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Feminists in the Field of Time

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Last summer, I drove from Boston to Albuquerque. On the way, I traveled through South Dakota to see the Badlands and the Black Hills. The trip made me heartsick. The history of South Dakota is the history of many Indian peoples, particularly the Great Sioux Nation, who have suffered countless inequities, including treaty violations and massacres such as the one at Wounded Knee. The South Dakota air reeks of it.[1] At the same time, the South Dakota land cries out with its fantastic, ever diminishing prairies and enchanting mountains. South Dakota is a sacred, and perhaps irretrievably scarred place.

The culmination of my nausea was visiting Mount Rushmore. I could not stop myself from going there. Mount Rushmore leaps like the proverbial sore thumb out of a wondrous part of the Black Hills. The attraction is not the mountain, but its defacement. The image is familiar: enormous carved faces of dead United States Presidents George Washington, Thomas Jefferson, Abraham Lincoln, and Theodore Roosevelt.[2] I was disgusted — and not just because I am profoundly ambivalent about these Presidents' roles in United States history. Mount Rushmore is ecologically pornographic. Just as pornography portrays women as enjoying abuse, Mount Rushmore portrays nature as being enhanced by being mutilated in the image of what white males think nature ought to be and do.

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1. South Dakota was one of six western states to celebrate its statehood centennial last year. *The Lakota Times* called on Western Indians to fly their tribal flags at half mast for these celebrations. The Rosebud Sioux tribal council ruled that tribal members could not participate in the South Dakota centennial. As Rosebud president Alex Lunderman stated, "Why should we celebrate? It would be like the Jews celebrating Hitler's birthday." *For Sioux, A Century of Anger, Latest Battle Pits Tribe Against South Dakota Highway Patrol*, Chicago Tribune, June 18, 1989, at 6, zone C (final ed.).

2. Some suggest adding the face of Ronald Reagan to Mount Rushmore. When I was there, I saw two men in business suits taking dimensions. I am sure they were discussing the feasibility of the Reagan addition. I am all for it — Mount Rushmore might as well be sublimely ridiculous. As long as we are defacing, let's add Edward Teller, Ivan Boesky, and Richard Speck.

The two ideals that my South Dakota visit assaulted — genuine cultural diversity and genuine respect for nature — are in my view the two paramount challenges for contemporary feminist practice. But my South Dakota experience also inspired my thinking about the theoretical issues I wish to address today: time, space, and causality. Mount Rushmore is partially about arrogance with respect to time: it portrays puny, genocidal United States history as more important than the timelessness of the Black Hills. Mount Rushmore also is paradigmatic of white males' idea that space exists to be filled up. Finally, Mount Rushmore serves as a monument to their version of causality: what counts as history is the effect that white males have in the world. The tangible changes they inflict are somehow worthy of monument, even if those changes are actually destructive or trivial. And, these notions of time, space, and causality are portrayed as almost inevitable.

The way in which Mount Rushmore depicts these ideas is the way they work in the common law. The common law is a slippery customer. Its contextuality is attractive and essentially feminist. Common law rules, at least in theory, serve at the pleasure of the facts. The application of any solution always is provisional. The common law, like the stereotypical woman, reserves the right to change its mind. Insofar as that stereotype is true for me, I embrace it gleefully: it provides sanity and clarity.

But this much-heralded majesty of the common law also is a trap. Whenever we hear arguments extolling the beauty of a system or the elegance of a process, we need to be on heightened trap alert.[3] This warning is true of the common law. The real function of the fact-based nature of the common law is to justify the snail-like pace of its movement. In practice, changes in the factual context of common law may go unnoticed. The rules become like dead snails: they look okay, but they are stuck to the sidewalk with all sorts of yucky juices until someone makes a conscious effort to remove them.

Take my common law field, torts, as an example.[4] In liberal legal education, torts is portrayed as an out-of-date but useful, and ulti-

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3. Systemic intellectual beauty is one of the reasons that property law, for example, is always taught in the first year of law school, despite the fact that the vast majority of people will never possess anything remotely resembling an estate in land. *See* Warrington, *Land Law and Legal Education: Is There Any Justice or Morality in Blackacre?*, 18 LAW TEACHER 77, 81, Spring 1984 ("Some law teachers like to extol the beauty of the workings of land law. Students who adopt that view are liable to resist attempts to alter the beauty they have been encouraged to love.").

4. I am here at a feminist legal symposium, billed as a specialist in feminist jurisprudence. But that is not primarily what I do. I lecture on feminist jurisprudence on the road and teach

mately wise, system for dealing with injuries. Torts is slow but dear, waiting in its earnest way like a faithful dog to respond to the next noisy, smelly, or terrifying situation. And, if you will allow me to throw in yet another metaphor, the semester spent teaching torts is an exploration of the tension between the rickety boxes in the ancient structure and the contemporary need for more cupboard space. We spend hours determining where we can take out a panel and still maintain structural integrity. This process comes to seem necessary, inevitable, and the best we can do.

I am not suggesting either venerating or abolishing the common law, nor am I proposing a new system for compensating injuries.[5] The organizers of this Symposium — "Goals for the 1990s" — have given us only a decade upon which to comment. Therefore, I intend only to suggest a couple of feminist ways of thinking about the common law.

We are beginning to see feminist commentary about how torts is taught in law school and how we might incorporate women's issues into that teaching. Feminist authors critique the blatant sexism of textbooks, demonstrate that the change in terminology from "reasonable man" to "reasonable person" has not disturbed the underlying male norm, and list the issues crucial to women that systematically are excluded from study — reproductive harm, women battering, and sexual harassment. They show us how women's issues that are included are trivialized — women's historical disability to sue, interfamilial immunity, and the undervaluation of damages to women who are not wage earners. These authors also reveal how women are stereotyped in torts study: women often are portrayed in frivolous litigation and as the claimants for emotional damages.[6]

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a seminar in it every year or so, as well as a number of courses in which feminist jurisprudence is saliently in the enterprise. But my bread-and-butter as a teacher is torts. I am teaching it this semester for the tenth time. Strangely enough, I have written almost nothing in the area. I, like many of my sisters who do feminist jurisprudence for a living, have concentrated in public law analysis. I first plunged into the pregnancy dilemma, criticizing the Supreme Court's pregnancy decisions and berating Congress for not going far enough in the Pregnancy Discrimination Act of 1978. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375 (1981).

5. In a just and caring world, perhaps we would not need a torts system. We would have significantly fewer injuries because capitalist greed would be subdued. Either we would not have automobiles at all, or the vehicles we would have would be truly safe. We would not have many on-the-job injuries because unalienated labor would make fewer mistakes and would create its own safe working conditions. Preventive health care would be so good that we would need fewer drugs. The health care system would be honest and open, and consumers could make truly informed choices. The drugs we would need would be reliable and safe. And when injuries would occur, people would have instant and full restitution for their present and future costs. *See* Abel, *Torts*, in THE POLITICS OF LAW 185 (D. Kairys ed. 1982).

6. *See generally* Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. L. EDUC. 3 (1988); Chamallas & Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH.

Each of these issues is important. Each speaks to life experience that the reasonable man, the man on the Clapham omnibus on his way home to mow the lawn,[7] has never dreamed. Each is an example of the invisibility, and indeed in the context of the legal system, the unimaginability of harm to women. Exploring these issues leads commentators to discuss underlying theoretical points such as the impossibility, from a feminist point of view, of an objective standard in torts[8] and the prospect of substituting a feminist standard of responsibility for one of reasonableness.[9]

I want to take this inquiry more deeply and talk about how torts as conventionally taught is really intended to limit lawyers in their perceptions and aspirations. By "perceptions" I mean epistemology: the method by which we "know" things, a person's abilities to see events and to feel confident about her own account of them. Questioning this fundamental basis of discourse is the first crucial task of feminist jurisprudence. By "limitation of aspirations," I mean the phenomenon whereby legal education teaches the beauty and limits of the rules and circumscribes students' aspirations of what law might be able to do for the world.

The invisibility of harm to women is not just a failure to include feminist concepts in legal study. Nor is it just a massive failure of empathy, compassion, and humility. It is also a problem of different *realities*. The way a woman thinks the world works is not necessarily the same as the way the man on the Clapham omnibus thinks the world works. However, in law school this gender-based difference is not discussed in terms of gender. Torts as conventionally taught is a seminar in how the law of the fathers wants us to perceive existence. All the allegedly necessary rules of law follow from the male portrayal of the world.

I want to emphasize that by "the fathers," I mean the fathers of Western civilization. In this culture, men's dominance over women operates through rigid, linear conceptual schemes. In other cultures or at other times, that same result can be achieved by myriad means,

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L. REV. 814 (1990); Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41 (1989); Tobias, *Gender Issues and the Prosser, Wade and Schwartz Torts Casebook*, 18 GOLDEN GATE U.L. REV. 495 (1988).

7. *See* F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 16.2, at 389 (2d ed. 1986).

8. Finley, *supra* note 6, at 63-65.

9. Bender, *supra* note 6, at 28-36 (suggesting the application of Carol Gilligan's "ethic of care" to negligence law).

classifications, and metaphysics,[10] some of which many Western women might think of as feminist. "Linearity" in epistemological thought is not necessarily male. More rounded ways of perceiving also are susceptible to use as male domination instruments. Conversely, linearity is not useless to Western feminists, and the alternative modes are not necessarily the only "truly feminist" ones. Therefore, when I say that some epistemological tenets are "white male" perspectives, I mean to refer to the linear tenets of societies and eras, like ours, which are dominated by white males and in which those ideas almost always win in the weighted dialectic among ways of thinking. In American law, linear thinking is stunningly pervasive and rarely questioned.[11] It controls and decides how the law, already such a harsh force in social life, shall treat individual members who may or may not think the same way.

At the bottom of the legal portrayal of the world are the ideas of time, space, and causality. In contemporary Western thinking, from existentialism to postmodernism to post-postmodern feminism, avoiding universalization is crucial. Therefore, referring to those thinkers who are the universalizers and systematizers is unpopular. I am going to do it anyway, with reference to the stodgiest, most sweeping systematizer of all, Immanuel Kant. Kant, though undoubtedly wrong about many things, was right about at least one thing. Whatever else we as human beings may perceive, understand, or judge, and however we may differ in those pursuits, we could not do anything without using the underlying notions of time, space, and causality. They are

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10. Because I am neither philosopher nor anthropologist, on this crucial issue of multiple modalities of human understanding I simply would refer the reader to Jorge Luis Borges's much-quoted passage, describing the taxonomy of animals in an ancient Chinese encyclopedia:

> On those remote pages it is written that animals are divided into (a) those that belong to the Emperor, (b) embalmed ones, (c) those that are trained, (d) suckling pigs, (e) mermaids, (f) fabulous ones, (g) stray dogs, (h) those that are included in this classification, (i) those that tremble as if they were mad, (j) innumerable ones, (k) those drawn with a very fine camel's hair brush, (l) others, (m) those that have just broken a flower vase, (n) those that resemble flies from a distance.

J. BORGES, OTHER INQUISITIONS 104 (L. Simms trans. 1964).

11. I also should confess that, as a "well-educated" person, I am a previously willing victim of that way of thinking. It is very easy to begin to critique American law, even on fundamental epistemological bases, because American law is so narrowminded. It is not easy, in that critique, to relieve oneself of one's own learned narrowness. The real goal of a woman's education must be, as Adrienne Rich said, to learn to "debrief" one's self of "false messages" every day. Address by Adrienne Rich, *Smith College Commencement*, 70 SMITH ALUMNAE Q., Aug. 1978, at 8 (on file with the *Florida Law Review*.

percepts[12] of reason: these are notions the truth of which cannot be proven but without which we could not think or be human.[13] I can imagine space and time as empty, but I cannot comprehend a nonspatial object nor a nontemporal event.[14] I can understand the difficulties in causal analysis, but I cannot help but believe that the orange juice got cold because I put it in the fully operational refrigerator. All of us rely on contingently reliable measurements of time, space, and causality in everything we do.

But, having agreed with stodgy old Professor Kant that time, space, and causality are ideas without which we cannot function, I do not believe that everyone has the same concept of these percepts. On the contrary, I claim that in legal education, for example, we inculcate the percepts of reason from a white male legal point of view, a point of view substantially at odds with other experiences.

In my torts classes I perceive that women respond to cases differently, in ways that are called liberal, leftist, overly emotional, or fluffy-headed. Women sometimes seem to miss the conventional lessons of cases. Consider, for example, *Sindell v. Abbott Laboratories*.[15] In that case the California Supreme Court held that a daughter of a mother who took DES could recover against manufacturers of the drug for her own cervical cancer, even though the daughter could not show which manufacturer out of many, a majority of them unnamed as defendants, made the doses her mother took.[16] Thus, *Sindell* seemed to have abandoned the usual notion of cause-in-fact in which a specific cause must link to a specific defendant and a specific effect must link to a specific plaintiff's injury.[17]

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12. *See* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 972 (New College ed. 1976) ("percept *n* . . . An impression in the mind of something perceived by the senses, viewed as the basic component in the formation of concepts) (back-formation from "perception").

13. I. KANT, CRITIQUE OF PURE REASON 68, 75, 45 (MacMillan Press ed. 1978) (1781). In Kant's scheme, time and space are actually logically prior to causality. Time and space are pure forms of a priori intuition, *id.* at 68, 75, which make possible a body of other sorts of knowledge, called a priori synthetic principles. *Id.* at 50, 124. This body of knowledge includes pure mathematics and the principle of causality. *Id.* at 78. Such knowledge is possible only by means of the apprehension of alteration in the underlying ideas of time and space. *Id.* at 76. However, Kant grouped all three percepts — time, space and causality — together in explaining their relationship to experience: "We can extract clear concepts of them from experience, only because we have put them into experience, and because experience is thus itself brought about only by their means." *Id.* at 223.

14. *Id.* at 68, 75.

15. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980).

16. *Id.* at 613, 607 P.2d at 938, 163 Cal. Rptr. at 146.

17. For a study of the repercussions of *Sindell*, see Delgado, *Beyond* Sindell: *Relaxation of Cause-In-Fact Rules for Indeterminate Plaintiffs*, 70 CAL. L. REV. 881 (1982). For a doctrinal

Sindell always gets studied, I believe, either to show wild judicial activism or to show how wonderful the common law is: how it begrudgingly can disregard requirements as honored as "real" cause-in-fact in order to accommodate difficult situations and even the most difficult (i.e., female) litigants. However, my women students usually do not think that *Sindell* represents any extraordinary treatment of cause-in-fact. Rather, they view the result as obviously correct. And, that is not leftism, fluffiness, or anything of that sort. *Sindell* simply makes ontological sense to them. It describes their reality.

I do not claim that all women see the world in this manner. I do not stake any claim about the essential attributes of women or men. I understand that our gendered chemistries are different, and that our genes are different. Maybe someday someone will prove that those few biological differences have a necessary effect on how we are and can be in the world. I have no idea how that will turn out or what it will mean. And, really, I do not care, because I know that the social experiences of women and men are vastly different now. Life for a woman in this society is about existential contingency.

In my case, the existential undermining is not constant. I live in a sleepy southwestern community, and I have a comfortable life. Nevertheless, existential torpedoes hit me with some regularity. I recently got a letter from a guy who claimed that some of my mail mistakenly had been delivered to his house. He inferred from a postcard that I was a lesbian and inquired whether he and the woman with whom he lived could engage in a *ménage à trois* with me. He did not include much information about his partner, but he told me everything about his body. The letter was simply, and appropriately, signed "Randy."

Now here was a torpedo that caused a dilemma. For my own sanity, I simply had to take it in stride. So, I told myself, hey, the misdelivery of my mail was an honest mistake. The letter was pleasant enough, except for the anatomical detail. Randy promised that he would never bother me again if I did not call the telephone number he enclosed. I did not and he has not. On the other hand, I spent the next few days wondering how Randy got my mail, speculating whether Randy had a violent streak, trying to discern if each passing male might be Randy, and writing down the license numbers of cars that seemed to be parked too long on my street. My energy was diverted, and I was a little crazy.

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explanation and an excellent argument in favor of alternative causal standards, see Rosenberg, *The Causal Connections in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851 (1984).

This episode, however, was nothing compared to that endured daily by the women who lead less comfortable lives — women in poverty, women in abusive relationships, women in the sex industry, women in most employment situations. My anecdote is nothing compared to what happens thousands of times each day on the streets, or to what almost happens.

On my way to this Symposium, I stopped off to see my parents in North Carolina. Consider this excerpt from the letters to the editor in their hometown newspaper:

> Rape is a horrifying experience that stays with a person for the rest of her life . . . .
>
> In my files I have an article that estimates that 35 percent of all females will be sexually assaulted in their lifetimes.
>
> If this is true, why do so many women take such foolish chances of being the next victim of rape? This past week I was driving through a fairly well-lighted part of Winston-Salem. It was 9 p.m., and hardly anyone was on the streets.
>
> As I stopped at a red light, rounding a corner was an attractive young woman, I would say in her early 20s, wearing a skin-tight aerobic outfit with bike pants. As I watched her run I became increasingly angry and wanted to say something, but she was wearing a Walkman.
>
> Then I thought I would throw the soft-drink can I had in my hand at her to protest her foolishness.
>
> But I immediately ruled that one out, figuring it to be a bit too much. . . .
>
> I'm writing this letter in hopes that the jogger, or someone like her, will read it and realize that instead of being someone concerned for her well-being, *I could have been a rapist* and she my next victim.[18]

I hereby nominate this letter as the lead item on the "No Shit News." The author does not have to have been a rapist; he does not have to have thrown the soft-drink can. He did not even have to write to the newspaper. All he had to do, in order to fulfill his patriarchal duty to control the night, was to blame the woman for existing and looking great.

So we live with it. And, the law of the land is that we are obligated to live with it. Thus, a woman in a job in which she was otherwise isolated and undermined had to endure in her workplace posters of nude women and of women being threatened by men, being called

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18. Kerhoulas, *Taking Foolish Chances*, Winston-Salem J., Sept. 30, 1989, at 16, col. 3 (emphasis added) (letter to the editor) (copy on file at the *Florida Law Review*).

"cunt," and being told that all she needed was a "good lay." This, according to the Sixth Circuit, is just the way it is. These conditions "had a *de minimis* effect on the plaintiff's work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places."[19]

I do not mean to say that men do not have existential collapses. In this world defined by hierarchical violence, powerless men are reminded every day of who they are not. In a world of nuclear terror, the nausea of existential contingency has become an equal opportunity affliction.[20] But I do mean to say that a special, thoroughly pervasive version of existential meltdown happens only to women. That weird, squirrelly, contingent condition defines what a woman is, what we are as a group. Randy, I dare say, hasn't a clue as to what it might feel like.

I will begin my discussion of women's version of reality by talking about time. The possibility of a gender differential with respect to time occurred to me while talking to women active in the peace movement.[21] These women and the government really do perceive the deployment of nuclear weapons differently. The government perceives a clear distinction between "deployment" and "use." Use follows deployment linearly in time; therefore, they are completely discrete events.[22] For the women the harm is continuous. Deployment is active violence. I believe this disagreement basically is about the nature of time.

The temporal difference noticeably exists in disputes about the "imminent harm" requirement in defending battered women who have killed their batterers. The battered woman's defense is a relatively recent innovation in criminal law.[23] Paradigmatically, it applies to the

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19. Rabidue v. Osceola Refining Co., 805 F.2d 611, 622 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) (Title VII claim for sexual harassment denied).

20. *See* Scales, *Militarism, Male Dominance and Law: Feminist Jurisprudence as Oxymoron?*, 12 HARV. WOMEN'S L.J. 25, 75 (1989).

21. My work has centered around the Greenham Common Women's Peace Camp in England. *See* Scales, *Midnight Train to Us*, 75 CORNELL L. REV. 701 (1990) [hereinafter Scales, *Midnight Train*]; Scales, *supra* note 20.

22. Historically, that point of view is on rocky ground. The distinction between war and peace is blurry. As Cynthia Enlow points out, since World War II and with the advent of the arms race, society's premier values are national security and military readiness. More and more resources are devoted to warring. Thus, we live neither in wartime nor in peacetime, but in "militarized peacetime." C. ENLOW, DOES KHAKI BECOME YOU?: THE MILITARIZATION OF WOMEN'S LIVES 190 (1983).

23. Its genesis is probably in the case of State v. Wanrow, 88 Wash. 2d 221, 559 P.2d 548 (1977) (holding that the trial judge's failure to instruct on the gender-based attributes of a

"burning bed" situation: the woman who has killed her batterer at a moment when he was not beating her. The battered woman's defense is closely akin to self-defense, and most jurisdictions consider it as a variation of self-defense available only to battered women.[24] Thus, the battered woman's claim is not one of insanity or of temporary insanity.[25] Her claim is not that in the moment she was unable to tell right from wrong; rather, she claims that, in light of the history of physical abuse from the batterer, her use of deadly force against him was acting as a reasonable *X* would have acted under the same circumstances.[26]

The historical and evidentiary predicate for the defense is psychological data about the "battered woman's syndrome." Pioneered by psychologist Lenore Walker, the syndrome identifies typical behaviors and beliefs of women in battering relationships.[27] According to this data, the woman's state of mind in the advanced stages of the

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defendant claiming self-defense to a charge of murdering a man who threatened her children was a denial of the equal protection of the laws). *Id.* at 558-59.

24. Florida follows this rule. In Florida, expert testimony as to the "battered woman's syndrome" is admissible to aid the jury in determining whether the defendant's belief in the necessity for use of deadly force was reasonable, as required by the self-defense doctrine. *See* Terry v. State, 467 So. 2d 761, 763 (Fla. 4th D.C.A. 1984); *see also* Borders v. State, 433 So. 2d 1325 (Fla. 3d D.C.A. 1983); Hawthorne v. State, 408 So. 2d 801 (1st D.C.A.), *rev. denied*, 415 So. 2d 1361 (Fla. 1982).

In *Hawthorne* the court noted,

> Appellant did not seek to show through expert testimony that the mental and physical mistreatment of her affected her mental state so that she could not be responsible for her actions; rather, the testimony would be offered to show that[,] because she suffered from the syndrome, it was reasonable for her to have . . . believed that her life and the lives of her children were in imminent danger. It is precisely because a jury would not understand why appellant would remain in the environment that the expert testimony would have aided them in evaluating the case.

Id. at 807. For citations to data on why women stay in battering relationships, see Kinports, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393, 400-08 (1988).

25. Like the insanity defense, the battered woman's syndrome defense results in acquittal. However, as in self defense, the woman acquitted on the basis of the battered woman's syndrome defense goes free. The insanity defense leads to involuntary commitment to a mental hospital, *see* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 4.6(a), at 360-63 (2d ed. 1986), possibly for a term longer than the maximum sentence allowed for the crime originally charged. *See* Jones v. United States, 463 U.S. 354, 368-69 (1983).

26. For general descriptions of self-defense, see W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 19, at 124-29 (5th ed. 1984); W. LAFAVE & A. SCOTT, *supra* note 25, § 5.7, at 454-63.

27. *See* L. WALKER, THE BATTERED WOMAN (1979). Dr. Walker often is an expert witness in battered women's cases. *See* Kinports, *supra* note 24, at 397 n.16 (citing cases in which Dr. Walker has testified).

battering relationship is characterized by "learned helplessness": a belief that there is no correlation between her behavior and his.[28] Pursuant to this learned helplessness, or in addition to it, battered women have feelings of "paralyzing terror" and "something terrible always about to happen."[29] Thus, the battered woman's syndrome defense consists of a claim that an *X in this state of mind* would reasonably believe she was in imminent danger, even if, according to the traditional self-defense "real world" perspective, no immediate threat to her existed.

In this discussion I have referred to *X*: what would an *X* do in these circumstances? The algebraic and political problem before us is, "What is *X*"? Is *X* the reasonable person, the "reasonable woman," or the "reasonable battered woman"? Which of these formulations we and the courts choose makes a difference. That choice indicates how we perceive the relationship between gender and reason, and, indeed, the relationship between womanhood and personhood.

Some lawyers cling to the "reasonable person" standard.[30] It is comforting; it signifies the universal rule of law. It pretends that we are all just folks. That, however, is exactly the standard's flaw. In pretending that we are all essentially the same, it ignores the real experiential differences between men and women. The standard thereby perpetuates the male norm underlying the reasonable person standard and fails, yet again, to take violence against women seriously.

The "reasonable battered woman" standard is similarly flawed and inherently oxymoronic because the cycles of violence in which women find themselves are not about reason. Moreover, the "reasonable battered woman" standard is falsely divisive. Making "learned helplessness" the norm only for battered women suggests that the rest of us have not been forced to learn how to be helpless, or that we somehow can avoid the condition of learned helplessness if we play our cards right. I do not think these suggestions are true. All women are prey to the affliction of existential contingency and the battered woman's syndrome is just one extreme.

Thus, and largely by default, I endorse a "reasonable woman" standard in battered woman's syndrome cases. I certainly realize the flaws in this standard. It makes some version of learned helplessness the norm for all women. It reifies the worst parts of the social construc-

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28. *See* L. WALKER, *supra* note 27, at 45-55; Kinports, *supra* note 24, at 396-408.

29. Kinports, *supra* note 24, at 399-400.

30. *See, e.g.*, Rittenmeyer, *Of Battered Wives, Self-Defense and Double Standards of Justice*, 9 J. CRIM. JUST. 389 (1981).

tion of gender. In MacKinnon's words, "the price of this special consideration seems to be that women not only be perceived as weak, or as rationally perceiving themselves as such, but that we actually remain so."[31]

Admittedly, a potential trap exists here, but only if we fail to be vigilant in our use of standards. All standards impose stereotypes, and some of those stereotypes are true, at least temporarily. In some circumstances, such as the defense of battered women, it makes most sense to write the stereotype into law. Our tasks then are to work to render the given stereotype false and to eliminate it from law when it ceases to be true or useful.[32] If we must have law, and if law must have standards (and I am not claiming that either of these predicates is necessarily so), then we must examine the content of those standards.

In any case, there is already an opposite, gender-based stereotype present in battered woman's defense cases, and that is the male notion of "imminence." In traditional self-defense cases, the threatened harm must be "imminent" in the sense of "right now," immediately preceding the defensive action at issue.[33] However, in the paradigmatic battered woman's defense case, that sense of imminence is missing. Courts, therefore, either reject the defense or stretch the facts to construct the male ideal of imminence.[34] The "reasonable woman" standard that I endorse requires the recognition of a version of time very different from, but just as objective and truth-telling as white male standard time.

As a percept of reason, time is an essential template of human understanding. Time measurement is a human device for dealing with

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31. MacKinnon, *Toward Feminist Jurisprudence* (Book Review), 34 STAN. L. REV. 703, 732 (1982) (reviewing A. JONES, WOMEN WHO KILL (1980)).

32. For a further discussion of the positive use of stereotypes in law, see Scales, *The Emergence of Feminist Jurisprudence*, 95 YALE L.J. 1373, 1393-99 (1986).

33. *See* W. LAFAVE & A. SCOTT, *supra* note 25, § 5.7, at 458-59.

34. In these cases, courts look probably to irrelevant words or gestures on the part of the "victim" indicating an imminent, as opposed to an ongoing, lethal threat. Thus, even in cases involving a shocking history of abuse, the defendant must show that her eventual defensive response was triggered by some immediate act on the victim's part. *See, e.g.*, People v. Scott, 97 Ill. App. 3d 899, 902, 424 N.E.2d 70, 71 (1981) (the victim's tapping his wrist while on the telephone to indicate that the defendant should bring him his handcuffs); State v. Gallegos, 104 N.M. 247, 250-51, 719 P.2d 1268, 1272 (Ct. App. 1986) (the victim's calling the defendant into the bedroom just before she killed him). It seems in both cases, however, that the defendant would still be a battered woman and would still fear for her life even if these events had not happened. Those words or gestures may or may not have anything to do with her fear or her reason for killing her torturer when she did.

mortality. The idea of linear time evolved from the human desire for life to have meaning. In Western culture, linear time provides an eschatology, a notion of goals, an idea of the possibility of progress.[35] But, of course, linearity is not the only conceivable temporal modality. Linearity took on the guise of necessity in the age of Newton. Because modern physics required an objectively measurable rate at which time can be said to flow,[36] the emotional and practical need for time *measurement* was transformed into a need for unquestioned *absolute time.*

Linearity is fine for "scientific" endeavors. It made sense to me in college while solving Physics 101 problems. However, the history of time is really about the consolidation of male power. Women's bodies, for example, are on a twenty-eight day lunar cycle, yet "civilization as we know it" runs on a solar calendar. Though practical reasons for the solar calendar exist, in terms of planting and harvesting cycles, the solar calendar also reflects the subjectivity of patriarchy. For example, in the first century B.C., Julius Caesar commissioned a calendar that would decisively reject lunar measurement. July, named after the commissioner, had thirty-one days. August, named after Augustus Caesar, had only thirty days. Augustus refused to have fewer days than Julius; August, therefore, now has thirty-one days. The extra day was taken from February, which was already limping along on twenty-nine out of thirty days three out of four years.[37]

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35. *See* J. FRASER, TIME: THE FAMILIAR STRANGER 14, 21, 255 (1987).

36. *Id.* at 41. Pythagoras, of course, is the person to whom we can trace the worship of numbers, and hence the eventual allegiance to linear time, as "a shelter against the unpredictability of change." *Id.* at 26. And in the medieval age, "metaphysical bookkeeping," *id.* at 45, by way of clocks became all the rage, similar to the obsession with computers today. *Id.* at 57. Only in the post-Newtonian world, however, did time become nonmetaphysical and noncontingent. I would not attribute this sinister turn to Newton himself, who I think to be visionary and spiritual in the way that great physicists often are. For feminist commentary on Newton, see E. SOCOLOW, LAUGHING AT GRAVITY: CONVERSATIONS WITH ISAAC NEWTON (1988); Griffin, *Split Culture*, in HEALING THE WOUNDS: THE PROMISE OF ECOFEMINISM [hereinafter HEALING THE WOUNDS] 7, 9-10 (J. Plant ed. 1989) (suggesting that Newton's discoveries can be interpreted to mean profound connection with, rather than alienation from, nature).

37. J. FRASER, *supra* note 35, at 78. After the Julian Calendar came the Gregorian Calendar. The Pope's main concern was the timing of Easter Sunday. How many among us can predict a year in advance on which Sunday Easter will fall? I surely cannot. It should be the same in principle as the equinox, as it once was. However, the needs of the Catholic Church changed all that. Easter sets the rhythm of the ecclesiastical year. Easter must occur during early spring so that the Church gets credit for the rebirth of life. It cannot be closely contemporaneous with Passover, because if it were, the Christian god would have to share the credit. In short, Easter had to be temporally segregated for political reasons. *Id.* at 79-81. Because of this, in the middle ages the art of figuring Easter, or *computus*, became a very big deal. That is when clockmaking became a massive cultural undertaking. *Id.*

Time reflects how powerful males count the appearance of temporal flow so that it makes sense to them of their lives. Consider the designation "A.D." and the use of the century as a time unit. They were not invented until what we now call the sixteenth century.[38] The idea of counting years backward before the birth of Christ first appeared in the seventeenth century. The year of Christ's birth is designated 1 A.D.; the year preceding it is 1 B.C. No year "zero"[39] exists. No "free time" exists, no time comprehensible except in terms of male activity. Time has no void; it has only them.

J.T. Fraser articulated what I believe to be the truth about time:

> [T]here is no final standard to which one can point and state, "This is the rate at which the time of the world flows." There are only comparisons among clocks . . . . *To perform a time measurement it is necessary — and sufficient — to have two processes usable as clocks, as well as the conviction that their indications are connectable in a meaningful way. Such a conviction, when carefully stated and expressed in mathematical terms, is known as a law of nature.*[40]

Bingo. In the defense of women who kill their batterers, traditional white male law uses the ticking of a mechanical clock *plus* its own idea of linear time to define the "imminence" element. And, that gets called absolute — the way it has to be if her conduct is to be justified, as if it were all a law of nature.

I have no problem with the first measurement: seconds, minutes, and hours are very useful. The men in charge of time are now telling us that a second is the same as 9,192,631,770 vibrations of the cesium atom.[41] If they must play with atoms, these tinkerings seem a relatively harmless way to do it. I have a major problem, however, with the second measurement: white male standard linear time. The measurement that should count in these cases is not linear time, but contingent, overlapping, multivalent time.

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38. *Id.* at 92.

39. *Id.*

40. *Id.* at 59, 70 (emphasis in original).

41. *Id.* at 72. The United States atomic clock in Boulder, Colorado beeps worldwide every time its cesium atom has had 9,192,631,770 cycles. Two atomic clocks measuring each other should get out of step on the average only one second in every three million years. *Id.* However, even these fancy clocks do not do a particularly good job of measuring the solar year. An extra second has had to be added to the year 15 times since 1972 "because atomic clocks keep time better than the Earth." Twomey, *'80s Go into Overtime with an Extra Second on the Clock*, Wash. Post, Dec. 31, 1989, at B1, col. 2 (copy on file at the *Florida Law Review*).

We can call this latter "women's time." Some social science data speak of it. In a study of college undergraduate men and women, researchers found that young men operate in a "linear temporal world," whereas young women operate in a "contingent temporal world."[42] Thus, for men, education is a continuous process, with family as a nonproblematic adjunct to that pursuit. In contrast, the women's futures might involve a career, might involve a family, or might involve both, but in no set order or expectational pattern.[43] According to the researchers, these findings represent more than socially conformed aspirations about status attainment. Rather, the researchers argue, they suggest fundamentally different temporal frameworks: "linear futures" for men and "contingent futures" for women.[44] The study noted that "linear futures rest on an assumption of timelessness — of social orders as perpetual ongoings. Contingent futures rest on an assumption of interrupted time — of social orders as disrupted."[45] Imbedded in each are differential notions of time. Linear temporality means discrete events follow other discrete events. Contingent temporality is more dense, suggesting overlap in the occurrence of multiple, less boundaried, events.[46]

These data illustrate Julia Kristeva's theoretical treatment of women's time.[47] According to Kristeva, women have a problem with the time of history — time as project, as linear unfolding.[48] Rather, women's subjectivity retains repetition and eternity as the modalities of time. Repetition is time measured by cycles, gestation, biological rhythms, and cosmic events. The eternal modality views time as an illusion, as not really passing.[49]

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42. Maines & Hardesty, *Temporality and Gender: Young Adults' Career and Family Plans*, 66 SOC. FORCES 102, 108-11 (Autumn/Winter 1987). Unfortunately, as is often the case, this study gives no clear account of the race and economic status of the participants.

43. *Id.*

44. *Id.*

45. *Id.* at 112-13.

46. *Id.* at 116-17.

47. Kristeva, *Women's Time*, 7 SIGNS: J. WOMEN IN CULTURE & SOC'Y 13 (A. Jardin & H. Blake, trans. 1981).

48. *Id.* at 17.

49. *Id.* at 16. Kristeva suggests that these modalities are the conceptions of time in "mystical" cultures and in certain "recent scientific preoccupations." *Id.* at 17. For a discussion of the former, see P. ALLEN, *The Ceremonial Motion of Indian Time: Long Ago, So Far*, in THE SACRED HOOP 147-54 (1986). By reference to science, I assume that Kristeva refers to some highly speculative interpretations of quantum mechanics and relativity theory. *See, e.g.*, F. WOLF, PARALLEL UNIVERSES: THE SEARCH FOR OTHER WORLDS 213-24 (1990). In fairness, however, the modalities of "women's time" described in the text are not substantive parts of the "new physics." Rather, contemporary physics, in demonstrating the contingency and obser-

I recognize these approaches in the wise women I know. They acknowledge that they are "in the field of time," in the sense of living a life bounded by birth and death. However, they see birth and death as mere markers in a much larger cycle. They pursue their daily tasks and make plans in accordance with linear time measurement. But these are practical accommodations, not expressions of allegiance. These women could not endure life except in their conviction that they — that all of us — are part of an expression of eternity.

Kristeva calls for a "third phase of feminism," which is a mixture of modalities of time.[50] The goals of the third phase are to insert women's time into history and radically reject the subjective limitations imposed by this civilization's idea of time.[51] This project consists of an effort "to break the code, to shatter language, to find a specific discourse closer to the body and the emotions, to the unnameable repressed by the social contract."[52]

And that, in broad philosophical language, is my idea of feminist lawyers' goal for the 1990s: to enter the third phase. This goal aspires not only to use law to its fullest, but also to transform its discourse to meet women's experience. In the context of battered woman's defense cases, to name "the unnameable repressed by the social contract" is to continue to expose and resist the realities of violence against women in spite of the denial and the silence, in spite of the institutions that shield it.[53] The law needs to recognize multiple modalities of time so that law might recognize something "closer to the body and the emotions" of women. "Breaking the code" requires us to use our temporal flexibility to reach cases that matter and to hurdle falsely imposed barriers created by someone else's subjectivity. As lawyers, because words are our business, we should be able "to find a specific discourse." By listening closely to the stories of abused women around

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vor-dependency of time measurement, has opened the possibility of recognizing many alternative modalities. *See, e.g.*, B. D'ESPAGNAT, REALITY AND THE PHYSICIST: KNOWLEDGE, DURATION, AND THE QUANTUM WORLD 217-19 (J. Whitehouse & B. D'Espagnat, trans. 1989).

50. The first phase of feminism, according to Kristeva, was what United States feminists call liberal feminism: women seeking their place in linear time, their part in the logic of identification. Kristeva, *supra* note 47, at 18-19. In contrast, the second phase corresponds to what we in the United States call cultural feminism. According to Kristeva, it demands "recognition of an irreducible identity, without equal in the opposite sex and, as such, exploded, plural, fluid, in a certain way nonidentical, this feminism situates itself outside the linear time of identities . . . ." *Id.* at 19.

51. *Id.* at 20.

52. *Id.* at 24-25.

53. *See* A. DWORKIN, *A Battered Wife Survives* and *What Battery Really Is*, in LETTERS FROM A WAR ZONE: WRITINGS 1976-1989 [hereinafter LETTERS], at 100, 329 (1989).

and among us, we can help articulate provisional rules, or standards, or five-part tests, or whatever the law feels it has to have in order not to crush us. We can buy some breathing room.

Like time, space is a percept that both men and women necessarily employ to understand their world. However, their respective concepts of space are not necessarily the same. According to the French feminist, Claudine Herrmann, men's space is one "of domination, hierarchy and conquest, a sprawling, showy space, a *full* space."[54]

In Anglo-American law, we see this domination-based idea of space in the nearly absolute primacy of property over other values. Within property law, we see it in the primacy of the notions of "fee simple ownership" and "beneficial use." In every course I teach, some version of these ideas emerges as the real decisionmaking criterion. Again, the women students tend to find it shocking, and only slightly less so than the Native American students who have been raised on reservations or pueblos and for whom the idea of dominating the land in any way is sacrilege. The same attributes of property pertain more generally to the white male notion of space: space is divided; the acquisition and "protection" of property justify violence; property boundaries must be defined and controlled; property has meaning because property is infused with the owner's ego.[55]

Women, on the other hand, as well as people of many other cultures, respect and cultivate empty space.[56] For us the void is a positive value, bespeaking a very different relationship between self and environment.[57] Empty space is not only a friendly epistemological and

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54. Herrmann, *Women in Space and Time*, in NEW FRENCH FEMINISMS 168, 169 (1980) (emphasis in original).

55. Nationalism is of course a major component of this way of spacial thinking. As Andrea Dworkin puts it:

> The United States has property where the United States does business, wherever that is. Oil that the United States needs rests on United States property wherever it happens to be. Europe is United States property if the United States wants to base missiles there. Any place the Soviets are — including any barren rock in Afghanistan — is United States property waiting to be rescued from foreign invasion. United States property includes the multinational corporation, the factory, and the sweatshop. Women and children are also property: fenced in, guarded, frequently invaded.

A. DWORKIN, *Preface to the British Edition of* Right-Wing Women, in LETTERS, *supra* note 53, at 185, 192.

56. Herrmann, *supra* note 54, at 169.

57. I am impressed by the work of women in the ecofeminism movement, which is attempting to blend contemporary feminist theory, politics, and spirituality with ecological principles and eastern and Native American ideas. *See generally* HEALING THE WOUNDS, *supra* note 36 (useful introduction to this body of work).

spiritual phenomenon; empty space is necessary to our survival. Empty space acts as a buffer between women and all that threatens us.

Again, the battered woman's defense is illustrative. The common law requirement of "imminence" entails physical proximity between the woman and the threatening bodies or weapons. That proximity demonstrates the requisite immediate possibility of carrying out a threat, like Newtonian billiard balls about to connect. From the woman's point of view, however, the space around her need not be filled with flailing limbs and weapons in order to be threatening. The space need only be filled — by the man's definition of it, by his demonstrated ability to control it, by his need to fill it.

Similar lessons from battered woman's defense cases apply to the percept of causality. Consider the concept of "learned helplessness." The battered woman believes she can do nothing to change the situation; she cannot affect the realities of her own life.[58] She causes nothing; she is a walking effect of something else.[59] She understands "agency" as something belonging only to the man and as something entirely unpredictable and incomprehensible.[60] This conviction is extreme in the case of battered women, but true to some extent in most women's lives. Again, social science data support this assertion. Women's view of time as contingent is a reflection of partial autonomy and forced flexibility. In pursuing linear time, men take their autonomy for granted. They assume that they will be able to enact their futures.[61] The men act in accordance with ideas of legal, moral, and political personhood, all of which are in short supply for women.[62]

The notion of personal agency is, however, overblown and very dangerous. People do have agency, just less than many of us suppose. If I plant a seed in the clay soil of New Mexico and attend it worshipfully, it might grow. If I send a letter, I might get a response. If I teach in a matrix of unconditional love, some student might think twice before indulging in lawyerly atrocities. I must believe that all these things are true. The fact of death, our inability to comprehend the totality of the world, and our inability to know our destinies create a need for us to define ourselves as more than mere specks in the plasma of the universe. Yet, we are specks, and our sanity depends

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58. *See* Kinports, *supra* note 24, at 398 (citing L. WALKER, *supra* note 27, at 45-54 and other authorities).

59. *See id.*

60. *See id.*

61. Maines & Hardesty, *supra* note 42, at 116.

62. *See* Scales, *supra* note 20, at 34-40.

upon recognizing this fact. This world is indeed out of balance. The craving for causal agency — the need to be super-specks — has resulted in extraordinarily unrealistic and destructive organizations and allegations of false necessity.[63]

Agency is part of a larger habit and privilege of causal analysis. We have to believe that causes (including individuals) can have effects. But causation, an idea so central to human enterprise, is itself a political construct. I am not referring to the legal doctrine of proximate cause, which even conservative lawyers admit is political. I mean the legal cause-in-fact inquiry and the causal judgments we make as people hundreds of times every day. Lawyers have an apparently endless need to insist that the cause-in-fact inquiry is factual, an observable empirical process.[64] But, really, that just is not so. If empiricism is the standard, as the law claims, then David Hume eliminated the possibility of causal certainty three-and-a-half centuries ago. According to Hume, the king of the eighteenth-century British empiricists, any causal allegation has the following three elements: (1) The alleged cause and effect are contiguous in space and time. (2) The alleged cause and effect are in constant conjunction, i.e., every time A occurs, B occurs. (3) There is a necessary connection between alleged cause and effect.[65] We can observe the first two, but never the third. The third step, the necessary connection between cause and effect, is where the magic happens. The only "factual" thing about what we call causation is really mere correlation. Hume's factors (1) and (2), the closeness of events in time and space and the unfailing repetition of the pair of events, respectively, describe perfect correlation. The third factor, the necessary connection between a supposed cause and supposed effect, simply is a habit of perception — an ingrained and extremely useful habit, but nonetheless merely a habit.[66]

Similarly, the way we isolate causes and effects is habit. I say the rock got warm because it was lying in the sun: isolated cause, isolated

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63. This causal macho stuff is largely a western, perhaps mostly United States fetish. A friend of mine once was learning Swahili in Tanzania. She said that in her language class one of their dialogue exercises was the following: Question — "Who broke it?" Answer — "Nobody broke it, it just broke." So be it.

64. *See, e.g.*, Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001 (1988).

65. *See* D. HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING 16-37, 50-53 (E. Steinberg ed. 1977) (1st ed. 1748).

66. I actually believe that all three parts of Hume's test denote social habits. Our social circumstances also determine what we can perceive and in what order. *See* S. LANGER, PHILOSOPHY IN A NEW KEY 89 (3d ed. 1957) ("Our merest sense-experience is a process of *formulation.*") (emphasis in original).

effect. But much more is going on. The rock got warm also because of its chemical composition, because of its position relative to the sun, because of geological activity of millions of years ago, because no clouds appeared in the sky that day, because of the weather patterns everywhere, because of the route a butterfly chose to fly over Brazil,[67] and because the goddess allowed the sun to work customarily that day. The effects of all those infinite causes are infinite: we never could perceive or count the consequences of this piece of earth being warmed at this moment.

Thus, when we designate a cause and an effect, we exercise a habit and impose our own organization on a mere slice of all the relevant data. Some commentators point to the truly amazing fact that we agree on so many causal propositions as proof that causation is a factual matter.[68] That agreement, however, really is a testament to the conformity of our training as well as to the immense practicality of causal judgments. And, a little investigation reveals that we really agree only on the easiest cases, like the rock warming and the orange juice cooling. Complicate the system just a little, and disagreements abound. For example, disagreement exists when we introduce the necessity of a negative inference, such as in the "but for" test of cause in-fact as applied in *Reynolds v. Texas & Pacific Railway*.[69] In *Reynolds*, which appears in almost every torts text, a woman fell down an unlit stairway, which had no handrail.[70] The trial court found that the failure to have a light and a handrail "caused" the fall.[71] Notice that the situation met only the first of Hume's conditions for causation: contiguity in space and time between alleged cause and alleged effect.[72] The situation did not meet Hume's second condition:[73] every person who tries to descend an unlit, unrailed stairway does not fall. Nor could we prove the necessary connection between cause

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67. This is the so-called Butterfly Effect, the nickname for the scientific concept of "sensitive dependence on initial conditions." J. GLEICK, CHAOS: MAKING A NEW SCIENCE 8-31 (1987). It describes systems, such as the weather, that are "aperiodic"; they never exactly repeat themselves. *Id.* at 22-23. The weather is not susceptible to long-range forecasting because all of the initial conditions that effect the system — such as the butterfly disturbing the air thousands of miles away — cannot be known. *See Predictability: Does the Flap of a Butterfly's Wings in Brazil Set Off a Tornado in Texas?*, address by Edward Lorenz, American Association for the Advancement of Science Annual Meeting (Dec. 29, 1979).

68. *See, e.g.*, Wright, *supra* note 64, at 1018.

69. 37 La. Ann. 694 (1885).

70. *Id.* at 696-98.

71. *Id.* at 695, 698.

72. *See supra* text accompanying note 65.

73. *See id.*

and effect: not even the sophisticated processes that detect quarks and photons will discover any "cause-ons" leaping from the stairs to Mrs. Reynolds.[74] When we ask juries to make causal inferences, we ask them to exercise their habit, and very often with data insufficient to establish even correlation.

Causation helps us to make sense of our world as it appears to work. That role of causation is human and beautiful. However, we also must recognize how those in power can abuse causal arguments. Slippery slope arguments are ubiquitous in law.[75] Pursuant to our old friend the slippery slope, society cannot allow consenting adult homosexuality because that will lead society to condone incest. Society cannot allow civil rights actions against pornographers because next thing you know we will be banning *The Sound of Music*. Society cannot allow the euthanasia requested by terminally ill patients because tomorrow we will be slaughtering uncomplaining hemorrhoid victims. These arguments say that the reason behind any change in any rule will necessarily become obscured, and later decisionmakers necessarily will reach horrid results. The basic argument is that people cannot handle change.

Slippery slope arguments almost always entail some causal "crackpotism." But they and other casual crackpot arguments make the political world go round.[76] For instance, we cannot distribute sterile needles to drug users for AIDS prevention because doing so would imply that society condones drug use. We have not had a nuclear war since the United States destroyed Nagasaki because the superpowers have so many nuclear weapons. Academics cannot disclose the content of tenure deliberations because that would chill honest exchange and we would end up with unqualified college teachers.[77] And the following one is my favorite: When the draft registration controversy was going on in 1980, and the Congress was in a mad scramble for reasons why women should not be registered, some congressperson argued that if

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74. *See id.*

75. One positing the slippery slope argument would concede the innocuousness of the instant case, but would claim that further extensions would lead to pernicious results down the road because no logical or legally principled line can be drawn. Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361-62, 378 (1985).

76. The causal crackpotisms in the text are just a few of my favorites. Please share yours, as I would be happy to keep a central list. Write me at University of New Mexico School of Law, 1117 Stanford N.E., Albuquerque, New Mexico 87131.

77. *See, e.g.*, EEOC v. University of Notre Dame du Lac, 715 F.2d 331, 340 (7th Cir. 1983). Since the *Notre Dame* decision, the United States Supreme Court unanimously has rejected the claim that a privilege should automatically protect tenure deliberations. University of Pennsylvania v. EEOC, 110 S. Ct. 577 (1990).

we register women, we might have to draft them; and if we draft them, they may have to fight; and if they have to fight, and if we get into a conventional war with the Russians, and the Russians win, they will feel bad because they beat a bunch of girls.[78]

These examples are not sound causal or even correlative argument. Rather, each of these is an assertion of some kind of agency for some other purpose. The congressperson's concern for the Soviets' feelings masked the pathological need to protect the manliness of war.[79] The academics' "star chamber" approach to tenure really assures academics that their subjectivity defines education, thus preserving the Academy, and reason itself, in their own image. The theory of nuclear deterrence is about justifying the military economy, the "Dr. Strangelovian" self-importance of the military, and the planet-threatening pathology of all that.[80] The argument against distributing sterile needles provides the illusion that society has some influence over drug use, the illusion that George Bush's opinion matters to anyone connected to the drug trade.

These causal crackpotisms are sad for several reasons. First, of course, they reveal the low intellectual content of public discourse. In addition, they illustrate that politics has become largely a contest of personal pathologies. The causal arguments are undoubtedly a source of comfort to those in power, but they are also evidence of a rampant disease: those people are control addicts.[81] Their causal arguments do not explain anything about the world as we need to know it. Rather, their arguments are for the purpose of consolidating power and attributing praise and blame.[82] Finally, and saddest to me, such arguments implicitly deny that things can be different. The subtext of this discourse is that the world works only according to our sloppily maintained mechanistic ideas; only people are capable of changing how things are, and we are really not up to it. There is, these arguments tell us, no mystery in the world.

But mystery does exist. For this reason, I take some delight in the proliferation of the "shit happens" bumper sticker. Of course, I

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78. I have plowed without success through newspapers and Congressional Records to find the report of these remarks. If I made them up, I am sorry, but I don't think I did.

79. *See* Scales, *supra* note 20, at 37-46.

80. *See* H. CALDICOTT, MISSILE ENVY 74-110 (1986); B. EASLEA, FATHERING THE UNTHINKABLE: MASCULINITY, SCIENTISTS, AND THE NUCLEAR ARMS RACE 166-67 (1983); Kittay, *Womb Envy: An Explanatory Concept*, in MOTHERING, at 94 (1984).

81. *See* Scales, *Midnight Train*, *supra* note 21.

82. Philosopher Sarah Hoagland argued that the compulsion to attribute praise or blame to every situation is a mainstay of the politics of domination. S. HOAGLAND, LESBIAN ETHICS: TOWARDS NEW VALUE 212-21 (1988).

realize that the slogan has been popularized largely by those who wish to be destructive but not accountable.[83] But when the bumper sticker is affixed for the right reasons, the slogan is about embracing the mystery and the paradox that make life worth living. It acknowledges that we did not make this beautiful world, can never understand it completely, and do not have the authority to destroy it.

In the hard cases of today, the usual response of the legal system is to slap on the "shit happens" bumper sticker for all the wrong reasons. The cutting edge of torts practice, for example, does not involve linear causation in the "John-hit-Mary" sense. The hard cases of today are not atomistic exercises; they are not about people falling down stairs. They are about capitalism out of control and the incredible capacity of the military-industrial complex to injure masses of people.

In these cases we see three major issues in legal causal analysis: the problem of imperfect data, the problem of infinite causal predicates, and the problem of social causation. Agent Orange cases exemplify all the causal problems. The imperfect data problem has to do with insufficient passage of time. Scientific studies to date do not show a statistically significant cancer increase among Vietnam veterans.[84] Similarly, studies have not shown a significant difference in birth defects between Vietnam veterans' children and other children.[85] The problem is that cancers take time to develop — forty years in the case of solid tissue cancers in Japanese atomic bomb victims.[86] Genetic defects may not manifest for generations. As Judge Jack Weinstein pointed out, that information cannot be available in time to affect current litigation.[87]

The infinite causal predicates problem is especially acute in Agent Orange cases. The plaintiffs cannot "prove" that their diseases are "caused" by dioxin exposure. Whereas adenosis and clear cell adenocarcinoma of the vagina and uterus are largely unknown among women whose mothers have not taken DES, the harms attributed to Agent Orange are distributed in the population in a way indistinguishable from "naturally occurring" versions of the diseases.[88] The cancers suf-

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83. *See* 36 UTNE READER, Nov./Dec. 1989, at 89 (cartoon by Bering showing the Exxon Valdez with a "shit happens" sticker on its side).

84. *In re* "Agent Orange" Prods. Liab. Litig., 597 F. Supp. 740, 787-88 (E.D.N.Y. 1984) (approving settlement between Vietnam veterans class and Agent Orange manufacturers).

85. *Id.* at 788-90.

86. *Id.* at 795.

87. *Id.* at 800-28 (28 pages devoted to statutes of limitations issues).

88. *Id.* at 834-35.

fered by Vietnam veterans could be caused by anything other than Agent Orange, including the stress associated with Vietnam service.[89]

At this point in the Agent Orange analysis we see the "social causation" problem. The diseases associated with Agent Orange could be a function of attitudes and emotions. What if the cancer of a veteran is caused by Agent Orange plus his stress? What if Agent Orange has its lethal effects only upon people who so far have survived the horrible emotional experiences of being told one's perception of events is erroneous? What if his disease would not have happened "but for" each of those predicates?

My guess is that most of us do not have personal difficulty with Agent Orange cases. When I exercise my habit of causal inference, it seems obvious to me that there is a sufficient connection between Agent Orange exposure and veterans' problems. As a post-Einsteinian, post-quantum-physical citizen of the late twentieth century, and as a woman, my universe of possible causal inference is greatly expanded. But is the law sufficiently open minded? The Agent Orange cases have forced federal judges to re-evaluate causation in ways that are on the right track. Judge Thelton Henderson of California recently has ordered the Veterans' Administration to use what he calls a "statistical association" test as opposed to a "cause and effect" test in ruling on Agent Orange claims.[90] However, Henderson still implicitly recognized a factual difference between correlation and causation. Judge Jack Weinstein went further, admitting that "particularistic evidence" — some data beyond statistics which connects this plaintiff to this defendant[91] — is itself probabilistic and essentially a leap of faith.[92]

I believe that we are seeing, in Thomas Kuhn's language, an impending paradigm shift on the nature of causality.[93] One sees the movement in both the discussions described above and in the violent

89. *Id.* at 789.

90. Nehmer v. United States Veterans' Admin., 712 F. Supp. 1404, 1416-20 (N.D. Cal. 1989).

91. *See* Smith v. Rapid Transit, Inc., 317 Mass. 469, 58 N.E. 2d 754 (1945).

92. *In re* "Agent Orange" Prods. Liab. Litig., 597 F. Supp. 740, 833-37 (E.D.N.Y. 1984). "As a matter of rough justice . . . [w]e are in a different world of proof than that of the archetypical smoking gun. We must make the best estimates of probability that we can using the help of experts such as statisticians and our own common sense and experience with the real universe." *Id.* at 838. *But cf.* Wright, *supra* note 64, at 1064 ("This probability-based aggregative approach is not consistent with the *traditional* concept of corrective justice that is *held by ordinary people* and is implemented by the courts.") (emphasis added). One must ask, *whose* tradition and *which* ordinary people?

93. *See generally* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 66-68 (1962) (discussing the paradigm shifts in response to newly discovered anomalies inadequately addressed by existing paradigms).

resistance to change. Consider, for example, the radiation injury cases arising from the atmospheric nuclear testing at the Nevada Test Site.[94] Between 1951 and 1962, the United States detonated over 120 nuclear bombs in the atmosphere upwind of St. George, Utah.[95] Recently, the downwinders have experienced increased incidence of leukemia and other cancers.[96] When I consider this situation I think, Good God, what more do the plaintiffs need? An atomic bomb has been detonated in the air every six weeks or so, you are downwind, and everybody you know has leukemia. Legally speaking, of course, it could not be that simple. In an extraordinary 225-page opinion, Judge Jenkins of the District of Utah did a thorough probabilistic/causal analysis. His opinion devoted over one hundred pages to nuclear physics principles, fallout patterns, and inferences drawn from every conceivable permutation of radiation exposure and the kind, severity, and time of appearance of the cancer.[97] In a laudable if insufficient attempt to push the envelope on causation, Judge Jenkins held the government liable to several plaintiffs.[98]

The United States appellate courts did not address the causation issues at all; they instead reversed on the ground that the United States could not be liable pursuant to the discretionary function exception to the Federal Tort Claims Act.[99] Now, the "discretionary function" exception is a can of worms worthy of vehement feminist attack in its theory and practice.[100] The target here is the shifting basis of the dispute. For decades, the government and other cavalier death-dealing risk-takers have been able to rely on linear atomistic causation

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94. For an excellent account of the entire context of the downwinders' claims, see H. BALL, JUSTICE DOWNWIND: AMERICA'S ATOMIC TESTING PROGRAM IN THE 1950'S (1986).

95. Allen v. United States, 588 F. Supp. 247, 462-66 (D. Utah 1984), *rev'd*, 816 F.2d 1417 (10th Cir. 1985), *cert. denied*, 108 S. Ct. 694 (1988).

96. *Id.* at 258.

97. *See generally id.* at 247-472.

98. *Id.* at 446-47. *Allen* involved approximately 1200 plaintiffs. The judge chose to deal with only 24 "bellwether" cases and found in favor of eight individual plaintiffs. *Id.* at 258, 446-47.

99. *See Allen*, 816 F.2d at 1424; *Allen*, 108 S. Ct. at 694. The fact that the case involved a military operation, of course, made it all the more unreachable. And, in my view, the unreachability of military issues, and thus in this case the unreachability of causation issues, is gender based. *See* Scales, *supra* note 20.

100. The result of that exception is that civilian victims have no remedy: not against the government, as the exception was interpreted in the *Allen* case, nor against private contractors involved in nuclear testing due to the "Warner Amendment," 42 U.S.C. § 2212 (Supp. IV 1986), whereby contractors have the same immunity as the government. *See* Titus & Bowers, Konizeski *and the Warner Amendment: Back to Ground Zero for Atomic Litigants*, 1988 B.Y.U. L. REV. 387.

to absolve them of their arrogant excesses.[101] However, in the recent Agent Orange and radiation injury cases, the government and the military had no choice but to abandon the causal arguments in favor of immunity arguments. The paradigm shift was too threatening and the tide in favor of an expanded notion of causation was too strong. Thus, the controversy reached an explicitly political, as opposed to an allegedly "fact-based," plane.[102]

What is next in the wonderful world of shifting causal paradigms? What role do women play? In any paradigm shift, outsiders are key.[103] Changing any cherished idea requires arguments that stem from experience not acknowledged as valid by that cherished idea.[104] In the end, personnel must change, as acknowledged by the great physicist Max Planck: "[A] new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it."[105]

Women are among the key outsiders in this paradigm shift. Something that might be called "women's causality" corresponds to Julia Kristeva's notion of "women's time." In my experience, women have the same problem with the legal requirement of linear causation as they have with linear time. As in temporal judgments, women reject the linear and the discrete for the repetitive, the multiple, the contingent.

We are also familiar with social causation: the role that place, culture, and conditioning play in susceptibility to harm. Consider the DES cases. My mother says that when she was pregnant with me the threat of miscarriage was consistently in the news. Drugs like

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101. For extensive consideration of whether nuclear testing radiation caused harm to sheep in Utah and evidence that the government concealed data concerning causation, see Bulloch v. United States, 145 F. Supp. 824 (D. Utah 1956) (insufficient evidence of causation), *vacated* 95 F.R.D. 123 (D. Utah 1982) (on grounds of government's fraud), *rev'd* 721 F.2d 713 (10th Cir. 1983) (insufficient evidence of fraud).

102. The Congress, thus far, has provided only cancer screening and research for the civilian downwinders. Human Services Reauthorization Act, Pub. L. No. 98-558, 98 Stat. 2878 (1984) (codified in scattered sections of 20 U.S.C. and 42 U.S.C.). Various bills, introduced and reintroduced since 1979, either to provide direct compensation or to repeal the Warner Amendment, have not been successful. *See* Titus & Bowers, *supra* note 100, at 405-08.

103. In both the Agent Orange and Nevada Test Site downwinder cases, the plaintiff classes were composed of likely *patriots*: veterans in the first scenario, primarily Mormons in the second. However, these insiders were transformed into outsiders by the government. On the fascinating issue of the developing sense of betrayal on the part of Mormons, see H. BALL, *supra* note 94.

104. T. KUHN, *supra* note 93, at 57, 61-62.

105. M. PLANCK, SCIENTIFIC AUTOBIOGRAPHY AND OTHER PAPERS 33-34 (1949), *quoted in* T. KUHN, *supra* note 93, at 150.

DES seemed so necessary that women could not resist them. She cannot remember what she took. She knows only that she did what the doctor said.[106] To talk about my mother's "choice" to take the drug under those circumstances, or to say that the drug companies harmed me, in the "John-hit-Mary" sense, is ridiculous. Consider pornography. Traditionalists and civil libertarians want us to "prove" that pornography "causes" sexual harm to women.[107] However, that linear sense of causation inadequately describes the effect pornography has on women by ignoring its limiting effect on our aspirations, our opportunities, and our chances for mental and physical survival.[108]

The acknowledgement of women's causality that I propose has the additional virtue of embracing mystery. The worst aspects of Mount Rushmore were its denial of the possibility of mystery and its violation of the Native American admonition that we must live lightly on the earth. I am prepared to recognize the torts of "insult to mystery" and "ecological arrogance." At the very least, we must consider such transgressions in evaluating causal responsibility. We are accountable, not because we are isolated nomads who must respect each other's alienated space, but because we are participants in this universe, not controllers of it. Let breach of the duty of stewardship to the earth be the test. Let the law listen for how heavy the risk-taker's step falls. I propose that we explicitly acknowledge the fluidity of cause. Let the jury take into account different versions of causality and apply a version suitable to the case at hand, with due regard to the differing causal perceptions of and the power differential between the parties.

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106. Personal conversation with Elizabeth Randel Scales (1980).

107. For an article insisting that very traditional causal concepts be applied in the case of pornography, see D'Amato, *A New Political Truth: Exposure to Sexually Violent Materials Causes Sexual Violence*, 31 WM. & MARY L. REV. 575 (1990). Professor D'Amato went so far as to say that "[c]orrelational evidence cannot *ever* establish causality," *id.* at 591 (emphasis in original), and to suggest that the problem of social causation (as I have called it in the text) is necessarily a matter of "introspection and intuition." *Id.* at 587 n.35. For a much more modern treatment of the meaning of "causation" within the pornography debate, see Schauer, *Causation Theory and the Causes of Sexual Violence*, 1987 AM. B. FOUND. RES. J. 737 (1987).

108. Catharine MacKinnon has produced the most extensive legal work on a feminist understanding of pornography. *See, e.g.*, C. MACKINNON, FEMINISM UNMODIFIED 127-213 (1987). In my view, her finest contribution to date is MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321 (1984). Professor MacKinnon has not spoken extensively to the causation issue, except to say that, "[i]t is difficult to avoid noticing that the ascendancy of the specific idea of causality used in obscenity law dates from around the time that it was first believed to be proved that it is impossible to prove that pornography causes harm." *Id.* at 337-38. She also called for "an entirely new theory of social causality . . . by which pornography *constructs* women and sex, defines what 'woman' means and what sexuality is, in terms of each other." *Id.* at 344 (emphasis in original).

To recognize alternative modalities of time, space, and causality is just a beginning in an effort to respond to the fundamental diversity in human understandings. My proposal only would crack the legal system's door, which has been closed to outsiders and locked with false claims of necessity as to how the world works. Yet, even this modest proposal has high stakes.

I do not believe the difficulty is doctrinal. In this paper I do not propose explicit alternative theories of time, space, and causality. I have not created alternative standards, tests, or jury instructions. I hope we can all participate in that enterprise and do not think it will be difficult. The real obstacles, of course, are political. My proposal includes an intended threat of economic redistribution. It will cost the United States, for example, a large amount of money to compensate the downwinders in Utah, Arizona, and Nevada for injuries created by nuclear testing. But in this historic time, this country inevitably must detach from militarism and reconceptualize the military budget. Military economies, such as those of the United States and the Soviet Union, will become civilian economies.[109] Part of that conversion will require cashing out the liabilities incurred by the military economy. The damages done to the downwinders are just one of the costs of having participated in a dirty business. The books must be balanced before we can realize the "peace dividend."

We can manage that economic difficulty; history is forcing those in power to do so. The ultimate obstacle to my proposals is gender politics. To multiply the modalities of time, space, and causality cognizable by law is to make law less reliable as an institutional support of male dominance. That will not be well-received — not consciously, nor at deeper levels of white male psychology.

Julia Kristeva helps us to understand what is at stake in choosing among modalities of time. According to her, the identity of groups in power depends upon sedimented history, and that in turn depends upon linear time.[110] Some women, meanwhile, have rejected linear temporality, and have come to distrust the whole political dimension of life, instead devoting themselves to the project of giving expression

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109. This process of "economic conversion" requires detailed economic analysis, economic creativity, and a transformation in our ideas about the economic mechanisms and obligations of the nation-state. The best work in the area of economic conversion is by Seymour Melman. *See, e.g.*, S. MELMAN, OUR DEPLETED SOCIETY (1965); S. MELMAN, THE PEACE RACE (1962); S. MELMAN, THE PERMANENT WAR ECONOMY (1974); S. MELMAN, PROFITS WITHOUT PRODUCTION (1983).

110. Kristeva, *supra* note 47, at 13-14.

to "female subjectivity."[111] In rejecting linear time, these women threaten the very basis of this culture's idea of self-worth. As Kristeva stated, "[The women] are attempting a revolt which they see as a resurrection but which society as a whole understands as *murder* . . . . [T]hat is precisely where the stakes are, and they are of epochal significance."[112]

These same stakes pertain to recognizing alternative conceptions of space and causality. The cries of irresponsibility and lawlessness that these proposals will provoke will be just surface expressions of a more deeply felt threat. We must be prepared for that. And, we must be willing to meet the challenges, because the struggle for recognition of alternative perceptions is nothing less than the struggle for human dignity. To fail in that struggle will leave us again silent, worthless, and, from the point of view of those that define reality, nonexistent.

> [A]nd still we have to stare into the absence
> of men who would not, women who could not, speak
> to our life — this still unexcavated hole
> called civilization, this act of translation, this half-world.[113]

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111. *Id.* at 19. Kristeva described this phenomenon as the "second phase" of feminism. *See supra* note 50.

112. Kristeva, *supra* note 47, at 25 (emphasis in original).

113. Rich, *Twenty-One Love Poems*, No. V, in THE DREAM OF A COMMON LANGUAGE 27 (1978).