

Introduction

This book is intended for people concerned about how the law treats women. Despite the apparent progress in women's legal status, the law remains profoundly male. We believe the law's fundamental paradigm must change because superficial changes serve primarily to mask the continuing, pervasive violence and injustice against women. The spectrum of violence and disregard of women is most evident and problematic in the law of sexual harassment, stalking, rape, and domestic homicide—all areas in which acquaintances or intimates usually inflict the injury. Men harass, beat, stalk, rape, and kill women, yet the law still minimizes, or even denies, these injuries. We therefore propose a method by which the law can better redress the injuries women experience.

We advocate that courts apply a “reasonable woman” standard *to the conduct of men* in certain legal settings—where men's and women's life experiences and views on sex and aggression diverge and women are overwhelmingly the injured parties. Such a woman-based legal standard would make currently acceptable or excusable conduct unacceptable and inexcusable by focusing on respect for bodily integrity, agency, and autonomy. It would help rectify the imbalance in how society and its legal system view sexual and gender-based harassment, rape, stalking, and domestic imprisonment, violence, and death. This “reasonable woman,” based to the extent possible on the experiences and expectations of most women, would become the standard by which men's behavior is measured. When women are the aggressors, their conduct would also be held to the reasonable woman standard.

Our proposal is radical. The reasonable woman standard is intended to make a difference by affecting both the head and the gut. In certain contexts, this paradigm shift will entirely change the outcome in women's lives and in legal cases. It is based on the premise that human beings have great ability to learn, empathize, adapt, and to control

their own behavior. Men who batter or kill their intimates, who harass, stalk, or rape, *can change*. The rare women who behave similarly can change also. And they must.

We place men into three broad groups with regard to these issues. First are the “good guys”—men who already “get it,” who respect and value the personhood, physical integrity, and safety of women and of other men. Happily, many men are good guys and already behave according to the reasonable woman standard. The second group we call the “redeemables”—men who are willing and able to change their beliefs and behavior once they are induced to reconsider their attitudes toward gender roles. The reasonable woman standard will assist such men in changing both their perceptions and their behaviors. In the third group are the “diehards”—men who will not change their beliefs, who will always blame the target for their own rage and aggression. It is highly unlikely that the reasonable woman standard will affect the diehards’ worldview. However, application of this standard will force them to stop their violence against women, through the threat of either economic, social, or legal consequences or by lengthy incarceration.

Sexual harassment, stalking, rape, and domestic violence are choices—voluntary acts. To those men who try to impose their will on women, we want the law to say “Change or else!” We believe that once they understand women’s perspectives and experiences, many men who engage in such conduct—the redeemables—will change of their own accord. Many of those who are unwilling to change their beliefs—the diehards—can still learn to conform their behavior to the law, stemming their violence against and subordination of women. But if they continue to harass, to hit, to stalk, to kill, to rape, the legal consequences must be swift, harsh, and certain. Such men must be made to take responsibility for and recognize the wrongfulness of their own acts. The law must no longer support rationalizations such as “She led me on” or “I beat/killed her because she provoked me.”

At present, law is a warrior code that sympathizes with and accommodates violence that derives from sexual jealousy, wounded pride, and the desire to dominate another. For women, the most common forms of such violence involve intimates or former intimates. But, even though women are by far the most common victims of intimate violence, men’s intimate violence injures themselves as well, both interpersonally and physically. A particularly grim example is domestic homicide. In many

cases, men who kill their wives also kill themselves, and some women kill their batterers in response to extreme violence and threats. Thus, demanding that batterers behave like reasonable women will save the batterers' lives too. Furthermore, because the reasonable woman standard would apply to the conduct of both men and women, regardless of the parties' gender, women who harass or kill men would also be held to this more respectful and antiviolenence standard of conduct.

We believe that deliberate use of the reasonable woman standard in areas involving sex, sexism, and aggression, with careful explanation of what the standard means, will elicit greater empathy for women's experiences from society in general and from legal decision makers in particular. Humans have a great capacity both to empathize and to modify their behavior based on better understanding of another's experiences. Studies have demonstrated, for example, that many men and women have divergent perceptions about what conduct constitutes rape—about what kinds of words and conduct indicate nonconsent. However, according to a study by Hatterly Freetly and Kane, men who know rape survivors have views that are much like those of women. That is, men personally acquainted with a rape survivor share with most women a similar perception, recognizing that sex with someone who says “no” is rape. The law, by adopting a reasonable woman standard that incorporates and explains women's values and experience, can similarly increase empathy. It can thereby help decision makers—male and female—identify with the injured party in assessing the injuring conduct.

For the reasonable woman standard to be effective, it must be given substantive content. Unlike some versions of the reasonable woman standard that make women into either victims or pseudomen, our standard seeks to achieve meaningful equality by emphasizing that reasonable women want and demand respect, personal autonomy, agency, and bodily integrity. These values must be effectively communicated to avoid simply putting another name onto male values and perspectives. Therefore, our standard should be fleshed out in jury instructions, clearly explaining that a reasonable woman expects these personal qualities to be honored, and that behavior violating these aspects of a woman's humanity is legally unacceptable. Such instructions would enhance decision-maker empathy, require judges and juries to treat women with respect, and subvert the inherent bias in the law. Courts and other lawmakers would also be encouraged to find new ways to

put a human face on the reasonable woman standard, for example, through expert testimony refuting myths about women and by admitting evidence of a perpetrator's earlier instances of violence and aggression toward women.

As Ruth Colker put it, our law should first ask whether the particular behavior "respect[s] women's well-being, as seen from women's perspective." Explicitly holding men to a reasonable woman standard in areas where male prerogatives have traditionally defined what is right and lawful will challenge the systematic subordination of women and the largely unexamined biases in the law. Specifically, law must change so that it stops holding women responsible for the violent and aggressive conduct of men.

For example, men who kill their former or current "intimates" often claim that the victim provoked the killing by her behavior, which almost invariably involves the entirely emotional "provocation" of her infidelity or leaving. Like O. J. Simpson, these men explain: "Let's say I committed this crime. Even if I did do this, it would have to have been because I loved her very much, right?" Wrong! Yet, under current law, the basic assumption that a woman *makes* a "reasonable" man uncontrollably jealous, *causing* his violent rage and loss of control so that he kills her out of love, is almost never adequately scrutinized. As a result, the law treats a killing that is "provoked" by a woman's infidelity or leaving less seriously than other forms of killing.

Under our standard, decision makers would judge the killer in terms of whether a reasonable woman would have lost control and killed in the circumstances. Only secondarily would they consider the victim's "provocatory" conduct, and then only in terms of whether it would have provoked a reasonable woman to lose control and kill. Thus, for example, the decision maker would be asked whether a reasonable woman, on discovering that her husband was unfaithful, or knowing that her ex-husband was seeing someone new, would react with deadly violence. The decision maker would also consider whether a husband's unfaithfulness or an exhusband's dating behavior would provoke a reasonable woman to be violent. As a result of applying our reasonable woman standard, provocation would most likely disappear as a mitigating factor except in response to threatened or actual violence.

As current rape law demonstrates, certain applications of a reasonable woman standard are not in women's interests. In rape claims, the reasonable woman standard has been used to judge, in essence,

whether the target “asked for it,” by asking how *men* think “reasonable” women ought to behave or demonstrate nonconsent. Our proposed reasonable woman standard would turn current rape law on its head: consent would not be determined by whether the target resisted enough to demonstrate nonconsent (protecting her virtue unto death, if necessary, as some men choose to believe a “reasonable woman” would if she didn’t *really* want sex). Instead, the culpability of the accused rapist would be measured by whether, in the same circumstances, a reasonable woman would have believed consent existed and behaved similarly to the *accused*—*not* the target. In assessing the *target’s* conduct in the rape context, the reasonable woman standard would be used only to the extent that conduct may have indicated consent to a reasonable woman under the circumstances.

We do not believe that men and women are different in the sense that women are fragile, needing special protection in order to be equal. Rather, recognition of women’s viewpoints and experience in areas where women are primarily on the receiving end of violence aids in achieving equality: the perceptions and conduct generally associated with women—*gendered* female—in our culture are simply better for everyone in addressing these areas. Women are disproportionately injured, terrorized, and killed as a result of male dominance and aggression. Holding women to the present male standard and therefore permitting them to “equally” injure, terrorize, and kill men is not an equality that would serve anyone well. In contrast, holding everyone to a reasonable woman standard of behavior when it comes to assessing violence against acquaintances and intimates could be transformative and foster meaningful and positive equality. Thus, we advocate that *everyone* be held to this more respectful standard of conduct associated with, and expected of, women in our culture.

By applying these gendered perspectives and viewing certain behavior in context of women’s experience, we may begin to achieve true equality of the sexes. If such a rebalancing occurs, then, over time, society will evolve sufficiently so that a reasonable *person* comes to mean not just a man in disguise but instead incorporates the positive values of both genders. When that time arrives, the reasonable woman standard will no longer be necessary to ensure justice.

The book is organized into sections. Part 1 gives an overview of the issues and of our argument. The other parts examine four major areas of law and conduct that continue to injure, silence, and disempower

women—sexual harassment, stalking, domestic homicide, and rape. We believe and argue that applying our proposed reasonable woman standard in these contexts would effectuate positive change for women in particular, and for people in general. We do not examine the law of domestic violence as such, although it is conduct that injures, silences, and disempowers vast numbers of women. However, stalking, domestic homicide, and acquaintance rape intersect many domestic violence issues. Battered women are the most common victims of stalking; rape is most frequently committed by intimates or former intimates; and domestic homicide is the most violent and extreme outcome of domestic violence and stalking.

Each substantive part begins with an overview of the applicable legal framework and the current legal standard for the area of law at issue; the parts can be read independently and in any order. We examine the bias of the “reasonable person” through legal cases described in news articles and judicial opinions. Appellate and trial decisions tell stories about real people and demonstrate how the legal system succeeds or fails in achieving justice. These legal cases illustrate the differences between how men and women experience male violence and sexual conduct as well as how the law perceives that conduct. Challenging the basic assumptions in these cases, we show how the existing legal framework distorts the woman’s voice and sometimes erases her story—reducing her to a provoker, a bad woman who tempted the man to harassment or violence—and how a woman-based standard would change the outcome.

A Note on Sources and Citation

Readers will notice that we do not include footnotes or in-text references. Instead, when we refer to a particular work, we cite the author or title in the text. We decided to write the book this way to make it easier to read while still giving appropriate credit. The “References” section at the end of the book includes the full citation for each work referred to in the text, as well as additional books and articles that we consider useful and that have formed a more general basis for our theories and analysis. Anyone interested in referring to the source material from which we drew quotes or other facts can do so by finding the author and work listed in the references.