Mahdieh Javid
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Gender of Rape

"In my early 20s I was raped[1]. He was a friend and I had invited him over after a night out. He had recently broken up with his girlfriend and I remember when I first met the two of them together I had thought 'he makes a great boyfriend. She must be very happy.' After they had broken up, he showed some interest in me. I liked him also but I wasn't sure if I wanted to get involve with him. I think I didn't want to date him so soon after his breakup. Nevertheless, we went out one night. After dinner he walked me home and asked if he could come up. I said yes. Neither one of us had been dirking. I had a friend who knew him and lived near by so I called and ask her to come as well. She was there for an hour or so. It was probably around 10 o'clock by the time she decided to go home. She asked me if I was going to be ok with him. I said yes.

The next thing I remember is that he moved next to me on the couch and almost immediately started to grab me. I tried stopping him and made it clear to him that I did not want him to touch me. I didn't want to have sex with him. But, it was as if he couldn't hear me at all. As if I hadn't objected.

He was much taller than me; probably over a foot. I couldn't physically resist him but the more I objected and tried to get his hands off me the more aggressive he got and he started to look very angry. In hindsight, I don't think he was truly angry. He was trying to intimidate me. I don't remember him saying a word. I don't remember how long my resistance lasted.

This was not the first time that someone was forcing himself on me. Maybe it was because of my past experience with sexual assault but, at some point, it became evident to me that he was not going to stop. I had to make a decision about whether I was going to get hurt *beyond* being raped. My hearth just dropped. I knew what was going to happen. I submitted.

I cried during the entire time he was raping me. He was unfazed. The next morning I went to work. I did not report it."

The cases of many rape victims never reach a prosecutor's desk. Most rapes are never reported (Harris, 1976, p. 615). Many victims do not report the crime because they

[1] The person who provided this account wished to remain anonymous. This Note respects her whishes.

anticipate hostile or dismissive treatment by the judicial system[2] (Bartlett & Rhode, 2006 p. 816). Many others, although identified by researchers as rape victims, do not consider what has happened to them as 'rape'[3]. Even, some who do perceive the act as rape do not describe it as a crime[4] (Ibid).

Studies show that between 15 to 40 percent of all women will experience rape or attempted rape during their lifetimes (Remick, 1993, p. 1103). According to the FBI Uniform Crime Report, every 5.8 minutes a "forcible rape" occurs[5] (2000). In the year 2000, of those rape cases that were reported, 46.9 percent were "cleared" by law enforcement (Ibid). Meaning, the offenders were either arrested or factors "beyond a law enforcement agency's control" prevented them from making arrest. Less than half of those who are arrested for rape are convicted. Prosecution of most rapes result in either dismissal or acquittal ("The Response to Rape," 1993). Some 21 percent of convicted rapists are never sentenced to jail or receive prison time; Twnty-four percent spend (an average of) less than 11 months in penitentiary (Ibid). Ultimately, the vast majority of rapists never face any punishment for their crime.

The overwhelming majority of rapes are committed by men, against women[6] ("Uniform Crime Report," 2000). The criminal justice system's stance in regards to rape has denied women justice. Because of rape law, the judicial system has contributed to the discrimination that women face in their daily lives and has limited the opportunities

[2] In a study carried out by the National Crime Victimization Survey, 20 percent of those who were raped stated anticipating harsh or dismissive treatment by the justice system as the reason for not reporting the crime (as quoted in Bartlett & Rhode, 2006, p. 816)
[3] Almost half the women who had been raped did not considered the conduct to be rape (Ibid).
[4] Over 40 percent did not perceive the act as serious and could not describe it as a crime (Ibid).
[5] The FBI Uniform Crime Report (UCR) defines forcible rape as "the carnal knowledge of a female forcible and against her will." UCR includes the statistics for "assaults or attempts to commit rape by force or threat of force …; however, statutory rape (without force) and other sex offenses are excluded" (2000: 25)
[6]

available to them. In order for women to reach equality, it is necessary for the justice system to recognize and insure their sexual rights; the right to say 'no' as well as 'yes.' Sexual autonomy of women is dependent on a new (social as well as legal) perception of rape.

In order to reach a better legal standard for examining the crime of rape, the inadequacies of current laws needs to be reviewed. Part I of this Note examines the way the legal system has ensured men's sexual access to women and hence discriminated against women by denying them sexual rights.

Part II, proposes an affirmative action for traditional victims of rape. It is the position of this Note that in order for women and other victims of rape (children, male prison inmates, and homosexual men) to receive "equal protection of the law," as it is guaranteed by the Fourteenth Amendment, the social disadvantages that make these groups vulnerable to rape should be considered. Meaning, there should be no legal requirement for women to assert overt resistance in order to demonstrate non-consent. The burden of ensuring that consent exists should be on men. If the circumstances create any doubt in regards to consent, the man should inquire and failure to do so would make his assumption in consent at best negligent, if not reckless. Therefore the defense of mistaken belief in consent would be inadmissible if the defendant did not take adequate steps to ensure consent. It must be emphasized that this affirmative action is simply a *consideration* and no rape case should be decided solely on these guidelines. The totality of circumstance should always be kept in mind. However, the legal system can not ignore the realities of women's lives. Furthermore, like other affirmative actions, this plan should be a temporary measure and continue only until women as a class are not

subordinated to men as a group. It is the position of this Note, that the legal system has ignored women's subordinated position in regards to rape law. Consequently, the very assumption that sexual conduct between men and women are often encounters between two people with equal social powers, has contributed to the discrimination against women, as a class, by law.

Furthermore, while this Note is primarily focused on examining the victimization of women by rape law and suggesting a standard that would help holding more rapists accountable, the victimization of other social groups is not taken lightly. Any effective rape law should consider not only patriarchy, but also other forms of domination, such as those based on race, sexuality and class. In non-conventional rape cases, in which the victim is not a woman or that a man is not the perpetrator, the effects of other hierarchies should be more carefully examined. However, since the statistics clearly demonstrate that gender is the greatest factor in determining who falls victim to rape and by whom, subordination based on gender should be given more weight.

Moreover, it should be emphasized that this Note is not an argument for special protection for women but rather affirmative measures for all victims of rape. The consideration of other hierarchies besides gender would allow for more protection for both male and female victims.

I: The Problematic Aspects of Current Rape Laws

Since criminal law is state law, the legal standards of rape differ in each state. However, there are common trends across the nation. In general, in the United States a man commits rape when he engages in intercourse with a woman by force or threat of

force, *and* without her consent. The law traditionally demanded the victim's "utmost resistance."

> "Voluntary submission by the woman, while she has power to resist, no matter how reluctantly yielded, removes from the act an essential element of the crime of rape … if the carnal knowledge was with the consent of the woman, no matter how tardily given or how much force had therefore been employed, it is not rape" (Reynolds v. State 27 Nb. 90, 91, 42 N.W. 903, 904 (1889).

Today, requirements that the victim should resist to the "utmost" and "continuously" have been abolished by all states (Estrich, 1986, p. 1123). However, the shift in how force, threat of force and consent have been interpreted, has not resulted in clear definitions and standards. In fact, much confusion exists in regard to what these elements mean in social realities (Harris, 1976).

In legal practice, even the prohibition of force has not been sufficient to eliminate the requirement for woman's "physical resistance." Since in our judicial system there is a presumption of women's consent, the opposite, her non-consent has to be proven. The courts have accepted that lack of physical resistance could be sufficient cause for a "reasonable man" to "honestly" believe that consent exists. Thus, since "force" by the offender and "physical resistance" by the victim are in reality equivalent, in legal practice the element of force has not been repealed. Force continues to be perceived as an important factor in determining women's lack of consent.

The majority of rape cases involves acquaintances (Baum, 2005) and reasonable belief in consent arises during the prosecution of nearly every case in which the defendant and the victim knew each other (Berliner, 1991 p. 2688). In such cases, the courts have examined the defendant's intent in light of the victim's actions. Meaning,

they have assumed, if the victim did not establish clear lack of consent (by physical resistance), then the defendant could not have intended to rape. Although a woman's lack of consent could be clear to a reasonable man much before she physically resists, courts have often drawn the line of establishing lack of consent at physical resistance. Thus, they have essentially implied anything less than physical resistance would be insufficient for a reasonable man to recognize. As a result, as Dana Berliner has pointed out, "the evaluation of both lack of consent and intent, [has] become an inquiry into the victim's physical resistance" and the requirement for force has been effectively reestablished (p. 2697).

The defense of mistaken belief is used to prove that the defendant did not have *mens rea* (guilty mind or criminal intent). Since *mens rea* is an important element of criminal responsibility, its absence would undermine the defendant's culpability. Generally, the legal standard for mistaken belief is that it has to be *honest* and *reasonable.* However, in rape cases the honest element has been virtually ignored (Ibid). Instead of examining the defendant's honest belief, courts have erroneously combined the two elements of the defense. That is, courts ask "whether *any* defendant *could have* reasonably believed the victim consented" (Ibid, p. 2694). Therefore, when a judge or a jury finds a defendant's belief reasonable, the honest element of the defense is automatically dropped.

In comparison to other crimes, mistaken beliefs in rape cases have been much more broadly interpreted. For example, as Berliner has argued, mistaken belief in bodily harm or death *must* be judged honest in order to be accepted as a defense. Such a defense is accepted based on two key elements: the defendant had minimal time to decide what an

appropriate action would be and failure to act could have resulted in his death. Both the risk of death and the time pressure, as interpreted by courts, are necessary elements of the defense for murder.

On the other hand, in sexual settings often there is no time pressure and failing to engage in sexual activity does not pose any threat to the defendant. Inquiring the truth about the victim's consent (or lack there of) poses no risk. Nothing necessitates split second-decisions about the victim's consent in rape cases. Therefore, hasty decisions where women's consent is not clear should not be judged reasonable.

The treatment of consent in rape cases is also inconsistent with how other areas of law review the consent element. Only in rape, proof of lack of consent is insufficient for establishing non-consent (Remick, 1993). For example, for the crime of auto theft, showing the owner never gave permission to take the car is sufficient to reject the defense of owner's consent (Ibid). Like consensual sex, borrowing a car from an acquaintance is a common practice. However the courts do not allow the prevalence of the act shift the assumption form non-consent to consent. It would be clearly unreasonable to require a resident of a house to establish she did *not* consent for an acquaintance (or a stranger) to enter her house. Instead we ask the person who entered the residence to prove he had permission. However, in rape this standard is reversed.

Because in sexual encounters the presumption is consent, there has been almost no limit for the type of behaviors juries have been allowed to consider in examining consent (Remick, 1993, p. 1123). Some juries clearly believe that a woman could ask to be raped, and they judge the guilt or innocent of the defendant accordingly:

> "In 1989, a circuit court jury in Florida acquitted 26-year-old Steven Lord of abducting a 22-year-old woman at knife point and

> repeatedly raping her. The jury based its finding partly on the fact that she was wearing a lace miniskirt without underwear. In explaining the decision of the three-man, three-woman jury, foreman Roy Diamond said: 'We felt she asked for it for the way she was dressed" (as quoted by Bergelson, 2005, p. 249)[7].

In another case, in which the victim was gang-raped, demonstrators protesting the guilty verdict held a sign that read "She got herself raped" (Ibid). It's less clear whether these juries even examined consent, and believed that it was granted, or just assumed the victim *deserved* to be raped. Nevertheless, the victim's clothes, drinking, dancing, hitchhiking, friendly behavior, flirting or prior relationships (Kalven & Zeisel, 1966) could each be sufficient for satisfying or ignoring the consent element.

The prejudices that exist against "bad" victims of rape are rare in other crimes. As mentioned above, robbery like rape is an aggressive version of an ordinary and lawful human interaction. However victims of rape are not treated the same way victims of robbery are. As Harris has pointed out, potentially reckless behavior by a victim of rape is not just pointed out; it is believed to *cause* the crime:

> "Although a flagrant display of cash in public may very predictably precipitate a robbery, the law does not hold an alleged robbery victim responsible for his own foolishness in making such a display. Nor is an assault victim asked to answer for his walking on the street or being alone in his house after dark. The law does not expect a citizen to structure his activities around avoidance of robbery or physical assaults" (Harris 639).

As harsh as the scrutiny of victims of stranger rapes have been, those who are raped by an acquaintance, face even more hostile treatment. The majority of rapes in the United State are so-called "nontraditional" rapes, or what Susan Estich calls, simple rapes (Real Rape, 1987). A "nontraditional" rape is a case in which there is a single defendant

[7] In an extensive research, 66 percent of the participants stated they believed women's behavior or appearance provokes rape. 34 percent also said that women should be responsible for preventing their own rape (Field & Bienen 1980).

who knew his victim, did not use force nor threatened force, and *simply* had nonsensical sex with the victim. In her influential book, *Real Rape*, Estirch argues that many simple rapes are not treated as real rapes, neither by authorities nor the victims.

Studies that have been carried in this regard, confirm Estrich's hypothesis. Victims are less likely to report acquaintance rapes and, when they do report, charges are less likely to be filed (Bryden & Lennick, 1997, p. 1214). In analyzing National Crime Victim Survey (NCVS), Alan Lizotte found in comparison to assault, rape victims tend to report cases in which there is strong supporting evidence (1985). However, a much wider variety of assaults are reported. As a result, rape cases that are prosecuted are stronger (relative to all reported and non-reported rapes) than assaults that are prosecuted. As discussed before[8], many rape victims do not report the crime because they anticipate hostile or dismissive treatment by the authorities. Many others, although identified by researchers as rape victims, do not consider what has happened to them as rape[9]. Even if victims of acquaintance rape do report the crime, the police are less likely to believe them and prosecutors are less likely to file charges (Bryden & Lennick, 1997 p. 1230-46). Overall "victim blaming," whether done by the victims themselves or the legal system, is much more common in acquaintance rapes than stranger rapes.

One of the reasons why acquaintance rapes are much more difficult to prosecute is the false assumption that men and women have reached social equality. Courts assume a woman who truly doesn't want to have sexual intercourse, would be able to prevent it. They assume a woman who is paralyzed by fear should clearly, affirmatively and

[8] *See supra* note 3.

[9] In a survey of 930 women in San Francisco, 22 percent stated they had been victims of "attempted or completed rape." However, when the question was rephrased and asked whether they had experienced forced intercourse or intercourse obtained by threat (rather than using the word "rape") the percentage increased to 56 percent. (Estrich, 1987, p. 12).

continuously express her unwillingness, and anything less would be a failure on her part. In fact, some courts have ruled if the victim has never seen the defendant act violently, her fear of him, no matter what the circumstances, would be unreasonable[10] (People v. Iniguez, 7 Cal. 4th 847, 30 Cal. Rptr. 2d 258, 872 P.2d 1183 (1994). On the other hand, according to this assumption, it is reasonable for a woman to physically resist a man who is likely larger in size and strength because that is what supposedly a man would do if he is faced with the threat of rape.

The legal system has undoubtedly reflected and legitimized the sexually coercive values that are dominant in our society. The courts accept a certain amount of force and coercion as part of a *normal* sexual encounter and thus judge them as lawful. Such an acceptance has reinforced the ideologies of hegemonic masculinity in which men are seen as inherently aggressive and violent and women are assumed to *enjoy* violence[11]. The courts' assumption of consent, rather than non-consent, reflects the belief that men always have or should have sexual access to women. These assumptions severally undermine women's right to sexual autonomy and ensure men's access to coercive sex.

By protecting aggressive male behavior the legal system has severely limited women's right to live an ordinary life. Instead of discouraging "wrongdoers from harmful activity" women are deterred from "harmless activity which is … labeled" the cause of harm (Harris, 1976, p.640). Women are forced to structure their daily lives around a "rape schedule." They limit their daily activities, in terms of time, place and the attire

[10] The court argued that: "[the victim] knew nothing about him which would suggest that he was violent. [The] event of intercourse is singularly unusual in terms of its ease of facilitation causing no struggle… lasting, as the victim testified, 'maybe a minute."

[11] For more information regarding the "willing victims of rape" and the myth of women's "rape fantasies" see *Guided Imagery of Rape: Fantasy, Reality, and the Willing Victim Myth* (Bond & Donald 1986).

they choose to wear, based on the fear of rape. This fear restricts women's public space and reinforces the ideology that positioned them solely in the private realm.

II: Affirmative Action for Victims of Rape

Since the 1960s Affirmative action has been used as a tool to ensure equality and remedy past discriminations. In education and employment opportunities, the Supreme Court has allowed minorities' race and/or gender to be considered as a *plus*[12]. Meaning, minority applicants must first be qualified and then their race and/or gender could be viewed as an additional advantage that would allow for more diversity and ultimately result in more equality. The affirmative action that this Note suggests for victims of rape should be viewed as a plus as well. That is, when there is any doubt about whether a person who is being pursued for sex is consenting, the pursuer should verbally inquire. However, if the person who is being pursued is a woman or a person with less physical or social power than the pursuer, there is additional reason for inquiry, and failure to do so should satisfy the legal standard of negligent or reckless behavior. Since an overwhelming percentage of rapes are committed by men, and against women, the main burden of inquiry falls upon men.

Furthermore, rapes committed due to negligence should not be dismissed by the criminal justice system (Estrich, 1983, p. 98-104). Negligent rapists should be held criminally responsible. However, the maximum punishment for such rapes should be less. Studies suggest one of the reasons why juries are hesitant of finding a defendant in simple rapes guilty is due to the harsh criminal sanction involved (Kalven & Zeisel, 1966,

[12] *See* Johnson v. Transportation Agency, 480 U.S. 616 (1987) and Steelworkers v. Weber, 443 U.S. 193 (1979)

p. 250-254). Dividing the crime of rape into several degrees of criminal conduct, depending on the seriousness of the assault, would allow juries who are discouraged by the harsh penalty to find the defendant guilty of a lesser crime -- instead of allowing him to walk. Nevertheless, when the rates of rape are as high as they are, the courts should not reward rapists by abolishing criminal responsibility of those who behave negligently.

The proposed affirmative action plan is partly dependant on the complete elimination of the element of force from the crime of rape. So far, with the exception of some cases in which the defendant claims mistaken belief in consent, courts have almost completely ignored the issue of lack of consent as the essential element of rape. *State v. Alston* is a striking example of how consent has almost been put aside and how instead, courts have relied on narrow interpretations of force and threat of force (312 S.E 2d 470 (N.C. 1984).

In early 1980s, Mr. Alston and his victim were involved in "consensual" relationship for a few months. The North Carolina Supreme Court recognized that there was "some violence" in their relationship and the defendant "had struck her several times … when she refused to give him money or refused to do what he wanted." The court also granted "that she had often had sex with the defendant just to *accommodate* him" (emphasis added). The "consensual" relationship was eventually ended when the victim moved out of the house that they shared. However, the defendant found her by going to her school and waiting for her. He blocked her path and demanded to know her new address. When she refused and let him know that their relationship was over, he threatened to "fix" her face. He "grabbed her arm and said she was going with him." When they eventually reached his friend's house and he asked her if she was "ready," she

said “no, [she] was not going to bed with him.” He ignored her statement by pulling her and undressing her. The North Carolina Supreme Court found him not guilty,[13] arguing:

> “[while there is ample evidence of lack of consent under the peculiar facts of this case, there was no substantial evidence that threats or force by the defendant on June 15 were sufficiently related to sexual conduct to cause Brown to believe that she had to submit to sexual intercourse with him or suffer harm. Although Brown's general fear of the defendant may have been justified by his conduct on prior occasions, absent of evidence that the defendant used force or threats to overcome the will of the victim *to resist the sexual intercourse alleged to have been rape*, such general fear was not sufficient to show that the defendant used the force required to support a conviction of rape” (312 S.E 2d 470 (N.C. 1984.

Thus, the Court confirmed its long held belief that non-consensual sex, even if it is accompanied by *some* force and coercion, is not rape. To the Court the prior history of violence, the force and threat of force that was demonstrated outside the school and even in the house prior to the rape was not sufficiently *related* to the sexual conduct. By declaring the victim’s fear of the defendant justified but *irrelevant*, the Court also established, once again, that while in reality rape is how a woman judges a sexual encounter, courts completely ignore her position even if that position is justified. Interestingly, the Court also ignored the defendant’s state of mind. Brown’s behavior at the school[14] and even at the house clearly demonstrates that he intended to have sex with her even (or preferably) against her will. Nevertheless, the Court did not find his intent and the fact that he forced himself on her as sufficient to meet the crime.

State v. Alston clearly demonstrates that courts have ignored that non-consent is the core of rape. Even if the victim clearly and verbally expressed her non-consent, most

[13] The two previous courts had found him guilty of rape.
[14] After the victim told Alston that their relationship was over he declared, “since everyone could see her but him he had a right to make love to her again.”

states do not consider the encounter as rape (Breyden, 2000, p. 322). Rape has to be defined as simply, nonconsensual sex. Sexual intercourse even without force or threat of force could be rape but no encounter could be rape if consent exists. Force or resistance *could* be a sign of non-consent but by no means, they are the only signs.

Another way of eliminating the requirement for force, besides abolishing it form the statute, is to recognize that the very act of rape amounts to force. In 1992, a New Jersey trial acknowledged the force inherent in rape and thus, found a way of circling the element of force without challenging the statute. The court found a juvenile guilty of rape for engaging in non-consensual sex. It held that the requirement for physical force was satisfied "simply by the … non-consensual penetration" (609 A.2d 1266 (N.J. 1992). The appellate court reversed, arguing that the statute required "some level of force *more* than thaT necessary to accomplish penetration" (emphasis added Ibid). The Supreme Court of New Jersey however, agreed with the trial court, stating:

> "Physical force in excess of that inherent in the act of sexual penetration is not required for such penetration to be unlawful. The definition of 'physical force' is satisfied … if the defendant applies any amount of force against another person in the absence of what a reasonable person would believe to be affirmative and freely-given permission to the act of sexual penetration" (Ibid).

The Court also relied on the legislation's intent to eliminate the requirement for force, arguing, "to require physical force in addition to that entailed in an act of involuntary or unwanted sexual penetration would be fundamentally inconsistent with the legislative purpose" (Ibid). Therefore, the New Jersey Supreme Court without rejecting force as an element of rape effectively accepted non-consensual sex as rape.

In order to recognize women's right to sexual autonomy and also make the law of rape less discriminatory, force ought to be separated from the crime, the same way that, for example, theft and trespassing is separate violence. Robbery and trespassing are independent crimes regardless of whether violence was used or not. The presence of violence is seen as an additional charge or the maximum punishment is increased. The same standard should be employed for rape (Estrich, 1983, p. 98-104). Forcible rape should be effectively divided in two crimes, assault *and* rape. If the legislature is not satisfied by this division, the crime of rape, like murder could be divided in several degrees and based on the amount of violence and coercion which was involved, the maximum punishment could be adjusted[15].

Furthermore, the legal system should adopt a standard of "no" means "no." The common masculine belief that "no means yes," should not be a legal defense (Estrich, 1987, p. 98). In fact, if we ignore the stereotypes about what a woman's behavior says about her desire to engage in a sexual encounter, her verbal statement is the only objective standard that courts could use to examine consent. Of course, there are always those who question whether a woman's "no" is sincere (Bryden, 2000, p. 388). However, that should be legally irrelevant since it can not be objectively measured. As Donald Dripps has argued "the law … should punish the disregard [for] expressed refusal even if the … refusal is proved by twenty bishops to have been insincere." (1992, p.276).

It must be emphasized, that even if there are *some* women who say "no" when they mean "yes," other women should not be punished for their behavior. If disregard for a woman's expressed refusal to sex is declared unlawful, those men who ignore women's

[15] Michigan, for example, has reformed its rape law by establishing several degrees of gender natural criminal sexual conducts. The degree of assault is dependent on the amount of force or coercion, the degree of injury, the age and incapacitation of the victim (Spohn & Horney, 1996, p. 866).

"no," and those women who say "no" when they desire sex, would have a great incentive to ignore the dominant coercive ideologies.

It is only after the element of force is separated from rape, and the standard of "no" means "no" is accepted, that the proposed affirmative action could be put in practice. In which case, the requirement for verbal inquiry would allow for the honest element of mistaken belief in consent to be reestablished. A man could confirm his honest belief by directly asking his partner whether she desires sexual contact. If a man fails to enquire, where there is some evidence that raises doubt about consent, he could not have honestly believed in consent without being negligent.

Under the standard of verbal inquiry, states make a distinction between citizens based on their gender. If challenged, states must show that this distinction does not violate the equal protection clause of the 14th Amendment, which prohibits them from denying citizens equal protection of the law. Traditionally the Supreme Court has allowed states to categorize their citizens as long as it is for a legitimate purpose[16]. States clearly have an interest in protecting their citizens from any crime, including rape. This interest could be seen as a compelling interest since citizens' safety is connected to many state objectives. The standard of verbal inquiry is also directly and substantially related to

[16] Legal analysis in examining whether a government purpose is legitimate falls into three categories. If the distinction is based on a non-suspect class, the discrimination is judged on a rational basis. Meaning, the classification must be *rationally* related to a *legitimate* government interest. For example, distinguishing between people who have taken the state's driving exam and those who have not. States have a legitimate purpose for distinguishing between those who can drive and those who cannot and their interest is rationally related to citizens' safety.

Race is considered a suspect classification and any discrimination by the state based on race should be *necessary* to achieve a *compelling* government purpose. (See, e.g., *Loving v. Virginia* 388 U.S, 1 (1967). Distinction based on gender is judged by intermediate scrutiny. The state needs to show the classification is *substantially* related to an *important* purpose (See, e.g., *Craig v. Boren* 429 U.S. 190 (1976). For more information regarding different standard of judicial review see *Feminist Jurisprudence: Taking Women Seriously* (Becker, Bowman, Torrey, 2001, p. 25-40).

the interest of citizens' protection. Therefore, there are sufficient reasons to assume the requirement of inquiry could satisfy constitutional challenges.

In Johnson v. Transportation Agency (480 U.S. 616 (1987) the Supreme Court lists three elements for a permissible affirmative action. First the affirmative plan must be for the purpose of remedying past wrongs that a group with a long history of discrimination has experienced. Second, the affirmative action cannot unnecessarily trammel the interest of other classes of people. That is, a man should not be fired in order to give his position to a woman. There can also be no "absolute bar" that prevents the advancement of other groups. The third requirement for a permitted affirmative action is that the plan must be a temporary measure, used to ensure the empowerment of a minority group.

There is little question about the long history of discrimination that women as a group have experienced, and the history of rape law clearly establishes this inequality. Adopting a policy that would require men to ask women about their desire to engage in sexual activity would empower women and address some of the major issues that exist in the current law. With a standard of verbal inquiry, many rapists who are acquitted due to the narrow definition of rape would be found negligent and criminally responsible for their action. Consequently, many victims of rape would find justice.

Undoubtedly, the law of rape has had a disparate impact on women as a class. As Katherine Mackinnon has argued, the widespread practice of rape, fear of rape, and the legal system's protection of rapists work as a mechanism to control women's lives (1991, p.1303). Under such conditions, the justice system's practices become part of the dominant ideologies that systematically reinforces gender hierarchy.

In recent decades, legislators have altered the language of rape statutes to make them more gender *neutral* (Bryden, 2000, p. 321). A gender neutral rape law, while admirable, does not change the facts that the majority of rapists are men and the majority of victims are women. To avoid the disparate impact of the statute on women, legislatures and the courts must go *beyond* gender neutral language, and the supposedly gender neutral "objectivity" that they have so far practiced. The law must not avoid the gendered nature of rape but recognize it. The equal treatment of the law at times requires for gender to be taken into account and rape is one instant in which such consideration must be made.

The standard of verbal inquiry also meets the second requirement of affirmative action plans: it does not unnecessarily trammel the interest of other groups. Requiring a man to ask his partner whether she wants to have sex, at worst, results in no sex. But also it gives him a clear opportunity to make sure that consent exists. In 1983, Illinois' Appellate Court acquitted a defendant because the complainant did not "communicate" her lack of consent in an "objective manner":

> "[T]he State contends that defendant coerced complainant … by threatening to use physical force … by [saying] 'I don't want to hurt you,' the implication being that he would hurt her if she did not comply…. [But] defendant did not make [this statement] while brandishing a weapon or applying physical force….
>
> [T]he State argues that the threat of force was conveyed by the disparity of size and strength between the parties. The record shows that at the time of the incident complainant was 5'2"weighing 100 to 105 pounds, whereas defendant was 6'3" and 185 pounds….
>
> Much of the State's case rests upon its contention that complainant's absence of effort in thwarting defendant's advances was motivated by her overwhelming fear. [Complainant testified] she did not attempt to flee because, "it was in the middle of the woods and I didn't feel like I could get away from him and I thought he'd kill me." …
>
> Complainant's failure to resist when it was within her power to do so conveys the impression of consent regardless of her mental state,

> amounts to consent and removes from the act performed an essential element of the crime. We do not mean to suggest, however, that the complainant did in fact consent; however she must communicate in some objective manner her lack of consent" (People v. Warren, 446 N.E. 2d 591 (Ill. App. Ct. 1983).

Therefore, according to the court, the defendant's substantially bigger size, the seclusion of the area, the fact that he told her "he did not want to hurt her," and carried her in to the woods, were not sufficient to justify her fear and "lack of resistance." In this case, while not specifically stated, the court implies that the defendant's supposed belief in her consent was reasonable. But the question that arises here is that how is it *reasonable* for him to assume she is consenting and unreasonable for her to be fearful and thus, not "resist?" How is it reasonable for him to assume a woman he had just met (and had resisted enough for him to say "I do not want to hurt you") would consensually perform oral sex on him? To assume a woman, who has neither shown nor expressed *any* affirmative interest in sexual contact -- and has in fact said that she wants to leave[17] -- would consensually perform oral sex, is negligent. At the minimum, the defendant ignored the signs that she was frightened and hoped that he would *persuade* her. But, his possible intension to persuade is irrelevant since he violated her before she was ready or willing to consent. Starting a coercive sexual encounter with the *hopes* of persuading the woman does not make the encounter consensual and it is certainly not a legal defense.

The question that ought to be asked here is that: what would have been the consequences of asking her whether she wants to be intimate? Shouldn't a reasonable man ask? Under the standard of verbal inquiry, the simple fact that it was the first time the two were having sexual intercourse is sufficient to demand an inquiry. There are

[17] In the beginning of the encounter when the victim had tried to leave by getting on her bicycle, the defendant had "placed his hands on her shoulder [in order to stop her. At which point she had] stated "No, I have to go now" (People v. Warren, 446 N.E.2d 591 (Ill App. Ct. 1983).

definitely other elements that reinforce the need to ask in this case, such as the victim's expressed desire to leave, her much smaller size, and the fact that they were in a secluded area. A reasonable man should neither assume that all women in every circumstance declare their non-consent by physical resistance nor that any woman in such conditions would automatically consent.

Certainly, an inquiry is not required in every sexual encounter. Specifically, if the two adults have had consensual sex before, the burden is less. However, even in case of long-term consensual partners there are circumstances in which some doubt arises in regards to consent. Crying, passivity or the appearance of disregard could each certainly satisfy the need to ask. The requirement for inquiry is not a heavy burden on men or an infringement of their (legitimate) interests. It does not require every man to investigate in every circumstance and with every woman. It simply requires him to act *truly* reasonably. Men in ambiguous circumstances always have the power of avoiding liability by assuming non-consent and stopping. Under this standard, men are only denied coercive sex, and their access to legitimate sexual encounters is protected. Furthermore, this access does not come at the cost of women's sexual autonomy.

The third and last necessary element of affirmative action is that it must be temporary. Verbal inquiry is a temporary measure because women's disadvantage and vulnerability to rape, although argued by some as biological[18], is in reality the product of larger social inequalities. Thus, improvement in women's social standing, as a class, would reduce their disadvantage in regards to rape. Women's empowerment, ultimately,

[18] Susan Brownmiller has argues, "had it not been for this accident of biology, an accommodation requiring the locking together of two separate parts, penis into vagina, there would be neither copulation nor rape as we know it" (1975, p. 13).

would make verbal inquiry unnecessary since the mechanism that has made them vulnerable to rape will no longer exist.

In Dothard v. Rawlinson (433 U.S. 321 (1977) the Supreme Court declared that woman's capacity to be raped is biological and "sex based" (MacKinnon, 2001, p. 796). Dianne Rawlinson a 22 year old woman applied to work at a maximum security prison in Alabama. However, at 5'3" and 115 pounds she didn't meet the weight requirement of the position. She filed a complained with the Equal Employment Opportunity Commission (EEOC) alleging sex discrimination since the requirements were not relevant to the nature of the job and overwhelmingly excluded women applicants. However, the Supreme Court did not accept this claim and declared (male) sex, in the case of prison guards, is a bona fide occupation qualification (BFOQ) and allowed by Title VII of the Civil Rights Act[19]. The Court based its decision mainly on the dangerous setting of Alabama's penitentiaries and the effect that women's presence could possibly have in those settings. The Court argued:

> "The environment in Alabama's penitentiaries is a peculiarly inhospitable one for human beings of whatever sex. Indeed, a Federal District Court has held that the conditions of confinement in the prisons of the State, characterized by "rampant violence" and a "jungle atmosphere," are constitutionally intolerable. Pugh v. Locke, 406 F. Supp. 318, 325 (MD Ala. 1976). The record in the present case shows that because of inadequate staff and facilities, no attempt is made in the four maximum-security male penitentiaries to classify or segregate inmates according to their offense or level of dangerousness …
>
> In this environment of violence and disorganization, it would be an oversimplification to characterize Regulation 204 as an exercise in "romantic paternalism." Frontiero v. Richardson. In the usual case, the argument that a particular job is too dangerous for women may

[19] In its ruling, the Supreme Court reaffirmed part of the previous court's ruling and rejected another part. That is, the Court ruled that the height and weight requirement was discriminatory on it face however, banning women from close contact positions in male prisons does not violate their rights

> appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself. More is at stake in this case, however, than an individual woman's decision to weigh and accept the risks …
>
> The essence of a correctional counselor's job is to maintain prison security. A woman's relative ability to maintain order in a male, maximum-security, unclassified penitentiary of the type Alabama now runs could be directly reduced by her womanhood. There is a basis in fact for expecting that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison. There would also be a real risk that other inmates, deprived of a normal heterosexual environment, would assault women guards because they were women. In a prison system where violence is the order of the day, where inmate access to guards is facilitated by dormitory living arrangements, where every institution is understaffed, and where a substantial portion of the inmate population is composed of sex offenders mixed at random with other prisoners, there are few visible deterrents to inmate assaults on women custodians….
>
> The likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and the other security personnel. The employee's very *womanhood* would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility" (emphasis added, Dothard v. Rawlinson (433 U.S. 321 (1977).

If we accept that women's very *womanhood* is the cause of rape, clearly there would be no possibility for change and in fact, rape would be a natural heterosexual practice. However, in order to accept such a biological explanation one must ignore the vast population of incarcerated men who are raped.

Incarcerated men are perhaps the only other class of people who fear rape as much as women do. In fact, "will I be raped," seems to haunt men awaiting imprisonment more than any other question (Robertson, 2003, p. 423). Targeted inmates have no option other than "fight, fuck, or flee" (Ibid). In 1998, a survey of more than 7 thousand male inmates, in seven states, found that 21 percent had experienced "coerced or forceful"

sexual contact at least once (Struckman-Johnson C & Struckman-Johnson, 2000, p. 383). Seven percent of those surveyed reported that they had been raped in their current facility.

In the hierarchy of prison, rape of a fellow inmate is considered one of the main masculine and dominating practices. Interestingly, sexual predators in prisons are typically heterosexual and while, by raping, they acquire a "respected masculine" role, the victims, "involuntarily assume female roles" (Robertson, 2003, 425-6). In the case of these victims of rape, their biology is perceived as irrelevant to the practice and it is their vulnerability and the high reward of the practice that exposes them to rape.

In contradiction to what the Supreme Court argued in *Rawlinson*, in prisons, female correctional officers are not the main target of predators. By 1995, almost 20 percent of correctional officers in the U.S. were women and, compared to male officers, they had not been disproportionately assaulted. The fear of "epidemic" rape of female officers has not materialized. In fact, a study of assaults on California prisons shows, that female officers are assaulted "significantly less frequently" than male officers and despite previous fears, there is no evidence that men experience more assaults when women are present in the prisons. (MacKinnon, 2001, p. 798).

In reviewing the data on prison assaults, it becomes evident that the position of the individuals in the social hierarchy determines the likelihood of rape. There is no other explanation that justifies why male inmates systematically fall victim to rape and female guards, who experience the same threat outside prison, are safe from sexual assaults inside the prison setting. As with the prison inmates, women in society are singled out as potential rape victims because they occupy a lower position. Thus it could

be safely assumed that the empowerment of women, as a class, would reduce their vulnerability to rape. Ultimately, with the empowerment of traditional victims of rape the proposed affirmative action would be unnecessary.

Some feminist intellectuals fear that the very notion of consent is in conflict with women's empowerment. Katharine MacKinnon argues that the element of consent reinforces notions of aggressive male and passive woman. The author is concerned that consent, could be a defense of a fifth man in a gang rape, since he saw the other four have sex with her (2001, p.817). However, under the standard of inquiry the very assumption of consent (rather that lack of consent) is negligent therefore such a defense would be invalid. While, Mackinnon's fear is in general valid, it cannot be ignored that in our current society women *are* the main victims of rape. False beliefs in empowerment in areas in which we still do not have access to sufficient power would only work against women. In fact, one of the reasons why the law of rape has been so problematic is the very assumption that women have been empowered and reached equality. Without a doubt, sex equality should be the ultimate goal of rape law however we can not afford to disregard the social realities of women's lives.

In recent decades, feminists have also hoped for a more clear rape law, one that could reduce the difficulties of prosecution. Perhaps, affirmative action and verbal inquiry is not the clear and objective solution that feminists have hoped for. But if we have learned anything from the reforms of the last decades is that the most objective statute, the elimination of force, could be interpreted subjectively. Certainly, there is a valid fear that biased courts could misinterpret or misapply subjective standards. But, in the realm of law there is no *bias-proof* standard. In any legal dispute, including rape, the

two sides' accounts of what happened would differ and the very dispute could open the door to potential bias by the courts. However, the heart of the issue in rape cases is not determining which side is being truthful, since ultimately courts accept certain elements of the case as "facts." The main concern is how these "facts" are interpreted by judges and juries, and whether the accepted "facts" are seen as sufficient to establish guilt beyond a reasonable doubt. The ultimate goal of the requirement of inquiry is adopting a higher standard of reasonableness and eventually achieving gender equality.

Another possible fear in regards to adopting the standard of inquiry is that such a practice would be unromantic. Many conducts that our society considers romantic are in reality sexually coercive and they reinforce gender hierarchy. There are numerous circumstances in which a man's aggressive behavior is perceived as appealing and attractive. It is because of this notion of romance that many rape victims do not perceive what has happened to them as rape. Juries and judges, like others in our society, have often had normal consensual sex that is so close to coercive sex that they can not accept that someone else's similar experience is, in fact, rape. The adoption of verbal inquiry would change the way people have consensual sex and that is what we ought to do in order to establish a more visible line between mutual and coercive sexual conducts

The affirmative action plan proposed by this Note would certainly help the prosecution of many rape cases since the burden of proof would shift to the defendant. However, to expect dramatic changes solely based on a legal reform would be naive. Many rape law reforms have not had the effect that feminist were hoping for (Spohn & Horney, 1996). Unless society's attitude towards women's sexual autonomy shifts, biased courts could misapply even the most egalitarian standard.

The purpose of law is discouraging conducts that harm society and it is time for the legal system to see the effect that rape law has had on daily lives of women. It is time for the justice system to declare nonconsensual sex and negligent rapes as criminal. Justice can no longer be blind to the victimization of women by rape law.

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