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THE LOOSENESS OF LEGAL LANGUAGE: THE REASONABLE WOMAN STANDARD IN THEORY AND IN PRACTICE

Naomi R. Cahn†

INTRODUCTION

For feminists working with the law, the relationship between theory and practice has been critical, although often uneasy and problematic.[1] Part of this tension between theory and practice[2] stems from inevitable, and important, questions about whether the legal process can meaningfully address women's needs.[3] Nonetheless, because the strength of feminist theory is grounded so deeply in the actual experiences of women,[4] an exchange between theory

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1 *See, e.g.*, KATHARINE BARTLETT & ROSANNE KENNEDY, *Introduction, in* FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 1, 4 (KATHARINE BARTLETT & ROSANNE KENNEDY eds., 1991). The following story illustrates this problem:

> Several years ago I attended a small seminar where a noted feminist legal theorist presented a brilliant paper, replete with theoretical insights into women's subordination. When she finished the presentation, we all clapped in admiration. During the discussion period, a participant said, "Many of us are lawyers who represent women in court, seeking protection from batterers, equal employment in the workplace, a fair trial. Have you thought about how your theories can help us?" The noted feminist looked blankly at the questioner. She was silent for a few seconds before she said, hesitantly, "That is a very interesting idea. You know, I had never really thought about how my ideas could help women in practice."

2 I am interested not only in the process of how feminist jurisprudence affects practice, but also in more specific questions of how changes in law and methodology are intertwined in this process. For an extraordinary study of these issues, see Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); *see also* Kathryn Abrams, *Feminist Lawyering and Legal Method*, 16 LAW & SOC. INQUIRY 373 (1991). Abrams comments that "[t]he impact of feminism on the methods of lawyers—those who work for legal change in the courts, legislatures, and other public forums—is only now beginning to be explored." *Id.* at 374.

3 *See* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1196 (1989); Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1687 (1991); Margaret J. Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1700 (1990) (arguing that rather than think about justice in an ideal world, we should think about "nonideal justice: given where we now find ourselves, what is the better decision?"). These questions arise both in substantive law and in methodological concerns. *See* Naomi R. Cahn, *Defining Feminist Litigation*, 14 HARV. WOMEN'S L.J. 1 (1991).

4 *See* Cahn, *supra* note 3; Goldfarb, *supra* note 3, at 1668.

and practice should remain central to the differing visions of what feminism[5] can be.

This is where the theoretics of practice, a developing movement that attempts to understand the interaction between legal theory and practice, can inform feminism.[6] It studies how the lawyer perceives and can empower, or do violence to, her client.[7] Much of this scholarship is based on experiences with real clients, and includes both analysis of lawyers' struggles to translate client experiences into language that is meaningful in the law, and critiques of the translations.[8] As scholars, looking at practice in our theorizing not only keeps us grounded in reality, but also ensures broader participation in the law so that changes are engendered by clients as well as lawyers, thereby challenging existing legal catagories and methods.[9]

Theoretics of practice scholarship primarily has focused on poverty law and drawn much of its critical strength from attempts to reconstruct poverty law practices.[10] In this Article, I use the theoretics of practice to examine the relationship between feminist the-

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5 Feminism is not, of course, a single viewpoint, but includes many different ideas from a variety of viewpoints. *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE (1990).

6 While no single definition describes the theoretics of practice, the thread common to all is a foundation in practice. By practice, we mean ways of arguing as well as relating to other participants in the legal system, including clients, the relevant communities, judges, and other lawyers.

Theoretics of practice is different from practice theory, which "reintroduces agency and practice into disciplines traditionally preoccupied with systems and structures, without abandoning a recognition of the shaping power of socially constructed structures as retreating to a methodological individualism." Rosemary J. Coombe, *Room for Maneuver: Toward a Theory of Practice in Critical Legal Studies*, 14 LAW & SOC. INQUIRY 69, 71 (1989).

7 *See* Lucie White, *Paradox, Piece-Work, and Patience*, 43 HASTINGS L.J. 853 (1992).

8 *E.g.*, Clark D. Cunningham, *The Lawyer As Translator, Representation As Text: Towards An Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992) [hereinafter Cunningham, *Lawyer As Translator*]; Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989) [hereinafter Cunningham, *Thinking About Law*]; Gerald P. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603 (1989).

The method of study borrows—sometimes explicitly, sometimes not—from the ethnographic method of attempting "to provide a particularist and holistic account, based upon . . . extended observation, of a single culture group." Jean G. Zorn, *Lawyers, Anthropologists, and the Study of Law: Encounters in the New Guinea Highland*, 15 LAW & SOC. INQUIRY 271, 274-75 (1990). Judith Stacey provides another definition of the ethnographic method, describing it as "intensive participant-observation study which yields a synthetic cultural account. . . ." Judith Stacey, *Can There be a Feminist Ethnography?*, 11 WOMEN'S STUD. INT'L F. 21, 22 (1988); *see also* James Clifford, *Introduction*, *in* WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY 1, 7 (James Clifford & George E. Marcus eds., 1986); Mary Black & Duane Metzger, *Ethnographic Description and the Study of Law*, *in* THE ETHNOGRAPHY OF LAW 141, 141 (Laura Nader ed., 1965).

9 *See* Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25, 30 (1990).

10 *See* Anthony V. Alfieri, *Reconstructing Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991); White, *supra* note 7.

ory and practice by exploring specific situations involving sex and violence against women. The language of legal doctrine about "the reasonable woman" in sexual harassment law, battered woman self defense law, and rape law is the text I seek to interpret.[11] My perspective is grounded in legal practice; I wonder how feminist theory and legal practice interact, and how both can help women. I also examine what it means to help women; helping some women may not help others.[12]

I examine the practice of the reasonable woman standard in the contexts of rape, sexual harassment, and domestic violence because these areas are linked, and because the impact of this standard in each area has important implications and lessons for the others.[13] The three phenomena involve different forms of violence against women; each symbolizes different forms of women's subordinated status.[14] The reasonable woman standard raises the possibility of changing this status by providing a legal standard that increases the potential for effective enforcement of laws against subordinating behavior. The need for a new standard in sexual harassment and battered woman cases emerged from the divergence between women's experiences and legal doctrines addressing these gender-specific acts,[15] and the concept of the reasonable woman developed to "account" for the differences between these experiences and those of men in a form that the legal system could comprehend and incorporate.

Part I explores some ideological considerations relevant to the reasonable woman concept. As a constructed image of reasonable

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11 Like Joan Scott, I believe that by examining the ways that "language constructs meaning we will also be in a position to find gender." JOAN W. SCOTT, GENDER AND THE POLITICS OF HISTORY 55 (1988). Language in the legal process occurs in many different settings: in court, between lawyers, between lawyers and their clients, between clients, with courtroom clerks, etc. It is important, then, not to focus on only one type of talk. *See* Austin Sarat & William L.F. Felstiner, *Legal Realism in Lawyer-Client Communications*, *in* LANGUAGE IN THE JUDICIAL PROCESS 133 (Judith Levi & Anne Walker eds., 1990) (exploring law talk in various contexts).

12 *See* Christine A. Littleton, *Does it Still Make Sense to Talk about "Women"?*, 1 UCLA WOMEN'S L.J. 15 (1991).

13 *See* Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L.J. 1, 21 (1985) (connection between sexual harassment, rape, battery and other aspects of women's subordination); *see also* Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987) (same).

14 As Robin West argues, they are "gender-specific injuries." West, *supra* note 13, at 82. Men, too, are battered, raped and harassed; overwhelmingly, however, these acts happen to women. *See* Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1301-02 (1991).

15 *See* Schneider, *supra* note 2. For a comparable discussion between women's actual roles and legal rhetoric in the context of work and family, see Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415 (1991).

behavior, the reasonable woman has several theoretical underpinnings, each of which has different implications for the content of the standard. One theoretical underpinning of the reasonable woman construct may be "difference" feminist theory, which suggests that men and women differ as groups, and that women are more nurturing and moral than men.[16] Through another lens, the reasonable woman can be viewed as a construct of difference-as-dominance feminist theory.[17] This concept persuasively shows the need to include women's experiences in a system with asymmetrical power relations that has historically excluded women's participation.[18] A third body of theory, critical race studies, also confronts the alleged objectivity of supposedly "neutral" rules that exclude the experiences of outsiders.[19] Such experiences may result in the need to change universal standards.[20]

In sharp contrast with the reasonable woman standard in sexual harassment and domestic violence cases stands the reasonable woman standard used to judge the victim's behavior in rape cases. In rape law, this standard implicitly requires women to conform to a certain image, developed largely by men, before the legal system will recognize their experience as rape. For example, women are still blamed for provoking or seducing men, unless they meet the male-set standard of "reasonable" resistance.[21] Thus in rape law

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16 Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 799, 807 (1989); *See infra* notes 84-95 and accompanying text. Williams provides an insightful critique of difference theory by showing that it adopts for women positive attributes from traditional stereotypes, such as women's connection to others, while discarding negative ones, such as women's passivity. Williams, *supra*. Additionally, as discussed *infra*, difference theory rarely attributes positive values to men. *See also* Jeanne L. Schroeder, *Abduction from the Seraglio: Feminist Methodologies and the Logic of Imagination*, 70 TEX. L. REV. 109, 124-130 (1991)(difference feminism establishes a universal male that is opposite to female).

17 *See* Catherine A. MacKinnon, *Legal Perspectives on Sexual Difference*, *in* THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE 213 (Deborah L. Rhode ed., 1990). As discussed *infra* at notes 65-95 and accompanying text, I believe the standard results from a mixture of difference and dominance theories.

18 *See* HISTORY AND POWER IN THE STUDY OF LAW 1, 6-11 (June Starr & Jane F. Collier eds., 1989) (discussion of power relations in the legal order).

19 *See, e.g.*, Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies*, 1989 U. CHI. L.F. 139 (analyzing different experiences of white women, black men, and black women); Richard Delgado, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813 (1992); Patricia Williams, *The Obliging Shell: An Essay in Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2142 (1989).

20 *See* Harris v. International Paper, 765 F. Supp. 1509, 1515-16 (D. Me. 1991) (exploring different responses of whites and blacks to particularly harrassing behavior, and noting that "the fact finder must 'walk a mile in the victim's shoes' to understand" the effects of discriminatory acts).

21 *See* SUSAN ESTRICH, REAL RAPE (1987) (discussing societal expectations of reasonable behavior of a raped woman); *see also* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813 (1991) (analogies between rape and sexual harassment law) [hereinafter *Sex at Work*].

the image of the reasonable woman hurts women, confining them within a particular discourse.[22] In rape law, men developed this standard to protect other men who, in their eyes, were wrongfully accused of rape. As a result, the rape law standard's attributes of reasonableness differ from those embodied in the sexual harassment and domestic violence law standard.[23] The image of the reasonably raped woman, because of its ubiquitous nature and foundations in popular culture, constrains legal thought and language.[24] Once such a stock figure is developed, it is difficult to displace, to find new language to think beyond it.

Part II illustrates the potential dangers inherent in a reasonable woman standard in any context by discussing stories that construct reasonable women as told by lawyers and judges. At the center of this Part is a story about a reasonable woman based on clients that I have represented. Ms. Sims was a battered woman who, among other things, had stabbed her husband with a knife after running into his house. Our challenge of representing her as feminist lawyers required us to think through what it means to be a reasonable woman. This client differs from those portrayed by other theorists of practice because her story, in her own words, may not have been entirely sympathetic to a legal tribunal. Her story thus shows the need to ensure that legal constructs reflect real stories, and shows how the powers of doctrine (not just the powers in the attorney-client relationship) distort.

I argue that even in sexual harassment and domestic violence cases, where the standards were developed to respond to women's needs, the theory and practice of the reasonable woman standard further stereotypes and disempowers. While its use may empower some women, in the practical reality of the attorney-client relationship and in the courtroom, the reasonable women standard both encourages client passivity and iguores the complexities of the client's situation.[25] Moreover, the use of separate standards operates to entrench differences between men and women, rather than to establish

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22 By discourse, I mean "a way of talking about actions and relationships . . . . Like other discourses, law is limiting in that it asserts some meanings and silences others." SALLY E. MERRY, GETTING JUSTICE AND GETTING EVEN 9 (1990).

23 *See* Delgado, *supra* note 19.

24 *See* Lynne N. Henderson, *Review Essay: What Makes Rape a Crime?*, 3 BERKELEY WOMEN'S L.J. 193, 228 (I988)("Confusion and ambivalence about rape are deeply embedded in our cultural consciousness and structures . . . .").

25 *See* Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195 (I986); *see also* Alfieri, *supra* note 10.

a standard that transcends issues of sameness and difference[26] and provides for even more effective litigation strategies.[27] Just like a reasonable man standard, the reasonable woman standard is biased and deliberately ignores the reality that women's experiences are diverse. Should the actions of an Hispanic lesbian woman be measured against those of a reasonable woman, or against those of a reasonable Hispanic lesbian woman? In failing to address these diverse experiences, the reasonable woman standard illustrates feminists' dilemmas over how to reconstruct the law (including attorney-client relationships) so that the dominant discourse is not male. Feminist challenges to the traditional stereotype of the reasonable man and its categorization of women, too often result in new stereotypes and inflexible categories of our own.[28]

Finally, Part III suggests the beginnings of a new paradigm based on feminism as well as the theoretics of practice (including my own experiences in representing victims of domestic violence and sexual harassment), and applies it to generate some practice strategies. Using this paradigm, I reinterpret the reasonable person standard to include the experiences of both women and other excluded groups, as well as alternative conceptions of reasonableness. I examine the attorney-client relationship, and show how we can begin the process of developing new constructs that respect client autonomy, and create spaces for women in the law without fostering stereotypes and passivity.

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26 *See* Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Tort Course*, 1 YALE J.L. & FEMINISM 41, 64 (1989).

The debate over whether men and women should be treated the same or differently has divided feminists for decades. For a collection of citations to recent literature on the debate, see Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1, 4 nn. 6-8 (1990); *see also* THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE, *supra* note 17 (collection of essays on differences between men and women).

27 *See* Naomi R. Cahn, *Speaking Differences: The Rules and Relationships of Litigants' Discourses*, 90 MICH. L. REV. 1705 (1992) (book review).

28 By itself, categorization is not inherently destructive, so long as "we can recognize changes and interactions within the category." Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1773 (1990). At the same time, however, it is critical to examine whose community norms determine categories such as reasonableness, and then to challenge any stasis within the category. *See* Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990).

I
SOME STORIES ABOUT THE DEVELOPMENT OF THE REASONABLE WOMAN STANDARD

A. The Challenge to the Reasonable Man

The reasonable man standard remains an entrenched and pervasive standard by which courts measure potentially illegal conduct. Tort law, criminal law, and employment discrimination law all employ this standard[29] to determine whether conduct is appropriate. That conduct is acceptable if it is "reasonable" is one of those "neutral" principles with which everyone can agree. As one critique points out, "[t]he notion that reason is divorced from 'merely contingent' existence still predominates in contemporary Western thought . . . ."[30]

The standard actually incorporates two different, although interrelated, requirements: first, that conduct be "reasonable," and second, that conduct be that expected of a "man." By "reasonable man," of course, the standard purports to be universal, to include all "mankind," and in practice courts have applied it to women as well as men.[31]

Feminism challenges both aspects of the standard: the implicit assumption of a "man" as the standard, as well as the assumption of reasonableness. The male bias inherent in a standard that explicitly excludes consideration of women as reasonable actors is obvious.[32]

Using a term that is centered on a "man" channels and informs the content of the standard even when the court (or jury) knows that

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29 *See* Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. 435 (1981) (noting the ubiquitousness of the standard and exploring its use in criminal law).

30 Jane Flax, *Postmodernism and Gender Relations in Feminist Theory*, *in* FEMINISM/POSTMODERNISM 39, 43 (Linda J. Nicholson ed., 1990).

31 Ronald K.L. Collins, *Language, History and the Legal Process: A Profile of the "Reasonable Man,"* 8 RUT.-CAM. L.J. 311 (1977).

32 *See, e.g.*, Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 20-25 (1988); *see also* Susan Bordo, *Feminism, Postmodernism, and Gender-Skepticism*, *in* FEMINISM/POSTMODERNISM, *supra* note 30, at 133, 137. For a discussion of the difficulties in defining "man," see JUDITH BUTLER, GENDER TROUBLE (1990); *see also* Suzanne J. Kessler, *The Medical Construction of Gender; Case Management of Intersexed Infants*, 16 SIGNS 3 (1990) (discussing assignment of gender in children born without defined sex characteristics). At a very basic level, there are at least three linguistic problems with the "generic masculine": first, there is a "nonparallelism between the male and female terms"; second, it is unclear in particular instances whether the term includes or excludes women; which, in turn, is partially caused by the third problem of exclusivity, because "man" sometimes does just mean men and not women. Wendy Martyna, *The Psychology of the Generic Masculine*, *in* WOMEN AND LANGUAGE IN LITERATURE AND SOCIETY 69, 69-78 (Sally McConnell-Ginet et al. eds., 1980); *see also* Collins, *supra* note 31, at 315-17 (noting that, historically, courts may have intended the reasonable man standard to apply only to men, while they adopted a standard for women closer to that of children).

they are applying the standard to a woman.[33] In recognition of these problems, courts have articulated, as at least a cosmetic improvement, a reasonable person standard.[34] In application, however, little but the male language of the standard has changed.[35]

This leads to feminism's second critique: a reasonable person may resemble a reasonable man because the term "reasonable" is problematic. Existing conceptions of reasonableness are gendered through their creation of a standard of conduct based on rationality, exclusive of emotions and morality.[36] Feminist theory has re-examined the reasonableness standard as part of a critique of "objective" standards.[37] So-called neutral and objective standards may contain unstated assumptions that are actually gendered.[38] This questioning of "neutral" rules has taken many forms: Regina Austin has challenged the tort of intentional infliction of emotional distress as gender, race, and class biased;[39] Joan Williams has challenged a

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33 It is a truism that language influences and structures experience. ROBIN LAKOFF, LANGUAGE AND WOMAN'S PLACE 1-50 (1975); GEORGE LAKOFF, WOMEN, FIRE AND DANGEROUS THINGS 39-84 (1987).

The reasonable man standard renders women invisible. *See* Donovan & Wildman, *supra* note 29, at 436; *see also* Collins, *supra* note 31, at 315-17 (suggesting that this was based in the common law view that husband and wife are the same person in the law).

34 *E.g.*, State v. Norman, 366 S.E.2d 586, 591 (N.C. App. 1988) (battered woman case finding that "person of ordinary firmness" might have killed a sleeping husband in self-defense), *rev'd on appeal*, 378 S.E.2d 8, 12 (N.C. 1989)("person of ordinary firmness" would not have killed a sleeping husband in self-defense).

35 *See* Finley, *supra* note 26, at 59 (in her torts course she includes some cases "in which it appears that, despite use of 'reasonable person' language, courts are evaluating a woman's conduct according to a male standard."). *See generally* Martha Minow, *Supreme Court Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987)(relationship between gender and judicial action). The contribution of Richard Delgado and Jean Stefancic to this Symposium discusses how difficult it is to recoguize contemporary expressions of discrimination. Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992).

36 Bender, *supra* note 26, at 23. Rationality is not a neutral standard, and includes its own gendered versions of emotion and morality. *See* Ehrenreich, *supra* note 28 (discussing construction of meaning of "reasonableness").

37 *See* JANE FLAX, THINKING FRAGMENTS (1990); Bordo, *supra* note 32, at 136-37 (ascribing questioning of objectivity and neutrality to movements that emerged "to make a claim to the legitimacy of marginalized cultures"); Donovan & Wildman, *supra* note 29; *infra* notes 85-91 and accompanying text. The challenge to reasonableness resonates historically with the legal realist challenge to abstract formalist concepts. *See* Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 503 (1988).

Objectivity is not, of course, just a topic for feminist inquiry; other outsiders have developed powerful critiques of it. *See* Delgado, *supra* note 19, at 108 (the objective approach is accepted because it embodies the views of the stronger, more culturally powerful, party, and renders irrelevant the perspective of the subordinated party).

38 *See* MINOW, *supra* note 5, at 51; Martha Minow, *Feminist Reason: Getting it and Losing it*, 38 J. LEGAL EDUC. 47, 51 (1988).

39 Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1 (1988); *see* Martha Chamallas & Linda Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990)(suggesting that the apparently gender neutral valuation in tort law of physical security and property

workplace that establishes an ideal worker based on male norms, which does not include child care.[40]

On a practical level, feminists have challenged the reasonable man standard in an attempt to modify it to correspond with women's lives. The challenge to a male standard of reasonableness has been successful in two areas discussed in this Article: sexual harassment law and battered women self defense cases.[41] In rape law, however, though standards have begun to change, a distorted expectation concerning the reasonable behavior of women persists not only because a male legal system established what constitutes reasonable behavior, but also because rape is a deeply entrenched symbol of male control over women.[42] For black women, rape represents an even more complex form of oppression: it "includes not only a vulnerability to rape and a lack of legal protection radically different from that experienced by white women, but also a unique ambivalence" because black men are disproportionately accused and punished for rape as compared to white men.[43]

B. The Reasonable Woman Standard

The parameters of the reasonable woman are largely determined by the type of case in which the standard is used, and many are still very much in flux. Reasonable woman standards are designed to reflect women's perceptions of what constitutes sexual harassment[44] and what constitutes a sufficient basis for a battered woman to kill her abuser.[45] Unlike in the sexual harassment and battered women's contexts, in rape cases the reasonable women's standard rarely benefits women, instead reflecting men's perceptions of what constitutes force and consent in sexual intercourse.[46]

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over emotional security and interpersonal relationships actually disadvantages women when it comes to torts for which there is no comparable male injury).

40 *E.g.*, Williams, *supra* note 16, at 822.

41 *See infra* notes 49-64 and accompanying text. It has, of course, been successful in other areas not covered by this Article.

42 *See* Estrich, *Sex at Work*, *supra* note 21, at 814-15 (Rape is an area of the law where "traditional male prerogatives are most protected, male power most jealously preserved.").

43 Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 601; *see* Kimberle Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, *in* THE POLITICS OF LAW 195, 205-08 (David Kairys ed., 1990); *see also* Furman v. Georgia, 408 U.S. 238, 250 (Douglas, J. concurring) (noting studies showing that the death penalty was disproportionately applied to blacks convicted of rape).

44 *See* Abrams, *supra* note 3, at 1206.

45 *See* Elizabth M. Schneider, *Equal Rights for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R-C.L. L. REV. 623, 630-38 (1980).

46 In an oft-cited quote, Susan Estrich notes, "the reasonable woman, it seems, is not a schoolboy 'sissy'; she is a real man." ESTRICH, *supra* note 21, at 65.

When a woman has been raped, the law (and society) impose expectations concerning her behavior. Helena Michie labels these expectations "the cultural master-narrative

The standard is not defined explicitly so much as it is merely used without elaboration.[47] To give it meaning, it is regularly contrasted to the perspective of a reasonable man; thus, implicitly (and often explicitly), there is an underlying belief that the reasonable woman differs from the reasonable man.[48] The standard thus helps women win in situations where a reasonable man standard might preclude their claims.

The standard may include either a subjective (what did this reasonable woman think at the time?) and/or an objective (how would other reasonable women react?) element or both.[49] Accordingly, it

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of rape that says that in all cases of rape women are complicitous, that rape is not a rape in the first place." Helena Michie, *The Greatest Story (N)ever Told: The Spectacle of Recantation*, 9 GENDERS 19, 21 (1990). As an example, consider the case of the young black female student at St. John's University who said that she had been sodomized and sexually assaulted by six white male students, most of whom belonged to the school's lacrosse team. Joseph P. Fried, *3 St. John's Students Acquitted of Sexually Assaulting a Woman*, N.Y. TIMES, July 24, 1991, at A1. At three of the men's criminal trial, the woman testified that they made her drink a mixture of vodka and orange soda, and then forced her to perform fellatio. The defendants' lawyers argued that the woman consented to whatever sexual activity occurred, and that she subsequently fabricated the story because she was ashamed of her actions. After the jury acquitted the three men, some jurors explained that there were too many inconsistencies in all of the testimony they had heard. John Kifner, *Jurors Say Complainant Didn't Seem Believable*, N.Y. TIMES, July 24, 1991, at B4. As with many sexual harassment stories, this rape story was not perfect.

On the campus, one student applauded the verdict, and asked, " 'Who in their right mind would have gone to a house where eight guys lived?' " *Id.* As Susan Estrich asked about the woman who claimed that William Kennedy Smith raped her after he picked her up in a bar and brought her to the Kennedy family compound in Palm Beach, "Can you rape a woman who voluntarily comes up for a drink at 3:30 A.M.? . . . The right question in rape cases is not what she did wrong, but what he did." Susan Estrich, *The Real Palm Beach Story*, N.Y. TIMES, Apr. 18, 1991, at A25.

Another example of the general distrust of rape victims is contained in the film THELMA AND LOUISE (Metro-Goldwyn-Mayer 1991). Thelma flirts with a man who plies her with drinks, and then almost rapes her (she is rescued by the well-timed intervention of Louise). Louise kills the man. The two women begin driving away; when Thelma suggests calling the police, Louise points out that they would never believe two women who were drunk and who had been flirting.

47 *See, e.g.*, Rabidue v. Osceola Ref. Co., 805 F.2d 611, 624, 626-67 (6th Cir. 1986) (Keith, J., dissenting), *cert. denied*, 481 U.S. 1041 (1987).

48 In *Ellison v. Brady*, the court noted:

> A complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women . . . . [W]e believe that many women share common concerns which men do not necessarily share.

924 F.2d 872, 878-79 (9th Cir. 1991) (citations omitted). *See* Yates v. Avco Corp., 819 F.2d 630, 637 n.2 (6th Cir. 1987) (acknowledging that men and women are vulnerable in different ways and offended by different behavior); Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1459 (1984).

49 For example, the *Ellison* court used an objective test, explaining that a plaintiff must allege conduct that "a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." 924 F.2d at 879 (citation omitted). In another sexual harassment case, the court

requires both an individualized inquiry and a "community norm" inquiry.

The reasonable woman is used fairly consistently in different contexts: in sexual harassment cases, it is used to judge whether a similarly situated woman would have felt harassed; in domestic violence cases, it is purportedly used to judge whether another woman would have felt comparably endangered; and in rape cases, it is used to judge whether another woman would have felt herself raped. By providing an authoritative image of acceptable conduct, the reasonable woman standard enhances the credibility of women whose conduct or beliefs conform with that image. Its use makes women's accounts believable within a system that puts the reasonable man on a pedestal and denies legal protection to unreasonable behavior.[50]

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used a similar objective test, but also required the plaintiff to show that the discrimination adversely affected her. Andrews v. City of Philadelphia, 895 F.2d 1469, 1480-81, 1486 (3rd Cir. 1990)(two female police officers who were regularly subjected to derogatory and obscene name calling, and to pornographic pictures in the workplace could have alleged "a work environment hostile and offensive to women of reasonable sensitivitiess"); *see* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1524 (M.D. Fla. 1991), *appeal docketed*, No. 91-3655 (11th Cir. 1991) (same test). The reasonable woman standard is actually only one component of a larger test to determine hostile environment sexual harassment.

In *State v. Wanrow*—a women's self-defense case that has been used as a model for battered women's cases—that court used a subjective test, stating that Ms. Wanrow "was entitled to have the jury consider her actions in light of her own perceptions of the situation." 559 P.2d 548, 559 (Wash. 1977).

50 As Kathleen Lahey points out, "various kind[s] of abuse . . . [including] sexism . . . condition and shape people in ways that often make it easy to label them 'unreasonable.'" Kathleen Lahey, *Reasonable Women and the Law*, *in* AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY 3, 5 (Martha A. Fineman & Nancy Thomadsen eds., 1991).

Senate hearings on the nomination of Judge Clarence Thomas to the Supreme Court dramatically illustrate the need for a reasonable woman standard. After Anita Hill, a law professor at the University of Oklahoma, reported that Judge Thomas had sexually harassed her, the judiciary committee attempted to determine the "truth" of her allegations.

Although Professor Hill described her experiences, often in graphic terms, there was a sense throughout the Senate debates that many men did not "get" it—did not understand sexual harassment. *E.g.*, Anna Quindlen, *Public & Private: Listen to Us*, N.Y. TIMES, Oct. 9, 1991, at A25. As Senator Dennis DeConcini explained his reaction to Professor Hill's statement, "people have to make their judgments based on what happens to them in their life at their period of time. I don't say that it didn't happen but I'm convinced that there's another side to this story." *Excerpts from 2 Panel Members' Comments on Allegations Against Thomas*, N.Y. TIMES, Oct. 8, 1991, at A20; *see* Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991) (discussing how narrative accords with personal experiences). His attitude of incredulity typifies that of many Senators and shows, in the words of Professor Susan Deller Ross, that men simply may not understand what it feels like to be "a vulnerable and trapped female." Maureen Dowd, *The Thomas Nomination: The Senate and Sexism*, N.Y. TIMES, Oct. 8, 1991, at A1, A21.

Repeatedly, Senators questioned how a woman could remain silent for ten years about egregious sexual harassment, and even maintain a cordial relationship with her harasser. *Excerpts From Senate's Hearings on the Thomas Nomination*, N.Y. TIMES, Oct. 12, 1991, at A12, A15. Beyond questioning Professor Hill's actions in not reporting the

In some cases, the reasonable woman standard has successfully helped women win sexual harassment and domestic violence cases.[51] Indeed, the "reasonable woman" is starting to become something of a stock figure[52] in such cases because it helps women explain their experiences to judges and juries. For example, in sexual harassment cases, the standard shows why a woman might find that sexually explicit pictures in the workplace constitute harassment;[53] in domestic violence cases, it helps explain why a woman might reasonably feel that she is in imminent danger at a time when her husband is sleeping.[54]

In both sexual harassment and battered woman's cases, expert testimony has helped to establish the conduct and reactions of the reasonable woman,[55] providing additional support for the reasonableness of the woman's feelings.[56] For example, in *State v. Stewart*,[57] Ms. Stewart had been repeatedly abused by her husband: he had beaten her with a baseball bat, shot one of her cats, and threatened repeatedly to kill her.[58] She shot him while he slept. At her trial, she called an expert witness who testified that she suffered from battered woman syndrome.[59] The court held that "expert evidence of the battered woman syndrome is relevant to a determination of the

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sexual harassment, Senators also raised questions about her character. Andrew Rosenthal, *White House Role in Thomas Defense*, N.Y. TIMES, Oct. 14, 1991, at A1. Pennsylvania Senator Alan Specter accused Professor Hill of perjury. *Id.* In an extreme example of male incomprehension, Senator Thurmond noted that he had "been contacted by several psychiatrists, suggesting that it is entirely possible she is suffering from delusions. Perhaps she is living in a fantasy world." 137 CONG. REC., S14,649 (daily ed. Oct. 15, 1991) (remarks of Senator Thurmond). In evaluating all of the evidence, Senator DeConcini (who voted to confirm Justice Thomas) explained that it was appropriate to use a "reasonable person" standard. *Id.* at S14,656 (statement of Senator DeConcini).

51 *See, e.g., Ellison*, 924 F.2d at 872 (sexual harassment); State v. Kelly, 478 A.2d 364, 577 (N.J. 1984) (self-defense) (expert testimony is relevant to determining the reasonableness of the belief of a battered woman that she was in imminent danger).

52 For discussion of "stock stories," see generally Delgado & Stefancic, *supra* note 35; Gerald Lopez, *Lay Lawyering*, 34 UCLA L. REV. 1 (1984).

53 *See* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991).

54 *See* State v. Leidholm, 334 N.W.2d 811, 820 (N.D. 1983) (expert testimony on the battered woman syndrome helps the jury to decide "the existence and reasonableness of the accused's belief that force was necessary to protect herself from imminent harm.").

55 *Robinson*, 760 F. Supp. 1486 (sexual harassment); Kelly, 478 A.2d at 364 (battered woman's syndrome).

56 As Kim Lane Scheppele explains, "The use of expert testimony allows a woman to win a case against a man by having a 'qualified person' testify that she was suffering from trauma or delusion . . . ." Kim L. Scheppele, Just the Facts, Ma'am: Considering Considered Stories 33 (Nov. 1991) (unpublished manuscript on file with the *Cornell Law Review*).

57 763 P.2d 572 (Kan. 1988).

58 *Id.* at 575.

59 *Id.* at 576.

reasonableness of the defendant's perception of danger."[60] Evidently, even under a reasonable battered woman standard, the reasonableness of a particular woman's conduct is not always obvious; she often needs additional corroboration. Expert testimony provides the means to look outside of "objective" rules and expectations; that is, while many women have been raped, battered, or sexually harassed, their experiences may not be familiar to judges or juries. Alternatively, because prevailing societal myths blame women for letting these things happen to them, it is easy to believe that these women are aberrational, and even for other victims not to recognize the feelings.[61]

Indeed, this is how the reasonable woman standard works in rape cases. Several myths exist about how women act that make rape cases difficult, such as: "women mean 'yes' when they say 'no'; women are 'asking for it' when they wear provocative clothes, go to bars alone, or simply walk down the street at night; only virgins can be raped."[62] In the future, the reasonable woman in battered women self-defense cases and in sexual harassment cases may come to resemble the reasonable woman in rape cases, rather than the rape standard changing.[63]

The following section explores the reasonable woman in feminist theory. This examination helps to illustrate why a new "quasi-metanarrative"[64] has been created to replace the reasonable man, and how the reasonable woman fits into some debates in contemporary feminist theory. Because the reasonable woman standard is also a construct which attorneys use in practice when seeking to rep-

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60 *Id.* at 577.

61 *See* Christine A. Littleton, *Women's Experience and the Problems of Transition: Perspectives on Male Battering of Women and the Problem of Transition*, 1989 U. CHI. L.F. 23. These myths are held by women, as wll as men. Morrison Torrey reports:

> In one experiment, female subjects believed that over 25 percent of the female population would derive some pleasure from being victimized [by rape], even though the subjects themselves clearly believed that they personally would not derive pleasure from being victimized under any circumstances.

Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1039-1040 (1991).

62 Torrey, *supra* note 61, at 1015. Professor Torrey notes the need for expert testimony concerning the falseness of these myths in order to change attitudes and expectations about women's behavior. *Id.* at 1067.

63 *See* Estrich, *Sex at Work*, *supra* note 20 (making similar observation with respect to the standards in rape and sexual harassment cases); letter from Nancy Ehrenreich, 3/5/92 (on file with *Cornell Law Review*).

64 "Quasi-metanarratives" are concepts which "tacitly presuppose some commonly held but unwarranted and essentialist assumptions about the nature of human beings and the conditions for social life." Nancy Fraser & Linda Nicholson, *Social Criticism without Philosophy: An Encounter between Feminism and Postmodernism*, *in* FEMINISM/POSTMODERNISM, *supra* note 30, at 19, 27.

resent "reasonable women," later sections then examine how these theoretical debates can inform future practice strategies.

C. The Reasonable Woman and Feminist Theory

Feminist practice[65] and scholarship are mainly concerned with issues of sameness and differences between and among men and women.[66] Two somewhat overlapping perspectives from within feminism exist on these issues: sameness-difference and domination-subordination. Critical race theory adds a third perspective.

"Sameness" feminist theories are concerned with similarities between men and women, and differences among women; they "target overtly sex-based legislation as problematic because it limits how we may define ourselves and how we can unfold over time."[67] "Difference" theories are concerned with differences between men (as a group) and women (as a group); theorists argue that "abolishing overt sex categories in the law does not . . . directly attack women's disadvantages and subordination."[68] Catharine MacKinnon rejects both sameness and difference feminism, arguing that these theories do not address the experiences of women who live under conditions of sex inequality. Both sameness and difference feminists use a male standard to evaluate issues of sameness or difference, and MacKinnon argues that women simply are not similarly situated to men, especially with respect to issues of sexual assault and reproduction.[69] Indeed, she believes that the sameness approach to legal issues obscures women's inequality because it finds discrimination only where men and women are similarly situated.[70] Her theory also diverges from difference feminism in that she objects to reifying differences, perceiving this as insulting because it

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65 *See* ALICE ECHOLS, DARING TO BE BAD (1990), for an historical perspective on the sameness-difference debate among radical feminists.

66 Joan Williams begins her 1989 article as follows: "I start out, as have many others, from the deep split among American feminists between 'sameness' and 'difference.'" Williams, *supra* note 16, at 798; *see also* Bender, *supra* note 26.

Feminist jurisprudence and epistemology challenge the exclusion of women's experiences from prevailing discourses and the (male) perspective of the all-knowing, objective person. *See generally* Marie Ashe, *Mind's Opportunity: Birthing a Post-Structuralist Feminist Jurisprudence*, 38 SYRACUSE L. REV. 1129 (1987); Clare Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, 3 BERKELEY WOMEN'S L.J. 1 (1989); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989); Heather R. Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN'S L.J. 64 (1985).

67 Wendy W. Williams, *Notes from a First Generation*, 1989 U. CHI. LEGAL F. 99, 108.

68 *Id.*

69 MacKinnon, *supra* note 14, at 1296-99.

70 *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 217 (1989); Holly Fechner, Note, *Toward an Expanded Conception of Law Reform: Sexual Harassment Law and the Reconstruction of Facts*, 23 U. MICH. J.L. REF. 475, 483 (1990).

only affirms, as "feminine," what a male society has permitted women to be.[71] MacKinnon contends that sex discrimination results from the power inequality between men and women, and she has developed a difference-as-dominance theory.[72] Under MacKinnon's theory, gender is a hierarchy constructed by men.[73] Because men have power, they have constructed this hierarchy of inequality.[74] Difference is the way that men dominate women.

Like feminists, other outsider groups have developed new ways of challenging how difference is constructed. Critical race theory, which focuses on the relationship between the law and race, critiques how law "create[s] racial categories and legitimates racial subordination."[75] Critical race theorists believe that racism is part of American culture,[76] and that telling counterstories about the victim's experience may help to change the dominant culture.[77] Through these stories, others may be able to recognize the complexity of oppression for outsiders.[78]

Even though some feminists are seeking to move beyond the sameness-difference discussions and related ideas,[79] and to incorporate insights from critical race theories, these discussions are still useful in sorting out the significance of the reasonable woman standard. We cannot move beyond the sameness-difference debate until we better understand its implications.

Sameness feminism suggests that the reasonable woman standard is too limiting. Such a standard perpetuates distinctions between men and women, rather than developing a standard applicable to both sexes. Thus, sameness theories would advocate a reasonable person standard. Difference feminism critiques a rea-

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71 CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32, 39 (1987).

72 Others have developed modifications of MacKinnon's approach. Ruth Colker bases her analysis of sex discrimination on the antisubordination principle. Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986). Under this approach, any policy or practice that contributes to the subordination of an historically dominated group is discriminatory.

73 MACKINNON, *supra* note 70, at 227.

74 *Id.* at 219.

75 Crenshaw, *supra* note 43, at 213 n.7. She emphasizes that there is no single definition of critical race theory. The first conference on critical race theory was held in July 1989. Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 758 n.2.

76 Richard Delgado, *Recasting the American Race Problem*, 79 CAL. L. REV. 1389, 1395 (1991).

77 *See, e.g.*, Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2320 (1989).

78 Crenshaw, *supra* note 43, at 212.

79 *E.g.*, Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296; Williams, *supra* note 16.

sonable person approach, because only the language, and not the underlying content, changes. It would call for a reasonable woman standard that takes into account women's perceptions and experiences that differ from men's, and likewise a reasonable man standard that reflects these different experiences. Dominance theorists might articulate a reasonable woman perspective for both men and women,[80] imposing women's perspectives onto men's lives,[81] just as men's perspectives have been imposed on women.[82] The problem would be determining a woman's perspective that is developed outside of the structures which subordinate women.[83]

As a theoretical construct, the reasonable woman standard accords nicely with difference feminism because it focuses on similarities among women and differences with men.[84] An examination of the premises of difference feminism reveals that the reasonable woman standard parallels difference theories. Consequently, critiques of difference theory provide insights into the shortcomings of the reasonable woman standard from which we can generate more effective practice strategies.

Many difference theorists draw upon the work of psychologist Carol Gilligan[85] and philosopher Nel Noddings.[86] These "cultural feminists"[87] assert that women use an ethic of care in their moral reasoning, while men are more oriented to an ethic of rights.[88] Dif-

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80 *See* Ruth Colker, *Feminist Consciousness and the State: A Basis for Cautious Optimism*, 90 COLUM. L. REV. 1146, 1157 (1990) (review of MacKinnon).

81 *Id.*

82 *See* MACKINNON, *supra* note 70, at 183.

83 *Id.* at 117. For a critique of false consciousness, see Kathryn Abrams, *Ideology and Women's Choices*, 24 GA. L. REV. 761 (1990) (suggesting alternative strategies to describe women's choices, such as articulating multi-causal explanations).

84 However, unlike dominance theory, which suggests a new standard for all based on a reasonable woman, difference theory suggests different standards based on sex. As discussed *supra* notes 44-64 and accompanying text, courts have contrasted reasonable men and women, rather than suggesting a reasonable woman's perspective should control the action of both sexes.

85 *E.g.*, CAROL GILLIGAN, IN A DIFFERENT VOICE (1982) [hereinafter GILLIGAN, DIFFERENT VOICE]; CAROL GILLIGAN, MAPPING THE MORAL DOMAIN (Carol Gilligan et al., eds., 1988) [hereinafter GILLIGAN, MORAL DOMAIN].

86 *E.g.*, NEL NODDINGS, WOMEN AND EVIL (1990); NEL NODDINGS, CARING (1984) [hereinafter NODDINGS, CARING].

87 *See* Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

88 This perspective views women as more caring and oriented towards relationships than men. Women tend to perceive morally troubling problems as situations in which people might be hurt, RAND JACK & DANA C. JACK, MORAL VISION AND PROFESSIONAL DECISIONS 173 (1989), and try to resolve conflicts by using strategies that maintain connection and relationship, NODDINGS, CARING, *supra* note 86, at 8. Correspondingly, women are contextual, looking at the concrete circumstances surrounding any problem. GILLIGAN, DIFFERENT VOICE, *supra* note 85, at 38; NODDINGS, CARING, *supra* note 86, at 8, 96; Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 587 (1986). Men, by contrast, are oriented towards individual autonomy and impartial rules. They tend to see problems in terms of violations of rights, rather

ference feminism criticizes the legal system because (white) men constructed it to accord with male values, overlooking or devaluing female values. The legal system values claims of individual rights, and overlooks claims that are based on interconnection and responsibility. A legal system based on connection, rather than on competing rights, would value different aspects of each case, and might result in court opinions that "cr[y] out in anguish about the lessons of history, power and domination,"[89] rather than opinions that use "neutral" language. It might result in according the right to shelter, a basic human need, a higher status than the right to own property, a male assertion of individual rights.[90] Procedurally, litigation might involve more negotiation and mediation, rather than aggressive litigation battles.[91]

For women in the workplace, difference feminism appears to free women from the need to succeed according to male standards,[92] because it aspires for a workplace that appreciates both traditionally male and female attributes. It allows women to value both motherhood and work. This newly restructured workplace would "fit female persons and lifestyles to the same extent they now fit male ones."[93] In battered women's cases, feminists have developed an image of a reasonable battered woman as a way not only to explain battered women who kill their husbands, but also to justify the need for special intrafamily statutes that offer protection to battered women.[94]

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than relationships between people. JACK & JACK, *supra*, at 173. Men are more likely to resolve conflicts by examining competing rights, and applying neutral and abstract standards. Nona Plessner Lyons, *Two Perspectives: On Self, Relationships, and Morality*, *in* MORAL DOMAIN, *supra* note 85, at 35.

89 Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 887, 897 (1989) (discussing dissent in *City of* Richmond v. Croson) 488 U.S. 469, 528 (1989) (Marshall, J., dissenting).

90 JACK & JACK, *supra* note 88, at 167-68; *see also* Bender, *supra* note 32; *see, e.g.*, Webster v. Reproductive Health Servs., 492 U.S. 490, 537 (1989) (Blackmun, J., dissenting) (contrasting the (nonexistent) duty to rescue from an ethic of right and an ethnic of care); Tracy Higgins, Note, *Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy*, 103 HARV. L. REV. 1325 (1990) (contrasting treatment of pregnant, drug-addicted women from an ethic of right and an ethic of care perspective).

91 *See* Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985).

92 June Carbone & Margaret Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953, 984 (1991).

93 Christine Littleton, *Equality and Feminist Theory*, 48 U. PITT. L. REV. 1043, 1052 (1987).

94 For the development of this image on the criminal side, see LENORE E. WALKER, TERRIFYING LOVE (1990); LENORE E. WALKER, THE BATTERED WOMAN SYNDROME (1984); LENORE E. WALKER, THE BATTERED WOMAN (1979) [hereinafter WALKER, BATTERED WOMAN]; Schneider, *supra* note 25. On the civil side, see SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE (1982).

Given that existing legal standards generally exclude women's experiences, a new standard that centers and values women's experiences is needed. To ensure that women's lives are adequately recognized, this recommended standard accordingly recognizes that women and men may need different treatment.[95] The reasonable woman standard is a powerful development in practice for women in sexual harassment and self-defense cases.

II
MORE STORIES ABOUT REASONABLE WOMEN: FEMINIST THEORY, STEREOTYPES, CATEGORIES, AND CLIENTS

A. Double-Edged Nature: Stereotypes and Categories

Notwithstanding its many benefits, the reasonable woman standard is problematic. Not only does it remind us of earlier stereotypes of women as more pure and moral than men,[96] but it also reduces women's experiences by attempting to capture the essential, relegating "other" experiences to the margins of acceptance. While the standard nonetheless has enabled women to win some cases, and it may also depict some valuable attributes that can contribute to new possibilities of lawyering on behalf of women, its problems ultimately overwhelm its utility.

First, the reasonable woman standard is reminisent of earlier dominant images of white middle class women. The prevailing discourse of the nineteenth and twentieth centuries depicted women as pure, chaste, virtuous, and altruistic.[97] Today, women are still en-

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95 *See* Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1299 (1987).

96 Joan C. Williams, *Domesticity as the Dangerous Supplement of Liberalism*, 2 J. WOMEN'S HIST. 69, 71-72 (1991) (men were associated with baseness, women with "higher" virtues).

97 *See* Barbara Welter, *The Cult of True Womanhood: 1820-1860*, 18 AM. Q. 151 (1966); *see also* SUZANNE LEBSOCK, THE FREE WOMEN OF PETERSBURG 232-34 (1984) (suggesting that while the true womanhood cult was closer to reality than is comfortable, it was a conservative response to changes in women's status). In Victorian literature, women were generally depicted as thin, delicate creatures. They rarely ate because to eat was to display hunger and sexuality; the very absence of female bodily needs defined women. HELENA MICHIE, THE FLESH MADE WORD (1987). It is important to note the many women were excluded by this discourse: women of color, lesbians, and women of a lower socioeconomic class. *See* HAZEL CARBY, RECONSTRUCTING WOMANHOOD 23-30 (1989) (contrasting discourse that defined the roles of the white plantation mistress and female slaves); *see also* Harris, *supra* note 43, at 598-601 (exploring differences between rhetoric of rape, which is based on white women's experiences, and the meaning of rape to black women). In the early twentieth century, these stereotypes resulted in courts upholding "protective" employment restrictions for women. *E.g.*, Muller v. Oregon, 208 U.S. 412 (1908) (limiting hours women could work).

couraged to reject self-interest.[98] Similarly, the reasonable woman standard today denies the needs and realities of women in order to create them as passive, delicate creatures.[99] By definition, the reasonable woman standard establishes certain expectations for women that are different than those for men. A reasonable woman is offended by workplace decorations that depict nude women; a reasonable woman will not go to a man's house at three a.m. (nor allow a man into her house at that time) unless she expects sex, and will report promptly to the authorities if her virtue is violated; a reasonable woman will not tolerate repeated battering or, if she does, she will certainly not respond aggressively or resort to violence herself. The reasonable woman thus becomes a victim who needs protection; when her actions can be portrayed as those of a victim, she is protected by the courts. Other women do not, unfortunately, fit the reasonable woman stereotype.

A second problem with the reasonable woman standard is that it does not accommodate the experiences of all women. Women define harassing behavior differently.[100] Some women accept as normal operating behavior actions that other women would equate with harassment; indeed, various forms of sexual harassment are so pervasive that many women have learned to "take it and smile," lest they be labelled an "uptight bitch."[101] The reasonable woman standardizes harassing behavior, making it conform to a certain standard before it is legally actionable. Women who have suffered the

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98 *See* Joan C. Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559 (1991) (discussing current effects of domesticity).

99 *See* Finley, *supra* note 26, at 64.

100 Professor Anita Hill's experiences, *see supra* note 50, show the diversity of attitudes among women about what conduct is reasonable. Many women understood why Professor Hill only reluctantly reported sexual harassment years after it occurred. On the other hand, however, many other women simply did not believe Professor Hill and dismissed her claims. Various polls found differing percentages of women who believed, or did not believe, Professor Hill. An ABC News poll conducted on the eve of the confirmation vote showed that 49% of women found Judge (now Justice) Thomas more credible. Priscilla Painton, *Woman Power*, TIME, Oct. 28, 1991, at 24. In a *USA Today* poll taken after the hearings, 45% of women believed Justice Thomas, while 26% believed Professor Hill. Steve Marshall, *Poll: Sexes in Agreement on Thomas*, USA TODAY, Oct. 14, 1991, at A1. One woman stated, "There were too many inconsistencies in [Professor Hill's] story. . . . I think women are scheming little creatures." Eloise Salholz et al., *Dividing Lines*, NEWSWEEK, Oct. 28, 1991, at 24.

According to Catharine MacKinnon's perspective, we can dismiss these views as constructed by genderized power relations. *See generally* MACKINNON, *supra* note 70. Such a perspective, however, denies women any agency, negating the reality that many women experience. *See* Abrams, *supra* note 83; Colker, *supra* note 80.

101 If we acknowledged that these actions were sexual harassment, our work environments would be intolerable. *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991); *cf.* Littleton, *supra* note 61 (notwithstanding the pervasiveness of domestic violence, victims are isolated and unbelieved, because of the horror of their reality).

requisite type of conduct have been harassed or raped; others who suffer different types of behavior, or react differently to "accepted" behaviors, have no claim.

Finally, the reasonable woman standard is victim-focused. It is used in evaluating the behavior of sexual harassment, rape, or domestic violence victims. Rather than the harasser/rapist/abuser being held to certain standards of behavior, it is the recipent of male actions who is judged according to whether she reacted appropriately.

Yet I find myself reluctant to dismiss entirely the reasonable woman standard. Yes, the reasonable woman standard builds on earlier stereotypes of women, emphasizing women's virtuous and sensitive nature in sexual harassment cases, and her passivity in self-defense cases. Sometimes, however, these images are accurate: more women than men are apparently offended by certain types of sexually explicit behavior.[102] Some of these images are inaccurate, especially, of course, in rape cases. Many women are reluctant to report that they have been raped, not because the rape never occurred, but because they do not want the publicity, or do not want to acknowledge their vulnerability, or they fear being debased by the legal process. The question then becomes whether and how to balance some of the truths behind stereotypes with the damage caused by the stereotypes in legal theory and practice in these areas.

Stereotypes about women, when "viewed differently, reflect real injuries of subordination and subtle strategies through which people cope with a relative lack of social power."[103] We need not embrace the stereotypes as accurate in order to acknowledge that they may contain positive attributes.[104] These "outsider" exper-

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102 The research by Pauline Bart on women's and men's attitudes towards pornography shows that they respond differently. *E.g.*, Pauline Bart, et. al., *The Different Worlds of Men and Women*, *in* BEYOND METHODOLOGY 171 (Mary Freeman & Judith Wok eds., 1991). For example, she found that 29% of women moderately or strongly agreed that pornography has its place, compared to 61% of men. *Id.* at 175.

103 Lucie E. White, *Lawyering for the Poor*, 56 BROOK. L. REV. 861, 881 (1990); *see also* Kathleen Lahey, *On Silences, Screams and Scholarship: An Introduction to Feminist Legal Theory*, *in* CANADIAN PERSPECTIVES ON LEGAL THEORY 319, 320-21 (1991) (women's silence has been a form of resistance).

104 Joan Williams has suggested that many of the stereotypes of women as nurturing and moral as compared to selfish, self-interested men, that underlie Gilligan's work and feminist difference theory men are more of a "status report" of contemporary gender role ideology than a description of how women actually behave. Williams, *supra* note 98. She suggests that women's behavior is actually far more complex than these stereotypes suggest: women are caught in a society which promotes a selfish ideal worker, rather than the moral and nurturing mother that female gender ideology promotes, and women feel themselves torn between the two competing images. *Id.* at 82.

As Kathryn Abrams notes, however, Williams's analysis results in "abstracting" gendered attributes from gender. Abrams, *supra* note 3, at 1193. Abrams points out that this is dangerous because men and women often do act differently, and it may bene-

iences contain potential sources of strength and positive imagery,[105] although they are not necessarily "more" valid than insider's experiences. Thus, stereotypes that show the effects of disempowerment can also illustrate strategies of resistance.[106] For example, women used the value of their supposed virtuousness as a reason to get suffrage in the early twentieth century. That women had to manipulate male legislators by using the stereotyped attribute of "virtue" in this manner does illustrate their comparative powerlessness, but also shows that they could use this "positive" stereotype to their advantage. Or take "deference," an attribute that Kathryn Abrams labels "unproductive" for women.[107] This powerless quality may be an important component of a reconstructed attorney-client relationship where the attorney defers to her client's goals, encouraging some clients to assume control over the terms of the representation. The stereotype here may empower the clients and help the lawyer to resist the tendency toward lawyer domination.

The reasonable woman standard can be seen as a comparable strategy of resistance. It was developed by reclaiming stereotypes about women, using the positive aspects of those stereotypes but not challenging the utility of the stereotypes themselves.[108] While it

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fit women to value traditionally female attributes. *Id.* at 1193-94. Unlike Williams, Abrams believes it is possible to separate those traditional feminine attributes that are "desirable" from those that are "undesirable," and to utilize the former while rejecting the latter. *Id.* at 1194 & n.47.

I agree, in part, with both Williams and Abrams about the effect of stereotypes and the need to value gendered attributes. Williams is correct that males are far more "female" than gender ideology credits them (and, similarly, females are far more "male" than gender ideology acknowledges); Abrams is right that the positive attributes of what has been defined as "woman's voice" must be valued as gendered attributes. I think, however, that it will be very difficult to isolate undesirable attributes because of the tenacity and pervasiveness of stereotypes. Moreover, we need to re-examine some of these negative attributes to help us understand what they say about women and whether, and how, they can be useful in constructing new images.

105 *See* Matsuda, *supra* note 66; *see also* Patricia H. Collins, *Learning from the Outsider Within*, *in* BEYOND METHODOLOGY 34, 39 (Mary Fonow & Judith Cook eds., 1991) (While stereotypes are used to control subordinated groups, "many of the attributes extant in Black female stereotypes are actually distorted renderings of those aspects of Black female behavior seen as most threatening."). *But see* Williams, *supra* note 79, at 317 (noting that, unlike difference feminists, "outsider-scholars" do not try to revive traditional stereotypes of blacks because they "are so unambiguously insulting.").

106 Women have some power even in a male-dominated society. *See* Colker, *supra* note 80 (if male power were so all-encompassing, there could be no feminist consciousness); Flax, *supra* note 30, at 56; Linda Gordon, *Response to Scott*, 15 SIGNS 4 (Summer 1990).

107 Abrams, *supra* note 3, at 1194 n.47.

108 I am not arguing for a full endorsement or adoption of stereotypes. To the contrary, I am arguing for the need to disclose the historical link between certain modes of self-understanding and modes of domination, and to resist the ways in which we have already been classified and identified by dominant discourse. This means "redefining [] from within resistant cultures." June Sawicki, *Identity Politics and Sexual Freedom: Foucault*

establishes a new standard, however, this standard is one that accepts that there is a reasonable man, and that the reasonable woman acts differently from him in ways that the legal system can understand, and that courts can apply.[109] It does not change the underlying standard, which still applies male notions of reasonableness to women.

The reasonable woman thus remains an image drawn in reaction to male images of women, which in turn draw upon women's biological nature.[110] Even in the areas of sexual harassment and battered woman self defense law, where women have assumed some of the power to define legal images, the resulting standard still can be destructive to women because it embodies and perpetuates stereotypes and requires women to conform to them. In the rape context, the reasonable woman standard certainly is destructive because it establishes myths for juries about women's behavior. While some interpretations of the reasonable woman do help women, the standard accepts commonly held images of women and as such, is "conservative."[111] It constructs rhetoric based on moral or passive women, regardless of who controls the imaging powers. It is not a standard that facilitates the slow and careful exploration of individual client realities.[112]

The multiplicity of voices which emerges from the experiences of individual clients is the undoing of the reasonable woman. As is clear, the experiences of women in different groups (and the experiences of individual women within these groups) varies. Not all women who were sexually harassed never indicated welcomeness; not all battered women are helpless; and some raped women flirted and acted seductively with their rapist. The variety, depth, and complexity of conduct that can be reasonable within given circumstances needs to be recognized within legal theory and practice. Although it

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and Feminism, in FEMINISM AND FOUCAULT 177, 186 (Irene Diamond & Lee Quinby eds., 1988).

109 *But see* Williams, *supra* note 67, at 106 (arguing that when laws assign benefits based on whether one is Jake or Amy (Carol Gilligan's paradigmatic male and female), then "the women who are supposed to be Amys but look more like Jakes, or in some other way not-Amy, are foreclosed from expressing who they are and are officially invalidated for it.").

110 *See* Schroeder, *supra* note 16.

111 Jeanne L. Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence*, 75 IOWA L. REV. 1135, 1216 (1990).

112 This was Elizabeth Schneider's goal in developing women's self-defense. *See* Elizabeth Schneider, *Lesbians, Gays, and Feminists at the Bar*, 10 WOMEN'S RTS. L. REP. 107 (1988). Of course, whenever a new and powerful theory is developed, there is a temptation to transform it into a "grand theory." *See* Frances Olsen, *Feminist Theory in the Grand Style*, 89 COLUM. L. REV. 1137 (1989); *supra* note 9 and accompanying text.

is easier to use one grand stereotype,[113] convenience simply does not justify this practice.

There are, of course, many practical problems to representing women's differences while seeking to end (at least some forms of) discriminatory treatment. Indeed, the issue of how to represent the complexities of women's experience within the legal system is complicated and frustrating. Professor Abrams suggests various methods for presenting multiple views to a legal forum, such as presenting the interests of different clients in an amicus brief.[114] The reasonable woman standard is another attempt to represent women's differences, at least by suggesting their differences from men (although not from each other). While it essentializes women, the standard is, nonetheless, an attempt to meet the need for different standards that respond to concrete realities.

B. Practice: How the Stereotype of the Reasonable Woman Affects Attorney-Client Relationships

Our clients come to us for many different reasons, with diverse backgrounds and motivations, not all of which are comprehensible. We translate their experiences into legally recognized claims or defenses.[115] We see individual clients, but we also see these clients as manifestations of larger patterns.[116] In fact, it is imperative to determine whether similar claims have been made by others, and what strategies have been effective.[117] Consequently, stereotypes operate within the attorney-client relationship for both attorney and cli-

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113 Abrams, *supra* note 83; Olsen, *supra* note 112.

114 Abrams, *supra* note 2, at 393. This strategy may work well at the appellate level, where amicus briefs serve as a recognized forum for presenting multiple overlapping and supporting perspectives. *See* Sally Burns, *Notes From the Field: Reply to Professor Colker*, 13 HARV. WOMEN'S L.J. 189 (1990) (discussing the development of amicus briefs in Supreme Court cases).

But the problems are more difficult at the trial level. Nonetheless, trial counsel often do convey a multiplicity of perspectives when they plead in the alternative as permitted under procedural rules. *E.g.*, FED. R. CIV. P. 8(e)(2) ("A party may set forth two or more statements of a claim or defense alternately or hypothetically . . . . A party may also state as many separate claims or defenses as the party has regardless of consistency."). Even under this strategy, which presents multiple, possibly competing claims, each claim is considered separately, without an attempt to develop a whole mosaic.

115 "The job of a lawyer is to re-present her client's views in such a way that the client's 'story' comes across as compelling to a judge or jury." Kim L. Scheppele, *Telling Stories*, 87 MICH. L. REV. 2073, 2090 n.53 (1989); *see* Cunningham, *Thinking About Law*, *supra* note 8, at 2492 (contrasting "re-presenting" with translation).

116 For a discussion of how we apply these patterns, see Steve Winter, *Contingency and Community in Normative Practice*, 139 U. PA. L. REV. 963, 993-94 (1991).

117 I mean "effective" in the limited sense of the plaintiff achieving the purpose of her suit, as declared in her pleadings. I am not addressing empowerment.

ent.[118] For the attorney, the focus in these cases is often on whether her client is a victim and whether she meets the requisite standards for legal recognition.[119] The lawyer must try to fit her client ("the victim") into an acceptable story so that she can win. Her actions must become "reasonable," as that term is defined, by some community standard.[120] Rather than examine standards of conduct that allow the aggressor to behave as he has, we must instead examine our client's actions to see whether she is a worthy victim. If she did not resist enough, if she led him on, or if she did not leave when she had (what we now see as) the opportunity, then she did not act sufficiently reasonable and will not win. Instead, she will be blamed for talking to a man, flirting and teasing, drinking too much, or being too wild.[121]

At the same time as we scrutinize her individual behavior, we are trying to fit her into a group with distinguishable characteristics. We are familiar with the legal requirements for sexual harassment victims, battered women, and rape victims. There are syndromes that help to describe their behavior. We want our clients to fit into the recognized patterns. Not only does it make our jobs easier, but

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118 *See* Alfieri, *supra* note 10, at 2124 (poverty lawyers name their clients as dependent); Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499 (1991) (discussing dominant visions of the poor).

119 For an example of how a rape survivor had to be represented as weak and vulnerable, rather than angry, see Kristin Bumiller, *Fallen Angels: The Representation of Violence Against Women Legal Culture in* AT THE BOUNDARIES OF THE LAW 95 (Nancy S. Thomuelsen & Martha Fineman eds., 1991). For a comparable discussion of homelessness and victimization, see Lucie E. White, *Representing "The Real Deal"*, 45 U. MIAMI L. REV. 271, 298 (1990-1991); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 46 (1990) ("The lawyer had scripted [her client] as a victim. That was the only strategy for the hearing that the lawyer . . . could imagine for [her client].") [hereinafter White, *Subordination*].

120 *See* Ehrenreich, *supra* note 28; Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1152 (1985).

121 *See* Camille Paglia, *Rape: A Bigger Danger than Feminists Know*, NEWSDAY, Jan. 27, 1991, at 32 ("A woman going to a fraternity party is walking into Testosterone Flats . . . . A girl who goes upstairs alone with a brother at a fraternity party is an idiot."); Ann Landers, *After Hours of Petting, It's Too Late to Stop*, CHI. TRIB., Aug. 4, 1991; *see also* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 204 (1986) (citing studies of jury attitudes in rape cases that reflect male perspective of what is reasonable: many beieved 50% of all rapes are reported by women seeking revenge on men or trying to cover for an illegitimate pregnancy); 2 Charged with Assault on Student from Loyola, CHI. TRIB., Sept. 9, 1987, § 2, at 4 (two men who allegedly gang raped a woman were charged with misdemeanor criminal sexual assault rather than felony rape because woman had been drinking and delayed reporting the incident until the morning after it occurred). *But see* Naomi Wolf, *We're All "Bad Girls" Now: Our Lives are Just as "Lurid" as Those of Alleged Rape Victims*, WASH. POST, Aug. 4, 1991. Similarly, as discussed *infra*, in our domestic violence cases, it is more difficult to construct a case to support a client's receipt of a protection order, especially for women who are too angry, hit back, started fights, or who left home without their children.

it also may help our clients overcome some of the distrust directed against them, so that they will be believed.

Thus, the actual physical violence committed against our clients may be compounded by their lawyer's and judge's reactions.[122] An example from one of my classes shows the potentially damaging effects of stereotyping within the attorney-client relationship. We were exploring the reasons that battered women might stay with their abusers. Many of the students suggested that the battered woman was a victim of learned helplessness and could not leave for psychological reasons. Then a formerly battered woman, who had observed hundreds of cases and talked with thousands of victims, spoke. She suggested that the battered woman may stay because she loves her abuser and cannot afford to live apart from him.

A lawyer who cannot see (or understand) how love affects a battering relationship or the importance of economics is missing important aspects of her client's life.[123] She will not understand why her client stays with the abuser or returns to him. As a result, she will grow angry and frustrated with her client, and perhaps seek ways to terminate the representation. This will make her client feel blameworthy for her "unreasonable" love for the batterer, and the client will feel judged—by her own lawyer—at the moment she first enters the legal system. Of course, understanding this context does not ensure that the attorney will not become angry and frustrated; however, her emotions will be tempered with understanding.

Even if she does understand her client's circumstances, in her role as intermediary between the client and the court, the lawyer may nonetheless choose to portray her client in a certain way so that she will win. I do not criticize feminist lawyers for trying to help their clients in this way. But having achieved some success, we must evaluate the costs and benefits of existing legal standards and the mode of their development within—and to—the attorney-client relationship. A reasonable woman image does help make difficult stories more comprehensible within the legal system. However, the same problems that arise from theoretical insights also appear in practice. First, as the foregoing discussion makes clear, the reasonable woman standard essentializes women. It defines characteristics that a reasonable woman must exhibit in order to become a reasonable client who may succeed.[124] Consequently, it excludes all other

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122 *See* Schneider, *supra* note 25 (abuse of battered woman self defense syndrome); White, *supra* note 7.

123 *See* Littleton, *supra* note 101, at 43-47; Mahoney, *supra* note 101.

124 *See supra* notes 97-101 and accompanying text; *see also* Shirley Sagawa, *A Hard Case for Feminists:* People v. Goetz, 10 HARV. WOMEN'S L.J. 253, 266 n.71 (1987) (citing to criminal case in which defense counsel's use of battered woman syndrome was held er-

characteristics as unreasonable. Second, the image marginalizes those women whose stories do not fit within the image, and those women who have different, and difficult, stories to tell.[125] For example, what do we do with the sexually harassed woman who had a consensual sexual relationship with her harasser and then sued him?[126] What about the woman who was raped by a former boyfriend with whom she previously had consensual sex?[127] What about the victim of domestic violence who wants custody of her children but has "abandoned" them when she fled the violence, or worse, has beaten them?[128] As lawyers, we must look at the entire contexts in which these actions occur in order to make sense of them, and we must convince courts to examine context, rather than to rely on summary standards.[129]

Third, although the reasonable woman standard emerged from women's actual experiences, it has since been overtaken by lawyers and legal theorists. Consequently, it shifts power from women to their lawyers.[130] Rather than challenging definitions, women must still accommodate their experience to someone else's reasonableness standard. Moreover, because reasonableness is a powerfully

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roneous because the relationship between the victim and the defendant did not conform to the "characteristic patterns" of the syndrome).

125 Interview with Marie Ashe, Oct. 4, 1991; *see* Naomi R. Cahn, *A Preliminary Feminist Critique of Legal Ethics*, 4 GEO. J. LEGAL ETHICS 23 (1990).

126 *E.g.*, Keppler v. Hinsdale Township High School Dist., 715 F. Supp. 862 (N.D. Ill. 1989); *cf.* Shrout v. Black Clowson Co., 689 F. Supp. 774 (S.D. Ohio 1988) (employee has duty to notify superior, with whom she had a consensual sexual relationship, that continued contact is unwelcome).

127 State v. Ciskie, 751 P.2d 1165 (Wash. 1988); State v. Alston, 312 S.E.2d 470 (N.C. 1984); Estrich, *supra* note 21, at 60-65 (discussing *Alston*).

128 *See* Marie Ashe & Naomi Cahn, *Abuse of Women and Children: Issues for Feminist Theory*, 2 TEX. W. L.J. (forthcoming 1992); Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041 (1991) (discussing battered women who abuse their children).

129 Of course, we must also figure out how to set limits. *See* Abbe Smith, Presentation at Frontiers of Legal Thought: Race, Gender and Justice (Duke University School of Law, Jan. 24, 1992) (discussing criminal defendant who shot two women after he saw them making love because he is homophobic). In setting these limits, we may appear arbitrary: why should domestic violence be relevant, while homophobia is not? My answer is that we must choose certain determinate values. *See* Joan Williams, *Rorty, Radicalism, Romanticism: The Politics of the Gaze*, 1992 WIS. L. REV. 131, 143 (discussing the possibilities of certainties without absolutes—we can believe in right and wrong so long as we recognize that they are arbitrary beliefs).

130 *See* White, *supra* note 103, at 886 (arguing that poor people must take the power to define themselves away from the courts); *see also* Tove S. Dahl, *Taking Women as a Starting Point: Building Women's Law*, 14 INT'L J. SOC. L. 239, 239-40 (1986) (articulating the purpose of women's law as describing, explaining, and understanding actual experiences to improve their position in law and society; women's experience is removed from the subjects themselves and becomes filtered through the interpretations of their lawyers).

drilled-in legal standard (beginning in first year torts), it is difficult for lawyers to challenge the paradigm of reasonableness.

We represent our clients in a system that has excluded women from the legal process.[131] As we think about litigation on behalf of women, we must beware of reverting to traditional methods of thinking and developing doctrine. Instead, we must focus on the impact of our theory on practice as a method for understanding the impact of doctrine on images and cultural stereotypes of women that operate within the attorney-client relationship.

C. A Representation

A client representation that occurred in our clinic illustrates many of these themes.[132]

We first met Arlene Sims at our Citizens' Complaint Center, where the local police send virtually all victims of domestic violence. She came in through Center intake with a one-page form setting out a summary of her reason for being there. She had already seen at least two people that day, one from the local prosecutor's office and another from the Court Social Services office. She had been at the Center since nine a.m.; by the time we interviewed her, it was about two p.m.

A student in my clinic called her into our office from the central waiting area. Ms. Sims followed slowly. The student began by apologizing to Ms. Sims for the long delay at the Center and that she hoped we would be the last people Ms. Sims needed to talk to that day. Ms. Sims looked up, and smiled a little. The student explained that she was a law student, acting under the supervision of an attorney-professor. She then informed Ms. Sims that we understood she was at the Center because her husband had beaten her with a chair, and that she wanted to go to court about this. The student then asked, "Is this accurate?"

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131 *See* White, *Subordination*, *supra* note 119, at 20-21 (while some women do participate "fluently" in the legal process, many are unable to do so).

Historically, of course, married women did not have a legal existence separate from that of their husbands. *See* Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1361 (1983). Women have also been excluded from practicing law. *See* KAREN B. MORELLO, THE INVISIBLE BAR (1986) (history of women in the legal profession); Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987).

132 To protect my clients and my future practice, the facts in this case are based on a compilation of several cases and, for this reason, I have summarized the attorney-client conversation. Clark Cunningham has commented that my methodology takes away the client's voice. Because Ms. Sims does not exist, there was no way to get her permission to use her actual words; yet, I did not want to invent either her actual words or mine. This article, then, omits illustrating some of the steps in the process of how client language is distorted by the law. The attorney deliberations discussed *infra* are hypothetical.

Ms. Sims said, "yes." Looking back, I am not sure what she meant; what we later learned she wanted and what had happened to her were different from what the intake form stated.

Ms. Sims explained that she already had a civil protection order (CPO), but that had not stopped her husband from beating her. The student asked for a copy of the CPO; it did indeed direct Mr. Sims to stay away from his wife, and not to molest or assault her. We also noticed that the order was issued by consent. Ms. Sims and her husband, with the help of a victim advocate, had negotiated the terms of the order. The victim advocate is not a mediator, and she explains at the start of each session that she is there to help the complainant. The advocate has handled virtually all domestic violence cases in the local court for more than ten years, and is sensitive to power disparities between the parties. She is also skilled at negotiating terms that the complainant wants and that are acceptable to the abuser. When the parties consent in this kind of process there is no hearing. The judge generally reads out the terms of the agreement, and makes sure both parties understand the penalties for a violation. Even though such orders only direct batterers to stay away from victims, judges often tell victims also not to go anywhere near the batterer.

The fact that an abuser consents to a civil protection order does not necessarily mean that he admits to any of the allegations underlying the initial complaint. Nor does it mean that he is more likely to comply with the order than if it had been issued after a full fact-finding hearing. It often does mean, however, that the abuser is intimidated by the court process, that neither party wants to explain all the details of their relationship in court, or that the parties still have some type of minimal relationship. Ms. Sims explained later that she felt intimidated by being in court and had gone through the consent process because she did not want a hearing. She was concerned, however, that because there had been no court hearing, Mr. Sims had not taken the court proceedings as seriously as she had. This was of particular concern because, as Ms. Sims explained, she and her husband still lived within one block of each other. She continued to visit friends on his street, and he lived with her uncle.

Within the previous two weeks, he had beaten her twice. The first time, he came to her house one weeknight to visit their three children, Alice, who was two years old, Jim, who was five, and Dan, who was seven. Even though the civil protection order allowed him to visit only on weekends, she let him into her house. She explained that she wanted him to see the children, and that she was also scared he would bang on her door until she let him in. As soon as he walked in, he began to hit her, punching her on the right side of her

face with his fist, kicking her legs. She screamed, and by the time a neighbor came to the door, he had stopped. We could still see the faint bruise marks on her face.

The second time he beat her after she refused to hand over the keys to "his" car. When they were first married, Mr. Sims bought a 1980 Chevy. Ms. Sims did not work, so he provided the car payments and kept up the insurance. While he was at work, she used the car mostly to drive the children to and from school, to go grocery shopping, and for other errands. At the court hearing on the CPO, neither of them had brought up use of the car, so the order said nothing about it. Because he had lost his keys, she knew that she had the only set.

Ms. Sims explained that on the day before she came to the Center, she and the children had stopped to visit some friends on her husband's street after doing grocery shopping. As she was standing in front of a friend's house, she saw Mr. Sims pull up in his truck. He parked, and she watched him, hoping he would not come near her. He came towards her, yelling at her to give him the keys to his car. She ran into her uncle's house (also her husband's home) to ask him for help. Mr. Sims followed her inside the house and her uncle walked outside, leaving her in the house with her husband. He again demanded his keys. She ran into the kitchen, and got a knife, because she did not think he would let her leave the house. She tried to leave the house, but he blocked the door. She was somewhat confused about what had happened next. She believes that he picked up a chair and approached her with it, and that she stabbed him as she tried to ward him off. He then lifted the chair over his head and brought it down on her head several times. A friend of his ran into the room and told him to stop beating her. She left, got her kids, went home, and called the police.

About an hour later, two officers appeared. She showed them her CPO, but they told her that there was nothing they could do because he was no longer around and they had not seen anything happen. They referred her to the Center for help. This police response seemed frustrating to her—it certainly was to me. I had just finished working on a survey of how the police respond to domestic violence victims in the District of Columbia, which found that, notwithstanding a police general order to the contrary, the existence of a CPO had little effect on police response.[133]

As she told her story, Ms. Sims was soft-spoken and matter-of-fact. Even when she showed us the bruises, her demeanor did not

133 Karen Baker et al., Report on District of Columbia Police Response to Domestic Violence 45 (1989) (unpublished study, on file with the *Cornell Law Review*).

change. She seemed prepared to talk to many "professionals" before she could get help. She said that what she wanted was for Mr. Sims to stop abusing her. She had hoped the CPO would take care of his violence; it had not, and she was resigned to taking the next step. When we told her that we might be able to represent her, she seemed desperate for our help. Several times, she asked if we really thought we could represent her, and she seemed genuinely glad when we said we would. When she asked if it made any difference to us that she had refused to give him the car keys, run into his house, and then used a knife against him, we reassured her that it did not. We tried to take photographs of her bruises (they did not appear on our Polaroid pictures), and arranged to meet with her two days later so that we could file the necessary court papers to enforce her CPO through a motion for contempt.

During the next few days, the student and I had numerous discussions about how to handle the second incident. We were concerned about what might appear to a judge to be "inconsistencies" in her story, such as her grabbing the knife and stabbing him. Clearly, he had approached her first and she had acted only in self-defense. Refusing to give him the car keys seemed reasonable because she did not want to be bullied by him, and she needed the car for family errands. Running into her uncle's house to ask him for help also seemed reasonable, although we did wonder why her friends on the street did not try to protect her. We assumed that she did not want to involve any of them in her "personal" problems, and that they did not even know that she had a civil protection order. When we asked her why she had run to her uncle rather than to a friend, she explained that he was family and knew something about her relationship with her husband; while her friends were also her husband's friends and they told her they did not want to get involved in choosing sides. We struggled with how to present these facts to a judge, who might blame Ms. Sims for visiting friends on her husband's street, not leaving as soon as he arrived, running into "his" house, and drawing a knife on him.

In discussions with Ms. Sims, we developed two theories. Our first theory concluded that any reasonable woman in her situation would have acted as she did. Many of her friends lived on the same street as Mr. Sims did and she did not want to stop seeing them nor always ask them to come see her. Her friends were also his friends; these friends knew little of his past violence, and thought he was a decent man. Given this, she could turn only to her family for help. After her uncle refused to help her, she had to help herself. When her husband still lived with her, he had broken her nose, pulled out her hair, and threatened to do worse. She feared him, justifiably

and reasonably so. Grabbing the knife was an act of desperation. In this version of the story, she would tell the judge that she was confused about when exactly she had stabbed him with the knife.

In our second story about the incident, Ms. Sims was a lifelong victim.[134] She had become stuck in an abusive situation, and was unable to step out of a cycle of violence with her husband. Her father had abused her mother, and her mother had abused her. She expected abuse in a relationship. In the first incident that formed the basis for the contempt motion, she knew that he had been building towards a severe beating, notwithstanding the CPO. She let him into her house, resigned to his abuse. In the second incident, she again knew that a beating was inevitable, and almost literally walked into it. She had grabbed the knife, but felt unable to use it to hurt him, and in fact dropped it quickly.

The facts in both stories were true (that is, they corresponded to Ms. Sims's actual experiences). In discussions with Ms. Sims, we needed to decide which story had fewer "inconsistencies," whether she would have a better chance at winning a contempt proceeding if she appeared to be a victim or a reasonable woman.[135] We three lawyers preferred the reasonable woman approach because it allowed Ms. Sims some dignity in telling her story to the judge and in front of her husband. We knew, however, that at the time, she was not thinking about whether her reactions were reasonable. Moreover, as her representatives, we felt it was important to let her know that we believed many judges would find her actions unreasonable and provocative. A judge quite simply might not believe that she had acted reasonably in visiting friends across the street from where her batterer lived, running into his house, and then stabbing him. We told her we especially feared this result because we tried to talk to the friend who intervened in the second beating, but he told us he did not want to get involved. In a case where a judge must determine credibility based on the parties' testimony, with a high burden of proof (beyond a reasonable doubt), a judge simply might not believe her, and could easily find reasonable doubts about her actions.

We did not have a trial. On the day we were scheduled for court, she decided that rather than having a hearing at which the penalty might be jail time for him, or at which she might lose, she

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134 *See* White, *Subordination*, *supra* note 119, at 46. Our victim theory was based on the cycle of violence/battered women syndrome identified by Lenore Walker. *See* sources cited *supra* note 94.

135 At the time, the stories seemed too inconsistent to combine. On reflection, I think we could have tried harder to combine the two images. Even so, we might have faced the same issues in court. It may also be that the stories are too divergent. *See* Delgado, *supra* note 77, at 2411 (discussing different stories for dominant and subordinant social groups).

would rather Mr. Sims relinquished possession of the car and paid child support. She reasoned that he could not earn money while he was in jail. Thus we do not know whether our reasonable woman strategy would have worked in practice.[136]

Looking back, I am particularly aware of the risks of painting her actions as reasonable to a court. Mr. Sims clearly violated the order, and Ms. Sims's actions are irrelevant. Nonetheless, his behavior could be excused or justified because of her actions. Even to me, her behavior initially seemed somewhat risky, not quite reasonable. I imagine that if I were in her situation, I would have called the police as soon as he came over on a weeknight to visit the children. But then I remember that not only did she not have a phone at the time, but in the past when she called the police, they had not come in time.[137] I also imagine that I would give up visiting my friends, so as not to run into him. And I believe that I could never stab anyone.[138] But I do not really know.

My definition of the actions of a reasonable woman is based on my own experiences. I am not a black mother of three who receives AFDC and has been battered by my husband. The only way that I can begin to represent her situation is to know as many facts about her life as possible, to understand my position in interpreting them,[139] and to examine the power structures underlying her

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136 Another story shows the gap in understanding that we feared. A friend recently represented a victim of domestic violence who had been raped repeatedly over a ten year period. The victim testified that she returned to her batterer because he promised not to rape her again, and because she could not earn enough money to support herself and their children. The judge simply did not believe that she could have stayed for ten years with a man who repeatedly raped her (and thus it must not have been rape). Staying with her rapist-husband simply does not appear to be the action of a reasonable woman. Mahoney, *supra* note 101, at 64; West, *supra* note 13; *see also* Maryland Special Joint Committee, *Gender Bias in the Courts* 7 (May 1989) (judges do not understand why victim of domestic violence might not leave the abusive situation or might return to her husband). Another influence may have heen that, until recently, marital rape was a legal contradiction.

137 Several courts have found that police respond discriminatorily to domestic violence calls. *E.g.*, Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Com. 1984); *see* Carolyne R. Hathaway, Comment, *Gender Based Discrimination in Police Reluctance to Response to Domestic Assault Complains*, 75 GEO. L.J. 667 (1986).

138 My doubts illustrate some of the limits of the method of "participant observation study." My beliefs and knowledge are central to this story. I have labelled this story "a story of representation" because it is my story of how I represented this client, both to myself and within the legal system. *See* Ross, *supra* note 112, at 1546; White, *Subordination*, *supra* note 119, at 45 n.143.

139 Clifford Geertz suggests that any interpretation is particular and holds different meaning in any cultural setting. CLIFFORD GEERTZ, LOCAL KNOWLEDGE 167-234 (1983).

story.[140] How can we possibly give such a "thick description"[141] to a judge, given current definitions of relevance and limited images of reasonableness for poor black battered women?[142]

III
PRACTICE STRATEGIES

We have seen how the reasonable woman standard affects sexual harassment, domestic violence, and rape law. When it emerges from women's experiences, it has the capacity to help women, to make women feel less alien in the legal system, and to make women's experiences appear more credible. When the standard develops from a male legal system, it clearly disadvantages women. Obviously, when it responds to the concrete realities of the lives of women who are using the legal system, it succeeds; in any other situation, as in the context of rape law, it fails, and, indeed, damages women. What, then, do we do with the reasonable woman standard? How should it affect legal strategy and representation?

It seems to me that we can choose from several possible approaches. Understanding its dangers of essentialization, marginalization, and potential disempowerment, we can nonetheless embrace the standard when it does account for women's lives, and reject it in all other situations; we can use a reasonable person standard; or we can articulate a new standard that does not depend on an analysis in each situation of whether the reasonable woman image developed from women's lives. Whichever of these difficult strategies we follow, it must be accompanied by revisions to the attorney-client relationship.

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140 *See* Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1647-52 (1990) (in examining the particular experiences of individuals, it is important to examine larger patterns of power and oppression to aid in judgment).

141 *See* ALICE MILLER, BREAKING DOWN THE WALL OF SILENCE 156 (1991) (explaining that because an American fighter pilot's feelings were frozen inside of him, he could not feel the anger and powerlessness of the people he was bombing). Geertz borrows this term from Gilbert Ryle to refer to "the multiplicity of complex conceptual structures, many of them superimposed upon or knotted into one another, which are at once strange, irregular and inexplicit and which [an ethnographer] must contrive somehow first to grasp and then to render." CLIFFORD GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, *in* THE INTERPRETATION OF CULTURES 3, 10 (1973). That is, there are multiple levels of siguificance to any single action.

142 On the difficulties of doing exactly this, see Delgado & Stefancic, *supra* note 35. The problem lies not just in the the lawyer's ability to translate the client's story, but also in the law itself. While much of lawyering does involve translation, *see* Cunningham, *supra* note 7, and interpretation, it requires some responsiveness, some similarity of concepts, between the law and the original speaker. These concepts simply may not exist.

A. Reasonable Person Standard

One solution, in accord with sameness theory, is to give meaning to the "reasonable person" standard. The reasonable person would not become simply a linguistic substitute for the reasonable man; rather, it would be "premised squarely on an androgynous rather than a male prototype."[143] This androgynous creature would combine gendered male and female attributes, and would transcend the characteristics of each sex. It would embody a standard that could be universally applied. To develop a new conception of the reasonable person standard requires taking the "male tilt" out of its existing application[144] so that it truly establishes a new standard.

The reasonable person standard has the advantage of simplicity and custom. We are accustomed to evaluating reasonableness. Indeed, the reasonable person appears to provide a neutral and abstract standard so that the law is not interpreted according to the whims of individual judges or juries, but instead is based on a societal consensus.[145] Reasonableness protects against the extremes of the egg-shell plaintiff and the sledge-hammer defendant by setting out a mediating middle ground with seemingly determinate standards. In addition to providing neutral norms, a reasonable person standard, rather than a reasonable woman standard, prevents gender-attributed characteristics from controlling the appropriate legal standard.

Nonetheless, the standard may be impractical in implementation, as well as undesirable in theory. It is subject to the same criticisms as traditional conceptions of sameness feminism. Use of the reasonable person construct has not meant sudden equality for women, it has meant applying a male standard under a different name.[146] Theoretically, we may be confining ourselves and our cli-

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143 Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 367 (1984-1985). *But see* Littleton, *supra* note 95, at 1292-95; West, *supra* note 87, at 22; Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1577 (1983); Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471, 476 n.22 (1990).

144 Wendy Williams argues that feminists must challenge "in court a male defined set of structures and institutions . . . [using, among others] a doctrinal tool with which to begin to squeeze the male tilt out of a purportedly neutral legal structure." Williams, *supra* note 143, at 331.

145 For analysis of the falseness of this consensus, see Ehrenreich, *supra* note 31, at 1204-07; *see also* Richard Delgado, *Norms and Normal Science: Toward a Critique of Normality in Legal Thought*, 139 U. PA. L. REV. 933, 944 (1991) ("We must preserve the fiction that normative principles are neutral authorities we consult, humbly and objectively.").

146 Senator DeConcini used a reasonable person standard, and drew on his experiences in deciding to believe Justice Thomas, rather than Professor Hill. *See supra* note 50. The *Norman* court stated that a reasonable person does not kill a sleeping spouse. *See* State v. Norman, 378 S.E.2d 8 (N.C. 1989).

ents if we adopt a reasonable person standard. Moreover, as with the reasonable woman, a reasonable person standard pretends that there is an objective neutral standard that can be applied appropriately to all facts. As Lucinda Finley notes, "the purportedly objective reasonable person standard may actually be subjective due to its failure to include a variety of perspectives and experiences and its use of biased stereotypes."[147]

B. Reasonable Woman Standard

The reasonable woman standard developed from the experiences of outsiders. As such, it provides valuable information about how the legal system has excluded women. It also forces lawyers to consider how existing standards are male-biased, and how they can be changed to become more inclusive. Yet it differs from a gender-neutral standard because of its explicit focus on women; it requires the fact-finder to think about the reasonable woman's reactions to a particular situation, rather than proceeding from the perspective of the reasonable man or reasonable (male-dominated) person.[148] The reasonable woman is a powerful image because of its implicit critique of the reasonable man. Its very phrasing shows that the reasonable man is a gendered, exclusionary standard.

When we litigate, we need concrete strategies that show the inadequacy of existing standards. Using a reasonable woman standard in sexual harassment cases dramatizes why behavior that many men find acceptable constitutes harassment to women.[149] In the rape context, a reasonable woman standard could explain why a woman failed to report her rape, perceived a man's behavior as threatening, or did not understand herself to have consented to sex.[150] The reasonable woman standard is seductive because it not

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147 Finley, *supra* note 26, at 63.

148 *See* Estrich, *supra* note 21, at 859 (noting that some courts are "ready to meet the challenge" of protecting women from sexual harassment by pointing to the adoption of the reasonable woman standard in *Ellison v. Brady*); *see also* Ehrenreich, *supra* note 31, at 1207.

149 *See* Abrams, *supra* note 3, at 1202-03.

150 For example, some states still require marital rape to be reported within a certain time period, or else there was, legally, no rape. In Virginia, marital rape must be reported within ten days. VA. CODE ANN. § 18-2-61(B) (Michie 1988); *see* Cathleen M. Gillen, *Violence in Marriage: A Comparison of the Legal System's Approach to Domestic Violence and Marital Rape*, AM. CRIM. L. REV. (forthcoming 1992) (manuscript on file with *Cornell Law Review*).

As Kim Scheppele explains, "[a]dopting the 'reasonable woman' . . . allows women's views to have a strong impact on the outcome of rape trials while simultaneously putting men on notice that they must consider how women's perceptions of sexualized situations may be very different from their own." Kim L. Scheppele, *The Reasonable Woman*, THE RESPONSIVE COMMUNITY, Fall 1991, at 45.

only sounds like familiar language (the reasonable man or person), but unlike the traditional language, it explicitly includes women.

Nonetheless, as Clark Cunningham points out, when one speaks a particular language, its limitations seem so natural that they are invisible.[151] The term "reasonable woman" is both legal language and feminist language; its very familiarity as legal language obscures its problems. It still assumes the possibility of defining the reasonable woman's perspective, both imagining the theoretical likelihood of a standard capable of general application to women, and pretending that, in practice, judges can apply the standard in a "neutral" fashion that will benefit women.[152] Indeed, it tries to separate the process of applying the law from the substantive content of the law, which depoliticizes the law.[153] That is, it does not recoguize that the process of applying the law is interrelated with the actual content of the law.[154]

Consequently, courts that use a reasonable woman standard can apply it in a manner that subordinates women just as easily as one that supports women. As with the reasonable person standard, a mere change in language does not, alas, mandate a change in application and result. The trial court judge in *Rabidue v. Osceola Refinery Co.*[155] explicitly used an "average female employee" standard in support of its finding that no harassment had occurred.[156] In rape cases, the reasonable woman standard—as currently developed and articulated (albeit not by feminists)—hurts women. When we leave the interpretation of substantive norms "to the sole discretion of judges, most of whom are upper—or middle—class white men," they will naturally perpetuate their traditional white male viewpoint.[157] On this perspective, women are subjected to a reasonable

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151 Cunningham, *Lawyer as Translator, supra* note 8 at 1319; *see generally* Delgado & Stefanic, *supra* note 35 (racism and sexism maybe so imbedded in our culture as to obscure their existence).

152 *See* Finley, *supra* note 26, at 64.

153 *See* William Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Norm*, 89 MICH. L. REV. 707, 765 (1991).

154 *See, e.g.*, Katharine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990).

155 584 F. Supp. 419 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

156 *Id.* at 433. The conduct that was not harassing included: "In common work areas plaintiff . . . [was] exposed daily to displays of nude or partially clad women belonging to a number of male employees . . . ."; a male employee who "regularly spewed anti-female obscenity"; and a general exclusion in formalities that Ms. Rabidue (the only female manager) needed access to in order to to her job. *Rabidue*, 805 F.2d at 623-34 (Kieth, J., dissenting).

157 Kit Kinports, *Evidence Engendered*, 1991 U. ILL. L. REV. 413, 420 (discussing evidentiary rules). Similarly, the substantial discretion that judges enjoy in other areas often disadvantages women. *Id.*; *see, e.g.*, Karen Czapanskiy, *Gender Bias in the Courts: Social Change Strategies*, 4 GEO. J. LEGAL ETHICS 1, 18-21 (1990) (discussing effect of judicial discretion in child support awards).

woman standard that is again constructed with male bias.[158] Indeed, the goal of making the reasonableness standard reflect the actual experiences of women may be too difficult because of this entrenched bias that prevents judges from analyzing conduct and circumstances from the perspective of a reasonable woman (rather than a reasonable man labelled a reasonable woman).[159]

Moreover, the reasonable woman standard establishes a standard for women that differs from the standard for men, incorporating and perpetuating stereotypes of women. This suggests that men are not harmed by conduct that a reasonable woman might find offensive. This conclusion is unjustified. Some men may be injured by the same harassing behaviors that subordinate women. Men can be harmed by a legal standard that tolerates domestic violence, not only by its affect on them as children, but also by its relationship to fostering violent and abusive behavior in other men.[160] Moreover, the perpetuation of certain stereotypes of women can reinforce limiting stereotypes of men. For example, the image of women as sensitive, delicate, and needing protection in the workplace from conduct that men easily tolerate, reinforces the restrictive images of men as the necessary breadwinner and provider, thick-skinned and hardened.[161] Finally, the actions of a reasonable woman may differ depending on whether she is black or white, rich or poor, a professional or unemployed. The reasonable woman standard does not include these multiple perspectives, generating instead a cookie-mold stereotype.[162]

Having said all that, however, a reasonable woman standard may remains a better alternative than any other formulation based solely on reasonableness. The standard could be applied to both men and women, ensuring that one standard governs behavior.[163] Indeed, it could even be applied to the behavior of the harasser-abuser-rapist to judge whether his behavior was reasonable.[164] Its very language instructs courts to think from a different perspective than that of the reasonable man or person. Notwithstanding its capacity for misinterpretation, the reasonable woman standard en-

158 Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 809 (1988).

159 *Id.*

160 Cahn, *supra* note 128.

161 Williams, *supra* note 16.

162 The intent of the standard was actually different. Within the legal system, however, in the interest of ease of application, or in order to accommodate expectations about women's behavior, the standard has collapsed into itself.

163 Donna Lenhoff, General Counsel of the Women's Legal Defense Fund, suggested this as one solution to the practical quandary of litigating sexual harassment cases. Interview with Donna Lenhoff (Dec. 7, 1991).

164 Of course, this would mean a dramatic shift in how cases are structured.

courages judges and juries to recognize the impact of different gender ideologies on the actions of women, and on their own expectations.[165] It can also help clients like Ms. Sims feel more "fluent" within the legal system by formulating legal rules in terms that are meaningful in her experience.

C. Towards a New Standard

Given the problems with both a reasonable woman and a reasonable person standard, we need to develop a new conception against which to understand and evaluate behavior. A new standard must recognize that reasonable men and women can and do disagree both within and across gender groups; yet it must also acknowledge that prevailing gender, race, class, and sexual orientation ideologies construct a different and subordinate role for (sometimes intersecting) groups. Such a new standard must reformulate reasonableness, not merely because of its indeterminacy but because it is a mirage. It is an illusion that promises objectivity but actually incorporates subjective beliefs, and an imaginary standard that does not describe how people such as Ms. Sims think about their actions. It also allows (encourages) lawyers to reshape their clients' stories to conform to this objective standard. I envision a standard that is tailored to the experiences of individual litigants in a manner similar to that proposed by Lucie White for poor people's hearings.[166] As Professor White explains, in order to "shap[e] the law to respond to the needs of subordinated groups[,] the *power* to tailor must shift to those that the tailoring seeks to help. Those who have been diagnosed as different, as disabled, must assume the power to describe their own circumstances."[167]

Consequently, a new standard would presume that each woman's experience be viewed according to how she experiences it.[168] Rather than listening for a story that constructs one dominant image in the courtroom, we must develop ways to admit multiple voices and images. Instead of requiring a victim to conform to preexisting images, a new standard would be contextual, focusing on the victim's actual reactions.[169] It would incorporate all the circum-

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165 It might drastically alter the range and types of evidence admissible, as has already happened with respect to battered women syndrome. For other possible effects on evidence, see Kinports, *supra* note 157.

166 *See* White, *supra* note 103, at 877-87.

167 *Id.* at 886-87.

168 *But see* Rosemary J. Coombe, *supra* note 6, at 80 (claiming that we cannot rely on a particular woman's belief as to whether she has consented to intercourse because those beliefs are "invaded by social power and dominant notions."); MACKINNON, *supra* note 70, at 177 ("women are socialized to passive receptivity.").

169 To some extent, this proposal is similar to a standard articulated by Kathryn Abrams. She suggests that the victim's "description of the defendant's sexually oriented

stances surrounding a woman's actions. In the rape context, for example it would ask, Was the consent to sex mutual,[170] neither economically nor physically pressured? If there was any form of pressure, when did it occur? How did the woman perceive the pressure? How did it make her feel at the time she "consented"? Such a standard subjectively considers the pressure on an individual who is a member of a community with explicit standards for her behavior.

This new standard could permit lawyers to return to the excitement of learning from our clients' experiences in order to craft more effective and responsive legal theories. Such a standard must draw its strength from communities of disempowered people, while seeking to change prevailing community attitudes. Its application entails educating judges so that they better understand and respect victims' perspectives.[171]

This new contextual standard is justified because it responds to the texture of our clients' lives and gives them space to speak their own words. While reshaping clients' stories is certainly appropriate in some instances,[172] both the lawyer and her client must acknowledge the lawyer's role as intermediary, her role in translating the client's (narrative) language into law language (rules).[173] By recognizing the diverse nature of our clients' stories, a new contextual standard allows for the diversity of real experiences, and recoguizes the distortion imposed by any particular doctrinal standard. This may allow litigants to feel "counted" within the legal system, providing the recognition and validation that are important goals of many who seek legal relief.[174] And it ensures the continuing responsiveness of legal doctrine to legal practice.

Of course, one major problem with such a standard is its subjectivity. It ignores the perpetrator's intent, focusing instead on the victim's context, resulting in broad indeterminacy of legally appropriate behavior.[175] Given the importance of *mens rea* to our concepts

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behavior and of the feelings of coercion or devaluation it produced would establish the plaintiff's prima facie case." Abrams, *supra* note 3, at 1209; *see also* Brief Amicus Curiae of Women's Legal Defense Fund, *Robinson* (proposing standard that credits plaintiff's credible allegations). The standard set out in this Article differs in its focus on the victim's context and its attention to the attorney-client relationship.

170 Chamallas, *supra* note 158, at 837-39.

171 For suggestions, see Martha Minow, *Words and the Door to the Land of Change*, 43 VAND. L. REV. 1665 (1990).

172 *See infra* notes 200-02 and accompanying text.

173 *See* Cunningham, *Lawyers as Translator*, *supra* note 8; Cunningham, *Thinking About Law*, *supra* note 8; Cahn, *supra* note 27.

174 *See* JOHN CONLEY & WILLIAM O'BARR, RULES VERSUS RELATIONSHIPS (1990).

175 Many of us are suddenly concerned with line-drawing. Women I know report the same type of conversation with men about where to draw the line between appropriate and inappropriate sexual behavior. Indeed, some might argue that this is not "law" at all; rather it is a process of ad hoc authoritative exercises of discretion.

of responsibility and the importance of the presumption of innocence to our adjudicative system, we want to find deliberate, or at least reckless, disregard for the victim's rights or interests before we impose liability.[176] We have rapists who claim, "I didn't intend to rape her—I thought she consented," or harassers who state, "I didn't know that my conduct was unwelcome to her," or batterers who stated (before they were killed), "I didn't intend to hurt her again." Can we ignore their understandings so that it is the victim's perspective that becomes dominant?

To some extent, the legal system has ignored the victim's perspective, focusing only on that of the perpetrator.[177] That is, burdens of production and persuasion in the legal system are allocated to assume that the perpetrator's conduct was reasonable, asking only if the victim's conduct was reasonable according to the perpetrator.[178] The "objective" reality of what happens in rape, sexual harassment, or domestic violence cases is how the man thinks about his conduct.[179] This does not mean that we should make women's experiences the only reality; we must recognize that there are multiple realities. A new standard could recognize the multidimensional nature of disputes[180] and experiences of reality. Instead of labelling the male reality the "objective" one, each reality is both objective and subjective for the participants. In the past, one reality has been dominant; both must be weighted more equitably within the legal

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176 A recent survey of sex bias in criminal law teaching concluded that "[t]he central role of mens rea . . . in criminal responsibility is reflected in the almost universal coverage of the 'mistake of fact' defense [in rape cases]." Nancy Erickson & Mary Ann Lamanna, *Sex-Bias Topics in the Criminal Law Course: A Survey of Criminal Law Courses*, 24 U. MICH. J.L. REF. 189, 208 (1990).

See Scheppele, *supra* note 150, at 45 (noting that given the harshness of penalties and stigma for criminal conduct, "[t]o base criminal convictions on potentially idiosyncratic perceptions of victims is unfair to those accused.").

177 *See* David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1034-35 (1990).

178 The possibility of asking whether the reasonable woman (man or person) would have acted as did the perpetrator adds another dimension to this picture. The reasonable woman makes more explicit the existing focus on whether she acted reasonably, given his conduct; perhaps we should focus on whether he acted reasonably, given her conduct. *See id.*

179 MACKINNON, *supra* note 70, at 180.

180 *See* Brenda Danet, *Language in the Legal Process*, 14 LAW & SOC. REV. 445, 509 & n.32 (1980) (noting that while

> [d]isputes constitute two different versions of reality, each advocated with all the resources—linguistic and nonlinguistic, substantive and formal—the parties can muster, [i]n fact there are likely to be more than two versions of reality since even witnesses on the same side may vary considerably in their versions of events.).

system.[181] Even with a presumption of innocence, one could infer intent from the victim's perceptions and the perpetrator's actions. In this way, the facts that had previously been "discounted" would be heard in a new way.[182]

A second problem with a more subjective standard is that in its focus on the victim's perspective, it requires that she expose her feelings. The reality is that this already happens: when a victim comes forward, she is put on trial. Under a standard of conduct that respected her reality, she could explain her experiences in a supportive, or at least nonjudgmental, environment rather than a criticial one. For example, the notion of "imminence" in self-defense law would be flexible enough to accommodate the genuine perceptions of a woman who viewed her sleeping batterer as a threat (unlike the person with "ordinary firmness"). In employment discrimination cases, the law could acknowledge the influence of power relationships in the workplace so that a woman could explain why she did not complain loudly and often about harassment. In rape cases, the concept of consent would be transformed to one of real, affirmative consent, so that a woman could explain why, notwithstanding her past sexual activity, forced intercourse with a social acquaintance was still rape: she *knows* when sex is consensual and when it is not.

Finally, a new context-based standard may not always be appropriate in all cases. We may need "broader" norms, at least in some cases.[183] But this, too, is a context specific inquiry, which recognizes that setting out one standard is sometimes, but not always, reasonable.

To see how this standard would work in practice, I suggest some reforms within the attorney-client relationship that would transform traditional standards to take account of different experiences, without setting out a separate standard for each gender.

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181 *See* Abrams, *supra* note 50, at 979 (many lawyers believe that the "truth" can best be established by a "neutral decisionmaker with the task of discovering it.").

I am focusing on the process of constructing and valuing alternative narratives. This process dramatizes the problem of conflicting narratives, an issue that Abrams does not directly address. Where two people tell compelling, resounding narratives, how do we know which is "right"? How can we move away from "neutral" arbiters without trusting all to the discretion of judges? For some thoughts, see Ashe & Cahn, *supra* note 128 (the first step is telling new stories); Sally E. Merry, *The Culture of Judging*, 90 COLUM. L. REV. 2311, 2327 (1990) (suggesting it is appropriate to consider allowing in some aspects of "pluralism" into judging); Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for our Judges*, 61 S. CAL. L. REV. 1877 (1988) (exploring how feminist notions of caring can inform judging); *see also* Martha Minow & Elizabeth Spelman, *supra* note 140 (an analysis of context and power can lead to better judgments).

182 Finley, *supra* note 26, at 64-65.

183 *See* Fechner, *supra* note 70, at 487.

D. Transforming the Attorney-Client Relationship

Phyllis Goldfarb has pointed out that feminists have much to learn from legal clinicians about the nature of the legal system, client stories, and the attorney-client relationship.[184] In addition, feminists have much to learn from practicing lawyers and clients. Some feminists have begun this process by examining the legal methods that we use in challenging the law's exclusion of women's perspectives and the different claims of truth implicit in those methods. Others examine women's relationships to other actors in the effort to produce social change.[185] I too ask how feminists have used the legal system to produce change, but also ask how do we think about feminists as litigators? What changes must we make in our methods in order to practice feminist representation of our clients? What happens when a particular theoretical construct is used in practice? What about when a practical construct is transformed, through court decisions or scholarly commentary, into legal theory?

While there are many theoretical perspectives from which to explore answers to these questions, any answers must include an examination of the representation process[186] and the attorney-client relationship. It is not enough simply to develop theory; we must be concerned about what happens when it is implemented.

Underlying this problem of implementation is a concern with power issues in the surrounding society as well as within the attorney-client relationship.[187] A complicating factor is the existence of many distinct power issues in the attorney-client relationship in the

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184 Goldfarb, *supra* note 3, at 1689-90.

185 Abrams, *supra* note 2; Bartlett, *supra* note 154.

186 Representation is a complex process and has multiple strands, including: 1) the client's representations to herself concerning the nature of her problem and her use of the legal system; 2) the client's representations to her lawyer; 3) the lawyer's representation of the client to the world outside of the attorney-client relationship; 4) the lawyer's representations to the client within the attorney-client relationship; and 5) the lawyer's representations to herself concerning her client. This Article has focused on the last three aspects because they are the ones to which I, as a lawyer, have easy access. It is easy to see how the reasonable woman standard affects these three levels by allowing for the creation of a comfortable yet novel image such that these three forms of representation are in accord.

Awareness and understanding of these different levels of representation can help in rebuilding the attorney-client relationship. *See* Goldfarb, *supra* note 3, at 1675-1687 (suggesting how to reshape the attorney-client relationship into a method that joins personal and professional ethics).

187 Michael Foucault identified the importance of deconstructing power issues. *See, e.g.*, Michael Foucault, *Truth and Power*, *in* THE FOUCAULT READER 51 (Paul Rabinow ed., 1984). Robin West disagrees with Foucault, arguing that power is not a creative force because women are silenced and unable to develop their own discourse under patriarchal power. Robin West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. L. FORUM 59, 59-65. She points out that we must look at the violence inflicted by this power, rather than the structures it has constructed. *Id.*

cases discussed in this Article. One is women's powerless position in a male-dominated society, which breaks down further into white women's positions relative to white men and "minority" women's position with respect to white men and women and "minority" men. A second is clients' relationship to their lawyers, which can, in turn, be seen as the result of the inherently distorting nature of legal doctrine—when lawyers translate clients' stories into the law, the resulting story is always different[188] and the problematic nature of the representation process itself.[189] Because of these inherent power strnctures, lawyers must be careful to respect their clients and to ameliorate, or at least avoid aggravating, the pre-existing power structures in the attorney client relationship. The most meaningful strategies in legal representation have emerged as lawyers learn from their clients. Others have suggested some strategies that lawyers can use to work with their clients. Gerald Lopez suggests a rebellious style of lawyering that requires lawyers to work *with*, not merely for, their clients.[190] This involves an understanding of the context and complexity in which legal issues arise,[191] as well as a willingness to work with other professionals who are similarly committed to confronting subordination.[192] Tony Alfieri suggests strategies that allow lawyers to break out of client stereotypes by reinterpreting client stories.[193] Lucie White focuses on how lawyers shape their clients' stories.[194] Underlying these practices is a need for the lawyer to be critically aware of her motivations. She must

188 As Brenda Danet points out, "the 'facts' of a case do not preexist but are constructed through interaction." Danet, *supra* note 180, at 509 (citing Thomas J. Scheff, *Negotiating Reality: Notes on Power in the Assessment of Responsibility*, 16 SOC. PROB. 1 (1968)). Lawyer client talk helps to construct the facts; indeed, lawyers need to appreciate that "language is not only a tool they use but a cultural artifact that subtly channels . . . ." Lawrence Rosen, *A Consumer's Guide to Law and the Social Sciences*, 100 YALE L.J. 531, 537 (1990) (book review).

189 Of course, not all women are subordinated to all men. Issues of race, class, and sexual orientation are intertwined in women's relationship to men. Similarly, in many situations clients are not subordinated to lawyers. *E.g.*, Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503 (1985) (showing the dominance of client interests in large law firms); *see* William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 144 (1992).

190 *See* Lopez, *supra* note 8, at 1608; *see also* Gerald Lopez, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305, 358-60 (1989) [hereinafter Lopez, *Training Future Lawyers*] (suggesting changes in legal education to prepare students to engage in this rebellious style of lawyering); Gerald Lopez, *The Work We Know So Little About*, 42 STAN. L. REV. 1 (1985) (pointing out that modern legal education does not seek to address, much less to understand, the concerns of low-income women of color).

191 *See* Lopez, *Training Future Lawyers*, *supra* note 190, at 381-82.

192 *See* Lopez, *supra* note 8, at 1608-09.

193 Alfieri, *supra* note 10.

194 White, *supra* note 119.

understand when she is using others' images, rather than her client's, for what she sees as her client's advantage.

Three other aspects of this mode of lawyering lead to a contextualized approach to lawyering. First, a client-centered representation recognizes clients' varied goals—to win, to tell their stories, to feel respected by the legal system (including their lawyers)—and attempts to translate these goals into the legal system.[195] Second, a representation process must also respect that a lawyer herself is not completely neutral and objective. Third, there needs to be a recognition of the importance of explicit examination of the doctrine and practice interconnection.

First, a client-centered representation recognizes that clients come to lawyers for many reasons. They may seek access to the legal system because they have no other choice,[196] they want the legal system to validate their claims, they seek to tell their stories to a judge,[197] or they want a particular legal result. As lawyers, we must understand our clients' needs, and then use doctrine accordingly. This means listening to our clients.[198] For the client who wants to win, it may be appropriate to reshape her narrative and fit it into a stock story, rather than risking a more innovative turn to narrative strategy. For a client who wants both to win and to tell her story to a judge, we need to explore her willingness to take the risk of losing, especially if her story does not conform to prevailing norms of reasonableness. A client like Ms. Sims wants to use the legal system to send a message to her abuser that his behavior is illegal, and that the law, at least, gives her some power over him.[199]

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195 These suggestions assume that lawyers and clients want to use the legal system so that clients can tell their stories. However, I am not here proposing an immediate overthrow of the legal system, and the construction of a new system in which all clients could tell their stories. *See* Kathryn Ahrams, *Lawyers and Social Change Lawbreaking: Confronting a Plural Bar*, 52 U. PITT. L. REV. 753, 783 (1991) (exploring different motivations of lawyers with respect to working within and outside of the legal system).

196 *See* Austin Sarat, "... *The Law is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343, 359-65 (1990).

197 *See* CONLEY & O'BARR, *supra* note 174 (although they discuss unrepresented litigants, their conclusions about the motivations of parties apply as well to represented litigants).

198 A study of physicians found that empathetic doctors who listen to their patients are more satisfied with their work and have patients who are more satisfied with their medical care. Daniel Goleman, *All Too Often, The Doctor isn't Listening, Studies Show*, N.Y. TIMES, Nov. 14, 1991, at C1, C15.

For some discussion on listening in attorney-client relationships, see DAVID BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (1990); Robert Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 502, 604 (1990).

199 *See* MERRY, *supra* note 22 (concluding that this was one reason that women in abusive relationships sought court protection).

As lawyers, we need to help clients clarify their goals, and explore the risks of different strategies.

This is particularly important given the diversity of client stories and objectives. Not all clients tell sympathetic stories; lawyers do not (and should not) represent only those clients who initially relate legally "winnable" tales. For these "unwinnable" clients, we may be obligated, ethically and morally, to transform their unsympathetic stories into compelling ones that will prevent further beatings or harassment. Indeed, we can contextualize their stories in ways that they might not be able to do themselves in court, or that a judge might otherwise be unable to do.[200] For example, a battered woman who "abandons" her children when she leaves the batterer may have left the children because she was fleeing for her life. Alone in court she might not explain the history of violence, how it made her feel, how she felt her options were restricted, or how scared she was of assault at separation.[201] A woman who was sexually harassed may not, without the aid of an attorney, be able to explain why she did not leave her work situation after she was sexually harassed, why she needed to continue at the job, why the contacts and references she established were helpful.[202] This additional information might be overlooked unless her lawyer tries to understand and appreciate her client's context, without judging her client's actions.

Second, many feminist lawyers undertake representation because of their commitment to legal reform. Lawyers may choose to represent particular clients to achieve larger goals that benefit all women,[203] and can choose to use their own experiences to inform

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200 Clients really do need some form of translation during this process. Poverty law clients often do not speak in the language recognized by courts. *See id.*; Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. (forthcoming 1992) (manuscript on file with *Cornell Law Review*).

201 *See* Mahoney, *supra* note 101, at 79-80:

> The idea that the woman should have left the relationship and especially the idea that she failed to leave, shapes the court's analyses of many aspects of self-defense cases, including the reasonableness of the woman's perceptions and reactions, the imminence of the threat of death or threat of bodily harm and her duty to retreat from the confrontation.

202 *See* F. Lee Bailey, *Where Was the Crucible? The Cross Examination that Wasn't*, A.B.A. J. 46-49 (Jan. 1992) (pointing out that Anita Hill did not have any lawyers who were her advocates).

203 *See* Burns, *supra* note 114, at 191 (addressing the importance of challenging "forces that obscure women's interests" as "[o]ur first duty to ourselves as litigators and to our clients"); Cahn, *supra* note 3, at 12-14 (discussing work of ACLU Women's Rights Project); Ruth Cowan, *Women's Rights through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971-1976*, 8 COLUM. HUMAN RTS. L. REV. 373, 374 (1976) (acknowledging that the Project resulted in a "blurring of the distinction between litigant and advocate"); *see also* Abrams, *supra* note 195 (exploring motivation of lawyers in representing socially subordinated groups).

the representation process.[204] They thus empathize with the particular goals of their clients, and place the particular representation in the context of a larger effort to challenge women's subordination.

Consequently, there is a danger that the lawyer will impose her feminist theories on the client without listening to her.[205] To some extent, this danger is unavoidable.[206] All lawyers have a particular philosophy that they impose on the attorney-client relationship. For example, the professional responsibility rules for lawyers, which control the ethics of representation, are not neutral.[207] The values they elevate—professional neutrality—e.g., zealous advocacy—may conflict with feminist goals of empowered representation because feminists do not advocate professional neutrality and may want to redefine the meaning of zealous advocacy.[208] Therefore, it is important to ensure that one's perspective is explicit to oneself and to one's clients; and to question how it affects client narrative.[209]

Accordingly, lawyers must remember that it is not their ideals but the client who is being represented. This means ensuring that clients are involved in the representation process. Although the rules of professional ethics tacitly permit lawyers to control every-

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204 For examples of personal experiences informing litigation, *see, e.g.*, Cahn, *supra* note 3, at 14; Katrina Grider, *Hair Salons and Racial Stereotypes: The Impermissible Use of Racially Discriminatory Pricing Schemes*, 12 HARV. WOMEN'S L.J. 75 (1989); Schneider, *supra* note 112.

205 I observe this tension in many different situations. For example, when Ms. Sims did not want to go forward with the contempt proceeding, I was torn: feminist theory argues that prosecution may be in the woman's best interest. *See* Naomi R. Cahn & Lisa G. Lerman, *Prosecuting Woman Abuse*, *in* WOMAN BATTERING: POLICY RESPONSES 95 (Michael Steinman ed., 1991); LISA G. LERMAN, PROSECUTION OF SPOUSE ABUSE: INNOVATIONS IN CRIMINAL JUSTICE RESPONSE (1981); Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267 (1985). I did not want to manipulate her, but I did want the violence to stop. I had to step away from theory and respond to my client's objectives. (This is, of course, a simplification of the issues presented and ignores issues of false consciousness).

206 *See* Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 646-49 (1982) (arguing that paternalism is pervasive and desirable).

207 Cahn, *supra* note 125.

Some have critiqued the system because it is self-serving, protecting lawyers at the expense (literally and metaphorically) of their clients. *See* Thomas Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977); *see also* Richard Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639 (1981) (suggesting the answer is to legitimize the legal profession). Others have critiqued the system for ignoring the interests of third parties who are affected by any particular client's decisions. *See* Peter Margulies, *"Who Are You To Tell Me That?" Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests to Nonclients*, 68 N.C. L. REV. 213 (1990).

208 *See, e.g.*, JACK & JACK, *supra* note 88, at 92 (describing a lawyer who used an ethic of care to resolve his case and "flirted" dangerously with violating the conflict of interest and disclosure rules).

209 *See* Austin Sarat & William Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663 (1989).

thing but the underlying "objectives" of the representation, requiring only that "[i]n questions of means, the lawyer should assume responsibility for technical and legal tactical issues,"[210] representation can and should be more of a collaborative process.[211] Even though true collobaration is extremely difficult (some suggest impossible),[212] it is an appropriate goal. In attempting to approach this goal through a critical self-awareness, we can improve existing relationships.

Third, a new type of lawyering must consider the influence and effects of doctrine on practice. Much of the distortion (and even the "rhetorical violence")[213] that occurs in the attorney-client relationship results from the limits of doctrine. We shape our clients into reasonable women because only they can win. But at least in some circumstances, we must challenge the effect those stereotypes have on client relationships, as well as in the courtroom. Theories such as the reasonable woman do not develop in a practice-free vacuum; they are based on the realities of practice, or at least on cases and laws that result from someone's practice.[214] But theoretical insights must maintain a continuing dialogue, and dialectic, with practice.[215]

We can begin to implement this changed form of practice by sharing information, power, and empathy. For me, a telling example of this need is my experience with doctors. With their knowledge, jargon, and instruments, they intimidate me. I know that through them, I can gain access to a whole new embodied world, if only I cooperate. Once they begin talking to me, I forget any questions I had, or else I do not ask them for fear of being labeled troublesome. I am ready to take whatever advice they give me, even if I

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210 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. 1 (1983). The Rules acknowledge that it may be difficult to distinguish between the objectives of representation (over which the client has control) and the means of representation, and that "in many cases the client-lawyer relationship partakes of a joint undertaking." *Id.* Nonetheless, the rules do not require this type of undertaking.

211 *See* Andrew D. Gitlin, *Educative Research, Voice and Social Change*, 60 HARV. EDUC. REV. 443 (1990). Even in a collaborative process there is a risk of manipulation, of the lawyer redefining the client's goals and problems. *See* Stacey, *supra* note 8 (pointing out these problems with ethnographic study itself).

212 *See* Marilyn Strathern, *An Awkward Relationship: The Case of Feminism and Anthropology*, 12 SIGNS 276, 290 (1987) (arguing that feminists believe that the anthropological ideal of a truly colloborative process is a "delusion" given the underlying power relationships).

213 *See* White, *supra* note 7.

214 For example, a significant impetus to the development of the battered woman syndrome resulted from Lenore Walker's studies of battered women, and from the need in cases to explain battered women's actions. BATTERED WOMAN, *supra* note 94; Schneider, *supra* note 20; Walker, *supra* note 94.

215 This is not an obvious point, as Elizabeth Schneider emphasizes as well. *See* Schneider, *supra* note 2; Schneider, *supra* note 25; Schneider, *supra* note 45; Schneider, *supra* note 112.

have little or no understanding of my diagnosis or treatment. I feel disempowered and unrespected.[216] It is only with great effort that I can overcome my own paralysis. From this experience, I can only begin to imagine what it feels like to be a client.[217]

There remains an issue of "meta"-manipulation. By sharing information and power, I am manipulating my client so that she becomes my image of an appropriate client. I want a client who will collaborate with me in any manner she can, just as I want to collaborate with her in the ways I can.[218] Is imposing this image on my client just as violent as imposing a reasonable woman standard on her? Perhaps. As Tony Alfieri perceptively points out, I am confronting contradictions between "client-centered decisionmaking and lawyer authority . . . ."[219] These contradictions are further reinforced by doctrine. Even though I know that these contradictions may never be resolved and that lawyers by themselves will never overcome them, I believe it is important to recognize and to challenge them. I thus accept that there are some images of the attorney-client relationship which are better than others,[220] and fostering new forms of that relationship is appropriate.

CONCLUSION

Much of feminist theory has emerged from feelings and experiences of exclusion.[221] The practical reality of confronting standards that explicitly and implicitly exclude women's experiences has

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216 *See* Goleman, *supra* note 198.

217 Such empathy, however, can be dangerous. *See* Trina Grillo & Stephanie Wildman, *Obscuring the Importance of Race: The Implications of Making Comparisons between Racism and Sexism*, 1991 DUKE L.J. 397; *see also* GEERTZ, *supra* note 139, at 59 (describing the need to move beyond Western conceptions of empathy to see others' experience in their own framework).

218 As such, this differs from the family law lawyers studied by Sarat and Felstiner, who shared knowledge and demystified the legal system, but only in an attempt to bolster their own authority and better maintain client control. Sarat & Felstiner, *supra* note 209.

219 Anthony V. Alfieri, *Stances*, 77 CORNELL L. REV. 1233, 1247 (1992).

220 While I am not claiming access to a universalized truth, I am claiming that, from my standpoint, I can imagine that there are less manipulative types of attorney-client relationships. Postmodernism has shown the dangers of universalized narratives; *see, e.g.*, Fraser & Nicholson, *supra* note 64. But feminists have critiqued postmodernism for not acknowledging its own point of view(s) on the impact on women of power structures, and the need for some type of grounding. *See e.g.*, Bordo, *supra* note 32, at 140; *see also* Drucilla Cornell, *The Doubly-Prized World: Myth, Allegory and the Feminine*, 75 CORNELL L. REV. 644, 681-682 (1990) (choosing between competing interpretations requires "ethical and political" criteria) Joan Williams, *supra* note 129, at 134, 153-154 (noting the importance for pragmatists of looking at patterns of oppresion to — their theories).

221 *See, e.g.*, Menkel-Meadow, *supra* note 131; Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539.

encouraged theory.[222] Indeed, feminist theorists continually acknowledge their debt to practice.[223] Yet in this role, practice merely serves as a predicate, as a stepping-stone, to theory. Theory is the goal, practice merely a method to help achieve that goal. A more appropriate sequence is to view theory and practice as a continuous iterative process, with adjustments in one prompting refinements in the other. It is not sufficient to draw upon practice when we develop theories; our theories must return to practice.

That has been my goal in this Article: to show how theory and practice must be intertwined,[224] and how concepts of practice must extend to the attorney-client relationship. At times, it is easier to do one or the other: in practice, we may be too focused on the multitudes of clients who need our help to think about theory; as theoreticians, we may never represent a client and thus may never be forced to grapple with the need to develop concrete strategies that either will change the law as it is interpreted or will help real clients win. In theory, we can abstract the actual violence that occurs in women's lives, and overlook the physical damage inflicted.[225]

The reasonable woman standard has emerged from practice, and it accords with some strands of feminist theory. As theory and practice learn from each other, however, we see the dangers of the standard, as well as the difficulties of developing new standards that reflect women's (sometimes different) experiences and yet do not confine women in male norms. As theory remains grounded in practice and ethnographic, localized study, not only of courts, but also of what happens in the attorney-client relationship, we can truly begin to construct new images of women in law and in practice.

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222 Cahn, *supra* note 3, at 3-5, 8-10.

223 *E.g.*, Littleton, *supra* note 12, at 18.

224 *See* Finley, *supra* note 89, at 891; Schneider, *supra* note 2, at 610; *see also* Elizabeth M. Schneider et al., *"Feminist Jurisprudence"—The 1990 Myra Bradwell Day Panel*, 1 COLUM. J. GENDER & L. 5 (1991) (noting perspectives on the relationship between feminist theory and practice); Fineman, *supra* note 9.

225 *See* JESSICA BENJAMIN, THE BONDS OF LOVE: PSYCHOANALYSIS, FEMINISM, AND THE PROBLEM OF DOMINATION 216 (1988); White, *supra* note 7.