Spring 4-2007

Twice Raped: The Failure of American Rape Laws

Ryan Frances Lacey
University of Tennessee - Knoxville

Twice Raped:

The Failure of American Rape Laws

Ryan Lacey

Senior Honors Thesis

Dr. David Reidy

26 April 2007

American society is inundated with sexual imagery, and yet the subject of sexual interactions among Americans remains completely taboo, largely kept out of classrooms, discussions between parents and their children, and insofar as meaningful discussions, among peers. Often times, even sexual partners discuss very little of their sexual relationships. In spite of the fact that sex is so prevalent in the American media, and society generally, people generally remain silent on topic in everyday life. The result is that the only exposure to sex that adolescents and young adults have when they begin engaging in sexual activity is that which they have seen in pop culture. This, in and of itself, is not entirely problematic. The media could quite easily portray responsible, healthy images of sex. Yet, this is not the case in America. Women are typically portrayed as either promiscuous, devalued prostitutes, or dutiful wives. However, the focus of this paper is not to indict the American media for poorly representing women. Instead, I will discuss the patriarchal context which has fueled the conditions for such views of women to exist, and how it has also stifled serious conversations about sex, such that the political power imbalance between men and women pervades even the most intimate moments they share. This is reflected in the primary focus of this paper: how the American patriarchy has influenced rape laws, rendering them useless, even damaging, to victims and making them political tools to entrench male dominance over women. Male oriented ideas permeate and dominate all aspects of our culture, including sex. This is why the sexual portrayal of women in the media is typically in the form of objects of sexual desire. And even when they are portrayed as a dominant sexual figure, they are portrayed either as promiscuous or as "acting like a man." Never are men and women portrayed as sexual equals. To illustrate this point, I will focus on the

philosophical debate among legal scholars, feminists, and philosophers over the deep problems and raging disagreements over rape laws.

Rape laws, though very specific in nature, are a striking example of political inequality between men and women, and how that inequality is manifested through imbalances of power in sexual interactions. Within the context of rape laws, I will focus primarily on the patriarchal development of rape laws, as well as three key issues regarding rape laws which remain controversial to this day: the issue of consent, the proof of resistance to force requirement, and the dangerous message rape laws convey about the sexual autonomy of women in America. First, I will discuss some problems with patriarchal culture, the negative effects of which fall almost exclusively on women. In such a society, rape is used as a political tool to institutionalize male dominance by proscribing gender roles for women. I will then discuss how historical societal views of women have developed and influenced current rape laws. Next, I will discuss modern rape laws and the problems they pose for women in today's society. All of these issues relate back to an overarching theme, which is that America is a patriarchal society, and, via the government and its policies, sex is in couched terms to reflect male domination in sexual interactions.

Rape as a Political Tool for Patriarchy

In our society, male dominance is masked as being the product of natural differences between men and women. The imbalance in power in sexual relations is not a product of the natural biological differences between men and women. Instead, it is the product of an overall political power imbalance in America known as patriarchy. Patriarchy is a unique form of oppression, whose force, at least in American society, has

particularly far-reaching implications into personal and public realms. As Michelle Lazar points out in her book, *Feminist Critical Discourse Analysis*, "It is not a cultural norm for each working class individual to be paired up for life with a member of the middle class or for every black person to be so paired with a white person. However, our ideology dictates just this kind of relationship between men and women" (3). Thus, while the effects of racism or elitist classism certainly have implications for private interactions which are strictly among black or lower class families, at least when people interact as black or poor people (independently of their gender) they are doing so as equals among themselves. This is not the case with gender oppression, which is as much a part of a wife, mother, or sister's private family life, if not more, than it is in her career or public life generally. Most people in American society at some point in their lives, are paired up with a member of the opposite sex, to whom they remain committed for the rest of their lives. And even before that occurs, people spend many years dating members of the opposite sex. Because of the patriarchal society in which we live, this means that women are constantly subject to experiencing political inferiority. Lazar's point is that while racism and classism surely exist in America, our social guidelines do not dictate that every black person be in search of a white person to be paired up with, to share tax breaks, to start families, etc—all of the things which men and women are socially expected to do. In our patriarchal society women are disempowered, their voices silenced and made trivial, patriarchy is justified, and forced sexual interactions which fall anything short of blatant threats or extreme physical abuse are often allowed to slide through the American legal system unpunished.

Here the point must be made that men, too, are often the victims of rape or other forms of sexual harassment. However, the numbers (outside of prison) are very small. In his book *Unwanted Sex: The Culture of Intimidation and the Failure of Law*, Steven Schulhofer writes, "There is no reason to think that men outside of prison are victimized anywhere nearly as often as women are" (14). The FBI reports that less than two percent of rape victims outside of prison are male ("Forcible Rape"). Male rape should not be trivialized, but undeniably rape is primarily a problem for females. Even when male rape occurs, the victim is commonly referred to as "The Bitch" by the aggressor, clearly feminizing the victim. The victim of male rape is viewed "as a woman," not as a man. Therefore, even when a man is a victim of rape, it is as a woman that he is actually victimized. Essentially, in our society, only women are raped.

Is it a coincidence that the only crime whose victims are almost exclusively female also happens to be one of the most difficult to successfully prosecute? The answer is no. The general problems with rape laws relate back to the patriarchal view of women perpetrated in the media, in the workplace, in classrooms, and in social interactions generally. Rape is as much a political hate crime as beating a homosexual or a black person. To de-politicize rape is to ignore the vast political, economic, and social power disparity between men and women in America, and further the long-standing but incorrect view that women are, and should be, mere objects of sex.

One could, and many do, attribute the problems surrounding rape laws to the unique nature of sexual relationships. Surely, sexual interactions, the motives behind engaging in them, and the emotions arising after the fact, can all be confusing, and are all subject to personal interpretation. There are a number of reasons for this confusion,

mostly cultural and arguably traceable to patriarchal norms. However, citing the problems with sexual interactions does not bring to light any good reasons why women have consistently been the victims of the failure of rape laws. In this sense, rape victims are twice raped—once by their perpetrators, and once by the legal system, while the perpetrators of these crimes have their own views about rape reinforced: they did nothing wrong and they are guilty of no crime. The people involved in the legal system, men and women alike, in an effort to *not* choose the *wrong* method of prosecuting and convicting rapists, have simply chosen not to do so at all, thus entrenching more and more deeply the patriarchal ideas of the normalcy of male dominance.

Schulhofer cites an incident which illustrates the extent to which the law "twice rapes" women and essentially legalizes rapist behavior. A young woman, whom Schulhofer calls Sandra, a student at St. John's College in New York, was riding home with a male friend, Michael, one night, when he invited her up to his apartment so he could borrow some gas money from his roommates to drive her home. Once inside, he offered her a drink, which she initially declined, but then accepted after Michael assured her "It's only vodka. It can't do anything to you" (7). After having three drinks and passing out, Sandra was raped repeatedly by Michael and three of his roommates. At one point she woke up and screamed, only to be slapped by one of Michael's roommates. Sandra reported the incident to the police, and Michael pled guilty to sexual assault, and agreed to testify against the three roommates. Another roommate, present at the incident but not involved, corroborated Sandra's story. The three defendants were acquitted. Their attorney argued that if Sandra was sober enough to remember what happened, she could have resisted but chose not to, which essentially amounts to tacit consent. If she

was so drunk that she actually passed out, then "her testimony lacked credibility" and "she knew she was getting drunk but continued to drink to cast off her inhibitions" (8). Sandra failed to not consent, which the jury somehow interpreted as her desire to be gang raped. Whether or not she was capable of resisting is irrelevant. Even with Michael's corroborative testimony, Sandra's brutal raping went unpunished. The focus of the trial was on Sandra herself, not on the defendant's or the circumstances of the crime.

Though Sandra's case is extreme, cases of this type are not unique. Especially when alcohol is involved, it seems that the American legal system hands sexual predators a get out of jail free card, unless the woman can prove she was literally so incapacitated as to have no control whatsoever of her faculties. Which leads her immediately back into the trap created by the defense attorney in Sandra's case; namely, if a woman is that drunk, how can she remember that she did not consent, especially if she cannot prove her assailant used force.

Imagine if the same were true for other crimes. Take simple assault for example. Imagine that person X went out for drinks one night, alone, then engaged in conversation with a fellow bar patron, person Y, which over the course of a few hours and several drinks, escalated into an spirited debate, (much in the same way a friendly conversation between a man and a woman might take a sexual tone over the course of an evening). Imagine that things begin to get very heated, and the two people decide to leave the bar to avoid a public scene, and they go to Y's apartment, where a particularly inciting comment prompts X to lay a hand on Y's arm (much in the same way a particularly flattering comment from a man might encourage his date to touch his arm in a flirtatious manner). Y then takes this gesture to mean that person X is just asking for a beating, and

Historical Images of Women: "The Lying Temptress"

Problems such as the courts' fetish-like focus on victims and the behavior of victims in rape cases and high percentages of unreported rapes can be attributed to the patriarchal context in which rape laws have developed, or perhaps more accurately not developed. Rape laws, to this day, still reflect an archaic view of women, which Rosemarie Tong refers to as "Lying Temptress" in her book, *Women, Sex and the Law* (99). According to Tong, in the thirteenth century, the secular and ecclesiastical systems of law began to merge in England. This yielded many positive results in many areas of the secular English common law, particularly the adoption of the *mens rea* requirement in proving the guilt of a defendant. Previously, one need only illustrate that a wrong had been done by a defendant in order to secure a conviction, not that the defendant intended to or even knew he or she was committing the act. Ecclesiastical law spurned the adoption of *mens rea*, which is a key element in criminal prosecutions to this day. However, as Tong points out, "Church law may have given Anglo Saxon law *mens rea*, but...it also infused in with the interrelated images of women as temptress and liar, two poisonous images that continue to pervade certain streams of Western thought" (99). Tong references Tertullian, the early Church leader, considered "father of the Latin church" as an early figure who deeply entrenched the "lying temptress" view of women in his works. In his work, *The Origin of Female Ornamentation, Traced Back to the Angels Who Had Fallen*, he describes the beauty of women as, "having proved a cause of evil...that became offensive to God" ("Tertullian of Carthage"). This view, furthered by the church, had an impact on rape laws that has not been eliminated to this day.

Tong's description of the portrayal of women as "Lying Temptresses" can be broken down into its two distinct parts, which, although intertwined, have each had a separate impact on the development of rape laws. First, the image of women as liars has had a tremendous effect on rape laws. Stephen Schulhofer writes, "Courts are obsessed with the idea that a woman might fabricate an accusation of rape, either because she feared the stigma of having consented...or because she was pregnant" (18). Perhaps the classic example of this "obsession" is the corroboration requirement, which was present in most state rape statutes as late as the 1970's, according to Schulhofer (38). Not only must a woman have medical corroboration, in the form of scratches, bruises, and proof of penetration, but often times in the form of eyewitness testimony (Taslitz 6-7). Immediately, several problems come to mind concerning this type of corroboration. First, rape is typically a crime committed in isolated areas, in which no eyewitnesses can be available, other than the victim and the defendant. Second, date rapes, or acquaintance rapes, may not produce physical evidence of the sort required for convictions, especially if the victim was incapacitated to the point where she could not physically resist. Third, a raped woman can be expected to be shocked, disturbed, frightened, even ashamed after being raped. These types of emotions can understandably prevent prompt reporting, which can compromise crucial medical evidence.

A more significant problem with the corroboration requirement in obtaining rape convictions, reflective of the influence of the image of women as liars, is that rape was the only crime which required corroboration of the victim's testimony before going to trial other than perjury (Tong 104). This fact alone illustrates how the traditional view of women as liars has influenced the development of rape laws. Perjury is a crime which

proceeds to assault person X, although person X never meant to incite violence simply by touching person Y's arm. To person X, it was just an emphatic gesture, simply expressed as part of the argument. Would law enforcement officials and courts take assume that because person X went out alone, and in fact *home* alone with person Y, consumed large amounts of alcohol, and then touched the arm of person Y that X actually *wanted* to be assaulted? Would the court assume that the two people were simply engaged in a friendly wrestling match in the privacy of their own home and that Y was well within the boundaries of assault laws? That a court would reach that decision is highly unlikely. However, if X were a woman, and Y a man, and the assault was rape, it is just as unlikely that the court would find Y guilty of rape. The court would interpret X's choices earlier in the evening as essentially consenting to sex with Y. X would be victim to two injustices: the rape itself and the utter failure of the legal system to punish Y for harming her.

Andrew Taslitz argues this double victimization is a primary cause for the high percentage of unreported rapes, "When the justice system fails to achieve adequate retribution, respect for that system and for the rule of law breaks down, and social conflict and tension escalate. In the case of rape, the victim feels abused, disregarded, raped again. Reported rapes decline" (59). The nation's largest anti-sexual assault organization, The Rape Abuse and Incest National Network, reports that 59% of all rapes go unreported ("Statistics"). Women don't report rapes because they are unlikely to see the man who raped them punished. They are only likely to have their own sexual history put on trial, to see defendants portrayed as innocent victims who must have their reputations protected.

solely deals with the untruthfulness of the perpetrator. The person accused of perjury is literally accused of being a liar, so it stands to reason that corroboration, independent of the accused, be required. Requiring independent corroboration in rape cases, then, has the effect of accusing the victim of being a liar, just as if she were accused of perjury. When this corroboration is unavailable, according to Tong, the likelihood of the case ever making it to trial is very small. Tong cites statistics from New York state in 1985, "2,415 rape complaints yielded only 34 indictments and only 18 convictions" (108). Of course, I am not suggesting that a man has never been falsely accused of rape. However, Tong writes that unfounded rape complaints make up only 2-3 percent of all rape complaints, a figure which is similar for all violent crimes (101). Despite figures such as this one, other crimes, such as assault, have no corroboration requirement.

Although strict corroboration requirements have been dropped from statutes on paper as a result of the Criminal Justice and Public Order Act of 1994 (McColgan 277), American patriarchy continues to devalue the testimony of women in practice, if not by statute. In addition to the traditional societal view of women as liars, our legal system favors defendants. The combination of these two factors effectively results in de facto corroboration requirements in cases. Andrew Taslitz attributes this to the attitudes of jurors who "demand corroboration, speculate about a victim's character, and hypothesize about motives for her to lie....The behavior of police and prosecutors now becomes more understandable: they are reluctant to spend scarce resources on cases where juries will not convict" (37). Women who have engaged in casual sex in the past are even more likely to be accused of lying about being the victims of rape. In her article, *Common Law and the Relevance of Sexual History Evidence*, Aileen McColgan quotes a study

conducted by Z. Adler called *Rape on Trial*, "The degree of fit between any reported rape and the 'ideal' rape has a profound impact on the chances that the complainant will see her alleged attacker convicted" (279). Here, an ideal rape is one in which "the victim is sexually inexperienced...whose assailant is a stranger and whose company she had not willingly found herself in" (McColgan 278). These are the types of rape that police, prosecutors, and judges are most likely to attempt to secure convictions. This luxury is not afforded to women who have had casual sexual relationships in the past. Prior chastity on the part of the victim is key for her testimony to be believed. McColgan affirms this idea by citing a passage from J. Wigmore's study *Evidence*. Wigmore writes, "The unchaste mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or victim" (McColgan 280). This link between sexual promiscuity and untruthfulness is tenuous at best. Wigmore, and others like him, may have a better case if they used past sex acts as an attack on the victim's morality, not on her truthfulness. Although truthfulness certainly contributes to a person's credibility as a witness, is it not at all clear that a person's sexual morality does, especially if the witness is forthcoming about her sexual past on the stand or in her public life generally. Furthermore, if people like Wigmore insist that sexual promiscuity is linked to a person's truthfulness and credibility, then perhaps past sexual pursuits should be presented as evidence in all criminal prosecutions, from shoplifting to simple possession. Attacking a victim's sexual morality on the stand amounts to little more than convincing a jury and judge that the victim, because of what some might consider a morally void lifestyle, is undeserving of sympathy or an opportunity to seek legal retribution on her perpetrator. Thus, the image of woman as liar, especially in matters

regarding sex, is entrenched by the American legal system. It has been institutionalized over the years so that now it is an accepted norm, both in the legal system, and American culture generally.

The persisting image of woman as temptress has had an equally significant impact on the development of rape laws. The story of Eve tempting Adam with the forbidden fruit has been transposed onto all women in American society and manifests itself during rape trials. The image of woman as a temptress is most visible in rape trials when the victim's character is essentially put on trial. In her book, *Images of Rape: The "Heroic Tradition and Its Alternatives,* Diane Wolfthal describes how the credibility of women as witnesses has steadily eroded since the sixteenth century, which is around the same time, according to Rosemarie Tong, the church's influence on legal processes began to discredit women discussed earlier. Wolfthal writes, "This legislated urban morality, with its tightening restrictions on social and sexual deviance for women...served to reinforce the belief that it was the sexual behavior of women, not of men, that was the real menace to society" (119). The idea of woman as temptress also can be fleshed out in the 'ideal rape' mentioned earlier. One ingredient in the concept of the 'ideal' rape is a sexually inexperienced woman. Tong writes, "Because criminal justice personnel tend to believe that women are predisposed to have sex with acquaintances, they also tend to take all acquaintance rapes with a grain of salt" (103). True, it is possible that the lines of sexuality are blurred between two people who know each other depending on their past relationship, or at least more so than between two complete strangers. However, this fact alone does not make the rape of an acquaintance any less likely than the rape of a stranger. If anything, an acquaintance would have greater access to a victim, thus

creating greater opportunities to rape her. A woman is unlikely to allow a complete stranger into her apartment, but certainly she would allow, even invite, an acquaintance. Total strangers are likely to have to jump on a woman alone, late at night. Premeditation would also be difficult for a stranger, unless he stalked his victim for weeks, tracing her habits. Otherwise, the victim would have to be completely random. Only by luck could a rapist approach and attack a victim, hoping she is completely unarmed and actually alone. An acquaintance would have the advantage of being able to plan an evening with his victim, and due to their relationship, he can assume that he would be able to catch her off guard. Despite all of these considerations, law enforcement officials as well as the court system, influenced by the idea of woman as temptress, think that all women are basically 'asking for it,' especially from men with whom they are familiar. Tong condemns the legal system for sending women the message that they are getting what they deserve as temptresses: "Today's woman may think that she has a right to initiate sexual activity, but when a sexual situation gets out of control or violent, she may see her assailant's determination for sex as a punishment for her boldness, carelessness, or fantasies" (120). This is an extremely dangerous message to women. It is blatant evidence of the existence of a patriarchal system in America. It is transparent control of a woman's right to choose the way she acts in any situation, and worse, a social manipulation of her feelings about the way she acts, implemented to maintain the imbalance of political power between men and women.

Steven Schulhofer also recognizes the problems associated with the commonly accepted perception of women as temptresses. In *Unwanted Sex*, he quotes a college freshman, "If I'm on a date and a girl's dressing sexy and acting sexy, why doesn't she

want to have sex? The women who say they feel humiliated when a guy whistles at them: deep down, they really like it, its boosting their egos" (47). This is a clear articulation of the image of woman as temptress. The assumption is that all women are trying to entice men with sex, and that these women feel gratified when they are recognized by men as the sexual creatures they truly are. This assumption persists, at least for the rapist, even the woman responds to that recognition in a negative way.

Beliefs like these can have alarming implications in sexual relationships. A 1992 survey found that 22 percent of American women felt "they had been forced to have sex, almost always by a husband, boyfriend, or close acquaintance" (Schulhofer 62). The same survey reported that only 3 percent of American men have ever felt like they have forced a woman to have sex (Schulhofer 62). So, either the same three percent of men in America are each forcing several women to have sex with them, or the remaining percentage of acquaintance rapists do not even realize they are forcing themselves onto their partners. Schulhofer fails to defend the study against the possibility that perhaps these men were simply ashamed or afraid to report they had forced sex with a woman, which could account for the gross disparity, but does report that the researchers noted, "There seems to be not just a gender gap but a gender chasm in perceptions of when sex was forced" (66). In legal proceedings, the most commonly accepted perception by juries, when there is conflicting perceptions of the event, seems to be that the woman actually really wanted to have sex with the man, and in fact communicated that to her aggressor in the typical female temptress way.

Women with sexual history are more frequently subject to this characterization, as they are more often characterized as liars about being raped. Past sexual activity may

even have a greater impact on jurors than evidence of the presence of a lethal weapon during the rape, or proof that the victim actually sustained injury, two pieces of evidence each of which should, by statute, secure a rape conviction, according to Aileen McColgan. She reports the findings of a 1996 study:

> Although any evidence that a woman was forced to submit to a sexual act against her will might be expected to persuade jurors of the defendant's guilt, neither variable significantly affected juror's judgments...In contrast, jurors were influenced by a victim's character. They were less likely to believe in a defendant's guilt when the victim had reportedly engaged in sex outside marriage, drank, or used drugs. (287).

Most women today, as well as in 1996, during this survey, have had premarital sex. Similarly, drinking is generally socially acceptable. Therefore, one would be hard pressed to find any woman, rape victim or not, who does not meet these qualifications. And yet, these factors are more convincing to juries than proof that a woman was forced to submit. This speaks volumes about what the pervasive viewpoints are regarding appropriate female behavior. Basically, almost any woman who engages in modern American social behaviors, such as drinking and premarital sex, is never the victim of a *rape*; instead, she is the willing object of pleasure.

The traditional view of women in American society as both liar and temptress, while greatly impacting the legal system in the form of rape laws, is essentially a cultural issue that cannot be eliminated statutorily. As Andrew Taslitz points out, police and

prosecutors have limited resources. Without proof such as corroboration and a victim with a virginal past, juries, brainwashed with archaic ideas about proper female behavior and roles in society, will continue to acquit accused rapists. With the historical perspective of rape laws, I will now examine current rape laws and their problems as a result of the impact cultural and legal history has had on societal views of women in America. Specifically, these problems include the proof of force requirement, the issue of consent, and how both of these problems relate back to a woman's sexual autonomy.

Problems with Modern Rape Laws

The Tennessee state legislature defines rape as, "unlawful sexual penetration of a victim by the defendant or of the defendant by a victim" (TCA 39-13-503). The statute goes on to outline specific circumstances, one of which must happen in order for a defendant to be convicted of rape: 1. Force or coercion is used to accomplish the act, 2. The penetration is accomplished without the consent of the victim and the defendant knows or has reason to know that the victim did not consent, 3. The sexual penetration is accomplished by fraud. In Tennessee, this form of rape is a class B Felony, punishable by up to thirty years in prison. Although the Tennessee law requires that only one of these three be met for a rape conviction, all three have serious problems which in practice allow rapists to avoid arrest by wary policemen, trial by prosecutors with limited resources, or convictions by juries skeptical of a woman's account of an unwanted sexual encounter. Because the legal system is typically very doubtful that the woman actually did not want to have sex, when rape cases actually proceed to trial, the evidentiary proof requirements go above and beyond what is required for most criminal prosecutions. This problem is not immediately evident from reading the statute, which seems to cover what

most people would consider rape. The problem is the opinion of the victim by the jurors and judges, who are influenced by the cultural perceptions of women described in the previous section of this paper.

The Tennessee version of rape laws reflects the requirements for most states in obtaining a rape conviction, but most states have similarly raised levels of proof. For example according to Steven Schulhofer, until recently in New York, "courts held that independent evidence must corroborate every material fact essential to constitute the crime" (27). Schulhoer cites a case in which a rape conviction was set aside during an appeal because the doctor who had examined a rape victim and testified during the original trial, who had also appeared three times to testify during the appellate case but was unable to due to continuances, was out of the country when the trial actually proceeded (28-30). Furthermore, the nature of proving these requirements in a court is such that they are essentially intertwined with one another, so that it is nearly impossible to prove a lack of consent without proving use of force or coercion. In practice, courts do not accept that a woman expresses nonconsent without proof that the perpetrator used force and that the woman resisted the force. According to Andrew Taslitz, segal reforms of the 1970s and 80s sought equal treatment between rape and other crimes, so that the corroboration and utmost resistance requirements would be dropped, cautionary instructions such as the infamous Hale's warning would be barred, and rape shields to eliminate the introduction of the victim's past sexual history into evidence. However, "the instrumental goals that the reformers sought to achieve by such equal treatment have eluded us...but the new laws did not foster a widespread rejection of patriarchal views"

(153-4). Rapists and their victims continue to be treated differently by the American legal system.

Most rape statutes require proof of the use of force in rape convictions. However, the law does not go on to define "force or coercion" in any clear way, except in cases involving clear instances of threats to a woman's personal safety. In the Tennessee Code Annotated, Coercion is defined as, "threat of kidnapping, extortion, force or violence to be performed immediately or in the future" (TCA). This definition immediately poses more problems for victims than it solves. It suggests that a woman must resist until the point at which her life is in serious jeopardy, at which point no matter which course the aggressor decides to take, a woman's bodily integrity is compromised. The question becomes, would I rather be raped before this man threatens to beat me or should I wait to be raped until he credibly threatens me with physical violence? If a woman chooses to submit to sex to avoid the risk of being kidnapped or beaten, essentially she has no legal recourse. The same is simply not true for other crimes. If a large man engages a woman in conversation, then shortly after demands that she give him her wallet, most courts assume that the woman has done so out of fear, and that the man is a thief. Courts do not assume that the woman wanted to give the man her money because of the pleasure she derives out of donating to people in need. The woman doesn't have to prove that she physically resisted. However, if instead of demanding the wallet, the man demands sex, suddenly the woman has to prove that she strongly resisted. In Schulhofer's words, "The courts have been far too quick to find consent in situations [of this kind] or to give the benefit of the doubt to men who claim they mistook the woman's fear for awe and sexual interest" (117).

Steven Schulhofer addresses the problems associated with the force requirement in rape laws. He writes, "The criminal law's continuing fixation on force means that a woman's right to determine the boundaries of her own sexual interactions is, at best, only partially protected. The law only guards against the risk of violent injury to life or limb" (11). Schulhofer recounts a rape story involving a young woman in Illinois. One afternoon, while bicycling in a somewhat isolated area, she was sexually assaulted: "he pulled off her pants, pushed up her shirt to expose her breasts, and subjected her to several acts of oral sex" (1). The man, Joel Warren, was a complete stranger, who struck up a seemingly friendly conversation ostensibly to get close enough to her to rape her. Warren was a foot taller than the woman and outweighed her by more than 100 pounds. Because the two were in a very isolated area, the woman did not yell out or scream, likely because she thought resistance was futile with no one around, and resisting might only incense her attacker. Warren was found guilty of sexual assault, but his conviction was set aside by a higher Illinois court. The court which set aside his conviction did so because, "the record is devoid of any attendant circumstances which suggest that complainant was forced to submit" (Schulhofer 1). Rulings like this one force women to choose between being beaten and then raped in order to have proof for a court, or to protect their lives but sacrifice their right to abstain from unwanted sex.

Along the same vein as the corroboration requirement, proof of resistance to the use of force is not required in other crimes. If a person has his wallet stolen from him on the street by a thief, he is not required to offer any proof that he tried to resist at all. He could just report the incident to the police, and then have the thief arrested and prosecuted. He could simply testify in court that, when the thief approached him, he immediately

offered up his wallet to avoid being beaten. Establishing that he did not consent to having his wallet taken would be relatively easy. Most jurors and judges would like assume that no one would actually want to have his or her wallet stolen, whereas in rape cases the original assumption by jurors and judges is that the woman actually wanted to have sex, especially when there is a lack of strong corroborative medical evidence proving that she physically resisted to the utmost, due to late reporting or some other reason. What could possibly account for this type of discrepancy in laws? Rape, unlike theft, is a crime which is almost exclusively committed by a male onto a female. A functioning patriarchy requires that social mechanisms, such as sexual relationships, be employed for political ends, such as creating a fully dominant male class. Andrew Taslitz writes, "The fear of rape among women not yet raped leads them to rely on male protectors, avoid nocturnal public spaces, dress modestly, and repress their sexuality" (154). Thus, rape has become a powerful political tool to prop up patriarchy, requiring that women live in fear of the possibility of being raped.

The commonly accepted idea that male sexual aggression is a biological given and that female resistance then submission is a social given both pose great barriers for victims attempting to meet the proof of force requirements in rape trials. Actions such as ripping a woman's clothes off, hoisting her onto a bed, and holding her wrists down are not likely to convince a jury that force was used, even if the victim offered verbal protests. The assumption is that sexual aggression is a natural impulse that all men live with, which biology forces them to act upon. Imagine if these same types of excused were allowed for other types of crimes. For example, if a person were excused from urinating in a public area because there are no bathrooms around and "nature called." Surely,

urination is recognized as a more urgent need than sex, and yet the natural urge of urination would not be an excuse in a court of law. Steven Schulhofer presents a scenario which illustrates this point:

> Suppose that homeowner leaves his bedroom window open on a hot night. In the early morning a stranger climbs through the window and steals the television. Is the stranger's urge for the easy buck an inevitable human instinct? Probably. Was the homeowner foolish to leave his window open? Perhaps. But do we was that the homeowner has only himself to blame or that he has really "consented"? Not for a minute. (13)

Furthermore, there is no proof that a man's sexual needs are any more imperative than a woman's sexual needs. The idea that men are far more sexualized than women is only an idea that is propagated in pop culture representations. If a woman has a natural impulse to kill her husband when he is caught sleeping with another woman, the law provides no excuse for such behavior, unless the woman can illustrate to a court that she was literally insane when she committed the crime. We accept that one major function of law is to control human impulses to act inappropriately so that society can function in a relatively stable manner. The classic articulation of this autonomy concept is that my freedom to swing my arm stops at the tip of your nose. Rape laws, by inviting the suggestion that men literally cannot control their physical impulses to have sex with women, mark a striking departure from classic tenets of liberalism upon which much of American law is based, and destroy a woman's sexual autonomy.

Force requirements pose an even greater threat to a woman's sexual autonomy for what they leave out. Requiring proof of the use of force in rape cases could possibly be considered a positive benefit for women if the definition of force were expanded to include any action which coerces a woman into having sex against her will. If authorities and courts began to consider other pressures as unacceptable force, such as when a husband threatens to abandon his wife and children, or when a co-worker threatens to spread false, career-ruining rumors, then greater respect for a woman's sexual autonomy could be achieved. This would require a shift away from the legal focus on proving use of force towards an emphasis on proving whether or not a woman's sexual autonomy was interfered with by her aggressor. To be sure, a new focus on sexual autonomy would create an entirely new set of problems. As Stephen Schulhofer points out, "If the law makes all nonviolent coercion illegal, must we condemn the college student who threatens to stop dating a girlfriend if she continues to spurn his requests to go 'all the way'?" (116). Of course, no one would agree to enlarging the scope of force to include that type of situation. To criminalize that sort of action would compromise the sexual autonomy of the boyfriend in the situation, who has a right to have consensual sex with a different woman if his girlfriend refuses. The problem becomes a question of where to draw the line.

Unfortunately for rape victims, the line has always been drawn incredibly far in favor of the defendant, far past the protections afforded defendants in other criminal cases. Schulhofer uses extortion as an example. He writes, "A person commits extortion if he obtains the victim's property by making any of the prohibited threats....The target of extortion almost always has alternatives...Yet if he submits to the threat, he is still treated

as a victim of extortion" (129). Schulhofer's insightful point is that when a person threatens another person, for sex, money, or anything, the focus of the threat should not be on the person being threatened. The person doing the threatening, in all criminal cases other than rape, is the person whose behavior is examined. The questioned behavior is that of the defendant who did the threatening, not that of the victim. Regardless of the actions of the victim, the defendant broke the law by issuing the threat. Never is the victim of extortion asked to prove how much and what type of force he employed to resist the threat of extortion. The same is simply not true for rape victims, whose behavior is often the focal point around which the entire rape trial evolves.

Rape trials also evolve around another question of the victim's behavior, namely whether or not she consented to sex with the aggressor. Clearly, consent is linked back to force, in that often a lack of resistance to force, in the minds of juries, equates to at least tacit consent, if not actual consent, by the victim. As rape trials have played out, it has become more and more clear that actual consent is unnecessary for a man to impose himself sexually on a woman. Rather, only a lack of non-consent is required. This reasoning is flawed. Essentially, either a woman absolutely says no, and physically resists, or else clearly she is willing to have sex. This is false. Failing to give positive consent is, and should be considered by courts to be, evidence that a woman does not want to engage in sex, or at the least, that she is unsure. Any other actions on her part are irrelevant. Stephen Schulhofer quotes a defense attorney, who epitomizes the typical reaction to this sort of proposal, "You not only have to bring a condom on a date, you need a consent form as well" (58). Outrageous responses to honest concerns about securing a woman's consent before sex only illustrate the lack of respect for women's

sexual autonomy in America. What exactly is so ludicrous about asking a woman if she wants to have sex before a man imposes himself on her? "Asking" here does not mean backing her into a corner, threatening to ruin her career, or worse threatening her life. In order for a woman to actually be able to decide for herself, she must be free of any pressures, physical or otherwise. Requiring that a defendant prove that he had consent is no more unreasonable than requiring the victim to illustrate her nonconsent. This is especially true considering the prejudice juries have towards rape victims.

The consent form proposal, while sarcastically proposed and clearly ridiculous, illustrates an important point about the American patriarchy. Proposals which would require a man secure positive consent before engaging in sex with a woman would in effect require that the two discuss having sex before becoming intimate. It would require that women be given an equal, autonomous role in sexual activities. If the sexual autonomy of women was recognized in society, then a fundamental shift in rape laws would be necessary. Instead of obsessing over whether or not force was used and nonconsent vehemently expressed, the question would become, was the victim's sexual autonomy violated? Were the advances of the perpetrator significant enough, no matter what form they are presented in, to limit the victim's ability to choose for herself whether or not she wanted to have sex or not? These sorts of changes would reduce the law's reliance on proof of physical coercion in rape cases.

This is not a revolutionary legal concept. For centuries, people have been afforded protection against having their physical property taken from them in any sort of way, not simply if it is literally beaten out of them. One would not say that a person is a victim of theft if I am able to persuade him to give me his wallet or I will block his

advancement within his career. He is a victim of extortion, and I am subject to prosecution under extortion laws. I did not, in the true sense, *coerce* him to give me his wallet, as he had a choice whether or not to actually give it to him. However, I did significantly affect his freedom to decide how he wishes to control his property, thus interfering with his autonomy. Steven Schulhofer describes how sexual autonomy is treated much differently than other concepts of autonomy, such as the right to control possession of your property:

> Sexual autonomy, almost alone among our important personal rights, is not fully protected. The law of rape, as if it were only a law against the "robbery of sex," remains focused almost exclusively on preventing interference by force. With minor exceptions, other infringements on our right to sexual self-determination aren't covered. (101)

Essentially, there is little protection against the extortion of sex, or any other way other than extremely violent physical force. This focus has left women helpless to defend themselves against many different types of unwanted sexual advances which could not be classified as forcible rape, and robbed of their sexual autonomy.

Of course, a shift towards a focus on sexual autonomy raises its own set of issues. Autonomy requires that a person lead which is truly her own, and that she is free to make decisions and judgments about her behavior in all cases whatsoever. However, no one would make the argument that any person's life is free from external influences altogether. All people are subject to a wide array of social pressures and obligations which most certainly compel certain behaviors in a very real way, even beyond the basic

restriction which requires that the swinging of my arm stop at your nose. People do not exist in a vacuum; people exist and operate in a society which imposes all sorts of norms and values upon them. This is a restriction on one's autonomy, as one can expect some sort of condemnation for choosing to ignore these norms and values, either social or legal. However, following these norms and adhering to societal values at least within a relatively wide range of degrees is an acceptable restriction on autonomy, at least insofar as these norms and values apply to all members of a society across the board. If men, women, whites, blacks, the disabled, etc., are all subject to the same sorts of pressures, then essentially everyone is on an equal playing field when considering whether or not all the individuals within all of these groups are able to achieve an acceptable degree of autonomy in which they are free from systematic domination or oppression at the hands of another group. However, the playing field is not equal when considering sexual relationships between men and women. I am not attempting to argue that in all cases whatsoever a woman can never freely enter into a sexual relationship with a man. What I am arguing is that in a patriarchal society such as our own, men and women are subject to entirely different social pressures as a result of societal norms and values. There are times in which these pressures are intensified to what could potentially be considered a criminal degree when a man co-opts them and then uses them to compel a woman to have sex with him against her will.

Schulhofer makes an important distinction regarding this idea: "We must not confuse two distinct issues—the wrongfulness of background conditions and the wrongfulness of individual conduct" (110). He gives the example of a young attractive woman sleeping with an older but very wealthy man and contrasts that situation with a

student who submits to her principal so that he doesn't prevent her from graduating. The difference is clear. Although one might question the morality of the first scenario, no one would call that situation rape. The second situation is clearly much more problematic. The crucial difference in Schulhofer's example, which alludes to the whole issue of autonomy, is that the person deciding whether or not to sleep with someone must remain free from suffering some harm at the hands of her potential sexual partner if she chooses not to have sex. Clearly, the woman having sex with the old man for money is not made worse off for refusing the offer. Her financial situation may not *improve* but she has lost nothing. The social background conditions which have led her to such a lifestyle may be subject to some criticism, depending on her individual situation. For example, if she is uneducated, poor, or led to believe that her only value to society is as a sexual object, one might criticize society for limiting her opportunities. However, criticism of this sort certainly should not lead to legal prosecution of the man with whom she is sleeping. On the other hand, the student loses her ability to graduate high school, something to which she is entitled (Schulhofer 99-114).

Shifting the focus of the law to upholding a woman's right to sexual autonomy is certainly not the ultimate solution to the problems associated with rape laws which has eluded lawmakers and legal theorists for years. A focus of this type brings about an entirely new range of problems which could easily be used to as excuses to further entrench the status quo. Laws focusing on sexual autonomy would still be legislated, enforced, and adjudicated under the great patriarchal umbrella under which we live; thus, rape laws could still be used to proscribe "appropriate" female behavior: that woman should not go out at night without a male protector, they should dress modestly in public,

and should not openly express sexual interest towards a man. These ideas about women are the real problem. While rape laws, as they stand, are wildly unfair and deeply flawed, social and cultural changes must come about if women are to see any real improvement. Improved statutes, more rape shield laws, and even improved methods of trying rape cases which shift the focus away from the victim's actions and towards the defendant's actions and the whether or not those actions constitute a true infringement on the victim's right to refuse sex would be helpful. However, such legal changes will not eliminate unreported rapes, or change the prevailing social attitude that men are naturally sexual aggressive and women submissive so therefore rape is acceptable. What the American society needs is a recognition of the political inequalities which persist between men and women and an open dialogue about how these inequalities are expressed and entrenched in unwanted sexual encounters of which women often find themselves the victim—the victim with no legal recourse. By making sex a taboo subject for honest and open discussion, especially honest and open political discussion, the machinery of our patriarchy has stifled this discussion, halting meaningful discussions which could foster advancements for made for women in a number of areas—most notably for the purpose of this paper—rape laws.

In America, sex has been pushed into a dark corner, to which the law simply does not extend. The law has evolved in most if not all areas of society since the days of kingly decrees to cover modern ideas such as liberalism and private property, but has failed to progress to a point where women are given actual and meaningful opportunities to seek legal redress when they are forced to have undesired intercourse. Current laws protect women's sexual freedom from life-threatening physical violence, but little else.

In fact rape laws may actually be damaging to women, by further entrenching and institutionalizing ideas of proper female behavior—not drinking around men, not going out alone, not living alone, and not engaging in casual consensual sexual relationships. These messages instantiate deeper inequality and force women to become more and more dependent on men, and seek single partners from whom they are expect to receive all the things they need for their well-being. In return, all they must do is resign their bodies. These are the markers of male domination over females, evidence of the existence of a patriarchal society in America. We live in a rape culture, which treats sex as a commodity, of which men are the brokers. Keeping discussions about the political nature of sexual relationships stifled helps to maintain this system and keeps women in a position to be dominated. We don't need consent forms. We need men and women to initiate sexual relationships as equals, and be able to discuss their feelings about engaging in sex with one another as equals.

Works Cited

Davis, Glenn. "Tertullian of Carthage." The Development of the Canon of the New Testament. 1997. 25 March 2007. <http://www.ntcanon.org/Tertullian.shtml>.

"Forcible Rape- Crime in the United States 2005." US Department of Justice Federal Bureau of Investigation. 2005. United States Government. 1 April 2007. <http://www.fbi.gov/ucr/05cius/offenses/violent_crime/forcible_rape.html>.

Lazar, Michele M. "Politicizing Gender in Discourse: Feminist Critical Discourse Analysis as Political Perspective and Praxis." Feminist Critical Discourse Analysis. Ed. Michele M. Lazar. New York: Palgrave MacMillan, 2005. 1-31.

McColgan, Aileen. "Common Law and the Relevance of Sexual History Evidence." Oxford Journal of Legal Studies. 16.2 (1996): 275-307.

Schulhofer, Steven J. Unwanted Sex: The Culture of Intimidation and the Failure of Law. Cambridge: Harvard UP, 1998.

"Statistics." Rape Abuse and Incest National Network. 2007. 3 April 2007. <http://www.rainn.org/statistics/index.html> .

Taslitz, Andrew E. Rape and the Culture of the Courtroom. New York: New York UP, 1999.

"Tennessee Code Annotated." Michie's Legal Resources. The Government of the State of Tennessee. 1995. 20 March 2007. <http://michie.lexisnexis.com/tennessee/lpext.dll?f=templates&fn=main-h.htm&cp=>.

Tong, Rosemarie. Women, Sex, and the Law. Totowa, NJ: Rowman & Allanheld, 1988.

Wolfthal, Diane. Images of Rape: The "Heroic" Tradition and Its Alternatives.

Cambridge: Cambridge UP, 1999.