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The Reasonable Woman and the "Warrior Code"

by Lyrissa Barnett Lidsky

A Law of Her Own: The Reasonable Woman as a Measure of Man

Caroline A. Forell & Donna M. Matthews

New York, NY: New York University Press, 2000

In this provocative book, Professor Caroline Forell and Ms. Donna Matthews (an Oregon lawyer) argue that existing law systematically undervalues women's experiences of sexual harassment and sexual violence. In essence, the authors contend that law is a "warrior code" that is unduly forgiving of sexual aggression and violence, and they support this contention by showing how "male-centered values" permeate the law of sexual harassment, stalking, domestic violence, and rape. This critique alone would make this work worthy of serious consideration by anyone concerned with the law's treatment of women.

"Male" vs. "Female"

The authors argue that both the traditional "reasonable man" standard and the more modern "reasonable person" standard allow decision-makers to apply male-defined community norms to assess sexual harassment of, and sexual violence against, women. That claim is most persuasive when, as in the case of domestic homicides, the authors support their argument not only with case law analysis and newspaper accounts but with social science research and statistics showing the differential treatment women defendants receive in such cases. The authors use that combined data to indict the criminal justice system's treatment of men who kill their intimates and of battered women who kill in self-defense.

The authors are on weaker footing, however, when relying predominantly on case analysis, as they do in their discussion of hostile environment sexual harassment law. They tend to conclude their discussions of cases with which they disagree by saying that the judges decided them from a "male perspective." For example, they find the Supreme Court's sexual harassment decision in *Harris v. Forklift Systems, Inc.* (1993) to be "directly attributable to the presence of two women on the Supreme Court." But this is mere labeling, not analysis. Moreover, it creates problems for the authors when cases with which they disagree are decided by female judges; in these cases, they are forced to argue that the female judges applied male standards in evaluating the harassing conduct. Although it is fair to suggest that a judge may not have considered all the relevant factors in a case (including those factors that are critical to women's experiences in the workplace), it is perhaps simplistic to argue that the result stems from the judge's applying a male perspective. This does not, however, undercut the book's value in illuminating the types of considerations that can and should influence the finding of a hostile work environment under sexual harassment law.

The "Reasonable Woman": A New Legal Benchmark for All?

The most interesting part of the book is its proposed remedy for existing imbalances in the law. Like some other commentators, Forell and Matthews advocate the use of a reasonable woman standard in cases that predominantly affect women. Unlike other commentators, however, the authors advocate applying the reasonable woman standard to the conduct of men as well as women. Thus, for example, the relevant standard in a rape case would be "whether, in the same circumstances, a reasonable woman would have believed consent existed." In a domestic homicide, the relevant question would be whether a reasonable woman would have killed her spouse or lover under the circumstances. Defining the minimum standard of socially acceptable conduct by reference to the reasonable woman is preferable as a policy matter, the authors argue, because it would enhance the law's respect for bodily integrity, agency, and autonomy – values that get short shrift under male-based legal standards.

Thus, the authors forcefully argue that the reasonable woman standard should be used to evaluate both men's and women's conduct. At first, this proposal sounds counterintuitive. Even if existing law judges female conduct in accordance with male norms, it is not initially obvious that the solution for this problem should be to judge male conduct by female norms. Yet the authors convincingly argue that a dramatic paradigm shift is necessary to eliminate the bias in existing law.

Of course, the authors' contention raises both pragmatic and philosophical questions about the operation of the reasonable woman standard. Is a simple shift in verbal formulas, from a "reasonable person" standard to a "reasonable woman" standard, sufficient to eliminate any underlying gender bias by decision-makers? The authors convincingly show that the shift from a "reasonable man" standard to a "reasonable person" standard only marginally ameliorated the application of male-based norms. Further, the authors acknowledge that care must be taken lest decision-makers transform the "reasonable woman" into a reasonable man in disguise or base judgments on sexist stereotypes. But they fail to define the reasonable woman standard other than to urge that it would enhance respect for female-based norms of bodily integrity, agency, and autonomy.

The authors acknowledge that the standard must be accompanied by a "careful explanation of what the standard means," and they further suggest that the explanation would take the form of expert testimony and carefully worded jury instructions. Nonetheless, their argument would have been stronger had they chosen to provide more concrete examples of exactly what types of expert testimony would be admissible and the exact wording of proper jury instructions. That also would allow direct comparison of the proposed reasonable woman standard with other alternatives – whether, for example, it is better to judge all defendants in domestic homicide cases by the reasonable woman standard (even if the defendant is a man) or whether it is more effective to declare certain "provocations," such as discovery of one's partner committing adultery, insufficient as a matter of law to reduce first-degree murder to manslaughter. But perhaps this is a

lawyer's quibble with a book that is, after all, designed to reach a broader audience than simply law professors and practitioners.

Fumbling Towards Gender Equality

The underlying assumption of *A Law of Her Own* is that changing to a "reasonable woman" standard will alter social norms about sex and violence. The authors suggest that application of the reasonable woman standard across the board will not only increase empathy for both male and female victims of harassment, stalking, and violence; rather, it will also "re-educate" a certain portion of men about what behavior is expected and help achieve "true equality of the sexes."

This is a bold claim, one that warrants at least some philosophical exploration of the role of law in shaping social norms, especially since some decision-makers are likely to view the application of a reasonable woman standard to the conduct of men as fundamentally unfair. *A Law of Her Own* is nonetheless an important book, and the authors' proposals merit sustained consideration by anyone who cares about gender equality.

Professor Lyriisa Barnett Lidsky teaches Torts, Professional Responsibility, and Mass Media Law at the University of Florida Levin College of Law. Her research typically focuses on the difficulties that tort law faces in providing redress for dignitary injuries, particularly when such injuries are defined by reference to community norms.