

DATE RAPE: A FEMINIST ANALYSIS

ABSTRACT. This paper shows how the mythology surrounding rape enters into a criterion of 'reasonableness' which operates through the legal system to make women vulnerable to unscrupulous victimization. It explores the possibility for changes in legal procedures and presumptions that would better serve women's interests and leave them less vulnerable to sexual violence. This requires that we reformulate the criterion of consent in terms of what is reasonable from a woman's point of view.

The feminist recognition that dominant ideologies reinforce conceptual frameworks that serve patriarchal interests lies behind what must now be seen as a revolution in political analysis, one which for the first time approaches the problems that women face from a woman's point of view. One of those problems is the ongoing difficulty of dealing with a society that practices and condones violence against women. This is particularly the case with date rape.

Date rape is nonaggravated sexual assault, nonconsensual sex that does not involve physical injury, or the explicit threat of physical injury. But because it does not involve physical injury, and because physical injury is often the only criterion that is accepted as evidence that the *actus reus* is nonconsensual, what is really sexual assault is often mistaken for seduction. The replacement of the old rape laws with the new laws on sexual assault have done nothing to resolve this problem.

Rape, defined as nonconsensual sex, usually involving penetration by a man of a woman who is not his wife, has been replaced in some criminal codes with the charge of sexual assault.¹ This has the advan-

¹ Geis, G. and R. Geis. 'Rape Reform: An Appreciative-Critical Review', *Bulletin of the American Academy of Psychiatry and the Law* 6, 301-312. Also see, Michael Davis, 'Setting Penalties: What Does Rape Deserve', *Law and Philosophy* 3, 61-110.

tage both of extending the range of possible victims of sexual assault, the manner in which people can be assaulted, and replacing a crime which is exclusive of consent, with one for which consent is a defence.² But while the consent of a woman is now consistent with the conviction of her assailant in cases of aggravated assault, nonaggravated sexual assault is still distinguished from normal sex solely by the fact that it is not consented to. Thus the question of whether someone has consented to a sexual encounter is still important, and the criteria for consent continues to be the central concern of discourse on sexual assault.³

However, if a man is to be convicted, it does not suffice to establish that the *actus reus* was nonconsensual. In order to be guilty of sexual assault a man must have the requisite *mens rea*, i.e., he must either have believed that his victim did not consent or that she was probably not consenting.⁴ In many common law jurisdictions a man who sincerely believes that a woman consented to a sexual encounter is deemed to lack the required *mens rea*, even though the woman did not consent, and even though his belief is not reasonable.⁵ Recently, strong dissenting voices have been raised against the sincerity condition, and the argument made that *mens rea* be defeated only if the defendant has a reasonable belief that the plaintiff consented.⁶ The introduction of

² Under Common Law a person cannot consent to aggravated assault. Also, consent may be irrelevant if the victim was unfit to consent. See Michael Davis 'Setting Penalties: What Does Rape Deserve', 104—105.

³ Discussion Paper No. 2, *Rape and Allied Offenses: Substantive Aspects*, Law Reform Commission of Victoria, August (1986).

⁴ In a recent Australian case a man was convicted of being an accomplice to a rape because he was reckless in determining whether the woman raped by his friend was consenting. The judge ruled that his 'reckless indifference' sufficed to establish *mens rea*. This ruling was possible, however, only because unreasonable belief is not a rape defence in Australia. *Australian Law Review* 71, 120.

⁵ This is true, at present, in jurisdictions which follow the precedent set by *Morgan vs. Morgan*. In this case, four men were acquitted of rape because they sincerely thought that their victim had consented, despite their admitting that she had protested vigorously. See Mark Thornton's 'Rape and Mens Rea', *Canadian Journal of Philosophy*, Supp. Vol. VIII, 119—146.

⁶ *Ibid.*

legislation which excludes 'honest belief' (unreasonable sincere belief) as a defence, will certainly help to provide women with greater protection against violence. But while this will be an important step forward, the question of what constitutes a reasonable belief, the problem of evidence when rapists lie, and the problem of the entrenched attitudes of the predominantly male police, judges, lawyers, and jurists who handle sexual assault cases, remains.

The criteria for *mens rea*, for the reasonableness of belief, and for consent are closely related. For although a man's sincere belief in the consent of his victim may be sufficient to defeat *mens rea*, the court is less likely to believe his belief is sincere if his belief is unreasonable. If his belief is reasonable, they are more likely to believe in the sincerity of his belief. But evidence of the reasonableness of his belief is also evidence that consent really did take place. For the very things that make it reasonable for *him* to believe that the defendant consented are often the very things that incline the court to believe that she consented. What is often missing is the voice of the woman herself, an account of what it would be reasonable for *her* to agree to, that is to say, an account of what is reasonable from *her* standpoint.

Thus, what is presented as reasonable has repercussions for four separate but related concerns: (1) the question of whether a man's belief in a woman's consent was reasonable; (2) the problem of whether it is reasonable to attribute *mens rea* to him; (3) the question of what could count as reasonable from the woman's point of view; (4) the question of what is reasonable from the court's point of view. These repercussions are of the utmost practical concern. In a culture which contains an incidence of sexual assault verging on epidemic, a criterion of reasonableness which regards mere submission as consent fails to offer persons vulnerable to those assaults adequate protection.

The following statements by self-confessed date rapists reveal how our lack of a solution for dealing with date rape protects rapists by failing to provide their victims with legal recourse:

All of my rapes have been involved in a dating situation where I've been out with a woman I know. . . . I wouldn't take no for an answer. I think it had something to do with my acceptance of rejection. I had low self-esteem and not much self-confidence and when I was rejected for something which I considered

to be rightly mine, I became angry and I went ahead anyway. And this was the same in any situation, whether it was rape or it was something else.⁷

* * *

When I did date, when I was younger, I would pick up a girl and if she didn't come across I would threaten her or slap her face then tell her she was going to fuck — that was it. But that's because I didn't want to waste time with any come-ons. It took too much time. I wasn't interested because I didn't like them as people anyway, and I just went with them just to get laid. Just to say that I laid them.⁸

There is, at this time, nothing to protect women from this kind of unscrupulous victimization. A woman on a casual date with a virtual stranger has almost no chance of bringing a complaint of sexual assault before the courts. One reason for this is the prevailing criterion for consent. According to this criterion, consent is implied unless some emphatic episodic sign of resistance occurred, and its occurrence can be established. But if no episodic act occurred, or if it did occur, and the defendant claims that it didn't, or if the defendant threatened the plaintiff but won't admit it in court, it is almost impossible to find any evidence that would support the plaintiff's word against the defendant. This difficulty is exacerbated by suspicion on the part of the courts, police, and legal educators that even where an act of resistance occurs, this act should not be interpreted as a withholding of consent, and this suspicion is especially upheld where the accused is a man who is known to the female plaintiff.

In Glanville Williams's classic textbook on criminal law we are warned that where a man is unknown to a woman, she does not consent if she expresses her rejection in the form of an episodic and vigorous act at the 'vital moment'. But if the man is known to the woman she must, according to Williams, make use of "all means available to her to repel the man".⁹ Williams warns that women often welcome a 'mastery advance' and present a token resistance. He quotes Byron's couplet,

⁷ *Why Men Rape*, Sylvia Levine and Joseph Loenig, eds., (Toronto: Macmillan, 1980), p. 83.

⁸ *Ibid.*, p. 77.

⁹ Williams, *Textbook of Criminal Law* (1983), p. 238.

A little still she strove, and much repented
And whispering 'I will ne'er consent' — consented

by way of alerting law students to the difficulty of distinguishing real protest from pretence.¹⁰ Thus, while in principle, a firm unambiguous stand, or a healthy show of temper ought to be sufficient, if established, to show nonconsent, in practice the forceful overriding of such a stance is apt to be taken as an indication that the resistance was not seriously intended, and that the seduction had succeeded. The consequence of this is that it is almost impossible to establish the defendant's guilt beyond a reasonable doubt.

Thus, on the one hand, we have a situation in which women are vulnerable to the most exploitive tactics at the hands of men who are known to them. On the other hand, almost nothing will count as evidence of their being assaulted, including their having taken an emphatic stance in withholding their consent. The new laws have done almost nothing to change this situation. Yet clearly, some solution must be sought. Moreover, the road to that solution presents itself clearly enough as a need for a reformulation of the criterion of consent. It is patent that a criterion that collapses whenever the crime itself succeeds will not suffice.

The purpose of this paper is to develop such a criterion, and I propose to do so by grounding this criterion in a conception of the 'reasonable'. Part of the strength of the present criterion for consent lies in the belief that it is reasonable for women to agree to the kind of sex involved in 'date rape', or that it is reasonable for men to think that they have agreed. My argument is that it is not reasonable for women to consent to that kind of sex, and that there are furthermore, no grounds for thinking that it is reasonable. Since what we want to know is when a woman has consented, and since standards for consent are based on the presumed choices of reasonable agents, it is what is reasonable from a woman's point of view that must provide the principal delineation of a criterion of consent that is capable of representing a woman's willing behaviour. Developing this line of

¹⁰ *Ibid.*

reasoning further, I will argue that the kind of sex to which it would be reasonable for women to consent suggests a criterion of consent that would bring the kind of sex involved in date rape well within the realm of sexual assault.

THE PROBLEM OF THE CRITERION

The reasoning that underlies the present criterion of consent is entangled in a number of mutually supportive mythologies which see sexual assault as masterful seduction, and silent submission as sexual enjoyment. Because the prevailing ideology has so much informed our conceptualization of sexual interaction, it is extraordinarily difficult for us to distinguish between assault and seduction, submission and enjoyment, or so we imagine. At the same time, this failure to distinguish has given rise to a network of rationalizations that support the conflation of assault with seduction, submission with enjoyment. I therefore want to begin my argument by providing an example which shows both why it is so difficult to make this distinction, and that it exists. Later, I will identify and attempt to unravel the lines of reasoning that reinforce this difficulty.

The woman I have in mind agrees to see someone because she feels an initial attraction to him and believes that he feels that same way about her. She goes out with him in the hope that there will be mutual enjoyment and in the course of the day or evening an increase of mutual interest. Unfortunately, these hopes of *mutual* and *reciprocal* interest are not realized. We do not know how much interest she has in him by the end of their time together, but whatever her feelings she comes under pressure to have sex with him, and she does not want to have the kind of sex he wants. She may desire to hold hands and kiss, to engage in more intense caresses or in some form of foreplay, or she may not want to be touched. She may have reasons unrelated to desire for not wanting to engage in the kind of sex he is demanding. She may have religious reservations, concerns about pregnancy or disease, a disinclination to be just another conquest. She may be engaged in a seduction program of her own which sees abstaining from sexual activity as a means of building an important emotional bond. She feels she is desirable to him, and she knows, and he knows that he will have sex with her if he can. And while she feels she doesn't owe him anything, and that it is her prerogative to refuse him, this feeling is partly a defensive reaction against

a deeply held belief that if he is in need, she should provide. If she buys into the myth of insistent male sexuality she may feel he is suffering from sexual frustration and that she is largely to blame.

We do not know how much he desires her, but we do know that his desire for erotic satisfaction can hardly be separated from his desire for conquest. He feels no dating obligation, but has a strong commitment to scoring. He uses the myth of "so hard to control" male desire as a rhetorical tactic, telling her how frustrated she will leave him. He becomes overbearing. She resists, voicing her disinclination. He alternates between telling her how desirable she is and taking a hostile stance, charging her with misleading him, accusing her of wanting him, and being coy, in short of being deceitful, all the time engaging in rather aggressive body contact. It is late at night, she is tired and a bit queasy from too many drinks, and he is reaffirming her suspicion that perhaps she has misled him. She is having trouble disengaging his body from hers, and wishes he would just go away. She does not adopt a strident angry stance, partly because she thinks he is acting normally and does not deserve it, partly because she feels she is partly to blame, and partly because there is always the danger that her anger will make him angry, possibly violent. It seems that the only thing to do, given his aggression, and her queasy fatigue, is to go along with him and get it over with, but this decision is so entangled with the events in process it is hard to know if it is not simply a recognition of what is actually happening. She finds the whole encounter a thoroughly disagreeable experience, but he does not take any notice, and wouldn't have changed course if he had. He congratulates himself on his sexual prowess and is confirmed in his opinion that aggressive tactics pay off. Later she feels that she has been raped, but paradoxically tells herself that she let herself be raped.

The paradoxical feelings of the woman in our example indicate her awareness that what she feels about the incident stands in contradiction to the prevailing cultural assessment of it. She knows that she did not want to have sex with her date. She is not so sure, however, about how much her own desires count, and she is uncertain that she has made her desires clear. Her uncertainty is reinforced by the cultural reading of this incident as an ordinary seduction.

As for us, we assume that the woman did not want to have sex, but just like her, we are unsure whether her mere reluctance, in the presence of high-pressure tactics, constitutes nonconsent. We suspect that submission to an overbearing and insensitive lout is no way to go about attaining sexual enjoyment, and we further suspect that he felt

no compunction about providing it, so that on the face of it, from the outside looking in, it looks like a pretty unreasonable proposition for her.

Let us look at this reasoning more closely. Assume that she was not attracted to the kind of sex offered by the sort of person offering it. Then it would be *prima facie* unreasonable for her to agree to have sex, unreasonable, that is, unless she were offered some pay-off for her stoic endurance, money perhaps, or tickets to the opera. The reason is that in sexual matters, agreement is closely connected to attraction. Thus, where the presumption is that she was not attracted, we should at the same time presume that she did not consent. Hence, the burden of proof should be on her alleged assailant to show that she had good reasons for consenting to an unattractive proposition.

This is not, however, the way such situations are interpreted. In the unlikely event that the example I have described should come before the courts, there is little doubt that the law would interpret the woman's eventual acquiescence or 'going along with' the sexual encounter as consent. But along with this interpretation would go the implicit understanding that she had consented because when all was said and done, when the 'token' resistances to the 'masterful advances' had been made she had wanted to after all. Once the courts have constructed this interpretation, they are then forced to conjure up some horror story of feminine revenge in order to explain why she should bring charges against her 'seducer'.

In the even more unlikely event that the courts agreed that the woman had not consented to the above encounter, there is little chance that her assailant would be convicted of sexual assault.¹¹ The belief that the man's aggressive tactics are a normal part of seduction means that *mens rea* cannot be established. Her eventual 'going along'

¹¹ See Jeanne C. Marsh, Allison Geist, and Nathan Caplan, *Rape and The Limits of Law Reform* (Boston: Auburn House, 1982), p. 32. According to Marsh's study on the impact of the Michigan reform of rape laws, convictions were increased for traditional conceptions of rape, i.e., aggravated assault. However date-rape, which has a much higher incidence than aggravated assault, has a very low rate of arrest and an even lower one of conviction.

with his advances constitutes reasonable grounds for his believing in her consent. These 'reasonable' grounds attest to the sincerity of his belief in her consent. This reasonableness means that *mens rea* would be defeated even in jurisdictions which make *mens rea* a function of objective standards of reasonableness. Moreover, the sympathy of the court is more likely to lie with the rapist than with his victim, since, is the court is typical, it will be strongly inclined to believe that the victim had in some way 'asked for it'.

The position of the courts is supported by the widespread belief that male aggression and female reluctance are normal parts of seduction. Given their acceptance of this model, the logic of their response must be respected. For if sexual aggression is a part of ordinary seduction, then it cannot be inconsistent with the legitimate consent of the person allegedly seduced by this means. And if it is normal for a woman to be reluctant, then this reluctance must be consistent with her consent as well. The position of the courts is not inconsistent just so long as they allow that some sort of protest on the part of a woman counts as a refusal. As we have seen, however, it frequently happens that no sort of a protest would count as a refusal. Moreover, if no sort of protest, or at least if precious few count, then the failure to register these protests will amount to 'asking for it', it will amount, in other words, to agreeing.

The court's belief in 'natural' male aggression and 'natural' female reluctance has increasingly come under attack by feminist critics who see quite correctly that the entire legal position would collapse if, for example, it were shown empirically that men were not aggressive, and that women, at least when they wanted sex, were. This strategy is of little help, however, so long as aggressive men can still be found, and relics of reluctant women continue to surface. Fortunately, there is another strategy. The position collapses through the weakness of its internal logic. The next section traces the several lines of this logic.

RAPE MYTHS

The belief that the natural aggression of men and the natural reluctance of women somehow makes date rape understandable underlies

a number of prevalent myths about rape and human sexuality. These beliefs maintain their force partly on account of a logical compulsion exercised by them at an unconscious level. The only way of refuting them effectively, is to excavate the logical propositions involved, and to expose their misapplication to the situations to which they have been applied. In what follows, I propose to excavate the logical support for popular attitudes that are tolerant of date rape. These myths are not just popular, however, but often emerge in the arguments of judges who acquit date rapists, and policemen who refuse to lay charges.

The claim that the victim provoked a sexual incident, that 'she asked for it', is by far the most common defence given by men who are accused of sexual assault.¹² Feminists, rightly incensed by this response, often treat it as beneath contempt, singling out the defence as an argument against it. On other fronts, sociologists have identified the response as part of an overall tendency of people to see the world as just, a tendency which disposes them to conclude that people for the most part deserve what they get.¹³ However, an inclination to see the world as just requires us to construct an account which yields this outcome, and it is just such an account that I wish to examine with regard to date rape.

The least sophisticated of the 'she asked for it' rationales, and in a sense, the easiest to deal with, appeals to an injunction against sexually provocative behaviour on the part of women. If women should not be sexually provocative, then, from this standpoint, a woman who is sexually provocative deserves to suffer the consequences. Now it will

¹² See Marsh, p. 61, for particular good example of this response. Also see John M. MacDonald, 'Victim-Precipitated Rape', *Rape: Offenders and their Victims* (Illinois: Charles C. Thomas, 1971), pp. 78–89, for a good example of this response in academic thinking. Also see Menachem Amir, *Patterns in Forcible Rape* (University of Chicago Press, 1972), p. 259.

¹³ See Eugene Borgida and Nancy Brekke, 'Psycholegal Research on Rape Trials', in *Rape and Sexual Assault*, Ann Wobert Burgess, ed., (New York: Garland Press, 1985), p. 314. Also see M. J. Lerner, 'The Desire for Justice and Reactions to Victims', *Altruism and Helping Behaviour*, J. Macaulay and L. Berkowitz, eds. (New York: Academic Press, 1970).

not do to respond that women get raped even when they are not sexually provocative, or that it is men who get to interpret (unfairly) what counts as sexually provocative.¹⁴ The question should be: Why shouldn't a woman be sexually provocative? Why should this behaviour warrant any kind of aggressive response whatsoever?

Attempts to explain that women have a right to behave in sexually provocative ways without suffering dire consequences still meet with surprisingly tough resistance. Even people who find nothing wrong or sinful with sex itself, in any of its forms, tend to suppose that women must not behave sexually unless they are prepared to carry through on some fuller course of sexual interaction. The logic of this response seems to be that at some point a woman's behaviour commits her to following through on the full course of a sexual encounter as it is defined by her assailant. At some point she has made an agreement, or formed a contract, and once that is done, her contractor is entitled to demand that she satisfy the terms of that contract. Thus, this view about sexual responsibility and desert is supported by other assumptions about contracts and agreement. But we do not normally suppose that casual nonverbal behaviour generates agreements. Nor do we normally grant private persons the right to enforce contracts. What rationale would support our conclusion in this case?

The rationale, I believe, comes in the form of a belief in the especially insistent nature of male sexuality, an insistence which lies at the root of natural male aggression, and which is extremely difficult, perhaps impossible to contain. At a certain point in the arousal process, it is thought, a man's rational will gives way to the prerogatives of nature. His sexual need can and does reach a point where it is uncontrollable, and his natural masculine aggression kicks in to assure that this need is met. Women, however, are naturally more contained, and so it is their responsibility not to provoke the irrational in the male. If they do go so far as that, they have both failed in their responsibilities, and subjected themselves to the inevitable. One does

¹⁴ As, for example, Lorraine Clark and Debra Lewis do in *Rape: The Price of Coercive Sexuality* (Toronto: The Women's Press, 1977), pp. 152–153.

not go into the lion's cage and expect not to be eaten. Natural feminine reluctance, it is thought, is no protection against a sexually aroused male.

This belief about the normal aggressiveness of male sexuality is complemented by common knowledge about female gender development. Once, women were taught to deny their sexuality and to aspire to ideals of chastity. Things have not changed so much. Women still tend to eschew conquest mentalities in favour of a combination of sex and affection. Insofar as this is thought to be merely a cultural requirement, however, there is an expectation that women will be coy about their sexual desire. The assumption that women both want to indulge sexually, and are inclined to sacrifice this desire for higher ends, gives rise to the myth that they want to be raped. After all, doesn't rape give them the sexual enjoyment they *really* want, at the same time that it relieves them of the responsibility for admitting to and acting upon what they want? And how then can we blame men, who have been socialized to be aggressively seductive precisely for the purpose of overriding female reserve? If we find fault at all, we are inclined to cast our suspicions on the motives of the woman. For it is on her that the contradictory roles of sexual desirer and sexual denier has been placed. Our awareness of the contradiction expected of her makes us suspect her honesty. In the past, she was expected to deny her complicity because of the shame and guilt she felt at having submitted.¹⁵ This expectation persists in many quarters today, and is carried over into a general suspicion about her character, and the fear that she might make a false accusation out of revenge, or some other low motive.¹⁶

But if women really want sexual pleasure, what inclines us to think that they will get it through rape? This conclusion logically requires a theory about the dynamics of sexual pleasure that sees that pleasure as an emergent property of overwhelming male insistence. For the assumption that a raped female experiences sexual pleasure implies

¹⁵ See Sue Bessner, *The Laws of Rape* (New York: Praeger Publications, 1984), pp. 111–121, for a discussion of the legal forms in which this suspicion is expressed.

¹⁶ *Ibid.*

that the person who rapes her knows how to cause that pleasure independently of any information she might convey on that point. Since her ongoing protest is inconsistent with requests to be touched in particular ways in particular places, to have more of this and less of that, then we must believe that the person who touches her knows these particular ways and places instinctively, without any directives from her.

Thus we find, underlying and reinforcing this belief in incommunicative male prowess, a conception of sexual pleasure that springs from wordless interchanges, and of sexual success that occurs in a place of meaningful silence. The language of seduction is accepted as a tacit language: eye contact, smiles, blushes, and faintly discernible gestures. It is, accordingly, imprecise and ambiguous. It would be easy for a man to make mistakes about the message conveyed, understandable that he should mistakenly think that a sexual invitation has been made, and a bargain struck. But honest mistakes, we think, must be excused.

In sum, the belief that women should not be sexually provocative is logically linked to several other beliefs, some normative, some empirical. The normative beliefs are that (1) people should keep the agreements they make (2) that sexually provocative behaviour, taken beyond a certain point, generates agreements (3) that the peculiar nature of male and female sexuality places such agreements in a special category, one in which the possibility of retracting an agreement is ruled out, or at least made highly unlikely, (4) that women are not to be trusted, in sexual matters at least. The empirical belief, which turns out to be false, is that male sexuality is not subject to rational and moral control.

DISPELLING THE MYTHS

The 'she asked for it' justification of sexual assault incorporates a conception of a contract that would be difficult to defend in any other context and the presumptions about human sexuality which function to reinforce sympathies rooted in the contractual notion of just deserts are not supported by empirical research.

The belief that a woman generates some sort of contractual obliga-

tion whenever her behaviour is interpreted as seductive is the most indefensible part of the mythology of rape. In law, contracts are not legitimate just because a promise has been made. In particular, the use of pressure tactics to extract agreement is frowned upon. Normally, an agreement is upheld only if the contractors were clear on what they were getting into, and had sufficient time to reflect on the wisdom of their doing so. Either there must be a clear tradition in which the expectations involved in the contract are fairly well known (marriage), or there must be an explicit written agreement concerning the exact terms of the contract and the expectations of the persons involved. But whatever the terms of a contract, there is no private right to enforce it. So that if I make a contract with you on which I renege, the only permissible recourse for you is through due legal process.

Now it is not clear whether sexual contracts can be made to begin with, or if so, what sort of sexual contracts would be legitimate. But assuming that they could be made, the terms of those contracts would not be enforceable. To allow public enforcement would be to grant the State the overt right to force people to have sex, and this would clearly be unacceptable. Granting that sexual contracts are legitimate, state enforcement of such contracts would have to be limited to ordering nonsexual compensation for breaches of contract. So it makes no difference whether a sexual contract is tacit or explicit. There are no grounds whatsoever that would justify enforcement of its terms.

Thus, even if we assume that a woman has initially agreed to an encounter, her agreement does not automatically make all subsequent sexual activity to which she submits legitimate. If during coitus a woman should experience pain, be suddenly overcome with guilt or fear of pregnancy, or simply lose her initial desire, those are good reasons for her to change her mind. Having changed her mind, neither her partner nor the state has any right to force her to continue. But then if she is forced to continue she is assaulted. Thus, establishing that consent occurred at a particular point during a sexual encounter should not conclusively establish the legitimacy of the encounter.¹⁷

¹⁷ A speech-act like 'OK, let's get it over with' is taken as consent, even though it is extracted under high pressure, the sex that ensues lacks mutuality, and there

What is needed is a reading of whether she agreed throughout the encounter.

If the 'she asked for it' contractual view of sexual interchange has any validity, it is because there is a point at which there is no stopping a sexual encounter, a point at which that encounter becomes the inexorable outcome of the unfolding of natural events. If a sexual encounter is like a slide on which I cannot stop halfway down, it will be relevant whether I enter the slide of my own free will, or am pushed.

But there is no evidence that the entire sexual act is like a slide. While there may be a few seconds in the 'plateau' period just prior to orgasm in which people are 'swept' away by sexual feelings to the point where we could justifiably understand their lack of heed for the comfort of their partner, the greater part of a sexual encounter comes well within the bounds of morally responsible control of our own actions. Indeed, the available evidence shows that most of the activity involved in sex has to do with building the requisite level of desire, a task that involves the proper use of foreplay, the possibility of which implies control over the form that foreplay will take. Modern sexual therapy assumes that such control is universally accessible, and so far there has been no reason to question that assumption. Sexologists are unanimous, moreover, in holding that mutual sexual enjoyment requires an atmosphere of comfort and communication, a minimum of pressure, and an ongoing check-up on one's partner's state. They maintain that different people have different predilections, and that what is pleasurable for one person is very often anathema to another. These findings show that the way to achieve sexual pleasure, at any time at all, let alone with a casual acquaintance, decidedly does not involve overriding the other person's express reservations and providing them with just any kind of sexual stimulus.¹⁸ And while we do not

are no ulterior reasons for such an agreement. See Davis, p. 103. Also see Carolyn Schafer and Marilyn Frye 'Rape and Respect', *Readings in Recent Feminist Philosophy*, ed. by Marilyn Pearsell (California: Wadsworth, 1986), p. 189, for a characterization of the common notion of consent as a formal speech-act.

¹⁸ It is not just women who fail to find satisfaction in the 'swept away' approach to sexual interaction. Studies of convicted rapists, and of conquest oriented men,

want to allow science and technology a voice in which the voices of particular women are drowned, in this case science seems to concur with women's perception that aggressive incommunicative sex is not what they want. But if science and the voice of women concur, if aggressive seduction does not lead to good sex, if women do not like it or want it, then it is not rational to think that they would agree to it. Where such sex takes place, it is therefore rational to presume that the sex was not consensual.

The myth that women like to be raped, is closely connected, as we have seen, to doubt about their honesty in sexual matters, and this suspicion is exploited by defence lawyers when sexual assault cases make it to the courtroom. It is an unfortunate consequence of the presumption of innocence that rape victims who end up in court frequently find that it is they who are on trial. For if the defendant is innocent, then either he did not intend to do what he was accused of, or the plaintiff is mistaken about his identity, or she is lying. Often the last alternative is the only plausible defence, and as a result, the plaintiff's word seldom goes unquestioned. Women are frequently accused of having made a false accusation, either as a defensive mechanism for dealing with guilt and shame, or out of a desire for revenge.

Now there is no point in denying the possibility of false accusation, though there are probably better ways of seeking revenge on a man than accusing him of rape. However, we can now establish a logical connection between the evidence that a woman was subjected to high-pressure aggressive 'seduction' tactics, and her claim that she did not consent to that encounter. Where the kind of encounter is not the sort to which it would be reasonable to consent, there is a logical presump-

indicate that men are frequently disappointed when they use this approach as well. In over half of aggravated sexual assaults penetration fails because the man loses his erection. Those who do succeed invariably report that the sex experienced was not enjoyable. This supports the prevailing view of sexologists that men depend on the positive response of their partners in order to fuel their own responsive mechanisms. See A. N. Groth, *Rape and Sexual Assault*. Also see *Why Men Rape*, edited by Sylvia Levine and Joseph Koenig (Toronto: Macmillan, 1982) or consult any recent manual on male sexuality.

tion that a woman who claims that she did not consent is telling the truth. Where the kind of sex involved is not the sort of sex we would expect a woman to like, the burden of proof should not be on the woman to show that she did not consent, but on the defendant to show that contrary to every reasonable expectation she did consent. The defendant should be required to convince the court that the plaintiff persuaded him to have sex with her even though there are no visible reasons why she should.

In conclusion, there are no grounds for the 'she asked for it' defence. Sexually provocative behaviour does not generate sexual contracts. Even where there are sexual agreements, they cannot be legitimately enforced either by the State, or by private right, or by natural prerogative. Secondly, all the evidence suggests that neither women nor men find sexual enjoyment in rape or in any form of non-communicative sexuality. Thirdly, male sexual desire is containable, and can be subjected to moral and rational control. Fourthly, since there is no reason why women should not be sexually provocative, they do not 'deserve' any sex they do not want. This last is a welcome discovery. The taboo on sexual provocativeness in women is a taboo both on sensuality and on teasing. But sensuality is a source of delight, and teasing is playful and inspires wit. What a relief to learn that it is not sexual provocativeness, but its enemies, that constitutes a danger to the world.

COMMUNICATIVE SEXUALITY: REINTERPRETING THE KANTIAN IMPERATIVE

The present criterion of consent sets up sexual encounters as contractual events in which sexual aggression is presumed to be consented to unless there is some vigorous act of refusal. As long as we view sexual interaction on a contractual model, the only possibility for finding fault is to point to the presence of such an act. But it is clear that whether or not we can determine such a presence, there is something strongly disagreeable about the sexual aggression described above.

In thinking about sex we must keep in mind its sensual ends, and

the facts show that aggressive high-pressure sex contradicts those ends. Consensual sex in dating situations is presumed to aim at mutual enjoyment. It may not always do this, and when it does, it might not always succeed. There is no logical incompatibility between wanting to continue a sexual encounter, and failing to derive sexual pleasure from it.¹⁹

But it seems to me that there is a presumption in favour of the connection between sex and sexual enjoyment, and that if a man wants to be sure that he is not forcing himself on a woman, he has an obligation either to ensure that the encounter really is mutually enjoyable, or to know the reasons why she would want to continue the encounter in spite of her lack of enjoyment. A closer investigation of the nature of this obligation will enable us to construct a more rational and a more plausible norm of sexual conduct.

Onara O'Neill has argued that in intimate situations we have an obligation to take the ends of others as our own, and to promote those ends in a non-manipulative and non-paternalistic manner.²⁰ Now it seems that in honest sexual encounters just this is required. Assuming that each person enters the encounter in order to seek sexual satisfaction, each person engaging in the encounter has an obligation to help the other seek his or her ends. To do otherwise is to risk acting in opposition to what the other desires, and hence to risk acting without the other's consent.

But the obligation to promote the sexual ends of one's partner implies the obligation to know what those ends are, and also the obligation to know how those ends are attained. Thus, the problem comes down to a problem of epistemic responsibility, the responsibility to know. The solution, in my view, lies in the practice of a

¹⁹ Robin Morgan comes perilously close to suggesting that there is when she defines rape as any sexual encounter that is not initiated by a woman out of her own heartfelt desire. See *Going Too Far* (New York: Random House, 1968), p. 165.

²⁰ O'Neill, 'Between Consenting Adults', *Philosophy and Public Affairs* 14, 252–277.

communicative sexuality, one which combines the appropriate knowledge of the other with respect for the dialectics of desire.

So let us, for a moment, conceive of sexual interaction on a communicative rather than a contractual model. Let us look at it the way I think it should be looked at, as if it were a proper conversation rather than an offer from the Mafia.

Conversations, when they are proper conversations, as opposed to lectures, diatribes, or interrogations, illustrate the logical relation between communicative interaction and treating someone as an end in herself in O'Neill's sense. This logical relation can be illustrated by the difference in kind between a typical contract and a proper sort of conversation, a difference that derives primarily from the different relation each bears to the necessity for cooperation. The difference is this: typically, where contracts are concerned, cooperation is primarily required as a means to some further end set by the contract. In proper conversations, as I shall define them here, cooperation is sought as an end in itself.

It is not inimical to most contracts that the cooperation necessary for achieving its ends be reluctant, or even hostile. Although we can find fault with a contractor for failing to deliver goods or services, we do not normally criticize her for her attitude. And although there are situations where we employ people on the condition that they be congenial, even then we do not require that their congeniality be the real thing. When we are having a proper conversation, however, we do, typically, want the real thing. In conversation, the cooperation with the other is not just a means to an interesting conversation; it is one of the ends we seek, without which the conversation ceases to satisfy.

The communicative interaction involved in conversation is concerned with a good deal more than didactic content and argument. Good conversationalists are intuitive, sympathetic, and charitable. Intuition and charity aid the conversationalist in her effort to interpret the words of the other correctly and sympathy enables her to enter into the other's point of view. Her sensitivity alerts her to the tone of the exchange. Has her point been taken good-humouredly or resentfully? Aggressively delivered responses are taken as a sign that *ad*

hominems are at work, and that the respondent's self-worth has been called into question. Good conversationalists will know to suspend further discussion until this sense of self-worth has been reestablished. Angry responses, resentful responses, bored responses, even over-enthusiastic responses require that the emotional ground be cleared before the discussion be continued. Often it is better to change the topic, or to come back to it on another day under different circumstances. Good conversationalists do not overwhelm their respondents with a barrage of their own opinions. While they may be persuasive, the forcefulness of their persuasion does not lie in their being overbearing, but rather in their capacity to see the other's point of view, to understand what it depends on, and so to address the essential point, but with tact and clarity.

Just as communicative conversationalists are concerned with more than didactic content, persons engaged in communicative sexuality will be concerned with more than achieving coitus. They will be sensitive to the responses of their partners. They will, like good conversationalists, be intuitive, sympathetic, and charitable. Intuition will help them to interpret their partner's responses; sympathy will enable them to share what their partner is feeling; charity will enable them to care. Communicative sexual partners will not overwhelm each other with the barrage of their own desires. They will treat negative, bored, or angry responses, as a sign that the erotic ground needs to be either cleared or abandoned. Their concern with fostering the desire of the other must involve an ongoing state of alertness in interpreting her responses.

Just as a conversationalist's prime concern is for the mutuality of the discussion, a person engaged in communicative sexuality will be most concerned with the mutuality of desire. As such, both will put into practice a regard for their respondent that is guaranteed no place in the contractual language of rights, duties, and consent. The dialectics of both activities reflect the dialectics of desire insofar as each person's interest in continuing is contingent upon the other person wishing to do so too, and each person's interest is as much fueled by the other's interest as it is by her own. Each respects the subjectivity of the other not just by avoiding treading on it, but by fostering and

protecting the quality of that subjectivity. Indeed, the requirement to avoid treading on the subjectivity of the other entails the obligation to respect the dialectics of desire.²¹ For in intimacy there is no passing by on the other side. To be intimate just is to open up in emotional and personal ways, to share personal knowledge, and to be receptive to the openness of the other. This openness and sharing normally takes place only in an atmosphere of confidence and trust. But once availed of this knowledge, and confidence, and trust, one has, as it were, responsibility thrust upon one, the responsibility not to betray the trust by misusing the knowledge. And only by respecting the dialectics of desire can we have any confidence that we have not misused our position of trust and knowledge.

CULTURAL PRESUMPTIONS

Now it may well be that we have no obligation to care for strangers, and I do not wish to claim that we do. Nonetheless, it seems that O'Neill's point about the special moral duties we have in certain intimate situations is supported by a conceptual relation between certain kinds of personal relationships and the expectation that it should be a communicative relation. Friendship is a case in point. It is a relation that is greatly underdetermined by what we usually include in our sets of rights and obligations. For the most part, rights and obligations disappear as terms by which friendship is guided. They are still there, to be called upon, in case the relationship breaks down, but insofar as the friendship is a friendship, it is concerned with fostering the quality of the interaction and not with standing on rights. Thus, because we are friends, we share our property, and property rights between us are not invoked. Because we are friends, privacy is not an issue. Because we are friends we may see to each other's needs as often as we see to our own. The same can be said for relations between

²¹ The sort of relationship I have in mind exemplifies the 'feminist' approach to ethics argued for by Nell Noddings, *Caring: A Feminine Approach to Ethics* (Berkeley: University of California Press, 1984). In particular, see her discussion of teaching as a 'duality', p. 195.

lovers, parents and dependent children, and even between spouses, at least when interaction is functioning at an optimal level. When such relations break down to the point that people must stand on their rights, we can often say that the actors ought to make more of an effort, and in many instances fault them for their lack of charity, tolerance, or benevolence. Thus, although we have a right to end friendships, it may be a reflection on our lack of virtue that we do so, and while we cannot be criticized for violating other people's rights, we can be rightfully deprecated for lacking the virtue to sustain a friendship.

But is there a similar conceptual relation between the kind of activity that a date is, and the sort of moral practice which that it requires? My claim is that there is, and that this connection is easily established once we recognize the cultural presumption that dating is a gesture of friendship and regard. Traditionally, the decision to date indicates that two people have an initial attraction to each other, that they are disposed to like each other, and look forward to enjoying each other's company. Dating derives its implicit meaning from this tradition. It retains this meaning unless other aims are explicitly stated, and even then it may not be possible to alienate this meaning. It is a rare woman who will not spurn a man who states explicitly, right at the onset, that he wants to go out with her solely on the condition that he have sexual intercourse with her at the end of the evening, and that he has no interest in her company apart from gaining that end, and no concern for mutual satisfaction.

Explicit protest to the contrary aside, the conventions of dating confer on it its social meaning, and this social meaning implies a relationship which is more like friendship than the cutthroat competition of opposing teams. As such, it requires that we do more than stand on our rights with regard to each other. As long as we are operating under the auspices of a dating relationship, it requires that we behave in the mode of friendship and trust. But if a date is more like a friendship than a business contract, then clearly respect for the dialectics of desire is incompatible with the sort of sexual pressure that is inclined to end in date rape. And clearly, also, a conquest mentality which exploits a situation of trust and respect for purely selfish ends is

morally pernicious. Failure to respect the dialectics of desire when operating under the auspices of friendship and trust is to act in flagrant disregard of the moral requirement to avoid manipulative, coercive, and exploitive behaviour. Respect for the dialectics of desire is *prima facie* inconsistent with the satisfaction of one person at the expense of the other. The proper end of friendship relations is mutual satisfaction. But the requirement of mutuality means that we must take a communicative approach to discovering the ends of the other, and this entails that we respect the dialectics of desire.

But now that we know what communicative sexuality is, and that it is morally required, and that it is the only feasible means to mutual sexual enjoyment, why not take this model as the norm of what is reasonable in sexual interaction. The evidence of sexologists strongly indicates that women whose partners are aggressively uncommunicative have little chance of experiencing sexual pleasure. But it is not reasonable for women to consent to what they have little chance of enjoying. Hence it is not reasonable for women to consent to aggressive noncommunicative sex. Nor can we reasonably suppose that women have consented to sexual encounters which we know and they know they do not find enjoyable. With the communicative model as the norm, the aggressive contractual model should strike us as a model of deviant sexuality, and sexual encounters patterned on that model should strike us as encounters to which *prima facie* no one would reasonably agree. But if acquiescence to an encounter counts as consent only if the acquiescence is reasonable, something to which a reasonable person, in full possession of knowledge relevant to the encounter, would agree, then acquiescence to aggressive noncommunicative sex is not reasonable. Hence, acquiescence under such conditions should not count as consent.

Thus, where communicative sexuality does not occur, we lack the main ground for believing that the sex involved was consensual. Moreover, where a man does not engage in communicative sexuality, he acts either out of reckless disregard, or out of willful ignorance. For he cannot know, except through the practice of communicative sexuality, whether his partner has any sexual reason for continuing the encounter. And where she does not, he runs the risk of imposing on

her what she is not willing to have. All that is needed then, in order to provide women with legal protection from 'date rape' is to make both reckless indifference and willful ignorance a sufficient condition of *mens rea* and to make communicative sexuality the accepted norm of sex to which a reasonable woman would agree.²² Thus, the appeal to communicative sexuality as a norm for sexual encounters accomplishes two things. It brings the aggressive sex involved in 'date rape' well within the realm of sexual assault, and it locates the guilt of date rapists in the failure to approach sexual relations on a communicative basis.

THE EPISTEMOLOGICAL IMPLICATIONS

Finding a proper criterion for consent is one problem, discovering what really happened, after the event, when the only eye witnesses give conflicting accounts is another. But while there is no foolproof way of getting the unadulterated truth, it can make a significant difference to the outcome of a prosecution, what sort of facts we are seeking. On the old model of aggressive seduction we sought evidence of resistance. But on the new model of communicative sexuality what we want is evidence of an ongoing positive and encouraging response on the part of the plaintiff. This new goal will require quite different tactics on the part of the cross-examiners, and quite different expectations on the part of juries and judges. Where communicative sexuality is taken as the norm, and aggressive sexual tactics as a presumption against consent, the outcome for the example that I described above would be quite different. It would be regarded as sexual assault rather than seduction.

Let us then consider a date rape trial in which a man is cross-examined. He is asked whether he was presuming mutual sexual enjoyment. Suppose he answers in the negative. Then he would have to account for why he persisted in the face of her voiced reluctance. He cannot give as an excuse that he thought she liked it, because he

²² As now seems to be the case in Australian Law. See fn. 4.

believes that she did not. If he thought that she had consented even though she didn't like it, then it seems to me that the burden of proof would lie with him to say why it was reasonable to think this. Clearly, her initial resistance, her presumed lack of enjoyment, and the pressure tactics involved in getting her to 'go along' would not support a reasonable belief in consent, and his persisting in the face of her dissatisfaction would surely cast doubt on the sincerity of his belief in her consent.

But suppose he answers in the affirmative. Then the cross-examiner would not have to rely on the old criteria for non-consent. He would not have to show either that she had resisted him, or that she was in a fearful or intimidated state of mind. Instead he could use a communicative model of sexuality to discover how much respect there had been for the dialectics of desire. Did he ask her what she liked? If she was using contraceptives? If he should? What tone of voice did he use? How did she answer? Did she make any demands? Did she ask for penetration? How was that desire conveyed? Did he ever let up the pressure long enough to see if she was really that interested? Did he ask her which position she preferred? Assuming that the defendant does not perjure himself, he would lack satisfactory answers to these questions. But even where the defendant did lie, a skilled cross-examiner who was willing to go into detail could probably establish easily enough when the interaction had not been communicative. It is extraordinarily difficult to keep up a consistent story when you are not telling the truth.

On the new criterion, the cross-examination focusses on the communicative nature of the ongoing encounter, and the communicative nature of an encounter is much easier to establish than the occurrence of an episodic act of resistance. For one thing, it requires that a fairly long, yet consistent story be told, and this enables us to assess the plausibility of the competing claims in light of a wider collection of relevant data. Secondly, in making noncommunicative sex the primary indicator of coercive sex it provides us with a criterion for distinguishing consensual sadomasochism from brutality. For even if a couple agree to sadomasochistic sex, bondage and whippings and the rest of it, the court has a right to require that there be a system of

signals whereby each partner can convey to the other whether she has had enough.²³ Thirdly, the use of a new criterion of communicative sexuality would enable us to introduce a new category of nonaggravated sexual assault which would not necessarily carry a heavy sentence but which would nonetheless provide an effective recourse against 'date rape'.²⁴

CONCLUSION

In sum, using communicative sexuality as a model of normal sex has several advantages over the 'aggressive-acquiescence' model of seduction. The new model ties the presumption that consensual sex takes place in the expectation of mutual desire much more closely to the facts about how that desire actually functions. Where communicative sex does not occur, this establishes a presumption that there was no consent. The importance of this presumption is that we are able, in criminal proceedings, to shift the burden of proof from the plaintiff, who on the contractual model must show that she resisted or was threatened, to the defendant who must then give some reason why she should consent after all. The communicative model of sexuality also enables us to give a different conceptual content to the concept of consent. It sees consent as something more like an ongoing cooperation than the one-shot agreement which we are inclined to see it as on the contractual model. Moreover, it does not matter, on the communicative model, whether a woman was sexually provocative, what her reputation is, what went on before the sex began. All that matters is the quality of communication with regard to the sex itself.

But most importantly, the communicative model of normal sexuality gives us a handle on a solution to the problem of date-rape. If

²³ The SAMOIS justification of sadomasochism rests on the claim that sadomasochistic practice can be communicative in this way. See *Coming To Power*, Samois (Boston: Alyson Publications, 1981).

²⁴ See sections 520e, Act No. 266, State of Michigan. Sexual assault in the fourth degree is punishable by imprisonment of not more than two years or a fine of not more than \$500, or both.

noncommunicative sexuality establishes a presumption of nonconsent, then where there are no overriding reasons for thinking that consent occurred, we have a criterion for a category of sexual assault that does not require evidence of physical violence or threat. If we are serious about date rape, then the next step is to take this criterion as objective grounds for establishing that a date rape has occurred. The proper legislation is the shortest route to establishing this criterion.

There remains, of course, the problem of education. If we are going to change the rules about what is socially acceptable in sexual relations, then it is only fair to let the public know. In a mass media society, this is not hard to do. A public information campaign will spread the news in no time at all. The real problem is the reluctance of the mass media to deal with questions of sexual relations and sexual intimacy. Its politicians are still curiously reluctant to stand up to an increasingly small sector of society that is unwilling to admit, despite all the evidence to the contrary, that anyone but well-meaning husbands and wives ever have sex. I would not be surprised if this sort of puritanical holdout were the very source of the problem of rape. Certainly, sexual ignorance must contribute significantly to the kind of social environment conducive to rape.

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