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RAPE, LIES AND VIDEOTAPE

*Robert García **

I. INTRODUCTION

A six-minute scene from the film *Last Tango in Paris* makes it possible to explore law, lawyering, and interpretations of sex and violence: What is rape? What is acceptable behavior between men and women in bed? How should the crime of rape be defined? What do social attitudes about gender roles, race and ethnicity, class and women's credibility have to do with rape? What is the relationship between values, facts, evidence, law and lawyering? How do we think about these issues in the courtroom, in the classroom and in legal scholarship?

In the spring of 1991, the students in my seminar on sex and violence did an exercise involving the scene from *Last Tango in Paris*.¹ The scene depicts a sexual encounter between a man and a woman in an apartment. Two people watched the scene and played the role of witnesses. Two students in the seminar who had not seen the film played the role of lawyers, one as the prosecutor and one as the defense attorney for the man. Each lawyer prepared and presented the testimony of one witness on direct examination, and cross-examined the other witness. Each witness truthfully described what he or she saw and heard, as if he or she had witnessed the scene from a neighboring apartment. The government witness was a woman, and the defense witness was a man. Both lawyers were women. The remaining students, who had not seen the film, were then asked to decide whether the man raped the woman. Based on the testimony, the students concluded that any claim of rape was unfounded. The students then watched the scene for the first time.

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I presented an earlier version of this piece at the Evidence Conference of the Association of American Law Schools (AALS) at the University of Iowa College of Law on June 8, 1991.

Thanks to many people, including Peter Arenella, Paul Bergman, David Binder, Carole Goldberg-Ambrose, Willy Forbath, Ken Graham, Joel Handler, Chris Littleton, Leon Letwin, Jerry López, Chris Mueller, Lucie White and Steve Yeazell; to Doug Gravelle, Lizbeth Parker, Elaine Stroeber and Matt Swafford; and to the students in my seminar on sex and violence.

1. *LAST TANGO IN PARIS* (Produzioni Europee Associate 1972). The movie was directed by Bernardo Bertolucci and stars Marlon Brando and Maria Schneider. The seminar covered sexual homicide (a killing where the person kills the object of his or her desire), Battered Woman Syndrome, postpartum disorders and infanticide, rape and Rape Trauma Syndrome. For a transcript of the scene, see *infra* note 180 and accompanying text.

Based on the film clip, all the students agreed beyond a reasonable doubt that the man raped the woman.

The purpose of the exercise was to explore rape, criminal law, evidence, professional responsibility and lawyering, in the context of trying to solve a realistically complex legal and social problem.² In some respects, the exercise was a simulation of the testimony in a rape trial. The simulation, however, was only an incidental part of the exercise. More importantly, the exercise was quite real: the witnesses truthfully described what they saw and heard.³ The students actually had to decide whether the man raped the woman, first on the basis of the testimony, and then on the basis of the film clip.

Did the man rape the woman? Is there a correct answer to that question? Did the students get it right when they concluded that the claim of rape was unfounded? Did they get it right when they concluded that the man raped the woman? If the man did rape the woman, why was it so difficult to prove?

Many people believe that there are objective facts out there in the real world. If we could simply figure out "what really happened," we would know the answer to relevant legal questions. If we knew "what really happened" between a man and a woman, we would know whether the man raped the woman. Witnesses describe "what really happened" outside the courtroom. The jury reconstructs that historical reality on the basis of the evidence at trial. The legal consequences follow when the jury applies the law to the so-called facts. The "statement of facts" in an

2. See generally Anthony G. Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. LEGAL EDUC. 612 (1984) (discussing clinical education's attempts to go beyond traditional case and doctrinal analysis, and to provide students with method of learning from experience); Gerald P. López, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Antigeneric Legal Education*, 91 W. VA. L. REV. 305 (1989) (suggesting what is wrong with legal education and how to change it).

3. Each witness was instructed, in substance, as follows: "You are about to watch a scene from a movie. Assume you are who you are. You are in Paris. Through your window, you see and hear the following events take place in the apartment next door." Each witness then watched the film clip alone. Each was then instructed, in substance: "Someone will be asking you some questions. You should answer truthfully all questions about what you saw and heard."

I did not know what either witness would say. I arbitrarily assigned the first witness to the prosecutor, and the second witness to the defense attorney. The examinations were conducted under the Federal Rules of Evidence. The defense attorney heard the government's witness for the first time on direct. The prosecutor did not know there was a second witness until he testified. The attorneys did not make opening statements or closing arguments. In discussions afterwards, the government witness said she felt the man raped the woman. The defense witness felt the man did not rape the woman. The preparation of the witnesses and the testimony were not videotaped. In future seminars, the preparation and the testimony will be taped, and the class will analyze the tapes as part of the exercise.

appellate opinion summarizes what happened. Law professors speak and write about the "facts" in a rape case, as if we could tell what the "facts" were by reading an appellate opinion.⁴ This Article explores those assumptions.

Last Tango brought a new level of realism to the movies. The scene provides a rich opportunity for examining how sex and violence, and the relations between men and women, are depicted in the movies. The portrayal of sex and violence in the movies reflects and helps define what is acceptable behavior between men and women in real life.⁵ More importantly, the scene serves as a mirror that reflects the values of the people who watch and describe it.

Part of the problem in deciding whether a man raped a woman is that something gets lost (or added) when "what really happened" is translated into words through the testimony of witnesses. Another part of the problem is that "what really happened" involves not only the external actions between the man and the woman, but also their internal thoughts and emotions: Did the man intend to rape the woman? Did the woman feel raped? In addition, even if we know "what really happened"—by watching a film clip, for example—it may be difficult to decide whether that was a rape, unless we first decide what should count as rape.

Rape is not just a legal problem. Rape is a social problem. The law is only one tool for trying to solve the underlying social problem. In addition, rape is not simply a descriptive issue. Rape is also a normative issue. Different people have different perspectives on what constitutes rape. Whether the man raped the woman depends on the values, beliefs, attitudes and biases of the people describing the event, and of the people deciding the question. How many layers of interpretation are involved in

4. Cf. Charles R. Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1360-61 (1985) (to be socially acceptable, verdicts must be interpreted as statements about what happened, not as statements about evidence at trial).

5. See Robin Warshaw, *Ugly Truths of Date Rape Elude the Screen*, N.Y. TIMES, May 5, 1991, § 2, at 17 (depiction of acquaintance rapes in movies reflects and reinforces beliefs that rape occurs only between strangers, that women want to be raped, that women fall in love with their rapists, and that some women deserve to be raped); see also William Grimes, *Buried Themes: Psychoanalyzing Movies*, N.Y. TIMES, Dec. 23, 1991, at B1 (applying psychoanalysis to films of Bertolucci and others). See generally Neil M. Malamuth, *Sexually Violent Media, Thought Patterns, and Antisocial Behavior*, 2 PUB. COMM. & BEHAV. 159 (1989) (synthesis of empirical studies which suggest that (1) sexual violence in media is one of many social forces that could affect person's thought patterns (e.g., attitudes, beliefs, perceptions and schemas) supporting sexual aggression, along with other cultural forces and individual experiences; (2) such thought patterns could in turn contribute to aggression against women, including rape; and (3) more research is needed).

describing the scene from *Last Tango*? How many layers of interpretation are involved in a real rape case? What values are reflected in each interpretation? How are those values shaped? Whose interpretations matter, and why? What can a lawyer do about those interpretations?

This Article will examine the question of whether the man raped the woman in the scene from *Last Tango* from several different perspectives. It will focus primarily on the perspective of a trial lawyer. For example, a prosecutor investigating a rape case must address a series of issues: "Is that a rape? What do the witnesses say? How is rape defined under the criminal law? What will the defense be? Who's the judge? Who's on the jury? Will a conviction stick on appeal?" Generally, it is the prosecutor who tries to prove that a rape occurred, and the defense attorney who tries to discredit that claim. However, the question of whether the man raped the woman is not as simple as being pro-government or pro-defense. If a woman were prosecuted for killing the man who she claims raped her, the prosecutor would want to discredit that claim. In an adversarial system, it is useful to be able to think like your adversary. Flipping the roles of the government and the defense also helps illuminate the values involved in deciding whether the man raped the woman.⁶

Part II will focus on the social context in which rape issues arise. It will examine the reviews of *Last Tango in Paris* by film critics Pauline Kael, Richard Schickel and Norman Mailer. Their reviews reflect and may help define social attitudes about what is acceptable behavior between men and women in this society, and social attitudes about race, ethnicity and class. Part II will also explore social attitudes about the credibility of women that are reflected in a popular casebook on evidence. It will then discuss the influence that social attitudes might have on the presentation and interpretation of evidence in a rape case based on the scene from *Last Tango*. Finally, Part II will focus on what a lawyer can do to expose the values that lie beneath those interpretations—for example, through witness preparation, jury selection and the testimony of expert witnesses.

Part III examines whether the man raped the woman in the scene from *Last Tango* under traditional, rape reform and radical feminist no-

6. I have been both a prosecutor and a defense attorney. I was an Assistant United States Attorney in the Southern District of New York from 1983 to 1987. I did not prosecute any rape cases, which are generally not handled through the federal courts in New York. I also served as a cooperating attorney with the NAACP Legal Defense Fund from 1980 to 1983, defending people on Death Row. One client was wrongfully convicted and sentenced to die for rape, sodomy and murder. His conviction and death sentence were reversed on appeal, and the state subsequently dropped all charges. See *Zant v. Nelson*, 296 S.E.2d 590 (Ga. 1982), cert. denied, 460 U.S. 1056 (1983), appeal after remand, 405 S.E.2d 250, 250-51 (Ga. 1991).

tions of rape. For radical feminists Catherine MacKinnon and Andrea Dworkin, rape is about power and the domination of men and the subordination of women. Part III will probe the implications of radical feminist jurisprudence for the trial of a rape case. It considers how a lawyer might translate competing legal standards and legal theories into evidence that a jury can grasp. That is part of the broader problem of translating the complexities of everyday life into the courtroom.

The scene from *Last Tango*, while short, is complex and ambiguous. A reader may feel confused, disoriented, or cheated without having a summary of "what really happened" in the scene. That illustrates some of the major points of this Article. Any summary would reflect an interpretation of whether the man raped the woman. Any description would necessarily shape the answer to that question. Prosecutors and defense attorneys often feel confused and disoriented when they try to piece together a case from the conflicting testimony of witnesses and bits and pieces of circumstantial evidence. Jurors may feel disoriented and confused when they are asked to decide a case beyond a reasonable doubt.

A transcript of the dialogue appears in the Appendix. Although the transcript is fair and accurate, it does not begin to capture the richness of the scene. When I have described the exercise to people who have previously seen the movie, they commonly remember the scene as "the butter scene," or sometimes as "the sodomy scene," but never as "the rape scene." When I discussed the exercise and showed the film clip at the Evidence Conference of the Association of American Law Schools, many of the evidence professors were stunned that the students would consider that a rape. As one professor put it, "their tripwire for when the aggressor crosses the line into rape is sensitive indeed." Those reactions may reflect varying social attitudes about what is acceptable behavior between men and women.

The film is available on videotape. Ideally, each reader would watch the scene; decide whether the man raped the woman; examine what values are reflected in that determination; try to describe the scene to someone else who has not seen it; and explore how that description is shaped by the values and goals of the reader, and by the values of the other person. Going through that experience would drive those points home in ways that simply reading about the issues would not. Ideally, this Article would include the film clip. That is beyond the present limitations of this medium. I am working on that problem by developing interactive multimedia materials on sex and violence.⁷

7. I recently received a grant to develop multimedia materials on Battered Woman Syn-

This is not a trial manual for prosecuting or defending rape cases. The exercise is a teaching device for enabling students to think about rape issues the way trial lawyers do. However, the exercise is not only a teaching device. The exercise helps illuminate the problem of rape and how we teach, write and think about rape as a social and legal problem. This is a progress report on a larger work in progress: developing a clinical seminar on sex, violence and law, and producing multimedia materials on evidence and criminal law.

II. SOCIAL INTERPRETATIONS OF SEX AND VIOLENCE

This Part will examine social attitudes about sex and violence, gender roles, race and ethnicity, and class relations as reflected in reviews of *Last Tango*, and social attitudes about the credibility of women as reflected in an evidence casebook. Such attitudes may affect how witnesses and jurors interpret "what really happened" in a rape case. Trial lawyers must understand those attitudes so that they can begin to think about how to deal with them in the courtroom. Law professors must understand those attitudes so that they can enable students to think like lawyers.

A. *It's Not About Rape: It's About Domination and Subordination*

Different people may see the same scene, and some will see rape while others will not. For example, when *Last Tango in Paris* was first released in 1972, film critic Pauline Kael wrote: "I don't believe that there's *anyone* whose feelings can be totally resolved about the sex scenes and the social attitudes in this film. . . . It's like seeing pieces of your life."⁸ According to Kael, *Last Tango* was "the most powerfully erotic

drome. The project will implement the approaches discussed in this Article. The materials will include an interactive video lesson involving the testimony of a psychiatrist concerning Battered Woman Syndrome in a criminal case in which a woman is charged with murder for killing her abusive husband. The computerized video will show the direct examination of the expert by the defense attorney at trial. The student will play the role of the prosecutor by typing objections into the computer. The computer will then rule on the objections. The computer will also contain information to place the testimony in a broader context, including relevant statutes, cases, trial transcripts, writings on feminist jurisprudence, videotaped interviews with battered women and materials on jury selection. I received the grant from the National Center for Automated Information Retrieval. Cf. John Markoff, *Technology: Mouse! Movie! Sound! Action!*, N.Y. TIMES, Oct. 27, 1991, § 3, at 11 (discussing developments in multimedia personal computers that allow user to interact with text, sound and video images).

8. Pauline Kael, *Introduction* to BERNARDO BERTOLUCCI & FRANCO ARCALLI, BERNARDO BERTOLUCCI'S *LAST TANGO IN PARIS: THE SCREENPLAY* 9, 18-19 (1973). Kael's essay originally appeared in the *New Yorker* magazine when *Last Tango in Paris* was released.

movie ever made,"⁹ and the "film that has made the strongest impression on me in almost twenty years of reviewing."¹⁰ What aspects of real life does Kael see in the film? What does Kael consider erotic? According to Kael, the film is about power, sexual warfare, sexual enslavement, dominating men and adoring women, the aggression in masculine sexuality, the man's sexual anger, his need to debase the woman and himself, and his demands for total subservience to his sexual wishes.¹¹ Although she does not directly address the sodomy scene,¹² Kael feels that the woman is "erotically sensitized by the rounds of lovemaking."¹³ Although the relationship between the man and the woman is defined by sexual domination and subordination, Kael interprets that as eroticism; she does not mention the possibility of rape. Yet to a radical feminist, rape is about power and the domination of men and the subordination of women.

The question of whether the man raped the woman does not arise for film critic Richard Schickel, writing in 1991.¹⁴ For Schickel, Marlon Brando was not just playing a role. Brando was improvising and revealing himself in the male character: The sodomy scene in *Last Tango* symbolizes an act of rebellion by the Brando character against the bourgeois values represented by the woman: "When Brando buggers Schneider's chic, saucy, *cultured* little bourgeois ass, he is bugging everything that has bugged him, all those middle-class importunings, all those demands for discipline, responsibility and, while you're at it, how about a *Hamlet*?"¹⁵ For Schickel and other men like him who came of age in the 1950s, Brando was a rebel hero, "someone who appeared not to accept the corporation as a model social institution, was scornful of bourgeois manners and habits of mind, was capable of emblemizing the soul's immutable need to say—well, all right, mumble—'no' on our behalf."¹⁶ For Schickel, the man in the scene is a construct that combines the character, the performance of that role, Brando's personality and Schickel's

9. *Id.* at 10.

10. *Id.* at 18.

11. *Id.* at 11, 16.

12. I use the word "sodomy" to refer to anal intercourse without thereby expressing any normative judgment about the scene, or about sodomy. Cf. *Bowers v. Hardwick*, 478 U.S. 186, 193-94 (1986) (until 1961, all 50 states outlawed sodomy; some still do); Jane E. Brody, *Who's Having Sex? Data Are Obsolete, Experts Say*, N.Y. TIMES, Feb. 28, 1989, at C1 (survey of 2000 white middle-class women in Southwest found that 23.8% regularly and willingly engaged in anal intercourse, much larger number than 8-10% that previous data had suggested).

13. Kael, *supra* note 8, at 11.

14. RICHARD SCHICKEL, *MARLON BRANDO: A LIFE IN OUR TIMES* (1991). Schickel is a movie critic for *Time* magazine.

15. *Id.* at 185.

16. *Id.* at 6.

own fantasies about power, rebellion, women, sex and violence. The woman in the scene, the female character, the actress, is not a human being: she is a stage prop, an object, a symbol of bourgeois niceties that serves as the target of Brando's youthful promise and rebellion, transformed now into the anger and aggression of a mid-life crisis for the character-actor-critic.¹⁷ Schickel does not focus on the film as violence against women. The film represents "elegant erotica" with an "intellectually . . . soft-core" twist.¹⁸

For Norman Mailer, the sodomy scene is an "historic bugger[y]."¹⁹ The woman is not an individual human being. She is an object defined by men, the daughter of a racist dead French army officer, and a symbol of power that the Brando character overthrows through his sexual aggression: "It is nothing less than the concentrated family honor of the French army she will surrender when Brando proceeds . . . to bugger her."²⁰

In addition, Mailer reflects a fascination with penetration. Penetration has been the target of radical feminist critiques of sex, intercourse and rape under conditions of male domination.²¹ Mailer's reaction to the film makes it easy to see why. For Mailer, *Last Tango* is a disappointment because the sex was simulated: "Brando's real cock up Schneider's real vagina would have brought the history of film one huge march closer to the ultimate experience it has promised since its inception (which is to re-embodiment life)."²² For Mailer, sex *is* intercourse *is* penetration *is* male domination over a submissive sex object. Without real penetration and some penetration shots, *Last Tango* is "a fuck film without the fuck. It is like a Western without the horses."²³ Intercourse without penetration is not sex and certainly cannot be rape.

In contrast, Brando himself felt that the emotional relationship between the characters was more important than penetration. According to Brando, "Bernardo wanted me to fuck Maria . . . on screen. . . . I told him, 'That's impossible. If that happens, our sex organs become the cen-

17. Maria Schneider played a subordinate role to Brando, who was the "power center" of the film: she had fewer lines, and had to take off more clothes. *Id.* at 183.

18. *Id.* at 182-83.

19. Norman Mailer, *A Transit to Narcissus*, reprinted in BERTOLUCCI & ARCALLI, *supra* note 8, at 199, 207. Mailer's essay originally appeared in the New York Review of Books on May 17, 1973, shortly after *Last Tango* was released.

20. *Id.* at 206.

21. See, e.g., ANDREA DWORKIN, INTERCOURSE 121-43 (1987) (analyzing intercourse as penetration, violation and occupation of subordinated women by dominant men).

22. Mailer, *supra* note 19, at 203. To achieve perfect realism, there was a "real need for the real cock of Brando into the depths of the real actress." *Id.* at 204.

23. *Id.* at 213.

terpiece of the film.”²⁴ Schneider, on the other hand, simply did not want to have sex with Brando. According to Schneider: “We were never screwing on stage. I never felt any sexual attraction for him . . . he’s almost fifty you know, and’—she runs her hand from her torso to her midriff, ‘he’s only beautiful to here!’²⁵

B. Cultural Stereotypes

Cultural stereotypes based on gender, class, ethnicity and race pervade the film criticism of *Last Tango*. How can racial stereotypes be at issue when all the people are white? Other people, people of color, have race; white people are just people. The dominant, white culture defines what is perceived as “normal” or “neutral”; departures from that “norm” are perceived as different, deviant, “other.” The film critics do not explicitly focus on the fact that they themselves are white, and that the man and the woman are white. This may create the illusion that the critics enjoy a neutral or objective viewpoint, that race is not an issue in the scene, and that race is not an issue in describing the scene.

Race is not a neutral issue in this society. Social attitudes about what is acceptable behavior between men and women depend in part on social attitudes about race, ethnicity and class. Those attitudes may affect the interpretations of “what really happened,” and whether the man raped the woman. It is necessary to explicitly state the unstated assumptions and to explore what difference those assumptions make.²⁶ What if the man or the woman were black?

According to Pauline Kael, the woman is like “the adorably sensual [white] bitch-heroines of French films of the twenties and thirties. . . . These girls know how to take care of themselves.”²⁷ The (white) “American male tough-guy sex role,”²⁸ reflected in the Brando character, “is no

24. SCHICKEL, *supra* note 14, at 184 (quoting Marlon Brando).

25. Mailer, *supra* note 19, at 204 (quoting Maria Schneider).

26. See, e.g., Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1369-87 (1988) (exposing race consciousness is crucial to exposing beliefs that present social conditions are natural, inevitable and fair; in process of socially creating races, whites became associated with normatively positive characteristics, and blacks with subordinate, aberrational characteristics); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2435-41 (1989) (event that seems non-racist to whites may appear racist when viewed from minority perspective); Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 12-17, 31-34, 45-47, 58 (1987) (unstated point of comparison may appear to be neutral and inevitable if left unstated; point of comparison must be exposed and challenged by looking at issue from another point of view).

27. Kael, *supra* note 8, at 18.

28. *Id.* at 11.

match for a French bourgeois girl."²⁹ In the end, the woman wins the sexual warfare that so enraptured Kael by shooting the man to death. Kael need not worry about whether the man raped the woman—the bitch can take care of herself.

According to Mailer, the woman "is every [white] eighteen-year-old in a mini-skirt and maxi-coat who ever promenaded down Fifth Avenue in that inner arrogance which proclaims 'My cunt is my chariot.'"³⁰ In other words, she asked for it. The man is a (white) American, ex-boxer, ex-actor, ex-foreign correspondent, ex-adventurer and ex-gigolo.³¹ According to Schickel, the male character is the (white) rebel hero having a mid-life crisis.³² It would be difficult for Mailer and Schickel to believe that the Brando character raped the woman because they identify with him, and because they objectify the woman.

How would each of those (white) witnesses feel if the man were black and the woman were white? What if the man were a black, unemployed, Algerian day laborer living in Paris after the Algerian revolution, and the woman were, as she is, the daughter of a racist French army officer? Would Kael still feel that the woman was erotically sensitized by the rounds of lovemaking, and that the movie was the most powerfully erotic film ever made? Eldridge Cleaver claimed that he raped white women as an insurrectionary act against racism (although he "practiced" by raping black women first).³³ Schickel and Mailer see the sodomy scene as a rebellion by the Brando character against bourgeois values. "What a waste!"—that is the reaction of the white cops who try to stop what they mistakenly assume is an attempted rape, and learn that, in fact, the white Italian woman is engaged in a friendly wrestling match with her black boyfriend in Spike Lee's film *Jungle Fever*.³⁴ Would those white cops have made that mistake if the man and the woman were white? What if the man in *Last Tango* were white and the woman were black? "Colored girls just want to fuck all night," according to Mick Jagger and the Rolling Stones in their hit song, *Some Girls*.³⁵ Black women must be hard to rape—consent comes so easily to them.³⁶ What if both the man and the

29. *Id.* at 18.

30. Mailer, *supra* note 19, at 202.

31. *Id.* at 216.

32. SCHICKEL, *supra* note 14, at 184.

33. See ELDRIDGE CLEAVER, *SOUL ON ICE* 26 (1972).

34. *JUNGLE FEVER* (Four Acres and a Mule 1991).

35. THE ROLLING STONES, *Some Girls*, on *SOME GIRLS* (CBS Records 1978).

36. Joan Little, a black woman prisoner, was prosecuted for killing a jailer who allegedly raped her. Social scientists working on her defense conducted a survey in the county where she was to be tried. The survey contained two questions: "Do you believe that black women have lower morals than white women? Do you believe that black people are more violent than

woman were black? Hispanic?³⁷

The stereotypes about being a young middle-class white French woman or a middle-aged, middle-class, white American man may seem relatively innocuous. They are not innocuous if you share some of their characteristics and that hurts you, or if you don't share some of their characteristics and *that* hurts you.³⁸ For example, the stereotypes are

white people?" Sixty-three percent of the sample responded yes to both questions. In a neighboring county, "only" 35% of the sample responded yes to both questions. Little received a change of venue and was subsequently acquitted. See W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* 179-80 (1981).

37. Cf. *TIE ME UP, TIE ME DOWN* (El Deseo 1990) (film by Spanish filmmaker Pedro Almodovar in which Spanish man kidnaps and ties Spanish woman to bed for days to make her love him).

38. See, e.g., Kimberlé Crenshaw, *Race, Gender and Violence Against Women: Convergences, Divergences and Other Black Feminist Conundrums*, 43 *STAN. L. REV.* (forthcoming 1992) (disregarding interaction between rape, sexism and racism can distort or erase experience of black women, who may be victims of all three); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 *U. CHI. LEGAL F.* 139, 139-40 (tendency in antidiscrimination doctrine to treat race and gender discrimination as distinct can marginalize experience of black women, who are vulnerable to multiple forms of discrimination); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 598-601 (1990) (discussing experience of black women and rape); Valerie Smith, *Split Affinities: The Case of Interracial Rape*, in *CONFLICTS IN FEMINISM* 271, 278-84 (Marianne Hirsh & Evelyn Keller Fox eds., 1990) (discussing tension between sympathy for white civil rights worker who was raped and sympathy for black man accused of raping her); Jennifer Wiggins, Note, *Rape, Racism, and the Law*, 6 *HARV. WOMEN'S L.J.* 103, 118-19 (1983) (rape against black women was not considered crime in several states in Old South); see also *Furman v. Georgia*, 408 U.S. 238, 364 (1972) (Marshall, J., concurring) (89% of all men executed for rape in United States since 1930 were black); Ellis Cose, *Rape in the News: Mainly About Whites*, *N.Y. TIMES*, May 7, 1989, § 4, at 27 (race and class help define what is news and what is not; any suggestion of violence across racial lines is likely to push story onto front page); Bob Drogin, *Rapes That Are "Not as Heinous,"* *L.A. TIMES*, Jan. 28, 1992, at A1 (discussing recent Australian rape case which found rape of prostitute less grave because "prostitutes suffer little or no sense of shame or defilement;" noting topic will be raised before Annual United Nations Committee overseeing U.N. Convention on Elimination of All Forms of Discrimination Against Women); Jane Gross, *To Some Rape Victims, Justice Is Beyond Reach*, *N.Y. TIMES*, Oct. 12, 1990, at A14 (prostitutes and drug addicts are being raped with increasing frequency but rarely report rapes; criminal justice system frequently disregards their claims). See generally HUBERT S. FEILD & LEIGH B. BIENEN, *JURORS AND RAPE* 119-43 (1980) (suggesting that combined effect of various factors, including juror, victim, defendant and case characteristics, are more significant in predicting recommended sentences in rape cases than individual factors); HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 249-54 (1966) (suggesting that jurors redefine crime of rape by incorporating notions of contributory fault and assumption of risk by woman). If the jury perceives that the woman in some sense assumed the risk of being raped, the jury may find the defendant guilty of a lesser crime if given the option of doing so. If forced to choose between a finding of rape and total acquittal, the jury will usually choose acquittal as the lesser evil. This suggests that the jury is not saying that the defendant has not done anything wrong, but that what the defendant did does not deserve to be classified as rape. *Id.* at 250-51, 254.

not innocuous if you happen to be black rather than white and you are charged with rape, or if you are raped.³⁹ The stereotypes are not innocuous if you happen to be a (young middle-class white French) woman, and no one believes you when you claim you were raped.

C. *Women's Credibility*

One of the problems that women encounter when they are raped is that no one believes them. People are conditioned to believe that a woman is mistaken, fantasizing or just plain lying when she claims she was raped. What can a lawyer do about the problem of women's credibility in the courtroom? What are law professors doing to educate future lawyers?

All of the materials in the casebook that I use in my evidence course suggest that a woman is lying, fantasizing or mistaken when she claims she was raped.⁴⁰ Nothing in the casebook suggests that a woman may be telling the truth. There is nothing in the book on how to prove that a woman was raped. For example, the casebook features a hypothetical in which a woman driver who is involved in a car accident falsely accuses her male passenger of sexually molesting her. The woman files the false accusation in a police report so that she can blame the accident on the man and thus defraud her insurance company.⁴¹ This transforms a hypothetical about negligence and the admissions exception to the hearsay rule into a statement that women lie when they cry rape. In addition, the casebook contains only two cases involving rape.⁴² One case involves the admissibility of psychiatric testimony that the woman was fantasizing about having been raped.⁴³ Why was that case included in the casebook?

The other case involves an acquaintance rape that the editors use to examine the admissibility of the woman's prior sexual conduct.⁴⁴ There are dramatic differences in how the appellate court and the casebook edi-

39. Analyzing rape prosecutions in Minneapolis, Gary LaFree concluded that the racial dyad of the woman and the man is significant in predicting the outcome in rape cases. Black men accused of raping white women are treated most harshly, and black men accused of raping black women are treated most leniently. GARY LAFREE, *RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT* 140 (1989). In addition, jurors are less likely to believe black women who complain of rape. *Id.* at 219-20.

40. JOHN KAPLAN & JON R. WALTZ, *CASES AND MATERIALS ON EVIDENCE* (6th ed. 1986).

41. *Id.* at 162.

42. *Id.* at 433, 459.

43. *Mosley v. Commonwealth*, 420 S.W.2d 679, 680 (Ky. Ct. App. 1967).

44. *State v. Cassidy*, 489 A.2d 386 (Conn. App. Ct.), *cert. denied*, 492 A.2d 1239 (Conn. 1985).

tors present the woman's account. The published opinion summarized the woman's testimony in part as follows:

After she was in the bed, the defendant, who was undressed, yelled, '[lady,] you came here to get fucked and that's exactly what you are going to get. I'm going to fuck you until you can't stand up.' He then lunged at her and forced her to submit to vaginal intercourse. She attempted to leave the room but the defendant grabbed her, turned her around, punched her in the mouth and threw her on the bed on her stomach. After he tied her arms behind her, gagged her, and forced her head down into the bedding, the defendant forcibly performed anal intercourse on her. He then offered to untie and ungag her if she would do everything he said. She assented because she did not want to be hit anymore. After untying her wrists and taking the gag out of her mouth, the defendant again forcibly had vaginal intercourse with her and forced her to perform oral sex with him.⁴⁵

That information is highly relevant to show that the man raped the woman. The editors nevertheless edited that portion of the opinion to read: "After she was in the bed, the defendant * * * lunged at her and forced her to submit to intercourse."⁴⁶ Why was the case edited that way? As edited, the case appears to involve an ambiguous encounter that arguably could be interpreted from the defendant's perspective as kinky sex rather than rape. The published opinion leaves little room for subtle interpretations. Perhaps the editors merely intended to sanitize the case, but they thereby undermined the persuasiveness of the rape claim. What is worse: quoting a graphic account containing four-letter words from a published decision about rape, or undermining the claim of rape? Whose sensibilities would be offended in each situation? Would a trial court in a rape case legitimately exclude the information that the editors deleted on the grounds of unfair prejudice?⁴⁷

The treatment of rape in the casebook reflects and helps define social attitudes about women's credibility in this society. It is important to think about how rape is covered in the casebook, about casebooks as legal institutions, about casebook authors as actors in the legal system, about whether the casebook reflects the biases of the authors and about whether people who use the casebook without reflecting on those issues

45. *Id.* at 388.

46. See KAPLAN & WALTZ, *supra* note 40, at 433.

47. See, e.g., FED. R. EVID. 403 (exclusion of relevant evidence on grounds of unfair prejudice).

internalize the (subliminal?) message that women lie when they cry rape.⁴⁸ Those attitudes may go unnoticed unless they are explicitly identified and discussed.⁴⁹

A lawyer needs to understand how a woman feels when she is raped, and what a persuasive description sounds like, so that the lawyer can try to translate that into a convincing presentation in the courtroom. It is important to hear women speak for themselves about rape in situations where their credibility is not at stake. It is important not to interpret their stories through the biases of appellate judges, casebook editors and law review writers. It is important to realize that obstacles to proving a rape may arise not only because a woman may be lying, but also because people may not believe a woman when she is telling the truth. For example, studies suggest that a woman may be perceived as less credible because she uses what is perceived as a powerless speech style.⁵⁰ This may

48. The casebook also contains another hypothetical on the state of mind exception to the hearsay rule based on a real homicide case involving two lesbian lovers, but the authors changed the facts into a hypothetical involving a heterosexual couple. Why? Is homosexuality more offensive than murder? Is that an example of what radical feminists mean by compulsory heterosexuality? Compare *People v. Spencer*, 71 Cal. 2d 933, 458 P.2d 43, 80 Cal. Rptr. 99 (1969) with KAPLAN & WALTZ, *supra* note 40, at 225.

My comments are directed at the sixth edition of the Kaplan & Waltz casebook. In response to my comments at the AALS Evidence Conference, Roger Park, one of the editors of the seventh edition, changed some of the material in that edition, which appeared in December of 1991. See Letter from Roger Park to Robert García (July 8, 1991) (on file with author); JOHN KAPLAN ET AL., *CASES AND MATERIALS ON EVIDENCE* (7th ed. 1991).

49. My goals include preparing students to think like lawyers, to think of legal rules and doctrines as tools for solving complex legal and social problems, and to think of ways of using those tools to serve the best interests of their clients. Cf. Irene Coombs, *Crime in the Stacks, or a Tale of a Text: A Feminist Response to a Criminal Law Textbook*, 38 J. LEGAL EDUC. 117 (1988) (critiquing criminal law textbook from feminist perspective); Nancy S. Erickson, *Final Report: "Sex Bias in the Teaching of Criminal Law,"* 42 RUTGERS L. REV. 309 (1990) (advocating inclusion of gender-related topics in law school curriculum); Nancy S. Erickson, *Sex Bias in Law School Courses: Some Common Issues*, 38 J. LEGAL EDUC. 101 (1988) (noting lack of law school courses with emphasis on gender issues and urging changes in casebooks reflecting sexual bias); Kit Kinports, *Evidence Engendered*, 1991 U. ILL. L. REV. 413 (advocating incorporation of feminist perspective to evidence).

50. A powerless speech style is characterized by the abundant use of hedges, hesitation forms, polite forms, question intonations, intensifiers and qualifiers. See John M. Conley et al., *The Power of Language: Presentational Style in the Courtroom*, 1978 DUKE L.J. 1375, 1379-86. Women use powerless speech more frequently than men, and poor and uneducated witnesses use powerless speech more than other witnesses. *Id.* Variations in speech style may be related more to social subordination than to gender roles. See WILLIAM M. O'BARR, *LINGUISTIC EVIDENCE: LANGUAGE, POWER, AND STRATEGY IN THE COURTROOM* 70-71 (1982). However, according to Robin Lakoff, women use language differently from men. Gender-related differences in language reflect cultural values about what it means to be a good man or a good woman. Men's language is the language of the powerful. Women's language is the language of the powerless, although some women can switch speech styles. See ROBIN T. LAKOFF, *TALKING POWER: THE POLITICS OF LANGUAGE IN OUR LIVES* 198-214 (1990)

affect the credibility of a woman in a rape case, whether the woman is the victim or an eyewitness. For example, the government witness in the exercise was a woman.⁵¹

The materials in an evidence course can include powerful accounts by women about being raped, such as videotaped interviews of real rape victims, Carolyn Craven's personal account of having been raped,⁵² a transcript of a good direct examination of the woman in a rape case,⁵³ and a passage from Maya Angelou's autobiography, *I Know Why the Caged Bird Sings*.⁵⁴ Angelou vividly describes two occasions when she was molested and one occasion when she was raped as a child, and her own testimony at trial. The passage illustrates the child's conflicted feelings of affection towards and fear of the man; her enjoyment mingled with shame about the early sexual encounters; the psychological impact of sexual abuse on a child; and the trauma of forcing the child to face the man who abused her at trial.⁵⁵ Angelou, a poet, can voice what a child knows and feels in ways that judges, lawyers and experts typically cannot.⁵⁶

There is no "neutral" or "correct" way of presenting a woman's account of a rape. Different women talk about rape in different styles, what they say can be presented in dramatically different ways and the presentations can be interpreted differently. Two documentaries illustrate those points. One documentary, *Rape: Cries from the Heartland*, presents raw personal accounts by women of different cultural and eco-

(discussing how forms of women's speech reflect roles women are supposed to play in society); see also Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 2-21, 55-57 (1990) (speech practices that accompany race, gender and class domination may invite dominant speakers to dismiss or devalue what subordinated people say).

51. See *supra* notes 1-3 and accompanying text.

52. Carolyn Craven, *No More Victims*, 2 SELF-DETERMINATION Q.J., Issue 2, at 11 (1978); see also SUSAN BROWNMILLER, *AGAINST OUR WILL* 387-419 (1975) (personal accounts of women who have been raped).

53. See, e.g., THOMAS MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* 99-106 (2d ed. 1988).

54. MAYA ANGELOU, *I KNOW WHY THE CAGED BIRD SINGS* 59-74 (1970).

55. When the defense attorney asks whether the man touched her before the alleged rape, the child lies and says no. The man is convicted, but is freed on bail the same day. Later that day he is kicked to death. The child believes she is responsible for killing the man because she lied at trial, and stops speaking. *Id.* at 69-74.

56. The evolving rules on child witnesses in sexual abuse cases should be studied in that context. The problem is not simply one of constructing a coherent theory of the Sixth Amendment right to confrontation. Cf. *Maryland v. Craig*, 110 S. Ct. 3157 (1990) (discussing admissibility of videotaped testimony of child witness in sexual abuse case under Confrontation Clause).

conomic backgrounds talking about being raped.⁵⁷ The producer, using a hand-held camera and harsh lighting, shows women in a police car, in a rape treatment center and in a police station within minutes or hours after they were raped. The other documentary, *Campus Rape*, shows articulate, well-educated, attractive, well-groomed, apparently well-rehearsed young women talking about being raped. The producer, using carefully framed, well-lit shots, shows the women in idyllic campus settings, and the stars of *L.A. Law* narrate the film.⁵⁸ Different viewers may react differently to those presentations. Some viewers may find the first documentary more riveting because the women's accounts ring so "true to life" (whose life?). Some viewers may find it easier to relate to the women in the second documentary because they are like those women, and may find their accounts more compelling for that reason. Other viewers may feel that the women in the second documentary appear to be too well-rehearsed, and they may discount what the women say for that reason. What are the implications of different styles for the presentation and interpretation of evidence of rape at trial and throughout the criminal justice system?

D. Interpreting "What Really Happened"

How many layers are involved in interpreting "what really happened" in the scene from *Last Tango*? How many layers are involved in interpreting a real rape case? The social science literature on trials tends to focus on the role of the jury in processing information.⁵⁹ However,

57. *Rape: Cries from the Heartland* (HBO television broadcast, July 2, 1991).

58. *CAMPUS RAPE* (Santa Monica Rape Treatment Center at Santa Monica Hospital, California 1990).

59. According to the "story model" of jury decision-making, jurors organize the information at trial by constructing stories based on the evidence and their own world knowledge. The stories have a beginning, a middle and an end; events in the stories are causally connected; and the characters in the stories are motivated by goals that cause actions. The jurors then test the stories against the available verdicts. The jurors select the story and the verdict that "fit" the best. Jurors with different attitudes, experiences and beliefs may construct different stories and reach different verdicts. See Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. PERSONALITY & SOC. PSYCHOL. 242 (1986); see also *id.* at 248 (presenting four different interpretations of a homicide, corresponding to first degree murder, second degree murder, manslaughter and not guilty verdicts). See generally BENNETT & FELDMAN, *supra* note 36 (discussing story construction and social judgment in criminal trials); LINDA BROOKOVER BOURQUE, *DEFINING RAPE* (1989) (review of empirical research on rape, with emphasis on why there is much disagreement in evaluating particular instance as rape or not rape); REID HASTIE ET AL., *INSIDE THE JURY* (1983) (studying psychology of jurors, jury decision-making and jury deliberation); Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1, 3 (1984) (people understand world through stock stories, and lawyering can be described in story-telling terms); Albert J. Moore, *Inferential Streams: The Articulation and Illustration of the Trial Advocate's Evidentiary Intuitions*, 34 UCLA L. REV. 611 (1987)

jurors are not the only ones who interpret the evidence, and most cases never go to trial.⁶⁰ The participants in a sexual encounter, other witnesses, investigators, prosecutors, defense attorneys and judges interpret the information as well. The interpretation at any given point may also reflect the combined effects of the interpretations of various players. For example, when a good lawyer prepares a witness to testify, the lawyer should have in mind how opposing counsel will cross-examine the witness, how the trial judge will rule on evidentiary objections, what other witnesses may say, who is on the jury, what appellate courts have said in similar cases in the past and what an appellate court is likely to do in this case in the event of an appeal. This section will examine what a lawyer can do to illuminate the values that lie behind various interpretations—for example, through witness preparation, jury selection and expert testimony.

1. Layers of interpretation

The following layers might be involved in a rape case based on the scene from *Last Tango*. The interaction between various layers will be examined below.

(1) There is “what really happened” between the man and the woman. Here, this means what happened between the characters, rather than what happened between the actors on the set. The sex between the actors was simulated; the sex between the characters was not.

(2) There is the scene captured on the film.

(3) There is the woman’s interpretation.

(4) There is the man’s interpretation.

(5) Each viewer is a witness who interprets what happened. For example, the art director of *Last Tango* intended to portray the scenes in the apartment in “uterine” colors.⁶¹ Yet according to film critic Pauline Kael, “the colors in this movie are late-afternoon orange-beige-browns and pinks—the pink of flesh drained of blood, corpse pink.”⁶²

(discussing how inferences are drawn from circumstantial evidence, and how advocate can use that information to select and present evidence at trial); Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273 (1989) (suggesting ways for trial lawyers to accommodate jurors’ limited information processing capabilities).

60. See BENNETT & FELDMAN, *supra* note 36, at 17, 147-50, 163-68 (suggesting that research on criminal trials tends to focus on individual variables and offers incomplete theoretical framework for assessing how participants in criminal justice system organize information and make judgments).

61. SCHICKEL, *supra* note 14, at 182; Mailer, *supra* note 19, at 201.

62. Kael, *supra* note 8, at 16; cf. RAYMOND QUENEAU, *EXERCISES IN STYLE* (Barbara Wright trans., 1979) (Queneau observed man on bus accusing someone else of deliberately

(6) A witness's testimony at trial may be different from the witness's original interpretation, because of memory loss over time, trial preparation and the process of direct and cross-examination.

(7) Each lawyer formulates an interpretation. The lawyer's theory of the case will shape witness preparation, trial strategy, plea bargaining, motions to admit or exclude evidence, the presentation of evidence at trial, direct and cross-examinations, arguments to the jury and the briefs on appeal.⁶³ A prosecutor must be convinced of the guilt of the accused, and in that sense the prosecutor must decide for herself "what really happened." A defense attorney, on the other hand, does not have to decide whether the defendant is guilty. The defense attorney generally can focus on how the evidence can be interpreted to create a reasonable doubt. In the seminar, the students who played the attorneys in particular had to explore the tension between their own values and their roles as advocates. The defense attorney, for example, was happy to discredit the claim of rape because she did not think that the man raped the woman based on the accounts of the witnesses. After seeing the film clip, she was distressed that she had helped discredit a legitimate claim of rape.⁶⁴

(8) The jurors interpret the evidence as it comes in, during deliberations and in their verdict. Who's on the jury?

(9) The trial judge may form an opinion about whether the defendant is guilty or not, and whether the jury will find the defendant guilty or not. The judge may create a more favorable courtroom climate for the defendant if he or she thinks the defendant is not guilty. For example, the judge's beliefs may affect the way he or she addresses the lawyers, rules on objections, or reads the jury charge. The judge may signal his or her views to the jury, and this may affect the outcome of the trial.⁶⁵ Who's the judge?

(10) A judge writing an opinion for an appellate court interprets the evidence in the so-called statement of "facts." What would the statement

jostling him, and later saw same man talking to friend about button on his coat; Queneau describes experience ninety-nine ways).

63. See generally DAVID BINDER & PAUL BERGMAN, *FACT INVESTIGATION: FROM HYPOTHESIS TO PROOF* (1984) (analyzing methods by which lawyers gather and prove facts of case).

64. Cf. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988) (examining personal values and lawyering).

65. See Peter David Blanck et al., *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89, 90-91, 140 (1985); cf. Kim Murphy, 'Soft Touch' Bandit Gets a Break from Judge on Term, L.A. TIMES, May 10, 1989, § 2, at 1 (federal judge departed from sentencing guidelines and imposed lower sentence on woman convicted of multiple bank robberies because she was under influence of boyfriend and women have "soft touches" for men, "particularly if sex is involved").

of facts look like in an appellate opinion summarizing the scene from *Last Tango*? The statement of facts could vary dramatically depending on whether the court was affirming or reversing a conviction of the man for rape; depending on whether the court was affirming or reversing a conviction of the woman for killing the man who raped her; and depending on who wrote the opinion. The summary of the facts on appeal is an interpretation that reflects the values of the appellate judges and is many layers removed from "what really happened."⁶⁶ Lawyers who have tried cases frequently find it hard to recognize their cases as described in appellate opinions. It can be like seeing a bad snapshot of yourself and asking: "Is that really what I look like?" Focusing on appellate opinions ignores the interpretations of the many other actors in the criminal justice system that shaped the case before it got to the appellate court, and the context in which those interpretations were shaped. The statement of facts in an appellate opinion is a poor basis for discussing rape, but that is how many of us think about and teach law.⁶⁷

2. "What really happened" in the videotape?

The exercise relies on the use of what is depicted in the scene to explore "what really happened" between the man and the woman, and to explore their thoughts and emotions. Arguably, that raises several problems: *Last Tango in Paris* is a work of art; real sexual encounters are not as ambiguous as the encounter in that scene; and the woman did not testify about whether she felt raped. Using the exercise does raise some problems, but those problems are not necessarily flaws, and the

66. The majority and dissenting opinions in an appellate case can illustrate dramatic differences in the interpretation of the so-called "facts." See, e.g., *State v. Rusk*, 424 A.2d 720, 725-28, 733-35 (Md. 1981) (interpretations of force and consent in rape case); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 622-27 (6th Cir. 1986) (interpretations of impact of defendant's actions on work environment in sexual harassment case), *cert. denied*, 481 U.S. 1041 (1987); *Godfrey v. Georgia*, 446 U.S. 420, 424-25, 450-51 (1980) (interpretations of homicide scene in death penalty case); *Lehr v. Robertson*, 463 U.S. 248, 262, 270-71 (1983) (interpretations of relationship between unwed father and child in adoption proceeding).

The rules on relevance, character evidence, and discretionary balancing are tools for preventing evidence of cultural stereotypes from being introduced at trial. See FED. R. EVID. 401-404, 608; see also *United States v. Abel*, 469 U.S. 45, 49 (1984) (admissibility of evidence that witness is biased). What can be done about the attitudes that lawyers, jurors, and trial and appellate court judges may bring to the courtroom?

67. See, e.g., Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1105-25 (1986) (discussing courts' differing interpretations of facts constituting force, threats and consent); cf. Robert García, "Garbage In, Gospel Out": *Criminal Discovery, Computer Reliability, and the Constitution*, 38 UCLA L. REV. 1043, 1097-1101 (1991) (excessive reliance on appellate opinions distorts our understanding of criminal justice system).

problems are not insurmountable.⁶⁸ In fact, similar problems might arise in a real rape case.

Some readers may feel that the exercise is flawed because Bertolucci is a world class filmmaker and artist, and *Last Tango* is a work of art. The ambiguities in deciding whether the man raped the woman are a function of the artistic qualities of the film. The ambiguities would not exist in real life. I disagree.

The scene from *Last Tango* is complex and open to interpretation. That is why it works in the exercise. Focusing on the testimony of the witnesses highlights the proof problems involved with rape. Focusing on the scene itself highlights the normative issues in deciding what should count as rape. The scene serves as a mirror that reflects the values of the people who describe the scene, and the values of the people who decide whether the man raped the woman. Their reactions and interpretations are at least as important as what happens on the screen for purposes of the exercise. One could instruct the witnesses to describe the scene itself, rather than to pretend that they saw the event out the window. Certainly the other students knew they were watching a film clip when they decided that the man raped the woman. The scene itself is then the real-life event. Using works of art to explore social attitudes about sex and violence is a legitimate enterprise.⁶⁹

Real-life sexual encounters between men and women can also be complex and open to interpretation. It would be more realistic to observe a real encounter between a man and a woman, but that would be problematic for practical and ethical reasons. We would want to stop a real rape, and we do not want to become a bunch of peeping toms. It would be possible to use the witnesses or the participants in a real rape case, but that would require giving up the degree of control provided by clinical simulations.

A film may be as close to raw data as we can come in the seminar, or

68. Thinking about rape by using the statement of facts in appellate opinions, or by using the vignettes that are commonly used in empirical studies, also entails some problems, but we do it anyway. See generally BOURQUE, *supra* note 59, at 95 (one limitation of attribution studies of rape is that simulation in most studies is presented so that it is assumed that rape occurred; no studies have asked the subject whether event portrayed was rape); *id.* at 314-47 (discussing weaknesses and strengths of using vignettes—short descriptive statements of situation—in empirical studies of rape); HASTIE et al., *supra* note 59, at 40-42 (discussing weaknesses of empirical studies of jury simulations). Are the results of the exercise statistically significant? Every rape case is statistically significant to the participants and to the lawyers. In any event, the exercise is not intended to be part of an empirical study (although it could be used that way).

69. See, e.g., DWORKIN, *supra* note 21, at 3-79 (exploring intercourse in works of Leo Tolstoy, Kobo Abe, Tennessee Williams, James Baldwin and Isaac Bashevis Singer).

in a criminal case. It would be more realistic to use a videotape of a real sexual encounter.⁷⁰ However, even a film of a real sexual encounter might not resolve "what really happened," questions of credibility and the normative issues of rape. A film might not capture the internal thoughts and emotions of the participants. Did the man intend to rape the woman? Did she feel raped?

The mental states in a criminal case are subject to interpretation (and can be the subject of expert testimony) despite seemingly clear videotaped evidence. For example, two white cops in Lynwood, California, were charged with assault and with falsifying a police report after a traffic stop of a black man that was secretly videotaped. One of the cops stated in the police report that the black man talked back to the cops and used four-letter words. The tape showed that the cop who prepared the report used the obscenities, not the black man. A defense psychologist testified that what the cop wrote in the report, even if inaccurate, was how the cop remembered it, because he was suffering from post-traumatic stress disorder following the arrest. The cops were acquitted.⁷¹

Trying to decide whether the woman was raped without hearing from the woman or the man is a problem with the exercise. However, that also raises interesting issues in real life. There are rape cases where the participants do not testify. For example, the woman will not testify if she is dead. In addition, if there is other evidence that a rape occurred, the prosecution and the woman may wish to spare the woman the ordeal

70. A recent development in home video is couples who videotape themselves having sex and then distribute the tapes commercially. See Michael DeCourcy Hinds, *Starring in Tonight's Erotic Video: The Couple Down the Street*, N.Y. TIMES, Mar. 22, 1991, at A14. Some of those tapes might depict what is arguably a rape—particularly if the couples act out the type of behavior that is depicted in commercial movies, such as *Last Tango in Paris*.

71. Roxana Kopetman, *Charges Against Officers in Video 'Sting' Dismissed*, L.A. TIMES, May 14, 1991, at A1; cf. *United States v. Salerno*, 937 F.2d 797, 809-10 (2d Cir. 1991) (reversing RICO conviction because defense counsel was improperly denied opportunity to cross-examine FBI agents for possible bias in recording and transcribing surveillance tapes); JOSEPH F. O'BRIEN & ANDRIS KURINS, *BOSS OF BOSSES: THE FALL OF THE GODFATHER: THE FBI AND PAUL CASTELLANO* 197 (1991) (describing ambiguities of surveillance tapes); Melinda Beck et al., *Video Vigilantes*, NEWSWEEK, July 22, 1991, at 42, 45 (discussing video cameras as high-tech witnesses for police officers, investigators and private citizens).

New technologies can also call into question whether something that is depicted in a video or audio tape actually took place. See generally García, *supra* note 67, at 1045-68 (discussing growing use of computerized information in criminal cases); Robert García, *Demo or Die: Computer Reliability, the Federal Rules of Evidence, and the Confrontation Clause* (article in progress, on file with author) (analyzing admissibility of digital photographs, movies and sound recordings and other forms of computerized information at trial); Geoffrey Cowley et al., *Frames or Frame-Ups: Can the Camera Lie?*, NEWSWEEK, July 22, 1991, at 44, 45 (discussing potential for altering videotaped evidence).

of testifying.⁷² If a woman is prosecuted for killing the man who allegedly raped her, she might decide not to testify at trial. If the woman made a statement to the police, the woman's statement might be suppressed. In such situations, the jury would have to decide whether the man raped the woman without her testimony.⁷³ Similarly, a man charged with rape might choose not to testify, or might have his statement suppressed. Obviously, the man will not testify at her trial if she killed him. The woman in *Last Tango* shoots the man to death at the end of the movie, and then claims that he tried to rape her.⁷⁴

If there is no videotape, whether the man raped the woman raises serious proof problems. If there is a tape, what does the testimony of the participants add? Additional layers of interpretation?

For example, according to police reports, two college students recently videotaped themselves repeatedly raping and beating a nineteen-year-old woman for several hours in an apartment in Connecticut.⁷⁵ The two then tried to blackmail the woman by threatening to release the tape if she called the police. The woman went to the police, who arrested the two suspects and seized the tape pursuant to a search warrant. According to the police, the tape showed the men sexually assaulting the woman with inanimate objects while she was semi-comatose from drinking. At one point, the two men joked about the woman as she lay motionless. "Geez, I wonder if she's dead?" one of them reportedly said.⁷⁶ One detective who saw the tape said it was "degradation, pure and simple," and that the tape was "one of the cruelest things" he had ever seen.⁷⁷ Nevertheless, the woman subsequently said she was not raped.⁷⁸ "I hon-

72. In the Central Park jogger case, for example, the prosecutors stated that they believed they had enough evidence to obtain convictions without the woman's testimony and that the decision to call her as a witness would depend on her best interests. Ronald Sullivan, *Defense Hopes to Block Park Jogger's Testimony*, N.Y. TIMES, Nov. 16, 1989, at B8. Ultimately, however, the woman testified that she had not voluntarily had intercourse with anyone for several days before the attack. This supported an inference that the sperm found in her vagina came from the assailants, and not from her boyfriend. William Glaberson, *Reporter's Notebook; As Jogger Trial Unfolds, the Fear Hits Home*, N.Y. TIMES, July 23, 1990, at B1, B2.

73. The students were instructed to draw no inference from the fact that the woman did not testify. The students presumably did not take the absence of the woman's testimony into account when they decided whether she was raped, because her testimony was not available either when the witnesses testified or when the students saw the film.

74. The woman's last words in the movie are: "I don't know who he is. He followed me on the street. He tried to rape me. He's a madman. I don't know his name. I don't know his name. I don't know who he is . . ." BERTOLUCCI & ARCALLI, *supra* note 8, at 197.

75. Jacques Steinberg, *2 Videotaped Themselves in Rape, Authorities Say*, N.Y. TIMES, Aug. 13, 1991, at B3.

76. *Id.*

77. *Id.*

78. *Woman Says Video Doesn't Prove Rape*, L.A. TIMES, Aug. 26, 1991, at A13.

estly don't think they should be charged with rape. The whole thing has been blown out of proportion."⁷⁹ She told police she knew she had sex with at least one of the men, one of whom was her boyfriend, but she was not sure whether she had agreed.⁸⁰ One of the men subsequently pleaded no contest to a lesser assault charge and was sentenced to a one year suspended sentence with two and one-half years of probation. The other man has applied for accelerated rehabilitation on a lesser assault charge.⁸¹

Sometimes a tape will eliminate credibility issues. For example, rape charges against a photographer in Los Angeles involving two separate women were dismissed at the prosecutor's request after the defendant produced a videotape during his trial, apparently showing that the first woman was a willing participant.⁸² The defense did not produce the tape until after each woman testified that the defendant had attacked her. The state also dropped the charges in the second incident, which involved the woman's word against the man's, because that incident would have been difficult to prove without the evidence in the first incident to establish a pattern.⁸³ The defense did not produce the tape until the trial in order to ensure that charges involving both women were dismissed.⁸⁴ The prosecution is considering perjury charges against the first woman.⁸⁵ Where does that leave the second woman: there is no reason to think she is lying, but the charges against the man for raping her have been dismissed because who would believe her?

3. What did the witnesses see, hear and say?

Why did the students decide that any claim of rape was unfounded based on the testimony, but that the man raped the woman based on the film clip? Did the witnesses do something wrong? Did the lawyers do something wrong? The government witness was a woman, and the defense witness was a man. Did that make any difference? Could the prosecutor have done anything differently to make the government witness more persuasive? What happens in the process of witness preparation?

The student jurors agreed that the lawyers had not done anything

79. *Id.*

80. Nick Ravo, *Woman Now Denies Being Raped on Video*, N.Y. TIMES, Aug. 26, 1991, at A16; see also *2 Held in Taped Rape Are Beaten by Inmates*, N.Y. TIMES, Aug. 16, 1991, at B2.

81. *Suspect in Taped Rape Will Not Go to Jail*, N.Y. TIMES, Jan. 24, 1992, at A9.

82. Michael Connelly, *Photographer's 2 Sexual Assault Cases Dropped after Videotape Viewed*, L.A. TIMES (Valley Ed.), Apr. 18, 1991, at B3.

83. *Id.* at B6.

84. *Id.*

85. *Id.*

"wrong." The prosecutor and the defense attorney performed well on direct and cross-examination. The students also agreed that the witnesses had not done anything "wrong." The witnesses testified truthfully about what they saw and heard. Neither witness had any motive to lie. However, the government witness generally remembered fewer details. The defense witness seemed to remember much more of the conversation that actually took place in the scene.⁸⁶

Do men and women interpret sex and violence differently? The defense witness, a man, testified twice that the man in the scene said "I love you" to the woman. In fact, the man in the film clip did not say that. The government witness, a woman, did not say anything about love. The defense witness testified that the woman in the apartment was not crying. The government witness testified that the woman in the apartment was crying. In fact, the film clip shows that the woman *was* crying. Was the defense witness "mistaken" about the love and the tears? Or did the defense witness associate what he saw and heard with love? Has he been conditioned to ignore what a woman says and does? Does that mean the defense witness was biased? Can that type of "bias" be tested through cross-examination at trial? If he associates what he saw and heard with love, is that because he is a man, or because of his personal background?⁸⁷ We could say that the defense witness was "mistaken," because we can compare what he said to what is depicted in the film. What if, as is usually the case in a real trial, there was no videotape to serve as a check on his testimony?

Maybe the students perceived the defense witness as more credible because he seemed to remember more details, or perhaps because he expressed himself with greater certainty. Empirical studies suggest that witnesses who use a powerful speech style are perceived as being more credible than witnesses who use a powerless speech style. Women generally use a powerless speech style more frequently than men.⁸⁸ A lawyer could use pretrial witness preparation to improve a witness's testimonial style and credibility, and to create a more favorable impression with the

86. The description of the testimony at trial is based on the notes that I took at the time. My notes and the description in the text, of course, reflect additional layers of interpretation.

87. "The safest generalization that can be made from all the research on gender differences [among mock jurors in rape trials] is that female students are more likely than male students to regard the defendant in a rape case as guilty and that males participate at higher rates in deliberations than females." HASTIE et al., *supra* note 59, at 141; *see id.* at 140-42 (surveying empirical research on juror gender). *See generally* THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE (Deborah L. Rhode ed., 1990) (essays on sexual difference by scholars in various disciplines); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987) (interpreting biological and cultural differences between men and women).

88. *See supra* notes 50-51 and accompanying text.

jury.⁸⁹ A lawyer could also educate the jury about the impact of testimonial style on a witness's credibility through arguments to the jury,⁹⁰ or through the use of expert testimony. On the other hand, witness preparation may distort the witness's memory by altering the content of what the witness remembers, or by altering the certainty with which the memory is held. If a lawyer changes the speech style of the witness, does that make the witness simply appear to be more credible to others, or does it change the witness's interpretation?⁹¹

Empirical studies on eyewitness identification indicate that the experience of the attorney has no effect on the ability of mock jurors to distinguish between accurate and inaccurate eyewitness identifications.⁹² The perceived confidence of the witnesses was the major determinant of juror belief, despite the fact that the mock jurors rated the experienced lawyers as having done a better job.⁹³ What are the implications of those studies for rape trials where the identity of the perpetrator is not an issue? There are no "eyewitnesses" to the mental states of the man and the woman in a rape case, or to the other normative issues of rape. The quality of the lawyering might make a difference on the normative issues. Good lawyering might require, for example, creative pretrial preparation, skillful jury selection, and the presentation of expert testimony to place the evidence at trial and the normative issues in the proper social context.⁹⁴

89. See generally O'BARR, *supra* note 50, at 61-75, 127-35 (discussing differences in speech styles of courtroom witnesses). Witnesses who speak in a powerful style, avoid unnaturally formal speech patterns, testify with minimal assistance from counsel, and resist efforts by opposing counsel to cut short their answers may make a more favorable impression on the jury. *Id.* at 113-14.

90. *Id.*

91. See John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 298-304, 308-14, 322-23, 328-34 (1989) (arguing that witness preparation may unwittingly turn skeptical witness into "true believer," causing witness to in effect change testimony); Olin G. Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1081-82 (1991) (arguing that even benign advice regarding demeanor by ethical attorney can occasionally contribute to cognitive distortion).

92. See R.C.L. Lindsay et al., *Mock-Juror Belief of Accurate and Inaccurate Eyewitnesses: A Replication and Extension*, 13 LAW & HUM. BEHAV. 333, 336-37 (1989).

93. Confidence is not a good predictor of accuracy in eyewitness identifications. Mock jurors do no better than chance in distinguishing between accurate and inaccurate eyewitness identifications. *Id.*; Wellborn, *supra* note 91, at 1088-91.

94. Even the minimal guarantees of due process and the effective assistance of counsel under the Constitution may require the assistance of expert testimony to help the jury understand a woman's condition if she is prosecuted for killing the man who raped her. *Cf.* Dunn v. Roberts, 768 F. Supp. 1442 (D. Kan. 1991) (woman convicted of murder, kidnapping, battery and robbery was denied state funds for expert services concerning Battered Woman Syndrome and "a disassociate response" to develop defense that she was under influence and control of co-defendant at time of crimes; denial violated due process and effective assistance of counsel).

4. Who's on the jury?

The students who decided whether the man raped the woman were relatively young women law students who had studied rape, rape reform, feminist perspectives on rape, Rape Trauma Syndrome, rape myths, and problems with the credibility of women. They were politically progressive and came from a variety of racial, cultural and economic backgrounds. Based on my experience as a trial lawyer, and based on the empirical studies on jurors and rape,⁹⁵ I would have predicted that this group of people in the context of this case was ideal for the prosecutor to get a rape conviction. Yet the students unanimously decided that the claim of rape was unfounded based on the testimony. On the other hand, the students did agree that the man raped the woman based on the film clip. A different group of people might not have reached that conclusion. What if individuals like Pauline Kael, Norman Mailer and Richard Schickel were on the jury? What if individuals like Catherine Mackinnon and Andrea Dworkin were on the jury?

The reactions to the film clip suggest that while significant members of this society would be willing to convict a man for doing what the man did in the scene from *Last Tango*, others do not consider what the man did a crime. It is unlikely that a jury consisting of a group of individuals similar to the students would be seated in a rape case at the present time. The process of jury selection may serve as a check on the use of the law to achieve rape reform, regardless of what the criminal law and the rules of evidence say.

The rules of evidence are a child of the jury system, yet we seldom focus on the issues of jury composition and jury selection in evidence courses. We should. We can. Selection strategies depend heavily on the particulars of a specific case, such as the nature of the charge, what the

95. See, e.g., FEILD & BIENEN, *supra* note 38 (empirical study exploring combined effects of various characteristics, including race, physical attractiveness, and moral character of victim; race of defendant; strength of government's case; personal background of jurors; and jurors' attitudes towards women and knowledge about rape, in predicting severity of sentences in simulated rape cases); *id.* at 95-98 (cataloguing empirical literature on extra-evidentiary factors that may affect outcome in rape trials, including juror, victim, defendant and case characteristics); HASTIE et al., *supra* note 59, at 121-23 (suggesting dangers of mechanically applying rules of thumb for jury selection); *id.* at 123-35 (discussing social science methods for systematic jury selection); *id.* at 237 (discussing dangers of overgeneralizing selection strategies); *cf.* *Holland v. Illinois*, 493 U.S. 474, 480 (1990) (Sixth Amendment requires impartial, not representative, jury); David Margolick, *Idea of a Jury of Peers is Questioned*, N.Y. TIMES, Feb. 17, 1992, at A9 (states are beginning to experiment with requiring racial and sexual diversity on juries in criminal cases); David Margolick, *As Selection of Smith Jurors Begins, Focus Is on History of the Kennedys*, N.Y. TIMES, Nov. 1, 1991, at A10 (discussing jury selection and jury consultant in rape trial).

evidence shows, who the witnesses are, who the defendant is, who the lawyers are, and who else is in the jury pool. It is not enough to read about empirical studies on juries in the abstract. We should think about these issues in the context of a particular case.⁹⁶

The preceding sections focused on the contexts in which rape cases arise, independent of the legal definition of rape. What difference does the substantive criminal law make?

III. WAS IT RAPE?

In returning a guilty verdict after seeing the film clip, the students in the seminar were sending several messages: that is not the way they want to be treated when they have sex, that is not the way men should treat women and the criminal law should back them up. Was it rape? How should rape be defined? This section will examine those issues under a traditional definition of rape, under the Michigan rape reform statute and under a radical feminist interpretation of rape. This section will also explore what evidence is relevant under different definitions of rape. Many of the questions throughout this section are not intended as rhetorical questions in a Socratic dialogue. They are the types of questions that would guide a lawyer's investigations in this particular case.

A. A Traditional Definition of Rape

Rape is traditionally defined as penetration, however slight, through the use of force and without the consent of the woman.⁹⁷ The mental state concerning the lack of consent varies from jurisdiction to jurisdiction.⁹⁸ In many jurisdictions, the woman need not actually consent. Mistake as to consent is a defense. Under a subjective standard, the mistake must be honest. Under a criminal negligence standard, the mistake must be honest and reasonable.⁹⁹ Mistake is judged on the basis of the information available to the man. The woman might honestly feel she

96. For example, we can use the documentary *Inside the Jury Room* to discuss jury selection. *Frontline: Inside the Jury Room* (WGBH television broadcast, Apr. 8, 1986). The producers filmed the actual jury deliberations in a prosecution for illegal possession of a handgun. The defendant was a sympathetic person with limited intelligence, and the jury nullified the charge. Although the documentary focuses on the jury deliberations, the case was probably won at the jury selection stage. An experienced trial lawyer can predict how the jury will view that case just by looking at the jurors and reading the background information about each juror that appears on the screen at the beginning of the program.

97. See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 515-40 (1987).

98. See generally Estrich, *supra* note 67, at 1096-1105 (discussing various legal standards).

99. Compare *Regina v. Morgan*, App. Cas. 182 (H.L. 1976) (mistake need only be honest) with *People v. Mayberry*, 15 Cal. 3d 143, 542 P.2d 1337, 125 Cal. Rptr. 745 (1975) (adopting negligence rather than strict liability standard).

was raped, but the defendant is not guilty of rape if the defendant believed the woman consented even under a negligence standard.¹⁰⁰

The acceptable level of force can involve a high level of force.¹⁰¹ Although resistance by the woman is not an element of the offense, whether the woman resisted is relevant to establish force and lack of consent. Whether the woman resisted is also relevant to establish whether any mistake was honest or reasonable.¹⁰²

1. The lack of consent

The exercise makes it possible to explore how consent is and should be defined in a realistically complex context. What constitutes consent: what the woman said, what she did, or the totality of circumstances? Even if consent should be defined so that "no means no," did the woman say "no" in the scene from *Last Tango*? What did "no" mean in that context? Was she crying? What does the evidence show?

The dialogue in the scene is complex and ambiguous. The words are used as symbols in an elaborate and intimate code that is part of the emotional relationship between the man and the woman. Real people frequently talk that way in real life. Would an eyewitness who observed the scene once in real time, and who did not know what was going on, and who did not know that she would be questioned later, or what she would be asked, and who did not know rape or evidence law, listen for the woman to say the word "no," remember in what context the woman said it, and testify about that unambiguously at trial, even if the witness were sincere and unbiased?

One of the strongest arguments that the man raped the woman is that the woman said "no" and cried, but the man went ahead anyway. However, the evidence in the exercise was problematic as to what the woman meant when she said "no." There was conflicting evidence about whether she was crying. The government witness testified that she heard the word "no" at one point. She believed that the woman was resisting because the woman said "no." However, the witness also testified that the woman said "no" when the man asked her if she was afraid. The government witness testified four times that the woman was crying. She

100. See, e.g., *People v. Bledsoe*, 36 Cal. 3d 236, 250 n.12, 681 P.2d 291, 300 n.12, 203 Cal. Rptr. 450, 459 n.12 (1984).

101. See, e.g., *State v. Alston*, 312 S.E.2d 470, 475 (N.C. 1984) (reversing rape conviction despite physical abuse and verbal threats by defendant, undressing of woman against her will and pushing her legs apart to achieve penetration).

102. See, e.g., *People v. Barnes*, 42 Cal. 3d 284, 303 n.19, 304, 721 P.2d 110, 121 n.19, 122, 228 Cal. Rptr. 228, 240 n.19 (1986) (resistance is not element of rape, but may be evidence of nonconsent and mistake).

testified that the woman was crying while the man was thrusting into her. She did not recall when the woman started crying. The defense witness, on the other hand, testified that the man asked the woman if they should open the secret compartment in the floor, and she said "no." The man asked her if she was afraid, and she said "no." The defense witness testified that the woman was not crying. Even if she was crying, what did the crying mean? A woman can consent through her tears, according to the courts.¹⁰³

Setting aside the problems with the witnesses' testimony, what does the film show? What did the woman mean when she said "no" in the context of this scene? "No," don't open up the hiding place? What does the hiding place refer to: the hollow place in the floor, or her body? Does she mean "no," she is not afraid? Not afraid of what? Not afraid of exposing some family secrets? Does "family secrets" refer to what might be in the hiding place in the floor, or does it refer to her body? Does she mean "no," she is not afraid of the man? "No," she is not afraid of anal intercourse? Does she mean "no," she will not repeat what the man wants her to repeat? Does she mean "no," she does not want to have anal intercourse? What about the fact that she stayed in the apartment after he fell asleep, listened to some music with him when he woke up, and is swaying to the music as the scene ends?

Assume that the woman meant she did not want to have intercourse when she said "no." From whose perspective should the meaning of the word "no" be determined: From the perspective of the woman, or the perspective of the man? What evidence is there of what she thought she meant? What evidence is there of what he thought she meant? What does the viewer think she meant? What is the reasonable meaning of the word "no" in the context of this scene? Did the man know that "no" meant "No, I do not want to have anal sex?" What if it never entered his mind? Was the woman crying? Did the man hear the "no" in the context of the crying, and ignore the woman? Or did the man in the scene, like the defense witness, not realize that the woman was crying? If "no" was ambiguous in this context, should the man have asked for clarification? What if it never entered his mind that "no" here was ambiguous?

What legal standard should apply to the consent issue? Did the woman in fact consent? Should consent in fact be required? Should mistake be a defense? What mental state should apply to the consent issue? Was the man's purpose to have intercourse without her consent? Did the man know that "no" meant "No, I do not want to have anal sex?" Was the

103. See, e.g., *Alston*, 312 S.E.2d at 475.

man aware of a risk that the woman did not consent? Did the man make an honest mistake? Did the man make a reasonable mistake? Should the man be criminally liable for negligence?

In the context of rape, arguably, the man should be liable for criminal negligence because of the gravity of the injury, the need for deterrence, and the blameworthiness of the individual who has the capacity and the opportunity to do better, but does not do so. The punishment could be less to reflect the lower culpability. On the other hand, reasonableness is an evolving standard. Should the criminal law be used to redefine what is acceptable behavior between men and women in bed? What about fair warning to the man in times of change—like now?

If negligence is the standard, what does negligence mean? Is it unreasonable for a man to proceed when the woman says, "No, I do not want to have sex?" Many people today believe that it is. Did "no mean no" when *Last Tango* was released in 1972? Is it unreasonable to proceed without clarification when the woman says "no," but the meaning of "no" is ambiguous, as it is here? Is there any obligation on the part of the woman to be clear when she says "no"? "What part of 'no' don't you understand?"¹⁰⁴ Should the man ask and be certain? Does this scene raise the same problems as if the man were claiming, "Her lips said 'no, no,' but her eyes said 'yes, yes' "?

Even under a negligence standard, consent could be defined so that only "yes means yes": a woman must affirmatively consent to the act actually engaged in on a specific occasion. It is unreasonable for a man to have intercourse unless the woman affirmatively consents. Under that standard, the man raped the woman. The man never asked, and the woman never said, whether or how she wanted to have sex. That standard scares the hell out of a lot of men. Is affirmative consent too much to ask? May I have this dance? Would you like to tango? Would you like to make love? Would you like to have anal sex? Society may not want to impose a standard under the criminal law that only "yes means yes."¹⁰⁵

104. I saw that written on a woman's T-shirt at UCLA.

105. See *State v. Lederer*, 299 N.W.2d 457, 460 (Wis. Ct. App. 1980) (although Wisconsin statute defines consent as words or actions indicating freely given agreement to have intercourse or sexual contact, court apparently construed language so that "no means no"); Dana Berliner, Note, *Rethinking the Reasonable Belief Defense to Rape*, 100 YALE L.J. 2687, 2702 n.99 (1991) (prosecutors apparently do not apply standard requiring affirmative consent in Wisconsin); *id.* at 2703 (advocating rebuttable presumption that belief of consent is not reasonable if victim offered verbal resistance, any physical resistance, or cried); see also Toni Pickard, *Culpable Mistakes and Rape: Relating Mens Rea to the Crime*, 30 U. TORONTO L.J. 75 (1980) (advocating criminal negligence regarding consent); Robin D. Wiener, Note, *Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 6 HARV. WOMEN'S L.J. 143,

Under a negligence standard, the jury must decide what is socially reasonable. The jury must decide what is acceptable sexual behavior between men and women. Who's on the jury?

How can a lawyer help the jury understand the values that are reflected in the determination of what is acceptable behavior between men and women, and the social context in which that question arises? That is what experts are for: to educate the jury. For example, Pauline Kael, Norman Mailer and Richard Schickel eroticize the use of women as targets for the sexual aggression and frustrations of middle-aged white men. The critics describe a relationship of male domination and female subordination, but they fail to draw any connection between rape and power.¹⁰⁶ To a radical feminist, that is what rape is all about. An expert could help the jury understand the connections between power, rape and gender domination.¹⁰⁷ An expert could illuminate how images of sex and violence—in films like *Last Tango in Paris*, and in the reviews of that film—reflect and may help shape interpretations of what is acceptable behavior between men and women. An expert could illuminate how stereotypes about gender, race, ethnicity and class affect interpretations of “what really happened.” An expert could help a jury understand the

159 (1983) (advocating standard which requires overt behavior demonstrating consent to sexual contact).

106. The film critics did not watch just one scene from *Last Tango*; they reviewed the entire film. Knowing more about the relationship between the man and the woman could be helpful in deciding whether the man raped the woman. That is a problem with the exercise. The witnesses in the exercise truthfully testified that they had never seen the man and the woman together before, and never saw them again. However, real cases are commonly tried with whatever bits and pieces of evidence are available to interpret an historical event. There might not be any other evidence in a real case if the man and the woman do not testify (although that would be rare). The relationship between the man and the woman would raise interesting issues concerning the relevance of prior sexual conduct. For example, if the woman must affirmatively consent to the act actually engaged in on this occasion, how is the prior relationship relevant? See FED. R. EVID. 412 (admissibility of complaining witness's prior sexual conduct in rape case); 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5382 (1980 & Supp. 1991) (discussing legality and politics of rape); Beverly Balos & Mary Louise Fellows, *Guilty of the Crime of Trust: Nonstranger Rape*, 75 MINN. L. REV. 599 (1991) (exploring assumption that prior relationship between man and woman is relevant to establish consent or mistake); Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 808-12, 903-06 (1986) (sexual history of alleged victim with accused is generally admissible; sexual history of alleged victim with persons other than accused is inadmissible if offered to prove that alleged victim consented, or that alleged victim is lying, but should be admissible for other purposes if relevance does not depend on invidious inference of unchaste character); Leon Letwin, “*Unchaste Character, Ideology, and the California Rape Evidence Laws*,” 54 S. CAL. L. REV. 35, 54-62 (1980) (examining relevance of prior sexual conduct).

107. See, e.g., FED. R. EVID. 702 (expert testimony is admissible if it will help trier of fact to understand evidence or to determine fact in issue).

impact that sexual and racial discrimination have on how people interpret what goes on around them.¹⁰⁸ An expert could illuminate the issues that this Article has tried to illuminate. The use of expert testimony to help the jury understand the social context for rape would go beyond the use of Rape Trauma Syndrome to show the lack of consent, or to explain the woman's subsequent conduct.¹⁰⁹ This use of expert testimony would go beyond dispelling misconceptions about rape.¹¹⁰ This use of expert testimony would help educate not only the jury, but also the lawyers, the judges and the public generally.

Of course, if the government offered such testimony against a man in a prosecution for rape, the defense would object. If the defense offered such testimony in the trial of a woman for killing the man who allegedly raped her, the government would object. The courts could manipulate the admissibility of such testimony.¹¹¹ The question of whether the evidence would help the jury might get lost in the scuffle. Litigating the use of expert testimony for these purposes could take years of litigation on a state-by-state basis.

Should the standard of criminal negligence be described in terms of the reasonable man, the reasonable woman or the reasonable person? The phrasing of the reasonableness standard may be of largely symbolic or rhetorical significance.¹¹² The phraseology should not mask the basic policy issues discussed above. The jury can be asked to decide what is socially reasonable, but the jury should consider the social context in

108. Cf. Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195, 218-20 (1986) (using expert testimony to help jury understand what is socially reasonable and to overcome sex-bias); Patricia A. Tetreault, *Rape Myth Acceptance: A Case for Providing Educational Expert Testimony in Rape Jury Trials*, 7 BEHAV. SCI. & L. 243, 243 (1989) (expert testimony can provide jurors with social framework to evaluate evidence in particular case).

109. See Bridget Clarke, Comment, *Making the Woman's Experience Relevant to Rape: The Admissibility of Rape Trauma Syndrome in California*, 39 UCLA L. REV. 251, 270-87 (1991) (using Rape Trauma Syndrome to prove nonconsent, and to dispel myths about rape).

110. See 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, 1067, 1069-70 (1991) (advocating use of expert testimony to dispel juror misconceptions about rape).

111. See Clarke, *supra* note 109, at 252 n.8, 260-64, 267-70, 283-85 (discussing how courts manipulate admissibility of Rape Trauma Syndrome).

112. Cf. *Ellison v. Brady*, 924 F.2d 872, 879-80 (9th Cir. 1991) (woman's sexual harassment claim under title VII must be evaluated under reasonable woman standard; sex-blind reasonable person standard tends to be male-biased and to systematically ignore experience of women); *State v. Wanrow*, 559 P.2d 548, 558-59 (Wash. 1977) (using reasonable woman standard for self-defense in criminal cases); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1210-14 (1990) (discussing symbolism of reasonable man standard).

which that question is asked. The jury can consider what different people consider acceptable, and why.

Should the issue of consent be interpreted on the basis of the information that is available to the man, or the information that is available to the woman? Evaluating the issue solely on the basis of the information that is available to the woman would make rape a strict liability offense. Not even a reasonable mistake would be a defense. There is only a subtle difference between that standard and a negligence standard defined so that only "yes means yes."

However, a fundamental purpose of the criminal law is to assess the culpability as well as the dangerousness of the defendant. For that reason, if a man is charged with rape, the issue of consent should be evaluated on the basis of the information that was available to the man. That does not entail adopting a "male standard" of behavior.

Are there any situations in which rape should be judged based on the information that is available to the woman? Yes. If the woman is charged with killing the man who allegedly raped her, the woman's culpability and dangerousness would be at issue, not his. The fact that she felt she had been raped would be relevant even if she were not legally raped, as that crime is defined when a man is charged with rape. The fact that she felt she had been raped could serve, for example, to reduce murder to manslaughter, or to establish self-defense.¹¹³ In a prosecution of a man for rape, the government would have to prove beyond a reasonable doubt that the man raped the woman. In a prosecution of the woman, in many jurisdictions it would be enough for the defense to create a reasonable doubt concerning rape.¹¹⁴

In criminal cases, the defendant faces the loss of liberty, and the stigma of being branded a felon. In contrast, in civil cases, the defendant

113. See, e.g., BENNETT & FELDMAN, *supra* note 36, at 179-80 (Joan Little acquitted of killing jail guard who allegedly raped her); Elizabeth M. Schneider & Susan B. Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 WOMEN'S RTS. L. REP. 149, 160-63 (1978) (Inez Garcia acquitted of killing man who allegedly helped rape her); cf. Garcia, *supra* note 67, at 1140 n.332 (mental states in criminal cases are relevant to determine defendant's culpability, level of offense, mitigating circumstances, appropriate sentence and whether act was criminal).

114. Cf. *Martin v. Ohio*, 480 U.S. 228 (1987) (state must prove every element of offense beyond reasonable doubt, but placing burden on defendant of proving self-defense by preponderance of evidence does not violate due process); *Patterson v. New York*, 432 U.S. 197 (1977) (placing burden on defendant of proving extreme emotional disturbance by preponderance of evidence to reduce murder to manslaughter does not violate due process). Washington apparently is the only state that shifts the burden of proof on a consent defense to the defendant when a man is prosecuted for rape. See *State v. Camara*, 781 P.2d 483, 487 (Wash. 1989); Berliner, *supra* note 105, at 2693 n.43.

may be liable for money damages. In a tort suit by a woman against a man for rape, the law could focus on the effect of the man's actions on the woman, rather than on the man's intent or fault. The purpose of the remedy would be to compensate the woman for her injuries.¹¹⁵ Similarly, sexual harassment law under title VII focuses on the effect of the man's actions on the woman, rather than on the culpability of the man. Liability under title VII is not based on fault.¹¹⁶ In civil cases, the woman could prove a rape by a preponderance of the evidence. Thus, an encounter may constitute a "rape" under civil law, but not under the criminal law. These contrasting situations highlight the different values that are at stake in civil and criminal cases, and the importance of evaluating the culpability of the accused in a criminal case, whether the accused is a man or a woman.

Rape law traditionally does not define consent so that "yes means yes." In fact, rape law traditionally does not define consent so that "no means no." Simply getting the criminal law to recognize that "no means no" is one goal of rape reform.¹¹⁷ Getting the criminal law to recognize that only "yes means yes," and to abolish mistake as a defense, are goals of radical feminists.¹¹⁸ That is one difference between liberal feminism and radical feminism. That is one difference between reform and revolution.

115. See, e.g., S. 15, 102d Cong., 1st Sess. § 301, 137 CONG. REC. S608, S610 (daily ed. Jan. 14, 1991) (proposed Violence Against Women Act would create civil cause of action for damages under federal law for crimes of violence motivated by victim's gender, including rape); Ann Pelham & Garry Sturgess, *Domestic Relations in Federal Court?*, LEGAL TIMES, Oct. 21, 1991, at 7 (Judicial Conference opposes proposed bill making federal case out of civil actions for crimes of violence motivated by gender); see also Gail M. Ballou, Note, *Recourse for Rape Victims: Third Party Liability*, 4 HARV. WOMEN'S L.J. 105 (1981) (advocating use of tort remedies for purposes of providing compensation to rape victims and preventing future rapes); Maja Hanks & Laurie Zimet, *Liability for Rape*, in WOMEN & L. (Carol H. Lefcourt ed., 1984) (addressing legal issues which may arise in civil sexual assault suit); Camille LeGrand & Frances Leonard, *Civil Suits for Sexual Assault: Compensating Rape Victims*, 8 GOLDEN GATE U. L. REV. 479, 491-513 (1979) (exploring various tort theories applicable to sexual assault cases); Maureen Balleza, *Many Rape Victims Finding Justice Through Civil Courts*, N.Y. TIMES, Sept. 20, 1991, at A1 (examining cases where women have successfully filed civil suit against rapists, rapists' employers or security companies responsible for maintaining safety).

116. See, e.g., *Meritor Savs. Bank v. Vinson*, 477 U.S. 57, 63-69 (1986) ("hostile environment" sexual discrimination actionable under title VII); *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) (sexual harassment claim must be evaluated from perspective of victim because title VII is aimed at effects of employment practice and not at motivation of co-worker or employer).

117. See, e.g., Estrich, *supra* note 67, at 1127.

118. See *infra* notes 150-79 and accompanying text for a discussion of the perspectives of radical feminists Catherine MacKinnon and Andrea Dworkin.

2. The use of force

What level of force is acceptable between men and women in bed? In more basic terms, did the man make the woman have intercourse? How much force is too much force? Was she afraid of him? Did he do anything to scare her? If the woman did not consent, why is force relevant?

What evidence is there on the use of force? The government witness in the exercise testified that the man did not threaten to hurt the woman, did not threaten to kill her, and did not threaten her in any way. The defense witness testified that the man did not physically threaten or hurt her, and although the man was not gentle, he was not forceful.

Using the language of the California statute as an example¹¹⁹ and focusing on the actions of the man: Did the man use force? Did he use violence? He did not use physical force or violence in the sense of hitting the woman. Did he cause fear of immediate bodily injury? Did he threaten to inflict extreme pain or serious bodily injury? Is the fact that she was crying, or the conflicting testimony on whether she was crying, relevant? Did the man menace the woman? Menace is defined as "any threat, declaration, or act which shows an intention to inflict an injury upon another."¹²⁰ Did he use duress? Duress is defined as a "direct or implied threat of force, violence, danger, hardship, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities."¹²¹ Did

119. CAL. PENAL CODE § 286(a) (West 1988 & Supp. 1992) (sodomy defined as "contact between the penis of one person and the anus of another person"); *id.* § 286(c) (sodomy "against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury . . . or by threatening to retaliate in the future" is punishable by three, six or eight years in prison); *id.* § 261.6 (consent defined as "positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved."); *id.* § 266c (West 1988) (consent procured by false or fraudulent representation with intent to create fear of unlawful physical injury or death); *id.* § 287 (West 1988 & Supp. 1992) ("Any sexual penetration, however slight, is sufficient to complete the crime of sodomy."); *see also id.* § 261(a)(2) (rape defined as "sexual intercourse . . . accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person of another"); *id.* § 261(a)(6) (threat to retaliate in future defined as "a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death"); *id.* § 261(b) (duress defined as "a direct or implied threat of force, violence, danger, hardship, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities"); *id.* § 261(c) (menace defined as "any threat, declaration, or act which shows an intention to inflict an injury upon another"); *id.* § 263 (West 1988) ("The essential guilt of rape consists in the outrage to the person and the feelings of the victim of the rape. Any sexual penetration, however slight, is sufficient to complete the crime."); *id.* § 264 (West 1988 & Supp. 1992) (rape punishable by three, six or eight years).

120. CAL. PENAL CODE § 261(c) (West 1988 & Supp. 1992).

121. *Id.* § 261(b).

the man do any of those things?

Shifting to the actions of the woman: Was the woman subjectively coerced by what the man did? Shifting to a socially reasonable standard: Would a reasonable person of ordinary susceptibilities have been coerced? Is the reasonable person a man or a woman in this context? The existence of duress is to be determined under the totality of circumstances.¹²² The fact that the person is a woman and not a man presumably should be taken into account in deciding what is impermissibly coercive here. Should the inquiry be whether the man engaged in unreasonable behavior to cause the woman to have intercourse? Are social attitudes about sex and violence part of the totality of circumstances?

3. Penetration

The videotape shows circumstantial evidence of penetration. The witnesses testified as to what they saw and heard concerning penetration. However, there is no direct evidence of penetration. In Mailer's words, "there has been no shot of Brando going up Schneider."¹²³ There was in fact no penetration: the sex was simulated.

Penetration is an essential element that the government must prove beyond a reasonable doubt. Radical feminists have attacked the emphasis on penetration in intercourse and in rape law. Penetration is problematic for a number of reasons. The witnesses in the exercise were embarrassed and reluctant to talk about whether they had actually seen the man's penis penetrate the woman's anus. The lawyers were embarrassed to ask. The other students were embarrassed to hear the questions and answers. A woman who has been raped may find it humiliating to talk directly about penetration during the investigation and trial. The government may feel that it is necessary to gather and offer additional evidence of penetration, such as evidence of lacerations or sperm found in the woman. Why is penetration the focus of intercourse and rape? Would a woman be injured if a man achieved sexual contact but not penetration? If she were, would it be enough to prosecute the man for assault and battery? Should penetration be an essential element of the crime of rape? Should sexual contact be enough, as it is in some rape reform statutes?¹²⁴ It is one thing to read about these issues. It is some-

122. *Id.*

123. Mailer, *supra* note 19, at 203.

124. *See, e.g.*, MICH. COMP. LAWS ANN. § 750.520a(k) (West 1991) (sexual contact defined as intentional touching of victim's intimate parts if touching can reasonably be construed as being for purpose of sexual arousal or gratification); *id.* § 750.520c(1)(f) (second-degree criminal sexual conduct when force or coercion used to achieve sexual contact and personal injury)

thing else to experience first hand some of the problems raised by the penetration requirement, as the students did in the exercise.

On a less emotional level, the need to prove penetration illustrates the relationship between "what really happened," the evidence, the elements of the offense and proof beyond a reasonable doubt; the process of drawing inferences from the evidence to the ultimate issues; the difference between circumstantial evidence and direct evidence; the questions relevant on direct examination to establish each element of the offense beyond a reasonable doubt; and the questions relevant on cross-examination to create a reasonable doubt. This looks like penetration, but it is not. The film clip makes it possible to grasp those issues at an experiential level, rather than at an abstract intellectual level.

B. Rape Reform Legislation

Feminists and law enforcement interests have achieved substantial and widespread changes in rape laws over the past fifteen years.¹²⁵ What difference does rape reform make in this particular case? This section will focus on the Michigan rape reform statute,¹²⁶ and on Susan Estrich's proposals for further reform.¹²⁷

1. The Michigan statute

The Michigan statute is not a radical departure from the traditional model of rape as intercourse through the use of force and without consent. Whether the man in *Last Tango* is guilty remains problematic. Under the Michigan statute, the crime is called criminal sexual conduct (CSC) rather than rape. The statute defines criminal sexual conduct in the first, second, third and fourth degrees.¹²⁸ The essential inquiries under the Michigan statute are four: (1) Did the man use force or coercion? (2) Did the man cause personal injury to the victim? (3) Did the man penetrate the woman? (4) Did the man have sexual contact with the woman? In addition, although the statute does not make the lack of con-

results); *id.* § 750.520e(1)(a) (fourth-degree criminal sexual conduct when force or coercion used to achieve sexual contact).

125. See Carole Goldberg-Ambrose, *Unfinished Business in Rape Law Reform*, 48 J. Soc. ISSUES (forthcoming May 1992; manuscript on file with author) (summarizing rape law reforms and research findings on impact of those reforms). Carole Goldberg-Ambrose concludes that "we have insufficient and conflicting information about the difference these laws make for victims, for the criminal justice system, and for the treatment of women generally." *Id.* at 23-24.

126. MICH. COMP. LAWS ANN. §§ 750.520a-m.

127. See *infra* notes 139-48 and accompanying text.

128. MICH. COMP. LAWS ANN. §§ 750.520b-e.

sent an element of criminal sexual conduct, the courts have recognized consent as a defense under the statute.¹²⁹

Did the man use an unacceptable level of force or coercion in the scene from *Last Tango*? Arguably not. The man did not engage in the behavior that is expressly forbidden under the statute. The man probably did not "overcome" the woman through the use of physical force or physical violence.¹³⁰ He did not threaten to use force or violence.¹³¹ He did not threaten to punish, kidnap or extort the woman.¹³² He did not overcome the woman through concealment or surprise.¹³³ He was not armed with a weapon.¹³⁴ Although force or coercion is not limited to those enumerated circumstances,¹³⁵ it is not clear what actions by the man would constitute force or coercion.

Did the man cause personal injury to the woman? Mental anguish constitutes personal injury under the statute.¹³⁶ Arguably, the fact that the woman cried would support an inference that she suffered mental anguish—but whether she cried was the subject of conflicting testimony. Did the man achieve penetration or sexual contact? Sexual contact is defined as the intentional touching of the victim's intimate parts if that touching can reasonably be construed as being for the purpose of sexual arousal or gratification.¹³⁷ The man appeared to be sexually aroused and gratified: he appeared to have an orgasm (although that was simulated, like the penetration). Whether the man in *Last Tango* used force or coercion, whether the woman consented, how consent is defined, and therefore whether the man is guilty of a crime remains problematic under the Michigan statute.¹³⁸ Does that mean the man should not be guilty of rape, or does that mean the Michigan reforms did not go far enough?

129. See *People v. Thompson*, 324 N.W.2d 22 (Mich. Ct. App. 1982); *People v. Hearn*, 300 N.W.2d 396 (Mich. Ct. App. 1980).

130. MICH. COMP. LAWS ANN. § 750.520b(1)(f)(i).

131. *Id.* § 750.520b(1)(f)(ii).

132. *Id.* § 750.520b(1)(f)(iii).

133. *Id.* § 750.520b(1)(f)(v).

134. *Id.* § 750.520b(1)(e).

135. See *id.* §§ 750.520b(1)(f), .520c(1)(f), .520d(1)(b), .520e(1)(a).

136. *Id.* § 750.520a(j).

137. *Id.* § 750.520a(k).

138. If the man caused personal injury to the woman and he used force or coercion to achieve penetration, that constitutes CSC in the first degree. *Id.* § 750.520b(1)(f). If the man caused personal injury to the woman and he used force or coercion to achieve sexual contact, that constitutes CSC in the second degree. *Id.* § 750.520c(1)(f). Even if the man did not cause personal injury to the woman, he could be guilty of CSC in the third degree if he achieved penetration through force or coercion, *id.* § 750.520d(1)(b), or CSC in the fourth degree (a misdemeanor) if he achieved sexual contact through force or coercion, *id.* § 750.520e(1)(a).

2. "Real rape"

Susan Estrich criticizes extensively the reasoning of traditional rape cases and the wording of rape reform statutes, and describes some proposals for further reform.¹³⁹ According to Estrich, consent should be defined so that "no means no."¹⁴⁰ Criminal negligence regarding consent should be enough to establish criminal liability for rape.¹⁴¹ Negligence means ignoring a woman's words.¹⁴² Reasonable men know that "no means no." Society has not yet reached a point where consent should be defined so that "yes means yes," so that the woman must affirmatively consent to the act actually engaged in.¹⁴³ Unlike radical feminists, Estrich is not willing to use the criminal law to lead society to that point. In addition, the force or coercion that negates consent should be defined to include extortion and deception.¹⁴⁴ The law of rape should prohibit exactly the same threats as the law of extortion, and the same deceptions as the law of false pretenses or fraud.¹⁴⁵ That is Estrich's "easy answer" to difficult hypotheticals: resolve the question as if money were involved.¹⁴⁶ "Real rape" includes nontraditional rapes where the woman says "no," or submits only in response to lies or threats that would be prohibited if the man were seeking money.¹⁴⁷

What did "no" mean in the scene, based on the witnesses' testimony? Based on the videotape? If the man in the scene reached into the woman's pants and took some cash, would that be theft by extortion or deception? I think not.¹⁴⁸ I think therefore that the man did not rape

139. Estrich, *supra* note 67, at 1102-05, 1117-21, 1147-57, 1179-84; see also SUSAN ESTRICH, REAL RAPE 92-104 (1987) [hereinafter ESTRICH, REAL RAPE].

140. Estrich, *supra* note 67, at 1182.

141. *Id.* at 1182-83.

142. *See id.*

143. *Id.* at 1182.

144. *See id.* at 1183.

145. *Id.* at 1182.

146. *Id.* at 1182 n.334.

147. *See* ESTRICH, REAL RAPE, *supra* note 139, at 102-04 (summarizing her views of what constitutes "real rape").

148. The man did not create, reinforce or fail to correct any false impressions, fail to disclose any relevant information, or prevent the woman from acquiring any information. *See* MODEL PENAL CODE § 223.3 (1980) (theft by deception). The man did not make any threat of bodily injury, accusation, exposure, official action, lawsuit or other harm that would not benefit the man. *See id.* § 223.4 (theft by extortion). As an Assistant United States Attorney, I served in the Public Corruption Unit, and investigated and prosecuted extortion and bribery cases. I would not prosecute the man for theft by extortion or deception. *Cf.* 18 U.S.C. § 201 (1989) (bribery); *id.* § 872 (extortion); *id.* § 873 (blackmail); *id.* §§ 1961-1963 (racketeering influenced corrupt organizations); *id.* § 1961(1) (extortion); Robert García, *RICO and the Constitution*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 417 (Leonard W. Levy et al. eds., Supp. I 1992).

the woman. Under Estrich's self-proclaimed easy approach to hard questions, the scene may not depict a "real rape."¹⁴⁹ Is that approach satisfactory? Does the act of taking money from a woman by a man occupy the same role in society that intercourse does? Where does Estrich's approach leave women who feel raped, but who do not fit within her construct of "real rape"?

C. Radical Feminists

Radical feminists Catherine MacKinnon and Andrea Dworkin address the significance of sex and violence in the context of power, inequality, domination and subordination based on gender.¹⁵⁰ For MacKinnon, sexuality is socially created under conditions of male power and gender inequality.¹⁵¹ The sexuality of male dominance and female subordination is defined by men and forced on women, and defines the meaning of gender.¹⁵² Sexuality becomes centered on penetration and ejaculation.¹⁵³ Domination and submission are eroticized. Men are socialized to be sexually aggressive, and women to be passively receptive.¹⁵⁴ The objectification of women—defining women as things for sexual use by men—becomes fundamental to the meaning of sex.¹⁵⁵ It can be difficult to distinguish between sex, rape and violence in specific cases because many women experience everyday sex as violence under conditions of male supremacy.¹⁵⁶ Feminist theory addresses that situation in order to change it.¹⁵⁷

According to MacKinnon, rape law fails to expose this underlying social structure of male dominance.¹⁵⁸ Rape and the meaning of a sexual encounter are defined from a male perspective.¹⁵⁹ The issues of force and consent are analyzed as if the woman exercised freedom of choice under conditions of equality. The consent standard requires only passive consent, and there need not even be actual consent or nonconsent.¹⁶⁰ Mis-

149. See Estrich, *supra* note 67, at 1182 n.334; ESTRICH, REAL RAPE, *supra* note 139, at 102-04.

150. DWORKIN, *supra* note 21, at 121-43; CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 126-54, 171-83 (1989).

151. MACKINNON, *supra* note 150, at 127-33.

152. *Id.* at 128-29, 131, 137.

153. *Id.* at 133, 172.

154. *Id.* at 135, 177-78.

155. *Id.* at 140-41.

156. *Id.* at 146, 174, 177.

157. *Id.* at 128.

158. *Id.* at 174-75.

159. *Id.* at 150, 180-83.

160. *Id.* at 149, 150, 174-78.

take measured from a male perspective is a defense.¹⁶¹

Measuring consent under a socially reasonable standard can perpetuate male domination if the perspective of women is ignored.¹⁶² One must recognize that socially reasonable behavior is itself socially created under conditions of gender inequality.¹⁶³ One must ask to whom the conduct is reasonable, and why.¹⁶⁴ "What really happened" does not objectively exist, or cannot be objectively determined.¹⁶⁵ There are only interpretations of what happened, and those interpretations are shaped under conditions of gender inequality.¹⁶⁶ The different interpretations of the scene from *Last Tango* illustrate these points.

MacKinnon would inquire into the meaning of the encounter from a woman's point of view.¹⁶⁷ From MacKinnon's perspective, rape is an act of subordination of women to men that expresses and reinforces women's inequality.¹⁶⁸

It is not clear what follows from MacKinnon's statement of the problem. One possibility is that the crime of rape would be defined as any act of intercourse by the man that subordinates the woman and expresses and reinforces her inequality. Mistake would not be a defense. The feelings of the woman, or perhaps of a "reasonable woman," could be relevant in defining the crime: Did the man do anything to make the woman feel subordinated, unequal and raped? Did she feel raped? Would a reasonable woman in the victim's situation feel subordinated, unequal and raped? Under such an approach, arguably the man raped the woman in the scene from *Last Tango*.

MacKinnon, however, does not seem to go that far. Instead, she maintains that rape should be defined as sex through compulsion (whatever that means).¹⁶⁹ Lack of consent should not be a separate element of the crime because it is redundant.¹⁷⁰ Mistake concerning consent should not be recognized as a defense, because it takes the male point of view on sex and violence.¹⁷¹ Whether the man compelled the woman to have intercourse in the scene remains problematic: what evi-

161. *Id.* at 181-83, 245.

162. *Id.* at 180-81.

163. *Id.* at 183.

164. *Id.*

165. *Id.* at 180-83.

166. *Id.*

167. *Id.* at 182.

168. *Id.*

169. *Id.* at 245.

170. *Id.*

171. *Id.* at 245-46.

dence is there that the man used compulsion? MacKinnon's insights regarding power, context and interpretation nevertheless are powerful tools for understanding sex and violence.

For Dworkin, rape is also about power and male dominance.¹⁷² Rape is not just the abuse of women through violence, threats or fear. Rape is simultaneously an abuse and a normal use of women under conditions of male domination.¹⁷³ Women are socialized to become objects of male sexual desire, to become "the thing he wants to fuck."¹⁷⁴ Sex is defined by what men want: intercourse as penetration and occupation of subordinated women.¹⁷⁵ Consent in this context is meaningless.¹⁷⁶

Is all intercourse rape? No. Dworkin leaves open the possibility that intercourse could be an experience of equality, passion, sensuality and intimacy if the woman controlled each and every act of sex, if the woman initiated sex, and if the woman were the final authority on what the sex would be.¹⁷⁷ Intercourse could take place under conditions of freedom, dignity and self-determination if penetration were just one possible sex act among many entered into by equals as part of other, deeper, longer, more sensual lovemaking; or if the social structure reflected the low value of penetration in the sexual pleasure of some women like Dworkin; or if new technologies freed intercourse from reproduction.¹⁷⁸

Dworkin's standard goes far beyond "no means no." The goal of rape reform is to stop the sexual abuse of women. The goal of radical feminism is to stop the normal use and abuse of women as sex objects under conditions of male domination. Dworkin's standard opens up new lines of relevant inquiries into the scene from *Last Tango*. The woman did not initiate the act of intercourse, she did not control that act, and she was not the final authority on what the act would be or was. The act did not take place under Dworkin's ideal conditions of love, equality and control. Does that mean the man raped the woman?

What's love got to do with it? Do only women want the kind of love that Dworkin seeks? Many people—men and women—seek that kind of love. Do all women want that kind of love? Does everybody want that kind of love every time they have sex? Many people are not prepared to classify the failure to make love as rape. Many people are not prepared

172. DWORKIN, *supra* note 21, at 121-43.

173. *Id.* at 122, 125.

174. *Id.* at 140.

175. *Id.* at 123-24.

176. *Id.* at 129.

177. *Id.* at 135-36.

178. *Id.* at 138-39.

to use the criminal law to force individuals to live up to the highest standards of virtue in this society.

Nevertheless, Dworkin's and MacKinnon's seemingly radical views cannot be dismissed as simply utopian, repressive or man-hating. Dworkin, like MacKinnon, illuminates the injury of rape to a woman's humanity, equality and self-determination. In a humane sexuality, men and women would treat each other with mutual respect and dignity.

The criminal law is not the only tool for achieving social change. Other tools are available to impose standards of behavior that currently fall below criminal negligence. Campaigns to educate the public could go beyond redefining consent so that "no means no." Civil suits for damages, rather than the criminal sanction, could also be used to begin to change people's attitudes about sex and violence. Women could act collectively to change the conditions under which they have sex¹⁷⁹—and men could join them. Perhaps in those ways a humane sexuality will be incorporated over time into what society considers acceptable behavior between men and women in bed, and into the standard of criminal negligence.

IV. CONCLUSION

Did the man rape the woman?

179. See Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 432 & n.206 (1984) (suggesting sex strike by women to change social conditions of sexuality).

APPENDIX

The following is a transcript of the scene from *Last Tango in Paris*:¹⁸⁰

- WOMAN: *Tu es la?*
 Nobody here? *Il y a personne?*
 Hi, monster. *Salut, monstre.*
 Something wrong? *Ca va pas? Tu as des
 problemes, hmm?*
- MAN: There's some butter in the kitchen.
- WOMAN: So you're here. Why didn't you answer?
- MAN: Go get the butter.
- WOMAN: I have to hurry. I have a cab downstairs waiting.
- MAN: Go get the butter.
- WOMAN: It makes me crazy, that you're so damn sure that I'm
 coming back here.
 What do you think? *Qu'es ce que tu crois, toi?*
 That an American on the *Qu'un Americain, assis par
 floor terre,*
 in an empty house . . . *dans un appartement vide,*
 eating cheese *a manger du fromage et a*
 and drinking water *boire de l'eau,*
 . . . is interesting? *tu crois que c'est
 interessant?*
- What's under here? *Il y a quelque chose la-
 dessous.*
- An empty space. *Tu entends? Il y a un*
 Can your hear it? *vide.*
 It's hollow.
- MAN: Yeah. Maybe it's a hiding place.
- WOMAN: Don't open it.
- MAN: Why not?
- WOMAN: I don't know. Don't open it.

180. The following is a fair and accurate transcript of the dialogue in a home video version of *Last Tango*. The dialogue in the video and in this transcript is different from the dialogue in the published screenplay. In addition, some of the stage directions and other descriptions in the screenplay are inconsistent with the video. The screenplay thus represents yet another interpretation of the scene. See *supra* notes 61-67 and accompanying text; BERTOLUCCI & ARCALLI, *supra* note 8, at 128-33. The author's secretary, Jean-Paul Dervaux, a native French speaker, transcribed the scene and compared this transcript to the video. The translation from the French appears in subtitles in the film.

MAN: What about that? Can I open that? Hm? Wait a minute. Maybe there's jewels in it. Maybe there's gold. You afraid?

WOMAN: No.

MAN: No? You're always afraid.

WOMAN: No but, maybe there is some family secrets inside.

MAN: Family secrets? I'll tell you about family secrets.

WOMAN: *Qu'es ce que tu fais?*

MAN: I'm going to tell you about the family. A holy institution, meant to bring virtue in savages. I want you to repeat it after me.

WOMAN: No, no. No.

MAN: Repeat it. Say it. Holy family. Come on, say it. Go on. Holy family, church of good citizens.

WOMAN: Church. Chu—

MAN: Good citizens.

WOMAN: Good citizens. Aahh.

MAN: Say it. Say it. The children are tortured until they tell their first lie.

WOMAN: The children are tortured . . . Aahh.

MAN: And the will is broken by repression.

WOMAN: And the will is broken [unintelligible].

MAN: With freedom.

WOMAN: With freedom.

MAN: Is . . .

WOMAN: Freedom.

MAN: Is assassinated. The freedom is assassinated by [unintelligible].

WOMAN: [Unintelligible].

MAN: Fa—, family.

WOMAN: Family.

MAN: You. You. You. You f—. You fucking. You fucking family. Aah. You fucking family. Oh, god. Jesus. Oh you. Oh. Oh, god. Aahh.

WOMAN: *Eh, merde.*

A, you. Yes, you.

MAN: Huh?

WOMAN: I've got a surprise for you.

MAN: What?

WOMAN: I've got a surprise for you.

MAN: That's good. I like surprises. What is it?

WOMAN: Music, but I don't know how to work it.

MAN: Did you enjoy that?