

# [The body of law is a site of gendered power](https://assignbuster.com/the-body-of-law-is-a-site-of-gendered-power/)

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Introduction

For centuries, lawyers, philosophers, sociologists and others have tried to define ‘ law’, but it resists definition. In this essay, ‘ the body of law’ will be taken to mean not just the law laid out in the statute books, or expounded by judges in their judgements, but also the application of law, in the courts and in dealing with those who are deemed to have violated the law’s provisions. This essay attempts to navigates through all these different faucets of the body of law and show that it is a site of gendered power, favouring men and unfairly discriminating against women.

Law-making

First to be considered is the most obvious component of law: law-making. Whilst the process of law-making varies from jurisdiction to jurisdiction, in the UK it includes inter alia Acts of Parliament, judicial decisions, crown prerogative, law and customs of Parliament and constitutional principles. Thus a mixture of these sources will be considered.

As Heugh (2010, 87) stipulated, ‘ the assertion that law is masculine is grounded in the proposition that legal language has traditionally been the domain of male interpretation and application’. Women played no part in the drafting of law until relatively recently and even now the role they play in lawmaking is, at best, barely significant (Kennedy 2005, 25).

That law is patriarchal is a wide-spread assertion. The majority, if not all, of the early male writers of law were men considered women to be inferior. In Timaeus, Plato suggests that women were criminal or unworthy men in their previous lives and whilst The Republic is more egalitarian, Socrates concludes: ‘ natural capacities are similarly distributed in each sex, and it is natural for women to take part in all occupations as well as men, though in all women will be the weaker partners.’ Hobbes, whilst implicitly agreeing that men and women are equal, argued that men necessarily had to assume a dominate position in society because they were the nations’ founders and Locke also thought men should guide and protect their ‘ inferior’ counterparts (Heugh 2010, 98). Feminist have long sought to show that such views are ‘ patriarchal myths’, which are projections of the male psyche (MacKinnon 1982, 541).

Modern legislative attempts atequalityhave failed. Section 1(1)(a) of the SexDiscriminationAct 1975, now repealed, defined discrimination against women as when ‘ on the grounds of her sex he treats her less favourably than he treats or would treat a man’. Thus a woman had to show that whilst in a similar situation to a man she was treated differently. If she is unable to find a man in her position, a woman may find it hard to benefit from anti-discrimination legislation framed in this manner. According to Heugh, the ‘ essential purpose’ of such legislation it to ‘ make women like men’ (2010, 100).

A similar approach can be seen in judicial attempts to address discrimination. Many States, including the US and the UK have adopted the ‘ formal equality’ approach, this is also the legal approach favoured by the European Court ofHuman Rightsaccording to Timmer (2011). This approach has been much criticised for making ‘ maleness the norm ofwhat is human’ (Scales 1986).

Thus it may be argued that law-making and the existing body of law is inherently patriarchal and gendered. This flaw cannot simply be smoothed over by brash judicial or legislative attempts at equality. As Wishik propounds, “ the analytic frames of patriarchal law are not the spaces within which to create visions of feminist futures” (1985, 77)

It it, Scales (1986) and others argue, necessary to instead go to the root of the problem and reconstruct the legal system. Showalter (1982) demands that women need to create their own legal theory with their own language. This argument is based on the claim that it would be ‘ impossible to accurately define the experience of a woman using language that is chiefly made by men to express their own experiences’ (Heugh 2010, 106).

Gendering Crime

This section will first explore the heinous acts of rape anddomestic violence, and the gendered way in which they are approached in law, and then turns to explore how a gendered body of law has criminalised women’s behaviour.

### Rape

Rape is often seen as the quintessential gendered crime; the majority of its perpetrators are men and most victims are female, targeted because they are female (Graycar and Morgan 2002, 300). In a 2000 British Crime Survey, one in twenty women said they had been raped (Myhill and Allen 2002, ch 3).

Female victims of rape of almost unique in their treatment by society and negative attributes are regularly imposed on them including naivety, stupidity or the notion that they somehow wanted it, particularly compounded by media representations of rape. Female victims are ‘ implicitly represented as ‘ deserving or ‘ accepting’ of rape’ unless able to present themselves as ‘ sexually ‘ modest’’ (Stevenson 2011, 123). To add insult to injury, male rape is often treated as more serious and male victims treated with greater privilege. Temkin and Krahe’s 2007 survey (2009) reported that 65 per cent of male rapes resulted in conviction, whilst only 46 per cent of female rapes did.

Under section 1 of the Sexual Offences Act 2003, a person commits the offence of rape if:

he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,   
B does not consent to the penetration, and   
A does not reasonably believe that B consents.

This introduces a ‘ reasonableness test’ which many believed is gendered. A ‘ reasonable man’ test is often used instead of a ‘ reasonable women’ one (see Hubin and Haely 1999). Female rape victims are often judged adversely by juries if they fail to fight back, scream or try to escape. Scheppele (1991, p. 46) stipulates that whilst ‘[t]he reasonable man, who doesn’t fear city streets the way the reasonable woman does and who can fight physically with the expectation of success, may have tried to leave or fight’, a reasonable woman probably would not.

This notion is further compounded by subsection 2 of section 1, which states:

‘(w)hether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.’

Temkin and Ashworth (2004, 342) argue that the inclusion of ‘ all the circumstances’ invites juries to examine the victim’s behaviour to deduce if she did anything to have ‘ induced a reasonable belief in consent’ and in ‘ deciding what it is “ relevant” to consider, what is to prevent the influence of stereotypes about B’s dress, B’s frequenting of a particular place, an invitation to have a drink, and so forth?’

Sections 74 to 76 of the Sexual Offences Act 2003 deal with consent, with section 74 giving the general definition, section 75 a list of rebuttable presumptions and section 76 stipulating two conclusive (and irrebuttable) presumptions. One of the rebuttable presumptions of no consent listed in section 75 is where:

‘ any person had administered to or caused to be taken by the complainant, without the complainant’s consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act’ (s75(f)).

The origins of the 2003 Act lie in the proposals of a review carried out for the Home Office (2000) (the “ Report”). In addition to the above ‘ date rape’ scenario, the Report (2000, para 2. 10. 0) also recommended the inclusion of the situation where the victim was ‘ too affected by alcohol or drugs to give free agreement’. This recommendation was ignored leading to the conclusion that ‘(t)hose who take alcohol or drugs voluntarily are placed in a different moral category from those who have had alcohol or drugs “ administered” to them by the defendant’ and so women who get raped whilst drunk, and got drunk fully voluntarily, will not have the benefit of evidential presumptions (Temkin and Ashworth 2004, 339-340). This bolsters the already prevalent opinion that women who get drunk on a night out are somehow asking for it.

Kennedy (2005, ch1) argues that rape is the ‘ perfect example of the inadequacy of legal reform…all the changes designed to secure justice for women who have been raped…have amounted to little.’ The way that legislation has been written to define the offence is biased towards men with it ‘ reasonable test’ and negative stereotypes still pervade the court when dealing with alleged rape offenders and victims. As a conclusion, many women are so disenchanted with the law’s approach and response to rape that many victims still do not come forward. Kennedy suggests this is because rape is the ‘ rawest display of the continuing power imbalance between men and women’ (op cit.).

### Domestic violence

Domesticviolenceis also a gendered problem, with the majority of victims being women and perpetrators men. Choudhry and Herring (2010, 342) call “ violence against women by their intimate partners… an epidemic of global proportions”. Whilst it is true that the range of legal remedies for domestic violence in Great Britain has increased over the last thirty years, criminal law has been slow to develop and there is yet a specific criminal offence of domestic violence (Burton 2011, 161). Domestic violence has longed suffered due to the public/private dichotomy, the notion that the public sphere, in which law is included, should not intrude on the private sphere (see Kennedy 2005, 88-89).

It can be argued that domestic violence is covered by a variety of existing offences, especially where it leads to physical injury, but difficulties still lie “ with the police and prosecution response to such cases” (Choudhry and Herring 2010, 346). A report by Her Majesty’s Inspectorate of Constabulary and the Crown Prosecution Service Inspectorate (2004, 6) reported:

‘ Until relatively recently…dominant policeculturedepicted violence in the home as ‘ just another domestic’ – a nuisance call to familiar addresses that rarely resulted in a satisfactory policing outcome.’

And there is evidence that prosecution authorities are hesitant to take domestic violence cases to court without a high chance of success (Cahn 1992). The police, lawyers and judges often believe their role is in preserving thefamilyunit and so are reluctant to pursue prosecution and aid in the break-up of the relationship (Kennedy 2005, 92). This is clearly to the detriment of women who need help and support in getting out of abusive relationships.

As with rape, ‘ gendered identities’ (Smart 1989) have been created for women subjected to domestic violence. If the female victim did not act in the stereotypical ‘ wifely’ way then she is often held to be partly, if not wholly to blame. This can be seen for example in the case Richards v Richards (1984) AC 174, where the wife was criticised for having number of affairs and so the judge in the first instance held her allegations as ‘ flimsy’. Many believe that women simply invite beatings ‘ because of nagging, because they push their men to the edge, or because they are masochists’ (Kennedy 2005, 92).

Likewise, ‘ non-submissive behaviour’ is seen as ‘ antithetical to ascribing ‘ victim’ status’ (Burton 2011, 163) and if a women appear confident or ‘ materially well-off’ in court, many judges and jurors fail to see how they have been victimised (Kennedy 2005, 97). This sits uncomfortably with what is wanted of the women during the abuse. Many do not understand why women are ‘ passive’ during the abuse, seeming to not resist the alleged attacks, and staying with an abusive partner for many years. However, as a WorldHealthOrganisation (WHO) Report (2002, 95) observed, what may seem as a ‘ lack of positive response’, may actually be a deliberate assessment of what is needed not only to survive and protect herself, but also her children. Furthermore, global studies show that a variety of factors keep women in an abusive relationship, including:

‘ fear of retribution, a lack of alternative means of economic support, concern for the children, emotional dependence, a lack of support from family and friends, and an abiding hope that the man will change’ (WHO 2002, 96).

Some women do eventually come forward but will face abuse, on average, 35 times before they do seek police support (Kennedy 2005, 92). But yet again, the question of ‘ what would a reasonable man do’ too often comes to the judges’ minds and once again the law can be seen a site of gendered power.

Attitudes towards domestic violence spills into other areas of law, most notably homicide. Men who kill their unfaithful female partners have historically been able to more easily rely on the defence of provocation then women who kill their abusive male partners after years of domestic violence. In English law, the defence of provocation has two main elements; firstly the subjective test of whether the defendant was actually provoked to lose control; and secondly the objective test that the provocation was enough to make a reasonable man do as the defendant did.

The objective ‘ reasonableness test’ brings up the same issues discussed in relation to rape. Turning to the subjective test, the inclusion of ‘ the loss of self-control’ excludes revenge killings, for which the courts do not believe deserve the lesser culpability, and in Duffy [1949] 1 All ER 932, Devlin J phrased the law’s requirement as ‘ a sudden and temporary loss of self-control’. The inclusion of the ‘ suddenness test’ has been widely criticised as it ‘ favours those with quick tempers over others with a slow-burning temperament’ (Ashworth 2006, 266). It is men that typically have this short-fuse, snap anger and women the ‘ slow-burning temperament’, highlighted in the case of R. v Ahluwalia [1992] 4 All E. R. 889. In this case, the appellant had suffered violence and abuse from her husband over a long period. After one evening during which she had been threatened the appellant went to bed, but thinking about her husband’s behaviour was unable to sleep. She went downstairs, poured petrol into a bucket, lit a candle, then returned and set fire to her husband’s bedroom. He died from his injuries. At the appellant’s trial the defence pleaded manslaughter on the grounds that she had not intended to kill him, only to inflict pain. Provocation was pleaded as a second line of defence based on her ill treatment throughout the marriage, but she was convicted of murder.

Thus, as with rape, legislation is the first source of gendered power in the case of domestic violence. There is no specific offense of domestic violence, leaving police to apply which of that assault and battery offences they feel best fits. The second blow, again as with rape, comes with the treatment of the female victim in court. She is subject to negative stereotypes and must behave with gumption during the abuse and then submissive during the trial in order to win over the discriminatory and gendered law.

### Criminalising women’s behaviour

Snider (2003, 360) postulates that feminist criminology has long claimed that female offenders were ‘ punished more harshly than male offenders, for a wider range of offences’. Historically, crimes that women could be arrested for included ‘ ungovernability’ or ‘ promiscuity’, behaviour that was admired in men (op cit.).

Women have also long been penalised for prostitution, while their male customers were ignored (op cit.). There were, and it seems that there still are, higher expectation of women, whilst men are ‘ simply victims of their appetites, hardly capable of free will when it (comes) to sex or violence’ (Kennedy 2005, 15). Legislation has since been introduced to penalise the male customer, but the law still tilts in a man’s favour as police must see ‘ two overt acts’ before making an arrest, for example a man must approach two women, but a prostitute could be charged merely for waiting in a particular area for ‘ loitering’ (op cit., 146).

Many critics, including Worrall (2004), argue that more bad behaviour by girls is being redefined as criminal. Snider (2003, 363) reports that ‘ new, blatantly unequal initiatives aimed specifically at women continue’, including recent campaigns to criminalise pregnant women who smoke, drink, or give birth to babies addicted to crack cocaine (Tong 1996), which Snider (2003, 364) postulates is possible because ‘ subjecting women to ever more intensive disciplinary procedures is compatible with dominant cultural scripts.’

However, no matter what the crime, ‘ victimisation’ has been said to be the cause of criminal acts by women (Chesney-Lind and Faith 2000, 27). This argument has been comprehensively examined and recorded throughout feminist criminology (Carlen 1983; Comack 1996). Female offenders are victims of abuse, whether it is physical, sexual and/or emotional, and discrimination based on their gender, race, sexuality or position in life (Snider 2003, 364). As Kennedy notes, ‘(p)oor, battered and abused they find themselves continually punished’ (2005, 81).

The law has been unable to address with the underlying cause of female crime, nor the discriminatory practices which have been in place for centuries. Instead more offences aimed at women only are introduced and this serves only to propound the conclusion that the body of law is a site of gendered power.

Sentencing

Not only is the body of law gendered, but so is the application of law. According to Heidensohn and Gelsthorpe there are several established observations in relation to female crime:

‘ women commit fewer and less serious offences, they desist from crimes more readily, girls reach their peak age of offending sooner than boys and are much less involved in professional crime’ (2007, 391).

And yet the female share of crime and the percentage of women in prison are increasing.

After studying the increasing sentencing rates in Great Britain, Hedderman (2004, 86) concluded that ‘ there is little to suggest that female offending…has become more prevalent of more serious’. Instead it is the custody rate that has changed: ‘ 40% of the women sentenced in the Crown Court are being given custodial sentences compared to under a quarter eight years ago…at the magistrates’ court…the rate of increase has been higher…custody is now used five times more frequently than in 1992’ (op cit., 89).

One enduring belief is that women offenders are protected from the full rigours of the law when it comes to sentencing but, whilst many have reviewed the respective treatment of women and men by the courts, few offer clear support for the theories of chivalry or leniency towards women unrelated to offence seriousness (Heidensohn and Gelsthorpe 2007, 399). Daly (1989) looked at the situation in America and concluded that it was not the women but rather the family and in particular the child who were the focus of the courts’ chivalry. Snider (2003, 363) indicates that there was evidence from the 1970s that suggested that some women, in particular ‘ white, older, familied caregivers’ were treated with some leniency, however once this was highlighted, the leniency disappeared, resulting in what Snider termed ‘ equality with vengeance’.

In addition there is, what has been known as, double jeopardy, where the fact that women have a ‘ low share of recorded criminality has significant consequences for those women who do offend: they are seen to have transgressed not only social norms but gender norms as well’ (Heidensohn and Gelsthorpe 2007, 400) and are deemed afailureas wife/partner, mother, daughter and worker (Snider 2003, 365). Webb (1984) and others have particularly noticed this affect in the treatment of young girls, where minor sexual offences seem to consistently result in harsher punishment in comparison to boys.

Judges are often not aware that they are being discriminatory and do not actively impose stereotypical ideals, but ‘ hidden expectations creep in unawares’ (Kennedy 2005, 74). One consistent stereotype is of the good wife or mother. Women who are separated or divorced, women whose children are in care, or women who otherwise somehow do not conform to the idealised stereotype ‘ encounter unmatched prejudice’ (op cit., 75). Pre-sentencing reports, written to help the judge in deciding what sentence is appropriate, often mention facts irrelevant to the offence such as the cleanliness of the home and the grooming of the children (op cit., 76).

Women are often given custodial sentences, rather than community order, because of childcare responsibilities (Easton 2011, 180) and because there are few community programmes suited to women, even with the recent expansion of options available to comprise the community order. Furthermore, financial penalties are often unsuitable as women frequently lack the resources (Kennedy 2005, 330).

Thus whilst women in general commit fewer crimes and less violent crimes, they suffer once again at the hands of a gendered law not wishing to seem soft or lenient towards women and a law that recognises that fewer women are criminals so that one who is must be especially bad. To top it all off, the law then has a limited arsenal of sentences that it can impose and thus sends women to prison more often than their male counterparts.

Incarceration

Penitentiaries were conceived with only male offenders in mind, women were an afterthought (Snider 2003, 357). With the reform of women’s prisons, particularly in the US from 1830-1930, new institutions were built, called reformatories, consisting of groups of cottages presided over by female matrons, however, this too was patterned on the ‘ patriarchal family model (albeit without the patriarch)’ (Snider 2003, 358).

The ‘ under-representation of women’, known as the ‘ gender ratio’ problem, is one of the truths in criminology (Snider 2003, 357). As already discussed, women commit fewer violent offences and so it is often argued that imprisoning women convicted of non-violent offences does not meet the aims of punishment; it cannot be justified on grounds of risk, due to the nature of the offence, or retributive grounds, as custody is seen to be disproportionate (Easton 2011, 181). The loss of contact with the outside world, along with the shame of imprisonment on their family, is an anguish often more keenly felt by women (Davies et al 2010, 457). The guilt of failing children weighs especially heavy on women (Kennedy 2005, 64) Whilst most male prisoners can be safe in the knowledge that their partners are looking after their children, in their own home, just 25% of women said that their partners were looking after their children, and just 5% of those children were being cared for in their own house (op cit., 83). The trauma of being separated from ones children can lead to emotional problems and sometimes even mental illness (op cit.)

Formally ‘ neutral’ policies often have a ‘ disparate impact’ on women, for example cell sharing and full body searching as women find the loss of privacy more stressful and pose less of a security risk than men (Easton 2011, 182). Due to the relative scarcity of female prisons, a female offender is likely to be incarcerated further away from her family and friends, than a male would, with fewereducationor training programmes and medical services, in particular reproductive care, is likely to be poor (Snider 2003, 365).

The push for equality has in this regard disadvantaged women. Instead of taking into account the different way in which a woman commits crime, why she commits crime, and how best to deter women from committing further crimes, female offenders have been tarred by the male brush and suffer in male-oriented prisons. And so the ‘ formal equality’ approach fails again and the law is still a site of gendered power.

## Conclusion

It can thus be concluded that conventional legal and judicial systems are gendered. As Dobash and Dobash put it: ‘ it is impossible to use the law and legal apparatus to confront patriarchal domination and oppression when the language and procedures of these social processes and institutions are saturated with patriarchal beliefs and structures’ (1992, 147).

Legislation relating to discrimination and gendered crime is lacking. Judicial attempts at equality fail time and time again. Even where women face seemingly institutional sexism in the police force, they have to fight against deep-rooted stereotyping in the court. When found guilty of a crime they are more likely than men to be sent to be given a custodial sentence and are then welcomed into a prison system ill-designed to meet their needs. There is no other conclusion than the body of law is a site of gendered power.

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