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# A Space for Women in the Law

Thesis Presented by

Megan Murphy

in partial fulfillment of the requirements for  
Honors in Philosophy: Pre-Law

University of Mary Washington

May 2, 2018

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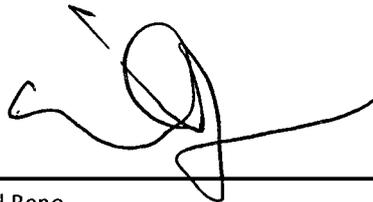
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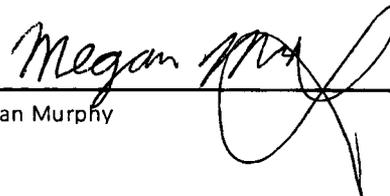
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Megan Murphy

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## Introduction

Standards of reasonableness play a crucial role in many areas of our legal system, including, but not limited to, criminal law, contract law, tort law, and employment law. Standards of reasonableness assist fact-finders—either juries or judges—in determining whether the conduct under scrutiny is legally acceptable. An example describing how reasonableness may factor in determining whether an individual's actions should be considered criminally negligent will help clarify what is meant by standards of reasonableness. Imagine that a man enters an area where people often pass through. He decides to shoot his shotgun into the air for fun, but he has no intent to harm anyone. While he is shooting his gun, someone walks by and receives a fatal bullet wound. The man who shot his gun into the air would be found to have executed legally unacceptable behavior because any reasonable person would have known that the action of shooting the gun into the air was likely to cause harm to others. He would likely be charged with involuntary manslaughter due to his criminally negligent behavior, which is classified as such by the concept of reasonableness.

The specific area of the law that standards of reasonableness operate under determines the significance of legal acceptability. For example, under criminal law, a pronouncement of acceptability due to the reasonableness of the act will often result in the person who has been charged with a crime being found not guilty or being given a reduced punishment because of mitigating circumstances after being found guilty. In contract law, acceptability is often used to compare the questionable conduct of the actual party to the contract with how a hypothetical, reasonable individual would have been expected to act under a contract with identical terms to the one being examined by the court. Reasonableness can also factor into legal matters in

different ways; for example, it can be used to evaluate a defendant's actions or to evaluate a victim's perceptions of a defendant's actions.

As there are multiple definitions of reasonableness that are accepted by the courts, the concept has generated much debate, some of which is directly related to my thesis, within the fields of philosophy of law and legal feminism. Philosophical questions surrounding reasonableness standards include those that ask who the reasonable person is and how a reasonable person should be described. Is the imaginary reasonable person someone of average intelligence? Is the reasonable person someone whose values reflect those held by most individuals in a certain community? In this thesis, I will weigh in on the debates surrounding reasonableness standards in the following two areas of the law that deal with gender-based harm: hostile environment due to workplace sexual harassment, also referred to as workplace sexual harassment, and acts of self-defense committed by women who are victims of Intimate Partner Violence (IPV), often referred to as battered women.

In our society, gender plays an immeasurable role in shaping individual lives, experiences, and opportunities; thus, it is my contention that justice requires the law to utilize a gender-specific, reasonable woman, or reasonable abused-women, standard in cases dealing with workplace sexual harassment and in cases in which women who have been abused by their spouses for extended periods attack or kill their abusers in non-confrontational settings. By "non-confrontational settings," I simply mean any situation in which violence or threats of imminent (meaning immediately present) violence is absent. An example of a non-confrontational setting could involve someone attacking his or her abuser after being beaten—but not right away in the moment of the attack. A gender-specific reasonableness standard in these two areas of the law will serve as an acknowledgment of how women experience and respond to harassment and

violence, thereby furthering a contextualization of gender inequality in the law, which will hopefully provide a theoretical and practical environment that is more conducive to an equal situation for women and men. However, it does not follow from these assertions that either the unequal position or the differences of perception and lived experience between men and women are incapable of transformation. Because these discrepancies and inequities are not fixed aspects of reality, it also does not follow that the reasonable woman standard should be a permanent legal rule. I view the implementation of the reasonable woman standard in cases of workplace sexual harassment and acts of self-defense committed by women who are victims of extensive IPV as a temporary move, and once men and women become equally situated in these, and other, areas of life, it will be unnecessary.

In analyzing these two areas that harm women physically and psychologically, I do not wish to undermine the experiences and suffering of men who are victims of workplace sexual harassment, IPV, or both—either at the hands of men or women. Rather, I wish to focus on women because, statistically speaking, women are much more likely to be subject to sexual harassment and IPV; according to statistics compiled by Centers for Disease and Control Prevention, one in four women and one in nine men have been victims of sexual violence, physical aggression, or stalking by an intimate partner (Prevent Domestic Violence in Your Community, 2017). The U.S. Equal Employment Opportunity Commission (EEOC) has found that anywhere between 25% to 85% of working women have experienced sexual harassment on the job, while 14% to 19% of men have been victims of workplace sexual harassment; however, it is important to note that these numbers are not precise because of underreporting (Select Task Force on the Study of Harassment in the Workplace, 2016). In my opinion, this gendered disparity is largely, if not entirely, related to historical and current patterns of gender

socialization, which have created a context of inequality where women as a group occupy a disadvantaged position compared to that of men as a group.

The thesis will be organized into five sections, followed by a conclusion. Part I will explain how reasonableness standards function in workplace sexual harassment law and law addressing acts of self-defense committed by women who are victims of IPV. This section will also lay out the philosophical issues surrounding the notion of reasonableness in the legal setting. Part II will examine how the following three branches of feminist theory understand the two issues discussed in this thesis: *difference feminism*, also known as *cultural feminism*; *dominance feminism*; and *equal treatment feminism*; this section will also make assumptions about where each branch would end up in the reasonableness dispute. I will ultimately defend a combination of difference and dominance theory. Part III will offer an analysis of workplace sexual harassment and propose a reasonable woman standard to be applied to these legal cases. Part IV will provide an analysis of how IPV and long-term abuse leads to a different context of self-defense than that offered by traditional self-defense, where two strangers of relatively equal strength and size have a physical confrontation. This section will also lay out what a reasonable abused-woman standard would look like in cases of self-defense committed in non-confrontational settings by women who have been victims of IPV. Part V will provide objections and responses to my position.

## I.

*A. Reasonableness in Workplace Sexual Harassment*

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on several suspect classes, such as religion, race, and for the purposes of my thesis, sex.<sup>1</sup> Largely beginning in the 1980s, the courts have expanded the workplace conduct that constitutes discrimination based on sex. The EEOC, which is the federal agency in charge of enforcing Title VII, defines harassment as follows:

Harassment is unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive (31).

The latter form of sexual harassment (2) describing hostile environment harassment is the focus of this thesis, as it presents the most philosophically interesting issues dealing with reasonableness standards. Whereas the former form of sexual harassment (1), often labeled *quid pro quo*, deals with tangible and thus often economic harms of discrimination, such as a woman being fired for refusing sexual favors, hostile environment is typically less discernible, although not necessarily any less injurious than *quid pro quo* harassment. An example of a hostile environment situation could involve a woman who is repeatedly ridiculed, taunted, and put in uncomfortable situations, such as being presented with pornographic images, by several coworkers and boss, who perceive her as less capable of performing work tasks because of her gender. The hostile environment situation is different from *quid pro quo* in that it alters the work atmosphere in a manner that makes it difficult, if not impossible, for the victimized individual to perform his or her job. As such, hostile environment situations usually involve multiple

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<sup>1</sup> The law typically does not provide a strong distinction between sex and gender.

transgressions, and any one of the defendant's (or group of defendants) transgressions considered by itself does not typically amount to a legally actionable harassment claim. Because our legal system was traditionally crafted to sort out direct harms between equally situated individuals, discrimination law, especially workplace sexual harassment law, presents unique difficulties for fact-finders, for the ubiquitous nature of discrimination results in a context where victims are wronged through both an individual injury and a collective injury, resulting from membership in an oppressed group—in this case, women. Therefore, discrimination law is complicated because of its acknowledgment of, and goals of, providing a solution to historic and current unfair treatment of certain groups.

One major concern surrounding sexual harassment law involves preventing frivolous claims of harassment from succeeding in the legal system. Fact-finders must determine whether the defendant's actions are harmful enough to qualify as “intimidating, hostile, or abusive” (31)—note that the use of “or” instead of “and” seems to allow for more action to potentially create a hostile work environment. Our legal system has adopted a standard of reasonableness, which applies to the objective component of a two-pronged objective/subjective standard, most clearly described in *Harris v. Forklift* (1993), that the plaintiff is required to show (Dolkart 1). The objective standard of reasonableness ideally blocks unjust outcomes in favor of the plaintiff in sexual harassment cases, and I will elaborate on what it involves below.

A brief description of the evolution of workplace sexual harassment, which includes a description of several landmark court cases, is necessary if one is to grasp the importance of reasonableness in this area of the law. Although a vast number of court cases have addressed hostile environment and what reasonableness entails, the following four are of considerable importance to these issues: *Meritor Savings Bank v. Vinson* (1986), *Rabidue v. Osceola Refining*

*Co.* (1986), *Ellison v. Brady* (1991) and *Harris v. Forklift*. In *Meritor Savings Bank v. Vinson*, the U.S. Supreme Court held for the first time that hostile environment harassment was actionable under Title VII as a form of sex discrimination (Newman 534). Before the *Meritor* decision, plaintiffs were required to show that quid pro quo harassment had taken place to file a Title VII claim (Newman 534). *Meritor* signifies a momentous step forward in the path toward women's equality, as it acts as the first meaningful acknowledgment by the courts that hostile environment harassment is harmful enough to allow for legal reparation, thereby opening the door for a vast number of women to pursue legal claims of workplace harassment that impedes their ability to develop to their fullest potential as workers.

*Rabidue v. Osceola Refining Co.* was decided by the U.S. Court of Appeals for the Sixth Circuit in 1986, and although the petitioner, Vivienne Rabidue, did not prevail in her claims of workplace sexual harassment, Judge Damon Keith's dissenting opinion is generally viewed as the birth of the reasonable woman standard (Newman 535). Ms. Rabidue's claims were evaluated from the perspective of a reasonable person (Newman 535). The court asked, "how a reasonable person in similar circumstances would have perceived the [defendant's] conduct... to determine whether Ms. Rabidue had satisfied the burden of proof, meaning that the harassment had created a hostile environment and had affected her psychological well-being" (535). In his dissention opinion, Judge Keith asserted that the court adopted the incorrect standard to evaluate Ms. Rabidue's claims; Keith argued for the application of a reasonable woman standard instead of a reasonable person standard, citing the difference in opinion generally held by men and women over what consists of appropriate behavior (535). According to Nicole Newman, "Judge Keith warned that unless the outlook of the reasonable woman was adopted, defendants and

courts would continue to perpetuate ingrained notions of reasonable behavior defined by the offenders—in most cases, men” (536).

Judge Keith’s dissent offered a previously unheard-of option for future judges to adopt: a gender-specific standard of reasonableness, which prioritizes the lived experience of women in the workplace, an area largely dominated by men in terms of positions of power, compensation for work, and numbers of workers, while simultaneously recognizing that reasonable person standards used by the courts may be biased against women. Further, his dissent galvanized the academic debate over two issues. First, whether utilization of a reasonable woman standard will result in more just outcomes for women workers. And, second, whether it is fair to hold defendants (often men) to a standard that by definition reflects the perceptions of women.

In *Ellison v. Brady*, the U.S. Court of Appeals for the Ninth Circuit applied the reasonable woman standard for the first time to determine “whether conduct is sufficiently severe or pervasive to create a hostile working environment,” and found for petitioner, Kerry Ellison, marking the end of the use of the reasonable person standard in workplace sexual harassment cases in the Ninth Circuit (Westman 813). One of the most important implications of the *Ellison* decision is that it sends the message that women’s insights should be seriously considered when dealing with workplace sexual harassment, a gender-based harm that predominately affects women. Further, the Ninth Circuit Court seemingly takes the position that it is possible for fact-finders, whether juries or judges (the latter of whom are more often male), to comprehend and apply the perspective of a reasonable woman. Finally, *Ellison* set a precedent that other federal courts may choose to follow, that is, unless the U.S. Supreme Court takes a position regarding the suitability of the reasonable woman standard. However, only some circuit courts have chosen to adopt the reasonable woman standard, and the U.S. Supreme Court has not

elected to take an explicit position on the issue (Newman 537). That said, it is possible that one could interpret the combination of the fact that the Court has neglected to take an explicit stance on the issue and the language in the Supreme Court's written opinions in *Harris* and *Oncala v. Sundowner Offshore Services, Inc.* (1998) to suggest its implicit acceptance of the reasonable woman standard (537). Ultimately, though, the Supreme Court's explicit or implicit endorsement of the reasonable woman standard is not required to defend it as a legal solution (in a normative sense) in workplace sexual harassment, due to its potential to create a more just situation between men and women.

Finally, *Harris v. Forklift* is a landmark Supreme Court case that, as stated earlier, most clearly lays out how reasonableness standards currently factor into workplace sexual harassment law. However, the Court originally granted certiorari on the issue of whether evidence of serious psychological harm is required to find liability in Title VII workplace sexual harassment cases, and it determined that it is not (Dolkart 1). But because of uncertainty among lower courts, the Court attempted to clarify the test for establishing that conduct is "sufficiently severe or pervasive to constitute sexual harassment" (Dolkart 1). As Dolkart notes, quoting from *Harris*, "the Court adopted a dual objective/subjective standard, holding that harassing conduct must be sufficiently 'severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive,' and that the victim must 'subjectively perceive the environment to be abusive'" (1). Thus, it is necessary but insufficient for plaintiffs in sexual harassment cases to show that they were harmed by the behavior in question (the subjective component). Plaintiffs must also demonstrate that the examined behavior would have harmed a similarly situated reasonable person (the objective component).

The focus of this thesis is on what Dolkart and others label the “objective standard”: how are fact-finders and the public to make sense of what kind of behavior a reasonable person, or in some cases, a reasonable woman, would find objectionable enough to be considered “hostile or abusive?” Further if it is the case, as proponents of the reasonable woman standard propose, that men and women often react differently to behaviors that are sexual in nature, how is one to make sense of the hypothetical responses of a reasonable genderless person, as suggested by the reasonable person standard? The *Harris* decision provides a small amount of guidance through its requirement that “the context of the totality of the circumstances in the workplace” is to be considered (Dolkart 20). The “totality of the circumstances” requirement indicates that fact-finders are to conceive of a reasonable person who understands the workplace environment as a dynamic context, rather than evaluating the conduct in question as taking place in a vacuum, or as a random injury. Further, it is possible for the “totality of the circumstances” requirement to be interpreted as involving consideration of how one’s gender, and in the case of women, their unequal position in society, may affect how certain treatment stemming from this societal inequality should be evaluated in the workplace. Thus, the *Harris* decision may be interpreted as offering implicit acceptance of a gender-specific reasonableness standard. The *Harris* court had the opportunity to comment on the reasonable person versus the reasonable woman debate, but it chose not to, leaving the lower courts and academic scholars to make sense of the debate.

### *B. Reasonableness in Self-Defense Law*

Reasonableness in the law regarding acts of self-defense committed in non-confrontational settings by women who have been victims of long-term IPV plays a different role than it does in the sexual harassment described above. In the type of self-defense described in this thesis, standards of reasonableness are used to evaluate the actions of the woman perpetrator,

who has committed act(s) of violence against her abuser. Evaluating actions in these cases involves examining two identities, namely offender and victim, which seem *prima facie* conflicting. Yet upon closer examination, these two identities are connected, as understanding a woman's status as a perpetrator in these cases is futile without also having a comprehension of her experiences as a victim of horrific abuse, and the effects this abuse has had on her physical and psychological states, including her beliefs about the possibilities available to her. For example, a victim of domestic violence may believe that she is unable to escape the violent relationship—even if this belief is not objectively true. Put succinctly, a reasonable woman standard may be used in these cases to help fact-finders determine what amounts to a sufficient basis for an abused woman to be either justified or excused (an important distinction that I will elaborate on later) in attacking her abuser. The courts may accept that the woman uses deadly force in a non-confrontational moment because she reasonably believes that doing so is the only way to save her life.

To facilitate a more thorough understanding of how reasonableness factors into self-defense law, I will explain the following: first, the traditional view of self-defense adopted by the courts, including a brief discussion on justification and excuse; second, objections to traditional self-defense in terms of its possible inability to account for the reality of women who act in self-defense, and how these objections relate to the subjective versus objective debate regarding how to properly evaluate a defendant's actions; and finally, how taking the subjective position allows for the development of a standard of reasonableness that can assist fact-finders in assessing acts of violence committed by abused women in the rare event that they use deadly force against their abuser.

A fundamental goal of our legal system is to discourage the use of violence as a form of self-help; this goal stems from our desire to protect individual lives. As well-stated by Catheryn Jo Rosen, “The law’s prohibition against intentional killing coincides with contemporary society’s emphasis on the importance of human life as the most valuable interest protected by the criminal law” (512). Our legal system has good reason for wanting to prevent members of the public from inflicting unnecessary harm, as from a utilitarian standpoint, whereby actions are evaluated based on outcomes, encouraging such behavior would likely result in disastrous outcomes, such as an overall increase in societal violence. However, in limited circumstances, our legal system generally tolerates, to a widely varying level, the actions of an individual who attacks another with the intent to kill. One of such circumstances is the law of self-defense, where victims of an attack who have used force to protect themselves may claim self-defense as an affirmative defense to a homicide charge.

In “On Self-Defense, Imminence, and Women Who Kill Their Batterers,” Richard Rosen lays out the three fundamental principles of self-defense that are generally accepted by the courts: proportionality, fault, and necessity (378). Rosen notes that “While different jurisdictions employ different rules to govern the defense, in every jurisdiction the rules used embody one of the three principles, or are a product of a balancing of these principles” (378). The condition of proportionality asks that the defensive force being used be no greater than the force used by the attacker (Rosen 379). For example, if an attacker is about to shoot a victim with a gun, the victim is generally allowed to also use a gun in self-defense against the attacker. By fault, Rosen means that the individual claiming self-defense cannot be the aggressor in the altercation being legally examined (379). And finally, “Both imminence and, when used, retreat, [which] require[s] that under some circumstances the actor must retreat if it is possible to do so in safety, are included to

ensure that the defensive force is truly necessary” (Rosen 379). Imminence is most often understood to entail immediate threats to one’s life. These seemingly narrow requirements reflect the law’s reluctance to allow self-help in the form of putting individual lives at risk. That said, it is important to note that the actual existence of these three prerequisites is not necessary in cases where a reasonable person, or reasonable abused-woman, sensibly believes that these conditions exist. If the jury finds the defendant’s belief to be reasonable, even if incorrect, she may be found to not be blameworthy for her actions, and thereby she may be absolved of the homicide charge.

There are two possibilities for conceptualizing the finding that a defendant is not culpable, and thus able to succeed by means of a plea of self-defense: the defendant is viewed as either excused or justified in his or her actions.<sup>2</sup> Most jurisdictions consider self-defense as a justification, and Catheryn Jo Rosen describes it as such: “Justification defenses identify objectively determinable external circumstances that render otherwise criminal acts acceptable to society...The law assumes that, when circumstances that define the justification exist, the defendant has accomplished a socially desirable objective by committing the act or, at least, has not harmed society” (18-19). It follows that if one were to take the position that self-defense is justified, taking this position would necessarily involve labeling those who act in self-defense as acting correctly from an objective standpoint. Thus, if others were to find themselves in a similar situation, they too would be correct in acting in using lethal force to fend off an attacker (Rosen 18). Under the justification theory, self-defense is correct because one life is more valuable than another, or because of some positive outcome it produces in society—and Catheryn Jo Rosen is correct in arguing that both claims are strong and difficult to defend (512-513). The other, and what I view as the weaker, option of labeling self-defense as an excuse involves “[focusing] on

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<sup>2</sup> Justification and excuse are different than mitigating circumstances. Whereas justification and excuse are pre-sentencing determinations, mitigating factors usually affect the sentencing process.

the actor's subjective perceptions...An excused actor has committed a harmful act that the criminal law seeks to prevent...the excused act did not avoid a greater societal harm or further a greater societal interest. The actor is excused despite the harmful act because, due to internal or external pressure, she was not morally blameworthy" (Rosen 22). Thus, excusing an individual who acted in self-defense does not compel us to say that said individual made the objectively correct choice.

Both justification and excuse theories of self-defense allow us to avoid convicting individuals, including abused women who kill in self-defense, from being convicted of a crime. However, some feminist philosophers, such as Phyllis Crocker, argue that abused women's acts of self-defense must be justified rather than excused, as such a classification is the only way to defend these women as acting as reasonably as men who act in self-defense, through its apparent avoidance of the stigma that these women are by definition unreasonable (Crocker 131). Crocker and those who also take this position appear to assume that it is difficult, if not impossible, to label self-defense as an excuse and hold that those who act in self-defense act reasonably under the situation they find themselves in. I do not believe that taking the excuse approach forces us to say that abused women who act in self-defense act unreasonably; rather abused women's actions may be consider reasonable in light of their status as victims. I argue that an excuse defense is the only way to seriously defend the use of a reasonable woman standard in cases of abused women who attack their batterers, as it would be absurd to claim that these women are justified, and thus that anyone, i.e. possibly someone who has not been trapped in an abusive household, would also be justified in protecting themselves by force. Under a characterization of self-defense as an excuse, it can be said that abused women are not as free to make decisions and act

as those who are not in an abusive household; therefore, although their acts of violence are harmful, they should not be found blameworthy if sufficient evidence is presented to fact-finders.

The traditional notion of self-defense, which entails the three principles of proportionality, fault, and necessity as described above, has generated much debate among those who wish to include abused women in the self-defense paradigm. The debate centers around making sense of women who kill and how they do so under very different circumstances than men. For example, women who attack their abusers are often smaller and less physically capable than their male counterparts (Rosen 510). Also, these women are acting with a familiarity of their partner's patterns of violence (Rosen 510). These two realities factor into abused women's perception of danger by often making imminent danger appear more likely than it would to a woman who has not been abused or to a man. Cathryn Jo Rosen draws attention to the complexities involved in including abused women in the traditional self-defense model, "Rules requiring like force, imminency, consideration of only the circumstances surrounding the killing, and the use of an objective reasonable man standard necessarily defeat the woman's claim" (509).<sup>3</sup> Taking note of these difficulties could cause one to assert that an entirely new conception of self-defense theory, where the core principles described above are discarded, or maybe even something else entirely, is required to enable abused women to have a legitimate chance at being excused (or justified) from their violent acts. I disagree with the belief that there is no place for abused women who kill in the traditional self-defense paradigm. If the generally accepted principles of self-defense are loosened, self-defense, as currently accepted by the courts, can provide justice for women who, given the horrific conditions they exist in, act out violently

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<sup>3</sup> To give context, the reasonable man standard was the default position until feminists rejected it as biased, leading to the development of the reasonable person standard.

against their abusers. I will expand upon this argument in Part IV, where I will lay out what a standard of reasonableness to judge the actions of an abused woman should look like.

Whether the reasonableness of the defendant's actions should be measured by a subjective or an objective standard is a point of contention among the courts. This objective-subjective debate is also of critical importance to the concerns of fitting abused women who attack their abusive partners into the traditional self-defense model that is accepted by the courts. The objective standard asks the jury to consider whether the facts and situation of the case would have led a hypothetical reasonable person to act in self-defense (Kultgen 843). In contrast, "Under the subjective standard, the jury need not decide what a [nongendered] reasonable person would believe, but rather what the defendant reasonably believed" (Kultgen 844).<sup>4</sup> Taking the subjective approach allows the jury to take "the unique physical and psychological characteristics of the accused into account" (*State v. Leidholm* 507). Further, taking the subjective approach allows for the possible admittance of expert testimony from psychologists or doctors to further the jury's understanding of the defendant's physical and psychological state. An example of testimony that often accompanies cases dealing with self-defense of abused women is the battered women's syndrome. The battered women's syndrome was originally developed by Dr. Lenore Walker, who argues that domestic violence has a cyclical nature and can produce predictable responses in women suffering from the syndrome (Kultgen 839). However, the battered woman syndrome theory is by no means the only expert testimony that should be admissible in court. There is an extensive amount of credible psychological findings that can be used to assist juries in understanding the realities and experiences of victims of IPV

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<sup>4</sup> I understand Kultgen to mean in that sort of person's position, not literally that person.

(Teays 74). Expert testimony can help juries make sense of how a reasonable woman in a similar position as the defendant would have acted.

If one grants my position that it would be morally wrong to convict *some* abused women who kill in non-confrontational settings, the subjective position must be taken, as it seems unlikely that these women's self-defense claims could prevail by means of the objective standard. Use of the objective standard to admit the self-defense pleas of abused women would demand us to accept that the hypothetical reasonable person, i.e. someone who has not been a victim of long-term abuse, would be justified or excused in attacking someone in a non-confrontational setting—a claim we obviously want to avoid making (Rosen 511). Women who are victims of IPV must be judged as different from those without similar experiences precisely because their social realities cause them to interpret danger differently than men or women who have not been repeatedly abused (Rosen 511). Consequently, I believe that the only way to seriously defend a reasonable woman standard in these self-defense cases is to apply the subjective standard to assist in assessments of reasonableness of conduct.

## II.

### *A. Feminist Theory*

Feminist legal theorists have effectuated change in standards of reasonableness. Feminists are responsible for the shift from the reasonable man standard to the reasonable person standard; they challenged the reasonable man standard on the grounds that it assigns the universal point of reference to men and that it eliminates the possibility of women as reasonable (Cahn 1404). Feminists have also challenged the allegedly objective and neutral reasonable person by arguing that in practice, the reasonable person is identical to the reasonable man, as it contains “unstated assumptions that are actually gendered” (Cahn 1405). By definition, all feminists believe that men and women should have political, social, and economic equality, but feminists disagree about what it means to be equal and how to achieve equality (Levit et al. 161). The three feminist theories that I will discuss as they relate to this thesis are cultural feminism, also known as difference theory; dominance theory; and equal treatment theory, which offers an objection to the first two theories. A discussion of these theories provides a theoretical foundation to assist in the conceptualization of the reasonable woman standard in sexual harassment and self-defense law. Ultimately, I will argue that the best approach to take in regard to the two issues discussed in my thesis is a combination of cultural feminism, where I assert that differences, although many are social in nature, do exist, and dominance theory, which supports my claim that sexual harassment and IPV can both be understood through a lens of widespread unequal power relations between men and women in our society.

### *B. Cultural Feminism (Difference Theory)*

Broadly speaking, cultural feminism, which I will use interchangeably with “difference theory,” holds that there are differences between men and women and that there are

commonalities between most women. Further, “Cultural feminism argues that formal equality does not always result in substantive equality. Gender-neutral laws can keep women down if they do not acknowledge women’s different experiences and perspectives” (Levit et al. 162). I understand formal equality to mean equality that is codified into law. An example of a law that is *prima facie* gender neutral, but that in practice puts women at a disadvantage is a law that requires all persons applying for a job to be a certain height, say 5 feet 10 inches; on its face this law supports formal equality between men and women, but in practice it would prevent most women from applying for the job; consequently, this law would not ensure substantive equality between the genders. Difference feminists would criticize this law because of its unfair outcome of limiting the possibilities available to women workers. Proponents of difference theory may recognize biological or social differences between men and women or a combination of the two. Because cultural feminism believes that there are pertinent differences between men and women, it holds that women should not be required to conform to male norms to be guaranteed fair treatment (Levit et al. 162).

One can sensibly believe that cultural feminism supports the reasonable woman standard. Underneath the difference theory, we can question supposed objectivity in the law. The reasonable person is a type of objective standard in the law that cultural feminists would likely criticize due to its pronouncement of one universal standard of rationality that any fact-finder can adopt to evaluate legal scenarios. Cahn argues that difference feminists criticize the reasonable person standard because only the language changes (from man to person), while the content remains the same, i.e., the standard still evaluates reasonableness from the perspective of an upper-middle class white male (1413). From the standpoint of difference feminism, a genderless reasonable person is incomprehensible because there are significant differences between men

and women that the law should recognize. Cultural feminists would also reject the reasonable person standard because it inevitably suppresses group differences as irrelevant. The suppression of group differences is especially questionable in anti-discrimination law, which is supposed to make reparations for harms that occur because of one's membership in a group. The difference theory also questions the assumption that legal processes and outcomes are most just when differences that shape individual lives are excluded from the dialogue by means of the reasonable person standard. In *Justice and the Politics of Difference*, Iris Marion Young claims that, "The liberal imperative that differences should make no difference puts a sanction of silence on those things which at the level of practical consciousness people 'know' about the significance of group differences" (165). Under the guise of objectivity, the reasonable person standard arguably trivializes the experiences of minority groups, such as women, by sending the message that the challenges they face because of membership in their respective groups can be adequately understood using the ambiguous reasonable person.

I believe that cultural feminism offers support for the use of a reasonable woman standard in workplace sexual harassment law. Under this theory, the reasonable woman standard would be beneficial in evaluating reasonableness in workplace sexual harassment for two connected reasons. First, since women are relative newcomers in the U.S. workforce, especially in certain fields like medicine and construction, women in these fields operate in a context that has been shaped, and continues to be predominately controlled by, men. Because of the context of the workplace in our society, working women are not similarly situated to men. There are real differences that stem from this historic and current male-centered workplace; these differences take form in barriers to women's success in the work sphere. One significant barrier is that women are more likely to be physically and verbally harassed on the job than men. As cited in

the introduction, there is a 25% to 85% chance that working women will be harassed during their lifetime (Select Task Force on the Study of Harassment in the Workplace, 2016). Because of the prevalence of workplace harassment, and other forms of violence against women in our society, it comes as no surprise that women fear being harassed, and reasonably so. This leads to my second point. Women are often more likely than men to perceive conduct as hostile or intimidating (Shoenfelt et al. 648). Thus, it is more likely that physical or verbal forms of behavior will negatively affect working women; for example, women who have been subjected to harassment may be in a constant state of fear while at work, which may result in them being less productive and may eventually result in penalties such as being fired from their jobs. According to the cultural feminism viewpoint, Shoenfelt et al.'s findings mark a pertinent difference that the law should acknowledge to help level the playing field between men and women. Accommodating women's perspective by means of the reasonable woman standard is one way that the law may acknowledge these gender differences.

Cultural feminism also provides theoretical support for use of the reasonable woman standard in the law regarding acts of self-defense committed by women who are victims of IPV in non-confrontational settings. Under a difference theory approach, it makes sense to draw attention to the statistical findings that one in four women are at risk of being abused by their spouse during their lifetime (Prevent Domestic Violence in Your Community, 2017). Similarly, to the sexual harassment analysis above, assumptions can be drawn from these statistics. It is reasonable for women in abusive relationships with men to fear for their well-being, especially because their male spouses are typically larger, and thus more capable of inflicting serious bodily harm. I consider it reasonable for these women to believe that they would not be able to protect themselves in the event of an altercation with their spouse. Also, cultural feminism calls attention

to the typical differences between men and women in acts of self-defense. Psychological findings such as the battered women syndrome demonstrate that physical and psychological harm sometimes results in “learned helplessness” in abused women that may cause them to believe self-defense is necessary to save their lives, even in cases where someone without the experience of abuse would not feel the need to act in self-defense (Kultgen 839). Long-term abuse produces changes in perceptions of danger in the victim, which cultural feminists would argue is a difference that the law should take into consideration.

Finally, cultural feminists would support the reasonable woman standard in cases of non-confrontational self-defense because they would want to take the environment that many of these women live in into consideration. Women in abusive relationships often have a difficult time leaving their spouses due to many reasons. Kultgen lists the following factors that may affect an abused woman’s belief that she is free to leave her abuser: economic dependence on her spouse, children living in the abusive home, and fear that the abusive spouse would find and kill her and her children if she attempted to leave (841). Proponents of cultural feminism, myself included, would note that this environment is one that not as many men find themselves in, suggesting another pertinent difference that the law should realize and act on through the implementation of a reasonable woman standard.

### *C. Equal Treatment Theory*

Equal treatment feminism applies the ideals of traditional liberalism and, as such, is quite distinct from and acts as pushback against the other two theories discussed here. It is based on the standard of formal equality, which is primarily concerned with “equal citizenship, equal opportunities in the public arena, individualism, and rationality” (Levit et al. 161). Proponents of equal treatment theory attempt to achieve equal standing between men and women by means of

focusing on similarities between the two genders. As stated by Levit et al., “The equal treatment principles were simple: the law should not treat a woman differently than a similarly situated man. Also, the law should not base decisions about individual women on generalizations (even statistically accurate ones) about women as a group” (161). Proponents of equal treatment theory believe it to be an appealing approach to sex inequality because it challenges the notion that “natural” differences, i.e. stereotypes about women, warrant divergent treatment under the law (161). I admit that in some areas, such as in terms of educational opportunities, where women’s equality was advanced through arguments asserting that there are no relevant differences between men and women that would preclude women from achieving in an educational setting, this theory can produce positive outcomes.

Equal treatment theory, however, seems unsuited to tackle the situations, such as those described in this thesis, or pregnancy, for example, where women are not equally situated to men. The assumption that women and other minority groups must prove that they are similarly situated to men to receive fair treatment and a full recognition of their humanity seems wrong. Why should the burden of proof be placed upon women to prove that they are similarly situated? Also, who gets to determine what it means to be similarly situated and decide who meets the qualifications? It seems that the decider of such issues would presumably be men. I believe that equal treatment fails to provide a solution to issues like domestic violence and workplace sexual harassment; because equal treatment theory leaves out analysis of power structures in society, it seems to interpret issues such as workplace sexual harassment and domestic violence as random instances of violence and harm, rather than as harms occurring through a broader pattern—something dominance and difference theories can explain. Understanding these issues as random occurrences of violence does an injustice to men and women alike.

Equal treatment theory strongly rejects the reasonable woman standard, as it goes against the theory's fundamental belief that giving women particular treatment will not advance equality between men and women. Cahn argues that, "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" (Cahn 1412). Advocates of equal treatment theory would believe that a gender-specific standard of reasonableness would propagate negative stereotypes about women, such as the belief that women only need special protection in the form of their own standard of reasonableness because they are weak and incapable of defending themselves otherwise. While I believe that the perpetuation of negative stereotypes by means of a reasonable woman standard is certainly a possibility, I also argue that we can ideally prevent this from occurring by ensuring that a diverse group of women is involved in the formulation of a gender-specific standard and that fact-finders are given careful instructions on how to apply the standard so that the chance of this negative outcome occurring is reduced.

#### *D. Dominance Theory*

Dominance theory takes a more radical approach than cultural feminism and equal treatment feminism in explaining social, political, and economic inequalities between men and women. Dominance theory is largely attributed to Catharine MacKinnon, and its central premise is that, "the inequalities women experience as sex discrimination in the economic, political, and familial arenas result from patterns of male domination" (Levit et al. 164). As Levit et al. notes, quoting from Robin West's *Jurisprudence and Gender*, male domination is reinforced by "a political structure that values men more than women" (165). Under the dominance theory approach, equal treatment theory and cultural feminism are problematic because neither bring

sufficient attention to the structures and institutions in society that perpetuate the patriarchy, or the systematic rule by men. The patriarchy is reinforced by a set of societal structures; one example is religion, which has often been utilized to defend the claim that women's role is to serve men. The patriarchy provides a context that allows for and perpetuates individual harms against women. Further, dominance theory takes issue with equal treatment theory and cultural feminism because they judge women either by their correspondence with men, which manifests through similar characteristics, or a lack of correspondence with men (Levit et al. 164). Equal treatment theory and cultural feminism assume that men signify the norm, thereby justifying the assignment of the general point of reference to men. On the other hand, dominance theory would call for women to define their own norm, or point of reference, that is free from the prescriptions of a system that believes men are superior.

Dominance theory departs from the equal treatment and difference approaches in that its primary goal is emancipation from men; whereas the main goal of the other two approaches is to achieve equivalence between men and women (Levit et al. 164). Cahn argues that "Catharine MacKinnon rejects both sameness [equal treatment theory] and difference [cultural feminism], arguing that these theories do not address the experiences of women who live under the conditions of sex inequality" (Cahn 1411). MacKinnon calls for attention to the voices of women who describe their experiences of subordination, which manifests in housework, sexuality, the workplace, domestic abuse, etc., through a process she labels as "consciousness raising;" she believes that doing so is an effective way for women to be liberated from men (Levit et al. 165). Under dominance theory, we can label workplace sexual harassment and IPV as forms of violence against women that are perpetuated by structures such as the workplace and sexuality. In the workplace, victims of sexual harassment are dominated by men who, for example, use

economic status and power to sexually exploit women. On the other hand, dominance theorists understand IPV, which sometimes leads to cases of non-confrontational acts of self-defense, as violence against women in its highest form (Levit et al. 164). Furthermore, dominance theorists argue that our legal system does little to improve women's lives because it is deeply entrenched with male biases (MacKinnon 1294). For example, our legal system harms women even further when it imposes mild sentences on perpetrators of sexual violence (Levit et al. 164). Thus, dominance theory holds that sex discrimination and inequality have deeper roots than the other two branches believe to be the case, and therefore that practices based on the theories given by the other two branches will not be as effective as those prescribed by dominance theory.

It is not as obvious where dominance theory would fall on the reasonable person versus reasonable woman debate, and it is possible that it would call for something more radical, such as throwing out reasonableness altogether. The notion of reasonableness could be considered too entrenched with male norms to be workable. However, I do not believe that the more radical approach is necessarily the case, and I will argue for an interpretation of dominance theory that promotes the reasonable woman standard. For example, MacKinnon's notion of "consciousness raising" fits nicely with the reasonable women standard. If the standard is formulated correctly, i.e., by women themselves and not by men attempting to speak for women, the reasonable women standard is powerful because it presents an opportunity for women to speak up about their oppression in the home and in society and to reformulate an important aspect of our legal system (standards of reasonableness) to better align with women's experiences. Also, encouraging women to speak up about forms of violence against them and using this dialogue to craft a new standard of reasonableness undermines the notion that what goes on in the home and

in sexual relationships is private in nature, and thus belongs outside of the realm of what the government and the law should deal with.

*E. Combining Cultural Feminism and Dominance Theory to Make Sense of Workplace Sexual Harassment and Acts of Self-Defense by Victims of IPV*

Many of the disagreements between the three branches of feminist theory discussed in this thesis ultimately come down to what is labeled as the sameness-difference debate. Martha Minow articulates the sameness-difference debate as follow: “When does treating people differently emphasize their differences and stigmatize or hinder them on that basis? And when does treating people the same become insensitive to their differences and likely to stigmatize or hinder them on that basis?” (404). It is difficult to predict the answers to Minow’s questions, but I believe that in the law of workplace sexual harassment and self-defense of IPV victims who attack their abusers, at least currently, acknowledgment of difference through the reasonable woman standard will result in a more just outcome. However, acknowledgement of differences by means of the reasonable woman standard will only lead to more fairness between men and women if the current differences are not understood as essential—which means natural and permanent. Gender and gender roles are malleable and thus subject to change. There is nothing inherent in men that causes them to be more likely to abuse their partners, or more likely to hold positions of economic and social power in the workplace. Ideally, more widespread use of the reasonable woman standard in in these cases will offer a new perspective to our judicial system that will promote an admission of the power gender roles have over individuals in our society and a desire to alter the roles to advance equality between men and women.

I argue that combining cultural feminism with dominance theory allows us to say that the differences between men and women, although real in the sense that they shape experiences, are

not necessary in the sense that gender and the gender roles that society prescribes are not determined by an individual's sex. For example, one prominent gender role often prescribed to women is that they should be caring individuals and take care of their family. Mackinnon describes women's belief that they must be caring to be valued in society as "false consciousness," she states that, "women value care because men have valued us according to the care we give them... Women think in relational terms because our existence is defined in relation to men" (Levit et al. 165). This plays out in sexual harassment and domestic violence; men place demands on women to be caring and women feel that the only way to succeed in either the workplace or in a relationship is to be caring, perhaps to such an extent that the caring involves a harmful sort of self-sacrifice. A reasonable woman standard may take these pressures into account to help make sense of women's responses, such as reluctance to report due to fear of retaliation or shaming, to sexual harassment and domestic abuse. Through a combination of difference and dominance theories, we can assert that patterns of responses among women stem from unequal power relations that do not need to be in place, while also saying that the power imbalance creates a situation in which differences are produced that may need to be acknowledged through legal means.

Taking a difference and gender subordination approach facilitates the defense of a more subjective standard of reasonableness. However, there are several important objections to such an approach as the theoretical foundation for a reasonable woman standard that need be answered for. A popular criticism of dominance theory is that the MacKinnon's idea of "false consciousness" suggests that women cannot make free choices, making it demeaning (Levit et al. 165). While "false consciousness" may be interpreted in a way that makes it seem condescending, I think it makes more sense to interpret it as a notion that allows women and men

to question gendered societal assumptions, such as those surrounding gender roles, which are commonly taught and taken as given. Once gendered beliefs are examined, both men and women will be freer in making decisions on how to act. There is nothing inherent in MacKinnon's ideas of "false consciousness" and "consciousness raising" that forces us to criticize women who choose to subscribe to more traditional gender roles, such as making the choice to not work outside the home—rather, dominance theory undermines the belief that women *belong* in the home, or private sphere, rather than the public sphere.

A common critique of cultural feminists (and the gender-specific reasonableness standard they support) is that they "characterize women as needing special protection" (Levit et al. 163). I do not believe "special protection" is necessarily a bad thing, as long as this protection does not end up putting women at a disadvantage by restricting them, and if this approach is used only while women are at an unequal position in society overall. It is certainly possible that women benefit from protection in *some* cases, such as sexual harassment and acts of non-traditional self-defense. The protection given by a more widespread use of reasonable woman standard could help women achieve more equal footing with men, as it did in *Ellison v. Brady*. That said, I wish to avoid using the word "special," as it implies undeserved or unwarranted, and I do not think this is the case. Why should we think that treating women and men differently in some cases is automatically unjust? Minow argues that, "Buried in the questions about difference are assumptions that difference is linked to stigma or deviance and that sameness is a prerequisite for equality. Perhaps these assumptions themselves must be identified and assessed if we are to escape or transcend the dilemmas of difference" (405). Once we examine and question popular assumptions, such as that different treatment cannot be fair, the reasonable woman standard stands as a more feasible option. If formulated and executed correctly, the reasonable woman

standard, and the different treatment it affords men and women, may be considered fairer than the use of one genderless reasonable person standard for men and women.

### III.

#### *The Reasonable Woman in Workplace Sexual Harassment Cases: What would she look like?*

Gender differences matter when evaluating workplace sexual harassment, both in terms of the total number of occurrences of harassment and in analyzing how the conduct in question may be perceived as harassing. Further, gender differences must be considered when examining how workplace sexual harassment affects individuals in the long-term, including the possibilities open to them in the future. In Catharine MacKinnon's *Sexual Harassment of Working Women*, she first argued that sexual harassment is a form of sex discrimination, and thus her work acted as a catalyst for immense change in our legal atmosphere, specifically in Title VII law.

MacKinnon connects women's economic subordination and sexual subordination as follows:

Work is critical to women's survival and independence. Sexual harassment exemplifies and promotes employment practices which disadvantage women in work (especially occupational segregation) and sexual practices which intimately degrade and objectify women. In this broader perspective, sexual harassment at work undercuts woman's potential for social equality in two ways: by using her employment position to coerce her sexually, while using her sexual position to coerce her economically (MacKinnon 7).

Thus, for MacKinnon, women will not be liberated from men until they are free economically and sexually—the two are inextricable. Even though women's position in our society has improved since MacKinnon published her piece on workplace sexual harassment in 1979, there is still a long way to go if women are to achieve equality with men. I believe that workplace sexual harassment can still be described as linking sexual and economic subordination; sexual subordination facilitates economic subordinate and vice versa.

According to Levit et al., the employment sphere can be considered a form of violence against women: “gendered division of labor occurs whereby women are segregated into inferior-status jobs at lower wages” (Levit et al. 164). Because of the gendered division of labor, and the fact that women are not equally compensated for their work, women, as a group, are more likely

to be exploited by those they work with (or under) through sexual harassment (there are exceptions, of course). Since women typically occupy positions of little power, it is often more difficult for them to speak out, for if they choose to speak out, repercussions that doubly harm victims of harassment, such as firing, are possible. Further, women's occupation of positions of little power may cause others to be more likely to discredit what they say when they do speak out; a common stereotype is that the complainant is lying, or exaggerating, her claims to win money. Consequently, fact-finders may view plaintiffs as untrustworthy, potentially reducing the likelihood of plaintiffs winning in legal battles. The notion of a hypothetical reasonable person standard exasperates the difficulties for victims of sexual harassment who choose the legal route.

Our legal tradition has prioritized neutral stances for evaluative purposes: "The ideal evaluator is supposed to be separated and uninvolved. Yet the dispassionate, uninvolved, remote stance is, on the contrary, the worst possible evaluative stance. For it is impossible for one who assumes this stance to take seriously what it is like to be victimized and oppressed" (Peterson 154). Linda Peterson adds, "Imagine, for example, that you have no gender, nor any sexual characteristics whatsoever. Now try to determine what it would be like to be fondled, pinched, grabbed, called a "whore," a "bitch," etc.," (154). If discrimination law, specifically Title VII, is to achieve its goals of changing society through the elimination of formal and concealed barriers to equality, it must take the stance of those groups who have historically been and continue to be discriminated against and marginalized. Bonnie Westman asserts that, "Title VII presents an opportunity to redress the imbalance of control in the workplace...By defining sexual harassment as any conduct which a reasonable woman finds hostile or offensive, a woman's opinion will carry equal weight. The reasonable woman standard... allows women to participate in the workplace on an equal footing with men" (825). Furthermore, and perhaps even more

problematically, “the ideal of impartiality serves ideological functions. It masks the ways in which the particular perspectives of dominant groups claim universality, and helps justify hierarchical decision-making structures” (Young 128). I believe that, at least in practice, the reasonable person is not a hypothetical person; rather, it is a person with standards matching those held by the dominant group, i.e. upper-middle class white men (who also make up the majority of law makers and judges). If the reasonable person standard reflects dominant perspectives, it seems inapt to use in the objective part of the two-pronged objective/subjective standard (described above) of workplace sexual harassment law, especially if men (the dominant group) and women (the subordinated group) do not always reach a consensus on what kinds of conduct amounts to harassment. In arguing for implementation of the reasonable woman standard in cases of workplace sexual harassment, Debra DeBruin alleges that:

We cannot eliminate oppression if we continue to privilege the perspectives and standards of dominant groups over those of oppressed groups. Thus, given a choice between adopting a criterion of sexual harassment that privileges men’s perspective and one that privileges women’s justice requires that we privilege the perspective of women (114).

Thus, the reasonable woman standard is an appealing solution because it offers an alternative to the genderless-person stance, which attempts to evaluate a gender-specific harm from a position that is divorced from gender—this seems impossible to do, or at least impossible to do in any manner that could benefit female workers. The reasonable woman standard accomplishes what the reasonable person standard does not: it provides context.

To conclude this section, I will describe what the reasonable woman looks like in the context of workplace sexual harassment, or put in another way, how the reasonable woman standard may be described to judges and juries. I believe that the reasonable woman stance that fact-finders should adopt in these cases should be a woman with a strong, but by no means

complete, understanding of knowledge regarding the realities, such as high rates of sexual harassment and the pressures often faced by women who confront their harassers, of women who choose to work outside the home. Even though Kathryn Abrams ultimately rejects the reasonable woman standard, she makes an assertion that is helpful to my position concerning the characterization of a reasonable person in sexual harassment cases. Abrams alleges that the reasonable person should have adequate “political knowledge regarding sexual harassment”; she adds, “Such knowledge includes understanding the ways in which sexism has operated on women in the workplace and elsewhere...The account of sex based struggle in the workplace and of sexual harassment as a means of male control and masculine normative entrenchment encapsulates many of the understandings that this reasonable person should have” (Abrams 1224).

I also believe that the reasonable woman is someone with knowledge of how sexuality is often tied to her economic standing, which is something that may result in harassment committed by male peers or bosses. Knowledge of how women’s sexuality has been historically tied to her economic status to oppress women as a group may reasonably cause women to be threatened or intimidated by behavior that their male counterparts may not believe to be legally actionable; fact-finders must take this into account when applying the reasonable woman standard. DeBruin argues that even though the reasonable woman standard forces us to admit that men and women may not always be equally protected from identical behaviors, it is not establishing special, or higher protection for women; rather the reasonable standard simply reacts to women’s needs (116). Thus, a contextual approach, which asks fact-finders to consider the history of women’s oppression as continuing to shape the present, assists women plaintiffs by undercutting the belief that occurrences of sexual harassment are random acts of violence.

Further, the reasonable woman has knowledge of the paradox that operates within the workplace and society at large; women are viewed as inherently sexual bodies, while simultaneously shamed for their sexuality, resulting in them being labeled as impure. This paradox is one of the realities that makes the patriarchy so pervasive and makes it difficult for women as a group to advance in the workplace. Female workers often must prove their value as workers, in a manner that men do not have to. Also, this paradox results in stereotypes such as the belief that the harassed woman was “asking for it,” so the harasser cannot be at fault. Because of these powerful stereotypes, and the risks that accompany them (such as those affecting a woman’s job status), the reasonable woman may not be someone who reports harassment immediately after it happens, and importantly, waiting to report does necessarily not make her any less credible. Fact-finders who adopt the reasonable woman should step into the shoes of the victim (plaintiff). Although those applying this standard obviously cannot acquire a perfect understanding of how the victim perceived the conduct in question, i.e., the problem of other minds, they can do their best by examining the facts and the victim’s story, and then use the facts of the case to determine the reaction said facts would have produced in a reasonable woman.

The reasonable woman standard should allow for some variance through consideration of diverse accounts of sexual harassment; it cannot assume that all women react in identical ways. Relevant factors such as race, socioeconomic status of the victim and harasser, the victim’s relation to the harasser (boss or coworker), ethnicity, severity and frequency of conduct, and the general workplace environment may influence fact-finders’ conclusions about what conduct a reasonable woman would view as harassment. For example, racism and sexism are often intertwined, so forms of harassment that are both racist and sexist, such as coworkers who

constantly make degrading comments about a woman's race and sexuality, could negatively affect an African American woman much more than they would affect a white woman. Jane Dolkart claims that the analysis of the workplace environment is important, and that "whether the employer maintains a sexually segregated environment or a sexualized workplace culture, and whether the victim is in a traditionally female job or is a token in a traditionally male occupation" should be taken into consideration (24). For instance, a woman in a traditionally male occupation might be the victim of threats that send the message that she has overstepped her boundaries, and therefore, must leave this traditionally male-dominated sphere. However, the reasonable woman standard should not be implemented in a relativistic manner, which would allow for determinations that any conduct be perceived as "intimidating, hostile, or abusive." Instead, fact-finders must carefully analyze each legal issue considering relevant factors, such as patterns detailing how harassment often operates differently for men and women in the workplace—an example being that since women often occupy less powerful positions, they are more likely to prolong the filing of reports of harassment due to the possibility of retaliation. That said, if a woman reports minor accounts of harassment 40 years later and cannot demonstrate sensible reasons for not coming forward earlier, she may not be entitled to compensation she would have been likely to receive originally, if any. The reasonable woman standard has some objectivity built into it, through limits of what may be considered reasonable, and it therefore upholds our legal system's emphasis on reasonableness as a guiding principle for fact-finders.

## IV.

*The Reasonable Woman in Non-Confrontational Acts of Self-Defense: What would she look like?*

I will begin this section by discussing *State v. Norman*, a case that directly relates to the issues surrounding acts of self-defense committed by abused women in non-confrontational settings. I believe that an illustration and analysis of *Norman* is helpful in terms of supporting my main contention that a reasonable woman standard should be used when warranted by sufficient evidence. Ideally, the *Norman* case will show that some women who act in self-defense should not be found guilty of the various crimes they may have been charged with, and thus, that some of these women should have the chance of being acquitted through claims of self-defense.

Without a gender-specific standard of reasonableness that accounts for the differences surrounding women's violent acts, it seems even more unlikely that courts will allow juries to hear defendants' self-defense claims, since, as argued earlier, reasonableness is entrenched with male biases. Historically speaking, the notion of self-defense was built on assumptions that the only way self-defense could be labeled as reasonable is in situations that are pertinent to men's lives—for example, as an acceptable response to an intruder entering a man's home (Teays 68). The *Norman* case also highlights how the traditional understanding of self-defense can be problematic for women, as its use often leads to unjust outcomes.

The facts of the *Norman* case are as follows. Judy Norman, after being victimized and abused, physically and mentally, by her husband, John Norman, for more than twenty years, shot him in the back of his head while he was asleep (Shad 1160). During the trial court proceedings, Ms. Norman testified that the beatings she experienced at the hands of her husband had intensified during the 36 hours leading up to the killing; during this time, she sought assistance from several sources and attempted suicide (Shad 1161). After Mr. Norman fell asleep, Ms.

Norman went to her mother's house to get a gun, which she used to kill her husband once she returned home (Shad 1161). Citing the *Norman* facts, Kerry Shad states that, among other forms of maltreatment, which were fueled by alcoholism and began five years into their relationship, "Mr. Norman regularly assaulted her, punching, kicking, slapping, and striking her with objects such as beer bottles and glasses. [Ms. Norman] also described having cigarettes extinguished against her skin, hot coffee poured on her, and glass and food crushed against her face" (1160). Richard Rosen also describes significant facts from the *Norman* case, "When she ran away, he tracked her, caught her, and beat her. He frequently threatened to kill her" (393). In fact, he threatened to kill her on the same day she used lethal force to protect her life (Rosen 393). The jury found Ms. Norman guilty and convicted her of voluntary manslaughter, resulting in a six-year prison sentence after "The trial court refused to submit the issue of self-defense to the jury...ruling that the victim's passivity at the time of the killing barred Mrs. Norman from asserting self-defense as a justification or as an excuse" (Shad 1161). I believe that our intuition leads us to the conclusion that the *Norman* outcome represents a miscarriage of justice, as Ms. Norman should not have been found guilty.

As I argued above, taking a more subjective stance to evaluate situations such as the *Norman* case is preferable, as it is the only way for these women to have an equal opportunity at presenting their defenses to crimes they have been charged with. Also, I believe the objective-subjective distinction is more accurately described as a continuum, rather than a clear-cut boundary separating the two. Even if the allegedly objective stance is applied by fact-finders, is pure objectivity possible? As fact-finders are only human, they are not capable of making a truly objective decision. When drawing conclusions about the reasonableness of a defendant's behavior, fact-finder's worldviews and biases certainly come into play, despite instructions given

by the judge and their efforts to evaluate the case from a neutral position. Therefore, there is a parallel to the argument I defended concerning sexual harassment law: because neutrality is impossible, evaluating actions from the standpoint of those who are much more likely to be victims of gender-violence, or women, and thus attempting to understand how gender-violence shapes women's lives and possibilities, appears to be a good alternative.

I suggest changing the reasonable person standard, which evaluates conduct through the stance of "the mind of a person of ordinary firmness" (Shad 1172) to the reasonable abused-woman standard, which asks what could be reasonably expected from the mind of a hypothetical abused woman, and if her beliefs are found to be reasonable, whether they excuse her violent acts of self-defense? The reasonable abused-woman standard should only apply in cases where there is sufficient evidence to prove that the defendant is a victim of IPV, which can be classified as severe enough to have affected her psychological well-being. Some may object and claim that the standard I propose is purely subjective, and thus that any woman who kills an abusive spouse may be acquitted by means of my reformulation of the reasonableness standard, but I do not believe that this is a well-founded worry. Not all acts of violence by abused women will even be sufficient to allow the judge to present the issue of self-defense to the jury, let alone to acquit them through the assistance of a reasonableness standard that accounts for their realities. There is some objectivity built into the standard I am proposing. The jury or judge must evaluate reasonableness based on a careful examination of the facts of the case. For example, it would be unlikely that a case involving a woman who had been struck by her husband once, several years before she used deadly force against him, would warrant the use of the reasonable abused-woman standard or an evaluation of whether self-defense is to be excused. Thus, the reasonable abused-woman standard provides victims of IPV with more equal access to our legal system, but

it does not abandon our fundamental belief that human life should be protected by the law unless there are strong reasons to think otherwise.

As noted in Part I, self-defense entails three core principles: necessity, proportionality, and fault. If we want to include abused women who attack their abusers in non-confrontational settings in traditional self-defense, it is necessary to loosen the core principles enough to allow for these women's self-defense claims to potentially be successful. When the principles are understood too narrowly, as was the case in *Norman*, abused women have little to no chance of being excused from their acts. When understood in an extremely limited way, the principles reflect male standards and beliefs, such as the belief that self-defense is only acceptable when a man fights off an attacker or protects his wife, children, and home from an intruder (Teays 67). Loosening the core principles involves acknowledging that even the best definitions of them are not completely objective, fixed aspects of reality. As argued by Wanda Teays, "the concepts of imminent, immediate, and reasonable have much to do with how our values shape our use of language. Courts seem reluctant to acknowledge this, often treating concepts as if they were abstract entities outside of space and time" (70). If fact-finders are instructed to extend the time frame and to contextualize the defendant's acts of violence, these concepts may be interpreted in a slightly different manner, which I will expand upon in the next several paragraphs. However, it is also important that the reasonable abused-woman standard does not cause us to depart from these core principles to such an extent that the principles, and our criminal justice system's goal of protecting individual lives, are abandoned. I contend that it is possible to use a reasonable abused-woman standard while upholding the core principles of self-defense.

At first glance, necessity seems pose the greatest issue for abused women who act in self-defense, as necessity is often interpreted as requiring that the threat the woman is responding to

be imminent. However, necessity need not be understood so narrowly, especially if one is willing to look beyond the one-time attack model as the only situation that could possibly warrant the use of violence to protect a victim's life. If one is insistent upon the belief that necessity entails imminency, we may reasonably consider a woman's acts of violence in a non-confrontation as a response to imminent harm to her life. Teays argues that several factors must affect how the legal system should rethink imminence in these cases:

All of the following are relevant: the woman has endured a history of battering, with a pattern of escalating violence, and has sought to remedy the situation by calling the police or, when possible without a greater threat to her life or those close to her, attempted to get help from others, or pursued resources in the community. Since we are not dealing with a one-time attack or combat, a reasonable woman has to weigh her options in light of the threat (74).

Thus, considering these factors that assist in a contextualization of the woman's actions, what may be considered a reasonable violent response to harm by an abused woman can differ from what could be reasonably expected of an ordinary person. Imminence can be understood in a broader, yet still sensible, manner if it is granted that the woman, as a victim of long-term abuse, has insight into the kinds of behavior that indicate an impending violent attack. Abused women are familiar with the nature of their abuser's verbal threats. Therefore, they often have a keen ability to predict, with much accuracy, whether his threats will be acted upon; "The threat of serious violence is itself an assault and expression of hostility; from the time such a threat is made (and remains operative, not having been withdrawn), the woman is under attack. The imminence requirement is fulfilled" (Dimock 169). Provided that the abused woman has been beaten near to her death before, the law should not require her to wait for another brutal physical assault, that she has little chance of winning (should she choose to act in self-defense once the violence begins), to defend herself. To refuse to acknowledge that the woman has knowledge of

her abuser's threats and the consequences of his threats is to undermine her experiences and struggles as a victim of IPV, and to imply that she could never be reasonable in her beliefs and about the harm posed by her abuser. Even if the attack doesn't happen, it can still be said that, considering the circumstances, the woman's belief was a reasonable one, and thus that her violent acts, although not justified, may be excused.

There is another route to conceptualizing the necessity principle. After examining the history of self-defense, Richard Rosen takes a more radical approach to the necessity principle through an argument in which he asserts that imminence should not be necessary for a self-defense claim.<sup>5</sup> Rosen argues that the judge should instruct the jury that imminence is a necessary component of the necessity principle of self-defense unless the defendant offers a sufficient amount of proof supporting her claim that she reasonably believed her attack was necessary even though the danger was not immediately present (405). According to Rosen, "If the defendant meets this burden of production, the jury will be instructed solely on necessity" (405). This reformulation of necessity would certainly benefit women who assert self-defense in the context examined by this thesis.

However, one may object that it is unfair to allow certain women, even those who have been harmed by severe injustices, to present self-defense claims to a jury in absence of proving the complete necessity of her violent actions, as is indicated by imminency. Those who object in this manner might claim that allowing fact-finders to be instructed solely on necessity and not imminency is unfair because others who act in self-defense do not have this option. Richard Rosen argues that the law does not require absolute necessity before acquitting defendants due to self-defense (396). As stated by Rosen, "The difficulty with such an argument is that it is based

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<sup>5</sup> Rosen means that imminence matters in evaluating self-defense claims; however, imminence can be superseded if other factors are present.

on an erroneous premise-that the law always requires absolute necessity before granting the privilege of self-defense...The possibility always exists that a person attacking another with a gun will change his mind, or miss, or have a heart attack before pulling the trigger” (396). If we are comfortable granting that someone could be acquitted by means of self-defense in an event where he uses fatal force to defend himself under the reasonable belief that his attacker has a loaded gun, which is, in fact, unloaded, we should also allow women’s claims of self-defense in non-confrontational settings to be seriously considered to be consistent. In both circumstances, absolute necessity should not be a prerequisite for acting in self-defense when the defendant’s belief is reasonable.

Next, I will address the proportionality principle of self-defense, which can also be broadened to align with the experiences of abused women who act in self-defense. As stated, proportionality requires that the defensive force be comparable to the force used by the attacker (Rosen 379). In situations like *Norman*, where a woman has been severely assaulted for years, the fact that she is still alive years later is a matter of chance. In fact, in many occurrences women are killed by their abusers; estimates suggest that each year around 42% of women who are killed are murdered by their partners (Teays 57). For example, it is likely that Ms. Norman could have been killed by Mr. Norman if she had not shot him, considering his threat to kill her when he woke up and the severity of abuse that she regularly suffered at his hands. Further, Teays notes that these women “often endure a catch-22 situation: they can live with violence or they can attempt to leave and, potentially at least, face even greater violence or death...The greatest danger battered women face is when they attempt to separate from their abuser” (Teays 58). In my opinion, these facts prompt a consideration of proportionality in a broader sense, in which, for example, the amount of time that fact-finders may consider should extend beyond the

moment of her self-defense. Whereas I think it would be unjust and in violation of the core tenets of self-defense to allow these women to act violently out of revenge, I believe that when there is sufficient evidence, the passivity of victim should not automatically preclude assertions of self-defense from being heard by juries (as was the case in Norman). A proportional response to violence is often different for abused women than what it would be for people who have not been abused. Even though her response may not be considered proportional in the precise moment that she inflicts harm, an understanding of the history of the abusive relationship may allow fact-finders to reach the conclusion that the harm she inflicted was proportional to the overall harm inflicted upon her by her abuser. Further, when abused women act in self-defense in non-confrontational settings, there is also no guarantee that the harm they inflict will kill their abuser, which makes their responses proportionate to the violence that has been inflicted upon them by their partners—both situations result in outcomes that come down to chance.

Finally, I will consider how the fault element can be understood in the context of self-defense by abused women. As the fault principle demands that the individual claiming self-defense cannot be the aggressor in the altercation under legal scrutiny (Rosen 379), it also poses issues for the type of self-defense claims examined in this thesis. A woman's self-defense claim automatically fails if the jury determines who the aggressor is based on an examination of the moment in time in which the woman acts in self-defense—that is, her decision to act in a non-confrontational setting. However, in cases involving victims of domestic abuse who act in self-defense, the distinction between aggressor and victim is not as evident as it is in cases of more traditional examples of self-defense. While it is not necessary to claim that the abuser's life is less valuable than the IPV victim's life, it is helpful to examine who bears the burden of risks that accompany any violent situation. Richard Rosen argues that, "Ultimately, a judgment on the

appropriateness of self-defense is a determination of who must bear the risks attendant upon a violent situation...it is the person who creates the violent situation, and who escalates it to a life-threatening level, who should bear that risk” (410). In my opinion, the abusive partner is the person who has created the conflict, escalated the violence, and should therefore bear the burden of risk if his victim does strike back. It seems very unlikely that many women without the experiences of extreme abuse would be driven to a state where they believe that self-help in the form of violence is a viable option, and often, the only way for them to protect their lives. As stated by Susan Dimock, “The batterer is not ‘innocent;’ he has issued credible threats of violence to kill or seriously harm the woman he batters. His behavior is immoral and unlawful” (168). And, if a defendant does not offer sufficient evidence demonstrating that her partner has created and escalated the violence, she would not satisfy the fault principle. Similarly, to the other two self-defense principles discussed in this thesis, fault can be reconceived in a manner that makes self-defense law more conducive to IPV victims who attack their abusers, but that does not abandon the meaning attributed to the fault principle.

I will conclude this section by laying out what the reasonable abused-woman standard looks like in the context of victims of domestic violence who attack, and, or kill their abusers, and what can be expected from women in this position. Like the reasonable woman standard described in the section on sexual harassment law, she is someone with an adequate level of political knowledge of the historical context of IPV and how the history affects the system today. As, Wanda Teays notes, quoting Martha Minow, “the result of a policy of ‘nonintervention’ by the state bolstered the authority of the man; thus, the battered woman has had limited options. Not until the 1970s and 1980s did courts and legislatures change the view that family disputes were off limits for the state” (59). The state remains reluctant to intervene with gendered

violence occurring in the home. For example, police are unlikely to make arrests when responding to domestic violence calls and around 70% of women are turned away from women's shelters that are at full capacity (Teays 59). Also, the vast majority of women who kill only do so after seeking out other solutions, such as calling the police, asking friends, or reaching out to organizations (Rosen 404). Therefore, it does not seem like these women view attacking their abusers as the first response, rather it can be understood as a last resort.

These facts highlight our society's traditionally accepted belief that the home is a realm of free, private individuals acting; however, this realm of privacy has also facilitated male control through the state's willingness to turn a blind eye to domestic violence, which implies that women are to be subservient to their partners. The reasonable abused-woman standard acknowledges how the history of the state's relationship to IPV has profound implications for today, which helps explain why many of these women reasonably feel as if there are not many viable options for escaping their abusers.

The implementation of a reasonable abused-woman standard should involve the use of expert testimony to help fact-finders understand that what warrants a reasonable defensive response by an abused woman may be different than what would warrant a reasonable defensive response by an ordinary person. Expert testimony is admitted if it will "draw inferences from the facts which a jury would not be competent to draw" (Crocker 137). Since there are many misconceptions and stereotypes about women who are in abusive relationships, such as the belief that she remains in the relationship because she likes the violence, or that if she wanted to leave, she would have once the abuse started, expert testimony citing psychological and sociological findings can help undermine these stereotypes. Analysis of cultural expectations can also be useful for fact-finders; as described by Crocker:

A battered woman who does not leave her husband, seek help, or fight back is behaving according to societal expectations. The cultural perception of marriage as a lifelong bond and commitment instructs a woman to stay and work to improve-not abandon-the marriage. By explaining why battered women stay, why they do not call for help, and why they do not fight back, and by relating these facts specifically to the defendant, expert testimony on battered woman syndrome allows the jury to judge the defendant on all the facts of the case and more accurately determine her claim of self-defense. (135)

An expert's analysis of these cultural values, such as the belief that a wife should never leave her husband, helps fact-finders understand that societal expectations play a role in men and women acting violently in different situations. Further, expert testimony is crucial if juries are to understand what characteristics are relevant to understanding a reasonable abused-woman's defensive actions, and whether these defensive actions stem from a reasonable fear of harm. For instance, women are socialized to be weak and passive; and this coupled with abused women's knowledge of what gestures or conduct, that may be meaningless to others, indicate an imminent attack by their abusers, may create a rational fear of danger in abused women that makes their use of force excusable (Crocker 127). The reasonable abused-woman standard cannot assume that all women respond in an identical manner to abusive situations, as individual responses are largely shaped by knowledge of the details of the women's relationship with their abusive partners.

However, the standard does consider women's subordinate status in our society, which is one major commonality experienced by all IPV victims who act in self-defense, and one of the primary reasons that justice requires the use of such a gender-specific standard in self-defense law. Even though the reasonable abused-woman standard is much more subjective than the reasonable person standard, it does not follow that there cannot be some objectivity built into it. There are discernable patterns, many of which I discussed above relating to abused women's acts of self-defense that can be used to determine whether a defensive response in the form of an

attack or killing is reasonable. These patterns, such as strong abilities to predict assaults, or the failure of the police and other parties to assist women, can be applied to the facts of cases to determine if a defendant should be excused for the harm she inflicted on her abuser. Finally, a reasonable abused-woman standard is necessary because of the societal norms concerning women who act violently; these norms are reflected in our legal system. As argued by Teays, “Anger or violence in a man wronged by his wife is often explained away as pride, protection, or healthy possessiveness. But the woman who is angry or violent elicits pity, irritation, or fear rather than sympathy” (Teays 69). These biases affect the implementation of our laws; for instance, women who kill their husbands are likely to get longer prison sentences than men who kill their wives (Teays 69). Justice demands that we use a reasonable abused-woman standard to challenge the belief that a woman who acts in violence is automatically unreasonable through her transgression of gender roles, and to give abused women a fair shot of being acquitted by means of self-defense claims.

V.  
*Objections and Responses*

The first major objection to the reasonable woman and reasonable abused women standards goes as follows: it will be too confusing for male legal officials, the majority of which are male, to use a standard that is based on the experiences and perceptions of women. Because men have not directly experienced the gender inequality in our society that women live through every day, they cannot understand how to apply the reasonable woman standard, which results in men either applying their own male biases to the reasonable woman standards or interpreting the standards in a manner that reflects negative stereotypes about women—such as the belief that women need special protection because they are weak. Therefore, our legal system should not use gender-specific standards.

To adopt this objection is to hold an extremely limited view of men and humanity. Even though men and women do not experience gender inequality in the same way, men can adopt reasonableness standards that align with women's lives, especially when men are willing to listen to and sympathize with women's first-hand encounters of gender oppression in the workplace and home. One of Iris Young's core claims is that, "it does not follow from the particularity of their histories and interests that people are only self-regarding, unable and unwilling to consider other interests and points of view" (134). Our human nature gives us the potential to listen to and understand diverse viewpoints. Further, MacKinnon's concept of "consciousness raising" also supports the implementation of the reasonable woman standard in the two areas argued for in this thesis because it can be used to foster men's understanding of women's realities—whether that be in offensive workplace environments, or in situations of horrible abuse that may make it more likely that abused women will resort to violence in non-traditional ways. The possibility of "consciousness raising" among men is especially important for the two areas being discussed in

this thesis, as most judges are men—around 65% to 70% of U.S. state court judges (Statistics: U.S. State Court Women Judges 2016). If the reasonable woman standard is put into use in the two areas discussed in my thesis, male fact-finders will ideally apply it in a manner that does not harm women further. Finally, men will only have to adopt gender-specific standards of reasonableness as long as women remain in an unequal position to men. Once equality between men and women is achieved, this standard will no longer be necessary, as, for example, the gendered gap between perceptions of sexual harassment noted by Shoenfelt et al. (649) will be closed, at least partially due to the reasonable (abused) woman standard. The standard I propose has the potential to heighten men's awareness of what conduct may be considered harassment, or of why abused women may reasonably use defensive force against their attackers in non-confrontational settings.

The second objection holds that the adoption of reasonable woman standards will make it impossible to strike a balance between restricting women by running into the same problems relating to the reasonable person standard, i.e. in practice the reasonable woman standard will reflect the perceptions and beliefs of white, upper-middle class women, thereby marginalizing women who are members of racial minorities or low socioeconomic statuses, and being so subjective that they leave out all objectivity. The latter concern is problematic because the functioning of our legal system depends on us having adequate guidance to evaluate conduct.

Balancing these two concerns is admittedly a difficult task, but the potential benefits outweigh the costs. The benefits to women that would result from a correctly formulated reasonable woman or reasonable abused-woman standard are immense; these standards would open up previously closed off space for women in our legal system, and they have the potential to create a legal environment that is more conducive to gender equality, which is a benefit for

everyone, as aspirations of gender equality in the legal realm uphold our system's core belief that everyone should be equal under the law. Naomi Cahn has a powerful insight: "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" (Cahn 1430). The reasonable woman standards must account for the fact that not all women are the same with identical experiences, but that this does not mean that there are no limits to what behavior or reactions to conduct may be considered reasonable. For example, fact-finders will not hold that any situation a plaintiff perceives as harassment is rightly workplace sexual harassment. If a woman perceives several glances from her male coworker as harassment, fact-finders may, even after considering that women often respond to conduct differently than men, hold that her reaction is not objectively reasonable, and thus, that she is not entitled to damages. Each situation of workplace sexual harassment and self-defense must be carefully examined, and a contextual consideration of the circumstances in question will help fact-finders determine what is reasonable from a viewpoint that is not entirely subjective.

Finally, one may object by asserting that gender-specific standards fail because even when fact-finders are instructed to use them when evaluating cases, the gender-specific standards make little, if any, positive difference in terms of outcomes. For instance, Nicole Newman's research on the outcomes of the reasonable woman standard in sexual harassment demonstrates that use of the reasonable woman standard does not lead to "significantly higher hostile work environment success rates than a strict use of the reasonable person standard, or even no reasonableness at all" (554). Newman concludes that the reasonable woman standard is not an effective solution to dealing with workplace sexual harassment, as it does not increase the rate that sexual harassment victims are able to prove the existence of an objectively hostile, abusive,

or intimidating workplace environment (554). Proponents of this objection may argue that reasonableness standards come down to semantics and thus do not have the potential to effectuate change in the law.

Findings indicating that reasonable woman standards do not make a difference in legal outcomes in terms of women having a greater chance to win workplace sexual harassment cases do not prove that they are the wrong answer. Practical consequences that could very well be the result of human error should be kept distinct from the theoretical justifications for reasonable woman standards. Perhaps the reasonable woman standard has not been correctly implemented by the courts. There is a possibility that the courts are not taking the diversity of women's voices into account, or that, in practice, the courts are not departing enough from the reasonable person standard. I suggest that there should be a general consensus among the courts on the definitions of the reasonable woman and the reasonable abused-woman standard, so that judges are able to instruct fact-finders on what these standards entail in a clear, straight-forward manner. Also, there could be other explanatory factors at work here that were not correctly isolated in Newman's study. Ultimately, though, more research is needed to identify what other factors may be affecting the outcomes in cases that use gender-specific reasonableness standards.

## Conclusion

In conclusion, I believe that because gender plays a major role in shaping people's lives, experiences, and opportunities, justice demands the use of a reasonable woman standard in sexual harassment law and the use of a reasonable abused-woman standard in self-defense law dealing with non-confrontational settings. The inclusion of these principles in our legal system will provide women with a chance to express their voices and experiences in our legal system, an area in which women as a group have largely been disadvantaged. Implementation of these standards would ideally heighten our legal system and society's awareness of the causes and effects of gender inequality in our society, which would encourage individuals to confront sexism in our legal system and beyond. Once equality for all is realized, reasonable woman standards will no longer be necessary.

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