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IS TORT LAW MALE?: FORESEEABILITY ANALYSIS AND PROPERTY MANAGERS' LIABILITY FOR THIRD PARTY RAPES OF RESIDENTS*

LESLIE BENDER**
WITH PERETTE LAWRENCE***

Recent feminist legal scholarship discloses how law is male both on its face and as applied. In this article I illustrate one way tort law's foreseeability doctrine is male "as applied." By claiming that tort law in terms of foreseeability is "male as applied," I mean the tort concept of foreseeability is broad and flexible enough to be inclusive of male and female experiences, perspectives and concerns, but instead it has been biased in its application. A benefit of a "law as applied" feminist critique is that in the name of fairness, courts enlightened by this analysis will be inspired to correct the naked biases and to proceed from more inclusive premises. Because we do not need to convince the courts to change the doctrine, our arguments are easier. We need only sensitize and educate the law appliers.¹ This article grew out of a panel discussion between Justice Martha Craig Daughtrey of the Tennesse Supreme Court and myself of one case, Doe v. Linder Construction Co.,² in which Justice Daughtrey had written a long dissent. I use that case as the focus of my analysis here. The feminist methodology I apply to unearth the male biases in Doe applies equally to analyses of law in many other tort cases.

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¹ Justice Levine, in her special concurrence in Swenson v. Northern Crop Ins., Inc., 498 N.W.2d 174, 189 (N.D. 1993), acknowledges the role of attorneys and clients in educating juries and courts about the history and harms of sex discrimination in our society.
As a second point, I give a short illustration of a way in which tort doctrine "on its face," or "at its core," in its conceptual framework, is male in the *Doe* majority's analysis of the requirement of "site-specific notice" of prior criminal activities in order to hold a property manager liable for criminal assaults of residents by third parties. Convincing courts to make changes using this kind of analysis is more difficult because they actually have to articulate new or revised doctrines. Using a feminist analysis, I suggest a change in the doctrinal approach that will more fairly represent the actual experiences and perspectives of women as well as men in tort law.

**The Male-Biased Majority Opinion in *Doe***

*Doe v. Linder Construction Co.* considers the liability of property managers or parties retaining residents' keys for rapes of residents committed by third parties who obtain the keys from the property managers. The majority opinion in *Doe*, written by Tennessee Supreme Court Chief Justice Reid, concludes that the trial court was correct in throwing out Jane Doe's case at the summary judgment stage because (1) her injury (rape) was not foreseeable and therefore there was no duty to protect against its happening, (2) the defendants had no notice that there was a need to protect against this kind of criminal activity, and (3) the property managers' negligence was not the proximate cause of the rape because the rapists' conduct was a superseding intervening cause of harm. The majority characterizes the situation as a "no duty" or nonfeasance case, resting much of its argument on the idea that there is no duty to protect against third party criminal assaults or key thefts which are unforeseeable. Justice Daughtrey's powerful dissent responds to each of these issues. [The factual background of the case, from the point of view of Justice Daughtrey's dissent, is included in the Appendix to this article.] She

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3. When I say that tort law is male on its face or at it's core, I mean in the language courts use to articulate it, but also in the substance of the doctrine, concepts and analytical framework used.

4. *Doe*, 845 S.W.2d at 175. Jane Doe was raped by two men who entered her house by gaining possession of her key from the office of the builder-seller of her home. She identified the rapists as workers employed by the builder-seller and they were convicted of the rapes. Jane Doe then sued the builder-seller, the real estate agent and their employees for, among other things, their negligence in handling her key and their failure to protect her from the foreseeable harms of the keys getting into the wrong hands. The trial court granted summary judgment to the defendants. Even though an intermediate appellate court reversed the summary judgment, the state supreme court found four to one that summary judgment was appropriate. Justice Daughtrey wrote the lone dissent.

5. The issue of negligent hiring was not preserved on appeal.
does not argue that as a matter of law the defendants were negligent and therefore liable, but only that this case should have gone to a jury. Her arguments are crystal clear, well-researched, supported by ample case law and scholarly authority, and are persuasive on the law.\(^6\) Departing from the majority's nonfeasance approach, Justice Daughtrey characterizes the case as one of misfeasance, about the mishandling of a house key, which is an affirmative action negligently done. She addresses the clear foreseeability of criminal conduct causing harm arising from the mishandling of a residence key and the substantial judicial support across the country for imposing duties on those in control of ingress to residences to act with reasonable care to protect against third party criminal assaults. In addition, she adroitly shows how a recent Tennessee precedent, *McClenahan v. Cooley*, supports her conclusion that this case should go to a jury for findings on foreseeability and cause.\(^7\) *McClenahan* was a case in which the same members of the Tennessee Supreme Court a year earlier unanimously held that it was a jury question whether a car owner should be liable in tort to a widower whose pregnant wife and child were killed when the owner left his keys in a car ignition resulting in car theft, a high-speed chase with police down a busy street, and ultimately a fatal collision with an oncoming car. As a matter of fact, arguments much like those Justice Daughtrey made in *Doe* persuaded a Texas court of ap-

\(^6\) One of the serious points of disagreement between the majority and dissent is the applicability by analogy of cases involving affirmative duties of landlords to provide adequate security for their tenants. The majority finds the analogy wholly inapplicable, *Doe*, 845 S.W.2d at 177, whereas the dissent finds the large body of cases and scholarship on a landlord's duty apposite because of the similarity between a landlord's retention of control over the premises and this defendant's retention of the key for repairs and control over access to the premises through the key. *Id.* at 191-98 (Daughtrey, J., dissenting). While I believe the analogy is quite useful and carefully argued by the dissent, for purposes of this paper, I will show how the plaintiff ought to have been permitted to go to trial based on other more traditional tort notions.

\(^7\) As Justice Daughtrey so ably highlights, the *Doe* majority's refusal to let this case get past summary judgment is particularly unsettling in light of its decision a term earlier in *McClenahan* v. *Cooley*, 806 S.W.2d 767 (Tenn. 1991), where the same court took a progressive stance by letting the jury decide the foreseeability of intervening criminal activity. In *McClenahan*, the court found that it was up to a jury to decide whether leaving a key in a car ignition, resulting in the car being stolen, can result in liability of the car owner to a person injured by the negligent driving of the car thief. Justice Daughtrey asks: If the foreseeability question about car thieves and subsequent accidents arising from mishandling of car keys is a jury question, why isn't the foreseeability of break-ins and rape based on mishandling of household keys a jury question? *Doe*, 845 S.W.2d at 198-99 (Daughtrey, J., dissenting). What is the difference between carelessly leaving the keys accessible to a car thief or to a home burglar? The majority in *Doe* unsatisfactorily declares, without explanation, "The difference in *McClenahan* and this case is that in *McClenahan* the proof would support a finding of foreseeability and in this case it would not." *Id.* at 181. If the question is whether the defendant was careless or negligent, then that is a jury question. Foreseeability is supposed to be a jury question. But the court understands this case to turn on foreseeability and decides that as a matter of law this rape was not a foreseeable consequence of mishandling of a resident's key.
peals in February 1993 to affirm a $16 million verdict for Juli Bliskey against her townhouse property manager for gross negligence in mishandling her key, conduct which resulted in the key being stolen and used by a rapist.8

Yet, these same arguments failed to persuade the four other justices of the Tennessee Supreme Court. Why is that? What was at stake in this case that impeded the majority from following its own lead in McClenahan? Why did Justice Reid feel the need to write in sarcastic, hostile tones about the “revolution” in tort law that would result from letting this case go to a jury as the dissent suggests?9 Why did the court veer from the usual approach in summary judgment cases of reading the facts favorably to the non-moving party and refusing summary judgment where facts are in dispute?10

8. Berry Property Management v. Bliskey, 850 S.W.2d 644 (Tex. Ct. App. 1993). The similarities between Bliskey and Doe are remarkable. In Bliskey the management left plaintiff’s key labeled to her townhouse on an open pegboard in a locked office. They also left the lease information files unlocked in the office. Id. at 651. Like in Doe, the rapist made an unauthorized entry into the property management office, found the key, and used it to enter the plaintiff’s apartment in order to rape her. The jury and court in Bliskey found the defendant property management grossly negligent in not specifically locking up the key (even though the property management office was locked) and in labelling the key so that it was clearly identifiable which house it opened. Bliskey, 850 S.W.2d at 651. In Bliskey there was the added negligence of leaving the lease information unlocked, but since the rapist in Doe already knew that Jane Doe was alone, this was not critical to his success. The essentially same conduct with respect to key handling which was found grossly negligent in Bliskey was found not negligent as a matter of law in Doe.

9. Doe, 845 S.W.2d at 176-77, 180.

10. The majority states that it is complying with the standard of review traditional in these kinds of cases, but as Justice Daughtrey points out, they did not afford Jane Doe the benefit of the law. Doe, 845 S.W.2d at 186-87 (Daughtrey, J., dissenting). A careful reading of majority and dissent opinions illustrates the differences in the perspective from which the facts are read. The majority, contrary to rules about review of summary judgment motions, clearly read the facts from the perspective of the defendants. But more is involved than just the weight or inferences given to evidence as presented by each party. Something else is going on here.

Strong messages about the justices’ personal understandings, points-of-view, and priorities are revealed by the order and tone in which they relate the facts. In Justice Reid’s section of his opinion entitled “Facts,” he begins with the stories of the defendants, Samuel Carpenter, Elwood Carpenter, Pattie Rollins and Clinton Osborne. He discusses the construction company’s relationship with the workers, how defendant Sam Carpenter came by the key to the model home, defendant Clinton Osborne’s coming onto the scene, and how Carpenter and Osborne got the pass key. Id. at 175-76. Finally, in the last paragraph describing the facts, Reid says “He [Carpenter] and Osborne then entered the plaintiff’s house with the pass key and raped her. Both men were convicted of the crime.” Id. Justice Daughtrey’s presentation of the facts begins:

[T]he plaintiff was raped by two men, who surreptitiously entered the home where she and her four-year-old son were sleeping on the night of October 9, 1986. After assaulting Doe, one of the men stole several pieces of jewelry from her bedroom and then helped himself to food from her refrigerator while the second rape was being committed.

Id. at 187 (Daughtrey, J., dissenting). Daughtrey continues her description by explaining how and why Doe purchased her home in this housing development, noting her dependence upon claims of safety and good security. Id.
Some might argue, although Reid did not develop this argument in his majority opinion, that the court's vision was skewed by a fear of potentially overwhelming costs to landowners, landlords, and property managers.\textsuperscript{11} I think not. Were a court to find that it is a jury question whether those in possession of a residence key could foresee some third party acquiring the key to commit a criminal act against the resident, the cost or "burden of precaution" would be minimal. To avoid liability, those taking responsibility for a residence key would have to institute practices that safeguard keys from unauthorized use. At most it involves locked key boxes, coded key systems, non-retention of owner's keys, inventories of keys, sign-out sheets for those who take keys, and the immediate changing of locks if a key is unaccounted for or lost. Any simple cost-benefit analysis would run in favor of such a minimum-cost solution over the tremendous individual and social costs of rape, sexual assault, or any other property or personal injury crimes that might ensue from a mishandled residence key.

Others might contend that natural judicial conservatism prevented the court from making this "revolutionary" move. Again, I would have to disagree. If any move by the court had been "radical" and a departure from precedent, it was the \textit{McClenahan} decision the year before. The court's willingness to unanimously broaden Tennessee's notions of proximate and intervening causes in 1991 militates against the supposition that this court was motivated by its natural conservativism and unflinching fidelity to precedent. A finding that Doe's case presents a jury question is hardly "revolutionary," despite Reid's assertions to the contrary, in light of Tennessee's own precedents and two decades of opinions by other courts across the nation.\textsuperscript{12} The court's sarcastic and loose use of the term "revolution," which Justice Reid attributes to Justice Daughtrey's dissenting approach, is especially disturbing when one realizes that the term was borrowed from one commentator's 1984 assessment of the earlier decades' responses to landlord-tenant law.\textsuperscript{13} Changes in law, even if they digress from an historically set course, are hardly revolutionary in our current

\textsuperscript{11} Actually, Reid's opinion makes passing reference in its conclusion to the "unrealistic burden" a finding of affirmative duty would place on contractors and other employers, \textit{Doe}, 845 S.W.2d at 184, but never elaborates on what the burden of safeguarding keys would be.

In \textit{Bliskey}, the Texas court found it relevant that the property management did not maintain the keys in a "safe manner." A safe manner included keeping the resident's keys under a coding system and in a locking metal box at a cost of approximately $30.00. \textit{Bliskey}, 850 S.W.2d at 655-57.

\textsuperscript{12} See cases and articles cited in Justice Daughtrey's dissent. \textit{Doe}, 845 S.W.2d at 184-203.

\textsuperscript{13} \textit{Id.} at 192 (citing Edward H. Rabin, \textit{The Revolution in Residential Landlord-Tenant Law: Causes and Consequences}, 69 \textit{CORNELL L. REV.} 517 (1984)).
I would argue that the all male majority of the Tennessee Supreme Court refused to let Jane Doe take her case to a jury, not because of economics or controlling legal precedents or judicial conservatism, but because the justices’ male-centered assumptions and understandings of the issue of rape and its relation to law warped their construction of the issue and their application of the law in this case. The assumptions about and dynamics of rape and sexually motivated violence in our culture are so powerful and subconscious or unconscious that they bring male bias into the soul of legal judgments and judicial wisdom unless overtly challenged. Feminist and pro-feminist lawyers and judges must persuade courts to expose the wrongful assumptions about rape contained in law and to confront the social injury of sexual violence to women by developing legal strategies that reduce those risks of harm. We must educate courts and lawmakers about the prevalence of rape and its clear foreseeability in our (unfortunately, still far too) patriarchal culture, while we disabuse courts of their sex-biased assumptions and complicity in continued sexist oppression. Moreover, we must reform the law so that it clearly reinforces our collective responsibilities to end our rape culture and prevent further harms to women.

I am outraged by how tort law treated Jane Doe, preventing her from presenting her case to a jury. Jane Doe’s case was unusual because she clearly identified the rapists, pursued a criminal prosecution, and they were convicted in criminal court. When under those circumstances a rape victim is prevented from using our legal system to seek compensation from parties she holds responsible for exposing her to the threat of sexual violence in her own home, tort law fails us. We must make certain that this never happens again this way. Justice Daughtrey made a valiant effort to avoid this heinous result, but as the only woman, she could not singularly dismantle the formidable bar of sexism and bias on her court.

I emphasize again that neither Justice Daughtrey nor I am saying that Jane Doe was entitled to a verdict as a matter of law. At this point we are only arguing that tort law should afford her an opportu-

14. Ninety-eight percent of rape victims never see their attacker caught, tried, and imprisoned according to a 1993 Senate Judiciary Committee Report. Staff of Senate Comm. on the Judiciary, 104th Cong., 1st Sess., The Response to Rape: Detours on the Road to Equal Justice (May 1993) [hereinafter The Response to Rape].
nity to persuade a jury of defendant's legal responsibility for her harm.

**Foreseeability as a Concept in Tort Law**

How could the majority of the Tennessee Supreme Court say that Jane Doe's rape was not reasonably foreseeable and that the defendants had no notice of the potential risk of harm? What kind of world view would one have to have to believe that rape was not a reasonably foreseeable risk of improper house key handling? To see the world from this perspective, the viewer would have to be someone who does not think or worry about the possibility of rape on a regular basis. And more than that, the person with this world view would also have to be ignorant of all the literature and reporting about the pervasiveness of rape, while buying into culturally based rape myths, the inaccuracies of which have repeatedly been exposed.\(^\text{15}\) Tort law cannot continue to abide that ignorance or use that narrow perspective. Those who apply and interpret tort law have a legal and moral obligation to incorporate the knowledge, experiences, and perspectives of people who understand the pervasiveness and reality of sexual violence in our society.

Tort law imposes a duty to act with reasonable care to avoid foreseeable harms. Foreseeability is a pivotal concept in tort law because both duty and proximate cause analyses often turn on it.\(^\text{16}\) Certainly this was true in the *Doe* case. The majority reasoned that criminal conduct by a known party in obtaining the key was not reasonably foreseeable, and therefore there was no duty to protect against it, while simultaneously ruling that commission of rape of a resident by a


Surprisingly, even people with easy access to national statistics continue to show incredible ignorance about the prevalence of rape. One example is the statement by Dr. Allen Beck, deputy associate director of the Corrections Unit for the Bureau of Justice Statistics within the Department of Justice, that "rape is a rare event, an infrequent crime." See Deborah Privitera, *Federal Study Suggests Rapists More Likely to Rape Again than Other Criminals*, States News Service, April 7, 1993. See also Caroline Wolf Harlow, Ph.D., U.S. Dep't of Justice, *Female Victims of Violent Crime* 7 (1991) [hereinafter DOJ Report] (rape and attempted rape are relatively rare crimes compared to robbery and assault, amounting to less than three percent of all violent crime measured by the National Crime Survey). When so much evidence shows that a large percentage of rapes go unreported, it seems irresponsible for government statisticians to reach these conclusions based on admittedly flawed and inaccurate data. See infra notes 24, 28.

\(^{16}\) William H. Hardie, Jr., *Foreseeability: A Murky Crystal Ball for Predicting Liability*, 23 Cumb. L. Rev. 349 (1993) (carefully explaining the history and role of foreseeability in duty and proximate cause analyses, but arguing against its continued use).
person who unlawfully obtained possession of the resident's key from the property manager was not foreseeable, and hence was a superseding intervening cause cutting off liability from the original key mishandler. The dissent countered with arguments that there exists a duty to protect against a resident's key ending up in the hands of thieves and burglars, because burglary and theft are completely foreseeable results of key mishandling. She also concluded that because criminal conduct resulting in harm following the theft of a house key is foreseeable, key mishandling can be a proximate cause of the harms perpetrated by key thieves.

How can the concept of foreseeability encompass both the majority's and dissent's very different understandings in this case? I think that it cannot. The problem here, however, is not with the concept of foreseeability itself, but that this central concept of foreseeability ends up meaning "what is foreseeable to reasonable men," rather than what it is supposed to mean, that is, "what is foreseeable to reasonable people," a group that includes women and men with their differing experiences in our society. It is not that the concept of foreseeability is inevitably male or flawed, but in many cases the partiality of the perspective traditionally employed to interpret or apply the concept of foreseeability has not been exposed. Instead the perspective has masqueraded as universal or whole and undermined the fairness of tort law.

The *Doe* case is a perfect illustration of a male-biased understanding of foreseeability interpreted to mean what men give attention to and focus on or protect against for their own well-being. Then the men using this male-biased perspective generalize from their experience-based perceptions about who is owed a duty and whether actors are responsible for harms, implicitly believing that those same things are what are or should be foreseeable and important for everyone. The jurists who developed this technique did so thinking it was equitable and just. Feminist lawyers must bring to these courts' attention data and stories about rape to explode the myths and alter the law appliers' misconceptions. Only then can the law move closer to the fairness it was designed to achieve for all who seek its justice, including people whose perspectives and understandings were formerly slighted by law's biases.
FORESEEABILITY OF RAPE

How foreseeable is rape? Experts estimate that a woman has between a 1 in 5 and a 1 in 8 chance of being raped in her lifetime. Dr. Mary Koss et al.'s study of sexual violence against women determined that 1 in 4 college women will be attacked by a rapist. The Senate Judiciary Committee that year reported that every hour sixteen women confront rapists and a woman is raped every six minutes. The Bureau of Justice, which uses a very narrow definition of rape, recites the number of reported rapes exceeded one hundred thousand for the first time in 1990. This figure represents a 6.3% increase in rapes in one year, which was nearly three times greater than the yearly increase of 2.2% in 1989. Even if we use the conservative estimate by the Justice Department that almost half of rapes are reported, that still would mean over two hundred thousand rapes a year. Feminist scholars estimate much higher numbers and rates.

17. STAFF OF SENATE COMM. ON THE JUDICIARY, 102d CONG., 2d Sess., VIOLENCE AGAINST WOMEN: A WEEK IN THE LIFE OF AMERICA 3 (Comm. Print 1992) [hereinafter A WEEK IN THE LIFE OF AMERICA] (The 1 in 5 figure is taken from Dr. Mary Koss, testimony before the Senate Judiciary Committee (Aug. 29, 1990); the 1 in 8 figure is taken from NATIONAL VICTIM CENTER AND THE CRIME VICTIMS RESEARCH AND TREATMENT CENTER, MEDICAL UNIV. OF S.C., RAPE IN AMERICA: A REPORT TO THE NATION 2 (1992) [hereinafter RAPE IN AMERICA: A REPORT TO THE NATION]).


21. Id. at 3.

22. DOJ REPORT, supra note 15, at 8 (estimating that forty-seven percent of nonstranger rapes and fifty-seven percent of stranger rapes are reported to the police). This data does not include rapes of children under 12 years old.

23. See THE INCREASE OF RAPE IN AMERICA 1990, supra note 20, at 28 (noting that the Bureau of Justice Statistics (BJS) Sourcebook on Criminal Justice Statistics (1989), recording a 1988 rape total of 127,000, has "extensive methodological flaws that all, including BJS, agree result in a severe undercounting of victims").

24. Id. at 8, 28 (citing The Violence Against Women Act, 1991: Hearings on S.15 Before the Senate Judiciary Comm., 101st Cong., 2d Sess. (1990) (The Senate Judiciary Committee not only
dict between 683,000 and well over two million rapes of women in the U.S. each year, based on studies that reveal that only between 7% to 16% of rapes and attempted rapes are even reported. That means that at least eighty-four percent are never reported and not included in any of the police or government data. You cannot read any city newspaper without learning of at least one rape report, and if such a small percentage of rapes are ever reported, imagine what is really happening. Newspapers recently have been reporting that rates of violent crimes have dropped, except for rates of rape, which are increasing. If you talk with workers at women's shelters, rape crises centers, and university rape centers, the prevalence of this gender-based violence becomes even more apparent.

A woman is ten times more likely to be raped than to die in a car crash. In light of this factual data, it seems clearly offensive to say that any rape is "unforeseeable"—especially since tort law clearly understands car crashes to be foreseeable and requires caution to guard against them. Even women who do not know these statistics are

accepted but included in their report Dr. Koss' statistics which concluded that less than 5% of college women report rape to the police, and more than half of them never tell anyone of their victimization. Also included was Koss' estimate that the number of women raped in 1986 was fifteen times higher than officially reported in the National Crime Survey).


27. THE RESPONSE TO RAPE, supra note 14, at 27 (citing RAPE IN AMERICA: A REPORT TO THE NATION, supra note 17, at 6, indicating 16% report rate); DIANA E.H. RUSSELL, SEXUAL EXPLOITATION: RAPE, CHILD SEXUAL ABUSE, AND WORKPLACE HARASSMENT 26-31 (1984) (San Francisco survey where only 9.5% of women reported their rapes); MENACHEM AMIR, PATTERNS IN FORCIBLE RAPE 27-28 (1971) (estimates from 5-30% of rapes are actually reported).


29. S. REP. No. 545, supra note 19, at 30-31 (discussing the gender gap in assault rates, where assaults against women have now outstripped assaults of men); Koss & Harvey, supra note 18, at 27-28 (While adult men can be raped, the prevalence rates vary from 0.6% to 7%); DOJ REPORT, supra note 15, at 7.


32. See, e.g., Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Cal. Ct. App. 1981) (conscious failure to take adequate precautions against foreseeable risk of rear end car crashes in the
trained from their girlhood to understand this intuitively. Women live their lives always conscious of the threat of rape and sexual violence. We watch for indicia of sexual danger at all times and govern many of our actions in relation to our degree of fear and caution. Men generally are oblivious to this fear. Tort law and foreseeability doctrine must deal with the concrete reality of women's vulnerability to sexual violence.

I would like to share a personal anecdote from my teaching to reinforce my claim that women and men have very different daily perceptions of the prevalence and reality of rape in their lives. In addition to torts, I coteach a civil rights class on power, privilege, and law. As one of the exercises in the class, we ask the students to write essays on the meaning of male privilege. Regardless of the political or ideological leanings of our students, women students in near uniformity discuss the privilege of men to live their lives free of the fear of rape and confinements because of the fear of rape. Men, on the other hand, rarely if ever notice this as part of their male privilege. Our discussions in class are always quite enlightening for them. If there is one sure thing we can say about rape in our society, it is that rape is unfortunately very foreseeable in women's lives.

Socializing the Responsibility for Rape Prevention

Although my arguments here are about how tort law must be adjusted to take women's consciousness and the reality of rape into account in its doctrines and their application, others are working with similar arguments in civil rights arenas. For the third year in a row, Senator Joseph Biden has introduced the "Violence Against Women Act" to Congress in hopes of establishing that violence against women (sexual and physical assaults by strangers and domestic partners) is a violation of women's civil rights and remediable through private damages actions like other kinds of civil rights violations. With the design of the Ford Pinto justified the imposition of millions of dollars of punitive damages, in addition to millions in compensatory damages).


36. For two excellent recent notes discussing this proposed legislation, see W.H. Hallock, Note, The Violence Against Women Act: The Civil Rights For Sexual Assault Victims, 68 IND. L.J.
assistance and support of many other senators, women's groups, and support staff, Senator Biden's committee has proposed that "violence against women" be treated as the kind of harm it is—a bias crime based on sex/gender discrimination—and as an issue of equality for women. Physical and sexual violence against women is a social injury affecting all women. A civil rights action is one way the law can try to remedy the systemic oppression of women through fear of rape and the consequences of the physical, sexual assaults. This year the Judiciary Committee of the Senate unanimously recommended passage of this Act. Hopefully the full Senate will take it up and pass it this session. As you can guess, there is some formidable opposition to this richer understanding of sexual assault in our law. It is very threatening to many men to understand rape as a civil rights violation because of its pervasive nature and their sense of vulnerability to accusations. In addition, opponents complain that federal courts will be overrun with what should be individualized state prosecutions.

As lynching was a form of terrorism and assault used against African-American men in our society, rape is a form of terrorism and assault used against women of all races. In order to get at this terrorism, we need more than prosecutions of the perpetrator rapists, yet


38. So long as rape is understood as individualized harm, it can be attributed to the inappropriate conduct of one man and of one woman. When the group-based nature of these assaults is recognized in law, the legal system will also be pressed to drop myths and assumptions that have prejudiced women, myths that attribute responsibility for rape to the women targets.

39. Penny Bender, Report Rips U.S. Rape Record, Sacramento Bee, May 28, 1993, at A21 (Judiciary Committee unanimously passed Senator Biden's Violence Against Women Act, as it did last Congress, but the act is opposed by judges and conservatives who believe it will flood the courts with civil rights cases).


41. Id. at 250-81 (statement of Dr. Leslie R. Wolfe, Executive Director, Center for Women Policy Studies). For slightly different challenging descriptions of the relationship between racism, rape and terrorism, see Angela Y. Davis, Women, Race and Class 172-201 (1983); Angela Y. Davis, Women, Culture & Politics 39-52 (1984); Jacquelyn Dowd Hall, "The Mind That Burns in Each Body": Women, Rape, and Racial Violence, in Race, Class, and Gender 397 (Margaret L. Anderson & Patricia Hill Collins, eds., 1992); bell hooks, Ain't I a Woman: Black Women and Feminism (1981); Valerie Smith, Split Affinities: The Case of Interracial Rape, in Conflicts in Feminism 271 (Marianne Hirsh & Evelyn Fox Keller eds., 1990); Jennifer Wriggins, Rape, Racism and Law, 6 Harv. Women's L.J. 103 (1983).
we are failing miserably at the limited solution of prosecuting the perpetrators. The Violence Against Women Report of the Senate found that ninety-eight percent of victims of rape never see their attacker caught, tried and imprisoned. Over half of all rape prosecutions are either dismissed before trial or result in an acquittal, and almost one quarter of convicted rapists never go to prison. Almost half of all convicted rapists can expect to serve an average of a year or less behind bars. A robber is thirty percent more likely to be convicted than a rapist, and a rape prosecution is thirty percent more likely to be dismissed than a robbery conviction. A convicted rapist is fifty percent more likely to receive probation than a convicted robber. While efforts are being made to reform the criminal justice system to deal more appropriately with rapists and protect potential rape victims, that is not enough.

The prevalence of rape and violence against women will only change when attitudes towards women change and women achieve true equality. One way to make that change is to equalize our responsibility for rape prevention. Until now the lion's share of rape prevention has been women's responsibility, from locking doors to avoiding dangerous places, from monitoring what we drink and how we act to learning self-defense techniques. If we are raped, we are often blamed or taught to blame ourselves for not taking adequate precautions for our own safety, for being too trusting, for not fighting back. It is not our fault, individually or collectively, that men commit these violent, hateful, disrespectful harms to women. And it is only partially our responsibility to protect against rape. In fact, the total responsibility for rape prevention should be with men, since men are the rapists and must learn to control their own behavior and attitudes. But given the fact that we are a long way from the day when men take full or even primary responsibility for preventing rape, it is not too much to ask that they bear their equal share.

Tort law has made consciousness about automobile safety the responsibility of car manufacturers. Likewise, consciousness about rape prevention should be the responsibility of all men, and of all our institutions (government, business, workplaces, housing, public transporta-

42. Fortunately, in Jane Doe's case in Tennessee, both men were convicted of rape. Yet, that is not so typical. The Response to Rape, supra note 14, at 2.
43. Id. All the statistics in this paragraph of the text are from the above cited report.
44. Of course, we are also often blamed for "provoking" the violence against ourselves by what we wear, where we are, how we look or walk or talk.
tion and public accommodations, schools, families), and of our law and legal system, our educational systems, health systems and the media. We can spread this responsibility by making all citizens, male and female, legally responsible through tort damages actions for failing to take conscious and reasonable precautions against the clearly foreseeable risk of rape to women and by working as lawyers and judges to take the male biases out of the perspective of tort law.\footnote{46}{Other responsibility-spreading techniques include continuous education of men and women about mutual consent being an absolute prerequisite to sexual relations and the elimination of rape images and pornographic images of sexualized harms to women.}

If tort law were to incorporate women’s perspectives in its application of foreseeability doctrines, the law would never doubt the foreseeability of rape and the need for every person to proceed with reasonable caution to guard against it. Women would not be held responsible or blamed for failing to protect themselves adequately, because all of us would be responsible (to the degree that we have some control over the context) for protecting women generally from the foreseeability of rape in that context. That the law does not inevitably understand this exposes its maleness. To answer the question of this panel “Is the law male?,” Yes. Law is male, at least in its application, because of its limited perspective and flawed assumptions that could permit a state supreme court to legally conclude that a rape was not a foreseeable consequence of a house key getting into the wrong hands.

\textbf{Application of Traditional Tort Concepts of Duty and Foreseeability to Rape}

We do not have to change tort doctrine to include women’s perspectives and experiences in duty and foreseeability analysis. We only have to change the ways in which the law is applied and interpreted. But we must change it across the board, so no other Jane Does will have their tort claims thrown out of court because their rapes were unforeseeable to parties controlling access to their homes or offices.\footnote{47}{See, e.g., Doe v. Dominion Bank, 963 F.2d 1552 (D.C. Cir. 1992) (opinion by Judge Ruth Bader Ginsburg) (finding potential liability of building manager for third party rape of woman at her office building).}

Using the \textit{Restatement (Second) of Torts}\footnote{48}{Clearly the \textit{Restatement} is not, in and of itself, “the law.” Each of the points I will make could be made by references to cases in many states. Because the exact language of state cases differs, although generally the gist or core of the conceptual analysis is similar, the \textit{Restatement} is the most useful, generally recognized national authority on what the law is. The annotations to the \textit{Restatement} sections give references to useful state cases that utilize that particular section’s} to illustrate my argument, it is clear that the principles in tort law already provide lucid rationales for liability in this and similar cases. Section 281 states that...
an actor is liable for an invasion of an interest of another if that invasion has caused harm, and if his or her conduct is negligent "with respect to the other, or a class of persons within which [the other] is included." 49 Comment e to that section discusses the nature of the risk of harm and specifically notes that the failure to lock a door may be negligent and result in liability precisely because a criminal may come in. 50 Following the Restatement's logic, mishandling of keys to inhabited residences may be negligent and result in liability precisely because it creates a risk that potential rapists will use the keys to enter the homes of women and rape them. It is a harm to the class of females and to the specific woman who ends up being raped.

An act is only negligent when done without reasonable care. 51 Comment a to section 298 explains that "'care' denotes not only the attention which is necessary to perceive danger, but also the caution required to avert it once it is perceived." Comment b to the same section explains that

the greater the danger, the greater the care which must be exercised . . . . The amount of attention and caution required varies with the magnitude of the harm likely to be done if care is not exercised, and with the utility of the act . . . . [I]f the act involves a risk of death or serious bodily harm, . . . the highest attention and caution are required, even if the act has a very considerable utility.

Applying this reasoning to the instant case, since sexual and physical assaults are very great and may result in serious bodily harms, reasonable care includes "the highest attention and caution" to perceive these dangers from an actor's handling of the key. But since the mishandling of the key itself does not directly involve an unreasonable risk of harm, but creates the risk that another person will cause harm, one may argue that it is not negligent.

The Restatement clearly addresses this concern in section 302 where it states "a negligent act or omission may be one which involves an unreasonable risk of harm to another through . . . (b) the foresee-
able action of... a third person... ."§2 What actions of third persons are foreseeable? Comment j to section 302 explains that actors are "required to know the common qualities and habits of other human beings... which a reasonable [person] in the actor's position would anticipate and guard against."§3 Although the language of the comment actually says reasonable man, I have substituted the more appropriate, gender-neutral term, reasonable person. Recognizing that reasonable persons include women leads to the conclusion that the section comment means that women's perceptions and understandings of the common qualities and habits of human beings must be guarded against and anticipated. By incorporating knowledge about the pervasiveness of rape and violence against women in our society, courts would be compelled to find as a matter of law that there is a duty to act to prevent the unreasonable risk of rapes by third persons.

The Restatement could not be more explicit in its coverage of the case at hand. Section 302B explains that an act or omission may be negligent because it involves an unreasonable risk of harm to another by a third person's intentional conduct, even though such conduct is criminal. The subsequent comments to section 302B note that ordinarily one need not assume someone will violate a criminal law, but there are circumstances where liability attaches to the original negligent actor for a third party's criminally caused harms to a plaintiff. The comment and illustration in this section again parallel the circumstances of the Doe case by noting that liability attaches "[w]here the actor's affirmative act is intended or likely to defeat a protection which the other has placed around his [sic] person or property for the purpose of guarding them from intentional interference."§4 Applying this to Doe, defendants' handling of plaintiff's key defeated plaintiff's protection of locking her door against intruders. So, even without applying rules about assuming a duty to aid or protect another§5 or the trend in law to impose affirmative duties on landlords to provide adequate security for their tenants, traditional tort law concepts expressly illustrate that a property manager has a duty of reasonable care in handling a key controlling entrance to a residence in order to prevent rapes by third parties. If reasonable care is not exercised in light of the gravity of the risk, then juries can find the key handling conduct

§2. Id. § 302.
§3. Id. § 302 cmt. j.
§4. Id. § 302B cmt. c. Illustration 6 gives an example of a mishandled key and liability of the key mishandler (A) to the victim of a theft by a third party (B).
§5. See id. §§ 314-324A.
negligent. But negligent conduct alone is not enough to impose liability. The negligent conduct must be a factual and legal cause of the injury.

PROXIMATE CAUSE

The Restatement language on causation reinforces Justice Daughtrey's conclusion that this case should have gone to a jury. Section 435(1) states: "If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him [sic] from being liable."56 The majority in Doe relied upon the fact that the defendants could not have foreseen that

the painter-wallpaper hanger would steal a key to a building which later would become the sales office, that he would use that key in order to steal a key to one of the completed residences, and that he would use the second key to commit a criminal assault on the occupant. There is no precedent or responsible authority which requires the builder-seller, under the circumstances of this case to foresee a crime upon a crime upon a crime.57

But that is not a fair interpretation of the settled law about proximate cause. Defendants would not be required to foresee the exact sequence of events, but to foresee that a rape might occur from an unlawful entry into the residence using the mishandled key. As section 435 stresses, the "manner in which it occurred does not prevent him from being liable."58 Section 442A explains that where the actor's negligent conduct (key mishandling) created or increased the foreseeable risk of harm from an intervening force (rape by third person), that intervening force is not superseding and does not cut off the original actor's liability.59 Comment b to section 442A is particularly telling:

Where the negligence of the actor has created the risk of harm to another because of the likelihood of such intervention, the actor is not relieved of responsibility merely because the risk which he has created has in fact been fulfilled. The same is true where there is already some existing risk or possibility of the intervention, but the negligence of the actor has increased the risk of such intervention or of the harm if it occurs.60

56. Id. § 435(1).
57. Doe, 845 S.W.2d at 181.
58. RESTATEMENT (SECOND) OF TORTS § 435.
59. Id. § 442A.
60. Id. § 442A cmt. b.
Although intentional or criminal conduct by third persons often severs the original negligent actor's liability, "such tortious or criminal acts may in themselves be foreseeable, and so within the scope of the created risk, in which case the actor may still be liable for the harm, under the rules stated in sections 448 and 449."61

The Restatement directly tackles causation issues in cases of intervening third party criminal acts in sections 448 and 449. Section 448 states that although the negligence of an actor creates an opportunity for a third person to commit a crime, liability will not attach for the resulting harm, "unless the actor at the time of [the] negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime."62 Even more to the point, section 449 reads, "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby."63 Comment b to this section reasons that

The happening of the very event the likelihood of which makes the actor's conduct negligent and so subjects the actor to liability cannot relieve him from liability. The duty to refrain from the act committed or to do the act omitted is imposed to protect the other from this very danger. To deny recovery because the other's exposure to the very risk from which it was the purpose of the duty to protect him resulted in harm to him, would be to deprive the other of all protection and to make the duty a nullity.64 To emphasize the applicability of this reasoning to a case similar to Doe's, comment c to the same section notes that

there are many precautions, such as locking a door . . . , which are designed to protect the chattels [or people] contained in the building or room from theft [or rape and physical assault]. The fact that the thief's [or rapist's] act in taking advantage of the opportunity is

61. Id. § 442B cmt. c.
62. Id. § 448. See particularly comment c:
The actor's conduct may be negligent solely because he should have recognized that it would expose the person, land, or chattels, of another to an unreasonable risk of criminal aggression. If so, it necessarily follows that the fact that the harm is done by such criminal aggression cannot relieve the actor from liability (see § 449). However, it is not necessary that the conduct should be negligent solely because of its tendency to afford an opportunity for a third person to commit the crime. It is enough that the actor should have realized the likelihood that his conduct would create a temptation which would be likely to lead to its commission.
63. Id. § 449.
64. Id. § 449 cmt. b.
criminal does not make it a superseding cause of the loss of the
stolen chattels [or the harm]. When read together, these sections and comments of the Restatement
(Second) of Torts ineluctably lead to a conclusion (at the very least!) that reasonable minds could differ about the proximate cause issue, and it should go to a jury for determination. It could be argued that they lead to the even stronger conclusion that if the facts show that the key was mishandled, and the mishandled key came into the possession of a criminal party, the mishandling will be considered the proximate cause of the later criminal intervention.

The Tennessee Supreme Court was quite familiar with these sections that I cite, having used them in McClenahan. I tend to believe that the court would have been more sympathetic to a complaint by elderly tenants that mishandling of their house key by the management office allowed Carpenter to enter their home and steal their property or beat them up. The only difference between that hypothetical case and Jane Doe's case is the kind of harm. If burglary and theft are foreseeable according to the Restatement and case law, what could there be about rape that makes it unforeseeable, except biased misunderstandings of its frequency and sources? Feminist analysis enables us to expose the male perspective and fallacious assumptions in the application of traditional tort doctrine of foreseeability, proximate cause, and intervening causes to the Doe case with the ultimate goal of correcting law's deficiencies and moving ever closer to justice and fairness.

**NOTICE ISSUE**

I hope I have illustrated how the court's application of tort law doctrines of foreseeability, duty, and causation was skewed by male bias in the Doe case. Now I will give one example of how the doctrine itself, on its face, rather than in its application, is biased. For this argument, I will use the Doe majority's requirement that a property manager have knowledge of prior crimes at the housing complex before a duty to protect or guard against criminal activity arises. I call this the “site-specific notice” requirement.

I imagine now that the majority in Doe might concede the foreseeability of rape, but then they would argue that just because some-

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65. *Id.* § 449 cmt. c. (bracketed words added to make language of comment c parallel to the Doe case facts).
66. *Doe*, 845 S.W.2d at 184.
thing is foreseeable in the abstract, it is not necessarily foreseeable in a particular context. In cases of premises liability law, the Doe majority required that property owners or managers have "notice" of prior similar incidents of criminal activity in the property area or on the site, before they have a duty to protect against it or before the property manager's acts or omissions will be considered causally connected to the harms from third party criminal activities.67 Most courts say that foreseeability applies if owners have notice of some criminal activity at the site, but prior occurrences of the specific crime are not required.68 Perhaps the Idaho Supreme Court expressed the rationale for this rule best in Sharp v. W.H. Moore where it stated, "There is no 'one free rape' rule in Idaho."69 The Missouri Supreme Court also observed that "if a burglar may enter, so may a rapist."70 A Florida appeals court went even further in stating:

We are not willing to give the landlord one free ride, as it were, and sacrifice the first victim's right to safety upon the altar of foreseeability by slavishly adhering to the now-discredited notion that at least one criminal assault must have occurred on the premises before the landlord can be held liable.71

By citing evidence of other unauthorized entries in homes in Doe's community, Justice Daughtrey demonstrates that there was notice under this "site-specific, prior incidences" rule. She argues that any evidence of unauthorized entry necessarily increases the foreseeability of rape. Yet the majority again rejected this approach, dismissing this evidence of break-ins as inconsequential. Even assuming that the reported unauthorized entries occurred, the court thought

67. "We hold that if the owner is to be held liable for the sudden criminal acts of third persons there must be a showing that the owner was on notice in some manner of the imminent probability of the act. Otherwise, there can be no issue for jury determination." Doe, 845 S.W.2d at 184 (citing Corbitt v. Ringley-Crockett, 496 S.W.2d 914 (Tenn. Ct. App. 1973); see also Kline v. 1500 Massachusetts Ave. Apt. Corp., 439 F.2d 477 (D.C. Cir. 1970).


69. Sharp, 796 P.2d at 510.
70. Aaron, 758 S.W.2d at 448.
71. Paterson, 472 So. 2d at 1218-19.
that because they were so minor and did not involve physical assault, they would not afford notice of possible risks of rape.\textsuperscript{72}

Here is another place that progressive lawyers can intervene in the male-biased reasoning of courts. There are two points I would like to make: (1) that in cases of rape and sexual assault, site-specific notice of criminal activity should \textit{never} be required for a woman’s residence; and (2) that if site-specific notice is needed, Justice Daughtrey’s argument about any unauthorized entries being sufficient notice should win the day.

The requirement that property managers have site-specific notice of criminal activity before a duty arises to protect against it is based on an assumption that the foreseeability of certain kinds of crimes differs in different localities. While I am not sure whether this assumption makes sense even for notice of other crimes at the site, it is clearly inappropriate for rape. Rape happens everywhere that women are.\textsuperscript{73} Contrary to popular myths that most rapes are by strangers and occur at night in specifically dangerous, badly lit, or lonely locations, most women are raped by non-strangers (men they know or who know them) in places that those women live and work.\textsuperscript{74} Women are raped by strangers in dark, isolated locations, but that is not half of the danger to women from rape. The male bias of law permits the perpetuation of myths about rape despite clear sociological evidence to the contrary.\textsuperscript{75} The evidence repeatedly shows that women are raped more often by people they know than by strangers, more often in

\textsuperscript{72} After ruling that a decision in which “such tenuous circumstances may constitute notice that produces foreseeability and therefore duty would truly ‘revolutionize’ the law of negligence,” Justice Reid concludes, “Finding circumstances such as minor thefts, unexplained use of a bathroom, and unsubstantiated rumors to be sufficient notice on which to base liability for subsequent criminal assaults is not the law in Tennessee or any other jurisdiction.” \textit{Doe}, 845 S.W.2d at 180.

\textsuperscript{73} See Schafan, \textit{supra} note 15 (explaining and debunking myths about rape).

\textsuperscript{74} DOJ \textit{REPORT}, \textit{supra} note 15, at 7 (Bureau of Justice statistics recite that only 18\% of rapes happen on the street, and, as I noted earlier, those statistics underestimate nonstranger rapes.); \textit{Rape in America: A Report to the Nation, supra} note 17, at 5 (75\% of rapes are nonstranger rapes). The continued vitality of these myths serves goals of sexist oppression. Women are much easier to “control” if they are fearful of going out alone or with other women at night. Also, the idea of stranger rape as the predominant form of criminal sexual abuse enables dominating men to distance themselves and their conduct from that criminality. They can believe that rapists only rape strangers. Therefore, if men only force sex upon women with whom they are acquainted, then they do not need to understand themselves as rapists or potential rapists.

\textsuperscript{75} See \textit{A Week in the Life of America}, \textit{supra} note 17; Morrison Torrey, \textit{When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions}, 24 U.C. \textit{Davis L. Rev.} 1013 (1991).
homes than out of them. Women are raped at all times of day and night and at all ages, whether young girls or elders. Women are raped by friends, husbands and lovers, male relatives, neighbors, employers and co-employees, professors, clergymen, dates and acquaintances, and repairmen, as in this case. The Doe majority stresses several times that this was a nonstranger rape, as if that were a legitimate ground for distinguishing this case from others finding premises liability. Somehow the fact that the management knew the rapist made the rape less foreseeable to the court. This is not consistent with contemporary understandings of rape. Rapists are not usually lurking psychopaths or sex-starved individuals, but people with whom we all deal on a daily basis.

Since women are vulnerable to male violence and forced sexuality in all environments, especially their own homes, and by people we all know, the law cannot require "notice" of prior rapes or lurking strangers in the building, neighborhood, or area as a precondition to foreseeability, duty, causation, and liability. A feminist lawyer should argue that every property manager, or anyone responsible for the security of a woman's residence or workplace, must be considered to have notice—whether actual or constructive—of the foreseeability of rape in that location by any male there. Notice does not mean that

76. A Week in the Life of America, supra note 17, at 27-28; The Response to Rape, supra note 14, at 21; Schafran, supra note 15, at 985-86 (concluding that approximately 80% of rapes are committed by someone known to the victim, citing Massachusetts Department of Public Health data that only 18% of sexual assaults reported to rape crisis centers involve strangers and a Minnesota Program for Victims of Sexual Assault report finding only 10% of reported sexual assaults were by strangers). See generally, Acquaintance Rape: The Hidden Crime (Andrea Parrot & Laurie Bechhofer eds., 1991); Robin Warshaw, I Never Called It Rape (1988); Lois Pineau, Date Rape: A Feminist Analysis, 8 Law & Phil. 217 (1989); Beverly Balos & Mary Louise Fellows, Guilty of the Crime of Trust: Nonstranger Rape, 75 Minn. L. Rev. 599 (1991); Steven I. Friedland, Date Rape and the Culture of Acceptance, 43 Fla. L. Rev. 487 (1991); Ian T. Bowmes et al., Rape—A Comparison of Stranger and Acquaintance Assaults, 31 Med., Sci. & L. 102 (1991).

77. Schafran, supra note 15, at 993-94.

78. "A significant difference between those cases [imposing duties to protect against third party criminal activity] and the present case is that in the present case, the criminal tortfeasor is not a 'stranger' to the defendants but a person who was authorized by contract to be on the premises . . . ." Doe, 845 S.W.2d at 177. "The key was not taken by a 'dangerous character' or one engaged in 'criminal activity.' In fact it was taken . . . by a contract painter-paper hanger who lawfully was working on the premises . . . ." Id. at 179. "It is important to emphasize again that the tortfeasor in this case was not a stranger to the defendants." Id. at 182.


By thinking of rape as violent sexual aggression against a total stranger, most people can think of rapists as mentally unstable, rather than the guy next door. Joyce E. Williams & Karen A. Holmes, The Second Assault: Rape and Public Attitudes 136, tbl 18 (1981).
property managers would be responsible for every rape, but their conduct would be evaluated in light of the real risk of rape in women's lives and the matters over which the property managers have some control. There would be no place in law to argue the absence of notice about the foreseeability of rape at a woman's residence or workplace. If lawyers fail to present these arguments, courts ought to take judicial notice of the facts about the prevalence of rape and who rapists often are.

I am not arguing that every property owner must become a private police officer to protect against rape, but that a determination about whether reasonable care to guard against rape of women residents with respect to matters within their control was exercised, and what is reasonable under all the circumstances, must rest on the reality of rape in women's lives. Tort doctrine as espoused and applied must progress beyond its biased, male orientation. Since women are especially vulnerable to rape in their own homes, at a minimum tort law should demand that we control who has access. If, as in the Doe case, access to a woman's residence is left in someone else's hands, there should never be a question about the foreseeability of rape or notice. That the location or site is her home gives specific notice of the foreseeability of rape. The only question in an unbiased tort law would be the one that goes to a jury—whether the property manager's conduct that enabled someone to get access to the woman's residence was below the standard of care given the foreseeability of rape.

Again, my argument here is not that all property managers must take affirmative steps to protect all women residents from rapes by all the people they know. That would not be feasible. They can, however, be required by tort law to protect women residents from rapes by people they know or don't know by using reasonable care to guard against rape, when aspects of a woman's safety are within their control—such as key management. Tort law must impose an enforceable obligation on those in control of aspects of a woman's safety to use reasonable care to protect her from potential rapes by known and unknown parties.

My second argument on the notice issue is brief. The majority argues that the series of unauthorized break-ins reported were inconsequential and minor, never having caused any real loss or injury. Justice Daughtrey counters in her dissent that once the break-ins

80. *Contra*, Glesner, *supra* note 68, at 679 (who hears arguments like mine as requirements for landlords to be cops).
evidence a risk, the need to act is clear, and the expected damages from those break-ins dictate how much the property manager is called upon to do, not whether s/he must act in the first instance. In *Doe*, the management was not being required to add locks, security systems, guards, or extra lighting in response to the reported unauthorized break-ins. They had already installed deadbolt locks for the safety of their residents. Justice Daughtrey's own words make the last step in this argument better than I can:

> But a deadbolt lock is only as good as the key to it is secure. Obviously, if the key to a lock falls into the wrong hands, the security of the residence itself is compromised.

Hence, when the question is one of wrongful use of a housekey, even a relatively minor breach of security takes on major significance, because it demonstrates the fact that the lock (and therefore the residence) is not secure. Clearly then, it does not take a rape or robbery to trigger the duty of one in possession of a passkey or duplicate key to investigate instances of unauthorized entry and to take adequate precautions against future breaches of security. Even incidents as minor as those reported in this case—use of a toilet or theft of a can of tuna fish—are sufficient to put those in control of the keys on notice that some reasonable response on their part is required. When no response is forthcoming and an injury results from the very risk that the person in control should have taken steps to avoid, it is clear that the person guilty of failing to take action should pay for the damages, and not the injured plaintiff.\footnote{Doe, 845 S.W.2d at 194-95 (Daughtrey, J., dissenting).}

Even if "site-specific, prior occurrences" notice is required, the evidence of the slightest breach of security by use of a passkey would meet the test.

**Conclusion**

Using one case as the central focal point of analysis, I have illustrated how tort law is male in its application and on its face or at its core regarding premises liability for third party rapes. By failing to understand the lived reality of rape in women's lives, tort law has allowed it to be legally coherent to rule, as the *Doe* majority did, that rape was an unforeseeable consequence of key mishandling. If something is factually incoherent from women's experiences and understandings, then it must also be legally incoherent.

My relatively simplistic feminist analysis in this article reveals how male bias has paraded as neutrality and how women's perspectives and experiences have been left out of doctrinal development and
law application in the tort area. We have a responsibility to inform ourselves and our courts about women's lives and needs, about ways in which women's perspectives have been ignored or marginalized in law, and about ways that legal doctrines and concepts need to be changed. Feminist legal theories offer many more critical perspectives on even this narrow area of tort law than I have shared in this article. With more time and space, I could argue how traditional tort law assumptions that property managers have no duty to protect residents were rooted in male-biased understandings of relationships, responsibilities, and values. The different approaches of the majority and dissent in some ways turned on their construction of the issue as one of misfeasance or nonfeasance, concepts which I have argued elsewhere seem rooted in alternative conceptions of human nature and human connection. Feminists could expose more ways in which the narrative styles used to report the facts can be male-biased and influence decisions. And there is much more.

I encourage all practitioners and judges to learn feminist methodology for critiquing law and demonstrating its biases. With knowledge of women's experiences and perspectives and the application of feminist methodology, we will be better able to educate judges, attorneys, juries, law professors, law students, and the public about ways in which male bias has undermined the fairness of law and created barriers to justice for women.

Factual Background

In this case, it is undisputed, for example, that the plaintiff was raped by two men, who surreptitiously entered the home where she and her four-year-old son were sleeping on the night of October 9, 1986. After assaulting Doe, one of the men stole several pieces of jewelry from her bedroom and then helped himself to food from her refrigerator while the second rape was being committed.

Doe recognized her assailants because she had seen both of them working in Idlewild Court, the residential development where she lived. Based upon her identification, Sam Carpenter and Clinton Osborne were arrested the next day; they were eventually convicted of rape and imprisoned. Doe then brought this suit for damages against the developer, the construction company, the realty company, and their agents, after the police investigation revealed that Sam Carpenter and Clinton Osborne had gained entrance to her house by use of a duplicate key that had been in the defendants' possession. One of those defendants is Elwood Carpenter, Sam Carpenter's father, who was the on-site superintendent at Idlewild Court and who hired his son to do painting and wallpapering there.

Doe had purchased her house, one of approximately 30 in a new "planned unit development" in Madison, Tennessee, in the summer of 1985. When she was first shown the house by real estate agent Pattie Rollins, it was unfinished. In her sales pitch, Rollins mentioned various selling points about Idlewild Court, including "good security." An advertising sheet for the development emphasized the fact that the outside doors to the units were secured by dead-bolt locks. Doe testified by deposition that one reason she decided to buy a house at Idlewild Court was that it appeared to be a safe place to raise her young son.

When Doe moved in the day after the closing on August 23, 1985, there were still two or three "unsolved problems" inside the house—the painter had missed covering a small area in the kitchen, and there was a tear in the wallpaper in one bathroom and a problem with the wallpaper seams in a second bathroom. At the closing, Rollins assured Doe that all necessary repairs would be made. As Doe later
remembered the conversation, Rollins told her that Elwood Carpenter, the on-site supervisor, “had a master key to the homes” and would take care of these matters for her. They were put on what is known in the real estate trade as a “punch list.” A few days after moving in, Doe discovered minor leaks in the plumbing and that problem, too, was added to the punch list. Later, she requested that a vent for a new clothes dryer be installed. All the items on the punch list but one were taken care of shortly after the closing.

As Elwood Carpenter explained in his deposition, the “master key” to the houses in the development was operable only until a key specifically made for a given lock was used in that lock, at which time the lock automatically rekeyed itself and would no longer accept the master key. Hence, in order to make inside repairs on a resident’s punch list, it was necessary to have access to a key specifically made for that particular house. Pattie Rollins testified that her usual procedure was to retain a key from the set of keys that was turned over to a new owner at the closing. Some residents knew that she had retained a key, she testified, but others did not. Rollins further testified that she did not recall the exact circumstances under which she had given Jane Doe her set of house keys. In Doe’s deposition, however, she repeatedly refers to Elwood Carpenter’s possession of a “master key,” leaving the impression that she did not know that Rollins had retained a duplicate key to her home.

In any event, the painting and plumbing problems in Jane Doe’s unit were cleared up a short time after she moved in. However, a lengthy dispute arose over the condition of the wallpaper in one of the bathrooms, and more than a year after Doe moved in, the matter had still not been resolved. Pattie Rollins apparently took the position that the wallpaper had been successfully patched; Jane Doe was dissatisfied and wanted the wallpaper completely replaced.

Despite the fact that she considered all the problems on the Doe punch list resolved, Rollins continued to retain the duplicate key to Doe’s home. She had tagged it with Doe’s lot number and kept it with other keys to units in Idlewild Court that had been similarly retained. They were stored in what Elwood Carpenter later referred to as a “plastic tray.” Another witness described it as a plastic box with “see-through drawers.” By all accounts, this plastic box was not only kept unlocked but had no locking mechanism on it. It was routinely stored in the closet of the front bedroom of the Idlewild Court unit that served as the “model home” for the development. Pattie Rollins used the bedroom as her office. Sometimes the key box was left on the
floor of the closet, and sometimes on the top shelf. Rollins conceded that the closet itself was never locked.

Rollins did assert that the model home was routinely kept locked up and secure. But her own testimony, as well as that of Elwood Carpenter and Sam Carpenter, leaves that assertion open to dispute. Rollins testified that in addition to her model home key, other sales agents working for the realty company had keys to the unit, as did Elwood Carpenter. The model home was visited regularly by outside sales agents and by prospective customers.

Moreover, the construction workers at the development came in and out of the model home to get supplies, make phone calls, and use the bathroom. In his original deposition, Elwood Carpenter admitted that he knew that his son, Sam, had a key to the model home. According to Pattie Rollins's testimony, Sam Carpenter was not authorized to have a key to the model home. Nevertheless, Sam himself testified that he regularly kept beer and food in the refrigerator at the model home, for consumption when he worked at Idlewild Court after hours and on weekends. Although Rollins denied knowing that the workmen made routine use of the model home, the fact that someone was using the kitchen in this fashion could scarcely have escaped her attention.

The defendants argue on appeal that Sam Carpenter's access to the model home (and thus his access to the key to Jane Doe's house) was the result of an intervening criminal act—his own, in stealing a key to the model unit sometime prior to October 1986. Sam Carpenter admitted taking one of several keys provided for locks to the model home, after the "trim kit" containing the keys and locks was left lying in the fireplace by the distributor while the model home was under construction and before the locks were installed in the doors. The theft of this key should have been noted months before the rapes occurred, at the time the locks were installed. But even if no one noticed the fact that a key was missing at that time, and thus took no action to account for it, Sam Carpenter's theft of the key is largely immaterial, because of his unimpeded access to the "key box" by means other than the stolen key. For example, he had painted the inside of the model home and could have taken the unsecured key to Jane Doe's house while he was in the model home for this purpose. Moreover, on the night that he allegedly stole the key to the Doe residence, he was in the model home after hours on two separate occasions, as indicated below. On one of those two occasions, the unit was unlocked, and he was able to enter without using his own key.
Finally, it is important to note that Elwood Carpenter knew that his son had possession of a key to the model home during the period in question but did nothing to stop him from using it. A jury could reasonably assume from Sam Carpenter’s uninterrupted use of this key that it was the product of acquiescence, if not out-right authorization.

In fact, Elwood Carpenter did nothing to stop Sam Carpenter’s access to the model home and its contents, even though he knew that his son “had a drinking problem” and had seen Sam use marijuana. More importantly, Elwood Carpenter took no action when, during the week immediately before the rapes occurred, Clinton Osborne showed up on the construction site.

Osborne was well-known to Elwood Carpenter because he was the nephew of Carpenter’s ex-wife. Carpenter also knew that Osborne had “been in trouble with the law” in Ohio and had spent eight or nine years in prison—as he recalled, for assault and arson. In fact, Osborne had apparently been most recently incarcerated following his conviction for armed robbery and was a fugitive from justice at the time he came to Tennessee, a fact which a superficial inquiry by Elwood Carpenter would have disclosed. In his deposition, Elwood Carpenter tried to minimize Osborne’s involvement by denying that Osborne had been hired to work at Idlewild Court. According to Elwood Carpenter, Osborne was just “loafing around the project with Sam while Sam was working.” But Carpenter was forced to admit that he had seen Osborne with a paintbrush in his hand and knew that Osborne had been “inside of the houses” during the week in question. Elwood Carpenter testified that he was leery of Osborne and told Sam to “get him away from the job site.” But he made no effort to eject Osborne from the premises himself, or to warn residents that a dangerous person was in the area.

The most significant indication that Sam Carpenter’s theft of the model home key is simply irrelevant to the question of negligence in this case comes from evidence in the record about the events surrounding his possession of the key to Jane Doe’s house on October 6, 1986, the evening of the rapes. According to Sam Carpenter’s testimony, he and Clinton Osborne had worked together at Idlewild Court that day, drinking beer and “smoking dope” off and on during working hours. After they quit late in the afternoon, they went to the construction trailer, where they continued to drink beer. There they also discussed Clinton Osborne’s proposal to get into Jane Doe’s house for purposes of having sex with her. At some point, Sam Carpenter broke
off the discussion and walked over to the model home to get some cheese and crackers he had stored there. When he arrived, he found the house unlocked and a real estate agent standing outside, waiting to show the model home to prospective buyers. The agent was apparently not a Linder employee, because Sam Carpenter had never seen him before. Carpenter went inside the house, without using his key, and retrieved his cheese and crackers from the kitchen. Although he did not take the key to the Doe home from the unsecured closet at that time, the significant point is that he could have. Instead, he returned to the construction trailer with the food, continued making plans with Clinton Osborne for later that evening, and ultimately returned to the model home to get the marked key to Jane Doe's house, using his own key to enter the model home.

Sam Carpenter was subsequently asked, "If there [had not been] a key in the box that night, what did you plan to do?" Referring to Jane Doe, he responded, chillingly, "She'd have probably been safe." This testimony raises serious questions about how and why the home-owners' keys were retained, as well as questions about the lack of any security measures with regard to those keys. A jury might well conclude, for instance, that the key to Jane Doe's house had been retained in Pattie Rollins's office long after there was any legitimate reason to keep it. Moreover, that key, like others, was kept in an unlocked plastic box, in an unlocked closet, in a house to which many unauthorized persons (including outside sales agents and prospective buyers) had access. In its current state, the record fails to show that there was any company policy about use of the keys, or any precautions taken to secure them. According to Pattie Rollins, there was no list of whose keys were kept in the box, no sign-out sheet to indicate who might have had possession of them (and thus an opportunity to make a copy), no regular inventory of any kind, and no policy that they be returned to their owners as soon as possible under the circumstances. As to unsold homes or those still under construction, such a lackadaisical method (or lack of method) of operation posed no immediate risk of personal harm. But as to occupied residences, this conduct clearly raises a jury question on the issue of the defendants' breach of duty to use reasonable care in the handling of Jane Doe's key.

Moreover, the defendants had been put on notice that unauthorized entries had been made into several occupied residences at Idlewild Court, under circumstances that suggested unauthorized use of a key. One resident, a man named John Myers, had allegedly com-
plained to Elwood Carpenter, Pattie Rollins, and Robert Linder that someone had been in his home on more than one occasion, without his permission; he was sure of this, he told Jane Doe, because “things [had been] rearranged or the commode had not been flushed when he felt like he didn’t leave it in that shape.” One couple had reported food missing from their home. Elwood Carpenter admitted that another resident, Randy Hutchison, was so upset when he learned that Carpenter had possession of a duplicate key to his home, that he demanded that it be handed over immediately and thereafter stayed home from work when repairs to the inside of his home had to be made. Finally, Elwood Carpenter conceded that still another occupied residence had been “burglarized” without any sign of forced entry. Various items were stolen from the house, and the matter was reported to the police. Even under these circumstances, Pattie Rollins took no steps to inventory or secure the keys in the model home. Indeed, when Jane Doe expressed some concern to Rollins after she unexpectedly saw Elwood Carpenter coming out of her house as she arrived home one evening, Rollins told Doe “not to worry about it, [that] he was bonded.”

There is a dispute between the parties concerning the timing of these events, i.e., whether the other unauthorized entries occurred before or after the unauthorized use of a key to Jane Doe’s house that led to her rape, and thus whether defendants had been put on notice that a breach of security had occurred. But viewed in a light most favorable to Jane Doe’s theory of the case, this evidence clearly presents a question for the jury on the issue of the defendants’ breach of duty in failing to take appropriate action in response to a known risk.