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## dith A. Baer

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## lited by Gregory A. Caldeira, R. Daniel Kelemen, and Keith E. Whittington

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**Feminist Theory and the Law**

## Abstract and Keywords

American feminists have identified law as an instrument of male supremacy since their first national gathering at Seneca Falls, New York in 1848. Critiques of law thus became an important part of the early feminist movement, which succeeded in eradicating the most blatant examples of legal sexism. The successes of the contemporary feminist movement might not have happened without one of those early successes: the opening of higher education to women. Contemporary feminism has had a profound and lasting impact on intellectual discourse. Many young scholars focused on gender in their research, pursuing the feminist goal “to question everything.” These scholars and their successors continue to realize the revolutionary potential of feminist thought. “Feminist jurisprudence,” as it came to be called, is law's equivalent of feminist history, feminist psychology, feminist philosophy, and their counterparts. Feminist jurisprudence has borrowed freely and fruitfully from these cognate disciplines. This article examines the premise and presence of male bias, feminist jurisprudence and gendered reality, and feminist legal reasoning.

Keywords: law, feminism, feminist jurisprudence, bias, women, legal reasoning, legal sexism, feminist psychology, feminist philosophy

AMERICAN feminists have identified law as an instrument of male supremacy since their first national gathering at Seneca Falls, New York in 1848. Modeled on the Declaration of Independence, the conference's Declaration of Sentiments and Resolutions listed the denial of the vote, marriage law that made a wife “civilly dead,” and divorce law “wholly regardless of the happiness of women” among the “injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her” that had inspired the meeting (Commager 1963, 315–16). Critiques of law thus became an important part of the early feminist movement, which succeeded in eradicating the most blatant examples of legal sexism. The signers of the Seneca Falls document were acting not only as social activists but also as legal theorists. Their thesis that law was designed by men for the purpose of dominating women is not far from the arguments of some contemporary feminist jurists.

Feminist scholarship was a product of the second stage of feminism that began in the late 1960s. This feminism arose from women's growing recognition that earlier victories had not succeeded in establishing equality between the sexes. Yet the successes of the contemporary feminist movement might not have happened without one of those early successes: the opening of higher education to women. Campuses proved to be as fertile a ground for the women's movement as they were for the civil rights, antiwar, and student movements. The enactment in 1972 of Title IX of the Education Amendments to the Civil Rights Act of 1964, which extended the prohibition of sex-based discrimination to educational institutions receiving (p. 438) federal funds, enhanced women's opportunities for postgraduate education and helped enlarge the pool of potential feminist scholars.

Twenty-first century Americans disagree on whether second-stage feminism has succeeded or failed, is alive, dead, or merely sleeping, is in stasis, crisis, or disarray, or is a positive or negative force in society. What no thoughtful and knowledgeable person can dispute is that contemporary feminism has had a profound and lasting impact on intellectual discourse. Many young scholars focused on gender in their research, pursuing the feminist goal “to question everything” (Wishik 1986, 64). These scholars and their successors continue to realize the revolutionary potential of feminist thought. “Feminist jurisprudence,” as it came to be called, is law's equivalent of feminist history, feminist psychology, feminist philosophy, and their counterparts. Feminist jurisprudence has borrowed freely and fruitfully from these cognate disciplines. Not only has feminist jurisprudence become an integral part of legal theory, but it has also contributed to real-world legal change.

This is not to imply that feminist jurisprudence has become law's equivalent of the pink-collar ghetto. Women legal scholars have made significant contributions in subfields that do not emphasize gender issues. No woman law professor, whatever her personal opinions about feminism, need choose feminist jurisprudence as her specialty; nor does the subfield exclude men.

Scholars who agree on little else agree that

> Feminists have tried to describe for the judiciary a theory of “special rights” for women which will fit the discrete, non-stereotypical, “real” differences between the sexes. And herein lies our mistake: We have let the debate become narrowed by accepting as correct those questions which seek to arrive at a definitive list of differences. In so doing, we have adopted the vocabulary, as well as the epistemology and political theory, of the law as it is. (Scales 1986, 1375)

Feminist theorists who distrust “the law as it is” share three fundamental premises. First, conventional legal doctrines, developed by men in a society dominated by men, have a fundamental male bias even when they are ostensibly gender-neutral. Secondly, women's lives, for whatever reasons, are so different from men's lives that theory developed by men does not fit women's concrete reality. Finally, the development of feminist theory requires that women produce theory from their own experience and perspective.

# 1 The Premise and Presence of Bias

Feminist jurists who accept the premise of male bias insist on “asking the woman question…to identify the gender implications of rules and practices which might (p. 439) otherwise appear to be neutral or objective” (Bartlett 1990, 832). This approach to law is radical, if not revolutionary. Conventional jurisprudence requires that adjudication “must be genuinely principled, resting…on analysis and reasons quite transcending the immediate result that is achieved” (Wechsler 1961, 5). The “woman question,” on the other hand, exemplifies the result-oriented jurisprudence that conventional jurisprudence condemns. Feminists are not the first to reject law's claim to neutrality. Marxists and the Critical Legal Studies movement had a head start, not to mention Anatole France: “The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread” (2002 [1894], ch. 7). Feminist scholars do not accept as equal “a scheme that affords extensive protection to the right to bear arms or to sell violent pornography, but not to control our reproductive lives” (Rhode 1990, 633).

Whether or not male decision-makers conspire to disadvantage women, policies designed for men have fit badly with women's lives. Some scholars have concluded that modern equal protection doctrine on sexual equality has benefited men at least as much as women; for example, by requiring gender-neutral spousal support laws (*Orr v. Orr* 1979) but permitting interpretations of divorce and child custody law that disadvantage ex-wives (Baer 1999, ch. 4). A specialist in contract law asserted that the law's refusal to enforce mutual agreements in nonmarital relationships injured the women plaintiffs by denying them compensation for homemaking and childrearing duties (Dalton 1985). When the second stage of feminism began, the law still allowed the defense to inquire into an alleged rape victim's sexual history.

The problem here is not so much that men are dominant and women subordinate, as that reality is gendered. This generalization, of course, is a restatement of the second premise of feminist jurisprudence that I have identified. Feminist jurists who accept this premise differ widely in their explanations of how and why reality is gendered.

# 2 Feminist Jurisprudence and Gendered Reality

Feminist jurisprudence has not been satisfied with pointing out the historical fact that law was created by men (more precisely, by all-male elites) and citing current examples of legal bias in favor of men (vis-à-vis women). These two observations have scant analytical value without connections between them. Making these connections became the first major project of feminist jurisprudence. Much of (p. 440) this early scholarship centered around what came to be called the “difference debate” (Goldstein 1992). There have been two overlapping versions of this discourse.

The first version, *sameness versus difference*, is essentially a dispute about the meaning of gender equality under law. Wendy Williams (1981; 1984–5; 1991 [1982]) and Ruth Bader Ginsburg (1978) advocated across-the-board gender equality with no special treatment for women.[1] Williams does not distinguish between invidious and benign sex discrimination. Therefore, she regards special benefits for women workers like pregnancy and childbearing leaves as no better than the once common, but now overruled, mandatory maternity leaves and the "fetal protection" policies that excluded women from jobs : "If we can't have it both ways, we need to think carefully about which way we want to have it" (1991 [1982], 26). Some feminist legal scholars regard male supremacist laws as anomalies within an essentially gender-neutral system. Nadine Strossen, for example, rejects the antipornography policies favored by many feminists: "We adamantly oppose any effort to restrict sexual speech not only because it would violate our cherished First Amendment freedoms…but also because it would undermine our equality, our status, our dignity, and our autonomy" (1995, 14.)

Scholars like Williams and Strossen comprise a distinct but vocal minority among feminist legal scholars. Most feminist jurists insist that gender equality cannot be equated with sameness, but demands the recognition of and adaptation to gendered realities like the childbearing function and women's economic disadvantages vis-à-vis men (Finley 1986; Kay 1985; Littleton 1987; West 1997; J. Williams 2000). Antipornography feminist Catharine MacKinnon insists that the First Amendment is one of several "abstract rights" that "authorize the male experience of the world" (1989, 248); giving constitutional protection to pornography effectively gives its consumers and producers license to brutalize and degrade women (1993). These responses to prevailing legal doctrines are among many feminist critiques of legal principles that feminist jurists have produced.

The second version of the debate, confusingly labeled *difference versus dominance*, consists of conflicting explanations of the bad fit between law and women's lives. Participants in this discourse use various labels for the two schools of thought, but the labels establish similar dichotomies. "Difference" or "cultural" feminists posit character differences between men and women that make masculinist theories inherently biased against women, whereas "dominance" or "radical" feminists hold that these differences result from "the perspective that has been forced on women" (MacKinnon 1989, 52). Difference feminism has been heavily influenced by the pathbreaking work of psychologist Carol Gilligan. Her study of moral psychology, *In a Different Voice*, maintains that, while men's moral (p. 441) development emphasizes "rights and noninterference," women's psychology is "distinctive in its greater orientation toward relationships and interdependence," valuing "attachment" to others over "separation" from them (1982, 2, 151).

Robin West's application of these arguments to jurisprudence stresses physical gender differences. "Virtually all modern American legal theorists," she writes, accept "the 'separation thesis' of what it means to be a human being: a 'human being,' whatever else he is, is physically separate from all other human beings.…The cluster of claims that jointly constitute the 'separation thesis'…while usually true of men, are patently untrue of women." Why? Because women are "connected to life and to other human beings" through four "critical material experiences:" menstruation, heterosexual penetration,

pregnancy, and breastfeeding (1988, 1–3). In an effort to unite care and justice, West criticizes conventional law for failing both “to protect and nurture the connections that sustain and enlarge women's lives” and “to intervene in those private and intimate “connections” that damage and injure” women (1997, 14).

The terms “connection thesis” and “ethic of care” have become familiar feminist concepts. The association of justice with men and care with women resonates with the observable reality that, other things being equal, women perform more caring activity than men do. The notion of a female ethic of care and nurturance may also appeal to those who share the belief of some nineteenth-century feminists that women are morally superior to men. Finally, the possibility of incorporating care into the concept of justice appeals to many feminist jurists who remain reluctant to associate care with women (Behuniak 1999). Linda McClain similarly argues for “recognizing and promoting care as a public value” that “should inform public deliberation about the meaning of personal responsibility and about the interplay of personal and public responsibility for social reproduction” and emphasizes “the indispensable role of care in fostering persons' capacities for democratic and personal self-government” (2001, 1730).

However, difference feminism and its focus on care have met with pervasive and persuasive criticism.[2] West's explanation for gender difference now seems simplistic, exclusionary, and illogical. While the experiences West mentions are unique to women, they are not common to all women; nor does she explain how these experiences connect women to people who are not connected to them. Feminist theorists have made no better case for gender differences than did pre-feminist or outright antifeminist theorists. Difference feminism reads too much like old arguments justifying male supremacy, such as the Supreme Court's opinion in *Muller v. Oregon* (1908), to gain universal feminist acceptance.

West distinguishes herself and other “cultural feminists” from radical feminists like MacKinnon. For cultural feminists, “the (p. 442) important difference between men and women is that women have children and men don't;” for radical feminists, “the important difference between men and women is that women get fucked and men fuck” (West 1988, 13). West does not exaggerate or distort. MacKinnon reasons by analogy with Karl Marx's theory of class struggle to argue that law is designed to facilitate men's sexual access to women: “Sexuality is to feminism what work is to marxism: that which is most one's own, yet most taken away” (1989, 3). Radical feminism accepts the premise of the Seneca Falls delegates that men designed the legal system to establish, or at least to preserve, male power.

MacKinnon is by far the most controversial of today's feminist jurists. Her extreme position has provoked considerable feminist criticism.[3] She has been accused both of vilifying men by depicting them as sexual predators and of denigrating women by denying their agency and autonomy (Baer 1999, 58–62). But the fact that a position is extreme does not prove it wrong. The evidence MacKinnon advances to support her thesis includes the fact that the

Supreme Court recognized rights to birth control and abortion years before it invalidated fetal protection policies barring women from well-paying blue collar jobs (1989, 190, 226). As we shall see, criticism has not persuaded MacKinnon to moderate either tone or content (MacKinnon; 2005; 2006; Jeffries 2006).

Feminist jurists need not believe that law's *purpose* is to entrench male supremacy in order to argue that law's *effect* is to do this. “Situation jurisprudence” (Baer 1999, 55–8), like radical feminism, emphasizes male power and privilege: men get to choose what they want to do, and women are stuck with whatever is left. Feminist jurists have subjected many ostensibly neutral legal concepts to reexamination and fresh analysis in terms of “what we know as women” (Baer 1999). One example of this type of analysis is Joan Williams's explanation of women's competitive disadvantage in employment. Williams argues that the workplace presumes an “ideal worker” whose other responsibilities take second place to the job. Since most women have greater domestic responsibilities, devoting more time and energy to care for households and dependents than do men, women are less likely to fit the description of the ideal worker (2000).

The difference versus dominance controversy continues in the face of—and in response to—the extensive and trenchant criticism both schools of thought have received. Ironically, feminist jurisprudence has received extensive criticism for doing what it criticizes conventional scholarship for doing. Authors who have asserted that conventional jurisprudence says “person” when it means “man” have been criticized by minority feminists for saying “woman” and meaning “woman plus modifiers:” Caucasian, heterosexual, Western woman.

Angela Harris criticizes both cultural and radical feminists for “gender essentialism—the notion that a unitary, ‘essential’ woman's experience can be isolated and described” (1990, 604). Harris maintains that race is a central component of the identities of women of color (in Europe and North America, at least), but not (p. 443) of white women. Therefore, the “critical material experiences” of cultural feminism and the sexual objectification of women emphasized by radical feminists are mediated through a racial context for some women but not for others. “Mainstream” Western feminist jurisprudence has encountered similar challenges made on behalf of lesbians (Brown 1990; Cain 1990) and disabled women (Baer 1999, 34–7).

No consensus exists within feminist theory about the possibility of locating a common essential identity. The same is true of the difference debate in its various manifestations. No one is forced to take sides, and many scholars choose to concentrate on other issues. But legal scholars on both sides and on neither side of these debates embrace the final premise of feminist jurisprudence: the need for scholarship based on women's experience.

# 3 Feminist Legal Reasoning

The feminist premise of male bias applies as much to methods as to theories. Feminist critiques of method from the humanities and social sciences have influenced legal scholarship. These critiques have characterized conventional methodology as dichotomous, oppositional, hierarchical, abstract, reason-based, and emphasizing separation. Feminist alternative methodology is an intuitive/emotional, holistic, noninvasive, concrete, and contextualized epistemology of connection (Baer 1999, 72–8). It emphasizes “the distinctive features of women's situation in a gender-stratified society” (Harding 1990, 119), “the world of concrete particulars” to which many women are relegated (Smith 1990, 19), and “women's ways of knowing” (Belenky et al. 1986) which applies Gilligan's work to epistemology. For MacKinnon, women's way of knowing is through consciousness raising, “the process through which contemporary radical feminist analysis of the situation of women has been shaped and shared” (1989, 84). Consciousness raising is inductive, not deductive. It came out of the women's discussion groups that flourished in the early years of second-wave feminism. Many members of the founding generation of feminist theory participated in these groups. Feminist jurisprudence has applied the insights of feminist epistemology to the study of legal methods. One scholar credited Gilligan's book with helping her understand “why I felt so uncomfortable in law school” (Feminist Discourse 1985, 1). A study of law students at an Ivy League university discovered that women tended to do less well than comparable men and theorized that the Socratic method of law school teaching is an ordeal for many women (Guinier et al. 1997).

Feminist scholars' distinctions between male and female methods work better in theory than in practice. They do not stand up when applied to concrete, particular (p. 444) analysis of everyday legal decision-making. “Legal feeling” (Baer 1999, 84) is as omnipresent as “maternal thinking” (Ruddick 1989); any follower of the Supreme Court knows that appeals to emotion are a common feature of the justices' opinions. Consciousness raising combines inductive and deductive reasoning. The different versions of the process that developed encouraged participants to use concepts from feminist theory in interpreting their shared experiences. The case for a distinctively *female* epistemology has yet to be made. But *feminist* epistemology has had significant impact on theory and jurisprudence.

# 4 From the “Woman Question” to “Woman Answers”

Feminist jurisprudence has not stopped with pointing out ways in which existing law is hostile to women's interests. Scholars have shown remarkable creativity in devising woman-oriented alternative theories. Twenty-first-century legal doctrine shows the influence of feminist inquiry, although the nexus between cause and effect is neither clear nor simple. Some feminist contributions to legal theory have yet to be put into practice, but others have gained judicial recognition. Since a single article cannot present all of this scholarship, this chapter will focus on three important and controversial innovations. The first two of these, Martha Fineman's work on family law and Catharine MacKinnon's analysis of the law of rape, address specific gendered legal issues. The third innovation is the concept of the “reasonable woman,” a theoretical construct that has guided decision-making in both civil and criminal law.

Martha Fineman's studies of family law reflected widespread feminist recognition that gender neutrality might not entail sexual equality. The gradual progression of American family law in the nineteenth and twentieth centuries from traditional male supremacy toward gender-neutrality coincided with, reinforced, and was reinforced by feminism. One major twentieth-century innovation that had some initial feminist support was “no-fault divorce.” The old adversarial process of ending a marriage was replaced by “dissolution” premised on the assumption that the decision was mutual. At the same time, maternal preference in child custody decisions yielded to a neutral “best interests of the child” rule. But by the 1980s, feminists had discovered that the new rules often resulted in support judgments that impoverished women and children and custody arrangements that ignored or denied the fact that the mother was almost always the children's primary caregiver (Baer 2002, 134–58.)

Fineman perceives a connection between this legal undervaluing of the mother–child bond and widespread (though decreasing) public hostility toward single and lesbian (p. 445) mothers. She argues that family law presupposed a “sexual family” consisting of mother, father, and children. “The neutered mother” becomes one of two parents and only half of the parental unit; “marriage and family” become inseparable. Fineman proposes abolishing marriage as a legal category and replacing sex with care and dependency as the crucial family bond. This “newly redefined legal category of family” would include “inevitable dependents along with their caregivers. The caregiving family would…be entitled to special, preferred treatment by the state” (1995, 231). While the caregivers could be either women or men, the result of such a change would benefit many women and might even encourage caregiving behavior among men. It would also derail the controversy over same-sex marriage.

Catharine MacKinnon's most recent publications (2005; 2006) apply her theory of law's maleness to criminal law. The radical transformation in the law of sexual assault in the past thirty years represents a landmark victory for second-stage feminism. The modesty of the complainant's appearance, the prudence of her behavior, and the details of her sexual history are no longer before the court. Nonetheless, MacKinnon asserts, “The law of rape protects rapists and is written from their point of view to guarantee impunity for most rapes.” She means, she tells an interviewer, “not that all the people who wrote [the law] were rapists, but that they are a member of the group who do.” The interviewer continues:

> She thinks consent in rape cases should be irrelevant. Women are so unfree that even if a woman is shown to have given consent to sex, that should never be enough to secure an acquittal. Why? “My view is that when there is force or substantially coercive circumstances between the parties, individual consent is beside the point; that if someone is forced into sex, that ought to be enough.” (Jeffries 2006)

The classic definition of rape is “carnal knowledge of a woman forcibly *and* (not *or*) without her consent.” The prosecution must prove both the presence of force and the absence of consent. Nowhere does the law distinguish between a woman's consent (the commonest defense to a rape charge) and her submission (Schulhofer 1998, ch. 13). The elimination of consent as a defense to sexual assault, like the elimination of legal marriage, would be a change so extraordinary that it brings to mind Ruth Rosen's metaphor for the effects of feminism: “the world split open” (2000). Neither change is even remotely likely in the foreseeable future. But less dramatic developments are bringing both family law and criminal law closer to feminist ideals. Many jurisdictions have adopted a “primary caregiver” preference in child custody cases (Baer 2002, 156–8.) And rape law is showing the effect of the “reasonable woman” standard.

The concept of the “reasonable person” is a crucial component in the law of torts, and is found also in criminal law. To be at fault is to fail to act as a reasonable person would in the same situation. For example, a defendant in a negligence suit can avoid damages by showing by a preponderance of the evidence either that he or she had acted with the “reasonable care” that the context required or by showing that the plaintiff's failure to exercise reasonable care constituted contributory (p. 446) negligence (although statutes have limited or abolished this defense in some instances).

The “reasonable person” concept originated in the common law notion of the “reasonable man.” Does the substitution render the concept gender-neutral? Kim Lane Scheppele (2004) insists that in many situations the reasonable person is in effect the reasonable man. She proposes a “reasonable woman” standard for gender-related civil and criminal law.

The question of whether “reasonable person” means “reasonable man” is integral to the criminal law of rape and domestic violence. Scheppele discusses the case of a man who got a ride home with a woman he had just met. He invited her to his apartment and snatched her car keys; she followed him because she feared being out on the street in an unfamiliar neighborhood. After much disagreement within the state appellate courts, the

Maryland Supreme Court finally upheld the conviction (*State v. Rusk* 1981.) “Women don't sexualize situations as quickly as men do,” Scheppele comments, “and so they may be slower to recognize danger in the first place” (2004, 460).

One tort, sexual harassment, is classified as sex discrimination by Title VII of the Civil Rights Act of 1964 (*Meritor v. Vinson* 1986). The law recognizes two types of sexual harassment. *Quid pro quo* harassment can be summarized as, “sleep with me or I'll fire you,” or “sleep with me and I'll promote you.” A more common form of harassment is the creation of a hostile environment in the workplace. The typical sexual harassment plaintiff is female; the typical defendant is male.

From the defendant's standpoint, the dispositive question in a hostile environment case becomes whether his behavior was that of a reasonable person or whether the plaintiff's reaction to his behavior met that standard. A defendant who pursues a co-worker after she has rebuffed him may well believe that his behavior is reasonable; after all, he is acting out the plot of countless works of fiction, drama, and comedy, and may even have seen this courtship technique work in real life. A defendant who tells dirty jokes or makes suggestive remarks may argue that the woman who complains about this behavior is unreasonably sensitive. Approaching sexual harassment litigation from these standpoints has the effect of authorizing men's experiences and attitudes.

But suppose that we approach hostile environment cases from the plaintiff's perspective. From her standpoint, the crucial questions become whether a reasonable woman would find the plaintiff's behavior objectionable or threatening enough to create a hostile environment in the workplace. The same year Scheppele published her article, an appellate court ruled in favor of a plaintiff who received unwelcome advances: “We adopt the perspective of a reasonable woman because a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women” (*Ellison v. Brady* 1991, 880). Plaintiffs who were asked “go to the Holiday Inn” to discuss pay raises, told to fish in the supervisor's pockets for change, or subjected to epithets like “dumb fucking broad” prevailed in court.



The reasonable woman doctrine is not without its defects and dangers. First, the concept conflates gender and role. As women gain power in the workplace, it is likely that some of them, like some men, will abuse their power. Asking what a reasonable woman might do will only confuse matters if aggressor and victim are the same sex (*Oncale v Sundowner Offshore Services* 1998). Might the law better adopt a “reasonable victim” rule? A second difficulty with a reasonable woman rule is that it could do real damage if applied in areas of law that are not overtly gender-sensitive. A jury in a negligence case, for example, might expect more caution and foresight from a reasonable woman than from her male counterpart. And think how a concept like “reasonable mother” might influence a jury!

The concept of the reasonable person has found yet another home in the area of domestic violence. Elizabeth Schneider (2000) points out that legal discourse has long been stuck on the question of why the battered women did not end the abusive relationship. This emphasis on the supposed unreasonableness of the victim's behavior became a rationale for law enforcement agencies and prosecutors to trivialize violence against women much as they once trivialized sexual assault. Feminist scholars have had much success in changing this official behavior.

Lenore Walker, a feminist sociologist, tried to explain victims' toleration of abuse by developing a concept that she labeled the “battered woman syndrome” (1984). Walker argued that long-term abuse taught many women that they were helpless to change their situation. Activists for battered women object that “the image that the concept of learned helplessness conveys…is one of passivity and lack of agency” (Downs 1966, 155–7). But the battered woman syndrome defense has won some acquittals in trials of women who kill their abusers, even though it applies the idea of learned helplessness to someone who has displayed considerable aggression. “BWS” is an uneasy combination of two defenses against homicide charges: self-defense and diminished capacity. These two doctrines do not mesh well; the first presumes a rational actor while the latter presumes the opposite.

Efforts to protect oneself, others, or property have long been recognized as exculpating factors in criminal cases. A defendant in a homicide case who pleads self-defense must convince the factfinder(s) that he or she perceived imminent danger of serious injury or death and that this belief was reasonable in the circumstances. Juries have been known to give defendants considerable latitude under the imminent danger rule. For instance, both a Louisiana man who fatally shot a stranger who rang his doorbell by mistake and a Virginia man who killed a neighbor who swore at him during an altercation were acquitted (Baer 1999, 207–8).

Feminists have questioned whether the imminent danger requirement is as neutral as it looks. The rule would lead us to expect a woman whose husband had abused her on numerous occasions to be acquitted after she killed him during yet another violent episode, even without recourse to the battered woman syndrome. When a woman was nonetheless convicted in such a case, the New Jersey Supreme Court ordered a new trial that would include testimony about BWS to (p. 448) show that that the woman could reasonably fear that her life was in danger during the episode (*State v. Kelly* 1984). But most battered women who kill do not do so during an attack, and BWS may have particular significance in those types of cases. The imminent danger rule that can respond so flexibly to male experience is unresponsive to their experience. The battered woman syndrome defense asks factfinders to consider whether the defendant might overreact to a perceived threat because her reasoning capacity is defective, in the same way that an insanity plea makes comparable demands. But, while the logic of the BWS defense is problematic, the defense has entered the legal repertoire.

# 5 Conclusion

Legal doctrine emerges from human experience. When women were excluded from the legal enterprise, man-made law was just that. The growth of feminist jurisprudence has coincided with the entry of more and more women into the lawyering, lawmaking, and judging professions. Relying on women's experiences and perspectives, the first generation of feminist legal scholars has progressed from incisive analyses of law's male bias to the creation of new doctrines, new methods, and new proposals for reform. Activists in the legal arena have changed law to embody these concepts, as the “reasonable person” example shows. The two groups of scholars and activists overlap, and each activity has infiltrated and influenced the other. But law's male bias remains pervasive enough to make legal doctrine more responsive to men's claims than to women's. Both scholars and practitioners know that much work remains for later generations to do.

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### Notes:

(1) This characterization refers to Ruth Bader Ginsburg's work as a feminist lawyer and law professor, not to her performance on the U.S. Court of Appeals and the Supreme Court.

(2) Baer (1999, 40–56); MacKinnon (1987, 38–9); Schneider (1986, 589–652); Williams (1992, 41–98).

(3) Cornell (1991, 139); “Feminist Discourse” (1985, 75); Smart (1989, 77).

**Judith A. Baer**

Judith A. Baer is Professor of Political Science at Texas A&M University.

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