ARTICLES

CONSENT, EQUALITY, AND THE LEGAL CONTROL OF SEXUAL CONDUCT

MARTHA CHAMALLAS*

INTRODUCTION

Despite its intimate character, sexual conduct is highly regulated activity. At any given point, the picture that emerges of the complex web of legal regulation is impressionistic, and some features are difficult to discern. The law of sex, however, can operate as a value generating force when those who create or are governed by it perceive in the law an underlying vision of appropriate sexual conduct.[1]

This is not to say that the laws concerning sex embody any single unifying conception, or that the ideology of sex embedded in our law is consistent. Such coherence is impossible because legal regulations concerning sex arise at different times and emanate from differing impulses. Moreover, the law of sex is a volatile subject. Each generation is interested in legal reform, and one generation's vision of liberation may be another generation's nightmare of oppression. Finally, the law on the

* Professor of Law, University of Iowa, College of Law.

I wish to thank Peter Shane for his edits of multiple incarnations of this Article. I am also grateful to Sara Beale, Paul Carrington, Walter Dellinger, and the many other faculty members of the Duke University School of Law who shared their comments with me. Credit for valuable research assistance goes to my students David Berger, Mary Blodgett, Nancy Greenlee, Beata Jostmeir, Dan Magel, and most especially, Roberta Gilbert.

1. For a general discussion of the role of law in shaping ideology and the perception of values, see K. O'DONOVAN, SEXUAL DIVISIONS IN LAW 19-20 (1985). *See generally* J. WEEKS, COMING OUT: HOMOSEXUAL POLITICS IN BRITAIN, FROM THE NINETEENTH CENTURY TO THE PRESENT (1977) (discussing the interplay between the laws regulating homosexual conduct and the development of a consciousness among homosexuals); Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 405-06 (1984) (discussing the interaction between statutory rape laws, ideology, and sexual encounters).

books often differs markedly from the law in action. This area of law is especially rife with unenforced statutes and dormant causes of action.[2]

For different periods of our history, however, it is possible to identify certain dominant concerns that stand out in bold relief. These elements do not entirely overwhelm or cancel out conflicting elements. Yet, as they shift, they alter the prevailing motif in the law's portrait of sexuality. For three overlapping periods, covering at least the last three generations, there are three different dominant views or attitudes toward sexual conduct that mark the law at each stage.[3] This Article looks briefly at the law of earlier generations as a prelude to the Article's central objective: to lend focus to the contemporary law of sex. Briefly stated, the thesis of this Article is that contemporary law has increasingly embraced a new and more egalitarian conception of appropriate sexual conduct. The clearest signal of this shift in motif is a change in the law's understanding of the phenomenon of consent in sexual encounters.

A full analysis of the law of sex might well include a large segment of family law as well as laws relating to marriage and reproductive rights. For this Article, however, I have selected only those laws that directly relate to interpersonal encounters between individuals that we typically regard as involving a sexual component.[4] The discussion concentrates,

2. *See, e.g.*, Michael M. v. Superior Court, 450 U.S. 464, 493 n.8 (1981) (from 1975-78, only 413 men were arrested for statutory rape, compared to almost 50,000 pregnancies among underage women during 1976 alone); MODEL PENAL CODE § 213.2 commentary at 373 (1980) (enforcement agencies decline to enforce statutes outlawing deviate sexual activities unless some aggravating factor exists); L. FRIEDMAN, A HISTORY OF AMERICAN LAW 588 (1985) (laws against immorality were enforced only sporadically, on the occasion of a "crackdown," or to "get" an unusually flagrant or unlucky offender).

3. For a discussion of the three views of sexual conduct, see *infra* notes 16-31 and accompanying text.

4. Even the boundary between sexual and nonsexual conduct is not a bright one. Alison Jaggar is correct in her claim that we lack a philosophical theory of sexuality adequate to explain how "non-genital activity can still be sexual" and how "genital activity may not be sexual." Jaggar, *Prostitution,* in THE PHILOSOPHY OF SEX 363 (A. Soble ed. 1980). This lack of theoretical agreement is at the core of the feminist debate regarding the appropriate characterization of forcible rape. Some writers stress the sexual nature of the crime and view rape as aggression directed at female sexuality. *See* C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 218-21 (1979); Kanin, *Date Rape: Unofficial Criminals and Victims*, 9 VICTIMOLOGY 95, 104-05 (1984) (date rapists may use power for the acquisition of sexual gain); MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. OF WOMEN IN CULTURE & SOC'Y 635, 649-50 (1983). Others, perhaps mainly for politically strategic reasons, have stressed the assaultive nature of the crime. They have argued that, from the victim's standpoint, the act of rape is not sexually arousing and is "markedly different" from "normal sexual intercourse." *See* Comment, *Rape Reform and a Statutory Consent Defense*, 74 J. CRIM. L. & CRIMINOLOGY 1518, 1527-29

therefore, on the legality of particular sexual contacts per se. This relatively narrow focus still encompasses a wide spectrum of legal regulations which, until recently, has not been analyzed as a conceptual unit.[5] This Article explores criminal laws on rape[6] and prostitution;[7] civil rights laws on sexual harassment[8] and amorous relationships;[9] and tort actions governing deception in sexual relationships.[10] Even when the focus is limited to the sexual encounter itself, the above list is not exhaustive.[11] However, it does provide a sufficient base from which to form a tentative hypothesis about emerging legal trends.

By way of background, Part I[12] of this Article gives a brief overview

(1983). *See generally* R. TONG, WOMEN, SEX AND THE LAW 117-19 (1984) (discussing the theoretical dilemma generated by attempts to assimilate rape law into the law of assault).

This Article takes the broader view of sexual conduct and examines physically violent behavior as well as nonviolent conduct. Implicit in the analysis is the belief that sex is so often interrelated with force, power, and dominance in our society that it is not appropriate to treat forced sex as conceptually distinct from consensual sex. Instead, the point of this piece is to analyze the notion of consent to see how our ideas of acceptable sexual behavior may be changing, and to evaluate the legitimacy of the varying kinds of pressure or force applied in sexual encounters.

5. Notable exceptions to the gap in the legal literature on the law of sex are R. TONG, *supra* note 4, at 6-152 (discussing pornography, prostitution, sexual harassment, rape, and woman-battering); MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS: J. OF WOMEN IN CULTURE & SOC'Y 515, 525-33 (1982) (discussing incest, contraception, abortion, sexual harassment, pornography, prostitution, and rape).

6. *See infra* notes 93-108, 168-90, 196-206, 222-32 and accompanying text.

7. *See infra* notes 209-20 and accompanying text.

8. *See infra* notes 109-47, 193-94 and accompanying text.

9. *See infra* notes 254-313 and accompanying text.

10. *See infra* notes 148-63, 233-41 and accompanying text.

11. For example, this Article provides no detailed discussion of either laws prohibiting the sexual abuse of children or of laws criminalizing sexual contact between homosexual adults. Although each of these are important topics in the law of sex, they tend not to reveal as much about the legal notion of consent as the topics selected for discussion here. With respect to the sexual abuse of children, there seems to be a widespread consensus that young children should not engage in sexual contacts of any kind with adults. Therefore, the legality of the sexual conduct does not depend on the consent, however defined, of the child. With respect to antisodomy laws and similar provisions targeting homosexual sexual conduct, consent of the parties also tends to be irrelevant. The raging debate in this area centers on whether the liberal view of tolerating private consensual conduct should displace the traditional view that approves only of heterosexual relationships that occur within certain contexts.

I have also chosen not to focus on laws regulating pornography. Although the issue of consent is important to any thorough treatment of pornography, the legal control of pornography raises many other questions of an empirical and normative character which tend to make pornography a special case. Our lack of knowledge regarding the relationship between sexual fantasy and sexual conduct makes it particularly difficult to catalogue the harms of pornography with a high degree of confidence. Further, the countervailing interest in free speech and press affected by legal control of pornography may be different from the more generalized interest in autonomy affected by legal control of sexual encounters.

12. *See infra* text accompanying notes 16-163.

of the three views of sexual conduct, followed by a more in depth discussion of each view. Detailed attention is given to recent feminist-inspired legal reforms in the law of rape and sexual harassment, and in tort law governing deception in sexual relationships.

Part II[13] synthesizes the recent legal reforms by demonstrating how the legal notion of consent is being transformed to meet feminist objections. The principal point is that, under the emerging doctrine, a superficial appearance of nonresistance is no longer sufficient to demonstrate consent. Most critically, it is becoming unacceptable to induce sexual compliance by the use of physical force, economic pressure, or deception. Part II also analyzes the legal impact of this trio of unacceptable inducements in varying criminal and civil contexts.

Part III[14] offers a positive conception of mutuality in sexual encounters that fits the mode of feminist reforms. Under this egalitarian view of sexual conduct, approved encounters are those engaged in for the purposes of creating intimacy or generating sexual pleasure. This Part discusses why such encounters are closest to the egalitarian ideal and how this view of sexual conduct differs from the traditional and liberal views.

In Part IV,[15] the egalitarian view of sexual conduct is applied to the problem of asymmetric sexual relationships in employment and educational settings. This Part discusses legal control of amorous relationships at work and at school. From an egalitarian perspective, these relationships are problematic because of the difficulty in characterizing the motivation behind them and in identifying the precise risks posed to parties within and outside the relationship. Part IV concludes by proposing a contextually sensitive approach to regulation designed to limit sexual coercion in amorous relationships, without eliminating sexual freedom.

I. THREE VIEWS OF SEXUAL CONDUCT

A. OVERVIEW

Contemporary law simultaneously exhibits three overarching views of sexual conduct. They can be roughly characterized as the traditional view, the liberal view, and the egalitarian view of sexual conduct.[16]

13. *See infra* text accompanying notes 164-241.

14. *See infra* text accompanying notes 242-53.

15. *See infra* text accompanying notes 254-313.

16. For additional discussions of these three views of sexual conduct, see 2 REPORT OF THE SPECIAL COMMITTEE ON PORNOGRAPHY AND PROSTITUTION, PORNOGRAPHY AND PROSTITUTION IN CANADA 15-22 (1985) [hereinafter CANADIAN REPORT] (detailing the liberal, conservative, and

Although most contemporary legislative enactments and judicial innovations appear to be in the egalitarian mode,[17] there have been recent legal developments characteristic of the other two views as well.[18]

The traditional view is the familiar moralistic notion that the only sexual conduct that is acceptable is sex that occurs within marriage. The traditional view is historically linked to an older, fundamentally religious attitude toward sexual conduct which approves of sex only for the purpose of procreation. By tying sex to procreation, the traditional view functions to cement the relationship between biological parents and their children and to promote the family as the key social institution.[19] When the traditional view is expressed in the law, the critical fact tends to be the status of the participants, rather than the purpose or nature of the sexual encounter. Legal regulation in the traditional mode regards nonmarital sexual activity, whether consensual or not, as properly subject to legal sanction. The traditionalist also tends to perceive the law as an important mechanism for expressing moral values and maintaining a morally decent society.[20] Under the traditional mode of regulation, the

---

feminist philosophical traditions); Hoffman, *Feminism, Pornography, and Law*, 133 U. PA. L. REV. 497, 504-07, 510-17 (1985) (analyzing conservative, liberal, and feminist positions on pornography); *see also* A. JAGGER & P. ROTHENBERG, FEMINIST FRAMEWORKS, ALTERNATIVE THEORETICAL ACCOUNTS OF THE RELATIONS BETWEEN WOMEN AND MEN 381-85 (2d ed. 1984) (applying six philosophical frameworks to the issue of sexuality: conservatism, liberalism, traditional Marxism, radical feminism, socialist feminism, and women of color); PHILOSOPHY AND SEX 11-19 (R. Baker & F. Elliston rev. ed. 1984) (thorough description of traditional view).

For this Article, I use "traditional" and "egalitarian" rather than "conservative" and "feminist" to describe two of the views of sexual conduct. "Traditional" seems preferable to "conservative" because it connotes a more well-established position. In my lexicon, "egalitarian" and "feminist" are interchangeable. My hope is that the term egalitarian is expansive enough to encompass the various strands of feminism and feminist approaches. *See infra* note 26.

17. *See infra* text accompanying notes 97-163.

18. For example, North Carolina's obscenity law, which restricts several types of sexually explicit material, was promoted by fundamentalist Christians and some feminist political forces. *See* N.C. GEN. STAT. §§ 14-190.1 to 14-202.12 (1985). An example of recent legislation in the liberal mode is New York City's 1986 ordinance banning discrimination against homosexuals in housing, employment, and public accommodations. Pornick, *Homosexual Rights Bill is Passed by City Council in 21 to 14 Vote*, N.Y. Times, March 21, 1986, § 1, at 1, col. 1.

19. For a discussion of the works of Thomas Aquinas advancing the theory that procreational sex is the only "natural" kind of sexual activity, and that disapproval of nonprocreational sex is essential to discourage fathers from abandoning their wives and children, see PHILOSOPHY & SEX, *supra* note 16, at 12-16. Robert Solomon describes the traditional conception of sex as "strictly [for] ulterior purposes," *i.e.*, procreation. The paradigm sexual act is heterosexual intercourse, characterized as "male 'evacuation lust' (coupled with female submissiveness)." Solomon, *Sex and Perversion*, in PHILOSOPHY & SEX 273 (R. Baker & F. Elliston eds. 1975). The traditional view disdains as a perversion any alteration from this model, in particular "any attempt or desire on the part of either [partner to seek] . . . equal enjoyment on the part of the female." *Id.*

20. The most widely cited author expounding the traditional position on the role of law in sexual matters is Lord Devlin. *See* R. DEVLIN, THE ENFORCEMENT OF MORALS (1965); *see also*

law functions actively to enforce the moral code, and immoral activity is likely to be unlawful. The emphasis is on community standards, and individuals are expected to conform to communal norms.

In marked contrast to the traditional view, the most salient feature of the liberal view is the distinction it draws between morality and legality.[21] Under this view, sexual conduct is quintessentially private conduct with which the law should not interfere. This conception of private sexual activity tolerates nonmarital sex in some circumstances. In place of marital status, the concept of consent emerges as the central demarcation line to separate lawful from unlawful sexual conduct.[22] The liberal definition of consensual conduct in turn defines the sphere of protected private conduct.[23] The liberal view finds no warrant for legal intervention with consensual sex unless external harm to third parties can be proven.[24] While not all forms of consensual sexual conduct between

---

CANADIAN REPORT, *supra* note 16, at 17-18, 22 (1985); Hoffman, *supra* note 16, at 505-06 (1985); Letwin, *"Unchaste Character," Ideology, and the California Rape Evidence Laws*, 54 S. CAL. L. REV. 35, 55-56 (1980).

21. The liberal position is usually traced to John Stuart Mill's essay, ON LIBERTY (1859). Mill's thesis is that the only ground for justifying legal coercion of an individual is to prevent harm to others. When the "harm principle" is accepted, a wide area is carved out for private morality that is immune from state intervention. Judge Richard Posner has recently described the "fundamental tenet of classical liberalism" as "delimit[ing] the proper role of the state" by generally proscribing government intervention in "voluntary transactions that impose no uncompensated costs on nonparties." Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431, 1431 (1986). Adhering to the liberal split between legality and morality, Posner is quick to add that not every "consensual transaction between informed adults having no effects on third parties should receive our moral approbation." *Id.* at 1442.

22. *See, e.g.*, REPORT OF THE COMM. ON HOMOSEXUAL OFFENSES AND PROSTITUTION, THE WOLFENDEN REPORT 48-49 (1963) [hereinafter WOLFENDEN REPORT] (recommending that consent of parties determine legitimacy of homosexual as well as heterosexual relationships); MODEL PENAL CODE § 207.5 commentary at 277 (Tent. Draft No. 4, 1955) (recommending decriminalization of private consensual sexual relations between adults).

23. For example, nonconsensual sexual conduct, even if it takes place in seclusion, is not protected by the constitutional right of privacy. *See* Kathleen K. v. Robert B., 150 Cal. App. 3d 992, 996-98, 198 Cal. Rptr. 273, 276-77 (1984) (no constitutional right to privacy when consent is vitiated by intentional deception); People v. Liberta, 64 N.Y. 2d 152, 165, 474 N.E.2d 567, 574, 485 N.Y.S. 2d 207, 214 (1984) (marital rape excluded from constitutional protection because "right of privacy protects consensual acts, not violent sexual assaults").

24. This statement is somewhat of an oversimplification, given the several variations on the liberal view. Some liberal philosophers, for example, would defend legal intervention if such were necessary to prevent *offense* to others, even if the questioned activity did not cause *harm* to others. 2 J. FEINBERG, MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS xiii (1985); H.L.A. HART, LAW, LIBERTY AND MORALITY 47-48 (1963). It is not even anathema to some liberals to endorse a limited form of legal paternalism in which legal intervention is used to prevent tangible harm to the actor. *Id.* at 32-33. *But see* J. FEINBERG, *supra*, at xiii (legal paternalism is a view excluded by liberalism). A liberal view of any stripe, however, seems to be opposed to laws that are based solely on a moral distaste for the practice or on a belief that the practice causes moral harm to the actor. CANADIAN REPORT, *supra* note 16, at 16.

adults are affirmatively encouraged, the liberal ideology displays a greater tolerance for diversity among individuals than does the traditional view.[25]

Because the egalitarian view is the newest to emerge, it is the most difficult of the three to characterize. Unlike the traditional view, the egalitarian conception of sexual conduct is not opposed to nonmarital sex. Instead, the fundamental animating concern is fostering equality between the sexes.[26] The paramount goal of the egalitarian view is to afford women the power to form and maintain noncoercive sexual relationships, both within and outside of marriage. Perhaps the most important force behind the development of the egalitarian view has been the feminist critique of the liberal view.[27] In particular, feminists have contended that the liberal notion of rights is inadequate to protect women against the coercive power exercised by men in society. Feminists theorize that the unequal status of women stems not only from biased governmental actions, but from the greater economic and social power exerted by men in the private sphere. Since liberalism's primary concern is with limiting governmental coercion, feminists charge that it is incapable of producing equality for women.[28] Many recent legal reforms are thus based on a reassessment of the notions of consent and privacy that are central to the liberal attitude.[29]

Like the traditional view, the egalitarian conception of sex tends to be moralistic and often calls for active legal intervention to regulate some

25. A good example of liberal tolerance of diversity is Judge Merhige's dissent in Doe v. Commonwealth's Attorney 403 F. Supp. 1199, 1203 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976), in which he argued for constitutional protection for the consensual sexual conduct of homosexual persons. Merhige took a Millian view of the Constitution and declared that even "socially condemned activity, excepting that of demonstrable external effect, is and was intended by the Constitution to be beyond the scope of state regulation when conducted within the privacy of the home." *Id.* at 1205.

26. Like the many strands of liberalism, feminism has been described as too diverse to constitute a "discrete philosophy," better understood as "a broad coalition of interests dedicated to the common purpose of improving the status of women in society." CANADIAN REPORT, *supra* note 16, at 18. Zillah Eisenstein contends that the common thread running through all "feminisms" is the "demand for equality, freedom of individual choice, and the recognition of woman as an autonomous being." Z. EISENSTEIN, FEMINISM & SEXUAL EQUALITY, CRISIS IN LIBERAL AMERICA 12 (1984).

27. A concise summary statement of feminist criticism of liberalism is found in the CANADIAN REPORT, *supra* note 16, at 20-21; *see also* Petchesky, *Introduction to Amicus Brief: Richard Thornburgh v. American College of Obstetricians & Gynecologists*, 9 WOMEN'S RTS. L. RPTR. 3, 5 (1986) (critique of liberal notion of privacy and argument for "subversive, radically democratic dimension to the idea of individual choice").

28. CANADIAN REPORT, *supra* note 16, at 20 (citing Clark, *Liberalism and Pornography*, in PORNOGRAPHY & CENSORSHIP 45 (D. Copp & S. Wendell eds. 1983)).

29. *See infra* text accompanying notes 95-114 and 161-63.

forms of unacceptable sexual conduct.[30] In this view, however, immoral sex is no longer associated with nonmarital sex or a person's status per se. Instead, for a feminist, immoral sex most often is synonymous with exploitive sex. The various legal reforms in the egalitarian mode represent a search for a refurbished notion of consent—a new conception of mutuality in sexual encounters that is capable of separating moral from exploitive sex. My tentative hypothesis is that moral sex is coming to be identified with sexual conduct in which both parties have as their objective only sexual pleasure or emotional intimacy, whether or not tied to procreation.[31] Good sex, in the egalitarian view, is noninstrumental conduct. Sex used for more external purposes, such as financial gain, prestige, or power, is regarded as exploitive and immoral, regardless of whether the parties have engaged voluntarily in the encounter.

B. THE TRADITIONAL VIEW OF SEXUAL CONDUCT

From the turn of the century until World War II, the traditional view of sexual conduct dominated legal culture. The law treated sex within marriage as qualitatively different from other sexual conduct and tended to punish nonmarital sex through a variety of legal sanctions. In addition to criminal laws prohibiting forcible sexual abuse, victimless crimes—such as fornication and sodomy—were outlawed without regard to consent.[32] Restrictive criminal obscenity laws also limited the volume of explicit sexual material available and tended to reinforce the view that sex without the sanctity of marriage was immoral.[33]

Perhaps more important than these direct criminal prohibitions, however, were an elaborate array of indirect civil sanctions that bolstered

30. *See, e.g.*, CANADIAN REPORT, *supra* note 16, at 19 (majority of feminist writers favor "vigorous use of legal as well as political and social strategies").

31. *See infra* text accompanying notes 246-50.

32. For a discussion of the history of these laws, see MODEL PENAL CODE § 213.6 comment on Adultery and Fornication at 430-36; *id.* § 213.2 commentary at 357-62 (discussing history of sodomy laws). Although some antisodomy laws prohibited sexual practices engaged in by married as well as unmarried persons, a key target of such laws were homosexual persons who were (and still are) legally prohibited from marrying. *See, e.g.*, Baker v. Nelson, 291 Minn. 310, 191 N.W. 2d 185 (1972) (rejecting constitutional challenge to prohibition on same sex marriage); *see also* H. KAY, SEX-BASED DISCRIMINATION 235-41 (2d ed. 1981) (diseussion of case law on same sex marriage).

33. For a historical overview of the legal treatment of obseene and pornographic materials, see ATT'Y GEN. COMM'N ON PORNOGRAPHY, FINAL REPORT, 233-48 (1986) [hereinafter ATT'Y GEN. REPORT]; Penrod & Linz, *Using Psychological Research on Violent Pornography to Inform Legal Change*, in PORNOGRAPHY AND SEXUAL AGGRESSION 245, 251-57 (N. Malamuth & E. Donnerstein eds. 1984).

the legal and moral ban on nonmarital sex. Nonmarital sex was discouraged by denying contraceptives to unmarried persons[34] and by victimizing nonmarital children for the unacceptable conduct of their parents.[35] Additionally, unmarried parents and homosexuals were often branded as immoral persons who deserved to lose their jobs[36] or be denied educational opportunities.[37]

For married persons, the chief legal deterrent to adultery was a fault-based divorce system that threatened the adulterous spouse either with loss of financial support or punitively high support obligations.[38] A wife's adultery was also likely to be punished by the denial of custody of the children upon divorce.[39]

---

34. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972) (striking down Massachusetts law forbidding distribution of contraceptives to unmarried persons).

35. *See, e.g.*, Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967); Note, *The Rights of Illegitimates Under Federal Statutes*, 76 HARV. L. REV. 337 (1962-63).

36. DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979) (rejecting Title VII challenge to dismissal based on sexual preference); Andrews v. Drew Mun. Separate School Dist., 507 F.2d 611 (5th Cir.), (invalidating school rule against hiring unwed parents as teachers' aides), *cert. granted*, 423 U.S. 820 (1975), *cert. dismissed as improvidently granted*, 425 U.S. 559 (1976); Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, 559 P.2d 1340 (1977) (en banc) (upholding dismissal of gay public school teacher). Even at present, only the state of Wisconsin and approximately 30 cities ban discrimination based on sexual preference. Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1286 n.5 (1985). For a thorough review of the law relating to discrimination against gay men and lesbians in employment, see Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HAST. L.J. 799, 805-74 (1979); Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties Part I*, 10 U. DAYTON L. REV. 459, 464-540 (1985); Rivera, *Recent Developments in Sexual Preference Law*, 30 DRAKE L. REV. 311, 312-24 (1980-81).

37. *See, e.g.*, Ordway v. Hargraves, 323 F. Supp. 1155 (D. Mass. 1971) (striking down school policy banning pregnant unmarried students); Perry v. Grenada Mun. Separate School Dist., 300 F. Supp. 748 (N.D. Miss. 1969) (successfully challenging school policy barring unwed mothers). Until the 1970s, moreover, many school districts limited educational opportunities for married students as well as unmarried parents, often barring them from extracurricular programs. M. YUDOF, D. KIRP, T. VAN GEEL & B. LEVIN, EDUCATIONAL POLICY AND THE LAW: CASES AND MATERIALS 757-59 (2d. ed 1982). For a general discussion of the history and legal status of policies on pregnancy and marriage affecting students, see NAT'L WOMEN'S LAW CENTER, SEX DISCRIMINATION IN EDUCATION: LEGAL RIGHTS AND REMEDIES 2-10 to 2-16 (1983). For a discussion of school policies affecting gay student organizations, see Stanley, *The Rights of Gay Student Organizations*, 10 J.C. & U.L. 397 (1983-84).

38. *See* H. CLARK, THE LAW OF DOMESTIC RELATIONS § 14.5, at 445-46 (1968); L. WEITZMAN, THE DIVORCE REVOLUTION 6-14 (1985) (description of traditional divorce law).

39. H. CLARK, *supra* note 38, § 17.4, at 585.

Nonmarital sex could also give rise to tort actions. Claims for seduction[40] or breach of a promise to marry,[41] brought by unmarried women[42] against former sexual partners, dramatically underscored the principle that nonmarital sex was socially and legally risky conduct. Moreover, in addition to claims brought by injured women, the husbands or parents of these women were permitted to seek damages for their own intangible injuries under the tort rubrics of criminal conversation[43] or alienation of affections.[44]

---

40. The cause of action for seduction was originally granted to fathers for the seduction of their daughters. *See* W. MALONE, TORTS IN A NUTSHELL: INJURIES TO FAMILY, SOCIAL AND TRADE RELATIONS 78-79 (1979); Sinclair, *Seduction and the Myth of the Ideal Woman*, 5 LAW & INEQUALITY 33, 41-60 (1987). One writer describes the motivation behind the seduction cause of action as "[t]he social interest in the preservation of female purity and in the prevention of illegitimacy." Feinsinger, *Legislative Attack on "Heart Balm"*, 33 MICH. L. REV. 979, 988 (1935). At common law, the seduced woman was denied a civil remedy for damages on the ground that she was a consenting party or equally at fault. Several states statutorily changed the common law to confer upon the woman the right to maintain a cause of action for her own seduction. Other states later recognized a common law action. All the statutes required the plaintiff to be unmarried; two statutes required the woman to be under twenty years of age at the time of seduction; three states required the woman to be over twenty-one. 4 C. VERNIER, AMERICAN FAMILY LAWS 267-68 (1936). The maximum age limit probably reflected a belief that an adult woman should be capable of preventing her own seduction. The rationale for the requirement that the plaintiff be over twenty-one probably stemmed from the desire to prevent double recovery, assuming that the father had a common law action to sue for the seduction of his child. Feinsinger, *supra*, at 986-87.

41. The action for breach of a promise to marry could be brought even if no formal or express promises were exchanged, as long as an agreement could be implied from the circumstances. *See* H. CLARK, *supra* note 38, § 1.2, at 3. For a discussion of the history of the cause of action, see *id.* § 1.1, at 1-3.

42. In virtually all states, there was no formal limitation of the cause of action to female plaintiffs. In practice, however, only women sued, either because male defendants were often better economic targets or because it was socially unacceptable for men to admit that they had been deceived and injured. *See, e.g.*, Kelly v. Renfro, 9 Ala. 325, 328 (1846) ("the action is common to either sex, though in our own country, a just regard to public morals, has long since confined the action alone to the female sufferer"); H. CLARK, *supra* note 38, § 1.2, at 5 (men are "incapable of assuming the air of wronged innocence" required by plaintiffs); Turano, *Breach of Promise: Still a Racket*, 32 AM. MERCURY 40, 45 (1934) (a man would hesitate to testify that "his tender heart has been completely busted by the inconstancy of a weaker vessel").

43. The cause of action for criminal conversation could be established merely by showing that the defendant voluntarily had intercourse with the spouse of the plaintiff. The gravamen of the tort was the violation of the marital right of exclusive sexual access. Criminal conversation was by its nature a strict liability tort because the defendant could not avoid liability by proving either that he did not initiate the encounter or that he did not know his sexual partner was married. W. MALONE, *supra* note 40, at 70-71. Some states formally limited this cause of action to husbands, reasoning that the action was intended only to protect the husband's interest in the legitimacy of children born to his wife. Other states allowed wives to sue, taking the view that the tort protected against the broader interest in preventing interference with familial relationships. Feinsinger, *supra* note 40, at 990.

44. The cause of action for alienation of affection could be established by proving that the defendant took action directed toward impairing the marital relationship and caused a loss of affection between the spouses. W. MALONE, *supra* note 40, at 72-77.

Starting in the mid-1930s, many state legislatures enacted anti-heart balm legislation abolishing these causes of actions.[45] The claim for breach of a promise to marry, in particular, fell into disfavor. The repeal movement was principally fueled by a perception that unscrupulous female plaintiffs abused the law by bringing unfounded claims against innocent men.[46] There was as yet little criticism of the traditional view of sex supporting the tort claims themselves.[47]

Besides being intolerant of nonmarital sex, the traditional view of sexual conduct functioned to maintain a patriarchal social system in which women were perceived as being sexually different from and

45. The first anti-heart balm legislation was passed by the Indiana legislature in 1935. The Indiana act made it a crime for any person to seek damages for breach of a promise to marry, seduction, alienation of affections, and criminal conversation. 1935 Ind. Acts ch. 208. In the same year, New York also abolished these causes of actions and criminalized the institution of suits for these claims. 1935 N.Y. Laws ch. 263. *See* Sinclair, *supra* note 40, at 65-71. The trend toward abolition has persisted. Twenty-two states and the District of Columbia have statutorily abolished the action for alienation of affections. *See* Note, *Heartbalm Statutes and Deceit Actions*, 83 MICH. L. REV. 1770, 1771 (1985) [hereinafter Note, *Heartbalm Statutes*]. Twenty-two states and the District of Columbia have statutorily abolished the action for breach of a promise to marry; twenty-one states and the District of Columbia have statutorily abolished the claim for criminal conversation. Cannon v. Miller, 71 N.C. App. 460, 322 S.E.2d 780, 794-95 (1984), *vacated*, 313 N.C. 324, 327 S.E.2d 888 (1985). Courts in two states have abolished the claim for alienation of affections and criminal conversation has been judicially abrogated in four states. *See, e.g.*, H. CLARK, *supra* note 38, at 15-22; W. MALONE, *supra* note 40, at 80-81; Note, *Alienation of Affections and Criminal Conversation: Unholy Marriage in Need of Annulment*, 23 ARIZ. L. REV. 323 (1981); Note, *Heartbalm Statutes, supra*, at 1770.

46. The author of the 1935 New York legislation, for example, declared that the bill was directed at "a tribute of $10,000,000 paid annually by New York men to gold-diggers and blackmailers. Nine out of ten recent breach of promise suits have been of the racketeer type." N.Y. Times, Mar. 30, 1935, at 3, col. 1. He further stated in a radio broadcast that "New York state refuses to be a party to blackmail any longer; the . . . [s]tate will not be a coconspirator of a certain type of lawyer, who, working in cahoots with the modern female racketeer seeks to become rich at the expense of reputation, embarrassment, and wide-spread [sic] publicity." *The Outlawry of Heart-Balm Suits*, 119 LIT. DIG. 22 (Apr. 13, 1935). Similar sentiments were repeatedly expressed by legal critics of the cause of action. *See, e.g.*, R. BABER, MARRIAGE AND THE FAMILY 53-56 (1953); 2 J. SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS §§ 128 and 1303, at 1518, 1547 (1870); 4 C. VERNIER, *supra* note 40, at 268-70 (1936); Brown, *Breach of Promise Suits*, 77 U. PA. L. REV. 474, 490-95 (1929); Feinsinger, *supra* note 40, at 985; Hadley, *Breach of Promise to Marry*, 2 NOTRE DAME LAW. 190, 193 (1927); Note, *Breach of Promise*, 7 HARV. L. REV. 372 (1893).

47. Although the early anti-heart balm statutes probably did not emanate from a greater tolerance for premarital sex, there is evidence that they reflected a new, more romantic view of marriage. Couples were expected to marry for love, not for material advantage. The breach of a promise to marry action was criticized as a relic of an older, more property oriented view of marriage. *See* H. CLARK, *supra* note 38, § 1.1, at 2-3; Lawyer, *Are Actions for Breach of the Marriage Contract Immoral?*, 38 CENT. 272, 273 (1894); Turano, *supra* note 42, at 46.

subordinate to men.[48] Stated as an abstract proposition, the traditional view of sex might seem egalitarian because the prohibition against nonmarital sex looks gender neutral. But the traditional system is inseparable from and gains much of its meaning from two sources of inequality: the subordinant social and economic position of wives and the double standard of sexual morality. When the only legally sanctioned sex is marital sex, the quality of the relationship between spouses takes on a special importance. The subordination of wives meant that the only legitimate environment for sex was destined to be controlled by men.[49] Although men as well as women could feel trapped by a traditional marriage, women typically had more to lose from divorce than men. Women were less likely to remarry[50] and were far more vulnerable to poverty if they had no support from a man.[51]

Moreover, the traditional view of sex coexisted peacefully with the double standard of sexual morality.[52] Under the double standard, men were expected to be sexually active before marriage and on occasion to

48. Two integral theses of the philosophy of Thomas Aquinas, for example, were that women were naturally inferior to men and that men should act as "female's governor" in marriage. PHILOSOPHY & SEX, *supra* note 16, at 11.

49. For a sampling of the literature on the male dominated traditional family, see Bernard, *Marriage: Hers and His*, MS. MAG. 46, 47-49, 110, 113 (Dec. 1972), *reprinted in* B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW (1975) (traditional marriage is far healthier for men than for women); Taub & Schneider, *Perspectives on Women's Subordination and the Rule of Law*, in THE POLITICS OF LAW 121-24 (D. Kairys, ed. 1982); Thorne, *Feminist Rethinking of the Family: An Overview*, in RETHINKING THE FAMILY—SOME FEMINIST QUESTIONS 3-20 (B. Thorne & M. Yalom eds. 1982) (summarizing feminist criticisms of traditional ways of thinking about the family).

50. *See* Hetzel & Cappelta, *Marriages: Trends and Characteristics*, in U.S. DEP'T OF HEALTH, EDUC. & WELFARE, DIV. OF VITAL STATISTICS, Series 21, at 17 (1971) (in 1967, the remarriage rate for divorced men was over 1 ½ times the rate for divorced women). This disparity has persisted into the 1980s. *See* U.S. DEP'T OF COMMERCE, *Marital Status and Living Arrangements*, CURRENT POPULATION REPORTS, Series P-20, No. 389, at 3 (March 1983) (higher incidence of remarriage for divorced men than for divorced women).

51. *See* London, *Women Bear the Brunt of Economic Crises*, in A. JAGGER & P. ROTHENBERG, *supra* note 16, at 44 (in first year after separation, former husbands improved standard of living 42%, while standard of former wives and children decreased by 73%); Greenwood-Audant, *The Internalization of Powerlessness: A Case Study of the Displaced Homemaker*, in WOMEN: A FEMINIST PERSPECTIVE 264-81 (J. Freeman 3d ed. 1984) (discussing structural and psychological barriers facing displaced homemakers).

52. Frances Olsen describes the double standard of morality as having two aspects:

> First, nonmarital sex, or sexual activity separated from emotional commitment, is considered desirable for men but devaluing for women. The second aspect is a corollary of the first: some women have to be "immoral" in order to serve as sexual partners for males outside of marriage. Thus, women are categorized as moral or immoral, good girls or bad girls, virgins or whores, wife material or playmate material.

Olsen, *supra* note 1, at 402 n.70; *see also* Brief of Amici Curiae of Feminist Anti-Censorship Task Force at 4-8, American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (describing legal manifestations of the sexual double standard).

engage in casual extra-marital sex. Women were ordinarily denied such freedom and were subjected to harsh social penalties if they exerted sexual independence. One serious threat a woman could face in a society that embraced this double standard was to be labeled "immoral" and ineligible for the respectable roles of wife and mother. Perhaps the harshest feature of the double standard was that it generated a demand for a class of prostitute women whose chief function was to service the illicit sexual desires of men who would not be stigmatized by their participation as customers of commercial sex.

Some restrictive sex legislation in the traditional mode was sponsored by feminists and other reformers who sought to eliminate the double standard and to promote male chastity.[53] Whether these laws had a chilling effect on the nonmarital sexual activity of men is uncertain. It now seems indisputable, however, that the traditional view of sexual conduct had a disparate negative impact on women.

One reason why women were disproportionately victimized under the traditional system is that the legal apparatus simply did not operate at the behest of nonvirtuous women. As a matter of formal legal doctrine, the unchaste woman could not sue for seduction[54] or breach of a promise to marry.[55] The promiscuous teenage girl could not be the victim of statutory rape.[56] The financial interests of prostitutes and mistresses were not protected by the law of contract or by the principles of equity.[57]

At the level of formal legal doctrine, women perceived as "virtuous" were technically protected from sexual exploitation by men other than their husbands. But a "Catch-22" occurred in that exploitation or victimization itself often served to degrade the female victim. For example, a woman who had been raped suffered disgrace as well as physical and

53. Olsen, *supra* note 1, at 402-04 (historical background of statutory rape laws); Walkowitz, *The Politics of Prostitution*, in WOMEN: SEX AND SEXUALITY (C. Stimpson & E. Person eds. 1980) (historical analysis of Victorian anti-vice movements in Great Britain and United States).

54. *See, e.g.*, Amburgey v. Commonwealth, 415 S.W.2d 103 (Ky. 1967) (plaintiff must be of a chaste character at time of intercourse); MODEL PENAL CODE § 213.3 commentary at 391-97 (discussing crime of seduction and requirement of chastity).

55. *See* H. CLARK, *supra* note 38, § 1.3, at 5-6 (unchastity of plaintiff is a defense if defendant did not know of her "condition" at the time of the engagement).

56. *See* MODEL PENAL CODE § 213.6(3) commentary at 419-20 (1980) (proof of prior sexual promiscuity rebuts the "presumption of naivete and inexperience" that underlies imposition of criminal penalties for statutory rape).

57. 6A A. CORBIN, CONTRACTS, § 1476 (1962); RESTATEMENT OF CONTRACTS § 589 (1932) (bargain based in whole or in part on illicit sexual intercourse or promise of such intercourse is illegal and unenforceable).

emotional injury.[58]

The debate over the desirability of permitting tort actions for sexually related injuries also reveals how the legal system could taint even the blameless female litigant. Proponents of anti-heart balm legislation forcefully argued that no self-respecting woman would seek relief for sexual abuse through the law. Many seemed to believe that any woman who would sue for breach of a promise to marry probably was not worthy of marriage.[59]

The law thus nominally functioned to protect the virtuous woman. However, even virtuous women who relied on the legal system for protection ran the risk of being judged immoral and thus classified as outside the protection of the law.

C. THE LIBERAL VIEW OF SEXUAL CONDUCT AND THE CENTRALITY OF CONSENT

It is doubtful that the liberal view of sexual conduct ever clearly dominated the American legal scene. The traditional view was too well-entrenched to be wholly supplanted, even with the sexual revolution of the 1960s. However, the two decades from the mid-1950s to the mid-1970s now seem like the "golden age" of the liberal era.

---

58. Women who have been raped may blame themselves and experience guilt for not having been able to prevent the crime. Herman, *The Rape Culture*, in WOMEN: A FEMINIST PERSPECTIVE *supra* note 51, at 20, 33-34; Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395, 424-32 (1985) (describing phases of rape trauma syndrome). Recent studies on mates and families of rape victims also indicate that the rape victim is often viewed by others as "unclean," "tainted," or "damaged" as a result of her victimization. R. TONG, *supra*, note 4, at 92-93; *see also* Herman, *supra*, at 23 (discussing the victim blaming attitudes of husbands); Massaro, *supra*, at 406-09 (discussing victim blaming attitudes of judges and juries). For a discussion of victim blaming theories in the academic literature, see D. RUSSELL, SEXUAL EXPLOITATION: RAPE, CHILD SEXUAL ABUSE, AND WORKPLACE HARASSMENT 164-66 (1984).

59. *See, e.g.*, Brown, *Breach of Promise Suits*, 77 U. PA. L. REV. 474, 493-95 (1929) (action was left to the "adventuress and the woman of shady character" because women of "modesty and good breeding" would hesitate to institute suit); Know, *The High Cost of Loving: What is a Breach of Promise—Cupid's Indemnity?*, 61 FORUM 735, 744 (1919) ("no woman with a vestige of pride would air in court the fact that she had been jilted"); *The Law and Lovers' Vows*, 71 SPECTATOR 712, 713 (1893) (innocent and worthy women were less likely to sue). One writer agreed that only "the vulgar" would bring suit because it would be "bad form" for a refined woman to sue while the majority of working women, if jilted by working men, would find litigation too expensive. This writer nevertheless endorsed breach of promise suits because they prevented "whole classes of very decent young women from being victimised by men who make an amusement of lovemaking, and who would, but for the law, delight in a succession of 'engagements,' after each of which the girl would be deserted." *A Word for Amelia Roper*, 64 SPECTATOR 83 (1890).

The reports of two highly controversial legal commissions studying sexual matters epitomize the ideology of the era. In 1957, the Wolfenden Committee[60] recommended the repeal of laws criminalizing consensual homosexual conduct in Britain.[61] The same committee endorsed the existing legal scheme which provided for punishment of prostitutes who solicited clients in public, without classifying the underlying commercial sex itself as unlawful.[62] In the United States, the President's Commission on Obscenity and Pornography[63] in 1970 recommended the abolition of legal restraints on the dissemination of sexually explicit materials to consenting adults.[64]

The hallmark of the Wolfenden Report is the importance it attaches to individual freedom of choice. The Committee recommended decriminalization of consensual homosexual conduct because of its belief that all persons should be free to act in matters of private morality, such as sex. In the Committee's view, attempts at legislating sexual morality were destined to be ineffective and, in any event, were "not the law's business."[65] The Committee rejected arguments that the decriminalization of homosexuality would encourage homosexual activity and have a negative impact on the heterosexual family. These arguments had little persuasive impact because the Committee believed that the law had little influence on either human behavior or social forces.[66] By so separating the law from its social context, the Committee was able to recommend legal change without simultaneously advocating social reform.

The Wolfenden Committee purported to follow the same restrictive view of the proper ambit of legal regulation when it analyzed prostitution. Without condoning prostitution, the Committee was able to support the then current legal scheme that did not make commercial sex criminal in and of itself. Similar to its views on homosexual conduct, it regarded prostitution as consensual activity and saw no reason for the law to impede the choice of an adult prostitute and her customer, so long

60. After its publication in 1957, the Wolfenden Report generated a decade of controversy in academia and in Parliament. *See* W. PRATT, PRIVACY IN BRITAIN 125-31 (1979).

61. WOLFENDEN REPORT, *supra* note 22, at 187-89. However, decriminalization did not occur in Great Britain until 1967. *See* Sexual Offenses Act, 1967 § (I) I, in 11 HALSBURY'S LAWS OF ENGLAND ¶ 1033 (4th ed. 1976).

62. WOLFENDEN REPORT, *supra* note 22, at 189-90. However, the Committee did recommend that the law no longer require proof of annoyance to establish the crime of street solicitation and advocated harsher maximum penalties. *Id.* at 141-43, 151.

63. PRESIDENT'S COMM'N ON OBSCENITY AND PORNOGRAPHY, THE REPORT OF THE COMM'N ON OBSCENITY AND PORNOGRAPHY (1970) [hereinafter OBSCENITY COMM'N REPORT].

64. *Id.* at 51.

65. WOLFENDEN REPORT, *supra* note 22, at 48.

66. *Id.* at 47.

as no concrete harm to third parties occurred. Significantly, the Wolfenden Committee started from the assumption that, in the great majority of cases, women voluntarily choose to become prostitutes because that occupation is "easier, freer and more profitable"[67] than other lifestyle choices. The Committee reasoned that the desire to become a prostitute stemmed predominantly from the "psychological makeup" of the woman, rather than from any economic constraints.[68] From this perspective, the institution of prostitution could be reduced to an aggregation of private, individual choices and its social significance thereby minimized.

Like the Wolfenden Report, the 1970 Report of the President's Commission on Obscenity and Pornography (the 1970 Report) placed paramount normative importance on freedom of individual choice. The majority of the President's Commission argued that consenting adults should have the right, free from government-imposed obstacles, to purchase obscene materials. In this respect, the President's Commission went further than the Wolfenden Committee in its conception of the private realm. For the President's Commission, privacy and individual autonomy were so closely linked that the act of purchasing obscene materials should be immunized, even though it occurs in the public marketplace.

The tone of the 1970 Report differed somewhat from the tone of the Wolfenden Report. While the Wolfenden Report accepted the traditional view that prostitution and homosexual activities are morally evil, the 1970 Report departs from this traditional view and conveys the impression that obscenity might also have positive uses.

The 1970 Report noted that obscenity can provide information and entertainment for adults or may satisfy the curiosity of adolescents.[69] The President's Commission also reviewed the empirical studies on the relationship between obscenity and sex crimes and concluded that there was no established causal link between them.[70] The 1970 Report cited evidence that sex offenders typically had less, rather than more, adolescent experience with erotica than did other adults.[71] The 1970 Report thus went beyond the Wolfenden Committee's advocacy of toleration and indicated approval of this form of sexualized activity, at least for

67. *Id.* at 131-32.

68. *Id.* at 131.

69. OBSCENITY COMM'N REPORT, *supra* note 63, at 24, 33-39, 53.

70. *Id.* at 27.

71. *Id.* at 52.

some individuals. The President's Commission placed positive weight on diversity in sexual and aesthetic tastes among individuals and viewed government intervention not simply as unwise or unnecessary, but as potentially harmful.[72]

The liberal ideology embodied in the reports of both commissions had a significant influence on legal reforms in this country. The celebrated constitutional right to privacy[73] emerged during this period and immunized procreative decisions involving sterilization,[74] contraception,[75] and abortion[76] from most forms of government intervention. Moreover, by the end of the liberal era, various constitutional doctrines had been employed to dismantle many of the indirect sanctions on nonmarital sex. For example, the Supreme Court no longer permitted the interests of unwed fathers[77] and of nonmarital children[78] to be sacrificed to preserve the privileged status of marriage. Although the Supreme Court's decisions provided no direct protection for nonmarital sex, they made it much easier for individuals to eschew marriage without incurring grievous emotional or financial losses.

Legislative reform in the liberal mode was probably even more significant in this period than were the constitutional developments. No-fault divorce caught hold in nearly every state[79] and permitted even the adulterous spouse to escape legal sanctions for extramarital sexual behavior. During this period, a sizeable number of states also repealed their

72. The President's Commission went so far as to suggest that government restriction might have a corrosive effect on moral standards: "Governmental regulation of moral choice can deprive the individual of responsibility for personal decision which is essential to the formation of genuine moral standards. Such regulation would also tend to establish official moral orthodoxy, contrary to our fundamental constitutional traditions." *Id.* at 55.

73. For general discussions of the constitutional right to privacy, see Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 665-92 (1980); Note, *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1161-66, 1177-87 (1980).

74. Skinner v. Oklahoma, 316 U.S. 535 (1942).

75. Carey v. Population Serv., Int'l, 431 U.S. 678 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

76. Roe v. Wade, 410 U.S. 113 (1973).

77. Caban v. Mohammed, 441 U.S. 380 (1979); Stanley v. Illinois, 405 U.S. 645 (1972).

78. *See, e.g.*, Lalli v. Lalli, 439 U.S. 259 (1978) (determining permissible extent of state's restrictions on interstate inheritance rights by illegitimates); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164 (1972) (invalidating system denying worker's compensation death benefits to dependent unacknowledged illegitimate children); Levy v. Louisiana, 391 U.S. 68 (1968) (striking down legislation denying unacknowledged illegitimate child the right to sue for mother's wrongful death).

79. By 1980, every state except Illinois and South Dakota had adopted some form of no-fault divorce. Freed & Foster, *Divorce in the Fifty States: An Overview as of August 1, 1980*, 6 FAM. L. REP. 4043, 4046 table I (1980).

anti-sodomy laws.[80] Moreover, because existing laws were virtually never enforced, many gay men and lesbians felt secure enough in the 1970s to agitate publicly for an end to discrimination against them.[81]

With respect to prostitution and pornography, however, the liberal ideology did not succeed in changing formal legal doctrine. Prostitution remains illegal in all states but Nevada,[82] and the courts have uniformly rejected the claim that the constitutional right of privacy insulates prostitutes from criminal prosecution.[83] Additionally, in 1973, the Supreme Court in *Miller v. California*[84] sided with the dissenting commissioners on the 1970 Commission[85] and allowed states to ban hard core obscenity.

Despite the Court's rejection of the liberal view on obscenity in *Miller*, pornography seemed to flourish as a social institution after 1973. One study reports the surprising finding that prosecutors were more reluctant to prosecute obscenity cases after *Miller*, even though they perceived that obscene materials were increasingly available in their communities.[86] Thus, while the liberal view did not succeed in revamping legal doctrine, its permissive ideology probably had some impact on legal actors who were reluctant to allocate limited resources to enforce existing obscenity laws.

As the liberal view of sex began to permeate the law, consent of the parties simultaneously emerged as the crucial determinant of the lawfulness of sexual conduct. Because consent replaced marriage as the legitimating force in many contexts, the extent of the legal control of sexual

---

80. Until 1961, every state criminalized sodomy. Currently, twenty-four states and the District of Columbia provide criminal penalties for sodomy engaged in by consenting adults in private. Hardwick v. Bowers, 106 S. Ct. 2841, 2845-46 (1986) (citing *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 524 n.9 (1986)).

81. *See* J. D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970, 223-39 (1983); THE RIGHTS OF GAY PEOPLE: THE BASIC ACLU GUIDE TO A GAY PERSON'S RIGHTS 1-2 (rev. ed. 1983).

82. *See* Note, *Right of Privacy Challenges to Prostitution Statutes*, 58 WASH. L.Q. 439, 472-80 (1980). In Nevada, legalized licensed brothels operate in two counties. Prostitution is illegal if it occurs outside the licensed facilities. *Id.* at 444 n.24.

83. *See, e.g.*, United States v. Moses, 339 A.2d 46, 50 (D.C. App. 1975) *cert. denied*, 426 U.S. 920 (1976); State v. Price, 237 N.W.2d 813, 818 (Iowa 1976); In re Dora P., 68 A.D. 2d 719, 731, 418 N.Y.S.2d 597, 604 (1979). In the latter two cases, however, the trial courts held the statutes unconstitutional on privacy grounds, but the rulings were reversed on appeal. United States v. Moses, 41 U.S.L.W. 2298 (Nov. 3, 1972); In re P., 92 Misc. 2d 62, 83, 400 N.Y.S.2d 455, 469 (N.Y. Fam. Ct. 1977).

84. 413 U.S. 15 (1973).

85. *See* OBSCENITY COMM'N REPORT, *supra* note 63, at 383-424 (statements of Morton A. Hill & Winfrey C. Link).

86. Penrod & Linz, *supra* note 33, at 263.

conduct often depended on the definition given to "consent" in the particular setting.

Perhaps more than in other areas of the law, the concept of consent as it relates to sexual activities is a complicated notion. Central to both the lay and legal notions of consent are considerations other than the subjective desires of the parties. Consent is a devilishly malleable term which may describe a wide spectrum of responsive behavior, ranging from the mere failure to engage in active resistance, to active participation in and encouragement of another's initiatives.[87] For that reason, a decision as to what conduct constitutes consent in any particular context may mask value judgments implicit in the choice of definition. A determination of sexual consent may, for example, serve as a proxy for moral judgments about the behavior of the parties[88] or as a shorthand method for classifying certain forms of sexual behavior as normal.[89] Particularly in an era greatly influenced by Freudian psychology, there was a willingness to label sexual conduct as consensual, even if it could be seen as fulfilling only the unconscious desires of the actors.[90] The Freudian concern for the ill effects of repression also provided a theoretical justification for a loose operative definition of consent.

---

87. Carole Pateman has compared consent in everyday relationships to the notion of consent in political obligations. Her thesis is that most liberal consent theorists have transformed the concept of consent into a mere " 'constituent' of liberal democratic ideology" without looking for evidence that consent has actually been given by individuals. Pateman, *Women and Consent*, 8 POL. THEORY 149, 162 (1980). When the focus is on hypothetical consent, rather than actual consent, consent may be used to describe "habitual acquiescence, assent, silent dissent, submission, or even enforced submission." *Id.* at 150. Joel Feinberg has also argued that it is helpful to think of consent as masking a "spectrum of voluntariness," corresponding both to "degrees of coercive pressure" exerted on the actor and to "variations in fraudulently produced inducement used" to procure agreement. Feinberg, *Victims' Excuses: The Case of Fraudulently Procured Consent*, 96 ETHICS 330, 335-36 (1986). In a similar vein, a legal commentator explains that to distinguish consent from submission, the law looks to a number of factors:

> the value placed on the personal freedom to make various kinds of choices; the severity of the damage which different types of coercion are capable of inflicting; the amount of resistance to coercion that the law expects of victims; and the degree to which coercion can serve an evidentiary function in determining issues of fact with respect to nonconsent.

Note, *Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613, 641 (1976).

88. *See infra* text accompanying notes 133-46, 207-208, 227-28.

89. Catharine MacKinnon claims, for example, that the legal definition of rape corresponds to "the level of acceptable force starting just above the level set by what is seen as normal male sexual behavior, rather than at the victim's, or women's, point of violation." MacKinnon, *supra* note 4, at 649.

90. A student law review comment written in 1952 drew heavily upon Freudian psychology to argue that a man should not be convicted of rape if a woman's response was ambivalent. Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55, 66-68 (1952). The writer characterized the victim's attitude as often ambivalent, even if her overt behavior looked like resistance. *Id.* at 66. The writer believed that women often harbored an "unconscious desire for forceful penetration, the coercion serving neatly to avoid

D. THE FEMINIST RESPONSE TO LIBERALISM AND THE CRITIQUE OF CONSENT

In the 1970s, feminists developed a critique of both the traditional and the liberal views of sex. Perhaps the most important aspect of the critique was its exposure of the inadequacy of the concept of consent that had operated in the law of sex. The broad claim was that the legal notion of consent had failed to safeguard the sexual freedom of women. Feminists sought to prohibit many forms of sexual conduct which, although not always overtly resisted by the women involved, were not truly consensual.[91] The feminist critique demonstrated that the liberal ideology, like the traditional view of sex, could be discredited for being fundamentally male oriented and for operating to bolster male dominance in sexual matters. Feminists charged that the law of sex legitimated a social order in which the sexual abuse of women was commonplace. Moreover, by purporting to treat consent as the decisive factor redeeming sex, but defining consent narrowly to mean no more than acquiescence or submission, the liberal ideology made the sexual exploitation of women less visible and more impervious to reform.[92]

Three contexts that demonstrate feminist disaffection with the legal concept of consent are rape, sexual harassment, and tort actions for deception in sexual relationships. In each of these areas, feminists contended that the law blinded itself to the sexual abuse of large numbers of

... guilt feelings." *Id.* at 67 (footnote omitted). Citing Freud, the author claimed that many women required "aggressive overtures by the man" and would experience erotic pleasure by an "accompanying physical struggle." *Id.* at 66. The author also regarded crying by the victim as a sign of an ambivalent attitude. *Id.* at 68.

For a study disputing the psychoanalytic position that women subconsciously desire physically forced intercourse, see Kanin, *Female Rape Fantasies: A Victimization Study*, 7 VICTIMOLOGY 114, 115-18 (1982). The study contends that there is a difference between physically forced sex and the quality of fantasies women often describe as their "rape fantasies." While 57% of the university women respondents reported having rape fantasies, *id.* at 115, their responses indicated that many of the situations labeled as rape fantasies were in fact aggressive seductions, devoid of violence and pain, in which the women actually consented to intercourse. *Id.* at 116-17.

91. An extensive bibliography of the feminist writings on rape, battery, sexual harassment, forced prostitution, and the sexual abuse of children is contained in MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 12 n.20 (1985).

92. *See* C. MACKINNON, *supra* note 4, at 219 (restricting legal punishment to sexual encounters that are unusually abusive prevents women from examining "the ordinary conditions of their own consent"); MacKinnon, *supra* note 4, at 648 ("As with protective labor laws for women only, dividing and protecting the most vulnerable becomes a device for not protecting everyone."); Olsen, *supra* note 1, at 427-28 (arguing that there is "no bright line" between consensual sexual intercourse and coercive sex and that it is harmful to conceive of sex as comprising only two categories); Scully & Marolla, *Rape and Vocabularies of Motive: Alternative Perspectives*, in RAPE AND SEXUAL ASSAULT: A RESEARCH HANDBOOK 305-06 (A. Burgess ed. 1985) (use of a vocabulary of motive can excuse and justify sexual violence in normal males).

women, while purporting to punish nonconsensual activity. Within the last decade, the feminist critique has profoundly changed the law of rape and is the force behind the recognition of sexual harassment as a prohibited form of sexual abuse. A new genre of tort actions based on deception in sexual relationships has also emerged. Although this sexual liability law is still in its infancy, it also has potential to reshape the legal notion of consent in sexual relationships.

1. *Forcible Rape*

The legal definition of consent has been a primary target of feminist criticism of forcible rape laws. Consent plays a pivotal role in the law of rape because most states define rape as sexual intercourse without the consent of the woman.[93] Despite this seemingly straightforward definition of rape, feminists argued that nonconsensual sexual abuse often went unpunished because the notion of consent was manipulated in a sexist fashion.[94]

The most glaring example of the failure of rape laws to punish all forms of nonconsensual sex is the exemption traditionally afforded to marital rape—an exemption which should be anathema even to the liberal view of sex. The marital rape doctrine still operates in most states either to immunize spousal rape completely or to provide a limited immunity for less aggravated rapes when the defendant is the husband of the victim.[95] In the marital rape context, consent is reduced to a legal

93. Traditionally, rape was defined as sexual intercourse by force and against the victim's will. The two elements of force and nonconsent often translated into a requirement that the state prove the victim's nonconsent by showing that she physically resisted a show of physical force. For discussions of the history of the legal definition of rape, see Weiner, *Shifting the Communication Burden: A Meaningful Consent Standard in the Law of Rape*, 8 HARV. WOMEN'S L.J. 143, 146 (1983); Comment, *supra* note 4, at 1518-37.

94. The burgeoning feminist literature on rape has been most influenced by Susan Brownmiller's celebrated book. S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975). Prior to the 1970s, much less attention was devoted to the crime of rape, particularly in the legal literature. A popular criminal law hornbook, for example, had no separate heading for rape, although separate chapters were devoted to such crimes as burglary, robbery, receiving stolen property, and mayhem. *See* W. LAFAVE & A. SCOTT, HORNBOOK ON CRIMINAL LAW (1972). Starting in the mid 1970s, feminist legal writers devoted considerable attention to the legal definition of consent in the law of rape. *See, e.g.*, Bienen, *Rape III—National Developments in Rape Reform Legislation*, 6 WOMEN'S RTS. L. RPTR. 170, 180-96 (1980); Wiener, *supra* note 93, at 143; Comment, *supra* note 4, at 1518; Note, *supra* note 87.

95. Only ten states authorize prosecutions of husbands for the rape of their wives on the same terms as other rape defendants. Some states authorize prosecutions of husbands only for first or second degree rape, and immunize husbands for lesser sexual offenses not entailing the application of physical force or resulting in serious additional physical injury. *See infra* note 100. Other states immunize husbands unless the spouses are no longer living together or are judicially separated. *See* Note, *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99

fiction based on status. The marital rape exemption permits husbands to force their wives to have sex and implies spousal consent simply from the fact of the marital relationship.

Feminists argued that this form of implied consent represented a severe incursion on sexual freedom of women, and was a clear example of how the legal notion of sexual privacy operated to legitimate the sexual dominance of males.[96] In the past few years, these arguments against the marital rape exemption have been particularly effective and the trend is now against affording the exemption.

The New York Court of Appeals, for example, recently held that the marital rape exemption violated the equal protection clause of the fourteenth amendment.[97] The court took the unusual step of declaring the exemption "irrational" and thus constitutionally impermissible, even without classifying the exemption as a form of sex-based discrimination.[98] In the political arena, feminists have also persuaded many state legislatures to eliminate or restrict the scope of the exemption.[99]

In contexts other than marital rape, consent is not so readily discernible from the status of the parties alone but is to be gleaned from the facts surrounding the encounter.[100] At this evidentiary level, the principal strategy of feminists has been to press for a change in the legal standard by which certain facts are deemed relevant to the issue of consent.

HARV. L. REV. 1255, 1258-60 nn.28-35 (1986). For a review of the empirical work on the incidence and effects of marital rape, see Yllö & Finkelhor, *Marital Rape,* in RAPE AND SEXUAL ASSAULT, *supra* note 92, at 146-58.

96. *See, e.g.*, S. BROWNMILLER, *supra* note 94, at 380-82; K. O'DONOVAN, *supra* note 1, at 119-22; R. TONG, *supra* note 4, at 94-96.

97. People v. Liberta, 64 N.Y.2d 152, 166-67, 474 N.E.2d 567, 574-75, 485 N.Y. S.2d 207, 214-15 (1984); *see also* Warren v. State, 255 Ga. 151, 156 & n.11, 336 S.E.2d 221, 225 & n.11 (1985) (indicating that an implicit exemption for marital rape would conflict with the constitution); *accord* Merton v. State, 500 So. 2d 1301, 1305 (Ala. Ct. App. 1986). *But see* People v. Brown, 632 P.2d 1025, 1027 (Colo. 1981) (finding a rational basis for the marital exemption in averting "difficult emotional issues and problems of proof" and facilitating "resumption of normal marital relations").

98. *Liberta*, 64 N.Y. 2d at 163, 167, 447 N.E. 2d at 573, 575, 485 N.Y.S.2d at 213, 215. The court viewed the exemption as distinguishing between married and unmarried defendants. The operative classification thus became the marital status of defendant, rather than the sex of the victim. *Id.* at 163-64, 447 N.E.2d at 573, 485 N.Y.S.2d at 213. For an argument that the marital rape exemption constitutes sex discrimination against married women in violation of the equal protection clause, see Note, *supra* note 95, at 1267-72.

99. Since 1979, eight state legislatures have rejected the marital rape exemption. Note, *supra* note 95, at 1259 n.28.

100. One exception to the irrelevance of status can be found in the Model Penal Code's grading of rape offenses. First degree rape is limited to those cases in which serious bodily injury is actually inflicted or to rapes perpetrated by strangers in which serious injury is threatened. If the victim is a "voluntary social companion" of the defendant or had "previously permitted him sexual liberties," the rape is downgraded to second degree unless actual physical injury is sustained. Thus, date rape

The two feminist reforms that stand out as most significant in this area are the elimination of the resistance requirement and the enactment of rape shield laws.[101] These two reforms have generated a deeper understanding of the complexities underlying the legal notion of consent and have spawned debate about the need for further reform of rape laws to eliminate all forms of nonconsensual sexual conduct.

The once common requirement that the victim prove actual physical resistance in order to negate consent has been modified or rejected in most jurisdictions.[102] The resistance requirement was successfully attacked as codifying the perpetrator's perspective by which even compelled silence could be transformed into assent. Many forcefully argued that the resistance requirement was especially harsh on victims because it prescribed a course of action that significantly increased their chances of suffering additional physical injury.[103] In response to these objections, most states have changed their basic definition of rape to include cases where the victim was too frightened by a defendant's behavior to resist.

Landmark reform legislation in Michigan eliminated the consent issue altogether and framed the crime of rape solely in terms of the type and amount of force used by the defendant.[104] Underlying the Michigan approach is a presumption that certain types of coercive behavior (for example, where a weapon is displayed) are per se unlawful. In such cases, there is no need to address the question of the subjective consent of the victim.

---

is by definition a less serious offense under the Model Code than stranger rape. *See* MODEL PENAL CODE § 213.1(1) commentary at 355 (1980).

101. Grading of the offense of rape according to both the degree of force exerted by the defendant and the vulnerability of the victim is another widespread reform aimed at increasing the likelihood of rape convictions. Other significant reforms include the elimination of the requirement of corroboration of the victim's testimony, reformulation of jury instructions that cast doubt on a rape victim's credibility, expanding the definition of the crime to include vaginal and anal penetration by objects as well as by a penis, redefining the crime in sex neutral terms, and creating a new crime of sexual contact to cover touchings that do not amount to penetration. *See* Searles & Berger, *The Current Status of Rape Reform Legislation: An Examination of State Statutes*, 10 WOMEN'S RTS. L. RPTR. 25, 25-27 (1987); Comment, *supra* note 4, at 1519-20 n.14.

102. *See* Bienen, *supra* note 94, at 181-84; Kneedler, *Sexual Assault Law Reform in Virginia—A Legislative History* , 68 VA. L. REV. 459, 474-85 (1982).

103. *See, e.g.*, People v. Barnes, 42 Cal.3d 284, 299-302, 721 P.2d 110, 119-20, 228 Cal. Rptr. 228, 237-39 (1986) (collecting social science data on the riskiness of resistance by rape victims). The studies cited also indicate that a common response to sexual assault is "frozen fright" in which the victim panics and is not able to resist actively. *Id.* at 298-301, 721 P.2d at 118-19, 228 Cal. Rptr. at 236-38.

104. MICH. COMP. LAWS ANN. §§ 750.520(a)-(e) (West Supp. 1982). Passed in 1974, the Michigan statute was the first feminist inspired reform legislation and has been used as a model in eight other states. *See* Comment, *supra* note 4, at 1537-43; Note, *Michigan Criminal Sexual Assault Law*, 8 U. MICH. J.L. REF. 217, 225-27 (1974).

Other states have taken a different approach and have tried to rehabilitate the concept of consent by defining consent from the victim's standpoint. Wisconsin, for example, has narrowed the definition of consent to include only those overt acts or words of the victim indicating freely given consent.[105] Under such a standard, a man is subject to criminal prosecution if he has sexual intercourse with a passive woman without first securing her express consent. Additionally, Illinois has demonstrated more trust in the credibility and reliability of rape complainants by shifting the burden of production to the defendant to present some evidence of consent before the issue is interjected into the criminal prosecution.[106] This represents an important change from the traditional allocation which assigns the victim's lack of consent as an element of the state's case.

In addition to narrowing the scope of encounters deemed consensual, the law has also broadened the class of victims who may receive protection. The proliferation of rape shield laws was prompted by feminist concerns that juries would not punish men accused of raping women who were sexually active outside of marriage. To ensure that legal judgments regarding consent were not used as proxies for condemnations of an unacceptable sexual life-style, the new shield laws barred admission of the victim's past sexual history in most cases.[107] To complement the new legal doctrine, pressure has also been put on law enforcement personnel and district attorneys to investigate and prosecute "date" and "acquaintance" rapes,[108] and to counteract the notion that a woman tacitly consents to intercourse if she accepts a date or is voluntarily alone with a man.

105. WISC. STAT. ANN. § 940.225(4) (West Supp. 1982) ("words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact"). For explanations of the Wisconsin statute, see Comment, *supra* note 4, at 1543-47; Weiner, *supra* note 93, at 155-61.

106. ILL. ANN. STAT. ch. 38 ¶ 12-17 (Smith-Hurd 1986). The Illinois legislation still requires the prosecution to prove nonconsent beyond a reasonable doubt, once the defense meets its burden of production. *See* Comment, *supra* note 4, at 1549-55.

107. A very influential article examining the need for rape shield laws and their operation is Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 12-84 (1977). For a listing of the various types of rape shield laws, see Searles & Berger, *supra* note 101, at 37.

108. For data on the incidence of date and acquaintance rape see, S. ESTRICH, REAL RAPE 12-14 (1986); Herman, *supra* note 58, at 26-27. One study concluded that date rape was not exceptional and that there were marked differences in the personal and social characteristics of the rapists, the rape interaction, and the experience of victim between date rapes and stranger rapes. Kanin, *supra* note 4, at 95.

2. *Sexual Harassment*

Perhaps even more dramatic than the feminist inspired reformation of forcible rape laws has been the success of the feminist campaign to recognize sexual harassment as a distinct legal harm. Prior to the mid-1970s, the term "sexual harassment" was not even in the popular vocabulary.[109] Conduct that is now widely condemned as a form of nonconsensual sexual conduct was not very often discussed and, when it was discussed, it was apt to be dismissed as just another benign feature of the battle of the sexes.

Feminists discovered that many of the insights as to the inadequacy of rape laws were equally applicable to the sexual harassment context. For example, the reluctance of sexual harassment victims to complain about the harassment to the proper authorities within the workplace mirrored the dilemma of rape victims who were afraid to report the crime to the police.[110] Both types of victims risked being disbelieved[111] and, if not supported by the authorities, were left open to retaliation by the offenders. In both the rape and sexual harassment contexts, resistance on the part of the victim was apt to be risky. The noncompliant employee risked losing her job; the resistant rape victim risked additional physical harm. Both classes of victims were also likely to feel complicit in their own victimization and experience shame and mental anguish for not being able to control male initiatives.[112] The male oriented legal system tended to minimize the extent and degree of both types of harms, perhaps because men were far less likely to be victims of either form of sexual aggression.[113]

---

109. Catharine MacKinnon states that the term was apparently first used as a term of art by activist groups in 1975. *See* C. MACKINNON, *supra* note 4, at 27.

110. A study of federal employees indicated that the vast majority of sexual harassment victims did not complain through established channels because of ignorance of procedures, fear of reprisals, or preference for informal methods. U.S. MERIT SYS. PROTECTION BD., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM? 88-92 (March, 1981) [hereinafter U.S. MERIT SYS. STUDY]. One litigator was quoted as saying that the "fear factor" prevents victims from complaining above the level of the harasser, because of the numerous opportunities for retaliation. Cook, *The New Bias Battleground: Sex Harassment*, Nat'l L.J., July 7, 1986, at 11, col. 2.

111. For a comparison of the use of prior sexual conduct to discredit both rape and sexual harassment victims, see Krieger & Fox, *Evidentiary Issues in Sexual Harassment Litigation*, 1 BERKELEY WOMEN'S L.J., 115-30 (1985).

112. *See* R. TONG, *supra* note 4, at 66 (discussing sexual harassment syndrome); Martin, *Sexual Harassment: The Link between Gender Stratification, Sexuality, and Women's Economic Status*, in WOMEN: A FEMINIST PERSPECTIVE *supra* note 51, at 58-59 (survey of studies on effects of harassment); *see also* Estate of Scott v. deLeon, 603 F. Supp. 1328 (E.D. Mich. 1985) (harassment of decedent alleged to have precipitated drug overdose).

113. Men rarely sue for sexual harassment, although the cause of action is not limited to women. For cases involving male plaintiffs, see Huebschen v. Department of Health and Soc. Serv.,

Proponents of bans on sexual harassment argued that women had never genuinely consented to the myriad forms of sexual harassment they experienced at work. Rather than indicating genuine consent, their lack of protest reflected the considerable economic power of employers and supervisors. Women tended to tolerate or acquiesce to the milder forms of sexual harassment. What passed for consent could better be described as a grudging accommodation to the fact of women's powerlessness to change the tone of the working environment or the social conventions of the workplace. When harassment became intolerable, the most common response by women employees was to quit their jobs.[114]

The recognition of sexual harassment as a legal harm has generated such a large body of case law that it is now fair to describe the law of sexual harassment as a "subspecialty" in the practice of law.[115] For the most part, the cases have involved sexual harassment in the workplace, and claims are most often brought under Title VII of the Civil Rights Act of 1964.[116] The primary thrust has been to establish sexual harassment as a form of sex discrimination in employment, and to emphasize its similarity to other discriminatory mechanisms that have operated against women, such as unequal pay and job segregation.

Sexual harassment also has been the driving force behind civil suits based on a wide variety of legal theories other than sexual equality. Victims of sexual harassment have prevailed in contract,[117] and tort cases,[118]

---

716 F.2d 1167 (7th Cir. 1983) (male employee alleges harassment by female boss); Wright v. Methodist Youth Serv., Inc., 511 F. Supp. 307 (N.D. Ill. 1981) (male alleged discharge for rejecting advances of male supervisor). The incidence of sexual harassment of males may actually be higher than the low number of reported cases suggest. The federal study found that 15% of male employees (compared to 42% of female employees) had been harassed within the preceding two year period. U.S. MERIT SYS. STUDY, *supra* note 110, at 36.

With respect to rape, the number of male victims of female aggression is very rare, but not nonexistent. *See* Sarrel & Masters, *Sexual Molestation of Men by Women*, 11 ARCHIVES OF SEXUAL BEHAV. 117 (1982). The limited data indicate that men are more often raped by men, particularly in prison. The overall rate of male victimization, however, is apparently much lower than that for females. For a review of the studies on male victimization, see D. RUSSELL, *supra* note 58, at 67-77.

114. The federal study, for example, reported that 12% of all rape victims and 7% of all severely harassed women reported quitting their jobs or transferring. U.S. MERIT SYS. STUDY, *supra* note 110, at 80. Another study found that 17% of sexual harassment victims reported quitting or transferring. Martin, *supra* note 112, at 63.

115. *See* Rabidue v. Osceola Ref. Co., 584 F. Supp. 419, 427 n.29 (E.D. Mich. 1984) (speculating that sex harassment may be "*the* hottest present day Title VII issue") (emphasis in original), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 1983 (1987).

116. 42 U.S.C. § 2000e-2(a) (1982).

117. A leading case creating a public policy exception to the common law at-will employment doctrine is Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) (finding a breach of contract resulting from plaintiff's discharge for not acceding to her supervisor's sexual demands).

administrative hearings for unemployment compensation,[119] labor arbitrations,[120] and even in a civil action for damages under RICO.[121] The speed with which sexual harassment claims have surfaced in these varying contexts indicates that unwanted sexual behavior permeates the public as well as private sphere.

Sexual harassment doctrine has progressed to the point where women who actively resist their harassment are entitled to a legal remedy. For example, when a woman's job is expressly conditioned on sexual compliance, technically she has a good claim if she refuses the advances, suffers the adverse consequences, and files a complaint. If a woman is the target of a milder form of harassment, not directly resulting in a job detriment of a tangible character, her chances of success depend on whether she has consistently manifested her objection to the harassing behavior or complained to management.

Only recently have the courts confronted the problem of the compliant sexual harassment victim. These cases focus directly on the issue of consent and provide the best counterpoint to the recent developments in rape law. Compliance in the context of sexual harassment potentially encompasses a wide spectrum of victim behavior. It may include, for example, submission to sexual intercourse or silence in the face of offensive conduct or language. Even a woman who participates in conduct that is characteristic of a sexually abusive work environment may argue that she too is a sexual harassment victim if her contribution is minimal or remote in time.

The leading case is *Meritor Savings Bank v. Vinson*,[122] the Supreme Court's only sexual harassment decision. Before *Vinson*, the principal force behind lower court decisions had been the Guidelines on Sexual Harassment issued by the Equal Employment Opportunity Commission (EEOC) in 1980.[123] The EEOC Guidelines broadly prohibit unwelcome

118. *See, e.g.*, Priest v. Rotary, 634 F. Supp. 571 (N.D. Cal. 1986) (awarding sexual harassment victim $110,000 compensatory and punitive damages for battery, wrongful imprisonment, and intentional infliction of mental distress); Moffett v. Glick Co., 621 F. Supp. 244 (N.D. Ind. 1985) (awarding harassment victim $93,810.24 compensatory and punitive damages for intentional infliction of mental distress and wrongful discharge).

119. *See, e.g.*, McEwen v. Everett, 6 Ark. App. 32, 637 S.W.2d 617 (1982); Hussa v. Department of Employment Sec., 34 Wash. App. 857, 664 P.2d 1286 (1983).

120. *See, e.g.*, Fisher Foods Inc., 80 La. 133 (1983); Dayton Power & Light Co., 80 La. 19 (1982).

121. *See, e.g.*, Hunt v. Weatherbee, 626 F. Supp. 1097 (D. Mass. 1986) (damages allowed under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68 (1984)).

122. 477 U.S. 57 (1986).

123. Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11 (1980).

sexual contacts[124] by both supervisory personnel[125] and co-employees[126] and hold employers accountable for harassment that results in economic or psychological harm either to resistant or compliant employees.[127]

In large measure, the Supreme Court's decision in *Vinson* approved the approach taken by the Guidelines. Although the majority opinion waffled on the issue of an employer's vicarious liability,[128] the Court declared that "without question" sexual harassment constitutes a form of sex discrimination under Title VII.[129]

Vinson held that even a sexually compliant victim of sexual harassment may recover, if the victim was subjected to severe harassment that

---

124. The Guidelines define sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." *Id.* § 1604.11(a).

125. The Guidelines hold employers strictly liable for the actions of supervisors, regardless of whether the employer knew or should have known of the harassment. *Id.* § 1604.11(c). A majority of the U.S. Supreme Court has now rejected this aspect of the Guidelines and directed courts to apply agency principles on a case by case basis to determine whether employers should be held liable in the absence of actual notice. *Vinson*, 477 U.S. at 72.

126. The Guidelines hold employers responsible for harassment by co-employees when the employer "knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." Guidleines on Sexual Harassment, 29 C.F.R. § 1604.11(d) (1980). The same negligence standard is applied in cases of harassment by non-employee third parties (*e.g.*, clients or customers) over whom the employer exerts control or legal responsibility. *Id.* § 1604.11(e).

127. The Guidelines prohibit (1) quid pro quo harassment, often resulting in direct economic harm to a sexually noncompliant employee, and (2) offensive environment harassment, in which the primary harm is psychological injury to employees who are targets of repeated sexually offensive behavior. *Id.* § 1604.11(a). For an explanation of the two types of harassment, see *Vinson*, 477 U.S. at 65-66; C. MACKINNON, *supra* note 4, at 32, 40.

128. The majority held that the court of appcals was wrong to impose strict liability on employers for the harassing acts of supervisors and instructed lower courts to apply agency principles in this area. *Vinson*, 477 U.S. at 69-72 (citing the RESTATEMENT (SECOND) OF AGENCY §§ 219-37 (1958)). The Restatement approach permits courts to examine such factors as whether the act is commonly done, whether the employer has reason to expect the act will occur, whether the act is seriously criminal, and whether the act serves the employer's objectives, rather than merely the supervisor's personal motives. RESTATEMENT (SECOND) OF AGENCY §§ 229, 235 (1958).

The majority hinted that it would be possible for employers to escape liability under the Restatement approach if a victim bypassed a special procedure for investigating sexual harassment complaints and the employer actively encouraged reporting. *Vinson*, 477 U.S. at 72-73. In contrast, the four concurring Justices would insulate an employer only if the offending supervisor had no authority over the harassed employee, "because the two work in wholly different parts of the employer's business." *Id.* at 2411 (Marshall, Brennan, Blackmun, Stevens, JJ., concurring). Justice Stevens, however, believed that there was no inconsistency in the majority and concurring opinions and thus joined both. *Id.* at 2411 (Stevens, J., concurring).

129. *Vinson*, 477 U.S. at 64. The Court gave no attention to an oft-mentioned concern expressed by Judge Bork in dissent in the Court of Appeals for the District of Columbia. Bork had remarked that classifying sexual harassment as sex discrimination would create a "doctrinal difficulty" because of the hypothetical possibility of a bisexual supervisor who indiscriminately harasses both sexes. Vinson v. Taylor, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork J., dissenting) (dissent from denial of rehearing).

could be characterized as "unwelcome."[130] The plaintiff in *Vinson* charged that her supervisor coerced her into having sexual intercourse with him on numerous occasions. The plaintiff prevailed even though she had never reported her supervisor's actions to higher management and did not prove that she would have been fired if she had not complied.[131] The Court's analysis was simple, yet victim oriented: unless the supervisor could establish that his advances were welcome, the plaintiff could recover. The Court was willing to believe that the sexual harassment victim often could be coerced into submission because of the disparate power relationship between the supervisor and employee. Resistance—either in the form of physical resistance or a prompt complaint to higher management—was not required. For the *Vinson* Court, the existence of an asymmetric relationship alone was enough to constitute intimidation, even if the supervisor had no specific intent to retaliate against the noncompliant employee.

Despite this protective holding, it is not entirely clear that *Vinson* fully embraces the victim's perspective. In offensive work environment cases, such as *Vinson*, the question of perspective is often important to determine both whether any harassment has occurred and whether the harassing conduct is sufficiently serious to warrant judicial intervention. Because the plaintiff in *Vinson* alleged that she was forced to engage in intercourse on numerous occasions, there was no doubt that the supervisor's conduct was of a kind serious enough to trigger Title VII relief. The only debatable issue was whether the serious sexual conduct should be classified as harassment or whether it should be regarded as freely consented-to intercourse.

The Court recast the consent issue as an inquiry as to whether the conduct was unwelcome. The Court's use of the term "welcomeness," rather than "voluntariness" or "consent," suggests a victim perspective because it tends to focus on the victim's desires, rather than on the perceptions of the perpetrator or even those of a reasonable third party. The term "welcomeness" arguably possesses a subjective quality, such that it seems strained to ask whether a third person believed that a particular

130. *Vinson*, 477 U.S. at 69-73. The term "unwelcome" was borrowed from the definition of sexual harassment in the EEOC Guidelines. *See supra* note 124.

131. Vinson did allege that she initially submitted to sexual intercourse out of a fear of losing her job. *Vinson*, 477 U.S. at 60. However, she did not prove that she would in fact have been fired if she had resisted. On the record before the Supreme Court, only Vinson's claim of offensive working environment was presented because the district court had refused her permission to amend her complaint to add a claim for constructive discharge. Brief of Respondent at 3, Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986).

overture directed at another was unwelcome. Moreover, the Court describes the relevant determination as "whether [the victim] *found* particular sexual advances unwelcome,"[132] suggesting that the victim's actual subjective attitude is determinative.

Other aspects of the *Vinson* opinion, however, do not support a standard premised on the subjective attitude of the victim. The Court explained that "[t]he correct inquiry is whether [the victim] *by her conduct* indicated that the alleged sexual advances were unwelcome . . . ."[133] The wording calls for a focus on the victim's actions, rather than on her state of mind. This behavioral focus tends to support a standard under which the encounter is gauged from either the offender's perspective or the perspective of a third party.[134] More importantly, the *Vinson* Court ruled that testimony about the victim's provocative clothing and sexual fantasies might be relevant to prove that the sexual initiatives of the supervisor were welcome.[135] Even given a liberal standard for admissibility, it is difficult to understand why provocative dress should tend to

132. *Vinson*, 477 U.S. at 69 (emphasis added).

133. *Id.* at 68 (emphasis added).

134. Of course, it is possible that the Court's focus on the victim's actions represented only the realization that it would be very difficult to ascertain the victim's subjective state of mind without referring to the victim's actions. Actions are often the best guide to subjective intent, although in some circumstances the victim's unexpressed desires may contradict her actions. *See* Ukarish v. Magnesium Elektron, 31 Fair Empl. Prac. Cas. (BNA) 1315 (D.N.J. 1983) (discussed *infra* text accompanying notes 145-46). Another possibility is that in interpreting the victim's conduct under a purportedly objective "reasonableness" standard, the Court would adopt an objective victim oriented perspective. This shift in perspective from a perpetrator, or third party perspective, to a victim perspective may be important because what is welcoming conduct from a reasonable male perspective may not signify welcomeness from the reasonable woman's or victim's perspective. *See* Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1458 (1984) (advocating adoption of reasonable victim standard).

Such a reasonable victim perspective, however, does not fit as well when it is the victim's response, rather than the harasser's actions, that is the focus of inquiry. The most plausible reading of the sentence in the opinion is that the Court was concerned either with how the harasser in fact interpreted the victim's conduct, or with how a reasonable person in the position of the harasser would interpret the victim's conduct. The perspective seems to be that of the perpetrator, using either an objective or subjective standard. One court has interpreted *Vinson* as requiring the employee to "deliberately and clearly make . . . her nonreceptiveness known to the alleged offender." Jackson-Colley v. Army Corps of Eng'rs, 43 Fair Empl. Prac. Cas. (BNA) 617, 620 (E.D. Mich. 1987). This extreme defendant oriented standard is not supported by the language of *Vinson*, which makes no mention of the clarity or deliberateness of the victim's response.

135. *Vinson*, 477 U.S. at 67-69. The plaintiff argued that the welcomeness issue was not before the Court because the supervisor denied having any sexual relationship at all with the plaintiff. Brief of Respondent, *supra* note 131, at 42. The evidence concerning plaintiff's sexual fantasies consisted of a conversation between plaintiff and a co-worker in which plaintiff related "an imagined reincarnation of her deceased grandfather." *Id.* at 44. Because the supervisor did not hear or know of this conversation, plaintiff claimed that the evidence was offered for the "single purpose" of providing "a pornographic image of the kind of woman plaintiff is." *Id.* at 43.

establish a woman's desire to have sexual intercourse with a particular man at work. Only if certain clothing is regarded as signalling that the wearer is generally sexually receptive (i.e., sexually indiscriminate) could it be regarded as relevant to the issue of whether a particular sexual encounter was indeed welcome from the victim's perspective.[136] Attributing such probative value to clothing or to intimate conversations with co-workers tends to resurrect the "good girl/bad girl" dichotomy which ignores women's subjectivity and may legitimate male sexual aggression. Thus, even with its endorsement of unwelcomeness as the operative standard, the *Vinson* ruling conceivably could be interpreted to deny recovery to a sexually compliant employee who has not convinced the judge that her submission to sexual intercourse was justified under the circumstances.

In cases of sexual harassment less egregious than in *Vinson,* where, for example, the behavior complained of falls short of coerced intercourse, the debate centers on the choice of perspective and the related question of whether the standard should be formulated as subjective or objective. In several offensive working environment cases,[137] female plaintiffs have complained of persistent abusive behavior by male coworkers, typically taking the form of sexually offensive language, jokes, and the open display of pornography. These cases are often constructive discharge cases involving allegations that the working environment became so intolerable that the plaintiffs were forced to quit their jobs.[138]

When the plaintiff's allegations do not include coerced sexual intercourse or other unequivocably serious abusive behavior, the courts are called upon to decide the interrelated questions of whether the conduct complained of is sufficiently serious to warrant judicial intervention, and whether the target of the conduct should be denied recovery because of

136. Two cases prior to *Vinson* seem to have applied a more restrictive standard for the discovery and admission of evidence bearing on the sexual history of a sexual harassment victim. Priest v. Rotary, 32 Fair Empl. Prac. Cas. (BNA) 1064 (N.D. Cal. 1983); Dep't of Fair Empl. & Housing v. Fresno Hilton Hotel, No. FEP80-81C7-0514se, Precedential Decision No. 84-03 (1984) (decision of Cal. Fair Empl. and Hous. Comm'n), *analyzed in* Krieger & Fox, *supra* note 111, at 119-28. Exclusion of sexual history evidence was justified by analogy to FED. R. EVID. 412, the rape shield law limiting admission of the rape victim's sexual history. *Priest,* 32 Fair Empl. Prac. Cas. (BNA) at 1069. The decisions also reflect the view that a woman's consensual sexual conduct with others has no factual bearing on her response to the harasser's conduct. Krieger & Fox, *supra* note 111, at 123.

137. For a thorough discussion of the cases and a proposal to adopt a victim oriented overt consent standard, see Note, *Perceptions of Harm: The Consent Defense in Sexual Harassment Cases,* 71 IOWA L. REV. 1109 (1986).

138. *See, e.g.,* Henson v. City of Dundee, 682 F.2d 897, 907 (11th Cir. 1982); Gan v. Kepro Circuit Systems, 28 Fair Empl. Prac. Cas. (BNA) 639 (E.D. Mo. 1982).

her own attitudes or actions.[139] The courts have chosen to apply an objective standard to determine whether the challenged conduct is serious enough to be regarded as actionable.[140] Some courts have acknowledged the importance of perspective and have embraced a victim oriented objective approach, in which the severity of the conduct is gauged from the perspective of the reasonable victim—that is, the average female employee.[141]

Even under such a victim oriented standard behavior that is customary may be viewed as tolerable, regardless of whether the women employees have had sufficient opportunity to affect the customary working atmosphere.[142] For example, a court in one case[143] tolerated the

139. Courts do not always distinguish these two issues. The first issue goes to whether the harassment results in a cognizable employment consequence, that is, the creation of an offensive working environment. The second issue involves the existence of harassment, because welcomed conduct is by definition non-harassing. The leading case prior to *Vinson* treated these as distinct issues and indicated that a subjective victim oriented standard may be appropriate to determine "welcomeness," even if the question of sufficient pervasiveness is determined by an objective standard that is less obviously victim oriented. *Henson*, 682 F.2d at 903-04. Thus, the *Henson* court formulated the welcomeness issue as whether the conduct was "unwelcome in the sense that the employee did not solicit or incite it, and in the sense that *the employee regarded* the conduct as undesirable or offensive." *Id.* at 903 (emphasis added). Its formulation of the pervasiveness issue was more objectively phrased: "[w]hether sexual harassment at the workplace is sufficiently severe and persistent to affect seriously the psychologieal well being of employees is a question to be determined with regard to the totality of the circumstances." *Id.* at 904.

140. *See, e.g.*, Scott v. Sears, Roebuck & Co., 605 F. Supp. 1047 (N.D. Ill. 1985), *aff'd*, 798 F.2d 210 (7th Cir. 1986); Jennings v. D.H.L. Airlines, 34 Fair Empl. Prac. Cas. (BNA) 1423, 1425 (N.D. Ill. 1984); Sand v. Johnson Co., 33 Fair Empl. Prac. Cas. (BNA) 716, 720 (E.D. Mich. 1982). If the subjective response of the target is not determinative, presumably evidence of the target's psychological state should not be routinely admissible. *Jennings*, 34 Fair Empl. Prac. Cas. (BNA) at 1425. However, despite endorsement of an objective standard, one court relied on psychiatric testimony to conclude that the plaintiff had "an ambivalent attitude toward relationships with men and because of her particular personality had a tendency to exaggerate male conduct towards her." *Sand*, 33 Fair. Empl. Prac. Cas. (BNA) at 725.

141. Rabidue v. Osceola Ref. Co., 584 F. Supp. 419, 433 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 1983 (1987); EEOC Decisions, 84-1, 33 Fair Empl. Prac. Cas. (BNA) 1887, 1892 (Nov. 28, 1983).

142. *See, e.g.*, *Scott*, 605 F. Supp. at 1051 (men were a "close-knit" group); Ukarish v. Magnesium Elektron, 31 Fair Empl. Prac. Cas. (BNA) 1315, 1319 (D.N.J. 1983) (distasteful language pervaded work atmosphere before plaintiff became an employee); *EEOC Decisions*, 84-1, 33 Fair Empl. Prac. Cas. (BNA) at 1889 (commonplace to engage in sexual jokes and pass around "dirty" materials); *Gan*, 28 Fair Empl. Prac. Cas. (BNA) at 640 (work environment "permeated by an extensive amount of lewd and vulgar conversation and conduct"). *Ukarish* and *Gan* are analyzed in Note, *supra* note 137, at 1132-34.

143. *Rabidue*, 584 F. Supp. at 433. On appeal, the Sixth Circuit declined to adopt the objective reasonable victim approach and instead applied the familiar "reasonable person" perspective. Rabidue v. Osceola Ref. Co. 805 F.2d 611, 620 (6th Cir. 1986). The majority agreed with the trial court that sexually explicit posters should not offend reasonable persons, given the pervasiveness of pornography in our society. *Id.* at 622. Dissenting Judge Keith contended that "reasonable

open display of pornography by co-workers, reasoning that the average American woman should not be offended by depictions of explicit sex. When the victim's perspective is applied in this objectified form, there is always risk that the judge's view of the reasonable woman may reflect male bias. The victim perspective may not encourage judges to treat women as moral agents capable of assessing the offensive quality of behavior when judges are asked to search for the opinion of the hypothetical reasonable victim.

Moreover, even in cases where the working environment is regarded as abusive from an objective standpoint, evidence that the plaintiff's actions contributed to the sexually offensive atmosphere is likely to disqualify the plaintiff.[144] For example, a woman who uses profanity may not be given a right to complain about a sexually offensive environment characterized by the use of profane language. In one case, the court discounted an entry in the plaintiff's diary indicating that she was offended by her co-worker's sexually abusive behavior towards her. Because the plaintiff herself had behaved abusively on occasion, she was deemed to have "welcomed" similar behavior.[145] This "clean hands" approach means that a plaintiff who belatedly realizes that she cannot safely behave like "one of the boys"[146] is likely to have no legal recourse for subsequent harassment.

By uncritically equating even limited participation with welcomeness, the courts fail to appreciate that some women may feel pressured to

---

women" would not "condone the pervasive degradation and exploitation of female sexuality perpetuated in American culture." *Id.* at 627 (Keith, J. dissenting). Keith's view was followed in Barbetta v. Chemlawn Serv. Corp., 669 F. Supp. 569 (W.D.N.Y. 1987).

144. *See, e.g.*, Loftin-Boggs v. City of Meridian, 41 Fair Empl. Prac. Cas. (BNA) 532, 533 (S.D. Miss. 1986), *aff'd*, 824 F.2d 971 (5th Cir. 1987); *EEOC Decisions*, 84-1, 33 Fair Empl. Prac. Cas. (BNA) at 1888; *Ukarish*, 31 Fair. Empl. Prac. Cas. (BNA) at 1318-19; *Gan*, 28 Fair Emp. Prac. Cas. (BNA) at 639. However, some courts have allowed recovery despite evidence of arguably offensive behavior by the plaintiff. Swentek v. U.S. Air, 44 Fair Empl. Prac. Cas. (BNA) 1808, 1812 (4th Cir. 1987) (despite plaintiff's use of "foul language" in a consensual setting, she did not welcome harasser's lewd conduct); Katz v. Dole, 709 F.2d 251, 254 n.3 (4th Cir. 1983) (plaintiff's use of sexual nickname for a friendly co-worker did not excuse unwelcome obscenity by unfriendly co-workers); Moffett v. Gene B. Glick Co., 621 F. Supp. 244, 267-68 (N.D. Ind. 1985) (victim of racial harassment need not be "a saint in a den of sinners"). The EEOC has taken the position that, if a party participates in sexual conduct at one time in the workplace, she will be deemed to welcome otherwise harassing conduct, unless she clearly indicates to the harasser that sexual conduct is now unwelcome. In the EEOC's view, simply ceasing the participatory behavior is not enough to indicate unwelcomeness. *EEOC Decisions*, 84-1, 33 Fair Empl. Prac. Cas. (BNA) at 1890.

145. *Ukarish*, 31 Fair Empl. Prac. Cas. (BNA) at 1315, 1319, 1321.

146. *Id.* at 1319. One litigator remarked that many "smart women" in corporate life unsuccessfully try to deal with sexual harassment by making it a joke or trying to be one of the boys. Cook, *supra* note 110, at 11, col. 1-2 (comment of Judith P. Vladeck).

conform to a male dominated workplace that does not take into account the sensibilities of female employees. A no participation requirement means that recovery will be limited to women who resist and who are willing to risk escalation of harassment either by complaining or by refusing to conform to the community norm.[147] The woman who goes along rather than resists may well be told that she has suffered no legal harm.

3. *Sexual Liability Law*

In addition to threats of physical force and economic coercion, it is well recognized in other areas of the law that deception may serve to vitiate consent.[148] These limitations on the scope of legally effective consent often represent attempts to equalize power between contending individuals or groups.[149] The feminist critique of consent in laws governing sexual conduct specifically seeks to ameliorate the disparity in power between men and women. In reforming rape laws, feminists have concentrated principally on refining the legal notion of consent to ensure that physically disadvantaged women who submit to sex out of fear for their physical safety are protected. The focus of the campaign against sexual harassment has been to prohibit employers from using their superior economic strength to force sexual compliance. In a few significant tort cases,[150] female plaintiffs have recently contended that sex induced by deception should also be classified as nonconsensual and subject to

147. The "Catch-22" for some employees is that if they complain of an abusive environment, their complaints may be rejected if the judge believes that the incidents fail to rise to an intolerable level, given the "prevailing work environment." *Rabidue*, 805 F.2d at 620; Williams-Hill v. Donovan, 43 Fair Empl. Prac. Cas. (BNA) 253, 257-58 (M.D. Fla. 1987). Thus, an employee may walk a fine line between failing to be tolerant enough of the status quo and waiving her right to complain because of her prior willingness to go along with prevailing behavior.

148. *See, e.g.*, E. FARNSWORTH, CONTRACTS §§ 4-9 to 4-15, at 232-57 (1982) (cause of action for misrepresentation in contract law); W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON TORTS § 105, at 725-35 (5th ed. 1984) (tort remedies for misrepresentation).

149. The organization of labor represents the classic example of action taken to reduce economic coercion and equalize bargaining power. By requiring employers to bargain collectively rather than deal with individual employees, the law may be said to vitiate the consent of the individual worker. Justification for a labor union is premised on the view that an individual employee is usually powerless in dealing with the employer and the employee's bargaining power can only be increased by substituting collective strength for individual weakness. A. COX, D. BOK & R. GORMAN, CASES & MATERIALS ON LABOR LAW 11-12 (1981).

150. *See, e.g.*, Kathleen K. v. Robert B., 150 Cal. App. 3d 992, 198 Cal. Rptr. 273 (1984) (cause of action for transmission of herpes); Barbara A. v. John G., 145 Cal. App. 3d 369, 193 Cal. Rptr. 422 (1983) (cause of action for damages due to ectopic pregnancy); S.A. v. K.G.V., 708 S.W.2d 651 (MO. 1986) (herpes); Maharam v. Maharam, 123 A.D.2d 165, 510 N.Y.S.2d 104 (1986) (herpes); Alice D. v. William M., 113 Misc.2d 940, 450 N.Y.S.2d 350 (1982) (cause of action for costs of abortion due to negligent misrepresentation of sterility).

legal disapproval. The concern here is to assure that a party to a sexual encounter is not put at a disadvantage by misinformation designed to induce acquiescence.[151]

The new genre of sexual liability cases has involved claims of injury resulting from sexually transmitted diseases[152] or physical complications stemming from pregnancy.[153] The gravamen of these complaints is that the defendant either lied about or failed to disclose critical facts about his physical condition, consequently physically harming the plaintiff. For example, a defendant may be held liable if he fraudulently tells the plaintiff that he is sterile or free from disease.[154] Plaintiffs in these cases allege that, absent such deception, they would not have agreed to sexual intercourse with the defendant, and therefore their apparent consent should not bar recovery in a tort action.[155]

So far, a few courts have permitted a cause of action if the harm alleged is physical, such as herpes or tubal pregnancy.[156] In one case where a male plaintiff alleged only economic and psychological harm arising from unwanted fatherhood, the court refused to recognize a cause of action.[157] Such a limitation of recoveries to cases of physical harm

151. Sisela Bok explains that deceit, like violence, can coerce people into acting against their will. Deceit, however, "controls more subtly, for it works on belief as well as action." S. BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 18 (1978). Bok argues that deceit affects the distribution of power by augmenting the power of the liar and diminishing the power of the deceived. *Id.* at 19.

152. For a discussion of unreported cases involving claims for transmission of disease, see Note, *Liability in Tort for the Sexual Transmission of Disease: Genital Herpes and the Law*, 70 CORNELL L. REV. 101 (1984).

153. *See, e.g, Barbara A.*, 145 Cal. App. 3d at 369, 193 Cal. Rptr. at 422.

154. In addition to intentional tort claims for fraudulent misrepresentation or concealment, a claim for negligence may be asserted based on a failure to exercise reasonable care to ascertain and disclose critical facts about defendant's physical condition. *See, e.g., Kathleen K.*, 150 Cal. App. 3d at 994, 198 Cal. Rptr. at 274 (seeking damages under negligence, battery, intentional infliction of mental distress, and fraud); *Alice D.*, 113 Misc. 2d at 946, 450 N.Y.S.2d at 355 (negligence claim sustained).

155. The same deception, however, might not give rise to criminal liability for rape or sexual abuse. For a discussion of the effect of fraudulent inducement in the criminal context, see *infra* notes 222-26. The deceiving party might be guilty of a misdemeanor under a specific criminal statute prohibiting intercourse by persons who are aware that they have an infectious venereal disease. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-631 (1983); CAL. HEALTH & SAFETY CODE § 3198 (West 1979); N.Y. PUB. HEALTH LAW § 2307 (McKinney 1985). A few states make it a crime to knowingly expose another person to the HIV (AIDS) virus. *See* FLA. STAT. § 384.24 (1986); IDAHO CODE § 39-601 (1987).

156. *Kathleen K.*, 150 Cal. App. 3d at 996, 198 Cal. Rptr. at 276; *Barbara A.*, 145 Cal. App. 3d at 381, 193 Cal. Rptr. at 430-31. Each case held that a cause of action existed against a sexual partner who by intentional tortious conduct causes physical injury to the other.

157. Stephen K. v. Roni L., 105 Cal. App. 3d 640, 164 Cal. Rptr. 618 (1980) (dismissing father's wrongful birth cross complaint in paternity action); *accord* Fashe v. Bonanno 357 N.W.2d 860

means that women are more apt to be plaintiffs because of the potential physical hazards they face from pregnancy and abortion.[158] It is also possible that courts may require plaintiffs in sexual liability suits to prove that they had good reason to rely on defendants' representations,[159] and cannot be faulted for not taking additional precautions against disease or pregnancy. If such a justifiable reliance requirement is imposed, the sexual liability suit might be further limited to those cases in which vulnerable women have been induced to have sex with men who have abused a position of trust, such as psychiatrists and divorce lawyers.[160]

At this early stage in the development of sexual liability law, plaintiffs have encountered two initial doctrinal obstacles. First, defendants have claimed that the constitutional right of privacy bars the recognition of a cause of action for deception in intimate affairs. Second, defendants have sought immunity under anti-heart balm legislation abolishing the tort action of seduction.

(Mich. App. 1984); Pamela P. v. Frank S., 88 A.D.2d 865, 451 N.Y.S.2d 766 (1982); Hughes v. Hughes, 455 A.2d 623 (Pa. 1983); Linda D. v. Fritz C., 38 Wash. App. 288, 687 P.2d 223 (1984); *see also* Doe v. Doe, 136 Misc. 1015, 519 N.Y.S.2d 595 (N.Y. Super. Ct. 1987) (wife could not recover for AIDS phobia resulting from husband's concealment of extra-marital homosexual relationship).

158. *See* Spake, *Trial and Eros*, MOTHER JONES 25, 28 (July 1985) (quoting Mary Dunlap, plaintiff's attorney in *Barbara A.*, 145 Cal. App. 3d at 369, 193 Cal. Rptr. at 422).

159. A common justification for trusting a lover may be that the lover occupies some role in addition to that of sexual partner. In *Barbara A.*, 145 Cal. App. 3d at 383, 193 Cal. Rptr. at 432, for example, the defendant was the plaintiff's divorce lawyer. The court declared that the existence of a pre-existing confidential relationship between the parties was relevant to a determination of whether the defendant had exerted "undue influence." The existence of undue influence was relevant to the consent issue in the plaintiff's claim for battery and the issue of justifiable reliance in her claim for misrepresentation. *Id.* at 384, 193 Cal. Rptr. at 432. If the plaintiff proved that the lawyer-client relationship was dominant and that the parties did not function on an "equal basis," the burden of proof would shift to the defendant to prove that the plaintiff's consent was "informed and freely given" or that her reliance was unjustified. *Id.* In Maharam v. Maharam, 123 A.D.2d 165, 170, 510 N.Y.S.2d 104, 107 (1986), the court held that the thirty-one year marital relationship between the parties was a sufficient relationship of trust to trigger a duty of disclosure. *But cf.* Long v. Adams, 33 S.E.2d 852, 854 (Ga. App. 1985) (every sexually active adult owes a duty of disclosure of venereal disease).

160. *See* Hoopes v. Hammargren, 725 P.2d 238, 242-43 (Nev. 1986) (physician may be liable for sexually exploiting a patient by taking advantage of her "vulnerabilities"). One court has, however, allowed recovery for the costs of an abortion and attendant emotional distress even though the defendant had no pre-existing fiduciary or confidential relationship with plaintiff. Alice D. v. William M., 113 Misc. 2d 940, 450 N.Y.S.2d 350 (1982). The court, taking into consideration "the length of time the parties had known one another, the regularity with which they saw each other, the degree of intimacy between them and the seriousness to the claimant of the issue of birth control and of an unwanted pregnancy," held that the defendant had a duty to speak truthfully, *Id.* at 944, 450 N.Y.S.2d at 354. The court warned that it might have found no such duty if the sexual intercourse had resulted from a more "casual encounter." *Id.*

In rejecting the constitutional challenge to sexual liability claims, the courts have emphasized that the right of privacy is not absolute, but can be counterbalanced by other weighty personal interests, such as the interest in health.[161] For these courts, the right to privacy is more allied with individual procreative or sexual choice than with a guarantee of freedom from governmental intervention in certain private settings. The feminist critique of privacy surfaces here to warn against using the concept of privacy to legitimate sexual coercion in the private sphere by immunizing sex coerced through deception.

With respect to the applicability of anti-heart balm legislation, the prevailing view has been to characterize the new sexual liability claims as qualitatively different from old fashioned claims for seduction or breach of a promise to marry. Under this approach, anti-heart balm legislation bars only claims grounded on injury to reputation and not claims for physical harms.[162] Complementing their narrow view of the right to privacy, the courts in sexual liability cases have thus far refused to interpret the anti-heart balm legislation as broadly prohibiting judicial intervention in tort claims involving intimate relationships.

On a doctrinal level, the sexual liability suits are significant because they indicate that apparent consent to sexual intercourse will not suffice to forestall legal intervention if consent of the injured party is uninformed. Although the law is far from requiring every sexual participant to disclose all relevant information prior to intercourse, the courts may be willing to punish those persons who display the most blatant disregard for the physical well-being of their sexual partners.

Beyond doctrine, the sexual liability suits are significant because they dramatically illustrate that some sexually active women are now insisting that they deserve legal protection, even if their sexual encounters take place outside of marriage and in the context of casual relationships. Perhaps the most significant aspect of the new sexual liability law is that it is only in the last few years that women have been bold enough to assert that they have a legal right to expect honesty from men in sexual relationships.[163]

161. *See* Kathleen K. v. Robert B., 150 Cal. App. 3d 992, 996, 198 Cal. Rptr. 273, 276 (1984); *Barbara A.*, 145 Cal. App. 3d at 381, 193 Cal. Rptr. at 430-31. *But see Stephen K.*, 105 Cal. App. 3d at 644-45, 164 Cal. Rptr. at 620-21 (right to privacy prevents courts from supervising "promises made between two consenting adults").

162. *See Kathleen K.*, 150 Cal. App. 3d at 997, 198 Cal. Rptr. at 276; *Barbara A.*, 145 Cal. App. 3d at 376-77, 193 Cal. Rptr. at 427-28.

163. In the past, unmarried women who sued for deception in connection with sexual encounters were apt to be barred from recovering because of the illegality of their nonmarital sexual

II. TRANSFORMING THE CONCEPT OF CONSENT IN THE EGALITARIAN MODE: THE TRIO OF UNACCEPTABLE INDUCEMENTS

The common thread that runs through the various legal developments just described is dissatisfaction with a narrow, behavior oriented definition of consent that equates consent with nonresistance. The feminist objection is that such a definition of consent is oblivious to the greater social and physical power of men. In the face of this inequality, women may not resist unfair inducements to male sexual initiatives, yet at the same time may not welcome those initiatives.

The feminist critique has prompted a refurbishment, but not an abandonment, of the concept of consent in the law of sex. Under the refurbished version of consent, consent is not considered freely given if secured through physical force, economic pressure, or deception. Consent secured by these inducements is no longer routinely treated as true consent—even if the woman conceivably could have avoided the sexual encounter by resisting.

In the view of some feminists, legal reforms that only refurbish, but do not displace, the concept of consent as a central feature of the law of sex may not be deep enough to effect substantial change.[164] This radical critique of consent asserts that the social meaning of "consent" is inherently tied to a system of unequal sexual relationships in which the man actively initiates the sexual encounter and the woman is relegated to the more passive role of responding to initiatives.[165] In the abstract, consent

---

activity. *See* Note, *supra* note 152, at 135-37. Only wives or women who were induced by fraudulent promises to marry were entitled to complain of injuries stemming from sexual intercourse. *See supra* text accompanying notes 54-57. Although the doctrine of interspousal immunity operated as a ban on tort liability, the willful communication of venereal disease was grounds for divorce, Fardcn v. Farden, 179 A. 317 (N.J. 1935), and could be considered when distributing property of the marital estate. Schultz v. Christopher, 118 P. 629 (Wash. 1911).

164. Andrienne Rich, for example, has argued that women will not be freed from male oppression until they are free to reject heterosexuality. In her view, the common belief that women are inevitably drawn to men means that women have little real choice in sexual relationships and "in the absence of choice, women will remain dependent upon the chance or luck of particular relationships and will have no collective power to determine the meaning and place of sexuality in their lives." Rich, *Compulsory Heterosexuality and the Lesbian Existence*, 5 SIGNS 631, 659 (1980).

165. An eloquent statement of this position is the concluding passage in Pateman, *supra* note 87, at 164 (1980):

> The conventional use of "consent" helps reinforce the beliefs about the "natural" characters of the sexes and the sexual double standard discussed in this article. Consent must always be given *to* something; in the relationship between the sexes, it is always women who are held to consent to men. The "naturally" superior, active, and sexually aggressive male makes an initiative, or offers a contract, to which a "naturally" subordinate, passive woman "consents." An egalitarian sexual relationship cannot rest on this basis; it cannot

may be gender neutral. But as long as women do not in fact have the opportunity to initiate sexual relationships on equal terms with men, the concept of consent continues to suggest that women are appropriately the passive parties in sexual relationships.

This argument stresses the importance of rhetoric to our thinking and has considerable force. Thus, to avoid any connotation of inequality in sexual decision making, I will use the term "mutual," rather than "consensual" to denote the touchstone of acceptable sexual encounters under the refurbished concept of consent that I see emerging in the law.[166]

Nonetheless, I am not seriously alarmed by the durability of consent rhetoric in the law. Whatever the law's language, its utility to women is likely to depend heavily on the presence of institutions responsive to women that exert pressure on the law. Rape crisis centers, shelters for battered women, and sensitivity training programs to counteract sexual harassment are some examples of female dominated institutions that were created to assure that changes in formal law of consent actually operate to benefit women.

The following discussion analyzes each of the three inducements to sex that are becoming increasingly unacceptable, noting both the egalitarian elements in the law and the remaining areas untouched by the feminist critique. This trio of unacceptable inducements may not seem exceptional to anyone with a passing acquaintance with twentieth century contract law.[167] They are novel, however, in their application to the sexual encounter, a relationship the law seldom treats as contractual.

---

be grounded in "consent." Perhaps the most telling aspect of the problem of women and consent is that we lack a language through which to help constitute a form of personal life in which two equals freely agree to create a lasting association together.

Expanding on the Pateman position, Catharine MacKinnon has argued that the failure to expose the "presuppositions" behind the conventional use of the term "consent" is "integral to gender inequality." MacKinnon, *supra* note 4, at 655. She sees consent as operating as "women's form of control" in sexual encounters with men. The fundamental inadequacy of this form of control or power is that the "model does not envision a situation the woman controls being placed in, or choices she frames, yet the consequences are attributable to her as if the sexes began at arm's length, on equal terrain, as in the contract fiction." *Id.*

166. Pateman suggests that new language is needed to characterize egalitarian sexual relationships "in which free and equal individuals can mutually commit themselves or assume obligations." Pateman, *supra* note 87, at 164. MacKinnon argues that the view that a woman's consent is an equal form of control to the custom of male initiative is incorrect and does not reflect genuine "mutual" control over intercourse. MacKinnon, *supra* note 4, at 655.

167. A contract compelled by physical force is void and those compelled by economic duress or misrepresentation are voidable. E. FARNSWORTH, *supra* note 148, at §§ 4.15-4.17 (1982).

A. PHYSICAL FORCE

The use or threat of physical force is universally condemned as an inducement to sex. If the recent drive to abolish the marital rape exemption is successful,[168] the law on the books will criminalize virtually all forms of nonconsensual intercourse effected by physical force. In addition to criminal penalties, physically forced sex may now trigger civil liability as well. An employee who is compelled to have sex with her supervisor because he exerts physical force is likely to have a good claim for sexual harassment against her employer,[169] and certainly has a tort action against the offending supervisor.[170] Moreover, rape victims now have a better chance of recovering damages in third party actions against landlords,[171] educational institutions,[172] prisons,[173] and other defendants who could have taken precautions to avoid the crime.[174]

Despite the growing realization that physical force should not be used to induce submission, the formal legal rules governing rape are still not entirely free from a bias that accepts physical force as legitimate in some contexts. In addition to the continued vitality of the marital rape exemption in some jurisdictions, the intractably sexist nature of the legal concept of consent is most evident in cases involving the victim's revocation of consent. In three recent cases,[175] courts have held that a victim may not revoke consent if she initially consented to intercourse and penetration has already occurred. Two of these cases involve an allegation of

168. *See supra* notes 95-99 and accompanying text.

169. *See supra* notes 130-31 and accompanying text.

170. For a general discussion of tort actions against rapists, see LeGrand & Leonard, *Civil Suits for Sexual Assault: Compensating Rape Victims*, 8 GOLDEN GATE U.L. REV. 479, 479-95 (1979).

171. *See* Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970) (landlord held liable to tenant raped in common area); O'Hara v. Western Seven Trees Corp., 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977) (landlord liability for failure to warn that other tenants had been raped and failure to provide adequate security).

172. *See* Duarte v. State, 88 Cal. App. 3d 473, 151 Cal. Rptr. 727 (1979) (cause of action against university landlord for rape and death of student).

173. *See* Withers v. Levine, 615 F.2d 158 (4th Cir. 1980) (42 U.S.C. § 1983 held to require officials to protect male inmates against sexual assault).

174. *See* Kenny v. Southeastern Penn. Transp. Auth., 581 F.2d 351 (3d Cir. 1978) (mass transit carrier held liable for inadequate lighting and oversight at train station); Lowers v. City of Streator, 627 F. Supp. 244 (N.D. Ill. 1985) (successful civil rights action against city and police for failure to prevent repeat rape). For general discussions of third party liability cases, see Ballou, *Recourse for Rape Victims: Third Party Liability*, 4 HARV. WOMEN'S L.J. 105 (1981); LeGrand & Leonard, *supra* note 170, at 495-513.

175. People v. Vela, 172 Cal. App. 3d 237, 218 Cal. Rptr. 161 (1985); Battle v. State, 287 Md. 675, 414 A.2d 1266 (1980); State v. Way, 297 N.C. 293, 254 S.E.2d 760 (1979). For a contrary view holding that the crime of rape is committed whenever the defendant continues intercourse after realizing that his partner has withdrawn her consent, see Kaitamaki v. Queen, 1 A.C. 147 (1985) (New Zealand).

rape by an acquaintance of the victim and, in each of the cases, the victim voluntarily accompanied the defendant to a bedroom.[176] The victims testified that they had never given their consent to intercourse and that they were physically brutalized and raped.[177]

The issue of revocation of consent surfaced in each of these three cases during jury deliberations. The jurors asked for clarification of the legal notion of consent. In particular, the jury inquired whether consent could be withdrawn by the victim.[178] In each case, the convictions were overturned because the trial judge did not clearly charge that consent could be withdrawn only prior to penetration.

The rule restricting revocation of consent after penetration is unabashedly male oriented. The rule equates the harm of rape with penetration alone and ignores the loss of sexual freedom that occurs when a woman is forced to continue a sexual encounter against her will. The revocation rule seems to analogize rape to theft of property in which, once possession has been lawfully taken, it is too late to quarrel with the terms of the transaction. Access to a woman's vagina (euphemistically referred to as her "womanhood")[179] is viewed as a valuable thing, separate and apart from the subjective desires and wishes of the woman herself.

This sexist view of rape as a property violation underlying the rule on revocation does not mesh with the contemporary view of rape, which emphasizes the injury to the person and the feelings of the victim.[180] As many feminist critics of traditional rape laws have observed, the emphasis on penetration is male oriented in that the sexual encounter is defined by the male's actions—each relevant contact starts with penetration and

176. *Battle*, 287 Md. at 677, 414 A.2d at 1267; *Way*, 297 N.C. at 294, 254 S.E.2d at 760. The recitation of the facts in the *Vela* case discloses only the ages of the victim (14) and defendant (19), that the incident occurred in the evening, and that the prosecution's evidence was "more than sufficient" to support a guilty verdict of forcible rape. *Vela*, 172 Cal. App. 3d 239-40, 218 Cal. Rptr. 162.

177. *Battle*, 287 Md. at 677, 414 A.2d at 1267 (allegations that victim was beaten and threatened with a screwdriver); *Way*, 297 N.C. at 295, 254 S.Ed.2d at 760-61 (victim's bruises support allegations of slapping, forced oral, anal, and vaginal intercourse, and threat of beatings).

178. *Vela*, 172 Cal. App. 3d at 239, 218 Cal. Rptr. at 162; *Battle*, 287 Md. at 678, 414 A.2d at 1268; *Way*, 297 N.C. at 296, 254 S.E.2d at 761.

179. *Vela*, 172 Cal. App. 3d at 243, 218 Cal. Rptr. at 165.

180. The court in *Vela* apparently recognized this tension and struggled unsuccessfully to reconcile the rule on revocation with the contemporary view. The court claimed that the sense of outrage of a woman who initially consented to intercourse could "hardly be of the same magnitude as that resulting from an initial nonconsensual violation of her womanhood." *Id.* at 243, 218 Cal. Rptr. at 165. The court cited no support for this empirical observation and merely assumed that penetration was an event of overriding significance, from a psychological as well as physical perspective.

ends with withdrawal.[181] By refusing to give women the authority to stop unwanted intercourse, the revocation rule also reinforces the idea that, beyond a certain point in a sexual encounter, men are powerless to stop.[182] The revocation rule places the blame on the woman who failed to exercise control sooner, and thereby diminishes sexual freedom for women in comparison to men. Albeit in a milder form than earlier evidentiary doctrines, the rule on revocation also communicates the message that sexually active women do not deserve plenary protection against nonconsensual sexual activity.[183]

The most important issues regarding physically forced sex, however, are not issues of formal legal doctrine but instead concern the administration of the law. A de facto resistance requirement will still exist so long as police and prosecutors are reluctant to prosecute cases lacking tangible evidence of physical abuse.[184] More importantly, when force is not actually applied but only threatened, there may be disagreement as to what types of behavior constitute an implicit threat of physical force. Some cases demand a special sensitivity to the particular predicament of the victim. For example, a teenage girl who is instructed by her uncle to engage in sexual acts may submit out of an amorphous fear of violence that stems as much from her uncle's superior status as from his precise words or actions.[185] In such a case, the pressure exerted may be seen as arising either from an implicit threat of physical force or from a kind of deception that tricks the teenager into believing that her uncle has a legal or moral right to demand her compliance.

Finally, the laws against physically forced sex will not be effective unless victims also regard such force as unjustified and illegal. Recent

181. *See* S. BROWNMILLER, *supra* note 94, at 422; R. TONG, *supra* note 4, at 92-93. The feminist criticism of the vaginal penetration requirement has led to a redefinition of rape in some states to include sexual assaults with an object, as well as forced oral and anal intercourse. Sexual contact offenses criminalizing offensive touchings other than penetration were also enacted as part of the reform movement. Bienen, *supra* note 94, at 175, 178.

182. For an argument that judicial acceptance of the male sexual impulse as irresistible has harmed women in a variety of contexts, see Aiken, *Differentiating Sex from* Sex: *The Male Irresistible Impulse*, 12 N.Y.U. REV. L. & SOC. CHANGE 357 (1984).

183. *See supra* text accompanying notes 107-08.

184. One study found that cases involving sexual assault need more "real evidence" to be brought to trial than other types of cases involving other violence or property crimes. Myers & LaFree, *Sexual Assault and its Prosecution: A Comparison with Other Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1282 (1982). In addition to official reticence to pursue rape complaints, many victims may fail to report rapes because they believe conviction is unlikely. One study found that rape victims tend only to report the crime when the probability of conviction is high. This did not hold true for victims of nonsexual assault. Lizotte, *The Uniqueness of Rape: Reporting Assaultive Violence*, 31 CRIME & DELINQ. 169, 185 (1985).

185. *See* State v. Clark, 87 Wis. 2d 804, 275 N.W.2d 715 (1979).

studies indicate that both men and women still tolerate some kinds of physically forced sex, and continue to place blame on the victim rather than to assign sole responsibility to the aggressor.[186] For example, in a recent study of attitudes on sexual aggression,[187] adolescents were presented a series of vignettes depicting a sexual encounter between two teenagers. In each of the vignettes, the story ended with the female submitting to intercourse, even though she did not want to do so.[188] Only if the male in the vignette used actual physical force were the respondents certain that the depicted incident shonld be labelled "rape." If the aggressor only threatened physical force, many were unsure whether the encounter was rape, particularly if they were told that the couple had a dating relationship.[189] The study also revealed that a significant minority of the respondents placed blame for the rape on the nonconsenting girl, even when the aggressor used actual physical force.[190]

In summary, the legal doctrine governing sexual encounters generally regards the use of physical force or threats of physical force as unacceptable. Although there are still instances in which the law formally legitimizes sex effected through physical force, these are exceptions to the general prohibition. In both criminal and civil settings, women have a theoretical right to seek legal relief from physically forced sex. In practice, however, both the parties themselves and the actors in the legal system may tolerate forced encounters that are technically illegal. The relationship of the parties and the severity of the physical force exerted are still important variables in determining whether the conduct will be sanctioned.

186. S. ESTRICH, REAL RAPE 13-14 (1987) (forced sex is often not viewed as criminal unless it occurs outside dating context or is especially violent); Shotland & Goodstein, *Just Because She Doesn't Want To Doesn't Mean It's Rape: An Experimentally Based Causal Model of the Perception of Rape in a Dating Situation*, 46 SOC. PSYCHOLOGY Q. 220, 229 (1983) (male use of force more acceptable if woman does not protest kissing or sexual activity other than intercourse). *But cf.* Dull & Giacopassi, *Democratic Correlates of Sexual and Dating Attitudes; A Study of Date Rape*, 14 CRIM. JUST. & BEHAV. 175, 188 (1987) (males are significantly more likely to hold attitudes that condone aggressive sexual behavior).

187. Goodchilds & Zellman, *Sexual Signaling and Sexual Aggression in Adolescent Relationships*, in PORNOGRAPHY AND SEXUAL AGGRESSION *supra* note 33, at 233-43.

188. Each story ended with "[t]hough the girl does not want to, they have sexual intercourse." *Id.* at 239.

189. *Id.* at 241.

190. On average the female was assigned 20% of the blame even in the "worst-case" vignette. *Id.* at 240.

B. ECONOMIC PRESSURE

The objection to economic pressure as an inducement to sex is neither as clear nor as pervasive in the law as the condemnation of physical force. Economic pressure is unlawful in some contexts but lawful in others. When the pressure is regarded as unlawful, it is labeled coercion; when the pressure is lawful, it is likely to be called a bargain.[191] Moreover, even coercive conduct that may not constitute a crime, may nevertheless subject the offender to a suit for damages or to some other noncriminal sanction, such as dismissal from employment.[192]

Despite this complex pattern, it is probably accurate to declare that a man who tries to "buy" sex from an otherwise unwilling woman will most often violate some formal legal rule. As discussed earlier, the prohibition against economically coerced sex figures most prominently in sexual harassment suits. The normative theory underlying sexual harassment suits is that neither job benefits nor job detriments should be conditioned on sex. Even the female applicant who reluctantly agrees to have sex with the personnel director in order to get the job probably has a good sexual harassment claim. In the employment context, technical consent by a woman who is put to such an unfair choice is not regarded as effective consent.[193] It does not matter that her submission also produced a corresponding benefit.[194] The law is willing to find sexual harassment from the existence of the improper inducement alone, because

---

191. The Model Penal Code characterizes the distinction between "coercion" and "bargain" as going to the "essential character of the threat." Coercion is described as overwhelming the will of the victim, while a bargain is viewed as an offer of "an unattractive choice to avoid some unwanted alternative." The comments recognize that it is "a task of surpassing subtlety" to differentiate the two in borderline cases. MODEL PENAL CODE § 213.1 commentary at 314.

192. *See, e.g.*, Phillips v. Plaquemines Parish Sch. Bd., 405 So. 2d 53 (La. Ct. App. 1985) (principal dismissed for sexually harassing teacher and job applicant); Downie v. Ind. Sch. Dist., 367 N.W.2d 913 (Minn. Ct. App. 1985) (guidance counselor dismissed for harassing staff and students).

193. The EEOC Guidelines prohibit unwelcome sexual advances whenever "submission to . . . such conduct by an individual is used as the basis for employment decisions affecting such individuals." Guidelines on Sexual Harassment 29 C.F.R. § 1604.11(a)(2) (1982) (discussed *supra* at notes 123-27 and accompanying text).

194. In the rare case where the harassed woman secures a job benefit (e.g., a promotion) as a result of her submission, it may be necessary to ask whether the woman was otherwise qualified for the position. Catharine MacKinnon, for example, draws a distinction between qualified women who must comply and nonqualified women who comply. She argues that the compliant woman should recover if sex was required "in addition to all the job-related standards." C. MACKINNON, *supra* note 4, at 196. If, however, sex is required *in lieu* of meeting the standards, MacKinnon is less willing to permit a harassment claim. *Id.* at 196-97. If harassment is defined as unwelcome sexual advances, however, it is possible that even a nonqualified woman who secures a promotion is also a victim of harassment. The promoted woman may reasonably believe that if she does not accept the promotion (and the sex), there will be retaliation at some future date, beyond simply the loss of the

the personnel director abused his position to secure sex. Even if the applicant's choice to submit made sense given her own personal predicament, her acquiescence does not override the fact that the employment decision was unlawfully tainted by an impermissible consideration.

The presence of economic pressure outside the employment relationship, however, does not always vitiate consent. In the law of rape, for example, an important unanswered doctrinal question is whether submission effected by economic coercion constitutes legally effective consent. There are no reported cases of criminal prosecutions for sexual assault in which the compulsion used was of an economic nature. Moreover, in most jurisdictions, the paradigm case of sexual harassment in which the supervisor forces the employee to have sex with him to avoid dismissal is probably not criminally punishable as rape or sexual assault of a serious nature.[195] These states characterize the employee's submission as consensual, unless the supervisor also threatens physical force.

There have been some initiatives to change the law of rape to encompass economically coerced sex. As of yet, however, no jurisdiction has passed a provision similar to the Swiss and Soviet criminal codes, that specifically punish persons who use their leverage as employers or supervisors to sexually exploit employees.[196] Instead, the reforms that

promotion. Her claim may be one of offensive work environment rather than *quid pro quo* harassment, however, because the adverse consequences she fears have not yet materialized.

195. Two of the most influential statutory schemes—Michigan and New York—do not appear to classify economically coerced sex as a serious sexual crime. Under the Michigan statute, the various degrees of criminal sexual conduct are defined as sexual penetration or contact accomplished by "force or coercion." MICH. COMP. LAWS ANN. § 750.520(b) (West Supp. 1987). The specific examples of "force or coercion" given are mainly limited to the use of physical force or threats of physical force. *Id.* § 750.520(b)(1)(f)(i)-(v). Because the statutory definition is expressly "not limited to" the specific examples, it is possible that economic coercion is covered. *See id.* § 750.520(b)(1)(f). But with the exception of threats of extortion, *id.* § 750.520(b)(1)(f)(iii), the statute gives no notice that coercion of a nonphysical type is contemplated. Eight states have based their statutes on the Michigan legislation. Comment, *supra* note 4, at 1541.

New York defines rape as sexual intercourse accomplished with "forcible compulsion." N.Y. PENAL LAW § 130.35(1) (McKinney 1987). "Forcible compulsion" is defined to include only the use of force, threat of force, or kidnapping. *Id.* § 130.00(8). Eight states have adopted the New York approach. Comment, *supra* note 4, at 1534.

In the ten or so states that follow the approach of the Model Penal Code, economic coercion may be criminalized as a less serious form of sexual abuse than rape. *See infra* notes 197-99 and accompanying text. The commentary to the Model Penal Code describes its approach as extending liability for "coercion by threat far beyond anything contemplated by prior law." Commentary to MODEL PENAL CODE § 213.1 commentary at 312 (1980). The general approach of the Model Penal Code is discussed in Comment, *supra* note 4, at 1529-33.

196. One comparative law writer reported that the Soviet Code punished the "coercion" of a woman "by any person on whom she is dependent materially or by reason of her employment." Donnelly, *The New Yugoslav Criminal Code*, 61 YALE L.J. 510, 527 n.119 (1952) (citing CRIMINAL CODE, R.S.F.S.R., art. 154); *see also id.* at 527-28 (citing YUGOSLAV CRIMINAL CODE art. 182

have been suggested in this country are more global in nature and attempt to outlaw all forms of unreasonable coercion, including psychological as well as economic coercion. For example, under the Model Penal Code, nonconsensual sexual intercourse resulting from coercion of a nonphysical nature may constitute the crime of gross sexual imposition, a third degree felony.[197] In determining what is prohibited coercion for this offense, the test of the Model Penal Code is whether the threat made by the defendant "would prevent resistance by the woman of ordinary resolution."[198] The commentary indicates that economic coercion is sufficient to satisfy the test and notes that if the defendant threatened to deprive the woman of a "valued" possession or caused her to lose her job, he would be guilty of the crime of gross sexual imposition.[199]

In a similar vein, legislation was introduced in Virginia in 1978 to impose criminal liability for rape if the defendant abused his position of authority to accomplish sexual intercourse.[200] Unlike the Model Penal Code's focus on the reasonable resistance of the victim, the Virginia bill attempted to define prohibited encounters by reference to the status or position of the defendant. In general terms, the Virginia bill defined

---

which made it a crime if a person through "misuse of his position procures a female person subordinated or dependent upon him to have carnal knowledge"). The Swiss Penal Code criminalized intercourse accomplished by a person's "taking advantage . . . of authority which he possesses over her by virtue of his official capacity or as employer or in a comparable relationship." MODEL PENAL CODE § 213.1 commentary at 311 n.105 (1980) (citing SWISS PENAL CODE art. 197 (Panchand 1951)).

197. MODEL PENAL CODE § 213.1(2)(a) (1980). In other respects, the Model Penal Code is not particularly reformist in its approach to sexual offenses. For example, the Code requires corroboration of a rape victim's testimony, a complaint within three months, and an instruction directing the jury to evaluate complainant's testimony "with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to the alleged sexual activities carried out in private." *Id.* § 213.6(4)-(5). One commentator describes the Code as "based upon a 1950's view that rape was a crime fantasized by pseudo-victims." Bienen, *supra* note 94, at 176. She notes, however, that the Code does incorporate some progressive features. *Id.*

198. MODEL PENAL CODE § 213.1(2)(a) (1980). The commentary noted that "[u]nlike the construct of the 'reasonable man,' the 'woman of ordinary resolution' is not a staple of the law . . . [and] lacks a history of judicial explication and accumulated refinement." *Id.* commentary at 313. The reasonable victim perspective has surfaced recently in the sexual harassment context. *See supra* note 134.

199. MODEL PENAL CODE § 213.1(2)(a) commentary at 312 (1980). The economic coercion must relate to an important interest. Threats of trivial harm are not included. An example of a threat of trivial harm is that of a policeman who persuades a woman to submit to intercourse to avoid a parking ticket. *Id.* at 313. The commentators expressed the sexist opinion that such overreaching by the police officer was only a "minor abuse of office" and that a woman in such a situation would probably be tempted to acquiesce because of the officer's "own attractiveness." *Id.* Although I doubt whether the example is a realistic one, it seems just as likely that a woman in such a situation would submit out of a misguided notion of the power and authority of the officer, rather than out of sexual attraction or desire.

200. The Virginia bill is discussed in R. TONG, *supra* note 4, at 111.

"position of authority" as "[a]ny relationship in which the actor appears to the victim to have a status which implies the right of the actor to expect or demand obedience, acquiescence or submission on the part of the victim."[201] The bill lists certain potentially abusive relationships, including those in which the defendant had apparent authority over the victim by reason of age, maturity, occupation, blood relationship, or because he had been entrusted with the care, education, or counseling of the victim.[202] Although not concerned principally with economic exploitation, the Virginia bill seems expansive enough to include at least the egregious case of sexual harassment where the victim is unusually dependent on her job.

Proposals such as these to criminalize economically coerced sex are not likely to be adopted, in part because it is difficult to draft a precise statute that captures the many unacceptable forms of economic and psychological coercion without prohibiting what many perceive as less culpable conduct. The inadequacy of the Model Penal Code illustrates this problem.

The comments to the Model Penal Code, for example, attempt to draw the line between criminal coercion and noncriminal pressure by distinguishing between a bargain and coercion.[203] The comments stress that it is not a crime for a man to induce submission from a woman as a result of a bargain, even if it is a bargain that she is in no position to refuse. The commentary to the Model Penal Code gives the example of a wealthy man who threatens to withdraw economic support from his unemployed girlfriend, unless she agrees to continue their sexual relationship.[204] The Code regards such pressure by the man as a legitimate offer of a bargain, rather than as coercion calculated to overcome the will of the girlfriend. If the man were the victim's employment supervisor, however, and threatened to have her fired if she refused to submit, the

201. *Id.*

202. *Id.* The bill provided:

> Authority or appearance of authority may be established by, but is not limited to, evidence of the relative ages, maturity, or occupations of the victim and actor; the blood or household relationship of the actor to the victim; or the actor's position of trust relative to the victim such as that involved in the support, care, comfort, discipline, custody, education or counseling of the victim.

Id. (footnote omitted).

203. MODEL PENAL CODE § 213.1 commentary at 314 (1980); *see also supra* note 195 (discussing statutory definitions of coerced sex).

204. MODEL PENAL CODE § 213.1 commentary at 313-14 (1980). The comments acknowledged that the "woman of ordinary resolution" might submit under such pressure, but nevertheless excluded such a situation from criminal liability.

supervisor would be subject to criminal liability under the Code.[205] What makes the first instance a "bargain" and the second instance "coercion" is not immediately apparent. The distinction might turn on the assumption that the girlfriend freely entered into the association with the man, knowingly exchanging sex for financial support, whereas the employee never bargained for sex as a condition of employment. Such a distinction would make it difficult to criminalize a case of sexual harassment in hiring where the person responsible for hiring made it clear that he would select only those applicants who agreed to engage in sex with him. If there were such knowledge of the sexual demands of the job, the compliant applicant might be said to have entered into a bargain. I suspect, however, that we would regard such a bargain as unduly coercive because most of us believe that sex should never be made a condition of employment.[206] The above judgment, however, only raises the equally troubling question of whether sex should ever be made a condition of material support, even outside the employment context.

It is significant that the concern for distinguishing between coercion and a bargain has stymied expansion of the law of rape, but has been of

205. *Id.* at 312. The Model Penal Code commentary on the related crime of extortion indicates that the wealthy man in the hypothetical example might also be immunized from criminal liability for extortion because the harm he threatens (*i.e.*, withdrawal of support) will benefit him economically. MODEL PENAL CODE § 223.4 commentary at 223-24 (1980). The Code draws a distinction between one "who in an economic bargaining context attempts to maximize his own advantage and one who attempts to use his position, status, knowledge, or any other unique characteristic of a situation, to his own personal advantage." *Id.* Because the wealthy man threatens to withdraw support, he may be treated differently from the supervisor who has nothing to gain personally by firing the noncompliant employee. While the commentary does not explain why this distinction should make a difference, it may be that we are more confident in characterizing an actor's behavior as an abuse of power if such behavior could not conceivably be justified by other rational considerations, such as economic gain. However, if the wealthy man's motiviation was not to lessen his own financial obligation but simply to apply economic pressure on his girlfriend, it is doubtful that the incidental economic benefit to him should make a moral difference. Under similar reasoning, a professor who refuses to write a recommendation for a sexually noncompliant student might argue that he has saved himself the effort of drafting the recommendation and thus his "threat" was not gratuitously cruel because it inured to his benefit as well.

206. Disapproval of economically coerced sex was expressed by the Eighth Circuit in holding that the dismissal of a female worker for refusing to engage in sex with her foreman constituted a wrongful discharge, actionable under the public policy exception to the "at-will" employment doctrine. Lucas v. Brown & Root, Inc., 736 F.2d 1202 (8th Cir. 1984). The court reasoned that the foreman was "in effect" asking the employee to become a prostitute. Because prostitution was unlawful under state law, the employee's refusal was characterized as tantamount to a refusal to commit a crime. *Id.* at 1205. The court noted, however, that the transaction might not be criminally punishable because the crime of prostitution requires the acceptance of a "fee," rather than the trading of an employment advantage. *Id.* While helpful to the employee's case, the analogy to prostitution is unfortunate since it tends to focus on the victim's response (*i.e.*, accepting money for sex) rather than on the defendant's threat. It suggests that the foreman's behavior might not be actionable if prostitution were decriminalized in the state.

little importance in sexual harassment law. Concepts of coercion and bargain are likely to reflect judgments involving the relative culpability of the victim and the gravity of the sanction to be imposed. The law of sexual harassment is beginning to afford women a sanctuary from economic pressure, whether labeled coercion or a proposed bargain. This sanctuary is appropriate because most women now are employed, many out of economic necessity. Moreover, even for economically secure women, jobs are increasingly important to their self image and their status in the community. Sexual harassment law recognizes that the choice of women to work, like the choice of men, is not unfettered; for most women, remaining outside the labor force is not a practical option. Given this lack of meaningful choice, there is now less of a tendency to blame the victim for being in a vulnerable position. Additionally, the sanctions for sexual harassment generally have been civil in nature and have often focused on deterrence and prevention. A man found guilty of sexual harassment may suffer serious harm, particularly if the incidents are publicized, but he is unlikely to be stigmatized to the same degree as a convicted felon.

In contrast to sexual harassment law, the law against rape applies in all contexts. Any protection against economic coercion in the law of rape thus would be more far-reaching and would cover what are often regarded as private, wholly discretionary encounters.[207] As the commentary to the Model Penal Code illustrates, there is a reluctance to criminalize many of these privitized encounters. The unwillingness to prosecute the wealthy man who threatens to cut off his girlfriend, for instance, probably stems from two implicit judgments that underlie the notion of bargain: first, that the woman is to blame for getting herself in this predicament; second, that even if the man's tactics are objectionable, his conduct is not so outrageous as to warrant a loss of liberty.[208] The tolerance of economic pressure in this context may reflect a belief that, in their personal lives, women have the freedom to choose whether to encumber their sexual relationships with material dependence. The belief is that although women may have to work, they do not have to be supported by their lovers. By so assuming, the criminal law saves itself a

207. In addition to the wealthy man hypothetical, the commentary also hypothesizes the situation of a man who threatens to "withhold an expensive present unless his girlfriend permits his advances." MODEL PENAL CODE § 213.1 commentary at 312 (1980). By giving no context to the example other than to describe the aggressive person as a "man" and the target as "his girlfriend," the Code implies a quintessentially private situation in which the parties play no role other than lovers or intimates.

208. The Model Penal Code, for example, describes threats of economic reprisals as threats of a less serious sort than threats of physical harm. *Id.*

difficult case by case inquiry into consent. The refusal to regard economically coerced sex as rape allows men to continue to use their economic superiority to gain sexual advantage, provided that they use only their own resources (not their employer's) and target only those women who show some willingness to tie sex to financial gain. From the target's standpoint, however, the economic pressure may feel the same regardless of whether it is her employer or her lover who threatens economic harm if sex is denied them.

It is interesting to compare the law's unwillingness to treat economically coerced sex as rape with the prevailing legal stance on prostitution. Prostitution is currently illegal in every state except Nevada.[209] It is unlikely, however, that there is any coherent theory supporting the criminalization of prostitution. The prostitution laws could be viewed as relics of a traditional attitude toward sex. This characterization, however, does not explain why prostitution laws have not been affected by liberal or feminist reforms. The current prohibition on prostitution may derive its principal support either from the belief that prostitution is not a truly consensual activity or from the belief that prostitution causes harm to persons other than the prostitutes themselves. If the criminalization of prostitution is justified because of the nonconsensual nature of the sex, it is hard to explain why economically coerced sex triggers criminal penalties for prostitution, but not for rape. That is, if prostitution is nonconsensual, it is presumably because a prostitute's solicitation of sex for money is not truly consensual. Not only would this judgment make the law of rape puzzling, but the characterization of prostitution as economically coerced sex would also make it unreasonable to impose criminal penalties on the prostitute herself, because she is the coerced party in the encounter.[210]

209. *See* CANADIAN REPORT, *supra* note 16, at 474. Forty-six states outlaw the act of prostitution, even if it takes place in private. Solicitation is outlawed in forty-five states, and loitering is illegal in nine states. All states outlaw pimping or pandering (arranging for prostitution or inducing someone to become a prostitute). *Id.* In contrast to the American system of suppressing prostitution, Great Britain and Canada do not proscribe private acts of prostitution. Public solicitation and other acts related to prostitution are, however, criminally punishable. *Id.* at 404, 479.

210. Whether prostitutes should be viewed as "coerced" parties in the transaction should depend on whether prostitutes are far more likely to experience work related physical abuse. One California study documented extremely high levels of victimization of street prostitutes. Silbert & Pines, *Occupational Hazards of Street Prostitutes*, 8 CRIM. JUST. & BEHAV. 395-98 (1981); *see also* D. MACNAMARA & E. SAGARIN, SEX, CRIME AND THE LAW 112-13 (1977) (prostitutes have been stigmatized, discriminated against, and considered "fair pickings" for extortion).

On the other hand, if prostitution is outlawed because of its supposed external effects—contribution to sexually transmitted disease, fostering of other crimes, the deterioration of neighborhoods, or even the decline of the moral climate of the community—criminal penalties for prostitution may be supportable. From this perspective, even if the encounter is viewed as consensual, it nevertheless might be rational to punish both the prostitute and her customer insofar as each may contribute to the asserted external harm.

Because the law has tended to target prostitutes for criminal prosecution,[211] it is not well designed to prevent the victimization of prostitutes. The external effects rationale clearly fits better with the current formal pattern of criminal penalties. However, the limited amount of empirical evidence on the external effects of prostitution does not provide a convincing case for criminalization.[212] This shaky legal foundation, coupled with the advocacy of decriminalization by important liberal organizations,[213] should encourage reform of the laws banning prostitution. Yet there has been no significant change in prostitution laws in recent years.

The failure to change prostitution laws may stem in part from disagreement about the consensual nature of prostitution itself. Many feminists believe that prostitution is generally a form of economically coerced sex. For example, a recent feminist law review writer depicted the average prostitute as a teenage runaway who later suffers psychological and physical abuse at the hands of pimps, police, and customers.[214] Studies also indicate that, as children, prostitutes are often victims of incest.[215]

---

211. Although in some jurisdictions, customers are also punishable under the prostitution laws, they are only rarely arrested. CANADIAN REPORT, *supra* note 16, at 390-91. Targeting prostitutes has been upheld as a rational attempt to concentrate on the "profiteer" rather than on the customer. People v. Superior Court, 19 Cal. 3d 338, 562 P.2d 1315, 138 Cal. Rptr. 66 (1977). One court, however, has recently ruled that such selective prosecution is systematically biased against women. Commonwealth v. Unnamed Defendant, 39 Cr. L. Rptr. 2218 (Mass. App. May 22, 1986).

212. *See, e.g.*, R. TONG, *supra* note 4, at 43-44 (disputing that prostitution is responsible for rapid spread of venereal disease or herpes or is linked to organized crime); Milman, *New Rules for the Oldest Profession: Should We Change Our Prostitution Laws?*, 3 HARV. WOMEN'S L.J. 1 (1980) (Boston study finding no strong evidence that prostitution causes robbery, other serious crimes, drug addiction, or neighborhood deterioration). It is also difficult to separate the harms of prostitution as an activity from the harms stemming from its status as an illegal activity.

213. *See, e.g.*, A. JAGGAR, *supra* note 4, at 350-51 (discussing positions of the American Civil Liberties Union and the National Organization of Women Task Force).

214. *See* Erbe, *Prostitutes: Victims of Men's Exploitation and Abuse*, 2 LAW & INEQUALITY: 609, 610-19 (1984).

215. *See* CANADIAN REPORT, *supra* note 16, at 373-74; Erbe, *supra* note 214, at 614.

The legacy of this childhood victimization may be that, as adults, prostitutes are psychologically more vulnerable to sexual exploitation by men.

Apart from concern for the treatment of prostitutes, some feminists also object to prostitution on ideological grounds.[216] They see prostitution as reinforcing the sexist view that a woman's role in a sexual encounter is to please a man and that the sexual or emotional desires of the woman are properly subordinated. In this view, the world of prostitution is an exaggerated version of the real world of sexual relationships, in which men often possess the resources to dictate the terms and nature of sexual encounters, without taking proper account of the subjective desires of their partners. This account of prostitution places it on a moral plane with rape; if a woman must be paid for sex, the sex must by definition be regarded as coerced. Although few feminists would agree that imposing criminal penalties on prostitutes is a good way to limit prostitution, this is a far cry from approval of prostitution from a moral standpoint.

Unlike the favorable reception given to feminist accounts of acquaintance rape and sexual harassment, the feminist account of prostitution as an extreme form of economically coerced sex has yet to gain widespread acceptance. Prostitution remains a difficult issue in the law of sex for three reasons.

First, we know very little about the reality of the lives of prostitutes.[217] Whether prostitutes are more often sexual slaves than liberated women is not just a matter of perception, but depends on the facts of their daily existence. If prostitutes are routinely beaten up, forced to give up most of their earnings to pimps, and likely to die young, it would be incorrect to categorize prostitution as a truly voluntary or consensual activity. However, this depressing portrait of the prostitute still competes with a far more favorable image. The competing image is that of a sexually uninhibited woman who has made a rational decision to sell sexual services, given her restricted options for other high paying work.[218]

---

216. *See, e.g.*, R. TONG, *supra* note 4, at 52-53 (descriptions of the radical feminist ideological objections to prostitution); *see also* A. JAGGAR, *supra* note 4, at 359-63.

217. For two very different, first hand accounts of prostitution see THE MAIMIE PAPERS (R. Rosen and S. Davidson eds. 1971) and L. LOVELACE, ORDEAL (1980); *see also* Millett, *Prostitution: A Quartet for Female Voices*, in WOMEN IN SEXIST SOC'Y (V. Gornick & B. Moran, eds. 1971) (taped interviews with two former prostitutes with ambivalent feelings about their lives as prostitutes).

218. Judith Walkowitz takes the position that the Victorian antivice crusade against prostitution changed both the perception and reality of prostitution. She describes the early feminist campaigns as designed to end official persecution of prostitutes. Prostitution was seen as "the end result of the artificial constraints placed on women's social and economic activity." As the campaign

Until we are able to discount the latter image as unrepresentative, there will be disagreement as to whether prostitution represents economic coercion or economic bargaining.

Second, the economic coercion present in prostitution appears to be of a different sort than that found in the paradigm sexual harassment case. Prostitutes are often subject to varying types of economic pressure. For example, pimps and other "protectors" may force prostitutes to pay them off from their earnings. This kind of economic exploitation is on an individual level and is readily accepted as coercion, primarily because we assume that pimps stand ready to back up their demand with physical force. But when the focus is directly on the sexual encounter between the customer and the prostitute herself, there likely exists no such individualized coercion. Instead, the economic pressure inherent in the transaction derives from social forces, rather than from any choice put to the prostitute by her individual customers. It is the prostitute's social predicament rather than the actions of the particular customer that may be characterized as coercive. Pressure at such a macro level is far less likely to be viewed as coercion in our individualistic legal system. Particularly in sexual matters, the law tends to regard an act as voluntary so long as it is not constrained by the will of another identifiable individual.[219]

Third, it is difficult to classify a sexual encounter as coerced when the party who initiates the encounter is also the party subjected to economic pressure. In the search for a refurbished concept of consent that takes into account the needs and desires of women, it is risky to ignore the fact that it is the woman herself who proposed the encounter. Ordinarily we presume that persons who initiate sexual encounters consent to those transactions.[220] Until we have a clearer definition of what constitutes exploitation in sexual encounters, it is difficult to override such presumption in any but the most extreme cases.

For these three reasons, prostitution is a particularly difficult problem for feminists trying to create an egalitarian model of sexual conduct;

---

shifted to a more right-wing antivice movement, however, prostitutes were more likely to be viewed as sexual slaves. At the same time, the legal repression forced prostitutes underground, severing their connection with working class neighborhoods and forcing them to be more dependent on pimps for protection and emotional support. Walkowitz, *supra* note 53, at 147-50.

219. *See* R. TONG, *supra* note 4, at 60 (contrasting individual and institutional coercion affecting prostitutes).

220. Compare the distinction between participation and tolerance in the sexual harassment context discussed at *supra* text accompanying notes 144-47. A caveat applicable in both the sexual harassment and prostitution contexts is that if the initiator has little or no influence in setting the terms of the exchange or the limits of participation, it may be hazardous to equate even overt behavior with actual desire.

it poses the basic question of whether sex traded for money must always be viewed as exploitation.

In summary, it is impossible to arrange the rules governing sexual harassment, rape, and prostitution into a coherent position on the legal status of economically coerced sex. Nor is there a definition of coercion that is consistently applied in each context. What can be said, however, is that the law of sexual harassment has highlighted the issue of economic coercion and much effort has been directed toward identifying those sexual encounters in which the use of economic pressure is most objectionable. Equally important, there seems to be little current sentiment in active support of the practice of trading sex for economic gain. Although the law has not been willing to declare that economically coerced sex is rape, this probably stems more from the severe nature of the criminal sanction than from approval or even tolerance of sexual encounters where consent is secured through economic pressure.

Indeed, the continued criticism of prostitution reflects a continuing disapproval of the use of sex for commercial purposes. I discern a trend here to regard economic pressure as an unacceptable inducement to sex and to create a range of legal sanctions to discourage economically coerced encounters, even if such sex is not subject to direct criminal sanctions.

C. DECEPTION

It is debatable whether the law is at a point where deception is generally regarded as an impermissible inducement to sex. It might be claimed that the current legal prohibitions against deception in sexual relationships are exceptions to a more general rule that immunizes sexual encounters from charges of fraud. My reticence to pronounce any general tendency in the law stems principally from the scarcity of recent fraud cases.[221] However, because the new tort claims for deception in

221. There are only a few cases involving tort claims based upon deception in sexual intercourse. *See supra* notes 151, 157. Criminal prosecutions for fraudulently induced sex were more prevalent before the turn of the century. *See, e.g.*, Moran v. People, 25 Mich. 356 (1872); People v. Bartow, 1 Wheeler C.C. 378 (N.Y. 1823); Commonwealth v. Childs, 2 Pitts. Rep. 391 (Pa. 1863). They tapered off after 1900 and only a few criminal prosecutions have been reported since 1960, predominantly in California courts. *See, e.g.*, Boro v. Superior Court, 163 Cal. App. 3d 1224, 210 Cal. Rptr. 122 (1985); Matthews v. Superior Court, 119 Cal. App. 3d 309, 173 Cal. Rptr. 820 (1981); People v. Harris, 93 Cal. App. 3d 103, 155 Cal. Rptr. 472 (1979); People v. Minkowski, 204 Cal. App. 2d 832, 23 Cal. Rptr. 92 (1962); State v. Oshiro, 5 Hawaii App. 404, 696 P.2d 846 (1985); People v. Borak, 13 Ill. App. 3d 815, 301 N.E.2d 1 (1973).

sexual relationships may arise in typical, rather than only in extraordinary sexual encounters, they take on a special normative significance.

Similar to the approach taken in cases of economic coercion, there seems to be a greater willingness to impose civil sanctions for fraudulent sexual conduct, while saving criminal penalties for only the most egregious cases. The result is that the kind of consent that provides a defense to a criminal charge may not qualify as effective consent in a tort suit regarding the same conduct.

The criminal law recognizes only a very few instances of rape by fraud. The most consistently punished deceptive activity involves the administration of drugs or intoxicants to an unsuspecting victim in order to prevent her physical resistance to intercourse.[222] These drug cases are the only rape by fraud cases that are likely to occur with any frequency. The prohibitions found in criminal codes against husband impersonation[223] or other types of "fraud in the factum"[224] are of little practical importance.

Significantly, the law of rape does not generally prohibit intercourse that results from fraudulent inducement,[225] provided that the deceived party was aware that she was actually engaging in sexual intercourse.[226]

---

222. *See, e.g.*, MODEL PENAL CODE § 213.1(b) (1962); CAL. PENAL CODE § 261(3) (West 1970); COLO. REV. STAT. § 18-3-404(1)(d) (1973); N.Y. PENAL LAW §§ 130.00, 130.05 (McKinney 1925).

223. For a sampling of the criminal prohibitions on sex fraudulently induced by spouse impersonation, see MODEL PENAL CODE § 213.1(2)(c) (1962); ARIZ. REV. STAT. ANN. § 13-1401(d) (1956); CAL. PENAL CODE § 261(5) (West 1970).

224. Fraud in the factum typically denotes a situation in which the victim consents to the doing of act *X* and the perpetrator of the fraud, in the guise of doing act *X*, actually does act *Y*. Fraud in the factum is most often distinguished from fraud in the inducement, whereby the victim is fraudulently induced to consent to the doing of act *X* and the perpetrator of the fraud does indeed commit act *X*. *See* R. PERKINS & R. BOYCE, CRIMINAL LAW 215 (1982). For a powerful philosophical critique of the traditional legal dichotomy, see generally Feinberg, *supra* note 87, at 330.

225. In Hawaii, however, one recent appellate decision noted in dicta that no distinction should be made between fraud in the inducement and fraud in the fact and that any consent induced by deception was statutorily ineffective. *See Oshiro*, 5 Hawaii App. at 407 n.2, 696 P.2d at 849 n.2 (1982).

226. A few rape prosecutions have been brought against doctors who tricked their patients into believing that they were undergoing a medical examination, rather than engaging in sexual intercourse. The most recent and highly publicized case was that of a Wyoming physician who was convicted of committing forcible rape and lesser sexual abuse crimes with five of his patients while they were undergoing pelvic examinations. *See* Story v. State, 721 P.2d 1020 (Wyo. 1986); *see also* People v. Minkowski, 204 Cal. App. 2d 832, 23 Cal. Rptr. 92 (1962) (doctor convicted of raping women he was treating for menstrual cramps); People v. Borak, 13 Ill. App. 3d 815, 301 N.E.2d 1 (1973) (doctor convicted of deviate sexual assault that occurred during gynecological exam); State v. Atkins, 292 S.W. 422 (Mo. 1926) (doctor convicted of rape occurring during examination to discover

False promises of marriage, false representations of sterility, or false professions of love will not vitiate the deceived party's consent, even if the consenting party would never have agreed to the encounter if the truth were told. The law of rape in these cases requires only technical or apparent consent, even though it is the defendant who is solely responsible for the deception. The judgment here may be that the man who lies to get his way is less blameworthy[227] than one who resorts to physical force or some forms of economic coercion. Correlatively, the woman who is deceived may be a less sympathetic victim.[228]

Cases of alleged fraud are particularly likely to trigger common prejudices about the behavior of men and women in sexual encounters.[229] The notion that women really want (or need) to be tricked into having sex has not yet been dispelled.[230] Additionally, many still believe that women have more control over their sexual desires than men and should therefore be assigned the responsibility to resist any resistible advances, including the psychological pressures exerted through deception.[231]

---

the cause of patient's eye trouble); State v. Ely, 114 Wash. 185, 194 P. 988 (1921) (doctor convicted of raping patient during examination of her ovaries).

Some states have modified their sexual abuse statutes to specifically encompass abuse that occurs during a physical exam. *See, e.g.*, WYO. STAT. § 6-2-303(a)(vii) (1979) (sexual assault in the second degree).

227. Indeed, some descriptions of the law of rape suggest that lies designed to induce sexual intercourse may not be regarded as morally unacceptable at all, but rather as normal conduct for men. See, for example, People v. Evans, 85 Misc. 2d 1088, 1099, 379 N.Y. Supp. 2d 912, 922 (1975), in which the court distinguished violent rapes from fraudulently induced sex:

> It is not criminal conduct for a male to make promises that will not be kept, to indulge in exaggeration and hyperbole, or to assure any trusting female that, as in the ancient fairy tale, the ugly frog is really the handsome prince. Every man is free, under the law, to be a gentleman or a cad.

Id.

228. For example, the Model Penal Code treats the rape of an unconscious woman as a more serious offense than rape of a deceived woman who did not understand that she was engaging in sexual intercourse. The comments justify the downgrading of rape by fraud by claiming that most women can prevent that kind of activity, the implication being that the deceived woman is partly to blame and may not warrant similar protection. MODEL PENAL CODE § 213.1 comment at 331 (1962). The comments also speculate that rape by fraud is more easily deterred by less severe sanctions than is the rape of unconscious women. *Id.*

229. One writer speculates that the scholarly fascination with cases of rape by fraud might be partly responsible for the law's willingness to equate consent with nonresistance in cases involving coercive inducements other than deception. The author posits that in the fraud cases, doubts about the credibility of the complainant are magnified and the harm to the victim is less severe than in cases of violent rape. Note, *supra* note 87, at 628-35.

230. *See, e.g., supra* note 90.

231. *See* P. FRANKLIN, H. MOGLEN, P. ZATLIN-BORING, & R. ANGNESS, SEXUAL AND GENDER HARASSMENT IN THE ACADEMY, 16 (1981) (citing Jurnovoy, *Sex in the Office*, HARPER'S BAZAAR, Aug., 1980, at 34).

Perhaps the principal impediment to criminalizing rape by fraud is the desire to avoid the difficult task of choosing which lies will be treated as material and which will be dismissed as insignificant.[232] There is a reluctance to judge the materiality of the deception solely from the victim's viewpoint, particularly when the sanction is criminal. A woman who consents to have sex with a man only because he falsely tells her that he is unmarried may well view the deception as material to her consent. So far, however, the criminal law continues to treat the woman's conduct as consensual, despite the material deception.

The few recent tort cases involving deception in sexual relationships have not yet developed a standard of materiality. To prove causation, the courts require that the victim prove that the lie was material from her standpoint.[233] However, the victim's perspective will probably not emerge as the sole gauge of materiality. For example, recent cases appear to require an additional showing that the fraud concerned the defendant's physical condition and produced physical harm,[234] as opposed to only psychological or financial harm. Because of the anti-heart balm statutes[235] and the values they represent, the courts will likely continue to refuse to monitor false representations about a party's social status or intentions regarding the relationship.

In the language of tort law, the question of materiality tends to arise in determining the scope of the claimant's assumption of risk. For example, if a court wishes to regard a false representation of a partner's marital status as immaterial to a tort claim, it may state that the claimant assumed the risk that the sexual partner would not be truthful about personal circumstances.[236] Like the distinction between coercion and

232. One court refused to permit instances of fraud in the inducement to be chargeable as rape, fearing that "where consent to intercourse is obtained by promises of travel, fame, celebrity and the like—ought the liar and seducer to be chargeable as a rapist? Where is the line to be drawn?" Boro v. Superior Court, 163 Cal. App. 3d 1224, 1230 n.5, 210 Cal. Rptr. 122, 126 n.5 (1985).

233. *See supra* note 159 (discussing the requirement of justifiable reliance). Although she does not analyze the subject along sex-based lines, Sisela Bok's analysis of lies underscores the importance of perspective in determining the harms of deception in public and private life. She contrasts the perspective of the deceived with the perspective of the liar, concluding that the latter possess a greater tendency to ignore the effects of their lies. S. BOK, *supra* note 151, at 24.

234. *See supra* text accompanying notes 156-57.

235. *See supra* notes 45-47.

236. *See* Alice D. v. William M., 113 Misc. 2d 940, 950-51, 450 N.Y.S.2d 350, 357 (1982) (holding that no award could be made for pain and suffering resulting from the deterioration of the couple's relationship: "[A]ffection and love are often transitory and mercurial. This may be stated in terms of the tort doctrine of assumption of risk: one who enters a love relationship assumes the risk that the feelings and emotions of the other party may change.") (citation omitted).

bargain often made in the economic pressure cases,[237] assumption of risk functions as a shorthand label that masks an implicit balancing of factors other than the actual effect of the deception on the deceived party. However, the courts have not fully explained why a deceived person in a sexual encounter does not assume a risk of physical injury, but does assume the risk of serious emotional or financial harm.

Beneath the physical harm limitation may be the concern that no limits should be placed on a person's decision to sever an intimate relationship or to control the level of intimacy. One good reason for refusing to afford a cause of action for a breach of a promise to marry, for example, is that, regardless of any emotional harm caused, it is desirable to permit everyone the opportunity to extricate themselves from unwanted intimate relationships. On balance, we tend to weight this interest in autonomy more heavily than the emotional harm suffered by the loss of the relationship.[238] Otherwise, we might allow damages for emotional harm when one spouse obtains a divorce over the objection of the other. Instead, the trend has been to deny any monetary compensation to the objecting spouse, unless based on severe economic need or past economic contributions to the marriage.[239]

A more difficult question is posed in a breach of a promise to marry suit in which the claimant alleges that the defendant's conduct was deceitful from the outset.[240] If the promisor never intended to fulfill the promise, a cause of action does not penalize a change of heart but targets only the knowing, harmful falsehood. A refusal to allow even this limited cause of action might stem from a fear that it is often difficult to separate false promises from those sincerely made but not kept. Moreover, perhaps the most common risk in any sexual relationship is the risk that one party will end the relationship unilaterally, against the wishes of

237. *See supra* note 191.

238. In Kenneth Karst's analysis of the values underlying intimate associations, choice—particularly the ability to reject or terminate a relationship—is given a central role. A person's choice to stay within a relationship when he or she has the legal means to opt out reflects a genuine commitment, rather than simply the operation of law. Karst, *supra* note 73, at 637-38. Karst eloquently explains that "the freedom to leave gives added meaning to the decision to stay." *Id.* at 638 (footnote omitted).

239. *See* L. WEITZMAN, *supra* note 38, at 147-53.

240. Some jurisdictions with anti-heart balm statutes have nevertheless allowed deceit actions, reasoning that they are distinct from traditional claims for breach of a promise to marry. *See, e.g.*, Piccininni v. Hajus, 180 Conn. 369, 373-74 429 A.2d 886, 888-89 (1980); Perthus v. Paul, 81 Ga. App. 133, 136, 58 S.E.2d 190, 192 (1950). For an analysis of the arguments supporting retention of deceit claims after passage of an anti-heart balm statute, see Note, *Heartbalm Statutes*, *supra* note 45, at 1780-83.

the other party. Given this pervasive risk, the judgment may be that people (especially women) should assume the risk that the other party might someday break off the relationship. If this is the implicit moral judgment, then the only damages properly cognizable in a breach of a promise to marry suit would be those for insult or indignity traceable to the deception, omitting any damages flowing from the relational loss. When so pared down, the claim for a breach of a promise to marry, or any other suit based on a deception relating to the status of the relationship, loses much of its apparent monetary value.[241] The harm that flows from the exploitive relationship alone, from the after the fact realization that one has been taken advantage of sexually, is not easily measured, nor yet clearly accepted as a harm that should be redressed at law.

In summary, the use of deception as an inducement to sex now runs some legal risk. Although it is unlikely that a criminal sanction will be imposed for deception, the prospect of civil liability is no longer farfetched. Indeed, the one value likely to constrain civil liability in the future is the desire to limit legal intervention to avoid unwarranted threats to the universal interest in ending unwanted relationships. This concern could be met by limiting recovery to cases in which a plaintiff proves that the defendant consciously misrepresented a material fact with the purpose of inducing sex. So far, however, the law has not placed an independent value on the sexual autonomy of plaintiffs and has only provided compensation to victims of deceit who also allege and prove serious physical injury. Even this limited coverage, however, makes the point that deceptive inducements to sex may be legally precarious. The fact that not all lies trigger legal liability does not undercut the legal recognition that some minimum standard of honesty in sexual relationships may be essential to effective consent.

III. TOWARD AN EGALITARIAN IDEAL OF SEXUAL CONDUCT

Legal regulations concerning sex typically take the form of prohibitions and thus express a social judgment as to what kinds of sexual conduct are inappropriate. As the regulations affect more and more contexts, however, the negative image may evoke a positive image as

241. One writer proposes that damages in sexual deceit actions be limited to those that arise directly out of fraudulently induced reliance and change of position. Such an award would encompass restitutionary, reliance, and possibly punitive damages, but not damages stemming from the emotional distress caused by the breakup of the relationship. Note, *Heartbalm Statutes, supra* note 45, at 1786-94.

well. Traditional sex regulations as I describe them fit a legal ideology that favors sex in marriage. Likewise, liberal sex regulations can be seen as expressing a legal ideology that favors consensual sex. We can thus expect to articulate another ideology of appropriate sex as legal regulations are increasingly reshaped under the feminist critique.

The positive ideal of sex that I infer from the legal developments described above is an ideal of sexual conduct based not just on consent, but on mutuality. Because egalitarian inroads into the law of sex are still new and incomplete, I do not mean to assert that the ideal which I shall describe is clearly defined or that it is the inevitable consequence of recent developments.[242] However, it does appear that the concept of mutuality captures the ideas embodied in the feminist critique of both liberalism and traditionalism and provides a rationale for recent reforms. At this stage, the ideal I posit must be understood as a mixture of legal analysis, political advocacy, and philosophy.

An egalitarian ideal of mutuality is perhaps most clearly embodied in the current law of sexual harassment, which has moved beyond older notions of consent or voluntariness to a more victim oriented standard of appropriate sexual conduct. In the sexual harassment context, mutuality is determined whether the more passive target of sexual overtures actually welcomed the initiative.[243] The welcome character of the initiative can in turn be determined by asking a hypothetical question—whether the target would have initiated the encounter if she had been given the choice. If we answer the question in the affirmative, there is some assurance of mutuality in the sexual encounter. The response of the target in such an encounter is more positive than, for example, an ambiguous decision not to resist. By redefining consent to mean welcomeness from the target's viewpoint, we can begin to incorporate the interests of women in the formulation of a legal standard.

In each context, however, there are special problems associated with the implementation of a victim oriented conception of mutuality. In the criminal law, our notion of culpability most often is tied to the perspective of the perpetrator, and, for serious crimes at least, we are reluctant to criminalize behavior unless the defendant deliberately disregards the expressed wishes of the victim. Consequently, the crime of rape may

242. In fact, the feminist pressure for change has contributed to a significant rise in antifeminist politics, with sexual issues at the forefront. For an account of the rise of the neoconservative state in the 1980s and the attempts by conservatives to "reprivatize sexuality" and resuscitate the traditional family, see R. PETCHESKY, ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY AND REPRODUCTIVE FREEDOM 241-76 (1984).

243. *See supra* notes 130-47.

continue to be reserved for the most egregious forms of sexual imposition involving displays of active hostility toward the victim.

Outside the sphere of criminal law, there is a greater willingness to view mutuality from the victim's perspective and to impose stricter liability. The principal problem here is to fashion a standard of mutuality in a society otherwise marked by inequality between the sexes. The simple test of mutuality proffered above—whether the target would have initiated the encounter—may be very difficult to apply in practice and does not invariably yield satisfactory answers.

The following two examples demonstrate that the concept of mutuality, like its predecessor consent, is defined by limits that may differ depending on the context in which the sexual encounter takes place. Suppose, for example, that an applicant for a job is told that she must acquiesce in the sexual demands of the personnel director in order to get the job. If the job is more important to her than her sexual freedom, she might be pressured into submission. Although she would prefer to be hired without the sexual obligation, this is not quite the same as saying that she would not have initiated the encounter if she had been given a choice. In judging the welcomeness vel non of the exchange, the key question is whether we should consider the actual economic context. It may be that, if the target thought that sexual submission was the only way to get the job, she would have initiated the encounter. The real world connection between constrained choice in economic matters and relative lack of sexual freedom makes the notion of welcomeness—like the notion of consent—dependent on the particular set of options available in the concrete context. In the sexual harassment context, however, it appears that the law displays a willingness to presume unwelcomeness whenever sex is made a condition of employment. Only if it can be shown that the applicant in fact explicitly proposed the encounter, is the encounter likely to be viewed as welcome and outside the legal definition of harassment. In all other cases, we tend to regard any economic pressure exerted as unwarranted and thus try to ignore the impact of the economic pressure when we ask whether the victim actually welcomed the conduct.

The test for mutuality is likely to be altered when the pressure occurs outside the employment context, and arises from the threat to break off an intimate relationship. Take, for example, the situation of a teenage girl whose boyfriend threatens to stop seeing her unless they have sexual intercourse. Assume that she would prefer to keep the relationship without the sex. If she nevertheless gives in to the demands of her

boyfriend, it is harder to classify the encounter as forced in the legal sense, at least as compared to the economically pressured sexual encounter occurring in the employment context.[244] There is a greater inclination to particularize the incident and ask whether the girl's choice was voluntary, given the ultimatum of the boyfriend. We might, for example, ask whether she would have initiated the encounter knowing, even without his vocalizing it, that the offer was the only way to save the relationship.

In determining the mutuality of sexual encounters, it is critical to evaluate the nature of the inducements to sex operating in each particular context. If the parties' goal is thought to be sexual pleasure or emotional intimacy, the encounter is unlikely to be viewed as so clearly exploitative as to warrant legal prohibition. Even when one party conditions the relationship, and thus emotional intimacy, on sexual compliance, the inducement is likely to be viewed as legally acceptable. Thus, for example, it is still commonly agreed that a spouse should be able to obtain a divorce if the other spouse refuses to have sex.[245] While marital rape effected by physical force is no longer legally acceptable, it is legally acceptable for a spouse unilaterally to condition the continuation of the marriage itself on sex.

When the law declares that certain inducements to sex are unacceptable, it implicitly endorses other common inducements. A list of acceptable inducements would surely include procreation, emotional intimacy, and physical pleasure. Of these three inducements, procreation probably plays a less significant social role today than either intimacy or pleasure. This is because pregnancies can now be planned, and sex for procreational purposes will account for only a very small percentage of sexual encounters.[246] It is the large residual category of sexual encounters

244. The encounter might possibly be subject to criminal sanction if the state's statutory rape law criminalizes even consensual relationships between teenagers. However, many states have recently changed their laws in order to decriminalize encounters where there is no signifieant age disparity between the parties. *See, e.g.*, IOWA CODE ANN. § 709.4(5) (West 1979) (criminalizing encounters where one participant is 14 or 15 years old only if other party is 6 or more years older).

245. For recent cases granting a divorce to a husband on the ground that his wife refused to have sex with him, see Culver v. Culver, 383 So. 2d 817 (Miss. 1980); Pfeil v. Pfeil, 100 A.D.2d 725, 473 N.Y.S.2d 629 (1984); Rollman v. Rollman, 280 Pa. Super. 344, 421 A.2d 755 (1980). For a rare case in which the wife complained of her husband's refusal to have sex with her, see Barr v. Barr, 58 Md. App. 569, 473 A.2d 1300 (1984). In Louisiana, a spouse's refusal to have sex may also justify a denial of permanent alimony. *See* Broussard v. Broussard, 462 So. 2d 1386 (La. App. 1985); Derbes v. Derbes, 462 So. 2d 302 (La. App. 1985).

246. Philosopher Robert Soloman claims that it is now "beyond argument" that human sexuality is no longer primarily concerned with reproduction and makes the argument that "most human

engaged in for the purpose of creating intimacy or generating sexual pleasure that most clearly approaches my egalitarian ideal of nonexploitive sex.

There are two fundamental reasons why sexual encounters engaged in for emotional and physical gratification may be characterized as the most egalitarian kind of sexual encounters. First, unlike their unequal access to wealth and power, men and women are regarded as possessing an equal capacity to experience sexual pleasure and emotional intimacy. Thus, if we allow sex to be traded for money, men have an unfair advantage. The legal reforms directed at economically coerced sex, particularly the law of sexual harassment, recognize and attempt to ameliorate the sex differentiated effects of economic pressure. Moreover, the history of the law of rape dramatically illustrates that, if physical resistance is used as a proxy for non-consent, women will be treated inequitably. One challenge to feminists is to find a currency in sexual encounters which places women at the least disadvantage. At this historical period, the reservation of sex for intimacy and pleasure seems more likely to empower women in sexual encounters than either the traditionalist insistance on marriage or the permissive stance of the liberal.

Second, sex which has intimacy or pleasure as its goal seems more capable of avoiding the dangers of sexual objectification which feminists have identified as a chief mechanism by which male supremacy is established and maintained. Alison Jagger, for example, explains sexual objectification as a process by which women are regarded as something other than "whole persons," as "sexual objects evaluated primarily in terms of their physical attributes and secondarily in terms of their skill (charm) in displaying these attributes."[247] So objectified, women become more vulnerable to sexual aggression because men erroneously assess women's desires in a self-serving fashion. Moreover, women may be deprived of the capacity for self expression because the objectified individual also experiences herself as an object and to this extent embraces the male perspective of the sexual encounter. Sexual objectification is an effective method for accomplishing the subordination of women because it renders sexual abuse invisible and prevents women from realizing their

sexual activity not only is not aimed at reproduction but is practiced *in spite of* the threat of reproducing." Solomon, *supra* note 19, at 270.

247. A. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE 309 (1983) (describing the socialist feminist account of sexual objectification); *see also* MacKinnon, *Desire and Power*: in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 55 (1987) (describing the relationship between male dominance, objectivity, and objectification).

own desires with sufficient precision to enable them to make comprehensible demands for their recognition.

Not surprisingly, there is a divergence of opinion among feminists as to which sexual practices present the greatest chance for appreciating women's subjectivity and expanding women's choice in sexual matters.[248] Much of the debate has centered around whether sex for sexual pleasure or sex for emotional intimacy better achieves this goal. Each of these two conceptions of ideal sex seems noninstrumental in the sense that the chief value of the activity, whether pleasure or intimacy, is seen as deriving from the activity itself rather than from some extrinsic benefit conferred after the fact as a payment for the activity.[249] Moreover, encompassed within both of these visions is a view of sex as a reciprocal activity in which each party's gratification is highly dependent on the other's response.[250]

While these feminist conceptions of ideal sex are often not developed in detail, they seem clearly to exclude sexual encounters in which money,

---

248. A brilliant and concise explanation of the positions taken by two of the prominent feminist "camps" is given in Ferguson, *Sex War: The Debate Between Radical and Libertarian Feminists*, 10 SIGNS: J. OF WOMEN IN CULTURE & SOC'Y 106 (1984) (essay in Forum: The Feminist Sexuality Debates). For radical feminists, "[t]he ideal sexual relationship is between fully consenting, equal partners who are emotionally involved and do not participate in polarized roles." *Id.* at 108. For libertarian feminists, it is "between fully consenting, equal partners who negotiate to maximize one another's sexual pleasure and satisfaction by any means they choose." *Id.* at 109.

249. Robert Soloman attributes to Freud the revolutionary conception that sex in its purest form is noninstrumental:

> People use sex as an expression of power, or as an expression of impotence (the one often parading as the other), as a way of going to sleep, as a way of getting even, . . . as a way of demeaning themselves, and so on. On Freud's account, these various extrasexual aims, however commonly they might be conjoined with sexual desire and activity, are not themselves sexual, and sexuality is not to be identified with any of them.

Despite this conceptual breakthrough, Soloman contends that Freud's account of sexuality remained stultified by then-prevailing notions of sexual morality. Soloman, *supra* note 19, at 273.

Barbara Ehrenreich has also charted the shift in the conceptualization of desirable sex from instrumental to noninstrumental behavior. B. EHRENREICH, RE-MAKING LOVE: THE FEMINIZATION OF SEX (1986). She characterizes the early 1960s as a time when girls learned to "use sex instrumentally: doling out just enough to be popular with boys and never enough to lose the esteem of the 'right kind of kids.' " *Id.* at 21. The advent of "Beatlemania" signaled a change as the new stars came to represent the possibility of noninstrumental love for its own sake. *Id.* at 27. This new vision of sexuality was "freed from the shadow of gender inequality" because the "Beatles' androgyny" was sexy, blurred the line between the sexes, and opened up new possibilities. *Id.* at 35.

250. In an essay on sexual perversion, Thomas Nagel provides an existential account of sexual desire which emphasizes mutuality, reciprocity, and interdependence. Nagel, *Sexual Perversion*, in PHILOSOPHY & SEX, *supra* note 19, at 247. While his essay is not self-consciously feminist and seems to proceed on the assumption that mutuality is the norm in heterosexual relationships, Nagel's portrait of sexual desire "as a complex system of superimposed mutual perceptions" fits the egalitarian ideal of mutual sexual relations. *Id.* at 253.

power, prestige, or financial or physical security is traded for sexual pleasure or intimacy. Although each party might be said to have gained something from these encounters, they are not premised on mutuality because the gains of each are so different in character. Additionally, because the success of the encounter is not dependent on the reciprocal response of the parties, it increases the chance that the sex will be an alienating experience for both parties and will perpetuate the sexual objectification of women.

The egalitarian view of sex offered here differs in significant respects from both the traditional and liberal views of sexual conduct. Unlike the traditional view, the egalitarian view does not determine the acceptability of sexual encounters solely from the status of the parties. Exploitive sex can exist within a marriage when one spouse uses physical force or economic coercion to pressure the other to submit. To determine whether the encounter is moral from an egalitarian perspective requires an examination of each party's motivation. Moreover, these motivations must always be subject to reassessment to assure the continuing mutuality of the relationship. Compared to the static assessment of status under the traditional view, the assessment of motivation central to the egalitarian view is dynamic and, partly for this reason, tends to present particularly difficult problems of legal implementation.

The principal difference between the egalitarian view and the liberal view of acceptable sexual encounters centers on their differing understandings of the relationship between individual choice as manifested in sexual behavior and the broad goal of sexual freedom per se. Under the liberal view, the characterization of an encounter as sexual tends to relegate it to the private sphere and insulate it from legal regulation, absent strong evidence of physical coercion or harm to third parties. The maximization of individual choice in the liberal view necessarily maximizes freedom in society as a whole. Thus, for example, no convincing liberal argument can be made against prostitution because it is possible to view prostitution as expressing the sexual autonomy of the individual prostitute and the data are unpersuasive that prostitution causes harm to third parties.

The egalitarian perspective, in contrast, is more reluctant to equate individual choice with sexual freedom and is consciously directed toward expanding the choices actually available to women. For example, the egalitarian view does not conclude that because prostitutes initiate sexual encounters, prostitution necessarily furthers the sexual freedom of women. Because prostitution may be a choice of last economic resort for

many women, the egalitarian is as likely to see it as the degrading artifact of sexual inequality as the expression of women's liberty. Insofar as genuine sexual freedom depends on sexual equality, full legal approval for prostitution may be appropriate only when resource equality between men and women is achieved.

Although I believe that sexual encounters which have pleasure or intimacy as their purpose come closest to the egalitarian ideal of good sex, even these encounters are not risk free for women. Every individual, regardless of gender, may possess the capacity to experience sexual pleasure and to form intimate relationships. However, this seeming equality of emotional resources operates in an unequal social setting. As long as men possess more of what is highly valued in society, both men and women may continue to place greater weight on their relationships with men. This gravitational pull towards men and their interests often means that intimate heterosexual relationships are more important to women than to men. If this is true, the threat to end a relationship may be more formidable when made by a man. If the pressure to maintain intimate relationships is too powerful an inducement to sex for women, this will continue to pose a barrier to sexual freedom and mutuality in sexual encounters.

Additionally, the egalitarian perspective of sexual conduct may be inadequate insofar as our experience of sexual pleasure is also related to our notions of power in the society. Scholarship debating the impact of pornography on sexual arousal, attitudes toward sex, and sexual conduct is uncovering a link between what we experience as a physical, sexual response and the structure of our social relationships.[251] If male dominance plays a central role in the sexual fantasies of many men and women, sexual pleasure, like emotional intimacy, may not be equally accessible to men and women.

The above two limitations on the egalitarian view of acceptable sexual encounters, while significant, do not amount to a fatal critique. The question should not be whether any class of sexual encounters is entirely free from inequality, because such mutuality may be impossible in our unequal society. As long as celibacy is an unacceptable mass strategy, we cannot avoid a choice among the lesser evils and there will not always be bright line differences between acceptable and unacceptable

251. *See, e.g.*, PORNOGRAPHY AND SEXUAL AGGRESSION, *supra* note 33.

encounters.[252] It thus makes sense to impose legal burdens only on those encounters we can confidently call exploitive and nonmutual.[253] We can expect that in the legal effort to discourage exploitive sex, civil sanctions of an indirect nature will be used with more frequency than direct criminal prohibitions.

IV. APPLYING THE EGALITARIAN VIEW: "ASYMMETRIC" SEXUAL RELATIONSHIPS AT WORK AND AT SCHOOL

This Part applies the egalitarian view to the controversial subject of the regulation of amorous, apparently consensual relationships that occur at the workplace and in educational institutions. The following discussion points to the different conclusions an egalitarian might reach on this subject from the conclusions of a traditionalist or a liberal. Yet, the message of the discussion is as much its complexity as its conclusions. Because the egalitarian ideal of mutuality places high value on individual autonomy, an egalitarian cannot judge the appropriateness of sexual encounters based on mere status with the confidence of a traditionalist. Moreover, the egalitarian, unlike the liberal, is wary of apparently consensual behavior that is nonetheless unwelcome, and does not regard the lack of an overt complaint as precluding the need for legal intervention. The egalitarian perspective tends to be more contextual than either the traditional or liberal perspective. Even if the approach yields ideas for appropriate categorical rules,[254] it counsels the need to reexamine those rules because the social facts that render them appropriate today may change.

252. *See* Olsen, *supra* note 1, at 431 (describes celibacy as "no choice for women"). Olsen's point is that resistance to unwanted sexual aggression is not an ambitious enough goal for feminists who should also attempt to construct a positive agenda of creating "new choices" for women. *Id.*

253. Ann Ferguson makes a similar point in her trisection of sexual practices into basic, risky, and forbidden sexual practices. Ferguson, *supra* note 248, at 111. She classifies forbidden sexual practices as "those in which relations of dominance and submission are so explicit that feminists hold they should be illegal." *Id.* Risky practices are "suspected of leading to dominant/subordinate relationships, although there is no conclusive proof." *Id.* Basic feminist practices are "those we would advise our children to engage in." *Id.* at 112. For the present, Ferguson advocates that we adopt a "transitional feminist sexual morality" that recoguizes a right of persons to engage in risky as well as basic sexual practices. *Id.* In her category of forbidden sexual practices, Ferguson lists "incest, rape, domestic violence and sexual relations between very young children and adults." *Id.* at 111. In the risky category is "[s]adomasochism, capitalist-produced pornography, prostitution, and nuclear family relations between male breadwinners and female housewives." *Id.* Basic feminist practices include "casual and more committed sexual love, co-parenting, and communal relationships." *Id.* at 112.

254. Application of a contextual approach does not necessarily mean that decisions about the propriety of individual sexual relationships should be made on a case by case basis. Rather, the

Employers and educational administrators have been drawn into the issue of amorous, apparently consensual relationships in the course of implementing policies and rules prohibiting sexual harassment.[255] The issue is related to sexual harassment because, in both contexts, sexual conduct is interjected into an inappropriate public setting. The principal distinction between the amorous relationship case and the paradigm case of sexual harassment is that complainants in the amorous relationship context are not themselves targets of sexual overtures. Instead, complaints are typically pressed by fellow employees[256] or students[257] who claim they are being disadvantaged in the competition for employment or

contextual approach I suggest in this Part is frequently best implemented by adoption of categorical rules, taking into account the relevant features of the regulating institution (*i.e.*, the institutional context). A categorical rule (*e.g.*, no sexual contact between a professor and a student in the professor's class) has the advantage of being easier to apply than an ad hoc assessment (*e.g.*, forbidding any "exploitive" relationship between a professor and a student) and may deter a broader range of risky "borderline" behavior. The disadvantage of a categorical rule (even those fashioned within the framework of a particular institutional context) is that it does not provide the opportunity for the parties to specify just which aspects of a relationship are exploitive or harmful to third parties.

255. The most recent policy addressing both sexual harassment and amorous relationships was adopted by the University of Iowa in July, 1986. The University of Iowa prohibits faculty members, graduate students with teaching responsibilities, and other instructional personnel from engaging in amorous relations with students enrolled in their classes or who are subject to their supervision, even when both parties appear to consent to the relationship. The policy does not flatly prohibit amorous relationships between faculty members and students occurring outside the instructional context. However, if a conflict of interest arises, the faculty member must withdraw from participating in decisions that may reward or penalize the student involved. UNIVERSITY OF IOWA, POLICY ON SEXUAL HARASSMENT AND CONSENSUAL RELATIONSHIPS §§ 7-8 (July 28, 1986) [hereinafter IOWA POLICY]; *see also* TEMPLE UNIVERSITY, POLICY PROHIBITING SEXUAL HARASSMENT OF STUDENTS (1985) (prohibition on sexual or romantic relationships within instructional context); HAMPSHIRE COLLEGE, STATEMENT ON PROFESSIONAL FITNESS, IN FACULTY HANDBOOK (1983) (caution that sexual relationships could impair teacher's fitness); UNIVERSITY OF MINNESOTA, OFFICE OF EQUAL OPPORTUNITY AND AFFIRMATIVE ACTION, POLICIES AND PROCEDURES ON SEXUAL HARASSMENT (July 1, 1984) (warning that existence of sexual relationship will make it "exceedingly difficult" for faculty member to prove defense of consent); MASSACHUSETTS INSTITUTE OF TECHNOLOGY, POLICIES AND PROCEDURES (1985) (urging faculty members involved in sexual relationships with students to be "attentive to feelings of colleagues and to potential conflicts of interest."); Letter from Harvard Dean Henry Rosovsky to the Faculty of Arts and Sciences (1983) (guidelines for faculty declaring that amorous relationships between students and faculty members are "always wrong" if the teacher has a professional responsibility for the student) [hereinafter Harvard Letter]; UNIVERSITY OF MICHIGAN, GENDER AND RESPECT IN THE UNIVERSITY COMMUNITY (1986) (faculty guidelines warning that sexual relationships between faculty members and students are potentially exploitative and should be avoided) [hereinafter MICHIGAN GUIDELINES].

256. *See* DeCintio v. Westchester County Med. Ctr., 807 F.2d 304 (2d Cir. 1986) (male respiratory therapists alleged requirements for promotion were modified so that position would go to a woman with whom supervisor was engaged in a romantic relationship); King v. Palmer, 778 F.2d 878 (D.C. Cir. 1985) (nurse challenged promotion awarded to competitor who had a sexual relationship with supervisor); Toscano v. Nimmo, 570 F. Supp. 1197 (D. Del. 1983) (unsuccessful applicant for hospital administrative position alleges promotion awarded to employee who had sexual affair with supervisor); Kersul v. Skulls Angels Inc., 130 Misc.2d 345, 495 N.Y.S.2d 886 (1985) (female employee alleges discharge and replacement by supervisor's lover).

educational benefits. Often the disadvantage stems from favoritism accorded to another employee or student because of that person's sexual relationship with a supervisor or professor.

This species of sexual encounter has not yet been given a name that captures all of its dimensions. The term "sexual payoff" describes the situations posed in cases where a favored employee or student is given a benefit as a payoff for sexual favors.[258] This term focuses our attention on the nature of the specific benefit given the favored employee. We could also think of the issue in terms of providing protection for indirect victims of sexual conduct. This formulation tends to leave open the question of whether the sexual encounter should be viewed as truly consensual, and does not focus as directly on any specific benefit given to the participant in the sexual relationship.

From the perspective of an institution developing policies and rules, the amorous relationship issue perhaps can best be characterized as involving the management of asymmetric sexual relationships.[259] This formulation tends to focus simultaneously on two concerns: the potential for harassment of the target of sexual conduct and the chances of favoritism prompted by the sexual relationship. This dual focus is necessary from an administrative perspective because it may be impossible to predetermine whether a sexual encounter will generate charges of harassment from the target of the sexual advances, or charges of favoritism from others in the work or school community.

In setting policy, the employer or educational institution confronts the task of defining those encounters that present an unacceptably high risk of producing either evil. The notion of an asymmetric relationship comes into play here as a label for such high risk encounters. The principal challenge is to identify those relationships so affected by the disparate

257. While there is apparently no case law involving a student's objections to a faculty member's consensual relationship with another student, the potential for third party complaints exists and is recognized by educational institutions. The Yale College Grievance Board has recommended that it consider further the Board's role in such third party complaints, although it currently pursues only complaints brought by harassed persons. Brandenburg, *Sexual Harassment in the University: Guidelines for Establishing a Grievance Procedure*, 8 SIGNS: J. OF WOMEN IN CULTURE & SOC'Y 320, 334-35 (1982); *see also*, IOWA POLICY, *supra* note 255 (expressly addressing the effects that faculty/student relationships may have on other students).

258. *See, e.g.*, King v. Palmer, 598 F. Supp. 65, 68-69 (D. D.C. 1984).

259. The Iowa policy statement and the Harvard guidelines for faculty describe sexual relationships between faculty members and students as "fundamentally asymmetric." IOWA POLICY, *supra* note 255, at § 6b; Harvard Letter, *supra* note 255; *see also* MICHIGAN GUIDELINES, *supra* note 255 (such a relationship is ultimately and structurally asymmetrical); HAMPSHIRE COLLEGE, *supra* note 255 (the faculty student relationship embodies an unequal power relationship).

power of the parties that the relationship likely constitutes a form of sexual harassment or will be used for extrinsic objectives—namely, the trading of employment or educational benefits for sex. This formulation of the issue presupposes that some amorous relationships occurring in the work or school setting are acceptable because they do not pose a high risk of either harassment or favoritism.

The scheme used for categorizing types of sexual harassment fits the context of asymmetric relationships as well.[260] Some asymmetric relationships might generate complaints of quid pro quo discrimination. In this type of case, the complainant can point to a specific benefit, such as a promotion, that was awarded to the favored sexual partner. Such favoritism often simultaneously denies a scarce employment benefit to a qualified competitor.[261] In the educational context, quid pro quo discrimination may produce less tangible consequences for persons outside the relationship, if, for example, there is no fixed grade distribution given in a particular course. However, when the resource to be distributed is a limited one (for example, a research assistantship), any favoritism accorded the sexual partner may also deprive another student of a tangible benefit.

More frequently, asymmetric relationships generate complaints of an offensive working or educational environment, rather than of quid pro quo discrimination. The essence of the offensive environment complaint is that the sexual relationship has had a negative impact on working relationships or has poisoned the educational environment, particularly the atmosphere of the classroom. The distinction from quid pro quo discrimination is that no specific benefit—scarce or otherwise—need be given to the sexual partner. This genre of complaint sometimes amounts to an anticipatory claim of quid pro quo discrimination—that is, a claim that sooner or later the relationship will prompt favored treatment that might be hard to prove. In other cases, however, the offensive environment complaint may result solely from a worker's or a student's negative

260. For the distinction between quid pro quo and offensive work environment harassment, see *supra* note 127.

261. Studies have found that in approximately one-third of the cases, office romances are characterized at least by perceptions of favoritism. Anderson & Hunsaker, *Why There's Romancing at the Office and Why it's Everybody's Problem*, 62 PERSONNEL 57, 62 (Feb. 1985); Quinn & Lees, *Attraction and Harassment: Dynamics of Sexual Politics in the Workplace*, 13 ORG. DYNAMICS 35, 42 (Autumn 1984). For a review of the surveys, studies, and reports on office romances, see CORPORATE AFFAIRS: NEPOTISM, OFFICE ROMANCE & SEXUAL HARASSMENT (BNA Special Report, 1988).

response to the existence of the relationship itself.[262] Students may complain, for example, that they feel uncomfortable when a professor deals with one particular student on personal, rather than professional, terms.[263] Similarly, workers may be offended by a display of affection or familiarity in a business setting. In still other cases, strain might result from injecting a person of a different status into the otherwise segregated social life of the institution. To take a familiar example, a student's presence at a faculty party may mean that certain discussion will be curbed to insure that other students do not learn too much about the inner workings of the more privileged group.

In addition to dealing with specific complaints of either variety, employers and educational institutions also confront the problem of asymmetric relationships when conducting personnel evaluations. The decision maker typically must determine whether the relationship alone, even if unaccompanied by specific complaints from people in the community, should weigh against the person evaluated. A key question, for example, might be whether a professor who dates a student or a supervisor who dates an employee should be penalized for engaging in "unethical" conduct. Moreover, the low status individual in the sexual relationship could also be sanctioned for unethical conduct. Employers must decide whether to apply anti-fraternization rules to nonsupervisory personnel; educational institutions must consider whether students should also be disciplined for engaging in sexual relationships with faculty members.

The law governing asymmetric relationships is undeveloped and has not yet touched on many of the situations described above. The most

262. Negative consequences attributed to office romances are increased gossip, hostilities, distorted communications within the workplace, lowered productivity, and perceptions that the image or reputation of the work unit is being jeopardized. Quinn, *Coping with Cupid: The Formation, Impact, and Management of Romantic Relationships in Organizations*, 22 ADMIN. SCI. Q. 30, 42 (1977).

263. In academia, consensual relationships may disrupt the academic environment by "jeopardizing collegiality among other students and faculty," IOWA POLICY, *supra* note 255, at 10 n.9 app., or by making students uncomfortable about interacting with an instructor who is sexually involved with another student. Brandenberg, *supra* note 257, at 320, 322. One commentator described the negative impact on student attitudes: "The student singled out for sexual attention is the object of speculation. Even if there is no overt exchange of favors, other students may assume that she has garnered academic advantages they are being deprived of. This cynical evaluation mars the academic climate." Winks, *Legal Implications of Sexual Contact Between Teacher and Student*, 11 J. L. & EDUC. 437, 459-60 (1982). *See* Korf v. Ball State Univ., 726 F.2d 1222 (7th Cir. 1984); Naragon v. Wharton, 572 F. Supp. 1117, 1121 (M.D. La. 1983).

significant cases on this issue[264] have dealt with the question of whether Title VII's ban on sex discrimination encompasses third party complaints of quid pro quo type discrimination. There is currently a split in the circuits on this threshold question. The District of Columbia Circuit allowed a cause of action where a promotion was made as a payoff for sexual favors.[265] The court relied on an EEOC Guideline that warned of liability to qualified competitors "[w]here employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests."[266] The use of the term "submission" in the Guideline suggests that the underlying sexual encounter may not have been welcome from the standpoint of the favored employee. Read narrowly, this provision merely allows more remotely disadvantaged parties to complain about the sexual harassment of other employees. The court went beyond this narrow construction, however, and allowed a cause of action in any case in which sex was a substantial factor in the promotion decision.[267]

By allowing plaintiffs to recover without a showing that the sexual conduct was unwelcome from the target's perspective, the court seemed to characterize the evil in these lawsuits as a taint in the decision making process. From this perspective, the sex based nature of the discrimination stems from sexual influence in the decision making process, rather than from the sex of the complainants.

A more restrictive view of the scope of Title VII protection was expressed by the Second Circuit which denied a cause of action in

264. DeCintio v. Westchester County Med. Ctr., 807 F.2d 304 (2d Cir. 1986); King v. Palmer, 778 F.2d 878 (D.C. Cir. 1985); Toscano v. Nimmo, 570 F. Supp. 1197 (D. Del. 1983). Only two other sex discrimination cases have touched upon this issue: Priest v. Rotary, 634 F. Supp. 571, 581 (N.D. Cal. 1986) (Title VII) (sexually offensive working environment may result in part from employer affording preferential treatment to consensual sexual partner); and Kersul v. Skulls Angels, Inc., 130 Misc. 2d 345, 495 N.Y.S.2d 886 (Sup. Ct. 1985) (state antidiscrimination law).

265. *King*, 778 F.2d at 878. On appeal, the parties in *King* agreed that plaintiff's allegations of a sexual relationship between the promoted employee and her supervisor stated a cause of action under Title VII. *Id.* at 880. Thus, the appellate court had no occasion to examine the legal issue. The court did state, however, that it agreed with the lower court's conclusion that the grant of a promotion as a sexual payoff violates Title VII, citing the circuit's most prominent sexual harassment precedent. *Id.*

266. 29 C.F.R. § 1604.11(g) (1982).

267. *King*, 778 F.2d at 880. The appellate court in *King* held that the plaintiff need only demonstrate that the sexual relationship was a substantial factor in the promotion decision and reversed the trial court by ruling that plaintiff is not required to prove sexual intercourse. Other forms of sexual conduct (*e.g.*, kisses or embraces) will satisfy the burden of proof. *Id.* at 882. If the promotion decision is not based on a sexual *relationship*, but on sexual *attraction* alone, however, there may be no violation. *Id.* at 882.

another sexual payoff/promotion case.[268] The court held that it was not sex discrimination to award a promotion as a sexual payoff, drawing a distinction between employment decisions based on the sexual affiliation of employees and those based on gender alone. Because the unsuccessful competitors could be of either sex in a sexual payoff case, the court reasoned that there was no "causal connection" between the sex of the plaintiff and the employment disadvantage.[269] The court gave a narrow reading to the relevant EEOC Guideline, declaring that it authorized third party complaints only in cases in which the sexual relationship that forms the basis of suit was coercive in nature.[270]

The doctrinal disagreement exhibited in the sexual payoff cases is not new to Title VII litigation. The question of whether the ban on sex discrimination should encompass all sexually inspired decision making or only decisions that exclusively disadvantage one sex has been raised in sexual harassment suits[271] and in suits brought by homosexual and transsexual employees.[272] In the sexual harassment context, the Supreme Court has declared that sufficient linkage exists between sexual harassment and the systemic disadvantage of women employees to justify the application of Title VII. However, the courts have provided no protection to sexual minorities perhaps because they are less able to see the connection between prejudice against these groups and the systematic discrimination against female employees.

The sexual payoff cases pose an interesting problem that does not fit precisely into either the sexual harassment or sexual minority model. In sexual payoff litigation, male plaintiffs might not be as rare as they are in sexual harassment litigation, because competitors for promotions may be of either sex. Thus, neither sex is systematically disadvantaged by sexual payoffs. However, a real connection between sexual harassment and sexual payoff probably exists because work forces permeated with harassment also tend to be likely environments for sexual payoffs. Moreover, in

268. *DeCintio*, 807 F.2d at 308.

269. *Id.* at 307-08.

270. For a sexual payoff case in which the promoted woman may also have been a victim of sexual harassment, see Toscano v. Nimmo, 570 F. Supp. 1197 (D. Del. 1983). The supervisor in that case had a reputation for harassment and had propositioned employees other than the promoted woman.

271. See *supra* note 129 (citing the doctrinal problem posed by hypothetical bisexual supervisor who harasses employees of both sexes).

272. *See* Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984) (denying cause of action for discrimination based on employee's transsexualism), *cert. denied*, 471 U.S. 1017 (1985); DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979) (no cause of action under Title VII for discrimination based on employee's sexual preference).

sexual payoff cases, the "advantaged" employee is likely to be a woman, and the decision maker, a man. In these cases, the specter of sexual harassment is often present. If the courts are particularly desirous of eliminating sexual harassment, they will be inclined to prohibit sexual payoffs as well.[273]

Although there are no reported sexual payoff cases involving professors and students,[274] policy statements recently issued by some universities indicate that these educational institutions are also beginning to treat certain amorous relationships as sex based discrimination. The 1986 University of Iowa sexual harassment policy explicitly states that amorous relationships between faculty members and students are inappropriate when the faculty member has professional responsibility for the student—for example, if the student is currently in the professor's class.[275] The professor is subject to discipline if a complaint is initiated by any person in the university community even if the relationship is apparently consensual.[276] Neither does there appear to be a requirement that a charging student allege any specific injury stemming from the relationship. The policy thus goes beyond a ban on quid pro quo discrimination and addresses offensive educational environments as well.[277]

Although not banned, amorous relationships occurring outside the instructional context are also frowned upon.[278] The University of Iowa policy statement focuses only on the misconduct of faculty members and

273. Moreover, the courts' reluctance to extend Title VII coverage to sexual minorities may reflect hostility to the sexual practices of these groups and a presumption that Congress would not want to protect these minorities to the same degree as racial and ethnic minorities and women. There is no similar hostility toward the class of plaintiffs in sexual payoff cases.

274. There are only two reported cases of sexual harassment of students brought under Title IX, 20 U.S.C. §§ 1681-86 (1982). Recovery was denied in each case, but the courts affirmed that a cause of action for harassment exists. *See* Moire v. Temple Univ. School of Medicine, 613 F. Supp. 1360, 1366 (D. Pa. 1985), *aff'd*, 800 F.2d 1136; Alexander v. Yale Univ., 459 F. Supp. 1, 4 (D. Conn. 1977). For a comprehensive discussion of sexual harassment claims in the university environment, see Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525 (1987).

275. IOWA POLICY, *supra* note 255, §§ 6-7.

276. "[T]he University will view it as unethical if faculty members engage in amorous relations with students enrolled in their classes or subject to their supervision, even when both parties appear to have consented to the relationship." *Id.* § 6.

277. The policy notes that amorous relationships may affect other students and faculty "because it places the faculty member in a position to favor or advance one student's interest at the expense of others and implicitly makes obtaining benefits contingent on amorous or sexual favors." *Id.*

278. The policy states that other amorous relationships occurring outside the instructional context may also "lead to difficulties." It warns that when the faculty member and student are in the same or allied academic units their consensual relationship may be viewed by others as exploitive, and that the faculty member has an obligation to withdraw from participation in any decisions that could reward or penalize the student. *Id.* § 8.

does not address whether the student who initiates or welcomes such a relationship will also be subject to discipline.

In addition to the sexual payoff cases in the employment and academic contexts, the legal status of asymmetric relationships is also implicated in cases challenging dismissals of employees for engaging in sexual relationships. In the private sector, employees have charged sex discrimination when the employer decided to discharge the female party to an office romance, but retained the male employee.[279] The developing wrongful discharge doctrine has also been applied to sustain a claim of arbitrary termination based on an employer's disapproval of an employee's sexual relationship.[280]

In the public sector, employees have challenged dismissals on the theory that the constitutional right to privacy prohibits the government from penalizing them for forming or maintaining sexual relationships.[281] Most of these cases have challenged policies prohibiting certain classes of

279. *See, e.g.*, Duchon v. Cajon Co., 791 F.2d 43, 46 (6th Cir. 1986) (discharge of female receptionist for her relationship with male employee actionable under Title VII); Oldfather v. Ohio Dep't of Transp., 653 F. Supp. 1167 (S.D. Ohio 1986), (Title VII violated by dismissing only female employee because of her affair with a male supervisor), *appeal dismissed*, 816 F.2d 681 (6th Cir. 1987); Shore v. Federal Express Corp., 589 F. Supp. 662, 667 (W.D. Tenn. 1984), (prima facie case of sex discrimination established by showing female employee discharged because of affair with male superior while male superior was not discharged), *aff'd in part*, 777 F.2d 1155 (6th Cir. 1985); Reber v. Mel Falley, Inc., 235 Kan. 562, 566, 683 P.2d 1229, 1233 (1984) (termination of female employee engaged in an affair with her male superior established a prima facie case, but was rebutted by evidence that affair interfered with the woman's job performance but had no effect on the man's job performance).

One commentator asserts that a woman is twice as likely as a man to be terminated for her participation in an office romance because the man is generally in a superior position, is viewed as more of an asset to the company, and is more costly to replace. Quinn & Lees, *supra* note 261, at 41. Another author suggests that if lovers hold positions of equal status and are equally effective in their roles, the man should be dismissed to avoid the appearance of sexism. Collins, *Managers and Lovers*, 61 HARV. BUS. REV. 142, 151 (Sept.-Oct. 1983).

280. Rulon-Miller v. International Bus. Mach. Inc., 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984) (dismissal of plaiutiff for relationship with mauager of rival firm violated company rule guaranteeing employee's right of privacy); *see also* Mason v. South E. Ill. Elec., 125 L.R.R.M. (BNA) 2022 (7th Cir. 1987) (insufficient evidence to warrant finding of constructive discharge based on employee's affair with foreman's wife).

281. *See, e.g.*, Johnson v. San Jacinto Junior C., 498 F. Supp. 555 (S.D. Tex. 1980) (challenging a change in job classification because of au adulterous relationship with an employee), *cert. denied*, 474 U.S. 1101 (1986); Hollenbaugh v. Carnegie Free Libr., 436 F. Supp. 1328 (W.D. Penn. 1977) (library employees challenge discharge for living together in "open adultery"), *aff'd*, 578 F.2d 1374 (3rd Cir.), *cert. denied*, 439 U.S. 1052 (1978); Andrews v. Drew Mun. Separate Sch. Dist., 371 F. Supp. 27 (N.D. Miss.) (challenging local policy prohibiting employment of unwed parents), *aff'd*, 507 F.2d 611 (5th Cir. 1973). For a discussion of public employee cases, see Note, *Public Employees or Private Citizens: The Off-Duty Sexual Activities of Police Officers and the Constitutional Right of Privacy*, 18 U. MICH. J.L. REFORM 195 (1984).

public employees from engaging in nonmarital sexual relationships.[282] In some cases, the prohibited liaison involved two employees at the same worksite.[283]

The results in these public employee lawsuits are quite evenly split between plaintiffs and governmental defendants. Courts do not agree on whether heightened scrutiny is appropriate,[284] or on any list of acceptable justifications for sexually based dismissals.[285] However, the courts seem more likely to sustain dismissals in cases involving homosexual conduct or adultery,[286] rather than those involving premarital heterosexual cohabitation.[287] There may also be a greater willingness to allow an employer to ban amorous relationships between employees, particularly

282. *See, e.g.*, Shawgo v. Spradlin, 701 F.2d 470, 472 (5th Cir.) (police department rules proscribing conduct that " 'if brought to the attention of the public, could result in justified unfavorable criticism of that member or the department.' ") (quoting General Rules and Regulations of the Amerillo Police Department, § 113, part 8), *cert. denied sub nom.*, Whisenhunt v. Spradlin, 464 U.S. 965 (1983); Wilson v. Swing, 463 F. Supp. 555, 562 (M.D.N.C. 1978) (prohibiting police department employees from conducting "their private and professional lives [in such a manner as to avoid] bring[ing] the Department into disrepute," or "engaging in any immoral or indecent conduct . . . .") (quoting Greensboro Police Dept. Rules 410.03 & 410.67).

283. *See Shawgo*, 701 F.2d at 470 (two police officers disciplined for off-duty dating and alleged cohabitation); Krzyzewski v. Metropolitan Gov't of Nashville and Davidson County, 584 F.2d 802 (6th Cir. 1978) (female police officer discharged for dating fellow officer); *Swing*, 463 F. Supp. at 555 (police officer demoted for engaging in an alleged extramarital affair involving another police officer); *Hollenbaugh*, 436 F. Supp. at 1328 (W.D. Pa. 1977) (two library employees fired for living together in "open adultery").

284. Some courts require more than minimal rationality, but less than strict scrutiny. *See, e.g.*, *Hollenbaugh*, 439 U.S. at 1054 (Marshall, J., dissenting from denial of certiorari); Briggs v. North Muskegon Police Dep't, 563 F. Supp. 585, 590 (W.D. Mich. 1983), *aff'd*, 746 F.2d 1475 (1984). Others have applied a rational basis test. *See Shawgo*, 701 F.2d at 483; *Johnson*, 498 F. Supp. at 576.

285. Most notably, some courts insist on a showing that the employee's sex life adversely affected job performance in a specific tangible way (*e.g.*, an actual disrupting influence on working relationships). *See, e.g.*, *Briggs*, 563 F. Supp. at 591. Other courts are ready to sustain governmental interference if the employee's sexual relationship is unlawful or does not coincide with what the court perceives as popular morality. *See* Dronenburg v. Zech, 741 F.2d 1388, 1399 (D.C. Cir. 1984) (no need for social science data to prove that intramilitary gay sexual relationship would be deleterious to morale and discipline).

286. For cases upholding discharges of homosexual persons, see *Dronenburg*, 741 F.2d at 1388; Gaylord v. Tacoma School Dist., 88 Wash. 2d 286, 559 P.2d 1340 (1977), *cert. denied*, 434 U.S. 879 (1977). For cases upholding dismissal or demotion of employees for adultery, see *Krzyzewski*, 584 F.2d at 802; Suddarth v. Slane, 539 F. Supp. 612 (W.D. Va. 1982); *Johnson*, 498 F. Supp. at 555; *Hollenbaugh*, 436 F. Supp. at 1328.

287. Only one recent case has sustained the dismissal of employees engaged in a premarital heterosexual relationship. *See Shawgo*, 701 F.2d at 470. Moreover, when the parties to the relationship are not both employees, the premarital heterosexual relationship is a better candidate for protection under the right to privacy. Mindel v. United States Civil Serv. Comm'n, 312 F. Supp. 485 (N.D. Calif. 1970).

if the defendant can articulate a possible conflict of interest.[288]

The juxtaposition of the sexual payoff cases and the public employee dismissal cases dramatizes the tension that occurs when the law simultaneously attempts to control exploitive sex and to encourage mutual sexual relationships. The theory underlying the Title VII sexual payoff cases is that employment advantage should not be traded for sex. Together with the sexual harassment cases, the sexual payoff cases represent an effort to eliminate sexual coercion at the workplace.[289] In contrast, the constitutional theory in the public employee dismissal cases is that every person should have the opportunity to seek intimacy through sexual relationships.[290]

For the public employer, the case law pulls in opposite directions and may seem to expose the employer to liability, regardless of whether amorous relationships are permitted or banned. From an egalitarian perspective, however, the theories underlying each of the two types of lawsuits are compatible. Taken together, the lawsuits reinforce the distinction between exploitive sex prompted by economic gain, and nonexploitive sex prompted solely by a desire for intimacy or pleasure.

Endorsement of an egalitarian perspective in the amorous relationship context suggests that legal intervention and mandatory nonintervention may logically coexist. But it does not tell us how to determine whether a particular encounter should be put into one or the other category. Perhaps only in the most blatant cases of sexual harassment or favoritism in which a specific benefit is tied to sex will it be clear that the relationship is exploitive. A great many, if not most, relationships may be characterized partially by the exertion of external pressure and by shared intimacy.[291] Moreover, what starts as an intimate, seemingly personal encounter might well change into a more instrumental relationship

288. *See Shawgo*, 701 F.2d at 470 (finding a rational connection between the exigencies of police department discipline and forbidding officers, especially those different in rank, to share an apartment or cohabit).

289. Affording a cause of action in sexual payoff cases provides additional assurance against exploitive relationships by justifying institutional intervention, even absent a complaint by the employee in the relationship. The third party action thus may function as a mechanism for uncovering clear cases of harassment when the victim is too intimidated to complain, as well as for reaching those more debatable cases that defy classification as either mutual or coercive relationships.

290. The most thorough statement of the associational and privacy interests arguably protected by the Constitution is Karst, *supra* note 73, at 633-39.

291. Catharine MacKinnon asserts that between clear coercion and clear mutuality exists a "murky area where power and caring converge." C. MACKINNON, *supra* note 4, at 54. She calls this area "coerced caring" and explains that it is often unclear whether the coercion or the caring is the weightier factor in the relationship. Further, the predominance of one factor over another may shift over time and each may be causally related to the development of the other. *Id.* at 54-55.

as opportunities for harassment or favoritism arise. Conversely, if the parties ultimately marry or stay with each other for a long period of time, we are apt to engage in revisionist history and declare the relationship nonexploitive, out of a reluctance to analyze the possibly oppressive character of marriage or long-term relationships.

To fashion a workable policy on amorous relationships in the employment and educational context, it is therefore preferable not to focus narrowly on the actual nature of the relationship at issue, but rather to create rules or guidelines based on the potential for exploitation and external harm. To do so, we first need to identify the positive and negative effects of amorous relationships, both on the parties themselves and on others in the workplace or school community.

On the positive side, the workplace and school are now important sites for the establishment of intimate relationships.[292] No one disputes that many relationships begun at these sites are long lasting and emotionally significant. Particularly with the decline in importance of some other community social organizations, many people look to work or school as the place to make friends and form relationships of all sorts.[293] The use of the workplace and the classroom for this social purpose is logical because these sites are often more sexually integrated than other places in which people interact, particularly since most women are now in the labor force.[294] The increasing importance of work has meant that, for many people, there is no longer a sharp distinction between their social life and their working life. While much of the debate about amorous relationships in the employment context has focused on the dangers of fusing work and social life, this blurring of the private/public distinction could also have positive effects for women. Women have tended to

292. For many, work is "well on its way to replacing the family as a source of affection, community, and support. We separate from our biological families in our twenties and find replacement families at our jobs." P. HORN & J. HORN, SEX IN THE OFFICE, 3 (1982). Factors contributing to the emergence of intimate relationships within the work and school environments include the close physical and psychological proximity of the individuals and the empathy, understanding, and familiarity that accompany the sharing of common tasks. For further consideration of these and other factors, see Anderson & Hunsaker, *supra* note 261, at 57; Quinn & Lees, *supra* note 261, at 35.

293. "As contacts with community organizations, churches, and extended families diminish, many people become socially isolated and find the work environment becoming the primary setting in which to meet people." Driscoll & Beva, *The Sexual Side of Enterprise*, 69 MGMT. REV. 51, 52 (1980).

294. The proportion of women who are in the labor force has grown from one-third in 1950, to more than one-half today. U.S. DEP'T OF LABOR BUREAU OF LABOR STATISTICS, WOMEN AT WORK: A CHARTBOOK 2 (April 1983). Since 1980, women have taken more than 80% of the new jobs in the economy. If the trend continues, women will outnumber men in the workforce by year 2000. Hacker, *Women at Work*, The New York Review of Books, Aug. 14, 1986, at 26 col. 1.

be viewed as private, sexual beings who are out of place and out of character in the workplace. When sexual relationships are no longer separated from working relationships, the mystique of sex may break down. The hope is that such a demystification of sexuality could cause men and women to be viewed as more alike and as needing both work and sexual relationships for a fulfilling life.[295] Moreover, when sexual partners also work together, they may better appreciate the role that work plays in the life of each person, thus strengthening their personal relationship.[296]

On the negative side, there is the danger that it may be impossible to separate sexual harassment from truly mutual relationships. Particularly where there is an appreciable difference in power between the parties to the relationship, the lower status person may submit to sex out of fear of retaliation.[297] In some cases, the very fact of submission may indicate that the economic coercion was severe. Moreover, in cases in which the initiator of the sexual relationship carries both economic clout and moral authority, the target may submit to an unwelcome encounter, even if the target does not fear retaliation.[298] A young student, for example, may be conditioned to trust a professor and may tend to do what the professor

295. *See* Bradford, Sargent & Sprague, *The Executive Man and Woman: The Issue of Sexuality*, in SEXUALITY IN ORGANIZATIONS: ROMANTIC AND COERCIVE BEHAVIORS AT WORK 26 (D. Neugarten & J. Shafritz eds. 1980).

Professor Wasserstrom has discussed the mystification of sexuality created by segregation in his comparison of racially and sexually segregated bathrooms. He contends that while racially segregated facilities were based upon a white supremacist fear of contamination, sex segregated facilities reinforce that "same sense of mystery or forbiddenness about the other sex's sexuality which is fostered by the general prohibition upon public nudity and the unashamed viewing of genitalia." Wasserstrom, *Racism and Sexism*, in PHILOSOPHY AND SOCIAL ISSUES 11, 20-21 (1980). Wasserstrom explains that although this sense of privacy appears mutually desired by both sexes, it may function to the detriment of women by "maintain[ing] the primacy of heterosexual sexual attraction central to that version of the patriarchal system of sexual relationships we have today." *Id.* at 21.

296. While admitting that it is only conjecture, one author suggests that office romances may, in the end, make marriage stronger. "As people work together and experience the problems of the office, as they understand each other's anxieties and the demands their jobs place on them, marriage may well become more of a shared experience than the unequal relationship it has been." L. WESTHOFF, CORPORATE ROMANCE 14 (1985).

297. Such coerced submission may occur even if the higher status initiator believes that an employee's receptiveness to a sexual advance is motivated by mutual personal attraction. In such cases, the lower status employee may be more conscious of the differences in status and feel that compliance is "dictated by the implicit use of power and authority." Brewer, *Further Beyond Nine to Five: An Integration and Future Directions*, 38 J. SOC. ISSUES 149, 155 (No. 4 1982).

298. For an argument that supervisors can become the subjects of an employee's "transference" of respect and admiration, similar to that bestowed on "father figures" like doctors and teachers, see Josefowitz, *Sexual Relationships at Work: Attraction, Transference, Coercion or Strategy*, 27 PERS. ADMIN. 91, 95 (March 1982); *see also* B. DZEICH & L. WEINER, THE LECHEROUS PROFESSOR 74 (1984) (role disparity between professor and student makes it virtually impossible for a student to act as freely as the student would with a peer).

suggests. Even if the relationship is exploitive, only rarely will a party to an ongoing relationship complain. Thus, a ban on some amorous relationships might be a necessary safeguard against harassment.

Beyond the fear of sexual harassment, amorous relationships may be perceived as harmful insofar as they taint the decision making process. Any grant of a benefit based on considerations other than merit is likely to be viewed as unfair, even if not always illegal.[299] What makes sex based favoritism so damaging, however, may flow more from the message it conveys than from any specific misallocation of benefits. When a female employee observes that another female employee has received favored treatment because of her sexual relationship with the supervisor, she may be led to believe that sexual receptiveness is expected from female employees. Even if the actual party to the relationship is not coerced, the message transmitted to other workers may be coercive and threatening.[300] The existence of an amorous relationship may add to an offensive working environment, particularly in work environments not otherwise free from sexually abusive incidents.[301]

When no significant disparity in power exists between the parties in the sexual relationship, however, the likelihood of both sexual harassment and favoritism declines. Any harm engendered by these more symmetric amorous relationships chiefly depends on the quality of the relationship and the reactions of others in the community.[302] If the sexual relationship turns sour and creates bitter feelings, this could have a negative effect on the parties' working relations and could disrupt the

299. For a discussion of the concept of individual merit as a central, if problematic, value in American culture, see Daniels, *Merit and Meritocracy*, 7 PHIL. & PUB. AFF. 207 (1978); Fallon, *To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Antidiscrimination*, 60 B.U.L. REV. 815, 815-16 (1980); Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955, 962 (1974).

300. *See* IOWA POLICY, *supra* note 255, § 5(b) (even consensual amorous relationships are potentially damaging to third parties because of implicit coercive message).

301. *See* Priest v. Rotary, 634 F. Supp. 571 (N.D. Cal. 1986). *But see* Anderson v. University Health Center, 41 Fair Empl. Prac. Cas. (BNA) 1197, 1199 (W.D. Pa. 1985) (sexual relationship between supervisor and coworker irrelevant to plaintiff's claim of sex-based discharge).

302. Office romances need not necessarily result in a less cohesive or efficient working environment (although negative effects are more likely than are positive effects). *See* Quinn, *supra* note 262, at 42. Two studies have found that the participants in an office romance may become easier to get along with and more productive as a result of their liaison. *See id.* at 39; Andersen & Hunsaker, *supra* note 261, at 61. One writer suggests that even though productivity may decrease at the beginning of a relationship, managers should refrain from interfering until the couple have a chance "to get over their initial excitement, because in the long run their happiness could result in increased productivity." Westhoff, *What to do About Corporate Romance*, 75 MGMT. REV. 50, 52 (Feb. 1986).

normal working pattern.[303] The dynamics of a working group might also be adversely affected if there is a perception that lovers will team up and make it difficult for others to deal with them as individuals.[304] The above two harms, however, do not seem qualitatively different from the risks flowing from other types of personal relationships in the workplace.[305] For example, when close friends work together, there is a similar risk of estrangement and co-worker alienation. In contrast, the potential harms flowing from asymmetric relationships—the coercive power of sexual harassment and the coercive message of sexual favoritism—disproportionately harm women. Therefore, these harms are more disturbing than the damage to harmonious worker relationships caused by more symmetric amorous relationships.[306]

The choice of regulatory strategies for dealing with amorous relationships in the employment and educational contexts will no doubt be affected by which of these harms are emphasized and whether the benefits attributed above to school or workplace relationships are considered

303. *See* Handley, *Saying No to Office Romances*, THE BUREAUCRAT 35, 36 (Winter 1985-1986). In addition to disrupting normal working patterns, employers find that "one of the more threatening aspects of the breakup of an affair is that the incident can degenerate into charges of sexual harassment." L. WESTHOFF, *supra* note 296, at 103. For cases litigating the fallout from soured relationships, see Huebschen v. Department of Health & Social Servs., 716 F.2d 1167 (7th Cir. 1983); Shore v. Federal Express Corp., 589 F. Supp. 662 (W.D. Tenn. 1984); Williams v. Civiletti, 487 F. Supp. 1387, 1389 (D.D.C. 1980); Evans v. National Post Office Mail Handlers Union, 32 Fair Empl. Prac. Cas. (BNA) 634 (D.D.C. 1983).

304. "Many people are resentful of the intimacy, feel excluded and are threatened by the power block the two may represent." Josefowitz, *supra* note 298, at 94. A relationship between two managers can be perceived as dangerous because it challenges the organizational structure and "affects the organization's power alliances." Collins, *supra* note 279, at 143; *see also* M. CUNNINGHAM, POWERPLAY (1984) (first hand account of celebrated corporate romance); L. WESTHOFF, *supra* note 296, at 8 (romantic relationship between male and female executive distorts power structure).

305. For a view emphasizing the similarity between sexual conflicts of interests and other conflicts of interests, see Westhoff, *supra* note 302, at 53.

306. Margaret Mead might have disagreed. In a short article for *Redbook Magazine*, she took the view that sexual harassment in employment would not be eliminated by legal prohibitions, but would persist until sex at work becomes a taboo, which she defines as a "deeply and intensely felt [prohibition] against 'unthinkable' behavior." Mead, *A Proposal: We Need Taboos on Sex at Work*, in SEXUALITY IN ORGANIZATIONS: ROMANTIC AND COERCIVE BEHAVIORS AT WORK *supra* note 295, at 54 (reprinted from REDBOOK MAGAZINE, April, 1978). Although she is not precise on this point, the article suggests that the taboo should include relationships between co-workers and students who are equal in status. Mead seems to believe that people need certainty in matters of sexual relationships and that only in periods of historic transition is there confusion about acceptable rules of sexual behavior. Although the elimination of exploitive sex is also Mead's chief concern, she seems to advocate a bright line approach that would avoid some of the difficult problems of characterization posed by my contextual approach. Mead's taboo proposal, however, has the disadvantages of limiting sexual freedom and failing to educate persons on precisely which aspects of sexual relationships make them potentially exploitive.

weighty. I suspect that most institutions are likely to tend toward a broad ban on amorous relationships because the threat of sexual harassment or sexual favoritism is more concrete than any countervailing advantage that workers and students gain from expanded opportunities for intimate relationships.[307] Further, many policy makers might be tempted to adopt an expansive definition of asymmetric relationships, hoping to chill risky relationships without actually having to enforce the ban.

From an egalitarian perspective, it seems appropriate in most settings to prohibit those amorous relationships in which one party has direct authority to affect the working or educational status of the other. In such direct supervision cases, the danger of harassment or favoritism is particularly high. This situation presents a classic conflict of interest in which even the supervisor who tries to act ethically may find it difficult to treat the subordinate fairly. Most importantly, unless the employer or educational institution can act to prohibit these apparently consensual, high risk relationships, we may become reluctant to accept a victim oriented standard of consent in sexual harassment cases. By giving the policy maker a greater opportunity to prevent harassment, we can create a climate in which charges of harassment are not viewed with as much suspicion or defensiveness. Finally, we lose little in the way of sexual liberty by prohibiting this class of asymmetric encounters. Potential lovers usually have the alternative of taking steps to reduce a direct conflict of interest. For example, a professor who wants to date a student can wait until the student completes the course. An employee in love with a supervisor can seek a transfer. If a matter directly affecting one party to a relationship becomes an issue for collective decision making, the other party can recuse himself. Even if such insulation is not possible in particular settings, an outright prohibition does not seem particularly harsh because only a limited number of persons are likely to be affected by the ban.

Beyond cases of direct supervision, it is difficult to articulate criteria for gauging asymmetry in sexual relationships. I suspect that the greater the disparity in power, the greater the risk of harassment, favoritism, or

307. For some companies, the key question will be whether the fear of legal liability overcomes their ordinary reluctance to intervene in employees' private lives if there is no evidence of a concrete employment effect (*e.g.*, lowered productivity). Josefowitz, *supra* note 298, at 96 ("bottom line" is whether affair hurts morale and productivity); Graham, *My Lover, My Colleague*, Wall St. J., Mar. 24, 1986, at 26, col. 3. ("many companies eschew hard-and-fast policies, preferring to treat romance as a performance issue"). For further comments about the effect of relationships upon productivity, see Jamison, *Managing Sexual Attraction in the Workplace*, 28 PERSONNEL ADM'R 45 (Aug. 1983).

poisoning of the institutional atmosphere. A relationship between a Ph.D. candidate and the only chaired professor in a close knit department may be risky, even if the student is never in the professor's course. Other faculty members, for example, might tend to favor the student, either out of respect for their colleague or simply because the student becomes more visible to them as a result of the relationship. As these collateral benefits become more significant, there is a corresponding danger that they might become the inducement to the relationship itself, thus making the encounter exploitive from an egalitarian perspective. In a highly competitive atmosphere in which the recommendation of a single professor makes a great difference, the ban on amorous relationships might have to include all student/faculty relationships within the department. Likewise, the influence of some individuals in a working environment might be so great that any relationship into which they enter will inevitably have an impact on the job. It might be best to encourage "loneliness at the top" in these instances.

Aside from these structural factors, the relative age of the parties and the sexual composition of the job or occupation often may also be used as indicia of asymmetry. First, when the powerful individual has "the edge" in terms of job status as well as age, the likelihood of mutuality of the relationship is reduced. I have little trouble, for example, with a total ban on amorous relationships between high school teachers and their students.[308] Even when the lower status individual is above the legal age of majority, inexperience may result in more vulnerability to pressure. Young workers on their first job, for example, are particularly good targets for harassment.[309]

Second, amorous relationships between women working in predominantly female jobs and higher status males in the same workplace may pose an unacceptably high risk. If the female character of the job has contributed to a perception of the job in sexualized terms, the workers in that job may already be subjected to disproportionate sexual pressure.[310] The existence of amorous relationships in this context may reinforce the perception that these women workers are present in the workplace for

308. *See* Winks, *supra* note 263, at 437, 447-51 (discussion of the negative effect that a student/teacher sexual relationship can have on an adolescent's emotional development).

309. For a discussion on the vulnerability of young workers to sexual harassment, see L. FARLEY, SEXUAL SHAKEDOWN, THE SEXUAL HARASSMENT OF WOMEN ON THE JOB 113 (1978); B. GUTEK, SEX AND THE WORKPLACE 55 (1985).

310. For a discussion on the sexualization of female dominated jobs, see C. MACKINNON, *supra* note 4, at 23.

sex, not work.[311] Such perceptions may encourage sexual harassment and legitimize other discriminatory treatment, such as depressed wages and unfavorable rules governing only predominantly female jobs.

Whichever encounters are included under the rubric of an asymmetric relationship, there remains the difficult question of whether also to impose a sanction on the lower status individual in the relationship. Even if the ban on amorous relationship is framed in gender neutral terms, the lower status individual is likely to be a woman. If the regulatory pattern tends to immunize women from sanctions, there is a danger that the pattern might reinforce the belief that women must be protected against sex, even against their own wishes.[312] Further, there is no guarantee that this sexist ideological message might work against women's interests in the long run, even if the incidence of exploitive sexual relationships is reduced through bans on harassment and asymmetric relationships. However, the alternative—punishing both parties to the relationship—is even less appealing. If the risk of favoritism were the exclusive risk presented by asymmetric relationships, imposing sanctions on both parties might be just. But as long as we are unsure that the encounter was truly welcome and is not harassment, it seems unfair to punish the lower status party. This is particularly true when the lower status person is also likely to be more expendable to the institution. It is probably wise to sanction such persons only in those unusual cases where harassment is conclusively ruled out and the lower status person actively and expressly solicited favored treatment.[313]

311. *See* Winks, *supra* note 263, at 444 (arguing that women who are lower in rank in any hierarchy are perceived as being sexually available).

312. One author has suggested that institutional statements prohibiting amorous relationships reflect paternalistic policies of earlier eras (*e.g.*, curfew regulations and overnight guest prohibitions) and that amorous relationship policies risk reinforcing the inequities they seek to alleviate. Hoffmann, *Sexual Harassment in Academia: Feminist Theory and Institutional Practice*, 56 HARV. EDUC. REV. 105, 113 (1986). A similar dilemma is posed by statutory rape laws that criminalize sexual encounters involving underage females, but not those involving underage males. *See* Olsen, *supra* note 1, at 402.

313. A frequent objection to the punishment of a male professor or other supervisor for engaging in a sexual relationship with a female student or employee is that the woman may be the seducer and the man only the passive recipient of sexual initiative. Regardless of the truth of the perception, this objection does not justify immunizing the professor or supervisor because, even if he is not the aggressor, he has the ability and obligation to resist such sexual initiatives. *See* Freedman, *The Professional Responsibility of the Law Professor: Three Neglected Questions*, 39 VAND. L. REV. 275, 280 (1986). It is difficult to regard the professor or supervisor as being victimized by a sexual liaison with a subordinate, in the same fashion as the exploitation of students and employees. Sexual aggression from students or employees may be disturbing or perhaps even harassing, but it differs from sexual harassment by high status individuals because it carries no danger of economic retaliation and far less likelihood of creating an offensive atmosphere. *See* B. DZIECH & L. WEINER, *supra* note 298, at 24-25 (1984). Whether the subordinate is the sexual aggressor in a relationship might

The foregoing egalitarian perspective on the treatment of asymmetric relationships in the employment and educational contexts differs significantly from a pattern of regulation that would likely emerge under either the traditional or liberal views of sexual conduct. Under the traditional view, a nonmarital relationship between employees probably would expose both parties of the relationship to unfavorable employer action. The law would not protect immoral persons from the impact of community disapproval, regardless of whether the relationship resulted in identifiable harm to third parties. The traditional view would also tend to treat the power differential between the parties as irrelevant to the pattern of regulation. From a traditional perspective, anti-fraternization rules are simply one kind of rule designed to discourage immorality, both on and off the job. The traditionalist is also likely to view the employee who engages in publicized non-marital encounters as lacking in good judgment and perhaps even as untrustworthy.

In contrast, there is little, if any, room for the legal regulation of amorous relationships under the liberal view of sexual conduct. Unless the lower status party to the relationship complains of exploitation, the relationship is likely to be viewed as a private consensual matter that does not warrant intervention. The disparity in power alone, absent evidence of economic coercion on an individual level, will not likely operate to vitiate consent. With respect to the danger of favoritism, the liberal view might endorse intervention if there is evidence of a misallocation of a specific benefit. The response to favoritism in sexual payoff cases, however, would not be different from the response in any other case of misallocation based on non-merit considerations. The liberal perspective would tend not to focus on the sex based nature of the action and not to see the systemic link between harassment and favoritism in asymmetric relationships.

The egalitarian perspective on asymmetric relationships presented here attempts to balance the interest in avoiding sexual coercion with the interest in affording opportunities for the formation of noncoercive relationships. Because no blunt strategy can hope to accomplish both objectives, the balance of equality and liberty necessitate a sensitivity to context and a fact specific assessment of power relationships.

---

properly affect our views on whether to punish both parties to the relationship in order to protect the interest of third parties.

CONCLUSION

The legal regulation of sexual conduct increasingly reflects the influence of a feminist critique of both the traditional and liberal views of sex that have dominated for nearly all of this century. Over the last thirty years, liberal philosophy has eroded a traditional pattern of legal regulation that judged the appropriateness of sex largely from the marital status of the parties. Feminism is now challenging the liberal tendency to presume the appropriateness of sexual conduct simply from the absence of a complaint by either party. Rules intended to foster sexual freedom for women cannot unreflectively judge the propriety of sex by the acquiescence of individual women. The risk is too great that acquiescence reflects inequality, not free choice.

I have illustrated the egalitarian impact on the law by tracing developments in three important areas: the laws respecting rape, sexual harassment, and sexual deception. Developments in these areas suggest a tendency, however incomplete, to treat sex as not consensual when acquiescence is induced by physical force, economic pressure, or deception. Regarding sex so induced as inappropriate may be taken to imply a new positive ideal of mutual sexual conduct. Under this egalitarian view, sexual conduct is mutual and acceptable when animating inducements are the parties' desires for sexual pleasure or for intimacy.

So long as feminist pressure on legal institutions remains great, the egalitarian perspective is likely to continue as a significant force shaping the ideology of law. In the regulation of new areas of legal concern, such as amorous relationships at school or in the workplace, it is likely to demand a more subtle contextual analysis than either liberalism or traditionalism has yielded. In some cases, egalitarians may sponsor legal regulation to reduce exploitive sex; in others, they may counsel forbearance from regulation in order to promote both sexual freedom and equality. The feminists' twin focus on freedom and equality means that no one legal stance—interventionist or noninterventionist—can ever be presumptively correct without careful analysis of the power relationships at play in a particular regulatory context.