

Men's Rea: Gender Disparities in Morality and Law

A fundamental tenet of our shared morality is the uniform application of laws based on some objective moral standard. In order to judiciously administer any system based on such morality it is imperative that a level ground be established for the consideration of criminal offenses. For a tremendous portion of our history and extending until the current day, ours has been the standard of the reasonable man. In consideration of this standard, millions of criminals have been convicted based on evidence that they acted in a morally reprehensible manner in comparison to the reasonable man. The standard has found use in nearly all aspects of the law and has become the key determinant of guilt in a select few criminal acts such as the insanity defense and other forms of criminal exculpation (Forell & Matthews, 1994). However, despite the historic and deeply rooted foundations of this standard, it holds within it an undeniable reflection of only one subset of our national population. The reasonable man standard is rather obviously a standard based in the mentality of men. Furthermore, it is and was likely intended for consideration in trials involving males. As such it can accurately represent only a half of our current population. Despite some of the attention paid to this issue in recent years, a simple nongendered standard of reasonable conduct for legal proceedings remains as elusive as ever (Denno, 1994). Though one might protest that the difficulties encountered in defining an acceptable and reconcilable legal standard are the simple results of historical inertia, I believe this problem to be much deeper and more complicated. In this paper I will address the various difficulties inherent in this problem, in the hopes of coming to grips with the real legal and moral barriers to the acceptance of a nongendered standard for non-criminal conduct. For both the legal and moral schemas, it will be necessary to answer two primary questions. The first of these

is: are the differences in the application of law between men and women just? Secondly, what might result both legally and morally from the adoption of a reasonable woman standard.

However, before any of these questions can be answered, I should speak first as to why they should be answered. That is, why is it even necessary to consider the legal and moral implications of disparities between the treatment of men and women? To quote one Harvard scholar: “The failure to see the different reality of women's lives and to hear the differences in their voices stems in part from the assumption that there is a single mode of social experience and interpretation. By positing instead two different modes, we arrive at a more complex rendition of human experience.” (Larrabee, 1993). This quote summarizes what we already know, and examines a point that we are less likely to accept. The first is that men and women are different. The second is that, rather than ignore these differences it could be worthwhile to examine them, and perhaps to see in what ways law or morality would differ if examined through two prisms rather than the typical one. While no means a stunning revelation, this fact has deep and far-reaching implications, especially to the criminal law. It is perhaps best illustrated by examining briefly a world where men and women were, in actuality, identical. In such a place, even assuming the historic inertia of a male-dominanted legal system and system of moral values, the only barrier to a nongendered moral standard (one that both men and women could agree with wholeheartedly) would be time. Given that men and women did not differ along their moral sensibilities, the only aspects of the criminal law that would need changing would be the literary conversion from “reasonable man” to “reasonable person”. This, it would seem, is not the case in our current legal system. In reality, the idea that men can be generalized to women or that women can be generalized to men is the very notion that we have begun to find problematic. After all, if all people really were equal in all ways, the reasonable man standard

would become completely irrelevant. All individuals would act exactly as would a reasonable person, and any speculation as to the reprehensibility of acts would cease altogether.

In light of these ideas, the first question I endeavor to illuminate is how the law can be applied differently to men and women. Examples of such disparities abound. Especially prevalent are legal examples in the areas of sexual harassment, stalking, rape and domestic homicide. An example can be easily identified in the final of these four areas. Murder can be relegated to manslaughter in the event that a man manages to witness his wife involved with another man. No such provision exists for women. In the case of rape law, there are even states where a woman cannot technically rape a man. While it soon becomes obvious that we do, to some degree, hold men and women to different legal standards, the question then becomes whether or not this practice is just. Should those behaviors we wish to criminalize be at all dependent on the gender of the individual in question? I suggest the answer to this question is that they should not. In fact, I believe that even the law itself would agree with me on this point. The sexually discriminatory practices mentioned above are more likely relics of a bygone era of gender ignorance than they are representations of how we feel the criminal process should proceed. As the majority of these laws were written in reaction to some crimes being committed, it is likely that the gender-reversals of the situations mentioned above (a woman raping a man for example) have not at this point been written into law because they historically have not been prevalent. Legally it seems that this discrimination based on sex cannot continue, as it represents something of a self-contradictory position on sex for our legal system. The very same legal system where trials are held on cases of sexual discrimination has itself instituted sexually discriminatory practices. Something of a non sequitur, I believe this aspect of gender disparity

likely should and reasonably will be eliminated or severely reduced given an adequate application of time and the patient efforts of those interested in making the law more just.

However, in contrast to the question of whether it is legally justifiable to divide crimes based on gender, should we also hold men and women to different moral candles? This question is deeper and more complicated than the former. Unconstrained by the practical boundaries of our legal system, the assignment of blame in the moral arena can be made more precise. It need not rely on a standard easily internalized by juries hailing from vastly different backgrounds. Rather to the contrary, it can be highly nuanced. As a result of this increase in complexity, at the very least one can say that there is no practical reason that moral standards should not differ between men and women. As to the question of how they might differ between men and women, one can examine the tremendous amount of literature in Psychology and Sociology to find that there are at least subtle but appreciable *cognitive* differences between men and women. Men and women do find differing amounts of value in different things. The notion that men and women are psychologically different has become accepted in mainstream society. From this information we should be able to derive that men and women will have slightly different perceptions on morality in a broad range of situations with perhaps drastically divergent viewpoints on at least some subsection of those situations. This notion, the one of *moral* differences, has been met with extreme resistance. The suggestion that there be two moral standards is in itself problematic at first viewing. After all, if morality is concerned with the selection of the best decision given a set of circumstances, how can there be two separate correct answers?

One might be tempted to assume or led to believe that a divergence in the assessments of male and female moralities is an attempt to establish differences in moral *worth* between groups. This claim, in particular, requires attention. In attempting to establish two different moral

standards, one might willingly evoke ideals of “separate but equal.” While we are all acutely aware of exactly the direction in which that particular path leads, it is drastically different than the one on which we are traveling. It is not my suggestion that the two moral platforms would be distinct but equivalent. Perhaps the most readily apparent difficulty with a declaration of moral equivalence between the platforms of male and female morality is the obvious impossibility of finding some objective vantage from which to view these two moralities. Given that we are all female, or male, or some mixture of these, there exists no way to identify either that these are equivalent or decry one as being subordinate to another. However, even if such a vantage did exist, I suggest that these two moralities could not be compared. They would not be separate, but equal. Rather these two moral platforms would simply be separate. It is likely the result of the fact that we do not perceive differences in moral worth that these two platforms should arise. Though historically masculine morality has dominated moral discourse, the interjection of a female perspective will undoubtedly result in some shift in perspective.

Thus it would seem that the adoption of differing standards for men and women either legally or morally results in two separate answers. Morally it would seem reasonable, given the real and identifiable differences in their respective psychological perspectives to give some thought to the differences between men and women in the moral discourse. The result of such actions, far from being a statement of differing moral worths, might actually resolve some nagging philosophical questions, by allowing opposing sides on some issue the ability to, in essence, agree to disagree. However, this same courtesy is not likely to be extended to the law. Though heavily informed by tenets of morality, the law is an entirely different beast. The adoption of different moral standards for the conduct of its citizens can be viewed as an action with perhaps disastrous consequences. Perhaps most readily apparent would be the hypocrisy in

advocating both disparity in legal treatment in terms of criminality, while at the same time requiring unity in the treatment of men and women in all other aspects of citizenship. In order to institute such a change in the legal system, at least in this country, one would be required to change a significant number of additional legislation. Practical barriers aside, how might the world look if two standards were allowed into our current legal system. More appropriately how would the current reasonable man standard differ from the novel reasonable woman standard?

One thing that should be made clear is that this reasonable woman standard would not appear very similar to the current female-specific legislation on record. For this standard to be of any use, it is imperative that it breaks free from the previously enacted male-dominated legislation concerning women. There currently exists a great deal of legislation aimed at, for example, protecting women. Such is the case in rape law (Dressler, 1995). Further examples exist in dealing with spousal homicide, as is the case with battered women syndrome. However, all of these pieces of legislation are aimed at protecting women in the eyes of men. Perhaps more ominously, some legislation appears to protect men specifically at the expense of women. Examples for this sort of law are more difficult to distill but still readily available. One special example mentioned previously is in relation to provocation law. Men who kill their former or even current lovers often claim that the victim provoked their actions by her behavior. In one statute relating to provocation the provoking act must be “calculated to inflame the passion of a reasonable man and tend to cause him to act for the moment from passion rather than reason” (State). In the case of *Maher v. People*, exactly such a judgment was handed down. The judge in the case found that evidence for provocation might have been sufficient to mitigate a (hypothetical) murder charge to manslaughter given the evidence of his wife’s adulterous affair with the victim of his crime. The basic assumption in this case is that a woman makes a

“reasonable man” uncontrollably jealous, and *causes* his violent rage and loss of control. Furthermore, this violent rage is sufficient to remove that ordinary man from his capacities to such an extent that the manslaughter rather than the murder sentence is applied. Consider, for a moment, the very same trial with the roles reversed. That is to say that a woman found her lover to be entangled in an adulterous relationship with another woman. The question then becomes would a “reasonable woman” under the circumstances be provoked enough to commit murder? It seems likely that with this reasonable woman standard in mind, provocation would disappear as a mitigating factor for the murder of the adulterous individual or her partner.

It may be even easier to understand the differences between the female and male perspectives in cases where the woman is the recipient of violence. The most obvious of these cases involve the laws regarding nonconsensual sexual acts. At current, rape law can be said to ask whether the victim, in essence, provoked her aggressor to commit his crime by failing to adequately demonstrate nonconsent (Denno, 1994). However, these laws are written and viewed from a male perspective, one that undoubtedly views the necessary stages of nonconsent differently than would a woman. At current, the legal question in cases of rape is whether or not the individual accused of rape reasonably believed at the time of his actions that consent existed with his victim. This is a profoundly male-dominated view. We are asked to make a determination as to whether or not a reasonable man would act as did the defendant. However, regardless of whether or not the defendant believed there to be consent, if there was no consent in reality, a crime must have been committed. Some serious moral wrong has occurred. Here we see the fundamental disconnect between crimes held to a reasonable man standard versus their outcomes when held to a reasonable woman standard. Indeed, what might be the outcome if this same situation placed under the consideration of a reasonable woman standard. That is to say,

what if we were required to make a determination as to whether or not a “reasonable woman” would have believed consent existed. Without knowing a considerable amount about any particular case, it seems reasonable to posit that the reasonable woman standard would be fairer in cases such as these. The reason for this is that in such cases, it is really the woman whose perspective matters most.

Doubtless, we have made significant progress towards a legal system that treats justly both men and women and while much has changed in the perception of women since the founding of this country, many aspects of our criminal law system and perceptions on morality have not. While it may seem that only time will tell how the treatment of women will improve under the law, it is far more likely that real action will need to be taken to institute both mindsets and laws that allow reasonable treatment for both men and women given their differing moral and legal sensibilities.

Works Cited

- Denno, D. W. (1994). Gender, crime, and criminal law defenses. *Journal of Criminal Law and Criminology*, 85.
- Donno, D. (n.d.). Who is Andrea Yates? A short story about Insanity.
- Dressler, J. (1995). When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard. *The Journal of Criminal Law and Criminology*, 85 (3), 726-763.
- Forell, C. A., & Matthews, D. M. (1994). *A Law of Her Own: The Reasonable Woman as a Measure of Man*. New York, NY: NYU Press.
- Larrabee, M. (1993). *An Ethic of Care: Feminist and Interdisciplinary*. Boston, MA: HUP.
- Morris, N. (n.d.). Madness and the Criminal Law.
- Slobogin, C. (n.d.). The Integrationist Alternative to the Insanity Defense: Reflections on the Exculpatory Scope of Mental Illness in the Wake of the Andrea Yates Trial.
- State, G. V. (n.d.). Court of Appeals of Maryland.