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TEXT, CONTEXT, AND THE PROBLEM WITH RAPE

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In this issue of the *Southwestern University Law Review*, Jody Armour addresses the importance of context.¹ The context in which a certain action takes place determines what we understand an action to mean. As Lawrence Lessig has written, text (what happens) plus context ("the associations that get made when [a] particular text is asserted") gives social meaning.² Evidence law is concerned with both text and context. To the extent a trial is about what actually happened, it is about determining the text. If there is competing testimony, the textual problem for evidence law is usually a question of credibility: Whose version of the text should we believe? A trial is also about context, however. It is about what nontextual facts might have motivated someone to act, what relationships might explain the parties' actions, and what background understanding will help the jury determine what the text might mean. Context is essential because without it, the jury is left simply to choose between two competing stories of what happened. The contextual problem for evidence law is relevancy: How much context does the jury need?

The problem with allowing too much context is that when we let context control, we open the door to potential bias. Context gives meaning to text by incorporating social norms that help us interpret certain actions.³ In addition to allowing the jury to come to a more

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1. See generally Jody David Armour, *Color-Consciousness in the Courtroom*, 28 Sw. U. L. Rev. 281 (1999).

2. Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 961 (1995).

3. To use one of Lessig's examples, the text of buckling one's seatbelt is the same no matter where one is, but how that act is interpreted depends on where one is. If one's context is a taxicab in Budapest, using a seatbelt would be interpreted as a sign of disrespect. See Lessig, *supra* note 2, at 952. The social norms in Budapest give pejorative meaning to the act of buckling one's seatbelt. See *id.* In contrast, if one's context is a taxicab in Chicago, because the social norms are different, the act of buckling one's seatbelt is interpreted differently.

complete understanding of what happened, context allows the jury to pass legally irrelevant normative judgment on who the actors are and on the propriety of what happened. That normative judgment, made through the jurors' understanding of social norms, is what can so readily constitute prejudice. Judges are supposed to bar contextual evidence that, even if it may help the jurors come to a more certain understanding of what happened, is likely to lead to prejudicial normative judgments.⁴ In this Essay, I will suggest that there are—as there always have been—compelling reasons to limit context in rape cases, but that we are doomed to an overreliance on context in such cases unless we start addressing the ambiguity surrounding the rape text. In short, I will argue that we cannot address the problem of rape until we start talking about sex.

Rape trials have always been context heavy. They have focused as much on who the characters are as on what actually happened. In doing so, they have become notorious havens for myths and stereotypes.⁵ Rape trials used to focus on the woman's context. Before *Federal Rule of Evidence* 412,⁶ there was a sense that a woman's sexual history was relevant because people thought it shed light on whether she was likely to tell the truth about being raped. Ostensibly, a woman who was sexually active was thought more likely to consent to sex and thus less likely to have been the victim of nonconsensual sex. In other words, if she was sexually active, it was more likely that her asserted text of nonconsent was a lie. Of course, the real reason people used the evidence, and the reason it is now excluded under Rule 412, is because the sexual history allowed the jury to make a character judgment about the complainant.⁷ Her history allowed the jury to determine whether the context of the sexual encounter was such that someone actually needed to be punished for what happened. Regard-

4. See FED. R. EVID. 403 (establishing the authority of judges to exclude evidence that is more unduly prejudicial than probative).

5. See generally Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013 (1991).

6. Under *Federal Rule of Evidence* 412, evidence offered to prove an "alleged victim engaged in other sexual behavior" or to prove an "alleged victim's sexual predisposition" is generally inadmissible in civil and criminal proceedings, subject to certain exceptions in criminal cases. FED. R. EVID. 412(a), (b).

7. Recently David Bryden and Sonja Lengnick have argued that the advocates of Rule 412 were misguided if they thought that a woman's sexual history had no probative value. See David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1278-83 (1997). A sexually active woman is more likely to consent, they insist, but she is also more likely than a nonsexually active woman to be raped; so, for the sexually active woman, sexual history is ambiprobative evidence. See generally *id.*

less of what the law said rape was or what the testimony revealed to have happened, the jury was allowed to decide whether the complainant was rapable.⁸ Rule 412 tried to eliminate the jury's ability to make that normative judgment by explicitly restricting juror access to some of the context of the story.

As verdicts began to trickle in after the passage of Rule 412, however, it became clear that despite attempts to limit jury access to context, jurors continued to rely heavily on normative judgments about the characters in front of them.⁹ Thus, a conviction has as much to do with jurors' willingness to blame the victim as it has to do with what actually happened.¹⁰ People, regardless of sex, race, and class, still believe that a woman's behavior and dress provoke and/or excuse rape.¹¹ As one meta-analysis of the various studies done with college populations summarized: "a rape victim in revealing clothing is held more responsible than a victim dressed otherwise, and a less 'respectable' rape victim is held more responsible than is a victim with 'good' character."¹² There is only so much context one can eliminate, and the jury will capitalize on any remaining context (i.e., dress, demeanor, or occupation) to which it has access.

In many situations, people also refuse to blame the men who commit rape. As one member of a jury that acquitted several university students of rape explained, the jury's "main concern . . . [was not] want[ing] to ruin the boys' lives."¹³ Two researchers studying rape

8. See Torrey, *supra* note 5, at 1024-37 (critiquing the myths about rape victims).

9. "[S]ome sorts of evidence about the complainant's character and habits will inevitably be available to the jury." Bryden & Lengnick, *supra* note 7, at 1287.

10. In one study designed to measure public perceptions of rape, the study's respondents imputed different levels of responsibility to a nun, a social worker, and a dancer in a factually identical acquaintance rape scenario. See Ronald E. Smith et al., *Role and Justice Considerations in the Attribution of Responsibility to a Rape Victim*, 10 J. OF RES. IN PERS. 346, 354 (1976).

11. See HUBERT S. FIELD & LEIGH B. BIENEN, JURORS AND RAPE: A STUDY IN PSYCHOLOGY AND LAW 54 (1980) (reporting 66% of the polled population believe that a woman's behavior and appearance provoke rape, and 34% thought that women should be held responsible for preventing their own rape); JOYCE E. WILLIAMS & KAREN A. HOLMES, THE SECOND ASSAULT: RAPE AND PUBLIC ATTITUDES 118 (1981) (finding that women's behavior is believed to be the second most frequent cause of rape); Cynthia E. Willis, *The Effect of Sex Role Stereotype, Victim and Defendant Race, and Prior Relationship on Rape Culpability Attributions*, in 26 SEX ROLES 213, 223 (Sue Rosenberg Zalk ed., 1992) (suggesting that traditional stereotypes cause victims to be perceived as less sincere and women to be responsible as gatekeepers in sexual relations).

12. Mark A. Whately, *Victim Characteristics Influencing Attributions of Responsibility to Rape Victims: A Meta-analysis*, 1 AGGRESSION AND VIOLENT BEHAV. 81, 91 (1996).

13. Joseph P. Fried, *St. John's Juror Tells of Doubts in Assault Case*, N.Y. TIMES, Sept. 14, 1991, at 24 (quoting one juror in a St. John's University sexual assault trial who eventually agreed to acquit after being the only juror holding out for convictions of two of the three defendants accused of sexually assaulting a female student).

complainants in Boston found that most rape victims were hesitant to proceed with formal charges; seventeen percent said that they were hesitant because they wanted to avoid sending a person to jail, and nine percent said that they actually felt sorry for the rapist.¹⁴ Despite what people know the text to be, they refuse to blame men if the context does not demand it.

Perhaps in an effort to combat this sympathy for rapists, or in frustration with the failure of rape reform efforts to achieve anticipated success,¹⁵ the most recent rape reform effort, *Federal Rule of Evidence* 413,¹⁶ adopted an "if you can't beat 'em, join 'em" strategy and shifted the focus back to context. Whereas Rule 412 restricts juror access to the victim's context,¹⁷ Rule 413 increases juror access to the defendant's context. Ostensibly Rule 413 allows the admission of prior acts of sexual assault because it allows the jury to better determine whether the defendant is likely to rape.¹⁸ Relying on mistaken assumptions about rapist psychopathology and recidivism, proponents of Rule 413 presume that one who has raped before is particularly likely to rape again.¹⁹ The evidence regarding lack of both psychopathology and particular recidivism belie the logic of these presumptions.²⁰ Moreover, by relying on these mistaken understandings of the contexts in which rape happens, Rule 413 encourages jurors to make normative assessments about a defendant's character—not factual judgments about what actually happened—and perpetuates mistaken,

14. See LYNDY LYTLE HOLMSTROM & ANN WOLBERT BURGESS, *THE VICTIM OF RAPE: INSTITUTIONAL REACTIONS* 58 (1978).

15. The weight of the collective evidence strongly suggests that most rape reforms have had no impact on conviction rates. "In most of the jurisdictions . . . studied, the reforms had no impact." CASSIA SPOHN & JULIE HORNEY, *RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND IMPACT* 173 (1992). Some reform efforts have led to more cases getting into the system, but the most comprehensive study of rape reform efforts concludes that reforms have not led to any better evaluation of the cases themselves. See *id.* at 104.

16. Under Rule 413, in a criminal case involving sexual assault, evidence that the defendant committed previous sexual assault offenses is admissible for any relevant purpose. See FED. R. EVID. 413(a).

17. Under Rule 412, in a civil or criminal case, evidence offered to prove that the victim engaged in other sexual behavior or has any sexual predisposition is inadmissible. See FED. R. EVID. 412(a)(1), (2).

18. See FED. R. EVID. 413(a).

19. See David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15, 22, 24 (1994) (defending Rule 413); see also 140 CONG. REC. S12,990 (daily ed. Sept. 20, 1994) (statement of Senator Robert Dole regarding the likelihood of rapists to rape again).

20. See Katharine K. Baker, *Once A Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 576-583 (1997).

but widely held views about who rapists are.²¹ It allows jurors to do to men just what Rule 412 was supposed to prevent jurors from doing to women.²² It perpetuates an overreliance on context. This overreliance on context prevents us from confronting rape for the widespread, multidimensional, and socially accepted practice that it is because it encourages jurors to rely on the myths and stereotypes that permeate their contextual understanding.

In light of these problems with context, one might think that rape reformers should call for a vigilant allegiance to text. Only by focusing on what actually happened will we be able to rid these trials of the stereotypes that infect them. This strategy seems all the more appropriate in light of the significant reforms that have been made in the textual area. Many states have changed their statutory definitions of rape or sexual assault.²³ As a matter of law, these states have changed the story that needs to be told in order to find guilt. Most states now de-emphasize the requirement that rape involve force by the defendant, at least by removing the need to prove a victim's resistance,²⁴ and several states have rendered illegal any act of nonconsensual sexual touching.²⁵ With these new statutes, one might be hopeful that trials

21. See *id.* at 597 (arguing that Rule 413 perpetuates the belief that rapists are depraved perverts and that the more jurors believe this, the less likely they are to convict someone who does not appear to be a depraved pervert).

22. I want to emphasize that my argument is not based on relevancy here. A woman's prior acts of consensual sexual activity are, if not wholly irrelevant, see Bryden & Lengnick, *supra* note 7, at 1277-78, only very marginally relevant to whether she might have been raped. A man's prior acts of nonconsensual activity are significantly more relevant to whether he would rape again. Rapists are not more recidivistic than other criminals, but the recidivism statistics strongly suggest that they are still more likely than men who have not raped before to rape again. See Baker, *supra* note 20, at 578-79. Thus, Rule 413 is not problematic because of any "asymmetry" between Rule 412 and Rule 413. The contextual evidence that Rule 412 excludes is only marginally relevant and very prejudicial. The contextual evidence that Rule 413 permits is quite relevant, but also, like most prior acts evidence, very prejudicial. See JOHN HENRY WIGMORE, EVIDENCE IN TRIAL AT COMMON LAW § 58.2, at 1212 (Peter Tillers rev. ed., 1983) (explaining that prior acts evidence "is objectionable not because it has no appreciable probative value but because it has too much"). If Rule 413 is wrong, it is wrong because the potential prejudice to the defendant and the perpetuation of false beliefs about rapists outweigh the probative value of the prior acts evidence. See Baker, *supra* note 20, at 590-97.

23. See Spohn & Horney, *supra* note 15, at 23, 24 (explaining that Pennsylvania, among other states, no longer requires the victim's resistance as an element of a rape, see PA. CONS. STAT. ANN. § 3107 (Purdon 1983), and noting that Illinois, among other states, has defined consent more clearly as "a freely given agreement to the act of sexual penetration or sexual conduct in question," ILL. ANN. STAT. ch. 38 §§ 12-17 (South-Hurd. Supp. 1985)).

24. See *id.*

25. See Ronald J. Berger et al., *The Dimensions of Rape Reform Legislation*, 22 L. & Soc'y REV. 329, 350 app. 1 (1988) (indicating that fifteen states criminalize nonconsensual touching, and five states criminalize nonconsensual penetration).

would now focus only on whether there was consent, instead of focusing on the kinds of people who might consent or the context in which the action took place.

There is a problem, however, with asking jurors to draw conclusions based solely on the textual question of consent. As currently understood, despite the various reform efforts, the text asserted is necessarily ambiguous. This ambiguity stems from a cultural willingness to see rape as a substitute for sex, from a demonstrable chasm between men and women's perception of nonconsent, and from a cultural resistance to talking about sex at all.

For a jury to find that the text "says" rape, the jury must understand what rape is. If rape is defined as nonconsensual sex, the jury must have an understanding of what nonconsensual sex is. To a certain extent, they do. When a man jumps out of the bushes on a dark night with a knife in his hand and forces a woman to have intercourse, that is nonconsensual sex. The tricky part, of course, is what nonconsensual sex looks like when the signs of nonconsent are less clear.

Catharine MacKinnon argues that many women have a hard time telling the difference between consensual and nonconsensual sex given women's limited ability to say no in a world of male dominance.²⁶ People have rejected MacKinnon's position as radical,²⁷ but it is essentially the same position as Richard Posner's when he asserts that "rape appears to be primarily a substitute for consensual sexual intercourse rather than a manifestation of male hostility"²⁸ If there is any truth in what either MacKinnon or Posner argue (and given the extent of their theoretical differences, it seems unlikely that there could be no truth to an empirical judgment that they both have made), there must be *some* cultural confusion about the distinction between consensual and nonconsensual sex—at least in the absence of knives and bushes and strangers.

26. "[T]he 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." CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 174 (1989).

27. See, e.g., RICHARD POSNER, *OVERCOMING LAW* 367 (1995) (arguing that MacKinnon's views about the comparability between sex and rape have "far outrun the facts"); RENE DENFELD, *THE NEW VICTORIANS: A YOUNG WOMAN'S CHALLENGE TO THE OLD FEMINIST ORDER* 8-10 (1995) (arguing that "extremists" like MacKinnon drive young women away by insisting that intercourse is like rape); Kenneth Jordan, Editorial, *Democrats Tax-Cut Plan Shows They Don't Understand the Problem*, ATLANTA J. & CONST., Dec. 18, 1991, at A15 (suggesting that MacKinnon's position would lead to the outlawing of heterosexual sex).

28. RICHARD A. POSNER, *SEX AND REASON* 384 (1992).

Indeed, it only makes sense to substitute nonconsensual for consensual sex, as Posner insists men do,²⁹ if the two acts are seen as alike in some sort of meaningful way. If they were not seen as alike, but instead were seen as two completely different acts, then it would make no sense to substitute one for the other.³⁰ If it were always perfectly obvious when one was actively assenting to sexual contact, then there would be no problem distinguishing between the two acts. If sex was understood to be more about mutual listening and communication and less about unilateral action, then acts of nonconsensual sex would seem oxymoronic. As long as our understanding of what sex is allows us to accept consensual and nonconsensual sex as alike in some meaningful way, it may be difficult for jurors to determine whether the sex was consensual.

As it is now, the extent to which men and women's perceptions differ on the question of consent is staggering. In one of the most comprehensive studies on sexual practices in America, researchers at the University of Chicago found that twenty-two percent of women reported having been forced by a man to do something sexual, while only three percent of the men reported ever using force to do something sexual to a woman.³¹ As the study summarized "[t]here seems to be not just a gender gap but a gender chasm in perceptions of when sex was forced."³² R. Lance Shotland concluded that misperception is the most likely cause of date rape if the rape happens early in a relationship.³³ Eugene Kanin's study of admitted rapists on one college campus found that some men who acknowledged using force to get sex had trouble determining what consent was because similar amounts of force on their part met with different levels of resistance on the part of their dates.³⁴ In other words, some women effectively fought back, but other women gave up, even though the men used the

29. *See id.*

30. If consensual and nonconsensual sex are seen as alike, it can only be because we define sex as being about intercourse, orgasm, or some other potentially noncommunicative act. If sex were culturally understood to be more about communication than about intercourse or orgasm, jurors could more easily understand the difference between sex and rape.

31. *See* ROBERT T. MICHAEL ET AL., *SEX IN AMERICA: A DEFINITIVE SURVEY* 223, 227 (1994).

32. *Id.* at 221.

33. *See* R. Lance Shotland, *A Theory of the Causes of Courtship Rape: Part 2*, 48 J. SOC. ISSUES 127, 130 (1992).

34. *See* Eugene Kanin, *Date Rape: Unofficial Criminal and Victims*, 9 VICTIMOLOGY 95, 102 (1984).

same amount of force in each situation. When the other women did not put up as much physical resistance, the men presumed assent.³⁵

Kim Scheppele suggests that “[g]iven the current state of divergent perceptions of men and women, the . . . troubling question for law is not the question of truth or falsehood, but instead the question of *which* true version of a particular story should be adopted as the official version of what happened.”³⁶ It seems unlikely, however, that we will ever arrive at a consensus on what the “official” story should be until we have a shared understanding of what happened. And it is wildly optimistic to think that we can come to a shared understanding of what happens in these situations, unless we start talking about it. Yet people refuse to talk about sex or what consent really means.

Most people are very uncomfortable talking about sex, even with those with whom they are very close. People, particularly women, resist articulating desire before sex because they do not want to be seen as unfeminine and loose.³⁷ Many women believe that they are supposed to say “no,” not just because they should not want to have sex, but because it is the polite thing to say. Refusing to talk about sex is condoned, if not encouraged, because it is perceived to be the most private and personal of experiences—despite the fact that it involves more than one person.³⁸

Both men and women reject calls to increase verbal communication during sexual activity because such communication is thought to ruin the passion and romance of the moment. Consider, for example, the virulent reaction to the Antioch College Sexual Offense Policy, which required verbal consent before moving to a higher level of sexual intimacy. *Time* magazine called the policy “extreme”;³⁹ *Newsweek* claimed that it “stultif[ied] relationships”;⁴⁰ and George Will claimed

35. *See id.*

36. Kim Lane Scheppele, *The Re-Vision of Rape Law* 54 U. CHI. L. REV. 1095, 1111 (1987).

37. Women say “no” because they do not want men to think that they are “easy,” “loose,” or that they are too eager. *See* JOHN M. MACDONALD, RAPE: CONTROVERSIAL ISSUES, CRIMINAL PROFILES, DATE RAPE, FALSE REPORTS AND FALSE MEMORIES 65 (1995).

38. One Korean-American man accused of rape explained that he was not forthcoming when questioned by police investigators because talking about the sexual experience would have offended his sense of privacy. *See* Todd Nelson, *Sex Was Consensual, Defendant in Date-Rape Trial Testifies*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 2, 1996, at B6, available in LEXIS, News Library, NWSOBV File. “It’s just something deeply personal. It’s just the way I was brought up. I wasn’t trying to hide anything.” *Id.* The privacy and silence that we afford to all sexual matters gave him a shield behind which he could hide his behavior from the police.

39. Nancy Gibbs, *When Is it Rape?*, TIME, June 3, 1991, at 52-53.

40. Sarah Crichton, *Sexual Correctness: Has it Gone Too Far?*, NEWSWEEK, Oct. 25, 1993, at 52.

that "hormonal heat [would] be chilled by Antioch's grim seasoning of sex with semi-colons."⁴¹

Subsequent investigations reveal that the policy has had minimal, if any, chilling effect.⁴² Contrary to widespread concern, verbal communication and sexual expression are not incompatible. People just presume that verbal communication and sexual expression are incompatible. People presume this, in part, because explicit communication removes ambiguity and, for many, it is ambiguity that creates mystery and romance.⁴³ That romance comes at a high price, however. Ambiguity increases the miscommunication that results in coercive sex, and ambiguity makes evidentiary searches for truth all but impossible.

This difficulty is exacerbated by an accepted distrust of those people who do explicitly talk about sex. This distrust operates both in conversations between sexual partners and in conversations with third parties about previous sexual experiences. For instance, we do not really expect people, particularly young people, to know what they are talking about when they profess love, commitment, or desire. It is very common to say what one thinks the other person wants to hear, regardless of whether one knows it to be true. It is not so much that we believe that people lie; we just do not demand of lovers, as we do of car salesman, for instance, that they be responsible for the consequences of their representations.⁴⁴ As Stephen Schulhofer notes, "there does not appear to be a clear social consensus about the circumstances in which misrepresentation in matters of sexual intimacy is improper."⁴⁵

In addition, polls taken during the recent political scandals⁴⁶ suggest that we often accept dishonesty and half-truths when it comes to representations others make about sex. Much of the American public

41. George F. Will, *Sex Amidst Semi-Colons*, NEWSWEEK, Oct. 4, 1993, at 92.

42. See Jason Vest, *The School That's Put Sex to the Test, At Antioch, A Passionate Reaction to Consent Code*, WASH. POST, Dec. 3, 1993, at G1, available in 1993 WL 2085355; Jane Gross, *Combating Rape on Campus in a Class on Sexual Consent*, N.Y. TIMES, Sept. 25, 1993, at A1, A9.

43. Professor Neil Gilbert suggests that with efforts to remove ambiguity in sexual interaction "the kaleidoscope of intimate discourse—passion, emotion, turmoil, entreaties, flirtation, provocation, demureness—must give way to cool-headed contractual sex." Neil Gilbert, *The Phantom Epidemic of Sexual Assault*, 103 PUB. INTEREST 54, 59 (1991).

44. Some puffing is permitted in the commercial context, but advertisers who make unilateral representations are usually held responsible for those representations. See, e.g., *Carlill v. Carbolic Smoke Ball Co.*, 1 Q.B. 256 (C.A. 1892).

45. Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 LAW & PHIL. 35, 92 (1992).

46. I am referring particularly to the scandal involving President Clinton and Monica Lewinsky. See James Bennet & Janet Elder, *Despite Intern, President Stays in Good Graces*, N.Y. TIMES, Feb. 24, 1998, at A1.

considers it appropriate for people to lie about their sex lives.⁴⁷ Sometimes this lying is done to protect the participants, and sometimes it is done to protect third parties. And sometimes it is just a form of boasting. Rarely is such lying considered all that improper. Indeed, for many it may be considered the most appropriate way to handle a situation.⁴⁸

In sum, people are not really sure that they know the difference between consensual and nonconsensual sex. It is clear that men and women often have different understandings of what "consensual" means, and the confusion and misperception are perpetuated by a culture that scorns explicit discussions of sex—whether it be before, during, or even after the act. When people do discuss sex we tend not to believe them anyway.

Imagine what these textual problems might look like if we were adjudicating not a rape, but a traffic violation. The jury is supposed to figure out whether the traffic light was red or yellow. Many people have a hard time telling the difference between red and yellow, but no one ever talks about it. Few would dispute that some people see yellow, when other people see red, but this disagreement is never discussed because one is not supposed to talk about traffic lights. Whenever people do talk about traffic lights, they tend toward hyperbole, and lie: "I've never run a red light." People say this to "puff" for themselves or to protect others who might be hurt by an honest discussion of what one saw. At trial, one party says he saw yellow. The other party says that she saw red. If the jury decides it was red, someone goes to jail.

How many juries will be comfortable finding, beyond a reasonable doubt, that the light was red and not yellow? How many juries will emerge from the jury room believing that the light was actually a shade of orange, even though neither party testified that the light was orange and the law does not recognize orange as a color category. Will not most members of that jury be desperate to find out more information about the parties so that they can rely on something besides just the testimony about whether the light was red or yellow? Will they not cry out for context?

47. Fifty-nine percent of people polled by the *New York Times* in February of 1998 thought that President Clinton had lied about his sex life under oath, but fifty-nine percent also thought that this lying was understandable. *See id.*

48. During the course of 1998, the propriety of lying about one's sex life was a subject that most people were talking about. I found numerous people who had no personal problem with, or who thought that the general public would have no problem with, the President lying because it was the most responsible course of action to protect both his family and his alleged mistress.

If it is dangerous to focus too much on context because it allows jurors to make decisions based on factors irrelevant to the case before them, and if it is particularly dangerous to focus on context in rape cases because of the historical biases and stereotypes that people bring with them,⁴⁹ then people concerned about rape convictions must start focusing on text. Given the interplay between nonconsensual and consensual sex, this means focusing not only on what rape looks like, but on what sex looks like. Several scholars have begun to do this. Lois Pineau stresses that sex must be “the practice of a communicative sexuality, one which combines the appropriate knowledge of the other with respect for the dialectics of desire.”⁵⁰ Martha Chamallas focuses on three permissible motivations for sexual contact: procreation, emotional intimacy, and mutual physical pleasure.⁵¹ Although some commentators, including myself, have questioned the utility of these definitions for some reform efforts,⁵² they undoubtedly do help us understand what sex might be. This is an essential task because until we have a clearer *shared* understanding of what sex is, it will be very difficult for the laws of evidence to ever find rape. If the goal is to make text what matters, we must start addressing the problems with that text as culturally understood.

Inevitably, and perhaps ideally, some ambiguity will remain. To quote folksinger Nanci Griffith, “no one ever really knows the heart of anyone else,”⁵³ and that is probably the way we want to keep it. But there is a huge difference between a world in which people communicate even if they do not fully understand each other and a world in which people refuse to communicate because they pretend to fully understand each other. Only by coming to a collective recognition of the difference between consensual and nonconsensual sex can we expect jurors to feel comfortable drawing lines between the competing texts, instead of passing judgment on the context.

49. See *supra* notes 10-22 and accompanying text.

50. Lois Pineau, *Date Rape: A Feminist Analysis*, 8 *LAW & PHIL.* 217, 234-35 (1989).

51. See Martha Chamallas, *Consent, Equality and the Legal Control of Sexual Conduct*, 61 *S. CAL. L. REV.* 777, 784 (1988).

52. See Baker, *supra* note 20, at 600 (questioning whether some rapists might not be striving for the very qualities that Pineau and Chamallas endorse); Schulhofer, *supra* note 45, at 70 (questioning whether it is possible or desirable to legally enforce “healthy” relationships or “good sex”).

53. “You’re saying you were thinking that you thought you knew me well,
But no one ever knows the heart of anyone else.
I feel like Garbo at this Late Night Grand Hotel,
‘Cause living alone is all I’ve ever done well.”

NANCI GRIFFITH, *Late Night Grande Hotel*, on *LATE NIGHT GRANDE HOTEL* (UNI/MCA Records 1991).

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