Georgetown University Law Center
Scholarship @ GEORGETOWN LAW

1997

Intimate Violence and the Problem of Consent

Jane H. Aiken
Georgetown University Law Center, jha33@law.georgetown.edu

This paper can be downloaded free of charge from:
https://scholarship.law.georgetown.edu/facpub/1404

48 S.C.L. Rev. 615-640 (1997)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: https://scholarship.law.georgetown.edu/facpub

Part of the Family Law Commons, and the Law and Gender Commons

INTIMATE VIOLENCE AND THE PROBLEM OF CONSENT [AN ESSAY]

*Jane Harris Aiken**

INTRODUCTION 615
PART ONE: SEXUAL HARASSMENT, NON-STRANGER RAPE, BATTERING AND INEQUITABLE DIVORCE 618
A. The Double Binds of Familial Intimacy 619
1. Invisible and Uncompensated Home Labor 620
2. Woman Abuse 626
B. The Double Binds of Sex 629
1. Non-Stranger Rape 630
2. Sexual Harassment 633
PART TWO: QUESTIONING THE DOCTRINE OF CONSENT 637
CONCLUSION 639

INTRODUCTION

This volume of the South Carolina Law Review is devoted, in part, to the issue of intimate violence. The juxtaposition of intimacy with violence is striking. Intimacy implies a closeness and a vulnerability that is treasured and inviolate. Intimacy should foreclose the possibility of violence. Intimate violence should be an oxymoron. Yet, intimacy sometimes creates its own special kind of violence, one that can erupt into rape or assault. On a less physical level, intimacy may cause violence to a woman's personal integrity and economic independence.

Intimate violence manifests itself with a certain subtlety that forces women to walk a careful tightrope in order to avoid threatened harm. This essay is about that tightrope: the double binds women experience in their intimate lives and the ways in which the law reinforces those binds by interpreting women's constrained choices as consent.[1] This essay focuses on familial and sexual

---

* Professor of Law, University of South Carolina School of Law. The author wishes to thank Eric Johnsen for his extensive research support, Sarah McKay and Jenny Horne for their early enthusiasm and later patience, and Annette Appell, Barbara Flagg, and Karen Tokarz for their suggestions and comments.

1. Consent is an enormous topic spanning virtually all areas of the law. This essay looks merely at consent in the area of sexual and familial intimacy. Intimate violence is likewise an extremely broad topic, and the focus of this essay is again limited. The issues covered have been

intimacy to see how the law reads women's behavior as indicating consent to what would otherwise be redressable harm.[2] It deals with conflicts that arise when a victim experiences harm but the alleged perpetrator believes his behavior was the result of consensual activity. There is confusion in such conflicts, confusion that is grounded in social forces that have the effect of limiting a woman's choice. The social forces that drive this confusion arise principally from the commodification of women's sexuality and the expectation of women's self sacrifice on behalf of their families. As long as women's sexuality remains commodified in the public sphere and women's home labor is uncompensated and treated as a product of love, legal analysis of apparent consent by women will continue to be deeply flawed. Courts will continue to use social expectations as an unexamined norm against which a woman's behavior is judged. Inappropriately, deviations from the norm will, or will appear to be, penalized. Failing this impropriety, courts may continue to act as if the above social forces do not exist, and a woman's behavior, even in complying with the norm, will continue to be treated as if it were freely chosen. In both instances, when the behavior is compared to the norm and when it is interpreted as if freely chosen, women will lose.

Perhaps because intimacy makes human interaction more complicated, the legal system has historically been uneasy with the subject. Chief among these complications are sex and love. These aspects of relationships create particular difficulties because they affect the perceptions of consent and harm. Moreover, women are in a dubious position to help themselves. The double binds that women experience in their sexual and familial lives are insidious; they often operate on an unconscious level. The day to day harm is often invisible and the recognition of the binds only arises at crisis time: when a woman's behavior is used to excuse violence or to evaluate stability.

Much of what is expected from life is socially constructed. People learn, therefore, to tolerate some harms without identifying them as harms. Choices are limited by our political power, and political realities color our expectations. Acting contrary to these realities and ignoring obvious social construct, the legal system often operates as if our expectations from life are not colored by our experiences and there is an equality of power and choice. By its contrary actions and blind eye, the law reinforces the social pressures that serve to objectify women and render their contributions invisible.

The liberal legal system is founded on the value if individual autonomy. Within this foundation the self is conceived as "a solid, self-sufficient unity, not defined by or in need of anything or anyone other than itself."[3] The self

---

chosen for their particular relevance to adult women.

2. Martha Chamallas offers treatment of the same subjects in *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777 (1988). I offer a narrower view of issues similar to those thoughtfully detailed by Chamallas.

3. Iris Marion Young, *The Ideal of Community and the Politics of Difference*, *in* FEMI-

acts in its own interest. It is a parallel principle of negative liberty that assumes that each individual should be allowed the maximum freedom to act undisturbed by others.[4] People are expected to tolerate others and to leave them alone. Therefore, people are expected to articulate what they want and to articulate their disagreement with situations they find unacceptable. Key to this understanding are notions of choice and consent. A fundamental principle in the law is that people ought to be held to the reasonably interpreted objective manifestations of their desires.

Traditional law and economics doctrine assumes that individuals act so as to maximize their own pleasures and minimize their own pains.[5] Voluntary exchange, the law and economics term of art for "consensual" transactions, is at the very heart of this principle of maximized individual welfare.[6] Indeed, consent itself is a praised feature of the economic view.[7] By their very definition, consensual transactions increase the well-being of those who have consented. The state of affairs that results from expressly consensual transactions is, therefore, inherently moral.[8]

"Consent," means both actual consent and imputed consent. Either form may be words or actions of a party that would lead a reasonable person to believe that there was true consent. Imputed consent, however, poses particular problems since it relies on an outsider's assessment of words and behavior rather than demanding the unequivocal expression required of actual consent. What happens when assent appears to be the result of strong social forces that leave little room for deviation? How does and should the law cope with such a forced scenario? This essay looks at the way in which imputed

---

NISM/POSTMODERNISM 300, 307 (Linda J. Nicholson ed., 1990).

4. As Cynthia R. Farina states:

> The fateful loose thread is consent. Consent, the manifestation of choice, is critically important to the picture of the individual as autonomous moral and political actor. . . . A freely chosen fate is not an unfair fate. If individual dignity necessarily requires the opportunity to act and not simply be acted upon, to determine one's own life and not simply to have one's life determined, it necessarily implies accepting responsibility for the actions one has taken, the decisions one has made.

Cynthia R. Farina, *Conceiving Due Process*, 3 YALE J. L. & FEMINISM 189 (1991); *see, e.g.*, Richard A. Posner, *The Cost of Rights: Implications for Central and Eastern Europe—And the United States*, 32 TULSA L.J. 1, 2 (1996). Chief Judge Posner gives a brief history and synopsis of the distinction between positive liberty (originally, the "right to demand a service from the government") and negative liberty (originally, the "right not to be interfered with by government"). *Id.* at 2-3. Clearly the distinction has been expanded beyond the political arena. *See id.* at 3.

5. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 1.1 at 3-4 (4th ed. 1992).

6. *Id.* § 1.1 at 10-11.

7. RICHARD A. POSNER, THE ECONOMICS OF JUSTICE (1981); *see also*, RICHARD A. POSNER, SEX AND REASON (1992) (applying the law and economics view to contemporary issues involving sexuality).

8. *See* POSNER *supra* note 5, § 8.3.

consent functions in our legal system in areas that have a great deal of impact on women. It is meant to suggest that our traditional notions of consent are not workable in intimate settings and may well disguise harms that should be redressed. More specifically, this essay will look at how courts interpret behaviors related to sexual and familial intimacy and systematically ignore societal patterns that should vitiate imputed consent.

PART ONE: SEXUAL HARASSMENT, NON-STRANGER RAPE, BATTERING AND INEQUITABLE DIVORCE

There are at least four areas in which legal interpretations of a woman's sexual or love-related behavior play a significant role in the recognition of (or failure to recognize) harm: the sexually harassing environment, date rape, battering, and the recognition of the disproportionate burden that women bear in family life.[9] These areas have in common the fact that only a few years ago they were unrecognized as legal harms. Many women believed that it was just a matter of living in the world that one had to tolerate these kinds of harms. Still, these areas are not without controversy. They often turn on the idea of consent, and popular defense tactics take advantage of the confusion that results. The social phenomena that have created women's double binds explain, to some extent, why these "harms" have been so hard to identify and why so many women behave as if there is no harm at all. In particular, two of the four recently recognized harms, sexual harassment and date rape, demonstrate the sex as commodity problem. The other two examples demonstrate the trap of familial intimacy.

---

9. *See* Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398 (1992). Cahn explores the reasonable woman standard in the contexts of rape, sexual harassment, and domestic violence. She contends, and I agree, that these three areas symbolize "different forms of women's subordinated status." *Id.* at 1400. Cahn also argues that "[t]he reasonable woman standard raises the possibility of changing this status by providing a legal standard that increases the potential for effective enforcement of laws against subordinating behavior." *Id.*; *see* Joan L. McGregor, *Force, Consent and the Reasonable Woman*, *in* IN HARM'S WAY: ESSAYS IN HONOR OF JOEL FEINBERG (Jules Coleman et al. eds., 1993); *see also* Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359 (1993) (advocating a shift in the focus of rape statutes from violence to the violation of women's sexual autonomy); Mary Jo Shaney, Note, *Perceptions of Harm: The Consent Defense in Sexual Harassment Cases*, 71 IOWA L. REV. 1109 (1986) (proposing a consent standard that takes into account whether a victim of sexual harassment overtly indicated consent and whether that consent was freely given).

A. The Double Binds of Familial Intimacy

Altruism has little role to play when assessing bargained for exchanges, yet women consistently demonstrate altruistic behavior in their intimate familial relationships. That is, women make choices in relationships that are inconsistent with their apparent self-interest. In a familial setting, family members and adults in particular will choose to do things for others that may not maximize their own interests but will be of great use to the family as a functioning unit. Self-sacrifice and accommodation are in fact keys to the functioning family. In this setting, the primary value is that of responsibility for others which can include and indeed probably requires self-sacrifice. Family members often provide this sort of care despite inconvenience, hardship, and lack of monetary compensation. The work within the family is thought of as a "labor of love" and is paid in the "currency of emotion" rather than material well being.[10]

Generally speaking, the caretaking functions within the family are not equally shared between heterosexual partners. The traditional family functions within a larger system of gender hierarchy. As such, caretaking within a family can make women vulnerable to dependency, exploitation, and abuse. One can identify these vulnerabilities by evaluating the distribution of power, prestige, self-esteem, opportunities for self-development, and physical and economic security between a husband and a wife. Despite market advances that have created greater opportunities for women, the traditional idea of sex-differentiated marital responsibility, with its provider-husband and domestic-wife roles, continues to influence how men and women think and behave.[11]

Despite the clear conflict with apparent self-interest, women continue to bear a disproportionate burden in household labor and child rearing. Even in households with more egalitarian attitudes toward marriage and opposite sex relationships, studies indicate that there is little impact on this skewed division of work.[12] Even in families in which opposite sex parents both identify themselves "primary caretaker" of their children, women tend to be more emotionally involved with the children, find separation more distracting, and find concentrating on other tasks more difficult when they are caretaking.

10. Katherine Silbaugh, *Turning Labor Into Love: Housework and the Law*, 91 NW. U.L. REV. 1, 36 (1996); *see also* Nancy Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996) (pointing out that the Federal Income Tax Code in distinguishing between market labor and household activities helps perpetuate the devaluing of household labor).

11. Just as an example, one often hears that when there is disagreement about whether a wife will work outside the home, a woman will say that she wants to but her husband will not "let" her. This results in various forms of internalized oppression: Many divorcing women still see the money that their husbands earn as "their" money. And it is not uncommon for husbands in ongoing marriages to use the fact that they are the breadwinner to enforce their views or wishes.

12. Silbaugh, *supra* note 10, at 8.

Consequently, in those families where both mother and father perceive themselves to be the primary caretaker, women devote much more time to childcare than their male partners.[13]

Housework, childcare, and relationship maintenance are considered "women's work," and women often bear the disproportionate load without complaint and without recognition of the unequal impact on material well-being and career advancement. Women are encouraged to sacrifice themselves when maintaining relationships with men and caring for children and their homes. That sacrifice is treated as a labor of love and leaves women vulnerable to economic dependency. When women make the conscious choice to devote themselves to a career, they risk significant consequences, such as losing any ongoing relationship with men who have provided economic support. They also risk the loss of their children in a custody battle in which their contributions to child rearing will be undervalued and the father's efforts enhanced.

Thus, women face a double bind: If women bear the disproportionate load without the family, they may find themselves penniless upon divorce or from death of a supporting spouse. If women attempt to abdicate the disproportionate load, the law will either thwart their attempts outright or use the deviation from expected behavior as evidence of parental unfitness. In essence, the law treats women's relationship-focused behavior as inconsistent with the self-interested autonomy model and imputes consent to them, resulting in personal harm. When the legal system evaluates evidence of self-sacrifice, it is treated as a consensual ordering of the family relationship. When a woman deviates from the traditional role as primary caretaker of home and family, her break from the castle is magnified and used to her detriment. In sum, a woman is judged against the norm of self-sacrifice. Two examples of the harms that result are the problems of battering or woman abuse and the failure to credit the disproportionate burden women assume in housework and childcare when making critical child custody and marital property determinations.

1. Invisible and Uncompensated Home Labor

Women's dedication to family creates significant limitations on women's material security, yet women continue to shoulder the burden as if it were uniquely their responsibility, and social forces reinforce their sacrifice. The law treats this structuring of family life that systematically disadvantages women as a set decision, consensually made. When women attempt, however, to restructure household burdens deliberately, the law refuses to honor the agreements they negotiate. Furthermore, if a woman does act inconsistently with the role society has cast for her—of self-sacrificing mother and mate—she

13. DIANE EHRENSAFT, PARENTING TOGETHER: MEN AND WOMEN SHARING THE CARE OF THEIR CHILDREN 96-102 (1987).

finds that her actions disproportionately reduce her familial status, and the man's role is disproportionately enhanced. She therefore risks losing in a custody battle or in a dispute over equitable division of marital property. Once again, the double bind is evident.

The fact is that once children are born, if a parent leaves, it will be the man. Given the value of self-interest, this behavior does not make sense. Staying with children requires self-sacrifice, and women appear to be willing to make that sacrifice. The social forces that reinforce such self sacrifice go unexamined. Women make up the vast majority of single person heads of household. In 1988, more than one in five U.S. households with dependent children were single parent households,[14] and 90 percent or more of those were headed by women.[15]

In the United States, women also continue to be primary providers of care within the family.[16] All the recent statistical data confirms that in two income families, women remain the primary provider of childcare, cleaning services, food procuring and preparation, bill paying, and other maintenance work that is required to keep a family going.[17] When looking at studies of total time spent in family work, including housework, childcare, yard work, and repairs, fully employed husbands appear to do, at the most, approximately half as much work as their fully employed wives, and some studies show a much greater discrepancy.[18] Husbands of wives with full time jobs averaged about

---

14. Louis W. Sullivan, *The Doctor's RXfor America's Troubled Children . . . Strengthen the American Family*, 2 KAN. J.L. & PUB. POL'Y 5, 6 (1992).

15. This fact has not gone unnoticed by the United States Supreme Court: "Almost 90% of single-parent households are headed by women, and a considerable percentage of them face great financial difficulty." *See* Bowen v. Gilliard, 483 U.S. 587, 613 (1987) (Brennan, J., dissenting) (*citing* U.S. DEPT. OF COM., BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, HOUSEHOLD AND FAMILY CHARACTERISTICS: MARCH 1984 5 (1985)).

16. *See* Anne L. Alstott, *Tax Policy and Feminism: Institutional Choices*, 96 COLUM. L. REV. 2001, 2046 (1996) (maintaining that "[o]nce we recognize that women are more likely than men to be primary caregivers, then family allowances are in effect a 'special' payment to women, which could reinforce traditional gender roles by rewarding women who act as primary caregivers"); Stephanie S. Gold, Note, *An Equality Approach to Wrongful Birth Statutes*, 65 FORDHAM L. REV. 1005, 1007 (1996) (stating that "[m]uch of the law and philosophy in [the area of wrongful birth statutes] reinforces women's stereotypical roles as child-bearers and mothers . . . This vision of women as exclusively mothers and caretakers associates women with children and incompetent people and consequently limits women's rights to decisional autonomy"); Leslie Bender, Essay, *Sex Discrimination or Gender Inequality*, 57 FORDHAM L. REV. 941, 943-49 (1989) (arguing that women are allowed to engage in the professional world as long as they do not integrate their professional duties with their caregiving duties). Bender also maintains that women are forced to seek alternative careers if they do not wish to sacrifice their primary care duties. *Id.*

17. BETH ANNE SHELTON, WOMEN, MEN AND TIME: GENDER DIFFERENCES IN PAID WORK, HOUSEWORK AND LEISURE 65-66 (1992).

18. Silbaugh, *supra* note 10, at 10.

two minutes more housework per day than did husbands in housewife-maintaining families.[19] Even unemployed husbands do much less housework than wives who work forty-hour weeks.[20] Katherine Silbaugh has laid out some generally representative statistics:

> [I]n 1975 men spent 46% as much time on household labor as women, in 1981, 54% and by 1987, 57%. In homes where both men and women work more than thirty hours per week for pay, men's share of the housework rises to 60% of the women's in 1987, compared to 53.1% in 1975.[21]

Women's working opportunities are necessarily reduced by the demands that family care makes on women. For instance, married women often choose jobs that allow flexibility in order for them to have sane lives, given the division of labor in their families. These jobs are less likely to pay high salaries or have substantial room for upward movement in the work hierarchy. This behavior, however, is entirely consistent with the value of self-sacrifice and the gendered power relations in a family. Women who perform unpaid labor at home are also at a decided disadvantage should the supporting spouse go bankrupt or die. The homemaker spouse, because the work is unpaid, has no claim for back wages to ensure her solvency.

Housework is treated as a private, non-economic family event.[22] Most women do not identify this disproportionate division of labor as a harm and do it without complaint. In other words, they "consent" to it. Indeed, many women do such acts on instinct and only upon reflection recognize the disproportionality. The disproportionate burden of housework on women has

---

19. ARLIE HOCHSCHILD, THE SECOND SHIFT (1989).

20. *See* Silbaugh *supra* note 10, at 9-10.

21. *Id.* at 8. Although the data initially seems encouraging, Silbaugh warns that:

> This modest increase in the proportion of housework being performed by men is misleading because it overstates the changes in men's conduct. These data changes occur without men devoting any more time to housework, because as women devote less time to housework, men's housework becomes a greater portion of the total amount of housework done. Between 1960 and 1986, housework hours have fallen for women and remained virtually constant for men. The difference is accounted for in a lower standard of household care and in an increase in the purchases of housework replacement services or good, such as carry-out food and laundry service.

Id. at 8-9. Of course, when housework services are purchased, they are almost always provided by women.

22. *See* Silbaugh, *supra* note 10, at 25. Women ensure that the family is maintained. This phenomenon creates a market anomaly. Women, on average, are more willing than men to sacrifice their own well-being to have children and to protect the interest of their children. The result is that men individually and society generally are able to have children at a lower price than the price they would have to pay if women's preferences were the same as men's.

considerable impact on women's careers. In the case of single mothers or divorcing women, it will often result in poverty.[23]

If women seek to resist complicity in this socially imposed scheme, they may find themselves without a relationship and involved in a legal system that reinforces women's traditional roles within the family. Social science data studying the division of housework in the family show that housework is a source of conflict among married and co-habitating couples, and women cannot be perceived as doing less housework than their partners desire without jeopardizing their relationships.[24] Yet, the reverse is not true for a man. The study found that it is difficult for women to achieve an equal division of housework and still preserve the relationship.[25] At the relationship's end, the legal system steps in.

Divorce destroys the buffer against economic vulnerability. Since so few divorcing couples have property to divide, there is usually no way to compensate a woman who has suffered relative economic stagnation due to her housework and childcare responsibilities. With the rise in the number of women working outside of the home, courts appear more frequently to be granting divorces with little or no alimony awards and only very rarely with awards that give the wife a portion of the husband's future earning power.[26] The wife's sacrifice of her career asset in a two earner family generally will not be compensated.[27] As a case in point, equitable distribution statutes fail to credit this kind of day-to-day labor in their allocative schemes.[28] Although one of the factors to be considered in equitable distribution is the contributions of a homemaker, courts have read this only to apply to situations in which the

---

23. *See* Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 287. The skewed distribution leaves a wife with much less time and energy than her husband has to commit to wage work. The problem is magnified upon divorce. Statistics show that the most valuable asset a person has after divorce is his or her earning potential. LENORE WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 56-57 (1985). Weitzman shows that 60% of divorcing couples have a net worth in more tangible assets of less than $20,000. Creating a similar problem and despite awards of child support and public benefits, a woman's own earnings make up the major portion of income in single mother households. *See* Fineman, *supra* note 23, at 288. Fineman cites with approval an unpublished paper which contends that "[m]ost analysts agree that the proximate causes of poverty in mother-only families are (1) the low earnings capacity of the single mothers; (2) the lack of child support from nonresident fathers; and (3) the paucity of public benefits." *Id.* at 288 (citing RENEE MONSON & SARAH S. MCLANAHAN, A FATHER FOR EVERY CHILD: DILEMMAS OF CREATING GENDER EQUALITY IN A STRATIFIED SOCIETY (unpublished paper) (copy on file with Fineman)).

24. PHILLIP BLUMSTEIN & PEPPER SCWARTZ, AMERICAN COUPLES: MONEY, WORK, SEX 144-89 (1983).

25. *Id.*

26. *See* Silbaugh *supra* note 10, at 56-67.

27. *Id.* at 62.

28. *Id.* at 57.

spouse is a full time homemaker.[29] Therefore, in the majority of families—where the wife is both homemaker and wage earner—this factor is inapplicable.[30] The legal consequences of home labor do not give any financial reward or security, and home labor does not result in accrued experience in a lucrative field. In fact, courts have been reluctant to place any monetary value on housework.[31]

Even if a fair market value could be determined, courts are likely to continue in their failure to fully appreciate the long term financial consequences of the disproportionate burden that the woman has borne. The cases basically treat the disproportionate division of labor as a private arrangement between the parties. In fact, husbands can be expected to assert that they would have been willing to share more of the load but that their wives never asked for help. That argument is, of course, the argument that there was apparent consent. Imputing consent at this stage legitimizes divorce decrees that ensure the eventual decline in the standard of living for women. It is not a surprise that Lenore Weitzman found in her landmark study of no-fault divorce that after divorce men experienced a standard of living increase of 42 percent while woman's standard of living fell by 73 percent.[32]

As if it were not enough that the law imputes consent for this socially imposed, one-sided distribution of labor, the legal system is additionally resistant to any mutually conscious efforts to restore the balance. When couples attempt to create contracts that would allow compensation for housework and personal services, courts have found their agreements in violation of public policy. They generally fail for lack of consideration.[33] Yet, premarital contracts in which a spouse forgoes any interest in the wage-earning spouse's income are enforceable.[34]

The law not only reinforces a woman's role in providing the bulk of unpaid labor but also penalizes her choice not to conform to that social

---

29. *See In re* Marriage of Pitas, 372 N.E.2d 493 (Ind. Ct. App. 1978); *In re* Marriage of Stice, 779 P.2d 1020 (Or. 1989).

30. Silbaugh, *supra* note 10, at 59-60.

31. *See In re* Marriage of Patus, 372 N.E.2d 493, 495-96 (Ind. Ct. App. 1978). The Uniform Marriage and Divorce Act (UMDA) lists the contributions of a homemaker as a factor to consider in distribution of property. The UMDA, however, lists it among several factors, does not give it greater weight and does not require that it be monetized. *See* UNIFORM MARRIAGE AND DIVORCE ACT § 309 ALTERNATIVE A, 93 U.L.A. 238-39 (1987).

32. Weitzman, *supra* note 23.

33. *See* Borelli v. Brusseau, 16 Cal. Rptr. 2d 16 (Cal. Ct. App. 1993). In *Borelli*, the court prevented the wife from recovering compensation for personal duties she performed for her husband following his stroke. Although the husband had promised the wife certain properties if she cared for him in his home and the wife performed such duties, the court found that "[p]ersonal performance of a personal duty created by the contract of marriage does not constitute a new consideration supporting the indebtedness alleged in this case." *Id.* at 20.

34. *See, e.g.*, S.C. CODE ANN. § 20-7-473(4) (Law Co-op. Supp. 1996).

expectation. Courts have used a woman's failure to provide household labor as a reason to deny child custody. Essentially, when a woman defies the expectation that she will be the primary provider of household services and childcare she is viewed as neglecting her responsibilities.[35] In *Parris v. Parris,*[36] the South Carolina Supreme Court unanimously affirmed the trial court's grant of custody to Mr. Parris and denied that gender bias had any effect on the determination.[37] Mrs. Parris was described by the trial court as "a woman, who in the past has not been particularly family oriented."[38] The record reveals that both father and mother shared childcare activities with the primary caretaking being done by a housekeeper. The court, however, describes the hiring of the housekeeper as a necessity to accommodate Mrs. Parris' career goals and praises Mr. Parris for taking up the slack. The final order states:

> [T]he evidence reflects that there have been problems during this twelve year marriage over conflicts between [the wife's] career goals and objectives, and her marital situation. To accommodate the conflicts between career, family, and marriage the parties employed a full time housekeeper, and [the husband] has assumed many of the household responsibilities.[39]

The court assumes that unpaid household labor is women's work, and the failure to comply with that social expectation is costly. Other courts have similarly criticized mothers for relying on others for childcare and credited fathers for having made caretakers available. For instance, in *Elmer v. Elmer,*[40] the Utah Supreme Court criticized a mother for relying on her child's father for childcare when she was having another baby. Change of custody was deemed appropriate despite the fact that the father's new wife would be caring for the child while the father was at work.[41] Loss of custody is a strong incentive to behave in ways a court would consider appropriate. This ensures that women continue to demonstrate their willingness to self-sacrifice for the family.[42]

---

35. *See* Lynn Hecht Schafran, *Gender and Justice: Florida and the Nation*, 42 FLA. L. REV. 181 (1990).

36. 319 S.C. 308, 460 S.E.2d 571 (1995).

37. *Id.* at 310, 460 S.E.2d at 572.

38. Record at 40.

39. Record at 35.

40. 776 P.2d 599 (Utah 1989).

41. *Id.* at 605-06.

42. For more examples and a discussion of the ways in which women are explicitly punished for stepping out of their homemaker role see Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations,* 7 WOMEN'S RTS. L. REP. 235 (1982); Jennifer E. Horne, *The Brady Bunch and Other Fictions: How Courts Decide*

Once again a woman faces a double bind: She bears a disproportionate burden in the unpaid labor of housework and childcare, which incidentally renders no financial reward or security. Yet, if a woman chooses to ignore her household duties in an attempt to equalize the load, she puts at risk her marital relationship and her relationship with her children. Courts evaluating this self-sacrificial behavior call it love, imputing consent, and any harm that may flow from it is, therefore, rendered invisible. Courts evaluating a woman's departure from the self-sacrificial norm find it inadequate, and the deviant is generally left economically insecure and without custody of her children.

2. Woman Abuse

Presently, there are hundreds of women in jail for killing their abusive spouses.[43] When such a killing appears pre-meditated and not a response to immediate assault, claims of self-defense frequently go unheard because courts conclude that a woman should leave an intolerable domestic situation rather than kill her abuser. When an abused spouse kills her abuser, it raises two significant questions: "Why did she stay?" and "Why did she kill?" A woman's continued cohabitation with her batterer often results in imputation of consent to his assaults.[44] On the other hand, when a woman manages to leave her batterer before a killing occurs and later sues for divorce, her behavior in leaving the abusive marital relationship is often used as evidence of instability and unfitness to retain custody of her children.[45] When family life is examined under the harsh lights of the courtroom self-sacrifice has no place. Remaining with an abusive spouse cannot be understood when

---

Child Custody Disputes Involving Remarried Parents, 45 STAN. L. REV. 2073 (1993).

43. *See* Erich D. Andersen & Anne Read-Andersen, *Constitutional Dimensions of the Battered Woman Syndrome*, 53 OHIO ST. L.J. 363 (1992). Andersen and Read-Andersen note that "[b]etween .20% and .64% of battered women kill their abusive spouse or companion." *Id.* at 366. Of the 1.6 to 4 million women who are battered each year, approximately 800 to 1000 will be charged with the murder of that abusive partner. *Id.*

44. *See generally* Malinda L. Seymore, *Isn't It a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 NW. U. L. REV. 1032 (1996) (detailing the battered spouse syndrome and pointing to ways in which the law of evidence has overlooked the realities of spouse abuse).

45. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 43-49 (1991). Professor Mahoney actually points to a "Catch-22" in a woman's decision to leave her abusive relationship and to later seek custody of her children. On the one hand, if she leaves, she may be called "unstable" and accused of abandoning her children. *Id.* at 46-47. In one case Mahoney reports that a judge granted custody to a father after walking past the battered women's shelter to which the mother and children had fled. He determined that the shelter was an inappropriate living arrangement for the children. *Id.* at 45. On the other hand, "learned helplessness may 'explain' why a woman 'stayed' in the self-defense context, but may be interpreted as making her a poor model in childrearing and possibly a poor caregiver as well when custody is in question." *Id.* at 49. Perhaps there is a hazard in the stereotypes that judges and social workers hold.

evaluating self defense. Yet, such sacrificial behavior is expected when evaluating stability for purposes of child custody.

In relatively recent times, the law has acknowledged what has been called the Battered Woman's Syndrome. This syndrome documents the cycle of violence and the resultant dysfunctional behavior in a battering relationship. As a study in human interaction, the syndrome attempts to explain both why women do not leave the home and why certain behaviors, not necessarily violent in themselves, can indicate that the batterer is about to batter and, thus, justify self defense.[46] As an essential step in a legal defense, the syndrome explores a woman's *mens rea* and attempts to undermine the notion of guilt by explaining the complex relationship that exists between a batterer and a battered person.[47] The syndrome explains that women in abusive relationships often believe they had no right to complain about their treatment because they did "consent" by staying. In any sense, the assumption that the syndrome must combat is the erroneous belief that if a woman stays in a situation of battering, she must want to be there. The battered women's syndrome defense has been most helpful in cases which involved a clear "cycle of violence" followed by "learned helplessness,"[48] and generally, some form of expert testimony

---

46. *See* David Winthrop Hanson, *Battered Women: Society's Obligation to the Abused*, 27 AKRON L. REV. 19 (1993).

47. *See* State v. Kelly, 478 A.2d 364 (N.J. 1984). For a discussion of the issues underlying the battered women's defense see Beth I.Z. Boland, *Battered Women Who Act Under Duress*, 28 NEW ENG. L. REV. 603 (1994).

48. *See, e.g.*, Pitts v. White, 1997 WL 12127 at *6 (N.D. Cal. 1997) (counsel's failure to object to expert testimony concerning battered woman's syndrome and learned helplessness was defensible); People v. Gams, 60 Cal. Rptr. 2d 423, 426 (Ct. App. 1997) (applying the principles of learned helplessness to state stalking statute); *In re* Heather & Helen A., 60 Cal. Rptr. 2d 315, 318 (Ct. App. 1996) (quoting expert testimony that learned helplessness "is perpetuated throughout the victim's life that psychologically causes her to return again and again to relationships in which she is battered and abused"); *see also* R.H. v. B.F., 653 N.E.2d 195 (Mass. App. Ct. 1995) (overturning trial court's award of custody to father where psychologist testified that mother's violence was a defensive reaction characteristic of battered woman's syndrome); State v. Borrelli, 629 A.2d 1105 (Conn. 1993) (holding that expert testimony regarding battered woman's syndrome properly admitted as an explanation for a battered wife's recantation of her original description of abuse).

As Cheryl Hanna points out:

> The question of what the battered woman's role in the prosecution process ought to be often masks an ambivalence about what her role in the abusive relationship is. Women who want to follow through with prosecution are seen either as the true victims of domestic violence or as manipulators with an agenda. Women who do not want to proceed are characterized either as agents in the battering—allowing it to continue because of their lack of cooperation with the state—or as true victims who have "learned helplessness."

Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1883 (1996); *see also* LENORE E. WALKER, TERRIFYING LOVE 50-51 (1989) (stating that battered women who suffer from learned helplessness avoid

regarding battered woman syndrome has been allowed in all fifty states.[49] There are also, however, instances in which the syndrome has failed to be an adequate defense[50] or, worse yet, been used as a weapon by defendant-batterers against women who "stay and fight."[51]

Legally, the syndrome is viewed as a sort of psychological disorder.[52] By isolating the behavior as an "illness," the law effectively ignores the social forces that elicit women's self-sacrificial behavior in the home.

The battered woman's syndrome treats women's self sacrificial behavior as if it were unusual. Yet, self-sacrifice is one of the primary requirements of women's role within their families whether it be as child-care providers or as partners with men. Despite the harms they suffer, financial or physical, women often choose to devote themselves to families in ways that men do not. The legal system interprets this behavior as consent, and thus, there is no harm. However, when a woman decides not to sacrifice bodily integrity and self-esteem within her family and attempts to negotiate change or leave, she risks heightened violence from her abusive mate, while her assertiveness or exodus exempts her from the battered woman's defense. Thus, the law reinforces the self-sacrificial behavior.[53] Mahoney describes the forces at work on a woman in a battering relationship:

> The social insistence that women should leave treats the actions women often take as illegitimate unless those actions succeed in stopping violence . . . [and] contain[s] assumptions about mobility and autonomy in the lives of women that overlook emotional and economic interdependence.

---

behavioral responses, like escape, that will not have predictable outcomes); Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias and the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 646 (1980) (voicing the concern that expert testimony on learned helplessness may promote stereotypes of women).

49. *See* Myrna S. Raeder, *The Double Edged Sword: Admissibility of Battered Woman Syndrome by and Against Batterers in Cases Implicating Domestic Violence*, 67 U. COLO. L. REV. 789, 795 (1996).

50. *See, e.g.*, Mullis v. State, 282 S.E.2d 334 (Ga. 1981).

51. *See* Melanie Frager Griffith, Note, *Battered Woman Syndrome: A Fool for Batterers?*, 64 FORDHAM L. REV. 141, 183-87 (1995).

52. This is true despite the lack of any formal recognition in the primary reference, the American Psychiatric Association's The Diagnostic & Statistical Manual of Mental Disorders IV, AMERICAN PSYCHIATRIC ASSOCIATION, THE DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS, 424-25 (4th ed. 1994) [hereinafter DSM-IV]; *cf.* Bechtel v. State, 840 P.2d 1, 6-7 (Okla. Crim. App. 1992) (concluding battered woman syndrome is a implied sub-category of Post Traumatic Stress Disorder which is formally recognized in DSM-IV), and despite criticism for the theory in general, Raeder, *supra* note 49, at 796.

53. *See, e.g.*, Sharon Angella Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L.J. 191 (1991); Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121 (1985).

> This view actually *increases inequality* by stripping legitimacy and social respect from the very things most women do.[54]

To properly understand the battered woman's syndrome, courts must view the behavior it documents with a greater appreciation for the complexity of relationships. They must understand the value in self-sacrifice inherent in the family model and the fact that the family structure results in increased vulnerability for women. Women stay because they expect to sacrifice for the family and because the costs of leaving are too high. The lack of resources leaves a battered woman with no place to go, and the decision to leave may actually result in an escalation of the violence.[55] It is the classic double bind: women sacrifice financial security by providing unpaid labor within the home; they render themselves dependent upon their batterers. Such sacrifice is expected and, more often than not, internalized without question by women in these circumstances. Yet, their behavior is only legally understandable if it rises to a pathology, constituting a "syndrome."

B. The Double Binds of Sex

Social ideas about sex and the appropriate sexual behavior for women may also result in misapprehensions about consent. Sex and sexuality for women are often treated as commodities. Women are objectified and evaluated primarily by their sexual attributes and their skill in making use of those attributes.[56] Thus, women's sexuality becomes a currency for access to power. Sex is instrumental. Through flirtation, beauty, and the promise of possible sexual access, women can gain power. It is generally a derivative power—power gained through marriage and association with men. However, through the marketing of one's sexual appeal, it can also result in some "independent" power. Examples of engagement in this marketing approach include: the receptionist who gets a job because she is better looking than the other applicants, the student who gets a bit more attention because she is more attractive, and the sex worker who sells sexual services. Conversely, the failure to trade on one's sex appeal can result in negative reactions. Women who choose not to trade on their physical attributes are described as distant, frigid, or bitchy, or are labeled as "dykes." This negativism creates an incentive to use sexuality as a commodity. One can gain something from using sex appeal, and there is a price to pay if it is not used at least to some degree.

---

54. Martha Mahoney, *Victimization or Oppression? Women's Lives, Violence, and Agency*, *in* THE PUBLIC NATURE OF PRIVATE VIOLENCE 59, 77-78 (Martha Albertson Fineman & Roseanne Mykitiuk eds., 1994).

55. *Id.* at 6 (referring to the phenomenon as "separation assault").

56. ALISON M. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE 309 (1983).

Thus, the double bind exists: A woman must trade on her sexuality because it is expected, and there are significant social costs when she chooses not to use that currency. Yet, this objectification makes women more vulnerable to sexual aggression because men evaluate this constrained behavior as an indicator of consent.[57]

As a social phenomenon, these expectations about sex may account for the recent recognition of two particular harms to women: sexually harassing work environment and non-stranger rape. In the early seventies, when sexual harassment cases were first being brought, the courts dismissed them as beyond their power to remedy and susceptible of punishing only "petty flirtation." Prosecutors in non-stranger rape cases likewise advised victims that their chances of prevailing were so small, even in cases in which there had been substantial injury, that it was not worth their effort and agony to pursue legal retribution. It was assumed that by going on a date, the woman had opened the door to the possibility of sexual activity and that it was too difficult to distinguish consensual from nonconsensual sex. These "legal conclusions" stem from the inference that a victim has consented to harmful sexual activity. In essence, consent was imputed to the victim, and proof was accomplished by simply describing a woman responding to the social forces that make sex instrumental for women. These responses, expected by men when dealing with women, continue to be used by men erroneously to justify their sexually aggressive behavior.

1. Non-Stranger Rape

Women's socialization to treat sexual attractiveness as a commodity arises most vividly in cases of non-stranger rape.[58] Like any claim of rape, these cases often turn on the victim's consent or lack of consent.[59] And when the victim and perpetrator were previously acquainted, courts look to the conduct of the victim to determine whether there was consent.[60] Courts allow defendants to use a pre-existing relationship to give credibility to a defense of

---

57. Chamallas, *supra* note 2, at 839.

58. For a discussion of the "commodity theory" of sex and rape, see Robin L. West, *Legitimizing the Illegitimate: A Comment on* Beyond Rape, 93 COLUM. L. REV. 1442 (1993).

59. *See* Carla M. da Luz & Pamela C. Weckerly, *The Texas "Condom-Rape" Case: Caution Construed as Consent*, 3 UCLA WOMEN'S L.J. 95 (1993).

60. Lynne Henderson argues that "a number of cultural conventions and beliefs about heterosexuality transform most rape cases into 'sex' and not criminal conduct." Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 TEX. J. WOMEN & L. 41, 42 (1993). Henderson contends that "common beliefs about the morality of heterosexuality and cultural understandings about what constitutes normal heterosexual practice account for much of the failure of law reform to reduce the rate of rape and sexual abuse." *Id.*; *see also* Lea VanderVelde, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817 (1996) (analyzing the common law tort of seduction and its omission of the notion of consent and its effect on women's independence).

consent or reasonable, good faith belief of consent. Even when a woman believes that she said "no," her sexual behavior may be used to show apparent consent and defeat a claim of rape.

Morrison Torrey describes rape "myths," which often serve as barriers to successful rape prosecutions:

> [W]omen mean "yes" when they say "no"; Women are "asking for it" when they wear provocative clothes, go to bars alone, or simply walk down the street at night; only virgins can be raped; women are vengeful, bitter creatures "out to get men"; if a woman says "yes" once, there is no reason to believe her "no" the next time; women who "tease" men deserve to be raped; the majority of women who are raped are promiscuous or have bad reputations; a woman who goes to the home of a man on the first date implies she is willing to have sex; women cry rape to cover up an illegitimate pregnancy; a man is justified in forcing sex on a woman who makes him sexually excited; a man is entitled to sex if he buys a woman dinner; women derive pleasure from victimization. [61]

All of these myths describe behavior by women that is misinterpreted as consent to sexual contact. Further, they originate from the view that sex is a commodity for women. The instrumental nature of sex thus allows men to interpret women's behavior in such a way that it excuses male aggressiveness. Being perceived as sexually attractive is important to a woman's success in the world. That reality makes women second guess whether they can complain about male behavior.

In a 1988 New Hampshire case, decided by Justice Souter before he reached the Supreme Court bench, the issue was whether evidence of the complainant's behavior barred by the Rape Shield statute should nevertheless be admitted because it was constitutionally required. In reversing a defendant's conviction for rape and remanding for a new trial, the court stated, "[o]n the one hand, . . . a complainant's open, sexually suggestive conduct in the presence of patrons of a public bar obviously has far less potential for damaging the sensibilities than revealing what the same person may have done in the company of another behind a closed door."[62] The court ultimately found that the Constitution required admission of this behavior since it was indicative of apparent consent.[63]

Given the attitudes of courts and the public, it is not surprising that women question whether they somehow indicated consent when finding themselves victims of non-stranger rape. When women talk about being raped

---

61. Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1015 (1991).

62. State v. Colbath, 540 A.2d 1212, 1216 (N.H. 1988).

63. *Id.* at 1216-17.

by acquaintances, many initially do not call it rape and believe that in some way they must have communicated consent. To this end, victims of non-stranger rape often evaluate their own behavior for clues of how they triggered the rape. In a survey taken of college students regarding sexual assault on campus, 15 percent of female students reported they had been raped, and another 11 percent reported having experienced an attempted rape, usually by an acquaintance.[64] A telling aspect of the findings is that 42 percent of the women who reported that they had been raped said that they again had sex with the men who had assaulted them.[65] In a court of law, this type of evidence would likely be offered to show that the offensive sexual act had been consensual. How can this be explained? One researcher studied the data and made the following observations:

> Because the rape victim doesn't believe that what has happened to her is rape, she sometimes decides to give her attacker another chance. After all, he's nice-looking, has a good job or belongs to the right fraternity, and everyone else seems to think that he's a great guy.
>
> What happens? Often, the same thing: He rapes her again. That's when most women bail out of continuing to see the men involved. In the *Ms.* survey, women who were raped had a mean average of 2.02 episodes. . . .
>
> Sometimes a woman sees the man who raped her again in order to turn the rape into an experience of sexual intercourse that happened in the context of an ongoing relationship and, therefore, to make it acceptable. For example, after being raped by a man she had dated for three weeks, Bonnie then had intercourse with him (she had been a virgin at the time of the rape). She explains her action as an attempt to "sort of legitimize what happened."[66]

Yet, the woman who refuses to participate in her own objectification is often socially shunned and treated as a sexual outlaw. For young women, this experience can be devastating. A woman's self-esteem is often inextricably linked to her sexual attractiveness to men. A woman's power is often dependent upon her complicity in her objectification. A woman experiences her worth by how much she is desired. Therefore, she take the initiative in making herself attractive.[67] The cost of not trading on one's sexuality is lack of access to power through association with men.

---

64. ROBIN WARSHAW, I NEVER CALLED IT RAPE: THE MS. REPORT ON RECOGNIZING, FIGHTING AND SURVIVING DATE AND ACQUAINTANCE RAPE 48 (1988).

65. *Id.* at 63.

66. *Id.*

67. For a discussion of how objectification functions, see ANDREA DWORKIN, *Occupation/Collaboration*, *in* INTERCOURSE 121-143 (1987).

Once again the double bind: women are encouraged to be flirtatious and attractive, but that same behavior will be used as evidence of consent, thus, indicating that there has been no rape and no harm.[68]

2. Sexual Harassment

It was not until the late 1970s that courts began recognizing sexual harassment as a form of gender discrimination actionable under Title VII.[69] Prior to legal recourse becoming available, women regularly endured inappropriate sexual behavior in the workplace.[70] Perhaps one of the primary obstacles to the recognition of this harm was the notion that sexual harassment was within the range of normal heterosexual interaction.[71] Women endured sexual innuendo and remarks as just a part of being in the job.[72] Women did not often complain or even identify this treatment as something that was a "harm." When sexual harassment became intolerable, women simply quit their jobs believing a complaint would be futile.[73] When complaints were made,

---

68. Even more troubling are courts' perceptions of consent in non-stranger rape cases even when violence was integral to the rape. In *State v. Rusk*, 424 A.2d 720, 721 (Md. 1981), the victim met the defendant through a mutual friend. She gave the defendant a ride home from the bar where they had met, and he asked her to come up to his apartment. *Id.* at 772. When she declined, the defendant took her keys, and she reluctantly went up to the apartment where he immediately began to undress her. Before the rape, the victim stated, "If I do what you want, will you let me go without killing me?" *Id.* She then began to cry, and the defendant started to choke her lightly. The court of appeals argued that the victim had not been raped since she had not been forced. *Id.* at 724.

69. *See* Shaney, *supra* note 9, at 1109 n.1.

70. CATHERINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 24 (1979).

71. *See* Sally A. Piefer, Comment, *Sexual Harassment From the Victim's Perspective: The Need for the Seventh Circuit to Adopt the Reasonable Woman Standard*, 77 MARQ. L. REV. 85 (1993). Ms. Piefer documents an increasing acceptance of the "reasonable woman" standard and explains that such a measure allows courts to focus "on the rudimentary discrepancies in the viewpoints of women and men." *Id.* at 87. Piefer cites at least one adjudicator as having recognized that without a reasonable woman standard "notions of reasonable behavior [are] fashioned by the offenders, in this case, men." *Id.* at 87 n.14 (citing Rabidue v. Osceola Ref. Co., 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., dissenting), *cert. denied*, 481 U.S. 1041 (1987)). The reasonable woman standard was adopted in *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991), and implicitly rejected by the Supreme Court in *Harris v. Forklift Systems*, 510 U.S. 17 (1993).

72. In the past, courts held that, in order to prevail on a claim of sexual harassment, the victim had to prove psychological harm. However, the United States Supreme Court eliminated the psychological harm element for sexual harassment cases in *Harris v. Forklift Systems*, 114 S. Ct. 367 (1993). *See also* Thomas J. Gehring, *Hostile Work Environment Sexual Harassment After* Harris: *Abolishing the Requirement of Psychological Injury*, 19 T. MARSHALL L. REV. 452 (1994). *But see* David Schultz, *From Reasonable Man to Unreasonable Victim?: Assessing* Harris v. Forklift Systems *and Shifting Standards of Proof and Perspective in Title VII Sexual Harassment Law*, 27 SUFFOLK U. L. REV. 717 (1993).

73. Chamallas, *supra* note 2, at 802.

they were discounted as heightened sensitivity to "petty flirtation." The focus quickly shifted to the behavior of the alleged victim. It was said that her actions must have indicated an openness to this behavior. And concern about whether the women "consented" to her treatment was embodied in the regulations interpreting Title VII. Actionable conduct occurring in a workplace is defined as "*unwelcome* sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[74] Such conduct can create a sexually harassing work environment if it has "the purpose or effect of unreasonably interfering with the individual's work performance or creating an intimidating, hostile or offensive working environment."[75]

The Supreme Court has had to interpret what is meant by "unwelcome." The case, *Meritor Savings Bank v. Vinson*,[76] involved a plaintiff who had engaged in sexual intercourse with her supervisor. The plaintiff testified that her boss first treated her in a fatherly fashion. Eventually, the plaintiff went to dinner with the defendant after which he asked her to go to a motel and have sexual relations. "At first she refused, but she eventually agreed because of what she described as a fear of losing her job, she eventually agreed."[77] According to the employee, after this first encounter, her supervisor "made repeated demands . . . for sexual favors, . . . fondled her in front of other employees, . . . exposed himself to her, . . . followed her into the women's restroom, . . . and even forcibly raped her on several occasions."[78] This continued for several years. Plaintiff finally quit under the guise of "indefinite" sick leave. She presented evidence of her own abuse and attempted to introduce evidence of the boss's fondling other women in the workplace.[79] The supervisor claimed that none of this had occurred. He asserted that the plaintiff had made these claims in response to a business-related dispute.[80] The district court did not resolve whether or not there had been a sexual relationship, but found that if there had been one, it had been voluntary and did not constitute sexual harassment. The court of appeals reversed and found that plaintiff's complaint did state a claim for sexual harassment.[81] The case then went to the Supreme Court.

---

74. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1996) (emphasis added).

75. Mattern v. Eastman Kodak Co., No. 95-40836, 1997 WL 14761 at *5 (5th Cir. Jan. 16, 1997).

76. 477 U.S. 57 (1986).

77. *Id.* at 60.

78. *Id.*

79. *Id.* at 60-61. The court limited the plaintiff's presentation of other employee complaints to rebuttal uses only.

80. *Id.* at 62-63.

81. *Id.* at 68.

One of the key issues for the Supreme Court was whether the behavior, though voluntary, was unwelcome. The plaintiff claimed that she had tolerated the behavior but that it had not been welcome. Ultimately, the Court found logic in Vinson's position and held that behavior could be both voluntary and unwelcome, in the same instant.[82] This decision was a major step forward in sexual harassment law because it refocused the inquiry on the perception of the victim and acknowledged how power imbalances may affect an assessment of voluntariness.

The Court left open the problem of determining whether the offensive conduct was in fact "unwelcome."[83] Evidence generally relevant to such a determination is the testimony of the victim. However, the law requires that a victim's testimony be supported by her behavior. A court must look to see if the victim solicited or incited the behavior.[84] To satisfy this inquiry, the *Vinson* court ruled that there must be freedom to look at evidence of the plaintiff's sexually provocative dress and sexual fantasies.[85] Evidence of "welcomeness" has traditionally included voluntary submission to sexual activity, a woman's manner of dress on the job, whether she engaged in sexually suggestive banter, told "dirty" jokes, or discussed her sex life with colleagues, or whether she flirted within the workplace. This sort of evidence indicates apparent consent and thus has the potential to defeat a harassment claim.[86]

The admissibility of this welcomeness evidence is logically tied to the notion of consent. Such behavior indicates to the harasser that sexual horseplay or innuendo is acceptable to the alleged victim: she has apparently consented, and thus there can be no harm. This view of the evidence fails to recognize power imbalances that may make "going along" the most effective way for the victim to cope in a harassment situation. Yet, "going along with it," will effectively deprive the victim of a legally recognizable claim.[87] When evaluating unwelcomeness, courts do not consider the constrained choices that a woman might face. Because sex is a commodity that can increase one's power or, if not used, decrease one's power, our society encourages women to be "nice" and "flirtatious"—to appeal to men in order to get along. If a woman fails to trade in this commodity, she may limit her job potential. Yet, if she does enter the market, her behavior is used against her as evidence that a sexual overture or act was welcome.

---

82. *Id.*

83. *Id.*

84. *See* Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982).

85. *Vinson*, 477 U.S. 57 at 68-69.

86. *See id.*

87. Chamallas, *supra* note 2, at 810.

Moreover, making it clear that sexual advances are unwelcome can also have its costs. Another Supreme Court case, *Price Waterhouse v. Hopkins*,[88] demonstrates the point. Ann Hopkins challenged her being held over for partnership despite an excellent performance record as gender discrimination. As evidence of the gender discrimination she offered comments by partners that she was "macho."[89] She also introduced a partner's statement advising her that if she wished to be reconsidered for the partnership she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[90] The Court allowed the evidence to be used to show unlawful discrimination based on gender stereotyping.[91] The *Hopkins* holding demonstrates the Court's grasp of how gender expectations can effect employment assessments that have little to do with the job.

The courts have not consistently demonstrated a willingness to question the imposition of gender appropriate behavior. For example, in *Craft v. Metromedia, Inc.*,[92] Christine Craft was reassigned from news anchor to reporter because of her employer's concern that she did not look feminine enough.[93] The decision was based on viewer surveys which indicated that Craft was least favored for her looks and dress.[94] Craft was counseled to wear blouses with feminine touches.[95] The Eighth Circuit affirmed the trial court's determination that these appearance standards were not shaped by stereotypical notions of female roles or images.[96] Thus, the requirement that women should trade on their "femininity" and their sexuality as a commodity was rendered invisible by the court. Once again the double bind exists: women are expected to be flirtatious and attractive in order to succeed in their jobs, yet the same behavior is used as an indicator of welcomeness when determining whether there has been sexual harassment. According to these rules, a woman must walk this tightrope very carefully. Under such circumstances, can there be an objective evaluation of whether there was apparent consent?

---

88. 490 U.S. 228 (1989); *see also* Michael A. Zubrensky, Note, *Despite the Smoke, There is No Gun: Direct Evidence Requirements in Mixed-Motives Employment Law After* Price Waterhouse v. Hopkins, 46 STAN. L. REV. 959 (1994) (criticizing the circuit courts' requirement of direct evidence proof in mixed motives Title VII cases and advocating the alternative use of probative circumstantial evidence to prove discriminatory animus).

89. *Hopkins*, 490 U.S. at 235.

90. *Id.*

91. *Id.* at 251-52.

92. 766 F.2d 1205 (8th Cir. 1985), *cert. denied*, 475 U.S. 1058 (1986).

93. *Id.* at 1208.

94. *Id.* at 1209.

95. *Id.* at 1214.

96. *Id.* at 1216.

PART TWO: QUESTIONING THE DOCTRINE OF CONSENT

Raising questions about the legal system's ability to evaluate women's consent necessarily risks robbing women of their agency.[97] How can the law recognize the double binds that sex and love create in women's lives and still give meaning to consent? The behavior that is used as indicative of consent is not different in kind from that which is expected from women generally. The difference is only a matter of degree. This essay suggests that courts should scrutinize evidence of apparent consent more carefully to determine if it is the product of severely constrained choices.

There does not appear to be a traditional legal doctrine dealing with consent that adequately addresses the double binds that women experience when dealing with situations involving sex or love. Traditional doctrines vitiate consent when the immediate circumstances indicate a necessity. Such doctrines are grounded in the same notions of individual autonomy that render the effects of intimacy so opaque. Traditional doctrines typically arise when the evidence suggests something that shocks the conscience, some extreme disparity in bargaining power, or excessive pressure used on someone who is particularly vulnerable due to a lack of full vigor. None of these doctrines take into account the complex social phenomena that affect human relationships. Again, these doctrines assume the autonomy model; they posit an individual motivated by self-interest and unaffected by general, rather than particularized, social forces.

How should a legal system that reasonably relies upon outward manifestations to impute consent cope with the problem? One solution might be to get rid of the issue of consent all together. For example, the academic rule that bars relationships between faculty and their students attempts to deal with the problem of evaluating consent under conditions in which sex can be used as a commodity. This rule renders consent irrelevant because of a recognition of the inherent power imbalance in such relationships and perhaps its impact on third parties.

Similarly, the Federal Rules of Evidence attempt to restrict the use of behavioral indicators to impute consent to sexual misconduct. Congress recently passed civil limitations incorporated within Rule 412 of the Federal Rules of Evidence, otherwise known as the rape shield law.[98] This provision is designed to exclude evidence "related to the alleged victim's mode of dress, speech or lifestyle" and other evidence that "does not directly refer to sexual

---

97. For a discussion of this problem, see Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995).

98. Ironically, while rape shield laws may provide some protection for women in the courtroom, they may also have negative impacts long before a case goes to trial. Ann Althouse, *The Lying Woman, the Devious Prostitute, and Other Stories from the Evidence Casebook*, 88 NW. U. L. REV. 914 (1994).

activities or thoughts, but that the proponent believes may have a sexual connotation for the factfinder."[99] The rule deems inadmissible evidence that would appear to many as extremely relevant. This restriction on such evidence was not without dissent. In fact, it was specifically expressly reject by the Supreme Court when the amendment to the rule was first introduced. The Court voiced concern that limitations like those incorporated in Rule 412 would prevent just the kind of evidence discussed in *Vinson*[100] from being admitted to show welcomeness of sexual entreaties in the workplace.

Changes in the Federal Rules appear to be addressing a concern that arises only in cases of sexual misconduct. It is unusual to see rules that traditionally have been designed for general application adopted for their substantive impact in particular kinds of cases. Although this may be a step toward understanding the complex effects of social forces that make sex a commodity for women, designing specific evidence rules for particular kinds of legal issues raises other troubling problems.

Administrative difficulties notwithstanding, specific rules could be enacted in the familial context to remedy the problem of disparity in home labor. One possibility would be to award all paychecks brought into the family to both parties, divided equally. That way the woman's diminished earning power and the man's enhanced earning power would affect both parties equally.[101] This takes the issue of "consent" out of the equation. Another option, as some commentators have suggested, would be to tax housework.[102] Such a tax would make household labor valuable and offer some financial security for women for their old age, in the event of divorce or death of a spouse.[103]

These ideas attempt to foreclose by operation of law the effect of strong social forces that subtly influence woman's behaviors and other's assessments of the meaning of that behavior. This essay has merely looked at a few examples of times in which imputed consent is used as a vehicle for determining the outcomes of cases. Imputed consent is a necessary aspect among numerous other legal determinations of whether there has been a harm that needs legal redress. Due largely to the myriad of ways in which these issues arise, it is not feasible to construct special rules to foreclose decision makers from imputing consent in circumstances in which choice is clearly constrained. The law's analysis of behavior that constitutes apparent consent should, therefore, take into consideration the complex power relationships in which women's sexuality is rewarded or self-sacrifice is rewarded and encouraged yet

99. FED. R. EVID. 412 advisory committee's note (1994 Amendments). The Committee identified the objective of Rule 412 to be "shielding the alleged victim from potential embarrassment and safeguarding the victim against stereotypical thinking." *Id.*

100. See *supra* notes 82-83, 85-86 and accompanying text.

101. SUSAN MILLER OKIN, JUSTICE, GENDER, AND THE FAMILY (1989).

102. *See* Staudt, *supra* note 10.

103. *See id.*

used to justify acts that violate women's dignity. If a woman decides to complain, the fact that she behaved in ways that are consistent with the notion of sex as a commodity or of self-sacrifice for family that could buy her power should not automatically preclude her from asserting that she has been harmed.

Translating the complexities of the gendered family into language understandable within the public sphere leads to a more fundamental criticism. What is wrong with self-sacrifice for the benefit of children or a family unit? Maybe it should be valued as well. Perhaps it is time to challenge the public system that places self-interested autonomy at its heart and makes consent a key indicator of when that autonomy has been invaded. To assume that each of us is unconnected to others is false—both existentially and practically. Indeed, as society becomes more and more technologically advanced, it becomes more false everyday. People do not exist without the benefit of others. Moreover, to assume that people are connected is not inconsistent with autonomy. Our understanding of autonomy should extend beyond the right to be free from interference by others and include the ability to flourish among and in relation to others.

The collective should not be viewed as a potential threat to individuals. It is a unit made up of individuals and facilitates autonomy. The central question for assessing autonomy is not whether a woman indicated through her behavior that she consented to the acts that were done to her or by her. Rather the question is whether the subject relationship fosters rather than undermines autonomy. With this realization intact, consent ceases to play the pivotal role that it currently within the framework of our traditional notion of autonomy. Apparent consent becomes but one factor to consider in assessing a relationship. Each party to a transaction would take some responsibility for its occurrence.

CONCLUSION

Women are socialized to behave in certain ways that may work to their detriment. This socialization may make them unable to identify harm. By behaving consistently with that socialization, women may appear to have consented to a harm. Given its current treatment of consent, the law will find that there has been no harm since the woman has freely given up her autonomy. This essay has outlined how consent is deeply rooted in the traditional notions of autonomy, which are motivated primarily by individualism and self-interest. This conception of autonomy fails to reflect social forces that serve to constrain choices. In particular, two phenomena of particular significance to women are highlighted: that sex is a commodity and that women operate much of their lives using a model of intimate relationships that does not place self-interest as its ultimate value. These social phenomena create double binds for women. When women navigate these double binds, their behavior is interpreted as apparent consent, rendering harm they suffer

invisible to outside perspectives. As long as sex is commodified and home labor is uncompensated and treated as a product of love, legal analysis of apparent consent by women will remain deeply flawed.