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EVOLUTIONARY BIOLOGY AND RAPE

Deborah W. Denno*

ABSTRACT: This article queries whether an evolutionary analysis of rape may be more compelling in explaining a rape victim's fear than a defendant's sexual aggression. Such a victim-oriented approach could help legal decisionmakers assess the reasonableness of the victim's fear when determining whether sex was forced or threatened. These ideas are explored in the context of two well-known rape trials, *State v. Rusk* and *State v. Smith*. This article concludes that evolutionary biology can contribute to an understanding of rape. However, the supposed evolutionary underpinnings of male sexual aggression should not justify such behavior or render it acceptable as a criminal defense. Moreover, evolutionary research must be evaluated in a social frame so that generalizations do not unfairly or inaccurately bias plaintiffs or defendants.

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Increasingly, criminal law embraces biological research to explain human behavior.¹ This article considers the implications of applying evolutionary biology to understand the rape of women by men.² An “evolutionary analysis in law”

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1. See generally ALAN M. DERSHOWITZ, *THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY* (1994); Deborah W. Denno, *Human Biology and Criminal Responsibility: Free Will or Free Ride?*, 137 U. PA. L. REV. 615 (1988) [hereinafter Denno, *Human Biology*]; Deborah W. Denno, *Gender, Crime, and the Criminal Law Defenses*, 85 J. CRIM. L. & CRIMINOLOGY 80 (1994) [hereinafter Denno, *Gender*]; Owen D. Jones, *Law and Biology: Toward an Integrated Model of Human Behavior*, 8 J. CONTEMP. LEGAL ISSUES 167 (1997).

2. Rape and attempted rape are comparatively rare crimes, constituting less than 3% of all violent crimes examined by the National Crime Survey. Each year from 1973 to 1987, there were 1.6 rapes per 1,000 women age 12 or older, which indicates that annually, one out of every 600 women was a rape victim. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS—FEMALE VICTIMS OF VIOLENT CRIME 7–12 (1991). This article's focus on the rape of women by men is not intended to

approach to rape seems viable given the importance of “reproductive success” in evolution.³ The challenge is to develop laws that both accommodate and control our biology. Simply because human motivations and drives are “natural” or “evolutionary” does not mean that they are beneficial or comport with the way we want the world to be.⁴

This article first details one classic rape case to illustrate an evolutionary analysis approach and to illuminate the social and legal underpinnings of rape law. Next, the article discusses the promises and pitfalls of an evolutionary analysis. It suggests that the evolutionary approach may provide a fairer and more compelling explanation of a rape victim’s behavior, rather than a rape defendant’s sexual aggression, for several reasons. First, there is no longer a purpose or place for sexual aggression in human society. As a result, there should be no “my maleness made me do it” defense. Second, data indicating men’s greater proclivity to have sex and to engage in impersonal sex with a variety of partners are inappropriately pejorative and overinclusive because these data cannot identify who is actually going to rape. On the other hand, evolutionary theory may help explain a woman’s fear of rape under circumstances not apparent to judges and juries. Legal decisionmakers could consider an evolutionary analysis of a victim’s fear when determining whether sex was forced or threatened in the same way they may rely on rape trauma syndrome evidence to help explain a woman’s post-rape symptoms, or battered woman syndrome evidence to help explain a woman’s stay in an abusive relationship. Evolutionary data can help specify whether that fear was reasonable.

This article concludes that evolutionary biology can contribute to an understanding of rape. It is, however, essential to consider social norms, acknowledge the need for women to have more control (and men less control) over women’s sexuality, and know that sexual aggression can be deterred and prevented.

I. THE ELEMENTS OF RAPE LAW

Most state law definitions of rape contain five elements: (1) the act of sexual intercourse; (2) the victim’s lack of consent to intercourse; (3) the defendant’s intent to engage in intercourse; (4) the defendant’s use of force in achieving intercourse; and (5) the victim’s resistance to intercourse.⁵ A defendant’s good

downplay or disregard the severity of rapes involving other gender patterns, such as male-on-male rape. See Deborah W. Denno, *Why Rape Is Different*, 63 *FORDHAM L. REV.* 125, 127–28 (1994).

3. Owen D. Jones, *Evolutionary Analysis in Law: An Introduction and Application to Child Abuse*, 75 *N.C. L. REV.* 1117, 1133 (1997).

4. See Cheryl Hanna, *Can a Biological Inquiry Help Reduce Male Violence Against Females? or What’s a Nice “Gal” Like Me Doing at a Conference Like This?*, 22 *VT. L. REV.* 333, 334 (1997).

5. See Deborah W. Denno, *Sexuality, Rape, and Mental Retardation*, 1997 *U. ILL. L. REV.* 315, 340. Certain classes of individuals are legally unable to consent to intercourse: for example, children up to a certain age, related individuals, or persons who are mentally incapacitated, either because of mental retardation, drugs, or alcohol. *Id.*

faith belief that the victim consented can, in many states, negate the element of intent. Alternatively, the defendant's mistaken belief of consent can become a defense only if it is "reasonable."⁶

The reasonable belief defense is controversial. Because elements such as force and consent are vague and socially constructed, courts have relied on a range of presumably objective factors to help decipher these elements. These factors include the nature of a past sexual relationship (if any) between the defendant and the victim, as well as circumstances enhancing the victim's fear or vulnerability, such as geographic isolation.⁷

State v. Rusk,⁸ a casebook classic rape case,⁹ illustrates the subtle interplay between these factors and the elements of rape. In *Rusk*, the plaintiff, Pat, and her girlfriend, Terry, met at a high school alumnae gathering and drove separately to a bar. At the bar, Pat started conversing with Edward Rusk, who apparently knew Terry. After talking about being separated from their spouses, Pat informed Rusk that she needed to return home because it was a weeknight and she would be up early with her baby. When Rusk requested that Pat drive him home, Pat agreed, but explained that she was driving him only "as a friend."¹⁰

Twenty minutes later, between 12:30 and 1:00 a.m., Pat and Rusk arrived at Rusk's apartment. Pat testified that a series of events then "scared" her into believing Rusk would rape her. Pat was "totally unfamiliar" with the neighborhood. Rusk turned off the ignition and took her car keys. He disregarded her "repeated refusals" to come up to his room, as well as her protestation that because she was separated from her husband she could not come up even if she wanted to since a detective could be watching her. Eventually, Rusk walked over to her side of the car and opened her car door, inquiring again if she would come up with him.¹¹ She explained, "[I]t was the way he looked at me, and said 'Come on up, come on up' and when he took the keys, I knew that was wrong."¹²

After accompanying Rusk to his one-room apartment, Pat sat in a chair beside the bed while Rusk left the room for a few minutes. During this time, Pat remained silent, made no attempt to leave, and testified that she did not see the telephone in the room. When Rusk returned, he removed Pat's clothing and had her remove some of his. He also said that he wanted her to stay when she requested to leave. While crying and asking if she could leave, Pat engaged in oral sex and vaginal intercourse with Rusk.¹³ She claimed she thought he would kill

6. *See id.* at 340–41.

7. *See infra* notes 56–62 and accompanying text.

8. 424 A.2d 720 (Md. 1981).

9. Major criminal law casebooks highlighting *Rusk* include JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 363 (2d. ed. 1999); SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 333 (6th ed. 1995); LLOYD L. WEINREB, *CRIMINAL LAW: CASES, COMMENT, QUESTIONS* 445 (6th ed. 1998).

10. *See Rusk*, 424 A.2d at 721.

11. *See id.*

12. *Id.* at 721–22.

13. *See id.* at 722.

her if she refused to have intercourse. She also claimed that he started to choke her “lightly” when she cried. In addition, Pat testified that she asked, “If I do what you want, will you let me go?” and that Rusk said, “Yes.”¹⁴

After intercourse, Pat immediately asked Rusk if she could leave, and he said, “Yes.” When Rusk asked Pat for her telephone number, she said she would see him again sometime, although she had no intention of doing so. Within hours, Pat contacted the police and took them to Rusk’s apartment.¹⁵ Charges were filed, and a jury found Rusk guilty of second degree rape for engaging in “vaginal intercourse with another person [by] force or threat of force against the will and without the consent of the other person.”¹⁶ The Maryland Court of Appeals affirmed.¹⁷ On appeal, the issue was whether Rusk’s conduct constituted a sufficient degree of force. The next part of this article considers whether expert testimony on evolutionary biology could illuminate these factual circumstances. It applies an abbreviated four-stage model to frame the purpose, theories, conflicts, and applicability of an evolutionary analysis approach to rape in the context of *Rusk*.¹⁸

II. AN EVOLUTIONARY ANALYSIS APPROACH TO RAPE

The legal goals of rape prevention and justice for both rape plaintiffs and defendants suggest, at least initially, an evolutionary analysis approach to both sides of *State v. Rusk*. For example, Rusk could argue that he reasonably believed Pat had consented based not only on her actual conduct (agreeing to drive him home after knowing him only a short time and meeting him at a bar), but also on the “male lenses” through which he viewed her conduct.¹⁹ Perhaps evolutionary biology could help discern what the reasonable male “sees.” Evolutionary

14. *Id.*

15. *See id.*

16. *See id.* at 720 (quoting MD. CODE ANN., art. 27, § 463(a)(1)).

17. *See id.* at 728 (reversing the Court of Special Appeals and remanding with directions to affirm the judgment of the Criminal Court of Baltimore). Such appellate to-and-fro highlights how close and controversial the facts of *Rusk* were.

18. *See Jones, supra* note 3, at 1157–59 (providing a four-stage model for an evolutionary analysis of law). This article conceptualizes a modified version of this four-stage model as follows: (1) *The purpose of evolutionary analysis and the legal goal*: to prevent rape and ensure legal justice for both the rape plaintiff and the defendant; (2) *The relevant evolutionary theories, evidence, and predictions*: to consider evidence of gender differences in sexuality and perception of sexual scenarios; (3) *Conflicts and compatibilities among prevailing evolutionary theories*: to assess the hypotheses of rape as a by-product and rape as an adaptive tactic; (4) *The application of evolutionary analysis to help generate new legal strategies and identify policy conflicts*: to evaluate the appropriate frame of reference for determining “reasonableness” in mistake of fact cases, and for proposing less injurious ways for men and women to interact sexually.

19. Rusk never raised a reasonable mistake of fact defense, but rather claimed that he did not force Pat to have intercourse. This discussion of *Rusk* considers such a defense nonetheless, as it is commonly raised in rape cases.

biologists, however, debate whether human rape is a “by-product” or “adaptation,” and these theories have different implications.²⁰

A. The By-Product and Adaptation Explanations of Rape

The rape as a by-product hypothesis emphasizes differences in the emotional and behavioral characteristics of male and female sexuality. These differences supposedly explain the male’s relatively greater need for sexual activity, reliance on visual arousal and sexual variety, and ability to engage in impersonal and indiscriminate sex.²¹ Such male characteristics also create a circumstance in which “the typical male is at least slightly sexually attracted to most females, whereas the typical female is not sexually attracted to most males.”²² While such a mechanism helps males avoid overlooking possible mates, “it also means that males are more likely than females to engage in misdirected or resisted copulatory attempts.”²³

An alternative view is that rape constitutes an adaptive behavioral mating strategy. From this perspective, a man is more likely to rape when the potential benefits of the rape behavior (the creation of additional offspring) are greater than the potential costs (resources and risks expended) due to some likelihood of

20. See Craig T. Palmer, *Human Rape: Adaptation or By-Product?*, 28 J. SEX RES. 365, 366 (1991) (“Differentiating adaptations from by-products is a central task in modern evolutionary biology.”). An “adaptive” behavior “has been ‘designed’ for natural selection for a specific function.” *Id.* “[T]he type of thing that could be an adaptation is a psychological mechanism in the human male’s psyche that exists solely because it allowed males to increase their reproductive success by raping.” *Id.* at 368. Therefore, the distinction between adaptation or by-product hinges on “whether the mechanisms involved in rape have been selected for rape itself, or for a variety of other behaviors.” *Id.*

21. See JOHN ALCOCK, *ANIMAL BEHAVIOR: AN EVOLUTIONARY APPROACH* 620–24 (6th ed. 1998); Palmer, *supra* note 20, at 369. In one study, researchers found vast gender differences in a sample of college undergraduates asked to assess the probability that they would want to have sexual intercourse with an attractive person after knowing that person for a period ranging from one hour to five years. See ALCOCK, *supra*, at 620–21. “After knowing a potential mate for just 1 hour, men are slightly disinclined to consider having sex, but the disinclination is not strong. For most women, sex after just 1 hour is a virtual impossibility.” *Id.* (citation omitted). See also Neil M. Malamuth, *An Evolutionary-Based Model Integrating Research on the Characteristics of Sexually Coercive Men*, in 1 *ADVANCES IN PSYCHOLOGICAL SCIENCE* 151, 157 (J.G. Adair et al. eds., 1998) (citing research indicating “that approximately one-third of the male population says that they would coerce a woman into sexual acts if they could be assured that they would not suffer any negative consequences and that they would find such acts sexually arousing,” as compared to a substantially smaller proportion of women indicating such a proclivity); Vernon L. Quinsey & Martin L. Lalumière, *Evolutionary Perspectives on Sexual Offending*, 7 *SEXUAL ABUSE: J. RES. & TREATMENT* 301, 303 (1995) (noting a positive correlation between self esteem and number of previous sexual partners among young males whereas the reverse is evident among young females); Randy Thornhill & Nancy Wilmsen Thornhill, *The Evolutionary Psychology of Men’s Coercive Sexuality*, 15 *BEHAV. & BRAIN SCI.* 363, 366 (1992) (explaining that because women are more discriminating about their sexual partners and delay intercourse, “men, to get sexual access, must often break through feminine barriers of hesitation, equivocation, and resistance”).

22. Palmer, *supra* note 20, at 369 (citation omitted).

23. *Id.* at 372 (citations omitted).

victim resistance or legal retribution that would impede the rapist's (or his relative's) reproductive gain.²⁴ Rape is an "evolved facultative behavior that is condition dependent."²⁵ It is used "by men who are unable to compete for resources and status necessary to attract and reproduce successfully with desirable mates."²⁶

Both the by-product and adaptation hypotheses depict male sexual behavior as reproductive-driven;²⁷ yet, they also show major differences. Advocates of a by-product approach claim that rape is not an adaptive reproductive strategy because the tactics involved in achieving rape were not selected specifically for rape.²⁸ They also maintain that there is inadequate evidence to support the adaptive view,²⁹ and particularly the "low benefits and high costs of rape."³⁰

B. Defendant-Oriented vs. Victim-Oriented Perspectives

Does either the by-product or adaptation hypothesis enhance an understanding of *Rusk*? Although this article proposes that, in general, evolutionary theory and data may be more supportive of victims than defendants, this is not the traditional view and does not hold true in all rape cases. The facts and circumstances of each case are critical.

According to some commentators, the proposition that rape is motivated primarily by sex rather than power, control, domination, or violence³¹ provides an

24. See *id.* at 369; Craig T. Palmer, *Twelve Reasons Why Rape Is Not Sexually Motivated: A Skeptical Examination*, 25 J. SEX RES. 512, 523 (1988) [hereinafter Palmer, *Twelve Reasons*] (emphasizing that a rapist's selection of a victim is determined by both the victim's attractiveness and her vulnerability).

25. Randy Thornhill & Nancy Wilmsen Thornhill, *Human Rape: An Evolutionary Analysis*, 4 ETHOLOGY & SOCIOBIOLOGY 137, 137–38 (1983).

26. *Id.*

27. See ALCOCK, *supra* note 21, at 624 ("Discriminating between the rape as by-product and rape as adaptive tactic is difficult, given that they generate many of the same predictions.")

28. See Palmer, *supra* note 20, at 369.

29. See *id.* at 379. For example, there is no indication that "human" scorpionflies exist. See *id.* at 371 (citing evidence that the "notal organ of scorpionflies appears to have been 'designed' specifically for rape").

30. *Id.* at 376. Indeed, some commentators claim that the same male characteristics that enhance the likelihood of rape "could have been selected solely because they helped human males reproduce by ways other than rape." *Id.* at 379. See also *supra* notes 21–22 and accompanying text; ALCOCK, *supra* note 21, at 622 ("The greater eagerness of males for sex in general is also apparent in the readiness of some to engage in coercive sex, including criminal rape.")

31. See generally Palmer, *Twelve Reasons*, *supra* note 24, at 512 (examining twelve specific arguments claiming that rapists are motivated by control, power, violence, or domination rather than sex, and finding all twelve arguments "to be either logically unsound, based on inaccurate definitions, untestable, or inconsistent with the actual behavior of rapists"). But see Lee Ellis, *A Synthesized (Biosocial) Theory of Rape*, 59 J. CONSULTING & CLINICAL PSYCHOL. 631 (1991) (contending that rapists are motivated by two unlearned drives—the sex drive and the drive to possess and control); Charlene L. Muehlenhard et al., *Is Rape Sex or Violence? Conceptual Issues and Implications*, in SEX, POWER, CONFLICT: EVOLUTIONARY AND FEMINIST PERSPECTIVES 119, 133 (David Buss & Neil M. Malamuth eds., 1996) ("Ultimately, we would like to see this discussion move beyond sex versus violence to one of control.")

excuse for rapists.³² Traditionally, the “sex as an excuse” view and stereotyped presumptions that rape victims encourage rapists have appealed to the general public. In one survey, for example, one half of questioned respondents believed “[a] woman who goes to the home or apartment of a man on the first date implies she is willing to have sex” and “[i]n the majority of rapes, the victim was promiscuous or had a bad reputation.”³³ Although rape shield laws were enacted during the 1970s to prevent defendants from using the victim’s past sexual history to contest a rape accusation,³⁴ a woman’s behavior at the time of the rape (for example, going to a man’s apartment) or merely claiming she was raped still suggests promiscuity to many.

Such stereotypes were evident during phases of the William Kennedy Smith rape case, which ended in acquittal.³⁵ The defense not only constructed a positive biological stereotype of Kennedy Smith’s impersonal sex behavior, it urged a negative biological stereotype of Patricia Bowman’s supposed sexually indiscriminate behavior. Kennedy Smith and Bowman met for the first time in a bar, and Bowman drove Kennedy Smith home. In the parking lot, Bowman admitted that she and Kennedy Smith kissed and that she willingly accompanied Kennedy Smith into the house even though it was late and Bowman had to take care of her infant early the next morning. At some point during the evening, Bowman took off her pantyhose. Bowman claimed that Kennedy Smith raped her while they were on the beach. She testified that afterward Kennedy Smith was “calm,” “cold,” “indifferent,” and “arrogant” to her, although she admitted that prior to the rape, she had hoped that he would take her telephone number. Kennedy Smith claimed that they engaged in consensual sex two separate times during the course of the evening and that during the second act of intercourse, he called out another woman’s name, and Bowman responded hysterically.³⁶

According to one commentator, the facts and circumstances of the Kennedy Smith case were presented through an “arbitrary male’s” lenses—“the all-or-nothing, impersonal, and penetration-oriented normative preferences of sexuality—governing the interpretation of sexual desire, sexual access, and sexual interaction.”³⁷ The defense accentuated this perspective, depicting “the putative purpose of the evening not as ‘romance’ or even as a prelude to a possible future

32. See ALCOCK, *supra* note 21, at 623.

33. VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 204 (1986).

34. See Denno, *supra* note 5, at 368–70.

35. See Gregory Matoesian, *Language, Law, and Society: Policy Implications of the Kennedy Smith Rape Trial*, 29 L. & SOC’Y REV. 669 (1995); John Taylor, *Men on Trial I, The Palm Beach Rape Case Is the Latest Skirmish on the Sexual Battlefield: Will Men or Women Define the Reality of How They Treat Each Other?*, N.Y. MAG., Dec. 16, 1991, at 22; Videotape: *Florida v. Smith* (The American Lawyer-Court TV Video Library Service 1991) [hereinafter *Florida v. Smith* video] (edited tape of the William Kennedy Smith rape trial).

36. See Matoesian, *supra* note 35, at 678–85.

37. *Id.* at 682.

relationship or an impending date but, at its starkest, as impersonal sex."³⁸ Unwittingly, the prosecution fueled this depiction, to the victim's detriment³⁹

The defense also stressed the reverse sexual stereotype. Because Bowman supposedly complied with the typical male norm favoring impersonal sex, she contradicted "her own feminine normative preferences for sex in an intimate relationship."⁴⁰ This contradiction caused Bowman to feel "angry and guilty," so much so that she reacted hysterically, attempted to force some semblance of romance back into the situation to avoid further embarrassment, and then fabricated the rape charge.⁴¹ In sum, as the facts were presented, Kennedy Smith epitomized the typical sex-motivated evolutionary biological male, while Bowman contradicted the typical sex-discriminating evolutionary biological female. The jury chose to believe Kennedy Smith's representation that the sex was consensual, rather than Bowman's assertions that the sex was forced.

Increasingly, however, rape judgments show intolerance for male sexual aggression,⁴² irrespective of evolutionary biology research suggesting that "the *potential* for male sexual aggression is inherent in our species."⁴³ Moreover, the few high profile rape cases that have relied on sexual aggression as a "defense" have failed. A notorious case involved Mike Tyson, who attempted to explain his intercourse with Desiree Washington by invoking the stereotype of African American men as "oversexed" and "prone to violent and aggressive behavior."⁴⁴ Comparably ridiculed was the "boys will be boys" defense in the Glen Ridge case, involving four teenage high school sports stars convicted of raping their mildly mentally retarded neighbor with a broomstick and fungo bat.⁴⁵ The jury rejected defendants' claims that their actions were caused by "out of control hormones" sparked by the "loose," "devious," and "sexually active" victim.⁴⁶

38. *Id.* at 685.

39. For example, the prosecution was ridiculed for fervent questioning of Kennedy Smith's ability to convince the victim, through his "animal magnetism," to have intercourse with him twice after having met Bowman for the first time at a bar a few hours earlier. See *Florida v. Smith* videotape, *supra* note 35. In so doing, the prosecution appeared out of touch with social reality; the defense did not need a biology expert to testify that (attractive) males of Kennedy Smith's age were willing and able to engage in quick, impersonal, and indiscriminate sex.

40. Matoesian, *supra* note 35, at 685.

41. See *id.* at 686.

42. There are notable exceptions to this generalization. See Denno, *Gender*, *supra* note 1, at 133-34 (discussing cases, such as the "Spur Posse" episode, where defense tactics employed, with varying degrees of success, the "boys will be boys" and "testosterone theory" defenses to explain the "normal" sexual aggression of young male defendants).

43. Ronald D. Nadler, *Sexual Aggression in the Great Apes*, 528 ANNALS N. Y. ACAD. SCI. 154, 160 (1988).

44. Kevin Brown, *The Social Construction of a Rape Victim: Stories of African-American Males About the Rape of Desiree Washington*, 1992 U. ILL. L. REV. 997, 1005-06.

45. See Denno, *supra* note 5, at 316-18.

46. See *id.* at 362-65.

C. An Evolutionary Analysis of *State v. Rusk*

An evolutionary biology approach is, however, a double-edged sword for a defendant like Rusk. On the one hand, Rusk could argue that he reasonably believed his encounter with Pat was consensual because, as a typical or reasonable male, he is at least “slightly attracted” to “most” females⁴⁷ and is more willing to engage in impersonal sex with a variety of casual partners.⁴⁸ Rusk could also contend that he reasonably believed Pat would consent because she drove him to his apartment after having just met him. On the other hand, facts indicated that Rusk’s sexual motivation that evening was premeditated and predatory. For example, one of Rusk’s friends testified that he and Rusk went to the bar “to dance, drink and ‘tr[y] to pick up some ladies.’”⁴⁹ Moreover, Rusk had intercourse with Pat in a rented apartment; he resided elsewhere.⁵⁰ Thus, Rusk’s motivation for sex heightened the probability that he would miss or disregard Pat’s nonconsensual cues and engage in threatening behavior to achieve his goal. Given the isolated setting and Pat’s vulnerability, Rusk also may have believed the likelihood of punishment or victim resistance was less than the potential benefit of the forced sexual intercourse.

Lastly, the supposed “natural” or “evolutionary” underpinnings of male sexual aggression do not justify, or render acceptable, such behavior. For example, most violent crime is committed by males,⁵¹ but this statistic does not diminish a male defendant’s blameworthiness or promote a “my maleness made me do it” defense. Most males never commit a violent or sexually aggressive act.⁵² Violence and sexual aggression are either no longer “natural” or they can be successfully deterred.

In sum, evolutionary evidence is not beneficial for Rusk. It may, however, help to explain Pat’s behavior. While the dissent questioned Pat’s fear of Rusk,⁵³ research has revealed that primates use intimidating posturing and threatening looks to acquire sexual access without physical force beyond penetration.⁵⁴ Evolutionary theory also may bolster Pat’s explanation for why she failed to resist

47. See *supra* note 22 and accompanying text.

48. See *supra* note 21 and accompanying text.

49. *Rusk*, 424 A.2d 720, 733–34 (Md. 1981).

50. See *id.*

51. See Denno, *Gender*, *supra* note 1, at 80–82, 86.

52. See *supra* note 2 and accompanying text.

53. See *Rusk*, 424 A.2d at 733–34.

54. Men who rape employ intimidation strategies not unlike those used by the great apes during episodes of forced copulation. See Nadler, *supra* note 43, at 160 (stating that if the behavior of great apes can be extrapolated to humans, “the probability of a human female encountering sexual aggression is directly related to conditions—social, cultural, and environmental—that permit the male’s dominance over the female to assume the predominant role in the regulation of their sexual interactions and thereby reduce the female’s prerogatives for refusing sexual overtures”); Ronald D. Nadler, *Sexual Behavior of Orangutans (Pongo Pygmaeus): Basic and Applied Implications*, in *THE NEGLECTED APE* 223, 235 (Ronald D. Nadler et al. eds., 1995) (recommending that provisions be made to allow captive female orangutans to avoid the male’s sexual initiatives).

Rusk's behavior more fervently, by resisting physically or calling for help. Moreover, the facts in *Rusk* suggest that Pat was neither sexually nor romantically motivated during the evening of the rape. She went to the bar by happenstance after meeting a girlfriend. She indicated repeatedly that she never wanted to go to Rusk's room and that she needed to be home with her child, and she felt more vulnerable due to her geographic isolation. From an evolutionary biology perspective, Rusk and Pat typify their sex in ways that hurt Rusk's defense but help Pat's credibility.

III. EVOLUTIONARY BIOLOGY, RAPE LAW, AND SOCIAL POLICY

Although rape law has yet to incorporate explicitly evolutionary biology research, legal doctrine embraces such research implicitly to distinguish acceptable sexual strategies from pathological and injurious ones. Such distinctions are also made within a social frame.⁵⁵ For example, courts consider (1) the nature and extent of a past (sexual) relationship between the defendant and the victim;⁵⁶ (2) the nature and extent of the victim's physical injury;⁵⁷ (3) whether there was a threat of force;⁵⁸ (4) the victim's perception of force or threat of force;⁵⁹ as well as (5) aggravating circumstances or other indicators of victim

55. Incorporating a social frame is of course different from relying only on a social frame. See Jones, *supra* note 3, at 1154 (noting the "glaring weaknesses" in hypotheses suggesting that "all relevant human behavior is socially constructed").

56. Compare *Rusk*, 424 A.2d at 720 (rape conviction, no past relationship, met for the first time), with *State v. Alston*, 312 S.E.2d 470 (N.C. 1984) (no rape conviction, a prior sexual relationship), and *Commonwealth v. Berkowitz*, 641 A.2d 1161 (Pa. 1994) (no rape conviction, flirtatious acquaintances); see also MODEL PENAL CODE § 213.1(1) (noting that rape is a felony of the first degree if the defendant seriously injures anyone or if "the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties").

57. Compare *Rusk*, 424 A.2d at 720 (evidence of "light choking" directly prior to the act of intercourse), with *Berkowitz*, 641 A.2d at 1161 (no force apart from sexual insertion), and *In re MTS*, 609 A.2d 1266 (N.J. 1992) (no force apart from sexual insertion); see also MODEL PENAL CODE § 213.1(1)(a) (stating that a male is guilty of raping a female if "he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone").

58. Compare *Rusk*, 424 A.2d at 727-28 (the victim's reasonable fear of death, serious bodily harm, etc. justifies her lack of resistance to a defendant's acts), with *People v. Evans*, 379 N.Y.S.2d 912 (N.Y. Sup. Ct. 1975) (noting that the "controlling state of mind must be that of the [defendant]").

59. This factor generally concerns two standards for determining whether or not the victim's fear is "reasonable": (1) the *objective standard*, see, for example, *Rusk*, 424 A.2d at 727 ("The vast majority of jurisdictions require that the victim's fear be reasonably grounded to obviate the need for either proof of actual force on the part of the assailant or physical resistance on the part of the victim."); and (2) the *subjective standard*, see, for example, *Salsman v. Commonwealth*, 565 S.W.2d 638, 641 (Ky. Ct. App. 1978) ("a subjective rather than objective standard must be applied").

vulnerability, including geographical isolation,⁶⁰ multiple defendants,⁶¹ and repellant sexual conduct that reasonable people would not agree to.⁶²

It appears that rape law is gradually siding with the female lenses of what conduct is considered threatening or unreasonable,⁶³ emphasizing the extent of a woman's control in sexual relationships.⁶⁴ The focus on control stems from two realizations: (1) men who rape (or engage in other kinds of violence toward women) tend to have personality characteristics indicating dominance and control; and (2) women who have control are less vulnerable and therefore less frequently victimized.⁶⁵

The turn toward control in discussions of rape comports with a similar focus in evolutionary biology literature. For example, Ronald Nadler concludes that the inherent potential for male sexual aggression "is likely to be expressed under a variety of conditions unless society and individuals take specific measures to preclude it."⁶⁶ He contends that the recent acceptance of laws prohibiting sexual harassment in the workplace—the "traditional domain[] of male power and dominance"—is supported by research results on the great apes.⁶⁷ Increasing control for females and decreasing control for males may promote greater equivalence between the sexes that can prevent or reduce sexual aggression.

In sum, the evolutionary approach explains a rape victim's fear and apprehension better than a rape defendant's sexual aggression. First, there is no social function for male sexual aggression and no defense for it based solely on an individual's sex. Second, data indicating a greater male proclivity to have sex and to engage in impersonal sex cannot identify who is going to rape. On the other hand, the research helps explain a woman's fear of rape and can provide guidance in determining what fear is reasonable. The research could be introduced into court the same way as other victim-oriented strategies, such as expert testimony

60. Compare *Rusk*, 424 A.2d at 721 (victim testified that "she was totally unfamiliar with the neighborhood"), and *Commonwealth v. Sherry*, 437 N.E.2d 224 (Mass. 1982) (victim driven to unfamiliar house), with *Berkowitz*, 641 A.2d at 1161 (plaintiff visiting an acquaintance's dorm room at plaintiff's college).

61. Compare *Berkowitz*, 641 A.2d at 1163 (one defendant), with *In re B.G.*, 589 A.2d 637 (N.J. Super. Ct. App. Div. 1991) (four defendants), and *Sherry*, 437 N.E.2d at 224 (three defendants).

62. See *In re B.G.*, 589 A.2d at 641 (insertion of a broomstick and baseball bat).

63. See *supra* notes 42–46 and accompanying text.

64. See Muehlenhard, *supra* note 31 at 133 (encouraging a focus on control, rather than sex versus violence as the underlying source for rape).

65. See Ellis, *supra* note 31, at 631 (contending that rapists are motivated by sex and the drive to possess and control); Malamuth, *supra* note 21, at 178 (concluding that men who use sexually coercive tactics have personality characteristics indicating dominance); Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1563 (1998) (noting that "most" domestic violence is "used in varying degrees and with different motivations to gain some advantage or control over a mate"); Margo I. Wilson & Martin Daly, *Male Sexual Proprietariness and Violence Against Wives*, 5 CURRENT DIRECTIONS IN PSYCHOL. SCI. 2, 2 (1996) (emphasizing that "unusually controlling husbands are also unusually violent husbands" and that "wife assault appears to go hand in hand with other tactics of control").

66. See Nadler, *supra* note 43, at 160.

67. *Id.*

on rape trauma syndrome (to explain the symptoms of a sexual assault)⁶⁸ or battered woman syndrome (to explain why a battered woman would continue to stay with her assailant).⁶⁹ Evolutionary research must be evaluated in a social frame, however, so that generalizations do not unfairly or inaccurately bias plaintiffs or defendants.

This article considers the implications of an evolutionary analysis of rape by discussing evolutionary biology research in the context of selected rape cases. It concludes that, with some exceptions, an evolutionary approach is a more just and viable way to explain a rape victim's fear and apprehension than a rape defendant's sexual aggression. Evolutionary data can provide legal decisionmakers context or guidance for determining whether a rape victim's fear is reasonable. In this way, an evolutionary analysis of law approach can enhance our understanding of human behavior and better protect plaintiffs and defendants.

68. See JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW 494–511 (4th ed. 1998).

69. See Denno, *Gender*, *supra* note 1, at 148–51.