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EXIT: POWER AND THE IDEA OF LEAVING IN LOVE, WORK, AND THE CONFIRMATION HEARINGS

MARTHA R. MAHONEY*

How could she have brought herself to follow Judge Thomas so faithfully and so long in her career, given the sordid remarks he allegedly made to her?¹

On cross-examination, when discussing an occasion when Mr. Kelly temporarily moved out of the house, the State repeatedly asked Ms. Kelly: "You wanted him back, didn't you?" The implication was clear: domestic life could not have been too bad if she wanted him back.²

Exit—the door with the glowing red sign—marks the road not taken that proves we chose our path. Prevailing ideology in both law and popular culture holds that people are independent and autonomous units, free to leave any situation at any time, and that what happens to us is therefore in some measure the product of our choice. When women are harmed in love or work, the idea of exit becomes central to the social and legal dialogue in which our experience is processed, reduced, reconstructed and dismissed. Exit is so powerful an image that it can be used both to dispute the truth of our statements and to keep people from hearing what we say at all. The image of exit hides oppression behind a mask of choice, forces upon us a discourse of victimization that emphasizes individualism and weakness rather than collectivity and strength, and

* Associate Professor, University of Miami School of Law. Thanks to Jeanne Adelman, Ken Casebeer, Donna Coker, Joan Mahoney, Susan Mann, Rob Rosen and Steve Schnably for their suggestions, and to Dianne Fischer for research assistance. Stephanie Wildman offered extensive and insightful comments very quickly. All errors are my own. For my indebtedness to Lynne Henderson on timely exit and on getting this project underway, this essay is my particular thanks.

1. Senator Jim Exon, explaining his vote in favor of the confirmation of Clarence Thomas; Maureen Dowd, *Republicans Gain Edge by Going Nasty Early*, N.Y. TIMES, Oct. 15, 1991, at A18.

2. *State v. Kelly*, 478 A.2d 364, 377 (N.J. 1984).

conceals the possibility and necessity of alliance and resistance to oppression.

I began writing this essay the week the Senate confirmed the appointment of Clarence Thomas to the Supreme Court. As I type these words, weeks later, images of the hearings are still before me: of Anita Hill testifying—graceful and composed, tiring as the day wears on, maintaining dignity, clarity, directness, honesty.³ Of Orrin Hatch's face, filling the screen—the Grand Inquisitor, reprocessing her testimony. Of Clarence Thomas, rigid in his chair, claiming he is being lynched for his independence.⁴

The emotional impact of the hearings was profound but hard to capture. The political impact is hard to predict, because it depends in part on what happens next. Intellectually, there is much to assess. Of all that happened in the hearings, this essay addresses the ways in which failure to exit was used against Anita Hill in the Senate and in public discourse. I compare the treatment of exit in the confirmation hearings with cases involving battered women.⁵

Love and work are the most important areas of life, from which life gains meaning, satisfaction and pleasure. Battering and sexual harassment are abuses of power within the relational worlds of love and work. Battering is about power over the lover: the attempt to exercise power and control marked by a pattern of violent and coercive behaviors.⁶ Sexual harassment is an abuse of power associated particularly with the workplace and with preparation for work.⁷ Battering and harassment happen, therefore, in the course of constructing ourselves in the world in relation to others, especially to those we love, and in relation to the world itself.

The image of exit denies the ongoing construction of relationships—the process that gives them coherence and meaning—by its insistent attention to idealized moments of mutual freedom to enter and leave.

3. A survey of judges, who are in the business of hearing testimony and weighing credibility, revealed that two-thirds of them believed Anita Hill's testimony. Scott Armstrong, *Women Seeking Office Quickened by Thomas Flap*, CHRISTIAN SCI. MONITOR, Oct. 22, 1991, U.S. section, at 1.

4. Cf. William Raspberry, *Thomas's Credential: Deprivation*, WASH. POST, Sept. 20, 1991, at A27 (quoting Jesse Jackson referring to Clarence Thomas as "the most sponsored black man in American history").

5. Much of my analysis of exit in the context of battering is based on material more fully developed in my recent article, Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

6. *Id.* at 53-60.

7. Academia, the other notorious site of sexual harassment, is a workplace for its staff and preparation for work for its students.

Also, emphasizing exit directs attention to individual misbehavior and individual response, concealing relations of power in the family and the workplace—male domination of women,⁸ and a legal regime of work without rights in a job or protection against most forms of abuse. The first half of this essay discusses what is hidden in, and hidden by, the focus on exit.

Once exit is defined as the appropriate response to abuse, then staying can be treated as evidence that abuse never happened. If abuse is asserted, “failure” to exit must then be explained. When that “failure” becomes the point of inquiry, explanation in law and popular culture tends to emphasize victimization and implicitly deny agency in the person who has been harmed. Denying agency contradicts the self-understanding of most of our society, including many who share characteristics and experiences of oppression with the person who is being harmed. The conservative insistence that we are untrammelled actors plays on this sensibility, merging rejection of victimization with an ideology that denies oppression. The privatization of assaults on women makes it particularly difficult to identify a model of oppression and resistance, rather than one of victimization and inconsistent personal behavior.

Equating exit and agency denies the possibility and legitimacy of resistance against oppression. Since both staying and leaving can be normal acts of resistance, the focus on exit warps inquiry and treats as illegitimate the struggle to make the fundamental areas of life more one’s own. To recognize oppression and resistance in the lives of women, we must reject exit as the test of truth or the core of agency. If we emphasize antisubordination in love and work, we will see resistance differently and see different allies as well. The second half of this essay discusses the necessity of choosing legal and social arguments to reveal and facilitate resistance to oppression.

I. THE IMPORTANCE OF EXIT

[A]n “outraged person” would [not] stay with a mentor who psychologically abused her, until she was secure enough to make her own way. . . .⁹

8. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 3 (1987); CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 1 (1979) [hereinafter MACKINNON, *SEXUAL HARASSMENT*].

9. Maureen Dowd, *Republicans Gain Edge By Going Nasty Early*, N.Y. TIMES, Oct. 15, 1991, at A18 (J. Bennett Johnston, Democratic Senator from Louisiana, explaining why he found Anita Hill’s testimony implausible).

[O]ne of the common myths, apparently believed by most people, is that battered wives are free to leave. To some, this [suggests masochism] . . . to others, however, the fact that [she] stays on unquestionably suggests that the 'beatings' could not have been too bad for if they had been, she certainly would have left.¹⁰

During the week of the confirmation hearings, newspapers repeatedly cited studies of working women, including lawyers, who said that they neither filed complaints nor left their jobs when they encountered sexual harassment.¹¹ Many women said they would just tell the offender to stop ("just say knock it off.")¹² Anita Hill's story generally tracked this course of action: She said she told her supervisor, Clarence Thomas, that she would not go out with him and that she didn't enjoy sexual conversations; she believed she had successfully handled the situation when the harassment stopped, found the recurrence of harassment distressing, and finally left for academic employment.

Nevertheless, those who supported the confirmation discussed Anita Hill's story as if it did *not* follow a plausible course. In particular, the fact that she continued to work for Clarence Thomas was used to discredit her account of harassment: first, she continued to work for him at the Department of Education, then she moved to the EEOC and continued to work for him there. The move to the EEOC lent a heightened sense of affirmative choice, since she continued working with him rather than trying to continue in an unknown job in the same department.

Failure to exit was raised to dispute the truth of her claims of fact, her account of words spoken by Clarence Thomas (if he really said that, why did she follow him to the EEOC?). Failure to exit was also raised to argue that, if he indeed said those things, his statements could not have been entirely unsought and unwelcome. This position allowed listeners to reconcile absolutely contradictory factual claims with centrist agnosticism or cynicism about truth (maybe they were both telling the truth as

10. *State v. Kelly*, 478 A.2d 364, 377 (N.J. 1984).

11. See, e.g., Tamar Lewin, *A Case Study of Sexual Harassment and the Law*, N.Y. TIMES, Oct. 11, 1991, at A17 (women fear reprisals if they sue for sexual harassment; women fear that their careers and reputation will suffer even if they win; most women do not make formal complaints or leave the job); Emily Courie, *Women in the Large Firms: A High Price for Admission*, NAT'L L.J., Dec. 11, 1989, at 3-5 (survey found that at least 60% of women at large firms experienced unwanted sexual attention of some kind); cf. LIN FARLEY, *SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB* 21-22 (1978) (only 9% of women quit immediately upon harassment; most stayed, though many of these did quit eventually when the situation escalated later).

12. Alan Deutschman, *Dealing With Sexual Harassment*, FORTUNE, Nov. 4, 1991, at 32, 33; Peter Applebome, *In Hometowns, Outrage Over the Senate and Adamant Support for Thomas*, N.Y. TIMES, Oct. 15, 1991, at A19.

they saw it, or, they were both lying in part). Failure to exit was seen as an indication of inconsistency between her actions and her report of her feelings, making suspect her overall credibility (she couldn't be telling the truth, because if she felt the disgust she claimed, she would have left). Finally, failure to exit was used in a sort of waiver argument to imply at least political opportunism, if not dishonesty (if it wasn't bad enough to leave or bring charges then, why bring this up now?).

These concepts of exit in the confirmation hearings bear striking similarity to the uses of exit in social and legal discussion of battered women. The woman's very *presence* in the battering relationship is used against her in several ways. Most important, as in the confirmation hearings, failure to exit is raised to dispute the truth of descriptions of physical violence (if it was so bad, why didn't she leave?). The issue of exit also shapes perception of the woman's functionality, as in custody cases (if she didn't leave, how can she be a strong or competent person—or a fit mother?).¹³ In self-defense cases when women kill or harm their abusers, other doctrinal points can also hinge on exit (could danger have been imminent if she could have left instead?).¹⁴

Anita Hill's move to the EEOC was presented in the hearings as a choice of Clarence Thomas as supervisor rather than a choice of particular work or federal department within which to work. The move was then raised to cast doubt upon the truth of her account and, indirectly, to support challenges to her motives or rationality (she had "fantasies"; she was in love with him).¹⁵ Battered women who separate temporarily and return to their partners encounter similar perceptions. Failure to exit comes to include a very high degree of intentionality. Exit is now clearly defined as possible. The woman is seen as choosing to return to a batterer, rather than to a husband; the act of choosing a batterer throws into question either the truth of her claims or her sanity.

13. Battered women are disfavored in custody evaluations. Lenore E. A. Walker & Glenace E. Edwall, *Domestic Violence and Determination of Visitation and Custody in Divorce*, in *DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE* 127, 140-41 (Daniel J. Sonkin ed., 1987). This problem is exacerbated because explanation of battered women emphasizes victimization, as battered woman syndrome and learned helplessness are generally understood by courts. See Myra Sun & Elizabeth Thomas, *Custody Litigation on Behalf of Battered Women*, 21 *CLEARINGHOUSE REV.* 563, 569-70 (1987).

14. When women kill or harm their abusers, the possibility of exit shapes the issue of whether they faced the *imminent* danger of death or great bodily harm that is crucial to establishing the need for self-defense. See, e.g., *Kansas v. Stewart*, 763 P.2d 572 (Kansas 1988). Exit is also an issue when law imposes a duty to retreat before using deadly force, although only a small number of states impose this duty on someone attacked by another occupant of the home.

15. *Witnesses Support Account by Judge Thomas's Accuser*, *N.Y. TIMES*, Oct. 13, 1991, at A1, A10.

The image of exit in battering cases is inconsistent with the realities of separation from violent relationships. Half of all marriages may include violence.¹⁶ A significant number of divorced women report that their husbands were physically violent with them.¹⁷ Violence is everywhere; *both* staying and leaving are normal activities when women encounter violence. Women may leave and return, leave and return, unless or until they are convinced that the relationship is over.¹⁸ The question "why didn't she leave" hides the commonality of violence, the ways women actually behave in the face of violence, and the dangers of exit.¹⁹

Similarly, the image presented in the confirmation hearings—exit as the normal prompt response to harassment—is inconsistent with the actions of the majority of women who neither report harassment nor leave their jobs. In *Meritor Savings Bank v. Vinson*,²⁰ the leading case on the "hostile work environment" in sexual harassment, the plaintiff had been harassed continually during virtually the entire four years of her employment with the firm. She sued only after she was fired for taking too much sick leave. There was no hint in the opinion that this undermined her claim of harassment, or that staying with the job was anything other than a normal response to harassment. Similarly, a government

16. See the discussion of difficulties of estimating violence in marriage in DIANA E.H. RUSSELL, *RAPE IN MARRIAGE* 96-101 (1982). The rate of physical abuse in marriage has been estimated by Lenore Walker and other experts at about 50%, though the lowest recent estimate is 12% and the highest is 60%. See Mahoney, *supra* note 5, at 10-11; Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 28 n.19 (1989) (accepting the 50% estimate).

17. In one study of all women seeking divorce through a Legal Aid office in a five-day period, twenty of fifty wives were identified as "battered women" and thirteen more said that their husbands had been violent with them on one occasion—making a total of 66% who had experienced violence by their husbands at least once. Barbara Parker & Dale N. Schumacher, *The Battered Wife Syndrome and Violence in the Nuclear Family of Origin: A Controlled Pilot Study*, 6 AM. J. PUB. HEALTH 760-61. In another study, 37% of women who applied for divorce listed physical abuse among their complaints. RICHARD A. STORDEUR & RICHARD STILLE, *ENDING MEN'S VIOLENCE AGAINST THEIR PARTNERS: ONE ROAD TO PEACE* 21 (1989) (citing G. THORMAN, *FAMILY VIOLENCE* (1980)); see also RUSSELL, *supra* note 16, at 96 (21% of divorced women in study reported ex-husbands were physically violent with them).

18. R. EMERSON DOBASH & RUSSELL DOBASH, *VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY* 144-60 (1979); LEWIS OKUN, *WOMAN ABUSE: FACTS REPLACING MYTHS* 55-56 (1986); Mahoney, *supra* note 5, at 61-63.

19. In many cases in which the woman's "failure" to leave a violent relationship was at issue legally, the woman had repeatedly left the relationship only to be attacked and forced to return by her batterer. See, e.g., *People v. Aris*, 264 Cal. Rptr. 167 (Cal. App. 1989); *State v. Hodges*, 716 P.2d 563, 566-67 (1986) (expert testimony allowed in part to "help dispel the ordinary layperson's perception that a woman in a battering relationship is free to leave at any time"; wife had repeatedly left husband but experienced brutal attacks and threats against her family).

20. *Meritor Sav. Bank v. Vinson*, 477 U.S. 63 (Kan. 1986).

lawyer who successfully sued the Securities and Exchange Commission after enduring several years of sexual harassment on the job recently pointed out that she had not brought suit until she was "forced into it" when her job was threatened.²¹

Exit is also not the norm for many workers who encounter painful choices about work. Workers threatened by plant closings or job cuts make givebacks on wages and working conditions. When women face particularly agonizing choices in relation to work, they often internalize the pain and keep the job. This is why there were sterilized plaintiffs in the fetal protection cases, and why latchkey children care for themselves after school.²²

So the normal responses to abuse and harassment in love and work conflict with the image of exit. Yet exit retains great rhetorical power. Exit shaped at least the public rationales of several senators for their votes to confirm Clarence Thomas, and it continues to shape doctrine, juror perception, and litigation strategy in many cases involving battered women. Failure to exit promptly can affect the way a woman's account—or even uncontested facts—are heard, remembered, or weighed.

These images of exit are particularly dangerous because they are used against women when analyzing harms that are particular to women. Women's lives are constructed under conditions of inequality, and any gains we make are built on unequal ground. The ideology of exit implicitly denies inequality in relationships by emphasizing mutual freedom to leave. This rhetoric actually *increases inequality* by strengthening the position of the abuser, because it makes suspect the choice most women make—neither leaving nor suing.

Albert Hirschman noted some time ago that exit has a powerful ideological hold on our society: "With the country having been founded on exit and having thrived on it, the belief in exit as a fundamental and beneficial social mechanism has been unquestioning."²³ As Hirschman explained, however, exit effects change only indirectly; voice (any effort

21. Nancy Gibbs, *Office Crimes*, TIME, Oct. 21, 1991, at 52, 54 (quoting Catherine Broderick, a lawyer at the Securities and Exchange Commission and successful plaintiff in a sexual harassment suit against the SEC).

22. Elizabeth Iglesias points out that these are examples of what liberation theologians call "structural violence"—in these cases, another form of violence against women. Personal Communication with Professor Elizabeth Iglesias (1991). For a further example of structural violence in the lives of women workers, see *infra* note 55 (loss of job because of high medical bills for infant).

23. ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 112 (1970). For the ideology of exit in sexual harassment,

to change the situation rather than escape) is important as an option in its own right and particularly important when loyalty or structural barriers make exit difficult or undesirable.²⁴ In the context of sexual harassment, voice would include, among other actions, telling the perpetrator to "knock it off," filing complaints through company mechanisms, bringing lawsuits, or taking political action.²⁵

In sexual harassment, both exit and voice are affected by the abuse itself. The alternatives for exit—the possibilities of new jobs—can be shaped by the good will of the harasser. But the public exercise of "voice" carries a stigma and may also involve traumatic recounting of personal experience, including experience of the abuse itself.²⁶ The private exercise of voice—the one that women adopt when they tell the harasser to stop—is invisible at the time and is hidden in retrospect in the question "why didn't she leave?" In battering, both loyalty—identification with the family rather than simply as an individual—and the batterer's determination to block exit may create a similarly invisible attempt to effectuate change.

The concept of exit that pervaded the confirmation hearings denied the importance of work. Similarly, exit denies the importance of love in the context of violence that starts during an intimate, loving relationship. Relationships in both love and work are extended and multiple. Working women form ties to the people with whom they work *and* often ties to their work as well. They have pride in their work, or in their capacity for hard work, for holding on to work, for survival.²⁷ In the context of family, women often have ties to both the relationships with their husbands *and* the relationships between their husbands and their children. As a test of facts or authenticity of response, exit makes all these ties invisible and eliminates from our understanding of agency the time and effort required to shape one's life under adverse conditions.

see FARLEY, *supra* note 11, at 24 (most women are advised to quit; quitting is the prevailing social advice).

24. HIRSCHMAN, *supra* note 23, at 33-34.

25. *Id.* at 30 (voice may include individual or collective petition to the management directly in charge, appeal to a higher authority, or various types of actions or protests).

26. MACKINNON, FEMINISM UNMODIFIED, *supra* note 8, at 114.

27. ELLEN ISRAEL ROSEN, BITTER CHOICES: BLUE-COLLAR WOMEN IN AND OUT OF WORK 14-15 (1987) (noting that blue-collar women describe both the pressure of work and also expressions of pride in their trades, strong friendships, and accomplishments at work).

II. EXIT, WORK AND POWER

The work itself was interesting.²⁸

There's no doubt a great many people define themselves in terms of their work. . . . A job or a trade defines who you are and your place in society. Your network of friends is often related to your job, so it represents a lot of connections with a lot of humanity, all of which we can lose in one fell swoop.²⁹

Recent articles on unemployment tell us with passionate empathy that job loss strikes skilled workers and professionals as well as less skilled workers, and is devastating because people get so much of their identity through work.³⁰ Most discussion during the hearings emphasized the harm of harassment to women as *women*, not its harm to women's work. Yet like unemployment, harassment jeopardizes our work-related sense of ourselves, and the particular coercion of sexual harassment is the exercise of power attached to work.³¹

The hearings and their public discussion left many questions of work subsumed in the focus on exit. There was little or no recognition of the importance of work in human life nor sense of dignity and purpose in work at least partly distinct from pure (or impure) ambition. In contrast, there was a great deal of attention to fears about job loss and the availability of jobs; however, framing the issue as jobs led promptly to a focus on exit and whether it was possible or constrained in Anita Hill's particular circumstances. Completely invisible and undiscussed, sexual harassment also poses questions of the structure of work in our society, of a culture shaped by the lack of rights in jobs generally and by norms of abuse in employment and forced internalization of pain by women workers.

Anita Hill repeatedly described a strong sense of purpose in her work. At the law firm, she was "not dissatisfied with the quality of the work, or the challenges of the work,"³² but she was not very interested in

28. Anita Hill, in opening statement. Videotape of Senate Judiciary Committee meetings on sexual harassment charges against Clarence Thomas, Oct. 11, 1991 [hereinafter Videotape of Hearings] (on file with the *Southern California Law Review*).

29. University of Miami psychology professor Richard Carrera, discussing the suicide, ten months after Eastern Airlines went out of business, of a woman who had been a flight attendant with Eastern for 22 years. Patrick May, *Death of a Flight Attendant*, MIAMI HERALD, Dec. 3, 1991, at 1A, 18A.

30. See, e.g., Martin Merzer, *Florida's Jobless Never So Many, Never So Diverse*, MIAMI HERALD, Nov. 28, 1991, at 1A.

31. MACKINNON, *SEXUAL HARASSMENT*, *supra* note 8, at 208.

32. Videotape of Hearings, *supra* note 28.

private practice in commercial law. When she was offered the opportunity to begin working for Clarence Thomas, she had heard criticisms of the work of the Office of Civil Rights, but she "saw this as an opportunity to do some work that I might not get to do at another time."³³ She described two of her major projects at the Department of Education. Explaining her decision to move to the EEOC, she said, "The work itself was interesting. . . . I was dedicated to civil rights work, and my first choice was to be in that field."³⁴ She described feeling helpless and troubled by the combination of pressure for dates and explicitly sexual discussion because she "really wanted to do the work I was doing, I enjoyed that work, but I felt that that was being put in jeopardy by the other things that were going on in the office."³⁵ Later, she feared he "might take out his anger with me by degrading me or not giving me important assignments."³⁶ She believed he controlled her access to future opportunities, inside and outside the government.

Anita Hill told a story of ambition that was neither careerism and desire for power and status nor a search for security in any slot as a government lawyer. For the work she sought, the EEOC was an extraordinary opportunity for someone less than two years out of law school. But the Senate and the media overlooked her clear sense that her work was important and worthy. The obverse was true: If her work had been poor, she would have been charged with raising sexual harassment to retaliate for criticism or distract attention from her own failings.

There may have been several simultaneous interactive factors that led Anita Hill's account of her work to be overlooked. First, most working people with day jobs never heard Anita Hill's testimony; they heard sound bites, and they heard Orrin Hatch. This was a special effect created by Clarence Thomas's assertion that he had not heard her testimony himself. In order for him to reply, therefore, her edited words were read to him, on Friday night and Saturday, when working people were at home and watching. If her representations about her work reached the working public at all, they arrived through the filters of the media and Senator Hatch. The consistency of her presentation of work, and the absolute lack of reference to it in the quotes from the public and discussions I have heard, suggest to me that this is the part of her testimony

33. Videotape of Hearings, *supra* note 28.

34. Videotape of Hearings, *supra* note 28.

35. Videotape of Hearings, *supra* note 28.

36. Videotape of Hearings, *supra* note 28; see also *Hill Tells of Sex Talk in Opening Statement*, MIAMI HERALD, Oct. 12, 1991, at 19A; *Public Still Backs Confirmation of Thomas, Poll Shows*, N.Y. TIMES, Oct. 15, 1991, at A1, A20.

that was effectively eliminated by the double filter of the senators and the media.³⁷

Commitment to her work was also unheard because of her race and her gender. Despite her extraordinary record of achievement, the public and the senators could not perceive in this African-American woman a person with a fine mind—and a finely trained mind—who would seek intellectual challenge and feel committed to using her abilities for worthy ends. To the extent she was heard, work was treated as a question of opportunism or careerism, not idealism or substance.

Also, in the context of sexual harassment, work itself became unimportant, as if the *sexual* quality of the abuse ought to take the event out of the framework of work and identity completely. Senator Specter asked why, if she feared retaliation, she never made notes of Clarence Thomas's sexual conversations to provide evidence in the future. She replied that what she had done in this period was document her work: "I was documenting my work so that I could show to a new employer that I had in fact done these things . . . not [to] defend myself" or bring a claim for harassment. She had wanted to show that she turned her work around quickly in a fast-paced situation. The senators sought to cast her as a victim—an inconsistent victim—of a *sexual* violation. She had chosen to make this primarily an issue of *work* and protected herself against the employer's power over work, source of the particular coercion of sexual harassment, fighting for her status as a productive attorney. Of this exchange, however, only the "failure" to take notes was reported by the media.³⁸

Anita Hill's discussion of work was intermixed with discussion of jobs. She spoke of uncertainty about the future of her position at the Department of Education and of the possibilities of other employment in that department. She said she had no expectation of doing the same job for the new incoming head of the office, that Clarence Thomas had considerable influence with the administration and therefore could block access to other jobs, and that because the Department of Education had been slated for closure by the Reagan administration she did not consider further employment there.

37. For example, *New York Times'* excerpts of her testimony omitted almost all references to her work. *Excerpts from Senate's Hearings on the Thomas Nomination*, N.Y. TIMES, Oct. 12, 1991, at A12.

38. Videotape of Hearings, *supra* note 28. The *New York Times'* excerpt, *supra* note 37, reported only Senator Specter's questions regarding her failure to take notes since notes would be useful under the law of evidence, and her initial responses that she had not thought of taking notes and had not been interested in litigation.

The ordinary concept of exit in jobs or consumer exchanges is based on the idea of competition, of having somewhere else to go or another choice to make.³⁹ Sexual harassment affects the possibility of job searches in several ways. The sexually harassed employee may become less productive in other ways (for example, she may be absent from work more often⁴⁰), and then fear that these problems in her work record will now impede her job search. Explaining to a prospective employer that you are fleeing sexual harassment carries a stigma not present when you say you want different hours, or more responsibility, or you want to work closer to public transportation. Also, when the harasser is a supervisor, the person who has abused power is the one whose references will determine your options. There is no neutral market forming a revolving "exit" door when the continued approval of your current employer is a prerequisite to developing somewhere else to go.

Available alternatives in any field are determined by the nature of the job and may depend on the supply of skilled or unskilled jobs in a small geographic area, or on the supply of jobs within a particular craft, or on the market in a professional field. For legal professionals, among others, qualifications are determined by references describing the quality of one's work. Credentials consist of the certification of ability that is performed by former supervisors and colleagues, not merely of the formal training that makes it possible to apply for a job. Also, the legal profession is a relatively small universe.⁴¹ Exit from employment in such a situation involves a necessary management of references—or else it is exit to nowhere. However, in part because closing the Department of Education does not approach the impact of shutting down a factory or large corporation, it was hard for some listeners to credit anxiety about jobs in a lawyer. Therefore, the discussion of jobs was part of what made failure to exit promptly problematic in public opinion.

Harassment has marked both the exploitation of women's traditional fields of work and the resistance to the desegregation of formerly all-male domains of work such as skilled crafts and the legal profession.⁴²

39. See, e.g., HIRSCHMAN, *supra* note 23, at 58-59; Farley notes that future work is the key for a woman contemplating leaving a situation where she is sexually harassed. FARLEY, *supra* note 11, at 25.

40. FARLEY, *supra* note 11, at 46 (noting that harassment creates a bad employee record by inducing job turnover and describing absenteeism as "a temporary female coping behavior").

41. The continuing contact between present and former employers can therefore also be threatening. "I can speculate that had I come forward immediately after the EEOC . . . I would have lost my job at Oral Roberts." Videotape of Hearings, *supra* note 28.

42. Vicki Schultz describes both crafts and law as formerly all-male arenas where women are subjected to harassment, and includes stories of egregious lack of training and offensive sexual

Catharine MacKinnon's pioneering work on sexual harassment emphasized the coercion inherent in work itself and the way harassment harmed women as workers.⁴³ MacKinnon described the "reciprocal enforcement of two inequalities[:] . . . male sexual dominance of women and employer's control of workers."⁴⁴ However, the "sexual" in harassment received more attention in the hearings and some scholarship than the "employer control."⁴⁵ To protect women from sexual abuse because it is so particularly harmful and egregious, most argument about sexual harassment has effectively ceded the inequities, abusiveness and uncertainty of work. In the hearings and in all of the press coverage, there is no sense of how the legal structure of work facilitates the abuse of workers.

Law tolerates abuse by supervisors in lower echelon jobs⁴⁶ and upper-echelon and professional jobs as well.⁴⁷ Sexual harassment is only part of the harassment women encounter at work, including in the legal profession.⁴⁸ As I worked on this essay, friends and colleagues told me stories of being ordered to violate the rules of professional responsibility while employed as associates in large law firms, of new lawyers treated contemptuously and personally insulted by partners at firms, of a young white male associate told by a white male partner to "carry my briefcase, because shit rolls downhill." Nonsexual abuse is also generally kept secret: Nobody told me those things for attribution, even though not one of them now works or expects to work in a large private firm, and each would be very uncomfortable to have his or her experience identified.

behavior on the job. Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1750, 1835-36 & nn.331-34 (1990). Catharine MacKinnon notes that sexual harassment is facilitated by and helps perpetuate women's presence in sex-segregated spheres of work. MACKINNON, SEXUAL HARASSMENT, *supra* note 8, at 9.

43. MACKINNON, SEXUAL HARASSMENT, *supra* note 8, at 216.

44. *Id.* at 1.

45. See Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751, 773 (1989) (contrasting MacKinnon's view of the workplace as "only one of many contexts in which society acts upon the social meaning of female sexuality" with scholars who treat sexual harassment as the use of an *existing* hierarchy (work) to create another hierarchy (sexual misuse)). I do not imply that *either* sex or work exists as some neutral phenomenon which is coerced or affected by the other. Rather, I emphasize that work is *also* a fundamental part of a woman's identity, and that sexual misuse is possible in part because of the amount of abuse and exploitation (not merely hierarchy) we permit in work.

46. See generally Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1 (1988).

47. *Id.* at 46-49 (discussing abuse in primary sector jobs).

48. Schultz, *supra* note 42, at 1835-36.

Most workers encountering abuse assert themselves directly or indirectly, but self-assertion need not mean exit. Staying on a job may not mean defeat but victory, or at least successful resistance. Regina Austin describes the ways secondary sector workers deal with employer abuse by finding ways to maintain their identity, continue working, and survive.⁴⁹ In the professional world, silence about abusive behavior by superiors is considered prudent and normal.⁵⁰ In both situations, the common occurrence of abuse and gender-based nonsexual harassment⁵¹ means that when the harassment is sexual, employees are already accustomed to internalizing some pain or unhappiness at work.

The week of the confirmation, the Miami Herald reported that "most large local employers . . . have adopted strongly worded policies [on sexual harassment] that are prominently posted."⁵² Surely these companies also post minimum wages and permissible hours of work on their shop floors, office corridors or cafeteria walls. The exceptions to employer power—the signs on the wall—are all that is visible. It is as if the walls themselves carry a message, built in brick, hidden under institutional paint:

This place can close at any time. We could be gone with minimal warning to you, and you can't stop us.

I can fire you any time I want. I don't even need a reason.

If I do fire you, it will be up to *you* to prove it was not your fault.

Otherwise, you can't even get any unemployment insurance benefits.

The rules that determine prudent employee response to abuse make power invisible in law and social consciousness. When power is invisible, this facilitates the focus on exit. Exit, in turn, denies structures of power by focusing on termination rather than the nature of power in that relationship, and by pretending exit from this particular situation will mean exit from all abuse.

Free exit from employment is not a new myth; it is the fundamental underlying tenet of American capitalism. Our jurisprudence holds firm notions of formal equality and mutuality. The fiction that employees and employers are equally, mutually free to walk out is a time-honored one in

49. Austin, *supra* note 46, at 25-29; see also ROSEN, *supra* note 27, at 77 (women learn to devise strategies to protect against the exploitation intrinsic to factory work, manage difficult jobs, and protect themselves on shop floor).

50. See, e.g., Laura Mansnerus, *Don't Tell*, N.Y. TIMES, § 6 (Magazine), Dec. 1, 1991, at 42.

51. Schultz, *supra* note 42, at 1832-39 (describing serious nonsexual harassment of women as women in nontraditional occupations).

52. Beatrice E. Garcia, *How Rules Against Harassment Can Fail*, MIAMI HERALD, Oct. 17, 1991, at 1A. The local companies with posted policies on sexual harassment included a newspaper chain, American Express, utility companies, a bank, and a large grocery store chain. *Id.*

American law.⁵³ Exit uses the question of mobility to cover up the power dynamic in the mutuality principle. By emphasizing the woman's freedom to leave, we actually vest in her employer the freedom to take actions that can force her out of her work life. Asking why she didn't leave masks the employer's power to force exit for which the doctrine of constructive discharge is an apologetic, partial compensation.

There is enormous impact on women as women and as workers when we internalize the harms imposed by our lack of rights in work. The least obvious are those that appear exceptional or external to work, such as a company that fires a woman because her newborn had high medical costs.⁵⁴ While fetal protection policies were being litigated, women at several plants accepted sterilization in order to avoid losing work.⁵⁵ In *American Cyanamid*, after the women were sterilized and before the company's right to force this choice under the Occupational Safety and Health Act was upheld on adjudication, the company closed the department after pressure from OSHA to clean up the environment.⁵⁶ Rights to a job or to voice in management would have protected the ability of these women to bear children more surely than did the *Johnson Controls* opinion, which followed the logic of mutual freedom to contract or exit by allowing a woman to choose to expose herself to lead to keep a job.⁵⁷

The difficulty of protecting workers from abuse through tort law is one reason that protection through Title VII is so important.⁵⁸ In tort

53. See Kenneth M. Casebeer, *Teaching an Old Dog Old Tricks: Coppage v. Kansas and At-Will Employment Revisited*, 6 CARDOZO L. REV. 765, 783-89 (1985) (discussing the continued vitality of at-will employment discharge and of image of public good as comprised of sum of employers' private needs).

54. *Fleming v. Ayers & Assoc.*, 948 F.2d 993 (6th Cir. 1991) (holding that a company has no duty to reinstate woman terminated because of newborn's high medical costs even though her discharge was unlawful under ERISA).

55. *Oil, Chem. & Atomic Workers v. American Cyanamid Co.*, 741 F.2d 444 (App. D.C. 1984) (holding that a company did not violate Occupational Safety and Health Act by offering jobs only to infertile women); *International Union, UAW v. Johnson Controls*, 111 S.Ct. 1196 (1991) (holding that an employer policy barring fertile women from jobs with lead exposure was sex discrimination under Title VII of the Civil Rights Act).

56. *Lead Pigments Shop Closes*, WASH. POST, Jan. 16, 1980, at A12. These women were not laid off with their sixty male colleagues, so sterilizations may have paid off with temporary job retention based on the company's fear of publicity.

57. Rights against plant closings would have protected them from possible later actions by the employer that could also have made a mockery of the choice they had made.

58. MACKINNON, *SEXUAL HARASSMENT*, *supra* note 8, at 168 (noting high standard for sexual harassment in intentional infliction of emotional distress claims when harassing activity consisted solely of sexual propositions); *id.* at 170-71 (arguing that individualization of claim in tort tends to remove sexual harassment from social context of oppression and domination).

law, "every practice or pattern of emotional mistreatment except the outrageous, atrocious and intolerable is treated as the ordinary stuff of everyday work life."⁵⁹ If most abuse of employees is irremediable, then ordinary methods of internalizing stress, coping, and indirect resistance surely shape the response of workers who encounter the types of racist and sexist abuse banned by our anti-discrimination laws.

When at-will employment renders all workers vulnerable, its interaction with other forms of social dominance such as racism and sexism increases vulnerability to exploitation and abuse. Other structural features of law also facilitate harassment but conceal the way it is part of abuse of power regarding work. The legal determination that poverty is not a suspect classification tends to focus legal reform on issues that involve suspect classes and leave class itself out of the picture. This diminishes our consciousness of work generally, including among professionals. Charles Reich recently argued that shifts in constitutional interpretation of the past few decades are also important: the simultaneous retention of negative constitutional protection of the individual and constitutional expansion of affirmative government interrelationship with private enterprise as employer and manager of the economy has created and legitimated profound social exclusion through exclusion from employment.⁶⁰

The social structure of work also hides power. The racial structure of the burdens of unemployment has allowed economic decline to be masked by ascribing blame to alleged cultural characteristics of African-American women and men.⁶¹ Race (or, more accurately, racism) therefore decreased social consciousness of the uncertainty of work itself. The burdens of unemployment on women have been concealed by the assumption that women are at least somewhat glad to have time off from work.⁶² Therefore, debates about work often take place indirectly, cloaked as questions of race and gender.

Diminished consciousness of work in our consciousness of oppression also follows the decline of organized labor. Many unions have fought for civil rights and against gender discrimination. But to the extent that labor leadership remains disproportionately white and male,

59. Austin, *supra* note 46, at 7-8.

60. Charles Reich, *Beyond the New Property: An Ecological View of Due Process*, 56 BROOKLYN L. REV. 731, 742 (1991); see also Charles Reich, *The Individual Sector*, 100 YALE L. J. 1409, 1424-25 (1991) (arguing for protecting the inclusion of individuals in the economy as part of contemporary constitutional thought).

61. See, e.g., WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED* (1987).

62. ROSEN, *supra* note 27, at 129-39.

this may also diminish labor consciousness as part of our consciousness of oppression.⁶³ When labor leaders perpetuate the vulnerability of women by being dilatory or uncooperative in pursuing sexual harassment complaints,⁶⁴ or by committing sexual harassment themselves, this also separates issues of power in sex and work in public consciousness. Finally, labor has no party and no independent political voice in the United States, which helps keep direct debate about work out of national politics.

Sexual harassment harms women as part of male dominance *and* as part of abuse at work. It creates stress and stigma, marginalizes, creates insecurity about the quality of work, and forces women out of work entirely through constructive discharge. It also creates harm that is particular to the *sexual* quality of the abuse: fear, shame and anger that do not attach to many other forms of abuse of workers. In order to make comprehensible women's choice to respond to sexual harassment by holding on to work, we need to see the oppression in work at this intersection of oppression.

III. EXIT AND POWER IN LOVE AND BATTERING

In our society, a woman does not have to take abuse, mental or physical, from her husband; she can leave him. If she stays, it may be because, all things considered, the feasible alternatives are even worse.⁶⁵

The history . . . revealed a four year relationship with her boyfriend in which abuse began very early and escalated over the course of that relationship, [and] that [Jo Smith] continued the relationship for three basic reasons—she loved him, she believed him each time he said that he loved her and that he was never going to repeat the abuse, and she was afraid that if she tried to leave she would be endangering her life.⁶⁶

63. Sexual harassment can be both racial and sexual oppression simultaneously, and the attempt to divide these forms of oppression may misrepresent the nature of exploitation and the experience of oppression. Mary E. Becker, *Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment*, 79 GEO. L.J. 1659, 1668, 1675-77 (1991).

64. Jennifer Kaylin, *Women Cite Harassment on Road Building Jobs*, N.Y. TIMES, Nov. 24, 1991, § 12CN, at 4; Elvia R. Arriola, *What's the Big Deal? Women in the New York City Construction Industry and Sexual Harassment Law, 1970-85*, 82 COL. HUM. RTS. L. REV. 21, 59 (1991).

65. Richard A. Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431, 1444 (1986).

66. *Smith v. State*, 277 S.E.2d 678, 680 (Ga. 1981).

Exit is also important in legal and social treatment of domestic violence. The question "why didn't she leave?" shapes the discourse on battering in ways markedly similar to the questions raised during the discussion of sexual harassment in the confirmation hearings. This "shopworn question"⁶⁷ directs attention away from the batterer's quest for power and control, shifting inquiry to the legitimacy of *response* in the person who was harmed. And just as it directs attention away from the importance of work outside the home, the focus on exit obscures the importance of love, home, and family—and the enormous investment of energy to achieve these goals—that form the context within which battered women are harmed.⁶⁸

It is a peculiarity of the abuse of women that we are expected to "leave" the very centers of our lives whether or not we have anywhere else to go. Leaving *itself* is the option. Christine Littleton has shown that law's emphasis on exit in battering denies the commitment to relationship that women recount in their lives: "Jo gave three reasons for staying—love, faith and fear. The law only had a category—self-defense—for the last, and so it heard only fear."⁶⁹ When women describe their experience in violent marriages in terms of love and responsibility, they are treated as insane or masochistic.⁷⁰ But relationships begin with love and emotional commitment—forged in a context of social inequality, with the strong societal expectation that women should sacrifice to create and maintain them.⁷¹ Leaving becomes the question because we are seeing the harm, not the relationship in which it arises, or because we have decided (though perhaps the woman has not) that the harm has now come to define the relationship.

Economists and others who are attached to the idea of exit as part of a vision of autonomy and choice may object that a focus on exit does not mean we've focused only on the harm. Rather, a person is always choosing between the *entire situation*, including the harm, and a different situation without it—this doesn't deny the relational world. The quote from

67. Ann Jones, *The Burning Bed and Man Slaughter*, 9 WOMEN'S RTS. L. REP. 295, 296 (1986) (book review).

68. Of course, for most women, the home represents a workplace as well the locus of family and love, even for those women who also work outside the home. Francis E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1565 (1983).

69. Littleton, *supra* note 16, at 44 (discussing *Smith v. State*).

70. *Id.* at 45-47.

71. For an insightful discussion of both the importance of love and relationships in women's decision making, and of the problems created by the insistence that the woman should leave the relationship, see *id.* at 45-47 (women may stay to save something besides themselves), 53-54 ("Why should the woman leave? It's her home, too—in fact, often it's her home, period.").

Richard Posner at the beginning of this section, an inadvertent caricature of liberal theory on exit and choice, asserts every woman's ability to exit and then treats "staying" as just another preference. Does this make battering the only question and deny love? In Posner's view, a woman can have the relationship with the battering, because she has decided that the feasible alternatives are worse, or she can be without battering and without this relationship.⁷²

But women seek relationships without battering. At the start of most marriages and often for some time afterwards, this is in fact the woman's experience.⁷³ The onset of violence is always atypical—a break from the previous knowledge of one's partner either absolutely (this sort of temper was never demonstrated before) or in quality (he was often angry, but he never did *this!*)⁷⁴ The first incident of violence often takes place after marriage, when the relationship has been cemented in law and public ritual with friends and family, or during pregnancy, when women are most vulnerable physically, economically and emotionally, and have undertaken a life-transforming commitment that ties them more closely and deeply to their partner.⁷⁵

A temporary separation is one of the most common responses to a battering incident.⁷⁶ This is not because the woman needs time to consider Posner's question ("will I have him with battering, or leave him to be without it") but because her relationship itself has been thrown into question, her trust damaged or shattered. She *had* a relationship—and

72. Posner therefore defines the danger to battered women *as themselves*: "We ought to be wary about embracing a system in which government breaks up families to protect wives against themselves." Posner, *supra* note 65, at 1444. Posner claims to be writing as a liberal, not a law and economics scholar, and I believe he has captured the core of traditional argument on battered women: First, freedom to leave is asserted and treated as a solution (of course, this contains two assumptions); therefore, the problem is the decision not to leave.

73. In Lee Bowker's study of women in Milwaukee, there was no premarital violence in 73% of relationships. In all but five of the cases with premarital violence, it occurred only once or twice. LEE H. BOWKER, BEATING WIFE BEATING 40-41 (1983). Since Bowker reports that one-third of the women experiencing premarital violence were pregnant at the time, it is likely that even in these relationships violence did not occur until after a strong commitment to the relationship.

74. DOBASH & DOBASH, *supra* note 18, at 95-96; *see also* LENORE E. WALKER, THE BATTERED WOMAN (1979).

75. Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1047 (1991) (battering begins or becomes more acute during pregnancy). Many of the women in Bowker's study were attacked after the wedding or during pregnancy. BOWKER, *supra* note 73; *see also* Walker, *supra* note 74, at 105-06 (battering during pregnancy).

76. EDWARD GONDOLF & ELLEN FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS 77-78 (1988); OKUN, *supra* note 18, at 55; LENORE E. WALKER: THE BATTERED WOMAN SYNDROME 26 (1984).

she wants a relationship—with a person she loves. Her partner expresses regret and promises to reform.⁷⁷ If he seeks psychological help or enters a counseling program, she is most likely to decide it is worth another try.⁷⁸

If we *start* with “battering,” then making exit the question is easy: “Why didn’t she leave?” Love as a reason for staying is introduced in response, which seems paradoxical. Indeed, I believe women do not love “batterers.” Women love their husbands, lovers, and partners. The problem is that their loved ones have begun using violence. Violence may be only one betrayal out of many, and relationships involve many efforts to rebuild trust between partners. It may take time and testing to decide whether it is possible to rebuild trust and continue the relationship. One factor in this process is the determination of whether a loved one has been redefined as a “batterer.”⁷⁹ But the rhetoric of exit and the focus on battering rather than relationship has made addressing the woman’s emotional truth almost impossible: the idea of “loving batterers” is incomprehensible to the great majority of listeners except by implying either masochism or self-destruction on the part of the woman.

Lee Bowker studied formerly violent relationships to determine the ways women succeeded in ending violence in their marriages.⁸⁰ Most of the women in his study had “successfully solved the violence problem while married,” rather than divorcing to solve the problem.⁸¹ For many of the women in Bowker’s study, a threat to end the relationship or the act of taking shelter proved a helpful strategy in ending the violence.⁸² In more than half of the relationships, husbands ended violence because they feared divorce or wanted to reestablish the relationship.⁸³ Many of the narratives in Bowker’s study involve either filing for divorce, a threat of separation, or a temporary separation. But at the moment that these

77. OKUN, *supra* note 18, at 55 (citing several studies in which the promise to reform was important to the wife’s decision to return).

78. GONDOLF & FISHER, *supra* note 76, at 87.

79. Reaching the conclusion that her partner is a batterer may be made more difficult, however, if she does not recognize in her own love and decision making anything she has previously heard about battered wives. MAHONEY, *supra* note 5, at 18-19.

80. BOWKER, *supra* note 73, at 24. The criteria for this survey required that no physical violence have occurred for a period of at least one year before the interview.

81. *Id.* at 29. Interestingly, almost half had found other reasons why the marriages were not worth continuing and separated or divorced eventually, sometimes years after the violence had ended. *Id.*

82. *Id.* at 65-66 (23% of wives made “nonviolent threats” and 49% of these were threats to separate); *id.* at 81 (many women took shelter with family, friends or shelters temporarily.).

83. *Id.* at 123 (“reestablishing their relationship” is a category that includes a general desire not to be forced apart and to achieve a healthier relationship).

women decided their husbands were serious about change and decided to try one more time, they had no way to know whether they would one day be congratulated on their successful strategizing or scrutinized to determine why they didn't leave earlier.

Many women think that they will be the success stories, and some of them are right. The pursuit of love, family ties, and economic support by women who encounter violence in marriage is directly comparable to the tenacity in pursuing work and protecting income among women who have been sexually harassed. Social and legal focus on exit strips motive and context, allowing women's ordinary actions to be treated as deviant or questionable.

Women also stay because they are constrained. Free exit from marriage is a modern myth but a powerful one. Historically, exit from marriage was difficult for both men and women, and men had legal power over most resources. The shift to modern divorce law brought a sense of "at-will" continuation that made possible our modern notion of exit from battering. The importance of exit in legal and social analysis of battering is both product and cause of the invisibility of legal structures of power and actual relations of power in marriage and divorce. Since domestic violence is so common, "staying" is actually a relatively normal feature of marriage, and all rules governing divorce regulate exit from violent situations. Making divorce faster and easier facilitated exit in some ways, but removing fault from the picture tended to hide violence against women.⁸⁴

Many batterers threaten custody suits when women consider separation. Modern changes in the standards of child custody decision making have been based on formal concepts of legal equality, and have often resulted in downplaying or ruling out consideration of the contributions to child-rearing that are usually made by mothers.⁸⁵ With violence out of the picture at divorce, women might still raise battering as an issue in custody disputes, although in many jurisdictions, absent physical harm to a child, violence against the mother remains legally irrelevant.⁸⁶ The standards for deciding custody disputes make it difficult to raise questions of violence. On one hand, the woman's failure to exit earlier may

84. LENORE WEITZMAN, *THE DIVORCE REVOLUTION* 223 (1985); see also Cahn, *supra* note 75, at 1043 (when fault was a factor in divorce, 95% of women seeking divorce alleged cruelty, usually in the form of ongoing physical abuse).

85. Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107, 121; MARTHA A. FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 20-35 (1991).

86. Cahn, *supra* note 75, at 1072-73.

be seen as personal weakness and discredit her mothering; on the other hand, if judges or social workers feel she overemphasizes violence in the attempt to gain sole custody, she may be seen as manipulative and lose custody of her children completely.⁸⁷

Actual power in relationships also tends to disappear in discussions of exit. Violence is a way of "doing power" in a relationship; battering is power and control marked by violence and coercion.⁸⁸ Men who batter justify their expectations and treatment of women with explanations that closely track society's expectations of women.⁸⁹ But discussion of exit hides the correlation of the batterer's individual quest for power with society's expectation: The question "why didn't she leave" implies abuse is unusual, when statistics tell us it is not, and directs attention away from the abuser as well as the context of power that makes abuse possible.

Separation assault,⁹⁰ the violent attacks batterers make when women attempt to leave relationships, shows that batterers do not stop seeking power and control merely because the woman has left the relationship. How can we tell whether a woman is *in* her home or her job because of her will, strength and determination to create her life under adverse conditions, or because she has been constrained and endangered, or even captured? Jo Smith, the woman who loved her boyfriend and hoped he would change, also feared he would kill her if she left.⁹¹ Law, hardship and fear constrain us—and we seek to build relationships. "Staying" will likely be the product of all of these impulses. To use law to oppose subordination, we need to determine how to work with the needs and struggles of the subordinated. When exit itself is the question, we cannot get at the far more important questions of power and will.

87. Mahoney, *supra* note 5, at 43-49; see also Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 766 (1988) (discussing social workers' suspicions of mothers who seek sole custody).

88. Mahoney, *supra* note 5, at 93 (quoting JAN E. STETS, *DOMESTIC VIOLENCE AND CONTROL* 109 (1988)).

89. Batterer's justifications of violence focus on their partner's "failure to fulfill the obligations of a good wife." James Ptacek, *Why Do Men Batter Their Wives*, in *FEMINIST PERSPECTIVES ON WIFE ABUSE* 133, 147 (Kersti Yllo & Michelle Bograd eds., 1988) (quoting Michelle Bograd, *Domestic Violence: Perceptions of Battered Women, Abusive Men, and Non-Violent Men and Women* (unpublished doctoral dissertation, 1983)); see also OKUN, *supra* note 18, at 69-70 (discussing domestic tasks as subjects of batterers' complaints).

90. See Mahoney, *supra* note 5, at 64-71 (defining and explaining separation assault).

91. See *supra* note 66.

IV. EXPLANATION AND VICTIMIZATION

Fairness means . . . understanding . . . why victims often do not report such crimes, why they often believe that they should not, or can not, leave their jobs. Perhaps fourteen men sitting here today cannot understand. I know there are many people watching today who suspect that we never will understand.⁹²

The expert could clear up these myths, by explaining that one of the common characteristics of a battered wife is her inability to leave despite such constant beatings; her "learned helplessness"; her lack of anywhere to go; her feeling that if she tried to leave, she would be subjected to even more merciless treatment; her belief in the omnipotence of her battering husband; and sometimes her hope that her husband will change his ways.⁹³

Exit centers inquiry on the individual who was harmed and the reasons she acted in a particular way, rather than on the person who sought power and control abusively. With the context of power and control invisible, failure to exit generates a demand for explanation: either these events did not happen, or they were not truly harmful, or *this individual has exceptional problems*, qualities that caused failure to exit, qualities that need to be explained. This process of explaining the individual, now defined by *failure* to exit, has brought with it a discourse of victimization in the areas of both battering and sexual harassment that is heard as denying agency in those who are harmed, with important cultural and political consequences.

Beginning in the early 1970s, feminists identified and fought against rape, sexual harassment, and battering, as well as other forms of abuse of women,⁹⁴ as part of a project of articulating experience and undertaking transformation in the lives of women and in society. The feminist method of consciousness raising was based on articulating women's experience through discussions with other women.⁹⁵ This experience was then publicly asserted in speakouts in which women told their stories at

92. Senator Joseph Biden, in his opening remarks at the Senate Judiciary Committee Hearing on October 11, 1991. Videotape of Hearings, *supra* note 28.

93. *State v. Kelly*, 478 A.2d 364, 377 (N.J. 1984).

94. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 8, at 5; NEW YORK RADICAL FEMINISTS, *RAPE: THE FIRST SOURCEBOOK FOR WOMEN 1-2* (1974) [hereinafter NYRF].

95. The radical feminist project of consciousness-raising was described as "[t]he process of transforming the hidden, individual fears of women into a shared sense of the meaning of them as social problems, the release of anger, anxiety, the struggle of proclaiming the painful and transforming it into the political." NYRF, *supra* note 94, at 6 (quoting JULIET MITCHELL, *WOMAN'S ESTATE* (1973)). While problems arose (at the time and later) from some of the tendencies of consciousness-raising groups to generalize the experience of their often homogeneous members as the

public meetings organized by feminists, breaking down the walls of silence that had surrounded many aspects of the oppression of women.⁹⁶ The first speakout on rape took place in 1971.⁹⁷ A speakout on sexual harassment was held in Ithaca, New York in 1975.⁹⁸ Women founded battered women's shelters and rape crisis centers. And knowledge was produced, with pioneering books about several sorts of violence against women in print by the late 1970s.⁹⁹

Shaping legal claims was part of this process of political action.¹⁰⁰ But legal doctrine itself creates categories that affect the articulation of experience. When doctrine shifts sufficiently to bring aspects of women's experience into law, it is filtered through the consciousness of legal actors (including judges, jurors, prosecutors, policemen called to the scene of assault, social workers evaluating custody claims) in ways that further reshape the articulation of experience. Therefore, defining legal terms that reflect the oppression of women creates new contests over meaning. Each block of progress shifts the style or locus of struggle over how to understand harm to women, reveal it, discuss it, and work against it, raising questions of the possibility and method of mobilization and transformation.

Law forces upon us a discourse of victimization. Either you are on the playing field of liberal competition, in which case you require no protection, or you prove into a category as a victim who is being kept off the field. The goal of remedy is to lift you back on to the playing field, to the starting line of the race, so you too can "play."¹⁰¹ Resistance may

experience of all women, with results that distorted its application as "feminist method," see Littleton, *supra* note 45, at 773, consciousness-raising groups also served a valuable function in providing a forum focused on unlearning sexism. BELL HOOKS, *FEMINIST THEORY FROM MARGIN TO CENTER* 48 (1984).

96. Speakouts took what was gained in small group discussions and brought it into public consciousness as an "open act of rebellion." NYRF, *supra* note 94, at 27.

97. *Id.* at 27-28, 274. The first speak-out was organized by the feminist group Redstockings after women were not permitted to testify at a legislative hearing on abortion law reform in which testimony was taken from fifteen experts, fourteen of whom were men. *Id.* at 28.

98. FARLEY, *supra* note 11, at 74.

99. These works include SUSAN BROWNMILLER, *AGAINST OUR WILL* (1975); SANDRA BUTLER, *CONSPIRACY OF SILENCE: THE TRAUMA OF INCEST* (1978); DEL MARTIN, *BATTERED WIVES* (1976); MACKINNON, *SEXUAL HARASSMENT*, *supra* note 8.

100. Catharine MacKinnon states that the development of the law of sexual harassment was the first time women defined harms to women within the law. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 8, at 105.

101. The images of equality in competition occur frequently in scholarship on race, and in labor and other fields as well.

merely show your ability to function on the field.¹⁰² Therefore, while a generation of social historians have painted a complex world of oppression and resistance—slaves both suffer and resist, battered women gradually shape the consciousness of social workers¹⁰³—law has not managed to incorporate this duality and struggle, pain and strength, but filters it to a sense of victimization.

One important mechanism of constructing victimization, related to the vision of the person as wholly autonomous and mobile, is to make women explain failure to exit. When women are harmed, exit tests the existence of abuse by looking to conformity with a *predicted* response that contradicts both resistance and the presence of social and legal constraint. Rather than challenge the prediction of exit, the woman must explain “inconsistency” through victimization. Once battering is dragged into the light, for example, we explain why the woman didn’t leave through a syndrome she develops in response to battering.¹⁰⁴ We explain why a woman “feels” she cannot tell or leave work,¹⁰⁵ defensively, *as if* the norms were “leaving,” because of how the question has been set up.

This problem of explanation rapidly becomes acute because, in the course of shaping our lives under conditions of oppression, women both leave and stay. The fact that we sometimes do leave is used to challenge

102. See, e.g., Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 846 (1991) (noting that superwomen who do not complain and continue competent work may not recover because their situations were not psychologically debilitating enough to constitute a hostile environment).

103. See, e.g., LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE IN AMERICA* (1988).

104. Battered woman syndrome is “a collection of specific characteristics and effects of abuse on the battered woman.” While battered woman syndrome will not affect all women who experience violence from their partners, women who experience this syndrome are unable to respond effectively to violence. Mary Ann Douglas, *The Battered Woman Syndrome, in DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE* 40 (Daniel J. Sonkin ed., 1987). Elsewhere, I have criticized the assumptions regarding the commonality of violence and the necessity and availability of exit that often justify the admission of expert testimony on battered woman syndrome. Mahoney, *supra* note 5, at 10-19, 61-71, 80-82. I do *not* mean to imply criticism of expert testimony on battered woman syndrome itself, nor of the underlying psychological theories involved. *Id.* at 42. However, the emphasis on helplessness and the implications of pathology which some courts have drawn from this testimony can contribute to stereotypical perceptions of women. *Id.*; see also Elizabeth M. Schneider, *Describing and Changing: Women’s Self-Defense Work and the Problem of Expert Testimony*, 9 WOMEN’S RTS. L. RPTR. 193 (1986).

105. For example, the explanation by Ellen Wells, one of the friends whom Anita Hill told about harassment contemporaneously:

When you’re confronted with something like that, you feel powerless and vulnerable. And unless you have a private income, you have no recourse. And since this is generally done in privacy, there are no witnesses. And it’s your word, an underling, against that of a superior, someone who is obviously thought well of or they would not have risen to the position they hold.

Witnesses Support Account by Judge Thomas’s Accuser, N.Y. TIMES, Oct. 14, 1991, at A10.

the legitimacy of staying to fight for what we need and to deny the difficulties we face in exit. The ideology of exit is extremely powerful,¹⁰⁶ so we make concessions to it in legal explanation. Our concessions are shaped by the urgency of need when encountering law: The legal system broadly interacts with social expectation, shaping and shaped by our beliefs about women, but law intersects the lives of particular individuals at moments of crisis, when attempting to remake social expectation is too large a task. However, concessions may reinforce cultural stereotypes about exit, and even when we carefully articulate duality, stereotypes may result in the irony of having this heard as victimization.

Self-defense killings by battered women are the most dramatic example. Juries often see failure to leave as discrediting the defendant's account of violence and her perceptions of danger. Feminist litigators responded by winning the right to expert testimony to explain patterns of response to abuse summed up in battered woman syndrome, rather than insistently denying that exit is the appropriate focus at all. Battered woman syndrome explains the woman's failure to leave in part through the psychological theory of learned helplessness. Even when experts simultaneously emphasize objective obstacles to leaving such as economic constraints, and even when experts try to draw a complex portrait of the woman's experience, courts tend to hear "learned helplessness" as utter dysfunctionality and a complete lack of agency.¹⁰⁷ This portrait of a battered woman may be difficult to reconcile with her violent act of self-defense, and some juries remain unpersuaded.¹⁰⁸

By responding in terms of exceptionality, explaining the victim subtly reinforces the ideology of exit. A woman pursuing her work in the face of harassment therefore risks future disbelief. In a particularly ironic twist, once victimization is *expected*, the woman's agency can become invisible even when it takes the form of exit—a woman may be condemned for not leaving soon enough.¹⁰⁹ Therefore Anita Hill could

106. HIRSCHMAN, *supra* note 23, at 106, 112.

107. Kristin Bumiller has described the reluctance of people who experience discrimination to engage the legal system with its attendant concepts of victimization. KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY* (1989).

108. For a thoughtful discussion of the tension between agency and victimization in representing battered women who kill their abusers, see Schneider, *supra* note 104, at 220-22.

109. Agency can become invisible *even when agency takes the form of exit*. In one of the early cases holding expert testimony on battered woman syndrome admissible, the defendant had ended a violent five-year marriage by initiating divorce proceedings and serving her husband with restraining orders. A week later, she came home late at night and locked the door, thinking herself alone. He flicked on a light and said he guessed he would have to kill her. She tried without success to escape through a window. Within the next few moments, believing she had heard him get out a weapon,

speak of herself, and the press could speak of her, both as someone who left and moved on—and simultaneously as someone who stayed.

When agency is equated with exit, failure to exit must be a sign of a positive choice or a symptom of such subjugation that agency no longer exists. In the rhetoric of victimization, battered women fail to leave because they are helpless; harassed women mysteriously “believe that they should not, or cannot, leave their jobs.”¹¹⁰ But helplessness and lack of agency present a picture with which most women refuse to identify. This makes it more difficult for us to understand our own lives in a context of violence and power. Denying commonality with battered women leaves our sense of agency intact—but it also leads us to deny the danger of episodes of rage or violence and to be unaware that hotlines for battered women are the appropriate place to call for help when we are attacked. A similar dynamic exists in regard to abuse at work. Virtually all of us who work outside the home have put up with some behaviors that we found ugly or hurtful in order to keep a job or protect the possibility of getting another. Yet this common ground was not recognized by many people watching the confirmation hearings.

People’s sense of agency in their own lives is very strong. In low-paid industrial settings and in clerical positions, in playgrounds where women talk as they swing children, and in the professional world as well, this strong sense of agency reflects both sound self-knowledge and denial of the impact of structures of power. A battered woman, for example, may know her own strength in endurance, survival, care for her children, and tough decision making under pressure, yet minimize or deny the extent of the violence she has experienced and the physical and emotional harm that results. We may know we encounter discrimination and subordination—and simultaneously know that our own efforts matter in the shape of our lives, that survival under adversity depends on energy, imagination and resourcefulness.¹¹¹

she shot him. The Washington Supreme Court reversed her conviction and remanded for the admission of expert testimony on battered woman syndrome, to explain, in part, “why a woman suffering from the battered woman syndrome *would not leave her mate*, would not inform police or friends, and would fear increased aggression against herself.” *State v. Allery*, 682 P.2d 312, 316 (Wash. 1984).

Of course, Allery *had* left her husband. If agency equals exit, she had shown agency. Both her attempt to separate and the dangerous power and control moves typical of batterers at separation were disguised by the perception of failure to exit. However, if the court saw her as too competent an actor, it could disbelieve either her account of prior abuse or her perceptions of danger based on the history of abuse.

110. Videotape of Hearings, *supra* note 28 (remarks of Senator Biden).

111. See Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 613 (1990) (“[A]t the individual level, black women have had to learn to construct themselves in a

Belief in one's own agency trumps identifying with victims. This is exacerbated when identification as "victim" helps make the perception of agency impossible.¹¹² I believe this ability of a sense of agency to defeat understanding of claims of victimization is crucial *whether or not this consciousness is false*,¹¹³ since claims that do not represent both strength and oppression may not be heard as relevant to one's own experience. Constructing women "purely" as victims leaves the rhetoric of agency for conservative Republicanism, with important political consequences. Conservative politics has been able to mobilize people's sense of agency in their own lives to reject the impact of oppression in other people's lives and perception of their own oppression as well. The conservative appeal to the middle and working classes is about agency (you act for yourself, so do they; you handle tough things, so should they). Denial of oppression is part of the same process of making the rules invisible that allowed exit to become the question.

This is the terrain the conservatives capture, part of the ground upon which Senator Hatch stood when he attacked Anita Hill the day after she testified. One component of the conservative attack is to render her way of exercising agency invisible to the public and disguise its meaning. The significance of her work, her perceived success in stopping harassment, and the particular agency involved in "staying" to work on terms one has defined—all disappeared. How could all that agency become invisible, especially when it so closely tracked the self-image of many who did not believe her?

One columnist called Anita Hill a "perfect victim."¹¹⁴ But victimization is not "perfect." It implies a one-way exercise of power, harm

society that denied them full selves."); *id.* at 614 ("[T]he recognition of the role of creativity and will in shaping our lives is liberating, for it allows us to acknowledge and celebrate the creativity and joy with which many women have survived and turned existing relations of domination to their own ends."); *cf.* Littleton, *supra* note 45, at 780-81 (contrasting MacKinnon's emphasis on victimization by men as definitive of women with Simone de Beauvoir's belief in "a human (and female) agent as a potential architect of the meaning of her own life").

112. Bell hooks tells of giving Lenore Walker's book, *The Battered Woman*, to a young woman who had been severely beaten by her husband. The woman's relatives threw the book away. "They felt that she would be making a serious mistake if she began to see herself as an absolute victim which they felt the label 'battered woman' implied." BELL HOOKS, *TALKING BACK: THINKING FEMINIST, THINKING BLACK* 88-89 (1989).

113. For a thoughtful recent discussion of feminist analysis of "false consciousness," see Kathryn Abrams, *Ideology and Women's Choices*, 24 *GEORGIA L. REV.* 761 (1990).

114. Anna Quindlen, *The Perfect Victim*, *N.Y. TIMES*, Oct. 16, 1991, at A25.

without strength, oppression without struggle.¹¹⁵ People do not identify with those they pity, and this allowed the paradox: To the extent she was seen as victim, she had not behaved in the way people thought she should; to the extent she had been strong, she had not seem like a "victim." Therefore, J.C. Alvarez could testify on behalf of Clarence Thomas, "[t]he Anita Hill I knew before was nobody's victim,"¹¹⁶ when in fact Anita Hill had not spoken of herself in the status of "victim" but described both agency and oppression in her experience. A model of victimization had been imposed by cultural understanding and the processing of her experience through the mouths of Senate Republicans and the media, and this model took over the story she actually told.

In addition to indirectly promoting victimization, a focus on exit is directly opposed to the idea of resistance. In love and work, women build lives under conditions of inequality, and whatever we find of success, security, love and companionship is built on or against unequal ground. Exit proposes that one should leave, rather than hold on to what has been gained. In battering, this stigmatizes women's efforts to make viable families out of the raw material handed them by a profoundly sexist and violent society. In sexual harassment, the secrecy surrounding the abuse and the social expectation that women will react by departing create a "death before dishonor" mentality that denies respect to the stubborn determination to keep the job. Sexual harassment is frightening, ugly, debilitating, and humiliating—staying should not be understood as negating the harm—but agency may be exercised through working. When the only recognizable act of agency is exit, this makes acts of resistance like those Anita Hill described (doing one's job and telling the perpetrator to stop) into acceptance of victimization.

Anita Hill was used to exercising agency. She is the daughter of a farmer from Oklahoma. She was the youngest of thirteen children, one of few African-American women at Yale. She was used to being able to work hard enough, and well enough, and successfully enough to take hold of the world and shape it. Her expectations of her own ability to define a work environment would be very high. She said that during each of the offensive discussions, she was able to stop the discussion for that day, though he began again another time. But the greater her sense of her own agency, the more likely that she would believe she could

115. This is why the terms "survivor" has replaced "victim" in feminist vocabulary (as in "rape survivor," "domestic violence survivor"). See, e.g., GONDOLF & FISHER, *supra* note 76 (describing battered women as survivors).

116. *Statements of Character Witnesses in Defense of Judge Thomas, Statement by J.C. Alvarez*, N.Y. TIMES, Oct. 13, 1991, at A15.

restrain him, and therefore that all her agency would be later rendered invisible because it was not exercised as exit.

Could Anita Hill have been insufficiently presented as a victim? Just after the confirmation vote, the New York Times reported that feminist groups had concluded that Clarence Thomas "won" by presenting himself as more of a victim than she did.¹¹⁷ But his claim was not necessarily believed by the public, and since public opinion in favor of Thomas almost perfectly tracked disbelief in Anita Hill,¹¹⁸ the vote seems to have been decided by the ability of Senate Republicans to attack her. When Anita Hill described the will of a young woman to carry on her work under adverse conditions, the emphasis on exit and the construction of victimization helped prevent the public from hearing what she said.

An increasing emphasis on victimization could be an important mistake. Elizabeth Schneider has pointed out that although victimization has sometimes been a significant part of feminist analysis, there are inherent tensions in portraying agency and victimization in battered women's experiences.¹¹⁹ Some black feminists have criticized a rhetoric of victimization or do not use it.¹²⁰ Bell hooks associates privilege with claims of victimization and argues that women who face exploitation daily "cannot afford to relinquish the belief that they exercise some measure of control, however relative, over their lives."¹²¹ If we cannot speak of both exploitation and agency, we will not be heard by the women who insist on perceiving it in themselves, and we will help stifle their voices when they speak.

117. Maureen Dowd, *The Thomas Confirmation: Image More Than Reality Became Issue, Losers Say*, N.Y. TIMES, Oct. 16, 1991, at A1.

118. *Public Still Backs Confirmation of Thomas*, *supra* note 36, at A20 (most of those polled rejected claim that the accusations were prompted by racism; all but one percent of those who believed Anita Hill opposed the confirmation).

119. Schneider, *supra* note 104, at 221 (urging feminists to explore "the role of both victimization and agency in women's lives" because portraying women solely as victims or agents is not adequate to explain the complex realities of women's lives, and showing that emphasizing only victimization among battered women helps make violent self-defense hard for judges and juries to understand); see also Littleton, *supra* note 16, at 38 (need to emphasize victimization of women conceals questions of male power and domination).

120. Harris, *supra* note 106, at 612-13 (criticizing the view of women as victims, and calling upon feminism to learn from the strength of black women who have constructed their lives under conditions of oppression); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 166-67 (focusing on the need to embrace the intersection of race and gender in the struggle against oppression; arguing for placing "those who are currently marginalized in the center" to resist compartmentalizing experiences and undermining collective political action).

121. HOOKS, *supra* note 95, at 45.

V. AGENCY AND OPPRESSION

At that time, staying seemed the only reasonable choice. At that time, staying was . . . a choice that I made because I wanted to do the work. I in fact believed that I could make that choice, to do the work, and that's what I wanted to do. And I did not want to let that type of behavior control my choices. So I attempted to end the behavior. And for some time, the behavior did stop. I attempted to make that effort. So the choice to continue with the same person to another agency involved a belief that I had stopped the behavior that was offensive.¹²²

Anita Hill never said she believed that Clarence Thomas had simply stopped harassing her. Throughout her testimony, she had spoken of offensive *behavior*, rather than of Thomas himself, as the problem. At the end of the day, responding to a question from Senator DeConcini about why she stayed, she said *she thought she had stopped it*. Her choices had not been controlled. She would be able to go on with her work. She believed she had won.

Most sexual harassment cases turn, as did the confirmation hearings, on the credibility of the witnesses.¹²³ Credibility in turn depends on the capacities of the listener to hear and understand. Anita Hill's account of the move to the EEOC was undermined by making invisible her intelligent determination to defend herself on the job, and by completely collapsing her work into issues of sex and job loss.

If agency among the oppressed is judged only by effectuated change, it is defined almost out of existence. The acting, aware self is often realized in love and in work through resistance against oppression, survival, and partial victories—like women who “just deal with” harassment, or women who seek to hold on to marriages without violence. Or—even closer to the experience of many women—the self is realized through a *combination* of accommodation and resistance, through private resistance chosen because oppression itself simultaneously makes exit difficult and open resistance impractical. This duality may sometimes create or allow individualism: When working women say they “just deal with” harassment, this implies they have power to resist but may permit later denial of commonality with a woman who publicly describes the experience of harassment.

122. Anita Hill, Videotape of Hearings, *supra* note 28 (first seven minutes of Tape #4 in answer to Sen. DeConcini).

123. Estrich, *supra* note 102, at 847-53.

Contemporary conservative insistence on agency treats self-realization as a question of pure will, not constrained in any serious way.¹²⁴ Conservatism equates all analysis of oppression by race or gender with individual victimization and treats it as negating agency. The conservative claim that agency may be exercised without struggle is very different from claiming agency through liberatory struggle, through resistance to oppression.¹²⁵ "Pure" victimization also denies the many ways people resist oppression. For women, the stigma and shame of being sexually assaulted creates a circumstance that will often discourage publicity (including lawsuits) and therefore tend to make resistance individual. This should not equate staying with either acceptance of victimization or claims of pure individual agency without struggle.

If we were better at articulating *both* oppression *and* resistance, at both the individual and collective level, we might be less confused. But law does not make this easy, and feminist legal scholarship has had difficulty dealing with both oppression and an insistence on agency.¹²⁶ In feminist activism, pain suffered privately became political—not *only* by being spoken to other women, but by being spoken to the world and collectively acted upon in the creation of alternative institutions. Speakouts led to political action that included personal transformation sought through the struggle for social transformation. The legal claim for sexual harassment as sex discrimination was strategically created to reveal oppression as part of political change.¹²⁷ But even here, litigation

124. Richard Delgado points out the importance of agency in the writings of black conservatives. Richard Delgado, *Enormous Anomaly? Left-Right Parallels in Recent Writing About Race*, 91 CAL. L. REV. 1547 (1991).

125. Clarence Thomas himself may have shown that conservatism, not agency, is the essence of this position when he switched during the confirmation hearings from a claim of agency-without-struggle (civil rights advocates whine, moan and bitch when they could be working with a Republican administration) to a claim of victimization (I am being lynched) without moving a millimeter toward liberatory struggle. See Juan Williams, *EEOC Chairman Blasts Black Leaders*, WASH. POST, Oct. 25, 1984, at A7 (reporting remarks on whining). A complete analysis of Clarence Thomas's testimony is beyond the scope of this article, however.

126. Within feminist theory, equating female existence with victimization has been understood as denying agency; insisting on agency has been heard as denying the inevitable situation of every woman as part of a subordinated sex. See *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFFALO L. REV. 11, 75 (1985), in which Mary Dunlap, a feminist lawyer, responded to Catharine MacKinnon's discussion of oppression. MacKinnon emphasized harm to women: a boot is on your neck; you have no authentic voice; confront your victimization. Dunlap stood and said she was not subordinate to any man, that she frequently contested efforts at her subordination; she urged women to stand to show they did not have to be subordinated. For a thoughtful discussion of this exchange, and later development of these themes in the work of MacKinnon, see Stephanie Wildman, *The Power of Women*, 2 YALE J.L. & FEMINISM 435 (1990) (reviewing CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989)).

127. See generally MACKINNON, *SEXUAL HARASSMENT*, *supra* note 8.

is largely a one-on-one undertaking: this woman, this man; he said, she said; a question of credibility of this *individual woman* making an *individual claim*, subject to being discredited by her *individual traits*. Even if her actions are completely consistent with those of other assaulted women—as Anita Hill’s were—her place in the world of response to assault is not visible. The challenge is to find ways to represent both oppression and agency in *law*, with its strong impetus toward individualism and victimization.

What decides whether a claim about pain is collective and transformative or heard to represent victimization without agency? The answer may be part culture and part the structure of legal argument. When experts describe normal reactions to battering and emphasize economic constraints and physical danger, but are heard as describing women as pathologically helpless, both the structure of expert testimony (dealing with matters beyond the layman’s ken) and the persistence of social stereotypes are involved. Law’s interactive existence in politics is another answer. A recent example of claims about harm is the movement against racist speech. This claim within law is based on articulating and defending the perception and experience of those who are targets of hate speech—it simultaneously articulates harm and tries to redefine legitimate perception. It is also part of a larger contest over culture, knowledge and perception that includes fierce debates that have challenged the traditional core curriculum in academia and triggered an intense counterattack about “political correctness.”

So part of the struggle against oppression is more articulation, of more experience, of *more women*, learning difference as well as asserting commonality. We need to learn from the experience of women a sense of agency as well as pain—in Angela Harris’s lovely phrase, “integrity as will and idea”—and learn from women who have constructed lives under oppression their example of creativity and will.¹²⁸

Both this articulation and the political action built on it are parts of the effort to bring law and societal perception closer to the experience of the subordinated and to counteract the persistent misrepresentation of resistance to oppression as victimization.¹²⁹ But political action, like the consciousness of oppression, should include the many forms of oppression that intersect here to authenticate acts of resistance as they happen,

128. Harris, *supra* note 111, at 613-14.

129. Several types of political action were proposed after the hearings, including a new national party. Ellen McGarrahan, *MIAMI HERALD*, Oct. 17, 1991, at 4B. In addition, feminists placed increased energies on electing women. Kay Mills, *L.A. TIMES*, Dec. 1, 1991, at M3.

show the significance of "staying" at work or in a relationship as well as "leaving," and reveal the nature and mechanisms of oppression.

We live in an era of terrible uncertainty about work. In the weeks after the confirmation hearings newspapers repeatedly announced that *fear* of economic collapse was likely to slow consumer spending, and that these fearful consumers would cause another recession or even another great depression. In these weeks, Pan American World Airways "died," taking with it 7,500 jobs of the airline's employees and many more jobs with outside companies that depended on the airline.¹³⁰ I.B.M. announced that it would follow previous cuts in its workforce with additional reductions of at least 20,000 employees in 1992.¹³¹ General Motors announced it would eliminate more than 70,000 jobs in the next few years, closing 21 of its 125 assembly and parts-making plants in North America.¹³² The same newspapers that blamed slow consumer spending for the danger of economic collapse noted that consumers specifically feared job loss—without correlating fear and common sense.

The urgent crisis of work appears frequently in political life as an issue of race or gender. Jesse Helms turned fear of unemployment into elected office by manipulating claims that white workers' jobs will be lost because of affirmative action; David Duke used this strategy as a key stepping stone to national prominence and mobilizing a new white right. Justice Scalia, too, says that hard working white men are being treated unfairly by the law, cheated by preferences for minorities and women.¹³³

Racism in the fear of loss of work does not need to be forced into the discussion of sexual harassment—it is already here. In the confirmation hearings, it was articulated by J.C. Alvarez: "You don't follow them to the next job—especially if you are a black, female, Yale law school graduate. Let's face it, out in the corporate sector, companies fight over women with those kinds of credentials."¹³⁴ The claim that "companies fight" over "black, female" graduates of Yale uses rhetoric that invokes contemporary white fears of being disfavored by affirmative action to argue that Anita Hill's fear of job loss was not credible. This implies

130. Agis Salpukas, *Its Cash Depleted, Pan Am Shuts*, N.Y. TIMES, Dec. 5, 1991, at D1.

131. John Markoff, *I.B.M. Will Change in Effort to Keep Market Dominance*, N.Y. TIMES, Nov. 27, 1991, at A1. The announcement covered job cuts worldwide and did not predict how many of these jobs would be cut outside the United States.

132. Doron P. Levin, *General Motors to Cut 70,000 Jobs; 21 Plants to Shut*, N.Y. TIMES, Dec. 19, 1991, at A1.

133. *Johnson v. Santa Clara County*, 480 U.S. 616, 677 (1987) (Justice Scalia, dissenting).

134. J.C. Alvarez, *quoted in Hill, Thomas Witnesses Recount Own Experiences*, MIAMI HERALD, Oct. 14, 1991, at 14A. This remark was widely quoted and emphasized in press coverage.

there is *no* credible explanation for failure to exit—educated black women are the luckiest people in today's market! In fact, there are still very few black women attorneys in the corporate world, and given pervasive suspicions of the competence of blacks and of women, the recommendations of supervisors are crucial to status in the professional job market. To argue from this starting point, however, falls into the structure of conceding the focus on exit and raising oppression defensively to disprove exit (but racism and discrimination are real!).

In the aftermath of the confirmation hearings and in other current legal and political contests in the fields of gender and of race, we need to recover the idea of sexual harassment as simultaneous oppression in *work* as well as sex and race.¹³⁵ It is a fundamental critical insight that the very task of law is to make the exercise of power invisible.¹³⁶ This leaves a continuing role for critique: Legal intellectuals, analyzing a reactionary court in the midst of a crisis of work, can help make power visible again in many dimensions by unpacking the background of power.

In law and politics, we need to choose terms of discussion and forms of legal challenge for their capacity to mobilize consciousness, not solely for their potential legal success. If law pushes us toward victimization rather than struggle and resistance, it also pushes us toward *only* particularity because our legal regime is founded on the fictions of formal equality and mutual free agency. If we move too far toward the norms of employment that permit abuse in the workplace, and leave behind particular injuries by race or gender, then we rapidly reach harms that are not remediable because they are the very foundation of our law—like employment at will, or the freedom of plants to close.

Yet abuse of employees—as well as acceptance of sexual abuse of women—helps make sexual harassment hard to remedy. A woman must prove very specific elements to get past the general difficulty of controlling offensive behavior.¹³⁷ If she cannot, then she loses, even if the behavior was offensive. If we only see the harm of women by men, we

135. See Mary Becker, *supra* note 63 (racial and sexual harassment often simultaneously present in oppression of women).

136. See, e.g., Karl Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1358 (1982) (“[t]he peculiarity of legal discourse is that it tends to constrain the political imagination and to induce belief that our evolving social arrangements and institutions are just and rational, or at least inevitable, and therefore legitimate.”).

137. Estrich, *supra* note 102, at 826-34 (noting that in order to prevail, a plaintiff must have expressed that the behavior was unwelcome); *id.* at 843-47 (hostile work environment must have been pervasive and debilitating, so significant as to substantially and adversely affect the entire work experience of female employee).

lose a sense of the ways sexual harassment is part of other systemic misuse of power in our society. Regina Austin has pointed out that an interest in fighting abuse on the job can span divisions between different sectors in the workforce, from unskilled labor to white collar and professional employees.¹³⁸

Bell hooks has called on women to work toward ending all violence in society, including racism and the violence of the workplace, as part of a movement to end violence against women.¹³⁹ If we focus on resistance to oppression, then ending sexual harassment means work against harassment *and* against the abuse of workers.¹⁴⁰ Feminist work against sexual harassment then includes issues of more jobs and more job security. It includes resistance to current attacks on affirmative action—by rejecting the rhetoric that pretends away power, and by working for more jobs for all. In *any* contest about work, including opposition to sexual harassment, antiracism is also essential, because concepts of both employability and sexuality are deeply entwined with concepts of race. In battering, the effort to end the batterer's power and control and the social structures that reinforce it makes allies of men as well as women who oppose that exercise of power. In dealing with harms to women, shifting focus from victimization to oppression increases the possibilities for alliance.

Finally, in order to reveal both agency and oppression, we need to reject false questions that define and structure legal discourse. Exit hides both oppression and resistance. Staying at work can mean victory, stubborn persistence at a chosen goal, or nightmare and exploitation; leaving may mean going without work, or it may bring a successful turn in career path. Staying in a marriage could prove to be retaining a family without violence, or it may well be the result of death threats and custody suits; leaving may mean giving up on having both love and safety, or it can be empowerment and a loving family forged by a single mother. Any snapshot labeled "exit" or "no exit" will not show whether this woman is in this home, this job, because she is fighting for this territory or because her will to leave has been defeated. For work against subordination, her will against oppression is what she needs, and what we need to know.

138. Austin, *supra* note 46.

139. HOOKS, *supra* note 95, at 122, 130. This also involves a rejection by women of participation in violence and subordination.

140. And, indeed, against the brutal Social Darwinism that marks our inadequately funded transfer programs, which help enforce insecurity about work.

VI. CONCLUSION

Law itself funnels and shapes consciousness and resistance to oppression. There are good reasons to use law on behalf of the subordinated, and it is worth fighting within the field of law for the principle that law should do justice.¹⁴¹ In the coming months and years, antisubordination efforts including the fight to end sexual harassment will continue to move through the legal system and other political arenas.

The Supreme Court, with Justice Thomas as its newest member, will do many things to repress, constrain, or channel struggle. It will continue to insist on an "empty state"¹⁴² in which the public good is the sum of private interests and there is no public presence but an accretion of private actions; it will continue to hide the deployment of power by describing mutual and mobile voluntary social relations of entrances and exits, privatizing harm and seeing only intentional individual victimizations; it will undoubtedly endorse further retrenchment in entitlements, unions, affirmative action, immigration, abortion, federal jurisdiction and other areas of legal contest as inconsistent with a liberal playing field inhabited by equally powerful free actors. A civil rights bill was enacted promptly after the confirmation, but any action taken pursuant to that bill will come before this very Court for review.

These things will not happen separately. They will overlap but have different specifics; if they hurt many, they will not affect all the same way. To work against them, in law and elsewhere in politics, we will need to work together. To work together, to reach the very people who are hurting too, we will need to hear strength as well as pain—the articulation of experience that is an integral part of the struggle against subordination is not an appeal for pity. When we speak of oppression and resistance, we must not be told—and we must not tell others—to take things as they are or leave them. This discussion is part of a demand for the transformation of power, and it cannot be answered by showing us the door.

141. See Mari Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1403-06 (1991) ("In meeting the goal of true equality—of ending all forms of subordination—I continue to see claims of logic, legality, and justice as both useful and true.").

142. Kenneth Casebeer, *Toward a Critical Jurisprudence—A First Step by Way of the Public-Private Distinction in Constitutional Law*, 37 U. MIAMI L. REV. 379, 412-22 (1983); see also Kenneth Casebeer, *Running on Empty: Justice Brennan's Plea, The Empty State, the City of Richmond, and the Profession*, 43 U. MIAMI L. REV. 989, 1002-03 (1989).