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## ARTICLES

### SEX AND GUILT

*Anne M. Coughlin\**

*[Our] law does not entertain quite such sublime ideas of the honour of either sex, as to lay the blame of a mutual fault upon one of the transgressors only: and therefore, makes it a necessary ingredient in the crime of rape, that it must be against the woman's will.*

William Blackstone<sup>1</sup>

*Only in marriage is sex expression socially and legally acceptable. The jailer and the social censor cast their shadow across non-marital and extra-marital sexual behavior.*

Morris Ploscowe<sup>2</sup>

*Moses gave us the laws and one of those laws was, "Thou shalt not fornicate." It's that simple.*

Sheriff Mark John, Emmett, Idaho<sup>3</sup>

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<sup>1</sup> 4 William Blackstone, Commentaries \*211.

<sup>2</sup> Morris Ploscowe, Sex and the Law 1 (1951).

<sup>3</sup> Maggie Hall, Lock Up Your Daughters, Sunday Mail, Nov. 3, 1996, at 32, available in LEXIS, News Library, Record File (quoting Sheriff Mark John, Emmett, Idaho).

## INTRODUCTION

THE contemporary critique of the law of rape proceeds from the theoretical premise that the prohibition against rape exists to protect female sexual autonomy. This assertion about the proper purpose of rape law serves different strategies for different authors, depending on their political inclinations. From the perspective of liberal philosophy,<sup>4</sup> the claim represents the primary normative judgment that lawmakers should employ when articulating a formal definition of rape and when applying that definition to particular circumstances. After scrutinizing rape doctrine in the light of late-twentieth-century liberal sexual mores, some authors have noticed that elements of the offense promote the sexual agency of men at the expense of that of women.<sup>5</sup> Therefore, these commentators have suggested revising rape law in ways calculated to secure for women the authority to make sexual choices on an equal basis with men.<sup>6</sup>

For other commentators, including primarily feminist scholars, the claim provides the focal point for a trenchant criticism of both the rape prohibition and the liberal premises that ostensibly support it. Only a law dedicated to the extirpation of female autonomy and to the exploitation of female sexuality, they argue, could so ruthlessly ignore, indeed misrepresent, the cultural, material, and

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<sup>4</sup> For purposes of this Article, readers need have only a basic understanding of liberal philosophy. Liberalism incorporates a model of the human being that presupposes that adult actors are rational, autonomous characters, who are capable of identifying and acting to maximize their own interests. According to liberal theory, state intervention in the lives of individuals should be carefully limited: Since individuals are in the best position to judge which transactions to enter and which to avoid, the state should uphold their choices as long as (for one thing) those choices do not unduly burden the autonomy of other persons. Finally, liberal theory is especially hostile towards state intrusion into the so-called private domain, which includes the domain of sexuality. For a feminist description and critique of liberal political philosophy, see Alison M. Jaggar, *Feminist Politics and Human Nature* 27-50, 173-206 (1983).

<sup>5</sup> Indeed, Donald Dripps believes that the practical effect of the rape prohibition always has been "only to . . . reinforce the interests of males in controlling sexual access to females." 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, 1780-81 (1992).

<sup>6</sup> See, e.g., *id.*; Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 *L. & Phil.* 35 (1992); see also Susan Estrich, *Real Rape* 102 (1987) ("The issue is not chastity or unchastity, but freedom and respect. What the law owes us is a celebration of our autonomy, and an end . . . to the distrust and suspicion of women victims of simple rape . . .").

psychological conditions that constrain women's exercise of sexual agency.<sup>7</sup> Not surprisingly, both radical and cultural feminist authors insist that the law will never be faithful to women's sexual perspectives and experiences until lawmakers thoroughly revise not only the rape prohibition, but the liberal construct of autonomy itself.<sup>8</sup>

The critics' assertion that rape law is designed to protect female sexual autonomy carries with it a cluster of related assumptions about gender, heterosexuality, and the legal regulation of heterosexual intercourse. Speaking generally, the critics treat heterosexuality as a social sphere within which men and women should be free to pursue a range of erotic options.<sup>9</sup> Although their conceptions of the state's role in securing sexual freedom differ in some crucial respects, the critics stipulate that, at a minimum, sexual freedom re-

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<sup>7</sup> See, e.g., Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 175 (1989) ("If rape laws existed to enforce women's control over access to their sexuality, as the consent defense implies, no would mean no, marital rape would not be a widespread exception, and it would not be effectively legal to rape a prostitute." (footnote omitted)); Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 *Chi.-Kent L. Rev.* 359, 387 (1993) ("The concept of sexual autonomy must spring from a substantive vision of gender, race, and class relations that seeks liberation from all conditions of subordination."); Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 *Wis. Women's L.J.* 81, 90-97, 103-06 (1987) (arguing that by treating women as autonomous individuals able to consent to sexual encounters on the same basis as men, rape law ignores the pervasive fear of violent male sexuality that constrains women's sexual choices); see also Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 *S. Cal. L. Rev.* 777, 796-800 (1988) (describing feminist critique of rape).

<sup>8</sup> For example, Catherine MacKinnon argues that, in a culture of sex inequality, neither the law nor the accused man—nor even the woman herself—can know a woman's will because both law and culture define the crucial constructs of human will and consent from the male perspective. MacKinnon, *supra* note 7, at 175-78. For MacKinnon and other radical feminists, therefore, so-called ordinary intercourse and rape are and will continue to be virtually indistinguishable until we confront and dismantle the state-sponsored male standpoint that "presents consent as free exercise of sexual choice under conditions of equality of power without exposing the underlying structure of constraint and disparity." *Id.* at 175. Although Robin West has criticized aspects of radical feminism, she too has argued that feminists must reject liberal philosophy's "commitment to the ethical primacy of consent" because such a commitment is unfaithful to women's definition of themselves as beings whose "motive[s] for acting . . . [are] the direct antithesis of the internal motivational life presupposed by liberalism." West, *supra* note 7, at 97.

<sup>9</sup> See, e.g., Chamallas, *supra* note 7, at 840-43 (identifying an "egalitarian ideal of mutuality" in heterosexual encounters which "places high value on individual autonomy"; Schulhofer, *supra* note 6, at 94 (characterizing "freedom of choice in matters of sexual intimacy" as a "[c]ore right[] of the person").

quires that people should be entitled to expect that the law will protect them from sexual contacts that they subjectively do not want and affirmatively reject or that they accept under conditions that would invalidate the exchange of other kinds of goods.<sup>10</sup> The commentators imply that men enjoy sexual autonomy and that, at least when they are pursuing sexual connections with women, biological and cultural conditions coincide to support their autonomy and, indeed, their domination of female sexuality.<sup>11</sup> Men are superior in size and strength to women, and culture long has fostered male initiative, if not aggression, in the exchange of heterosexual intimacies.<sup>12</sup> Women, on the other hand, possess physical and social traits

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<sup>10</sup> See, e.g., Model Penal Code § 213.1 cmt. 4, at 301 (Official Draft and Revised Comments 1980) (“The law of rape protects the female’s freedom of choice and punishes unwanted and coerced intimacy.”); MacKinnon, *supra* note 7, at 174-75 (criticizing rape law for ignoring women’s choices by treating “[a]mbiguous cases of consent . . . as ‘half won arguments . . .’ Why not half lost?”); Dripps, *supra* note 5, at 1785 (“What is meant by sexual autonomy is the freedom to refuse to have sex with any one for any reason.”); Schulhofer, *supra* note 6, at 79 (“If one cannot obtain another’s property by threatening ‘to inflict any harm that would not benefit the actor’, there is no reason why one should be able to obtain sexual acquiescence in this way.”).

<sup>11</sup> One account of these conditions was provided more than a century ago by John Stuart Mill:

All women are brought up from the very earliest years in the belief that their ideal of character is the very opposite to that of men; not self-will, and government by self-control, but submission, and yielding to the control of others. All the moralities tell them that it is the duty of women, and all the current sentimentalities that it is their nature, to live for others; to make complete abnegation of themselves, and to have no life but in their affections . . . . When we put together three things—first, the natural attraction between opposite sexes; secondly, the wife’s entire dependence on the husband . . . and lastly, that the principal object of human pursuit, consideration, and all objects of social ambition, can in general be sought or obtained by her only through him, it would be a miracle if the object of being attractive to men had not become the polar star of feminine education and formation of character. And, this great means of influence over the minds of women having been acquired, an instinct of selfishness made men avail themselves of it to the utmost as a means of holding women in subjection, by representing to them meekness, submissiveness, and resignation of all individual will into the hands of a man, as an essential part of sexual attractiveness.

John Stuart Mill, *The Subjection of Women* 16 (Susan Moller Okin ed., Hackett Publishing Co. 1988) (1869).

<sup>12</sup> See, e.g., Susan Brownmiller, *Against Our Will: Men, Women and Rape* 13-15, 16 (1975); see also Anna Clark, *Women’s Silence, Men’s Violence: Sexual Assault in England 1770-1845*, at 34 (1987) (“As a violent, aggressive assault, rape was and is the extreme expression of a socially-constructed masculine sexuality in which men are supposed to be the active, dominant, partners.”). According to the drafters of the Model Penal Code, one of the “possible motivations for forcible rape” is the “over-development of normal

that complement those of men—for example, where men are strong and assertive, women are weak and acquiescent—so they are ill-equipped to repel on their own the sexual depredations that men are disposed to undertake.<sup>13</sup> Hence, in order to effectuate its goal of equal sexual autonomy, rape law intervenes in heterosexual relations to correct the existing imbalance in sexual power: By punishing rape, the law seeks to constrain the exercise of male sexual autonomy to the extent necessary to secure the sexual autonomy of women.

Viewed from this perspective, rape law *in practice* is thoroughly misogynistic. As the critics remark, the courts have interpreted the offense so narrowly that it prohibits only the most egregious violations of female sexual agency.<sup>14</sup> By limiting the definition of rape to intercourse procured by physical violence, the courts tacitly validate many other coercive practices that would be criminal if, for example, men were trying to obtain money, rather than sex, from unwilling women.<sup>15</sup> Worse still, the courts often represent such women as if they subjectively desired the sexual connection.<sup>16</sup> The courts have achieved this inversion of female desire by holding that a rape occurs only when the woman physically resists the man's violent sexual advances.<sup>17</sup> Rape law thus instructs men that they are free to ignore a woman's verbal protests and even to construe such protests as expressing her agreement to participate.<sup>18</sup> Through these and other distortions of women's experiences and perspec-

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male aggressiveness." Model Penal Code § 207.4, cmt. 1, at 241 (Tentative Draft No. 4 1955).

<sup>13</sup> See Brownmiller, *supra* note 12, at 13-15, 16; cf. MacKinnon, *supra* note 7, at 177 ("The . . . problem [with the law of rape] is that women are socialized to passive receptivity; may have or perceive no alternative to acquiescence; may prefer it to the escalated risk of injury and the humiliation of a lost fight; submit to survive.").

<sup>14</sup> See, e.g., Schulhofer, *supra* note 6, at 93-94 ("Rather than asking whether male conduct is abusive and unwarranted, the law in effect asks only whether conduct is so bad that it is equivalent to forcible rape. Core rights of the person to physical autonomy and to freedom of choice in matters of sexual intimacy are devalued or obscured as a result.").

<sup>15</sup> See Estrich, *supra* note 6, at 70 ("Had the men in these cases been seeking money instead of sex, their actions would be in plain violation of traditional state criminal prohibitions.").

<sup>16</sup> See, e.g., *Commonwealth v. Berkowitz*, 641 A.2d 1162, 1164 (Pa. 1994).

<sup>17</sup> See, e.g., *State v. Rusk*, 424 A.2d 720, 724-26 (Md. 1981).

<sup>18</sup> See MacKinnon, *supra* note 7, at 182 ("[R]ape law affirmatively rewards men with acquittals for not comprehending women's point of view on sexual encounters.").

tives, the law of rape promotes, rather than restricts, male control of female sexual expression.<sup>19</sup>

By now, this account of rape law is a familiar one, and, if frequency of repetition is any indication, many members of the legal academy find it to be compelling.<sup>20</sup> In this Article, I offer an alternative account of rape doctrine that the legal literature has not explored and that emerges only implicitly from recent historical investigations of the legal regulation of sexuality. My account endeavors to be sensitive to the historical specificity of rape by examining some of the different ways of thinking about heterosexuality that may have shaped the prohibition, conditioned the experiences of rapists and their accusers, and influenced the community's response to rape allegations, in long (as well as recently) forgotten cases.

In particular, I argue that we cannot understand rape law unless we study the doctrine, not in isolation, but in conjunction with the fornication and adultery prohibitions with which it formerly resided and, perhaps, continues to reside. When we recall that the contemporary definition of rape emerged from a system that outlawed these forms of consensual heterosexual intercourse, it seems clear that the official purposes of rape law—and, surely, there were and are many theoretical and practical justifications for the rape prohibition—did not include the protection of sexual autonomy. Contrary to the assumptions of the modern rape critique, influential institutions within that former system decreed that sexuality was a force so dangerous that it could not safely be left to self-regulation, but rather should be closely confined, by state law, within marital relationships.<sup>21</sup> Far

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<sup>19</sup> See Estrich, *supra* note 6, at 4 (rape law confers on men the right to force sex on their wives and acquaintances); see also Dripps, *supra* note 5, at 1780-81 (“[E]very society has punished rape, but only to the end of reinforcing the interests of males in controlling sexual access to females.”).

<sup>20</sup> Indeed, Dripps believes that legal scholars unanimously would support rape law reform. As he puts it, “the values [rape] law protected for millennia are not values any modern legal scholar would defend.” Dripps, *supra* note 5, at 1783.

<sup>21</sup> To pick just one spokesman concerning one era's official evaluation of extramarital sex, the 18th-century philosopher William Paley, whose works were influential in this country as well as in Britain, offered this condemnation of fornication:

Fornication produces habits of ungovernable lewdness, which introduce the more aggravated crimes of seduction, adultery, violation, &c. Likewise, however it be accounted for, the criminal commerce of the sexes corrupts and depraves the mind and moral character more than any single species of vice whatsoever. That ready perception of guilt, that prompt and decisive resolution against it, which

from being positively valued and protected, therefore, the exercise of sexual autonomy was something to be discouraged, even criminalized.<sup>22</sup> Since legal institutions were assigned the task of enforcing both the rape laws and the fornication and adultery laws, it would not be surprising to discover that appellate judges and, presumably, other law enforcement officials found ways to enlist rape doctrine to detect and discipline sexual transgressions by women, as well as by men.

Therefore, I propose that we examine rape law by suspending our understanding that heterosexual intercourse ordinarily is lawful activity and by attempting instead to recapture the ways of thinking about heterosexual intercourse underlying the fornication and adultery laws. In other words, what I suggest is an investigation of rape doctrine that proceeds from the premise that nonmarital heterosexual intercourse is—and should be—criminal misconduct for both men and women. When we consider the regulatory framework from which rape law emerged, this reversal of value is sensible, indeed, necessary, though it may seem absurd at first glance, especially to liberal readers. We inherited the rape crime from a culture in which rape was only one of two basic categories of heterosexual offenses. The other category of offenses consisted of consensual sexual intercourse outside marriage—fornication and adultery—in which the man and the woman were accomplices. The existence of this prohibition on consensual nonmarital sex has a number of im-

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constitutes a virtuous character, is seldom found in persons addicted to these indulgences. They prepare an easy admission for every sin that seeks it; are, in low life, usually the first stage in men's progress to the most desperate villainies; and, in high life, to that lamented dissoluteness of principle, which manifests itself in a profligacy of public conduct, and a contempt of the obligations of religion and of moral probity. Add to this, that habits of libertinism incapacitate and indispose the mind for all intellectual, moral, and religious pleasures; which is a great loss to any man's happiness.

William Paley, *The Principles of Moral and Political Philosophy* 197 (5th American ed., Boston, John West 1806) (footnote omitted).

<sup>22</sup> See John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 27-38 (1989) (stating that laws against nonmarital sexuality were vigorously enforced in the colonies, carrying "harsh penalties" for both men and women and punishing "[e]ven behaviors that might lead to sex outside marriage"); see also Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 454-56 (3d ed. 1982) (tracing the historical development of the crimes of adultery and fornication); Ploscowe, *supra* note 2, at 1, 136 (explaining how earlier views on sexual behavior inform contemporary laws and social mores); Richard A. Posner, *Sex and Reason* 78, 260-66 (1992) (discussing contemporary regulation of nonmarital and extramarital sex).



portant implications, one of which I will explore in this Article and another of which I will notice, briefly, at relevant points herein.

The first set of implications—those to which the Article is devoted—concerns the influence that we would expect the fornication and adultery prohibitions to exert on the development of the substantive definition of rape. How would judges who believed that consensual nonmarital intercourse was a crime define rape? This Article will develop a contentious point: By unearthing our ancestors' belief that *all* nonmarital intercourse should be criminalized, we may begin to understand, even as we reject, the inclination of courts to approach rape complaints with deep suspicion. Since, under our ancestors' system, the underlying sexual activity in which a rape complainant engaged (albeit, by her own testimony, unwillingly) was criminal misconduct, her complaint logically could be construed as a plea to be relieved of responsibility for committing that crime.<sup>23</sup> A court would be receptive to such a plea only if the woman could establish that, although she had participated in a sexual transgression, she did so under circumstances that afforded her a defense to criminal liability. Significantly, careful examination of rape doctrine reveals that the elements of the rape offense (almost) are a mirror image of the defenses we would expect from women accused of fornication or adultery. Such traditional defensive strategies would include the claim that the woman had committed no *actus reus*, that she lacked the *mens rea* for fornication or adultery, or that she had submitted to the intercourse under duress. For example, just as courts allowed perpetrators of nonsexual crimes to interpose a duress defense, so we must assume that they would be willing to excuse those women suspected of fornication or adultery who could prove that their accomplices had forced them to offend under threat of death or grievous bodily harm. According to this account, the features of rape law to which the critics most strenuously object—namely, the peculiar definitions of the nonconsent and force elements of the crime—are better understood as criteria that excuse the woman for committing an illegal sexual infraction, than as ingre-

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<sup>23</sup> Cf. Jerome Hall, *General Principles of Criminal Law* 424 (2d ed. 1960) (explaining that “a married woman who was raped did not commit adultery” because the wrong was caused solely by physical forces external to the woman herself); Dripps, *supra* note 5, at 1781 (noting that under the law of the ancient period, “rape appeared as an excuse to be pleaded by a [married] woman who would otherwise be executed for adultery”).

dients of the man's offense. Curiously, when we acknowledge, rather than ignore or minimize, the long-standing and explicit connection our culture has made between sexual intercourse and criminal guilt, we produce a description of rape law that incorporates a justification for thorough doctrinal reform. That is, if we now are prepared to agree that fornication and adultery no longer should be criminalized—whether because these offenses violate contemporary constitutional guarantees<sup>24</sup> or contemporary moral and political judgments (to the extent that such judgments differ from constitutional guarantees)—then there appears to be no justification for adhering to a definition of rape that treats the rapist's victim as a lawbreaker who must plead for an excuse from criminal responsibility.

The second set of implications that I will notice, but largely set aside for future research, concerns the tendency of many commentators to develop a general critique of the criminal regulation of heterosexuality based solely upon their investigation of rape law. Not surprisingly, the critics argue that the traditional rape offense is incapable of serving contemporary feminist interests because it represents an especially vivid instantiation of the heterosexual double standard.<sup>25</sup> Rape law promises to constrain aggressive male sexuality in order to protect female sexual agency, but the courts have created numerous obstacles to enforcement of the prohibition so that it operates instead to constrain women from establishing that they have been raped.<sup>26</sup> The critics then take this political assessment of rape law and apply it to the criminal regulation of sexuality in gen-

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<sup>24</sup> See, e.g., *State v. Saunders*, 381 A.2d 333 (N.J. 1977) (holding that fornication statute infringes constitutional right of privacy when applied to private sexual activity between consenting adults); see generally Note, *Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex*, 104 Harv. L. Rev. 1660 (1991) (outlining the civil and criminal laws outlawing extramarital sex and arguing that such restrictions are constitutionally impermissible). However, in *Bowers v. Hardwick*, 478 U.S. 186 (1986), the opinion of the Court, *id.* at 191, 195-96, and the opinion of some of the dissenters, *id.* at 209 n.4 (Blackmun, J., dissenting), suggest in dicta that, at the time that case was decided, a majority of the Justices assumed that the criminal prohibition of adultery did not violate constitutional guarantees.

<sup>25</sup> See, e.g., Chamallas, *supra* note 7, at 787-90 (describing the traditional view of sex that shaped the rape offense as inseparable from "the double standard of sexual morality").

<sup>26</sup> See Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. Davis L. Rev. 1013, 1014 (1991) (arguing that the substantive and evidentiary law of rape is calculated "to make it as difficult as possible to establish that any given man has raped any given woman").

eral: The claim is that by consistently refusing to vindicate rape complaints, the law assures that men enjoy a broad right of access to women who are unwilling to have sexual intercourse with them.<sup>27</sup>

The problem with this application of the critique is that it omits completely the criminalization of consensual nonmarital sexuality, without any explanation of why this prohibition is theoretically and practically irrelevant. Since the fornication and adultery laws extend(ed) to men as well as to women, it seems crucial to determine whether, how, and against whom those laws are or were enforced before implying that the criminal regulation of sexuality always and everywhere has promoted the sexual freedom of men at the expense of that of women.<sup>28</sup> Probably, it would be enough for some of us to recover and publish this history for its own sake, but a more careful historical examination might also serve well our rape reform agenda. If our critique is inattentive to the sexual proscriptions with which rape formerly coexisted, we may fail to articulate the precise forms that sexism previously assumed and thus be unable to respond directly to the illiberal and/or anti-feminist ways of thinking about sexuality presumably still indulged by those opposed to rape reform.<sup>29</sup>

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<sup>27</sup> For example, Susan Estrich argues that through its grudging definitions of the force and nonconsent elements, the law of rape “protects male access to women where guns and beatings are not needed to secure it.” See Estrich, *supra* note 6, at 62-63. Cf. B. Anthony Morosco, *The Prosecution and Defense of Sex Crimes* § 3.10[3], at 3-150 (1996) (“[The force element of rape] meant that intercourse without the woman’s consent, even if that lack of consent was known to the man, was not rape if the man could succeed in imposing his will without using physical force.”).

<sup>28</sup> Cf. Dripps, *supra* note 5, at 1780-81 (suggesting that women were punished disproportionately under adultery and fornication laws).

<sup>29</sup> A congressional report accompanying one of the early versions of the Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified in scattered sections of 16, 18 & 42 U.S.C.), laments the slow pace, indeed, the failure of reform in this area. As the drafters point out, “[t]he sad fact is that law reform has failed to eradicate the stereotypes that drive the system to treat these crimes against women differently from other crimes.” S. Rep. No. 102-197, at 46 (1991). The drafters further remark:

not only the increasing numbers of victims, but also the puzzling persistence of public policies, laws, and attitudes that treat some crimes against women less seriously than other violent crimes. Women bear the disproportionate burden of some of the most pernicious crimes, like rape, and some of the most persistent crimes, like beatings in the home. At the same time, survivors of these crimes often face barriers to justice not shared by male victims of assault: barriers of law, barriers of enforcement, and perhaps most importantly, the even stronger barriers of attitude.

Therefore, I offer this Article as a theoretical guide to questions for further historical and empirical, as well as doctrinal, research.

## I. THE CONTEMPORARY CRITIQUE OF RAPE DOCTRINE

As many legal scholars have noticed, modern penal codes throughout the United States retain a substantive definition of rape that is facially indistinguishable from that which judges have been applying in our culture for many hundreds of years.<sup>30</sup> William Blackstone's *Commentaries* are the standard source for this definition: In Blackstone's concise prose, rape is "the carnal knowledge of a woman forcibly and against her will."<sup>31</sup> Although no element of the definition has escaped their scrutiny, modern critics generally have concluded that the requirement that the sexual activity be "against [the] will" of the woman is the gravamen of rape, and they assert that the courts have treated this phrase as synonymous with the term "nonconsensual."<sup>32</sup> According to this view, the woman's nonconsent distinguishes the crime of rape from ordinary, lawful heterosexual intercourse.<sup>33</sup> To this point in their description of the offense, the critics do not necessarily disapprove. Assuming that

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Id. at 33. For reformers whose objective is to reshape community attitudes, it would seem crucial to identify as precisely as possible the content of the attitudes to be revised.

<sup>30</sup> See Dripps, *supra* note 5, at 1782-85; Schulhofer, *supra* note 6, at 36-37; see also Estrich, *supra* note 6, at 27-56 (describing the common law approach to rape).

<sup>31</sup> See 4 Blackstone, *supra* note 1, at \*210.

<sup>32</sup> See Estrich, *supra* note 6, at 29 ("Female nonconsent has long been viewed as the key element in the definition of rape."); Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 *Colum. L. Rev.* 1, 8 (1977) ("The ancient definition, which used the phrase 'against her will,' made it clear that non-consent by the female partner constitutes the essence of rape." (footnote omitted)); Chamallas, *supra* note 7, at 797 ("[M]ost states define rape as sexual intercourse without the consent of the woman."); Schulhofer, *supra* note 6, at 63 ("[A]nalysts searching for a single organizing principle had to recognize that legally, the gist of rape was . . . nonconsent."); see also Perkins & Boyce, *supra* note 22, at 209-10 ("[A]gainst the will' and 'without the consent' are equivalent terms in the law of rape."); Posner, *supra* note 22, at 388 ("[A]ll that distinguishes [rape] from ordinary sexual intercourse is lack of consent . . .").

<sup>33</sup> See, e.g., Lynne Henderson, *Rape and Responsibility*, 11 *L. & Phil.* 127, 166 (1992) (woman's exercise of agency distinguishes the crime of rape from "good sex" and "bad sex," both of which are lawful). One historian seems to assert that women in 18th-century Britain may have internalized this definition of rape. Thus, Anna Clark remarks that "[f]or women, the definition of rape was engraved on their minds by lack of consent" in that rape "deprived [them] of the right to desire or refuse a sexual encounter." Clark, *supra* note 12, at 24, 26.

courts are willing and able to apply this element so that it validates liberal and/or feminist ways of thinking about heterosexual relationships, the participants' consent is an acceptable construct for distinguishing noncriminal from criminal sexual activity.<sup>34</sup> As Kristin Bumiller puts it, "Both traditional rape law and the feminist law reformers share a vision in which the boundary between sex and rape is defined by the woman's nonconsent."<sup>35</sup> I highlight this interpretation of the offense because it provides the basis for the central rhetorical strategy pursued by many of the scholars who criticize rape doctrine. This strategy is to assert that the "against her will" element is the law's commitment to protect women's sexual autonomy. By threatening to punish men who have sex with women without their consent, the law promises women that they have the authority to determine for themselves the conditions under which they will engage in heterosexual intercourse.<sup>36</sup>

Predictably, the critics conclude that the criminal courts have renegeed on this promise. At common law and under the earliest codifications of the rape offense, courts promulgated definitions of the nonconsent and force elements that excluded virtually all instances of male sexual aggression other than those involving serious forms of physical violence. Despite several decades of legislative reform designed to free rape law from these misogynistic antecedents,<sup>37</sup> contemporary courts remain hostage to the traditional definitions,<sup>38</sup> which require rape victims to surmount special legal obstacles that the victims of other crimes are spared.<sup>39</sup> Through these accretions,

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<sup>34</sup> See Chamallas, *supra* note 7, at 784 (offering a "refurbished notion of consent" based on egalitarian conception of sexuality); Dripps, *supra* note 5, at 1787-88 (arguing that "[c]onsent is only the label we attach to causes of conduct deemed legitimate" and, therefore, "we must grade the pressures to have sex according to their legitimacy").

<sup>35</sup> Kristin Bumiller, *Rape as a Legal Symbol: An Essay on Sexual Violence and Racism*, 42 U. Miami L. Rev. 75, 76 (1987).

<sup>36</sup> See, e.g., MacKinnon, *supra* note 7, at 175 (suggesting that the consent element implies that "rape laws exist[] to enforce women's control over access to their sexuality").

<sup>37</sup> For a helpful summary of the various movements to reform the law of rape and the changes those movements have secured, see Schulhofer, *supra* note 6, at 36-41.

<sup>38</sup> See, e.g., *Commonwealth v. Mlinarich*, 498 A.2d 395, 396 (Pa. Super. Ct. 1985) ("forcible compulsion" element of rape is not satisfied by "threats to do non-violent acts," such as threatening to send a 14-year-old girl to a juvenile detention center if she refused to have intercourse), *aff'd* by equally divided court, 542 A.2d 1335 (Pa. 1988).

<sup>39</sup> For example, the drafters of an early report on The Violence Against Women Act asserted that "rape survivors routinely confront [legal rules and] practices—practices

the critics suggest, the law of rape is instrumental in securing male domination of female sexuality. Unique doctrinal burdens and evidentiary hostility may be expected to and do deter women from bringing rape complaints, thereby safeguarding an expansive domain for the exercise of male heterosexual aggression.<sup>40</sup>

The heart of the critique, then, is the claim that a kind of subterranean, even unconscious, sexism has distorted the objectives of the rape prohibition.<sup>41</sup> As Susan Estrich states, “[t]here is simply no . . . explanation for the unique rules governing rape prosecutions” other than “the operation of sexism in law.”<sup>42</sup> Again and again, we are advised that the courts have perverted the *explicit* objective of rape law, which is to punish men who override women’s will to refuse sex, through the application of doctrinal and evidentiary innovations that *implicitly* represent rapists’ victims as the perpetrators of their own victimization. Thus, the legal system is said to be infected by “*subtle prejudices*”<sup>43</sup> against rape victims; among other biases, law enforcement officials have “*inadvertently accepted*”<sup>44</sup> sexual violence as “*normal*,”<sup>45</sup> rather than exceptional and criminal, and so they have

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that the typical victim of a barroom brawl never faces.” S. Rep. No. 102-197, at 44 (1991). One historian makes a similar remark about the position of rape victims in 18th-century Britain, namely, that “[i]t was easier for a woman to get a man convicted to death for stealing her bundle worth a few shillings than to convince a jury he had raped her.” Clark, *supra* note 12, at 48.

<sup>40</sup> See MacKinnon, *supra* note 7, at 179 (“Rather than deterring or avenging rape, the state, in many victims’ experiences, perpetuates it.”); see also Susan Estrich, Teaching Rape Law, 102 Yale L.J. 509, 512 (1992) (“What I have been fighting for . . . is . . . to stop treating [rape] specially; to get rid of both the rules and the prejudices that have narrowed the scope of the crime far more than the words of the statutes, and have uniquely increased the burdens and obstacles to prosecution.”); Torrey, *supra* note 26, at 1060 (“[T]he low conviction rate [in rape cases] lends support to the belief that rape operates as a social control mechanism to keep women in a position of subordination. As long as rapists need not fear punishment, women will need to fear rape.” (footnotes omitted)).

<sup>41</sup> For example, Morrison Torrey argues that the recent statutory reforms have failed to secure a higher rate of rape convictions because the objectives of the reformers have been thwarted by a variety of sexist “myths” about rape, which have “insinuate[d] themselves in rape prosecutions” where they influence “the way judges, jurors, and others perceive testimony in rape trials.” Torrey, *supra* note 26, at 1014-15; see also Henderson, *supra* note 33, at 150-51 (endorsing Torrey’s argument to allow expert testimony on rape myths implicated in a given case).

<sup>42</sup> Susan Estrich, *Sex at Work*, 43 Stan. L. Rev. 813, 815 (1991).

<sup>43</sup> S. Rep. No. 102-197, at 39 (1991) (emphasis added).

<sup>44</sup> *Id.* at 36 (emphasis added).

<sup>45</sup> *Id.*

produced a system for prosecuting rape that “operate[s], *in effect*, to put the victim—not the attacker—on trial.”<sup>46</sup>

Not surprisingly, one of the most prominent objections to the substantive law of rape targets the courts’ narrow definitions of the sexual encounters that qualify as nonconsensual intercourse.<sup>47</sup> Up until the latter part of this century, courts in all jurisdictions held that intercourse was nonconsensual where there was evidence that the woman physically resisted the man’s sexual proposals.<sup>48</sup> In its most rigorous form, this definition of “nonconsensual” required proof that the woman had offered her “utmost” or “earnest” physical resistance to her attacker.<sup>49</sup> As one influential decision explained, “In order that the offense might constitute rape, she must have resisted with all her power, and kept up that resistance as long as she had strength.”<sup>50</sup> Moreover, the courts frankly and unabashedly treated the woman who said “no” to a man’s sexual invitation, but who did not energetically endeavor to repel him physically, as if she had consented to the ensuing intercourse.<sup>51</sup>

After years of lobbying, members of the rape reform movement have persuaded lawmakers to modify, but certainly not eliminate, the physical resistance requirement. At least one jurisdiction con-

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<sup>46</sup> *Id.* at 46 (emphasis added). For an overview, see *id.* at 36-48.

<sup>47</sup> As Steve Schulhofer has remarked, this objection has produced a popular feminist consciousness-raising slogan, as well as a prescription for doctrinal reform: “Insistence that ‘no means no’ remains important for reversing perverse cultural assumptions and raising consciousness among men.” Schulhofer, *supra* note 6, at 42.

<sup>48</sup> See *People v. Barnes*, 721 P.2d 110, 117-20 (Cal. 1986) (providing a brief history of rape law, including an overview of the resistance requirement).

<sup>49</sup> A classic description of the “utmost” or “earnest” resistance requirement is contained in *People v. Dohring*, 59 N.Y. 374, 382-83 (1874): “The resistance must be up to the point of being overpowered by actual force, or of inability from loss of strength longer to resist, or from the number of persons attacking, resistance must be dangerous or absolutely useless, or there must be duress or fear of death.” *Id.* at 382.

<sup>50</sup> *Mathews v. State*, 29 S.E. 424, 426 (Ga. 1897).

<sup>51</sup> See *id.* (“Opposition to the sexual act by mere words is not sufficient.”). *Mills v. United States*, 164 U.S. 644 (1897), reflects the attitude of common law judges to women who just said “no”:

[A]lthough the crime is completed when the connection takes place without the consent of the female, yet in the ordinary case where the woman is awake, of mature years, of sound mind and not in fear, a failure to *oppose* the carnal act is consent; and though she object verbally, if she make no outcry and no resistance, she by her conduct consents, and the act is not rape in the man.

*Id.* at 648.

tinues to hold that a rape occurs only in cases where the woman offers "earnest resistance" to sexual intercourse.<sup>52</sup> Most others demand proof that the woman physically opposed the man, though something short of her utmost effort now is satisfactory.<sup>53</sup> The critics offer a number of objections to the resistance requirement, even in its current relaxed form. For one thing, the requirement exposes women to the risk of serious physical injury.<sup>54</sup> Many women lack the physical strength, fighting expertise, or psychological inclination to subdue a male attacker,<sup>55</sup> and, while the question is not free from doubt, there are empirical data suggesting that victim resistance may incite some rapists to behave more violently than they

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<sup>52</sup> See Ala. Code §§ 13A-6-60(8), 13A-6-61(a)(1) (1994); *Ayers v. State*, 594 So. 2d 719, 720 (Ala. Crim. App. 1991).

<sup>53</sup> Thus, as one treatise on rape explains, "while the 'utmost resistance' requirement is probably not currently the law of any jurisdiction, most courts continue to inquire into the woman's 'earnest resistance' to establish nonconsent." Morosco, *supra* note 27, § 3.01[3], at 3-9. The judge who presided over the rape prosecution of Mike Tyson provided a helpful account of the contemporary status of the resistance requirement. During voir dire, a prosecutor informed members of the venire that Indiana law did not require a woman to put forth any physical resistance to a man making a sexual overture in order to establish that the man was a rapist. When Tyson's lawyers objected to this comment, the trial judge advised the venire that the prosecutor was wrong. As the judge put it, the victim is "not required to have a knock-down, drag-out, but she is required to resist." E.R. Shipp, Notes From Tyson Trial: Many Say It Ain't So, *N.Y. Times*, Feb. 3, 1992, at C7.

<sup>54</sup> See Berger, *supra* note 32, at 11 ("With respect to resistance, male lawmakers realize at last what every woman always knew: Fighting back is extremely risky—'purity' may exact too high a price."); see also Model Penal Code § 213.1 cmt. 4(a) at 305 (Official Draft and Revised Comments 1980) ("[R]esistance may prove an invitation to danger of death or serious bodily harm.").

<sup>55</sup> Susan Estrich offers this implicit characterization of women in criticizing judges who fault victims for crying, rather than fighting, when confronted by a rapist. According to Estrich, judges in rape cases tacitly have held women to a standard of reasonable male, rather than female, behavior by assuming that women can and will fight when many cannot and will not. Thus, Estrich condemns the courts' "version of a reasonable person [as] one who does not scare easily, one who does not feel vulnerable, one who is not passive, one who fights back, not cries. The reasonable woman, it seems, is not a schoolboy 'sissy'; she is a real man." Estrich, *supra* note 6, at 65. Remarks by one historian remind us that the qualities that divide the "sissy" from the "man" are influenced, if not determined, by social conditions. Anna Clark points out that, during the 18th century, women living in "Yorkshire . . . were renowned for their brute strength." Clark, *supra* note 12, at 25. Since "Victorian taboos on heavy work for women had not yet come into being," many women performed heavy labor on farms and thereby developed the physical strength and psychological confidence with which they might thwart male attackers. *Id.* at 24-25.



otherwise would.<sup>56</sup>

A second, more political objection is that the resistance requirement allows men to annul women's exercise of sexual agency. Though a woman verbally expresses her unwillingness to have intercourse in unambiguous terms, the man is free to have sex with her as long as she does not try to fight him off.<sup>57</sup> According to these critics, therefore, lawmakers should abolish the resistance requirement altogether and announce that intercourse is nonconsensual when a woman *verbally* rebuffs a man's sexual advances.<sup>58</sup> The critics insist that such reform is long overdue since they believe that the resistance requirement is "virtually without precedent in the criminal law."<sup>59</sup> Victims of other crimes are under no obligation to resist their assailants physically as a precondition to legal redress of their injuries. For example, the victim's nonconsent is an element of crimes such as assault, theft, and trespass, but, in those cases, courts routinely validate the victim's verbal objections as sufficient proof of an unwillingness to consent to the transaction.<sup>60</sup> By contrast, in rape prosecutions, the resistance requirement implicitly places the victim's behavior and demeanor at the center of the trial, thereby deflecting attention from the man's misconduct and even exonerating him in cases where the woman did not vigorously resist injury.

Many authors raise analogous substantive objections when they criticize the courts' interpretation of the force element of rape. Indeed, as the critics have remarked, the woman's resistance to intercourse may serve as a proxy for the man's force as well as for her nonconsent. Thus, where the woman offered a satisfactory level of physical resistance and the man still managed to have sex with her,

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<sup>56</sup> See *People v. Barnes*, 721 P.2d 110, 119 (Cal. 1986) (describing "a 1976 study of rape victims and offenders [that] found that over half of the sexual assault offenders studied reported becoming more violent in response to victim resistance").

<sup>57</sup> See Estrich, *supra* note 6, at 62-63; MacKinnon, *supra* note 7, at 175; Henderson, *supra* note 33, at 159; Schulhofer, *supra* note 6, at 41.

<sup>58</sup> Susan Estrich is the most influential advocate for this position. As she puts it, "Consent should be defined so that no means no." Estrich, *supra* note 6, at 102. See also Schulhofer, *supra* note 6, at 72 ("Whenever a woman says no, an act of intercourse is clearly, indisputably, a violation of her right to autonomous choice in matters of sexual intimacy.").

<sup>59</sup> Estrich, *supra* note 6, at 40.

<sup>60</sup> See *id.* at 29, 40-41; Berger, *supra* note 32, at 8; see also MacKinnon, *supra* note 7, at 174 ("Usually assault is not consented to in law; either it cannot be consented to, or consensual assault remains assault.").

the courts conclude that a rape occurred since proof that she resisted him establishes both that she did not consent to the penetration and that he must have subdued her forcibly.<sup>61</sup> By contrast, where the woman resists feebly or not at all, the courts have held that the elements of the crime are satisfied only if the evidence shows that the man secured her sexual compliance by threatening to inflict a fatal or grievous bodily wound on her if she refused to submit.<sup>62</sup> In such cases, the courts reason that the use or threat of serious physical violence constitutes force, presumably because the man's resorting to such extreme tactics creates the inference that the woman decided to acquiesce, not because she desired the sexual connection, but only because she wanted to spare herself from serious injury. Over the years, appellate judges have employed a variety of synonyms to describe the kinds of threatening words or conduct the man must employ, but most agreed that the prosecution was required to show that the man had comported himself "in such rough or brutal manner as to put a woman of mature years and intelligence in fear of loss of life or other great danger."<sup>63</sup>

In the past decade or so, lawmakers have modified this interpretation of force, but not enough to satisfy many reformers, particularly feminist critics, who raise the following objection. According to most courts, rape statutes continue to require proof that the man employed or threatened some increment of physical force above and beyond that required to achieve sexual intercourse with a willing woman.<sup>64</sup> If rape law really were dedicated to the protec-

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<sup>61</sup> See *Morosco*, *supra* note 27, § 3.01[3], at 3-9 ("[F]orce is often defined in terms of the amount necessary to overcome the resistance that the woman puts forth to show her lack of consent.").

<sup>62</sup> Cornelia Hughes Dayton describes the kind of threats found in successful rape prosecutions in colonial Connecticut: "In the rare cases defined as rape . . . the act was accompanied by lurid threats of violence ('he would splay her,' 'he would kill her and cutt [her?] in peices [sic] and Hang her on that tree')—threats that served to squelch female resistance." Cornelia Hughes Dayton, *Women before the Bar: Gender, Law, and Society in Connecticut, 1639-1789*, at 238 (1995).

<sup>63</sup> See *Hollis v. State*, 9 So. 67, 69 (Fla. 1891).

<sup>64</sup> See, e.g., *State v. Thompson*, 792 P.2d 1103 (Mont. 1990) (evidence that high school principal threatened to block student's graduation was not sufficient to establish nonconsent because he did not threaten her with bodily injury, kidnapping, or death as required by the state's rape statute); *State v. Alston*, 312 S.E.2d 470 (N.C. 1984) (general fear of defendant and general threats of violence against the victim—for example, that he would "fix" her face—were not sufficient to establish either the

tion of female sexual autonomy, as the critics maintain it should be, the crime would occur whenever a man proceeded to have sex with a woman over her verbal objections. Catharine MacKinnon offers this objection concisely: "In a critique of male supremacy, the elements 'with force and without consent' appear redundant. Force is present because consent is absent."<sup>65</sup> Other commentators have elaborated (and, in the process, modified) MacKinnon's objection by emphasizing that unwanted sexual intercourse inevitably is violent and inflicts painful physical injuries since the site of the penetration is a woman's body.<sup>66</sup> The notion that more in the way of force is required to convict men for rape serves only to discourage women from seeking redress for injuries inflicted by male sexual aggression. In this connection, Susan Estrich muses, "Certainly if a thief stripped his victim, flattened that victim on the floor, lay down on top, and took the victim's wallet or jewelry, few would pause before concluding forcible robbery."<sup>67</sup> Critics argue that by requiring a heightened level of violence in rape cases alone, lawmakers reveal their complicity in the male domination of female sexual expression.

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actual or constructive force elements in a case where the parties had a prior sexual history); *Commonwealth v. Berkowitz*, 641 A.2d 1161 (Pa. 1994) (relying on 18 Pa. Cons. Stat. § 3121 to hold that a rape conviction requires evidence of force or threat of force even though the court interpreted another statute to provide that the "victim of a rape need not resist"); *Commonwealth v. Mlinarich*, 542 A.2d 1335 (Pa. 1988) (threat made by guardian of a 14-year-old girl that he would have her recommitted to a juvenile detention facility judged not to meet the rape statute's forcible compulsion element because she "voluntarily" chose sex over returning to the detention facility); *State v. Weisberg*, 829 P.2d 252 (Wash. Ct. App. 1992) (fright of mentally retarded victim in response to defendant's suggestion to lie down on his bed was insufficient to establish threat of forcible compulsion under state's rape statute). These holdings are not surprising when we consider that many rape statutes continue to define the crime as intercourse secured, for example, by force or by threat of imminent death, bodily injury, or kidnapping. See Richard A. Posner & Katharine B. Silbaugh, *A Guide to America's Sex Laws* 7-34 (1996).

<sup>65</sup> MacKinnon, *supra* note 7, at 172.

<sup>66</sup> See Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 *Tex. J. Women & L.* 41, 65 (1993); Henderson, *supra* note 33, at 157 ("Metaphors for the pain of forced penetration—stabbing, searing, tearing—do not really capture the body-shattering pain of forced intercourse."); Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 *Colum. L. Rev.* 1442, 1448 (1993).

<sup>67</sup> Estrich, *supra* note 6, at 59. Steve Schulhofer offers an intriguing hypothetical robbery that involves less force than Estrich's example but that he nonetheless characterizes as "forcible": "If the woman is holding the purse when the offender grabs it, the taking itself is 'forcible.'" Schulhofer, *supra* note 6, at 45.

In a related argument, the commentators point out that, where goods other than sexual favors are at stake, the law criminalizes not only the use of violence, but also a fairly broad range of coercive and deceptive strategies that people otherwise might employ to procure such goods. For example, it is a crime to extort money from another by threatening to inflict on her a physical or reputational injury, or to injure her property.<sup>68</sup> Yet, the critics complain, men who use these and analogous pressures to coerce women's sexual compliance do not risk punishment because such tactics do not constitute the physical force required for a rape conviction.<sup>69</sup>

Similarly, critics consider the traditional position regarding sex obtained by fraud as overly generous to male sexual misconduct, punishing only those men who procure intercourse by so-called "fraud in the factum" and ignoring other egregious forms of deception known as "fraud in the inducement." The traditional approach holds that it is a crime to obtain sexual intercourse by fraud in only two narrow contexts. The first (and, apparently, most common) case of rape by fraud in the factum involves a man who obtains the sexual connection by deceiving the woman into thinking that she is submitting to a nonsexual act. The other tactic sometimes found to constitute rape by fraud in the factum involves a man who obtains intercourse by masquerading as the woman's husband. All other types of misrepresentations that men use to elicit women's sexual submission are fraud in the inducement and provide no basis for a rape conviction.<sup>70</sup> Yet again, the critics wonder, why does the crimi-

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<sup>68</sup> See, e.g., Perkins & Boyce, *supra* note 22, at 448-52, 1077-78.

<sup>69</sup> See Estrich, *supra* note 6, at 67-71, 102-03; Schulhofer, *supra* note 6, at 44-46, 77-79.

<sup>70</sup> The following description elaborates the distinction between fraud in the factum and fraud in the inducement for purposes of rape prosecutions, and it identifies the most frequently litigated example of rape by fraud. Although it was written in the 1860s, the description remains accurate today.

It is not rape where a medical practitioner represents to a patient that coition is necessary for the treatment of her case, and she consents to connection with him, through a belief in his representations; for there is a consent to the act, though fraudulently obtained. But where connection is obtained by a physician under pretense of making a professional examination of her person . . . there is no consent, and a conviction of rape may be had. . . . But the ignorance and innocence of the victim must be plainly established . . . . The criterion is, whether or not the woman consented, not to something else, such as medical treatment, but to the act of coition. A consent to coition, though fraudulently obtained, is,

nal law refuse to intervene in cases of sex by fraud in the inducement when it vigorously opposes such fraud whenever nonsexual assets are at stake?<sup>71</sup> The critics respond to this (rhetorical) question by alleging that lawmakers are disinclined to constrain men's access to female sexuality, indeed, that they are determined to vindicate the sexual agency of men at the expense of that of women.<sup>72</sup>

## II. REPOSITIONING RAPE DOCTRINE

A foundational assumption of the foregoing critique is that, apart from cases of rape, the criminal law does not and should not intervene in private erotic exchanges between adult partners. Even those critics who would expand the definition of rape well beyond its traditional scope assume that there is a broad range of sexual expression that not only falls outside the rape prohibition, but also falls completely outside the prohibitory reach of the criminal law. This understanding that sexual intercourse ordinarily is lawful activity may fairly represent the dominant way of thinking about sexuality today, but it is in conflict with fundamental moral and legal premises of the culture from which the rape prohibition emerged and even with a basic ingredient of the traditional rape crime. As Rollin Perkins and Ronald Boyce remark, "an essential element of

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notwithstanding the fraud, a consent, with the presence of which there can be no rape.

Note, 80 Am. Dec. 361, 366 (1861) (citations omitted). See also Perkins & Boyce, *supra* note 22, at 1079-81 (discussing the two different kinds of fraud and their relation to consent in rape law). For contemporary examples of sex by fraud in the factum, which is rape, see *McNair v. State*, 825 P.2d 571 (Nev. 1992), and of sex by fraud in the inducement, which is not rape, see *Boro v. Superior Court*, 210 Cal. Rptr. 122 (Cal. Ct. App. 1985).

<sup>71</sup> As Perkins and Boyce remark, "the distinction between fraud in the *factum* and fraud in the inducement is controlling in the prosecution of offenses in which absence of consent is an element of the crime, but unimportant in the prosecution of other offenses." Perkins & Boyce, *supra* note 22, at 1084. Thus, to take just one example, larceny originally required (among other elements) proof of a "*trespassory taking*" of the personal property of another, and the definition required that "the taking . . . be 'without the consent of the owner.'" *Id.* at 303-04. However, "in the course of time a fraudulent taking was held to constitute constructive trespass and hence was sufficient for larceny if the other elements were present." *Id.* at 304.

<sup>72</sup> See Estrich, *supra* note 6, at 70-71 (arguing that lawmakers are determined to maintain a distinction between lawful "seduction," whether carried out by means "benign or sinister," and illegal "rape" by holding that rape may be accomplished by force alone).

the crime [of rape] is that the sex be unlawful.”<sup>73</sup> To make this essential showing, Perkins and Boyce further explain, the prosecution must prove that the sex act in question was extramarital because “[i]n fact, any act of extra-marital sex is unlawful.”<sup>74</sup>

Before proceeding, I must acknowledge that the modern critique of rape does not wholly neglect this element of the offense since commentators condemn the exemption from criminal liability that it traditionally afforded to men who raped their wives.<sup>75</sup> Understandably distressed by and determined to reverse the law’s failure to protect women from sexual abuse inflicted by their spouses, the authors have been inattentive to other doctrinal implications of the requirement “that the sex be unlawful.”<sup>76</sup> It is with such implications that this Article is concerned in the first instance.

These assertions by Perkins and Boyce are striking not only as a blunt reminder that the definition of rape is premised upon sexual norms apparently very different from those embraced by contemporary liberal and feminist authors, but also because they are describing the legal status of extramarital intercourse as of 1982. The Perkins and Boyce treatise further reports that, as of 1982, nonmarital intercourse was a criminal offense in a significant minority of states.<sup>77</sup> And so it remains today. As of today, the penal codes of seventeen states

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<sup>73</sup> Perkins & Boyce, *supra* note 22, at 203.

<sup>74</sup> *Id.*

<sup>75</sup> See Posner & Silbaugh, *supra* note 64, at 5 (remarking that the “exemption from rape for married people” is among the “particular aspects of the old law of rape that [has] received the most criticism” in the past 30 years); cf. Perkins & Boyce, *supra* note 22, at 203 (explaining that since “marital sex is not unlawful” sex, “a husband cannot rape his wife”).

<sup>76</sup> For example, the comments by Perkins and Boyce emphasizing that rape requires proof of “unlawful” intercourse are made in the context of a description of the marital exemption. See Perkins & Boyce, *supra* note 22, at 202-04. Many other authors strenuously oppose the marital exemption. See, e.g., Estrich, *supra* note 6, at 72-79; Rene I. Augustine, Marriage: The Safe Haven for Rapists, 29 J. Fam. L. 559 (1990-91); Robin West, Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment, 42 Fla. L. Rev. 45 (1990). Such opposition has led to widespread reform, though not complete abolition, of the exemption. See Posner & Silbaugh, *supra* note 64, at 35; Jaye Sitton, Comment, Old Wine in New Bottles: The “Marital” Rape Allowance, 72 N.C. L. Rev. 261 (1993) (describing current status of the marital rape exception). For a history of the marital exemption to the rape prohibition, see Rebecca M. Ryan, The Sex Right: A Legal History of the Marital Rape Exemption, 20 L. & Soc. Inquiry 941 (1995).

<sup>77</sup> See Perkins & Boyce, *supra* note 22, at 455 n.18.

and the District of Columbia forbid fornication,<sup>78</sup> under eight of these provisions, it is a crime for unmarried partners to engage in a single act of sexual intercourse.<sup>79</sup> The criminal prohibition of adultery enjoys more widespread popularity. Twenty-four states and the District of Columbia criminalize extramarital sex;<sup>80</sup> under nineteen of the adultery statutes, it is a crime for a married person to commit a single act of intercourse with someone other than his or

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<sup>78</sup> See Ariz. Rev. Stat. Ann. § 13-1409 (West 1989); D.C. Code Ann. § 22-1002 (1996); Fla. Stat. Ann. § 798.02 (West 1992); Ga. Code Ann. § 16-6-18 (1996); Idaho Code § 18-6603 (1997); 720 Ill. Comp. Stat. Ann. 5/11-8 (West 1993); Mass. Gen. Laws Ann. ch. 272, § 18 (West 1990); Mich. Comp. Laws Ann. § 750.335 (West 1991); Minn. Stat. Ann. § 609.34 (West 1987); Miss. Code Ann. § 97-29-1 (1994); N.M. Stat. Ann. § 30-10-2 (Michie 1994); N.C. Gen. Stat. § 14-184 (1993); N.D. Cent. Code § 12.1-20-10 (1985); Okla. Stat. Ann. tit. 21, § 1120 (West 1983); S.C. Code Ann. § 16-15-60 (Law Co-op. 1985); Utah Code Ann. § 76-7-104 (1995); Va. Code Ann. § 18.2-344 (Michie 1996); W. Va. Code § 61-8-3 (1997). Fornication is graded as a misdemeanor in each of these jurisdictions, though the Oklahoma penal code provides that “[i]t is a felony to seduce and have illicit connection with any unmarried female of previous chaste character under promise of marriage; later marriage is a defense.” Okla. Stat. Ann. tit. 21, §§ 1120, 1121.

<sup>79</sup> See D.C. Code Ann. § 22-1002; Ga. Code Ann. § 16-6-18; Idaho Code § 18-6603; Mass. Gen. Laws Ann. ch. 272, § 18; Minn. Stat. Ann. § 609.34; Utah Code Ann. § 76-7-104; Va. Code Ann. § 18.2-344; W. Va. Code Ann. § 61-8-3. Virginia’s statute is typical of those that punish a single act of intercourse. It declares that “[a]ny person, not being married, who voluntarily shall have sexual intercourse with any other person, shall be guilty of fornication, punishable as a Class 4 misdemeanor.” Va. Code Ann. § 18.2-344. “The authorized punishment[] for conviction of a . . . Class 4 misdemeanor[] [is] a fine of not more than \$250.” Id. § 18.2-11(d). Eight jurisdictions’ fornication statutes require proof of one or more elements in addition to intercourse, such as the requirement that the misbehavior be “open and notorious,” see Ariz. Rev. Stat. Ann. § 13-1409; 720 Ill. Comp. Stat. Ann. 5/11-8; N.D. Cent. Code § 12.1-20-10, the requirement that the man and woman “cohabit” or “cohabitate,” see Ariz. Rev. Stat. Ann. § 13-1409; Fla. Stat. Ann. § 798.02; Mich. Comp. Laws Ann. § 750.335; Miss. Code Ann. § 97-29-1; N.M. Stat. Ann. § 30-10-2; N.C. Gen. Stat. § 14-184; N.D. Cent. Code § 12.1-20-10, or the requirement that the requisite misconduct be conducted “lewdly and lasciviously,” see Fla. Stat. Ann. § 798.02; Mich. Comp. Laws Ann. § 750.335; N.C. Gen. Stat. § 14-184.

<sup>80</sup> See Ala. Code § 13A-13-2 (1994); Ariz. Rev. Stat. Ann. § 13-1408; Colo. Rev. Stat. Ann. § 18-6-501 (West 1997); D.C. Code Ann. § 22-301; Fla. Stat. Ann. § 798.01; Ga. Code Ann. § 16-6-19; Idaho Code § 18-6601; 720 Ill. Comp. Stat. Ann. 5/11-7; Kan. Stat. Ann. § 21-3507 (1995); Md. Ann. Code, art. 27, § 3 (1996); Mass. Gen. Laws Ann. ch. 272, § 14; Mich. Comp. Laws Ann. §§ 750.29, 750.30; Minn. Stat. Ann. § 609.36; Miss. Code Ann. § 97-29-1; N.H. Rev. Stat. Ann. § 645:3 (1996); N.Y. Penal Law § 255.17 (McKinney 1989); N.C. Gen. Stat. § 14-184; N.D. Cent. Code § 12.1-20-09 (Supp. 1997); Okla. Stat. Ann. tit. 21, §§ 871, 872; R.I. Gen. Laws. § 11-6-2 (1994); S.C. Code Ann. §§ 16-15-60, 16-15-70; Utah Code Ann. § 76-7-103; Va. Code Ann. § 18.2-365; W. Va. Code § 61-8-3; Wis. Stat. Ann. § 944.16 (West 1996).

her spouse.<sup>81</sup> Over the past two or three decades, a number of commentators have been tempted to announce the demise of fornication and adultery prohibitions,<sup>82</sup> interpreting the dearth of recent prosecutions as evidence of the practical repeal of these provisions by desuetude.<sup>83</sup> These funerary pronouncements appear to be premature. First, in civil lawsuits, courts in a number of jurisdictions continue to invoke fornication and adultery provisions in order to explain why injuries inflicted by nonmarital intercourse are non-compensable; the theory is that the plaintiff's crimes should not provide the basis for her recovery in tort.<sup>84</sup> Second, and more significantly, a recent spate of news stories about prosecutions for nonmarital intercourse has (re)focused public attention on the criminal character of the activity. As one editorial writer declared,

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<sup>81</sup> See Ariz. Rev. Stat. Ann. § 13-1408; Colo. Rev. Stat. Ann. § 18-6-501; D.C. Code Ann. § 22-301; Ga. Code Ann. § 16-6-19; Idaho Code § 18-6601; Kan. Stat. Ann. § 21-3507; Md. Code Ann., Crimes and Punishments § 3; Mass. Gen. Laws Ann. ch. 272, § 14; Mich. Comp. Laws Ann. §§ 750.29, 750.30; Minn. Stat. Ann. § 609.36; N.H. Rev. Stat. Ann. § 645:3; N.Y. Penal Law § 255.17; N.D. Cent. Code § 12.1-20-09 (Supp. 1997); Okla. Stat. Ann. tit. 21, § 871; R.I. Gen. Laws § 11-6-2; Utah Code Ann. § 76-7-103; Va. Code Ann. § 18.2-365; W. Va. Code § 61-8-3; Wis. Stat. Ann. § 944.16. Most of these jurisdictions punish adultery as a misdemeanor, but in Idaho, Massachusetts, Michigan, Oklahoma, and Wisconsin, adultery is a felony. Idaho Code § 18-6601; Mass. Gen. Laws Ann. ch. 272, § 14; Mich. Comp. Laws Ann. §§ 750.29, 750.30; Okla. Stat. Ann. tit. 21, § 872; Wis. Stat. Ann. § 944.16. Several jurisdictions' adultery statutes require proof of an element in addition to intercourse, such as the requirement that the couple "cohabit," Ala. Code § 13A-13-2; Miss. Code Ann. § 97-29-1; N.C. Gen. Stat. § 14-184, the requirement that the misconduct be "open" or "open and notorious," Fla. Stat. Ann. § 798.01; 720 Ill. Comp. Stat. Ann. 5/11-7, or the requirement that the misbehavior be carried out "lewdly and lasciviously," N.C. Gen. Stat. § 14-184.

<sup>82</sup> See, e.g., Model Penal Code § 213.6 note on adultery and fornication at 435 (Official Draft and Revised Comments 1980) (describing laws against fornication and adultery as "dead-letter statutes").

<sup>83</sup> Certainly the recent decision by a prosecutor in Idaho to punish unmarried teenage mothers and their boyfriends for violating the fornication statute seems to have taken many residents of his county by surprise. James Brooke, *An Old Law Chastises Pregnant Teen-Agers*, N.Y. Times, Oct. 28, 1996, at A10. For example, one young woman responded to reports about the cases by asking, "Forn-if-cation? . . . What's that?," while a teenager charged with the crime explained that her mother had to consult a dictionary to understand the nature of the accusation against her. *Id.*

<sup>84</sup> See, e.g., *Zysk v. Zysk*, 404 S.E.2d 721, 721 (Va. 1990) (holding that a woman's "participation in the crime of fornication" with her husband before marriage barred her "recovery in tort for injuries," namely, her infection with herpes, "resulting from that criminal act"); cf. *Trotter v. Okawa*, 445 S.E.2d 121, 123-24 (Va. 1994) (ruling that although participation in crime of fornication ordinarily bars recovery of tort damages for injurious consequences, such bar does not apply if the plaintiff can establish that he participated in the fornication "under coercion and duress").



the moral and legal status of nonmarital intercourse is "the obsession of the moment."<sup>85</sup> Within the armed services, prosecutors are zealously pursuing adultery and fornication accusations against both male and female soldiers,<sup>86</sup> sometimes in combination with rape charges and sometimes on their own.<sup>87</sup> The civilian community is a source of similar reports, as officials in Idaho have expressed their interest in using the fornication laws to punish teenagers who engage in premarital intercourse.<sup>88</sup> Finally, (male) public officials re-

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<sup>85</sup> Jane R. Eisner, *Why Are Americans So Obsessed With Adultery?*, *The Record*, June 30, 1997, at A11, available in LEXIS, News Library, Njrec File.

<sup>86</sup> Military prosecutors bring such sexual misconduct charges under either Article 133 or Article 134 of the Uniform Code of Military Justice. Article 133 criminalizes "conduct unbecoming an officer and a gentleman," 10 U.S.C. § 933 (1994), while Article 134 forbids "all disorders and neglects [that operate] to the prejudice of good order and discipline in the armed forces [and] all conduct of a nature to bring discredit upon the armed forces," *id.* § 934. For a helpful overview of the history of adultery prosecutions in the military, see *United States v. Hickson*, 22 M.J. 146 (C.M.A. 1986); see also Captain Mayer, *Satisfying All Elements of Adultery: Was the Act Service-Discrediting?*, *Army Law.*, Apr. 1992, at 38 (explaining that a required element of the adultery offense in the military is that the accused's conduct be service-discrediting). For a discussion of the prosecution of fornication by military authorities, see *United States v. Boyett*, 42 M.J. 150 (C.M.A.), cert. denied, 516 U.S. 917 (1995). For a survey of enforcement of the ban on fraternization in the context of sexual relationships in the military, see Major David S. Jonas, *Fraternization: Time for a Rational Department of Defense Standard*, 135 *Mil. L. Rev.* 37 (1992).

<sup>87</sup> The recent military prosecutions have involved a variety of defendants brought up on an array of different charges. The most highly publicized cases include those against Delmar Simpson, an Army drill sergeant, who pleaded guilty to 11 counts of fraternization and was convicted of 18 counts of rape, see Elaine Sciolino, *Sergeant Convicted of 18 Counts of Raping Female Subordinates*, *N.Y. Times*, Apr. 30, 1997, at A1, and Kelly Flinn, the first female B-52 bomber pilot, who was forced out of the Air Force on a general discharge after she was accused of adultery, fraternization, conduct unbecoming an officer, and making false statements about the affair, see Bradley Graham & Tamara Jones, *Air Force Averts Trial of B-52 Pilot: General, Not Honorable, Discharge Granted*, *Wash. Post*, May 23, 1997, at A1; see also Tamara Jones, *U.S. Military Takes Aim at Adultery*, *Wash. Post*, Apr. 28, 1997, at A1 (chronicling the significant recent rise in military prosecutions against service members on adultery and fraternization charges).

<sup>88</sup> Art Lawler, *Gem County Teens Charged for Having Sex*, *Idaho Statesman*, May 15, 1996, at 1A, available in LEXIS, News Library, Idstmn File. One reason offered by the prosecutor who decided to bring fornication charges against unmarried teenage parents was the desire to hold girls, as well as boys, responsible for their sexual activity. The prosecutor conceded that it was possible to resolve many of these cases by charging only the male participants with statutory rape since that offense occurs in Idaho whenever a male has sex with a female who is under age 18; but he argued, "I don't think it's fair to charge the male child with statutory rape and not charge the female with anything." *Id.*

cently have been compelled to respond to accusations and rumors about their extramarital sexuality, attempting thereby to avoid political disgrace and potential disqualification from continued public service.<sup>89</sup> While these reports may assist in persuading readers that my claims are not fanciful, they probably do not presage a renewed interest in criminalizing fornication and adultery in their own right.<sup>90</sup>

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<sup>89</sup> To date, President William J. Clinton has exhibited a pattern of strenuously denying most allegations of sexual misconduct, including adultery and sexual harassment charges, and then selectively admitting to certain facts. See, e.g., Bill Clinton: Accusations and Explanations, N.Y. Times, Jan. 24, 1998, at A10; John M. Broder, Clinton and Vernon Jordan Tighten Denials on Affair and on Seeking a Cover-Up, N.Y. Times, Jan. 23, 1998, at A1; Michael Kelly, An Emerging Strategy, Wash. Post, Jan. 27, 1998, available in 1998 WL 2464205. In sharp contrast to President Clinton's tactics is the confessional strategy adopted by Michael Bowers, the former Attorney General of Georgia, whose office owns the dubious honor of litigating, by its political lights successfully, *Bowers v. Hardwick*, 478 U.S. 186 (1986), and *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997), cert. denied, 1998 WL 6489 (1998). In June 1997, less than a month after launching his campaign for Governor of Georgia, Bowers disclosed that he had engaged in a decade-long, extramarital affair with a woman whom he identified only as a former "subordinate" in his office. James Salzer, Governor-Hopeful Bowers Admits Decade-Long Affair, Florida Times-Union, June 6, 1997, at A1, available in LEXIS, News Library, Flatun File. Under the Georgia penal code, adultery, a misdemeanor, is defined as "voluntar[y] . . . sexual intercourse with a person other than [one's] spouse." See Ga. Code Ann. § 16-6-19 (1996). Bowers revealed that he decided to make the disclosure because he long had been feeling guilty about his adulterous relationship and because he knew that rumors about the affair were beginning to circulate widely in state political circles. Salzer, supra. In an abundance of candor, Bowers also admitted that his positions in litigating *Hardwick* and *Shahar* were "hypocritical morally," since, for example, the reason he gave for firing Ms. Shahar upon learning that she planned to marry a woman was that "he could not 'separate the way someone does their job from the way they respect the law.'" Kevin Sack, Georgia Candidate for Governor Admits Adultery and Resigns Commission in Guard, N.Y. Times, June 6, 1997, at A29. Indeed, it appears that Bowers was aware of the false moral—and legal—position he occupied with respect to the *Shahar* litigation, since he took steps to prevent discovery of his affair in that case. After a deposition at which Bowers was asked, but refused to answer, questions about whether attorneys on his staff had ever committed fornication or adultery, the parties entered into a stipulation under which the Attorney General's office agreed not to question Shahar about her sexual activity and Shahar's attorneys agreed not to question Bowers or members of his staff about sexual misconduct by anyone in his office. Emily Heller & Jonathan Ringel, Stipulation Let Ex-AG Keep His Affair Secret, The Recorder, June 11, 1997, at 1, available in LEXIS, News Library, Recrdr File. Although the local prosecutor's office has stated that "it doesn't currently plan to prosecute the former attorney general for adultery," see Paul M. Barrett, Clash of Consenting Adults: An Admitted Adulterer Fights a Married Lesbian in Court, Chattanooga Times, July 2, 1997, at C4, available in LEXIS, News Library, Chtms File, it may be that Bowers will pay a price for his illegal activity in the form of lost votes in the upcoming gubernatorial race.

<sup>90</sup> Data collected by the National Opinion Research Center at the University of Chi-

Nonetheless, I will insist that, at least insofar as women are concerned, the fornication and adultery prohibitions retain their vitality because the way of thinking about heterosexuality underlying those prohibitions made a significant contribution to the definition of rape that is extant today. From that perspective, the prohibitions continue to regulate women's participation in heterosexual intercourse.

The history of the criminalization of heterosexual intercourse is a vast and complicated topic that modern historians are only now beginning thoroughly to explore.<sup>91</sup> For my purposes, it is sufficient here to remark the durability of the official prohibition of nonmarital intercourse and, more importantly, to notice that it was among the earliest offenses articulated by lawmakers in this country and that, in some eras and in some regions, the prohibition was vigorously enforced against both men and women.<sup>92</sup> With even this

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cago reveal that, in assessing the morality of nonmarital sexual behavior, the community draws a distinction between fornication and adultery. Thus, in the General Social Survey conducted in 1991, 27% of respondents characterized premarital sexual relations between men and women as "always wrong," and 42% characterized such relations as "not wrong at all." See Tom W. Smith, *Attitudes toward Sexual Permissiveness: Trends, Correlates, and Behavioral Connections*, in *Sexuality Across the Life Course* 63, 65-66 tbl.2D (Alice S. Rossi ed., 1994). By contrast, in that same survey, 77% of respondents characterized extramarital relations as "always wrong," while only 3% of respondents described such relations as "not wrong at all." *Id.* at 69 tbl. 3. The survey does not reflect public attitudes concerning the potential criminalization of nonmarital sex, since respondents apparently were asked only whether such sex was "wrong," not whether it was or should be "legal." Conversely, in probing public attitudes towards homosexual activity, the survey asked both whether such activity was "wrong" and whether such activity should be "legal." *Id.* at 70 tbls. 4A, 4B. Thus, by omitting to ask whether nonmarital sex between men and women should be "legal," the authors of the survey may have been relying on their own view that such activity is legal and that there is no great public controversy over that question.

<sup>91</sup> For a general overview of the history of sexual regulation in the United States, see D'Emilio & Freedman, *supra* note 22; see also David Hackett Fischer, *Albion's Seed: Four British Folkways in America* (1989) (tracing the influence in British America of four waves of English-speaking immigrants, including each group's family, marriage, gender, and sex ways). For in-depth studies of the legal regulation of sexuality in colonial New England, see Dayton, *supra* note 62; Roger Thompson, *Sex in Middlesex: Popular Mores in a Massachusetts County, 1649-1699* (1986). A fascinating discussion of the history of sexual regulation in Canada is offered by Karen Dubinsky, *Improper Advances: Rape and Heterosexual Conflict in Ontario, 1880-1929* (1993).

<sup>92</sup> See Dayton, *supra* note 62, at 173 ("During the Colony period of New Haven's history, magistrates and ordinary residents alike demonstrated remarkable rigor and evenhandedness in the way they treated men and women who engaged in illicit premarital affairs or flirtations."); Carol F. Karlsen, *The Devil in the Shape of a Woman: Witchcraft in Colonial New England 194-202*, 198 (1987) ("Fornication and adultery aroused greater and greater concern in New England as the [17th] century wore on.").

minimal account in mind, we may begin to examine rape from the perspective of a system that forbade all heterosexual intercourse outside of marriage and, in particular, to explore the following question: How would the criminalization of nonmarital intercourse influence the content of rape doctrine?

Certainly, criminal law theory instructs us that judges operating in a system that punishes fornicators and adulterers as well as rapists would approach sexual misconduct cases by asking substantive questions different from those entertained by officials working in a regime that punishes only rapists. In the former world, the task of a judge confronted with an allegation of sexual misconduct was not to determine whether the incident involved a rape, for which the man alone would be punished, or ordinary intercourse, for which no one would be penalized. Rather, the task was to decide whether the encounter involved a rape, for which the man was solely to blame; fornication or adultery, for which both the man and the woman shared criminal responsibility; or marital intercourse, for which neither participant would be punished. In this former world, the “against her will” or, as the critics call it, “nonconsent” element did not perform the substantive function that the critics would assign to it today. Rather than separating noncriminal from criminal heterosexual intercourse—marking the “boundary between sex and rape,”<sup>93</sup> as Kristin Bumiller puts it—the woman’s nonconsent was the element that divided one heterosexual crime from another, namely, the woman’s nonconsent distinguished the man’s crime (rape) from the couple’s crime (fornication or adultery). (In the former world, the parties’ marriage—not their consent to the intercourse—was the element that distinguished lawful from unlawful sex.)<sup>94</sup> The meaning of nonconsent (and, concomitantly, of consent) in the context of sexual encounters necessarily would be conditioned by the fact that it served this function. Moreover, contrary to the political assumptions that permeate the modern critique of rape law, in a world in which all nonmarital intercourse is criminalized, we would not expect or desire law enforcement authorities to approach a report of sexual misconduct with the conviction that, if an offense had oc-

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<sup>93</sup> Bumiller, *supra* note 35, at 76.

<sup>94</sup> See *supra* notes 74-76 and accompanying text.

curred, the man inevitably would turn out to be the guilty party.<sup>95</sup> Rather, given the range of potentially applicable offenses, the authorities at least would be obliged to consider whether, and might even be predisposed to believe that, both the male and the female participants shared responsibility for the criminal intercourse.

Thus, theoretical considerations suggest that, for lawmakers operating within the culture from which we inherited the rape prohibition, the assignment of blame to women who accused men of rape was not tacit, implicit, or unconscious. We would not expect these judges to be subtle when characterizing such women as blameworthy or inadvertently to treat rape complainants *as if* they were the persons whose guilt was on trial. To the contrary, for these law enforcement authorities, criminal law theory dictated that there was every reason *actually* to put the rape complainant on trial, together with the man she accused, since she was guilty by her own account of the crime of fornication or adultery.<sup>96</sup>

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<sup>95</sup> Cornelia Hughes Dayton points out that in cases involving premarital fornication, colonial magistrates eventually began “excusing wives from public appearances and letting husbands stand in for them.” Dayton, *supra* note 62, at 185. This “newfound sympathy . . . suggested that women, once married, need not be held accountable as individuals for their actions . . . [and] thus reinforced women’s political subordination and invisibility before the law.” *Id.* at 185-86. In the context of fornication prosecutions in colonial Connecticut, she argues that a decision to punish only the husband for the couple’s premarital fornication constructed the husband as the responsible partner who, among other things, possessed the power to direct the couple’s finances. As Dayton puts it, “The de facto policy of fining only husbands . . . was not so much a rejection of the double standard as it was a convenient gesture that underscored who held the reins of authority—and the purse strings—in each newly formed household.” *Id.* at 186.

<sup>96</sup> A recent prosecution of a female sailor nicely illustrates the range of substantive questions that a rape complaint poses for officials working in a world that punishes fornication, adultery, and rape, and it illuminates as well the skepticism, if not hostility, with which the officials might approach the rape accusation. The case arose in the Navy, where, as in the other branches of the armed forces, fornication and adultery still may constitute criminal misbehavior. See *supra* note 86. In 1994, a sailor named Andrea Staggs came forward and accused a male shipmate of raping her. After investigating the charge, Navy officials prosecuted Staggs for adultery, fraternization, and underage drinking based on admissions she made to investigators, and they punished the man she accused “not for rape . . . but for having oral sex with Staggs.” Carol Hernandez, *The Victims: Speaking Up Carries Stiff Costs for Victims of Crime*, Dayton Daily News, Oct. 3, 1995, 1A, available in LEXIS, News library, Daydnw file. While it appears that the adultery charge against Staggs was based on an affair that she had with an officer other than the man she accused, the news account describing her conviction refers to other cases in which women were prosecuted for false swearing or

Let us now investigate more specifically how the idea that non-marital intercourse is a crime for which the participants are mutually at fault<sup>97</sup> may have influenced the substance of rape doctrine.<sup>98</sup> As I mentioned in the preceding Part of the Article, modern critics assert that lawmakers have crafted a definition of rape that unfairly burdens rape victims with a variety of legal requirements that other crime victims are spared.<sup>99</sup> According to Susan Estrich's example, a rape complaint is analogous to a robbery complaint, and the law's refusal to treat the two complaints analogously is evidence of entrenched hostility towards women's exercise of sexual agency.<sup>100</sup> Leaving aside any problems the analogy between a rape complaint and a robbery complaint may raise within our current system, the analogy collapses completely when we locate rape within a world that criminalizes nonmarital intercourse. Within such a world, the woman who comes forward to report that she has been raped is not in the same position as the person who comes forward to report that she has been robbed because someone who gives away sex, unlike someone who gives away money, is herself committing a crime. For the authorities working within such a world, it seems that the more compelling analogy would be to compare the situation of the rape complainant to that of a person who implicated herself in the commission of a crime, albeit one in which another

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sodomy based on the very encounter that they claimed was a rape. See *id.* As one military investigator explained, "We'll still investigate the rape aspect of that, [but] she'll have to be held accountable for her actions, because what she's done is in violation of our system—the military system." *Id.*

<sup>97</sup> See 4 Blackstone, *supra* note 1, at \*211.

<sup>98</sup> In addition to their critique of the substantive definition of rape, liberal and feminist commentators object to a number of evidentiary rules that traditionally applied in rape prosecutions. See, e.g., Estrich, *supra* note 6, at 42-56; Berger, *supra* note 32, at 12-22. While I have not thoroughly researched the genealogy of those rules, my impression is that they also would have been influenced by the fact that a woman who complained of rape necessarily presented herself as a candidate for a fornication and adultery charge. For example, the law of evidence applied in many jurisdictions has declared that uncorroborated testimony by an accomplice is insufficient to support a criminal conviction. See 7 John Henry Wigmore, *Evidence in Trials at Common Law* § 2056 (James H. Chadbourn ed., 1978) (describing evolution of cautionary instructions concerning uncorroborated accomplice testimony into statutory rules mandating that such testimony be corroborated). Since courts would be inclined to view the rape complainant as a potential accomplice in the crime of fornication or adultery, it would not be surprising to find them applying these accomplice corroboration rules in rape cases.

<sup>99</sup> See *supra* notes 57-69 and accompanying text.

<sup>100</sup> Estrich, *supra* note 6, at 59.

perpetrator also was involved.<sup>101</sup> If this analogy is the more persuasive one, we then must wonder, how would those authorities react to a person who, for example, confessed that she had been involved in carrying out a robbery? Law enforcement officials confronted with such a malefactor today—and, we may speculate, then—would be inclined to punish her for her misconduct, unless she was able to establish that her participation came about under circumstances that afforded her a defense to criminal liability. Certainly, the malefactor would not be spared merely because she testified that she subjectively did not want to commit the theft or even that she manifested her reluctance by saying “no” when her confederate proposed the criminal venture.

Viewed from this perspective, the traditional elements of rape begin to mimic perfectly the substantive arguments that we would expect a woman to make if she were trying to defend herself against an accusation of fornication or adultery. In many cases, it was (and is) impossible for women actually charged with those crimes to testify that they had not participated in sexual intercourse, as men presumably would feel free to do, since detection of their illicit pregnancies frequently triggered accusations against women.<sup>102</sup> For example, of women charged with fornication in colonial Connecticut, one historian remarks, “[p]regnancy, of course, visibly manifested a woman’s

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<sup>101</sup> Anna Clark suggests that, in 18th-century Britain, officials investigating rape complaints were inclined to treat the woman as a potential perpetrator:

Given the increased legal surveillance over the sexual behaviour of working-class women, women who infringed the bounds of modesty by accusing a man of rape could be punished themselves. Police and magistrates, accustomed to treating prostitutes and vagrant women harshly, rarely became more sympathetic to victims of rape. In fact, a woman could be arrested for indecent exposure while being assaulted.

Clark, *supra* note 12, at 65.

<sup>102</sup> See Dayton, *supra* note 62, at 224 (“[I]n colonial Connecticut, the ‘sober, discreet’ men serving as grand jurors in each town made premarital sex (when it resulted in pregnancy) their most frequent presentment.”); Martin Ingram, *Church Courts, Sex and Marriage in England, 1570-1640*, at 280 (1987) (“In court the bulk [of men accused of fornication] denied the charges against them; female denials were naturally less common since many of the women had been incriminated by illicit pregnancies.”); Thompson, *supra* note 91, at 19 (explaining that almost all fornication cases prosecuted by the county courts in 17th-century Massachusetts “arose from the birth of a bastard”); see also Karlsen, *supra* note 92, at 198 (“For the period 1650-1700, charges of sexual misconduct in Essex County show a new focus on illicit conceptions and, especially, illegitimate births, rather than on sexual misbehavior *per se*.”).

offense.”<sup>103</sup> Likewise, a journalist writing about a recent fornication prosecution in Idaho asserts that the accused woman’s pregnancy constituted “abundant probable cause for [the] charges.”<sup>104</sup> Significantly, as the comments by Perkins and Boyce remind us, any woman who claimed that she had been raped necessarily also was confessing that her body had been the site of an unlawful sexual connection. Assuming that the man she accused was disinclined to concede that he was a rapist, he could, as a partial defense, denounce the woman as his accomplice in crime: That is, he could confess that a crime had occurred but insist that the transgression was fornication or adultery, for which the woman shared joint criminal responsibility, rather than rape.<sup>105</sup> To contradict the damaging inferences of their own sexual complicity to which their rape complaints inevitably gave rise, we would expect women to pursue the few well-worn defensive strategies available to those accused of criminal

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<sup>103</sup> Dayton, *supra* note 62, at 198. However, it appears that in some cases pregnant women did, at least in the first instance, deny that they had engaged in sexual intercourse. Thus, one woman testified at an incest trial in 1885 that her husband’s stepdaughter “denied positively that she had ever had carnal acquaintance with anybody.” *Johnson v. State*, 20 Tex. Ct. App. 609, 614 (1886). The woman advised the girl that “such a denial . . . was out of the question” since she was pregnant. *Id.* It is impossible to determine from the text of this opinion whether the girl was lying when she denied having engaged in “carnal” activity or whether she did not understand to what kind of activity the phrase (“carnal acquaintance” or other nomenclature employed by her stepmother) referred.

<sup>104</sup> Quentin Hardy, *Prosecuting Teen Pregnancy: In Idaho, A Different Approach*, *Newsday*, July 17, 1996, *available in* 1996 WL 2529913. Another journalist made a similar point about the guilt of this accused woman, though more bluntly: “Smizek’s pregnant belly was all the proof needed to convict her.” David Diamond, *When Having Babies Is a Crime*, *USA Weekend*, Feb. 16, 1997, *available in* 1997 WL 7698677.

<sup>105</sup> See, e.g., Dubinsky, *supra* note 91, at 50 (“Many . . . men [who were acquaintances of women who accused them of rape] claimed in their defense that they were having affairs with these women and that criminal charges were merely a ruse to placate jealous husbands.”). This might be a sensible defense for men to offer where the prosecution has sufficient evidence to establish that the sexual intercourse occurred and that the man was a perpetrator therein. If they are prosecuted at all, fornication and adultery for many years have been graded far less severely than rape, and, even in eras when adultery, like rape, was a capital crime, adulterers reasonably might have expected to receive more lenient penalties than rapists did. For example, Cornelia Hughes Dayton remarks that “during the period in which adultery was [a] capital” crime in Puritan Connecticut, “authorities and witnesses alike usually backed off from charging defendants explicitly with the full act. If the charges enumerated ‘uncleanness,’ ‘unlawful familiarity,’ or lascivious carriage, then the convicted adult could be fined, whipped, or shamed—but not executed.” Dayton, *supra* note 62, at 166.



wrongdoing, and each of these strategies had the effect of attributing sole responsibility for the intercourse to the man. In short, like any other person who was implicated in criminal activity, a woman suspected of fornication or adultery could attack the elements of the prosecution's *prima facie* case, or, if that strategy failed, she could interpose an affirmative excuse to liability.<sup>106</sup>

One defense a woman might offer would be to challenge the *mens rea* element of the *prima facie* case against her. The claim that the woman lacked the mental state required for a fornication or adultery conviction would be credible only in a narrow set of circumstances, which coincide perfectly with the facts of the rape by fraud cases. Indeed, the rule that sex by fraud constitutes rape only in the context of "fraud in the factum" singles out for prosecution as rape the few cases in which a woman engaged in fornication or adultery only through an exculpatory mistake of fact. The argument proceeds as follows: Though the woman in fact had participated in an act of non-marital intercourse, she was innocent because she neither knew nor should have known that her conduct was of the forbidden character. This argument would be successful in only two types of cases. First, the argument would be accepted in cases where the woman showed that she reasonably believed that her conduct was nonsexual, such as participating in a routine medical procedure, but the man had used the procedure as a subterfuge to perpetrate sexual intercourse. Second, a mistake of fact argument might prevail where the woman believed that the sex act constituted marital (i.e., lawful) intercourse because she believed that she was having sex with her husband, when in fact the paramour was someone else.<sup>107</sup> That the woman was

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<sup>106</sup> As news reports concerning the recent sex scandal at the Army's Aberdeen Proving Ground reveal, women might feel some pressure to allege that a consensual sexual affair amounted to rape, if they thereby might avoid punishment for fornication or adultery. Last year, five female soldiers asserted that they told investigators that they had engaged in consensual sex with their drill instructors, which is a criminal offense in the military, and that the investigators then tried to pressure them into bringing rape charges by promising them immunity from prosecution for their own misconduct. See Peter T. Kilborn, *5 Women Say Sex Charges In Army Case Were Coerced*, N.Y. Times, Mar. 12, 1997, at A14; Paul Richter, *Army Accused of Coercion in Sex Probe*, L.A. Times, Mar. 12, 1997, at A1.

<sup>107</sup> In describing this type of fraud in the factum, Perkins and Boyce remark that the "better reason[ed]" opinions "hold such a misdeed to be rape on the theory that . . . the woman's consent is to an *innocent* act of marital intercourse while what is actually

induced to engage in sexual intercourse based on some other mistaken belief that she held, even if such belief was created by active deception on the man's part, would be irrelevant to her mental state and, ultimately, to her guilt.<sup>108</sup> In such cases, standard mistake of fact analysis instructs that the woman knew or should have known that she was engaging in nonmarital intercourse, and therefore she, as well as her partner, deserved to be punished for that crime.

The next defensive strategy that a woman suspected of a sexual infraction might pursue would be to assert a failure of the *actus reus* element of the offense in question. This potential defense is a significant component of my theoretical reconceptualization of rape doctrine because it accounts, in part, for the peculiar definitions of force and nonconsent that judges engrafted onto the rape offense. Criminal law commentators offer competing descriptions of *actus reus*, which often is characterized as the "first and most basic requirement of the criminal law: that the subject with which it deals is conduct."<sup>109</sup> One definition that has won scholarly approval is the Model Penal Code's indirect description under which *actus reus* is *not* satisfied by "a bodily movement that . . . is not a product of the effort or determination of the actor, either conscious or habitual."<sup>110</sup> In the terminology employed by contemporary criminal law theorists, *actus reus* must include some conduct by the accused that is "voluntary"; "involuntary" acts are not the proper subject for criminal correction.<sup>111</sup> For example, the commentators assume that

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perpetuated upon her is an act of adultery." Perkins & Boyce, *supra* note 22, at 1080-81 (emphasis added).

<sup>108</sup> In some colonial fornication prosecutions, it appears that women asserted a version of the disfavored mistake of law claim, arguing, for example, that they agreed to have sex after their lovers advised them that the biblical injunction forbade adultery, but not intercourse between single persons. See Dayton, *supra* note 62, at 176. Although such claims did not earn the women a reprieve, magistrates apparently did punish the men in such cases more harshly, on the ground that they had "draw[n] [the women] to sin." *Id.*

<sup>109</sup> Herbert L. Packer, *The Limits of the Criminal Sanction* 76 (1968).

<sup>110</sup> Model Penal Code § 2.01 (Official Draft and Revised Comments 1985). See also 2 Paul H. Robinson, *Criminal Law Defenses* § 161(b)(2), at 230-31 (1984) (discussing the meaning of voluntariness in the context of the *actus reus*).

<sup>111</sup> See, e.g., Model Penal Code § 2.01 cmts. 1, 2, at 214-22 (Official Draft and Revised Comments 1985). Among other reasons for refusing to criminalize "involuntary" acts, the drafters of the Model Penal Code remark that "the law cannot hope to deter involuntary movement or to stimulate action that cannot physically be performed; the sense of personal security would be undermined in a society where such movement or

the actus reus element is not satisfied in cases where an assailant, through the exercise of brute physical strength, uses the body of the accused to perpetrate a crime.<sup>112</sup> Criminal law scholars usually illustrate this aspect of actus reus with hypothetical scenarios in which an aggressor uses the body of a bystander as a weapon; for example, Wayne LaFave and Austin Scott cite “the classic case in which one person physically forces another person into bodily movement, as where *A* by force causes *B*’s body to strike *C*.”<sup>113</sup> The commentators agree that neither moral nor legal philosophy provides a basis for punishing *B* since the bodily movement through which she injured *C* was not produced by any exercise of *B*’s volition, but by an external, physical force over which she had no control.<sup>114</sup> According to H.L.A. Hart, “the movements of the human body [in such a case] seem more like the movements of an inanimate thing than the actions of a person,”<sup>115</sup> and, of course, the criminal law does not punish inanimate things, even when their movements inflict harm.

By lamenting the dearth of real cases that explicate this aspect of the act requirement, the commentators imply that they are offering a doctrinal refinement that is merely academic, even fanciful.<sup>116</sup> When we construe a rape complaint as a defensive maneuver by a woman trying to exonerate herself from a charge of unlawful intercourse, however, we encounter real examples of the problem that

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inactivity could lead to formal social condemnation of the sort that a conviction necessarily entails.” *Id.* cmt. 1, at 214-15.

<sup>112</sup> Thus, the drafters of the Model Penal Code believe that their definition of actus reus would exclude from liability “the classic case where the actor is moved by force, as distinguished from threat; such motion never has been viewed as action of the victim of the force.” *Id.* cmt. 2, at 221.

<sup>113</sup> See 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 3.2, at 277 (1986); see also Hall, *supra* note 23, at 424 (“Illustrations . . . are: being pushed or thrown against someone, being physically forced to trace another’s signature or to pull the trigger of a gun, the hand being merely the coercer’s instrument.”); Robinson, *supra* note 110, § 161(b)(2), at 230 (“[C]onsider the case where *A*’s automobile strikes *B*, pushing *B*’s body against *C* who is pushed over a cliff and killed.”); Stephen J. Morse, *Culpability and Control*, 142 U. Pa. L. Rev. 1587, 1590 (1994) (“Someone vastly stronger than you pulls your leg up . . .”).

<sup>114</sup> See Hall, *supra* note 23, at 424-25; Morse, *supra* note 113, at 1591.

<sup>115</sup> H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* 91-92 (1968).

<sup>116</sup> See Hall, *supra* note 23, at 422 (“[T]he relevant case-law is very scant, indeed, it is limited to situations where there was uncertainty regarding the facts.”); Hart, *supra* note 115, at 95-96 (remarking that cases involving “[p]hysical compulsion of one person by another” are “very interesting, though mainly hypothetical”).

heretofore have eluded the attention of criminal law theorists. Like the hypothetical actor *B* caught in the predicament LaFave and Scott describe, the woman suspected of fornication or adultery would not be responsible for the sexual offense if she established that the man actually had physically forced her to participate. If the woman's bodily movements were produced not by her "effort or determination," but by the man's exercise of superior physical strength, then she was merely an "inanimate thing" that the man had used to perpetrate an illicit objective that was entirely his own.

Certainly, the courts' traditional measures of the "extraordinary circumstances of force"<sup>117</sup> required to convict a man of rape appear perfectly calibrated to reassure us that the woman had committed no sexual actus reus for which she could be held criminally responsible. Thus, if he "overpowered [her] by actual force,"<sup>118</sup> for example, by capturing her by surprise, throwing her down on the ground, immobilizing her body with his, and then penetrating her, he alone was responsible for the unlawful intercourse, and thus his crime was rape rather than fornication or adultery. According to this account, therefore, the "against her will" (or "nonconsent") element of rape was not designed to substantiate the woman's subjective desire to refrain from having intercourse, but to establish that her participation was not the product of her voluntary conduct and that, therefore, she was not an appropriate candidate for criminal punishment.

In the view of criminal law theorists, courts would and should be reluctant in such cases to conclude that the man literally had forced the woman to transgress unless she attempted to resist him. Thus, the commentators who discuss hypothetical potential failures of actus reus in other contexts remark that evidence of resistance by the accused adds substantial weight to her claim that she should not be punished because she committed no act at all. For example, Stephen Morse recently implied that we would expect to see that an accused had resisted physical force exerted by another person before concluding that such force had literally compelled the accused to commit the crime in question.<sup>119</sup> Significantly, the terms that Morse employs to designate the exculpatory quantum of resis-

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<sup>117</sup> *People v. Dohring*, 59 N.Y. 374, 382 (1874).

<sup>118</sup> *Id.*

<sup>119</sup> See Morse, *supra* note 113, at 1590.

tance—"valiant resistance efforts"<sup>120</sup>—are indistinguishable from the language appellate judges used to describe the physical opposition women formerly were expected to offer to men trying to perpetrate an illicit sexual connection. As a component of the woman's failure of actus reus defense, the resistance requirement was not engrafted onto rape doctrine merely to provide evidence of the woman's subjective opposition to the sexual penetration, as contemporary commentators suggest. Rather, its function was to support her claim that the intercourse had occurred without even that minimal connection between her mind and the illegal conduct in which her body participated that is the foundation of criminal responsibility.

A third defense that a woman might interpose to a fornication or adultery charge is that she had submitted to the unlawful intercourse under duress. The close connection between rape and duress is suggested by the facial similarity in the rhetoric appellate courts use to describe, on the one hand, the elements of the offense and, on the other, the elements of the excuse. An accused who pleads duress concedes that the prosecution can satisfy the actus reus and mens rea elements of the crime. She claims, however, that she is not responsible for the misconduct because she was psychologically pressured into offending by a person who threatened to harm her physically if she refused to commit the crime.<sup>121</sup> Although the coerced actor does elect to violate the criminal law rather than suffer the threatened harm, the alternatives available to some offenders are so painful that the community is willing to excuse them on the ground that they pursued a course of conduct imposed on them by their assailants, rather than their own choices.<sup>122</sup> In such cases, the law holds the assailant responsible for the accused's offense, as well as presumably for the assaultive conduct through which he coerced the accused into committing the crime.

Most criminal law scholars agree that the duress defense is and should be narrowly confined.<sup>123</sup> People ordinarily are subject to a

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<sup>120</sup> *Id.*

<sup>121</sup> See Robinson, *supra* note 110, § 177(b)-(d), at 351-55.

<sup>122</sup> See Hart, *supra* note 115, at 16; Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 *Ind. L.J.* 719, 744 (1992).

<sup>123</sup> The drafters of the Model Penal Code provide a helpful survey of the duress commentary as of the time they were deliberating, and, although the drafters rejected

variety of external and internal forces pressuring them to offend. Thus, to prevent erosion of the criminal sanction, the courts properly have insisted that the duress defense be allowed only in cases involving abnormal and egregious pressures, which serve clearly to distinguish the excused actor from members of the general population.<sup>124</sup> Presumably because the duress excuse usually faces “judicial hostility,”<sup>125</sup> very few cases have entertained the defense seriously, let alone sympathetically.<sup>126</sup> Despite this judicial skepticism, the criminal law commentators report that the defense has been ingrained in our criminal jurisprudence since times no less “ancient” than the era to which the rape prohibition usually is traced.<sup>127</sup>

When we compare the elements of the duress defense to the elements of rape, the connection between the woman’s sexual excuse and the man’s sexual crime is irresistible. In particular, the primary substantive elements of the duress excuse are indistinguishable from the force and resistance elements of rape. The duress defense is satisfied only in cases where the accused shows that she was subject to precisely the same kinds of threats of force uttered by a rapist; that is, she must show that an assailant threatened to kill or inflict serious bodily injury on her if she refused to commit the crime he proposed.<sup>128</sup> Certainly, at common law, judges insisted that the du-

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arguments that effectively would “demand that heroism be the standard of legality,” they also refused to recognize as exculpatory the claim that “the actor lacked the fortitude to make the moral choice.” Model Penal Code § 2.09, cmt. 2, at 374-75 (Official Draft and Revised Comments 1985). In order to assure that the actor’s “cowardice” would have no defensive significance, the drafters agreed to “confine . . . exculpation” to cases involving threats of physical violence “against the person of the actor or another . . . [b]ut when the claimed excuse is that duress was irresistible, threat to property or even reputation cannot exercise sufficient power over persons of ‘reasonable firmness’ to warrant consideration in these terms.” *Id.* cmts. 2-3, at 375.

<sup>124</sup> See Robinson, *supra* note 110, §§ 161(b)(5), 177(c), at 239-41, 352-53.

<sup>125</sup> See Hall, *supra* note 23, at 444. In a decision authored at mid-century, the United States Court of Appeals for the First Circuit expressed some of that hostility, remarking that “[b]arring cases involving children, wives, and mental defectives, there do not seem to be many cases in point.” *R.I. Recreation Ctr. v. Aetna Cas. & Sur. Co.*, 177 F.2d 603, 605 (1st Cir. 1949).

<sup>126</sup> Thus, Alan Wertheimer reports that the case law on duress “seem[s] quite thin.” Alan Wertheimer, *Coercion* 145 (1987). Likewise, Jerome Hall characterizes the British case law on duress as “almost *tabula rasa*.” Hall, *supra* note 23, at 437.

<sup>127</sup> See Hall, *supra* note 23, at 416; see also Perkins & Boyce, *supra* note 22, at 1064 (characterizing the duress defense as an “age-old rule”).

<sup>128</sup> See Hall, *supra* note 23, at 443 (“[T]he fear must be of death or of ‘serious bodily injury.’”); Perkins & Boyce, *supra* note 22, at 1060 (“[F]or duress to be recognized in

ress defense, like the rape offense, was not satisfied by threats of minor physical injury or by threats to harm the actor's reputation or property,<sup>129</sup> and most jurisdictions today continue to limit the defense to cases involving threats of serious physical violence.<sup>130</sup> The notion is that when the coercer proposes to inflict a harm short of death or grave physical injury, the accused should be punished for succumbing to the evil demand because human actors are expected to possess the fortitude to withstand minor threats and even to suffer the threatened harm, if necessary, rather than break the commands of the criminal law. When we recall that judges formerly would view rape complainants not merely as crime victims, but also as potential accomplices in fornication or adultery, we must question the commentators' assertion that the law has imposed on rape victims legal burdens different from and greater than those faced by other crime victims. Rather, the criminal law merely was holding suspected female perpetrators of sexual crimes to the same demanding standard that any offender was required to satisfy in order to secure an excuse to liability.

Similarly, when we construe the rape complaint as the woman's plea to be excused for committing fornication or adultery, we must contest the critics' assertion that the resistance obligation imposed on rape victims is without precedent in the criminal law.<sup>131</sup> Far from being unprecedented, resistance is a standard element of the duress defense. Since the man who asked a woman to have sex with him was soliciting her participation in a crime, the court would be reluctant to pronounce her to be his victim, rather than his accomplice, absent clear evidence that she had submitted only because of his coercive threats. Certainly, when evaluating duress claims

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a criminal case it must be such as to induce a well-grounded apprehension of imminent death or great bodily injury."); Morse, *supra* note 113, at 1616 ("The classic example, of course, involves a threat of death unless the defendant commits some other crime.").

<sup>129</sup> See, e.g., *Arp v. State*, 12 So. 301, 303 (Ala. 1893); *State v. Patterson*, 241 P. 977, 978 (Or. 1925).

<sup>130</sup> See Robinson, *supra* note 110, § 177(e)(3), at 359-60 & n.28. According to the drafters of the Model Penal Code, the duress defense should continue to be limited to threats of "force against the person of the actor or another . . . [W]hen the claimed excuse is that duress was irresistible, threats to property or even reputation cannot exercise sufficient power over persons of 'reasonable firmness' to warrant consideration in these terms." Model Penal Code § 2.09, cmt. 3, at 375 (Official Draft and Revised Comments 1985).

<sup>131</sup> See *supra* notes 67-69 and accompanying text.

raised by defendants accused of nonsexual crimes, the courts often use language suggesting that the excuse is credible only where the suspect resisted her coercer, before succumbing to the threats and committing the crime. According to criminal law scholars, resistance is an essential element of duress since the excuse “will not obtain if the agent . . . fail[ed] to employ possible, resistant strategies.”<sup>132</sup> Thus, if it appears that resistance would have thwarted the crime, criminal law theory dictates that the duress excuse should fail since the accused is obliged to pursue any reasonable alternative that would allow her to escape from the coercer without offending.

Yet another intriguing similarity appears when we compare the courts’ disposition of rape complaints with their treatment of duress claims. In both contexts, the courts refuse to excuse a wrongdoer who culpably placed herself in a situation in which it was probable that she would be coerced into violating the criminal law.<sup>133</sup> This rule is applied explicitly in the duress context to limit the scope of the excuse. To return to the robbery analogy, the duress excuse is not available to a person who borrows money from the leader of a violent gang and who then is pressured by gang members to commit a robbery in order to satisfy the debt. Since the defendant voluntarily associated herself with the criminal operation, presumably with full knowledge of its members’ violent dispositions, the criminal law assigns responsibility for her criminal misconduct to her culpable choice of companions, rather than to those companions’ evil commands. As one court put it, “[she herself] began the digression from the path of rectitude. Without [her] act, the situation which [she] claims was compulsory would not have occurred.”<sup>134</sup> In the rape context, courts traditionally invoked this principle in cases where they believed that the woman had voluntarily placed herself in a situation where her companion was likely to pressure her into having sex with him. In such cases, the courts were disinclined to pronounce the woman “innocent” of fornication or adultery,<sup>135</sup> just

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<sup>132</sup> Morse, *supra* note 113, at 1615; see also Hall, *supra* note 23, at 447 (explaining that in duress cases, courts have imposed “a duty to resist the evil-doer”).

<sup>133</sup> See Robinson, *supra* note 110, §§ 162(a), (b)(3), at 247 n.4, 251 n.19 (an actor who has placed herself in a situation that will likely result in duress is deprived of that defense).

<sup>134</sup> Williams v. State, 646 A.2d 1101, 1109 (Md. Ct. Spec. App. 1994) (quoting State v. Patterson, 241 P. 977, 978 (Or. 1925)).

<sup>135</sup> Cf. State v. Rusk, 424 A.2d 720, 733 (Md. 1981) (Cole, J., dissenting) (criticizing



as they would be reluctant to acquit the person pressured into stealing in order to repay the loan from the gang leader. An infamous example of the application of this principle in the rape context appears in the opinion of the dissenting judge in *State v. Rusk*.<sup>136</sup> The complainant in *Rusk* was a 21-year-old woman who was raped after she drove a man home from a bar. The Court of Appeals of Maryland rejected the defendant's argument that there was insufficient evidence to support his rape conviction, concluding that the jury rationally could find that the woman was "restrained by fear of violence."<sup>137</sup> Writing in dissent, Judge Cole vehemently disagreed with this conclusion on the ground that the case involved only an "ordinary seduction."<sup>138</sup> In Judge Cole's estimation, the woman knowingly placed herself in a situation where she might be subjected to pressures calculated to overcome her expressed disinclination to engage in (illegal) intercourse. In particular, Judge Cole believed that, when the woman submitted to the man's request to accompany him to his room, "[s]he certainly had to realize that they were not going upstairs to play *Scrabble*."<sup>139</sup>

#### CONCLUSION

*And what hast thou to do with all these iron men, and their opinions? They have kept thy better part in bondage too long already!*

Nathaniel Hawthorne<sup>140</sup>

Rape law reformers well may wonder, how should we respond to Judge Cole's sarcastic remark about the complainant's state of mind as she followed Rusk up the dark stairs to his room? Certainly, it is tempting to refuse any exchange at all, except perhaps to retort in kind, since Judge Cole's querulous tone betrays an inability to entertain feminist ways of thinking about this young woman's fearful experience. Yet, his choice of language must pique our curiosity

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the court, which upheld a rape conviction, for "declar[ing] the innocence of an at best distraught young woman").

<sup>136</sup> 424 A.2d 720, 728-35 (Md. 1981) (Cole, J., dissenting).

<sup>137</sup> Id. at 728.

<sup>138</sup> Id. at 733 (Cole, J., dissenting).

<sup>139</sup> Id. at 734 (Cole, J., dissenting).

<sup>140</sup> Nathaniel Hawthorne, *The Scarlet Letter* 142 (Scully Bradley et al. eds., 2d ed., W.W. Norton & Co., Inc. 1978) (1850).

about *his* way of thinking about consensual sexuality. Precisely what did Judge Cole mean when he criticized the majority for declaring the complainant innocent? One implication that I take away from this rebuke is that Judge Cole believed that the young woman actually had committed a crime, and I suspect that the crime he had in mind was the act of adultery<sup>141</sup> for which she had failed to establish any legal excuse. If this indeed were his analysis of the intercourse that occurred in the *Rusk* case, Judge Cole thereby would affirm his fidelity to a system in which all expressions of nonmarital sexuality are criminal offenses. As a late inhabitant of the former world I sketched above, Judge Cole understandably would feel bound to scrutinize the rape complainant's testimony for evidence of her complicity in the unlawful sexual connection.

I have argued in this Article that the substantive pressure exerted on rape doctrine by the concurrent criminalization of nonmarital intercourse provides a satisfactory theoretical explanation for Judge Cole's skeptical reading of the rape complaint. Indeed, my argument may imply that the objectionable elements of the rape offense could have been produced not by the law's special hostility towards women, but rather by its ordinary hostility towards defendants who seek to be excused from criminal liability. When we examine the woman's admission of involvement in illegal intercourse in the light of the law's traditional reluctance to grant an excuse to any criminal offender, we even might advance the proposition that courts were not treating rape complainants *differently from* other crime victims, but rather were treating them *the same as* other crime perpetrators who pleaded for an excuse.

In order to test this alternative interpretation of rape jurisprudence, however, we must consider a number of significant practical questions about the enforcement of the rape, fornication, and adultery prohibitions in the former world suggested by Judge Cole's opinion. First, if the unsuccessful rape complainant really were deemed guilty

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<sup>141</sup> Adultery was and remains a criminal offense in Maryland. See Md. Ann. Code, art. 27, § 3 (1996). At the time of their encounter, both the woman and Eddie Rusk were married to other people, though each was separated. See *Rusk*, 424 A.2d at 721. Moreover, it is interesting to notice that, when the intermediate appellate court decided to reverse Rusk's conviction, see *Rusk v. State*, 406 A.2d 624 (Md. Ct. Spec. App. 1979), the dissenting judge there construed the majority's decision as announcing that the complainant was "in effect, an adulteress," see *id.* at 636 (Wilner, J., dissenting).

of fornication or adultery, as Judge Cole implies, we would expect the system to prosecute and punish her for her offense. And if it did not, why not? Moreover, if the system did prosecute the women in some of these cases, which women were punished, and what penalties did they receive? A second, crucial set of questions focuses on the proper treatment of the men accused of rape. In cases where the prosecution managed to prove all of the elements of rape, the harsh penalties authorized for rape would seem adequate to punish the man for *both* the illegal intercourse *and* the egregious assault through which he secured the woman's sexual submission. Next, we must wonder, what penalties were imposed on a defendant who concededly had sex with the complainant, but was acquitted of rape on the ground that the prosecution had failed to establish the force or nonconsent element? In such cases, the male defendant presumably would be punished, together with his female accomplice, for the illegal sexual intercourse under the fornication or adultery statute. Even if both participants were punished, did they receive equivalent penalties? Punishing the man for fornication or adultery alone would not appear to be severe enough in many such cases. That is, judges in the former world would decree that the woman's participation in the illegal intercourse was not excused if, for example, she was not subjected to the grievous kinds of threats required by the duress defense. Since he had not employed death threats to coerce her cooperation, the man would be acquitted of rape. In at least some of these cases, however, we would expect him to incur a penalty for his forceful, threatening behavior over and above the punishment he (and, presumably, the woman) received for the illegal sex. To be sure, his threats may not have been serious enough to excuse her participation and concomitantly aggravate his sexual offense from fornication or adultery to rape; however, ordinary principles of culpability suggest that he would deserve some additional punishment for his assaultive conduct. To return to the robbery analogy, we would expect that the offender who pressured our hypothetical robber into committing the crime would be eligible for more severe penalties than his too easily intimidated colleague. If women were punished more (or less) harshly than men in fornication and adultery cases, how did the sentencing authority justify the disparate penalties? In other words, my questions have accepted uncritically essential premises underlying both contemporary rape

doctrine and most reform proposals, namely, that intercourse procured through physical violence is the most egregious sexual offense and that men inevitably are the actors who perpetrate such offense. Did former generations share those premises, or did our ancestors believe that some of the strategies through which women initiate and consummate sexual connections are as culpable, or possibly more culpable, than the violent practices we associate with men?

Of course, none of these questions seems especially difficult if we limit our investigation to enforcement practices today. At least up until very recently, most scholars and lawyers probably would feel safe to assert, without pausing to do any research at all, that there is virtually no direct enforcement of the fornication and adultery prohibitions in any jurisdiction in this country. Where the state fails to discharge its burden of proof in a rape prosecution, the criminal sexual misconduct case is closed: The accused man is acquitted, and no further criminal charges are brought against either party based on their participation in the intercourse.

At least at first glance, therefore, our enforcement practices appear to stand in sharp contrast to those pursued, for example, in the Puritan colonies. According to historian Cornelia Hughes Dayton, "In New Haven as in the rest of New England, fornication was by far the largest category of criminal cases on the county court docket from about 1690 until 1770."<sup>142</sup> Significantly, Dayton also reports that, "During the Colony period of New Haven's history, magistrates and ordinary residents alike demonstrated remarkable rigor and evenhandedness in the way they treated men and women who engaged in illicit premarital affairs or flirtations."<sup>143</sup> In the fascinating account provided by Dayton, Puritan magistrates zealously prosecuted these charges against both sexes, men and women were accused of that crime in almost equal numbers, and the distribution of punishment against men and women was evenhanded.<sup>144</sup>

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<sup>142</sup> Dayton, *supra* note 62, at 160.

<sup>143</sup> *Id.* at 173.

<sup>144</sup> In a chapter entitled *Consensual Sex: The Eighteenth-Century Double Standard*, *id.* at 157-230, Dayton describes prosecutions for fornication and adultery in colonial New Haven. According to Dayton, Puritan magistrates were able to achieve this remarkable evenhanded treatment of men and women in fornication cases because "the Colony period was . . . the era of confessions. The bench was able both to convict nearly all sexual transgressors and to mete out equal punishment to men and women because it succeeded in persuading miscreants of *both* sexes to confess." *Id.* at 173.

Dayton's description also suggests that, in colonial New England, judges were inclined to construe a rape allegation as the woman's attempt to be excused for fornicating, at least if she waited to bring the accusation until after she herself faced sexual misconduct charges.<sup>145</sup> It seems that the magistrates treated most rape accusations in that context skeptically; indeed, they rejected most of them. However, the Puritan judges may have been sensitive to the differing degrees of culpability displayed by the partners to fornication; at least, they seem to have calibrated the penalties imposed in such cases according to the familiar culpability principles I mentioned above. As Dayton puts it, "If a woman's response [to a man's sexual proposition] was to flirt, tarry, or quietly submit, then she lost her claim to being free from corrupting sin, and she was perceived to merit some measure of punishment, even though the more aggressive man was typically penalized more severely."<sup>146</sup> Based on these and other observations about the Puritan regulation of heterosexuality, Dayton insists that, at its inception, this Puritan community was determined to hold men and women equally accountable for premarital intercourse and to suppress at least that aspect of the sexual double standard that blamed women alone for promiscuous sexuality.<sup>147</sup>

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Whereas the early Puritan magistrates sought to eliminate the sexual double standard in fornication prosecutions, it appears that

a double standard was inscribed into the law of adultery in Connecticut from its earliest codes into the nineteenth century. Long past the intensely Puritan seventeenth century, the statute clung to the Old Testament's restrictive definition of adultery as an act committed with a married woman. Thus a married woman who engaged in any extramarital affair was subject (along with her lover) to the statute's punishment, whereas a married man who had an affair with a single woman or a widow would not be legally accounted an adulterer, but would be liable only to the fines and possible child support imposed on fornicators.

*Id.* at 164-65.

<sup>145</sup> See *id.* at 240-41.

<sup>146</sup> *Id.* at 242. Dayton provides this illustrative case:

The case involving Caleb Horton was only partly resolved when Horton was fined for throwing "three mayds . . . down upon heaps" in a yard, sitting on them, and calling for a passing man "to help him, for he could not serve three at one." At the next court, the young women were summoned and seriously warned that "their carriage was then uncomly," "unseasonable," "mixed with some degree of daliance," and characterized by "too much compliance."

*Id.*

<sup>147</sup> *Id.* at 162-63, 173.

I sketch this history here not to suggest that the Puritan regulation of sexuality was egalitarian, though Dayton's account has provoked me to imagine what it would be like to live in a world that aggressively, but even-handedly, regulates heterosexual intercourse. To the contrary, as Dayton's account also emphasizes, the Puritan definition of adultery incorporated a sexual double standard on its face, and indeed, it seems that one purpose of most fornication prosecutions was to pressure the erring couple to enter into marriage, an institution founded explicitly on the subordination of women to men.<sup>148</sup> Rather, I provide this brief account of early fornication prosecutions to identify the kind of evidence necessary to test my theoretical claims about the substantive relationship between rape doctrine and the criminalization of nonmarital intercourse. For most contemporary observers, the gulf between the Puritan world and our own must seem impassable, and properly so: There simply is and should be no way to reconcile our world's official *laissez-faire* approach to sexuality with the Puritan preference for official interference in the sexual domain. The problem for women today is that we seem to inhabit neither of these two worlds; rather, we live in a world that combines the worst features of both. Ostensibly, our culture long ago rejected the notion that those who engage in nonmarital sex should bear an official stigma, and, therefore, our lawmakers (practically) have repealed the fornication and adultery laws, leaving the field of heterosexual intercourse to the autonomous choices of the individual participants. Yet, when women bring a rape complaint in order to vindicate their interest in heterosexual autonomy, they discover that this movement towards decriminalizing nonmarital sexuality has been far from complete insofar as they are concerned. Though our system no longer punishes anyone directly for fornication or adultery, the substantive elements of rape still are calibrated so as to require women to prove—as a condition for convicting the men who violated their interest in sexual self-determination—that they should not be held responsible for one of those offenses. As is the case with other forms of sex discrimination still practiced today, it would be naïve to think that doctrinal solutions alone may eliminate this bias against women; surely, the social attitudes and practices that stigmatize female sexual ac-

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<sup>148</sup> See Dayton, *supra* note 62, at 114-15, 173.

tivity will influence the outcome of rape trials long after all remnants of that stigma have been eliminated from the official definition of rape. Yet, because we can isolate the precise substantive connection between that (former) stigmatization of consensual sex and the elements of rape, we should immediately move to reform the definition of rape so that law enforcement officials no longer are licensed to construe rape complaints as admissions of guilt for which women alone must seek to be pardoned.