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Gender and Emotion in Criminal Law

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GENDER AND EMOTION IN CRIMINAL LAW

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I. INTRODUCTION

Despite most people's view that emotion is far from simple, the criminal law's approach to emotion is, for the most part, simplistic. The criminal law acknowledges mechanistic emotions—those that are immediate, clear, or seemingly instinctive—but it frequently ignores or discounts complicated emotional states.[1] The failure to appreciate or accommodate complex emotion and willingness to recognize simplistic emotion has gendered effects. Specifically, this Essay will focus on two areas involving complicated, conflicting feelings—rape and domestic violence—that the law oversimplifies to the detriment of women. The doctrines that tend to excuse typically masculine emotional outbursts, the heat of passion excuse and self-defense, fail to provide a responsive framework for understanding women's emotional experiences. This Essay will look at how the failure to incorporate the emotional realities of sex and family violence negatively impact the law of rape and domestic violence and how, in contrast, the heat of passion and self-defense doctrines recognize, and thus encourage,

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[1] In their article on emotion in the criminal law, Martha Nussbaum and Dan Kahan identify two concepts of emotion, mechanistic and evaluative. Dan N. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 273 (1996). The "mechanistic conception sees emotions as forces that do not contain or respond to thought." *Id.* The evaluative conception "holds that emotions express cognitive appraisals . . . and that persons (individually and collectively) can and should shape their emotions through moral education." *Id.* In this Essay I break down emotional conditions somewhat differently into simplistic and complicated emotional stances. I argue that what the criminal law best recognizes is what Kahan and Nussbaum would probably call mechanistic emotions, but which I label simplistic, unidimensional emotions: anger, frustration, or fear. What the law is fairly inept at appreciating is the more complicated, multifaceted emotional situations in which people often find themselves, situations in which they feel competing and diverse emotions—fear and desire, love and hate—at the same time. Unlike Kahan and Nussbaum, I am not concerned so much with how one comes to feel emotion (i.e., whether or not emotions result from and respond to cognitive processes), *see id.* at 277–301, as I am with simultaneously feeling competing emotions. Those emotions categorized by Kahan and Nussbaum as mechanistic would probably fall under my "simplistic" label, but what I refer to as "complicated" emotions may or may not be arrived at cognitively, and cognitively produced emotions may or may not be complicated.

emotionally basic reactions. It will then develop some of the normative questions raised by this varied legal treatment of emotion.

Before turning to rape and domestic violence, it is worth noting that research in both the natural and social sciences suggests that men and women often approach emotion differently. The reasons for this probably stem from a complex combination of sex differences in experience, genetics, neuroanatomy, neurochemistry, and gender socialization. For example, the larger proportion of the cerebral cortex devoted to emotional modulation observed in female brains may relate to differences in the ways men and women process emotions.[2] Numerous studies have shown that men and women respond differently to hormones during times of stress.[3] From a very early age, females appear more likely than males to use verbal persuasion than physical force to achieve their desired ends; words are often more complicated than fists.[4] The result of these and a host of other differences is that the sexes tend to display distinct emotional reactions, with those of women being, at times, more nuanced.

Beyond these studies, various researchers have suggested that, whereas men tend to think in terms of autonomy and separation, women are more likely to think in terms of connection.[5] Reasons for this gendered approach to connection and autonomy may stem from women's unique experiences with pregnancy and child-birth (an intrinsically nonautonomous state of being),[6] women's traditional assumption of disproportionate caretaking responsibilities,[7] or the socialization of women to cultivate and nurture relationships.[8] There may even be a biological component. What-

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[2] *See* Ruben C. Gur et al., *Sex Differences in Temporolimbic and Frontal Brain Volumes of Healthy Adults*, 12 CEREBRAL CORTEX 998, 998, 1001 (2002).

[3] *See infra* text accompanying notes 61–63 (discussing effects of oxytocin and other hormones). *See* SHELLEY E. TAYLOR, THE TENDING INSTINCT: HOW NURTURING IS ESSENTIAL FOR WHO WE ARE AND HOW WE LIVE 20–34 (2002) (describing biological processes supporting the hypothesis that females, unlike males, "tend and befriend" in response to stress).

[4] In a study of thirty-three-month-old children, researchers found that boys tended to ignore verbal protests of girls, whereas girls responded to verbal protests from boys. Carol Nagy Jacklin & Eleanor E. Maccoby, *Social Behavior at Thirty-three Months in Same-Sex and Mixed-Sex Dyads*, 49 CHILD DEV. 557, 566 (1978). In this study, given the age of the subjects, the boys had no physical advantage over the girls, though it is possible that these two-and-a-half-year-old children had all already been socialized into their "proper" gender roles.

[5] As Carrie Menkel-Meadow summarizes, "[t]he common theme that unites [the] body of work by psychologists such as Chodorow, Dinnerstein, Miller, Shaef and . . . Gilligan, is that women experience themselves through connections and relationships to others while men see themselves as separately identified individuals." Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 43 (1985).

[6] *See* Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 21 (1988).

[7] "[T]he burdens associated with intimacy and its maintenance have always been and continue to be disproportionately allocated to women." MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 162 (1995).

[8] "From the beginning, boys learn to be independent, to seek success actively through

ever the cause, connection, which brings with it simultaneous feelings of love, rejection, warmth, and frustration, makes things more complicated emotionally. The socialization of boys and men to eschew outward expression of emotionality and introspection, coupled with male chemical and biological predispositions, appear to make men less likely to wrestle with emotional complexity.[9]

It is important to highlight that I do not intend to essentialize all emotional differences between men and women. On the contrary, to the extent that such differences may be attributable to neurochemistry, our neurochemistry is not fixed.[10] To the extent that differences may be attributable to evolutionary forces, we are still evolving.[11] To the extent that such differences are rooted in caretaking patterns, those patterns can change.[12] And, plainly, learned social practices can be transformed over time. In addition, not all women exhibit typically female qualities, and not all men behave in typically male ways. At this stage of our knowledge about the differences between men and women, it is probably irresponsible to attribute generalized differences to any one cause. However, it is equally irresponsible to assume no difference just because the differences are not automatic or we are not sure where they come from or because we just never bother to notice them. This Essay argues that the law has been deficient in failing to recognize the different ways that women and men tend to experience emotion. It suggests that the criminal law should take account of women's common emotional responses to reduce gender bias in the law.

II. RAPE

Sex can be emotionally confusing and emotionally laden in ways that the criminal law largely ignores. The emotional complexity of sex often leaves women ambivalent about whether to proceed. The emotional intensity of sex can lead to injury if sex is taken, not given. Moreover, the

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their own efforts and abilities while girls are encouraged to be dependent, to seek success passively through pleasing others." Stevi Jackson, *The Social Context of Rape: Sexual Scripts and Motivation*, *in* RAPE AND SOCIETY 16, 19 (Patricia Searles & Ronald J. Berger eds., 1995). *See generally* SANDRA LIPSITZ BEM, THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL INEQUALITY (1993) (arguing that situational influences shape our perceptions of gender, reinforcing stereotypes and obscuring our view of social reality).

[9] *See* ALLAN G. JOHNSON, THE GENDER KNOT: UNRAVELING OUR PATRIARCHAL LEGACY 61 (1997) ("According to patriarchal culture . . . men are aggressive, daring, rational, emotionally inexpressive, strong, cool-headed, in control of themselves, independent, active, objective, dominant, decisive, self-confident and unnurturing.").

[10] *See* STEVEN JOHNSON, MIND WIDE OPEN: YOUR BRAIN AND THE NEUROSCIENCE OF EVERYDAY LIFE 155 (2004) (noting that "life experience and learning also alter your neurochemistry").

[11] *See* Katharine K. Baker, *Gender, Genes, and Choice: A Comparative Look at Feminism, Evolution, and Economics*, 80 N.C. L. REV. 465, 519–20, 523–24 (2002).

[12] *See* Katharine K. Baker, *Taking Care of Our Daughters*, 18 CARDOZO L. REV. 1495, 1525 (1997).

emotional harm inflicted when men try to coerce sex from women is routinely ignored by the criminal law.

A. Emotional Complexity and Emotional Harm

Early in a relationship, or in a relationship in which one person does not know the other very well, some people, but particularly women, are ambivalent about their desire for intercourse.[13] According to The Alan Guttmacher Institute, 9% of women between the ages of fifteen and twenty-four report that their first sexual encounter was forced, and another 25% recount that they did not want it to happen, even though it was not forced.[14] That means that over one-third of women in this age group did not want to participate in their first sexual encounter. There are many possible explanations for why this is so. Some women may fear desertion if they refuse to engage in sex.[15] Others may be afraid that they will be hurt physically if they resist. Some women find certain aspects of sex appealing, but the prospect of contracting a disease or becoming pregnant causes them to be reluctant.[16] Others worry that their reputations will suffer if they have sex.[17] The answer to the seemingly straightforward question, "do you want to have sex?" often has no easy answer.

Rape law—the law that interprets the existence of consent in sexual encounters—should take into account the many concerns that influence women's decisions to engage in sex. If the law was more aware of the emotional complexity of the situation, if it incorporated the idea that in almost one-third of first-time encounters women did not want to proceed, would it be structured such that a failure to say no is interpreted as a yes?[18] Why structure the law such that there is no incentive on the pur-

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[13] This is not to imply that men universally fail to consider thoughtfully the decision of whether or not to engage in sex or that men are always fully sure about their desire to engage in sex.

[14] THE ALAN GUTTMACHER INST., IN THEIR OWN RIGHT: ADDRESSING THE SEXUAL AND REPRODUCTIVE HEALTH NEEDS OF AMERICAN MEN 20 (2002).

[15] Eugene J. Kanin, *Date Rape: Unofficial Criminals and Victims*, 9 VICTIMOLOGY 95, 97 (1984) (reporting that in a study of seventy-one self-disclosed rapists, six involved cases where the woman became receptive after forced penetration by a man with whom she was in a relationship and suggesting that these women might have become cooperative to avoid losing their partners).

[16] *See* Anke A. Ehrhardt et al., *Gender Perspectives and STDs*, *in* SEXUALLY TRANSMITTED DISEASES 117, 119 (King K. Holmes et al. eds., 3d ed. 1999).

[17] *See* MARILYN FRYE, THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY 3 (1983) ("If she is heterosexually active, a woman is open to censure and punishment for being loose, unprincipled or a whore.").

[18] *See In re* John Z., 29 Cal. 4th 756, 760 (2003) (questioning but presuming it is permissible to assume consent if the victim "tacitly refrained from objecting"); Commonwealth v. Berkowitz, 641 A.2d 1161, 1163 (Pa. 1994) (reversing conviction because there was not sufficient evidence that the woman did not consent where both parties agreed that after intercourse the defendant commented "we just got carried away," and that the woman responded "no, you got carried away"); People v. Warren, 446 N.E.2d 591, 594 (Ill. App. Ct. 1983) (reversing conviction of a man who carried a woman he had just met from a bike

suer to ask questions and get confirmation in a situation that is inevitably ambiguous and complicated? A system that put the burden of communication on the pursuer would change the cost of miscommunication; instead of unwanted sex being the result of ambiguity, the result would be a missed opportunity for sex.[19]

Changing the cost of miscommunication by placing the burden of getting assent on the pursuer can be criticized on two different grounds. First, it may discount the desirability of ambiguity. Second, it may punish people who have done nothing wrong.

First, the law's acceptance of ambiguity may be rooted in a belief that ambiguity is itself desirable. According to Professor Neil Gilbert, rape reform demands that "the kaleidoscope of intimate discourse—passion, emotional turmoil, entreaties, flirtation, provocation, demureness—must give way to cool-headed contractual sex."[20] As I have written elsewhere,[21] and notwithstanding the disdain inherent in Professor Gilbert's comparison, contract law may be an entirely appropriate place for rape law to look for guidance. Mutual assent is a critical component of contract law.[22] When assent is ambiguous, there usually is no contract. One purpose for requiring such assent is to ensure respect for the autonomy of the parties to the contract; imposing terms on people to which they did not explicitly agree can be perceived as paternalism.[23] In contrast, rape law has placed the burden of ambiguity on the silent party, and thus silence has meant assent to sex. Ironically, some defend this status quo in rape law because they believe that placing the burden on women to expressly decline sex defends their right to sexual autonomy.[24] It is not clear why a requirement

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path into the bushes and proceeded to perform several acts of oral sex because her "failure to [protest] when it was within her power to do so convey[ed] the impression of consent").

[19] There is no doubt that establishing what constitutes affirmative consent is a challenge in this context. Two states, Washington, WASH. REV. CODE § 9A.44.010(7) (2004), and Wisconsin, WIS. STAT. § 940.225(4) (2004), make an attempt to do this by punishing intercourse without "freely given" consent, but neither state defines freely given consent with much clarity. Given the cultural norms that still validate the idea that "no" can mean "yes" and that silence can mean assent, it is no surprise that requiring consent without defining it may not effect much change. States that have attempted to define consent, such as California ("positive cooperation in act or attitude pursuant to an exercise of free will," CAL. PENAL CODE § 261.6 (Deering 2005)), still assume that silence can mean consent. *See In re John Z.*, 29 Cal. 4th at 760.

[20] Neil Gilbert, *The Phantom Epidemic of Sexual Assault*, 103 PUB. INT. 54, 60 (1991).

[21] Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L REV. 663, 668–69 (1999).

[22] RESTATEMENT (SECOND) OF CONTRACTS § 69 (2004) (noting very limited circumstances under which silence may operate as acceptance of a contract). Silence only very rarely means assent. *Id.* at § 69 cmt. a. In contract law, this default might not apply where "previous dealings" change the presumption to require the offerree to notify the offeror if she does *not* accept the offer. *Id.* at § 69(1)(c) (2004). This might have implications for the law of rape—i.e., perhaps the standard for ascertaining consent should be different in circumstances of repeated sexual encounters. *See infra* note 33 and accompanying text.

[23] *See* Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 272, 319 (1986).

[24] *See, e.g.*, Vivian Berger, *Not So Simple Rape*, 7 CRIM. JUST. ETHICS 69, 75–76 (1988) (reviewing SUSAN ESTRICH, REAL RAPE (1987)) (disagreeing with Estrich in arguing that

that women say no when they do not want to have sex protects women's autonomy any better than a requirement that they must say yes when they desire sex, particularly when contract law adopts the opposite view.[25] Minimizing ambiguity by requiring affirmative consent thus protects women's autonomy.

A second criticism of requiring affirmative assent is that it simply punishes too many innocent people. Currently the criminal law only punishes those men who know their partners do not consent. An affirmative assent requirement could punish people for acting in the face of ambiguity even though their partners silently consent.[26] The problem here is one of trade-offs.

There is every reason to believe that allowing pursuers to act in the face of ambiguity has led to a significant amount of unpunished harm.[27] Proceeding in the face of ambiguity is harmless only if we assume either that a woman's failure to communicate "no" means that she does not really care or that the unwanted sex will not be harmful to her. Both assumptions belie the emotional reality of the situation.

Indecision must not be confused with indifference. To assume that because one is pulled in different directions, one does not care, conflates uncertainty with apathy. Uncertainty can be caused by emotional confusion that reflects intensely held, if somewhat contradictory, feelings.

Sometimes an individual is torn between two choices, neither of which is very significant. In such a case, the individual will not feel particularly hurt or disempowered if another person makes the decision for her; after all, not much is at stake. But sometimes we are torn between two choices,

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treating silence as nonconsent patronizes women because women are capable of asserting their own desires).

[25] Consider, for instance, the case *In re John Z.*, 29 Cal. 4th 756 (2003). *In re John Z* is known as a "post-penetration" rape case because the California Supreme Court ultimately decided whether a man could be guilty of rape if he continued with intercourse when the woman said no after initially consenting. However, the court only had to make that determination because it assumed that the victim's failure to object and her apparent enjoyment of earlier foreplay could constitute consent. *Id.* at 760, 762 (assuming arguendo initial or apparent consent in addressing the issue of withdrawal of consent). Perhaps the victim could have screamed "no," but so, easily, could the man have asked her whether she wanted to continue. There is no apparent reason why demanding that he ask for her consent to engage in sex should be seen as a denial of the victim's autonomy. Usually, asking for a person's preferences is seen as a way of respecting her autonomy.

[26] Andrew Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J.L. & GENDER 381 (2005) (arguing that men often deceive themselves regarding women's desires to have sex).

[27] In the tradeoff between punishing the innocent and failing to punish the guilty, the American system tends to accept that it is better to let many guilty people go free than to send one innocent person to jail. Even if one generally adopts this view, there might be some point at which a system becomes too concerned with protecting the innocent at the expense of failing to punish too many of the guilty, particularly when there are implications for gender equality. Although there is no obvious Archimedean point between these two sorts of errors (i.e., false positives and false negatives), it is important for the law to take account of gendered effects in striking a balance between them.

both of which matter a great deal. We can be truly conflicted about what to choose without being at all willing to let someone else make the decision for us. If someone else did make the decision for us, just because we could not decide, we would likely feel robbed and hurt and violated. Whether to have sex can be a significant decision for many women.[28] The law should not allow a woman's thoughtful uncertainty to be interpreted as indifference.[29]

The law's tolerance of this logical error becomes particularly appalling when one considers the harms that can result from coerced sex. It is true that the harm of rape, unlike that of battery, can be primarily emotional and thus difficult to verify with objective evidence, but this does not in any way negate its seriousness.[30] The emotional injuries from rape can manifest themselves in withdrawal, fear, and personal devaluation.[31] The healing processes for these harms are often longer, more complicated, and less inevitable than the physical healing processes, but that hardly makes them inconsequential.[32]

By allowing men to go forward in the face of ambiguity, the criminal law ignores both the emotional complexity and the emotional harm that may characterize many sexual situations. If the law required men to obtain clarification of their sexual partners' wishes, it could reduce the risk of emotional harm to women.[33] The concept of an affirmative consent

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[28] The Pfizer company recently abandoned its attempt to make a Viagra drug for women because, the leader of Viagra's research team reported, whether women want to have sex "depend[s] on a myriad of factors." Gardiner Harris, *Pfizer Gives up Testing Viagra on Women*, N.Y. TIMES, Feb. 28, 2004, at C1. The research team concluded that "men and women have a fundamentally different relationship between arousal and desire." *Id.* If men feel aroused, they feel desire. Apparently, the relationship between arousal and desire is more complicated for women.

[29] Evolutionary biologists have always maintained that sexual choice is a far more important concept for women than men because the consequences of a bad sexual choice are much more burdensome for women. *See* Katharine K. Baker, *Biology for Feminists*, 75 CHI.-KENT L. REV. 805, 808–10 (2000). Not only does it take many more resources for a female to produce a female gamete (an egg) than it does for a male to produce a male gamete (sperm), but women make virtually all of the investment in offspring between fertilization and birth. *Id.* 809–10. Biologically speaking, a man who makes a bad sexual choice and wants to walk away loses only the cost of one ejaculation. *Id.* at 809. A women who makes a bad sexual choice loses the much more significant investment of an egg *and* nine months of gestational labor. *Id.* at 808–09. The availability of abortion, of course, can lessen the extent of women's inevitable investment, but it cannot reduce it to the minimal level of men's.

[30] Rape can of course be very harmful physically as well. However, if the criminal law is right in punishing he who forces someone to have sex more severely than he who punches someone else in the face, it is not because the physical damage of rape is necessarily greater but because the emotional damage is greater.

[31] *See* ROBIN WARSHAW, I NEVER CALLED IT RAPE 65–71, 73–75 (1988).

[32] *See* Bonnie L. Katz, *The Psychological Impact of Stranger Versus Nonstranger Rape on Victims' Recovery*, *in* ACQUAINTANCE RAPE: THE HIDDEN CRIME 251, 267 (Andrea Parrot & Laurie Bechhofer eds., 1991).

[33] Requiring verbal or unequivocal nonverbal indicia of consent in some encounters need not mean always requiring clear indicia of consent. As I have written with others elsewhere, regulating only first-time sexual encounters (the first time that two particular

requirement is not a novel reform proposal.[34] What is new is the recognition that part of the reason the law has not included an assent requirement stems from the law's dismissal or ignorance of emotional harm. Because the law has not incorporated or addressed the reality of emotional harm, it has not seen the danger of going forward in the face of ambiguity.

Unquestionably, a requirement of meaningful affirmative assent, at least in the early stages of relationships, would place the burden of understanding and responding to ambiguity largely on men. This would not only lead to the conviction of a man who carries a terrified woman off into the bushes to have nonconsensual sex[35] or takes a woman's keys so she cannot escape,[36] it would make cases that now seem hard, much easier.[37] An affirmative assent requirement would also send a clear message that sex is not something to be taken but rather something to be received when it is voluntarily given.[38]

B. The Harm from Coercion

The law's failure to appreciate emotional complexity is reflected in other areas of rape law as well. As Professor Stephen Schulhofer has ex-

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people have sex) may single out for regulation the vast majority of instances of nonrelative acquaintance rape. *See* Ian Ayres & Katharine Baker, *A Separate Crime of Reckless Sex*, 72 U. CHI. L. REV (forthcoming spring 2005) (on file with author). An affirmative assent requirement could be applied to all encounters between people who have not engaged in sexual activity for a given period of time (perhaps several months). *Id.* This would protect women in first-time sexual encounters and ex-wives or girlfriends who did not want to engage sexually with former partners. *Id.*

[34] *See* STEPHEN SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 283 (1998) (advocating for the statutory standard of consent to mean that "at the time of the act of sexual penetration there are actual words or conduct indicating affirmative, freely given permission to the act of sexual penetration").

[35] *See* People v. Warren, 446 N.E.2d 591, 592 (Ill. App. Ct. 1983) (holding that the failure of a woman to resist when it was within her power to do so conveyed the impression of consent where the male defendant lifted the complainant off the ground, carried her into the woods, and told her to take off her clothes, and the complainant did not verbalize "no").

[36] *See* State v. Rusk, 424 A.2d 720, 721–22 (Md. 1981). In *Rusk*, the victim voluntarily drove the defendant home into a neighborhood that was unfamiliar to her, at which point the defendant took the victim's car keys and demanded that she come into his apartment with him. *Id.* The victim was thus left with a choice of being stranded alone in a strange neighborhood or following the defendant into his home and doing what he asked so that she could get her keys back.

[37] *See supra* note 25 (discussing *In re John Z.*, a "post-penetration" rape case, where it was difficult for the court to determine whether the victim had withdrawn consent and likely would have been easier to resolve if the burden of clarifying ambiguity regarding consent were placed on the pursuer).

[38] Although there are sound reasons to be wary of commodifying sex and rape, *see* Katharine K. Baker, *Once A Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 603 (1997), an analogy from property law may be appropriate here. Sex is something that must be voluntarily given. Gifts require proof of delivery. *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 178 (5th ed. 2002) (noting that "[t]he law has long required that, to make a gift . . . the donor must . . . manifest intent[ ]. . .").

plained, even when a woman says yes to sex, there may be background conditions that suggest coercion.[39] When a woman is pressured by her therapist, dentist, lawyer, or teacher to have sex, she may agree out of fear of losing something to which she already has an established legal right—provision of services by these professionals without any expectation of sex in return. To be a subordinate in these situations, to be asked by someone on whom one is dependent to have sex that one does not want can be frightening, humiliating, and confusing. But the criminal law remains reluctant to punish men who take advantage of power relationships to coerce sexual cooperation and it shies away from making excessive asking actionable. This restricted understanding of injury is inconsistent both with civil law and with other areas of criminal law. If an employee agrees to an employer's sexual requests out of fear of the professional consequences of refusal, the employer is liable for harassment; acceptance does not vitiate the employer's responsibility.[40] Situations outside of the employment context can be similarly coercive, and coercing acceptance to sex in these situations can be just as emotionally harmful, but the criminal law has yet to acknowledge these dangers. Thus, as Professor Schulhofer suggests, there are persuasive reasons to punish criminally sexual coercion in any context.[41]

Additionally, criminal law could mimic civil law by finding harm in persistently asking for sex, whether or not the solicited party eventually says yes. Currently, an employer risks liability for harassment if he or his agent repeatedly asks for sex after the employee has refused.[42] The criminal law's inquiry could parallel the civil law's, which is both objective (whether a reasonable person would find the questioning hostile and abusive) and subjective (whether the complainant actually experienced the treatment as harmful).[43] The law of employment discrimination recognizes that repeated asking and all of the anxiety that comes with it causes harm. Indeed, it is a kind of harm that the criminal recognizes in physical contexts. If one puts another in fear of serious physical injury, one is

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[39] *See generally* SCHULHOFER, *supra* note 34 (arguing that new legal safeguards should be instituted to protect sexual autonomy).

[40] As long as the requests were unwelcome and there was a quid pro quo of sex for employment benefits, there is a cause of action for sexual harassment. *See* 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 763–66 (3d ed. 1996).

[41] "Just as nonviolent threats to take property amount to criminal extortion, nonviolent coercion to induce consent to unwanted intercourse should constitute a serious criminal offense." SCHULHOFER, *supra* note 34, at 280.

[42] If repeated asking results in severe and pervasive harassment, it is actionable under Title VII. BARBARA T. LINDEMANN ET AL., SEXUAL HARASSMENT IN EMPLOYMENT LAW 44–46 (Supp. 1999).

[43] Under civil law, "[t]he objective question is whether a reasonable person in the complainant's position would find the environment hostile and abusive. The subjective question is whether the complainant actually perceived the environment to be hostile." *Id.* at 40–41. A criminal provision might want to make the standard harder to meet, for instance, by buttressing the objective requirement with an "extremely hostile or abusive" standard. Subjectively, the criminal law could require some proof of actual subjective harm.

guilty of assault.[44] If one repeatedly maintains a physical proximity or conveys verbal or written threats of bodily injury, one is guilty of stalking.[45] In these contexts, the criminal law punishes those who inflict fear of physical harm. It can be just as frightening to have someone on whom one is dependent or with whom one is in constant contact to repeatedly and offensively "ask" for sex. It is frightening in a way that repeated asking to buy your car or borrow your coat would not be. It is frightening because of the emotional component of sex.[46] If one treats sex as an emotional experience, one that involves a giving of self,[47] then repeated, unwanted demands for sex become demands on one's self-definition and one's self-perception, not just demands on one's time or labor or bank account. If the criminal law appreciated these emotional consequences of sex the way it appreciates the physical consequences of almost everything else, it would be much more likely to find criminal harm in repeated asking.

The criminal law traditionally may have ignored this harm because it expected women to extricate themselves from harassing situations. If a woman walks away from her male harasser, he will obviously have no opportunity to continue his harassment. This reliance on extrication in such situations is both ironic and misplaced. It is ironic because when physical harm is at issue, one is not legally required to extricate oneself from the threatening situation. The criminal law tells us we need not walk away from physical danger, while it expects us to simply walk away from emotional danger.[48]

The demand that women remove themselves from emotionally dangerous situations is misplaced because of the severe emotional or financial costs of ending an established relationship. The law of sexual harassment recognizes that people can invest substantially in their jobs; requiring them to walk away requires them to abandon that investment. Many other nonemployment relationships involve comparable kinds of investment.

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[44] *See, e.g.*, MODEL PENAL CODE § 211.1(1)(c).

[45] *See* NAT'L INST. OF JUSTICE, MODEL ANTISTALKING CODE FOR THE STATES (1996), *available at* http://www.ojp.usdoj.gov/ocom/94Guides/DomViol/appendb.htm (last visited Mar. 24, 2005). For a discussion, see 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW 575–76 (2d ed. 2003) (citing model stalking law drafted by National Criminal Justice Association and presented to the states in 1993).

[46] For a broader discussion of why asking for sex is different than asking for other goods, see Katharine K. Baker, *Unwanted Supply, Unwanted Demand*, 2 GREEN BAG 103, 107 (1999).

[47] Robin L. West, *Legitimating the Illegitimate: A Comment on* Beyond Rape, 93 COLUM. L. REV. 1442, 1451 (1993) ("Ideally—and it may be an ideal worth holding on to—the 'self' is given with the giving of sex; there is no clear differentiation between the sex given and the giving and receiving self.").

[48] If we are in our own home, in most states, we may fight back with any amount of force, albeit with a degree of proportionality. *See* LAFAVE, *supra* note 45, at 156. If we are not in our own home, we may fight back with nonlethal force. *Id.* at 155 (noting that "[i]t seems everywhere agreed that one who can safely retreat need not do so before using nondeadly force").

Lawyer-client, doctor-patient, and professor-student are all examples of relationships that require one to expend significant financial and personal resources as the relationship develops. Abruptly terminating such a relationship would likely lead to sizable personal and financial losses.[49] By failing to recognize these losses, the criminal law fails to appreciate the cost of leaving. It assumes, wrongly, that sex is simple, harmless, easy to say no to, and easy to walk away from.

III. Domestic Violence

The emotional investments that complicate violent domestic relationships also confound the criminal law. Professor Victoria Nourse's comprehensive analysis of self-defense and subjectivity shows both how courts use the imminence requirement in criminal law to impose a duty to retreat from the home on battered women and how that duty to retreat is more accurately perceived as a pre-retreat duty.[50] Not only must battered women run instead of fight, they must run before the fight even starts.[51] Once again, the law's presumptions about how women should behave fail to take into account the emotional realities of such situations. There is often far too much emotional glue for women to extricate themselves easily from abusive relationships.

Women remain in relationships not only because they may be financially dependent on their partners or because they face a greater risk of violence if they leave;[52] these women are often emotionally bound to their partners. Many battered women do not want to go.[53] They want the

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[49] Some of these losses might be recoupable civilly if the sexual relationship is found to be a breach of professional duty that could lead to recovery in tort. *See* Wall v. Noble, 705 S.W.2d 727, 731 (Tex. Ct. App. 1986) (holding that the sexual relationship between doctor and patient was relevant to determining whether the physician breached standard of care); Hoopes v. Hammargren, 729 P.2d 238, 242 (Nev. 1986) (arguing that taking "sexual advantage of the physician-patient relationship can constitute malpractice"). Professional organizations often discourage sexual contact with patients or clients. *See* ADA Principles of Ethics & Code of Prof'l Conduct § 2.G (Am. Dental Ass'n 2005); Model Rules of Prof'l Conduct R. 1.8(j) (2004).

[50] "As courts themselves have made clear, the practice, if not the law, of battered woman cases revolves around the question whether 'she should have left.'" V. F. Nourse, *Self-Defense and Subjectivity*, 68 U. Chi. L. Rev. 1235, 1282 (2001) [hereinafter Nourse, *Self-Defense*]; *see also* Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. Rev. 371, 378 (1992) (explaining that traditional self-defense doctrine requires that one must be in danger of imminent deadly harm before one is justified in using deadly force in defense).

[51] *See* Nourse, *Self-Defense*, *supra* note 50, at 1284–85.

[52] *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 83–93 (1991).

[53] Consider the words of one of the women in Martha Mahoney's work:

> [M]y husband is an alcoholic. Things have been really bad these past few years. But we've been married thirteen years. And I have three children. For nine of those years, he was the best husband and father anyone could have asked for . . . . I may have to leave. But if I do, I'm giving up on a father for the children, and

violence to stop, and they want to feel safe, but they do not want to leave.[54] Rather, they want to stay in a relationship with men whom they often continue to love, and with whom they share a life, a family, and a community.[55] The legal presumption that one should walk away from a relationship because one gets hit reflects a remarkably anemic understanding of the emotional complexity relationships.

Science is now validating what observers of domestic violence have long recognized: female victims of domestic violence are not likely to respond to physical violence in the way that the law presumes that they should. The law recognizes hitting back or running away as legitimate responses to violence, but in emphasizing these responses, it exhibits male bias. Like most people with a rudimentary education in traditional biology, the law has assumed that the typical human response to stress is an adrenaline-induced "fight or flight" response.[56] However, scientists have now identified significant gender differences that challenge the ubiquity of this response. In the late 1990s, researchers began to recognize that virtually all of the experiments measuring and observing the "fight or flight" response had used only males as subjects.[57] When experimenters began focusing specifically on women's responses to stress or comparing male and female reactions, they found a new response, which they labeled "tend and befriend."[58] One who tends and befriends in times of stress reacts by reaching out to support groups and taking particularly good care of dependents.[59] Thirty studies have examined the differences between male and female reactions to stress, and all thirty show that women draw more on social support than do men in times of stress. As psychologist Shelley Taylor concludes, "the difference between women's and men's inclination to turn to social groups in times of stress ranks with giving birth as among the most reliable sex differences there are."[60]

The chemical key to this difference is a hormone called oxytocin, which is released at times of intense emotional attachment, such as when

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> I'm giving up on him. And I can't just throw away those nine years . . . . I may have to decide to go. But I'm not going to do it lightly.

Id. at 21.

[54] *See* Katharine K. Baker, *Dialectics and Domestic Abuse*, 110 YALE L.J. 1459, 1477 (2001).

[55] For various different analyses of women's subjective experiences of battering, see Mahoney, *supra* note 52, at 16; Lynora Williams, *Violence Against Women*, 12 BLACK SCHOLAR 18, 22 (1981); RODDY DOYLE, THE WOMAN WHO WALKED INTO DOORS 176–77 (1996) ("I mopped up my own blood. I lost all my friends, and most of my teeth. . . . And I never stopped loving him. . . . And he loved me.").

[56] *See* LAFAVE, *supra* note 45, at 142–57 (discussing whether, when, and where one can fight and when one must flee).

[57] *See* TAYLOR, *supra* note 3, at 17–18.

[58] *Id.* at 20.

[59] *Id.* at 22–24.

[60] *Id.* at 24.

falling in love,[61] when in labor or nursing,[62] and when experiencing certain stressful events.[63] Oxytocin makes people feel as though they have bonded with one another.[64] Although both men and women release oxytocin, estrogen enhances its effects, while androgens like testosterone—which increases in times of stress—block oxytocin's effects.[65] Because women have higher estrogen levels than men and men have higher testosterone levels than women, oxytocin affects men and women differently.[66] The way oxytocin interacts with estrogen indicates that women might be chemically more likely to feel attachment than men. This has obvious implications for a woman's brain chemistry when the man she loves turns violent. Even while he is hitting her, her body chemistry could be driving her to reach out to him, stay where she is, and protect those within her care.

As indicated, the data on oxytocin is new and still developing. One can hardly fault traditional criminal law for not having a twenty-first century understanding of neurochemistry. But one can fault the criminal law for not incorporating a clear emotional difference between men and women; what biochemistry can now only begin to explain was capable of observation long ago.

The criminal law has presumed that a woman's decision to leave an abusive situation should be easy. But many women understand the harsh reality of what it may mean to leave. They realize that they may well be risking greater physical danger. They may also be risking increased financial hardship.[67] They know that to leave is to give up an emotional connection that they may desperately want. The long-term nature of the cycle of violence may also make it more difficult for a woman to extricate herself because periods of reconciliation, hope, and mutual emotional attachment are often intermingled with violence.[68] The decision to leave is thus far from easy.

Battered women's syndrome attempts to give a defense to women who fail to leave their abusers and eventually retaliate against them by explaining how the violence these women suffer can make them uniquely captive. However, it still paints a simplistic emotional picture, one of a woman who is helpless, not one who is struggling.[69] Expert testimony on

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[61] *See* C. Sue Carter, *Neuroendocrine Perspectives on Social Attachment and Love*, 23 PSYCHONEUROENDOCRINOLOGY 779, 788 (1998) (explaining that oxytocin plays a critical role in pair-bonding).

[62] *See* TAYLOR, *supra* note 3, at 25.

[63] *Id.* Other hormones, like endogenous opioid peptides (natural pain relievers), estrogen and progesterone may aid the tending instinct in times of stress. *Id.* at 26–27.

[64] JOHNSON, *supra* note 10, at 111–12.

[65] TAYLOR, *supra* note 3, at 28.

[66] *Id.*

[67] *See generally* Mahoney, *supra* note 52 (describing domestic violence through accounts of individual women, the difficult choices battered women make, and the experiences that shape these choices).

[68] *See* LENORE E. WALKER, THE BATTERED WOMAN 55 (1979).

[69] *See* ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 80–

battered women's syndrome generally focuses on women's "learned helplessness" and passivity.[70] It tells the story of a woman who is so broken that she no longer cares that she is mistreated. This defense often fails because when real women get into court, the jury hears a story of a woman who struggles, emotionally if not physically. Such struggles show signs of initiative and agency that are inconsistent with battered women's syndrome.[71] When the woman fails to choose the emotionally simplistic background option—leave—or conform to the emotionally simplistic alternative—give up completely—the law has no place for her and thus assumes that she must be culpable when she finally fights back.[72]

Again, my aim is not to offer yet another critique of the battered women's syndrome defense, but rather to highlight that the absence of an adequate legal interpretation of women's experiences with domestic violence, like the insufficiency of traditional rape law, stems from the criminal law's failure to recognize emotional complexity. A battered woman often does not come to experience just one feeling of helplessness; she is likely to experience an extensive range of emotion, including anger, love, hope, attachment, frustration, fear, and pain. A litigation strategy that tries to define this emotional complexity as a simple, uniform reaction is bound to fail.

IV. Excuses and Justifications

The fact that the law holds women culpable for the physical violence they inflict on their former abusers is particularly troubling when one contrasts it with the legal treatment of men's violent emotional reactions. As long as men react immediately, thoughtlessly, and without emotional struggle, their violent acts are minimized or excused.

The heat of passion excuse and the self-defense doctrines both exemplify this difference. For the heat of passion excuse to apply, a person must have been in a circumstance that would "cause a reasonable man to

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81 (2000). Schneider argues that in many cases, the battered women's syndrome merely reflects old stereotypes because it identifies women as helpless rather than explaining homicide as a necessary choice to save women's own lives. *Id.* She further criticizes the battered women's syndrome as a revival of the excuse concept. *Id.* at 135–36.

[70] *See id.* at 80–81.

[71] *See* Mahoney, *supra* note 52, at 38–43 (criticizing the idea that battered women appear helpless); Shelby A. D. Moore, *Battered Woman Syndrome: Selling the Shadow to Support the Substance*, 38 How. L.J. 297, 302–03 (1995) (arguing that African American women do not necessarily fit well into the battered women's syndrome typology because they are viewed as "angry, masculine, domineering, strong, and sexually permissive").

[72] *See* David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 Ariz. L. Rev. 67, 112 (1997) (explaining that "[b]ecause . . . 'learned helplessness' theory places so much emphasis upon the woman's inability to rescue herself from the abusive situation, any proactive measures on the woman's part may thrust her outside of the protective realm of the syndrome theory").

lose his normal self-control."[73] The most common situations in which men are excused for losing control involve intimate relationships.[74] Pursuant to the heat of passion excuse, men often receive reduced sentences for killing their intimates or their intimate's lovers.[75] In theory, the heat of passion excuse is available to women who kill their intimates or their intimates' lovers as well, but a review of relevant cases shows that women rarely claim they kill their intimates in a fit of jealous rage. In fact, women rarely employ the excuse at all.

A review of all state and federal cases found to include the words heat, passion, and defense in proximity revealed only three cases in which the female defendant claimed that she killed her husband because she learned of an adulterous affair.[76] This gender disparity in the use of the defense is especially significant in light of the fact that men are more likely to have adulterous affairs.[77] Three other cases involved women claiming to have killed their abusive partners in the heat of passion.[78] Women attempted to raise the heat of passion defense in only fourteen cases, and the defense was successful in only nine of these cases. In contrast, men tried to use the heat of passion defense 227 times. There can be little doubt that the use of the heat of passion defense is gendered.[79]

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[73] LAFAVE, *supra* note 45, at 17.

[74] *See* Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1375–77 (1997) [hereinafter Nourse, *Passion's Progress*]. A man can invoke heat of passion to justify a violent outburst after merely hearing about adultery (as well as after witnessing an adulterous act). LAFAVE, *supra* note 45, at 498. Heat of passion has also been used to justify reactions to a violent, painful blow and an unlawful arrest. LAFAVE, *supra* note 45, at 496–98.

[75] *See* Nourse, *Passion's Progress*, *supra* note 74, at 1364 & nn.206–10.

[76] *See* Scroggs v. State, 93 S.E.2d 583, 585 (Ga. Ct. App. 1956) (holding that killing another woman to prevent adultery is not just excused but justified); People v. Williams, 576 N.E.2d 68 (Ill. App. Ct. 1991) (sustaining conviction of first-degree murder where woman killed her husband after she found him naked with two other women in their bedroom); Commonwealth v. Legg, 711 A.2d 430 (Pa. 1998) (granting female defendant a new trial due to ineffective counsel where defendant, who had been treated for serious mental illness, shot her husband during an argument about an extramarital affair she had known about for many years).

[77] ROBERT T. MICHAEL ET AL., SEX IN AMERICA: A DEFINITIVE SURVEY 105 (1994) (citing that 80% of women are faithful in marriage, while only 65–85% of men are).

[78] *See* State v. Guido, 191 A.2d 45 (N.J. 1963) (remanding such that issue of manslaughter for heat of passion crime could be submitted to the jury where female defendant claimed that she shot her husband due to her having "exploded" under pressure brutally applied to her by her husband); State v. Felton, 329 N.W.2d 161 (Wis. 1983) (remanding case for submission of heat of passion manslaughter verdict where female defendant provided evidence of her husband's long course mistreatment of her, culminating in public humiliation hours before she killed him); State v. Hoyt, 128 N.W.2d 645 (Wis. 1964) (permitting a new trial for female defendant, a battered spouse who claimed to act in self-defense by killing her husband, because lawyer failed to inform himself of the heat of passion manslaughter defense).

[79] The search conducted suggests that men are well over ten times more likely than women to use the heat of passion defense, even though men are just under ten times more likely than females to commit murder. JAMES ALAN FOX & MARIANNE W. ZAWITZ, U.S. DEPT. OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES (2004), *available at* http://www.ojp.usdoj.gov/bjs/homicide/gender.htm (last visited Mar. 24, 2005).

The availability of the heat of passion defense demonstrates the criminal law's recognition that intimacy can cause immediate, unidimensional reactions—most commonly rage—that keep men from exercising any kind of self-control or reason.[80] At the same time, however, the criminal law refuses to take account of the ways in which those same intimate relationships can produce multidimensional, conflicted reactions, which often manifest themselves in a veritable paralysis.[81] The woman whose emotional confusion leads her to stay with a violent man is condemned; the man whose emotional clarity leads him to kill the woman he loves is excused. The heat of passion excuse favors quick, unthinking violent responses and fails to encourage people to act in a constructive way—to absorb their frustration, process their feelings, and try to channel those feelings into communication. This differential treatment of emotion privileges the behavior more frequently demonstrated by men and devalues the reactions more common among women.

Like the "heat of passion" excuse, the self-defense doctrine encourages immediate physical response. To take advantage of the self-defense doctrine, one must have been acted upon first. There is no duty to retreat before using nondeadly force.[82] Professor Wayne LaFave justifies the doctrine by explaining that "there is a policy against making one act in a cowardly and humiliating role."[83] Of course, if unarmed, women have little choice but to act "cowardly." For the most part, when threatened by men, women know that they will not be able to win a physical contest, and, if they try, they bear a substantial risk of additional physical violence.

Justice Holmes had an alternative, more famous justification for allowing people to fight back. Holmes succinctly stated, "detached reflection cannot be demanded in the presence of an uplifted knife."[84] Holmes thought that reflection was too much to ask of someone faced with an immediate threat. Yet unarmed women must exercise precisely this behavior to survive. Professor LaFave's view implies that running away is cowardly despite the fact that this is often a woman's only realistic option. Justice Holmes implies that detached reflection cannot be expected even though women routinely engage in detached reflection. Put together,

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[80] *See* Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 465 (1982) (noting that "some anger is so great that it is unrealistic to expect that the anger can be controlled by the actor . . ."). In Nourse's analysis of the Model Penal Code, she suggests that the Code drafters saw losing control in intimate situations as "rational," while losing control in other situations was not. *See* Nourse, *Passion's Progress*, *supra* note 74, at 1375–77.

[81] Confused and conflicted potential rape victims are frequently hesitant to resist. *See supra* text accompanying notes 14–17. Angry but attached domestic violence victims may stay with their abusive partners rather than leave. *See supra* text accompanying notes 55–68.

[82] LAFAVE, *supra* note 45, at 142.

[83] *Id.* at 155.

[84] Brown v. United States, 256 U.S. 335, 343 (1921).

LaFave's and Holmes's rationales for the self-defense doctrine seem to ignore the reality of women's lives.[85]

V. Normative Questions

The normative question underlying the heat of passion and self-defense doctrines—whether the law should encourage detached reflection in more situations—is relatively easy for most scholars to answer. The bulk of analysis suggests that we should in fact encourage reflection over immediate aggression, and thus the law should not excuse violent emotional reactions if nonviolent alternatives are available. Others have made this point convincingly, and there is little need to expand upon it here.[86] In contrast, the normative questions underlying the emotional complexity inherent in rape and domestic violence situations are not likely to lead to a consensus. Should women continue to be burdened (or enriched, depending on one's perspective) by the emotional content of sexual activity? Should women be expected to immediately abandon their abusers without regard for the attachment they may feel to them? Although I have discussed in this Essay certain biological components of behavior, in addressing these normative questions, it is important to note that the law need not take neurochemistry or biology as fixed. Human behavior results from a complex interaction of biology and social factors. Biological proclivity is not inevitable, and the law plays a huge role in shaping the social factors that interact with biology.

Embracing the complex emotions that can result from sexual relationships may foster types of joy and intimacy that most interpersonal encounters lack.[87] This is not the only way to experience sex, however. A more transactional approach which views a request for sex as little dif-

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[85] In his article on deterrence, Professor Kahan suggests that there is every reason to see the Holmes and LaFave justifications as relying on the same rationale. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 Harv. L. Rev. 413, 429–35 (1999). When writing *Brown*, Holmes endorsed a version of what is known as the "true man" doctrine. *Id.* The true man doctrine grew out of American Southern and Western traditions that "put a premium on physical displays of courage and on violent reactions to slights." *Id.* at 432. Holmes's justification, though couched in neutral language about the inevitability of fearful, immediate reaction, may have been a deliberate attempt to simply rephrase the policy against cowardice. *Id.* at 433. Probably less deliberate was his clear endorsement of a doctrine that would do women little good. As the name of the "true man" doctrine suggests, the values vindicated by allowing people to fight back were not values thought to be important in women. There did not exist the parallel expectation that "true women" should display physical courage or react immediately and decisively to emotionally charged situations.

[86] *See, e.g.*, 2 Paul H. Robinson, Criminal Law Defenses § 131(c) (1984) (describing the necessity requirement of self-defense); A. J. Ashworth, *Self-Defence and the Right to Life*, 34 Cambridge L.J. 282 (1975) (arguing that a prohibition on force is one of the minimum conditions of social life); Stephen Schulhofer, *The Gender Question in Criminal Law*, 7 Soc. Phil. & Pol'y 105 (1990).

[87] *See* Martha Nussbaum, *"Only Grey Matter"? Richard Posner's Cost-Benefit Analysis of Sex*, 59 U. Chi. L. Rev. 1689, 1716–28 (1992).

ferent than a request to buy a car or borrow a coat could leave women less vulnerable to the emotional harms of coerced sex. If we drain sex of its emotional content, we remove much of the potential harm. Numerous women endorse this approach as truly feminist precisely because it would eliminate what is now gender-differentiated vulnerability in sex.[88]

The men who routinely take advantage of their positions of power to exploit women for sex[89] do not seem burdened by the potential emotional consequences of sex. They may view sex as merely another desirable transaction. If more women treated sex in this way, requests for it would likely be less complicated and confusing for women. Thus, women may best be able to overcome their sexual victimization by approaching sex in a more stereotypically masculine way. If that is deemed the most desirable direction, then it is our own attitudes about sex, rather than the criminal law, that must change. If a transactional approach to sex is what we seek, then we must discourage the notion that sex has unique "psychological preconditions and emotional consequences."[90]

Despite its possible benefits, this course would obviously have many critics. For those who wish to endorse a view of sexual expression that allows for a greater degree of meaningful enrichment and intimacy, change must be achieved through the law itself. The criminal law must begin to acknowledge that sexual interaction fosters emotional complexities that it has previously overlooked. Recognizing those emotional complexities may require reallocating burdens such that one who wants to have sex, at least before the relationship develops to the point where consent can be ascertained by implication, must get affirmative consent so as to avoid the harms of ambiguity. Exploiting the background conditions that can lead to coerced sex, and repetitive, offensive asking might also be punishable criminally.

Reifying the emotional complexity of violent relationships in the law presents further difficulties. If women struggled less with competing feel-

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[88] *See generally* LINDA R. HIRSHMAN & JANE E. LARSEN, HARD BARGAINS: THE POLITICS OF SEX (1998) (arguing that sex is political and has always reflected some form of bargaining, and proposing changes to the legal regulation of sex to remove the unequal, coercive bargaining power typically favoring men in these political negotiations); CAMILLE PAGLIA, SEX, ART, AND AMERICAN CULTURE (1992) (compiling essays that equate contemporary American feminism with Puritanism and argue that women should be sexually liberated, ambitious, and aggressive); KATIE ROIPHE, THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS (1993) (arguing that feminists are too consumed with legislating love and overly infatuated with consent, and instead promoting ideal of sexual liberation). In contrast, this Essay argues that by forcing pursuers (mostly men) to clarify their potential sexual partners' desires, an affirmative consent requirement acknowledges and validates the emotional complexity that women experience in response to sexual encounters and might have other positive effects. For example, requiring those who pursue sex to affirmatively seek consent to sexual encounters may prompt more sensitivity on the part of the pursuers and promote better communication and understanding between sexual partners.

[89] *See generally* SCHULHOFER, *supra* note 34 (describing the prevalence and prominence of the problem of power exploitation in seeking access to sexual partners).

[90] *Id.* at 117.

ings of love and anger and simply let anger consume them they might well leave abusive situations earlier. This would not only spare them future abuse; it would avoid often fatal final confrontations. Perhaps, then, the norm we should seek is a norm of leaving. To encourage women to leave, the law would have to reject as normatively unacceptable whatever tending instinct oxytocin may produce. The law should be careful to make sure that fleeing women (and their children) have adequate financial resources and physical protection, but it should not concern itself with developing legal defenses that would be applicable to women who do not leave. Indeed, if leaving is the desired norm, then the law could be more explicit and transparent in its demands that women leave.[91]

As scholars of domestic violence have argued, however, the spectrum of violence within the household is wide; it is not clear that we want to endorse uniform reactions to violent episodes. In cases that Professor Portwood has classified as "patriarchal terrorism,"[92] i.e., cases of repeated, severe, and consuming violence, flight is unquestionably the proper course. But in "common couple" violent situations, when the violence is often more isolated, the terror only momentary, and the injury less severe, should we always encourage flight? Endorsing a norm of leaving means endorsing a norm of autonomy and individualism that is consistent with the criminal law's treatment of domestic violence, but is inconsistent with how many people actually experience and want to experience love and family relations. When reality falls short of the ideal of total nonviolence, should the law endorse a norm of leaving or staying? The norm the law currently endorses—fighting back—does women little good. For the most part, women's options are to leave or to stay without fighting back. A norm of connection, as opposed to a norm of autonomy, would suggest that it is permissible, maybe even desirable, for a spouse to respond to isolated incidents of violence by staying right where she is.[93]

Endorsing a connection norm would not necessarily allow women to kill their abusers with impunity. Instead, it could provide women with the same kind of reduced sentence that men get when they act in the heat of passion. If a woman's emotional confusion, brought on by the intensity of an intimate relationship, induces her to stay or to delay a violent reaction, then she could be afforded the same treatment as the man whose emotional clarity, honed by the intensity of an intimate relationship, causes him

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[91] *Cf.* Nourse, *Self-Defense*, *supra* note 50, at 1247. (describing how courts use the "imminence" requirement in self-defense doctrine to impose a kind of retreat rule even in jurisdictions that do not require retreat).

[92] Sharon Portwood, *When Paradigms Collide: Exploring the Psychology of Family Violence and Implications for Legal Proceedings*, 24 PACE L. REV. 221, 226 (2003).

[93] At what point does that detached reflection become inappropriate? And, even if we can answer that question academically, perhaps with when the violence ceases to be about anger and is instead about control, can we really expect the victims themselves to know when to make that determination? If disentangling these issues is too much to ask of victims, we cannot demand that they leave.

to act out immediately. In both cases, first-degree murder could become manslaughter, but in neither case would the violence be excused completely.

VI. CONCLUSION

Some people say that women are too emotional.[94] In truth, women may just be different emotionally than men. Currently, criminal law pays too little attention to this difference. It has devalued the importance of responding thoughtfully to emotionally complex situations, and it has remained blind to the tension that conflicting emotions can cause.

Rape law has been far too hesitant to recognize the implications of viewing sex as emotionally charged. To embrace the emotional component of sexual interaction, the law must recognize that emotional confusion is not the same as emotional indifference, that the emotional harm that unwanted sex inflicts is grave enough to warrant more exacting scrutiny of consent, and that fear of emotional harm can be just as injurious as fear of physical harm. Meaningful consent requirements and the criminalization of severe sexual harassment could make considerable progress towards recognizing these harms.

Comparably, the law of domestic violence has been too reluctant to acknowledge the emotional complexity of many domestic relationships. It has assumed that immediate, uniform reactions to violence are the norm. Thus, it has recognized the heat of passion and self-defense doctrines, but ignored what women's behavior demonstrates and what science now verifies—that fighting back and running away are not the only "typical" human reactions to stress. Women tend to display a different reaction, one that involves neither fighting nor fleeing, and one that has been extraordinarily hard to fold into the heat of passion or self-defense doctrines. This likely explains why women find these doctrines to be of such little use. Not only does the law need to take account of women's tendency to "tend and befriend," it needs to evaluate whether such a tendency may actually present a normatively superior reaction to violence and stress.

The law's unwillingness to incorporate emotional complexity into its understanding of harm and its skewed validation of particular emotional reactions leaves women at a significant disadvantage. It leads the law to ignore the emotional complexities of unwanted sex and violent domestic relationships and causes the law to overlook the unnecessary harms caused by assuming and excusing unidimensional emotional responses.

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[94] "Poets, playwrights, and philosophers have long remarked on women's emotionality—often with a tinge of scorn. This contempt still thrives." HELEN FISHER, THE FIRST SEX: THE NATURAL TALENTS OF WOMEN AND HOW THEY ARE CHANGING THE WORLD 120 (1999).