

**EVERYTHING OLD IS NEW AGAIN:  
A FOREWORD TO THE TENTH ANNIVERSARY EDITION  
OF THE DUKE JOURNAL OF GENDER LAW & POLICY**

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It was the summer of 1848 that Elizabeth Cady Stanton and Lucretia Mott called together the first conference to address women's rights in Seneca Falls, New York.<sup>1</sup> Relying on the Abolitionist movement's analysis of human freedom, Stanton and Mott laid the groundwork for what would become the women's movement in America.<sup>2</sup> During the two-day conference, the participants drafted and ratified the Declaration of Sentiments and Resolutions, using the Declaration of Independence as a model.<sup>3</sup> The Declaration of Sentiments demanded that the rights of women be acknowledged and respected by society.<sup>4</sup> It is a fascinating document, if only because it reminds us that many of the struggles for women's equality that we face today are really just old problems with new twists.

Most relevant to this Tenth Anniversary Edition of the *Duke Journal of Gender Law & Policy* is what our foremothers wrote about women within the context of criminal activity and moral culpability. The Declaration of Sentiments proclaims:

The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her. To prove this, let the facts be submitted to a candid world. . . .

He has made her morally, an irresponsible being, as she can commit many crimes with impunity, provided they be done in the presence of her husband. In the covenant of marriage, she is compelled to promise obedience to her husband, he becoming, to all intents and purposes, her master – the law giving him power to deprive her liberty and administer chastisement.<sup>5</sup>

The Declaration of Resolutions calls for an end to this inequality of treatment:

Resolved, that the same amount of virtue, delicacy, and refinement of behavior that is required of woman in the social state also be required of man, and that

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1. See generally Carolyn S. Bratt, *The Sesquicentennial of the 1848 Seneca Falls Women's Rights Convention: American Women's Unfinished Quest for Legal, Economic, Political, and Social Equality*, 84 KY. L.J. 715, 715 (1995-96).

2. *Id.*

3. *Id.*

4. *Id.* at 715-720.

5. THE BIRTH OF AMERICAN FEMINISM, THE SENECA FALLS WOMEN'S RIGHTS CONVENTION OF 1848 (Virginia Bernhardt & Elizabeth Fox-Genevese eds., 1995).

the same transgressions should be visited with equal severity on both man and woman.<sup>6</sup>

The Declaration considered being held accountable for one's crimes central to women's greater demands of being able to make moral and political decisions independent of their husbands or male guardians.

This portion of the Declaration of Sentiments was, in part, a reaction to an American legal doctrine, often referred to as the "marital coercion defense," in which the law excused a woman's otherwise criminal behavior because it was assumed that wives acted at their husbands' direction and had, therefore, neither moral independence nor a distinct "legal personality."<sup>7</sup> Thus, women, so long as they were married, often had an "excuse," or what has now become known as a gender-specific defense, in criminal cases. Indeed, the law expected that a dutiful wife would obey her husband's commands, and therefore it was neither considered nor desired that she could act of her own free will.<sup>8</sup> Of course, not only were women expected to obey their husbands, but they also were subject to physical chastisement (chastisement is the proper word) from them when they failed to do so.<sup>9</sup>

In the nineteenth century, the law was not the only force that deprived women of moral responsibility and, correspondingly, legal and social rights. Psychologists and criminologists reinforced the notion that women were inferior to men in terms of moral agency. For example, Caesar Lombroso, the late-nineteenth century criminologist, argued that females were less evolved than males, and thus more childlike, weak, and passive.<sup>10</sup> As a result, he concluded they were less able to participate in independent activities like crime. Furthermore, because their primary evolutionary function was to bear and care for children, they were predominately unsuited for criminal activity.<sup>11</sup> Lombroso warned, however, that any activity that distracted women from their normal pursuits of being wives and mothers could awaken their "latent fund for wickedness."<sup>12</sup> This psychological explanation for women's deviance supported the social norm that women should be governed by their husbands' judgments.<sup>13</sup>

Although, in many ways, married women were protected from criminal culpability because their husbands acted as moral shields, unmarried women did not necessarily fare any worse, or better for that matter, depending on one's point of view. As Anne M. Coughlin explains, because single women were considered deviant for not being governed by a husband or other master, "the law

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6. *Id.*

7. Margaret J. Chriss, *Troubling Degrees of Authority: The Continuing Pursuit of Unequal Marital Roles*, 12 LAW & INEQ. 225, 228 (1993). It is interesting to note that in Anglo-Saxon England, women were accountable for their crimes because they were considered independent of their husbands. Christine G. Clark, *Women's Rights in Early England*, 1995 BYU L. REV. 207, 221.

8. Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 31 (1994).

9. Chriss, *supra* note 7, at 229-30.

10. See Cheryl Hanna, *Ganging Up on Girls, Young Women and their Emerging Violence*, 41 ARIZ. L. REV. 93, 120 (1999) (citing CAESAR LOMBROSO & WILLIAM FERRARO, *THE FEMALE OFFENDER* 121 (1895)).

11. *Id.*

12. Coughlin, *supra* note 8, at 39.

13. *Id.* at 40.

often intervened and provided unmarried women, especially from the lower classes, the kind of supervision expected from the absent husband.”<sup>14</sup> Until the 1970s, rather than be incarcerated, many deviant women were committed to mental hospitals or sanatoriums; they were mad girls, not bad girls.<sup>15</sup> Thus, social hierarchy and psychological theories worked in tandem to ensure that single and married women were both excused from criminal acts and deprived of a host of other legal and social freedoms.

It was not until the 1970s—more than 125 years after the Seneca Falls convention—that the marital coercion defense was finally abolished in the United States.<sup>16</sup> Since its elimination, a new phenomenon has developed - one that some have labeled a “decline of chivalry.”<sup>17</sup> For example, Rita Simon and Jean Landis, in their review of the criminal justice system’s changing response to women, conclude that, as a result of the women’s movement, criminal justice personnel are no longer treating women as leniently as they once did; rather, there has been a backlash resulting in harsher experiences for women who find themselves at the mercy of police and prosecutors.<sup>18</sup>

While there still exists a great deal of disparity in the ways in which men and women are treated in the criminal justice system, most often dependent on the crime that was committed, women are no longer treated with the kind of deference they once received, in part because the law no longer presumes them devoid of moral responsibility due to their husbands’ governance over them.<sup>19</sup> On the other hand, since the 1970s, the criminal justice system has become far more responsive to the ways in which men victimize women. For example, there are more laws protecting victims of domestic violence and rape, and psychologists increasingly study the ways women respond physically and emotionally to victimization.

Yet not everyone is celebrating these changes. Despite the fact that equal treatment—treatment as morally autonomous, rational, free actors—was central to our foremothers’ demands for women’s rights, many commentators and feminists consider the decline in chivalry as less than desirable for women and as further evidence of ongoing gender bias in the criminal justice system.<sup>20</sup> In

14. *Id.* at 46-47.

15. For a history of women and the criminal justice system, see generally FREDA ALDER, *SISTERS IN CRIME: THE RISE OF THE NEW FEMALE CRIMINAL* (1975); *THE CRIMINAL JUSTICE SYSTEM AND WOMEN: WOMEN OFFENDERS, VICTIMS AND WORKERS* (Barbara Raffel Price & Natalie J. Sokoloff eds., 1982); KATHLEEN DALY, *GENDER, CRIME & PUNISHMENT* (1994); RITA JAMES SIMON, *WOMEN AND CRIME* (1975); Dorothy E. Roberts, *The Meaning of Gender Equality in Criminal Law*, 85 J. Crim. L. & Criminology 1 (1994); Carol Smart, *Proscription, Prescription, and the Desire for Certainty: Feminist Theory in the Field of the Law*, in *LAW, CRIME AND SEXUALITY: ESSAYS IN FEMINISM* (1995).

16. Coughlin, *supra* note 8, at 29.

17. Ilene H. Nagel & Barry L. Johnson, *The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, & the Sentencing of Female Offenders Under the United States Federal Sentencing Guidelines*, 85 J. CRIM. L. & CRIMINOLOGY 181 (1994); Myrna S. Raeder, “Gender Neutral” Sentencing Wreaks Havoc in the Lives of Women Offenders & their Children, 8 CRIM. JUSTICE 20 (1993).

18. RITA J. SIMON & JEAN LANDIS, *THE CRIMES WOMEN COMMIT, THE PUNISHMENTS THEY RECEIVE* 23 (1991).

19. Chriss, *supra* note 7; Coughlin, *supra* note 8 and accompanying text.

20. See, e.g., Elizabeth Rapaport, *Gender Discrimination & The Death Penalty*, 25 LAW & SOC’Y REV. 367 (1991); Dorothy E. Roberts, *Foreword: The Meaning of Gender Equality in Criminal Law*, 85 J. CRIM.

contrast, others fear that the emphasis on female victimization has only reinforced notions of women's helplessness and need for protection, and ultimately justifies gender discrimination.<sup>21</sup>

It is ironic, and telling, and perhaps even sad, that questions about women's moral autonomy and psychological fitness still haunt both the law and psychology more than 150 years after Seneca Falls. The extent to which males coerce women into behaving in ways they otherwise would not, and the extent to which women have a unique psychology that prohibits them from exercising their free will under certain circumstances, are issues that lawyers and mental health professionals continue to ponder. More importantly, how does women's status in the criminal justice system relate to women's status in society?

Nowhere are the dilemmas posed by women's moral responsibility more troublesome than in situations involving domestic violence and infanticide. Cases in which women kill their male abusers or their young children are distinctly gendered acts. Unlike robbing a bank, selling drugs, or assaulting a peer, these two acts cannot be understood or analyzed without accounting for women's unique social and biological status relative to that of men's. These are acts that directly confront and reject a woman's traditional, idealized, and legally reinforced role as that of obedient wife and loving mother. They are at once liberating acts of rebellion, and acts of extreme evil.

Nor can these acts be discussed without placing them within the larger context of women's greater struggle for equality. Is it fair and just and good to be sympathetic to these acts because a woman cannot resist her male partner's aggression or leave the relationship, or because she suffers from a mental condition which makes it difficult, if not impossible, to exercise legal and nonviolent options to her dilemma? Or is it more desirable to be less sympathetic, view the acts absent of gender, and demand that women suffer the same consequences as men for their wrongdoings?

Ambiguity around these issues seems never-ending. Just as the doctrine of marital coercion fell into legal disfavor, and women were resisting being characterized as intellectually weaker and less capable than men, defenses such as battered woman syndrome<sup>22</sup> and clinical diagnoses such as premenstrual syndrome and postpartum psychosis were introduced. Thus, it could be argued that women traded in one set of gender-specific defenses for another. Whether intended or not, this phenomenon has had a dual effect. It has ensured that in many cases women have been treated more leniently than their male counterparts who commit similar crimes, and has reinforced notions that women have less moral autonomy.

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L. & CRIMINOLOGY 1, 12 (1994). See generally Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905 (1993); Stefanie F. Seldin, *A Strategy for Advocacy on Behalf of Women Offenders*, 5 COLUM. J. GENDER & L. 1 (1995).

21. See generally, Coughlin, *supra* note 8; Alifair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211 (2002); Christina Dejong & Christopher E. Smith, *Equal Protection, Gender, & Justice at the Dawn of a New Century*, 14 WIS. WOMEN'S L.J. 123 (1999).

22. Coughlin, *supra* note 8, at 29.

This Tenth Anniversary Edition of the *Duke Journal of Gender Law & Policy* focuses on these broader questions and the nuances that they present. Each of the authors revisits criminal law's treatment of women offenders when they kill either their male partners or their children, and explores the relationship between psychology, legal doctrine, and gender-specific defenses. In this way, each author asks the reader to consider those same issues raised at Seneca Falls surrounding women's moral culpability and greater social freedoms.

Much has changed, however, since the Conference of 1848. Today, our understanding of the scientific method is far more sophisticated, allowing us to critique scientific claims better than we were able to during Lombroso's time. Furthermore, the modern sciences have helped us understand in greater depth the relationship between our behavior and our biology, calling into question the stringent historical legal demarcation between free will and insanity. Sensitive to these developments, the authors provide a sophisticated analysis of the relationship between law and psychology in the context of both the battered woman syndrome and postpartum psychosis as they are raised as defenses in gendered crimes.

Most importantly, this anniversary edition showcases some hallmarks of legal journals that are dedicated to the inquiry of gender and its relationship to the law and society. The editors ensured that this edition would incorporate different perspectives. Thus, the authors are both scholars of law and scholars of psychology, and in that respect, this edition is rich with information, nuance, and point-of-view. An interdisciplinary approach to law and gender has been one of the most significant contributions that the *Duke Journal of Gender Law & Policy* and other specialized journals focusing on gender have made to the world of legal scholarship.

Furthermore, legal journals dedicated to gender were some of the first to publish articles that departed from the traditional formalism of legal scholarship. This trend over the last decade in particular has improved contributions to our knowledge-base in immeasurable ways. This edition continues that trend by showcasing some interesting and thought-provoking pieces that analyze what seem to be never-ending dichotomies posed by the subject of women and crime. Yet, each author does so by introducing new ideas within the context of modern day dilemmas. The reader will find among these pages narrative-centered case studies that are rich in factual detail, articles that incorporate empirical and scientific research, and pieces that rely primarily on doctrinal and theoretical analyses. It is both a depth of information and a breadth of formats that especially mark the progress the Journal has made over the last ten years.

This edition begins with Deborah Denno's article on Andrea Yates, the Texas mother who drowned her five children in a bathtub.<sup>23</sup> Andrea was found guilty despite her plea of insanity, and sentenced to life in prison. Denno, one of America's leading scholars on gender and crime, retells Andrea's story with compelling details—details that were not readily discerned from news reports or media coverage. In that respect, Denno's contribution is as much that of an investigative journalist as it is of a legal scholar.

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23. Deborah W. Denno, *Who Is Andrea Yates? A Short Story About Insanity*, 10 DUKE J. GENDER L. & POL'Y 1 (2003).

But Denno is indeed a legal scholar, and her analysis hones in on one aspect of Andrea's story. During the trial, the prosecution introduced the testimony of Dr. Park Dietz, a psychiatrist infamous for his testimony against other high profile defendants such as John Hinckley, Jr. In Andrea's case, Dietz was able to persuade the jury that Andrea was sane and knew the difference between right and wrong when she killed her children. Denno analyzes Dietz's testimony as if working her way through snarled hair with a fine-toothed comb, and makes the case that Dietz's expert opinion was virtually unsubstantiated by medical or psychological science. Yet, Denno suggests, the jury, concerned solely with Andrea's mental state at the time of the killings, was so swayed by his testimony that a miscarriage of justice occurred.

She takes particular issue with Dietz's obsession with trying to explain Andrea's actions as logical. For example, although Andrea had told others that she was concerned that she was under the influence of Satan, she never told anyone that she had thoughts of harming her children. Dietz based much of his opinion on the fact that her concealing her intentions showed that she acted intentionally. Denno points out that this explanation has no support in the psychological literature. As she writes:

[T]he field of psychology does not encourage members of its profession to engage in a logical analysis of the illogic of a mentally ill person. There is really no point to it.

But for Andrea, there was no escape from Dietz's testimony; he seemed to have cut off every avenue with some explanation based entirely on speculative presumptions. Dietz showed striking confidence in his conclusions, despite the conjecture. Comparatively noteworthy was Dietz's complete disregard of the literature on postpartum depression which shows that women generally do not tell others that they want to kill their children. They are afraid and embarrassed and disturbed by such thoughts. They also believe that they would never act them out. Dietz's sweeping generalizations about Andrea's mental state are consistent with his ignorance on the subject.<sup>24</sup>

Denno concludes that the legal system should question the unregulated authority that experts have to testify to a narrative of events that may, in fact, have no real basis in any psychological reality. She suggests that the potential for this inequity is even more profound in cases where both sides agree the defendant is mentally ill, and where the death penalty is at stake.

What Denno does not explicitly say, but certainly implies, is that the psychiatric literature on postpartum depression, as well as the defense experts, should have led the jury to find Andrea not guilty by reason of insanity. Yet, in gendered crimes, it is far too easy for "experts" to retell the defendant's story to make her seem evil, rather than ill.

Sherry F. Colb continues Denno's inquiry into the Andrea Yates case with a short but provoking comment on what else went wrong for the mother convicted of murdering her five children.<sup>25</sup> Not only does she agree with Denno that

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24. *Id.* at 45.

25. Sherry F. Colb, *The Conviction of Andrea Yates: A Narrative of Denial*, 10 DUKE J. GENDER L. & POL'Y 139 (2003).

Dietz's overly ambitious and ill-informed testimony, coupled with the harshness of insanity law in Texas, contributed to Andrea's conviction, she also suggests that the jury needed a satisfying narrative itself. Colb draws an analogy to the ancient tale of the Wisdom of Solomon, in which two women claim to be the mother of a living infant. Solomon proposed dividing the child in half. The true mother protests, for the belief is that mothers are willing to sacrifice their own happiness for the survival of their children. The other mother, in contrast, who both kidnaps another woman's child and is willing to see it die, is truly evil.

Colb offers an alternative ending to this story. Perhaps, she argues, that Solomon's tale is too simple. Maybe it is the true mother who would rather see her child die than to be raised by another woman. Both the kidnapper and the true mother are mad. This version is about pathology and jealousy among mothers rather than a classic tale of good versus evil. The law asked the jury to choose between two versions of the story, Colb suggests, and therefore the jury was forced to classify Andrea either as either "mad" or "bad." It was less threatening for the jury to believe she was evil, Colb concludes:

If Andrea was insane, as Denno suggests so effectively by mobilizing the actual evidence, what follows next? One conclusion that would be hard to escape is that serious mental illness can be hard to detect, particularly if the sick person is in denial about her illness (as Andrea was). People like to believe that they can "tell" who the mentally ill are. If an insane woman can calmly execute a plan to drown her five children, however, and immediately call the police, then there may be many very sick people who walk among us without our even knowing it. Who can guess what some of them might be capable of doing?<sup>26</sup>

Colb further suggests that the jury needed to blame someone, and since only Andrea (and not her husband) was on trial, it was asking too much of the jury to see her as a sixth victim on that fateful day. Like Denno, Colb leaves us wondering whether the outcome of the case was just, or whether Andrea remains deserving of our sympathy rather than our scorn.

While Denno and Colb find that Andrea was treated unjustly by a criminal justice system that is all too ready to accept the story of "experts" despite their lack of expertise, Jayne Huckerby, in her essay that follows, suggests that Andrea Yates fared well, at least in her "trial by media," when compared to Khoua Her, a Hmong immigrant living in the United States who strangled her six children.<sup>27</sup> Huckerby is as compelling a writer when she tells us the story of Khoua's life as Denno when she tells us Andrea's. While Denno's focus is on the interplay of law and psychology in the courtroom, Huckerby's is on the media coverage of infanticide cases. Huckerby employs a now-familiar analysis within the larger realm of feminist literature: she explores the role of race, culture, class, marital status, and biology when comparing the media's treatment of the two cases, reminding us that gender is only one of a number of factors salient to questions of just treatment and equal rights.

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26. *Id.* at 142-43.

27. Jayne Huckerby, *Women Who Kill Their Children: Case Study and Conclusions Concerning the Differences in the Fall from Maternal Grace by Khoua Her and Andrea Yates*, 10 DUKE J. GENDER L. & POL'Y 147 (2003).

Khoua received fifty years in prison as a result of a plea bargain for her crimes. Unlike Andrea, she never submitted evidence of insanity, despite the fact that her actions were consistent with postpartum psychosis. Although Andrea received a sentence of life imprisonment, she is eligible for parole forty years from now. Thus, in terms of outcomes, the cases are arguably very similar. Nevertheless, Huckerby does offer a striking argument that when white mothers who embody traditional values kill, they are likely to be labeled “mad,” while when poor women of color do so they are considered “bad,” a conclusion which adds a certain degree of nuance, if not contradiction, to Colb’s observations. It is in the deconstruction of these multiple factors of race, class, and religion, for example, that the reader will find this a thought-provoking piece.

Employing a postmodern analysis to each case, Huckerby begins by suggesting that these cases cannot be analyzed outside of the framework of what it means to be a “good mother.” “Good mothers” are white, Christian, married to their children’s father, and of moderate economic status. Khoua was none of these things, and Andrea all of these things. When Andrea kills, she argues, the media is drawn to the narrative of madness because it preserves the maternal myth, while when Khoua kills, society responds by increased surveillance of poor and minority women because a tale of badness has been told. These narrative distinctions within the media have many implications. For example, Huckerby suggests:

The fact that it is easier to politicize medical issues, which are ostensibly applicable to all women, also means that inadvertently the plight of white women is more likely to be taken up as a “cause” by political movements. This support from interest groups is evident in the fact that [the National Organization for Women] justified their support of Yates on the basis that it was a general women’s health issue. By becoming the cause of such movements, white, middle-class mothers like Yates are likely to be treated more leniently for their crimes due to increased support and available resources. At the same time, this politicization has exclusionary effects that operate to the detriment of minority women who kill their children.<sup>28</sup>

One of the underlying messages in Huckerby’s, Denno’s, and Colb’s articles, is that it is somehow preferable to be considered “mad”/insane/morally excusable than it is to be considered “bad”/sane/morally responsible. This is certainly the practical truth for Khoua and Andrea, who would no doubt prefer to be hospitalized with the real possibility of cure and release than to be incarcerated for decades. Certainly Khoua is just as deserving of public sympathy as was Andrea, if not more so. Nevertheless, what those outcomes mean in the greater scheme of things for women remains a question largely unanswered. Huckerby, Denno, and Colb suggest that a better understanding of women’s psychology would bring more just results. They indeed may be right, yet none of them can escape the ambiguity created for women when having to choose between madness and badness.

Continuing on themes raised by Denno, Colb, and Huckerby, Norman Finkel, a psychologist who has written extensively on insanity defenses, exam-

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28. *Id.* at 168.

ines the legal doctrines as they relate to gender-specific criminal defenses.<sup>29</sup> Finkel employs the ironic analogy of fashion to examine a series of questions related to what he refers to as “designer defenses”—those designed specifically for women. He examines cases in which defendants invoke the battered woman syndrome defense to prove self-defense or mitigation from murder to manslaughter, and in which defendants raise the insanity defense based on postpartum psychosis in cases involving infanticide. He argues that one-size-fits-all defenses have not rendered justifiable results. Rather, he suggests that we need a greater array of defenses, based on a more subjective analysis of intent, one which would provide both juries and defendants more “tailor-made” options in deciding what a just punishment ought to be in particular cases.

Finkel’s arguments are based largely on a careful doctrinal analysis of mistake of fact defenses; an analysis that he then applies to the introduction of battered woman syndrome in non-confrontational killings, as well as infanticide cases. One of the most interesting aspects of the article is that he contrasts black letter law, which forces defendants into rigid categories, with common sense justice or the analysis juries actually prefer to use if given the opportunity. Finkel’s scope is ambitious and, at times, more theoretical than that of the previous authors. For example, in reviewing the data on the actual outcomes in these cases, he concludes:

But at this stage in the empirical development of the [battered woman syndrome] construct, and in the selling of [battered woman syndrome] to courts and jurors, we seem to be stuck at a stage where experts want to dress all battered women who kill in the same outfit, an off-the-rack strategy that is bound to fail, because there is no one prototype of the battered woman who kills.<sup>30</sup>

The value of Finkel’s piece is that he begins to move the reader away from the two distinct categories of “mad” and “bad” and suggests that we need more fact-driven verdicts that fit individual situations. Like those at the Seneca Falls Convention, Finkel finds that gender-specific defenses are fundamentally wrong, as they reinforce stereotypes and remove from the jury the chance to exercise some common sense justice. When compared to the three previous authors, Finkel does not believe gender should matter at all.

The final article by Regina Schuller, also a psychologist, further develops the theme raised by the previous authors on the intersection of science and the law.<sup>31</sup> Schuller’s article is an excellent example of how much lawyers can learn from our colleagues in the social sciences. She writes clearly and cogently, helping the reader easily cross the disciplinary divide. Schuller examines closely the social psychological research on the impact battered woman syndrome evidence has on mock jurors’ decisions in homicide trials involving battered women who kill their abusers, including her own empirical research on the subject. In many studies she reviews, expert testimony in mock trials exerted no direct impact on verdicts unless jurors were liberated from the strict doctrinal

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29. Norman Finkel, *Haute Couture, Poorly Tailored Crimes, and Ill-Fitting Verdicts*, 10 DUKE J. GENDER L. & POL’Y 171 (2003).

30. *Id.* at 196.

31. Regina Schuller, *Expert Evidence and Its Impact on Jurors’ Decisions in Homicide Trials Involving Battered Women*, 10 DUKE J. GENDER L. & POL’Y 223 (2003).

confines of the law. In those cases, jurors did tend to be more lenient. Interestingly, jurors were most lenient in cases in which testimony about battered woman syndrome was accompanied with an instruction on nullification.

Indeed, her findings strongly support Finkel's analysis. She argues that the black letter law, and specifically the doctrine of self-defense, does not work well in cases involving abused women. It is only when jurors can follow more common sense approaches that the evidence makes a measurable difference. Thus, Schuller notes that battered woman syndrome evidence has hardly been the panacea that many had hoped, and indeed has had the consequence of stereotyping women rather than liberating them. She concludes with a warning to those who have been too quick to use this evidence:

The easy fit between battered woman syndrome and the practice of law has its allure, but as the complexity of the problem of male battering expresses itself at the individual, institutional, and societal level, a quick fix solution is doomed to fail.<sup>32</sup>

Finkel and Schuller differ in one key aspect worth noting, however. While Finkel suggests that the law ought to better account for the specific state of mind of defendants, focusing heavily on the details of their psychological realities, Schuller suggests that our efforts be directed toward transforming battered woman syndrome evidence to reflect the social realities. In this respect, gender does matter, not because women are psychologically or biologically unique, but because their social reality still differs from that of men.

Each of the authors in this edition leaves us pondering both what has become, and what should become, of gender-based defenses in the criminal law. And, as we do so, this edition concludes with a note by law student and *Duke Journal of Gender Law & Policy* editor Joel Israel on quid pro quo sexual harassment and its changing meaning within the law.<sup>33</sup> The note, a fine example of student scholarship, upholds the the important tradition, especially in women's law journals, of publishing young legal writers. Israel reviews the history of quid pro quo harassment as defined and applied in Title VII cases and paradigms, as well as the Supreme Court's jurisprudence in this area. He then argues strict liability should apply to employers who demand some sort of sexual favor as a condition of employment, answering critics who argue that strict liability does nothing to encourage employers to take preventative measures to avoid such scenarios. This note is a must-read for anyone who works in employment and Title VII for it is as thorough in its research and analysis as it is in its strength of argument. Israel adds much to this little-discussed area of sex discrimination.

This lively collection of articles does justice to this important milestone in the *Duke Journal of Gender Law & Policy's* history. What is most compelling about this edition is that it revives and revisits those tensions that have been central to the women's movement. It reminds us that the interplay between law, science, gender, and justice is a complicated one indeed. Alive at Seneca Falls, these is-

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32. *Id.* at 244.

33. Joel Israel, *Quid Without a Quo: Harassment Law Changes Its Terminology Without Changing Its Meaning*, 10 DUKE J. GENDER L. & POL'Y 245 (2003).

sues will likely be revisited again more than 150 years from now. Defenses will come and go, and psychological explanations will always fall in and out of favor, but the central relationship between women's moral responsibility and women's rights is fundamental to our collective humanity. The works presented here will no doubt shed intellectual light on that relationship for many years to come.