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SEX, RAPE, AND SHAME*

*Katharine K. Baker***

INTRODUCTION

In his book *Sex and Reason*, Richard Posner writes that "[c]ontrary to a view held by many feminists, rape appears to be primarily a substitute for consensual sexual intercourse rather than a manifestation of male hostility"¹ Although much research belies Posner's suggestion that all men who rape do so as an alternative to having sex,² studies of acquaintance rape populations indicate that Posner may be right. This Article will argue that for the acquaintance rape population Posner is right: men do substitute rape for sex. Posner is right, however, not because rape is actually a substitute for consensual sex, but because people believe it to be so. He is right because most people, including the date rapists themselves, believe that men can actually substitute nonconsensual for consensual sex in some sort of meaningful way. Our collective understanding of what sex is does not distinguish between consensual and non-consensual sex in a significant enough manner for people to see them as truly different. It is precisely because most people

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**Assistant Professor of Law, Chicago-Kent College of Law. I would like to thank Toni Massaro, Michelle Oberman, Andrew Taslitz, Jennifer Wriggins and participants at Loyola University's Symposium on Sexual Violence and Arizona State University's Symposium on Sexual Aggression for their insights on many of the ideas expressed in this paper. I reserve special thanks for Lynne Henderson, Dan Kahan and Richard McAdams, all of whom gave incredibly thoughtful comments on an earlier draft.

¹ RICHARD A. POSNER, *SEX AND REASON* 384 (1992) (footnotes omitted).

² Timothy Beneke studied numerous men who suggested they would use rape as a tool to subordinate or retaliate against women. For instance, one man explained, "If I were actually desperate enough to rape somebody ... it would be a very spiteful thing, just being able to say, I have power over you and I can do anything I want with you." TIMOTHY BENEKE, *MEN ON RAPE* 44, 45-60 (1982). In their influential study of incarcerated rapists, Groth, Burgess and Holmstrom found that "in all cases of forcible rape three components are present: power, anger and sexuality ... [but] power and anger dominate and ... rape rather than being primarily an expression of sexual desire, is, in fact, the use of sexuality to express issues of power and anger." A. Nicholas Groth et al., *Rape: Power, Anger and Sexuality*, 134 *AM. J. PSYCHIATRY* 1239, 1240 (1977). For a legal discussion of the various factors that may motivate men to rape, see Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 *HARV. L. REV.* 563, 599-612 (1997).

do not see them as all that different that, in the words of Susan Estrich "it is far easier to condemn date rape than it is to condemn the date rapist."³ The goal of this Article is to explore ways in which we might move toward a world in which it is much easier to condemn the date rapist.

The first step in reaching that goal is accepting the proposition that men and women often see sex and rape as alike.⁴ Once we accept this proposition we can move beyond it and toward a world in which we prove Posner false by changing the social meaning of sex. To do this, we must rely on more than just criminal proscriptions on nonconsensual sex--indeed at times we may need to ignore them--because a simple criminal proscription on nonconsensual sex cannot get us where we need to go. In order to alter the belief that nonconsensual sex is a substitute for consensual sex, we need to move beyond a sense that nonconsensual sex is wrong and toward a recognition that it is truly "other." It will not become "other" until we understand the social meaning of the act differently.

The focus of this Article is on "non-violent" rape between acquaintances. By this, I mean rape that is not accompanied by any assault or battery except the battery implicit in unwanted sexual touching and the assault implicit in the ability of someone bigger and stronger to overpower someone smaller and weaker. Defined as such, date rape presents the best opportunity to analyze the sometimes elusive line between consensual and nonconsensual sex. Part I analyzes why acquaintance rape happens. Date rape happens, in large part, because some men want or need sex so much that the question of consent becomes irrelevant. These men need sex so much because, for them, the greater the number of sexual encounters they have, the more they demonstrate their masculinity to other men. Their desire for sex exists completely apart from its consensual nature, and it is integrally linked to the cultural construct of masculinity.

³ Susan Estrich, *Palm Beach Stories*, 11 *LAW & PHIL.* 5, 32-33 (1992).

⁴ Catharine MacKinnon has suggested that "the wrong of rape has proved so difficult to define because the unquestionable starting point has been that rape is defined as distinct from intercourse, while for women it is difficult to distinguish the two under conditions of male dominance." CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 174 (1989) (footnote omitted). Although MacKinnon is usually considered much more radical than is Posner on matters of sex and rape, their positions on the fungibility of rape and sex are quite similar. MacKinnon is called a radical when she says that for women, sex is like rape. Posner is in the mainstream when he says that for men, rape is like sex. See, e.g., Robert Garcia, *Rape, Lies & Videotape*, 25 *Loy. L.A. L. REV.* 711, 751 (1992) (calling MacKinnon a radical feminist).

Part II of this Article explores why men who ignore the question of consent often go unpunished.⁵ Although criminal law prohibits men from just taking nonconsensual sex when they want sex,⁶ we are still culturally ambivalent about what nonconsensual sex actually is and whether it is always morally wrong. The world of sexual relations is one that abounds with unstated messages, ambiguous statements, and confused intentions. The lines between pressure and force, strength and violence, and reluctance and refusal are not nearly as clear as the law would like them to be. Lack of effective communication makes it particularly hard for men and women to tell the difference between sex and rape. Cultural confusion regarding the bounds of appropriate conduct also makes it very difficult for the prosecution to prove nonconsent beyond a reasonable doubt because any trial inevitably focuses on events that we do not interpret uniformly.⁷

Thus, the problems surrounding date rape--its very existence and the ability of the criminal law to curb it--are not likely to change unless we (1) begin to challenge the premise that nonconsensual and consensual sex are substitutable, (2) alter the norms that give men an incentive to use sexual conquest as a means of enhancing their masculinity, and (3) begin to construct a discourse for sexual communication that makes willing participation obvious and integral to the experience. The law cannot do this alone.

Part III suggests that extra-legal, shame-inducing sanctions may alter the social meaning of non-consensual sex thereby effectively challenging the idea that rape and sex are substitutable. Relatively close-knit communities, like college campuses, in which prestige and

⁵ Despite widespread rape reform efforts, the conviction rate for rape has not increased. See CASSIA SPOHN & JULIE HORNEY, *RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT* 160 (1992) (Legal reform has had "limited effects on reports of rape and the processing of rape cases. The reforms did not produce an increase in the likelihood of conviction, and they produced an increase in reports and in the likelihood of indictment in only one of the six jurisdictions [studied]."); see also David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 *J. CRIM. L. & CRIMINOLOGY* 1194, 1283-94 (1997) (attributing the low impact of reform efforts, at least in part, to burden of proof obstacles, inadequate rape shield laws and unrealistic expectations).

⁶ This is not true for some married men. In Oklahoma, for example, rape is defined as "intercourse involving vaginal or anal penetration accomplished with a male or female who is not the spouse of the perpetrator" Okla. Stat. tit. 21, § 1111 (Supp. 1995); see also Lalenya Weintraub Siegel, Note, *The Marital Rape Exemption: Evolution to Extinction*, 43 *CLEV. ST. L. REV.* 351, 368 (1995) (highlighting Oklahoma's treatment of marital rape); KY. REV. STAT. ANN. §510.010(3) (Baldwin 1987) (requiring a husband and wife to be living apart for marital rape to be criminal).

⁷ See *infra* Part II.A.

esteem operate at a level that makes a real difference in people's lives, may be able to use alternative sanctions as a way of de-coupling sexual conquest from masculinity.⁸ If sanctions can be used to link the meaning of nonconsensual sexual encounters not to what is masculine, but to what is demeaning and petty, the costs of engaging in nonconsensual sex will increase sharply for men. By placing the burden on men to fully determine, despite the potential ambiguity, that their sexual encounter is consensual, and by making anything short of obvious consent a sign not of prowess but of weakness, men may come to understand the real difference between consensual and nonconsensual sex. In addition, sanctions that require perpetrators publicly to acknowledge and ask for forgiveness from their victims should help everyone understand the human cost involved in disregarding the question of consent.

As the discussion in Part III will make clear, shaming is not a perfect means of eradicating acquaintance rape. It risks minimizing the gravity of the injury and humiliating, without reforming, the date rapist. The kind of sanctions suggested here will also probably only be effective in fairly small, homogenous communities. Nonetheless, as the conclusion suggests, alternative sanctions may be worth their limitations and risks. If we ambiguate⁹ the meaning of sexual conquest we can erode the social construction of masculinity and the social acceptance of sexual aggression that leads people to conflate rape and sex in the first place.

I. SEX, NATURE, AND MASCULINITY

Numerous studies of college male populations indicate that the primary motivation for date rape is a desire for sex. A 1990 study of 276 male and female undergraduates by Margaret Hamilton and Jack Yee found that rape was "more often a form of instrumental aggression rather than a means of expressing hostility or anger towards women."¹⁰ In other

⁸ See *infra* Part III.A.

⁹ This is Lawrence Lessig's term. See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1010 (1995) (stating that to ambiguate something is to make the social meaning of that thing ambiguous); see also *infra* Part III.A (describing alternative sanctions as a way to ambiguate sexual consent and masculinity).

¹⁰ Margaret Hamilton & Jack Yee, *Rape Knowledge and Propensity to Rape*, 24 J. RES. PERSONALITY 111, 119 (1990). Hamilton and Yee were quick to point out, however, in ways Posner did not, that "the instrumental-aggression model of rape need not and, in fact, almost surely does not, apply to all rapists.... [This model cannot explain] the not infrequent occurrence of sexual assault involving extreme brutality." *Id.* at 120.

words, date rapists use rape instrumentally to obtain sex. A 1992 study of 143 university males found that low sex guilt, not low aggression guilt, was linked to sexually aggressive behavior.¹¹ Of the seventy-one self-disclosed rapists that Eugene Karin studied, only 18% described themselves as very angry when they raped.¹² Thirty-one percent described a low level anger "to having been led on" and then rejected, but 51% were "very reluctant to characterize their feelings in terms of anger or hostility" and "a substantial majority of these men emphasized that they could never have carried through sexually if they were experiencing such emotions."¹³ However, date rapists do tend to put a very high premium on "carrying through" sexually. Date rapists tend to have more extensive sexual histories than their peers¹⁴ and to persistently seek new sexual encounters.¹⁵

Rapists' subjective perception that date rape is more about sex than anger may explain why so many men seem remarkably willing to engage in the behavior. Various studies confirm that close to 25% of college age men admit to having used some form of coercion to obtain sexual relations.¹⁶ A 1982 study found 23% of 1846 college men

¹¹ In other words, sexually aggressive males could be distinguished based on their desire for sex, not their desire or tendency toward aggressive behavior. See James Porter et al., *Sexual and Aggressive Motives in Sexually Aggressive College Males*, 21 ARCHIVES SEXUAL BEHAV. 457, 464 (1992) (finding minimal support for the rape as aggression hypothesis, but finding some support for the rape as sex hypothesis).

¹² See Eugene Kanin, *Date Rape: Unofficial Criminals and Victims*, 9 VICTIMOLOGY 95, 100 (1984).

¹³ *Id.* "The majority [of rapists] indicated an initial response more akin to bewilderment or confusion, a response focused on the perplexing question, 'What was I doing wrong?'" *Id.* It is important to again note that the disjunction between sexual performance and anger is not applicable to all men who rape. Many of Timothy Beneke's interviewees suggest that they would rape precisely because they were angry. See Beneke, *supra* note 2.

¹⁴ See R. Lance Shotland, *A Theory of Courtship Rape: Part 2*, 48 J. SOC. ISSUES 127, 130 (1992) (asserting that sexually aggressive males have more sexual experience than their non-aggressive counterparts); Eugene J. Kanin, *Date Rapists: Differential Sexual Socialization*, 14 ARCH. SEXUAL BEHAV. 219, 222-23 (1985) (asserting that date rapists tend to be more sexually active than other men); Neil M. Malamuth et al., *The Characteristics of Aggressors Against Women: Testing a Model Using a National Sample of College Students*, 59 J. CONSULTING & CLINICAL PSYCHOL. 670-81 (1991).

¹⁵ See Kanin, *supra* note 12, at 97; see also Shotland, *supra* note 14, at 130 (stating that date rapists utilize "surreptitious techniques with greater frequency to obtain sexual activity").

¹⁶ See Mary P. Koss et al., *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 J. CONSULTING & CLINICAL PSYCHOL. 162, 166 (1987) (reporting that 25.1% of men studied engaged in some form of sexual aggression); K. Rapoport &

surveyed answering "yes" to the question, "Have you ever been in a situation where you became so sexually aroused that you could not stop yourself even though the woman didn't want to?"¹⁷ Various studies demonstrate a sizable percentage of men willing to rape if assured they will not get caught.¹⁸ A study of college students in Hawaii showed somewhat different but still discouraging results. In that group, 97.2% of men said they would be unlikely to go ahead with nonconsensual sex even if they thought they could get away with it, but 10.4% of those men also said that women want men to be forceful, and 50.9% said women mean "yes" when they say "no."¹⁹ Those who thought "no" means "yes" suggested, on average, that a woman had to say "no" 2.6 times before they would believe her.²⁰

What accounts for these attitudes? Why do these men want sex so badly that they carry through with their act despite the resistance of the women with whom they are supposedly making love? There are two rather obvious and related answers: one, orgasms are pleasurable and these men are seeking pleasure, and two, men are biologically compelled to pursue sexual encounters. This biological compulsion operates, in part, to create in aroused men an instinctual, non-rational, almost uncontrollable urge for intercourse.²¹

B.R. Burkhard, *Personality and Attitudinal Characteristics of Sexually Coercive College Males*, 93 J. ABNORMAL PSYCHOL. 216, 219 (1984) (reporting that 26% of men have ignored a women's protests at some time); John Briere & Neil Malamuth, *Self-Reported Likelihood of Sexual Aggressive Behavior: Attitudinal Versus Sexual Explanations*, 17 J. RES. PERSONALITY 315, 318 (1983) (reporting that 28f subjects indicated some likelihood of both raping and using force).

¹⁷ Mary P. Koss & Cheryl J. Oros, *Sexual Experiences Survey: A Research Instrument Investigating Sexual Aggression and Victimization*, 50 J. CONSULTING & CLINICAL PSYCHOL. 455, 455-57 (1982).

¹⁸ See, e.g., Todd Tieger, *Self-Rated Likelihood of Raping and the Social Perception of Rape*, 15 J. RES. IN PERSONALITY 147, 154 (1981) (reporting that out of 172 males assured that they would not be caught, 64 indicated "some likelihood of raping").

¹⁹ See Crystal S. Mills & Barbara Granoff, *Date and Acquaintance Rape Among a Sample of College Students*, 37 SOC. WORK 504, 506 (1992).

²⁰ See *Id.*

²¹ Social science data confirm the prevalence of these beliefs: "In American society, sex is perceived as more important and enjoyable for men than for women. It is commonly believed that men have stronger sex drives than women do, and that they are difficult for men to control once aroused." ANTONIA ABBEY, *MISPERCEPTION AS AN ANTECEDENT OF ACQUAINTANCE RAPE*, IN *ACQUAINTANCE RAPE: THE HIDDEN CRIME* 104 (Andrea Parrot & Laurie Bechhofer eds., 1991) (CITING D.N. RUBLE AND T.L. RUBLE, *SEX STEREOTYPES*, IN *IN THE EYE OF THE BEHOLDER* 188-251 (A.G. Miller ed., 1982)); see also JACQUELINE D. GOODCHILDS & GAIL L. ZELLMAN, *SEXUAL SIGNALING AND SEXUAL AGGRESSION IN ADOLESCENT RELATIONSHIP*, IN *PORNOGRAPHY AND SEXUAL AGGRESSION* 233-43 (Neil Malamuth & Edward

Both the pleasure and the biological compulsion explanations prove overinclusive, however. First, if what motivates the rapist is just the desire for orgasms, it is unclear both why masturbation is not equally gratifying and why most people, even date rapists, are repulsed by the idea of orgasmic sex with a four year old. Everyone, except possibly the person we can collectively label as "sick," views sex with a four year old as fundamentally different than sex with a twenty-four year old.

Second, if men are biologically compelled to pursue sexual encounters with potentially reproductive mates,²² why do most men refrain from raping? Any answer to the question of why men rape must also address why most men do not rape. While studies of college age populations alarm us with the number of men who admit to having raped and who say that they would rape if they could get away with it, there are also at least as many, if not more, men who say they have no interest in raping even if they could get away with it.²³ Fear of retribution may explain why some men who would like to rape do not rape, but it cannot explain why at least half of all men do not desire forced intercourse even if they know they can get away with it.

It may be that many men have sufficiently internalized the moral message that forced intercourse is wrong for their consciences to overcome their biological urges. Thus, it may be that evolutionary biology explains why men want sex regardless of consent, but that men's motivations are a function of culture and chromosomes, and

Donnerstein eds., 1984) (noting in a study of sexual signaling, the "most reprehensible action of the 11 behaviors in the eyes of our young people, male and female, is for the woman to change her mind"); STEVI JACKSON, *THE SOCIAL CONTEXT OF RAPE: SEXUAL SCRIPTS AND MOTIVATION*, IN *RAPE AND SOCIETY* 16 (Patricia Searles & Ronald J. Berger eds., 1995) (arguing that the popular belief in males' uncontrollable sex drives burdens women with the responsibility of limiting sexual activity).

Lynne Henderson has explained how this biological compulsion theory has evolved into a "widely accepted cultural 'story' of heterosexuality that results in an unspoken 'rule' of male innocence and female guilt in the law." Lynne Henderson, *Rape and Responsibility*, 11 *LAW & PHIL.* 127, 130 (1992).

²² See, e.g., Craig T. Palmer, *Human Rape: Adaptation or By-Product?* 28 *J. OF SEX RES.* 365-86 (1991); Randy Thornhill & Nancy Wilmsen Thornhill, *The Evolutionary Psychology of Men's Coercive Sexuality*, 15 *BEHAV. & BRAIN SCI.* 363-421 (1992) (discussing an evolutionary basis for coercive male sexuality); Barbara Smuts & Robert W. Smuts, *Male Aggression and Sexual Coercion of Females in Nonhuman Primates and Other Mammals: Evidence and Theoretical Implications*, 22 *ADVANCES IN THE STUDY OF BEHAV.* 1-63 (1993).

²³ See *supra* notes 18-19 and accompanying text (discussing a study finding that most men would not rape even if assured they would get away with it).

culture often overrides chromosomes.²⁴ If that is the case, the question we must then ask is when does culture override chromosomes? Even if one accepts the biological explanation as to why men rape, one must admit that there are profound, perhaps overwhelming, moral reasons²⁵ to counteract men's biological motivations. What distinguishes those men who internalize the moral message from those men that do not?

One finding emerging from the research conducted on date rapist populations indicates that men with a willingness to rape are under a disproportionate amount of pressure to have sex.²⁶ This pressure blinds them to the question of consent. As I have argued elsewhere,²⁷ different rapists' motivations vary, but the research suggests that an instrumental need for sex is what motivates most date rapists to rape. For these men, sex is often a means of gaining the esteem of their peers. "Scoring" is seen as an individual accomplishment for which one earns prestige. Many young men are eager to have sex because they want to think of themselves and to have others think of them as men worthy of esteem.²⁸

Sometimes these esteem systems are explicit. The infamous Spur Posse gang of adolescent boys in Southern California devised a game in which each boy got a point for every girl (most of them were between thirteen and sixteen years old) he had sex with.²⁹ The winner was he who had the most points. Arguably, the Spur Posse story got so much attention in the press³⁰ and in the rape literature³¹ not because it

²⁴ For more on the distinctions between the biological inevitability of rape and the social constructions that encourage and to a certain extent condone rape, see Katharine K. Baker, *What Rape Is and What It Ought Not To Be*, 39 *JURIMETRICS J.* 233, 238-40 (1999).

²⁵ For a thoughtful discussion of just how devoid of moral consideration the legal/sociobiological arguments are, see Robin West *Sex, Reason, and a Taste for the Absurd*, 81 *GEO. L.J.* 2413, 2416 (1993) (reviewing Richard Posner, *Sex and Reason*) ("[T]he great and indeed glaring flaw of [Posner's] book is moral, not conceptual or factual: it is a failure to criticize where criticism is due and a failure to condemn where condemnation is called for.").

²⁶ See Kanin, *supra* note 12, at 97; Shotland, *supra* note 14, at 139.

²⁷ See Baker, *supra* note 2, at 597-612.

²⁸ This is not to say that hormones play no role in the young male sex drive. They do. But most young males have comparable hormone levels. Some men learn or aspire to control hormonal urges; some do not.

²⁹ See Jennifer Allen, *Boys: Hanging with the Spur Posse*, *ROLLING STONE*, July 8-22, 1993, at 54, 55, 63, 128.

³⁰ A Lexis "News" search for "Spur Posse" generates 440 hits.

³¹ See, e.g., Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 85 *J. CRIM. L. & CRIMINOLOGY* 15, 15-16 (1994); Deborah W. Denno, *GENDER, CRIME, AND THE CRIMINAL LAW DEFENSES*, 85 *J. CRIM. L. & CRIMINOLOGY* 80, 133 N.268 (1994); Jane L. Dolkart, *Hostile Environment*

was so outrageous, but because the Posse point system made so perfectly explicit that which we know happens every day anyway. Anyone familiar with locker room or fraternity banter knows that an affirmative answer to the question "did you score?" entitles one to the respect of one's peers.³² This kind of peer group pressure and re-enforcement appears to play a critical role in the lives of date rapists. Eugene Kanin found that his sample of college age date rapists were "products of highly erotic-oriented peer group socialization."³³ Other studies have found a strong correlation between peer support and willingness to rape.³⁴

Consider the story of John, a minister's son attending college.³⁵ John wanted to join a popular fraternity, but he was a virgin and the members of the fraternity made it clear that virgins were not allowed to join their club.³⁶ John was not dating anyone consistently and he did not have what he considered any prospects for a sexual partner. The fraternity brothers told John that all he had to do was invite a date to one of their parties. John invited a woman he had dated a few times to the party. She went and drank one heavily spiked drink. John then led her upstairs to the room of one of the fraternity brothers, pushed her up against the wall, put a condom on and raped her. Prior to this fraternity initiation ritual, John's hormones had not forced him to rape. His "need" to rape had much more to do with his desire for acceptance, than with his biological drive. He needed to have sex to prove that he was "one of the guys," not just because he was a guy.

Harassment: Equality, Objectivity and the Shaping of Legal Standards, 43 EMORY L.J. 151, 178, n.100 (1994); Linda J. Lacey, We Have Nothing to Fear But Gender Stereotypes: Of Katie and Amy and "Babe Feminism," 80 CORNELL L. REV. 612, 626 (1995) (Book Review of Katie Roiphe, *The Morning After: Sex, Fear and Feminism on Campus* (1993)).

³² The NEW YORK TIMES MAGAZINE reported that Warren Beatty, world-renowned movie star and "lady's man," was given the credibility he needed in the African-American rap community to make the movie *Bulworth* because he was seen as a "Mack" or "Mack Daddy." See Lynn Hirschberg, Warren Beatty Is Trying to Say Something, N.Y. TIMES MAG., May 10, 1998, at 20. As Russell Simmons, who runs Def Jam Records, explained, this means that "he's been with a lot of women." *Id.* Because this 61 year old, white movie star had had sex with a lot of women, young, black men looked up to him. See *Id.*

³³ Kanin, *supra* note 12, at 97.

³⁴ See Shotland, *supra* note 14, at 139.

³⁵ This story is taken from Andrea Parrot, Institutional Responses: How Can Acquaintance Rape Be Prevented, in *Acquaintance Rape*, *supra* note 21, at 355, 363-64 (using the example as an illustration how low self-esteem may drive date rapists).

³⁶ See *Id.* The very idea that a fraternity could have such an initiation requirement suggests that they are using sexual prowess or experience as a kind of currency or accomplishment.

Peer support also explains numerous gang rape stories with which we are now, sadly, familiar. Consider the comments of Nathan McCall when he joined the "train" his gang was running on a thirteen year old girl: "All the fellas were there and everybody was anxious to show everybody else how cool and worldly he was."³⁷ Or consider the behavior of the men who stood by and cheered as their friends raped a woman at a bar in New Bedford, Massachusetts, a scene depicted in the movie *The Accused*.³⁸ The more they "performed," the more praise they received from their peers.

Not all of these esteem systems are so explicit. Research suggests that young men often internalize the extent to which sexual activity can bring them the respect they desire. For these men "sexual conquest . . . [is] . . . intimately associated with their feelings of worth."³⁹ Rapists tend to be more sexually active than non-rapists, but they "are significantly more apt to evaluate their sexual achievements as unsatisfactory" and they see themselves as relatively deprived.⁴⁰ In other words, these men rape to feel better about themselves because they believe other men have outperformed them sexually. Given these findings, the question becomes why is sex a performance criteria? Why do these men consider it an accomplishment to get as much, and hopefully more, sex than their male peers?

To answer that question, one needs to turn to the emerging literature on norms. In his recent article on the origin of norms, Richard McAdams suggests that a preference for esteem is what explains much of the strength and persistence of social norms.⁴¹ A norm develops and thrives because conforming with that norm is a means of securing the esteem of others.⁴² McAdams goes on to explain how this esteem process can explain both adaptable, behavior specific norms and more abstract internalized norms.⁴³ Examples of behavior specific norms are rules like "mow your lawn" or "make your child wear a bike helmet." Examples of abstract internalized norms are ideals like "Be a Good Neighbor" or "Be a Good Parent." Abstract

³⁷ NATHAN MCCALL, *MAKES ME WANNA HOLLER* 47 (1994).

³⁸ For a description of the actual event, see Lynn S. Chancer, *New Bedford, Massachusetts, March 6, 1983- March 22, 1984: The "Before and After" of a Group Rape*, 1 *GENDER & SOC'Y* 239, 244-45 (1987) (describing the New Bedford rape in detail and studying the community's reaction to the rape).

³⁹ Kanin, *supra* note 12, at 97.

⁴⁰ *Id.* at 99.

⁴¹ Richard H. McAdams, *The Origin, Development and Regulation of Norms*, 96 *MICH. L. REV.* 338, 342 (1997).

⁴² *See Id.* at 355.

⁴³ *See Id.* at 376.

internalized norms tend to encapsulate broad, noncontroversial ideas that enjoy unanimous support.

The two kinds of norms often interrelate.⁴⁴ Behavior specific rules support internalized ideals.⁴⁵ Thus, to put the above examples together, one mows one's lawn in order to prove that one is a good neighbor, and one makes one's child wear a bike helmet as a way of showing that one is a good parent. (Or at least one worries about being labeled a bad parent if one fails to do so.)⁴⁶ Because behavior specific norms can support internalized norms, the internalized norm often gives social meaning to the behavior required by non-internalized norms.⁴⁷ Thus, mowing one's lawn means one is being a good neighbor.

Behavior specific norms, however, can change relatively rapidly. In many places in this country one can be perceived as a good neighbor or a good parent without mowing one's lawn or making one's child wear a helmet. On the other hand, abstract, internalized norms tend to stay constant over time and place.⁴⁸ No one thinks it is okay to be a bad neighbor or a bad parent. Because internalized norms give social meaning to behavior specific norms and because behavior specific norms can change over time and place, the meaning of certain behaviors can change over time and place.⁴⁹ Thus, in a year of bounty, one complies with the norm to water and mow one's lawn and complying with that norm makes one a good neighbor. The greener and shorter one's lawn, the more esteem one receives. But, in a year of drought, the behavior specific norm changes such that the good neighbor becomes she who lets her lawn grow long and brown. The act of mowing one's lawn has different social meanings at different times. It can, but does not always, mean that one is being a good neighbor.⁵⁰

⁴⁴ *See Id.* at 382-83.

⁴⁵ *See Id.* at 383.

⁴⁶ One of the hallmarks of internalized norms is that in violating them, one incurs the psychic costs of guilt or inadequacy, regardless of the existence of external sanction. *See id.* In contrast, one can violate a behavior specific norm without feeling guilty (although one still runs the risk of losing the esteem of others). *See Id.*

⁴⁷ *See Id.*

⁴⁸ *See Id.*

⁴⁹ *See Id.*

⁵⁰ McAdams uses the example of drunk driving. *See Id.* at 385. Thirty years ago, being a loyal friend (the internalized norm) meant defending one's friends ability to drive home after a few too many beers. *See Id.* Letting your friend drive was an act of loyalty. *See id.* Today, taking one's friend's keys is often seen as the act of loyalty. *See id.* How we interpret the act of taking someone's keys depends on how the internalized norm gives meaning to that act.

What does all this have to do with rape? Consider the following hypothesis. Having sex, as much and as obviously as possible, is an esteem-enforced behavior specific norm for many young men. Date rapists rape to gain, or at least not lose, the esteem of others. Demonstrating one's masculinity, "being a man," is the abstract, internalized norm that gives meaning to the act of having sex. Thus, just as one proves oneself a good neighbor by mowing one's lawn, one proves oneself masculine by getting as much sex as possible. The norm of frequent sex supports the masculinity norm. The act of having sex means one is demonstrating one's masculinity.⁵¹

Having sex is not the only means of proving one's masculinity, just as mowing one's lawn is not the only means of being a good neighbor. Nor is having frequent sex, particularly nonconsensual sex, always a means of confirming one's masculinity status. As established, the same behavior can have different meanings in different situations.⁵² But for many men in contemporary social settings, particularly men in overwhelmingly young male environments, to have sex, consensual or not, is to prove one's masculinity.

The remarkably strong adherence to traditional sex-roles within the date rapist population supports this hypothesis. Gender roles explain both why date rapists fail to appreciate the importance of consent and why date rapists have such an exaggerated desire for sex. As Judith Herman summarizes the work done with these populations, "young rapists in the college-student surveys are demonstrably sexist, but not demonstrably 'sick'."⁵³ Macro sociological research demonstrates a positive link between the acceptance of gender

⁵¹ As Dan Kahan reminds us, "actions have meanings as well as consequences." Dan C. Kahan, *What Do Alternative Sanctions Mean*, 63 U. CHI. L. REV. 591, 597 (1996).

⁵² For instance, when the cost of having extramarital sex included significantly greater risks of financial responsibility for children and when other cultural norms more strongly discouraged premarital sex, the frequency of one's sexual encounters may not have as readily translated into an affirmation of the masculinity norm. Or, even if they did, the affirmation of the masculinity norm may have been offset by the operation of norms encouraging responsibility. In a culture in which one can engage in premarital sex without being considered either irresponsible or immoral, neither of those offsetting norms is likely to be very effective in counterbalancing the masculinity norm.

⁵³ Judith Lewis Herman, *Considering Sex Offenders: A Model of Addiction*, in *Rape and Society*, supra note 21, at 74, 77; see also James V.P. Check & Neil Malamuth, *An Empirical Assessment of Some Feminist Hypotheses About Rape*, 8 INT'L. J. WOMEN'S STUD. 414, 415 (1985); M.P. Koss, *Hidden Rape: Incidence, Prevalence, and Descriptive Characteristics of Sexual Aggression and Victimization in a National Sample of College Students*, in 2 *Sexual Assault* 3- 25 (A.W. Burgess ed., 1988).

inequality and the prevalence of rape.⁵⁴ Date rapists tend to believe that men must be in charge in sexual encounters, that women are devious, and that nice women do not (but nice men can) engage in premarital sex.⁵⁵ These sex-role paradigms make it particularly easy for men to assume or simply ignore the question of consent because the paradigms assign to men the role of Aggressor and to woman the role of passive Recipient.

[B]oth women and men see it as normal and natural for the male to play a more dominant or assertive role in a heterosexual encounter and the female to play a more yielding or accommodating role. They also see it as emasculating for the man and defeminizing for the woman if those assertive and yielding roles are reversed.⁵⁶ Just as important, sex role paradigms explain why date rapists persistently seek sex. Date rapists see and endorse stark distinctions between the masculine and the

⁵⁴ See LARRY BARON & MURRAY A. STRAUS, *FOUR THEORIES OF RAPE IN AMERICAN SOCIETY: A STATE-LEVEL ANALYSIS* 185 (1989) (arguing that study results support the notion that "gender inequality contributes to rape").

⁵⁵ See Shotland, *supra* note 14, at 139 (citing research demonstrating that sexually aggressive males are more likely to have rape-supportive beliefs than sexually non-aggressive males). An acceptance of sex-role stereotypes also correlates to an increased tendency to blame the victim in date rape situations. See Cynthia E. Willis, *The Effect of Sex Role Stereotype, Victim and Defendant Race, and Prior Relationship on Rape Culpability Attributions*, 26 *SEX ROLES* 213, 223 (1992). Studies demonstrate that "individuals with female sex-role orientations, and those holding profeminine attitudes have more sympathetic attitudes towards victims of rape than do individuals with masculine sex-role orientations and those with restrictive attitudes about sex-roles." Susan Bell et al., *Understanding Attributions of Blame in Stranger Rape and Date Rape Situations: An Examination of Gender, Race, Identification, and Students' Social Perceptions of Rape Victims*, 24 *J. APPLIED SOC. PSYCHOL.* 1719, 1720 (1994) (citations omitted).

⁵⁶ SANDRA LIPSITZ BEM, *THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL EQUALITY* 163 (1993); see also Jackson, *supra* note 21, at 19. ("From the beginning, boys learn to be independent, to seek success actively through their own efforts and abilities while girls are encouraged to be dependent, to seek success passively through pleasing others."); ROBIN WARSHAW & ANDREA PARROT, *THE CONTRIBUTION OF SEX-ROLE SOCIALIZATION TO ACQUAINTANCE RAPE*, IN *ACQUAINTANCE RAPE*, *supra* note 21, at 75. ("From their socialization in childhood and adolescence, [men and women] develop different goals related to sexuality ... [M]en are supposed to single-mindedly go after sexual intercourse with a female, regardless of how they do it... [W]omen should passively acquiesce or use any strategy to avoid sexual intercourse.").

Historically, the gendered nature of aggressor/recipient roles has transcended biological sex. See ALLEN G. JOHNSON, *THE GENDER KNOT* 70 (1997) (discussing imposition of these roles). Thus, lesbian couples were bi-polarized as butch (aggressor) and femme (recipient). See *Id.* Ancient Greek and Roman men were able to have sex with other men without sacrificing their masculinity as long as they played the active-dominant role in the sexual encounter. See *Id.* This link between masculinity and aggression is seen today in prison populations in which status, power and masculinity are associated with the sexual aggressor despite the fact that he often engages in behavior (sexual relations with another man) that is often seen as very non-masculine. See *Id.*

feminine. They identify strongly as male and they want to define themselves and have others define them as masculine. These men want sex so badly because it is a means of proving to themselves and others that they are masculine. The man who remains a virgin or does not join his gang's "train" or frequently goes home alone when everyone else "scores" is somehow seen as a "wimp."⁵⁷ He is not proving himself to be a man.

Linking sexual behavior norms to the internalized ideals of gender⁵⁸ is hardly a novel idea. Beginning as early as the late nineteenth century, the psychological and medical professions began trying to prove that outward displays of masculinity and femininity indicated people's sexual orientations.⁵⁹ Early sexologists and psychologists argued that feminists suffered from sexual pathology or sexual inversion because feminist desires to have some of that which has been defined as masculine (like power, money, and self-determination) indicated confused sexuality.⁶⁰ Because gender types were then and still are polarized (the masculine and the feminine are defined in opposition to each other),⁶¹ "confused sexuality" is equated with non-polarized sexuality and gender conformance is tied exclusively to heterosexuality. One cannot conform to norms of masculine or feminine without being heterosexual.⁶² As Stevi Jackson

⁵⁷ See *People v. Cruise*, 266 N.E.2d 109, 110 (Ill. App. Ct. 1971) (indicating that friend who did not join his friends in raping a woman in the back of a car was teased by the defendants for not joining).

⁵⁸ I use the term gender here to refer to the social constructions of masculine and feminine.

⁵⁹ See Bem, *supra* note 56, at 82.

⁶⁰ See *Id.* at 86 (describing "gender inversion" which was defined as having cross-gender desires); see also JOHN BANCROFT, *THE RELATIONSHIP BETWEEN GENDER IDENTITY AND SEXUAL BEHAVIOR: SOME CLINICAL ASPECTS IN GENDER DIFFERENCES: THEIR ONTOGENY AND SIGNIFICANCE* 57 (C. Ounsted & D. Taylor eds., 1972) ("There is a reciprocal relationship between [sexual] identity and behavior and vice versa.").

⁶¹ As Kathryn Franke writes, "we are left with a conception of male and female as not only one another's opposite, but as one another's contradiction." Kathryn Franke, *The Central Mistake of Sex Discrimination Laws: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 50 (1995).

⁶² See Bem, *supra* note 56, at 165 (stating that "heterosexuality has been defined as the sine qua non of psychological normality"). People tend to presume that masculine men are straight, effeminate men are gay, see Posner, *supra* note 1, at 122-23, and non-feminine women are lesbians. Male students at one Canadian University that tried to institute a "No means no" campaign, countered with signs that read "no means dyke." See Henderson, *supra* note 21, at 155. Judith Butler points out that Freud's theories of sexuality relied heavily on a link between (hetero)sexuality and gender. See Judith Butler, *Gender Trouble* 60-61 (1990). For Freud, the masculine disposition was, by definition, oriented toward the mother as an object of sexual love and the feminine disposition was, by definition, oriented toward the father as an object of sexual love. See *Id.* For some

comments, "[i]t is gender identity which provides the framework within which sexuality is learnt and through which erotic self-identity is created."⁶³ The more definitively one exemplifies the masculine or the feminine, the less confused one's sexuality is perceived to be. Thus, date rapists need sex because it is a means of proving one's heterosexuality and therefore one's masculinity. Proving oneself heterosexual and proving oneself masculine are one in the same act.

Furthermore, in a world in which the masculine is given more esteem than the feminine, men are likely to have more need to prove their gender, lest they be mistaken for someone less worthy of esteem or power.⁶⁴ Such male insecurity about gender will be at its greatest in highly competitive environments in which one's masculinity is subject to challenge. Not surprisingly, this is precisely the kind of environment in which we find date rapists. They belong to all male groups that make a point of competing with each other and demonstrating their masculinity.⁶⁵ As indicated above, it is a sense of relative inferiority--a desire to prove themselves to their male peers--that drives date rapists to have such a desire for sex.⁶⁶ Thus, gender ideals explain why male competition for esteem works itself out in (hetero)sexual performance. Date rapists feel an exaggerated need to have sex because having sex is a means of demonstrating gender and he who demonstrates gender garners esteem.⁶⁷

exceptions that prove the rule, see *supra* note 56 (discussing how the masculine/feminine roles operate even in some same-sex relationships).

⁶³ Jackson, *supra* note 21, at 18-19.

⁶⁴ As Sandra Bem writes:

[T]he cultural definition of a real man makes males feel much more insecure about the adequacy of their gender than females, for the definition unrealistically requires them not only to suppress every impulse with even the slightest hint of femininity but also to attain the kind of power and privilege in their social community that will produce respectful deference in women and less powerful men.

Bem, *supra* note 56, at 166.

⁶⁵ Fraternity men report having forced intercourse more than men involved in other organizations (like student government) or men not affiliated with any organization. See J. Garrett-Gooding & R. Senter, *Attitudes and Acts of Sexual Aggression on a University Campus*, 59 *SOC. INQUIRY* 348, 366 (1987) (reporting the results of their study and hypothesizing that this result has to do with traditional attitudes about sex roles). Athletes at NCAA-affiliated schools were reported to the police for rape 38% more often than non-athletes. See R. Hoffman, *Rape and the College Athlete: Part One*, *PHILADELPHIA DAILY NEWS*, Mar. 17, 1986, at 104.

⁶⁶ See *supra* notes 26-42 and accompanying text. It may be that the extra need to demonstrate their masculinity stems from a need to dispel any notion that the cohesiveness of the group is an indication of same sex attraction. To overcome any assumption that they might actually be attracted to each other and to make sure that they are worthy of the esteem that comes with masculinity, these men need to prove their heterosexuality.

⁶⁷ See Bem, *supra* note 56, at 166.

The link between sexual performance and the gender ideal is also important in the rape context because it helps explain why it is so difficult to condemn the date rapist. Even if most people think that having sex without consent is impermissible, they are likely to sympathize with men striving to conform with the masculinity norm.⁶⁸ Throughout recorded history, societies have been extraordinarily careful to distinguish between the masculine and feminine.⁶⁹ What is masculine and what is feminine may change over time,⁷⁰ but gender-bending has always made and continues to make many people very uncomfortable.⁷¹ To the extent that people, particularly men, fail to gender differentiate, people hold them in low esteem.⁷² The corollary is also true: We hold people who do gender differentiate in high esteem.⁷³

The need date rapists have to assert their masculinity stems from the same system of gender that explains the collective's need to gender differentiate. When people respond to date rape by saying

⁶⁸ See *Id.* at 163.

⁶⁹ See *Id.* at 65 ("Throughout the history of Western culture, three beliefs about women and men have prevailed: that they have fundamentally different psychological and sexual natures, that men are inherently the dominant or superior sex, and that both male-female difference and male dominance are natural."); JUDITH LORBER, PARADOXES OF GENDER 26-27 (1994) (discussing the importance society places on distinguishing the gender statuses of "man" and "woman"); see also THOMAS WALTER LAQUER, MAKING SEX 8 (1990) ("In pre-enlightenment times gender ... mattered a great deal and was part of the order of things."). As Marjorie Gerber has written about the history of fashion, "[t]he ideal scenario--from the viewpoint of the regulators--was one in which a person's ... gender ... in the world could be read, without ambiguity and uncertainty." MARJORIE BERGER, VESTED INTERESTS: CROSS DRESSING AND CULTURAL ANXIETY 26 (1992).

⁷⁰ For instance, according to a 1989 New York Times story, prior to World War I, pink was the color of choice for boy babies because it was a stronger color than blue, which was seen as delicate and therefore more appropriate for baby girls. See Sandra Salman, When an It is Labeled a He or She, N.Y. Times, Nov. 16, 1989.

⁷¹ As Freud wrote in The Psychology of Women, "[m]ale or female is the first differentiation that you make when you meet another human being, and you are used to making that distinction with absolute certainty." SIGMUND FREUD, THE PSYCHOLOGY OF WOMEN, IN NEW INTRODUCTORY LECTURES ON PSYCHO-ANALYSIS 153, 155 (W.J.H. Spott, trans., 1933).

⁷² Consider the reaction that most people have to transvestites. Or consider how eagerly people want to know whether the short-haired, leather-clad, deep-voiced person who could be either a man or a woman is a man or a woman. See Lorber, *supra* note 69, at 26 (commenting that when gender differences between men and women blur, society develops a sameness taboo). Men who fail to differentiate may make people feel the most uncomfortable because when a man fails to endorse the gender system, he questions not only the applicability of gender categories, but the status system that equates masculinity with power. See Bem, *supra* note 56, at 166 (noting that people's aversion toward homosexuality implicates males more than females because of the cultural definition of what it is to be a real man).

⁷³ See Bem, *supra* note 56, at 148 (noting most people see conformity to society's gender scripts as normal and natural).

"boys will be boys" they are not only saying "you're excused," they are saying "thank goodness." People want boys to be boys and girls to be girls. It is still, as it was in pre-enlightenment times "part of the order of things."⁷⁴ In addition, people are likely to be more sympathetic to men's desire to assert their masculinity because people are aware of men's need to do so.⁷⁵ The "higher level of gender insecurity among males makes the affirmation of maleness much more emotionally charged for men than the affirmation of femaleness is for women . . ."⁷⁶ To impair men's ability to demonstrate their masculinity (by telling them they cannot have sex on demand, for instance) threatens a core part of the male identity.⁷⁷

As many scholars of gender have implied, if not explicitly argued, it is only by de-linking sexuality from gender and de-polarizing gender that we can hope for a world that ceases to allocate prestige or material goods on the basis of sexual preference, biological sex, or gender.⁷⁸ This is an honorable and important goal, but it is a goal that we are not likely to meet anytime soon. In the meantime there are many women being seriously hurt by men desperate to prove their masculinity by demonstrating their heterosexuality in a manner that remains indifferent to women's consent to sexual activity.⁷⁹ It is that

⁷⁴ Laquer, *supra* note 69, at 8. Moreover, to the extent that sociobiological or hormonal urge theories are widely accepted, they confirm that men's greater need for sex and men's disregard for consent is natural and inevitable.

⁷⁵ As Lynne Henderson explains, men's "biological" need has been incorporated into a cultural script of male innocence (because they cannot control their hormones) and female guilt (because they can control the behavior that triggers the hormones.) See Henderson, *supra* note 21, at 132-44.

⁷⁶ Bem, *supra* note 56, at 166.

⁷⁷ Feminists--and others--may find this rather pathetic depiction of the male psyche to be egregiously apologist or just inexplicably blind to the real physical and material power that men have over women. It is important for feminists to understand the source and extent of common sympathy for rapists, however, because it is that sympathy that explains the number of unconvicted date rapists.

⁷⁸ See Lorber, *supra* note 69, at 10 (asserting that changes in society require a re-ordering of the organizing principles of social life, or acknowledgment of hidden assumptions about gender, and awareness of the effects of gender labels). For discussion of legal reforms aimed at breaking down the links between sex, sexual orientation and gender, see Franke, *supra* note 61; (focusing on how to break down the bipolarization of biological sex); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *Yale L.J.* 1, 93-94 (1995) (focusing on breaking down the polarization of gender); Francisco Valdez, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex", "Gender" and "Sexual Orientation" in Euro-American Law and Society*, 83 *Cal. L. Rev.* 1, 301-41 (1995) (focusing on breaking down the polarization of sexual orientation).

⁷⁹ In 1996, 307,000 women were the victim of rape, attempted rape, or sexual assault. See Rape Abuse and Incest National Network (visited Mar. 3, 1999) < <http://>

male behavior, and the norms animating that behavior, that this Article hopes to address. Before doing so, however, it is necessary to turn to a discussion of why it has been so difficult for the law to curb this behavior by simply declaring it wrong.

II. RAPE, CONSENT AND THE PROSECUTORIAL DILEMMA

The motivational link between sexuality and gender norms helps explain why it has been so difficult to secure date rape prosecutions, but it is not a complete explanation. As this Part will demonstrate, the problems with securing date rape convictions stem from cultural ambivalence about how wrong date rape is, cultural confusion about what date rape is, and contextual and constitutional barriers that make it very difficult to prove whether date rape happened.

A. How Wrong Is Date Rape?

In declaring date rape wrong, the criminal law has encountered the common, if intractable, problem of trying to proscribe behavior that society has yet to condemn as wrongful. A study of high school students in Los Angeles found that 56% of the girls and 76% of the boys believed that "forced sex was acceptable under at least some circumstances."⁸⁰ In a Rhode Island study 51% percent of boys and 41% of girls thought it was acceptable for a man to force sex on a woman if he had "spent a lot of money on her."⁸¹ A cross-cultural study of adults in San Antonio found that 30% of whites, 26% of African-Americans and 44% of Mexican-Americans defined rape as requiring an unknown man and force or threat of violence.⁸² Although most of these studies are now somewhat dated, it is unlikely that public consensus has changed significantly in ten to twenty years. This is a critical problem because as Paul Robinson and John Darley write, "[t]he real power to gain compliance with society's rules of prescribed conduct lies not in the threat or reality of official criminal sanction, but in . . . [t]he networks of interpersonal relationships in which people find themselves, [and] the social norms and prohibitions shared among

//feminist.com/raim.htm> (citing Rational Crime Victimization Survey, Bureau of Justice Statistics, United States Dept. of Justice, 1997).

⁸⁰ JACQUELYN W. WHITE & JOHN A HUMPHREY, YOUNG PEOPLE'S ATTITUDES TOWARD ACQUAINTANCE RAPE, IN ACQUAINTANCE RAPE, supra note 21, at 43, 47 (citations omitted).

⁸¹ *Id.*

⁸² See JOYCE E. WILLIAMS & KAREN A. HOLMES, THE SECOND ASSAULT: RAPE AND PUBLIC ATTITUDES 115 (1981).

those relationships"⁸³ In other words, the real reason people do not commit murder and theft is not for fear of sanction but because they know it is wrong.⁸⁴ People obey the law because they internalize the external legal proscription.⁸⁵

This is not true for all laws. For instance, to the extent that people obey the speed limit on a highway, they probably do so out of fear of being caught. They have not internalized a sense that it is wrong to drive eighty miles per hour on the highway.⁸⁶ Obeying the speed limit in a school zone at two o'clock in the afternoon on a weekday may be a different matter. People who shamelessly drive eighty miles per hour on the highway may also routinely slow down to twenty miles per hour in the school zone, not because their chances of getting caught in the school zone are any different but because they have internalized the wrong of breaking the law in the school zone.

Many rapists appear to treat the proscription on nonconsensual sex like the highway speed limit. Date rapists themselves acknowledge that they are "technical criminals,"⁸⁷ but they reject their own moral culpability.⁸⁸ The percentage of men who indicate some likelihood of forcing sex is significantly larger than the number of men who indicate a likelihood of committing other "nonnormative behaviors (such as pedophilia, murder, rape [sic], transvestism, homosexuality and armed robbery)."⁸⁹ Date rapists do not see forced sex as really all that wrong. Indeed, despite what the law explicitly says, they do not define it as rape.⁹⁰ A set of interviews with convicted rapists found that only 8%

⁸³ Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 457 (1997).

⁸⁴ Most of us would answer "no" to the question, "would you murder or steal if you knew you could get away with it?" As John Brathwaite writes, "conscience is a much more powerful weapon to control misbehavior than punishment." JOHN BRATHWAITE, *CRIME, SHAME AND REINTEGRATION* 71 (1989).

⁸⁵ "Individuals thus refrain from criminality not because they fear the threatened punishment but because they have no desire to engage in such behavior; and they have no desire to engage in such behavior because they know it is deemed worthy of criminal punishment." Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in the Criminal Law*, 96 COLUM. L. REV. 269, 356 (1996).

⁸⁶ See Brian Bix, *H.L.A. Hart & the Hermeneutic Turn in Legal Theory*, 52 SMU L. REV. 167, 174 (1999) (asserting that people obey the speed limit out of fear of the penalty they might face if they are caught).

⁸⁷ Kanin, *supra* note 12, at 96.

⁸⁸ *See Id.* The men interviewed by Kanin thought that fines, not imprisonment, might be the appropriate penalty for their actions.

⁸⁹ NEIL M. MALAMUTH & KAROL DEAN, *ATTRACTION TO SEXUAL AGGRESSION, IN ACQUAINTANCE RAPE*, *supra* note 21, at 229, 234.

⁹⁰ The men questioned by Malamuth and Dean defined forced sex as something different than rape. *See Id.* at 1234 (noting that the percentage of men likely to engage in the behavior differed depending on whether the question defined the conduct as forced sex

felt any guilt after their act⁹¹ and a study of unconvicted rapists found that their rapes had no negative impact on their self-image.⁹²

Rapists understand that men are "supposed to" play by the rules that the law lays down, just as people know that they are supposed to obey the speed limit, but given the slightest excuse to deviate from those rules, they do so without remorse or guilt.⁹³ Thus, when situational factors like alcohol or a women's behavior suggest the suspension of the technical rules or the applicability of alternative rules, men perceive themselves to be and are often perceived by others to be relieved of their moral, if not legal, responsibility to obey the rape law.

The studies with regard to alcohol are particularly telling.⁹⁴ Numerous studies document a correlation between alcohol use and date rape.⁹⁵ One of the most comprehensive studies of acquaintance rape on college campuses found that 75% of the men who had committed sexual assault had used alcohol or drugs prior to the assault.⁹⁶ Arguably more important, however, is the correlation found between

or rape). One observer of a gang rape trial in Michigan demonstrates how people believe rape to be something other than what the law defines it to be: "I don't believe she was raped ... I believe they ran a train on her." Chris O'Sullivan, *Acquaintance Gang Rape on Campus*, in *Acquaintance Rape*, supra note 21, at 140. A Los Angeles study found that "teenagers understood the difference between consensual and nonconsensual sex, [but] they were frequently reluctant to apply the label 'rape' to the examples of forced sexual relations...." White & Humphrey, supra note 80, at 46 (citing Jacqueline D. Goodchilds et al., *Adolescents and Their Perceptions of Sexual Interactions*, in 2 *Rape and Sexual Assault* 245, 268 (Ann Wolbert Burgess ed., 1988)).

⁹¹ See Diana Scully & Joseph Marolla, "Riding the Bull at Gilleys": Convicted Rapists Describe the Rewards of Rape, in *Rape and Society*, supra note 21, at 58, 70.

⁹² See *Id.* (citing S. Smithyman, *The Undetected Rapist* (1978) (unpublished Ph.D. dissertation, Claremont Graduate School)).

⁹³ I have previously referred to this as the "little rule" hypothesis. See Baker, supra note 2, at 604-05. "The rule against raping, particularly date raping is like the rule against shoplifting--it is a little rule." *Id.*

⁹⁴ Typical responses to one study of women's experiences with unwanted sexual contact included the following: "Most incidents occurred in the bars or at parties where guys are wasted and don't care what they do;" "Some males get very obnoxious and grab girls in bars whenever they feel like it;" "Some guys cannot seem to control their hands when at a tavern." Ronald J. Berger et al., *Sexual Assault in a College Community*, 19 *Soc. FOCUS* 1, 13 (1986).

⁹⁵ See, e.g., DEBORAH RICHARDSON & GEORGINA HAMMOCK, *ALCOHOL AND ACQUAINTANCE RAPE*, in *ACQUAINTANCE RAPE*, supra note 21, at 83, 85-88 (examining several studies documenting the correlation between alcohol consumption and acquaintance rape).

⁹⁶ See ROBIN WARSHAW, *I NEVER CALLED IT RAPE: THE MS. REPORT ON RECOGNIZING, FIGHTING AND SURVIVING DATE AND ACQUAINTANCE RAPE* 44 (1988). Cf. Richardson & Hammock, supra note 95, at 85-88 (discussing studies that indicate a strong correlation between alcohol use and date rape).

acquaintance rape and "the social meaning of drunkenness."⁹⁷ Different studies have found a correlation between presumed alcohol consumption and increased interest in and/or arousal from violent pornography.⁹⁸ When given a placebo, men who thought that they had been given alcohol became more aroused at images of violent pornography and rape than men who knew that they had not drunk alcohol.⁹⁹ As one researcher concluded, alcohol gives "social permission or personal permission or both, to indulge in otherwise unacceptable behavior."¹⁰⁰

The most important situational factor excusing nonconsensual sex is the woman's behavior. In virtually every study of the allocation of blame in rape situations, respondents import "contributory fault" or "assumption of risk" theories.¹⁰¹ As Harry Kalven and Hans Zeisel found in their landmark 1966 study, people assume that women can be responsible for their own rape.¹⁰² This assumption persists today among college students. As one meta-analysis of the various studies summarized, "a rape victim in revealing clothing is held more responsible than a victim dressed otherwise and a less "respectable" rape victim is held more responsible than is a victim with "good" character."¹⁰³

One of the most extensive studies of citizen perceptions of rape found that 66% of the polled population believed that women's

⁹⁷ See Herman, *supra* note 53, at 79 ("Thus, the social meaning of drunkenness, with its implied exemption from ordinary behavioral limits, may play a more significant role than the pharmacological effects of alcohol in the behavior of an offender.")

⁹⁸ See *Id.* (reporting that both men who consumed alcohol and those who did not—but believed that they had—became aroused by violent rape pornography); Richardson & Hammock, *supra* note 95, at 87 (same).

⁹⁹ See Richardson & Hammock, *supra* note 95, at 87 (noting that actual alcohol consumption did not have an effect on sexual arousal).

¹⁰⁰ L. C. Crowe & W. H. George, *Alcohol and Human Sexuality: Review and Integration*, 105 *Psychol. Bull.* 374, 380 (1989).

¹⁰¹ See Harry Kalven & Hans Zeisel, *The American Jury* 249-51 (1966) (discussing jury perceptions of contributory fault in rape cases).

¹⁰² See *Id.* at 249 (explaining that juries will often be lenient to defendants where "there are suggestions of contributory behavior on [the victim's] part").

¹⁰³ Mark A. Whately, *Victim Characteristics Influencing Attributions of Responsibility to Rape Victims: A Meta-Analysis*, 1 *AGGRESSION & VIOLENT BEHAV.* 81, 91 (1996). Studies show that men and those that adhere to traditional sex role stereotypes are more likely to blame victims than women and those with less traditional sex role views. See Willis, *supra* note 55, at 223 (concluding that people with traditional sex role stereotypes showed bias against rape victims); Bell et al., *supra* note 55, at 1719 (finding that male students are more likely to blame the victim than are female students). The tendency to blame the victim is by no means limited to men or particularly conservative people. See Berger et al., *supra* note 94, at 15 (detailing instances of victims blaming themselves for having placed themselves in risky situations).

behavior or appearance provokes rape and 34% believed that women should be held responsible for preventing their own rape.¹⁰⁴ In one of the few cross-cultural surveys of attitudes toward rape, Joyce Williams and Karen Holmes found that "most respondents, including victims, saw women's behavior and/or appearance as the second most frequent cause of rape."¹⁰⁵ A 1991 telephone survey of 500 Americans found 38% of men and 37% of women believed that a woman is partly to blame for her own rape if she dresses seductively.¹⁰⁶ In other words, people believe that when women stray from polite society's rules regarding dress and behavior, men are also allowed to stray from the rules that the law lays down.

Victims themselves adopt these beliefs. When asked why she did not report an incident of forced sex, one woman responded, "I would have felt stupid [reporting it] because I let him walk me home."¹⁰⁷ Other rape victims reported feeling "responsible for nonconsensual sexual contact" because they felt "they should have had more sense"¹⁰⁸ "[T]hey often questioned their 'right' to withdraw consent once sexual activity had begun and the man had become aroused."¹⁰⁹ The polite rules of society suggest that women are not supposed to provoke men by arousing them, or to even suggest that sex might be desirable.¹¹⁰ Once women entice men in this way, the men are absolved, by both men and women, of their moral responsibility to control their sexual appetites. As Stevi Jackson concludes:

The moral prescriptions and proscriptions that define the limitations of acceptable conduct may well contain escape clauses

¹⁰⁴ See HUBERT S. FEILD & LEIGH B. BIENEN, *JURORS AND RAPE: A STUDY IN PSYCHOLOGY & LAW* 54 (1980).

¹⁰⁵ Williams & Holmes, *supra* note 82, at 118. These respondents thought that perpetrators' mental illness was the primary cause of rape. See *Id.* The falsity of this proposition, particularly among date rapists, is now well-established. See Baker, *supra* note 2, at 576-78 (reporting that researchers have failed to identify "psychological differences" between the rapist and non-rapist populations).

¹⁰⁶ See Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 *St. John's L. Rev.* 979, 995 n.58 (1993) (citing Telephone Survey of 500 Adult Americans by Yankelovich Partners, Inc., for TIME/CNN (May 8, 1991)).

¹⁰⁷ Berger et al., *supra* note 94, at 15.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ There is an important distinction between what I refer to as "polite" rules, or norms, of romantic and sexual interaction and sex role norms. Although related, the former refers to norms suggesting that men should be romantic initiators and women should not be too sexual. The latter includes the entire spectrum of gender characteristics. Women and men who no longer adhere to traditional gender roles in professional or other personal spheres may still adhere to the propriety of the "polite" rules of sexual interaction.

allowing behavior that would generally be considered immoral to be seen as justifiable under certain conditions. These extenuating circumstances, or neutralizations, are not mobilized only after the act in order to enable the offender to beg our pardon: knowledge of acceptable justifications may control conduct.¹¹¹

If there was an underlying consensus that what date rapists did was morally wrong, these rationalizations would fail and neutralizations would be irrelevant. If taking sex without consent were seen as something completely other than consensual sex, if it were seen more like sex with a four year old, then no degree of drunkenness and no manner of dress could excuse the action. The prevalence and power of the neutralization factors in date rape situations suggest an extreme societal ambivalence about the deviance of the act.¹¹² Without consensus on the deviance of the act, it will remain very difficult to retard the behavior.

B. What Is Date Rape?

We are not likely to reach consensus on the deviance of date rape until we have a better understanding of what the act is. Date rapists feel little remorse and juries feel little need to punish them because people are not really sure how what the date rapist did was wrong. It is hard to see this behavior as wrong, in part, because we are collectively confused about what is right. The culturally prescribed roles for sexual conduct are so lacking in communicative content and so reliant on the Male-Aggressor/Female-Recipient model¹¹³ that it is hard to define the boundaries of reasonable conduct. If men are supposed to be sexual initiators,¹¹⁴ when does initiation turn into too much aggression? If women are supposed to be passive recipients,¹¹⁵ how are men supposed

¹¹¹ Jackson, *supra* note 21, at 18 (citation omitted).

¹¹² John Brathwaite writes "deviant behavior is no more than behavior people so label However arbitrary the labeling process, it is the fact that the criminal chooses to engage in the behavior knowing that it can be so labeled that distinguishes criminal choices from other choices." Brathwaite, *supra* note 84, at 2.

¹¹³ See *supra* note 56 and accompanying text (discussing traditional sex roles that place men in the role of sexual aggressor and women in the role of recipient).

¹¹⁴ See John Carlson, *The Sexual Role, in Role Structure and Analysis of the Family* 101, 103 (F. Ivan Nye ed., 1976) (discussing a 1976 study of married couples where 44% of the men and approximately 50% of the women thought that men should be the initiator of sexual overtures). Only 45% of the men and 26% of the women thought that men and women should share responsibility for initiating sex and the remaining respondents refused to assign responsibility. No one indicated that the woman should initiate. See *id.* A study of college age dating couples found that men always initiated sexual activity. See Letitia Anne Peplau et al., *Sexual Intimacy in Dating Relationships*, 33 *J. SOC. ISSUES* 86, 96 (1977).

¹¹⁵ As one commentator notes:

to know that women's failure to respond is actually a sign of nonconsent? In his study of seventy-one college date rapes, Eugene Kanin had to exclude five cases from his sample because the women were "actually immobilized with fear" and therefore could not even communicate their nonconsent.¹¹⁶ Kanin did not want to label these encounters as rape because the women's immobilization actually made coercion unnecessary.¹¹⁷ While the women in these situations were petrified, "the men were viewing themselves as successful seducers."¹¹⁸ This kind of misperception is remarkably common. In one of the most comprehensive recent studies on sexual practices in America, researchers at the University of Chicago found that 22% women reported having been forced to do something sexual,¹¹⁹ but only 3% of the men reported having forced women to do something sexual.¹²⁰ The study concluded that "[t] here seems to be not just a gender gap but a gender chasm in perceptions of when sex was forced."¹²¹ Studies with college age populations confirm this observation. R. Lance Shotland concluded that misperception is the most likely cause of date rape if that rape happens early in a relationship.¹²² Kanin found men who acknowledged using force to get sex, but were confused about whether they had raped because they encountered different levels of resistance to comparable amounts of force.¹²³ In other words, some women effectively fought back while other women gave up, even though the men used the same amount of force in each situation. When these other women did not put up as much physical resistance, the men presumed assent. Date rape victims often acknowledge and even take responsibility for these misperceptions.¹²⁴ When victims believe the issue is one of miscommunication, they do not file reports. As one

Th[e] overriding theme of female silence as the mark of a good woman expresses itself in numerous variations in our general sexual culture and our conceptions of rape. A woman need not literally be silent. She may speak if her voice soothes, entertains, informs, or otherwise helps to serve male needs. What she may not do is express her own needs or views

Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L & WOMEN'S STUD. 387, 440 (1996).

¹¹⁶ Kanin, *supra* note 12, at 97.

¹¹⁷ *See Id.*

¹¹⁸ *Id.*

¹¹⁹ See Robert T. Michael et al., *Sex in America: A Definitive Study* 223 (1995).

¹²⁰ *See Id.* at 227.

¹²¹ *Id.* at 221.

¹²² See Shotland, *supra* note 14, at 129-30 ("Early date rape occurs after several dates but before the couple's sexual ground rules are established.").

¹²³ See Kanin, *supra* note 12, at 102.

¹²⁴ See Berger et al., *supra* note 94, at 16.

woman commented, "I felt threatened, but I am not sure he meant to threaten me."¹²⁵

Kim Scheppele has written that "[g]iven the current state of divergent perceptions of men and women, the . . . troubling question for law is not the question of truth or falsehood, but instead the question of which true version of a particular story should be adopted as the official version of what happened."¹²⁶ For years, the law adopted the men's version by explicitly requiring signs of force in order to prove nonconsent.¹²⁷ For the past thirty years, legal reformers have been trying to adopt the women's version by eliminating the force requirement and defining rape simply as nonconsensual sex.¹²⁸ The problem with either of these definitions is that with such wildly different versions of what happened it seems unfair to adopt either version as truth.¹²⁹ We need a truth that both parties can share.

Ironically, despite the apparently critical need to communicate so that we might reach a shared understanding of truth, there is a remarkable cultural aversion to explicit communication in this area. Even as we struggle to reach greater societal agreement that nonconsensual sex is wrong,¹³⁰ we balk at doing the work necessary to figure out what nonconsensual sex is. The reactions to various rape reform efforts aimed at increasing discourse about the act of sex have met with overwhelming resistance. A proposed Canadian law that would have required men to "take all reasonable steps to assume

¹²⁵ *Id.*

¹²⁶ Kim Lane Scheppele, *The Re-Vision of Rape Law*, 54 U. CHI L. REV. 1095, 1111 (1987) (discussing the evidentiary and perceptual difficulties of sexual assault that confront courts).

¹²⁷ See Spohn & Horney, *supra* note 5, at 23, 24 (describing the consent standard under common law rape statutes).

¹²⁸ See Ronald S. Berger et al., *The Dimensions of Rape Reform Legislation*, 22 L. & SOC'Y REV. 330, 330-31 (1988) (discussing how various rape laws use different approaches in defining consent). Three states now proscribe all forms of nonconsensual sexual touching. See *id.* at 350 app. 1.

¹²⁹ The rape reform movement has focused on the unfairness to women of accepting, as the law used to, the man's version of "truth." Juries that acquit date rapists have often focused on the unfairness to men of criminally punishing men who understandably see things as other members of their sex do. The "main concern" of the jury that acquitted a group of St. John's University students for the alleged date rape of a comatose woman was a reluctance to "ruin th[e] boys' lives." Joseph P. Fried, *St. John's Juror Tell of Doubts in Assault Case: He Says He Went Along with Vote to Acquit 3*, N.Y. TIMES, Sept. 14, 1991, at 24.

¹³⁰ As Part II.A indicates, we are still a long way away from societal consensus on how wrong date rape is, but the changes in the law and empirical studies conducted in the last 20 years suggest that more people are becoming sensitized to the problems involved in nonconsensual sex. See Spohn & Horney, *supra* note 5, at 175 (noting that reforms in rape law "may have started a process of long-term attitude change").

consent" was condemned as killing passion.¹³¹ Bemoaning the definitions of acquaintance rape that define the act simply as nonconsensual sex, Neil Gilbert, a prominent research scholar, wrote that "the kaleidoscope of intimate discourse--passion, emotional turmoil, entreaties, flirtation, provocation, demureness--must give way to cool-headed contractual sex."¹³²

The most vitriolic criticisms of attempts to define consent have been reserved for the Antioch College Sexual Offense Policy. The Policy stipulates that "if one person wants to initiate moving to a higher level of sexual intimacy in an interaction, that person is responsible for getting the verbal consent of the other person(s) involved before moving to that level."¹³³ When news of its existence spread, Antioch's policy was widely mocked by a variety of influential media sources. *Time Magazine* called it "extreme."¹³⁴ George Will worried that "hormonal heat [would] be chilled by Antioch's grim seasoning of sex with semicolons."¹³⁵ *Saturday Night Live* parodied the gender differences that arguably make the policy necessary,¹³⁶ and *Newsweek*, in a cover story article, complained that the Antioch Policy "seem[s] to stultify relationships between men and women on the cusp of adulthood."¹³⁷

These aspersions notwithstanding, there is absolutely no evidence that sexual relations have been stultified at Antioch. As one reporter subsequently found, "sex has always been [and continues to be] a big part of life . . . at [[[Antioch.]]]"¹³⁸ People are not having less sex, they are just talking about it.¹³⁹

¹³¹ John F. Burns, *Canada Moves to Strengthen Sexual Assault Law*, N.Y. TIMES, Feb. 21, 1992, at B9 (reporting Canada's efforts to remove sex bias in criminal laws and highlighting objections to proposed reforms).

¹³² Neil Gilbert, *The Phantom Epidemic of Sexual Assault*, 103 PUB. INT. 54, 60 (1991).

¹³³ Phil McCombs, *Taking a Look at Love*, WASH. POST, Feb. 16, 1996, at F5 (quoting the Antioch policy).

¹³⁴ See Nancy Gibbs, *When Is It Rape?*, TIME MAGAZINE, June 3, 1991, at 48, 53.

¹³⁵ George F. Will, *Sex Amidst Semi-colons*, NEWSWEEK, Oct. 4, 1993, at 92.

¹³⁶ One skit involved a game show of sorts entitled "Is It Date Rape?"; a "prim, bespeckled" woman contestant always answered "yes," while the "driveling fraternity slob" always answered "no." 'Ask First' at Antioch, N.Y. TIMES, Oct. 11, 1993, at A16 (recounting the *Saturday Night Live* skit).

¹³⁷ Sarah Crichton, *Sexual Correctness*, NEWSWEEK, Oct. 25, 1993, at 52.

¹³⁸ Jason Vest, *The School That's Put Sex to the Test; At Antioch, A Passionate Reaction to Consent Code*, WASH. POST, Dec. 3, 1993, at G1.

¹³⁹ One recent Antioch graduate commented, "It's not that you necessarily have to go down a list, but you need to talk first, set some ground rules, ... [H]ow we're doing it may seem a bit stilted. But at least we're stressing the importance of talking about sex." 'Jane Gross, *Combating Rape on Campus in a Class on Sexual Consent*, N.Y. TIMES, Sept. 25, 1993, at A1, A9.

In the world outside of Antioch, however, people are not talking about what consensual sex is and they are not talking about it because it is awkward, emotionally difficult and potentially embarrassing.¹⁴⁰ Moreover, the Aggressor/Recipient models for sexual interaction that cast men and women into well-understood and reciprocal roles make explicit communication unnecessary.¹⁴¹ These models, restrictive though they may be, are comfortable ones for men and women to follow because they allow people, particularly young people, to avoid the emotionally awkward problem of communication about sex.¹⁴² But the models also exacerbate the problems with two different and concurrent versions of truth.¹⁴³

Rape reform measures like the Antioch Policy clarify that it is unreasonable to assume that there is a shared version of the truth in a sexual encounter. By requiring explicit verbal assent each and every time one engages in sexual activity, the Antioch Policy may go too far, but given the alarming frequency with which sex occurs on college campuses without a meeting of the minds on the question of consent, forcing people to focus on what consent means is not only appropriate, it is essential.¹⁴⁴ People like Professor Gilbert reject reform proposals that require affirmative assent because he says they reduce romantic interaction to "cool-headed contractual sex."¹⁴⁵ Contract doctrine may be an entirely appropriate place to look for help, however. There is every reason to believe that we should be concerned here, as we are in the commercial context, with ensuring a manifestation of assent.¹⁴⁶ Contract law concerns itself with whether it is reasonable to presume

¹⁴⁰ See Michael, et al., *supra* note 119, at 8-9; see also *id.* at 32- 34 (highlighting the need for specially trained interviewers to ensure that people answer questions about their sex lives and behavior truthfully).

¹⁴¹ See *supra* note 56 and accompanying text (discussing the traditional roles that men and women were expected to play in sexual intercourse).

¹⁴² As two commentators noted:

Both [men and women are] influenced by traditional stereotypic sexual scripts: men should use any strategy to get women to have sexual intercourse and women should passively acquiesce or use any strategy to avoid sexual intercourse. Even if these patterns are known to be dysfunctional or dangerous by the actors, it is often easier and more comfortable for them to repeat familiar patterns than to counteract them.

Robin Warshaw & Andrea Parrot, *The Contribution of Sex-Role Socialization to Acquaintance Rape*, in *Acquaintance Rape*, *supra* note 21, at 75 (citations omitted).

¹⁴³ See Scheppele, *supra* note 126, at 1111 (highlighting the problem of two different versions of the same encounter).

¹⁴⁴ See Michael et al., *supra* note 119, at 222 ("There seems to be not just a gender gap but a gender chasm in perceptions of when sex was forced").

¹⁴⁵ Gilbert, *supra* note 132, at 60.

¹⁴⁶ See RESTATEMENT (SECOND) OF CONTRACTS § 69 (a contract is valid only if a court finds that the parties assented).

that a particular person manifested assent.¹⁴⁷ That should be the concern of rape law also. To find assent, contract doctrine looks to words.¹⁴⁸ So should rape law. Silence almost never means assent in contract law.¹⁴⁹ Neither should it in rape law. College students tend to be young, sexually inexperienced, insecure, nervous and quite non-monogamous. Why should we assume that the parties know either the context or each other well enough to be able to presume assent without verbal communication?

The popular rejection of verbal communication in the sexual context not only perpetuates the alarming level of miscommunication, it robs the less physically powerful of the one tool at their disposal—language. By insisting that romance and passion have nothing to do with words and all to do with physical contact, we necessarily give an advantage to those who have greater physical strength.¹⁵⁰ Because,

¹⁴⁷ Tort law, in contrast, is concerned with whether a reasonable or average person would agree to do something. Lois Pineau has suggested that this tort framework may be an appropriate one through which to categorize rape. Thus, the question of consent would be decided by looking at whether it is reasonable, from a woman's perspective, to assume consent. See Lois Pineau, *Date Rape: A Feminist Analysis*, 8 *LAW & PHIL.* 217, 219 (1989). The problem with this, as Lynne Henderson points out, is that Pineau's reasonable woman standard "might be coopted into a deeply conservative standard that no reasonable woman would consent to sex outside of marriage, or go with a man to his hotel room, or drink with a man in a bar" Henderson, *supra* note 21, at 173. I am suggesting that rape law needs to focus less on what reasonable or average women do and more on whether a particular woman consented. The easiest way to ensure that consent is to require, as we do in the contract context, a clear manifestation of assent.

¹⁴⁸ "A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent." *Hotchkiss v. Nat'l City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911) (Hand, J.).

¹⁴⁹ The RESTATEMENT OF CONTRACTS states that silence can be an indication of assent in only three cases:

(a) Where an offeree takes the benefit of offered services (b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction; [and] (c) Where because of previous dealing or otherwise, it is reasonable that the offered should notify the offeror if he does not intend to accept.

RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 147, at 164. None of these exceptions should apply in a date rape situation. To assume that the woman/offeree benefits from a nonconsensual sexual encounter is to adopt an extremely outdated and male-defined version of sex. To suggest that it is reasonable for the offeree/men to assume that silence means assent is to adopt the Aggressor/Recipient model that lies at the root of so much of the communication chasm. Finally, as indicated above, most date rapes take place early in a relationship. Thus, it is highly unlikely that "previous dealing" should lead the man to conclude that silence means an intent to assent.

¹⁵⁰ This may be why the Antioch Policy, even though it was explicitly gender neutral, was seen as an affront to men. See Vest, *supra* note 138, at G1 (describing how men feel attacked by the policy); see also Rene Schaefer, *We're Teaching Young Women Wrong Lesson*, *DALLAS MORNING NEWS*, Nov. 30, 1993, at 5C (arguing that Antioch's policy is "lunacy and a subtle brainwashing that tells women that men are the enemy, no matter what").

according to the traditional model, women are not supposed to say what they want,¹⁵¹ men do not expect them to. Men are just supposed to read women's body language. If the woman is scared, confused and maybe even a little bit drunk, her body language may look to men like willing submission but feel to her like paralysis.¹⁵²

To be sure, there is a mystery and spontaneity to non-verbal communication that can be alluring and exciting and intimate, but it can also be very dangerous. Communication based on physical clues and implicit understanding may be a goal worth working towards in long term sexually intimate relationships, but it is hardly a goal that we should expect people to be able to meet in their first few sexual encounters. First, the evidence is clear that there is no implicit understanding between new sexual partners; there is a great deal of misunderstanding. Second, the misunderstanding results in serious harm to those who are less powerful physically. Third, it is wildly utopian to think that the model of Male/Aggression--Female/Passivity will ever change unless we talk about how it should change. As it is now, many women question their right to say no once they have consented to any sexual contact and the man is aroused. If women could rely on the legal presumption that all escalations of intimacy required a clear, affirmative assent, it might be easier for them to decline to go forward.

The difficulty in convicting date rapists can thus be linked to societal sympathy for men's masculine motivations, cultural ambivalence about the morality of non-consensual sex, and cultural confusion about what nonconsensual sex is. Until society comes to a collective understanding of what consent is, it will be difficult to condemn date rapists for not finding it. There remains one further difficulty with convicting date rapists, however, and that is the rather obvious one of the evidentiary burden.

C. How To Prove Date Rape

As David Bryden and Sonja Lengnick have recently pointed out, modern rape scholars have inexplicably failed to address the substantial obstacle posed by the "beyond a reasonable doubt" standard in acquaintance rape trials.¹⁵³ Unlike stranger rapes, date rape trials are nothing but credibility contests. There is no fruit of the crime to be

¹⁵¹ See Taslitz, *supra* note 115, at 440 (describing the "overriding theme of female silence").

¹⁵² See *supra* notes 116-18 and accompanying text (stating that some women who were sexually assaulted were immobilized by fear).

¹⁵³ See Bryden & Lengnick, *supra* note 5, at 1316.

produced, no weapon to be traced and no mistaken identity. Everyone concedes that both parties were there, that there was no weapon and that intercourse did take place. The only question is whether she consented. In many situations, it is simply not so implausible to believe that she did consent. Many of these encounters start out with consensual touching which then goes too far.¹⁵⁴ Others of these encounters involve individuals that have had consensual sexual relations before.¹⁵⁵ Many women continue to maintain a dating relationship with the man after the rape.¹⁵⁶ Given how easily the sexual acts could be consensual in these cases, it is very hard for the prosecution to remove all reasonable doubt that they were not.

Because the defendant is entitled to a presumption of innocence and because the only issue in date rape cases is who is telling the truth, the jury in these cases must begin the trial disbelieving the victim's claim that she did not consent.¹⁵⁷ Assuming, as is usually the case, that the defendant never takes the stand, the victim alone is subject to cross-examination and rigid scrutiny of every detail in her account. Inevitably, defense attorneys find inconsistencies.¹⁵⁸

Ideally, jurors should be able to realize that no one's memory is perfect and that no rape victim, however honest, could ever give testimony that was completely immune to impeachment. Susan Estrich has argued that juries should not acquit in date rape trials just because the victim "could not remember exactly who said what and when."¹⁵⁹ But because the only issue is credibility and because the defendant's credibility is never subject to impeachment, even the most fair and

¹⁵⁴ See Shotland, *supra* note 14, at 129 (citation omitted).

¹⁵⁵ *See Id.*

¹⁵⁶ *See Id.* at 128 (discussing research finding that 39% of rape victims date their attacker after the assault).

¹⁵⁷ This is a slight exaggeration because the jury could believe the woman without believing her beyond a reasonable doubt. That is a fairly subtle distinction, however, and if the two stories are flatly inconsistent on the critical point of consent, it is often difficult to believe him without disbelieving her. This is what makes date rape cases so much more problematic than stranger rape cases. In stranger rape cases, if the defense is mistaken identity, the jury is not required to believe that the woman is lying about being raped. The jury in a stranger rape case can believe beyond a reasonable doubt that the victim was raped and still find that the defendant did not do it.

¹⁵⁸ In the date rape trial of William Kennedy Smith, the alleged victim testified that she screamed, but she was unable to produce any witnesses who heard the scream and the defense produced witnesses who did not. See Paul Richter, *Heard No Noises, Smith Case Witness Says*, L.A. TIMES, Dec. 9, 1991, at A20. A juror in the trial of Sergeant Major of the Army Gene McKinney complained that many of the alleged incidents were months and years old, and there was "no irrefutable evidence that might back up the memories." Interview with Martha Raddatz, *All Things Considered* (NPR broadcast, Mar. 19, 1998), available in 1998 WL 3644223.

¹⁵⁹ Estrich, *supra* note 3, at 30.

sensitive juror may find his or herself stuck on the acquittal side of the burden of proof. In some cases, perhaps those in which prior sexual assaults are introduced,¹⁶⁰ the prosecution may be able to sway the jury, but the absence of corroborating evidence coupled with the burden of proof make it inevitable that date rapists will be acquitted frequently.

Finally, it is important to note that the subject of these trials, dating and sex, is one for which people presume dishonesty. Stephen Schulhofer has briefly highlighted this problem in the context of misrepresentations between sexual partners, asserting that "there does not appear to be a clear social consensus about the circumstances in which misrepresentation in matters of sexual intimacy is improper."¹⁶¹ Response to recent political scandals suggests that much of the American public appears to consider it appropriate for people to lie about their sex lives.¹⁶² Of course, there is a huge difference between presuming that someone is lying about a consensual extramarital affair, or embellishing a description of sexual prowess, and presuming that someone is fabricating a rape allegation, but to the extent that jurors think about these trials as different accounts of sexual encounters, it is not surprising that they are highly suspicious of both parties' veracity. In light of the burden of proof, as long as the jurors remain suspicious of both parties, even if they believe the complaining victim more, they are likely to acquit.

The history of rape prosecutions is replete with illegitimate dismissals of women's testimony¹⁶³ and ridiculous presumptions of consent.¹⁶⁴ Scholars have soundly and appropriately criticized those

¹⁶⁰ See Baker *supra* note 2, at 620-23 (arguing for the admissibility of prior sexual assaults in rape trials in which the defendant is claiming consent if he has claimed consent in previous cases).

¹⁶¹ Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law & Beyond*, 11 L. & PHIL. 35, 92 (1992).

¹⁶² In a poll taken for the February 24, 1998 edition of the *NEW YORK TIMES*, 59% of the people polled thought that President Clinton lied under oath about his sexual relationships, but those same 59% thought that such lying was understandable. See *N.Y. TIMES*, Feb. 24, 1998, at A1. Five months later, Jeffrey Rosen commented "There is, after all, an almost palpable sense of entitlement to lie when one is asked point-blank about sex" Jeffrey Rosen, *The Perjury Trap*, *THE NEW YORKER*, Aug. 10, 1998, at 28, 31.

¹⁶³ See Baker, *supra* note 2, at 587 (detailing that an attorney for defendant in gang rape case asked the jury what the victim was doing "running around getting raped," and that a jury foreman who helped acquit a man charged with knifing, beating and twice raping a woman who had been wearing a lace miniskirt, stated that "the way she was dressed with that skirt ... she was [asking] for sex"). See generally Morisson Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1056 (1991) (describing how rape myths severely hinder rape prosecutions).

¹⁶⁴ See *People v. Warren*, 446 N.E.2d 591, 592, 594 (1983) (finding that the victim "must communicate in some objective manner her lack of consent" even though the

cases and the ideologies that produced them.¹⁶⁵ Nonetheless, even if we eradicate the rape myths and mindsets that lead us to discount women's testimony as a matter of course, the rules of the criminal courtroom inevitably disadvantage the date rape complainant. Jurors in these cases are asked to convict because they find that the woman did not voluntarily have sex with a man under circumstances in which voluntary sex is perfectly plausible. To acquit, they do not have to believe that she willingly engaged in sexual relations with a stranger in the bushes¹⁶⁶ or consented to three different men successively sodomizing her.¹⁶⁷ By definition, the assaults in date rape cases take place in a context in which it is reasonable to assume that consensual sexual activity might occur. Date rapists can be and are acquitted even if the jury believes the woman by a preponderance of the evidence. To quote a juror from the recent sexual misconduct trial of Sergeant Major Gene McKinney, "it's not that we did not believe the women. It's that we had reasonable doubt."¹⁶⁸

D. Summary

An exaggerated desire for sex can explain the prevalence and perpetuation of date rape because some men use sex as a means of enhancing their masculinity. Having sex demonstrates one's heterosexuality which demonstrates one's masculinity and masculinity brings with it the esteem of one's peers. The desire for sex turns into a tendency to rape for these men because sex is more about demonstrating masculinity and esteem than it is about communication,

defendant was a stranger, who met her on a bike path and carried her off to a secluded area); see also CAROL BOHMER, *JUDICIAL ATTITUDES TOWARD RAPE VICTIMS*, IN *FORCIBLE RAPE: THE CRIME, THE VICTIM, AND THE OFFENDER* 161, 164 (1977) (detailing a hypothetical in which a woman lets a man drive her home from a bar and then man forces intercourse, and that judges describe the event as "friendly rape," "felonious gallantry" and "assault with failure to please").

¹⁶⁵ See generally SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975) (criticizing rape law from a historical perspective); Susan Estrich, *Real Rape* (1987) (criticizing the law's treatment of rape); Lynne Henderson, *What Makes Rape a Crime*, 3 *BERKELEY WOMEN'S L.J.* 193 (1988) (reviewing and criticizing Susan Estrich's book).

¹⁶⁶ See Warren, 446 N.E.2d at 592, 594 (finding that the defendant did not break the law when he carried a women into the bushes and forced her to perform oral sex).

¹⁶⁷ See Karen M. Kramer, *Rule by Myth: The Social & Legal Dynamics Governing Alcohol-Related Acquaintance Rape*, 47 *STAN. L. REV.* 115, 136-38 (1994) (discussing a publicized alleged rape at St. John's University involving claims that three men sodomized an intoxicated woman). The men were acquitted. See Fried, *supra* note 129.

¹⁶⁸ Interview with Martha Raddatz, *supra* note 158.

intimacy or mutual pleasure. The consensual nature of the act is irrelevant to the act's ability to bring esteem to its perpetrator.

This disregard for the question of consent on the part of men has led to a massive victimization of women.¹⁶⁹ Criminally punishing nonconsensual sex has proved difficult, however, precisely because the legal proscription on nonconsensual sex competes with the masculinity norm, biological theory and popular belief, all of which re-enforce and legitimate the notion that men crave sex regardless of consent. Given this tension between the law and other well-established norms, it should come as little surprise that a sizable number of men have yet to internalize the moral wrong of nonconsensual sex. And even those men who have internalized the abstract wrong of nonconsensual sex can have difficulty concretely identifying what nonconsensual sex is. This difficulty stems both from well established sexual behavior roles that shun explicit communication and from our continuing reluctance to explicitly discuss, both societally and individually, what consent is. Finally, the constitutional protections afforded defendants make convictions particularly difficult to secure in cases, like date rape, in which consent is the only issue.

The weak moral prohibition against date rape is both a normative and a practical problem. Normatively, it sends the impermissible message that a woman's body, her sexuality, and her autonomy need not be respected by the men she dates. Practically, the weak moral prohibition means that the only thing stopping many men from committing date rape is a threat of being caught.¹⁷⁰ Attempts to shore up moral condemnation of date rape behavior by increasing criminal penalties have only been marginally successful however because the social meaning of sex is still so muddled. The seemingly sacred allegiance to ambiguity in sexual encounters means that any moral proscription on impermissible sex inevitably falters because it is impossible to proscribe something without naming it first. Thus attempts to curb date rape have been caught in a vicious cycle.

¹⁶⁹ According to the National Victim Center's Rape in America report, 10% of all rape victims or over 1.2 million women have been raped by their boyfriend or ex-boyfriend. See CRIME VICTIMS RESEARCH AND TREATMENT CTR., RAPE IN AMERICA: A REPORT TO THE NATION 2, 4 (1992).

¹⁷⁰ Research strongly suggests that the best societal defense to date rape is strong moral condemnation. In a 1996 study of college males, Ronet Bachman, Raymond Paternoster and Sally Ward found that "when moral condemnation was strong ... respondents reported a nonzero probability of committing a sexual assault in only 6% of the scenarios. Conversely, when moral beliefs were low, respondents reported some probability of committing sexual assault in 45% of the scenarios." Ronet Bachman et al., *The Rationality of Sexual Offending: Testing a Deterrence/Rational Choice Conception of Sexual Assault*, 26 L. & SOC'Y REV. 343, 364 (1992).

Increasing criminal enforcement of date rape law would shore up the moral inhibition against it, but we cannot increase enforcement if the moral proscription is not strong enough for people to want to prosecute and convict date rapists.

Alternative sanctions offer a route out of this vicious cycle because they can make victims and adjudicative bodies more comfortable with labeling and punishing the offensive conduct. Alternative fora and sanctions may forego determining whether date rape is criminal, but they allow communities to judge the behavior unacceptable and punish it in a way that makes it undesirable. Alternative sanctions will also allow communities to steer social influence. As Dan Kahan has written, "[t]he phenomenon of social influence . . . reveals that individuals' assessments of both the value and the price of criminal activity are endogenously related to their beliefs about the attitudes and intentions of others."¹⁷¹ "The level of crime turns not just on the price of crime but also on the direction of social influence."¹⁷² The next Part explores how alternative sanctions can help decrease date rape by examining the behavior publicly, declaring it wrong and punishing it in a way that helps change the social meaning of sex.

III. FOR SHAME

Most college student victims of date rape, if they choose to come forward at all, seek redress from university disciplinary procedures, not from the criminal courts.¹⁷³ One prominent date rape researcher has concluded that "[m]ost victims of acquaintance rape and sexual assault do not even attempt to have the assailant arrested; but they would like him to know that what he did was wrong."¹⁷⁴ Grass roots efforts by women on various college campuses in the early 1990s compelled universities to develop procedures for dealing with sexual assault.¹⁷⁵

¹⁷¹ Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 359 (1997).

¹⁷² *Id.* at 378.

¹⁷³ See ANDREA PARROT, *RECOMMENDATIONS FOR COLLEGE POLICIES AND PROCEDURES TO DEAL WITH ACQUAINTANCE RAPE*, IN *ACQUAINTANCE RAPE*, supra note 21, at 368, 369; see also Kathryn Kranhold & Katherine Farrish, *Anxiety About Sex, Dating, Rape Transforms College Life*, HARTFORD COURANT, Oct. 10, 1993, at A1; *Rape List on Bathroom Walls Spur Furor at Brown University*, ST. LOUIS POST-DISPATCH, Dec. 16, 1990 (noting that most complaints involving students at Brown University have been resolved through the university).

¹⁷⁴ Parrot, supra note 173, at 369.

¹⁷⁵ The grassroots tactic that received the most press involved writing the names of alleged date rapists on bathroom walls and on posters on campus. There were reports of

Federal law now requires colleges and universities to draft sexual assault policies and conduct disciplinary hearings.¹⁷⁶ These hearings are usually not designed to replicate criminal court procedures.¹⁷⁷ They involve less rigid standards of proof and relaxed evidentiary rules. They often do not require unanimity to reach a conviction.¹⁷⁸ The composition of college adjudicative bodies varies depending on the school,¹⁷⁹ but the proceedings are usually confidential¹⁸⁰ and any rendered punishment usually involves some restriction on the perpetrator's access to the benefits of the university. In egregious cases this means expulsion.¹⁸¹ Usually, it means some lesser form of suspension,¹⁸² probation¹⁸³ or dormitory restriction.¹⁸⁴ The schools often

this at Brown University, Wesleyan University, Northwestern University and Oberlin College. See Kranhold & Farrish, *supra* note 173 (reporting that women wrote the names of alleged rapists on the bathroom walls at Wesleyan); Justice Not Posters, *THE PLAIN DEALER*, May 3, 1993, at 6B (reporting that women at Oberlin wrote the names of alleged date rapists on posters and women at Brown wrote rapists' names on the bathroom walls); David Silverman, *NU Divided over Rage and Rights in Rape Claim*, *CHI. TRIB.*, Nov. 21, 1991, at 1 (reporting that alleged rapists' names were written on the bathroom walls at Northwestern).

¹⁷⁶ See HIGHER EDUCATION AMENDMENTS OF 1992 § 486(c)(1)-(2) (amending federal law), 20 U.S.C. §§ 1092(f)(1)(F) (1994) (requiring universities to collect information on crimes, including rape, to be eligible for federal funds); *Id.* § 1092(f)(7)(B)(i)-(B)(iii) (requiring development of rape awareness programs and disciplinary procedures).

¹⁷⁷ See Kranhold & Farrish, *supra* note 173, at A1 (reporting that Yale University's dean of student affairs says that Yale does not want the hearings to resemble a criminal courtroom).

¹⁷⁸ See Parrot, *supra* note 173, at 369 (noting that campus judicial hearings require only a majority to convict and employ less rigid standards of proof than the criminal process); Kranhold & Farrish, *supra* note 173, at A1 (highlighting Yale's efforts to employ informal methods).

¹⁷⁹ See Kranhold & Farrish, *supra* note 173, at A1. See generally Paul E. Rosenthal, Note, *Speak Now: The Accused Student's Right to Remain Silent in Public University Disciplinary Proceedings*, 97 *COLUM. L. REV.* 1241, 1250-51 (1977) ("The composition of hearing boards differ from school to school, and in many places students sit in judgment of other students.").

¹⁸⁰ See Kranhold & Farrish, *supra* note 173, at A1; Silverman, *supra* note 175, at 1 (same); Alice Dembner, *Colleges Struggle to Find Answers*, *BOSTON GLOBE*, May 19, 1997, at A1.

¹⁸¹ See Kranhold & Farrish, *supra* note 173, at A1 (stating that Yale University expelled a star player on its basketball team after a disciplinary hearing in which he was found guilty of assault); Dembner, *supra* note 180, at A1 (reporting that Northeastern University expelled a freshman tried for sexual assault).

¹⁸² See, e.g., Silverman, *supra* note 175, at 1 (reporting that the penalties at Northwestern include reprimand, suspension and expulsion).

¹⁸³ The university Chancellor of a large northeastern university placed one of the school's football player's on probation and prohibited him from playing in the first five football games of the season after he pled guilty in a criminal proceeding to sexual misconduct. See Parrot, *supra* note 173, at 368.

try to keep the punishment, like the hearings themselves, confidential.¹⁸⁵ In this Part, I will argue that although college tribunals should continue, as they by law must,¹⁸⁶ to adjudicate cases of sexual aggression, they should re-think their punishments. Public sanctions designed not only to punish but to teach and steer social influence will be more effective than either banishing punishments used by universities now, or imprisonment, the traditional sanction used by the criminal law.¹⁸⁷ College tribunals that can punish behavior that is wrongful if not criminally illegal, and can convict, without permanently branding, a date rapist, should be more willing to penalize date rapist behavior. Punishing date rapists with the alternative sanctions suggested here will help undermine the social institutions that currently encourage the offensive behavior.

In one of the most recent symposia on social norms, Avery Katz argues that the legal academy should devote more energy to addressing private communities that live with and by the social norms that the academy has taken to critiquing.¹⁸⁸ Instead of only focusing on how and when the government should supplant private norms, academics should help private communities develop the norms that will meet their needs most effectively.¹⁸⁹ This Part takes Katz's exhortation to heart by offering concrete examples of private sanctions that can help shape social norms.

Part III.A illustrates examples of alternative sanctions that can be used to "manipulate the social sources"¹⁹⁰ of rapist motivation. Some

¹⁸⁴ A William and Mary student found guilty of attacking another student was forbidden to enter any dormitory or fraternity other than his own. See Helaine Olen & Ronald Ostrow, *Date-Rape Gains Attention After Years as Taboo Topic*, L.A. TIMES, Apr. 23, 1991.

¹⁸⁵ See Dembner, *supra* note 180, at A1 (collecting sources indicating that college disciplinary procedures are typically confidential).

¹⁸⁶ See *supra* note 176 and accompanying text.

¹⁸⁷ Kenneth Dau-Schmidt argues that the criminal law itself tries to steer social influence by molding preferences. See Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 2. This is no doubt true, but competing social influence often defeats whatever message the criminal law is trying to send. See Kahan, *supra* note 171, at 357 ("Most people refrain from engaging in crime not because they fear formal penalties, but because they fear damage to their reputation and loss of status."); Lessig, *supra* note 9, at 968-70 (illustrating in the context of dueling in the American South that social influence can override criminal sanctions).

¹⁸⁸ See Avery Katz, *Taking Private Ordering Seriously*, 144 U. PA. L. REV. 1745, 1756-57 (1996) (advocating for legal scholars to work to create more practical norms for various private communities).

¹⁸⁹ See *Id.*

¹⁹⁰ This is H. Laurence Ross' term. See H. Laurence Ross, *Confronting Drunk Driving* (1992). He uses it to suggest that in order to attack drunk driving, we must do more than

of these proposed sanctions shame the perpetrator directly; others shame him more indirectly. All can be used as part of a controlled effort to change social norms.¹⁹¹ As this Part will demonstrate, comparable efforts to change social meaning have been effective in the past. In Part III.B, I explain why the proposed alternative sanctions are particularly likely to be effective for date rape.

The sanctions suggested here should help alter the consequences of sexual activity such that taking sex without consent will be seen as a sign of weakness and desperation, not a sign of bravado.¹⁹² The goal is to change the definition of sex, so that it is understood to be not so much about intercourse, as about the communication involved in affirmative assent. We must change the definition of sex so that the failure to get affirmative assent is seen not as an alternative to consensual sex, but as instead something completely other, like sex with a four year old.

If the social meaning of sex could change in this manner then the criminal law's work would be much reduced. Instead of the law competing with norms that condone, if not encourage, rapist behavior, the normative understandings of sexual activity would change so that the law would mirror those understandings. Instead of the law striving to define what "nonconsensual sex" is, that phrase itself could become an oxymoron. Instead of the law trying to regulate those men who so narrowly walk the line between consensual and nonconsensual sex, shame sanctions could internalize the proscription on nonconsensual sex so that those men would regulate themselves. "Shaming is a route to freely chosen compliance."¹⁹³ It is a means of making people understand, take responsibility for, and want to avoid harmful conduct.¹⁹⁴

just punish drunk drivers, we must attack the social institutions, notably recreation and transportation, that encourage drunk driving behavior. See *id.* at 5 and *infra* text accompanying notes 304-06.

¹⁹¹ My suggestions are certainly not offered as an exclusive list. They are a beginning, and a practical outgrowth of the theoretical work advanced by Dan Kahan in his seminal work on alternative sanctions. See Kahan, *supra* note 51, at 591-663.

¹⁹² Sex without consent might come to be seen as a last refuge of someone who could not control his animal instincts or was not sophisticated enough for the woman to want to say "yes."

¹⁹³ Brathwaite, *supra* note 84, at 10.

¹⁹⁴ Brathwaite writes: "[M]oralizing social control restricts our autonomy by inviting us to see that we cannot be whole moral persons through considering only our own interests in the choices we make. We are shamed if we exercise our own autonomy in a way that tramples on the autonomy of others." *Id.* at 11.

A. Changing the Meaning Through Sanctions

In relatively close-knit communities, like college campuses, in which prestige and esteem play a critical role in people's daily lives,¹⁹⁵ we may be able to use alternative sanctions as a way of de-coupling sexual conquest from masculinity. Suppose, for instance, that if a college tribunal or administrative body found that someone had committed date rape, he did not go to jail or leave campus for a semester or two. Instead, the perpetrator stayed on campus and for a period of time, a semester or a year, and was required to wear a bright orange armband or badge that was unmistakably associated with his sanction. His insignia would have to list his group associations, fraternity letters, sports team--all the affiliations that are normally listed beneath one's name in a college yearbook--so that he was bringing shame not only to himself but to his peer group. His picture, with his badge prominently displayed, should be published on a monthly or weekly basis in the school newspaper. He should also be barred from partaking in any extracurricular activities, sports teams, clubs, and fraternity organizations, through which students usually garner the esteem of their colleagues. The university could also forbid him to consume alcohol, a proscription that they could enforce through unannounced (and demeaning) urine tests.¹⁹⁶ While he was being sanctioned, the date rapist would be in the community without being able to be an active part of it. For this period of time he would be stripped of all of the traditional means of acquiring masculine esteem. After completing his sentence, however, his penance would be over and he should be allowed to re-integrate himself into the community.¹⁹⁷ Some re-

¹⁹⁵ Toni Massaro argues that America is too big and diverse a society for shaming to work because one can only feel shamed in interdependent communities in which the shamed person wants and needs the respect of others. See Toni Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1923 (1991) [hereinafter *Massaro, Shame*]. "American subculturalism, or cultural pluralism, is pronounced enough to make broad conclusions about our moral coherence suspect" *Id.* College campuses are much more physically, culturally and morally coherent than is American culture generally, however. People on college campuses know each other well. They often work, play and live with each other. The richness of one's experience on that campus has a great deal to do with whether one has the respect and friendship of the community as a whole.

¹⁹⁶ I am grateful to Richard McAdams for this suggestion. As he pointed out to me, in addition to subjecting men to embarrassing tests, this sanction also deters date rape by deterring drinking (for the correlation between drinking and date rape, see *supra* notes 94-100) and it pits one means of proving masculinity--drinking--against another--sex. This provides men with a masculine reason not to date rape.

¹⁹⁷ Both Toni Massaro, see *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL. & LAW 645, 693 (1997) [hereinafter *Massaro, Meanings*] (cautioning

integration is crucial. If the punished one loses hope of being able to rejoin the community, he will simply leave and join a subculture that accepts his behavior.¹⁹⁸

Apologies could also play an important role in sanctioning date rapists. For instance, the date rapist could be required to publicly apologize and acknowledge his weakness.¹⁹⁹ Similarly, he could be required to explain publicly, in classrooms perhaps, what he did, why he did it, and how he now sees it as wrong. The perpetrator would not have to admit criminal wrongdoing, but he would have to admit wrongdoing.²⁰⁰ The class would not be allowed to jeer; they would

that shaming "may lack any redemptive, dues-paid end point"), and John Brathwaite, see Brathwaite, *supra* note 84, at 74, note the importance of a temporally limited sanction.

¹⁹⁸ The offender who is not re-integrated "may 'drift' toward subcultures that are more accepting of her particular norm violation." Massaro, *Shame*, *supra* note 195, at 1919; see also Brathwaite, *supra* note 84, at 65-68.

Of course, many men may choose to leave rather than undergo the demeaning sanctions suggested here. If that happens, the university community loses the opportunity for public education but it is no worse off than it is now, when rapists are suspended or expelled. Moreover, a convicted rapist who decides to leave rather than be humbled is at least forced to take some responsibility for his actions. He is forced to balance his need for esteem against his desire to continue with his education. That balancing process in and of itself may help young men think more closely about the legitimacy of status systems that they now uncritically accept.

¹⁹⁹ The victims' names could still be kept confidential. One can apologize for an action without naming the parties to the action. If the victim wishes to remain anonymous, she should be able to do so.

²⁰⁰ A defendant who refuses to testify, is found guilty, and still refuses to acknowledge wrongdoing should be expelled. However, a defendant who acknowledges wrongdoing and subsequently finds himself the subject of a criminal trial should be able to exclude from the criminal trial any previous exculpatory statements made under the threat of expulsion. The two federal courts that have encountered this issue, *Hart v. Ferris State College*, 557 F. Supp. 1379, 1384-85 (W.D. Mich. 1983) (finding that a student had a right to remain silent during a disciplinary hearing); *Furutani v. Ewingleben*, 297 F. Supp. 1163, 1165 (N.D. Cal. 1969) (same) and the one state court, *Nzuve v. Castleton State College*, 335 A.2d 321, 325-26 (Vt. 1975) (same), have followed *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (protecting individuals against coerced statements by punishing their use in subsequent criminal proceedings) to find that testimony given in a college administrative hearing under the threat of suspension or expulsion for failure to testify is not voluntary and is therefore inadmissible in a subsequent criminal proceeding. In *Garrity*, two police officers were told that they would be fired if they invoked the Fifth Amendment during a Grand Jury proceeding investigating police corruption. See 385 U.S. at 495 ("[T]heir statements were coerced, by reason of the fact that, if they refused to answer, they could lose their positions with the police department."). The Supreme Court held that under those circumstances, the officers' testimony could not be construed as a waiver of their right against self-incrimination, and therefore could not be used against them in a subsequent trial. See *id.* at 498-500. It is unlikely that this analysis would be different for private schools because they too are required by federal law to provide "sanctions to be imposed following the final determination of an on-campus disciplinary procedure regarding rape, acquaintance rape, or other sex offenses," see Higher Education

have to listen, but he would have to explain why he was sorry. The rapist should have to acknowledge publicly that his behavior was morally wrong and worthy of scorn.²⁰¹ He might also be asked to deliver to his victim, every day or every week, reparations of some kind. This act would force the rapist to focus on what all too many of these men fail to see, namely, the person who is hurt when they selfishly use sex to enhance their own esteem.

Controlled efforts like this to shape social norms and change social meaning have worked in the past. Consider the following examples. In the eighteenth and nineteenth century, dueling--the act of retiring to a field and firing pistols at each other--was an important means of satisfying social insults between members of the elite classes.²⁰² If one felt insulted, one challenged someone to a duel, and if one was challenged to a duel, one was compelled to fight or his honor would be damaged in the community. State governments were not particularly fond of this means of dispute resolution because it was remarkably arbitrary and left a considerable number of otherwise quite useful people dead. States tried to curtail the practice in a number of ways, including various unsuccessful attempts to simply outlaw dueling. Apparently, this strategy did not work because gentlemen placed the importance of their social honor above the importance of obeying the law. An anti-dueling strategy that arguably worked better was to forbid anyone who dueled from demonstrating their honor

Amendments of 1992 (amending federal law), 20 U.S.C. § 1092(f)(7)(B)(ii) (1994) (requiring information on "possible sanctions to be imposed following the final determination of an on-campus disciplinary procedure regarding rape, acquaintance rape, or other sex offenses, forcible or nonforcible").

²⁰¹ In a recent Note, Paul Rosenthal argues that due process requires public universities not to construe silence on the part of a defendant as an admission of guilt. See Rosenthal, *supra* note 179, at 1271-86 (arguing for the application of the privilege against self-incrimination in college disciplinary hearings). However persuasive this argument for expanded due process rights may be, it is not likely to afford a public school defendant significantly more protection given the less rigid standards of proof, relaxed rules of evidence and majority rule procedures that govern most university hearings. See Parrot, *supra* note 173, at 369 (concluding that judicial board hearings employ less rigid standards of proof and more flexible evidentiary rules than criminal proceedings). If an accused man remains silent, it is quite likely that the defendant will be convicted, even if his silence cannot be construed against him. Without his testimony, the preponderance of the evidence will probably weigh against him. As long as the courts and Congress continue to allow universities to discipline students for non-academic activity, students should not expect the procedural protections afforded in criminal courts. See Lisa L. Swem, Note, *Due Process Rights in Student Disciplinary Matters*, 14 J.C. & U.L. (1987).

²⁰² I take this first example and much of the following analysis from Lessig's work on social meaning. See Lessig, *supra* note 9, at 968; Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181, 2187 (1997).

through another well-established practice, holding public office.²⁰³ This alternative sanction was effective because it directly addressed that which gave men the need, or incentive, to duel in the first place, i.e., their honor.²⁰⁴ By refusing to duel, gentlemen could argue that they were behaving honorably by maintaining their ability to hold office, not dishonorably by "wimping" out of the duel.

A similar strategy could work for rape. Currently, our policy for attacking rape mimics the attempts to outlaw dueling and it is just as ineffective. Young men place the importance of their masculinity above the importance of obeying the law, just as duelers placed the importance of their honor above the importance of obeying the law. If young men continue to preference their masculinity in this way, they will continue to break the law, particularly because breaking the law may be seen as another means of proving one's masculinity.²⁰⁵ However, if breaking this particular law was punished such that one's masculinity, like a Southern gentleman's honor, could not stay intact after one was caught, these young men might begin to worry more about their transgressions. If not only the individual, but his entire peer group, risked public humiliation, there might soon be strong peer pressure to avoid this risky behavior.

Alternative sanctions may be able to ambiguate both the meaning of non-consensual sex and the meaning of stopping short of rape. By using demeaning sanctions, like public display, communities can destabilize the link between sexual conquest and masculinity. Instead of enhancing the perpetrator's masculinity, taking sex without consent could result in an emasculation of the perpetrator. In addition, stopping short of rape could suggest that one's masculinity and the status of one's peer group were important enough to forego the risk of a demeaning display. Instead of being seen as a "wimp," the man who does not join in the sexual exploits could be seen as the man more capable of valuing masculinity, honor and peer affiliation. The criminal law has tried to change the social meaning of date rape by tying it to other forms of rape.²⁰⁶ By minimizing the force and violence

²⁰³ See Lessig, *supra* note 9, at 971 (suggesting that banning an individual from participating in public office was a more effective method of regulation).

²⁰⁴ See *id.* (asserting that such a sanction created "an elite-based reason for refusing the challenge of a duel"). It is hard to determine exactly how effective this anti-dueling device was because legislatures tended to grandfather past duels out of the bar on public office and they often repassed grandfathering legislation every few years. See *id.* at 972.

²⁰⁵ See Kahan, *supra* note 171, at 374-76 (arguing in the context of gang activity that harsher punishments may actually make the targeted behavior more attractive).

²⁰⁶ "Tying" is one of two strategies Lessig describes that help alter the social meaning of certain actions. See Lessig, *supra* note 9, at 1009.

requirements²⁰⁷ and trying to define rape simply as nonconsensual sex,²⁰⁸ reform efforts implied that date rape is the equivalent of "real rape."²⁰⁹ From the perspective of the victim, tying date rape to more violent forms of rape and stranger rape makes eminently good sense. The feelings of fear, anger, shame, and impaired trust are comparable among victims of all types of rape.²¹⁰ From the standpoint of rape reform, however, this tying strategy may have backfired because most men and many women view rape along a complex spectrum of permissibility. Because the line between date rape and consensual sex is so hard to draw, while the line between "real rape" and consensual sex is easy to draw, people refuse to accept that date rape is real rape, that X really is like Y. Y involves a man, probably a stranger jumping out of the dark with a weapon. For many, date rape just cannot be tied to those circumstances. Instead of tying, therefore, it may be worth trying to ambiguate. Instead of just saying X means Y, we may need to suggest that X also means Z. Z is demeaning and pathetic and inconsistent with the esteem traditionally associated with X. If X can mean Z, as well as Y, X becomes much more confusing and much less appealing.

Consider a second example. The smoking rate among African-American teenagers decreased substantially in the 1980s, while the smoking rate among white teenagers stayed relatively constant.²¹¹ Researchers attribute this racial difference to a private antismoking campaign in the African-American community, which, instead of focusing on the health effects of smoking, tapped into an anti-white establishment norm common among African-American youth.²¹² Among the most graphic symbols of this effort was a poster of a skeleton lighting a cigarette for an African-American child with a caption that read "They used to make us pick it. Now they make us

²⁰⁷ See Spohn & Horney, *supra* note 5, at 23, 24 (discussing how many states have removed the requirement that the victim must "resist to the utmost" in order to prove force).

²⁰⁸ See Berger et al., *supra* note 94, app. 1 at 350.

²⁰⁹ "Real rape" is Susan Estrich's term. She used it to describe the prototypical violent stranger rape, but argued that all forms of nonconsensual sex should be treated like real rape. See Estrich, *supra* note 165, at 7.

²¹⁰ See Mary P. Koss et al., *Stranger and Acquaintance Rape: Are There Differences in the Victim's Experience*, 12 *PSYCHOL. WOMEN Q.* 1, 21-22 (1988) (finding that date rape and stranger rape victims exhibited the same psychological symptoms after the attack); Mills & Granoff, *supra* note 19, at 504 (same).

²¹¹ See Michelle Ingrassi, *Waiting to Exhale*, *NEWSWEEK*, May 1, 1995, at 76. Cass Sunstein first brought this example into the legal scholarship on norms. See Cass R. Sunstein, *Social Norms and Social Roles*, 96 *COLUM. L. REV.* 903, 905-06 (1996).

²¹² See Ingrassi, *supra* note 211, at 76.

smoke it."²¹³ With the introduction of the private campaign, smoking in the African-American community became a sign of selling out to the white establishment and letting down one's peer group.

The same strategy could work with rape. Any reform effort must consider the receptivity of the targeted audience. If the cultural resistance to a tying strategy is strong enough, the legal strategy of tying may backfire. Just as we may not be able to curb, and indeed may exacerbate, the problem of teenage smoking by telling young people that smoking may be harmful to their health,²¹⁴ so we may not be able to curb date rape simply by telling people that date rape is real rape. Lighting up a cigarette used to signify defiance and maturity and bravado. It may still do that for African-American youth, but, after the successful ad campaign, lighting up can also signify disloyalty and weakness.²¹⁵ The social meaning of date rape could be similarly ambiguated. If, by taking sex without consent a man subjects his peers to the scorn of the community and risks the very bond that gives him such a distorted incentive to have sex, he may very well not incur the risks of taking it.

The last example involves drunk driving. Formerly, driving home after too many beers was seen as a macho and appropriate thing to do.²¹⁶ One certainly did not ask someone else to drive or leave one's car and take a cab. Indeed, among men, asking someone else to drive home would have been very emasculating. Drunk people may have believed that they were doing something wrong by driving drunk, but that wrong was merely a violation of a technical rule for which the police could pull them over. The technical wrong had no meaningful purpose or consequence. Mothers Against Drunk Driving and similar groups²¹⁷ began to alter people's drinking and driving behavior

²¹³ *Id.*

²¹⁴ Focusing on adverse health effects of a certain behavior is likely to be a particularly ineffective means of altering the behavior of youth. Most young people suffer from serious delusions of immortality. Young people do not think that they are going to die and they are notorious for engaging in extremely high-risk behavior. Telling young people that by smoking they are more likely to die in 30 years than in 50 is not likely to change their behavior.

²¹⁵ See Ingrassi, *supra* note 211, at 76.

²¹⁶ McAdams also discusses how norms regarding drunk driving have changed. See *supra* note 50, at 385 ("The 'loyal friend' defends the right of his friend to drink, even when driving, and feels guilt if he does not, until the esteem-based norm changes to 'friends don't let friends drive drunk.'").

²¹⁷ As part of their on-going campaign in the late 1980s, a group of anti-alcohol activists from the Harvard School of Public Health met with 250 television writers and producers. As a result of that meeting, more than 160 prime time television shows included at least some dialogue about the harms of drunk driving. See Burt Solomon,

patterns²¹⁸ by changing the crime of drunk driving from an essentially victimless act of bravado, to an act with potentially deadly consequences for very real victims.

Date rape, in the eyes of many date rapists and in the eyes of many jurors, is also still seen as a victimless crime. Thus, date rapists view themselves and are viewed by others as technical criminals, but not real criminals.²¹⁹ If these men were forced to apologize for what they did, if they were forced to articulate how rape carelessly used women, they might begin to think twice about their actions, just as most people now think twice before having another beer when they have to drive home. Apologizing forces people to admit their wrongdoing in a way that criminal punishments often do not. It also forces people to appreciate the consequence of their actions and focus on whether the consequences are worth it.

The nontraditional nature of these sanctions should not be viewed as calls for mercy or attempts to impose mandatory mediation.²²⁰ Mercy involves mitigating a punishment that is otherwise deserved²²¹ or meting out a punishment that is less than retribution or deterrence requires.²²² Mercy has its place, but the public display and apology alternatives suggested here will not be particularly merciful. They will not "season justice" as mercy does.²²³ They will do justice by

Teens and Sex, NAT'L J., July 4, 1998, at 1566, 1568 (highlighting the media coverage of the designated driver concept).

²¹⁸ The proportion of fatally injured drivers with a Blood Alcohol Level of .1% decreased significantly between 1980 and 1985. See H. LAURENCE ROSS, CONFRONTING DRUNK DRIVING 40 (1992) (noting that the percentage of fatally injured drivers with a Blood Alcohol Content above .10% declined from 46% in 1980 to 39% in 1985). It is difficult to say whether this decrease is directly attributable to the efforts of groups like Mothers Against Drunk Driving, but it seems likely that their efforts contributed to this reduction.

²¹⁹ See supra notes 87-92 and accompanying text.

²²⁰ For an extensive analysis of the problems with mandatory mediation, see Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1273-99 (1994) (criticizing mandatory mediation from the victim's, offender's, and state's perspective).

²²¹ See Jeffrie G. Murphy & Jean Hampton, *Forgiveness and Mercy* 20.

²²² See id. at 158; see also Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 115 (1993) (asserting that deterrence and retribution, as opposed to mercy, focus on the crime committed, not the individual who committed it).

²²³ It is enthroned in the heart of kings, It is an attribute of God himself; And earthly power doth then show likest God's When mercy seasons justice.

WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*, act 4, sc. 1, at 111-12 (Methuen & Co. Ltd., Arden ed. 1955) (1600).

clearly negating whatever benefit the rapist gained from his act.²²⁴ As Part III.B explains, the suggested sanctions are also particularly retributive and likely to deter because they make the perpetrator subject to the same kind of public humiliation that rape victims suffer and they take away the esteem that motivated him to rape.

The victim will also always retain the right to ask the state to bring criminal charges. The victim should not be forced to forgive the perpetrator nor should she be forced to interact with him if she does not want to. The victim and the offender will not necessarily come to terms with each other; rather, the offender will have to come to terms with his behavior, in the context of a community that scorns that behavior. The sanctions proposed here, in contradistinction to Victim-Offender Mediation programs, do not make what had been considered a crime against the public into a private dispute that the parties work out amongst themselves.²²⁵ Rather, the proposed sanctions take what has been treated as a largely private harm and transform it into an issue that demands community-wide response.

Experts who study date rape and work with college age populations agree on the paramount need to sever sexually predatory behavior from notions of masculinity.²²⁶ The proposed sanctions try to do just that. Nonetheless, we must be careful in our attempts to manipulate notions of masculinity, lest we legitimate the status system that our culture already reads into gender.²²⁷ The most effective way to emasculate a perpetrator would probably be to make him expressly female--to make him wear women's lingerie or clothing. Yet punishing someone by feminizing him in this manner would trade on the misogynistic messages in our system of gender.²²⁸ For most people concerned with rape reform, this is an unequivocally unacceptable

²²⁴ Legitimate retribution "aims to defeat the wrongdoer in order to annul the evidence provided by the crime of his relative superiority." Murphy & Hampton, *supra* note 221, at 137.

²²⁵ See Brown, *supra* note 220, at 1308 (stating that Victim-Offender Mediation "characterizes cases as private disputes affecting individuals rather than the state, and it rejects the state's substantive legal rules for resolution of criminal cases").

²²⁶ Martin Schwartz, a criminologist at Ohio University argues that "[w]e have to figure out a way to change the culture on campus .. and disconnect sexual conquest from male self-identity." Dembner, *supra* note 180, at A1. Bob Haynor, who coordinates rape prevention efforts at one Northeastern college, argues that students know that "no means no," but date rape still happens because of "the culture of masculinity that supports [raping] behaviors." *Id.*

²²⁷ For a discussion of the gender status quo, see *supra* notes 58-67 and accompanying text.

²²⁸ The misogyny involved becomes clear when one recognizes that punishing a woman by making her masculine would not come close to invoking the same level of humiliation involved in punishing a man by making him feminine.

message for any punishment to send. Emasculation must therefore be achieved more indirectly. The sanctions suggested here emasculate indirectly by temporarily prohibiting men from displaying the masculine qualities of independence, pride, control and righteousness and requiring them to acknowledge publicly their dependence, humility, limitation and wrongdoing. The key is to make date rapists feel sorry for what they did and make others uninterested in emulating their behavior.

B. Why Shame Should Work

By manipulating the punishments imposed on rapists, communities can help change the social meaning of rape by altering the context in which rapist behavior is evaluated.²²⁹ However, we must recognize that the shaming sanctions suggested here are a potentially dangerous means of trying to affect social change.²³⁰ In her Article on the meaning and potential ramifications of shame sanctions, Toni Massaro highlights the importance of distinguishing between shame, shaming, and the shameful. Shame is a noun, an emotion; shaming is a verb, an external action; and to label something shameful is to make a normative judgment on a particular behavior or action.²³¹ One can feel shame without having been a target of shaming.²³² Shaming someone does not necessarily make them feel shame²³³; nor does it necessarily lead to a shared understanding of what is shameful. "[T]he chances that these [shaming] signals will be read and reinforced by others in a uniform fashion will depend on social proximity, norm cohesion and other highly contextual variables."²³⁴ This Part explains why, notwithstanding these concerns, the proposed shaming sanctions should effectively curb date rape in college communities.

²²⁹ As Lessig writes, "meaning is the product of a text in a particular context." Lessig, *supra* note 9, at 961. Context is "the associations that get made when the particular text is asserted." *Id.* Instead of just trying to change the extent to which the text is asserted (by criminalizing rape and therefore discouraging people from raping), shaming may change the associations arising from rape so that its social meaning will change, making it less desirable to assert the text.

²³⁰ See Massaro, *Meanings*, *supra* note 197, at 648-49; James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 *YALE L.J.* 1055, 1057-59 (1998); Massaro, *Shame*, *supra* note 195, at 1921-28.

²³¹ Massaro, *Meanings*, *supra* note 197, at 672.

²³² For instance, one can feel shame for pocketing a cashier's arithmetic mistake even if no one else ever knows that you did so.

²³³ Shaming may lead some people to feel more angry than shamed. It can also lead people to externalize blame. See Massaro, *Meanings*, *supra* note 197, at 664.

²³⁴ *Id.* at 658.

Punishing date rape with shame sanctions serves four goals. First, it sends an unequivocal message of public condemnation that will help people internalize the wrong of date rape.²³⁵ Second, it generally deters the population of potential date rapists by making them afraid of being emasculated.²³⁶ Third, it specifically deters individuals who will feel particularly diminished by the public display.²³⁷ Fourth, by including the perpetrator's group affiliations in the public display, alternative sanctions may retard, if not reverse, the peer pressure that currently encourages date rape.

First, as discussed above, prosecutors have difficulty securing date rape convictions because there is no clear moral consensus that date rape is wrong. Rapists see themselves as technical criminals not real criminals.²³⁸ Shaming sanctions will help solidify public consensus on the immorality of the act by sending an obvious public message of moral condemnation. Rape will cease to be seen as a technical violation. As James Whitman argues, "it is simply wrong to suppose that the shaming state is not a maker of public norms."²³⁹ Because there is no clear norm condemning date rape, we need a maker of public norms.

Communities must shore up the norm against date rape not because, as is often the case with norm violations that inspire shame sanctions, our culture has experienced some kind of moral decline with regard to the normative proscription on date rape,²⁴⁰ but because the normative proscription on date rape has never existed.²⁴¹ This is an area in which social norms currently do not "police the behavior better than

²³⁵ Massaro does not dispute that shaming sanctions do send an official message of moral condemnation. *See Id.* at 698.

²³⁶ *See* Massaro, *Shame*, *supra* note 195, at 1919 (detailing that shaming deters those who fear social disapproval).

²³⁷ *See infra* notes 244-46 and accompanying text.

²³⁸ *See supra* notes 87-92 and accompanying text.

²³⁹ Whitman, *supra* note 230, at 1089. Whitman objects to shaming sanctions precisely because "[i]t is a form of legislating and politicking in the realm of morality that goes unchecked by any of our standard ideas about the propriety of legislating or moralizing." *Id.* at 1090. That may be, but if we adopt shame sanctions fully aware of the kinds of norms we are trying to encourage, the lack of traditional checks on government moralizing is less problematic.

²⁴⁰ Shaming is a particularly common response to those norm violations that shaming advocates think stem from what Massaro calls "norm collapse." *See* Massaro, *Meanings*, *supra* note 197, at 668 (noting that some culture critics "believe that a shame-affect bind with respect to our sexual desires and acts is crucial and worth preserving"). Thus, sexual "crimes" are often the target of shame sanctions. *See* Whitman, *supra* note 230, at 1063.

²⁴¹ There is no guarantee that these sanctions will shore up a norm against date rape, but criminalizing the behavior has not been particularly effective in shoring up that norm either. *See supra* Part II.A (highlighting the criminal law's problems in combating date rape).

any legal rule could."²⁴² There is no clear social norm against date rape. "Public shaming generalizes familiar principles to unfamiliar or new contexts. It integrates new categories of wrongdoing . . . into pre-existing moral frameworks."²⁴³

Moreover, the communal, public nature of shame sanctions is likely to do a better job of engendering a community-wide reaction than can more external, atomized criminal punishments or banishments, particularly in communities like college campuses, where "meaningful social connections . . . tend to make communities cohesive and their members emotionally vulnerable to social sanctions."²⁴⁴ Shame sanctions may not create cohesion or connection, but they are likely to be uniformly interpreted in communities that already have some of those qualities. Thus, they will likely send a clear message of moral condemnation.

Second, because shame sanctions will be linked publicly to the motivation that inspires rapist behavior, that is, because they will be linked to the masculinity norm, they will deter men who are concerned about their masculinity. The potential date rapist who would rape to enhance his masculinity will be particularly afraid of emasculating shame sanctions. Massaro writes that "the threat of . . . shaming best deters the people who most fear social disapproval, who are usually not offenders."²⁴⁵ Date rapists do fear social disapproval, particularly with regard to their masculinity, but they have yet to have to encounter disapproval when they commit date rape. People fail to find the rapist's act problematic or they blame the victim for its occurrence.²⁴⁶ It is society's failure to communicate disapproval rather than the date rapist's failure to respond to disapproval that enables date rape. Clear,

²⁴² Massaro, Meanings, *supra* note 197, at 693 (stating that "shaming penalties ... may do nothing by themselves to deter norm violations (because social norms already police the behavior more effectively than any legal rule could ...)").

²⁴³ Brathwaite, *supra* note 84, at 82. Somewhat inconsistently, Brathwaite seems to argue that shaming sanctions are most effective when there is strong consensus as to the deviance of the conduct, but he assumes that such consensus exists for "predatory crimes ...involving victimization of one party over another." *Id.* at 14. Date rape is a predatory crime involving victimization. The consensus as to its deviance cannot form until we emphasize its predatory nature.

²⁴⁴ Massaro, Meanings, *supra* note 197, at 648.

²⁴⁵ Massaro, Shame, *supra* note 195, at 1919.

²⁴⁶ See *supra* notes 80-82 (discussing studies where people don't find forced sex unacceptable), 101-04 (discussing studies where people blame the victim for the rape) and accompanying text. In the words of a father of one of the Spur Posse, "[n]othing my boy did was anything that any red-blooded American boy wouldn't do at his age Those girls around my son are giving it away." Scoring with the Spur Posse, N.Y. TIMES, Mar. 30, 1993, at A22. See generally Baker, *supra* note 2, at 587-89 (discussing the tendency for many to blame the victim in rape cases).

well communicated social disapproval that jeopardizes a man's masculine status will deter those most likely to rape.

Traditional criminal sanctions are supposed to create comparable kinds of deterrent effects, but criminal trials and punishments, which often take place outside of the immediate community in which the incident took place²⁴⁷ permit observers to establish distance. This distance allows third parties to view the criminals as social deviants and thus dismiss what they do not see.²⁴⁸ If forced to confront the consequences of date rape daily, members of the community will be less able to distance themselves from the rapist and his behavior. Characterizing the date rapist as pathological is precisely what reformers should avoid because it diverts attention from the extent to which the raping behavior is encouraged by social norms, and it allows other men who are likely to fall victim to the same masculinity norm, to view the rapist as more demonic than he actually is.²⁴⁹

One way to minimize the degree to which the community demonizes the shamed rapist is to forbid public taunting. Although subject to some First Amendment concerns, this kind of regulation could take the form of many contemporary Hate Speech codes.²⁵⁰ Indeed, the purpose of the anti-taunting and Hate Speech codes are

²⁴⁷ The rules of venue ensure that a criminal trial will take place in reasonable proximity of the scene of the incident. See FED. R. CRIM. P. 18. Nonetheless, reasonable proximity allows people to establish considerable distance; a college student accused of date rape would be held, tried and punished away from campus. It is unlikely that his peers would see the trial itself or his punishment.

²⁴⁸ Massaro has suggested that shaming may not work for one of the same reasons that rehabilitation has not worked, specifically, that "people today view criminals as irredeemably 'pathological.'" Massaro, *Shame*, supra note 195, at 1929. Part of the reason that people have resisted convicting date rapists, however, is that people refuse to criminally sanction rapists who do not seem at all pathological. See Baker, supra note 2, at 588-89.

²⁴⁹ As Stephen Schulhofer has noted, "[t]he conception of the criminal offender as alien enemy fuels savage punishments and such punishments in turn require that we demonize those on whom they will be dropped." Stephen J. Schulhofer, *The Trouble with Trials; the Trouble with Us*, 105 *YALE L.J.* 825, 852 (1995).

²⁵⁰ For a sampling of various recently adopted university hate speech codes, see 1 *Hate Speech and the Constitution* 292-302 (Steven J. Heyman ed., 1996). For instance, Stanford's anti-taunting provision bars speech "addressed directly to the individual or individuals whom it insults or stigmatizes." See *id.* at 293. The prohibited comments might also fall into the category of "insulting or 'fighting words'--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Fighting words can be regulated under the First Amendment. See *id.* at 573 (upholding statute restricting speech that, if used in a public place, would cause a breach of the peace).

similar: to prevent any accentuation of ostracism or difference.²⁵¹ Ironically, and perhaps hypocritically, the purpose of a public shaming ritual is to make the punished person isolated, publicly visible and different. The ultimate effectiveness of the sanction, on the other hand, depends on not making him too isolated or too demonic. If he feels completely isolated, he will leave the community. If the community sees him as too demonic, others will not recognize how prone they are to the same offending behavior. As John Brathwaite notes, however, there is "something to be said for hypocrisy."²⁵² Surely there is nothing more hypocritical in the isolating/integrationist approach to shaming than there is in the current regime in which we criminalize behavior that we then refuse to punish. Integrative public sanctions that allow for some degree of re-integration offer a means of punishing without pathologizing. In doing so, they force a community to understand the offending behavior as its own creation.

Third, the proposed sanctions will specifically deter the shamed rapist. Carl Schneider writes that "we experience shame when we feel we are placed out of the context within which we wish to be interpreted."²⁵³ Shame sanctions will place men who are very, very eager to demonstrate their masculinity, in public positions in which they are seen, by everyone, as humbled and diminished. They will feel shame. They may also feel other emotions, like anger or guilt, but they are likely also to feel shame because of the "special kind of visibility and exposure."²⁵⁴ Brathwaite explains, that "individuals are more susceptible to shaming by other individuals when they are in relationships of interdependency."²⁵⁵

College campuses offer a rare opportunity to use shame sanctions in an interdependent environment. Students are dependent on their peers for social status and on their universities for educational credentials. Universities and peer groups are, in turn, dependent on student populations for their members. Universities and peer groups also gain and lose status based on the achievements and actions of their members. University campuses are also communities in which there are repeated social interactions with the same people, another

²⁵¹ This kind of anti-taunting regulation would also minimize what Professor Whitman sees as the danger of the mob. Whitman views shaming as "state-encouraged lynching" that "involves a troubling tolerance for ochlocracy." Whitman, *supra* note 230, at 1089.

²⁵² Brathwaite, *supra* note 84, at 83.

²⁵³ CARL D. SCHNEIDER, *SHAME, EXPOSURE, AND PRIVACY* 53-54 (1977).

²⁵⁴ FRANCIS J. BROUCEK, *SHAME AND THE SELF* 23 (1991).

²⁵⁵ Brathwaite, *supra* note 84, at 89.

prerequisite for effective shame sanctions.²⁵⁶ Moreover, the relative homogeneity of college campuses helps ensure that the sanctions' message will be uniformly applied.²⁵⁷ One of the problems with shame sanctions in more diverse societies is that the very rich and the very poor can escape a sense of scorn either because their wealth can insulate them or because their poverty makes them impervious to social stigma.²⁵⁸ Thus as Massaro writes, shaming sanctions are most likely to specifically deter the "least dangerous offenders, that is, status conscious, shame-sensitive offenders such as middle class, first time offenders."²⁵⁹ College student date rapists fit that description almost perfectly.

Nonetheless, Massaro warns, shame sanctions imposed on the population most susceptible to their message may be the "most destructive, both to the offender and to the offender's family or other intimates who may suffer spillover effects of the offender's public humiliation."²⁶⁰ In the date rape context, however, this spillover effect is positive not negative. Indeed, it is because the offenders peer group is likely to suffer from these sanctions that the sanctions are likely to be effective.

If the date rapist's peer groups are publicized and indirectly shamed along with the rapist, the peer groups will have an incentive to re-evaluate the benefits of the frequent sex norm. If, as was suggested, peer groups currently bestow esteem based on the frequency of one's sexual encounters²⁶¹ and pay little heed to the consensual nature of those encounters, the imposition of shame sanctions may create strong incentives to change that normative structure.²⁶² The bestowal of esteem by peer groups may be inevitable and the masculinity norm may

²⁵⁶ See ROBERT WRIGHT, *THE MORAL ANIMAL--WHY WE ARE THE WAY WE ARE: THE NEW SCIENCE OF EVOLUTIONARY PSYCHOLOGY* 219-20 (1994).

²⁵⁷ Obviously, not all college campuses have comparable levels of homogeneity. A small, private, elite college in a bucolic, rural setting is likely to be much less diverse than a large, urban, state university. Nonetheless, when compared to the population as a whole, even a large state university or a community college is a fairly uniform group. The students are mostly in the same age range, they usually have comparable educational goals, and they tend to rely on each other for social support. Moreover, they are often separated from family, the institution that often insulates people from the effect of social influence.

²⁵⁸ See Massaro, *Meanings*, supra note 197, at 682.

²⁵⁹ *Id.* at 685.

²⁶⁰ *Id.*

²⁶¹ See supra notes 26-33 and accompanying text.

²⁶² "The effectiveness of shaming is often enhanced by shame being directed not only at the individual offender but also at her [collectivity].... When a collectivity as well as an individual is shamed, collectivities are put on notice as to their responsibility to exercise informal control over their members" Brathwaite, supra note 84, at 83.

be intractable, but that does not mean that groups cannot start encouraging new, less risky systems of bestowing esteem for masculinity.²⁶³ Thus the fourth reason why shame sanctions should be effective: peer groups damaged by the spillover effects of shame are likely to develop new, less dangerous esteem systems. The power and influence of the frequent sex norm should diminish over time.

Admittedly, shame sanctions will be an especially harsh form of punishment for the date rapist because his yearning for social approval and his insecurity about his masculinity which give rise to his tendency to rape in the first place will make being the subject of a humbling public display particularly painful for him. Emasculating someone who places a high premium on masculinity is grave punishment indeed.²⁶⁴ It may, in fact, be humiliating. This is dangerous because as Avishai Marasalit explains, once punishment becomes humiliation it "reject[s] human beings as human."²⁶⁵ Without a sense of his own humanity, a shamed individual ceases to feel the connection to human society that makes him susceptible to social norms in the first place.²⁶⁶

To reject shame sanctions because of the risk of humiliation associated with emasculation, however, concedes that impugning someone's masculinity necessarily impugns his human dignity. If the perpetrator feels and is perceived by others to have lost all human dignity because his gender identity is damaged, then it is clear we have come to believe that to be human is to be gendered. However empirically true this may seem, it is a deeply troubling conclusion for those who find gender norms restrictive, and it is a conclusion that suggests that we would rather incur the costs (to women, of rape) associated with over accentuating gender than the costs (to men, of humiliation) associated with de-emphasizing gender.

²⁶³ Ideally, we might move toward a world in which there was no esteem value given, by anyone, for frequency of sexual encounter (however defined), but that world is still a distant, if achievable, dream. Adolescence brings with it an undisputed hormonal incentive for sexual experimentation. Most teenagers are intensely curious about sex. They always have and they always will talk to their peers about it. It is highly unlikely that we can make either men or women's hormonal drives disappear and highly unrealistic to think we can keep young people from talking to each other and comparing experiences. However, it may be possible for the social meaning of young people's sexual drives to be channeled into something that is about getting the consent of a partner, not just finding a body. After all, this is how sexually curious women do it. They must use communication because they cannot use force.

²⁶⁴ "Shame forces a downward redefinition of oneself and causes the shamed person to feel transformed into something less than her prior, idealized image." Massaro, Shame, supra note 195, at 1901 (citing G. Piers & M. Singer, Shame and Guilt 26-27 (1971)).

²⁶⁵ Avishai Margalit, *The Decent Society* 117 (1996).

²⁶⁶ See supra notes 197-98 and accompanying text.

In sum, the need to send an official message of condemnation, the likelihood that others will be deterred by shaming, the high probability that the offender will feel shame, and the benefits of the spillover effect all suggest that the proposed sanctions may be a just and effective means of trying to curb the prevalence of rape. They may also be an effective way to de-emphasize gender.

Finally, there are two additional reasons why the proposed sanctions may be a particularly appropriate response to date rape. The essence of shaming is its public nature. With shaming sanctions, a "person's privacy is invaded in a way that sets him or her apart from others, degrades him or her, and denies him or her control."²⁶⁷ Massaro and Whitman have suggested that this invasion of privacy is both counterproductive and uncivilized. Massaro argues that the public nature of shaming is counterproductive because "[t]o shame a person, one must invade the shamed person's privacy and autonomy in a manner that departs from cultural norms about privacy and concealment. By defying privacy norms, shaming thus may also, paradoxically, erode them."²⁶⁸ Whitman suggests that shame sanctions' tendency to accentuate base and exclusively private behavior decivilizes the communities in which they are used.²⁶⁹ Although Whitman questions whether the current use of shame sanctions could make American society any more base than it already is, he implies that a return to civility might be a desirable goal and one that is at odds with the re-emergence of shame sanctions.²⁷⁰ These concerns, however valid in some situations, are outweighed in the date rape context because the public nature of the punishment is perfectly tailored to the crime.

When we publicly shame a date rapist, we are not forcing him to relinquish any privacy that he has not already forced his victim to relinquish. The sexual nature of rape means that any investigation and prosecution of the crime will inevitably require its victim to open the privacy barrier behind which she usually keeps her sexual experiences. Making sexual experiences public may be per se demeaning, and to a certain extent, base, but this is a form of embarrassment and baseness

²⁶⁷ Massaro, *Meanings*, supra note 197, at 666.

²⁶⁸ *Id.* at 667.

²⁶⁹ See Whitman, supra note 230, at 1074-75 (discussing DE MONLENS, *DE L'HUMANITE DANS LES LOIS CRIMINELLES* (Paris, Felix Locquin 1830); WILLIAM GRAHAM SUMNER, *FOLKWAYS* (Ayer Co., 1940) (1906); and L.T. HOBHOUSE, *MORALS IN EVOLUTION* (2d rev. ed. 1908)).

²⁷⁰ See Whitman, supra note 230, at 1079. He notes that the Victorians "mounted what was an honorable effort to found social morality on the maintenance of a carefully patrolled distinction between the human and the animal." As he explains, however, "[t]he belief that we should hide away our sins and our bodily functions is simply gone."

with which rape victims have always had to live. If a rapist is to be punished, his victim must be willing to sacrifice her privacy. Many women resist coming forward with rape allegations precisely because it makes public that which, however horrible, is nonetheless very private. Therefore, it is wholly appropriate that her perpetrator be put through comparable public scrutiny. Making rapists feel a parallel sense of embarrassment encourages rapists to empathize with the humiliating public experience they have forced upon their victims.

The animal or bestial associations with shame sanctions also make shaming particularly appropriate in the rape context. Whitman suggests that shame involves a sudden "reverting of our attention to the animal-like existence of the body, so narrowly circumscribed in time and space, with its whole crowd of bodily necessities."²⁷¹ As discussed previously, many people condone or at least explain rape because it is part of men's inescapable animal-like existence.²⁷² People believe, and some biological research suggests, that human males, like other male animals, are genetically driven and biologically compelled to rape.²⁷³ If these men rape because they cannot exercise the kind of restraint, responsibility and rational analysis that is supposed to demarcate adult human existence, then temporarily accentuating their animal like natures may well hasten men to cultivate the adult human qualities that they seem to be lacking. If the legitimacy of men's lack of civility excuses their conduct, arguments for a more civilized punishment mechanism seem inapt.

The sanctions suggested here are likely to emasculate the date rapists in ways that will help de-link sexual conquest from masculinity. They may not perfect the appropriate levels of shame and emasculation, but they propose a paradigm for punishing date rape that goes to the core of rapist motivation. Other public sanctions may be able to attack that motivation also. The emphasis of any chosen sanction should not be on stripping the punished individual of his dignity, but on making him and others in the community understand that a wrong has been committed in the name of a masculinity quest that ultimately must not be honored. Norms that allow men to continue to bestow esteem based

²⁷¹ Whitman, *supra* note 230, at 1078 (quoting Max Scheler, *Über Scham und Schamgefühl*, in *I SCHRIFTEN AUS DEM NACHLASS* 65, 69-77 (Maria Scheler ed., 1954)).

²⁷² See *supra* notes 22-23 and accompanying text.

²⁷³ See, e.g., Lee Ellis, *A Synthesized Biosocial Theory of Rape*, 59 *J. CONSULTING & CLINICAL PSYCHOL.* 631, 632-33 (1991) (stating the proposition that "as a result of natural selection, the average sex drive of a male is stronger than that of a woman"); Palmer, *supra* note 22; Thornhill & Thornhill, *supra* note 22, at 363 ("Men have certain psychological traits that evolved by natural selection specifically in the context of coercive sex and made rape adaptive during human evolution.").

on their sexual "success" are norms that put women at risk. Date rape sanctions do not have to tear a perpetrator down completely, but they have to make rapists, potential rapists and their peers understand that they cannot continue to link their self-worth to a practice that ignores women's autonomy and dignity.

CONCLUSION

Shame sanctions offer an opportunity to ambiguate the meaning associated with sexual activity such that the instrumental use of sex, by men, to enhance their own masculinity becomes much more risky. As currently understood, sexual activity is an esteem-enhancing behavior that reinforces a masculinity norm in male dominated environments. Men use sex to enhance their own masculinity. As a concrete, behavior specific norm, the frequent sex norm is subject to manipulation and change, however. The sanctions proposed here try to effectuate that change by subverting the meaning of the behavior specific norm such that it becomes not about enhancing masculinity but about attributes at odds with the socially understood meaning of masculinity.

Alternative sanctions are necessary because of the particular problems that the criminal law faces in combating date rape. Well established norms condone raping behavior as appropriate because it is masculine, biologically inevitable because of the male sex drive, and understandable because of the socially accepted prohibition on explicit communication. These norms make it very difficult for people to internalize the wrong associated with date rape. Without such internalization, the criminal law's task in proscribing date rape is almost insurmountable. The constitutional protections afforded to defendants and the fact that most date rape trials revolve around the issue of consent also make it very difficult to prove date rape beyond a reasonable doubt. Without more convictions, it is even harder for people to understand that the law and society condemn date rape.

In his book on drunk driving, H. Laurence Ross suggests that because drunk driving is a "predictable product of our social institutions,"²⁷⁴ the most effective way to curb the behavior is not a "threat of punishment" but an "attempt to reduce the motivation [to engage the behavior] through manipulating its social sources."²⁷⁵ As Parts I and II explained, date rape is also the predictable product of the social institutions that encourage it. Because of this, date rape is both common and difficult to punish because people refuse to treat the

²⁷⁴ Ross, *supra* note 218, at 5.

²⁷⁵ *Id.* at 74.

conduct as deviant. We refuse to imprison date rapists just as we resist imprisoning drunk drivers.²⁷⁶

Alternative sanctions address this problem by focusing not on the behavior itself, but, as Ross suggests, on the incentives that motivate the behavior. In communities that have the freedom to adopt less rigid fora of adjudication and in communities that are interdependent and able to absorb, with some degree of uniformity, an official message of condemnation, shaming sanctions can attack motivating incentives by making it clear that date rapists are not worthy of esteem. Indeed, date rapists are weak and dependent and a source of embarrassment for the entire community. They are also, however, members and products of a community, and tackling the problem of date rape requires addressing that behavior in the context of the community that fosters it.

The world is much bigger, of course, than the sum of its university campuses and there are many, many date rapes that happen in communities unable to use the kind of sanctions explored in this article. The under inclusiveness of the remedy does not rob it of its influence, however. Over fifteen million people attend college in this country²⁷⁷ and countless others are related to those that do. The sample size effected by these remedies may not include everyone in this country, but it includes a sizable number. Moreover, the people who are affected are likely to be those in the best position to help shape social norms elsewhere. People who go to college are less likely to be a part of subcultures that shun social norms and they are more likely to be esteemed members of their communities. As such, they are more likely to be able to be what Cass Sunstein calls "norm entrepreneurs."²⁷⁸ Norms do not always change from the top down, but if a desire for esteem helps explain the existence of norms, people with esteem are in the best position to be able to affect norms.²⁷⁹ If alternative sanctions can help change the sexual norms of today's undergraduate population, there is likely to be a normative ripple effect of considerable magnitude.

²⁷⁶ Mandatory jail sentences for drunk driving corresponds to increases in the numbers of "dismissals and not guilty findings." *Id.* at 58. Ross notes that judges in drunk driving cases (like juries in date rape cases) are aware of the stigma that accompanies a jail sentence and believe in a "moral distinction" between drunk drivers and other criminals. *Id.* at 56-57.

²⁷⁷ See Tamar Lewin, *American Colleges Begin to Ask, Where Have All the Men Gone?*, N.Y. TIMES, Dec. 6, 1998.

²⁷⁸ Sunstein, *supra* note 211, at 909.

²⁷⁹ For instance, when Michael Jordan wears a hoop earring, it becomes much easier for other men to do so.

Furthermore, college campuses do not exist in a vacuum. The press reports on what happens on college campuses.²⁸⁰ Consider the recent coverage of political correctness debates, sexual harassment and hate speech codes on college campuses. There is every reason to believe that the press will publicize these incidents.

In certain situations, the type of sanctions proposed here may also be appropriate for criminal convictions. Shaming critic Toni Massaro even concedes that criminal shaming may work "in proper contexts, through proper methods, and subject to appropriate limits."²⁸¹ If a criminal court judge can identify a young, status-hungry man who has raped more out of carelessness and a desire for esteem than out of anger or venality, and that man has a discernible desire and need to be a part of a community that can shame him, substituting public display for imprisonment may be worthwhile.

Even if the brunt of the norm alteration occurs on college campuses as a result of administrative decisions, however, it is important because it begins an effort to emasculate sexually aggressive behavior and reformulate rules of sexual interaction. If the risk to college men of using sex to enhance their own esteem is a risk to their masculinity, men's tendency to view sex as a masculine privilege and biological inevitability will likely decrease. The less people view sex as a masculine privilege and biological imperative, the easier it is to view it as a process or a medium for communication²⁸² through which the ultimate goal is mutual enjoyment or intimacy.²⁸³ Once sex is viewed as a fundamentally mutual assertive experience, nonconsensual sex ceases to represent some form of fungible alternative to consensual sex, and is seen as something truly "other." It will be easy to condemn the date rapist when nonconsensual sex is viewed as something truly "other," like having sex with a four year old.

If communities are to stop rapist behavior, they must reach out to the rapists themselves and those most likely to encourage the raping activity. The goal is not simply to label date rapist behavior as "other," but make people understand why it is "other." It is "other" because it

²⁸⁰ See, e.g., Schaefer, *supra* note 150, at 61 (criticizing the sexual consent policy at Antioch).

²⁸¹ Massaro, *Meanings*, *supra* note 197, at 649.

²⁸² Lois Pineau writes that lovemaking should be viewed as "the practice of a communicative sexuality, one which combines the appropriate knowledge of the other with respect for the dialectics of desire." Pineau, *supra* note 146, at 234-35.

²⁸³ Martha Chamallas writes that "sexual conduct is mutual and acceptable when animating inducements are the parties' desires for sexual pleasure or for intimacy." Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 862 (1988).

hurts people. It is "other" because it is not about mutual pleasure and intimacy, but about selfish pursuit of one's own goals at the expense of another person's autonomy. It is "other" because it really is wrong. Because it is wrong, we must strive to make it about something other than masculinity.