Men, Women and Rape

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PANEL DISCUSSION

MEN, WOMEN AND RAPE*

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INTRODUCTION

Why Rape is Different1

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"Short of homicide, [rape] is the 'ultimate violation of self.' "2 Yet, comprehending the stigma and controversy of rape in this country re-

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1. This essay introduces a panel discussion on "Men, Women and Rape," one of a series of programs celebrating 75 Years of Women at Fordham Law School. I am most grateful for Fordham Law School's generous support in making this panel possible. I also thank Bruce Green for his helpful comments.
quires an understanding of why rape differs from other crimes on so many dimensions. This introduction to Fordham Law School's panel, *Men, Women and Rape*, summarizes briefly some of the unique historical, sociological, and psychological aspects of rape as a backdrop for discussions of its legal elements.

Much of the information about rape in this introduction was derived from *Rape in America: A Report to the Nation* ("Rape in America"), a recent analysis of empirical data collected on the forcible rape of a sample of women in this country. *Rape in America* was based on the results of two nationwide studies: (1) The National Women's Study, a three-year longitudinal survey of a national probability sample of 4,008 adult American women age 18 and over; and (2) The

N.Y. Times, Jan. 9, 1993, at A1. As one commentator noted, in Bosnia, the stigma and trauma of rape were more effective weapons of war than even homicide.

In Bosnia, rape, far from being a side effect of war, has become one of the indispensable instruments of war. . . . And as a weapon of war, rape works—sometimes even better than killing does. Killing may make martyrs, and thus inspire and strengthen the morale and solidarity of the victims. Rape, on the other hand, not only defiles and shatters the individual woman but, especially in traditional societies, also administers a grave, long-lasting wound to morale and identity. Rape penetrates the pride and cohesion of a people and corrodes its future.


4. Id. at 1. Forcible rape was defined conservatively as: "[A]n event that occurred without the woman's consent, involved the use of force or threat of force, and involved sexual penetration of the victim's vagina, mouth or rectum." Id. at back of title page.

The National Women's Study included the following questions about the elements of forcible rape:

- Has a man or boy ever made you have sex by using force or threatening to harm you or someone close to you? Just so there is no mistake, by sex we mean putting a penis in your vagina.
- Has anyone ever made you have oral sex by force or threat of harm? Just so there is no mistake, by oral sex, we mean that a man or boy put his penis in your mouth or somebody penetrated your vagina or anus with his mouth or tongue.
- Has anyone ever made you have anal sex by force or threat of harm?
- Has anyone ever put a finger or objects in your vagina or anus against your will by using force or threat?

5. There also have been a number of other empirical attempts to obtain information on the unique aspects of rape, although many of these studies are dated. For example, one of the most significant and frequently cited rape studies was conducted over thirty years ago. See Menachim Amir, *Patterns in Forcible Rape* (1971). Furthermore, data collected from the Federal Bureau of Information and victimology surveys appear to underreport the frequency of rape. See infra notes 28-30 and accompanying text.

6. *Rape in America*, supra note 3, at 1. The 4,008 women who constituted the probability sample for the National Women's Study consisted of two groups: (1) 2,008 women who were selected to represent a cross section of all adult women in the
State of Services for Victims of Rape ("The State of Services Study"), a survey conducted with respondents from a national probability sample of 370 agencies that provide crisis counseling to rape victims. Although there are methodological weaknesses with these studies, they provide the most recent and comprehensive account of women's experiences with, and attitudes towards, forcible rape.

Stereotyping and Stigma

Rape is different because it overwhelmingly involves male perpetrators and female victims. A focus on this male-female pattern should not, however, discount the severity of sexual assaults by males against males, which appear to be unjustifiably downplayed, or examined

United States, and (2) 2,000 women who were an oversample of younger women between the ages of 18 and 34. Id. The Study was based on three waves of telephone interviews concerning these women's experiences with forcible rape during the past year and over the course of their lives: (1) 4,008 agreed to participate in the Wave One interview; (2) approximately 85% (3,220) of the 4,008 women agreed to participate in the Wave Two interview a year later; and (3) 69% (2,785) of the 4,008 agreed to participate in the Wave Three two-year follow-up interviews, which are still in progress. Preliminary data from this Wave Three group were included in final data analysis for the Women's Study. See id. at 15.

7. Id. at 1. The National Women's Study, which was funded by the National Institute of Drug Abuse, and The State of Services Study, which was sponsored by the National Victim Center, were both conducted by the National Victim Center and the Crime Victims Research and Treatment Center at the Medical University of South Carolina. See id.


9. See Richard A. Posner, Sex and Reason 383 (1992) (noting that the "rape of either men or women by women is exceedingly rare, as is male homosexual rape outside of prisons") (citation omitted). According to 1990 estimates provided by the Department of Justice, 1.2 in 1,000 females were victimized by rape (both completed and attempted) as compared to only 0.1 in 1,000 males. Moreover, within the sample of 97,000 persons that the Justice Department used for its estimates, 10 or fewer men reported having been raped. Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 275, 756-59 (1991).

10. One source estimates that more than 290,000 males are sexually assaulted in penal institutions each year, as compared to 135,000 women. It is likely that both figures are underestimates. See infra note 29; Stephen Donaldson, The Rape Crisis Behind Bars, N.Y. Times, Dec. 29, 1993, at A11; see also A. Nicholas Groth, Men Who Rape: The Psychology of the Offender 118 (1979) ("Except for a few articles on the sexual assault of male inmates in an institutional setting, there is almost no attention given to the forcible sexual assault of adult males."); Michael B. King, Male Sexual Assault in the Community, in Male Victims of Sexual Assault 1, 1 (Gillian C. Mezey & Michael B. King eds., 1993) (noting that, until recent years, "there has been little consideration of sexual assault of men in the community"). For example, the National Women's Study did not examine rape statistics for either men or boys. See infra note 29. Regardless, there is compelling evidence that men suffer as much psychological and physical harm as a result of sexual assaults as do women. See, e.g., Craig L. Anderson, Males as Sexual Assault Victims: Multiple Levels of Trauma, in Homosexuality & Psychotherapy: A Practitioner's Handbook of Affirmative Models 145, 148-55 (John C. Gonsiorek ed., 1982) (noting the similar responses between men's and women's reactions to rape); Arthur Kaufman et al., Male Rape Victims: Noninstitutionalized Assault, 137 Am. J. Psychiatry 221, 223 (1980) ("Although little has been written about the effect of rape on males, it appears, that despite the con-
exclusively in the context of prison settings. Nor should an emphasis on this pattern minimize the even rarer occurrence of sexual assaults of males by females or of females by other females.

This overwhelming distribution does, however, highlight the special nature of rape. Relative to other crimes, rape reveals the dark side of the social and biological differences and potential conflicts between men and women.

Because of this pattern, rape can also evoke the worst aspects of gender and racial stereotyping for both males and females. The trolled reaction usually evident, male victims may experience major, hidden trauma."

As Susan Estrich emphasizes, "[t]he apparent invisibility of the problem of male rape, at least outside the prison context, may well reflect the intensity of the stigma attached to the crime and the homophobic reactions against its gay victims." Susan Estrich, Rape, 95 Yale L.J. 1087, 1089 n.1 (1986).

See, e.g., Michael B. King, Male Rape in Institutional Settings, in Male Victims of Sexual Assault 67, 70 (Gillian C. Mezey & Michael B. King eds., 1993) (estimating that between 19% and 45% of men in United States prisons have homosexual experiences); Wilbert Rideau & Ron Wikberg, Life Sentences: Rage and Survival Behind Bars 74 (1992) ("While many women live in fear of rape, so must the typical man walking into the average jail or prison in the nation, where rape and other sexual violence are as much a part of the men's gained existence as the walls holding them prisoner."); Anthony M. Scacco, Jr., Rape in Prison 3 (1975) ("The end result of victimization in a correctional institution is usually sexual aggression and domination as a political act based on a show of force."); Carl Weiss & David J. Friar, Terror in the Prisons: Homosexual Rape and Why Society Condomes It x (1974) ("Prisoners are convinced that prison rape is an integral part of the prison punishment system."); Amicus Brief for Prisoner, Farmer v. Brennan, 114 S. Ct. 1970 (1994) (No. 92-7247) (reviewing the literature on the extent of rape in prison); see also David M. Siegal, Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of Wilson v. Seiter, 44 Stan. L. Rev. 1541 (1992) (analyzing the more recent dangers associated with prison rape as a result of the potential risk of acquiring AIDS).

Some courts have incorrectly maintained that it is physiologically impossible for a man to be raped by a woman and therefore have discounted any such accusations, despite medical evidence to the contrary. See, e.g., People v. Liberta, 474 N.E.2d 567, 577 (N.Y. 1984) ("Although the 'physiologically impossible' argument has been accepted by several courts . . . it is simply wrong.") (citations omitted); see also William H. Masters, Sexual Dysfunction as an Aftermath of Sexual Assault of Men by Women, 12 J. Sex & Marital Therapy 35, 35-45 (1986) (discussing the cases of three men who became sexually dysfunctional after having been sexually assaulted by women); Philip M. Sarrel & William H. Masters, Sexual Molestation of Men by Women, 11 Arch. Sexual Behav. 117, 117-31 (1982) (discussing eleven reported cases of sexual dysfunction as a result of men being assaulted by women); Cindy Struckman-Johnson, Forced Sex on Dates: It Happens to Men, Too, 24 J. Sex Research 234, 234-41 (1988) (reporting that 16% of the male college students surveyed experienced at least one forced sex episode).

Such assaults are rare, although they do occur. See Tom Sullivan, Two Women Sent to Prison for Life in Rape, Boston Herald, Apr. 19, 1983, at 3.

See generally Susan Brownmiller, Against Our Will: Men, Women and Rape (1975) (describing rape as a crime of power and violence rather than a crime of lust); Groth, supra note 10, at 13 ("In every act of rape, both aggression and sexuality are involved, but it is clear that sexuality becomes the means of expressing the aggressive needs and feelings that operate in the offender and underlie his assault.").

Helen Benedict has thoroughly documented such stereotyping in her study of the media's coverage of four major sex crimes from the past decade: (1) the Greta and John Rideout marital rape case; (2) the New Bedford "Big Dan's" Gang Rape;
Glen Ridge, New Jersey, rape case is one of the more blatant recent examples of gender stereotyping.\textsuperscript{16} Examples of racial stereotyping were apparent in cases involving the Central Park Jogger,\textsuperscript{17} St. John's

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(3) the killing of Jennifer Levin; and (4) the Central Park Jogger case. Helen Benedict, Virgin or Vamp: How the Press Covers Sex Crimes (1992).


As one newspaper account explained, one of the four defense attorneys, Michael Querques, had "relied heavily on stereotypes about men and women." For example, Querques claimed that the alleged victim was a physically mature, "full-breasted, full-bodied," woman who was on birth control pills as a result of her having had intercourse from a young age. Bernard Lefkowitz, \textit{Teen Called Sex Obsessed}, Newsday, Oct. 17, 1992, at 74; see generally Peter Laufer, \textit{supra} (providing a complete overview of the Glen Ridge case); Robert Hanley, \textit{Defense Lawyers in Glen Ridge Abuse Case Say Woman Was Aggressor}, \textit{N.Y. Times}, Oct. 17, 1992, at A31 (discussing Querques' claims).

17. The media remains sensitive to criticism of its coverage of the Central Park Jogger rape case, an incident that drew particular attention—both for what the media did not do (no major news organizations ever revealed the accuser's name) as well as for what it did (stereotype, according to some, the racial differences between the victim and the defendants). See Benedict, \textit{supra} note 15, at 189-249.

The jogger victim, a young, white, successful, and well-educated investment banker, was raped and brutally assaulted on April 19, 1989, by at least six youths who were a part of a roving gang of 36 black and hispanic teenagers "looking for trouble." The gang jumped the victim as she was jogging in Central Park and, using a lead pipe and rocks, beat her to unconsciousness and raped her, leaving her for dead. She was found hours later in a puddle of freezing mud with one eye socket smashed, her skull and body battered and cut, and with so much loss of blood that doctors expected her to die. \textit{Id.} at 189-91.

According to Benedict, the media began immediate press coverage of the case with a "Beauty and the Beast" theme in which the victim (Beauty), depicted by her upper-class job and physical attractiveness, was continually contrasted with her attackers (Beasts), the savage and violent wolf pack. \textit{id.} at 193. Although any possible racial factors involved in the crime were initially denied, \textit{id.} at 201, the media's coverage of the suspects' profiles and explanations for why they raped created an uproar in much of the black community. \textit{Id.} at 202-49. The black press responded with the following accusations:

The press was racist to repeatedly use animalistic descriptions for the suspects. Such phrases would not have been used for whites.

\ldots
University, Mike Tyson and Desiree Washington, and the Glen Ridge defendants. Throughout American history, blacks in particular have suffered disproportionately when a crime has involved rape.

The press was racist to paint all black youths as being as bad as the assailants.

The press was racist to ignore the sympathy for the victim expressed by the Harlem community.

The press was racist to pay so much attention to the crime while ignoring similar crimes against black or Hispanic victims.

Id. at 216-18 (emphasis omitted).

18. Addressing the accusation by the black press that the mainstream press ignores the rape of black women, Benedict focused in particular on the St. John's University gang-rape case, in which the victim was black and foreign born and the accused were white and upper-middle-class. All were college students. The accused were acquitted. Id. at 219; See Lorrin Anderson, Boyz N St. John's, Nat'l Rev., Aug. 26, 1991, at 22; Stephen P. Scaring, The Real Story of the St. John's Case, N.Y.L.J., Aug. 9, 1991, at 2; E. R. Shipp, Sex Assault Cases: St. John's Verdict Touches Off Debate, N.Y. Times, July 25, 1991, at B1.


20. The media's accounts of the Glen Ridge rape case emphasized the fact that all those involved were white suburban teenagers. See Bill Turque, Gang Rape in the Suburbs, Newsweek, June 5, 1989, at 26. As Benedict has documented, the press in earlier decades focused with disproportionate frequency on the rape of white women by black men, regardless of the rarity of such incidents. See Benedict, supra note 15, at 25-42. Although the press has diminished this focus, these cases are still included in the news with "exaggerated frequency." Id. at 251. Perhaps for this reason, Newsweek explained that news editors covering the Glen Ridge case appear "intent on demonstrating that they will train the same harsh glare of coverage on young, white suburban defendants that they did on the black East Harlem teens arrested in the Central Park attack." Turque, supra, at 26.

21. This has been particularly true in the alleged rape of a white woman by a black male. See Brownmiller, supra note 14, at 230-38; Leon Higginbotham, Jr. & Anne F. Jacobs, The "Law Only As An Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia, 70 N.C. L. Rev. 969, 1057-60 (1992); Jennifer Wriggins, Rape, Racism, and the Law, 6 Harv. Women's L.J. 103, 104-17 (1983).

In one extensive study of 3,000 rape convictions in eleven southern states between 1945 and 1965, researchers found that blacks were seven times more likely to receive the death penalty than whites. See Marvin E. Wolfgang & Marc Riedel, Race, Judicial Discretion, and the Death Penalty, 407 Annals Am. Acad. Pol. & Soc. Sci. 119, 129-30 (1973). A black who was convicted of raping a white woman, however, was 18 times more likely to be executed compared to a black convicted of raping a black, a white convicted of raping a white, or a white convicted of raping a black woman. Id. In Coker v. Georgia, 433 U.S. 584 (1977), the Supreme Court held that the death penalty for the rape of an adult woman was "grossly disproportionate and excessive" and therefore prohibited as cruel and unusual punishment under the Eighth Amendment. Id. at 592. As one commentary notes, however, Coker could have "just as easily" held that the death penalty for rape violated the Equal Protection Clause. Higginbotham & Jacobs, supra, at 1060. Altogether, 405 of the 455 men who were executed for rape in this country were black. Id. Potential racial bias also prompted a recent move by black leaders to criticize a state judge's plan to punish through castration a black man.
Rape is unique because of the shame and stigma associated with it and the resulting psychological and physical harm. Such concerns have heightened with the advent of AIDS. Because of the stigma, accused of rape. Robert Suro, Amid Controversy, Castration Plan in Texas Rape Case Collapses, N.Y. Times, Mar. 17, 1992, at A16.

22. The stigma of rape was brought forth in The National Women's Study. Rape victims indicated that they were "at least somewhat" or "extremely" concerned about the following aspects of their rape, most particularly, whether others would know or what others would think of them if they did know. Rape in America, supra note 3, at 4. The frequency with which each response was received was as follows:

-Their family knowing they were sexually assaulted (71%)
-People thinking that the rape was their fault or that they were responsible for it (69%)
-Nonfamily members knowing they were sexually assaulted (68%)
-Name being made public by news media (50%)
-Becoming pregnant (34%)
-Contracting a sexually transmitted disease, not including HIV/AIDS (19%)
-Contracting HIV/AIDS (10%)

Id.

23. As described in Coker, 433 U.S. 584 (1977):
A rapist not only violates a victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. The long-range effect upon the victim's life and health is likely to be irreparable; it is impossible to measure the harm which results. Volumes have been written by victims, physicians, and psychiatric specialists on the lasting injury suffered by rape victims. Rape is not a mere physical attack—it is destructive of the human personality. The remainder of the victim's life may be gravely affected, and this in turn may have a serious detrimental effect upon her husband and any children she may have.

Id. at 611-12 (Burger, C.J., dissenting); see also Linda A. Fairstein, Sexual Violence: Our War Against Rape 81 (1993) ("[S]ex offenses occupy a unique place in the criminal justice system because of the more traumatic nature of the crimes, the most personal invasions an individual can sustain.").

24. According to Rape in America, rape victims showed relatively less concern about their exposure to sexually transmitted diseases because many of the victims were raped as children at a time preceding the AIDS epidemic. For this reason, The National Women's Study examined the major concerns of rape victims who had been assaulted in the past five years to assess whether they had any greater reaction to the threat of sexually transmitted diseases. The Study also was interested in determining whether these victims were more concerned about the possible public disclosure of their rapes stemming from the media attention directed toward the William Kennedy Smith and Mike Tyson trials. See Rape in America, supra note 3, at 5.

Findings showed that, compared to all rape victims, the more recent rape victims were: four times more likely to be concerned about acquiring HIV/AIDS as a result of the rape (40% vs. 10%); more than twice as likely to be concerned about the development of sexually transmitted diseases (43% vs. 19%); and they were somewhat more likely to be concerned about the possibility that their names would be made public (60% vs. 50%). Id.

Unfortunately, this comparative analysis conducted in Rape in America is statistically flawed, because it is erroneous to compare a subgroup with a larger group of individuals containing that subgroup. See Travis Hirschi & Hanan C. Selvin, Principles of Survey Analysis 260 (1973). Regardless, the analysis is still informative because the responses of the five-year rape group are credible in themselves.

The survey items presented in The State of Services for Victims of Rape were an alternative means of acquiring further information on this issue. These items incorpo-
rape victims are treated differently than other crime victims by most news media who do not publish a victim's name either at the time the rape is reported or when the victim testifies at trial. Survey respondents have also indicated that they would be far more likely to report rated responses from staff at 370 agencies that provide crisis counselling to rape victims, including those victims who may not report their rapes to the police. In total, 370 (or 74%) of the 498 eligible centers in the United States were contacted. Only two centers refused to cooperate. Rape in America, supra note 3, at 16.

A substantial number of those centers that did not participate were simply not able to assemble their information in sufficient time for the Rape in America report, although it appears that their information will be included in any future report. An eligible center was defined as an office which provided services to adult victims of sexual assault, apart from those limited to criminal reports. Id.

According to the agencies surveyed, victims' concerns had increased over the course of 1991 with regard to the following issues:

- Contracting HIV/AIDS (71%)
- Names becoming public (40%)
- Contracting a sexually transmitted disease (30%)
- Acquiring appropriate mental health counselling (23%)
- Non-family members knowing they were raped (17%)
- People thinking that the rape was their fault or that they were responsible for it (16%)
- Their family knowing they were raped (10%)
- Becoming pregnant (6%)

Id. at 9.

The differences in these responses may be due to a number of reasons, which include the following: (1) the agencies were responding for an obviously different group of rape victims, since the victims were old enough to attend the agencies and sufficiently traumatized to seek out professional help; and (2) the responses pertained to more recent rape experiences relative to those surveyed in The Women's Study, which spanned a lifetime or, at the least, five years. Regardless, the responses again highlight rape victims' privacy concerns concerning the effects of stigmatization.

25. See Deborah W. Denno, Perspectives on Disclosing Rape Victims' Names, 61 Fordham L. Rev. 1113, 1113 (1993). This "conspiracy of silence" is attributable in part to the media's recognition that rape involves more personal trauma and stigmatization than other crimes. See id.

According to the rape crisis agencies surveyed in Rape in America, the following efforts would help increase victims' willingness to report rapes:

- Public education about acquaintance rape (99%)
- Laws protecting the confidentiality of rape victims and prohibiting news media from disclosing their names and addresses (97%)
- Expansion of counselling and advocacy services for victims and their families (97%)
- Mandatory HIV testing of individuals who become indicted on sexual assault charges (80%)
- Free abortions and pregnancy counselling for rape victims who become pregnant (77%)
- Confidential free testing for possible transmission of HIV/AIDS or other sexually transmitted diseases to victims (57%)

Id. at 11. Nearly two-thirds (63%) of the rape crisis agencies supported laws prohibiting the disclosure of the names of those accused of rape until after an arrest is made. However, only 40% of the agencies' respondents favored such laws for those indicted of rape and 24% for those convicted of rape. Id. at 10.
a rape if their names were not disclosed, particularly in light of their knowledge of the circumstances surrounding highly publicized rape trials.

26. The National Women's Study reported that 78% of the rape victims and 76% of all American women surveyed favored legislation that prohibited the media from disclosing rape victims' names. Id. at 9. One-half of the rape victims questioned also said that they would be "a lot more likely" to report rapes if the media were prevented by law from acquiring and revealing their names and addresses. Another 16% were "somewhat more likely" to report under these circumstances, making a total of 66% who would be more likely to report under these circumstances. Moreover, 86% of all participants in the Women's Survey thought that victims would be "less likely" to report rapes if those victims believed that the news media would disclose their names. Id. at 6.

The service agencies were consistent with the responses provided by the victims and the non-victims who were surveyed. When asked whether they favored laws preventing news media from disclosing the names and addresses of sexual assault victims, 91% of the agencies "strongly favored" or "somewhat favored" such laws. Id. at 9. In addition, 96% of the agencies surveyed stated that media disclosure of names would make rape victims "less likely" to report crimes to police; no agency thought that involuntary media disclosure would increase victims' rape reports. Id. at 10.

Based on these data, Rape in America concluded the following:

During the past year, several high profile rape cases received vast publicity, with several respected news agencies straying from their standard wise policies of not disclosing rape victims' names. The argument has been made that disclosing rape victims' names would "destigmatize" the crime of rape and encourage victims to report rapes to police. It is extremely significant that rape victims appear to strongly disagree with this argument. . . . [Moreover,] it appears that women are just as likely in recent years to fear negative evaluation by others if a rape is disclosed, and are more concerned about the possibility of their names being made public.

Id. at 6.


Nearly two-thirds (66%) of all rape service agencies stated that the William Kennedy Smith rape trial lead rape victims to be "somewhat or much less likely" to report their being raped to the police. In response to the question of whether a victim would be less likely to report a rape as a consequence of the William Kennedy Smith rape trial, 71% of the agencies said that victims would be "somewhat less likely" to report; 20% said victims would be "much less likely" to report; 9% said victims would be "somewhat more likely" to report; and no agency said victims would be "much more likely" to report. In contrast, nearly half (48%) of the agencies stated that the Mike Tyson rape trial influenced victims' willingness to report rapes; however, most thought this influence was encouraging. Rape in America, supra note 3, at 12.

Whereas 82% of the agencies stated that women would be "somewhat or much more likely" to report rapes to police, 18% said that women would be "much or
Some commentators contend that rape is different because they believe it is the most underreported violent crime in the United States. According to the National Women's Study, thirteen percent of the surveyed women reported that they were the victim of at least one forcible rape in their lifetimes. Perhaps the most stunning finding, however, was that this figure was more than five times larger than those figures derived from the FBI Uniform Crime Reports and from the Bureau of Justice Statistics National Crime Survey, despite the more conservative definition of rape in the National Women's Study. Consequently, the National Women's Study found that a high proportion (eighty-four percent) of the rape victims did not report their rapes to the police.

Determining the accuracy of such information has significance far beyond whatever impact it may have for comparative crime reporting.
As Rape in America notes, "[u]nreported rapes are a threat to public safety in America." As long as rape victims refrain from reporting their rapes, rapists will remain free to rape others until they are apprehended. For example, there is considerable evidence that many rapists are recidivists. In one study of a sample of 126 unincarcerated sex offenders who admitted to having raped, the average number of different victims per rapist was estimated to be seven.

According to FBI Uniform Crime Reports, rape is also the most "overreported" violent crime because its "unfounded rate," or percentage of complaints that law enforcement agencies determine to be false or baseless, is higher than for any other serious ("Index") crime. Thus, in 1991, eight percent of forcible rape complaints were unfounded compared to an average of two percent for all Index crimes. Some claim that such data justify concerns over the potential for false accusations of rape.

Perhaps more than any other crime, rape is plagued by myths and misinformation. The Women's Study attempted to dispel this igno-

32. Id.
33. See id. There is also evidence that individuals will be more apt to rape if they perceive a low likelihood of receiving sanctions. See generally Ronet Bachman et al., The Rationality of Sexual Offending: Testing a Deterrence/Rational Choice Conception of Sexual Assault, 26 L. & Soc'y Rev. 343, 345 (1992) (stating that "the inclination to commit a sexual offense is willful and therefore subject to a rational calculation of utilities and disutilities").
35. Federal Bureau of Investigation, Uniform Crime Reports for the United States 24 (1992). When complaints of forcible rape are determined to be false, law enforcement agencies "unfound" the complaints and exclude them from their crime statistics. Id.
36. Id.
37. See, e.g., Ben MacIntyre, New York Lawyers Get Between the Sheets, Times of London, Oct. 15, 1992, at 11 (suggesting a "sex contract" to avoid the possibility of false rape accusations). Although the National Women's Study did not report information on unfounded complaints, other researchers have found the figure to be considerably lower than that provided by the Uniform Crime Reports. See, e.g., Lynn Hecht Schafran, Writing and Reading About Rape: A Primer, 66 St. John's L. Rev. 979, 1012 (1993) (citing, for example, a finding of 1.6% from a study in Portland, Oregon); Tom Coakley, Norwood Police Pursue Charge of False Rape Report, Boston Globe, July 8, 1992, at 23 (reporting prosecution of woman making false rape charge). For accounts of false rape accusations and how they are handled by police and prosecutors, see Fairstein, supra note 23, at 217-30; Abbe Smith, Prosecuting Sex Crimes in the 90s: A Defense Perspective, 17 Harv. Women's L.J. 227, 231-33 (1994) (reviewing Linda Fairstein, Sexual Violence: Our War Against Rape (1993), and Alice Vachss, Sex Crimes: Ten Years on the Front Lines Prosecuting Rapists and Confronting Their Collaborators (1993)); Stephen Buckley, Unfounded Reports of Rape Confound Area Police Investigators, Wash. Post, June 27, 1992, at B1; William Robbins, Sentence for Lie On Rape Charge Creates Debate, N.Y. Times, July 8, 1990, at A10; see also Malcolm Weller, Sexual Fantasies, Anesthesia, and False Accusations, 143 New L.J. 1471 (1993) (discussing false accusations in the medical context). Moreover, the FBI's estimates have been criticized based on the argument that myths about rape cause police to "unfound" rape reports. Schafran, supra, at 1011.
rance through detailed questions about the characteristics of rape victims and the consequences of rape. First, the Women's Study concluded that "rape in America is a tragedy of youth." Nearly two-thirds of all forcible rapes occurred during childhood and adolescence; over forty percent of the women surveyed were raped more than once. Second, over three-quarters of the victims were raped by someone they knew. Third, contrary to popular belief, most rape victims did not suffer serious injuries although nearly half feared that they would be injured or killed. Fourth, rape victims were substantially more likely to experience major health problems, such as depression and risk of suicide, relative to women who had never been raped. Fifth, other research has shown that the victim's attributes,

38. Rape in America, supra note 3, at 3.
39. Id. at 2-3. In total, 61% of all forcible rapes occurred during childhood and adolescence, 29% when the victim was less than 11 years old, and 32% when the victim was between the ages of 11 and 17. In turn, 22% of the rapes occurred between the ages of 18 and 24, 7% between the ages of 25 and 29, and only 6% when the victim was 30 years or older. Id. Although 56% of the women surveyed experienced only one rape, 39% were raped more than once, and 5% were unsure how many times they were raped. Id. at 2.
40. Id. at 4. Altogether, 9% were raped by husbands or ex-husbands, 11% by their fathers or step-fathers, 10% by boyfriends or ex-boyfriends, 16% by other relatives, and 29% by acquaintances who were non-relatives, such as friends and neighbors. Only 22% were raped by someone they did not know or did not know well. Id.
41. Id. Altogether, 70% reported no physical injuries, 24% reported minor physical injuries, and only 4% said that they suffered serious physical injuries. Nearly half (49%), however, said that they feared being seriously injured or killed during the rape. Id.
42. Id. at 7-8. The Women's Study focused on four problems: (1) post-traumatic stress disorder (PTSD); (2) major depression; (3) suicide; and (4) drug and alcohol consumption. Id. Relative to these problems, the Women's Study found that rape victims: (1) were 6.2 times more likely than non-victims to develop post-traumatic stress disorder, and they were 5.5 times more likely to have the disorder currently; (2) were 3 times more likely than non-victims to have ever experienced an episode of major depression, and they were 3.5 times more likely to be experiencing such an episode at the time they were questioned; (3) were more than 4 times more likely than non-victims to have contemplated a suicide, and they were 13 times more likely to have actually made an attempt; and (4) had substantially higher rates of drug and alcohol consumption and a greater chance of having drug and alcohol-related problems, relative to non-victims. Id. For example, rape victims were 5 times more likely to have engaged in the non-medical use of prescription drugs, they were 5.3 times more likely to have used cocaine, and they were 12 times more likely to have used hard drugs other than cocaine. Id. The Women's Study noted that most rape victims experienced their first rape prior to when they first began using alcohol, marijuana or cocaine. Id.

The Women's Study next examined the percentage of rape victims with and without post-traumatic stress disorder, who had two or more alcohol-related and drug-related problems. Compared to rape victims without PTSD, rape victims with rape-related PTSD were: (1) 5.3 times more likely to have at least two serious alcohol-related problems; and (2) 3.7 times more likely to have at least two serious drug-related problems. Relative to women who had never been crime victims, rape victims with rape-related PTSD were: (1) 13.4 times more likely to have at least two serious alcohol-related problems; and (2) 26 times more likely to have at least two serious drug abuse problems. Id.
rather than those of the defendant, affect how individuals will attribute blame when a sexual assault has occurred. Lastly, it is commonly perceived that rapes are more difficult to prosecute than other felonies in part because of the problems in establishing a motive as well as the crime's perplexing legal elements.

Debates concerning the legal elements of rape reflect the ways that rape is different from other crimes. Of particular concern are the elements of force and consent, which are the primary topics of this panel, *Men, Women and Rape*.

The three speakers for this panel stand out not only because of their professional accomplishments, but also because they have succeeded in approaching the topic of rape in a manner fitting for practical legal application and interchange.

Donald Dripps is a Professor of Law at the University of Illinois College of Law. He has also taught at Cornell Law School and Duke Law School. Professor Dripps is the author of many law review articles in the areas of Criminal Law, Criminal Procedure and Constitutional Law, including those appearing in *California Law Review, Yale*

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*Rape in America* provides no additional information about other factors in these rape victims' lives that may have contributed to their alcohol and drug abuse problems apart from the rape or rapes that they experienced. Nonetheless, the Study is perhaps still warranted in concluding that the "findings provide compelling evidence about the extent to which rape poses a danger to American women's mental health and even their continued survival because of the increased suicide risk." *Id.* at 8. Indeed, other research has shown that a victim's rape trauma can persist a minimum of three years and, in certain circumstances, it can be permanent. See Paul Marcus & Tara L. McMahon, *Limiting Disclosure of Rape Victims' Identities*, 64 S. Cal. L. Rev. 1020, 1032 (1991).


Dressler, *supra* note 43, at 531; Fairstein, *supra* note 23, at 81. The difficulty with convictions accords with some commentators' views that rape law has evolved differently from other kinds of criminal laws because rape was perceived to be different from other kinds of crimes. See, e.g., Cynthia Ann Wicktom, *Note, Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 Geo. Wash. L. Rev. 399 (1988) (noting that the underlying assumptions of rape law are that it is difficult to distinguish rape from voluntary sexual activity, offenders rape because of sexual desire, and a victim's complaint must be scrutinized because women are viewed as suspicious).

As Susan Estrich has explained:

> What I have been fighting for, over these years, is not to give rape special treatment... but rather to stop treating it specially; to get rid of both the rules and the prejudices that have narrowed the scope of the crime far more than the words of the statutes, and have uniquely increased the burdens and obstacles to prosecution.


Linda Fairstein is Chief of the Sex Crimes Prosecution Unit and Deputy Chief of the Trial Division of the New York County District Attorney's Office. She has personally tried or been involved in numerous prominent rape prosecutions, including the Robert Chambers Preppy Murder Trial and the case of the Central Park Jogger. Ms. Fairstein has been featured in many magazines and other media profiles, including the book The Trial Lawyers: The Nation's Top Ten Litigators Tell How They Win.47 She also recently authored Sexual Violence: Our War Against Rape,48 which documents her experiences and insights on prosecuting rape offenses.

Robin West is Professor of Law at Georgetown University. She has taught at several other law schools, including Stanford and the University of Chicago Law School. Professor West is the author of Narrative, Authority, and Law,49 a collection of essays about law and literature, and the forthcoming book, Progressive Constitutionalism,50 a collection of essays on the meaning of the Fourteenth Amendment. She has also written extensively on various topics in jurisprudence and feminist legal theory. Recently, Professor West wrote a response to Professor Dripps' Columbia Law Review article as the author of Legitimating the Illegitimate: A Comment on "Beyond Rape,"51 which also appeared in Columbia Law Review.

As you will notice, these speakers do not all agree on all issues. This, of course, makes the exchange far more interesting.

46. Dripps, Beyond Rape, supra note 45.
48. Fairstein, supra, note 23.
51. West, supra, note 45.
Each panelist was allotted twenty minutes for initial remarks. Two further rounds of discussion followed the initial remarks, concluding with questions from the audience and further debate among the panelists.

Remarks by Professor Dripps

Our topic is "Men, Women and Rape," a topic which is connected to two of the broadest and most passionately debated contemporary ideas: the idea of sexual equality and sexual diversity. Given those connections, the space between platitude on the one hand and provocation on the other is dauntingly narrow. I want to explore that space equipped with the modern law professor's standard bag of intellectual tricks—just enough philosophy, just enough economics to be dangerous, tempered by the wealth of human experience reposed in the reported cases.

Let me, in true law professor style, begin with the cases. The first of these is the case of Russell West, the so-called "Midtown Rapist," with which Linda Fairstein begins her book, Sexual Violence. She begins the book by describing one of West's crimes: a young office worker leaves her desk for lunch. She is alone on the elevator on the way down when the elevator stops at the sixteenth floor which, unknown to her, is now vacant. When the elevator doors open, West gets in, draws a knife, demands the victim's money and her jewelry, and then forces her at knife-point into the ladies' room. He threatens to kill her if she doesn't do exactly what he wants. Then he forces her first into a stall, then onto the tile floor, where he has sex with her while holding the knife against her ear. The ordeal lasts perhaps an hour. When he leaves she collapses, sobbing, on the toilet seat. A moment later he's back. "Hey," he says, "did I leave my newspaper in there?" The terrified victim slides the New York Post out under the stall. Before West takes the paper, he says, "thank you," then leaves.

The second case is Commonwealth v. Berkowitz, a case from the Intermediate Appellate Court in Pennsylvania, still pending on direct review in the State Supreme Court. In the spring of 1988, Berkowitz and the victim were students at the East Stroudsburg State University. On April 19, after attending classes, the victim had a drink in her dormitory room before going to try to meet her boyfriend, with whom she had quarreled the night before. Some ten minutes later she walked to her boyfriend's dorm to meet him, but he hadn't arrived yet. To kill

52. Fairstein, supra, note 23.
53. Id. at 19-23.
the time the victim went looking for a friend, Earl Haskell, who was Berkowitz's, the defendant's, roommate. She went to the Haskell-Berkowitz room, knocked on the door, got no answer, tried the door, and went in. Berkowitz was on the bed. The victim asked which bureau was Haskell's, her friend's, and she left a note on the Haskell bureau. Berkowitz then asked the victim to hang out for awhile, and she agreed to do that. He asked her if he could give her a back rub, which she refused, saying that she didn't trust him. He asked her to sit on the bed, but she sat on the floor. They chatted for awhile. Then Berkowitz moved onto the floor and began kissing and fondling the victim. He tried to put his penis in her mouth. All the while she said "no" and "I've gotta go." He locked the door, but she knew that the door only locked from the inside.56

What follows is quoted from the Pennsylvania Court's opinion:

Then, in the victim's words, appellant 'put me down on the bed. It was kind of like—he didn't throw me on the bed. It's hard to explain. It was kind of like a push, but no.' She did not bounce off the bed. 'It wasn't slow, like a romantic kind of thing, but it wasn't a fast shove either; it was kind of in the middle.' Once the victim was on the bed, appellant began straddling her again while he undid the knot in her sweatpants. He then removed her sweatpants and underwear from one of her legs. The victim did not physically resist in any way while on the bed because the appellant was on top of her and she 'couldn't like go anywhere.' She didn't scream out at any time because 'it was like a dream was happening or something.' Appellant then used one of his hands to 'guide' his penis into her vagina. At that point, after the appellant was inside her, the victim began saying, 'no, no' to him softly, in a moaning kind of way because 'it was just so scary.' After about thirty seconds, appellant pulled out his penis and ejaculated onto the victim's stomach. Immediately thereafter, appellant got off the victim and said, 'Wow! I guess we just got carried away.' To this the victim retorted, 'No, we didn't get carried away; you got carried away.' The victim then quickly dressed, grabbed her schoolbooks and raced downstairs to her boyfriend who was by then waiting for her in the lounge. She began crying. They went to the boyfriend's room. The boyfriend washed her, cleaned Berkowitz' semen off her stomach, and the boyfriend then called the police.57

On these facts the court held that Berkowitz could not be guilty of rape, which is defined in Pennsylvania as "engaging in sexual intercourse with a person other than a spouse by forcible compulsion or by threat of forcible compulsion."58 In reaching this conclusion, the Pennsylvania Court is quite unexceptional. Absent force extrinsic to

57. Id. at 1340.
the penetration, there is no rape or sexual assault under the law of every American jurisdiction except New Jersey.59

The thesis underlying the law is that the two cases that I have described are fundamentally different. West's conduct amounts to the second-most serious felony on the books and Berkowitz' conduct amounts to no crime at all. This distinction, based on the presence or absence of force, has been attacked by commentators, primarily, but not exclusively, feminists. In their view, the cases of West and Berkowitz are fundamentally similar. The distinction favoring Berkowitz, drawn by current law, reflects from this account less a rational value judgment about the culpability of force than the political dominance of male over female interests in the political process.

My own thesis rejects both the present law's absolute insistence on force before imposing criminal liability and the focus of feminist commentators on sexual autonomy or consent. Rather, under the statutes I propose, West would still be guilty of an extremely serious felony and Berkowitz would be guilty of a serious misdemeanor or a low-grade felony. In both cases the government's case would not need to disprove the victim's consent.

In a case like West, involving sexually motivated assault, the government would have to prove the defendant injured or threatened to injure the victim for the purpose of causing her to engage in sex. In a case like Berkowitz, involving what I call "sexual expropriation," the government would have to prove that the defendant engaged in a sex act with the victim knowing that the victim had expressed the refusal to engage in that particular sex act. This approach depends on distinguishing sex as such, from violence. I don't find that distinction problematic.

Sex may be unpleasant, but it is not the equal of a physical assault. Although she surely suffered, the victim in the Berkowitz case suffered less than the victim in the West case. As I put it in my article, people generally, male and female, would rather be subjected to unwanted sex than be shot, slashed or beaten with a tire iron.60

In cases of sexual violence, the advantages of my proposal derive from abandoning the present law's focus on the victim's psychology. At present, the law recognizes an absence of consent as a fact necessary to any conviction for rape, and understands consent as a mental state of the victim. This focus on consent in cases of sexual violence caused little doctrinal difficulty in the days when the law required the victims to "resist to the utmost" the rapist's attack. Since the absence of resistance meant the presence of consent, there could not be the case of force and consent, or of non-consent without force, and the


60. Dripps, Beyond Rape, supra, note 45, at 1801.
rapist could hardly plead that he was reasonably mistaken about the victim's non-consent when non-consent could be found only after the rapist prevailed in a fistfight with the victim.

With the unmourned demise of the resistance requirement, however, complications arise. The government now must prove not only what was in the victim's mind, but, in many jurisdictions, what was in the defendant's mind regarding what was in the victim's mind. Thus, the focus of the trial is removed from where it belongs—on what the defendant thought and whether that was culpable—to what the victim could have thought and whether that was culpable.

The rape shield laws now prevent the defense from proving past sexual history or reputation for sexuality. These laws are constitutional only to the extent that the evidence they bar is irrelevant. So long as the law requires the jury to focus on the victim, rather than the defendant, the shield laws are pretty difficult to justify on the basis of relevancy, at least in some of their more interesting applications. We can talk about this.

Privacy, for good or no, has been expressly rejected by the Supreme Court as a justification for excluding exculpatory evidence. By contrast, under my proposed sexually motivated assault statute, the government would not need to prove anything about the victim's psychology. She could be eager to have sex with the defendant, and yet, if he threatened her for the purpose of causing sex out of the mistaken belief that he needed to threaten her to obtain her sexual cooperation, he would be guilty nonetheless. Nothing about her sex life, or her clothing, or her reputation would be relevant in determining whether or not he threatened her for the purpose of causing sex.

Likewise, my proposed sexual expropriation statute dispenses with consent as a psychological category. In a case like Berkowitz it wouldn't make any difference whether the victim was moaning "no" because she was scared, to quote the victim's testimony, or because she was "amorously, passionately responding to his advances," to quote the defendant's testimony. It wouldn't even matter that he believed that her expressed refusal was a thinly veiled act of encouragement. If he heard her say "no," he would be guilty of sexual expropriation.

Why? If a woman really wants sex, why should we punish a man who understands "no means yes?" And why do we treat "yes" as immunizing the subsequent sex from criminal liability except in those cases in which "yes" is motivated by the threat of violence? Those questions sound cogent, but we might as well ask why women should be recognized as free and equal citizens rather than as beings of marginal competence who should be made wards of the state were it not for their numbers.

Anyone who wants sex can learn to say "yes." No one who says "no" should be subjected to another's sexual advances. Any woman
who says "yes" because of the pressures of an unjust world deserves our efforts to make the pressures of the world less unjust. But she also deserves our respect for whatever she chooses.

I do not exclude the possibility that there may be some particular pressure to say "yes" other than threats of violence that ought to be legally condemned. For example, under Title VII the law has developed to forbid conditioning employment on sexual cooperation.\(^6\)

That example, however, suggests skepticism rather than enthusiasm for broadening the criminal law's role in the regulation of sexuality. There seems to be no demand that sexual harassment be made a criminal offense. Civil sanctions seem adequate to the task and can be invoked without surmounting the constitutional hurdles of the criminal process.

I am even more skeptical about any legal prohibition of non-consensual sex in general. All that consent can mean is that the causes of conduct are morally acceptable. Sooner or later we must inquire into the specific causes of sexual cooperation and evaluate them according to the moral values that apply to human interactions generally. Any celebration of sexual autonomy as such, any celebration of unconstrained sexual choices, seems to elevate casual, anonymous sex to the status of an ideal. That ideal has its defenders, but I know of none who would condemn as immoral, let alone criminalize, committed sexual relationships because of the constraints that apply to them.

Nor do I believe that generalized notions of sexual autonomy can be rescued by resort to the idea of mutuality, the idea that both partners derive sexual pleasure from the sex. That idea seems to presuppose a similarity of erotic experience between men and women, a similarity that denies gender differences and seems foreign to the experience of many people. Whatever we give and take when we make heterosexual sexual love, we are giving and taking different experiences depending on our gender. If that is so, there seems to be no principled distinction between exchanging female erotic pleasure for male erotic pleasure on the one hand, and exchanging male erotic pleasure for financial security, for status, or what have you on the other.

Even if "erotic" meant the same thing to men and women, I would not understand why it would be immoral for an individual of either gender to make love for reasons other than physical pleasure. There are, no doubt, many unjust or unworthy reasons for making love, but they are not unjust or unworthy simply because they appeal to the mind rather than the body.

So whether we are pragmatists in epistemology or not, I think we have no choice but to pursue our inquiries into the ethics of sexuality

pragmatically, by asking whether the particular pressures or incentives to engage in sex are immoral, and if they are immoral, whether they are harmful and culpable so as to call for the application of the criminal sanction.

This is not the sort of claim that can be proved, but it is a very hard claim to disprove. To disprove it, a critic would have to posit a general theory of sexual ethics that can resolve a bewildering variety of cases. They are the cases I talked about in my article—the case of the gay bath house, the case of the unconscious victim and the case of the complex relationship or sexual bargaining. There are others.

I developed one in my response to Professor West: the prostitute who turns tricks to avoid either an interdiction of her heroin supply or physical brutality at the hands of her pimp, acts without consent and under threat of force. But the johns with whom she has sex are not the efficient cause of the force. Where would she be without them?

So, too, in the case of the comely young widow who has sex with the lecherous old banker to avoid foreclosure on her mortgage. The victims here are the bank’s shareholders, hardly the class of victims one would hope to protect with either legal or moral rules against sexual behavior.

I do not see much promise for the prevailing feminist focus on consent. Instead, we must ask, in the current categories of cases, whether causing another's sexual cooperation is praiseworthy or neutral, immoral, or so immoral as to be classified as criminal.

I would like to focus on two illustratively difficult cases: one is sexual fraud; the other is the “indifferent welcome” case.

Professor West is quite right to argue that my theory of the right to refuse sexual cooperation as a legal entitlement—what I call the “commodity theory”—calls for criminalizing sexual fraud as a species of theft of services, unless some strong reason found in the peculiar nature of sexual transactions counsels against imposing liability.

On due reflection, I now believe that evidentiary problems do not supply such a reason. Proof problems are endemic in the rape context. Even if the defendant threatens the victim with a gun, this will be done in private, and if she submits to the threat there will be no proof that the threat was ever made other than her testimony. We trust juries to evaluate the testimony in that kind of a case, and there doesn’t seem to be any reason why we should treat the sexual fraud context differently.

What seems to be at the heart of the problem of sexual fraud is that a pristine contract of prostitution is itself a crime under the criminal

62. Dripps, Beyond Rape, supra note 45, at 1788-89.
63. Id. at 1789.
64. Id. at 1789-90.
65. Dripps, Distinguishing Sex, supra note 45, at 1470.
law, and unenforceable under the law of contracts because contrary to public policy. Whatever the strength of the reasons that counsel against civil enforcement of contracts for sexual services, those same reasons apply to any resort to the criminal law as a public remedy for breach of contract.

Now, I tend to agree with the case for legalizing prostitution. It's hard to deny the force of the pragmatic considerations urged in the Wolfendon Report—prohibition causes corruption, promotes pimping and encourages the spread of disease. I can empathize with the women who work as prostitutes, whether they do so out of economic necessity or personal proclivity. I can even empathize with the johns, who are again doing nothing worse than pursuing their own pleasure without hurting anybody else. On a deeper level of principle, I believe that society manufactures better individuals when it permits people to make their own mistakes rather than trying to force them into the mold of what politicians take for virtue.

There is, of course, a contrary position, supported by arguments that run the gamut from Christian conservative to radical feminist. So long as that position prevails and prostitution remains illegal, relying on promises to pay for sex would be unreasonable under the law, and not much more reasonable according to common sense.

You can test this hypothesis by reversing the role of defrauder and defrauded. Under current law, a john cannot recover the benefit of his bargain and sue for breach of contract against a non-performing prostitute. Should the prostitute be prosecuted for fraud? That seems to be enforcing a contract of prostitution.

My point is not that sauce for the goose is sauce for the gander. My point is that until the civil law enforces contracts for sexual services, criminal penalties for sexual fraud are premature. As soon as the civil law enforces sexual contracts, the criminal law should follow up by punishing fraud.

Now, I believe this analysis applies to cases of wrongful, but non-violent, inducements to have sex even when the inducement is not contractual in form. Suppose a man calls and says, "I don't have herpes," or "I'm not married," and the woman relies on those representations in deciding to have sex with him. Or suppose a lawyer calls an important client and asks her out for a date. Until the civil law of torts for commercial sex discrimination attempts to remedy such wrongful inducements, and fails at the attempt, it is premature to call for the application of a criminal sanction.

The second difficult case I would like to address is what I call the "welcome of indifference" problem. Under the statutes I propose, a man commits a crime by having sex with anyone who expresses refusal. What about silence, the "welcome of indifference?" Recall the episode in The Waste Land from which I took this phrase.
The carbuncular clerk visits the woman home from work. Endeavors to engage her in caresses Which still are unreviewed, if undesired. Flushed and decided, he assaults at once; Exploring hands encounter no defense; His vanity requires no response, And makes a welcome of indifference.66

Now, as recounted by an over-conservative American Anglophile, the transaction is tawdry and contemptible. But viewed through modern lenses, is it culpable? If we say that the generally prevailing social pressures caused her to fail to object, so that her failure to object makes his conduct culpable, we will be hard pressed to rescue either liberty or responsibility from the logic of determinism. To paraphrase Justice White's dissent in Miranda v. Arizona,67 if your silence in the face of sexual advances is compelled by social pressures, how can your answer to the question "may I make sexual advances upon you?" be anything but compelled?

In our society men make sexual advances to women without asking first. So long as men accept rejection, there is nothing immoral about this practice, any more than there is anything immoral about the less frequently common case in which the woman initiates the physical contact. Indeed, I suppose, an entirely unsolicited letter proposing in writing specific sexual acts could be viewed as boorish, if not coercive or harassing.

Instead, typical sexual encounters begin at a low level of physical intimacy and escalate. Women are expected to object when male advances exceed female preference. Unless a man either exploits an unconscious or incompetent victim, or induces a woman's acquiescence by violence or some other wrongful pressure, this doesn't seem like so much to ask. The critical thing is to avoid discontinuous, catastrophic moves from one stage of intimacy to the next.

Again, I'm afraid we must proceed pragmatically. A kiss is just a kiss. Vaginal intercourse is something different. I suppose it is paradoxical to speak of making a fetish of a vagina, but the possibility of pregnancy pretty much calls for the law to do just that. AIDS has already changed the gay understanding of what can be done in bed without talking about it in advance, and it is well on its way to making a similar change in the practices of heterosexuals.

Nonetheless, the transition from penetration of the mouth by the tongue to the penetration of an orifice by the penis is neither instantaneous nor unscripted. The partners will have time to object to sex acts they don't like, typically before those acts occur, and in any event immediately upon their initiation.

Now, if sex were a commodity undistinguishable from commercial goods, I would be compelled to give a different answer. The law does not permit shoppers to remove items from retail stores’ shelves unless the shopkeeper allows it; that’s larceny. What would be lost by accepting that analogy and insisting on express affirmative permission to exempt intercourse from moral or legal sanction? What would be lost is some of the spontaneity, some of the intensity, that gives sex its special pleasure. It is possible, after all, to be too diffident or too analytic in bed, whatever our gender or orientation. Call it “eroticized domination,” called it the “robust, uncomplicated lay”—call it whatever you like, but don’t deny that, from whatever causes, the loss of control is a central feature of sexual experience.

I will anticipate objections by emphasizing the distinction between moral and legal condemnation. Our topic, as was said at the outset, is intensely contested, and I would be shocked if what I have said about the ethics of sexuality commands unanimous acceptance. But when reasoned views of ethics diverge, we should be most reluctant to allow a criminal sanction to carry the day for our own moral views.

Ms. Fairstein informs us that the resources presently available for enforcement of the criminal laws we have are quite inadequate for the task. Expansion of criminal liability for the purpose of regulating sexual behavior should be undertaken only after sober calculation suggests that the criminal law can play a role in leading, rather than following, society’s progress towards a more just and more fully human regime of gender relations.

I thought it was curious that in her comments on my article, Professor West might have endorsed the mutuality criterion some feminists have defended, or developed an alternative normative framework for evaluating sexual conduct. What is the role of sex in a good life? Can that role be fulfilled in a society such as ours? I believe that her argument depends on developing a systematic answer to those questions in a way that my argument does not. For I content myself with the claim that the law ought to protect the individual entitlement to engage in sex out of the hope that free individuals in a pluralistic society are best equipped to find their own answers to those fundamental questions.

To be sure, there are fallible individuals formed and warped by the society they have constituted. The case for liberty, like the case for responsibility, does not deny causation. If it was only that the relative absence of deliberate collective coercion causes both better people and better conduct.

If I understand Professor West correctly, she believes that our collective institutions, including the criminal law, should promote deliberately some model of ideal gender relations. If that is indeed her view, I would challenge her to develop that idea more fully. Whether or not we agree with it, we could not help but profit from her reflections on the subject.
Thank you. First, I would like to thank Deborah Denno and the Fordham Law Review members and Fordham Law School for providing this forum and for their hospitality.

The topic, “Men, Women and Rape,” is well chosen. We need to focus our attention on the criminal law process if we are going to protect women against the threat, fear and reality of rape. We do indeed need to improve the law on the books and enforcement on the street.

Both of my co-panelists are involved in that effort, and I applaud their efforts. I will be raising some questions about their work, but I do generally favor the direction they have set for the future of rape law. Ms. Fairstein wants more enforcement and Professor Dripps wants to widen the law to include, albeit as a lesser offense, some sexual behavior which is presently for the most part non-criminal. Although I will be raising some questions primarily about Professor Dripps’ proposal, for the most part I think both proposed courses of action are wise.

But there are problems, and they are of two types. First, there are problems, I think, of the fairly traditional legal sort, particularly with the particular law that Professor Dripps has proposed. I will spend a little bit of time discussing what some of those problems might be. They may well be curable; I don’t mean that these problems defeat his project, but they do need to be addressed.

The second sort of problem, and the sort I’ll spend more time on, are of the more general sort. They apply not only to Dripps’ own proposed reform but to the project of reform itself. They are even more general than that. They are problems that infect the conversation virtually whenever lawyers gather to discuss how we might use law to make the world better. At the core of these lawyerly discussions is the belief that the law will and should provide protection against harm. There is nothing wrong with such a belief—I hold it myself—but nevertheless there are real problems when it shuts out all others and becomes instead the quite different claim that only the law protects us against harm and that is all that the law does.

In a nutshell, the problem is simply that this belief, when it becomes a defining commitment rather than simply one belief held among others; when it becomes the glasses through which we gaze, can distort as much as bring into focus our vision. We need to be aware of how the distortions which our commitment to this instrumental conception, this conception of law as the instrument by which we protect ourselves against harm, impact upon our understanding of the social world.

After I have looked at some of the specific problems of the Dripps’ proposal, I want to discuss three such distortions, some of which I
have elaborated upon in more detail in my response to Dripps' initial article in the *Columbia Law Review*.68

First, let me characterize the Dripps proposal by distinguishing it from existing law just very generally, and then distinguishing it from most feminist proposals, and then I want to suggest two problems.

Most states presently require two things for sex to be rape: non-consent and force. If both are present, there is a rape. If one but not the other is present, there is no crime. Thus, if there is considerable force but consent, there is no rape. On the other hand, perhaps more importantly, if there is clearly no consent but the defendant has accomplished his end without using force, then again there is no rape. Most feminists, as well as Professor Dripps, think that this is unjust and that the law should criminalize more.

Feminists, for the most part, as he stated, have urged adoption of a pure non-consent standard: all non-consensual sex should be understood as rape and prosecuted as such. Dripps agrees with the feminists that the present law is inadequate, but fears that the feminists' solution would criminalize too much. He proposes instead to drop the consent requirement altogether and focus exclusively on the defendant's conduct and *mens rea*.

He then proposes two separate crimes: rape, although he calls it something else, defined as procuring sex through violence or the threat of violence; and secondly—and this is more interesting and more controversial—a criminal but less serious misdemeanor, which he calls "sexual expropriation," which he defines as something like procuring sex in spite of or in the face of a woman's expressed "no." The effect would be that, as with most feminist reform proposals, we would criminalize more than we presently criminalize; but, unlike the reforms propounded by feminists, the sexual expropriation crime would be regarded and punished less severely than rape.

There are two differences worth noting between the pure non-consent standard advocated by feminists and Dripps' proposal. First, the man who refrains from violence or threat of violence but who persists in the face of a non-consenting woman who is silent, and who the man knows to be non-consenting, under the feminist reform has committed a crime. Under Dripps' law he is not.

Second, and maybe more importantly, feminists will generally categorize these acts and urge their prosecution as rape and not as a lesser crime. Very generally, Dripps' proposed law cuts the difference between present law and feminist reforms down the middle. Like feminists, Dripps believes that some sexual behavior that is presently non-criminal ought to be criminalized—namely, non-consensual sex procured without using extreme force—but, unlike most feminists, he wants to call it something other than rape and punish it less severely.

68. West, *supra* note 45.
This proposal has the obvious virtues and vices of most compromises. It accurately captures the political intuition that truth often lies somewhere in the middle of a polarized debate; it reflects the growing consensus that rape law ought to cover more than it presently covers; and, at the same time, it respects the shared intuition that so-called “non-violent rapes” are less harmful, and therefore less culpable, than the horrendous and terribly frightening rapes accompanied by threatened and actual acts of violence.

Now, what are the problems with this proposed reform? I think that there are two.

First, the difference between expropriation and what Dripps calls “sexually motivated assault” is basically the difference commonly referred to between violent and non-violent rape. But it is not clear such a distinction can be maintained. In other words, what Dripps has defined as expropriation is also an act of violence.

There may indeed be a distinction, and an important one, between what he is calling a rape and what he is calling an expropriation, but it is not the difference between violence and non-violence, for two reasons. First, unwanted, undesired penetration of a woman who has expressed a refusal, by a man who then ignores her refusal, is a violent act. It is a physical intrusion of one’s body, it causes pain, and if that intrusion to which one has not consented is non-violence, I’m not sure I understand what violence is. Second, for the acts described by Dripps to be successful, sexual penetration in spite of a woman’s expressed “no,” there must be an implied threat that the man would use a very real weapon, namely, his fists. Women are physically smaller and weaker than men and socialized to fear men. Every expropriation, every sexual act in which sex happens after a woman has expressly refused it involves both the violence of the unwanted penetration and the threat of further violence should the woman refuse to cooperate.

More generally, what Dripps’ talk tonight makes clear, at least to me, is that his proposed reform law, and the distinction it rests on between rape and expropriation, is grounded in an assumption that the behavior of men like Russell West is worse than that of men like Berkowitz, and that therefore the former should be judged and punished more harshly than the latter. This assumption is shared, of course, by current law, which, unlike Dripps’, tends to exculpate the second class of defendants, if not excuse them entirely.

The problem is that it’s simply not clear that the proposed distinction between the two cases can be defended on any principled grounds. The cases cannot be distinguished, of course, under the pure consent standard proposed by some feminists; that’s one of the reasons why Dripps thinks the pure consent standard goes too far. Nor is it clear, the actual outcome of the Berkowitz case notwithstanding, that the cases can be distinguished under the forced consent standard
in current law; both seemingly involved both non-consent and force. Nor can it be distinguished, I think, in the way Dripps wants to distinguish them, as both do involve violence and the threat of violence.

Perhaps the most plausible way to distinguish the two—and indeed what seems to run throughout Dripps' description of those two cases—is the possibility that West caused his victim more harm than Berkowitz, simply because he caused more terror; that the West, but not the Berkowitz victim, was in real fear of her life, and that makes the experience all the more horrible. Having sex on a tile bathroom floor while having a knife at your throat would simply be more horrible, and thus more terrifying, than having non-consensual sex with your friend's roommate while pinned to his bed in a dorm room, and therefore ought to be punished more severely.

Although that distinction tracks what is probably a widely shared intuition, and is certainly at the heart of Dripps' treatment of the two cases, I doubt that it is descriptively accurate. At least if we are to believe the testimony of both rape victims and crisis center workers, rape victims are always terrified, and always terrified for their lives, and for a very simple reason: anyone who would so trivialize you as to impose non-consensual sex is also capable of killing you. And that is the reality that bears down on a victim in the middle of a rape, whether she knows the rapist or not, whether she knows his roommate or not, whether she is married to him or not, and whether or not he carries a weapon.

The second problem with Dripps' reform has to do not with the contrast between rape and expropriation, but rather the moral difference he has drawn between expropriation and other forms of non-criminal, non-consensual sex. It is not clear that the behavior he wants to criminalize is really worse than some of the other methods of extracting sexual cooperation from a victim.

"Have sex with me or else" is a fairly common way of extracting sexual cooperation, and depending upon the content of the "or else," this sort of sexual extortion may be considerably more harmful than the expropriation Dripps describes. Dripps seemingly wants to insulate all of these transactions from criminality, most of them I suspect from civil liability, and many of them even from criticism. But depending on how one finishes the sentence, some of them might well be worse than ignoring a stated "no."

69. Ms. Fairstein indicates in her comments that both her experience and current research suggests that the distinction described in the text is in fact accurate: that victims of date rape often report that they were not in fear of their lives. I am happy to concede the point, and stand corrected. I was obviously over-generalizing from the particular case of marital rape, which generally does involve fear of death or great bodily harm, to all acquaintance rapes, which often do not. The statement in the text is simply too broad. (Footnote added after the panel concluded.).
Consider some of the following: "Have sex with me or I won't give you money for the groceries next week," "Have sex with me or I'll beat you senseless tomorrow," "Have sex with me or I'll tell your boss you're a whore," to use an example from Professor Shulhofer, "Have sex with me or else I'll be sullen and uncooperative for a week," "Have sex with me or I'll divorce you," "Have sex with me or I won't be your friend," "Have sex with me or I won't be your drama teacher," "Have sex with me or I'll give you a C rather than the A you deserve," "Have sex with me and I'll give you the A you don't deserve," "Have sex with me or else be fired."

So we presently have the anomalous situation, I think, that only the last three of those are regarded as a violation of anyone's rights giving rise to any form of legal liability at all. I think that's odd. (Some of these transactions might be fairly characterized as so extortionist as to be non-consensual and are rape under feminist reform proposals.)

Under existing law, however, with the exception of the last three examples, which would constitute actionable sexual harassment, none of these would be regarded as even tortious, much less criminal. I note as a point here simply that Dripps' law must somehow assume that all of these are less harmful than having an expressed "no" ignored, and it's just not obvious that that's so.

Let me comment quickly on what I alluded to at the outset as the distortions of our instrumentalist conception of law. I think that there are three and they all problematize the project of rape law reform.

First, the focus on law, and particularly on the criminal law, as the means by which to protect against harm obscures the fact that, at least for some of us, the ideal or the end that we're trying to achieve is an end to sexual violence and not maximum incarceration. Accordingly, the instrumental conception of the law obscures the simple but important truth that if there are better ways to achieve that end, we ought to be exploring what they are.

At least for some of us, incarceration is not an end in itself, it is a means to an end, the end being a pacific world in which there is no sexual violence. We do need to explore and think about and experiment with other ways to end violence, even as we commit ourselves to increase resources on the enforcement side and maximize the effectiveness of criminal sanctions. Of course, that is itself hotly contested. There is no societal consensus that the point of the criminal law on sexual assault, or of the criminal law generally, is to stop violence.

A good number of the theorists and a good portion of the population believe quite strongly in a very different understanding of the point of criminal law, according to which the point of criminal law is to punish evildoers, of which there will always be some number. According to this view, we should not be aiming so much to stop the behavior—there will always be bad people—we should be aiming to punish them. This view, which might be called and is sometimes
called retributivist, might in turn be contrasted with the conception I endorsed a moment ago, which I would call pacifist, the simple point of which is that criminal law is nothing more than an instrument for bringing about the end of violence. If some better method could be identified, there would be no role for criminal law and its attendant violence at all.

These two visions of criminal law might from time to time co-exist. They often converge on common strategies, but they are fundamentally and philosophically opposed. One of the interesting things about this current Administration is that, for the first time in a long time, we have a pacifist rather than a retributivist Attorney General. Indeed, Janet Reno may be our first truly pacifist Attorney General, our first Attorney General to insist that the goal of criminal law ought to be to stop violent behavior and that incarceration is only a means to that end, rather than viewing punishment as somehow being an end in itself. She is right to establish that priority, and she is also right to insist that we must focus attention on our children, not only as potential victims of crime, although they most assuredly are that, but more significantly, perhaps, as potential criminals. If we are serious about stopping crime, we have to think about ways to address that potentiality.

The second problem with our instrumental orientation towards law is this: the focus on law as a means by which we protect against harm tends to obscure the extent to which law does other things beyond that which we intend for it to do. Most importantly, the focus on the effectiveness of law as a mechanism for protecting against violent criminality obscures the degree to which the same law which penalizes the criminal also legitimates the non-criminal, by which I mean to include not only the behavior which it explicitly defines as non-criminal—behavior which itself may be problematic—but also the culture and preferences those behaviors reflect and mold.

In the context of rape, the focus on the effectiveness or ineffectiveness of rape law, which is the subject of this panel, tends almost inevitably to legitimate, as praiseworthy, just or morally non-problematic, the vast bulk of our non-criminal consensual heterosexual encounters. The law does this quite generally, as it has been the burden of the critical legal studies movement to show, but I think that in this area in particular this process of legitimation is both extraordinarily complicated and extraordinarily debilitating. It is imperative that we not only reform rape laws to better target what ought to be criminal, but it is also imperative that we figure out a language, a way of talking, within which we can subject to moral and political scrutiny our non-criminal, wholly consensual heterosexual practices.

Unfortunately, it is extremely difficult to do both of these projects, and part of the reason why is because of this phenomenon of legitimation, by which again I mean simply the process by which we tend to
assume that whatever is non-criminal is morally unproblematic, or even praiseworthy.

Now, let me confess that part of the reason for my interest in Dripps' work is that he actually does this explicitly, and because of that his writing is almost a perfect case study of the process of legitimation. Thus, he is explicitly, rather than simply implicitly, interested in the project of legitimating, or defending, or justifying, or embracing consensual heterosexual practices. In fact, he seems to be at least as much interested in defending heterosexuality against feminist critique as he is interested in the project of defending women against criminal assault.

Again, in his original article he did this quite explicitly. That is, after redrawing lines around the behavior he wants to see criminalized, he went on to legitimate, applaud, justify, praise—or at least defend—the behavior he wanted to be non-criminal: sexual transactions in which sex is traded for something other than pleasure. By so doing, he wound up defending an awful lot of behavior which in my view, while appropriately non-criminal, is extremely harmful and ought to be viewed as such.

He did it again in his talk tonight. Note how the description of the unwanted, indifferent encounter at the end of his speech is first described as being, from her point of view, an “unpleasant as well as undesired event that the woman is relieved to see end;” then, in the next two minutes, has become an “uncomplicated lay;” then in the next phrase has become a “pleasurable encounter,” although by this point in time the claim of pleasure is perspectiveless; in the next phrase it has become “the pleasure we have in losing control;” and by the end of the piece this unpleasant, undesired, albeit non-criminal sexual encounter, has somehow come to actually be exemplary of the virtues of individualism, autonomy, self-direction and all the rest of it. That is legitimation with a vengeance. He began with the premise of a hardly praiseworthy event—consensual but undesired and unpleasant sex—and by the end, that same event has become the goal of liberal society.

This problem of legitimation is what I focused on in my response to Dripps.\textsuperscript{70} And while I don't wish to repeat those arguments, let me add just one comment, or try to say this in a different way.

I think that one can identify four premises in Dripps' work that together render virtually inevitable the legitimation of consensual heterosexuality.

First, like many theorists, Dripps almost routinely equates the category of the non-criminal with the morally unproblematic. He says he doesn't do that, but he does. Second, Dripps' basic view of the world is "commodificationist"—which is a word I just made up. He believes

\textsuperscript{70} West, \textit{supra} note 45.
that consensual trade typically, if not definitionally, leaves consenting parties better off than before the trade and does so pretty much regardless of what is traded. This means that a trade of sex for something else—money, security, status—like any trade, is going to be of value to the traders in a way that can’t be distinguished from other trades of commercial commodities. Thus, tonight Dripps asserts flatly that there is no principled difference that he can see between the trade of sex for pleasure and the trade of sex for security or status. Again, the implication is that sexual trades, so long as they are voluntary and legitimate, are value enhancers.

Third, Dripps’ political stance is basically liberal, which leads him to applaud individual choice and discourage collective action. This, too, will tend in practice to legitimate individual choices. But again, this was the subject of our original exchange.

Let me cut to the chase and add that Dripps also wants to legitimate consensual heterosexual encounters because of a suspicion he harbors that women and men are so erotically different that exchanges of sexual pleasure for sexual pleasure are really simply not possible, and that any heterosexual transaction therefore has to be an exchange in which he gets pleasure and she must be in it for something else. Therefore, if heterosexual men are going to have their pleasure then it is going to be through sexual exchanges in which women get something other than pleasure.

Thus, the fourth reason Dripps is inclined to legitimate consensual heterosexual transactions is that he needs to do so in order to assure that the transactions from which men derive so much sexual pleasure are themselves morally justified.

I have two responses. First, it simply isn’t the case that men and women can’t exchange sex for pleasure, nor are such exchanges quite the rare bald eagle Dripps seems to think them to be. Sexual differences advise nothing to the contrary.

My second response is that to the considerable extent to which men and women do trade sexual pleasure for something else—money, status, a promise not to be beaten up, a promise not to have the children beaten up—those trades may well be unjustified, even if consensual, where they cause more harm on balance than pleasure. I think that many such trades do. Suffering unwanted, undesired, unpleasurable, painful penetration of one’s body in exchange for food, shelter, money, a promise not to be physically assaulted, or perhaps most commonly, protection against other men’s sexual aggressiveness, and suffering these penetrations over an extended period of time repeatedly causes damage—damage to a woman’s sense of autonomy, damage to her integrity and damage to her sense of self-worth.

The last, and related, problem with discussions of this sort, discussions among lawyers that assume an instrumental and unproblematic relation between law and harm, is that such discussions tend to ob-
secure the existence of social hierarchies which may be unjust and harmful, but which are not amenable to legal solutions.

A focus on intentional discrimination, for example—and even more clearly, a focus on a broad-based liberal reform law against intentional discrimination—intended to pick up even subtle as well as explicit forms of intentional discrimination, may distort rather than enlighten our understanding of the harms brought by institutional, unintentional, unconscious or indeed simply non-culpable racism, harms which may not be amenable to legal compensation, but which are nevertheless quite real and may well be amenable to other forms of political redress. Worse, it may tend to underscore our reflexive sense that whatever cannot be characterized as discrimination is therefore not a matter of injustice and not something for which justice demands a resolution.

Thus, the focus on rape law, even though on balance necessitated by the level of unchecked sexual violence in modern life, carries a simple cost: it may distort rather than enlighten our understanding of harms done to women by men in our routine, normal, day-to-day heterosexual transactions, some of which, if understood, might also, like mal-distributions of wealth or institutional racism, be correctable, albeit not through the criminal law.

We surely must not err on the side of over-criminalization, and Dripps’ articles are timely corrections to our impulse to do so. But nor should we err on the side of complacency. Quid pro quo sex on the job, consensual sex in exchange for protection against others, sex in exchange for money, and even I would submit sex in exchange for friendship or emotional benefits, all might be consensual, but nevertheless both painful and harmful transactions. They are not rapes, but they are the substance of too many heterosexual lives. As such, these transactions deserve our criticism, not our praise or defense.

Thank you.

Remarks of Linda Fairstein

Thank you. Good evening. It is a pleasure to return to Fordham for what has become an annual event for me, which is participation in one of your programs concerning some aspect of the issue of sexual assault.

I have followed the eloquent debate between Professors Dripps and West in print with great interest, and may only be useful here tonight in adding a practical perspective to their discussions, not from reported cases but from actual experience. We three seem to agree that a rethinking of the law of rape should be undertaken from a new perspective rather than working from the archaic and unsatisfactory base we inherited from the British.
I disagree with Professor Dripps’ proposal that we begin our review by thinking of sex as a commodity and rape as the theft of that commodity. Two decades of working with thousands of victims and survivors of these crimes leads me to applaud Professor West’s statement (in her article in response to Professor Dripps) that “Dripps’ theft analogy wildly misdescribes the experience of rape.”

It is my view that the current rape laws in states throughout this country, which clearly need improvement, do not prevent the overwhelming number of allegations of rape from going forward in the criminal justice system. That is, the current definitions of forcible compulsion, requiring at a minimum the use of force or threat of the use of force, enable the prosecution of the majority of cases which present themselves to law enforcement.

The larger problems for me, as a practitioner, are twofold. First, whether prosecutors choose to take to trial the cases in which the force alleged is minimal, or instead to exercise prosecutorial discretion in those cases and simply decline to prosecute them, which has for too long been the case all over this country. Second, whether once argued to a jury, the attitudes about these crimes which jurors bring to the courthouse result in verdicts of not guilty, notwithstanding the evidence of force adduced at trial.

Let me distinguish among what I consider four categories of cases relevant for the purpose of this discussion. Since I had the advantage of receiving Professor Dripps’ paper last week, I’ll begin with the case examples he selected.

The first of those is the case of Russell West, a man described by the media as the “Midtown Rapist,” and which is related in my book Sexual Violence. He committed a series of attacks in Manhattan office buildings in the mid-1980s, using a knife to compel women he had never seen before to submit to acts of intercourse after robbing them of jewelry and money. This is what Professor Dripps calls a “sexually motivated assault.” We in law enforcement call it a “stranger” or “serial” rape.

In this day and age the defense almost always admits that the crime occurred without the consent of the victim—submission to the threat of force or the threat of the use of force is not consent—and the singular issue at trial is the identification of the assailant.

(As an aside, I think his title, “sexually motivated assault,” is completely inappropriate for this kind of victimization and represents a real step backwards. It is clear to me that until we learn a lot more about the assorted reasons for which these crimes occurred—what motivates the attackers, that is—it is a dreadful label to assign.)

71. Id. at 1448.
72. Fairstein, supra, note 23.
While Professor Dripps is free to distinguish between the suffering of Russell West's victim and what he calls the "lesser suffering" of the woman he goes on to describe in the Berkowitz case, not every survivor of sexual assault, of course, would accept his succinct distinctions. In the studies quoted in my book, the studies by psychologists, the main difference agreed upon in the psychological community is the nature of the trauma. To victims of stranger rape, the trauma is usually compounded by the fact that their lives are threatened at the time of attack, in addition to the intimacy of the physical assault.

While some acquaintance rapes do also have a life-threatening element, the more common kind of psychological harm described by victims of acquaintance rape is the feeling of betrayal, because the victim has been attacked by someone in whom she has placed her trust and confidence. She does not usually claim the use of life-threatening force—although she sometimes may—but rather that the defendant maintained the application of force until he accomplished what he was determined to do: penetrate her vagina.

Unlike what Professor West said today, the overwhelming number of acquaintance and date rape victims who present themselves to prosecutors in emergency rooms will often distinguish when there has not been a life-threatening mode to the case. They say, "I wasn't afraid he was going to kill me. I've known him for ten years... I've known him for three months... I have lived with him... I love him... I don't like him... I don't think he was going to kill me, but I didn't want to have intercourse with him and he wasn't going to stop until I did." Most psychologists who have studied this area and most of us who work with victims do find a distinction in the nature of the trauma, although not in the extent of it, that many victims do describe.

Cases of stranger rape, for a variety of reasons which I explain in my book, do extraordinarily well in the criminal justice system in this day and age, and have done so for the past two decades, following the elimination of the corroboration requirement, the passage of rape shield laws, the elimination of the "earnest resistance" requirement, with the inauguration of specialized police and prosecutorial units, and with exciting technological advances like DNA, or genetic fingerprinting.

The second category of these crimes, which suffers from an overly broad descriptive title, is that known as acquaintance rape cases—covering everything, as you know, from marital and domestic relationships, through dating violence, through molestation by casual acquaintances, as well as by professional care-takers like doctors, lawyers, clergy, and teachers. In most, although not by any means all, of

73. The earnest resistance requirement was still in effect in New York until a decade ago, requiring victims, even when faced with life-threatening force, to "resist to the utmost of their ability." See N.Y. Penal Law § 130.00(8) (McKinney 1975), repealed, Act of July 22, 1982, 1982 N.Y. Laws ch. 560 § 1.
the cases in this category, the assailant is not armed and the force used is not life-threatening.

Many jurisdictions have chosen to distinguish between cases of armed and unarmed rape—in their laws for the purpose of prosecuting—by labeling armed attacks, or those assaults in which the victims sustained physical injury—as “aggravated rape.” The use of a weapon or an injury to the victim is not an element of the crime, but rather is a different crime; many states label those crimes as “aggravated rape.” The unarmed cases and attacks in which the victim is not injured are prosecuted in many states as “simple rapes.”

In my view, the second category is not a non-violent assault; rather, it is a very violent crime sometimes accomplished through the use of less than life-threatening physical force, or just less application of force. Studies are currently underway in many jurisdictions to see whether [the use or threat of life-threatening force] actually enhances the likelihood that a jury will convict a defendant of simple rape since most of the general public, sadly, prefers to distinguish simple rape in some way from armed attacks, viewing it generally as a far less serious crime.

In New York, for example, we do not have that distinction between the felonies aggravated and simple rape. However, we do have a misdemeanor charge called sexual misconduct, which is also the case in many states. The elements of the crime are exactly the same as the elements of the crime of rape in the first degree. It was designed originally, a hundred years ago, simply as a tool by which prosecutions could go forward without exposing the defendant to a felony disposition (originally designed to avoid stigmatizing teen-age and young adult offenders with a conviction for the crime of rape in the first degree). It is now frequently used by prosecutors when the forcible compulsion is so minimal that we believe there is a greater likelihood of obtaining a conviction, which we often try to convince the survivors is a more realistic avenue to pursue. Most of us would like some kind of felony in existence in this state to correspond to the misdemeanor charge.

No matter how one distinguishes between the two types of criminal acts, aggravated or simple rapes, they are both violent crimes and, as Professor West writes, not at all analogous to a larcenous taking. To call them such truly trivializes the experience of the woman victimized during the event.74

The second case cited by Professor Dripps, Commonwealth v. Berkowitz,75 does not in my view, as he suggests in his piece, speak to the political dominance of male over female interests in the legal con-

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74. West, supra note 45, at 1448-49.
text. I don’t think it speaks to the distinction between rape as defined by force versus rape as defined by consent either. I think it speaks more clearly to a prosecutor’s failure to flesh out all of what we call the “totality of the circumstances” which we are allowed to present in support of the victim’s claim of forcible compulsion in, what on the evidentiary basis, is a very weak case.

I must say that Professor Dripps was very kind to the victim in the summary of the events he presented here. For those of you who have not read the facts, included in the people’s case is the fact that the victim decided to “loosen up” for her two o’clock in the afternoon meeting with her boyfriend by having a martini in her dorm room; the meeting followed a series of arguments about her sexual fidelity to him; and during cross-examination the prosecutor learned, perhaps for the first time—and that’s an awfully bad time to learn these things—that the victim had previously had a phone conversation with Mr. Berkowitz following a college sex education seminar in which she asked him the size of his penis. He repeatedly suggested that she come over to his room and find out. Somehow, the jury convicted. I’m not saying this to blame the victim; I am saying this to marvel at the fact that the prosecution was undertaken and met with success.

The Intermediate Appellate Court, which overturned the conviction, seems quite simply not to have liked the facts of the case, or perhaps felt that the sanction was too severe for a college student. The court’s opinion, in fact, I think seems to voice many of the appropriate things in describing the definitions of criminal elements, including what constitutes forcible compulsion. In fact, the court chided the prosecutor for not having put more facts on the record that might have sustained a finding of force in this totality of circumstances mode that we can use. The court made reference to the fact that the prosecutor had not elicited on the record the physical size of each of the parties, and therefore was not able to argue that simply the larger size of the offender holding the victim down—and, in the expression of the victim, “straddling her on the bed”—would have been in any of the cases that we have prosecuted more than sufficient force to establish forcible compulsion. The lack of detail in the direct case did not lay the foundation for those things.

I think the facts of the Berkowitz case are simply not representative of the vast pool of rape complaints, and so I think it is just simply not a case from which we can draw very significant conclusions.

Thus, in regard to this category of simple rape—which I think, obviously, needs a much better name, since it is anything but simple—I think that most states have some law currently in place that allows prosecution of these cases. In most states, a fresh look at the nomenclature and at the corresponding penalty phase of the crime should be undertaken. But the more problematic aspect is that these are the cases that are less frequently successful in the criminal justice system,
and are often not taken to trial—although they should be—by offices lacking any specialized treatment or attention to crimes of sexual violence.

I would add as an aside, though, that in twenty years of prosecuting sex offenses, I have never had a case in which the only expression of lack of consent was the victim's verbalization of the word “no,” without any display of force or threats by the aggressor.

A quick mention of a third phenomenon, and the only arena in which I would agree that sexual encounters may be commodities, as suggested by Professor Dripps, is in the category of prostitution. Once a woman or a man agrees to engage in sexual acts for a fee, she or he has entered the marketplace. For that reason, when I discussed prostitution and rape victims in my book I distinguished between those matters in which prostitutes made complaints, which occasionally happens, after completing sexual acts by consent in exchange for money and not getting that money after the act, which we do liken, in the language anyway, to theft of services. I distinguish those from the very large number of violent sexual assaults to which prostitutes are vulnerable in the course of their work environment, which we do prosecute.

In regard to Professor Dripps' reference to prostitutes who turn tricks to avoid beatings or interdiction of their drug supply by their pimps, pimps can be prosecuted for serious felonies, albeit not sex offenses, like Promoting Prostitution. So there are sanctions to help resolve some of the bewildering array of cases related to sexual ethics.

My fourth category, and one which in my book I relate to the lack of appropriate legislation, involves what I call sexual scams. Many states, New York among them, have failed to license and to legislate certain conduct which legitimizes a substantial amount of sexual abuse. My intention was not to suggest legislation, à la Dripps, that treats sex as a commodity, but rather suggest the need for other legislative proposals.

As an example, I told the story of a woman who received treatment from a therapist she encountered at a wellness center in New York City. The victim was a bright graduate student at a prestigious university here and who was clearly in emotional distress. She found the defendant through the Yellow Pages, where he had advertised as a therapist. During the period of treatment the defendant convinced the young woman that it was essential for him to touch parts of her body, and eventually to put his mouth on her breasts and vagina to taste her bodily secretions, to see if she was getting better.

None of his actions were criminal. Incredibly, to me, as I learned for the first time working on that case, therapy is not a licensed profession in New York. Any one of us could tonight hang out a shingle and tomorrow offer treatment to anyone who responded to it. It was not until several years later, long after our initial investigation, when
another victim appeared, and the same individual, the therapist, had finally added the title "doctor" to his credentials, donned a laboratory jacket and stethoscope, and that we could charge that therapist with a violation of the Education Law: Practicing Medicine Without a License. No criminal charge in the penal law covers that conduct.

In similar fashion, many of the cases reported to us involve healthcare professionals who are licensed and who abuse patients in the course of treatment. The patient consents because she or he is told it is part of the cure, and yet there is no criminal liability for the doctor in these matters. Brain surgeons, for example, who tell women they have to perform gynecological exams in the course of treatment; psychiatrists who tell the patient that they have to have sexual intercourse with the patient to see that she gets better. There have been civil suits in which those patients have recovered damages, but there is no criminal law in New York which makes the physicians liable for that conduct. There remains much legislative reform to be accomplished as we encounter and understand more about the staggering volume of these bizarre crimes.

I thank Professors West and Dripps for opening this conversation and for examining the scope of consensual and forcible sexual conduct.

First Round of Response.

MR. DRIPPS: Four things.

I wanted to maybe make this a little clearer now, by asking Professor West to develop more fully her view of sexual ethics. Because what she wants, somehow, is to engage the law in the process of creating a society that has a different and better view of sexual ethics than the one we have. I think that if that is our project we can expect people to tell us what view of sexual ethics we want the state to promote through the operation of the legal system. That's my first point.

Second, the distinction between sex and violence. If you really think that the West case and the Berkowitz case are the same, if you hear those facts and you say, "That's the same thing; there's a violation of autonomy, and the business about the knife is just kind of a surplus issue"—if you really think that, and they're right and I'm wrong, then it seems to me that when we talk about equating cases and legitimating cases by comparison, to say that a case like Berkowitz is the equal of a case like West, we are trivializing the cases like West. That is what is being clearly trivialized when you go exclusively to the issue of consent.

The third thing I would say is that consent is not a very satisfying analytic basis for rape law reform. I guess the best proof of that is Ms. Fairstein's discussion of the Berkowitz case. This was a terrible case, she said, because the victim did all these terrible things—she called up the defendant and asked about the size of his penis. Well, what does
that have to do with the culpability of the defendant? That has nothing to do with what he did and what he thought.

So long as we focus on consent, so long as we focus on autonomy, so long as we focus on the victim in these cases, then we are going to be looking at things that are not relevant to the culpability of the defendant's conduct.

The final thing I want to say is to address the focus of Professor West on the constitutive role of the legal system. It's not just about self-protection. The law creates the kind of society we have. Yes, it does that, and it can do that in different ways. The fewer people in prisons for the purpose of making a better society or causing better individuals, the better off we are. Well, that's fine. The less violence we employ for the purposes of constituting a particular society, the better off we are going to be.

Let me give you an example of what I had in mind in that context, and that's the distinction between our social policies regarding tobacco and our social policies regarding marijuana and cocaine. We are trying to get to a drug-free society in both cases, but in the latter case we have employed criminal sanctions and sent hundreds of thousands of people to jail, and it hasn't gotten us to our destination. Society is no more drug-free than it was before. Contrast that with cigarettes, where we restrict, where we manipulate, but where we don't punish the use or the behavior we want to put behind us. We are making some progress on that front, and we haven't sent people to prison in order to do that.

It seems to me that when we address sexual ethics that that's a good analogy for us to think about. If we want to encourage a different model of sexuality, the way to encourage it is not to punish departures from that model, it's to truly create a society in which the model we want is one that people come to on their own.

MS. WEST: I'll be very brief.

First, I'm interested in the studies that Ms. Fairstein mentioned. Some of the early research by Russell and Martin and others suggest an equal amount of terror within marital rape and stranger rape. Maybe that all fits together, and maybe an acquaintance rape in this context means that you know the person somewhat but not all that well, so you may rightly assume this person is not going to be a threat, whereas if it's someone you are married to who is raping you, the victim may well know that this person is violent.

I never said that there was no difference between those situations. I said there may well be a difference, but it's not the difference between violent and non-violent rape. It is the difference between lots of violence and not as much violence, or lots of force and not much force. Of course there's a difference.

I am not very interested in a project of figuring out the role of sex in a good life. I'm more interested in a project of figuring out the role of
sex in a not-so-good life. It seems to me that sex has a fairly major role to play in the not-so-good lives of women—not only rape, but also a good bit of consensual sex as well.

So I want to insist that feminists should be involved in both of these projects, but have to carefully distinguish between them because confusing the two undercuts both. If you think that you are going to help the anti-rape movement by categorizing all unwanted sex as rape, I think that is a mistake. But also it will not further the project of thinking critically, morally and politically about consensual heterosexual practices by focusing exclusively on rape.

MS. FAIRSTEIN: I just want to start backwards. One of the big problems with the over-broad category of acquaintance rape is that it does put in certain domestic violence with other forms of acquaintanceship. In all of the studies that I am aware of that have been done, the big difference with marital rape is that it does tend to have many more violent elements.

And rarely is a marital rape case a single act of forced intercourse without violence. It usually is accompanied by a lot of other battery. So in those cases there is usually a history of violence, and a lot of other gratuitous violence, some of it not sexual, much of it sexual. But those victims have a very real fear for their lives.

I really need to [explain] that most of the distinction is between women in this category [that of marital rape] and those in casual acquaintances and on dates. Generally, and often, they have not had any kind of history of violence between them; the reason the victim is with the offender at the time of the rape is because she trusts him and in every other situation he has been benign.

When I read Berkowitz in greater detail I find nowhere expressed that at any point [the victim was in] any fear for her life. She didn’t want to have intercourse with him—and I don’t blame her for not wanting to have intercourse with him—but I think that kind of date relationship is very different from marital rape and from most stranger rape.

I agree with Professor West. I think that Berkowitz and West are very different kinds of violence. They are both violence, although they are very different in nature. But they are both rape. I think that my comments about the victim, as I said, were about the difficulty of prosecuting that kind of case. Those conversations which she had with the defendant are something that were very relevant to the case. A case can’t be tried in a vacuum without bringing those conversations into it. To not find out about them as a prosecutor is both sloppy and bad prosecutorial work, not to mention annoying when they come out at the trial.

But I don’t think that has anything to do with consent or force. I think that from those facts, and from somebody who could flesh it out better, based on the totality of the circumstances you could make a
good argument that the rape was accomplished. I think that the force is there.

*Second Round of Response.*

MR. DRIPPS: To pick up on *Berkowitz*, the Pennsylvania law presently requires force and the absence of consent;\(^{76}\) that's in the statute. And in the statute Ms. Fairstein works under, it requires forcible compulsion and lack of consent.\(^{77}\)

Now, one could say that every time there is sex that isn't wanted, there is force. So how can you define rape? What do we mean by rape? If we mean by force and non-consent simply unwanted sex, then the law says that any non-consensual sex is rape.

What then do we make of all these cases where there is cooperation that is wrongfully induced cooperation that is induced by fraud, cooperation that is induced by desire for economic security, or cooperation induced for any other immoral reason? Are those rape? Well, according to what I hear, because there is unwanted sex in those cases, there must be force, because sex is forced if it's unwanted. In that case those cases are the same. If you are saying that after the acceptance in the sex scam cases, that the rape is—

MS. FAIRSTEIN: It isn't accepted, as I understand it.

MR. DRIPPS: Well, I think for example, that you can prosecute the sex scams as rape—because there is sex in those cases there must be force.

MS. FAIRSTEIN: I don't say that because there is sex there must be force. I commented on the fact that they are sad examples of cases that fall between the cracks, because I think they should be prosecuted as rapes. I think they are the sorts of professions that should be licensed and regulated. But I have no problem knowing force when I see it. I'm not confusing—and I don't think—

MR. DRIPPS: You're speaking about the criminal enforcement?

MS. FAIRSTEIN: Yes.

MS. WEST: Criminal sanctions. There absolutely is force. It's not a consent.

MR. DRIPPS: Could you elaborate on what you were referring to in the record in *Berkowitz* which showed force?

MS. FAIRSTEIN: As the court says the prosecutor failed to do and as we would do in every case—one of the easiest things to do is you always put on the record the size of your victim; you ask for the record her height and weight. It establishes at least—if it's the *West* case, if it's a date rape case—you can argue when he is over her—I mean, here you've got the expression "straddling"—you can make the argument that he is 6'2" and she's 5'1" and unable to move, pinned on the

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\(^{77}\) N.Y. Penal Code § 130.65 (McKinney 1989).
bed, straddled by him. The court said the prosecutor failed to do that and that that might have made a difference to them. I mean, that’s there in the opinion.

There is a lot of language. I think that we always go to great pains to bring out all of the language and all of the encounter. I think there are clearly facts missing here. I don’t know everything that happened during that encounter. But it is certainly more than you present in your summary of it. The court was clearly troubled by not knowing. Now, that could have cut both ways.

As you know, Berkowitz took the stand. The victim said Berkowitz locked the door; after his first approach to her, he got up away from her and went and locked the door. She made no effort to leave the room. He tells a fairly compelling story, that of course before he went to bed with her, he locked the door, because he had a roommate and they wanted to proceed without being found that way. She knew and says it was a door that she thought she couldn’t get out of, that was locked with a key.

I think that there is a lot in that case that cuts both ways. I fault not the victim in this case, but the prosecutor, for not having elicited every minute fact, that I could therefore have argued at the end that the totality of the circumstances creates force. But I think there is bare-bones force that is made out there.

MR. DRIPPS: But that seems to give up, it seems to me, the principle of culpability; that there is implicit in the situation force because she is afraid. What has he done that is wrong that he is being punished for?

MS. FAIRSTEIN: He’s raped her. The fact that she was on the bed, he was over her body, that he was straddling her—and that’s where the prosecutor leaves it. But it was not clear from those facts, as I would like it to be, that she could not move because he was straddling her.

I mean, it’s amazing to me that on the lack of facts in that a record that a jury convicted him, as they did, of the same level of felony, that I assume has a mandatory sentence, that would put him in the position of being sentenced like Russell West.

I think the court couldn’t live with that. But I think he raped her, and I think there are enough of the basic facts that force was established by her saying “no” and his straddling her and holding her on the bed. You don’t think that’s important?

MR. DRIPPS: Well, if you look at it from a different perspective, she’s afraid, but what has he done to threaten her?

MS. FAIRSTEIN: He straddled her.
Audience Questions

MS. DENNO: Maybe at this point I will ask the audience if anyone has a question to ask of the panel speakers?

QUESTION: There has to be a difference between the fear and force in the West case versus the Berkowitz case. If you study what the abnormal psychologists write about the sadists, the anger rapists, and so forth, those are dangerous predatory sociopaths that we have to get out of society. There's a difference, then, between somebody taking a knife and forcing a girl. With those people their act is a deep-rooted hatred of women. Penetration is not really the ultimate in their minds.

I think there's a difference, Professor West, with today's rapists. They are not putting that victim into that fear that West did. Berkowitz did not do what West did. We're nit-picking on this when I'd love to hear some more about how do we define how these men got this way. How do we learn to identify it? And maybe your job, once you see a level of violence on a victim, is to let them be studied by the people down at the Behavioral Science Unit. Those people are beyond correction. It's only in a controlled environment, with dedication, that—

I think you've got to break down between West and Berkowitz. They are different classes of this problem.

MS. WEST: Let me just repeat that I'm not saying there's no difference. There is obviously a difference. I don't think, though, that it is the difference between violence and non-violence. There may be a difference in degree of fear. I don't think it's right to characterize the Berkowitz case as a non-violent rape.

QUESTIONER: But isn't there a difference between sex going a little too far between a couple of youngsters that are out and somebody like West, with a knife, or somebody who beats somebody into submission?

MS. WEST: Yes. But I don't think that's the Berkowitz case.

MS. FAIRSTEIN: There are acquaintance rapists who will rape once in a situation, and maybe Berkowitz—and I just hate to use Berkowitz, because I think it's a bad example of everything—but there are acquaintances, there are people on a date, who will commit a rape once, and it will be violent in that he will do against the victim's will what she doesn't want to do, and that person may never do it again. But there are many acquaintance rapists who are very violent, and there are many acquaintance rapists who repeat their acts as frequently as Ted Bundy did. That's a fact.

QUESTIONER: Then they are serial rapists.

MS. FAIRSTEIN: Then they are serial rapists, even though they may know their victims. So it is not that all acquaintance rape is less
serious. We’re talking so broadly and over-generally; that’s one problem.

And the example that you speak to is one of our major dissatisfactions working in this field. Nobody came to the study of sex offenders until about the mid-1960s, and the studies that were done break it down very over-simply into anger rapists and hate rapists, and there are four or five categories.

But none of those describe to my satisfaction—or I think anybody else’s—why people become pedophiles who attack eight-year-old children and not seven-year-olds and not nine-year-olds; or explains why the junkie breaks into a hospital to steal hypodermic needles and rapes an 86-year-old quadriplegic paralyzed in a hospital bed; or explains why Russell West stalks women of every shape, size and color in midtown office buildings at 3:00 in the afternoon; and that’s different than a guy who may be on a date and has never done anything like this before who commits an outrageous act; and maybe there’s a guy who makes a mistake because he’s had too much to drink or too much cocaine and he’ll never offend again. But we haven’t devoted any resources in our society to studying offender conduct.

There are a handful of states, like New York and New Jersey, which isolate offenders in the prison system and are attempting to study them. We see, because we are right in the middle of those states, so many recidivists, so many repeat offenders.

The first time I had one I called down to New Jersey to speak to the therapist, and I said, “We have Jerome Cohen, a man who has been arrested thirty-five times for sexually abusing nine-year-old children.” I said, “We have Mr. Cohen in custody.” She said—she must have been Anna Freud’s granddaughter—“You cannot have Mr. Cohen in custody. Mr. Cohen has been completely rehabilitated.” She was wrong, and he was arrested for eight more cases.

But now, in the last two years, the handful of people who do this work tell us that there are sexual predators—and they are more likely the Russell West/Ted Bundy kind—and there is no rehabilitation known to anybody working in the field that works for those predators.

You’ve got a nineteen-year-old kid in New Jersey who has three arrests for molesting young children, and the fourth time breaks into a neighbor and friend’s home and abducts, molests, and kills a six-year-old child. I’m not optimistic that we know any way to rehabilitate somebody like that.

That’s a sad commentary, but I think it’s simply because we have come to study this kind of victimization much too late, we know very little about it at this point, and there are not a lot of people willing to spend a lot of money to understand why it occurs. We are not going to stop it and prevent it until we know why it occurs.

QUESTION: Let me just make an observation. My sense is—I would just make my own comment—that the system is loaded against
the victim, and we take a very narrow view of rape if our view is that the rapist is the person with a knife or a gun. There are a lot of young women out there—I understand it from being a parent—who find themselves in the dark of night, victims of an attack by a larger person. This may not only be a stranger, but it may be somebody you know. That person has no right to do what that person does to a young woman.

I applaud what Linda has done. I think we need far more development to recognize that rape comes in many different contexts. The person who is perpetrating the rape, with or without a knife, is guilty of a very serious offense against a woman. I hope we can see more of the kind of development that Linda Fairstein has argued for. That’s my feeling.

QUESTION: One quick question. I’ve got to respond. I’m not minimizing the fear here. My point is those violent predators should never be out again. I don’t believe they are subject to rehabilitation. The offender in the date rape type of situation might be rehabilitated. That’s why I think you have a duty to make a difference between the types of rapists. One never gets out, and I don’t believe should get out, and the other might.

QUESTION: I would disagree with Professor Dripps. I don’t see the problem of rape in this country as being narrowly drawn such that you can distinguish between very violent and lesser violent consent. Men and women in this country are all affected by the phenomenon of rape and how it terrorizes women in this society, and how it leads to really the objectification of women by men, and specifically the references that you made, Professor Dripps, when talking about the appropriation of sex and looking at sex as a commodity. If that’s not objectifying sex and women, then I really don’t understand what is objectifying sex and women. I think that’s a large part of the problem with rape, is that in our society, through our culture, we have been raised and brought up to look at women as sexual objects—commercials, TV, what not. I think rape becomes a direct product of that. Having sex with a woman becomes a sport, becomes “what can I get from her tonight?”—not “when can I make love with her?”—seemingly one sur-text of rape can be called “making love,” which again I think needs reexamination.

MS. DENNO: Professor Dripps?

MR. Dripps: Start with what you mean by rape.

QUESTIONER: To use the term loosely, I guess, any unwanted sex.

MR. Dripps: So is it rape when a banker has sex with a widow to avoid foreclosure of her mortgage because she doesn’t want it?

QUESTIONER: It certainly is forced sex.
MR. DRIPPS: That is not the view of any jurisdiction in the coun-
try right now, that transaction.

QUESTIONER: I'm not trying to say that the patriarchal jurisdic-
tions of this country are necessarily looking out for the best interests
of women.

MR. DRIPPS: And so down the line with any incentive, at what
point do you find an incentive that's acceptable in that setting?

QUESTIONER: Excuse me?

MR. DRIPPS: Well, what would be a non-criminal incentive to
have sex?

QUESTIONER: Why do you need an incentive to have sex?

MR. DRIPPS: Let me change the language. What would be a non-
criminal cause, let's say?

QUESTIONER: A non-criminal cause? You mean what would be
consensual sex?

MR. DRIPPS: If you want to use that word, okay. But when you
get down to consent you start talking about cases in which people—

QUESTIONER: Well, if people are coerced into having sex, that's
far from consent.

MR. DRIPPS: What we mean by consent is typically—well, a con-
fession is coerced. Why is it coerced? Well, it's coerced because the
police did something that we think is objectionable to obtain the con-
fession. We don't mean it as a descriptive, scientific term. If a confes-
sion is caused by the defendant's schizophrenia, it is quite literally, in
the psychological language, "compelled." If the "voice of God" tells
the defendant to confess, that is not coerced because the police ha-
ven't done anything wrong.

So when we talk about consent what we usually mean—now, you
may mean something different, and I don't want to tell you what you
mean—but if what you mean is that the pressure to cause sex is objec-
tionable in a particular case, then, for example, you have to explain
why we treat Title VII sex harassment cases differently from rape.

MS. DENNO: Let's open it up to questions.

QUESTION: I think that a great deal of the controversy about
rape comes down to a matter of communication. Certainly not in the
West case, but in the Berkowitz case did he really understand that she
wanted him not to? I think that rather than trying to hash out on a
case-by-case basis who understands what and under what circum-
stances, you might do better in the long run to set up some sort of
national standard for what is an acceptable method to indicate a de-
sire not to have sex. For example, the words "I want you to stop now"
might be embedded in some sort of a national advertising program, as
there is no question about whether "no, no, no" is passion or whether
"yes means no." We might do better to enhance our communication
for many of those borderline cases rather than trying to do this on a case-by-case basis.

MS. FAIRSTEIN: Let me simply disagree with the fact that most of these cases have anything to do with understanding or communication. There are occasionally cases that happen that way, but most of the time the signals that the victim has given, whether verbally or physically, are very clear. There is very little rape that is due to failure to communicate, in fact.

QUESTION: Professor Dripps, in your article, Beyond Rape, you do acknowledge that there is one state in the country, New Jersey, that has somewhat, or at least for now, eliminated the element of consent in rape. Do you favor that kind of an—

MR. DRIPPS: They haven’t eliminated the element of consent, they have eliminated force.

QUESTIONER: Well, they tinker with both the elements. They say that they are eliminating consent, but I guess that they do eliminate force. Is that something that—

MR. DRIPPS: But as I read it, in that case it says that sex without expressed affirmative permission is rape.

QUESTIONER: Right.

MR. DRIPPS: I think what that means is that you’ve got to have consent.

QUESTIONER: Right, which is absolutely the reverse of your model.

MR. DRIPPS: Yes. That, I think, is the difference between myself and Professor West, Professor Shulhofer, and so forth, is that we all agree with the resistance requirement—under the present rape laws that is an anachronism—and the question is where do we go from here?

QUESTION: I have a question for Professor Dripps—two actually. The first question is, how did you come to the conclusion that a woman would rather submit to rape than be assaulted, and aren’t they the same thing?

MR. DRIPPS: I didn’t take a poll. If you’re serious about this, let me—if you criminalize you generalize, and there are going to be some people who, for whatever reason, are not phased by the shock, it doesn’t bother them. Nonetheless, beating people is illegal, and for most people a very negative experience.

I’m not going to say that all women feel that way or that there is some way to empirically validate that. They may disagree about whether it is more objectionable or less objectionable. But when I think about a tire tool and when I think about being involuntarily sexually penetrated, involuntary sexual penetration strikes me as more attractive than being hit in the head by a tire tool.
QUESTIONER: I think that is a very subjective view. My second question was, don’t you think that your commodity theory throws women back? Not only does it undermine the horror and violence of rape, but it throws women back to the time when they were considered a man’s property?

MR. DRIPPS: On the contrary, it’s exactly the opposite. The old theory was that a woman’s property was a man’s, her father’s until she is married, her husband’s in perpetuity thereafter. In my view the property interest in sexual cooperation is a woman’s personal interest or a man’s personal interest, as the case may be.

It seems to me to say that there is no commodity with respect to sexual cooperation means that somebody other than that woman is the gatekeeper to her sexuality, that she needs somebody’s permission—the government’s or just somebody—and that there has to be somebody else who can say, “No, you may not engage in sex.” To me that is the position that it seems to me is the throwback.

QUESTIONER: Well, it seems that you imply that she is the one who holds the commodity, and that therefore she is the one who has something to gain, that there’s no pleasure involved, and therefore she has something to trade—she’s not a person, she’s an item.

MR. DRIPPS: Why would you say that? If you sell a poem to a journal, and you have a copyright of that writing, and you transfer the copyright to the journal for a fee, have you suddenly lost your personal connection with the poem, does it become objectified?

QUESTIONER: But your personal being has not been violated.

MR. DRIPPS: Well, because you decided to publish it, no one forced you to publish it, and when you decided to publish it for your own advantage you parted with some of your personality, you gave up something, you exposed more of yourself to the world, in exchange for money from the journal, or fame at being a published author, or whatever.

It seems to me to say that when you separate from your personality, sexuality, by recognizing that there’s a legal entitlement, we have to grapple with the situations where we have intensely personal commitments that are protected by every aspect of the law.

QUESTION: On a different vein, what I see as one of the main problems with rape law—and rape and sexual assault in general—is that what we are dealing with, I think, is a society of women who are in fear, and I think that all women have at some point in their lives been fearful that they will be sexually assaulted in a variety of contexts, whether it be walking home at night, or being at a fraternity party in college, or in an intimate relationship with someone. I want to know, as far as rape law acts to deter crime, to rehabilitate, and to do all these other kinds of roles, what function does it have to help women stop feeling that they need to be fearful, to make women feel
that they exist in a society where they can protect themselves, where they can be safe?

MS. WEST: I think that it could do some of the work but not all of it. I think your question is a very good one. It’s really the central question. At present, [we do not have an effective rape law, and thus, we still have half the population in a state of fear.] You can’t have that and be equal citizens.

So, somehow, we have to, as the gentleman first stated, but I think more broadly, we have to address the causes of rape. We have to do that, if we’re serious about our commitment to a free and equal citizenry, because you simply cannot have one-half of the population in a state of fear of the other half. I don’t have the answer, but that is certainly the right question.

MS. FAIRSTEIN: I would agree and just say that the law does nothing except prosecute after the fact. It obviously doesn’t address in any way the terrible problem we have in this country in volumes far greater than any other civilized country in this world, that we have done nothing to better socialize our male population, and prosecuting after the fact is of little value.

I also just want to add to Professor Dripps’ distinction for choosing between rape and other forms of violence—shooting, stabbing, whatever—the major, or one of the major, concerns when women are victimized, but especially in situations that they perceive as life-threatening—as with armed assailants, usually strangers—is that they not only have to be subjected to the rape, but they don’t know as they are being raped that they are not also going to be shot, stabbed, and strangled. It is not a choice that they often have, and in many cases both things occur.

MR. DRIPPS: May I just make one comment? I want to make sure that I’m not understood as trivializing the state of fear that far too many female citizens today live with.

But I would also want to add that I know there is skepticism about other than deterrence and incarceration, which work—they’re crude, they don’t work perfectly, but they do make some measurable contribution to promoting female security. Once we go beyond that and get into rehabilitation as our first pacifist Attorney General Ramsey Clark did, we begin to empower the state to manipulate people’s personalities; that’s what it means. The last time we tried it, in that system in the 1970s, it didn’t do much to promote public security, but it did authorize the government to exert power over people’s lives to a degree it had not before. Before we go down that road again I think we ought to have pretty clear evidence that we are going to get a payback.

MS. DENNO: Thank you very much. I want to thank our panelists for their insights, all of whom have written extensively on this topic, and certainly thought about it. Thank you very much.