Inside an unjust, embittering social universe where there are moral possibilities, however imperiled, of self-esteem and empathy, fucking is the universal event, the point of connection, where love is possible if self-knowledge is real; it is also the place where the price paid, both for ignorance and truth, is devastating, and no lie lessens or covers up the devastation.¹

Nationally, a conservative estimate is that, under current conditions, 20-30 percent of girls now twelve years old will suffer a violent sexual attack during the remainder of their lives.²

The law of forcible rape is premised on the enforcement of male³ expectations of sex. When a man reasonably expects that sexual ac-

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³ Notwithstanding the facts that (1) either sex can be a rapist or rape victim, and (2) both rape reformers and law reviews have discovered the virtues of gender-neutral language, I will refer to rapists as males, and rape victims as females. Phenomenologically, rape is a male act, and being raped, a female experience. Schafer & Frye, Rape and Respect, in Women and Values: Readings in Recent Feminist Philosophy 188, 189 (M. Pearsall ed. 1986).
cess is forthcoming from a woman, he will not be convicted of rape if he proceeds to have sex with her, even though she has not consented to have sex. Whether a given expectation is "reasonable" depends much less on the cognitive capacities of the man — whether her subjective unwillingness to have sex ought to be apparent to him — than it does on the arrangements of male desire and female desirability which comprise the social arrangements we call gender. I will argue not only that the law unjustly presumes (or, constructs) women's consent, but also, under a system where men are socially and legally privileged to achieve some of their sexual expectations by means of self-help, that one cannot fully imagine what consensual sexuality is. I will not raise a self-satisfied charge of false consciousness against women who experience their sexual lives with men to be consensual. But under our law of forcible rape I am not sure if I could comfortably share with these women the conclusion that their sexual choices are uncoerced.

In Part One of this article I will introduce a contractual model to explain the social arrangements protected under the law of forcible rape — a model which allows men to enforce their "reasonable" expectations of sexual access by means of self-help without regard to the willingness of his partner. Parts Two and Three argue that rape law doctrine does, in fact, enforce the reasonable expectations of sexual access held by men. Part Two focuses on the construction of the victim, examining both the marital exemption and evidence issues. One can think of it as describing the conditions under which wives and lovers are rapable. Part Three explores the construction of the rapist, discussing the relationship between mens rea and force in terms of the resistance standard, and the mistake-of-fact defense. Part Four examines the relationship between the principle of the enforcement of expectations and the cognitive capacities of rapists. The "weakness" of rapists is that they fail to discipline their sexual desire to their cognitive capacity to understand the desired woman's subjective willingness to engage in sex. Part Five concludes by highlighting the contradiction between the fact of enforcement and the liberal ideal of sexual bodily autonomy.

This article thus ultimately struggles with the following question: Is genuine sexual choice ever possible where a legally-defined entitlement structure empowers men over women? Here is the tragedy of the law of forcible rape, and the social relations it defines and sustains. We cannot really be sure.

4. See infra notes 9-22 and accompanying text.
5. See infra notes 23-114 and accompanying text.
6. See infra notes 115-70 and accompanying text.
7. See infra notes 171-219 and accompanying text.
8. See infra notes 220-30 and accompanying text.
I. The Concept Of Enforceable Expectations In The Law Of Rape

The characteristic of the law of rape that I will explore in this article — the male right of self-help to enforce reasonable expectations of sexual access — does not apply across the entire range of possible encounters between (predatory) men and (unwilling) women. The "blitz" rapist — who pulls his victim off the street, or forces his way into her home — cannot avail himself of this right of self-help. In no possible sense of the word can any of his expectations be deemed "reasonable." But a man who is married to a woman, or who has a sexual relationship with her, and who therefore has reasonable expectations of sexual access (expectations generated chiefly by the fact that she is with him, or has consented to sex in the past) may accomplish these expectations regardless of the woman's subjective willingness to have sex, as long as he does not pick a means of self-help which vitiates the reasonableness of his expectations (e.g., more physical force than necessary to enter her). It is enough for a reasonable expectation if such a woman does not explicitly and obviously refuse, or resist, or fight back; she need not affirmatively consent to sex.

This is a "contract" conception of rape law. There is another conception of rape law, a "property" conception, which feminist scholarship traditionally uses to criticize rape laws as a social institution. Although the argument that rape laws treat women as the property of men encompasses both conceptions of rape law (and the critiques they generate), I want to be careful about distinguishing the property conception from my contract conception.

The property conception receives its most coherent, and convincing, explication in the work of Loreen Clark and Debra Lewis. They make a four-step argument for the validity of the property conception: (1) The need for stable and certain lines through which family (material) wealth may descend, when combined with the perception of women as naturally incapable of serving as stewards of society's primary goods (wealth, power, authority, etc.), leads to a form of control over the bodies of women which looks very much like the relationship between owner and property. (2) Rape is seen as a property crime, which one man (the rapist) commits against another
(the husband/father/owner). Accordingly, the severity or harm of the crime is in proportion to the value of the property taken. There is thus great harm in raping "valuable" women (women of the upper classes, and women of any class who are "owned" adhere to social conventions which are expressed through the regime of property in women), and no harm in raping "valueless" women (poor or independent). Valueless women can hardly be "raped" at all.\(^1\) (3) Women are enjoined by social convention to adhere to the rules which make them valuable; to refuse to stick to these rules is tantamount to violation of a trust duty. A woman who is a poor trustee of her conventional value renders herself valueless, and hence rapable. Furthermore, when such a woman is raped, her fault — poor trusteeship — eclipses the fault of the man who "took" her.\(^2\) (4) Sexuality (including reproductive capacity) is thus virtually the only primary good which women control. They have to use it in order to secure their material and emotional well-being in society. The inevitable result is that the line between force and consent becomes blurred, making all sexuality in some sense coercive:

Women's alienation from her own sexuality, man's resentment at having to purchase sexual fulfillment, the unequal bargaining that trades security for sex—all of these distortions of human sexuality make it inevitable that much sexual contact between men and women will necessarily be coercive in nature. Women must withhold sex from men, and men must pay women a price for it. The top price is marriage, but women may also exchange their sexuality for emotional security, social status, minor economic rewards, or, more negatively, safety from economic or physical threats. If men are unable or unwilling to pay the top price, they must bargain women down. If they still do not have the assets to purchase the sexual property they want, they must persuade or force women into parting with it. Of course, even the "best" bargain a woman can make is fundamentally coercive, since it entails an acceptance of herself of property, and is made from a position of inequality.\(^3\)

Although the property and contract conceptions of rape law eventually end up at the same place — the problematic distinction between coercive and consensual sexuality in society — it is important to separate them. Although the property conception offers an explanation for the specific performance of sexual promises identified under the contract conception, it both over- and under-explains. It over-explains specific performance because, at least as far as women who are classic "open-territory victims"\(^4\) are concerned, it assimilates the privilege to rape accorded to husbands, and boyfriends with

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\(^1\) L. Clark & D. Lewis, supra note 9, at 115-20.  
\(^2\) Id. at 120-24.  
\(^3\) Id. at 129.  
\(^4\) Open-territory victims are women who are "valueless" under the property conception of rape law — "'promiscuous' women, women who are 'idle', 'unemployed' or 'on welfare', living 'common law', 'separated' or 'divorced'" — who are not credible victims, and therefore rapable. Id. at 123.
that accorded to any man in society. Wives, lovers, and social companions are rapable; but not in the same way, and not to the same degree, as prostitutes and "loose" women.15

The property conception also inadequately explains specific performance in the case of "valuable" women because it makes status of such women seem too self-consciously contrived. In explaining the marital rape exemption, for instance, the property conception digs up statements from Hale and Blackstone about the unity of husband and wife (or, merger of the wife into the husband) into one juristic person.16 But no one worth responding to would try to defend the exemption in these terms. They would instead defend it in terms of actual (not hypothetical or presumed) consent implied from wedding vows.

John Harman, for instance, argues that consent pursuant to the marital relationship should properly be viewed as a kind of a license to the husband to have sex. A wife grants blanket permission to her husband, until she decides to revoke that permission by express refusal.17 Harman defends this construction of the marital exemption in terms of his account of harming and consent. Harm is a function of the actual distress created in a situation. This distress can be of two kinds: "situational" — "shock, surprise and anxiety at being involved in an unanticipated situation" — and "reactive" — "the shock and trauma that occur in reaction to the hostile acts of another." Consent vitiates the first kind of harm — because the consenting "victim" anticipated the situation — but never the second.18 Harman's modified marital exemption is thus just because it is premised on the fact that once a wife impliedly (but actually) grants permission to her husband to accomplish sexual access, she will not

15. As Catherine MacKinnon writes: "The law of rape divides the world of women in spheres of consent according to how much say we are legally presumed to have over sexual access to us by various categories of men." MacKinnon, Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence, 8 SIGNS 635, 648 (1983).

16. For a powerful description of the power all men have over "loose" women, see Nestle, My Mother Liked to Fuck, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 468 (A. Snitow, C. Stansell & S. Thompson eds. 1983).


18. Id. at 440. See also Harman, Consent, Harm, and Marital Rape, 22 J. FAM. L. 423, 434-36 (1983-84) [hereinafter Harman, Marital Rape].
be harmed unless she revokes permission, or unless he harms her in Harman's second sense by abusing her.\textsuperscript{19} Harman's theory does not justify only the marital exemption, of course; change wife to "woman," husband to "man," and wedding vow to "prior relation," and he justifies all of the substantive rape law doctrines which I criticize in this essay.\textsuperscript{20}

The property conception has nothing fruitful to say against Harman. It can argue that since women are property, they, like slaves, are legally unable to give or withhold consent to harm inflicted by their masters; thus, Harman's reliance on "consent" is fruitless. But women are not literally the property of men,\textsuperscript{21} and (when they are competent adults) they are not legally unable to consent. The problem with Harman's account is the complexity of, not the capacity to, consent.

The property conception focuses on the ways in which the rape victim is constructed under the law. It most fruitfully explains the ways in which open territory victims become "rapable" --- the abuses of sexual history evidence, lax police response to rape victims, the harshest forms of the marital exemption, and the utmost resistance standard. It is toward these features of the law of forcible rape that feminist criticism allied with the rape reform movement has turned.\textsuperscript{21} But while a property-conception-focused critique can attack the chastity inquiry, it has nothing to say about the universal conduct-with-accused exception to rape shield statutes. It can attack the marital exemption, but has nothing to say against Harman's defense and partial retrenchment. It can attack utmost resistance without having further to say about subtler issues of force and mens rea which are implicated in the construction of the rapist. I do not fi-

\textsuperscript{19} Harman, \textit{Marital Rape, supra} note 17, at 440.

\textsuperscript{20} The interpretation of the marital exemption which he rejects as being indefensible (both as a construction of a just marital exemption and as an accurate account of acts of sexual promising) is precisely the one that I propose to apply to rape law: The idea that implied consent is essentially a contractual promise leads to the notion that it creates a legal right in the husband to sexual relations. The essence of a legal right, in turn, is that the right-holder enjoys a power to compel the performance of (or abstinence from) some act by another. When such a right derives from a contract, the other who can be compelled is usually the other party(ies) to the contract. "Power to compel" means at least noninterference by the state when the right-holder attempts to insure performance. Most often it means intervention by the state on the side of the right-holder to insure performance or compensation by the other party. The exemption of the husband from prosecution for forced intercourse is thus bound intimately to an interpretation of implied consent as a right-establishing contractual promise.

\textit{Id.} at 433-34 (footnote omitted). I differ with Harman when he purports to identify permissive consent-acts with volitional anticipation and assumption of situational harm. I'm not sure how to recognize "volitional" behavior in a regime which enforces a marital exemption.

nally think the property conception is wrong. But I also do not think that it is a universal vantage point from which all of the injustices of rape law can be attacked. I will examine rape law from a different point of view.

II. THE ENFORCEMENT OF EXPECTATIONS IN THE DEFINITION OF THE RAPE VICTIM

A. The Marital Rape Exemption

Lord Mathew Hale's 250-year-old dictum "the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given up herself in this kind unto her husband which she cannot retract," is now part of the received wisdom of the common law in the United States. Only ten states do not recognize the marital exemption in any form, eight by legislative action and two by judicial action; another seven exempt the husband only from lower (usually misdemeanor-level) grades of rape. In two-thirds of the states the exemp-


But the reforms have made the experience of the rape victim in the criminal justice system much less traumatic. J. MARSH, A. GEIST & N. CAPLAN, supra, at 67-84.


For an interesting account of how Hale might have been personally motivated to reach this conclusion, see Geis, Lord Hale, Witches, and Rape, 5 BRIT. J.L. & SOC'Y 26, 40 (1978).


tion applies with full force.

The scope of the exemption's application varies with the nature of the marital relationship. In some states it ceases to apply when the spouses are actually living apart; others require legal separation or a pending application for separation; in two states only a final divorce decree terminates operation of the exemption. But, significantly, at least seven states have expanded the exemption recently to cover not only spouses, but cohabitators and social companions.

1. The Justifications for the Marital Exemption

Hale's presumption of the wife's consent rests on two propositions: (1) a wife is the "mere chattel" of her husband, his to do with what he wishes; and (2) a husband and wife are one legal entity. From this foundation evolved Blackstone's "unities" doctrine, by which the husband and wife were deemed "one person in law": "[T]he very being or legal existence of the women is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything." By virtue of this unity a husband could not rape his wife any more than he could rape himself. Of course, no one takes these legal principles seriously today.

The modern justifications for the marital exemption have in common a notion of the irrevocability of once-given consent to sexual contact, at least until the wife begins to take formal action to dissolve the marriage. One argument asserts that blanket consent is a term of the marriage contract. Another argues that the wife has impliedly consented to permanent access. Since the "marriage contract" is predominantly an implied one, both of these arguments amount to the same thing — that there is something about prior voluntary intimacy which lowers the degree of necessary voluntariness for subsequent acts.

There is yet another justification for the marital exemption which is not often recognized: the ideology of "separate spheres." The

28. See Note, To Have and To Hold, supra note 16, at 1259-60.
32. See Note, Legal Sanction of Spouse Abuse, supra note 16, at 569-70.
33. Id. at 567.
34. Id; Note, To Have and To Hold, supra note 16, at 1256.
35. Note, To Have and To Hold, supra note 16, at 1257-58.
family, and all that occurs within it, is private, contrasted with the public world of politics, economics, and civic life generally.\textsuperscript{38} Human actions, particularly men's actions, are accorded different normative statuses simply by virtue of their occurring within one sphere or the other:

\begin{quote}
[T]he legitimacy of male rule both within and outside the family is reinforced — despite the challenges to it that are inherent in individualism — on the grounds that the interests of the family are totally united, that family relations, unlike those outside, are based only on love, and that therefore husbands and fathers can be safely entrusted with power within the household and with the right of representing their families' interests in the political realm.\textsuperscript{39}
\end{quote}

Therefore, when men force their wives to have sex, the act is not rape, because rape does not occur in the family; instead, the wife was performing "the noble and benign offices of wife and mother."\textsuperscript{38} However, it is easy to overstate this argument: first, because the family is becoming increasingly "deprivatized" as the welfare state intervenes; second, because it is by no means clear that the erection of a zone of legal privilege around the exercise of male power in the family makes the family "private."\textsuperscript{39} But, if there is any feature of life to which the ideology of privacy strongly attaches, it is the marital bed. Rape disappears behind the veil draped about the family, and the experience of raped wives is erased from the public record.

The separate spheres justification is sometimes dressed up in modern constitutional language and presented as a privacy justification. While sexual exploitation is regrettable, this argument goes, as long as it is nonviolent it cannot be criminally addressed without trampling upon \textit{Griswold v. Connecticut}'s\textsuperscript{40} principle of marital privacy. Removing the marital exemption would obligate the state to violate the sanctity of the bedroom by investigating the most intimate details of a couple's sexual and emotional lives. But \textit{Griswold}'s progeny — most notably \textit{Eisenstadt v. Baird}\textsuperscript{41} and \textit{Roe v. Wade}\textsuperscript{42} — strongly affirm a woman's right to bodily integrity. State protection of the

\textsuperscript{37} \textit{Id.} at 74 (emphasis supplied).
\textsuperscript{38} Note, \textit{To Have and to Hold}, supra note 16, at 1257-58.
\textsuperscript{40} 381 U.S. 479 (1965).
\textsuperscript{41} 405 U.S. 438, 453 (1972) (all persons have a right to access to contraception).
\textsuperscript{42} 410 U.S. 113, 152 (1973) (women have a right to terminate pregnancy before viability).
man’s interest in preserving sexual/marital privacy during the course of a rape trial or investigation cannot stand over a woman’s stronger right to bodily integrity, without a compelling state interest.\textsuperscript{43}

There are several pragmatic excuses for the marital exemption: (1) It is feared that removing the exemption will allow wives to use rape accusations for blackmail.\textsuperscript{44} This is a charge which is always leveled at potential rape victims — that they will lie — and never proven, since there is no evidence that rape is falsely reported more than any other crime.\textsuperscript{45} (2) Difficulties of proof are also raised,\textsuperscript{46} although they are no more difficult in marital rape than in other kinds of rapes. (3) The possibility of reconciliation is often raised along with the observation that criminal charges or investigation would certainly make this impossible.\textsuperscript{47} This last excuse is undoubtedly true — but it is not much of an excuse. What kind of reconciliation would this be? On whose terms? Such reconciliation more often demonstrates “psychological dependence upon a violent, abusive husband” then it does genuine healing; sexual intimacy does not erase violent blows (although the converse is true).\textsuperscript{48}

2. The Role of Expectations

Except for the “mere chattel” justification, which has not been taken literally since the days of Lord Hale himself, the justifications for the marital exemption, and the excuses offered against its repeal, show that expectations of subsequent sexual access attached to prior voluntary acts are perceived to legitimately lower the amount of willingness required to validate sexual overtures. By marrying, women raised expectations that men were entitled to enforce.

Seen in this light, legal doctrine seemingly opposed to the marital exemption become an entrenchment of it. For example: An Arizona case, \textit{State v. Bateman},\textsuperscript{49} involved the conviction of a man on sodomy charges for the oral rape of his wife. The court rejected the privacy justification, noting that none of the privacy cases involved “sexual misconduct”: “Certainly the State retains a compelling interest in protecting its citizens from violence even if the combatants are married to one another.”\textsuperscript{50} One student note concluded that \textit{Bateman} and similar cases “indicate a trend toward judicial recogni-

\begin{itemize}
\item \textsuperscript{43} See Note, To Have and to Hold, supra note 16, at 1262-64.
\item \textsuperscript{44} Freeman, supra note 16, at 19.
\item \textsuperscript{45} On the contrary, false reports of rape are probably less frequent than of other crimes. S. Katz & M. Mazur, UNDERSTANDING THE RAPE VICTIM: A SYNTHESIS OF RESEARCH FINDINGS 212-13 (1979).
\item \textsuperscript{46} Freeman, supra note 16, at 18-19.
\item \textsuperscript{47} \textit{Id.} at 19-20.
\item \textsuperscript{48} Note, To Have and to Hold, supra note 16, at 1268-69.
\item \textsuperscript{49} 113 Ariz. 107, 547 P.2d 6 (1976).
\item \textsuperscript{50} \textit{Id.} at 109, 547 P.2d at 9.
\end{itemize}
tion that forced sexual relations should not be protected within the marital relationship. ¹⁶¹ But Bateman does nothing of the kind; all it does is affirm the State's ability to proscribe certain kinds of sexual acts. Bateman's actions went beyond the terms of the marriage contract, as the state defined it. By drawing a careful line between rapes that fall under the terms of the contract (those involving "normal" sex) and rapes that do not (those involving "unnatural" sex), and affirming the state's police power to punish those which do not, the Bateman court sharpened the marital exemption. To the extent that Bateman limits the scope of the exemption, it also legitimizes it.

As the marital exemption is broadened to include cohabitators and social acquaintances, ¹⁵² it will become increasingly difficult to view it in terms of the marriage contract. Instead, we must see the exemption as a particular application of a more general proposition, by which proximate (social) relations with men lower a woman's options for autonomously choosing her sexual behavior. In the official commentary to Hawaii's criminal code there appears a statement of this proposition's relationship to the way wives (and girlfriends) are treated under rape law, regardless of the specific doctrine involved:

The degree and nature of the victim's acquaintance with the actor as a mitigating circumstance . . . is based on the theory that a person who resorts to sexual aggression against a female who has permitted previous sexual intercourse, and who has thereby furnished to some extent an incentive to further amorous advances, presents less of a social danger than the person who commits sexual aggression against a female who is not his voluntary social companion or with whom he has not been previously familiar. Moreover, a male who forces sexual intercourse in such situations does not deserve the same degree of moral condemnation, as the male who forces sexual intercourse upon a female with whom he has little or no acquaintance. ¹⁵³

Does the acquaintance-rapist really represent "less of a social danger?" On the individual level, he probably does more harm than his nonacquaintance counterpart performing essentially the same actions. Fear is the most common form of psychological distress found among victims of rape and attempted rape. ¹⁵⁴ Measured in terms of

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¹⁵¹ Note, The Marital Rape Exemption, supra note 16, at 578.
¹⁵² See supra note 29 and accompanying text.

consequent perceptions of social safety, the intensity of subsequent fear seems to be a function of the experience itself. If some kind of penile contact takes place, one study found that four-fifths of survivors experienced diffuse fear or fear that severely impaired functioning; if none took place (even though other kinds of sexual contact, like digital penetration, did), only a third of the survivors experienced fear at this level (although everyone experienced some fear regardless of the circumstances). Thus, it is not the identity of the actor, but the character of the act, that determines the degree of subsequent fear.

The second most frequent consequent psychological distress among rape victims is self-blame. Self-blame can be adaptive or maladaptive, depending upon its direction and ability to be put to constructive use: where it is “situational” (focused “on one’s own behavior”) it can function to aid the victim’s control over a fearful world; where it is “characterological” (focused on “an overall view of the kind of people individuals perceive themselves to be”), it can lead to self-condemnation and moral despair.

In the case of rape, for example, a woman can blame herself for having walked down a street alone at night or for having let a particular man into her apartment (behavioral blame), or she can blame herself for being “too trusting and unable to say no” or a “careless person who is unable to stay out of trouble.” Situational self-blame leads (1) to a belief that the victimization was “caused” by modifiable behavior, and (2) that the victimization can be avoided in the future; both of these restore control and provide less of a basis for diffuse fear. On the other hand, characterological self-blame leads the victim (1) to believe that she can do little or nothing about her vulnerability, and (2) to “begin to perceive herself as a chronic victim.”

Characterological self-blame is more likely to be correlated with acquaintance rape. We should thus expect that, individually, acquaintance-rapists are going to harm their victims more, if only to the degree that characterological self-blame is likely to follow their acts. Perhaps, then, the Hawaii commentary tries to suggest that acquaintance-rapists are less of a social danger in the aggregate because stranger-rapists are far more common. However, this is not

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56. Janoff-Bulman, supra note 54, at 1801.
57. Id. at 1799.
58. Id.
59. Id. at 1802.
60. Id. (emphasis added).
61. See, e.g., Bart, A Study of Women Who Were Raped and Avoided Rape, 37:4 J. Soc. Issues 123, 131-35 (Fall 1981) (women are much less likely to avoid threatened rape when they know the man who threatens them).
supported by available research on rape. Although the rates attributable to strangers vary enormously, depending upon the age of the victims, the source of reports (reported or unreported rapes), the city, and the way “stranger” is defined by the study, at least a third and perhaps as many as a half of all rapes are committed by acquaintances.\(^2\)

And how is he deserving of less “moral condemnation?” Trust is the foundation of the human activities which we consider susceptible to “further amorous advances.”\(^3\) And trust is a significant ethical category, a deep source of moral value in human arrangements.\(^4\) The acquaintance-rapist commits an egregious violation of trust, far worse than the stranger, because he does violence to twice-given trust: first, his victim invests in him the minimal social trust any person would receive; second, he is specifically trusted by her when she lets him enter her life, increasing her vulnerability to his coercive behavior. It is probably splitting fine moral hairs to assert that the stranger-rapist is less morally culpable for his violation of trust than the acquaintance; but it is outrageous to boldly state the reverse.

What the Commentary may mean is that men who enter into proximate relations with women — particularly relations open to “further amorous advances” — invest an expectation in sexual access. Then the lesser social danger and moral blameworthiness of the acquaintance-rapist is clear. He is doing something which is normal and rightful — taking what is legitimately his. The application of contractarian thinking to such a relation represents a denial of the autonomous choice of women and is forcefully emblematic of the second-class status of the women to whom this doctrine applies.\(^5\)

Fifteen percent or more of married women are forced to grant their husband sexual access against their will.\(^6\) Some call this rape. The law, by and large, does not; and in so doing it erases the experience completely, leaving the victims to suffer in silence.

\(^{62}\) See S. Katz & M. Mazur, supra note 45, at 108-16.


\(^{65}\) Baier, supra note 64, at 241.

\(^{66}\) D. Russell, Rape In Marriage 57-72 (1983).
B. The Conduct-with-Accused Exception to Rape Shield Statutes

1. Conduct-with-Accused Evidence

At one time it was quite common to hear commentators claim that the rape victim was subject to double victimization: once by the rapist, and once by the criminal justice system. If the victim survived the police investigatory process without having her claim deemed unfounded, and saw the complaint go to trial, she would have to ready herself for the most unsolicitous treatment afforded any victim of crime in our system. Her cross-examination by the accused’s attorney would generally be “grueling,” covering the rape in minute detail. She might be asked if she enjoyed the experience. And finally, she would be interrogated at length about her sexual history, all the while being humiliated by the defense counsel’s (not always) unspoken accusations of promiscuity and dishonesty. The justification for this interrogation, in the prosaic and oft-quoted words of People v. Abbot, is this: “[W]ill you not more readily infer assent in the practiced Messalina, in loose attire than in the reserved and virtuous Lucretia?” In the early 1970s this type of interrogation would occur, although without the classical allusions.

Sexual history evidence, when it was routinely admitted, was presented as a species of “character” or “propensity” evidence, offered to demonstrate “that a person possessing a particular character trait acted in conformity with that trait on the occasion in ques-
A description of a person’s general propensities or character is hardly, in any meaningful sense, an account of what caused a particular act, let alone a prediction of the act’s occurrence. Thus, such evidence was generally inadmissible, except for a few particular purposes, in criminal trials. The accused was allowed to introduce character evidence in order to demonstrate (1) that he or she was known for or possessed a generally good character in the community (character witnesses), (2) that the victim was of bad character (in homicide or rape cases), and (3) that the witness was not credible.

But under the “multiple uses” doctrine, evidence which was ostensibly offered for a non-character or non-propensity purpose, but which would allow the jury to independently draw character inferences, was admissible under the traditional standard (i.e., the offered evidence’s relevance outweighed its inflammatory nature).

Sexual history evidence by its very nature serves as the basis of simultaneous inferences. First, it goes to the credibility of the complainant “based upon the theory that a moral flaw in one area of her character (sexual laxity) reflected on other aspects of her character (e.g., honesty) as well.” Second, it goes to the actual issue of consent on the theory that a woman who said yes once will likely say yes again. I will not deal with the first point, the theory of Lucretia and Messalina, which divides the world into good women (those who don’t) and bad women (those who do); it is of little persuasive value today. The second point, however, is one that lingers in various forms, and it is worth seeing how intelligent and sensitive people might agree with it, and in what ways they would be wrong to do so.

A “modern” argument for the admissibility of general sexual history evidence, one which does not fall simple-mindedly into the good woman/bad woman prejudice trap, would go something like this:

72. Galvin, Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade, 70 MINN. L. REV. 763, 777 (1986); see also Berger, supra note 69, at 55-56.


74. See Galvin, supra note 72, at 781-87.

75. Id. at 788-91.

76. Letwin, supra note 73, at 46.

77. But note how the property-centered conception of rape law explains this rationale: Messalina and Lucretia are only ideologically moral types; in reality, they are market types. Messalina is the valuable/valued sexual commodity, Lucretia the poor trustee and waster. Under the martial exemption, the property conception elucidates an outmoded justificatory structure.
While all references to "prior unchastity" (or other pejorative language) would appropriately be stricken from the approved courtroom rhetoric, prior sexual activity should simply be seen as a morally neutral basis for inferring subsequent consent. Prior sexual indulgence is, in this view, not offered to prove morally reprehensible behavior; rather, it is offered because it suggests a receptivity, an interest, a taste, or at the very least, the absence of unalterable antipathy, and perhaps, depending on frequency, even some enthusiasm for the activity.\footnote{78}

There are good reasons to be skeptical about this argument. Relatively little is understood about sexual behavior; the jury "will not be well equipped to draw rational inferences from the complainant's earlier sexual experiences."\footnote{79} Even if the evidence is not offered on sexually-stereotypic premises, there is no guarantee the jury will not put it to stereotypic use.

It is not fanciful to suppose that jurors confronted with evidence of a previously sexually active rape complainant will adopt unarticulated premises such as: "She got what she deserved," i.e., even if she were raped, she has at long last been punished for past misdeeds; she is previously "damaged property," i.e., she lacks purity and has therefore suffered no great additional harm; or "All women want to be raped," and the evidence of prior "unchaste" conduct is somehow seen as brilliant confirmation of these widespread male fantasies.\footnote{80}

A New Jersey study of public attitudes toward rape confirms this. One thousand fifty-six people were asked to agree or disagree with a series of statements. The following illustrate most clearly these prejudices: "In forcible rape, the victim never causes the crime." (thirty-seven percent concurred); "A raped woman is a less desirable woman." (fourteen percent concurred); "Most women secretly desire to be raped." (thirteen percent); "It would do some women some good to get raped." (ten percent); "Women provoke rape by their appearance or behavior." (sixty-six percent); "In most cases when a woman was raped, she was asking for it." (eleven percent); "Rape of a woman by a man she knows can be defined as a 'woman who changed her mind afterward.'" (twenty-nine percent); "A raped woman is a responsible victim, not an innocent one." (sixteen percent.)\footnote{81}

The "modern argument" resurrects the probative worth of sexual history evidence, but does nothing to alleviate fears about the prejudicial effect of such evidence. It is thus simply not an argument that, in any significant way, is about the relevance of sexual history evidence.

\footnote{78} Letwin, \textit{supra} note 73 at 57.  
\footnote{79} \textit{Id.}  
\footnote{80} \textit{Id.} at 57-58.  
\footnote{81} H. FEILD \& L. BIENEN, \textit{JURORS AND RAPE: A STUDY IN PSYCHOLOGY AND LAW} 50-51 (1980).
2. Rape Shield Statutes

Rape shield statutes, which control the introduction of sexual history evidence in rape cases, exist in some form in forty-eight states, the federal courts, and the military courts-martial. In Arizona the sexual history of rape victims is shielded by judicial decision. In Utah there is no rape shield at all, and chastity or sexual history is admissible on the issue of consent.82.

There are four basic rape shield schemes;83 these are their chief features:

(1) Twenty-four states84 follow Michigan’s lead in barring the admission of any sexual history evidence, for any purpose, with two exceptions: sexual history with the accused and explanation of physical evidence. Only two of these states—Montana and Virginia—impose any kind of proximity requirement on the admission of evidence regarding sexual history with the accused. Arizona does not have a rape shield statute, but its judicially-defined standards follow these approaches. In State ex rel. Pope v. Superior Court,85 the Arizona Supreme Court held that (a) sexual history evidence which goes to character is inadmissible, and (b) evidence of prior acts which goes to consent is also inadmissible unless it is offered to establish sexual history with the defendant, to rebut physical evidence, or to rebut prosecution claims about the complainant’s chastity. Evidence which falls under any of these exceptions must be admitted after an in camera determination of relevance.86

83. Galvin, supra note 72, at 773-76.
85. 113 Ariz. 22, 545 P.2d 946 (1976).
86. Id. at 29, 545 P.2d at 953.
(2) Eleven states[^87] declare that sexual history evidence is admissible if the judge rules in camera that it is relevant. Alaska and New Jersey impose a slightly stricter rule, requiring (a) the relevancy determination to take the complainant's privacy interests into account, and (b) a heightened level of relevancy scrutiny where the offered evidence bears on sexual history older than one year prior to the act in question. Colorado, Rhode Island, and Wyoming specifically exempt evidence of sexual history with the accused from the operation of their statute.

(3) In the federal courts[^88], the military courts-martial[^89] and five states[^90] sexual history evidence is barred unless (a) the court in camera finds evidence of sexual history with the accused or explanation of physical evidence relevant, or (b) the evidence must be admitted to save the trial from constitutional infirmity[^91].

(4) Five states[^92] bar all sexual evidence going to the issue of consent except for history with the accused, but permit evidence impeaching the credibility of the complainant[^93]. Two states[^94] reverse this, banning credibility evidence but allowing evidence of sexual history generally which goes to the issue of consent[^95].

In forty-six states, the federal courts, and the military courts-martial, evidence of the victim's sexual history with her rapist is admissible on a minimal showing (its probativeness must outweigh its prejudicial effect). In two states this inquiry is tempered with a one-year proximity rule, so that evidence of sexual behavior more than one year before the alleged rape is presumptively inadmissible. In two more states this proximity requirement is attached to a heightened analysis which takes the complainant's privacy interests into


[^88]: FED. R. EVID. 412.


[^91]: For a discussion of the constitutional dimension of rapeshield provisions, see infra notes 107-112 and accompanying text.


[^93]: Galvin, supra note 72, at 894.


[^95]: Galvin, supra note 72, at 900.
account.

3. Justifications for the Exception

The justification for the conduct-with-defendant exception is not apparent on the surface. Why doesn't the argument offered above against the general use of sexual history apply with equal force to this specific use? One student note, for instance, recognized that this exception limits the effective scope of women's sexual choice, but still unambiguously endorsed its validity. I am going to examine a number of justifications advanced for this exception in order to demonstrate that none of them can justify it without reliance on the validation and enforcement of expectations of sexual access.

Harriet Galvin summarily concludes that such evidence "is probative of the complainant’s state of mind toward the particular defendant, permitting an inference that the state of mind continued to the occasion in question." Hers is the dominant view, which takes the exception as one of the intuitions which underlie the justification of rape shield statutes generally. Professors Wright and Graham modify this position slightly by limiting the scope of the exception to proper handling, which means not applying it where there is "uncontroverted and credible evidence of the use of force." They also offer two feeble excuses for retaining the exception: (1) allowing such evidence will not deter reporting, one of the infirmities of the old regime, since most rapes are stranger rapes; and (2) the harshness of the exception is mitigated by the judge's determination of relevance before admission of such evidence. If there is any substance to this line of thought at all, I suppose, as Vivian Berger argues, that it just makes sense to most of us to suspect the nonvoluntariness of someone in a sexual relationship:

Although in unusual circumstances (a "one night stand" some ten years earlier) even this could be deemed irrelevant, a history of intimacies with the accused would ordinarily tend to bolster a claim of consent to yet another sexual encounter. The inference from past to present behavior does

97. Galvin, supra note 72, at 815.
100. See supra note 62 and accompanying text.
101. C. WRIGHT & K. GRAHAM, supra note 98, at 599-600.
not, in the cases of third party acts, rest on highly dubious beliefs about "women who do" and "women who don't" but rather relies on common sense and practical psychology. Admission of the proof "supplies the accused with a circumstance making it probable that he did not obtain by violence what he might have secured by persuasion . . . ." 102

Kenneth Ordover justifies the exception on the basis of a pattern of similar behavior which is inherently more probative than general propensity evidence:

The approach suggested here will limit admissibility to evidence demonstrably related to the conduct presently under investigation — i.e., past conduct occurring under circumstances substantially similar to those of the alleged rape. This view comports with longstanding evidentiary principles. For example, if the prosecution seeks to prove that robbery defendant X is the same person who robbed others under similar circumstances, the prior acts may be offered to show a modus operandi pointing to identity. Evidence of the prior robberies should be admissible only if there is clear and convincing proof that X committed the robberies and that the method was nearly identical to circumstances of the present case. This reasoning allows the factfinder to draw an inference of present conduct from past acts. 103

On this view it is the nature of the acts which make up the complainant's sexual history, not their mere existence, which is probative. 104 Ordover asserts that the common theme running through the kinds of acts admissible as evidence under the exception — that they involved sexual conduct with the accused — is sufficient to satisfy his "pattern-of-behavior" standard for probativeness. But he also paradoxically concludes that "dissimilar" acts of sexual conduct would be properly admissible in this special instance, as long as their dissimilarity is not "marked," or there is evidence of "proven force." 105

Leon Letwin offers an independent ground of justification for the exception:

The goal of rationally untangling what happened between two persons on the charged occasion requires one to understand the history of their sexual relationship. Quite apart from any character implications, this prior relationship bears too heavily on the complainant's probable conduct on the charged occasion, as well as on the motivation for her present accusation, to be excluded. 106

I take his point to be that when rape is charged within a sexual relationship, a criminal court must function as a quasi-family court, be especially sensitive to the possibilities of reconciliation, and be especially sensitive to the possibility of false accusation.

Finally, some commentators argue that the conduct-with-accused

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102. Berger, supra note 69, at 58-59 (quoting Bedgood v. State, 115 Ind. 275, 279, 17 N.E. 621, 623 (1888)).
103. Ordover, Admissibility of Patterns of Similar Sexual Conduct: The Unla-
mented Death of Character for Chastity, 63 CORNELL L. REV. 90, 113 (1977-78).
104. Id. at 93.
105. Id. at 117.
106. Letwin, supra note 73, at 72.
exception is one of a small handful of exceptions which any rape shield regime must possess in order to be constitutionally secure. The sixth amendment's confrontation and compulsory process clauses form the basis of a unitary right of the accused to present relevant testimony on his or her behalf in a criminal proceeding.\(^{107}\) The Supreme Court uses a balancing test to judge restrictions on the introduction of evidence, weighing the state interest in exclusion against the accused's right to offer relevant evidence in his or her defense. The strength of the accused's interest, naturally enough, is substantially a function of the probativeness of the evidence in question. In *Chambers v. Mississippi*,\(^{108}\) for example, the accused was prevented from calling as a witness a man who had confessed, and then repudiated his confession, to the murder with which the accused was charged because of a state evidence rule which barred the impeachment of any witness by the calling party. The Court held that Mississippi's justification of this "remnant of primitive English trial practice"\(^{109}\) was insubstantial when compared to the probativeness of such evidence and the effect that it would have on the accused's defense. In *Davis v. Alaska*,\(^{110}\) the Court held that a juvenile-shield law (which barred evidence concerning the criminal record of a juvenile) could not bar character evidence impeaching the juvenile witness, where his testimony was crucial in the case. What tips the constitutional balance in favor of rape-shield provisions is the substantial privacy interest which a sexual history inquiry threatens; but rape-shield laws are also truth-enhancing, since the admission of sexual history evidence distorts the jury's view of the case in terms of conventional sexual mores.\(^{111}\) Yet the consensus is that rape shield provisions must minimally exclude two categories of uses from their prohibitions in order to pass constitutional muster: (1) Proof of specific instances of previous sexual conduct which explain the physical evidence introduced by the prosecution (semen, pregnancy, venereal disease, etc.); and (2) evidence of the complainant's sexual history with the accused.\(^{112}\)

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109. *Id.* at 296.  
111. See *Galvin, supra* note 72, at 806; *see also* notes 80-81 and accompanying text.  
112. *Id.* at 807-08.
4. The Role of Expectations

We are now in a position to review the various justifications offered for the exception, and to weigh the constitutional mandate attached to it. We shall see that without the enforceability of expectations as a given premise, no justification for the exception can work.

The bald-faced assumption of Galvin, Berger, and others, who treat the exception as a basic intuition which any rape shield regime must cover, is essentially a "lingering consent" argument: the victim's consent to sexual activity is presumed to exist through time to cover at least one other discrete act, the purported rape, unless there is some clear "break" in the "chain" of consensual contact(s). By permitting the accused to raise in the minds of the jury an inference that such a chain existed, the exception forces the prosecution to prove that this break occurred, and that it was sufficiently clear to the accused. Thus, the strength of the "break" must be commensurate with the strength of the expectations. In other words, when a woman raises expectations, she must go to extra means to say no, and have her "no" taken seriously.113

Ordover's pattern-of-behavior justification for the exception generally fails on its face. The spirit of his test requires that the fact which serves as the inclusion criterion for the pattern be relatively specific and unique to the point being proved. "Sexual contact with the accused" is not sufficiently specific to make evidence admissible under the exclusion any more probative than the general run of sexual history evidence which Ordover explicitly rejects as nonprobative. If we separate the kinds of evidence presumptively admissible under the exception into two categories — "sex with accused" and "sex with accused plus other common characteristics" — then we would be able to tease out a class of proposed facts ("sex with accused plus") which were so probative that under Davis v. Alaska they would be admissible even if the general exception did not exist. However, this evidence does not require a conduct-with-accused exception, since it would be admissible under an omnibus constitutional-infirmity exception. Such an exception is already present in many, and would probably be construed into most other, shield statutes to save them in the face of a constitutional challenge. The other evidence, whose admission is not constitutionally required, is insufficiently probative on Ordover's criterion to merit admission, and a general exception to admit such evidence is justifiable only on the terms of the previous argument.

The most sensible justification is the one offered by Letwin; but it proves little. His "helping-professions" approach to rapes which oc-

cur within a relationship represents an attempt to turn criminal court into family court proceedings. Given his own argument about the “slippery-slope” effects of admitting general sexual history evidence (it allows the jury to impose prejudicial and unfounded notions of conventional morality to the detriment of the ban on chastity-for-character evidence), there is little reason to turn his sensible point into a general justification for the exception.

Although rape shield laws signal an improvement in women’s sexual autonomy (by removing some of the possibility that conventional morality will be used to frustrate women’s sexual choice), they possess one pervasive and common flaw: they allow the introduction of evidence concerning past sexual conduct between the complainant and the accused. While such evidence may not necessarily allow conventional moral beliefs to impeach the complainant unjustly, they support the inference that the complainant “belongs” to the defendant (she is his lover), or that she has issued (in express or implied terms) blanket consent to sexual contact — perhaps even the contact which prompted her to file charges. Assuming the propriety of enforcing, to some degree, men’s expectations of continued sexual contact, the exception is justified. Such evidence is probative since it will help the jury understand the degree to which such expectations should be presumed to alter the degree of sexual choice which the woman is entitled to exercise. But without that assumption, evidence under the exception is no more probative than the complainant’s sexual history in general, which is admittedly (except in Utah) non-probative. And without this probativeness, the accused’s interest in introducing it will not be strong enough to outweigh the state’s interest in protecting women’s sexual choice.

III. THE ENFORCEMENT OF EXPECTATIONS IN THE DEFINITION OF THE RAPIST

Force, resistance, mistake, and mens rea all dance in a hectic orbit about one another. It is impossible to talk about any of these issues in terms other than of the other three. Taken together, the culpability of men for rape is set at that point where no reasonable man can possibly ignore the brutality of his actions. That men have a duty to be careful, to inquire carefully about the voluntariness of women, to refrain from exploiting subtle weaknesses, is fairly unthinkable. Only the willfully brutal man is clearly guilty of rape. Thus, the rapist is

114. See supra note 80 and accompanying text.
constructed to be a man who acts upon unreasonable expectations of sexual access.

A. The Resistance Standard

Rape law has traditionally been skeptical about relying upon consent acts as reliable indications of a woman's willingness to have sex. The Neo-Freudian commentators of the 1950s and 1960s (including the drafters of the Model Penal Code) resorted to a number of arguments to support their belief that an inquiry into the victim's mental state was too uncertain a premise for criminal liability for rape: (1) It is difficult to know when a woman is really being coerced into sexual contact, or when her outward "no" is an inward "yes," especially when social convention requires her to refuse sexual access to all but her husband. (2) She may have had no clear attitude at all about the sexual act. Caught between social pressures to remain chaste and other kinds of pressures (internal and interpersonal) to engage in sex, she might have been psychologically as well as behaviorally ambivalent. (3) She may be masochistic, attracted to men whose seductions would brutalize and shock the average conscience. (4) She might have been the actual precipitator of rape, unconsciously wishing to exorcise a general fear of rape by undergoing an actual one.

In response, the courts attempted to shift away from a vague inquiry into the victim's state of mind and toward an easily ascertainable and unambiguous fact in the world: whether the woman resisted, and whether the man accomplished the sexual contact by means of force. These are really flip sides of the same inquiry. The advantage to a resistance standard, it is argued, is that it allows the court to examine "actual conduct," not vague intention. But consent is conduct—a very wide range of both physical and verbal acts. The conduct which the resistance standard examines is not a proxy for consent—it is a direct indication of consent. This conduct consists of those actions which turn a "seduction" into a "rape."

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course, merely a circle: resistance is an objective indicia of rape because it indicates that the sexual contact in question was not a consensual seduction. Apart from the consent standard, the resistance/force inquiry has no meaning. The resistance standard is not a rejection of the consent standard but a reformulation of it in more definite terms in the world.\footnote{119}

The reason that the resistance standard works at all is because vigorous resistance ties three "subjective" facts together into one "objective" fact: (1) The victim's nonconsent can be inferred from her active resistance; (2) the man's intention to proceed either against her wishes, or in spite of her refusal, can be inferred from his application (and escalation) of force; and (3) the interaction between force and resistance make it likely that the man's attention was directed toward the woman's resistance, and hence her nonconsent. Proceeding from the fact that the underlying act of rape — sexual contact — occurred, evidence of force overcoming resistance allows the court to infer that the victim did not consent, that the accused had the mens rea of rape, and that the accused was aware of the victim's nonconsent.\footnote{120} Only ten states have done away with the resistance standard completely.\footnote{121}

Susan Estrich identifies two broad consequences of using resistance as a proxy for mens rea and consent. First, the focus of inquiry rests upon the victim, making her character — her resilience, valor, toughness — the turning-point for liability. A woman who fails adequately to resist against force that is insufficient to infer mens rea is accordingly "blamed" for her injury, in the sense that she was too weak to protect herself.\footnote{122} As one judge puts it:

\begin{quote}
Law, in Sexual Practices and the Medieval Church 141, 143-47 (V. Bullough & J. Brundage eds. 1982). Criminal liability for acts amounting to stuprum withered away into statutory rape, until rape reformers began to reintroduce it in the form of lower-grade sexual assault.\footnote{119} See id. at 684-88.

\footnote{120} See Estrich, supra note 116, at 1099 ("The definitions of nonconsent as resistance — in the older cases, as utmost resistance . . . — functions as a substitute for mens rea to ensure that the man has notice of the woman's nonconsent.") (footnotes omitted).


\footnote{122} Estrich, supra note 116, at 1099-1100.
She must follow the natural instinct of every proud female to resist, by more than mere words, the violation of her person by a stranger or an unwelcomed friend. She must make it plain that she regards such sexual acts as abhorrent and repugnant to her natural sense of pride. It hardly occurs to proponents of the resistance standard that they may be asking too much of rape victims. Many rape victims freeze when they are caught between the outrage of rape and the (probably greater) outrage of bodily injury or death. Their first response is shock, followed by fright and panic. The panic may become “frozen panic” or a kind of “psychological infantilism” whereby the victim disassociates (becomes passive), giving up all claims to sexual autonomy in exchange (hopefully) for survival. In cases where there is no doubt about there having been sexual contact between an unwilling victim and accused, the crucial issue is not the man’s guilt for rape but whether a “rape” occurred at all. The victim’s hurt is totally erased if the rapist is not fully culpable. Paradoxically, the woman who is too weak to protect herself from harm is seen as unharmed by the very actions against which she cannot protect herself. Second, the resistance standard’s internal logic leads to overbroad application. Even where the accused clearly possesses the mens rea for rape, a lack of resistance will exculpate him. Thus, the accused can “bootstrap” himself into a higher level of review. Even if his mental state is proven beyond a reasonable doubt, he cannot be guilty unless he picks a victim of sufficient vigilance and valor to resist. The resistance standard compels courts to conclude that even in cases where there is no doubt as to nonconsent, where there was no force used to accomplish sexual contact — because the victim was too afraid to resist — there was no rape. As Estrich puts it, “the woman was not forced to engage in sex, but the sex engaged in was against her will.” Such conclusions are paradoxical, unless one adopts as the paradigm case of “force” the “traditional male notion of a fight.” Estrich is right in concluding that “[t]o say that there is no ‘force’ in such a situation is to create a gulf between power and

125. Estrich, supra note 116, at 1100.
126. Thus, the “reform” of rape into a graded assault-based crime, which is supposed to “reaffirm that all citizens are equal under the law,” (Schwartz & Clear, Toward a New Law on Rape, 26 Crime & Delinq. 129, 136 (1980)) ties gradation of rape, not to the seriousness of the rape (can women be raped “a little”?), but to the willingness of the victim to risk bodily injury. Giacopassi & Wilkinson, Rape and the Devalued Victim, 9 Law & Hum. Behav. 367, 375 & n.2 (1985).
127. Estrich, supra note 116, at 1100-01.
128. Id. at 1111.
force, and define the latter solely in schoolboy terms." The resistance standard is interpreted through this idea of force: "[f]orce is when he hits me; resistance is when I hit back."

It is unproblematic to inculpate a man on the basis of resistance and concomitant force. It is equally unproblematic, in nonforce/nonresistance cases, to inculpate him on the basis of an intent to overcome the woman's will to resist. But where he is blamelessly unaware that he has overcome her will by force, he has not satisfied the mens rea for rape. However, the resistance standard departs from these grounds and treats nonforce/nonresistance cases under what is really a proximate cause rubric, asking whether the defendant intended his actions to overcome the will of a reasonable woman, or whether a reasonable woman would have actually been overcome. If the accused did not intend to overcome the will of a reasonable woman through fear, and the complainant actually was overcome, then the resistance standard concludes that her unreasonableness is an independent intervening cause which stands between the defendant's acts and the harm. The cases do not talk in terms of causation; but their logic is that but for the unreasonableness of this victim, a rape would not have occurred; a reasonable woman would have resisted, and this unintending "rapist" would have stopped.

To summarize Estrich's thesis: the schoolboy idea of force and the proximate cause test combine to mark off a group of women who are ipso facto rapable, and who deserve whatever harm flows from their status. In so doing it ignores the issue of mens rea, shifting the responsibility for vigilance from men to women. It creates a world in which men are allowed to act according to their expectations of sexual access, protecting such expectations unless they attach to a woman who is unafraid and willing to resist. As such, the difference between the legitimate inference of mens rea from force and the illegitimate exculpation of men on the basis of proximate cause constitutes, in part, a denial of the sexual autonomy of women.

B. The Mistake-of-Fact Defense

The resistance standard enables courts to tie mens rea and the victim's unwillingness to have sex into an easily ascertainable fact in

129. Id. at 1112.
130. Id. at 1105.
131. See id. at 1117-18.
132. See id. at 1118.
the world. Under it some courts have even gone as far as to suggest that there is no mens rea for rape; that, in effect, without a valid consent defense a man is strictly liable for sexual contact which takes place under conditions of force. Of course this is nonsense. Rape, like all of the other serious crimes against the person, has a mental element, and by and large that element is intent. The actus reus of rape is sexual contact with a woman when she is not consenting. The mens rea is intention to perform the actus reus; or, intention to have sexual contact regardless of the woman’s consent. Since performance of the core act (sexual contact) is virtually impossible without intention (setting aside rare cases of physical compulsion), the focus of mens rea inquiry has been in regard to the attendant circumstances — the woman’s consent.

In D.P.P. v. Morgan, the English House of Lords had to decide whether a mistake of fact as to consent had to be both honest and reasonable in order to act as a defense, or whether the mistake need only be honest. This issue is equivalent to a debate about which mens rea going to the attendant circumstance of victim’s consent is necessary for liability: recklessness or negligence. If you believe that mistakes must be honest and reasonable, then you are imposing a negligence mens rea with regard to consent. If you believe that honesty alone will suffice to exculpate (as the Morgan court did), then you are requiring a mens rea of recklessness (that is, you are asserting that negligence with regard to consent is not sufficient for criminal liability).

When a defendant raises the mistake-of-fact defense, he concedes

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For reasons that are somewhat mysterious to me, George Fletcher disagrees. He asks us to imagine a scale of contact in increasingly incriminating order: “touching”; “sexual contact”; “forcible sexual contact”; and “non-consensual, forcible sexual contact.” Touching, he rightly argues, is too “routine” to serve as the basis of the actus reus of rape; sexual contact is not. Thus, sexual contact requires a “good reason” to occur, analogous to tort principles which require the consent of a touchee or a medical emergency to insure constructive consent. “This seems to me to be sufficient to regard the definition of rape as sexual penetration, with consent functioning as a ground for regarding the sexual act as a shared expression of love rather than as an invasion of bodily integrity.” G. Fletcher, Rethinking Criminal Law 705 (1978). Fletcher presumably is concluding that consent is not an inculpatory fact, but an exculpatory one, part of the justification for the actus reus, not its definition. See id. at 703. I think this is mere word-play, jumping from “consent justifies sexual contact” (i.e., sexual contact is an individual decision, not a social one) to “consent is a justification for rape.” Fletcher even admits that consent in this instance does not look like justificatory defenses generally: (a) Justifications generally function as “exceptions to a prohibitory norm” (i.e., they represent lesser evils). (b) They justify the imposition of regrettable harm. But consent to sexual contact “converts the act into one of mutual benefit.” Id. at 707.

that the victim did not consent, and maintains that he was nonculpably unaware of her nonconsent. He can be unaware in two different ways. First, he might have been literally unaware of the woman’s actions which now raise the inference of her unwillingness to have sex; that is, he never paid attention to them at all. Second, he might have heeded those actions, but misunderstood the inference of nonconsent they raise. This distinction does not serve as a proxy for the negligent/reckless mens rea distinction. Neither kind of mistake necessarily involves, as Lord Halisham put it in *Morgan*, an intent to have sexual contact “willy-nilly not caring whether the victim consents or no,” thus establishing a mens rea of recklessness. A defendant can be totally inattentive to the victim’s acts because of his a priori inference of her willingness drawn from the circumstances of their encounter, the history of their relationship, or even from third-hand accounts of her reputation. Such inferences can be made negligently or recklessly. Likewise, these kinds of inferences might color the scope of his inadvertence or the conclusions he draws from her acts; these too may be negligent or reckless. The *Morgan* rule holds that neither kind of negligent mistake as to consent is consistent with criminal liability for rape.

The debate over the exculpatory effects of unreasonable mistake is a debate over whether the unreasonableness of the mistake justifies relating the defendant’s mental state to an intentional failure to notice (Lord Halisham’s “willy-nilly” intention). The defendant who is truly negligently mistaken has the intention to engage in intercourse subject to the factual belief that his partner is consenting. The intentionally inadvertent defendant, however, has a compound conditional intent which runs something like this: “[I]f she consents, I will have intercourse with her” and “[I]f she does not consent, I will have intercourse with her.” The difference between these two defendants is that the mistaken one might alter his actions when he alters his belief about consent. If, in a particular instance, he

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138. See supra note 136 and accompanying text.
140. In other words, the intention to proceed to have sex under (relatively) ambivalent circumstances is an action which is distinct from mis- or in-advertence to a woman’s willingness. It is the act of proceeding under ambivalent conditions, not the act of mistaken apprehension, which merits punishment. Such a “disjoined view” of negligent rape is necessary to maintain its criminal character. See Kelman, *Interpretive Construc-
would not have altered his simple intention, then his honest belief in consent does not negate the inference of intentional inadvertence which the twin facts (1) that the rape occurred, and (2) that he can offer no consent defense, raise. How do we come to judge whether he would have altered his simple intention? Aside from the defendant’s own claims about his mental state, we are left only with a reasonableness inquiry.\textsuperscript{141} If the mistake was reasonable, then there is no reason to believe that the defendant intended to ignore his victim’s consent acts. If it was not, there is no reason to believe that he did not intend to proceed “willy-nilly.” This inference — from reasonableness of mistake to intention to be inadvertent — is the crux of the debate over the unreasonable mistake defense. If you believe that reasonableness can be unproblematically used in this way, then you are making a moral judgment that one who is negligently mistaken is nearly as deserving of punishment as one who is intentionally inadvertent, and you are concluding that an unreasonable mistake of fact does not negate an inference of intentional inadvertence.\textsuperscript{143}

The various kinds of weak consequentialist justifications which can be made to support this use of reasonableness inquiry, such as a heightened deterrent effect which will follow from the greater likelihood of conviction, or the need to provide an outlet for retributive urges which would accrue if unreasonable mistakes could exculpate rapists,\textsuperscript{144} are of relatively little value in assessing its justness. The crux of this debate must take place over the issue of desert. But we must bear in mind that it is a particular kind of desert. Mistake — even reasonable mistake — exculpates only in cases where it has been proven that sexual contact did take place, and that the victim was not consenting. The defendant found innocent under this defense is not innocent in the same way as someone who was mistakenly identified as the perpetrator, or as someone who establishes a consent defense. The “innocence” of the misadvertent defendant is the innocence of someone who does not, all things considered, deserve to suffer the effects of punishment (that is, suffer the penalty); but this defendant might still deserve to be branded a criminal, and have his actions judged to be a crime.\textsuperscript{144} As such, it is not the kind of inno-

\textsuperscript{141} “Reasonableness” would not require a man to be a good reader of a woman’s willingness to have sex; but it would require that he be sensitive to the ambiguities of sexual communication, and take care to insure that he does not presume consent from near silence (“silence” referring both to verbal silence and behavioral passivity). See Wiener, Shifting the Communication Burden: A Meaningful Consent Standard in Rape, 6 HARV. WOMEN’S L.J. 143, 146-49, 158-61 (1983).

\textsuperscript{142} This is essentially the argument that Anthony Kenny uses to criticize the Morgan rule, although he couches it in different terms. See A. KENNY, supra note 134, at 61-62.

\textsuperscript{143} Curley, supra note 98, at 343.

\textsuperscript{144} See L. KATZ, BAD ACTS AND GUILTY MINDS: CONUNDRUMS OF THE CRIMI-
cence that by right exempts the actor from liability; it is a kind which we may justifiably alter in accord with our moral sensibilities. In terms of Ronald Dworkin's famous distinction between principles and policies, the "innocence" of such a defendant does not exculpate him on principle (unlike the misidentified accused), it exculpates on the basis of a policy to give it that effect; as such, it is rightfully subject to change under a consequentialist rubric (such as deterrence).

The classic argument against criminal liability for negligent acts — that it amounts to odious strict liability for crimes — would deny that the Morgan court faced a "policy" choice at all. Rather, the Morgan court could have argued that a man who was unreasonably mistaken about his partner's consent could not (because he, unlike the reasonable man, did not) anticipate that his partner was unwilling to have sex with him. If he could anticipate her unwillingness, but was unreasonably mistaken, then he intended to have sex regardless of her willingness. Thus, the negligence mens rea for rape, like negligence liability for crimes generally, will unfairly inculpate a man who either lacks the capacity, or the opportunity, to arrive at a reasonable conclusion concerning his partner's willingness to have sex.

H.L.A. Hart demonstrates how these arguments are clearly wrong. They presume a simplistic and unpersuasive account of the relationship between knowledge and action. In their view, knowledge of the consequences of one's actions is a necessary and sufficient condition for assuming responsibility for those actions, and, inversely, not having such knowledge bars responsibility because one could not have acted otherwise. In other words, proponents of these arguments think of the word "negligence" as the description of a state of mind which is largely synonymous with the word "inadvertent." Hart, on the other hand, treats the word "negligence" to denote a moral judgment which encompasses both a characterization of its object's mental state — inadvertence — and its object's blamewor-
thiness for this mental state:

[A] careful consideration is needed of the differences between the meaning of expressions like 'inadvertently' and 'while his mind was a blank' on the one hand, and 'negligently' on the other. . . . [I]f we say of that person that he has acted negligently we are not thereby merely describing the frame of mind in which he acted . . . . [W]e are referring to the fact that the agent failed to comply with a standard of conduct with which an ordinarily reasonable man could and would have complied. . . . Through our negligence in not examining the situation before acting or in attending to it as we act, we may fail to realize the possible harmful consequences of what we are doing and as to these our mind is in a sense a 'blank'; but the negligence does not, of course, consist in this blank state of mind but in our failure to take precautions against the harm by examining the situation.181

When we punish the negligent rapist, we are punishing him for failing to take appropriate efforts to discover whether his partner is willing to have sex — and for letting her bear the risk of error.182 I am not, therefore, arguing that it is always just to punish negligence with criminal penalties. I am advocating criminal liability where negligence is generated by (or, characterized as) a lack of respect for others. It is the unexcusable violation of the principle of respect for persons manifested as negligence, not negligence as such, which justifies, on retributive grounds, criminal stigma and penalty.183 There will certainly be men who are unable to exercise care because they lack the capacity. And such men will not deserve to be punished in accord with a relentlessly objective standard of reasonable behavior. But they do not compel us to abandon the requirement that mistakes as to consent be reasonable; they only require that we weigh their subjective capacities to live up to the objective standard versus their actual shortfall (that is, reject an objective standard of reasonableness).184

Is it possible that a man who is capable of examining his partner's willingness to have sex might not, under the circumstances, have an opportunity to do so? If it is, then a man who blamelessly fails to exercise due care could be held liable for rape under the negligence mens rea. But I do not see how this is possible. Reasonable, even careful, attention to a woman's willingness to have sex is easy: (1) the man's attention ought to (and in most cases is) directed toward this fact (consent); (2) the fact requires a fairly simple inquiry; and (3) the woman is immediately present in all cases. All he need do is ask her. If her answer is equivocal, he can wait and/or ask for clarification. Unless she is actively noncommittal, or totally contradic-

151. Id. at 147-48 (emphasis in original).


154. Pickard, supra note 152, at 79.
tory, the fault for misadventure is much more likely to be his fault than hers.\textsuperscript{168}

It seems to me ridiculous to argue that it is hard for a man to reasonably and carefully pay attention to his partner's willingness to have sex with him, unless what is meant by "hard" is that such attention is detrimental to a man's interests. If he expects consent, then the exercise of due care, and his partner's concomitant opportunity to frustrate these expectations by voicing unwillingness (withholding consent), represent a threat to even "reasonable" expectations of sexual access. The "cost" of reasonable advertence rises in proportion to the strength of the expectations. To argue that to carefully pay attention is "too hard," or that the defendant had "no opportunity," is, generally speaking, to weigh the cost of inquiry (detriment to expectations of sexual access) over the harm of rape.\textsuperscript{169} To refuse to require that mistakes be reasonable before they exculpate a man from rape (as the \textit{Morgan} court did) is to presume the justness of enforcing, through a right of self-help, reasonable expectations of sexual access.

\textbf{C. The Role of Expectations}

The status of the \textit{Morgan} rule in the United States is uncertain. Although the issue of a mistake-of-fact defense in toto is being raised increasingly\textsuperscript{157} there is no consensus on the validity of the reasonableness inquiry. \textit{People v. Mayberry},\textsuperscript{158} perhaps the leading American case on the subject,\textsuperscript{159} firmly establishes a negligence mens rea with regard to consent. Only one state — and that by a lower court decision — has come firmly down on the side of \textit{Morgan}. But the seductiveness of the reasoning used in this case raises the risk that other states may follow suit, leaving \textit{Mayberry} behind. \textit{Reynolds v. State}\textsuperscript{160} involved a fairly typical date rape. Reynolds brought one J.D. back to his apartment, instead of driving her home

\begin{itemize}
  \item \textsuperscript{155} \textit{Id.} at 81.
  \item \textsuperscript{156} Thornton, \textit{supra} note 153, at 132.
  \item \textsuperscript{157} \textit{See Comment, Culpable Mistakes in Rape: Eliminating the Defense of Unreasonable Mistake of Fact As to Victim Consent, 89 DICK. L. REV. 473, 481 & n.40 (1985).}
  \item \textsuperscript{158} 15 Cal. 3d 143, 155, 542 P.2d 1337, 1345, 125 Cal. Rptr. 745, 753 (1975).
  \item \textsuperscript{159} I conclude that it is the leading American case on the basis of its inclusion in Sanford Kadish's widely-read and influential casebook on criminal law. S. KADISH, S. SCHULHOFER & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 293-96 (4th ed. 1983).
  \item \textsuperscript{160} 664 P.2d 621 (Alaska Ct. App. 1983).
\end{itemize}
as she requested, at the end of an evening outing. He forced her to enter; after she did, he locked the deadbolt on the door and removed the key. She protested verbally to his sexual overtures, but did not physically resist because there was a handgun sitting in the open in Reynolds' room. He interpreted his actions as pure seduction, and perceived nothing in her behavior which would indicate willingness.\textsuperscript{161} The substance of his appeal was that Alaska's first degree rape statute, and the jury instructions issued under it, were unconstitutional because they held him strictly liable for J.D.'s lack of consent. The court disagreed, holding that the instructions correctly reflected Alaska law which required recklessness as to the victim's nonconsent.\textsuperscript{162} It is the court's explanation of why recklessness must be shown that is dangerously seductive.

The Court reasoned that rape was once a "general intent" crime. The actus reus was intercourse with a nonconsenting woman. But nonconsent had to be established by reference to resistance and the concomitant force necessary to complete the underlying act — intercourse — over the resistance. This requirement of resistance, usually utmost resistance, served to mitigate the "potential harshness" of a rule which made the defendant, in effect, strictly liable for the complainant's lack of consent.\textsuperscript{163} It is this theory which allows some courts to define the actus reus of rape as forcible intercourse and conclude that there is no mens rea at all.\textsuperscript{164} But the utmost resistance standard has been softened in recent years, thus "increasing the risk that a jury might convict a defendant under circumstances where lack of consent was ambiguous."\textsuperscript{165} To "counteract" such a risk, courts have had to recognize a defense of reasonable mistake-of-fact as to consent — \textit{Mayberry} being the leading example of this response.\textsuperscript{166} \textit{Reynolds} diverges from \textit{Mayberry}, however, because Alaska's resistance standard diverges from California's. Alaska has no resistance standard: "'without consent' means that a person . . . \textit{with or without resisting}, is coerced by use of force . . . or by express or implied threat of imminent physical death . . . injury, or . . . kidnapping."\textsuperscript{167} This elimination shifts "the focus of the jury's attention from the victim's resistance or actions to the defendant's understanding of the totality of circumstances."\textsuperscript{168} In order to protect the defendant from conviction when "the circumstances regarding consent are ambiguous" the prosecution must establish reckless-

\textsuperscript{161} \textit{Id.} at 622-23.
\textsuperscript{162} \textit{Id.} at 627-28.
\textsuperscript{163} \textit{Id.} at 623.
\textsuperscript{164} See \textit{supra} note 133 and accompanying text.
\textsuperscript{165} 664 P.2d at 624.
\textsuperscript{166} \textit{Id.}
\textsuperscript{167} ALASKA \textsc{Stat.} \textsection 11.41.470(3)(A) (1983) (emphasis supplied).
\textsuperscript{168} 664 P.2d at 625.
ness as to nonconsent.  

Reynolds reveals the foundational presence of the enforcement of expectations of sexual access in the construction of the rapist. A man exercising his right of self-help under the principle of enforcement will be able to defend himself against a rape charge by pointing either to his partner's failure to offer reasonable physical resistance (in a Mayberry-type jurisdiction) or his honest (albeit mistaken) belief in consent (in a Reynolds-type jurisdiction). She will not have resisted because, by definition, exercise of the right of self-help is incompatible with force sufficient to overcome resistance (marital rape is an exception here, where the expectation is so strong, even force is permitted in the exercise of self-help). His belief in consent will be honest because holding reasonable expectations of access is incompatible with vigorously-voiced unwillingness or resistance.

Aside from the construction of the rape victim as a woman who is not subject (as a wife, lover, or companion) to reasonable expectations of sexual access lies a construction of the rapist as a man who intends to have sex with women for whom his expectation of sexual access is unreasonable. It is possible to think of the marital exemption and the conduct-with-accused exception to rape evidence rules as particular applications of this more basic construct of the rapist. Is this construction of the rapist a particular application of a yet more basic construct? M.T. Thornton suggests that it is:

Surely a man should take care to find out whether or not a woman is consenting? If her role were simply to gratify the man's desires, the situation would be different. In that case violating a woman's body would be like damaging her property, where an honest albeit unreasonable belief negates mens rea. To require that belief in the woman's consent be both honest and reasonable is to require that the man treat the woman as an equal partner in sexual intercourse.

I will explore this yet-more-basic construct next.

IV. EXPECTATION AND DESIRE: THE SOCIAL CONSTRUCTION OF RAPE

Up to now this article has been concerned with describing the law of rape — with telling a story which renders coherent seemingly disparate features of the substantive law of rape. The "story" which makes these features of rape law coherent (or, in other words, the underlying normative structure of the law) explains that the law of

169. Id.
170. Thornton, supra note 153, at 142.
rape does not respond to instances where unwilling women are coerced into having sex with men who hold reasonable expectations of sexual access, which men are privileged to use means of self-help to enforce their expectations. Women enter into sexual contracts with men, which the law largely respects and, by immunizing men from state interference when they undertake "reasonable" means of self-help, renders enforceable. In this respect the law of forcible rape is one of many institutions which enforce what Carole Pateman calls the "law of male sex-right" — the "demand that women's bodies, in the flesh and in representation, should be publicly available to them." 171

While feminist scholarship has had little difficulty seeing with clarity the ways in which the "law of male sex-right" shapes the law of rape, 172 it remains perplexed about the link between male attitudes and the sexual access the law protects. 173 This link is important. With an understanding of the link, it becomes possible to think about rape law as a possible vehicle for the elimination of sexual coercion, and a means of liberation. Without it, rape law remains an object of reformist tinkering, because it appears to be little more than an automatic reflection of the biased attitudes of the men — judges, lawyers, police officers — who inhabit it. 174

To find that link, I will argue, you have to look at some of the ways in which men in our society are socialized to desire women. Men are socialized 175 to desire women in such a way that the desired woman's own desire for the desirer is irrelevant. It is certainly important as a circumstance which either facilitates or hinders the satisfaction of desire, but it plays little role in the formation of the desire. Desire is thus experienced as wholly individualized, part of the very same autonomous self which makes bargains and seeks to have expectations enforced.

To illustrate this link, I shall compare three groups of men: (1) normal ones, who have not raped, but who can, under the right conditions, contemplate and appreciate rape; (2) prison-population rapists, who have raped and know they have raped; and (3) date rapists, who have raped and are not (completely) sure if they have. The

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173. See Henderson, supra note 64, at 197-98.
174. Hence the limitations of the liberal feminist critique of rape law, which misses the underlying moral structure of rape law and sees only the individual actors who act out this moral structure. Katz, supra note 21, at 1014-17.
175. Arguing toward such broad generalization is an enterprise fraught with danger. Not every man experiences desire in this way, and not every one who does so experiences it to the same degree. Although I do believe that it is an accurate (albeit partial) description of the nature of male desire, I do not suggest that it is truly natural for men to experience their desire in this way.
common thread which unites these groups of men is not any kind of social or psychological pathology, but a moral flaw. For them sexual desire is not necessarily something which is to be shared with a willing partner. It is instead something to be subjectively satisfied. These men look very much like mis- or nonadventent actors discussed in the prior part of this article: they proceed to have sex "willy-nilly not caring whether [she] consents or not." 176

A. The "Sickness" of Rapists

One of the standard myths of rape is that "All rapists are sick." If the accused did "sick" things to the complainant (viz. actions which are not considered acceptable in the normal conversation or seduction process) — if he beat her, or jumped her, or made her perform unusual acts — it was fairly easy to convict him. But if the accused appeared normal, was respectable, had more-or-less conventional sex with the complainant, he was not "sick" and ipso facto not a rapist. If it could be shown that the complainant was the "sick" one — because of her unusual, risky, or sexualized lifestyle—then he was in even better shape. In the early days of "scientific" rape jurisprudence, much effort was expended in trying to discover how to identify the sick, and hence lying, complainant. 177 (Race was used in a similar way.) 178 I would like to examine the rebuttal of this myth.

W.L. Marshall and H.E. Barbaree have proposed a behavioral model of rape which destroys the myth of sickness. 179 It distinguishes rapists and nonrapists by their inability to inhibit sexual arousal when sexual depictions sufficient to generate arousal are mixed with indications of force or nonconsent which usually inhibit such arousal. 180 This does not mean that rapists prefer forced or noncon-

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178. The myth of the sick rapist says that no one is capable of rape, save the rare maniac. Therefore, a normal man having normal sex with a woman cannot be raping her. The myth of the black man's sexual potency struck such fear and envy in white hearts that every black man was deemed not only capable of raping a white woman, but actually desirous of so doing. Therefore, a black man having sex with a white woman must be raping her. For a discussion of rape and racism, see Hall, "The Mind that Burns in Each Body": Women, Rape and Racial Violence, in POWERS OF DESIRE, supra note 15, at 328; Wriggins, Rape, Racism, and the Law, 6 HARV. WOMEN'S L.J. 103 (1983).
180. Id. at 56-57.
sensual sex. It means that, for instance, if you show men two different films with the same erotic content — the same sexual "cues," in the same order, and with the same timing — rapists are distinguished from other men by the fact that they will be aroused, and other men will not, notwithstanding additional cues of force or non-consent.\textsuperscript{181} It is not that sexualized force turns rapists on; it is that forced sexuality fails to turn them off.

Measures of "normal" (nonrapist) men's sexual response to mixed depictions of sexuality and nonconsent/force have repeatedly indicated that there are a number of disinhibitory factors whose presence leads to a heightened sexual response to rape depictions. Men who are (1) intoxicated, (2) angry at a woman, (3) sexually aroused prior to exposure to the rape depiction, (4) told by an authority figure that arousal to rape is "normal," or (5) subjected to a rape depiction in which the victim becomes aroused, show a greater arousal response (measured in terms of penile tumescence) than men who are confronted with the same depictions without the disinhibitory influences.\textsuperscript{182}

Diana Scully and Joseph Marolla have studied the rapist prison population, asking these men how they viewed their crime, what their explanation of it was, and how their account differed from the one which society (or, the law) gave of it.\textsuperscript{183} A number of themes emerged as these men attempted to excuse, justify, or describe the motivations for their actions: (1) Many attempted to excuse themselves by claiming that they were under the influence of alcohol or drugs. Curiously, they often also claimed that the victim was also under the influence, and hence more "responsible" for the harm than was perceived.\textsuperscript{184} (2) The crime was blamed on prior emotional trauma. Very often that trauma was proximate to the rape (commonly, the rapists were enraged over something connected to a woman they loved); but more distant emotional trauma, including an unhappy or unstable childhood, was also cited to excuse the rape. Further, some rapists tried to present a "nice guy" image, attempting to pass off the rape as an inexplicable and transitory wrongdoing.\textsuperscript{185} (3) The rape was seen as a way to punish or avenge some wrong. The victim could be a random token of some other woman, a token of women generally, or the rapist's specific antagonist. Victims were transformed into antagonists when the rapist seized upon some

\begin{itemize}
    \item \textsuperscript{181} Id. at 66.
    \item \textsuperscript{182} Id. at 57.
    \item \textsuperscript{183} Scully & Marolla, 'Riding the Bull at Gilley's': Convicted Rapists Describe the Rewards of Rape, 32 Soc. PRBS. 251 (1985) [hereinafter Rewards of Rape]; Scully & Marolla, Convicted Rapists' Vocabulary of Motive: Excuses and Justifications, 31 Soc. PRBS. 530 (1984) [hereinafter Excuses and Justifications].
    \item \textsuperscript{184} Excuses and Justifications, supra note 183, at 538-39.
    \item \textsuperscript{185} Id. at 539-41.
\end{itemize}
action which occurred after the rape had begun to stand for the more general retributive motivation.\textsuperscript{186} (4) Some rapists explained that they preferred the power which rape gave them over mutually consensual sex, enjoyed the sense of adventure, or experienced elevated self-esteem after the rape.\textsuperscript{187} As one interviewee put it, “After rape, I always felt like I had just conquered something, like I had just ridden the bull at Gilley’s.”\textsuperscript{188} Others saw the rape as an “added bonus” to a crime (typically burglary and robbery) over which they had significant control.\textsuperscript{189} (5) The victim was depicted as the aggressor in the encounter, a seductress who demanded the rapist’s performance.\textsuperscript{190} (6) Some explained that their actions were a way to achieve a sexual access to which they felt entitled.\textsuperscript{191} (7) Many attempted to excuse their actions by describing the victim as a generally disreputable person, on the presumption that “nice girls don’t get raped.”\textsuperscript{192} (8) Particularly among younger men convicted for gang rapes, the rape was explained as an exercise in male bonding, a way to prove one’s self and experience adventure. These men frequently claim that they practiced gang rape regularly, but only with women who were “known” to enjoy such activities.\textsuperscript{193} Many of the rapists studied were convinced that their victim enjoyed the rape; even if the victim objected at first, she eventually relaxed and began to enjoy the act.\textsuperscript{194} (10) Finally, many also claim that the victim, and women generally, really mean “yes” when they say “no” — that some initial force was a necessary overture to sex without which the woman could not enjoy herself.\textsuperscript{195}

The parallels between the disinhibitory factors found among “normal” males and the justifications, excuses, and explanations offered by convicted rapists (summarized in Table 1)\textsuperscript{196} provide striking confirmation of Marshall & Barbaree’s thesis that what rapists “suffer from” is a failure to disinhibit sexual response under coercive or forceful conditions. The question remains, why?

A number of social inadequacies are found among rapists. They

\textsuperscript{186} Rewards of Rape, supra note 183, at 255-57.
\textsuperscript{187} Id. at 259-61.
\textsuperscript{188} Id. at 261.
\textsuperscript{189} Id. at 257.
\textsuperscript{190} Excuses and Justifications, supra note 183, at 534.
\textsuperscript{191} Rewards of Rape, supra note 183, at 257-59.
\textsuperscript{192} Excuses and Justifications, supra note 183, at 536-37.
\textsuperscript{193} Rewards of Rape, supra note 183, at 259-60.
\textsuperscript{194} Excuses and Justifications, supra note 183, at 535-36.
\textsuperscript{195} Id. at 534-35.
\textsuperscript{196} See infra note 219 and accompanying text.
are all associated with a manifestly negative attitude toward women, which is itself a strong disinhibitory factor. (1) They are unable to satisfactorily manage their lives, work, and leisure; they are often substance abusers, and generally stressed by the relative boredom of their lives. (2) They exhibit a general lack of regard for others: “such individuals fail to acquire the social prohibitions which prevent most people from abusing the rights of others and from interfering with the personal integrity of others.” (3) They are poor in relationship-building and -sustaining skills. (4) Their sexual knowledge can be limited, and they are often prudish and anxious about their masculinity. (5) Rapists possess poor conversational skills, particularly when it comes to conversation with women.

**B. Normal Desire**

Compare these functional inadequacies, which were found among prison-population rapists, with the statement of Jay, a perfectly ordinary twenty-three-year-old, discussing his attitudes toward rape:

Let’s say I see a woman and she looks really pretty and really clean and sexy, and she’s giving off very feminine, sexy vibes. I think, “Wow, I would love to make love to her,” but I know she’s not really interested. It’s a tease. A lot of times a woman knows that she’s looking really good and she’ll use that and flaunt it, and it makes me feel like she’s laughing at me and I feel degraded.

I also feel dehumanized, because when I’m being teased I just turn off, I cease to be human. Because if I go with my human emotions I’m going to want to put my arms around her and kiss her, and to do that would be unacceptable. I don’t like the feeling that I’m supposed to stand there and take it, and not be able to hug her or kiss her; so I just turn off my feelings and react in a way that I really don’t want to.

If I were actually desperate enough to rape somebody, it would be from wanting the person, but also it would be a very spiteful thing, just being able to say, “I have power over you and I can do anything I want with you,” because really I feel that they have power over me just by their presence. Just the fact that they can come up to me and just melt me and make me feel like a dummy makes me want revenge. They have power over me so I want power over them . . . .

Society says that you have to have a lot of sex with a lot of different women to be a real man. Well, what happens if you don’t? Then what are you? Are you half a man? Are you still a boy? It’s ridiculous. You see a whisky ad with a guy and two women on his arm. The implication is that real men don’t have any trouble getting women.

This example shows how quickly desire and expectation can get bound up with frustration and anger. Jay is not on the whole a functionally-impaired person. While we can interpret his statement in light of the categories of dysfunction proposed by Marshall & Barbaree, and even conclude that Jay could use some improvement

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198. *Id.* at 58-61.
in some of them, we cannot conclude that he is anything but an average functioning person; nor can we conclude that his statement is unrepresentative of men. Yet Jay is certainly a potential rapist. How long will it be before his frustration at feeling controlled, “dehumanized,” will erupt in the determination that “Now am doing the controlling?” How long will it be before he feels the need to acquit his self-esteem before the ideal of the whisky ad by letting his expectations in a date run ahead of his willingness to pay heed to the desires of his companion? If his desire at the sight of a “sexy” woman runs directly into its negation without the interposition of a desire that she want him, can we be sure that Jay will ever do well at conforming his sexual conduct to his companion’s willingness? He exhibits a great deal of frustration at the idea that this sexy woman’s unwillingness runs against his desires and expectations. The line between men who have raped and those who have not is a flimsy one — maybe as flimsy as the line between those who were caught (or realized) and those who have not.200

From the rapist’s failure to disinhibit his arousal to rape, Marshall & Barbaree reason that there is a baseline “biological tendency to respond to coercive sex which is ordinarily under the control of acquired constraints but can be released by certain conditions.”201 Whether men are exposed to a tug-of-war between a biological urge to rape and cultural imperative to refrain, or whether they are subject to dissonant cultural demands,202 one to rape and one not to, makes little normative difference. For this discussion it is important to see the fundamental fact that men generally experience an urge to rape — to take out their sexual desires/expectations regardless of their partner’s willingness — and that most men manage to check this urge through inhibitory mechanisms. Rapists do not check this urge because they lack certain kinds of functional skills. It would be a mistake, however, to think that rapists fall short of a baseline level of functioning. Rather, these functional skills mark dimensions of treatment and comprehension of a complex (and perhaps over-deter-

200. There is a great deal of similarity between the attitudes of rapists toward women and the attitudes of non-rapists who report that they would likely rape if they could avoid punishment. Malamuth, Rape Proclivity Among Males, 37:4 J. Soc. Issues 138 (Fall 1981).
mined) behavior. These skills, if improved upon, most fruitfully enable rapists to regain the upper hand on the urge to rape. But many men whose function is as "impaired" as rapists do not rape.203

Pornography is the one social institution which is most strongly associated with the failure to inhibit sexual response to rape depictions.204 Marshall & Barbaree argue that a permissive posture toward pornography — especially in a time when all pornography is getting more violent — plays the social analogy to the laboratory disinhibiting factor of authoritative assurance that disinhibition is "normal." They conclude that "lax attitudes toward the availability of pornography . . . legitimizes the possibility of forced sex . . . ."205 Feminists have always understood this. Before any of the studies upon which Marshall & Barbaree rely were published, Robin Morgan wrote: "Pornography is the theory, and rape is the practice."206

We can better understand the relationship of pornography to rape if we understand the relationship between pornographizing and rape. "Pornographizing" is, writes Timothy Beneke,

the process by which men relate to women, images of women, the visual presence of women, stories about women, women in any way as PORNEA, which is Greek for "low whore." How does one relate to a low whore? As property one uses for "sexual" pleasure. In pornographizing, one anonymises the woman and fails to acknowledge her moral, spiritual, or emotional being. One relates to her as a thing without a soul. The woman as locus of experience is denied. And often, one relates to her body as a fetish. A fetish: the new pair of shoes you stare and stare at that won't quite give you what you want. The new watch that shines in the dark but somehow leaves you empty. The thighs, breasts, calves, rears or women searched for through your adolescence. Images savored and extorted for lust. Pornographizing is the perceptual counterpart to sex as achievement of possession of a commodity and sex as aggressive degradation.207

Pornography as a cultural institution is the chief product of pornographizing as a cultural process; it teaches how to pornographize, sustains our efforts, and draws its strength from our practices.208 Pornographizing sustains men's participation in the

203. "It is important to realize that all rapists will not necessarily suffer all these deficiencies, but rather that the social factors we will mention describe a presumably incomplete list of the possible defects in need of correction if we are to effectively treat rapists." Marshall & Barbaree, supra note 179, at 58.
204. See supra note 182 and accompanying text.
207. T. BENEKE, supra note 199, at 2324.
208. See A. DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1981); S. GRIFF-

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arousal/expectation/frustration cycle that Jay described earlier—a cycle which never acknowledges as one of its terms whether the object of desire desires the beholder.

Let us now look at the relationship between pornographizing and rape in the absence of social dysfunction. Marshall & Barbaree’s social dysfunction conception was derived from studies done on rapists in the prison population or somewhere in the criminal justice system. Such rapists will share much of their dysfunction with the prison population as a whole. The kinds of subjects used to discover the “normal” inhibitory response to coercive sex depictions are not highly dysfunctional to begin with (they are usually college students), but they are also not rapists. In comparison to them, the prison-population rapists may over-exaggerate the connection between dysfunction and disinhibition. It would be immensely useful to examine a third group whose social functioning is little different from the “normal” men, yet who, like the prison population, have actually raped.

Eugene Kanin studied a group of seventy-one self-reported rapists. All were white middle-class university undergraduates with no history of violence, who, on a date, had accomplished sexual penetration by force on a nonconsenting female. In comparison with a control group of unmarried university undergraduates, these rapists appeared to be subject to a longstanding and “highly erotic peer group socialization” process by which sexual performance became “intimately associated with their feelings of worth.” They were “dramatically” more sexually active than the controls, yet also “significantly more apt to evaluate their sexual achievements as unsatisfactory.”


209. For instance, substance abuse, linked to poor life management skills, is one of the social inadequacies found among prison population rapists. See supra note 198 and accompanying text. But substance abuse levels are not significantly higher for rapists than for other felons. Ladouceur & Temple, Substance Use Among Rapists: A Comparison with Other Serious Felons, 31 CRIME & DELINQ. 269 (1985).


211. Id. at 96, 98. Kanin excluded from his sample 15 cases which did not unequivocally present the mens rea of rape. Seven cases involved an initial episode of force giving way to receptive cooperation where there was a long-term relationship between the victim and her rapist; in five cases the victim was so “literally immobilized with fear” that she was purely passive. And three cases were not included because the respondent decided to terminate the interview. Id. at 97.

212. Id. at 98.

213. Id. at 99.
caught up in a desire/expectation/frustration cycle with women. Kanin suggests that

It is inevitable that a socialization process which produces high levels of sexual aspiration will also result in these men being highly vulnerable to relative sexual frustration, that is, a frustration resulting from their sexual accomplishments falling short of the lofty and often elusive aspiration levels introjected from their erotic-oriented peers.\textsuperscript{214}

Several characteristics marked the encounter which ended in rape. The rapists did not plan their act; rather, they hoped that seduction would lead to consensual sex. Consensual foreplay preceded the rape, and this foreplay was often linked to some kind of consensual sexual contact on previous occasions. Two-thirds of the rapists were intoxicated; nearly all of these attempted to excuse their conduct to some degree on this fact. There was a high degree of expectation of sexual access or accomplishment present which simply caused the men to exaggerate their perception of the woman's willingness and to ignore contrary indications. Sixty-eight percent of the women, for instance, expressly stipulated that foreplay was the limit of their willingness to sexual contact. The sexual arousal which proceeded from this consensual sexual contact was interpreted by the men as willingness to engage in intercourse. Resistance was taken to be a sign of conventional morality, not a serious expression of unwillingness.\textsuperscript{215} The rape itself was not accomplished angrily, but it was accomplished forcefully — “mismatched wrestling contests” are what Kanin called them.\textsuperscript{216} In the initial stages of the rape itself the woman was not able to perceive herself as a victim, and the “vast majority” resisted at first. As the rapist became more insistent, however, the “aura of danger” led many victims to cease resistance. Thus, the rapists perceived the truth of their expectant assumptions in the rapid denouement from resistance to compliance.\textsuperscript{217} Penetration was accomplished because the rapists were (perhaps unwittingly) able to project a threat of force sufficient to overcome resistance.\textsuperscript{218}

These rapists are not dysfunctional like their prison counterparts; but they are pornographizers. They desire (a purely subjective concept) their sexual partners; they also expect (an objective form of desire) that such access will be forthcoming, and act in accord with this expectation. In light of their expectations they skew their interpretation of her behavior until she mirrors their own willingness to

\begin{small}
\begin{itemize}
\item \textsuperscript{214} Id. at 98-99.
\item \textsuperscript{215} Id. at 98-101.
\item \textsuperscript{216} Id. at 101.
\item \textsuperscript{217} Id. at 101-02.
\item \textsuperscript{218} “Put simply, a substantial number of these rapes occurred because the 'right man' (sexually aggressive and determined) did the 'right thing' (presented a level of force not usually encountered in dating) to the 'right girl' (easily frightened or inebriated).” Id. at 102.
\end{itemize}
\end{small}
have sex. The prison rapists, as we can see from the work of Scully & Marolla, are also pornographizers. They skew the victim's voluntariness and think they are justified in exacting their own ends (power, access, thrill, well-being, revenge, etc.) from her.

Let us return to Marshall & Barbaree's list of dysfunction categories to see how pornographization underlies them: (1) Life Management Skills. Date rapists, like prison rapists, blame intoxication for their acts. Both of their intoxications can be the result of poorly managed, stressful, empty lives. The apparent (and material) well-being of the date rapist can easily be a facade. (2) Communal Skills. The date rapist's unceasing efforts at seduction are designed to satisfy his equally unceasing need for sexual conquest, and his doomed search for sexual fulfillment. His partner is an object, a means toward these ends. Pornographization can only occur when it is possible for the woman — the object — to be seen as a thing to be consumed, and the pornographizer a consumer. (3) Relationship Skills. The date rapist is a desirable commodity on the relationship market. He is an attractive date. He is also a good prospect for marriage because he has great potential for meeting the characteristics of the provider. But he is over-sexed, predatory, and under-satisfied. His good prospects do not work out well. And, of course, the pornographizer must remain "liquid" in the flow of his "commodities." (4) Sexuality Skills. The date rapist is probably not as sexually ignorant as the prison rapist. However, he does possess the same sense of exaggerated (and at the same time fragile) masculinity. (5) Communication Skills. Date rapists are glib and effective communicators, but like prison rapists, they do not communicate meaningfully with women. Indeed, they need not, because meaningful communication implies communication with a Kantian subject; the pornographizer's woman is an object. Table 1 illustrates the interrelationships between the disinhibitors for "normal" men, rapists' self-explanatory accounts, and Marshall & Barbaree's categories of social dysfunction.
<table>
<thead>
<tr>
<th>INCREASE IN &quot;NORMAL&quot; MALE RESPONSE</th>
<th>RAPISTS’ VIEW OF THEIR ACT</th>
<th>CATEGORIES OF SOCIAL DYSFUNCTION</th>
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<tr>
<td>(1) Intoxication</td>
<td>(1) Intoxication</td>
<td>(1) Life Management Skills</td>
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<td>(2) Misogynist Anger</td>
<td>(2) Emotional Problems</td>
<td>(2) Communal Skills</td>
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<td>(3) Revenge/Punishment</td>
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<td>(4) Power</td>
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<td>(3) Prior Sexual Arousal</td>
<td>(5) Woman As Seductress</td>
<td>(3) Relationship Skills</td>
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<td>(6) Sexual Access</td>
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<td>(4) Authoritative Imprimatur</td>
<td>(7) Nice Girls Don’t Get</td>
<td>(4) Sexuality Skills</td>
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<td>Raped</td>
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<td></td>
<td>(8) Male Bonding/Adventure</td>
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<tr>
<td>(5) Victim Arousal</td>
<td>(9) Victim Enjoyed Rape</td>
<td>(5) Communication Skills</td>
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<td></td>
<td>(10) “No” Means “Yes”</td>
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Table 1: Rape Disinhibitors, Rape Explanations, and Categories of Social Dysfunction

Except for the most shocking rapes and the most brutal rapists, it is very hard to draw a line between rape and seduction which responds to our conventional assumption about what rape is. Clean-cut

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219. Column one summarizes the text accompanying note 182; column two, notes 183-95; column three, notes 197-98.
upwardly-mobile fraternity boys do not look like our image of convicted rapists. Yet both are unable to accurately — or even reasonably — comprehend his partner’s willingness to have sex. The obvious rapes, the “traditional” ones, where one stranger overpowers another with his fists while the other fights back, are easy cases because we cannot imagine that the people we see every day will commit such acts. The other rapes, equally real, but nontraditional, are hard cases because those around us might easily commit them. The myth of the sickness of rapists banished these other rapes from the legal realm by denying that they really exist. The debunking of this myth reveals these rapes and discovers that the men who commit them are not sick — but that they have real shortcomings nonetheless.

V. THE POLITICAL ECONOMY OF SEXUALITY

Men, in their moments of greatest intimacy and vulnerability with women — in their sexual relationships with wives and lovers — are legally empowered to enforce, by means of self-help, their reasonable expectations of sexual access. Rape — sexual contact against a woman’s will — occurs when male desire gets bound up with expectation. Reasonable desires — that is, natural ones — generate reasonable expectations. When such a moment coincides with a moment of sexual intimacy, a man is legally empowered to act out his desires regardless of whether his partner shares them, or even if she acquiesces to them. He is entitled to proceed in these moments “willy-nilly not caring whether [she] consents or not.”

Of course, he cannot use too much physical force to enforce his expectations; nor can he be too inattentive to her subjective desires; nor can he set his expectations too high relative to her relationship to him. “Reasonableness” is a continuum, sensitive to the subtleties of relationships. It would not be unreasonable to conclude that the right of enforcement only applies to precisely those situations where it is least likely to ever be used: in conventional sexual relationships where each party desires the other. According to this interpretation of the enforcement principle, the right of self-help is not so much an entitlement to enforce expectations under certain circumstances as it is a conclusion that, under such circumstances, women are generally willing to engage in sex.

This characterization of the enforcement principle may be true.

But what about women who do not want to be average or conventional in their relationships with men? What happens when wives and lovers say "No?" Unless they have husbands who will let them, these women will have to defend their sexual autonomy with their fists. Although men do not, in any meaningful sense, consciously resort to their right of self-help in the vast majority of cases in which the principle of enforcement applies, the mere presence of the right has a powerful effect: it defines reality (in this instance, reasonableness, naturalness, and conventionality) and, through political power (the law of forcible rape), makes its definition come true.221

The obvious turn for this argument to take is toward false consciousness: that women in these circumstances usually do subjectively desire sex is the "big lie" society tells women (and tricks them into telling themselves) to cover the exercise of male power.222 I want to resist making this argument, however. The idea that women will, under these conditions of powerlessness, usually (or, naturally) desire their partners, and therefore consent to sex, makes a mockery of women's sexual choice and keeps the lid on a whole world of sexual pain. As Robin West puts it:

The societal and institutional commitment to the notion that powerless women naturally desire powerful men — that heterosexual desire is reciprocal, symmetrical and natural even though it is between concededly unequal partners — accounts for this society's inability to "see" marital rape as rape rather than as "bad sex." It accounts for the societal belief that women who don't desire men are "frigid." It accounts for the social inability to see that sexual harassment in the workplace is indeed harassment rather than the soft "personal" touch of an office. It accounts for the social inability to even consider the possibility that teenage pregnancy is a function of teenage male coercion rather than a breaking of "taboos" against "natural" promiscuity. It accounts for the belief that rape victims asked for it. It accounts for the belief that pornography causes no harm other than an imagined and illusory offense to a Victorian sensibility. It accounts for the


It is this kind of power — "[p]ower to create the world from one's point of view" — that Catherine MacKinnon argues is quintessentially the male political and social power over women: "Combining, like any form of power, legitimation with force, male power extends beneath the representation of reality to its construction: it makes women (as it were) and so verifies (makes true) who woman 'are' in its view, simultaneously confirming its way of being and its vision of truth." MacKinnon, Feminism, Marxism, Method, and the State: An Agenda for Theory, 7 Signs 515, 539 (1982).

belief that wolf whistles and sexual jeers on the streets are compliments rather than assaults.223 But the false consciousness argument also makes mockery of women's choice. A woman can fully, freely, and authentically desire a man who is legally empowered over her if his renunciation of legal power is genuine.224 But it is difficult to know, in any given case, whether her desire is full, free, and authentic. The point is not whether her desire is genuine and natural, or false and constructed. The point is that women's sexual choice is deeply problematic.226

These complexities should be deeply troubling to a liberal society (such as ours) whose avowed cornerstone of sexual ethics is bodily autonomy and choice.228 If they are in fact not troubling, that is because they are hidden underneath the idea that powerless women naturally desire powerful men. They will remain hidden as long as society is willing to say that sexual inequality (historical, contingent, situated in public life) is separate from sexual desire (natural, eternal, situated in private life). But it is not ahistorically natural that powerless women desire powerful men. We can eroticize other things besides power and powerlessness.227

But we do not have to wait for the apocalypse (or social change of an apocalyptic nature) to realize a more just law of forcible rape—one that does not complicate women's sexual choice in the manner just described. Recall how I peeled away the enforcement principle layer by layer. The "front line" of the principle is the marital ex-

223. West, Deconstructing the CLS-FEM Split, 2 WIS. WOMEN'S L.J. 85, 89 (1986).
225. This is why, I think, Adrienne Rich is careful to acknowledge that questioning heterosexuality as a historical, contingent, and political institution does not involve claiming that the desire it constructs is "false." Rather, it involves recovering the truth of the kinds of desire which heterosexuality denies or submerges (what Rich calls "lesbian existence"), and arguing that these desires can, and do, function in the lives of women who autonomously choose sexual desires which coincide with the constructs of heterosexuality (female friendship on the "lesbian continuum"). See Rich, Compulsory Heterosexuality and Lesbian Existence, 5 SIGNS 631 (1980).
227. West, supra note 223, at 88-91.
emption, which strictly formalizes the right to self-help, and the conduct-with-accused exceptions to rape evidence rules, which enable a man to make his reasonable expectations argument to his jury. Underlying this is the construction of the rapist as a man whose expectations of sexual access are unreasonable. Where a man is entitled either to notice in the form of resistance, or an unreasonable mistake-of-fact defense, he will not be convicted of rape when he exercises his right to self-help. Underlying the construction of the rapist is the construction of rape. Rape occurs when expectations of sexual access are conflated with natural, conventional desire. It is true that if this last construct withered away, the rest would collapse (like a house of cards); but we do not have to wait for it to do so. If we can eliminate the higher levels of this construct (the enforcement principle in the law of rape), leaving it without its obfuscating legalistic defenses (which make the male expectation/desire complex appear just in application), it might die of exposure.

Imagine a law of rape with no marital exemption and no conduct-with-accused exception to its bar on sexual history evidence. Such a law of rape would probably include some kind of “reverse” cautionary instruction which exhorts the jury against holding sexual promises or expectations against the victim. Further, imagine this law had no resistance requirement, and required that mistakes must be reasonable if they are to serve as a defense. This law of forcible rape is certainly logically (and I hope politically) imaginable. Under this law a man who enforces the right to self-help — a date rapist who exploits drunkenness, a husband who forces his wife, a boss who uses his tacit authority, a lover who exploits vulnerability and solitude — will have to argue capacity (“I couldn’t help myself”) or justification (“I was entitled”) directly to the jury. With the obfuscating layers of legal doctrine stripped away, society (through its representatives, the jury) will have to confront the contradiction between the nature of male desire, and its (society’s) aspiration of sexual bodily autonomy.

To change the law of forcible rape from what it now is to what I have just imagined it to be would empower women vis-a-vis men

228. The traditional cautionary instruction in rape cases warns the jury, in effect, the rape is easy to charge and hard to prove. This is, literally speaking, true. But the not-so-subliminal message sent to the jury when this instruction is read is: “Be suspicious of the victim’s claims.” See S. Estrich, Real Rape 54-55 (1987); Berger, supra note 69, at 21-22.

229. As Lynne Henderson notes, the key to rape reform may lie more in changing community norms than in changing legal ones, since the key disincentive to bringing rape cases today is not as much a legal structure which bars complaints as it is a social structure which makes juries unlikely to convict in “close” cases. Henderson, supra note 64, at 198-99. The reform strategy I suggest dovetails into Henderson’s, in that I believe society must confront the construction of male desire which makes rape possible in order to change its attitudes about rape.
(but not, I think, make women powerful and make men powerless). It would present to society the contradiction between the construction of male sexual desire which underlies our law of forcible rape and our sexual ethic. It might be that the result of this presentation will be further, less subtle, oppression; that male power will take by clear force what it attempted to steal by epistemological stealth. But it also might be that this presentation will create the conditions for a sexual ethic which sees that sexual powerlessness does violence to mutuality, and that “good sex” requires genuine mutual respect.\footnote{\textit{B. Harrison, supra note 226, at 90.}}