Chapter 8

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What is "Abuse"? - The Legal Standard & The Political Standard

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To get a restraining order under Chapter 209A, the plaintiff must allege that the defendant has committed "abuse" against the plaintiff and/or their children, as it is defined in Section 1 of that chapter.

Chapter 209A, Section 1 defines abuse as being in one of three specific categories enumerated in the sidebar on this page. If the Defendant has not committed one of the three types of abuse as defined in this law, a restraining order should not be issued by the court, at least in theory. In practice, some judges go by their gut instinct more than by the law.

The definition of 'abuse' in Section One does not include psychic abuse, emotional abuse, yelling, being a jerk, or being annoying. Be aware that some judges read those behaviors tacitly into the statute as being "abuse".

Appellate case opinions state that a court must find that the plaintiff's fear of abuse is "reasonable" or objective, rather than subjective.[1] As shown below, the "objective" standard to discern abuse is actually quite subjective, and presents substantial problems for defending against the issuance of orders.

Mass. General Laws, Ch. 209A, §1 (Partial)

Section 1. As used in this chapter the following words shall have the following meanings:

"Abuse", the occurrence of one or more of the following acts between family or household members:

(a) attempting to cause or causing physical harm;

(b) placing another in fear of imminent serious physical harm;

(c) causing another to engage involuntarily in sexual relations by force, threat or duress.

The Elements of a Claim of Abuse

To get a restraining order, the

[1] *E.g., see Carroll v. Kartell*, 56 Mass. App. Ct. 83, 87 (2002).

plaintiff has to prove that the defendant committed at least one of the three acts of abuse listed in Section 1, cited in the sidebar above. If you learn these three definitions of abuse verbatim, and understand their meaning as applied to the facts of your client's particular situation, you will be as effective as possible for your client.

When you use the exact words of the law to explain to the court how none of these three definitions apply to the defendant's actions, the judge will know that he or she is dealing with a professional.

Physical Harm

The first definition of abuse is:

> "Attempting to cause or causing physical harm."

This definition leaves room for vague interpretations of the critical words "harm" and "attempting", neither of which are defined in the law.

The statute raises many questions for counsel: What is physical *harm*? How far does a physical act have to go to constitute harm? Is it a bruise, a slap, a wound, broken bones, a hangnail? How much physical harm is prohibited is a key element of the law, but is left undefined.

What is "attempting" to cause harm? It may be akin to a criminal assault, namely placing a person in fear of an imminent battery, but that is not specified in the law.

Does "attempting to cause harm" mean raising a hand against the other person? Saying that you will cause harm? Saying you wish you could cause harm, but wouldn't? Trying to hit, but missing?

A common and well-meaning refrain heard in hearings to defend against allegations of physical abuse is, "If I had wanted to hurt you, I could have." Many persons have said that to show that they would *not* harm the other person, but it can be easily twisted and interpreted out of context.

Because of this vagueness in the text of the law, appellate courts have waded into the vacuum to interpret its terms. Court interpretations of the meaning of "harm" and "abuse" have been uneven and have shifted over time. There is little predictability.

Real Abuse - We Know It When We See it

The law itself does not define the quantum of physical contact that is necessary to qualify as "abuse" under G.L. ch. 209A, § 1. Because of that open definition, advocates have argued that any unwelcome touching is abuse.

But what about minor acts of physical contact which cause no injury at all, such as a light slap or a push? What if the defendant is only reacting to boorish or vile behavior of the plaintiff, or even a physical act of self-defense to fend off the plaintiff's own abuse or assault?

Although the text of the law does not define the seriousness of physical harm necessary to invoke protection of the law, it does state in the second definition, that "fear" must be of

"imminent serious physical harm". When only fear is alleged as the basis for an order, the quantum of the necessary fear is expressed in far more intense language. The harm to be feared must be all - not just one - of the following: "Imminent", "serious" and "Physical".

This duality in the first and second definitions of abuse leaves an uncomfortable ambiguity for counsel, parties, and courts.

In the final analysis, most of us usually do know real domestic abuse when we see it. However, courts sometimes don't have the same standard or scale. No one can realistically say whether a minor physical assault by either party, which causes no injury at all, should be deemed "abuse" under the restraining order law.

The one legitimate and inarguable basis for issuance of a restraining order under the first clause of Chapter 209A is substantial physical violence resulting in an injury of some sort. That is hardly controversial. However, most of the orders are issued under the "fear" provision. Then, the answer of many advocates is: It is abuse. It is always abuse. Issue a restraining order.

How Appellate Judges Have Interpreted "Physical Harm".

No case opinion to date has defined the term "physical harm" in section One of chapter 209A. We do have generalities like this one, which are not much help:

> Violence brought on by, or exacerbated by, familial relationships was the "mischief or imperfection to be remedied" by c. 209A.[2]

Or this:

> The proper exercise of judicial discretion involves making a circumstantially fair and reasonable choice within a range of permitted options".[3]

The later explanation hardly gives any kind of clear guidance to either judges or lawyers as to what constitutes abuse? What is the range of permitted options?

Courts have found that if a defendant commits an actual defined crime of violence or sexual abuse, then it meets the standard. That makes sense, and makes a bright line to cleave genuine abuse from the more politicized variety.

For example, when a father raped and abused his minor children, even eight years before the request to extend a restraining order, it was not a difficult decision to determine that he had physically harmed them.[4]

But, the court was, in that case,

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[2]*C.O. v. M.M.*, 442 Mass. 648, 651 (2004).

[3]*Lonergan-Gillen v. Gillen*, 57 Mass. App. Ct. 746, 748-749 (2003).

[4]*Vittone v. Clairmont*, 64 Mass. App. Ct. 479 (2005).

not ruling on the definition of physical harm, but whether that previous conduct was sufficient to place the plaintiff currently - eight years later - in fear of imminent, serious physical harm, the second definition of abuse in Section One.

We do have some guidance from one court as to what is NOT abuse, regarding a father's treatment of a seven year old daughter. The Mother brought a petition on behalf of the daughter, which was overturned on appeal. Frankly, it seems at odds with many of the other case opinions out there. Here are the allegations, from the court's recitation:

> *First*, on a Saturday morning, while in bed at a motel where she and her father had shared the available bed, Brittany said that she missed her mother. That annoyed the defendant and he kicked Brittany "hard" in the back of her legs. *Second,* Brittany woke up in the middle of the night and asked for a glass of milk. The defendant said, "Wait, I'm finishing a dream...." In the dream, as he then related it to Brittany, she was on the floor playing; dust bunnies and monsters came out from under the bed and cut her with a knife until she died. He, the father, then took the dust bunnies and monsters outside, poured gunpowder on them and killed them. *Third,* on a Wednesday morning, the fifth day of the ski trip, Brittany said she did not feel well and did not want to go to ski school, in which her father had enrolled her. The defendant told her that "quitters never win, and winners never quit." Brittany reported that the defendant, by way of emphasis, threw an empty plastic milk container at her that hit her foot. *Fourth*, on the way back from the Killington, Vermont, ski area, the defendant stopped with Brittany at a K—Mart store in New Hampshire to buy a piece of jewelry for her. The two became separated when he walked to a cashier to conclude his purchase. She was looking at "pretty pink Easter eggs." The defendant asked a customer service representative to page his daughter but spotted her before a page went out. Loud enough for Brittany to hear, and for her benefit, the defendant said to the customer representative, "Don't call the police." He then took Brittany aside and struck her twice with his hand under her chin.

In addition to the ski trip incidents, the Probate Court judge found that the father had pinched Brittany's arm "on one occasion in the past, and that this incident caused her physical harm that resulted in bruises." In his findings, the probate judge also noted with disapproval that the defendant frequently had shared a bed with Brittany in motel or hotel rooms when

> traveling with her. The judge further found that there had been an occasion when the defendant had angrily pushed Brittany into the back seat of a car "and press[ed] and pin[ned] her down.[5]

Most trial judges would issue a restraining order based on these facts, despite the fact that the Appeals Court has explicitly found that this conduct did not constitute abuse. In regard to that conduct by that father, the Appeals Court stated:

> It misconceives the level of social pathology at which c. 209A aims, however, to categorize the defendant's conduct as abuse within the meaning of that statute.
> *Id.*

In another case, the Supreme Judicial court again states what abuse is *not*, this time involving a father who spanked a child with a belt. This was found to not be abuse in a Dept. Of Children and Families administrative proceeding, although almost all judges would likely rule this to be abuse, and issue a restraining order post-haste. An excerpt:

> In his interview with Ugol, the plaintiff admitted to striking the boy on his buttocks with a leather belt on five or six occasions during the preceding school year. He denied being a "spontaneous spanker," explaining that he only spanked the boy as punishment for reports of misbehavior at school. He described the punishment as follows: The plaintiff would have the boy stand next to him and place his hands on the plaintiff's outstretched left hand (this latter measure to ensure that the boy would not suffer injury to his hands by attempting to shield his buttocks from the spanking); the plaintiff would grasp the belt buckle in his palm and wrap the belt, which was approximately one and one-half inches wide, around his right hand, leaving approximately one foot of leather strap exposed; he would then hit him on his clothed buttocks once or twice with the strap, explaining to him that it was punishment for bad behavior and that such discipline is required by the Bible. At Ugol's request, the plaintiff demonstrated the force with which he would spank the boy by striking a couch cushion with the belt. Ugol reported that the belt made a "solid smack." The plaintiff denied ever having caused any bruising on the boy's buttocks (although he later admitted that he had never checked for any).[6]

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[5] *Szymkowski v. Szymkowski*, 57 Mass. App. Ct. 284 (2003).

[6] *Cobble v. Commissioner of the Department of Social Services*, 430 Mass. 385, 387 (1999).

The Department of Children and Families routinely ignores the finding of the SJC on this point, and judges continue to issue restraining orders when parents discipline their children, in contravention of *Cobble*. This, despite the court's assertion that, "We do not judge this present case to be a close one."[7]

The only conclusion is an unsatisfying one: Other than the certitude that committing a crime of physical violence falls under the ambit of the statute, we do not know where the line of "harm" is in lesser situations, or where a judge may draw it in a particular case.

Placing Another in Fear of Imminent Physical Harm

The second definition of abuse in Section One of Chapter 209A is:

> "Placing another in fear of imminent serious physical harm."

This is the clause under which the vast majority of restraining orders are issued. This definition of abuse is more vague than the first one, and the source of most of the law's problems. It will help you to be familiar with the case opinions interpreting it which are set out in Chapter 34. The whole gamut of legal arguments and strategy for defense under this clause is set out in Chapter 25.

Some judges start and stop by just looking at the phrase, "Placing another in fear", and then issuing an order. But 'fear' itself is not enough. It has to be fear of something, namely "imminent serious physical harm." Always remind a judge of the entirety of the phrase if the signals from the bench appear to go that direction.

"Imminent" is not defined in the law, but it means "right now" or immediately, not a vague threat to do something someday. It is not a threatening call from Wyoming, from where your client could not do something to the plaintiff, but it is a promise of harm that he could do right now, this minute.

Note Bene: The SJC has stated that a six hour plane ride from a western state could, under certain circumstances be enough to qualify as "imminent".[8]

"Serious" harm is also not defined in the law, but it commonly means that the harm must be more than just a minor or moderate physical injury, and certainly not emotional or verbal unkindness, or controlling behavior.

Something like slapping a sassy partner or child in the mouth would appear to fall far short of "serious", as does sending a child to bed without TV, taking a teen's cell phone (no greater harm could be envisioned by some teens), pushing or shoving, holding a person down who is trying to hurt the other, or deflecting a blow, although orders are routinely issued for these things or variants on them.

The proscription against "serious

[7] *Cobble,*430 Mass. at 391.

[8] *MacDonald v. Caruso*, 467 Mass. 382, 292 (2014).

harm" applies to a person, not to an inanimate object. Clients who punch a wall or kick something, without the action being directed at a person, or the possible risk to a person from it, should not justify the issuance of an order. Many judges will issue them on this evidence, though, especially if it is accompanied by other bad behavior.

Some property destruction can indeed be inferred to be directed at a person, so such an analysis is fact intensive. Also, an assailant can propel an object at the victim, which is an assault and battery, a criminal act.

In other words, an angry strike at an inanimate item - without more - should not automatically be considered abuse. This does not justify these behaviors; They are unkind, immature, unloving, irresponsible and some are criminal. We are only trying to clarify the parameters of the restraining order law, not justify swinish human behavior in a family.

Finally, any threat must involve a promise of physical harm, not emotional, psychic, psychological, or financial harm. Emotional control of other person, control of money in the house, or disciplining a teenager cannot serve as bases for issuance of an order. It must involve a threat of something physical. Blood, injuries, wounds. Not psychobabble or taking away a cell phone.

The Court Adds Definitions to the Law

Appellate courts have addressed many of the gaps in the restraining order statute, particularly ones related to standards of proof, and the meaning of "fear". The Supreme Judicial Court filled in one gap by decreeing that,

> "The definition of 'abuse' under G. L. c. 209A, § 1 (b), closely approximates the common-law definition of the crime of assault, and we are guided by our definition in considering whether the defendant's conduct rose to such level of 'abuse' under the statute."[9]

The crime of assault may be committed in one of two ways: by attempting (or achieving) a battery, or by engaging in objectively menacing conduct so as to place another in reasonable apprehension of an immediately threatened battery.[10]

The legislature did not define "abuse" and "assault" interchangeably in the law, and should have used that definition if it had intended to do so. Nonetheless, we are now constrained by the SJC's somewhat vague definition.

Fear Must Be "Reasonable", Says the Court - It Is Actually Totally Subjective

A recent case opinion has stated that in order to obtain a restraining order, "the plaintiff must satisfy; a subjective and an objective standard:

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[9]*E.C.O. v. Compton*, 464 Mass. 558, 563 (2013). See, also, *Commonwealth v. Gordon*, 407 Mass. 340, 349 (Mass. 1990).

[10]*Commonwealth v. Melton*, 436 Mass. 291 , 294-295 & n.4 (2002).

she must show both that she is currently in fear of imminent serious physical harm, and that her fear is reasonable".[11]

Most of the case opinions focus on the "objective" issue of reasonability. Any fear of harm has to be "reasonable" or "objective". The term, however, does not appear in the text of the law. Experienced lawyers may nod sagely in recognition of those words, but the use of them does not clarify how to interpret and apply this law in real life situations.

What is "reasonable" or "objective" fear versus "subjective" fear? The traditional way to define objective fear is that it is what a "reasonable person" would do in response to some wrongdoing. Subjective fear may be an inner and relative fear, outside the range of how a reasonable person would react.

Law cannot objectively define such a subjective concept as "fear". Different persons exhibit a wide variety of reactions to the same stimuli, ranging from paralyzing terror, to no concern at all.

If a bee buzzes by two people standing next to each other, one may scream and flee, while the other is nonchalant. This simple example from daily life shows how hard it is to establish a standardized amount of fear to use as our gauge for what is "objective".

In restraining order hearings, different persons could also have substantially variable thresholds of fear of abuse. One person could have been abused as a child, and could be triggered by even the most minor of incidents. Another could have had a happy childhood, and have a much higher threshold of fear.

The problem gets thornier. A person abused as a child could engage in therapy and return to a more mainstream view of what is objectively abusive. Another person with a similar experience may not be able to make such a transition.

Some persons are drastically affected by even one minor incident, others are more stoic, depending on personality, temperament, culture, or other factors.

Thus, arriving at an "objective" or standardized analysis of fear of abuse is virtually impossible.

The formulation used by most courts appears to have originated in the case of *Wooldridge v. Hickey*, and has been repeated in many cases since:

> "Generalized apprehension, nervousness, feeling aggravated or hassled, i.e. psychological distress from vexing but nonphysical intercourse, when there is no threat of imminent serious physical harm, does not rise to the level of fear of imminent serious physical harm.[12]

This formulation helps to clarify what is <u>not</u> fear, but does not define what IS fear. That definition remains

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[11] *Yahna Y. v. Sylvester S.*, 97 Mass. App. Ct. 184, 186 (2020).

[12] *Wooldridge v. Hickey*, 45 Mass. App. Ct. 637, 639 (1998).

elusive.

Some acts are so inherently clear in their provocation of fear, that little guessing is needed. If the defendant threatens a person with a baseball bat or points a loaded gun, the bright line of fear is clearly crossed.

If all cases were that easy, this discussion would be academic. But a large proportion of the cases presented to the court, and for which you will be called to provide a defense, are far more ambiguous, thus the need for clarity.

Objective Neutrality is a Myth

Many lawyers will remember discussions in law school torts class about the so-called "reasonable man", a description used to define a standard of objectivity for negligence.

This fictional "reasonable man" was defined in some fusty old English case as the man who rode the "Clapham Omnibus" to work,[13] and in another as "the man who takes the magazines at home, and in the evening pushes the lawn-mower in his shirt sleeves."[14] These descriptions contribute little to how to defend a person in a restraining order hearing.

Clapham is a middle class suburb south of London. At the beginning of the 20th Century, it was a typical commuter suburb that was said to represent "ordinary" London, like Peoria in the United States. An "omnibus" is an old term for a London public bus still in common use at the beginning of the 20th century.

That is the historical basis for our description of the "objective" standard of tort law. It is Nigel Lunchbucket, an English suburban everyman who rides the bus into London to work, reads magazines, and keeps his lawn cut.

Why our case opinions still cling to the utility of this standard is a mystery.

Every judgment is subjective on some level, even the "bright line" ones. Every judge and every plaintiff has biases, prejudices, experiences, and unstated political and philosophical presuppositions. Much of this is subconscious and unknown even to ourselves. The vagaries of these subconscious forces undermine any claim to pure, neutral objectivity. No one, without exception, is able to be purely neutral.

The subjectivity of the "objective" standard is openly evident in the judgments and case opinions issued by courts themselves on the cases where the "fear" is not so clear.

At the trial level, one judge will issue a restraining order, and another will not, on virtually identical facts. The difference may have been in the bias of the judge, or it may be that the judge discerned something important, good or sinister in one of the parties that swayed the decision.

Or it may be that the plaintiffs experienced fear in a very different way due to their background, such as childhood abuse or chronic domestic

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[13] *McQuire v Western Morning News* [1903] 2 K.B. 100 at 109 per Collins MR.

[14] *Hall v Brooklands Auto-Racing Club* [1933] 1 KB 205.

violence. That process of character judging is quite subjective and rarely revealed in the court's written findings.

Trial judges also apply the objective standard quite differently than the Appeals Court applies it. Trial judges see real people, with their present combination of experiences and circumstances. Appellate judges work much more in the theoretical, thinking they are applying an objective standard of analysis in a dispassionate way.

Restraining orders get overturned after being issued, or re-instated after being dismissed. Both sets of judges are applying the same law to the same facts but come out with different subjective interpretations of them.

The "Reasonable" Englishman on the Clapham omnibus, with his bowler hat, his magazine, and his bumbershoot, does not analyze things at this level. Maybe if we drop him off at his bus stop and leave him alone to mow his lawn in his shirt sleeves, he will trouble us no more.

That leaves us, however with a huge problem: What IS the standard for analyzing reasonable fear.

The Subjective Standard of "Reasonable" and "Objective" fear.

The conclusion from the foregoing discussion: The "objective" standard of fear of abuse is really a totally subjective one. Each case turns on the subjective standards and state of mind of both the judge and the plaintiff. Judges make an intensely personal, subjective determination about the plaintiff's fear, based on observation of both objective and subjective concerns and characteristics of the plaintiff.

The exception to that normal process is where the defendants' behavior is clearly threatening, and then the decision is easy to render in favor of the plaintiff. It is in those many gray-middle matters where there is no obvious threat, that the lack of a predictable standard causes the most problems.

Bottom line: counsel should first view the matter subjectively - asking what seems like the expedient thing to do here. The judge will probably do that.

It is helpful to also consider the matter through the eyes of an appellate judge, since a trial judge will nominally adhere to that standard. Here is an appellate formulation which shows why the analysis of objectivity is so futile:

> As observed in *Vittone v. Clairmont*, 64 Mass. App. Ct. at 486: "A restraining order is not to be issued 'simply because it seems to be a good idea or because it will not cause the defendant any real inconvenience.' *Smith v. Joyce*, 421 Mass. 520, 523 n.1, (1995). There must be more than '[g]eneralized apprehension, nervousness, feeling aggravated or hassled,' *Wooldridge v. Hickey*, 45 Mass. App. Ct. [637, 639 (1998)], because what is of 'central importance' is the 'fear of imminent serious physical harm.' Id. at 641. The applicant's fear

> must be more than 'subjective and unspecified'; viewed objectively, the question is 'whether the plaintiff's apprehension that force may be used is reasonable.' *Carroll v. Kartell,* 56 Mass. App. Ct. 83, 86-87, [2002]."[15]

Here, the court attempts to define objective fear more for what it is not than for what it is. An order can't issue simply because it is a good idea or won't cause the defendant inconvenience. It can't be a "generalized apprehension" or "nervousness." It can't be "unspecified". Then what is it exactly?

From this case opinion, a plaintiff must have a focused fear, based on specific actions of the defendant that are threatening in the manner of a criminal assault. Otherwise, defense counsel can show that the Plaintiff's fear is generalized and not directed at a particular action of defendant.

In order to do that, you must somehow figure out how much fear an "objectively reasonable" person would have in the plaintiff's situation.

The question is: Is the plaintiff's fear enough to justify the issuance of a restraining order, given the defendant's actions. Did the person threaten to commit a serious physical offense? The best way to make an educated guess is to see if a decided case has facts which are similar, and see how the court ruled. If not, go with the "gut" standard.

[15] *Corrado v. Hedrick*, 65 Mass. App. Ct. 477, 485 (2006).

Caution: Has the "Law" Been Modified by a Stray Case Opinion?

The "objective" standard is arbitrary, in that it is not set out anywhere in the law itself. This leads to problems for defendants which the courts have sometimes not considered.

How could diligent and careful counsel know that the court may have signaled a subtle change in the analysis that it will apply in these cases, and where to find that change? *Shepards* only goes so far. Some subscription statutes like Westlaw and Lexis are annotated with case citations, but they are not comprehensive, and the official state reporters on-line do not have them at all.

There is no footnote in the statute that says, "Hey, look over at the Appeals Court or SJC opinions for changes that the legislature did not put in the law, which, if you don't know about it, could cause you to lose your case."

Forced Sexual Relations

The third definition of abuse is to "cause another to engage involuntarily in sexual relations by force, threat, or duress." Fewer restraining orders are issued under this definition than under the other two.

This definition also suffers from vagueness and lack of clarity in the definitions. "Duress" is not defined in the statute. A law dictionary defines it as "the use of force, false imprisonment or threats to compel someone to act contrary to his or her wishes or

interests."[16] That is not the definition usually used in restraining order matters.

What if your client wants sexual relations, and his partner says, "Not tonight, dear, I have a headache?" He responds, "Oh, please, I really want you", and she gives in and says "Oh, well, OK." Is that duress? The law is unclear.

If a plaintiff claims forced sexual relations, the judge will be generous toward the claimant if there is evidence of it. When there is some evidence of conflict over whether sex was consensual, the matter will usually be resolved in the plaintiff's favor. Therefore, your presentation will have to be both sensitive and factual if you are to have a reasonable likelihood of success. See Chapter 40 for more information.

An influential segment of legal academics regards all marital sex as rape, rather than as mutually agreed activity. Thus, all sex is done under duress, in their view.[17] The influence of these academics may find some sway in the judge who reviews your case.

An activist group called Jane Doe, Inc. in Boston has been given a prominent role in setting policy, in the training of advocates, and in creating legal standards. The description of "sexual violence" on its web site states:

> Sexual violence is a multi-layered oppression that occurs at the societal and individual level and is connected to and influenced by other forms of oppression, in particular, sexism, racism, and heterosexism.

In the view of this group, a large segment of the population are oppressors, whether they have done something intrinsically wrong or not. This thinking can affect your case if the judge accepts these premises.

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[16] *Real Life Dictionary of the Law*, Hill & Hill, General Pub. Group, (1995).

[17] America is a "male supremacist society" in which women are rarely capable of giving meaningful consent to sex.
- Catherine McKinnon

"Marriage as an institution developed from rape as a practice."
-Andrea Dworkin

"It's conceivable somebody could be happy despite being married, but never because they were married. .. Sex and love is the dynamic that keeps women's oppression going . . ." - Ti-Grace Atkinson.