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CONTEMPORARY LEGAL SCHOLARSHIP: ACHIEVEMENTS AND PROSPECTS

Feminist Approaches to Tort Law Revisited - A Reply to Professor Schwartz

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Feminist Approaches to Tort Law Revisited — A Reply to Professor Schwartz

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It takes courage to characterize feminist writings on tort law as "thin." Indeed, Professor Schwartz in his provocative and challenging article examines feminist writings in a unique and innovative way. In his analysis of a number of such writings, he attempts to demonstrate that they either have not done enough or could have done better. His provocative analysis of many issues invites vigorous discussion. One could write a separate comment on each and every one of the issues he raises; however, I will limit my comment to two: the tension between the "reasonable man" and the "reasonable woman" standard and the (no) duty to rescue rule.

I. THE REASONABLE MAN AND THE REASONABLE WOMAN

In the first part of his article, Professor Schwartz addresses the claim made by feminist scholars that a reasonable woman standard should be adopted as an alternative to the reasonable man standard for evaluating an actor's negligence, especially if that actor turns out to be an "actress." He makes a number of comments on this matter.

First, he discusses two articles on U.S. legal history, written by Welke[1] and Schlanger,[2] respectively. In their articles, these two scholars tried to demonstrate that feminist trends and, especially, the demand for a reasonable

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1 Barbara Y. Welke, *Unreasonable Women: Gender and the Law of Accidental Injury, 1870-1920*, 19 J.L. & Soc. Inquiry 369 (1994).

2 Margo Schlanger, *Injured Women Before Common Law Courts, 1860-1930*, 21 Harv. Women's L.J. 79 (1998).

woman standard are not as new and radical as they may seem to be and that the courts have always taken special note of female characteristics in determining tortious liability and compensation for women. Professor Schwartz' main contention is that Welke and Schlanger did not succeed in substantiating the thesis they presented. He argues that the few sporadic references to female characteristics in court decisions do not amount to a general tendency in the jurisprudence, especially in view of the fact that the results of the discussions regarding a different standard of liability based on gender differences have not been unequivocal. Professor Schwartz also criticizes Welke and Schlanger for failing to relate to more general historical writings, which bring into doubt the conclusions of their work. Thus, he concludes, Welke and Schlanger failed to prove the thesis they had professed to prove, in overlooking the possibility of a temporary, more general pro-defendant tendency of the courts, and not particularly towards women defendants.

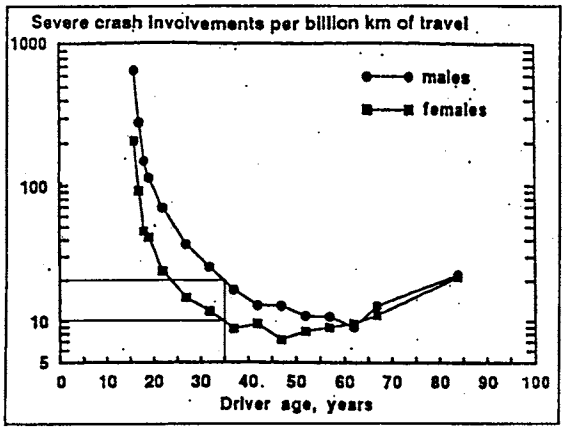
For the purposes of this comment, I am willing to accept Professor Schwartz' contentions. However, I will show that accepting these claims only serves to bolster feminists' arguments for adopting the reasonable woman standard.

The feminist works that Professor Schwartz refers to and criticizes are "unusual" feminist writings in the sense that they go to great lengths to detect and prove a different attitude towards women and a different characterization of the reasonable woman by the courts. However, the "usual" argument made by feminist scholars is that such a different attitude and characterization have never existed.[3] Professor Schwartz himself mentions that according to the feminists, "[t]he new wisdom ... is that the reasonable man standard in traditional tort law has effectively served to exclude or erase women." Therefore, if we accept that Welke and Schlanger in fact did not succeed in substantiating their theories or even that they were wrong, this will only strengthen the more general belief of feminists that the law is male-gender biased and, in most cases, considers only male standards, while female standards are ignored.

Second, Professor Schwartz challenges the empirical evidence that women behave more cautiously than men do, and from that he seems to imply that there is no need for different standards. He contends that even if there is a difference between the male and female level of caution, the degree of that divergence is what is relevant. Schwartz presents, among other things, a chart on the involvement of women drivers in severe car crashes, according

3 *See, e.g.*, Matthew H. Kramer, Critical Legal Theory and the Challenge of Feminism — A Philosophical Preconception 265-316 (1995).

to which, women motorists under the age of sixty tend to be, on average, less frequently involved in such accidents than their male counterparts do.



The lines charting the gender differential at the age of 35 were superimposed by the author of this article.

Schwartz also refers to an empirical study that examined gender-based differences in fastening seat belts. The study showed that women tend to wear seat belts 60% of the time, while men do so only 50% of the time. Professor Schwartz downplays the significance of this difference, stating,

> But as significant as a 10% gender differential is, it is, of course, no more than 10%. That is, for every five men out of ten who wear seat belts, there are also five women out of ten; for every four men out of ten who do not wear seat belts, there are also four women out of ten. It is only one person out of ten where gender makes a difference in explaining seat belt use.

Schwartz attempts to minimize the significance of the differential in female and male behavior as far as caution level is concerned by emphasizing that there is *only* a 10% gender differential. However, the fact that in the U.S. there are approximately 260 million people, about 50% of which are men, means that there are roughly 13 million men[4] who are driving without their

4 Even if one excludes non-drivers (children or the elderly, for example), the figure will still amount to a few million people.

seat belts and, therefore, less safely. Does the fact that we are now dealing with absolute numbers and not percentages make enough of a difference? I believe that when we are dealing with a phenomenon that relates to or affects the whole or most of the population, 10% is not *just* 10% and one should consider the difference accordingly.[5]

Furthermore, Professor Schwartz does not seem to attribute great significance to the gender differential that arises from the chart on severe crash involvement. For example, the added lines in the chart show that the number of men aged thirty-five involved in severe crash accidents is twenty for every billion kilometers, while the number of thirty-five-year-old women involved in such accidents is only ten. This is a 100% differential. These data, which Schwartz provides in order to undermine the claim that women are more cautious than men, only reinforce it, and quite convincingly.

This empirical data presented above should definitely affect substantial law and the ordering of national priorities with regard to safety precautions. The interesting question is how? What legal implications should such a gender differential have? In one of his footnotes, Professor Schwartz raises the following, unexpected possibility:

> If the behavior of women litigants were to be assessed under a "reasonable woman" standard, and if the conduct of the average woman is at least relevant in considering the "reasonable woman," then the adoption of a "reasonable woman" criterion would result in an increase in findings of negligence directed against women litigants.

With all due respect, I think both legislators and the courts should reach a different conclusion. As a matter of principle, society seeks perfect deterrence. Put differently, we want every person to invest just the right amount in preventive measures. Under the Learned Hand formula, this should equal the damage expectancy, no more and no less. If the average amount of damage caused by women's activities is less than the average amount of damage created by men's activities, then on average, the damage expectancy of women will be lower than that of men. Therefore, as a matter of law and as an inherent part of a tort negligence regime, women will have to invest *less* in precautions. Indeed, failure on the part of women to invest

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5 One should also note the following fact: if we assume an equal number of men and women in the U.S., then Professor Schwartz' example does not show a 10% differential, but, rather, a 25% differential. When we check men in comparison to women, men's driving is less careful than women's driving by 25%.

in such precautions would amount to negligence. However, women would not be exposed to higher standards than men, but rather quite the contrary.

Moreover, one should not restrict oneself to a negligence regime. In light of empirical differences in the behavior of men and women, society may seek to place further limitations on men's behavior, for example, by adopting two different tort regimes, one for men and one for women, or imposing greater limitations on men within these regimes. It is common knowledge that a negligence regime does not provide enough of an incentive to reduce accidents by lowering the level of activity; it only promotes taking precautions when performing a certain activity. If society seeks as a social goal to further reduce the level of car accidents, it may consider changing the legal regime from one of across-the-board negligence to a regime of negligence for women drivers and strict liability for male drivers. This would provide greater incentive for men to reduce the number of hours they spend on the roads, beyond the "regular" precautions they take. Society may also impose a different driving-age limitation for men and women. If, as the chart shows, at the age of eighteen, men are, by far, more likely to be involved in severe crash accidents than women of the same age are, perhaps the legislature should enact legislation limiting to twenty the age at which men are allowed to drive without accompaniment, while the age limitation for women will remain the same.[6] This would reduce the number of severe car accidents dramatically, without imposing an unnecessary burden on half of the population.

I know that these suggestions may seem fantastic. However, this is a result of the rigid preconceptions we have, as a society, regarding certain issues — preconceptions that feminists try to counter. It is also the result of the social costs involved in creating two different standards of strict liability and negligence for men and women respectively. I realize that there are cases in which these costs would be extremely high and would preclude adopting different standards.[7] However, in many other instances, these costs should not be overestimated. For example, it is not uncommon for men and women to be awarded different compensation due to the difference in their life expectancies. The only reason we do not find this peculiar is that we have grown accustomed to it.[8] Now consider for a moment a legal

6 Men under the age of twenty will either not drive at all or will be accompanied by an adult.

7 By using the term "costs" I do not mean only monetary costs but also costs in the broader sense.

8 It could be argued that women's longer life expectancy is influenced, in part, by their being more cautious.

system under which males and females receive the same compensation for their average life expectancies. Switching from that system to one under which males and females receive different compensation may trigger vigorous public debate and produce considerable social costs. However, this does not mean the transition is not justified.

We can also learn about differential treatment of the two genders from insurance companies, who do not wait for substantial changes in the law and keep themselves continuously updated about the expected harm of car accidents. These companies charge men, especially young men, a different premium from what they charge women. This can be illustrated by an excerpt from an insurance company's "publication" that appears on an English website, addressing the issue of the difference between men and women motorists in relation to serious injury and even death as a result of car accidents (the publication is from April 1998):

> Department of Transport research indicates that male drivers are involved in almost twice as many accidents as their female counterparts.
>
> In 1996, the number of male car drivers killed or seriously injured in road accidents was 9,770. The corresponding figure female car drivers was almost half at 5,240.
>
> ...
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> Several insurers have noticed this statistical tendency to road safety and have started to target women drivers by offering them reduced premiums. This reduction may be presented as a separate discount or it may be written into the premium rates.[9]

This difference in premium rates, which represents the different damage expectancies, does not seem odd and is generally accepted as a normal mechanism of the free market and categorization.

Third, Professor Schwartz contends that although the arguments in

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9 http://www.iii.co.uk/news/moneywise/april98/women_3.html. The website explains why men are involved in more deadly car accidents than women are:

> Research by Gallup for direct insurer Prospero Direct shows this is due to several factors. Women tend to drive fewer miles and at a slower pace. They avoid driving at night and in adverse weather conditions and their cars are usually older, less powerful models. And just 4% of women admit to occasionally exceeding the drink drive limit, compared with 10% of men.

This seems to suggest that at least as far as driving is concerned, the reasonable woman is more risk averse than the reasonable man is.

feminist writings are interesting, and likewise the proposition to adopt a reasonable woman standard, "none of these articles really endorses a differential standard for purposes of evaluating the negligence of a party's conduct in personal injury litigation." He argues that feminists do not provide alternatives that could be applied in the judicial process and discourse. Therefore, even if a judge or jury were to want to use standards more in line with the feminist approach, they would not know exactly what to apply or how to apply such standards.

As I understand, many feminists do not view their role as one of providing new, comprehensive standards or of offering an alternative to replace the existing system.[10] They are aware of the importance of such considerations as stability, clarity, and predictability of the judicial rule. However, many feminist scholars *are interested* in adding their own opinion and point of view to the judicial discourse. This would render a more balanced judicial process, one that represents all segments of society. On this matter, it has been observed that

> [l]egal feminism is an extremely new field[11] and cannot yet be held responsible for complete or totalizing theories of law. Only in masculinist myth does wisdom spring fully grown and armed from the thinker's head.[12]

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10 According to some feminists, especially the radicals (and MacKinnon's famous article is a good example of this approach, Catherine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 J. Women Culture & Soc'y 635 (1983)), women are not yet in the position to allow them to suggest an adequate and comprehensive alternative, something that will only be possible at a much later stage.

11 It is, indeed, a relatively new field as opposed to other areas of law. For example, the debate on corrective justice has been going on for centuries.

12 Jeanne L. Schroeder, *Abduction from the Seraglio: Feminist Methodologies and the Logic of Imagination*, 70 Tex. L. Rev. 109, 113-14 (1991). Schroeder also refers to Imre Lakatos, who argues that new paradigms rarely, if ever, are as complete or as free from apparent anomalies as the old paradigms they seek to replace, but that this defect alone should not be viewed as a reason to reject a new paradigm. Imre Lakatos, *Falsification and the Methodology of Scientific Research Programmes, in* Criticism and the Growth of Knowledge 91, 120 n.2 (Imre Lakatos & Alan Musgrave eds., 1970). However, Schroeder agrees that while feminism has been particularly successful in challenging assumptions and, sometimes, even in changing the law of "obvious" gender issues such as employment discrimination, rape, and abortion, it has been less successful in developing overarching jurisprudential approaches designed to achieve one of the primary feminist goals: not merely bringing women into the definition of person for the purposes of the law, but also redefining the concept of person and law in light of women and their insights.

And

> [f]eminist legal method does not ignore, nor exclude, the necessity of predictability and certainty in law which is facilitated by the application of rules and principles. Nor, necessarily, does feminist legal method offer an exhaustive alternative to "traditional" legal methods. Rather, feminist legal method seeks to complement traditional legal method by incorporation of alternative views, experiences, perceptions and values which traditional method, in its insistence on logic and deductive thought, may exclude.[13]

The assumption is that female intervention "[i]s most likely to be influencing the adversarial process, in 'softening' the hard, cold logic of male reasoning ... ."[14]

Most feminist scholars assert that the feminist approach does not dictate a *list* of attributes or parameters that should be taken into account when addressing certain issues. Most do not even point to *one* feminist approach for solving a certain problem, but, rather, claim that there is a heterogeneous variety of feminist opinions that tend to deviate from the usual male opinions.[15] The commonly held view is that

> [t]he concern for interconnectedness, for relationships through an "ethic of care" has a valuable contribution to make to the justice system. A justice system based primarily on cold rationality will not benefit all in the community. A legal system which incorporates women's

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13 Hilaire Barnett, Introduction to Feminist Jurisprudence 25 (1998).

14 Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 Berkeley Women's L.J. 39, 42 (1985). *See also* Maria Lugones & Elizabeth Spelman, *Have We Got a Theory for You! Feminist Theory, Cultural Imperialism and the Demand of the Women's Voice, in* Feminist Philosophies — Problems, Theories, and Applications 378 (Janet A. Kourany et al. eds., 1992).

15 *See, e.g.*, Schroeder, *supra* note 12, at 209:

> On my analysis, I do not expect that one feminist theory will or can emerge, any more than all male legal scholars agree on the same issues. I am, therefore, wary of articles that purport to give a "feminist" analysis of a particular area of law, because of the implication that women are so unoriginal in their thought that they all think alike. I would be surprised, however, if women did not — on average — approach problems differently than men — on average — and, consequently, will not only be able to critique the unexamined presumptions of current legal theory, but eventually will propose new imaginative alternatives.

> insights and experiences, women's ethic of care and responsibility, is far more likely to exhibit humanity and justice.[16]

Indeed, Professor Schwartz' criticism is justified in the sense that feminists do not provide better alternatives to replace all or most of the existing judicial doctrines. However, if we were to continue this line of thought, we could conclude that an existing legal concept cannot be criticized without providing an appropriate alternative. I do not think that such an approach is a legitimate one. A common concept can and should be criticized even absent a suggested comprehensive alternative. Criticism can affect the way existing doctrines are construed and, hence, the entire concept. Often the alternatives develop only later.[17] The mere criticism and expression of dissatisfaction with the existing system are what triggers academia (and perhaps also the courts and legislators) to seek and find better alternatives to the current situation. Any other approach leads to stagnation from which there is no escape.

Furthermore, an interesting argument in this context is that the time and forum for making an impact by means of a different philosophical view or concept is not court deliberations and decisions, but at a much earlier stage. Hence, an inherent failure in the academic legal analysis is that it concentrates on the analysis of cases and court decisions and on the litigation phase (which is the phase of confrontation), when it is difficult to express female attributes such as care and empathy. Such attitudes can be expressed earlier, at the planning, negotiation, advising, and settlement stages of the case. Thus, for example, feminist scholar Jeanne Schroeder noted,

> Once litigation has commenced, the hostility between the litigants is so high that it is too late to talk about relations, compromise, and mutuality ... . Legal cases, which are studied in law school, are the embodiment of this warlike stage in the life of legal relations. A large

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16 Barnett, *supra* note 13, at 26.

17 *See* Carolyn A. Goodzeit, Note, *Rethinking Emotional Distress Law: Prenatal Malpractice and Feminist Theory*, 63 Fordham L. Rev. 175, 178 (1994):

> Integrating feminist theory into tort law does not conclude with a reconsideration of traditional tort concepts. Tort law frequently involves issues, such as pregnancy, that are of central concern to women. Therefore, when both traditional torts concepts and pregnancy coincide within a single tort, feminist legal theory can supply a vast array of critiques and suggestions for change. This collision is evident in a series of cases that involve recovery for negligent infliction of emotional distress for the stillbirth or injury of fetuses as a result of prenatal medical malpractice.

See also id. at 209 (listing standards that should be taken into account from the feminist perspective).

> portion of what lawyers do, indeed all of what many lawyers do, takes place at the planning, negotiation, advising, and settlement stages of legal relationships. All these stages are characterized by concerns for relationships and mutuality. Of course, decisions are affected by the knowledge that war in the form of litigation is always a possible alternative, but it is usually one that the parties want to avoid.[18]

Finally, Professor Schwartz argues that since the courts have replaced the term "reasonable man" with "reasonable person" — or the more recent "reasonable prudent/careful person" — the term is no longer male — or gender-biased. First, he states, "I find it impossible to identify anything that is even implicitly sexist in terms of this sort." He then argues that in any event, the instructions regarding the decision are given to juries that today are composed of men and women alike and "there is nothing in a phrase such as ‘reasonable prudent person’ that would induce a jury consisting of a combination of men and women to exhibit a male bias in reaching its decision."

According to Professor Schwartz, today, when the term "reasonable man" has undergone a terminological change and the jury consists of both sexes, male/gender bias no longer exists. In so claiming, Professor Schwartz fails to grasp the feminist view accurately, and with all due respect, it is my claim that this renders his criticism inaccurate. What Professor Schwartz does not consider is that feminists claim that the reasonable man standard can be criticized on several levels.

The main feminist argument that Professor Schwartz targets is that the judicial system does not take into account female characteristics in applying the reasonable person standard and compares the reasonable woman to the reasonable man. According to this argument ignoring unique female characteristics, whether they stem from biological differences or from different social roles, causes an injustice to women, in that the benchmark by which their behavior is assessed is comprised of male traits. He argues that due to the change in terminology and jury composition, this problem has ceased to exist.

However, the use of new terminology does not result, at least not directly, in a change in attitude of the courts. The case of *Sayers v. Harlow UDC*[19] is a prime illustration of this point, exemplifying the absurdity of male

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18 Schroeder, *supra* note 12, at 122. *See also* Jeanne L. Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence*, 75 Iowa L. Rev. 1135, 1142 n.12 (1990).

19 [1958] 1 W.L.R. 623.

judgments and the unrealistic standards attributed to the reasonable person in certain circumstances. In that case, criticized in one of the leading feminists articles,[20] three elderly male judges were required to put themselves in the position of a woman dressed in a tight skirt and high-heeled shoes and locked in a lavatory while her impatient husband waited for her at a bus stop. The court concluded that the woman had been contributorily negligent in trying to climb over the lavatory door. Professor Martin, the author of the above-mentioned article, argues that a "true" standard of the reasonable woman (composed both of the definition of the standard and its implementation by the courts) could have led to a different outcome. This example demonstrates that a terminological change is not always enough and that there may be a need for the judicial system to develop values, norms, and standards that are not automatically apparent. This process will be possible only once the ratio of male and female judges changes, with greater weight given in the judicial sphere to the female voice.

As noted, Professor Schwartz also discusses the factor of jury composition, arguing that the fact that juries today consist of both men and women reduces gender-bias, for at least the women jury members consider female traits. Furthermore, most judicial decisions are reached by the court of first instance (i.e., by the jury) and not the appellate court, which narrows the opportunity for bias even further. However, the jury still is instructed by the judge, who directs them as to what they may and may not consider in their decision and what factors and standards are relevant for their decision. These instructions have a significant influence both on the jury's decision and on the way in which the decision is examined by the appellate court. Gender-bias in the judge's guidelines can, conceivably, affect the jury's decision. Hence, it is not at all certain that male-bias has been eliminated even at the jury level.[21]

At this juncture, it should be recalled that there are further levels of

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20 Robyn Martin, *A Feminist View of the Reasonable Man: An Alternative Approach to Liability in Negligence for Personal Injury*, 23 Anglo-Am. L. Rev. 334, 348 (1994).

21 Unlike Professor Schwartz, I think that the instructions to the jury can preserve the gender bias even if they "give a very substantial discretion to the jury." For numerous examples of such instances and their potential to influence the jury decision, see David W. Barnes & Rosemary McCool, *Reasonable Care in Tort Law: The Duty to Take Corrective Precautions*, 36 Ariz. L. Rev. 357 (1994); Douglas H. Cook, *Personal Responsibility and the Law of Torts*, 45 Am. U. L. Rev. 1245 (1996); Kevin J. Heller, *Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 Am. J. Crim. L. 1 (1998); Cathryn J. Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 Am. U. L. Rev. 11 (1986).

feminist criticism of tort law, which were neglected in Professor Schwartz' article. These levels address not only the characteristics that are examined, or not examined, and taken, or not taken, into account by the courts, but also the "pure" logical/rational implementation of the reasonable man standard, which is not necessarily required by the mere definition of reasonableness. The courts have exhibited a growing tendency to examine the question of reasonableness according to the Learned Hand formula, even though there are a variety of other methods to do so. For example, reasonableness can be examined in terms of the blameworthiness of certain behavior, of the flaw in that behavior (wrongfulness), etc. The standard feminist argument is that the courts very rarely choose to do so. The judicial discourse emphasizes rationality and cost/benefit analysis. The feminist literature, which derives much of its reasoning from Carol Gilligan's *In a Different Voice*,[22] claims that implementing the reasonable person standard in such a way gives voice to only the male point of view and not the female.

In an attempt to provide insight into the differences between men and women, Carol Gilligan notes in *In a Different Voice*, amongst other things, the divergent reactions of a boy and a girl to a moral dilemma that they were requested to address.[23] In this dilemma, a man, Heinz, is trying to decide whether to steal medicine he cannot afford to purchase, in order to save his wife's life. After hearing the description of the dilemma — Heinz' difficulties, his wife's illness, the pharmacist's refusal to give Heinz a discount — the boy and the girl were asked whether Heinz should steal the medication. Gilligan describes the boy's reaction as follows:

> Fascinated by the power of logic, this eleven-year-old boy locates truth in math, which, he says, is "the only thing that is totally logical." Considering the moral dilemma to be "sort of like a math problem with humans," he sets it up as an equation and proceeds to work out the solution. Since his solution is rationally derived, he assumes that anyone following reason would arrive at the same conclusion and thus that a judge would also consider stealing to be the right thing for Heinz to do.[24]

The similarity between the boy's logic and the way in which negligence is commonly examined is striking. The Learned Hand formula, developed by Richard Posner and adopted by the courts, uses mathematical parameters

22 Carol Gilligan, In a Different Voice (rev. ed. 1993).
23 *Id.* at 24.
24 *Id.* at 26-27.

and examines B (the Burden of taking precautions) verses PL (the magnitude of the Loss multiplied by its Probability). The boy described in Gilligan's book, like the presiding judge who implements the Learned Hand formula, enters the data into the equation and examines the result arithmetically.

In contrast, the girl's response to the moral dilemma is completely different. The girl does not see the dilemma as "a math problem with humans but [as a] narrative of relationships that extends over time."[25] She "seeks to respond to the druggist's need in a way that would sustain rather than sever connection."[26] She sees "a world comprised of relationships rather than of people standing alone, a world that coheres through the human connection rather than through systems of rules."[27]

The differences in conception and attitude between the male and female modes of analysis presented in Gilligan's book lay the foundation for criticism of the positive law at a higher level. At this level of criticism, the question examined is not whether and which traits of the plaintiff and defendant are taken into account.[28] Put differently, here, the question of whether female traits are taken into account under the Learned Hand formula is irrelevant. It is at this level that the feminist scholars challenge the very use of the formula. They argue that in deciding who is the reasonable man or what the reasonable man standards are, the court should base its decision less upon pure logic and formulas and much more upon the context: more feelings and emotions and less rationality. Thus, such questions will arise as: Why should we accept that it is "reasonable" to let an accident happen when it is more expensive to prevent it, if such a calculated approach to human suffering affronts us? Or: Why should people who act irresponsibly and without regard for others so often be able to pay their way out of a situation, which in no real sense recompenses the victim for the loss she has sustained?[29]

Feminists further assert that the legal characteristics of the reasonable person — particularly the ability to detach oneself from the specific circumstances of a situation and weigh the costs and benefits of an action without recourse to "emotional" or "sentimental" considerations — are male in the sense that they rely upon characteristics conventionally attributed to, and applauded in, men and are in contrast to features typically associated

25 *Id.* at 28.
26 *Id.*
27 *Id.* at 29.
28 *But see* Schroeder, *supra* note 12, at 131-32.
29 Joanne Conaghan, *Tort Law and the Feminist Critique of Reason, in* Feminist Perspectives on the Foundational Subjects of Law 47, 49 (Anne Bottomley ed., 1996).

with women, such as a passionate or emotional nature. That is to say, at least some feminist scholars doubt the validity of economic analysis and economic principles as the (primary) guiding rules in tort.[30] In this context, Professor Bender asks in one of her articles, "Have we gained anything from legally condoning behavior that causes enormous physical and mental distress and yet is economically efficient?"[31] The tendency of tort law to reduce human tragedy to efficiency calculations is, she claims, inconsistent with our core values of human dignity and equality.[32]

The feminist position takes these arguments one step further, questioning the very use of the reasonable person standard and not only the way in which it is implemented. Under this approach, the move from reasonable "man" to "person" is immaterial. Here, too, the feminist argument rises to a higher level of abstraction. There are feminist scholars who argue that the use of the reasonable person standard, which tries to create a high level of abstraction and objectivity and emotional detachment with regard to the case and its circumstances, is in fact also a male-oriented standard, which perpetuates the gender inequality in tort law. These feminist writers claim that this approach to resolving tort cases reflects a mode of analysis that is distinctly "male." Thus, the tendency of judges to abstract a dispute from its particular context, to reformulate it in terms of a conflict of rights, and to seek a universal guiding principle by which the conflict can be resolved contrasts with more "feminine" approaches to dispute resolution, which emphasize the relevance of context and the importance of preserving and developing particular relationships.[33]

Thus, when the court examines whether a defendant has been negligent, it does not ask whether the defendant acted *bona fide* and genuinely to the best of his or her judgment, but whether he or she acted as a reasonable person would. The court emphasizes the objective standard to which all must conform, rather than the subjective standard that takes account of individual human frailties. The focus is on the abstract and impersonal and not on the injurer's personal traits. Feminists claim that "by and large, neither the personal characteristics nor the particular weaknesses of the defendant are considered when evaluating his behavior and he may be liable

30 There are many empirical works that demonstrate that people do not act or are not driven solely by economic incentives.

31 Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. Legal Educ. 3, 31 (1988).

32 Leslie Bender, *Changing the Values in Tort Law*, 25 Tulsa L.J. 759, 767 (1990); *cf.* Conaghan, *supra* note 29, at 63.

33 Conaghan, *supra* note 29, at 51.

even in circumstances where, in no moral sense, can he be said to be at fault."[34] Furthermore, some believe that "objectivity, expressed through the articulation of universal standards, plays a principal role in constructing and maintaining hierarchical and oppressive gender relations."[35]

While it is true that Professor Schwartz addresses these issues in the second part of his article, where he analyzes the duty to rescue, he does so only partially. Moreover, discussing the duty to rescue in detachment from the reasonable man/person standard is artificial. The feminist view with regard to the importance of the circumstances of any given and specific case and the emphasis on relationships are equally applicable to the general tort negligence regime, and it is odd that Professor Schwartz did not mention this in this context as well. As noted, Professor Schwartz' claim regarding the elimination of a male/gender bias is directed, for the most part, at the first level of the feminist argument, and perhaps it touches also on the second level, but it does not truly address the third level discussed above.

II. THE DUTY TO RESCUE

In the second part of his article, Professor Schwartz criticizes the feminist approach to the duty to rescue. His criticism can be divided into two principal lines of argument.

The essence of his *first argument* is that it is not at all clear that women's ethics do, indeed, support a general duty to rescue. Professor Schwartz claims that Professor Bender, who analyzes the rule precluding a general duty to rescue (and who derives much of her material from *In a Different Voice*), goes too far and that her analysis is not compatible with Gilligan's arguments. In his opinion, even if one adopts Gilligan's point of view, this does not lead to the conclusion that women favor a general duty to rescue. His main argument is that although Gilligan does emphasize affection and care as female characteristics, these traits are manifested in close relationships, between people who know each other. Nothing in Gilligan's account implies that women care or feel responsible towards strangers. Moreover, while Gilligan writes about responsibilities that are voluntarily assumed, Bender attempts to translate these tendencies into affirmative duties. In Professor Schwartz' opinion, nothing in Gilligan's book, on which Bender attempts to rely, supports the idea that women's ethics would condone such coercion. In

34 *Id.*

35 *Id.* at 61; *see also* Catharine A. MacKinnon, Feminism Unmodified 50 (1986).

addition, he claims, Gilligan emphasizes the importance of the circumstances of each specific event, and not the general, abstract norm, which is detached from the particular case.

In short, Professor Schwartz believes that imposition of a general duty to rescue deviates from the rationale underlying Gilligan's work. First, such a duty usually is applicable in the context of strangers, since a prior relationship in any event imposes a duty upon the parties. Second, a general duty is regarded as a male form of thought, which emphasizes the rational, normative, general rule, and not an ad hoc examination of a particular case. Professor Schwartz also brings evidence from empirical studies that show that men actually have a greater tendency to extend aid. While he concedes that this is often the result of factors irrelevant to the duty to rescue, such as skillfulness and competence, he nonetheless makes the claim that these studies show no significant behavioral difference between men and women that could point to greater commitment on the part of women to the act of rescuing. He concludes by saying that "the empirical studies (ignored by Bender) fail to support her claim that women's ethics make the rescue of strangers more normal and more likely."

Professor Schwartz' *second argument* is that even if one could demonstrate (and he agrees that this is not impossible) that women's ethics do condone rescue more than men's ethics do and, therefore, would support a general duty to rescue, this cannot justify altering the judicial rule. He states,

> If this assessment is right, then it might seem fair to say that the common law rule denying any rescue duty has a male orientation, while the reversal of the common law rule (recognizing a rescue obligation) would have a female orientation. Yet if such a characterization sheds light on the rescue debate by conferring a descriptive label to each side of the debate, it nevertheless fails to generate a normative resolution of that debate. Only if one takes the further step and concludes that women's ethics are right and men's ethics wrong would the description lead to a normative recommendation.

Both of Professor Schwartz' arguments can be countered. However, I will focus on the second argument primarily — that even the existence of a different attitude on the part of women towards the act of rescuing cannot, alone, justify altering the prevailing rule. I will then make only a few comments with regard to the first argument.

Professor Schwartz claims that in the absence of evidence of the superiority of women's attitude towards the duty to rescue, assuming one exists, a normative resolution cannot be reached. Why should female ethics be preferred over male ethics, when the superiority of the former to the

latter has not been shown? Professor Schwartz asserts that even those who advocate economic analysis of the law fail to agree on the question of which rule should gain preference. Different models lead to different conclusions, and not one scholar has been able to show conclusively and convincingly that one approach is better than the other.[36]

At first glance, this argument seems quite appealing. Even if we accept the fact that feminists advance a duty to rescue, we cannot reach a normative decision before women substantiate the superiority of this rule or the rightfulness and superiority of their ethics. However, I disagree with Professor Schwartz on a number of points.

First, leaving the legal status quo unaltered will perpetuate inequality and not allow for a real attempt to change our reality. Since the feminist claim is that inequality has been perpetuated by the system from the day it was established, the default rule that Professor Schwartz presents does not give women a real opportunity to change what they consider gender-biased rules. Professor Schwartz, in imposing the burden of proof regarding the superiority of the rule upon women, perpetuates the unequal status quo and, in so doing, hinders any change.

We could draw an analogy between this issue and the burden of proof in civil cases. The default rule of evidence is that in order for the plaintiff to win the case, he or she must convince the court with greater than 50% certainty that he or she is right. However, I believe that the correct analogy is not with the standard rule of evidence, but with the rule of *res ipsa loqitor* or other doctrines that shift the burden of proof from the plaintiff to the defendant.[37] In cases in which the plaintiff is in a position of inherent evidential inferiority, the legal system allows for a shift of the burden of proof to the defendant. The defendant then bears the burden of convincing the court, by a preponderance of the evidence, that he or she is right. This evidential inferiority can be likened to the disadvantage borne by women in the legal system in terms of their ability to change long-established rules and their representation in legislative bodies, higher courts, and even academia.

Second, the fact that the studies Schwartz cites are inconclusive with regard to the benefits arising from changing the prevailing rule does not mean it should not be changed. Even some of the proponents of economic analysis of the law and advocates of theories of deterrence concede that

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36 *See, e.g.*, William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. Legal Stud. 83 (1978).

37 *See, e.g.*, Ariel Porat & Alex Stein, *Liability For Uncertainty: Making Evidential Damage Actionable*, 18 Cardozo L. Rev. 1891 (1997).

sometimes the right way to decide between two or more alternatives of equal weight is by trial and error or educated guess.[38] In my opinion, it is sufficient that the rule of no-duty to rescue, which has prevailed for so long, meets with dissatisfaction amongst a large part of the population to justify adopting a new rule that may, if applied correctly and successfully, convince the rest of the population of its benefits. This argument, I believe, is valid in itself, but is bolstered by the next, third argument.

My third argument is that the assumption that because there is no normative guidance for deciding between the duty to rescue and the no-duty to rescue rules, a decision cannot be reached rests on another, hidden assumption. Under this latter assumption, the two genders bear, in equal part, the harm caused by the no-duty to rescue rule. Accordingly, and in light of the fact that the alternative rule has not been proven to be economically preferable, one could argue that a "tie" exists between the no-duty rule and its alternative and therefore no normative decision can be reached with regard to which rule should prevail. I believe that undermining the claim of equality between the genders could provide clear guidance to choose the duty to rescue rule.

I will illustrate this argument with a numerical example. Assume that the no-duty rule costs society an average of 100 each year. In order to simplify matters, we will only consider costs that are a direct result of the rule — that is to say, costs that arise when an easy rescue does not occur, when a duty to rescue rule would have prevented these costs altogether. Now let us assume that since the no-duty to rescue rule has not been proved to be more or less efficient than the alternative rule, the social costs involved in maintaining a duty to rescue rule are about 100 per year as well.[39] These costs result from

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38 For example, in his famous book *The Costs of Accidents*, Professor Calabresi explains the method of finding the one who, in the absence of more information, is likely to be the cheapest cost-avoider — the one to whom the costs of the accident should be allocated. Imposing liability upon the latter will, according to Calabresi, yield the optimal result, for it will minimize the costs of the accident and the costs of its prevention. In his book, Calabresi provides several guidelines that should be followed in order to find the cheapest cost-avoider. However, he admits that sometimes the decision will not be easy and the guidelines will not be sufficient, for there still may be a tie situation between a few of the candidates. In such a situation, one suggestion Calabresi offers to break the tie — the one that is relevant to our discussion — is to make an educated guess. In such a case, "the general deterrence approach can ... make a guess about the activity and then test it experimentally." This would be done through controlled experiments or statistical record-keeping. Guido Calabresi, The Costs of Accidents 161 (1970). *See also id.* at 153-60.

39 One could complicate the example by claiming that not all damage would be prevented. But this would only amount to a more complex calculation (between

the application of the rule, restriction of the rescuer's personal liberty, damage occurring pursuant to rescue attempts, expenses borne by the rescuer, etc. In other words, the overall social costs of maintaining each of these regimes are about the same. Now let us add another factor to this example, that the absence of a duty to rescue causes harm mainly to women. Stated differently, the social costs are not allocated equally (or thereabout) between men and women, but, rather, most are borne by women — say at a 10 to 90 ratio. If feminists can demonstrate that in today's world, it is women who are mainly injured by the prevailing no-duty to rescue rule, whether due to the fact that most acts of rescue are required during acts of rape, domestic violence, and the like or because women in general are in greater need of help, then the burden of damage is unequally distributed between the two genders. This inequality may justify altering the rule, even if the overall social benefit derived from the alternative rule is no greater, and perhaps even less, than the benefits derived from the existing rule.[40]

In fact, the feminist approach should be given preference not because of superior ethics, but due to the misallocation of the harm caused by the failure to rescue. This argument can be justified by considerations of distributive justice and by the law of diminishing returns, with regard to all women as a group and every woman as an individual. As a group, women are characterized, at least according to feminists, as possessing a smaller amount of resources than men possess. Therefore, allocating a greater piece of the harm to them creates injustice and inequality, in two aspects. The first aspect is a result of the disproportionate harm allocated to women: when unequal portions of the harm are imposed upon equals, injustice results, because one group suffers more than the other. The second aspect stems from the fact that according to feminists, women have fewer resources than men to begin with. Thus, even equal allocation of the overall burden of harm will cause greater injury to women than to men, because every

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the damage that would be prevented and the costs involved in the rule's alteration) without a change in the outcome. Here, too, the meaning of a "tie" between the rules is that one rule, at least from an economic aspect, is not preferable to the other; that is to say, both rules entail the same social costs and benefits.

40 And, indeed, feminists provide many studies and empirical evidence that show that women are injured significantly more than men from crime and an act of rescue would reduce their damage. Moreover, as social psychology studies show, women also need significantly more help than men. That is another reason why they are injured more by the existing rule, for if men seek less help, then they suffer less damage, as a group, from the absence of a duty to rescue, since they often do not require help in any event. This, too, has its influence on the rule from a distributive aspect. *See infra* note 47.

dollar of harm they bear costs them relatively more than it costs the deeper pockets of men. These two aspects are valid both with regard to women as a group, as well as every woman as an individual. The burden imposed upon rescuers as individuals is usually small. Yet the burden borne by the individual unsaved victim is great, since the cases relevant to this discussion usually involve a victim whose physical wellbeing or even life is in danger. Imposing the greater harm of not being rescued upon individuals, especially women, hurts these individuals more significantly. The female victim is the one who suffers the harm, to a greater extent and, therefore, in an unequal manner. If the overall costs of rendering help are distributed equally among all members of society, then the average cost to each individual rescuer in cases of an easy rescue is significantly smaller than that with which the person who is not rescued is faced. Indeed, this argument applies to both men and women, but since women require more help, equality is once again overthrown.

Adopting a duty to rescue rule will have a redistributive effect, although it may not lead to an overall economic improvement. My argument is that this redistributive effect, together with the distributive injustice existing today, could lead to a normative recommendation for adopting the duty to rescue rule even if there is no proof of that rule's overall higher efficiency and the superiority of women's ethics.

Fourth, Professor Schwartz' claim that there is a "tie" between the two alternative rules reflects a binary approach under which we must choose between one of two alternatives. The question that then arises is whether there is room for an intermediate solution. Namely, can we accept that one stance is no better or more substantiated than the other and therefore neither of the extreme antithetic methods should be applied exclusively and in its entirety? We could then conceive of a solution that expresses partially both points of view — for example, a duty to rescue only in respect to victims of a crime. Such an approach would reduce considerably the injury to the rescuer's freedom, but would still provide a response to the majority of problematic cases, in which women tend to favor imposing a duty to rescue. There is a multitude of possibilities for other creative solutions, which could apply both to the scope of the duty — the circumstances in which the duty will apply — and to its substance — what the rescuer would have to do in order to comply with the duty. There are various possibilities for the content of the duty, a sliding scale ranging from a basic obligation to report to the relevant authorities, to an obligation to take active intervention that involves self-risk. Society could position itself along this spectrum in accordance with its values and policies. It is possible that a solution could be found lying between the two points of the spectrum that would lead to a duty to

report only in cases of violent crimes. Perhaps such a definition of the duty, at least in the first stages of its implementation, would satisfy both sides of the debate.

At this point, I would like to address the *first* part of Professor Schwartz' criticism. In psychological literature, we can find many scholars — and Carol Gilligan is only one such scholar — who support the claim that women attach more importance to expressing emotions and sympathy towards others than men do.[41] Much of the bloodshed throughout the history of mankind would probably have been spared had women held key positions in politics. Empirical studies show that men have a much higher level of aggression than women.[42] More than 95% of reported cases of rape and sexual assault involve a male offender and a female victim. Sexual assaults comprise about 6% of the violent crime reported in the United States, and over 80% of these crimes involve aggravated assault: an attack by one person on another with the intent of causing bodily injury. These assaults overwhelmingly involve male attackers.[43]

The qualities of sensitivity, sympathy, and interconnectivity are manifested in women's conduct in their interaction with each other and with members

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41 This view is endorsed by feminists who see a broad common denominator between most women. However, it would probably be rejected by neo-feminists. *See, e.g.*, Matthew H. Kramer, Critical Legal Theory and the Challenge of Feminism (1995).

42 These differences can be explained either by different social roles attributed to men and women, by biological differences, or both:

> It seems reasonable to explain these male-female differences in terms of different expectancies learned as part of one's gender role rather than in terms of biology. ... For example, a history of social pressure to accept second place in assertive and aggressive situations may be the reason that women are less likely than men to emphasize masculine behavioral styles. ... A different explanation for these sex differences is found, however, in studies of the effects of testosterone levels on behavior ... [the hormone] strongly affects the tendency to dominate and control. Among our ancestors, the production of testosterone was useful in increasing the odds of male reproduction in that the most combative and dominant individuals could subdue rival males and the desired female sexual target. Today the remnants of these primitive tendencies can be seen in the competitive, dominant, and sometimes aggressive actions of males compared to females. One of the general conclusions is that testosterone has a significant effect on antisocial behavior, but that both personality and social variables can moderate antisocial tendencies and hold them in check.

Robert A. Baron & Donn Byrne, Social Psychology — Understanding Human Interaction 206 (7th ed. 1994).

43 H. Andrew Michener & John D. DeLamater, Social Psychology 294-95 (3d ed. 1994).

of the other sex.[44] For example, women are more likely than men to deprive themselves in order to help someone else.[45] Likewise, in managerial roles, women's leadership style is characterized as connective and interactive; women tend towards collaboration, consultation, and negotiation rather than the more masculine tradition of competition, individual achievement, and demands.[46]

It is therefore reasonable to assume that a woman would be less of an individualist and more attentive to other people's needs, less preoccupied with war, competition, and winning, and more with social involvement. Women would have less of a need for independence and more of a calling for interdependence.[47] From the psychological studies and in light of women's different philosophical views and ethics, it seems that the female view of the duty to rescue would undoubtedly be different from the male view.

Gilligan, too, describes the female attitude as different from that of males, and not exclusively in the context of close relationships. While men conceive the world as filled with dangers and relationships on the verge of explosion, women see a much more protective world. They tend towards a way of life in which love for the other has great significance. According to Gilligan, the female experience sheds light onto a territory in which violence is rare, unlike the male experience.

Professor Schwartz, in order to refute these arguments, turns to empirical studies. These studies examine the rescuing level of men and women. Professor Schwartz' conclusion on this matter is that "the empirical studies (ignored by Bender) fail to support her claim that women's ethics make the rescue of strangers more normal and more likely."

I believe that these studies are empirically insignificant to this issue. Do women actually need to rescue in order to hold a moral stance that supports rescuing? I do not think so. However, even if we were to argue that a moral stance cannot be held without being acted upon, the studies cited by Professor Schwartz would still have little significance. Not only do they include (as Professor Schwartz concedes) irrelevant factors that affect potential rescuers and bias the results of the study, such as physical skill (in acts of rescue that require extreme strength), professional skill, etc., but every act of rescue is also affected by social roles that are dictated to us from

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44 Baron & Byrne, *supra* note 42.

45 *Id.* at 206.

46 *Id. See also* David G. Myers, Social Psychology 184-86 (6th ed. 1999).

47 Arie Nadler, *Help-Seeking Behavior: Psychological Costs and Instrumental Benefits, in* Prosocial Behavior 290 (Margaret S. Clark ed., 1991). *See also* Baron & Byrne, *supra* note 42, at 415.

childhood. We were all brought up to believe that where help is needed, men should be the first to lend a hand, just as men are expected to go to war to protect country and family. These are the roles that society has pre-assigned to each gender. Do these social roles dictate or, to be more accurate, should they dictate our ethics and philosophical view of what is right and what is necessary? While feminists oppose such social dictates, they do not deny that the world still acts in accordance with them.

Moreover, the fact that in general, women seek more help than men must not be overlooked. It is only reasonable to assume that this would affect their interest in changing the existing rule. The female view of the rule must not be narrowed to the rescuer's point of view — the chances that they would be required to rescue someone else — but should also take into account their odds of being rescued. If women, in general, value the giving of help differently than men do, it is highly likely that even if their opinion from the rescuer's point of view is similar to that of men (and I doubt even that), the determining factor is their fear of not being helped when they are in need. Since every woman has a greater chance of finding herself in need of being rescued than of being a rescuer, one could argue that a woman's major concern would be the former. Hence, even if their attitude towards the act of rescuing as such is the same as that of men, women may still have a different attitude in general towards the duty to rescue.

There is a series of studies that show unequivocally that women as a gender need help and seek help a lot more than men do.[48] There are both trivial examples, such as help in changing a flat tire, as well as less trivial examples, such as rape. According to these studies, women in general "seek more help. They are twice as likely to seek medical and psychiatric help. They are the majority of callers to radio counseling programs and clients of college counseling centers. They often welcome help from friends."[49] Furthermore, not only do women seek more help, they also get more help, at least insofar as male rescuers are involved. Studies show that men tend to lend considerably more help to women than they do to men, for example, to women hitchhikers or women trying to change a tire as opposed to men in the same situations. Once again, there may be many possible explanations for this phenomenon, but the purpose of this comment is not to explain it, but only to point it out.

An interesting illustration of this is the sinking of the Titanic. About

48 There is debate as to the origins of these differences, but elaboration on this matter is beyond the scope of this article. However, see Baron & Byrne, *supra* note 42, at 196.

49 Myers, *supra* note 46, at 503.

70% of the female population was saved, as opposed to only 20% of the men. The objective survival chances in First Class were 2.5 times those of Third Class (due to better access to the deck, more life-saving devices, etc.). Nevertheless, due to gender norms of altruism, the survival odds were better for the *Third Class* passengers who were women (47%) than for the *First Class* passengers who were men (31%).[50]

In sum, the fact that women require and receive more help and that at least according to their belief, a general duty to rescue is likely to increase the amount of help they will receive may explain why their stance is different from that of men (although I am quite confident that some feminists will not agree with this explanation, since it may hinder the changing of social conventions).[51]

CONCLUSION

Professor Schwartz concludes his article by observing that the first decade (or more) of feminist writings on tort law has succeeded in opening up valuable lines of inquiry. One may hope, he adds, and perhaps predict that in the next decade, those lines of inquiry will be more thoroughly explored and additional lines of inquiry identified.

Professor Schwartz' article and conclusion may leave the impression of a missed opportunity. Feminism could (and perhaps should) have done better. Something is still missing and yet to be developed. Indeed, feminists themselves have reached the same conclusion. Professor Bender, in the Introduction to her well-known article *An Overview of Feminist Tort Scholarship,*[52] stated that the work of feminist scholars in the field of tort law lags behind their work in more traditional areas of law.

However, while Bender's article was published in 1993, Professor Schwartz' article is published in the year 2001. Eight years have passed, and nothing radical has happened. Is there an inherent element to tort law that prevents radical change? Are tort law practitioners, judges, and even scholars more conservative than their counterparts in other areas of law?

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50 *Id.*

51 This would be true especially of neo-feminists, who see a greater similarity between a man and a woman of the same social status or with the same job than between two women of different social status or with different occupations, such as a businesswoman and a housewife.

52 Leslie Bender, *An Overview of Feminist Torts Scholarship,* 78 Cornell L. Rev. 575 (1993).

This leaves us with an open-ended question to which I have no answer. On the one hand, if Professor Schwartz is correct in his conclusion that nothing radical has transpired in the last decade, then feminist scholars should take this as a warning sign or as a challenge to be met. If, on the other hand, feminists do truly believe that they did make a difference during this last decade, then shifting their efforts to tort law just because male scholars think they have not done enough in that area would once again be conforming to gender norms.