

“HANDS OFF”: SEX, FEMINISM, AFFIRMATIVE CONSENT, AND THE LAW OF FOREPLAY

DAN SUBOTNIK*

*A feminist inquiry into the distinction
between rape and intercourse . . .
would inquire into the meaning of the
act from women’s point of view*

Catharine MacKinnon¹

*[W]omen have a seemingly endless
capacity to lie, both to ourselves and
others, about what gives us pain and
what gives us pleasure.*

Robin West²

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I dedicate this article and give three gold stars to Professor Richard Delgado for his stalwart support of my work. I am compelled to withdraw one star, however, because Delgado’s own work, in ramping up inter-group tensions, has aggravated the very problem that I deal with here.

For ease of presentation, my focus is on the theory and practice of heterosexuality. Much of the discussion, however, is equally applicable to homosexuality in its various forms.

¹ CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 181-82 (1989).

² Robin L. West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN’S L.J. 149, 214 (2000).

XY was walking through a friend's room during a fraternity party at Brown University when he spied XX, a female student, asleep near a puddle of what seemed to be her own vomit.³ Waking up, XX asked for some water, whereupon XY invited her into his room to drink something. She entered under her own power, seemingly in control.⁴ After talking with XY for a while on his bed, clothed, she began kissing him.⁵ He kissed her back,⁶ and, human nature running its course, she asked if he had a condom.⁷ After he donned one, they had sex.⁸ They then talked and smoked cigarettes before falling asleep in XY's bed.⁹ Although there is obviously more to the story, there is no gainsaying this account. XY is the only one with memory of the night's events, which took place a decade ago.¹⁰

The parties talked briefly in the morning about the prior night's doings¹¹ and XX gave XY her phone number.¹² When he called her thereafter, however, she did not answer or return his calls.¹³ One month after the night in question, XX reported the story to the Dean of Student Life and XY was thereafter brought up on a disciplinary charge of "non-consensual physical contact of a sexual nature."¹⁴ The *Brown Daily Herald* broke the story in an EXTRA edition, which identified XY by name and photograph.¹⁵ The XY case, which prefigured recent rape charges leveled at three lacrosse players at Duke University and led to a nationally publicized manifesto signed by 88 Duke faculty members and administrators,¹⁶ became a cause

³ For reasons that will become clear, the parties will not be named here. A fuller account of the story is available in Ben Gose, *Brown University's Handling of Date-Rape Case Leaves Many Questioning Campus Policies*, CHRON. HIGHER EDUC., Oct. 11, 1996, at A53, and a complete account can be found in a series of articles over more than a year in *The Brown Daily Herald*.

⁴ Gose, *supra* note 3, at A53.

⁵ *Id.*

⁶ According to XY, XX "began removing my shirt," "unbuckled my belt, and helped me remove my pants and socks"; she then "started touching and fondling my penis." Statement of [XY], filed with Brown University (Apr. 4, 1996) (on file with author).

⁷ Gose, *supra* note 3, at A53.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Celeste Tarricone, *Pomerantz Lessens Charge to Flagrant Disrespect*, BROWN DAILY HERALD, Sept. 9, 1996, at 9.

¹² Gose, *supra* note 3, at A53.

¹³ See Statement of [XY], *supra* note 6.

¹⁴ See Gose, *supra* note 3, at A53. "Non-consensual" for this purpose included acts using "advantage gained by the offended student's mental or physical incapacity or impairment of which the offending student was aware or should have been aware." OFFICE OF THE DEAN OF THE COLL. & STUDENT LIFE, BROWN UNIV., ACADEMIC CODE & NON-ACADEMIC CONDUCT 18 (2006).

¹⁵ Cover Page, BROWN DAILY HERALD, May 3, 1996, at 1.

¹⁶ See Buzz Bissinger, *That Championship Scandal*, VANITY FAIR, July 2006, at 70. Here is the introductory language of the manifesto:

célèbre on the Brown campus.¹⁷ It led to a rally against sexual assault,¹⁸ which featured XX as a speaker and resulted in XY being widely shunned.¹⁹ Following a hearing, the University Disciplinary Council found XY in violation of school disciplinary rules and recommended his suspension,²⁰ a penalty later reduced by the Provost to two semesters of probation.²¹

Among hundreds of faculty members and administrators at Brown, not a single woman spoke out publicly on XY's behalf; among men, only one actively and openly supported him.²² The XY story, highlighting the complex sexual attraction/repulsion function,²³ also raises some intriguing questions for us here: Was XY's behavior, which did not involve force, worthy of a great university's condemnation? If so, should XY also be criminally liable for rape? If not, how much volition constitutes legal—and moral—consent to sex? Are law professors, who do not study human behavior, much less the psychology of sexuality, competent to answer these questions? How to explain why the academic community cannot deal with cases like XY and Duke in a calm and businesslike manner?

Regardless of the results of the police investigation, what is apparent everyday now is the anger and fear of many students who know themselves to be objects of racism and sexism, who see illuminated in this moment's extraordinary spotlight what they live with everyday [sic]. They know that it isn't just Duke, it isn't everybody, and it isn't just individuals making this disaster.

Duke Case: The 'Listening' Statement, JOHNSVILLE NEWS, Nov. 10, 2006, <http://johnsville.blogspot.com/2006/11/duke-case-listening-statement.html>. The Manifesto went on to quote relevant letters: “. . . no one is really talking about how to keep the young woman herself central to this conversation, how to keep her humanity before us . . . she doesn't seem to be visible in this. Not for the university, not for us.” *Id.* “This is not a different experience for us here at Duke University. We go to class with racist classmates, we go to gym with people who are racists. . . . It's part of the experience.” *Id.* In the wake of this hullabaloo, the coach was forced to resign, the players were suspended, and the rest of the lacrosse season cancelled. See S.L. Price, *The Season After*, SPORTS ILLUSTRATED, Feb. 26, 2007, at 18, 18-19; Charlotte Allen, *Duke's Tenured Vigilantes*, WKLY. STANDARD, Jan. 29, 2007, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/013/190uejex.asp>.

¹⁷ Interview with Rose R. Subotnik, Professor of Music, Brown University, in Providence, R.I. (1996) (on file with author).

¹⁸ D. Morgan McVicar, *20/20 Vision?: Tempest over Sexual Assault*, PROVIDENCE J.-BULL., Jan. 30, 1997, at B1.

¹⁹ Information provided by Brown professors Rose R. Subotnik and David Josephson.

²⁰ See Gose, *supra* note 3, at A53.

²¹ *Id.* at A54.

²² The lone supporter was Professor David Josephson, who reports that he did not know XY and learned of the story only when he read the EXTRA edition of the Herald.

²³ According to a report based on a study of 1.5 million women, those under threat of rape should try “defecating or sticking fingers down the throat to induce vomiting as few people can stand the smell.” David Ward, *Advice to Resist Sex Attackers May Make It Worse, Rape Charity Warns*, GUARDIAN UNLIMITED, Aug. 16, 2000, <http://www.guardian.co.uk/print/0,,4051998-103690,00.html> (quoting the report). For more on the relationship of desire and disgust, see DAN SABBATH & MANDEL HALL, *END PRODUCT: THE FIRST TABOO* (1977); WILLIAM IAN MILLER, *ANATOMY OF DISGUST* (1997).

Ideally, of course, a woman should address these questions. Women are normally the victims of sexual assault; men their victimizers. But if a woman has not stepped forward and a man, practicing therapeutic jurisprudence, can bring a measure of gender peace, is he not owed a debt of gratitude?

I. "NOLI ME TANGERE"²⁴

In the academic war over gender, the action has shifted from the abortion to the rape front. We Americans are living in a "rape culture," announce the editors of a major anthology on rape.²⁵ According to CUNY English Professor bell hooks, American culture actually "celebrates" rape.²⁶

The grim consequences of men's rapacious sexuality reportedly play out not only on the vulnerable bodies of women pinned down for men's pleasure, but on all women. Professor Ann Cahill's philosophical treatise on rape begins: "The threat of rape . . . constitutes a persistent and pervasive element in women's lives."²⁷ "Rape," she goes on, "has never been far from my experiences."²⁸

It is not easy for a man to understand women's fears. It is no easier for him to alleviate them, for neither pure heart nor good works can earn a woman's trust. "I need not assume that every man is a potential rapist," says philosopher Judith Baer, "but for my own safety I must assume that any man may be."²⁹ For anti-rape pioneer Susan Brownmiller, rape is "nothing more or less than a conscious process of intimidation by which *all men keep all women* in a state of fear."³⁰ This fear, according to some, is greater than the fear of death—perhaps because murder is perceived as the

²⁴ "Don't touch me" (Latin). Jesus voiced these words to Mary Magdalene when rising from the tomb, explaining that He was off to see His Apostles. *John* 20:17.

²⁵ TRANSFORMING A RAPE CULTURE 2 (Emilie Buchwald et al. eds., 1993). "[O]n TV programs and ads, in newspapers, novels, poetry, song, opera, rock, and rap, on every billboard, in every shop window, on every museum wall we found evidence of a rape culture." *Id.* at 2. For a definition of "rape," see *infra* notes 120-21 and accompanying text. Because the subject of this article is not rape generally, only the briefest summary of the "rape culture" argument is presented here.

²⁶ "We live in a culture that condones and celebrates rape." bell hooks, *Seduced by Violence No More*, in TRANSFORMING A RAPE CULTURE, *supra* note 25, at 351, 353. (Out of modesty, or not, hooks refers to herself without upper-case letters. I respect her choice here.)

²⁷ ANN J. CAHILL, RETHINKING RAPE 1 (2001).

²⁸ *Id.*

²⁹ JUDITH A. BAER, OUR LIVES BEFORE THE LAW 59 (1999). Query: Is there a difference? "A fully justified fear of acquisitive and violent male sexuality . . . permeates many women's—perhaps all women's—sexual and emotional self-definition." West, *supra* note 2, at 162.

³⁰ SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 15 (1975).

end product of rape.³¹ According to Paul Nathanson and Katherine Young, who teach religious studies at McGill University and co-authored two books on gender relations,³² that “all men subjugate all women by the universal female fear of being raped . . . is still a fundamental—no, *the* fundamental—doctrine of ideological feminism.”³³

Is it any wonder that the Brown and Duke campuses erupted? In the contemporary climate, says Georgetown University law professor Robin West, the American woman has come to define herself as “a being who ‘gives’ sex, so that she will not become a being from whom sex is taken.”³⁴ There are no Saturday night fevers, no Cats on a Hot Tin Roof, in this cool world,³⁵ only women who would “rather eat chocolate” than have sex.³⁶ And here is the rub. In practice, says West, “[i]f a man wants to have sex and his female partner doesn’t, they more often will than won’t.”³⁷

These critics of the American way of sex are surely right—up to a point. Notwithstanding recent legislative reform, too many men are still violating women’s rights, and bodies, with impunity. The worst of all these cases, documented over and over, involve 1) those who, heedless of the woman’s consent, literally or metaphorically jump out of bushes to attack their victims, 2) psychiatrists, school teachers, priests and school administrators who prey on their wards, and 3) those who assault their romantic partners.³⁸ In 1994, when opinions addressing the aforementioned prob-

³¹ See CAHILL, *supra* note 27, at 160, 165; see also LAURA KIPNIS, THE FEMALE THING: DIRT, SEX, ENVY, VULNERABILITY 132 (2006) (explaining that the fear arises out of the expectation that that they will be killed after the rape). Kipnis is a professor of media studies at Northwestern University.

³² PAUL NATHANSON & KATHERINE K. YOUNG, SPREADING MISANDRY: THE TEACHING OF CONTEMPT FOR MEN IN POPULAR CULTURE (2001); PAUL NATHANSON & KATHERINE K. YOUNG, LEGALIZING MISANDRY: FROM PUBLIC SHAME TO SYSTEMIC DISCRIMINATION AGAINST MEN (2006) [hereinafter LEGALIZING MISANDRY].

³³ LEGALIZING MISANDRY, *supra* note 32, at 248.

³⁴ See West, *supra* note 2, at 165 (emphasis omitted).

³⁵ See CAT ON A HOT TIN ROOF (MGM 1958), a film based on the play by Tennessee Williams about a sexually frustrated housewife.

³⁶ JOAN SEWELL, I’D RATHER EAT CHOCOLATE: LEARNING TO LOVE MY LOW LIBIDO (2007). She would also rather read a good book. *Id.* at 1.

³⁷ ROBIN WEST, CARING FOR JUSTICE 110 (1997). Marriage makes matters worse. “Do young brides *know* that they are relinquishing control over access to their physical bodies when they agree to a marriage proposal? Do they know that they are . . . ending, with respect to this man, their right to say no to sexual penetration?” Robin West, *Law’s Nobility*, 17 YALE J.L. & FEMINISM 385, 409 (2005). We’ll deal at length with the problem of marital sex later on. West’s premise is so stunning, however, that at least a limited response is required here. Query: How do you get a Jewish woman to stop having sex? Answer: Marry her. Gail Dines, *Invisible in Hollywood: Jewish Women*, BOSTON GLOBE, Jan. 16, 2006, at A13. If the joke did not have the ring of truth, would it be a classic?

³⁸ See, e.g., *People v. Warren*, 446 N.E.2d 591 (Ill. App. Ct. 1983) (bushes); *State v. Leiding*, 812 P.2d 797 (N.M. Ct. App. 1991) (psychiatrist); STEPHEN J. SCHULHOFER, UNWANTED SEX: THE

lems were first being voiced, nine hundred thousand women were victims of violent crimes (e.g., murder, rape, assault) by their “intimates.”³⁹ No one should be raped—or suffer fear of rape. Such fear can be devastating and can lead to self-destructive decision-making.⁴⁰

Without for one second trying to justify rape, one must nevertheless ask, is life for women the horrifying experience that critics have made it out to be? Whether or not it is, should women at least be discouraged from conflating rape and death? A critic of feminism writes that women “vastly overestimate the likelihood of being murdered while being raped.”⁴¹ In 2004, thirty-six women in America were raped and murdered, or about 1 in 2500 rape victims; that represents less than half the number of women killed in love triangles.⁴²

The questions keep gushing forth: Do men “celebrate” the foregoing cases and others for keeping women in line? Are they not fathers, brothers and sons too? Is it, ironically, women, not men, who are terrorizing women with a “state of fear”? Do men manipulate women into sex as easily and regularly as West suggests? (Is this the reader’s personal experience?) And even if far more sex is taking place than in West’s ideal world, is the long and crude arm of the law the answer? If so, how deep into the lives of Americans should regulation of sex reach?

Consider this charge by West: “Rape within marriage is criminal in name only, and even then generally to a lesser degree than rape outside marriage.”⁴³ Or this declaration by Stanford law professor Deborah Rhode: Date rape (not defined here) “*is no less harmful* than other assaults, because it calls into question a woman’s behavior, judgment, and sense of trust in ways that random acts by strangers do not.”⁴⁴ Assuming West and Rhode are right, what follows? Social critics, both men and women, often call for narrative to clarify these kinds of issues.⁴⁵ So consider this classic story:

CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 191-92 (1998) (teacher); *State v. Thompson*, 792 P.2d 1103 (Mont. 1990) (school administrator).

³⁹ See Jane Campbell Moriarty, “*While Dangers Gather*”: *The Bush Preemption Doctrine, Battered Women, Imminence, and Anticipatory Self-Defense*, 30 N.Y.U. REV. L. & SOC. CHANGE 1, 17 (2005) (citing DIANE CRAVEN, BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, SEX DIFFERENCES IN VIOLENT VICTIMIZATION 4 (1994), available at www.ojp.usdoj.gov/bjs/pub/pdf/sdvv.pdf).

⁴⁰ See *infra* text accompanying note 65.

⁴¹ See KIPNIS, *supra* note 31, at 132.

⁴² *Id.* at 133-34.

⁴³ WEST, *supra* note 37, at 2.

⁴⁴ DEBORAH L. RHODE, SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY 123 (1997) (emphasis added).

⁴⁵ See, e.g., Nancy L. Cook, *Outside the Tradition: Literature as Legal Scholarship*, 63 U. CIN. L. REV. 95, 101 (1994). “Stories, parables, chronicles, and narratives are powerful means for destroy-

A young man and woman want to join a church. The pastor tells them that they “must abstain from sex” for a month. The couple agrees, but when the man and woman return to the Church three weeks later, the woman is crying, and the man is clearly in distress. “We are terribly ashamed to admit that we did not manage to abstain from sex for the required month,” the young man tells the pastor sadly.

The pastor asks him what happened. “Well, the first week was difficult. However, we managed through sheer willpower. The second week was terrible, but with the use of prayer we got through it. By the third week things were unbearable. I tried cold showers, prayer, reading from the Bible, anything to keep my mind off carnal thoughts. I started spending nights at my mother’s house.

“One afternoon,” he continues, “Dolores was reaching for a can of coffee when it dropped out of her hand. As she bent over to pick it up, I was overcome with lust and had my way with her right then and there.”

“You know this means you are not welcome in the Church,” says the pastor sternly. “We know, we know,” says the young man, hanging his head. “We’re not welcome at Wal-Mart, either.”⁴⁶

Should the young man be prosecuted for penetrating the woman? He did so without her consent, failing not only to ask her permission, but actually knowing that she was committed to abstinence. Deliberately left ambiguous in the story is whether the parties were married or had previously had sex. Readers who assumed one or the other may want to reconsider their responses.

In any event, the definition of consent comes up more centrally where parties are unmarried and force is not used. We can all agree that some women are so brutalized by circumstances or people that they cannot say “no.”⁴⁷ Our principal focus for now is not on them but on the tens of millions of mentally healthy women and their partners. Should the law criminalize sexual coercion, defined to include “verbal threats, pressure, deception, and harassment?”⁴⁸ If requests for sex tend to sap a woman’s free

ing mindset—the bundle of presuppositions, received wisdoms, and shared understandings [in our] legal and political discourse They can show that what we believe is ridiculous, self-serving, or cruel.” Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413, 2415 (1989). Poet John Dryden defined satire not in terms of its entertainment value but as “a kind of poetry invented for the purging of minds.” Harriet Deer & Irving Deer, *Satire as Rhetorical Play*, 5 BOUNDARY 2, at 711, 712 (1977) (quoting John Dryden, *A Discourse Concerning the Original and Progress of Satire*, in *ESSAYS OF JOHN DRYDEN II* (W. P. Ker ed., 1961)).

⁴⁶ This story was told to me by a friend who prefers anonymity.

⁴⁷ See *supra* notes 38-39 and accompanying text.

⁴⁸ E. Sandra Byers & Lucia F. O’Sullivan, *Introduction to SEXUAL COERCION IN DATING RELATIONSHIPS 1, 2* (E. Sandra Byers & Lucia F. O’Sullivan eds., 1996). Morrison Torrey, law profes-

will, can she not ordinarily up and leave? How many times should a man be allowed to ask?

Still more questions: On a theory that touching a woman without advance permission is assaultive, should the law apply a hands-off rule regardless of the environment and circumstances in which the touching takes place? Or, on a theory that the woman knows that “sex will be taken” regardless of her wishes, and thus no real consent is possible, is every heterosexual act a rape? Was one of the primary lessons of the 1960s, i.e., that sex is liberating, just another patriarchal lie? Should we go back to criminalizing fornication—perhaps this time only by the man? Whatever else this would do, puritanizing America would help cure some major ills of our age, e.g., libertinism, unwanted pregnancy, sexually transmitted diseases, the decline of marriage, and the increase in singlehood and childlessness.

Contrariwise, is the inflamed rhetoric of rape precluding a useful analysis of it? In particular, are West, Rhode and other affirmative consent supporters (hereinafter “rape reformers”) out of touch with contemporary women’s feelings? Are they just indulging themselves and their readers in misandrous fears and, sorry to say, pleasures?⁴⁹ Is writing about sex, perhaps like sex itself, mostly a game?

We have reached the core of this essay: rape reform proposals that would regulate foreplay by ensuring that all sexual touching be *preceded* by absolutely clear consent.

son at DePaul University College of Law, believes that “any coerced sexual activity is ‘rape.’” Morrison Torrey, *When Will We Be Believed?: Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1017 n.15 (1991).

⁴⁹ See DAN SUBOTNIK, *TOXIC DIVERSITY: RACE, GENDER, AND LAW TALK IN AMERICA* (2005). Consider in particular the Duke 88 manifesto complaining that rape was “everyday” fare at the school (and at other academics institutions). See *supra* note 16.

This charge would be consistent with a finding by two University of Cincinnati faculty members that almost five percent of university students are victims of rape or attempted rape each year. See HEATHER M. KARJANE ET AL., NAT’L INST. OF JUSTICE, DEP’T OF JUSTICE, *SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES AND UNIVERSITIES ARE DOING ABOUT IT 2* (2005), available at <http://www.ncjrs.gov/pdffiles1/nij/205521.pdf>. But is this statistic credible? The FBI reports that of 12,770 students at Duke in 2005, there was only one conviction for (forcible) rape. FBI, DEP’T OF JUSTICE, *CRIME IN THE UNITED STATES 2005 tbl.9* (2005), available at http://www.fbi.gov/ucr/05cius/data/table_09.html. Duke students themselves reported 10 completed or attempted rapes. Office of Postsecondary Educ., Dep’t of Educ., *OPE Campus Security Statistics for 2003-05*, <http://ope.ed.gov/security/search.asp> (search for “Duke” under “Name of institution”; then follow “Duke University” hyperlink; then follow “Criminal Offenses” hyperlink). Even if we assume that all the self-reporting was accurate (a dubious proposition, see *infra* note 228), this would mean that of, say, 6385 women at Duke, less than 0.2% were victims in 2005. Every rape or attempt is horrible, but is rape an everyday affair at Duke? If not, what can explain the manifesto signed by Duke 88 other than the pleasures of stoking misandrous and racist fears?

First, however, some preliminary words on the roots of the problem adverted to by West and others. Why are women having sex with unchosen partners? There is of course the matter of brute strength, in which arena women generally are not men's equals. Whether the man is a stranger or acquaintance, accordingly, a woman might be leery of saying "no." But this, reportedly, is only part of the story.

For late law professor Mary Jo Frug, women's relationships with men arise from the need for protection and financial well-being in a rough-and-tumble male-dominated physical and economic world⁵⁰ as much as from the biological or psychological instinct for attachment.⁵¹ This conclusion is buttressed by a well-developed sociobiological account of women's sexual strategies.⁵² Women are, ironically, left in a sorry and impossible position, says Frug. On the one hand, they must rely on the protection of men to negotiate their way through the world; on the other, financial pressures arising from discrimination induce "unmarried women to yield to the sexual demands" of these "protectors."⁵³

Like Frug and West, who deplore power differentials between the sexes as they affect sexual transactions, former Brandeis University professor Linda Hirshman and University of Wisconsin law professor Jane Larson argue that men are stronger, are immune from pregnancy, have greater economic resources than women, and are the "beneficiaries of millennia of assumptions that they belong on top."⁵⁴ Accordingly, "absent extraordinary [circumstances and] strategies, in any unstructured sexual bargaining process[,] females will come out behind and on the bottom."⁵⁵

If a man "needs a partner to play a particular sexual role in order to have pleasure, he can [accordingly] use his power to cause a weaker player to give it to him."⁵⁶ Confusing "their interests with their limited prospects,"⁵⁷ women will allow "sexual access under terms of emotional, physical, and financial disadvantage" in exchange for a "lesser sexual deal."⁵⁸ This is the "commodity" or "contract" model of sexual relations.

⁵⁰ See Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1066 (1992).

⁵¹ *Id.*

⁵² See DONALD SYMONS, *THE EVOLUTION OF HUMAN SEXUALITY* (1979).

⁵³ See Frug, *supra* note 50, at 1066.

⁵⁴ LINDA R. HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX* 262 (1998).

⁵⁵ *Id.*

⁵⁶ *Id.* at 224.

⁵⁷ *Id.* at 263.

⁵⁸ *Id.* at 262.

Not everyone agrees that women are such pushovers—or so innocent. Famed culture critic Camille Paglia “categorically reject[s] current feminist cant that insists that the power differential of boss/worker or teacher/student makes the lesser party helpless.”⁵⁹ “Servility to authority to win favor is an old story; it was probably business-as-usual in Babylon.”⁶⁰ “Objective research would likely show,” Paglia continues, “that the incidences of sycophancy by subordinates far exceed that of coercion by bosses. That a woman . . . has no choice but to submit without protest to a degrading situation is absurd.”⁶¹ She concludes: “Women, as much as men, have the obligation to maintain their human dignity.”⁶²

In any event, for rape reformers the availability of abortion (and now, the morning-after pill) adds to the problem of unwanted sex. While abortion (and abortifacients) may limit some of the harm of sex, it serves, as University of Chicago professor of law Catharine MacKinnon points out, to intensify the coercive pressures on women because it “removes the one remaining legitimized reason that women have had for refusing sex.”⁶³

What happens to women when they nevertheless refuse sex? For reformers like MacKinnon, the following account by a victim is typical:

I was no longer the same person I had been before the assault, and one of the ways in which I seemed changed was that I had a different relationship with my body. My body was now perceived as the enemy . . . and as a site of increased vulnerability. But rejecting the body and returning to the life of the mind was not an option, since body and mind had become nearly indistinguishable. My mental state (typically, depression) felt physiological, like lead in my veins, whereas my physical state (frequently, one of incapacitation by fear and anxiety) was the incarnation of a cognitive and emotional paralysis resulting from shattered assumptions about my safety in the world.⁶⁴

⁵⁹ ELLEN R. KLEIN, UNDRRESSING FEMINISM 108 (2002) (quoting Camille Paglia, *No Law in the Arena*, in *SEXUAL HARASSMENT: ISSUES AND ANSWERS* 260, 260 (Linda LeMoncheck & James P. Sterba eds., 2001)); *see also* Paglia, *supra*.

⁶⁰ *Id.* at 108-09 (quoting Paglia, *supra* note 59).

⁶¹ *Id.* at 109 (quoting Paglia, *supra* note 59).

⁶² *Id.* (quoting Paglia, *supra* note 59). Katie Roiphe is only slightly less dubious about women's innocence. *See* KATIE ROIPHE, *THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS* 72 (1993).

⁶³ CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 99 (1987).

⁶⁴ CAHILL, *supra* note 27, at 130 (quoting Susan J. Brison, *Outliving Oneself: Trauma, Memory and Personal Identity*, in *FEMINISTS RETHINK THE SELF* 12, 16-17 (Diana Tietjens Meyers ed., 1997)).

This wrenching reaction⁶⁵ to what was undoubtedly forced sex only reinforces the conclusion that the law must deal severely with “real rape,” the kind that University of Southern California professor Susan Estrich suffered and eloquently described in her eponymous book.⁶⁶ Nevertheless, if we are to understand sexual violation, we must boldly ask, how bad is rape compared to the other horrible things that happen?

In particular, is an assault on sex organs worse than one on other parts of the body? Not according to French philosopher Michel Foucault: “[T]here is no difference, in principle, between sticking one’s fist into someone’s face or one’s penis into their sex.”⁶⁷ Paglia argues that if rape “is a totally devastating psychological experience for a woman, then she doesn’t have a proper attitude about sex.’ Rape is just ‘like getting beaten up. Men get beat up all the time.’”⁶⁸ If rape were experienced as worse than death, Paglia might have added, there would be fewer rapes and many more deaths—God forbid.

By no means the only woman to hold that the injury of rape has been exaggerated,⁶⁹ Paglia claims that rape reformers actually compound the pain of rape: “The whole system now is designed to make you feel that you are maimed and mutilated forever if something like that happens.”⁷⁰

⁶⁵ Professor Janet Halley claims that sometimes women’s experience of injury is inauthentic or false. See Janet Halley, *Sexuality Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 182, 197 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004). Halley’s lead is not followed here.

⁶⁶ SUSAN ESTRICH, REAL RAPE (1987). For what it is worth, I would not have ruled out the death penalty as reflexively as did presidential candidate Michael Dukakis when asked whether he would apply it in a case where his wife was raped and murdered. See Comm’n on Presidential Debates, 1988 Debate Transcript: The Second Bush-Dukakis Presidential Debate (Oct. 13, 1988), available at http://www.debates.org/pages/trans88b_p.html.

⁶⁷ See CAHILL, *supra* note 27, at 144 (quoting Michel Foucault, *Confinement, Psychiatry, Prison*, in POLITICS, PHILOSOPHY, CULTURE 178, 200-02 (Lawrence D. Kritzman ed., Alan Sheridan trans., 1988)).

⁶⁸ WENDY SHALIT, A RETURN TO MODESTY: DISCOVERING THE LOST VIRTUE 41 (1999) (quoting CAMILLE PAGLIA, SEX, ART, AND AMERICAN CULTURE: ESSAYS 64-65 (1992)); see also PAGLIA, *supra*, at 64-65.

⁶⁹ For example, H. E. Baber, a professor of philosophy at the University of San Diego, argues that “while rape is very bad indeed, the work that . . . women . . . are compelled to do [outside the home] is . . . more harmful.” See CAHILL, *supra* note 27, at 176 (quoting H. E. Baber, *How Bad Is Rape?*, 2 HYPATIA 125, 125 (1987)). That is, “virtually everyone has an interest in avoiding involuntary contact with others, particularly unwanted contacts which are intimate or invasive.” *Id.* (quoting Baber, *supra*, at 126). What most horrifies Baber are deadening and dead-end jobs, such as key-punching, that women have been stuck with for extended periods of time. See Baber, *supra*, at 133-36. This position, as we shall see shortly, conflicts with prevailing identity theory and has been labeled by Cahill as “astounding.”

⁷⁰ WENDY MCELROY, SEXUAL CORRECTNESS: THE GENDER-FEMINIST ATTACK ON WOMEN 34 (1996) (quoting PAGLIA, *supra* note 68, at 50). McElroy, a rape victim herself, claims to have recovered. “Feminists who say otherwise are paying [her] . . . disrespect.” *Id.*

My purpose, of course, is *not* to promote rape, but rather to lay the foundation for a discussion of the situation where sex is neither forced nor embraced by the woman either in part or whole—a situation that, Estrich insists, is also “real rape.” Robin West makes analyzing the issue more difficult when she conflates violent and “nonviolent” rape. For West, just the amount of force necessary to perform the sexual act is brutalizing: “*From the victim’s perspective, unwanted sexual penetration involves force, and unwanted force is violent . . . [an] assaultive penetration of one person’s body by another . . . like spiritual murder . . .*”⁷¹ But if Foucault and Paglia are right that the pain of “classic” rape is overstated, so likely is the pain of reluctant sex, and this has important implications for us.

There is a conflict among theories on injury. Happily, recent empirical research tends to show that human beings greatly underestimate their resilience. Indeed, distinguished Harvard psychologist Daniel Gilbert reports that only a “small fraction” of people enduring “trauma such as rape, physical assault, or natural disaster . . . will ever develop any post-traumatic pathology or require any professional assistance.”⁷² The “vast majority,” according to Gilbert, bounce back “quite well,” and a significant number of these folks—hard as it is to believe—say that their lives were “*enhanced by the experience.*”⁷³

Nevertheless, relying on theories like West’s or Cahill’s, an increasing number of commentators propose expanding the definition of rape. Under current law, rape normally requires penetration (not necessarily penile) *and* force or threat of force.⁷⁴ In practice, since penetration is often easier to show, the outcome of rape cases hinges on proof that force or threat of force was used.

A number of proposals would shift the focus to consent, not force, and thus on the accused, not the victim; or, as Professors Hirshman and Larson

⁷¹ Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1448 (1993). “Rape and intercourse are not authoritatively separated by any difference between the physical acts or amounts of force involved but only legally, by a standard that revolves around the man’s interpretation of the encounter.” DAVID DENBY, GREAT BOOKS 401 (1996) (quoting Catharine A. MacKinnon, *Sexuality, Pornography, and Method: “Pleasure Under Patriarchy,”* 99 ETHICS 314, 340 (1989), revised and repinted as chapter seven in MACKINNON, *supra* note 1).

⁷² See DANIEL GILBERT, STUMBLING ON HAPPINESS 152 (2006).

⁷³ *Id.* This counterintuitive proposition is, of course, not an argument for rape. It may, however, add useful meaning to the old adage, “that which does not kill you makes you stronger.” For a compilation of articles finding that a “majority of women fully recover from all but the most egregious incidents” of sexual abuse, see Edward Greer, *Awaiting Cassandra: The Trojan Mare of Legal Dominance Feminism (Part I)*, 21 WOMEN’S RTS. L. REP. 95, 106 & n.77 (2000).

⁷⁴ See Michelle J. Anderson, *All-American Rape*, 79 ST. JOHN’S L. REV. 625, 628 (2005).

make explicit, "on the more powerful player, usually the male."⁷⁵ The accused would have to demonstrate that he had "affirmative consent" to penetrate.⁷⁶

Affirmative consent has not been clearly defined, save for the hermeneutical understanding that "[s]ilence and ambiguity would be construed against the intruder,"⁷⁷ and that "only positive and clear agreement"⁷⁸ to sexual contact would make the contact lawful.⁷⁹ Thus, if the prosecutor showed beyond a reasonable doubt that defendant penetrated complainant, and defendant adduced no positive evidence of consent, he could be convicted.

Designed to promote the interests of women by ensuring that there is a meeting of the minds, affirmative consent would seem like a no-brainer. Some college dating policies have already incorporated it seemingly without adverse effect.⁸⁰ But is this what women, and men, want?

To begin to answer this question another classic story may prove helpful. Unlike the Wal-Mart story where the relationship status is unclear, the woman here is not married to the man who penetrates her.

⁷⁵ See HIRSHMAN & LARSON, *supra* note 54, at 302.

⁷⁶ See *id.* The affirmative consent issue was deftly introduced back in 1993 by Katie Roiphe. See ROIPHE, *supra* note 62, at 51-84. More recently, Caroline Forell and Donna Matthews have held that rape should be defined as "a crime committed when a person penetrates another person's vagina or anus without first obtaining explicit consent from that person." CAROLINE A. FORELL & DONNA M. MATTHEWS, A LAW OF HER OWN 239-40 (2000).

⁷⁷ HIRSHMAN & LARSON, *supra* note 54, at 271.

⁷⁸ *Id.*

⁷⁹ "Consent . . . should be distinguished from mere acquiescence or submission . . ." JOAN MCGREGOR, IS IT RAPE?: ON ACQUAINTANCE RAPE AND TAKING WOMEN'S CONSENT SERIOUSLY 118 (2005).

⁸⁰ See Div. of Student Affairs, Duke Univ., Policies: Sexual Misconduct, http://judicial.studentaffairs.duke.edu/policies/policy_list/sexual_misconduct.html (last visited Apr. 22, 2007) ("Conduct will be considered 'without consent' if no clear consent, verbal or nonverbal, is given." Further, "[s]tudents should understand that consent may not be inferred from silence, passivity, or lack of active resistance alone."); Dean of Students Office, Univ. of Houston, Student Handbook: Sexual Assault Policy, <http://www.uh.edu/dos/hdbk/relpolicies/sexassault.html> (last visited Apr. 22, 2007) ("[S]exual assault has occurred if there is not consent. Accompanying another to a dorm or bedroom is not affirmative consent, nor is voluntary hugging or kissing affirmative consent . . ."); Webster Univ., Sexual Offense Policy, http://www.webster.edu/about/policy/sexual_offense.shtml (last visited Apr. 22, 2007) ("Affirmative consent is required when one seeks to initiate a sexual encounter. A person may give consent either verbally or by voluntary acts unmistakable in their meaning."). Undoubtedly, the best known of these policies is the Antioch College sexual offense policy, which became effective January 1, 2006: "Consent is defined as the act of willingly and verbally agreeing to engage in specific sexual conduct"; "Consent is required each and every time there is sexual activity," defined in part as "sexually based touching"; "Each new level of sexual activity requires consent." Antioch Coll., Sexual Offense Prevention Policy, <http://www.antioch-college.edu/Campus/sopp/index.html> (last visited May 4, 2007). Whether a trend is developing in this direction I cannot say. No systematic effort to examine sexual consent policy at American colleges has been made here.

C, an upper middle-class married woman in her mid-twenties, has a passing acquaintance with M. A major class difference divides them, as does an age gap of more than ten years. Suffering the strain of childlessness and a physically empty marriage, C finds relief only in watching the interaction between the hens and their chicks on her large estate. One day, emotionally distraught, C goes back to the henhouse where she runs into M. After a very brief discussion with him about the chickens, she bursts into tears. Trying to comfort her, M puts his hand on her shoulder. When she does not draw away, he proceeds to run his hand “down the curve of her back . . . to the curve of her crouching loins . . . [to] the curve of her flank.”

While C tries to dry her face, M invites her into his hut. He spreads a blanket for her and tells her to lie down. She lies “quite still, in a sort of sleep, in a sort of dream,” as M softly gropes, carefully caresses, disrobes and then quickly enters her.⁸¹

One is hard pressed to find affirmative consent through word or deed. In her disembodied state, C says nothing to M, much less titillates him with erotic words and images. She does not kiss him, purr or moan to his touch, much less stroke his private parts. If just accepting an invitation to a man’s house constitutes “affirmative consent,” then “affirmative” serves no function for reformers, for this would mean that when a woman enters a man’s abode, she may be legally entered. This notion is explicitly at odds with at least some university consent standards.⁸²

Readers with well-honed feminist sensibilities may be turned off by perceived sexism in the C story. C shows no interest in sexual pleasure, and, in any event, does not ask anything of M. She is shown in the scene to be pasty-faced, even effete. And yet before marriage, as D. H. Lawrence describes her, C was the one in control, distributing her favors for the purpose of manipulating her male admirers, while holding back emotionally so as not to get entangled.⁸³ Still, it is fair to ask whether we should understand the story of C today as a patriarchal fantasy about women and, more important, whether in an era of mass culture, the representative American woman for purposes of legislative reform should be Buffy the Vampire

⁸¹ See D. H. LAWRENCE, *LADY CHATTERLEY’S LOVER* 120-22 (Signet Classics 2003) (1928).

⁸² See, e.g., Dean of Students Office, Univ. of Houston, *supra* note 80 (“Accompanying another to a dorm or bedroom[, without more,] is not affirmative consent, nor is voluntary hugging or kissing affirmative consent to sexual intercourse.”).

⁸³ “A woman could take a man without [really] giving herself . . . into his power. Certainly she could take him without giving herself into his power. Rather she could use this sex thing to have power over him.” LAWRENCE, *supra* note 81, at 4.

Slayer,⁸⁴ Carrie Bradshaw,⁸⁵ Rachel Green,⁸⁶ and for readers, Charlotte Simmons,⁸⁷ rather than C.⁸⁸

A few responses seem appropriate. First, it seems unlikely that the world has changed all that dramatically in the last ninety years. For example, like Constance Chatterley, Charlotte Simmons allows herself to be taken (albeit with internal *Sturm und Drang*).⁸⁹ Second, and more important, women's magazines suggest that for every Garbo who wants to be alone,⁹⁰ many women, like Rachel Green, are desperate to fall in love. Romance novels are not peripheral to female culture, as Boston College law professor Catherine Wells suggests.⁹¹ Produced mostly by women, these stories climax not with the woman haggling with her lover over terms, but melting into his arms.⁹² Third, rape reformers have no choice but to make the sexually passive and pliant woman a part of their model. Not to do so would undermine the case for reform. But here is the problem for reformers. Bradshaw and Green—and, I'll dare hypothesize at this time, most young readers of this article—are fully able to say "no." They do not need affirmative consent; they take their sexuality into their own hands. While Charlotte Simmons is not the experienced player that they are, she *is* well-practiced at saying "NO."⁹³ As for Buffy, when a brutish

⁸⁴ See *BUFFY THE VAMPIRE SLAYER* (Twentieth Century Fox 1992).

⁸⁵ Bradshaw (Sarah Jessica Parker) was the narrator in the television series *Sex and the City* (HBO television broadcasts 1998-2004).

⁸⁶ Green (Jennifer Aniston) was one of the principal characters in the television series *Friends* (NBC television broadcasts 1994-2004).

⁸⁷ TOM WOLFE, *I AM CHARLOTTE SIMMONS* (2004).

⁸⁸ Or, even coming on the scene 25 years after C, Judith Hearne, Laura Wingfield, Ado Annie ("I'm Just a Girl Who Can't Say No"), Blanche DuBois and Scarlett O'Hara. See BRIAN MOORE, *THE LONELY PASSION OF JUDITH HEARNE* (1955); TENNESSEE WILLIAMS, *THE GLASS MENAGERIE* (New Directions Books 1999) (1945); RICHARD RODGERS & OSCAR HAMMERSTEIN II, *OKLAHOMA!* (1943); TENNESSEE WILLIAMS, *A STREETCAR NAMED DESIRE* (1947); MARGARET MITCHELL, *GONE WITH THE WIND* (1936). Perhaps with these characters in mind, English professor Sharon Stockton unhesitatingly calls Mellors a rapist. See SHARON STOCKTON, *THE ECONOMICS OF FANTASY: RAPE IN TWENTIETH-CENTURY LITERATURE* 80-82 (2006).

Compare a female character's declaration on the television show *Weeds*: "I want a man, someone big and strong, someone who . . . does not ask you for permission. I want someone who would throw me up against the wall f___ing me until I come like a volcano." Seeing that she has nonplussed her gentle suitor, the woman throws him a bone: "We could still be friends, though." *Weeds: A.K.A. The Plant* (Showtime television broadcast Sept. 4, 2006). Thanks to Richard Klein for this reference.

⁸⁹ WOLFE, *supra* note 87, chs. 24-25.

⁹⁰ See *GRAND HOTEL* (MGM 1932). ("I vont to be left alone," not "I vont to be alone," as it is remembered today.)

⁹¹ See Catharine Pierce Wells, *Date Rape and the Law: Another Feminist View*, in *DATE RAPE* 41-50 (Leslie Francis ed., 1996).

⁹² See generally *THE ROMANCE READER*, <http://www.theromancereader.com> (last visited Apr. 19, 2007).

⁹³ See, e.g., WOLFE, *supra* note 87, at 221.

young man places his unwanted hand on her butt, she does not fall into his arms; she upends him.⁹⁴

In sum, the foregoing culture heroes are no easy prey,⁹⁵ nor, arguably, are most other women. Distinguished and experienced prosecutor Linda Fairstein says, "I have never had a case in which the only expression of lack of consent was the victim's verbalization of the word 'no,' without any display of force or threats by the aggressor."⁹⁶ That is to say, if women do not want sex, and if they *can* resist, they do.

To more directly evaluate affirmative consent, let us go back to C and some follow-up questions: How would we feel if C's husband learns of the affair (in the original telling, he does) and induces her to bring felony charges against M (he does not)? Would jurors, female or male, convict M because C simply went limp? Are the millions of women who have thrilled to one of the world's greatest class-crossing love stories actually celebrating a woman's degradation because it is, at heart, a rape? If so, does this say something worth analyzing about women's real desires?

Contrariwise, do young women today want men to stop acting as men? Are feminist mothers and grandmothers getting off on hitting males where they hurt? Are they so professionally insecure that they repress all memory of youthful adventures? Are they so angry with men that they relish the thought of Lady Chatterley's lover rotting in the same cell as their own sons and grandsons?

"One of my chief regrets," laments University of California, Hastings law professor Joan Williams, "[is that] despite my awkward contentment with middle age, . . . my own interest in sex is not professional. I ask myself: why on earth did I pass up the opportunity of writing about sex for a living?"⁹⁷ We should not be surprised. Academics have always been honored more for nerdiness than for cool. A caring, (normally) insecure, and

⁹⁴ See *BUFFY THE VAMPIRE SLAYER*, *supra* note 84.

⁹⁵ To be sure, Charlotte suffers terribly after sex that was not desired. That pain, however, does not come from being taken against her will, but rather from knowing that the whole campus was talking about the virgin who had entrusted herself to a fraternity boy at an overnight bash in Washington, D.C. As if to add insult to injury, the boy had sought to prove his macho credential by displaying the blood-stained sheets. It is inconceivable that the proud and ordinarily self-possessed Charlotte would think that she or anyone else needed affirmative consent. Charlotte is disgusted not by her deflowerer, but by herself. See WOLFE, *supra* note 87, ch. 26. "Hoyt was what he was . . ." *Id.* at 673.

⁹⁶ Panel Discussion: *Men, Women and Rape*, 63 *FORDHAM L. REV.* 125, 161 (1994) (Remarks of Linda Fairstein).

⁹⁷ Joan Williams, *Hard Bargains*, 8 *AM. U. J. GENDER SOC. POL'Y & L.* 803 (2000) (reviewing HIRSHMAN & LARSON, *supra* note 54).

ambitious law professor would surely want 1) to get beyond originalism, the economics of antitrust law, and all those carefully extruded two- and three-pronged tests; 2) to enhance the quality of everyday life; 3) to prove to colleagues and students—and, above all, to herself—that, in the face of creeping senectitude, she is still in the game; and 4) at the same time, to make some money and possibly win the citation sweepstakes.⁹⁸

But would the rape reformers who write with such conviction about male sexuality buy anything that a man—no matter how seasoned or wise—says on the subject of female sexuality, much less rape? Have men, whose sexual partners are women, learned anything useful about them? Men, says Robin West, “have no conception of what ‘non-violent’ forms of rape are even about, . . . no sense of what could possibly be painful about sex . . . [because their] conception of pain . . . is derived from a set of experience which *excludes* women’s experience.”⁹⁹ “[W]omen’s experience [is] a necessary prerequisite for doing feminism,” writes UCLA law professor Christine Littleton.¹⁰⁰ Bioethicist Joan McGregor is building on this argument when she calls for use of a “reasonable woman” standard in rape cases.¹⁰¹ Speaking generally about the views of the hegemonic and subordinated, West’s colleague Mari Matsuda would seem to agree: “I would . . . give special credence to the perspective of the subordinated”¹⁰²

A central theme in *Spreading Misandry* and *Legalizing Misandry* is that diversity, though highly promoted when directly serving group interests, has little to contribute to our understanding of gender relations.¹⁰³ But are there risks of credibility and self-absorption when men do not participate in feminist discourse and when commentators such as West insist that “the fundamental fact of women’s lives is pain”?¹⁰⁴ Women, West writes,

⁹⁸ That copulation is a hot topic in academic circles is evidenced by the reaction to an article by Ohio State law professor Christopher M. Fairman, *F_ _ _*, 28 CARDOZO L.REV. 1711 (2007). Within two months of publication, the article had been downloaded at least 18,000 times. See SSRN Author Page for Christopher M. Fairman, http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=343920 (last visited May 4, 2007).

⁹⁹ CAHILL, *supra* note 27, at 35 (quoting Robin L. West).

¹⁰⁰ Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751, 765 n.72 (1989) (reviewing MACKINNON, *supra* note 63).

¹⁰¹ See CAHILL, *supra* note 27, at 175.

¹⁰² See Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1764 (1990).

¹⁰³ See *supra* note 32 and accompanying text. “[M]en who want[] to use the label ‘feminist’ would have to spend a significant number of years living as women to qualify.” Littleton, *supra* note 100, at 765 n.72.

¹⁰⁴ West, *supra* note 2, at 213. We should “remain skeptical about theory,” advises Deborah Rhode. See Deborah L. Rhode, *Theoretical Perspectives on Sexual Difference*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE 1, 8 (Deborah L. Rhode ed., 1990). Feminist “method requires us to leave no myths untouched, not even our own,” says Katharine Bartlett, author of a major casebook

“have a seemingly endless capacity to lie, both to ourselves and others, about what gives us pain and what gives us pleasure.”¹⁰⁵

And what of men’s pain? “Unless [feminism] Takes a Break from itself,” Harvard Law professor Janet Halley observes, “it can’t see injury to men . . . by women.”¹⁰⁶ No, not from *scrotum lividum* (“blue balls”)—apophasis unintended—but rather, for example, from the pain suffered by XY. You do not have to be a woman to feel men’s pain from marginalization and from ascribed responsibility for women’s ills. Women, complains Alan Dershowitz, “are entirely free to attack . . . men . . . in the most offensive of terms. Radical feminists can accuse all men of being rapists . . . without fear of discipline or rebuke.”¹⁰⁷ Concluding, presumably, that the absence of diversity has helped box feminists into needlessly hostile and self-destructive positions, University of Missouri-Kansas City law professor Nancy Levit invites them to foster men’s “interest in writing about gender issues and . . . reacting to feminist ideals and methodologies.”¹⁰⁸

Putting down research in my primary teaching area, tax, and respecting affirmative consent supporters,¹⁰⁹ I accept the invitation to inquire into affirmative consent. I do so not only because, as the reader may already sense, that doctrine is theoretically shaky, but also because it has not been subjected to empirical testing. Among other things, rape reforming law professors have not bothered to inquire into how real women turn their partners on to sex and how they show consent, much less what they think about affirmative consent.¹¹⁰

This is both amazing and depressing. Ungrounded academic product, as *Toxic Diversity* shows, is not only unproductive, it is destructive.¹¹¹ Presumably for this reason, the leadership of the Association of American Law Schools chose empirical scholarship as the theme for its 2006 Annual

on gender. Katharine T. Bartlett, *Cracking Foundations as Feminist Method*, 8 AM. U. J. GENDER SOC. POL’Y & L. 31, 54 (2000).

¹⁰⁵ See West, *supra* note 2 and accompanying text.

¹⁰⁶ JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 33 (2006).

¹⁰⁷ Alan Dershowitz, Commentary, *Harvard Witch Hunt Burns the Incorrect at the Stake*, L.A. TIMES, Apr. 22, 1992, at B17.

¹⁰⁸ NANCY LEVIT, THE GENDER LINE: MEN, WOMEN, AND THE LAW 224 (1998).

¹⁰⁹ “To be taken seriously in the business of law and legal scholarship means becoming the subject of sustained criticism.” See Martha Minow, *Beyond Universality*, 1989 U. CHI. LEGAL F. 115, 116.

¹¹⁰ For a view of the limited work that has been done in this area by law professors, see *infra* notes 338-45 and accompanying text.

¹¹¹ See generally SUBOTNIK, *supra* note 49.

Meeting.¹¹² In any event, it is the reason for the empirical nature of this article.

Assuming I am right that our gender climate is poisoned by current scholarly practices, a frank and comprehensive analysis is needed. To this end, Part II begins with a brief history of American rape law. I will then summarize the case that scholars have offered for affirmative consent. In Part III I *evaluate* the contemporary sexual environment and in Part IV I evaluate arguments against accommodative sex. Part V responds directly to the case for affirmative consent made in Part II. Part VI assesses recent empirical studies of consent. I present and assess the implications of my own study of sex and consent here. I bring all the discussion together in Part VII and end with a brief conclusion.

Husbands, fathers, lovers and bosses have been walking on eggshells with academic women, complains essayist Midge Decter, “pretending not to notice what the women’s movement was saying about them.”¹¹³ “Why men should have responded with so much timidity in the face of so violent an assault on them . . . , I do not understand . . . to this day.”¹¹⁴ Why indeed?

Although my colleagues, friends and I do not rape, much less celebrate it—and I have Nancy Levit’s consent in advance—“Hands Off” is no testosterone-driven stomp on women’s sensibilities. Since women are the primary victims of sexual aggression, their views must be, and will be, sought out and carefully examined. However much women may complain that their voices are not heard, it is, happily, no derogation of maleness to hear them. The expert on manliness, Harvard political science professor Harvey Mansfield, centrally advises men “to ‘ask [women] what they think. And when they tell you, try to *listen*.’”¹¹⁵ If women want to criminalize groping and half-hearted sex, then, unless there is very good reason not to, that is the right and, if I may say, the feminist thing to do.

Yet, I must admit, and caution, this intensely personal and perhaps unprecedented discussion (for a law review article) carries risk. Though ridicule is an essential debating tool,¹¹⁶ women, it is argued, unlike men,

¹¹² I attended this conference.

¹¹³ MIDGE DECTER, *AN OLD WIFE’S TALE: MY SEVEN DECADES IN LOVE AND WAR* 81 (2001).

¹¹⁴ *Id.*

¹¹⁵ Diana Schaub, *Man’s Field*, CLAREMONT REV. BOOKS, Spring 2006, at 8 (reviewing HARVEY C. MANSFIELD, *MANLINESS* (2006) and quoting same).

¹¹⁶ See *supra* note 45 and accompanying text.

are too delicate to be mocked for rhetorical deficiencies.¹¹⁷ As if to prove the point, of the dozen or so gender and women's law journals to which this article was sent, not one found it fit for female consumption by offering publication.¹¹⁸

Even those with only rudimentary understanding of contemporary masculinity will understand that the risks to men will be greater yet. Who will not tremble at the thought of men's wounded pride and sense of lost opportunity upon learning that, after years of experience, their seduction strategies are sorely wanting?

II. BUILDING THE AFFIRMATIVE CONSENT BANDWAGON

The English jurist William Blackstone supplied the classic definition of rape used in America: "carnal knowledge of a woman forcibly and against her will."¹¹⁹ Over the years this definition expanded to include threats of force.¹²⁰

On a theory that women will lie in order to cover up their sexual indiscretions, juries classically were warned to exercise special care in assessing victims' accounts.¹²¹ To make matters even harder for a victim, the defense practice arose of making full inquiry into her sexual history.¹²² If she had given herself to others, it would evidence her gift to the defendant. Since a woman's sexual innocence was central to her reputation, women would often not report violations of their sexual autonomy.¹²³ Tough corroboration, resistance and statute of limitation requirements also served as impediments to convictions.¹²⁴

¹¹⁷ See Frug, *supra* note 50; see also Richard Delgado & Jean Stefancic, *Scorn*, 35 WM. & MARY L. REV. 1061 (1994). "[S]atire, sarcasm, scorn, and similar tools only should be deployed upward . . ." Delgado & Stefancic, *supra*, at 1099. "[I]t is never [justifiable] to use destructive humor at the expense of someone weaker of a lower station than oneself." *Id.* at 1063.

¹¹⁸ For evidence of how women are patronized in law school for being weak-minded, see *infra* Parts VI & VII.

¹¹⁹ See SCHULHOFER, *supra* note 38, at 18 (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES *210). There have been a variety of good histories of rape in America over the last few years so that there is no need for a comprehensive review here. For the most current such account, see Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945 (2004).

¹²⁰ See BLACK'S LAW DICTIONARY 1288 (8th ed. 2004).

¹²¹ They should evaluate the testimony of a rape complainant "with 'special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.'" DEBORAH L. RHODE, JUSTICE AND GENDER 248 (1989) (quoting MODEL PENAL CODE § 213.6).

¹²² See SCHULHOFER, *supra* note 38, at 25-28.

¹²³ *Id.*

¹²⁴ *Id.* at 248.

A few opinions from the 1950s and 1960s nicely capture this period's prevailing thinking. For illustrious scholar John Wigmore, the "unchaste mentality" of rape complainants "finds . . . direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or victim."¹²⁵ A (then) contemporary law review note explained that a "woman's need for sexual satisfaction may lead to the unconscious desire for forceful penetration, the coercion serving neatly to avoid the guilt feeling which might arise after willing participation."¹²⁶

Pressure from the Women's Movement in the 1970s led to 1) repeal of corroboration requirements and modification of the special jury instruction on credibility of witnesses, 2) easing of resistance and limitations rules, 3) enactment of rape-shield laws (under which a woman's sexual history other than with the defendant was not open to inquiry), and 4) circumscription of the spousal exemption.¹²⁷ Under most state statutes today, force is still an element of the crime, and where it is employed, a defendant is guilty of a felony.¹²⁸ Some sixteen state statutes criminalize nonconsensual sex without use of force, half of them treating such behavior as misdemeanors.¹²⁹ A few states, notably Michigan, Washington, and New Jersey, have abolished the force requirement by judicial fiat.¹³⁰

If the limitation of the force requirement was the father of affirmative consent, then its mother was a perception of gender difference between men and women. Citing biological factors such as pregnancy and childbirth, West contends that women, unlike men, are "essentially connected," not "essentially separate," from the rest of human life, both materially . . . and existentially, through the moral and practical life."¹³¹ Some have called this "cultural" or "relational" feminism;¹³² we might think of this as the "connection" model of gender relations.

¹²⁵ See ESTRICH, *supra* note 66, at 108 n.7 (quoting JOHN HENRY WIGMORE, 3A EVIDENCE IN TRIALS AT COMMON LAW § 924a (James H. Chadbourn ed., rev. ed. 1970)).

¹²⁶ *Id.* (citing Note, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55, 61, 67-68 (1952)).

¹²⁷ See SCHULHOFER, *supra* note 38, at 30, 43-44.

¹²⁸ See Anderson, *supra* note 74, at 628.

¹²⁹ *Id.* at 631-32. For example, see OR. REV. STAT. § 163.425(1) (2003) (criminalizing, as second degree sexual abuse, one who "subjects another . . . to sexual intercourse . . . or . . . penetration . . . and the victim does not consent thereto").

¹³⁰ See Anderson, *supra* note 74, at 632-33; see also, e.g., *State ex rel. M.T.S.*, 609 A.2d 1266 (N.J. 1992). Professor David Bryden has written an excellent article dealing with the element of force in rape cases. According to Bryden, eliminating force as a formal requirement will only shift the focus to "consent," and since evidence is likely to be scanty, force will still be the central focus. See David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 370 (2000).

¹³¹ Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 3 (1988).

¹³² See BAER, *supra* note 29, at 40-47.

In one important respect, cultural feminism is of a piece with a large literature that views women as more emotional than men and, consequently, as having developed more emotional understanding than men.¹³³ How emotional women actually are and whether their emotional intelligence in fact exceeds that of men is beyond the scope of this article. I will consider this effort successful if I can responsibly assess women's emotionality for purposes of evaluating whether they require an affirmative consent regime.

Of course, if West is right that sex affects women more deeply, it might well make sense to ask the law to be absolutely sure that women consent. If West is also right that an ethic of care is an essential feature of women's lives—as some feminists believe—then women should hold to this value instead of adopting individualistic male values.¹³⁴ “My methodological assumption,” writes West, “is that the key to moral decision-making lies in our capacity to empathize with the pain of others, and thereby resist the source of it, and not in our capacity for abstraction, generalization, or reason.”¹³⁵ West is suggesting that women are the caring, relational gender¹³⁶ and their values, not men's, are the hope for a dog-eat-dog male world.

Such an ideology, however, would seem highly counterproductive for rape reformers. Given the previously described view of male sexuality, a well-developed ethic of care would result, among other things, not in less but more of what some young people today call “charity farming.”¹³⁷

In any event, to illustrate the uniqueness of sex for women, West has critiqued the proposal that rape be treated as theft of services. Referring to her computer, she explains that when she sells or gives it away, “[i]n no case does part of my self go *with* the thing so traded.”¹³⁸ In fact, she holds

¹³³ See Jim D. Shelton, *The Failure of Feminist Epistemology*, ACAD. QUESTIONS, Spring 2006, at 82, 87-91, <http://www.nas.org/publications.html#AQ> (online journal's homepage).

¹³⁴ Through its ethics of care and justice, feminist theory can “heal[] the world” and “salvage the planet as well as save the species.” WEST, *supra* note 37, at 280. Saving this world, however, may come at a high cost in the next. See the *Gospel of Thomas*, as quoted in LEE STROBEL, *THE CASE FOR CHRIST* 123-24 (1998), for the risks of rejecting masculinity: “Every woman who will make herself male will enter the kingdom of heaven.” Political, rather than theological, reasons may have kept this gospel out of that canon.

¹³⁵ West, *supra* note 2, at 158.

¹³⁶ But see Norah Vincent, *Both Sides Now*, N.Y. TIMES, Feb. 18, 2007, § 7, at 19 (reviewing JENNIFER BAUMGARDNER, *LOOK BOTH WAYS: BISEXUAL POLITICS* (2007)) (“As a homosexual of long standing, I can tell you that the surest way to disabuse yourself of the notion that women are sexually powerless and better at relationships is to date, or, God help you, marry them.”).

¹³⁷ I am told by male students that this practice is not limited to women.

¹³⁸ West, *supra* note 71, at 1451.

her "self" back in order to "bask in the glow of [her] beneficence, or feel free of the burden of [her] now disposed excess baggage."¹³⁹ By contrast, West says, when women "'have sex,' or 'make love,' at least ideally, [they] do not hold [their] 'self' back in this way."¹⁴⁰ West concludes that when women "consciously separate the 'sex' [they] are giving, and hence [their] 'sexual self,' from the self who will receive in exchange an equal or greater value[, they] tend to think of that sex as being to some degree injurious."¹⁴¹

We will revisit this passage. For now: Do rape reformers find "equal or greater [spiritual] value" in sex with men?

Certainly not West. "If what we need to do to survive, materially and psychically," says West, "is have heterosexual penetration three to five times a week, then we'll do it, and . . . [w]e'll report as pleasure what we feel as pain."¹⁴² These striking sentiments are, reportedly, par for the feminist course. Enjoying the irony that "feminists who interdict [male desire] ethically seem to keep going back for more of it,"¹⁴³ Professor Janet Halley reports that "I have not found *anyone* determined to produce a theory or politics of *women's heterosexual desire for . . . men.*"¹⁴⁴

In such an environment, sex will always be perceived as injurious to women and thus, as Edward Greer has charged, a zero-sum game.¹⁴⁵ Women will then gravitate to such forms of revenge as affirmative consent. Halley herself concludes that West's public, virtuous sexuality has a "decidedly infantile, lesbian . . . shape."¹⁴⁶

Much feminist philosophy of sex supports the view that sexual intercourse is fundamentally different from, say, the sale of a computer. Human sexuality, says Cahill,

[should] not . . . be understood as a possession of an essentially intellectual, disembodied being, but rather as . . . a facet of personhood no less relevant than one's capacity for rational thought. My sexuality is a central part of my being; it is not something that I "own" and can give away,

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* Why, one wonders, the qualification?

¹⁴² West, *supra* note 2, at 214.

¹⁴³ HALLEY, *supra* note 106, at 67.

¹⁴⁴ *Id.* at 65. Halley refers to herself as a "sex-positive postmodernist." *Id.* at 15. Whether women actually identify more with her or with "sex-negative" feminists remains to be seen.

¹⁴⁵ See Greer, *supra* note 73, at 99-101.

¹⁴⁶ HALLEY, *supra* note 106, at 64.

because such a model of possession implies that “I” exist as myself separate from my sexuality.¹⁴⁷

The sex-is-self argument also continues below. For now, consider that this argument is both logically problematic and dangerous. If women do not exist apart from their sexuality, the taking of sex is murder from which there is no recovery. There are serious legal and moral problems, moreover, with selling or gifting limbs,¹⁴⁸ so if one’s sex is like a limb, one might not be able to give it away. Yet an important function of public morality is, arguably, to establish conditions for the perpetuation of the species. With no one to educate, morality is out of business. A no-contract, no-gift sexual ethic for women, however, could extinguish the human race (that is, absent rape). It is hard to imagine that Cahill wants to promote, not prevent, rape.

Consider also the implications of telling women, as Cahill does, that the seat of personhood is as much between their legs as in their heads, a charge identical to one made in popular culture against men. How are women to recover from rape if taught that rape unpersons them?

So what is it that Cahill really wants? Quoting in part from Carol Pateman’s magisterial *The Sexual Contract*, Cahill laments that “in the relationship between the sexes, it is always women who are held to consent to . . . [t]he ‘naturally’ superior, active, and sexually aggressive male [who] . . . offers a contract.”¹⁴⁹ Cahill holds that an “egalitarian sexual relationship cannot rest on this [passive] basis.”¹⁵⁰ If “intercourse were clearly beneficial to women,” she explains, “we would not speak of women’s consent, but rather of their desire.”¹⁵¹ No one has better presented the hedonic ideal.

Hirshman and Larson cannot and do not claim that an affirmative consent regime is a panacea for woman’s “lesser sexual deal.”¹⁵² Holding that a woman should have the right to make her own decisions, even be they unwise, the authors seek modestly to adjust the bargaining position of the

¹⁴⁷ CAHILL, *supra* note 27, at 183. This idea of sexuality as property and the basis of exchange, of course, goes back at least to Kant. See IMMANUEL KANT, LECTURES ON ETHICS (Louis Infield trans., 1963), reprinted in part in *SEXUAL LOVE AND WESTERN MORALITY* 162-63 (D. P. Verene ed., 1972).

¹⁴⁸ For the latest thinking on the large body of literature on the subject, see Jo-Anne Yau, *Stealing What’s Free: Exploring Compensation to Body Parts Sources for Their Contribution to Profitable Biomedical Research*, 5 PIERCE L. REV. 91 (2006) and Michele Goodwin, *Formalism and the Legal Status of Body Parts*, 2006 U. CHI. LEGAL F. 317.

¹⁴⁹ CAHILL, *supra* note 27, at 174.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² HIRSHMAN & LARSON, *supra* note 54, at 262.

parties so that perhaps the man will have to “make himself a more agreeable companion, or promise [the woman] more mutuality of pleasure, or agree to forego sex with others, or use a condom,”¹⁵³ and thus produce a better sexual deal for women.

New York University law professor Stephen Schulhofer supports affirmative consent because it will limit the frequently asserted defense that the defendant reasonably believed that the woman was giving true consent, and thus there was no *mens rea*.¹⁵⁴ Holding that “actual permission—nothing less than positive willingness, clearly communicated—should ever count as consent,”¹⁵⁵ Schulhofer claims that affirmative consent would help avoid the “serious injury” of “reluctant submission.”¹⁵⁶

In supporting affirmative consent, Schulhofer draws a distinction between the relationship an employer has with a tradesperson and the relationship a sexual player has with a partner.¹⁵⁷ In the former, the parties are bound when they commit by word or action.¹⁵⁸ Under current rape law, he complains, women can be considered to have consented by inaction.¹⁵⁹ At the same time, Schulhofer evokes the criminal law, which punishes those who take by stealth or coercion.¹⁶⁰ He contrasts that with the law of rape, “as if it were only a law against the ‘robbery’ of sex.”¹⁶¹ Affirmative consent again is his suggested solution.

Because affirmative consent has never been properly evaluated, proposals continue unabated. Indeed, 2005 was a high watermark for enthusiasts of affirmative consent, and that year’s literature is the precipitating force for this essay. A summary follows.

Agreeing with West,¹⁶² Chicago-Kent law professor Katharine Baker charges that rape law has ignored women’s unique emotional make-up.¹⁶³ Baker explains: “The emotional complexity of sex often leaves women ambivalent about whether to proceed.”¹⁶⁴ Since women “tend and be-

¹⁵³ *Id.* at 270.

¹⁵⁴ See SCHULHOFER, *supra* note 38, at 255-60.

¹⁵⁵ *Id.* at 271.

¹⁵⁶ See *id.* at 23.

¹⁵⁷ See *id.* at 100-01.

¹⁵⁸ See *id.* at 100-01, 107-08, 270.

¹⁵⁹ See SCHULHOFER, *supra* note 38, at 254-58.

¹⁶⁰ *Id.* at 100.

¹⁶¹ *Id.* at 101.

¹⁶² See *supra* notes 131-32, 140-41 and accompanying text.

¹⁶³ Katharine K. Baker, *Gender and Emotion in Criminal Law*, 28 HARV. J.L. & GENDER 447, 449-50 (2005).

¹⁶⁴ *Id.*

friend,”¹⁶⁵ she adds, nonresistance to men’s sexual overtures does not necessarily evidence true consent.¹⁶⁶ Beyond that, writes Baker, agreeing to sex may result from the knowledge that “[t]he emotional intensity of sex can lead to injury if sex is taken, not given.”¹⁶⁷ A “yes” may result from women’s tendency to neither confront nor escape from difficult situations: “[F]ighting back and running away are not the only ‘typical’ human reactions to stress;”¹⁶⁸ they are male reactions. A female-friendly rape law, concludes Baker, would require that meaningful consent be truly given.¹⁶⁹

To avoid the pervasive problem of self-delusion on the part of males in the service of their sex drives, Howard University Law’s Professor Andrew Taslitz wants men to make “reasonable communicative efforts” to discover whether their partners are indeed consenting to sexual union.¹⁷⁰ The man should “progress slowly, spending more time with a woman, getting to know her better.”¹⁷¹ He should “directly ask [the woman] questions about her thoughts, feelings, and desires.”¹⁷² Requiring this by law, Taslitz holds, would also counter some damaging and widespread notions, including that “certain sorts of limited male physical aggression are to be expected.”¹⁷³

Ilene Seidman, professor at Suffolk University Law, and Susan Vickers, founder and executive director of the Victim Rights Law Center in Boston, Massachusetts,¹⁷⁴ differ from Taslitz,¹⁷⁵ in holding that because intercourse is fraught with psychological and health risks, verbal consent up front is not enough; instead, “affirmative verbal consent must be obtained immediately prior to an act of penetration.”¹⁷⁶

¹⁶⁵ *Id.* at 466. Dissertations have been written on the subject. Nevertheless, according to some, women’s reputed “ethic of care” is wearing thinner these days. See, e.g., PHYLLIS CHESLER, *WOMAN’S INHUMANITY TO WOMAN* (2001); SUSAN SHAPIRO BARASH, *TRIPPING THE PROM QUEEN: THE TRUTH ABOUT WOMEN AND RIVALRY* (2006).

¹⁶⁶ See Baker, *supra* note 163, at 466.

¹⁶⁷ *Id.* at 449.

¹⁶⁸ *Id.* at 466.

¹⁶⁹ *Id.*

¹⁷⁰ Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J.L. & GENDER 381, 444 (2005).

¹⁷¹ *Id.* at 437.

¹⁷² *Id.*

¹⁷³ *Id.* at 444.

¹⁷⁴ See Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFF. U. L. REV. 467, 490 (2005).

¹⁷⁵ See Taslitz, *supra* note 170, at 437.

¹⁷⁶ See Seidman & Vickers, *supra* note 174, at 490.

Upping the ante for men still further, CUNY Law Dean Michelle Anderson would require "negotiation" before penetration.¹⁷⁷ Not only does Anderson reject the current "no" standard, like all foregoing commentators, but she also rejects the "yes" or affirmative consent model because it allows the woman's consent to be inferred from her behavior.¹⁷⁸ "The Yes Model assumes that a woman consents to sexual penetration if she engages in heavy petting, when in fact she may be engaging in heavy petting [precisely] in order to avoid penetration and the risks associated with it."¹⁷⁹

Under both the Yes and No models, the legal issue is, "What did she let him do?"¹⁸⁰ Under Anderson's Negotiation Model, the question becomes rather, "Did the person who initiated sexual penetration negotiate with his or her partner and thereby come to an agreement that sexual penetration should occur?"¹⁸¹ Did it "minimally require a request for information about another person's desires and boundaries?"¹⁸² Anderson requires "an interchange . . . of ideas[,] . . . a conversation starter that expresses a willingness to consider the other person's inclinations and humanity."¹⁸³

If mere verbal consent in this view is of little significance, silence "would never be adequate to constitute a negotiation."¹⁸⁴ Anderson is concerned about the situation where a woman may be reacting to male sexual aggressiveness with "peritraumatic disassociation," which is marked with passivity and silence.¹⁸⁵ The common law, Anderson charges, "called frozen fright in response to sexual trauma 'consent.'"¹⁸⁶ The negotiation model would change that.

Negotiation, Anderson assures her readers, need not follow any pattern, nor need it be elaborate. She provides a model of sexual give-and-take:

[A] girl may be willing to engage in fellatio but unwilling to engage in vaginal sex because she wants to preserve her technical virginity. Her boyfriend may say, "I want to have sex with you. Do you want that,

¹⁷⁷ See Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1421 (2005).

¹⁷⁸ *Id.* at 1419-22.

¹⁷⁹ *Id.* at 1421.

¹⁸⁰ *Id.* at 1422-23.

¹⁸¹ *Id.* at 1423.

¹⁸² *Id.*

¹⁸³ *Id.* This idea of "communicative sex" may have been first developed by Lois Pineau in 1989. See Lois Pineau, *Date Rape: A Feminist Analysis*, in DATE RAPE, *supra* note 91, at 1-26.

¹⁸⁴ See Anderson, *supra* note 177, at 1424.

¹⁸⁵ See *id.* at 1429.

¹⁸⁶ *Id.* at 1432.

too?" She may respond, "I'll go down on you, but that's all, because I want to save myself for marriage."¹⁸⁷

Despairing over the law's ability to protect women from unwanted sex because of male/female sexual differences and "he said/she said" accounts as to consent, (the same) Katharine Baker and Yale Law's Ian Ayres have advanced the most far-reaching reform measure.¹⁸⁸ It would shield women not only from the emotional trauma and the sense of "annihilation" from rape¹⁸⁹ but also from certain physical consequences of even wanted penetration. Ayres and Baker propose criminalizing sexual intercourse where the man does not use a condom *and* where the woman has not given "unequivocal indications of affirmatively consenting to engage in sexual activity that is specifically unprotected."¹⁹⁰ The penalty would be up to three months in prison.¹⁹¹ The proposed statute, entitled "Reckless Sexual Conduct," would apply only to the first sexual encounter with any given individual.¹⁹² Because of the psychological window it offers on male sexuality and jurisprudential method, the proposal is described here in some detail.

The proposal is grounded on deeply disturbing data. Seventeen percent of men in the 15-to-49 age range have genital herpes.¹⁹³ Reportedly, 25% of sexually active teenagers have a sexually transmitted disease (STD).¹⁹⁴ The exact number of people infected with an STD is difficult to assess because many people do not get tested, and many STDs have no obvious symptoms.¹⁹⁵ Male-to-female transmission of STDs is far greater than the reverse; in the case of HIV, the ratio is up to 20 times as high.¹⁹⁶

If Ayres and Baker had stopped at this point, their proposal to limit the harms from STDs, while intriguing, would have been irrelevant to us here. They make clear, however, that their second purpose—protecting women from unwanted sex—is no less important.¹⁹⁷ Admitting that William Kennedy Smith, Mike Tyson and Kobe Bryant had probably received some kind of limited consent from the women in question, the authors point out

¹⁸⁷ *Id.* at 1424.

¹⁸⁸ Ian Ayres & Katharine K. Baker, *A Separate Crime of Reckless Sex*, 72 U. CHI. L. REV. 599 (2005).

¹⁸⁹ *Id.* at 619.

¹⁹⁰ *Id.* at 632. The unequivocal indications would be an affirmative defense to their proposed crime of reckless sexual conduct. *Id.*

¹⁹¹ *Id.* at 633.

¹⁹² *Id.* at 632.

¹⁹³ *See id.* at 604.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 605.

¹⁹⁷ *Id.* at 644.

that the sex in each case was unprotected.¹⁹⁸ Accordingly, “the criminalization of reckless sexual conduct is likely to reduce the problem of acquaintance rapists going completely unpunished.”¹⁹⁹

The rule, say the authors, will be of use in those numerous cases where a “tragic lack of communication . . . often gives . . . the illusion of consent.”²⁰⁰ A requirement that the man stop to put on a condom should increase deliberation and communication.²⁰¹ The more deliberation and communication, the less the likelihood of acquaintance rape.²⁰²

Ayres and Baker further support their proposal with the datum that less than 1% of rape cases involve use of a condom.²⁰³ They cite studies showing that about a third of young women’s first sexual encounter was either forced (9%) or otherwise unintended by them (24%), and that most nonstranger rapes take place where the man and woman have not yet established a sexual relationship.²⁰⁴ Additionally, because sex with 46% of one’s partners is a one-time affair,²⁰⁵ the authors argue that even a rule limited to first encounters would be valuable. The “Reckless Sexual Conduct” statute applies on its face to both participants in unprotected sex. One might argue, however, that the statute should apply only to men:

The vast majority of acquaintance rapists are male. From the perspective of [decreasing the rate of] acquaintance rape it is almost completely unproblematic to have a larger de facto immunity for women. The class of people hurt by the emotional dangers of sex is overwhelmingly female.²⁰⁶

Why exempt women if a goal is to stop STDs?²⁰⁷ Ayres and Baker see a trap for women here.²⁰⁸ If women will incriminate themselves by reporting instances of unprotected sex, they will be less likely to report it, especially if force is not used.²⁰⁹ It should be clear, then, that the paramount motive for the condom rule is to punish wayward males.

¹⁹⁸ *Id.* at 638.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 602.

²⁰¹ *Id.*

²⁰² *Id.* at 602-03.

²⁰³ *Id.* at 620.

²⁰⁴ *Id.* at 621 & n.96.

²⁰⁵ *Id.* at 607-08.

²⁰⁶ *Id.* at 644 (footnote omitted).

²⁰⁷ The fact that women are more likely than men to contract STDs would seem irrelevant.

²⁰⁸ See Ayres & Baker, *supra* note 188, at 644-45.

²⁰⁹ *Id.*

Topping off the list of proposed reforms is one by Catharine MacKinnon.²¹⁰ MacKinnon brings us back to the issue discussed earlier: economic inequality and its sexual implications.²¹¹ According to MacKinnon, sex both produces and is the product of social and economic inequality,²¹² and breaking the cycle first requires recognition that social and economic “inequalities are coercive conditions.”²¹³ To remedy the problem, force would be “defined to include inequalities of power.”²¹⁴ In particular, the law would start with the “assumption that money is a form of force in sex.”²¹⁵ A defense would be available to the man if he could show that “sex was wanted—affirmatively and freely wanted—despite the inequality.”²¹⁶ The current consent test would be replaced by a “welcomeness standard.”²¹⁷

Thus far we have examined affirmative consent as a secular matter. What, we might ask, would Jesus say? Again, a well-known story can help to contextualize affirmative consent and lay the foundation for later discussion. Consider the Virgin Mary. In his Gospel, Matthew reports: 1) Mary was impregnated by the Holy Ghost, 2) she later gave birth to a baby boy, and 3) an angel related to Joseph the unusual circumstances of Mary’s conception.²¹⁸ Mark, in his Gospel, ignores the virgin birth.²¹⁹ A protofeminist issue probably arose as the Good News spread: Did Mary have no say in the matter?²²⁰ Perhaps to solve this problem, Luke reports in his Gospel that an angel visited Mary with the Good News that she was to become mother to the Messiah.²²¹ To this Mary responded, “Let it be according to thy will.”²²²

²¹⁰ See CATHARINE A. MACKINNON, *WOMEN’S LIVES, MEN’S LAWS* (2005).

²¹¹ See *supra* note 50 and accompanying text.

²¹² See MACKINNON, *supra* note 210, at 240-47.

²¹³ *Id.* at 247.

²¹⁴ *Id.* at 247-48.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ See *Matthew* 1:18-23.

²¹⁹ See *Mark* 1:1-9.

²²⁰ The problem may, in a sense, be even greater. Although *presented* after that of *Matthew* in the New Testament, the *Gospel of Mark*, which, again, ignores the special circumstances of Mary’s pregnancy, is understood by many to have been *written* first. See *Mark, The Gospel According to*, in 7 *ENCYCLOPÆDIA BRITANNICA* 858 (15th ed. 2003). As to why consent matters as a theological concept, consider: The “[Lord] does not work in His elect as does the artist on insensible and inanimate matter.” GREGORY ALASTRUEY, *THE BLESSED VIRGIN MARY*, VOLUME ONE 42 (Sister M. Janet La Giglia trans., 1963) (quoting St. Ambrose). By this line of reasoning, Mary’s consent was needed.

²²¹ *Luke* 1:31-33.

²²² *Luke* 1:38.

This is the problem for reformers. Mary’s consent was not requested; she was told her fate. Indeed, according to one contemporary scholar, it was essential that she *not* consent.²²³ In any event, the story is referred to in Christian tradition as The Annunciation, i.e., announcement, and not “The Offer.” Mary’s response, furthermore, is not what reformers want to hear as a declaration of female autonomy: “according to *thy* will” is a far cry from “according to *my* will,” and hardly satisfies a welcomeness standard. There was no conversation there, let alone a “negotiation.” Mary’s answer, “according to thy will,” responds, finally, to “What did she let him do?”

Talk about inequality! How could Mary have a will of her own when evolutionary biology and patriarchy conspire in this world to cause women to seek protection and resources from powerful males? Who will say “no” to the Father, the Al(l)-mighty, for some the Arch-Patriarch Himself? The unavoidable issue for us here has nothing to do with Original Sin and the need for a Virgin Birth: Was Mary, the model for millions, raped?

The question is, of course, absurd. In the real world, people have differing needs at different times. Consequently, we are regularly called upon to do for others. Equity cannot be determined on a transaction by transaction basis. A practical definition of consent, then, must include simple acquiescence. Must a practical definition of consent then not include simple acquiescence?

III. SEXUAL FUNDAMENTALS

Having presented the case for affirmative consent, I proceed to engage it. Like many gender theorists who insist on highlighting the affective basis of their academic work, I begin with a personal narrative.

Of all my memories of young adulthood, nothing sticks out more than chronic concupiscence. The pain did not abate as my financial power grew, for I continued striking out far more than scoring. In confessing these failures, I do not even take into account the times I did not ask for sex because I could not face additional rejection. If women are easily seduced because they “tend and befriend,” I certainly gained no benefit from it.

²²³ In PAMELA NORRIS, *EVE: A BIOGRAPHY* (1999), the author says that one of Mary’s important functions was to atone for the first woman sin of disobedience. (Remember Eve and the snake.) *Id.* at 233-36. Had Mary’s permission been sought, that function could not have been performed; consent is not obedience. *Id.* In any event, Church writers have used Mary’s response to the Annunciation to evidence her obedience *and* her consent. See ALASTRUEY, *supra* note 220, at 43-44.

In other words, the implication that this particular man was master of his sex life made no sense. My purpose here is not to blow off steam. Nor is it to lay claim to the reader's sympathy or to suggest that the law can or should be organized to relieve men's pain. A classic story will help me make my point. Harry is standing on a street corner. As female prospects pass, he leans over and politely asks, "Want a good time?" One, two, three, four women shoot harsh glances and mutter obscenities at him as they walk brusquely past. A friend who happens to be observing the scene this time finally approaches, asking, "Why subject yourself to this abuse if you're so regularly rejected?" "Oh, I get rejected a lot," Harry admits, "but I also get laid a lot." "Noes" may just be a prerequisite for male sexual success.

My goal then is limited to grounding an all-too-abstract discussion and to show why I felt compelled to join the affirmative consent debate. Readers feeling a little queasy at this point should not worry about continuing. They can rest assured that there will be no further crude stories—or intimate revelations.

Do Americans inhabit a "rape culture?" According to United Nations data for 2000, the percentage of people reporting victimization by "sexual incidents" in the United States is less than the average percentage of victimization in the twenty-three industrialized countries measured.²²⁴ This was equally true for component parts of that category, "sexual assaults" and "offensive sexual behavior."²²⁵ Moreover, the U.S. assault and threat rates are, generally, far higher than the "sexual incident" rate.²²⁶ This is not to equate the impact on victims of these various crimes with the impact on rape victims, but I know from personal experience the trauma of being mugged.²²⁷ If we do not despair over an assault-robbery culture, it seems both fair and socially constructive to be highly skeptical of the rape-culture claim.

²²⁴ See John van Kesteren et al., UNITED NATIONS INTERREGIONAL CRIME & JUSTICE RESEARCH INST., CRIMINAL VICTIMISATION IN SEVENTEEN INDUSTRIALISED COUNTRIES: KEY FINDINGS FROM THE 2000 INTERNATIONAL CRIME VICTIMS SURVEY app. 4, tbls.1 & 2 (2000), available at www.unicri.it/wwd/analysis/icvs/pdf_files/key2000i/pdf/17-icvs-app4.pdf. The incidence rate of sexual incidents in the U.S. per 100 persons was 2.8 in the year 2000, while the 23-country average in that same year was 3.6. *Id.* app. 4, tbl.2.

²²⁵ See *id.* app. 4, tbl.6.

²²⁶ See *id.* app. 4, tbl.2.

²²⁷ See SUBOTNIK, *supra* note 49, at 212-14.

And perhaps of everything else written about rape, for it should be evident that the entire body of rape literature requires strict scrutiny.²²⁸ We begin applying it here to West's declaration of an equivalency between forced sex, on the one hand, and reluctant sex, on the other. According to philosopher Alan Wertheimer, this is a "straightforward empirical question," i.e., one that requires evidence, and the argument is weak.²²⁹ He cites Linda Fairstein, a well-known prosecutor of sex crimes, who holds that the psychological consequences of stranger rape are normally more severe.²³⁰ Wertheimer goes on to cite a report that only 27% of date rape victims (by that author's definition) perceived themselves as such;²³¹ a major study of

²²⁸ Let's focus on false rape charges. A much-cited datum is that false rape charges amount to only two percent of all rape complaints. See Edward Greer, *The Truth Behind Legal Dominance Feminism's "Two Percent False Rape Claim" Figure*, 33 LOY. L.A. L. REV. 947, 949 & n.11 (2000). The latest data "indicate that the rates for false reports of rape are comparable to false charge rates for other crimes." NANCY LEVIT & ROBERT R. M. VERCHICK, *FEMINIST LEGAL THEORY* 184 (2006); see also Bonnie S. Fisher et al., *Acknowledging Sexual Victimization as Rape: Results from a National-Level Study*, 20 JUST. Q. 535 (2003) (reporting that women considered to have been raped were, in fact, raped).

Anderson, however, admits that the two-percent number is questionable. See Anderson, *supra* note 119, at 984, 985 & n.235. The false rape problem would appear to be far more serious. See JOHN M. MACDONALD WITH DAVID L. MICHAUD, *RAPE: CONTROVERSIAL ISSUES* 84-108 (1995). A medical doctor and highly published author on criminal law issues, Macdonald was, at the time he wrote the book, professor emeritus in psychiatry at the University of Colorado Health Sciences Center.

In what is probably the most extensive empirical study of false rape, Purdue psychologist Eugene J. (E.J.) Kanin, reported on his study of a small Midwestern metropolitan area where, of 109 charges of forcible rape, 41% proved false and unfounded. Eugene J. Kanin, *False Rape Allegations*, 23 ARCHIVES SEXUAL BEHAV. 81, 83-84 (1994). A "false and unfounded" conclusion was reached only when the complainant admitted that no rape occurred. *Id.* In two large Midwestern universities that they also studied, 50% of reported forcible rapes were found to be false and unfounded. *Id.* at 90. Here complaints were investigated exclusively by female officers and, again, recantation was required. *Id.*

The FBI has put the rate of false rape charges at 8%, four times the number for other crimes it tracks. See MACDONALD, *supra*, at 86 (citing the FBI's Uniform Crime Reports); Anderson, *supra* note 119, at 985; see also Dick Haws, *The Elusive Numbers on False Rape*, COLUM. JOURNALISM REV., Nov.-Dec. 1997, available at <http://archives/cjr/org/year/97/6/rape.asp>. And in the context of race, false rape charges have long been acknowledged. See LISA LINDQUIST DORR, *WHITE WOMEN, RAPE, AND THE POWER OF RACE IN VIRGINIA, 1900-1960* (2004). The Duke case provides a contemporary example. Should this not raise concern generally?

The false rape problem goes way back in time. In fact, our patriarchs' lives stand as a stern warning against women's brazenness in this regard. See *Genesis* 39, for the account of Potiphar's wife who sets Joseph up for incarceration because he rejected her advances. She apparently never recanted, and let Joseph languish in prison for twelve years. See *THE PENTATEUCH AND HAFTORAHS* 158 n.46 (J. H. Hertz ed., Soncino Press 1965).

The above discussion raises a simple but important question: Was enactment of rape shield laws a capitulation to the mob as in the Brown and Duke cases?

²²⁹ ALAN WERTHEIMER, *CONSENT TO SEXUAL RELATIONS* 89 (2003).

²³⁰ See *id.* at 107 (citing Fairstein in *Panel Discussion: Men, Women and Rape*, *supra* note 96, at 159).

²³¹ *Id.* (citing ROBIN WARSHAW, "I NEVER CALLED IT RAPE": THE MS REPORT ON RECOGNIZING, FIGHTING, AND SURVIVING DATE AND ACQUAINTANCE RAPE 2, 26 (1988)).

sex in America finding that 50% of those reporting that they were “forced” into sex say that they were “in love” with those sexual partners;²³² and a datum that “almost 40% of such victims date their attacker *after* the rape.”²³³ These findings raise questions about whether a rape in the legal sense took place.

That unwanted sex with a stranger may be experienced as more harmful than with an acquaintance hardly means that the law need not address the latter problem. That “only” 27% of women felt raped, moreover, may mean most victims need the kind of education provided by reformers to overcome “false consciousness.”²³⁴ That 40% date rape victims date their victimizers may mean, as has been suggested, that they are trying to suppress consciousness of the experience. Nevertheless, again, we must be careful about eliding distinctions between forced and reluctant sex.

Does “no” actually mean “no”? If it does not necessarily mean “no” *psychologically*, as Paglia insists,²³⁵ the reason will help explain ambiguous responses like silence. In fact, “no means no” is not a truism in this sense even in the reform literature.²³⁶

Schulhofer himself cites a well-known study showing that 39% of women admitted that they sometimes said “no” to sexual advances when they meant “yes.”²³⁷ Among sexually experienced women the number rose to 61%.²³⁸ The details of the study are revealing. The most important reasons for thinking “yes” and saying “no” were “Practical” ones, comprising “Fear of appearing promiscuous,” “Nature of the relationship,” “Uncertainty of the partner’s feelings” and “Situational problems” (presumably

²³² *Id.* (citing EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY* 332-38 (1994)).

²³³ *Id.* (citing David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1233 (1997)).

²³⁴ In the feminist literature, the term is used perhaps most frequently by Robin West. See, e.g., West, *supra* note 2.

²³⁵ “‘No’ has always been, and always will be, part of the dangerous, alluring courtship ritual of sex and seduction, observable even in the animal kingdom.” Camille Paglia, *Madonna—Finally, a Real Feminist*, N.Y. TIMES, Dec. 14, 1990, at A39.

²³⁶ See SCHULHOFER, *supra* note 38, at 65.

²³⁷ See *id.* at 64 (citing Charlene Muehlenhard & Lisa Hollabaugh, *Do Women Sometimes Say No When They Mean Yes? The Prevalence and Correlates of Women’s Token Resistance to Sex*, 54 J. PERSONALITY & SOC. PSYCHOL. 872, 874 (1988)). Some readers of my manuscript interpret this “no” as no *now*, but not necessarily later. I cannot entirely agree. The question asked is whether the respondent said “no” while meaning “yes.” In answering “yes” to the question, I suggest the respondent is likely saying to herself, “I hope he woos me harder so I can feel more secure in a sexual relationship with him.”

²³⁸ Muehlenhard & Hollabaugh, *supra* note 237, at 875.

having to do with fear of being caught in the act).²³⁹ The second class of reason, after Practical, was "Inhibition-related," comprising "Emotional, religious or moral reasons," "Fear of physical discomfort" and "Self-Consciousness/embarrassment about the body."²⁴⁰

The last class was "Manipulative." It comprised "Game playing," "Anger with Partner" and "Desire to Be the One in Control."²⁴¹ Game playing means wanting the man "to beg," "to talk [a partner] into it," or "to get him more sexually aroused by making him wait."²⁴² A minority of women reported, moreover, that "women enjoy it when men use physical force during sex," or that it was "acceptable" for men to do so.²⁴³

If the women in question were concerned about 1) appearing promiscuous; 2) the uncertainty of men's feelings; 3) whether they might get caught; 4) the appearance of their bodies; and 5) eliciting stronger responses from men; and especially if, as Schulhofer points out, some of them believe that some physical force is considered good form, then a "no" will not necessarily mean that these women want men to get up, pull themselves together, and go home.

To be sure, the 39% of the women who reported saying "no" while meaning "yes" also reported that they played that card only occasionally.²⁴⁴ Because the consequences of unwanted sex can be extreme, "no" must be taken very seriously.²⁴⁵

²³⁹ *Id.* at 875-76.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* at 875. "Making him wait will only increase his desire and create more passion when you finally have sex whenever you're ready." ELLEN FEIN & SHERRIE SCHNEIDER, *THE RULES* 81 (1995).

²⁴³ Muehlenhard & Hollabaugh, *supra* note 237, at 876-77.

²⁴⁴ *Id.* at 874.

²⁴⁵ One might argue that since non-marital sex is more socially acceptable these days, there would likely be fewer no-means-yes responses by women today. Perhaps, though the study in question took place in the mid-eighties, decades after the first shots of the sexual revolution were fired. Writing in 1994, Martha Nussbaum remarked that "lots of people do [believe] that vaginal . . . penetration in the context of sexual relations is (except under very special circumstances) immoral, and that a woman who goes in for that is therefore an immoral and base woman." MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* 285 (1999).

Should a verbal no be a *per se* legal no? Some law academics hold that whatever "no" may mean in a given case, the stakes are too high for "no" to legally mean anything other than no. I have no quarrel in principle. As a practical matter, however, there are nos and NOs. "I don't think this is right" or "This is not right" is different from "STOP NOW." In the latter case, the message would normally be accompanied by some resistance. Perhaps for this reason, when force is absent, Professor Joshua Dressler holds, a "no" should not always mean no as a legal matter. See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* § 33.05 (2d ed. 1995).

Why not a *per se* no-means-no rule to eliminate all doubts? "Maybe half the sex in world history," says a well-known columnist, "has followed an initial 'no.'" Posting of Gregg Easterbrook to Easterblogg, "No" Does Not Always Mean No; Time to Agree on a Phrase that Does,

The important point for our purposes is that if a no is, psychologically speaking, not always “no,” a yes and an ambiguous response have even less claim to be treated as “no.” The point is highlighted in a study of hundreds of men which showed that one declaration—widely understood by women, I am told—was especially helpful in putting the man off and yet inducing him to come back: “I really care about you, but I want to wait until the relationship is stronger.”²⁴⁶ Women’s failure to use this stratagem in a particular sexual interaction would seem to evidence a volitional element.

This leads us more directly to a central issue raised by Frug, Hirshman and Larson, among others concerning the econo-sexual bargaining positions of men and women.²⁴⁷ No one will deny that often men have more political, social, economic and physical power than women. Compounding this problem is that a woman’s social status is enhanced more than a man’s by being in a romantic relationship.²⁴⁸ As a result of easy access to sex, moreover, a woman who does not hook up can easily end up the “old maid.” It is not a pretty story.

No moral problem exists even under these conditions, however, according to University of San Diego law professor Donald Dripps.²⁴⁹ The distribution of economic resources is unequal, he admits, but so is the distribution of “erotic assets.”²⁵⁰ In this second area, women have the advantage.²⁵¹ Since the law cannot redistribute erotic assets,²⁵² it should not, ex-

<http://www.tnr.com/easterbrook.mhtml?pid=832> (Oct. 9, 2003, 10:00 EST). Easterbrook is no sex maniac. His interest is less in the quantity of sex than in the quality of discourse. His recommendation for stopping most truly unwanted sex is not affirmative consent, but the words “This is rape!” *Id.*

Neither I nor anyone else has come up with a good test for distinguishing nos and NOs. This does not doom our project; the problem under examination here does not involve the use of “no,” but behavior that is ambiguous.

²⁴⁶ Charlene L. Muehlenhard et al., *Beyond “Just Saying No”: Dealing with Men’s Unwanted Sexual Advances in Heterosexual Dating Contexts*, 8 J. PSYCHOL. & HUM. SEXUALITY 141, 164 (1996).

²⁴⁷ See *supra* notes 50-58 and accompanying text.

²⁴⁸ See E. Sandra Byers, *How Well Does the Traditional Sexual Script Explain Sexual Coercion? Review of a Program of Research*, in *SEXUAL COERCION IN DATING RELATIONSHIPS*, *supra* note 48, at 7, 10.

²⁴⁹ As he puts it:

Whatever we give and take when we make heterosexual sexual love, we are giving and taking different experiences depending on our gender. If that is so, there seems to be no principled distinction between exchanging female erotic pleasure for male erotic pleasure on the one hand, and exchanging male erotic pleasure for financial security, for status, or what have you on the other.

Panel Discussion: Men, Women and Rape, *supra* note 96, at 143 (Remarks of Donald Dripps); see also Donald Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780 (1992).

²⁵⁰ See Dripps, *supra* note 249, at 1786.

²⁵¹ A well-known proverb bears on the sexual power issue, at least for Uruguayans. *La chocha tiene más fuerza que un par de bueyes.* (The female genitalia are more potent than a yoke of oxen.) Thanks to Lila Castro Mester for this.

cept in instances where force is used, intrude in the sexual marketplace. From this perspective, Title VII and equal pay for equal work are, *overall*, counterproductive. Far from unbalancing the playing field, as the reform literature suggests, men’s greater economic resources and power would seem to actually even it out.

Prominent psychologist Roy Baumeister and marketing expert Kathleen Vohs develop this bio-psycho-economic analysis of sex.²⁵³ According to this analysis, sex is a “female resource” for social exchange in heterosexual interactions.²⁵⁴ “When a man and a woman have sex, . . . the woman is giving something of value to the man. In th[is] sense, the interaction is one-sided . . .”²⁵⁵ Male sex, that is, has no “exchange value.”²⁵⁶ None of this, of course, should come as news. Anthropologist Donald Symons famously pointed out years ago that in virtually all societies the man is the one who has to make gifts for sex.²⁵⁷ Courtship in this view is the “process by which [men] seek[] to persuade [women] to have sex with [them].”²⁵⁸ “[W]e have,” Paglia summarizes, “what they want.”²⁵⁹

Can anyone doubt that women with careers and resources, like reformers themselves, are in the catbird seat? Not having to becharm and succumb to the likes of Donald Trump, Catharine MacKinnon today is much freer to fall in love with Rodolfo than Mimi ever was.²⁶⁰

But what about the more common case where women need or just want the resources that men provide? In this case, Baumeister and Vohs admit, they may *have to* trade sex. Indeed, a twenty-plus-year-old study provides some evidence that wives with few resources of their own feel

²⁵² Dripps, *supra* note 249, at 1790-92.

²⁵³ See generally Roy F. Baumeister & Kathleen D. Vohs, *Sexual Economics: Sex as Female Resource for Social Exchange in Heterosexual Interactions*, 8 PERSONALITY & SOC. PSYCHOL. REV. 339 (2004).

²⁵⁴ *Id.* at 341-42.

²⁵⁵ *Id.* at 341. Note that nothing is said here about the distribution of sexual pleasure in the marketplace, only power.

²⁵⁶ *Id.*

²⁵⁷ “Everywhere sex is understood to be something females have that males want.” SYMONS, *supra* note 52, at 253. Asks one of my readers, “What sorts of gifts?” In our society, dinner, a show, a day trip to some recreation or resort area.

²⁵⁸ See Baumeister & Vohs, *supra* note 253, at 349.

²⁵⁹ See WERTHEIMER, *supra* note 229, at 45 (quoting PAGLIA, *supra* note 68, at 62).

²⁶⁰ Mimi is a working-class seamstress in Giacomo Puccini’s *La Bohème*; Rodolfo is the Bohemian poet with whom she falls in love. See GIACOMO PUCCINI ET AL., *LA BOHÈME*.

less able to resist their husbands' demands for sex than others.²⁶¹ Is this, finally, the heart of the case against men?

The problem is that hard bargaining in exchange for sex is precisely what Hirshman and Larson²⁶²—and Cosmo legend Helen Gurley Brown—urge women to do.²⁶³ We are back to evolutionary psychology, which teaches that females will ordinarily seek a male with enough resources to provide well for them and their children. Their thinking is that if a man is willing to trade food for sex now, he will be willing to do so upon marriage.

Bargaining would seem to continue as long as the relationship lasts—and not only for food. I have written elsewhere about the trap of thinking that everything is sex, sex, sex:

[E]ven if marital sex is uncongenial, nothing changes. As feminists themselves have noted, marriage requires negotiation. One would have to suppose that in return for the sex, husbands are doing more than they would if they had their druthers. Thus, if women are to be rewarded for [answering] booty calls [above and] beyond the call of duty, the law will have to compensate men for any extra vacuuming, garbage-removal, house-painting, shopping, or for pilgrimages to Mother-in-law's on Super Bowl Sunday.²⁶⁴

The woman may still get less from the sex itself than the man after the bargain, but if the woman can get a more favorable distribution of house-keeping chores, and if we apply bargaining theory more generally, how can we know if the woman is getting the “lesser sexual deal”?

A creative, albeit by now annoying, commercial on television these days can show reformers how couples solve real problems. The husband is desperately trying to watch the ball game on television, “the most important of the year,” while his wife is whining about the state of the carpets. The tension escalates. In the final scene, the carpet salesman comes to the rescue. The woman gets her new carpets, though not her husband's attention; the husband gets to watch the game, but only intermittently. That the

²⁶¹ See Baumeister & Vohs, *supra* note 253, at 348. In the category of morally risky sex, writes Ann Ferguson, are “nuclear family relations between male breadwinners and female housewives.” Ann Ferguson, *Sex War: The Debate Between Radical and Libertarian Feminists*, 10 *SIGNS* 106, 111 (1984).

²⁶² Structured bargaining can take place “between naturally and socially unequal players” because “eroticism and emotions are [not] exempt from the ordinary rules of human behavior.” See HIRSHMAN & LARSON, *supra* note 54, at 267-68.

²⁶³ “If there's a man who might be up for having sex with you, take him to Gucci.” MAUREEN DOWD, ARE MEN NECESSARY? 177 (2005) (quoting Helen Gurley Brown, *Don't Give Up on Sex After 60*, *NEWSWEEK*, May 29, 2000, at 55).

²⁶⁴ See SUBOTNIK, *supra* note 49, at 116 (footnote omitted).

parties are not bargaining over sex does not matter. The point is that the wife's nagging is highly coercive; buying the carpet is the last thing on his mind during the most important game of the year.

Would rape reformers want the power of the law to come down on the woman? Do they imagine that the working-class husband would want it that way? The husband understands that he must negotiate with his wife, that compromise means not getting everything he wants, and that ill-temper is the consequence of frustrated needs combined, perhaps, with sensed opportunity. This point is lost on Carol Pateman when she complains that it is currently "reasonable" for men to put a lesser or greater degree of pressure on unwilling women in sexual matters,²⁶⁵ and on Robin West when she complains of men's sexual use of the "unbearable snit."²⁶⁵

In short, if 1) bargaining is pervasive in relationships, 2) "coyness," as Wertheimer has pointed out, "is a standard bargaining strategy,"²⁶⁶ 3) women want their relationships with men to be successful, and 4) men press for sex more than do women, then women will have to sometimes give it up.²⁶⁷ This is going to be true for singles no less than for the married.

Have rape reformers identified a moral crisis for women? Is sex simply too dear to be sold because sex is "self"?²⁶⁸ Whether sex is different from other transactions is the subject of the next Part. We consider the transaction here only in economic terms. Would women be better off if rich and upwardly mobile men stick to their own kind, as is increasingly happening now?²⁶⁹ Or if men ignore women because women cannot be trusted to satisfy their needs?

Finally, recall West's notion that sex is injurious to women when they do not receive in return "equal or greater value."²⁷⁰ If West is using a material measuring rod, it will not be easy to persuade at least one learned commentator that women are getting the short end of the stick. "Pricey dinners, diamond rings," this commentator writes, "in what other system of

²⁶⁵ See CAHILL, *supra* note 27, at 173 (quoting Carole Pateman, *Women and Consent*, 8 POL. THEORY 149, 161 (1980)); West, *supra* note 37, at 448.

²⁶⁶ See WERTHEIMER, *supra* note 229, at 43.

²⁶⁷ The egalitarian asks whether the same is not true for men. Of course the answer is yes—if we could only force a man to be "ready."

²⁶⁸ See *supra* notes 138-141. In the film GUYS AND DOLLS (MGM 1955), Adelaide cries, "But when I think of what [he] want[s] in exchange [for 'gifts' of pearls and mink], it all seems a horrible dream."

²⁶⁹ See Annie Murphy Paul, *The Real Marriage Penalty*, N.Y. TIMES MAG., Nov. 19, 2006, at 22, 22-23.

²⁷⁰ See *supra* note 141 and accompanying text.

exchange can you trade exclusive access to an orifice for a suburban split-level and a lifetime of monetary support? Not such a bad deal," she concludes, "considering the backbreaking and alienated things that a lot of people end up doing for money."²⁷¹

IV. ACCOMMODATIVE SEX

Is sex a commodity to be bought and sold?²⁷² Ohio State University law professor Martha Chamallas argues that sex should not be exchanged for external resources where men dominate.²⁷³ Rather, it should be exchanged for pleasure. "[W]omen . . . possess[] an equal capacity to experience sexual pleasure and emotional intimacy."²⁷⁴ Sex in the first case, i.e., when used for "financial gain, prestige, or power, is . . . exploitive and immoral, regardless of whether the parties have engaged voluntarily in the encounter."²⁷⁵ Chamallas can be read as chastising women for using sex against successful men. If so, it would be women's moral deficiencies, not men's, that are in question, and it is hard to see what affirmative consent would accomplish.

Whether or not that is what Chamallas had in mind, two questions arise: Does the weightiness of sex for women require the law's intervention? And should the law get its back up even more when a woman receives no tangible benefit for the sex, i.e., where sex is provided as an accommodation?²⁷⁶ Two responses to the first question. First, studies of romantic breakups show no gender differences in distress levels.²⁷⁷ Second, the premise of women's sexual fragility is dubious in theory. Speaking on the issue of legalization of prostitution, distinguished University of Chicago jurisprude, classicist and philosopher, Martha Nussbaum, dismisses the notion that "the prostitute alienates her sexuality just on the

²⁷¹ See KIPNIS, *supra* note 31, at 123.

²⁷² See *supra* notes 140 and 147 and accompanying text.

²⁷³ See Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 820-21 (1988).

²⁷⁴ *Id.* at 839.

²⁷⁵ *Id.* at 784.

²⁷⁶ "Any sexual intercourse without mutual desire is a form of rape." ANDREA PARROT, *ACQUAINTANCE RAPE AND SEXUAL ASSAULT PREVENTION TRAINING MANUAL 1* (4th ed., 1990).

²⁷⁷ See generally Ty Tashiro & Patricia Frazier, "I'll Never Be in a Relationship Like That Again": *Personal Growth Following Romantic Relationship Breakups*, 10 PERS. RELATIONSHIPS 113 (2003). The studies show that women do, however, have somewhat higher scores for depression and hostility. *Id.* at 124.

grounds that she provides sexual services to a client for a fee. Does the [opera] singer alienate her voice" by selling her service?²⁷⁸

The prostitution issue is knotty and contentious; happily, we do not have to decide whether laws against prostitution discriminate against poor women. Dealing with West's computer-sale analogy to highlight the uniqueness of sex is, by contrast, a piece of cake.²⁷⁹ Recall her argument that giving sex for the woman is different from giving a computer because, when she parts with the former, she is giving a part of herself. This being the case, the computer is easier to give and she can "bask in the glow of [her] beneficence, or [can] feel free of the burden of [her] now disposed excess baggage."²⁸⁰ All this may be true for West. Who can presume to say otherwise? For other women, however, giving sex will be easier than a computer; unlike in the case of the computer, they can have their sex and eat it too.

As for the moral value of accommodative sex, suppose that on a scale of minus ten to plus ten a man locates his desire for sex with a partner at plus ten; his randiness is unbearable. At the same time, the woman fixes her sexual appetite at minus five; her lack of desire is not as great as the man's desire for sex. Should the law intercede when the woman puts the man out of his misery, thereby maximizing/minimizing their joint happiness/unhappiness?

Not according to Wertheimer, who nicely expounds on this matter. Philosophically, he says, desires differ from wants. I desire X when I have a favorable "attitude toward doing X considered (more or less) by itself."²⁸¹ By contrast, I want X when I have that attitude not for X itself, but "*all things considered*."²⁸² However, he insists:

[L]ittle of moral interest turns on whether sex is either desired . . . or wanted . . . One can desire sex that is not wanted, as when one decides to "wait" until one is married, and one can want sex that is not desired.²⁸³

Citing a major study of sexual behavior showing that 25% of young women reported that their first act of intercourse was neither forced nor wanted, Wertheimer admits that the women "were not motivated by desire

²⁷⁸ Martha C. Nussbaum, "Whether from Reason or Prejudice": Taking Money for Bodily Services, 27 J. LEGAL STUD. 693, 714 (1998). In her article, Nussbaum uses this principle to advocate the legalization of prostitution because criminalization hurts poor women. *Id.* To the extent Nussbaum is right, a woman who has less-than-ideal sex with a date is even less likely to be injured.

²⁷⁹ See *supra* notes 138-139 and accompanying text.

²⁸⁰ West, *supra* note 71, at 1451; see also *supra* note 139 and accompanying text.

²⁸¹ See WERTHEIMER, *supra* note 229, at 157.

²⁸² *Id.*

²⁸³ *Id.* at 158. Sex after emotional manipulation might be an example of the latter case.

for sex itself, but by a desire to express affection for their partner or to keep their partner in the relationship.”²⁸⁴ Still, he insists, “there is no reason to believe that mutual sexual desire is morally superior to . . . the desire to . . . show affection.”²⁸⁵ As he points out, we do many things not because we desire them for ourselves, but out of moral or legal obligation. To provide a few examples, we pay taxes, make charitable contributions, visit the sick and take our kids to Disney World. Only a child would attach moral opprobrium to such conduct because it is not in furtherance of a parent’s selfish goals.

Indeed, we engage our world with an affect that ranges from wild enthusiasm to ambivalence, from indifference to horror. Men can have ambivalent feelings about sex too. “Give me chastity and self-control,” Augustine famously prayed, “but not just yet.”²⁸⁶ If sex can be performed indifferently, sex is not “self.”²⁸⁷ It need not produce an intimate “connection,” and thus may do no harm. If a woman then, not by sexual hunger, but by “all things considered,” has sex with a man, how can the law object?²⁸⁸ If the law does object, a great many new correctional facilities will surely have to be built.

Even if the law wanted to interpose itself, how could it “know” whether the woman is engaging in accommodative or “ideal” sex? Electrodes suitably placed? If the woman tells the man she is participating only as an accommodation—so as to establish a record—he will understand that he is not desired in the way he wishes. This will hardly serve to strengthen male/female bonds. It should be clear then that affirmative consent cannot be supported on a theory that inducing a person to do something he or she does not *desire* to do is morally problematic.

²⁸⁴ See *id.* at 42-43.

²⁸⁵ *Id.* at 136.

²⁸⁶ ST. AUGUSTINE, *CONFESSIONS*, bk. 8, para. 17, at 173 (Garry Wills trans., Penguin Books 2006).

²⁸⁷ See *supra* notes 140-141, 147 and accompanying text.

²⁸⁸ For a fictional look at the emotional and moral implications of indifferent, non-ideal sex, readers should watch the movie *THE THREE BURIALS OF MELQUIADES ESTRADA* (Europa Corp. 2005). In one scene, frustrated after a hard day’s work, the young border patrol guard becomes home hungry for sex. Unwilling to give fully because her husband does not understand her isolation, the young wife bends over and the husband enters her from underneath. Far from revealing horror or disembodiment, the woman’s rolling eyes say to the viewer, “Look what I have to put up with.” Perhaps most important for our purpose here is that notwithstanding the wife’s utter social and financial dependence on her husband, she picks herself up and moves back to her hometown in Cincinnati.

This is not to say that marital sex cannot be a horror. See ANDREA DWORKIN, *INTERCOURSE* (1987), for some old stories of very bad marriages. Happily, divorce is now available, acceptable, and reasonably compensatory.

The usefulness of the discussion is limited insofar as it is theoretical and because Wertheimer is male. Lucia O’Sullivan’s empirical work may prove helpful. O’Sullivan has found that most committed couples “characterized their experiences of unwanted sexual activity . . . as pleasant and identified a number of positive outcomes” flowing therefrom.²⁸⁹

Looking at the matter practically and forthrightly, what should a strong, self-possessed woman do when a man she likes, requesting his own kind of connection, looks at her with moony, plaintive eyes? When he has “special needs”?²⁹⁰ When he is unhinged by randiness?²⁹¹ Tell him, “Go f _ _ _ yourself”?

Bestselling psychologist John Gray tells us what we need to know about this problem—and perhaps more—in a chapter entitled, “The Joy of Quickies.”²⁹² Is Gray, for all his training, experience and success, morally and psychologically obtuse? Will half-hearted sex produce the predicted sense of disembodiment in the woman?²⁹³

With women’s best interests presumably in mind, marital therapist Michele Weiner Davis counsels wives to proceed with sex even when they “might not have been thinking sexual thoughts or feeling particularly sexy.”²⁹⁴ She suggests they might even be “thrilled” by the results.²⁹⁵ Carolyn Graglia, author, noted antifeminist and wife of Professor Lino Graglia for some forty years, is almost as enthusiastic about accommodative sex.²⁹⁶ She writes that normally a woman who is “married to a minimally competent lover should rarely find a sexual encounter anything less than pleasant. It not only will do no violence to her nature but will contrib-

²⁸⁹ See Lucia F. O’Sullivan & Elizabeth Rice Allgeier, *Feigning Sexual Desire: Consenting to Unwanted Sexual Activity in Heterosexual Dating Relationships*, 35 J. SEX RES. 234, 242 (1998). O’Sullivan here distinguishes, as she must, between unwanted and nonconsensual sex.

²⁹⁰ Sometimes “a man can feel that he just wants to skip all the foreplay and, as the slogan goes, just do it. Something deep inside him wants to cut loose and completely let go without any restraint or worry about lasting longer or what he should do to make his partner happy.” JOHN GRAY, *MARS AND VENUS IN THE BEDROOM* 77 (1995). No wonder that at these times his partner is not as aroused as he.

²⁹¹ For a terrifying view of a man dangling over the edge of the sexual precipice, see *PENNIES FROM HEAVEN* (MGM 1981) and *Pennies from Heaven* (BBC television broadcasts 1978).

²⁹² See GRAY, *supra* note 290, at 77-95.

²⁹³ See *supra* note 147 and accompanying text.

²⁹⁴ STEVEN E. RHOADS, *TAKING SEX DIFFERENCES SERIOUSLY* 71 (2004) (quoting MICHELE WEINER DAVIS, *THE SEX-STARVED MARRIAGE* (2004)). “I frequently tell women, ‘The next time your husband approaches you, you should just do it. . . . Don’t wait for fireworks. . . . Work with the embers.’” Jessie Knadler, *Make This Your Year: Sizzle Up My Sex Life*, *PREVENTION*, Feb. 2007, at 96 (quoting Michele Weiner Davis).

²⁹⁵ See RHOADS, *supra* note 294, at 71. “Don’t ever (unless desperately ill) reject an amorous approach by yur [sic] beloved.” LAURA SCHLESSINGER, *THE PROPER CARE & FEEDING OF MARRIAGE* 134 (2007).

²⁹⁶ See F. CAROLYN GRAGLIA, *DOMESTIC TRANQUILITY* 211-12 (1998).

ute to her enjoyment if she tries to think of herself as being always available for sex.²⁹⁷ Maybe less-than-ideal sex is not a zero-sum game after all.²⁹⁸

Graglia's position on marital sex is not necessarily typical, as her marriage seems to be an especially good one.²⁹⁹ Indeed, the classic posture of the wife may be Lady Hillingdon's: "I am happy now that Charles calls on my bedchamber less frequently than of old," she reportedly wrote in her journal almost one hundred years ago.³⁰⁰ "As it is, I now endure but two calls a week and when I hear his steps outside my door I lie down on my bed, close my eyes . . . and think of England."³⁰¹ Sex may be more of a chore for married women today. Joan Sewell, the young *I'd Rather Eat Chocolate* lady, was good for twice a month.³⁰²

Are the Lady Hillingdons and Joan Sewells of the world, who "endure" marital sex, deserving of our pity or rather of our admiration? According to Immanuel Kant, it is not the person who gets pleasure when doing things for his fellow human being who is the true moral hero,³⁰³ but rather the other kind,³⁰⁴ the person who acts "by temperament cold and indifferent to the sufferings of others . . . [F]or it is just here that the worth of character is brought out, which is morally the incomparably highest of all: he is beneficent not from inclination, but from duty."³⁰⁵

Not everyone is cut out to be a hero, to be sure. Here is the stuff of tragedy for rape reformers and discouraging news for idealists generally. But is the law a solution? Joan Sewell can deny her husband conjugal pleasures but she must risk losing him. Every couple, whether married or not, has to make its own bed and lie in it—or not—and live with the consequences. In many cases, sex and whatnot is going to happen because one of the parties wants it badly enough and the other is not equally resistant.

²⁹⁷ *Id.*

²⁹⁸ See *supra* note 145 and accompanying text.

²⁹⁹ See GRAGLIA, *supra* note 296, at 211.

³⁰⁰ OXFORD DICTIONARY OF MODERN QUOTATIONS 102 (Tony Augarde ed., 1991).

³⁰¹ *Id.* "[T]he total amount of undesired sex endured by women is probably greater in marriage than in prostitution." EUGENE H. EHRLICH, THE INTERNATIONAL THESAURUS OF QUOTATIONS 387 (1970) (quoting Bertrand Russell).

³⁰² See SEWELL, *supra* note 36, at 11; see also *supra* note 36 and accompanying text.

³⁰³ See DENBY, *supra* note 71, at 259.

³⁰⁴ *Id.* at 259-60.

³⁰⁵ *Id.* (quoting IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 14 (1785)). Sex may be such a duty. "Am I obligated to have sex with my husband? Even when I don't feel like it? My answer has always been the same," says Dr. Laura. SCHLESSINGER, *supra* note 295, at 132. "Yes, the same way he is obligated to go to work and support the family even if he doesn't feel like it." *Id.*

But the law has no more business keeping people apart than keeping them together.

“Is it as good for you as it is for me?” while nice in theory, works not as a standard of consent but of good etiquette. Even as a standard, however, it is overrated, as it does not normally call for an honest answer. Learning to accept the way the hard world really works, however distasteful, is important, even in academic discourse. Distinguished scholar Thomas Sowell summarizes the human condition for us best: “[T]here are no ‘solutions’ . . . , but only trade-offs”³⁰⁶

V. NEGATING AFFIRMATIVE CONSENT

What might affirmative consent proposals contribute to women’s well-being? Little, I suggest. A temporary shift of power resulting from the interrupted flow of male sexual energy may allow the woman to induce the man to make certain declarations, to commit to pleasuring her in some way, to use a condom, or to buy a rug. But any such declaration or “bargain” struck *in medias res* will be seen as the product of duress. Surely, it will not induce the male to make himself “a more agreeable companion”—at least not for very long.

More important, *mandating* affirmative consent may well affect the woman’s sexual autonomy. Sex ethicists agree that sexual autonomy comes in two forms: negative and positive.³⁰⁷ Positive autonomy comprises the right to have sex with the person of one’s choice³⁰⁸ and, I would add, in the manner of one’s choosing. Negative autonomy consists of the right to say no to anyone for any reason.

Consider the case where a woman has a couple of drinks before sex. A rule like Brown University’s, which focused on “mental impairment,”³⁰⁹ would, as Wertheimer suggests, preclude many women from achieving their goal—“not to be required to consent before they become intoxicated.”³¹⁰ That is, he says, “drinking to the point of . . . moderate intoxication may be crucial to what some regard as a desirable sexual and social

³⁰⁶ THOMAS SOWELL, *THE VISION OF THE ANOINTED* 113 (1995).

³⁰⁷ See WERTHEIMER, *supra* note 229, at 125.

³⁰⁸ *Id.* Does either of these two rights trump the other? This is a question of no little interest here. According to Maslow’s classic “hierarchy of needs,” while sex is at the highest rank, abstention from sex does not make the list. See A. H. Maslow, *A Theory of Human Motivation*, 50 *PSYCHOL. REV.* 370, 370-84 (1943). Because this is too easy and too perilous a solution to the problems under discussion, we won’t go there here.

³⁰⁹ See *supra* note 14.

³¹⁰ See WERTHEIMER, *supra* note 229, at 257.

experience.”³¹¹ There would seem to be no good reason to frustrate the woman’s plan.

Will affirmative consent at least protect the woman’s sexual autonomy by ensuring that there are no misunderstandings of intention?³¹² Not, it would seem, according to Linda Fairstein. Most of the time, “the signals that the victim has given, whether verbally or physically, are very clear. There is very little rape that is due to failure to communicate”³¹³

To be sure, much can be said in favor of slowing things down, as Schulhofer, Hirshman and Larson, and others have argued. Besides making sure that the woman is agreeable, slowing things down and talking may help in stirring women’s sexual response. John Gray has found that women need more time than men to reach the same level of sexual intensity.³¹⁴ But should the law require it? The very point of the time-out, as recognized by rape reformers, is to stop the roller coaster. Unlike a time-out in a football or baseball game, however, the speed of the roller coaster is central to the experience. “Most of us,” declares successful author Cynthia Heimel, “would kiss the ankles of a man who lets his passion overtake him to the point where he forgets all the amenities. Call us weird, but we love that. Passion—the feeling that a man wants us so badly he can hardly breathe—is the ultimate aphrodisiac.”³¹⁵

Perhaps most important in evaluating the autonomy implications of affirmative consent is that those inclined to talk, whether to discourage sex or to stimulate their own or their partners’ erotic feelings, should not need prompting; there is nothing to stop a woman from opening up a discussion with a taciturn partner. If she won’t act on her own behalf, why should the law force her to do so?

For all we know, moreover, talking may damage romantic relationships. In a new book on marital sexlessness, Dr. Esther Perel claims that democracy deadens eroticism in marriage.³¹⁶ The solution, she urges, is not more talk, but less, and cultivation of a “sense of *ruthlessness*.”³¹⁷ Gray would seem to understand. “[A] woman also wants [a] man to know what he is doing. . . . She may . . . resist telling him what she likes because she

³¹¹ *Id.* at 251. XX was, of course, completely intoxicated when she was found. When she had sex, it would appear, she was “moderately intoxicated.”

³¹² This is the point made by Taslitz. See *supra* note 170 and accompanying text.

³¹³ See WERTHEIMER, *supra* note 229, at 153 n.29 (quoting Fairstein in *Panel Discussion: Men, Women and Rape*, *supra* note 96, at 171). Wertheimer agrees completely with Fairstein. See *id.* at 153.

³¹⁴ See GRAY, *supra* note 290, at 35-44.

³¹⁵ CYNTHIA HEIMEL, *SEX TIPS FOR GIRLS* 81 (1983).

³¹⁶ Lauren Collins, *Not Tonight Dept.: Dr. Esther*, NEW YORKER, July 24, 2006, at 25, 25.

³¹⁷ *Id.* (emphasis added).

doesn't want sex to be a pat formula but something they discover together.”³¹⁸ “Secretly,” says Gray, “a woman may feel that . . . the right man . . . will know what to do,”³¹⁹ and, by extension, how to do it. The best time for talking about desired sex is not right before or during sex, Gray adds, but after sex or at some other time.³²⁰ “During sex, she doesn't want to think about her needs; instead, she wants to *feel* more and let it all gradually unfold.”³²¹

This brings us back to the needs of the woman who, like Lady Chatterley, may not be seeking a fully intimate connection at the time. The *Sex and the City* women may be looking for love, but they often settle for sex. In short, “millions of women,” says Professor Catharine Wells, “do not seek . . . the kind of communicative sexual relations” that reformers want.³²²

Erica Jong made a fortune appealing to this crowd.³²³ Selling eighteen million copies in thirty languages, her *Fear of Flying* flew to the top on the wings of its iconic metaphor, the “Zipless F_ _ _,” i.e., uncomplicated sex with a complete stranger.³²⁴ The metaphor can be distracting because it conjures up sex without the bother of prettifying oneself, seducing and undressing a partner. We can think of it as the *Lipless F_ _ _*.³²⁵

Undermining positive sexual autonomy, an “affirmative-talk” rule would in some cases be plain silly. Recall Dean Anderson's earlier model of an acceptable negotiation wherein the man asks for sex and the woman refuses, proposing fellatio instead, because she “wants to save herself for marriage.”³²⁶ Now suppose that before the woman had spoken, but know-

³¹⁸ GRAY, *supra* note 290, at 47.

³¹⁹ *Id.*

³²⁰ *See id.* at 53.

³²¹ *Id.*

³²² *See* Wells, *supra* note 91, at 48.

³²³ ERICA JONG, *FEAR OF FLYING* (1973).

³²⁴ *See* Cristina Nehring, *Zip It: Erica Jong's Stunning Self-Absorption*, ATLANTIC, Sept. 2006, at 116, 116. That talking is not mandatory for at least some women is made clear in what may be the most famous personal advertisement ever placed: “Before I turn 67—next March—I would like to have a lot of sex with a man I like. If you want to talk first, Trollope works for me.” JANE JUSKA, A ROUND-HEELED WOMAN (2003) (writing about this advertisement).

³²⁵ “There is significant psychological theory and data to support the claim that women who crave truly non-communicative sex do not know what is in their best interests.” Andrew E. Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, 15 WIS. WOMEN'S L.J. 3, 44 (2000). Taslitz is paternalistic here. Action is certainly what Eliza Doolittle wants from Freddie, her artless wooer: “Words! Words! Words! I'm so sick of words! . . . Don't talk of stars, burning above; if you're in love, show me.” *See Show Me, in MY FAIR LADY* (MGM 1964). Whether Eliza wanted intercourse is a question I cannot answer.

³²⁶ *See supra* note 187 and accompanying text. As a test of Anderson's proposal to change the rape law, the reader may want to consider a seduction passage from Henry Miller's *Sexus*, in which the

ing her inclinations, the man had said, "I can't stand it any more; will you [perform oral sex]?" and she proceeded to do so. In a case that must come up frequently, should the man go to jail because he showed no concern for her "inclinations and humanity"?³²⁷ Does this scenario evoke Anderson's image of "frozen fright" or "peritraumatic disassociation"?

Journalist Cathy Young puts the problem with the negotiation model well:

Partly it's because we want to camouflage the vulnerability that comes from expressing sexual need; partly because, as women's magazines often point out when warning about the baneful effects of self-consciousness about one's body, good sex is about letting go. This does not mean that . . . talk in intimate encounters kills eroticism; but lucid, clear-headed negotiations certainly do.³²⁸

As for Ayres and Baker's proposal to criminalize sex *au naturelle*, the reason for exempting women is not necessarily to acknowledge their innocence in these matters but, as we have seen, to encourage them to come forward after undesired sex.³²⁹ Nevertheless, punishing men but not women for unprotected sex when the real objection is date rape, is risky. Duplicity of this nature breeds contempt for law and may well be unconstitutional.

We come, finally, to the strong economic determinism of critics like MacKinnon. Take the case of the sixty-five-year-old CEO dating a thirty-five-year-old blonde with no financial resources of her own who dreams of becoming his trophy wife. MacKinnon would have us believe that the woman, having no bargaining power, is effectively being raped.

Maybe so. But to function best as a trophy wife the woman has to be desirable to a large group of people. This will give her bargaining power. A propos, how does one measure who has power over whom? Call in the man's mother-in-law? The neighbors? Did Elizabeth Taylor rape construction worker Larry Fortensky when she hooked up with and then married the younger man?³³⁰ Might the late Anna Nicole Smith's ninety-year-

narrator initiates sex while in the tub after his partner's bathrobe slides open. See HENRY MILLER, *SEXUS* 180 (Grove Press 1965) (n.d.). "Not a word spoken," though his partner provides oral sex. *Id.* Kate Millett was so horrified by the passage that she began her landmark book with it. See KATE MILLETT, *SEXUAL POLITICS* 3 (1970) (quoting MILLER, *supra*, at 180).

³²⁷ See *supra* note 183 and accompanying text.

³²⁸ CATHY YOUNG, *CEASEFIRE!* 143 (1999).

³²⁹ See *supra* note 209 and accompanying text.

³³⁰ See Alex Kuczynski, *Good Times and Bum Times, but She's Here*, N.Y. TIMES, Sept. 29, 2002, § 9 (SundayStyles), at 1.

old mega-millionaire husband not have been a slave to her?³³¹ That is the argument that the husband’s son is making, and one can safely bet that while millions of women are envious of the riches already bestowed on her, they are rooting for Anna Nicole’s estate—as they did for Monica Lewinsky.³³²

To be sure, a rich and powerful man may thrill a woman by introducing her to people she could not otherwise meet and by taking her to places she could but dream of. Still, she is likely far from powerless herself. Her youth evidences the man’s continuing vitality, which helps undermine suspicion that he is losing his grip. If she bears a child, so much the better. If she later dumps that man for someone younger, she makes him a fool—particularly if she takes a good chunk of his money in the process. The point is not only that each party has power, but also that power is protean; the person in the saddle regularly gets thrown off.

Assuming that women can hold their own in fated battles with men over sex because accommodationist tendencies do not overwhelm their power to say no, MacKinnon has failed to persuade that the trophy wife needs the protection offered by affirmative consent. Without affirmative consent, the Mellors of the world need not worry about the Lady Chatterleys turning on them, and the Lady Chatterleys will be able to have sex just as they like it.

Even Robin West, who complains about how patriarchy produces sexually submissive women, seems concerned about Lady Chatterley’s needs. Many women are not turned on by sexual equality, she admits: “Rather, the experience of dominance and submission that go with the controlled, but fantastic, ‘expropriation’ of our sexuality is precisely what *is* sexually desirable, exciting and pleasurable”³³³ She further notes that “[w]omen take pleasure—and often, intense pleasure—in eroticized submission. Whatever causes women pleasure without causing attendant pain is something we should celebrate, not censure.”³³⁴

“Dominance,” “submission,” “expropriation,” “exciting,” “pleasurable” and not a word about contract. Are Robin West and I—and the

³³¹ See *She’s in the Money*, PLAYBOY, Feb. 2001, at 122; John Spong, *A Star Is Sworn*, TEX. MONTHLY REP., Nov. 2000, at 25; Steve Lopez, *Who You Calling a Bimbo?: Anna Nicole Smith Goes After More Black Gold*, TIME, Oct. 16, 2000, at 6.

³³² Who runs the show in the White House? When President Clinton was resistant, Monica Lewinsky successfully “plead[ed with him] to be allowed to cause him to ejaculate.” RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT AND TRIAL OF PRESIDENT CLINTON 36 (1999).

³³³ West, *supra* note 2, at 185-86.

³³⁴ *Id.* at 206-07; see also MARIE N. ROBINSON, THE POWER OF SEXUAL SURRENDER (1959).

famed psychoanalyst Rollo May³³⁵—the only ones concerned with women’s sexual delight? Are there others in the real world who would want Mellors to be Mellors?

VI. OUT OF THE MOUTH OF STUDENTS

It should be clear by now that the reform literature is too tendentious to untangle the affirmative consent issue. So, when should sexual touching be unlawful? Unless we want to risk reform based on ignorance and self-delusion, we need to know how young people, the parties most affected by affirmative consent, value sexual autonomy and how they actually signal consent. A reform program based only on what a vocal minority of women want will create more problems than it solves.

Some useful data on the subject of consent in dating settings emerged several years ago. In 1997 Rutgers-Newark law professor George Thomas and University of Wollongong (Australia) finance professor David Edelman distributed a questionnaire in which they asked male and female Rutgers law students to assess the culpability of actors for rape in a series of very explicit hypothetical fact patterns.³³⁶ Specifically, students were asked to respond to different scenarios where sex took place after a woman (*Diane*) displayed reluctance to a man’s (*Lee*’s) advances.³³⁷ There were alternative verbal indications: “No, Lee, don’t,” “Stop, Lee, don’t,” “I don’t want to,” “Stop, I want to go home.”³³⁸ Diane alternatively “slaps Lee across the face,” “hits him on the chin with the palm of her hand,” and “started to push his face away.”³³⁹ Because a “Stop, Lee, don’t” and a slap across the face clearly evidence nonconsent, it is not surprising that the great majority of respondents, male and female, were highly critical of Lee’s behavior.³⁴⁰ The authors were heartened by student reactions.³⁴¹ Compared with reactions to a questionnaire they had distributed five years

³³⁵ See ROLLO MAY, LOVE AND WILL 146 (1969).

[O]ur effete cultivation of sex can make us so . . . detached that the simple power of the sexual act evaporates and the woman loses the vital, elemental pleasure of being taken, carried away, transported. The ‘love bite’—that moment of hostility and aggression . . . —has a constructive psychophysical function, as pleasurable, or more so, for the woman as it is expressive for the man.

Id.

³³⁶ George C. Thomas III & David Edelman, *Consent to Have Sex: Empirical Evidence About “No,”* 61 U. PITT. L. REV. 579 (2000).

³³⁷ *Id.* at 581-82.

³³⁸ See *id.* app. A at 619-20.

³³⁹ See *id.*

³⁴⁰ For results of the 1997 survey, see *id.* at 604-05.

³⁴¹ See *id.* at 581.

earlier, the authors concluded that "community norms [were] moving in the direction of respecting a woman's sexual autonomy."³⁴²

Several problems associated with this study, however, reduce its usefulness for us. First, "rape" was not defined, nor were students told whether they were being asked to respond to rape "as a crime or as an ordinary-language concept."³⁴³ That is, they were not asked explicitly for either a moral or legal analysis. Second, as suggested, respondents were not presented with truly ambiguous cases of consent, which could help the law to draw the line. Diane's nonconsent could not have been clearer. Third, the researchers made only limited efforts to distinguish between the responses of male and female students.

In order to determine what truly constitutes "ambiguous" circumstances, we need to find out how young people manifest consent to sex in the real world. In a study by two women psychologists several years ago, students were asked about the methods used to show consent.³⁴⁴ Data were collected for the following: direct verbal, direct nonverbal, indirect verbal, indirect nonverbal and no response.³⁴⁵ While no one response came close to being dominant, one method stood out from the rest. Men and women both reported that "they most often showed their consent to sexual intercourse by making no response."³⁴⁶ What this means, the authors explain, is that there are numerous passive partners of both sexes who are "letting their partner undress them, not stopping their partner from kissing or touching them, not saying no."³⁴⁷ This is, of course, precisely how Lady Chatterley responds to Mellors.³⁴⁸

That men and women responded to sexual overtures by simply yielding was unwelcome news for the authors whose goals were to protect women from unwanted sex. The authors' banal conclusion: "consent is complex and can take many forms" and "[s]imply requiring that people verbally communicate consent by saying 'I consent to sexual intercourse' . . . is probably unrealistic for most people."³⁴⁹ How much more unrealistic

³⁴² *Id.* at 616.

³⁴³ *See id.* at 581.

³⁴⁴ Susan E. Hickman & Charlene L. Muehlenhard, "By the Semi-Mystical Appearance of a Condom": How Young Women and Men Communicate Sexual Consent in Heterosexual Situations, 36 J. SEX RES. 258 (1999).

³⁴⁵ *Id.* at 266 tbl.3.

³⁴⁶ *Id.*

³⁴⁷ *Id.* at 271.

³⁴⁸ *See supra* note 81 and accompanying text.

³⁴⁹ *See* Hickman & Muehlenhard, *supra* note 344, at 271.

is it, by extension, to lock males up for undressing their female partners without having obtained express affirmative consent?

If sexual partners often show consent through “no response,” we need to know, *before* revolutionizing rape law, 1) where women want to draw the criminal line on the continuum of sexual behavior and 2) the extent to which men are in agreement.

For these purposes, I distributed the following questionnaire to 313 Touro Law students.³⁵⁰ Like the Thomas and Edelman survey, and in keeping with findings about date rape discussed earlier, the questionnaire’s focus is on the early stages of the male/female relationship. (The questions in boldface were added in a second distribution, discussed below.)

For each scenario, please circle the response that best reflects your belief/opinion.

Facts: Sam and Vivian, age 25, have gone out on several occasions. After dinner and drinks again, Vivian invites Sam up for a nightcap. When he kisses her, she kisses back. Soon, and for the first time, he puts his hand on her genital area over her pants.

| | | | |
|-------------|---|-----|----|
| 1. | Has Sam committed what you would consider a Felonious Act (FA)? (See instruction page for definition.) | Yes | No |
| 2. | If in question (1) Sam had put his hand inside Vivian’s pants, would he have committed a FA? | Yes | No |
| 3. | If in question (1) Sam had placed his finger inside Vivian, would he have committed a FA? | Yes | No |
| 3(a) | Regardless of whether Sam should be criminally liable, is Sam acting immorally? | Yes | No |
| 4. | If in question (3) when Vivian did not resist (but did not express consent or actively show it), Sam proceeded to have intercourse with her, is Sam guilty of a FA? | Yes | No |
| 4(a) | Regardless of whether Sam should be criminally liable, is Sam acting immorally? | Yes | No |
| 5. | If in question (3) Vivian pushes Sam’s hand aside, and Sam, while telling Vivian how much he wants her, puts his hand back, has Sam committed a FA? | Yes | No |
| 6. | If in question (5) Vivian tells Sam that she does not feel up to genital intimacies before pushing his hand aside, has Sam committed a FA? | Yes | No |

³⁵⁰ An introduction to the questionnaire is provided in Appendix A.

| | | | |
|--------------|--|------|-----|
| 7. | If in question (4) Vivian said to Sam that she was not ready for intercourse but otherwise did not resist, is Sam guilty of a FA? | Yes | No |
| 7(a) | Regardless of whether Sam should be criminally liable, is Sam acting immorally? | Yes | No |
| 8. | If in question (4) Vivian tried to wrest herself free of Sam, but Sam would not let her go and proceeded to intercourse, is Sam guilty of a FA? | Yes | No |
| 9. | If in question (4) Vivian had drunk enough alcohol to be tipsy, would Sam have been guilty of a FA? | Yes | No |
| 10. | Have you been involved in more than one of the foregoing situations? | Yes | No |
| ***** | | **** | *** |
| 11. | To stem the tide of sexually transmitted disease and to make it easier to prosecute date rapists, two law professors propose to criminalize unprotected sex with a first-time partner, unless the partner clearly consents to sex without a condom. The penalty would be a fine and up to three months in prison and would normally be imposed only on males. Would you support such a reform measure? | Yes | No |
| 11(a) | If you said yes to question (11), is Vivian acting morally in not insisting on condom use? | Yes | No |

Please provide information about yourself by circling the best answer below.

| | | | | |
|-----|--|--------------------|-------|----------|
| 12. | What is your sex/gender? | Female | Male | |
| 13. | Which age category do you fall within? | Less than 25 years | 25-32 | 33+ over |

| | | | | |
|------------|---|--------------|--------|--------------|
| | Very often | Occasionally | Rarely | Almost Never |
| 14. | (For women only) How often do you worry about being raped? | | | |
| 15. | (For women only) How often do you worry about rape in general? | | | |

Before examining the results presented below, readers are encouraged to respond to the questionnaire themselves in order to test representativeness of responses:

Table 1. Survey Item Responses ($n=313$)

| Item Number | Percent Answering Yes | Females / Males |
|-------------|-----------------------|-----------------|
| 1 | .96% | 0% / 1.8% |
| 2 | 10.3% | 7.7% / 12.4% |
| 3 | 18.8% | 22.6% / 14.2% |
| 4 | 16.4% | 22.7% / 11.2%* |
| 5 | 52.6% | 51.4% / 53.6% |
| 6 | 66.24% | 68.3% / 64.5% |
| 7 | 56.5% | 60.3% / 53.3% |
| 8 | 98.1% | 99.3% / 97% |
| 9 | 40.5% | 53.9% / 29.2%* |
| 10 | 52.1% | 52.5% / 51.8% |
| 11 | 28.7% | 42.0% / 17.4%* |

* $p < 0.01$

The study population was made up of 170 (54%) men and 143 (46%) women. Nearly 42% were under the age of 25 years, 47% were between 25 and 32, and 11.5% were 33 or older. Item responses did not significantly differ statistically based on respondent's age or prior involvement in sexual situations (Question (10)).

The "rape culture" theory advanced by reformers implies that responses to questionnaire items would substantially diverge by sex. But in fact, there was much agreement. Women were more likely to convict in only two cases. These were Question (4) [$\chi^2(311, 1) = 7.459, p = 0.006$] when Vivian "did not resist (but did not express consent or actively show it)" and Sam proceeds to have sex with her, and Question (9) [$\chi^2(309, 1) = 19.469, p < 0.0001$] where Vivian was "tipsy." Additionally, women were significantly more likely to support the reform measure proposed in

Question (11) [$\chi^2(310, 1) = 22.764, p < 0.0001$]. In agreeing generally with women, it should be clear, Touro men were not “celebrating” rape.

Overall, the table shows that female respondents are willing to give males room to maneuver on their bodies—and in them. For less than a quarter (23%) of women are willing to criminalize the behavior in Question (3).³⁵¹ Just as noteworthy, only 23% of females favor criminalizing in Question (4), when penile penetration takes place. Even in Question (5), where the woman shows her disapproval, only a bare majority of women think conviction is appropriate. As for Question (11), 40% favor criminalization.

I added several questions in a second survey (in boldface, as noted earlier) to assess the moral dimension of the behavior in question. While the 149 respondents, male and female, are more willing to find breaches of morality than breaches of law for specific transactions, even here they often do not condemn men (See Table 2). Just short of 40% of women and 25% of men hold that the behavior in Question (4) is immoral. Similarly, while women support the proposed reform measure more than men, more than two-thirds of women indicate that Vivian would not be acting morally if she did not insist on condom use. As for Question (3), a slightly higher percentage of men than women find the behavior immoral, another strike against the alleged “rape culture.”³⁵²

Table 2. Morality of Actions*

| Item Number | Percent Endorsing Act as Immoral | Females / Males |
|-------------|----------------------------------|-----------------|
| 3a | 24.7% | 24.3% / 25.0% |
| 4a | 31.7% | 39.4% / 24.7% |
| 7a | 70.1% | 77.6% / 62.9% |
| 11a | 67.9% | 71.4% / 64.1% |

*Note: Question 11a was only asked for individuals who supported the reform measure proposed in question 11 (n= 81)

³⁵¹ I am not suggesting here that majority opinion should be necessary to effect change. If the injury is great to a minority, criminalization may nevertheless be appropriate. Thus, the matter could use further exploration. I thank Alan Wertheimer for pointing this out.

³⁵² I am not presenting or analyzing respondent commentary here because so little was provided.

We are left with an important, albeit unanswerable, question: Are Touro Law students representative of the general population of young people, i.e. those most at risk for date rape? Much work, as they say, still needs to be done here. At this point we can safely say that because of an understanding of how law works, law students might feel more comfortable than most to summon its power to vindicate their rights. Also, since most law students come from the middle class, it is unlikely that they grew up in dangerous environments. This could make them more or less likely to want to prosecute.

Whatever issues remain, the big picture could not be clearer. Notwithstanding the affirmative consent hard sell, Touro women, at least, are not buying. When they give tokens of affection, they expect men to be somewhat aggressive, with criminal penalties being appropriate only when a clear “no” is given, or force is used—and even in the former case, not all women feel that way. As to the existence of a rape culture, the study suggests no. Very few women indicated that rape is a constant concern for them (6%), or for women in general (7%). Indeed, more say that they rarely or never think of being raped themselves (60%), than say that it is a frequent or occasional concern (40%). Maybe it is rape reformers, not rapists, who are responsible for the fear that exists. In any event, if men conspire to keep women in check through rape, they are wildly unsuccessful.

VII. VICTIMIZATION, POWER, LOVE AND RISK

How does one explain why rape reformers, men and women alike, are so out of touch with young women’s opinions and perceived needs? Why did the surveyed students effectively reject affirmative consent? The answer to the first question requires exploration of contemporary feminism’s ideological underpinnings. “Whatever their differences,” writes Martha Chamallas, “feminists tend to start with the assumption that the law’s treatment of women has not been fair or equal and that change is desirable.”³⁵³ Similarly, feminism as Janet Halley defines it “posits some kind of subordination as between m and f, in which f is the disadvantaged or subordinated element.”³⁵⁴ Says Catharine Wells, “I no longer think about whether I *should* be offended. Instead, I . . . know that I *am* offended[, and

³⁵³ MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 9 (1st ed. 1999).

³⁵⁴ See HALLEY, *supra* note 106, at 18.

t]he result is a feeling of wholeness"³⁵⁵ "[M]y goal," announces Joan Williams, "is not to deliver the truth but to inspire social change."³⁵⁶

This is not, to be sure, the only strain of feminist thinking, but it is a dominant one with far-reaching implications. When a theory begins with an *assumption* of injury and injury taken is not tested, when challenging injury is deemed anti-feminist, and when truth is subordinated to power, theorists will naturally conclude that America is hopelessly broken and they alone are qualified to fix it. In this setting, rape will be defined as "whenever a woman has sex and feels violated,"³⁵⁷ and the felt pain of injury will morph into a felt claim for revenge. Hence, I suggest, the over-the-top reactions at Brown and Duke.

Included in the category of putatively failed academic institutions is the American law school. Here, too, some over-the-top, though typical, declarations can tell us much of what we need to know. "There can be no doubt that law schools . . . favor men over women in almost every way imaginable," says DePaul law professor Morrison Torrey and her co-authors.³⁵⁸ Things are no better for women faculty. In American law schools, says Hofstra law professor Richard Neumann, women law professors "are greeted, at best, with ambivalence."³⁵⁹ Before accepting an offer to a law school, writes Linda Hirshman, who authored a self-help book for those considering law school, "ask for a schedule that has at least one woman teacher," one where the teacher does not turn you into your own "worst enemy."³⁶⁰

Why bring law schools into the discussion here? Because my project has itself elicited cries of victimization in the law school setting; it also serves as a warning to academics who, dubious about the findings herein, might, for entirely valid reasons, try to test them. When I finished devising my questionnaire, I approached half-a-dozen colleagues at my school, male and female, to request help in distributing the questionnaire to students. I explained that the best way to draw a fair line between criminal and non-criminal behavior was to explicitly ask those most affected by the proposed

³⁵⁵ Catharine Wells, *The Theory and Practice of Being Trina: A Remembrance of Trina Grillo*, 81 MINN. L. REV. 1381, 1387 (1997).

³⁵⁶ JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 244 (2000).

³⁵⁷ See Nancy French, *New York Silences Southern Belle*, N.Y. SUN, Jan. 24, 2007, § Opinion, at 9 (quoting Catharine MacKinnon).

³⁵⁸ Morrison Torrey et al., *What Every First-Year Female Law Student Should Know*, 7 COLUM. J. GENDER & L. 267, 309 (1998).

³⁵⁹ See SUBOTNIK, *supra* note 49, at 147.

³⁶⁰ See *id.* at 138.

change. I argued that the anonymous and entirely voluntary aspect of the process should allay concerns about probing students' private feelings. Among responses I received from male and female colleagues: "I don't trust you with my students; you are a dirty old man";³⁶¹ "Are you out of your mind?"; "Our [innocent] students would react badly; you're talking about fingerf _ _ _ ing";³⁶² and "Over my dead body." The questionnaires involving 313 students were distributed in other classes with nary a peep.³⁶³

If the legal system (of which law schools are a part) has been so destructive to women on so wide a scale, assailing current rape law for its failures makes perfect sense. What could be more retributively satisfying for angry feminists? Equitable distribution, family leave, sexual harassment and other areas of feminist contest yield only money. Affirmative consent puts a man in jail.

To further understand the attraction of affirmative consent for rape reformers, consider that, as West and Muehlenhard effectively concede and as the various surveys show, women sometimes do want to be taken, though not by force.³⁶⁴ Unable to admit it to themselves and simultaneously desiring to stoke men's libidos, they erect barriers for men to dismantle.³⁶⁵ That women eroticize submission, however, has to be deeply distressing to most rape reformers. Modern feminism, embodied in the law review literature and elsewhere, is often a reaction against the notion that women are the passive sex. Indeed, the very foundation of sex discrimination law is the notion that women are unfairly held back in the workplace and that, if allowed to compete, women would be equally successful. Affirmative consent ensures in a sense that women will not be passive.

³⁶¹ This person did not even look at the questionnaire.

³⁶² When I reported to students the reactions of faculty to references to digital manipulation, my student, Cynthia Leitzell ironically responded, "Heavens, what next?" (quoted with permission). The idea that digital manipulation is beyond the pale of experience or discourse in relation to intercourse is strange, especially coming from a sixty-ish colleague. "The early 70's," Erica Jong declares, "were all about the clitoris." Ron Powers, *How to Save Your Own Life*, N.Y. TIMES, Apr. 23, 2006, § 7, at 9 (reviewing ERICA JONG, *SEDUCING THE DEMON* (2006) and quoting same). No less an authority than John Gray urges gentle and substantial manual stimulation of the clitoris before intercourse: "it is very important for a man to remember to go north before he goes south." GRAY, *supra* note 290, at 168. And of course, I did not use any "unscientific" language—my colleague did—and I warned students that the questions were very explicit. As for the "dirty old man" implication, nothing a target can say is useful on that subject.

³⁶³ Very few, if any, women students failed to complete the questionnaire.

³⁶⁴ What other conclusion explains women allowing men to undress and then penetrate them? See *supra* note 347 and accompanying text. Writes one distinguished psychotherapist: "Every woman wants at some time to be 'laid'—transported, carried away, 'made' to have passion when at first she has none . . ." MAY, *supra* note 335, at 48.

³⁶⁵ See discussion *supra* Part I.

The irony is that embarrassment over passivity is unnecessary. Here is the good news: men need to be taken too. How else to explain that men say that they fantasize about sexually aggressive partners³⁶⁶ and that, like women, they show consent by going limp?³⁶⁷ The world demands non-stop decision-making. Can it be shameful to seek respite through shucking off prevailing burdens, and placing oneself, like Lady Chatterley, entirely in another’s hands?

Consider that blockbuster declaration that men and women make to one another: “I love you.” What does this mean to the declarant other than “I am thrilled to be entirely in your power”? To the listener the words are no less potent. “I love you” suggests that the declarant can be trusted. He or she can be asked to get up, make coffee, and go out to buy the paper in the morning when you are too tired. He or she can ask for sex on the chandeliers. For many, nothing is more seductive than knowing that we have power over another person.

If love does not reflect male power—and thus form the foundation for affirmative consent—does intercourse? It not only involves the man’s excretory organ, but it also results in his leaving his “waste product” in the woman, a fact of life that traumatized essayist Andrea Dworkin.³⁶⁸ This same phenomenon has also been recast as the expropriation by the woman of a man’s vital juices or envelopment by the woman.³⁶⁹ In any event, for Paglia, intercourse is not a male, but a female triumph. “Most men merely grunt, at best,” reports Paglia, but a woman emits “strange . . . cries” for she is about to “rend her victim,” a victory evidenced by the “woman’s barbaric ululation of triumph of the will. . . . The dominated becomes the dominator.”³⁷⁰

Oral sex would seem no different. Anderson has suggested that it can serve as a less-than-sex form of connection.³⁷¹ It can also be more than sex. The “message,” whether provided by men or women, may well be something on the order of: “You can get others to sleep with you, but look at what I am willing to do to make you happy.” Is this necessarily a mes-

³⁶⁶ See, e.g., SEWELL, *supra* note 36, at 81 (revealing her husband’s confession that “[h]e was aroused by the image of a woman wearing leather or black vinyl lingerie with thigh-high boots—dominatrix gear—or maybe a sexy woman cop, and he fantasized about her taking charge”).

³⁶⁷ See *supra* note 347 and accompanying text.

³⁶⁸ DWORKIN, *supra* note 288, at 169-94.

³⁶⁹ The reader is asked for forgiveness. I cannot find the reference.

³⁷⁰ CAMILLE PAGLIA, *SEXUAL PERSONAE: ART AND DECADENCE FROM NEFERTITI TO EMILY DICKINSON* 26 (1990).

³⁷¹ See *supra* note 187 and accompanying text. Recall Bill Clinton: “I did not have sex with that woman.”

sage of subordination? Maybe—but maybe not.³⁷² Sex is a labile business. Indeed, when the woman is willing to “go down” on the man, she may gain power, not lose it. As a reputed male expert on the subject says—not unhappily—when you get well-executed oral sex, “you’re in heaven. A girl owns a guy when she does that.”³⁷³

The problem for rape reformers writ large is that, in concerning themselves with power relations, bargaining and emotional connection, they ignore the four-legged beast, the animal side of sex. There is no doubt that our animality needs to be controlled, but it also needs room for expression. This may well explain a recent ruling of the Maryland Court of Special Appeals.³⁷⁴ When asked whether it is rape if “a female consents to sex initially and, during the course of the sex act . . . she changes her mind and the . . . man continues until climax,” the Court answered no.³⁷⁵

The Wal-Mart story drives home the message of human creatureliness.³⁷⁶ Though the young man did not receive affirmative consent, presumably no one wants to lock him up. The same is true for Mellors when he failed to get Lady Chatterley’s consent. We cannot be sure why she did not provide it, but she was a married woman at a time when manifesting consent to an extramarital partner was especially difficult. We can imagine that she badly wanted to, tried to, but could not bring herself to say yes; she wanted to be taken.

Paglia’s message also suggests a deeper reason for Lady Chatterley’s failure to affirmatively consent: a “yes” would have undermined her pleasure. Here is the dilemma that affirmative consent poses. How can one find submissive pleasure when *agreeing* to be taken? In “seeking to drive power relations out of sex,” Paglia sums up, reformers “have set them-

³⁷² See *ME AND YOU AND EVERYONE WE KNOW* (MGM 2005) (portraying a scene in which the teenage girls are doing it on a lark—for sex education in praxis). The reader is challenged to find even a hint of self-mortification in the scene.

³⁷³ See Rachel Kramer Bussel, *Long Live Blowjob Nation*, *VILLAGE VOICE* (N.Y.), Apr. 26–May 2, 2006, at 129 (quoting Massachusetts D.J. Tom Birdsey). Does it work the other way around too?

³⁷⁴ See *Baby v. State*, 916 A.2d 410, 429 (Md. Ct. Spec. App. 2007).

³⁷⁵ *Id.* The legal problem of rape is not in the creative or destructive power of the ejaculate. Other courts have held that “no” has legal effect anytime. See Jeninne Lee-St. John, *A Time Limit on Rape*, *TIME*, Feb. 12, 2007, at 59.

³⁷⁶ See discussion *supra* Part I.

selves against nature. Sex *is* power.”³⁷⁷ Leaving sex to reformers is like “letting your dog vacation at the taxidermist.”³⁷⁸

If rape reformers insist on being embarrassed about something, they need consider only their idea that women lack capacity to beat off the men banging on their doors.³⁷⁹ The issue is not only sex. A CEO or law firm partner might sleep indiscriminately with anyone and everyone who expresses any interest in her; there can be no doubt, however, that she must regularly and comfortably be able to say no.³⁸⁰ Why? It is not only a matter, as Paglia put it, of “human dignity,”³⁸¹ but, among other reasons, of being in control. Controlling resources elicits the greedy attention of those who want them and managers are paid to increase the store of resources, not to give away the store.

But if we hold that a woman cannot say “no” to sex because, say, she tends and befriends, on what basis can she be expected to say “no” to *any* request from someone close to her? Can one be a wuss with respect to sex, but captain of her soul otherwise?

The two roles are linked, according to Germaine Greer:

It was not the insistence upon her sex that weakened the American woman student’s desire to make something of her education, but the insistence upon a *passive* sexual *role*. In fact the chief instrument in the deflection and perversion of female energy is the denial of female sexuality for the substitution of femininity or sexlessness.³⁸²

³⁷⁷ PAGLIA, *supra* note 370, at 2. Hebrew reflects this understanding in its word for intercourse, *be’ila*, from “ownership” or “possession.” See Joseph Lowin, *About Hebrew: Nine-Tenths of the Law*, HADASSAH MAG., Jan. 2007, at 33.

³⁷⁸ See Kevin Lynch, *These Art Profs Can Do, Too*, CAP. TIMES (Madison, Wis.), Dec. 15, 1994, at D1 (quoting Camille Paglia).

³⁷⁹ Compare the stunning end of *THE HEIRESS* (Paramount Pictures 1949), in which Morris, who has come to marry the romantically hapless Catherine Sloper, is pounding on the door of her Washington Square townhouse only to be ignored. Boston Globe columnist Cathy Young asks: “Are women so weak that they can’t even say ‘no,’ or otherwise indicate their lack of consent, unless the man takes the initiative of asking?” Cathy Young, *On Campus, an Absurd Overregulation of Sexual Conduct*, FIRE Q., Fall 2006, at 8.

³⁸⁰ “If they want to be the top dog at anything,” says philosophy professor Ellen Klein, women “will have to do more than show that men can bare their teeth and bite; they will have to ‘bare their own fangs.’” See KLEIN, *supra* note 59, at 109 (quoting in part Paglia, *supra* note 59).

³⁸¹ See *supra* note 62 and accompanying text.

³⁸² GERMAINE GREER, *THE FEMALE EUNUCH* 59 (McGraw-Hill Book Co. 1971) (1970). Obviously, Greer objects to the idea that women should think of themselves as sexually passive. Sex writer Rachel Kramer Bussel explores the sex/power relationship another way when asking women why they want social power in the first place: “What good is power in the boardroom if we have to lie back and wait to get f _____?” See Rachel Kramer Bussel, *F _____ ing and Feminism*, VILLAGE VOICE (N.Y.), July 19–25, 2006, at 132, 132.

Of course, rape reformers do not set out to promote female sexual passivity. Nevertheless, their need to see women as incapable of saying “no” cannot help but promote it.

One hundred and thirty years ago Myra Bradwell was denied the right to practice law because a court believed that, by virtue of their delicate dispositions, women could not endure the “hot strifes of the bar.”³⁸³ For rape reformers, Bradwell was no better prepared for the strifes of the sofa.

That today Buffy, Carrie Bradshaw *et al.* are not up to saying “no,” however, is mind-numbing. Nothing would be more humiliating to them than the idea of calling on the law to bail a woman out of a jam she gets herself into because she does not know her own mind or, if she does, cannot speak it.

This is not to condone the subway rider, who, uninvited, slips his hand under a straphanger’s skirt. No one, however, compels the woman to go to a boyfriend’s house at night or to invite him to hers after an evening of drinking and to start necking with him. I suggest—to answer the second question at the beginning of the chapter—that the reason women in my study rejected affirmative consent was precisely because it patronizes them by assuming that they do not know what they are getting into or how to get out of it?³⁸⁴

What about the casualties the present regime produces? Paglia is tough-minded:

The minute you go out with a man . . . there is a risk[.] . . . [P]art of the sizzle of sex comes from the danger of sex . . . I think it’s a very exciting kind of sex. But you have to realize you are risking injury and not just rape but *death* . . . I’m encouraging women: *accept* the adventure of sex, *accept* the danger!”³⁸⁵

Some will find this “wacky,” as Schulhofer reports.³⁸⁶ The point, however, is that many people engage in activities knowing that there is a risk to health, in some cases even a risk of death. Most women are already prepared to accept some risk—especially a loss of courage to say “no” later—evidenced by their going out on Saturday nights instead of staying home to replace the batteries in their smoke detectors.

³⁸³ *In re Bradwell*, 55 Ill. 535, 542 (1869).

³⁸⁴ “And just what was the woman doing when she was being fondled?” asked a female student respondent in disgust.

³⁸⁵ See SCHULHOFER, *supra* note 38, at 51 (quoting PAGLIA, *supra* note 68, at 57, 70-71).

³⁸⁶ *Id.*

The idea that for every injury there should be a remedy, accordingly, must be rejected; a first-baseman who breaks a leg when a runner crashes into her must not be allowed to recover damages. Sowell's trade-off for the thrill of competition is the possibility of injury.³⁸⁷ Allowing recovery for injury would kill the game thereby undermining Title IX, whose purpose was to give women access to the playing fields.

The real concern here, obviously, is not baseball or softball but its Title IX equivalent in relationships: sexual jousting, flirting and playing hard to get. "[I]n the absence of physical violence," Paglia says, "sexual conduct cannot and must not be legislated from above."³⁸⁸

The philosophical battle lines can now be clearly drawn. Freedom of choice, for Robin West, is a trap: "My substantive claim is that women's happiness or pleasure—as opposed to women's freedom or equality—should be the ideal toward which feminist legal criticism and reform should be pressed."³⁸⁹ Freedom from injury, by contrast, is not a concern to liberal-feminist mother Simone de Beauvoir: "I am interested in the fortunes of the individual as defined not in terms of happiness but in terms of liberty."³⁹⁰

The follow-up questions to the questionnaire³⁹¹ back up the Paglia-Beauvoir view of what women want. Recall what many women were saying about the earlier stages of sexual play, that the men were not behaving *immorally*. This position is at least consistent with the way both women and men reported showing consent in one of the surveys: by inaction, i.e., *laissez deshabiller*.³⁹² If women have the capacity to make judgments

³⁸⁷ See SOWELL, *supra* note 306 and accompanying text. Is thrill even possible without fear? Here is Lawrence describing Lady Chatterley, who is gazing at Mellor's erect phallus:

"So proud!" she murmured, uneasy. "And so lordly! Now I know why men are so overbearing. But he's lovely, *really*. Like another being! A bit terrifying! But lovely really! And he comes to *me!*—" She caught her lower lip between her teeth, in fear and excitement.

LAWRENCE, *supra* note 81, at 222.

³⁸⁸ See SCHULHOFER, *supra* note 38, at 66 (quoting CAMILLE PAGLIA, *VAMPS & TRAMPS* 23, 24, 47 (1994)).

³⁸⁹ See West, *supra* note 2, at 158. West completes her thought: "[W]omen's misery, suffering and pain—as opposed to women's oppression or subordination—is the evil we should resist." *Id.*

³⁹⁰ See DENBY, *supra* note 71, at 393 (quoting SIMONE DE BEAUVOIR, *THE SECOND SEX* (1949)).

The idea that women's autonomy trumps safety is, of course, the theory underlying *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (holding that women guards could be excluded from prison jobs involving male contact for prison security reasons, but *not* in order to protect women, because women had the right to make choices about risk themselves) and *UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (striking down an employer's policy of excluding women of child-bearing years from a portion of a plant producing a chemical that could cause injury to a fetus).

³⁹¹ See discussion *supra* Part VI.

³⁹² See *supra* note 347 and accompanying text.

about their own needs, this would seem a fatal blow to Schulhofer's contract and criminal law models.

Put otherwise, a kiss is not always "*just* a kiss," a principle firmly embedded in the French language, which uses the same word for kiss and *f__*—*baiser* (the former as a noun and the latter as a verb)—and a point that XX understood when she asked XY whether he had a condom. The legal impact of the connection should not be hard to absorb. We lawyers understand about presumptions and burden-shifting. We understand that a wide range of the world's business gets done through implied consent and that if women are to participate fully in the worldly affairs, they cannot be exempt from the burden of saying "no."

Depending on the circumstances, when the woman does not say "no," then, the magic of implied consent can convert the body from a "temple of the Holy Spirit"³⁹³ into a temporal object of play.³⁹⁴ In the Wal-Mart case, implied consent to sex underlies the temporary commitment to abstinence. Different understandings can apply when a woman starts playing with her hair, licking her lips, putting her hand on her date's knee, or just delivering a "soul kiss" at the end of the evening. Her exact meaning may not be altogether clear, but it probably means "Hands on" more than "Hands off."³⁹⁵ Among likely more specific messages: "Do your thing and let's see what happens"; "Please do not stop until I tell you to"; or, even more basically, the sly "thy will be done, only don't make me say yes."

In this symbolic, postmodern world, do we have to require a woman to demonstrate consent by unzipping a man's fly and inserting her hand? For even if we do, would rape reformers not hold that the woman is offering not intercourse but masturbation?

CONCLUSION

My conclusion is, to be sure, self-serving for men, including myself. This is, in and of itself, no reason for legislators and judges to press for af-

³⁹³ 1 *Corinthians* 6:19.

³⁹⁴ *But see* The Queen v. Ewanchuk, [1999] S.C.R. 330, 349-50 (Can.) ("The doctrine of implied consent has been recognized in our common law jurisprudence in a variety of contexts but sexual assault is not one of them. There is no defence of implied consent to sexual assault in Canadian law."). The question of how seriously this language should be taken—the extent to which the court gave defendants room to maneuver—will not be addressed here.

³⁹⁵ "[W]hen a guy's shy and it takes you both a really long time to get to bed, then it's usually great when you get there. So I just keep on kissing him until neither of us has any choice." See HEIMEL, *supra* note 315, at 78 (quoting her friend with approval).

firmative consent. That doctrine, after all, is self-serving for some, but should not be dismissed out of hand; nor was it here.

Aware that defending grudging, reluctant and half-hearted sex fails the *cui bono* test, I made "every possible effort" herein, as did famed French love expert Stendhal in his own work, "to be *dry*."³⁹⁶ Unlike rape reformers, I have combed the literature for prior studies and, where more information was needed, I elicited it with care. Put off by the hysteria, I tried in my own case "to impose silence on my heart, which thinks it has a lot to say" and have been "continually fearful that I have written only a sigh of longing, when I think that I have set down a truth."³⁹⁷

Whether or not I have succeeded in disinterestedly analyzing (young) women's intimate feelings about sex, am I not more in touch with them than are rape reformers? Respondents to my questionnaire said "no" to incarcerating men unless objections are raised to their behavior. Respondents presumably understood that because sex takes place in private, receipt of affirmative consent would be hard to prove and thus in practical terms would drive men away, a risk to social life that they were unprepared to assume.

Far from being objects of pity, as rape reformers portray young women, respondents consider themselves savvy, brave, and maybe even cunning, more like (Bizet's) Carmen and (Mitchell's) Scarlett than like Constance Chatterley.³⁹⁸ They understand implicitly, as Janet Halley says explicitly, that sex is a site of "liberty and transgression," that, crudely put, spreading legs and spreading wings often go hand in hand, that joy is the issue, and that in the absence of freedom only insipid pleasures are available.³⁹⁹ When I explained to a middle-aged female professor that affirmative consent would put an end to groping in the back seats of cars, her (straight, I think) response was: "Wouldn't that be awful?"

Rape reformers do not talk about money. We can understand why. If affirmative consent is not about money in one sense, it is precisely about money in another. The discerning reader knows that the very day a man is held to have failed the affirmative consent test, a vindictive woman can top

³⁹⁶ See Martha Nussbaum, "Only Grey Matter"?: Richard Posner's Cost-Benefit Analysis of Sex, 59 U. CHI. L. REV. 1689, 1689 (1992) (reviewing RICHARD A. POSNER, SEX AND REASON (1992) and quoting STENDHAL, DE L'AMOUR 40 (Gallimard 1969) (1822)).

³⁹⁷ *Id.* (quoting same).

³⁹⁸ "When it comes to manipulating, betraying, controlling, and otherwise mistreating each other, each sex generally gives as good as it gets." YOUNG, *supra* note 328, at 267.

³⁹⁹ See Halley, *supra* note 65, at 194-98.

the conviction off with a sure-bet civil claim.⁴⁰⁰ Survey respondents presumably did not like this scenario either.

That a majority of women rejected affirmative consent on a theory that they can take care of themselves, thank you very much, does not necessarily mean that the doctrine is bad policy. Contemporary psychology shows how poorly we predict that which will make us happy.⁴⁰¹ Affirmative consent might still be desirable because women generally are not prepared to make an informed decision balancing freedom of action and regulation.

Respondents' objections to affirmative consent, however, cannot readily be laid to false consciousness, to respondents' failure to apply a reasonable woman standard, or to the belief that "women have an endless capacity to lie" about what gives them pain and pleasure.⁴⁰² And their objections should be noted not only because dismissing opinion with which one does not agree on any of these grounds is patronizing and often tyrannical.⁴⁰³ Respondents were law students, not women on the street. Their stand against affirmative consent must, accordingly, at least shift the burden of proof to those who would revolutionize rape law.

Respondents, moreover, could not have cared less whether a "dirty old man" or a randy young one was doing sex research on them. They had no trouble standing up to any discomfort produced by the questionnaire and perhaps even appreciated someone taking their opinions seriously. Nothing in their responses, furthermore, suggests that rape "has never been far from [women's] experiences."⁴⁰⁴

In sum, respondents saw that reluctant sex, to use Schulhofer's term, while not ideal, is far from the "spiritual murder" West describes.⁴⁰⁵ To see that such sex has no good legal solution is to accept the world as it is and always will be. Scripture offers visions of the wolf and the lamb, and the

⁴⁰⁰ Indeed, a civil claim need not be preceded by a conviction. See *United States v. Morrison*, 529 U.S. 598 (2000) (refusing, however, to allow recovery because the Violence Against Women Act, which allowed a federal civil claim, represented an unconstitutional overreach of federal power). For a review of tort claims for rape, see Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55 (2006).

⁴⁰¹ See generally GILBERT, *supra* note 72.

⁴⁰² See *supra* note 2 and accompanying text.

⁴⁰³ An accusation of false consciousness, says Hastings Law professor Joan Williams, "is infuriatingly condescending; can you imagine a trade book that actually inspired women to think of themselves as responding to social mandates rather than making authentic choices by telling them they suffered from 'false consciousness'?" Joan Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 CHI.-KENT L. REV. 1441, 1470 (2001).

⁴⁰⁴ See *supra* note 28 and accompanying text.

⁴⁰⁵ See *supra* note 71 and accompanying text.

leopard and the kid, laying down together in peace,⁴⁰⁶ but no such prospect is offered to men and women.⁴⁰⁷

This essay will be both derided and ignored. But how to dismiss women scholars who have raised important questions about rape reform? Columbia Law Professor Vivian Berger worries that "[t]o treat as victims in a legal sense all of the female victims of life is . . . to cheapen, not celebrate, . . . sexual autonomy, and self- and societal respect of women," and thus "'to empower women in potentially consensual situations with the weapon of a rape charge'" may in fact backfire and enfeeble them.⁴⁰⁸

For feminist writer and professor Janice Haaken, some of the rape reform critique

is not so far from the idea that virginal women are "ruined" by early, culturally unauthorized sexual experiences Under the guise of validating female injuries, the old idea of an inherent feminine vulnerability can be imported into the therapeutic field. The therapist who assumes that psychic devastation follows from particular life events may be operating under the sway of an archaic fantasy: that an original female "castratedness"—a primal "wound"—leaves the feminine psyche perpetually vulnerable.⁴⁰⁹

Highlighting women's helplessness actually invites rape. As Professor Elizabeth Iglesias puts it, "women will continue to live under the threat of hate rape so long as they are perceived as vulnerable and weak, that is, as appropriate targets for rape."⁴¹⁰

So, let us bear down hard on husbands, lovers, and strangers, who use their physical powers, and on school teachers, administrators, and psychiatrists, who use their psychological or physical powers, to compel sex. But for the sakes of our daughters and granddaughters (if not of our sons and grandsons), we must ignore the lead of rape reformers from here on.⁴¹¹

⁴⁰⁶ *Isaiah* 11:6.

⁴⁰⁷ The same might be said of parents and children, brothers and sisters, and employers and employees.

⁴⁰⁸ See Vivian Berger, *Not So Simple Rape*, 7 CRIM. JUST. ETHICS 69, 75 (1988) (reviewing ESTRICH, *supra* note 66, and quoting same in part).

⁴⁰⁹ JANICE HAAKEN, *PILLAR OF SALT: GENDER, MEMORY, AND THE PERILS OF LOOKING BACK* 76 (1998).

⁴¹⁰ Elizabeth M. Iglesias, *Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869, 894-95 (1996).

⁴¹¹ Imagine the public service the Duke 88 could have provided on campus if, instead of stoking the coals of race and gender animus, they had asked the community to be patient until the investigation into the alleged rape had been concluded. See *supra* note 16. Even as these words are written, the Duke 88 refuse to apologize for the damage done. See Jane Stancill, *Duke Post Seeks to Defuse '88' Ad*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 17, 2007, at A1.

Since the feminist project, as MacKinnon rightly holds, “is to uncover and claim as valid the experience of women, the major content of which is the devaluation of women’s experience,”⁴¹² we must say no to affirmative consent—and let people copulate in peace.

Happily, in reaching this conclusion, we are not powerless to help our female students with the problem of reluctant, half-hearted and ambivalent sex. At my undergraduate institution, incoming freshmen were assigned Professor Jacques Barzun’s *The House of Intellect* as summer reading. No less useful today in preparing high school graduates for the next stage—and not only because more of them might actually read it—would be *I am Charlotte Simmons*, research for which, it should be noted, took place at Duke.⁴¹³ For those disinclined to 600-page novels, I might recommend this far shorter essay.

A final thought: If the core of “ideological feminism”⁴¹⁴ cannot hold, what other aspects will crumble upon examination?

There is good news or bad news to tell about the outcome of the XY matter. Readers’ reactions will hinge on their conceptions of social justice, the subject matter of this journal. In the midst of the uproar, XY sued the University for sex discrimination and XX for libel. Although encouraged to tough it out, Brown must have decided that it had allowed matters to get out of hand. In any event, it settled the case by acknowledging that it had erred in finding XY guilty of anything. Together with XX, it paid XY an undisclosed sum of money reported to be in the six figures. XX’s lawyer in the settlement conceded only that “in retrospect, she understands that, at the time she met [XY], he may not have perceived her as impaired.”⁴¹⁵

Under heavy psychological and social pressure, XY dropped out of Brown and received his Brown B. A. only ten years after the incident in question, in May 2006. The same kind of fate may well await the defendants at Duke, although all three players were exonerated of all charges and an investigation into whether the lead prosecutor withheld evidence for

⁴¹² See HALLEY, *supra* note 106, at 44 (quoting Catharine MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 638 (1983)); see also *supra* note 1 and accompanying text.

⁴¹³ *Early Inkling?*, N.Y. POST, Apr. 7, 2006, at 12.

Kipnis suggests workshops for young women with titles such as “Ten Signs That Your Professor Is Sleeping with You to Assuage Midlife Depression and Will Dump You Shortly Afterward.” See KIPNIS, *supra* note 31, at 144.

⁴¹⁴ See *supra* note 33 and accompanying text.

⁴¹⁵ See D. Morgan McVicar, *Student Settles Suit with Brown Accuser*, PROVIDENCE J.-BULL., Jan. 1, 1998, at A1.

personal gain is ongoing. Students are not the only victims in these witch hunts. The Brown Dean of Student Life and her Associate Dean were gone in a year.

While *XY*'s future seems dim and uncertain, *XX*'s experience in the fraternity house—and afterwards—seems not to have slowed her down at all. Indeed, notwithstanding all the concern about the consequences of ambivalent sex, *XX* seems to have triumphed. She graduated a few years later, went to law school, and, as these words are written, is preparing herself to administer justice from the heights of the justice system as a United States Supreme Court clerk.

APPENDIX A

Introduction to Questionnaire

Much of the contemporary academic literature on law and sexual behavior focuses on the issue of where the line *should be* drawn between behavior that is legally (but not necessarily morally) acceptable and behavior that *should be* punishable as a serious crime (whether called rape or not). For our purposes here, a crime for which the punishment *can be* more than one year in prison (a “felonious act”) will be considered serious. To date, it seems, only one study has polled the educated public on the subject. Building on that study is the purpose of the attached questionnaire. In responding to it, please ignore current law—or your conception of it—and assume that you have the power to create the relevant law. Your cooperation is appreciated. Results will be published and made available to you upon request; your responses are **anonymous**.

CAVEAT: The discussion that follows may make you uncomfortable. IT CONTAINS DESCRIPTIONS OF EXPLICIT SEXUAL ACTS. IF YOU ARE SQUEAMISH ABOUT THESE THINGS, PLEASE STOP HERE. And if you proceed to an examination of the questionnaire itself, you should feel free to stop at any point. In either of these cases, please indicate your withdrawal at the top of the questionnaire when you turn it in. Bear in mind, though, that without input from people like you, legislators (and academics) normally have no basis other than their own experience for drawing a proper or informed line.