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# Rape, Violence, and Women's Autonomy

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# RAPE, VIOLENCE, AND WOMEN'S AUTONOMY

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## INTRODUCTION

One of feminism's most dramatic contributions to legal culture has been expanding society's perception of what constitutes rape. Reforming rape law raises the question, "What is wrong with rape?"—meaning, what is the injury to women who are raped and why hasn't the law recognized that injury? Feminists have answered these questions by demonstrating that the law of rape historically has regulated competing male interests in controlling sexual access to females, rather than protecting women's interest in controlling their own bodies and sexuality.[1] Some feminist reformers proposed instead as the object of modern rape law "a celebration of our autonomy."[2] Ironically, the feminist critique of rape law has involved both explaining rape as violence and explaining rape as heterosexual sex.[3] Rape embodies both physical harm and a subordinating sexuality; "Rape is an act of violence similar to other crimes of physical assault, but the meaning of this violence is unmistakably the demonstration of power

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1. *See, e.g.*, SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975); ANDRA MEDEA & KATHLEEN THOMPSON, AGAINST RAPE (1974); DIANA E.H. RUSSELL, THE POLITICS OF RAPE: THE VICTIM'S PERSPECTIVE (1975).

2. SUSAN ESTRICH, REAL RAPE 102 (1987).

3. *Compare* BROWNMILLER, *supra* note 1, at 15 (interpreting rape as an act of violence) *and* Patricia Searles & Ronald J. Berger, *The Current Status of Rape Reform Legislation: An Examination of State Statutes*, 10 WOMEN'S RTS. L. REP. 25, 25-26 (1987) (describing one feminist reform "that redefined rape as sexual assault in order to emphasize that rape was a violent crime and not a crime of uncontrollable sexual passion") *with* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 134-36, 173-74 (1989) (criticizing the view of rape as a crime of violence, not sex, for failing to include a critique of heterosexuality). *Compare also* A. Nicholas Groth et al., *Rape: Power, Anger, and Sexuality*, 134 AM. J. PSYCHIATRY 1239, 1240 (1977) (explaining that rape is "concerned much more with status, aggression, control, and dominance than with sensual pleasure or sexual satisfaction") *with* DIANA SCULLY, UNDERSTANDING SEXUAL VIOLENCE 143 (1990) ("Make no mistake, for some men, rape is sex—in fact, for them, sex is rape."). The classic interpretation of heterosexual intercourse as the violent penetration of women by men is ANDREA DWORKIN, INTERCOURSE (1987).

over women."[4] The greatest challenge to feminist reformers has been crafting a legal remedy for this *political* aspect of rape's injury to women—one that accounts for rape's violation of both women's bodies and humanity, and that grasps how rape is both criminal and derived from ordinary relations between men and women.

Despite two decades of rape reform, the effort continues to increase the criminal law's protection of female sexual autonomy. To this end, two criminal law scholars recently proposed a refiguring of rape law. In essays appearing simultaneously, Donald Dripps and Stephen Schulhofer present alternative visions of rape law that reject the traditional solitary crime of rape centered on violence.[5] Both scholars criticize the conjunction of force and nonconsent that remains the gravaman of rape[6] and propose new schemes which distinguish between violent sexual assaults and nonviolent impairment of sexual autonomy.[7]

Although they arrive at similarly structured statutes, Dripps and Schulhofer proceed from very different understandings of sexual relations. Their justifications for protecting sexual autonomy differ dramatically. Schulhofer suggests extending the interest protected by rape law from freedom from violence to "sexual autonomy as a distinctive constitutent of personhood and freedom."[8] He proposes a "thin" sense of autonomy—the capacity of individuals to "act freely on their own unconstrained conception of what their bodies and their sexual capacities are for."[9] This model replaces the typical preoccupa-

4. Kristin Bumiller, *Rape as a Legal Symbol: An Essay on Sexual Violence and Racism*, 42 U. MIAMI L. REV. 75, 81 (1987).

5. Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780 (1992); Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 LAW & PHIL. 35 (1992).

6. Dripps and Schulhofer report that, despite widespread rape reform in the 1970s and 1980s, nearly all states retained as essential elements both force and nonconsent. Dripps, *supra* note 5, at 1784; Schulhofer, *supra* note 5, at 39. *See generally* Searles & Berger, *supra* note 3 (documenting the status of rape reform legislation). As Dripps points out, the requirement of both force and nonconsent means that "no matter how much force is used to obtain it, consent can still occur," and that "no matter how nonconsensual the sex may be, there is no crime without force." Dripps, *supra* note 5, at 1793-94.

In a rare departure from this tradition, the New Jersey Supreme Court recently upheld a rape conviction where there was no separate showing of physical force. *See* State ex rel. M.T.S., 609 A.2d 1266 (N.J. 1992). Comparing New Jersey's rape reform legislation to the law of assault and battery, the Court held that the physical force element could be satisfied "if the defendant applies any amount of force against another person in the absence of what a reasonable person would believe to be affirmative and freely-given permission to the act of sexual penetration." *Id.* at 1277.

7. Dripps, *supra* note 5, at 1797; Schulhofer, *supra* note 5, at 36.

8. Schulhofer, *supra* note 5, at 35.

9. *Id.* at 70.

tion with force and nonconsent with a concern for the preconditions for women's meaningful choice in sexual matters. Under Schulhofer's approach, sexual crimes would be organized in two separate groups: "rape" would include intercourse by actual or threatened physical violence; "sexual abuse" or "sexual misconduct" would include nonviolent interference with freedom of choice.[10]

Dripps, on the other hand, justifies his scheme with a "commodity theory" that views sexual cooperation as "a service much like any other, which individuals have a right to offer for compensation, or not, as they choose."[11] He defines sexual autonomy as "freedom from illegitimate pressures to provide this particular service."[12] Dripps's reform also centers on distinguishing sexual autonomy from freedom from violence. He identifies two distinct harms to women—the use of force, which violates the interest in freedom from physical injury, and the use of another person's body for sexual gratification, which violates the interest in exclusive control of one's body for sexual purposes.[13] Like Schulhofer's, his scheme punishes these harms through two separate offenses—"sexually motivated assault," defined as inflicting or threatening physical injury for the purpose of causing sex, and "sexual expropriation," defined as purposely or knowingly engaging in a sexual act with another person, knowing that the other person expressed a refusal to engage in that act.[14] Dripps's commodity theory of sex, however, leads him to see as an acceptable aspect of sexual bargaining pressures which Schulhofer finds at least problematic.[15]

These essays renew difficult questions about the relationship between violence, heterosexuality, and women's autonomy. Can the criminal law reconfigure these concepts in a way that better redresses women's injury from sexual subordination? The critical contribution of these essays is their effort to give women's sexual autonomy concrete protection. I agree with Schulhofer's basic premise that "taking sexual autonomy seriously means at the very least making this core constitutent of human freedom an explicit part of criminal law stan-

10. *Id.* at 67.

11. Dripps, *supra* note 5, at 1786. For another comodification theory of sex and rape, see RICHARD A. POSNER, SEX AND REASON (1992). For a critique of Dripps's comodification theory of sex, see Robin L. West, *Legitimating the Illegitimate: A Comment on* Beyond Rape, 93 COLUM. L. REV. 1442 (1993).

12. Dripps, *supra* note 5, at 1786.

13. *Id.* at 1797.

14. *Id.* at 1807-08. Dripps further distinguishes the two offenses by punishing sexually motivated assault severely, while punishing sexual expropriation by a maximum prison sentence of only one year and one day. *Id.* at 1807.

15. *See infra* note 117 and accompanying text.

dards of permissible behavior and recognizing that violations warrant condemnation and serious penalties."[16] I want to point out, however, three ways in which these proposals may fall short of achieving this goal. Part I demonstrates how blaming rape law's failure to protect women on the association of rape with violence misses more fundamental biases in the law. Part II argues that separating violent rape from nonviolent exploitation neglects important continuities between the two. Finally, Part III argues that relying on a baseline of choice ignores important ways in which society constrains women's autonomy.

All of these shortcomings result partly from the proposals' failure to attend sufficiently to the political significance of sexual assault and exploitation; that is, their role in maintaining unjust relationships of power. These failings may also result from the criminal law's inability to comprehend completely the particular harms of women's sexual violation.[17] I am not so much rejecting a statutory scheme that includes a separate, lesser crime of nonviolent sexual misconduct as exploring the additional work required in order for the law to understand this conduct as an aspect of women's subordination.

## I. THE MEANING OF RAPE

Dripps and Schulhofer argue that the criminal law should punish violations of women's sexual autonomy, and that, to accomplish this, it must distinguish these violations from violence. They blame the criminal law's failure to protect women's sexual freedom on "the seemingly unshakeable association of rape with physically violent misconduct."[18] This assertion raises the question whether the association of rape with violence is really the problem with rape law. It is true that the requirement of extra physical injury has denied women protection. If rape is violence as the law defines it (weapons, bruises, blood), then what most men do when they disregard women's sexual autonomy is not rape.[19] If rape is committed only by violent men, then very few men are rapists. By defining most male sexual conduct as nonviolent, even when it is coercive, it has been possible to exempt a multitude of

16. Schulhofer, *supra* note 5, at 94.

17. Schulhofer recognizes that "this inquiry into conceptual foundations [is not] necessarily central to solving the problem of rape." *Id.*

18. *Id.*

19. *Cf.* Lynne Henderson, *Rape and Responsibility*, 11 LAW & PHIL. 127, 157 (1992) ("In calling rape 'violence', feminists have enabled many men to distinguish what they have done from what rapists do, because they haven't caused external physical damage that they can understand as violence.").

attacks on women's autonomy from criminal punishment, or even critical scrutiny.[20] The category of violence, far from punishing all sexual assaults, actually privileges most of them.

This does not necessarily mean that the problem with rape law derives from its association with violence. Just as significant is rape law's failure to protect women from all that we experience as violence. The interpretation of force and consent depend on factors other than the woman's own experience of injury. Dripps and Schulhofer both demonstrate this indeterminacy, but link it to rape's focus on violence: "So long as rape is viewed as a crime of violence, the core issue remains, as it always was, the elusive one of determining when male conduct is sufficiently forcible to negate a verbal yes."[21] Attributing this indeterminacy to conceptualizing rape as a violent crime, however, misses the law's deeper biases.

Although rape statutes and cases articulate the tests of force and nonconsent, their meaning has always depended on the identity of the victim and the accused. Courts often appear to be asking the question, "How much force should we allow this type of man to use against this type of woman?" Very little force, if any, was required to convict a Black man of raping a white woman.[22] No amount of force was enough to convict a man of raping his wife[23] or a Black woman[24] or a

20. *See* MACKINNON, *supra* note 3, at 173 ("The level of acceptable force is adjudicated starting just above the level set by what is seen as normal male sexual behavior, . . . rather than at the victim's, or woman's, point of violation.").

21. Schulhofer, *supra* note 5, at 42; *see also* Dripps, *supra* note 5, at 1788 (criticizing "the assumption that only force can overcome the woman's absolute autonomy").

22. *See* Jacquelyn Dowd Hall, *"The Mind That Burns in Each Body": Women, Rape, and Racial Violence, in* POWERS OF DESIRE: THE POLITICS OF SEXUALITY 328, 336 (Ann Snitow et al. eds., 1983) ("[W]hen a black man and a white woman were concerned intercourse was prima facie evidence of rape."); Barbara K. Kopytoff and A. Leon Higginbotham, Jr., *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 2015 (1989) ("At trial, the accusation of rape by a white woman seemed virtually to ensure conviction of a Negro."); Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 111 (1983) ("If the accused was Black and the victim white, the jury was entitled to draw the inference, based on race alone, that he intended to rape her."). The judge in the notorious 1931 Scottsboro rape trial of nine Black youths explained this logic:

> Where the woman charged to have been raped, as in this case is a white woman there is a very strong presumption under the law that she would not and did not yield voluntarily to intercourse with the defendant, a Negro; and this is true, whatever the station in life the prosecutrix may occupy, whether she be the most despised, ignorant and abandoned woman of the community, or the spotless virgin and daughter of a prominent home of luxury and learning.

DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 297 (1971) (1969). *See also* Story v. State, 59 So. 480, 482-83 (Ala. 1912) (holding that evidence of a white prostitute's unchastity is not relevant when the defendant accused of raping her is Black).

23. *See* Searles & Berger, *supra* note 3, at 28 (reporting that most states still exempt spouses from definition of some sexual assaults).

24. *See infra* notes 44-49 and accompanying text.

prostitute.[25] Women are not angry about the law's treatment of "acquaintance rape" just because rape laws only protect against violence. They are angry because courts often do not recognize forced sex by acquaintances as rape, even when they use violence.[26]

Categories of entitlement that reflect relationships of power in our society determine the meaning of rape. By entitlement, I mean the man's entitlement to sexual control and the woman's entitlement to the law's protection of her sexual autonomy.[27] In America, the hierarchies that determine rape's meaning are based on race and class, as well as gender. "Rape myths" that determine whether what happened "counts as violation" explain and enforce these categories of entitlement.[28]

American society has always defined rape in terms of race.[29] Race is not a peculiar aspect of rape; race helps to determine what rape means. The racialized history of rape does not diminish rape's roots in ordinary heterosexual relations; in America, rape's racial and sexual origins are inseparably intertwined. This history also clarifies

25. *See* Jane Gross, *To Some Rape Victims, Justice is Beyond Reach*, N.Y. TIMES, Oct. 12, 1990, at A14 (reporting that the criminal justice system frequently disregards rapes of prostitutes and drug addicts).

26. The Model Penal Code, for example, grades rape by a "voluntary social companion" as a less serious offense than rape by a stranger. *See* MODEL PENAL CODE § 213.1(1) (1962). Even when permission for acquaintances to use violence is not statutory, it is often granted by police and prosecutorial decisions, attorneys' trial strategies, juries' verdicts, and victims' reporting decisions. *See* ESTRICH, *supra* note 2, at 14-25; Henderson, *supra* note 19, at 145. *But see* Lois Pineau, *Date Rape: A Feminist Analysis*, 8 LAW & PHIL. 217, 217 (1989) (defining date rape as "nonconsenual sex that does not involve physical injury, or the explicit threat of physical injury").

27. *See* Steven B. Katz, *Expectation and Desire in the Law of Forcible Rape*, 26 SAN DIEGO L. REV. 21, 21, 23 (1989) ("The law of forcible rape is premised on the enforcement of male expectations of sex" and protects "the male right of self-help to enforce reasonable expectations of sexual access"); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 648 (1983) ("The law of rape divides the world of women into spheres of consent according to how much say we are legally presumed to have over sexual access to us by various categories of men."). Rapists explain their actions in terms of their entitlement to sexual access. *See, e.g.*, State v. Alston, 312 S.E.2d 470, 472 (N.C. 1984) (recounting that the defendant told his former girlfriend he had a "right" to have sex with her); WHY MEN RAPE 83 (Sylvia Levine & Joseph Koenig eds., 1980) (quoting a confessed date rapist's statement that, "[W]hen I was rejected for something which I considered to be rightly mine, I became angry and I went ahead anyway.").

I prefer to conceptualize the categories that define rape as degrees of entitlement rather than the general (and solely gendered) categories of female guilt and male innocence because the latter does not account for rape's racialized meaning. *Cf.* Henderson, *supra* note 19, at 130-31 (describing a cultural "story" of male innocence and female guilt in sexual encounters). Underlying the determination of guilt and innocence is the question of entitlement.

28. Mary I. Coombs, *Telling the Victim's Story*, 2 TEX. J. WOMEN & L. 277 (1993).

29. *See* PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT 176-79; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 598-601 (1990); Hall, *supra* note 22; Wriggins, *supra* note 22.

how both the practice and legal interpretation of rape are essentially political. First, the social meaning of rape has centered on a racialized sexual mythology arising from slavery. This mythology defines Black women as sexual objects, while it defines Black men as sexual predators. The image of the sexually loose woman who is unrapable, who always consents, and who is therefore unprotected by the law, is a Black woman. The image of the violent man, who is the rapist, and who is therefore the target of the law, is a Black man.

Even before the African slave trade began, Europeans explained the need to control Africans by mythologizing the voracious "sexual appetites" of Blacks.[30] The Western cultural dichotomy between reason and desire combined with this racist stereotype to create the "white supremacist discourse that depicted whites as rational and civilized, and blacks as irrational and lustful . . . ."[31] The fear of Black sexuality both shaped whites' own identity characterized by sexual repression and justified white domination over Blacks. The image of Black men as a constant threat to the virtue of white womanhood legitimated the violent subjugation of Black men.[32] At the same time, the image of Jezebel, a woman governed by her sexual desires, legitimated white men's sexual abuse of Black women.[33] The myths of the licentious Black woman and brutish Black man were deliberately perpetuated after slavery ended and persist in contemporary American culture. According to theologian Cornel West: "Americans are obsessed with sex and fearful of black sexuality. The obsession has to do with a search for stimulation and meaning in a fast-paced, market-

30. WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812, at 32-40, 151 (1968); Karen A. Getman, *Sexual Control in the Slaveholding South: The Implementation and Maintenance of a Racial Caste System*, 7 HARV. WOMEN'S L.J. 115 (1984).

31. Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 805 (citing ELDRIDGE CLEAVER, SOUL ON ICE 145-73 (1968)). *See also* John L. Hodge, *Mind, Body, and Soul on Ice, in* CULTURAL BASES OF RACISM AND GROUP OPPRESSION 90 (John L. Hodge et al. eds., 1975) (discussing Cleaver's analysis of mind-body dualism in Western thought).

32. Wriggins, *supra* note 22, at 107-13.

33. *See* BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY 163 (Gerda Lerner ed., 1973); ELIZABETH FOX-GENOVESE, WITHIN THE PLANTATION HOUSEHOLD 292 (1988); DEBORAH GRAY WHITE, AR'N'T I A WOMAN? FEMALE SLAVES IN THE PLANTATION SOUTH 61 (1985). *See also* Darlene C. Hine, *Rape and the Inner Lives of Black Women in the Middle West*, 14 SIGNS 912 (1989) (discussing Black women's resistance to these degrading images and creation of positive alternative images of their sexual selves). Myths about Black male and female sexual degeneracy were connected. *See* PHILIP A. BRUCE, THE PLANTATION NEGRO AS A FREEMAN 84-85 (1889) (tracing the alleged propensity of the Black man to rape white women to the "wantonness of the women of his own race" and the "sexual laxness of plantation women as a class"); ANGELA Y. DAVIS, WOMEN, RACE, & CLASS 28 (1981) ("[T]he mythical rapist implies the mythical whore.").

driven culture; the fear is rooted in visceral feelings about black bodies fueled by sexual myths of black women and men."[34]

Second, whites have used both the act and the law of rape as an instrument of white supremacy, as well as male domination. Catharine MacKinnon observed that the definition of rape as the violation of a white woman by a Black man legitimates the more common incidents of intraracial rapes by acquaintances.[35] For Black people, this definition of rape just as profoundly has justified the control of their bodies by whites. Black men's supposed propensity to rape white women became the pretext for thousands of brutal lynchings in the South.[36] In the words of Ida B. Wells, who crusaded against lynching during the nineteenth century, "white men used their ownership of the body of white female[s] as a terrain on which to lynch the black male."[37]

White men exploited Black women sexually before and after slavery as a means of subjugating the entire Black community.[38] During slavery, white slavemasters raped Black women both for pleasure and profit.[39] They considered slave women to be purely sexual objects, to be raped, bred or abused.[40] After Emancipation, white employers continued to subject Black women who worked as servants in their homes to sexual violation.[41] The Ku Klux Klan's terror included the

34. CORNEL WEST, RACE MATTERS 83 (1993).

35. *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 81-82 (1987). *See also* Wriggins, *supra* note 22, at 124 (observing that "the myth that rape is only a crime committed by Black men against white women has obscured and deflected attention from the varied nature, pervasiveness, and influence of the sexual subordination to which all women are subjected").

36. *See generally* JACQUELYN DOWD HALL, REVOLT AGAINST CHIVALRY 129-57 (1979) (describing lynchings of Blacks at the turn of the century and their connection to the myth of the Black rapist). "The ritual of lynching . . . served as a dramatization of the hierarchical power relationships based both on gender and on race." *Id.* at 156. *See also* Kopytoff & Higginbotham, *supra* note 22, at 2019 (noting that statutes making attempted rape of white women by Blacks a capital offense primarily protected a racial caste system, rather than white women).

37. Harris, *supra* note 29, at 600. For an historical account of the women's anti-lynching campaign in the early 20th century, see HALL, *supra* note 36.

38. COLLINS, *supra* note 29, at 177-178; DAVIS, *supra* note 33, at 23. For a contemporary example of rape used as a weapon of terror against an ethnic community, see John F. Burns, *150 Muslims Say Serbs Raped Them in Bosnia*, N.Y. TIMES, Oct. 3, 1992, at 5 (describing experiences of Muslim women and girls raped by Serbian nationalist fighters); Tamar Lewin, *The Balkans Rapes: A Legal Test for the Outraged*, N.Y. TIMES, Jan. 15, 1993, at B16 (discussing the rape of Muslim women as a war crime and human rights violation).

39. BELL HOOKS, AIN'T I A WOMAN 33-36 (1981).

40. Henry L. Gates, Jr., *To be Raped, Bred or Abused*, N.Y. TIMES, Nov. 22, 1987, § 7 (Book Review), at 12. For an argument that the objectification of Black women's bodies is the foundation for contemporary pornography, see COLLINS, *supra* note 29, at 167-73.

41. *See* DAVIS, *supra* note 33, at 91-92; JACQUELINE JONES, LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT 149-50 (1985). Black women frequently suffer a racialized sexual harassment in the workplace. *See*

rape of Black women, as well as the more commonly cited lynching of Black men.[42] White sexual violence attacked not only freed Black men's masculinity by challenging their ability to protect Black women, but also freed Black women's devotion to their own families.[43]

The criminal law has enforced this racial construction of rape. The legal treatment of rape targets Black assaults of white women and devalues rape's injury to Black women. For much of American history, the rape of a white woman by a Black man was considered a capital offense; while the rape of a Black woman was hardly punished, if at all.[44] Angela Harris concluded, "as a legal matter, the experience of rape did not even exist for black women."[45] Black men convicted of raping white women still receive the most severe sentences and media attention.[46] Police and prosecutors treat Black women's com-

Kimberle Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1469 (1992); Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1 (1988). On Black women's unique experience of gender and racial oppression, see Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365; Harris, *supra* note 29, at 604; Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989).

42. *See* HAZEL V. CARBY, RECONSTRUCTING WOMANHOOD: THE EMERGENCE OF THE AFRO-AMERICAN WOMAN NOVELIST 39 (1987) (noting that, because of patriarchal notions about rape, "[t]he institutionalized rape of black women has never been as powerful a symbol of black oppression as the spectacle of lynching").

43. Hall, *supra* note 22, at 332-33.

44. *See* EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 33 (1972); Wriggins, *supra* note 22, at 105-23. Between 1930 and 1972, 89 percent of all those executed for rape were Black men who raped white women. Marvin E. Wolfgang, *Racial Discrimination in the Death Sentence for Rape*, *in* EXECUTIONS IN AMERICA 109, 113 (William J. Bowers ed., 1974). During that period in Georgia, 58 of 61 defendants executed for rape were Black. Marvin E. Wolfgang & Marc Riedel, *Rape, Race, and the Death Penalty in Georgia*, 45 AM. J. ORTHOPSYCHIATRY 658, 663 (1975). This disparate punishment of rape arose out of a legal system during slavery that generally "fail[ed] to protect blacks against the violent acts of whites, [while] it denied African-Americans the right to seek legal redress, or to testify as a witness against whites." Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 13 (1990).

45. Harris, *supra* note 29, at 599. *See also* Kopytoff & Higginbotham, *supra* note 22, at 2011 n.204 ("No 18th-century Virginia court whose records have survived convicted a white man or a slave of raping a female slave.").

46. *See* Ray F. Herndon, *Race Tilts the Scales of Justice*, DALLAS TIMES HERALD, Aug. 19, 1990, at A1 (reporting study of jury sentencing in Dallas, Texas, in 1988, which found that the median sentence for a Black man who raped a white woman was 19 years, compared to 1 year for a white man who raped a Black woman); Gary D. La Free, *The Effect of Sexual Stratification by Race on Official Reactions to Rape*, 45 AMER. SOC. REV. 842, 852 (1980). La Free theorizes that "[t]he results are generally consistent with the proposition that American society is characterized by a sexual stratification system which imposes more serious sanctions on men from less powerful social groups who are accused of assaulting women from more powerful social groups." *Id.* For criticism of La Free for emphasizing the comparative sexual access between white and Black men, thereby "view[ing] racism primarily in terms of inequality between men," see Kimberle Crenshaw, *The Intersection of Race and Gender in Rape Law*, *in* WOMEN AND THE LAW 800, 803 (Mary Joe Frug ed., 1992).

plaints of sexual assault less seriously.[47] When Black women's claims do go to trial, the evidentiary connection between chastity and veracity may lead juries to expect Black women (whom they presume to be promiscuous) to lie.[48] Men who are convicted of raping a Black woman typically receive far more lenient sentences.[49]

One striking example of rape's race- and gender-based meaning is the case of a Black student at St. John's University in New York who claimed that as many as five white students sexually assaulted her in a fraternity house.[50] The woman testified at trial that, after one of the defendants pressured her into drinking three glasses of vodka and orange juice, she began to feel sick and lay down on a couch. Each male student then took turns forcing his penis in her mouth as she drifted in and out of consciousness.[51] One witness, who pled guilty to second-degree sexual abuse, testified that he saw two of the defendants repeatedly hit the woman in the head with their penises as she moaned.[52]

In this case, all of the rules of entitlement converge.[53] As a Black woman, the victim was entitled to little protection. The fact that she voluntarily entered the fraternity house with one of her assailants and consumed alcohol while she was inside reinforced her vulnerability. As white college students, the defendants were entitled to use a great deal of force. The fact that they were acquainted with the victim rein-

47. Barbara Omolade, *Black Women, Black Men and Tawana Brawley—The Shared Condition*, 12 HARV. WOMEN'S L.J. 11, 16 (1989); Gerald D. Robin, *Forcible Rape: Institutionalized Sexism in the Criminal Justice System, in* THE CRIMINAL JUSTICE SYSTEM AND WOMEN 241, 246 (Barbara R. Price & Natalie J. Sokoloff eds., 1982); Wriggins, *supra* note 22, at 122. Studies have found that Black women are significantly less likely than white women to disclose sexual assault, perhaps because of the criminal justice system's devaluation of Black victims and mistreatment of Black defendants. *See* Gail E. Wyatt, *The Sociocultural Context of African American and White American Women's Rape*, 48 J. SOC. ISSUES 77, 86 (1992).

48. Crenshaw, *supra* note 41, at 1470 ("One judge warned jurors that the general presumption of chastity applicable to white women did not apply to Black women."); Wriggins, *supra* note 22, at 126-27. *See also* Gary D. La Free et al., *Jurors' Response to Victims' Behavior and Legal Issues in Sexual Assault Trials*, 32 SOC. PROBS. 389, 401-02 (1985) (finding that jurors in 38 rape trials were less likely to believe Black complainants); Kitty Klein & Blanche Creech, *Race, Rape, and Bias: Distortion of Prior Odds and Meaning Changes*, 3 BASIC & APPLIED SOC. PSYCH. 21, 30 (1982) (finding that jurors in two experiments gave white rape victims preferential consideration in all stages of the decision process).

49. La Free, *supra* note 46, at 847-48; Wriggins, *supra* note 22, at 121.

50. *See* Kathy Dobie, *What the Jury Wouldn't See*, THE VILLAGE VOICE, Aug. 6, 1991, at 27; Joseph P. Fried, *Three Students From St. John's Face Indictment*, N.Y. TIMES, Apr. 28, 1990, at 29.

51. *See* Dobie, *supra* note 50, at 30.

52. Joseph P. Fried, *Witness Details Sexual Abuse at St. John's*, N.Y. TIMES, June 8, 1991, at 27.

53. *See generally* HUBERT S. FEILD & LEIGH B. BIENEN, JURORS AND RAPE: A STUDY IN PSYCHOLOGY AND LAW (1980) (describing how a combination of factors, including juror, victim, defendant, and case characteristics, determine sentences in rape cases).

forced their privilege. It was not surprising that, despite the corroborating testimony, the jury concluded that the victim consented to the sexual assault, and acquitted the defendants.[54] In my mind, the jury acquitted the defendants not because it associated rape with violence, but because it did not understand the sexual humiliation of a Black woman as violence.

## II. THE CONTINUITY OF VIOLENCE IN WOMEN'S LIVES

Separating violent rape from the less serious, but more common, nonviolent sexual abuse may have the pragmatic advantage of ensuring more convictions: "When the law seeks to change social attitudes, lighter penalties increase the probability that juries will convict."[55] By creating a separate category of "lesser abuses" distinct from violent rape, however, the proposals may evade confronting the role of violence in women's lives and its relation to other types of sexual coercion. Are there reasons for continuing—and expanding—the association between rape and violence? I want to explore this association in two senses—first, the continuity created by male power that produces and interprets both violent and nonviolent sexual violations, and, second, the continuity created by physical violence in particular that often underlies male sexual demands.

### *A. The Context of Power*

Catharine MacKinnon made a pivotal contribution to the feminist understanding of rape by explaining its origin in ordinary heterosexual relationships.[56] She argued that a feminist view of rape, based on women's experiences, construes sexuality as "a social sphere of male power to which forced sex is paradigmatic."[57] Rape is not an aberration—a practice separate from normal sexuality. Rape is part

54. *See* Joseph P. Fried, *3 St. John's Students Acquitted of Sexually Assaulting a Woman*, N.Y. TIMES, July 24, 1991, at A1. Several jurors explained that they found too many inconsistencies in the victim's testimony. *Id.* Another juror disclosed that "the 'main concern' of some jurors was that 'they didn't want to ruin these boys' lives.'" Joseph P. Fried, *St. John's Juror Tells of Doubts in Assault Case*, N.Y. TIMES, Sept. 14, 1991, at 24.

55. Dripps, *supra* note 5, at 1805.

56. *See* MACKINNON, *supra* note 3, at 126-54, 171-83. For a critique of MacKinnon's theory of rape for failing to account for the experiences of Black women, see Harris, *supra* note 29, at 595-601.

57. MACKINNON, *supra* note 3, at 173. *See also* BELL HOOKS, BLACK LOOKS: RACE AND REPRESENTATION 94 (1992) (describing the shift from a patriarchal to phallocentric emphasis in asserting masculine status: "A sexually defined masculine ideal rooted in physical domination and sexual possession of women could be accessible to all men.").

of a cultural interpretation of sexuality that eroticizes dominance.[58] Rape is part of a system in which women's submission, humiliation, violation, and injury define sexual excitement.

Although all sexual relations between men and women occur in this realm of male power, the criminal law must distinguish between different types of sexual encounters. Some feminists interpret MacKinnon's analysis as asserting that all heterosexual sex is rape.[59] MacKinnon's blanket condemnation, they argue, trivializes the injury violent rape causes by putting it in the same category as typical relations between two lovers and by denying women's pleasure in sexual relations with men.[60] When MacKinnon proposes, "Instead of asking what is the violation of rape, . . . the more relevant question is, what is the nonviolation of intercourse?" and answers, "for women it is difficult to distinguish the two under conditions of male dominance,"[61] some feminists worry that she is negating women's ability to tell the difference between rape and other types of sex with men.[62]

MacKinnon's point is not that women are incapable of telling the difference—as if the difficulty in defining rape arises from some female deficiency. The insight of MacKinnon's question is that women experience commonalities between what is legally defined as rape and what is considered normal sex. The legal dividing line between rape and sex does not correspond with our own experience of violence. MacKinnon demonstrates that the pervasive effect of male dominance makes it impossible to say definitively that some of women's sexual relations with men (called sex) are "free" and others (called rape) are "coerced." As Fran Olsen observed, "it is not helpful to pretend that sexual intercourse is normally equal."[63] How, then, should the law identify within this context of power which sexual acts are criminal, and which crimes deserve more severe punishment than others?

58. MACKINNON, *supra* note 3, at 126-54.

59. Susan Estrich, *Teaching Rape Law*, 102 YALE L.J. 509, 512 n.10 (1992).

60. *See, e.g.*, Susan Estrich, *Palm Beach Stories*, 11 LAW & PHIL. 5, 9 (1992); Henderson, *supra* note 19, at 159. Henderson identifies as the critical task in fighting rape, not showing how rape is similar to all heterosexual sex, but developing "our understanding of what makes rape such a heinous offense, and distinguishing that from sexual relations generally." Lynne N. Henderson, *What Makes Rape a Crime?*, 3 BERKELEY WOMEN'S L.J. 193, 220 (1988) (book review). *See also* Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 390 (1984) ("[F]eminists who are or should be engaged in a joint or parallel project of challenging the dominant definitions of sexuality come to perceive themselves as opposing one another.").

61. MACKINNON, *supra* note 3, at 174.

62. *See, e.g.*, Henderson, *supra* note 19, at 163.

63. Olsen, *supra* note 60, at 428.

Dripps and Schulhofer focus on physical violence to differentiate between levels of criminality. Dripps's scheme denies any violence at all in the act of unwanted penetration. The more serious offense in his statutory model—sexually motivated assault—punishes the threat or infliction of physical injury used to cause sexual acts, whether or not the sexual acts take place. Sexual expropriation, which does punish an unwanted sex act, is treated leniently. Dripps justifies this distinction by arguing that physical violence is more harmful than unwanted sex: "I venture the suggestion that people generally, male and female, would rather be subjected to unwanted sex than be shot, slashed, or beaten with a tire iron."[64]

Schulhofer also distinguishes between violent rape and nonviolent sexual abuse. His strongest support for this dichotomy is women's own experience of the two:

> Violent and non-violent abuse are behaviorally and experientially different problems. The defendants in *Mlinarich* and *Boro* were obnoxious, manipulative con men, but they were not potential killers. Their victims suffered abuses that should be unacceptable to any civilized society, but they never faced the terror of being beaten or strangled to death.[65]

Schulhofer quotes two feminist scholars, Robin West and Lynne Henderson, who "testif[y] to the importance of this distinction."[66] Robin West writes, "There is a fine line between the feeling of being threatened by an implied threat of force and the feeling of the sheer inevitability of sex. Nevertheless, they are . . . distinctly different experiences . . . ."[67] Lynne Henderson confirms, "[T]he difference between rape and lovemaking, between rape and undesired sex, is phenomenologically real . . . . To lose the distinction, however tenuous and unamenable to bright line distinctions it may be, is to trivialize what rape *is* and what it *does* to a woman."[68]

Understanding West's and Henderson's point requires exploring the nuances of women's sexual experience in a world dominated by men. Every sexual encounter is affected by that imbalance of power

64. Dripps, *supra* note 5, at 1801.

65. Schulhofer, *supra* note 5, at 56-57. The cases Schulhofer mentions are Commonwealth v. Mlinarich, 498 A.2d 395 (Pa. Super. Ct. 1985), *aff'd*, 542 A.2d 1335 (Pa. 1988), and Boro v. Superior Court, 210 Cal. Rptr. 122 (Ct. App. 1985). In *Mlinarich*, the defendant forced his 14-year old foster daughter to submit to sexual intercourse by threatening to send her back to a detention center. In *Boro*, the defendant tricked the victim into sexual intercourse by pretending he was a doctor who was treating her for a fatal disease.

66. Schulhofer, *supra* note 5, at 57.

67. *Id.* at 57 (quoting Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 103 (1987)).

68. *Id.* at 57 (quoting Henderson, *supra* note 60, at 226).

and by the meaning of sexuality imbued with inequality. But, despite this backdrop of power, there is a phenomenological distinction in heterosexual intercourse under differing conditions. Women do not always feel harmed when they have sex; they often feel great pleasure. Many women enjoy satisfying and even uplifting, rather than degrading, sexual relations with men.[69] Somewhere in between—perhaps, for some women, in most heterosexual encounters—women do not experience pleasure because they feel some sort of pressure to engage in sex.[70]

The writings of West and Henderson have helped to flesh out these variations in the continuum between rape and pleasure. Lynne Henderson has distinguished between "bad sex" and rape:

> The phrase "bad sex" covers a range of heterosexual interactions for women: their partner was clumsy; their mood or their partner's mood affected the interaction; they lost their desire but felt they should let the man continue to orgasm, either because they believed things were "too far along" to stop and they wanted to avoid a hassle or because they cared about the man; and so on. . . . Women—and men—have sexual relations that they later regret. Nevertheless, in "bad sex," women do not feel *raped*, if for no other reason than they are exercising some agency.[71]

Their work suggests two grounds for distinguishing between rape and bad sex: the degree of the woman's pain and the degree of the man's

69. *See* Ann Snitow et al., *Introduction* to POWERS OF DESIRE: THE POLITICS OF SEXUALITY 9, 42 (Ann Snitow et al. eds., 1983) (describing women's sexual experience as "a peculiar mixture," at once objectifying, pleasurable, degrading, and inspiring). Moreover, women's desire and struggle for non-oppressive heterosexual practice should not be confused with support for the current institution of heterosexuality or for heterosexism. *See* bell hooks, *Ending Female Sexual Oppression, in* FEMINIST THEORY: FROM MARGIN TO CENTER 147-56 (1984).

70. *See* Pineau, *supra* note 26, at 234 ("There is no logical incompatibility between wanting to continue a sexual encounter, and failing to derive sexual pleasure from it.").

71. Henderson, *supra* note 19, at 165-66. Dripps provides another example of what Henderson might call "bad sex":

> Ellen married Frank because she finds him a boon companion—caring, thoughtful, sophisticated, well-heeled, and well-established in trendy circles. He is rather ugly and a dreadful, piggish lover. Whenever Frank initiates love-making, Ellen cooperates for several reasons. These include a sense of reciprocity, of doing a favor for her best friend; fear that he might seek satisfaction elsewhere, perhaps leading to a break-up with devastating financial and social consequences; and the more immediate fear that if rebuffed, Frank will be in a predictable snit for days thereafter.

Dripps, *supra* note 5, at 1789.

No one suggests that the criminal law should redress "bad sex," even though it often results from unequal power relations. Nevertheless, we should not overlook the harm "bad sex" causes women. *See* West, *supra* note 11, at 1456-57. For critiques of interpreting rape as unwanted sex, see Neil Gilbert, *The Phantom Epidemic of Sexual Assault*, 103 PUB. INTEREST 54 (1991); Douglas N. Husak & George C. Thomas III, *Date Rape, Social Convention, and Reasonable Mistakes*, 11 LAW & PHIL. 95, 118-20 (1992); R. Lance Shotland & Lynne Goodstein, *Just Because She Doesn't Want to Doesn't Mean It's Rape: An Experimentally Based Causal Model of the Perception of Rape in a Dating Situation*, 46 SOC. PSYCHOL. Q. 220 (1983).

disregard of the woman's personhood and humanity. In Henderson's words, "When a woman's *existence just does not matter*, intercourse becomes rape."[72]

Schulhofer does not assert that coerced sex of the type in *Mlinarich* should go unpunished. Rather, he places it in the less serious category of nonviolent sexual abuse. Henderson's and West's work, however, does not support this categorization. In the quote Schulhofer uses, Henderson was distinguishing between rape and nonpleasurable sex, the kind that most women inevitably experience—not between violent rape and nonviolent sexual abuse. West observed that a "self-regarding woman" experiences a difference between forced sex and sex that is inevitable. Her main point, however, was that many women do *not* experience this distinction because they have engaged in painful or dangerous sex so many times, partly out of a fear of violence.[73] Neither scholar states that sexual coercion must be life-threatening (in the sense of the victim's potential death) before it can be called rape.[74] Elsewhere when Henderson speaks of the "excruciating and violent pain of forced penetration" she is referring to the harm of the intercourse itself.[75] Forced sexual penetration is itself a battery, resulting in physical and mental injuries.[76] That harm is not

72. Henderson, *supra* note 60, at 226.

73. Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 102-03 (1987).

74. Schulhofer apparently confuses Henderson's statement, "[W]omen experience total helplessness and obliteration during rape," Schulhofer, *supra* note 5, at 57 (quoting Henderson, *supra* note 60, at 226), with a contention that rape is a "life-threatening 'obliteration.'" *Id.* at 57; *see also id* at 68 (referring to rapists as "potential killer[s]"). I believe that Henderson used the word "obliteration" not in its literal sense but in the sense of completely negating women's personhood.

In her writing about rape, Henderson does sometimes connect rape with the fear of death, perhaps because in her own experience of rape she "realized he might very well kill me if I did not cooperate." Henderson, *supra* note 60, at 221. For example, in the essay from which Schulhofer quotes, Henderson states, "A crime which confronts its victims with death is *not sex*," *id.* at 225, and "rape is life-negating; it is death." *Id.* at 226. In a subsequent essay, Henderson describes rape as "a form of soul murder, a life-threatening and life-damaging experience." Henderson, *supra* note 19, at 175. The balance of her work, however, makes it clear that she does not limit rape to life-threatening assaults. *See, e.g., id.* at 176 (including in her proposed statutory scheme "rapes where . . . threats of physical or economic harm occurred" and "rapes in which the man did not have consent and went ahead anyway").

75. *See id.* at 157. *See also id.* at 176 (expressing concern about denigrating "the harm of rape independent of other 'violence'").

76. *See* THOMAS W. MCCAHILL ET AL., THE AFTERMATH OF RAPE 23-38 (1979) (describing typical problems experienced by rape victims, including depression, recurring nightmares, decreased social activity, difficulty in resuming sexual relations, fear of men and of being alone, and self-hatred); Lynn Hecht Schafran, *Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist*, 20 FORDHAM URB. L.J. 439, 443-47 (1993) (discussing injuries caused by rape). Both Henderson and West make this point in more recent articles. *See* Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 TEX. J. WOMEN & L. 41, 54-55, 58, 64-65 (1993); West, *supra* note 11, at 1448.

limited to potentially lethal attacks. That is the pain that the girl in *Mlinarich* felt when her foster father forced her to have sex with him by threatening to return her to the detention center.[77] Was the experience any less painful or degrading than if he had raised his fist? Certainly her injury is far closer to rape than to sex with an inartful partner. The physical trauma and disregard of her personhood that she experienced is a form of violence.

### *B. The Threat of Violence*

In addition to the context of male power that links violent rape and nonviolent sexual abuse, there is a related continuity of physical violence often underlying male demands for sexual control.[78] Men violate women's sexual autonomy in various ways, including extortion, economic threats, and deception. I want to suggest that men often back up these nonviolent tactics with an implicit threat of violence. Men sometimes give women the chance to comply with their demands on nonviolent terms. If the threat of losing a job, or being kicked out the house, or ending a relationship fails, however, men often resort to physical harm. Feminists have recognized force not only in physical attacks, but also in "the power one need not use."[79]

In *State* v. *Alston*,[80] the defendant and the victim, Cottie, had previously been involved in a violent relationship. Alston had beaten Cottie and Cottie had submitted to sex with Alston "just to accommodate him."[81] After Cottie ended the relationship, Alston approached her at school, grabbed her arm, threatened to "'fix' her face," and claimed that he had a "right" to have sex with her again.[82] Cottie walked with Alston to a friend's house, where she told Alston that she did not want to have sex with him. Alston nevertheless started to un-

77. The complainant in *Mlinarich* testified that she experienced pain and "'scream[ed] and holler[ed]'" and cried when the defendant attempted to penetrate her. Commonwealth v. Mlinarich, 498 A.2d 395, 406 (Pa. Super. Ct. 1985), *aff'd*, 542 A.2d 1335 (Pa. 1988).

78. I do not believe that identifying the physical violence in heterosexual relations necessarily "leav[es] the sexual fundamentals of male dominance intact." *See* MACKINNON, *supra* note 3, at 135. The actual or latent threat of violence does not comprise all of the coercion in heterosexuality, but it is a significant aspect of it.

79. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1115 (1986). Courts have been reluctant to acknowledge the unstated threat of violence. In State v. Rusk, for example, the defendant took the victim's car keys in an unfamiliar neighborhood, scared her with the look in his eyes, and repeatedly made demands of her despite her crying and pleas to leave, in addition to "lightly choking" her. 424 A.2d 720 (Md. 1981). Estrich points out that even the court which ultimately affirmed the rape conviction nevertheless felt compelled to place "'particular focus upon the actual force applied by Rusk to Pat's neck.'" ESTRICH, *supra* note 2, at 65 (emphasis omitted).

80. 312 S.E. 2d 470 (N.C. 1984).

81. *Id.* at 471.

82. *Id.* at 472.

dress her and directed her to lie down on the bed. Cottie remained passive while they had sexual intercourse. Alston did not need to beat or even threaten Cottie at the house to get her to yield to him. Despite Cottie's lack of consent, the North Carolina Supreme Court reversed Alston's rape conviction because there was no force. The facts of *Alston* demonstrate how the threat of violence may be unexpressed, and yet may be just as coercive as a physical threat of assault.[83]

It is easy to recognize the latent threat of violence when, as in *Alston*, the defendant has beaten the victim in the past. The threat of violence is present in many relationships, however, even when no physical assaults have taken place. How often do nonviolent men rely on the violence of others to give extra force to their verbal persuasion? How does the common knowledge that men often resort to violence when women challenge their authority influence women's responses? How ingrained is our training at keeping men appeased in order to prevent the possibility of violence? Robin West describes how many young women become "giving selves" to avoid the violence that might eventually turn into rape: "A straightforward, sensible, protective reaction to someone who is indifferent to your subjectivity, and at the same time must have you as an object, is to hide your subjective self and objectify and then give your sexual self for his pleasure and your safety."[84] Rather than suggesting that "men are not just physically but also intellectually and emotionally more powerful than women" (as Katie Roiphe accuses "campus-rape-crisis feminists" of

83. *See id.* at 472-73. *But see* Vivian Berger, *Not So Simple Rape*, 7 CRIM. JUST. ETHICS 69, 75 (1988) (book review) (doubting that Alston raped Cottie). Berger explains her reservations about using rape law to protect women who cave in to men's demands:

> I worry that a *too* "understanding" attitude toward the Cotties of this world by the legal system may backfire and ultimately damage the cause of women in general. . . . To treat as victims in a legal sense all of the female victims of life is at some point to cheapen, not celebrate, the rights to self-determination, sexual autonomy, and self-and societal respect of women. Naturally, no bright line exists to make the border separating justified use of rape law to safeguard female personhood and choice, accounting for lesser physical strength and socialization discouraging fighting, from abuse of this law to "defend" women who abdicate self and will entirely.

*Id.* at 75-76. I do not see Cottie as a woman who "abdicated self and will entirely." She did fight Alston: she escaped their violent relationship and refused to tell him where she was living when he tracked her down at school. It was only after he grabbed her arm and threatened to "fix her face" that she agreed to go with him. She told him that she did not want to have sex with him. It may very well be that Cottie determined that, based on Alston's prior violence, that was all the fighting she could safely do that day. *See* discussion on separation assault *infra* notes 87-91 and accompanying text.

84. West, *supra* note 73, at 102.

doing), I am suggesting that it is often physical power that underlies seemingly "verbal coercion."[85]

Women sometimes fear that men may turn violent if we exercise our autonomy, especially in the form of rejection or abandonment.[86] Perhaps the most extreme example of men's retaliation for women's rejection is the escalation of violence that often occurs when battered women attempt to leave their batterers.[87] Martha Mahoney uses the name "separation assault" to identify "the attack on the woman's body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return."[88] At least half of women who escape an abusive relationship are then followed and harassed or assaulted by the abuser.[89] Most wife-killings occur when the wife leaves.[90] Mahoney found that protracted, inventive, and brutal attacks on separation pervaded the stories of the battered women who spoke with her. She explains how men use separation assaults to control their wives:

85. *See* Katie Roiphe, *Date Rape's Other Victim*, N.Y. TIMES, June 13, 1993, § 6 (Magazine), at 26, 30.

A case which is commonly cited as an example of sex induced by non-violent fraud, People v. Evans, 379 N.Y.S.2d 912 (1975), *aff'd*, 390 N.Y.S.2d 768 (1976), actually contains explicit threats of violence. Evans, who tricked a college student into accompanying him to an apartment by posing as a psychologist doing a magazine interview, told the student when she resisted his efforts to undress her, "'Look where you are. You are in the apartment of a strange man .... I could kill you. I could rape you. I could hurt you physically.'" *Id.* at 917. The court held that Evans was "crafty, scheming, [and] manipulative," but not a rapist. *Id.* at 918.

86. It is critical to distinguish this fear, grounded in women's experience of violence, from racist and class-based stereotypes of dangerous men. *Cf.* Roiphe, *supra* note 85, at 40 (suggesting that the heightened concern about date rape on college campuses is partly a reaction to increased diversity among the student body). Experts estimate that at least half of all married women will be beaten by their husbands at some point in their marriage. *See, e.g.*, LENORE WALKER, THE BATTERED WOMAN 19 (1979). Between fifteen and forty percent of all women are victims of attempted or completed rapes, and most are committed by acquaintances. CRIME VICTIMS RESEARCH AND TREATMENT CENTER, RAPE IN AMERICA 3-5 (1992) (at least 12.1 million American women have been victims of rape, 75% of which were committed by acquaintances); *Victims of Rape: Hearing Before the House Select Comm. on Children, Youth, and Families*, 101st Cong., 2d Sess. 5 (1990) (statement of Hon. George Miller, "Victims of Rape" Fact Sheet); *Study: Rapes Far Underestimated*, CHI. TRIB., Apr. 24, 1992, § 1, at 3 (reporting study showing that one of every eight adult women in America has been raped at least once).

87. *See* CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW 150-52 (1989); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 63-71 (1991).

88. Mahoney, *supra* note 87, at 65.

89. ANGELA BROWNE, WHEN BATTERED WOMEN KILL 110 (1987).

90. George Barnard et al., *Till Death Do Us Part: A Study of Spouse Murder*, 10 BULL. AM. ACAD. PSYCHIATRY & L. 271, 274 (1982). Mahoney points out that these figures obscure the many times that the battered woman's *decision* to leave triggers escalated violence. Mahoney, *supra* note 87, at 65. The assault may occur when the couple are still living together, but it may be in response to the woman's announcement that she is leaving or to her first steps toward separation. *Id.*

> Men who kill their wives describe their feeling of loss of control over the woman as a primary factor; most frequently, the man expresses the fear that the woman was about to abandon him, though in fact this fear may have been unfounded. The fact that marital separation increases the instigation to violence shows that these attacks are aimed at preventing or punishing woman's autonomy. They are major—often deadly—power moves.[91]

We all know—from personal experience, the story of a friend we have harbored, or the numerous newspaper accounts of murdered women clutching temporary restraining orders—how many men react to women who express their autonomy by ending a relationship.[92]

The latent threat of violence pervades women's encounters with strange men, as well. Women acknowledge strange men who hassle us

91. Mahoney, *supra* note 87, at 65.

92. *See, e.g.*, Lynette Holloway, *Boyfriend of One Victim Is Charged in 6 Slayings*, N.Y. TIMES, May 5, 1993, at B3 (man killed his former girlfriend, her three children, and her mother two months after she ended their relationship, and after she filed four complaints against him for harassment); Donatella Lorch, *Suspect in Slaying Had Order to Stay Away*, N.Y. TIMES, April 6, 1990, at B3 (woman was carrying protection order in her pocket when her estranged boyfriend stabbed her to death); Larry Olmstead, *Courthouse Death: One Family's Tragedy*, N.Y. TIMES, May 18, 1993, at A1 (woman shot to death by her estranged husband in family court); Garry Pierre-Pierre, *Queens Woman and two Children Slain*, N.Y. TIMES, May 9, 1993, at 27 (man stabbed former girlfriend and her two children to death); Sam Roberts, *As Wachtler Awaits Fate, A Tortured Tale Emerges*, N.Y. TIMES, Mar. 29, 1993, at B3 (recounting events that led to indictment of former appellate court Judge Sol Wachtler for extortion and mailing threatening communications arising out of his harassment of his former girlfriend when she ended their relationship).

Reported cases of men who killed their estranged wives include: Godfrey v. Georgia, 446 U.S. 420 (1980) (striking death penalty in case involving man who killed his wife and mother-in-law after his wife left him to stay with relatives); Harrison v. Dahm, 880 F.2d 999 (8th Cir. 1989) (affirming denial of habeas corpus relief of prisoner convicted of first-degree murder of his estranged wife after repeated attempts to see her at her residence); *In re* J.L.M., 418 S.E.2d 415 (Ga. Ct. App. 1992) (denying appeal of order terminating parental rights of man who pled guilty to murdering his wife and her companion after she fled their abusive relationship); People v. Berry, 556 P.2d 777 (Cal. 1976) (allowing husband's claim that wife's taunting about her love for another man and plan to leave him provoked him to strangle her).

Several years ago I began a collection of newspaper articles about men who killed their estranged wives or girlfriends and then committed suicide. *See, e.g.*, Diana J. Schemo, *Woman, Stalked for Year, Is Slain by Ex-Companion, Who Also Kills Himself*, N.Y. TIMES, May 27, 1993, at B7 (recounting story of a man who, despite a protection order, harassed his former girlfriend for a year after she left their abusive relationship, shot her to death at her job, and then killed himself); *Gunman Kills 4 and Then Himself*, N.Y. TIMES, Dec. 9, 1989, at A13 (reporting story of a man who killed former wife, her two daughters, and her new husband before killing himself, and noting that there were two other murder-suicides reported around the nation that day). When I raised this phenomenon in my women and criminal law seminar, I was astonished by the number of students who could tell similar stories about friends, neighbors, or relatives. One of these murder/suicides happened recently in my neighborhood in Montclair, New Jersey, one school morning. *See* Jonathan Welsh & Jamie Ruderman, *Gunshot Murder, Suicide Stun School, Community*, MONTCLAIR TIMES, May 21, 1992, at A1 (telling how 24-year-old Angela Lance, a school secretary, was shot to death in the school parking garage by her former boyfriend, who then shot himself in the head).

on the street partly because we are afraid to reject their attention.[93] A woman's failure to respond can transform an unsolicited comment into a hostile, vulgar, and even physical, confrontation.[94] It is sometimes hard to tell the difference between a friendly remark and a threat: "I have lost the ability to discriminate between men who are being friendly and those who wish me harm. Now I view all gestures from men on the street as potential threats;"[95] "'I'm afraid everyday that a verbal assault is going to turn into a physical one.'"[96] Cynthia Grant Bowman concluded:

> Consequently, any incident of harassment, no matter how "harmless," both evokes and reinforces women's legitimate fear of rape. It does so by reminding women that they are vulnerable to attack and by demonstrating that any man may choose to invade a woman's personal space, physically or psychologically, if he feels like it.[97]

Women's fear of strangers on the street is complicated by the deeply-embedded image of the dangerous Black man. In the South, a Black man's glance at a white woman signified a threat of rape.[98] I am not sure that efforts to combat street harassment through criminal statutes could ever successfully overcome this powerful racial stereotype. Nevertheless, street harassment expresses men's unstated threat of physical force to enforce their sexual demands.

Our culture largely permits men to display violence as a way of forcing their will upon women. A recent essay in the New York Times *About Men* section describes the apparently common practice of men punching the wall when they are angry, usually during disputes with or

93. *See* West, *supra* note 73, at 106 (describing women's experience of street hassling: "smile so he might stop . . . learn to smile—*to show pleasure* when you are frightened."). Of course, all comments from men on the street are not harassing. I think some strange men acknowledge me—"How are you doing today, sister?"—as a sign of racial solidarity.

94. Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 525 (1993).

95. Emily Bernard, *Black Women and the Backwash of Harassment*, WASH. POST, Aug. 12, 1990, at C8. In a practice known as "rape-testing," men harass women on the street in order to determine which women appear vulnerable to assault. Bowman, *supra* note 94, at 533. This recently happened to a woman in my neighborhood, who was raped by two men on her way home from the supermarket after she ignored their comments.

96. Cristina Del Sesto, *Our Mean Streets: D.C.'s Women Walk Through Verbal Combat Zones*, WASH. POST, Mar. 18, 1990, at B1, B4.

97. Bowman, *supra* note 94, at 540. *See* West, *supra* note 73, at 106 ("If they haven't learned it anywhere else, street hassling teaches girls that their sexuality implies their vulnerability.").

98. *Cf.* McQuirter v. State, 63 So. 2d 388, 389 (Ala. 1953) (affirming conviction of a Black man for attempt to commit an assault with intent to rape based on evidence that he "said something unintelligible" to a white woman and "followed her down the street").

over women.[99] The author boasts of how he broke his hand hitting a wall in order to resolve a "difference of opinion" with his girlfriend:

> On the way to the hospital, gloriously revved on adrenaline, I thought I must have done something terribly original. It turned out I hadn't—practically every man in my circle of friends had done the same thing. . . . Of course, exploding is risky around someone you love, so I hurt myself. It's the one way a man has of showing anger without harming someone or appearing weak. It communicates clearly that *things must change*.[100]

The author praises men for turning their anger "on themselves," rather than questioning men's use of this implicit threat of harm to win an argument.

Our culture also reinforces this fear by blaming women who are victims of sexual violence. Society constantly admonishes women for not taking adequate precautions against the ever-present risk of sexual assault. It considers male aggression a "natural" response to female seduction.[101] Women should *expect* violence when we dress too provocatively, accept an invitation to a man's room, walk the street at night, or enter a bar alone.[102] We should expect men to act like ferocious, untamable beasts: "One does not go into the lion's cage and expect not to be eaten."[103] Rather than seeking to create a society in which women need not fear male sexual aggression, society chides us for not being fearful enough.

I must believe that this intimate knowledge of violence shapes how most women respond to certain demands from men, even ordinarily nonviolent men.[104] Women know that saying "no" to sex often

99. *See* Sebastian Junger, *Hitting the Wall*, N.Y. TIMES, Aug. 16, 1992, § 6 (Magazine), at 14.

100. *Id.*

101. *See* Jane Aiken, *Differentiating Sex from Sex: The Male Irresistible Impulse*, 12 N.Y.U. REV. L. & SOC. CHANGE 357 (1983-84) (discussing courts' assumption, in employment, rape, and prostitution cases, that men have an irresistible sexual impulse); Henderson, *supra* note 19, at 130-31 (noting "an unexamined belief that men are not morally responsible for their heterosexual conduct, while females are morally responsible both for their conduct and for the conduct of males").

102. Much of the admonishing comes from women. *See, e.g.*, CAMILLE PAGLIA, SEX, ART, AND AMERICAN CULTURE 58 (1992) ("The girl in the Kennedy rape case is an idiot. You go back to the Kennedy compound late at night and you're surprised at what happens?"); Ann Landers, *After Hours of Petting, It's Too Late to Stop*, CHI. TRIB., Aug. 4, 1991 (Tempo), at C3 ("The female who agrees to hours of petting but does not want to complete the sex act is asking for trouble and she will probably get it."); Camille Paglia, *Rape: A Bigger Danger than Feminists Know*, NEWSDAY, Jan. 27, 1991 (Currents), at 32 ("A woman going into a fraternity party is walking into Testosterone Flats . . . . A girl who goes upstairs alone with a brother at a fraternity party is an idiot.").

103. Pineau, *supra* note 26, at 227-28.

104. This does not mean that women respond passively to male threats of violence. In fact, women resist in many ways. *See* Hine, *supra* note 33 (suggesting that Black women migrated to the North to achieve personal autonomy and to escape rape and sexual exploitation by white and

provokes a peculiar anger because, like ending a relationship, it is "understood as a challenge to manhood."[105] Refusing a man's sexual demands means much more than refusing to provide any other "bargained for" service. Male sexual prerogatives are well-guarded political privileges; they represent and enforce men's power over women.

I am not arguing that the mere capacity to overpower women makes all men rapists. Recognizing this capacity does not make rape "pervasive and perhaps unavoidable," as Schulhofer contends.[106] Nor am I arguing that (as the rape myth goes) men are naturally aggressive and incapable of controlling their sexual impulses. Instead, I am arguing that we should consider how often men use that capacity to control women without actually resorting to physical attack. What makes some sexual intercourse violent is not the mere "disparity in size, strength, and fighting ability" between the sexes;[107] it is men's systemic use of that disparity to dominate women through sex.

Fear of violence is not the only reason—or even the main reason—women engage in unwanted sex. This would indeed be a simplistic view of male power. More common is women's desire to please men because of cultural expectations of feminine conduct, and women's economic and emotional dependence on men. But these motivations are often intertwined. In describing a date rape in which the man persists in aggressive (but nonviolent) tactics until the woman "goes along with him," Lois Pineau explains the complexity of the woman's response: "She does not adopt a strident angry stance, partly because she thinks he is acting normally and does not deserve it, partly because she feels she is partly to blame, and partly because there is always the danger that her anger will make him angry, possi-

Black males); WHITE, *supra* note 33, at 76-90 (describing slavewomen's resistance to white masters' control of their sexuality); Mahoney, *supra* note 87, at 61-68 (describing battered women's efforts to leave violent relationships and the "separation assault" that often results); Ann W. Burgess & Linda L. Holstrom, *Coping Behavior of the Rape Victim*, 133 AM. J. PSYCHIATRY 413, 414-16 (1976) (describing verbal and physical strategies of rape victims).

105. CAROL SMART, FEMINISM AND THE POWER OF LAW 32 (1989).

106. *See* Schulhofer, *supra* note 5, at 51. The inevitability of rape is disproved by its apparent rarity in some cultures. *See* MARGARET MEAD, SEX AND TEMPERAMENT IN THREE PRIMITIVE SOCIETIES 104 (1935) ("[T]he Arapesh [do not] have any conception of the male nature that might make rape understandable to them."); Peggy Reeves Sanday, *The Socio-Cultural Context of Rape: A Cross-Cultural Study*, 37 J. SOC. ISSUES 5 (1981) (discussing studies of "rape-prone" and "rape-free" societies which demonstrate that the incidence of rape varies cross-culturally). Of course, some of these "rape-free" societies may simply fail to recognize some forced sex as rape. Most mother-child relationships demonstrate the possibility of caring despite an enormous disparity in size and power. *See* Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 27 (1988).

107. *See* Schulhofer, *supra* note 5, at 51.

bly violent."[108] The woman's fear of rejection is inseparable from her fear of physical injury. Recognizing the prevalence of the threat of violence does not diminish the power of other coercive forces.

Dripps and Schulhofer, like some feminists, justifiably fear that lumping together all unwanted sex and violent rape will trivialize violence against women. I fear as much that disconnecting all seemingly nonviolent sexual coercion from sex accompanied by physical violence will obscure the common nature of both.[109] It may be wise to divide sexual crimes into two categories. But distinguishing the violent from the nonviolent ones is not as simple as Schulhofer and Dripps suggest. An alternative approach would rethink the legal meaning of violence and explore how men use violence on many different levels to impose their will upon women. The boundaries of violence against women are still in dispute.[110] Viewed in this light, the move *beyond* violence seems premature. Before we can move beyond violence, we must see all the violence that still escapes the law.

## III. PROTECTING WOMEN'S AUTONOMY

Will the protection of sexual autonomy serve women better than the protection against violence? Schulhofer recognizes that the principal challenge for a statutory scheme based on sexual autonomy "is to identify what it is that makes nonforcible conduct excessively intrusive or coercive, without resort to concepts and terminology that are hope-

108. Pineau, *supra* note 26, at 223. *See also* KRISTIN LUKER, TAKING CHANCES: ABORTION AND THE DECISION NOT TO CONTRACEPT (2d ed. 1991) (exploring the social and relational forces that lead women to have sex without contraception even when they do not wish to become pregnant); Robin West, *Authority, Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 397-99 (1985) (describing the "maddeningly ambiguous" reasons that Kafka's fictional character consented to sex with a magistrate); West, *supra* note 73, at 101 ("The fear of violence in promiscuous heterosexuality, when it is there, is always disguised and always confused.").

109. Some feminists explain battering as part of women's common experience of male power in the home. Linda Gordon, for example, observed:

> In Jean Thompson's extraordinary short story "The People of Color," a woman comes to question her own marriage from listening to beatings and screams from the next apartment. Considering the violence of others, instead of congratulating herself on the superiority of her relationship, she begins to question what might be called the institutionalized violence of her own marriage, a relationship that "works" only because of her acquiescence to her husband's infantile need for domination and ego support.

LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE 291 (1988). Martha Mahoney makes a similar point about domestic violence when she stresses the need to view it as men's quest for control: "Focusing on control lets women understand our lives without stigma by describing battered women's experience as part of all women's experience. A focus on control places the sensational, severely violent cases on a continuum of violence . . . ." Mahoney, *supra* note 87, at 60.

110. I borrowed this phrasing from Linda Gordon. *See* GORDON, *supra* note 109, at 291 ("The boundaries of family violence are openly in dispute among child-abuse experts . . . .").

lessly open-ended."[111] Unfortunately, the test of sexual autonomy defined as choice is no more determinate than the test of force or consent. The concept of "choice," like "force" and "consent," is, to use Schulhofer's words, a "social construct."[112] Indeed, choice is closely related to force and consent in the conventional notion of sexual autonomy: traditional rape law incorporates the three concepts by defining a woman's participation in sexual activity as her "choice" as long as she "consented" or was not compelled by "force." This indeterminacy is true of all legal choices: "[J]udicial determinations that contracts (or sexual relations or criminal conspiracies) were freely entered into are *not* determinations about 'what happened,' but rather they are value-based decisions about what should be considered choice."[113]

Dripps's definition of sexual autonomy ("freedom from *illegitimate* pressures" to provide sexual cooperation),[114] as well as Schulhofer's ("the capacity to choose, unconstrained by *impermissible* pressures and limitations"),[115] explicitly incorporate this normative content. They acknowledge that the only coherent meaning of consent is the determination that it constitutes behavior caused by legitimate antecedents.[116] Here, Dripps and Schulhofer part company. Dripps's model statute identifies violence as the only illegitimate inducement to have sex.[117] Schulhofer's proposal, on the other hand,

111. Schulhofer, *supra* note 5, at 65.

112. *Id.* at 41.

113. Nancy Ehrenreich, *Surrogacy as Resistance? The Misplaced Focus on Choice in the Surrogacy and Abortion Funding Contexts*, 41 DEPAUL L. REV. 1369, 1385 (1992) (book review) (discussing the choice-constraining effect of distributional disparities on surrogacy contracts). *See also* Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1199-1200 (1990) (critiquing the concept of choice used in sexual harassment law); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1757-58, 1787-89 (1990) (same in workplace sex segregation cases). More fundamentally, a person's consent or choice does not necessarily enhance her autonomy since she may agree to a transaction out of obedience to a more powerful authority. West, *supra* note 108, at 423-24 (criticizing Richard Posner's theory that wealth-maximizing consensual transactions are morally desirable because they promote well-being and autonomy).

114. Dripps, *supra* note 5, at 1786 (emphasis added).

115. Schulhofer, *supra* note 5, at 70-71 (emphasis added).

116. *See* Dripps, *supra* note 5, at 1787. *See also* MacKinnon, *supra* note 27, at 648-55 (discussing the indeterminacy of the consent standard in rape law).

117. Under "sexual expropriation," the victim's express revocation of her refusal to engage in a sexual act, unless caused by infliction or threat of physical injury, negates criminal liability. Dripps, *supra* note 5, at 1807, 1809. Dripps rejects proposals to include in the definition of sexual expropriation obtaining sex by extortionate or fraudulent means. He suggests that extortion statutes might be amended to include sex and he remains skeptical about the desirability of criminalizing sex by fraud. *Id.* at 1802-03.

extends the range of impermissible coercions from physical violence to other sorts of pressure. Although Schulhofer's scheme increases the law's potential reach, its method of deciding which specific coercions will qualify to negate "choice" suffers from the same pitfalls as force and consent analysis.

Schulhofer distinguishes illegitimate coercions from legitimate ones based on the man's entitlement to constrain the woman's options. For example, whether a producer who demands sex from a successful fashion model in exchange for an acting role is guilty of nonviolent sexual abuse depends on "whether his freedom entails a prerogative to act in this fashion even at the cost of curtailing hers. . . . [C]oercion results from altering the model's ordinary range of options in a legally impermissible way."[118] Schulhofer concludes that the producer does not have this prerogative because of the widely recognized principle that sexual services are never an appropriate condition of ordinary employment.[119]

What about the man who offers a desperate mother of four economic support in exhange for an ongoing sexual relationship, and who, once the relationship has commenced, threatens to terminate his economic support unless she continues to comply with his sexual demands? The mother certainly feels greater pressure to comply than the successful model, who would still live comfortably if she turned down the producer. Schulhofer reluctantly concludes, however, that the benefactor is not guilty of nonviolent sexual abuse because he is entitled to constrain the mother's options:

> Though her acquiescence has to seem troubling in a sensitive analysis of autonomy concerns, the suitor's conduct does not violate her freedom of choice or render her consent ineffective. Since sexual fulfillment is a goal he is entitled to seek in his intimate personal relationships, a sexual condition on establishment or continuation of

118. Schulhofer, *supra* note 5, at 85.

119. *Id. But see* Berger, *supra* note 83, at 76 (criticizing the crime of rape by fraud: "[T]he notion that rape, one of the gravest possible infringements of human integrity, should be expanded to include situations where the woman attempts to sell her body and fails to receive the bargained-for price simply makes a mockery of women's long efforts to achieve autonomy, respect, and equality."). Berger approves punishment of extortionate threats, but suggests that the law should in some cases encourage women to file civil complaints before yielding to the threat rather than impose criminal liability after women have yielded. *Id.* at 77. For a defense of civil remedies for the tort of "sexual fraud," see Jane E. Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit': A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374 (1993). Larson defines sexual fraud as "an act of intentional, harmful misrepresentation made for the purpose of gaining another's consent to sexual relations." *Id.* at 380.

> the relationship does not constrain her autonomy in an impermissible way . . . .[120]

Thus, the desperate mother's decision is deemed freely chosen and the rich fashion model's decision is deemed coerced based on a value judgment about male prerogatives. Schulhofer is correct that the current norm of personal relationships would not permit the law to impose criminal punishment on the benefactor. His examples show, however, that relying on autonomy replicates the problems I noted earlier of defining rape according to male entitlements to sexual access to women.

The determination of which constraints are "permissible" will depend on judgments about the victim's entitlement to autonomy, as well. I will demonstrate this with one of Schulhofer's hypotheticals. Schulhofer offers the parable of a hospitalized athlete to support his suggestion that sexual intercourse should always require an affirmative indication of permission.[121] The injured athlete cannot make up his mind about the surgery his doctor has recommended for his chronic knee problems. The athlete, still wracked with doubts, says nothing when the impatient surgeon readies the anesthesia and reminds him that he can stop the procedure. Despite the athlete's failure to respond, the surgeon goes ahead with the surgery. Schulhofer concludes, "In the surgical context, at least, nonconsent cannot mean aversion or a crystallized negative decision, because in our society this

120. Schulhofer, *supra* note 5, at 88. As the quote in the text indicates, Schulhofer views the benefactor's coercive deal with the woman as *morally* reprehensible, although not criminal. Dripps's commodification theory of sex, on the other hand, overlooks this moral problem altogether.

121. *See id.* at 74-75. Schulhofer further discusses this proposal in Stephen J. Schulhofer, *The Gender Question in Criminal Law, in* CRIME, CULPABILITY, AND REMEDY 105 (Ellen F. Paul et al. eds., 1990). "[C]itizens may not presume a privilege to intrude upon the rights of others, but rather must respect the autonomy of each person and stand clear in the absence of a direct, affirmative manifestation of consent. On this basis, anything less than an explicit 'yes' should not count as consent." *Id.* at 133. Other articles advocating an affirmative consent standard in rape law include Robin D. Wiener, *Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 6 HARV. WOMEN'S L.J. 143 (1983); Lucy R. Harris, Comment, *Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613 (1976); Lani A. Remick, Comment, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103 (1993). For exceptional statutes requiring affirmative manifestations of consent, see CAL. PENAL CODE § 261.6 (West Supp. 1987) (defining consent as "positive cooperation in act or attitude pursuant to an exercise of free will"); WIS. STAT. ANN. § 940.225(4) (West Supp. 1992) (defining consent as "words or overt actions . . . indicating a freely given agreement to have sexual intercourse or sexual contact"); WASH. REV. CODE ANN. § 9A.44.010(7) (West Supp. 1992) ("'Consent' means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse."). Antioch College in Ohio recently adopted a sexual offense policy that requires "willing and verbal" consent for each sexual touching. *See* Jane Gross, *Combating Rape on Campus In a Class on Sexual Consent*, N.Y. TIMES, Sept. 25, 1993, at 1.

kind of intrusion on the person requires unambiguous, positive permission."[122]

I believe Schulhofer chose this story because he wanted a clear case, a situation in which the duty to respect individual choice is unequivocal, "an obvious violation of the physical autonomy of [the patient's] person."[123] His choice of protagonist also challenges the claim that protecting women's autonomy is paternalistic. Now suppose we replaced the male athlete lying indecisive on the operating table with a woman, especially a woman of color? Is the meaning of autonomy and impermissible violation still so clear? It is well documented that gender, race, and class affect the type of care patients receive and the way in which doctors understand their duty to respect patient autonomy.[124] For example, doctors have forced pregnant patients, usually poor women of color, on numerous occasions to undergo surgery against their will.[125] A recent study of judicial reasoning in right-to-die cases found that gender profoundly affects how courts view the role of patient autonomy: courts are much more willing to accept evidence of men's preferences with regard to life-sustaining treatment.[126] Alexandra Dundas Todd discovered in her observations of doctor-patient interactions in a community clinic and private office that "the darker a woman's skin and/or the lower her place on the economic scale, the poorer the care and efforts at explanation she received."[127] These women were more likely to be considered "difficult" and "to be talked down to, scolded, and patronized."[128] In upholding regulations

122. Schulhofer, *supra* note 5, at 75.

123. *Id.*

124. *See, e.g.*, SUE FISHER, IN THE PATIENT'S BEST INTEREST: WOMEN AND THE POLITICS OF MEDICAL DECISIONS (1988); ALEXANDRA DUNDAS TODD, INTIMATE ADVERSARIES: CULTURAL CONFLICT BETWEEN DOCTORS AND WOMEN PATIENTS 77 (1989); Council on Ethical and Judicial Affairs, *Black-White Disparities in Health Care*, 263 J.A.M.A. 2344 (1990).

125. *See* Veronika E.B. Kolder et al., *Court-Ordered Obstetrical Interventions*, 316 NEW ENG. J. MED. 1192 (1987); Nancy K. Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans*, 74 CAL. L. REV. 1951 (1986). Kolder, Gallagher and Parsons reported that their national survey discovered 21 cases in which doctors petitioned courts to order obstetrical procedures, of which 18 petitions were granted. Kolder et al., *supra*, at 1192. Eighty-one percent of the women involved were women of color; all were treated in a teaching-hospital clinic or were receiving public assistance. *Id. See also* Lisa C. Ikemoto, *Furthering the Inquiry: Race, Class, and Culture in the Forced Medical Treatment of Pregnant Women*, 59 TENN. L. REV. 487 (1992).

126. Steven H. Miles & Allison August, *Courts, Gender and "The Right to Die,"* 18 LAW, MED. & HEALTH CARE 85 (1990). The authors found that courts viewed men's opinions about treatment as rational and women's remarks as unreflective, emotional, or immature; failed to recognize women's moral agency in relation to medical decisions; and were more likely to consider life-support dependent men as subjected to medical assault. *Id.* at 87.

127. TODD, *supra* note 124, at 77.

128. *Id.*

prohibiting abortion counseling in publicly funded clinics, the Supreme Court in *Rust v. Sullivan*[129] minimized the importance of autonomy when patients are women dependent on government assistance.[130]

These violations of female patients' autonomy illustrate all the work required to make "nonviolent sexual misconduct" a meaningful protection. The meaning of Schulhofer's parable changed not because the definition of autonomy changed, but because the identity of the patient changed. Society often sees the female patient, especially when she is a poor woman of color, as someone without a will, someone whose choices it is not bound to respect, someone for whom the intrusion is more likely to be permissible. These attitudes about women's autonomy will shape courts' interpretation of a new crime of sexual coercion. I have less confidence than Schulhofer in the "baseline of existing social protection for freedom of choice, which is already quite concrete and substantial."[131]

## CONCLUSION

The shift from violence to sexual autonomy raises at least three remaining questions. First, if hierarchies of power, supported by deeply embedded images, determine whose autonomy matters, how can the law make autonomy a meaningful concept? Dripps and Schulhofer are right that the law should understand sexual crimes as a violation of women's sexual autonomy, as well as a violent assault. But the conception of rape or sexual abuse in terms of "choice" leaves us where we started.

Second, why does sexual autonomy deserve society's extra protection? What is so special about women's agreements to engage in sexual intercourse (as opposed to the multitude of other "choices" people make) that warrant the intervention of the criminal law? Some feminists have expressed concern that an indiscriminate protection of women's sexual choices smacks of paternalism.[132] For example, Katie Roiphe, a critic of "rape-crisis feminists," observed:

> People pressure and manipulate and cajole each other into all sorts of things all of the time. As Susan Sontag wrote, "Since Christianity

129. 111 S. Ct. 1759 (1991).

130. *See* Dorothy E. Roberts, Rust v. Sullivan *and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587, 593-604 (1993).

131. Schulhofer, *supra* note 5, at 84.

132. *See* Berger, *supra* note 83, at 77 (arguing that criminalizing some forms of sexual coercion may imply "that one should not expect weak females to defend their own sexual autonomy against any form of unpleasantness or pressure").

> upped the ante and concentrated on sexual behavior as the root of virtue, everything pertaining to sex has been a 'special case' in our culture, evoking peculiarly inconsistent attitudes." No human interactions are free from pressure, and the idea that sex is, or can be, makes it what Sontag calls a "special case," vulnerable to the inconsistent expectations of double standard.[133]

Conservatives similarly require special justification to exempt sexual transactions from the unfairness of the marketplace.[134] Indeed, Dripps ventures that "there is good reason to believe that the inequality of women in sexual bargaining is *less* than their inequality in commercial bargaining."[135] We can answer these concerns only by thinking of women's sexual autonomy in terms other than an individual's bargained-for service or even an important personal freedom. The justification for protecting women's sexual autonomy must identify the role of sexuality and sexual violation in women's oppression. 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.

Third, to what extent should we rely on the criminal law, which vindicates an injured individual woman and places blame on a guilty individual man, to create conditions necessary for women's sexual autonomy? Schulhofer's parable of the desperate mother illustrates how economic inequality and the cultural acceptance of sexuality as a vehicle of domination may be just as responsible for her sexual vulnerability as her benefactor's bargain. As Schulhofer's pronouncement of legal innocence confirms, the benefactor is simply taking advantage of unfair configurations he did not create. One revelation of feminist rape reform is that the violation of women's sexual autonomy is not the aberrant behavior of a few deviant men, but a pervasive social phenomenon supported by institutions and ideology. Moreover, the singleminded mission of enhancing individual women's security by ensuring that offenders are punished conflicts with the antiracist interest in protecting the Black community's freedom from excessive and bi-

133. Roiphe, *supra* note 85, at 40.

134. *See, e.g.*, POSNER, *supra* note 11 (presenting a view of sex as a commodity to be traded on the market). In fact, the double-standard operates the other way around: the law extends far greater protection against coercion to commercial transactions than sexual ones. *See id.* at 392-95 (justifying the legality of fraudulently procured sex); Estrich, *supra* note 79, at 1115-21; Larson, *supra* note 119, at 412 (referring to the "law's failure to protect the decision to have sexual relations from coercion by fraud" as a "sex exception to fraud").

135. Dripps, *supra* note 5, at 1791 (emphasis added).

ased state power.[136] The proposed statutory schemes may generate more convictions of middle-class white men for less serious sexual misconduct. Without confronting the racialized meaning of rape, however, they may also create a system in which the more serious crime of violent rape is reserved for Black men, leaving Black women unprotected.

Dripps and Schulhofer have taken on the tough challenge of separating violation of women's sexual autonomy from violence in order to make it amenable to criminal law's remedies. Despite their pragmatic benefits, these schemes risk obscuring rape's relationship to arrangements of power, as well as the continuities of sexuality and violence that continue to injure and dehumanize women. Even more important than jailing more minor sexual violators is the task of developing a vision of liberation from sexual oppression that accounts for these complexities of power, sexuality, and violence.

136. *See* Bumiller, *supra* note 4, at 87. *Cf.* Olsen, *supra* note 60, at 429 (criticizing the feminist position that "recognizes males as aggressive but acts as though merely expanding social control, without changing the nature of social control, will provide a real answer").