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THE 'BLACKMAIL MYTH' AND THE PROSECUTION OF RAPE AND ITS ATTEMPT IN 18TH CENTURY LONDON: THE CREATION OF A LEGAL TRADITION*

ANTONY E. SIMPSON**

I. INTRODUCTION

As is now generally appreciated, the crime of rape occupies a very special place in the criminal courts among those offenses involving assaults against individuals. Conviction rates for rape, however, are unusually low and its incidence is grossly under-reported. The conventional response of the criminal justice system toward those complaining of being so victimized by rape has been unreceptiveness and hostility.¹ So strong is official and public suspicion of the rape victim that her treatment by the justice system after she has lodged a complaint has been termed "the second assault".²

The distinguishing feature of the rape prosecution in the courtroom, unparalleled in other violent crimes, has traditionally been the intense focus on the character and motivations of the complainant. This focus is exemplified by the concern of the courts with aspects of the victim's behavior which are not immediately related to the circumstances of the offense; an extraordinary interest in the demonstration of proof of resistance and application of force; and even, in some jurisdictions, the use of corroboration requirements to support the victim's testimony.³

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¹ E.g., Schwartz & Clear, *Toward a New Law on Rape*, 26 CRIME & DELINQ. 129 (1980).

² J. WILLIAMS & K. HOLMES, *THE SECOND ASSAULT* (1981).

³ For a detailed analysis of the recent history of these and other legal rules applied in rape prosecutions, see Berger, *Man's Trial, Women's Tribulation: Rape Cases in the Courtroom*, 77 COL. L. REV. 1 (1977). For a guide to the current principles underlying the prosecution of this crime, which documents the continuing importance of all of these

Cases of rape are invariably ordeals for victims and usually failures for the prosecution because the legal rules set to guide the conduct of these cases reflect mistrust of the motives and sworn evidence of the complainant. In this lies the singularity of the legal rules which surround the law of rape and its prosecution.⁴

Most of the considerable number of recent criticisms of rape law include strong calls for its reform. It is not the intent of this article to challenge either the justice or the importance of these criticisms. It is, however, this article's intent to modify the generally ahistorical views taken regarding the significance of the act of rape in society, and of the legal rules used in its prosecution. Some of the obstacles to the successful prosecution of rape at the present time are almost precisely the same as those operating in England in the eighteenth century. The analysis which follows is intended to show that when these legal rules are considered from the point of their historical origin, a better understanding can be gained of their present value, as well as the concerns which originally motivated them. The persistence of these rules in the law, beyond the historical circumstances that produced them, requires that they be justified by more than just legal tradition and, perhaps, the male folk-memory of a distant past.

The image of the malicious, venal, or disturbed prosecutrix—that *bête noire* of the present-day rape prosecution—was a very familiar one in the courts of eighteenth century London. It will be suggested, however, that it emerged in circumstances which were quite particular, and concerned with an unhappy clash between the interests of a legal system undergoing modernization and the values of a popular culture. This conflict had a strong influence on the moulding of legal tradition in this area. If it can be shown that our present treatment of rape is based on a tradition which was a product of particular, and not universal, experience, then this image will at least have been stripped of some of its conventional protection.

There are other reasons, both general and specific, for believing that an examination of the substance and application of the law of rape in mid- and late-eighteenth century England has considerable relevance to legal theory in the present day. Legal developments in eighteenth century England are of great importance to the law of modern Anglo-American jurisdictions. Achievements in the development of procedural rules were considerable during this pe-

rules see F. LEE BAILEY & H. ROTHBLATT, *CRIMES OF VIOLENCE: RAPE AND OTHER SEX CRIMES* (1973).

⁴ Berger, *supra* note 3, at 10.

riod. These developments occurred primarily because of the increasing involvement of lawyers in the criminal process,⁵ and because of developments in legal bibliography which made more reliable reporting of cases possible, and therefore fostered the development of *stare decisis*.⁶

The doctrine of *stare decisis* had a rather special meaning in eighteenth century law; one which permitted, indeed encouraged, the notion of change. Like all legal rules, the notion of precedent has true significance in its expression, not just in its principle. In England at this time, the notion of precedent was a very flexible one which encouraged the primacy of judges as masters in their own courts.⁷

Precedent at this time was regarded as a guide to the judge's actions and not as a binding restraint. The belief that judges "have always assumed the power to disregard cases which are plainly absurd and contrary to principle" was pervasive in the eighteenth century.⁸ Until the notion of precedent assumed its modern form, judicial flexibility was built into the common law system. Because of this flexibility, Sir James Stephen was prompted to characterize the early modern common law system as one in which the meaning of statute law was so extended by court decisions and writers of legal texts, "that the statute resembles an ancient sea-wall superseded by the receding of the sea in front of it."⁹

In fact, certain areas of the law underwent great changes during the eighteenth century, and in ways unrelated to statutory enactment. Not a single statute addressing the crime of rape was enacted in England during the eighteenth century. Nonetheless, this branch of the law was transformed, through the re-interpretation of common-law principles. The net effect of this legal change was to make both rape and attempted rape much more difficult to prosecute. The flexibility of contemporary interpretations of precedent also created a great deal of confusion over what the law was at any given moment. Definitions of what constituted carnal knowledge, for example, an obvious requirement for a rape prosecution, could vary from court to court, and between judges sitting in the same court. Not until the early Victorian period was a single definition of carnal

⁵ Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263 (1978) [hereinafter cited as Langbein, 1978].

⁶ Holdsworth, *Case Law*, 50 L.Q. REV. 180 (1934).

⁷ Langbein 1978, *supra* note 5.

⁸ Holdsworth, *supra* note 6, at 186.

⁹ 3 J.F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 49 (1883).

knowledge universally accepted.¹⁰

In eighteenth century England, most of the principles of the modern law of rape were established. These include criteria for demonstrating a lack of consent, corroboration requirements for cases involving child victims, and the focus upon the character and motives of the complainant. The current belief that the principles of modern American rape law began with Dean Wigmore¹¹ is therefore not conducive to the understanding of the origins of these principles. Wigmore wrote at a time when statute and common-law affecting rape were at least generally uniform and understood. The rules he cites, however, were to a large extent those which emerged in late eighteenth century England, toward the end of a long period of tremendous confusion in the law regarding this offense.

II. THE LAW OF RAPE AND POPULAR TRADITION

Principles which emerge from periods of confusion should be recognized as such, and their content at least in part evaluated from the nature of the forces within the maelstrom which produced them. They should not be given to us, even by implication, simply as products of logic and experience.

It is one thing to suggest that the legal traditions in which the law of rape is embedded are a direct heritage of an earlier and more flexible age. It is another to show that some of these very traditions were, at their point of origin, linked more closely to contemporary popular beliefs and concerns than to earlier versions of the common law. Such was in fact the case. Many of the principles affecting the prosecution of the law in this area were closely related to popular belief.

One folk-belief that was widely-held in the community, but apparently rejected by the courts, was that forced sexual congress could never result in pregnancy. The legal corollary of it was, of course, that a pregnant complainant was to be regarded with great suspicion. This belief was occasionally mentioned in Old Bailey trials, but it does not seem to have been taken seriously by the

¹⁰ For a detailed discussion of the development of the law of rape, and the pattern of its prosecution, in all 294 cases of rape, and eighty-one of attempted rape, heard in the Old Bailey between 1730 and 1830, and the City of London Quarter Sessions between 1740 and 1830, see A.E. Simpson, *Masculinity and Control: The Prosecution of Sex Offenses in Eighteenth Century London* 114-311 (Ph.D. dissertation New York University 1984). Later observations on this area of the law are, unless otherwise indicated, based on this source.

¹¹ Most writers cite the 1940 edition of his work as the earliest influential statement of these tenets; J. WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* (3d ed. 1940).

courts.¹² It may, however, have influenced the findings of juries whose verdicts were not entirely under the control of the courts.

Of much greater significance to the very substance of the law of rape and the legal rules affecting its prosecution concerned the widespread belief that a man afflicted with venereal disease (V.D.) could cure his condition through carnal knowledge of a virgin. As I have shown elsewhere in some detail,¹³ this belief was widespread in popular culture and continued long beyond the eighteenth century. Its influence on the crime of rape was that almost half the victims of rape or attempted rape, (at least of those cases which reached a trial court) were children below the age of ten.

It could, of course, be argued that, in a society in which V.D. was endemic, men may have sought extremely young, and presumably innocent, partners to avoid the *risk* of contagion. Nonetheless, the courts were tolerant of this popular belief. It was occasionally cited as a mitigating factor of this crime—not because polite society necessarily accepted it, but because it recognized that the lower orders of society most certainly did accept this notion.¹⁴

It is possible that this tolerance was reflected in the particularly low conviction rates for rape prosecutions involving very young children. A much more powerful indicator of this tolerance, however, is the fact that the courts of this period effectively, and through a re-interpretation of the common law, *lowered* the age of female consent from twelve to ten. This change made prosecuting defendants accused of violating children in the ten to twelve age-group much more difficult, as compelling evidence of force and lack of consent had then to be introduced.

Because of the tender ages of so many of the victims, this legal innovation had a powerful impact on the legal position of rape as a whole. In an age when greater concern for the young, and more affective relations within the family, were supposedly coming to the fore,¹⁵ it is hard to explain this legal trend as anything other than extreme tolerance of a popular belief which benefited only those who were both diseased and male.

¹² *E.g.*, R. v. Jones, OLD BAILEY PROCEEDINGS, sessions beginning January 21, 1755 (No.91) [hereinafter cited as O.B.P. In those instances where the case has been assigned a case number, this will be so indicated].

¹³ Simpson, *Vulnerability and the Age of Female Consent: Legal Innovation and Its Effect on Prosecutions for Rape and Its Attempt in London, 1730 through 1830*, in IN LIBERTY'S A GLORIOUS FEAST: SEXUAL UNDERWORLDS OF THE ENLIGHTENMENT (G.S. Rousseau & R. Porter eds. 1986 forthcoming) [hereinafter cited as Simpson, *Vulnerability*]. This essay is the authority for the few undocumented comments which follow.

¹⁴ *E.g.*, R. v. Russen, Morning Chronicle, Aug. 1, 1777.

¹⁵ P. ARIÈS, CENTURIES OF CHILDHOOD (R. Baldick trans. 1962).

Similarly, the lack of interest in criminalizing incest shows little concern for the circumstances of many of the rape cases coming before the courts. Of the many cases involving children in the courts that I have studied, a substantial proportion involved incestuous liaisons.¹⁶

Incest was not, however, a criminal offense in England at this time. It was, in fact, not made a crime until 1908, and ten years of serious lobbying preceded its promotion to the statute books. Concern for incest, when it finally developed, has variously been attributed to an intensified interest in the family as a social unit,¹⁷ and to the decision of social purity organizations to force the criminalization of incest as a means of demonstrating their own political strength.¹⁸ Concern for the prime targets of the rapist's attentions was not much of a factor in the development of the law in this area, either in the eighteenth century or the nineteenth.

III. THE 'BLACKMAIL MYTH'

From the foregoing discussion, it is apparent that there was a strong link between popular, and male-biased, cultural beliefs of the eighteenth century and the law of rape. However, we can adduce more than just this link from this finding. It can be shown that the particularized values of a male-oriented culture presently inform the prosecution, and sometimes the legal substance, of the offense of rape. The 'blackmail myth' is the legal crystallization of the assumption that the complainant in a rape prosecution is quite likely to have made her charge from motives corrupt, vindictive, or otherwise dishonest. Its influence continues even today. The hostility and vulnerability to character assassination which the modern American rape victim faces in attempting to follow her complaint through the criminal courts is well known and requires little documentation here. Prosecutions for rape are now, as they have been for over 250 years, associated with institutionalized reactions that have the effect of bringing discomfort to the victim, rather than the defendant. Mistrust of the victim's motives in filing a charge of rape has been widespread in the criminal justice system. Concern for the "vindic-

¹⁶ Of the 189 cases in which the relationship between attacker and victim can be determined, ten involved sexual abuse within the nuclear family. An additional thirty-five involved assaults allegedly committed by a man on a member of the same household.

¹⁷ Wohl, *Sex and the Single Room: Incest Among the Victorian Working Classes*, in *THE VICTORIAN FAMILY* 197 (1978).

¹⁸ Bailey & Blackburn, *The Punishment of Incest Act of 1908: A Case Study of Law Creation*, 11 *CRIM. L. REV.* 708 (1979).

tive female" who makes such a charge from malice or from a desire for revenge¹⁹ has been manifested in the attention paid in rape prosecutions to the alleged victim's motives and reputation.

These attitudes are not just those taken in the prosecution of the law, they are actually embedded in legal tradition. As the standard legal encyclopedia addressing this offense tells us: "Counsel should carefully investigate the conduct of the prosecutrix at the time of the alleged rape."²⁰ Recent case-law upholds the principle that "the reputation of a complainant is the most generally used means to prove her character in order to establish or discount her credibility."²¹

False reports are lodged, of course, in every type of crime, and for a variety of reasons connected to the infinite spread of human emotion. The difference, between rape and other crimes in regard to this factor lies in the matter of proportion. In the past, it has been believed that the number of false allegations of rape has generally been abnormally high.²² Recent studies suggest, however, that the rate of unwarranted charges of rape may be no higher than that for other crimes.²³

These findings may take a little time to filter down into the mechanics of judicial practice. Innate courtroom suspicion of the rape victim is thought to have its basis in tradition and not in fact, and this tradition is in turn closely related to the notion of sexual violence as a demonstration of male power.²⁴ In fact, findings of this sort may never filter down at all. If, as is often suggested, attitudes within the law are based on a legal tradition which reflects a universal male desire to use rape as a weapon to keep women in their place,²⁵ these attitudes are unlikely to be dented by empirical findings.

¹⁹ For discussion of this and other images held by judges, see Bohmer, *Judicial Attitudes Toward Rape Victims*, 57 JUDICATURE 303 (1974).

²⁰ F. LEE BAILEY & H. ROTHBLATT, *supra* note 3, § 457 at 294.

²¹ See e.g., *State v. Cole*, 20 N.C. App. 137, 201 S.E.2d. 100, (1973); see also cases cited in F. LEE BAILEY & H. ROTHBLATT, *supra* note 3, § 465 (Cum. Supp. 1983).

²² Widely cited in this context is the finding that about twenty percent of rape allegations are unfounded, and the contention that rape is "one of the most falsely reported crimes." Comment, *Police Discretion and the Judgment that a Crime has been Committed—Rape in Philadelphia*, 117 U. PA. L. REV. 277 (1968) (quoting, G. PAYTON, *PATROL PROCEDURE* 283 (1966)).

²³ For a review of research findings on this and other aspects of this crime, see S. KATZ & M. A. MAZUR, *UNDERSTANDING THE RAPE VICTIM* 205-14 (1979). See also the annotated bibliographies on the subject regularly included in the J. CRIM. L. & CRIMINOLOGY.

²⁴ Berger, *supra* note 3.

²⁵ The classic statement of this view is included in the work of Susan Brownmiller; see *infra* note 182.

The situation is perhaps even more depressing than this. If legal tradition in this area is of recent origin, as is usually thought,²⁶ it may presumably be more easily eroded than if it was based on more ancient tradition. In fact, as I have suggested, the pro-defendant bias in this law is old indeed.

The long arm of the English law of this period has reached to the American legal system of the late twentieth century in a very particular way. The famous dictum of Lord Hale regarding the caution with which an allegation of rape should be received²⁷ was read verbatim in the courts of many states until the 1970s.²⁸ "Countless articles on rape laws and rape trials document the problems that have confronted the rape victim ever since Lord Hale's admonition made the victim's past sexuality a legitimate measure of credibility."²⁹

The obvious effect of Hale's warning was to make the victim, and not the defendant, the focus of the court's attention. Hale himself intended his admonition in a very specific sense, and not just as a general caution. After describing a number of cases of malicious prosecution for this crime, from his own experience as a judge on the assize circuit in the late 17th century, he concluded with the passage:

I only mention these instances, that we may be the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation, that they are overhastily carried to the conviction of the person accused thereof, by the confident testimony of sometimes false and malicious witnesses.³⁰

One cannot attribute Hale's concerns to his personal bigotry—although there are those who have challenged his probity in this way.³¹ Hale was generally quite sympathetic to rape victims. His treatise appears to be unparalleled in challenging contemporary

²⁶ "The structure of rape law seems to be based on a series of irrelevant and intellectually suspect anecdotes and conclusions quoted by Dean Wigmore . . ." Schwartz and Clear, *supra* note 1, at 132.

²⁷ It is true, that rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.

I M. HALE, *HISTORIA PLACITORUM CORONAE. THE HISTORY OF THE PLEAS OF THE CROWN* 635 (new ed. by S. Emlyn and G. Wilson London 1800).

²⁸ This requirement was only removed from the California code of criminal procedure in 1975; *300 Years On*, 256 *ECONOMIST*, Aug. 16, 1975, at 51.

²⁹ T. McCahill, L. Meyer & A. Fischman, *THE AFTERMATH OF RAPE* 197 (1979).

³⁰ I M. HALE, *supra* note 27, at 636.

³¹ See Geis, *Lord Hale, Witches, and Rape* 5 *BRIT. J.L. & SOC'Y* 26 (1978).

movements, previously mentioned, toward lowering the age of female consent and increasing the difficulties of proving carnal knowledge.³² On this last point, Hale's contention that "the least penetration maketh it rape or buggery, yea altho there be not *emissio seminis*"³³ was offered as the *traditional*, and therefore binding, common-law principle on point. It is also the definition now generally accepted in Anglo-American law,³⁴ although not in late eighteenth and early nineteenth century England. If it is accepted at all, Hale's statement should be taken as an opinion of one who was, in his interpretation of the law, unusually supportive of those prosecuting this crime.

Lord Hale's concern should therefore be seen as an unsensational statement of a common male belief in the prevalence of rape charges motivated by well-organized attempts at monetary gain. This belief was quite vocal³⁵ and effective in its consequences, in that those charged with rape were rarely convicted.³⁶

In one sense, anyone in eighteenth century London was vulnerable to unwarranted prosecution. The City of London, that square mile in the very center of the Metropolis, was governed by elected aldermen-magistrates who were rich men with aristocratic connections³⁷ who would not have been attracted by the petty rake-offs available through the manipulation of their office. In Westminster and those other urbanized parts of the Home Counties which made up the bulk of the Metropolis, however, things were quite different.

Throughout the century, the venality of the Middlesex bench was a byword.³⁸ Paid perjurers were well-known, easily accessible and operated extensively in the courts. In Francis Place's youth, civil litigation was regarded as the avenue for thinly-disguised at-

³² I M. HALE, *supra* note 27, at 627, 631.

³³ *Id.*, at 627.

³⁴ F. LEE BAILEY & H. ROTHBLATT, *supra* note 3, at §§ 428-29 at 275-76.

³⁵ In one trial the counsel for the prosecution observed that extortion of this kind: "had become . . . the fashionable vice of the present day . . . There were detestable wretches engaged in (such) conspiracies." R. v. Henderson, Court of King's Bench, *The Times*, July 6, 1798.

³⁶ The conviction rate for rape in the Old Bailey between 1730 and 1830 was seventeen percent. Comparable rates for the capital crimes of burglary and robbery were fifty-six percent and thirty-five percent. A. E. Simpson, *supra* note 10, at 842-44, 846-48.

³⁷ Rogers, *Money, Land and Lineage: The Big Bourgeoisie of Hanoverian London*, 4 Soc. Hist. 437 (1979).

³⁸ Tobias Smollett presented the standard caricature of the Middlesex trading justice' in his depiction of Justice Gobble. Gobble is characterized as low-born, badly-educated, arrogant and corrupt. He is a tyrant to the poor and a sycophant of the rich. T. SMOLLET, *THE LIFE AND ADVENTURES OF SIR LAUNCELOT GREAVES* 92-101 (D. Evans ed. 1973)(1st ed. London 1761).

tempts at extortion and other "enormous and scandalous frauds."³⁹

People therefore had some reason to fear the corrupt prosecution or civil suit. They had no *particular* reason, however, to believe these centered on accusations of rape. In fact, all of the periodic scandals showing the existence of highly-organized gangs who used the courts in this way showed other crimes to have been the focus of attention. The various scandals involving groups of police officers who swore away the lives of innocent or entrapped people concerned the capital crime of robbery. Robbery was the focus of such activity because robbery convictions brought a very substantial statutory reward.⁴⁰

Organized gangs specializing in blackmail did exist, but allegations of rape did not appeal to them. Accusation of homosexuality was their stock-in-trade and, judging by the amount of attention paid to their activities in the press and in the criminal courts, these gangs were greatly feared.⁴¹

It is not difficult to understand why allegations of blackmail constituted a major item in the defense of so many rape cases.⁴² A plea that the victim had sought to extort money, had consented to the act, or both, was a convenient adjunct to a defense strategy which attempted to focus the interest of the court on the character of the complainant.

What is surprising is that in many instances extortion, or attempts to extort, were either admitted or attested to by more than one witness. It should be noted here that the interpretation of this finding is not without difficulty; the fact that the defense could produce two or more witnesses to swear to attempts of extortion does not mean that these attempts actually occurred.⁴³ There is simply

³⁹ F. PLACE, *THE AUTOBIOGRAPHY OF FRANCIS PLACE (1771-1854)* 32 (M. Thale ed. 1972).

⁴⁰ Scandals of this nature became objects of sustained official attention in 1725, 1755, and 1816; G. HOWSON, *THIEF-TAKER GENERAL* (1970); *The Trial of Stephen M'Daniel, John Berry, James Egan . . . and James Salmon*, in *19 A COMPLETE COLLECTION OF STATE TRIALS 745-814* (T.B. Howell comp. London 1816-28); *THE FOUR WHOLE TRIALS OF THE THIEF TAKERS* (London 1816).

⁴¹ Simpson, *Blackmail as Capital Felony in Eighteenth Century English Criminal Law: Donnelly's Case and Its Legal Context*, (Unpublished paper) [hereinafter cited as Simpson, *Blackmail*].

⁴² In 167 of the 375 prosecutions of rape or attempted rape identified, the presence or absence of this factor can be assessed. Extortion was an issue in fifty-seven; rather more than one-third of them.

⁴³ The very detailed reports of the domestic servant Jane Byrne's attempt to prosecute her employer, William Smith, for rape show just what a wealthy defendant could manage when he chose to mobilize his resources in an unscrupulous fashion. *The Times*, Dec. 5, 6, 8, 11, 13, 20, 1828, Jan. 1, Feb. 25 and May 1, 1829; *O.B.P.* Jan. 17, 1829 (No. 364) and Feb. 24, 1829 (No. 325).

no way of knowing how many of these cases involved testimony for the defense—or the prosecution, for that matter—which was perjured.

We *can*, however, be reasonably certain that extortion in this context was not much of a hazard for eighteenth century men because it was neither highly-organized nor skillfully managed. There *were* extortion attempts in the period which were professional and centered on the crime of rape, but there were not very many of them.⁴⁴ Most of the extortion attempts which involved rape charges and which were clearly criminal in origin were amateurish and did not involve large amounts of money. They were not regarded in a very serious light by the courts.⁴⁵

Therefore, one cannot attribute the public image of the innocent defendant and venal prosecutrix to the susceptibility of men to sophisticated criminal intentions in this regard. Neither can one attribute it to any heightened fears of men of being accused of child assault. It is true that attacks on very young girls made up a high proportion of the cases of rape and attempted rape which reached the London courts, although such attacks offended the values of male culture as well as those of the law.⁴⁶ There is no reason, however, to believe that this situation provided a favorable scenario for the blackmailer. On the contrary, suggestions of blackmail scarcely appear in the reports of these cases.⁴⁷

Even if a man was prosecuted for rape, falsely or not, he need not have been unduly worried about it. The low rate of conviction for this offense made legal sanctions unlikely. Married men would presumably have been fearful of public exposure of their indiscretions, real or imagined. Many may have preferred to pay hard cash in preference to having to explain their situation to a possibly un-

⁴⁴ Only a few can be identified through court records: *R. v. Morris*, O.B.P. sessions ending Apr. 23, 1757; *R. v. Shortney and Fripp*, O.B.P. sessions ending Oct. 27, 1757; *R. v. Shortney, Shortney, Leigh and Warren*, O.B.P. sessions ending Dec. 10, 1757; *R. v. Elliott, Davis, Davis, Elliott, Evans, Suggote and Kneller*, O.B.P. sessions beginning Apr. 15, 1815 (No. 590). These cases, however, were atypical of cases of extortion through accusation of rape, in that many of the conspirators were *men*: in *R. v. Morris*, four of the five indicted extortionists were male and in *R. v. Elliott, Davis, Davis, Elliott, Evans, Suggote and Kneller*, three out of the seven were male.

⁴⁵ A barmaid who was caught in a second attempt of this nature had obtained only 10/6d from her accused attacker. When her past history was brought out in court, the judge dismissed the case and let her off with a caution: "You should not play these tricks, young woman." *R. v. Foy*, O.B.P. sessions beginning Dec. 4, 1782.

⁴⁶ Simpson, *Vulnerability*, *supra* note 13.

⁴⁷ There were sixty-three prosecutions for rape of children under ten identified in the century and the setting that were studied. Of the forty-one cases for which such a determination can be made, blackmail was only mentioned in three of them.

sympathetic audience on the home front.⁴⁸

For a large number of men, however, even those of position and substance, being accused of this crime was not necessarily something of which to be ashamed. A surgeon accused of the attempted rape of one of his patients in 1825, a time when a good deal of public attention was being directed toward the prevalence of attacks on women, felt able to admit to the assault in a quite open and shameless fashion:

Miss Murdison is a young lady who bears a very general character in the neighbourhood for levity; and hearing this, as also that she was a person that any advantage might be taken of her by any designing person, I did not consider that the little liberties which I might take with her would be repulsed.⁴⁹

There are many similar examples to be found of men of rank who offered considerable violence to those who rejected their advances and who did not appear upset by their public exposure. The picture of the young Hooray Henry sniggering in the dock while being accused of attacks of the most cowardly nature is a standard feature of the early nineteenth as well as the eighteenth century.⁵⁰

Although the above considerations do suggest that blackmail of this sort was not a serious worry for men at this time, they scarcely address the probability that such blackmail, or overtures on the part of the victim which could be so characterized, *did* often occur. The familiarity of the rape-and-blackmail association is exemplified by the misfortunes of Isaac Rapine, encountered by Smollett's Roderick Random in his travels.

Rapine, (so called because of his notoriety as a moneylender rather than an as an aggressive swordsman), ends a short stay at an inn by being accused of rape by a lady who had invited him into her bed. All those present on the occasion understand the truth of the situation fully, but advise Rapine to settle the matter rather than risk a prosecution for rape. This is duly done.⁵¹

There are, however, indications that Rapine was especially unfortunate. One indication that such activities may have been wide-

⁴⁸ This would not always have been true because many wives probably accepted, or at least tolerated, the *droit de seigneur* commonly exercised by a master over his servants. The wife of one man accused in this setting informed the victim that the master "always served his servants so," gave her sixpence, and offered to maintain the child should the girl become pregnant. *R. v Carter*, O.B.P. sessions ending Dec. 16, 1772 (No. 147).

⁴⁹ *R. v Manly*, *The Times*, July 23, 1825.

⁵⁰ See, e.g., the report of *R. v Lord Townshend*, Marlborough Street Police Office, *The Times*, July 6, 1825.

⁵¹ T. SMOLLETT, *RODERICK RANDOM* 61-62 (H.W. Hodges introd. 1967)(1st. ed. London 1748).

spread but were not a focus for professional criminals is that the kinds of sums paid, and even demanded, were comparatively low. Rapine's lady adversary asked for 100 guineas,⁵² but settled for five, and the evidence is that she did much better than most. Table 1 includes all of the cases in the data set in which actual sums are mentioned in alleged extortion attempts. In one of the eighteen cases the demand was reportedly as high as £200, but this was quite exceptional. About half the cases involved demands of well under ten pounds. The amounts offered or actually paid are even less. Apart from one case in which ten pounds was offered, and another in which £3/8/0d was accepted, in no instance did the sum actually paid in blackmail exceed two guineas, and in most instances the sum was a good deal less.

TABLE 1

AMOUNTS ALLEGEDLY DEMANDED AND/OR PAID IN BLACKMAIL ATTEMPTS IN RAPE CASES IN METROPOLITAN CRIMINAL COURTS, 1715 THROUGH 1830*

Demanded	<u>Received</u> or <u>Offered</u>	<u>Case</u>
£50		H. Leeson, The Case of Captain Leeson (London 1715).
30 guineas		R. v. Reytown, O.B.P. sessions ending Dec. 9, 1730.
3 guineas		R. v. Brown, O.B.P. sessions ending Sept. 17, 1735 (No. 111).
£100		R. v. Jones, O.B.P. sessions ending Dec. 15, 1735 (No. 84).
5 guineas		R. v. Trout & Fastnege, O.B.P. sessions ending Dec, 12, 1737 (No. 52).
2/6d	halfpenny	R. v. Haggis, Keeble & Gibbons, O.B.P. sessions ending Feb. 24, 1739 (Nos. 182, 183 & 184).
5 guineas		R. v. Remue, O.B.P. sessions beginning Dec. 8, 1742 (No. 44).
	10/6d	R. v. Kill, O.B.P. sessions beginning Oct. 12, 1743 (No. 476).
£200		R. v. Bright, O.B.P. sessions ending July 16, 1747 (No. 296).
£100		R. v. Morris, O.B.P. sessions ending Oct. 27, 1757.
£40		R. v. Clark, O.B.P. sessions ending April 23, 1762.

⁵² That is £105; a guinea being one pound and one shilling.

5 guineas	2 guineas	R. v. Sheridan, O.B.P. sessions ending April 16, 1768 (No. 284).
5 guineas	2 guineas	R. v. Taylor, O.B.P. sessions ending July 13, 1768 (No. 519).
£20		R. v. Dowling & Cove, O.B.P. sessions ending April 15, 1771.
£20		R. v. Barrett, Cherry & Smith, O.B.P. sessions beginning June 3, 1772 (Nos. 425, 426 & 427).
6 or 7 guineas	6/6d	R. v. Carter, O.B.P. sessions ending Dec. 16, 1772 (No. 147).
	6d	R. v. Amenet, O.B.P. sessions ending May 23, 1774.
	£3/8/0d	R. v. Hatfield, O.B.P. sessions beginning Oct. 15, 1777.
£20	1 guinea	R. v. Jones, O.B.P. sessions beginning Sept. 16, 1778.
	10 shillings	R. v. Morris, Lock & Mills, O.B.P. sessions beginning Oct. 18, 1780.
	10/6d	R. v. Foy, O.B.P. sessions beginning Dec. 4, 1782.
	2 guineas	R. v. Fyson, O.B.P. sessions beginning June 25, 1788.
	£10	R. v. Mann, Lambeth Street Police Office, <i>The Times</i> , Feb. 5, 1827.
£50		R. v. Fricker, Westminster Quarter Sessions, <i>The Times</i> , April 20, 1829.
£10		R. v. Tuttell, Westminster Quarter Sessions, Nov. 13, 1829.

* Both Table 1 and Table 2 suffer from deficiencies in that they include those prosecutions which have been *identified* as supplying the information in question. After the late 1780's rape cases were not generally well-reported. Details of those reported in the earlier period were given at the whim of the court reporter.

Similarly, most misdemeanor prosecutions for offenses such as perjury, conspiracy, extortion, assault, libel or false imprisonment are not reported in detail. No information can now be obtained on the circumstances of most of these offenses.

One could suggest that two guineas was, by the standards of the times,⁵³ a tidy sum. It was, however, probably at best no more than the cost of bringing a prosecution.⁵⁴ Amounts received or offered in this way do not suggest extortion. They were apparently calculated to do no more than reimburse the prosecution for legal ex-

⁵³ It is equivalent to about £125, or \$200, today.

⁵⁴ The offer of ten pounds was made in an 1827 case. By this time the criminal process had become dominated by attorneys and legal costs had, predictably enough, escalated.

penses actually incurred. They included little or no compensation to the victim for the injury suffered.⁵⁵

I have undertaken no proper analysis of the social categories of rape defendants in the cases I have studied, but it is clear that most of them were not men of rank or substance.⁵⁶ The proportion of defendants in this privileged group is uniformly low among the total of those accused of rape and also among those in this group who alleged or were able to prove extortion.

If the blackmail fears of the time were justified, more wealthy men would have been taken to court, and higher sums would have been asked for in extortion attempts. Innocent men may well have been victimized by extortionists claiming rape, but if so, such cases were not characteristic of those which reached the courts.

It could be argued that cases involving wealthier men and larger sums would be more likely to have been settled before going to court. It can be pointed out, however, that the process of negotiation which court cases sometimes reveal show that negotiation continued long after the charge was initially laid. Once a complainant had her allegation accepted by the magistrate, in theory least, she could not then formally drop the charges. She *could* modify or amend her evidence before the grand jury and at the trial, if a true bill was found, to ensure an acquittal.

Negotiation between the defense and the prosecution was a common procedure in all criminal cases,⁵⁷ and was possible at any stage in the legal process.⁵⁸ Prolonging the process through trial could be an excellent tactic for mercenary prosecutions. If a larger number of wealthy men had been blackmailed in this way, then more would have reached the courts.

If it is accepted that most of the attempts at extortion in rape cases were carried out by amateurs, and for small sums, then a greater understanding of the true nature of the negotiation process can be achieved. What was then categorized as 'extortion' was usu-

⁵⁵ The five guineas demanded of William Remue by the employers of a servant-girl he had allegedly raped was intended primarily to compensate them for money that they had laid out for expenses connected with the case. Only one guinea was intended for the victim. *R. v. Remue*, O.B.P. sessions beginning Dec. 8, 1742.(No. 44)

⁵⁶ In the 141 cases in which the defendant's occupation is given, fifteen were gentlemen, eighteen were domestic servants, and fifteen were other servants. The remainder pursued a variety of occupations of the lower and 'middling' classes.

⁵⁷ "The first, the constant thought and occupation of a prisoner on being committed for trial is to devise means of tampering with his prosecutor, and the witnesses against him"; E.G. WAKEFIELD, *FACTS RELATING TO THE PUNISHMENT OF DEATH IN THE METROPOLIS* 54-55 (London 1831).

⁵⁸ Captain Leeson's prosecutrix offered to intercede on his behalf if he was convicted—and if he paid her £50; H. LEESON, *THE CASE OF CAPT. LEESON* (London 1715).

ally no more than an honest attempt by a genuine victim to use the criminal courts as a civil court, and to thereby obtain satisfaction.

Working-class people in the early modern period frequently turned to the courts for redress.⁵⁹ John Langbein has documented the modest social class of most of those prosecuting in the Old Bailey Court in the eighteenth century.⁶⁰ Alan Macfarlane and Sarah Harrison comment upon the lack of a clear distinction in the uses made of the civil and criminal courts and note the willingness of victims to settle their problems by negotiation or civil litigation in lieu of filing criminal charges.⁶¹ Civil actions involving all social classes continued to be popular in the eighteenth century. Libel suits, civil and criminal, were rife. A post-chaise boy could sue an admiral in the Court of King's Bench,⁶² and a pauper could be sued in the same court for the costs of a few nights' lodging.⁶³

It seems likely that in London, in the eighteenth century, the trend could have been in the other direction as civil suits, especially those concerning sexual matters, were notoriously costly. For example, in the 1780's, Francis Place's father fought a paternity suit initiated by the parish and heard in the ecclesiastical courts. He ended up excommunicated, but victorious, having "saved the payment of four and sixpence a week at the cost of a thousand pounds".⁶⁴

Ordinary people used the criminal courts in eighteenth century London, but in the case of rape victims at least, they used them as part of an informal process of negotiation, intended more to bring the victim an acknowledgement of injury than to bring her profit or the dubious satisfaction of seeing a conviction obtained.⁶⁵

The very modest payoffs, unfairly regarded as 'extortion,' are therefore explained. The payments were intended to be large enough to ensure that the prosecution was not out of pocket in its legal expenses, but they were otherwise tokens. If monetary gain

⁵⁹ Ingram, *Communities and Courts: Law and Disorder in Early Seventeenth Century Wiltshire*, in *CRIME IN ENGLAND 1550-1800* 110 (J.S. Cockburn ed. 1977), refers to the traditional litigiousness of pre-industrial England.

⁶⁰ Langbein, *Albion's Fatal Flaws*, 98 PAST & PRESENT 96 (1983).

⁶¹ A. MACFARLANE & S. HARRISON, *THE JUSTICE AND THE MARE'S ALE* (1981).

⁶² Bigley v. Bowater, *The Times*, July 16, 1810.

⁶³ Wordsworth v. Caines, *The Times*, July 6, 1811.

⁶⁴ F. PLACE, *supra* note 39, at 85-86.

⁶⁵ This process could combine civil and criminal litigation. In three instances defendants alleged that criminal proceedings had only been commenced after civil action had been threatened or initiated. *R. v. Brown*, O.B.P. sessions ending Oct. 17, 1735 (No. 35); *R. v. Turner*, Westminster Quarter Sessions, *The Times*, July 12, 1827; *R. v. Tut-tell*, Westminster Quarter Sessions, *The Times*, Nov. 13, 1829. The defendants in these actions included a known robber, a gentleman, and a music teacher.

had been the primary concern, the women would have picked richer men to accuse, and they would have demanded more money. The small sums victims gained in this way were often accepted openly and without furtiveness.⁶⁶ Moreover, such transactions were sometimes reported in the press with no sense of surprise or outrage, even in instances that were, in theory at least, under the jurisdiction of the court.⁶⁷

What mattered to victims was public recognition that they had been wronged, and admission of this by the guilty party. This fact, however, did not dent the blackmail phobia of the period. When Charlotte Rawlins said, after charging her master with rape: "Is there not money to be got when a man behaves in this way to a young girl?"⁶⁸ she may have been talking either about fair compensation for an injury received, or out-and-out blackmail for an assault which never took place. But in the masculine aura of the courts, she would never be given the benefit of the doubt.

'Making up' through a combination of public apology and monetary compensation was recognized formally in the policy of the courts. When we read that William Smith, acquitted of the attempted rape of his housemaid but convicted of common assault, was fined forty pounds "with permission to speak to the prosecutrix,"⁶⁹ we must appreciate that this sentence had a quite specific meaning. It meant that if Smith gave *half* this sum to the victim, together with an apology, the fine itself would be remitted entirely.

Forty pounds was usually the fine imposed in such cases, twenty pounds of which went to the victim. A glance at Table 1 shows that in none of the financial arrangements made or suggested privately did the victim do anywhere near as well as this. If money had been their primary objective, the women whose cases are reflected in the table would have sought judgement by charging a lesser offense which could be dealt with by a court in this traditional way.

Courts therefore recognized customary law, but only when they monopolized control over its use. 'Making up' was in theory limited

⁶⁶ The evidence offered by the defense in one case included a receipt for £3/8/0d paid by the defendant to the prosecutrix in recognition of the injury suffered. The prosecutrix freely admitted that a financial understanding had been reached, but argued that, as her attorney had cheated her of the entire sum, the agreement was void. The defendant was acquitted; *R. v. Hatfield*, O.B.P. sessions beginning Oct. 15, 1777.

⁶⁷ "A true Bill was found by one of the Cyprian Corps, at the Westminster Sessions, against a notorious *Girgashite*, for an unmanly assault on her; but he has, we understand, settled the business with the lady". *The Times*, Oct. 23, 1798.

⁶⁸ *R. v. Thurtell*, *The Times*, Aug. 20, 1829. The capital charge apparently did not stick, as Thurtell was never tried for it.

⁶⁹ *R. v. Smith*, *The Times*, September 14, 1825.

to the offenses of assault, wounding, and false imprisonment, where the injury done to the victim commonly varied tremendously from case to case. This policy was to be implemented with great caution and never in such a way as to provide a viable alternative to civil action. It was only to be used in "superior courts of record" and *never* in "local and inferior jurisdictions."⁷⁰ The rationale for its persistence in law was both to compensate the injured party and to protect the defendant, who could not thereafter be subject to civil action for the injury.

Public acknowledgement of a wrong was an important element of 'making up,' as it was practiced within and without the judicial system. An apology, verbal or written, could be negotiated by the victim or even ordered by the court.⁷¹ In fact, an apology was an important element even in felony prosecutions. At the trial of Richard Freelove, an apprentice accused of raping his master's daughter in 1774, much was made of question of whether the victim's father had "forgiven" Freelove's behavior. If he had, it was acknowledged, the prosecution would have been insupportable.⁷²

The apology was undoubtedly an important ritual to reinforce patterns of deference in legal encounters between the gentry and their social inferiors.⁷³ But it was a good deal more than this: it was an accepted device, by all classes, for the public statement of guilt and innocence. If this had not been the case, public apologies would have been that much less effective as a mechanism for preserving the dominant social order.

The unknown number of rape victims who were forced to settle for a public apology and perhaps a small sum of money in a magistrate's court, negotiated privately or by the justice, did a good deal better than the few who got to a trial court. Those in the former group at least had the benefit of public vindication in a form comprehensible to those around them.

Many rape victims therefore undoubtedly prosecuted out of a desire for some sort of justice—if only an affirmation of their injury in magistrate's court, or a token financial settlement. Those who were able to pursue their cases to trial, however, fared badly indeed.

⁷⁰ W. EDEN, *PRINCIPLES OF PENAL LAW* 234-35 (London 1771).

⁷¹ In the Town Hall, Southwark, Thomas Taylor and his victim both accepted the magistrate's forceful recommendation that he apologize and she drop the case. *The Times*, Oct. 3, 1828. This was a common solution to a common circumstance, and in this case, a solution in which the magistrate overstepped the bounds of his legal authority.

⁷² *R. v. Freelove*, O.B.P. sessions ending July 13, 1774. Freelove was acquitted.

⁷³ Hay, *Property, Authority and the Criminal Law*, in *ALBION'S FATAL TREE* 17 (1975).

Only the extremely naive, or those intent on prolonging negotiations with the accused, would have had a hopeful view of the outcome of a case that went before a jury.

Despite legal recognition of 'making up,' attempts by women to obtain redress through informal negotiation were not accepted as such in the courtroom. The law, however, did in a backhanded fashion recognize that blackmailing women were not a serious problem for male society. Such recognition existed in the fact that this form of blackmail was extremely difficult to prosecute in law.

Use of the word 'blackmail,' in its modern sense, denoting the exaction of material benefit through threats to prosecute or to publish a libel on someone's character, first appeared in the English law in the text of the Theft Act of 1968.⁷⁴ It was not even used *popularly* in this sense before the early nineteenth century. As a misdemeanor in law, it was considered a species of extortion.

Extortion proper was an ancient common law misdemeanor which covered a number of crimes stemming from abuses of public office.⁷⁵ At the beginning of the eighteenth century, the offense was expanded to include 'private extortion,' that is what we would now call blackmail, whether carried out by private citizens or public officials.

Woodward's case,⁷⁶ decided in 1707, affirmed that a man who had been forced to pay to avoid being prosecuted for perjury could prosecute his oppressor on criminal charges for an indictable misdemeanor.⁷⁷ For the rest of the century, such prosecutions could be brought against anyone who extorted, or attempted to extort, money in this manner.

In 1805, this avenue of redress was closed off when, in *Souther-ton's case*,⁷⁸ the Twelve Judges held that the threat of prosecution no longer qualified as a sufficient basis for bringing a charge of extortion in a criminal court.⁷⁹ The Judges felt that the intimation of prosecution "was not such a threat as a firm and prudent man might not and ought not to have resisted".⁸⁰

After 1805, those blackmailed on sexual charges could no longer take what was until then the theoretically easiest route to

⁷⁴ Hepworth, *Deviants in Disguise: Blackmail and Social Acceptance*, in *IMAGES OF DEVIANCE* 192, 197 (S. Cohen ed. 1971).

⁷⁵ 4 W. BLACKSTONE, *COMMENTARIES* *141.

⁷⁶ *R. v. Woodward*, 11 Mod. 137 (1707).

⁷⁷ Winder, *The Development of Blackmail*, 5 MOD. L. REV. 21, 30-32 (1941).

⁷⁸ *R. v. Southerton*, 6 East 126 (1805).

⁷⁹ *Id.*

⁸⁰ Winder, *supra* note 77 at 31 (quoting Lord Ellenbough, C.J. in *Souther-ton*, 6 East 126).

bring their persecutors to justice. They could, of course, continue to prosecute for perjury or conspiracy if they could meet the tougher legal demands of such prosecutions. They could also prosecute for criminal libel. If they took this last course, the truth or falsehood of the allegation which provided the basis of the extortion attempt was not, in theory at least, a factor in the prosecution. This was true both before and after the passage of Fox's Libel Act⁸¹ in 1792.⁸²

Use of libel prosecutions in this way did not prove a popular alternative to the old extortion misdemeanor, and as Table 2 suggests, they were rarely so applied. Between 1805 and 1843, when Lord Campbell's Libel Act⁸³ was passed, there was precious little basis for bringing any sort of misdemeanor prosecution against a blackmailer.

Misdemeanor prosecutions of sexual blackmailers were clearly severely limited by the 1805 decision. Table 2 represents an attempt to quantify all cases involving this type of extortion heard in the Old Bailey and the City of London Quarter Sessions over a one hundred year period. Unfortunately, it suffers from the severe limitation of only including those misdemeanor prosecutions which can be *identified* from court records as being of this nature. The probability remains that many more occurred but cannot now be identified through existing records.

Nonetheless, the findings in the table are striking. In the first place, very few prosecutions of this nature were ever brought. The twenty-three⁸⁴ documented in these courts between 1740 and 1830 pale into insignificance when compared to the 294 accused rapists prosecuted on capital charges in the same period, and the approximately 2,000 total cases which were prosecuted each year in the Old Bailey alone by the late 1820's. Secondly, the conviction rate was low—lower in fact than those routinely achieved for most capital offenses involving acts of violence which came to the attention of this court.⁸⁵

The most interesting finding, however, is that all twenty-three prosecutions identified were for conspiracy, perjury, or criminal li-

⁸¹ Fox's Libel Act, 1792, 32 Geo. 3, ch. 60.

⁸² 2 J.F. STEPHEN 1883, *supra* note 9, at 342-47.

⁸³ 1843, 6 & 7 Vict., ch. 96, § 7.

⁸⁴ This number of prosecutions is inflated by the fact that all seven people charged with conspiracy in 1815 were involved in the same case. One of the people who was charged was the victim's wife. *R. v. Elliott, Davis, Davis, Elliott, Evans, Suggote, and Kneller*, O.B.P. sessions beginning Apr. 15, 1815 (No. 590).

⁸⁵ See *supra* note 36.

TABLE 2
MISDEMEANOR PROSECUTIONS FOR BLACKMAIL UNDER ALLEGA-
TION OF RAPE IN THE OLD BAILEY AND IN THE CITY OF LONDON
QUARTER SESSIONS, 1740 THROUGH 1830*

Year	Number of Prosecutions	Number Guilty	Percentage Guilty
1754	3	3	
1755	3	3	
1757	5	1	
1762	1	1	
1763	1	1	
1764	1	1	
1815	7	0	
1820	1	0	
1829	1	0	
Totals:	23	10	43%
<hr/>			
Number of Victims:	10		
<u>Offense Totals:</u>			
Perjury:	6		
Extortion/Attempt:	0		
Conspiracy:	16		
Libel:	2		

* See note to Table 1 for background information. Prosecutions reported in Table 2 include only those few which can be identified for what they are from information provided by the court reporter or the press. Sources for Table 2 include: OLD BAILEY PROCEEDINGS, 1730 through 1830; Corporation of London Sessions Minute-Books, [Peace, Gaol Delivery, Oyer and Terminer], January 1740 through January 1785 CLRO SM 107-50; Corporation of London Sessions Minute-Books [Peace], February 1785 through December 1830 CLRO SMP 1-9.

bel—all offenses notoriously difficult to prove in a court of law.⁸⁶ Not a single one was for extortion itself. This clearly shows the legal difficulties of prosecuting this offense, both before and after *Souther-ton's case*.

Whatever was said in society about the prevalence of women making false allegations of rape for mercenary motives, no anxiety about such villains was reflected in the substance of the criminal law or the patterns of its prosecution. Men were obviously just not frightened of being victimized in this way.

⁸⁶ Sir James Stephen classes the first of these with other "imperfect inchoate crimes." 2 J.F. STEPHEN 1883, *supra* note 9, at 229.

Table 2 reflects only those cases which were brought to a trial court. It does not include charges of indictable misconduct brought before a magistrate. The justice of the peace in this period was a very important figure with increasing powers of summary adjudication. His role in prosecutions for felony was, however, in theory quite limited. He was obliged to accept any and all charges of felony brought before him and, although he had some obligation to investigate these charges, he was required to forward all of them to the grand jury. His only legitimate discretion concerned his handling of misdemeanor allegations.⁸⁷

In practice, things were quite different, at least in the City of London. The rich alderman-magistrates of this jurisdiction saw their function as one of screening out cases that did not warrant the attention of the grand jury. In this liberal interpretation of their office, they were fully supported by vocal popular opinion.⁸⁸ As a matter of course, these justices rejected allegations of felonies, as well as misdemeanors, which they considered to be unfounded or otherwise unsuitable for further consideration by the criminal justice system.

From the few surviving *Minute-Books of Proceedings* of the Guildhall Justice Room,⁸⁹ the seat of the City magistrates, I have identified every sex-related case brought before these offices between 1752 and 1796 for which documentation now exists, and have traced the subsequent histories of those cases which appeared to involve crimes of an indictable nature. The results are much more favorable to rapists than to those blackmailing through an allegation of rape.

Of seventeen complaints of rape or attempted rape, only two reached a grand jury.⁹⁰ The other fifteen were—quite illegally—decided summarily. On the other hand, not one case of extortion through an allegation of sexual assault on a woman is documented as having been accepted by these magistrates. This sort of blackmail

⁸⁷ Of the considerable literature addressing the history and development of this office, the outstanding works are those of John Langbein. See J. LANGBEIN, *PROSECUTING CRIME IN THE RENAISSANCE* (1974); Langbein 1978, *supra* note 5.

⁸⁸ An article in *The Times* on July 15, 1829, made an unfavorable comparison between the high rate of acquittal in Westminster jury trials and the low rate in the City. The latter was approvingly attributed to the greater zeal with which City magistrates screened out the less promising of indictable charges brought before them.

⁸⁹ 1752 through 1796 (incomplete), Corporation of London Record Office Ms. 204B.

⁹⁰ Both were indictable crimes and were required to be heard in a jury trial; the one as a capital felony and the other as an indictable misdemeanor.

was apparently an offense which rarely reached even a magistrate's court.

There was one way in which sexual blackmailers of all kinds could be indicted on felony or misdemeanor charges in this period: through statutory law affecting the sending of threatening letters. Under the Black Act of 1722,⁹¹ anyone sending a letter demanding money by threat was guilty of a capital felony, provided the letter sent was anonymously, or was signed with a fictitious name. This legislation was re-enacted and refined a number of times between 1723 and 1843 and there were many prosecutions under it.⁹² I have not, however, identified a single such prosecution of the kind of blackmailer who is our object of interest in the Old Bailey during the hundred years studied.

Concern for predatory females who cried rape for purposes of extortion may have been apparent in society and in the proceedings of rape trials, but it was not apparent in the criminal courts as a whole. Prosecutions of this type of extortionist were very hard to undertake successfully. Perhaps in part as a result of this, such prosecutions were hardly ever contemplated. If this type of activity had been considered as any sort of real threat, however, it would have been much more strictly addressed in the criminal law.

This is proven by the very different legal history of the crime of extortion under an allegation of misconduct of a homosexual nature. At the time when rape related blackmail remained a misdemeanor, and are extremely difficult to prosecute successfully, blackmail which involved an accusation of homosexuality was transformed into a capital felony, and one regularly productive of convictions.⁹³ A comparison between the legal positions of these two kinds of blackmail is instructive of the true social concerns of male society in eighteenth and early nineteenth century England. The one kind of accusation may have brought embarrassment and shame, but it did not challenge the accused's status as a man. The other most certainly did.

The 'blackmail myth' was supported by the customary behavior of victims, compounded by the purposive legalism of the courts. A further indication that moral values determined by custom were characteristic of working-class women at this time concerns the idea of marriage as a suitable recompense for a woman victimized by sexual attack. This was certainly offered by defendants frequently

⁹¹ 1722, 9 Geo., ch. 22, § 1.

⁹² See J. F. STEPHEN 1883, *supra* note 9, at 149; Thompson, *The Crime of Anonymity*, in ALBION'S FATAL TREE 255 (1975).

⁹³ See Simpson, *Blackmail*, *supra* note 41.

enough.⁹⁴ In many instances, too, it was the recompense that was sought by the injured party. For example, a witness for a journeyman confectioner accused of raping a fellow-servant "went to Mary Hicks and asked her if she intended to hang the prisoner, and . . . she answered, No, I had rather marry him than hang him.'" ⁹⁵ One hundred years after this incident, "an elderly spinster, apparently on the wrong side of forty," attempted to get the magistrate at Queen Square to compel the man she had accused of rape to marry her.⁹⁶

It scarcely seems conceivable that a lower-class woman would accept marriage from an unknown party who had raped her, but this happened, at least occasionally.⁹⁷ The problem with the court data, however, is that while they usually indicate whether the parties were known to one another, they usually do not show if they were intimates or lovers. In cases where the parties involved were courting, accusations of rape could take on another meaning in the context of eighteenth century working-class values.

The findings presented so far support the view that lower-class women subscribed to values that were traditional and conservative. Attitudes of rape victims show that a high value was placed on virginity, chastity and reputation. These attitudes made the ordeal in court that much worse and the prospect of character assassination more horrifying. If working-class women of this time had conformed to Francis Place's depiction of them as brazen and immodest,⁹⁸ they would scarcely have been intimidated in court the way that most rape victims were.

If this is so, then the incidence of marriage proposals in the negotiations surrounding rape allegations is understandable: the criminal courts were perhaps used, as civil courts, to stir reluctant swains into living up to their promises. In no other way can events such as the following, which occurred at the Hatton Garden Police Office in 1805, be made intelligible: "Yesterday Thomas Stapleton, a porter, was charged by Elizabeth Burn, with an attempt to commit rape upon her; the prisoner did not deny the charge, but offered to marry her, which she consenting to, he was only held to bail until he

⁹⁴ See e.g., *R. v. Sheridan*, O.B.P. sessions ending Apr. 16, 1768 (No. 284); *London Evening-Post*, July 25-27, 1780.

⁹⁵ *R. v. H— J—*, *Old Bailey*, 1722, 1 *THE OLD BAILEY CHRONICLE* 10-12 (J. Mountague ed. London 1786).

⁹⁶ *The Times*, Sept. 12, 1827.

⁹⁷ E.g., *R. v. Stains, Tookey and Tookey*, Hertford Assizes, *The Times*, Feb. 7 and Mar. 18, 1817.

⁹⁸ His views should perhaps be seen as those of one who wished to dramatize the progress of mankind in his lifetime, and who wrote for eventual publication. See Thale, *Introduction to F. PLACE*, *supra* note 39, at xxvi.

shall fulfill his promise."⁹⁹

Again, this course of action was one which had support in common law, although not as it was interpreted in this period. Until the First Statute of Westminster, a rape victim who was a single woman could save her attacker from the gallows by agreeing to marry him.¹⁰⁰ This principle was not unknown in the eighteenth century and, as Clarissa Harlowe's friend Miss Howe slyly pointed out to her, in 1740 it was still the legal position that obtained in the Isle of Man.¹⁰¹

Appeals of this kind to magistrates are best understood as efforts to use the criminal courts to resolve civil matters—a technique that was standard during this time period.

Stepping out of the working-class for the moment, the association of rape and marriage was not unknown in other social strata. Lord Fellamar's rape attempt on Tom Jones' beloved Sophia is encouraged by the corrupt Lady Bellaston, not as a general celebration of viciousness, but as a standard and down-to-earth, way of compromising the lady into marriage.¹⁰² Virtue among women was prized amongst the noble too, although, as Lord Chesterfield kept telling his son, its incidence diminished sharply once the marriage lines were on the wall.¹⁰³

If virtue in women was valued highly within society as a whole, there were sectional divisions regarding what could be done to protect it. Preservation of a traditional value by traditional means was an activity of but one social group. Middle- and upper-class people had recourse to 'crim. con.' actions which were supported by the legal system.¹⁰⁴ Lower-class women had 'making up', which was not.

The criminal courts of eighteenth century London consistently

⁹⁹ The Times, Sept. 3, 1805.

¹⁰⁰ I M. HALE, *supra* note 27, at 627.

¹⁰¹ 3 S. RICHARDSON, CLARISSA 379 (J. Butt introduction 1968)(1st. ed. London 1740).

¹⁰² I H. FIELDING, THE HISTORY OF TOM JONES, 248 (A. R. Humphreys introduction 1962)(1st. ed. London 1749).

¹⁰³ One should accept one's wife's infidelities as a part of life: "A prudent Cuckold . . . pockets his horns, when he cannot gore with them; and will not add to the triumph of his maker, by only butting with them ineffectually." 4 P.D. STANHOPE, EARL OF CHESTERFIELD, LETTERS WRITTEN BY THE LATE RIGHT HONOURABLE PHILIP DORMER STANHOPE . . . TO HIS SON 12 (3rd ed. London 1774).

¹⁰⁴ Civil suits for 'crim. con.' (criminal conversation) were widely used in the eighteenth and early nineteenth centuries by the wealthy, and the avaricious, as alternatives to criminal prosecutions for various types of sexual misbehavior. Wagner, *The Pornographer in the Courtroom: Trial Reports about Cases of Sexual Crimes and Delinquencies as a Genre of Eighteenth-Century Erotica*, in *SEXUALITY IN EIGHTEENTH-CENTURY BRITAIN* 120 (P.-G. Boucé ed. 1982).

misinterpreted the substance of victims' efforts to obtain redress through negotiation. Judges quite failed to recognize that the informal use of this technique was normal and customary. In doing so, they provided considerable support for the now-traditional, and probably mythical, association between the rape complaint and the corrupt or malicious prosecution.

Analysis of this historical scenario obviously lends support to the view that the law of rape and the mode of its prosecution have served to intimidate all women by underscoring their vulnerability to uncontrolled male violence. There are, however, additional messages conveyed by it. Despite the courtroom harassment encouraged by the focus on the victim engendered by the 'blackmail myth,' women of the time were not afraid to use the courts.¹⁰⁵

Women of the period may have encountered social and legal barriers of increasing magnitude,¹⁰⁶ but they were not necessarily passive in the face of these barriers. The very persistence of the tradition of 'making up' strongly suggests that the values of lower-class women, and men, were not entirely imposed upon them by those further up the social scale, or by economic circumstance. There is in fact a growing body of findings which challenge conventional historical wisdom that the forces of industrialization and urbanization exerted a powerful and immediate influence on the values of those they most affected.¹⁰⁷ Women victimized by men sought modest compensation, and frequently public apology, because they still subscribed to traditional class-based values. If their ways of thought had been affected by the sharp edge of urban experience, they would have asked for more money, and been less ready to admit using informal negotiation when in court.

Neither can the smallness of the sums sought and given be viewed as evidence that the injury done was in any way trivialized by the victims. There is now a prevalent belief that English lower-class values of this period underwent a marked change, and came to re-

¹⁰⁵ Of 216 valid cases of rape and attempted rape heard between 1730 and 1830, victims prosecuted in sixty-five, or about thirty percent, of them. Female friends, employers, or family members prosecuted on their behalf in eighty-six instances, about forty percent. The remainder were prosecuted by men, acting as individuals, or on behalf of concerned public or private institutions.

¹⁰⁶ There are many discussions of the declining status of Englishwomen beginning in the late 17th century. That of Margaret George is notable for its emphasis on some of the structural, as well as cultural, influences involved. *From Goodwife' to Mistress'; the Transformation of Women in Bourgeois Culture*, 37 *SCI. & SOC'Y* 152 (1973).

¹⁰⁷ For a review of the main issues in this debate, see Vicinus, *Sexuality and Power: A Review of Current Work in the History of Sexuality*, 8 *FEMINIST STUD.* 133 (1982).

flect an 'affective individualism,'¹⁰⁸ and an interest in personal gratification, sexual and otherwise. However, the evidence for this view is rather slender, and that against it of some substance.¹⁰⁹

The principal finding of this analysis is that women at this time retained values which were conservative and traditional, and largely unaffected by the modernization process. Only the persistence of such values can explain the successful career of Barton Dorrington, who made a profitable living as a professional rapist. Dorrington's practice was to lure working-class women into convenient settings, rape them, and then persuade them to sign notes saying they would marry him or forfeit the sum of £20. Victims were intended to appreciate that a cash payment represented the better end of the deal. His stock-in-trade was the traditional belief that sex could occur before marriage, but that for the respectable it was usually closely followed by marriage. Without this belief, Dorrington could not have pursued his profitable line of work.

If this traditional belief had not commonly prevailed, the violent part of the proceedings would not have been necessary. Dorrington enacted this scenario many times but was never convicted, at least not in the Old Bailey or the City of London courts. The only punishment he is known to have received was a strict warning from a judge: "You will some time or another get your neck into the halter, if you do not leave off these practices."¹¹⁰ Dorrington was the archetypal profiteer of the transition between the old world and the new.

This sexual conservatism was a heritage of tradition, but in many ways a tradition which recognized the higher status of women in an earlier time, and was supportive of it. The lower-class woman's acknowledged right to preserve her chastity in the face of differing and perhaps forceful opinion, was also an expression of a right to control her own existence.¹¹¹

These values were not, however, in tune with things in the eighteenth and early nineteenth centuries. In this period, tradition was *not* protective of its urban adherents. The emergence of the 'blackmail myth' in prosecutions for rape shows how easily the motives of those who applied traditional methods of dispute resolution could be brought into question by unsympathetic courts. As has

¹⁰⁸ L. STONE, *THE FAMILY, SEX & MARRIAGE IN ENGLAND, 1500-1800* (abr. ed. 1979).

¹⁰⁹ See, e.g., Gillis, *Servants, Sexual Relations, and the Risks of Illegitimacy in London, 1801-1900*, 5 *FEMINIST STUD.* 142 (1979); Hill, *Sex, Marriage, and the Family in England*, 31 *ECON. HIST. REV.* 450 (1978).

¹¹⁰ *R. v. Dorrington*, O.B.P. sessions beginning Sept. 10, 1788.

¹¹¹ S. MARCUS, *THE OTHER VICTORIANS* 146 (1966).

been shown, the emergence of this myth had some slight basis in traditional practice. The myth, however, transcended the substance and intent of this practice and thrived in legal folk memory long after the practice was abandoned.¹¹² Such partial interpretation of customary practice went a long way toward protecting male rapists.

One could argue that the legal circumstances of eighteenth century England are somewhat distant from those of twentieth century America. To cut it finely, one could point out that if the earlier worry was of female venality, the current is of the fraudulent rape complainant who is malicious, vengeful or even, in the psychological orientation of our age, mentally disturbed.¹¹³ Such an approach would, however, be gilding the lily. The mythical proportions of the female blackmailer of the eighteenth century and the "spiteful shrew" of the twentieth¹¹⁴ are very similar and have served an identical purpose.

It is clear that the importance of the 'blackmail myth' in the old world and the new is much the same. The 'blackmail myth' of the eighteenth century did, as has been shown, have some slight justification. Twentieth century prosecutions for rape are faced with myths that are just as strong, but whose substance is not similarly palpable. It is often suggested, in fact, that such modern-day myths constitute the principal obstacles to prosecutions of this nature. The work of Martha R. Burt in particular suggests that the internalization of such myths, by both men and women who are not on the receiving end of the crime, is the principal influence on the operation of the law in this area.¹¹⁵ As Burt's work suggests, cultural influences on the practice of law may be as important, or more important, than the substance of the law itself in influencing the progress of a rape case through the criminal justice system.¹¹⁶ As this discussion indicates, such influences are much more historically pervasive than has hitherto been appreciated.

This finding is a gloomy one, because it documents the historical *strength* of the 'blackmail myth,' as well as the popular nature of its origin. The true circumstances of this origin, however, tend to uphold the bias of its substance.

¹¹² Its popularity in nineteenth century England is documented in S. EDWARDS, *FEMALE SEXUALITY AND THE LAW* 117-51 (1981).

¹¹³ The neurotic false cryer of rape seems to be a major figure in the modern literature of victimology. See Schwartz & Clear, *supra* note 1, at 130.

¹¹⁴ *Id.*

¹¹⁵ Burt, *Cultural Myths and Supports for Rape*, 38 J. PERS. & SOC. PSYCHOLOGY 217 (1980). Such myths include: "only bad girls get raped," "she must have asked for it," "she must have an ulterior motive in prosecuting," and so forth.

¹¹⁶ *Id.*

IV. VICTIM CHARACTER AND THE ORDEAL IN COURT

Rape victims in eighteenth century courts suffered from the suspicion inherent in the myth by being subjected to the ordeal of hostile cross-examination, where their morals and honesty were routinely impugned. As the work of John Langbein has shown,¹¹⁷ courts' interest in character was initially strong in all cases that came before them. As lawyers became more involved in the process and juries became less tractable, however, courts were generally obliged to apply more protective evidentiary rules.

The prosecution of rape, however, remained an exception to this general trend. Judges openly averred that the question of victim character remained paramount. One judge referred to this in noting that "the conduct of females in these cases . . . was one very material circumstance to be taken into consideration."¹¹⁸ Another judge acted strongly upon this belief in stopping a trial shortly after the prosecutrix had begun giving evidence, and, in directing an acquittal, observed "[g]entlemen, one looks more to the conduct than the testimony of a party in a case of this nature."¹¹⁹

Other judges did attempt to counter especially vicious campaigns by defendants against the character of their accusers. At Marylebone Police Office, a magistrate severely rebuked a defendant for his impudence in attempting to destroy his victim's character after he had already confessed to the act charged.¹²⁰ Another magistrate attempted to stem a similar attempt by reminding those present that two men had recently been convicted and hanged for raping and killing a prostitute.¹²¹ Such actions sound consistent with Sir William Blackstone's famous and much-quoted observation that the protection afforded by the law was available even to those of doubtful character.¹²² However, this observation makes its point in a quite revealing fashion, as the full text of it carries the strong implication that such protection is only extended in a case of rape to those among the dissolute who can lay claim to redemption.

¹¹⁷ Langbein 1978, *supra* note 5, at 305-307.

¹¹⁸ R. v. Dunn, Exeter Assizes, The Times, Mar. 21, 1825.

¹¹⁹ R. v. Scallon, O.B.P. Dec. 12, 1825; The Times, Dec. 13, 1825.

¹²⁰ The Times, Oct. 12, 1827.

¹²¹ R. v. Jarvis, The Times, Aug. 21, 1829.

¹²² The civil law seems to suppose a prostitute or common harlot incapable of any injuries of this kind: not allowing any punishment for violating the chastity of her, who hath indeed no chastity at all, or at least hath no regard to it. But the law of England does not judge to [sic] hardly of offenders, as to cut off all opportunity of retreat even from common strumpets, and to treat them as never capable of amendment. It therefore holds it to be felony to force even a concubine or harlot; *because the woman may have forsaken that unlawful course of life . . .*

4 W. BLACKSTONE, COMMENTARIES *212-13 (emphasis added).

On the other side of the fence, the 'general disposition' of a defendant to commit a particular kind of offense could not be addressed in court. This was a general rule which applied in all criminal cases, with the striking exception of those involving prosecutions for forgery.¹²³

Traditional suspicion was but one element in the ordeal of the rape victim in court. A very detailed description of the circumstances of the attack was necessary to determine whether it conformed to the various definitions of carnal knowledge then applied. As noted, this concept was interpreted somewhat variably until the middle of the nineteenth century. Under the most strict interpretation, both *penetratio* and *emissio seminis, in re infecta* had to be proven. The kind of questioning needed to elicit confirmation of these requirements from the victim was necessarily detailed and most discomforting to the modest. An overly delicate witness had necessarily to steel herself to testify to the full facts of the case.¹²⁴

Judges not infrequently showed a certain exasperation when faced with witnesses whose natural modesty conflicted with a desire to tell the full facts. Mary Batten testified to being attacked by three men who

... threw me down upon my back, and two of them held me, while the prisoner lay with me. COURT. Lay with you! What, did he lay down by your side? BATTEN. No, he lay upon me. COURT. And did he do any thing to you? BATTEN. Lord bless me! What must I say? COURT. You must tell the Court what he did.—There's a necessity of speaking plain in such cases.—The life of a man is at stake, and it is not fit that he should be condemned upon bare conjectures, arising from words that are doubtful, and carry a double meaning.—You ought therefore to express yourself in such terms as may signify what you intend, and nothing else: and, though decency might not admit of it on other occasions, it is requisite on this, and cannot be dispensed with. BATTEN. And must I speak plain English then—and before all these gentlemen?—I vow I am shamed.—I don't know how to say such a word.—But if I must, I must.¹²⁵

One can appreciate the court's need to know vital facts. There is, however, strong evidence that this situation was routinely used by defense lawyers to harass witnesses. The records of the time are full

¹²³ H. R. DEARSLEY, *CRIMINAL PROCESS* 57-58 (London 1853). This exception was established in the law in 1807, *R. v. Ball*, in *CROWN CASES RESERVED FOR CONSIDERATION* 132-33 (W.O. Russell & E. Ryan eds. London 1825).

¹²⁴ One recalcitrant witness was told "[Y]ou must be more explicit . . . because if there was not compleat carnal knowledge, the prisoner cannot be convicted of this offense," *R. v. Costillo*, O.B.P. sessions beginning Feb. 25, 1784.

¹²⁵ *R. v. Simmons*, in 1 *THE OLD BAILEY CHRONICLE*, *supra* note 97, at 32-35.

of examples of this technique, and it was often one which was successful—then, as well as in later times.

The footnote below¹²⁶ includes an extract from the prolonged

¹²⁶ This prolonged interchange between Sarah Tipple and the counsel of the man accused of raping her is taken from the 1793 trial of Henry Curtis in the Old Bailey. *R. v. Curtis*, O.B.P. sessions ending Feb. 20, 1793. Curtis was acquitted.

Q. When he threw you on the bed I suppose that you suspected his intention?—I did, and shrieked out. Q. You never shrieked out more than once?—He put the sheet into my mouth, immediately crammed it in; the sheet was in my mouth all the time of the business, he was holding it down with his hand. Q. Then he only had one hand at liberty, for one hand was constantly employed in keeping down the sheet in your mouth; that was so?—It was. Q. How was your two hands employed against his one?—My two hands were behind me. Q. Pray, who was it put your hands in that shape?—Seeing him bar the door I was frightened and I held my hands so. Q. You suspected when you saw him bar the door?—I did not know what he was going to do, I thought he was going to kill me or something, I cried out and he immediately chucked me on the bed. Q. Then he shoved you on the bed the moment that he barred the door; how far is the bed from the door?—It is close. Q. Then you had time to make one cry and no more; how came your hands to fall behind you?—I cannot tell. Q. That was rather odd, was not it . . . how could they be twisted backwards by that fall?—I cannot tell. Q. Then they remained behind all the time?—I could not get them away, I made all the resistance I could; I could not get my hands away. Q. They then remained pinioned like a fowl?—Exactly so, he prevented me, he lay on me. Q. The man is not two or three ton weight?—I made all the resistance I perfectly could. Q. How could he laying on you prevent your drawing one hand from under you?—I made all the resistance I could. Q. Then you really could not get one hand from under your back, that man is not a very fat man?—The moment I saw him bar the door [was] the moment my strength failed me directly, I being in a strange place what I did I suppose that man was going to do. Q. Did you slap his face?—I did not. Q. Did you pull his hair?—I could not get away. Q. Did you kick him at all?—I kicked him all that lay in my power. Q. Then you almost overturned him by your kicking?—I don't know, I cannot say but what I might. Q. Here he lays on you and you kicking about, it is natural you should almost overturn him?—I did all that lay in my power. Q. Did you kick his shins or did you not kick at all?—I did all that lay in my power to get away, I tried to get up. Q. How did you try to get up; the moment that you fell down he threw himself on you; where was your petticoats?—He pulled up my petticoats. Q. Were they pulled up before you was on the bed or after?—After. Q. How did he manage with his other hand?—And then he laid his knee on me and in that situation he lay on me, he kept my petticoats high up with his knee. Q. And in that situation he did it?—No, he did not do it so. Q. What did he do with his knee?—After he pulled up my petticoats he laid his knee on me to keep them up while he pulled down his breeches. Q. He continued his knee there then?—No, he did not. Q. What kept your coats up?—He took his knee up when he unbuttoned his breeches; he was on the bed and my coats kept up. Q. Did they keep up of their own accord or did you keep them up?—He kept them up to be sure. Q. Now, how did he keep them up, he had not three hands, had he?—No. Q. Now, let us dispose of the two; how did he keep them up?—I cannot tell. Q. How high were your clothes?—My clothes were quite up to my chin. Q. And you struggled and kicked about a good deal, did not you?—All that lay in my power. Q. Still they kept up to my chin; you was quite a maid at this time?—I never knew a man before. Q. Will you tell us how he managed to bring his private parts to your's, can you account how he did that?—No. Q. Did you cross your legs?—No. Q. It did not occur to you that that would be a good way to stop him; did you keep your legs a little wider than usual?—I don't know that I did. Q. Don't you know that you did not?—I don't know that I did not. Q. I should have thought keeping the legs close would be the best way to prevent him; do you know how he managed to introduce his private parts? Where was the hand that was at liberty? One hand was at the sheet at your mouth, where was the other hand?—I cannot tell. Q. Cannot you tell me how he managed to introduce his

cross-examination by the counsel for the defense of Sarah Tipple, a domestic servant recently arrived in the city ("I did not know a soul in the world in London"), who in 1793 charged her master with raping her. After a lengthy period of questioning, in which she is accused of blackmail, promiscuity and finally, prostitution, the defense counsel begins to address the circumstances of the attack, and in the end reduces her to a state of complete confusion. In this case the defendant, Mr Curtis, was acquitted. This quite sophisticated piece of legal bullying occurred at a time when, according to the strict letter of the law, the accused was not entitled to counsel at all.¹²⁷

Witness harassment, like the 'blackmail myth,' is not just a feature of the nineteenth and twentieth centuries. Both originated in the eighteenth century, encouraged on the one hand by the peculiarly demanding standards of carnal knowledge and on the other by the norms of customary practices of 'making up.' Both have survived because they suit modern conceptions of how the law of rape should be applied. At the same time, both have acquired the support and respectability of legal tradition—a tradition, it is suggested here, that is a creature of particular historical circumstance.

V. RAPE PROSECUTIONS AND THE LAW OF EVIDENCE

A major element in the proof of rape concerned a demonstration that the fact had been accomplished by force. Proof of force, defined by physical evidence of injury or persuasive evidence of its threat, was considered vital throughout the period. Not until 1845 was such evidence considered unnecessary for conviction.¹²⁸ Long after this time and to the present day, however, evidence of resistance has been considered an essential element of any rape prosecution if it is to have any chance of success. "Resistance or opposition by mere words is not enough; the resistance must be by acts, and

private parts to you, because you know you was a maid?—No. Q. Nor where his hand was? Was it employed to prevent your struggling?—He laid on me. Q. Really my girl in the way you describe it I cannot see how such a thing could be effected?—He certainly did. Q. You did not feel where the other hand was, you never felt how he employed the other hand?—No. Q. Never felt it about your person at all?—Yes. Q. Then how was it employed?—He took his other to put his private parts into mine. Q. Now my girl, how came you to tell me a minute ago that you did not know how it was employed, because I put it to you several times?—Because I was ashamed. Q. When one hand was on your mouth and the other hand was so employed a very little struggle would have put him off; how came it you did not get rid of him when both hands were engaged?—I did all in my power. Q. Did he continue this hand to his private parts all the time that he did this to you?—No, not all the time. Q. How did he employ it afterwards?—I cannot tell you, I am sure . . .

¹²⁷ J. LANGBEIN, *supra* note 87; Langbein, *supra* note 5.

¹²⁸ R. v. Camplin, Old Bailey, March 1845, in 1 CROWN CASES RESERVED 92-94 (S. C. Denison comp. Philadelphia 1853). See also S. EDWARDS, *supra* note 112, at 38.

must be reasonably proportionate to the strength and opportunities of the woman."¹²⁹

In fact, such evidence was vital in the eighteenth century. It was invariably demonstrated through expert medical testimony which often reflected the poor state of medical knowledge in the period. Doctors frequently could not agree whether a person showed symptoms of venereal infection.¹³⁰ An even greater problem was the frequent inability of medical witnesses to determine whether or not penetration had taken place.¹³¹ This situation was undoubtedly exacerbated by the demonstrably poor quality of many of the doctors called to testify.¹³²

Perhaps because such little independent evidence could be brought in rape cases, courts looked with askance at prosecutions in which medical evidence was not provided.¹³³ Of the twenty-eight convictions for rape achieved in the Old Bailey during the period under study, and for which it is possible to make a determination of this factor, twenty-six occurred in situations where medical evidence was presented by the prosecution.

Force was interpreted quite literally. It could include threat of force, although claims of this were rarely persuasive. Evidence of resistance had to be palpable, as shown by marks of injury, disordered clothing or, of course, eyewitness testimony. A threat of force was the equivalent of force in the law, but it was not enough for a victim to claim that she had simply been cowed into submission. In the case of one woman who explained that she failed to resist because she was paralyzed with fear, ("I had no power"), the court ruled that the circumstance of force, or threat of force, had not been proven.¹³⁴ Similarly, the court refused to accept the pathetic explanation for lack of resistance given by a twelve-year workhouse inmate raped by her father in the course of one of his visits to her: "I said I would tell my mistress; he said if I did he would never come and see me any more."¹³⁵

¹²⁹ F. LEE BAILEY & H. ROTHBLATT, *supra* note 3, § 432 at 277.

¹³⁰ R. v. Harris, Westminster Quarter Sessions, *The Times*, Nov. 7, 1829.

¹³¹ R. v. Pearson, O.B.P. sessions ending Dec. 11, 1732 (No. 80); R. v. Dixon, O.B.P. sessions ending July 13, 1774.

¹³² At the trial of James Larwill, one doctor testified that: "The hymen . . . lies at the very entrance of the vagina, not within the vagina; it is not called the vagina till you pass the hymen." O.B.P. sessions beginning Sept. 16, 1778.

¹³³ *E.g.*, R. v. Ottey, O.B.P. sessions beginning May 23, 1798 (No. 430), *The Times*, Apr. 17, 18, and 19, May 25, 1798.

¹³⁴ R. v. Adkins, O.B.P. sessions ending Sept. 18, 1751 (No. 532).

¹³⁵ R. v. Sherwin, O.B.P. sessions beginning January 13, 1779; *London Evening-Post* December 12-15, 1778.

In law, menace was regarded as fully equivalent to force itself. For crimes such as highway robbery, menace was interpreted very broadly indeed and came to encompass, under certain circumstances, a threat of damage to reputation as well as a threat of physical injury.¹³⁶ By contrast, in cases of rape, tangible evidence of actual injury was almost invariably required.

Resistance on the part of the victim could, however, be overdone. Mary Weimar was tried for common assault at London Quarter Sessions in 1825 after she had seriously injured a man in "a spirit of resistance to his unmanly attacks."¹³⁷ In spite of this defense, she was found guilty and sentenced to three months imprisonment, although she had already been in prison awaiting trial a considerable period of time.¹³⁸

The point to which resistance had to be demonstrated was therefore a fine one. An 1807 decision by the Twelve Judges upheld the general principle that proof of violence was a necessary ingredient of the crime of rape, but allowed that resistance was not necessary in an assault case, if its absence could be accounted for by such factors as the authority and influence of the attacker combined with the tender years of victim. This only made it easier to convict those accused of attempted rape with the lesser crime of common assault. It made no difference whatever to the level of proof required in capital cases of rape.¹³⁹

Despite the importance of force as an essential legal ingredient in the crime, if committed on a victim of discretionary age, there was one circumstance in which extreme brutality would actually protect the guilty party. If the aggressor killed his victim in the course of a rape, or rape attempt, he could only be charged with rape and not with murder. As his victim would not, of course, be around to testify, he would therefore very likely escape scot-free.

The reasoning behind this position was discussed in some detail in *Lad's case*,¹⁴⁰ heard by the Twelve Judges in 1773. Murder was defined as killing with malice and the prosecution had to prove not just the fact of the killing, but also that the act had resulted from an intent to slay or hurt which was both deliberate and felonious.¹⁴¹

¹³⁶ Simpson, *Blackmail*, *supra* note 41.

¹³⁷ The Times, Oct. 25, 1825.

¹³⁸ The man, Robert Fogue, had lost a hand as a result of Miss Weimar's objections, and had been obliged to spend thirteen weeks in a hospital. The Times, Oct. 25, 1825.

¹³⁹ R. v. Nicholl, Gloucester Assizes, Summer 1807, in CROWN CASES RESERVED, *supra* note 123, at 130-32.

¹⁴⁰ This case does not have a direct citation. For a discussion of it see R. BEVILL, A TREATISE ON THE LAW OF HOMICIDE 18-19 (London 1799).

¹⁴¹ *Id.*

Lad had raped a nine year-old child, who died as a consequence of the attack, and he was duly convicted of murder. His conviction was actually overturned because the indictment against him was faulty, but, in their opinion, the Judges asserted that a murder charge would rarely be supportable in such circumstances. They noted that "In most cases the act of committing a rape cannot imply a 'compassing or designing to do some bodily harm'; there is then no probability that it will occasion death or personal injury, and therefore under the above rule it cannot be murder."¹⁴²

The 1773 rule represents one of several instances, all of which occurred at this time, of the law actually changing to make the prosecution of rapists more difficult. A number of prosecutions which were undertaken before 1773 under similar circumstances demonstrate that this rule certainly did not exist before then. Most resulted in acquittals, either because the evidence was insufficient or because the surgeons could not swear to the attack being the cause of death.¹⁴³ The last prosecutions for murder under these circumstances which I have encountered resulted in convictions, but the outcome was something of an embarrassment to the courts. Richard Coleman was convicted at Surrey Assizes in 1749 for having murdered Sarah Green, with two others not taken, "by cruelly tearing her private Parts . . . so that they were lacerated and became mortify'd."¹⁴⁴ Despite his continued protestations of innocence, he was duly executed.¹⁴⁵ Two years later, Nicholls, one of Coleman's supposed accomplices, was arrested and, after turning King's evidence, confessed that Coleman had been completely innocent and that he and two other men had committed the crime. The two, in their turn, were tried and hanged, and Nicholls was able to walk away from the situation and his involvement in four deaths—two of them of innocent people.¹⁴⁶

A number of others were prosecuted only for rape under similar circumstances and sometimes convicted.¹⁴⁷ Rape charges in situations of this nature appear to have been initiated only after it had

¹⁴² *Id.* at 26-27.

¹⁴³ *R. v. Pickup*, O.B.P. sessions ending Sept. 17, 1735 (No. 59); *R. v. Thompson*, O.B.P. sessions beginning Jan. 15, 1742 (No. 21).

¹⁴⁴ THE SOLEMN DECLARATION OF RICHARD COLEMAN (London 1749).

¹⁴⁵ *Id.*

¹⁴⁶ THE TRUE AND GENUINE ACCOUNT OF THE CONFESSION . . . OF THOMAS JONES AND JAMES WELCH (London 1751).

¹⁴⁷ Those acquitted include: *R. v. Manning*, O.B.P. sessions ending Apr. 15, 1738 (No. 72); *R. v. Senoy* O.B.P. sessions ending Sept. 1, 1741. Those convicted include: *R. v. Makin*, Lancaster Assizes, *St. James's Chronicle*, April 18-20, 1775; *R. v. Togwell and Matthews*, O.B.P. sessions ending Oct. 18, 1740; *R. v. Duell*, O.B.P. sessions ending Oct. 18, 1740.

become clear that murder charges could not be sustained, owing to medical rather than legal reasons. After the 1740s, it seems to have been narrower interpretations of the law which precluded the bringing of rape charges in circumstances in which the death of the victim ensued. As will be further shown, this very limited legal view of the felonious nature of sexual attack eventually became embodied in the law.

Thus, until the early part of the nineteenth century, rape was the only felony which could conceivably be charged by women who were victims of sexual attack. Those who killed their victims in the course of rape or of attempted rape were immune from felony prosecution after 1773. They could not be charged with murder or manslaughter. If they could not be convicted of rape, there was no related felony with which they could be charged.

This situation reflects the undeveloped state of the law regarding offenses against the person which obtained at this time. The Stabbing Act of 1604¹⁴⁸ was intended to punish fatal acts of violence committed with a sharp instrument and in the heat of passion. This Act was, however, widely regarded as a faulty item of legislation because it failed to provide for punishment in cases where death did not result. Furthermore, the courts that applied this law actually trivialized the crime addressed by reducing it to a species of manslaughter, subject to nominal punishment.¹⁴⁹

The Black Act of 1722¹⁵⁰ covered a wide range of offenses, mostly crimes against property, and was capable of very broad interpretation.¹⁵¹ One section of this Act dealt specifically with offenses against the person, but limited itself to attacks involving the use of firearms.¹⁵² Under this Act, it also became a capital offense to be found with any offensive weapon in the wrong place, but this was carefully defined to include only situations wherein property appeared to be at risk.¹⁵³ Another statute which specifically addressed non-fatal attacks unaccompanied by threats to property was the

¹⁴⁸ 1603, 1 Jac., ch. 8.

¹⁴⁹ 3 J. F. STEPHEN 1883, *supra* note 9, at 46-49. "Le nomme de murder ne fuist unque change, mes le ley ceo reteignoit continuelment par le haynoustie del crime a mitter difference inter homicide par chauce medley et homicide perpetre per voye de murder." *Id.* at 46 (quoting STAUNDFORDE, PLEAS OF CROWN (1607)).

¹⁵⁰ 9 Geo., ch. 22.

¹⁵¹ E. P. THOMPSON, WHIGS AND HUNTERS (1975).

¹⁵² Under one section of this Act, it became a capital offense to "wilfully and maliciously shoot at any person in any Dwelling-house, or any other Place . . ." 9 Geo., ch. 22. § 1.

¹⁵³ *Id.*

Coventry Act of 1670.¹⁵⁴ This statute, however, applied only to situations in which serious injury of a very particular nature had resulted, and the prosecution had to substantiate premeditation, or 'lying in wait'.¹⁵⁵ None of these statutes was suitable for the prosecution of those committing injury in the course of sexual attack, and no such prosecutions were initiated under any of them in the Old Bailey during the period studied. Except under the particular circumstances of the Coventry Act and the Black Act, even attempted murder remained a misdemeanor until the early years of the nineteenth century.

Many alleged rapes of women above the age of discretion were apparently accompanied by robbery. In such circumstances, it is not surprising that victims sometimes chose to prosecute their attackers for crimes other than rape. Prosecutions for robbery had a much greater chance of success and did not require the victim to undergo the trauma of giving detailed testimony of an intimate nature in open court. Mary Wilds, a servant girl, was able to convict two men of the capital crime of highway robbery in this way, even though they were acquitted of her rape.¹⁵⁶

In the early nineteenth century, however, this avenue of redress was closed off because more rigid interpretations of intent were adopted by the courts. Samuel Gilbert, for example, was convicted of highway robbery in 1826 following a prolonged attack on a woman which resulted in severe injury to the victim. The robbery indictment was supported because the rape was accompanied by the taking of one shilling from the victim. Gilbert was later pardoned, however, because it was held that the primary objective of his attack was rape and not robbery. The shilling was, presumably, seen as but an unexpected bonus for Gilbert and, in the eyes of the law, the malicious intent necessary to support a conviction for robbery was simply not there.¹⁵⁷

During the eighteenth century, then, there were no statutes which concerned crimes against the person, other than rape statutes, that could effectively be used to prosecute for rape. From at

¹⁵⁴ 22 & 23 Car. 2, ch. 1.

¹⁵⁵ By this statute it is enacted, that if any person shall of malice aforethought, and by lying in wait, unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any other person, *with intent to maim or to disfigure him*; such person, his counsellors, aiders, and abettors, shall be guilty of felony without benefit of clergy.

⁴ W. BLACKSTONE, COMMENTARIES *206-07 (emphasis added).

¹⁵⁶ R. v. Harrison and Mitchell, O.B.P. sessions ending Dec. 14, 1772.

¹⁵⁷ R. v. Gilbert, Wells Assizes, The Times, Aug. 14, 1826. He was subsequently convicted of the misdemeanor of assault with intent to commit rape.

least the early nineteenth century the use of prosecutions for related capital felonies to circumvent the difficulties of prosecuting rape charges was severely impeded. Neither the common law nor eighteenth century legislation paid much attention to crimes against the person. When concern for these crimes did appear in the law, it was in response to particular settings and in situations that could not easily be applied to rape cases.

The passage of Lord Ellenborough's Act¹⁵⁸ in 1803 could have changed this situation because it was specifically intended to make possible capital prosecutions for attempted murder or attempts to commit serious injury. This Act was effective as far as it went, but was quite unsuitable for prosecutions in cases of sexual attack. The reason for this lay in the wording of the statute, which stipulated that it only applied in instances in which the injury was caused by attacks accompanied by an intent "to murder or rob, or maim, disfigure or disable . . . or with intent to do some other grievous bodily harm."¹⁵⁹ Rape and attempted rape were not included in any of these legislated categories. Hence this Act did virtually nothing to make the violence characteristic of many sexual attacks subject to legal sanctions.

A few rapists *were* prosecuted under Lord Ellenborough's Act, but these instances included only those in which intent to commit rape was accompanied by other felonious intent. In *Cox's case*,¹⁶⁰ the defendant had done violence to a child's genitals with a knife. He was convicted under the 1803 Act, and the Twelve Judges upheld his conviction on the grounds that his object in cutting his victim's private parts was "probably to enlarge them to admit his entrance."¹⁶¹ Cox was therefore considered to have attacked the girl with the dual intent of committing rape *and* inflicting grievous bodily harm. He was accordingly convicted, even though his attempt to rape his victim had not succeeded.¹⁶²

Two decades later, the 1803 Act was repealed by Lord Lansdowne's Act.¹⁶³ Although this did not specifically address the question of injury inflicted in the course of sexual attack, its wording made its application in this type of situation easier. By the addition of the single word "wound" to the original phrase addressing at-

¹⁵⁸ 1803, 43 Geo. 3, ch. 58.

¹⁵⁹ *Id.*

¹⁶⁰ *R. v. Cox*, Easter Assizes, 1818, in *CROWN CASES RESERVED*, *supra* note 123, at 362.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ 9 Geo. 4, ch. 31, § 12 (1828). The provisions of this were re-enacted in 1 Vict., ch. 85, § 11 (1837).

tempts to "shoot at, stab or cut," this Act became applicable to serious assaults which did not involve the use of a firearm or sharp instrument. At the time, Lansdowne's Act was generally viewed as making exceptionally violent rapes or rape attempts capital crimes.¹⁶⁴ This view, however, did *not* preface the widespread application of the new law to violent sexual offenders.

In fact, this Act was applied very sparingly in cases of sexual attack. Between 1828 and 1830, it was never used in this way in the Old Bailey.¹⁶⁵ This result was to have been expected. Intent remained the crucial limiting factor under Lansdowne's Act, as it had under Ellenborough's Act. Although the relevance of injury was easier to establish under the later statute, the need to show that the attacker was motivated by a desire to hurt remained.

The enactments of the 1803 and 1828 statutes show that there was increasing concern for the vulnerability of citizens to attacks on their persons. The way these Acts were worded and applied shows that this concern did not extend to victims of rape. This impression is confirmed by the intent of Parliament, as revealed in the debates on these two bills. The primary concern of the 1803 bill was to amend the Coventry Act to provide greater coverage of attempts to commit *murder*. Legislators were only incidentally concerned with other acts of violence.¹⁶⁶ Interest shown in the relevant section of the 1828 bill was with the much broader issue of attacks against the person in general, but there was no demonstrable consideration of injuries inflicted in the course of rape attempts or in the commission of other crimes.¹⁶⁷ These Acts appear to be important supportive evidence for the view that the continued ineffectiveness of the law of rape during this period was symptomatic of an unstated policy of not-so benign neglect, rather than judicial and legislative inefficiency.

¹⁶⁴ John Tranter, convicted at Warwick Assizes on two separate counts of assault with intent to commit rape for crimes undertaken shortly before the passage of the Act, was advised by the judge that, if he had committed the offenses two months later, he would have been facing a death sentence. *The Times*, Aug. 14, 1828. A similar observation was made at the trial of Richard Blackmore at Wells Assizes in the same month. *The Times*, Aug. 16, 1828.

¹⁶⁵ Similarly, no prosecutions of sex offenders were undertaken in this court under the Ellenborough statute in the entire twenty-five years of its existence, with the occasional exception of cases such as *R. v. Cox*, *supra* note 160, which involved other felonious circumstances.

¹⁶⁶ See 36 *PARL. HIST. ENG.* 1245-47 (1803); 45 *ANNUAL REGISTER* 109 (1803).

¹⁶⁷ 18 *PARL. DEB.* (new ser.) 1357, 1442-45 (1828); 19 *PARL. DEB.* (new ser.) 350-60 (1828).

VI. CONCEPTIONS OF PUBLIC ORDER AND MALE SEXUALITY

There was, in fact, considerable ambivalence in society toward male sexual misconduct. The eighteenth century macho world view supported a very cavalier attitude toward women. However, eighteenth century England was also a society which, from the late Georgian period on, saw the emergence of great concern for personal restraint and orderly public behavior.¹⁶⁸ This concern was reflected in the creation of powerful agencies of social control.¹⁶⁹

Despite the general partiality of the law toward the defendant in rape cases, individual judges often reacted with horror and disgust in situations where it became clear that the prosecutrix was neither a liar nor an extortionist.¹⁷⁰ After all, the most celebrated rape case of the eighteenth century resulted in a conviction, even though it involved an immensely rich defendant and a poor servant girl. This was one of the very rare circumstances in which the impeccability of the victim's character, and the evil nature of the defendant's, were proven to the court's satisfaction.¹⁷¹

In the legal texts and court cases of the time, there is a clear abhorrence of this crime where it is clearly proven.¹⁷² In fact, the abolition of the death penalty for this crime, in 1841, was largely a product of informed concern that juries would refuse to convict when the offense was of a capital nature.¹⁷³ The concern here was not for those who had been convicted of rape, but rather for deciding how such culprits could best be brought to their just deserts.

At times when the offense was proven to public satisfaction, popular outrage was quite vocal.¹⁷⁴ Ambivalence toward the accused rapist was also compounded in a society quite worried about

¹⁶⁸ L. LOFLAND, *A WORLD OF STRANGERS* (1973).

¹⁶⁹ Philips, *'A New Engine of Power and Authority': The Institutionalization of Law Enforcement in England 1780-1830*, in *CRIME AND THE LAW* 155 (V.A.C. Gatrell, B. Lenman and G. Parker eds. 1980).

¹⁷⁰ "It is a very brutal thing for which this fellow deserves to punished . . . one cannot presume any thing more brutal and beastly than his conduct." *R. v. Hodge*, O.B.P. sessions ending Oct. 25, 1786.

¹⁷¹ *R. v. Charters*, O.B.P. sessions beginning Feb. 25, 1730; *THE LIFE OF COLONEL DON FRANCISCO* (London 1730).

¹⁷² An editorial in 1810 commented approvingly of the fact that rape and murder were two crimes for which convicted "perpetrators could not expect any mercy." The article goes on to assure its readers that these offenses were not included in the list of those for which abolition of capital punishment was proposed. *The Times*, Feb. 10, 1810.

¹⁷³ 57 *PARL. DEB.* (3rd ser.) 47-58 (1841).

¹⁷⁴ When John Price, the public hangman of his time, known by the generic name of 'Jack Ketch', was executed for beating a woman to death in the course of a rape or rape attempt, the following rhyme was distributed at the execution: "Though Jack's misdeed is punish'd right; It never was intended; That he should leave his office quite; He only is

the consequences of unrestrained male sexual adventurism. Such lack of restraint was generally thought to lead to self-indulgence, disease, and debilitation.¹⁷⁵ Broadsides and pamphlets of the period are full of cautions addressed to men against the evils and dire moral and physical consequences of promiscuity.¹⁷⁶ On a more practical level, Lord Chesterfield advised his son that "As to running after women, the consequences of that vice are only the loss of one's nose, the total destruction of health and, not unfrequently, the being run through the body."¹⁷⁷

The 'blackmail myth' perhaps mediated the conflict between a society increasingly concerned with order and restraint on the one hand, and subject to the oppression of the unrestrained image of 'manliness' on the other. The myth permitted male violence against women to be castigated in the abstract, but tolerated it in particular cases where the defendant's behavior did not conflict with the masculine ideal. Flexibility of the rape law also reflected what I consider to have been the hidden agenda of the law relating to sex offenses in this period: the moderating of male behavior, and the spelling out of the new limits of male and female conduct in a tighter and more disciplined world.

Concern with the female role, of course, played a strong part in all of this. I have in passing referred to structural and cultural developments which combined to lower the status of women in this period. However, setting aside the law of rape, the focus of the law affecting sexual misconduct at this time was overwhelmingly concerned with men. Lesbianism was not an illegal activity, nor did it arouse much comment, tolerant or otherwise.¹⁷⁸

The overriding, almost obsessive, concern of this area of the law was male homosexuality. I have already cited the sources which show that while blackmail under an allegation of heterosexual misconduct was a trivial offense hardly capable of being prosecuted, blackmail alleging homosexual misconduct was transformed in the late eighteenth century into a capital felony.¹⁷⁹ Hatred of the homosexual was phenomenal, and was reflected in the severity with which those accused of this behavior were treated. When eighteenth century attitudes toward rape are considered in tandem with those to-

suspended"; 1 THE NEW NEWGATE CALENDER 152-54 (A. Knapp & W. Baldwin eds. London 1819).

¹⁷⁵ A TRIP THROUGH LONDON 17-18 (3rd ed. London 1728).

¹⁷⁶ See, e.g., R. KING, THE FRAUDS OF LONDON DETECTED 92 *passim* (London 1780).

¹⁷⁷ 1 P.D. STANHOPE, *supra* note 103, at 255.

¹⁷⁸ L. FADERMAN, SURPASSING THE LOVE OF MEN (1981).

¹⁷⁹ Simpson, *supra* note 10, at 361-425.

ward other sexual offenses, the strength of the concern with male sexuality, and the power of the public image of manhood, is apparent.

VII. EXPLANATIONS OF RAPE

It is of course true that explanations for persistent judicial mistrust of women alleging rape are inextricably tied to the reasons given for the prevalence of the crime itself. Most recent analyses of this crime, however, offer theories that are universal, but unsupported by historical evidence. Most of these do not therefore include the variable of change and are therefore static and relatively uninteresting.

Such recent theoretical consideration of the psychological origins of the crime of rape quite rightly addresses the broad spectrum of gender relations, but tends to do so in a rather limited structural context. A focus on the 'double standard' of morality is commonly justified by its importance as a manifestation of the property concerns of males. Adultery in women is especially destructive because, according to Dr. Johnson's famous maxim, "confusion of the progeny constitutes the essence of the crime; and therefore any woman who breaks her marriage vows is much more criminal than a man who does it".¹⁸⁰

The link between gender and property considerations is frequently used to support explanations of the social significance of rape based on a conspiratorial male interest in controlling property and extending this control over women. In this scenario, the crime of rape is not, of course, overtly approved of by the dominant sector of society. The difficulties and humiliations associated with its usually unsuccessful prosecution in the courts, however, are seen as powerful social reinforcement of female dependency and as important messages to both men and women about the nature of approved female conduct.

The equation of women with property is one of the less valuable legacies of Friedrich Engels.¹⁸¹ Susan Brownmiller has presented an influential, and rather extreme, version of Engels' position.¹⁸² Muted versions of this perspective have also been

¹⁸⁰ Thomas, *The Double Standard*, 20 J. HIST. OF IDEAS 195, 209 (1959).

¹⁸¹ His influential theory of the social evolution of this development is included in Chapter 2 of F. ENGELS ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE (1942).

¹⁸² *E.g.*,

Man's discovery that his genitalia could serve as a weapon to generate fear must rank as one of the most important discoveries of prehistoric times . . . From [then] . . . to the present, I believe, rape has played a critical function. It is nothing more

presented in historical contexts. Judith Walkowitz's analysis of contemporary press coverage of the 'Jack the Ripper' murders in London in the 1880s presents a very persuasive case for the view that its net effect was to underscore the vulnerability of women to the predatory tendencies of men.¹⁸³ In her view, an appreciation of this vulnerability affected the perceptions of men and women across the social spectrum regarding the power of each sex relative to the other.¹⁸⁴ Susan Edwards, in her analysis of the development of the law of rape since the beginning of the nineteenth century, emphasizes the effect of this area of the law and its prosecution on the self-images of women. She concludes that the developments in the law of rape had the effect of emphasizing the socially-approved image of women as one of passivity, asexuality, and dependence.¹⁸⁵

Such accounts may present accurate representations of particular situations. They do not provide us, however, with an explanation of *why* these situations occurred which goes beyond the familiar linkage of male attitudes toward women and male interests in property. There are a number of difficulties with this equation of the incidence and prosecution of rape with male property concerns. Some of these are inherently conceptual.¹⁸⁶ The most serious of these, however, is that such approaches cannot be used to explain the undoubted fact that rape has been prosecuted rather differently in different historical periods.

Historians have not been kind in their attentions to this crime. Brownmiller's work purports to be historical, but shows no understanding of history's lessons as to the facts of social change. Edward Shorter has offered a dynamic explanation of rape which does account for change over time, but which relies on suspect evidence, and on a familiar, and probably apocryphal, relation between the incidence of rape and the availability of outlets for male sexual relief.¹⁸⁷ His reliance on the male "sexual frustration" thesis has, quite rightly, been criticized for its lack of understanding of the social and political correlates of this crime.¹⁸⁸ The only study I have

or less than a conscious process of intimidation by which *all* men keep *all* women in a state of fear."

S. BROWN MILLER, *AGAINST OUR WILL* 14-15 (1975)(emphasis added). This has to be the most-quoted passage in the recent literature of this crime.

¹⁸³ Walkowitz, *Jack the Ripper and the Myth of Male Violence* 8 FEMINIST STUD. 542 (1982).

¹⁸⁴ See *Id.* at 569-70.

¹⁸⁵ S. EDWARDS, *supra* note 112, at 21-48.

¹⁸⁶ *E.g.*, if women are regarded by men as property, then why is rape not considered a violation of another man's property, and prosecuted with as few legal difficulties as any other form of robbery?

¹⁸⁷ Shorter, *On Writing the History of Rape*, 3 SIGNS 471 (1977).

¹⁸⁸ Hartmann & Ross, *Comment on On Writing the History of Rape* 3 SIGNS 931 (1978).

encountered of rape in eighteenth century America shows no awareness of the legal difficulties inherent in the prosecution of this crime¹⁸⁹ and therefore adds little to our understanding.

Only two studies appear to exist which represent serious and informed attempts to show the historical development of social and legal attitudes toward this crime in Anglo-American jurisdictions. Both presume that current attitudes have their origin in the nineteenth century.¹⁹⁰

My own work suggests that rape could be prosecuted more easily in the early eighteenth century than in the early nineteenth. This was only in part due to the increasing legal requirements for the proof of the crime. It was also due to a *de facto* increase in the discretionary powers of those administering the law.¹⁹¹ This at least raises the possibility that there are particular social factors influencing gender relations which are structural and identifiable. If their force can be demonstrated in the historical context of a society in the throes of a modernization process, which in some form continues today, an important step toward our understanding of the social constructs of this crime will have been achieved.

I have suggested elsewhere, and in some detail, that an 'ethos of masculinity'¹⁹² arose within the lower-class male inhabitants of early modern London. This was primarily a defense mechanism occasioned by the loss of status by these men when they moved from the countryside, where they had property and local reputation, to the city where they had neither. Urban migration is considered to have been largely determined by the push of the enclosure movement rather than the pull of life in the Metropolis. A greater emphasis of their superiority as males was adopted by men affected by urban migration. For these men, the idea of gender related to power acted as a form of cultural compensation. It helped men in this position cope with what amounted to the downward mobility which resulted from their move from the country to the city.

Masculinity, defined in this way as a cultural value, is therefore

¹⁸⁹ Lindemann, 'To Ravish and Carnally Know': *Rape in Eighteenth-Century Massachusetts*, 10 *SIGNS* 63 (1984).

¹⁹⁰ S. EDWARDS, *supra* note 112; Nemeth, *Character Evidence in Rape Trials in Nineteenth Century New York: Chastity and the Admissibility of Specific Acts*, 6 *WOMEN'S RTS. L. REP.* 214 (1980).

¹⁹¹ The J. P. who accepted the complaint against Captain Leeson, convicted of rape in 1715 and later pardoned, did so even though he believed it to be unfounded. He accepted it because he believed he was legally bound to do so. H. LEESON, *supra* note 58. A few decades later, justices were rejecting such complaints as a matter of routine.

¹⁹² Documentation of this concept and its origins is the principal substance of my dissertation, A. E. Simpson, *supra* note 10.

seen as resulting from structural change. It was created by enclosure as the force which at this particular point in history eradicated England's peasant class and propelled the newly dispossessed into circumstances for which they were ill-equipped, in both a material and a cultural sense.

This ethos of masculinity did not, however, maintain close contact with its economic base. It invaded other classes and persisted and was reinforced in the industrialized society which came later and in which the traumas of enclosure were largely no more than folk-memories. The sphere of influence of this ethos was not, however, limited to the lower classes. Masculinity hit a chord very familiar to men of genteel background and also proved attractive to the bourgeoisie. The violence associated with this ethos was certainly inimical to the rising middle-class values of this period. Violence has, however, exerted its own attraction in the modern world on men of all social classes.

Norman Mailer is not the only man of his station in life, now or then, to have been drawn to the idea of violence as a proof of self-worth. The cult of the highwayman, which persisted throughout the eighteenth century, has been considered as both an expression of lower-class interest in the image of the free male, and vicarious indulgence in the values of the genteel.¹⁹³ The extraordinary revival of dueling, which began in the late eighteenth century and continued well into the reign of Victoria, has been analyzed as a product of middle-class interest in upward mobility and the trappings of gentility.¹⁹⁴ This analysis does, however, recognize the attraction of this activity as a dangerous and therefore quintessentially masculine pastime.

It is easier to specify the effects of masculinity than to define it precisely. As an imperialistic phenomenon through time and across class lines, masculinity cannot be defined just from its point of origin. Other writers have addressed the development of masculinity in other historical contexts and have focused on different attributes of it.¹⁹⁵ Characteristics common to these accounts, and to the concept of masculinity used in my previous study,¹⁹⁶ are those of male solidarity, competence in the working world and in society, and au-

¹⁹³ For a discussion of the first of these approaches, see E. J. HOBBSBAUM, *BANDITS* (rev. ed. 1981). For the second, see Simpson, *supra* note 10, at 664-74.

¹⁹⁴ A. E. Simpson, *Dandelions on the Field of Honor: Dueling, The Middle Classes, and the Law in Nineteenth Century England*, Paper presented at the Annual Meeting of the American Society of Criminology, Cincinnati, November 1984 (unpublished manuscript).

¹⁹⁵ G. BARKER-BENFIELD, *THE HORRORS OF A HALF-KNOWN LIFE* (1976); P. STEARNS, *BE A MAN! MALES IN MODERN SOCIETY* (1979).

¹⁹⁶ Simpson, *supra* note 10, at 585-635.

tocracy within the family. The most crucial notion in this cultural image, however, is male *autonomy*. A "real man" is in control of his own life, and perhaps the lives of others, and makes decisions based on his own feelings and beliefs, and not according to outside constraints.

Several things follow as a consequence of these characteristics. People who lack the attributes of masculinity are necessarily denigrated. This is in part because the man must obviously be the patriarch in his own home. It is also because maleness as a special quality cannot be demonstrated unless there are those whose inferiority is shown in comparison. Without troops there can be no generals.

Secondly, by definition, the masculine ideal is essentially a moral one. As the autonomous male responds to no external constraints, his only controls are from within. Hence the importance of masculine virtues such as dignity, fairness, and integrity. Breaking the rules of the game is a more heinous sin when there are no policemen to enforce the rules.

Finally, this ideal is, for a lower class man at least, quite unattainable. The major effect of the move to the city was to require more subservience of working-men, not less. Masculinity was a sub-cultural construct that helped to compensate for status that was no longer to be had and deference that had now to be given. Its expression created potential conflict within the family and elsewhere which could never be satisfactorily resolved. Masculinity as an ethos is therefore considered as a cultural response to a structural problem, but one which, though ultimately dysfunctional, developed its own momentum. In terms of the schema developed by Michel Foucault,¹⁹⁷ sexuality, as a social construct, became a vehicle that allowed for the intrusion of new and imperialistic ways of thought. It was, however, both widespread and non-conspiratorial, and affected all without favor or prejudice. Its power was immense, but non-Machiavellian; it enjoyed the support of the state, but was not directed by a thoughtful Prince.

This notion does not denigrate the strength of unrelated factors exerting an adverse influence on the status of women at this time. Masculinity was both a cause and a consequence of changing attitudes of men toward women. The decline in the status of women during this period, however, was certainly attributable to major structural changes affecting the importance of the family as a unit of

¹⁹⁷ M. FOUCAULT, I THE HISTORY OF SEXUALITY (R. Hurley trans. 1980).

production and the position of women in the 'free' labor force.¹⁹⁸ Women came to constitute the bulk of Metropolitan domestic servants and in situations which made them much more vulnerable than in times past.¹⁹⁹ There was, however, more to the situation than male willingness to exploit increased female vulnerability. Even the strongest economic determinists recognize that cultural shifts had their influence too.

Masculinity was clearly not a mode of thought that favored female emancipation. It was itself a product of economic conditions that came to deny status to the lower-class male, but as a cultural influence it spread far beyond its economic base. Acts of violence directed by men against women, with or without overt sexual connotations, characterized one aspect of the fundamental pathology of the code which influenced men so strongly. Pathology does not, however, necessarily lead to obsolescence. A way of thought that is destructive to all those who have dealings with it must also exert its own charm if it is to survive. An appreciation of the attractions of masculinity is indispensable to any understanding of how it arose, what it meant, and what it became.

It is probable that the masculinity ethos most strongly influenced the rape law through its lack of interest for female concerns rather in its active denial of them. Rape was extremely difficult to successfully prosecute because the substance of the law affecting it was confused. This confusion resulted from jurists' slight interest in rape, as evidenced by their failure to even understand its content properly.²⁰⁰ The rise of the masculinity ethos served to focus attention on the needs and social styles of men. It was not directly concerned with women. Moreover, as victimized women of substance had access to better means of redress through the civil courts,²⁰¹ criminal prosecutions for rape became the preserve of those who were lowly-born as well as female. The interest of the law and the courts in this crime was therefore inhibited by reasons of social class as well as of gender.

VIII. CONCLUSION

Although this study is of another place and another time, its

¹⁹⁸ M. D. GEORGE, *LONDON LIFE IN THE EIGHTEENTH CENTURY* (1928); R. HAMILTON, *THE LIBERATION OF WOMEN* (1978).

¹⁹⁹ In the 375 cases of rape and attempted rape identified as prosecuted in London between 1730 and 1830, the occupations of ninety-one victims can be determined. Two-thirds of them (sixty-one) were domestic servants.

²⁰⁰ Simpson, *Vulnerability*, *supra* note 13.

²⁰¹ See *supra* note 104.

relevance to the modern world should not be ignored. There is much support in the literature for the belief that the inferior status of lower-class males continues to be associated with concerns for masculinity in a way that supports ongoing difficulties in current gender relations and in the social order. Intense concern with 'manliness' has been widely discussed as a consequence of low status, and as a contributing factor to delinquency and anti-social behavior.²⁰²

The position of the lower-class man who is led to rely on masculinity as a protective device is an untenable one. Modernization in England was essentially a process that separated producers from the means of production and therefore made conditions for survival less secure.²⁰³ Women may have been forced into marginal positions in the work-force in the eighteenth century,²⁰⁴ but their role was nonetheless often a vital one to family exchequers.²⁰⁵

The very circumstances that created masculinity undermined the myths that could be invoked to support it. Acceptance by a working-man's family of his public strengths is something of a trade-off. Family members provide him with the status he needs, as a man of power and courage, in the only setting he is ever likely to be granted it. In return, he must demonstrate his ability as a good provider.²⁰⁶ If the man fails to complete his part of the bargain, he loses title to deference from his family, and to his own self-respect. Challenges to his authority in his home are challenges to the only position from which he can lay claim to being a man of independence and strength. Failure to bring home the bacon brings bitterness within the home and between the sexes, and feelings of inadequacy and self-contempt within the patriarch *manqué*.²⁰⁷

Such feelings of inadequacy have often been translated into active expressions of misogyny, at least in England in the eighteenth and nineteenth centuries.²⁰⁸ However, as has been suggested, the

²⁰² See e.g., D. MATZA, *DELINQUENCY AND DRIFT* (1964); Greenberg, *Delinquency and the Age Structure of Society*, 1 *CONTEMPORARY CRISES* 189 (1977).

²⁰³ E. BOSERUP, *WOMEN'S ROLE IN ECONOMIC DEVELOPMENT* (1970).

²⁰⁴ M.D. GEORGE, *supra* note 198.

²⁰⁵ See, e.g., Taylor, "The Men Are as Bad as their Masters . . .": *Socialism, Feminism, and Sexual Antagonism in the London Tailoring Trade in the Early 1830s*, 5 *FEMINIST STUD.* 7 (1979).

²⁰⁶ A. TOLSON, *THE LIMITS OF MASCULINITY* 68 (1977).

²⁰⁷ These are exactly the consequences that historical denial of adequate job opportunities for black males of the lower strata is thought to have produced in more recent times. See, e.g., E. LIEBOW, *TALLEY'S CORNER* (1967).

²⁰⁸ ROSS, "Fierce Questions and Taunts": *Married Life in Working-Class London, 1870-1914*, 8 *FEMINIST STUD.* 575 (1982); Tomes, "Torrent of Abuse": *Crimes of Violence Between Working-Class Men and Women in London, 1840-1875*, 11 *J. Soc. Hist.* 328 (1978).

power of masculinity as a persuasive and attractive mode of thought has by no means limited its adherents to those of a single economic group.

The importance of myths, such as the 'blackmail myth,' in all this should not be underestimated. Beliefs that are powerful are internalized by *all* members of society, women as well as men. There is ample evidence that Englishwomen of the eighteenth century were responsive to the thoughts and feelings of those around them. Modesty and shame are public as well as private emotions, and there are many examples of rape victims who had second thoughts about pursuing a prosecution when they realized the nature of the ordeal to which they would be subjected.²⁰⁹

Similar victim reactions appear to operate in the twentieth century. Recent evidence strongly suggests that feelings of guilt and shame, unwarranted though they may be, exert debilitating effects on victims which are powerful and lasting.²¹⁰ This fact has been appreciated by therapists and various 'blame models' are now incorporated within standard approaches to rape victim therapy.²¹¹

It is apparent that this situation could not occur unless the 'blackmail myth' had stepped out of the courts and into society. This is yet another reason why the historical origins of this myth should be appreciated and evaluated in a society where the practice of 'making up' an injury no longer has relevance in legal theory or popular practice.

Theoretical constructs which view the law simply as a mechanism for translating power into authority are usually naive and ill-informed. Explanations of rape such as that offered by Brownmiller do not tell us, for example, why the traditional definition of carnal knowledge documented by Hale was cast aside for half a century at least, only to re-emerge in the nineteenth century and to persist today. Nor do they tell us why the law affecting sexual assaults on women came in other ways to mitigate so strongly against the prosecution.

I have suggested one reason why this might have been so. I have also suggested that the historical, though hitherto unattributed, influence of tradition that emerged in this period persists in the present day. In his classic study of the development of the law of theft, Jerome Hall appreciated that legal tradition can come to

²⁰⁹ See, e.g., R. v. Smith, *The Times*, Aug. 12, 1827.

²¹⁰ For a review of a number of studies documenting this, see S. KATZ & M. A. MAZUR, *supra* note 23, at 221.

²¹¹ Brodsky & Hobart, *Blame Models and Assailant Research*, 5 CRIM. JUST. & BEHAV. 379 (1978).

exert an influence all its own—modified, of course, by prevailing social attitudes and substantive law in point.²¹² The current power of the 'blackmail myth,' given the distant and particular nature of its origin, provides another striking example of this phenomenon.

With all this, the long pedigree and demonstrable power of myths surrounding the rape law and its prosecution indicate a strength of legal tradition which should not be accepted without question. Historical analysis provides the only means of showing that legal traditions emerging in one society can be criticized, on grounds of function and provenance, when applied in another.

²¹² See his introduction in, J. HALL, *THEFT LAW AND SOCIETY* (2nd ed. 1952).