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Volume 35
Number 3 *Symposium—At the Crossroads of
Law & Technology: Third Annual Conference*

Article 4

4-1-2002

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Samuel H. Pillsbury

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Samuel H. Pillsbury, *Crimes against the Heart: Recognizing the Wrongs of Forced Sex*, 35 Loy. L.A. L. Rev. 845 (2002).

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CRIMES AGAINST THE HEART: RECOGNIZING THE WRONGS OF FORCED SEX

*Samuel H. Pillsbury**

"I guess I just thought you wanted it I guess I just thought you were the kind of person that, whatever, that it would be okay. . . . [Y]ou have sex with a lot of people And I just thought you wanted it."

"Didn't you hear me say no? . . . Didn't you understand?"

"Yeah, I heard you I kind of knew, but I just sort of wanted to do it anyway."¹

"I told him to stop—maybe he didn't hear me. . . . "I didn't hit him or anything. I was so scared I didn't know what to do. And plus I started crying a little bit and he shouted, 'Shut up!' Right? And I thought, Oh gosh, he's gonna break my leg, or he's gonna break my arm. 'Cause he was a lot bigger than me. So I said, 'Okay.' But I didn't fight, I didn't scratch, and I didn't scream to the top of my lungs and stuff like that. At first I didn't even know it was rape. . . . I just didn't want to hear it. . . . I don't know if I can ever think of myself as a [rape] survivor. . . . I guess

* Professor of Law, Loyola Law School, Los Angeles, California. My thanks to Katharine Baker, Paula Mitchell, and Andrew Taslitz for their comments on earlier drafts, to Anne Coughlin for an extended electronic dialogue on related topics, to the participants of a faculty workshop at Loyola Law School, to the Escuela de Derecho, Universidad de Chile, Santiago, Chile for a congenial space to work during my sabbatical, and to research assistants Simone Schiller, Evelyn Solis, and Suzy Snyder for their help.

1. Lisa Gerson, *Rape at Harvard*, BOSTON, Aug. 1999, at 103, 153 (account of a conversation between a young man and woman at Harvard, concerning an incident in which the man forced the woman to have sexual intercourse).

*because it was 'date rape.' It's like something will happen—the walls will crumble—if I say the word. Even though I've heard many people confirm it and say that what happened to me was date rape, there's still a part of me who's not sure if it was. I always wish that there could be at least one day that goes by when I don't think about it."*²

Famed neuroscientist, V.S. Ramachandran, reports the following case from his practice: A young man suffered serious head injuries in a car crash. He appeared to make a full recovery except for one disturbing mental deficit. He could not recognize familiar persons or places. He engaged in heated arguments with his parents, claiming that they were impostors. He said that they looked like his mother and father but they were not his parents. Of this he was quite sure.³

Dr. Ramachandran developed a physiological diagnosis for this condition. The man had suffered damage to the part of the brain that connects the amygdala, where emotional sensations originate, and the temporal lobes, where image processing takes place. As a consequence, the young man could recognize the likeness of his parents, but that recognition triggered no feeling. Because he felt nothing when he saw his "parents," he had to conclude that they could not, in fact, be his parents. In a struggle between emotional and intellectual faculties, emotions won.⁴

As a society, we experience a similar problem with respect to acquaintance rape. In the last generation, we developed a new legal and moral appreciation of the wrongs of sexual coercion, even between acquaintances. Yet we experience great difficulty in identifying particular instances of forced sex. Episodes of sexual coercion between acquaintances tend to be categorized as "bad sex" or "bad romance" rather than serious criminal wrongs. There exists a troubling and persistent gap between our formal understanding of sexual wrongdoing and actual recognition of such wrongs when they

2. CHARLOTTE PIERCE-BAKER, SURVIVING THE SILENCE: BLACK WOMEN'S STORIES OF RAPE 98, 103-04 (1998) (giving the account of a young woman who, at the age of fifteen, was raped by a young man following consensual foreplay).

3. See V.S. RAMACHANDRAN & SANDRA BLAKESLEE, PHANTOMS IN THE BRAIN 158-61 (1998).

4. See *id.* at 166.

occur. Our intellectual and emotional understandings of rape and romance are at odds.

Society formally condemns the use of force against another to obtain sex and does so without regard to any previous social relationship between those involved. As a matter of law, this is rape. Yet incidents of acquaintance rape are common and prosecutions rare. Surveys consistently show that many girls and women are forced to have sex by boys and men with whom they have a social relationship.⁵ Most of these assaults go unreported; the vast majority

5. Exactly how prevalent are sexual assaults involving acquaintances remains a matter of considerable debate. For an excellent review of the debate and essential studies on the issue, see MARK COWLING, *DATE RAPE AND CONSENT* 38-80 (1998). A number of surveys have been conducted in the last twenty years with different methodologies on different populations, producing significant variations in results. All have revealed a very significant problem, with incidents of acquaintance rape and sexual assault far in excess of reported rates. See e.g., IDA M. JOHNSON & ROBERT T. SIGLER, *FORCED SEXUAL INTERCOURSE IN INTIMATE RELATIONSHIPS* 35-49 (1997) (summarizing research on prevalence and incidence).

A study published in 1998 revealed that 18% of women surveyed had suffered an incident of actual or attempted forcible vaginal, oral, or anal intercourse. See PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, *PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 3* (1998). A study published in 1992 indicated that 13% of all females at some point in their life, suffered forcible sexual penetration or forced oral sex. See NAT'L VICTIM CTR., *RAPE IN AMERICA: A REPORT TO THE NATION 2* (1992). Only 22% of these attacks were by strangers. See *id.* at 4. In another study, focusing on sexual experience, 22% of women reported having been forced to engage in some sexual act, with the overwhelming majority of such acts by men with whom they had either a close personal relationship or were social acquaintances. See EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 335-38 (1994). Only 2.8% of men in that survey, however, reported ever forcing women to engage in a sexual act. See *id.* The figure reported for women is consistent with the results of a number of other studies. See, e.g., Mary P. Koss, *Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education*, in *RAPE AND SOCIETY: READINGS ON THE PROBLEM OF SEXUAL ASSAULT* 35, 42-46 (Patricia Searles & Ronald J. Berger eds., 1995).

A consistent feature of modern surveys concerning forced sex is a significant disparity between the rate at which women report suffering coerced sex and the rate at which men report committing it. Indeed, surveys consistently reveal that women report experiencing forced sex at higher rates than men report using force. See JOHNSON & SIGLER, *FORCED SEXUAL INTERCOURSE IN INTIMATE RELATIONSHIPS*, *supra*, at 42-43; Katharine K.

of perpetrators go unpunished.⁶ In many cases, no one (including the victim) labels what has happened a crime. When it comes to sexual assaults between acquaintances, we often do not recognize the wrong.

Nonrecognition comes in many forms. Men who use force to obtain sexual gratification from social partners may admit violating the rules of romance, but heatedly deny any criminal wrongdoing. Meanwhile female victims often blame themselves for provoking the man's conduct or putting themselves in a vulnerable position. And they often deny the extent of the wrong done to them. Similarly, third parties asked to judge the incident go through a variety of psychological and forensic maneuvers to avoid labeling what occurred in a quasi-romantic setting as criminal.

What links these forms of nonrecognition is the assumption that ordinary sexual interaction—romance—is fundamentally distinct from rape. For many people this distinction shapes their emotional constructs of rape and romance, the paradigmatic ideas upon which intuitive, emotional reactions are based. Many still assume that rape involves dramatic violence, usually committed by a malevolent stranger, while romance involves the interactions of two persons with a preexisting social relationship who engage in activities commonly associated with courtship. Confronted with an incident in which the man does not use dramatic force and in which the overall pattern of interaction was consistent with that of courtship, many read an incident of forced sex between social acquaintances as bad romance rather than rape. Because the incident does not fit the emotional

Baker, *Text, Context, and the Problem with Rape*, 28 SW. U. L. REV. 297, 303 (1999); Koss, *Hidden Rape*, *supra*, at 40-42, 47.

There are a number of possible explanations for the disparity between men and women in reporting forced sex, including that, even in a purportedly anonymous survey, men do not wish to admit such conduct. It is also likely, however, that much of the disparity stems from sincere differences in perception—that some men do not realize the extent to which they force sex on their partners. A similar disparity appears in surveys of sexual pleasure. Women report experiencing less pleasure in sex than men believe they experience. This disparity may be traced in part to a different, though not necessarily unrelated, phenomenon by which women—especially young women—may report more pleasure to their partners than they in fact experienced because of relationship-oriented reasons. See MICHAEL S. KIMMEL, *THE GENDERED SOCIETY* 221-22 (2000).

6. On low reporting, see Koss, *Hidden Rape*, *supra* note 5, at 44.

construct of rape, it does not trigger the horror that we expect rape incidents to inspire. Without this emotional reaction the person presumes that what happened—however unfortunate—cannot be classified as a serious criminal wrong.

In this paper, I take up the project that feminists began a generation ago of trying to alter our social understanding of rape. But I contend that we need a change of direction; we need to revise the earlier feminist conception of rape as a crime of violence. Although the violence conception has done enormously important social, political, and legal work—indeed the current undertaking would be unimaginable without it—it presents significant problems with respect to recognizing the wrongs of forced sex. As popularly understood, the violence conception may actually reinforce traditional views of rape and romance. In order to change these traditional views, we must place more emphasis on the sexual motivations of perpetrators and the spiritual injuries of victims, which stem from the sexual nature of the assault.

This paper departs somewhat from the usual concerns of legal scholarship about rape. It focuses neither on legal doctrine nor the theories of wrong and responsibility that shape legal doctrine. Instead, it takes up the essentially lawyerly task of seeking arguments to persuade skeptics about the reality of forced sex. I seek ways of attacking the obstacles to recognition of wrong in common emotional constructs of rape and romance. Instead of analyzing appellate cases, statutes, jury instructions, and legal theory, I examine common patterns of forced sex and interpretations of such incidents. Using the persistent patterns of nonrecognition evidenced by the words and actions of perpetrators and those who defend them, as well as of victims and third parties who must judge such incidents, we may identify the working concepts—the emotionally embodied notions of rape and romance—that shape judgments of sexual wrongdoing between acquaintances and that make so many people so resistant to recognition of serious wrong.

I choose this focus not because work on legal doctrine or relevant principles of moral and legal responsibility is unimportant. Such work is in fact vital to reform. But it is not enough. In attempting to change attitudes as complex and deeply rooted as our understanding of sexual wrongdoing in romantic and quasi-romantic contexts, we need to acknowledge the importance of understandings

that operate under the surface of formal dialogue. Dormant during general discussions of right and wrong conduct, these understandings function as powerful background influences on the assessment of particular incidents.⁷

The argument proceeds in five parts. In Part I, I set out the basic nature of the project, defining its aims, methods and limits. My aim is to reach those skeptical of forced-sex allegations, to persuade them that their reluctance to condemn perpetrator conduct is unjustified. This requires a close examination of the paradigmatic concepts of rape and romance that shape many persons' emotional reactions to particular incidents.

In Part II comes an overview of nonrecognition: the extent to which perpetrators, victims, and society at large each fail to recognize the wrongs of forced sex. Despite years of critique, the simplistic traditional paradigms of rape and romance still powerfully influence the interpretation of particular incidents. Many still associate rape with a man's sudden and violent attack on a woman with whom he has no social relationship. Many still presume that any sexual interaction that occurs between social acquaintances, in romantic or quasi-romantic settings, should be treated under the rules of romance and not criminal law.

Part III opens with an exploration of rival conceptions of rape and romance: the traditional and the modern. We see how reformers have developed a concept of rape as a crime of violence in order to combat the victim blaming and other negative tendencies of traditional, more sexualized views of rape. Unfortunately, this effort has proven more successful for stranger rapes than acquaintance attacks. Indeed, an insistence on the violence of rape may exacerbate problems of nonrecognition of forced sex because, for many people, the conflict between the parties in such cases seems to be far more about sex than about violence. This emphasis on the sexual aspects of the incidents represents both a problem and an opportunity. I

7. On the significance of culture in shaping the law rather than formal legal structures, see David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 478-79 (2000); Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 TEX. J. WOMEN & L. 41, 42 (1993); Kim Lane Scheppelle, *The Re-Vision of Rape Law*, 54 U. CHI. L. REV. 1095, 1111-16 (1987) (book review). Of course, there is an important sense in which culture and law are inextricably intertwined, with influences always going in both directions—cultural change affecting the law, and legal change producing cultural change.

suggest that we may be able to use this reading of the cases as the basis for a reconceptualization of rape. We just need to find a way to link the violation to the sexual aspects of interaction.

We begin the reconceptualization effort by listening to victims of stranger rape speak of their injury. Because there is little controversy concerning the traumas suffered by such victims, their experience provides a useful starting place for the larger argument about the wrongs of rape. Such victims tell us of the connection between hurt to the sexual parts and injury to the spirit. This allows us to understand rape as not simply a violent act causing trauma, but as a crime against the spiritual self. We hear similar themes in the accounts of victims of forced sex, with a particular emphasis on the harms done to the person's ability to make intimate connections with others. Thus I argue that forced sex should be considered a crime against the heart.

Continuing in our effort to build an alternative conception of wrong, in Part IV we proceed to the voices of male perpetrators to examine the question of the motive behind forced sex. By examining the particulars of several cases and by comparing these with general characteristics of male sexuality, we see how forced-sex incidents may have primarily sexual meanings for the men involved. Sexual desires and expectations appear to inspire and justify the use of force in intimate encounters for many perpetrators, and are key points for those who defend them against moral and legal condemnation. This means that recognition of the wrong requires an appreciation for the way in which ordinary male sexual desire can motivate sexual violence.

The paper concludes with a look at the major obstacles to attitudinal change. We find that the sexual understanding of acquaintance rape challenges the feminist emphasis on violence, leading to concerns about a return to patriarchal views of sexual responsibility. The proposed approach also challenges a number of important aspects of traditional male and female sexual identity. It requires a reworking of masculinity and femininity norms. Perhaps most seriously, the sexual understanding urged here threatens ideals of romance and our own sense of security. We want to associate sex with love and romance and all that is good in human intimacy; we want to keep it free of perversion by violence, especially violence by potential romantic partners. This, more than anything else, explains

why we do not recognize what our eyes present, why we do not hear what our ears report.

I. THE CHALLENGE OF NONRECOGNITION

To have a meaningful discussion of an issue, all parties to the controversy must articulate their views. Without a candid presentation of rival ideas, there is little chance that anyone will change his or her mind. In the last twenty years, our society has engaged in extended discussion of acquaintance rape but candor has often been lacking. Reading the voluminous literature on acquaintance rape, one is sometimes reminded of a political debate in which one of the main candidates has decided not to appear. Anti-rape reformers argue vigorously for change. They may disagree about reform methods and theories of wrong, but not about the need for more vigorous reporting, prosecution, and punishment of forced sex.⁸ With only a few exceptions, no one argues to the contrary.⁹ Yet reformers all agree that there is serious opposition to such a program.

The opposition to change appears primarily in the assessment of particular cases of alleged forced sex. The public, perpetrators, and even victims resist the conception of rape that reformers have advocated and that the law often maintains. There appears to be a serious gap between publicly touted principles of sexual responsibility and actual assessments of individual conduct. Many object to attributions of male criminal responsibility for sexual coercion of female acquaintances, even when the legal requirements of rape are clearly met. This prompts the question I pursue here: What will it take to persuade the skeptics that forced sex is a serious, widespread problem in our society? This inspires another, though logically prior, question: Why do so many resist acknowledging the prevalence and seriousness of forced sex?

8. See generally SUSAN ESTRICH, REAL RAPE 80-91 (1987) (discussing the reform of rape laws, under which the scope of the crime is expanded).

9. See KATIE ROIPHE, THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS 51-58 (1993).

A. Addressing Skeptics: Understanding and Persuading

In the last thirty years, few crimes have been as written about, and no serious crime has received as much attention from legal reformers, as rape. In a field of law that is in most respects deeply conservative, the breadth and speed of change with respect to crimes of sexual assault has been remarkable. Feminist rethinking of rape has prompted the elimination of the special caution to the jury about allegations of rape;¹⁰ the elimination of the requirement of corroboration of a victim's account; and in recent years,¹¹ broader use of past instances of sexual aggression by the defendant.¹² Legislatures have enacted shield laws to severely restrict inquiry into the complainant's sexual history and have changed the definition of the offense itself, particularly the requirements of *mens rea*, force, and resistance.¹³ Nor has this change been limited to the law as written. There are indications that across the country more resources are being devoted to prosecuting rape cases and, as a result, punishment following conviction may be more severe than previously.¹⁴

10. See LINDA BROOKOVER BOURQUE, *DEFINING RAPE* 111 (1989).

11. See *id.*; Ronald J. Berger et al., *Rape Law Reform: Its Nature, Origins, and Impact*, in *RAPE AND SOCIETY: READINGS ON THE PROBLEM OF SEXUAL ASSAULT* 223, 226 (Patricia Searles & Ronald J. Berger eds., 1995) [hereinafter Berger et al., *Rape Law Reform*]; Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 *JURIMETRICS* 119, 124-26 (1999).

12. See, e.g., FED. R. EVID. 413; CAL. EVID. CODE § 1108 (West 1995 & Supp. 2002). For a critical view of the federal rule change, see Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 *HARV. L. REV.* 563, 563-624 (1997).

13. The period of most active reform was in the late 1970s and early 1980s. See BOURQUE, *DEFINING RAPE*, *supra* note 10, at 13-19; Berger et al., *Rape Law Reform*, *supra* note 11, at 227-28; Leigh Bienen, *Rape III: National Developments in Rape Reform Legislation*, 6 *WOMEN'S RTS. L. REP.* 170, 171-76 (1980); Spohn, *The Rape Reform Movement*, *supra* note 11, at 120-21; see also Laurie Bechhofer & Andrea Parrot, *What Is Acquaintance Rape?*, in *ACQUAINTANCE RAPE: THE HIDDEN CRIME* 9, 18 (1991) (charting landmark events in acquaintance rape between 1957-89).

14. Generally, improvements have related to stranger rape cases, the kind of cases most likely to be reported to authorities and most likely to be prosecuted. See Berger et al., *Rape Law Reform*, *supra* note 11, at 228-29. Overall, few, if any, improvements in conviction rates have been demonstrated. See Spohn, *The Rape Reform Movement*, *supra* note 11, at 129-30. This conclusion must be treated with some caution, however, as comparisons of conviction rates are

During the 1980s and continuing into the 1990s, the nation's media engaged in a new discourse about acquaintance rape.¹⁵ Particularly during the late 1980s and early 1990s, virtually all media in the nation—newspapers, radio, and television—devoted significant attention to the crime.¹⁶ Media accounts of its prevalence, its harms, and its causes became common. Meanwhile many colleges and universities made education about sexual assaults standard practice during student orientation.¹⁷ In addition, college administrations convened disciplinary boards to consider sexual-assault cases involving students.

But for all these changes in the law and public awareness, evidence of significant change in human behavior—in the prevalence of sexual coercion and frequency of its prosecution—is scant. One problem in effecting change is that the great majority of forced-sex cases never reach any administrative or legal forum.¹⁸ A close

difficult across time periods and jurisdictions for many reasons, not the least of which may be prosecutorial willingness to pursue more difficult cases that in the past would have been rejected and thus would never appear in conviction rate statistics.

15. See Bechhofer & Parrot, *What Is Acquaintance Rape?*, *supra* note 13, at 9, 17-18.

16. See, e.g., David Gelman et al., *The Mind of the Rapist*, NEWSWEEK, July 23, 1990, at 46; Michelle Lodge, *Rape: Why Does It Happen? What Can Women Do?*, COSMOPOLITAN, June 1990, at 112; Ann Rule, *Rape on Campus*, GOOD HOUSEKEEPING, Sept. 1989, at 189; Anne Scott, *Everyone Has a Story*, BUS. REC., Sept. 16, 1996, at 8; TORI AMOS, *Me and a Gun*, on LITTLE EARTHQUAKES (Atlantic Records 1992).

17. See Alice Dembner, *Rape on Campus* (pts. 1 & 2), BOSTON GLOBE, May 18, 1997, at A1, BOSTON GLOBE, May 19, 1997, at A1.

18. See, e.g., Susan Estrich, *Palm Beach Stories*, 11 LAW & PHIL. 5, 7 (1992). For an extensive review of legal reform and its effects, believed by the authors to be minimal at least as they directly affect reporting and successful prosecution, see David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1199 (1997); see also BOURQUE, *DEFINING RAPE*, *supra* note 10, at 109-18 (providing a survey of research and discussing the debate surrounding legal reform); Berger et al., *Rape Law Reform*, *supra* note 11, at 228-31 (discussing the impact of the reform of rape laws); Owen D. Jones, *Sex, Culture, and the Biology of Rape: Toward Explanation and Prevention*, 87 CAL. L. REV. 827, 830-31 n.5 (1999) (reviewing reformers' disappointment in law enforcement results of rape reforms). Several authors have expressed some optimism about continuing changes in social attitudes concerning rape and forced sex. See Bryden, *Redefining Rape*, *supra* note 7, at 479; George C. Thomas III & David Edelman, *Consent to Have Sex: Empirical Evidence About "No,"* 61 U. PITT. L. REV. 579, 616-17 (2000).

examination of prosecuted cases helps to explain why: such cases often provoke heated public controversy about who should be believed and who should be blamed. The cases reveal profound social conflicts about the moral and legal status of sexual aggression.¹⁹ Whatever formal consensus we may have reached about the general principle of respect for sexual autonomy, it seems to crumble in the face of particular incidents and the need to pass judgment on otherwise law-abiding people.²⁰

In fact, major disagreements about sexual responsibility appear at all levels of discourse about acquaintance rape. Beginning with first principles, many disagree about the proper balance to strike between the two rights that comprise sexual autonomy: the right to express oneself sexually, and thus make sexual advances to another; and the right to be free of sexual oppression, that is, the right to refuse sexual advances.²¹ Disagreements about sexual autonomy lie beneath many legal controversies about rape, especially its proper definition.²² We also disagree about gender norms, particularly as

19. This was demonstrated in a pair of high-profile acquaintance rape cases in the early 1990s that led to acquittals. See Estrich, *Palm Beach Stories*, *supra* note 18, at 5-14 (describing the William Kennedy Smith case); Karen M. Kramer, *Rule by Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes*, 47 STAN. L. REV. 115, 136-40 (1994) (describing a case involving St. John's University students). The exception to this trend was the rape conviction of heavyweight boxer Mike Tyson, but even this was controversial. See Henderson, *Getting to Know*, *supra* note 7, at 49-51. International comparison rates are always problematic due to differences in offense definitions and reporting methods, but the differences are clearly large. Reported rapes in the U.S. have been estimated four times higher than Germany, thirteen times higher than England, and twenty times higher than Japan. See Gelman et al., *The Mind of a Rapist*, *supra* note 16, at 52; see also KIMMEL, *THE GENDERED SOCIETY*, *supra* note 5, at 255 (stating that "the United States has the highest rate of reported rape in the industrialized world").

20. See, e.g., STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* 17-46 (1998); ANDREW E. TASLITZ, *RAPE AND THE CULTURE OF THE COURTROOM* 15-57 (1999); see generally Henderson, *Getting to Know*, *supra* note 7, at 41 (stating that "two decades of feminist law reform efforts to hold men responsible for raping women have yielded disappointing results").

21. See SCHULHOFER, *UNWANTED SEX*, *supra* note 20, at 99-113.

22. See *id.* For other recent and important works on essential responsibility principles, see Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780 (1992); Lynne Henderson, *Rape and Responsibility*, 11 LAW & PHIL. 127 (1992); Robin L. West, *Legitimizing the Illegitimate: A Comment on*

they affect romance. In part because of the feminist movement, we lack a clear consensus about how young people should conduct themselves in romance. Should males be the aggressors? Is it proper for females to take the sexual lead, or to openly express their sexual desires and act upon them? Often related to these questions, we find disagreements about how to evaluate the facts of alleged incidents of acquaintance rape, especially who should be believed.²³

Given such broad-scale disagreement, deciding where to begin can be difficult. I choose to focus here on hidden obstacles to change, on the emotional constructs of rape and romance that mislead so many in their assessment of forced-sex incidents. The project seeks to both illuminate and persuade. First, we need to understand why so many persons fail to see incidents of forced sex as serious wrongs. Once we have developed a better understanding of their nonrecognition, we can look for arguments that may open their eyes to the reality of forced sex.

The most controversial part of this inquiry will likely be its first stage: developing an understanding of nonrecognition. In order to effectively address those with whom we disagree—and the entire premise of this paper is that I and other anti-rape reformers disagree with skeptics—we must temporarily set aside our disagreements concerning sexual responsibility and concentrate on skeptics' views of particular incidents. The idea is that by understanding the skeptical perspective we may find the means to persuade skeptics of their mistaken views. Thus I assume for purposes of this paper that forced-sex skeptics are rational individuals who may be reached by rational argument. I presume that if we can make our half-articulated disagreements express, we can address those disagreements and effect change, even in deeply rooted social and personal attitudes.

Beyond Rape, 93 COLUM. L. REV. 1442 (1993); see also COWLING, DATE RAPE AND CONSENT, *supra* note 5, at 25-32 (discussing rape as a moral category); Symposium, *Consent in Sexual Relations*, 2 LEGAL THEORY 87, 87-88, 121-29 (1996) (discussing the mental, moral, and performative aspects of consent).

23. See Estrich, *Palm Beach Stories*, *supra* note 18, at 11-27; see also 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, 1025-31 (1991) (discussing the stereotypes surrounding victims of rape). For an extended look at problems in the proof of rape in the courtroom, see TASLITZ, *CULTURE OF THE COURTROOM*, *supra* note 20, at 111-33.

Some will see this approach as naive. Surely those who sexually attack others care nothing for social standards of proper conduct, however they are phrased. Simple talk cannot change such people. We have tried that already, endlessly. Instead, we need to deploy more powerful methods for changing attitudes and conduct, such as behavior modification techniques or brute punishment. Or perhaps nothing short of a fundamental restructuring of society will do. Yet there are reasons to take the traditional tools of rational, moral argument seriously here.

The perpetrators of most acquaintance assaults are individuals without criminal histories and often well-integrated into social and economic communities. They see themselves (and are seen by others) as basically decent human beings. In other words, they are individuals for whom the threat of serious moral and social condemnation has force.²⁴ Nor do perpetrators represent our only target of persuasion here. Victims of sexual assault, who for a variety of reasons do not acknowledge the wrong committed or its severity or understand how it occurred, constitute another group to be addressed. If altering the terms of the discussion assists their recognition, that will be a worthy end in itself. Finally, the argument is directed to all those who must evaluate claims of sexual wrongdoing, whether formally or informally. In this group we find nearly infinite variations in views about sexual wrongdoing, yet there are enough with a basic commitment to personal security and justice to make the persuasive effort worthwhile. It is true that in the end, results will likely be modest: a marginal shifting of perspective. However, fundamental social change often represents the accumulation of thousands of incremental shifts in perspective.

B. Framing the Issue: Scope of the Inquiry, Basic Definitions, and a Caveat

Before we turn to examples of nonrecognition, we must define the project more precisely: to set the scope of the effort, define

24. Put in social science terms, the conduct of perpetrators is often strongly influenced by the culture of their peers, suggesting that arguments addressing cultural values may be very important in changing behavior. See, e.g., R. Lance Shotland, *A Theory of the Causes of Courtship Rape: Part 2*, 48 J. SOC. ISSUES 127, 139 (1992).

essential terms, and recognize some of the hazards of this kind of inquiry.

1. Scope of the inquiry

Our primary concern will be nonrecognition of sexual assaults that occur between persons with a preexisting social relationship who interact in romantic or quasi-romantic settings. A romantic setting refers to an interaction within the context of a preexisting boyfriend-girlfriend relationship or a commonly recognized courtship interaction, such as a date or a party. A quasi-romantic setting refers broadly to social situations that may be read by third parties as having a romantic aspect to them. This definition is deliberately vague to encompass widely divergent views of whether a particular encounter might have a romantic dimension. Thus while the visit of a young woman to a young man's room at college during the day may be in her mind an event without the slightest sexual implications, given certain words and gestures, others may read it differently, meaning that it qualifies as a quasi-romantic encounter.²⁵

For the most part we focus on situations where, prior to the assault, both parties engaged in, or could imagine engaging in some form of romantic interaction. Such interaction might range from a personally intimate conversation between persons who have some degree of attraction for each other, a date, limited physical touching such as a hug, a kiss, or holding hands, all the way to a completed sexual act such as sexual intercourse. We concentrate on such cases because they are both the most common and the least punished. Here is where nonrecognition is most likely.

We will not be directly concerned with so-called stranger rape, where the victim and assaulter had little or no prior relationship. Such crimes generally do not inspire the same recognition problems, as is shown by much higher rates of reporting and successful prosecution.²⁶ Nor will we generally be concerned with marital rapes because, while these share many similarities with other

25. See *Commonwealth v. Berkowitz*, 641 A.2d 1161, 1163 (Pa. 1994) (upholding the reversal of a rape conviction on similar facts); see also *infra* Part IV.

26. By this I do not mean to suggest a neat factual or conceptual separation of the two. We will find some acquaintance rapes that have most of the salient characteristics of stranger rapes, and vice versa.

acquaintance assaults, including nonrecognition problems, they present enough differences in patterns of commission and injury to make a unified discussion difficult.

Finally, we will concentrate on male assaults on females. Available evidence suggests that, outside of prison, most rapes follow this pattern. Certainly this is the form of sexual assault about which we currently have the most information.²⁷

2. Basic definitions: rape and forced sex

A critical question for any discussion of acquaintance rape is how rape should be defined.²⁸ Here I will employ a definition consistent with (though not identical to) that used by many U.S. jurisdictions. Rape is nonconsensual sexual conduct involving genital contact or penetration committed by physical force or other means that demonstrate the perpetrator's culpable disregard for the sexual integrity of the victim.²⁹ By culpable disregard, I mean an

27. This does not mean that the arguments presented here necessarily are inapplicable to male-on-male rape or even to female-on-male sexual assault. *See generally* MICHAEL SCARCE, *MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME* (1997) (presenting accounts by male victims of rape); Zsuzsanna Adler, *Male Victims of Sexual Assault: Legal Issues*, in *MALE VICTIMS OF SEXUAL ASSAULT* 125, 134-39 (Gillian C. Mezey & Michael B. King eds., 2d ed. 2000) (comparing male and female victimization); Cindy Struckman-Johnson, *Male Victims of Acquaintance Rape*, in *ACQUAINTANCE RAPE*, *supra* note 13, at 192 (discussing male victimization by both men and women).

At least on current knowledge, the problem of female sexual assaults on adult males appears to be negligible as compared to male assaults on females. Here we have to distinguish between men who are pressured into having unwanted sex by women and men who are forced to have sex by women. According to recent surveys, the former situation is relatively common, with females employing verbal persuasion and touching, often as a kind of challenge to their partner's manhood, to pressure him into sexual activity in which he would prefer not to engage. *See* Struckman-Johnson, *Male Victims of Acquaintance Rape*, *supra*, at 194-98. The latter scenario, of women using force against men, is rare but does occur. *See id.* at 202-05. I also exclude all forms of child sex abuse.

28. *See, e.g.*, SCHULHOFER, *UNWANTED SEX*, *supra* note 20, at 17-46; Bryden, *Redefining Rape*, *supra* note 7, at 457-79 (discussing the debate over criminalizing deception); Dripps, *Beyond Rape*, *supra* note 22, at 1785-92 (discussing the definition of sexual autonomy); Simon Gardner, *Reckless and Inconsiderate Rape*, 1991 CRIM. L. REV. 172, 172-78 (1991); *see also* Donald C. Hubin & Karen Haely, *Rape and the Reasonable Man*, 18 LAW & PHIL. 113, 114-15 (1999) (stating that "the relevant defining element of rape is lack of consent," as opposed to force or the threat of force).

29. Jurisdictions define rape in various ways. *See, e.g.*, *State v. Alston*, 312

attitude of disrespect for the right to control one's sexuality that is demonstrated by a failure to heed warnings about nonconsent, usually because of the perpetrator's desire to commit the particular sexual act.³⁰ I consider forced sex a synonym for acquaintance rape but will generally prefer the former term in order to avoid conflicts between legal definitions and emotional constructs of rape. By referring to incidents as involving forced sex, we may be able to reach those persons who would, because of their emotional reactions to particular incidents, reject as unwarranted any designation of rape.

It is important to note that not all cases of nonconsensual sex between acquaintances will meet the suggested legal criteria for forced sex. Forced sex requires proof of nonconsent and *mens rea*. In some cases where the woman experiences sexual coercion, this

S.E.2d 470, 475 (N.C. 1984) (defining rape as "vaginal intercourse with the victim both by force and against the victim's will"); Commonwealth v. Berkowitz, 609 A.2d 1338, 1343-44 (Pa. Super. Ct. 1992) (defining rape as including "not only physical force or violence, but also moral, psychological or intellectual force used to compel a person to engage in sexual intercourse against that person's will." (quoting Commonwealth v. Rhodes, 510 A.2d 1217, 1226 (Pa. 1986))); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 538 (2d ed. 1995) ("[R]ape is defined as sexual intercourse achieved 'forcibly,' 'against the will' of the female, or 'without her consent.'"). In some jurisdictions, courts have held that the key to culpability is the use of force without regard to possible mistakes, reasonable or otherwise, as to nonconsent. See, e.g., State v. Reed, 479 A.2d 1291, 1295-96 (Me. 1984); Commonwealth v. Ascolillo, 541 N.E.2d 570, 575 (Mass. 1989). In such jurisdictions, the definition of force is critical, with attention to the perpetrator's understanding that his conduct was forceful often doing the same work as a *mens rea* requirement with respect to nonconsent. See, e.g., State v. Rusk, 424 A.2d 720, 725-26 (Md. 1981) (establishing force by victim's resistance or reasonable fear precluding resistance). Some jurisdictions require awareness of a risk that the partner is not consenting to the act. See, e.g., Reynolds v. State, 664 P.2d 621, 625 (Alaska Ct. App. 1983) (requiring reckless disregard of victim's lack of consent); see also J.C. Smith et al., *Case and Comment: Regina v. Gardiner*, CRIM. L. REV. 432, 455 (1994) (defining recklessness); Regina v. Morgan, 2 All E.R. 347, 365 (1975) (employing recklessness as *mens rea* regarding nonconsent for rape under English law).

30. For a discussion of the concept of culpable indifference, see Samuel H. Pillsbury, *Crimes of Indifference*, 49 RUTGERS L. REV. 105, 168-69 (1996). For arguments supporting various nonsubjective forms of *mens rea* for criminal liability for rape, see Bryden, *Redefining Rape*, *supra* note 7, at 336; Craig T. Byrnes, *Putting the Focus Where It Belongs: Mens Rea, Consent, Force, and the Crime of Rape*, 10 YALE J.L. & FEMINISM 277, 293-99 (1998); Gardner, *Reckless and Inconsiderate Rape*, *supra* note 28, at 177-79; Hubin & Haely, *Rape and the Reasonable Man*, *supra* note 28, at 126-34; Toni Pickard, *Culpable Mistakes and Rape: Relating Mens Rea to the Crime*, 30 U. TORONTO L.J. 75, 75-83 (1980).

proof will be lacking. In these cases, the facts do not establish beyond a reasonable doubt that the woman did not consent to the act or the fact finder cannot determine that the man's conduct demonstrated culpable disregard for his partner's sexual autonomy. In such cases, the man may be judged morally blameworthy for his conduct but the level of wrongdoing needed for criminal punishment is not established.³¹

3. Romance, sex, and ordinary sexual desire

Three other critical terms for our purposes are romance, sex and, ordinary sexual desire. Here romance is used in a broad sense to refer to socially acceptable sexual interaction, rather than love or related sentiments. Thus romance as defined here includes bad sex and failed efforts at romantic attachment.

By sex, or sexual, I refer primarily to interactions which involve the stimulation of the sexual organs and accompanying physiological and psychological states of arousal.

I will use the term "ordinary sexual desire" to signify the kind of sexual arousal and accompanying urge to engage in sexual conduct

31. In many acquaintance rape cases, the woman's will is overcome by the man's exertion of superior physical strength, a threat, implied or express, to exert such force, by taking advantage of the woman's diminished ability to resist due to intoxication, or some combination of these techniques. Such methods may not constitute the kind of force that the law requires for rape. There are also cases where the perpetrator's advances are so sudden that the woman becomes paralyzed by fear and the man requires no physical force to accomplish the sexual act beyond that involved in the physical conduct of sex itself. However, such cases usually do not involve persons in romantic or quasi-romantic situations. See, e.g., *People v. Iniguez*, 7 Cal. 4th 847, 850-51, 872 P.2d 1183, 1184, 30 Cal. Rptr. 2d 258, 259 (1994) (involving nonconsensual intercourse without violence but under circumstances indicating the victim's fear and surprise). Some jurisdictions, largely as the result of changing judicial interpretations of existing statutes, have termed this conduct rape. Such courts have done this by deemphasizing the force requirement in favor of emphasis on the *mens rea* requirement. In these jurisdictions, evidence about the actual or threatened violence used by the perpetrator and the victim's resistance may bolster the determination of a lack of consent and the perpetrator's *mens rea*, but do not represent independent legal requirements. See *id.* at 856-57, 872 P.2d at 1188, 30 Cal. Rptr. 2d at 363. In New Jersey, nonconsensual intercourse will be rape if accomplished by force unless the accused reasonably believed that his partner freely gave affirmative permission for the act. See *In re M.T.S.*, 609 A.2d 1266, 1279 (N.J. 1992). For an overview of the role of force in current U.S. rape law, see Bryden, *Redefining Rape*, *supra* note 7, at 355-87.

inspired in the average person by an attractive member of the opposite sex.³² This is not a normative concept but a statistical one. If the sexual desire under discussion is one that is essentially similar to the kind of desire that most men or most women experience, then we can call it ordinary.

4. A caveat: the generalization problem

Finally, an important caution: what follows is stupid generalizations. The generalizations are necessary. To understand phenomena as common and varied as forced-sex incidents we need to examine broad patterns of human thought, feeling, and behavior, especially gender patterns. As with an Impressionist painting, to see the social picture whole we need to step back until the blurry details coalesce into a recognizable image. Nevertheless, each generalization employed, regardless of statistical, demographic or cultural truth, remains stupid in one critical sense: it tells us little or nothing about particular individuals.

When we look closely at individual men and women—and in looking at sex crimes, even more than most offenses, we want to know about individuals because the experience of such offenses is so personal—we may or may not find the patterns identified from afar. The parties and their conduct may echo larger trends; by definition they *generally* will, but because they often will not, we must not forget the limitations of generalization. To cite an obvious example, the problem of nonrecognition appears only in some cases of acquaintance assaults. In other instances, perpetrators have a clear sense of their own transgression, victims readily name their violation and third parties identify the event as criminal without hesitation.³³ This does not negate the reality of the problem, it only shows that it is not universal. It also illustrates the challenge facing any writer on sexual matters, that of finding explanations simple enough to be useful without being simplistic.

32. I use a heterosexual definition because of this paper's limited focus on heterosexual forced sex.

33. See, e.g., ROBIN WARSHAW, I NEVER CALLED IT RAPE: THE MS. REPORT ON RECOGNIZING, FIGHTING AND SURVIVING DATE AND ACQUAINTANCE RAPE 7 (2d ed. 1994) (describing an account where a man accused of rape many years after the incident responded: "Yes . . . but the statute of limitations is up."); Karyn Hamaguchi, *My Boyfriend Raped Me*, JUMP, Dec. 1998, at 60, 60-61.

C. *Emotional Constructs of Rape and Romance: An Introduction*

My working thesis is that for many people, emotional constructs of rape and romance create major barriers to recognition of forced sex. Before we can test this thesis by looking at particular statements and cases though, I need to elucidate the general notion of an emotional construct. I need to explain how traditional views of rape and romance shape emotional reactions to sexual conduct.

By emotional construct, I mean the concept that guides an appraisal of a situation, producing a particular kind of emotional reaction. As philosophers and legal commentators increasingly recognize, our emotional reactions have their own rationality, which depend upon certain kinds of appraisals of the situations we encounter. Anger, for example, involves a judgment that in the situation a wrong has been done to someone about whom we care. Compassion involves an appraisal of unwarranted hurt experienced by another for whom we care.

We experience the world in a complex interaction of our emotional and deliberative intelligences. Some forms of understanding may be primarily emotional. The recognition of another person as especially attractive, whether as a friend or potential sexual mate, tends to come much more from the emotional faculties than from deliberative intelligence. By contrast, an assessment of the logical strengths and weaknesses of a legal argument will generally rely primarily on deliberative thought processes. Our intellectual assessment of the argument may be influenced by our emotional reactions to the speaker or the consequences of his argument, but still the process of evaluation remains self-consciously deliberative.

The legal field emphasizes deliberative processes in judgment, to the extent that the sometimes beneficial and often unavoidable influences of emotion are slighted.³⁴ Good lawyers never forget that emotional responses are often critical to understanding, and therefore to persuasion, however. They understand that even an argument built on clear facts and impeccable logic may not be sufficient to overcome a contrary emotional appraisal of the situation.

34. See, e.g., John Deigh, *Emotion and the Authority of Law: Variation on Themes in Bentham and Austin*, in *THE PASSIONS OF LAW* 285, 285-87 (Susan A. Bandes ed., 1999).

Emotional appraisals are often based on paradigms or classic stories of particular situations or conduct. Every individual bases emotional reactions to new situations by comparing them to relevant paradigms of good and bad conduct that he or she has previously internalized, usually without deliberative thought, often influenced by extant social norms.³⁵ Commonly held paradigms of wrongdoing strongly influence the criminal law, informing us, for example, whether a criminal killing should be classified as premeditated murder or a provoked homicide, and therefore manslaughter. These terms represent not just legal definitions, but may for many people represent classic instances of homicidal wrongdoing to which new fact patterns should be compared.³⁶ In similar fashion, the terms rape and romance connote particular kinds of conduct for many people. Their invocation conjures up paradigms of right and wrong conduct that inform moral judgments about sexual interaction.³⁷ They represent emotional constructs that may or may not be consistent with legal definitions.³⁸

35. See Richard A. Posner, *Emotions versus Emotionalism in Law*, in THE PASSIONS OF LAW, *supra* note 34, at 309-12.

36. See SAMUEL H. PILLSBURY, *JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER* 147-88 (1998).

37. Some have posited that our emotions are essentially paradigmatic—cognitive and physiological reactions triggered by story recognition. We become angry when we recognize a personally significant anger-generating story, such as the victimization of a loved one. We turn sad when we recognize a classic sorrowful tale concerning ourselves or others. See ROBERT C. SOLOMON, *THE PASSIONS* 269-81 (1976); Amélie Oksenberg Rorty, *Explaining Emotions*, in EXPLAINING EMOTIONS 103, 103-22 (1990); see also RONALD DE SOUSA, *THE RATIONALITY OF EMOTION* 40-41 (1987) (describing the modern cognitive theory of emotion); Cheshire Calhoun, *Making Up Emotional People: The Case of Romantic Love*, in THE PASSIONS OF LAW, *supra* note 34, at 217, 220-22 (explaining how “emotional scripts” help people show emotion); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 272-74, 285-89 (1996); Andrew E. Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, 15 WIS. WOMEN’S L.J. 3, 5-6 (2000).

38. Thus modern commentators have frequently decried the influence of the traditional paradigm of rape, arguing that it has inspired and supported a number of myths that have hindered reporting and successful prosecution of the offense. See generally BOURQUE, *DEFINING RAPE*, *supra* note 10, at 285-86; Martha R. Burt, *Rape Myths and Acquaintance Rape*, in ACQUAINTANCE RAPE, *supra* note 13, at 26-37.

The traditional paradigm of rape remains that of the stranger attack, of a man lurking in the dark, in the bushes or the shadows of the parking garage, who grabs an unsuspecting female, takes her to a remote location, and violently attacks her with weapons or fists, blows, or threats, targeting her vulnerabilities, especially her private parts, ending with a penile invasion of her genitals.³⁹ Certainly some rape cases fit this paradigm. Indeed, the majority of rape cases successfully prosecuted involve stranger attacks. As Susan Estrich and others have shown, however, the traditional paradigm of rape does not fit the pattern of most acquaintance assaults.⁴⁰

The traditional paradigm of romance in our culture is complex and not easily summarized, but it does have certain gender features that we all recognize. Under the traditional paradigm, the man is sexually aggressive, the woman passive.⁴¹ The man pursues the woman as a sexual partner, using a wide variety of strategies, verbal and physical, all aimed at consummation in sexual intercourse or other orgasmic release.⁴² Romantic interaction is characterized by distinct gender roles. The woman sends complex and often changing sexual signals, sometimes enticing advances, sometimes deflecting them and sometimes rejecting them entirely. Meanwhile the man pursues a single aim of sexual conquest.⁴³ The traditional paradigm of romance places limits on how a woman may flirt and how much

39. See BOURQUE, *DEFINING RAPE*, *supra* note 10, at 286 (“As matters stand, large segments of the population, if not the majority, continue to equate rape with attacks by strangers in dark alleys.”); see also Stevi Jackson, *The Social Context of Rape: Sexual Scripts and Motivation*, in RAPE AND SOCIETY, *supra* note 5, at 16, 16 (describing “the popular imagination [of] psychopaths lurking in dark alleys waiting to pounce on any likely victim and inflict their uncontrollable desires upon her” as a “widely-believed myth”); Burt, *Rape Myths and Acquaintance Rape*, *supra* note 38, at 27 (addressing common perceptions).

40. See ESTRICH, *REAL RAPE*, *supra* note 8, at 8, 11-12. On acquaintance rape generally, see ACQUAINTANCE RAPE *supra* note 13; BOURQUE, *DEFINING RAPE*, *supra* note 10, at 54; COWLING, *DATE RAPE AND CONSENT*, *supra* note 5, at 34-39; PEGGY REEVES SANDAY, *A WOMAN SCORNED: ACQUAINTANCE RAPE ON TRIAL* (1996); WARSHAW, *I NEVER CALLED IT RAPE*, *supra* note 33, at 11-26.

41. See SANDAY, *A WOMAN SCORNED*, *supra* note 40, at 142-43, 163, 175-76; WARSHAW, *I NEVER CALLED IT RAPE*, *supra* note 33, at 38, 92-97.

42. See WARSHAW, *I NEVER CALLED IT RAPE*, *supra* note 33, at 39, 92-97.

43. See, e.g., CAROL CASSELL, *SWEPT AWAY: WHY WOMEN FEAR THEIR OWN SEXUALITY* 54-56 (1984).

aggression a man may employ, but even so, violations of these limits are usually labeled bad romance rather than criminal behavior.⁴⁴

II. NONRECOGNITION: MISTAKING RAPE AND ROMANCE

We take up nonrecognition problems according to group: those evidenced by perpetrators, by victims, and by society at large. A look at the characteristic views of each group demonstrates the power of traditional visions of rape and romance in the assessment of forced-sex incidents.

A. Male Perpetrators

Men who engage in coerced sex often believe they have done nothing seriously wrong, certainly nothing that deserves the label rape. In this respect they present important similarities to men who commit stranger rapes; stranger rapists often deny responsibility by insisting that the woman enjoyed herself or that she was to blame for provoking his conduct.⁴⁵ In the case of acquaintance assaults, perpetrators may concede that they pushed harder for sex than was polite. They often concede that at some point in the interaction they became more intense in their sexual behavior than their partner wanted. They may concede that, like a driver in a hurry, they may have violated some of the rules of the road to reach their destination. Still they firmly deny committing rape, or any wrong serious enough to be criminally punished. While in some cases this denial may be utterly duplicitous, in many cases it appears sincere.⁴⁶ The man is stunned by the woman's accusation of rape. This raises an important question. Why? Why do so many men who force sex on women

44. See COWLING, DATE RAPE AND CONSENT, *supra* note 5, at 90-94.

45. See Diana Scully & Joseph Marolla, *Convicted Rapists' Vocabulary of Motive: Excuses and Justifications*, in IN THEIR OWN WORDS: CRIMINALS ON CRIME 107, 109-10 (Paul Cromwell ed., 1996); see also MENACHEM AMIR, PATTERNS IN FORCIBLE RAPE 259-76 (1971) (explaining "victim precipitated" types of forcible rapes). For a particularly striking example of a rapist who contended that his victims enjoyed sex with him, see Jerry Hicks, "Good-looking Guy" Found Guilty of Rapes, Assaults, L.A. TIMES, Jan. 13, 1989, at Metro, Part 2, 1 (describing the aftermath of a rapist's encounter with a victim as follows: "[S]he laid back on the pillows exhausted, but with a happy look on her face.").

46. See Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, *supra* note 37, at 54.

deny that they have committed a serious wrong? Consider the following:

The summer before eleventh grade, Karyn, a sixteen year-old woman starts dating a high school boy named Rodney. They date for several months, kissing and engaging in other sexual contact, but Karyn makes clear that she wants to keep her virginity. Rodney says: "Fine, yeah, I respect that." Nevertheless, one night while studying upstairs at her parents' house, he becomes insistent. He pins her to the floor, using the power of his five foot ten inch body to control her petite, five-foot frame. He penetrates her and has intercourse. The carpet is left stained red from her ruptured hymen. Before leaving, Rodney tells her that he is sorry. Later Rodney admits to Karyn that he forced her to have sex, but denies it was rape. "[O]nce the word 'rape' came out, it really scared him, and he was like, 'I didn't do that. No, that's not me,'" she reports.⁴⁷

A young woman is raped by a recent acquaintance after helping her move into her new apartment. He pushes her onto the floor, slams her headfirst into a corner; they struggle until he manages intercourse. "The penetration was very violent," she reports. "When it was all over, he asked me if I usually fight so much during sex. I don't think it ever occurred to him that he had raped me."⁴⁸

A young woman is raped by a friend of a friend, who pins her to the bed and chokes her to achieve intercourse. "He left me a note with one of those smile faces drawn on it. The note read: 'Denise, I woke up and you were gone. Catch ya later! Have a nice day! Bob'

Minutes later, the phone rang. The voice belonged to a cheerful Bob. I think I called him a bastard or a fucker and I told him not to ever call me again, and then hung up. He

47. Hamaguchi, *My Boyfriend Raped Me*, *supra* note 33, at 60-61 (account of the author).

48. WARSHAW, *I NEVER CALLED IT RAPE*, *supra* note 33, at 91.

called back, sounding surprised, asking, 'Hey, what's the matter?'"⁴⁹

Long after an incident in which a drunken male friend forced a young woman to have sex, she tells him: "I didn't want that; that was wrong." She reports he is stunned. "He was totally speechless He stared straight ahead for so long. He said, 'Oh my God, I can't believe I did this. I can't believe I hurt you. Don't hate me.'"⁵⁰

A young man explains: "When you're drunk, and there are all sorts of ambiguity, and the woman says 'Please, please' and then she says no sometime later, even in the middle of the act, there still may very well be some kind of violation, but it's not the same thing. It's not rape. If you don't hear her say no, if she doesn't say it, if she's playing around with you—oh, I could get squashed for saying it—there is an element of say no, mean yes."⁵¹

In legal and popular literature we can find many accounts where a man forces a woman to have sex then asks if he can see her again, as if what had occurred was normal romantic activity.⁵² Surveys of young men indicate that engaging in unwanted sexual contact is

49. *Id.* Unlike the other quotations in this section, this involves an incident that occurred in the mid-1970s, before the greatest educational efforts about acquaintance rape.

50. Stephanie Gutmann, "It Sounds Like I Raped You!" *How Date-Rape "Education" Fosters Confusion, Undermines Personal Responsibility, and Trivializes Sexual Violence*, REASON, July 1990, at 23, 26 (stating also that the woman said the man's first stammered reaction was: "God! It sounds like I raped you.").

51. Nancy Gibbs, *When Is It Rape?*, TIME, June 3, 1991, at 48, 52 (account of a male freshman at a liberal arts college regarding an incident in which, after drinking, he had sex with a female friend and she later accused him of rape).

52. See, e.g., *State v. Smith*, 554 A.2d 713, 714-15 (Conn. 1989) (involving a case where the accused said he knew the victim thought it was rape, but that she enjoyed it, and that he asked for her phone number afterward); *State v. Rusk*, 424 A.2d 720, 722 (Md. 1981); see also Jean Seligmann et al., *The Date Who Rapes*, NEWSWEEK, Apr. 9, 1984, at 91 (recounting the story of a twenty-eight year-old woman raped by her stockbroker date who let her leave his house only after they arranged for another date).

common and that when men admit to using force against women partners to gain sex, they do not generally consider it rape.⁵³ An explanation may be found in the traditional paradigm of romance. Having begun an interaction with a romantic (read here: sexual) motivation, having had an experience with a woman that in very rough outline follows the pattern of accepted romantic (sexual) encounters, the man works hard to keep the experience categorized as romance. He may concede that it was not good romance; it may not have been good sex, but he will be adamant that it was not rape.

B. Female Victims

"I never told anyone I was raped. I would not have thought that was what it was. It was unwilling sex. I just didn't want to and he did."⁵⁴

"It took me about three years to realize I had been raped. Before that, all I focused on about the assault was the feeling that I could die. Since my attacker had been my boyfriend, with whom I had had sexual intercourse before, I never attached the word 'rape' to what happened. Rape, after all, was what vile strangers did to you."⁵⁵

"I didn't report the rape because I felt guilty, thinking I brought it on. He also was a friend and I was having trouble believing he had raped me."⁵⁶

53. See Koss, *Hidden Rape*, *supra* note 5, at 35, 45-46. A quarter of men surveyed admitted to some form of unwanted sexual contact; 3% admitted to attempted rape; 4.4% admitted to forced sex; of these, 88% said it was not rape and 47% said they would do it again. See SANDAY, *A WOMAN SCORNED*, *supra* note 40, at 192; see also *supra* note 5.

54. WARSHAW, *I NEVER CALLED IT RAPE*, *supra* note 33, at 120 (account of Sandi, a then twenty-nine year-old woman, describing how she was raped at the age of seventeen).

55. *Id.* at 6 (account of the author).

56. VERNON R. WIEHE & ANN L. RICHARDS, *INTIMATE BETRAYAL: UNDERSTANDING AND RESPONDING TO THE TRAUMA OF ACQUAINTANCE RAPE* 31 (1995).

"I didn't report the rape to authorities because I believed it was my fault for voluntarily going with him."⁵⁷

A victim states she blamed herself for the incident: "[T]here was kissing and he got excited. Therefore, he was not thinking rationally. All he cared about was his sexual drive, not about me or my feelings. It was my fault for turning him on."⁵⁸

"I thought, 'Well, he's my friend I guess whatever happens, it's not going to be that bad.' . . . I was just, 'Well, let's keep the situation under control.' . . . I wasn't aware of the problem then or really what was happening After it had happened, I thought, 'OK, I didn't want that, but it's not that bad '[be]cause he's a friend of mine'—you know, no big deal."⁵⁹

Again and again, women report having been forced to have sex with partners without realizing they have been criminally assaulted.⁶⁰ During the incident, the woman may fear for her life; she may feel violated, but often the recognition of serious, potentially criminal wrongdoing comes much later at the prompting of others. Women may not identify the event as a criminal wrong because they blame themselves, believing that their own sexual provocation caused the man to lose control and force himself on her.⁶¹ Victims often resist acknowledging that a trusted friend, colleague, or romantic partner is

57. *Id.*

58. Catalina A. Mandoki & Barry R. Burkhardt, *Women as Victims: Antecedents and Consequences of Acquaintance Rape*, in ACQUAINTANCE RAPE, *supra* note 13, at 176, 187.

59. Gutmann, "*It Sounds Like I Raped You!*", *supra* note 50, at 26 (account of a woman forced to have sex with a drunken college friend).

60. See WIEHE & RICHARDS, *INTIMATE BETRAYAL*, *supra* note 56, at 29; Adele M. Stan, *Fighting Back: Both Sides Miss the Mark in the Date Rape Debate*, SAN DIEGO UNION TRIB., Dec. 21, 1993, at B5 (recounting a date rape and the victim's nonrecognition of it until much later). Other reasons for nonreporting include fear of social stigma and an unwillingness to subject the man to criminal consequences.

61. See Charlene L. Muehlenhard & Jennifer S. MacNaughton, *Women's Beliefs About Women Who "Lead Men On,"* 7 J. SOC. & CLINICAL PSYCHOL. 65, 77 (1988).

capable of such evil, and thus resist the criminal categorization of what occurred.⁶²

Partly because of their own nonrecognition and partly because of fears that others will not recognize the incident as criminal, victims of forced sex normally do not report the incident to authorities.⁶³ While stranger rapes appear to be reported at about the same or even higher rate than other serious offenses, acquaintance rapes are reported at a much lower rate.⁶⁴ Women who do report acquaintance rape to authorities are more likely than victims of other forms of rape to withdraw from the prosecution process before a verdict.⁶⁵

Social science research into sexual aggression indicates that those most vulnerable to sexual aggression are young and sexually active.⁶⁶ The research also indicates that most forced sex occurs between persons with some kind of romantic relationship.⁶⁷ Both of these facts are consistent with the picture of assault that occurs when a man, expecting sex and intent on achieving it, disregards a partner's signs of reluctance and protest.

Perhaps the most striking evidence of nonrecognition by victims is the percentage of women who, following an incident of forced sex, go on to have some form of consensual romantic relationship with their assaulter. One recent study reported that thirty-nine percent of sexually assaulted women later dated their attacker.⁶⁸ This is

62. See WARSHAW, *supra* note 33, at 63; see generally Bryden & Lengnick, *Rape in the Criminal Justice System*, *supra* note 18, at 1201 (discussing some general reasons for nonreporting).

63. See Bryden & Lengnick, *Rape in the Criminal Justice System*, *supra* note 18, at 1208. In a survey published in 1992, 69% of women who said they had been forced to have sex also reported being concerned that others might find them responsible for the incident. See NAT'L VICTIM CTR., *RAPE IN AMERICA*, *supra* note 5, at 4.

64. See Bechhofer & Parrot, *What Is Acquaintance Rape?*, *supra* note 13, at 9, 11; Bryden & Lengnick, *Rape in the Criminal Justice System*, *supra* note 18, at 1208.

65. See Bryden & Lengnick, *Rape in the Criminal Justice System*, *supra* note 18, at 1208.

66. See TJADEN & THOENNES, *PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN*, *supra* note 5, at 6 (mentioning previous reports of rape as a "tragedy of youth").

67. See Koss, *Hidden Rape*, *supra* note 5, at 43-44.

68. See Shotland, *A Theory of the Causes of Courtship Rape*, *supra* note 24, at 128.

consistent with a number of studies, including one done for *Ms.* magazine, indicating that a substantial percentage of women forced by their partners to have sex later agree to sexual relations with the same men.⁶⁹

This statistic is so startling, so contrary to what we generally believe about rape, that it requires some immediate discussion. Some have argued that the fact of a continuing relationship indicates that no rape or other serious wrong occurred.⁷⁰ Certainly it is true that women surveyed about their sexual experiences generally apply the rape label more narrowly than does current law in many jurisdictions.⁷¹ The prevalence of continued relationships also

69. See WARSHAW, I NEVER CALLED IT RAPE, *supra* note 33, at 63. Forty-two percent of women who reported being forced to have sex said that they later went on to have sex again with the man who had assaulted them. Fifty-five percent of men who forced a woman to have sex said that the women later had sex with them again. See *id.* For a criticism of this study based on its inclusion of a question concerning unwanted sex following intoxication as part of assessment of forced sex, see COWLING, DATE RAPE AND CONSENT, *supra* note 5, at 39-47. A recent study of women at a southern college found that nearly one-third of the women who reported being forced to have sex by a partner thereafter continued dating the perpetrator. See JOHNSON & SIGLER, FORCED SEXUAL INTERCOURSE IN INTIMATE RELATIONSHIPS, *supra* note 5, at 119. For a revealing account of a young woman who dated a young man in her senior year of high school, even though he had raped her when she was a freshman, see LEORA TANENBAUM, SLUT! GROWING UP FEMALE WITH A BAD REPUTATION 165-66 (1999). See also IAN MCEWAN, THE INNOCENT 92-98 (1990) (comprising a fictional account of a man who forced sex on his partner as part of his sex fantasy, which temporarily ended their relationship).

70. A number of writers in recent years have centered their criticisms of feminist advocacy on a perceived exaggeration of the threat of acquaintance rape, based on methodologically and conceptually skewed surveys. See, e.g., RENE DENFELD, THE NEW VICTORIANS: A YOUNG WOMAN'S CHALLENGE TO THE OLD FEMINIST ORDER 58-89 (1995); ROIPHE, THE MORNING AFTER, *supra* note 9, at 51-85; CHRISTINA HOFF SOMMERS, WHO STOLE FEMINISM? HOW WOMEN HAVE BETRAYED WOMEN 210-26 (1994); Neil Gilbert, *The Phantom Epidemic of Sexual Assault*, 103 PUB. INT. 54, 57-65 (1991); see also Wendy McElroy, *The New Mythology of Rape: Politicizing Women's Pain*, at <http://zetetics.com/mac/rape.htm> (last visited Jan. 23, 2002).

71. In a 1985 study, only 27% of those women who reported having been forced to have sex identified themselves as having been raped; only 5% of this total reported the incident to police. See Koss, *Hidden Rape*, *supra* note 5, at 44. In a 1978 survey conducted by the same lead researcher, 13% of the women surveyed reported being victims of forced sex; only 6% of those surveyed answered the question of whether they had ever been raped. See SANDAY, A WOMAN SCORNED, *supra* note 40, at 190; see also JOHNSON & SIGLER, FORCED

suggests that the trauma of forced sex varies considerably according to situation and individuals, at least in the short term.⁷² None of this precludes a judgment of serious wrongful conduct, however. There are many reasons to believe that forced sex occurs in continuing relationships.⁷³

Research into patterns of domestic violence provides an illuminating analogy here. Social science research indicates that a wide range of violence occurs within some ongoing, largely consensual romantic relationships.⁷⁴ A great deal of work in recent years has documented the prevalence of often severe violence between partners who nevertheless remain together in an intimate relationship.⁷⁵ Contrary to expectation, relationships built on strong

SEXUAL INTERCOURSE IN INTIMATE RELATIONSHIPS, *supra* note 5, at 142 (noting that half of the women who reported being forced to have sexual intercourse stated that they were not raped).

72. Research on victims suggests that psychological trauma from acquaintance rapes and assaults may be less severe initially than for more violent rapes, but may also be particularly persistent, in part because of nonrecognition. See Catalina A. Mandoki & Barry R. Burkhart, *Women as Victims: Antecedents and Consequences of Acquaintance Rape*, in ACQUAINTANCE RAPE, *supra* note 13, at 176, 185-88; see also SUZANNE S. AGETON, SEXUAL ASSAULT AMONG ADOLESCENTS 131-32 (1983) (noting few psychological effects on victims within a six month period of coerced sex besides anger and embarrassment, but increased depression and anxiety in long-term follow-up. It should be noted this survey also employed an extremely broad view of coerced sex that included sex obtained by emotional and verbal pressure), *infra* Part III. See generally Christine A. Gidycz & Mary P. Koss, *The Effects of Acquaintance Rape on the Female Victim*, in ACQUAINTANCE RAPE, *supra* note 13, at 270, 273-80 (stating that acquaintance rape victims are at a greater risk for experiencing behavioral, emotional, and cognitive consequences than are stranger rape victims).

73. See, e.g., Diana E.H. Russell, *Wife Rape*, in ACQUAINTANCE RAPE, *supra* note 13, at 129.

74. See CALLIE MARIE RENNISON & SARAH WELCHANS, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE 1 (2000); Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1210, 1220 (1993); Andrea D. Lyon, *Be Careful What You Wish For: An Examination of Arrest and Prosecution Patterns of Domestic Violence Cases in Two Cities in Michigan*, 5 MICH. J. GENDER & L. 253, 259-60 (1999); Daniel G. Saunders, *Wife Abuse, Husband Abuse, or Mutual Combat? A Feminist Perspective on the Empirical Findings*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 90, 97 (Kersti Yllö & Michele Bograd eds., 1988).

75. See Dutton, *Understanding Women's Responses to Domestic Violence*, *supra* note 74, at 1210-11, 1224 ("Problems that battered women may experience within relationships include attachment to or dependency upon the

emotional ties between partners can accommodate significant violence.⁷⁶ In this regard, the evidence of a significant number of forced-sex victims choosing to pursue a relationship with their victimizers seems less startling. Given this perspective, the prevalence of continuing relationships after forced sex underscores the severity of the nonrecognition problem suffered by many women.

C. *The Judging Society*

We turn finally to the attitudes of the rest of society about forced sex: to law enforcement officials and legal decision makers who must pass judgment on assault accusations and to the larger community of observers who assess in more informal ways accounts of alleged wrongdoing. Unsurprisingly, we find here the same problem recognizing rape when it occurs in romantic and quasi-romantic settings that we have seen with respect to perpetrators and victims. The more the pattern of interaction fits the romance paradigm, the less likely are third parties to judge it criminal. Conversely, attributes associated with the traditional rape paradigm—lack of a preexisting relationship, respectable character on the part of the woman, disrespectable on the part of the man, and the use of dramatic violence—increase the likelihood of a criminal label:

“It’s tough [to try the case] if the victim comes across as being loose, or if the victim has frequented bars. Also important is where she was when she was picked up and what time of night it occurred.”⁷⁷

“In cases where identification is not an issue, consent becomes important. These cases are reasonably easy. The parties will have known each other—will have been together, drinking, dancing. I try to point out to the jury that even if she did change her mind, it was in the middle of the act.”⁷⁸

abusive partner.”).

76. Here I mean relationships in which feeling for the other person, and an emotional need for the other, comprise part of the bond between the partners.

77. GARY LAFREE, *RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT* 100 (1989) (quoting a prosecutor).

78. *Id.* at 200 (quoting an Indianapolis defense attorney).

"A nice-looking young fellow. Nice dressed, like a college boy. Neat haircut. I couldn't believe he would be capable of something like this."⁷⁹

"She led him on. [She] accepted a ride in the middle of the night. [She] rode around with him for several hours."⁸⁰

"We all feel she asked for it from the way she was dressed"⁸¹

In studies of both jury verdicts and general surveys of public attitudes, the most influential factor in the assessment of sexual assault allegations is the preexisting relationship between victim and accused. In their landmark mid-twentieth century study of jury verdicts, Harry Kalven and Hans Zeisel found that juries rejected nearly all claims of rape in cases where the complainant and the accused had a prior social relationship.⁸² Indeed, out of all criminal cases surveyed, it was in nonaggravated (generally no dramatic violence) acquaintance-rape cases that judges and juries were found most likely to disagree on verdict.⁸³ More recent studies of the legal process reveal that the victim's relationship with the defendant continues to influence juries, albeit not as strongly as the Kalven and Zeisel study documented.⁸⁴ In a quasi-romantic setting, decision makers require more definitive proof in order to settle the cognitive dissonance created by the conflict between the women's allegations and traditional notions of rape.⁸⁵ A similar skepticism about

79. *Id.* at 219 (quoting a juror in a rape case in reference to the defendant).

80. *Id.* at 218 (quoting a juror in reference to the victim).

81. Steven I. Friedland, *Date Rape and the Culture of Acceptance*, 43 FLA. L. REV. 487, 488 (1991) (quoting the jury foreman in a rape case).

82. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 251 (1966).

83. See *id.* at 253-54. For a good overview of the study and its continuing validity, see Bryden & Lengnick, *Rape in the Criminal Justice System*, *supra* note 18, at 1255-63.

84. See, e.g., LAFREE, *RAPE AND CRIMINAL JUSTICE*, *supra* note 77, at 200-04, 214-24. For studies on conviction rates for rape, see Bryden & Lengnick, *Rape in the Criminal Justice System*, *supra* note 18, at 1251. See also TASLITZ, *CULTURE OF THE COURTROOM*, *supra* note 20, at 40 (stating that juries draw on stereotypes in making decisions).

85. See Estrich, *Palm Beach Stories*, *supra* note 18, at 32 ("It is not enough to

credibility affects law enforcement decisions at both the investigative and prosecutorial levels about which cases to pursue.⁸⁶

Other studies of public attitudes reveal the same bias: factors associated with traditional romance cut against any determination of rape. The more involved the relationship the man and woman had before the incident and the more romantic it appears, the more reluctant people are to characterize forced sex as rape.⁸⁷ Evidence that the man paid for the woman's food or entertainment on a date also predisposes third parties to noncriminal judgments about allegations of forced sex.⁸⁸ Evidence that the woman had been drinking or was dressed provocatively inclines decision makers against a criminal judgment.⁸⁹ Nor do these factors operate simply

decide that no means no; we must also decide when we are willing to accept that a woman said no.”). Consider the following statement by a police investigator—regarding a jury's desire for more hard evidence as underlying its acquittal of a defendant on rape and assault charges but conviction for trespass—in a case in which the victim testified that a male acquaintance came to the victim's home drunk and uninvited and raped her: “They said they wanted more pictures, some real gory pictures, something concrete that said, ‘Wow! There couldn't be any other explanation!’ They didn't deny they thought it had occurred, but they didn't feel like the evidence was there.” WARSHAW, I NEVER CALLED IT RAPE, *supra* note 33, at 132-33.

86. See Bryden & Lengnick, *Rape in the Criminal Justice System*, *supra* note 18, at 1230-35 (regarding police skepticism). It is difficult to distinguish here between official skepticism about the victim's account, as opposed to belief in the complainant's account but concern that a jury will not be convinced beyond a reasonable doubt.

87. See *id.* at 1266-69, 1369. See generally BOURQUE, DEFINING RAPE, *supra* note 10, at 171 (stating that sexual assaults between friends or acquaintances are less likely to be labeled as rape); Jacqueline D. Goodchilds et al., *Adolescents and Their Perceptions of Sexual Interactions*, in 2 RAPE AND SEXUAL ASSAULT 245, 266-69 (Ann Wolbert Burgess ed., 1988) (discussing how teenagers label consensual and nonconsensual sex); Jacquelyn W. White & John A. Humphrey, *Young People's Attitudes Toward Acquaintance Rape*, in ACQUAINTANCE RAPE, *supra* note 13, at 43, 47.

88. See Bryden & Lengnick, *Rape in the Criminal Justice System*, *supra* note 18, at 1268, 1281.

89. See *id.* at 1271. On intoxication, see *id.* at 1247-51. Consider this comment from a local resident concerning a case in upstate New York involving five men in a bar who had intercourse with a woman totally incapacitated by alcohol: “No one will tell you that what happened to her was right, but c'mon, a girl that drunk, what did she expect?” Barry Bearak, *Outrage May Revive Rape Case*, L.A. TIMES, Apr. 15, 1994, at A1. For other indications of public acceptance of sexual provocation as either an excuse from criminal responsibility for assault or as a mitigation, albeit some years in the past, see Associated Press,

as inferences about credibility concerning allegations of force. Many seem to use them in a normative fashion to judge comparative fault in a situation where something clearly went wrong. Many recognize a kind of provocation excuse for men, that where the woman acted in a sufficiently enticing way—if she indicated sexual interest, directly or indirectly, so provoking the man to full sexual arousal—the man’s disregard of her nonconsent to particular sexual activity thereafter should be legally excused.⁹⁰ Conversely, the more socially respectable the woman’s social character and the more sexually traditional she appears, the more likely an incident will be given a criminal label.⁹¹ Although less influential, the man’s character also matters. Some researchers have come up with a “loser scale” indicating that the worse the man fares on standard attractiveness criteria, from looks to education to occupation, the more likely the person surveyed will declare an incident of forced sex to be criminal.⁹² In other words, the less appealing the man appears on a scale of traditional romance, the more he is suspected of rape. Finally, the amount of force used by the perpetrator strongly influences judgments about rape. Consistent with the traditional paradigm of rape as a crime of dramatic violence, the more force that the man employs, the more likely the incident will be labeled rape.⁹³ Of course, acquaintance rapes rarely involve dramatic violence.⁹⁴

Many Rape Victims Share Blame, Students Say, L.A. TIMES, Aug. 14, 1988, at Metro 9.

90. On the recognition by many of a kind of provocation defense to rape, see generally Friedland, *Date Rape and the Culture of Acceptance*, *supra* note 81, at 495-96 (analogizing female sexuality as a weapon and male reaction as self defense). See also Muehlenhard & MacNaughton, *Women’s Beliefs About Women Who “Lead Men On”*, *supra* note 61, at 77 (discussing some women’s lack of empathy for rape victims based on the belief that “leading men on justifies rape”); Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, *supra* note 37, at 30 (discussing the idea that women are viewed as inciting male sexual desire).

91. See Bryden & Lengnick, *Rape in the Criminal Justice System*, *supra* note 18, at 1247, 1270-71.

92. See *id.* at 1274-78.

93. See JOHNSON & SIGLER, FORCED SEXUAL INTERCOURSE IN INTIMATE RELATIONSHIPS, *supra* note 5, at 147; Koss, *Hidden Rape*, *supra* note 5, at 44.

94. See JOHNSON & SIGLER, FORCED SEXUAL INTERCOURSE IN INTIMATE RELATIONSHIPS, *supra* note 5, at 142 (reporting a survey indicating that a man held the victim down in nearly 55% of the cases of forced sex and that no violence occurred in 30% of the cases; 90% of women reporting forced sex in

In sum, many persons remain skeptical about rape allegations when made against acquaintances in romantic or quasi-romantic situations. While some of the factors listed above may in some cases be probative on legal issues—they may legitimately go to credibility questions or *mens rea*, for example—the overall picture of judging tendencies is troubling for those who wish to protect the right to refuse intimate contact.⁹⁵ Both within the legal process and without we find strong evidence that incidents of forced sex are considered noncriminal because of traditional paradigms of rape and romance, rather than case-specific judgments of responsibility according to principles of respect for sexual autonomy.

We now move from explanation to persuasion. Given that traditional paradigms of rape and romance continue to shape emotional reactions to contested incidents, we need to consider how these reactions might be altered. How do we alter the emotional constructs of rape and romance?

III. SEX, VIOLENCE, AND NONRECOGNITION: FORCED SEX AS A CRIME AGAINST THE HEART

“When he went for the buttons on my dress, I tried to stop him. Tried to fight him. Tried to yell. Nothing worked. He ripped the dress, my stockings, panties . . . and me. He ripped my soul out of me.”⁹⁶

The modern history of rape reform is in significant measure the history of a struggle between rival visions of rape, a traditional view emphasizing its sexual aspects and a modern feminist view emphasizing its roots in violence.⁹⁷ Contemporary reformers have concentrated on the violence of the offense because this is central to the experience of rape victims and because it represents a powerful

the survey said they suffered no physical injury).

95. For example, the greater the use of force, the clearer the proof of nonconsent. Similarly, the intensity of prior consensual sexual activity may increase the chance of a nonculpable misunderstanding about consent. See Bryden & Lengnick, *Rape in the Criminal Justice System*, *supra* note 18, at 1195-1201.

96. *My Story*, at <http://www.geocities.com/hotsprings/villa/1261/survpoetry> (last visited Oct. 19, 1999) (Internet source no longer active).

97. See Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1093 (1986).

means of fighting the tendency to blame sexual assaults on female victims because of sexual allure or violations of gender norms.⁹⁸

The violence conception has been an important force behind many legal reforms and has inspired increased recognition of the wrongs of so-called stranger rapes. It appears to have had little impact upon forced-sex cases, however. The explanation for this disparate impact lies in common emotive constructs of rape, romance and violence. The violence conception of rape fits well with many people's paradigmatic understandings of both rape and violence—as long as the rape is committed by a stranger. A sexual attack by a stranger who employs dramatic force such as a gun or knife or verbal threat to life matches many people's images of rape and violence. But forced sex incidents do not play out this way; in fact their patterns are closer to those of ordinary courtship, making the label "bad romance" seem more appropriate than rape.

I argue here that our paradigmatic conception of rape, at least with respect to forced sex, cannot rest as heavily on violence as some recent reformers have insisted. In order to address common emotional reactions to the facts of forced-sex cases, we must appreciate more the sexual aspects of such wrongdoing.

We begin this aspect of the inquiry by listening to victims of rape speak of the injuries they have suffered. We learn that the deep hurt of the crime is a wound to the victim's inner self, to her spirit, and that this injury occurs because the attack is sexual. Articulating more fully the sex-spirit connection, which intuition recognizes as critical to the horror of the crime, provides us with a powerful argument about the wrongs of all forms of rape. I argue that we should characterize rape generally as a crime against the soul, for this phrase expresses in emotive terms the way that the rapist attacks the victim's inner person through sexual invasion. And we should characterize forced sex as a crime against the heart because of the way the perpetrator's sexual callousness damages the victim's ability to make intimate connections with others.

98. See Bryden & Lengnick, *Rape in the Criminal Justice System*, *supra* note 18, at 1288-89.

A. Ideological Battles: A Brief History of Sex vs. Violence in Rape

The modern emphasis on violence in rape has roots in a particular history in which a more sexual approach to the crime of rape produced a law and practice reluctant to blame men for sexual coercion outside of certain limited situations. The traditional view of rape was deeply influenced by patriarchal concepts of gender roles and sexual responsibility. By insisting that rape is a category of violent conduct entirely distinct from consensual sexuality, anti-rape reformers sought to separate criminal analysis from traditional patriarchal views of gender and romance.

Under the traditional view of rape, the victim's sexual virtue—a moral quality—was taken by the offender via sexual invasion.⁹⁹ There was a sense that this loss was permanent. Through brute attack she was sexually, and so morally, tainted. If the victim had previously been virginal, she lost her innocence forever. If the victim was married, her marital virtue was permanently stained. Under the traditional view, the rapist was a barely human brute who acted out of animal lust. In this man, sexual desire, always a dangerous and potentially destructive force, inspired one of man's worst deeds.¹⁰⁰

The traditional view of rape matched a traditional view of distinct male and female interests and roles in romance. The virtuous woman was essentially without sexual passion. In her romantic interactions with a man she was to act as the sexual gatekeeper, keeping social virtue by barring the way to out-of-wedlock

99. See SUSAN BROWNMILLER, *AGAINST OUR WILL* 13-14 (1975); Estrich, *Rape*, *supra* note 97, at 1103.

100. The classic critique of the traditional view in Anglo-American law is found in *Against Our Will* by Susan Brownmiller. See BROWNMILLER, *AGAINST OUR WILL*, *supra* note 99, at 16-22. For influential statements on the common law of rape, see JOEL PRENTISS BISHOP, 2 COMMENTARIES ON THE CRIMINAL LAW 624-38 (7th ed. 1977) (1882); 2 WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 211-15 (Oxford, Clarendon Press 1769); SIR MATTHEW HALE, 1 PLEAS OF THE CROWN 626-36 (Philadelphia, Robert H. Small 1847). For historical accounts of rape in English law and practice, see ANNA CLARK, *WOMEN'S SILENCE, MEN'S VIOLENCE: SEXUAL ASSAULT IN ENGLAND, 1770-1845*, at 46-58 (1987); SHANI D'CRUZE, *CRIMES OF OUTRAGE: SEX, VIOLENCE AND VICTORIAN WORKING WOMEN* 171-90 (1998). For U.S. history, see Barbara S. Lindemann, "To Ravish and Carnally Know": *Rape in Eighteenth-Century Massachusetts*, in 9 *CRIME & JUSTICE IN AMERICAN HISTORY* 778, 778-82 (Eric H. Monkkonen ed., 1992).

intercourse.¹⁰¹ The good woman was interested in men for marriage and family, but not, primarily, for sexual relations. Of course this was just the feminine ideal. Some women did display sexual interest, but they faced moral condemnation for their violation of gender norms.¹⁰² Meanwhile the romantic man was expected to be sexually motivated.¹⁰³ While the gentleman was expected to refrain from untoward advances, it was assumed that all males of the species would be strongly drawn toward sexually attractive women, making restraint difficult, particularly in the face of active female enticement.¹⁰⁴

The traditional view of rape and romance had a number of legal consequences, most of them negative from the victim's perspective. The presumably permanent harm to the woman's moral character meant the offense was considered among the law's most heinous, meriting its most severe penalties, including death.¹⁰⁵ In part because the penalties were so severe, and corroborating evidence from third parties difficult to obtain, the law developed a series of special procedural protections to ensure that such extreme penalties were not inflicted on the innocent.¹⁰⁶ This also meant that many guilty were not convicted or even prosecuted.¹⁰⁷

The sexual nature of the crime made the complainant's sexuality a legal issue. Defense attacks on a woman's sexual virtue were legitimate for a number of reasons. If unchaste, the woman's injury from the attack might be dismissed as trivial.¹⁰⁸ A bad reputation would also raise suspicions that she acted as a temptress.¹⁰⁹ If a man found himself unable to restrain his sexual impulses, perhaps the woman had provoked him and should be estopped from complaining later about the consequences.¹¹⁰ Sexual virtue was also important

101. See Bryden & Lengnick, *Rape in the Criminal Justice System*, *supra* note 18, at 1281.

102. See *id.* at 1204.

103. See *id.* at 1197.

104. See *id.* at 1282.

105. See *id.* at 1288.

106. See *id.* at 1197.

107. See *id.* at 1208.

108. See *id.* at 1355.

109. See BROWNMILLER, *AGAINST OUR WILL*, *supra* note 99, at 385; Torrey, *When Will We Be Believed?*, *supra* note 23, at 1015.

110. See Torrey, *When Will We Be Believed?*, *supra* note 23, at 1015.

because of what it indicated about her honesty.¹¹¹ The sexually virtuous woman told the truth; the loose woman lied.¹¹² Again, a complex array of special defendant protections was needed for rape cases to ensure that only the clearest cases of forcible sexual attacks, against the worthiest (most sexually virtuous) females, would produce convictions.

Beginning in the 1970s, feminist reformers sought to transform the concept of rape from a sexual offense to one grounded in violence, and to a remarkable extent, they succeeded.¹¹³ Largely inspired by feminist thought, the modern conception of the crime sees the rape victim as suffering serious psychological trauma from a particularly devastating form of violence aimed at her sexual parts.¹¹⁴ The rapist is a man motivated not by the passions of sex, but of sexism.¹¹⁵ Giving voice to the fear of death and violent injury that many victims report, even in the absence of deadly weapons or express threats, the modern view rejects any notion that the rape experience involves sexual arousal, pleasure or any other feature of consensual sex. Rape is a violent attack upon the sexual organs rather than an act of sexuality.¹¹⁶

111. See BROWNMILLER, *AGAINST OUR WILL*, *supra* note 99, at 385.

112. See Bryden & Lengnick, *Rape in the Criminal Justice System*, *supra* note 18, at 1304-06.

113. See BROWNMILLER, *AGAINST OUR WILL*, *supra* note 99, at 386.

114. For especially influential examples of the modern view, see *id.*; DIANA E.H. RUSSELL, *THE POLITICS OF RAPE: THE VICTIM'S PERSPECTIVE* 24 (1984); Estrich, *Rape*, *supra* note 97, at 1090; Torrey, *When Will We Be Believed?*, *supra* note 23, at 1064 n.252. For a general overview, see LEE ELLIS, *THEORIES OF RAPE: INQUIRIES INTO THE CAUSES OF SEXUAL AGGRESSION* 10-12 (1989).

115. See ELLIS, *THEORIES OF RAPE*, *supra* note 114, at 10-12.

116. See, e.g., Bonnie L. Katz, *The Psychological Impact of Stranger versus Nonstranger Rape on Victims' Recovery*, in *ACQUAINTANCE RAPE*, *supra* note 13, at 251, 252 ("Rape is an act of power and control, intended by the rapist to humiliate the victim."). For additional reference, see sources cited in ELLIS, *THEORIES OF RAPE*, *supra* note 114, at 21-24; Bryden & Lengnick, *Rape in the Criminal Justice System*, *supra* note 18, at 1329. Thus one early proposal in California was to redefine rape as felonious assault to make clear its violent nature: "[W]e believe that rape is an act of violence which always carries with it the threat of death, and it is an act of aggression in which the victim is denied her right to self-determination. Rape is not a sexual crime." *Revising California Laws Relating to Rape: Hearing Before the Assemb. Criminal Justice Comm. and the California Comm'n on the Status of Women* 11 (Los Angeles, Oct. 18, 1973) (statement of Barbara Allen, who was attacked by a

The modern shift in emphasis from sexuality to violence has had a number of important and beneficial consequences for the criminal law. The violence approach has helped alter rape law's concern with the sexual character of the complainant. It encouraged a shift in focus from the preexisting social and sexual conduct of the victim to the accused's use of force against the victim in the charged incident.¹¹⁷ It served to rebut a number of generally unfounded concerns about false claims of rape used to justify special defendant-protective rules in rape law.¹¹⁸ By associating rape with violent

man who broke into her house through her living room window); *see also id.* at 145 (statement of attorney Riane Eisler, arguing that the term rape should be replaced with "aggravative or felonious assault").

117. *See, e.g.,* ESTRICH, REAL RAPE, *supra* note 8, at 95-96. As long as the offense requires proof of offender culpability, meaning proof of actual awareness of nonconsent or notice of facts that should signal nonconsent, decision makers will have to examine the conduct of both parties, however. *See* Bryden, *Redefining Rape*, *supra* note 7, at 417.

118. Reformers argued that the traditional view's sexualized distrust of female complainants contradicted the reality of women's experience. Strong social and legal disincentives to claiming rape mean that few rational actors will make a false claim. (This is true at least as to rape allegations that the complainant pursues as a legal matter. There is some evidence that a significant number of women who initially allege rape to parents, friends, and police, and within a short time recant their accusation, may have made a false claim originally, usually to avoid a shameful or embarrassing disclosure concerning their own conduct. *See* Bryden & Lengnick, *Rape in the Criminal Justice System*, *supra* note 18, at 1200-01.) In most cases, only the deep injury of rape will persuade a woman to come forward and endure the further pain of making a public, legal accusation and being subjected to potential humiliation, disbelief, and even retaliation. Indeed, fear of such pain dissuades many victims from even reporting the incident to the police. Although innocent men are sometimes convicted of rape, the great majority of documented cases of miscarriage of justice involve stranger rape allegations where a conviction rested on questionable eyewitness identifications. *See id.*; *see also* EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 12, 34-76 (1996) (providing case studies involving exculpatory DNA evidence). In such cases issues of nonconsent and the woman's sexual character are normally unimportant. Finally, there are cases where a woman makes and pursues a rape claim she knows to be false, but generally these seem to stem from psychological disturbances unrelated to sexual character. Nor is it clear that traditional proof rules would necessarily screen out such cases better than reformed rules. *See* LINDA A. FAIRSTEIN, SEXUAL VIOLENCE: OUR WAR AGAINST RAPE 217-30 (1993) (describing an apparently strong case in which physical injury to the victim proved to be false because self-inflicted). In sum, the old view of rape unjustifiably increased the risk that the guilty would go

offenses such as robbery, aggravated assault, and murder, advocates sought to make victims worthy of our unabashed sympathy, and perpetrators the subject of unadulterated enmity. Just as we do not consider the murdered, robbed or the assaulted responsible for, or deserving of their victimization, so we must not blame rape victims for their victimization. Not coincidentally, the violence approach makes it easier for victims to speak publicly about rape, for it means that victims need not speak of that private and still shameful subject, sex, but the far more public matter of violence.¹¹⁹ For all our supposed sexual liberation in American culture, violence remains a more comfortable topic for public conversation than sex.¹²⁰

The violence approach has been further developed by social and behavioral scientists studying rape. Using its normative framework, researchers have studied those who rape, the patterns of the offense, and the psychological traumas it inflicts on victims. This work has bolstered the violence conception in a number of ways, most importantly by linking the experience of rape victims with the experiences of others who suffer trauma from other forms of violence.¹²¹

free, by unrealistically—and ineffectively—seeking to minimize the risk of erroneous convictions.

119. For instance, consider this testimony of a worker at an emergency room on how she comforted a young woman who was raped after awaking in her apartment to a man holding a razor blade against her neck:

I humanly touched her, held her hand, and talked to her. I talked to her about my daughters and about her grief, and this did seem to make a difference. She was bewildered by the fact that a guy would do this to her just to get sex. She seemed relieved when I explained to her that I did not feel that rape was a sexual assault and that she had every right to be outraged.

Revising California Laws Relating to Rape, *supra* note 116, at 43 (statement of Margaret Barker). This may help explain why for those most actively seeking to educate the public about rape—prosecutors, police in specialized units, and social scientists who do anti-rape training—the violence conception has become a virtual mantra, recited early and often with respect to all aspects of rape, from victim injury to perpetrator motivation.

120. An early reformer in California argued that renaming rape as a form of assault would help eliminate myths about women acting to sexually provoke men into rape. She also argued that prior sexual conduct should never be admitted into evidence. She stated: “As you can see from the results that people have been testifying to, the moment that you introduce sex, let’s face it, people just don’t think very clearly.” *Id.* at 150 (statement of attorney Riane Eisler).

121. *See generally* WIEHE & RICHARDS, *INTIMATE BETRAYAL*, *supra* note

The violence approach, as classically set out, posits that men rape, not out of sexual desire, but out of the same angry motivations that prompt other crimes of violence against women.¹²² Men rape because of a need to assert power over females.¹²³ Thus for male perpetrators as well as for female victims, talk about sex is deemed inappropriate in the context of rape. Sex and rape may involve similar bodily movements and physiological processes, but in human terms, they are fundamentally distinct acts.

As with the traditional conception of rape, the modern conception pairs with a particular view of romance. Inspired by feminist thought, the modern view of romance rejects the gender distinctions of the past.¹²⁴ Women have sexual passions, just as men do. Women have sexual interests and drives that they should be free to pursue.¹²⁵ Nor do women have special moral or social

56, at 122-26 (discussing the types of trauma experienced by victims of acquaintance rape). Some victims develop substance abuse problems. Some withdraw from work and social contacts, from family and friends. Others apparently function normally, but inside feel fundamentally disordered and distrusting. Many victims suffer flashbacks and a host of severe mental and emotional symptoms, which psychologists call post-traumatic stress disorder (PTSD). Victims often suffer some form of sexual dysfunction; they may have great difficulty finding pleasure in sexual relations. Some retreat from sexuality entirely; others become promiscuous. Finally, some use sex as a form of denial, or a way of punishing themselves or others.

122. As previously noted, this is increasingly controversial. A number who now argue that the essence of the wrong and injury is violence nevertheless argue that perpetrator motivation may be in significant part sexual. *See infra* Part IV.

123. For example, in speaking before a California legislative hearing in 1973, a rape victim testified:

What does a woman feel when she realizes she is going to be violently assaulted? . . . Most women don't relate so much to the sexual aspects of the crime, but rather to the terror—the sheer terror and fear that is involved in such a violent act. Rape always carries with it the threat of death. This is true even when the rapist doesn't have a visible weapon. When it was happening to me, I was paralyzed by the absolute fear that he was going to kill me.

Revising California Laws Relating to Rape, *supra* note 116, at 4 (statement of Barbara Allen).

124. *See* Estrich, *Rape*, *supra* note 97, at 1149 n.201.

125. As described by one author:

Sexual freedom means women are allowed to behave as freely as men to express this sexuality, to have it allowed, that is (hopefully) shamelessly and without social constraints to initiate genital drive

responsibility for sexual virtue. In any romantic interaction she should be free to take the sexual lead if she wishes and should be equally free to desist whenever she wishes. The only limit she must respect is the consent of an adult partner.¹²⁶ Men should be subject to the same rules and limitations. They must respect the desires of their adult partners to refrain from sex, even if this means denying their own desires for sex.

B. Match and Mismatch: The Violence Conception, Stranger Rape, and Acquaintance Rape

As noted, the violence conception of rape has come to dominate the official discourse about rape and inspired a range of criminal law reforms. Yet one category of rape offenses remains largely impervious to its influence: forced-sex cases. The persistence of nonrecognition of wrong in such cases has been a major source of frustration for anti-rape activists. It seems that when it comes to evaluating instances of coerced sex among acquaintances, the old notions of rape and romance prevail.

Why has so little changed with respect to our understanding of forced sex? Why is it that when the parties have a previous social relationship, suddenly all the old, supposedly discredited ideas about rape and romance resurface? The answer clearly involves some difference between acquaintance and stranger rape cases and our emotional constructs of rape and romance.

For reliable recognition of criminality we need a powerful match between a paradigm of wrongdoing and the facts of a particular case. The conception of rape on which our emotional reactions of anger and horror and often disgust are based must match up with essential features of events presented by the accusing witnesses. The violence

satisfaction through heterosexual intercourse. Hence, the liberated woman. Hence, the sexual revolution.

CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 133 (1989).

126. There is a gap here between criminal law and social practice and understanding. In many jurisdictions, sexual intercourse by any person with another under the age of eighteen is a felony. Yet social practice indicates that a large number of people under this age have sex. Half of all teenagers in the U.S. experience their first intercourse in the age range of fifteen to eighteen. See ROBERT T. MICHAEL ET AL., SEX IN AMERICA: A DEFINITIVE SURVEY 91-92 (1994).

conception of the offense presents just such a match with respect to sexual attacks by strangers. Speak of violence in a sex crime and many imagine a surprise attack by gun, knife or brute blows by a strange figure in the dark against an especially vulnerable female, culminating in assault on sexual parts of the body. We imagine an attack that occurs in tandem with other frightening, intrusive offenses such as burglary, robbery, a beating, or even a killing. We imagine terror: from the beginning of the incident fear floods the victim. When the strange figure is spotted at the foot of the bed, or in the shadows of the building, or the driver turns into a strange and isolated neighborhood, the internal alarm bells ring loud and long.

It is not hard to imagine the rage that must fire a man who commits such acts, nor the trauma that such violence inflicts on anyone who survives it. Nor is it hard to see such attacks as primarily violent and only secondarily sexual. An unprovoked attack on a stranger represents a quintessential example of criminal violence. And so it is that stranger rapes remain the most likely forms of rape to be reported, to be prosecuted and to result in conviction and significant punishment. Thus we can see that the relatively swift public acceptance of a violence conception of rape may be deceptive. In fact, the new conception has required no fundamental change in emotional constructs. We can dress up old notions of rape with new, modern clothes and feel pleased at our progress. As makeovers go, this one is relatively painless. But the same cannot be said for forced sex.

There is no easy match between the rhetoric of violence and the facts of assault cases in romantic or quasi-romantic contexts. Where the parties are acquaintances, friends or romantic partners, where weapons rarely appear, and where express threats to life, or blows are less frequent than in other sexual attacks, where the initial interaction between the parties is often overtly sexual and consensual, where the woman's consent is frequently overcome by some combination of intoxication, superior physical strength and male sexual determination, the basic facts of the interaction do not suggest violence, at least not in the usual sense of that word. By contrast with stranger rape cases, most forced-sex interactions begin, and often continue for a significant period, as consensual exchanges of talk and sometimes touch. Signs of coercion often come late in the sequence of events and even then they do not often inspire the

terror of a stranger's attack. There is generally no moment of startling realization, when the world is utterly transformed. More common, there is a gradual realization that something has gone badly wrong. What initially appears to be an ordinary conflict over the level of sexual contact becomes something more as the man refuses to desist. But even if the man uses significant force, causing pain and fear, the incident does not fit the image that most have of events deemed violent.

It is critical to see that this is not a problem in rape theory. Advocates of the violence approach contend that our concept of violence should include sexual coercion.¹²⁷ They argue that, in principle and experience, forcible disrespect for the sexual autonomy of the victim constitutes violence to the person.¹²⁸ Unfortunately, such arguments are too abstract to effectively address the emotional assessment of particular cases. On an emotional level, traditional paradigms of rape remain powerful. We can hear this in victim accounts:

"I had always perceived of date rape as a violent, purposefully hateful act. Date rape was something which occurred when a man's aggressions escaped his control, and despite ardent protests from his victim, the man carried out the sexual act. But I was wrong."¹²⁹

"Privately, my attacker admitted to me that what he did was not kosher, but he didn't think that it was rape because it was not violent-he never hit me."¹³⁰

"I don't even know if I can call it rape.... I was definitely taken advantage of. I never would have done it

127. See Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359, 373-74 (1993).

128. See *id.*

129. *Student Survivors Expose Three Faces of Date Rape*, YALE HERALD, May 1, 1996, available at <http://yaleherald.com/archive/xxi/4.26.96/front.html> (last visited Jan. 22, 2002) (account of a woman who had intercourse for the first time during her sophomore year in college when, during consensual foreplay, her boyfriend penetrated her against her will).

130. *Id.* (account of a woman in college who, after becoming drunk, was raped by a friend).

sober, but it's hard to call it rape because I was too drunk to say no."¹³¹

These statements exemplify the way traditional and modern views of rape are often conflated in the assessment of forced sex. Even those predisposed to accepting the feminist view of rape still presume that the crime requires dramatic physical violence, screaming protests and wild resistance.

What we need for recognition of forced sex is a concept of wrong that fits the romantic or quasi-romantic context. In short, we need a sexual concept of wrong. Most forced-sex cases play out as a dispute about sex between persons with mutual or potentially mutual sexual interest. Given this, an exclusive focus on violence is confusing. Yes the perpetrator acts violently, but his use of force is unexpected, and takes such an unexpected form, that speaking of it without also speaking about sex—which is front and center in the minds of the participants—makes recognition of serious wrong difficult.¹³²

The need to talk more about sex brings us to the other part of our conceptual problem: current views of romance. Just as with rape, here we see that much less change has occurred in social understanding than contemporary public rhetoric might suggest. Traditional gender role distinctions remain very influential, especially among the young people most likely to be involved in forced-sex cases.

The idea that the woman is, or should be, sexually dispassionate is generally rejected today. At least the idea receives little public support; tacit support may be found in a variety of patterns, including the way in which victims of forced sex are evaluated according to their sexual behavior. As will be detailed further in Part V, many young people believe that females should not indulge in too much

131. Laura Sneade, *Date Rape: College's Dirty Secret*, HOOKED-UP, at www.urich.edu/~journal/magazine/4-97/features/articles/f-daterape.html (last visited Jan. 27, 2002) (account of Jill, who learned—after the fact—that, during a weekend outing after college finals, two men she had never met before had sex with her while she was incapacitated by alcohol).

132. For example, as one date rape victim observed: "It's very confusing. He was my date. He was supposed to respect me. Instead he sodomized me." WIEHE & RICHARDS, *INTIMATE BETRAYAL*, *supra* note 56, at 43.

sexual conduct or display too much sexual interest.¹³³ Conversely, males are still expected to take the sexual lead in interactions, still expected to be the ones most interested in the physical pleasures of sex, and still seen as less capable of sexual restraint than females. Many still regard women as having special sexual responsibilities, that she must set the pace for sexual interaction and that she bears some significant measure of the fault if the man becomes so aroused as to force her into acts she does not desire.

The persistence of these traditional gender norms can be found in many victim accounts. They are among the most important reasons that victims often blame themselves for what happened:

“I thought it was my fault. What did I do to make him think he could do something like that? Was I wrong in kissing him? Was I wrong to go out with him, to go over to his house?”¹³⁴

“Over the next few weeks, whenever I tried to tell someone, I would hear, ‘If he had forced you, you wouldn’t have gotten into the car with him’ [T]he story got twisted around in my head so many times that I started to feel that it was my fault. I must be a tramp, I thought. Good girls wouldn’t fool around like that.”¹³⁵

Once more we find ourselves face-to-face with our old adversaries: traditional paradigms of rape and romance. Where the conflict between the man and the woman seems to involve levels of sexual interest—the man wanting more sexual involvement than the woman—traditional views of the woman as the sexual gatekeeper remain powerful. Those most reluctant to label incidents of forced sex as rape generally interpret such events as ordinary conflicts about

133. What is “too much” is highly variable. The important point for our purposes is that a special female norm of “too much”—of promiscuity—remains a powerful part of contemporary gender identity. For a further discussion of this issue, see *infra* Part V.

134. WARSHAW, I NEVER CALLED IT RAPE, *supra* note 33, at 17 (account of a victim of date rape at the age of seventeen).

135. Sara Kate, *Was It Rape?*, at http://www.stardate.bc.ca/survivors/survstor/sarah_kate.html (last visited Jan. 27, 2002) (account of a sexual assault by a would-be boyfriend in high school).

sex. For those of us who consider forced sex a serious wrong, this perspective is obviously a serious problem. But it may also present an opportunity. Like any good lawyer, we need to find places of common agreement with those we wish to persuade. We can then use these places of agreement as the foundation on which to build normative arguments. In forced-sex cases, we can use skeptics' sexual interpretation of the conflict as a critical part of our responsibility argument. Instead of trying to substitute violence for sex in the incident, we can concede that the conflict is importantly sexual, but that this is consistent with serious wrongdoing. Indeed, appreciating the sexual nature of the harm proves essential to understanding the wrong of this kind of rape.

In order to create a modern, sexual conception of forced sex, we reconsider the injuries caused by rape. This is how feminist reformers began their persuasive campaign on behalf of the violence conception. It remains a useful starting place, because victim injury represents a far less controversial aspect of rape than perpetrator responsibility. There is general agreement in contemporary society that rape can be psychically devastating. Thus if we can demonstrate that an important part of the devastation of rape is tied to sexual aspects of the offense, we will have a new way of linking the sexual aspects of forced sex to the wrongs—the harms—of this kind of criminality.

As did feminist reformers in the 1970s, we begin with those offenses for which there is already general emotive agreement: stranger rapes. Obtaining a revised understanding of injury here will give us an important tool for revising common understandings of injury in forced sex and thus recognition of the wrongs of forced sex.

C. Another View of Rape's Injury: A Crime Against the Soul

Few today doubt that rape inflicts major psychological injuries on its victims. In modern discourse these injuries are usually described in the language of psychological trauma, which draws from the fields of mental health and social science.¹³⁶ This language

136. The other academic discourse employed with respect to victim injury is that of autonomy violation, which draws from the fields of law and philosophy. See, e.g., SCHULHOFER, UNWANTED SEX, *supra* note 20, at 99-113. This discourse is generally employed for discussions of larger theories of legal and moral wrong rather than to describe the particular injuries of individuals in

has its own significant strengths, but is both too abstract and too concerned with explanation and treatment to serve our current needs.¹³⁷ We need an evocation of injury that speaks simply and powerfully to personal experience and to wrongdoing in order to address the underlying assumptions about rape that shape so many people's emotive concept of the offense. In search of language that may prove emotionally effective, we turn to victims themselves and the words they used to express their hurt.¹³⁸

Many stranger rape victims speak of a fundamental loss of identity as the result of their sexual violation:

“When I run into someone I haven't seen for a long time, someone who doesn't know what happened, I feel as though I'm talking across a great distance. A part of me wants to say, ‘Don't you see, everything's changed. I'm a different person now.’”¹³⁹

particular cases, however. In other words, in their dealings with victims, the language of autonomy is not normally employed by trial lawyers or others who work with victims.

137. By design, the language of trauma generalizes the victim's experience. It links the individual's experience to larger patterns of human thought, feeling, and action documented by scientific observers. The language seeks to make the victim's experience common, to show that the victim does not stand alone. For the same reason, the language of trauma is impersonal. It cannot speak for the individual except to relate the individual's situation to a general pattern. It does not easily convey the subjective quality of the victim's experience. Cf. Judith Lewis Herman, *Considering Sex Offenders: A Model of Addiction*, in RAPE AND SOCIETY, *supra* note 5, at 74, 74-75.

Perhaps more importantly, the language of trauma does not speak of moral wrong. It quantifies the damage to mental and emotional health that sexual injury causes in words equally appropriate to the damage wrought by natural disasters or disease. Scientific language gives no voice to the *moral* horror involved. It does not express the terrible realization that comes with the experience of a powerful moral wrong—that a world thought to have moral order, may have none.

138. For recent extraordinary books that tell of victim injury in the kind of language sought here, see PATRICIA WEAVER FRANCISCO, *TELLING: A MEMOIR OF RAPE AND RECOVERY* (1999); JAMIE KALVEN, *WORKING WITH AVAILABLE LIGHT: A FAMILY'S WORLD AFTER VIOLENCE* (1999); PIERCE-BAKER, *SURVIVING THE SILENCE*, *supra* note 2; NANCY VENABLE RAINE, *AFTER SILENCE: RAPE & MY JOURNEY BACK* (1998). *After Silence*, in particular, is a work of haunting beauty.

139. KALVEN, *WORKING WITH AVAILABLE LIGHT*, *supra* note 138, at 102 (account of the author's wife, Patsy, on her experience of a violent sexual attack).

"My *rapist* stole me from me. He ripped my personality out of me—who I was—the same as if he had ripped out my heart."¹⁴⁰

"I remember he was very forceful. He wanted to hurt me But he could never hurt me as much as my soul was hurting me."¹⁴¹

"It's as though you escaped death, which would have been absolute, but suffered another kind of death. The death of your sense of the world It's amazing to think what happened to my soul during those minutes of struggling with him I never imagined it would be like this."¹⁴²

These statements resonate emotionally, but they can be hard to understand intellectually. How can a physical interaction that leaves few or no physical scars make such a permanent impression on the core of the person, her sense of who she is? How can anyone, short of insanity, lose his or her sense of "me"?

The victims speak about self-identity: who they are to themselves. They speak of a basic change in their idea of themselves as a unique person, constituted of particular experiences, tendencies and abilities, particular thoughts and feelings. They report that sexual violation does such violence to these aspects of identity that their own thoughts and feelings become alien to themselves.

These accounts point us to an important and insidious aspect of the injury of sexual aggression. They reveal that, in some

140. Sylvia Hauser, *A Victim's Story: "My Rapist Stole Me from Me"*, SAN DIEGO UNION-TRIB., June 15, 1991, at C1; see also Mike Granberry, *The Crime of Rape: "Essentially, It Took My Life," Says Woman Who Works to Help Others to Recover from Attacks*, L.A. TIMES, Apr. 3, 1986, at V1 ("Essentially it took my life It will never be the same again. . . . I lost me.").

141. Marjorie Miller, *Three Guilty in Bosnia 'Rape Camps' Case*, L.A. TIMES, Feb. 23, 2001, at A1 (account of a rape victim testifying in a prosecution for war crimes of rape and torture before a U.N. tribunal in The Hague).

142. KALVEN, WORKING WITH AVAILABLE LIGHT, *supra* note 138, at 147.

unexpected fashion, the aggressor overcomes psychic defenses to invade the inner person. Normally we can defend ourselves against hostile physical attacks, and even if we cannot, we can separate harm to the body from harm to the inner self. We can keep our minds intact. Indeed rape victims frequently do this by mentally separating from their bodies during the attack.¹⁴³ They watch their bodies being used, becoming observers to themselves. But this works only for a time. Eventually the victim's self, her spirit, must rejoin the body and this requires the spirit's acceptance of what the body has suffered.

The victims' accounts remind us that regardless of the power of our minds, we remain embodied beings, inextricably linked to our physical existences. Our bodily and psychic lives are absolutely intertwined, and more closely than we sometimes realize in this age of virtual exploration and fantasy. A meaningful life requires a joining of body and mind, and when their connection is torn, it takes long and hard work to rebuild. The sometimes overwhelming temptation for victims—to treat the body as tainted, as separate from the self—just prolongs the rapist's act of disregard for personal integrity.

The same point can be made another way. The victim accounts remind us of the importance of sex to gender and personal identity. Whether sexually active or inactive, adults generally see themselves as individuals with a particular sexual identity, which implies certain kinds of relationships with others. An important part of every life story is the individual's development of a particular sexual identity through chosen interactions with others. Among the most powerful influences on that development can be physical sexual contact. When that contact is unwanted, it can wreak havoc on the individual's sense of self and future direction.

Although this injury is internal and individual, it has important social repercussions. Because of the perpetrator's invasion of the victim's self and disruption of identity, because of his disregard for her value, many survivors of rape feel socially devastated. Victims feel the attack has dragged them from a place of social order and comfort to one of indifference and cruelty, where ordinary human

143. See, e.g., *My Tale*, at <http://www.stardate.bc.ca/survivors/survstor/lorrie.html> (last visited Feb. 17, 2002) ("I just went into this world were [sic] I felt almost nothing.").

bonds do not function. They feel abandoned in a place of utter loneliness:

“It’s as though the moment I was hit . . . I was cut off from myself—as though all my connections to the world were slashed.”¹⁴⁴

In our densely populated world, full of forced interaction with strangers and near-strangers, and therefore full of efforts to avoid personal entanglements, we sometimes forget the importance of making and keeping emotional connections with a variety of other human beings.¹⁴⁵ Such connections not only promote physical and psychological health; in a moral sense they are vital to life. We might even say that these connections constitute life. For most of us, the emotional and moral connections we make with others distinguish living from mere existence. We make these connections in a variety of ways, many of them nonsexual, but sex remains one of the most powerful and broadly influential forces for human intimacy.

To summarize: By forcibly using the other’s body sexually, the rapist intrudes not just into the body but into the mind, and not just temporarily, but in many cases permanently.¹⁴⁶ A crude and in many ways stupid physical act¹⁴⁷ can violate the individual’s sense of self and security, crippling the victim’s ability to connect to others. Because the injury is sexual it goes deep into the self; because it goes deep, we should consider it a harm, a crime to the soul.¹⁴⁸

144. KALVEN, WORKING WITH AVAILABLE LIGHT, *supra* note 138, at 256. That victim also stated:

I was very afraid of this person, but I wasn’t afraid of what he was doing. . . . I was afraid it meant the end of me. . . . I wasn’t afraid of pain. I wasn’t afraid of death. I was afraid of the *aleness* of it. That terrified me. The world just disappeared.

Id. at 257.

145. See MICHAEL LERNER, SPIRIT MATTERS 96-99 (2000).

146. This does not mean that victims never recover from their assault, but that the person is permanently changed. The survivor may go on to have a rich and satisfying life, but as a different person than she was before she was sexually attacked.

147. The attack is stupid in the sense that the perpetrator usually has no clue as to the psychic damage he is doing. See Maureen Dowd, *Rape: The Sexual Weapon*, TIME, Sept. 5, 1983, at 27, 28 (“Assailants have no idea that what they are doing has devastated a life. They think, ‘It’s just sex. She’s had sex before. What’s the big deal?’” (quoting Peg Ziegler, director of a rape crisis center in Atlanta)).

148. The idea of a wound to the soul is a refrain repeatedly heard in victim

Some may object to the connotations of this terminology. Soul is a word used most frequently in religious discussions. In the United States, we need a secular basis for criminal law. Similarly, soul normally refers to a private aspect of moral life—the pursuit of the good in life, rather than a matter of rights to be protected from public or private injury. Yet the phrase has real promise for our purposes. It has immediate emotional impact far greater than the trauma language of behavioral science. Equally important, it allows us to connect the sexual dimension of the offense with the victim's hurt without reinvigorating the suspect-the-woman's-sexuality tendencies of the traditional rape concept.

D. The Injury of Forced Sex: A Crime Against the Heart

Now we turn from stranger rapes to forced sex. Even if we accept the notion of stranger rape as a crime against the soul, it is not clear how this formulation will fit, or be seen by many to fit, forced-sex cases which involve a different pattern of confrontation between perpetrator and victim.¹⁴⁹ Perpetrators of forced sex are less likely to employ weapons or direct threats to life or limb, and less likely to

accounts. See, e.g., PIERCE-BAKER, SURVIVING THE SILENCE, *supra* note 2, at 20; RAINE, AFTER SILENCE, *supra* note 138, at 206, 239.

149. Two introductory caveats are needed for the discussion of forced sex victimization. First, despite extensive literature on the victims of rape, there remains much about the harms of forced sex that we do not know. Most of the empirical work on victim experience has focused on those who have suffered stranger rapes. Data on the survivors of acquaintance assaults is sparser and may be skewed due to the nature of the sample. Those studied tend to be women who identify themselves as having been victimized. Yet as we have seen, many who in fact have been forced into sexual acts, do not so categorize themselves. If the total population of forced sex victims were included in studies, it might change our overall picture of the nature and severity of injury. See JOHNSON & SIGLER, FORCED SEXUAL INTERCOURSE IN INTIMATE RELATIONSHIPS, *supra* note 5, at 45, 48.

We also should acknowledge acute problems with generalization here. Individual reactions to trauma vary greatly. Some soldiers encounter the worst of combat and emerge from the experience psychologically unscathed, while others, exposed to far less horror, suffer devastating breakdowns in reaction. The experience of physical violence, sexual abuse, and neglect in childhood also produces dramatic variations in adult psychological states. The same is true for those who suffer sexual injuries. As a result of both data problems and individual variation, we cannot readily quantify the experience of victims of forced sex. We can explore the essential nature of the injuries suffered, however, by listening to victim accounts.

inflict beatings or other physical injuries. Unlike stranger rapes, forced sex rarely occurs in tandem with other frightening crimes such as burglary or robbery.¹⁵⁰ As a result, the victim of forced sex may experience less physical terror during the crime than the victim of a stranger rape.¹⁵¹ In addition, it is possible that the existence of a prior relationship with the perpetrator may diminish the amount of fear inspired by forcible sexual conduct. Given the evidence of a link between the degree of physical threat presented by the perpetrator of an attack and the trauma experienced by the victim, it is possible that forced-sex attacks produce less violence-related trauma than stranger rapes.¹⁵²

But as with stranger rapes, the central injury of forced sex is a harm to the spirit.¹⁵³ Here the fact of a prior relationship and the nature of that relationship must be considered aggravating factors. Forced sex involves a betrayal of a personal human bond. A man assumed to be trustworthy, at least to the extent of fundamental respect for physical integrity, proves to be entirely untrustworthy. A person thought to be a friend, or at least friendly, becomes for a critical time, an enemy.

Similarly, the consensual sexual beginnings of many incidents, which many take to be a source of female responsibility,¹⁵⁴ should be considered a potential source of increased injury. The excitement and pleasure of sex—whether kisses, touches, or more—requires opening oneself to others. To become sexual with another normally means to become more vulnerable to the other. This means that when the interaction goes wrong, the consequences for the spirit are

150. See Linda Fairstein, *Men, Women and Rape*, 63 *FORDHAM L. REV.* 125, 158 (1994).

151. While some who experience forced sex report they feared for their lives, this is not the common refrain that it is among stranger rape victims. See *id.*

152. Note, though, that any distinction here is a matter of degree, not kind. Forced-sex victims also commonly experience considerable fear of their perpetrator.

153. See Fairstein, *Men, Women and Rape*, *supra* note 150, at 158.

154. Forced sex victims suffer additional psychological injuries due to the lack of support from others who do not recognize the existence or severity of the wrong and because of their own doubts about the severity of their injury and their responsibility for the incident. I will not focus on these aspects of harm because it is just these forms of nonrecognition that the paper seeks to change.

more serious. To have sex acts forced on oneself, is to find one's vulnerability exploited, one's spirit betrayed.

The effects of this betrayal can be severe, including long-term depression, resentment, anger and withdrawal. As with stranger rapes, such incidents corrode self-identity. Most of all, the incident frequently damages the woman's capacity for intimate connection with another:

"Before the rape I was *totally* different. I was just so much nicer. I guess, in a way, naive. I would let my heart go to someone. I was dating a guy in high school before this happened, and I really liked him. I let my feelings go with him. I have *never* done that since. I think I've fallen in love after that as a matter of convenience and not as really being in love. I don't think I'm capable of loving anyone at this point. Not the *right* way. . . . I don't know how to give anymore. I don't like sex. I don't like to be touched."¹⁵⁵

"I find I cannot truly love. I don't seem to know how. The intimacy is fine for a while. Then, something happens inside of me and not long after, I don't want him to touch me anymore. There are horrible memories inside me wanting to get out but there is no escape. I sometimes don't think I can go on. This is like a huge dark cloud always hanging above my head."¹⁵⁶

"I am very distrustful of others, particularly men. When a guy comes up to me to talk and to be friendly, my "radar" is working full force. Even if he seems nice, I try not to be left alone with him. I have pretty well gotten over the panic if a man sits next to me, even in church."¹⁵⁷

155. PIERCE-BAKER, SURVIVING THE SILENCE, *supra* note 2, at 148-49 (account of a woman raped on a date at the age of twenty).

156. WIEHE & RICHARDS, INTIMATE BETRAYAL, *supra* note 56, at 47.

157. *Id.* at 44.

“I no longer date and have no expectations for marriage now or in the future. I keep my thoughts and feelings to myself. I limit the amount of information anyone has about me to factual accounts of education and work experience.”¹⁵⁸

“I don’t know if I can ever experience intimacy or sex again. It turns my stomach just thinking of a man touching me.”¹⁵⁹

These voices tell us of the same kinds of harms to the spirit, to personal identity that we heard from victims of stranger rape. If there is a difference in the accounts of hurt, it is in the emphasis that forced-sex victims place upon social relations, on the self’s ability and interest in connecting with others, especially (though certainly not exclusively) in intimate ways. Forced-sex victims tell us that because of their wounds they lack the strength, the hope, the sense of warmth and even joy needed to reach out to another and make the close connections that distinguish life from mere physical existence. Forced-sex victims tell us of the wounds to their heart, that metaphysical organ of intimate connection. For this reason we may speak of forced sex as a crime against the heart.

As with our previous “soul talk,” references to crimes against the heart may sound strange to ears accustomed to the philosophical and psychological terms of contemporary criminal jurisprudence.

158. *Id.*; see also PIERCE-BAKER, SURVIVING THE SILENCE, *supra* note 2, at 93 (quoting a date rape survivor as saying: “I don’t date now. I just decided I wasn’t going to date. I don’t have sex. I don’t have the equipment to deal with it, to keep myself safe. So every man is a rapist and a batterer until proven otherwise.”).

159. WIEHE & RICHARDS, INTIMATE BETRAYAL, *supra* note 56, at 47. Some similar voices:

Sex with my husband is very, very hard. I can be looking right into his eyes, but the moment he touches me sexually, he isn’t my husband anymore. He’s the man who raped me.

Id. at 46.

I do not trust men. They are all sex maniacs in one way or another. After the rape, I set out to become just like them. I used alcohol to numb myself and then went out to ‘get them’—to screw them without any love or consciousness—to use them the way they used me.

Id. at 49.

Worse, the word “heart” may evoke old-fashioned and sentimental ideas of romance that do not apply here. But every term with persuasive potential bears its own dangers of abuse. The potential value of this terminology comes from the link it can forge between coercive sexual conduct and spirit harm. It allows us to speak directly of how men ostensibly engage in a romantic pursuit, in fact attack the idea of romance. We can speak of cold-hearted men who evince disregard for their victims’ desires and so chill their victims’ spirits. The perpetrator’s betrayal of the victim’s trust makes trusting anyone else, and especially an intimate, much more difficult. The memory of this hurt undercuts the hope and the courage needed to reach out to others.¹⁶⁰ The perpetrator’s callousness imprints on the heart the opposite of love, which is not hate but indifference.

Again a reminder about the purpose of this reexamination of the rape experience. In an effort to find ideas that might alter the predominant emotional construct of rape, we have listened to accounts of the suffering of rape victims. As with any crime of violence, the victim’s injury is the root from which all moral thinking about the offense must grow. I have argued that if we can convince others that rape is a crime against the soul that does potentially devastating harm to the spirit, and that forced sex constitutes a crime against the heart, we will have taken an important step toward curing nonrecognition of acquaintance rape.

Our new words will not by themselves persuade, of course. They represent but the headlines that introduce a larger story about the consequences of sexual coercion, even when it occurs in romantic or quasi-romantic settings. They give us new tools and a new direction for the continuing campaign to educate the skeptical about the lived-reality of forced sex.

We get an idea of the possibilities for change by comparing current emotional constructs of the wrongs of other sex offenses. The word rape, with its connotations of stranger violence, terror, and sexual violation, carries the weight of moral condemnation. We presuppose that any conduct deserving to be called rape will hurt more than the victim’s body. Similarly, as Katharine Baker recently observed, we have a ready sense of the moral injury, the soul-hurt

160. See RAINE, *AFTER SILENCE*, *supra* note 138, at 163 (“The opposite of fear is not, I think, courage. It is faith.”).

caused by certain sex offenses such as child sexual abuse.¹⁶¹ In sexual child abuse, we recognize immediately the long-lasting harm to the spirit that premature and unequal sexual interaction can do, regardless of force or apparent consent.¹⁶² What we may forget is that this social understanding is of relatively recent vintage. A century ago, apart from rape, children were not seen as potential victims of sex crimes.¹⁶³ We need to build a similar visceral understanding of the spirit harms of forced sex. To accomplish this, we must deepen our understanding of the sexual aspect of the offense. We need to acknowledge that the victim's injury is in some sense sexual even if—indeed because—it was not sexually desired.

IV. THE QUESTION OF MOTIVE

“In many cases . . . the man thought it was sex, and the woman thought it was rape, and they are both telling the truth.”¹⁶⁴

“Rape is not less sexual for being violent.”¹⁶⁵

We began our search for arguments to persuade skeptics of the wrongs of forced sex with an examination of the experience of female victims. We continue the effort by taking a closer look at the experience of male perpetrators and those who, to a greater or lesser

161. See Katharine K. Baker, *Sex, Rape and Shame*, 79 B.U. L. REV. 663, 669 (1999).

162. See PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 1-2 (1998).

163. See *id.* at 14-15.

164. Nancy Gibbs, *When Is it Rape?*, TIME, June 3, 1991, at 48, 54 (quoting Susan Estrich). Or, in the words of a former Arkansas deputy sheriff on his personal web site:

Most experts will tell you that [r]ape is about control and not sex. For the text book serial rapist [sic] case I would agree, but from some of our real case investigation I think you can see most rape cases are nothing more than two people with two different ideas about what they do or do not want.

Rick O'Kelley, *From a Man's Point of View*, at <http://arkansasusa.com/deputy/fromaman.htm> (last visited Jan. 28, 2002).

165. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 125, at 173.

extent, sympathize with their experience. We shift from a concern with the victim injury to perpetrator motive.

Because this represents the most controversial aspect of the endeavor, and perhaps the most easily misunderstood, a reiteration of purpose may be helpful. My aim is to understand the nonrecognition of perpetrators and their defenders. Understanding must not be confused with excuse. The entire point of this effort is to find a way to persuade skeptics that their view of forced sex is mistaken. But unless we temporarily put aside our normative judgments about forced-sex incidents, we will not be able to do the close listening required for perpetrator understanding. Once we gain a better grasp of perpetrator nonrecognition, we may find the places of common agreement needed for successful—and normative—arguments about the reality and wrong of forced sex. While the larger project is absolutely normative, this aspect is absolutely not. The distinction I insist on here between understanding and judgment may prove unsettling and obnoxious for readers, but it is a prerequisite to constructing a meaningful dialogue about forced sex.

We must, as best we can, enter into the experience of perpetrators and their defenders. We need to grasp the perceptions, assumptions, and feelings that explain their insistence that forced-sex incidents involve bad romance, not rape, even where there is considerable evidence of female nonconsent. This will not be an easy task because we must fight our own (normative) impatience with certain explanations and because candid accounts from perpetrators and those sympathetic to them are much harder to come by than victim accounts.

Compared to victims, there is relatively little in the way of first-person literature of the perpetrator experience. Over the last thirty years, rape survivors—those who have been victims and fought against their victimization—have told of their experiences in all available media of expression.¹⁶⁶ Their words have been widely

166. For recent nonfiction accounts, see the four books cited *supra* note 138. The Internet has fostered a great outpouring of victim exchanges and expression. See, e.g., Hope for Healing.Org, at <http://www.hopeforhealing.org> (last visited Jan. 24, 2002); Leaving the Shadows, at <http://www.angelfire.com/on2/shadows> (last visited Jan. 28, 2002); RapeRecovery.com, at <http://www.raperecovery.com> (last visited Jan. 28, 2002); The Survivor's Page, at <http://www.stardate.bc.ca/survivors> (last visited Jan. 28, 2002).

broadcast to a generally respectful audience, even if their message has not always been understood or heeded. By contrast, perpetrators and those who might sympathize with them have either spoken tersely in public or kept entirely silent.¹⁶⁷ The reason for the dearth of first person accounts is obvious. Candid speech about forced sex is dangerous, bringing the risk of serious criminal or social penalties. The problem may go deeper than this, however. Even more than other offenders, most sexual wrongdoers deny responsibility. No one wants to admit being a sex offender. Even in prison they are despised.

The antipathy generated by sexual wrongdoing also makes listening to the accounts that are available, difficult. In seeking to justify, excuse, or mitigate conduct that we may find reprehensible, such speakers aggravate us. We do not want to hear their tired excuses. Similarly, expressions of even partial support for perpetrators, or nuanced accounts of female, as well as male responsibility for sexual conflicts, are frequently dismissed as mere rationalizations of male wrongdoing. Unless we take great care, we may find ourselves listening to these accounts not to understand, but merely to gather evidence for moral and legal condemnation.

Our primary concern here is with what perpetrators experience and believe about their own conduct and that of their partners. We will look at scientific research on the biological and social causes of sexual aggression, but only to corroborate subjective accounts. Partly because of the difficulties of gaining reliable direct testimony, we will look at common patterns of perpetrator conduct in forced sex, in other forms of sexual wrongdoing, and in male sexuality generally. Each of these sources of information may shed light on what perpetrators think and feel and, thus, why they act as they do.

For our purposes, reaching a scientific judgment about physical or social causes of rape is not critical. Most important of all, we do not seek to determine *the* motivation for forced sex. Like all complex behavior, perpetrators act for a variety of reasons that come in different combinations and sequences. We just want to determine

167. Perhaps the best book giving direct expression to contemporary male attitudes on sexual aggression is *Men on Rape* by Timothy Beneke. See TIMOTHY BENEKE, *MEN ON RAPE* (1982). Unfortunately the work is currently out of print. It is also somewhat out-of-date given the significant changes in attitudes during the last twenty years.

the predominant reasons for which perpetrators see themselves acting.

A. Perpetrator Perceptions and Motives—It's About Sex

We begin with a close examination of a particular incident of forced sex, a case that arose on a Pennsylvania college campus at the end of the twentieth century.¹⁶⁸ The case involves many features typical of acquaintance sexual assaults. The people involved were college students with a casual social relationship. At least one of the parties had consumed alcohol prior to the incident. The man had sex with the woman without her consent but did not use dramatic force—there is no gun, knife, blows, or overt threats in the case. Besides the fact that it was successfully prosecuted in a jury trial, the most unusual aspect of the case is that defendant and complainant testified to very similar events. The issue at trial was concerned less with what occurred than with the meaning of what occurred. For this reason the case makes a particularly useful vehicle for exploring perpetrator perceptions and nonrecognition of wrong.

The following summarizes the testimony at trial: The defendant will be called M.; the complainant, W. M. and W. were sophomores at college in Pennsylvania. He was twenty; she was nineteen. At 2:00 p.m. on an April afternoon, W. returned to her dorm room from classes and drank a martini to “loosen up a little bit” before going to meet her boyfriend, with whom she had argued the night before.¹⁶⁹ W. went to the lounge of her boyfriend's dorm; not finding him there, she decided to visit a young man, Earl Hassel, who was M.'s roommate. After knocking on the door and getting no answer, she left a note stating: “Hi Earl, I'm drunk. That's not why I came to see you. I haven't seen you in a while. I'll talk to you later, [W].” She later said she was not drunk but said she was “for a laugh.” W. knocked once more and then tried the door to the room. Finding it unlocked, she went in. She saw a young man lying on the bed with a pillow over his head. She thought it was Earl, but after lifting off the

168. See *Commonwealth v. Berkowitz*, 641 A.2d 1161 (Pa. 1994). Most of the following account is derived from an intermediate appellate decision. See *Commonwealth v. Berkowitz*, 609 A.2d 1338 (Pa. Super. Ct. 1992).

169. Defense counsel tried unsuccessfully at trial to introduce evidence that W. and her boyfriend had argued about W.'s past infidelity. See *Berkowitz*, 609 A.2d at 1348-49.

pillow she realized it was M. She asked him which dresser was Earl's and M. answered, after which W. left the note on Earl's dresser. M. then asked W. to stay. W. agreed. She later explained that she did because she "had time to kill" and she wanted to give M., whom she did not know well, "a fair chance."¹⁷⁰

M. later said that he had several sexually charged conversations with W. in the recent past. Two weeks before the incident, both had attended a school seminar entitled, "Does 'no' sometimes mean 'yes'?" Among the subjects covered at the seminar was the average size of a man's penis. After the seminar, during a conversation via speakerphone between M., his roommate, Earl, W. and several of her friends, W. asked M. how big his penis was. M. responded that she should "come over and find out"; W. refused. M. testified that W. came by his room on two occasions after this, while intoxicated, and lay down on his bed "with her legs spread and again ask[ed] to see his penis."¹⁷¹ From these previous encounters, and W.'s conduct in coming into the room a third time while intoxicated and waking him up, M. concluded that W. was interested in a sexual relationship.¹⁷²

M. asked W. "to give him a back rub but she declined, explaining that she did not 'trust' him." M. then asked W. to sit down on the bed; instead, W. sat on the floor. The two spoke briefly about a mutual friend. M. then got off the bed and "kind of pushed [W.] back with his body," W. testified. "It wasn't a shove, it was just kind of a leaning-type of thing." M. "straddled" W. and began kissing her. According to W., she responded by stating: "Look, I gotta go. I'm going to meet [my boyfriend]." M. then "lifted up her shirt and bra and began fondling her," and W. responded by saying, "no." According to M., W. responded warmly to his advances, returning his kisses passionately. He testified that she did continually say no, but that she did so "passionately," indicating that she truly enjoyed their interaction and wanted him to continue.¹⁷³

170. *See id.* at 1339-40.

171. W. testified that she had visited M.'s room on two occasions previously while intoxicated and on one of those occasions had lain on his bed. She did not remember whether she had asked M. about the size of his penis during these visits. *See id.* at 1341.

172. *See id.*

173. *See id.* at 1340-41.

M. undid his pants and moved his body against her. He “tried to put his penis in her mouth.” According to W., she continued to protest, saying, “No, I gotta go, let me go.” She testified she said this “in a ‘scolding’ manner.” M. then stood up and walked two feet to the door to lock it from the inside. This did not prevent the occupants from leaving but barred intruders. M. stated he did it to ensure privacy for himself and W.¹⁷⁴

As stated by W.:

[M. then] put me down on the bed. It was kind of like—he didn’t throw me on the bed. It’s hard to explain. It was kind of like a push It wasn’t slow like a romantic kind of thing, but it wasn’t a fast shove either. It was kind of in the middle.¹⁷⁵

Thereafter, M. straddled W. on the bed, “undid the knot in her sweatpants,” and removed her pants and underwear from her legs. W. said that she did not physically resist because M. was on top of her and the experience was “like a dream was happening or something.” M. guided his penis into her vagina. Once he was inside her, W. said, “no, no to him softly in a moaning kind of way . . . because it was just so scary.” According to W., after about half a minute, M. withdrew and ejaculated on W.’s stomach.¹⁷⁶

M. reported that during intercourse he noticed W. had a “blank look on her face,” which caused him to withdraw and ask her if anything was wrong. He said that he ejaculated on her stomach because he could not “control” himself. Both M. and W. reported that, after ejaculation, M. said, “Wow, I guess we just got carried away,” to which W. responded, “No, we didn’t get carried away, you got carried away.” W. hurriedly dressed, grabbed her books and ran downstairs to the lounge where her boyfriend was waiting. W. began crying. She went to her boyfriend’s room with him; there he saw her clean M.’s semen from her stomach. Her boyfriend called the police.¹⁷⁷

At trial, the jury was asked to determine who was telling the truth about the few factual issues in conflict, such as the tone of W.’s statements of “no,” as well as whether the prosecution’s evidence

174. *See id.*

175. *See id.*

176. *See id.*

177. *See id.*

proved all the elements of rape, particularly the force element.¹⁷⁸ Our concern, though, is with M.'s understanding of the event. Looking at the undisputed facts in the case, what can we say about his likely mental and emotional processes? What did he think was going on here? What did he see himself doing and why might he think himself justified in acting this way?

All the available evidence indicates that M. believed W. was willing to have sex with him. M. tells of perceptions of sexual interest leading to sexual desire that grew beyond his own control. He tells of sexual signals read selectively. For example, moaning statements of "no" as evidencing sexual desire. The key exchange is that which occurred after the completion of the sex act. M. stated: "Wow, I guess we just got carried away."¹⁷⁹ W. responded: "No, we didn't get carried away, you got carried away."¹⁸⁰

This reading of the case fits with many other facts that we know about the perpetrators of acquaintance assaults. Most view the episode as a sexual experience from beginning to end. In many cases the man seems fixed on a particular sexual goal; all of his conduct, verbal and physical, respectful and disrespectful, charming and crude, appears calculated to achieve sexual union with his chosen partner. The ferocity of his final demands may preclude the possibility of enjoyable sex on the woman's part, but this does not render the man's motivation nonsexual. Just as sexual intercourse may be forced by one person on another, so sexual arousal and satisfaction may involve only one party to a sexual interaction.

Researchers have long noted the overlap between patterns of youthful romance and acquaintance rape.¹⁸¹ The greatest frequency of sexual assault occurs during adolescence and early adulthood, the ages when romantic interaction tends to be most frequent and intense.¹⁸² A high percentage, perhaps the majority, of acquaintance assaults, occur after initial consensual foreplay when the man insists on a more intimate level of contact than the woman desires.¹⁸³ A

178. See *id.* at 1342, 1347 n.6.

179. *Id.* at 1340.

180. *Id.*

181. See Baker, *Once a Rapist?*, *supra* note 12, at 600-01.

182. See JOHNSON & SIGLER, FORCED SEXUAL INTERCOURSE IN INTIMATE RELATIONSHIPS, *supra* note 5, at 32.

183. See *id.* at 32-33, 44-46; Baker, *Sex, Rape and Shame*, *supra* note 161, at 690; Owen D. Jones, *Law and the Biology of Rape: Reflections on Transitions*,

large percentage of forced-sex cases follow traditional courtship interactions such as a date, a party, a drive, or a walk together.¹⁸⁴ A high percentage take place when both parties are using drugs or alcohol, another common feature of recreation by young people.¹⁸⁵

Most acquaintance assaults occur with relatively modest force, as compared with other rapes and nonsexual assaults.¹⁸⁶ In many instances, the man uses force only as a last-resort tactic after other strategies such as encouraging drug or alcohol intake, verbal charm, and emotional pressure have not succeeded in persuading the woman to have sex.¹⁸⁷ The most common force techniques are implicit threats, refusal to desist, and the application of greater weight and strength. Although there are significant exceptions, most acquaintance assaulters do not attempt to injure the victim by blows or other violence. They employ violence largely as needed to accomplish the sexual act without the woman's consent. Most victims of acquaintance assaults do not suffer significant physical injuries.¹⁸⁸

We have already seen that after the assault many men express interest in a further romantic relationship.¹⁸⁹ We have already seen that some women do pursue a romantic relationship with the man following the assault,¹⁹⁰ which is evidence that both parties considered the forced-sex incident as part of the romantic process, however hurtful and unfortunate. Clearly, some perpetrators view forced sex as just a normal part of romance. It is but another way that males prove their manhood by sexually "scoring" with multiple women.

A less direct but nevertheless revealing indicator of the sexual motivation of many perpetrators is their sexual history. Generally,

11 HASTINGS WOMEN'S L.J. 151, 161-62 (2000).

184. See Baker, *Once a Rapist?*, *supra* note 12, at 571.

185. See Karen M. Kramer, *Rule By Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes*, 47 STAN. L. REV. 115, 116 (1994).

186. See *id.* at 127-28.

187. See *id.* at 144-45.

188. See Bryden & Lengnick, *Rape in the Criminal Justice System*, *supra* note 18, at 1331 n.811 (citing Ian T. Bownes et al., *Rape: A Comparison of Stranger and Acquaintance Assaults*, 31 MED. SCI. & THE LAW 102, 104-06 (1991)).

189. See Baker, *Once a Rapist?*, *supra* note 12, at 600.

190. See *supra* Part II.B.

they begin active sex lives earlier than their contemporaries, have more sexual partners, and more varied sexual experiences.¹⁹¹ Researchers have suggested that this shows that as a group they have high sexual expectations; it may also mean they have high sexual drives. In either case, it suggests that sexuality is an important, perhaps dominant, feature of their young lives.

B. Sex vs. Violence, Again

The argument presented so far directly contradicts one aspect of the original violence conception of rape, that concerning perpetrator motivation. Over the last generation, many reformers have argued that rapists are motivated by anger and a need to assert power, rather than sex.¹⁹² In recent years, this contention about motive has become perhaps the most contested aspect of the violence conception of rape. Writers from varied ideological perspectives have questioned whether sexual arousal can be excluded from motivation in the way the classic violence mantra suggests.¹⁹³ Some of these writers have

191. See Mary E. Craig, *Coercive Sexuality in Dating Relationships: A Situational Model*, 10 CLINICAL PSYCHOL. REV. 395, 411 (1990); Shotland, *A Theory of the Causes of Courtship Rape*, *supra* note 24, at 128, 130. High sex drive and high sexual expectations are clearly interrelated. It should be noted that women who are victims of forced sex are more likely than their peers to have begun their sex lives earlier, have had more partners and more varied sexual experiences. See Craig, *Coercive Sexuality in Dating Relationships*, *supra*, at 411-12; Shotland, *A Theory of the Causes of Courtship Rape*, *supra* note 24, at 128, 130.

192. Feminist anti-rape advocates, especially early in the reform movement, emphasized evidence of violent motivations for rapes. Writers such as Susan Brownmiller, in her landmark 1975 book, *Against Our Will*, detailed how many of the most heinous rapes involve great violence and appear to be more crimes of rage than of sexual desire. See BROWNMILLER, *AGAINST OUR WILL*, *supra* note 99. Attacks on the very young and the elderly, rapes of civilian enemy populations in war time, male attacks on female sexual parts without ejaculation or even without erection, attacks featuring blows and stabs and bites and mutilations all suggest a gender-based rage rather than sexual excitement. This led to the observation that such conduct bears no resemblance to ordinary, noncriminal sexual interaction. Some behavioral scientists also emphasized the role of anger and need to assert power as the primary motivations of rape. See, e.g., A. NICHOLAS GROTH, *MEN WHO RAPE: THE PSYCHOLOGY OF THE OFFENDER* 60-61 (1979).

193. See Mareva Brown, *Debate Rages over Sex as Rape Motive*, SACRAMENTO BEE, July 24, 1995, at A7. For an overview of the debate generally critical of feminist efforts to emphasize the violent motivation of rape in explanations of rapist behavior, see Craig T. Palmer et al., *Is It Sex Yet?*

expressed general doubts about feminist views of gender and responsibility.¹⁹⁴ Some center their concern with sexual motivation in biological and behavioral science research,¹⁹⁵ while others work from feminist principles to argue for a greater emphasis on sexual motives.¹⁹⁶ Violence conception advocates have vigorously responded to many of these arguments, producing a debate that has ranged over nearly every aspect of sexual aggression.¹⁹⁷ But most of this debate does not concern us here.

Here we are concerned with perpetrator motive, not victim experience. Many who argue for the centrality of violence in rape emphasize that *the victim's experience* has nothing in common with consensual sex, a point made to block victim blaming moves characteristic of highly sexualized, traditional views of rape. But this says nothing, directly, about the perpetrator's motive. The same

Theoretical and Practical Implications of the Debate over Rapists' Motives, 39 JURIMETRICS J. 271 (1999).

194. For critics of feminist ideology as it relates to rape, see CAMILLE PAGLIA, SEX, ART, AND AMERICAN CULTURE 49-54 (1992); ROIPHE, THE MORNING AFTER, *supra* note 9. See also RICHARD A. POSNER, SEX AND REASON 146-80 (1992) (proposing an economic theory of sexuality).

195. For a good overview of biological approaches, see Jones, *Sex, Culture, and the Biology of Rape*, *supra* note 18, at 837-57.

196. See, e.g., MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 125, at 135 ("To say rape is violence . . . preserves the 'sex is good' norm by simply distinguishing forced sex as 'not sex,' whether it means sex to the perpetrator or even, later, to the victim, who has difficulty experiencing sex without reexperiencing the rape."); SCHULHOFER, UNWANTED SEX, *supra* note 20, at 39 (arguing that the problem with the violence approach is its lack of attention to sexual autonomy); Baker, *Once a Rapist?*, *supra* note 12, at 597-606; Henderson, *Getting to Know*, *supra* note 7, at 125-32; Catharine A. MacKinnon, *Sex and Violence: A Perspective*, in RAPE AND SOCIETY, *supra* note 5, at 28, 28-33; see also Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazy Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 154-60 (2001) (criticizing recent legislation based on the conception of rape as perpetrated by crazed, extremely violent men).

197. For arguments that rape and related offenses often have sexual motivations, see POSNER, SEX AND REASON, *supra* note 194, at 106-07; Craig T. Palmer, *Twelve Reasons Why Rape Is Not Sexually Motivated: A Skeptical Examination*, 25 J. SEX RES. 512 (1988). Generally, men are more likely to believe that rape is motivated by sex while women tend more toward a power view. See Lynda A. Szymanski et al., *Gender Role and Attitudes Toward Rape in Male and Female College Students*, 29 SEX ROLES 37, 39, 52-53 (1993).

event may feel like sex for the man and be experienced as violence by the woman.¹⁹⁸

Even when the sex vs. violence debate seems to concern the perpetrator's motive, the real battleground is often responsibility. Violence advocates argue for the normative centrality of violence and assert that opponents, by emphasizing the sexual, are supporting old notions of diminished male responsibility. In response, critics of the violence approach frequently insist their arguments are descriptive, not normative. They want to know what does drive perpetrators, a question independent of their responsibility.¹⁹⁹

Another problem with the current sex vs. violence debate about motive is the common assumption that we can isolate a single motivation for sexual aggression. For example, early violence proponents pointed to rapes in wartime, rapes of the elderly and the very young, rapes by instrument and, at least some marital rapes that feature particularly strong revenge motivations.²⁰⁰ Yet such crimes are far removed in terms of use of violence, offender-victim relationships and motivational patterns from acquaintance rapes. In fact, the conduct encompassed within the legal definition of rape includes a highly varied set of behaviors, victims, and perpetrators, suggesting considerable variation in motivation.²⁰¹ We do not

198. For example, recognizing that child sex abuse is sexually motivated does not change our view of the perpetrator's responsibility. Indeed, it may increase it for many people. The distinction is that, with child victims, we view the sexual motivation as perverse, whereas with acquaintance rape and assault, the male sexual motivation, if any, appears uncomfortably close to the motivations of "ordinary" men in ordinary sex.

199. See Baker, *Once a Rapist?*, *supra* note 12, at 598; Henderson, *Getting to Know*, *supra* note 7, at 43, 51-55.

200. See BROWNMILLER, *AGAINST OUR WILL*, *supra* note 99, at 32-40.

201. Social scientists increasingly emphasize the multiplicity of motives for sexual aggression. See Howard A. Barbaree & William L. Marshall, *The Role of Male Sexual Arousal in Rape: Six Models*, 5 J. CONSULTING & CLINICAL PSYCHOL. 621, 628 (1991); Gordon C. Nagayama Hall & Richard Hirschman, *Toward A Theory of Sexual Aggression: A Quadripartite Model*, 59 J. CONSULTING & CLINICAL PSYCHOL. 662, 664-67 (1991); Eugene J. Kanin, *Date Rape: Unofficial Criminals and Victims*, 9 VICTIMOLOGY 95, 104 (1984); Linda Mealey, *The Multiplicity of Rape: From Life History Strategies to Prevention Strategies*, 39 JURIMETRICS 217, 222-25 (1999); Robert Prentky & Raymond A. Knight, *Identifying Critical Dimensions for Discriminating Among Rapists*, 5 J. CONSULTING & CLINICAL PSYCHOL. 643, 643 (1991); Shotland, *A Theory of the Causes of Courtship Rape*, *supra* note 24, at 127-28.

believe that other violent crimes have a single motivation. For example, most jurisdictions recognize different homicide offenses based, in part, on different motivations.²⁰² Why should we assume that decisions to force sex are any less complex? Thus many social scientists argue that stranger rapists generally act for different reasons than do acquaintance rapists.²⁰³ There is also evidence that acquaintance rapes may be divided into a number of subcategories, each with their own motivational distinctions.²⁰⁴

There is an aspect of the sex vs. violence debate that directly relates to our inquiry. To what extent do perpetrators of forced sex—and those who defend their conduct in whole or in part—believe that perpetrators acted as they did because of the experience of sexual arousal? The evidence in the Pennsylvania case described above suggests that the man acted for sexual reasons.²⁰⁵ There was no evidence that the man was angry at his nonconsenting partner, or at women in general.²⁰⁶ There was no evidence of any conscious desire on his part to exert power over females.²⁰⁷ There was direct and indirect evidence of ordinary sexual desire motivating the man's conduct, however.²⁰⁸

Of course, one case does not a theory make. We need to look at a variety of forced-sex cases, especially those where the man uses significant physical force and displays sexist attitudes, classic

202. Motive is sometimes the explicit basis for doctrinal distinctions in homicide, as in self-defense and provocation; in other doctrines, such as premeditation, it plays an indirect role. See PILLSBURY, *JUDGING EVIL*, *supra* note 36, at 79.

203. See Kanin, *Date Rape*, *supra* note 201, at 104. Rapists serving prison terms are by far the best-studied group, but such men are far more likely to have committed stranger assaults, to have committed other crimes, and to have committed serial sex offenses, all of which generally distinguish them from those who commit acquaintance rapes and assaults.

204. See, e.g., JOHNSON & SIGLER, *FORCED SEXUAL INTERCOURSE IN INTIMATE RELATIONSHIPS*, *supra* note 5, at 144 (distinguishing between predatory and courtship acquaintance rapes); Shotland, *A Theory of the Causes of Courtship Rape*, *supra* note 24, at 127, 129-39 (1992) (breaking down courtship rape into five different categories based on stages of the relationship).

205. *Commonwealth v. Berkowitz*, 609 A.2d 1338, 1342 (Pa. Super. Ct. 1992).

206. See *id.*

207. See *id.* at 1344.

208. See *id.* at 1346-47.

features of the violence conception. In forced-sex cases where the man displays signs of gender anger, does he nevertheless see his conduct as driven by sexual desire?

With this in mind, we turn to another case involving young people, this one involving a boyfriend-girlfriend relationship. A young woman named Lana posted the following account on an Internet site devoted to rape survivors, detailing how her boyfriend, David, assaulted her when she was a teenager, forcibly taking her virginity:

“I was only 16—only 16, and very naive. David was 20, had completed a year in the Army, and been back for about 3 months. We started dating almost immediately after he returned, so we had gone stead[y] for almost 3 months. During that time, he was controlling and aggressive, but I never thought he would hurt me, at least not seriously. I’l [sic] had bruises from where he would hold my arm too tight, but he rarely ever hit me. He was controlling with me by telling me what to wear and ordering for me when we went out. He didn’t like me spending a lot of time with friends, so I spent the time with him instead. At this time I was already depressed and thought he was just showing love and I was craving love. February 10, 1995 was our Valentine’s dance at school. I’d spent weeks trying to lose enough weight so I would look good in my dress I really don’t like the whole dance scene, so when he suggested that we leave early I agreed. He drove around town and I showed him where some of my friends lived. Eventually we ended up out in the country, about 3 miles away from my house. Well, everyone knows that parking out in the country means ‘making out.’ That was all I expected from that night. I liked David and he kept telling me he loved me, so I figured there was nothing wrong with it. But, the kissing led to more. We were in the front seat, so he leaned my seat back and pushed it back as far as it would go and got on top of me. When he went for the buttons on my dress, I tried to stop him. Tried to fight him. Tried to yell. Nothing worked. He ripped the dress, my stockings, panties . . . and me. He ripped my soul out of

me. I know I hit him, fought him, yelled at him, and tried to talk to him, but he didn't respond. All he did was tell me it was love. 'Baby, you're just confused and don't know what you want. Just shut up and let me show you my love.' Does love make you cry hysterically and say "no, no, nooo . . ."? Not that I know of. He just kept touching me and raping me over and over. When he'd finally had enough, I looked at the clock—45 minutes had passed. He started kissing me again and asked if I'd lik[ed] it as much as he had."²⁰⁹

David's controlling behavior and his use of force on Lana throughout their relationship shows unmistakable evidence of gender-based aggression. A man who grips his partner's arm so tightly as to leave bruises displays a need to exert power over his mate. The age differential between the two, David's direction of Lana, and his refusal to listen to her objections and protests all indicate a need to dominate consistent with familiar patterns of male aggression against female partners. Thus we may say that David raped Lana because of his need to assert power over her; because he could not feel himself a man unless he asserted sexual dominance in this way.

But given our interest in addressing perpetrator nonrecognition, our focus must be a little different than this. We are interested in subjective understanding. Why did *David* feel compelled to act this way? What made him think his conduct appropriate? There may well be other important reasons for his conduct that he does not grasp, but if we wish to reach him with a persuasive argument, we will have to start with the situation as he sees it. We need to know where *he* is coming from.

David's statements and the context of the incident provide evidence of ordinary sexual motivation. A boyfriend and girlfriend leave a Valentine's Day school dance to drive into the country for a consensual interlude of physical romance. The boyfriend insists that every sexual deed that follows is inspired by his love for his girlfriend. After completing the sexual act he seeks reassurance from her that she enjoyed it as much as he did.

209. *My Story*, *supra* note 96.

And so we ask: How did David see this event? Did he sexually attack Lana because he felt angry at her or because he felt sexually frustrated? The overlap between the pattern of the incident and standard patterns of romance, and the consistent thrust of his words suggest that David saw this as a sexual event, an ordinary incident in ordinary, lawful romance. We may disagree with this assessment, we may object—strongly—to David’s conception of romance, but our normative disagreement will not change David’s at-the-moment-of-conduct reading of what he was doing.

But can we believe David’s words as accurate reports of his own thoughts and feelings? Lana’s account makes it seem obvious that David was engaged in rape, not romance.²¹⁰ He used violence to overcome physical and verbal resistance. He forced himself on a terrified, horrified sixteen-year-old virgin. How could he possibly believe that this was ordinary sex, let alone love? Surely it is more likely that his statements about loving Lana were blatant lies to cover his own brutality; that he knew perfectly well the wrong he was doing. This is an emotionally tempting reading of the case, for it permits total condemnation of David’s conduct. Yet we must resist it until we have exhausted all other explanations.²¹¹ If there is a chance that David saw this event as legitimately sexual, then we need to take that view seriously for the insight it may provide into perpetrator nonrecognition.²¹²

The only way we can believe the sincerity of David’s romantic assertions is if David believes that ordinary sexuality includes the use of some degree of force. To preview the argument developed in the rest of this part: David may have seen male sexuality as inherently and legitimately forceful and this belief provided him with enough moral cover to pursue the goal that he desired (sexual intercourse),

210. We do need to remember that the facts here are given by Lana. David may not have realized the violence of his actions in the way that she did. *See id.*

211. The emotional temptation to simplify complex moral matters is a constant and serious one in discussing sex offenses. Such cases present some of the most disturbing and messiest features of humanity. Our first instinct is to take clean, firm stands, distinguishing the good guys from the bad. But morality makes its own demands to recognize complexity.

212. *See, e.g.,* Lyon, *Be Careful What You Wish For*, *supra* note 74, at 257-58 (discussing the history of why men view the exertion of force over women as legitimate conduct).

within the bounds of what he saw as ordinary sexual interaction. This explanation has two related features: (1) a close link between male sexuality and sexual forcefulness in the person's emotional construct of romance; and (2) a distortion of ordinary reasoning processes and loss of self-control because of strong sexual desire.²¹³

213. Another way of assessing sexual versus violent meaning in acquaintance sexual assaults is to compare its common patterns with those of domestic violence where anger and the need to control represent predominant motivations. See Dutton, *Understanding Women's Responses to Domestic Violence*, *supra* note 74, at 1204-07 (1993). Patterns of domestic violence sometimes overlap with those of acquaintance sexual assault, but overall, the dissimilarities are more striking than the similarities. The violence of domestic violence varies greatly from case to case, but commonly involves much more severe violence than in forced sex. Violence in this context is frequently used by men to hurt their women partners, often causing serious injury, including death. See Lyon, *Be Careful What You Wish For*, *supra* note 74, at 259-60. Male violence in the domestic situation generally comes in situations where the man displays obvious anger and seeks to exert control over his partner. Batterers frequently justify the use of force because of violations of good wife or good partner norms by their spouse or girlfriend. See *id.* at 257-58. Violence is often but one tactic in a larger campaign of control that includes the social isolation of the woman, economic control, and psychological abuse. See *id.* at 255-56, 263. The control motivation is especially evident in studies of severity of violence; the most dangerous time for a woman in an abusive relationship is when she threatens to temporarily or permanently separate from the man. See *id.* at 262. This phenomenon has been well documented in the literature on homicide. See Carolyn Rebecca Block & Antigone Christakos, *Intimate Partner Homicide in Chicago over 29 Years*, 41 CRIME & DELINQ. 496, 506-07 (1995); Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 84-88 (1992); Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1351-58 (1997).

There is a sexual element to domestic violence, as batterers often sexually abuse their partners. Angry men may rape or sexually humiliate their wives or girlfriends, using sex to hurt and punish, as well as to gain sexual satisfaction. At least some such cases will fit our definition of forced sex—but they present a different motivational profile from the standard acquaintance case. Here the man acts out of anger. He deliberately inflicts hurt, whether physical or psychological. The sexual attack appears to be yet another means of effecting a permanent and global dominance over the woman. None of these features are characteristic of the majority of acquaintance rape and sexual assault cases. In sum, acquaintance sexual assault cases generally look more like romantic interactions than domestic violence, suggesting that their perpetrators are generally more interested in their own sexual satisfaction than in hurting, and thereby controlling, their intimate partners.

C. *A Male Perspective on Sex—The Paradox of Power*

In trying to understand human nature we can easily go wrong by applying simple rules of logic. Once we have identified an important motivator of human behavior, whether it be money, physical pleasure, fear, or anything else, we tend to see it as a unitary force in human lives. We look for consistent measures of its influence. Real understanding of human nature requires a recognition of the conflicts and paradoxes of our characters, though. We are shaped by multiple, interacting, and interrelated but independent forces that constantly battle for dominance. Thus when we examine the perpetrator's perspective on sexuality and power, we find a complex jumble of forces, in some respects paradoxical, but each with their own human rationales. We find that for many men, sexual arousal inspires both a sense of powerlessness with respect to women and a drive to assert power over women.²¹⁴

So far we have seen a sexual world in which men dominate, a world in which men use superior physical strength to sexually assault female partners. In this raw battle of the sexes, men wield the power. But many men report a profoundly different reality.²¹⁵ They say that, from their perspective, it is women who are in charge most of the time.

Many men say that sexual arousal is a force of nature they can barely control.²¹⁶ They report feeling dominated by an essentially unchosen, yet nearly overwhelming sexual attraction for certain females, triggered by simple cues, often physical appearance. They describe sexual arousal as something that happens to them, that they must struggle to control, and that women can manipulate with ease.

214. See Michael Kaufman, *Men, Feminism and Men's Contradictory Experiences of Power*, at <http://www.michaelkaufman.com/longarticles.html> (last visited Feb. 28, 2002) (arguing that men experience a complex combination of "power and privilege, pain and powerlessness"). As an important caveat, similar to those issued before with respect to generalizations, what follows does not constitute the male perspective on sex. The notion that we could reduce half the world's population to a single perspective on a topic as rich and complex as sexuality is absurd. Instead, we seek a common (though not universal) perspective, largely male (neither excluding females nor including all males), which expresses experiences and norms that help explain men's sexual aggression toward acquaintances in romantic and quasi-romantic situations.

215. See *id.*

216. See Kimmel, *The Gendered Society*, *supra* note 5, at 256-57.

Thus men experience sexual attraction for females as a potential threat to their male selves. Yet men—often the same men—view manhood as, in part, defined by the exercise of sexual power. A “real man” takes the lead in sexual interactions with women. A real man will not be put off by minor obstacles such as female reluctance to move from foreplay to more intense sexuality. A real man uses his own arousal to achieve sexual success. He finds a way to focus his sexual power on his partner so that the woman feels overwhelmed and finally inspired by it. Thus in subtle, and not so subtle ways, male sexual aggression becomes a positive gender norm. For some men it can be a trigger or heightener of sexual arousal. These two sides of male sexuality—vulnerability to female sexual allure and a need to exert sexual power over females—form the paradox of a traditional male perspective on sex.²¹⁷

There is an old joke that men tell about themselves and their sexuality that expresses a traditional understanding of maleness.²¹⁸ It goes as follows:

“Why do so many guys name their cocks?”

“I don’t know. Why?”

“Because they don’t want strangers making 90% of the most important decisions in their lives.”

The joke turns on the idea that male sexual desire is a force separate from the man’s rational self that nevertheless dominates male decision making. It suggests a dualist view of the self, with the mind controlling rational choice generally, but being overruled in sexual matters by the sexual organ. It presents an obviously absurd view of personal identity, but one with strong resonance for many men.²¹⁹

217. *See id.*

218. Jokes are the quintessential anecdotal evidence and for that reason lack validity in most social science methodologies. But they also can provide important cultural evidence of otherwise hidden values and concerns, for jokes can express legitimately what is otherwise inexpressible.

219. For example, naming the sexual organ is not uncommon among young men, but virtually unheard of among young women. For such naming as a way of avoiding sexual responsibility, see WIEHE & RICHARDS, *INTIMATE BETRAYAL*, *supra* note 56, at 79-80.

While the joke finds humor in the absurdity of the male sexual condition, there is a dark side to this perspective. Due to their sense of sexual arousal as an external force, manipulable by others, some men experience it as threatening. Men often report that their sexual urges are subject to torturous manipulation by women who coolly and casually, sometimes ignorantly and sometimes cynically, use their physical allure for self-interested ends. The picture that emerges is of men under sexual siege, fighting both their own bodily urges and the provocations of women. If men occasionally succumb to sexual aggression, they have ready both a biological explanation and a normative justification:

“A lot of it depends upon the situation. If you’re with a girl and you’re drunk and she’s teasing you and leading you on and on and at the very end she says, ‘No!’—well, if a guy’s real drunk, he’s gonna lose control and go after her. It’s like stopping a hole in a dam with a rock. . . .

“A lot of women can look great in anything. Some girls you can tell they’re flaunting it and they have power over you. They don’t have to wear shirts cut down to their nipples and tight, tight pants. Some of these girls try to flirt with you all the time. I don’t know what I’d do if I were in one of their rooms and we were making out and things were hot and heavy and she said, ‘No.’ You don’t know what you’d do until the situation arises.”²²⁰

“A man’s body is like a coke bottle, shake it up, put your thumb over the opening and feel the tension. When you

220. BENEKE, MEN ON RAPE, *supra* note 167, at 36 (quoting an eighteen year-old man). As stated by a nineteen year-old man quoted in the same work:

When you see a girl walking around wearing real skimpy clothes, she’s offending you and I guess rape would be a way of getting even. If I’m on a date and a girl’s dressing sexy and acting sexy, why doesn’t she want to have sex? The whole time you figure she’s going to say yes because she’s teasing you, and all of a sudden she switches because she wants to save it for marriage or something. That’s not right. She shouldn’t have lead [sic] you on in the first place. . . .

The only time it should ever be considered rape is if a guy jumps out of nowhere and rapes a woman. In dating rape or marital rape, the lady is just as much at fault for getting the guy going in the first place. *Id.* at 54, 56.

take a woman out, woo her, then she says, 'no, I'm a nice girl,' you have to use force."²²¹

Male feelings of lust based on the physical display of female beauty can prompt resentment and anger. Men rage at women they see toying with male sexual feelings:

"Where I work it's probably no different from any other major city in the U.S. The women dress up in high heels, and they wear a lot of makeup, and they just look really *hot* and really sexy, and how can somebody who has a healthy sex drive not feel lust for them when you see them? I feel lust for them, but I don't think I could find it in me to overpower someone and rape them. But I definitely get the feeling that I'd like to rape a girl. I don't know if the actual act of rape would be satisfying, but the *feeling* is satisfying."²²²

The same speaker commented on the effect that the appearance of sexually enticing but clearly unavailable women had on him:

"Let's say I see a woman and she looks really pretty and really clean and sexy, and she's giving off very feminine, sexy vibes. I think, 'Wow, I would love to make love to her,' but I know she's not really interested. It's a tease. A lot of times a woman knows that she's looking really good and she'll use that and flaunt it, and it makes me feel like she's laughing at me and I feel *degraded*."²²³

This speaker tells us how for him, the ideal of ordinary sexual desire ("really pretty and really clean and sexy"), can become tainted by feminine abuse; a taint that the man experiences internally ("I feel degraded"). The next step in the emotional progression is frequently

221. Scully & Marolla, *Vocabulary of Motive*, *supra* note 45, at 108.

222. BENEKE, MEN ON RAPE, *supra* note 167, at 42-43 (quoting a file clerk working in the financial district in San Francisco).

223. *Id.* at 43.

anger. Feelings of physical weakness must be purged by the assertion of physical power:

“If I were actually desperate enough to rape somebody, it would be from wanting the person, but also it would be a very spiteful thing, just being able to say, ‘I have power over you and I can do anything I want with you,’ because really I feel that *they* have power over *me* just by their presence. Just the fact that they can come up to me and just melt me and make me feel like a dummy makes me want revenge. They have power over me so I want power over them.”²²⁴

“I think I was really pissed off at her because it didn’t go as planned. I could have been with someone else. She led me on but wouldn’t deliver . . . I have a male ego that must be fed.”²²⁵

“There’s so many things women do . . . and it pisses a lot of men off. The way they dress, the way they tease. I hate that.”²²⁶

Note that these men do not deny feeling anger towards women or that it may inspire sexual aggression, but they report that this anger and aggression comes *from* sexual arousal.²²⁷ They explain and seek

224. *Id.* at 44. This same speaker made a revealing distinction between a violent rape and a rape with minimum force, perhaps revealing a motivational distinction between violence and sex:

I know a girl who was walking down the street by her house, when this guy jumped her and beat her up and raped her, and she was black and blue and had to go to the hospital. That’s beyond me. I can’t understand how somebody could do that. If I were going to rape a girl, I wouldn’t hurt her. I might *restrain* her, but I wouldn’t *hurt* her.

Id. at 45.

225. Diana Scully & Joseph Marolla, “*Riding the Bull at Gilley’s*”: *Convicted Rapists Describe the Rewards of Rape*, in RAPE AND SOCIETY, *supra* note 5, at 58, 66.

226. Jeanie Kasindorf, *Inside the Mind of a Rapist*, REDBOOK, Jan. 1993, at 77, 77 (quoting convicted rapist Glenn Herbert).

227. See John Bancroft, *Sexual Motivation and Behavior*, in EMOTION AND MOTIVATION 58, 71 (Brian Parkinson & Andrew M. Colman eds., 1995)

to justify the use of sexual force by the feminine frustration of sexual urges which women themselves have provoked.

If we listen closely we may also discern another theme in the relationship between male sexuality and force. Some men find that employing force is sexually exciting. We can see this most clearly in male excitement at rape accounts:

“Rape turns me on vicariously. It has a definite appeal. I am excited by reading about it, by seeing it in the movies. Not the actualization of it, but the fantasy of it turns me on. . . . My fantasies are not of violent rape, but more of forcing someone to submit and then get into the enjoyment of sex. . . . I . . . like those films that show a woman forcibly protesting while becoming more and more turned on viscerally as the rape proceeds, despite her protestations.”²²⁸

A standard male fantasy involves just such a scenario, where the man’s desire proves so powerful that it brings to arousal even the most reluctant partner. Thus the sexually charged man can coerce a

(discussing the potential compatibility of anxiety and anger with sexual arousal). *But cf.* Kanin, *Date Rape*, *supra* note 201, at 100 (providing that a majority of self-disclosed date rapists deny anger in the incident and state that they could not have performed sexually if angry). Behavioral sciences have noted that some males are brought up with the idea that anger is the only truly acceptable male emotion, with the result that a wide range of emotions essentially become funneled into anger in order to be expressed. *See* WILLIAM POLLACK, *REAL BOYS: RESCUING OUR SONS FROM THE MYTHS OF BOYHOOD* 44 (1998).

228. BENEKE, *MEN ON RAPE*, *supra* note 167, at 63-65 (quoting a man in his mid-forties who emphasized that this is just fantasy; in reality, he is disgusted by rape and in his personal life is very sensitive to female consent); *see also* Henderson, *Getting to Know*, *supra* note 7, at 51-55 (discussing the eroticisation of dominance in heterosexuality); Kasindorf, *Inside the Mind of a Rapist*, *supra* note 226, at 79 (“I’d get turned on just thinking about the risk and violence.”). A particularly insightful account of male excitement at sexual force may be found in Ian McEwan’s novel, *The Innocent*, in which the novel’s protagonist, acting out a fantasy, forces his girlfriend to have sex with him. He is hurt and surprised when she does not understand that this is just a game—even though he never explained that it was a game—and she leaves him. Eventually he does win her back, however. *See* IAN MCEWAN, *THE INNOCENT* 92-98 (1990). On the general prevalence of male arousal at sexual coercion, *see* Herman, *Considering Sex Offenders*, *supra* note 137, at 75-76.

woman into not just physical submission, but sexual bliss.²²⁹ The fantasy features prominently in the thinking of some serial rapists.²³⁰

Males often say their sexual forwardness with women comes from predominant gender norms promoted by men but often shared by women. They say that, as men, they are *expected* to take the initiative in sexual encounters and achieve sexual results. Manhood depends on successful competition, especially in the sexual arena. Success here means scoring—achieving a male orgasm via feminine contact, often through intercourse.²³¹ And aggressiveness seems to many boys and men to correlate with sexual success:

A sixteen-year-old young man comments on classes at school that teach boys to be respectful of girls: “Everybody listens very carefully, and agrees in class. But, then, a lot of guys go around bragging about how many girls they’ve done it with. Everybody wants to know if you’ve scored or not. There’s just a lot of pressure to have sex with a girl.”²³²

229. See Jackson, *The Social Context of Rape*, *supra* note 39, at 20.

230. See, e.g., Scully & Marolla, “*Riding the Bull at Gilley’s*”, *supra* note 225, at 69-70. It is important to note that such accounts come from convicted rapists serving prison terms, individuals who usually are convicted of stranger rapes and often have an extensive criminal history, factors which potentially differentiate them from men who commit the majority of acquaintance assaults. On the general link between sexual fantasy and conduct, see Prentky & Knight, *Identifying Critical Dimensions for Discriminating Among Rapists*, *supra* note 201, at 650-52.

231. See PEGGY REEVES SANDAY, *FRATERNITY GANG RAPE: SEX, BROTHERHOOD, AND PRIVILEGE ON CAMPUS* 72 (1990); see also BERNARD LEFKOWITZ, *OUR GUYS: THE GLEN RIDGE RAPE AND THE SECRET LIFE OF THE PERFECT SUBURB* 127-28 (1997) (describing a group of young men as “surgical and functional in their dealings with girls” and parties in which sex was “fun only if [they] could tell [their friends] about it,” while also noting that the sex in question rarely involved “[f]ace-to-face intercourse”).

232. POLLACK, *REAL BOYS*, *supra* note 227, at 149. Pollack makes the point that in sex education, gender stereotypes about interest in sex are reinforced when girls are encouraged to explore their feelings and work on clear communication, but boys are lectured to stop at any female “no,” without any concomitant opening for exploring feelings or working on communication. “The attitude seems to be that boys don’t have their own confusion, as if they’re sexual machines, poised and ready to go at all times.” *Id.* at 151.

"[I]t's like I think of it as all men are gladiators, right, and the more competitions they win with women, the more stronger they feel."²³³

"Sometimes I feel like the available alternatives are to be strong, aggressive, and inconsiderate and do well with women, or to be weak, considerate, and a eunuch. It's almost as if to be powerful, you have to be insensitive. You're forced to be aggressive even though you don't want to be."²³⁴

"The whole time I'm thinking that she expects to have sex. . . . I'd be a real wimp if I let her get away."²³⁵

From these voices we can draw a preliminary picture of male sexuality and power, at least for some men. Women's power to sexually arouse them makes men feel weak; men exercise sexual power in response to feel manly and strong. In this formulation, there is no simple separation between ordinary sexual arousal and gender anger or control, no neat distinction between sex and violence. Instead, we see a sexuality that inspires a wide array of emotions, including anger. We see men who insist on the sexuality of their experience, even when it leads to force.²³⁶

233. JANET HOLLAND ET AL., *WIMP OR GLADIATOR: CONTRADICTIONS IN ACQUIRING MASCULINE SEXUALITY* 18 (1993) (quoting a nineteen-year-old English man).

234. BENEKE, *MEN ON RAPE*, *supra* note 167, at 49 (quoting a thirty-year-old man).

235. Seligman et al., *The Date Who Rapes*, *supra* note 52, at 91-92 (quoting a young man in high school regarding his expectation that a date involves sex). Note the following from a gang rapist: "We felt powerful, we were in control. I wanted sex and there was peer pressure. She wasn't like a person, no personality, just domination on my part. Just to show I could do it—you know, macho." Scully & Marolla, "*Riding the Bull at Gilley's*," *supra* note 225, at 68.

236. See Bancroft, *Sexual Motivation and Behavior*, *supra* note 227, at 70-71 (describing sexual responses as compatible with either anxiety or anger in some cases); George Loewenstein et al., *The Effect of Sexual Arousal on Expectations of Sexual Forcefulness*, 34 J. RES. CRIME & DELINQ. 443, 446-47 (1997); Shotland, *A Theory of the Causes of Courtship Rape*, *supra* note 24, at 130 (reviewing literature on "excitation-transfer," a process by which male sexual arousal and resentment at female sexual nonconsent may reinforce each other, increasing the risk of forced sex).

D. Looking for Corroboration: Other Evidence Supporting a Sex-Power Link in Males

The male voices heard so far tell a story we have heard in many places, for many years. Some men have a strong urge to have sex with women based on physical stimuli, making it difficult for them to restrain themselves from violating social norms of conduct, including the use of force against women. But do we believe this? Do men really experience sex this way, or is this story just a way of avoiding responsibility? Perhaps these men lie about their own experience in order to defend otherwise indefensible attitudes and conduct. Resistance to male accounts is increased by the fact that many link the experience of strong visceral emotion (I felt overwhelmed) to diminished responsibility (and couldn't control myself). If we accept that men feel this way, then we will have to do battle with the argument that it's really women who should be faulted for provoking these feelings.

But again, our present task is strictly descriptive. Before taking up the admittedly vital responsibility question, we need to know: Are these accounts of sexual arousal sincere? One way of answering this question is to look for corroboration in patterns of male and female behavior. In particular, we can look to two general categories of gender-differentiated conduct: (1) patterns of sexual arousal, and (2) patterns of the use of force in connection with sexual acts. As always, we have to be careful when speaking of a distinction as general as gender. Our purpose here is to find patterns of male behavior that appear distinct from female behavior. To use an analogy from physics, we want to identify potential differences in the centers of sexual gravity for men and for women. Looking at a great range of human sexual behavior, are there patterns of sexual attraction and conduct that suggest a link between maleness, sexual arousal, and coerced sex acts?²³⁷ Such patterns, if they exist, may

237. Again, some now-familiar caveats. This inquiry is neither normative nor causal. We should at this point view human sexual patterns as we might view those of bees or mollusks, simple phenomena to be explained, not judged. Nor are we concerned with causation. The description of distinctive patterns between men and women in current society says nothing about whether, or to what extent, such patterns stem from genetic or socially constructed differences. Finally, identifying general sex patterns will not necessarily tell us anything about any individual, because many individuals will not fit the patterns of their sex. See KIMMEL, *THE GENDERED SOCIETY*, *supra* note 5, at

support the idea that some men force women into sexual acts as a way of satisfying their own (male) sexual needs.

We begin with distinctive patterns of sexual arousal. Males, far more than females, tend to become sexually aroused based on physical, usually visual cues. This means that males, more than females, experience the urge to have sexual relations with another person without having an otherwise intimate relationship with the individual. Once aroused, males, far more than females, view the achievement of a particular sexual act, usually ending in orgasm, as a nearly all-consuming goal.²³⁸

Gender differences in arousal patterns may be the easiest to document. Indeed, popular culture proves the point endlessly. Examine nearly any work of pornography that appeals to men. Whether on the Internet, in magazines, videos, or any of the other media of sexual titillation, the content will be similar—images of unclothed female bodies. Naked women and their sexual parts displayed in varying poses of sexual invitation, ranging from the demure to the bizarre and gynecologic, form the essence of such works. All forms of male pornography assume an ability to arouse quickly and with relatively little intimacy. The look of the woman and her posture are presumed sufficient to titillate.²³⁹

Now consider erotic expression aimed at a more female audience. Such expression tends to be primarily verbal rather than graphic and concerned with relationships rather than just bodies.²⁴⁰ Consider, for example, the relatively new phenomenon of explicitly erotic writing for women in which the author spins out a variety of sexual situations between individuals for the purpose of the reader's sexual entertainment and titillation.²⁴¹ The situations often involve social taboos, including sex between strangers or near strangers, but even in describing stranger sex, sexual excitement comes from individual interaction, from an emotional as well as physical connection between persons. The more traditional form of female

14-15 (explaining mean differences between the genders).

238. *See id.*

239. Visual pornography is predominantly created for and consumed by men. *See generally* MICHAEL ET AL., *SEX IN AMERICA*, *supra* note 126, at 157 (noting purchase rates of adult videos and magazines according to gender).

240. *See* KIMMEL, *THE GENDERED SOCIETY*, *supra* note 5, at 226-27.

241. *See, e.g.*, *THE BEST AMERICAN EROTICA 2001* (Susie Bright ed., 2001); *BEST WOMEN'S EROTICA* (Marcy Sheiner ed., 2001).

oriented erotic entertainment is the television soap opera or the romance novel. Here melodrama about romantic relationships stirs the romantic-sexual feelings of the viewer or reader. The physical excitement of sex grows out of and is intertwined with a larger set of human concerns, rather than being abstracted from the rest of life as it tends to be in male pornography.²⁴² It concerns identifiable people engaged in an erotic relationship rather than two sets of sexual organs interacting.

The physicality and self-orientation of male sexuality is supported by masturbation practices. Sex researchers have long documented significantly higher rates of masturbation by males than females, and at an earlier age, suggesting a sexuality that is more inspired by, and directed toward the physical pleasures provided by orgasm than the emotional rewards of intimate exchanges of thoughts and feelings.²⁴³ For males, masturbation usually serves as the early introduction to sex—the doorway to becoming a sexually active adult—while for females the first sexual acts are more likely to involve interaction with others.²⁴⁴ Throughout their lives, males generally masturbate more than females.²⁴⁵

Other gender-distinctive sexual patterns support the same physicality versus relationship distinction. Men are more likely to have fetishes—sexual attractions to unusual body parts, clothes, or

242. See KIMMEL, *THE GENDERED SOCIETY*, *supra* note 5, at 224-25; JAMES T. TEDESCHI & RICHARD B. FELSON, *VIOLENCE, AGGRESSION, AND COERCIVE ACTIONS* 310 (1994).

243. See MICHAEL ET AL., *SEX IN AMERICA*, *supra* note 126, at 163-66.

244. See *id.*; see also TEDESCHI & FELSON, *VIOLENCE, AGGRESSION, AND COERCIVE ACTIONS*, *supra* note 242, at 313 (“Women usually attribute their low masturbation rates to lack of desire, not guilt.”). Thus many women do not masturbate until they have had extensive sexual experiences with others; for most boys and men masturbation precedes such sexual experiences. See MICHAEL ET AL., *SEX IN AMERICA*, *supra* note 126, at 164. Interestingly, the gender disparity on masturbation becomes most pronounced at puberty. Prior to puberty some studies show no gender distinction of note. For ages of first masturbation and gender breakdown, see SAMUEL S. JANUS & CYNTHIA L. JANUS, *THE JANUS REPORT ON SEXUAL BEHAVIOR* 78 (1993). Cf. JOHN H. GAGON & WILLIAM SIMON, *SEXUAL CONDUCT: THE SOCIAL SOURCES OF HUMAN SEXUALITY* 55 (1973) (showing pre-pubertal rates of male masturbation double that of females).

245. See JANUS & JANUS, *THE JANUS REPORT ON SEXUAL BEHAVIOR*, *supra* note 244, at 31. There is considerable evidence that the rate of female masturbation has increased over the last generation. See *id.* at 76-79.

objects—than are women.²⁴⁶ Men consistently display more interest in sex with strangers, something evidenced both in surveys of sexual desires and in the overwhelmingly male use of prostitution services.²⁴⁷ The sexual patterns for homosexual men and women, where the former have many more sexual partners, on average, than the latter, also suggests a male-female distinction with respect to the relative importance of physical and emotional rewards in intimate relations.²⁴⁸

There is also considerable evidence supporting a connection between maleness and aggression in sexual relations in a wide range of species. In the nonhuman world, biologists have documented many instances of male use of force against females to achieve sexual relations. In species ranging from insects to primates, scientists have observed common patterns of male use of force to mate with females.²⁴⁹ Human society is no different. Social scientists have documented a sexual culture in Western society that associates male sexuality with aggressiveness.²⁵⁰ A large number of surveys over many years indicates that both men and women expect men to take the lead in sexual interaction.²⁵¹ The standard sexual script—the socially accepted paradigm of behavior—is that the man should test the woman's willingness to engage in series of increasingly intimate sexual activities.²⁵²

246. See TEDESCHI & FELSON, VIOLENCE, AGGRESSION, AND COERCIVE ACTIONS, *supra* note 242, at 310.

247. See *id.*; CHARLES WINICK & PAUL M. KINSIE, THE LIVELY COMMERCE: PROSTITUTION IN THE UNITED STATES 185-206 (1971).

248. See JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 339-40 (2d ed. 1997); KIMMEL, THE GENDERED SOCIETY, *supra* note 5, at 237.

249. See Jones, *Law and the Biology of Rape*, *supra* note 183, at 159-60. See generally Ronald D. Nadler, *Sexual Aggression in the Great Apes: Implications for Human Law*, 2 JURIMETRICS J. 149, 149-53 (1999) (describing research showing that males of three species of great ape perform "aggressively initiated copulation through coercion or intimidation, force, or threat of force" upon females).

250. See Jackson, *The Social Context of Rape*, *supra* note 39, at 18-20.

251. See *id.*

252. See Ronald J. Berger et al., *Sexual Assault in a College Community*, 19 SOC. FOCUS 1, 3 (1986); Jackson, *The Social Context of Rape*, *supra* note 39, at 18-19; M.N. LaPlante et al., *Living the Sexual Script: College Students' Views of Influence in Sexual Encounters*, 16 J. SEX RES. 338, 339 (1980); cf. E. Sandra Byers, *How Well Does the Traditional Sexual Script Explain Sexual*

Complaints about sexual aggression overwhelmingly involve male, not female aggressors.²⁵³ While in recent surveys a substantial minority of men report having experienced unwanted sex, most such incidents either involve other men, or women who use emotional pressure rather than physical force to achieve sexual ends.²⁵⁴ Finally, one indicator of a sexual basis to sexual aggression is the success of physical and chemical castration in diminishing the aggressive drives of some of the worst perpetrators of sexual violence via reduction in or suppression of the male sex hormone, testosterone.²⁵⁵

In summary, we have a great deal of objective evidence to support the subjective accounts of some men that sexual arousal is connected with forced sex. We have reason to believe perpetrators when they say that they forced sex on an acquaintance because of their own sexual desire.

Coercion? Review of a Program of Research, in SEXUAL COERCION IN DATING RELATIONSHIPS 7, 12 (E. Sandra Byers & Lucia F. O'Sullivan eds., 1996) (suggesting that, especially in ongoing relationships, women initiate sexual interaction almost as much as men, but that, in new or casual relationships, the traditional script is most influential).

253. See TEDESCHI & FELSON, VIOLENCE, AGGRESSION, AND COERCIVE ACTIONS, *supra* note 242, at 309. Among heterosexual couples, the most common sexual complaint from women is that their male partners are too aggressive sexually, and from men that their female partners are not interested enough in sex. *See id.* at 310.

254. See Struckman-Johnson, *Male Victims of Acquaintance Rape, supra* note 27, at 194-98. Summarizing recent surveys of college populations, the author reports that between 12% to 16% of men have been forced into intercourse by dating partners, primarily through verbal pressure; rates of physical sexual assault ranged from 1% to 7%. *See id.* at 198.

255. See Bryden & Lengnick, *Rape in the Criminal Justice System, supra* note 18, at 1331; Christopher Meisenkothen, *Chemical Castration—Breaking the Cycle of Paraphiliac Recidivism*, 26 SOC. JUST. 139 (1999) (providing an overview of new chemical methods); Palmer, *Twelve Reasons Why Rape Is Not Sexually Motivated, supra* note 197, at 520 (reviewing research on castration and recidivism); cf. Nikolaus Heim & Carolyn J. Hursch, *Castration for Sex Offenders: Treatment or Punishment? A Review and Critique of Recent European Literature*, 8 ARCH. SEXUAL BEHAV. 281, 300, 303 (1979) (concluding that no scientific or ethical basis for castration exists, though noting studies showing potential correlation between castration and reduction in recidivism). For a first-person account linking chemically lowered testosterone levels to reduced urges to sexual violence, see Michael B. Ross, *It's Time for Me to Die: An Inside Look at Death Row*, 26 J. PSYCHIATRY & L. 475, 484-85 (1998). It should be emphasized that, to date, there exists no clear scientific consensus about whether there is an effective chemical or surgical treatment for any sex offenders or, if there is, how potential offenders may be identified.

E. Explaining Denial—Visceral Desire Akrasia and the Dynamics of Forced Sex

From the data examined so far we can construct a coherent view of perpetrator thought, feeling, and behavior. We see men wanting sex, expecting sex, and determined to have sex. We see men pursuing their sexual goals by means of intoxication, verbal persuasion or physical force: whatever proves necessary to the task. We see men willing to bend or break socially accepted norms of romance in order to achieve their own physical satisfaction with a partner.²⁵⁶ We see men engaged in what they see as a lawful sexual pursuit.

Yet the explanation still does not fully satisfy. Perhaps in the Pennsylvania case where the sexual interaction was quick and relatively nonviolent, we can accept that M. missed his partner's unwillingness—though even here the signs of nonconsent were readily available to one interested in reading them. The problem is that many cases of acquaintance sexual assault are like Lana's, where the woman's lack of consent is persistent, obvious, and dramatic. Is there any way to bridge the gap between David's protestations of love and Lana's cries of nonconsent, except by declaring David a liar about his own perceptions and desires?

An answer may be found in research into so-called akratic behavior.²⁵⁷ Akratic behaviors are generally self-destructive activities that individuals indulge repeatedly despite often searing personal experience of their harms. They include activities such as

256. There is a mystery lurking here with respect to the nature of the male sexual drive. As some have noted, if men simply desire orgasm, then why isn't masturbation sufficient? See Baker, *Sex, Rape and Shame*, *supra* note 161, at 669. There is a logical appeal to this view when we see men who seem to care nothing for their partner's desires, apparently rejecting the mutual pleasure model of sex. And yet, all of the evidence suggests that even men who have no real interest in their partner's feelings find satisfaction in sexual relations with another that masturbation cannot provide. This seems to be true of forced sex just as it is with male purchase of a prostitute's services. A similar point has been made by sex researchers with respect to masturbation—that it correlates with other sexual interests and activities rather than functions primarily as a substitute for partnered sex. See MICHAEL ET AL., *SEX IN AMERICA*, *supra* note 126, at 158-59, 165-66.

257. Akrasia comes from the Greek word for weakness. In philosophy it is often used interchangeably with weakness of will. See ANTONY FLEW, *A DICTIONARY OF PHILOSOPHY* 4 (2d ed. 1984).

personal evidence to the contrary.²⁶² This creates a split in the self, a Jekyll and Hyde dynamic where the person in repose has little insight into the values and behavior of the person who experiences a strong visceral desire, and vice versa.

In many important respects, forced-sex cases fit this model.²⁶³ The man experiences a strong visceral desire for sexual satisfaction, which drives all of his actions. Sexual desire crowds out other considerations, distorting perceptions and inspiring selfish destructive conduct—coerced sex—that he otherwise might not contemplate. In the immediate aftermath of the incident the man often feels remorse.²⁶⁴ He may apologize, or otherwise seek to make amends. He becomes empathetic once more.²⁶⁵ As time passes, however, the man increasingly denies any wrongdoing, a denial that may be linked to diminishing appreciation of the force of his own sexual desire. The man in repose maintains that he did not, and would not, be so affected by sexual desire as to resort to criminal violence.²⁶⁶ This leads to a moral reconfiguration of the incident,

262. Thus one of the keys to the success of Alcoholics Anonymous may be the constant reinforcement of knowledge about the power of visceral desire through personal accounts of alcoholics and their suffering from drinking. See *id.* at 284.

263. See TEDESCHI & FELSON, VIOLENCE, AGGRESSION, AND COERCIVE ACTIONS, *supra* note 242, at 307-43. For a provocative argument in favor of considering sex offenders under an addiction model, see Herman, *Considering Sex Offenders*, *supra* note 137, at 84-87.

264. In the Pennsylvania case of *Commonwealth v. Berkowitz*, M. stated that this recognition came before completion of the sexual act. He stated that when he saw the blank look on W.'s face, he realized something was wrong and he withdrew, though at that time he ejaculated. See *Commonwealth v. Berkowitz*, 609 A.2d 1338, 1341 (Pa. Super. Ct. 1992).

265. Such recognition often does not last. When later confronted, such men often deny responsibility. This may be traced to either a desire to avoid moral and legal consequences, or from a reevaluation of the incident. The point is that they have some internal understanding, at least early on, of their wrongdoing.

266. Other patterns of harmful sexual conduct fit the akratic pattern even more closely: the pedophile who, on the afternoon of his release from a multi-year prison term for child molestation, goes to a playground to scout for a new victim; the man who repeatedly engages in unsafe sex practices despite personal warnings of the many hazards; the woman who seems compelled to have sex with multiple partners regardless of the personal or social costs. As George Loewenstein puts it: "Expressions such as 'I don't know what got into me,' or 'I must have been crazy when I...' refer to discrepancies between behavior and perceived self-interest that are produced by the influence of visceral

heavy smoking, substance abuse, compulsive gambling, unsafe sex, and various eating disorders.²⁵⁸ In each instance we see humans acting repeatedly against their own self-interest, often against their own declared values and goals. The obvious question is: What makes people act this way? The question is important for our purposes because we will see that forced-sex cases share at least some aspects of classic akratic behavior.

Researchers posit that an akratic phase may begin in a number of ways, often with an external cue that triggers the visceral desire.²⁵⁹ Once triggered, the visceral craving for a particular pleasurable activity crowds out all other rival considerations. To the susceptible person, nothing counts as much as the next high, the next drink, the next bet, the next bite of food. The craving is so great that the individual believes the short-term benefits of satisfying the desire easily outweigh the enormous medium and long-term harms of indulgence. Often the craving so dominates the individual's perspective that deliberation, the process of weighing the costs and benefits of conduct, seems to disappear entirely. The result is highly selfish behavior that does serious long-term harms to the individual, friends, and family.²⁶⁰

Researchers report that the distorting effects of visceral desire greatly diminish at the end of an akratic phase.²⁶¹ As the visceral desire fades, the person returns to a more balanced perspective. She recognizes the harms of her own drinking or gambling, overeating, or induced vomiting. Unfortunately, the individual also gradually loses insight into the power of her own visceral desires. The alcoholic rewrites personal history, rationalizing that past desires to drink were not so powerful that she could not now, or in the future, handle them better. One drink, or maybe two will not hurt. The individual sincerely believes that she can make rational, long-term decisions while indulging a particular visceral desire, despite powerful

258. See ROY F. BAUMEISTER ET AL., *LOSING CONTROL: HOW AND WHY PEOPLE FAIL AT SELF-REGULATION* 3-5 (1994); TEDESCHI & FELSON, *VIOLENCE, AGGRESSION, AND COERCIVE ACTIONS*, *supra* note 242, at 159-61; George Loewenstein, *Out of Control: Visceral Influences on Behavior*, 65 *ORG. BEHAV. & HUM. DECISION PROCESSES* 272, 273 (1996).

259. See Loewenstein, *Out of Control*, *supra* note 258, at 280.

260. See *id.* at 274-75, 280.

261. See *id.* at 274.

with primary responsibility for any injury placed on the woman. She either agreed to what happened or she provoked it with her own irresponsible sexual conduct.

The dynamic of visceral desire *akrasia* fills an important gap in our understanding of forced sex. It explains how some men may sincerely claim that they acted out of ordinary sexual desire, in the course of what they believed to be romantic sex play, when in fact they committed an act of sexual violence. It explains how they may deceive themselves about the aggressiveness of their own actions and the unwillingness of their partners. It also provides insight into how we might attack nonrecognition. We see that nonrecognition may depend not only on sexist beliefs about male rights to sexual aggression, but also on lack of sexual self-understanding. Lack of insight into sexual arousal and its effects on thoughts, feelings, and behavior appear to be critical to perpetrator nonrecognition in many cases.²⁶⁷

Visceral desire *akrasia* poses this challenge for advocates of attitudinal change: how do we convince otherwise law-abiding men that, under the influence of strong sexual desire, they may be tempted to use force, when in repose they cannot imagine such conduct?²⁶⁸

factor." Loewenstein, *Out of Control*, *supra* note 258, at 289. One thinks of President Clinton's conduct with Monica Lewinsky.

Forced-sex cases generally do not present as clear a pattern of compulsive and self-destructive conduct as do classic examples of *akrasia* such as smoking or alcoholism. This may not make the visceral desire model inapposite, however. In many instances the man who strongly desires sex from his partner will be able to satisfy that desire without force. In addition, nonrecognition mitigates the bad consequences of cases where the man uses some degree of force. Without general recognition of the wrong, there are no serious bad consequences for the perpetrator, meaning that the conduct is not in fact self-destructive. Also, one recent study suggested that, while sexual arousal may increase the risk of sexual coercion, it does not do so by blocking awareness of the negative consequences of that coercion. See Loewenstein et al., *The Effect of Sexual Arousal*, *supra* note 236, at 461-63 (providing a predictive study in which subjects indicated a greater likelihood of using force when aroused, but also a greater awareness of its negative consequences).

267. This is not to deny that sexist attitudes contribute to forced sex, but to question whether they operate in the directly causal fashion that some have posited. Such attitudes may lower inhibitions to sexual aggression and ease after-the-fact rationalizations of the conduct rather than directly inspire the aggression.

268. Note that this question concerns psychology, not responsibility. Neither

F. *Confronting Denial—Male Sexual Desire and the Listening Problem*

Assuming some commitment on the part of men to respect female sexual autonomy—a large assumption in many cases, but a necessary one for our purposes—what arguments might we make that would alter the common perception that forced sex is but a variant of ordinary courtship? More specifically, how can we encourage men to listen better to their romantic partners?

There is no question that many cases of forced sex involve serious miscommunication between partners. Many have argued that sexual and social inexperience; intoxication; complex, confusing, and often conflicting gender expectations; and the difficulty of talking about sex, especially while sexually aroused with a new partner, makes the chance of good faith mistake about consent a real possibility.²⁶⁹ This leads to what we may call the miscommunication thesis: that forced sex occurs because of mistaken words or gestures. It suggests that if only the communicative acts or their meanings were clearer, the assault might have been avoided.²⁷⁰ We might say, for example, that W. in *Commonwealth v. Berkowitz* did not employ the necessary words or gestures needed to communicate her nonconsent to M., or conversely, that M. did not correctly interpret W.'s indications of nonconsent. Given their fundamentally different perceptions, the incident unfolded as if each was speaking a different language. The extent of the misunderstanding was not clear, at least to M., until it was too late.

But in forced-sex cases, communicative breakdowns go beyond language problems. While effective communication requires a

criminal law nor morals generally grants an excuse from responsibility because individuals feel themselves incapable of self-control due to strong desire. See *infra* Part V. Thus scientists may be right that many behaviors, including those under the influence of strong visceral desires, may be involuntary in the sense of being beyond the immediate control of the individual, and yet, these individuals remain responsible persons. See, e.g., Loewenstein, *Out of Control*, *supra* note 258, at 289 (“My argument is that much behavior is non-volitional or only partly volitional—even in situations characterized by substantial deliberation.”); see also PILLSBURY, *JUDGING EVIL*, *supra* note 36, at 18-46.

269. See, e.g., Douglas N. Husak & George C. Thomas III, *Date Rape, Social Convention, and Reasonable Mistakes*, 11 *LAW & PHIL.* 95 (1992); Stefani Cook, *What Men Want*, *GQ*, Oct. 1989, at 292, 299-300.

270. See Husak & Thomas, *Date Rape, Social Convention, and Reasonable Mistakes*, *supra* note 269, at 119-25.

common language for proper interpretation of verbal and nonverbal signals, this is a necessary, not sufficient condition for understanding. Communication also requires interest. In forced-sex cases the perpetrator remains oblivious to his partner's nonconsent, not because of a failure to use the right words or gestures—though in some cases this may be literally true, as the man would in fact desist if confronted with screams, crying, scratches, bites or kicks—but because the perpetrator is not interested in her message. She says slow down or stop, but expecting more sexually, and intent on achieving more, the man finds ways to ignore or reinterpret her expressions to give him permission to continue.

We need to recognize that, like all forms of perception, listening is an affirmative mental activity. We have to *pay* attention. To hear what is said in class or on the radio or in the street we have to open our mental listening channels—and open them not just to sounds, but to certain categories of information. Living as we do in a data-choked world, we cannot pay attention to all the information available to us. To keep our sanity and achieve our goals, we have to restrict our data intake. We do so by setting priorities. We pay attention to information according to our interests, fears, and desires.

In many forced-sex cases, men place their highest attention priorities on the achievement of sexual satisfaction and so look vigorously for any sign of sexual willingness, no matter how trivial or stale, while filtering out, or biasing, the interpretation of contrary signs.²⁷¹ If the partner says “no,” he treats the “no” with skepticism. He may ask himself how this “no” stands up to the partner's earlier conduct. She definitely wanted to go on a date, she agreed to come to my room, she seemed to like it when we kissed and made out. Does she *really* want me to stop now or is this a show of propriety for the sake of her good reputation? He may compare his partner's “no” to his own expectations of dramatic, physical resistance to truly undesired contact.²⁷² I'd sure fight a lot harder if I really didn't want

271. See *id.* at 117-18.

272. For example, consider this sequence from a magazine article in the late 1980s, quoting from a discussion among young professional men on whether they had ever committed date rape:

WILL: Not when she's screaming or anything.

PHILIP: If she says no and you keep at it another minute, often she'll then say yes.

it, he may think. She's not screaming, kicking or biting, after all. Thus M. hears W.'s moaned no's as affirmatively passionate, not serious calls for desistance.²⁷³

Missing from this analysis is attention to less dramatic signs of nonconsent. In fact, less obvious signs of nonconsent are often perversely interpreted as signaling desire. Intoxication is read as increasing the likelihood of consent rather than increasing the difficulty of effective verbal and physical resistance. Passivity is interpreted as consent rather than a state induced by some combination of drink, a sense that physical resistance is hopeless, and despair at the man's determined disregard of fundamental principles of personal space and bodily integrity. Male misreading of female signs of fear in these situations may be likely given that men generally have a hard time comprehending the fear of sexual assault that is so much a part of every day female life in our society.²⁷⁴

We return to the point made in the previous Part: the importance of recognizing the sexual nature of forced-sex cases. In

JOE: It's sort of like a program you feel you're up against. They have to say no at least twice.

TED: When are you supposed to realize that no is no.

JOE: When they start crying

TED: I had a girl start crying one time and I like—oh, I just did not know—maybe I *have* date raped.

JEFF: That's scary business.

Cook, *What Men Want*, *supra* note 269, at 299-300.

273. A related point is illustrated in a statement by a college counselor: "Most guys know when it's a red light, and most guys know when it's a green light, but we really have a hard time with the yellow light. Instead of slowing down and checking things out, most guys wish it was green and they run right through it." Irene Lacher, *The Rape Debate*, L.A. TIMES, Oct. 17, 1993, at E1 (quoting Mark Stevens, director of student counseling services at the University of Southern California); *see also* Gutmann, "*It Sounds Like I Raped You!*", *supra* note 50, at 26 (describing an exchange in which a man, when later confronted regarding forced sex, says that he interpreted his female friend's squirming as sexual interest because that was what he desired).

274. As Mark Cowling writes: "[T]he possibility of rape frightens very many women in a way which men (myself included) find hard to fully understand: what seems just obvious to women needs to be explained at length to men" COWLING, DATE RAPE AND CONSENT, *supra* note 5, at 7. *See generally* MARGARET T. GORDON & STEPHANIE RIGER, *THE FEMALE FEAR* (1989) (discussing the fear of rape, its sources, and the ways women cope with it).

addressing perpetrators and their defenders, sexual desire constitutes the needed starting place for our argument. It is the place of common agreement where we may plant our persuasive lever. Acknowledging that some men do experience strong sexual desire in many romantic and quasi-romantic situations, and that that desire may lead to urges to action that are hard to control, we continue: among those urges may be an urge to use force to accomplish sexual ends. Indeed, force may itself be sexually arousing for men. Strong male sexual desire certainly makes hearing partner expressions of protest or reluctance much more difficult. For all these reasons, the ordinary male, subject to ordinary sexual desire, is a potential perpetrator of forced sex.

Conversely, the more we reject or diminish the role of male sexual desire in forced-sex cases, the less likely we are to reach those with the strongest personal reasons for denying wrongdoing in these incidents. To reach the M. of *Commonwealth v. Berkowitz*, we need to show him how he—as an ordinary young man extremely interested in sex with young women—might be tempted to commit a sexual assault. Telling him that he must curb his rage and need to control women will be met with a shrug because it does not speak to *his* experience of sexual interaction. He will not get the message because he will be certain that we are not talking about him. Speak to him about the power of sexual arousal and frustration and we may at least get his attention.²⁷⁵ The same may be true of persuading the David of Lana's story. Even though he clearly displays gender-based anger, and that is an important factor in his conduct, our most effective persuasive technique may be to speak to him of sexual desire, not rage.

275. One of the ironies of the case is that the assault occurred not long after a college seminar on the meaning of "no." See *Berkowitz*, 609 A.2d at 1341. The more we emphasize power assertion and therefore downplay the role of the perpetrator's sexual desire, the harder it will be for the law to read the requirement of force except as a requirement of overt violence, that is, force beyond that needed for the sexual act itself. That in fact was the final result of the case. The Pennsylvania Supreme Court held that there was an insufficient showing of force by M. to support a rape conviction. See *id.* at 1352.

V. RESISTANCE TO CHANGE

We have seen that, blinded by misguided concepts of rape and romance, we often do not recognize the wrongs of forced sex. We have seen that nonrecognition often involves the sexual dimension of the wrong. We do not appreciate the injury done to the heart because we do not see the connection between the spirit and sex. We do not see the wrong done because we do not acknowledge the connection between male lust and sexual assault.

Of course now we know better. Having found what was missing in our collective understanding, having described and named it, we are now thoroughly prepared to educate skeptics. We simply tell them what they are missing and they will figuratively slap their foreheads and exclaim: "Of course! Why didn't I see it before?"

Or maybe not.

The end of our inquiry into the sources of nonrecognition represents but the beginning of our persuasive effort. We have identified what needs to be changed in predominant emotional constructs of rape and romance and suggested how that might be done, but we have not dealt with the problem of emotional resistance. In addition to the intellectual work of reconfiguring our paradigms of rape and romance, curing nonrecognition will require breaking strong personal commitments to traditional paradigms. Just as perpetrators of forced sex have powerful motives for not hearing the protests of their partners, so do many in society have strong reasons for minimizing the sexual aspects of forced sex.

Adopting the sexual view of forced sex threatens the feminist principle that sexual aggression is always motivated by anger and a need for control rather than ordinary sexual arousal. The sexual view of acquaintance rape also argues for changes in traditional conceptions of male and female identity that many will fiercely resist. And finally, the perspective proposed here threatens both popular ideals of romance and our sense of personal security. In short, when it comes to changing our paradigmatic notions of forced sex, the forces of denial and avoidance run broad, deep, and strong.

What follows is an introduction to the major emotional obstacles to forced-sex recognition. It represents a preliminary sketch of a road that must be surveyed, built, and finally traveled. Included are some of the more obvious and important obstacles to change, but the

rendering is far from complete.²⁷⁶ My aim is simply to point the way forward.

A. *The Risk of a Return to Patriarchy*

Those who emphasize the violence of rape may be among the first to object to the revised picture of forced sex presented here.²⁷⁷ As we saw in our discussion of the sex vs. violence debate, some will argue that an emphasis on the sexual aspect of rape opens the door for a return to patriarchal views of sexual responsibility, where male arousal diminishes male responsibility and women are automatically suspect for sexual provocation.²⁷⁸ A greater emphasis on the sexual will necessarily de-emphasize the moral core of the crime, which is

276. Among the most important obstacles to change not discussed here is the difficulty of engaging in serious public discourse about the wrongs and spirit harms of ordinary sexual desire in a society where public culture treats sex as a fundamentally physical activity whose moral dimension is a matter of private, not public concern. As depicted in public culture, sex is a source of humor, a commodity to be sold, or a matter of psychological health, rather than a matter to be considered in public moral terms. Overtly moral discourse about sex is often religious, presenting other problems in a society where matters of legal concern generally must be resolved on secular grounds.

277. See Brown, *Debate Rages over Sex as Rape Motive*, *supra* note 193, at A7. Reform advocates spoke of the offense as one of political oppression:

I have concluded on the basis of the data that I have compiled about the nature of rapes, that in view of the fact most rapes are both violent and planned, the aim is not sexual gratification but humiliation of the victim. And it is not the product of spontaneousness and uncontrollable urges Rape is a deliberate act, and it is a conscious or unconscious attempt to assert male dominance in a very impersonal way, because rape is very seldom directed toward an individual woman. It is always the woman happening to be in the wrong place at the wrong time.

Revising California Laws Relating to Rape, *supra* note 116, at 116 (statement of Camille Le Grand).

A reform-minded former prosecutor agreed:

I think that if nothing else changes today, the one fact that ought to be realized and ought to be accepted is this that in the overwhelming number of rape cases, the issue is not the guy getting some sexual gratification at all, but that the individual is getting back at women in general for every real or imaginary wrong done to him by women.

Id. at 136 (testimony of Maurice Oppenheim, Project Director, Penal Code Project of the Joint Committee on the Revision of the Penal Code).

278. For a good overview of the influence of such views in rape law, see Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, *supra* note 37, at 18-24.

its violent disrespect for autonomy. Soon we will face renewed sexual—and sexist—arguments concerning female responsibility for forced sex.²⁷⁹

This concern must be taken seriously. Emphasizing the sexual motivations of assaulters and the sexual-spiritual harm done to the victim *may* encourage some to return to old, patriarchal views of sexual responsibility. Though they may be reluctant to say so openly, many in our society still believe that, given the enormous sexual pressures that men experience (that great force of nature, so hard to keep in its place), women are obliged to exercise special care in sexual interactions with men. If a woman pushes, pulls, or otherwise entices a man over the edge of sexual self-control, she must face the consequences. To use a popular metaphor, the man's sexual organ is like a gun: a woman should know better than to play with it.²⁸⁰ As we saw in Part I, for people holding this view,

279. For example, a rape survivor in a recent autobiographical work reports her discouragement at hearing the family of an accused serial rapist protest his innocence based on his proper sexual conduct within the family: "The myth that rape is caused by some irrepressible sexuality persists, protecting us from the stark violence at rape's core." PATRICIA WEAVER FRANCISCO, *TELLING: A MEMOIR OF RAPE AND RECOVERY* 167-68 (1999); see also LEFKOWITZ, *OUR GUYS*, *supra* note 231, at 310-11 (containing arguments by a defense attorney and others in support of young men charged with sexually assaulting a mentally retarded young woman).

280. The loaded gun is capable of several different responsibility interpretations, however. For example, the following dialogue from the 1998 film, *There's Something About Mary*, suggests that it is the owner of the gun, the *man*, who must exercise gun control. He is, after all, the owner:

DON: You choke the chicken before any big date don't you? Tell me you spank the monkey before any big date. Oh my God, he doesn't flog the dolphin before a big date. Are you *crazy*? That's like going out there with a loaded gun. . . .

TED: Holy shit, I've been going out with a loaded gun.

THERE'S SOMETHING ABOUT MARY (Twentieth Century Fox 1998). The metaphor can also be used to shift responsibility to the woman. Here the man becomes the dangerous weapon—a nonresponsible, dangerous, inanimate object—and a woman must handle it/him with care. "When it comes to sex, women would be wise to treat men . . . like a load[ed] gun. Don't get it out of the holster unless you intend to use it, and certainly do [not] point it [at] anything you don't wish to shoot." O'Kelley, *From a Man's Point of View*, *supra* note 164. In fairness, this argument may represent prudential advice to women rather than constitute a position about moral or legal responsibility. On the tendency for men to avoid sexual responsibility by blaming their sexual organs, see Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, *supra* note 37, at 28.

evidence of a consensual romantic prelude to a sexual assault virtually precludes a judgment of criminal wrong. The woman who suffers nonconsensual sex after this point has lost the right to criminal protection because of her own previous sexual miscalculations or manipulations.

But the real question is: How do we defeat these arguments about responsibility? Do we persuade best by insisting that the conduct under scrutiny constitutes violence rather than sex, and so categorically exclude all sexual considerations from the conversation? Or will our presentation be more effective if we concede the sexual aspects of the encounter and confront the patriarchal ideas about sexual responsibility latent in our society? As should be clear by now, I favor the latter approach.

The argument about sexual responsibility should not be difficult to win. We need only subject sexual matters to the same responsibility principles we do other aspects of human conduct. We must insist that sexual arousal does not alter the universal obligation of respect for others' autonomy.²⁸¹

281. In fact, the frustrated man scenario as traditionally imagined does not fit the pattern of many forced-sex cases. The standard account of sexual provocation presents a man physically aroused by a woman's active and willing participation in foreplay, a man who becomes enormously frustrated by his partner's sudden indication that she does not wish to go any farther. The scenario painted usually involves sexual foreplay that has progressed so far that, for the man, stopping short of orgasm will be intensely uncomfortable, physically and psychologically. See Cook, *What Men Want*, *supra* note 269, at 299. The far more common pattern involves indications of moderate romantic-sexual interest on the woman's part, leading to quite moderate foreplay, before the man resorts to force. As a result, it appears that the man develops exaggerated sexual expectations based on his own personal priorities, his experience and misinterpretations of sexual signals from the woman. Thus getting a ride home from a bar with a woman just recently met, or general conversation about sexual topics with a fellow student, combined with her open, friendly and perhaps intoxicated manner are seen as indications of willingness to have intercourse. See, e.g., *Commonwealth v. Berkowitz*, 609 A.2d 1338 (Pa. Super. Ct. 1992); *State v. Rusk*, 424 A.2d 720 (Md. 1981). Or a man involved in a romantic relationship may simply decide to disregard the woman's reluctance to go beyond a certain level of foreplay. See Hamaguchi, *My Boyfriend Raped Me*, *supra* note 33; *My Story*, *supra* note 96.

On a more theoretical level, the assumption that sex is an especially strong biological drive that is merely suppressed or channeled by social controls may be wrong, mistaking the psychological effects of guilt for those of biology. See GAGNON & SIMON, *SEXUAL CONDUCT*, *supra* note 244, at 55.

We begin with the fundamental moral principle that all persons have equal value and that any rational decision to disrespect basic value should be condemned. Put simply, every person has a right to sexual autonomy: the right to choose whether, when, how, and to what extent to engage in sexual contact with another. Each gender, and each individual should be held equally responsible for communication and understanding. Each individual bears equal responsibility for ensuring that selfish wants do not lead to conduct in disrespect for another's choice.²⁸² This means that men must be held responsible for coercing partners regardless of their own sexual desire.²⁸³

Nowhere else in our responsibility practices do we directly correlate temptation with lessened responsibility. We can construct persuasive psychological explanations for those who steal cars, deal drugs, or murder, detailing why they broke the law, but we do not believe these explanations alter their criminal responsibility. Those abused and neglected as children who grow up to be angry, violent adults; those genetically or environmentally predisposed to be substance abusers who grow up to be addicts—all are held responsible for the violent and other crimes they commit, crimes that may be directly traced to their backgrounds. In their cases, we do not convert explanations of wrongdoing into excuses for wrongdoing.

This responsibility argument is in fact exactly that put forward by the last generation of rape reformers. It simply recasts the argument in terms more readily applicable to common patterns of forced sex. The evidence is strong that ordinary male sexual desire *does* play an important role in many forced-sex cases. We have good

282. For a recent and particularly thoughtful exploration of law and responsibility in this context, see SCHULHOFER, UNWANTED SEX, *supra* note 20, at 99-105, 274-82.

283. See LARRY MAY, MASCULINITY AND MORALITY 12-23 (1998). Equal responsibility means that women should bear negative consequences for disrespectful sexual choices as well. Thus if female sexual behavior is manipulative—offering or withholding sex for hidden reasons—moral blame is warranted for the dishonesty involved. While such conduct is not and should not be criminal, it does warrant moral blame. Similarly, a failure to express sexual desires clearly may also be held socially blameworthy, as inflicting needless pain on others. But neither should alter the man's criminal responsibility for using force. Sexual temptation does not excuse, however it arises.

reason to believe that for some men the experience of sexual arousal does inspire the use of force, making it more difficult for them to respect the sexual reluctance of partners. The evidence is also powerful that many persons—victims, perpetrators, and third parties—view forced-sex incidents as fundamentally sexual encounters. We should take these facts as the foundation of our normative argument about male sexual responsibility, rather than undercutting that responsibility.

In the end, while the violence conception of sexual assault merits respect for its many insights and historical accomplishments, we can no longer ignore its shortcomings. Like most theories of behavior, it was shaped to remedy earlier simplistic concepts, resulting in its own oversimplifications. In part, the violence approach stands the victim of its own success. With broad dissemination, subtleties and cautions of original proponents have been lost.²⁸⁴ But the problem goes deeper than this. As some second-generation feminist reformers have asserted, the violence conception of sexual aggression stands in the way of a much-needed re-examination of the sexual dimensions of forced sex.²⁸⁵ While the

284. From early in the feminist anti-rape movement, even writers identified with radical positions noted a strong sexual element to this violent crime. For example, Andrea Dworkin writes:

When feminists say *rape is violence, not sex*, we mean to say that from our perspective as victims of forced sex, we do not get sexual pleasure from rape; contrary to the rapist's view, . . . rape is not a good time for us. This is a valiant effort at crosscultural communication, but it is only half the story: because for men, rape and sex are not different species of event.

ANDREA DWORKIN, *Violence Against Women, It Breaks the Heart, Also the Bones*, in *LETTERS FROM THE WAR ZONE* 172, 179-80 (1993). Unfortunately, the need to simplify anti-rape messages to maximize impact elides important distinctions. All that is left is that rape equals violence. For example, a typical educational material on rape is the following from the Rape Response & Crime Victim Center:

RAPE IS VIOLENCE NOT SEX!

- Sex forced or against your will is rape
- Rape is an act of force, violence, and humiliation
- A person who rapes seeks power and control

Victim Information, Rape Response & Crime Victim Center, at <http://abc.eznettools.net/D302506/X329849/info.html> (last visited Feb. 10, 2002).

285. The problem, as Katharine Baker describes, is not that men substitute rape for sex, but that "most people, including date rapists themselves, believe that men can actually substitute nonconsensual for consensual sex in some sort

sexual approach presents new hazards, it also offers one of the few promising avenues for changing our current social (mis)understanding of forced sex.

B. *The Threat to Sexual Identity*

1. Masculinity

We have seen that part of our problem with forced-sex recognition involves traditional ideas about romance, in particular, distinctive romantic roles for males and females. The sexual approach to forced sex brings these gender issues forward because it requires us to consider wrongdoing in ordinary sexual interactions. It therefore requires a more direct confrontation with still-powerful notions of distinct gender roles in romance.

The sexual view of forced sex challenges traditional masculinity and femininity in sexual interactions. It condemns conduct that is but an exaggeration of traditional male and female roles. In this respect, it demands change in how many individuals view their own sexual identity. Recognition will challenge how young males see themselves as men, and young females as women.²⁸⁶

Particularly for adolescents and young adults, sexual identity represents the soft underbelly of the self. It is the part of the self that she or he tries hardest to protect from hostile scrutiny, because this is where young adults can be hurt in the most painful ways. No wonder they—and the rest of us—resist personal or social critique of accepted concepts of maleness or femaleness.

To appreciate the nature and force of this resistance, consider common threats to male sexual identity today. What is it that a young man fears most when it comes to the sexual aspect of manhood? For many young men, the great fear is that he will be declared a sexual nonperformer.²⁸⁷ The labels vary, certainly the derogatory vocabulary is rich and ever changing, however, the essential theme is invariant: a real man has sex with women and wannabe men do not. The object of male scorn may be called a

of meaningful way.” Baker, *Sex, Rape and Shame*, *supra* note 161, at 664.

286. On this distinction, see White & Humphrey, *Young People's Attitudes Toward Acquaintance Rape*, *supra* note 87, at 51-52.

287. See SANDAY, *A WOMAN SCORNED*, *supra* note 40, at 200.

homosexual, a wimp, a child—anything but a man.²⁸⁸ Thus what boys growing into adulthood fear most in their sexual lives is not unwanted pregnancy or sexually transmitted diseases, not criminal charges or a reputation for being sexually or romantically cruel, but the embarrassment and humiliation of being one who cannot “get it on” with a female.²⁸⁹ In reaction, many seek concrete reassurance of masculinity in the sexual conquest of females:

“When it comes to my masculinity I get very defensive. Because I know that men are admired for having many partners, I set quotas—so many girls in one month. The joy of sex for me is the feeling of acceptance and approval which always goes with having sex with a new person.”²⁹⁰

“It was not a big deal If you had sex, you got a point. It was like bragging rights for the person who thought he was the biggest stud.”²⁹¹

Feminists and others have long noted the destructiveness of these kinds of traditional masculinity norms.²⁹² When sexual performance determines masculinity, romance becomes a form of competition, in which the goal of sexual scoring “on” a female takes

288. For general accounts of male anxieties and compensations, see LEFKOWITZ, *OUR GUYS*, *supra* note 231, at 103-256. The author quotes a young man present at the sexual assault of a mentally retarded young woman by a group of his peers as stating: “I realize Leslie had a learning disability. . . . I think maybe I should have just left, but . . . I didn’t want my friends talking bad about me, calling me a wimp.” *Id.* at 282-83. The insult in its most common adolescent form is that the male is derided as either a female or homosexual. See Patricia Yancey Martin & Robert A. Hummer, *Fraternalities and Rape on Campus*, in *RAPE AND SOCIETY*, *supra* note 5, at 139, 141-42.

289. See SANDAY, *A WOMAN SCORNED*, *supra* note 40, at 199-200.

290. *Id.* at 184 (quoting a male college student in a 1984 interview).

291. Bill Hewitt et al., *The Body Counters: The Studs in the Spur Posse Think They’re the Hottest Guys at Lakewood High, and If You’ve Got Any Doubts They Can Show You the Numbers*, *PEOPLE*, Apr. 12, 1993, at 34, 35 (quoting Mike Weber, a seventeen year-old, in discussing the so-called “sexual scoring scheme” used by teenage members of the so-called “Spur Posse” at a southern California high school in the early 1990s); see also SUSAN FALUDI, *STIFFED: THE BETRAYAL OF THE AMERICAN MAN* 102-14 (1999) (discussing the attitudes of young men in relation to the Spur Posse).

292. See *infra* Part V.C.

precedence over achieving intimacy with her. Male approbation based on male orgasm makes the sexual desires of female partners unimportant, making sexual coercion of females more likely. When young people believe that maleness depends on sexual forcefulness and femininity on sexual passivity (discussed further below), forced sex can seem just an exaggerated expression of gender norms.²⁹³

Our initial goal therefore, must be to change predominant concepts of sexual manhood.²⁹⁴ We need a maleness in which sexual prowess does not depend on conquest of females by male orgasm. Identifying the negative in masculinity is but the first step to change, however. The more difficult and important step will be to devise new, affirmative norms of manhood. Arguments that attack the concept of gender norms, or that urge men to adopt norms widely understood as feminine, present few prospects for persuasive success.²⁹⁵ Whatever their intellectual appeal, such arguments do not

293. See *infra* Part V.C.

294. Another possibility—at least theoretically—would be to do away with gender standards entirely. If we could entirely eliminate the concept of masculinity, it would likely alleviate our problems with nonrecognition of forced sex. My working assumption here is that, while distinctive gender identity creates major problems, it also presents an enormous opportunity for social change. It also seems to be too basic to give up. Thus for the pragmatist committed to addressing forced sex skeptics, the question is not whether we will have masculinity and femininity, but what we should choose as our masculine and feminine standards.

295. Thus simple exhortations that men should be more relationship and less body oriented in romantic interaction, or that they should generally be more verbal and emotionally open—while worthwhile in their own right—will not be sufficient here unless they are presented as part of a specifically male conception of romance. See MICHAEL GURIAN, *A FINE YOUNG MAN: WHAT PARENTS, MENTORS, AND EDUCATORS CAN DO TO SHAPE ADOLESCENT BOYS INTO EXCEPTIONAL MEN* 47-51 (1998). The danger is that these efforts may be viewed by men as an indirect attack on their manhood. If gender norms are to be used as a positive tool—and this is obviously a controversial matter—then we need a maleness that is respectful of partner choice, but still distinctly male. Psychologist Carol Tavris writes about the resistance to this kind of change, for both sexes, here discussing different styles of dealing with problems:

I think it will be as uncomfortable, even frightening, for women to modify their fondness for talk and risk independent action, when this is called for, as for men to modify their silences and risk vulnerability. It's much easier for women to focus on changing men, even if the results are few and puny, than to develop their own programs of self-development. It's much easier for men to withdraw into silence than to try to articulate the fears and losses that jeopardize masculine

have the personal emotional power needed to alter emotive constructs of right and wrong sexual behavior.

2. Femininity

The sexual view of forced sex also challenges female sexual identity. Especially in recent years, many have noted the link between traditional feminine roles and the nonrecognition of forced sex by women. Traditional concepts of the good and the bad in femininity as to sex and romance create powerful barriers to effective responses to sexual aggression. As we did with males, we may begin with common insults to female sexual identity, for these strongly influence female reactions to forced sex.

While the most feared insults to masculinity center on sexual nonperformance, the great sexual slur for women is the opposite, that of sexual over-performance, or promiscuity.²⁹⁶ The definition of promiscuity is very much contested in modern youth culture, but however defined, the insult strikes at a particularly vulnerable place in female identity:

“Sometimes I wonder now why I didn’t stop it. It amazes me to think of the powerful and double-edged fear of not being accepted or of being a prude or of being a ‘slut’.”²⁹⁷

identity.

CAROL TAVRIS, *THE MISMEASURE OF WOMAN* 286 (1992).

296. See COWLING, *DATE RAPE AND CONSENT*, *supra* note 5, at 125; TANENBAUM, *SLUT!*, *supra* note 69, at 154; NAOMI WOLF, *PROMISCUITIES: THE SECRET STRUGGLE FOR WOMANHOOD* 104-15 (1997) (describing a personal account of changing female sexuality); Mary Krueger, *Sexism, Erotophobia, and the Illusory “No”: Implications for Acquaintance Rape Awareness*, in *SEXUAL COERCION IN DATING RELATIONSHIPS*, *supra* note 252, at 107, 110; Charlene L. Muehlenhard & Lisa C. Hollabaugh, *Do Women Sometimes Say No When They Mean Yes? The Prevalence and Correlates of Women’s Token Resistance to Sex*, 54 *J. PERSONALITY AND SOC. PSYCHOL.* 872, 875 (1988) (containing a study documenting fear of promiscuity as a contributor to token resistance); see also LILLIAN B. RUBIN, *EROTIC WARS: WHAT HAPPENED TO THE SEXUAL REVOLUTION?* 58-69 (1990) (describing a double-standard regarding attitudes towards the promiscuity of men and women).

297. TANENBAUM, *SLUT!*, *supra* note 69, at 163 (account of a young woman who was raped when she was very drunk at a party as a high school freshman).

"I think it's made a sin for women to enjoy sex. From the time we begin enjoying sex we're called slags, or we can't have too many friends that are men. The ones who have good rapport with boys are called slags and the ones who don't are simply called tight bitches. 'Never get close to her,' y'know, 'prude', and I don't think it ever stops."²⁹⁸

The slut pejorative shapes female attitudes and behaviors in a host of negative ways relevant to forced sex.²⁹⁹ Fear of the slut label can inspire illusory sexual refusals, where the woman resists a man's advances to avoid seeming "loose," even though she actually welcomes the advances and hopes they will continue.³⁰⁰ A woman may say no simply because social convention seems to require it as a formal sign of sexual propriety.³⁰¹ Such feigned refusals feed the dangerous perception among both sexes that women do not mean it when they say no to a sexual advance. Fear of the slut label, combined with feminine ideals of nonsexual romanticism, discourages women from honest recognition of their own sexual desires and clear articulation of those desires to partners. The slut pejorative may affect the credibility of forced-sex complainants, as some suspect that a woman caught engaging in out-of-relationship sex may charge rape just to avoid the socially devastating label.³⁰²

298. SUE LEES, SUGAR AND SPICE 30 (1993) (account of an English adolescent girl; "slag" is the British slang version of slut.).

299. See TANENBAUM, SLUT!, *supra* note 69, at 7 (providing an extensive list of pejoratives for sexually active females, and a much shorter list of similar terms for sexually active males).

300. See *Id.* at 15; Husak & Thomas, *Date Rape, Social Convention, and Reasonable Mistakes*, *supra* note 269, at 110-14; Krueger, *Sexism, Erotophobia, and the Illusory "No"*, *supra* note 296, at 111-12; Muehlenhard & MacNaughton, *Women's Beliefs About Women Who "Lead Men On"*, *supra* note 61, at 66-67. The promiscuity of the victim is frequently used as a way to deny rape responsibility. For example, consider this comment from a sorority member in response to allegations of the rape of two college women: "I think these girls got a little bit too drunk and a little bit promiscuous They were asking for it and they got it." Leon Wynter, *Campus Rapes Create Alarm at College Park*, WASH. POST, Nov. 13, 1980, at Md. 1.

301. See Baker, *Text, Context, and the Problem with Rape*, *supra* note 5, at 304 ("Many women believe that they are supposed to say 'no,' not just because they should not want to have sex, but because it is the polite thing to say.").

302. See TANENBAUM, SLUT!, *supra* note 69, at 15..

There are also more direct connections between a reputation for promiscuity and incidents of forced sex. Girls and women labeled sluts often find themselves the target of male sexual aggression, as male partners expect, based on social reputation, that they will consent to any sexual advance.³⁰³ Calling the forced-sex victim a slut has also proven an effective social defense against assault accusations, allowing male perpetrators and their supporters, male and female, to engage in the most vicious kind of denial by converting the victim into the wrongdoer.³⁰⁴

For all this concern with promiscuity, we have to note the beginnings of an opposite trend in sexual libel for women. At least in some parts of society, norms of femininity have changed to include sexual independence and physical passion.³⁰⁵ Unfortunately, this means that young women may increasingly face a threat to sexual identity similar to that faced by males: the label of prude. The girl or woman who refuses sex with males risks the charge from her peers that she is immature and childish in her fear of adult sexuality. While this label may not be as powerful for females as it is for a male, it complicates sexual decision making by reducing the space for socially acceptable refusals.³⁰⁶

303. *See id.* at 121.

304. *See id.* at 26.

305. Making generalization difficult here are the enormous differences in the United States between different groups with respect to sexual attitudes. For example, attitudes accepted in wealthier and more highly educated segments of metropolitan populations may be considered radical in other places and in other social groups. *See cf.* Muehlenhard & MacNaughton, *Women's Beliefs About Women Who "Lead Men On"*, *supra* note 61, at 72 (noting a study of college students at Texas A&M University indicating that a substantial percentage of women say "no" to sexual advances they actually desire); *The Antioch College Sexual Offense Policy*, in *DATE RAPE: FEMINISM, PHILOSOPHY, AND THE LAW* 135, 136-42 (Leslie Francis ed., 1996); Alan E. Guskin, *The Antioch Response: Sex, You Just Don't Talk About It*, in *DATE RAPE*, *supra*, at 155, 155-58 (discussing the policy of Antioch College under which no sexual contact between students was to be permitted without express verbal permission). Regardless of these important variations, it is clear that adolescents form the group most affected by gender norms because they are still forming their own sexual identities. And for adolescent females, a group at significant risk for forced sex, the female promiscuity insult remains socially powerful.

306. *See* LEES, SUGAR AND SPICE, *supra* note 298, at 30 (quoting a sixteen year-old woman); TANENBAUM, SLUT!, *supra* note 69, at 46 ("[G]irls who have never kissed a boy are ridiculed as undesirable and unattractive, as 'losers' or

As with males, the positive aspects of female identity—the ideals to which girls and women aspire—can also interfere with recognition of sexual aggression. At least three features of idealized (we might also say caricatured) femininity are particularly problematic for our purposes: the female as pure romantic, as sexual diplomat, and as sexual gatekeeper.

In traditional gender norms, the feminine ideal is the woman who cares about love but not sex. Females value affection and romance, but the latter only in the sentimental not the sexual sense.³⁰⁷ The physical dimension of female sexual desire is seen as unimportant, a byproduct of romance that requires no separate attention. This discourages exploration of one of the most powerful and most difficult aspects of adulthood for both sexes, the management of sexual arousal. It promotes a lack of introspection and discussion of sexuality among girls and women. It encourages girls and women to enter romantic relationships with only vague ideas of what they want sexually, making it difficult for them to make sound sexual decisions and to express their desires clearly to male partners:³⁰⁸

“Girls are so encouraged to not talk about sex. Nobody talks about sexual pleasure at all, even though sexuality is such a big part of who you are. When people talk about sex, it’s always attached to a stigma, like homosexuality or

‘schoolgirls’ without a prayer of ever being asked out on a date.”). For a specific example of the prude label changing sexual behavior, see TANENBAUM, *SLUT!*, *supra* note 69, at 119.

307. See generally CASSELL, *SWEPT AWAY*, *supra* note 43, at 53 (describing women as seeking passionate romance); DENFELD, *THE NEW VICTORIANS*, *supra* note 70, at 69 (quoting from a late nineteenth-century treatise on marriage: “As a general rule, a modest woman seldom desires any sexual gratification for herself. She submits to her husband’s embraces, but principally to gratify him.”); HOLLAND ET AL., *WIMP OR GLADIATOR*, *supra* note 233, at 8 (describing female sex education as protective, designed to prevent harmful sexual consequences, without discussion of sexual pleasure); KIMMEL, *THE GENDERED SOCIETY*, *supra* note 5, at 221-22 (discussing nineteenth-century views of the passionless female); TANENBAUM, *SLUT!*, *supra* note 69, at 124-28.

308. See TANENBAUM, *SLUT!*, *supra* note 69, at 180. This problem is compounded both by male lack of experience with sexual nuance and male sexual desires which discourage attention to female refusals.

disease or rape. So when we do see a woman who is sexually active, she is a threat."³⁰⁹

Another problematic ideal is that of the woman as sexual diplomat. Female sexual identity has long been tied up in the ability to manage social situations peacefully and without embarrassment or hurt feelings. Thus a real woman can handle a man's sexual demands without causing a scene, private or public. Less overwhelmed by sexual impulse than males, she can keep her cool and find a way to gracefully deflect his unwanted attentions without wounding his sensitive ego or violating her own sexual integrity. Indeed, she can preserve both of their social reputations—his for sexual aggression and hers for sexual purity. She can read the early warning signs of male overzealousness and avoid putting herself in real danger.³¹⁰ This conception of femininity as the master of sexual signs and situations is dangerously naive. The signs of risk may be extremely hard to read (after all, many of the men who perpetrate forced sex also miss them), and appear too late for easy or diplomatic response.

A related ideal is that of the perfect hostess. Survivors of forced sex often explain their lack of dramatic resistance—the absence of the punching, kicking, scratching, biting, or screaming that many would expect of them—by a deeply engrained fear of making a scene. Girls and women are encouraged to be the perfect hostess, the one who suffers personally, if necessary, in order to ensure that social occasions go off without overt unpleasantness. Feminine reluctance to make a scene may unintentionally bolster the man's perception of her willingness, allowing him to believe that persistence, even force, will not violate her true desires.³¹¹ Consider the following:

309. *Id.* at 137 (quoting a college student).

310. This tendency comes out clearly in patterns of victim self-blaming. See, e.g., Linda Stasi, *The Sex Crime Women Never Talk About*, LADIES' HOME J., May 1994, at 167, 210 (containing a first-person account of a divorced woman's rape and subsequent reactions: "We think, as divorced women, that we should know better, right? We've been married, gone through divorces, probably have kids. We should know the difference between a potential rapist and a potential relationship.").

311. See Kanin, *Date Rape*, *supra* note 201, at 101-02.

Relating how a group of boys with whom she was friendly “pulled a train” on her (had sex with her in succession) in high school, a woman reports: “It was more an environmental pressure than anything else. I got into a situation and I didn’t know a way of getting out of it gracefully.”³¹²

Relating how a would-be boyfriend forced sexual acts on her in a high school music room following her school talent show performance: “He was my friend, I trusted him and of course I could talk him out of it, right? Besides, would I really want to be found in front of the whole high school like this? For god’s sake, my parents were in the audience. He proceeded to perform oral sex on me.”³¹³

The sexual diplomat and hostess must also serve as sexual gatekeeper. Traditional norms state that, as the partner least affected by base sexual desire and with the strongest commitment to social responsibility, the woman must decide for both partners what will be sexually permitted. She must decide how far and how fast a sexual relationship will progress. As a result, women often hold themselves responsible for male sexual coercion, believing that if he went too far, it must be because she led him on.³¹⁴

Each of these conceptions of femininity encourages victim self-blame. They inspire a common despair that overwhelms many girls and women during and after the incident, that she is at fault for failing in sexual management and awareness. Her own sense of worthlessness seems confirmed by the man’s brutality. Despair discourages recognition of the man’s wrongdoing.

Each of these gender role fears and ideals must be addressed to reduce the incidence of nonrecognition of forced sex. Women must find the courage to say yes to sex that they desire, and say so clearly, regardless of consequences for social reputation. Conversely,

312. TANENBAUM, *SLUT!*, *supra* note 69, at 213.

313. Sara Kate, *Was It Rape?*, *supra* note 135.

314. See Stasi, *The Sex Crime Women Never Talk About*, *supra* note 310, at 210 (“At first I took the classic female approach and blamed myself—I must have given him the wrong signals, I must have acted like I was ready for sex, and on and on.”); see also *supra* Part III.

women must find the courage to say no when that is their desire, regardless of social expectations. Women must also give up the conceit that they have special insights into male sexuality and special ability to manage it. Above all, they must relinquish diplomatic, gatekeeping, and hostessing obligations in the sexual arena. The costs of misunderstanding here are too great to allow a traditional sense of propriety to obscure the truth about personal desire.³¹⁵

C. *The Threat to Magical Romance*

The sexual view of acquaintance rape threatens not just sexual roles, but sexual ideals. In particular, it threatens the ideal of romance as a magical process that transcends ordinary communicative methods and understanding. Many yearn for a romantic connection that occurs without conscious thought or formal communication.³¹⁶ Magical romance may involve a plunge into the physical delights of sex without preliminaries, fast-forwarding through verbal foreplay to the special effects of sex itself.³¹⁷ Or it may be the wondrous joining of partners who reach perfect ecstasy

315. See generally Gutmann, "It Sounds Like I Raped You!", *supra* note 50, at 26 ("The picture is further clouded by the tradition that men should take the sexual initiative, the inclination of some women to voice resistance in order to avoid appearing 'easy,' and the prevalent belief that saying no is a mere convention, part of foreplay."). See also Byers, *How Well Does the Traditional Sexual Script Explain Sexual Coercion?*, *supra* note 252, at 21 (citing clinical evidence that women are not as clear as they could be in communicating their sexual desires).

316. The power of this idea can be seen in reaction to proposals for requiring explicit communication to obtain sexual consent. See Baker, *Sex, Rape and Shame*, *supra* note 161, at 686-89; Baker, *Text, Context, and the Problem with Rape*, *supra* note 5, at 305. For a variety of perspectives on rape and the requirement of explicit verbal consent, see David M. Adams, *Date Rape and Erotic Discourse*, in DATE RAPE, *supra* note 305, at 27, 31; Lois Pineau, *Date Rape: A Feminist Analysis*, in DATE RAPE, *supra* note 305, at 1, 8; Lois Pineau, *A Response to My Critics*, in DATE RAPE, *supra* note 305, at 63, 65-67; see also Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, *supra* note 37, at 44 ("There is significant psychological theory and data to support the claim that women who crave truly non-communicative sex do not know what is in their best interests.").

317. This is an ideal often associated with the notion of a "zipless fuck" contained in *Fear of Flying* by Erica Jong, in which sex is nearly anonymous, casual, and utterly without consequences. See ERICA JONG, *FEAR OF FLYING* 10-15 (1973).

by a communion of body and spirit entered into without negotiation, express articulation of desire, or even deliberate decision making.³¹⁸

However beautiful the ideal, magical romance provides a dangerous guide to real life. The reality is that the sexual realm is a place where individual desires are complex and take considerable work to be understood, respected, and fulfilled. To achieve real intimacy and mutual pleasure, each individual must put deliberate effort into understanding both his or her own desires and those of a partner. The result may be magical, but the process rarely is.

The sexual understanding of forced sex threatens the magical view by suggesting that we need to talk, and more seriously, with more people, about our sexual fears and desires. Most anti-rape advocacy in recent years has urged improved sexual communication, but primarily in private conversation between partners. The view of forced sex presented here suggests that at least as important is a general public discussion of sexuality, male and female. This requires that men put aside locker room jokes and after-dinner banter to take their own sexuality seriously. Though it can be funny, sex is not a joke and its problems cannot be foisted off on an unruly body part. Nor should the male discussion focus entirely on the physical dimension of sex, for as we have seen, sex plays a critical role in a person's spiritual life.³¹⁹ Women face their own challenges in engaging sexual topics more frankly, and discussing not just the dangers of sex, but their own sexual needs and pleasures. Finally,

318. See CASSELL, *SWEPT AWAY*, *supra* note 43, at 26-27; see also TAVRIS, *THE MISMEASURE OF WOMAN*, *supra* note 295, at 284 (criticizing the female tendency to over-romanticize love).

319. This brings us to another potential threat of the sexual view presented here. The modern trend is to emphasize the physical dimension of sexuality, to recognize that while it can be invested with metaphysical value, it is essentially a physical process no different than eating, digestion, and excretion. But if it is true that in sexual assault the person's spirit is disturbed, then we must consider a much larger spiritual dimension for sexual conduct generally. We must also consider that our spirits may be affected not just by what we want to do, but what others do to us. We are subjects as well as actors, sometimes willing and consciously choosing, sometimes unwilling and unchosen. We have to imagine the possibility that sex involves not just bodies, but spirits interacting and that this spiritual interaction may occur without consent, or consciousness. This reconceptualization of injury in sexual assault will likely have serious implications for our conceptualization of consensual sexuality and for the wide variety of sexual philosophies, which are built on the notion of "if it feels good, do it."

this discussion needs to take place not just among women, but between women and men.

Members of both sexes must frequently make difficult sexual decisions under pressure and at considerable risk to their own sense of themselves and their social identities. Because the stakes are high, the standards of conduct should likewise be high. Individuals of both sexes must work hard to know themselves, to speak clearly, using words and gestures, and to listen closely to partners. These may sound like simple matters, but for many of us they are anything but simple.³²⁰

D. The Threat to Personal Peace: Acknowledging the Traitor in Our Midst

"I felt I was carrying a bomb. Every time I told someone that I had been raped, I caused a small explosion."³²¹

"I thought your article was well-written. But let's face it, no one wants to hear about such things."³²²

Last, but certainly not least, taking to heart a sexual understanding that forced sex threatens our sense of personal security, and our peace of mind. We can imagine few more frightening events than a sexual attack. It terrifies us because we instinctively sense its power to isolate. By invading the self's inner space, the assaulter separates the victim from the rest of the human community. He destroys the faith in personal security that we need to make meaningful connections with others.

320. See WIEHE & RICHARDS, *INTIMATE BETRAYAL*, *supra* note 56, at 158-61 (advising women on the need to make clear sexual decisions and to clearly communicate them); McElroy, *The New Mythology of Rape*, *supra* note 70; see also Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, 46 CLEV. ST. L. REV. 409, 414 (1998) (discussing the responsibility of both the male and female to communicate their wishes).

321. FRANCISCO, TELLING, *supra* note 138, at 19 (account of the author on telling her mother that she had been raped).

322. RAINE, *AFTER SILENCE*, *supra* note 138, at 119 (comment made to Nancy Venable Raine about a magazine article that she wrote on her experience as a rape victim).

There may be no better sign of our fear of rape than our reluctance to speak the word aloud. Those convicted of the crime avoid its utterance.³²³ Victims often speak of the event as an assault or an attack in order to avoid saying rape.³²⁴ In polite conversation, mention of the word seems improper. It is a brute that once introduced, shatters the social convention of mutual reassurance, that such things cannot happen to us, the good and the safe. Behind this avoidance lies the fear that victimization may be contagious, that simply speaking of rape may infect us with a rape victim's pain and terror.³²⁵

By contrast, romance, whether taken in the limited sense of consensual sex, or as a broader reference to the intimacies of sexual love, constitutes one of our most treasured ideals. Who does not long for that state of harmony with another that, however fleeting, makes us feel that we utterly and truly belong? We seek a romantic bond that will ease the loneliness that otherwise seems our natural condition.

Thus rape is our nightmare; romance our dream. Of course we want to keep them apart, and their boundaries clean and sharp. It should not surprise, therefore, that every publicly accepted conception of rape and romance to date has either argued for a clear differentiation between these opposites, or has been susceptible of supporting a clear distinction.³²⁶ Full recognition of the sexual nature of forced sex would blur the emotional lines between these categories of conduct, however.

The traditional barrier between rape and romance was maintained by a view of the rapist as a barely human sexual predator. He was a brute, perverted in mind and body, who intentionally

323. See Scully & Marolla, "Riding the Bull at Gilley's", *supra* note 225, at 72 n.7.

324. See BOURQUE, DEFINING RAPE, *supra* note 10, at 286-88.

325. See *id.* at 292 ("[S]ignificant numbers of the population are so threatened by the word 'rape' that they simply avoid information that might lead them to see rape as an activity that encompasses a wide range of sexually coercive behaviors, some of which apply to them."); see also FRANCISCO, TELLING, *supra* note 138, at 60-65 (discussing a victim's encounters with other victims and the effect that her sharing of information about her rape had upon them); PIERCE-BAKER, SURVIVING THE SILENCE, *supra* note 2, at 91 (discussing the common resistance to hearing about rape); RAINE, AFTER SILENCE, *supra* note 138, at 273-74 (same).

326. See BOURQUE, DEFINING RAPE, *supra* note 10, at 285-88.

violated chaste women with whom he had no social relationship. This conception served to limit the number of sexual attacks that could be termed rape and thus reassured that it was a rare occurrence be readily distinguishable from ordinary romance.

Feminist reformers of the late twentieth century attacked the traditional picture of rape as a dangerous caricature, insisting that perpetrators are ordinary men and that the crime is an all-too-ordinary part of the female experience.³²⁷ A central message of anti-rape reformers has been that rape is horrible *and* common.³²⁸ In this regard, the sexual approach advocated here seems to present no new threats. But there may be an important psychological difference between the sexual and violence versions of this argument.

Mirroring the pattern previously documented, the attempt to convince the public about the prevalence of rape has proven much less successful with respect to acquaintance than to stranger assaults. Many people refuse to believe that an offense as serious as rape could occur as frequently as many surveys indicate that forced sex does. Such resistance to recognition may inspire a misreading of the violence conception of rape.³²⁹ Instead of fearing the man-brute-pervert, now we fear the man-brute-sexist. Look out for the man consumed with an inner rage against women. He may be hard to spot at first, but with proper training we can identify the warning signs of gender violence. This vision of threat provides indirect reassurance because the man described bears so little resemblance to most men, even those men with a strong interest in sex.

The sexual conception of forced sex suggests that this crime is part of ordinary life. Just as serious accidents go with cars; and alcoholism with beer, wine, and liquor; so ordinary sexual interaction has its dark, violent side. Nor can we reassure ourselves by noting

327. *See id.* at 285-89.

328. *See id.* at 291-95.

329. Again, this is not to say that it is an accurate reading of the feminist-violence conception. MacKinnon makes a related point in criticizing the "rape is violence" conception, saying that the social function of the rape label is to distinguish the crime from sex. Thus "[r]ape becomes something a rapist does, as if he were a separate species." MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 125, at 145. She questions the violence-sex distinction on the ground that "male sexuality is apparently activated by violence against women and expresses itself in violence against women to a significant extent." *Id.*

that the bad guys and their bad ways are readily identifiable. Because they are not. These are deeply disturbing ideas. No wonder we find ways to avoid their full comprehension.

VI. CONCLUSION

This paper has addressed what we see and do not see, and so it seems fitting to end with a discussion of blindness. There is a curious fact about blindness and its possible cures that provides insight into the problem explored here. Persons born blind reach a point of no return with respect to corrective surgery at about the age of eight.³³⁰ If physical defects are corrected up to this time, sight may be restored. Thereafter, repair of the physical organs will be ineffectual in restoring sight because the nervous system needed to process images will not have developed and apparently cannot develop after this age.³³¹ From this we learn that sight involves more than sensory input. It also requires a complex processing system, developed over time.

The analogy to nonrecognition of forced sex is crude and imperfect, but useful nonetheless. Over the last quarter century we have performed major surgery on the law of rape and the principles of personal responsibility that inform it. We have restructured our official understanding of wrong to better protect individuals' rights against sexual oppression. Now we must do similar work on the emotional constructs that shape our intuitive understanding of sexual wrongdoing. In particular, we must rework our paradigms of rape and romance. Nonrecognition of forced sex is common in contemporary society, not so much because our law is deficient (though in some cases it is), nor because the facts of the incidents are contested and obscure (though this is also true in many instances), but because misguided and simplistic concepts of rape and romance obscure our view of wrongdoing.

This paper has been devoted to the question of how we may better see and hear the wrongs of forced sex. In its simplest form, the argument has been that we need to focus more on the sexual aspects of the offense. In this sense, the doorway to the hidden is

330. See Eric Mankin, *Second Sight*, USC TROJAN FAM. MAG., Autumn 2000, available at http://www.usc.edu/dept/pubrel/trojan_family/autumn00/sight/sight_pg1.html.

331. See *id.*

located in the obvious. But the paper has presented a larger argument as well, one that concerns moral imagination. It involves the shapes and sounds we expect serious wrongdoing to take. I have argued that, for a host of reasons, we do not expect serious wrongdoing to appear in romantic and quasi-romantic situations, so that when it does occur we have a hard time recognizing it.

For many who combat rape, the slow pace of change in our social understanding of forced sex has been a source of dismay, discouragement, and anger. Candidly, I cannot say these feelings are unjustified given the current chasm between formal conceptions of wrong and social understanding. But we should acknowledge the difficulty of the task here. In many ways, changing our approach to stranger rape was easy compared to changing our view of forced sex. It should come as no surprise therefore that the task will require more than a generation to accomplish. The job that lies before us is to find the plain words to convince the skeptical—who come in all ages, sexes, races, and backgrounds—of the nature and seriousness of these violations of the person. The challenge is to open human eyes and ears to what many would prefer not to see or hear. In this paper I have suggested how we might meet that challenge.

