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# No Penetration—and It's Still Rape

Lundy Langston\*

*No woman should be against men, but every woman should be for women.*<sup>1</sup>

## INTRODUCTION

Rape is a crime of violence; it is not sex.<sup>2</sup> In 1995, an estimated 260,000

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1. JOHNNETTA B. COLE, DREAM THE BOLDEST DREAMS AND OTHER LESSONS OF LIFE 17 (1997).
2. *But see* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 172-78 (1989).

Considering rape as violence not sex evades . . . the issue of who controls women's sexuality and the dominance/submission dynamic that has defined it. When sex is violent, women may have lost control over what is done to them, but absence of force does not ensure the presence of that control. Nor, under conditions of male dominance, does the presence of force make an interaction nonsexual. If sex is normally something men do to women, the issue is less whether there was force than whether consent is a meaningful concept.

*Id.* at 178. Furthermore, MacKinnon asserts that it is futile to seek to define rape as violence and not sex:

The point of defining rape as "violence not sex" has been to claim an ungendered and nonsexual ground for affirming sex (heterosexuality) while rejecting violence (rape). The problem remains what it has always been: telling the difference. The convergence of sexuality with violence, long used at law to deny the reality of women's violation, is recognized by rape survivors with a difference: where the legal system has seen the intercourse in rape, victims see the rape in intercourse. The uncoerced context for sexual expression becomes as elusive as the physical acts come to feel indistinguishable. Instead of asking what is the violation of rape, their experience suggests that the more relevant question is, what is the nonviolation of intercourse? To know what is wrong with rape, know what is right about sex. . . . Perhaps the wrong of rape has proved so difficult to define because the unquestionable starting point has been that rape is defined as distinct from intercourse, while for women it is difficult to distinguish the two under conditions of male dominance.

*Id.* at 173-74.

individuals were raped.<sup>3</sup> Of that number, an estimated 237,000 were female.<sup>4</sup> Approximately two-thirds of rapes occurred at night, and most occurred at the victim's home.<sup>5</sup> Central city residents were the most likely to be raped.<sup>6</sup> Women in low-income groups were more likely to be raped; most rape victims tried to protect themselves; and when rape victims knew their offenders, they were more likely to be injured than victims of strangers.<sup>7</sup>

At common law, rape was defined as the unlawful carnal knowledge of a woman, without her consent.<sup>8</sup> Carnal knowledge was defined as sexual intercourse. Sexual intercourse implied genital copulation. Genital copulation, in turn, connoted the act of sexual intercourse. Unlawful carnal knowledge required sexual penetration, however slight.<sup>9</sup> Today, in addition to the requirement of carnal knowledge, most rape statutes require force or threat of force against the will and without the consent of the victim.<sup>10</sup> Many people in the criminal law field,

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3. See LAWRENCE A. GREENFIELD, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ-163392, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 1-6 (1997).

4. See *id.*

5. See *id.* at 3.

6. See *id.* at 2-3.

7. See *id.* at 1-6.

8. See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 210 (1769) (stating that rape is "the carnal knowledge of a woman forcibly and against her will"); see also *People v. Cieslak*, 149 N.E. 815, 816 (Ill. 1925) (noting that "[r]ape" is the carnal knowledge of a female forcibly and against her will"); *Adams v. Commonwealth*, 294 S.W. 151, 152 (Ky. Ct. App. 1927) (noting that rape is the "unlawful carnal knowledge of a woman without her consent"). For the crime of rape, it was necessary to prove that the defendant had sexual intercourse with the victim. See *State v. Clark*, 544 P.2d 1372, 1375 (Kan. 1976) ("Rape is an act of sexual intercourse committed by a man with a woman not his wife without her consent and when the woman's resistance has been overcome by force or fear."); *Adams*, 294 S.W. at 152; *Commonwealth v. McCan*, 178 N.E. 633, 634 (Mass. 1931) ("Rape is the carnal knowledge of any woman above the age of consent against her will; . . . its essence is the felonious and violent penetration of the person of the female . . ."); *State v. Johnson*, 289 S.W. 847, 851 (Mo. 1926) ("Before you can find . . . rape, you must believe and find from the evidence that the defendant forcibly assaulted and had sexual intercourse with the [victim] . . . against her will. . . . You cannot find that there was such sexual intercourse, unless you believe from the evidence that the defendant penetrated the private parts of the body of the [victim] with his private parts to some extent."); *Starr v. State*, 237 N.W. 96, 97 (Wis. 1931) ("Rape" consists in accomplishing the act of sexual intercourse by force and against the will of the female assaulted. . . . [T]he tearing of the vagina to the extent that it was torn [was sufficient to show intercourse].").

9. See, e.g., *State v. Machunsky*, 274 A.2d 513, 515 (Vt. 1971) ("Penetration is necessary, according to all authorities, to prove the crime of rape, . . . penetration of her sexual organ by that of the male.").

10. See *Cieslak*, 149 N.E. at 816 ("Rape" is the carnal knowledge of a female forcibly and against her will, . . . coupled with a present ability, to commit a violent injury upon the person of another."); *Johnson*, 289 S.W. at 851 (stating a requirement of "the utmost resistance of which she was capable to prevent"); *Starr*, 237 N.W. at 97 (stating that the crime of rape requires force and against the will of the woman); *Goldberg v. Maryland*, 395 A.2d 1213, 1218-19 (Md. Ct. Spec. App. 1979) ("[A]ctual physical force is not an indispensable element of the crime of rape. . . . [T]he presence or absence of [resistance] . . . must depend on the facts and circumstances in each case. But the real test . . . in all cases, is whether the assault was committed without the consent and against the will of the prosecuting

particularly authors who have written on the subject of rape law, have asserted that meeting an attacker with force was a male response and that this requirement placed women in the position of being severely injured or killed.<sup>11</sup> In particular, numerous feminists responded to legislators by stating that women are not socialized to meet an attacker with an attack, whereas men are socialized to respond to an attack with force. Men will likely respond to an attack by a woman with extreme rage, usually resulting in very serious injuries or death to the woman.<sup>12</sup> Thus, an attack response, in essence, is a male response.

Numerous law review articles have been written on the requirements of force and against the will of the victim.<sup>13</sup> The articles focus on the force requirement and not the penetration requirement, which is the male understanding of what is necessary when a woman is threatened with the crime of rape.

Even though there are numerous articles stating the force and against the will requirements are male responses to being attacked, the *male* question has not been addressed with respect to penetration. Penetration is required in addition to the force and against the will requirements.<sup>14</sup> Penetration, too, is a male understood type conduct.<sup>15</sup> The *penetration* of requirement does not necessarily require that the vagina is completely entered or that the hymen is ruptured. Is entering the

witness.”).

11. Although the focus of this Article is on female rape victims, the author recognizes that males are also rape victims.

12. See GREENFIELD, *supra* note 3, at 9 (noting the disparity between numbers of male and female sex offenders).

13. See, e.g., Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1126, 1131 (1986).

[T]he law puts a special burden on the rape victim to prove through her actions her nonconsent . . . while imposing no similar burden on the victim of trespass, battery, or robbery . . . .

. . . [F]or many courts, saying “no”—passive resistance—does not count as resistance. . . .

The consent standard, like the force standard, thus emerges as another means to protect men against unfair convictions by giving them full and fair warning that their (forceful) advances constitute an unwelcome rape rather than a welcome, or at least accepted, seduction.

*Id.*

14. See MACKINNON, *supra* note 2, at 172-78. “Penetration is necessary, according to all authorities, to prove the crime of rape, and such fact must be proven beyond a reasonable doubt.” *Machunsky*, 274 A.2d at 515.

15. See Catharine MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 *Signs*, J. OF WOMEN IN CULTURE AND SOC’Y 635, 647 (1983) (defining rape in male genital terms by requiring sexual penetration).

vulva<sup>16</sup> or labia<sup>17</sup> sufficient?

Penetration, at common law, was defined as the penetration of the sexual organ of the female by the sexual organ of the male. What is the female sex organ: the vagina, the vulva, the labia? What is the male sex organ: the penis? The requirement of penetration by "some male organ type mechanism" removed other types of conduct with the vulva from the crime of rape.<sup>18</sup> The penetration of the vulva by the male sex organ is not regarded as rape by most jurisdictions. Some jurisdictions legislated penetration of the vulva, but required a showing of penetration of the vagina.

The maleness requirement of force and penetration may be linked to the historical male concepts of property.<sup>19</sup> At early common law when rape statutes were initially written, women were deemed property of men.<sup>20</sup> Virgin daughters were a valuable commodity belonging to their fathers; wives were the chattel of their husbands.<sup>21</sup> The father or husband ownership right of women made rape a crime against property.<sup>22</sup> Because rape was a property offense, the father or husband was the victim rather than the woman. Because fathers or husbands were the victims of rape, men wrote rape laws for their own benefit and therefore, included a penetration requirement. Penetration requires male type conduct and therefore, evolved as the measuring rod for determining when conduct had gone far enough to constitute a crime. One commentator has stated the following:

[C]riminal law that reflects male views and male standards imposes its judgment on men who have injured other men. It is "boys' rules" applied to a boys' fight. In rape, the male standard defines a crime committed against women, and male standards are used not only to judge men, but also to judge the conduct of women victims. Moreover, because the crime involves sex itself, the law of rape inevitably treads on the explosive ground of sex roles, of male aggression and female passivity, of our understandings of sexuality-areas where differences between a male and a female perspective may be most pronounced.<sup>23</sup>

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16. The vulva is "the external female genitalia including the labia majora, labia minora, clitoris, and vestibule of the vagina." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1438 (1970).

17. The labia is the folds of tissue surrounding the vulva. *See id.* at 731.

18. This would exclude cunnilingus which is defined as an act of sex committed with the mouth and the female sexual organ. *See id.*

19. *See* SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 18 (1975).

20. *See* Estrich, *supra* note 13, at 1127. Furthermore, "[i]n matters of sex, the common law tradition views women ambivalently at best: Even when not intentionally dishonest, they simply cannot be trusted to know what they want or to mean what they say." *Id.* at 1122.

21. *See* BROWNMILLER, *supra* note 19, at 18.

22. *See* Alexandra Wald, *What's Rightfully Ours: Toward a Property Theory of Rape*, 30 COLUM. J.L. & SOC. PROBS. 459, 470 (1997) ("Women during the eighteenth century did not own their bodies; instead, rights in sexual access to a wife or unmarried daughter were the property respectively, of a husband or father.").

23. Estrich, *supra* note 13, at 1091.

In addition to law review articles discussing the force requirement, numerous articles have challenged the marital immunity rule. Because men deemed women as property, rape laws originated as a way of protecting men's chattel.<sup>24</sup> There are also numerous religious references to those rights of men. *The Torah* states the following:

In the case of a virgin who is engaged to a man—if a man comes upon her in town and lies with her, you shall take the two of them out to the gate . . . and stone them to death: the [woman] because she did not cry for help in the town, and the man because he violated his neighbor's wife. . . . But if the man comes upon the engaged [woman] in the open country, and the man lies with her by force, only the man who lay with her shall die, but you shall do nothing to the [woman]. The [woman] did not incur the death penalty, for this case is like that of a man attacking another and murdering him. He came upon her in the open; though the engaged [woman] cried for help, there was no one to save her.

If a man comes upon a virgin who is not engaged and he seizes her and lies with her, and they are discovered, the man who lay with her shall pay the [woman's] father fifty [shekels of] silver, and she shall be his wife. Because he has violated her, he can never have the right to divorce her.<sup>25</sup>

Moreover, *The Holy Bible* asserts the following:

If a man find[s] a damsel that is a virgin, which is not betrothed, and lay hold on her, and lie with her, and they be found; Then the man that lay with her shall give unto the damsel's father fifty shekels of silver, and she shall be his wife; because he hath humbled her, he may not put her away all his days.<sup>26</sup>

Furthermore, *The Holy Quran* states, "Woman was made to be (1) a mate or companion for man; (2) except for sex, of the same nature as man . . . ."<sup>27</sup> Today, states have either abolished the immunity or modified it to cover situations where the parties are living apart.<sup>28</sup> Carnal knowledge or sexual intercourse had to be

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24. See BROWN MILLER, *supra* note 19, at 16-30.

25. THE TORAH: A MODERN COMMENTARY V, DEUTERONOMY 22:23-29 (1983).

26. Deuteronomy 22:28-29 (King James).

27. THE MEANING OF THE HOLY QURAN 16:72, n.2103 (1989).

28. See Michael J. Gohring, Comment, *Spousal Exemption to Rape*, 65 MARQ. L. REV. 120, 133-35 (1981). Unlawful carnal knowledge had to be by a man who was not the woman's husband. See *id.* at 121. Lord Hale explained the view that husbands could not rape their wives when he stated the following: "[B]y their mutual matrimonial consent and contract the wife hath given up herself in this kind to her husband, which she cannot retract." See *id.* (citations omitted).

unlawful, and courts interpreted marital intercourse, in whatever form, as lawful.<sup>29</sup> With modifications of the rape statutes, there are some protections for wives today. For example, wives who separate from their husbands are protected by rape statutes.<sup>30</sup>

After the onslaught of feminist jurisprudence, numerous articles were written concerning the "maleness" requirement for the female in order for there to be a charge of rape.<sup>31</sup> Force against her will and consent requirements have been interpreted to require "a male response" to the threatening behavior experienced by female rape victims.<sup>32</sup> Even though feminists have consistently raised the issue of

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29. See *id.* at 133-37; see also *State v. Bell*, 560 P.2d 925, 931-33 (N.M. 1977) (stating that an individual causing another to have unlawful sexual intercourse must be an individual other than the spouse of the accused).

30. See NEV. REV. STAT. § 200.373 (1997). The New York "marital exemption" provision was held to violate equal protection. See *People v. Liberta*, 474 N.E.2d 567, 573 (N.Y. 1984); see also *Warren v. State*, 336 S.E.2d 221, 222 (Ga. 1985) (noting that there is no marital exemption under Georgia's rape statute).

31. See Estrich, *supra* note 13, at 1092-93.

At one end of the spectrum is the "real" rape, what I will call the traditional rape: A stranger puts a gun to the head of his victim, threatens to kill her or beats her, and then engages in intercourse. . . . But most cases deviate in one or many respects from this clear picture, making interpretation far more complex. Where less force is used or no other physical injury is inflicted, where threats are inarticulate, where the two know each other, where the setting is not an alley but a bedroom, where the initial contact was not a kidnapping but a date . . . .

*Id.* at 1092; see also Susan Ager, *The Incident*, DET. FREE PRESS MAG., Mar. 22, 1992, at 17.

We were alone beneath the stars, high in the mountains, miles from the nearest light, our sleeping bags unrolled on the ground, weary from a long drive and anticipating sleep. Or so I thought. We were not lovers, merely acquaintances. We worked together. We respected each other. He owned a few acres in the mountains, and I admired that back-to-the-land streak in anyone. So we agreed to make this weekend camping trip together to his patch of earth. A few days earlier, oh so briefly, I thought about saying something. Issuing a "don't get any ideas" warning. But I didn't. I thought he'd feel insulted. He did not worry so much about my feelings. For hours on that starlit night he pestered me. Stroked me. Whispered to me first, then argued, then whined: "Oh come on. You'll love it. Why'd you come up here with me then? Just once. It's such a beautiful night. You'll enjoy it, really. Come on. Please?" I didn't scream, because there was no one to hear. I didn't fight, because there was nowhere to run. It was his car, and he had the keys. Instead, I curled up. I buried my head against my chest while he touched me. I slapped blindly at his touches, as if I were batting away mosquitos . . . . Finally, weary and weepy, I gave up. I remember the sting of my tears rolling down my cheeks and into my ears as I lay on my back and he moaned. Then, I fell instantly into sleep, as if from the top of a mountain. Our weekend ended early, because I was sullen and that made him angry. There was nothing to say on the long ride home. I never called what happened that night "rape." I still don't. But it wasn't bliss either.

*Id.*

Although questioning rape and its maleness, Estrich's and Ager's queries about rape do not involve discussions on the physical act of penetration, rather they ponder the notice given to the male.

32. See Estrich, *supra* note 13, at 1114.

In a very real sense, the "reasonable" woman under the view of the . . . judges who would reverse Mr. Rusk's conviction is not a woman at all. Their version of a reasonable person is one who does not scare easily, one who does not feel vulnerability, one who is not passive, one who fights back, not cries. The reasonable woman, it seems, is not a schoolboy "sissy." She

maleness, courts have continually upheld the validity of force, threats of force, or a showing of against the woman's will. Law review articles and cases discussing the penetration requirement have addressed it from the premise that some penetration should be required.<sup>33</sup>

What intrigues me is the origin of the penetration requirement and how we moved from the common law punishment of death for the crime of rape<sup>34</sup> to the Supreme Court's opinion that "a sentence of death is grossly disproportionate and excessive punishment . . . and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."<sup>35</sup> Drawing analogies to the force requirement, the penetration requirement and the inability to punish rape by death suggest that the penetration issue might also be *male*: a male understanding of what is necessary for the crime and punishment of rape.

This Article explores the penetration requirement and considers the following:

is a real man.

*Id.* Estrich was responding to the majority opinion in the Maryland Court of Appeals' case, *State v. Rusk*, 424 A.2d 720 (Md. 1981). In *Rusk*, the victim met Rusk at a bar. *See id.* at 721. She followed him home, and upon arriving at his home she realized she was in an unfamiliar neighborhood, and when asked to come upstairs to his apartment, she refused. *See id.* Rusk reached into the victim's car, removed her keys, and then asked, "Now will you come up?" *See id.* The victim stated that at this point she was "scared" because he had her car keys and she was in unfamiliar surroundings, so she followed him up to his apartment. *See id.* Rusk left the victim in his apartment while he walked across the hall to the bathroom; upon returning, the victim began to "beg" Rusk to let her go, and he responded "no." *See id.* The victim then became "really" scared and testified that it was more the look in his eyes that caused her to do what he wanted. *See id.* She proceeded to have oral sex and then sexual intercourse. *See id.* The Maryland Court of Appeals held that the reversal of Rusk's conviction was in error because the reasonableness of the victim's fear was plainly a question of fact for the jury. *See id.* at 727. Judge Cole stated in his dissenting opinion that the evidence was insufficient for a conviction of rape. *See id.* at 728 (Cole, J., dissenting). Judge Cole stated that "[i]n the absence of any verbal threat to do her grievous bodily harm . . . [it is] difficult to understand how a victim could participate in these sexual activities and not be willing." *Id.* at 734 (Cole, J., dissenting). Judge Cole's lack of understanding could be attributed to his maleness.

33. *See supra* notes 13-15 and accompanying text. *But see* MacKinnon, *supra* note 15, at 647 (noting that although women resent non-consensual sexual penetration, the "penile invasion of the vagina may be less pivotal to women's sexuality, pleasure or violation, than it is to male sexuality"). The requirement of penetration represents a male-defined loss, namely the male's exclusive access to the female. MacKinnon suggests that rape is more like a crime against female monogamy rather than an offense against her sexuality. *See id.*

34. Originally, rape was a capital offense. *See generally* Coker v. Georgia, 433 U.S. 584, 593-95 (1977) (discussing the history of punishment for rape). How bad is rape? Recognizing the heinousness of rape, Chief Justice Burger, in his concurring opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986), stated that the "'crime against nature' was an offense of 'deeper malignity' than rape"—suggesting that rape, although bad, is not all that bad. *See id.* at 196-97 (Burger, C.J., concurring) (quoting BLACKSTONE, *supra* note 8, at 215). Part of the problem is the sad and mistaken belief that rape is sex.

35. *See* Coker, 433 U.S. at 592.



(1) whether it is a male or reasonable person understanding of what is so violative of a woman's body that it should be referred to as rape; and (2) what punishment should be imposed. This Article explores problems raised by the "foreplay" issue. Understanding that rape is not sex, in order to deem a violation, one must understand how a violation is characterized. In addition to defining what is violative, the foreplay issue raises questions about characterizations from a male perspective concerning when a male is placed on notice by the female that she either no longer wishes to engage in the activity and that he should stop or that this is unwelcome conduct altogether and that he should stop. The focus has been on the male's notice rather than the desires of the female to stop the conduct. An additional problem is that the crime of rape may be lessened if penetration is deemed insignificant. If penetration, a male prerequisite for the crime of rape, is not used to determine severity of the violation, then there may be some concern that stiff penalties may no longer be imposed, that is, if men comprehend the violation, then it is not a violation. If stiff penalties are not imposed, then there could be a significant increase in rapes.

Part I of this Article discusses how society defines criminal conduct and why society punishes this type of conduct.<sup>36</sup> Part II explores the punishment theory, with regard to rape, from the woman's perspective of pain and pleasure.<sup>37</sup> This Article then compares what is pleasurable for women, and from this perspective, what should be punishment for conduct that is deemed violative from the woman's point of reference of pain and pleasure.<sup>38</sup> Part III addresses some solutions and perhaps, redirection in defining and punishing the crime of rape.<sup>39</sup> Finally, Part IV concludes that the severity of the invasion into the private, protected sphere of a woman's body should be defined in women's terms and punished accordingly.<sup>40</sup>

## I. DEFINING AND PUNISHING CRIMINAL ACTS

"A crime is any social harm defined and made punishable by law."<sup>41</sup> Blackstone defined crime as "an act committed or omitted, in violation of a public law, either forbidding or commanding it."<sup>42</sup> Although Blackstone noted the vicious will on the part of the actor, his focus was on the act.<sup>43</sup> Bishop, however, defined

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36. See *infra* notes 41-83 and accompanying text.

37. See *infra* notes 84-111 and accompanying text.

38. See *infra* notes 112-43 and accompanying text.

39. See *infra* notes 144-71 and accompanying text.

40. See discussion *infra* Part IV.

41. RONALD N. BOYCE & ROLLIN M. PERKINS, CRIMINAL LAW AND PROCEDURE § 2, at 5 (7th ed. 1989).

42. BLACKSTONE, *supra* note 8, at 5.

43. See *id.* at 21. Blackstone translated the latin phrase *actus non facit reum, nisi mens sit rea* as "an unwarrantable act without a vicious will is no crime at all." See *id.*; see also *Davis v. United States*, 160 U.S. 469, 484 (1895) (discussing Blackstone's definition of crime).

crime in terms of the "wrong" done.<sup>44</sup> According to Bishop, "'a crime is any wrong which the government deems injurious to the public at large, and punishes through a judicial proceeding in its own name.'"<sup>45</sup> Thus, Blackstone's focus was on the act itself while Bishop focused on the social harm. Blackstone's approach, also known as the modern approach, "takes the act—the range of the actor's control over what happens—as the core of the crime."<sup>46</sup> Bishop's traditionalist approach "emphasizes the victim's suffering and the actor's responsibility for bringing about irreversible damage."<sup>47</sup> George P. Fletcher made the following observations:

The traditionalists root their case in the way we feel about crime and suffering. Modernists hold to arguments of rational and meaningful punishment. Despite what we might feel, the modernist insists, reason demands that we limit the criminal law to those factors that are within the control of the actor. The occurrence of harm is beyond his control and therefore ought not to have weight in the definition of crime and fitting punishment.<sup>48</sup>

Fletcher also observed that "[s]ometime in the last two or three centuries, our scientific thinking about crime began to shift from the harm done to the act that brings about the harm."<sup>49</sup> Furthermore, "[i]nstead of seeing harm first and the action as the means for bringing about the harm, we are now inclined to see the action first and the harm as a contingent consequence of the action."<sup>50</sup>

Most criminal statutes focus on the act, following Blackstone rather than Bishop's social harm. Criminologists and sociologists, however, have defined crime in broader terms, that is, a crime is not such until it is recognized as a crime by law.<sup>51</sup> In the absence of a penal provision, a statute cannot be the basis for criminal prosecution.<sup>52</sup> Blackstone's focus on the act is problematic because any act is not a crime; Bishop's focus on a social harm is also flawed because of who

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44. See *State v. Jackson*, 77 So. 196, 198 (La. 1917) (quoting 1 BISHOP, NEW CRIMINAL LAW 32 (8th ed. 1892)).

45. *Id.* (quoting BISHOP, *supra* note 44, at 32).

46. See GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 64 (1988).

47. See *id.*

48. *Id.*

49. *Id.* at 65.

50. *Id.*

51. See A. KEITH BOTTOMLEY, CRIMINOLOGY IN FOCUS: PAST TRENDS AND FUTURE PROSPECTS 1-38 (1979).

52. See *id.*

defines social harms—judges, lawyers, legislatures, an all male review?<sup>53</sup>

Rape is an invasion of a woman's body in which her "private, personal inner space" is violated.<sup>54</sup> The act of rape denies a woman autonomy by abridging her right to determine when, with whom, and how she will allow an individual to enter her zone of body privacy. In addition to the physical harm, the crime of rape grants a man domination over the woman's zone of body privacy.

Of course, the common law no longer guides rape.<sup>55</sup> Today, state statutes guide rape. Under the Model Penal Code (MPC), the crime of rape occurs when the following happens:

A male . . . has sexual intercourse with a female not his wife . . . and compels her to submit by force or by threat of [force] . . . [or] has substantially impaired her power to appraise or control her conduct by administering . . . without her knowledge drugs [and] the female is unconscious . . . [or she] is less than 10 years old.<sup>56</sup>

Sexual intercourse, under the MPC, "includes intercourse per os or per anum, with some penetration however slight."<sup>57</sup> Sexual assault, under the MPC, includes sexual contact: "[The] touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire."<sup>58</sup> Under statutory law and under the MPC, rape begins to be "a sex crime that is not regarded as a crime when it looks like sex."<sup>59</sup> In other words, reference to rape as sexual intercourse suggests that rape is not a crime if it is sex. But rape is not sex.

The MPC and its followers suggest that sexual intercourse has to include penetration of the vagina, however slight, and anything less is not rape because it

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53. See Estrich, *supra* note 13, at 1091.

In one of his most celebrated essays, Oliver Wendell Holmes explained that the law does not exist to tell the good man what to do, but to tell the bad man what not to do. Holmes was interested in the distinction between the good and bad man; I cannot help noticing that both are men. Most of the time a criminal law that reflects male views and male standards imposes its judgment on men who have injured other men. It is "boys rules" applied to a boys' fight. In rape, the male standard defines a crime committed against women, and male standards are used not only to judge men, but also to judge the conduct of women victims. Moreover, because the crime involves sex itself, the law of rape inevitably treads on the explosive ground of sex roles, of male aggression and female passivity, of our understandings of sexuality—areas where differences between a male and a female perspective may be most pronounced.

*Id.*

54. See BROWNMILLER, *supra* note 19, at 376.

55. At common law, rape was forced sexual intercourse by a man against a woman who was not his wife. Today, both men and women can be raped, and in some jurisdictions married people can be raped by their spouses. But rape is dealt with in terms of men having an entitlement to invade a woman's body, unless and until she says "no." In that sense, rape remains relational as it did at common law.

56. MODEL PENAL CODE § 213.1(1)(a)-(d) (1962). The Model Penal Code provides guidelines for states to use in defining criminal offenses.

57. *Id.* § 213.0(2).

58. *Id.* § 213.4(8).

59. See MACKINNON, *supra* note 2, at 172.

is not intercourse. Thus, the touching of the female's sex organ, without the penetration of the vagina, cannot constitute rape under the MPC. Rape, however, is not sex; it is a crime, and it is a crime of violence. The crime is complete when the act is done, or the social harm has occurred. The act is done when the female's private, personal inner space is violated, and that space is violated when an uninvited individual enters the zone of protected pleasures.

Under the MPC, victimizers are punished less severely if they are known by their victims.<sup>60</sup> However, strangers or friends, if uninvited, equally violate the protected sphere.

There are noted distinctions between the common law and the MPC. Under the MPC, rape is defined in terms of the victimizer's positive acts of aggression, the victim's age, or the victim's physical condition. Under common law, the focus is on the victim's lack of consent. Thus, the common law uses negative terms of the victim's lack of consent in determining whether the conduct was rape while the MPC uses the victim's lack of consent to demonstrate that a rape occurred.

Many states use sexual assault as opposed to *rape* to define what was initially defined as *rape* at common law.<sup>61</sup> Florida chose the term sexual battery in an effort

60. See MODEL PENAL CODE § 213.1(1).

Rape is a felony of the second degree unless (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties, in which cases the offense is a felony of the first degree.

*Id.*

61. See ALA. CODE § 13A-6-61(a)(1) (1994) ("A male commits the crime of rape in the first degree if he engages in sexual intercourse with a female by forcible compulsion."); ALASKA STAT. § 11.41.410(a)(1) (Michie 1996) ("Sexual assault in the first degree [is when] the offender engages in sexual penetration with another person without consent of that person."); ARIZ. REV. STAT. ANN. § 13-1406(A) (West 1989) ("Sexual assault is intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person."); ARK. CODE ANN. § 5-14-103(a) (Michie 1997) ("A person commits rape if he engages in sexual intercourse . . . with another person."); COLO. REV. STAT. ANN. § 18-3-402(1) (West 1986) ("Any actor who knowingly inflicts sexual intrusion or sexual penetration on a victim commits a sexual assault in the first degree."); *Id.* § 18-3-404(1) ("Any actor who knowingly subjects a victim to any sexual contact commits sexual assault in the third degree."); CONN. GEN. STAT. ANN. § 53a-70(a)(1) (West 1998) ("Sexual assault in the first degree is when a person engages in sexual intercourse . . ."); HAW. REV. STAT. § 707-730(1)(a) (1993) ("A person commits the offense of sexual assault in the first degree if: (a) The person knowingly subjects another person to an act of sexual penetration by . . . compulsion . . ."); *Id.* § 707-731(1)(b) ("The person knowingly subjects to sexual penetration another person who is mentally defective, mentally incapacitated, or physically helpless."); *Id.* § 707-732(1)(a) ("A person commits the offense of sexual assault in the third degree if the person recklessly subjects another person to an act of sexual penetration by compulsion."); *Id.* § 707-733(1)(a)-(b) ("A person commits the offense of sexual assault in the fourth degree if: (a) The person knowingly subjects another person to sexual contact by compulsion or causes another person to have sexual contact with the actor by compulsion; [or] (b) The person knowingly exposes the person's genitals to another person under circumstances in which the

actor's conduct is likely to alarm the other person . . . or put the other person in fear of bodily injury . . . ."); 720 ILL. COMP. STAT. ANN. § 5/12-13(a)(1) (West 1998) ("Criminal sexual assault [is] . . . an act of sexual penetration . . . ."); IND. CODE ANN. § 35-42-4-1(a)(1)-(3) (Michie 1998) ("[A] person who knowingly or intentionally has sexual intercourse with a member of the opposite sex when: (1) the other person is compelled by force . . . ; (2) the other person is unaware that the sexual intercourse is occurring; or (3) the other person is so mentally disabled . . . that consent to sexual intercourse cannot be given . . . ."); KAN. STAT. ANN. § 21-3501(1) (Supp. 1994) ("Sexual intercourse" means any penetration of the female sex organ by a finger, the male sex organ or any object. Any penetration, however slight, is sufficient to constitute sexual intercourse."); *Id.* § 21-3501(2)(a)-(b) ("Sodomy" means oral contact or oral penetration of the female genitalia or oral contact of the male genitalia; anal penetration, however slight, of a male or female by any body part or object; or oral or anal copulation or sexual intercourse between a person and an animal. 'Sodomy' does not include penetration of the anal opening by a finger or object in the course of the performance of: (a) Generally recognized health care practices; or (b) a body cavity search conducted in accordance with K.S.A. 22-2520 through 22-2524, and amendments thereto."); *Id.* § 21-3502(1)(a) ("Rape is: (1) Sexual intercourse with a person who does not consent to the sexual intercourse, under any of the following circumstances: (A) When the victim is overcome by force or fear; [or] (B) when the victim is unconscious or physically powerless . . . ."); *Id.* § 21-3517(a) ("Sexual battery is the intentional touching of the person of another who is 16 or more years of age, who is not the spouse of the offender and who does not consent thereto, with the intent to arouse or satisfy the sexual desires of the offender or another."); *Id.* § 21-3518(a)(1)-(2) ("Aggravated sexual battery is the intentional touching of the person of another who is 16 or more years of age and who does not consent thereto, with the intent to arouse or satisfy the sexual desires of the offender or another under any of the following circumstances: (1) When the victim is overcome by force or fear; [or] (2) when the victim is unconscious or physically powerless."); KY. REV. STAT. ANN. § 510.010(7) (Michie 1988) ("Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party . . . ."); *Id.* § 510.010(8) ("Sexual intercourse" means sexual intercourse in its ordinary sense and includes penetration of the sex organs or anus of one person by a foreign object manipulated by another person. Sexual intercourse occurs upon any penetration, however slight; emission is not required. 'Sexual intercourse' does not include penetration of the sex organ or anus by a foreign object in the course of the performance of generally recognized health care practices . . . ."); *Id.* § 510.020(1)-(2) (Michie Supp. 1988) ("Whether or not specifically stated, it is an element of every offense defined in this chapter that the sexual act was committed without consent of the victim. . . . Lack of consent results from: . . . [f]orcible compulsion . . . [or] incapacity to consent . . . ."); *Id.* § 510.040(1)(a)-(b) (Michie 1985) ("A person is guilty of rape in the first degree when: (a) He engages in sexual intercourse with another person by forcible compulsion; or (b) He engages in sexual intercourse with another person who is incapable of consent . . . ."); *Id.* § 510.050(1) ("A person is guilty of rape in the second degree when, being eighteen (18) years old or more, he engages in sexual intercourse with another person less than fourteen (14) years old."); *Id.* § 510.060(1)(a)-(b) (Michie Supp. 1988) ("A person is guilty of rape in the third degree when: (a) He engages in sexual intercourse with another person who is incapable of consent because he is mentally retarded or mentally incapacitated; (b) Being twenty-one (21) years old or more, he engages in sexual intercourse with another person less than sixteen (16) years old."); LA. REV. STAT. ANN. § 14:41(A)-(B) (West 1997) ("Rape is the act of anal or vaginal sexual intercourse . . . . [A]ny sexual penetration, vaginal or anal, however slight, is sufficient . . . ."); MD. ANN. CODE art. 27, § 462(a) (1997) ("[First degree rape occurs] if the person engages in vaginal intercourse . . . ."); MASS. GEN. LAWS ANN. ch. 265, § 22(a) (West 1990) ("[Rape is] sexual intercourse or unnatural sexual intercourse."); MINN. STAT. ANN. § 609.342 (West 1998) ("[Criminal sexual conduct is] sexual penetration with another person . . . ."); MO. ANN. STAT. § 566.010(3)-(4) (West Supp. 1998) ("Sexual contact" means any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, for the purpose of arousing or gratifying sexual desire of any person; . . . 'Sexual intercourse' means any penetration, however slight, of the female sex organ by the male sex organ, whether or not an emission results.") (discussing the 1979 Comment to

to make the term gender neutral.<sup>62</sup> The statutory penetration requirement varies from state to state, and most statutes fail to define sexual intercourse. The statutes require penetration during sexual intercourse, but it is not clear what has to be penetrated.

The variations in definitions as to what constitutes sexual intercourse is part of the problem in defining what has to be penetrated. With respect to the raping

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1973 Proposed Code, which states that "[p]enetration, however slight (entry into the labia), is sufficient"; *Id.* § 566.030(1) ("A person commits the crime of forcible rape if he has sexual intercourse with another person by the use of forcible compulsion."); *Id.* § 566.040(1) ("A person commits the crime of sexual assault if he has sexual intercourse with another person knowing that he does so without that person's consent.") (discussing the 1979 Comment to 1973 Proposed Code, which states that while continuing to label the defendant as a "rapist," "[t]he Code reserves that term for the most heinous sexual offender"); *Id.* § 566.060(1) ("A person commits the crime of forcible sodomy if he has deviate sexual intercourse with another person by the use of forcible compulsion.") (discussing the 1979 Comment to 1973 Proposed Code, which states that "[u]nder this statute the 'detestable' act is the crime, and force, duress, or other lack of consent are immaterial"); *Id.* § 566.070(1) ("A person commits the crime of deviate sexual assault if he has deviate sexual intercourse with another person knowing that he does so without that person's consent."); MONT. CODE ANN. § 45-5-502(1) (1997) ("A person who knowingly subjects another person to any sexual contact without consent commits the offense of sexual assault."); *Id.* § 45-5-503(1) ("A person who knowingly has sexual intercourse without consent with another person commits the offense of sexual intercourse without consent."); VA. CODE ANN. § 18.2-61(A) (Michie Supp. 1998) ("[Rape is committed i]f any person has sexual intercourse with a complaining witness who is not his or her spouse or causes a complaining witness, whether or not his or her spouse, to engage in sexual intercourse with any other person and such act is accomplished . . ."); WASH. REV. CODE ANN. § 9A.44.040(1) (West 1998) ("A person is guilty of rape in the first degree when such a person engages in sexual intercourse with another person by forcible compulsion . . ."); W. VA. CODE § 61-8B-3(a)(1) (1997) ("A person is guilty of sexual assault in the first degree when: (1) Such person engages in sexual intercourse or sexual intrusion with another person . . ."); *Id.* § 61-8B-4(a)(1) ("A person is guilty of sexual assault in the second degree when: (1) Such person engages in sexual intercourse or sexual intrusion with another person without the person's consent, and the lack of consent results from forcible compulsion . . ."); WIS. STAT. ANN. § 940.225(1)(a) (West 1994) ("First degree sexual assault . . . [is committed when a person h]as sexual contact or sexual intercourse with another person without consent of that person and causes pregnancy or great bodily harm to that person.").

62. See FLA. STAT. ANN. § 794.011 (West Supp. 1998). The Florida Legislature's 1974 enactment of the sexual battery statute elucidated the legislature's intent to afford protection against nonconsensual invasions of sexual privacy to males as well as females. The impetus for replacing Florida's previous rape statutes with section 794.011 of the Florida Statutes appears to be a 1973 appellate opinion holding the following:

[M]ales are entitled to the same protection from degrading ravishment and sexual assault, regardless of the orifice involved, as are females. It is no longer consonant with constitutional principles of equal protection to continue a criminal sanction against sexual assaults on females and not provide the same criminal sanction where such assaults are made on males.

See *Brinson v. State*, 278 So. 2d 317, 322 (Fla. Dist. Ct. App. 1973), *rev'd*, *Wilson v. State*, 288 So. 2d 480 (Fla. 1974).

of a woman by a man, most states require penetration of the vagina.<sup>63</sup>

Defining what has to be penetrated is significant because if rape is viewed as a crime against the woman,<sup>64</sup> then any conduct that is perceived as violative to the woman should be classified as rape. Many statutes, with respect to the penetration element, provide that an offender has to engage in *sexual intercourse*.<sup>65</sup> It is assumed that penetration has to be effectuated in order for there to be sexual intercourse. The statutes, however, fail to state what has to be penetrated—the vagina, the vulva, the labia, or the clitoris? Some states refer to penetration of the female organ without further defining penetration.<sup>66</sup>

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63. See *Salsman v. Commonwealth*, 565 S.W.2d 638, 642 (Ky. Ct. App. 1978) (“Sexual intercourse is an element of rape. Sexual contact is an element of sexual abuse. Sexual intercourse always involves sexual contact . . . [but] sexual contact does not always involve intercourse.”).

64. Today, most statutes are gender neutral, but rape originally was physical conduct executed on a woman.

65. See *supra* note 61.

66. See, e.g., FLA. STAT. ANN. § 794.011(1)(h) (West 1997) (“‘Sexual battery’ means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object . . .”); GA. CODE ANN. § 16-6-1(a) (Supp. 1998) (“A person commits the offense of rape when he has carnal knowledge of a female forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ. The fact that the person allegedly raped is the wife of the defendant shall not be a defense to a charge of rape.”); *Id.* § 16-6-22.1(a)-(b) (1996) (“[T]he term ‘intimate parts’ means the primary genital area, anus, groin, inner thighs, or buttocks of a male or female and the breasts of a female. . . . A person commits the offense of sexual battery when he intentionally makes physical contact with the intimate parts of the body of another person without the consent of that person.”); *Id.* § 16-6-22.2(b) (“A person commits the offense of aggravated sexual battery when he intentionally penetrates with a foreign object the sexual organ or anus of another person without the consent of that person.”); IDAHO CODE § 18-6101 (1997) (“Rape is defined as the penetration, however slight, of the oral, anal, or vaginal opening with the perpetrator’s penis accomplished with a female under either of the following circumstances: . . . Where she is prevented from resistance by threats of immediate and great bodily harm, accompanied by apparent power of execution; or by any intoxicating, narcotic, or anaesthetic substance administered by or with the privity of the accused.”); *Id.* § 18-6102 (“No conviction for rape can be had against one who was under the age of fourteen (14) years at the time of the act alleged, unless his physical ability to accomplish penetration is proved as an independent fact, and beyond a reasonable doubt.”); *Id.* § 18-6103 (“The essential guilt of rape consists in the outrage to the person and feelings of the female. Any sexual penetration, however slight, is sufficient to complete the crime.”); ME. REV. STAT. ANN. tit. 17-A, § 251(1)(C) (West Supp. 1997) (“(1) Any act between 2 persons involving direct physical contact between the genitals of one and the mouth or anus of the other, or direct physical contact between the genitals of one and the genitals of the other; (2) Any act between a person and an animal being used by another person which act involves direct physical contact between the genitals of one and the mouth or anus of the other, or direct physical contact between the genitals of one and the genitals of the other; or (3) Any act involving direct physical contact between the genitals or anus of one and an instrument or device manipulated by another person when that act is done for the purpose of arousing or gratifying sexual desire or for the purpose of causing bodily injury or offensive physical contact.”); *Id.* § 253 (“A person is guilty of gross sexual assault if that person engages in a sexual act with another person and . . . [t]he other person submits as a result of compulsion, as defined in section 251, subsection 1, paragraph E; . . . [a] person is guilty of gross sexual assault if that person engages in a sexual act with another person and . . . [t]he actor has substantially impaired the other’s person’s power to appraise or control the other person’s sexual acts by administering or employing drugs, intoxicants or other similar means; . . . [or] the other person is unconscious or otherwise physically incapable of resisting and has

Notwithstanding oral and anal penetration, it is clear that the male's sex organ is the penis.<sup>67</sup> It is not equally clear as to what is the female sex organ. Is the female sex organ the vagina, the clitoris, or the vulva, which includes the vagina and clitoris?<sup>68</sup> If the clitoris is a sex organ, can it be penetrated? To penetrate is "to enter or force a way into; [to] pierce."<sup>69</sup> Penetration is the "act or process of piercing or penetrating something."<sup>70</sup> How do we determine what constitutes a sex organ? And what needs to be penetrated? And can it be penetrated? Defining the female sex organ is necessary because some states require penetration of the vaginal opening. I presume those jurisdictions are referring to the vagina as the female sex organ.<sup>71</sup> Recognizing that the requirement of penetration without further explanation of what needs to be penetrated is insufficient for the crime of rape, some states attempt to provide more protection for women.<sup>72</sup> If there is

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not consented to the sexual contact . . ."); TEX. PENAL CODE ANN. § 22.011(a) (West 1994 & Supp. 1998) ("A person commits an offense [of sexual assault] if the person: (1) intentionally or knowingly: (A) causes the penetration of the anus or female sexual organ of another person by any means, without that person's consent; (B) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent; or (C) causes the sexual organ of another person, without that person's consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor; or (2) intentionally or knowingly: (A) causes the penetration of the anus or female sexual organ of a child by any means . . .").

67. Although the tongue and other objects can penetrate, states refer to the penis as the male sex organ. See *supra* note 66.

68. The vagina is "the passage leading from the external genital orifice to the uterus in female mammals." THE AMERICAN HERITAGE DICTIONARY, *supra* note 16, at 1413. The vulva is "the external female genitalia including the labia majora, labia minora, clitoris, and vestibule of the vagina." *Id.* at 1438. The labia majora is defined as "[t]wo rounded folds of tissue that form the external lateral boundaries of the vulva." *Id.* at 731. The labia minora is defined as the "[t]wo narrow folds of tissue enclosed within the cleft of the labia majora. Also called 'nympha.'" *Id.* The clitoris is defined as "[a] small erectile organ at the upper end of the vulva, homologous with the penis." *Id.* at 252.

69. *Id.* at 969.

70. *Id.*

71. See *supra* note 66.

72. For example, Delaware protects against forced sexual intercourse or sexual contact, including fellatio, cunnilingus, and touching by a foreign object. See DEL. CODE ANN. tit. 11, §§ 761-75 (1996). Specifically, sexual intercourse denotes any act of penetration, however slight, of the genitalia or anus of one person by the mouth, anus or genitalia of another. See *id.* § 761(e)(1). Delaware defines fellatio as "any oral contact with the male genitalia." *Id.* § 761(b). Sexual contact refers to "any intentional touching of the anus, breast, buttocks, or genitalia of another person, which touching, under the circumstances as viewed by a reasonable person, is sexual in nature." *Id.* § 761(f). In Delaware, one has committed unlawful sexual penetration when "the person intentionally places [one] or more fingers or thumbs or an object . . . inside the vagina or anus of a person." See *id.* § 772.

The District of Columbia specifies that, in order to be guilty of first degree sexual abuse, a person must engage in a sexual act. See D.C. CODE ANN. § 22-4102 (1981).

Mississippi defines rape as carnal knowledge of an unmarried person, previously chaste, who is between the ages of 14 and 18, and younger than the perpetrator. See MISS. CODE ANN. § 97-3-67



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(1972). For the purpose of its sexual battery statute, Mississippi defines penetration to include "cunnilingus, fellatio, buggery or pederasty, any penetration of the genital or anal openings of another person's body, and insertion of any object into the genital or anal openings of another person's body." *Id.* § 97-3-97(a).

Nebraska's legislature statutorily expressed its intent "to enact laws dealing with sexual assault and related sexual offenses which will protect the dignity of the victim at all stages of the judicial process." *See* NEB. REV. STAT. § 28-317 (1995). In Nebraska, prohibited sexual contact includes "the intentional touching of the victim's sexual or intimate parts or the intentional touching of the immediate area of the victim's sexual or intimate parts . . . or the clothing covering [such] parts . . . [when] such conduct can reasonably be construed as being for the sexual arousal or gratification of either party." *Id.* § 28-318(5). Nebraska defines intimate parts as "the genital area, groin, inner thighs, buttocks, or breasts." *Id.* § 28-318(2). Under Nebraska law, "any person who subjects another person to sexual penetration [without consent of the victim or in certain other limited circumstances] is guilty of sexual assault." *Id.* § 28-319. Nebraska defines sexual penetration as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical and nonhealth purposes." *Id.* § 28-318(6).

Nevada defines sexual penetration as "cunnilingus, fellatio, or any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another, including sexual intercourse in its ordinary meaning." NEV. REV. STAT. § 200.364 (1995). Nevada further defines sexual seduction as "ordinary sexual intercourse, anal intercourse, cunnilingus or fellatio committed by a person 18 years of age or older with a consenting person under the age of 16 years." *Id.* § 200.364(3).

New Hampshire defines sexual contact as "the intentional touching of the victim's or actor's sexual or intimate parts, including breasts and buttocks, and the intentional touching of the victim's or actor's clothing covering the immediate area of the victim or actor's sexual or intimate parts . . . which can be reasonably construed as being for the purpose of sexual arousal or gratification." N.H. REV. STAT. ANN. § 632-A:1(IV) (1996). In New Hampshire, sexual penetration includes the following:

Sexual intercourse, . . . cunnilingus, . . . fellatio, . . . anal intercourse, . . . any intrusion, however slight, of any part of the actor's body or any object manipulated by the actor into genital or anal openings of the victim's body, . . . any intrusion, however slight, of any part of the victim's body into genital or anal openings of the actor's body, . . . [or] any act which forces, coerces, or intimidates the victim to perform any sexual penetration . . . on the actor, on another person, or on himself.

*Id.* § 632-A:1(V). New Hampshire defines genital openings as "the internal or external genitalia including, but not limited to, the vagina, labia majora, labia minora, vulva, urethra, or perineum." *Id.* § 632-A:1(I). In New Hampshire, a person is guilty of aggravated felonious sexual assault if he engages in sexual penetration with another person and subjects that person "to sexual contact and causes serious personal injury to the victim." *Id.* § 632-A:2-3(I).

New Jersey defines sexual penetration as "vaginal intercourse, cunnilingus, fellatio or anal intercourse between persons or insertion of the hand, finger or object into the anus or vagina either by the actor or upon the actor's instruction. The depth of insertion shall not be relevant as to the question of commission of the crime." N.J. STAT. ANN. § 2C:14-1(c) (West 1996). Sexual contact is "an intentional touching by the victim or actor, either directly or through clothing, of the victim's or actor's intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor." *Id.* § 2C:14-1(d). Intimate parts include the "sexual organs, genital area, anal area, inner thigh, groin, buttock, or breast of a person." *Id.* § 2C:14-1(e). In New Jersey, a person is guilty of aggravated sexual assault if the person commits an act of sexual penetration in a number of limited circumstances, including the use of physical force or coercion. *See id.* § 2C:14-2 (West Supp. 1998).

In New Mexico, "criminal sexual penetration is the unlawful and intentional causing of a person to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse or the causing of penetration, to

any extent and with any object, of the genital or anal openings of another." N.M. STAT. ANN. § 30-9-11 (Michie Supp. 1998).

New York defines sexual intercourse as any penetration, however slight. See N.Y. PENAL LAW § 130.00 (McKinney 1998). Sexual contact refers to "any touching of the sexual or other intimate parts of a person not married to the actor for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing." *Id.* § 130.00(3).

North Carolina specifies that, in order to be guilty of first degree rape, a person must engage in vaginal intercourse. See N.C. GEN. STAT. § 14-27.2 (1993).

North Dakota defines a sexual act as the following:

[S]exual contact between human beings consisting of contact between the penis and the vulva, the penis and the anus, the mouth and the penis, the mouth and the vulva, or any other portion of the human body and the penis, anus, or vulva; or the use of an object which comes in contact with the victim's anus, vulva, or penis . . . however slight.

N.D. CENT. CODE § 12.1-20-02(3) (1997). In North Dakota, sexual contact means "any touching of the sexual or other intimate parts of the person for the purpose of arousing or satisfying sexual or aggressive desires." *Id.* § 12.1-20-02(4). A person may be guilty of sexual assault if that person has reason to believe that the sexual contact engaged in is offensive to the other person. See *id.* § 21.1-20-07.

Ohio provides that "no person shall engage in sexual conduct with another who is not the spouse of the offender but is living separate and apart from the offender." OHIO REV. CODE ANN. § 2907.02(a)(1) (Anderson 1996). In Ohio, sexual contact is prohibited in all of the following:

(1) The offender knows that the sexual contact is offensive to the other person, or one of the other persons, or is reckless in that regard; (2) The offender knows that the other person's, or one of the other person's, ability to appraise the nature of or control the offender's or touching person's conduct is substantially impaired; (3) The offender knows that the other person, or one of the other persons, submits because of being unaware of the sexual contact.

*Id.* § 2907.06(a).

Oklahoma's legislature does not define rape. See OKLA. STAT. tit. 21, § 111.4(a) (1996).

In Oregon, a person commits third degree rape when "the person has sexual intercourse with another person under 16 years of age." OR. REV. STAT. § 163.355(a) (1995).

Rhode Island, South Dakota, and Tennessee merely define rape as penetration. See R.I. GEN. LAWS § 11-37-2(a) (1995); S.D. CODIFIED LAWS § 22-22-1(a) (Michie 1996); TENN. CODE ANN. § 39-13-502(a) (1996).

In South Carolina, a person commits first degree criminal sexual conduct if the person "uses aggravated force to accomplish sexual battery." S.C. CODE ANN. § 16-3-652 (Law Co-op 1985). Sexual battery is "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body." *Id.* § 16-3-651.

Utah's legislature defined aggravated sexual assault as the following:

[I]f in the course of a rape, object rape or attempted rape, forcible sodomy or attempted forcible sodomy, or forcible sexual abuse or attempted forcible sexual abuse, the actor: (a) causes bodily injury to the victim; (b) uses or threatens the victim by use of a dangerous weapon . . . ; or (c) compels, or attempts to compel, the victim to submit to rape, object to rape, forcible sodomy, or forcible sexual abuse, by threat of kidnapping, death or serious bodily injury to be inflicted on any person . . .

UTAH CODE ANN. § 76-5-405(1) (1995).

In 1981, the Vermont legislature passed a general amendment, stating that "the statutory revision commission is directed to revise Vermont statutes to delete the word 'rape' and insert the words 'sexual assault.'" See VT. STAT. ANN. tit. 13, § 3251 (Supp. 1997). The Vermont legislature defined sexual

contact with the clitoris by the penis, is it rape or is it a lesser offense because the vagina was not penetrated? Delaware's unlawful sexual intercourse statute is common to most jurisdictions. Delaware's statute provides that one is guilty of a class A felony when the person intentionally engages in sexual intercourse "without the victim's consent."<sup>73</sup> Sexual intercourse is defined as "[a]ny act of physical union of the genitalia or anus of [one] person with the mouth, anus or genitalia of another person. It occurs upon any penetration, however slight."<sup>74</sup> Sexual intercourse is also defined as "[a]ny act of cunnilingus or fellatio, regardless of whether penetration occurs."<sup>75</sup> Cunnilingus is "any oral contact with the female genitalia."<sup>76</sup> Sexual contact is "any intentional touching of the anus, breast, buttocks or genitalia of another person, which touching, under the circumstances as viewed by a reasonable person, is sexual in nature. Sexual contact shall also include touching of those specified areas when covered by clothing."<sup>77</sup> The unlawful sexual contact is a class F felony, a lesser crime than the class A unlawful sexual intercourse crime.<sup>78</sup> This statute raises a problem: if the clitoris, the female sex organ, the female genitalia, was touched and the touching was sexual in nature, would this constitute rape (unlawful sexual intercourse) or would this be the offense of sexual contact? For the woman, the physical contact of her genitalia, her clitoris, her sex organ by the penis or any object may be considered to be as violative as the penetration of her vagina. Delaware, like most jurisdictions, failed to declare that the battery of the clitoris is as serious of an

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assault as engagement in a sexual act with another person without that person's consent or by force or threat of force. *See id.* § 3252. The legislature defined sexual act as the following:

[C]onduct between persons consisting of contact between the penis and the vulva, the penis and the anus, the mouth and the penis, the mouth and the vulva, or any intrusion, however slight, by any part of a person's body or any object into the genital or anal opening of another.

*Id.* § 3251(1).

Wyoming provides that "any actor who inflicts sexual intrusion on a victim commits a sexual assault in the first degree if the victim submitted due to force or threats of severe force." WYO. STAT. ANN. § 6-2-302 (Michie 1997). Wyoming defines sexual intrusion as the following:

(A) any intrusion, however slight, by any object or any part of a person's body, except the mouth, tongue, or penis, into the genital or anal opening of another person's body if that sexual intrusion can reasonably be construed as being for the purposes of sexual arousal, gratification or abuse; . . . [or] (B) . . . sexual intercourse, cunnilingus, fellatio, analingus, or anal intercourse with or without emission.

*Id.* § 6-2-301(vii). In contrast, Wyoming defines sexual contact as "touching, with the intention of sexual arousal, gratification or abuse, of the victim's intimate parts by the actor, or of the actor's intimate parts by the victim, or of the clothing covering the immediate area of the victim's or actor's intimate parts." *Id.* § 6-2-301(a)(vii). Intimate parts include "the external genitalia, perineum, anus or pubes of any person or the breast of a female person." *Id.* § 6-2-301(a)(ii).

73. DEL. CODE ANN. tit. 11, § 775(a) (1996).

74. *Id.* § 761(e)(1). "This offense encompasses the crimes commonly known as rape and sodomy . . . ." *Id.*

75. *Id.* § 761(e)(2).

76. *Id.* § 761(a).

77. *Id.* § 761(f).

78. *See id.* § 769.

offense as the penetration of the vagina. Because there is no opening, the clitoris cannot be penetrated, and therefore, the crime is not severe enough to constitute the crime of rape.<sup>79</sup>

California, unlike Delaware, allows for penetration of the female genitalia or of the vagina.<sup>80</sup> It is unclear if other jurisdictions might permit rape without penetration of the vagina. For example, Nebraska courts have consistently held that rape requires the "slightest penetration of the sexual organ."<sup>81</sup> The courts, however, failed to define sexual organ. Other jurisdictions require any sexual penetration, however slight, if the other elements are proven beyond a reasonable doubt.<sup>82</sup> The other elements dealt with whether force or threat of force was present and had nothing to do with what was penetrated.<sup>83</sup>

How do we determine the severity of a violation? What are the standards and who decides? Today, discussions are more open and acceptable; at the same time, more rapes are occurring, in particular, rapes by acquaintances. Perhaps the increase in rapes is attributable more to an increase in the number of rapes being reported as opposed to an increase in actual incidence; nonetheless, there is a substantial increase in the number of rapes. Hopefully, we have moved away from the notion that women are the property of men and are moving towards the autonomy of women and in equalizing protections of women. A move away from property rights should be a move towards the rights of the woman. Because rape laws were originally written to protect men's chattel, and today we know that women are not the chattel of men, our laws today should be written in a way that a man does not automatically have the right to touch a woman until she stops him. Instead, men should have the responsibility of getting an affirmative response from a woman before touching her in any way. Rather than forcing women to say "no" before a man has to halt his touching, a more reasonable guidepost is requiring men to obtain a "yes" before they begin.

This approach places women in the position to decide who can touch, what can be touched, and when she can be touched. This approach provides the woman with the opportunity to set the bounds of her privacy interests and places the responsibility on men to get an affirmative response before they act. Women,

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79. See *supra* notes 68 & 72.

80. See *People v. Karsai*, 182 Cal. Rptr. 406, 410 (Cal. Ct. App. 1982) (stating that penetration is not necessary for the crime of rape), *overruled by* *People v. Jones*, 758 P.2d 1165, 1174 (Cal. 1988) (overruling on sentencing grounds only).

81. See *State v. Tatum*, 294 N.W.2d 354, 356 (Neb. 1980) (citing *State v. Holloman*, 248 N.W.2d 15, 20 (Neb. 1976); *State v. Atkinson*, 209 N.W.2d 154, 157 (Neb. 1973)).

82. See, e.g., *State v. Anderson*, 499 So. 2d 1252, 1253 (La. Ct. App. 1986); *Kackley v. State*, 493 A.2d 364, 366-67 (Md. Ct. Spec. App. 1985).

83. See *Anderson*, 499 So. 2d at 1254; *Kackley*, 493 A.2d at 368.

rather than men, will then set the boundaries, and perhaps over time, rapes will decrease because men will understand that they have no right to touch unless invited. This approach will also allow women to determine their pains and pleasures, rather than allowing such determinations to be made based upon the age-old property right entitlement that men, early in our history, had over women. Society dictates pains and pleasures, but women, rather than men, should define what is painful or pleasurable to a woman, in particular with respect to the female genitalia.

## II. OUR LAWS ARE DIRECTED BY SOCIETY'S PAINS AND PLEASURES

Nature has placed mankind under the governance of two sovereign masters - pain and pleasure. It is for these masters alone to point out what we ought to do, as well as to determine what we shall do. They govern us in all that we do, in all that we say, in all that we think; every effort we can make to throw off our subjection will serve but to demonstrate and confirm it. In other words, a man may pretend to abjure his empire, but in reality he will remain subject to it all the while. In an introduction to Jeremy Bentham's *The Limits of Jurisprudence Defined*, editor Charles Warren Everett highlighted Bentham's view on how pleasure and pain govern man:

"Pleasures then and the avoidance of pains," Bentham maintained, "are the *ends* which the legislator has in view; it behooves him therefore to understand their *value*.—Pleasures and pains are the *instruments* he has to work with: it behooves him therefore to understand their force." To learn the dimensions of value of a pleasure or pain [Bentham] thought there were seven important circumstances to be considered: 1. its intensity; 2. its duration; 3. its certainty or uncertainty; 4. its propinquity or remoteness; 5. its fecundity, or the chance it has of being followed by sensations of the same kind; 6. its purity; and 7. its extent, or the number of persons who are affected by it.<sup>84</sup>

The general object which all laws have, or ought to have, in common is to augment the total happiness of the community; therefore, in the first place, laws must exclude, as far as may be possible, every thing that tends to subtract from the happiness: in other words, exclude mischief.<sup>85</sup>

Society constructs a zone where all its citizens are protected from certain harms. There are certain uncomfortable and unprotected spheres within protected zones. While society acknowledges that there are some un comforts that all citizens have to "live" with, all citizens still share in the protections from other un comforts.

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84. See Charles Warren Everett, *Editor's Introduction* to JEREMY BENTHAM, *THE LIMITS OF JURISPRUDENCE DEFINED* 3, 26 (Charles Warren Everett ed., Greenwood Press 1970) (1945) (quoting JEREMY BENTHAM, *WORKS OF JEREMY BENTHAM* I 16 (1838)).

85. See *id.* at 38.

What becomes problematic is the determination of who should define where and what the zones of protections are to be. Men have always been at the bulwark of our society and have generally determined the zones of our protections. However, within the circumference of those zones lie both men and women, beings who are the products of social constructs. Can men define the protected zones for both men and women? Are there spheres that are necessary for the protection of women that differ from those necessary for the protection of men?

#### *A. Sex and Gender: Is There a Woman's Perspective?*

Our cultural, social, political, economic, and legal constructions of gender and sexuality privilege the experiences and understandings of males as the unstated norms. In order to better understand how women have been subordinated in law and society, theorists have articulated a sex and gender model. There are several approaches as to how the sex and gender model is discussed. Status and power are important, according to contemporary theorists, as they relate to behavior and attitudes.<sup>86</sup> These theorists treat sex as something separate and distinct from gender; they use sex to represent one's biology, while gender represents the social and "cultural expectations of those in a certain sex category."<sup>87</sup> "Sex is important . . . as a static cue that assigns people to a particular gender category, hence biological properties are relevant only as they are socially meaningful."<sup>88</sup> The theorists treat "culture as if it [is] completely separate and distinguishable from biology."<sup>89</sup> Gender is "one's sense of oneself as male or female," and the distinction between sex and gender suggests that gender "is not bound to one's biological sex."<sup>90</sup> The problem with this view is that it "risks overlooking important biologically linked aspects of women's . . . experiences."<sup>91</sup> "[B]odies are subject to cultural interpretation, but an emphasis on gender to the exclusion of sex (or on culture to the exclusion of biology) may disregard potentially important aspects of people's lives. A belief that biology is irrelevant may . . . hold women to a male standard of behavior."<sup>92</sup> Although biology is a product of culture, it is

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86. See Stephanie Riger, Rethinking the Distinction Between Sex and Gender, in LESLIE BENDER & DAAN BRAVEMAN, POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER 232, 232-33 (1995).

87. See *id.* at 233.

88. *Id.*

89. *Id.* The problem with treating culture as separate and distinct from biology is that "culture is always mediated by biology." See *id.* at 238.

90. See *id.* at 233.

91. See *id.* at 234. "A woman's breastfeeding may affect her attitude toward her children, while a stressful occupation may affect women's and men's physiology in different ways." *Id.*

92. *Id.*

not limited to reproducing cultural stereotypes.<sup>93</sup> The socially constructed nature of biology allows the possibility of bias.<sup>94</sup>

Women are "materially connected to other human life. Men aren't."<sup>95</sup> Furthermore, "[t]he potential for material connection with the other defines women's subjective, phenomenological and existential state, just as surely as the inevitability of material separation from the other defines men's existential state."<sup>96</sup> Women's "potential for material connection engenders pleasures and pains, values and dangers, and attractions and fears, which are entirely different from those which follow, for men, from the necessity of separation."<sup>97</sup> Under the connective theory, "[a]ccording to cultural feminist accounts of women's subjectivity, women value intimacy."<sup>98</sup> Radical feminists' accounts of women's subjectivity is different than that of the cultural feminists. Radical feminists believe that "women's potential for material 'connection' invites invasion into the physical integrity of women's bodies, and intrusion into the existential integrity of [women's lives]."<sup>99</sup> "Although women may 'officially' value the intimacy of connection, . . . [women] 'unofficially' dread the intrusion it inevitably entails, and long for the individuation

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93. See *id.* at 237.

94. An example of biology as culture is demonstrated in the research on the egg and the sperm. See *id.* Researchers study fertilization "through a lens of stereotypes of masculinity and femininity that colors what they see." See *id.* For example, "[m]ales are seen as *producing* sperm while females *shed* eggs, . . . the sperm is described in active terms, such as 'burrow' and 'penetrate,' while the lowly egg 'is transported' or even 'drifts.' The heroic sperm ventures up a dark passageway to find the dormant egg, the prize of its perilous journey." *Id.* The fertilization process is described "in terms that 'feminized' the passive egg and 'masculinized' the active, aggressive sperm." *Id.* "Current research suggests that adhesive molecules on the surface of the egg trap the sperm. Rather than a passive maiden, the egg now is depicted as an aggressive sperm-catcher . . . [T]his picture too taints new data with old stereotypes: the egg is now portrayed as engulfing and devouring rather than passive and waiting." *Id.*

95. See Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 14 (1988).

96. *Id.*

97. See *id.*

98. See *id.* at 15. Cultural feminists summarize feminism as follows:

[W]omen's potential for a material connection to life entails (either directly . . . or indirectly, through the reproduction of mothering) an experiential and psychological sense of connection with other human life, which in turn entails both women's concept of value, and women's concept of them. Women's concept of value revolves not around the axis of autonomy, individuality, justice and rights, as does men's, but instead around the axis of intimacy, nurturance, community, responsibility and care. For women, the creation of value, and the living of a good life, therefore depend upon relational, contextual, nurturant and affective responses to the needs of those who are dependent and weak, while for men the creation of value, and the living of the good life, depend upon the ability to respect the rights of independent co-equals, and the deductive, cognitive ability to infer from those rights rules for safe living. Women's concept of harm revolves not around a fear of annihilation by the other but around a fear of separation and isolation from the human community on which she depends, and which is dependent on her.

See *id.* at 28.

99. See *id.* at 15.

and independence that deliverance from that state of connection would permit."<sup>100</sup> What becomes even more problematic for women is that the rule of law does not value intimacy. Law values autonomy.

On the opposite end of the scientific reproduction of culture spectrum is the notion that "culture is always biologically-bound."<sup>101</sup> Some of the ways in which the sexes universally differ regard physical capacities and experiences.<sup>102</sup> For instance, only women menstruate, get pregnant, and miscarry; conversely, "men are, on average, larger and stronger than women."<sup>103</sup> However, these differences "define only central tendencies among human capacities, while the form that these capacities take is heavily dependent on social and cultural conditions."<sup>104</sup> Although gender and sex are inextricably entwined, gender is "what a culture makes of sex."<sup>105</sup> For example, most "humans are born with a motor capacity to smile, but what they smile at is shaped by culture."<sup>106</sup>

The approach to sex equality within the political, legal, and social perceptions is "equality is an equivalence, not a distinction, and sex is a distinction."<sup>107</sup> Equal treatment under the law is both a "systemic norm and a specific legal doctrine, . . . [that is] treating likes alike and unlikes unlike; and the sexes are defined by their mutual unlikeness."<sup>108</sup> Gender then is "socially constructed as difference epistemologically; sex discrimination law bounds gender equality by difference

100. *Id.*

101. See Riger, *supra* note 86, at 238. "Because the elements of culture that shape our biological beings are themselves experienced biologically, culture is always mediated by biology." See *id.*

102. See *id.*

103. See *id.*

104. See *id.* at 238-39.

105. See *id.* at 240; Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. PA. L. REV. 1, 1-3 (1995).

Contemporary sex discrimination jurisprudence accepts as one of its foundational premises the notion that sex and gender are two distinct aspects of human identity. That is, it assumes that the identities male and female are different from the characteristics masculine and feminine. Sex is regarded as a product of nature, while gender is understood as a function of culture. This disaggregation of sex from gender represents a central mistake of equality jurisprudence.

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... In many cases, biology operates as the excuse or cover for social practices . . . . In the end, biology or anatomy serve as metaphors for a kind of inferiority that characterizes society's view of women.

*Id.*

106. See Riger, *supra* note 86, at 240.

107. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 32 (1987).

108. See *id.*



doctrinally."<sup>109</sup> Sex equality becomes a contradiction in terms because equality presupposes sameness and sex presupposes differences.<sup>110</sup> Under this equality thesis, man becomes the measure of things, and women are either treated the same as men or different from men.<sup>111</sup>

### *B. The Pains and Pleasures of Women As Sexual Beings*

Women are damned if they enjoy sex and damned if they do not. Although women are defined as sexual beings, they are sexual beings in relation to their abilities to satisfy men, and they are not allowed to view themselves as sexual beings if it is unrelated to the sexual desires of men.

Throughout the 18th and 19th centuries, sex researchers assumed that women were asexual beings. A woman who enjoyed sex was believed to be ill or pathological. Havelock Ellis disputed this belief, maintaining that women are not only sexual beings, but that their sexual desire is comparable to that of men.<sup>112</sup> Ellis believed the sexual impulse to be different in women because their impulse is more passive, more complex, less spontaneous, and stronger after sexual relationships are established.<sup>113</sup> Ellis also claimed that women's "threshold of excess [is] less easily reached [and their] sexual sphere is larger and more diffused with more periodicity."<sup>114</sup> Generally, Ellis thought that there is "greater variation [in sexual response]—both among women and within a single woman."<sup>115</sup> He believed that the difference is basically biological in nature.<sup>116</sup> For the man, the sexual impulse is concentrated in the erect penis.<sup>117</sup> Ellis rejected the idea that female sex is exclusively vaginal and argued that the sexual impulse for women is

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109. *Id.* at 32-33.

110. *See id.* at 33.

111. *See id.*

[S]hould you have to be the same as a man to get what a man gets simply because he is one? Why does maleness provide an original entitlement, not questioned on the basis of its gender, so that it is women—women who want to make a case of unequal treatment in a world men have made in their image (this is really the point Aristotle missed)—who have to show in effect that they are men in every relevant respect.

*Id.* at 37. When I began discussions about looking at rape from a woman's perspective and the requirement that the crime of rape does not have the element of penetration, many colleagues and students told me that removing the penetration requirement would be a grave mistake because men would not understand how women are raped without penetration. When I responded that they were thinking about it from a male's perspective, they stated that rape needs to be defined so men understand the severity of the pain. My response was that is what I'm trying to do, only I'm trying to make them see it through a woman's eyes and not through their own.

112. *See* VERN BULLOUGH, *SCIENCE IN THE BEDROOM* 84 (1994) (citing HAVELOCK ELLIS, *SEXUAL INVERSION* (1897)).

113. *See id.*

114. *See id.*

115. *See id.*

116. *See id.*

117. *See id.*

spread throughout the genital area, the breast, and even the womb.<sup>118</sup> Therefore, it is because women have a more diffuse erogenous region that they are more sexual and that their sexuality is different.<sup>119</sup>

It has long been known that the clitoris is endlessly more sensitive than the vagina, and judging from the number of nerve endings, more sensitive than the penis as well.<sup>120</sup> In fact, anatomically, the clitoris and the penis have many similarities because they develop from the same cells in the female or male fetus.

Women experience two types of orgasms—vaginal and clitoral.<sup>121</sup> The vaginal type is adapted to the male anatomy and suits male pleasure. Unlike vaginal orgasms, clitoral orgasms do not require male type conduct. Clitoral orgasms, nonetheless, are more pleasurable to a woman than vaginal orgasms.<sup>122</sup> Because

118. See *id.* at 84-85. Recently, America dealt with a sensitive issue arising out of allegations of sexual (mis)conduct between President William Jefferson Clinton and Monica Lewinsky. The allegations of sexual conduct between the two provided an opportunity for society to consider Ellis' perspective concerning female sexuality. In the allegations of sexual conduct between the two, Ms. Lewinsky gave detailed accounts of her sexual interactions with the President. On several, alleged, encounters, Ms. Lewinsky stated that the President "put his hand down my pants and stimulated me manually in the genital area." See THE STARR REPORT: THE INDEPENDENT COUNSEL'S COMPLETE REPORT TO CONGRESS ON THE INVESTIGATION OF PRESIDENT CLINTON 73 (Pocket Books 1998) [hereinafter STARR REPORT]. On another occasion, she stated, "he went to go put his hands down my pants, and then I unzipped them because it was easier. And I didn't have any panties on. And so he manually stimulated me. . . . I wanted him to touch my genitals with his genitals' and he did so, lightly and without penetration." See *id.* at 116-17. Even though Ms. Lewinsky alleged that on several occasions she performed oral sex on the President, the extent of her sexual arousals and stimulations did not involve penetration of her vagina. See *id.* at 55.

119. See BULLOUGH, *supra* note 112, at 85.

120. See RUTH HERSCHBERGER, ADAM'S RIB 32-33 (Har/Row Books 1970) (1948) ("It was quite a feat of nature to grant the small clitoris the same number of nerves as the penis. It was an even more incredible feat that society should actually have convinced the possessors of this organ that it was sexually inferior to the penis.")

121. See Alix Shuman, *Organs and Orgasms*, in WOMAN IN SEXIST SOCIETY: STUDIES IN POWER AND POWERLESSNESS 198, 198-99 (Vivian Gornick & Barbara K. Moran eds., 1971).

122. With this in mind, it becomes clear why female circumcision involves the external female genitalia. Female circumcision is an operation performed in some instances to reduce women's sexual desires. See Robyn Cerny Smith, *Female Circumcision: Bringing Women's Perspectives into the International Debate*, 65 S. CAL. L. REV. 2449, 2481 (1992). Female circumcision is "necessary to enforce women's total emotional, erotic loyalty and subservience to men. . . . [M]ale power include[s] the power of men . . . to deny women our own sexuality [and] force (male sexuality) upon them," and thereby denying women the right to control their sexuality. See *id.* at 2482 (alternations in original) (quoting Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in THE POWERS OF DESIRE 177, 182-83) (Ann Snitow et al. eds., 1983)). There are "three different surgical procedures that remove all or part of a woman's external genitalia." *Id.* at 2450. These procedures are as follows:

The first operation, called circumcision, is the least severe. It consists of the removal of the prepuce of the clitoris, preserving the clitoris itself and the larger parts of the labia minora (small lips of the vagina). The second operation, called excision or clitoridectomy, consists

vaginal orgasms require male type conduct, they are deemed more violative than contact with the clitoris. From a woman's perspective, a violation of the clitoris may be more severe because of the pleasures that the clitoris brings to the woman.

Society shapes sexuality. We can make any decision about our sexual behavior, but our imagination and ability to carry out those decisions is limited by the surrounding culture. For example, sadomasochism (S/M) is usually portrayed as a violent, dangerous activity, and most people do not think that there is a great deal of difference between a rapist and a bondage enthusiast.<sup>123</sup> Sadomasochism is not a form of sexual assault; it is consensual activity that involves polarized roles and intense sensations.<sup>124</sup> "A sadomasochist is well aware that a role adopted during a scene is not appropriate during other interactions and that a fantasy role is not the sum total of her being."<sup>125</sup> The participants are enhancing their sexual pleasure, not damaging or imprisoning one another.

Pat Califia makes the following observations:

Some feminists object to the description of S/M as consensual. They believe that our society has conditioned all of us to accept the inequities in power and hierarchical relationships. Therefore, S/M is simply a manifestation of the same

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of the partial or total removal of the clitoris together with the adjacent tissues of the labia minora. . . . The final and most severe operation, called infibulation, involves removing the clitoris, labia minora, and all or most of the labia majora. After the operation, the two sides of the vulva are sutured together with catgut or thorns, leaving a tiny opening about the size of a matchstick or fingertip for the passage of menstrual blood and urine. All three operations may be performed with knives, razor blades, or pieces of glass . . . . In addition, all three operations are usually performed without the use of anesthetics.

*Id.* at 2450-51 (citations omitted). Female circumcision is an intentional act utilized to prevent women from engaging in pleasurable intercourse. *See id.* at 2481. This means that men understand the pleasurable nature of the clitoris to women but believe that the pleasurable nature of the clitoris is meant to benefit men rather than women, or so men think.

123. *See* PAT CALIFIA, *PUBLIC SEX: THE CULTURE OF RADICAL SEX* 167-68 (1994).

124. *See id.* But *see* *Regina v. Brown*, 1 App. Cas. 212 (H.L. 1993). In *Regina*, appellants, a group of sadomasochists, pled guilty to charges of various offenses relating to the infliction of wounds or actual bodily harm on genital and other areas of the body of the consenting victim. *See id.* at 230. Appellants participated in violent acts intended to yield sexual pleasure by giving and receiving pain. *See id.* at 231. They were found guilty of violating the Offenses Against The Person Act 1861, sections 20 and 47. *See id.* at 229. Appellants were guilty of some of the offenses in section 20 and of all the offenses in section 47. *See id.* The Court of Appeal (Criminal Division) dismissed the appeal as did the House of Lords by a divided 3-2 panel. *See id.* at 216. Although all parties consented to the sadomasochists' acts, the court criminally penalized them on the theory that sadomasochistic encounters involve the indulgence of cruelty by sadists and the degradation of victims. *See id.* at 229. Lord Mustill recognized the medical risk of harm to the parties: "[S]ome of the practices obviously created a risk of genito-urinary infection, and others of septicaemia. These might have been grave in former times, but the risk of serious harm must surely have been greatly reduced by modern medical science." *See id.* at 274. Lord Mustill stated that the parties consented to the acts and, moreover, he found it unfavorable to punish them for consensual conduct "even if the extreme consequences do not ensue, just because they might have done so, would require an assessment of the degree of risk, and the balancing of this risk against the interests of individual freedom." *See id.*

125. CALIFIA, *supra* note 123, at 168.

system that dresses girls in pink and boys in blue; allows surplus value to accumulate in the coffers of capitalists while giving workers a minimum wage; and sends out cops and soldiers to keep down the disenfranchised.<sup>126</sup>

Moreover, according to Califia, "[t]he issue of pain is probably as difficult for non-S/M people to understand as polarized roles are. We tend to associate pain with illness or self-destruction."<sup>127</sup> In contrast to the misconception non-S/M people have about S/M, S/M does not necessarily involve pain; rather, S/M is associated with "intense sensation, punishment or discipline."<sup>128</sup> Furthermore, more essential to S/M than pain is the exchange of power.<sup>129</sup> In any event, "pain is a subjective experience."<sup>130</sup> Califia further asserts that "[d]epending on the context, a certain sensation may frighten you, make you angry, urge you on, or get you hot. In many situations, people choose to endure pain or discomfort if the goal for which they are striving makes it worthwhile."<sup>131</sup> The derivative of women's behavior can be from a variety of sources, including culture or dominant, traditional views of society toward the roles associated with women. When legislating punishment for conduct associated with the choices women make, it is problematic to regard women's sexual activity as negative when the very same behavior for men is not regarded as negative. The legal system seems incapable of using the same reasoning and compassion applied to nonsexual issues when formulating a position on sexual issues.<sup>132</sup>

If there were equality between the sexes, then "women would not be sexually subjected."<sup>133</sup> "Rape . . . would be recognized as [a] violation . . . ." <sup>134</sup> Although

126. *Id.* at 169.

127. *Id.* at 170; *see also* PAULA J. CAPLAN, THE MYTH OF WOMEN'S MASOCHISM 1-2 (1985). Paula Caplan defines masochism as the following:

[T]he need to derive pleasure from pain, . . . [it] is defined first as sexual masochism—"the condition in which sexual gratification depends on suffering, physical pain, and humiliation"—and second as "gratification gained from pain, deprivation . . . inflicted or imposed on oneself, either as a result of one's own actions or the actions of others . . . ."

*Id.* Caplan also asserts that "women's behavior is used as evidence of our innate masochism, our sickness, while men's similar behavior is used as evidence that they are real men . . . . The belief that females seek out pain and suffering, that we have an innate need for misery, poisons every aspect of women's lives." *Id.* at 2.

128. *See* CALIFIA, *supra* note 123, at 170.

129. *See id.*

130. *Id.*

131. *Id.*

132. *See id.* at 171-72. Califia also notes that "[s]adomasochism is also accused of being a hostile or angry kind of sex, as opposed to the gentle and loving kind of sex that feminists should strive for. The women's movement has become increasingly pro-romantic love in the last decade." *Id.* at 172.

133. *See* MACKINNON, *supra* note 2, at 215.

134. *Id.*

rape is a violation, one author seems to suggest that this is only the case if it is *real rape*.<sup>135</sup> Rape, as defined by women, might be very different than man's definition. Women might define rape as entering that sphere of pleasure that is most sacred. That sphere would include the clitoris. Today, entering the sphere of the clitoris is, if anything, short of rape. If there is a violation of the clitoris, it is generally an offensive touching, but it is not rape. This violation would warrant punishment of a lesser offense of rape, but not the felony of rape. This is the case even though there was a body invasion of a substantial privacy interest. There are concerns that if the body invasion is not deemed to be significant or continues to be misunderstood by males, then it will be trivialized and not viewed as an offense in need of grave punishment.

Feminists who aspire to the sameness and difference models believe that in order for women to have access to equality principles, they need to be viewed in the same light as men, while those aspiring to the difference model believe that women are different from men and that difference should be celebrated.<sup>136</sup> "The

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135. What is also problematic is the misconception of the rape fantasy. Rape fantasies have been deemed masochistic desires:

What are called rape fantasies usually consist primarily of one of three elements, or of some combination of the three:

- (1) The wish that some man will find you so devastatingly desirable that he cannot control his aroused sexuality;
- (2) The wish to be able to trust someone so completely that you could feel that you could put yourself completely in his hands, sexually; and
- (3) The wish to have the man make all the sexual advances, so that you would not have to risk appearing "too" sexual and, therefore, "unfeminine" in the traditional sense.

None of these is masochistic. The first is about being desired . . . . The second element . . . is about being able to focus completely on one's own sexual enjoyment [and t]he third [is] a phenomenon . . . [of] women's need to be sexually "swept away."

See CAPLAN, *supra* note 127, at 155. Equating women's sexual explorations, or erotica, as a desire to suffer is a barrier to women seeking out their own sexuality and an impediment to their protection. This is especially true when erotica is viewed as equivalent to asking for pain and, therefore, desiring to be raped. Desiring to be raped is problematic in and of itself because rape is a crime, and one cannot consent to a crime.

136. See Wendy Williams, *The Equality of Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 196 (1982) ("[T]he equality approach is the better [approach]. The special treatment model has great costs."); see also CAROL GILLIGAN, IN A DIFFERENT VOICE 25 (1982). But see Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 963 (1984).

In her book, *In a Different Voice*, Carol Gilligan relates an experiment to support the contention that women simply speak in a different voice than men, that is, women think in terms of relationship, while men think in terms of hierarchy. See GILLIGAN, *supra*, at 25-32. In the experiment, Amy and Jake, two young children of the same age, were asked to respond to a hypothetical. See *id.* The hypothetical presented a situation in which a man named Heinz did not have the money to purchase a drug for his ill wife. See *id.* The children were asked whether Heinz should steal the drug. See *id.* Jake said Heinz should steal the drug because Heinz's wife was more important than the issue of stealing. See *id.* Amy said she did not think so. See *id.* Amy was concerned that Heinz would be imprisoned and that his wife would have no one to take care of her. See *id.* Amy was also concerned about whether the drug would be effective. See *id.* The interviewers claimed that Jake answered the question, but Amy did not. See *id.* Gilligan, however, asserts that Amy answered the question, but she answered in a different voice.

moral thrust of the sameness branch of the doctrine [is that it] conforms normative rules to empirical reality by granting women access to what men have: to the extent women are no different from men, women deserve what men have."<sup>137</sup> Furthermore, "[t]he differences branch, which is generally regarded as patronizing and unprincipled but necessary to avoid absurdity, exists to value or compensate women for what they are or have become distinctively as women—by which is meant, unlike men, or to leave women as 'different' as equality law finds them."<sup>138</sup>

To define the reality of gender as difference and the warrant of equality as sameness not only guarantees that sex equality will never be achieved; it is wrong on both counts. Sex in nature is not a bipolarity, it is a continuum; society makes it into a bipolarity. Once this is done, to require that one be the same as those who set the standard—those from whom one is already socially defined as different—simply means that sex equality is conceptually designed in law never to be achieved.<sup>139</sup>

Following this logic lends itself to problems with rape, specifically, how terms are defined and how laws are made. If rape is defined in male terms and laws are determined by male standards, then the violation of a woman's body can only be understood to the extent that a male can relate. The violation, then, is only relevant as understood by male conduct. This is the same problem articulated by Catherine MacKinnon in her discussion on pornography: pornography defines what a woman is through conditioning the male sexual response to that definition.<sup>140</sup> By not allowing a woman's perspective, these standards permit men to decide what is violative of a woman's body.

The two rape cases involving William Kennedy Smith and Mike Tyson

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*See id.*

In contrast to Gilligan's different voice theory and Wendy Williams' understanding of the equality approach, Sylvia Law notes the following:

A constitutional theory based on either the assimilationist vision or the respect-for-difference vision presumes that it is possible to answer the question, "Are men and women essentially similar?," with a simple yes or no. The assimilationist principle answers the question "yes" and condemns laws that treat people differently. The respect-for-difference principle emphasizes that, at least under present social conditions, the situations of men and women are not essentially similar, and it would evaluate laws affecting men and women differently by asking whether they empower and respect women. . . . A third vision . . . assumes that it is not possible to give a single answer to the question whether men and women are essentially similar. We know that there are biological differences between men and women in relation to reproduction.

*See Law, supra*, at 968-69.

137. MACKINNON, *supra* note 2, at 220.

138. *Id.*

139. *Id.* at 233.

140. *See id.* at 197-99.

marginalized a woman's perspective on rape. The cases focused on penetration and consent or the lack thereof, and there simply was a presumption that they had the right to touch and fondle until the men understood, undoubtedly, that they were to stop. These cases illustrate the difficulty for women who are raped. The two cases underscore the significant "problems associated with prosecuting nonstranger rape."<sup>141</sup> In the 1991 Smith case, the rape victim's credibility was found to be adversely affected because she met Smith over drinks in a bar and because she offered Smith a ride home.<sup>142</sup> The consent and credibility issues were also points raised by the defense counsel in *Tyson v. State*.<sup>143</sup> Therefore, in both the Smith and Tyson cases there was a presumption that the woman agreed to sexual intercourse because they rode in the same car or limo with the defendants. These cases demonstrate that women's bodies are for men to invade, unless and until the woman gets the point across to the *hot and heavy* man that she wants him to stop. The woman must show that she has done so by clear and convincing evidence. The woman's body, even her most private spheres, can be invaded, unless she unequivocally gets the point across to the man that she objects.

### III. REDEFINING RAPE

Each year in the United States, approximately 500,000 women report rapes and sexual assaults.<sup>144</sup> One of every two women will be a rape victim.<sup>145</sup> Although there is sufficient data to indicate that women are targeted by virtue of their gender,<sup>146</sup> the focus of new laws is gender neutrality. Kathleen Barry defined crimes against women as the following:

[T]hose acts of violence which are directed at women because of their female sexual definition. In committing a crime against a woman, sexual satisfaction, usually in the form of orgasm, is one of the intended outcomes of sexual violence for the aggressor who unites sex and violence to subdue, humiliate, degrade, and terrorize his female victim.<sup>147</sup>

Even though this is the focus, women still live with the constant threat of becoming

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141. See Allison West, *Tougher Prosecution When the Baptist Is Not a Stranger: Suggested Reform to the California Penal Code*, 24 GOLDEN GATE U. L. REV. 169, 185 (1994).

142. See David Margolick, *Credibility Seen as Crux of Celebrated Rape Trial*, N.Y. TIMES, Dec. 1, 1991, at 24L.

143. 619 N.E.2d 276, 285-92 (Ind. Ct. App. 1993).

144. See RONET BACHMAN & LINDA E. SALTZMAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ-154348, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY: NATIONAL CRIME VICTIMIZATION SURVEY 1 (1992).

145. See DIANA E.H. RUSSEL, SEXUAL EXPLOITATION RAPE, CHILD SEXUAL ABUSE, AND WORKPLACE HARASSMENT 35 (1984).

146. See *id.*; see also Kathleen Barry, *Social Etiology of Crimes Against Women*, 10 VICTIMOLOGY 164-73 (1985).

147. Barry, *supra* note 146, at 164.

a victim.<sup>148</sup> This everyday living as a potential victim was deemed sexual terrorism:

Sexual terrorism is the system by which males frighten, and by frightening, dominate and control females. It is manifested through actual and implied violence. All females are potential victims—at any age, any time, or any place, and through a variety of means: rape, battery, incest, sexual abuse of children, sexual harassment, prostitution, and sexual slavery. The subordination of women in all other spheres of the society rests on the power of men to intimidate and to punish women sexually.<sup>149</sup>

I proposed the question of redefining rape, from a woman's perspective, to my *Women and the Law* seminar at Nova Southeastern University Shepard Broad Law Center. One definition from the students, which was comprised of fourteen females and three males, was as follows:

Sexual battery means either the anal, clitoral, oral, penile, or vaginal intrusion by, or the junction with, the sexual organ of another, or the anal, clitoral, penile, or vaginal intrusion by any other object or body part. Intrusion means the act of entering into the physical area intended for one's exclusive use and control in an inappropriate and unwanted manner without invitation or permission.<sup>150</sup>

148. See MARGARET T. GORDON & STEPHANIE RIGER, *THE FEMALE FEAR* 1 (1989).

149. Carole J. Sheffield, *Sexual Terrorism: The Social Control of Women*, in *ANALYZING GENDER* 171, 171 (Myra Marx Ferree & Beth B. Hess eds., 1987).

150. This definition was created by my Spring 1996 *Women and the Law* class. Sexual battery is the equivalent to rape. Although the term sexual battery was the term decided upon by the class, there were students in the class who believed that the term "rape" should be the term used in the redefinition because society understands the term to indicate extreme harshness of the offense. There were several colleagues who attended a faculty colloquy at Nova Southeastern Shepard Broad Law Center where I presented my ideas on the subject. The colleagues agreed with the students that the term "rape" should be the term used by state legislatures for that same reason.

Another interesting note about the definition is that this was the definition presented by Paula Jones' attorneys in the deposition of President Clinton concerning the President's alleged sexual conduct with Monica Lewinsky. Jones' attorneys deposed the President with a question on whether the President had sexual relations with Ms. Lewinsky. See STARR REPORT, *supra* note 118, at 301. Sexual Relations, as termed by Jones' attorneys, occurs when a "person knowingly engages in or causes . . . contact with the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to arouse or gratify the sexual desire of any person. . . . 'Contact' means intentional touching, either directly or through clothing." *Id.* (alterations in original). At least two issues arise here: (1) which jurisdiction should provide the definition for the alleged sexual (mis)conduct, the District of Columbia or Arkansas?; and (2) should the President be held to know and be accountable to the laws of all jurisdictions and, if so, statutory law or judicial interpretations? With respect to the first question, one would assume that the controlling law would have to be the District of Columbia, because if Jones' question was directed to the President's (mis)conduct with Monica Lewinsky, that conduct occurred in the District of Columbia. See *id.* at 302. What creates the dilemma is the fact that neither jurisdiction uses the term sexual relations in their definitions. The District of Columbia provides that "sexual act" means, among other



things, "penetration . . . of the vulva . . . by a penis [or c]ontact between the mouth and the penis, the mouth and the vulva . . . or [t]he penetration . . . of the . . . vulva by a hand, finger or any object, with an intent to . . . arouse or gratify the sexual desire of any person." D.C. CODE ANN. § 22-4101(8)(A)-(D) (1997). The D.C. Code further provides that "'[s]exual contact' means the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks . . . with the intent to . . . arouse or gratify the sexual desire of any person." *Id.* at § 22-4101(9). The term sexual conduct includes masturbation, sexual intercourse, or "physical contact with a person's clothed or unclothed genitals, pubic area . . . or if such person be a female, breast." *See id.* at § 22-2001(b)(2)(C). "Sexual excitement" includes the condition of human male or female genitalia when in a state of sexual stimulation or arousal." *Id.* at § 22-2001(b)(2)(D). The alleged conduct raised by Ms. Lewinsky is termed sexual contact, sexual excitement, and sexual act. The President fervently stated that he did not engage in sexual relations with Ms. Lewinsky. *See STARR REPORT, supra* note 118, at 302. The problem is in determining what constitutes sexual relations in the District of Columbia. *The Starr Report* indicates that the conduct when the President, allegedly, placed his hands in Ms. Lewinsky's pants was "acts clearly within the definition of 'sexual relations' used at the Jones deposition." *See id.* at 304. According to the statute, this indicates a sexual act or sexual excitement. The President indicated to the public, without explanation, that he engaged in "inappropriate conduct" with Ms. Lewinsky. It seems to me that evidence was sufficient to show that at best there was sexual conduct because sperm was found on Ms. Lewinsky's dress, and the President would have problems overcoming circumstantial evidence of masturbation which is included in the statute. Even if the President argues that he did not engage in sexual contact or excitement and that he did not have contact with Ms. Lewinsky's genitalia or breasts, because of the sperm there is sufficient evidence to infer the occurrence of masturbation, which is sufficient for sexual conduct. Jones could have used sexual conduct, as opposed to sexual relations, and Judge Starr would have had a better argument on perjury. The section referencing to sexual conduct probably was not used in Jones' deposition because it also includes the term sexual intercourse, a term that was likely problematic because there was not sufficient evidence of vaginal penetration. What Jones presented as definitive of sexual relations was more likely used because of the inability to raise circumstantial evidence or any other evidence that would show vaginal penetration. Although Jones could not show it, she probably believed that because of the wording of the statute her definition would incorporate all the evidence raised in Ms. Lewinsky's allegations and circumstantial evidence that would corroborate President Clinton's statements of inappropriate behavior. Another problem it seems to me that developed from Jones' sexual relations definition was that President Clinton stated that his understanding and the common understanding of the American people is that "sexual relations" means conduct that leads up to sexual intercourse, meaning vaginal penetration, of which there is no evidence. I believe the President is correct that the common understanding of sexual relations and sexual intercourse means conduct that leads up to vaginal penetration. The definition presented by Jones and proposed by this Article would include conduct that does not necessarily lead up to vaginal penetration. The definition proposed by this Article better protects a woman's private sphere.

In Arkansas, "'sexual intercourse' means penetration, however slight, of the labia majora by a penis . . . and 'sexual contact' means any act of sexual gratification involving the touching, directly or through clothing of the sex organs . . . of a person or the breast of a female. ARK. CODE ANN. § 5-14-101(8) to (9) (Michie 1997). The statute was amended in 1995 and substituted "labia majora" for "vagina." *See id.* at historical notes. Penetration within the labia, up to as far as the hymen, is sufficient for penetration of the vagina. *See Hice v. State*, 593 S.W.2d 169, 170 (Ark. 1980). Masturbation, however, is not sexual conduct. *See Drymon v. State*, 875 S.W.2d 73, 77 (Ark. 1994).

At the time this Article was accepted to publication with *Pepperdine Law Review*, I had no knowledge of the alleged sexual (mis)conduct between President Clinton and Monica Lewinsky nor was I privy to the contents of Paula Jones' deposition of the President concerning the conduct. What is interesting is the definition of what constitutes sexual relations according to Paula Jones corresponds to the definition proposed by this Article for redefining rape. Although the conduct between Ms. Lewinsky and the President did not involve issues of rape, the sexual protective sphere of woman has

Several other definitions included physical and manual manipulation of the sexual organs of another, including the penis, anus, or vagina. A majority of the students believed that it was very important for the statute to be gender neutral. It was quite surprising, given the makeup of the class and the name of the class, that the students would allow this gender neutral focus.

The proposed definition of rape would certainly allow women in same sex relationships to be punished severely for an act which is now classified as a felony when different sexes are involved;<sup>151</sup> however, the act by lesbians, today, is not punished as Denise Snyder of the D.C. Rape Crisis Center reports the following: "So many women don't define what has happened to them as rape because we have this stereotype of what rape is in our minds . . . . To admit to yourself that what has happened is rape is an emotionally devastating experience."<sup>152</sup> The same stereotypes are even greater obstacles in instances of same sex rape.<sup>153</sup> Regarding same sex rape, Snyder states that she "literally had people ask me, 'How can that happen? What would constitute a sexual assault between two women?' . . . . It's tied to that whole stereotypical question, 'What could Lesbians possibly do to have sex?'"<sup>154</sup> Although Snyder seems concerned about rapes that occur between lesbians, she too, focuses on penetration. At the 25th anniversary of the Center, it was disclosed that the staff had reached their goal of redefining rape. In the new celebrated definitions, "references to gender in the definition were removed, and it was widened to define rape as forced penetration by any object, not just a penis."<sup>155</sup> Snyder stated that the new definition more accurately reflected reality "since rape does not necessarily have to involve a penis, and the perpetrator and victim are not always male and female."<sup>156</sup> Women, she states, can be perpetrators too;<sup>157</sup> but Snyder, like most of society, equates women to men. The problem is that women can be invaded without being penetrated. I was surprised that, unlike my students, Snyder did not consider that some same-sex couples do not penetrate during a sex act, and the forced intrusion in that sphere is as severe as if there had been penetration, by any object, to an individual who allows penetration.

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to be included in such a discussion. Ms. Jones presented, at best, what might constitute sexual relations, but this was not the definition used in the District of Columbia at the time the President was deposed.

151. See *supra* notes 8, 61 & 66.

152. See Wendy Johnson, *Battling Misconceptions About Rape for 25 Years: D.C. Rape Crisis Center Marks Anniversary*, WASH. BLADE, May 16, 1997, at 12 (quoting Denise Snyder, Executive Director, Washington D.C. Rape Crisis Center).

153. See *id.*

154. See *id.* (quoting Denise Snyder).

155. See *id.*

156. See *id.*

157. See *id.*

In a March 17, 1998 telephone interview with Denise Snyder, I questioned her about this aspect of rape.<sup>158</sup> She stated that at the time the Center was seeking a new definition for the crime of rape, the focus was on widening the definition to define rape as forced penetration by any object, not just a penis.<sup>159</sup> She stated that I was "taking it a step further."<sup>160</sup> She also relayed an analogy regarding her life in the urban Washington D.C. area that she uses when instructing on violent sex crimes.<sup>161</sup> She stated that she did not realize the severity of the smog, pollution, and other conditions in D.C. until she returned to her small, rural, hometown in Virginia.<sup>162</sup> Once arriving at home, she admonishes that this is how the air is supposed to be: clear, clean, crisp, fresh, and breathable.<sup>163</sup> She then stated that one forgets how it should be when one is so used to how it is.<sup>164</sup> Nonetheless, both spheres are sacred to women, and the unwelcomed invasion should be punished equally.

Even if we accept the equality principle, which is the gender-neutral approach, why is it that we cannot do the following:

[I]nsist that the equality theory requires that we reorganize our understanding of sexual crime, that unwanted sexual intrusion of types other than male-female sexual intercourse can similarly violate and humiliate the victim, and that legislation which defines sexual offenses in gender neutral terms, because it resists our segregationist urges and affirms our common humanity . . . ?<sup>165</sup>

Or should we simply do the following:

[D]efend traditional rape laws on the ground that rape, defined by law as penetration by the penis of the vagina, is a sexual offense the psychological and social consequences of which are so unique, severe, and rooted in age-old power relationships between the sexes that a gender-neutral law would fail in important ways to deal with the world as it really is?<sup>166</sup>

Even though men are more commonly the aggressors in sex acts,<sup>167</sup> "females account for a small percentage of known offenders, [and] in a very small fraction of sexual assaults, victim and offender are of the same sex."<sup>168</sup>

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158. Telephone Interview with Denise Snyder, Executive Director, Washington D.C. Rape Crisis Center (Mar. 17, 1998).

159. *See id.*

160. *See id.* (quoting Denise Snyder).

161. *See id.*

162. *See id.*

163. *See id.*

164. *See id.*

165. *See Williams, supra* note 136, at 187.

166. *See id.*

167. *See GREENFIELD, supra* note 3, at iii-iv (stating that "99 in 100 [rapists] are male").

168. *Id.* at iii.

Women can be perpetrators of sexual violence, too . . . . It does happen, but I would not be surprised if people aren't aware of it. There is discomfort when accepting the fact that women can be sexually violent. And when homophobia is heaped on top of all the victim-blaming and silencing that happens around sexual assault, it creates such denial."<sup>169</sup>

Snyder also added that in lesbian relationships, rape assaults may not happen as frequently because the relationship between two women has a different social dynamic than the relationship between a man and a woman.<sup>170</sup> The sphere is being protected, not the gendered person.<sup>171</sup> In protecting this sphere, it is not an issue of being against men, but rather, a need to be for women.

#### IV. CONCLUSION

The punishment for rape at one time was death. Rape is one of the felonies included in the felony murder rule. Only inherently dangerous felonies are included in the felony murder rule. A perpetrator may get life imprisonment for felony murder. Rape obviously is a very serious crime with severe trauma to the victim. The victims of rape are generally women. The crime of rape punishes victimizers for entering into an individual's most private sphere. Laws punish individuals for that invasion. Entering a woman's most private sphere does not have to include male type conduct in order for the invasion to be severely punished by law. Unlike men, women have at least two most private spheres—the clitoris and the vagina. The clitoris and the vagina are both female sex organs. The punishment for the invasion of either of those most private spheres should be identical.

The private sphere for women should be defined in women's terms and from a woman's perspective; otherwise, rape will continue to be a crime of violence on women by men, as defined by men. This practice permits men to continue, as they have from the beginning of American history, to treat women as property. This affords men the right to touch a woman's body, even her treasures, until she resists to the point that he understands that she is resisting. As we approach the millennium, it is time for women to say "no." A woman's body is not the property of a man, and he is not entitled to touch, unless he gets permission. There is no right for anyone to invade a woman's most private sphere. The severity of the

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169. Johnson, *supra* note 152, at 12 (quoting Denise Snyder).

170. *See id.*

171. *See id.*

punishment is generally related to the invasion. The severity of the invasion of a woman's body ought to be defined from a woman's perspective of intrusiveness. Rape is the invasion of the female sex organs by a male. Including the clitoris as a female sex organ in the definition of rape reflects the woman's perspective of intrusiveness. Consequently, because the clitoris, like the vagina, is a sex organ in which the nonconsensual invasion is so intrusive, the invasion of it, like that of the vagina, is rape.