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Rethinking Consent in a Big Love Way

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RETHINKING CONSENT IN A *BIG LOVE* WAY

Cheryl Hanna*

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INTRODUCTION

This Article is based on a presentation at the *Michigan Journal of Gender and Law* as part of their symposium “Rhetoric & Relevance: An Investigation into the Present & Future of Feminist Legal Theory.” In it, I explore the problem of categorical exclusions to the consent doctrine in private intimate relationships through the lens of the HBO series *Big Love*, which is about modern polygamy. There remains the normative

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question both after *Lawrence v. Texas* and in feminist legal theory of under what circumstances individuals should be able to consent to activity that takes place within the context of a private, intimate relationship. The tensions between individual autonomy and state interests are beautifully explored in *Big Love*. Drawing on themes presented in the series, this Article asks if there is any principled way to make the distinction between those relationships in which there is some physical or psychological harm inflicted and those in which the state has proscribed a relationship because of some moral or social harm it allegedly causes. Four case studies are presented to prompt readers to try to answer the question of when consent should be a defense to otherwise proscribed activity. I conclude that the future of feminist legal theory depends on its ability to remain ambivalent about the tensions presented in the consent doctrine as applied to contexts such as polygamy, prostitution, sadomasochistic sex, obscenity, and domestic violence. *Big Love* seeks to persuade us to accept ambivalence and to be open to changing our minds because of the complicated nature of women's (and men's) lives; feminist legal theory ought to persuade us to do the same.

Anyone who wants to understand the present and future of feminist legal theory ought to watch the HBO series *Big Love*. (Warning: viewers may find the show highly addictive.) *Big Love* is about a modern polygamist family in Utah. The patriarch is a man named Bill Henrickson who was raised on a polygamist compound, got expelled as a teen when he became a sexual threat to the older males, and found his way to a monogamous world. He marries his first love, Barb, has three children, and is a successful businessperson. But when Barb gets cancer and can no longer have children, he decides to "live by the principle" and begins taking other wives. Barb is beautiful and educated and otherwise completely sane but for the fact that she agrees, however reluctantly, to the family's ever-expanding footprint. As the series ended its fourth season, Bill had three wives and eight children, all of whom live in three houses in a modern suburban development. Bill briefly had a fourth wife, but she left when she couldn't handle the complicated family dynamics. She is also now pregnant with Bill's child, and she and her foreign fiancé have returned to the Henrickson homestead as they try to game the immigration system. Indeed, Stanley Fish has dubbed the Henrickson family "the new 'Waltons'"¹ for its nostalgic portrayal of multigenerational, large families.

The show highlights that to the extent that Barb and the other wives consent to polygamy, they do so in a world in which their choices

1. Opinionator, <http://fish.blogs.nytimes.com/2009/02/01/looking-for-someone-to-like/> (Feb. 1, 2009, 21:00 EST).

are inevitably constrained by material needs and their own spiritual beliefs, and, most profoundly for Barb, by her love for Bill. *Big Love* reminds us of a nearly universal desire to be in a relationship, which then often leads us to accept situations we never anticipated or wanted.

Yet, *Big Love's* polygamy is not obviously exploitative. It is fairly democratic, with the "sister-wives" having a voice in both how the family functions and who gets to join. True, each new "sister-wife" is younger (and hotter) than the last one, but there are no child-brides being forced into sexual servitude. Indeed, it is often the wives who run the show, and usually run Bill, who often seems powerless relative to their collective force. These are adult women who make their own decisions, and despite the expected jealousy and power struggles, the "sister-wives" share a special and affirming bond. (My best friend once commented that *Big Love* makes polygamy look pretty attractive. There are more hands on-deck to take care of the kids, you only have to give your husband limited attention, and when you sit around and complain to your friends about him, it is the same guy, so everyone can empathize).

This post-*Sex-in-the-City*-meets-*Desperate-Housewives* polygamy stands in sharp contrast to polygamy on the religious compound where Bill grew up and where his parents and brother still live. Bill's father-in-law, via his second wife Nicki, is Roman Grant, the compound's leader. The state unsuccessfully prosecuted Grant for forcing young girls to sexually submit to husbands they did not choose. This sexually exploitive polygamy robs young girls of any autonomy and freedom before they even reach the age of legal consent.² Thus, we are left to decide whether there is truly a way for us (the viewers and the state) to distinguish between a kind of "sister-wifedom-is-powerful" polygamy practiced by the Henrickson family and the kind of grotesquely "patriarchal and oppressive polygamy" that exploits girls and women, as well as outcasts many boys,³ practiced on the compound.

One of the central tensions in *Big Love* is the question of consent and its relationship to the law. The Henrickson family is always concerned that their private polygamy will become public and that they will lose everything. They are not just worried about public condemnation but also about the state raiding their cul-de-sac and taking away their children. Bill could be prosecuted under Utah's bigamy law for living

2. See, e.g., *State v. Green*, 99 P.3d 820, 830 (Utah 2004) (upholding polygamy prosecution and articulating the state's compelling interest in keeping underage girls safe from sexual abuse and forced marriage).

3. Brienne M. Billie, *The "Lost Boys" of Polygamy: Is Emancipation the Answer?*, 12 J. GENDER RACE & JUST. 127, 133–135 (2008–2009).

with three women as husband and wife.⁴ At the end of the fourth season, the family decides to go public with their polygamy at Bill's insistence after he wins a seat in the Utah State Senate, and viewers are left anxiously wondering whether Bill's decision to go public will liberate or condemn the family.

Of particular concern for the wives is their economic vulnerability. Only Barb, the first wife, enjoys the legal protections and the benefits of a public marriage. Therefore, as the show makes clear, even though all the adults consent and the children are unharmed, the state's refusal to recognize plural marriage leaves the other two wives and their children economically vulnerable were those marriages to end or Bill were to be out of the picture. That is why Bill assures third wife Margene's mother that his lawyer has drawn a will that ensures that upon his death Margene and her three children will receive a portion of his estate. Nevertheless, each of the wives consciously struggles to maintain her own financial independence: Barb manages the family's casino; Nicki runs up credit card debt and struggles with a gambling addiction; and Margene starts her own successful jewelry business. While Bill is consumed with living in the light and taking a stand against those who condemn the Principle, the wives are worried about how they will feed the children if public exposure ruins the family businesses.

Although the show is complicated and sometimes ventures too far into the land of the unbelievable, its basic premise is both simple and profound. *Big Love* asks us to ponder whether Barb and her sister-wives have a right to make their own choices, however bad or degrading or sad those choices might be to viewers, and what the role of the state should be in either recognizing or condemning those choices. At the end of each episode, viewers are left feeling completely ambivalent about these dilemmas, which is why this show is a perfect lens through which to contemplate feminist legal theory.

I. FEMINIST LEGAL THEORY AND THE BIG LOVE DILEMMA

It is in light of *Big Love* that I have been rethinking modern feminist legal theory and its continued relevance to the legal dilemmas of our

4. UTAH CODE ANN. § 76-7-101(1) (2003). Utah provides for the state recognition of common law marriages for the purposes of defining bigamy, and therefore, no actual issuance of a state marriage license is required. See *Whyte v. Blair*, 885 P.2d 791, 793-94 (Utah 1994).

time. Feminist legal theory is a rich and complicated field.⁵ It is responsible for many reforms that have improved the lives of women, including changes in family law, domestic violence law, workplace discrimination law, sexual harassment law, and rape law. But it is a field that can sometimes appear at odds with itself. Early debates within feminist legal theory centered around questions of formal versus substantive equality, questioning whether the law ought to treat men and women the same, or whether sometimes—as in the context of pregnancy, for example—gender matters.⁶ It is often hard to predict what feminist legal theory will conclude, and this tends to undermine its normative legitimacy. The theory's conclusions vary so widely in part because we continue to debate whether or not women are really victims of their circumstances or autonomous agents in shaping their lives,⁷ and to what extent the law ought to protect women from the seemingly harmful choices they might make. One should not assume, for example, that feminist legal theory would describe polygamy as *per se* exploitation any more than one should assume that it would describe single-sex public schools as *per se* gender discrimination. As with the growing sophistication of any field, context matters and ambiguity abounds.

This dilemma is particularly complicated relative to the doctrine of consent in private, intimate relationships. There remains the normative question in law and in feminist legal theory of under what circumstances individuals should be able to consent to activity that takes places within the context of such relationships. This Article explores that question and asks if there is any principled way to distinguish between relationships that involve violence and those that are non-violent but may offend some social values unrelated to physical safety, such as the preference for monogamous marriage over plural marriage.

The future of feminist legal theory, however, does not depend on its ability to offer an affirmative answer this question. Those who prefer a more limited consent doctrine, for example, are no less feminist than those who prefer an expanded one. No matter what normative rule we adopt, there will be consequences, both anticipated and unforeseen, that

5. See generally Carrie Menkel-Meadow, *Mainstreaming Feminist Legal Theory*, 23 PAC. L.J. 1493 (1992) (reviewing both the dilemmas and the accomplishments of the field).

6. See Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 628–29 (1986) (discussing various ways in which political and legal theorists have characterized rights in general and women's rights in particular).

7. See Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 548–50 (1992) (discussing the tensions between victimization and agency).

will create dilemmas for the law and for those individuals it affects. Thus, the future of feminist theory depends on its ability to have a sustained and rich conversation that continually revisits our assumptions and examines the impact of our theories on the real lives of women.

The future of feminist theory requires us to revisit our past and to humbly, yet passionately, embrace future ambiguities. The ambiguities raised by the question of consent will keep feminist legal theory alive and relevant in the decades to come. We need more seasons of feminist legal theory and *Big Love*, and I'm looking forward to both.

II. REVISITING CONSENT

In this Article, I revisit my own scholarly past. Nearly a decade ago, in an article entitled *Sex is Not a Sport: Consent and Violence in Criminal Law*,⁸ I examined the question of when the state should allow for consent in intimate relationships in which one person has physically harmed another. At the time, there were a growing number of cases, both domestic⁹ and international,¹⁰ in which people involved in sadomasochistic relationships were being prosecuted for assault and battery when the injury to the victim was significant, or had the potential to be significant. With rare exception, courts have held that individuals could not consent to activity that had the potential to cause serious bodily harm despite the sexual nature of the encounter.¹¹ Unlike sports, where there has been a long-recognized social utility in the activity and where there are clearly defined rules by which players must abide,¹² both American and international judges generally have refused to extend the doctrine of consent to sexual activity that involved the intentional infliction of bodily harm.¹³

The sports exception, I argued, was inherently gendered, creating a legal standard of what I termed civilized masculinity, in which men

8. See generally Cheryl Hanna, *Sex Is Not a Sport: Consent and Violence in Criminal Law*, 42 B.C. L. REV. 239 (2001).

9. See, e.g., *State v. Collier*, 372 N.W.2d 303, 303 (Iowa Ct. App. 1985); *People v. Jovanovic*, 700 N.Y.S.2d 156, 156 (N.Y. App. Div. 1999); *State v. Hardy*, Ohio LEXIS 4588, at *1 (Ohio Ct. App. 1997); *State v. Roquemore*, 85 Ohio App. 3d 448, 448 (Ohio Ct. App. 1993).

10. See e.g., *R v. Christopher*, BC9906145 (Supreme Court of Victoria-Criminal) (1999); *R v. Brown*, 1 A.C. 212 (Eng. H.L. 1993) [hereinafter *Regina*].

11. See Hanna, *supra* note 8, at 256–68 (reviewing cases in which consent was a defense to sadomasochistic activity and finding that most courts refused to accept this as a defense).

12. *Id.* at 249–56 (reviewing cases involving injuries sustained during a sporting activity).

13. See generally *id.* at 250–52.

could consent to limited exposure to violence as long as it was controlled within the greater public sphere.¹⁴ Despite the gendered roots of the consent doctrine, however, I largely agreed with the law's refusal to extend consent to injuries caused during sexual activity, including sadomasochistic sex. I argued that once defendants, all of whom have been male, could claim that the victim, almost always women or younger men, consented to violence, the ability to prosecute domestic abusers would be deeply frustrated.¹⁵ While this article focused specifically on cases involving sadomasochistic sex, it certainly has implications beyond that context to other relationships in which consent may negate culpability, such as polygamy, in which the inherent risk of harm, be it physical or emotional, is significant.

Since the publication of that article, however, there have been a number of developments in law and legal scholarship that invite a re-examination of the doctrine of consent in the context of intimate relationships, both violent and nonviolent. First, the United States Supreme Court's opinion in *Lawrence v. Texas* has opened up the questions as to what limits, if any, the state can place on private, sexual, consensual conduct. Second, there is a growing debate among feminist legal scholars over the appropriate role of state intervention in intimate relationships where the alleged victim neither welcomes nor wants that intervention. Third, there has been a shift in how feminist legal theory has come to understand sex and marriage. While at one time both represented locales of oppression for women, more modern understandings and practices suggest that sex and marriage hold many positive experiences for women as well, thereby complicating the question whether any choice an adult woman makes ought to be respected regardless of its consequences. Finally, there is a growing recognition that emotion plays a significant role in decision-making. This is particularly true for those decisions we make about intimacy and sexuality. Each of these factors is played out in *Big Love*, and each is discussed below as to how they clarify and complicate the question of consent.

A. *Lawrence v. Texas*

In the first season of *Big Love*, Roman Grant tells the press that after the Supreme Court's ruling in *Lawrence v. Texas*¹⁶ polygamists have the same rights as homosexuals. *Lawrence* certainly has the potential to

14. See *id.* at 249–50.

15. See *id.* at 286–87.

16. *Lawrence v. Texas*, 539 U.S. 558 (2003).

make some strange bedfellows¹⁷ because it limits the government regulation of sex and sexuality. Yet, in affirming the right of adults to engage in private consensual sexual conduct, the United States Supreme Court made clear that this right is still subject to some limits:

This [liberty interest], as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.¹⁸

This language attempts to limit *Lawrence*'s reach; while at the same time opens the door to claims that other private conduct may be protected within the Constitution's liberty interests beyond the conduct at issue in the case.

Thus, *Lawrence* continues to put pressure on both judges and policymakers to define those limits. There have been cases in which defendants have argued that *Lawrence* prohibits the state from prosecuting, for example, obscenity distribution,¹⁹ adult incest,²⁰ and sadomasochism.²¹ Although *Lawrence* is seen by some as creating a free market for sexual activity among consenting adults, courts have yet to agree. No court has articulated a set of guiding principles as to how the theory of private consensual adult conduct ought to be applied in other

17. See, e.g., Jaime M. Gher, *Polygamy and Same-Sex Marriage—Allies or Adversaries Within the Same-Sex Movement*, 14 WM. & MARY J. WOMEN & L. 559 (2008).

18. *Lawrence*, 539 U.S. at 567, 578.

19. *United States v. Extreme Assocs., Inc.*, 431 F.3d 150, 161 (3d Cir. 2005) (rejecting the argument that *Lawrence* renders federal obscenity law unconstitutional).

20. See *Muth v. Frank*, 412 F.3d 808, 818 (7th Cir. 2005) (holding that *Lawrence* "did not announce a fundamental right of adults to engage in all forms of private consensual sexual conduct.").

21. See *State v. Van*, 688 N.W.2d 600, 615 (Neb. 2004) (holding *Lawrence* did not give defendant a right to engage in sadomasochistic beatings).

contexts beyond the vague language “injury to a person or abuse of an institution.”²²

From a feminist legal jurisprudence perspective, we might ask whether the state could justify regulating private intimate conduct to prevent harm to women. Interestingly, in 2004, the Utah Supreme Court faced this question in *State v. Green*,²³ a recent case upholding polygamy prosecutions. In contrast to *Lawrence*, in which morality was the state’s primary rationale for regulating homosexual sodomy, in the context of adult consent, Utah argued that both the protection of monogamous marriage and the protection of women and children justified the ban on polygamy. The court held,

Utah’s bigamy statute serves the State’s interest in protecting vulnerable individuals from exploitation and abuse. The practice of polygamy, in particular, often coincides with crimes targeting women and children. Crimes not unusually attendant to the practice of polygamy include incest, sexual assault, statutory rape, and failure to pay child support.²⁴

The reasoning in *Green* suggests that since protecting adult women, as well as children, is certainly a legitimate, if not compelling, state

22. *Lawrence*, 539 U.S. at 567. For an excellent discussion of *Lawrence* and the question of consent, see Kim Shayo Buchanan, *Lawrence v. Geduldig: Regulating Women’s Sexuality*, 56 EMORY L.J. 1235, 1238 (2007), which states that “[b]y affirming a right to sexual autonomy, *Lawrence* reorients the equal protection analysis.” See also Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615 (2004); Marybeth Herald, *A Bedroom of One’s Own: Morality and Sexual Privacy After Lawrence v. Texas*, 16 YALE J.L. & FEMINISM 1, 5 (2004) (“[W]hether viewed as a right of liberty or privacy, the government should not have the authority to interfere with private adult sexual activities, whether with other consenting adults or as assisted by inanimate objects.”); Sonia Katyal, *Sexuality and Sovereignty: The Global Limits and Possibilities of Lawrence*, 14 WM. & MARY BILL RTS. J. 1429, 1471 (2006) (“[P]rivacy may be deserving of recognition under *Lawrence*’s protective aegis, but it may necessitate further limitations within the potential confines of the home and other private spaces, particularly to protect the more vulnerable.”); Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1583 (2004) (contemplating whether “something resembling the Playboy Philosophy will become the official doctrine of the United States”); Mark Strasser, *Monogamy, Licentiousness, Desuetude, and Mere Tolerance: The Multiple Misinterpretations of Lawrence v. Texas* 15 S. CAL. REV. L. & WOMEN’S STUD. 95 (2005); John Tuskey, *What’s a Lower Court to Do? Limiting Lawrence v. Texas and the Right to Sexual Autonomy*, 21 TOURO L. REV. 597 (2005) (examining the limits of *Lawrence* and criticizing a broad application of the holding).

23. *Green*, 99 P.3d 820.

24. *Green*, 99 P.3d at 830.

interest, the state can justify state regulation of intimate relationships.²⁵ The court further suggests that a case-by-case analysis would not be practical as it is often impossible to prosecute polygamy cases because of the difficulty of reaching out to its victims.²⁶

Interestingly, while one might attribute the court's concern for women and children to be a consequence of the heightened awareness of women's victimization that was aided by feminist jurisprudence, the United States Supreme Court considered these same concerns when upholding Utah's ban on polygamy in 1878 in *Reynolds v. United States*.²⁷ And while many feminist legal scholars might agree with the court's reasoning in *Green*, at least with respect to concerns about sexual exploitation and polygamy, one shouldn't ignore the dangerous precedent of paternalism that is implicit in this reasoning. By analogy, consider *Gonzales v. Carhart*,²⁸ in which the Supreme Court upheld a ban on a late-term abortion procedure. In justifying the ban, Justice Kennedy wrote,

Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.²⁹

Yet, Justice Ginsburg, in a stinging dissent, finds that justifying this ban on the grounds that women need some special protection is blatant paternalism. "[T]he Court deprives women of the right to make an autonomous choice, even at the expense of their safety. This way of

25. See e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 49 (1987).

26. *Green*, 99 P.3d at 830.

27. *Reynolds v. United States*, 98 U.S. 145, 167–68 (1878) (upholding a charge to the jury in a polygamy prosecution that considered the social consequences of polygamy by stating,

I think it not improper, in the discharge of your duties in this case, that you should consider what are to be the consequences to the innocent victims of this delusion. As this contest goes on, they multiply, and there are pure-minded women and there are innocent children,—innocent in a sense even beyond the degree of the innocence of childhood itself. These are to be the sufferers . . .).

28. *Gonzales v. Carhart*, 550 U.S. 124 (2007).

29. *Carhart*, 550 U.S. at 159 (internal quotations omitted).

thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited.”³⁰

While there are of course many distinctions to be made between reproductive choices and the regulation of sexuality, this tension in *Gonzales* between protecting women on one hand, and deferring to their autonomy on the other, is a central tension left unresolved in *Lawrence*. It is crucial in a post-*Lawrence* world for feminist legal theory to be able to articulate more clearly whether such an interest is in fact compelling enough to otherwise override individual consent.

B. Conflicting Theories of State Intervention

In addition to demands put on the consent doctrine by *Lawrence*, there is a deep and growing tension in feminist theory and legal scholarship about liberalism and the role of the state.³¹ While this debate has been raging for many decades now in the context of pornography³² and prostitution,³³ it has now become a central tension in domestic violence law as well. Many scholars have argued that the state should exercise great restraint before intervening in intimate relationships, even when

30. *Carhart*, 550 U.S. at 184 (Ginsburg, J., dissenting).

31. There is a long and rich history of this debate within feminist legal theory, and there are several examples of this debate. See Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 304 (1995); Robin West, *Desperately Seeking a Moralist*, 29 HARV. J.L. & GENDER 1, 1 (2006) (responding to Janet Halley's critique of the author's book *CARING FOR JUSTICE* and highlighting tensions within both feminist and queer theory).

32. For a non-exhaustive literature on feminism and pornography, see ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1987); MACKINNON, *supra* note 25, at 163–97; NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS* (1994); Lynn S. Chancer, *Feminist Offenses: Defending Pornography and the Splitting of Sex from Sexism*, 48 STAN. L. REV. 739 (1996); Bridget J. Crawford, *Toward a Third Wave Feminist Legal Theory: Young Women, Pornography, and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99 (2007); Jennifer C. Nash, *Bearing Witness to Ghosts: Notes on Theorizing Pornography, Race, and Law*, 21 WIS. WOMEN'S L.J. 47 (2006).

33. Again, while too numerous to list all literature in this area, consider: Margaret A. Baldwin, *Split at the Root: Prostitution and Feminist Discourses of Law Reform*, 5 YALE J.L. & FEMINISM 47 (1992); Emily Bernstein, *What's Wrong with Prostitution? What's Right about Sex Work? Comparing Markets in Female Sexual Labor*, 10 HASTINGS WOMEN'S L.J. 91 (1999); Cynthia Chandler, *Feminists as Collaborators and Prostitutes as Autobiographers: De-Constructing an Inclusive yet Political Feminist Jurisprudence*, 10 HASTINGS WOMEN'S L.J. 135 (1999); Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335 (2006).

there is physical violence,³⁴ and leave the decision of state intervention to the victim.³⁵ These arguments do not explicitly state that individuals should be able to consent to physical violence.³⁶ Rather, they articulate concerns about individual autonomy and decision making,³⁷ pragmatic concerns about the effectiveness of state intervention,³⁸ and to some extent, concerns about protecting privacy.³⁹ Yet, the practical, if not theoretical, effect is the same. To argue that individuals should decide if there should be some state intervention into the relationship is to argue that individuals have the right to consent to violence, or more broadly, the right to be in violent relationships even if the state could otherwise intervene at the victim's request.

In juxtaposition with these arguments are recent developments in international human rights law. Recently, for example, the European Court of Human Rights, in *Opuz v. Turkey*,⁴⁰ held that a state's failure to affirmatively intervene in domestic violence cases violated three provisions of the European Convention on Human Rights. The applicant, Nahide Opuz, claimed that Turkey had failed to protect her and her

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34. See, e.g., Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487 (2008); Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741 (2007); Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107 (2009); Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservarization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 239, 264–271 (2005); Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2 (2006).
 35. For an overview of marital rape, see Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Influences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465 (2003).
 36. For a very interesting discussion that explicitly makes the argument that people should be able to consent to domestic violence, see, *Muse Free*, <http://musefree.wordpress.com/2009/03/04/violence-state-and-consent-a-more-lengthy-discussion/> (Mar. 4, 2009) (arguing that the state should only recognize victimhood if the victim herself does).
 37. See Holly Maguigan, *Wading into Professor Schneider's "Murky Middle Ground" Between Acceptance and Rejection of Criminal Justice Responses to Domestic Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 427, 443–44 (2003) (suggesting that prosecutors should not adopt no-drop policies, which replace victim decision-making).
 38. See Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 806–07 (2001) (noting some potential benefits of mandatory policies as well as the complexity of the issue, but concluding that mandatory policies do not strike a good balance between reform efforts and state power).
 39. See Suk, *supra* note 34, at 66–67 (voicing concerns as to how mandatory state intervention undermine privacy interests).
 40. *Opuz v. Turkey*, App. No. 33401/02, 2009 Eur. Ct. H.R. 1, available at <http://www.unhcr.org/refworld/pdfid/4a2f84392.pdf>.

mother from her husband.⁴¹ The extreme violence they suffered was brought to the attention of authorities on numerous occasions, but the state withdrew several criminal prosecutions in part because the two women withdrew their complaints.⁴² Her husband eventually killed her mother.⁴³ In violating the right to life, the freedom from torture, and the rights to non-discrimination and equality, the Court held that the state is required in appropriate circumstances to “take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.”⁴⁴ The Court further explained that the obligation arises when it is established that the state “knew or ought to have known” of the existence of a “real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.”⁴⁵

Notably, the government of Turkey raised in its defense that pursuing cases without the victim’s willingness

[W]ould have amounted to a breach of the victims’ rights under Article 8 of the Convention, . . . the . . . authorities’ view that no assistance was required as the dispute concerned a “private matter” was incompatible with their positive obligations to secure the enjoyment of the applicants’ rights.⁴⁶

Article 8 of the Convention states that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.⁴⁷

41. *Opuz*, Eur. Ct. H.R. at 1–7.

42. *Opuz*, Eur. Ct. H.R. at 2.

43. *Opuz*, Eur. Ct. H.R. at 10.

44. *Opuz*, Eur. Ct. H.R. at 30.

45. *Opuz*, Eur. Ct. H.R. at 30.

46. *Opuz*, Eur. Ct. H.R. at 16.

47. European Convention on Human Rights art. 8, Nov. 4, 1950, Eur. T.S. No. 5.

Thus, the thrust of the government's argument was that victim privacy trumped state obligations to ensure her privacy, mirroring, in many respects, the current disagreement in feminist legal theory over the exercise of prosecutorial discretion when victims either recant or request that the state not proceed.

The Court rejected this argument. While emphasizing the gravity of the violence perpetrated against the women, the Court nonetheless found that despite concerns over victim privacy, certain situations require the state to intervene.⁴⁸ Such a duty arises from the obligation to protect women from private violence within a broader framework of gender discrimination, particularly as articulated by the Convention on the Elimination of All Forms of Discrimination Against Women.⁴⁹ The Court then balances the right to autonomy and decision making against present and persistent violence, which affects not just the immediate victim but also the broader interests of public rights.⁵⁰

While a similar argument regarding affirmative state duties within a human rights framework has been made in the aftermath of *Town of Castle Rock v. Gonzales*,⁵¹ no American case has suggested that the state has an affirmative duty to intervene against a victim's wishes.⁵² In *Castle Rock*, the United States Supreme Court held that it was not a violation of the due process clause for the police to fail to enforce an order of protection.⁵³ In this case, Jessica Gonzales had a protective order banning her estranged husband from contacting her or her three daughters. The husband subsequently kidnapped the children. Gonzales made numerous attempts to get the police to locate her husband and children, but they did nothing. Later that night, her husband arrived at the Castle

48. *Opuz*, Eur. Ct. H.R. at 34 (“[T]he more serious the offence or the greater the risk, the more likely that the prosecution should continue in the public interest, even if victims withdraw their complaints.”).

49. *Opuz*, Eur. Ct. H.R. at 15 (referencing the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and its conclusion that “gender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men.”). Note that the United States is not a signatory to CEDAW.

50. *Opuz*, Eur. Ct. H.R. at 35 (“[I]n some instances, the national authorities’ interference with the private or family life of the individuals might be necessary in order to protect the health and rights of others or to prevent commission of criminal acts.”).

51. *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

52. At least one American court has, however, held that the state may proceed in a case in which the victim recanted being battered. See *People v. Santiago*, 2003 WL 21507176 (N.Y. Sup. Ct. 2003) (allowing the use of the victim’s Grand Jury testimony and other out-of-court statements to prove First Degree murder charge when the victim refused to testify and recanted her prior allegations).

53. *Castle Rock*, 545 U.S. at 768 (finding that the respondent did not have a property interest in the enforcement of a restraining order).

Rock police station and started shooting. After police shot and killed him, they searched his van and found the bodies of the three children, whom he had murdered.⁵⁴

Once the Supreme Court ruled in favor of Castle Rock, advocates appealed the case to the Inter-American Commission on Human Rights, alleging the state's failure to provide her protection specifically violated the "rights to life, nondiscrimination, family life/unity, due process, petition the government, and the rights of domestic violence victims and their children to special protections" under the American Declaration on the Rights and Duties of Man, to which the United States is a signatory.⁵⁵ The Court granted admissibility of the case,⁵⁶ and a decision on the merits is still pending.⁵⁷

The crucial difference between the two cases is that in *Castle Rock*, the petitioner requested state intervention but was denied, while in *Opuz*, the petitioner was offered some state intervention but denied it. While international feminism has embraced a model of affirmative state duties to intervene in individual cases and political and cultural institutions, American feminism has remained deeply skeptical of state intervention absent a victim's request for state services.⁵⁸ This difference reflects a much deeper division in feminist theory about the effectiveness and desirability of the state to intervene into women's lives for their own (paternalistic/maternalistic) protection.

C. Changes in Sex and Marriage

Furthermore, there has been a continued shift in how scholars and society have come to understand the relationship between sex and gender. In feminist theory, there are two schools of thought concerning

54. *Castle Rock*, 545 U.S. at 753–54.

55. Petition Alleging Violations of the Human Rights of Jessica Gonzales by the United States of America and the State of Colorado, With Request for an Investigation and Hearing on the Merits, *Jessica Gonzales v. United States*, (Dec. 23, 2005), available at https://www.law.columbia.edu/focusareas/clinics/humanrights?exclusive=filemgr.download&file_id=93473&rtcontentdisposition=filename%3DGonzales+Petition.

56. Petition 1490–05 Admissibility, *Jessica Gonzales v. United States*, 1490–05 (July 24, 2007), available at https://www.law.columbia.edu/null?&exclusive=filemgr.download&file_id=13526&rtcontentdisposition=filename%3DAdmissibility%20Decision%2010.4.07.pdf.

57. For a complete history of the case, including links to documents and a video of Jessica (Gonzales) Lenahan's testimony before the commission, see http://www.law.columbia.edu/center_program/human_rights/InterAmer/GonzalesvUS/GonzalesvUS_Media (last visited Apr. 29, 2010).

58. See *id.* at ¶¶ 5–6.

intimate relationships. Traditionally, these relationships, particularly marriage, were understood as a source of repression for women. From the doctrines of coverture to chastisement, marriage was characterized as inherently oppressive to women.⁵⁹ Scholars, notably Catharine MacKinnon, argued that women's sexuality was inherently coerced within a culture of rape, drawing attention to the social, cultural, and legal constructs that subjugated women and made any consent they might give merely illusory.⁶⁰

In contrast, many modern scholars have put forth more liberal arguments that characterize state efforts to repress women's sex or sexuality, or to regulate relationships for their own protection as a denial of women's individual liberty to decide for themselves their own destinies⁶¹—sometimes referred to as sex-positive feminism.⁶² This argument has been extended to encompass same-sex marriage relationships in which the denial of the rights and responsibilities of marriage should not be denied on the basis of sex or sexual orientation. The entire political and legal agenda to have same-sex relationships decriminalized and same-sex marriages legally recognized has called into question traditional feminist theories that marriage is, in itself, a repressive institution.⁶³ Indeed, post-*Lawrence*, the availability of marriage to people regardless of sexual orientation is a welcome symbol of new equality to many, including feminists.

Along with this theoretical liberal shift has been a cultural shift to what Ariel Levy calls "raunch culture," in which younger women embrace sex and sexuality regardless of its degrading or dehumanizing nature in particular contexts.⁶⁴ Raunch culture thereby adopts this sense of what's-good-for-the-goose-is-good-for-the-gander approach to determining one's sexual choices. To that extent, sexual culture has embraced a kind of formal equality approach to sexual relationships, either deny-

59. See, e.g., Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

60. See, e.g., MacKinnon, *supra* note 25.

61. See, e.g., Janet Halley, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006); Abrams, *supra* note 31, at 351; Katherine M. Frank, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001); Susan E. Stiritz, *Cultural Cliteracy: Exposing the Contexts of Women's Not Coming*, 23 BERKELEY J. GENDER, L. & JUST. 243 (2008).

62. See, e.g., Rosalind Dixon, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J.L. & GENDER 277 (2008); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1019 (1984).

63. Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & POL'Y 397 (2001); Deborah A. Widiss et al., *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461 (2007).

64. ARIEL LEVY, *FEMALE CHAUVINIST PIGS AND THE RISE OF RAUNCH CULTURE* (2005).

ing or minimizing the observation that women and men experience sex, sexuality, and intimate relationships differently. At least some women, those whom Levy labels “female chauvinist pigs,” are now complicit in the sexual exploitation of other women.⁶⁵ Yet, young women embrace this hypersexuality as a symbol of empowerment without fully having real freedom and real power to embrace a wider range of choices about their sexuality.⁶⁶ Levy’s observations point to a catch-22 about female sex and sexuality. It can be both liberating and oppressive, just as marriage can be both a confining and a liberating institution. And thus, questions about consent to sex or marriage become complicated for feminist legal theory because discerning when something is good or bad for women depends on both subjective and objective understandings; posing a simple answer seems incomplete and disingenuous.

D. Big Love Redefined

In *Big Love*, no matter the material or psychic harms that polygamy has caused Barb, she stays, largely because, as her oldest daughter tells a friend, her mother loves her father too much. It is love, ultimately, that explains Barb’s choices. This is central to understanding the complex relationships in *Big Love*. Yet, the law, neither in theory nor in practice, does a very good job at understanding the role love plays when we consent to things that may cause us heartache and harm.⁶⁷ While *Lawrence* may affirm a qualified right to consensual sex, and *Loving v. Virginia*⁶⁸ may affirm a qualified right to marry someone of the opposite sex regardless of race, there is no unqualified right to “love” in the law.⁶⁹

65. *Id.* at 89-117 (describing what she terms “female chauvinist pigs” and how women themselves participate in the degradation of other women).

66. *Id.* at 200.

67. See Lynn D. Wardle, *All You Need is Love?*, 14 S. CAL. REV. L. & WOMEN’S STUD. 51, 79 (2004) (distinguishing between love as emotion and love as conduct and concluding that, “All emotional relationships are not equal in terms of stability, constancy, selflessness, service and fidelity. All emotional relationships do not contribute equally to the well-being of children or the good of society. Just as all emotions are not equal or equally beneficial, neither are all relationships equal. For the law to mandate the equality of all emotional relationships is to base public policy on romantic wishes rather than actual deeds and objective facts.”).

68. *Loving v. Virginia*, 388 U.S. 1 (1967).

69. See generally Barbara L. Atwell, *The Jurisprudence of Love*, 85 U. DET. MERCY L. REV. 495 (2008) (discussing love as a spiritual, not romantic, concept in relation to the law); Nan Seuffert, *Domestic Violence, Discourses of Romantic Love, and Complex Personhood in the Law*, 23 MELB. U. L. REV. 211, 240 (1999) (“[T]he common law legal system has repressed its actual or potential jurisdiction over matters of love and therefore has no precedent for hearing statements of romantic love and no framework

What to do about the role of love in relation to those choices that we make creates a particular dilemma for feminist legal theory. At the root of so many of our decisions to be in intimate relationships are the human desire to love and be loved, and a paradoxical optimism that things will get better.⁷⁰ And yet, love can also lead us to make decisions that may harm us in some way.

Sally Goldfarb makes this point in domestic violence cases. She argues that the law ought to allow for relationships to remain intact because, despite the violence, women often do not want these relationships to end.⁷¹ Here, Goldfarb implicitly recognizes the autonomy and self-determination of women to stay with partners, even if those relationships have, in the past, been marked by violence. This argument is similar to Jeannie Suk's argument that the criminal law questioning the imposition of a de facto divorce on couples just because there has been violence in the relationship.⁷² While neither scholar specifically discusses how a victim's expression of love is often at the heart of these decisions to stay, it is that expression of love that is often the tie that binds one to another.

In this vein, the concept of romantic love plays a powerfully persuasive role in expanding the choices adults can make. Take, for example, Justice Kennedy's language in *Lawrence*: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."⁷³ While Kennedy doesn't use the language of love, this language certainly evokes the relationship between the expression of emotion that leads to intimacy and autonomy. In this sense, if love is an expression of one's autonomy, then arguably the law ought to respect the choices made in the context of love. This represents the beauty of *Big Love*.

within which to interpret such statements. Paradoxically, the statements also invoke the spectre of love beyond patriarchal discourses and highlight the common law's lack of jurisdiction over romantic love.").

70. Kathryn Abrams, *Barriers and Boundaries: Exploring Emotion in the Law of the Family*, 16 VA. J. SOC. POL'Y & L. 301 (2009); Kathryn Abrams, *Legal Feminism and the Emotions: Three Moments in an Evolving Relationship*, 28 HARV. J.L. & GENDER 325 (2005).

71. See Goldfarb, *supra* note 34.

72. Suk, *supra* note 34, at 66 ("[I]ndividual's choice of intimate partner is so important that even in the extremely freedom-limiting context of imprisonment, the right to marry is not extinguished. Protection orders do not formally dissolve a marriage (though they would prohibit an unmarried couple from marrying). Nevertheless, state imposed de facto divorce burdens precisely the individual's choice of partner, which lies at the heart of autonomy in intimate relationships.").

73. *Lawrence*, 539 U.S. at 573 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

But, as Professor Elizabeth Schneider has suggested, romantic love can also play a powerfully perverse role in “a culture that celebrates [it] to the extent that ours does[,] shares responsibility for women who have difficulty protecting their children from the men whom those women are taught to love.”⁷⁴ Love, as women in particular are taught to express it, can also constrain our choices and convince us to suppress our own autonomy as an act of love for another. Thus, feminist legal theory also recognizes that there may be instances in which the law ought not respect an individual’s expression of love as equivalent to self-determination. This represents the dangers of *Big Love*.

III. GENDER AND THE DOCTRINE OF CONSENT

After *Lawrence*, there are essentially two categories of proscribed behavior within an intimate relationship to which consent will not alleviate the alleged wrongdoer(s) of liability. The first involves those activities that cause or have the potential to cause serious bodily injury⁷⁵—what *Lawrence* describes as “injury to a person.” The second category is those behaviors that undermine the social order; *Lawrence* specifically references public conduct and prostitution. While this category certainly suggests that morality alone could serve as the rationale for state regulation of intimate, sexual conduct, there is an instrumental quality to the Court’s decision that implies that morality alone will not suffice, but instead suggests that the state must articulate a specific government interest justifying state intrusion into private liberties.⁷⁶ While the Court does not elaborate on precisely what those state interests might be, I would suggest that one concern could be that by engaging in activities such as prostitution, for example, women will corrupt the morality of men. This section explores both of these categories and argues that both are very gendered in their history and application.

A. Behavior Proscribed Because It Causes Physical Harm

There are distinctions in legal rules and practices proscribing behavior that causes physical harm depending on whether the act takes

74. Katherine K. Baker, *Dialectics and Domestic Abuse*, 110 YALE L.J. 1459, 1469 (2001) (reviewing Elizabeth M. Schneider, *BATTERED WOMEN AND FEMINIST LAWMAKING* (2000)).

75. See Keith M. Harrison, *Law, Order and the Consent Defense*, 12 ST. LOUIS U. PUB. L. REV. 477, 478–80 (1993).

76. *Lawrence*, 539 U.S. at 578.

place in the private or public sphere. In the private sphere, historically, married men could often chastise their wives without fearing state intervention as long as that chastisement was moderate and did not cause serious harm.⁷⁷ Thus, to the extent that women “consented” to marry, they also consented to mild chastisement as well as sexual relations with their husbands.⁷⁸ This practice derived from the legal rule that married men were responsible for the crimes of their wives, and mild chastisement was acceptable in order to discipline one’s wife.⁷⁹ To that end, by allowing husbands to use some physical force against their wives, male privilege is reinforced by denying women autonomous rights.⁸⁰

The doctrine of consent in the public sphere allowed for people to consent to sporting activities even though the risk of injury is quite high, such as in prize fighting and hockey. As Keith Harrison explains, “such activity was condoned originally on the theory that the king (or sovereign) might have a sudden need to raise an army of physically fit and competitive-minded men to defend against an enemy invasion.”⁸¹ Activities that could result in physical harm thereby strengthened men in their potential service to the state.

Both historically and today, whether the law allows for activity that could result in physical harm depends largely on the social utility of the behavior, not the likelihood or severity of the harm itself. Relative to physical injury in intimate relationships, as a doctrinal matter, the law no longer recognizes any social utility in allowing one intimate to inflict injury upon the other since women are now morally culpable for their own transgressions and because we no longer formally recognize male superiority. In contrast, there is still much social utility in sport as long as it is played within certain confined rules.

At the heart of this line-drawing, as I have previously argued, is that concept of “civilized masculinity.”⁸² The law evolved, and continues to evolve, to allow for some controlled outlet for male aggression. The rules of consent historically sought to reinforce a concept of masculinity that is civilized and controlled. Being a “man” meant being in control of one’s spouse and being able to demonstrate one’s physical prowess in

77. See, e.g., *Bradley v. State*, 1 Miss. 156 (1824) (recognizing that husbands could use moderate chastisement for domestic discipline); Siegel, *supra* note 59.

78. For an overview of marital rape, see generally Anderson, *supra* note 35.

79. Cheryl Hanna, *Behind the Castle Walls: Balancing Privacy and Security in Domestic Abuse Cases*, 32 T. JEFFERSON L. REV. 65, 69–70 (2009) (discussing the Declaration of Sentiments and the demands of early feminists to hold married women accountable for their own crimes as to remove any legal justification for chastisement).

80. Siegel, *supra* note 59, at 2120.

81. Harrison, *supra* note 75, at 480.

82. Hanna, *supra* note 8, at 250.

competition with other men, but doing so in a controlled and rational way.⁸³

While the law still allows a great deal of public violence, largely via sport, it has now formally banned all private violence, thanks in large measure to the work of feminist legal theorists and activists. Over time, the law has redefined masculinity and aggression. To some extent, being a civilized man means that you do not hit women but that you can play extreme sports as long as you follow the rules of the game.

*B. Behavior Proscribed Because It Offends Morality
and the Social Order*

Lawrence leaves open the possibility of the state proscribing activity that could “abuse . . . an institution that the law protects.”⁸⁴ This language is referring primarily to the protection of heterosexual, monogamous marriage, but such vague language leaves open the question of whether morality alone can justify prohibiting certain consensual relationships, or whether there must be a more specific argument as to how a proscribed category of conduct abuses an institution.

But, if we take a closer look at certain well-recognized prohibitions, such as those that outlaw prostitution,⁸⁵ plural marriage,⁸⁶ and the distribution of adult obscenity,⁸⁷ instrumentally, they seek to limit expressions sexual desire. Specifically, they arguably seek to control women from sexually arousing men. While we often think of women as

83. Note, for example, in the late 18th and early 19th centuries, some courts were reluctant to interfere in private marriages where violence was alleged, as long as that violence was not severe. One justification for that non-interference was that it would disrupt the family. Implicit in some of these decisions was the acceptance that men might use moderate chastisement within the context of marriage. But never did men have *carte blanche* to abuse their wives. See, e.g., *Thompson v. Thompson*, 218 U.S. 611, 617–18 (1910) (holding that a wife had no cause of action for an assault and battery charge against her husband because it “would open the doors of the courts to accusations of all sorts of one spouse against the other and bring into public notice complaints for assaults, slander and libel”); *State v. Oliver*, 70 N.C. 60, 61 (1874)

(From motives of public policy and in order to preserve the sanctity of the domestic circle, the Courts will not listen to trivial complaints. If no permanent injury has been inflicted, nor malice, cruelty, nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze and leave the parties to forget and forgive.).

84. *Lawrence*, 539 U.S. at 567.

85. See *infra* notes 97–103 and accompanying text.

86. See UTAH CODE ANN., *supra* note 4.

87. *Miller v. California*, 413 U.S. 15 (1973).

the victims of prostitution, for example, because it is women who are usually the ones punished, we sometimes fail to see how proscribing prostitution arguably protects men from falling victim to the power of female sexuality. It is ultimately male sexual desires that are kept in check by regulating sex and the women who provide it.

If I have one criticism of *Big Love*, it is that the show often obscures the benefits that Bill enjoys from polygamy. The audience is not called upon to ask how Bill would otherwise satiate his sexual appetite and remain virtuous but for plural marriage. Bill does lapse in his virtue: first he lied to his soon-to-be fourth wife Ana about his marital status and then he had sex with her before their marriage is sealed. But the show asks us to forgive these transgressions. Ana is irresistible, and Bill does eventually marry her. The audience is too often invited to feel sympathy for Bill, who starts to take Viagra in order to keep up with his sexually demanding wives, and whose financial obligations to each of his wives and his children continue to mount. (This reminds me of the Woody Allen movie *Shadows and Fog* in which Allen's character comes to a brothel and tells the prostitute, played by Jodi Foster, "I've never paid for sex in my life." She replies, "Oh, you just think you haven't."⁸⁸) There is a subtle undertone that men are victims of women's sexuality, whether they know it or not.

That same subtle undertone that men are victims of women's sexuality is also present in the law. In the same way that prohibitions on violence provide some control over male aggression, prohibitions on certain sexual relationships provide some control over male lust. Of course, none of these prohibitions apply solely to one gender in formal legal doctrine, but it is imperative to recognize the gendered implications of them.

Yet, even though it is predominately male violence and sexuality that is controlled through such regulation, arguments against polygamy, prostitution, and the commercial distribution of obscenity, for example, focus almost exclusively on the resulting harms such activities have on women and children.⁸⁹ Even feminist-inspired arguments in favor of pornography,⁹⁰ prostitution,⁹¹ and polygamy,⁹² for example, focus on the resulting benefits legalization would have for women. No one, not even

88. Memorable Quotes for *Shadows and Fog* (1991), INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0105378/quotes>.

89. See, e.g., Green, 99 P.3d at 830. (explaining that prohibition of polygamy protects women and girls from exploitation).

90. See *supra* note 32.

91. See *supra* note 33.

92. See, e.g., Elizabeth Joseph, *Polygamy – The Ultimate Feminist Lifestyle*, ISLAM FOR TODAY, <http://www.islamfortoday.com/polygamy3.htm> (last visited Apr. 28, 2010).

the most committed libertarians, seriously discusses how such prohibitions infringe upon male liberty. There are no legal scholars arguing how adult males might be harmed when we deny them the right to plural marriage or the right to purchase sex. I do not suggest this flippantly. There is a growing men's rights movement that addresses many legitimate issues, such as parenting discrimination against fathers⁹³ and the high numbers of men who are homeless.⁹⁴ But this movement has not adopted the legalization of prostitution, for example, as social policy that would improve men's lives.⁹⁵

Modern controversies about consent continue to focus on arguments about the status of women and rarely ask how legal reforms would impact men. Take, for example, prostitution, and the recent controversy in Rhode Island. State law banned loitering in public places, so police could arrest street prostitutes, but it did not ban solicitation itself.⁹⁶ That left the indoor trade of prostitution untouched because no loitering is involved. Thus, the private exchange of sex for money was legal in Rhode Island. Had Elliot Spitzer privately solicited and met with Ashley Dupré in Providence, for example, no state laws would have been broken. In 2009, the Rhode Island legislature debated closing this loophole by criminalizing "indoor" prostitution.⁹⁷

On one side of the debate were feminists, such as Donna Hughes, who were concerned about trafficking and the sexual exploitation of women, men, and children who work in the sex industry.⁹⁸ It is Dr. Hughes' position that the institution of prostitution has encouraged sexual abuse and that there is no way for the state to combat trafficking

93. See, e.g., Michele A. Adams, *Framing Contests in Child Custody Disputes: Parental Alienation Syndrome, Child Abuse, Gender, and Fathers' Rights*, 40 FAM. L.Q. 315, 321–24 (2006).

94. See, e.g., The National Center for Men, <http://www.nationalcenterformen.org/page3.shtml> (last visited Apr. 18, 2010).

95. See, e.g., *Men's Rights Issues*, NATIONAL COALITION FOR MEN, http://www.ncfm.org/?page_id=482 (last visited Apr. 18, 2010) (listing topics including father's rights, false rape reports, men's health and military conscription, but not rights to engage in legalized prostitution or to distribute pornography).

96. *State v. DeMagistris*, 714 A.2d 567 (R.I. 1998) (holding that state laws only bar prostitutes from public, not private, solicitation).

97. Cynthia Needham, *Bill Targets Loophole in Rhode Island Prostitution Law*, PROVIDENCE J., Apr. 9, 2009, available at http://www.projo.com/news/content/PROSTITUTION_LOOPHOLE_04-09-09_VDDVTEO_v9.3865d13.html.

98. Donna M. Hughes, *Donna M. Hughes: R.I.'s Carnival of Prostitution*, PROVIDENCE J., June 24, 2009, available at http://www.projo.com/opinion/contributors/content/CT_nuhughes_06-24-09_AMER5HE_v6.18e5af6.html.

absent laws criminalizing prostitution.⁹⁹ To be sure, the vast majority of “buyers” in the sex industry are men, while both women and men are the “sellers.”¹⁰⁰ Thus, her argument that criminalization gives law enforcement the tools necessary to combat abuses in the sex industry is premised upon the desire to control men, both in their sexual desires and in their exploitation of others.¹⁰¹

In contrast, fifty university professors sent a letter opposing the legislation, arguing that there is a difference between coerced trafficking, on one hand, and willing and consensual sex work, on the other.¹⁰² They argued that the law should distinguish between outdoor sex workers, who do experience poverty, homelessness, and other social problems, and indoor sex workers, who have far fewer such problems, and many of whom express deep satisfaction in their work.¹⁰³ Thus, they counseled that the state should account for such differences rather than use a monolithic approach. This argument seeks to maximize individual autonomy and decision making over broader efforts to predominantly control men in their exploitation of women and children. Rhode Island chose to go the route of prohibition, and will criminalize all prostitution as a misdemeanor.

This debate is exactly the *Big Love* dilemma. In the same way one can question a meaningful way to distinguish between the exploitative aspects of the sex industry and at the same time recognize *Lawrence*’s individual liberty interest to engage in private consensual sexual conduct that is not the result of coercion, *Big Love* viewers are invited to ponder if there is a meaningful distinction between polygamy on the compound and polygamy in the suburbs. We have to decide if institutions otherwise so deeply rooted in patriarchy can shed their sexist pasts and reinvent themselves to be more egalitarian and a source of individual

99. Donna M. Hughes, *Legalizing Prostitution Will Not Stop the Harm, Making the Harm Visible*, THE COALITION AGAINST TRAFFICKING IN WOMEN, Feb. 1999, <http://www.uri.edu/artsci/wms/hughes/mhvlegal.htm>.

100. Norma Hotaling & Leslie Levitas-Martin, *Increased Demand Resulting in the Flourishing Recruitment and Trafficking of Women and Girls: Related Child Sexual Abuse and Violence Against Women*, 13 HASTINGS WOMEN’S L.J. 117, 121 (2002).

101. See Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep The Business of Sexual Exploitation Running Smoothly*, 18 YALE J.L. & FEMINISM 109 (2006); Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523 (2000).

102. Press Release, Ronald Weitzer, Professor, George Washington University and Elizabeth Ann Wood, Professor, Nassau Community College–SUNY with 50 signatories from the academic community, Letter to Members of the Rhode Island State Legislature, Re: Prostitution Reform Bills, (July 31, 2009), available at <http://www.rifuture.org/50-academics-sign-letter-opposing-ri-prostitution-bills.html>.

103. *Id.*

human expression. Empirically and philosophically, if we decriminalize, or even legalize, prostitution and polygamy, it is unclear whether the women and men most affected by those practices will be better or worse off. In the same way, if we allow individuals to decide if and how the state intervenes into relationships marked by intimate partner violence, it is hard to know whether victims will be safer or will simply trade in one form of coercion for another.

In all cases, however, if the law were to allow for consent to such activities, then the consequence would be less legal restraints on men in the fulfillment of their sexual and aggressive desires. It is particularly important for feminist legal theory to account for how men's lives will be impacted by revisiting the consent doctrine. Too often, just as in *Big Love*, we fail to appreciate both the benefits and restraints that men experience when we regulate human sex and aggression. As a result, we cannot fully appreciate how the law will impact all people's lives.

IV. CONTEMPLATING CONSENT

In *Big Love*, there is a telling exchange between Bill's second wife Nicki and her mother. Nicki had previously been sealed to a man when she was much younger. It is not clear how old she was—perhaps fifteen or sixteen—but we do know that her parents put her picture and profile in "The Joy Book," which was used by older men for choosing their next brides. Nicki, now a mature adult, suggests to her mother that she did not want to be sealed to her first husband. "Nonsense," her mother tells her, and recounts Nicki's adolescent excitement as they sewed her wedding dress. Assuming that Nicki was of legal age when she was married (as young as fifteen in some states with parental or court consent¹⁰⁴) how do we evaluate whether she consented? Do we simply ask if, at the moment that she said "I do," there was a gun to her head or a pending threat of physical violence? Do we widen the lens and understand her consent as acquiescence in a world where her choices were inevitably limited? Yet, even if we were to rewind the tape, how is the law to evaluate the pressures Nicki faced without completely denying her the autonomy to make her own decisions, and to accept the consequences of them?

104. See, e.g., IND. CODE § 31-11-1-6 (2008) (allowing for a female who is at least 15 years of age and pregnant to marry with consent).

There have been volumes written on the meaning of consent in the law.¹⁰⁵ The overall consensus has been that the definitions and understanding of consent by both courts and legislatures are inconsistent and largely confused. A number of scholars have proposed theoretical frameworks for defining consent to capture more fully the complexity of human behavior.¹⁰⁶ Yet, defining consent in a way that actually reflects human behavior is nearly impossible because it varies with each situation and each person. It is simply impossible to capture such a vast range of experiences into a single legal rule.

That said, there are some observations we might make about the consent as we both understand and practice it. First, consent is not the same as choice. While there is no specific legal definition of choice, common understanding assumes at least two real alternatives and an affirmative decision among those alternatives.¹⁰⁷ Yet, people rarely enter into relationships the same way they decide which law school to attend. We tend to slide into relationships. We acquiesce, we give in, we seek out, or we agree. We often enter relationships by default rather than by design. Although the law recognizes a wide range of situations and behaviors that constitute consent, we rarely affirmatively say "yes."¹⁰⁸

For Barb in *Big Love*, it is clear that while she consents to the polygamy, it is not of her choosing. That is not to say that individuals do not exercise agency or autonomy when they consent. For Barb, there is no threat of physical force that keeps her with Bill. She has financial resources, an education, and an extended family that would welcome her if she left her husband. Indeed, she once did leave, but returned because

105. For recent scholarship, see Markus Dirk Dubber, *Towards a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509 (2004); William N. Eskridge, Jr., *The Many Faces of Sexual Consent*, 37 WM. & MARY L. REV. 49 (1995); Heidi M. Hurd, *Blaming the Victim: A Response to the Proposal that Criminal Law Recognize a General Defense of Contributory Responsibility*, 8 BUFF. CRIM. L. REV. 503 (2005); Wolfgang Schomburg & Ines Peterson, *Genuine Consent to Sexual Violence Under International Criminal Law*, 101 AM. J. INT'L L. 121 (2007); Kenneth W. Simons, *The Structural Concept of Consent in Criminal Law*, 9 BUFF. CRIM. L. REV. 577 (2006); Peter Weston, *The Logic of Consent: The Diversity and Deceptiveness of Consent in Criminal Law* (2004); Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165 (2007).

106. See, e.g., Bergelson, *supra* note 105, at 202–36; Eskridge, *supra* note 105, at 53–67; Hurd, *supra* note 105.

107. Merriam-Webster's On-line Dictionary described a "choice" as "a number and variety to choose among, a plan with a wide choice of options." See Merriam-Webster's On-line Dictionary, <http://www.merriam-webster.com/dictionary/choice> (last visited Apr. 17, 2010).

108. Lani Guinier, Note, *Acquaintance Rape and Degrees of Consent: "No" Means "No," But What Does "Yes" Mean?*, 117 HARV. L. REV. 2341 (2004) (reviewing the various definitions of consent in the context of rape).

of a complicated set of emotions. Yet, we should not confuse her consent to polygamy with her choice of it.

Second, similar to the way the law looks at domestic violence as a series of discrete acts instead of an ongoing pattern of behavior, we tend to think about consent within intimate relationships as a moment in time—the few seconds before the act in question took place.¹⁰⁹ Thus, we often miss the broader context. But we can also understand that consent is largely contextual, encompassing more than just a few seconds before the act.¹¹⁰ If we look at cases outside of sexual assault, such as domestic violence, polygamy, or prostitution, there is no particular moment in time when we evaluate whether the person has consented. If we take seriously that coercion negates consent, then it is critical that we rewind the videotape to understand what led up to that moment in time.

If we focus on the moment in time, perhaps Nicki's consent is real. If we expand our time frame, we have to question, what, if anything, her consent really means. And, unlike in civil law, in criminal law, there is no concept of *informed* consent. When Barb or Nicki or Margene consents to be in a polygamous relationship, they have no idea how doing so will affect their lives. No one is obligated to tell them of the risks or benefits, if one could even figure out precisely what those might be. Thus, when they consent, they also assume a great deal of risk, as the relationship may not at all be what they bargained for. Of course, this is true for anyone who enters into any sort of intimate relationship. Relationships require us to take chances. Sometimes we are hurt or disappointed or regret our consent. Sometimes we are pleasantly surprised. But in any case, simply saying “she consented” doesn't really tell us the whole story about what led up to that moment in time when we say “I do” or when we do not say no.

Even if the law were to provide a definition of consent that captured the more nuanced nature of our decisions, individuals often perceive themselves as consenting even if the circumstances suggest otherwise. Sandra Tsing Loh plays with this conundrum wonderfully in her

109. Evan Stark describes how we think of battering in the domestic violence context – a slap, a kick, a punch, etc. instead of considering the entire context of the relationship. A similar problem exists in the doctrine of consent. We tend to see it as a “moment in time.” See generally EVAN STARK, *COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE*, 12 (2007); Cheryl Hanna, *The Paradox of Progress: Translating Evan Stark's Coercive Control into Legal Doctrines for Abused Women*, 15 *VIOLENCE AGAINST WOMEN* 1458 (2009).

110. See, e.g., Schomburg & Peterson, *supra* note 105, at 138 (detailing that in one international case, consent as a defense to sexual assault is disallowed “if the victim had been subjected to violent force, threats of force, or other coercive circumstances such as detention or psychological oppression”).

article, *I Choose My Choice! The Fruits of the Feminist Revolution? Sisterhood, Empowerment, and Eight Hours a Day in a Cubicle*.¹¹¹ In it, she reviews Linda Hirshman's book *Get to Work ... And Get a Life, Before It's Too Late*, in which Hirshman takes aim at professional women for opting out of the workforce to care for husbands and children.¹¹² Hirshman is particularly critical of Gloria Steinman. As Loh describes Hirshman's attack:

The pliant undercover Bunny shepherded in a "useless choice feminism" of soft convictions and "I gotta be me" moral relativism. Hirshman quotes *Sex and the City*'s hapless Charlotte, who, when given flak for quitting her job to please her smug first husband, can only wail plaintively, "I choose my choice! I choose my choice!"¹¹³

The main point is that despite Charlotte's insistence that she is choosing her choice when she drops out of the working world and into the wonderland of domesticity, she may be compelled to do so out of a deeper need to please the man she loves.

But as long as we assume that we have autonomy, then to a great extent, we have autonomy. The sister-wives in *Big Love* may, at times, regret their consent, but they do not perceive themselves as being coerced or otherwise forced into polygamy. The same is often true for victims of domestic violence. Even if the circumstances suggest that a decision not to testify against an abuser, for example, might have been coerced by abuser, the victim often perceives herself as making her own decision.¹¹⁴ Take, for example, the case of Beverly Johnson, which I have written about previously:

When I met Ms. Johnson . . . she informed me that, despite the fact that she had suffered abuse throughout the relationship, she did not want to proceed with the [criminal] case. "I have AIDS," she told me, "and I'm sure that the stress of my

111. Sandra Tsing Loh, *I Choose My Choice! The Fruits of the Feminist Revolution? Sisterhood, Empowerment, and Eight Hours a Day in a Cubicle*, ATLANTIC MAG., July-Aug. 2008, available at <http://www.theatlantic.com/magazine/archive/2008/07/i-choose-my-choice/6847/>.

112. *Id.*

113. *Id.*

114. Cheryl Hanna, *No Right to Choose: Mandated Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1873-74 (1996) (discussing the case of Beverly Johnson and her desire not to proceed in a domestic violence case); see also Miccio, *supra* note 34, at 294 (discussing this same case and criticizing the idea that short-term autonomy should be sacrificed for long-term equality).

illness caused him to beat me.” She begged me not to pursue the case because she was afraid that her family would discover that she had AIDS. She said that she and her boyfriend were “working things out.” . . .

Ms. Johnson implored me not to pursue this case. “I’m going to die soon and I don’t want a criminal case to interfere with my life. You’re making things worse, not better.” . . . A few weeks later, she sent me a card, thanking me for respecting her wishes. She did not mention whether the abuse was continuing.¹¹⁵

I did not doubt that Ms. Johnson believed that she was “choosing her choice.” Charlotte, the sister-wives, and the battered woman all give up a great deal to stay in the relationship. All may feel as if they freely “consented” to a loss of their autonomy; neither Charlotte, the Sister-Wives, nor Ms. Johnson may feel coerced or threatened, but rather each believes that the choice is hers alone to make. But there remains the normative question of whether such consent is really consent, and whether from a feminist perspective, such choices ought to be evaluated as equally “good” for those women to make. Who ought to give meaning and shape to that consent? The consenter herself, or some outside observer?

It is unlikely that the law will ever abandon an elusive concept of consent for a more fully informed affirmative choice standard relative to private intimate relationships. Such arguments have been put forth in the context of intimate sexual relations, such as the Antioch policy,¹¹⁶ without much political traction. We resist affirmative standards of consent, in part because they do not necessarily reflect human behavior. While in the sexual context one might be able to convince a court or legislature to adopt an affirmative choice policy, doing so in the context of other currently proscribed activities like prostitution or domestic abuse would be nearly impossible. Thus, we are left with a deeply imperfect definition of consent that, as we shall see, has its own set of consequences.

115. *Hanna*, *supra* note 114, at 1874.

116. Katharine K. Baker, *Rape, Sex & Shame*, 8 DEPAUL J. HEALTH CARE L. 179, 204–05 (2004–2005).

V. CASE STUDIES IN CONSENT

In this section, I introduce four case studies that highlight some dilemmas posed by allowing for consent to certain intimate conduct. Each of these cases highlights the difficulties posed by the law and suggests what consequences might result from an alternative framework. Readers should be cautioned that I do not necessarily resolve these dilemmas, but use them to invite some more nuanced discussion about consent. It is critical in examining these case studies, just as when we view *Big Love*, to ask ourselves exactly what it is that the law is seeking to protect in proscribing certain kinds of intimate encounters. It also important to ask if there is any principled way to distinguish among the cases presented. Is physical force or the threat of it the best way to distinguish between those activities that should be proscribed? Is there a way to clearly distinguish between sex and violence? Should we always allow for consent in all cases, leaving it to the alleged victim to decide whether she or he wants state intervention? Does it matter if the relationship is an intimate partnership or a fleeting commercial exchange? These cases help to illustrate these dilemmas. Like viewers of *Big Love*, feminist legal theorists may answer these questions differently, albeit no less sincerely.

A. R v. Emmett: Behavior That Falls Between Sex and Violence

The first case, which I have written about before, involves sado-masochistic sex (S&M) within the context of an intimate relationship. Even though the case originates in England, the fact pattern highlights this *Big Love* dilemma relative to consent in American law as well. In *R v. Emmett*,¹¹⁷ a heterosexual couple lived together. The defendant was charged with assault and battery. The case came to the attention of the authorities after the victim's doctor reported that one of his patients had received injuries that caused him grave concern.¹¹⁸ There were two incidents that gave rise to this concern. In the first, Emmett placed a plastic bag over his partner's head, tied it at the neck, and tightened it to the point where she could no longer endure the pain.¹¹⁹ This is known as erotic asphyxiation and is intended to heighten sexual pleasure. While he was performing sexual acts on her, she lost consciousness. She lived,

117. *R v. Emmett*, 1999 E.W.C.A. 2651 (June 18, 1999) [hereinafter *Emmett*], available at <http://a-level-law.com/caselibrary/R%20v%20EMMETT%20%5B1999%5D%20LTL%20AC9600065%20-%20CA.doc>.

118. See *Emmett*, E.W.C.A. 2651 at ¶¶ 5–6.

119. See *Emmett*, E.W.C.A. 2651 at ¶¶ 5–6.

but suffered hemorrhages in both eyes and bruising caused by lack of oxygen. A few weeks later, she returned to the doctor. The defendant had poured lighter fluid on her and lit it—again to heighten her sexual pleasure. She suffered a burn to her breast that became infected. Because she sought immediate medical help, she had no permanent scarring.¹²⁰ The defendant admitted that it was his idea to engage in this activity but argued that it was consensual. As the case was pending, the couple got married and she was able to claim marital privilege and refused to testify.

The question before the court was whether to allow consent as a defense to the assault and battery charges.¹²¹ The court presumed consent to the sexual activity, but the court considered this more than just a sexual encounter; there was a violent encounter that resulted in serious injury.¹²² The court found that consent was irrelevant, and based on the defendant's own statements, and those of the doctor, he was convicted and received a suspended sentence.¹²³

The appellate court rejected Emmett's argument, relying on a 1993 House of Lords decision, *R v. Brown*.¹²⁴ In that case, the House of Lords refused to allow consent as a defense to sadomasochistic acts that took place at a nightclub frequented by the gay community.¹²⁵ In *Regina*, the defendants engaged in a range of behaviors including maltreatment of genitalia (with, for example, hot wax, sandpaper, fish hooks, and needles) and ritualistic beatings either with the assailants' bare hands or a variety of implements, including stinging nettles, spiked belts, and a cat-o'-nine-tails.¹²⁶ There were instances of branding and infliction of injuries that caused bleeding and left scarring. The infliction of pain was subject to certain rules including "code words" that would communicate to the sadist to stop if the pain became unbearable. The activities took place in a highly controlled and private setting, instruments were

120. See *Emmett*, E.W.C.A. 2651 at ¶ 11.

121. *Emmett*, E.W.C.A. 2651 at ¶ 3

(Where two adult persons consent to participate in sexual activity in private not intended to cause any physical injury but which does in fact cause or risk actual bodily harm, the potential for such harm being foreseen by both parties, does consent to such activity constitute a defence to an allegation of assault occasioning actual bodily harm contrary to section 47 of the Offences Against the Person Act 1861?).

122. *Emmett*, E.W.C.A. 2651 at ¶ 3.

123. *Emmett*, E.W.C.A. 2651 at ¶ 29.

124. *Regina*, 1 A.C. 212. For a description of the case, see BILL THOMPSON, SADOMASOCHISM: PAINFUL PERVERSION OR PLEASURABLE PLAY? 1–13 (1994).

125. *Regina*, 1 A.C. at 212.

126. *Regina*, 1 A.C. at 236.

sterilized, and none of the participants sought medical attention.¹²⁷ The police raided the club and arrested some of those people who were in the role of the sadist. In that decision, the House of Lords ruled:

In principle there is a difference between violence that is incidental and violence that is inflicted for the indulgence of cruelty. The violence of sadomasochistic encounters involves the indulgence of cruelty by sadists and the degradation of victims. Such violence is injurious to the participants and unpredictably dangerous. I am not prepared to invent a defense of consent for sado-masochistic encounters which breed and glorify cruelty. . . .

Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilized.¹²⁸

Regina was appealed to the European Court of Human Rights (ECHR), which unanimously upheld the decision.¹²⁹ In doing so, the ECHR rejected the defendant's argument that the state had interfered with their right to respect for their private lives under the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹³⁰ Rather, even assuming that the acts were private, the court likened the activities of the defendants to acts of torture. The court found that the state was entitled to regulate activities involving the infliction of physical harm, whether they "occurred in the course of sexual conduct or otherwise."¹³¹ The ECHR maintained that these were not trifling or transient injuries.¹³² It found that the state had prosecuted not based on the defendants' sexual orientation or proclivities, but on the extreme nature of the practices themselves.¹³³ The court was clear that it did not need to reach the issue as to whether the state could regulate the activity based on moral grounds; it found sufficient social utility reasons to let the decision stand.¹³⁴

127. *Regina*, 1 A.C. at 236, 245.

128. *Regina*, 1 A.C. at 236–37.

129. *Laskey v. United Kingdom*, (1997) 24 Eur. Ct. H.R. 39.

130. *Laskey*, 24 Eur. Ct. H.R. at 39.

131. *Laskey*, 24 Eur. Ct. H.R. at 58.

132. *Laskey*, 24 Eur. Ct. H.R. at 59.

133. *Laskey*, 24 Eur. Ct. H.R. at 59.

134. *Laskey*, 24 Eur. Ct. H.R. at 60.

The *Emmett* court followed similar reasoning, finding no distinction between *Regina* and the present case.¹³⁵ It refused to privilege the activities merely because they took place in private and found that the injuries were significant enough to warrant state intervention.¹³⁶ Interestingly, the rulings in both *Emmett* and *Regina* foreshadow the ECHR's decision in *Opuz v. Turkey*, where the court also found that the prevention of physical harm outweighs any liberty interests, and thus not only justifies state intervention but also compels it.¹³⁷

Of course, we have no way of knowing whether the "victim" in *Emmett* was an enthusiastic participant or whether she was forced or coerced into the S/M encounters or whether she was afraid to come forward. But she married and stayed with Emmett—perhaps out of fear, or, perhaps out of *Big Love* for him. It is simply impossible to know unless she herself tells us, and even then, she may be very conflicted over her "consent."

Let's further assume that from a feminist perspective, at least, the law should have two simultaneous goals: the first is to protect liberty and autonomy, and the second is to promote gender equality; and that these goals are not mutually exclusive.¹³⁸ On one hand, it can be argued that in this context, the claim that the harm was part of a sexual encounter was just a guise for exploitation. The harms she suffered were serious, and absent state intervention, men will use the S&M context to inflict harm upon their intimate partners. While arguably paternalistic, the victim needs to be protected even if she herself doesn't recognize the harm. Given that the defendant claimed that the S&M was his idea, we can assume that while his partner might have consented, she did not choose what happened to her. Furthermore, how could she possibly exercise individual autonomy if she is subject to what amounts to torture? From this perspective, she suffers a human rights violation if the state doesn't prosecute her husband.

In contrast, a more libertarian-informed perspective might argue that individuals, including women, have the right to consent to relationships that may cause them physical harm. Furthermore, because the acts

135. *Emmett*, E.W.C.A. 2651 ¶ 29.

136. *Emmett*, E.W.C.A. 2651 at ¶ 31.

137. *Opuz*, Eur. Ct. H.R. 1.

138. For discussion of sadomasochism from feminist perspectives, see Maneesha Deckha, *Pain, Pleasure, and Consenting Women: Exploring Feminist Responses to S/M and Its Legal Regulation in Canada Through Jelinek's The Piano Teacher*, 30 HARV. J.L. & GENDER 425 (2007); Vanessa E. Munro, *Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy*, 41 AKRON L. REV. 923 (2008); Monica Pa, *Beyond the Pleasure Principle: The Criminalization of Consensual Sadomasochistic Sex*, 11 TEX. J. WOMEN & L. 51 (2001).

took place within the context of sexual activity intended to heighten pleasure, arguably she has a right to seek and receive such pleasure. If she asks for state intervention, claiming she did not consent, the state should intervene. If she is hostile or indifferent, we should defer to her silence, thus maximizing her autonomy and preserving her privacy, and providing her with the same rights men have historically enjoyed to engage in controlled, violent activities purely for pleasure.

I generally have preferred the former argument to the latter, largely on pragmatic concerns that at the very least, the criminal prosecution puts the defendant on notice that even if she consented to the activity, he has to exercise more caution and control. Given the level of danger involved, it was preferable to reinforce that if he plays with fire and someone is burned, he is responsible. But I also acknowledge that this argument may not give adequate weight or consideration to either the privacy or liberty interests of the woman involved and may damage women's overall autonomy when the state proceeds against her wishes.

Forbidding consent to private activities that carry with it the high likelihood of physical injury is a relatively easy line for the law to draw. Unlike consent to physical violence in the public sphere where third-party intervention is more likely, private violence has an increased risk that one person will get carried away and cause injury beyond that which was contemplated.¹³⁹ Categorical prohibitions further avoid a case-by-case inquiry into consent, thereby avoiding a legal quagmire that also invites uncertainty and possibly more state intervention into private intimate relationships in the search for what consent really means.

But, in that same way *Big Love* asks us to honor the choices the sister-wives have made, perhaps we should honor Mrs. Emmett's decision to reject state intervention into her private life. Apart from the empirical questions as to whether such intervention actually makes a positive difference in her life (how do we even measure this?), shouldn't the law assume her to be an autonomous decision maker who has the right to be in a relationship of which the objective viewer might disapprove? Absent evidence of force or coercion, shouldn't we treat her as an adult capable of making decisions for herself? Rather than assume that she is a victim, we should assume she is not.

This is an honest and real debate for feminist legal theory: those who would argue on either side can all legitimately claim to be on the side of gender equality. What this case, and those to follow, help to illustrate is that no matter which argument the law preferences, the consequences for women's equality are both imperfect and uncertain. It

139. See *Regina v A.C.*, at ¶ 39 (Lord Jauncey) ("[I]t would appear to be good luck rather than good judgment which has prevented serious injury from occurring.").

is both the complexity of the problem and its ambivalence, which that is at the heart of the future of feminist theory.

*B. People v. Brown: Behavior Proscribed Because
It Could Cause Physical Harm*

The second case, *People v. Brown*,¹⁴⁰ involves football legend Jim Brown and his wife Monique. He was 61 when they married; she was 23. One night in 1999, the police received a call to their residence. The police testified that Monique met them outside her house and told them that after a heated argument, her husband threatened he would kill her by snapping her neck and that he told her he had a gun in the house.¹⁴¹ To get away from him, she went into their garage, Brown followed and then picked up a shovel and began beating her car. Afraid, she fled to a neighbor's house.¹⁴² Brown was arrested and charged with terrorist threats and vandalism. Monique did state that there had been other incidents of domestic violence, but that this was the first time she had contacted the police.¹⁴³ She did not want the case to go forward, but the prosecution insisted.

Before trial, the couple made an appearance on *Larry King Live*, and Brown admitted to having hit women in the past. Indeed, he had been arrested at least five times for violence against women. But he denied threatening Monique. He said:

I don't want to play the race card. I don't want to play the independent black man. I don't want to play that particular game. But it is a fact in this country that all over this country policeman have been killing people for having screwdrivers in their hands. There has been brutality in New York. There are cases all over this country wherein African-Americans and Latinos are being harassed. I'm not blatantly saying that every policeman is against me or against the black community. I am saying that the black community have no trust in law enforcement.¹⁴⁴

Brown claimed that he was suffering from depression over the loss of a friend, which was why the fight had started.

140. *People v. Brown*, 96 Cal. App. 4th Supp. 1 (2001) [hereinafter *Brown*].

141. *Brown*, 96 Cal. App. 4th Supp. at 7.

142. *Brown*, 96 Cal. App. 4th Supp. at 7.

143. *Brown*, 96 Cal. App. 4th Supp. at 7–8.

144. *Larry King Live* (CNN television broadcast Aug. 4, 1999).

Monique blamed herself for the incident. At trial, she defended her husband and introduced expert testimony that she had personality and medical issues that caused her to overreact and escalate the incident.¹⁴⁵ The jury rejected the threat charge and found him guilty of vandalism. When Brown refused to attend mandatory domestic violence counseling, the judge sentenced him to six months in jail.¹⁴⁶ The court rejected the defense that Monique had consented to the smashing of her car. Brown spent four months in prison after an appeals court rejected his argument that the sentence was retaliatory.¹⁴⁷

Commentators such as Linda Mills have argued that the state should not have proceeded in this case because it put Monique in an impossible position.¹⁴⁸ She chose to protect her husband rather than herself, and the state should respect her decision.¹⁴⁹

We might even take Mills' argument one step further and argue that the State's decision to proceed with the case forced Monique to lie and degrade herself publicly, as well as subject herself to perjury charges.¹⁵⁰ While scholars like Mills locate the dilemma in prosecution policies,¹⁵¹ there is also a dilemma posed by the unavailability of consent as a defense to the threat charge. If the law allowed Brown to invoke consent as a defense to the charges, then Monique could be honest and say, "Yes, he threatened and scared me, but I accept that behavior." It is not necessary that she consent at the moment in time of the alleged assault. Rather, were we to think about consent more broadly as acceptance rather than affirmation, and within a broader time frame, she's willing to "put up with it" because she values the relationship despite any risks herself. She is in *Big Love* with her husband. Similar to

145. *Brown*, 96 Cal. App. 4th Supp. at 773.

146. *Brown*, 96 Cal. App. 4th Supp. at 742-43.

147. Jessica Blanchard, *Jim Brown Leaves Jail After Serving Reduced Sentence*, L.A. TIMES, July 4, 2002, available at <http://articles.latimes.com/2002/jul/04/local/me-jim4>; Margaret Talev, *2 Weeks Into His Jail Sentence, Jim Brown is Still Not Eating*, L.A. TIMES, Mar. 29, 2002, available at <http://articles.latimes.com/2002/mar/29/local/me-brown29>.

148. LINDA G. MILLS, *INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE* (2003).

149. *Id.*; see also Annalise Acorn, *Surviving the Battered Reader's Syndrome, Or: A Critique of Linda G. Mills' Insult to Injury: Rethinking Our Responses to Intimate Abuse*, 13 U.C.L.A. WOMEN'S L.J. 335, 341-50 (2005) (reviewing and criticizing Mills' response to this case in detail).

150. For a broader discussion of these issues, see Njeri Mathis Rutledge, *Turning A Blind Eye: Perjury in Domestic Violence Cases*, 39 N.M. L. REV. 149 (2009).

151. For a critique of mandatory interventions in domestic violence cases, see Miccio, *supra* note 34.

Barb's acceptance of Bill's polygamy, Monique does not choose Jim's anger and aggression towards her, but she consents to it.

Many domestic violence victims recant what happened when the state decides to proceed with the case.¹⁵² They often claim the injuries happened accidentally, or like Monique, blame themselves. Others simply distrust the judicial system more than they distrust their partners.¹⁵³ Theoretically, were the law to recognize consent as a defense, it would allow victims to tell the truth and say, "Yes, he threatened me, or kicked me, or hit me. But I accept that as part of the consequence of being in this intimate relationship." This argument assumes that Monique is not being coerced or controlled by her husband, but is able to make her own decisions when faced with imperfect choices. In both this case and *Emmett*, we do not know if the man in the relationship controls his partner through a series of coercive tactics, or whether these were isolated incidents. Similar to a liberal-feminist critique of *Emmett*, we assume that Monique is not a victim until she herself tells us she is, or until the state has better evidence of an ongoing pattern of coercion that robs the woman of her autonomy.¹⁵⁴

Let me be clear: I am not necessarily convinced (yet) by this argument. Indeed, I am very skeptical of allowing consent to be a defense to assault and battery in the context of an intimate sexual relationship. Even if the law of consent remains the same, however, prosecutorial policies that allow victims to decide whether a case should be prosecuted are the functional equivalent of recognizing consent as a defense to assault and battery and other related crimes of physical aggression. But, even though I am not convinced that victims themselves ought to have the final say in these cases, to be honest about the theoretical and practical effects of our decision to preference personal autonomy over other state interests, including physical safety, is helpful to the debate. To some extent, I agree with Mills that people should not have to choose between truth and autonomy, nor should there be legal rules that encourage people to lie. One consequence of the consent doctrine is that it does not allow victims to be completely forthcoming about their

152. Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 768 (2005) ("Victims of domestic violence are more prone than other crime victims to recant or refuse to cooperate after initially providing information to the police. Recent evidence suggests that 80 to 85 percent of battered women will recant at some point."); see also Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements As Substantive Evidence*, 11 COLUM. J. GENDER & L. 1, 3 (2002) (describing non-cooperation by recantation and failure to appear as "an epidemic in domestic violence cases").

153. Gruber, *supra* note 34, at 815–17.

154. See STARK, *supra* note 109.

decisions and treats them in a monolithic way as being incapable or pathological, rather than rational in their decision-making.

I should note that Jim and Monique Brown still appear to be together after a decade, and there have been no further press reports of calls to the police. Of course, we do not know if that indicates that there has been no further violence, or if Monique is afraid to have the state intervene because she fears the negative publicity and the loss of control over the process. We also do not know if Brown continues to coerce and threaten her, if she fears for her safety were she to call the police, or if the criminal prosecution has deterred his violence. Therefore, just as in the previous case, legal decision makers are left to speculate about the true nature of her consent and her safety, and whether a change in the law or the way we practice it might best achieve the simultaneous goals of equality and autonomy.

C. State v. Brian Rooney:
Behavior Proscribed Only if There Is No Consent

The next case I discuss, *State v. Brian Rooney*, is one that I witnessed unfold first-hand in my community. I include it in this discussion because it highlights the relationship between the doctrine of consent, privacy, and the possible unintended consequences of expanding the consent doctrine.

During parents' weekend at the University of Vermont, a college student named Michelle Gardner Quinn went missing after a night out with friends in Burlington, Vermont. A few weeks later, her body was discovered in a local gorge.¹⁵⁵ She had been anally raped and then brutally killed.¹⁵⁶

Michelle had gotten separated from friends that evening when Brian Rooney, a thirty-seven-year-old construction worker, saw her struggling with her dead cell phone. Rooney approached her and offered his cell phone. Rooney was caught on a surveillance tape walking with Michelle, so he was easily identified as a possible suspect in her disappearance and murder. Evidence against Rooney began to unfold, including a DNA match, and statements that he made to police in

155. Brian Joyce, *Body of Missing UVM Student Found*, WCAX, Oct. 13, 2006, <http://www.wcax.com/Global/story.asp?s=5535894>.

156. Adam Silverman, *Day Four Proceedings Cancelled*, BURLINGTON FREE PRESS, May 16, 2008, available at <http://www.burlingtonfreepress.com/article/20080516/NEWS01/80515048/Day-4-proceedings-cancelled>.

which he said, "If I did it, I deserve to die."¹⁵⁷ A jury convicted Rooney and sentenced him to life in prison.¹⁵⁸

In the course of the investigation into Michelle's death, it was discovered that Rooney had also sexually assaulted other women with whom he had been romantically involved.¹⁵⁹ According to at least one affidavit, Rooney allegedly drugged a former girlfriend and anally raped her on numerous occasions.¹⁶⁰ He had done this to other women as well.¹⁶¹

This young woman, identified as A.S. in court documents, met Rooney when she was only seventeen and he was thirty-one. The two of them eventually had a child together. During the course of their relationship, he sexually assaulted her as often as three times a week.¹⁶² A.S. eventually requested a temporary restraining order against Rooney after she discovered he was seeking someone to kill her.¹⁶³ At the hearing for the permanent order, no witness appeared to corroborate that story, so the court asked if there was another reason she would need a restraining order.¹⁶⁴ When she told the court about the sexual abuse, Rooney claimed that all the sex was consensual and that he had videotapes and pictures to prove that she liked what he did to her.¹⁶⁵ It is not clear from the affidavit if the judge was willing to allow him to introduce the tapes and photographs, but the court denied the final abuse of prevention order.¹⁶⁶

After Michelle's murder, when police discovered that Rooney had allegedly attempted to solicit someone to kill A.S.,¹⁶⁷ he was also charged with a felony for inciting murder for hire as well as other counts of

157. John Curran, *Murder Suspect: "If I Did It, I Deserve to Die"*, ASSOCIATED PRESS, May 21, 2008 available at http://findarticles.com/p/news-articles/virginian-pilot-ledger-star-norfolk/mi_8014/is_20080522/slaying-suspect-told-officer-tape/ai_n41402391/.

158. *Rooney Convicted of Killing Michelle Gardner-Quinn*, WCAX, May 22, 2008, <http://www.wcax.com/global/story.asp?s=8365117>.

159. Sam Hemingway, *Legal System May Change After This*, BURLINGTON FREE PRESS, Oct. 26, 2006, at A1.

160. Sam Hemingway, *Rooney's Violent Past*, BURLINGTON FREE PRESS, Oct. 22, 2006, at A1.

161. Chittenden Unit for Special Investigations Affidavit of Probable Cause VSP, at ¶ 16, State v. Rooney, No. 06A104828 (Oct 18, 2006).

162. *Id.* at ¶ 9.

163. *Id.* at ¶ 15.

164. *Id.* at ¶ 17.

165. *Id.* at ¶ 17.

166. *Id.*

167. *Id.* at ¶¶ 22–23.

sexual assault. These charges were dropped after the guilty verdict in the murder case.¹⁶⁸

Of course we do not know if granting a restraining order or prosecuting Rooney for nonconsensual sex with A.S. would have stopped him from raping and killing Michelle, but some in the legal community believed that taking claims of sexual abuse more seriously was necessary to protect victims.¹⁶⁹

A.S. claimed that she stayed in the relationship with Rooney because, "He was my first and I wanted to be with him. I really loved him."¹⁷⁰ She believed that he would change.¹⁷¹ Yet, despite those statements, I would suggest that A.S.'s decision to stay with Rooney was not a result of *Big Love*—but big fear. In what can only be described as a moment of some poetic justice, A.S. testified at Michelle's trial that Rooney was intimately familiar with the gorge where her body was found, having frequented it regularly. This evidence was particularly damaging to Rooney. Yet, despite the fact that A.S. was now safely away from Rooney, I never saw a woman look more terrified than when she testified against him. I couldn't help but believe that it was terror, not love, that bound her to Rooney.

Despite A.S.'s own "consent" to stay with Rooney and endure the abuse, nothing about her decision to stay evinced any autonomy or consent. But the mere availability of consent to sexual activity was enough to discourage her from seeking further legal help. Unlike assault and battery, rape and sexual assault allow for consent as a defense.¹⁷² Had Rooney hit her, consent would have been irrelevant and the court might have taken her claims of abuse more seriously. There would have been a greater possibility that the state would be able to exercise some control over him. But, because his violation was primarily sexual, he had the

168. Adam Silverman, *State Drops Rooney Charges*, BURLINGTON FREE PRESS, Nov. 4, 2008, at B1.

169. Hemingway, *supra* note 159, at A1.

170. Chittenden Unit for Special Investigations, *supra* note 161, at ¶ 19.

171. *Id.*

172. *See, e.g.*, VT. STAT. ANN. tit.13 § 3252 (2010), noting that under the Vermont statute for sexual assault:

(a) No person shall engage in a sexual act with another person and compel the other person to participate in a sexual act:

compel the other person to participate in a sexual act:

- (1) without the consent of the other person; or
- (2) by threatening or coercing the other person; or
- (3) by placing the other person in fear that any person will suffer imminent bodily injury.

right to claim that she agreed. Ironically, Rooney had told A.S. that he would never hit a woman because he saw his father abuse his mother.¹⁷³ He himself did not see sexual abuse as the same as physical abuse in the same way that the law differentiates between the two. It is this he said/she said dilemma in the context of sexual assault cases involving intimate partners that makes the prosecution of such crimes so difficult, particularly when there is no physical violence outside of the sexual activity involved. Yet, it is undeniable that A.S.'s victimization was no less significant than if Rooney had only physically abused her and that the impact on her autonomy and self-determination just as significant as if were she beaten and not raped.

This case also sends cautionary tale: once the law allows for consent to be a defense to assault and battery, for example, then women will often be deterred from seeking outside help. Even though A.S. tried to seek help, the public humiliation of having her sex life on trial was likely enough to deter her from pursuing help.¹⁷⁴ And, this case reminds us that perpetrators of violence rarely have a single victim. While the law may privilege an individual woman's choice to consent, how does it protect the next woman who does not consent? More than a decade of experience with these questions has left us no closer to the answers.

D. United States v. Extreme Associates: *Behavior Proscribed Because It Offends Morality and the Social Order*

In 2002, the PBS series *Frontline* produced a documentary called *American Porn*.¹⁷⁵ It explored the multibillion dollar pornography industry. It was subtitled, "It's a multibillion dollar business—and growing. In a wired world, can anything stop it?" During the filming of the documentary, PBS producers interview Rob Zicari, owner of Extreme Associates, a company that claimed to produce some of the most hardcore pornography available. During the filming of *American Porn*, the producers were so shocked by the simulated rape and murder scenes of women that they left the set. During the filming, Zicari challenged then

173. Chittenden Unit for Special Investigations, *supra* note 161, at ¶ 15.

174. Douglas E. Beloof, *Enabling Rape Shield Procedures Under Crime Victims' Constitutional Privacy Rights*, 38 SUFFOLK U. L. REV. 291, 299 (2005) ("The anti-rape movement confronts, as it must, the cultural myths that uniquely exist in the context of rape. Manipulation of these myths, along with humiliation and victim blaming, are typical informal defenses to rape charges. Blaming victims in rape cases may be an effective means to secure acquittal.")

175. *Frontline: American Porn* (PBS television broadcast Feb. 7, 2002), available at <http://www.pbs.org/wgbh/pages/frontline/shows/porn/>.

Attorney General Ashcroft by claiming that he would likely be the test case on obscenity.¹⁷⁶ Ashcroft decided that if anyone could stop such pornography, it would be him. In 2003, Zicari and his wife and co-owner Janet Romano were charged with violating federal obscenity laws.¹⁷⁷ This was the first federal obscenity prosecution in a decade.¹⁷⁸

The couple appealed the indictment, arguing that the right to privacy, then recently strengthened by the Court's opinion in *Lawrence v. Texas*, gave individuals the right to view obscene material.¹⁷⁹ That right was unconstitutionally burdened, they argued, by federal laws banning distribution of such material.¹⁸⁰ The District Court agreed, declaring that the federal anti-obscenity laws were unconstitutional.¹⁸¹ However, the Third Circuit reversed, holding that because only the Supreme Court itself could overrule precedent, it could not extend the right of privacy under *Lawrence* to include the distribution of obscenity.¹⁸² The Supreme Court denied the couple's petition for certiorari.¹⁸³ The couple pled guilty and each received a sentence of a year and a day.¹⁸⁴

At the heart of Extreme Associate's argument was that individual privacy interests can not be infringed upon simply because the government is attempting to regulate sexual morality.¹⁸⁵ In contrast, Mary Beth Buchanan, the U.S. Attorney for the Western District of Pennsylvania, where the case was prosecuted, and who once served as the acting director of the Justice Department's Office on Violence Against Women, said, after Zicari and Romano pled guilty, "This case affirms that no matter who you are, or where you are, certain abhorrent behavior simply violates our community's standards."¹⁸⁶ It was her position that such im-

176. Interview with Rob Black of Extreme Associates, in *Frontline: American Porn*, *supra* note 175, available at <http://www.pbs.org/wgbh/pages/frontline/shows/porn/interviews/black.html>.

177. News Release, Mary Beth Buchanan, U.S. Attorney for the W. Dist. of Pa., Aug. 7, 2003 (on file with author), available at http://www.justice.gov/criminal/ceos/Press%20Releases/WDPA%20Zicari%20indict%20PR_080703.pdf.

178. *Id.*

179. *United States v. Extreme Assocs., Inc.*, 352 F. Supp. 2d 578, 586 (W.D. Pa. 2005).

180. *Extreme Assocs.*, 352 F. Supp. 2d at 596.

181. *Extreme Assocs.*, 352 F. Supp. 2d at 595-96.

182. *United States v. Extreme Assocs., Inc.*, 431 F.3d 150, 161 (3d Cir. Pa. 2005).

183. *Extreme Assocs., Inc. v. United States*, 547 U.S. 1143, 1143 (2006).

184. Grant Gross, *Couple Gets Prison Time for Internet Obscenity*, IDG NEWS SERVICE, July 3, 2009, http://www.pcworld.idg.com.au/article/309771/couple_gets_prison_time_internet_obscenity.

185. See Brief of Defendants-Appellees at 13-14, *United States v. Extreme Assocs., Inc.*, 431 F.3d 150, No. 05-1555 (3rd Cir. May 12, 2005).

186. Press Release, U.S. Attorney's Office of W. Dist. of Pa., *Extreme Associates and Its Owners, Robert Zicari and Janet Romano, Plead Guilty to Violating Federal Obscenity*

ages degrade society, particularly women—the same arguments put forth by Catharine MacKinnon and Andrea Dworkin a generation earlier.¹⁸⁷

The debate over obscenity is doctrinally framed as free speech versus government censorship.¹⁸⁸ But we might also consider it as one that raises questions about consent and state intervention. The actresses in Zicari's films consent to be filmed. Indeed, his wife, whose screen name is Lizzie Borden, often was the star of Zicari's productions. Acting in pornography is generally legal, as most courts that have examined the issue have held that acting in pornography is not the same as prostitution.¹⁸⁹ The actors are being compensated for their craft, not the sex itself.¹⁹⁰

Laws, REUTERS, Mar. 11, 2009, available at <http://www.reuters.com/article/pressRelease/idUS206630+11-Mar-2009+PRN20090311>.

187. DWORKIN, *supra* note 32; MACKINNON, *supra* note 25.

188. See *Miller*, 413 U.S. at 25 (1973) (quoting *Roth v. United States*, 354 U.S. 476, 489 (1957)) (defining the test for obscenity as “(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest . . . , (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”).

189. See, e.g., *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1951) (“It cannot be doubted that motion pictures are a significant medium for the communication of ideas.”); *State v. Theriault*, 960 A.2d 687, 692 (N.H. 2008) (finding that “[t]o uphold the conviction in the instant case, where the only facts adduced at trial were that the defendant offered to pay two people to have sexual intercourse while being videotaped, would infringe upon an area of speech protected by the State Constitution”); *People v. Freeman*, 758 P.2d 1128, 1131 (Cal. 1988) (where the only payment made was acting fees for the actors’ performance in a non-obscene film, and “[t]here [was] no evidence that defendant paid the acting fees for the purpose of sexual arousal or gratification, his own or the actors’” there is no violation of the state prostitution statute) (*cert. denied*, 489 U.S. 1017 (1989)). But see *People v. Kovner*, 409 N.Y.S.2d 349, 352 (Sup. Ct. 1978) (“While First Amendment considerations may protect the dissemination of printed or photographic material regardless of the manner in which it was obtained, this protection will not shield one against a prosecution for a crime committed during the origination of the act.”).

190. I have been asked by both scholars and sex workers if videotaping a sexual encounter between a sex worker and her client would protect her from prostitution charges. While I would not want to give legal advice, the videotape defense, coupled with a contract that describes the nature of the exchange as acting services, would make for a compelling case in challenging what seems to be a bizarre contradiction in the law between consent to pornography versus consent to prostitution. For example, in *State v. Theriault*, 158 N.H. 123 (2008), the New Hampshire Supreme Court, when deciding this issue under state constitutional law, stated, “Our holding today will not prevent the State from continuing to prosecute prostitution, even when the acts are videotaped,” but would require the state to prove that the payment was for the purpose of sexual arousal or gratification, as required under New Hampshire law. *Id.* at 130.

Apart from the pragmatic question of whether extreme pornography encourages violence against women, there is the principled question as to whether we ought to allow women to consent to the filming of material that depicts men raping and murdering women, or whether doing so causes them harm.¹⁹¹ Women (and men) agree to be in pornography for many reasons including coercion and abuse,¹⁹² the need and desire to make money,¹⁹³ to reap the benefits of fame,¹⁹⁴ and *Big Love* reasons. The law recognizes that choice by not prosecuting pornography actors as prostitutes, rapists, or batterers. However, if you ever view one of Zicari's films and the clips shown in the Frontline video, in which some of his actresses are interviewed, you would likely have to acknowledge that there is indeed physical harm, as well as emotional damage, done to those women acting in these films. Therefore, I suspect that for many women, starring in pornography may not be of their choosing, despite their consent.

Yet, unlike domestic violence, the relationship between the theoretical wrongdoers, the producers and male actors who engage in the violence, and the theoretical victims, the women who act in the films, is often not an intimate relationship as much as a commercial one. To that extent, one could argue that the law protects commercial transactions. But prostitution is also a commercial transaction, and it remains illegal in all states except Nevada. Thus, commercialism alone cannot possibly provide a principled answer for the law. In a similar vein, to the extent that bans on prostitution are justified because commercial sex undermines the institution of marriage, as perhaps *Lawrence* suggests, one only has to read the advice columns in the newspaper to see that plenty of relationships are wrecked by one partner's addiction to internet pornography. Protecting marriage (if one even believes it to be preferable or possible) doesn't account for certain prohibitions either. Thus, even as

191. See Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 595 (1986); Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 809 (1993) (noting that women in this industry are often young, victims of sexual abuse as children, and forced into pornography, and that many of these "participants have been beaten, forced to commit sex acts, imprisoned, bound and gagged, and tortured"); see also Michelle McGovern, *A Progressive Perspective on Pornography: American Booksellers Association v. Hundt*, 4 WIDENER L. SYMP. J. 451, 456–59 (1999).

192. Sunstein, *Pornography and the First Amendment*, *supra* note 191, at 595; *Words, Conduct, Caste*, *supra* note 191, at 809; McGovern, *supra* note 191, at 456–59.

193. *Women and Porn Industry: The Reasons*, REAL SEX EDUCATION FACTS, <http://www.realsexeducationfacts.com/women-and-porn-industry-reasons.html> (last visited Apr. 18, 2010).

194. See LEVY, *supra* note 64, at 181–82 (discussing porn star Jenna Jameson's celebrity while also noting that the industry is marked by "violence and violation").

we move away from the private sphere of intimate relationships to the more public sphere of pornography, it is extremely difficult to articulate what rationale the law might give for banning some activities while allowing others.

CONCLUSION

In each of the cases presented in this Article, the potential for men to exploit women is real, and yet, for the women involved, they may derive some benefits, some pleasure, some joy, or some love from that relationship. In each case, they may also suffer some harm—harm from both male sexual and physical aggression, and harm from state intervention. It is the simultaneous dilemma of pleasure and pain, and autonomy and coercion, which makes deciding normative legal theory so tricky.

Should the law allow Barb and her sister-wives to consent to polygamy? Should it allow Mrs. Emmett to consent to asphyxiation and burning? Should it allow Monique Brown to accept her husband's violent rage as part of their relationship without government interference? Should the state wait until Brian Rooney's girlfriend is willing to proceed against him, knowing she likely will never do so as long as he has the right to claim consent as a defense to his violent sexual aggression? Should we allow Janet Romano to "act" in her husband's violent pornography even though it depicts, and perhaps encourages, men to rape and kill women purely for self-gratification?

We can make all sorts of distinctions between these cases, but they share in a common dilemma for feminist legal theory. Each of these cases leaves us wondering what the role of state intervention ought to be in private, intimate relationships. We might draw the line at physical violence, or require evidence of affirmative consent, or continue to disallow consent even in intimate relationships because of broader social concerns, including public safety. We might forbid certain relationships because they are intrinsically degrading to women, or we may take a free-market approach and let individuals decide for themselves the limits of their own autonomy. We might distinguish between commercial and noncommercial activities, or the public and private sphere. For those who embrace pragmatism rather than principle, we have so little evidence—after so many years—that really helps us determine which approach will maximize gender equality. We live in a world of empirical uncertainty, which makes deciding these questions even harder to definitively answer.

To the extent that life imitates art, and art life, *Big Love* reminds us that these tensions in life and law are not so easily resolved. The future of feminist legal theory will depend, in large measure, on the ability of scholars to boldly ask the questions that touch on gender equality, but then to humbly propose the answers. And we have to be able to revisit our positions, as I have attempted to do here. It is these tensions in the series and in scholarship that keep us watching, and keep us writing. It keeps feminist legal theory interesting, relevant, and challenging when it might otherwise become passé. Perhaps a guiding principle for future feminist legal theory could be paraphrased from a Joan Armatrading song: we need not be in love, but open to persuasion. *Big Love* seeks to persuade us to accept ambivalence, and to be open to changing our minds because of the complicated nature of the lives of women and men; feminist legal theory ought to persuade us to do the same. ♣