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ALL-AMERICAN RAPE

MICHELLE J. ANDERSON[†]

INTRODUCTION

What is rape? What is the harm in it, and how should the law conceptualize the crime? In this Article, I will contrast the classic rape narrative with a typical rape, describe how the law and legal scholars have conceptualized the harm of rape, and contrast those conceptions with the experience of rape for its victims and offenders. I will then begin to explore the legal implications of a focus on the experience of rape and suggest a new set of requirements for the crime. In this short discussion I cannot hope to persuade you of the merits of my proposal. For that I hope another article of mine entitled *Negotiating Sex*, forthcoming in the *Southern California Law Review*,¹ will do. What I do hope to convince you of is that current legal conceptions are inadequate to the lived experience of the crime of rape.

I. CLASSIC RAPE NARRATIVE

When asked to imagine the classic rape, the American mind often conjures up a narrative something like this:

A fair young woman is walking home alone at night. Gray street lamps cast shadows from the figure she cuts through an urban landscape. She hurries along, unsure of her safety. Suddenly, perhaps from behind a dumpster, a strange, dark man lunges out at her, knife at her throat, and drags her into a dark alley where he threatens to kill her, and beats her until she bleeds. The young woman puts up a valiant fight to protect her sexual virtue, but

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¹ Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. (forthcoming 2005).

the assailant overcomes her will and rapes her. Afterwards, she immediately calls the police to report the offense.

This classic rape narrative is woven from a racist and sexist mythology specific to our country and its history.² Color infuses the yarn: sinister blackness against innocent whiteness, in a conflict that draws red blood.³ Extrinsic, violent assaults by a stranger are the weft and warp of the tale: the rapist's wielding of a knife, his dragging her into an alley, his threat of death, his beating.

Despite generations of repeated storytelling, this type of rape is, in terms of actual incidence, a statistical outlier—so different from the norm as to be exceptional rather than typical. Contrast that classic narrative with a description of a typical rape, one in which both the offender and the victim are of your own race:

A male and a female student meet at a party and begin to talk, drink, and flirt. Later, she wanders to a quiet place with him. Once there, he pushes her down, pins her, and begins kissing her aggressively. She does not want to be rude. He must have misunderstood, she thinks. The alcohol is getting to her, she feels dizzy, and she wonders if she is going to throw up. She says, "Ummm . . . wait . . . please . . . I'm not sure that this is what we should do." He ignores her and begins taking off their clothes. She cannot seem to get away, and her panic rises. She cries as he penetrates her. Shamed by the experience, she does not tell anyone until three years later when she confides in a trusted friend. She never calls the police.

This time there are no extrinsic, violent assaults by a stranger—no knife, no dragging into an alley, no threat of death, no beating. There is no black male attack on white femaleness, no brawl that draws red blood. Yet, this story represents the

² See JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 86–112 (1988) (explaining that European immigrants to America differentiated themselves from nonwhites by merging sexual and racial ideologies in order to gain social control over slaves and justify the appropriation of land).

³ See BELL HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* 33–39, 52, 85 (1981); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1271 (1991) (describing how blacks have long been portrayed as more sexual, gratification-oriented people).

statistical norm of sexual assault in this country—no matter the race of the parties, it is an all-American rape.

The typical rape in the United States does not happen in an alleyway. It most often happens in the victim's own home or in the home of a friend, relative, or neighbor.⁴ The typical rape is not launched by a stranger. Acquaintances and intimate partners commit the vast majority of rapes.⁵ The typical rape does not involve a black man attacking a white woman. Rape is overwhelmingly an intra-racial crime.⁶ The typical rape involves no knives, guns, or other weapons.⁷ Many rapists find verbal coercion and pinning sufficient.⁸ The typical rape does not involve valiant physical resistance on the part of the victim. Frozen in fright, many women cry or remain passive in the face of a sexual attack.⁹ The typical rape does not involve a victim with untainted sexual virtue. Rape happens to imperfect, complicated souls—like all of us—whose sexual pasts could not withstand critical public scrutiny.¹⁰ The typical rape does not include a prompt report to the police; many victims never report their most harrowing experiences to any authority figures.¹¹

Stuck as it is on the classic rape narrative, the law has

⁴ BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2002 STATISTICAL TABLES tbl.61 (2002) (indicating that the highest percentages of rapes occur in the victim's home or the home of a friend or relative).

⁵ *Id.* at tbl.43 (stating that about sixty-eight percent of rapes and sexual assaults are committed by acquaintances, relatives, and intimates).

⁶ *See id.* at tbl.42 (indicating that eighty-six percent of black victims report black offenders and fourteen percent report white offenders, while seventy-six percent of white victims report white offenders and thirteen percent report black offenders).

⁷ *Id.* at tbl.66 (showing that eighty-five percent of rapes and sexual assaults involve no weapons).

⁸ *See* Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 1003 n.298 (noting studies which indicate that offenders in acquaintance rapes use a high level of verbal abuse but little physical force).

⁹ *See* Anderson, *supra* note 1; Anderson, *supra* note 8, at 958 (explaining that girls are taught to remain passive in situations like rape).

¹⁰ *See* Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 101–02 (2002) (citing studies that show young women today engage in more sexual experiences and at younger ages).

¹¹ *See* Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 978–79 (2004) (citing statistics that show “63 percent of rapes, 65 percent of attempted rapes, and 74 percent of sexual assaults were not reported to the police”).

fundamentally misconceived the crime. Instead of criminalizing rape, it has criminalized the extrinsic, violent assault: a bloody brawl with the goal of obtaining sex. The classic rape narrative actually involves at least two crimes: assault and rape. The all-American rape, by contrast, involves just one—the rape itself. Both historically and at present, the law has remained obsessed with criminalizing the extrinsic, violent assault and has disregarded the rape.

English common law defined rape as a man obtaining sexual intercourse by force and without a woman's consent. In 1769, in his *Commentaries on the Laws of England*, William Blackstone explained that rape was "the carnal knowledge of a woman forcibly and against her will."¹² "Forcibly" meant that the man used physical force or its threat to obtain sexual penetration.¹³ "Against her will" meant that the woman did not consent to sexual penetration, and the law required that she resist him to the utmost of her physical capacity to express her non-consent.¹⁴ The common law, therefore, required a physical fight on two parts. It required the victim to put up physical resistance against a sexual attack, and it required a rapist to overcome the victim's physical resistance with force.¹⁵

The English common law definition of rape has not disappeared over time. For instance, in the *Uniform Crime Reports* the FBI defines rape today as "carnal knowledge of a female forcibly and against her will"—precisely how Blackstone defined it 236 years ago.¹⁶

II. RAPE IN STATE STATUTES

Like the FBI's definition, although less literally, the vast majority of state laws in the United States derive from the classic rape narrative: they basically require a defendant to exert force against his victim before the state may convict him of what is commonly thought of as rape. Setting aside those circumstances

¹² WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 209 (1895).

¹³ SUSAN ESTRICH, REAL RAPE 59–60 (1987).

¹⁴ ESTRICH, *supra* note 13, at 59, 64–65; Anderson, *supra* note 8, at 962–63.

¹⁵ See Anderson, *supra* note 8, at 962–63 (discussing the history of resistance in the common law rape).

¹⁶ FBI, U.S. DEPT OF JUSTICE, CRIME IN THE UNITED STATES, 2002 (2002), available at http://www.fbi.gov/ucr/cius_02/html/web/offreported/02-nforciblerape04.html (defining forcible rape).

in which the victim *cannot* consent—such as when the victim is underage, mentally incapacitated, or physically helpless¹⁷—in order to be convicted of a state's highest, non-aggravated sexual offense, statutes in forty-three states and the District of Columbia require that the defendant use force¹⁸ against his

¹⁷ This would also include circumstances involving an abuse of authority or apparent authority. See ALA. CODE § 13A-6-61(a)(2)–(3) (Supp. 2004); ALASKA STAT. § 11.41.410(a)(3)–(4) (2004); ARIZ. REV. STAT. ANN. §§ 13-1401(5)(b) (defining “without consent”), 13-1405–13-1406 (2001); ARK. CODE ANN. § 5-14-103(a)(1)(B)–(D) (Supp. 2003); CAL. PENAL CODE §§ 261(a)(1), (3)–(5), (7), 261.5, 286(b)–(h) (Deering Supp. 2005); COLO. REV. STAT. § 18-3-402(1)(b)–(h) (2004); CONN. GEN. STAT. § 53a-70(a)(2)–(4) (1999); DEL. CODE ANN. tit. 11, §§ 761(h) (defining “without consent”), 773(a)(5)–(6) (Supp. 2004); D.C. CODE ANN. § 22-3008 (LexisNexis 2001); FLA. STAT. ANN. § 794.011(2)(a)–(b), (4)(a), (d)–(g) (West Supp. 2005); GA. CODE ANN. §§ 16-6-1(a)(2), 16-6-3 (2003); HAW. REV. STAT. ANN. § 707-730(1)(b)–(c) (LexisNexis Supp. 2004); IDAHO CODE ANN. §§ 18-1508, 18-1508A, 18-6101(1)–(2), (4)–(6), 18-6108(1), (4)–(5) (2004); 720 ILL. COMP. STAT. 5/12-13(3)–(4), 5/12-14.1 (2002); IND. CODE ANN. §§ 35-42-4-1(a)(2)–(3), 35-42-4-2(a)(2)–(3), 35-42-4-3(a)(1) (West 2004); KAN. STAT. ANN. §§ 21-3502(a)(1)(B)–(C), (a)(2)–(4), 21-3505(a)(2)–(3) (Supp. 2004); KY. REV. STAT. ANN. §§ 510.040(1)(b), 510.080(1)(b) (LexisNexis 1999); LA. REV. STAT. ANN. § 14:43(A)(1)–(3), 14:80, 14:80.1 (2005); ME. REV. STAT. ANN. tit. 17-A, §§ 253(1)(B)–(C), (2)(A), (C)–(G), 254 (Supp. 2004); MASS. ANN. LAWS ANN. ch. 265, § 23 (LexisNexis 2004); MICH. COMP. LAWS § 750.520b(1)(a)–(d), (g)–(h) (2003); MINN. STAT. § 609.342(a)–(b), (e)–(h) (2003); MO. ANN. STAT. §§ 566.032, 566.060, 566.062 (West 1999); MONT. CODE ANN. §§ 45-5-501(1) (defining “without consent”), 45-5-503 (2003); NEV. REV. STAT. ANN. §§ 200.366, 200.368 (Supp. 2003); N.J. STAT. ANN. § 2C:14-2 (a)–(b), (c)(3)–(4) (West Supp. 2005); N.M. STAT. ANN. § 30-9-11(C)(1) (West Supp. 2003); N.Y. PENAL LAW §§ 130.35 (2)–(4), 130.50 (2)–(4), 130.75 (McKinney 2004); N.C. GEN. STAT. §§ 14-27.2(a)(1), 14-27.4(a)(1), 14-27.7A (2003); N.D. CENT. CODE § 12.1-20-03(1)(b)–(e) (1997); OHIO REV. CODE ANN. §§ 2907.02(A)(1)(b)–(c), 2907.03(A), 2907.04 (LexisNexis 2003); OKLA. STAT. ANN. tit. 21, § 1114(A)(1)–(2), (5) (2002); OR. REV. STAT. §§ 163.375(1)(b)–(d), 163.405(1)(b)–(d), 163.411(1)(b)–(c), 163.435, 163.445 (2003); 18 PA. CONS. STAT. §§ 3121(a)(3)–(5), (c), 3122.1, 3125(a)(4)–(8) (Supp. 2005); R.I. GEN. LAWS §§ 11-37-2(1), (3)–(4), 11-37-8.1 (2002); S.C. CODE ANN. § 16-3-655 (2003); S.D. CODIFIED LAWS §§ 22-22-1(1), (3)–(5), 22-22-30.1 (1998 & Supp. 2003); TEX. PENAL CODE ANN. § 22.011(a)(2), (b) (defining “without consent”) (Vernon Supp. 2004); VA. CODE ANN. §§ 18.2-61(A)(ii)–(iii), 18.2-63, 18.2-67.2(A)(1)–(2) (2004); WASH. REV. CODE ANN. § 9A.44.073 (West 2000); W. VA. CODE ANN. §§ 61-8B-3(a)(2), 61-8B-4(a)(2) (2000); WIS. STAT. ANN. §§ 948.02(1), 948.09 (West Supp. 2004); WYO. STAT. ANN. § 6-2-302(a)(iii)–(iv) (2005).

¹⁸ Statutory language used to express the force requirements varies. Fourteen states use only the term “force.” See D.C. CODE ANN. § 22-3002 (LexisNexis 2001); IDAHO CODE ANN. § 18-6101 (2004); 720 ILL. COMP. STAT. ANN. 5/12-13 (2002); LA. REV. STAT. ANN. § 14:42.1 (2004); ME. REV. STAT. ANN. tit. 17-A, §§ 251, 253 (Supp. 2004); MICH. COMP. LAWS § 750.520b(1)(f) (2003); MINN. STAT. ANN. § 609.344 (c) (West 2003); N.J. STAT. ANN. § 2C:14-2 (West Supp. 2005); N.M. STAT. ANN. § 30-9-11(A)(2), (E) (West Supp. 2003); OKLA. STAT. ANN. tit. 21, § 1114 (West 2002); R.I. GEN. LAWS §§ 11-37-1(2), 11-37-2 (2) (2002); S.C. CODE ANN. § 16-3-654 (2003); S.D. CODIFIED LAWS § 22-22-1 (Supp. 2003); WYO. STAT. ANN. § 6-2-302(ii) (2005). Four states use a form of the phrase “compels by force.” See CONN. GEN. STAT. § 53a-70 (1999); IND. CODE ANN. § 35-42-4-1 (West 2004); N.D. CENT. CODE § 12.1-20-03

victim.¹⁹ Although eight of these forty-four statutes appear to require only non-consent, they include the use of force in the definition of "non-consent."²⁰

(1997); OHIO REV. CODE ANN. § 2907.02 (LexisNexis 2003). One state requires that a defendant coerce by threat of force. *See* FLA. STAT. ANN. § 794.011 (West Supp. 2005). Nine states use the term "forcible compulsion." *See* ALA. CODE § 13A-6-61 (Supp. 2004); ARK. CODE ANN. § 5-14-103 (Supp. 2003); KY. REV. STAT. ANN. § 510.040 (LexisNexis 1999); MO. ANN. STAT. § 566.030 (West 1999); N.Y. PENAL LAW § 130.35 (McKinney 2004); OR. REV. STAT. § 163.375 (2003); 18 PA. CONS. STAT. § 3121 (Supp. 2005); WASH. REV. CODE ANN. § 9A.44.050 (West 2000); W. VA. CODE ANN. § 61-8B-4(a)(1) (LexisNexis 2000). West Virginia combines "without . . . consent" and "forcible compulsion," and because forcible compulsion is a required element it is included here. Two states use the term "compulsion." *See* HAW. REV. STAT. ANN. § 707-730 (LexisNexis Supp. 2004); ME. REV. STAT. ANN. tit. 17-A, § 253 (Supp. 2004).

¹⁹ The following statutes deal only with the highest level offense that is not aggravated. *See* ALA. CODE §§ 13A-6-61(a)(1), 13-6-63(a)(1), 13-6-65.1(a)(1) (Supp. 2004); ALASKA STAT. § 11.41.410(a)(1)–(2) (2004); ARIZ. REV. STAT. ANN. § 13-1406 (2001); ARK. CODE ANN. § 5-14-103(a)(1)(A) (Supp. 2003); CAL. PENAL CODE §§ 261(2), 286(c)(2) (Deering Supp. 2005); COLO. REV. STAT. § 18-3-402 (2004); CONN. GEN. STAT. § 53a-70(a)(1) (1999); DEL. CODE ANN. tit. 11, § 773 (Supp. 2004); D.C. CODE ANN. § 22-3002 (LexisNexis 2001); FLA. STAT. ANN. § 794.011(3), (4)(b) (West Supp. 2005); GA. CODE ANN. § 16-6-1(a)(1) (2003); HAW. REV. STAT. ANN. § 707-730(1)(a) (LexisNexis Supp. 2004); IDAHO CODE ANN. §§ 18-6101(3), 18-6108(2)–(3) (2004); 720 ILL. COMP. STAT. 5/12-13(1) (2002); IND. CODE ANN. §§ 35-42-4-1(a)(1), 35-42-4-2(a)(1)–(b)(1) (West 2004); KAN. STAT. ANN. § 21-3502(a)(1)(A) (Supp. 2004); KY. REV. STAT. ANN. § 510.040(1)(a) (LexisNexis 1999); LA. REV. STAT. ANN. § 14:42.1 (2005); ME. REV. STAT. ANN. tit. 17-A, § 253(1)(A) (Supp. 2004); MD. CODE ANN., CRIM. LAW §§ 3-303(a)(1), 3-304(a)(1) (LexisNexis Supp. 2004); MASS. ANN. LAWS ch. 265, § 22(a)–(b) (LexisNexis 2002); MICH. COMP. LAWS § 750.520b(1)(e)–(f) (2003); MINN. STAT. ANN. § 566.030 (West 2003); MONT. CODE ANN. §§ 45-5-501(1)(a), 45-5-503 (2003); NEV. REV. STAT. ANN. § 200.366 (LexisNexis Supp. 2003); N.J. STAT. ANN. § 2C:14-2(c)(1) (West Supp. 2005); N.M. STAT. ANN. § 30-9-11(C)(2) (LexisNexis Supp. 2003); N.Y. PENAL LAW §§ 130.35(1), 130.50(1) (McKinney 2004); N.C. GEN. STAT. §§ 14-27.2(a)(2), 14-27.4(a)(2) (2003); N.D. CENT. CODE § 12.1-20.03(1)(a) (1997); OHIO REV. CODE ANN. § 2907.02(A)(2) (LexisNexis 2002); OKLA. STAT. ANN. tit. 21, § 1114(A)(3) (West 2002); OR. REV. STAT. §§ 163.375(1)(a), 163.405(1)(a), 163.411(1)(a) (2003); 18 PA. CONS. STAT. § 3121(a)(1) (Supp. 2005); R.I. GEN. LAWS § 11-37-2(2) (2002); S.C. CODE ANN. § 16-3-652(1)(a) (2003); S.D. CODIFIED LAWS § 22-22-1(2) (Supp. 2003); TEX. PENAL CODE ANN. § 22.011(b)(1) (Vernon Supp. 2004); VA. CODE ANN. § 18.2-61(A)(i) (2004); WASH. REV. CODE ANN. § 9A.44.040 (West 2000); W. VA. CODE ANN. § 61-8B-4(a) (LexisNexis 2000); WIS. STAT. ANN. § 940.225(2) (West Supp. 2004); WYO. STAT. ANN. § 6-2-302(a)(i) (2005).

²⁰ *See* ALASKA STAT. §§ 11.41.410, 11.41.470(8)(A) (2004) ("[W]ithout consent' means that a person . . . is coerced by the use of force . . ."); ARIZ. REV. STAT. ANN. §§ 13-1401(5)(a), 13-1406 (2001) ("Without consent' includes . . . the victim [being] coerced by the immediate use or threatened use of force . . ."); CAL. PENAL CODE § 261(a)(2) (Deering Supp. 2005) ("Rape is . . . accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another."); DEL. CODE ANN. tit. 11, §§ 761(h)(1), 773 (a)(5)–(6) (Supp. 2004) ("Without consent' means . . . the defendant compelled the victim to

Sixteen states and the District of Columbia do criminalize sexual penetration that is non-consensual and without force.²¹ These states, however, impose less punishment upon non-

submit by any act of coercion . . . or by force"); KAN. STAT. ANN. § 21-3502 (Supp. 2004) ("Rape is: (1) Sexual intercourse with a person who does not consent to the sexual intercourse, under any of the following circumstances . . . (A) [w]hen the victim is overcome by force or fear"); MONT. CODE ANN. §§ 45-5-502, 45-5-503, 45-5-501(1)(a) (2003) ("[W]ithout consent' means . . . the victim is compelled to submit by force against the victim or another"); TEX. PENAL CODE ANN. § 22.011(b)(1) (Vernon Supp. 2004) (defining "sexual assault" as "without the consent of the other person if . . . the actor compels the other person to submit or participate by the use of physical force or violence"); WIS. STAT. ANN. § 940.225(4) (West Supp. 2004) ("Consent' . . . means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact.").

²¹ See ALA. CODE § 13A-6-65 (Supp. 2004) (defining sexual misconduct as intercourse occurring "without [the victim's] consent"); CONN. GEN. STAT. § 53a-73a (1999) (making sexual contact without consent a misdemeanor fourth degree sexual assault); D.C. CODE ANN. § 22-3006 (LexisNexis 2001) (defining "misdemeanor sexual abuse" as "engag[ing] in a sexual act . . . without that other person's permission"); FLA. STAT. ANN. § 794.011(5) (West Supp. 2005) (defining second degree sexual battery as "without that person's consent" and without the use of force); HAW. REV. STAT. ANN. §§ 707-700, 707-733 (LexisNexis Supp. 2004) (noting that "compulsion" necessary for fourth degree sexual assault is satisfied simply by the absence of consent); KY. REV. STAT. ANN. § 510.130 (LexisNexis 1999) (making sexual contact without the other's permission a misdemeanor); ME. REV. STAT. ANN. tit. 17-A, § 255-A(1)(B) (Supp. 2004) ("The other person has not expressly or impliedly acquiesced in the sexual contact and the sexual contact includes penetration."); MD. CODE ANN., CRIM. LAW § 3-308 (Supp. 2004) (making contact without consent a sexual offense in the fourth degree); MINN. STAT. ANN. § 609.3451 (West 2003) (defining criminal sexual conduct in the fifth degree as nonconsensual sexual contact); MO. ANN. STAT. § 566.040 (West 1999) (defining sexual assault as "sexual intercourse with another person knowing that he does so without that person's consent"); N.Y. PENAL LAW § 130.20 (McKinney 2004) (defining the crime of "sexual misconduct" as sexual intercourse without the person's consent); N.D. CENT. CODE 12.1-20-07(1)(a) (Supp. 2003) (noting that "sexual assault" requires one to "knowingly ha[ve] sexual contact" and "know[] or ha[ve] reasonable cause to believe that the contact is offensive to the other person"); OR. REV. STAT. § 163.425(1) (2003) (stating that one who commits second degree sexual abuse "subjects another person to sexual intercourse, deviate sexual intercourse or . . . penetration . . . and the victim does not consent thereto"); 18 PA. CONS. STAT. § 3124.1 (Supp. 2005) (defining the offense of sexual assault as "sexual intercourse or deviate sexual intercourse . . . without the complainant's consent"); S.D. CODIFIED LAWS § 22-22-7.4 (Supp. 2003) ("No person fifteen years of age or older may knowingly engage in sexual contact with another person other than his spouse who, although capable of consenting, has not consented to such contact."); WASH. REV. CODE ANN. § 9A.44.060 (West 2000) (creating a lesser offense "[w]here the victim did not consent . . . and such lack of consent was clearly expressed by the victim's words or conduct"); WIS. STAT. ANN. § 940.225(3) (West Supp. 2004) (defining third degree sexual assault as any sexual intercourse or contact "without the consent" of the victim).

consensual penetration,²² with greater than half of them categorizing these offenses as mere misdemeanors.²³

Overall, then, under just six state statutes does the All-American rape constitute the highest, non-aggravated sexual

²² FLA. STAT. ANN. § 794.011(3), (5) (West Supp. 2005) (defining sexual battery without consent as a second degree felony while sexual battery with force is a felony punishable by life in prison); ME. REV. STAT. ANN. tit. 17-A, §§ 253(1)(A), 255-A(1)(A) (Supp. 2004) (defining gross sexual assault with compulsion as a Class A crime and non-consensual sexual contact as a Class D crime); MO. ANN. STAT. §§ 557.021(3)(1)(a), 566.030, 566.040 (West 1999) (making forcible rape a Class A felony and sexual assault without consent a Class C felony by stating that “[i]t is a Class A felony if the authorized penalty includes death, life imprisonment or imprisonment for a term of twenty years or more”); N.D. CENT. CODE §§ 12.1-20-03, 12.1-20-07 (Supp. 2003) (defining gross sexual imposition requiring force as a Class A felony while making nonconsensual sexual assault a Class C felony); 18 PA. CONS. STAT. § 3124.1 (Supp. 2005) (classifying sexual intercourse without consent as a second degree felony); WASH. REV. CODE ANN. §§ 9A.44.040, 9A.44.060 (West 2000) (defining first degree rape requiring forcible compulsion as Class A felony and third degree rape requiring only non-consent as a Class C felony); WIS. STAT. ANN. § 940.225 (West Supp. 2004) (establishing sexual assault in the first degree as a Class B felony and sexual assault in the third degree as a Class G felony).

Minnesota, which does not divide its crimes into felonies and misdemeanors, imposes discrepant punishments for forcible and nonconsensual sexual contact. See MINN. STAT. ANN. §§ 609.342, 609.3451 (West 2003). Criminal sexual conduct in the first degree is punishable by a maximum of thirty years in prison and a \$40,000 fine while the lesser offense of criminal sexual conduct in the fifth degree is punishable by not more than one year in jail and a maximum \$3,000 fine. See *id.*

²³ ALA. CODE §§ 13A-6-61, 13A-6-65 (Supp. 2004) (making first degree rape with force a felony and the offense of sexual misconduct, requiring only non-consent, a misdemeanor); CONN. GEN. STAT. ANN. §§ 53a-70, 53a-73a (West 2005) (making sexual assault in the first degree a Class B felony and sexual assault in the fourth degree, requiring only non-consent, a misdemeanor); D.C. CODE ANN. §§ 22-3002, 22-3006 (LexisNexis 2005) (making first degree sexual abuse a Class A felony and the lesser offense of sexual abuse, requiring only a lack of permission, a misdemeanor); HAW. REV. STAT. ANN. §§ 707-700, 707-730, 707-733 (LexisNexis Supp. 2004) (making sexual assault in the first degree, requiring strong compulsion, a Class A felony and sexual assault in the fourth degree, requiring compulsion defined by mere non-consent, a misdemeanor); KY. REV. STAT. ANN. §§ 510.040, 510.140 (LexisNexis Supp. 2004) (making rape in the first degree a Class B felony and the lesser offense of sexual misconduct without permission a misdemeanor); MD. CODE ANN., CRIM. LAW §§ 3-303, 3-308 (LexisNexis Supp. 2004) (making rape in the first degree, which requires force, a felony and sexual offense in the fourth degree, requiring contact without consent, a misdemeanor); NY PENAL LAW §§ 130.20, 130.35 (McKinney Supp. 2005) (making rape in the first degree, requiring force, a Class B felony while making the lesser offense of “sexual misconduct,” requiring only non-consent, a misdemeanor); OR. REV. STAT. §§ 163.375, 163.415 (Supp. 2004) (making rape in the first degree a Class A felony and sexual abuse in the third degree, requiring only nonconsensual contact, a Class A misdemeanor); S.D. CODIFIED LAWS §§ 22-22-1(7), 22-22-7.4 (Supp. 2003) (allowing second degree rape to be a Class 2 felony and the offense of “sexual contact without consent with person capable of consenting” to be a misdemeanor).

offense.²⁴ Under the statutes of sixteen states and the District of Columbia, the all-American rape is a lesser sexual offense, half of the time a lowly misdemeanor.²⁵ Under twenty-seven state statutes—in other words, under a majority of state statutes—the all-American rape is no crime at all.

Culturally, as well as legally, the classic rape narrative remains the public face of rape in this country. It is statistically rare but spoken of frequently. It leads the nightly news; it has centered academic discussion of the crime.²⁶ The all-American rape, by contrast, is painfully common but almost never discussed. Its victims rarely come forward for they know they will be blamed if they do.²⁷ As a result, the classic rape narrative is the official story of rape in this country, while the reality of the all-American rape is suppressed.

At least two legal scholars have written of their own experiences of rape. Professor Susan Estrich, who is white, has

²⁴ See MISS. CODE ANN. § 97-3-95 (Supp. 2004); NEB. REV. STAT. §§ 28-318, 28-319 (Supp. 2004); N.H. REV. STAT. ANN. § 632-A:2(m) (LexisNexis Supp. 2004); TENN. CODE ANN. § 39-13-503 (2003); UTAH CODE ANN. § 76-5-402 (Supp. 2004); VT. STAT. ANN. tit. 13, § 3252 (Supp. 2004).

Only the New Jersey Supreme Court has greatly deviated from its state's statutory force requirement. The court interpreted the victim's non-consent as satisfying the statute's force requirement. New Jersey *ex rel.* M.T.S., 609 A.2d 1266, 1276 (N.J. 1992) (stating that because the victim is not required to resist, she does not need to say or do anything for the sexual penetration to be unlawful). In a narrower way, three other states may be limiting their statutory force requirements as well. See *People v. Iniguez*, 872 P.2d 1183, 1189 (Cal. 1994) (establishing that resistance is not required to prove sexual assault); *State v. Borthwick*, 880 P.2d 1261, 1271 (Kan. 1994) (stating that the relevant statute requires a finding that the victim did not give her consent and that she was overcome by force or fear to facilitate intercourse but not that the victim was overcome by force in the form of a beating or physical restraint); *State v. Gamez*, 494 N.W.2d 84, 87 (Minn. Ct. App. 1992) (holding that evidence of coercion through creation of fear is sufficient to affirm a conviction for criminal sexual conduct). Nevertheless, there are few reported cases in New Jersey in which the defendant did not employ extrinsic force or a threat of such force. Likewise, in the seven states in which the criminal law statute does not require force, the case law is not markedly different from that in states in which there is a statutory force requirement.

²⁵ See *supra* notes 21–23 and accompanying text.

²⁶ See ESTRICH, *supra* note 13, at 1–2 (discussing her own rape experience, which is similar to the classic rape); Lynne N. Henderson, *What Makes Rape a Crime?*, 3 BERKELEY WOMEN'S L.J. 193, 221–24 (1988) (reviewing ESTRICH, *supra* note 13).

²⁷ See Anna Wakelin & Karen M. Long, *Effects of Victim Gender and Sexuality on Attributions of Blame to Rape Victims*, 49 SEX ROLES 477, 477 (2003) (arguing that the authorities, the rapists, and even the victims themselves often attribute the blame for the crime to the victim).

written about a black man stealing her car and money, holding an ice pick to her throat, threatening to kill her, and raping her.²⁸ She promptly reported her rape to the police.²⁹ Professor Lynne Henderson has written about a stranger breaking into her house, brandishing a screwdriver, threatening to kill her, breaking her nose and jaw, beating her bloody, and raping her.³⁰ After her prompt report to the police, the offender was "caught, convicted, and sent to prison for a long time."³¹ It was important and beneficial for these women to come forward to discuss their own rapes. They are particularly courageous because many legal academics regard personal experience not as a valuable source of knowledge that may enhance the scholarly discourse but as a troubling and perhaps disqualifying taint to one's academic objectivity.

Notably, however, these two legal scholars' experiences reflect only the official story of rape, the classic rape narrative. Few scholars have come forward to discuss their experiences of the all-American rape. Yet how many more of us must there be?

III. CONCEIVING THE HARM OF RAPE

Scan recent legal literature on the harm of rape and one may be surprised to discover the frequent assertion that sexual intercourse is intrinsically pleasurable³²—an assertion that does not begin to approximate the complexity of women's experiences of being sexually penetrated.³³ For example, Professor Joshua

²⁸ ESTRICH, *supra* note 13, at 1–2.

²⁹ *Id.* at 1–2.

³⁰ Henderson, *supra* note 26, at 221–24.

³¹ *Id.* at 223.

³² See Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, 46 CLEV. ST. L. REV. 409, 429 (1998); Alan Wertheimer, *What Is Consent? And Is It Important?*, 3 BUFF. CRIM. L. REV. 557, 582 (2000).

³³ It is not hard to discern whose pleasure these gentlemen have in mind. Using one's penis to penetrate someone else is ordinarily very pleasurable. Being penetrated, however, is much less so. Sexual penetration does not normally bring female ecstasy. Although effective at obtaining male orgasm, penetration is remarkably ineffective at obtaining female orgasm. See generally Anne Koedt, *The Myth of the Vaginal Orgasm*, in *FEMINISM IN OUR TIME: THE ESSENTIAL WRITINGS, WORLD WAR II TO THE PRESENT* 333 (Miriam Schneir ed., 1994). Seventy percent of women do not experience orgasm regularly from sexual penetration. See SHERE HITE, *THE NEW HITE REPORT: THE REVOLUTIONARY REPORT ON FEMALE SEXUALITY UPDATED* 212 (2000). Women's and men's first experiences of heterosexual intercourse are telling. While seventy-nine percent of men experienced orgasm their

Dressler, who advocates requiring a conscious victim to object before unwanted sexual intercourse is rape, argues that because "sexual contact ordinarily is a pleasurable event that humans generally seek rather than avoid...it is not grossly unreasonable to expect the parties to make their wishes evident in sexual affairs."³⁴ When arguing that most deception to obtain sexual intercourse should remain legal, Professor David Bryden asserts:

[S]ex is typically pleasurable in itself. Consequently, it usually is less clear whether the sexual encounter would have occurred without the deception and also whether the deception destroyed the value of the encounter to the victim....[A] sexual relationship...is usually mutually pleasurable even if seriously dishonest in some respect.³⁵

Concerned that criminalizing sexual penetration with an intoxicated person may fabricate an "ideologically loaded" form of "retrospective distress," Professor Alan Wertheimer asserts that "it is arguable that most sexual relationships—even intoxicated sexual relationships—are pleasurable, that they do not typically involve significant physical or psychological harm."³⁶ Implicit in the subjective assertion that sexual penetration is pleasurable and not harmful is the idea that the extrinsic, violent assault of the classic rape narrative is the central harm of rape.

first time, only seven percent of women did. See Susan Sprecher, Anita Barbee & Pepper Schwartz, "Was It Good for You, Too?": Gender Differences in First Sexual Intercourse Experiences, 32 J. SEX RES. 3, 9 (1995).

Setting aside those acts that are coerced or forced, many acts of sexual penetration remain unwanted. For twenty-five percent of women, their first experience, although voluntary, was not wanted. See Edward O. Laumann, *Early Sexual Experiences: How Voluntary? How Violent?*, in SEXUALITY & AMERICAN SOCIAL POLICY, 11 (Smith et al. eds., 1996). Thirty percent of a sample of college women had previously engaged in unwanted intercourse because they perceived that the cost of refusing sex was higher than cost of submitting to it. Miriam Lewin, *Unwanted Intercourse: The Difficulty of Saying No*, 9 PSYCHOL. WOMEN Q. 184, 184–87 (1985). Other acts of sexual penetration, although desired, turn out to be physically painful or emotionally deadening "masturbation in the vagina," as Germaine Greer famously phrased it. Germaine Greer, *The Female Eunuch*, in FEMINISM IN OUR TIME, *supra*, at 343, 349. Even if one could ignore the enormous physical and emotional risks of unwanted pregnancy and sexually transmitted diseases, it is inappropriate to conceive of the penetration of a body as a simple, pleasurable act. The act of penetration for the person being penetrated contains the intrinsic potential for harm.

³⁴ Dressler, *supra* note 32, at 429.

³⁵ David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 463–64 (2000).

³⁶ Wertheimer, *supra* note 32, at 582.

Without an extrinsic, violent assault, the law has often assumed there is no harm in rape. In *Coker v. Georgia*, for example, the United States Supreme Court assessed the harm of rape in order to determine whether the imposition of capital punishment was grossly disproportionate for the crime under the Eighth Amendment.³⁷ Erlich Coker escaped from the Ware Correctional Institution in Georgia, where he was serving life sentences for murder and rape, and entered the house of Elnita and Allen Carver.³⁸ Coker threatened the couple, tied Allen Carver up, stole his money, obtained a knife from the kitchen, brandished it at Elnita Carver, and raped her.³⁹ Later, he stole the Carvers' car and kidnapped Elnita in it.⁴⁰ Justice White, writing for a plurality of the Court, wrote that, when the police apprehended Coker, "Mrs. Carver was unharmed."⁴¹ By this bland assertion, White presumably meant that Coker did not stab Elnita Carver with his knife or beat her bloody. When assessing the gravity of the offense for Eighth Amendment purposes, White wrote, "[Rape] is also a violent crime because it normally involves force, or the threat of force or intimidation, to overcome the will and the capacity of the victim to resist."⁴² White's description assumed the classic rape narrative: the harm of rape was the extrinsic violent assault, and the rape itself was no harm at all.⁴³

What about rape without an extrinsic, violent assault? How should the law conceive of that crime, and what is its harm?

³⁷ *Coker v. Georgia*, 433 U.S. 584, 599 (1977) (plurality opinion) (holding that the imposition of capital punishment for the rape of an adult woman is unconstitutional under the Eighth Amendment).

³⁸ *Id.* at 587.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 597.

⁴³ In his dissent, Chief Justice Burger responded:

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.

Id. at 611–12 (Burger, C.J., dissenting). He continued, stating that "[v]ictims may recover from the physical damage of knife or bullet wounds, or a beating with fists or a club, but recovery from such a gross assault on the human personality is not healed by medicine or surgery." *Id.* at 612.

Professor Donald Dripps proposes a commodity theory of sexuality in which “individuals have a property right to the use of their bodies.”⁴⁴ Based on this theory, Dripps advocates that states criminalize two separate offenses.⁴⁵ The first, “sexually motivated assault,” mirrors the classic rape narrative.⁴⁶ The second, “sexual expropriation,” is, *inter alia*, sexual penetration with a person “known by the actor to have expressed the refusal to engage in that act, without subsequently expressly revoking that refusal.”⁴⁷ Dripps describes the harm of this crime as the “nonviolent” taking of another person’s body for sexual purposes,⁴⁸ and categorizes it as a “misdemeanor or a minor felony” punishable by the maximum of a year and a day.⁴⁹ In support of punishing sexual expropriation so much less severely, Dripps asserts:

Physical violence in general does far more harm to the victim’s welfare than an unwanted sex act. Physical violence in general expresses a more complete indifference, or a more intense hostility, to the victim’s humanity.⁵⁰

He continues:

I venture the suggestion that people generally, male and female, would rather be subjected to unwanted sex than be shot, slashed, or beaten with a tire iron . . . [W]hether measured by the welfare or by the dignity of the victim, as a general matter unwanted sex is not as bad as violence.⁵¹

Therefore, to Dripps, the all-American rape, would be “sexual expropriation,” and its harm would be analogous to a

⁴⁴ Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1789 (1992).

⁴⁵ See *id.* at 1799–1800 (explaining how “expropriation should be criminal, but to a lesser degree than sexually motivated assault”).

⁴⁶ See *id.* at 1807. Dripps’ proposed model statute for the crime of “Sexually Motivated Assault” would provide in pertinent part:

Whoever purposely or knowingly gives another person cause to fear physical injury, or purposely or knowingly inflicts physical injury on another person, or purposely or knowingly overpowers another’s physical resistance, for the purpose of causing any person to engage in a sexual act, is guilty of Sexually Motivated Assault.

Id.

⁴⁷ *Id.*

⁴⁸ See *id.* at 1800.

⁴⁹ *Id.* at 1804.

⁵⁰ *Id.* at 1800.

⁵¹ *Id.* at 1801.

property taking for sexual purposes.⁵²

Dripps' conception of sexual expropriation has some intuitive appeal. Victims often feel as if something of great value has been stolen from them in the act of rape.⁵³ Their loss, however, is not analogous to a physical taking of property. Rape steals or destroys a victim's sense of physical integrity and safety, which cannot be restored like pilfered loot. As Professor Robin West argues:

Dripps's theft analogy wildly misdescribes the experience of rape *From the victim's perspective*, unwanted sexual penetration involves unwanted force, and unwanted force is violent—it is physically painful, sometimes resulting in internal tearing and often leaving scars. Dripps omits this central feature of the experience. The offense that he calls "expropriation" is *itself* a forceful, physical, and in a word, assaultive penetration of one person's body by another. It is not in any way a "larcenous taking." Rape . . . [is] experienced, and typically described, as more like spiritual murder than either robbery or larceny.⁵⁴

Moreover, Dripps' assertion that extrinsic violence "expresses a more complete indifference, or a more intense hostility, to the victim's humanity"⁵⁵ than does nonconsensual sexual penetration is dubious. His assertion that people would rather be subjected to "unwanted sex" than be shot with a gun, slashed with a knife, or beaten with a tire iron places a thumb on the scale: nonconsensual penetration of the body is described as "unwanted sex," and each assault he compares it to threatens death. Death is worse than anything else, but surely that proves little. Without deadly peril, which rape rarely threatens,⁵⁶ the harm from assault may look quite less serious than the all-

⁵² This assumes that the victim objects verbally or physically. Often, however, acquaintance rape victims do not object because they are frozen in fright. See Anderson, *supra* note 1.

⁵³ See Lynn Hecht Schafran, *Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist*, 20 FORDHAM URB. L.J. 439, 446 (1993) (describing how a victim of rape suffers "the penultimate violation").

⁵⁴ Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1448 (1993).

⁵⁵ Dripps, *supra* note 44, at 1800.

⁵⁶ See BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 12, 27 (1997) (noting that fewer than one percent of rape victims in the United States are killed and only five percent suffer serious extrinsic injury).

American rape.

Given the degraded conceptualization of women's bodies as to-be-penetrated and the conceptualization of men's bodies as physically inviolable, it may be easier for some to see the relative harm of rape on a male body. I would venture to guess that most men, no matter their sexual orientation, would rather take a physical beating that causes two broken ribs and severe bruising than be pinned down and suffer nonconsensual, anal penetration by someone they despised, particularly if the penetration happened repeatedly over the course of an hour or more—as many acquaintances rapes do⁵⁷—and included the rapist's internal orgasm.⁵⁸ Without a condom, which most rapes do not include,⁵⁹ this invasion would also pose the threat of sexually transmitted diseases. When the victim is female, all this harm attends, as well as the risk of unwanted pregnancy, which takes her body hostage for much longer and forces upon her the profound ethical dilemma of what to do with the fetus. Dripps does not account for this harm, and his theory of sexual expropriation cannot capture it.

Professor Stephen Schulhofer advocates a different theory of rape not based on a property right to one's body, but instead on sexual autonomy, or “the freedom of every person to decide whether and when to engage in sexual relations.”⁶⁰ Like Dripps, Schulhofer advocates that states criminalize two separate sexual offenses.⁶¹ The first, a second-degree felony he calls “sexual assault,” criminalizes the use of “physical force to compel another person to submit to an act of sexual penetration.”⁶² This offense mirrors the classic rape narrative. Schulhofer's second crime, a

⁵⁷ JULIE A. ALLISON & LAWRENCE S. WRIGHTSMAN, *RAPE: THE MISUNDERSTOOD CRIME* 65–69 (1993) (citing research indicating that acquaintance rapes may occur repeatedly and last much longer than stranger rapes).

⁵⁸ In terms of the harm of male rape when the victim is heterosexual, never in the literature have I seen an argument that the harm is greater when the victim is a lesbian penetrated by a man or the victim is a straight woman penetrated by a lesbian. Again, penetration is scripted as normative for the female body.

⁵⁹ Ian Ayres & Katharine K. Baker, *A Separate Crime of Reckless Sex*, 72 U. CHI. L. REV. 599, 602 (2005) (explaining how “[m]en who rape recklessly, by not finding the time or compassion to discern a partner's consent, rarely find time to use a condom”).

⁶⁰ STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* 99 (1998).

⁶¹ *Id.* at 105.

⁶² *Id.* at 283.

third degree felony he calls "sexual abuse," criminalizes "an act of sexual penetration with another person, when he knows that he does not have the consent of the other person."⁶³ Its harm is the "nonviolent interference with sexual autonomy."⁶⁴ Therefore, the all-American rape, to Schulhofer, is sexual abuse, and its harm is the nonviolent interference with the victim's sexual choice.

Schulhofer's conception of rape enjoys more intuitive appeal than does Dripps'. It is true that rape constitutes an interference with one's sexual autonomy. But many things interfere with sexual autonomy, such as prohibitions on teacher/student sexual relationships, laws against public nudity, and a commitment to monogamy. Autonomy is not an absolute concept, and constraints on sexual autonomy are not always bad.⁶⁵ Schulhofer's focus on sexual autonomy is also inadequate to capture the harm of rape. The lack of sexual choice is part of rape, to be sure, but rape is so much more than that. The offense involves a profound dehumanization that the lack of sexual choice does not reflect.⁶⁶ Moreover, Schulhofer's characterization of sexual abuse as "nonviolent," like Dripps' characterization of sexual expropriation as "nonviolent," comprehends no intrinsic violence in the all-American rape itself and thereby greatly minimizes the harm of the offense.⁶⁷

As a final note, neither Dripps nor Schulhofer labels the all-American rape as "rape," but assigns it the lesser monikers of "sexual expropriation" and "sexual abuse," respectively.⁶⁸ Both would require force for the highest, non-aggravated sexual

⁶³ *Id.* Schulhofer also allows recklessness or criminal negligence to establish the mens rea of the crime, although negligence moves the grading of the crime down a degree. *Id.* at 284. He defines "consent" as "actual words or conduct indicating affirmative, freely given permission to the act of sexual penetration." *Id.* at 283.

⁶⁴ *Id.* at 105.

⁶⁵ Dripps, *supra* note 44, at 1787 (explaining that autonomy can only be given a coherent meaning when assigned to specific instances of behavior).

⁶⁶ Henderson, *supra* note 26, at 226 (describing rape as an experience which denies the victim's humanity as opposed to undesired sex which does not completely deny one's personhood).

⁶⁷ In the second wave of feminism, it was popular to proclaim, "Rape is violence, not sex." See Mary Ann Lagen, *The Anti-Rape Movement: Past and Present*, in *RAPE AND SEXUAL ASSAULT: A RESEARCH HANDBOOK* 1, 5 (Ann Wolbert Burgess ed., 1985). This assertion attempted to legitimate the harm of rape, but may have ended up underscoring the classic rape narrative as the standard rape. As we shall see in the next section of the essay, rape may be more aptly described as an expression of power through nonconsensual sexual penetration and its intrinsic violence.

⁶⁸ Dripps, *supra* note 44, at 1796-97; SCHULHOFER, *supra* note 60, at 105.

offense, just as forty-three state statutes currently do.

IV. RAPE AS EXPERIENCED BY VICTIMS AND OFFENDERS

The lived experience of rape for rape victims and rapists sheds a different light on the harm of the act. Although each rape is unique, certain themes of harm do emerge: dehumanization, objectification, and domination. Professor Henderson has written eloquently of her rape:

I had never confronted the utter helplessness of rape, of knowing that it just *did not matter* that I existed; that I did not want this; that I was a human being; not a thing to be invaded, punched, or possibly killed.⁶⁹

She elaborated:

Rape denies that you are a *person*, that you *exist* . . . [W]omen experience total helplessness and obliteration during rape. When a woman's *existence just does not matter*, intercourse becomes rape. Her existence may not matter whether the attack is by a date, a spouse, a friend, or a stranger. Thus, the important factor is non-existence.⁷⁰

The rape memoir, which has emerged as a new literary genre, reflects similar themes. One rape memoirist has written that human language itself was lost in her experience of sexual domination: "[a]nd [his] words made me give them up, lobbing off each part of my body as he claimed ownership—the mouth, the tongue, my breasts."⁷¹ A second wrote:

In the scheme of things, his penis, although employed as a bludgeon, did not make much of an impression. What he did with it was the least of my worries. Those parts of my body that hitherto had been reserved and private were no longer mine, but in this they were indistinguishable from the rest of my body, also no longer mine.⁷²

She concluded, "The rapist . . . made my body an object."⁷³ A third memoirist explained, "I actually remember little in my thoughts and feelings about the physical experience of being

⁶⁹ Henderson, *supra* note 26, at 223.

⁷⁰ *Id.* at 226.

⁷¹ ALICE SEBOLD, LUCKY 16 (1999).

⁷² NANCY VENABLE RAINE, AFTER SILENCE: RAPE AND MY JOURNEY BACK 11 (1998).

⁷³ *Id.* at 163.

raped. I remember in my body the subjugation of my body."⁷⁴

Interviews with convicted rapists echo the same refrain. A man convicted of multiple rapes explained, "I liked that feeling of being totally dominant."⁷⁵ A gang rapist said of his victim, "I had no feelings [for her] at all, she was like an object."⁷⁶ Another rapist admitted, "I felt in control, dominant. Rape was the ability to have sex without caring about the woman's response. I was totally dominant."⁷⁷ Another said, "She wasn't like a person, no personality, just domination on my part."⁷⁸

The experiences of these victims and rapists probably reflect the classic rape narrative. It is difficult to find studies of all-American rape victims and perpetrators because those victims so rarely report and those perpetrators are so rarely convicted. What we do know about all-American rape victims is that they talk about their experiences much less, they endure greater feelings of self-blame and guilt, and the psychological damage they suffer is as severe or worse than stranger rape victims.⁷⁹

The evidence we have about all-American rapists suggests that dominance is a central motivation for rape. One study of undetected acquaintance rapists found that their propensity to rape was significantly related to their belief that men were supposed to be dominant and women submissive.⁸⁰ Male college students who have engaged in sexually aggressive behaviors are more likely to agree with statements such as "I enjoy the feeling of having someone in my grasp," and "I enjoy the conquest [of

⁷⁴ PATRICIA WEAVER FRANCISCO, *TELLING: A MEMOIR OF RAPE AND RECOVERY* 28 (1999).

⁷⁵ DIANA SCULLY, *UNDERSTANDING SEXUAL VIOLENCE: A STUDY OF CONVICTED RAPISTS* 133 (1990).

⁷⁶ *Id.* at 134. A man who raped his girlfriend's mother agreed, and stated, "I don't think I had any feelings for her." *Id.* at 114.

⁷⁷ *Id.* at 149-50. Another explained, "I felt macho and power over her. Maybe a little anger. I felt she was a dirty slut and anything we did was justified. It gave me a sense of status. . . . I felt like I had put her in her place." *Id.* at 134.

⁷⁸ *Id.* at 156.

⁷⁹ ALLISON & WRIGHTSMAN, *supra* note 57, at 70-71, 165 (citing studies which show that the effects of rape upon victims of acquaintance rape were notably different from the effects felt by stranger rape victims).

⁸⁰ Shelly Schaefer Hinck & Richard W. Thomas, *Rape Myth Acceptance in College Students: How Far Have We Come?*, 40 *SEX ROLES* 815, 816 (1999) (citing studies of undetected, self-reported acquaintance rapists, which revealed a relation between a propensity to rape or engage in sexually abusive behavior and various rape-supportive attitudes).

sex].”⁸¹ Additionally, being motivated sexually by dominance is a predictor among college students of a willingness to impose sexual acts upon others without their consent.⁸²

It appears that both victims and rapists often experience rape as domination. Their experiences contrast strongly with Dripps’ description of rape as sexual commodity theft. Their experiences also deepen Schulhofer’s otherwise thin description of rape as a violation of sexual autonomy. Not only does the all-American rape involve the lack of sexual choice—the violation of sexual autonomy that Schulhofer decries—but it also involves the degradation of the body and spirit through objectification and dehumanization.

V. SEXUALLY INVASIVE DEHUMANIZATION

When one views rape from the perspective of those who experience it, rape no longer appears simply to be sexual theft or a violation of sexual autonomy. Instead, rape is sexually invasive dehumanization. There may be a number of legal implications to such a conceptualization. Here, I will just suggest one.

To dehumanize means to “deprive of human character or attributes,” make inanimate, treat as an object, and deprive of one’s concern.⁸³ To humanize, by contrast, means “to give a human character to” and to imbue with concern.⁸⁴ Humans possess the ability to inquire about one another’s feelings and to express concern by that inquiry and their response to it. This kind of communication prevents the objectification of one’s partner and creates the possibility for empathy.

I believe rape law should require communication between partners before sexual intercourse occurs. In a forthcoming article in the *Southern California Law Review*, I argue that a person should be required to inquire about his or her partner’s desires and boundaries and to come to an agreement with them about sexual penetration before it occurs. This communication

⁸¹ Neil M. Malamuth, *Predictors of Naturalistic Sexual Aggression*, 50 J. PERSONALITY & SOC. PSYCHOL. 953, 956 (1986); see also Neil M. Malamuth, *Predicting Laboratory Aggression Against Female and Male Targets: Implications for Sexual Aggression*, 22 J. RES. PERSONALITY 474, 481–82 (1988).

⁸² ALLISON & WRIGHTSMAN, *supra* note 57, at 31 (citing studies of primarily college students indicating that anger and dominance motives of sex are predictors of nonconsensual sexual behavior).

⁸³ 4 THE OXFORD ENGLISH DICTIONARY 402 (R.W. Burchfield ed., 2d ed. 1989).

⁸⁴ 7 *id.* at 476.

would express a willingness to consider the other person's humanity. It would express that the other person exists and matters. Communication is a mechanism of treating one's partner as fully human, as a separate and valuable person with his or her own desires and needs. It best protects against treating one's partner as an inanimate object to be sexually dominated.

I close by returning to the classic rape narrative and the story of an all-American rape that opened this essay. If rape is sexually invasive dehumanization, the first example, with its extrinsic violent assaults, involves multiple crimes: aggravated assault, kidnapping, and rape.

In the second example, the male student ignored the female student's verbal reservations and cries; he ignored her attempts to get away. He pushed her down, pinned her, and proceeded to take off her clothes. He failed to communicate with her and failed to come to an agreement with her about what they wanted to do together before he penetrated her. This story tracks what most acquaintance rape victims experience. Sexually invasive dehumanization is what the all-American rape victim suffers, and "rape" is what we should call it.