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GETTING TO KNOW: HONORING WOMEN IN LAW AND IN FACT

Lynne Henderson*

"Just What Part of No Don't You Understand?"¹

As the past year has at times painfully demonstrated, two decades of feminist law reform efforts to hold men responsible for raping women have yielded disappointing results.² Rape myths, woman-blaming, and resistance to taking rape seriously flourish, and successful prosecution of cases not meeting the stereotype of real rape, while no longer impossible, remains improbable. At the same time, the rate of rape and sexual violence against women continues to grow in this country. Even conservatively, the rate of rape of adult women in the United States is appallingly high. If the rape of minor females were included in the statistics, rather than being classified as (mere) molestations, the rate would probably be much higher.³ As a rape survivor who is also a lawyer and a law

* Professor, Indiana University at Bloomington School of Law. B.A., Stanford University, 1975; J.D., Stanford Law School, 1979. I would like to thank the past and present editors of the *Texas Journal of Women and the Law* for their kind invitation to speak at their conference, *New Perspectives on Women and Violence*, and for all their help in turning a speech into an article. I would also like to thank all the students and faculty who made the conference a special and enjoyable occasion to meet and learn. Finally, thanks to Joseph Hoffmann, Lauren Robel, and Susan Williams for their help and comments on drafts.

1. Phrase on t-shirt.

2. Of the three heavily publicized sexual assault trials in the last year, two resulted in acquittals and one in a conviction. The cases were the William Kennedy Smith case, the St. John's case, and the Mike Tyson case. *FLORIDA V. SMITH: A TRIAL TRAINING VIDEOTAPE* (American Lawyer 1992); *People v. Gubrinowitz No. 5413-90*; *State of Indiana v. Michael G. Tyson, Cause No. 49G04-9109-CF-116245*. See Susan Estrich, *Palm Beach Stories*, 11 *LAW & PHIL.* 5 (1992) (discussing the Smith and Tyson cases); see also Lynne Henderson, *Rape and Responsibility*, 11 *LAW & PHIL.* 127 (1992) (exploring the relationship of law to the social reality of rape). The intense publicity surrounding these trials undoubtedly masked the many other cases in which men were either not prosecuted or were not convicted in circumstances involving acquaintance rape.

3. See David Johnston, *Survey Shows Number of Rapes Far Higher Than Official Figures*, N.Y. TIMES, Apr. 24, 1992, at A9 (noting that estimates of the number of rapes in 1990 in the study sponsored by the National Victim Center, the Crime Victims Research and Treatment Center, and the Medical University of South Carolina, "did not include female children and adolescents or rapes of boys and men" and that "the estimates probably constitute less than half of rapes experienced by all Americans during

professor, I find the criminal law's continued failure to deter and punish rape horrifying. I believe that the problem is not so much with the law on the books in many jurisdictions as with the law in action, and with cultural images of sex and women. Many existing statutes do, or easily could, prohibit much of what feminists assert is rape,⁴ but the interpretation and application of rape laws sharply limit their efficacy.⁵

The thesis of this Article is that a major explanation for the law's failure to have a significant impact on the rate of rape in the United States arises from our cultural beliefs about heterosexuality and rape. In the Article, I argue that a number of cultural conventions and beliefs about heterosexuality transform most rape into "sex" and not criminal conduct. Of these conventions, I believe that common beliefs about the morality of heterosexuality and cultural understandings about what constitutes normal heterosexual practice account for much of the failure of law reform to reduce the rate of rape and sexual abuse. As a number of feminists have observed, both heterosexuality and rape are defined in male, rather than female, terms, including the terms of the morality of heterosexuality and assertions about what women want or are as sexual beings. The morality of heterosexuality that we have inherited, and often have internalized, creates a presumption of moral innocence for men and a presumption of moral guilt for women in sexual interactions. In cases of rape, then, men are presumed innocent and women guilty at the outset.

A second influential cultural belief is that female submission to male sexual dominance or aggression is natural, romantic, and erotic. Related to this is the eroticization of passivity, power, and violence presented in cultural images ranging from advertisements, to television, to soft-core pornography, to snuff films.⁶ If violence, or being overcome, or being "swept away" is what is erotic, then it is difficult to argue that being

1990"); see also *Unsettling Report on an Epidemic of Rape: The Latest Survey Reveals That Majority of Victims Are Minors*, TIME, May 4, 1992, at 15, 15 (reporting on a federally funded survey published by the National Victim Center which found that 683,000 women were raped in the United States in 1990, "five times the number of sexual assaults reported by the Justice Department for the same year" and that of the more than 12 million women estimated to be rape victims, 61% were under age 18 and that 3 out of 10 were under 11 years old).

4. The major exceptions to this statement are the Model Penal Code's provisions on rape. Despite 20 years of feminist efforts, the drafters of the Code have not seen a reason to eliminate the bias in the model sexual assault laws. The Code provisions applicable to rape and related offenses contain a marital rape exemption, a promiscuity defense, a prompt complaint requirement, and a corroboration requirement. See MODEL PENAL CODE § 213.6 (Proposed Official Draft 1962).

5. See SUSAN ESTRICH, REAL RAPE 89-91 (1987) (summarizing rape reform laws and noting that courts continue to interpret rape statutes narrowly).

6. The film *Not a Love Story* provides a powerful summary of images ranging from magazines to strippers to snuff films to billboard advertisements. See NOT A LOVE STORY: A FILM ABOUT PORNOGRAPHY (Nat'l Film Board of Can.); see also Lucinda M. Finley, *The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified: Discourses on Life and Law*, 82 Nw. U. L. Rev. 352, 366-67 (1988) (summarizing reactions to pornography and the film *Not a Love Story*).

ignored and overcome and forcibly penetrated is rape rather than sex. Because these stories of morality and sexuality provide the interpretive lens through which rape is viewed by men, women, prosecutors, judges, and juries, most men who rape women are never held legally responsible for their conduct, and most women who are raped have no chance at successful legal recourse.

Part I of this Article examines and criticizes the cultural morality of heterosexuality that relieves men of moral responsibility for their heterosexual actions. Part II analyzes a cultural story of heterosexuality that renders dominance and submission in heterosexual practice the norm. Part III argues that feminists must not only tell the story of rape, but also develop a positive account of heterosexuality that can challenge and change the prevailing stories in this culture. Finally, Part IV suggests that the next area of legal reform should focus on undermining the male innocence side of the story by assigning the risk of error and punishment to men rather than women. It insists that the law take seriously the woman's voice of heterosexual pain and pleasure: the only way the woman's story will be understood is if it is clear that intercourse without consent is not just bad sex, it is rape. Part IV also argues that the focus of sexual assault and rape statutes should be on consent, and that as soon as a woman indicates her unwillingness to engage in heterosexual activity, the man is guilty of rape or sexual assault if he persists. Such legal reform will not be easy; it is nothing less than a struggle to redefine sex and heterosexuality, and men know this. To challenge the male innocence side of the story, we must be willing to engage in a struggle for the power to define the world of sex and heterosexuality on women's, as well as men's, terms. The challenge may begin with law, but ultimately the struggle must take place in the larger culture.

I. Stories of Heterosexuality: Relieving Men of Responsibility

The story of male innocence and female guilt implies that men are not morally responsible for their heterosexual conduct, while women are morally responsible for their own heterosexual conduct as well as that of men.⁷ At the very least, this conception of heterosexuality traces back to the story of Adam and Eve.⁸ For example, the Judeo-Christian tradition, which has largely shaped moral thought in the United States, frequently emphasized the story of male innocence and female guilt. As Uta Ranke-Heinemann argues in *Eunuchs for the Kingdom of Heaven*, the Roman Catholic Church has reinforced female guilt and male innocence

7. For a more complete discussion, see Henderson, *supra* note 2, at 130.

8. See *Genesis* 3:1-24 (telling the biblical story of the Fall of humankind).

themes in its theology and doctrines throughout its history.⁹ In the thirteenth century, Albert the Great, who had asserted that the Virgin Mary was the only moral woman, declared that "Eve, by contrast, had left all women a double and triple 'woe' . . . first, the woe of the temptation to concupiscence, second, the woe of depravity in the sexual act, and third, the woe of excessive lust in conception."¹⁰ Thomas Aquinas argued that women were more inclined to sexual incontinence than men, and that sexual pleasure with women destroyed men's reason and control.¹¹ The Roman Catholic Church has continued to condemn women's sexuality in much the same way in the present.¹²

The Roman Catholic Church has not been the only religion to condemn women for the Fall or for being a source of temptation to men. Protestants have also held women morally guilty for sexuality. Early Puritan ministers blamed women for "wearing immodest dress" and thereby "enticing men into sexual sin."¹³ In the 1820s, moral purity campaigns led by Protestants in the United States emphasized women's sexual depravity and condemned some women as a threat to men.¹⁴ Preachers today exhort women to modesty, lest they tempt men. Judaism, too, has a tradition of viewing women as the source of sexual temptation and distraction.¹⁵ Islamic law and custom holds that a woman's uncovered hair is enough to drive men to distraction.¹⁶ And, in her critique of the Black Muslim movement, bell hooks observed:

9. UTA RANKE-HEINEMANN, *EUNUCHS FOR THE KINGDOM OF HEAVEN: WOMEN, SEXUALITY AND THE CATHOLIC CHURCH* (Peter Heinegg trans., 1st ed. 1990) (arguing that the hostility of the Catholic Church to sexual pleasures includes a notion of women as unclean and has manifested itself in such teachings as the Church's overemphasis of the virgin birth, the promotion of celibacy for priests, and the ban on contraceptives).

10. *Id.* at 180.

11. *Id.* at 188-89.

12. *E.g., id.* at 344-45 (discussing "Mariology" the church's teaching about Mary, and how it separates Mary from all other impure women).

13. JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 18 (1988).

14. *Id.* at 142-43 ("[C]lergy condemned 'depraved women' who led astray inexperienced young men in the city.").

15. *See, e.g.,* DAVID NOVAK, *LAW AND THEOLOGY IN JUDAISM* 144-45 (1976) (noting that women have been excluded from rituals such as reading the Torah for the community and that such exclusion is based on a desire to avoid the presence of females who would provide an "erotic distraction for male worshippers").

16. For example, in the Islamic fundamentalist country of Iran, "research proved female hair had a kind of radiance' that might tempt men," according to Iran's first President under the revolution, Abolhassen Bani-Sadr. Elaine Sciolino, *From Back Seat in Iran, Murmurs of Discontent*, N.Y. TIMES, Apr. 23, 1992, at E17. In those early years "women were insulted, arrested, fined and even lashed" for dressing in violation of the dress code. *Id.* Today women are still subject to harassment even though the dress code has eased. *Id.* *See also* James LeMoyné, *Some Saudi Women Push Changes*, N.Y. TIMES, Dec. 8, 1990, at A6 ("In public, Saudi women are required to wear a black robe, covering almost all their body and usually a veil . . . [and] to cover their hair and face as well;" allowing women to drive "could lead to temptations that would hurt the sanctity of women").

In American patriarchy, all women are believed to embody sexual evil Within the Muslim movement, the black man who once looked upon black women as devalued property could suddenly see her as elevated to the respected status of wife and mother, that is, after she wrapped her head in cloth and covered her body in long skirts and dresses.¹⁷

Overall, those religions that have influenced American culture have perpetuated a moral story of male innocence and female guilt in sex.

Philosophers have reinforced the story of male innocence and female guilt. In a dramatic example of the philosophic subscription to the story of sexual innocence and guilt, Carole Pateman discusses the work of Rousseau in *The Sexual Contract*.¹⁸ Pateman argues that Rousseau viewed women as the source of sexual temptation and irrationality:

Women, unlike men, cannot control their 'unlimited desires' Women have only modesty, and if they did not have this constraint, 'the result would soon be the ruin of both [sexes], and mankind would perish by the means established for preserving it Men would finally be [women's] victims and would see themselves dragged to death without ever being able to defend themselves.'¹⁹

While other philosophers may not have been as explicit about male innocence and female guilt, none believed women to be as morally developed as men; by inference, women arguably are a source of immorality.

Science has contributed its own stories of male innocence and female guilt. For men sex is a drive, an instinct that requires fulfillment.²⁰ The field of sociobiology has asserted that men are innocent in trying to ensure the survival of their genes.²¹ Women, on the other hand, withhold sex in order to protect their gene pool and are guilty of frustrating males.²² In this view, not only is male promiscuity natural and desirable, but so is rape, which is described as "nothing more sinister than males' efforts to spread their genes around."²³ Less directly, the science of human sexual

17. BELL HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* 110 (1981).

18. CAROLE PATEMAN, *THE SEXUAL CONTRACT* 96 (1988).

19. *Id.* at 97 (quoting JEAN-JACQUES ROUSSEAU, *EMILE OR ON EDUCATION* 358-59 (Allan Bloom trans., Basic Books 1979)).

20. See ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 682 (1953) (discussing a scientific report that concluded that men are "constantly being aroused" whereas women are not and arguing that "[b]ecause of this constant arousal, most males, particularly younger males, may be nervously disturbed unless they can regularly carry their responses through to the point of orgasm").

21. See DAVID BARASH, *THE WHISPERINGS WITHIN* 47-48 (1979) ("For males reproduction is easy, a small amount of time, a small amount of semen, and the potential evolutionary return is very great if offspring are produced A genetically influenced tendency to 'play fast and loose'—'love 'em and leave 'em'—may well reflect more biological reality than most of us care to admit.").

22. See *id.* (arguing that females are discriminating in choice of male sexual partners in order to ensure the best evolutionary outcome in offspring).

23. Ruth Hubbard, *The Political Nature of "Human Nature,"* in *THEORETICAL PERSPECTIVES ON*

behavior developed by Havelock Ellis in the late nineteenth century emphasized that "[m]en were characteristically active, aggressive, sexually insistent, and easily aroused."²⁴ Aggressive sexuality therefore is a natural and, by inference, an unavoidable and innocent part of men's essential nature. Accordingly, much of science reinforces beliefs that women are temptresses and that men are legitimately helpless in the face of that temptation.

The stories of male innocence and female guilt are not limited to religious, philosophical, or scientific texts; they permeate popular cultural beliefs and conventional sexual morality as well. One does not have to look far to see manifestations of the male innocence-female guilt story. For example, in 1991 columnist Ann Landers published the following letter in her column:

Dear Ann Landers: I hope I can put into words my personal theory on date rape . . .

There is no hiding a man's arousal. Usually the female enjoys bringing it on every bit as much as the man enjoys the experience. It is all part of human nature.

The problem is that with many men, there is only one way to end arousal and that is ejaculation. At the height of ecstasy, does the female partner think the man is going to excuse himself, go . . . and take a cold shower? No way. He wants the final act.

. . . If the female partner has made up her mind that there is NOT going to be penetration, she should put a stop to the proceedings at the very first sign of male arousal. A female who doesn't want the total sexual experience should have healthy respect for a flashing red warning light. If she goes beyond this point she could be in trouble.²⁵

This letter tells a story of heterosexuality in which women are in control of sex, even though it is defined on men's terms. Sex equals penetration from the male point of view. Female pleasure is defined in terms of arousing the male, not female arousal. He is not responsible, she is. Men are incapable of being sexually aroused and then going without intercourse; as Morrison Torrey recently remarked, this is "the runaway locomotive" theory of male sexuality.²⁶ Sexual contact or play of almost any kind becomes a justification for penetration. As long as the woman acts early and fast enough, all power is situated within her; otherwise, men are entitled to intercourse. Ann Landers seems to approve: "I see a great deal of logic in what you have said," she responded. "The female who

SEXUAL DIFFERENCES 63, 67 (Deborah L. Rhode ed., 1990).

24. D'EMILIO & FREEDMAN, *supra* note 13, at 224.

25. Ann Landers, *A Male's Theory on Date Rape*, S.F. SUNDAY EXAMINER/CHRON., Aug. 4, 1991, at C2 (quoting letter from W.B., Brookline, Mass.).

26. Conversation with Morrison Torrey, Professor, De Paul College of Law (Mar. 6, 1992).

agrees to hours of petting but does not want to complete the sex act is asking for trouble and she will probably get it."²⁷ In other words, she asked for it. As Jane Aiken observed nearly ten years ago, this kind of belief in men's "natural" sexuality has led courts to hold women responsible for male sexual behavior under a kind of irresistible impulse approach,²⁸ and therefore to exculpate many men who rape.

The work of George Lakoff and Mark Johnson on metaphor and cognition²⁹ provides a different source for understanding cultural perceptions of heterosexuality, male innocence, and female guilt.³⁰ Timothy Beneke uses Lakoff and Johnson's theory of cognitive framing through metaphor to examine metaphors for heterosexual desires and activities.³¹ He notes that male metaphors for sex depict women as commodities and reflect status, hostility, control, and dominance.³² Lakoff, in *Women, Fire, and Dangerous Things*, in turn uses Beneke's work in noting the parallels between metaphors for anger and metaphors for lust in this culture.³³ In an analysis of the metaphors used by a "mild mannered librarian" interviewed by Beneke, Lakoff notes:

The speaker assumes that A WOMAN IS RESPONSIBLE FOR HER PHYSICAL APPEARANCE and since PHYSICAL APPEARANCE IS A PHYSICAL FORCE, he assumes that if she looks sexy, . . . she is using her sexy appearance as a force on him The speaker also assumes that SEXUAL EMOTIONS ARE A PART OF HUMAN NATURE and that A PERSON WHO USES A FORCE IS RESPONSIBLE FOR THE EFFECT OF THAT FORCE. It follows that A WOMAN WITH A SEXY APPEARANCE IS RESPONSIBLE FOR AROUSING A MAN'S SEXUAL EMOTIONS.³⁴

Because forcing sex on another against her will is immoral, Lakoff writes, the speaker is forced to conclude that a man must inhibit his sexual emotions to act morally.³⁵ In turn, this humiliates the speaker, because

27. Landers, *supra* note 25, at C2.

28. Jane H. Aiken, *Differentiating Sex from Sex: The Male Irresistible Impulse*, 12 N.Y.U. REV. L. & SOC. CHANGE 357, 375 (1983-84) ("The courts perpetuate sex discrimination by justifying rape with the assumption that the mixing of sexes inherently causes strong and sometimes uncontrollable impulses in men.").

29. GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 156 (1980).

30. *See id.* ("Metaphors may create realities for us, especially social realities. A metaphor may thus be a guide for future action. Such actions will, of course, fit the metaphor. This will, in turn, reinforce the power of the metaphor to make experience coherent. In this sense metaphors can be self-fulfilling prophecies.").

31. TIMOTHY BENEKE, *MEN ON RAPE* 11-23 (1982).

32. *Id.* at 11-16 (discussing how men metaphorically structure their sexual experiences with women).

33. GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS* 412-15 (1987) (analyzing a passage from Beneke's book to support the suggestion that conceptual metaphors not only provide ways for discussing and understanding lust, but also enter into reasoning).

34. *Id.* at 413 (analyzing interview in BENEKE, *supra* note 31, at 42-45).

35. *Id.*

he must suppress his own natural instinct.³⁶ Thus, she injures him, and she deserves to be punished. The speaker says: "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."³⁷ Lakoff observes, "American culture contains within it a sufficient stock of fairly common metaphors and folk theories which, when put together . . . , can actually provide what could be viewed as a 'rationale' for rape."³⁸ If it is the woman who has power over the man, it is she who is morally culpable; the man is innocent.

Consistent with the Landers column and the Lakoff analysis are a number of cultural judgments about female guilt in sexual encounters. Women whose appearance, manner, or style is perceived as sexy by men are considered to be seductive, "asking for it," and consenting. Thus, common advice to women on how to avoid rape assigns responsibility to them for controlling male sexual reactions. Routinely, women are told to dress in a nonsexual manner, to avoid strange males, to avoid flirting (which can simply mean being friendly to a man). Women are told that on a date they must not drink; they must determine whether men are interested in them as persons; they must avoid going to a man's house or room; they should pay their own way on a date if at all possible (if he spends money on you, then he's entitled to sex); and, finally, they should not engage in other forms of sexual contact unless they are willing to have sexual intercourse with the man. While such advice might be given to women to "protect" them, it often justifies blaming women when they are raped. Combined with the probability that few men are told that they should not interpret the woman's agreement to have dinner or to visit their rooms, or her intoxication as an invitation to intercourse, it helps to illuminate our repeated failures to hold men responsible for rape. Indeed, several studies of how rape is treated in the legal system strongly suggest that larger cultural beliefs in male innocence and female responsibility always and already affect the interpretation of an event as rape or not.³⁹

Gary LaFree's extensive study of rape prosecutions in Indianapolis found that themes of male innocence and female guilt affected the interpretation of rape by legal actors and jurors.⁴⁰ The presumption of innocence became a presumption of entitlement to sex, at least where the defendant was not a total stranger who jumped out of the bushes.⁴¹ If

36. *Id.* at 413-14.

37. BENEKE, *supra* note 31, at 44.

38. LAKOFF, *supra* note 33, at 415.

39. See, e.g., GARY D. LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 53 (1989).

40. *Id.*

41. See *id.* at 222 ("[T]he victim-defendant relationship . . . [had] a significant effect on juror's

rape complainants had been drinking, had sexual experience outside of marriage, had even a passing acquaintance with the man, or otherwise engaged in all too traditional "nontraditional"⁴² behavior, police did not file charges, prosecutors did not prosecute, and juries did not convict in the few cases that actually made it to trial.⁴³ Particularly in "consent defense" cases—those cases in which the defendant argued that the woman agreed to intercourse—jurors relied on their perceptions of the victim's moral character and the defendant's resemblance to their stereotype of how a rapist would look and behave, rather than on the evidence: "[F]or jurors the victim's moral character was even more important than medical evidence or victim injury."⁴⁴ Another study of the effects of Michigan's reform of its rape laws similarly found that perceptions of the complainant's character influenced official decisions in rape cases to an important degree.⁴⁵ Yet another study found that reform of rape laws did not significantly affect police and prosecutorial attitudes to the crime and its victims in six large cities.⁴⁶ From police officer to prosecutor to judge and, especially, to jury, the societal myth of male innocence and female responsibility obstructs the successful prosecution of men who rape.

Indianapolis recently provided a widely-publicized national example of the translation of a rape into a story of female guilt and male innocence by many men and women in the United States. Before the trial of boxer Mike Tyson, condemnation of the victim was standard fare in the local and national media.⁴⁷ During the rape trial, the newspapers and television shows were filled with condemnation of the victim, and praise for the defendant. Much of the black community criticized the prosecution and condemned the trial as racist,⁴⁸ the "official" black response remained

evaluations. . . . [A]ny prior relationship between the victim and the defendant reduced the chances that jurors would consider the defendant guilty.").

42. *Id.* at 217 (describing behavior such as the use of marijuana, birth control pills, and explicit language as influencing a juror's verdict).

43. See Marianne Wesson, *Mysteries of Violence and Self Defense: Myths for Men, Cautionary Tales for Women*, 1 TEX. J. WOMEN & L. 1, 17-21 (1992) (discussing a study which reveals that nonconforming behavior negatively affects police arrest decisions, impacts prosecutors expectations of results at trial, and causes juries to acquit defendants).

44. LAFREE, *supra* note 39, at 218.

45. See JEANNE C. MARSH ET AL., RAPE AND THE LIMITS OF LAW REFORM 95-108 (1982) ("The evidence suggests that if a victim has ever been receptive to the assailant's sexual advances—from 'flirting' with him to having consensual intercourse with him in the past—then officials will be likely to discount her report.").

46. See Julie Horney & Cassia Spohn, *Rape Law Reform and Instrumental Change in Six Urban Jurisdictions*, 25 LAW & SOC'Y REV. 117 (1991) (concluding from studies in Detroit, Chicago, Philadelphia, Atlanta, and Washington, D.C. that the ability of rape reform legislation to affect case outcomes is limited).

47. Some of what follows is based on my conversations with Joe Gelarden, the reporter for the *Indianapolis Star* who covered the trial. See also Phil Berger, *Can Trial of Tyson Be Fair?*, N.Y. TIMES (Late Edition), Jan. 27, 1992, at C7 (reporting a sportscaster's comment that many phone-in poll callers were supporting Tyson and saying the "victim did, after all, go to his room late at night").

48. Interview with an African American female attorney in Indianapolis who had contacted the media

strangely silent about the fact that the victim was also African American.⁴⁹ Many asserted that Tyson was the one raped by the process, rather than Desiree Washington, his 18-year old victim.⁵⁰ Prayer vigils were held for Tyson, but not Washington.⁵¹ His mistreatment of other women meant that she knew he wanted sex. She had to have been consenting, rather than naive and star-struck, when she agreed to go out with him and to stop at his hotel room. She went to his room and broke curfew; therefore, she was blameworthy and consenting. Her nightmares, her injuries, her voice did not count for much; indeed, the *New York Times* barely noted the evidence of her vaginal injuries in its coverage.⁵² She was lying, vengeful, and greedy according to one of the defense stories. Apparently, her credibility would be lost if she pursued her legally recognized rights and remedies as a victim of a violent crime.⁵³ Appallingly, much of the condemnation of the victim appeared to be coming from women, including, no doubt, women who at ages seventeen and eighteen made "mistakes" similar to Desiree Washington's. And although the jury convicted Tyson of rape and deviate sexual conduct, the

to emphasize that she and others disagreed with the sympathy shown Mike Tyson by certain churches and spokespersons for the community; her response was ignored. See also Karen Baker-Fletcher, *Tyson's Defenders and the Church of Silence*, N.Y. TIMES, March 29, 1992, at E17 (criticizing the president of National Baptist Convention and male members of the black community for perpetuating sexism and discrediting black women).

49. Comparisons to the acquittal of William Kennedy Smith were frequently invoked as part of the claim of racism, but the prosecution's evidence in the Tyson case was stronger and the victim less subject to impeachment. There may have been some unconscious racism involved in the jury's verdict, but it is difficult to know to what degree race affected the decision to convict him. The defense portrayal of Tyson as looking for sex may have played into stereotypical beliefs about the black man as sexual predator in the minds of the ten white jurors. A similar case without that evidence or with a white defendant and a white victim might have been decided differently.

50. See, e.g., Lisa L. Ryckman, *Tyson Takes Stand to Deny Rape*, THE HERALD-TIMES (Bloomington, Ind.), Feb. 8, 1992, at A1, A7 (noting that Tyson fans engaged in a shouting match with demonstrators protesting rape outside the court house, with one fan yelling that Tyson was being "raped right now").

51. See Hank Lowenkron, *Tyson Misses Prayers for Justice at Church Service in His Honor*, THE HERALD-TIMES (Bloomington, Ind.), Feb. 3, 1992, at A7 (reporting that Tyson missed a "prayer vigil for justice" in his rape trial" that he was scheduled to attend); E. R. Shipp, *Notes from Tyson Trial: Many Say it Ain't So*, N.Y. TIMES (Late Edition), Feb. 3, 1992, at C7 ("At a rally sponsored . . . by the . . . [National Baptist Convention, U.S.A., Inc.], local churches and Louis Farrakhan's Nation of Islam, several hundred people cheered when . . . told . . . 'our brother needs us.' As Tyson sat in the pulpit . . . with . . . ministers and elected officials, they wrapped him in their affection with songs and prayers.").

52. Compare Phil Berger, *Tyson's Driver Says Woman Was Dazed After Date*, N.Y. TIMES (Late Edition), Feb. 2, 1992, §8, at 1, 2 (noting briefly doctor's testimony of vaginal abrasions) with Lisa L. Ryckman, *Doctor Supports Accuser's Story*, THE HERALD-TIMES (Bloomington, Ind.), Feb. 2, 1992, at C1 (reporting in detail doctor's testimony of vaginal abrasions).

53. Tyson's appellate counsel, Alan Dershowitz, has asserted that Washington's plans to bring a civil suit and market a future book and movie rights gave her "a motive to lie." *Tyson Case on Appeal*, THE HERALD-TIMES (Bloomington, Ind.), Dec. 17, 1992 (discussing second appeal filed by Dershowitz claiming that Washington met with lawyers about civil suit and media rights). Washington did file a civil suit in U.S. District Court in June of 1992 after the criminal trial. *Tyson Is Sued for Damages by Rape Victim*, LOS ANGELES TIMES, June 23, 1992, at C3. In any event, a victim should not have to surrender her credibility if she chooses to pursue the legal remedy to which she is entitled.

commentary after the conviction has "become a familiar litany: 'The jury is wrong. It's her fault. What was she doing in Mike Tyson's room at 2 a.m.? What did she expect?'"⁵⁴

II. Stories of Heterosexuality: Dominance and Submission

Not only is the theme of male innocence and female guilt a major one in our culture, there is also a story of male dominance and female submission in heterosexual sex. Dominance and submission, male aggression and female passivity, are not only considered "natural," but they also frequently define the erotic in this culture. Thus, this stereotype of what is "natural" human sexuality also affects understandings of romance in heterosexual relationships, and the stereotype is celebrated by the pornography industry.⁵⁵ By dominance and submission, I do not mean that sexual activity with another human being may involve intrusions on one's physical and psychic boundaries, nor am I concerned with questions of "who's on top" or questions of who is active and who is passive during a particular sexual encounter. Rather, by dominance and submission I mean to describe the notion that heterosexuality is based on power in some essential way: that females are always passive and to be overborne and that males are always active and overbearing, a notion that in turn justifies the eroticization of abusive power and violence in sex.

Stories of male dominance and persistence and female passivity and submission might appear to create a paradox with stories of male innocence and female guilt. But the stories are not as contradictory as they first seem. Indeed, the two primary definitions of seduction suggest a link. *Webster's* defines "seduction" as "the enticement of a female to unlawful sexual intercourse without use of force" and "something that attracts or charms."⁵⁶ But the "use of force" limitation in seduction appears to be a narrow one. As Susan Estrich observed about rape law, "[T]he force standard guarantees men freedom to intimidate women and exploit their weaknesses, as long as they [the women] don't 'fight' with them."⁵⁷ If seduction is male persuasion without force, it does not preclude males from overriding female wishes, a form of domination. If seduction is female enticement of men, the male innocence story holds. Finally, if force is

54. R. Joseph Gelarden, *Western Culture's Urge to Blame the Woman Has a Long History*, INDIANAPOLIS STAR, Mar. 1, 1992, at F1.

55. See generally *infra* text accompanying notes 64-68; cf. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF STATE 197 (1989) ("[P]ornography . . . institutionalizes the sexuality of male supremacy . . . fus[ing] the erotization of dominance and submission with the social construction of male and female").

56. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1062 (Frederick C. Mish et al. eds. 1988).

57. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1118 (1986).

narrowly interpreted, much dominating, forceful, behavior is simply seen as seduction. The force standard "makes clear that the responsibility and blame for [frightening] seductions belong with the woman."⁵⁸ Thus, the paradox of women as both submissive to, and guilty for, men's sexual experiences is played out in the context of seduction.

The dynamic of power and violence becomes evident in several authors' discussions of the erotic. Lakoff concludes his analysis of the metaphors of sexuality that can rationalize rape, discussed in Part I,⁵⁹ by noting, "What I find sad is that we appear to have no metaphors for a healthy mutual lust. The domains we use for comprehending lust are HUNGER, ANIMALS, HEAT, INSANITY, MACHINES, GAMES, WAR, and PHYSICAL FORCES."⁶⁰ These metaphors certainly can justify aggression and irresponsibility; metaphors of war, animals, and physical forces, and to some extent insanity and games, all are deeply resonant with violent erotic images.

The extent of the influence of these images might be found in the attention given one of their advocates, Camille Paglia,⁶¹ who was recently "honored" by *Newsweek* as a member of the "cultural elite."⁶² Paglia confirms and advocates these violent metaphors as "natural" in a mean-spirited attack on the anti-pornography work of Catharine MacKinnon and Andrea Dworkin: "[P]ornography . . . shows the dark truth about nature, concealed by the artifices of civilization. Pornography is about lust, our animal reality that will never be fully tamed by love. Lust is elemental, aggressive, asocial."⁶³ One need not go to the extremes of woman-hating manifested by Camille Paglia to find support for the violent image of human sexuality. In an article on date rape, *Time* quoted journalist Stephanie Gutmann: "How can you make sex completely politically correct and completely safe? . . . What a horribly bland, unerotic thing that would be! Sex is, by nature, a risky endeavor, emotionally. And desire is a violent emotion."⁶⁴ Similarly, Ann Snitow, writing about bodice rippers as pornography for women, states:

In recent debates, sex books that emphasize both male and female sexual

58. *Id.*

59. See *supra* text accompanying notes 33-38.

60. LAKOFF, *supra* note 33, at 415.

61. See CAMILLE PAGLIA, *SEXUAL PERSONAE: ART AND DECADENCE FROM NEFERTITI TO EMILY DICKINSON* xiii (1991) (arguing through emphasis on "the truth in sexual stereotypes and on the biologic basis of sex differences" that the "brutal pagan forces" of sex and nature still flourish in Western art, eroticism, astrology, and pop culture).

62. *The Newsweek 100*, NEWSWEEK, Oct. 5, 1992, at 36, 38 ("Cultural terrorist, author. She incenses feminists, calls date rape 'sex as usual,' . . . Why is the Ivy League so frightened?").

63. Camille Paglia, *Guest Opinion: "The Return of Carry [sic] Nation"*, PLAYBOY, Oct. 1992, at 36, 38. If I were an animal other than a human, I would take umbrage at this remark.

64. Nancy Gibbs, *When Is It Rape?*, TIME, June 3, 1991, at 48, 53.

feeling as a sensuality that can exist without violence are being called "erotica" to distinguish them from "pornography." This distinction blurs more than it clarifies the complex mixture of elements that make up sexuality. "Erotica" is soft core, soft focus; it is gentler and tenderer sex than that depicted in pornography. Does this mean true sexuality is diffuse while only perverse sexuality is driven, power hungry, intense, and selfish? I cannot accept this particular dichotomy. It leaves out too much of what is infantile in sex—the reenactment of early feelings, the boundlessness and omnipotence of infant desire and its furious gusto. . . . For adults this totality, the total sexualization of everything, can only be a fantasy. But does the fact that it cannot be actually lived mean this fantasy must be discarded? It is a memory, a legitimate element in the human lexicon of feelings.⁶⁵

The definition and interpretation of infantile sexuality Snitow alludes to is itself an assumption based on psychoanalytic constructs that are by no means proven or true in any empirical sense. Snitow's essay illustrates how persistent the paradigm of violence and power is in defining the erotic. But her acceptance of the conflation of aggression, rage, and sexuality as "natural" justifies the image of the erotic as a struggle for power rather than a pursuit of pleasure—a justification that legitimates sexual abuse.

Dominance and submission eroticize power, power in the sense of "power-over" another human being rather than the sense of liberating a human's "power-to."⁶⁶ This image of the eroticism of "power-over" exists throughout culture. The bodice rippers, with women swept off their feet or overpowered by passionate, if hard, men, construct an erotic romance of dominance and submission. The visual media also participate in romanticizing dominance and submission: Andrea Parrott has observed, "Men overriding women's protests to win their adoration—even after raping them—is a recurring theme in movies and television."⁶⁷ And many women in this society see, and defend, as erotic the use of power, domination, force, violence, and bondage. Recently, Sallie Tisdale wrote in *Harper's*:

Power fantasies . . . are rather common for men and women both. I use the term "power" to describe a huge continuum of images: physical and psychological overpowering of many kinds, seduction and bondage and

65. Ann B. Snitow, *Mass Market Romance: Pornography for Women Is Different*, in *PASSION AND POWER: SEXUALITY IN HISTORY* 259, 269 (Kathy Peiss & Christina Simmons eds., 1989)(footnotes omitted).

66. The terms "power-over" and "power-to" are explained in MARILYN FRENCH, *BEYOND POWER: ON WOMEN, MEN, AND MORALS* 505 (1985) ("[T]here are different sorts of power: there is power-to, which refers to ability, capacity and connotes a kind of freedom, and there is power-over, which refers to domination. Both are highly esteemed in our society.").

67. Annie Nakao, *Sex-Role Stereotypes Called a Cause of Date Rapes*, S.F. EXAMINER, June 10, 1991, at A1, A15 (discussing society's perpetuation of sex-role stereotypes, including comments by Cornell University's Andrea Parrott, author of *Acquaintance Rape: The Hidden Crime*).

punishment, the extremes of physical control practiced by S&M enthusiasts. The word "rape" for such scenes is inappropriate; the fact of rape has nothing to do with sex, or pornography.⁶⁸

Because rape is a crime of both sex and power, it is sexualized violence.⁶⁹ Accordingly, Tisdale's distinction is incoherent but telling: Sex can include anything short of broken bones and blood, and sometimes includes even those things.

Because the crime of rape as usually defined includes the elements of force and nonconsent, the dominance and submission theme of "sex" often justifies sexual violence. As Catharine MacKinnon observes, "[W]omen consent to sex with force all the time."⁷⁰ The cultural images of domination and force as erotic lead not only to the belief that "the legal concept of consent can coexist with a lot of force,"⁷¹ but also to juror's beliefs about what is sex and what is rape. Gary LaFree's work provides a troubling example of this phenomenon: "In one consent [defense] case, a black female juror noted that hospital records don't mean it was rape. Abrasion of the vagina still doesn't mean rape—*she might want that force.*"⁷² The dominance and submission story transforms the victim's claim of rape into one of sex throughout the criminal justice system, and makes men innocent and women guilty liars in many rape cases.

The dominance and submission story comports with the moral story of male innocence and female guilt in another way. Women's passion and lustfulness means that they are always already consenting; they are secretly lust-filled creatures who want men to be forceful and to overcome their false modesty. I once observed that Lord Byron's poetic phrase "[as she] whisper[ed] 'I will ne'er consent'—consented,"⁷³ had not altogether negative connotations in this culture.⁷⁴ Dominance and submission support the cultural belief that no means yes and that men are entitled to ignore and overcome women's objections. The belief is hardly new; in the thirteenth century Albert the Great wrote:

As I heard in the confessional in Cologne, delicate wooers seduce

68. Sallie Tisdale, *Talk Dirty to Me: A Woman's Taste for Pornography*, HARPER'S, Feb. 1992, at 37, 45.

69. Cf. Henderson, *supra* note 2, at 156-59 (discussing the problems of separating the definition of rape into either a crime of violence or a crime of sex).

70. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1303 (1991).

71. *Id.*; see also Estrich, *supra* note 57, at 1105-32 (1986) (describing appellate court interpretations of consent and force that tolerate a great deal of violence against women).

72. LAFREE, *supra* note 39, at 218 (emphasis added).

73. GEORGE G. BYRON (LORD BYRON), *DON JUAN: CANTO I* (1819), reprinted in *THE NORTON ANTHOLOGY OF ENGLISH LITERATURE*, at 1643 (M.H. Abrams et al. eds., 1975).

74. Lynne Henderson, *What Makes Rape a Crime?*, 3 BERKELEY WOMEN'S L.J. 193, 216 (1987-88) (book review).

women with careful touches. The more these women seem to reject them, the more they really long for them and resolve to consent to them. But in order to appear chaste, they act as if they disapprove of such things.⁷⁵

If no does not mean no, then the man is entitled to go ahead and override the woman's express statement of her wishes, to dominate her, regardless of what the woman actually says. A particular tragedy of the dominance and submission and no means yes stories is not only that passivity means acceptance, but also that women's assertiveness means acceptance.⁷⁶

It should be obvious that none of these defining stories is true in any essential way. Despite the constant references to human nature to justify the past and current paradigms of heterosexuality in the United States, there is no credible evidence that our practices of dominance and submission or female guilt and male innocence are biologically inevitable or necessary. The practice of heterosexuality, like other human practices, is variable and culturally scripted, which should give us hope. The story of heterosexuality can and should be rewritten and reinterpreted as part of the battle against rape. Rewriting that story is an urgent task for feminists, I believe, for if we do not, the story will simply continue to reproduce itself to the detriment of us all.

III. Rewriting The Stories

Rewriting the story of heterosexuality will be difficult because the stories are so deeply entrenched in our culture. Further, Americans become irrational on the subject of sex,⁷⁷ despite the prevalence of implicit and explicit sex in the media and advertising. As a culture, we may not know what healthy, nondominant, pleasurable, caring, and responsible sex would look and feel like any more than someone who has never known freedom from oppression would know what freedom looks and feels like. We have few metaphors for sexual desire and passion that are not also metaphors for violence, power, and irresponsibility.⁷⁸ Moreover, any attempt to develop a positive account of heterosexuality for women in the context of compulsory heterosexuality⁷⁹ and patriarchal

75. RANKE-HEINEMANN, *supra* note 9, at 179 (discussing how Albert the Great, corrupted and dehumanized by celibacy, readily slandered women to "further[] the monasticization of society").

76. Last year in a discussion with Indiana University undergraduates, I heard of an undergraduate male who proudly announced in a sociology class that he had a "three no rule." Fortunately his female classmates did not react passively: milder responses included, "Do you tell your dates about this 'rule'?"

77. See D'EMILIO & FREEDMAN, *supra* note 13, at 359 ("Contemporary events [in America, including the response to AIDS and outrage over the sex scandals of political leaders] . . . illustrate the continuing power of sex as a symbol capable of arousing deep, irrational fears.").

78. See LAKOFF, *supra* note 33, at 412-15 (noting parallels in metaphors for anger and metaphors for lust).

79. Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence* in *POWERS OF DESIRE: THE*

society may be dangerous, because of the dangers of reinforcing heterosexism.⁸⁰ Although it will be a great challenge, for the many women who do not choose celibacy and do not want or enjoy lesbian sexual experiences, I think it is crucial to examine which heterosexual practices and attitudes hurt women and which heterosexual practices and attitudes give them pleasure.

Catharine MacKinnon and Andrea Dworkin have offered one new version of the story of heterosexuality. But, although we owe much to MacKinnon and Dworkin for their theoretical and practical contributions to the effort to end sexual use and abuse of women, their story of heterosexuality is a reductionist one of female innocence or complicity and male guilt. Dworkin argues that women who voluntarily engage in heterosexual activity collaborate with or manipulate men; they do not experience pleasure, they experience pain and splitting in intercourse.⁸¹ While Dworkin's polemic against intercourse does capture one part of women's experiences, I also read the book as full of shame and hatred of the female body as well as a denial of women's heterosexual agency and pleasure.⁸² And although MacKinnon does not deny that glimpses of equality and heterosexual pleasure are possible, she has asserted that "[p]erhaps the wrong of rape has proved so difficult to define because the unquestionable starting point has been that rape is defined as distinct from intercourse, while for women it is difficult to distinguish the two under conditions of male dominance."⁸³ MacKinnon's denigration of women's ability to tell the difference between sex and rape leaves the current structures of heterosexuality unchallenged, unmodified, untouched.

The Dworkin and MacKinnon stories negate women's expressed wishes and experiences and ironically reinforce women's lack of control in heterosexual relations. This denial of agency parallels the stories of male innocence and female guilt, male dominance and female submission, and penetration as the criterion of sexual pleasure, allowing for continued tolerance of heterosexual violence. Thus, while MacKinnon and Dworkin have made an invaluable contribution to the dialogue, they have not helped

POLITICS OF SEXUALITY 177, 178-82 (Ann B. Snitow et al. eds., 1983) (suggesting that male-identified society has created political institutions that compel women into heterosexuality by portraying lesbian experience "on a scale ranging from deviant to abhorrent, or simply rendered invisible").

80. See, e.g., BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 147-56 (1984) (discussing the disruptive tendency throughout the feminist movement "to make the struggle to end sexual oppression a competition" between heterosexuality and lesbianism).

81. ANDREA DWORKIN, *INTERCOURSE* 121-43 (1987) (arguing that the objectification of women that occurs in heterosexual intercourse makes heterosexual equality and pleasure impossible).

82. This may be a somewhat idiosyncratic reading; however, the book contains repeated negative images and loathing of the female body that are not challenged directly by the author. There is no celebration of women's physiology that I can find, at least. See, e.g., *id.* at 169-72 (accepting ascription of dirtiness to females without contradiction).

83. MACKINNON, *supra* note 55, at 174.

women to define or explain any of the pleasure women might experience in heterosexual activity. To break out of the cage of guilt and submission, we need alternative stories that place women's experiences of heterosexuality in the center.

If we are to rewrite the story of heterosexuality, then we must listen to women's voices telling about their experiences. Lois Pineau has suggested that we look at heterosexual interactions from the woman's point of view, not the man's, and take seriously the woman's account of pleasure as well as pain.⁸⁴ Doing so should help to develop a cultural understanding that women are not always filled with lust, that sadomasochistic sexual practices as the norm of heterosexuality are damaging and painful to women, and that present definitions of rape ignore both women's human dignity and their sexual agency.⁸⁵ In order to develop an understanding of rape from a woman's perspective, a woman's story of the difference between heterosexual intercourse and rape must be heard.

While some writers have posited a continuum between rape and heterosexual intercourse,⁸⁶ none to my knowledge has attempted to describe what the continuum between rape and pleasurable heterosexuality might be. In this section, I present a *tentative* description of the continuum, using experiential accounts as a guide to that description.⁸⁷ In devising my descriptions, I have been guided by my own experiences as a rape survivor with a heterosexual identity, conversations with numerous other women, most of whom are white, and the writings of other feminist legal scholars. I have also borrowed from Sam Keen's men's movement best-seller, *Fire in the Belly*,⁸⁸ because it contains a description of heterosexuality that resonates with what my friends and I have experienced and discussed.

In formulating my descriptions of women's sexual experiences, I want to emphasize that I am making no claim to being an authority on the subject. Nor am I claiming anything "essential" about female sexuality, existing separate and apart from context and culture. Sex cannot be separated from context; heterosexual activity in this culture does take place

84. Lois Pineau, *Date Rape: A Feminist Analysis*, 8 LAW & PHIL. 217, 236-40 (1989).

85. I agree with Robin West's argument that the law cannot take women seriously until they speak of their pain and pleasure. See Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 144-45 (1987) (arguing that we need to listen to women's accounts of pain and pleasure in order to develop legal tools to combat pain and enhance pleasure).

86. See, e.g., Henderson, *supra* note 74, at 226-27 (suggesting a phenomenological difference between rape and lovemaking); Lynne Henderson, *Law's Patriarchy*, 25 LAW & SOC'Y REV. 411, 432-33 (1991) (criticizing Carol Smart for claiming there is a "continuum between (hetero)sex and rape" without explaining what it might be in CAROL SMART, FEMINISM AND THE POWER OF LAW 44 (1989)).

87. See Appendix A for a visual depiction of the continuum.

88. SAM KEEN, *FIRE IN THE BELLY: ON BEING A MAN* 489 (1991).

in a context of compulsory heterosexuality, widespread sexual abuse of females, and persistent gender inequalities. It is also true that a language of women's sexuality is not readily available, as sexuality remains described from a male point of view, using male words and metaphors. Nevertheless, this does not mean that female heterosexual experience cannot be described at all, or that women should continue to cede the description of heterosexuality to a masculine point of view. The challenge is to identify and express those elements of heterosexuality that are pleasurable, to separate those experiences from the ones that are painful, and to decide which of the painful experiences are rape and criminal.

If one listens to women's experiences, it becomes apparent that heterosexual women do not always feel harmed by heterosexual penetration; they may indeed find it desirable and pleasurable in certain contexts. Many women also know that it is rape when they are ignored by a man who does not care about their wishes and forces his penis into them. It is painful, scary, degrading, and damaging. Thus, we see the beginnings of the continuum: at one end, pleasurable heterosexual sex, at the other end, rape. Between the two situations are encounters which are sometimes "rape" and sometimes "sex."

The continuum includes the experience of what Robin West has identified as the problem of the "giving self" and the experience that I will refer to here as "bad sex."⁸⁹ West describes an experience somewhere between rape and "bad sex" where women transform a threatening and scary heterosexual encounter into consensual sexual intercourse or contact by becoming "giving selves" who consent in order to diffuse the danger.⁹⁰ The woman is frightened subjectively, although she may not be able to specify any behavior on the part of the man that frightened her. Rather, it can be a generalized fear of male violence, a "look," an attitude, that leads her to believe that she can diffuse the physical danger she perceives by "giving him what he wants." In this situation, differentiating between rape and intercourse might be the most difficult and would approach MacKinnon's description.⁹¹ Contrary to Lois Pineau's argument that it is unreasonable to think that women would consent to something that is not pleasurable for them,⁹² the giving self consents in

89. See West, *supra* note 85, at 103 (describing a "giving self" as a woman who consents to sex, not to satiate her own desires, but to satiate the desires and pleasure of the other). "Bad sex" is hardly an original term—it is used in ordinary discourse among lesbians, gays, bisexuals, and heterosexuals.

90. See *id.* at 101-06 (reviewing various accounts of the relationship between fear of violence and sexual consent).

91. See MACKINNON, *supra* note 55, at 174 (arguing that it is difficult for women to distinguish the difference between rape and intercourse because they are constantly subjected to male domination).

92. Pineau, *supra* note 84, at 232 ("[I]f science and the voice of women concur, if aggressive seduction does not lead to good sex, if women do not like it or want it, then it is not rational to think that they would agree to it. Where such sex takes place, it is therefore rational to presume that the sex was

order to avoid danger, a choice that may very well be "rational" under the circumstances.⁹³ She may have preempted a legal claim of rape, because she consented, but the giving self may be aware that whatever the encounter was, it was frightening, upsetting, and invasive. Alternatively, the encounter might have been deadening and self-denying. Such "consensual" sex for the giving self, although both rational and involving the exercise of some minimum of "choice" or agency on the part of the woman, is not a pleasurable experience. This sex is closer to rape than to pleasurable sex along the continuum between the two.

"Bad sex" for women is intercourse that was not particularly pleasurable but was not scary, or deadening, or shaming. Despite the common joke that women who say they were raped are only complaining about bad sex, in the various situations that constitute bad sex, the partners know they could stop things or change their minds without fearing that the other person would assault them.⁹⁴ The experience of bad sex actually ranges from the not-so-good to the truly rotten, but it does not involve abuse in the sense of the dehumanization of the woman or the experience of fear. Bad sex can range from the experience of disappointment when one hoped the man would be a better lover, to the experience of being distracted or losing desire during the course of events, to being bored, to feeling disappointed because one did not feel the pleasure one had hoped to at a particular time. A woman may have made a decision to engage in heterosexual intercourse that she regrets because it did not provide pleasure, or that she feels was a mistake. Or bad sex can be a disaster, where one's state of being or one's partner's state of being is such that there is an utter failure to have pleasure in the interaction. If one is preoccupied with a problem, the mechanics may work but the experience, while not painful, is not pleasurable either. Yet women who have experienced bad sex do not feel raped, because they were exercising some agency, and their partner did not abuse them, ignore them, or deny their humanity. They were not used as objects for the acting out of power or anger or sadism.⁹⁵ Bad sex is not particularly pleasant, perhaps, but, unlike rape, it does not damage a woman's personality, sense of self, sense of safety in the world, or overall well-being. Bad sex falls somewhere between the giving self and pleasurable sex on the continuum between rape and heterosexual sex.

not consensual.").

93. See West, *supra* note 85, at 102 ("A straightforward, sensible, protective reaction to someone who is indifferent to your subjectivity, and at the same time must have you as an object, is to hide your subjective self and objectivity and then to give your sexual self for his pleasure and your safety.").

94. I am grateful to Robin West for helping me with this point.

95. See generally A. NICHOLAS GROTH & H. JEAN BIRBAUM, *MEN WHO RAPE* 13 (1979) (suggesting that there are three forms of rape: anger rape, power rape, and sadistic rape).

The next step along the continuum involves distinguishing bad sex from something pleasurable and something of value to women, even within the context of inequalities in a male-dominated society. Drucilla Cornell made an important contribution to understanding what pleasurable heterosexuality might be. Cornell's efforts to describe the pleasure and positivity in sexual receptivity and intimacy as something other than sexual degradation suggest a feminine understanding of sexuality and desire that escapes hierarchy and celebrates human connection.⁹⁶ But her efforts are hampered by ceding, with some of the French feminists, the definition and realm of sexual description to male language.⁹⁷ I do not think, however, that female sexual experiences need to be confined to the realm of the unspeakable or metaphysical even though I agree with Cornell that for now we may have to be metaphorical in describing good sex.⁹⁸

Many women feel heterosexual desire. They want to, and do, act upon it and experience great pleasure. Heterosexual desire, touching, connection with another person who is male can feel good; it can be pleasurable; it can be happy and enjoyable for women. Intimacy here means more than what one body part is doing with another. It is closer to the "I-Thou" experience of permeable boundaries with simultaneous recognition of another living being,⁹⁹ together with all sorts of riffs of physical, bodily pleasure from head to toe. Good sex can be crazy, silly, sweaty, passionate, intense, languid, loving, orgasmic, enlivening,

96. See DRUCILLA CORNELL, *BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION, AND THE LAW* 130-64 (1991) (arguing that sex can be a receptive and connecting act rather than accepting Catharine MacKinnon's idea as interpreted by Cornell that sex results in the body becoming a "barrier in which the self hides and [either] guards itself" or asserts itself against others).

97. *Id.* at 147-52 (arguing that rather than reject metaphors that have been used to misdefine women, feminists should adopt a methodology of circling within the metaphors of the feminine); see also *id.* at 156 ("Feminine style is this constant experimentation to write the unspeakable, knowing all the while the inherent contradiction in the effort. . . . We can never know for sure that we have come out of their language."); Arleen B. Dallery, *The Politics of Writing the Body: Écriture Féminine*, in *GENDER/BODY/KNOWLEDGE* 52, 54 (Alison M. Jaggar & Susan R. Bordo eds., 1989) ("French feminism, *écriture féminine* [(writing the body)], essentially deconstructs the phallic organization of sexuality and its code, which positions woman's sexuality and signified body as a mirror or complement to male sexual identity."); Luce Irigaray, *The Sex Which is Not One*, in *NEW FRENCH FEMINISMS* 99, 106 (Elaine Marks & Isabelle Courtivron eds., 1981) (arguing that while women should take certain steps "in their effort to escape their proletarianization on the trade market," it is impossible for them to reverse the existing order of domination without a "return to phallocalism, where neither women's sex, their imaginary, nor their language can exist"); Xavier Gauthier, *Is There Such a Thing as Women's Writing?*, in *id.* at 161, 162 (noting that men and women "speak approximately the same language," one that is based "upon one fundamental signifier: the phallus").

98. CORNELL, *supra* note 96, at 203-05 (asserting that rather than reject the metaphors that have been used to define women, feminists should adopt a methodology of using the metaphors of the feminine to create and give value to the feminine).

99. In "I-Thou" relations, the "I" (self) knows itself as known and is active. "I-Thou" relations stand in contrast to "I-It" relations, in which I is not a reflective being and does not know itself as being known. H. RICHARD NIEBUHR, *THE RESPONSIBLE SELF* 72-73 (1963) (discussing Martin Buber's existentialist reflections that led him to postulate I-It and I-Thou relations as prior to any atomistic conception of I).

relaxing.

The cultural conflation of sexual pleasure and orgasm is insufficient to capture the experience of good sex. Orgasm is not a goal, an achievement, but a part of a process; orgasm is not necessary to having a pleasurable sexual encounter. Further, because orgasm can happen even in a violent rape, orgasm alone cannot define good sex. Nor is penile penetration, the model of heterosexual expression as reflected in the letter to Ann Landers discussed in Part I,¹⁰⁰ necessary in good sex. As Cornell and others have written, female sexuality is complex and multifaceted, and women may be stimulated at multiple sites in and on the body, with and through the emotions.¹⁰¹ Yet, although vaginal penetration is not the central part of sexual pleasure for women, it certainly can be a part of pleasure, and on this I agree with Cornell's characterization of connection and intimacy with another as part of the pleasure.¹⁰² In an atmosphere of trust, care and desire, heterosexual activity, including intercourse, is an experience of intimacy, not invasion; connection, not intrusion. Rather than being deadening, good sex can be enlivening and amazing.

Lois Pineau posits a somewhat less physical vision of sexuality, one that honors women's wants, desires, and voices. Pineau terms this "communicative sexuality," or heterosexuality modeled on friendship.¹⁰³ In friendship and sexuality, she suggests, both people operate in a context of sympathy or empathy, care, and concern for the other person's feelings and desires.¹⁰⁴ If we do not understand one another's communication, we ask and we strive to work together to understand one another. We take responsibility for the other's feelings and well-being in friendship and should do so as well in sexuality. Like Pineau, I think, although I do not know, that female sexual pleasure is most likely to occur in the context of a relationship of mutual care, communication, desire, and attention. Certainly it is not simply a matter of which button is pushed when or which bodily part is manipulated in what way, which is the thesis of so many American sex manuals. Rather, it is self and other, working and playing together.

Sam Keen presents another vision of women's sexuality that challenges

100. See *supra* text accompanying notes 25-27.

101. See CORNELL, *supra* note 96, at 156-64 (surveying the descriptions of female sexuality written by Luce Irigaray, Hélène Cixous, and Monique Wittig).

102. See *id.* at 154.

103. Pineau, *supra* note 84, at 233-37.

104. See *id.* at 236 ("Intuition will help them to interpret their partner's response; sympathy will enable them to share what their partner is feeling; charity will enable them to care."). I think Pineau uses "sympathy" to mean what is more appropriately designated "empathy." See Lynne Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1579-82 (1987) (discussing the linguistic origins, definition, and literary connotations of "empathy").

existing male understandings of what sex properly is and reflects conversations and feelings I have had as well:

I have it on good authority that when women get together and talk about their lovers they don't speak much about hardness, speed or numbers of orgasms. Instead they praise men who touch softly, who receive pleasure as easily as they give it, who are as comfortable melting into the softness of communion as in thrusting vigorously in the frenzy of climax. My informal poll of women of all political persuasions reveals that they all agree that they would like men to slow down, take their time, enjoy the trip and not worry so much about the outcome. . . . Almost without exception my informants say that women keep trying to degenitalize men's focus and teach them that there are only two erogenous zones—the heart and the skin.¹⁰⁵

This image, along with the other images of enjoyable heterosexual intimacy, is helpful, at least for me, in developing a description of the pleasurable sex end of the continuum.

Given such accounts of heterosexual pleasure, what of the disconcerting fact that women report sexual arousal and pleasure in sadomasochistic texts such as *Story of O*?¹⁰⁶ Or that women find pleasure in being overpowered? Undeniably, millions of women read bodice rippers for pleasure. Robin West, in a thoughtful analysis of women's seemingly paradoxical reactions to *Story of O*, suggests that dominance and submission may be erotic for women in an atmosphere of trust and care.¹⁰⁷ Sallie Tisdale, in her defense of pornography, writes that the appeal of pornography involving power and objectification frees the woman from sexual shame, and that the woman wants to be free of shame, guilt, and responsibility.¹⁰⁸ In a culture that makes women's sexuality shameful and dirty, in a culture that condemns women as the source of sexual immorality, through a story that places all guilt in the female, it is small wonder that she should seek that freedom. And in a telling conclusion to her celebration of sexual abandonment, Tisdale wrote, "I could not read such stories, watch such films, with anyone but a lover. I couldn't act them out except with the person whom I trusted most of all."¹⁰⁹

While I do not find domination and submission erotic—*Story of O* horrifies me—I believe that within a context of trust and care it would be possible for heterosexual couples to experiment and to play out fantasies

105. KEEN, *supra* note 88, at 489. Whether his authority is accurate in some technical social-scientific or scientific point of view is less interesting to me than his respectful description of the female-focused perception of what is pleasurable to women and what is not.

106. PAULINE RÉAGE, *STORY OF O* (Sabine d'Estrée trans., Ballantine Books 1973) (1954).

107. West, *supra* note 85, at 129-33.

108. Tisdale, *supra* note 68, at 46.

109. *Id.*

of domination and submission in a way that is not damaging. With empathy and trust, heterosexual couples perhaps can experience the kind of doubling that gay and lesbian couples describe in the experience of acting out dominance and submission.¹¹⁰ Such doubling does not simply recreate and reinforce existing hierarchies of gender, but produces a both-and experience, perhaps subverting gender hierarchy.¹¹¹ But the heterosexual couple might find entrenched gender roles and sheer physical inability to empathize a difficult barrier to cross in order to achieve doubling and rebellion in this way.¹¹² At least arguably, resistance and doubling take place within a context of willingness and empathy; each person has a choice and there is no denial of the other person's humanity and feelings. If this is possible for heterosexuals, then it provides a challenge to existing stories and practices.

From this tentative description of sexual pleasure and pain we may conclude that women experience pleasure in heterosexual practices in ways far different from those embodied in the male innocence-female guilt and dominance-submission stories as understood in this culture. If it is the case that women do not take pleasure in being obliterated, that they do not take pleasure in being ignored, used and frightened by men, then when men do these things, they are guilty of sexual abuse. The sooner we start emphasizing this, the better.

IV. The Role Of Law

Feminists, together with crime control conservatives and sympathetic men, achieved a number of important reforms in the law of rape starting in the 1970s.¹¹³ In response to the rape-as-violence argument, many states redefined rape to be forcible intercourse, dropping any explicit nonconsent requirement; other states dropped the force requirement and

110. See SIMON WATNEY, *POLICING DESIRE: PORNOGRAPHY, AIDS, AND THE MEDIA* 28 (2nd ed. 1989) (arguing that since homosexuals can play both the dominant (i.e. "penetrator") and the submissive (i.e. "one who is penetrated") roles in their relationships, they are able to exercise these roles without being damaged by the violence and hatred which can result from these sexual categories).

111. See Carl F. Stychin, *Exploring the Limits: Feminism and the Legal Regulation of Gay Male Pornography*, 16 VT. L. REV. 857, 878-79 n.51 (1992) ("Gay male pornography, particularly, has the ability to destabilize the signifier. The ability of gay men to assume both dominant and submissive roles establishes fantasy as open and 'boundaryless' . . .").

112. In *Rape and Responsibility*, I note that men might not be able physically to empathize with the violence and pain in forcible penetration, because they do not have vaginas. See Henderson, *supra* note 2, at 157-58. Because women do not have testes or penises, they may not be able to empathize with the pain that too much force or pressure can cause those bodily parts. Although there are analogues—the clitoris for women, the nipples for men—I, at least, have found it tricky to know if I am causing my partner discomfort unless he tells me.

113. See, e.g., MARSH ET AL., *supra* note 45, at 11 (describing the passage of the model rape reform law in Michigan in 1974 by a bipartisan coalition of women and law-and-order advocates).

made nonconsensual intercourse a crime.¹¹⁴ Many of these reforms were directed toward reducing bias against rape survivors.¹¹⁵ None of the statutes to my knowledge adopted a woman-focused view of rape, however. Force remained defined on male terms and so did consent.¹¹⁶ Few, if any, of the reforms directly addressed the problem of the myth of male innocence or challenged the male image of what constitutes noncriminal heterosexual behavior.¹¹⁷ Because these stories form the filter through which any given rape case is interpreted, any additional law reform should be directed at undermining these cultural myths.

Currently, understandings of what constitutes sex and what constitutes rape assume that women find pleasure in what is painful and, as MacKinnon says, consent to sadomasochistic sexual practices all the time.¹¹⁸ A diagram illustrating the continuum in beliefs about what is rape and what is sex in this culture follows this Article.¹¹⁹ Along the continuum from sex to rape, acts that involve intercourse in the context of actual violence, visible injury, threats, implied violence, and sheer overbearing of women are often believed to be sex and not rape. What might charitably be termed confusion over what rape is results from the belief that women are guilty in sexual encounters and that dominance and submission is the paradigmatic context for heterosexuality.¹²⁰

While I am not concerned with defending the argument here, I do think that rape is best defined in terms of nonconsent. Courts in jurisdictions that have a force requirement continue to require force beyond the overbearing of a woman who says no. A Pennsylvania appellate court

114. See, e.g., Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 LAW & PHIL. 35, 39 (1992) (noting that Mich. Comp. Laws § 750.520b(1)(f)(1991) has an elaborate definition of force, while Utah Code Ann. § 76-5-402, 406 (1990) has made nonconsent the central element in rape by defining nonconsent as an expression by the victim of "lack of consent through words or conduct").

115. See MARSH ET AL., *supra* note 45, at 3 ("[E]fforts [at reform] are part of a larger statement that, as women move into more autonomous roles in society, their activities deserve to be acknowledged and respected.").

116. See Schulhofer, *supra* note 114, at 64 (arguing that force has remained at the forefront of the definition of rape while consent has been deemed less important as a result of our social structure and concrete male interests in preservation of the male prerogative).

117. See *id.* at 41 (describing feminists' concern that force and consent reflect male viewpoints and that new standards need to incorporate female ideas about force, which can include nonphysical intimidation, in order to fully capture what rape is); Henderson, *supra* note 2, at 156-59 (explaining how the rape as violence argument allows men who rape to claim innocence because in labeling rape as "violence" "feminists have enabled many men to distinguish what they have done from what rapists do [due to the fact that] they haven't caused external physical damage that they can understand as violence").

118. MacKinnon, *supra* note 70, at 1303.

119. Appendix A.

120. But see Schulhofer, *supra* note 114, at 77 ("In sum, intercourse in the face of verbal objections, ambivalence, or silence is intercourse without consent, and it represents a clear offense against the personal autonomy of the person. Even in the complete absence of force, such behavior is 'nonviolent sexual misconduct' and should be punished as such."). But see *infra* text accompanying note 121.

recently held that although the victim "had continually said 'no' during the incident [sic]," because "there was no evidence that she was prevented from leaving the room," there was no "forcible compulsion," and therefore no proof of rape.¹²¹ The requirement of additional force assumes that lack-of-consent intercourse itself does not constitute force and pain, which utterly ignores women's experiences. As I have noted elsewhere, "it should go without saying that if a woman does not want to engage in intercourse and is not consenting, the man has to" use physical force to accomplish the act.¹²² And a man's forcing his penis into a woman's body can be excruciatingly painful. The harm is in the invasion and the denial of one's existence as a human being, not whether or not there is additional violence. Thus, I agree with a number of authors who have, using various perspectives, concluded that the harm in rape is nonconsensual intercourse or sexual abuse and that requiring some form of violence in addition perpetuates a male, rather than a female, interpretation of rape law.¹²³

Yet against the background of the stories we tell about heterosexuality, "consent" becomes the legal justification for finding that the man is not guilty of rape in a number of contexts. Even in states in which the statutory elements of rape no longer explicitly include language requiring lack of consent, consent remains an issue.¹²⁴ And in those jurisdictions that require the prosecution to prove that the defendant knew the victim was not consenting,¹²⁵ our stories of male innocence-female guilt, male aggression-female passivity make it almost impossible to prove the defendant had the requisite mens rea, especially where there is no weapon or additional violence. If the woman says no, the male innocence story holds that she does not really mean no, and thus juries can easily find that the defendant was reasonable in believing that the victim was consenting. Similarly, if the legally required mens rea as to nonconsent is recklessness,¹²⁶ a defendant can successfully argue that he never

121. *State v. Berkowitz*, 609 A.2d 1338, 1347-48 (Pa. Super. Ct. 1992); see also *Wherein 'No' Is Not Enough*, N.Y. TIMES, May 29, 1992, at B11.

122. Henderson, *supra* note 2, at 158.

123. See, e.g., Estrich, *supra* note 57, at 1103-15 (criticizing the legal understanding of force as male defined and arguing that law should not presume consent); cf. Schulhofer, *supra* note 114, at 36 (criticizing the force requirement and proposing that nonconsensual intercourse be criminal, although not rape).

124. See, e.g., ESTRICH, *supra* note 5, at 84-85 (describing a Michigan court's holding that a jury should be instructed that consent is a full defense under a rape statute drafted to preclude such a defense "under circumstances involving commission of a felony").

125. See, e.g., IND. CODE ANN. §35-42-4-1 (Burns 1992) (defining rape as: "A person who knowingly or intentionally has sexual intercourse . . . when: (1) The other person is compelled by force or imminent threat of force"). This statute can be read to require knowledge as to compulsion, which, in turn, means without consent.

126. See, e.g., *State v. Koonce*, 731 S.W.2d 431, 437 n.2 (Mo. Ct. App. 1987) ("Rape and sodomy can be committed 'recklessly' . . . [when the act is] done with an awareness of the risk and a conscious disregard of that risk.").

"consciously disregarded" the risk of nonconsent. Negligence, the least exacting mens rea requirement, does not really change this basic pattern. If a man has an honest and reasonable belief in consent from the male point of view, he is not guilty.¹²⁷ As a male Dartmouth student reportedly said, "There's a social dance that goes on. Passivity you read as acceptance rather than denial."¹²⁸ Thus, if it is reasonable to believe no means yes, if it is reasonable to believe that female passivity is normal and natural, then the man lacks the mens rea for rape.

The time framing¹²⁹ on consent also creates a cruel double bind for women. If the reasonable man, like the author of the letter to Ann Landers,¹³⁰ believes that as soon as the woman does anything to arouse him she is consenting to intercourse, then arguably any sexualized interaction is consent to intercourse. If male arousal is such that it demands satisfaction, setting into action an unstoppable chain of events, a woman's right to say no quickly disappears. On the other hand, even if a woman does say no early in the encounter, if she is not resisting and struggling late in the events, she is consenting. Thus, regardless of how she reacts, a jury could well find that she had consented to the act, transforming rape into sex.

A recent, and shocking, example of the themes of male innocence and female guilt, male dominance and female submission, and of misunderstandings about what constitutes consent comes from a grand jury's failure to indict a man for rape in Austin, Texas.¹³¹ The man entered his victim's home and hid in her bathroom. Returning from a party at 3 a.m., the victim had gone to bed. The victim said her dog began barking, and she got out of bed to see why the dog was barking. She saw the man, whom she did not know, in the hall. She latched her bedroom door, and "tried to call 911."¹³² At that point, the woman stated, he broke into her bedroom armed with a knife, and raped her at knife point. During the course of the sexual assault, the victim asked her assailant to wear a

127. See, e.g., *People v. Mayberry*, 542 P.2d 1337, 1345 (Cal. 1975) (holding that defendant is entitled to an instruction on whether he entertained a reasonable and bona fide belief as to consent under California law).

128. Philip Weiss, *The Second Revolution*, HARPER's, Apr. 1991, at 58, 72 (criticizing one university's efforts to protect undergraduate women).

129. This phrase comes from Mark Kelman's superb critique of criminal law doctrine. See Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 600-616 (1981) (defining the narrow time frame as beginning at the moment the person decides to commit the criminal offense, defining the broad time frame as accounting for events both prior and subsequent to the criminal incident, and arguing that the narrow time frame view of consent serves a vital ideological function for free markets—while "produc[ing] rather trivial criminal law results").

130. See *supra* text accompanying notes 25-27.

131. The following facts comes from Kimberly Garcia, *Grand Jury Decides Not to Indict on Rape Charge*, AUSTIN AM. STATESMAN, Oct. 9, 1992, at A1, A8.

132. *Id.* at A8.

condom that she provided to protect herself from AIDS and other infections. Subsequently, the man confessed, but said, "[T]here was no rape to it. She's the one who gave me the condoms. If she didn't want to, why would she give me the condoms?"¹³³ While these facts seem to fit the classic stereotype of rape—a stranger with a weapon breaking into one's home—the grand jury disagreed.

Given these facts, it appears to be outrageous that the grand jury did not indict the man.¹³⁴ The failure is less outrageous if one subscribes to the stories of male innocence or dominance and submission, however. The interpretation of the facts then becomes one of her blameworthiness and sexual proclivities. She was to blame because she was sexually active (she had condoms) and was out late at a party. Using a narrow time frame, despite the fact he was armed, she had to be consenting because she asked him to wear a condom that she provided him. Alternatively, the story could be one of her sexual "kinkiness" and women's desire to be overpowered: She liked having sexual intercourse with strangers holding knives.

In an unusual, although legal, move, the prosecution sought an indictment before a second grand jury. The second grand jury did indict the man for rape, but he continues to assert that she consented.¹³⁵

Such horror stories, together with existing interpretations of consent and mens rea, demonstrate that the male innocence and dominance and submission stories of heterosexuality must be challenged. I believe that the way to ensure women's sexual safety in this society is to place an affirmative burden on men to assure that their partners are consenting. One way to accomplish this would be to change the mens rea requirement for consent in a way that displaces the myths of male innocence and female guilt, dominance and submission. First, the minimum culpable mens rea as to consent should be negligence, as Susan Estrich has argued.¹³⁶ But, as I have argued elsewhere, simply using the reasonable man, or the reasonable man in the defendant's circumstances, standard is not enough to displace the presumption that women are always and already consenting, lustful creatures, nor does it counteract images of male persistence and

133. *Id.*

134. One could blame the prosecution, the grand jury, or both for this failure, but whether it was lack of prosecutorial interest or poor judgment on the part of the jurors is difficult to know. The prosecution did not have the victim testify before the grand jury, apparently because the prosecution thought it had a "clear cut case." See *id.* at A1 (discussing the facts surrounding the decision not to indict). It may also be true that the prosecution did not take the case seriously because of beliefs about the victim and rape. There are at least some who assert that the prosecution did not take the case seriously until the media brought the matter to public attention. *Id.* at A8.

135. Jim Phillips and Kimberly Garcia, *Grand Jury Indicts Man in Condom Rape Case*, AUSTIN AM. STATESMAN, Oct. 28, 1992, at A1, A6.

136. See ESTRICH, *supra* note 5, at 96-98; Estrich, *supra* note 57, at 1182-83.

dominance.¹³⁷ Thus, I would argue that the law impose strict liability as soon as the woman says no or indicates that she does not want to engage in sexual activity. This essentially creates a conclusive presumption of recklessness.¹³⁸ Once the man is told no, he is alerted to the risk of lack of consent and should bear the risk if he continues despite the no. No should mean no. Stop should mean stop. Crying should negate consent. Similarly, screaming and silence are negations. Further, a woman's lack of positive cooperation in sexual activity is a signal of nonconsent,¹³⁹ not her "natural" passivity. If the man is under the influence, it should not negate his mens rea; many jurisdictions already presume recklessness as mens rea when the defendant is voluntarily intoxicated,¹⁴⁰ and the presumption should be equally applicable to culpability for rape.

I believe imposing a conclusive presumption of recklessness in such instances would cover the so-called "ambiguous" situation, in which the man claims he had "mixed signals" or that the woman seemed to be "going along" because she was not actively resisting. If a man is receiving "mixed signals," he is on notice to ascertain whether his partner is willing to continue, and if he does not stop and clarify things, he is reckless. But even if the presumption does not work in the ambiguous case, the benefits of this presumption are several. First, it displaces focus from the male standard as to what constitutes consent and what does not. Second, a conclusive presumption would at least make those instances in which there were threats or where a woman's refusal to consent was ignored easier to prosecute. Third, a presumption of recklessness when a man is on notice that the woman does not want to have intercourse (or oral or anal sex) speaks to the specific event at the specific time more than the current practice does. While it may be true that the victim's credibility can still be attacked with prior acts of consent, in the instance of an acquaintance rape it is less relevant that she consented in the past if she said no at the time in question, because what he believed or presumed would be

137. Henderson, *supra* note 74, at 217-18.

138. Susan Estrich comes close to this when she argues that reasonable men should be held to a no means no standard, but refuses to argue for a conclusive presumption of recklessness and is unclear on negligence. See Estrich, *supra* note 57, at 1104.

139. See, e.g., CAL. PENAL CODE § 261.6 (West Supp. 1992) (defining consent as "positive cooperation in act or attitude pursuant to an exercise of free will"); WIS. STAT. ANN. § 940.225(4) (West Supp. 1992) (defining consent as "words or overt actions . . . indicating freely given agreement").

140. See, e.g., State v. Cameron, 514 A.2d 1302, 1308 (N.J. 1986) (holding that evidence of voluntary intoxication should be excluded when crimes require mental states of only recklessness or negligence); People v. Guillet, 69 N.W. 2d 140, 143 (Mich. 1955) (holding that intoxication may only negate specific intent); MODEL PENAL CODE §2.08(2) (1980) (establishing that if an actor is unaware of risk due to self-induced intoxication, and that actor would have been aware of risk if sober, the actor's lack of awareness is immaterial); cf. State v. Vaughan, 232 S.E.2d 328, 330 (S.C. 1977) (adopting what the court classified as the minority rule that "voluntary intoxication, where it has not produced permanent insanity, is never . . . a defense to crime, regardless" of whether intent is general or specific).

irrelevant to his being on notice at the time of the interaction that led him to rape. Of course, the woman's credibility as to whether she signalled no in such a way as to put the man on notice still can be attacked in a number of ways—by innuendo if nothing else—but at least the law would not be telling the jury that it does not matter if she said no, or cried, or froze in terror. Finally, a conclusive presumption really does give women some power to determine whether or not they wish to engage in heterosexual activity. At present, if their voices can be ignored, if their silence can be ignored, by men and by the law, it makes no sense for women to take any affirmative responsibility in sexual encounters. And if this is the case, then the old no-means-yes, just-overpower-me model of heterosexuality remains firmly in place in law and in fact.

I am not optimistic that legislatures would enact such a conclusive presumption in the near future. First, assigning the risk of being wrong to men rather than women through a form of strict liability significantly challenges the liberal legalist understanding of criminal law that requires that a person be morally blameworthy.¹⁴¹ Because of the assumptions that men cannot stop once they get to a certain point, that they are entitled to sex, and that women ask for it, imposing strict liability on men for raping women seems to punish them for unavoidable, and therefore not blameworthy, conduct. But this is simply not the case if one realizes that there is nothing about arousal that necessitates penetration. Another possible liberal objection is that a conclusive presumption of recklessness would relieve the prosecution of its burden of proving a serious offense beyond a reasonable doubt, but such an objection would be inapposite: the prosecution would still have to prove that the victim indicated lack of consent beyond a reasonable doubt in order for the presumption to apply. Finally, punishments for rape are fairly high in most jurisdictions. Liberal legal legislatures, and sympathetic scholars including Susan Estrich,¹⁴² are likely to be reluctant to punish the negligent or presumptively reckless man as severely as a stereotypical rapist, because somehow they are not as "culpable."¹⁴³ Thus, unless the punishment for rape were reduced in exchange, a conclusive presumption might not be enacted.

Strict liability for lack of consent would probably meet with severe opposition from crime control and conservative thinkers as well. Despite many conservatives' fondness for strict liability for some violations,

141. See Kelman, *supra* note 129, at 610-11 (observing that most resist the idea of punishing people who are without fault).

142. See ESTRICH, *supra* note 5, at 96-104 (noting that if negligence liability is imposed on men for rapes, traditional views of male aggression and conduct must be changed or men will be punished for behavior that they do not recognize as criminal).

143. I discuss this issue of punishment in *Rape and Responsibility*. See Henderson, *supra* note 2, at 174-76.

including those of drug laws and felony murder, they are likely to balk at a reform that challenges the male innocence-female guilt story of heterosexuality in such an explicit way. Empowering women is not on the agenda of many conservatives. While crime control advocates have supported some rape reform laws, some legislators have resisted repeal of the marital rape exemption in many states as well as reforms that expand the definition of rape beyond its classic formulation.¹⁴⁴ Conservative resistance to the formulation "no means no" and to woman-centered interpretations of rape would undoubtedly thwart additional reform challenging "traditional values" and woman-blaming. Further, the retaliatory and retributive rationales for punishment many subscribe to would not exist because they will not feel the kind of visceral moral outrage toward a man who "simply" rapes a woman, if for no other reason than they are likely to subscribe to the male innocence belief system.

Even if legislatures made further revisions in the law of rape or sexual assault to formally change the law on the books, it might not make much difference in successful criminal prosecutions, at least in the short term. As Susan Estrich recently noted, pushing the boundaries of rape law in acquaintance rape cases over the past few years may have created a kind of judicial and professional legal backlash against rape shield statutes and other reforms.¹⁴⁵ I have argued that juries and undoubtedly prosecutors will be reluctant to convict men of rape in all but the most stereotypical instances as long as the male innocence-female guilt model applies.¹⁴⁶ As the Pennsylvania case mentioned above indicates,¹⁴⁷ many appellate courts are still not willing to interpret rape and sexual abuse statutes outside of a male-defined view of force and sex. And as long as many subscribe to Camille Paglia's assertion that date rape is sex as usual¹⁴⁸ or to the idea that rape is the woman's fault and that sexuality is necessarily violent and barely controlled, we will not succeed in increasing the number of convictions for rape or in deterring rape via the criminal law regardless of the law on the books.

Recognizing that the criminal law's requirement of proof beyond a reasonable doubt and society's reluctance to punish men for heterosexual acts that fall within cultural understandings of sex, some feminists have urged that rape victims should use tort law to sue the men who raped

144. See, e.g., MARSH ET AL., *supra* note 45, at 14-19 (1982) (describing legislators' resistance to reform of rape law in Michigan).

145. See, e.g., Estrich, *supra* note 2, at 14-27 (discussing renewed attacks on rape victim's credibility, erosions in rape shield protections, and threats of psychiatric examinations of complainants).

146. See Henderson, *supra* note 2, at 172-73.

147. See *supra* note 121 and accompanying text.

148. See Paglia, *supra* note 63, at 38 (positing that pornography does not cause rape or violence and women should let "men be men").

them.¹⁴⁹ A civil action gives the victim control over the process, avoids the problem of proof beyond a reasonable doubt, and does not entail imprisonment for the offender, undoubtedly a source of the reluctance to convict on the part of some juries. I have no objection to using civil as well as criminal law to address the problem of rape, but I do not think it gets us much farther in the context of the stories we tell about heterosexuality. Although the burden of proof is less stringent in civil cases, the reluctance to think that anything but the most stereotypical rape is rape and the belief in male innocence still affect perceptions. The definition of sexual assault still allows for a consent defense, although it might be easier to have strict liability notions imported into the civil law. Further, as the Tyson defense tried to suggest, the possibility of a civil action for the crime of rape can be used to undermine the victim's credibility if she also is involved in a criminal prosecution.¹⁵⁰ Impeachment on the basis of prospects of financial gain is a matter of concern for those of us working to establish women's credibility. Finally, unless the defendant is financially well off, it may not be economically worthwhile to sue him. Thus, many of the underlying problems in the interpretation of rape law remain.¹⁵¹

The proposed Violence Against Women Act of 1991¹⁵² provides for federal suits for punitive and compensatory damages on the basis of sex discrimination in cases involving violence against women, including sexual assault.¹⁵³ The impetus behind the legislation included an understanding that crimes of violence against women constitute gender discrimination and deprive women of their civil rights, provided the plaintiff can prove by a preponderance of the evidence that the violence was committed because of, or on the basis, of gender.¹⁵⁴ Unless the federal courts are willing to adopt MacKinnon's argument that rape and sexual assaults are by definition sex discrimination, and are therefore crimes "motivated by gender, because of gender or on the basis of gender,"¹⁵⁵ the cause of action will be of

149. See Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 814-35 (1988) (discussing the development in some jurisdictions of tort actions based upon physical force, economic pressure, and deception in sexual encounters, and the varying success and potential of each approach).

150. See *supra* note 53 and accompanying text.

151. See CATHARINE A. MACKINNON, *Sexual Harassment: Its First Decade in Court*, in FEMINISM UNMODIFIED 103, 112-13, 150 (1987) (discussing the fact that the credibility of rape victims is often discounted and the standard applied in cases handled by the Equal Employment Opportunity Commission); cf. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 816 (1991) (noting difficulties of proof in sexual harassment cases and the parallels with the interpretation of rape).

152. S. 15, 102d Cong., 1st Sess. (1991).

153. *Id.* at § 301 (providing for a cause of action against persons who commit crimes of violence motivated by gender).

154. *Id.* at §§ 301(d)(1) - e(1).

155. See MacKinnon, *supra* note 70, at 1306-08 (arguing that because sexual assault should not be

little more than symbolic value. Particularly because several states have gender-neutral sexual assault laws,¹⁵⁶ courts plausibly could accept the argument that rape or sexual assault can be committed against men, too, as they briefly did in sexual harassment cases, so it is not automatically a crime of gender bias.¹⁵⁷ Determinations about what evidence would be sufficient to demonstrate bias, and the meanings of "because of" and "on the basis of" gender also could effectively render the cause of action meaningless. Given the general resistance of the federal judiciary to the Violence Against Women Act,¹⁵⁸ it is unlikely that the legislation, even if passed and signed into law, would be an effective legal remedy for rape survivors, although it might have symbolic value.

What then do we do? We do not stop trying for legal reforms and challenges where necessary. The mens rea of negligence as to consent is preferable to one of knowledge, for example. Having rape shield statutes is necessary; defending these statutes against claims that a man's Sixth Amendment right to confrontation allows him to impugn the character of his victim is also necessary. Using civil suits is necessary. Supporting practices that prevent disclosure of a rape survivor's name while supporting those who come forward is important.

But, ultimately, we have to challenge and change our cultural stories of heterosexuality so that men are held responsible for what they do with their penises and sexual abuse of women does not go unrecognized by the legal system. We do this by telling our stories of rape and sexual abuse, to be sure, but we also do it by telling a story of mutual responsibility, pleasure, and care in heterosexuality. In doing so, perhaps we can move on the continuum between rape and sex to a place where sex is understood not to be the submission of a terrified, or even worried, woman in the giving self category, but, rather, a mutual sharing between persons who recognize each others' humanity, even if—especially if—that includes recognition of each others' vulnerability and capacity for pleasure and pain.

treated as gender neutral, current sexual assault law should be subject to Fourteenth Amendment scrutiny).

156. See, e.g., CAL. PENAL CODE § 11165.1 (West 1992); N.M. STAT. ANN. §30-9-11 (Michie 1978); OKLA. STAT. ANN. tit. 21, §1111 (West 1993); TEX. PENAL CODE ANN. § 22.011 (Vernon 1993); see also ESTRICH, *supra* note 5, at 81 (discussing gender neutral language).

157. See MACKINNON, *supra* note 151, at 107-108 (discussing the possibility of defendants using a bisexual defense).

158. See Judith Resnik, *Hearing Women*, 65 S. CAL. L. REV. 1333, 1344-45 (1992) (noting that the U.S. Judicial Conference of the United States, the voice of the federal judiciary, issued a report opposing passage of the Violence Against Women Act because, among other things, issues of domestic violence are best left to state courts); David Savage, *Rehnquist Says New Laws Burden Courts*, S.F. CHRON., Jan. 1, 1992, at A1, A12 ("The proposal to allow civil suits for sexual assault 'would involve the federal courts in a whole host of domestic-relations disputes.'") (quoting J. Rehnquist).

APPENDIX A

TENTATIVE CONTINUUM OF PRESENT CULTURAL
UNDERSTANDING OF "RAPE" AND "SEX" IN HETEROSEXUAL
ENCOUNTERS IN THE UNITED STATES

LYNNE HENDERSON

| | |
|---|---|
| RAPE | COMPLETE STRANGER, INTERRACIAL (BLACK ON WHITE) |
| | WEAPONS |
| SOMETIMES "RAPE" SOMETIMES "SEX" | ACTUAL VIOLENCE, VISIBLE INJURY |
| | THREATS, IMPLIED VIOLENCE |
| | NO IGNORED, OVERBORNE, INTOXICATED VICTIM |
| "SEX" | "GIVING SELF" |
| | CONFUSION, AMBIVALENCE, RELENTING, "BAD SEX" |
| | MUTUAL RECOGNITION, AGENCY |
| | MUTUAL DESIRE, LIKING, COMMUNICATION |
| | MUTUAL DESIRE, LOVE, CARE, COMMUNICATION |

