

Cato Institute Policy Analysis No. 256: Feminist Jurisprudence: Equal Rights or Neo- Paternalism?

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Executive Summary

In the past decade, feminist legal theory has become a formidable presence in many of America's top law schools. Feminist activism has also had a major impact on many areas of the law, including rape, self-defense, domestic violence, and such new legal categories as sexual harassment. However, the ideology of legal feminism today goes far beyond the original and widely supported goal of equal treatment for both sexes. The new agenda is to redistribute power from the "dominant class" (men) to the "subordinate class" (women), and such key concepts of Western jurisprudence as judicial neutrality and individual rights are declared to be patriarchal fictions designed to protect male privilege.

Many feminist-initiated legal reforms have addressed real wrongs, such as the tendency to treat rape victims more harshly and suspiciously than victims of other crimes, and inadequate protection for victims of domestic violence. But feminist pressure has also resulted in increasingly loose and subjective definitions of harassment and rape, dangerous moves to eviscerate the presumption of innocence in sexual assault cases, and a broad concept of self-defense in cases of battered wives that sometimes amounts to a license to kill an allegedly abusive spouse.

Courts and legislatures should resist efforts to limit individual rights in the guise of protecting women as a class, and reaffirm the fundamental principle consistent with the classical liberal origins of the movement for women's rights: equality before the law regardless of gender.

Introduction

In May of 1992, Project P, an anti-pornography police unit covering Toronto and Ontario, seized a lesbian magazine, *Bad Attitude*, from Glad Day Books under a new law banning material that "subordinates, degrades, or dehumanizes" women. To comply with the Canadian Supreme Court's vague criteria defining illegal pornography--criteria based on American feminist writings--both parties at trial lined up experts to match wits on such esoteric matters as whether spanking between two homosexuals was "degrading." [\[1\]](#)

In compliance with rules established in 1985, customs officials at the Canadian border, along with a "secretive bank of bureaucrats" in Ottawa, search incoming shipments of books and tapes. They have seized comic books featuring a lesbian terrorist, Madonna's *Sex*, and a book called *Woman Hating*. The author of *Woman Hating* is none other than Andrea Dworkin, the noted American feminist crusading to stamp out "pornography" in the United States. [\[2\]](#)

In Toronto, Deborah Gallo is marketing a new kind of protection for men to carry in their wallets: a sexual consent form. [\[3\]](#) The need for legal protection is seen as stemming from a new law that requires men to "take reasonable steps" to ensure consent before engaging in any sexual activity. [\[4\]](#)

These all sound like scenes from George Orwell's 1984 or Margaret Atwood's dystopian vision of a puritanic theocracy, *The Handmaid's Tale*. Yet they are a part of daily life in Canada, where radical feminism has become a formidable political force. (Canada's two leading feminist groups, the Women's Legal Education and Action Fund and the National Action Committee, are not only the most active special-interest organizations in Canada but the most generously subsidized by the government, getting a combined total of over \$4 million between 1983 and 1991; from 1986 to 1991, the government-funded Women's Program provided over \$500 million to various feminist groups.) The Canadian experience, which American radical feminists hold up as a model for their own domestic goals, may prove to have great relevance to American politics and law. [\[5\]](#) The new "women's agenda," which has strong backers in both houses of Congress, should alarm traditional liberals and libertarians who seek to strengthen individual liberties in the social and personal spheres and expand the scope of privacy and freedom of choice.

The Rise of Feminist Jurisprudence

The liberal feminism inherited by the women's liberation movement of the 1960s was based on emancipatory theory and sought to dismantle the positive legal barriers that had denied women equal opportunity with men. The theory behind those goals was that the rights of individuals as traditionally understood in a liberal society should transcend gender differences. [\[6\]](#) This brand of legal feminism was in many ways exemplified by Ruth Bader Ginsburg, now associate justice of the Supreme Court, who said in a 1988 speech, "Generalizations about the way women or men are . . . cannot guide me reliably in making decisions about particular individuals." [\[7\]](#) As general counsel of the American Civil Liberties Union's Women's Rights Project in the 1970s, Ginsburg challenged laws that gave health benefits to wives of servicemen but not to husbands of servicewomen and prohibited women from engaging in certain types of business (such as running a bar) without a male co-owner. Feminists were also involved in efforts to overturn legal restrictions on contraception and abortion.

The illiberal feminist legal theory (also known as "radical feminism"), which emerged during the 1980s, urges women to renounce traditional notions of rights and justice, now viewed as perpetuating male dominance. Some of the new feminists charge that the reforms achieved by "equality feminists" have dismantled protections beneficial to women while doing nothing to eliminate their disadvantages. [\[8\]](#)

For radical feminists, the key concept is "patriarchy," the male-dominated social structure. [\[9\]](#) Patriarchy is perceived to be as all-encompassing and all-infecting as the Communist conspiracy of earlier days. Hence, even such liberal principles as neutrality of the law, equality, and individual autonomy must be discarded because of their "patriarchal" roots. [\[10\]](#) The new feminism attempts to replace those notions with a new breed of philosophy and jurisprudence premised on "connection" between persons. [\[11\]](#) Law is seen as an instrument to "change the distribution of power," which requires not equal treatment but "an asymmetrical approach that adopts the perspective of the less powerful group with the specific goal of equitable power sharing among diverse groups." [\[12\]](#)

The first steps toward the implementation of feminist jurisprudence on a national scale have taken place in Canada, though not without assistance from American feminists: when the Canadian Women's Legal Education and Action Fund (LEAF) drew up its arguments for the Supreme Court obscenity case, it turned to American law professor Catharine MacKinnon to help write its appellate brief. (It appears that MacKinnon and her supporters are using Canada as a testing ground in the hope that favorable rulings there will validate her widely criticized theories and soften U.S. courts with their precedent.) Another American feminist who wields great influence in Canada is Lenore Walker, whose role in pioneering the "battered wife syndrome" was commended by the Canadian Supreme Court in a key decision upholding that defense. [\[13\]](#)

The roots of the radical feminist legal revolution are in American law schools, where feminist jurisprudence is now a

strong and ubiquitous presence. "Over the next quarter century," says Professor Laurence Tribe of Harvard Law School, "feminist legal theory is likely to be the most fertile source of important insights in the law." ^[14] In 1991, Fred Streibigh reported in the *New York Times Magazine* that "most law schools in America now offer courses taught by professors concerned with feminist legal theory." ^[15] By 1990, there were at least eight law reviews devoted exclusively to feminist issues, with more appearing every year. Hundreds of articles of the same persuasion have appeared in mainstream law journals, especially the most prestigious ones. A 1990 bibliography of book and articles on women and the law occupied 70 pages. ^[16] In another sign of its ascendancy, feminist theory was the principal subject of the national conference of the American Bar Association in 1992.

The influence of feminist legal theory is not confined to academia. Now, its converts are graduating from law schools. They are clerking for judges, working as congressional staff members, and moving into other positions of influence. That is certain to have a profound impact on the nation's legal framework.

Free Speech

By the 1970s, American jurisprudence had reached the consensus that speech may be regulated by the government only under a very limited number of circumstances.

- "Clear and Present Danger": The government may penalize speech that poses a "clear and present danger" of inciting behavior that a legislature could criminalize. ^[17] It may not penalize speech that advocates unlawful behavior but does not pose a threat of "imminent lawless action." ^[18]
- Libel: The government may regulate certain libelous speech, stemming from the common-law refusal to protect false statements of fact. This limitation requires a showing of malice--knowledge that the statement was false or reckless disregard of whether or not it was false. ^[19] Truth is allowed as a defense. ^[20]
- Commercial Advertising: On the same grounds, the government may exert some control over commercial advertising. ^[21] Only untruthful or misleading speech with no purpose other than to propose a commercial transaction is subject to this regulation. ^[22] Even here, the law recognizes that the value of free speech is not limited to political debate but extends to the free flow of any ideas. ^[23]
- Obscenity: For an expression to be obscene, it must: 1) appeal, overall, to the prurient interest; 2) contain patently offensive depictions or descriptions of specified sexual conduct; and 3) on the whole, have no serious literary, artistic, political, or scientific value. ^[24] Before the Supreme Court set down this standard in 1973, states had used obscenity laws to ban such books as Theodore Dreiser's *An American Tragedy* and D. H. Lawrence's *Lady Chatterley's Lover*. ^[25] In the last two decades, very few materials have been banned as obscene.
- "Fighting Words": In *Chaplinsky v. New Hampshire* (1942), affirming the conviction of a Jehovah's Witness who called a city marshal a "damned Fascist" and upholding a statute that penalized "offensive or derisive names" to annoy another, the Supreme Court ruled that words likely to cause violence were not protected by the First Amendment. ^[26] No conviction based on "fighting words" has been upheld since *Chaplinsky*. ^[27] Indeed, the Court has reversed several convictions under similar statutes. ^[28] The doctrine is now seen as "a quaint remnant of an earlier morality" incompatible with "the principle of free expression." ^[29]

The concept of vagueness and overbreadth is a strong and uniquely American strain of jurisprudence. A law is void if "it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application," allowing "arbitrary and discriminatory" enforcement. ^[30] "Overbreadth" means that statutes must be carefully drafted to avoid encroaching on constitutionally protected speech. In 1972, striking down a Georgia statute that criminalized the use of "opprobrious" or "abusive" language, the Supreme Court warned that "government may regulate in the area only with narrow specificity." ^[31]

The narrow reach of exceptions to constitutional protection for speech underscores the value placed on all forms of expression in the American tradition. As Justice Oliver Wendell Holmes noted, "The best test of truth is the power of the thought to get itself accepted in the competition of the market." ^[32] Traditionally in this country, attempts to

restrict speech (whether insults directed at persons in authority or sexually graphic materials) came from the Right. Indeed, censorship laws were often used against feminists: birth-control advocate Margaret Sanger was prosecuted and saw her writings suppressed under the Comstock Act, which made it illegal to send through the mail any "obscene, lewd, or lascivious" printed or visual materials, including birth-control information. Yet today, the broadest and most relentless assaults on free speech come from radical feminists determined to quash "harassing" or "degrading" speech. Through the use of civil rather than criminal law for purposes of censorship, and under the guise of legislating equality, large areas of speech are becoming per se illegal, unbeknownst to the majority of Americans. [\[33\]](#) The target this time is not a pervasive Communist conspiracy but a collection of far more ubiquitous enemies: the sexual harasser, the insensitive college student, the consumer of pornography.

Sexual Harassment

Catharine MacKinnon, a feminist lawyer and scholar and now a professor at the University of Michigan School of Law, spearheaded the first major court victory of radical feminist jurisprudence. In 1986, in *Meritor Savings Bank v. Vinson*, the United States Supreme Court adopted her theory that women should be able to sue an employer for sexual harassment based on a "hostile work environment." [\[34\]](#) In contrast to earlier cases in which employers were found liable for sexual harassment because they pressured employees for sexual favors, in *Vinson* the Court held that the employer need do nothing to be liable and that there was no need for anyone else to have made sexual demands.

The problem of sexual imposition on women by male bosses is hardly a new one; the plight of innocent factory girls or maids being preyed upon by employers was a subject of much concern (and prurient interest) in the nineteenth century, though not a target for legal action. As women entered the workforce in great numbers in the 1970s and sought equal career opportunities, the issue of the burden imposed upon them by sexual demands became a more prominent one. The term "sexual harassment" came into use around 1975. [\[35\]](#)

In some early cases, female plaintiffs were able to combat unwanted sexual overtures in the workplace by using the common-law remedies of tort and contract. [\[36\]](#) Yet in formulating her theory MacKinnon expressly rejected the common-law approach because of what she saw as "the conceptual inadequacy of traditional legal theories to the social reality of men's sexual treatment of women." [\[37\]](#) Her main objection to a tort remedy was that it would treat sexual harassment as a personal affront rather than systemic persecution of women as a gender: "By treating the incidents as if they are outrages particular to an individual woman rather than integral to her social status as a woman worker, the personal approach . . . fails to analyze the relevant dimensions of the problem." [\[38\]](#) MacKinnon also felt that labeling harassment a breach of contract would subject women to male standards of behavior and limit the scope of the law to exclude most speech offenses. [\[39\]](#) Instead, she wanted the courts to classify both sexual extortion and verbal insensitivity as a form of sex discrimination, already prohibited under Title VII of the 1964 Civil Rights Act.

Initial attempts to apply this theory were rejected. In *Corne v. Bausch & Lomb* (1975), [\[40\]](#) in which two women claimed that sexual advances by their supervisor had driven them to quit their jobs, Judge Frey found that such behavior was not actionable under Title VII. His decision, and some other rulings of the time, noted that unlike discrimination in hiring, sexual overtures from supervisors or coworkers were personal actions, not company policy. Moreover, such overtures could be made toward a man (by a man or a woman) or toward men and women equally (by a bisexual supervisor).

However, before too long proponents of the sexual-harassment-as-discrimination theory scored their first victories. In 1976, the federal district court for the District of Columbia accepted their view in *Williams v. Saxbe*. [\[41\]](#) The following year, the Court of Appeals for the D.C. Circuit became the first appellate court to find that sexual harassment was indeed sex discrimination. [\[42\]](#) Finally, in 1986, the Supreme Court decided *Vinson*, adopting the most expansive part of MacKinnon's theory: that sexual harassment "sufficiently severe or pervasive" to create "an abusive work environment" is illegal even if sexual demands are not linked to concrete employment benefits. [\[43\]](#) The court further went along with MacKinnon's theory by finding that "'voluntariness' in the sense of consent" is not a defense to a sexual harassment charge. MacKinnon summed up, "What the decision means is that we made this law up from the beginning, and now we've won." [\[44\]](#)

Some dissenting voices have continued to criticize the radical paradigm of sexual harassment as sex discrimination, arguing for a return to the common-law structures of tort and contract in handling such claims. [\[45\]](#) The common-law system is more than just a method of resolving legal disputes one case at a time; it embodies basic historical principles such as neutrality, objectivity, and equality before the law. As legal philosopher Karl Llewellyn put it "Cases . . . build and become stones for further building." [\[46\]](#) The evolutionary nature of the common law ensures that it is drawn in the direction of greater fidelity to those basic principles yet is sufficiently flexible to meet the demands of new social problems.

Once the tort and contract approach had been jettisoned, the problem that arose after *Vinson* was how to define harassment. The National Organization for Women defines it as

any repeated or unwanted sexual advance, sexually explicit derogatory statements, sexually discriminatory remarks that cause the recipient discomfort or humiliation. . . . [\[47\]](#)

Given this broad category, it is not surprising that many feminists claim 85 percent of all women have been sexually harassed in the work force at some point in their lives. [\[48\]](#) That degree of vagueness in a statute would never pass constitutional muster. It is comparable to replacing speed limits with a law under which one could be fined for driving through a neighborhood at any speed which made some of its residents uncomfortable. "Discomfort" as the test of harassment is not only broad enough to outlaw many forms of previously legal speech but is also too subjective. According to one text, "Whether harassment has occurred is truly in the 'eye of the beholder'--or the ear. . . . The deciding factor is the feelings a particular phrase, gesture, or behavior evokes in the individual on the receiving end." [\[49\]](#)

The imposition of restrictions on such a large class of speech in the workplace angered several civil liberties groups, but that has done little to stem radical feminist influence on judicial thinking. [\[50\]](#) A major step in the direction of remaking the law in the neo-feminist image occurred early in 1991 (nearly a year before the testimony of Anita Hill at the Clarence Thomas confirmation hearings brought the issue of sexual harassment to the forefront of public consciousness). In *Ellison v. Brady*, the Ninth Circuit Court of Appeals in California abandoned the traditional test for offensive conduct--the "reasonable person" standard--and substituted a "reasonable woman" test, dealing yet another blow to common-law construction. [\[51\]](#)

In its ruling, the Ninth Circuit panel drew on legal feminist texts for the proposition that "men tend to view some forms of sexual harassment as 'harmless social interactions to which only overly sensitive women would object'" and that "because of the inequality and coercion with which it is so frequently associated in the minds of women, the appearance of sexuality in an unexpected context or a setting of ostensible equality can be an anguishing experience." [\[52\]](#) The court stated:

We . . . prefer to analyze harassment from the victim's perspective [which] requires . . . an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women. See, e.g., *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988). ("A male supervisor might believe, for example, that it is legitimate for him to tell a female subordinate that she has a 'great figure' or 'nice legs.' The female subordinate, however, may find such comments offensive"). . . . 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. [\[53\]](#)

The court found that behavior that would seem trivial to a man could be quite harmful to a woman because "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." [\[54\]](#) Thus, even "well-intentioned compliments by co-workers or supervisors" might be sufficient to bring a lawsuit based upon this new legal definition of sexual harassment if a "reasonable woman" could find them offensive, reversing an almost century-long march toward a more expansive view of free speech rights. [\[55\]](#) The court also uncritically embraced the neo-feminist notion that men and women do not and

perhaps cannot see the same events similarly, gutting the concept of neutrality under the law. Ironically, it was in part the earlier wave of "equality feminism" that led to the abolition of most traditional laws against indecent speech directed at women. As recently as May 1993, the South Carolina Supreme Court struck down a law making it a misdemeanor to communicate "any obscene, profane, indecent, vulgar, suggestive or immoral message" to a woman or girl: "Statutes . . . that distinguish between males and females based on 'old notions' . . . that females should be afforded special protection from 'rough talk' because of their perceived 'special sensitivities' can no longer withstand equal protection scrutiny." [\[56\]](#)

In March 1991, applying the reasonable-woman standard, a federal district court in Jacksonville, Florida, found a working environment at a shipyard abusive and in violation of civil rights laws because of nude pinups on the walls and frequent lewd remarks. [\[57\]](#) To buttress his findings, Judge Howell Melton quoted several feminist law articles. There was no evidence of obscene language or sexual demands being directed at the plaintiff, Lois Robinson-- although, *after* she had complained about sexually explicit materials at work, some of the male employees retaliated by posting a "Men Only" sign in one area and by leaving abusive graffiti at Robinson's workstation. Here are the main elements of the "hostile work environment" found by the court:

A Whilden Valve & Gauge calendar for 1985, which features *Playboy* playmate of the month pictures on each page. The female models in this calendar are fully or partially nude. In every month except February, April, and November, the model's breasts are fully exposed. The pubic areas are exposed on the women featured in August and December. Several of the pictures are suggestive of sexually submissive behavior. . . . Among the remarks Robinson recalled are: "You rate about an 8 or a 9 on a scale of 10." She recalled one occasion on which a welder told her he wished her shirt would blow over her head so he could look, 1 T.T. at 126, another occasion on which a fitter told her he wished her shirt was tighter . . . an occasion on which a foreman candidate asked her to "come sit" on his lap, and innumerable occasions on which a coworker or supervisor called her "honey," "dear," "baby," "sugar," "sugar-booger," and "momma" instead of calling her by her name. [\[58\]](#)

Although the plaintiff felt sexually harassed, other female workers said that they did not. To the judge, however, that merely provided additional evidence of victimization: "For reasons expressed in the expert testimony . . . the Court finds the description of [their] behavior to be consistent with the coping strategies employed by women who are victims of a sexually hostile work environment." [\[59\]](#) In light of that, it is difficult to imagine how any behavior with sexual overtones could escape classification as harassment--defined by the reaction of the most sensitive woman, even if she is the only one who takes offense.

This is not to say that Lois Robinson was hypersensitive. The Jacksonville Shipyard, as described in the record, appears to have been a working environment that most women, and probably a good many men as well, would have found an unpleasant place to work. Traditionally, however, the law has posited that when a person takes a job in what is known to be a rough environment, she or he willingly assumes the risk of being offended. While such an approach arguably limits some people's choice of jobs, it avoids the intrusiveness of the government regulating the mental comfort level of a workplace.

Judge Melton ordered all pinups, sexually oriented remarks, and sexually explicit magazines banned from the workplace, even in the men's locker room. [\[60\]](#) The decision was perceived by many as a green light for an expanded attack on offensive speech and images, and sparked similar suits. Several women suing Stroh Brewery Company for harassment by male coworkers (which they claimed included lewd touching, indecent exposure, and sexual demands) added to their suit a complaint that the company's use of seminude female images in its ads, particularly the "Swedish bikini team" promotional campaign, contributed to a hostile environment. [\[61\]](#) (In November 1993, a judge ruled that the advertising could not be used as evidence in the harassment suit.)

Under the guise of combating sexual harassment, radical feminists have imposed a speech regime that the Supreme Court of the 1930s would not have allowed. In *Ellison*, the Ninth Circuit panel suggested that women's sensitivities were not only "special," but might become further refined with the passage of time. Thus, even employers who have taken steps to stamp out any workplace conduct that might not pass muster with the "reasonable woman" should not

rest on their laurels:

We realize that the reasonable woman standard will not address conduct which some women find offensive. Conduct considered harmless by many today may be considered discriminatory in the future. Fortunately, the reasonableness inquiry which we adopt today is not static. As the views of reasonable women change, so too does the Title VII standard of acceptable behavior. [\[62\]](#)

There is no doubt that some of the conduct addressed by sexual harassment litigation would be egregious by most people's standards--sufficiently so to meet the tort standard applied to intentional infliction of emotional distress: a "case . . . in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous.'" [\[63\]](#) (That may even be true of *Ellison*, in which the plaintiff had been subjected not merely to persistent but obsessive and delusional attentions by a coworker, and had filed a suit only after her attempts to get him transferred to a different office failed because of intervention by the union.)

However, the label of sexual harassment is being used in increasingly trivial cases. Since most of the effects of legal theories take place "in the shadow of the law," many of the most expansive applications of the new standards have occurred in nonlitigation, compliance actions. [\[64\]](#) For instance:

- At the *Boston Globe* in 1993, veteran columnist David Nyhan humorously taunted another male staffer, who had declined a game of basketball after work, for being "pussy-whipped." The remark was overheard by a female staffer who complained about it. Nyhan was assailed in a memo to the staff by editor Matthew Storin and fined \$1,250, to be contributed to a women's organization. After abject apologies from Nyhan, the fine was rescinded. [\[65\]](#)
- A senior vice president of the New York City transit authority was demoted for making a ribald statement over a speakerphone from his hospital bed. While recuperating from triple-bypass surgery, he said on a conference call to his office mates that he felt good enough to have sex on stage with one of them. Unimpressed by his recuperative vigor, transit authority president Alan Kiepper, enforcing regulations based on new sexual-harassment rulings, demoted him. Commented Kiepper, "He can't push this aside by saying it was just a joke. A lot of demeaning things are said under the guise of being a joke. We have to become more sensitive to what we say." [\[66\]](#)

Obviously, sexual-harassment laws target not only speech but noncoercive sexual behavior--another sphere where the lessening of state controls has been commonly regarded as progressive. Penalizing "unwelcome" advances even when the initiator has received no sign that they are unwelcome clearly reduces opportunities for consensual relationships. (As one young woman writer notes, "The truth is, if no one was ever allowed to risk unsolicited sexual attention, we would all be solitary creatures." [\[67\]](#)) University of Southern California law professor Susan Estrich, considered a mainstream legal scholar, wants to eliminate the "welcomeness" test altogether, since it implies that women must express their objections to harassing behavior before they can sue. [\[68\]](#) Estrich also says that she would have "no objection to rules which prohibited men and women from sexual relations in the workplace, at least with those who worked directly for them." [\[69\]](#)

While no formal rules of that kind exist anywhere, it seems that existing sexual-harassment regulations have had the same effect for many women and men. A recent *New York Times* article about romance by electronic mail quoted a Los Angeles lawyer who had met his future wife in the late 1980s through a computer forum as saying that such a thing would have been "much more difficult" today: "With all the sexual harassment danger, it's a risky business." [\[70\]](#)

In a truly free market, private employers would have a right, absent contractual agreements to the contrary, to prohibit or ignore employees' workplace behavior, including crude language or sexual overtures toward coworkers. In today's political environment, however, courts and legislatures have restricted the employer's authority over his workplace. Toward limiting governmental intrusion in the workplace, political scientist Ellen Frankel Paul has called for replacing the civil rights model of sexual-harassment-as-sex-discrimination with a tort of sexual harassment. Paul proposes the following model tort, patterned on that of intentional infliction of emotional distress:

(1) Sexual harassment comprises

(a) unwelcome sexual propositions incorporating overt or implicit threats of reprisal, and/or

(b) other sexual overtures or conduct so persistent and offensive that a reasonable person apprised of the conduct would find it extreme and outrageous.

(2) To be held liable, the harasser must have acted either intentionally or recklessly and the victim must have suffered, thereby, economic detriment and/or extreme emotional distress.

(3) In the employment context,

(a) the employer is liable when the plaintiff has notified an appropriate officer of the company (not himself the alleged harasser) of the offensive conduct, and the employer has failed to take good-faith action to forestall future incidents.

(b) the employer is liable, also, when he should have known of the offending incident(s) (that is, when he failed to provide an appropriate complaint mechanism). [\[71\]](#)

Such a tort, Paul notes, "would encourage companies to provide an effective mechanism for dealing with sexual harassment" while setting the threshold high enough to deter frivolous complaints and requiring women (and men) who are sexually harassed to object to the behavior before they can file a suit. [\[72\]](#) It would also give employers reasonable assurance that an effective mechanism of processing nontrivial complaints would shield them from lawsuits.

Speech Codes

Not content to limit their assault on free speech to the workplace, radical feminists have been in the forefront of the effort to establish campus speech codes that prohibit "discriminatory" or "harassing" speech. A student at the University of Michigan was threatened with disciplinary action for pointing out in a computer bulletin-board exchange that a charge of date rape could be false. A memo from the dean informed him that his opinion constituted "discriminatory harassment." [\[73\]](#)

In an attempt to counteract restrictions on speech on college campuses across the country, Senator Larry Craig of Idaho sponsored the Freedom of Speech on Campus Act of 1991. The bill would have prohibited universities that receive federal funding from taking "official sanction" against any student for speech protected under the First and Fourteenth Amendments that had caused offense to others.

In 1992, MacKinnon testified in Congress against the bill. First noting that to the extent that the legislation tracks the First Amendment, it is redundant, she proceeded to advocate what amounts to an evisceration of the First Amendment, defending speech codes as "policies . . . regulating discrimination that takes expressive and other forms . . . for the purpose of promoting equality in university settings." [\[74\]](#) That is to say, it is appropriate to stifle words and ideas if the purpose is to "promote equality." Unlike laws covering libel or slander, which redress a particular injury intentionally directed at an individual, such rules seek to redress alleged generalized injuries to more than half of the population by silencing the other half. And, typically erasing the distinction between words and conduct, MacKinnon asserted that for a student to call another a "fucking faggot" was an "assault" that "effectively threw [the listener] off campus and out of class."

Ironically, MacKinnon uses workplace sexual-harassment rules to support the effort to police expression on campus. Completing the circle, she castigates courts that "have rendered discriminatory harassment as protected speech" for failing "to follow the clear workplace precedents which have recognized the activity the policies cover as actionable for over 15 years." [\[75\]](#) She marvels that without speech codes, "KKK scrawled on the wall [is] discrimination at work but . . . protected speech in school." [\[76\]](#) The court-approved feminist concept of harassment in the workplace turns out to be a legal toehold to extend its influence to other areas such as colleges.

As the University of Michigan example cited above illustrates, campus speech codes often affect not only racial or sexual slurs but the expression of "insensitive" ideas. In the spring of 1993 on the same campus, several students sent a letter to the Sociology Department, the Affirmative Action Office, and the university president accusing sociology professor David Goldberg of "racial and sexual harassment" in his graduate course on statistics. His crime was not insulting or mistreating anyone, but using statistical analysis to challenge some claims of race and sex discrimination--such as the assertion that blacks were disproportionately denied mortgage approval because of race, or that women earned 59 cents to a man's dollar because of discrimination. Although the university did not pursue harassment charges, Goldberg was forbidden to teach the statistics class or any other required course. His punishment was reduced after protests by senior faculty members: the 35-person class was split into two sections, one of which Goldberg was allowed to continue teaching. [\[77\]](#)

The true agenda of the radical feminists (and other campus radicals) is revealed by MacKinnon's comment that the "real issue of free speech on campus [is] the silencing of the disadvantaged and those excluded by the advantaged and powerful." [\[78\]](#) In this view, all debates are nothing but struggles for power.

The Freedom of Speech on Campus Act never got out of committee. Recently, several campus speech codes (including those of the universities of Michigan and Wisconsin) have been struck down by courts as too broad; other colleges, including Tufts University and the University of Pennsylvania, have "voluntarily rescinded speech codes after concluding they were ineffectual, divisive or illegal." [\[79\]](#) Still, according to a survey by the Freedom Forum First Amendment Center, nearly 400 public colleges and universities in the United States have speech regulations. About a third of the codes target not only threats of violence but "advocacy of offensive or outrageous viewpoints . . . or biased ideas." [\[80\]](#)

New Areas of "Harassment"

Another radical feminist proposal is that harassment policies should cover schoolchildren. In California and Minnesota, state legislatures have passed laws "to end sexual harassment by children." The California law penalizes "physical, visual or verbal actions of a sexual nature" that "have a negative impact upon an individual's academic performance or create an intimidating, hostile or offensive educational environment," and covers children from fourth through twelfth grade.

For some, even that is not enough. Sue Sattel, a gender equity specialist for the Minnesota Department of Education, complains that "California is sending a message that it's okay for little kids to sexually harass each other. . . . Title IX protects kids from kindergarten through college." [\[81\]](#) On her home turf, Sattel has been more successful. The Minnesota sexual harassment law covers children all the way down to kindergarten. In the 1991-92 school year in Minneapolis alone, over 1,000 children were suspended or expelled on charges related to sexual harassment. [\[82\]](#) In 1993, Cheltzie Hentz of Eden Prairie, Minnesota, became the youngest complainant ever to win a federal sexual-harassment suit--at the age of seven. She had been the target of abusive language by boys on the school bus. [\[83\]](#)

Once again, the language defining prohibited behavior is extremely broad and speech is punished as conduct. What is "a verbal action of a sexual nature" that has a negative impact on academic performance? Should ten-year-old children be expelled from school for making comments about each other's developing bodies? Margaret Pena of the California Civil Liberties Union correctly complains that the laws are not only vague but confusing and unnecessary--as redundant as the Freedom of Speech on Campus Act was according to MacKinnon. [\[84\]](#) School administrators already have authority to discipline students who attack other children or use obscenity, and they generally use their discretion to decide what action is warranted in each case. Feminist activists are trying to take that discretion away by raising the specter of lawsuits if the complainant feels that adequate steps were not taken. In the case of Cheltzie Hentz, school authorities had responded to letters from the girl's mother, Sue Mutziger, by suspending a few of the boys and replacing the school bus driver, after which the teasing stopped. Mutziger was not satisfied and pursued her complaints with the federal and state governments. [\[85\]](#) The U.S. Department of Education ruled that the school had "failed to take timely and effective responsive action." [\[86\]](#)

Not content to allow traditional parental and school supervision to set the boundaries of children's behavior, radical feminists are aiming to impose their view of "correct" action and speech at the earliest stages of development. One educational resource lists such "sexually harassing behaviors" as "name-calling (from 'honey' to 'bitch')," "spreading sexual rumors," "leers and stares," "sexual or 'dirty' jokes," "conversations that are too personal," "repeatedly asking someone out when he or she isn't interested," and "facial expressions (winking, kissing, etc.)." [\[87\]](#) In some states, such behaviors--long considered a normal part of childhood and adolescence--can now be severely punished.

What if some people still fall through the cracks of sexual-harassment regulations? Increasingly, the argument that women are entitled to a working or learning environment free of offensive or unwelcome sexual expression is expanding to claim that they are entitled to such an environment everywhere. Cynthia Grant Bowman, a professor of law at Northwestern University, has proposed more legislation to stop behavior that radical feminists dislike: "street harassment."

Writing in the *Harvard Law Review*, Bowman defines street harassment as "the harassment of women in public places by men who are strangers to them." [\[88\]](#) This includes wolf whistles, leers, winks, grabs, pinches, and remarks ranging from "Hello, baby" to "You're just a piece of meat to me, bitch." Examples are taken from sources that include *Mademoiselle* magazine and a novel by Joyce Carol Oates.

According to Bowman, street harassment is not merely vulgar or distasteful, but political. "By turning women into objects of public attention when they are in public, harassers drive home the message that women belong only in the world of the private." It can also "serve as a precursor to rape." In any event, it "takes a toll on women's self-esteem," restricts women's mobility and, even when seemingly trivial, objectifies women.

Bowman's solution, of course, is a legal remedy. She argues that laws directed at such behavior could be modeled on defamation laws or the sexual-harassment laws under Title VII, and also suggests that street harassment could be regulated as "low-value speech." Moreover, she calls for the passage of statutes specifically targeting street harassment, and litigation aimed at redefining the torts of assault, intentional infliction of emotional distress, and invasion of privacy. Her proposed model statute includes this language: "Street harassment occurs when one or more unfamiliar men accost one or more women in a public place . . . and intrude . . . upon the woman's attention in a manner that is unwelcome to the woman, with language that is explicitly or implicitly sexual."

In fact, truly egregious street harassment is covered by existing legal remedies. Sexually aggressive physical contact such as grabbing or pinching constitutes indecent assault or sexual battery. However, most of the expression that Bowman and other activists seek to curb does not fall into those categories. (An article in a women's magazine deploring the plague of street harassment featured the "harassment diaries" of 10 women. Although among them they totalled over 50 incidents in a week, none involved physical contact and only one involved obscene language. Many consisted merely of ogling or staring; typical remarks were, "Hi, baby. It's a nice day. You enjoying the weather?," "Have a nice day. God bless you," "Nice," "Sexy," and "You're beautiful.") [\[89\]](#)

The statute proposed by Bowman would punish a man for starting a conversation with a female stranger with any sort of implicitly sexual language--including, perhaps, an "unwelcome" pickup line in a singles bar. Unconstitutional vagueness and overbreadth would appear to stand in the way of such legislation. Even Bowman concedes that the "Supreme Court would be inclined to strike down any such regulation as gender-based, content-based, or underbroad." [\[90\]](#)

Such action by the high court is not only likely; it is mandated by longstanding legal precedents. The risk of occasionally being offended is the price we pay for living in a free society. The Supreme Court cautions us against "the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." [\[91\]](#)

However, most feminist legal theorists do not even deny that their intent is to censor particular words because they serve as conduits for evil ideas--namely, that it is proper for men to treat women as objects of sexual attraction. Even if

one agrees with their view that such "sexual objectification" is detrimental to women's status, that hardly warrants eviscerating First Amendment freedoms.

Pornography

Radical feminists have been conducting a far more outspoken--and far more controversial--attack on the First Amendment in the realm of what they view as pornography. MacKinnon, along with noted feminist writer Andrea Dworkin, has been in the forefront of the fight to regulate sexual expression they consider degrading to women.

While censorship of what Dworkin and MacKinnon call "pornography" is opposed by many feminists--including some who share many tenets of radical feminism--the pro-censorship position dominates at present in feminist legal scholarship. When ACLU President and New York University law professor Nadine Strossen examined post-1980 law review publications dealing with the Dworkin-MacKinnon approach to pornography, she found that a slight majority of the relevant pieces endorsed their position (not even including the writings of Dworkin and MacKinnon themselves). With only two exceptions, law review publications written from a feminist perspective supported the pro-censorship position; most of the articles challenging it were written by men. [\[92\]](#) Strossen adds that leading law schools have sponsored "conferences that are heavily, if not exclusively, oriented toward the feminist pro-censorship view." [\[93\]](#) At some of these conferences, anti-censorship feminists were themselves censored. [\[94\]](#)

In 1983, the City of Minneapolis contracted with MacKinnon and Dworkin to draft a suitable pornography code. While normally the city attorney would have supervised the project, that was not the case here. Dworkin and MacKinnon drew up a law that would make "pornography" a violation of women's civil rights. Any materials in which "women's body parts . . . are exhibited such that women are reduced to their parts" or "women are presented as whores by nature" were defined as pornographic. [\[95\]](#) Essentially, the law allowed any woman who felt that certain "degrading" sexually explicit materials violated her civil rights to sue the producers and distributors of pornography for monetary damages or to seek an injunction on the distribution of the materials. In addition, it gave women who had appeared in pornographic materials the right to sue for "coercion into pornography." A finding of coercion would not be negated by proof "that the person showed no resistance or appeared to cooperate actively in the photographic sessions or the events that produced the pornography; or . . . that the person signed a contract . . . that no physical force, threats, or weapons were used . . . or . . . that the person was paid or otherwise compensated." [\[96\]](#)

Allowing so broad a cause of action would in effect ban pornographic materials through the bankruptcy courts. Rather than attack expression they disliked through prior restraint, MacKinnon and Dworkin crafted a more subtle approach that would enable them to eliminate such expression through a statute giving new meaning to tort law.

The law forbade the defense "that the defendants did not know or intend that the materials were pornography or sex discrimination." [\[97\]](#) Examples of pornography for purpose of ordinance given by MacKinnon, Dworkin, and their supporters included not only X-rated materials but *Rolling Stone* album advertisements, French and Italian art films, and works by lesbian writers and avant-garde artists. [\[98\]](#) In Canada, under similar legislation based on the theories of Dworkin and MacKinnon, the infamous Two Live Crew video, "As Nasty as They Wanna Be," has already been banned. [\[99\]](#) Con

trast that to the treatment of Two Live Crew in the United States, where, no matter how distasteful their material, no attempt to suppress it succeeded under prevailing First Amendment standards, despite efforts by zealous local prosecutors.

Can any sexual expression be considered "non-degrading" according to Dworkin and MacKinnon? Dworkin is on record as stating that "sexual intercourse remains a means or the means of psychologically making a woman inferior." [\[100\]](#) And MacKinnon tells us that "the liberal defense of pornography as human sexual liberation . . . is a defense not only of force and sexual terrorism, but of the subordination of women. . . . What in the liberal view looks like love and romance looks a lot like hatred, a torture to the feminist. Pleasure and eroticism become violation . . . admiration of natural physical beauty becomes objectification." [\[101\]](#) Laws written by activists who hold such views are likely to result in even more extensive restrictions on expression than the ones imposed by traditional obscenity laws.

Because of the liberals' traditional revulsion toward censorship, the anti-pornography effort led by Dworkin and MacKinnon caused dissension in feminist circles. In 1984, a number of anti-censorship feminists founded a group called the Feminist Anti-Censorship Taskforce (FACT). When an Indianapolis ordinance similar to the one in Minneapolis and also crafted by Dworkin and MacKinnon was challenged in court in *American Booksellers Association v. Hudnut*, FACT filed an amicus curiae brief opposing the statute. The brief was joined by the Women's Legal Defense Fund and by prominent feminists such as law professor Susan Estrich, National Organization for Women founder Betty Friedan, battered-women's advocate Susan Schechter, and writers Kate Millett and Adrienne Rich--some of whom otherwise share many tenets of radical feminism. [\[102\]](#) (MacKinnon has compared anti-censorship feminists to "house niggers," saying, "The labor movement had its scabs, the [anti-]slavery movement had its Uncle Toms, and we have FACT.") [\[103\]](#)

In 1985, the United States Court of Appeals for the Seventh Circuit struck down the Indianapolis ordinance as unconstitutional. [\[104\]](#) In an opinion by Judge Frank Easterbrook, the court found that "the ordinance discriminates on the ground of the content of the speech," since "speech treating women in disapproved ways--as submissive in matters sexual . . .--is unlawful no matter how great the literary or political value of the work taken as a whole." [\[105\]](#) This, the Seventh Circuit accurately noted, was a blatant violation of the Constitution, which "forbids the state to declare one perspective right and silence opponents." Indeed, it amounted to "thought control." [\[106\]](#)

Throughout its opinion in *Hudnut*, the court underscored the genius of American free speech jurisprudence and the dangers of straying from its fundamental tenets in the name of fighting the allegedly unique harms caused by pornography. It pointed out that "[u]nder the First Amendment the government must leave to the people the evaluation of ideas." [\[107\]](#) All ideas, including the superiority of one race over another, the confiscation and redistribution of all property, or the eternal damnation of unbelievers, no matter how deplorable to some or most of us, are allowed free traffic throughout our society. As the Seventh Circuit panel emphasized, one of the things separating our society from others in which people have been jailed for expressing opinions disliked by the ruling régime is "our absolute right to propagate opinions that the government finds wrong or even hateful. . . . Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us." [\[108\]](#)

Clones of the unconstitutional Indianapolis statute have sprung up from Los Angeles to Suffolk County, New York; its most recent incarnation is the Act to Protect the Civil Rights of Women and Children introduced in the Massachusetts state legislature in 1992. [\[109\]](#) So far, their efforts have been for naught. (Another law based on the MacKinnon-Dworkin model anti-pornography ordinance, enacted by voter referendum in Bellingham, Washington, in 1988, was also struck down by a federal court.)

Undaunted by those losses, MacKinnon, Dworkin, and their followers keep trying to find ways to devise legislation that could technically survive First Amendment tests but would still enable them to suppress visual and printed materials these new Puritans consider harmful. In 1991, the anti-porn feminists joined forces with some religious conservatives to introduce a bill in the U.S. Senate that put a new twist on the MacKinnon approach. The Pornography Victims Compensation Act (PVCA) would have permitted victims of sex crimes to sue anyone involved in the production or distribution of pornography if the victim could show a link between the pornographic material and the crime. [\[110\]](#) The bill's main sponsor, Sen. Mitch McConnell of Kentucky (a conservative Republican), received advice from Catharine MacKinnon in the early stages of its drafting.

However, as with the Indianapolis ordinance, the bill ran into opposition not only from civil libertarians but from liberal and even radical feminists. In addition to FACT, another group, Feminists for Free Expression (FFE), was organized to oppose the PVCA and collected signatures from prominent women writers, artists, and activists on a letter to the Senate Judiciary Committee against the bill. The New York and California chapters of the National Organization for Women opposed it. While the Committee approved the bill by a 7-6 vote, the full Senate failed to vote on it before the end of the 1992 session; it seems unlikely to be revived.

The sweeping view of obscenity proposed by anti-pornography radical feminists has made its strongest inroads in

Canada, where free-speech protections are in some ways considerably narrower than in the United States. (For instance, Canadian law criminalizes expressions of ethnic, racial, or religious hatred.) In February 1992, the Canadian Supreme Court voted unanimously in *Butler v. The Queen* to redefine Canada's criminal obscenity laws to apply to any material that "subordinates, degrades, or dehumanizes." [111] That decision ran counter to the position of many liberal professionals' and women's groups who favored retaining the modern view of obscenity law. The Court's response to their objections was that free speech guarantees were only intended to protect "non-violent" expression. Justice John Sopinka stated that any free speech interest in a case involving a Winnipeg adult store owner was offset by "harm engendered by negative attitudes against women," that is, by the likelihood that pornography would cause men to mistreat women physically and emotionally. [112]

This Canadian Supreme Court precedent is certain to spawn a flood of expensive litigation--not only because more material will facially fall into a category so broadly defined, but also because the Court left the precise criteria for "degrading" material to prosecutors' imaginations. Police detective Bob Matthews explains the obvious: "[I]t won't be until we've had more court decisions dealing with actual material and the term 'degradation' that we will be able to say with any real certainty what is degrading material and what isn't." [113] In the United States, such a broadly phrased law would presumably be invalidated by the constitutional requirements that laws must be sufficiently clear for a reasonable person to know when his actions violate that law. Anti-censorship feminists point out that what some feminists find degrading--for example, images of women joyfully engaging in sex acts with many partners--could be considered liberating by others. [114] Again, while demeaning someone through words or images may be vulgar and offensive, our modern jurisprudence has generally not found that to be sufficient cause for legal action, drawing a clear line between conduct that causes physical harm and expression that does not. It is a distinction worth preserving.

As censorship opponents had warned, the anti-pornography feminists, armed with the powerful weapon of the Supreme Court decision in *Butler*, were not content to limit its reach to "hard-core" pornography. Canada's radical feminists have stepped up the campaign to impose their views on the rest of society. Without even resorting to a friendly legal system, they have succeeded in banning the Miss Canada Beauty Pageant and pulling "sexist" beer commercials from television. [115]

In other countries, anti-pornography feminists have resorted to more militant action, not unlike the old temperance advocates who supplemented their legal battles with smashing liquor store windows. Sometimes, they have been shielded from accountability for their acts by sympathetic judges. In Australia in 1993, Magistrate Pat O'Shane acquitted five protesters caught defacing an advertising billboard which showed a woman being sawed in half by a magician. O'Shane used a discretionary provision of state law to release the women without convictions, costs, or damages, declaring that the real offenders were the advertisers. Criticized for gender bias, O'Shane responded, "Women have a different worldview than men. . . . We have a duty to bring that to bear on how we discharge our functions." [116]

To disapprove of censorship is not to say that people have no right to object to offensive materials. Certainly, private owners of stores, newsstands, and movie theaters can exercise discretion in the types of materials they choose to display, and citizens have the right to attempt to influence--though not through harassment or intimidation--private owners' decisions about the materials they carry.

The constitutionality of zoning ordinances that permit communities to limit the locality of enterprises trafficking in sexually explicit materials is not the subject of this paper. What is certain, however, is that broad restrictions on expression that go beyond those limitations and attempt to stamp out certain kinds of material altogether are impossible without eviscerating the First Amendment.

Criminal Law

In addition to civil rights such as free speech, radical feminists are also trying, in effect, to dismantle equal protection in the criminal code. In their well-founded concern with violent crimes against women--particularly rape and domestic battery--the radicals are intent on eliminating many procedural protections for men accused of such crimes. Of course, there is no reason to think that such encroachments on procedural process will remain confined only to rape cases; but

to those feminists who dismiss autonomy, liberty, and privacy as mere male illusions, that is not a matter of great concern. At the same time, radical feminists are taking exactly the reverse doctrinal approach to cases of women who kill their partners. They have worked to create a new procedural defense for such women--the battered woman syndrome, which, if taken to its logical extreme, could free any woman who committed violent crimes. This paradox suggests that to the radical feminists, procedural protections belong exclusively to women. The overweening power men theoretically possess in the "patriarchy" in which we live is used as justification for eviscerating the rights of actual men.

Rape

Historically, Anglo-American law has treated rape as one of the gravest crimes, deserving of capital punishment. However, feminists in the 1960s had cause to complain about the treatment of complainants in rape cases. Many courts took the position that rape complainants were inherently less trustworthy than complainants in other crimes. Their attitude was encapsulated in the admonition of 17th-century jurist Lord Matthew Hale: "Rape is . . . an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent." [\[117\]](#)

In many states until the 1970s, a version of that warning was used to advise juries to examine cautiously the testimony of the complaining witness, particularly if she was "unchaste." [\[118\]](#) Many courts demanded independent corroboration of every element of the woman's testimony although such corroboration was not a prerequisite to conviction in robbery, assault, or kidnapping cases. [\[119\]](#) Rape laws usually required proof not only of force but of resistance to force; the prevailing view was that "rape is not committed unless the woman resist the man to the utmost limit of her power." [\[120\]](#) Victims of other crimes against person or property were not required to resist to prove that a crime had been committed.

It should be noted that legal precedent in many states stressed only "reasonable" resistance. In a 1968 ruling, the California Supreme Court said, "The amount of resistance need only be such as to manifest her refusal to consent." [\[121\]](#) California courts have generally followed such a standard since as early as 1931. Most traditional rape laws also modified the resistance requirement in cases where the victim was prevented from resisting by threats. In New Jersey, the Appellate Division invalidated the "utmost resistance" test in 1961, noting that "[s]ubmission to a compelling force, or as a result of being put in fear, is not consent." [\[122\]](#)

Nonetheless, in a number of fairly recent cases female complainants were held to a standard that seemed to require them to risk physical harm. In 1973, the Wyoming Supreme Court reversed the conviction of a man who got into the car of a woman he had met in a bar (despite her protests), made her stop on a deserted road, and told her he was going to rape her. When she protested, he "put his fist against her face and said, 'I'm going to do it. You can have it one way or the other.'" [\[123\]](#) The court found that the trial judge (sitting without a jury) had erred in considering the actual fear that the woman experienced rather than "reasonable ground for such fear," and that evidence of a threat sufficient to justify nonresistance was "far from overwhelming." [\[124\]](#)

The 1970s saw a concerted push for rape law reform to substantially modify or drop the resistance requirement and eliminate inquiries into the sexual lives of complainants. In 1986, the California Supreme Court ruled that under the state's revised rape statute, physical resistance was not necessary to prove rape. [\[125\]](#)

However, proof "[t]hat the act was accomplished by means of force [or fear of immediate and unlawful bodily injury]" was still required. [\[126\]](#) In the instant case, the woman had been prevented from leaving the defendant's house by his refusal to unlock the front gate, and had finally submitted to sexual intercourse after prolonged verbal and physical intimidation by him (which included grabbing her by the collar, flexing his muscles and saying, "I can make you do anything I want"). [\[127\]](#) In its decision, the court emphasized:

Although resistance is no longer the touchstone of the element of force, the reviewing court still looks to the circumstances . . . including the presence of verbal or nonverbal threats, or the kind of force that might reasonably induce fear . . . to ascertain sufficiency of the evidence of a conviction. [\[128\]](#)

For many feminists, that is not a sufficiently radical position. They pursue a double strategy: first, to reverse the presumption of innocence in rape cases by making consent an affirmative defense instead of an element of the crime (thereby making sexual intercourse per se suspect and in need of defense); second, to change the definition of consent so as to make it more difficult to prove, thus facilitating convictions. Both reforms are already established in Canadian law; parts of these proposals are also being incorporated into law, both by statute and by judicial fiat, in the United States.

The new feminist jurisprudence hammers away at some of the most basic foundations of our criminal law system. Chief among them is the presumption that the accused is innocent until proven guilty. The meaning of that rule is encapsulated in the oft-repeated maxim that it is better to free ten guilty persons than convict an innocent one. Long ago, we as a society decided not to sacrifice the rights of individuals to the benefits of punishing more people, and mandated that only those unquestionably guilty should suffer the penalties of the criminal law. [\[129\]](#)

Closely related to the application of this principle is the requirement that the state must prove its case beyond a reasonable doubt in order to convict a defendant. The Supreme Court gave constitutional status to this requirement in 1970 when it declared that the "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." [\[130\]](#) The purpose of this rule, which has been a part of the common law since at least the 18th century, is to reduce the risk of a wrong conviction. [\[131\]](#) "Throughout the web of the English Criminal Law," noted a British court, "one golden thread is always to be seen, that is the duty of the prosecutor to prove the prisoner's guilt." [\[132\]](#)

To convict a person of any crime, the state must ordinarily prove two things: an act (actus reus) and a guilty state of mind (mens rea). Each crime is defined by its elements, which dictate what actions and what state of mind must be shown in order to prove a defendant's guilt. [\[133\]](#) Thus, burglary requires entry into a dwelling at night to commit a felony therein. [\[134\]](#) That means the elements of burglary are: 1) activity occurring between dusk and dawn, 2) penetration into a place where people dwell, and 3) an intent to commit a felony once inside the dwelling. To convict a person of the crime of burglary, the state must prove all three elements beyond a reasonable doubt.

There are some very limited circumstances in which the burden of proof shifts to the defense. In some crimes, once the act has been proven, the defendant may show certain excuses or justifications that serve as exculpatory affirmative defenses. Some of those affirmative defenses include self-defense, duress, and insanity. The defendant generally bears the burden of proving those defenses by a preponderance of the evidence. A defendant, however, is only required to prove an element if the defense is "especially unusual." [\[135\]](#)

As commentators have pointed out, frequent shifting of burdens of proof onto defendants would severely undercut the constitutional and common law precept that the prosecution must prove its case beyond a reasonable doubt. Otherwise, "legislatures would be free to impose substantial burdens of proof on defendants by merely re-defining crimes, taking out critical elements and fashioning them into defenses instead." [\[136\]](#) One of the definitive treatises on criminal law, appearing in the *Columbia Law Review* more than 40 years ago, gives an uncannily prescient example of just this sort of unacceptable burden-shifting:

[A] state legislature, outraged by some shocking crime, might attempt to re-define rape by abolishing that crime and imposing a similar penalty for "fornication" defined as extramarital sexual intercourse, but permitting the accused to escape liability if he could prove consent. [\[137\]](#)

Yet what was once considered an obvious example of injustice is very close in essence to what many feminists propose today.

To circumvent the "reasonable doubt" standard in rape cases, feminists have sought to alter the elements of the crime. The crime of rape, for instance, has traditionally been defined as "forced sex without consent." [\[138\]](#) Under that definition, the burden of proof on the issue of consent, as with every other element of the crime, fell upon the government.

In states such as Michigan and Illinois, revised rape statutes have eliminated nonconsent as an element of the crime, instead making consent a defense available to the accused. At least in theory, that is a step toward destroying the presumption of innocence on the issue. However, both states specify that once the affirmative defense is raised, the burden of proving nonconsent shifts back to the prosecution. [\[139\]](#) That shift had made the statutory changes unsatisfactory to many feminist legal scholars. A 1988 law review Note, *Focusing on the Offender's Forceful Conduct*, explicitly proposed a "burden-shifting criminal sexual assault statute" that defined criminal sexual assault as an act in which "[t]he actor uses any . . . form of force, threat of force, or coercion to accomplish sexual penetration" and permitted consent as an "affirmative defense," requiring the accused to prove consent "by a preponderance of the evidence." [\[140\]](#) Consent is defined as "a freely given agreement to the act" rather than "lack of physical or verbal resistance or submission." The proposed model statute specifies that "force, threat of force, or coercion" includes *but is not limited to* circumstances in which "the actor overcomes the victim through the use of physical force," threatens to use violence, or uses a position of authority to coerce the victim. [\[141\]](#)

The State of Washington has openly shifted the burden of proving consent to the defendant. The Washington Supreme Court states that "we believe the removal from the prior rape statute of language expressly referring to nonconsent evidences legislative intent to shift the burden of proof on the issue to the defense." [\[142\]](#) The result of this unconstitutional burden-shifting will be not to jail more violent rapists--lack of consent is easy enough for the state to prove in those cases--but to make it easier to send someone to jail for failing to get an explicit nod of consent from an apparently willing partner before engaging in sex.

In 1979, for instance, New Jersey passed the so-called NOW bill designed to make it easier to prosecute rape cases. In this instance, the revised rape statute eliminated any references to nonconsent and defined "sexual assault" as "an act of sexual penetration with another person [when] [t]he actor uses physical force or coercion." [\[143\]](#) In a 1992 case styled *In the Interest of M.T.S.*, the New Jersey State Supreme Court ruled that absent "affirmative and freely given permission," the requirement of "force or coercion" is satisfied simply by the physical pressure inherent in the act of penetration. [\[144\]](#)

The case involved a male teenager found guilty of juvenile delinquency for an act of sexual assault on a teenage girl. The trial judge in Family Court determined that the teenagers had voluntarily gotten into bed together and engaged in consensual "heavy petting" but the boy had initiated intercourse without the girl's consent. (When told to stop, he withdrew almost immediately.) The Appellate Division reversed the verdict because the girl expressed no objection to intercourse and there was no "unusual or extra force" involved in penetration. The Supreme Court voted unanimously to reinstate the adjudication of delinquency. In a decision that extensively quoted from feminist legal literature, the court stated:

The New Jersey Code of Criminal Justice does not refer to force in relation to "overcoming the will" of the victim, or to the "physical overpowering" of the victim, or the "submission" of the victim. It does not require the demonstrated non-consent of the victim. Under the new law, the victim no longer is required to resist and therefore need not have said or done anything in order for the sexual penetration to be unlawful. The alleged victim is not put on trial, and his or her responsive or defensive behavior is rendered immaterial. . . . To repeat, the law places no burden on the alleged victim to have expressed non-consent or to have denied permission, and no inquiry is made into what he or she thought or desired or why he or she did not resist or pro-test. [\[145\]](#)

Susan Herman, the assistant deputy public defender in the case, was prompted to quip that from now on in New Jersey, "you should have a condom and a consent form when you go on a date." [\[146\]](#) Another way of shifting the burden of proof is for the judge simply to omit instruction on the state's burden of proof beyond a reasonable doubt, which is essentially what was done in the celebrated rape trial of heavyweight boxer Mike Tyson in Indiana in 1992. [\[147\]](#)

Some feminists are deeply skeptical of the very concept of consent as a defense in rape cases. Carol Sanger writes in the *Los Angeles Times*,

Consent--agreeing to something--is usually not a hard concept to understand. It may at first appear more complex in the context of rape. One reason is simply its unexpected presence. There is no other crime defined in terms of consent. Only in rape is the victim asked, "Did you agree to it?" Compare "Did you agree to be punched in the face?" "Did you agree to be mugged?" [\[148\]](#)

That comment reveals an astounding lack of comprehension that almost every illegal act is framed in terms of consent. Battery, for instance, is "intentional and wrongful physical contact with a person without her or his consent that entails some injury or offensive touching"; theft is the taking of property without the owner's consent. [\[149\]](#) The point is that almost no one (except boxers) agrees to be "punched in the face," but people do routinely agree to sexual intercourse; therefore one cannot assume lack of consent from the act itself. Intercourse is very rarely accompanied by explicit consent. That is why in rape trials, proving actual nonconsent has been essential before a person can be convicted and imprisoned.

Some feminist legal scholars proclaim their commitment to traditional standards of the burden of proof. "The constitutional requirement of proof beyond a reasonable doubt may well be difficult in cases where guilt turns on whose account is credited as to what was said," writes Susan Estrich. "If the jury is in doubt, it should acquit. If the judge is uncertain, he should dismiss." [\[150\]](#) The catch is that Estrich would expand the definition of nonconsent and therefore lower the threshold of the proof needed to show nonconsent. She criticizes revised rape statutes that focus on force or coercion by the defendant rather than on resistance by the victim because those laws fail to "recognize a woman's interest in saying no and in having her word respected in situations where force or threats in traditional terms are not present." [\[151\]](#) Estrich also makes it clear that the only reason she does not advocate verbal consent as the standard in rape cases is that the country is "not ready" for such an approach. [\[152\]](#) Meanwhile, she opts for the strict construction of "no means no," meaning that men who persist (without using force) after a woman says "no" should be held liable.

One such case occurred in Pennsylvania in 1988. A college student, Robert Berkowitz, was accused of raping a woman student in his dorm room. The woman, his roommate's girlfriend, had previously engaged Berkowitz in explicit sexual banter. On the afternoon of the alleged rape, after they had talked for a while, the woman said that Berkowitz moved over and "kind of pushed [her] down. . . . It wasn't a shove, it was just kind of a leaning type of thing." [\[153\]](#) He began to kiss and fondle her despite her protestation that she had to go and meet her boyfriend. According to her, she said "no" several times but did not push him away. He claimed that she returned his kisses and whispered "no" several times but moaned "amorously" as she did so. Then they both got up and Berkowitz went to lock the door; the lock worked so that the door could not open from the outside but opened from the inside by turning the doorknob. The young woman admitted she knew this; she made no attempt to leave. Next, he "put [her] down on the bed" and undressed her while she was "just kind of laying there"; after less than a minute of intercourse, during which she softly moaned "no," he pulled out and ejaculated. Berkowitz was convicted of rape and sentenced to a year's imprisonment. [\[154\]](#)

On appeal, the Superior Court concluded that while the young woman's lack of resistance did not invalidate her claim of rape, her own account contained no evidence of "forcible compulsion" since she was not pushed down, restrained, or threatened. In 1992, Berkowitz's conviction was struck down; that ruling was upheld by the Pennsylvania State Supreme Court in June 1994. The decision was greeted by an outcry from feminists and rape victims' advocates, who asserted (incorrectly) that it required victims to resist. Said Kathryn Geller Myers, a spokeswoman for the Pennsylvania Coalition Against Rape, "We've been educating people and the police have been educating people not to resist so you don't face grievous bodily injury. Now the Supreme Court appears to say you're going to . . . have to fight to the utmost. . . . That's what so dangerous." [\[155\]](#) (In fact, the court explicitly stated that its decision was based on the lack of a threat of harm, not on lack of resistance; Pennsylvania law already specifies that "the victim need not resist the actor in prosecutions" under the rape statute. [\[156\]](#)) Under pressure from women's groups, politicians immediately lined up behind a proposal by state Rep. Karen Ritter to change the law so as to eliminate the forcible-compulsion requirement. [\[157\]](#) "Politically, I call it rape whenever a woman has sex and *feels* violated," says Catharine MacKinnon. [\[158\]](#) The courts seem to be coming close to embracing this as a legal standard as well.

Feminist lawyers have pursued two other tacks to circumvent the constitutional protections of the accused in rape cases. The first is the creation of a parallel civil offense in which close cases would be much easier to prove. [\[159\]](#) In a civil trial, the modicum of proof needed for a showing of liability is lowered significantly, from "beyond a reasonable doubt" (about 99 percent) to "a preponderance of the evidence" (about 51 percent), and evidentiary rules are relaxed. [\[160\]](#) The second and much more ominous development is the proposal to make rape a federal hate crime. [\[161\]](#)

The Violence Against Women Act, (VAWA) introduced by Sen. Joseph Biden and co-sponsored by 60 senators, was passed by Congress in 1994 as part of the Crime Bill. That legislation will, among other things, make "crimes of violence motivated by the victim's gender" a federal civil rights violation. While the text of the bill gives no clear definition of "gender-motivated violence," the statements of its sponsors leave no doubt that they intend the provisions to apply to virtually all sexual assaults on women. According to Senator Biden, "One of the things that we are trying to do . . . is to make it a policy of the country that rapes are hate crimes committed against women, crimes of violence directed disproportionately at one group based on their gender." [\[162\]](#)

Intuitively, the claim that "women are raped because they are women" may ring true. But does that make it a crime of "sex discrimination," any more than a man's pattern of having consensual sex with female partners only represents bias against men? Of course, rape is primarily an act of violence and aggression, not of passion; but the violent and aggressive impulse is channeled into what is indisputably, in the technical sense, a sexual act. When a man's sexual impulses are directed toward women, chances are that his sexual aggression will be, too.

The view that rape invariably or usually stems from hatred of women is not accepted by researchers who study sex offenders. Psychologists Robert Prentky of the Boston University School of Medicine and Raymond Knight of Brandeis University identify several types of men who rape. The true women-haters, whom Drs. Prentky and Knight label "vindictive" rapists, constitute about one-fifth of incarcerated sex criminals: "These men resent women for all their perceived problems, and [the] sexual assault is intended to hurt and humiliate them." About one-tenth are angry at the whole world, not just at women, and are "as likely to assault men as women." Five percent are sexual sadists who "derive pleasure from the victim's fear or pain." The rest are more or less evenly divided between "sexual nonsadistic rapists" who "feel they are so inadequate that no woman in her right mind will willingly sleep with them" and fantasize about winning a woman's love by raping her, and "opportunistic" rapists who are primarily interested in sexual gratification and "rape on impulse either while committing another crime [such as a burglary] or if they happen to find themselves alone with a woman somewhere." [\[163\]](#)

Moreover, the theory of rape as an act of gender bias is undermined by the fact that males too are sexually assaulted. While the true percentage of men among the victims is unknown, one study found that about 10 percent of rape victims treated at a medical facility in New Mexico in 1978 were male; in another, men accounted for 6 percent of the victims treated at a South Carolina community mental health facility. [\[164\]](#) An analysis of Toledo police data by the *Toledo Blade* in 1989-92 showed that about 7 percent of victims of reported rapes were men; in another 4 percent of the cases, the gender of the victim could not be determined from the name. [\[165\]](#) In one campus study of sexual victimization, the incidence of date rape for gay students (three-quarters of them male) was 50 percent higher than for heterosexual women. [\[166\]](#) Finally, the Bureau of Justice Statistics National Crime Victimization Survey indicates that 6 to 10 percent of sexual assaults involve male victims. [\[167\]](#) That's not even counting sexual assaults on children, where up to a third of the victims are probably boys. And it doesn't count prison rape, a crime the prevalence of which is little known.

The absurdity of the "hate-crime" approach to rape became evident when one supporter of such legislation noted that "[i]f the assailant had a habit of raping both men and women, it might be more difficult to show that the rape was motivated by gender bias." [\[168\]](#) Is the "equal-opportunity" rapist less reprehensible? Do males who are raped deserve less legal protection than female victims?

VAWA will allow only damage suits, not criminal prosecutions, in federal courts. But feminists are likely to argue that since crimes motivated by race are subject to criminal prosecution under federal civil rights statutes, it is discriminatory to treat gender-motivated offenses as lesser crimes. In that manner, federal civil rights legislation could circumvent the

double jeopardy clause of the Fifth Amendment--as in the Rodney King case--by allowing two successive prosecutions for the same alleged sexual offense. [\[169\]](#)

The "gender-motivated violence" civil rights provision of the VAWA can lead to serious intrusions on civil liberties. One commentator notes that it would "invite publicity-oriented trials in which the desire is not so much to win as to call attention to the supposed injustice of American society." [\[170\]](#) Civil rights suits for rape may open the way to inquiries into supposedly bigoted motives and attitudes. Boston attorney Andrew Good points out that "with a civil case, you face the prospect of a very intrusive investigation of your views: 'Are you or have you ever been a sexist?'" [\[171\]](#)

That is exactly what the radical feminists want. In an op-ed article written after William Kennedy Smith's acquittal in the Palm Beach case, MacKinnon enumerated the advantages of treating rapes as civil rights cases: "Instead of asking did this individual commit a crime of battery against that individual, the court would ask did this member of a group sexually trained to woman-hating aggression commit this particular act of woman-hating sexual aggression? . . . The testimony of other women . . . would be central: how does this man treat women sexually? . . . We might have learned whether pornography . . . was part of the defendant's training." [\[172\]](#)

Radical feminist legal theories of rape have made their furthest inroads in Canada. In its path-breaking "no means no" rape law passed in 1991, the Canadian government reversed the burden of proof in rape cases, narrowed the definition of consent, and drastically limited the definition of "consensual sex." [\[173\]](#) The new definition will presumably make it much easier to convict accused rapists. Under the law, sex is rape when the man fails to "take reasonable steps" to ensure consent. [\[174\]](#) Even with explicit consent, sex can be rape if the woman is drunk and therefore considered incapacitated, or if one party is found in "abuse of a position of trust or authority" over the other. [\[175\]](#) Some Canadian courts have continued to hold that if the woman has not "indicated at any point by words or actions that she objects," then "legally she has consented unless the man has used force, threats, fraud or a position of authority to gain her submission." [\[176\]](#) On the basis of this, the Nova Scotia Court of Appeal exonerated a man of raping his teenaged stepdaughter (who was not under his authority, since she was a ward of the province). At the behest of feminist groups, who decried the decision as "reinforc[ing] the myth that a woman being sexually assaulted should behave in a certain way," the Canadian Supreme Court agreed in May 1993 to hear an appeal of the case. [\[177\]](#) Should it reverse the lower court decision, the "no means no" law will definitively become an "absence of a yes means no" law.

In essence, these changes are taking us toward a strict criminal liability regime, where all heterosexual sex is like statutory rape unless affirmative, explicit verbal consent given in a clear and sober frame of mind can be demonstrated. These laws are not only unfair to men in reversing the age-old presumption of innocence; they are also patronizing to women. As one dissenting feminist points out, "The idea that only an explicit yes means yes proposes that women, like children, have trouble communicating what they want." [\[178\]](#) Interestingly, some feminist legal scholars welcome the parallel between women and children. According to MacKinnon, "Some of the same reasons children are granted some specific legal avenues of redress . . . also hold true for the social position of women compared to men." [\[179\]](#)

MacKinnon has also repeatedly and outspokenly stated that almost all heterosexual sex is rape. She points out that "men see rape as intercourse; feminism observes that men make much intercourse rape." [\[180\]](#) Combine this with the similarity between the patterns, rhythms, roles, and emotions, not to mention acts, which make up rape (and battery) on the one hand and intercourse on the other. All this makes it difficult to sustain the customary distinctions between pathology and normalcy, paraphilia and nomophilia, violence and sex, in this area." [\[181\]](#) Clearly, there is much to fear from an approach to rape law based on a theory with that sort of dogma at its core. It means that the government can enter American bedrooms to force men to receive explicit consent to sexual activity--which, to say the least, does not comport with how most people conduct themselves in private--or risk a jail sentence.

Few people would like to see a return to days when rape victims could be subjected to humiliating interrogation about their private lives even when the inquiries had no relevance to their relationship with the accused, or questioned about their lack of resistance in a life-threatening situation. But the pendulum has swung too far. According to Boston

defense attorney and former sex crimes prosecutor Rikki Klieman, "Now, people can be charged with virtually no evidence. . . . Prosecutors are not exercising very much discretion in their choice of cases. In certain places in the country, I think they're exercising none. If a female comes in and says she was sexually assaulted, then on her word alone, with nothing else--and I mean nothing else, no investigation--the police will go out and arrest someone." [182] A comprehensive review of rape laws is in order to ensure that the reformed legislation does not reverse the burden of proof and does not eliminate physical force or threat of force from the legal definition of rape.

When sexual assault statutes stipulate that the victim is not required to resist her assailant, the text should specify that it does not apply to the failure to rebuff advances that do not involve force (as in *Berkowitz*). To prove a charge of rape or sexual assault, the prosecution would have to convince the jury that (a) the victim was physically unable to prevent sexual intercourse (because of physical restraint and/or incapacitation by alcohol or drugs), or (b) the victim reasonably feared bodily harm if she attempted to prevent sexual intercourse by pushing the aggressor away or by leaving. The statute should be narrow enough that, on the one hand, the victim's nonresistance in the face of physical restraint, force, or threats would not be held against her, while on the other hand a man could not be found guilty of sexual assault for engaging in persistent and aggressive but nonforcible advances, or for failing to obtain an explicit "yes." The possibility of such a middle ground is suggested by the position of the California State Supreme Court in *Barnes*: "[T]he complainant's conduct must be measured against the degree of force manifested or in light of whether her fears were genuine and reasonably grounded." [183]

Domestic Violence

VAWA has a broader purpose than to make rape a federal civil rights violation. It seeks to place all crimes seen as directed primarily at women into a special category. That applies, above all, to violence in relationships.

Again, the feminists' concerns are not groundless. While the notion that hitting his wife was considered (until recently) a husband's lawful prerogative is wrong (the first criminal code enacted by American colonists in 1642 forbade wife-beating), there was a marked tendency on the part of police and courts to view family violence as a private matter. [184] Criminologist Lawrence Sherman argues that "police underenforce [the law against] all violence associated with interpersonal conflicts. . . . In that sense, they are not discriminating against women, but against most violence." [185] However, there were enough well-publicized cases of police neglect of battered wives to warrant public support for the feminist call for change. One obstacle to policing of domestic violence was the general rule that arrests could not be made without a warrant in misdemeanor assaults the officer had not witnessed, even when there was probable cause to believe that violence had taken place. In 1983, 22 states did not allow warrantless arrests; by 1988, the number was down to 9. [186]

Not content to stop there, however, feminists have called for laws *mandating* arrest on probable cause for misdemeanor assault (which includes a slap or a shove). Such laws now exist in 15 states and in the District of Columbia; most recently, Maryland has a mandatory arrest law. [187] In other jurisdictions, a woman who signs a complaint against her husband for domestic violence is not permitted to drop assault charges. [188] Such rules do not apply to any other kind of misdemeanors: various studies have shown that when both the suspect and the complainant are present in misdemeanors (domestic or not), arrests are made less than half the time. [189] Recent studies have shown that the deterrent value of mandatory arrest for domestic violence, particularly in poor, high-unemployment communities where such violence is most common, is dubious at best. [190] Nonetheless, opposition to mandatory arrest has been frequently met with objections based on politics, not demonstrated effectiveness. [191] VAWA, which establishes federal grants for states and municipalities to combat domestic violence, requires as a condition of grant eligibility "laws or official policies [which] mandate arrest of spouse abusers on probable cause." [192]

Ironically, mandatory arrest laws have often backfired against women (who, ample research shows, are about as likely as men to resort to violence in domestic situations [193]). Analyzing the 1985 National Family Violence Survey, the largest survey on domestic violence, sociologists Murray Straus and Jan Stets write, "Of the . . . respondents who experienced one or more assaults, both parties engaged in violence in 49% of the cases, violence by men occurred in 23% of the cases, and violence by women occurred in 28% of the cases. No significant differences were found by

gender of respondent . . . [W]omen not only engage in physical violence as often as men, but they also initiate violence about as often as men. [\[194\]](#) In Wisconsin, two months after the mandatory arrest law was enacted, a woman was arrested for slapping her 18-year-old son "because he sassed her and made an obscene gesture." [\[195\]](#) Some states also showed a high rate of "dual arrests," in which both partners in a violent incident were arrested. This, says Sherman, "resulted in intensive lobbying [by battered-women's advocates] not to arrest women regardless of probable cause to do so." [\[196\]](#) VAWA requires that states and municipalities eligible for federal grants for anti-violence programs must "demonstrate that their laws, policies, practices, and training programs discourage 'dual' arrests." [\[197\]](#)

Stalking

Another area of feminist legal activism where good motives have been marred by an attempt to cast too wide a net has been the "stalking" legislation that has proliferated in recent years. While stalking is not exclusively a male offense against women (an Illinois police chief says that many men who are stalked are too embarrassed to get the police involved), it is often portrayed as such by advocates and by the media. [\[198\]](#)

The first stalking law was enacted in California in 1990; similar statutes are now on the books in 48 states and the District of Columbia. Their purpose, essentially, is to take a preemptive strike against a likely offender. As the former U.S. Attorney Jay B. Stephens put it, "We should not have to wait until an overt act of violence occurs to take action." [\[199\]](#) That seems to run counter to the principle that persons can only be punished for crimes they have already committed. To overcome that barrier, stalking--defined as a combination of threats, harassment, and surveillance--has itself been made a crime. In the past, such behavior was defined simply as harassment, a summary offense which carried no serious penalties.

In most states, stalking laws have been passed in response to a shocking crime that could have been prevented. In March 1992, 26-year-old Connie Chaney of Des Plaines, Illinois, was gunned down in her office by her estranged husband Wayne, who had repeatedly violated a protection order and had been released on bond after allegedly raping her at gunpoint. [\[200\]](#) A law that made stalking a felony punishable by a maximum of three years' imprisonment and a \$10,000 fine was passed by the state legislature in June of that year and signed by Gov. Jim Edgar. The law requires proof of a threat of harm followed by at least two instances of following or watching the victim. [\[201\]](#)

Other states have passed laws that are far broader and more vague. The District of Columbia law covers not only harassment that puts a person "in reasonable fear of bodily injury or death," but also "conduct with the intent to cause emotional distress to another person"; the penalty on the first offense is a fine of up to \$500, up to one year in jail, or both. [\[202\]](#) The Pennsylvania stalking statute, signed into law in June 1993, likewise covers conduct demonstrating "an intent to cause substantial emotional distress." [\[203\]](#) Some advocates even insist that there should be no need to prove intent to cause distress. [\[204\]](#) In Virginia, a district judge found the state anti-stalking law unconstitutional because it "goes too far and attempts too much." [\[205\]](#) In the case, the charge against the defendant was based on such actions as sending flowers to a woman and trying to attend her church and get a job at the place where she worked. The state claimed that those actions had caused the woman "great distress." In Georgia, a 63-year-old city councilman resigned after being arrested for stalking a woman who had broken off their relationship six weeks earlier. He was accused of repeatedly calling her at odd hours, leaving notes on her car saying, "I can't live without you," and, "Why did you turn on me?" and parking near her residence.

Such behavior is admittedly unpleasant, but one may question whether--unaccompanied by some expression of intent to cause harm--it warrants a charge that would result in one to five years of imprisonment on a second offense. The Georgia statute defines stalking as following or contacting a person in a way that "causes emotional distress by placing [the] person in reasonable fear of death or bodily harm," but adds that this "shall not be construed to require that an overt threat of death or bodily injury has been made." [\[206\]](#) The resulting application of the law, as the case of the city councilman demonstrates, obviously stretches the definition of "reasonable fear."

To reach the largest possible number of cases, anti-stalking-law advocates often want the statutes to be written as broadly as possible. In the District of Columbia, for instance, city attorneys argued that "defining stalking as just

'following and harassing' someone could unnecessarily limit stalking cases." [207] But for that very reason, stalking laws often run into the constitutional problem of vagueness and overbreadth. [208] In Florida, one county judge ruled that the state's stalking statute was unconstitutional. He said the law was so broad that a tenacious journalist could "run afoul" of it by following someone to obtain a comment. [209]

There are other aspects of anti-stalking statutes that civil libertarians and others find troubling. The challenged Florida law permits warrantless arrests on stalking charges. In Illinois in spring 1993, a state appeals court struck down a provision in an anti-stalking law that allowed stalking suspects to be denied bail. [210] (Further appeals are pending.) There is also the issue of standards of proof, which often come down to he said-she said. In 1993, a Chicago man was convicted of stalking his ex-girlfriend, despite evidence that after their breakup and during the time when he was alleged to have terrorized her, they spent time together in a motel and she listed him on a hospital form as the person to contact in case of emergency. [211]

Because of notorious incidents of stalkers who turn violent, anti-stalking laws have broad public support. In egregious cases where there is clear evidence of violent intent, such laws can be valuable and can be drafted narrowly enough to avoid violating individual freedom of movement. But under the banner of protecting women, the legislation as it is being written can become a weapon for levying criminal penalties for behavior that is merely annoying--or for offenses one is suspected of intending to commit. There are concerns that the law pressures the courts to lock up vast numbers of petty offenders to catch the few who will go on to commit serious violence. As Judge Harold Sullivan of the Skokie branch of the Cook County (Illinois) Circuit Court put it, "We can't send all these people to the County Jail until trial." [212]

Violence by intimates, which disproportionately affects women, is a problem that deserves serious attention. But exaggerated claims of its dangers, uncritically picked up by the media, have created a climate of hysteria in which the rights of mostly male defendants are easily trampled. (In fact, only 6.5 percent of all murders and non-negligent manslaughters committed in the United States in 1990 involved men killing their wives or girlfriends while 3.4 percent involved women killing husbands or boyfriends. [213]) Elaine M. Epstein, past president of the Massachusetts Bar Association, has written:

The recent media frenzy surrounding domestic violence has paralyzed us all. Police, prosecutors, judges and attorneys alike all seek to protect themselves from potential criticism. . . . The truth is that it has become impossible to effectively represent a man against whom any allegation of domestic violence has been made. In virtually all cases, no . . . meaningful hearing or impartial weighing of the evidence is to be had. . . . In many [divorce] cases, allegations of abuse are now used for tactical advantage. [214]

Battered Woman Syndrome

While feminist legal thinkers take a cavalier attitude toward procedural safeguards for male defendants, their views shift radically when the other sex stands accused. To Lenore Walker, members of the patriarchy's ruling class not only are not entitled to traditional civil rights but, in some cases, are not entitled to live. A psychologist, legal theorist, and director of the Domestic Violence Institute, Walker is the leading exponent of the battered woman syndrome. She makes no secret of the ideological nature of her work:

A feminist political gender analysis has reframed the problem of violence against women as one of misuse of power by men who have been socialized into believing they have the right to control the women in their lives, even through violent means. . . . [T]he underbelly of interpersonal violence is seen as the socialized androcentric need for power. Feminists believe that violence against women is at the core of all violence in the world. [215]

In her book *The Battered Woman*, Walker defines the elements of the battered woman syndrome: "A battered woman is a woman who is repeatedly subjected to any forceful physical *or psychological* behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights. . . . To be classified as a battered woman, [216]

the couple must go through the battering cycle at least twice." _____

Walker makes it clear that a woman can be "battered" even if there is no physical violence: "I decided that a woman's story was to be accepted if she felt she was being psychologically and/or physically battered by her man. [\[217\]](#) In the case of one couple Walker profiles, she acknowledges that the wife clearly initiated the physical assault, throwing a glass at her husband's head and hitting him with a chair, but adds that "it is also clear from the rest of her story that Paul had been battering her by ignoring her and by working late, in order to move up the corporate ladder, for the entire five years of their marriage." [\[218\]](#)

When battering is defined so broadly and so vaguely, it is hardly surprising that Walker finds it to be quite common: "Our research and most other studies show that wife-battering occurs in 50 percent of families throughout the nation." [\[219\]](#) Walker believes that virtually every woman who kills her mate is a victim of the battered woman syndrome. As the New Jersey Supreme Court (echoing Walker) described the condition, battered women "become so demoralized and degraded by the fact that they cannot predict or control the violence that they sink into a state of psychological paralysis and become unable to take any action at all to improve or alter the situation" short of killing the abuser. [\[220\]](#)

Recently, the emphasis on the "learned helplessness" aspect of the syndrome has come under fire from some feminist legal theorists such as Elizabeth Schneider. What worries them is not only that the image of the battered woman as passive and helpless perpetuates damaging stereotypes but that women who are "too strong [and] assertive . . . to fit the definition" may not be able to take advantage of the defense. [\[221\]](#) If battered women are not helpless, one may ask why they do not terminate the abusive relationship rather than the abusive partner. Some feminist scholars cite the danger of violence when battered women try to leave. [\[222\]](#) But Schneider also falls back on explanations that smack of helplessness, citing the women's financial and emotional dependency and even the fact that "they love the men and want to maintain whatever intimacy and sense of connection they have." [\[223\]](#) As in much feminist legal theory, logic (a patriarchal construct) takes a back seat to expediency.

While Walker describes the battered woman syndrome in psychological terms, she considers it vitally important to emphasize that the syndrome is not a form of insanity: "[The] behavior of battered women who kill their abusers needs to be understood as *normal*, not abnormal." [\[224\]](#) She advocates a radical shift in legal treatment of abused women who kill--not just leniency but full acquittal--and in social attitudes. In her view, "Women don't kill men unless they've been pushed to a point of desperation." [\[225\]](#) Courts initially rejected Walker's theories as biased and advocacy-driven. Yet by 1991 she had testified in about 150 criminal cases. [\[226\]](#) She charges \$170 to \$200 an hour as an expert witness for such defendants as Peggy Sue Saiz, the Denver, Colorado, woman who fatally shot her husband George in November 1990 after the two had sex and he fell asleep. Saiz then ransacked the home to make it appear that the crime had been committed by a burglar and went disco dancing with her sister. Although Saiz was involved in an extramarital affair at the time, took out hundreds of thousands of dollars in life insurance on her husband a few weeks before the killing, and went out target shooting the day before, Walker argued that all her behavior was consistent with battered woman syndrome. [\[227\]](#)

In the 1970s and early 1980s, women charged with murdering their alleged batterers began to assert self-defense claims based on the battered woman syndrome. The first question faced by state courts was whether expert testimony on the syndrome was admissible. In 1979, the first decision allowing such testimony came down from the District of Columbia Circuit Court of Appeals. [\[228\]](#) Since then, appellate courts in 26 states have addressed the issue. Seventeen states have concluded that expert testimony on the battered woman syndrome is admissible; only three exclude it. [\[229\]](#)

Traditionally in the Anglo-American system, those pleading self-defense in murder trials had to prove that they faced imminent danger at the time of killing with no means of escape. In other words, they had to show that they had been fending off an actual attack and had had to use force to do so. Once the aggressor made a move to retreat, the defense of self-defense was no longer available. [\[230\]](#)

Proponents of the battered-woman defense claim that existing legal doctrine "is defined in a narrow and male-

identified fashion to encompass . . . encounters between men of roughly equal size and strength" and "refuses to take into account the social context of a battered-woman defendant's act." [\[231\]](#)

In fact, as New York University law professor Holly Maguigan (who is sympathetic to the battered-woman defense) acknowledges, traditional self-defense law does not exclude the context of the event, such as previous threats or assaults. In 1902, long before battered woman syndrome was born, the Texas Court of Criminal Appeals reversed a woman's conviction for killing her husband because evidence of past violence had been excluded from the trial:

[I]t is admissible for the defendant, having first established that she was . . . in apparent danger, to prove that the deceased was a person of ferocity [and] excessive strength . . . for the purpose of showing either (1) that the defendant was acting in terror, and hence incapable of that specific malice necessary to constitute murder in the first degree; or (2) that she was in such apparent extremity as to make out a case of self-defense. [\[232\]](#)

In other spousal homicide cases in the pre-feminist 1940s, 1950s, and 1960s, appellate courts held that such factors as prior abuse and differences in physical strength needed to be considered to determine whether the defendant was reasonably responding in proportion to the threat. [\[233\]](#) If, as Maguigan argues, the law is often not applied fairly in cases of this kind, that is no reason to overhaul the basic premises of self-defense law.

The battered-woman defense seeks to establish the possibility of self-defense in cases where, even with such factors as prior violence or differences in strength taken into account, no court would have made such a finding under traditional doctrine. In 1981, Janice Leidholm stabbed her husband Chester to death as he slept after an argument that involved yelling and shoving; the marriage had a history of violence. [\[234\]](#) Under legal precedent, evidence of past abuse should have been inadmissible because it could have no bearing on whether Leidholm was in imminent danger. (She clearly was not, with her husband asleep.) Yet the judge allowed prior abuse into evidence and instructed the jury on self-defense. When Leidholm was found guilty nonetheless, the North Dakota Supreme Court threw out the conviction on the grounds that the judge had told the jury to consider whether she had acted justifiably by the standard of a person "of ordinary prudence and circumspection," rather than by her own subjective standards. [\[235\]](#) When killing a man in his sleep can be justified as self-defense, it seems like a prescription for legalized murder.

Once again, Canada leads the trend. The Canadian Supreme Court has unanimously decided to permit the battered-woman defense throughout Canada. This defense began as a mitigating circumstance that could be used to reduce the charge from murder to manslaughter. [\[236\]](#) It is now being used to acquit completely, even in questionable scenarios such as the case of Angelique Lavallee, who shot her abusive common-law husband Kevin in the back of the head as he was leaving the room after threatening her. The Supreme Court sustained the acquittal, upholding the admission of controversial expert testimony on battered woman syndrome. [\[237\]](#)

Other Canadian cases in which the battered-woman defense has been invoked include that of "Jeannette," who stabbed her boyfriend to death after a quarrel. Although this boyfriend had not abused her, Jeannette claimed that her history of being abused by *other* men sufficed to allow evidence of the syndrome as a defense to the killing. [\[238\]](#)

In the United States, too, attempts have been made to use the battered woman syndrome as a defense for women who kill people other than their alleged abusers. In the 1993 New Jersey case of Irene Seale, convicted of kidnapping in the abduction and death of Exxon executive Sidney Reso, Walker submitted a brief for the defense arguing that Seale was a victim of her husband (with whom she participated in the kidnapping and extortion scheme) and, as a battered wife, had become so numb to her feelings that "Sidney Reso was not a real person to her." There appeared to be no evidence that Seale had been abused. [\[239\]](#) Currently, Faye

Copeland, convicted with her husband Ray in 1990 of murdering five drifters the Copelands had hired as farm hands, is seeking a new trial on the grounds that she was not allowed to present the battered woman syndrome as a defense at her trial. Several family members testified that they had never seen Ray Copeland physically abuse his wife but that he "would say things like 'shut up' and 'you're stupid.'" [\[240\]](#)

When battered-women's advocates have not succeeded in the courts, they have often prevailed by using political pressure on the executive branch to free women who kill their mates. In 1991, Gov. Richard Celeste of Ohio and Gov. William Donald Schaefer of Maryland commuted the prison sentences of a number of women convicted of killing or assaulting alleged abusers. In Ohio, "15 of the 25 women selected for clemency had said they had not been physically abused, six had discussed killing their boyfriends or husbands, sometimes months before doing so, and two had tracked down and killed husbands from whom they were separated." [\[241\]](#) One of the women freed in Maryland had hired a hit man to kill her husband and had collected on their \$20,000 insurance policy. [\[242\]](#)

Thus, due to the persistent efforts of certain feminists, women who have not even been physically abused are released after serving very short sentences for killing their husbands. A 1994 Bureau of Justice Statistics analysis of murder cases disposed in 1988 in the courts of large urban counties found that wives convicted of killing their husbands were sentenced to an average of 6 years in prison while husbands convicted of killing their wives were sentenced to an average of 17 years. (By comparison, the average sentence for a non-family murder is 14.7 years.) Sixteen percent of the wives, but only 1.6 percent of the husbands, received probation. In addition, the acquittal rate was 12.9 percent for wives accused of killing their husbands compared to 1.4 percent for husbands accused of killing their wives. [\[243\]](#)

Other cases are never even tried. Reviewing a sample of female-offender homicides, sociologist Coramae Richey Mann found the case of a woman who claimed self-defense after shooting her husband *six times in the back of the head* in a domestic argument during which he had threatened her with a chair. The case was dismissed. [\[244\]](#) In Brooklyn, New York, in 1987, Marlene Wagshall shot her sleeping husband in the stomach with a .357 magnum revolver after finding a photo of him with another woman. (He survived but lost parts of his stomach, liver, and upper intestine.) There was no evidence to corroborate her claims of physical abuse. A grand jury indicted Wagshall for attempted murder, but feminist District Attorney Elizabeth Holtzman reduced the charge to second-degree assault and accepted a guilty plea with a sentence of *one day in jail* and five years' probation. [\[245\]](#)

In a speech in Banff, Canada, Andrea Dworkin exhorted her audience to "stop men who beat women": "Get them jailed or get them killed. . . . When the law fails us, we cannot fail each other." [\[246\]](#) The exhortation to break the law if it cannot be tailored to the radical feminist program shows the lengths to which the activists are willing to travel to implement their vision of a redistribution of power. Instead of focusing on measures to prevent and punish domestic assault no matter who commits it--a need to which police, courts, and social agencies should be more responsive--they seek to have one set of laws for women and another for men. What is alarming is that, all too often, the courts are helping in this endeavor.

In some spousal homicide cases, a history of past violence and especially threats to the person's life may undoubtedly be relevant to a finding of self-defense. Here, expert opinion on spousal abuse may have a place in the courtroom. Nonetheless, the concept of the battered woman syndrome needs to be reexamined impartially, given clear evidence that this condition was originally formulated on the basis of political rather than scientific premises.

Conclusion

The issues examined in this discussion cover only a portion of the feminists' attempt to overhaul our legal system. Their attack on "the masculine voice of rights, autonomy and abstraction" bodes ill for a liberal society. [\[247\]](#) Leslie Bender of the Syracuse University College of Law writes that "[t]he feminine voice can design a tort system that is caring . . . and responsive to others' needs or hurts" instead of "protect[ing] efficiency and profit." [\[248\]](#) The late Mary Jo Frug of the New England School of Law suggested that a woman should not be bound by a contract if her failure to read it before signing stemmed from concern for others' feelings. ("She was acting like a reasonable woman." [\[249\]](#))

It is often said that today's radical feminists are trying to roll back the clock to an era when frail women had to be protected from the harsh world and the natural predatory inclinations of men. That is only partly true. What the radical feminists want is the traditional special protections women had in more paternalistic days plus all the rights that they have gained in the quest for equality with men. Their effort to abolish male privilege while preserving and expanding female privilege is likely to create the very backlash feminists fear. Moreover, most women do not want their brothers,

husbands, or sons to live under a legal system that presumes them guilty; nor do they believe that sex is rape, freedom is a male plot, and an abused woman can be her own judge, jury, and executioner.

Yet because a small and vocal minority--the Catharine MacKinnons, the Andrea Dworkins, the Lenore Walkers--has been widely perceived as acting on behalf of all women, it has managed, in less than 15 years, to achieve spectacular successes. Some of their positions have been embraced by the supreme courts of the United States and Canada, and by the governors and voters of several states. They have commitment and time. If their win-loss average continues at its current pace, the day may soon arrive when sexual and political repression to fight sexual and political repression, gender hostility to fight gender hostility, and arbitrary laws to fight arbitrary laws become the order of the day.

Footnotes

[1] *Glad Day Book Shops v. Deputy Minister of National Revenue for Customs and Excise*, No. 619/90, 1992 Ont. C. J. Lexis 1296 (July 14, 1992).

[2] *The Gazette* (Montreal), April 14, 1993, p. A1.

[3] Susan Kastner, "The Sexual Future is in Contracts," *Toronto Star*, February 2, 1992, p. D1.

[4] Jim Reid, "New Sexual Assault Law Alarming for Men," *Toronto Star*, March 13, 1993, p. MS2.

[5] Nat Hentoff, "Pornography War Among Feminists," *Washington Post*, April 4, 1992, p. A23.

[6] Wendy McElroy, "The Roots of Individualist Feminism in 19th-Century America" in *Freedom, Feminism, and the State*, 2d ed., ed. Wendy McElroy (New York: Holmes and Meier 1991). For an excellent book-length discussion of liberal feminism, see Joan Kennedy Taylor, *Reclaiming the Mainstream: Individualist Feminism Rediscovered* (Buffalo, New York: Prometheus Books, 1992).

[7] Quoted in Jeff Rosen, "The Book of Ruth," *New Republic*, August 2, 1993, p. 19.

[8] *Ibid.*

[9] Jeanne L. Schroeder, "Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence," *Iowa Law Review* 75 (1990): 1135; Gerda Lerner, *The Creation of Patriarchy* (New York: Oxford University Press, 1987), pp. 9, 101-22, 239.

[10] Ann Scales, "The Emergence of a Feminist Jurisprudence: An Essay," *Yale Law Journal* 95 (1986): 1373; Liana Fiol Matta, "On Teaching Feminist Jurisprudence," *Revista Juridica de la Universidad de Puerto Rico* 57 (1988): 253.

[11] See, for example, Bruce Ackerman, *We the People* (Cambridge: The Belknap Press of Harvard University Press, 1991) p. 153, n. 43 (1991). See also Robin West, "Jurisprudence and Gender," *University of Chicago Law Review* 55 (1988): 1.

[12] Martha Chamallas, "Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation," *Texas Journal of Women and the Law* 1 (1992): 95, 131, 125.

[13] *Lavallee v. The Queen*, 55 C.C.C. 3d 97 (1990).

[14] Anastasia Toufexis, "Now for a Woman's Point of View," *Time*, April 17, 1989, p. 51.

[15] Fred Strebeigh, "Defining Law on the Feminist Frontier," *New York Times Magazine*, October 6, 1991, p. 30; Kenneth Lasson, "Feminist Awry: Excesses in the Pursuit of Rights and Trifles," *Journal of Legal Education* 42 (1992): 1, 4 n. 15 (noting that "at least one hundred professors teach or have taught courses on women in the law").

- [16] Lasson, p. 5 n. 15 (citing these examples as well as a two-volume bound bibliography of feminist law articles).
- [17] *Schenck v. United States*, 249 U.S. 47, 52 (1919).
- [18] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).
- [19] *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).
- [20] *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).
- [21] *Valentine v. Chrestensen*, 316 U.S. 52 (1942).
- [22] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).
- [23] *Ibid.*, p. 763.
- [24] *Miller v. California*, 413 U.S. 15, 24 (1973).
- [25] For ban of Dreiser, see *Commonwealth v. Friedre*, 271 Mass. 318 (1930); for ban of Lawrence, see *Commonwealth v. Delacey*, 271 Mass. 327 (1930).
- [26] *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).
- [27] Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, and Mark V. Tushnet, *Constitutional Law* (New York: Little, Brown, and Co., 1991), 2d ed., p. 1100.
- [28] *Brown v. Oklahoma*, 408 U.S. 914 (1972).
- [29] Stephen W. Gard, "Fighting Words as Free Speech," *Washington University Law Quarterly* 58 (1980): 531, 536. The kindred notion of group defamation laid out in 1952 in *Beauharnais v. Illinois*, 343 U.S. 250 (1952), which upheld an Illinois statute banning printed matter that defamed racial or religious groups, is likewise a dead letter. In no subsequent case has a conviction been upheld on these grounds. According to one scholar, it is widely assumed to have been "eroded, if not overturned, in 1969 by *Brandenburg v. Ohio*" (which set aside the conviction of a Ku Klux Klan member for burning a cross and making racist threats at a Klan rally). Burt Neuborne, "Cycles of Censorship," *Constitution* (Winter 1992): 23.
- [30] On vagueness, see *Connally v. General Construction Company*, 269 U.S. 385, 391 (1926). On overbreadth, see *Grayned v. Rockford*, 408 U.S. 104, 109 (1972).
- [31] *Gooding v. Wilson*, 405 U.S. 518 (1972).
- [32] *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
- [33] Charles Fried, quoted in John Leo, "Scaling the Shabby Barricades," *Washington Times*, May 7, 1992, p. G4.
- [34] 477 U.S. 57 (1986).
- [35] See Catharine MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (New Haven, CT: Yale University Press, 1979), p. 27 and n. 13.
- [36] See, for example, *Monge v. Beebe Rubber*, 316 A.2d 529 (N.H. 1974) (contract); *Miller v. Bank of America*, 418 F. Supp. 233 (1976).
- [37] MacKinnon, *Sexual Harassment of Working Women*, p. 27.
- [38] *Ibid.*, p. 88.

[39] *Ibid.*, p. 27.

[40] *Corne v. Bausch & Lomb*, 390 F.Supp. 161 (D. Ariz. 1975).

[41] 413 F.Supp. 654 (D.D.C. 1976).

[42] *Baines v. Costle*, 561 F.2d 983 (1977).

[43] *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986).

[44] Quoted in Tamar Lewin, "Sexual Harassment in the Workplace; A Growing Struggle for Equality," *New York Times*, November 9, 1986.

[45] See Ellen Frankel Paul, "Sexual Harassment as Sex Discrimination: A Defective Paradigm," *Yale Law & Policy Review* 8 (1990): 333.

[46] Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (New York: Little, Brown & Co., 1960), p. 223.

[47] Robert F. Conte & David L. Gregory, "Sexual Harassment in Employment--Some Proposals Toward More Realistic Standards of Liability," *Drake Law Review* 32 (1982-83): 407; Lin Farley, *Sexual Shakedown* (New York: McGraw-Hill, 1978), p. 15 (Sexual harassment is "any or all of the following: staring at, commenting upon, or touching a woman's body; requests for acquiescence in sexual behavior; repeated, non-reciprocated propositions for dates; demands for sexual intercourse; and rape"); MacKinnon, *Sexual Harassment of Working Women*, p. 1 (Sexual harassment is "the unwanted imposition of sexual requirements in the context of a relationship of unequal power").

[48] "Sexual Harassment," *Glamour*, January 1981, p. 31; Deborah L. Rhode, "The 'No-Problem' Problem: Feminist Challenges and Cultural Change," *Yale Law Journal* 100 (1991): 1731, 1776.

[49] Susan Strauss (with Pamela Espeland), *Sexual Harassment and Teens: A Program for Positive Change* (Minneapolis: Free Spirit Publishing, 1992), p. 15.

[50] The Florida ACLU has, for instance, opposed the more egregious actions of the judge in the Jacksonville shipyard case (see below); however, the national ACLU has stated that "exceptions must be made [to free speech] in the case of sexual harassment." Mike Graham, "Sexism in the Shipyards Sets off Legal Battle," *New York Times*, November 24, 1991.

[51] *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991).

[52] *Ibid.*, pp. 878-9 (quoting Ehrenreich, "Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law," *Yale Law Journal* 99 (1990): 1177, 1207-8); and 878 and n. 9 (quoting Kathryn Abrams, "Gender Discrimination and the Transformation of Workplace Norms," *Vanderbilt Law Review* 42 (1989): 1183, 1205).

[53] *Ellison*, pp. 877-8.

[54] *Ibid.*, pp. 876, 880 (noting that the district court found that the conduct complained of was trivial and that such an interpretation was not unreasonable). According to the *National Law Journal*, *Ellison* "has had a notable influence on subsequent federal and state court decisions. . . . *Ellison's* reasonable-women standard as applied to sexual harassment has very much taken hold in the courts." Eric Wallarch and Alyse Jacobson, "Reasonable Woman Test Catches On," *National Law Journal*, July 6, 1992, p. 26.

[55] *Ellison*, p. 880.

[56] In Interest of Joseph T., 430 S.E.2d 523, 524 (1993).

[57] Robinson v. Jacksonville Shipyards, Inc., 760 F.Supp. 1486, 1493 (1991).

[58] Ibid., pp. 1495-6.

[59] Ibid., p. 1499.

[60] Ibid., pp. 1514, 1538; Arthur Hayes, "Pinup Case Splits Free Speech Activists," Wall Street Journal, April 29, 1992.

[61] See Martha T. Moore, "Taste Test: Debate Brews over Selling Beer with Sex," USA Today, November 15, 1991, p. 1B; Carol Kleiman, "Harassment Suit at Stroh Brewery Puts Focus on Company's Own Ads," Chicago Tribune, March 9, 1992, p. 6C.

[62] Ellison, p. 879, n. 12.

[63] Restatement (Second) of Torts, Â§46, comment a (1965).

[64] Robert Mnoukin and Lewis Kornhauser, "Bargaining in the Shadow of the Law," Yale Law Journal 88 (1979): 950; Henry M. Hart and Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 7 (1958); Hugh Ross, Settled Out of Court 3-4 (New York: International Polygonics Ltd., 1970).

[65] Daniel Seligman, "PC Comes to the Newsroom," National Review, June 21, 1993, p. 30.

[66] Nat Hentoff, "Sexual Harassment by Speaker Phone," Washington Post, March 14, 1992, p. A23.

[67] Katie Roiphe, The Morning After: Sex, Fear, and Feminism on Campus, (New York: Little, Brown, 1993), p. 72.

[68] Susan Estrich, "Sex at Work," Stanford Law Review 43 (1991): 813, 826-34.

[69] Ibid., p. 860.

[70] Kirk Johnson, "E-Mail is Reprogramming the Office Romance," New York Times, March 26, 1994, p. 22.

[71] Paul, p. 362.

[72] Ibid., p. 363.

[73] Dinesh D'Souza, Illiberal Education (New York: The Free Press, 1991), p. 148.

[74] Catharine MacKinnon, Testimony on S.1484, Labor and Human Resources Committee, September 10, 1992.

[75] Ibid.

[76] Ibid.

[77] See Jonathan Chait, "Bad Examples," Reason, December 1993, pp. 58-60.

[78] MacKinnon, Testimony.

[79] Sarah Lubman, "Judicially Suspect: Campus Speech Codes Are Being Shot Down as Opponents Pipe Up," Wall Street Journal, December 22, 1993, p. A1.

[80] Ibid., p. A8.

[81] Ruth Shalit, "Romper Room," *New Republic*, March 29, 1993, p. 14.

[82] *Ibid.*, p. 16.

[83] See Margaret Lillard, "School Sex Harassment," Associated Press wire story, May 31, 1993. See also Mary Jordan, "Sex Harassment Complaints Starting in Grade School: Taunts, Intolerance on the Rise, Survey Finds," *Washington Post*, June 2, 1993.

[84] Shalit, p. 13.

[85] Lillard.

[86] Jordan.

[87] Strauss and Espeland, p. 8.

[88] Cynthia Grant Bowman, "Street Harassment and the Informal Ghettoization of Women," *Harvard Law Review* 106 (1993): 517, 519.

[89] Elizabeth Kuster, "Don't 'Hey, Baby' Me: How to Fight Street Harassment," *Glamour*, September 1992, pp. 311, 333.

[90] Bowman, p. 548.

[91] *Cohen v. California*, 403 U.S. 15 (1971).

[92] Nadine Strossen, "A Feminist Critique of 'the' Feminist Critique of Pornography," *Virginia Law Review* 79 (1993): 1099, 1107-8.

[93] *Ibid.*, p. 1108.

[94] See Tamar Lewin, "Furor on Exhibit at Law School Splits Feminists," *New York Times*, November 13, 1992, p. B16.

[95] For text of the statute and a general account of its passage, see Paul Brest and Ann Vandenberg, "Politics, Feminism and the Constitution: The Anti-Pornography Movement in Minneapolis," *Stanford Law Review* 39 (1987): 607.

[96] *Ibid.*

[97] *Ibid.*

[98] Brest and Vandenberg, pp. 620, 636-7.

[99] While Dworkin and MacKinnon did not draft the Canadian anti-pornography statute, they are closely associated with LEAF (the Women's Legal Education and Action Fund), the Canadian feminist organization which helped pass the law and defend it before Canada's Supreme Court (in *Butler v. The Queen*, 1 S.C.R. 452 [1992]). MacKinnon helped write the brief for *Butler* (National Coalition Against Censorship memorandum, September 23, 1993). For the *Two Live Crew* case, see *Her Majesty the Queen v. Marc Scott Emery*, 1992 Ont. C. J. Lexis 499 (March 26, 1992) (Ont. Ct. of Justice).

[100] Andrea Dworkin, *Intercourse* (New York: The Free Press, 1987), p. 137.

[101] Catharine MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989), p. 198. "What is sexual is what gives a man an erection. . . . Whatever else does this, fear does, hostility does, hatred does . . . revulsion does, death does." *Ibid.*, p. 137.

[102] See Strossen, p. 1109 and n. 32.

[103] Quoted in Pete Hamill, "Woman on the Verge of a Legal Breakdown," *Playboy*, January 1993, p. 186.

[104] *American Booksellers Association v. Hudnut*, 771 F.2d 323 (1985).

[105] *Ibid.*, p. 325.

[106] *Ibid.*, pp. 325, 328.

[107] *Ibid.*, p. 327.

[108] *Ibid.*, pp. 328, 330.

[109] An Act to Protect the Civil Rights of Women and Children, the Commonwealth of Massachusetts, H. 5194, 1992. See also "Censors in Feminist Garb," *New York Times*, November 19, 1984, p. A22; Thomas C. Palmer, Jr., "A Bill of Divorcement," *Boston Globe*, March 29, 1992, p. 69.

[110] S. 1521, 102d Cong., 1st Session (1991).

[111] Quoted in Anna-Liza Korman, "Porn Ruling: Canadian Court Ties Obscenity, Violence," *Chicago Tribune*, June 14, 1992, p. 1.

[112] Quoted in *ibid.*

[113] Quoted in *ibid.*

[114] See Strossen, pp. 1130-34.

[115] For an account of the banning of the Miss Canada pageant see Anna-Liza Korman, "Past Perfect," *Chicago Tribune*, February 9, 1992, p. 4. On the beer ads, see Dianne Allen, "Waiter, My Beer Is Sexist", *The Gazette* (Montreal), July 21, 1991, p. A1; "Hop-

ping Mad: In Canada, Controversy Brews as Ontario Bans Sexist Beer Ads," *Los Angeles Times*, April 4, 1991, p. E1.

[116] Suzanne Skubik, "Gendered Justice" (*International News*), Ms., May/June 1993, p. 11.

[117] I. Matthew Hale, *The History of the Pleas of the Crown*, *635 (1778).

[118] See *People of California v. Rincon-Pineda*, 538 P.2d 247 (1975). See also Leon Letwin, "'Unchaste Character,' Ideology, and the California Rape Evidence Laws," *Southern California Law Review* 54 (1980): 35, 38-39, 43-52.

[119] See, for example, Comment, "Towards a Consent Standard in the Law of Rape," *University of Chicago Law Review* 43 (1976): 613, 637-8.

[120] *Brown v. State of Wisconsin*, 106 N.W. 536, 539 (1906). See also Note, "Recent Statutory Developments in the Definition of Forcible Rape," *Virginia Law Review* 61 (1975): 1500, 1505-7.

[121] *People v. Nash*, 261 Cal. App. 2d 216, 224 (1968).

[122] *State v. Harris*, 174 A.2d 645 (1961).

[123] *Gonzales v. State*, 516 P.2d 592, 593 (1973).

[124] *Ibid.*, p. 594.

[125] *People v. Barnes*, 721 P.2d 110 (1986).

[126] *Ibid.*, p. 116 n. 12.

[127] *Ibid.*

[128] *Ibid.*, p. 122.

[129] George P. Fletcher, "Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases," *Yale Law Journal* 77 (1968): 880, 882.

[130] *In re Winship*, 397 U.S. 358, 364 (1970).

[131] Barbara D. Underwood, "The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases," *Yale Law Journal* 86 (1977): 1299, 1300.

[132] *Woolmington v. Director of Public Prosecutions*, A.C. 462, 481 (1935).

[133] Wayne R. LaFare and Austin W. Scott, Jr., *Substantive Criminal Law*, (St. Paul: West Publishing Co., 1986), Â§ 1.2, pp. 10-11.

[134] This is the common law definition of "burglary." Different jurisdictions have refined the definition.

[135] Underwood, p. 1332.

[136] LaFare and Scott, Â§ 2.13, p. 233 n. 51.

[137] Note, *Columbia Law Review* 55 (1955): 527, 545.

[138] *Williams v. United States*, 327 U.S. 711, 715 (1946) (noting that a conviction for rape cannot be sustained under federal law absent proof of the lack of consent); Dana Berliner, "Rethinking The Reasonable Belief Defense to Rape," *Yale Law Journal* 100 (1991): 2687, 2690 (noting that "the prosecution must prove that the defendant had sexual intercourse without the consent or against the will of the victim").

[139] *People v. Thompson*, 324 N.W.2d 22, 24-5; Ill. Rev. Stat. ch. 38 para. 3-2(b) (1984). See Cynthia Ann Wicktom, "Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws," *George Washington Law Review* 56 (1988): 399, 424-27.

[140] Wicktom, p. 429.

[141] *Ibid.*, p. 430.

[142] *State v. Camera*, 113 Wash 2d. 631, 638-40, 781; *Bowman*, 2d, pp. 483, 487 (1989).

[143] N.J.S.A. 2c:2-10 (West 1982).

[144] *State of New Jersey In the Interest of M.T.S.*, 609 A.2d 1266, 1276, 1274-8 (1992).

[145] *Ibid.*, pp. 1276, 1278.

[146] Charles Hutzler, "Sex Without 'Freely Given Permission' Is Rape, Court Rules," *United Press International*, July 30, 1992.

[147] Stuart Taylor, "On Appeal, KO the Tyson Verdict," *Legal Times*, April 6, 1992, p. 23.

[148] "New Perspective on Rape," *Los Angeles Times*, April 25, 1991, p. B7.

[149] Black's Law Dictionary, 6th ed. (St. Paul: West Publishing Co., 1991).

[150] Susan Estrich, "Rape," Yale Law Journal 95 (1986): 1087, 1183-4.

[151] Ibid., p. 1157.

[152] Ibid., pp. 1093, 1132, 1182.

[153] Commonwealth of Pennsylvania v. Robert Berkowitz, 609 A.2d 1338, 1340 (1992).

[154] Ibid., p. 1347.

[155] Emilie Lounsberry, "Court: 'No' Is Not Enough in Rape Cases," Philadelphia Inquirer, June 2, 1994, p. 1.

[156] 18 Pa.C.S.A. Â§ 3107.

[157] Lounsberry.

[158] Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987), p. 82 (emphasis added).

[159] Edward Correia, "A Proposal For Civil Prosecution Of Date Rape," Massachusetts Lawyers Weekly, February 17, 1992, p. 5.

[160] Ibid.

[161] The "Violence Against Women Act," S.15, 102d Congress, 1st Session (1991); S.11, 103d Congress, 1st Session (1993). See also, W. H. Hallock, "The Violence Against Women Act: Civil Rights for Sexual Assault Victims," *Indiana Law Journal* 68 (1993): 577; Ruth Shalit, "Caught in the Act," *New Republic*, July 12, 1993, p. 12; John Leo, "Radical Feminism in the Senate," *U.S. News & World Report*, p. 19; Cathy Young, "The Sexist Violence Against Women Act," *Wall Street Journal*, March 23, 1994, p. A15.

[162] "Women and Violence," Hearings on Legislation to Reduce the Growing Problem of Violent Crime Against Women Before the State Committee on the Judiciary, Part 1, p. 36.

[163] Jeanie Kasindorf, "New Research: Why Men Rape," *Redbook*, January 1993, p. 93.

[164] For New Mexico reference, see A. Kaufman, P. Divasto, R. Jackson, D. Voorhees, and J. Christy, "Male Rape Victims: Noninstitutionalized Assault," *American Journal of Psychiatry* 137 (1980): 221-3. For South Carolina reference, see B. Forman, "Reported Male Rape," *Victimology: An International Journal* 7 (1982): 235-6.

[165] Sam Roe and Nara Schoenberg, "Rape: The Making of an Epidemic" (Part 2), *The Blade*, October 11, 1993, p. 5.

[166] John L. Baier, Marianne G. Rosenzweig, and Edward G. Whipple, "Patterns of Sexual Behavior, Coercion, and Victimization of University Students," *Journal of College Student Development* 32 (1991): 316.

[167] Timothy J. Flanagan and Kathleen Maguire, *Sourcebook of Criminal Justice Statistics 1991*. (U.S. Department of Justice, Bureau of Justice Statistics.) (Washington, D.C.: U.S. Government Printing Office, 1992), Table 3.29, p. 283.

[168] W. H. Hallock, "The Violence Against Women Act: Civil Rights for Sexual Assault Victims," *Indiana Law Journal* 68 (1993): 607.

[169] See Charlotte Allen, "The King Cops and Double Jeopardy," *Wall Street Journal*, May 20, 1992, p. A17; Alan

Dershowitz, "Rights at Risk in a Retrial," Washington Times, May 10, 1992, p. B3.

[170] Leo.

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[221] Elizabeth Schneider, "Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse," *New York University Law Review* 67 (1992): 520, 563.

[222] *Ibid.*, p. 558; see also Martha R. Mahoney, "Legal Images of Battered Women: Redefining the Issue of Separation," *Michigan Law Review* 90 (1991): 85-87; Arlene Kristal, "You've Come a Long Way, Baby: The Battered Woman's Syndrome Revisited," *New York Law School Journal of Human Rights* 9 (1991): 111.

[223] *Ibid.*, p. 558.

[224] Feminist defense attorneys also object to the fact that the insanity defense raises the prospect of the woman's detention in a mental hospital. Schneider & Jordan, pp. 159-60. See generally, Elizabeth Schneider, "Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense," *Harvard Civil Rights and Civil Liberties Law Review* 15 (1980): 623, 638. Walker's comments on normality are quoted in Kristal, p. 146.

[225] Quoted in Brown.

[226] *Ibid.*

[227] See George Lane, "Psychogenic Amnesia Suffered by Peggy Saiz, Witness Claims," *Denver Post*, October 8, 1993, p. B5; Kevin Simpson, "Lenore Walker Takes the Stand for Another Lethal Woman," *Denver Post*, October 7, 1993, p. B1.

[228] *IBN-Tamas v. United States*, 407 A.2d 626, 634-5 (D.C. 1979).

[229] Book Note, *Harvard Law Review* 103 (1990): 1394. See also Dolores A. Donovan and Stephanie M. Wildman, "Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation," *Loyola of Los Angeles Law Review* 14 (1981): 435 (in the context of self-defense and provocation).

[230] Model Penal Code Â§ 3.04 (American Law Institute, 1985).

[231] Holly Maguigan, "Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals," *University of Pennsylvania Law Review* 140 (1991): 379.

[232] *Williams v. State*, 70 S.W. 756, 757-8 (1902).

[233] See Maguigan, pp. 409-413. In judging self-defense claims, some states apply an "objective" reasonableness test

(requiring the jury to measure the defendant's belief in the necessity of using deadly defensive force by the standard of what a generic "reasonable person" would have believed and done under the circumstances, while others require a combination of the "subjective" test (whether the defendant honestly believed that he or she was in grave danger) and an objective test of how a reasonable person in the defendant's circumstances would have perceived the situation.

[234] State v. Leidholm, 334 N.W.2d 811 (N.D. 1983).

[235] Kaplan.

[236] Model Penal Code Â§ 210.3 (American Law Institute, 1985).

[237] Lavallee v. The Queen, 55 C.C.C. 3d 97 (1990).

[238] Tracey Taylor, "Group Wants to Reopen Cases Using Battered Women Defence," Toronto Star, January 7, 1991, p. A1.

[239] "Irene Seale Sentenced to 20 Years," Star-Ledger, January 26, 1993, p. 1.

[240] Carl Manning, "Copeland Seeking New Trial," St. Louis Post-Dispatch, February 22, 1994, p. 2C.

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Langan, "Murder in Families" (U.S. Department of Justice, Bureau of Justice Statistics, July 1994). Interestingly, the official report did not include a breakdown of trial outcomes and sentences by gender; these data were tabulated by one of the statisticians at Dershowitz's request. Der-

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[247] Leslie Bender, quoted in Tamar Lewin, "Feminist Scholars Spurring a Rethinking of Law," New York Times, September 30, 1988, p. B9.

[248] Quoted in *ibid.*

[249] Quoted in *ibid.*