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ABSTRACT: This article suggests that the social meanings of both rape and sex help explain the prevalence of rape. Evolutionary biology can explain why it is evolutionarily beneficial for men to rape, but one needs to examine social norms before one can explain why rape is so hard to punish, why men are socially motivated to rape, and what the law should do about it. This article suggests that only by debunking the stereotypes that inhibit rape prosecutions, changing the social norms that encourage men to rape, and clearly distinguishing, as a matter of social understanding, the biologically identical acts of rape and sex can the law hope to curb the incidence of rape.

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“[E]volution simply is It says nothing about what ought to be.”¹

The law is normative. It is allowed, indeed compelled, to decide what is right and wrong. Rape is wrong. The physical control and sexual use of another’s body without that person’s consent is wrong. Biologists may tell us that rape is, that it always has been, and that it is universal.² Biologists may also be able to explain why, from an evolutionary perspective, this is so. But the law must be concerned with trying to make it not so. The law must try to stop rape.

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1. DAVID P. BARASH, *THE WHISPERINGS WITHIN* 70 (1979)

2. See Neil M. Malamuth, *An Evolutionary-Based Model Integrating Research on the Characteristics of Sexually Aggressive Coercive Men*, in *ADVANCES IN PSYCHOLOGICAL SCIENCE* 151, 156–57 (John G. Adair et al. eds., 1998).

One way the law tries to stop certain behaviors, like acting aggressively for instance, is to penalize it. Striking back against someone who has injured you may be natural and universal, but the law punishes people who physically retaliate in order to create a disincentive to engage in aggressive behavior. The law uses a comparable strategy to discourage rape. By criminalizing rape, the law tries to make the cost of rape so high (and, from an evolutionary perspective, so likely to result in decreased reproductive potential for the rapist) that the behavior will not prosper. Unfortunately, this strategy has not been effective. The criminal proscriptions on rape have massively under-deterred. Many more rapes are reported than are prosecuted,³ and many tried rapists are acquitted.⁴ Why is criminalization such an ineffective means of curtailing rape? First, victims often do not report rape because they blame themselves for men's sexual aggression⁵ or because they do not want to endure the trauma of a rape trial.⁶ Second, victims who do want to prosecute are often turned away by police or prosecutors who think that the case does not have enough merit to proceed.⁷ Third, those cases that are prosecuted often result in acquittal because juries blame the victim⁸ or refuse to blame the perpetrator.⁹ Fourth, rapists often fail to see their behavior as morally

3. According to one of the most comprehensive national surveys of rape victims, 84% of all rapes are not reported to the police. See NATIONAL VICTIM CENTER & CRIME VICTIMS RESEARCH & TREATMENT CENTER, *RAPE IN AMERICA: A REPORT TO THE NATION* 6 (1992).

4. Gary LaFree's landmark Indianapolis study found that of 881 reported rapes, 326 resulted in arrest and only 103 resulted in conviction. GARY D. LAFREE, *RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT* 129-31 (1989).

5. See Ronald J. Berger et al., *Sexual Assault in a College Community*, 19 SOC. FOCUS 1, 15 (1986) ("Respondents often [feel] responsible for nonconsensual sexual contact and even intercourse because they somehow [think] they should have had more sense . . . They question their 'right' to withdraw consent once the sexual activity ha[s] begun and man ha[s] become aroused.")

6. See LYNDY LYTTLE HOLMSTROM & ANN WOLBERT BURGESS, *THE VICTIM OF RAPE: INSTITUTIONAL REACTIONS* 58, tbl. 4 (1978) (explaining that 24% of women who did not prosecute said that they decided not to because they wanted to avoid the ordeal of court).

7. This practice is referred to as "unfounding" a case. Police or prosecutors decide that the victim's claims are not sufficiently founded in verifiable facts to move forward with the prosecution. See Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 ST. JOHN'S L. REV. 979, 1010-11 (1993).

8. Consider the comments of one juror in a Florida prosecution for a rape in which the defendant was charged with knifing, beating with a rock, and twice raping the victim. "We felt she . . . asked for it the way she was dressed . . . The way she was dressed with that skirt, you could see everything she had. She was advertising for sex." *Jury: Woman in Rape Case "Asked for It,"* CHI. TRIB., Oct. 6, 1989, at 11. See Katharine K. Baker, *Once A Rapist: Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 587 (1997).

9. See Baker, *supra* note 8, at 588 (suggesting that people can believe a rape took place, but do not consider the defendant's behavior culpable enough to justify sending the defendant to jail).

culpable.¹⁰ Because many men have not internalized the wrong of rape, they do not stop themselves from engaging in the behavior.¹¹

These obstacles to prosecution are social constructions. They exist totally apart from biological theory. Rape may be biologically driven, but what we think about rape, what it is, why it is wrong,¹² when it is wrong,¹³ and who is responsible¹⁴ is a function of social norms and values. Sexual violence may be natural and universal, but the *crime* of rape is social. It is the law that declares it wrongful. Thus, if the law wants to reduce rape, it must address rape's social constructions.

This short piece highlights how our understanding of who rapes and who can be raped is permeated by demonstrably false stereotypes, many indirectly supported by evolutionary literature, that greatly hinder the law's ability to punish forced sexual contact. It also exposes ways rapists understand rape as a means of acquiring socially constructed goods having nothing to do with reproductive success. If the law is to curb rape, the law must change the social institutions that foster rape as an instrumental means of acquiring social goods. Finally, it suggests that instead of discarding the biological theories that fail to account for the social constructions of rape, feminists should try to understand how rape can operate at both a social and a biological level so that the law can more effectively curtail the incidence of rape.

10. See Eugene Kanin, *Date Rape: Unofficial Criminals and Victims*, 9 VICTIMOLOGY 95, 96 (1984) (claiming rapists see themselves as technical criminals but not real criminals); Neil M. Malamuth & Karol Dean, *Attraction to Sexual Aggression in Acquaintance Rape*, in ACQUAINTANCE RAPE: THE HIDDEN CRIME 229, 234 (Andrea Parrot & Laurie Bechhofer eds., 1991) (asserting men who indicate a likelihood to force sex do not necessarily indicate a likelihood to engage in other "nonnormative" behavior).

11. Research suggests that the best societal defense to date rape is internalization of the moral proscription against it. A 1992 study of college males found that "when moral condemnation was strong . . . respondents reported a nonzero probability of committing a sexual assault in only 6% of the scenarios. Conversely, when moral prohibitions were low, respondents reported some probability of committing sexual assault in 45% of the scenarios." Ronet Bachman et al., *The Rationality of Sexual Offending: Testing a Deterrence-Rational Choice Conception of Sexual Assault*, 26 LAW & SOC'Y REV. 343, 346 (1992).

12. For instance, the historic need to protect "white womanhood" from African-American rapists suggests that interracial rape was a crime against a white man's property, not a crime against the victim herself. See Baker, *supra* note 8, at 595.

13. Until recently, marital rape was legal in most states and is still legal in one. See 21 OKLA. STAT. § 1111 (Supp. 1995).

14. One of the most extensive studies of citizen perception of rape found that 66% of the polled population believed that a woman's dress and demeanor provoked rape. Thirty-four percent of those polled thought that a woman should be held responsible for her own rape. See HUBERT S. FEILD & LEIGH B. BIENEN, *JURORS AND RAPE: A STUDY IN PSYCHOLOGY AND LAW* 54 (1980).

I. SOCIAL CONSTRUCTIONS THAT IMPEDE PROSECUTION

If the law is to address the social construction of rape, it must also address the social construction of sex. Society, through language and other systems of meaning, defines what sex is just as it defines what rape is. What we think about sex (when it is appropriate and why it is appropriate) is a function of social norms and values. Biologically, both rape and sex may be about reproduction, but socially they are about different things—very different things.

Socially, we are taught that sex is about pleasure and intimacy and, for the most part, is okay. Rape, in contrast, is about violation and domination and, for the most part, is not okay. Thus, socially we are taught that sex and rape are different, but except in extreme cases, we are not well taught on how to tell the difference. When a stranger with a weapon attacks a woman on a dark night and has intercourse with her, that is rape and everyone knows it. But when an acquaintance has sex with a woman who invited him into her house, many people are confused about whether that event could be rape. In neither situation do people doubt the biological fact that intercourse took place, but people are not sure whether the latter situation is rape as they have been taught to define it.

One of the reasons for this confusion is that many people believe, in contrast to the evolutionary literature, that only psychopaths rape.¹⁵ Or people believe, more in line with the evolutionary literature, that all men have an overpowering sex drive¹⁶ that can be irrepressibly stimulated by overtly sexual behavior in women.¹⁷ People who believe this also tend to believe that it is a woman's responsibility not to stimulate a man's sex drive.¹⁸ If she does, the rape is her fault.

The first idea, that only psychopaths rape, explains why juries do not convict men who look like such nice guys. It explains why juries resist convicting clean-cut college students and married gentlemen, particularly if these men's use of force does not involve knives and guns or other kinds of battery. It also explains why jurors convict men, particularly African-American men, who fit the

15. The evolutionary literature argues that rape is either an adaptive behavior or an evolutionary by-product. See Craig Palmer, *Human Rape: Adaptation or By-Product?*, 28 J. SEX RES. 365–86 (1991). Both of these theories suggest that rape is normal, not psychopathological. Nonetheless, studies show that people still believe that a perpetrator's mental illness is the primary cause of rape. See JOYCE E. WILLIAMS & KAREN A. HOLMES, *THE SECOND ASSAULT: RAPE AND PUBLIC ATTITUDES* 116–18 (1981). In arguing for the passage of Federal Rule of Evidence 413, which allows the admission of prior acts of sexual assault against those accused of sexual assault, the chief administration sponsor of the legislation argued that the rule was necessary because rapists constitute a "small class of depraved individuals." David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15, 24 (1994). During the last thirty years, social science rape research clearly debunks this myth. See Baker, *supra* note 8, at 576–77.

16. See Lee Ellis, *A Synthesized (Biosocial) Theory of Rape*, 59 J. CONSULTING & CLIN. PSYCHOL. 631, 632–33 (1991) (reporting that men have much greater sex drive than women).

17. See FEILD & BIENEN, *supra* note 14, at 54.

18. *Id.*

stereotype of a bad man.¹⁹ The second idea, that women are responsible for their own rape, explains why so many people excuse rapists by saying “she asked for it.” Both these ideas, that rapists are crazy and that women provoke rape, are widespread and firmly held. Indeed, one of the most extensive surveys of citizen attitudes toward rape found that most people thought that rapist mental illness was the primary cause of rape and that women’s behavior or appearance was the second most frequent cause of rape.²⁰

It is these socially constructed beliefs about rape that the law must change so that it can convict rapists and increase deterrence. It can do this through education that overcomes the rape-as-psychopathology fallacy and the social norms that allow people to blame women for male aggression. Any correlation between women’s behavior and male aggression should not, and legally must not, excuse the aggression.²¹

At the trial level, the law can work to minimize the effect of social norms that blame women and refuse to blame men by limiting jurors’ access to character evidence. For example, excluding the victim’s prior sexual history²² or the defendants’ prior good or bad acts²³ can help avoid reliance on stereotypes that impede conviction. If the jury does not know that the victim was wearing a short skirt, it cannot blame her for doing so.²⁴ Comparably, by limiting the character evidence that is introduced to stereotype the defendant, a court will decrease the likelihood of the jury convicting or acquitting based on its preconceptions of who a rapist is.²⁵ As Morrison Torrey has suggested, the law can also work with jurors

19. For a discussion of the disturbing ease with which African-American men have been convicted of rape, see Baker, *supra* note 8, at 585–86, 594–97.

20. WILLIAMS & HOLMES, *supra* note 15, at 116–18.

21. For many years in the Southern parts of this country, African-American parents taught their children not to look into the eyes of white people for fear of provoking violence. The need for these parental warnings was a very sad, if rational, statement on the acceptability of violence in that culture. That kind of interracial violence is no longer tolerated, and African-American parents are much less likely to teach their innocent children to take responsibility for controlling the immoral violence of others. The goal of many concerned with rape reform is to reach a comparable level of intolerance for the violence implicit in rape so that women will no longer be held responsible for controlling the immoral violence of men.

22. See FED. R. EVID. 412 (prohibiting the admission of a rape victim’s prior sexual history into evidence).

23. Federal Rule of Evidence 413 allows the admission of prior act evidence that is likely to exacerbate judgments based on stereotype. See generally Baker, *supra* note 8.

24. As David Bryden and Sonja Lengnick have pointed out, even with rape shield laws “some sorts of evidence about the complainant’s character and habits will inevitably be available to the jury.” David Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1287 (1997). For instance, the complainant’s skirt may come into evidence for the purpose of showing torn clothing or semen stains. If it does, the jury can see how short the skirt is.

25. For an analysis of why juries in rape trial are particularly likely to rely on stereotypes instead of performing the harder task of actually evaluating the complex characters in front of them, see Katharine K. Baker, *A Wigmorean Defense of Feminist Method*, 49 HASTINGS L. REV. 861 (1998).

to help them understand why they hold stereotypes and what they can do to curb their stereotypical thinking.²⁶

Prior to the trial stage, the law can establish programs that discourage women from feeling responsible for the sexual aggression of others and that encourage women to come forward.²⁷ In addition, those in the legal field can educate police and prosecutors about the tendencies to stereotype and can limit the discretion given to any one individual to decide whether to proceed with prosecution.²⁸

II. SOCIAL CONSTRUCTIONS THAT ENCOURAGE RAPE

Educational efforts to alter beliefs about rape must not be limited to making it more difficult to blame women and less difficult to blame men, however. The law must also address how men have come to use rape as a means of capturing socially constructed goods, such as control, esteem, and respect. Although rape may be explained at a reproductive level, potential reproductive success is not what most men are thinking about when they rape. If the law is to curb the behavior of rapists, it must recognize that rape is used by men as a conscious, instrumental tool to gain access to power, prestige, and community.

Consider the comments of several of Timothy Beneke's subjects. These men do not admit to having raped, but they can explain what rape means to them.

If I were actually desperate enough to rape somebody . . . it would be a very spiteful thing, just being able to say, 'I have power over you and I can do anything I want with you'. . . .²⁹

When you see a girl walking around wearing real skimpy clothes, she's offending you and I guess rape would be a way of getting even.³⁰

These men do not understand rape as a means of reproduction or even an impulsive sexual need; they understand rape as a conscious way of saying "I have power over you" and a means of "getting even." Rape for these men is a combative tool to be used against women.

Some men also come to understand that rape can be used as a tool against other men. While biologists suggest that inter-male aggression in humans and

26. 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).

27. Agencies that provide services to rape victims overwhelmingly conclude that increased public education about acquaintance rape and expanded counseling and advocacy services would increase women's willingness to report rape. See NATIONAL VICTIM CENTER & CRIME VICTIMS RESEARCH & TREATMENT CENTER, *supra* note 3, at 11.

28. Some communities have imposed this rule. Eugene Kanin studied one Midwestern police department that required all police officers to pursue each reported rape, regardless of the perceived merits of the complaint. Eugene J. Kanin, *False Rape Allegations*, 23 ARCH. SEX. BEHAV. 81, 83-85 (1994).

29. TIMOTHY BENEKE, MEN ON RAPE 54 (1982).

30. *Id.* at 44.

other animals can be linked to men fighting over the right to impregnate women,³¹ the study of contemporary rape as socially understood suggests that potentially impregnating women through rape is itself a form of inter-male aggression.³² It is not just that sexual motivation fosters aggression, it is that aggression fosters rape.³³

As a military device, rape is a form of aggression used against other men. Consider the scene viewed by a U.S. helicopter pilot in Viet Nam who flew over the site of the My Lai massacre. He looked down and saw a body. "It was a woman She [had been left] spread-eagled She had an 11th Brigade patch between her legs as if it were some type of display, some badge of honor."³⁴ By leaving their victims on display, indeed by publicizing their rapes at all, the U.S. soldiers at My Lai turned their rapes into symbolic statements, messages of sorts, that would have meaning for the enemy. By publicizing their rapes with the 11th Brigade patch, the soldiers indicated that they understood that meaning to be infused with their status as U.S. soldiers. That is the only reason they would have linked the patch to the rape as they did. The meaning in this context was probably best described by Eldridge Cleaver when he wrote that "[r]ape is an insurrectory act. It delighted me that I was defying and trampling upon the white man's law, upon his system of value and that I was defiling his women I felt I was getting revenge."³⁵

Rape is also used as a bonding activity.³⁶ Engaging in a group rape can be a means of relating to other men and glorifying the male bond without risking the stigma of homosexual conduct. When Nathan McCall wrote of joining his former gang's "train" on a woman, he wrote that he did so despite feeling sorry for the woman, because the rape "marked [their] real coming together as a gang."³⁷ The rape had symbolic importance for McCall and his peers, not because it signified control over the woman or triumph over their foes, but because it was a means of demonstrating their connection to one another.

Thus, it may be that men have always raped because it is genetically beneficial for them to do so, but it is also socially beneficial for them to do so. Rape is used to demonstrate power over women, power over other men, and

31. See Ellis, *supra* note 16, at 631 (reporting that male rats protect territory that they have lived in with a female rat more than territory that they have lived in without a female occupant).

32. Bosnian Serbs raped Muslim women as a way of "polluting" them so that Muslim men would no longer engage in sexual relations with them. Jeri Laber, *Bosnia: Questions of Rape*, N.Y. REV. BOOKS, Mar. 25, 1993, at 4.

33. As General Patton warned an aide to the Sultan, in wartime, "in spite of my most diligent efforts, there [will] unquestionably be some raping." GEORGE S. PATTON, JR., *WAR AS I KNEW IT* 23 (1947).

34. SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 105 (1975).

35. ELDRIDGE CLEAVER, *SOUL ON ICE* 14 (1968).

36. In their extensive study of men who rape, Nicholas Groth and Jean Birnbaum concluded that many men "may rape women, in part . . . to relate to men." A. NICHOLAS GROTH (WITH H. JEAN BIRNBAUM), *MEN WHO RAPE: THE PSYCHOLOGY OF THE OFFENDER* 116 (1979).

37. NATHAN MCCALL, *MAKES ME WANNA HOLLER: A YOUNG BLACK MAN IN AMERICA*, 47 (1994).

connection to other men. Rape is also used to demonstrate prowess. This prowess is more about masculinity and esteem, however, than it is about domination or connection. Rape, when used to get sex, is a means of proving one's worth to other men. Many men rape because they want sex, but they want sex not just because it is pleasurable and certainly not because of its reproductive potential, but because having sex is a means of gaining the esteem of one's peers.³⁸ Thus, men like the Spur Posse gang develop point systems to distinguish themselves based on how many women they have sex with,³⁹ and men praise and admire each other when they are able to "score."

This kind of inter-male "showing off" may be normal, natural, and universal, but it is also very dangerous because it so readily leads to rape. The esteem that comes with frequent sexual encounters pays little heed to whether the sex was consensual. Thus, even if the sex is not motivated by a desire to control or defile, it can easily end up doing so because esteem comes with the act, not with its communicative or mutual content. Therefore, even if sexually based esteem systems are common, natural, and universal, the law, because it must be concerned with what ought and what ought not to be, must try to diminish the influence of these inherently dangerous competitions.

III. LEARNING FROM BIOLOGY

If law is to combat rape effectively, it must attempt to change the social meaning of rape. The law cannot change what rape means or how rape operates biologically, but it can help shape what rape means socially. Dialogue between rape reformers and scientists studying rape's origins often stalls once one group tries to explain rape at either a biological or a sociological level, but the goal of rape reform should be to understand how rape exists on both levels. To the extent that feminists argue that rape is purely a socially constructed means of dominating women,⁴⁰ perhaps they are over-simplifying. To the extent that evolutionary biologists argue that rape has nothing to do with social construction, they are being comparably simplistic. Biology does not explain why we traditionally blame women for male aggression; nor does it explain why juries fail to blame men for sexual aggression but do convict them for other forms of aggression. Biology does not explain why men rape as a means of retaliating against women with whom they have no prior relationship,⁴¹ and it does not explain why intra-male aggression leads to rape (although it may explain why sex leads to intra-male aggression).⁴²

38. For more on the links between sex and esteem, see Katharine K. Baker, *Sex, Rape and Shame*, __ B.U. L. Rev. __ (forthcoming).

39. See Jennifer Allen, *Boys: Hanging with the Spur Posse*, ROLLING STONE, July 8, 1993, at 54.

40. This is the attitude usually attributed to Susan Brownmiller. See generally BROWNMILLER, *supra* note 34.

41. See BENEKE, *supra* text accompanying note 29.

42. See Ellis, *supra* note 16, at 632-33.

Biological theory does explain why we conflate rape and sex. Society teaches that rape and sex mean different things, but biology tells us that rape and sex involve the same act, intercourse. This makes it particularly easy to believe that sex is about the reproductive act. "Going all the way" means "making it" to male orgasm. Viewing sex in this way makes sense if the ultimate goal is reproduction, but it does not make sense if the ultimate goal is mutual pleasure and communication.⁴³ If sex were understood as more about reciprocal pleasure and less about reproduction, then one could not "make it" without achieving mutual pleasure. This would make esteem systems based on sexual encounters much less dangerous.

Redefining sex in this way is possible. In studies that ask men whether they would rape if they knew they could get away with it, at least half say no.⁴⁴ These men understand that rape is not the same as sex. Even though they want sex, these men know that sex is more about mutuality and communication than it is about orgasm. Or, at least these men's empathy with the victim makes them distinguish rape from sex. These are the kinds of understandings the law should encourage.

One way for the law to do this is to put the burden on men to determine whether the act is consensual. Silence should mean "no."⁴⁵ If there is any doubt about the mutuality of the act, the man should ask. Failure to ask should lead to a presumption of nonconsent. Some may object to forcing language into acts that are arguably at their most romantic and sensual in the absence of language,⁴⁶ but biological research makes a compelling argument for requiring language. If rape is a universal and natural phenomenon, then only by interrupting the flow of things with an artificial, social construct like speech can we ensure that women will be protected from male sexual aggression. Moreover, using language should help us move toward a social understanding of sex as about communication, not just intercourse.

The law can also work to get men to understand and empathize with the people harmed by their acts. It can do this with ex ante efforts to educate men, particularly young men, about what rape is and what sex is not.⁴⁷ It can do this by forcing men to listen to the pain that rape victims experience and the confusion

43. Moreover, to define sex as about reproduction is to deny that gay men and lesbians have sex.

44. See, e.g., James V.P. Check & Neil M. Malamuth, *Sex Role Stereotyping and Reactions to Depictions of Stranger Versus Acquaintance Rape*, 45 J. PERSONALITY & SOC. PSYCHOL. 344, 344 (1983); Neil M. Malamuth & James V.P. Check, *Sexual Arousal to Rape and Consenting Depictions: The Importance of the Woman's Arousal*, 89 J. ABNORMAL PSYCHOL. 763 (1980).

45. See Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 LAW & PHIL. 35, 71-77 (1992).

46. Neil Gilbert, *The Phantom Epidemic of Sexual Assault*, 103 PUB. INTEREST 54, 60 (1991) (decrying how rape reform measures make "the kaleidoscope of intimate discourse—passion, emotional turmoil, entreaties, flirtation, provocation, demureness . . . give way to cool-headed contractual sex").

47. Many universities now require rape sensitivity and sexual assault workshops. See, e.g., Patrice Gaines-Carter, *AU Freshmen Learn Another Fact of Life: Date Rape*, WASH. POST, July 9, 1991, at B1; Nancie Katz, *Convicted on the Ladies Room Wall*, NEWSDAY, Dec. 13, 1990, at 15.

and fear that women often feel at sexual encounters. Studies show that such programs effectively diminish rape acceptance attitudes.⁴⁸

The law can also try to change men's perception of rape by making men understand the act of rape not as one of bravado but as one of weakness. If we de-link sexual conquest from esteemed notions of masculinity by making nonconsensual sex not some form of slightly lesser alternative to consensual sex, but as something completely different than sex, men will want nonconsensual sex less. If we focus on making men feel ashamed for forced intercourse,⁴⁹ not just sorry that they got caught, then we might more effectively curb rape, whatever its biological roots.

The biological work on rape reveals that a world in which rape is natural, prevalent, and universal is not a world in which we want to live. One of the reasons we continue to live in that world is because we have not worked hard enough to make the social construction and collective understanding of what sex is sufficiently distinguishable from the biological definition of reproduction. If we come to understand sex as fundamentally about something other than intercourse, it will be easier to distinguish between rape and sex. If we cease to foster institutions that allow sexual conquest to be used as an instrumental means of acquiring control, respect, or esteem, men's incentive to rape will be significantly diminished. If we eradicate the social constructions that allow rape to go unpunished and that encourage men to do it, the only thing motivating men to rape will be their biological propensity. The law may not be able to eradicate that propensity. The law may not be able to stop all rape, but it can do a better job at deterrence than it has done thus far.

48. Neil M. Malamuth & James V.P. Check, *Sexual Arousal to Rape Depictions: Individual Differences*, 92 J. ABNORMAL PSYCHOL. 55 (1983).

49. See Baker, *supra* note 38.