected with one's beliefs and values. Beliefs and values do not exist in a world of pure abstraction, but rather always operate with and on specific assumptions about and perceptions of the state of the world. A judgment that murder is wrong, for example, already comes with the presupposition that some sorts of very specific factual occurrences count as murder and others do not. (And it also comes with a view that some cases are problematic for the classification scheme, existing as they do at the blurry boundaries of the concept of murder.) People might agree in the abstract that there should be legal rules condemning and punishing murder, but if a woman killing her husband counts as a murderer while a man killing his wife in otherwise identical circumstances does not, then some, at least, are apt to feel their sense of justice has been violated. And it is not because those whose sense of justice has been violated and those who think the judgment is fair disagree about abstract rules or basic structures that provide for the condemnation of murder. They disagree, at a minimum, about what features of the world are to be considered relevant to a particular description and how observations and evidence, themselves already and inevitably conceptualized, are to be further mapped into specialized descriptive categories. [FN28] They may also disagree about what is to count as evidence, about the accuracy of particular bits of information or about the correctness of taking certain ***2082** points into account in the description. But the most troublesome problem for an account of the legitimacy of law involves the sometimes irreconcilable differences among people in their widely varying accounts of the same event.

Social theorists have long known that people differently situated in the social world come to see events in quite distinct and distinctive ways. [FN29] How people interpret what they see (or what people see in the first place) depends to a very large extent on prior experiences, on the ways in which people have organized their own sense-making and observation, on the patterns that have emerged in the past for them as meaningful in living daily life. And so it should not be surprising that people with systematically different sorts of experiences should come to see the world in systematically different ways. The varying descriptions composed by people with varied experiences reveal that 'perceptual fault lines' [FN30] run through apparently stable community that appear to have agreed on basic institutions and structures and on general governing rules. Consent comes apart in battles of description. [FN31] Consent comes apart over whose stories to tell. And legal earthquakes are always just about to happen when there are serious perceptual fault lines that run through the legal construction of facts.

Stories may diverge, then, not because one is true and another false, but rather because they are both self-believed descriptions coming from different points of view informed by different background assumptions about how to make sense of events. In law, the adoption of some stories rather than others, the acceptance of some accounts as fact and others as falsehood, cannot ever be the result of matching evidence against the real world to figure out which story is true. Despite the popularity of correspondence theories of language, [FN32] courts cannot do what would be necessary to determine whether words corresponded to things and hence were being

used properly. In law, both at trial and on appeal, all courts have is stories. Judges and jurors are not witnesses to the events at issue; they are witnesses to stories about ***2083** the events. [FN33] And when litigants come to court with different stories, some are accepted and become 'the facts of the case' and others are rejected and cast aside. Some of what is cast aside may indeed be false (and some of what is accepted may be too). But some of the rejected stories may be accurate versions of events that grow from experiences different from the experiences of those who are doing the choosing.

This issue on legal narrative provides evidence of the presence and persistence of perceptual fault lines in contemporary American legal culture. Milner Ball traces the dominant story of origin of the American republic, and shows how the versions of American Indians present a very different picture. Patricia Williams reveals in a moving personal account what the experience of harm from racial discrimination feels like, although courts say no harm is done. Mari Matsuda presents compelling evidence that racist hate speech does have strong effects on those to whom it is directed, that it is patterned and organized, that it is not in experience what courts have said it is in theory. David Luban contrasts two quite different accounts of the demonstrations for racial equality held in Birmingham, Alabama, in 1963. Joseph Singer uses imaginative hypotheticals in teaching to get students who have never had the experience to imagine what it is like to be workers thrown out of jobs by a plant closing. Clark Cunningham wonders whether legal discourse is so different from ordinary discourse that a lawyer cannot really 'represent' a client's views in legal language at all. Derrick Bell and Richard Delgado create fictional events to provide vivid accounts of racial discrimination, to pierce the self-justification that those in the 'we' engage in to explain their actions, and to construct visions that might supplant usual ways of thinking.

All of these Articles attest to the very real presence of perceptual fault lines, different descriptions of events that grow from different experiences and different resonances. And most of these perceptual fault lines described in these Articles occur at the boundaries between social groups, between whites and people of color, between the privileged and the poor, between men and women, between lawyers and nonlawyers. And the Articles also make clear that the 'we' constructed in legal accounts has a distinctive selectivity, one that tends to ***2084** adopt the stories of those who are white and privileged and male and lawyers, while casting aside the stories and experiences of people of color, of the poor, of women, of those who cannot describe their experiences in the language of the law. 'They' are the outsiders, and this volume engages in what Mari Matsuda calls 'outsider jurisprudence,' [FN34] telling the stories that are omitted from mainstream legal discourse.

The papers in this volume show that the stories of outsiders are systematically ignored. But why are certain perspectives excluded from legal narrative? In asking this question, I share some of the theoretical concerns expressed in the Articles by Steven Winter and Toni Massaro. Winter shows how narrative provides a compelling way to make sense of the world because it invariably draws on concepts and categories with which people have first-hand experience. Massaro asks how judges should choose among competing stories when the stories diverge and empathy gives us uncertain guidance. Both Winter and Massaro examine the mechanisms that lead some stories to seem more compelling and to be chosen over others.

In the next Part, I will explore some of the other mechanisms that tend to exclude 'outsiders' stories.' One obvious answer suggests itself. Given that the perceptual fault lines occur at the boundaries between groups where there is much social tension these days, excluding outsiders' stories may be a direct act of racism, of sexism, of intolerance of difference. It may be an overt act of power, a response by those in control to keep those without power in their place. But many of the practices that put people of color and other outsiders at a disadvantage are more subtle, harder to see, and harder still to correct.

The exclusions of outsiders' views happens not only in explicit acts of hostility and rejection, but also implicitly in the details of legal practice, at the places where abstract rules are applied to concrete cases and at the places where courts invoke apparently neutral procedures. And it is at places where the perceptual fault lines shift and buckle, revealing the multiplicity of voices that the law generally quiets, that legal institutions reveal the strain under which they operate and the ordinary legal habits that guide legal practice. As I will try to show in the next Part, outsiders' stories are often excluded by the daily operation of apparently harmless legal habits.

***2085** III. LEGAL HABITS

Storytelling can be seen as a deeply patterned activity. English speakers know when they hear 'once upon a time' that a story is about to begin. 'And they lived happily ever after' is clearly an ending. Vladímir Propp has demonstrated that a whole tradition of Russian folktales followed a relatively simple, predictable structure. [FN35] And literary structuralists of all sorts demonstrate over and over again how, despite the enormous superficial variation in the content, style, and tone of stories, deep structures reappear. [FN36]

Legal storytelling is no less patterned than other sorts of storytelling; indeed, it may be even more structured because it is embedded in a larger institutional framework that routinizes solutions to unusual events and that values regularity and predictability. But unlike rules of law, which are explicitly taught and tested in law schools, the craft of legal storytelling is generally left to the practitioner to learn and develop without formal and systematic training. And though this craft is constrained by rules of evidence and the demands of legal relevance, there are few formal legal rules providing guidance on how the lawyer or judge should structure stories. [FN37]

Yet, it matters a great deal how stories are framed. The same event can be described in multiple ways, each true in the sense that it genuinely describes the experience of the storyteller, but each version may be differently organized and give a very different impression of 'what happened.' And different legal consequences can follow from the choice of one story rather than another.

Narratives may differ because they take a different cut through events, beginning and ending at a different place or taking a different point of view throughout. But they may also be different because the elements which go to make up the narrative are framed differently in the first place. While some important legal consequences flow from how the narrative is structured overall, other important legal consequences are

attendant upon the choice among alternative descriptions ***2086** for discrete elements of the story. I will examined discrete descriptions first and whole narratives in the sections to follow.

Let's start by taking one example where two different terms are applied to the same event: A 1977 Maryland rape attack involved a woman, identified only as Pat, who gave a ride home to Eddie Rusk, a man she met at a singles bar. Pat claimed that Rusk 'lightly choked' her. This action, however, could have also been a 'heavy caress.' [FN38] Both descriptions might be given to the same physical movements of the defendant in placing his hands at the woman's neck, but the description of 'choking' leads far more easily to the conclusion that the woman was raped than does the description that she was being 'caressed.' Neither version is evidently false, and yet the two competing descriptions lead judgment in different directions. In the Maryland Court of Appeals, Chief Justice Murphy's opinion upholding the conviction quoted the woman's words that the defendant 'started lightly to choke me' [FN39] and found that the jury could reasonably have believed her version 'with particular focus upon the actual force applied by Rusk to Pat's neck.' [FN40] In the dissent in that court, Justice Cole wrote, 'there is no suggestion by her that he bruised or hurt her in any manner, or that the 'choking' was intended to be disabling.' [FN41] But heavy caressing, light choking, actual force applied, or 'choking' (which put in quotes like this is probably meant to be read as 'so-called choking') could describe the same event, seen from different points of view.

Or take another situation where the witnesses produced different accounts: In 1958 in North Carolina, a black man confessed to raping and murdering a white woman. The defendant, Elmer Davis, said that he had been interrogated 'most all the time during the day and most all the time during the night' during the sixteen days he was held by the police before he confessed. [FN42] The detective captain denied that there was around-the-clock interrogation because there were no detectives ***2087** working on the 11:00 P.M. to 7:00 A.M. shift and so Davis couldn't possibly have been questioned all night. [FN43] All three of the detectives assigned to the Davis case during the 3 p.m. to 11 p.m. shift, however, testified that they might have asked Davis questions after dark. [FN44] These conflicting descriptions about the extent of the questioning might lead one to believe that someone was lying. Perhaps the detectives were coming back after the evening shift to interrogate Davis all night and were lying about it at trial. Perhaps Davis was exaggerating the extent of the questioning to make it seem that the police were unduly pressuring him. But perhaps both descriptions referred to the same physical occurrences. Davis, who was sitting in jail for sixteen days and who, in all probability, was not wearing a watch, [FN45] could have easily thought that he was being interrogated around the clock because the detectives asked him questions when it was light and when it was dark. Davis could have had a difficult time telling exactly when he was being questioned and, with nothing other than the alternation of light and dark and the twice-daily appearance of food to mark out his days, Davis could understandably have felt that the interrogation went on at all hours of the day and night. The detectives, being quite aware of the actual clock time when Davis was interrogated during each twenty-four hour period, could have understandably concluded that Davis was not questioned all day and all night. And the two descriptions might lead to very different legal consequences. If Davis were interrogated day and night, the court might conclude that his original confession was coerced. But if Davis were found to have been questioned only at

regular hours, the case for a coercive effect would be less compelling. Just such differences in descriptions of 'what happened' were central to the Court's judgments in the case. Chief Justice Warren's opinion overturning Davis' conviction describes Davis as having been 'interrogated repeatedly,' which was taken as evidence that police were overbearing. [FN46] Justice Clark's dissent, arguing that the conviction and death sentence should ***2088** be upheld, referred to 'sporadic interrogation,' [FN47] which was not thought to be that coercive. Repeated and sporadic interrogation may have described the same events, seen from different points of view, but they had quite different legal force.

Given how closely the legal results follow on the adoption of one description rather than another when both are arguably accounts of the same physical event, it matters a great deal how descriptions are framed in legal arguments in the first place, and how single descriptions are selected as 'what happened.' But despite the enormous literature on how judges and lawyers interpret the law, much less attention has been paid in the jurisprudential literature to how judges and lawyers interpret facts. And the construction and selection of descriptions of events in the social world is not just the process of gathering up facts the way one might gather up stones on a beach. The process of making a bit of information, an insight, or a description of experience into a 'fact' is itself an important part of what it means to engage in the practice of lawyering or judging and, while it is governed by legal rules in some limited ways, this activity is largely the product of legal habit. Gifted practitioners know without reflection how to make accounts into legal narratives the way native speakers of a language know how to express thoughts in grammatical sentences. But that does not mean that those who can do it know how to describe systematically what they have done. Those trained in the law learn to see the world of particular ways, and the particular ways come to be seen unproblematically as the only truth there is. There seems to be no question or choice about it. It just is.

What are some of the assumptions involved in the construction of facts in legal stories? What legal habits lead some versions and some accounts to be favored over others? A complete answer to these questions cannot be given without a great deal more investigation and a great deal more evidence than I can present in a foreword, but, from what I have seen in my work on this subject thus far, [FN48] I can suggest some candidates.

A. Law and the Objectivist Theory of Truth

Most people, when pressed, subscribe to what might be called the objectivist theory of truth. The objectivist theory of truth holds that there is a single neutral description of each event which has a privileged ***2089** position over all other accounts. This single, neutral description is privileged because it is objective, and it is objective because it is not skewed by any particular point of view. Its very 'point-of-viewlessness' [FN49] gives it its power.

For example, in the Rusk case, the point-of-viewless answer to the question of whether Pat was choked or caressed might involve an account of the degree of force actually applied to Pat's neck as it might be seen by a neutral observer. Choking as an activity is associated with force; [FN50] caressing as an activity is not. [FN51] So the

presence of force would allow the neutral observer to determine which description is most appropriate. If there is no actual observer to the event in question, other trace evidence can substitute. Were there bruises? Did Pat's neck show the marks that Rusk would have made if he had really choked her? To tell caressing from choking, an objectivist account would focus on those observable differences that would allow someone not involved in the event to tell whether force has been applied. What Rusk thought he was doing or what Pat felt he was doing would be details outside the point-of-viewless account.

Or, on the other example, the point-of-viewless answer to the question of whether Davis had been questioned 'most all the time during the day and most all the time during the night' would involve investigating the clock times that Davis was asked questions by the detectives. If Davis were never interrogated after 11:00 P.M. or before 7:00 A.M., then 'most all the time during the night' would not be a good description of his meetings with the detectives. And if he were only interrogated twice per day for an hour each time by the detectives, then 'most all the time during the day' would not be such a good description either. What the experience felt like to Davis or to the detectives would be irrelevant to the point-of-viewless account.

If one task of the law is to find truth [FN52] then, on the objectivist account, the task of the law is to locate this privileged description, the one that enables the audience to tell what really happened as opposed ***2090** to what those involved thought happened. Truth can be found by removing the self- serving accounts of those who stand to gain in the process of being partial. Truth, in this view, is what remains when all the bias, all the partiality, all the 'point-of-viewness' is taken out and one is left with an objective account free of the special claims of those who stand to gain. And though legal advocates may emphasize partial versions, [FN53] judges or juries are thought to be able to sort through those partial accounts to find the bits that are 'really true.' [FN54]

But how does one know truth when one finds it? Truth isn't a property of an event itself; truth is a property of an account of the event. As such, it has to be perceived and processed by someone, or else it couldn't be framed in language to count as an account at all. On the objectivist view, the potential 'someones' who might observe and report are interchangeable; as long as they approach the task of description in the proper spirit, the description does not depend on who the observers are. But, as Nelson Goodman remarks, the case against 'perception without conceptualization, the pure given, absolute immediacy, the innocent eye, substance as substratum, has been so fully and frequently set forth . . . as to need no restatement here.' [FN55] Observers, even those not directly involved in a dispute, bring with them a conceptual scheme already formed, a set of presuppositions and expectations, that influences what they see and report. Getting a group of observers to come up with the same description simply shows that one has found a group that shared the same conceptual scheme at the start and followed the same instructions for observation. The 'neutral observer's' point of view is no less a point of view than any other. It may be more widely shared in a social setting than other perceptions, and it may be systematically different from the perceptions ***2091** of those immediately involved, but it is not point-of- viewless. [FN56]

If the objectivist view is not point-of-viewless, then is the account it privileges still

worth the reverence the law accords it? A great deal depends on just what the observer's point of view includes and excludes and what consequences such a view has. If the objectivist account is one point of view among many (and not point-of-viewless as against other point-of-viewful accounts), then one needs some other account explaining why it should be privileged, if indeed it is to be. One might begin such an account by saying that the objectivist view includes those things that should be included and excludes those things that should have no bearing on the legal outcome. And here is where the fate of the stories of outsiders might be considered relevant to a discussion of the point of view the law should take. If objectivist accounts systematically leave out the stories of outsiders and those stories should be considered, then perhaps objectivist accounts should not be privileged.

What do our two objectivist accounts leave out in Rusk and in Davis? In Rusk, looking for the degree of physical force already makes important and controversial assumptions. For one thing, it assumes that intentional accounts are irrelevant. Looking at objective force in this situation drops out both Pat's understanding of what it felt like to her and Rusk's account of what he might have intended. Doctrinally, this is a very curious thing to do in a criminal case. And then there is the question: Force, as seen by whom? Rusk may have intended to caress Pat; Pat may have felt choked. He may not have seen force in what happened between them, while she did. Men and women with systematically different experiences of force perceive where force begins very differently. Women see force as starting much earlier than men do, before it turns to physical and observable violence. [FN57] And any apparently objective standard of force cannot be neutral as between these two very different accounts. [FN58]

In Davis, watching the clock also misses some crucial information. ***2092** If Davis felt that the detectives were frequently interrogating him in the day and at night (and he was supported in this because the questioning occurred when it was light and when it was dark), then considering only clock times would miss this crucial aspect of Davis' experience. Davis, after all, was not likely to see his situation the same way that the detectives saw it. For one thing, Davis was black and living in a state with a history and practice of severe and overt racism. Being questioned by the hostile white police [FN59] was a serious business and knowing he was being held in connection with the rape and murder of a white woman, when the likely result of being found guilty was execution, made his situation all the more dire. [FN60] He didn't know how long he was going to be held and questioned, questioned, questioned. He was frightened and didn't see any way out. [FN61]

Rusk and Davis, however, are unusual cases. In each, the outsiders (a woman in an acquaintance-rape case, [FN62] a black defendant in a racist climate) did in fact find that their views won out in the end. Rusk's conviction was upheld on appeal. Davis' confession was found to be coerced. This is not what one would expect if the objectivist accounts held sway, where actual force and clock time worked to undermine the outsiders' stories; nor is it what one would expect from the discussion above about the general exclusion of outsiders' perspectives from the law. What is going on here?

In each of these cases, the outsiders' stories were persuasive because other forces managed to overcome the general legal habit of using objectivist accounts. And what

were these other forces? For one thing, doctrine worked to the advantage of both outsiders here. In the rape case, one part of the relevant legal standard was whether the woman ***2093** was 'so terrified by threats as to overpower her will to resist.' [FN63] This put the focus on the woman's feeling of terror, and made her account relevant to judging whether the legal standard was met. In the confessions case, the issue was whether the confession was made voluntarily. This, also, involved considering the situation from the defendant's point of view. [FN64] Both fear and voluntariness pose challenges for an objectivist account; both raise questions of whether what might look like consent was what was felt as consent. Though one can tell a great deal about people's feelings from observing their actions, not all feelings show themselves clearly. And so, when the doctrinal requirements direct the attention of judges and juries to the point of view of the outsiders in these cases, it matters when outsiders say that the feelings do not match the observations.

But that was not all that was going on here. Doctrine might have allowed the results, but it did not compel them. A black man whose case arrived at the Supreme Court in 1966 and a woman whose case arrived in the Maryland Court of Appeals in 1981 had social forces working for them also. The Civil Rights Movement had by 1966 achieved substantial success in calling attention to the racially discriminatory practices of southern police departments. [FN65] Federal judges were clearly on notice that the treatment of blacks in southern criminal cases was appalling, and that federal constitutional remedies were needed to keep state courts in check. This certainly did not mean that federal courts always supported the cause of the Civil Rights Movement. [FN66] But it may have made it easier for the Supreme Court, in some circumstances at least, to hear and respond to the voices of blacks. Similarly, the Women's Movement had by 1981 succeeded in putting rape reform on the agendas of most state legislatures and had achieved reform of the laws in many states. [FN67] And though this certainly did not by any means signal automatic victory for the forces of feminism, it may have once again allowed courts to hear and respond to the voices of women. [FN68]

But two individual cases like this do not a general practice make. ***2094** It is hard for institutions to change old habits. And the vigorous dissents that both of these cases produced (as well as the fact that each high court overturned at least one other court below) testify to the controversial, transient nature of the solutions found and the perspectives adopted.

I raise these two cases to show that the objectivist theory of truth, however powerful a hold it may have on legal reasoning, is not all the law recognizes, even now. There are places where the stories of outsiders can break through the objectivist barricades. But these two cases show, too, just how much it takes to get an outsider's view to provide the winning account. In each case, doctrine directing courts to pay attention to particular points of view combined with massive social movements making more real those points of view at a social level produced some small victories, over vigorous, angry, and nearly successful dissents.

B. The Boundaries of Legal Narrative

When does a story begin? At the beginning, one might plausibly answer. But one of

the important characteristics of stories is that they have no natural beginning, in the sense of having only one particular place and time at which the story can begin. [FN69] Stories can always be constructed differently, though many are told in situations where there are such powerful background assumptions that a particular version seems to be the only version. This is just as true of legal stories as it is of any other sort of story. But in legal stories, 'where one begins' has a substantial effect because it influences just how the story pulls in the direction of a legal outcome. 'Where one begins' also has a great deal to do with the sympathy given the stories of outsiders. Where one ends the story also makes a similar difference. The boundaries of legal narrative are not fixed, but in many cases they might as well be. Those who are experienced legal storytellers often do not perceive themselves as having a choice; they just work with what is 'obviously' the way to tell this particular story. The boundaries of legal narratives are shaped powerfully by legal habit, a habit that has worked to the disadvantage of outsiders.

The traditional legal strategy of story-beginning looks to when 'the trouble' began, and fans out in the direction of legally relevant ***2095** facts. [FN70] 'The trouble' is that the set of events giving rise to the lawsuit and the legal statement of facts usually focuses narrowly on what made those events happen. So, for example, in Rusk, the standard legal storytelling strategy would direct attention to the events on the night Pat claimed she was raped. The beginning would be set at the time and place that she and Rusk first met. And details of the events occurring between them from that beginning point until they parted company later that evening would provide the boundaries of the legal story. Similarly, in Davis, judging the voluntariness of the confession would require beginning the story at the time of Davis' arrest and detention by the Charlotte police and would end when he confessed. The beginning seems obvious. As does the end.

But of course, these are not the only possible boundaries. In Rusk, the account given in the intermediate appeals court majority opinion started predictably with the setting in which Pat met Rusk. [FN71] But Judge Wilner, dissenting in that court and voting to uphold the rape conviction, began his narrative somewhere else, with the judicial equivalent of a wide-angel opening shot of the larger terrain on which this individual rape occurred. He noted that rape attacks were on the rise, that most victims responded with verbal rather than physical resistance, and that law enforcement agencies throughout the country warned women not to fight back against their attackers. [FN72] Against this background, Pat's actions in not physically struggling looked very different than they did in an account starting with when 'the trouble' began that night.

In Davis, too, the story in the lower courts upholding Davis' conviction fixed the narrative boundaries with the rape/murder at the beginning and the confession at the end, some with flashbacks to the point where he had escaped from prison right before the crime in question occurred. [FN73] But the story did not have to begin this way. Working from the same record, Chief Justice Earl Warren began his account of the Davis case like this:

Elmer Davis is an impoverished Negro with a third or fourth grade education. His level of intelligence is such that it prompted the comment by the court below, even while deciding against him on his claim of involuntariness, ***2096** that there is a moral question whether a person of Davis' mentality should be executed. Police first

came in contact with Davis while he was a child when his mother murdered his father, and thereafter knew him through his long criminal record, beginning with a prison term he served at the age of 15 or 16. [FN74]

In each of these cases, the wide-angle beginning puts the event before the court in a broader context than legal narratives usually invoke. And it is not surprising that in each of these 'wide-angel' versions, the stories of outsiders are given more sympathy than they are given in versions beginning with an account of 'the trouble.'

Why is this? Outsiders often have a different history, a different set of background experiences and a different set of understandings than insiders. (And just as all insiders' experiences are not all alike, neither are outsiders' experiences all of a piece.) So, when taken out of their context, outsiders' actions often look bizarre, strange, and not what the insider listening to the story would do under similar circumstances. And without knowing more about how the situation fits into a context other than the 'obvious,' insider's one, courts may find it hard to rule for outsiders. In the rape case, Pat didn't struggle to get away. It is probably hard for most men (who, after all, tend to be the judges) to imagine not fighting back when attacked unless their passivity results from a weakness of will or a failure of nerve, neither of which are remediable in law. But the beginning of Judge Wilner's narrative showing that most women do not physically struggle when attacked, and that women are advised not to struggle by police, provides a context within which Pat's actions may be understood by those who have not shared her background and experiences. Similarly, Chief Justice Warren's account succeeds in showing that Davis was at a great disadvantage in dealing with the police, allowing Warren to break through the usual assumptions that the relevant standard to apply was what the judge or juror (or the 'reasonable man') would have done under the circumstances. Davis became a real person with a distinctive past, and not some person on average or the law's vision of the typical rational actor. Warren might have been able to be even more effective in providing a wide-angle view helpful to outsiders had he documented the racism that existed in the North Carolina legal system at the time and the well-founded fear Davis had. Warren's perspective may not have provided a wide-enough angle since it only involved this particular case and not the structural conditions giving rise to the differential treatment of blacks and whites in many similar cases.

Now wide-angle descriptions may not always, or even frequently, ***2097** work to the advantage of outsiders. [FN75] But these examples show us how they might work in some circumstances. The claims of outsiders are often not heard in law because the experiences and reactions and beliefs and values that outsiders bring to the law are not easily processed in the traditional structures of legal narratives. Drawing the boundaries of legal stories closely around the particular event at issue may exclude much of the evidence that outsiders may find necessary to explain their points of view. But standards of legal relevance, appearing to limit the gathering of evidence neutrally to just 'what happened' at the time of 'the trouble,' may have the effect of excluding the key materials of outsiders' stories. And this apparently harmless legal habit has effects that are not at all harmless.

IV. RETHINKING LEGAL NARRATIVES

I have tried to show in this foreword how the 'we/they' structures of legal discourse have led to the exclusion of outsiders' stories. And I have further argued that some apparently neutral legal habits, such as preferring objectivist accounts to other point-of-viewful accounts of events and framing stories narrowly around 'the trouble' at issue, work to silence the accounts of outsiders (though sometimes doctrine may aid them). But what can be done from here?

In rethinking legal narratives, the first step is to realize that the presence of different versions of a story does not automatically mean that someone is lying and that a deviant version needs to be discredited. Stories can be told many ways, and even stories that lead to very different legal conclusions can be different plausible and accurate versions of the same event. It may make sense, then, to think that the presence of these different, competing versions of a story is itself an important feature of the dispute at hand that courts are being called upon to resolve.

In some cases, different participants come to see 'what happened' differently. Rather than choosing one point of view over another, courts might recognize that the existence of multiple, self-believed, plausible accounts is an important fact of the case that deserves some attention. If a dispute occurs across a perceptual fault line where people with different backgrounds, understandings and expectations have a disagreement, then the presence of different versions is a clue that there is more at stake here than the violation of a particular legal rule. ***2098** Whole world views may have come into collision and it does not serve courts well to simply suppress one of them. [FN76]

Courts can exacerbate and reinforce the differences and disagreements that invariably exist in a pluralistic society by clining to the views that there is only one true version of a story and that there is only one right way to tell it. Listening to the stories of outsiders does even more than provide a necessary corrective to monolithic and domineering majority stories; it also provides a way for courts to build into the structure of legal reasoning the pluralism that it is the business of the courts to protect and the respect for persons that it is the business of the courts to enforce.

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[FN1]. In addition to this special issue of the Michigan Law Review, there have been other symposia on the law-and-literature theme recently. See, e.g., Symposium: Law and Literature, 39 MERCER L. REV. 739 (1988); Symposium: Law and Literature, 60 TEXAS L. REV. 373 (1982); INTERPRETING LAW AND LITERATURE (S. Levinson & S. Mailloux eds. 1988). In addition, a rash of recent individual articles has appeared on law review pages. See, e.g., in a much larger literature, López, Lay

Lawyering, 32 UCLA L. REV. 1 (1984); Sherwin, A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling, 87 MICH. L. REV. 543 (1988); West, Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory, 60 N.Y.U. L. REV. 145 (1985); see also D. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); K. BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS (1988). The work of the founders of the law-and- literature movement, in which the legal narrative theme sounds prominently, is an almost mandatory citation in articles with this perspective. See J. B. WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETCIS OF THE LAW (1985); J. B. WHITE, THE LEGAL IMAGINATION (1973); J. B. WHITE, WHEN WORDS LOSE THEIR MEANING (1984); Cover, The Folktales of Justice: Tales of Jurisdiction, 14 CAP. U. L. REV. 179 (1985); Cover, The Supreme Court, 1982 Term--Foreword: Nomos and Narrative, 97 HARV. L. REV. 4 (1983) [hereinafter Cover, Nomos and Narrative]; Cover, Violence and the Word, 95 YALE L.J. 1601 (1986), for some of the inspiration that drives the movement.

[FN2]. T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

[FN3]. I owe the phrase to Don Herzog who has used it in conversation.

[FN4]. June 1, 1988, to be precise.

[FN5]. Letter from Richard Delgado to Kevin Kennedy (June 1, 1988).

[FN6]. Id. at 2.

[FN7]. Eric Rabkin and his colleague Macklin Smith have been experimenting with different formats for helping people to meet together to discuss work in progress and to assist each other in the process of writing. The format we adopted for this conference is adapted from these methods, which are more fully discussed in E. RABKIN & M. SMITH, TEACHING WRITING THAT WORKS (forthcoming) (on file with author).

[FN8]. The small groups in which the discussions took place had a complicated structure. Each participant, whether author, Review staffer, or general participant (and a number of Michigan Law School faculty participated) was assigned to an editing group of three or four members, each of which had one author in it. First, each editing group met to discuss and write comments on the paper of an author who was not present in that group but who was present at the conference. This allowed each group to consider a paper the way readers of this issue actually would: as an interested audience who did not have the author immediately present to ask for

clarifications or elaborations. Later, informal conversation between these editing groups and the authors whose papers were discussed in this way gave each writer oral feedback in addition to the written feedback. The original editing groups then met again, this time to discuss the paper of the author who was a member of that group. By this time, each group had had a chance to build solidarity and had had experience discussing a paper already. And this group also had as part of the material they could consider the comments of the group that had discussed that author's paper first. Each author, now in a group whose participants he or she knew fairly well already, was then able to discuss his or her own paper and the comments it had generated from other participants. Because this format meant that the authors didn't have an opportunity to discuss their papers directly with each other (since each was in a different editing group), there was an additional session in which the authors met together to talk about the overlapping subject matter and the structure of individual papers. After nearly two days of focused discussion of these papers in small groups, everyone met to talk about the papers, the topic, and the issue.

[FN9]. R. DWORKIN, LAW'S EMPIRE vii (1986).

[FN10]. Cover, Nomos and Narrative, supra note 1, at 4.

[FN11]. Gabel, Reification in Legal Reasoning, in MARXISM AND LAW 262 (P. Beirne & R. Quinney eds. 1982) (emphasis added).

[FN12]. Olsen, Statutory Rape: A Feminist Critique of Rights Analysis, 63 TEXAS L. REV. 387, 387-88 (1984) (footnote omitted; emphasis added).

[FN13]. I am not meaning to include here the uses of 'we' to include the writer and readers in a common journey through a text. References like 'we can see in this argument that . . .' and 'in the next section of this article, we will find that . . .' seem to me to be doing something else. They are joining writer and reader in a temporary alliance in the joint project of getting through a text. They are not examples of the 'constitutive we,' creating an alliance of fate or of belief or of community that goes beyond the text, as the Dworkin, Cover, Gabel, and Olsen examples do. Nor does the use of 'we' to indicate a collective author constitute a 'constitutive we.' The Supreme Court often uses 'we' this way, but the reference is clearly to an institution of multiple individuals, not some group created by the use of 'we.'

[FN14]. Of course, some of those writing in jurisprudence do explicitly recognize the assumptions which are masked by the 'constitutive we.' See, e.g., M. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 318 (1988) ('an ever-changing 'us'').

[FN15]. The Declaration of Independence para. 2 (U.S. 1776).

[FN16]. U.S. CONST. preamble.

[FN17]. Karl Llewellyn was well aware of this tendency when he wrote:

Nowhere more than in law do you need armor against . . . ethnocentric and chronocentric snobbery--the smugness of your own tribe and your own time: We are the Greeks; all others are barbarians. . . . Law, as against other disciplines is like a tree. In its own soil it roots, and shades one spot alone.

K. LLEWELLYN, THE BRAMBLE BUSH 44 (1960).

[FN18]. A more complete discussion of the relation between consent, legitimacy of a regime of laws, and obligation to obey the laws can be found in K. L. Scheppele & J. Waldron, Contractarian Methods in Political and Legal Evaluation (unpublished manuscript on file with author).

[FN19]. For one example of what happens when these two discourses collide, see Sarat & Felstiner, Law and Strategy in the Divorce Lawyer's Office, 20 LAW & SOCY. REV. 93 (1986).

[FN20]. The term is Erving Goffman's. Lies are 'self-disbelieved' statements, since what makes a statement a lie is not only whether the statement is false, but also whether the teller believes it to be false. E. GOFFMAN, STRATEGIC INTERACTION 7 (1969). Similarly, then, a self-believed story is one that the teller takes to be true.

[FN21]. This 'we-they' structure is not wholly independent of the other 'we-they' structures described above. Those whose self-believed stories find their way into law may well be those who are more plausibly represented as having consented to a legal regime and who are able to express their stories in language more amenable to legal argument.

[FN22]. See K. L. SCHEPPELE, LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW 86-108 (1988), for an argument that interpretation of law and interpretation of fact are not separate processes, but instead accomplished together in the process of justifying a decision.

[FN23]. See L. BENNETT & M. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM (1981) for a description of what makes stories persuasive at trial.

[FN24]. For Locke, for example, consent was given to the form of a government

rather than to the specific application of laws. See J. LOCKE, Second Treatise of Government, in TWO TREATISES OF GOVERNMENT (P. Laslett rev. ed. 1963) (3d ed. 1698). And consent for John Rawls means agreement on the basic institutions of a society, and nothing nearly as specific as individual laws, let alone particular facts or particular points of view. See J. RAWLS, A THEORY OF JUSTICE (1971).

[FN25]. Most efforts at understanding legal legitimacy operate at the level of the whole system and are reluctant even to claim that something so specific as that an individual law should be just for consent to be inferred. See J. RAWLS, supra note 24, at 350-55.

[FN26]. One effect of Rawls' 'veil of ignorance,' id. at 136-42, is that people do not have enough information to be able to develop different points of view, not just about preferences and self-interest, but perhaps even more importantly, about how to see the social world around them in the first place. This is not a necessary feature of contractarian thought, however. It is possible for a model of consent to have much more sociological fidelity and still be fully contractarian. For a case to this effect, see K. L. Scheppele & J. Waldron, supra note 18.

[FN27]. Contractarianism often captures the problem of conflicting accounts by asking people to see a situation from another person's point of view. As with the Golden Rule, we are asked to imagine what it would feel like to be in another person's position. But this is meant to capture an impersonal (or interpersonal) view of the situation, not a richly variegated sense of the ways in which different people may see things differently from different social vantage points. 'From this interpersonal standpoint, a certain amount of how things look from another person's point of view, like a certain amount of how they look from my own, will be counted as bias.' Scanlon, Contractualism and Utilitarianism, in UTILITARIANISM AND BEYOND 117 (A. Sen & B. Williams eds. 1982).

[FN28]. Judgments of relevance and problems of mapping are not usually idiosyncratic judgments, independent of rules. The injunction to 'decide like cases alike' is itself a rule that may be represented as the product of prior consent. But just what counts as 'alike' for the purposes of particular cases is often very much a local judgment that cannot be well captured in rules at the level of generality at which consent judgments are usually implied in liberal political thought. See C. GEERTZ, Local Knowledge: Fact and Law in Comparative Perspective, in LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 167 (1983).

[FN29]. See generally P. BERGER & T. LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY (1966); K. MANNHEIM, IDEOLOGY AND UTOPIA (1936); A. SCHUTZ & T. LUCKMANN, THE STRUCTURES OF THE LIFE-WORLD (1973).

[FN30]. For a more complete discussion of 'perceptual fault lines,' see Scheppele, The Re-vision of Rape Law, 54 U. CHI. L. REV. 1095, 1108-13 (1987).

[FN31]. For one particularly striking example of this, notice the battle between pro-choice and pro-life forces on abortion over whether to use 'fetus' or 'the unborn child' to describe something that or someone who has no neutral name--nor even an uncontested pronoun.

[FN32]. For a first-rate introduction to problems and puzzles in the philosophy of language, see S. BLACKBURN, SPREADING THE WORD: GROUNDINGS IN THE PHILOSOPHY OF LANGUAGE (1984).

[FN33]. Jerome Frank noticed this, and realized that, in legal storytelling, '[s]ince the actual facts of a case do not walk into court, but happened outside the court-room, and always in the past, the task of the trial court is to reconstruct the past from what are at best second-hand reports of the facts.' J. FRANK, Modern Legal Magic, in COURTS ON TRIAL 37 (1949). Frank also noticed that since jurors and judges are witnesses to stories, they themselves introduce another layer of interpretation of the facts. The facts are, in this process, 'twice refracted.' J. FRANK, Facts Are Guesses, in COURTS ON TRIAL 22 (1949).

[FN34]. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 MICH. L. REV. 2320, 2323-26 (1989).

[FN35]. V. PROPP, MORPHOLOGY OF THE FOLKTALE (1968).

[FN36]. See, e.g., S. CHATMAN, STORY AND DISCOURSE (1978); E. RABKIN, NARRATIVE SUSPENSE (1970); R. SCHOLES, STRUCTURALISM IN LITERATURE (1974); Winter, The Cognitive Dimension of the Agon Between Legal Power and Legal Meaning, 87 MICH. L. REV. 2225 (1989).

[FN37]. One such formal standard is the 'clearly erroneous' rule, which provides a way for appellate courts to overturn the judgments of lower courts when lower courts have reached a clearly erroneous conclusion about specific facts. But a thoughtful and detailed study of the uses of the clearly erroneous rule shows that it is not one standard but many, giving appellate courts substantial flexibility in reviewing lower courts' findings of fact and not providing explicit guidance in a rigorous way. See Cooper, Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review, 63 NOTRE DAME L. REV. 645 (1988).

[FN38]. Judge Thompson's intermediate appellate opinion in Rusk v. State, 43 Md.

App. 476, 406 A.2d 624, 628 (1979) stated, 'At oral argument it was brought out that the 'lightly choking' could have been a heavy caress.' See also the discussion of this case in S. ESTRICH, REAL RAPE 63-66 (1987), and Scheppele, supra note 30, at 1105.

[FN39]. State v. Rusk, 289 Md. 230, 235, 242 A.2d 720, 722 (1981).

[FN40]. 289 Md. at 246, 424 A.2d at 728.

[FN41]. 289 Md. at 258, 424 A.2d at 734 (Cole, J., dissenting).

[FN42]. This case appeared in the Supreme Court as Davis v. North Carolina, 384 U.S. 737 (1966). The record in the case included a transcript of an evidentiary hearing held by the federal district court to determine the voluntariness of Davis' confession on a habeas petition. Davis' testimony about the extent of his questioning appeared in the record as Transcript of Hearing upon Writ of Habeas Corpus, at 238, Davis v. North Carolina, 384 U.S. 737 (1966) (No. 65-815) [hereinafter Habeas Transcript].

[FN43]. Testimony of Detective Captain W. W. McCall, Habeas Transcript, supra note 42, at 354.

[FN44]. Testimony of Detective Gardner, id. at 329; Testimony of Detective Holmberg, id. at 343; Testimony of Detective Porter, id. at 346.

[FN45]. Davis had escaped from prison just before he allegedly raped and murdered Mrs. Foy Bell Cooper. The statement of facts in the North Carolina Supreme Court provides much detail about Davis' attire at the time of his arrest, commenting on his 'reddish brown shoes and dark clothing,' on the shoe box he was carrying and on the billfold found in his possession which belonged to someone else. There is no mention of a watch, which he would have had to have acquired following his escape from prison, and which would undoubtedly have been noticed by the police. See State v. Davis, 253 N.C. 86, 90, 116 S.E.2d 365, 367 (1960).

[FN46]. Davis v. North Carolina, 384 U.S. 737, 739 (1966).

[FN47]. 384 U.S. at 754 (Clark, J., dissenting).

[FN48]. Scheppele, Facing Facts in Legal Interpretation, REPRESENTATIONS, Spring 1990 (forthcoming); see also K. L. SCHEPPELE, supra note 22; Scheppele,

supra note 30.

[FN49]. The term is Catharine MacKinnon's. See MacKinnon, Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence, 8 SIGNS 635, 638-39 (1983).

[FN50]. The Oxford English Dictionary defines 'choke' as '[t]o suffocate by external compression of the throat; to throttle, strangle.' 3 OXFORD ENGLISH DICTIONARY 154 (2d ed. 1989).

[FN51]. The Oxford English Dictionary defines 'caress' as 'to treat affectionately or blandishingly; to touch, stroke or pat endearingly.' 2 Id. at 897.

[FN52]. Though finding truth is not the only goal of legal procedures, it certainly is one important consideration in assessing the adequacy of legal practice. If truth were the only goal, it would be quite difficult to make sense of the privilege against self-incrimination and many rules of evidence that exclude from a courtroom information that those outside the courtroom would take to be important and relevant in determining what happened. See Nessen, The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts, 98 HARV. L. REV. 1357 (1985).

[FN53]. The job of a lawyer is to re-present her client's views in such a way that the client's 'story' comes across as compelling to a judge or to a jury. See Clark Cunningham's article in this issue for a perceptive discussion of the limits of re-presentation. An advocate knows that her job isn't to present 'the truth,' but rather to present her client's version in the best possible light without actually lying. Jerome Frank saw this process as evidence that courts were really interested not in finding truth, but rather in judging competing stories. See J. FRANK, The 'Fight' Theory Versus the 'Truth' Theory, in COURTS ON TRIAL 80 (1949). Still, when asked about truth, I suspect that most advocates would say that there is one truth to the matter at issue and that it can be found by removing 'bias.'

[FN54]. Each side's presentation of the most helpful version of a story is not the only thing that makes it difficult for courts to get at a point-of- viewless description. Many bits of information that may be helpful in determining the truth may be excluded from legal description because they are not legally relevant or because they are not allowed to be considered for other reasons. We can see examples of the exclusion of informative but legally irrelevant information in this issue in the Articles by Milner Ball, David Luban, Mari Matsuda, and Patricia Williams.

[FN55]. N. GOODMAN, WAYS OF WORLDMAKING 6 (1978) (footnotes omitted).

[FN56]. Perhaps the best defense of this general position is W. JAMES, Pragmatism's Conception of Truth, in PRAGMATISM AND THE MEANING OF TRUTH 95 (1978).

[FN57]. See S. ESTRICH, supra note 38, at 58-71.

[FN58]. There is a further important question here, which has to do with the reliability of the perceptions of those involved. Suppose the rapist were a man who didn't know his own strength. He may not have realized just how much force he was applying in the course of what he saw as ordinary lovemaking when he almost killed his partner. Or suppose the victim were a woman who was particularly frightened of physical contact. Any touching would then be perceived as threatening. My suspicion is that the recurring drive toward objective standards comes from the worry that the disputants' perceptions cannot be trusted or that they may very well be seriously unrealistic. But I am trying to show here that there is also danger in objective standards, for they drop out important experiential information which cannot be observed.

[FN59]. In the brief submitted by North Carolina to the Supreme Court, the state did not even try to deny the language the police used in dealing with Davis. 'Surely, Davis was not such a sensitive person, after all his years in prison, that 'cussing' and being called 'Nigger' constituted any degree of fear or coercion.' Brief for Respondent, at 8, Davis v. North Carolina, 384 U.S. 737 (1966) (No. 65-815).

[FN60]. The execution rate in North Carolina for those indicated on first- degree murder charges around the time of Davis' case was 43% for black defendants charged with killing white victims and 15% for white defendants charged with killing white victims, with the differences being even greater in comparison on crimes different from the one Davis was charged with. S. GROSS & R. MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 28 n.8 (1989). In addition, nearly 90% of those executed for rape between 1930 and 1979 were black. Id. at 27 n.4. See Furman v. Georgia, 408 U.S. 238, 364 (1972) for the evidence that the Supreme Court found persuasive on the racism implicit in the administration of existing death penalty statutes.

[FN61]. In his testimony at the evidentiary hearing, Davis said, 'I signed that paper [the confession] to get away from [those] people over there because I was scared of them.' Habeas Transcript, supra note 42, at 252.

[FN62]. For a picture of the difficulty women have in getting rapes successfully prosecuted, see Scheppele, supra note 30, at 1096-99.

[FN63]. Hazel v. State, 221 Md. 464, 469-70, 157 A.2d 922, 925 (1959).

[FN64]. Davis v. North Carolina, 384 U.S. 737, 741 (1966).

[FN65]. A. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT 2 (1984).

[FN66]. See generally Luban, Difference Made Legal: The Court and Dr. King, 87 MICH. L. REV. 2152 (1989).

[FN67]. S. ESTRICH, supra note 38, at 80.

[FN68]. The reform of rape laws did not automatically lead to women's points of view being adopted, even when the states shifted from focusing on her consent to focusing on his force. In fact, the evidence shows many courts went on seeing their cases the same way. See Scheppele, supra note 30, at 1102-04 (diagnosing the problem), 1108-13 (discussing the cause).

[FN69]. This case is made very effectively in A. DANTO, NARRATION AND KNOWLEDGE (1985). For an excellent analysis in the legal literature, see Kelman, Interpretive Construction in the Substantive Criminal Law, 33 STAN. L. REV. 591 (1981).

[FN70]. This 'reactive lawyering' paradigm is well described in B. ACKERMAN, RECONSTRUCTING AMERICAN LAW 46-71 (1984).

[FN71]. Rusk v. State, 43 Md. App. 476, 406 A.2d 624, 625 (1979).

[FN72]. 406 A.2d at 635 (Wilner, dissenting).

[FN73]. Davis v. North Carolina, 339 F.2d 770, 773-78 (4th Cir. 1964); Davis v. North Carolina, 310 F.2d 904, 905-06 (4th Cir. 1962); Davis v. North Carolina, 221 F. Supp. 494, 495-98 (E.D.N.C. 1963); Davis v. North Carolina, 196 F. Supp. 488, 491-93 (E.D.N.C. 1961); State v. Davis, 253 N.C. 86, 116 S.E.2d 365, 366-69 (1960).

[FN74]. Davis v. North Carolina, 384 U.S. 737, 742 (1966).

[FN75]. One of the chief effects of the law-and-economics movement has been to

expand the scope of legal description. See B. ACKERMAN, supra note 70, at 53, for a discussion of these effects. The law-and-economics movement has not generally been associated with the claims of people of color, of women, or of other outsiders.

[FN76]. For a similar argument, see G. CALABREST, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 87-114 (1985).

APPENDIX 2

"REASONABLE" DOUBTS: A CRITIQUE OF THE REASONABLE WOMAN STANDARD IN AMERICAN JURISPRUDENCE

Robert Unikel

University Law Review; Robert Unikel

I. INTRODUCTION

The quest for objectivity is ongoing in American jurisprudence. [FN1] Only through the implementation and application of objective standards and procedures can the American legal system achieve its ultimate goal of promoting individual equality while adequately preserving community harmony. [FN2] The quest for objectivity has produced a number of important theoretical constructs to aid courts and legislators in deinstitutionalizing and combating existing legal and social inequities. One such construct is the concept of "reasonableness" which permeates American jurisprudence. [FN3]

While the basic principles and ideals underlying the concept of "reasonableness" have remained relatively constant, [FN4] the specific vehicles for implementing this concept have not. [FN5] First, the "reasonable man" and then the "reasonable person" standard gained acceptance among courts, commentators, and lawmakers in their attempt to inject objectivity into the law. [FN6] In response to the actual and perceived failure of those standards to incorporate women's views and ideals into the judicial decision making process sufficiently, however, some courts and legal scholars have advocated and utilized a "reasonable woman" standard. [FN7]

This Comment examines the concept of "reasonableness" generally and the reasonable woman standard in particular. Part II analyzes the theoretical underpinnings of the "reasonableness" principle. It traces the development of different vehicles used to implement that principle: from the archaic reasonable man standard to the facially gender-neutral reasonable person standard to the recently conceived reasonable woman standard. Part III examines the legal and theoretical suitability of a reasonable woman standard in light of the American model of jurisprudence that

emphasizes neutrality and formal legal equality. Part IV discusses ***327** the reasonable woman standard's linguistic flaws. Part V evaluates the standard's impracticability in light of male judges' and jurors' inability to discern the qualities of a reasonable woman without resorting to gender stereotypes. Finally, in Part VI, this Comment concludes with an explanation of how the concept of "reasonableness" could best be implemented through a modified reasonable person standard that is not subject to the flaws of either the traditional reasonable person standard or the reasonable woman standard.

II. EVOLUTION OF THE REASONABLE WOMAN STANDARD

It is difficult to pinpoint the precise origin of the legal concept of "reasonableness," but it is certain that the principle dates back at least one hundred and forty years. [FN8] From its modest beginnings, "reasonableness" has gained a prominent position in almost every area of American law. A general survey reveals that the concept of "reasonableness" is a standard of decision making in administrative law, [FN9] bailment law, [FN10] constitutional law, [FN11] contract law, [FN12] criminal law, [FN13] tort law, [FN14] and the law of trusts. [FN15]

This Part examines the theoretical appeal of the reasonableness principle in American jurisprudence and traces the evolution of the specific legal standards that have embodied that principle. It begins by analyzing the theoretical foundations of the reasonableness principle. It then describes the reasonableness principle's initial embodiment in the inherently male-biased reasonable man standard, detailing the eventual rejection of that archaic standard in favor of the supposedly gender-neutral reasonable person standard. Finally, this Part concludes with a discussion ***328** of the current movement toward the establishment of a reasonable woman standard.

A. "Reasonableness" as a Neutral Mediator

Objectivity is a fundamental precept of American jurisprudence. [FN16] The basic utility and broad appeal of the principle of reasonableness derive primarily from its objectivity. [FN17] The American legal system's concern for objectivity stems from an attempt to reconcile the basic contradiction between an individual's desire for freedom to act, on the one hand, and the individual's desire for security from the effects of others' actions, on the other hand. [FN18] One commentator describes this contradiction as follows:

> We want freedom to engage in the pursuit of happiness. Yet we also want security from harm. The more freedom of action we allow, the more vulnerable we are to damage inflicted by others. Thus, the contradiction [implicit in the political theory of liberalism] is between the principle that individuals may legitimately act in their own interest . . . and the principle that they have a duty to look out for others and to refrain from acts that hurt them. . . . [T]he only way to achieve security is to give power to the state to limit freedom of action. The contradiction between freedom . . . and security therefore translates into the contradiction between individual rights and state powers. [FN19]

Given the importance of both interests--freedom to act, on the one hand, and security from the effects of others' actions, on the other hand--resolution of this contradiction is an extremely delicate and dangerous task. If the resolution too heavily favors freedom, disorder and conflict result. [FN20] If the resolution too heavily favors security, individual autonomy is stifled. [FN21] Thus, an objective mechanism for evaluating conduct is necessary in order to achieve a beneficial balance between the two ***329** extremes. [FN22]

The concept of "reasonableness" effectively establishes the boundary between an acceptable exercise of individual freedom and an unacceptable interference with the rights of others. [FN23] Assuming that, "as part of the social contract, individuals implicitly agree to conform their conduct to community standards (in return for others' doing the same)," [FN24] the state, through the legal system, defines conduct that violates those standards as inherently unreasonable. [FN25] In this manner, "reasonableness" aids the legal system in its attempt to reconcile the tension between individual autonomy and community harmony by providing an objective means of superimposing community standards upon individual behavior. Thus, the reasonable individual is "a personification of a community ideal of reasonable behavior, determined by the fact finder's social judgment." [FN26] This personification "possesses and exercises those qualities of attention, knowledge, intelligence and judgment" that society believes are "required of its members for the protection of their own interests and the interests of others." [FN27] So defined, the "reasonableness" principle in general, and the reasonable individual in particular, constrain judicial decision making by forcing judges to consider the societal consensus embodied in the concept of reasonableness when deriving results. [FN28]

In addition, the reasonableness principle is theoretically appealing because its application requires judicial neutrality. [FN29] Since "reasonableness" is designed to maximize the freedom of all individuals (or groups) by minimizing the intrusive exercise of that freedom by any one individual (or group), [FN30] it is logically incoherent to utilize "reasonableness" for the protection of a particular individual's (or group's) freedom to pursue its own interests and express its own norms at the expense of another's ***330** such freedom. [FN31] If "reasonableness" were used in this non-neutral fashion, both the purposes that underlie the principle and the community norms that give that principle content would be undermined:

> This is so because all acts by any one group (or individual) are inevitably harmful to others. One side's freedom can always be seen as the other side's loss of security, one side's equal treatment can seem like the other's unequal treatment, one group's pursuit of its own interest can always be called intolerance of any other group that is affected by that pursuit. [FN32]

Hence, the effectiveness of the reasonableness principle in achieving objectivity depends upon its fundamental neutrality and refusal to differentiate among and between individuals (or groups). [FN33] By requiring judicial neutrality in the application of the concept of "reasonableness"--and thereby both explicitly and implicitly refusing to favor one individual's (or group's) interests--this concept furthers the law's goal of objectivity by maximizing the freedom of each individual, because it prevents the excessive exercise of that freedom by any single individual.

In summary, the principle of reasonableness serves as a mechanism by which courts

can distinguish--through the objective application of prevailing social norms--protected exercises of individual freedom from regulable interferences with collective security. Furthermore, the reasonableness principle ideally requires the courts to draw that line neutrally, so as to avoid protecting one individual's freedom at the expense of another's. However, as the following discussion will illustrate, in devising specific legal standards that purport to apply the reasonableness principle, courts have frequently subverted both its objective aspect and its neutral aspect by tailoring these standards to reflect the social norms and ideals of particular classes of individuals. [FN34] Such use of the reasonableness principle augments, rather than reconciles, the tension between individual freedom and community harmony.

B. The Reasonable Man

The reasonableness principle was initially embodied in the archaic reasonable man standard. [FN35] In theory, the reasonable man standard was ***331** fundamentally gender neutral--the term "man" being used in the generic sense to mean "person" or "human being." [FN36] In practice, however, the reasonable man standard reflected "a society in which women were not considered equal to men." [FN37] Hence the reasonable man standard was rarely, if ever, applied evenly to women and to men.

Women "were not regarded as persons under the law; [they] were regarded as chattel, as property." [FN38] As such, women were "disenfranchised and subjected to the discriminations of the common law." [FN39] Blackstone's description of the status of women in eighteenth century England clearly reveals this traditional common-law view:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage. . . . [Y]et there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion . . . . The husband also, by the old law, might give his wife correction. For, as he is to answer for her misbehavior, the law thought it reasonable to instruct him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children. [FN40]

In light of this societal belief that women were intellectually and rationally "lesser beings," [FN41] it is hardly surprising that courts were reluctant to evaluate women's conduct according to the standard of a reasonable man. The case of Daniels v. Clegg [FN42] provides an excellent ***332** illustration of this point.

In Daniels, the court was concerned with the degree of diligence required of a twenty-year-old woman. [FN43] Rather than utilize the common-law reasonable man standard, the court equated the young woman's conduct with that of a child. Writing for a unanimous court, Chief Justice Christiancy stated:

> The incompetency indicated by her age or sex,--without evidence (of which there is none) of any unusual skill or experience on her part,--was less in degree, it is true, than in the case of a mere child; but the difference is in degree only, and not in principle. [FN44]

As Daniels demonstrates, neither the courts nor society generally believed that women possessed the same degree of competency expected of a reasonable man.

[FN45] For all intents and purposes, "a reasonable woman did not exist" [FN46] at common law. In light of this historical fact--that women were not fully "persons" in the eyes of the law--the reasonable man standard operated, in practice, much more as a "reasonable male" standard than as a truly gender neutral "reasonable human being" or "reasonable person" standard. [FN47]

Since the reasonable man standard established one group's norms and ideals as dominant, [FN48] it effectively undermined the desired neutrality of the reasonableness principle. [FN49] The reasonable man standard did not, therefore, properly establish an objective standard by which to balance individual freedom with community security. [FN50]

***333** C. The Reasonable Person

For almost two centuries, the legal landscape remained fundamentally male-dominated. The judiciary persisted in its unwillingness to remedy the legal and constitutional neglect of women, and, as a result, it continued to apply the reasonable man standard in a nonneutral, and hence nonobjective, way. [FN51] By the mid 1970s, however, a general climate of political and social reform challenged the central tenets of this gender-biased legal ideology. Eventually, the reasonable man standard disintegrated, and the quest began for a more truly neutral standard.

Feminism experienced a popular resurgence during the mid- to late 1960s, marked by the creation of a National Commission on the Status of Women and the addition of a ban on sex discrimination to the 1964 Civil Rights Act. [FN52] As the feminist movement gained political influence and social acceptance over the next two decades, traditional notions of women as "property" or as "lesser beings" were increasingly challenged, and women began to attain formal legal status as "persons." [FN53]

Nowhere were the changing legal attitudes toward women more evident than in the Supreme Court's equal-protection analysis, [FN54] where the Court consistently invalidated statutes that "relied upon the simplistic, outdated assumption that gender could be used as a 'proxy for other, more germane bases of classification.'" [FN55] Justice Stevens' remarks in the 1977 case of Los Angeles Department of Water & Power v. Manhart, [FN56] concerning the relevancy of sex in the employment context, reflect the legal system's views on gender distinctions at the time:

> Before the Civil Rights Act of 1964 was enacted, an employer could fashion his personnel policies on the basis of assumptions about the differences between ***334** men and women, whether or not the assumptions were valid. It 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 inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less. [FN57]

Thus, the courts were heavily influenced by the atmosphere of reform that existed at the time and increasingly began to reject artificial gender distinctions that had been the basis of the previously dominant reasonable man standard.

Against this new legal and cultural backdrop, courts began reassessing the male-dominated standards and rules that had previously pervaded American jurisprudence. [FN58] In particular, many courts and legal scholars, recognizing the reasonable man standard's inherent sexism, began to utilize a formally gender-neutral reasonable person standard in applying the reasonableness principle. [FN59] The case of Rabidue v. Osceola Refining Co. [FN60] provides an excellent illustration of the courts' application of the reasonable person standard in the sexual discrimination context.

In Rabidue, a female employee brought a Title VII action in which she claimed that her supervisor created a hostile and abusive work environment when he directed vulgar language at her and displayed sexually oriented posters in both a private office and in common work areas. [FN61] The court held that the supervisor's conduct had not unreasonably interfered with the woman plaintiff's ability to work and, consequently, could not be considered sexual discrimination. Judge Krupansky, writing for the majority, relied heavily on the reasonable person standard:

To accord appropriate protection to both plaintiffs and defendants . . ., the trier of fact, when judging the totality of the circumstances . . ., must adopt the perspective of a reasonable person's reaction to a similar environment under essentially like or similar circumstances. Thus, in the absence of conduct which would interfere with that hypothetical reasonable individual's work performance and affect seriously the psychological well-being of that reasonable person under like circumstances, a plaintiff may not prevail on asserted charges of sexual harassment . . . regardless of whether the plaintiff ***335** was actually offended by the defendant's conduct. [FN62]

This statement illustrates an attempt to balance individual freedom and collective security through an application of the "reasonableness" principle within the specific context of sexual discrimination. [FN63] In effect, the judge established "reasonableness" as an objective boundary between protected and excessive exercises of freedom. The specific standard that the judge utilized in applying that principle, however--the reasonable person standard-- had an important and definite impact on where the boundary was actually drawn.

There were a number of standards available to the court in applying the concept of "reasonableness" in this instance, each reflecting a different balance between individual autonomy and collective security. If the court had applied the reasonableness principle through a reasonable man standard--relying exclusively on male norms for its definition--then it would almost certainly have held that the supervisor's conduct was a protected exercise of freedom. The court would have reached this conclusion by considering the rights of the supervisor to engage in such conduct, without considering the woman's right to be free from such conduct. If, on the other hand, the court had applied the reasonableness principle through a reasonable woman standard--relying exclusively on female norms for its definition [FN64]--the court would likely have held that the supervisor's conduct was an excessive exercise of freedom. In doing so, the court would have considered only the rights of the woman to be free from such conduct, without considering the supervisor's right to conduct himself in that manner. In fact, however, the court applied the principle through a reasonable person standard--incorporating both male and female norms in its definition. Hence, the court considered both the supervisor's and the woman's rights in determining whether the supervisor's conduct was protected. [FN65]

By refusing to establish one group's ideals as dominant and, instead, relying on prevailing social norms for its definition, the reasonable person standard approximates the objectivity and neutrality that are ideally required by the concept of "reasonableness." [FN66] Unlike either the reasonable man standard or the reasonable woman standard, the reasonable person standard does not preordain an outcome. It is for precisely these reasons that Judge Krupansky chose to utilize the reasonable person standard in applying the reasonableness principle in Rabidue. [FN67]

Yet, while the gender-neutral reasonable person standard was (and is) designed to be both objective and fundamentally neutral, many courts ***336** and legal scholars became enormously dissatisfied with that standard's actual utility in combating the system of gender inequality marked by the legal system's former reliance on the gender-biased reasonable man standard. This dissatisfaction was the catalyst for a movement to develop a reasonableness standard that would, in effect, force the courts to recognize the female viewpoint.

D. The Reasonable Woman

While, in theory, the reasonable person represents a formally gender-neutral standard for judicial decisionmaking, many courts and legal scholars have questioned that standard's neutrality in practice. These critics contend that although the reasonable person standard "neutered, made 'politically correct,' and sensitized" the language of the law in an attempt to protect it from "allegations of sexism," the law "did not change its content and character." [FN68] Given that the reasonable person standard evolved from the reasonable man standard, which represented solely male norms and ideals, it "still embodies many of the biases and male perspectives inherent in the legal system as a whole." [FN69] The inherent bias of the standard is exacerbated " because most judges are men, who have experienced the traditional forms of male socialization," [FN70] and are, consequently, instinctively predisposed to accept the male perspective. [FN71] As a result, the unique female perspective is virtually ignored in judicial decision making. Thus, critics maintain that a "facially neutral reasonable person standard simply makes it too easy for courts to overlook women's viewpoint, creating the false impression that that viewpoint is already subsumed within the general test." [FN72]

In an attempt to combat the gender bias that they feel is inherent in the reasonable person standard, critics have proposed a reasonable woman standard. These critics feel that courts should utilize such a standard in cases where a woman's conduct and/or perceptions are material. [FN73] In such cases, use of a reasonable woman standard is particularly necessary because it is in these legal disputes that the influence of ***337** gender bias would be most prejudicial and damaging. [FN74] Furthermore, in those instances where a woman's actions or reactions are at issue, recognition of a unique female perspective is necessary to assure equitable results. [FN75]

Because it relies exclusively on female norms for its definition, the reasonable woman standard is designed to "protect women from the offensive behavior that results from the divergence of male and female perceptions of appropriate conduct."

[FN76] Nowhere is this idea more important than in sexual harassment cases, where a woman's viewpoint is, typically, extremely relevant and significant. [FN77] In his influential dissent in Rabidue, Judge Keith explained the rationale behind the reasonable woman standard in the sexual harassment context:

In my view the reasonable person perspective fails to account for the wide divergence between most women's view of appropriate sexual conduct and those of men. . . . I would have courts adopt the perspective of the reasonable victim which simultaneously allows courts to consider salient sociological differences as well as shield employers from the neurotic complainant. Moreover, unless the outlook of the reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men. [FN78]

Thus, in those contexts where a wide divergence between men's and women's views exists, use of the reasonable woman standard prevents courts ***338** from systematically ignoring the women's perspective, thereby assuring more equitable and accurate results.

While the reasonable woman standard is intuitively appealing in theory, courts have been slow to utilize the standard in practice. Within the last fifteen years, however, the reasonable woman standard has gained legal force through a number of criminal self-defense [FN79] and hostile work environment sexual harassment [FN80] cases. [FN81] In the self-defense context, ***339** the 1977 case of State v. Wanrow [FN82] is particularly influential.

In Wanrow, the Washington Supreme Court reversed a conviction for first degree murder because the trial court's jury instructions regarding self- defense had erroneously held the female defendant to "an objective standard of 'reasonableness' . . . [which suggested] that the respondent's conduct must be measured against that of a reasonable male individual finding himself in the same circumstances." [FN83] This misleading standard, which was designed to evaluate conduct in a confrontation between two men, "constitute d a separate and distinct misstatement of the law and, in the context of this case, violate d the defendant's right to equal protection of the law." [FN84] The jury should have been directed to "consider the woman's actions in the light of her own perceptions of the situation, including those perceptions which were the product of our nation's 'long and unfortunate history of sex discrimination.'" [FN85] The court concluded:

Until such time as the effects of that history are eradicated, care must be taken to assure that our self-defense instructions afford women the right to have their conduct judged in light of the individual physical handicaps which are the product of sex discrimination. To fail to do so is to deny the right of the individual woman involved to trial by the same rules which are applicable to male defendants. [FN86]

Thus, the Wanrow court recognized, for the first time, both the failure of existing standards sufficiently to represent the female viewpoint and the practical importance of creating a new standard that would adequately incorporate the unique feminine perspective.

In the area of hostile work environment sexual harassment, the 1991 case of Ellison v. Brady [FN87] is similarly influential. In Ellison, the Ninth Circuit Court of Appeals

considered a situation in which a female worker received a series of "bizarre" love letters from a male co-worker. In finding that the co-worker's conduct constituted sexual harassment, the court refused to apply the reasonable person standard utilized in Rabidue. [FN88] The Ellison court stated: "If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a discriminatory practice was common, and victims of harassment would have no remedy." [FN89] The court recognized that " a complete understanding of the victim's view requires, among other things, an analysis of the different ***340** perspectives of men and women" because " c onduct that many men consider unobjectionable may offend many women." [FN90] Thus, because "a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women," [FN91] the court held "that a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." [FN92]

The Wanrow and Ellison decisions demonstrate that, just as the archaic reasonable man standard established male norms as dominant, the reasonable woman standard established female views and ideals as dominant in an attempt to offset the male bias purportedly endemic to the legal system. [FN93] The goal of gender equality in the law is both noble and desirable. This Comment argues, however, that the reasonable woman standard is both legally inappropriate and practically ineffective as a means of achieving gender equality, for three reasons. First, the standard is inconsistent with the principle of formal equality that underlies the legal system as a whole and the reasonableness principle in particular. [FN94] Second, the reasonable woman standard further institutionalizes existing gender hierarchy by utilizing gender-specific language. Such language recognizes the moral and legal relevance of gender, reinforcing a view of women as an oppressed group requiring a unique set of legal rules and standards for their protection. [FN95] Third, the standard is impractical, as male judges and jurors are unable to discern the qualities of a reasonable woman without resorting to gender stereotypes. [FN96] In light of these theoretical, linguistic, and practical difficulties with the reasonable woman standard, this Comment proposes that courts should utilize a modified reasonable person standard that incorporates the female perspective into judicial decisionmaking without falling prey to the difficulties described above. [FN97] Such a standard would be legally appropriate and consistent with the dominant model of formal equality. Moreover, this standard might have the concomitant effect of transforming gender stereotypes over time. [FN98]

***341** III. THEORETICAL/LEGAL DIFFICULTIES WITH THE REASONABLE WOMAN STANDARD

This Part examines the legal suitability of the reasonable woman standard in light of the American model of jurisprudence that emphasizes neutrality and formal equality. [FN99] First, it discusses the fundamental precepts of individualism and traces the development of those precepts from their origins in the writings of John Locke and Thomas Hobbes to their incorporation into modern Equal Protection doctrine. It then

examines the reasonable woman standard's theoretical inconsistency with these individualistic principles.

A. Individualism and the American Legal System

The dominant legal and political ideology in the United States is individualism. [FN100] Individualism is a theoretical construct that treats each person as a separate and distinct Module; it "dissociates the individual person from any context of family, religion, or class and invests in him, as an individual, certain 'natural' or 'inalienable' rights." [FN101] Furthermore, individualism "conceptualizes equality as a personal right rather than as a social policy; it exalts equality of treatment over equality of effect." [FN102]

Equal treatment requires that like individuals be treated alike--that is, judged by identical standards and bound by identical rules. For example, under an equal treatment regime, black individuals must be subjected to legal or social burdens and entitled to legal or social benefits on the same terms as white individuals. This is so because equal treatment regards each person as an individual rather than solely as a member of a particular racial group. [FN103] In fact, " equal treatment is the touchstone of the individualistic theory of rights." [FN104]

This individualistic theory derives primarily from the reductionist philosophy of John Locke and Thomas Hobbes. [FN105] Both regarded people ***342** as essentially equal for the purpose of defining the relationship between the individual and the state. From this is derived the requirement that the state treat all people equally.

Hobbes regarded human beings as by nature equal in physical strength and in mental ability. [FN106] As a result of this equality in the state of nature, Hobbes contended that individuals were inevitably on a collision course with one another:

> From this equality of ability arises equality of hope in the attaining of our ends. And therefore if any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies; and in the way to their end, which is principally their own conservation, and sometimes their delectation only, endeavor to destroy or subdue one another. [FN107]

The result of this behavior is a situation that Hobbes describes as the war of all against all. [FN108] Each individual, in an attempt to exercise her own freedom and maximize her own welfare, must compete with every other individual for finite resources. [FN109] Such a competition results in scarcity and insecurity and deprives the community as a whole of the ability to pursue loftier goals. [FN110] According to Hobbes, the only escape from this volatile condition is for free and equal individuals to agree, through a social contract, to concentrate political power in the hands of an absolute sovereign who will create and maintain civil order. [FN111]

Hobbes's political theory relies on the notion that human beings are distinct and independent individuals. The conflict between individuals pursuing personal, rather than collective, goals creates the need for political authority. [FN112] Furthermore, it is only the willingness of those same individuals to limit their own autonomy that enables the authority to ***343** exist. This individualistic quality of Hobbesian thought

was described by Elizabeth Wolgast:

In Hobbes's picture of equal autonomous agents, people can be likened to molecules of gas bouncing around inside a container. Each molecule proceeds independently, is free to go its own way, although it occasionally bumps into others in its path. As molecules have their energy, people are driven by their passions, and their relations with one another reflect both their love [of] Liberty and [love of] Dominion over others. No atom helps or moves aside for another; that wouldn't make sense. They are a collection of unrelated Modules. [FN113]

Thus, the notion of persons as separate and autonomous individuals, coequal with one another, is central to Hobbes's views on social competition and the origins of political authority.

Like Hobbes, John Locke assumes initial equality among individuals in a prepolitical state of nature. However, while Hobbes offers an elaborate argument justifying his belief in natural equality, Locke treats equality as a self-evident truth. [FN114] Describing "the state all men are naturally in," Locke wrote that it is:

[A] state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another; there being nothing more evident than that creatures of the same species and rank, promiscuously born to all the same advantages of nature and the use of the same faculties, should also be equal one amongst another without subordination or subjection. [FN115]

The foregoing passages illustrate that although Locke and Hobbes agree on the basic principle of natural equality, Locke takes equality as a given while Hobbes attempts to justify his belief in equality through a complex, descriptive analysis.

Furthermore, while Hobbes's equality is premised on a rough physical and mental parity among people, Locke's initial equality recognizes the existence of inherent differences between individuals:

Though I have said above that all men by nature are equal, I cannot be supposed to understand all sorts of equality. Age or virtue may give men a just precedence; excellence of parts and merit may place others above the common level. . . and yet all this consists with the equality which all men are in, in respect of jurisdiction or dominion over one another, which was the equality I there spoke of as proper to the business in hand, being that equal right that every man has to his natural freedom, without being subjected to the will or authority of any other man. [FN116]

The "natural rights to life, liberty, and property which humans possess in Locke's state of nature are possessed equally by all." [FN117] Locke goes on to argue, however, that as money is introduced into the state of ***344** nature and the "inherent trait of human nature, the boundless desire for possessions," [FN118] is permitted to operate, inequality inevitably results. [FN119] It is in this "second stage of the state of nature," where men are no longer equal, that "a course of action is required to safeguard unequal property." [FN120] Locke posits that it is in this stage that individuals will agree to enter civil society and establish government in an attempt to protect property and regulate or eliminate scarcity. [FN121]

It is clear that Locke's political theory, like Hobbes's, is fundamentally individualistic. It starts with the basic premise that each person is a separate and

autonomous individual who will, in the absence of political authority, naturally seek to maximize his own personal welfare. [FN122] As one commentator explained:

It starts with free and equal individuals none of whom have any claim to jurisdiction over others . . . . It acknowledges that these individuals are self-interested and contentious enough to need a powerful state to keep them in order, but it avoids the Hobbesian conclusion that the state must have absolute and irrevocable power. [FN123]

Thus, both Hobbes and Locke specifically isolate the individual as the primary actor in civil society. It is this recognition of persons as individual actors rather than as members of larger societal groups that is at the core of the modern individualistic thought.

In addition to its focus on humans as individuals, Locke's political theory is significant for its emphasis on the rule of law. Locke theorized that,

[B]ecause no political society can be, nor subsist, without having in itself the power to preserve the property, . . . and there is only political society, where every one of the members hath quitted this natural power, resigned it up into the hands of the community . . . [the] community comes to be umpire . . . [in] all the differences that may happen between any members of that society concerning any matter of right." [FN124]

In order to protect propertied individuals (whom Locke regarded as the critical group in civil society) from nonpropertied individuals, from each other, and from an arbitrary government, Locke maintained that the community had to mediate disputes according to formal rules. [FN125] Furthermore, ***345** to achieve its goal, Locke posited that these rules must be neutral. One scholar explained the Lockean notion of formal legal equality:

To Locke, the rule of law meant that every civilized community had to adjudicate disputes through appeals to 'settled standing rules, indifferent and the same to all parties.' Judges and administrators had a duty to treat similar cases in similar ways, evenly and impartially, with no trace of preference or favoritism. In law and administration, justice meant neutral, impartial, nonpreferential, equal treatment. [FN126]

Thus, according to Locke, the creation of neutral rules and the unbiased administration of those rules is necessary for the effective regulation of civil society.

This Lockean ideal of formal equality, when linked with the principle of individualism shared by both Hobbes and Locke, forms the construct of interchangeability. The concept of interchangeability posits that "individual members of different groups are inherently no different from one another by virtue of their group identity. Given the necessary training and experience, a constituent of one racial, ethnic, or sexual group can take the place of another." [FN127] This principle views people as essentially fungible. In light of this view, it would be "a violation of an individual's right to equality to treat him or her differently from members of another group, even if the two groups manifest normative differences." [FN128] This is so because where individuals are effectively interchangeable, any basis for differentiation among and between those individuals is inherently artificial. Such artificial distinctions deprive an individual of his or her natural right to be treated as

an autonomous and equal actor. Thus, according to individualism, the "appearance of equality embodied in uncompromised equal treatment takes precedence over the goal of equality of effect as a social reality." [FN129]

Interchangeability is central to individualistic theory. [FN130] Derived from the writings of Hobbes and Locke, it has dominated American political and legal thought throughout its history. [FN131] The individualistic ***346** model has been particularly influential in the American judicial system. It has served as the primary mediating principle through which American courts have interpreted the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act. [FN132] Consequently, "American constitutional and statutory civil rights opinions repeatedly propound an individualistic definition of equality." [FN133]

The influence of this individualistic orientation is particularly evident in decisional law concerning gender-based distinctions. In the gender context, where group lines are easily drawn, there is a natural predisposition to analyze discriminatory policies in terms of their potential effects on men or women in general. However, the American legal system is primarily concerned with the specific effects of alleged discrimination on discrete individuals rather than on groups. [FN134] As a result, the Supreme Court has consistently held gender-based classifications to be presumptively illegitimate because such classifications define individuals solely in terms of their group membership and fail to consider each person's ***347** individual attributes. [FN135] There are a number of important decisions that illustrate this point.

In Los Angeles Department of Water & Power v. Manhart, [FN136] the Court held that an employer had violated Title VII by requiring its female employees to make larger contributions to a pension fund than male employees in order to obtain the same monthly benefits upon retirement. [FN137] Discussing the legal relevance of the reasons for the contribution disparity in the pension fund policy (that women, as a class, live longer than men), Justice Stevens, writing for the Court, stated:

> The question . . . is whether the existence or nonexistence of 'discrimination' is to be determined by comparison of class characteristics or individual characteristics. A 'stereotyped' answer to that question may not be the same as the answer that the language and purpose of [Title VII] command. . . . The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. . . . Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply. [FN138]

This decision clearly indicates the Court's interpretation of Title VII as applying to individuals rather than groups.

Similarly, in Craig v. Boren, [FN139] the Court invalidated a state statute that established a higher legal drinking age for males than for females. The statute was based on statistics showing that a disproportionate number of eighteen to twenty-one year old males were involved in drunk driving accidents. [FN140] The Court reasoned that such statistics were insufficient to justify the discriminatory statute because they focused on group characteristics rather than considering individual attributes. [FN141] Writing for the Court, Justice Brennan described the Court's historical opposition to gender distinctions:

Reed v. Reed has also provided the underpinning for decisions that have invalidated statutes employing gender as an inaccurate proxy for other, more germane bases of classification. Hence, 'archaic and overbroad' generalizations . . . could not justify use of a gender line in determining eligibility for certain governmental entitlements. Similarly, increasingly outdated ***348** misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas' were rejected as loose- fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy. [FN142]

The Court then struck down the statute.

Like Manhart, the Court's decision in Craig demonstrates its unwillingness to condone regulatory policies that incorporate overbroad gender classifications. The Court is adamant in its declaration that such policies are inconsistent with the principle that rules and standards must focus solely on the individual.

As these decisions reveal, the individualistic model of equality at the core of American legal and political thought dominates the judicial system's approach to gender-based classifications. Since, according to this model, human beings must be viewed as distinct individuals rather than merely as members of a particular group, and since individuals are essentially fungible, establishing rules and standards that differentiate between persons on the basis of group affiliations violates each individual's right to equal and impartial treatment. Hence, "sex-specific policies or actions are invalid under this perspective because they reflect invidious motivation and result in dissimilar treatment for similarly situated individuals." [FN143] As the following discussion indicates, the reasonable woman standard is inherently inconsistent with the individualistic model embraced by the courts.

B. Individualism and the Reasonable Woman

Individualism--the idea that people should be treated by the law as if they were essentially fungible--informs not only the American legal system's notion of equality (as suggested by the foregoing discussion [FN144]) but also the legal system's notion of "reasonableness." As suggested in Part I, the individualistic model is central to the concept of "reasonableness." The reasonableness principle accepts the basic Hobbsean/Lockean proposition that equal individuals in a state of nature cannot exercise complete freedom of action without interfering with each other's rights. [FN145] In an attempt to mediate this inevitable conflict, "reasonableness" establishes an objective boundary between acceptable exercises of individual freedom and unacceptable interferences with the rights of others. This boundary is determined by looking to prevailing social norms. [FN146] In order to perform this function effectively, "reasonableness" must be facially neutral, so as to avoid protecting one individual's or ***349** group's interests at the expense of another's. [FN147] Thus, " b y seemingly allowing individuals to pursue their self-interest unless and until they interfere with the interest of others, . . . 'reasonableness' seems to overcome this conflict between the individual and the group, protecting collective security without threatening individual freedom." [FN148] The reasonableness principle's ability to mediate this conflict is, however, strongly influenced by the particular standard that is used to implement the principle. [FN149]

While the reasonableness principle is designed to reflect the individualistic model of equality, the reasonable woman standard utilized by some courts in criminal self-defense and hostile work environment sexual harassment cases is fundamentally inconsistent with this model. [FN150] The standard conflicts with the basic principle of equality in two primary respects. First, because it relies exclusively on a specific group's (women's) norms for its definition, the reasonable woman standard inappropriately adopts a group-rights, rather than an individual-rights, perspective. Second, the reasonable woman standard is, by definition, nonneutral. It establishes female values and perceptions as dominant and, therefore, violates the principle of formal equality by arbitrarily differentiating between individuals. This discussion first illustrates how the reasonable woman standard utilizes a group-rights perspective and discusses why the standard is inherently nonneutral. It then explains how such a noneutral, group focused standard is at odds with the basic principles of individualism.

1. The Reasonable Woman Standard Adopts a Group-Rights Perspective--In opposition to the individual-rights perspective mandated by individualism, the reasonable woman standard adopts a pluralistic group-rights perspective in evaluating conduct. This standard treats each woman primarily as a member of a particular gender group and ***350** establishes that group's norms as the measure of appropriate conduct. [FN151] A practical example of this pluralistic approach is the sexual harassment case of Radtke v. Everett. [FN152] In Radtke, the court stated:

> [B]ecause of their historical vulnerability in the work force, women are more likely [than men] to regard a verbal or physical sexual encounter as a coercive and degrading reminder that the woman involved is viewed more as an object of sexual desire than as a credible coworker deserving of respect. Such treatment can prevent women from feeling, and others from perceiving them, as equal in the workplace.
>
> We hold, therefore, that a female plaintiff states an actionable claim for sex discrimination caused by hostile-environment sexual harassment under the state Civil Rights Act where she alleges conduct of a sexual nature that a reasonable woman would consider to be sufficiently severe. . . . [FN153]

This language illustrates the manner in which courts treat women as a group with generalized interests and perceptions in utilizing the reasonable woman standard. Such a group focus is inconsistent with individualism's requirement that each person be regarded as an individual with individual qualities and attributes. [FN154] It also ignores the impact of wrongful conduct on the individual, focusing instead on the impact of that conduct on the group. [FN155] Additionally, the group focus is harmful to the goal of gender equality. [FN156] Finally, the rationale for adopting a reasonable woman standard can be applied to adopting a separate standard for any minority group--it is a slippery slope. [FN157]

It is clear that the reasonable woman standard treats women as a generalized group. Some legal scholars maintain, however, that a group-rights perspective is both acceptable and, in fact, preferable to an individual-rights perspective because it recognizes the group associations that influence and define each person. [FN158] These scholars argue that womanhood is an integral characteristic of any woman; it shapes her perceptions of the world and establishes her notions of self: to ignore this basic characteristic ***351** is to ignore social reality. [FN159] These critics contend that

a reasonableness standard that fails to recognize a woman's gender group affiliations provides an imperfect mechanism for courts to derive proper results.

Although this group-rights perspective possesses some intuitive appeal, it is, upon closer examination, both unnecessary and undesirable. Initially, group-rights advocates misunderstand the basic premise of individualism. Defenders of the group-rights perspective assume that individualism regards human beings as purely atomistic, unconnected individuals who do not possess and are, consequently, unaffected by any group membership. This assumption is inaccurate, however. As suggested initially by Locke's recognition of individual differences in a state of natural equality, [FN160] individualism recognizes the notion of a self partially constituted by group connection. [FN161] Thus, contrary to the contention of group-rights advocates, individualism does not completely dissociate individuals from their group memberships. [FN162] Individualism simply regards persons primarily as individuals with particular group affiliations, whereas the group-rights perspective views persons primarily as group-members. [FN163] Hence, the argument that a group-rights perspective is preferable to an individual-rights perspective, on the grounds that the group-rights perspective recognizes group affiliations that shape personality, must fail. Individualism recognizes that group membership influences the individual; but individualism premiates the individual, not the group, identity.

A second problem with the group-rights perspective reflected by the reasonable woman standard is that the standard inappropriately ignores the impact of wrongful conduct on the individual by focusing exclusively ***352** on that conduct's impact on the gender group of which the individual is a member. When a particular person is harmed by the malicious actions of another, it is that person (himself or herself) who has been injured rather than the entire male or female population. [FN164] For example, where a woman is the victim of rape or sexual harassment, it is she, and not womankind in general, who has been wronged and who demands and requires vindication. [FN165] A group- rights perspective fails to recognize this fact.

One commentator explained:

> An individual-rights perspective calls for vindicating [the victim's personal rights], while a group-rights approach subsumes the victim's rights under a diffuse claim of affront to all womankind. This group-rights approach, if carried to its logical extreme, would make each of us a victim of every criminal act--every robbery, assault, murder--thus vitiating the rights of the actual victim. [FN166]

The reasonable woman standard, which views each woman solely as a member of a gender group, thus fails to account for the harm suffered by the individual woman and instead only recognizes an illusory harm to womankind as a whole.

Finally, the group-rights perspective is counterproductive because it precludes recognition of gender equality, a primary goal of both the legal system as a whole and the reasonable woman standard in particular. [FN167] By focusing solely on a person's group affiliations, the group-rights approach not only condones, but actually encourages, the differentiation of individuals according to gender. [FN168] Given that women are both historically and constitutionally disadvantaged, [FN169] such differentiation merely maintains "gender hierarchy and, more fundamentally, treats women and men as statistical abstractions rather than as persons with individual

capacities, inclinations and aspirations--at enormous cost to women and not insubstantial cost to men." [FN170] Individualism, on the other hand, divorces each person from his or her gender group and treats him or her as a separate and distinct individual coequal with every other member of society. [FN171] Thus, individualism is an invaluable theoretical framework ***353** through which oppressive gender distinctions may be challenged. [FN172]

In addition to adopting a group-rights perspective with respect to gender issues, the reasonable woman standard also establishes a dangerous precedent for the application of a group-rights perspective to any issue in which a minority group's views or perceptions are material. As discussed earlier, judicial advocates of the reasonable woman standard argue that the formally equal reasonable person standard is fundamentally biased towards the norms and ideals of the historically dominant male and, therefore, effectively excludes the viewpoint of traditionally subordinate groups such as women. [FN173] As such, these advocates maintain that a reasonable woman standard that relies exclusively on female norms for its definition must be utilized where a woman's conduct and/or perceptions are at issue in order to assure that the unique female perspective is fairly represented. Judge Beezer's statement in Ellison v. Brady [FN174] illustrates this point:

A complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women. . . . We adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women. [FN175]

This rationale for the reasonable woman standard significantly alters the degree of specificity required by courts in applying the reasonableness principle. Given that it is premised on a judicial determination that the reasonable person fails to incorporate specific minority norms into its definition (and that such norms should be adequately represented), the reasonable woman standard establishes a powerful precedent for the application of the reasonableness principle through standards that reflect the perspectives of the particular minority groups involved in each case. [FN176] Thus, the reasonable woman standard establishes a slippery slope for the creation of a limitless number of specific reasonableness standards.

Harris v. International Paper Co. [FN177] illustrates the impact of the reasonable woman standard's precedent. In Harris, three black employees ***354** brought an action under the Maine Human Rights Act in which they claimed a hostile and abusive work environment was created when their fellow employees consistently directed racial epithets at them with the tacit approval of the employer's agents, supervisors, and foremen. [FN178] Utilizing the reasonable woman standard as a springboard, the court held that the fellow employee's conduct constituted racial discrimination because such conduct would have offended a "reasonable black person." [FN179] Chief Judge Carter, writing for the court, explained:

To give full force to this basic premise of antidiscrimination law [that conduct must be evaluated from the victim's perspective], and to Lipsett's [Lipsett v. University of Puerto Rico, 864 F.2d 881, 898 (1st Cir.1988)] recognition of the differing perspectives which exist in our society, the standard for assessing the unwelcomeness and pervasiveness of conduct and speech must be founded on a fair concern for the

different social experiences of men and women in the case of sexual harassment, and of white Americans and black Americans in the case of racial harassment. . . . Black Americans are regularly faced with negative racial attitudes, many unconsciously held and acted upon, which are the natural consequences of a society ingrained with cultural stereotypes and race-based beliefs and preferences. . . . Since the concern of Title VII and the MHRA is to redress the effects of conduct and speech on their victims, the fact finder must "walk a mile in the victim's shoes" to understand those effects and how they should be remedied. In sum, the appropriate standard to be applied in this hostile environment racial harassment case is that of a "reasonable black person." [FN180]

Thus, in Harris, the precedent established by the reasonable woman standard encouraged the court to develop a specific "reasonable black person" standard to incorporate the perspective of that particular minority group.

As suggested by Harris, the judicial policies underlying the development of the reasonable woman standard dictate the creation of a multitude of highly specific reasonableness standards incorporating the norms and ideals of particular groups into the decisionmaking process. Even if these standards were established only for those groups that could be legitimately classified as "suspect" [FN181] or "quasi-suspect," [FN182] the required ***355** number would be dizzying. For example, reasonableness standards would have to be designed to reflect the perspectives of specific racial groups (for example, the "reasonable black person," [FN183] "reasonable Hispanic person," [FN184] or "reasonable white person" [FN185]), ethnic groups (for example, the "reasonable Italian person" [FN186] or "reasonable Filipino person" [FN187]), religious groups (for example, the "reasonable Jewish person" [FN188]), and groups of similar sexual preference (for example, the "reasonable gay person" [FN189]).

Furthermore, because each person is inevitably a member of more than one group (for example, the "Caucasian" and "female"), in order for reasonableness standards adequately to reflect the entire spectrum of group norms relevant to any situation, those standards must be drawn to include all of a person's significant group associations. For example, a "reasonable black woman" standard, a "reasonable Asian, gay man" standard, or a "reasonable Russian, Jewish woman" standard may be required in certain circumstances, depending on the particular group affiliations of the person or persons involved. Consequently, a potentially infinite number of specifically designed reasonableness standards is required in order adequately to incorporate each individual's relevant group connections. [FN190]

This multitude of reasonableness standards is undesirable for two reasons. First, such standards rely on a group-rights perspective and are therefore at odds with the principles of individualism. Specialized reasonableness standards define individuals exclusively in terms of their specific group affiliations. For example, a "reasonable black woman" standard treats the individual for which it is designed as the member of both a particular racial group ("black") and a particular gender group ("woman"). By classifying individuals in this manner, these reasonableness standards arbitrarily differentiate between ideally fungible individuals. [FN191] Such differentiation both violates the concept of interchangeability which is central to individualism and implicitly allows discriminatory actions by recognizing the legal and social

importance of ***356** group membership. [FN192]

Second, specialized reasonableness standards are judicially impractical. As discussed previously, "reasonableness" is designed to mediate the fundamental conflict between individual freedom and collective security by superimposing community standards on individual behavior. [FN193] In order to perform this function effectively, however, the specific standard used to apply the reasonableness principle must enable the factfinder (judge or juror) to determine the relevant community standard. This becomes increasingly difficult as the number of reasonableness standards increase. For example, it would be extremely difficult, if not impossible, for a white male factfinder to discern the qualities of a "reasonable Muslim woman" or a "reasonable Asian, gay man." Thus, the creation of highly specialized reasonableness standards seriously complicates the factfinder's task of identifying the applicable social norm and, consequently, undermines the reasonableness principle's ability to regulate individual conduct effectively.

As demonstrated by the foregoing discussion, because a group-rights perspective fails to regard and treat persons as separate and equal individuals, effectually interchangeable with one another, it is fundamentally inconsistent with the individualistic principles that are at the core of American legal and political theory. [FN194] The reasonable woman standard adopts a group-rights perspective not only through its inherent focus on a person's gender group membership, but also through its implicit assumption that "reasonableness" must be applied in a manner that reflects the totality of a person's group affiliations. Consequently, the reasonable woman standard is theoretically and legally inappropriate.

2. The Reasonable Woman Standard Violates Formal Equality.--The reasonable woman standard--relying exclusively on one group's (women's) norms for its definition, and establishing those norms as dominant--is also at odds with the principle of formal legal equality that is central to individualism. The Lockean notion of equality at the core of modern individualistic thought requires that disputes between individuals be resolved through the application of "settled standing rules, indifferent and the same to all parties." [FN195] The individualistic model also proposes that each individual has a personal right to "neutral, impartial, nonpreferential, equal treatment." [FN196] The reasonable woman standard is inherently inconsistent with this proposition in two respects: It is nonneutral, and it differentiates between parties.

First, the reasonable woman standard is, by definition, nonneutral. ***357** Judicial neutrality requires that courts "[refuse] to ground judicial decisions on personal preferences for particular perspectives or political judgments about the importance of certain group interests." [FN197] However, it is precisely these types of "personal preferences" and "political judgments" that are at the heart of the reasonable woman standard. As explained in Part I, the reasonable woman standard is premised on a judicial determination that the interests of women as a group require special legal protection in light of the legal system's historic male bias. [FN198] The reasonable woman standard is therefore specifically designed to effectuate this judicial policy by categorically excluding the male perspective and establishing female norms as the sole measure of appropriate conduct in certain circumstances. [FN199] Thus, by explicitly attempting to promote the interests and ideals of a particular group

(women), the reasonable woman standard violates the individualistic principle of neutrality.

Second, the reasonable woman standard is not "indifferent and the same to all parties." [FN200] The individualistic notion of interchangeability posits that because individuals are inherently no different from one another by virtue of their group identity, it is a violation of an "individual's right to equality to treat him or her differently from members of another group, even if the two groups manifest normative differences." [FN201] The reasonable woman standard does just that. It only applies where a woman's perceptions are at issue. [FN202] Where the relevant perceptions are those of a man, an alternative reasonable man standard, which relies exclusively on male norms for its definition, is required. [FN203] Thus, the judicial paradigm established by the reasonable woman standard mandates that individuals be treated differently based on their gender group affiliations. This paradigm violates each individual's personal right to equal treatment and undermines the individualistic principle of formal equality. [FN204]

Advocates of the reasonable woman standard contend, however, ***358** that such different, nonneutral treatment is not only legally appropriate, but socially desirable given the respective positions of women and men within the American legal system. These advocates argue that individualism does not require formally equal treatment for all individuals, it merely requires equal treatment for all similarly situated individuals, and, given their long history of legal and political subordination, women are by no means similarly situated with men. [FN205] Thus, proponents of the reasonable woman standard maintain that such a standard does not violate the individualistic principle of formal legal equality. These proponents further argue that only through the adoption of legal standards and rules that focus on equality of effect [FN206] can true gender equality be achieved. The reason for this is that rules that exalt equality of treatment are "unable to ameliorate the material conditions of inequality characterizing our society." [FN207]

While this argument does possess a great deal of persuasive force, it is insufficient to justify the reasonable woman standard for two primary reasons. First, advocates of the reasonable woman standard inappropriately focus on the relative positions of groups, rather than individuals, in resolving the issue of "similar situation." As discussed earlier, the reasonable woman standard treats each woman primarily as a member of a gender group rather than as a separate and distinct individual. [FN208] As such, the reasonable woman standard is premised on broad generalizations that women as a group have been historically subordinated and that women as a group share similar views of appropriate conduct, rather than on specific determinations as to whether the particular woman at issue has actually experienced such historic subordination or whether that woman actually shares the group's presumed views. Such a generalization, because it fails to recognize each woman's fundamental right to be treated as an autonomous and equal individual, is both legally impermissible [FN209] and theoretically inconsistent with the individual- rights perspective ***359** central to individualism. [FN210] Furthermore, as illustrated by the following statement, such generalizations reinforce the gender hierarchies that they are designed to combat:

By dealing with women not as unique human beings but on the basis of statistical generalizations, [gender-dependent laws disadvantaging women] are an essential dimension of a pervasive social system that has the effect and even function of

confining and acculturating individual women as women to sharply limited social roles and subordinate social status. . . . Even gender dependent laws disadvantaging men should be subject to a heavier burden of justification. To the extent such laws are predicated, as many are at least in part, on a normative view of social roles proper to men, they imply a further view in which women, too, properly occupy an ordained niche. Moreover, such laws involve much the same costs as the laws discussed in the preceding paragraph: they attach significance to gender and serve to acculturate men and women to distinct social roles. [FN211]

Thus, the argument that the reasonable woman standard is justified because men and women are not similarly situated impermissibly, and dangerously, relies on a group-rights perspective which violates each individual's right to equal treatment as an individual.

Second, given that it focuses specifically on gender, the conclusion that women, as a class, are not "similarly situated" to men precludes the attainment of true sexual equality. In order to understand this point, it is important to identify the theoretical bases of claims of equality or inequality.

Inequality, by definition, involves difference with respect to some specified attribute and/or condition. [FN212] Given that human beings are both alike and different in innumerable respects, the claim that people are similar or dissimilar, equal or unequal, requires that a specific characteristic or group of characteristics be isolated as a basis for comparison. [FN213] The number of potentially relevant characteristics is infinite. [FN214] ***360** One commentator explained the difficulties in utilizing any of these infinite characteristics to evaluate equality:

> Furthermore, we have no agreed-upon way of specifying when differences constitute inequalities. A difference is only a difference until some normative judgment is placed upon it. A century ago black skin was not only different from white skin; it was also inferior. Today white skin and black skin are recognized as different but not unequal, except in the amount of melanin contained in the epidermal cells. In some quarters today people still argue whether anatomical differences in genital structure constitute mere differences or inequalities. . . . A difference may be natural; a difference that disadvantages someone on grounds that we consider irrelevant and discriminatory is one which we call an inequality. [FN215]

Thus, to say that two individuals (or groups) are unequal is merely to say that those individuals (or groups) are different with respect to some arbitrarily chosen attribute or condition.

Proponents of the reasonable woman standard isolate gender as the specific characteristic relevant for comparison. [FN216] While these proponents may claim that they are actually focusing on historic vulnerability and legal subordination as the relevant characteristics, neither the form of the reasonable woman standard itself nor the language used to justify that standard support this claim. If historic vulnerability and legal subordination are truly the relevant criteria, then the appropriate standard is that of a "reasonable victim" or a "reasonable historically vulnerable and disempowered person." Such neutral standards would effectively perform the same function as the sex-linked reasonable woman standard. [FN217] In utilizing the term "woman," however, the reasonable woman standard explicitly uses gender as a proxy

for the gender- neutral conditions that ***361** actually justify the classification. [FN218] Thus, by claiming that women are not "similarly situated" with men, rather than claiming that historically vulnerable persons are not "similarly situated" with non-historically vulnerable persons, advocates of the reasonable woman standard reinforce the notion that men and women are inherently different and should, therefore, be subject to different and unequal rules. [FN219]

Thus, given that it utilizes a group-rights perspective and legitimizes invidious gender classifications, the claim that women are not "similarly situated" with men and are therefore entitled to special legal standards and rules is not sufficiently powerful to justify the reasonable woman standard's fundamental inconsistency with the individualistic model of equality at the core of American jurisprudential thought.

IV. LINGUISTIC DIFFICULTIES WITH THE REASONABLE WOMAN STANDARD

The reasonable woman standard is intended to ameliorate the conditions of inequality characteristic of the American legal system as a whole and of the reasonable person standard in particular. [FN220] By specifically ***362** establishing female norms and ideals as the sole measure of appropriate conduct in hostile work environment sexual harassment and criminal self-defense cases, the reasonable woman standard attempts to overcome the male bias that has historically marked courts' application of the reasonableness principle. [FN221] Yet, while gender inequality poses a real and important problem, the reasonable woman standard actually aggravates this problem in an attempt to solve it. In order to understand how this is so, it is initially important to understand the influence of language in shaping and/or reinforcing societal attitudes.

Traditional thought concerning the role of language in human cognition regarded language as "a kind of marker of our image of reality." [FN222] With the development of modern linguistic theory, however, the view of language as simply a mirror of "social reality" was seriously questioned. In the early 1950's, ethnolinguist Edward Sapir recognized that although environment and social experience strongly influence language, language likewise influences experience:

> Language is a guide to "social reality." . . . [I]t powerfully conditions all our thinking about social problems and processes. Human beings do not live in the objective world alone, nor alone in the world of social activity as ordinarily understood, but are very much at the mercy of the particular language which has become the medium of expression for their society . . . . The fact of the matter is that the "real world" is to a large extent unconsciously built up on the language habits of the group. [FN223]

Benjamin Lee Whorf, Sapir's student, expounded on this theory. [FN224] Building on Sapir's findings that "because language as a 'social product' significantly induces certain modes of observation and interpretation, it exerts a powerful influence on cognitive behavior and social structuring and shapes the way people think about and perceive the world," [FN225] Whorf posited that language not only influences perceptions of reality, but actually determines those perceptions. This "Sapir-Whorf

hypothesis" [FN226] has been verified by a number of empirical linguistic studies that have established "tangible relationships between the use of a given language and definite behavior of human beings." [FN227] Thus, while it is unclear " w hether language creates reality or simply lends direction to it, the way we use language certainly characterizes much of the way we think about people and things in the real world." [FN228]

The relationship between language and social reality is particularly ***363** significant with respect to societal attitudes concerning gender. Since the way in which language is used influences the way in which people perceive reality, sexist language perpetuates and fosters sexist thinking. A number of important studies support this conclusion. In her book Language and Woman's Place, [FN229] Robin Lakoff examined the relationship between use of language and social inequities. She concluded that the bulk of contemporary speech is both theoretically and practically hostile toward women as a class. [FN230] Similarly, Mary Ritchie Key researched the causes and effects of traditional American linguistic behavior. [FN231] Noting that " masculinity and femininity are behavioral constructs which are powerful regulators of human affairs," [FN232] Key advocated the development and use of an "androgynous" language. [FN233] Similarly, Casey Miller and Kate Swift [FN234] have "compiled compelling semantic and historical evidence that linguistic biases operate to perpetuate society's conventional perceptions of women." [FN235]

In light of this recent understanding of the importance of language in creating and perpetuating gender bias, modern courts have begun to reject legal constructs such as the reasonable man standard which explicitly utilize gender- specific language. Karl Llewellyn observed that legal categories and concepts, once established, rigidify and solidify, taking on "an appearance of . . . inherent value which has no foundation in experience." [FN236] This phenomenon derives from "the tendency of the crystallized legal concept to persist after the fact model from which the concept was once derived has disappeared or changed out of recognition." [FN237] The reasonable man standard provides an excellent illustration of this point. [FN238] That standard not only reflected a society in which women ***364** were neither politically or legally equal, but actually helped to maintain those conditions of inequality. Ronald Collins explained:

> Because the ordinary words we use reflect our cultural understandings and transmit them to future generations, language that is gender biased carries with it culture's preconceptions and prejudices. As the longevity of the reasonable man standard demonstrates, women have traditionally been abstracted from the thought process of the Anglo-Saxon system of jurisprudence. . . . [Jurists who use this standard] are perpetuating, in [place of an otherwise objective reality] the "socially determined reality" handed down to us from the common law, which portrays female qualities as the antithesis of reasonableness. [FN239]

Thus, as the reasonable man standard demonstrates, gender-specific language in general, and gender-specific legal concepts in particular, not only reflect the dominant social reality but actually help to shape that reality by institutionalizing gender as a morally and legally relevant factor in judicial decisionmaking.

It is this capacity of language to shape individual and societal attitudes that makes the reasonable woman standard particularly dangerous. While it is designed to combat

the societal and legal male bias reflected in and reinforced by the reasonable man standard, the reasonable woman standard, by continuing to use language that is gender specific, merely perpetuates this male bias. This is so because, as noted previously, men have been and continue to be the referent against which all comparisons are made. [FN240] Consequently, legal categories or concepts that isolate a particular minority group essentially classify that group as "different" or "inferior." [FN241] Such a classification effectively precludes the affected group from attaining true legal equality: "'Difference' is stigmatizing because the assimilationist ideal underlying our society's conception of equality presumes sameness. Thus, the recognition of difference threatens our conception of equality, and the proclamation or identification of difference can serve as a justification for existing inequalities." [FN242] Furthermore, where those legal categories or concepts explicitly isolate a ***365** particular gender group, they implicitly recognize the legal relevance of gender, thereby further institutionalizing the existing gender hierarchy.

The reasonable woman standard produces precisely this deleterious result. By utilizing the gender-specific term "woman," rather than a gender-neutral term such as "person" or "victim," the reasonable woman standard inherently condones the distribution of legal benefits and burdens on the basis of gender. It explicitly mandates that women be evaluated according to an entirely different standard of conduct than similarly situated men. [FN243] By isolating gender as the specific basis for judicial differentiation of individuals, the reasonable woman standard, like the reasonable man standard that preceded it, enhances the moral and legal relevance of gender and, consequently, reinforces the existing conditions of gender inequality. Similarly, the reasonable woman standard, by explicitly isolating women as a group requiring unique legal rules, implicitly suggests that women are fundamentally "unlike" men and are inherently incapable of being evaluated by universally applicable standards of conduct. [FN244] Since male norms have traditionally been and continue to be the ideal, [FN245] such separation and differentiation "carries the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection." [FN246] Such stereotypes have historically been the basis for "special protection" legislation that created sex-specific rules purportedly to assist women but that, in fact, helped perpetuate paternalistic stereotypes about them. [FN247]

As the foregoing discussion illustrates, the use of gender-specific language operates to preserve the negative biases and attitudes towards women that currently pervade society. Although utilizing a reasonable woman standard may be effective in alerting judges and jurors to the necessity of evaluating particular situations from a woman's point of view, it is unclear whether the benefits of using such a standard will outweigh the costs of allowing gender- based language to reinforce conventional perceptions of women. Furthermore, as the next Part indicates, the reasonable woman standard may not even be particularly effective in forcing judges and jurors to evaluate conduct from the woman's perspective.

***366** V. PRACTICAL DIFFICULTIES WITH THE REASONABLE WOMAN STANDARD

In addition to the theoretical and linguistic difficulties discussed in Parts III and IV that undermine the reasonable woman standard's ability to combat broader conditions of gender inequality ingrained in the American legal system, [FN248] there are serious practical difficulties with the reasonable woman standard. These practical difficulties limit the standard's utility in specific cases. As discussed in Part I, the reasonable woman standard is designed to "protect women from the offensive behavior that results from the divergence of male and female perceptions of appropriate conduct" [FN249] by forcing the factfinder in a particular legal dispute to rely exclusively on female norms in evaluating the conduct at issue. [FN250] The effectiveness of the reasonable woman standard thus depends on the factfinder's presumed ability both to identify and to apply female norms in a specific context. [FN251] For example, in a fact pattern similar to the one in Ellison v. Brady, [FN252] the application of the reasonable woman standard provides a "complete understanding of the victim's view" [FN253] only if the jury is able to determine accurately how a reasonable woman would feel and respond upon receiving a series of "bizarre" love letters from a male co-worker. Thus, in order to incorporate effectively the female viewpoint into the judicial decisionmaking process and, consequently, to protect the rights of individual women litigants, the reasonable woman standard implicitly requires that judges and jurors be able to assess accurately the response of "reasonable" women in every relevant circumstance. [FN254] In the absence of such an accurate determination, the reasonable woman standard provides no practical benefit over the purportedly male-biased reasonable person standard. [FN255]

***367** The unfortunate reality of the American judicial system is that most jurors and, more importantly, most judges are still men "who have experienced the traditional forms of male socialization," [FN256] and, therefore, are unable to understand accurately the female viewpoint central to the reasonable woman standard. These judges and jurors have little or no experience from which to discern the qualities of a reasonable woman or to determine how a "reasonable woman" would feel or react in a given situation. [FN257] As such, these factfinders will either have to project their male norms onto the "reasonable woman" or they will have to resort to dangerous gender stereotyping. [FN258]

Thus, just as a white person would be unable to understand completely the perspective of an African American person, or as a Catholic individual would be unable to appreciate fully the perspective of a Jewish individual--given the unique social and cultural experiences that define each ethnic and religious group--a man would not be able fully and accurately to appreciate the unique perspective of a woman, given the specific traits and experiences that define each gender group. [FN259] Since the reasonable woman standard implicitly requires the identification and subsequent application of the female viewpoint, the inherent inability of male factfinders to appreciate the unique female perspective suggests that the reasonable woman standard does not, and cannot, adequately achieve its goal of incorporating female norms and ideals into the judicial decisionmaking process. [FN260]

***368** Proponents of the reasonable woman standard contend, however, that it is precisely this unique female perspective that not only justifies, but indeed mandates, the use of a gender-specific reasonableness standard. These proponents argue that because women's experiences are, in fact, "sex- specific, sex-linked and sex-charged," [FN261] a gender-neutral standard that does not recognize specific female perceptions

and ideals is inherently male-biased and, as a result, egregiously unjust. [FN262] Thus, advocates of the reasonable woman standard maintain that only through the application of a reasonableness standard that relies exclusively on female norms for its definition can the courts "account for the wide divergence between most women's views of appropriate sexual conduct and those of men." [FN263] These proponents further argue that even if the reasonable woman standard does not fully or accurately incorporate the female perspective into the legal system, it, at the very least, forces the courts to recognize that such a unique female perspective exists. [FN264] Such a recognition, by itself, would be a significant and positive departure from the legal system's present refusal to acknowledge the female viewpoint.

While this argument is highly persuasive, it is insufficient to justify a distinct reasonable woman standard because, first, the reasonable woman standard does not assure that female norms are accurately represented, and second, it reinforces, rather than combats, gender stereotypes.

While it is, by definition, objective, the reasonable woman standard does not specifically define appropriate conduct or proscribe certain results in particular factual circumstances. Consequently, "even under [such] an 'objective' [reasonable woman] standard, judges will have to ***369** make close judgment calls about when they think women ought to be offended and when not." [FN265] Since male judges and jurors cannot identify with either the physical traits or social experiences that define a "reasonable woman" and, therefore, are unable to understand how such a woman would feel or react in a particular situation, [FN266] these discretionary judgment calls "may reflect less an effort to see beyond the male perspective, than an attempt to evoke a woman who is, in Henry Higgins's words, 'more like a man.'" [FN267] As a result, the reasonable woman standard fails to assure a greater reliance on the female perspective than does the gender-neutral reasonable person standard. [FN268]

Similarly, while the reasonable woman standard may force the courts to recognize the existence of a unique female perspective, that recognition reinforces the precise gender stereotypes that the standard is designed to combat. Advocates of the reasonable woman standard do not regard the recognition and incorporation of female norms into the judicial decisionmaking process as an end in itself, but rather regard such recognition and incorporation as merely the means for achieving the desired end of true gender equality. [FN269] Consequently, where recognition of a distinct female viewpoint will merely serve to reinforce the traditional gender stereotypes upon which the current system of inequality is based, such recognition is highly undesirable.

The reasonable woman standard has exactly this deleterious effect. Since, as discussed previously, male factfinders have no intimate understanding of female norms and ideals, [FN270] they must rely on personal biases and ingrained stereotypes of female responses in order to evaluate conduct from the perspective of a reasonable woman. [FN271] Furthermore, by establishing the female perspective as totally separate and distinct from other perspectives, instead of incorporating that perspective into a broader and more general perspective shared, to some degree, by all persons, the reasonable woman standard undermines the effort to establish the moral irrelevance of gender. [FN272] As one scholar noted, "substituting a ***370** reasonable woman standard to judge the conduct of women, but not going further to question the

inclusiveness of the norms informing the reasonable person standard, implies that women's experiences and reactions are something for women only, rather than normal human responses." [FN273]

VI. CONCLUSIONS AND PROPOSED SOLUTION

As illustrated by the foregoing discussion, the reasonable woman standard, like the male-biased reasonable man standard that preceded it, is a legally inappropriate, practically ineffective, and socially undesirable vehicle for implementing the reasonableness principle. Initially, and most importantly, because the reasonable woman standard explicitly focuses on a person's gender group membership [FN274] and implicitly requires that "reasonableness" be applied in a manner that reflects the totality of a person's group affiliations, [FN275] the standard effectively adopts a group-rights perspective. Such a perspective is fundamentally inconsistent with the individualistic principle of formal equality that underlies the American legal system as a whole [FN276] and the reasonableness principle in particular. [FN277] Furthermore, in light of the capacity of language to shape individual and societal attitudes, [FN278] the reasonable woman standard's use of gender-specific terminology merely operates to preserve the negative biases and attitudes towards women that currently pervade society. [FN279] Finally, the reasonable woman standard is practically nonadvantageous, as male judges and jurors are unable to discern and comprehend the qualities and ideals of a "reasonable woman" without resorting to harmful gender stereotypes. [FN280]

Since the reasonable woman standard falls prey to these legal, theoretical, linguistic and practical difficulties, there is still a need for a truly objective and neutral reasonableness standard that adequately incorporates female norms and ideals into the judicial decisionmaking process, but without formally isolating women as a separate and distinct group requiring special legal protection. [FN281] This Comment proposes that the courts adopt a modified reasonable person standard [FN282] similar to the one ***371** suggested by both the American Law Institute's Model Penal Code [FN283] and the recently issued Equal Employment Opportunity Commission Guidelines. [FN284]

The modified reasonable person standard would, and must, take into account the central characteristics and significant group associations of the individual in question. [FN285] In applying the modified reasonable person standard, "the trier of fact may not simply construct a hypothetical reasonable person and imagine how that individual would have acted" or reacted in the isolated incident or event at issue. [FN286] Rather, the factfinder must evaluate the reasonableness of an individual's conduct and/or perceptions in light of that individual's vital beliefs, ideals, and physical attributes. [FN287] Thus, where a woman's actions or understandings are at ***372** issue, the modified reasonable person standard would, as a matter of law, require the judge or juror to consider female norms and ideals in making a "reasonableness" determination. [FN288]

Furthermore, unlike the more simplistic reasonable person standard utilized in Rabidue, [FN289] which fails to recognize or highlight women's viewpoints in any

meaningful sense [FN290] and, consequently, makes it easy for courts to overlook that viewpoint, [FN291] the modified reasonable person standard would require that where a woman's conduct or perceptions are at issue, jury instructions must acknowledge and reflect the female perspective. This acknowledgement may require the court simply to change the pronouns in the jury instruction from he to she, and from his to her where appropriate, [FN292] or may necessitate more extensive instructions challenging specific myths about women. [FN293] This use of jury instructions to incorporate female norms and ideals into the judicial decisionmaking process would combat the biases and male perspectives inherent in the legal system just as, if not more, effectively than would a separate and distinct reasonable woman standard. [FN294]

In addition, the use of such jury instructions in concert with a formally gender-neutral reasonable person standard is legally and theoretically preferable to the gender-specific reasonable woman standard, first, ***373** because it is a formally neutral standard of general applicability, and second, because it does not utilize gender-specific language. [FN295]

Because the modified reasonable person standard is a formally neutral standard of general applicability, it is fundamentally consistent with the individualistic model of formal equality that underlies the American legal system. [FN296] First, the modified reasonable person standard, unlike the reasonable woman standard, refuses to establish one group's views as dominant. Second, the modified reasonable person standard refuses to treat all women primarily as members of a gender group. Unlike the reasonable woman standard, the modified reasonable person standard regards each woman primarily as a separate and distinct individual possessing certain significant group affiliations. [FN297] In this manner, the modified reasonable person standard adopts the individual-rights perspective ***374** central to individualism [FN298] and effectively protects each individual's personal right to formally equal treatment. [FN299]

Likewise, because it does not expressly utilize gender-specific language, the modified reasonable person standard challenges, or, at the very least, refuses to recognize, the moral and legal relevance of gender. Unlike the reasonable woman standard, which by its phrasing inherently condones the distribution of legal benefits and burdens on the basis of gender, [FN300] the modified reasonable person standard refuses to differentiate between ideally fungible individuals on the basis of gender. [FN301] By explicitly refusing to isolate gender as a morally or legally relevant basis for comparison, the modified reasonable person standard implicitly challenges both paternalistic notions of women as a group requiring special legal protection and conventional perceptions of women as "different" from or "inferior" to men. [FN302]

***375** In the end, it may be that there can be no true gender neutrality, no perfect justice, in a society replete with unjustified and inappropriate gender distinctions. However, if we, as a society premised on the notion that each person is an individual possessing a personal right to equal treatment, do not wish to validate or perpetuate deleterious gender classifications by codifying them, such gender-specific legal constructs as the reasonable woman standard must be rejected in favor of formally gender-neutral standards. Such gender- neutral standards should be, and must be, sufficiently flexible to allow the factfinder to recognize and consider an individual's

significant group associations, but such standards must, first and foremost, treat each person primarily as an individual, rather than as merely a member of a gender group. Only when the courts formulate and adopt such truly gender-neutral standards can the legal system begin to break down the legal and social barriers that restrict each sex to its predefined role and to combat the existing conditions of gender inequality.

[FN1]. See OLIVER W. HOLMES, JR., THE COMMON LAW 46-47 (1945).

[FN2]. See infra notes 16-22 and accompanying text.

[FN3]. See infra notes 23-28 and accompanying text.

[FN4]. See infra notes 29-34 and accompanying text.

[FN5]. See infra notes 35-98 and accompanying text.

[FN6]. See infra notes 35-67 and accompanying text.

[FN7]. See infra notes 68-98 and accompanying text.

[FN8]. The phrase "prudent and reasonable man" is used in Blyth v. Birmingham Waterworks Co., 156 Eng. Rep. 1047, 1049 (Ex. Ch. 1856) (Alderson, B.J.).

[FN9]. See 2 AM. JUR. 2D Administrative Law § 686 (1962).

[FN10]. See ARMISTEAD M. DOBIE, HANDBOOK ON THE LAW OF BAILMENTS AND CARRIERS 35-36 (1914); WILLIAM F. ELLIOTT, A TREATISE ON THE LAW OF BAILMENTS AND CARRIERS 30-31 (1914); C. SMITH & R. BOYER, SURVEY OF THE LAW OF PROPERTY 463 (2d ed. 1971).

[FN11]. The term is used in a recent concurring opinion of Justice Marshall in Rogers v. Moduleed States, 422 U.S. 35, 44 (1975). Justice Marshall refused to apply the objective standard in construing the First Amendment. See id. at 44-48.

[FN12]. See JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 12 (1970); ARTHUR L. CORBIN, CORBIN ON CONTRACTS § § 645-46 (1951).

[FN13]. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW, 573-74, 578-81, 687 n.45 (1972); ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 55, 67-68, 71 (3d ed. 1982).

[FN14]. See JOHN G. FLEMING, THE LAW OF TORTS 107-13 (5th ed. 1977); 2 FOWLER V. HARPER ET AL., THE LAW OF TORTS § § 16.2-16.8 (2d ed. 1982) [hereinafter HARPER ET AL.]; W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 174-75 (5th ed. 1984) [hereinafter PROSSER & KEETON]; CLARENCE MORRIS & C. ROBERT MORRIS, MORRIS ON TORTS 49-72 (2d ed. 1988).

[FN15]. See GEORGE G. BOGERT & GEORGE T. BOGERT, HANDBOOK OF THE LAW OF TRUSTS 337-39 (5th ed. 1973). See also Johnson v. Clark, 518 F.2d 246, 251 (10th Cir.1975).

[FN16]. See, e.g., HOLMES, supra note 1, at 46-47.

[FN17]. See Leslie Bender, A Lawyer's Primer on Feminist Theory and Tort, 38 J. LEGAL EDUC. 3, 20-21 (1988); Nancy S. Ehrenreich, Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law, 99 YALE L.J. 1177, 1181 (1990).

[FN18]. See Duncan M. Kennedy, The Structure of Blackstone's Commentaries, 28 BUFF.L.REV. 205, 211-13 (1979); Gary Peller, The Metaphysics of American Law, 73 CAL.L.REV. 1151, 1201-04 (1985).

[FN19]. Joseph W. Singer, The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld, 1982 WIS.L.REV. 975, 980 (1982).

[FN20]. The excessive exercise of freedom by any one individual or group of individuals inevitably interferes with another individual's or group's ability to exercise its freedom in a similarly unrestricted manner. For example, one person's freedom to drive a car without any traffic restrictions will inevitably clash with another person's ability to exercise a similar freedom, because the two cars will crash into each other.

[FN21]. Where regulations on freedom are excessive or absolute, individuals are prevented from engaging in even that conduct that does not interfere with the rights of other individuals. For example, if the government completely prohibits all driving in an attempt to avoid traffic fatalities, the social costs of this regulation might well exceed its benefits.

[FN22]. As one commentator noted:

The reasonable man's development by the courts is generally thought to have been necessitated by the difficulty of applying a constantly changing standard based on individual capabilities and limitations, and the need of those who live in society to expect and require that all others behave, to some minimal extent, in a prescribed way.

Osborne M. Reynolds, Jr., The Reasonable Man of Negligence Law: A Health Report on the "Odious Creature", 23 OKLA.L.REV. 410, 414 (1970) (footnote omitted). Hence, a reasonable individual might well trade both complete freedom to drive recklessly and complete freedom from the reckless driving of others, for the intermediate regulation offered by traffic laws.

[FN23]. See Ehrenreich, supra note 17, at 1181.

[FN24]. Id.

[FN25]. Id.

[FN26]. PROSSER & KEETON, supra note 14, at 175 (footnote omitted).

[FN27]. Elmo Schwab, The Quest for the Reasonable Man, 45 TEX. BUS. J. 178, 178 (1982).

[FN28]. Ehrenreich, supra note 17, at 1181. See also Bender, supra note 17, at 20-21.

[FN29]. See Ehrenreich, supra note 17, at 1190; Victoria M. Mather, The Skeleton in the Closet: The Battered Women Syndrome, Self-Defense, and Expert Testimony, 39 MERCER L.REV. 567, 573 (1988).

[FN30]. See supra notes 23-28 and accompanying text.

[FN31]. See supra notes 18-22 and accompanying text.

[FN32]. Ehrenreich, supra note 17, at 1221 (footnote omitted).

[FN33]. See Mather, supra note 29, at 573. As Dean William Prosser noted in defining the principle for purposes of tort law: "The standard of conduct which the community demands must be an external and objective one, rather than the individual

judgement, good or bad, of the particular actor; and it must be, so far as possible, the same for all persons, since law can have no favorites." PROSSER & KEETON, supra note 14, at 173-74 (footnotes omitted).

[FN34]. See infra notes 35-98 and accompanying text.

[FN35]. One of the earliest references to the phrase is found in Sir William Jones' 1781 work on the law of bailments: "Thus the omission of care, which every prudent man takes of his own property, is the determinate point of negligence." WILLIAM JONES, AN ESSAY ON THE LAW OF BAILMENTS 7 (Garland Publishing 1978) (1781) (emphasis added). In tort law, where its use has been the most common, the phrase is first found in Vaughan v. Menlove, 132 Eng. Rep. 490 (C.P. 1837). In referring to the general personage of the reasonable man, the court stated: "Instead . . . of saying that the liability for negligence should be co-extensive with the judgement of each individual, . . . we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe." Id. at 493 (Tindall, C.J.) (emphasis added).

[FN36]. See Bender, supra note 17, at 22.

[FN37]. Ronald K.L. Collins, Language, History and the Legal Process: A Profile of the "Reasonable Man", 8 RUT.-CAM. L.J. 311, 317 (1977) (footnote omitted).

[FN38]. Women and the "Equal Rights" Amendment: Hearings Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. (1972).

[FN39]. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE MODULEED STATES 24 (1941).

[FN40]. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441-44 (Tucker, ed. 1803).

[FN41]. Collins, supra note 37, at 316. In Bradwell v. Illinois, Justice Bradley permitted the state of Illinois to deny Myra Bradwell the privilege of practicing law despite her qualifications. His opinion included the following discourse on women:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The harmony, not to say identity, of interests and views which belong or should belong to the family institution is repugnant to the idea of a woman adopting a

distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman has no legal existence separate from her husband, who was regarded as her head and representative in the social state. . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.
83 U.S. (16 Wall.) 130, 141-42 (1872).

[FN42]. 28 Mich. 32 (1873).

[FN43]. Id. at 34.

[FN44]. Id. at 42 (emphasis added).

[FN45]. Id. at 41-42.

[FN46]. A. P. HERBERT, UNCOMMON LAW 6 (4th ed. 1928). Herbert stated:
[I]n all [the] mass of authorities which [bear] upon this branch of the law there is no single mention of a reasonable woman . . . . [S]uch an omission, extending over a century and more of judicial pronouncements, must be something more than a coincidence; . . . among the innumerable tributes to the reasonable man there might be expected at least some passing reference to a reasonable person of the opposite sex.
Id. at 5.

[FN47]. As one commentator explained:
The original phrase "reasonable man" failed in its claim to represent an abstract, universal person. Even if such a creature could be imagined, the "reasonable man" standard was postulated by men, who, because they were the only people who wrote and argued the law, philosophy, and politics at that time, only theorized about themselves. When the standard was written into judicial opinions, treatises and casebooks, it was written about and by men. The case law and treatises are full of examples explaining how the "reasonable man" is the "man on the Clapham Omnibus" or "the man who takes the magazines at home and in the evening pushes the lawnmower in his shirt sleeves." When the authors of such works said "reasonable man," they meant "male," "man" in a gendered sense.
Bender, supra note 17, at 22.

[FN48]. See Collins, supra note 37, at 318-22.

[FN49]. See supra notes 29-33 and accompanying text.

[FN50]. See supra notes 16-28 and accompanying text.

[FN51]. See DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 20 (1989).

[FN52]. See Bender, supra note 17, at 14-15; Rhode, supra note 51 at 53-80.

[FN53]. See Rhode, supra note 51 at 81-92.

[FN54]. U.S. CONST. amend. XIV, § 1.

[FN55]. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 726 (1981) (quoting Craig v. Boren, 429 U.S. 190, 198 (1976)). The following is a representative sample of cases that invalidated certain statutes using an equal protection analysis: Kirchberg v. Feenstra, 450 U.S. 455 (1981) (statute granted only husbands the right to manage and dispose of jointly owned property without the wife's consent); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980) (statute required a widower, but not a widow, to show he was incapacitated from earning to recover benefits for a spouse's death under worker's compensation laws); Orr v. Orr, 440 U.S. 268 (1979) (only men could be ordered to pay alimony following divorce); Craig v. Boren, 429 U.S. 190 (1976) (women could purchase "nonintoxicating" beer at a younger age than could men); Stanton v. Stanton, 421 U.S. 7 (1975) (women reached majority at an earlier age than did men); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (widows, but not widowers, could collect survivors' benefits under the Social Security Act); Frontiero v. Richardson, 411 U.S. 677 (1973) (the determination of whether the spouse of a member of the Armed Forces was a dependant, was based upon the gender of the member of the Armed Forces claiming dependency benefits); Reed v. Reed, 404 U.S. 71 (1971) (statute preferred men to women as administrators of estates).

[FN56]. 435 U.S. 702 (1978).

[FN57]. Id. at 707 (citation omitted).

[FN58]. See Bender, supra note 17, at 21-23.

[FN59]. See id. at 21. For examples of this application in the law of torts see, e.g., HARPER ET AL. at § § 16.2-16.8; PROSSER & KEETON, supra note 14, at 174 n.5; STUART SPEISER ET AL., THE AMERICAN LAW OF TORTS § 9:1, at 994-95 (2d ed. 1985), and cases cited therein. In the law of sexual discrimination see, e.g., King v. Board of Regents of Univ. of Wisconsin Sys., 898 F.2d 533 (7th Cir.1990);

Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir.1986); Comment, Employer: Beware of "Hostile Environment" Sexual Harassment, 26 DUQ.L.REV. 461 (1988), and cases therein. In the law of criminal self-defense see, e.g., State v. Gallegos, 719 P.2d 1268 (N.M. Ct. App. 1986); State v. Leidholm, 334 N.W. 2d 811 (N.D. 1983); Kit Kinports, Defending Battered Women's Self-Defense Claims, 67 OR.L.REV. 393, 408-20 (1988); Mather, supra note 29, at 569-74, and cases therein.

[FN60]. 805 F.2d 611 (6th Cir.1986).

[FN61]. Id. at 615.

[FN62]. Id. at 620.

[FN63]. See supra notes 23-28 and accompanying text.

[FN64]. See infra notes 68-98 and accompanying text.

[FN65]. Rabidue v. Osceola Ref. Co. 805 F.2d 611, 620 (6th Cir.1986).

[FN66]. See supra notes 23-33 and accompanying text.

[FN67]. Rabidue, 805 F.2d at 620.

[FN68]. Bender, supra note 17, at 22.

[FN69]. Kathee R. Brewer, Note, Missouri's New Law on "Battered Spouse Syndrome:" A Moral Victory, A Partial Solution, 33 ST. LOUIS U. L.J. 227, 251 (1988).

[FN70]. Kathryn Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 VAND.L.REV. 1183, 1203 (1989).

[FN71]. Id.

[FN72]. Ehrenreich, supra note 17, at 1219 n.153. See also Bender, supra note 17, at 23 (stating that "reasonable person" implies reasonableness by male standards).

[FN73]. Krista J. Schoenheider, Comment, A Theory of Tort Liability for Sexual Harassment in the Workplace, 134 U.PA.L.REV. 1461, 1486-88 (1986).

[FN74]. This is so because men and women frequently possess very different views of the same or similar conduct. In the sexual harassment context, for example, the Ninth Circuit noted:

[B]ecause women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.

Ellison v. Brady, 924 F.2d 872, 879 (9th Cir.1991) (citation omitted).

[FN75]. Id. at 879-81.

[FN76]. Comment, Sexual Harassment Claims of Abusive Work Environment Under Title VII, 97 HARV.L.REV. 1449, 1459 (1984) [hereinafter Sexual Harassment Claims].

[FN77]. See infra note 80.

[FN78]. Rabidue v. Osceola Refining Co., 805 F.2d 611, 626 (6th Cir.1986) (citations omitted) (Keith, J., dissenting). The majority and dissenting opinions in Rabidue are analogous to the "equal treatment" and "special treatment" positions, respectively, over which feminist scholars have been debating for years. The Rabidue majority assumes that applying the same standard to women as men is not problematic, just as equal treatment advocates define justice as the application of completely sex-blind rules. In contrast, the dissent, like the special treatment advocates, seems more concerned with validating women's perceptions and achieving concrete gains for women than about complying with a sex-blind ideal of abstract equality. For a more detailed discussion of the equal treatment/special protection debate, see CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 4-10 (1979); Lucinda M. Finley, Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate, 86 COLUM.L.REV. 1118 (1986); Linda J. Krieger & Patricia N. Cooney, The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality, 13 GOLDEN GATE U.L.REV. 513 (1983); Wendy W. Williams, Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984).

[FN79]. See, e.g., Dinkens v. State, 546 P.2d 228 (Nev. 1976); State v. Bailey, 591

P.2d 1212 (Wash. Ct. App. 1979). The reasonable woman standard has also been utilized in Battered Wife Syndrome cases. For a detailed discussion of the Battered Wife Syndrome, see, e.g., Michael A. Buda & Teresa L. Butler, The Battered Wife Syndrome: A Backdoor Assault on Domestic Violence, 23 J. FAM. L. 359 (1984-85); Kinports, supra note 59, at 396-408; Mather, supra note 29, at 547-56; Elizabeth M. Schneider, Equal Rights to Trial for Women: Sex Bias and the Law of Self-Defense, 15 HARV. C.R.C.L. L.REV. 623 (1980); Brewer, supra note 69, at 229-30; Comment, Rendering Each Woman Her Due: Can a Battered Woman Claim Self-Defense When She Kills Her Sleeping Batterer?, 38 KAN.L.REV. 169 (1989).

[FN80]. See, e.g., Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir.1990); Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir.1988); Yates v. Avco Corp., 819 F.2d 630 (6th Cir.1987); Smolsky v. Consolidated Rail Corp., 780 F.Supp. 283 (E.D. Pa. 1991); Jenson v. Eveleth Taconite Co., 139 F.R.D. 657 (D.Minn. 1991); Austen v. State of Hawaii, 759 F.Supp. 612 (D.Haw. 1991); Robinson v. Jacksonville Shipyards, Inc., 760 F.Supp. 1486 (M.D. Fla. 1991); Tindall v. Housing Auth. of City of Fort Smith, 762 F.Supp. 259 (W.D. Ark. 1991); Radtke v. Everett, 471 N.W.2d 660 (Mich. Ct. App. 1991); Hughes v. City of Albuquerque, 824 P.2d 349 (N.M. Ct. App. 1991).

Courts have recognized two types of sexual harassment: "quid pro quo" and "hostile work environment." In quid pro quo harassment, the employer conditions employment advancement or employment benefits on sexual favors. Hostile work environment harassment occurs when the workplace is sexually offensive or abusive. Sandra R. McCandless & Lisa P. Sullivan, Two Courts Adopt A New Standard to Determine Sexual Harassment, NAT'L L.J., May 6, 1991 at 1, 1.

Since the Supreme Court's decision in Meritor Sav. v. Vinson, 477 U.S. 57 (1986), a plaintiff may establish a violation of Title VII by proving that sex discrimination created a hostile work environment. The Court stated: "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." Id. at 64.

To state a hostile work environment claim in most jurisdictions a plaintiff must show: (1) that he or she was subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (2) that the conduct was unwelcome; and (3) that the conduct was sufficiently severe or pervasive as to alter the conditions of the employee's employment and create a hostile work environment. Jordan v. Clark, 847 F.2d 1368, 1373 (9th Cir.1988), cert. denied, 488 U.S. 1006 (1989).

The Equal Employment Opportunity Commission's guidelines state that "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a) (1991) (emphasis added).

[FN81]. It should be noted that some legal scholars have advocated the use of the reasonable woman standard in other legal contexts as well. For example, some scholars have suggested that the reasonable woman standard should be used in evaluating whether handgun advertising is unfair or deceptive: "Since women may be

less aware of the correct usage of guns and less familiar with the handling of concealed weapons, arguably the 'reasonable woman' standard for deception might be less stringent than the reasonable person standard, and deception may be more easily found." Debra Dobray & Arthur J. Waldrop, Regulating Handgun Advertising at Women, 12 WHITTIER L.REV. 121, 123 (1991).

[FN82]. 559 P.2d 548 (Wash. 1977).

[FN83]. Id. at 559.

[FN84]. Id. at 558-59.

[FN85]. Id. at 559 (quoting Frontiero v. Richardson, 411 U.S. 677, 684 (1973)).

[FN86]. Id. at 559.

[FN87]. 924 F.2d 872 (9th Cir.1991).

[FN88]. Id. at 878-80.

[FN89]. Id. at 878.

[FN90]. Id.

[FN91]. Id. at 879.

[FN92]. Id. (emphasis added) (footnotes omitted).

[FN93]. Proponents of the reasonable woman standard contend that the focus on female norms and ideals is justified because men and women are, in reality, not similarly situated within the legal system. For a detailed discussion of this contention, see infra notes 205-19 and accompanying text.

[FN94]. See infra notes 100-219 and accompanying text.

[FN95]. See infra notes 222-47 and accompanying text.

[FN96]. See infra notes 249-73 and accompanying text.

[FN97]. See infra notes 282-99 and accompanying text.

[FN98]. See infra notes 300-02 and accompanying text.

[FN99]. See infra notes 100-43 and accompanying text.

[FN100]. See Krieger & Cooney, supra note 78, at 551-52.

[FN101]. Id. (emphasis in original). See also J.R. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY 293 (1978) (stating that "each individual . . . is entitled to claim the full and unalienable rights of man").

[FN102]. Krieger & Cooney, supra note 78, at 554.

[FN103]. For a discussion of the manner in which such formal equality combats existing conditions of inequality, see infra notes 167-72 and accompanying text.

[FN104]. Krieger & Cooney, supra note 78, at 552.

[FN105]. Id. at 551. Thomas Hobbes "is widely, and rightly, regarded as the most formidable of English political theorists; formidable not because he is difficult to understand but because his doctrine is at once so clear, so sweeping, and so disliked." C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE 9 (1962).

It should be noted that while the political philosophies of Hobbes and Locke have been the most influential, thinkers such as Montesquieu, Adam Smith, James Harrington, John Stuart Mill, and others have also had an impact upon American political theory and practice. James C. Foster, The Roots of American Notions About Equality, in ELUSIVE EQUALITY: LIBERALISM, AFFIRMATIVE ACTION, AND SOCIAL CHANGE IN AMERICA 12 (James C. Foster & Mary C. Segers eds., 1983) [hereinafter ELUSIVE EQUALITY].

[FN106]. Nature has made men so equal in the faculties of body and mind; as that though there be found one man sometimes manifestly stronger in body or of quicker mind than another, yet, when all is reckoned together, the difference between man and man is not so considerable as that one man can thereupon claim to himself any benefit

to which another man may not pretend as well as he. For as to the strength of body, the weakest has strength enough to kill the strongest. . . . And as to the faculties of the mind . . . I find yet a greater equality among men than that of strength.
THOMAS HOBBES, LEVIATHAN 94 (W.G. Pogson Smith ed., 1909) (1651).

[FN107]. Id. at 95.

[FN108]. Id.

[FN109]. Id.

[FN110]. Id.

[FN111]. Foster, supra note 105, at 16.

[FN112]. This is so because, as discussed previously, where individuals are completely free to pursue individual goals and compete without restriction for finite resources, conflict and disorder inevitably result. See supra notes 18- 21 and accompanying text. This conflict creates the pressing need for a political authority that will regulate conduct and, consequently, will prevent, or at least mediate, conflicts between individuals. See Foster, supra note 105, at 16.

[FN113]. ELIZABETH H. WOLGAST, THE GRAMMAR OF JUSTICE 4-5 (1987) (footnotes omitted).

[FN114]. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 309 (Peter Laslett ed., 1965) (1690).

[FN115]. Id.

[FN116]. Id. at 346.

[FN117]. Foster, supra note 105, at 17.

[FN118]. C.B. Macpherson, Introduction to JOHN LOCKE, SECOND TREATISE OF GOVERNMENT xix (C.B. Macpherson ed., 1980) (1690).

[FN119]. This is so because money is a durable medium of exchange. Under a barter system in which individuals trade, for example, meat for vegetables, people would only be able to take what they need to survive because any excess would spoil. Money, however, does not spoil and can be hoarded. Consequently, money will cause people to violate the fundamental natural principle "take only what you need" and scarcity will result.

[FN120]. Macpherson, supra note 118, at xi.

[FN121]. Id.

[FN122]. Id.

[FN123]. Id.

[FN124]. LOCKE, supra note 114, at 46.

[FN125]. Id.

[FN126]. Foster, supra note 105, at 17-18 (quoting LOCKE, supra note 114, at 367) (citations omitted).

[FN127]. Krieger & Cooney, supra note 78, at 555.

[FN128]. Id. at 555-56.

[FN129]. Id. at 554.

[FN130]. POLE, supra note 101, at 293 ("The individualist principle dissociates people from the context of family, religion, class, or race and when linked with the idea of equality in the most affirmative sense . . . it assumes the co-ordinate principle of interchangeability.").

[FN131]. As one commentator noted:

The cultural chemistry between the work of these two British philosophers and the founding of a new nation on the vast North American continent resulted in an enduring ideological bond, a bond which exists to this day. In an almost uncanny way American political culture continues to reproduce Hobbes's and Locke's political

theories.
Foster, supra note 105, at 11. It is interesting to note that John Locke's doctrine has frequently been cited as an important theoretical foundation of the American Revolution itself. See, e.g., JOHN DUNN, THE POLITICAL THOUGHT OF JOHN LOCKE 6-7 (1969); Macpherson, supra note 118, at xxi.

In fact, the interchangeability principle central to individualism has been the theoretical foundation of such important legislative initiatives as the Civil Rights Act of 1964 and the Equal Rights Amendment. See RHODE supra note 51, at 65-68; Ellen F. Paul, Sexual Harassment as Sex Discrimination: A Defective Paradigm, 8 YALE L. & POL'Y REV. 333, 336 (1990).

[FN132]. As noted by Judge Stephens in his dissent in Ellison v. Brady,

Nowhere in section 2000e of Title VII, the section under which the plaintiff in this case brought suit, is there any indication that Congress intended to provide for any other than equal treatment in the area of civil rights. The legislation is designed to achieve a balanced and generally gender neutral and harmonious workplace which would improve production and the quality of the employees' lives. In fact, the Supreme Court has shown a preference against systems that are not gender or race neutral, such as hiring quotas. See City of Richmond v. J.A. Croson Co., [488 U.S. 469 (1989)].

924 F.2d 872, 884 (9th Cir.1991). See also Paul Brest, The Supreme Court, 1975 Term - Foreword: In Defense of the Antidiscrimination Principle, 90 HARV.L.REV. 1, 1, 21 (1976); Ruth Colker, Anti-Subordinate Above All: Sex, Race, and Equal Protection, 61 N.Y.U.L.REV. 1003, 1058 (1986); Owen M. Fiss, Groups and the Equal Protection Clause, in EQUALITY AND PREFERENTIAL TREATMENT 84-154 (M. Cohen et al. eds., 1976); Krieger & Cooney, supra note 78, at 552 n.123.

[FN133]. Krieger & Cooney, supra note 78, at 552 n.123. For example, writing for the majority in Shelley v. Kraemer, 334 U.S. 1, 22 (1948), Justice Vinson noted that "[t]he rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The Rights established are personal rights. . . . Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." Similarly, in Connecticut v. Teal, 457 U.S. 440 (1982), the Court stated that "Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired. . . . Every individual employee is protected against both discriminatory treatment and 'practices that are fair in form, but discriminatory in operation.'" Id. at 455-56 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)). Finally, in University of California Regents v. Bakke, 438 U.S. 265 (1977), the Court explained that "[i]ndeed, in a broader sense, an underlying assumption of the rule of law is the worthiness of a system of justice based on fairness to the individual. As Justice Frankfurter declared in another connection, '[j]ustice must satisfy the appearance of justice.'" Id. at 319 n.53 (quoting Offut v. United States, 348 U.S. 11, 14 (1954)). These opinions demonstrate the Court's reliance on the individualistic model in deriving results. See also Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579 (1978); Teamsters v. Moduleed States, 431 U.S. 324, 342 (1977); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279 (1976); Oyama v. California, 332 U.S. 633 (1948); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); McCabe v. Atchison, Topeka

& Santa Fe Ry., 235 U.S. 151, 161-62 (1914).

[FN134]. See supra notes 132-33 and accompanying text.

[FN135]. See Ehrenreich, supra note 17, at 1184. For examples of statutes that have been invalidated by the Court on these grounds see supra note 247.

[FN136]. 435 U.S. 702 (1978).

[FN137]. Id. at 703-05.

[FN138]. Id. at 708 (emphasis added). The decision in Manhart was bolstered by the Court's ruling in Arizona Governing Comm. v. Norris, 463 U.S. 1073 (1983), in which the Court invalidated Arizona's voluntary pension plan, under which the state offered its employees the option of receiving retirement benefits from one of several companies selected by it, all of which paid women lower monthly retirement benefits than men who had made the same contributions. For further discussion of the Norris case, see infra note 209.

[FN139]. 429 U.S. 190 (1976).

[FN140]. Id. at 200-04.

[FN141]. Id. at 204.

[FN142]. Id. at 198-99.

[FN143]. Colker, supra note 132, at 1005-06.

[FN144]. See supra notes 132-42 and accompanying text.

[FN145]. See supra notes 106-21 and accompanying text.

[FN146]. See Ehrenreich, supra note 17, at 1181.

[FN147]. See supra notes 23-33 and accompanying text.

[FN148]. See Ehrenreich, supra note 17, at 1182. Some critics may contend that the "reasonableness" principle is fundamentally at odds with individualism because it focuses on the values of the communityas a whole rather than on the values of the particular individual. This argument misunderstands the basic premise of individualism. Individualism does not require the law and the legal system to evaluate each person according to his or her own individual characteristics or viewpoints, but rather requires that each person be treated as a distinct individual, inherently equal to all other individuals in civil society. If individualism required that each person judged only his or her own ideals, the conflict of interests which both Hobbes and Locke spoke of would be irreconcilable. However, because individualism merely requires that each person be treated as a separate and equal being, the imposition of neutral community standards is both allowable and desirable because it enables the law to mediate the conflict of interests while protecting the individual's personal right to equal treatment. Thus, the "reasonableness" principle, so long as it is facially neutral, is quite compatible with the individual model of equality.

[FN149]. See supra notes 63-65 and accompanying text.

[FN150]. See supra notes 68-93 and accompanying text.

[FN151]. See supra notes 63-98 and accompanying text.

[FN152]. 471 N.W.2d 660 (Mich. Ct. App. 1991).

[FN153]. Id. at 664.

[FN154]. This is so because to view and, consequently, treat each individual as though he or she were merely a member of a particular gender group is effectively to ignore that individual's status as a separate and distinct individual with specific characteristics that may vary quite significantly from the group norm. See Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 708 (1978). This failure to recognize a person's fundamental individuality is inherently at odds with the central tenets of individualism and the individualistic model of formal equality. See infra notes 158-63 and accompanying text.

[FN155]. See supra notes 164-66 and accompanying text.

[FN156]. See supra notes 167-72 and accompanying text.

[FN157]. See supra notes 173-93 and accompanying text.

[FN158]. See CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982); Colker, supra note 132, at 1003; Donna Greschner, Feminist Concerns with the New Communities: We don't Need Another Hero, in LAW AND THE COMMUNITY: THE END OF INDIVIDUALISM 119-50 (Allan C. Hutchinson & Leslie J.M. Green eds., 1989).

[FN159]. One scholar explained:

On descriptive grounds, they [cultural feminists] argue that connectedness and care, as a metaphysics and an ethics, more accurately reflect a woman's experiences than liberalism's paradigm of separate persons relating to each other through the mechanism of abstract rights. More importantly, on prescriptive grounds they argue that women's nurturing capacities and the care model should not just be valued, they should become the model for a far larger set of human interactions.

Greschner, supra note 158, at 127.

[FN160]. See supra note 116 and accompanying text.

[FN161]. See C. Edwin Baker, Sandel on Rawls, 133 U.PA.L.REV. 895, 897- 905 (1985); Will Kymlicka, Liberalism and Community, 18 CANADIAN J. OF PHIL. 181 (1988); Denise Reaume, Is There a Liberal Conception of the Self?, 9 QUEEN'S L.J. 352 (1984).

[FN162]. For example, individualism does not regard a woman as merely an individual indistinguishable from every other individual in society. Rather, individualism regards a woman as an individual with her own unique characteristics and attributes, included among which is her femaleness. See supra notes 116-29 and accompanying text.

[FN163]. Cf. Isaac D. Balbus, Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law, 11 LAW & SOC'Y REV. 571, 578 (1977) ("[A legal] form that defines individuals as individuals only insofar as they are severed from the social ties and activities that constitute the real ground of their individuality necessarily fails to contribute to the recognition of genuine individuality.").

[FN164]. Paul, supra note 131, at 360-61.

[FN165]. See Brest, supra note 132, at 48 ("[G]roup membership is always a proxy for the individual's right not to be discriminated against. Similarly, remedies for race-specific harms recognize the sociological consequences of group identification and affiliation only to assure justice for individual members. . . ." (emphasis added)).

[FN166]. Id.

[FN167]. See supra notes 68-75 and accompanying text.

[FN168]. See supra notes 76-93 and accompanying text.

[FN169]. See supra notes 37-47 and accompanying text.

[FN170]. Williams, supra note 78, at 329-30. See also Barbara A. Brown et al., The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 YALE L.J. 871, 889-93 (1971).

[FN171]. See supra notes 100-29 and accompanying text.

[FN172]. One scholar explained the importance of this aspect of individualism to the feminist movement:

Feminism cannot disregard this teaching. The notion of separate, equal selves with the capacity of choice and change gives us a critical space, it gives us a lever to help move the accumulated weight of centuries of patriarchy. . . . [H]ere is where the language of feminism intersects with liberalism. . . . We may begin, as do the commutarians with a situated self, but our aim is to renegotiate our identities.

Greschner, supra note 158, at 141.

[FN173]. See supra notes 68-72 and accompanying text.

[FN174]. 924 F.2d 872 (9th Cir.1991).

[FN175]. Id. at 878-79.

[FN176]. See infra notes 181-90 and accompanying text.

[FN177]. 765 F.Supp. 1509 (D.Me. 1991).

[FN178]. Id. at 1517-21.

[FN179]. Id. at 1516.

[FN180]. Id. at 1515-16 (footnotes omitted).

[FN181]. Traditionally "suspect" classes include race, see, e.g., Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Brown v. Board of Educ., 347 U.S. 483 (1954), ethnic origin, see, e.g., Hernandez v. Texas, 347 U.S. 475 (1954); Korematsu v. Moduleed States, 323 U.S. 214 (1944); Hirabayashi v. Moduleed States, 320 U.S. 81 (1943), alienage, see, e.g., In re Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971), and legitimacy, see, e.g., Trimble v. Gordon, 430 U.S. 762 (1977); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968).

[FN182]. Sex is the only clear "quasi-suspect" class. See, e.g., Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979); Kahn v. Shevin, 416 U.S. 351 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973). However, there is support for the claim that both age, see Vance v. Bradley, 440 U.S. 93 (1979); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976), and intelligence, see City of Cleburne, Texas v. Cleburne Living Ctr., 473 U.S. 432 (1985); James V. Dick, Note, Equal Protection and Intelligence Classifications, 26 STAN.L.REV. 647 (1974), are similarly "quasi-suspect" classes.

[FN183]. See Harris v. International Paper Co., 765 F.Supp. 1509, 1515- 16 (D.Me. 1991).

[FN184]. See Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1250 (6th Cir.1985).

[FN185]. See Calcotte v. Texas Educ. Found., Inc., 458 F.Supp. 231 (W.D. Tex. 1976).

[FN186]. See Cariddi v. Kansas City Chiefs Football Club, 568 F.2d 87 (8th Cir.1977).

[FN187]. See Torres v. County of Oakland, 758 F.2d 147 (6th Cir.1985).

[FN188]. See Compston v. Borden, Inc., 424 F.Supp. 157 (S.D. Ohio 1976).

[FN189]. See Wright v. Methodist Youth Servs., Inc., 511 F.Supp. 307 (N.D. Ill.

1981).

[FN190]. It must be noted that the need for such specifically designed "reasonableness" standards is not specifically mandated by the courts utilizing the reasonable woman standard, but is merely an illustration of the current logic that both explicitly and implicitly underlies the standard.

[FN191]. See supra notes 127-29 and accompanying text.

[FN192]. See infra notes 208-19 and accompanying text.

[FN193]. See supra notes 23-28 and accompanying text.

[FN194]. See supra notes 100-43 and accompanying text.

[FN195]. LOCKE, supra note 114, at 367.

[FN196]. Foster, supra note 105, at 18.

[FN197]. Ehrenreich, supra note 17, at 1190.

[FN198]. See supra notes 68-75 and accompanying text.

[FN199]. See supra notes 76-93 and accompanying text.

[FN200]. LOCKE, supra note 114, at 367.

[FN201]. Krieger & Cooney, supra note 78, at 555-56.

[FN202]. See supra notes 76-81 and accompanying text.

[FN203]. See Schoenheider, supra note 73, at 1488 n.156. Some may argue that, in light of the individualistic model, the reasonable woman standard should be utilized in all cases, thereby subjecting all individuals to the same measure of appropriate conduct. While this approach would allow the reasonable woman standard to comply with some of the mandates of individualism, it is legally inappropriate for two

reasons. First, such a universal application is theoretically inconsistent with the basic rationale for the reasonable woman standard, namely that each person is entitled to the application of a standard that reflects the norms of his or her gender group. Second, such an application may violate equal protection by subjecting men to a standard that explicitly excludes their group's perspective. See Buda & Butler, supra note 79, at 378- 80; Mather, supra note 29, at 572-74.

[FN204]. This is so because, as discussed earlier, the individualistic model of formal equality requires that the courts/government utilize formally equal rules and standards to regulate and evaluate conduct. When courts establish two or more different standards to evaluate similar conduct, they explicitly violate this requirement. See supra notes 124-29 and accompanying text.

[FN205]. See MACKINNON, supra note 78, at 4-10; Krieger & Cooney, supra note 78, at 547-55.

[FN206]. Ronald Dworkin has observed that the concept of equality can be viewed in two very distinct ways. The first is to view the right to equality as a right of equal treatment (this is the view adopted by individualism). The second is to view equality as the right to treatment as an equal, which focuses on equality of effect rather than equality of treatment. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 227 (1978).

[FN207]. Krieger & Cooney, supra note 78, at 553.

[FN208]. See supra notes 151-57 and accompanying text.

[FN209]. Arizona Governing Comm. v. Norris, 463 U.S. 1073 (1983), illustrates this point. In Norris, a class action suit was brought challenging the constitutionality of Arizona's voluntary pension plan, under which the state offered its employees the option of receiving retirement benefits from one of several companies selected by it, all of which paid women lower monthly benefits than men who had made the same contributions. Relying on the precedent established in Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978), the Court held that the pension plan constituted sex discrimination because it implicitly relied on a generalization that women, as a class, live longer than men:

This underlying assumption--that sex may be properly used to predict longevity--is flatly inconsistent with the basic teaching of Manhart: that Title VII requires employers to treat their employees as individuals, not "as simply components of a racial, religious, sexual, or national class." 435 U.S. at 708. Manhart squarely rejected the notion that, because women as a class live longer than men, an employer may adopt a retirement plan that treats every individual woman less favorably than every individual man.

Norris, 463 U.S. at 1083.

[FN210]. See supra notes 124-29 and accompanying text.

[FN211]. Michael J. Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 COLUM.L.REV. 1024, 1052-53 (1979).

[FN212]. Bette N. Evans, Thinking Clearly About Equality: Conceptual Premises and Why They Make a Difference, in ELUSIVE EQUALITY, supra note 105, at 103.

[FN213]. Id. As Wendy Williams explained:

Men and women, blacks and whites are different. If they were not they would not exist as categories. The focus . . . should be on whether the differences should be deemed relevant in the context of particular employment rules. For purposes of eating peas, a knife is not functionally the same as a fork; but if both utensils are silver, the difference is irrelevant to a thief.

Williams, supra note 78, at 357.

[FN214]. Evans, supra note 212, at 103.

[FN215]. Id. at 103, 111.

[FN216]. See supra notes 76-98 and accompanying text. The arbitrariness of this gender focus was noted by Judge Stephens:

It is clear that the authors of the majority opinion intend a difference between the "reasonable woman" and the "reasonable man" in Title VII cases on the assumption that men do not have the same sensibilities as women. This is not necessarily true. A man's response to circumstances faced by women and their effect upon women can be and in given circumstances may be expected to be understood by men. It takes no stretch of the imagination to envision two complaints emanating from the same workplace regarding the same conditions, one brought by a woman and the other by a man. Application of the "new standard" presents a puzzlement which is born of the assumption that men's eyes do not see what a woman sees through her eyes. 924 F.2d 872, 884 (9th Cir.1991) (Stephens, J., dissenting).

For a discussion of how women are "similarly situated" to men for purposes of securing employment, see Ruth B. Ginsburg, Gender and the Constitution, 44 U.CIN.L.REV. 1 (1975); Richard A. Wasserstrom, Racism, Sexism, and Preferential Treatment: An Approach to the Topics, 24 UCLA L.REV. 581 (1977).

[FN217]. In fact, such generic standards would not only incorporate the female perspective, but would have the additional benefit of incorporating the perspectives of blacks, Hispanics, Native Americans, and other historically disadvantaged groups without the creation of additional "reasonableness" standards. As discussed in Part II-

A, creation of such standards is extremely undesirable. As Judge Stephens put it:

While women may be the most frequent targets of this type of conduct that is at issue in this case [offensive or bothersome sexual letters in the workplace], they are not the only targets. I believe that it is incumbent upon the court in this case to use terminology that will meet the needs of all who seek recourse under this section [2000e] of Title VII. Possible alternatives that are more in line with a gender neutral approach include "victim," "target," or "person."

924 F.2d at 884 (Stephens, J., dissenting).

[FN218]. This focus on gender is obvious in the judicial decisions that have relied on the reasonable woman standard, see, e.g., Ellison v. Brady, 924 F.2d 872, 878-80 (9th Cir.1991); Radtke v. Everett, 471 N.W.2d 660, 664-65 (Mich. Ct. App. 1991), and in the scholarly articles that have advocated such a standard, see, e.g., Abrams, supra note 70, at 1205; Sexual Harassment Claims, supra note 76, at 1459.

[FN219]. On this point, one commentator stated:

Given the difficulty of administering a rule based on a distinction between 'factual' and 'normative' generalizations about women, and given the extent to which even gender-dependent laws based on a factual generalization about women weaken the effort to establish the principle of the moral irrelevance of gender, all gender-dependent laws disadvantaging women ought to be subject to a heavier burden of justification. The principle of the moral irrelevance of gender is better served thereby.

Perry, supra note 211, at 1053. Professor Wendy Williams expounded on this point:

The first proposition essential to this analysis is that sex-based generalizations are generally impermissible whether derived from physical differences such as size and strength, from cultural role assignments such as breadwinner or homemaker, or from some combination of innate and ascribed characteristics, such as the greater longevity of the average woman compared to the average man. Instead of classifying on the basis of sex, lawmakers and employers must clarify on the basis of the trait or function or behavior for which sex was used as a proxy. Strength, not maleness, would be the criterion for certain jobs; economic dependency, not femaleness, the criterion for alimony upon divorce. The basis for this proposition is a belief that a dual system of right inevitably produces gender hierarchy and, more fundamentally, treats women and men as statistical abstractions rather than as persons with individual capacities, inclinations and aspirations--at enormous cost to women and not insubstantial cost to men.

Williams, supra note 78, at 329-30.

[FN220]. See supra notes 68-98 and accompanying text.

[FN221]. See supra notes 35-72 and accompanying text.

[FN222]. ADAM SCHAFF, LANGUAGE AND COGNITION 145-46 (O. Wojtasiewicz trans. 1973).

[FN223]. Id. at 57.

[FN224]. See BENJAMIN L. WHORF, LANGUAGE, THOUGHT AND REALITY (J. Carroll ed., 1970).

[FN225]. Collins, supra note 37, at 321.

[FN226]. See SCHAFF, supra note 222, at 55.

[FN227]. Id. at 71.

[FN228]. Collins, supra note 37, at 321. See also Peller, supra note 18, at 1167-70 (language is a socially constructed and facile manipulator of our understanding rather than a neutral descriptive tool).

[FN229]. ROBIN LAKOFF, LANGUAGE AND WOMAN'S PLACE (1975).

[FN230]. Id. at 1-50.

[FN231]. MARY R. KEY, MALE/FEMALE LANGUAGE (1975).

[FN232]. Id. at 22.

[FN233]. Id. at 139-47.

[FN234]. CASEY MILLER & KATE SWIFT, WORDS AND WOMAN (1976).

[FN235]. Collins, supra note 37, at 322.

[FN236]. Karl Llewellyn, A Realistic Jurisprudence--The Next Step, 30 COLUM.L.REV. 431, 453 (1930). As one scholar explained:

In law, the proper use of words is always a matter of paramount importance. In fact, verbal precision is a hallmark of the legal trade. Those in the profession know well that because what is said often has a pronounced effect on what is eventually done, mastering language is essential to effective lawyering. Unfortunately, but not accidentally, the words chosen by these masters of language are not always as precise

as they seem and have too often obscured the practical significance of their use. Collins, supra note 37, at 311-12.

[FN237]. Llewellyn, supra note 236, at 454. Llewellyn used as an example the legal concept of "master-servant." This locution actively resisted change even as social reality shifted to the new industrial labor relationship between employer and employee. Id. For a discussion of the "reasonable man" locution, see Dolores A. Donovan & Stephanie M. Wildman, Is the Reasonable Man Obsolete?: A Critical Perspective on Self-Defense and Provocation, 14 LOY.L.A.L.REV. 435, 464 (1981).

[FN238]. As some commentators have explained: "By analogy, the objective reasonable man standard in provocation and, to a lesser extent, in self-defense has resisted alteration in accord with the emerging social reality of women, minority group members, and individuals not in the mainstream of middle-class values." Donovan & Wildman, supra note 237 at 464.

[FN239]. Collins, supra note 37, at 322-23.

[FN240]. See supra notes 35-72 and accompanying text. See also Collins, supra note 37, at 313-20; Finley, supra note 78, at 1155-57.

[FN241]. See Collins, supra note 37, at 322-23. This institutionalization of women's "inferiority" is particularly evident in language such as that used in State v. Wanrow, 559 P.2d 548 (Wash. 1977). In Wanrow, the court stated that, "care must be taken to assure that our self-defense instructions afford women the right to have their conduct judged in light of the individual physical handicaps which are the product of sex discrimination." Id. at 559 (emphasis added). The use of the term "physical handicaps" suggests that the court, while attempting to secure fair and equitable results for the female litigant, regards women as fundamentally "disadvantaged" or "handicapped." It is precisely this type of language that perpetuates the notion that women are weaker than men and require "special protection."

[FN242]. Finley, supra note 78, at 1154.

[FN243]. See supra notes 73-93 and accompanying text.

[FN244]. See Collins, supra note 37, at 322-23.

[FN245]. See supra notes 35-72 and accompanying text.

[FN246]. Orr v. Orr, 440 U.S. 268, 283 (1979).

[FN247]. For examples of such legislation, see Goesaert v. Cleary, 335 U.S. 464 (1948) (upholding a state statute that forbade women from becoming bartenders unless their husbands or fathers were bartenders); Muller v. Oregon, 208 U.S. 412 (1908) (sustaining an Oregon law that provided that "no female" shall be employed in any factory or laundry "more than ten hours during any one day").

[FN248]. See supra notes 100-247 and accompanying text.

[FN249]. Sexual Harassment Claims, supra note 76, at 1459.

[FN250]. See supra notes 73-93 and accompanying text.

[FN251]. See Abrams, supra note 70, at 1202-04.

[FN252]. 924 F.2d 872 (9th Cir.1991). This case is discussed supra at notes 87-88 and accompanying text.

[FN253]. 924 F.2d at 878.

[FN254]. If judicial factfinders are not, in fact, effectively able to make such accurate assessments, then the reasonable woman is useless in practice, as judges and jurors are forced to make "reasonableness" determinations in the precise manner, and relying on the same considerations, that they did when using a reasonable man or a reasonable person standard.

[FN255]. It should be noted that proponents of the reasonable woman standard implicitly acknowledge this argument in their criticism of the reasonable person standard. As discussed in Section I, these proponents contend that the reasonable person standard is fundamentally male-biased and, consequently, that a gender-specific reasonable woman standard is required to overcome this bias. It is this male bias, however, that similarly undermines the effectiveness of the reasonable woman standard itself. It is male judges' and jurors' inability to understand or apply the female perspective that forces factfinders using the reasonable person standard (purportedly) to resort to male norms; but similarly, factfinders using the reasonable woman standard are forced to resort to male stereotypes of female behavior.

[FN256]. Abrams, supra note 70, at 1203.

[FN257]. As noted in Sandra R. McCandless & Lisa P. Sullivan, Two Courts Adopt New Standard to Determine Sexual Harassment, NAT'L L.J., May 6, 1991, at 18, 19:

Some people believe, for example, that the reasonable-woman standard may be paternalistic and dangerous to enforce. The dissenting opinion in Ellison called the standard "ambiguous" and "inadequate." Indeed, even the majority opinion in Ellison alluded to what may be the most obvious problem with the reasonable-woman standard--that it may be difficult for a male co-worker to see things from a reasonable woman's perspective. Similarly, it may be very difficult to ask male jurors to place themselves in a reasonable woman's position when attempting to determine whether or not sexual harassment has occurred.

[FN258]. As one commentator explained:

We do not have a working concept of female objectivity untainted by the male viewpoint. . . . [And yet a] woman's reaction in a situation in which a man threatens her, particularly her spouse or boyfriend, will be intrinsically and significantly different than that of a man in a similar situation.

Mather, supra note 29, at 573 (citations omitted).

[FN259]. In evaluating the practical difficulties associated with the reasonable woman standard, this Comment assumes the truth of the basic premise of the argument in favor of the new standard: that there are legally relevant differences between men and women. See supra notes 205-07 and accompanying text.

[FN260]. Advocates of the reasonable woman standard may argue that even though men are unable to understand the female perspective without help, such a perspective could be accurately communicated by the use of expert testimony. Such testimony might include, for example, that of similarly situated women or of medical and/or psychological experts.

This argument is unpersuasive. First, the use of expert testimony is fundamentally inconsistent with both the "reasonableness" principle and with the American jury system. As discussed in Part I, "reasonableness" establishes an objective boundary between the acceptable exercise of individual freedom and the unacceptable interference with the rights of others. This principle relies on prevailing social norms for its definition. In the American jury system, these social norms are presumed to be within the common knowledge of every citizen, thus allowing all citizens to adjudicate disputes among and between their peers. Where a particular norm requires expert testimony in order to be understood, it obviously fails to be within the common knowledge of every citizen. Such is the case with the reasonable woman standard. While that standard might be commonly understood by women, it cannot be by men. Responding to this situation by creating a need for expert testimony is an inappropriate solution to the problems of the reasonable woman standard.

Second, expert testimony is insufficient to overcome male factfinders' inherent inability to understand the female perspective. As discussed in this Part, men have no personal knowledge of either the physical traits or social experiences that define a woman and condition her responses in particular situations. The mere introduction of third-party evidence as to how a woman might feel or react does not allow a man to

understand the true nature of those feelings or reactions. Thus, expert testimony would not enable men fully to comprehend or appreciate the female perspective. Without such comprehension the reasonable woman standard does nothing more than force male factfinders to rely on personal biases or stereotypes to determine how a woman would respond.

[FN261]. Mather, supra note 29, at 573.

[FN262]. See Ellison v. Brady, 924 F.2d 872, 878 (9th Cir.1991); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 626 (6th Cir.1986) (Keith, J., concurring in part, dissenting in part); State v. Wanrow, 559 P.2d 548, 559 (Wash. 1977); Sexual Harassment Claims, supra note 76, at 1459.

[FN263]. Rabidue, 805 F.2d at 626.

[FN264]. See Ehrenreich, supra note 17, at 1219 n.153.

[FN265]. Paul, supra note 131, at 359.

[FN266]. See supra notes 256-60 and accompanying text.

APPENDIX 3

The sample essay and court report in this Module Guide are provided to you by way of illustration. They are NOT to be copied and used for the purposes of your own coursework submission in this Module or in any other Module on this degree. Please also note that whilst the references for this essay appear at the end of the document, in downloading the document the reference numbering has disappeared.

Sample Essay: Matthew Palazon - Women and the Law 2 (2008 1st Class Hons student)
Extended Essay: Provocation/Domestic Violence

'Provocation was designed by men for men, and has always been of more use to husbands than to the few wives who have tried to use it.'

This is the proposition that will be examined in respect of the application of the defence, its historical lineage and the new Government proposals for reform. This essay will begin by considering the feminist and critical legal theories which provide a basis for understanding and analysing the law on provocation. It will then look at the defects of the law prior to the Government's new proposals in relation to the theoretical debate and will conclude by considering the benefits and deficiencies of the proposed reform, including whether an imbalance would be created against men.

Provocation is defined by s 3 of the Homicide Act 1957 and it is a partial defence which operates to reduce a charge of murder to one of manslaughter where: on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

On a straightforward reading of the Statute there is no reason (other than the difficulties surrounding the application of the reasonable man test) that the defence should not apply equally to both sexes. However, difficulties arise from its historical development. The defence was originally a creature of the common law and accordingly there has been a great deal of sometimes contradictory judicial interpretation since its conception in the mid 16th Century. It is exactly because of the age of the defence that it has been inextricably linked with patriarchy and power. The very basis of patriarchy rests upon a number of assumptions and presuppositions. That is, the oppositional dualism of nature and culture, and its socialised association to gender. Whilst historically men have been associated with culture, logic, objectivity, and rational thought so women have been forcibly associated with the converse qualities and deemed to be ruled by nature to such an extent that they are biologically unsuitable to participation in public affairs. Moreover, the qualities deemed to be naturally occurrent in women exist within a structured hierarchy where every corresponding male quality is considered superior and more valued in social dealings. Consequently, for the majority of the "civilised" centuries women have existed within a cultural dichotomy which separates the public and the private into two almost mutually independent spheres; the home being the domain of a woman (until the man returns) and the public sphere belonging rightfully to men. JS Mill notes that the state has historically enforced the subordination of women to men on the grounds of giving legal sanction to already existing power relationships on the basis that these relationships are natural, right and proper. Moreover, he notes that women who have been economically and legally dependent upon their husbands are socialised to believe that 'it is the duty of women, and… that it is their nature to live for others: to make complete abnegation of themselves, and to have no life but in their affections.' Thus, 'the private, regarded in legal ideology as unsuitable for legal regulation is ordered according to an ideology of love.' However, what there is in essence is a form of contract. A great deal of liberal thought centres around the notion of contract. Society is explained through the idea of a social contract and since the promulgation of capitalism contract law is a central part of everyday life. What is assumed in the relationship between men and women is that the part of family production which rightfully belongs to women is that of the private sphere which is unregulated and unpaid. Accordingly,

women, their domestic work, their bodies and their sexuality are controlled by the man in the relationship who appropriates all that is hers through the inequality of family contract. In short, 'underlying a complicated reality is the belief that women's natures are such that they are properly subjected to men and their proper place is in the private domestic sphere.' The liberal notion of the public and the private spheres is characterised by the belief that there is 'a realm of private morality which is, in brief and crude terms, not the law's business' and that this realm is and should be the home since 'the house of everyone is his castle'. The basis of this concept is that the social contract, for which men surrendered their personal rights to retribution, was entered into to protect personal property, property being the basis of all relationships. In fact, Sullivan notes that the protection of property was the only accepted provoking act in the 17th century. This comprising of an assault on oneself, kinsman or friend (since a man has a proprietary right in his own body), or the sight of an Englishman unlawfully deprived of his liberty (for similar reasons), or seeing a man in the act of adultery with his wife. As Lord Holt stated in R v Mawgridge the defence of provocation applied most emphatically to the husband of an adulteress:

When a man is taken in adultery with another man's wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter; for jealousy is the rage of man, and adultery is the highest invasion of property. Thus the historical basis of the defence of provocation has practically no relevance to women since it developed in relation to property right's (of which women had none) and in respect of a man's honour. What is interesting is that the formulation by Lord Holt sets the defence as justificatory rather than exculpatory, as there is no reference to a sudden loss of control, but rather it is the husband's rightful expression of his indignation. 'It was a case of hot-blooded yet controlled vindication of one's honour rather than spontaneous, uncontrolled fury.' In fact, it was not until 'the eighteenth and nineteenth centuries [that] a conception of anger as a condition incompatible with the exercise of reason achieved prominence.' It goes someway to evidence the imbalance within the law that a sudden confession of adultery was not overruled as a ground for provocation until 1946 when in Holmes v DPP the court stated that 'as society advances it ought to call for a higher measure of self-control in all cases.' The status on of women as property is one very compelling explanation for the

existence of domestic violence. The historical standpoint in regards to marriage was that husband and wife became one person upon marriage (and that one person was the man), thus, the wife being the property of the man, was required to act as the man wished. Any perceived misbehaviour on her part was, as per the pattern of thinking at that time, an insult to his honour and embarrassing to him in his public dealings, moreover he was legally accountable for her actions. There was therefore a lawful right to administer moderate castigation to one's wife so long as the punishment did not kill or deform her and the whip used was no thicker than the husband's thumb. 'Thus the husband's rights of coercion went hand in hand with his rights of possession.' The consequence of this is that 'long after society abandoned its formal approval of spousal abuse tolerance of it continued and continues in some circles to this day.' Another of the main issues which have caused problems for women in respect of provocation is the reasonable man standard. There are numerous problems with the concept of reasonableness. Historically it can be seen that women were excluded from all areas of civil life, including the law. Accordingly, the standards of justice the law values, such as objectivity and liberalness, are a product of the men who created it. In conjunction with this, a devaluing of the posited binary opposites associated with women has led to a legal system which is unsympathetic to the female experience and which is instrumental in the subjugation of women. A clear example of this is the Persons Case where the court held that women were not "persons" for the purposes of the British North America Act. This is reflective of the historical fact that women 'were not regarded as persons under the law; [they] were regarded as chattel, as property.' Consequently, the courts were reluctant to apply the reasonable man standard to women, as in Daniels v Clegg where the court refused to apply it on the basis that in view of a woman's characteristics the degree of diligence required of her was less "than in the case of a mere child'. In fact:

In light of this historical fact – that women were not fully "persons" in the eyes of the law – the reasonable man standard operated, in practice, much more as a "reasonable male" standard than as a truly gender neutral "reasonable human being" or "reasonable person" standard. The result is that whilst supposed feminine character traits such as subjectivity have been devalued, masculine values and norms such as objectivity and reasonableness have been re-branded and repackaged as axiomatic legal truths. The message is clear -

only those traits associated with the male viewpoint, such as objectivity and "the man on the Clapham omnibus" will guarantee legal neutrality – and the female viewpoint which often demands some element of subjectivity is a reminder to the judiciary that women are simply not suited to the public sphere. The reality is that the law is not neutral and when tests such as the reasonableness test have been applied to women, women have effectively been judged on whether they have acted as reasonable man would have done. It has only recently begun to be accepted within the law that women may react differently than men to the same experience. In rape cases for instance, it has been difficult for the courts to understand that even where a woman submits to a sexual encounter out of fear, she still may not consent to the conduct and in fact both sexes may have very different understandings of the situation. The law, Scheppelle notes, operates according to an objectivist theory of truth which deems that there is "a single neutral description of each event which has a privileged position over all other accounts." The aim of legal theory is to make the law point-of-viewless so that the people are removed from the problem and what is left is the abstract truth. However this ignores the fact that different people shape their opinions of what is right and wrong, what is real or false, and what is the truth, on their own experiences and on the type of society in which they have lived. Therefore, those who have had very different experiences in respect of the life they have led, their interactions with the state (e.g. the courts, police), and the way they relate to the prevailing hegemony will have very different accounts of the same event. The conflict here arises from the fact that the law's favouring of point-of-viewlessness is inherently contradictory to its aim since, although it claims to favour an objective and neutral standard, that standard is closely associated to the norms and values of those who created the legal policy to begin with. That is the white, middle class, heterosexual male. Consequently it is very difficult for those who have had different life experiences to convey, what they whole-heartedly believe to be the truth, to a legal system based on the truth of one section of society, and accordingly it is difficult for lawyers to translate the experiences of "outsiders" to a format that will be understood and get a just result in our legal system. The truths of those members of society is simply outside the boundaries of legal narrative. This desire to find an abstract truth has had severe effects on a woman's ability to use the defence of provocation since:

when taken out of their context, outsiders' actions often look bizarre, strange, and not what the insider listening to the story would do under similar circumstances. And without knowing more about how the situation fits into a context other than the 'obvious,' insider's one, courts may find it hard to rule for outsiders. The reforms of the 1957 Act were introduced during a period where the women's movement was still finding its feet. It would still take 10 years to decriminalise homosexuality and abortion, and equal rights campaigners were still focusing on sameness as a tool for obtaining some semblance of equality. It is understandable, therefore, that objections to the reforms on the grounds that they did not address the female experience are sparse if non-existent. The equal-but-different standpoint is a much more mature concept, which has had the benefit of a great deal of academic debate and social science research. Whilst the 1957 Act provided a statutory definition of provocation, it gave no explanation of the meaning to be given to the component tests, preferring to leave this to the judges and the common law. However, since the formulation of the statutory definition simply reintroduced that which was overruled in Holmes v DPP, without significant alteration to the substance of the defence, it was held by the judiciary that there was substantial body of common law which was still valid and continued to apply. Accordingly, the law on provocation continued to operate with remnants of its patriarchal origins enshrined within the common law. This has meant that over the last 50 years women have found it disproportionately difficult to rely on the defence of provocation. One of the most resilient anachronisms carried over by the common law is derived from the judgement of the court in R v Duffy which required that the provocation 'would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self control'. The criticisms arising around this requirement are of the necessity of suddenness in the loss of control and the requirement for the loss of control to be objectively reasonable. As noted previously in this essay, a sudden loss of control has been interpreted to be evidenced by a quick tempered angry reaction on the basis that this emotion is incompatible with the exercise of reason. However, having regard to the fact that the values and norms of the law are typically synonymous with the male viewpoint, it is suggested that, rather than hot temper indicating a loss of control, 'lack of self control became accepted as typically expressed in "hot temper".' Thus rather than anger being one

possible cause of a loss of self control it became the only cause which has prompted the Law Commission to conclude that 'the defence of provocation elevates the emotion of sudden anger above emotions of fear, despair, compassion and empathy.' The requirement of a sudden loss of control as expressed by the courts engenders serious difficulties for women in general and women who are victims of domestic violence in particular. The gendered response to provocation required by the courts of women is simply not the most readily available to them. The court expects an immediate reaction characterised by a sudden loss of temper. However, this ignores the importance of power relationships between members of each gender which have a huge impact on the behavioural responses of women. In cases of domestic abuse, there are a wide range of reasons that an abused woman will stay with her abusive partner. Some of the most relevant to this topic are: economic dependency, fear of future violence, cultural restraint, or fear for the safety of children (as contradictory as that may seem); although perhaps the most salient and compelling reason is simply fear of the man's strength. It is precisely for this reason that many women do not attack their abusers in the heat of the moment because they are acutely aware that they are not strong enough to overpower him. When this feeling of powerlessness is combined with an inability to extricate themselves from the violent environment (for whatever reason), the result is most likely to be an overwhelming feeling of isolation and despair. It is difficult for people to argue contrary to this since domestic abuse is defined as 'behaviour that seeks to secure power and control for the abuser to undermine the safety, security and self-esteem and autonomy of the abused person'. Consequently sufferers of domestic violence exist in a state of anticipatory fear which conditions and informs their response to the behaviour of their abusers. Thus in cases such as R v Ahulwalia (at first trial), where Mrs Ahluwalia was told by her husband that he was going to bed and when he woke up he was going to kill her, her actions in using force against him seem premeditated and disproportionate. Accordingly on appeal in this case, although approving Duffy, the court held that the phrase sudden did not mean immediate but that there could be a series of provoking events which burned away within the defendant until they reached a point where they were forced to act. However the court also stated that the longer the period between the provocation and the retaliatory act, the more likely the court would find that the

act was premeditated. This is a corollary of the fact that this time period is deemed as a cooling of period and is an absurd presumption based on the elevated status of anger. Thus, in the case of Ahluwalia, the court, in trying to incorporate the female experience, widened the defence for both men and women, with the unfortunate consequence that there was still a presumption against the female response. Women are not only disadvantaged by the suddenness requirement, but also by the application of the reasonable man standard. The second part of the test for provocation requires that, having established that the defendant did in fact lose his self control, this loss of self control was reasonable. The contention this has created is a complex issue. The reasonable man in all other areas but in the criminal law indicates an ethical and normative standard it is a standard of appropriate behaviour that the law demands of all citizens regardless of personal attributes or individual inclination. It therefore seems contradictory to include in a defence that is a concession to 'the frailty of human nature' a question which involves asking a jury to consider whether the reasonable man, (a paragon of virtue) would be provoked to commit an illegal act. The original legal position, consequent upon the objective test, was that no external characteristics should be considered in determining the reasonableness of the provocation on the defendant. This has obvious implications for women, in that it excludes consideration of gender, depression, and a history of violence. Moreover, it reduces the nature of domestic violence simply to actual violence and suggests that only if domestic abuse manifests as a psychological disease can it be taken into account. However, the subjective situation in which a battered woman has existed is completely relevant to the reasonableness of her actions. 'One of the effects of the experience of personal violence is that the victim is always in a state of anticipation of the provoker's capacity for future violence. This knowledge and experience affects her assessment of risk and management of risk.' 'Under the common law the "mode of resentment" was a rule of law.' There was a requirement that the retaliatory means had to be proportionate to the provocation and there was a presumption that the use of weapons was generally disproportionate although 'a less serious view was taken of weapons "already in the hand."' Thus in Oneby's Case, the fact that the father had only used a small club to beat the boy led the court to assert that there could have been no design to do any great harm to the boy, let alone kill him. This rule,

although only now applicable in self defence, has its roots in the idea of the defence of a man's honour, since in judging the appropriate response of two men the use of a lethal instrument could have been very useful in determining the reasonableness of their actions. However, considering that it is now not such a rare occurrence for women to kill their male partners of for children to kill their fathers this presumption that the use of a weapon is unreasonable continues to support unjust decisions. This is because, although there is no longer a proportionality requirement in the formulation of provocation, the use of a weapon is still instinctually considered to be more shocking and more indicative of premeditation. However, this ignores the disparity between the physical strength of men and women. Women may use a weapon to 'arm themselves against the a priori disproportionate force of men in order to achieve a notional equality between un-equals.' Thus the actions of a woman who uses a weapon are reasonable once contextualised. In contrast:

when men kill women, using body force such as strangulation, instead of this force being regarded as excessive when used against a person of smaller frame and when that person is also disabled from using physical force through social conditioning, the law construes body force as a mitigating factor. In response to this, Susan Edwards has noted that:

Weapons and body force have different consequences for the construction of intention… when men kill spouses they are less likely to be convicted of murder if they use body force than if the use weapons 47 per cent to 56 per cent… [but] when women kill, they almost exclusively use weapons. Thus the proportionality presumption in provocation and the proportionality requirement in self defence severely disadvantage an abused woman who assesses the risk of physical violence on the basis of her knowledge of the pattern of abuse she has come to anticipate. In an attempt to incorporate the female response to provocation some judges have widened the definitions wherever possible. In Ahluwalia the court widened the meaning of sudden to include a "slow-burn" reaction, in R v Sarah Thornton the court conceded that a loss of control was not necessary at the time of provocation provided that it was present at the time the fatal blow was struck, and in R v Humphries the appeal succeeded because the cumulative effect of many years of abuse were taken into account. However, despite the best efforts of a few judges there has been an incommensurability problem

between the reasonable man test, which excludes the examination of subjective elements, and the ability to determine whether a defendant's actions were, in fact, reasonable. Whilst at one stage the law held that characteristics other than age and sex could affect a person's capacity for self control and were therefore relevant to an examination of the defendant's conduct the law has now, following Attorney general for Jersey v Holley, returned to the decision that these characteristics are only relevant in so far as the affect the gravity of the provocation. Thus the defendant is still required to have an objectively reasonable response; however there is a concession that the degree of provocation can be subjectively affected. Thus the male response to provocation is still privileged and what is more, the provocation may be very trifling one-off conduct such as teasing a man about his impotence. A number of judges, notably Lord Taylor CJ in Thornton have criticised the approach of the law on the basis that that 'the nexus between what might be considered a characteristic of the reasonable man and the defendant's capacity for self-control… [is not] one that can be ignored'. In regard to battered women his lordship noted that: The severity of such a syndrome and the extent to which it may have affected a particular defendant will no doubt vary and it is for the jury to consider… it may form an important background to whatever triggered the actus reus. A jury may more readily find there was a sudden loss of control triggered by even a minor incident, if the defendant had endured abuse over a period, on the 'last straw' basis. The Government's current plans for reform, as expressed in the 2008 consultation paper, are to abolish the common law defence of provocation and to introduce a completely new partial defence to murder regarding loss of control resulting from fear of violence, and to allow words or conduct to constitute adequate provocation only in exceptional circumstances. The proposals alter the focus of the defence so that the primary reason for reducing a charge of murder will no longer be based upon anger. It has been suggested by a number of judges, reported by the BBC, that the reforms are unnecessary, that the current law has been stretched to accommodate women (and are now adequate), that the new proposals will catch only a limited number of circumstances that were not already covered, and that the proposals are overtly and politically feminist. This essay has already shown that these assertions are only partially, if at all, true. That in fact the law of provocation is gendered and has always been so. This has

been evidenced by the difficulty judges have faced in attempting to bring women within the definition of the provocation defence. Although judges have widened the meaning of sudden to include a "slow burn reaction, expanded the time lapse requirement before which provocation as a defence is negated, and attempted to consider cumulative provocation, the effect has been to evidence the fact that the law does not work rather than to improve it. The Law commission itself has noted that 'as a result of the courts stretching the requirement of "loss of self control" in order to accommodate battered woman's syndrome cases, there is no clear test for distinguishing a "provoked" killing from a "revenge" killing.' Consequently at least some from of reform is necessary. The questions to be asked of the Government's proposed reform are: do the new proposals actually correct those imbalances identified by feminist writers? And if they do, and even if they do not, do they tip the scales in favour of women therefore creating an imbalance against men? The most onerous requirements of the current defence, in terms of the female experience, are "suddenness", the "reasonable man test" and the fact that the defence it defined in such a way that when a woman uses a weapon to combat power inequalities this is perceived as unreasonably disproportionate. The Government states that one of its aims is to 'remove the existing common law requirement for loss of self-control in these circumstances to be "sudden". This they will give effect to in the new s 2 which would simply abolish the common law defence of provocation. However, it should be noted that the aim of removing the suddenness requirement is not expressly stated and since this requirement was a common law creation in the first place there seems to be no reason that the courts might not create a similar requirement under a different name This is especially so considering that their aim in creating the original test was to support a causative link between the provocation and the retaliatory act. In reality, it is probable that in implementing the new defence the court would still find that that the longer the period between a fear of serious violence and the retaliatory act, the more likely that the two were unrelated. In regard to the test of reasonableness (for the purposes of this defence) the proposals do present some measure of improvement. The new formulation is whether 'a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D might have reacted in the same or in a similar way.' The relevant circumstances to be

considered are defined as ‘all of D’s circumstances other than those whose only relevance to D’s conduct is that they bear on D’s general capacity for tolerance or self-restraint.’ Thus the test is twofold, first requiring that the defendant’s actions are considered objectively within the context of the subjective circumstances, whilst secondly limiting that subjectivity so that is not extended to the defendant’s general capacity, but only to her as regards the provocation. Or to put it another way, the subjective element is not to excuse the ‘exceptionally excitable or pugnacious’. This formulation is a great improvement and will allow the court to consider the full extent of the effects of domestic abuse on the victim’s response and may even go someway to addressing the perceived disproportionateness of women using weapons. Despite these proposed improvements it is suggested that the law may still be overly sympathetic to the male experience. Susan Edwards posits that on the basis of the historical context of provocation it is a fallacy to conceive anger as incompatible with the exercise of reason and that in fact to do so is simply ‘socially mediated approbation for provocation’. She suggests, similarly to the observations of JS Mill noted previously in this essay, that allowing anger as valid trigger for provocation gives legal sanction to something that already happens rather than being a concession of the law to a biological inevitability. The assertion is that ‘motives are the reasons for action not the causes of action’ In fact:

To say his motive in murdering his wife was his jealousy is to explicate the circumstances which make him the type of jealous person who would murder his wife - - that murdering his wife is one possible method available to him for doing jealousy. In this way, the event is formulated as the agent’s possible method for doing whatever the formulation of the motive requires as a course of action. Consequently the Government’s proposal to allow, as a triggering event of the loss of control, words and / or acts where there is a ‘justifiable sense of being seriously wronged’ raises very serious concerns even if this is limited to ‘an exceptional happening’. How a person, or in fact the jury, is to determine what constitutes such a situation in which a justifiable sense of being wronged is unclear. Also it is similarly unclear as to what will constitute an exceptional happening. ‘The problem with this formulation is that it will continue to allow indignation, moral righteousness and hubris to preside as acceptable excuses/ justifications for killing. After all who is to say what is justifiable?’

Accordingly cases where men have killed their wives for nagging or needling may continue to be classified as manslaughter. Moreover, the requirement of a serious wrong has echoes of the old common law requirement for the provocation to be gross, which historically has meant a male version of what is gross provocation. Despite the new proposals offering some improvement to the present law, it seems overly optimistic to suggest that they completely redress the imbalance against women, or indeed tip the scales in the other direction. There are a number of extra factors which have affected the effectiveness of the current provocation defence, which may continue to be detrimental to any woman using the new defence. Cultural judgements and the perception of judges can have a huge impact upon a case, particularly where 'the words or conduct of the wife are raised as the basis for a plea of provocation… [here] matrimonial behaviour becomes the focus as the centre of responsibility for her husband's actions.' Historically cases have shown that when words or conduct are raised as a trigger for provocation the wife is often put on trial in a similar way to those who allege rape or sexual harassment. Thus the woman is considered less credible, or more blameworthy, if her behaviour deviates from the male ideal. In the case of rape this might be making assumptions about the woman's preferred choice of clothing or her sexual promiscuity. In the case of provocation 'leaving one's husband, having an affair, not taking care of the child(ren), nagging one's husband, lack of appreciation for the husband's work on behalf of the family are all not manifested by the ideal woman', and consequently illustrate some blameworthiness on the part of that woman when she (apparently) drives her husband to domestic homicide. Dobash and Dobash have found that the man in the relationship was most likely to become physically violent 'at the point when the woman could be seen to be questioning his authority or challenging the legitimacy of his behaviour … or at points where she asserted herself in some way.' In this sense it is suggested that the link between patriarchy, private ordering and domestic violence becomes apparent since 'these men regarded the women as personal property and became violent whenever they showed any independence, particularly when that involved other males.' This type of patriarchal behaviour has been echoed in the language used by judges in numerous cases. 'The judge assists in reducing the responsibility of the offender (most commonly a man) by "trying the victim", sympathizing with the

plight of the husband, and voicing moral assessments', whilst the account of abuse by the woman is doubted or trivialised. In fact in Sarah Thornton's case the judge commented that 'this lady would have tried the patience of a saint' and revealed his prejudice, or at least ignorance of the effects of domestic abuse, in stating that 'there are… many unhappy, indeed miserable, husbands and wives. It is a fact of life… But on the whole it is hardly reasonable, you may think to stab them fatally, when there are other alternatives available like walking out or going upstairs.' Thus the combination of male biased tests within the defence of provocation and the patriarchal assumptions of some husbands and many judges, have functioned to prevent the defence of provocation being available to women. Moreover, there is little in the new proposals to prevent this from happening in the future. In fact it may continue to be the case that juries are influenced by the moral assessments of judges and encouraged to find provocation when the judge prompts them to do so. In conclusion, the Government's new proposals offer some measure of improvement. However their effectiveness will be determined by the way that judges and juries interpret them. I think it is safe to say that simply by removing anger as the main trigger for provocation, the Government has not created an imbalance against men, since to do so would require the entire current legal system, prevailing hegemony, and doctrinal rules to be reformulated in a matriarchal style.

In short: "Whatever the formal structure of the law, ultimately the success or failure of a provocation defence depends on ingrained cultural judgement, and the hidden agenda of this partial defence as it operates in practice in spousal homicide, [as] one of female responsibility, whether as victim or offender".

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APPENDIX 4

Matthew Palazon – lst Class (Hons) Student – 2008/09 Women and the Law 1 Court Observation Report.

The sample essay and court report in this Module Guide are provided to you by way of illustration. They are NOT to be copied for the purposes of your own coursework submission in this Module or in any other Module on this degree.

Court Observation

Case Number: T20087225
Defendant: Enright, Liam Patrick
Counsel for Defence: Louise McCullough
Counsel for Prosecution: Kenneth Dow
Judge: Judge Fraser
Court: Inner London Crown Court
Charge/s: Burglary, Battery

The defendant's story: Mr Enright is white, British, poorly educated, unemployed and in receipt of benefits. He received a letter from the Job Centre stating that unless he found work immediately certain consequences would ensue in relation to his benefits. Not having a CIS card he could not look for construction work via the usual avenues. Accordingly, he had taken to going to small residential construction sites and asking for work in person. Having exhausted such sites near his home, on the 25/03/08 he went by bicycle to an area which he had heard might have some work. Seeing what he thought were signs of construction work (doors, rubble and roofing tiles in the front yard, and a drilling noise) he approached the house, knocked and entered after hearing a female voice saying "come, come". He claims that he waited in the hallway near an open door until a female (Mrs Z) came down stairs and asked him to identify himself. At this point, he produced the Job Centre letter. Whilst he was trying to explain his presence Mr Z came in and attacked him for no good reason. He was then restrained and it was at this point he called the police for assistance.

The Prosecution's story: Mr and Mrs Z are Polish and speak limited English (they required a translator in court). They claim that there was no drilling noise and that signs of construction work were not apparent. They also claim that Mr Enright was not invited in and they did not immediately know of his presence. Mr Z says that when he entered the hallway there was no one there and that he could hear rustling noises from the back room. He also says that rubble bags had been opened and his briefcase was moved from one end of the room to the

other near the door which Mr Enright appeared to be coming out of. Mr Z states that the scuffle resulted as a consequence of Mr Enright trying to escape. Once he had restrained Mr Enright he called the police.

Telling Stories: This story occurs at a perceptual fault line. There are language and cultural barriers between the parties. There is also a difference in class and wealth, that is to say that Mr Enright relying entirely on benefits is in the lowest possible class . In court Mr Enright had trouble forming coherent sentences due to his grasp of English. Mrs Z stated that at the time of the incident she could not understand what he was saying. There was clearly a chasm of understanding between them.

If an insider is white, male and middle-class, Mr Enright is both an insider and an outsider. The law will have sympathies towards the behaviour of his gender and yet, because of his class and education, his behaviour will perhaps at times be different than that of the reasonable man as the law understands it. In this sense the perceptual fault line may also extend to the jury, who in deciding upon what evidence to accept will obviously apply their own norms which again may vary from those of Mr Enright.

Boundaries of Legal Narrative: The accounts given by the parties may be true different accounts of the same events. The facts of the case do not necessarily conflict. For example, it may have looked like Mr Enright was leaving the back room, despite the fact that he just happened to be standing in front of the door in a certain way. Mr Enright, in moving closer to the front-door, also may have looked like he was attempting to escape, despite having no inclination to do so.

Mainstream Stories: The prosecution are telling mainstream stories. They suggest that Mr Enright took his bike to the premises as a getaway vehicle and that he had no intention of looking for work. They claim that producing the letter was simply a clever "plan B" implemented once the burglary had gone awry. They say that signs of construction work were not apparent and the noises Mr Enright heard were fictional, including the invitation to come in. The counsel for prosecution (a white, middle-class male) invites the jury to look at abstract notions of truth. To consider who was a more reliable witness, Mr Z or Mr Enright, in one sense encouraging the jury to apply stereotypes. He invites the jury to consider whether the average person, would have entered a house in these circumstance and concludes that as they would not have, Mr Enright must have entered with the sole purpose of stealing. The impact this had was that it caused the jury to doubt Mr Enright's intentions, despite his story, because his norms did not align with the abstract paragon.

Counter Stories: The defence are telling counter stories. They suggest that Mr Enright did hear some noises, although he cannot be sure on reflection that they were coming from within the house. Counsel for defence (a white, middle-class female) invites the jury to take a more subjective approach to the evidence. She says "put yourself in his shoes". She says they should think that the method of looking for work was legitimate on the basis that he did not have

a CIS card and to think that the signs of building work in front of the house, although not prominent to some, would have been prominent for Mr Enright as he was particularly "desperate" [this word was stressed]. She also asked the jury to consider whether Mr Enright was in fact the criminal mastermind that the prosecution suggested he was, alluding, as contradictions, to his (limited) intelligence and readiness to present the Job Centre letter. The effect this had was to legitimise Mr Enright's actions and to therefore explain his behaviour and validate his version of events.

The Most Convincing Story: The defence's story seemed the most convincing, this may have been because of the combination of subjective and objective arguments. Subjectively Mr Enright did not seem sophisticated enough to lie consistently. His actions when taken in context seemed reasonable in relation to his social position. Objectively his story was affirmed by the facts that neither Mr nor Mrs Z saw him in any area of the house other than the downstairs landing and he also called the police for assistance himself.

I suppose that I might have reached a different conclusion if arguments of subjectivity had not been raised. Products of objectivity, such as the reasonable man standard assume that everyone has the same basic qualities. Personally, I feel that Mr Enright's intelligence is a significant factor here. If judged objectively everyone is deemed to have the same basic standard of intelligence, which prescribes various forms of behaviour. I believe it was apparent that Mr Enright did not conform to this standard and he was clearly frustrated with himself for not being able to explain his actions better. In fact in court when asked why he had not mentioned the "drilling sound" during the police interview, he said that he was frustrated and forgot. He also said that he was confused as he thought that once the police came they would understand his story. In short, his inability to transform his version of events into appropriate legal language was very apparent.

Counter storytelling: Counter storytelling is extremely valuable in a practical legal setting. The experiential values that someone holds shapes not only their understanding of the world, but influences the course of action that they take in relation to that understanding. Mr Enright was objectively a dishonest and adept criminal, however subjectively he was a simple, imprudent man doing what he thought best in relation to his problems. Counter storytelling allows for the legitimisation of outsider views and it contextualises the actions of these people so that they can be understood in a formal legal environment.

Counter storytelling, particularly in the context of a criminal trial decided by jury, can widen the boundaries of legal narrative. Such cases hang on what evidence 12 ordinary people consider both relevant and honest. If by explaining the norms and values of the outsider one can encourage those people to imagine that inconsistency does not necessarily mean that someone is lying, then you can completely change the outcome of a case. In short, it can divert the jury from the notion of abstract justice and consistent stories. Furthermore, by breaking down the idea that "they" inexplicably act differently

to “us”, the jury are encouraged to think more inclusively and consider what they would have done if they had the same social characteristics and problems.

It can be seen though that there are some areas of the law where counter storytelling would be redundant. In negligence, the law is so firmly based on objective standards of justice that it would be impossible to convince a judge that there are other stories that deserve to be heard.

Word Count:1,499