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# ENDING MALE PRIVILEGE: BEYOND THE REASONABLE WOMAN

Stephanie M. Wildman\*

A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN. By *Caroline A. Forell* and *Donna M. Matthews*. New York: New York University Press. 2000. Pp. xxii, 260. \$35.

*A Law of Her Own: The Reasonable Woman as a Measure of Man* by Caroline A. Forell<sup>1</sup> and Donna M. Matthews<sup>2</sup> aspires to provide a solution for an enigmatic jurisprudential problem — the systemic failure of the legal order to recognize and to redress the injuries that women experience. Feminist scholars have agreed that, for women, the legal separation of public and private spheres often insulates from legal review behavior that harms women.<sup>3</sup> But even in the so-called public sphere, women suffer harms that remain invisible and unnamed.<sup>4</sup> The authors identify four legal arenas in which the “spectrum of violence and disregard of women is most evident and problematic” (p. xviii): the areas of sexual harassment, stalking, domestic homicide, and rape. To make the legal system responsive to women’s experiences the authors propose applying a “‘reasonable woman’ standard to the conduct of men in certain legal settings — where men’s and women’s life experiences and views on sex and aggression diverge and women are overwhelmingly the injured parties” (p. xvii). The authors argue that by applying the standard of a reasonable woman in each of these areas — that is by making woman the measure of man — the legal system will be forced to recognize women’s perspectives. They define the reasonable woman as one who wants and demands “respect, personal autonomy, agency, and bodily integrity” (p. xix), and they elaborate that “behavior violating these aspects of woman’s humanity is legally unacceptable” (p. xix).

The idea of recognizing the harms women suffer and eliciting regard, respect, and empathy for women in these situations is an important and appealing goal.<sup>5</sup> The use of a reasonable woman standard will not be as effective a means of achieving this goal as actually naming the harms that women suffer and revealing the patriarchal system that maintains the invisibility of those harms. Furthermore, Forell and Matthews’ proposal to use a reasonable woman standard implicates two fundamental problems that have plagued feminist thinkers: the “sameness/difference” equality problem and the essentialism problem. Although Forell and Matthews acknowledge these issues,<sup>6</sup> their solution — looking to a reasonable woman standard — does not adequately address them because it fails to name the power dynamic that initially creates the problems. Using a reasonable woman standard implicitly accepts the fundamental notion of legal liberalism that all members of

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\* Copyright © 2000, Stephanie M. Wildman, Visiting Professor of Law and Director, Center for Social Justice at Boalt Hall, University of California at Berkeley; Professor of Law, Emerita, University of San Francisco School of Law. A.B. 1970; J.D. 1973, Stanford University. — Ed. Thanks to Margalynne Armstrong, Donna Coker, Bryan Ford, Angela Harris, Martha Mahoney, Lee Ryan, and Catharine Wells for helpful insights and continued support of my work. Special appreciation to Sonya Smallets for outstanding research assistance and commentary.

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<sup>3</sup> See *infra* note 31 and accompanying text.

<sup>4</sup> One recent exception to the definition of harms to women as private and immune from legal intervention has been the development of the law of sexual harassment. Federal law now recognizes workplace behavior, long accepted by women as “the way things are,” as a violation of federal civil rights. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). See also, CATHARINE A. MACKINNON, *THE SEXUAL HARASSMENT OF WORKING WOMEN* (1979); Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517 (1993). Recent interesting tort scholarship has discussed the gendered nature of harm in relation to torts like the negligent infliction of emotional distress, developed to remedy harms women suffered. See Martha Chamallas & Linda Kerber, *Women, Mothers and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990); see also *THE PASSIONS OF LAW* (Susan A. Bandes ed., 1999) (considering the “role that emotions play, don’t play, and ought to play in the practice and conception of law and justice.”).

<sup>5</sup> The idea of the reasonable woman having a different view of facts and culpability, particularly in the criminal context, received popular attention in Susan Glaspell’s short story, *A Jury of her Peers*. The story describes a woman arrested following the death of her husband. The male law enforcement officers see a clear-cut case of homicide. The women who accompany the officers to the crime scene see a darker tale of domestic hardship and abuse. Their identification with the perspective of the arrested woman defendant underlines the critical importance of perspective in evaluating human actions — the need for a jury of her peers. See Marina Angel, *Criminal Law and Women: Giving the Abused Woman Who Kills A Jury of Her Peers Who Appreciate Trifles*, 33 AM. CRIM. L. REV. 229 (1996) (discussing Glaspell’s story as a vehicle for teaching and the idea of diverse perspectives it raises); Patricia L. Bryan, *Stories in Fiction and in Fact: Susan Glaspell’s A Jury of Her Peers and the 1901 Murder Trial of Margaret Hossack*, 49 STAN. L. REV. 1293 (1997) (addressing the biases and assumptions that shape the narratives told in the courtroom).

<sup>6</sup> Chapter 2, “The Meaning of Equality,” discusses these subjects. Pp. 8-19.

society are equally-situated, autonomous actors, albeit with different perspectives. By failing to address the systems of privilege that maintain the sex-based, gendered status quo, the reasonable woman standard cannot go far enough to ensure that the legal system will recognize women's harms.<sup>7</sup>

## I. THE ARGUMENT IN FAVOR OF A REASONABLE WOMAN STANDARD

Forell and Matthews correctly identify the areas of sexual harassment, stalking, domestic homicide, and rape as spheres in which harms against women have long been ignored and are often still misunderstood by the legal system. One of the strengths of this book is the authors' ability to powerfully explain and provide examples of the problems women face. The legal system is not responsive to women's life experience in these four highlighted areas. Forell and Matthews believe that the use of a reasonable woman standard will serve to correct that systemic nonresponsiveness.<sup>8</sup>

The authors begin in the area of sexual harassment, by reviewing the evolution of legal doctrine and relating the important educational function of the Clarence Thomas Senate confirmation hearings, in which Anita Hill described the work environment created by the Supreme Court nominee (p. 24). The authors next report a series of cases and urge that the application of the reasonable woman standard would result in the correct decision. According to the authors, the proper result could be achieved by ensuring that a court would look at the workplace conduct through the eyes of the woman employee complaining of the harassment.<sup>9</sup> The many cases in which courts and the public do not recognize the sexual harassment that women experience at work as a harm show that the authors are correct in identifying this area as one in which experiences differ and a woman's perspective is often not regarded as legitimate.

Stalking is another area in which the legal system has only relatively recently recognized a specific legal harm.<sup>10</sup> As the authors explain: "The law's inaction on stalking exemplifies how the male-biased legal system

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<sup>7</sup>Another debate in feminist theory concerns the use of the term "gender" or the term "sex" to describe disadvantaging treatment of women. "Gender" advocates emphasize the cultural conditioning surrounding women's oppression. Those who urge the use of "sex" often highlight the role of biological difference. This essay uses "sex" and "gender" interchangeably because both biology and culture contribute to the system of power that privileges maleness. For a more complete discussion of the "sex" and "gender" debate, see Stephanie Riger, *Rethinking the Distinction Between Sex and Gender*, in POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER 232 (Leslie Bender & Daan Braveman eds., 1995).

<sup>8</sup>Several landmark articles have discussed the utility of a reasonable woman standard, while not advocating its adoption. See Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989) (arguing that sexual harassment claims should be cognizable as long as the harasser engaged in sexually oriented behavior and the victim experienced feelings of coercion or devaluation); Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and Practice*, 77 CORNELL L. REV. 1398 (1992) (rejecting the reasonable woman standard as not able to address the diversity of women's experiences); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990) (rejecting the reasonable woman standard, as well as the reasonable person standard, as relying on false ideas about objectivity and social consensus with the effect of supporting the status quo of subordination).

<sup>9</sup>For articles advocating the use of the reasonable woman standard in sexual harassment cases, see Deborah S. Brenneman, *From A Woman's Point of View: The Use of the Reasonable Woman Standard in Sexual Harassment Cases*, 60 U. CIN. L. REV. 1281, 1305-06 (1992) (urging that a reasonable woman standard is necessary in order to adequately address the problem of sexual harassment since men and women have divergent views on acceptable workplace behavior); Lynn Dennison, *An Argument for the Reasonable Woman Standard in Hostile Environment Claims*, 54 OHIO ST. L.J. 473, 495-96 (1993) (arguing that the reasonable woman standard should be used to evaluate sexual harassment claims because it recognizes and gives validity to more diversity of perspective than the reasonable person standard does); Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. ILL. L. REV. 769, 776 (contending that the reasonable woman standard should be used to evaluate the defendant's conduct in civil cases, including sexual harassment, in which "the perceptions of men and women differ as the existence and seriousness of the harmful conduct"); Elizabeth A. Glidden, *The Emergence of the Reasonable Woman in Combating Hostile Environment Sexual Harassment*, 77 IOWA L. REV. 1825, 1829 (1992) (advocating the adoption of a reasonable woman standard in order to combat sexual harassment, particularly as of means of promoting "greater employer consciousness in discovering and rectifying sexual harassment problems"); David I. Pinkston, *Redeeming Objectivity: The Case for the Reasonable Woman Standard in Hostile Environment Claims*, 1993 B.Y.U. L. REV. 363, 364 (advocating the reasonable woman standard because it "more fully achieves the purposes of Title VII by better protecting female employees, reducing sexual harassment, and ensuring an objective, fair standard upon which employers and employees can rely"). *But see*, Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 454 (1997) (urging that "reasonableness cannot anchor sexual harassment law"); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 750 (1997) (contending the reasonable woman standard resolves sex-based bias at the price of enforcing gender stereotypes).

<sup>10</sup>In 1990, California became the first state to make stalking a crime. See p. 126. The authors' discussion here illustrates one difficulty in using this book. This writer would be the first to object to the culture of legal writing that relegates its most salient points to footnotes, such as the infamous note 20 in *Geduldig v. Aiello*, 417 U.S. 484, 497 (1974), which says treating individuals differently on account of pregnancy is not sex discrimination, or the well-known *Carolene Products* footnote, emphasizing the protection of "discrete and insular minorities," 304 U.S. 144, 153 n.4 (1938). Nonetheless, the lack of footnotes in this book is distracting for the legal researcher, who

values the male stalkers' freedom of action and speech over the female targets' security and emotional well-being" (p. 126). Deploring the use of stalking as a scenario for humor in recent films like *There's Something About Mary*, Forell and Matthews emphasize that stalking is far from flattering or fun (p. 128). The authors perceptively explain that stalking is part of a pattern of gendered violence against women.<sup>11</sup> Here again, the authors urge that use of the standard of a reasonable woman will ensure that stalkers will be prosecuted.<sup>12</sup>

Addressing the issue of domestic homicide, Forell and Matthews recognize that these crimes involve men trying to control women and "women struggl[ing] to resist coercion and maintain their choices."<sup>13</sup> This characterization of domestic homicide embodies an implicit hierarchy in which men are the more powerful actors. Women are not the equal and independent actors that liberal legal ideology posits; women seek to resist men's efforts at control in a context in which men are more powerful. As the authors explain: "For men, the law generally treats violence against an intimate as *more* permissible than violence against an acquaintance or a stranger" (p. 163). Many women are simply not safe at home. When a woman reacts to the violence perpetrated by an intimate, the law often blames her, sympathizing with the man (p. 163). The authors criticize the law of provocation, which mitigates a first or second degree murder charge,<sup>14</sup> and urge applying the standard of behavior of a reasonable woman to the male killer's behavior. They contend that asking whether a reasonable woman would have "become enraged, lost control, and killed . . . would drastically limit legally condoned domestic violence and passion/provocation homicide" (p. 172). The authors also outline the problems with the traditional law of self-defense faced by battered women who kill. Here, however, improvement is slowly showing, and the authors acknowledge that in some jurisdictions "the legal system is starting to get it right" by accepting the serious implications of domestic violence.<sup>15</sup>

In the area of rape, Forell and Matthews review the long-standing stereotypes that female rape victims must combat: "women want to be seduced and to have their verbal and physical resistance overcome; women's behavior and clothing indicate willingness to engage in sexual intercourse; and women don't tell the

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would benefit from having a citation to the stalking statute. The lay reader, however, is unlikely to seek the statute and may well appreciate the flow of the text without footnotes.

<sup>11</sup>As for its potential application to legal studies, this stalking chapter could provide a useful primer on the underlying gender issues for a torts or criminal law course. Many professors leave examination of gendered harms, such as stalking, out of their courses in the interest of "bar coverage." See Joan Howarth, Remarks at the Society of American Law Teacher's Robert Cover Study Group, AALS annual meeting, Washington, D.C. (Jan. 6, 2000). One response to this problem has been to urge bar examiners to test in these subject areas. Texas and Florida have included questions on domestic violence on their state bar examinations. See Remarks of Sarah M. Buel (University of Texas School of Law), ABA Conference on Domestic Violence, Berkeley, California (Feb. 18, 2000). Inclusion of gendered harm is important, but it must not be done in a sensationalized manner that undermines the test-taking ability of bar applicants who have had personal experience with these issues. See, for example, the discussion of law school examinations that stereotype and generate trauma in PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 80-94* (1991).

<sup>12</sup>On the adoption of the reasonable woman standard in the area of stalking, see Lisa Nolen Birmingham, Note, *Closing the Loophole: Vermont's Legislative Response to Stalking*, 18 Vt. L. REV. 477, 521-23 (1994) (arguing that courts applying anti-stalking statutes should use a reasonable woman standard when determining whether the stalker's conduct is sufficiently severe to violate the law).

<sup>13</sup>P. 157 (quoting R. Emerson Dobash & Russell P. Dobash, *Violence against Women*, in GENDER VIOLENCE: INTERDISCIPLINARY PERSPECTIVES (Laura L. O'Toole & Jessica R. Schiffman eds., 1997)).

<sup>14</sup>The following California jury instruction explains how provocation serves to mitigate a murder charge:

CALJIC 8.42 SUDDEN QUARREL OR HEAT OF PASSION AND PROVOCATION EXPLAINED (PEN. CODE, § 192, SUBD. (A))

To reduce an intentional felonious homicide from the offense of murder to manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of the character and degree as naturally would excite and arouse the passion, and the assailant must act under the influence of that sudden quarrel or heat of passion.

The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up [his] [her] own standard of conduct and to justify or excuse [himself] [herself] because [his] [her] passions were aroused unless the circumstances in which the defendant was placed and the facts that confronted [him] [her] were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation. [Legally adequate provocation may occur in a short, or over a considerable, period of time.]

The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from passion rather than from judgment.

If there was provocation, [whether of short or long duration,] but of a nature not normally sufficient to arouse passion, or if sufficient time elapsed between the provocation and the fatal blow for passion to subside and reason to return, and if an unlawful killing of a human being followed the provocation and had all the elements of murder, as I have defined it, the mere fact of slight or remote provocation will not reduce the offense to manslaughter.

1 THE COMMITTEE ON STANDARD JURY INSTRUCTIONS, CRIMINAL, OF THE SUPERIOR COURT OF LOS ANGELES COUNTY, CALIFORNIA, CALIFORNIA JURY INSTRUCTIONS — CRIMINAL § 842 (6th ed. 1996).

<sup>15</sup>P. 214. For a discussion of the reasonable woman standard in the domestic homicide/self-defense area, see Holly Maguigan, *Battered Woman and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379 (1991) (arguing that existing criminal doctrine can accommodate the self-defense claims of women who kill their abusers, but it is being misapplied by judges). For an article urging the adoption of the standard, see Kim Lane Scheppelle, *The Reasonable Woman*, THE RESPONSIVE COMMUNITY, Fall 1991, at 36 (advocating the adoption of a separate reasonableness standard for women who kill their abusers).

truth about sex” (pp. 222-23). In this male-defined world in which “no” does not mean “no,” a woman’s consent to sexual intercourse serves as a defense to a charge of rape. The authors acknowledge a debt to Susan Estrich’s landmark work on rape law’s validation of the male perspective, particularly in the field of acquaintance rape.<sup>16</sup> Catharine MacKinnon, discussing the prevalence of unprosecuted rapes and acquittals in cases in which rape is charged, has taken this criticism a step further, explaining that under this legal regime rape is effectively allowed.<sup>17</sup> Forell and Matthews urge the reasonable woman standard as the remedy, holding men “to the standard of how women would like men to behave.”<sup>18</sup>

Having explored the inadequacies of the legal system in these four areas that affect women’s lives, Forell and Matthews offer a self-proclaimed “radical” solution (p. 241). In an effort to remedy these grave inadequacies and to compel the legal system to take seriously the harms that women suffer, they propose applying a “reasonable woman” standard to men’s conduct in these situations. Where men’s and women’s life experiences and views are so different and it is women who are “overwhelmingly the injured parties” (p. xvii), the authors reason that this “deliberate use of the reasonable woman standard in areas involving sex, sexism, and aggression, with careful explanation of what the standard means, will elicit greater empathy for women’s experiences from society in general and from legal decision-makers in particular” (p. xix). Forell and Matthews define a reasonable woman as someone requiring “respect, personal autonomy, agency, and bodily integrity” (p. xix). According to the authors:

a reasonable woman would be more likely to experience pornography and degrading treatment in the workplace as sexual harassment and consider no to mean no when sex is involved. She would also likely view killing a domestic partner who leaves or gets involved with someone else as murder and killing one’s batterer out of fear of severe injury or death as self-defense. [p. 18]

## II. THE REASONABLE WOMAN FACING SEXUAL HARASSMENT AND STALKING

In the field of sexual harassment the authors describe a series of cases involving the open discussion of graphic sexual stories,<sup>19</sup> display of pornographic pictures,<sup>20</sup> and prevalence of pin-up calendars.<sup>21</sup> Relating the facts in *Robinson v. Jacksonville Shipyards*,<sup>22</sup> the authors explain:

[t]hese sexually explicit and degrading images included “a picture of a woman’s pubic area with a meat spatula pressed on it, observed on a wall next to the sheetmetal shop”; “a picture of a nude Black woman, pubic area exposed to reveal her labia, seen in a public locker room”; “drawings and graffiti on the walls including a drawing depicting a frontal view of a nude female torso with the words ‘USDA Choice’ written on it . . . in an area where Robinson was assigned to work”; and “a dart board with a drawing of a woman’s breast with her nipple as the bull’s eye.” [p. 45]

Surely this is conduct that a reasonable man *or* woman might find offensive in a work environment. The employer conducted a defense suggesting that the female plaintiff was “extrasensitive about sexually offensive conduct” (p. 54). The employer further presented testimony from a female employee who said “pictorial displays of naked women did not offend her, and she suggested that Robinson ‘was spending too much time attending to the pictures and not enough time attending to her job’ ” (p. 54). This testimony by a female co-employee demonstrates the difficulty with using a reasonable woman standard; the employer urges that this woman who is not upset by her coworkers’ behavior is the reasonable one. The authors explain that this woman undoubtedly wanted to keep her “high-paying job” (p. 54) and therefore denied the “negative effects of the hostile environment” (p. 54).

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<sup>16</sup>. See pp. 223-24 (referring to SUSAN ESTRICH, *REAL RAPE* (1987) and Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986)).

<sup>17</sup>. See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 145-46 (1989). MacKinnon observes that “the systemic failure of the state to enforce the rape law effectively or at all excludes women from equal access to justice.” *Id.* at 245-46.

<sup>18</sup>. P. 223; see also Mary Ruffolo Rauch, *Rape — From A Woman’s Perspective*, 82 ILL. B.J. 614, 618 (1994) (arguing that courts apply a reasonable woman standard when determining if a man used force or the threat of force to coerce a woman into having sex with him). But see Catharine Pierce Wells, *Date Rape and the Law: Another Feminist View*, in *DATE RAPE: FEMINISM, PHILOSOPHY, AND THE LAW* 41 (Leslie Francis ed., 1996) (contending that adopting a woman’s point of view forces patterns of passivity and noncommunication that are the essence of victimhood).

<sup>19</sup>. See pp. 24-25 (using the Hill/Thomas confirmation hearings as an example).

<sup>20</sup>. P. 35; see also *Rabidue v. Osceola*, 805 F. 2d 611, 615, 623-24 (6th Cir. 1986) (holding that a reasonable person would not find that sexually oriented posters in the workplace create a hostile work environment).

<sup>21</sup>. See *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1493-98 (M.D. Fla. 1991).

<sup>22</sup>. *Id.*

The authors correctly explain that *Robinson* highlights how differently men and women may view their work environments, but here even women perceived the environment differently from each other. Forell and Matthews assert that the use of the reasonable woman standard in this case led to the correct result — the plaintiff prevailed on her hostile work environment claim. But it is unclear, where women themselves disagree, why the reasonable woman standard would always (or even often) lead to the vindication of women who complain about sexual harassment. Even the successful *Robinson* plaintiff was denied monetary damages by the court, which did afford her injunctive relief.

In the area of stalking, Forell and Matthews urge that a reasonable woman standard should be applied to the stalker's conduct to ensure that the legal determination as to whether the stalker's behavior merits legal intervention will reflect women's notions of fear, not men's. The authors explain that attitudes toward stalking are gendered, that "this kind of conduct rarely happens to men, and [that] when it does, it's usually annoying, not terrifying" (p. 126). Most state statutes require as a threshold for legal intervention that the stalker's behavior pose a "credible threat" of harm.<sup>23</sup> Forell and Matthews believe that, by applying the reasonable woman standard and asking whether the conduct would make a reasonable woman fearful, the legal system will ensure that the stalker's behavior is evaluated from the perspective of those individuals the law seeks to protect. "[R]easonable women are likely to experience fear in situations where reasonable men would not" (p. 133). The authors elaborate: "It is reasonable for a woman to be frightened when she experiences repeated and unwelcome visual, verbal, or written contact that indicates sexual interest or anger at rejection. Because, in the context of stalking, fear is gendered, stalking statutes need to explicitly take this into account" (p. 135). Ironically, the author's critique of stalking statutes' failure to value expressly a female perspective demonstrates why a reasonable woman standard is not the best method for achieving the goal of recognizing the harm women suffer. Instead of drafting statutes using vague language of reasonableness, legislatures should name the conduct that is objectionable.<sup>24</sup> Conduct that induces fear in a reasonable woman, "repeated and unwelcome visual, verbal, or written contact that indicates sexual interest or anger at rejection" (p. 135), could be targeted directly by lawmakers without a need to resort to the vagaries of reasonableness, gendered or otherwise.

### III. THE SYSTEM OF MALE PRIVILEGE

The conduct described as stalking and the notion that women in the workplace are sexual objects both result directly from a system of male privilege. Systems of privilege are "elusive and fugitive,"<sup>25</sup> deriving their power from their very invisibility. Privilege defines the societal norm and measure for us all,<sup>26</sup> yet, because each system is hard to see, and because systems of privilege interact to reinforce themselves, the power of privilege remains difficult to erode. MacKinnon offers perhaps the most complete description of the system of male privilege that defines vital aspects of American life from a male point of view:

Men's physiology defines most sports, their health needs largely define insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their military service defines citizenship, their presence defines family, their inability to get along with each other — their wars and rulerships — define history, their image defines god, and their genitals define sex.<sup>27</sup>

MacKinnon's examples articulate the male tilt that is present in seemingly neutral ideas and words that define society as we know it.<sup>28</sup> Rarely do we question "the way things are."<sup>29</sup>

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<sup>23</sup>P. 129. For examples of stalking statutes, see Robert P. Faulkner & Douglas H. Hsiao, *And Where You Go I'll Follow: The Constitutionality of Antistalking Laws and Proposed Model Legislation*, 31 HARV. J. ON LEGIS. 1, 2 & n.3 (1994) (reporting that 43 states have stalking statutes).

<sup>24</sup>See *id.* at 52 (proposing model anti-stalking legislation). While this proposed legislation uses "reasonableness" language, it also details objectionable conduct. See *id.*

<sup>25</sup>Stephanie M. Wildman with Adrienne D. Davis, *Making Systems of Privilege Visible*, in STEPHANIE M. WILDMAN WITH CONTRIBUTIONS BY MARGALYNNE ARMSTRONG, ADRIENNE D. DAVIS & TRINA GRILLO, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* 7, 17 (1996) (citing Peggy McIntosh's classic description of the system of white privilege).

<sup>26</sup>See *id.* at 15.

<sup>27</sup>CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 224 (1989).

<sup>28</sup>See *id.*; see also Stephanie M. Wildman, *Privilege in the Workplace — The Missing Element in Antidiscrimination Law*, in *PRIVILEGE REVEALED*, *supra* note 25, at 25-30 (discussing the normalization of male privilege in the workplace).

<sup>29</sup>Wildman with Davis, *supra* note 25, at 17 ("Privilege is not visible to its holder; it is merely there, a part of the world, a way of life, simply the way things are.").

Male privilege and entitlement, which derive from early notions of women as the property of their fathers and husbands, remain as a vestige of that history in stalking behavior by men. The authors recognize that a connection exists between stalking, sexual harassment, and domestic homicide. They examine two sexual harassment cases that involved stalking (pp. 138-48) and cases where the stalking of former intimates resulted in homicide (pp. 149-54). Rather than relying on use of a reasonable woman standard, a privilege analysis names and recognizes that continuum of gendered violence. Advocates of the reasonable woman standard may reject a privilege analysis. Indeed, the authors might answer that because the legal system, and indeed society, is imbued in that system of male privilege, the male behaviors are not named or recognized as terrifying. The authors might urge that a reasonable woman standard is required to highlight a different view of these behaviors, which are ordinarily seen as the “way things are.” While it is true that those with privilege rarely recognize it as such,<sup>30</sup> the failure to identify and name privilege as systemic merely perpetuates its existence. Focusing on reasonable women and engaging in the debate over whether to use an ungendered or gendered “objective” standard to measure behavior steers the discussion away from the heart of the matter. Using a gendered standard may achieve some victories that combat systems of privilege, but it can only do so by indirection, leaving the system of male privilege intact.

#### IV. DOMESTIC VIOLENCE AND RAPE: OF REASONABLE WOMEN AND MALE PRIVILEGE

Domestic violence is another site at which law has permitted male privilege to be maintained through nonintervention in the domestic sphere — a sphere labeled as “private.” Leading feminist scholars<sup>31</sup> have documented the poverty of this public/private distinction, which leaves women unprotected in the so-called private realm. Forell and Matthews recognize that the interaction of the criminal law doctrines of self-defense<sup>32</sup> and heat of passion/provocation in the area of domestic homicide result in blaming female victims for causing their own death or holding them criminally responsible for the death of their attackers. They use examples from cases such as *United States v. Paul*,<sup>33</sup> which described the female victim as dying “during a fight with her husband.”<sup>34</sup> The authors correctly point out that this language, “died during a fight,” implies a fair fight that “unfortunately ended in accidental death” (p. 165). The authors claim that “[l]ack of respect for women’s well-being and autonomy underlies what is wrong with the current law of domestic homicide” (p. 168).

It is true that women’s well-being and autonomy are not respected by the legal system. And as the authors assert, “cultural norms and expectations” (p. 168) play a role in how legal doctrines are interpreted. But the authors’ phrasing the goal of their reasonable woman reform in terms of women’s autonomy belies their assertion that their proposal is a radical one. Liberal legalism posits that all members of the nation state are autonomous, equal, and independent actors. This reasonable woman language veils the systems of privilege preventing the realization of a legal system of equally situated members.<sup>35</sup> By focusing the discussion on reasonable behavior, the reasonable woman standard preserves the underlying hierarchical power dynamic and fails to name and unmask male privilege, while appearing to be a progressive reform.<sup>36</sup>

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<sup>30</sup>.See Wildman with Davis, *supra* note 25, at 17.

<sup>31</sup>.See Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991) (arguing that the denial of the prevalence of battering sustains and legitimates its power); see also LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* 288 (1988) (explaining how family violence has been historically and politically constructed: “Men’s violence against some women . . . reinforces all women’s subordination and all men’s dominance.”); Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992) (arguing that the public/private distinction suggests that there are natural categories for ordering society, masking political decisions about how to order society); Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665 (1990) (arguing that societal permission for battering and the failure to intervene in battering behavior are part of the violence); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) (designating spheres as private is a public decision with public consequences).

<sup>32</sup>.See Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOYOLA L.A. L. REV. 435, 442-450 (1981) (describing the development of the doctrines of self-defense and provocation in the law of homicide).

<sup>33</sup>.37 F.3d 496 (9th Cir. 1994). The authors discuss this case on page 165.

<sup>34</sup>.37 F.3d at 497.

<sup>35</sup>.See Stephanie M. Wildman, *Teaching and Learning toward Transformation — The Role of the Classroom in Noticing Privilege*, in *PRIVILEGE REVEALED*, *supra* note 25, at 161, 168-71 (describing how liberal legalism operates to mask the status quo of privilege).

<sup>36</sup>For an explanation of “preservation through transformation,” describing how basic power relations are recreated and maintained using new doctrinal forms, see Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

Applying the reasonable woman standard to rape law, Forell and Matthews urge “if a woman believes she was raped and a reasonable woman would have believed the intercourse was without consent, it was rape.”<sup>37</sup> They advocate:

The law should ask whether the defendant behaved like a person who believed he was engaged in consensual sexual activity and whether a reasonable woman would have behaved similarly. A reasonable woman would not use force, intimidation, or threats of force. A reasonable woman would not believe the sexual activity was consensual if her partner cried, said no, tried to leave, or otherwise resisted intercourse. . . . In fact, a reasonable woman would want affirmative evidence of consent. [p. 239]

The authors argue that asking these questions ensures a standard that “embodies respect for women’s autonomy, physical integrity and right to control their sexuality” (p. 240). But, here again, the authors have specified behaviors that exemplify criminal conduct, making the notion of reasonableness unnecessary. Only by making the implicit explicit and by naming the system of male privilege that governs rape law can the legal system begin *not* to privilege that male point of view. Challenging action committed with the presence of “force, intimidation, or threats of force” (p. 239) and questioning the anti-woman use of the consent defense in rape law will dismantle the system of male privilege that presumes women’s availability for sexual activity.

Recognizing the harms women suffer and eliciting empathy for women in these situations remain vital objectives. But a truly radical change would result from challenging cultural norms and expectations by changing the dominant idea of what conduct is acceptable and what behaviors are harmful to women. Martha Mahoney demonstrated this power of naming by identifying separation assault as “an assault that by its nature takes place over time,”<sup>38</sup> every time a woman tries to separate from her violent partner “before she finally kills her abuser.”<sup>39</sup> Finding the words to describe women’s experience, as Mahoney did, changed the face of the battered woman’s self-defense claim, clarifying the reality of the existence of imminent danger of death or great bodily harm. In bringing “the ghosts of dead women — women slain by their abusers — into court to stand beside the woman accused of killing an abusive spouse,”<sup>40</sup> Mahoney did not seek a reasonable woman standard (though arguably the battered woman’s behavior is also reasonable). Rather by naming the harm women faced — the separation assault — Mahoney addressed the power in the relationship and exposed the privilege given to men to perpetrate their abuse.

#### V. THE SAMENESS/DIFFERENCE EQUALITY PROBLEM AND THE REASONABLE WOMAN

Forell and Matthews’ proposal to use the reasonable woman as the measure of man is also problematic because it implicates two fundamental problems that have continued to plague feminist thinkers: the “sameness/difference” equality problem and the essentialism problem. The paradigm language that constitutionally protects the notion of equality appears in the Fourteenth Amendment, which provides in relevant part: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>41</sup> This language does not require a comparison mode. Yet equal protection jurisprudence has relied upon this comparison mode, comparing the treatment of women to men and maintaining the status quo that privileges men.<sup>42</sup> Early feminist litigation in the Supreme Court urged equal access to jobs and education by comparing women to men and asking the Court to treat both sexes in the same manner.<sup>43</sup> Thus the Court held that women could

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<sup>37</sup>P. 239. In this passage Forell and Matthews seem to concede that sexual conduct must involve heterosexual intercourse to be considered rape. Many state statutes have redefined the crime to include “penetration by objects,” so that rape may include other sexual behaviors beyond heterosexual intercourse. See, e.g., Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 JURIMETRICS J. 119 (1999) (describing changes in rape law during the last thirty years). Spohn explains:

[T]he Michigan statute, considered to be a model rape reform law, defines sexual penetration as “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal opening of another person’s body, but emission of semen not required.”

*Id.* at 122-23 (quoting MICH. COMP. LAWS ANN. § 750.520a (1991)).

<sup>38</sup>Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 83 (1991).

<sup>39</sup>*Id.*

<sup>40</sup>*Id.*

<sup>41</sup>U.S. CONST. amend. XIV, § 1.

<sup>42</sup>See Stephanie M. Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 265, 267-68 (1984) (urging that any “stigmatizing conduct which inhibits the full participation of women in society should be found unconstitutional under the equal protection clause,” without regard to the treatment of women in relation to men).

<sup>43</sup>See MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 47 (1999); Wildman, *supra* note 42.

be estate administrators,<sup>44</sup> receive military benefits for their spouses under federal law,<sup>45</sup> and purchase 3.2% beer.<sup>46</sup>

Soon, however, the “sameness/difference” equality problem surfaced in the debate within the feminist legal community surrounding the treatment of pregnancy.<sup>47</sup> In the 1980s feminist litigators sought “to articulate a feminist vision that went beyond identical treatment to men.”<sup>48</sup> But the theorizing of difference or accommodation or special treatment, as this feminist vision was alternately characterized,<sup>49</sup> produced a serious schism in the feminist legal community. Opponents of accommodation for women’s workplace needs feared creating stereotypes of women workers that would be used to keep women from the access only so recently won.<sup>50</sup>

MacKinnon elaborates upon the critique of the comparison mode prevalent in equality theory, explaining that two paths to equality are allowed to women.<sup>51</sup> Women must either “be the same as men” or “be different from men.”<sup>52</sup> MacKinnon continues:

Under the sameness standard, women are measured according to our correspondence with man, our equality judged by our proximity to his measure. Under the difference standard, we are measured according to our lack of correspondence with him, our womanhood judged by our distance from his measure. Gender neutrality is thus simply the male standard, and the special protection rule is simply the female standard, but do not be deceived: masculinity, or maleness, is the referent for both.<sup>53</sup>

Forell and Matthews acknowledge that a “reasonable woman standard intentionally highlights difference” (p. 9). Clearly conscious of this sameness/difference equality problem, Forell and Matthews seek by their subtitle, “The Reasonable Woman as a Measure of Man,” to remedy the problem of male normativity by making the reasonable woman the measure. But this linguistic exchange fails meaningfully to address systemic male privilege and, in fact, contributes to the liberal, legal notion that all citizens are full and equal participants in society. The Forell and Matthews solution to the sameness/difference debate — making woman the measure of man — contributes to the veiling of the system of male privilege. Women and men are not fungible halves of a gender category whose places can be simply exchanged. Even when their places are switched, so that women are the measure of men, femaleness still occupies a subordinate position in the prevalent gender hierarchy that privileges maleness. Dismantling that system involves more than flipping positions; this false notion of fungibility simply encourages the kind of liberal legalist thinking that veils the system of privilege.

## VI. THE ESSENTIALISM PROBLEM AND THE REASONABLE WOMAN

Forell and Matthews’ proposal also cannot resolve the “essentialism problem.” The essentialism problem in feminist theory refers to the difficulty in speaking accurately about “women” as if women fit some universal definition. While essentialism is a term with a number of meanings within feminist theory,<sup>54</sup> the term is often understood to mean that “overgeneralizations or unstated reference points implicitly attribute to all

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<sup>44</sup>.See *Reed v. Reed*, 404 U.S. 71, 76-77 (1971).

<sup>45</sup>.See *Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973).

<sup>46</sup>.See *Craig v. Boren*, 429 U.S. 190, 191-92, 210 (1976).

<sup>47</sup>.See CHAMALLAS, *supra* note 43, at 23, 26-27 (identifying the 1980s as marking the emergence of the “Difference Stage” in feminist legal theory). This debate between sameness and difference is also sometimes couched as equal treatment versus special treatment.

<sup>48</sup>.*Id.* at 47.

<sup>49</sup>.See, e.g., Linda Hamilton 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); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987).

<sup>50</sup>.See, e.g., Wendy W. Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984-1985).

<sup>51</sup>.See CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32 (1987); see also

Elizabeth M. Schneider, *Resistance to Equality*, 57 U. PITT. L. REV. 477, 492 (1996) (describing tension between equal treatment and special treatment as “especially problematic” in cases involving battered women as defendants).

<sup>52</sup>.MACKINNON, *supra* note 51, at 33.

<sup>53</sup>.*Id.* at 34.

<sup>54</sup>.Katharine Bartlett and Angela Harris summarize seven meanings for the term “essentialism,” including the assumption mentioned here, as well as “the applicability of Western feminism to other cultures,” the view that gender oppression is “the most ‘fundamental’ or ‘primary’ oppression,” “selecting out only one possible source of a woman’s identity — such as her gender, race, class, or sexual preference — and treating it as severable from the rest of her being,” treating women “as a self-explanatory category, often defined by biology.” Bartlett and Harris also note that the term “essentialism” implicates the problems of categorization and perspective. See KATHARINE T. BARTLETT & ANGELA P. HARRIS, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 1007-09 (2d ed. 1998).

members of a group the characteristics of a dominant subset of that group.”<sup>55</sup> As Katharine Bartlett and Angela Harris explain: “A common subject for critique is the unstated, sometimes unconscious assumption that for purposes of feminism, ‘women’ are white, middle class, heterosexual, able-bodied, and otherwise privileged.”<sup>56</sup> They ask whether it is possible to theorize about “women” without “indulging” this essentialist assumption. No discussion of gendered assumptions, whether using language of the reasonable woman or relying on an articulation of a system of male privilege, can escape the essentialism trap. Using essentialism strategically — trying to avoid its pitfalls while trying to dismantle systemic privilege — and remembering the connections between systems of privilege seem the best available approach offered by feminist theory.<sup>57</sup> As Harris explains elsewhere:

[F]eminist theorizing about “women” must . . . be strategic and contingent, focusing on relationships, not essences. . . . [W]omen will be able to acknowledge their differences without threatening feminism itself. In the process, as feminists begin to attack racism and classism and homophobia, feminism will change from being only about “women as women” (modified women need not apply), to being about all kinds of oppression based on seemingly inherent and unalterable characteristics. We need not wait for a unified theory of oppression; that theory can be feminism.<sup>58</sup>

The reasonable woman standard and a privilege analysis both require recognition of context, the best method for avoiding the essentialism trap.

As jurisprudential critiques, both the comparison mode, implicit in the sameness/difference debate about equality, and the essentialism problem ignore the systems of privilege that underlie the constructed identity categories. Whether one focuses on sex/gender and runs the risk of essentializing by omitting discussions of race, class, sexual orientation, and other identity categories or whether one focuses on equality by talking about woman as the measure of man or the measure of reasonableness, these conversations mask the systems of privilege. The categories embodied in each identity group do not exist on an equal plane in the social structure. Maleness is privileged over femaleness, heterosexuality over queerness, economic advantage over poverty, whiteness over nonwhiteness. The path out of the sameness/difference equality trap and the essentialism problem necessarily travels through a discussion of systems of privilege.

MacKinnon has said she has not seen any reasonable people, only reasonable men and reasonable women, reflecting the idea that our lived reality is gendered.<sup>59</sup> It is precisely this description of the different norms of reasonableness as having sexually divergent meanings that makes the reasonable woman standard problematic and unhelpful in achieving a vision of equality in which women are not subjugated actors. Forell and Matthews’ text is full of examples of male judges understanding a female plaintiff’s or defendant’s viewpoint and female judges who rule from a “male” perspective. Reifying a reasonable woman standard does not get us away from the problem of who is interpreting that standard. Rather than leave to chance the vagaries of such interpretation, a helpful legal standard would make explicit the context of systemic privilege in which the decision is being made. Such a standard might ask whether the decision fosters notions of women as full and equal participants in society, recognizing the systems of privilege that prevent the promise of equal protection of the laws from being kept?<sup>60</sup>

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<sup>55</sup>. *Id.* at 1007.

<sup>56</sup>. *Id.*

<sup>57</sup>. See Gayatri Chakravorty Spivak, *The Problem of Cultural Self-Representation*, in *THE POST-COLONIAL CRITIC: INTERVIEWS, STRATEGIES, DIALOGUES* 50, 51 (Sarah Harasym ed., 1990) (interview with Walter Adamson) (discussing the need to use essentialism strategically); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 612 (1990) (describing the need to be strategic in discussing the category “woman”); see also Wildman with Davis, *supra* note 25, at 23 (discussing the koosh ball metaphor for multiple identity strands).

<sup>58</sup>. Harris, *supra* note 57, at 612 (footnotes omitted).

<sup>59</sup>. See CATHARINE A. MACKINNON, *Sex and Violence*, in *FEMINISM UNMODIFIED*, *supra* note 51, at 85, 87 (“I don’t use the term *persons*, I guess, because I haven’t seen many lately.”). Women experience the world differently than men. This statement could be viewed as siding in the sameness/difference equality debate on the difference side. But entering that debate assumes a fundamental premise of legal liberalism, that everyone is an equal actor in the nation state. MacKinnon rejects this liberal legal view. Her description of gendered relations has been labeled “dominance theory” by several commentators. See, e.g., BARTLETT & HARRIS, *supra* note 54, at 487; MARY BECKER ET AL., *CASES AND MATERIALS IN FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* 68-81 (1994); CHAMALLAS, *supra* note 43, at 53-62. The essentialism problem shows women also experience the world differently from each other.

<sup>60</sup>. *Cf.* Wildman, *supra* note 42, at 304-07 (articulating a participatory perspective for equal protection jurisprudence, a precursor to a recognition of systems of privilege).

## VII. THE DIFFICULTY IN NAMING SYSTEMIC MALE PRIVILEGE

Two cases, *Soto v. Flores*<sup>61</sup> and *Taylor v. State*,<sup>62</sup> demonstrate the need to identify systemic male privilege and the difficulties women face in achieving full, equal societal participation. These cases, with their compelling facts, illustrate a particularly egregious form of male privilege, in which the mechanism of the state functions to reinforce women's subjugation.

### A. *Soto v. Flores*

In 1981 Flor Maria Soto married Angel Rodriguez ("Rafi").<sup>63</sup> Their daughter, Sally, was born in 1983, and their son, Chayanne, was born in 1988.<sup>64</sup> Rodriguez began abusing Soto emotionally and physically about one year into the marriage in incidents frequently connected to drinking.<sup>65</sup>

Rodriguez performed gardening and vehicle repair work for police officers at the local Palmer Police Station, where he was friendly with several officers.<sup>66</sup> The court explained that

Rodriguez visited the station almost daily. Many of the officers, when on patrol in the area, would visit the Rodriguez-Soto home for coffee or a drink. [Officer] Flores and Rodriguez were particularly friendly; about once a week, during his patrol rounds, Flores would stop by the house for an hour's visit.<sup>67</sup>

According to the court, during nine years of domestic violence "Soto had never sought help because she believed that the police would do nothing, because she had nowhere to go, and because she was afraid of Rodriguez."<sup>68</sup> During this time, he had threatened her with a gun and threatened to kill members of her family if she went to the police to report his abuse.

In spite of these fears, on April 17, 1991, Soto went with her mother and children to the police station to report a beating.<sup>69</sup> Officer Flores, who was on duty, summoned help, referring to Ms. Soto as "Rafi's wife," told Soto that "he himself had domestic violence problems" for which his wife wanted him jailed, and "urged Soto to patch things up with Rodriguez."<sup>70</sup> When the supervising officer arrived to take Soto's complaint, "[t]he door to the interview room remained open, and Flores listened to everything that was said . . ."<sup>71</sup>

These events took place within a society seeking to address domestic violence. In 1989 Puerto Rico had enacted a comprehensive anti-domestic violence law, the Domestic Abuse Prevention and Intervention Act, known popularly as "Law 54."<sup>72</sup> Law 54 directs officers to arrest the abuser in any case in which an officer has grounds to believe the law has been violated.<sup>73</sup> The law further requires officers to provide complainants with information about social services, offer transportation to a safe place, transcribe a written report, ensure confidentiality, and explicitly states that mediation or reconciliation efforts by police shall not substitute for arrest.<sup>74</sup> The regulations further state: "Domestic violence . . . frequently ends in intra-family homicide and it affects all the components of the family, including the children."<sup>75</sup>

As the court explained, even in the face of this comprehensive legal framework, at the conclusion of his interview with Soto, the supervising officer "took no action. [He] did not tell Soto about the availability of battered women's shelters or about procedures for obtaining an order of protection. Nor did he prepare a

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<sup>61</sup>103 F.3d 1056 (1st Cir. 1997).

<sup>62</sup>452 So. 2d 441 (Miss. 1984).

<sup>63</sup>.See *Soto*, 103 F.3d at 1058.

<sup>64</sup>.See *id.*

<sup>65</sup>.See *id.*

<sup>66</sup>.See *id.*

<sup>67</sup>.*Id.* at 1059.

<sup>68</sup>.*Id.*

<sup>69</sup>.See *id.*

<sup>70</sup>.*Id.*

<sup>71</sup>.*Id.*

<sup>72</sup>P.R. LAWS ANN. tit. 8, §§ 631-635, 638 (1996). See Jenny Rivera, *Puerto Rico's Domestic Violence Prevention and Intervention Law and the United States Violence Against Women Act of 1994: The Limitations of Legislative Responses*, 5 COLUM. J. GENDER & L. 78 (1995) (discussing Puerto Rico's Domestic Violence Prevention and Intervention Law (Ley 54 or Law 54)), for an in-depth analysis of the sections of this legislative scheme.

<sup>73</sup>.See *Soto*, 103 F.3d at 1060.

<sup>74</sup>.See *id.*

<sup>75</sup>.*Id.* (quoting regulations implementing Law 54 (alterations in original)).

domestic violence report.”<sup>76</sup> He did prepare an “Other Services Report,” “falsely indicat[ing] that Soto had visited the police solely for advice relating to child custody.”<sup>77</sup> Soto then returned to her mother’s house.

The officer who had conducted the interview discussed the complaint with his Sergeant. The Sergeant discussed it with Officer Flores, who stated that “Soto and her husband had marital problems because Rodriguez was an alcoholic.”<sup>78</sup> Flores told the Sergeant that he [Flores] would speak to Rodriguez.<sup>79</sup> Even though he knew that Rodriguez had threatened to commit murder if his wife went to the police, Flores told Rodriguez about Soto’s visit to the police station.<sup>80</sup>

In a series of encounters over the next four days, Rodriguez went to Soto’s mother’s house to find her, argued with Soto in a local business, took the children on a beach trip, and refused to return the children twice.<sup>81</sup> Finally on Sunday evening, because the children had school the next day, Soto went again to try to retrieve the children from her husband.<sup>82</sup> As she stood on the lawn:

Soto heard both children tell Rodriguez that she had arrived. Sally shouted, “Run, Mommy, please run!” Rodriguez then shot his son in the forehead. Soto heard Sally say to her father, “Daddy, no, Daddy, no.” Rodriguez then shot Sally through her mouth. Soto heard a third shot. Rodriguez had killed himself.<sup>83</sup>

Soto filed suit alleging a violation of section 1983<sup>84</sup> which requires conduct under color of state law that denies rights secured by the Constitution or federal law.<sup>85</sup> Soto alleged an equal protection violation claiming: “[d]efendants have a custom, policy and practice of treating complaints from, or on behalf of, women threatened with violence in domestic disputes differently from other complaints of violence. Defendants have discriminated on the basis of the sex of the complaining victim.”<sup>86</sup> The First Circuit followed *Watson v. City of Kansas City*,<sup>87</sup> requiring a plaintiff seeking to survive a summary judgment motion to:

proffer sufficient evidence that would allow a reasonable jury to infer that it is the policy or custom of the police to provide less protection to victims of domestic violence than to other victims of violence, that discrimination against women was a motivating factor, and that the plaintiff was injured by the policy or custom.<sup>88</sup>

The court conceded that Soto had introduced enough evidence to raise an issue as to whether the police had a custom or policy of providing less protection to domestic violence victims than to other crime victims. But the court concluded that Soto had failed to show discriminatory purpose.<sup>89</sup> The court seemed to think that Flores’ actions in talking to Rodriguez about his family situation and Soto’s complaint did not derive from a sex-based motive, but instead from Flores’ personal belief that “his friendship could provide a basis to resolve the matter.”<sup>90</sup> The court concluded by saying that even though it found against Ms. Soto, “we do not of course condone the actions and failures of duties we have described. The deaths of children, which may have followed from risks arguably created by the actions of public officials, are very serious matters.”<sup>91</sup>

*Soto* provides another shocking illustration of gendered views of reality. This setting, in which the court dismisses a man’s friendship network as personal, separate, and distinct from sex discrimination or discriminatory purpose, illustrates the kind of scenario that most concerns Forell and Matthews. These “settings where men’s and women’s life experiences and views on sex and aggression diverge” (p. xvii) and where the children, Soto, and her relatives are “overwhelmingly the injured parties” (p. xvii) are sites where male privi-

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<sup>76</sup>. *Id.*

<sup>77</sup>. *Id.*

<sup>78</sup>. *Id.*

<sup>79</sup>. *See id.*

<sup>80</sup>. *See id.*

<sup>81</sup>. *See id.* at 1060-61.

<sup>82</sup>. *See id.* at 1061.

<sup>83</sup>. *Id.*

<sup>84</sup>. 42 U.S.C. § 1983 (1994) provides redress for those injured by actions committed “under color of” state law which deprive the victim of a right, privilege, or immunity protected by the U.S. Constitution or federal statutes. *See generally* *Monroe v. Pape*, 365 U.S. 167, 171-87 (1961).

<sup>85</sup>. *See Soto*, 103 F.3d at 1061.

<sup>86</sup>. *Id.* at 1065.

<sup>87</sup>. 857 F.2d 690 (10th Cir. 1988).

<sup>88</sup>. *Soto*, 103 F.3d at 1066 (quoting *Ricketts v. City of Columbia*, 36 F.3d 775, 779 (8th Cir. 1994) (internal quotation marks omitted) (citations omitted)).

<sup>89</sup>. *See id.* at 1072.

<sup>90</sup>. *Id.* at 1070.

<sup>91</sup>. *Id.* at 1072.

lege is contested. Forell and Matthews urge the reasonable woman standard as a solution to bring women's perspectives to the fore. Would a "reasonable jury" with a woman's perspective find the requisite intent to discriminate against women as a motivating factor?<sup>92</sup> Would a judge with the perspective of a reasonable woman find that intent?

Reasonable men or women might well find discriminatory intent on these facts. The author of the *Soto* opinion, Judge Sandra Lynch,<sup>93</sup> however, found no discriminatory intent as a matter of law. Asking her to examine the question of discriminatory intent from the perspective of a reasonable woman seeking autonomy seems redundant. As a judicial nominee of a Democratic president, she is a likely candidate for possessing views that coincide with a reasonable woman. In her own career she has sought to combat gender bias.<sup>94</sup> Yet her life experiences did not lead to a finding of sex discrimination in this case.

Could a privilege analysis help? If equal protection means not maintaining male privilege and ensuring women can be full societal participants, then *Soto's* right to equal protection was violated. These male actors are not simply private men, buddies getting together to complain about women and the domestic violence act. They are also police officers, the representatives of the state, and they act in that capacity to undermine the law and maintain male privilege. Naming the harm Ms. *Soto* suffered by the police refusal to take her claim seriously or to take Law 54 seriously, despite its language directed at such violent situations, confronts a system of state permission for domestic abuse. The gendered nature of the harm is apparent and systemic, not accidental.

### B. Taylor v. State

Mary Alice Taylor is serving a life sentence in Mississippi after being tried and convicted of murder. Ms. Taylor was fourteen years old when she shot and killed Mrs. Maple Markham. Stating that the trial provided the jury with a detailed description of Ms. Taylor's life leading up to the homicide, the Mississippi Supreme Court offered the following description of the record:

Mary, an unwed teenaged mother, arrived in Greenwood, Mississippi, with her infant son on October 15, 1980. As she was unable to properly care for the child, the Leflore County Court, *acting ex parte, and without notice to the appellant*, temporarily placed the child in the custody of the Leflore County Welfare Department. On December 21, 1980, *Mrs.*

*Maple Markham came to the lodgings of Mary Taylor and took the child from her custody.* So began the relationship between these two that has led us to this place.

The baby was placed in a foster home, but Mary Taylor did have visitations with the baby which were arranged for her by Mrs. Markham, as the case worker assigned to the case. These visits were terminated on February 24, 1981, when the County Court made permanent the original temporary order of removal. After that Mary continued to ask Markham to let her visit her baby son, even after March, when Mary learned that she was again pregnant. These visitation requests were denied by Mrs. Markham, and the relationship between the two women seriously deteriorated.

Mary Taylor made her last effort to talk Mrs. Markham into letting her visit her child on the day of July 19, 1981. Mary went to Markham's office and stayed for over three hours, seeking a visit with her first born. Her efforts were fruitless. Finally, Markham offered to drive Mary home. While in the automobile, Markham told Mary that not only could she not visit her child, but that as soon as the baby Mary was then carrying was born, that baby, too, would be removed from Mary's custody. At this point, Mary Taylor took a pistol from her purse and shot Mrs. Markham to death.<sup>95</sup>

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<sup>92</sup>.Much has been written on the poverty of the intent requirement in anti-discrimination law. Charles Lawrence and Linda Krieger have argued persuasively from different psychoanalytic theories that the human mind functions to defend itself and categorize in ways that make the intent requirement impossible to meet. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

<sup>93</sup>.103 F.3d at 1058. Judge Lynch was appointed by President Clinton in 1994. See Judy Rakowsky, *Lawyer Set for Breyer Vacancy; Lynch to Be First Woman on Circuit*, BOSTON GLOBE, Aug. 14, 1994, at 33 (detailing Lynch's legal career from activist law student to her role tackling gender bias in the court system as president of the Boston Bar Association).

<sup>94</sup>.See *id.*

<sup>95</sup>.Taylor v. State, 452 So. 2d 441, 443 (Miss. 1984) (emphasis added).

The judge instructed the jury as to both manslaughter and murder. The Mississippi Code<sup>96</sup> defines manslaughter as “[t]he killing of a human being without malice, in the heat of passion, but in a cruel or unusual manner, or by the use of a dangerous weapon, without authority of law, and not in necessary self-defense.”<sup>97</sup> Murder, however, must be committed with malice aforethought.<sup>98</sup>

Ms. Taylor appealed from the guilty verdict of murder alleging error in the exclusion of the testimony of psychologists as to her state of mind. The Mississippi Supreme Court affirmed her conviction, finding that the trial court’s exclusion of expert testimony as to Ms. Taylor’s state of mind was appropriate. The experts would have testified that “because of her state of mind, Mary Taylor’s crime could not have been murder, but was manslaughter.”<sup>99</sup> The court rejected the proffered expert testimony as subjective, stating that “the question of whether a defendant acted without malice and in the heat of passion is an objective one.”<sup>100</sup> The court evaluated the elements that would reduce a killing to manslaughter in terms of a reasonable provocation and whether a “reasonable man [sic] so provoked would not have cooled off.”<sup>101</sup>

Reasonable provocation is a term that is gender neutral on its face, presumably permitting women as well as men to be reasonably provoked. Forell and Matthews maintain that it is a “bizarre kind of equality” (p. 177) that would allow women to claim the defense of passion/provocation for homicides. The authors believe that this solution is a “false and perverse equality” because “women almost never kill their intimates out of jealousy or anger about rejection” (p. 177).

Passion/provocation remains a troubling defense. Reasonable men and reasonable women arguably do not kill. But the defense exists as a safety valve within the criminal justice system to recognize human weakness and loss of control.<sup>102</sup> The defense does not seek to condone homicidal behavior, but to acknowledge that different degrees of criminal conduct and culpability do exist. Women may rarely kill over jealousy or anger over sexual rejection, as the authors explain. But if any circumstances might lead a woman to homicide in a situation driven by heat of passion so that a provocation defense should be available to a woman, then the facts surrounding Mary Alice Taylor’s crime exemplify them. Forell and Matthews’ reasonable woman seeks respect and autonomy, but in this situation, Ms. Taylor has had those values trampled upon by the state’s removal of her child without a hearing. Faced with the new threat of removal of her unborn child, the fourteen-year-old Ms. Taylor lost control of her emotions.

We can only speculate as to whether a jury instructed with a reasonable woman standard would have reached a verdict other than one finding Ms. Taylor guilty of murder. Elizabeth Schneider has commented on the resistance in the battered women’s cases to female defendants receiving equal rights to trial without gender bias. Schneider identifies this failure as based in “a national chord of anxiety about ‘abuse excuse’ justice.”<sup>103</sup> “[G]ender bias,” she notes, “operates in these cases in both overt and subtle ways . . . .”<sup>104</sup> Schneider’s observations apply to Mary Alice Taylor’s prosecution and conviction as well. Schneider urges that “the particular facts and circumstances of each case must be evaluated in light of the general problem of gender-bias in order to ensure an individual woman’s equal rights to trial.”<sup>105</sup> Mary Alice Taylor’s conviction, whether under a reasonable man or woman instruction, illustrates this “resistance to reasonableness.”<sup>106</sup> In the context of criminal prosecutions, an emphasis on the particular facts and circumstances of each case is especially appropriate because the issue is individual criminal culpability in the face of an established societal

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<sup>96</sup> MISS. CODE ANN. § 97-3-35 (1994).

<sup>97</sup> *Taylor*, 452 So. 2d at 443 (quoting MISS. CODE ANN. § 97-3-35).

<sup>98</sup> *See id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 449.

<sup>101</sup> *Id.* at 447.

<sup>102</sup> *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 191 (William S. Hein & Co., Inc. 1992) (1769) (“[T]he law pays that regard to human frailty, as not to put a hasty and a deliberate act upon the same footing with regard to guilt.”);

Glanville Williams, *Provocation and the Reasonable Man*, 1954 CRIM. L. REV. 740, 742 (noting that “the true view of provocation is that it is a concession to ‘the frailty of human nature’ in those exceptional cases where the legal prohibition fails of effect”); and Rachel J. Littman, *Adequate Provocation, Individual Responsibility, and the Deconstruction of Free Will*, 60 ALB. L. REV. 1127, 1155-56 (1997) (“The entire heat-of-passion doctrine relies on the assumptions that (1) ordinary, reasonable people can be adequately provoked to violent behavior by external factors, and (2) the violent act is an uncontrolled response.”).

<sup>103</sup> Schneider, *supra* note 51, at 482.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 487. Like the use of the “reasonable woman,” the term “gender bias” fails to focus on the systemic nature of male power and privilege that enables the system of gender bias to continue. Schneider acknowledges “the broader problems of gender subordination” necessary to understanding the problem of battering. *Id.* at 495.

<sup>106</sup> *Id.* at 503. Schneider identifies this resistance to reasonableness in the dispute over the appropriate standard in the sexual harassment cases. *See id.*

norm prohibiting homicide. Where the societal norm is clear, reasonableness in violating that norm is a useful inquiry that relates to criminal culpability. Here the context of the particular circumstances — the state action removing her child and threatening to seize the next one — must be considered in evaluating reasonableness.

Ms. Taylor was an African-American unwed mother, still a child herself.<sup>107</sup> She was thirteen when her first child was born; the father was thirty-seven. She needed more than a reasonable woman standard in a jury instruction to emphasize the context in which her actions occurred. She needed a society that values caregiving<sup>108</sup> and supports single mothers.<sup>109</sup> She needed more care provided for herself during her adolescence. She needed a jury who could recognize the racialized world she inhabits and in which her actions took place.<sup>110</sup> She needed jury instructions that address racism. It is unlikely that her jury would value the relationship between this single African-American mother and her children without an explanation of the systems of privilege in which Ms. Taylor's actions occurred.

In the criminal law setting, a reasonableness standard, even when gendered female, does not go far enough to reveal the social reality in which the criminal conduct occurred. In a setting such as the workplace where the societal norm is evolving, the reasonableness standard provides insufficient guidance. The lens of reasonableness may be actually harmful in a case like *Soto*, where the norm of family dynamics is also contested. The police believed that a reasonable woman would return to her husband. *Soto* illustrates the nightmare for women of a world in which male privilege is reinforced by state action. One goes to the police for protection.<sup>111</sup> If that avenue is foreclosed, the state enables male privilege to function unchecked. *Taylor*, too, presented a scenario in which the state functioned to maintain patriarchal values. The social worker acted on behalf of the state “*ex parte* and without notice,”<sup>112</sup> removing Ms. Taylor's child from her lodging, and taking the child into state custody. Even the court, an arm of the state, speaks of Ms. Taylor as “Mary,” while the social worker is named the honorific “Mrs.” Linguistically, Mrs. Markham's married position placed her in a role of superiority to “Mary's” unwed-mother status. In this hierarchical landscape, Ms. Taylor's needs cannot be met by a resort to reasonableness.

The *Soto* case illustrates the poverty of the sameness/difference problem in equality theory which relies on a comparison model to find discrimination. In the domestic violence context, no mirror image comparison exists; the police conduct cannot be compared to other corresponding situations. Unable to make the comparison, the court fails to find a sex discriminatory purpose. The *Taylor* case exemplifies the essentialism problem in feminist theory. Ms. Taylor is a woman, but her race, age, and economic status, as well as her gender, all contributed to the tragic events that unfolded. Focusing on the gender portion of her identity can only begin to explain the circumstances that led to her murder conviction.

## CONCLUSION

*A Law of Her Own: The Reasonable Woman as a Measure of Man* presents a readable summary of the gendered issues in sexual harassment, stalking, domestic homicide, and rape. The authors advocate that the legal system adopt a reasonable woman standard in these areas to ensure that harms to women are recognized. The use of a reasonable woman standard, however, cannot sufficiently challenge the status quo that ignores those harms. In the end, the tensions generated by the sameness/difference equality problem and the essentialism problem remain unresolved. An analysis beyond the reasonable woman that recognizes systems of privilege, particularly male privilege, is necessary to truly give woman a law of her own.

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<sup>107</sup>.See Court Reporter's Transcript of Testimony of Witnesses at 152 (Circuit Court of Washington County, Mississippi, April, 1982 Term), *Taylor* (No. 54183) (on file with Professor Martha Mahoney, University of Miami School of Law).

<sup>108</sup>.See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 9 (1995) (“[A]s a society, we do not value caretaking or caretakers . . .”).

<sup>109</sup>.See generally Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539; Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

<sup>110</sup>.See PAUL HARRIS, *BLACK RAGE CONFRONTS THE LAW* (1997) (emphasizing the need for the judicial system to recognize the social reality of defendants). “[T]he black rage defense educates the judge and jury about society's role in contributing to the criminal act.” *Id.* at 5; see also Donovan & Wildman, *supra* note 32 (urging the need to address the social reality of defendants in self-defense and provocation cases).

<sup>111</sup>.See, e.g., *Riss v. City of New York*, 240 N.E. 2d 860 (N.Y. 1968). Linda Riss was also a woman in a battering relationship, threatened when she tried to separate. Her abusive boyfriend hired a thug who scarred her with lye after the police declined to provide her with protection. See David A. Andelman, *Woman Married to Ex-Lawyer who Hired Thugs to Blind Her*, N.Y. TIMES, Nov. 28, 1974, at A1, cited in JOHN W. WADE ET AL., *PROSSER, WADE & SCHWARTZ'S CASES AND MATERIALS ON TORTS* 629 (9th ed. 1994).

<sup>112</sup>.*Taylor*, 452 So. 2d at 443.