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## TELLING THE VICTIM'S STORY

Mary I. Coombs\*

A persistent theme in feminist work has been the complexity of sex: both a pleasure and a danger for women.<sup>1</sup> This Article involves a related complexity: the value and the danger of women talking about their sexual violations. Clearly, women need to come forward with their claims of rape and sexual harassment and assert these claims in the courtroom. Much valuable work of the feminist community has produced the doctrinal, evidentiary, and institutional changes that encourage women to report cases of sexual violation and to seek legal redress. I do not wish to undermine or impede those efforts. There is, however, a sociocultural cost to presenting claims of sexual violation in courtrooms or similar forums, such as the Senate Judiciary Committee hearing room, even when the woman and her advocates win. In this Article, I want to explore those costs and consider how to reduce them by making doctrinal changes, by exploding cultural myths, and, particularly, by encouraging women to share their stories of sexual violation in less risky environments.

Sexual violation actually occurs, and its victims experience it as such in a wide variety of circumstances. The legal system, however, will not acknowledge many of these instances. Doctrinal limitations exclude some,<sup>2</sup> and others, though they may fit within the legal definitions, are

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1. See, e.g., Kathy Peiss, *Charity Girls and City Pleasures: Historical Notes on Working Class Sexuality 1880-1920*, in *POWERS OF DESIRE: THE POLITICS OF SEXUALITY* 74-84 (Ann Snitow et al. eds., 1983) (discussing the dichotomous role of sexuality as a pleasure and a hazard for working women); *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* (Carol S. Vance ed., 1984) (presenting a collection of papers exploring the paradoxical nature of female sexuality from many different points of view).

2. The universe of legally recognized sexual violations is far smaller than that of perceived

rejected because they are inconsistent with deep cultural images of "legitimate" stories of sexual violation. Those cultural images, or rape myths, structure our beliefs about whether an event actually happened or even amounts to a violation, in accordance with facts and assumptions about the woman, the man, the relationship between them, and the context of the event.<sup>3</sup>

The woman who brings a legal claim of sexual violation, whether of rape or sexual harassment, wants to prevail. She and those acting on her behalf want the story to be believed. That natural and appropriate desire to win one's case, however, inevitably colors the way the case is presented and heard. In an attempt to persuade the fact finder that this particular situation should be acknowledged as a sexual violation, the story is likely to be crafted, within the limits of the facts, to resonate rather than to clash with the fact finder's cultural script.

The process of crafting a story that is as consistent as possible with current understandings of what qualifies as a true story of sexual violation leaves those understandings unchallenged. Worse, it reinforces these

sexual violations. A variety of rules operate to exclude from the law's proscriptions events that indisputably are experienced by a woman as sexual violation. These include: (1) the limitation of hostile environment sexual harassment claims to behavior that a reasonable person (or at least a reasonable woman) would find harassing, rather than what the woman actually perceived as harassing, (2) the relevance of the defendant's mental state in rape law, and (3) the traditional marital rape exception. *See, e.g.,* *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) (holding that a reasonable woman's perspective is appropriate in determining if the harassment is severe enough to be actionable); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982) (discussing conditions necessary to establish a Title VII claim against an employer for a hostile work environment); *People v. Liberta*, 474 N.E.2d 567, 572 (N.Y. 1984) ("[O]ver 40 states still retain some form of marital exemption for rape"); *People v. Draper*, 104 N.Y.S.2d 703, 711 (N.Y. App. Div. 1951) (overturning a rape conviction because the question of "whether the defendant was in a mental state at the time to form an intent to commit rape" and other questions were not put to the jury); *see also* *SUSAN ESTRICH, REAL RAPE 96-100* (1987) (discussing the mens rea requirement for rape).

A large body of feminist theoretical work has criticized legal rules for assuming the perspective of the violator and thus failing to protect the woman. These works have led to a number of reforms that increase the likelihood that rapists and sexual harassers will be held responsible for their behavior. *See, e.g., id.* at 80-91 (discussing how rape reform statutes have attempted to expand the definition of the crime of rape by redefining who is covered by the law, what counts as sexual intercourse, and what makes it criminal); *CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 6* (1979) (arguing that under Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment, sexual harassment in employment is sex discrimination). *See generally infra* notes 32-37 and accompanying text.

3. The general public, as well as relevant legal actors, frequently construct a set of facts around an image of a sexually loose woman rather than a sexually predatory man. For a general discussion of the social construction of events and persons as problems, *see* *JOSEPH R. GUSFIELD, THE CULTURE OF PUBLIC PROBLEMS 112* (1981) (describing the development and application of the "Myth of the Killer-Drunk"); *DONILEEN R. LOSEKE, THE BATTERED WOMAN AND SHELTERS: THE SOCIAL CONSTRUCTION OF WIFE ABUSE 3* (1992) (examining abuse and the battered woman as examples of "collective representations and . . . 'schemes of interpretation' which are frameworks for organizing and making sense of practical experience").

cultural scripts by instantiating them in the current case. This result is particularly problematic because of its spillover effects: for much of the public, legal claims of rape and sexual harassment, as filtered through the media or presented in the arresting images of Court TV<sup>4</sup> or the televised Thomas-Hill hearings,<sup>5</sup> are a primary means by which their cultural understandings are shaped.<sup>6</sup>

Part I of this Article briefly sets out some of the current stereotypes about what rape and sexual harassment are, and about which women are "legitimate" victims. It then summarizes selected literature illustrating how stories told and heard in legal settings, particularly trials, are affected by these cultural scripts.

Part II examines the stories told and heard in the Thomas-Hill hearings and the William Kennedy Smith rape trial. In each situation, the woman's claim was disbelieved at the time.<sup>7</sup> Each story was crafted in ways that acknowledged, but did not fully confront, certain stereotypes that undermined the claim. Patricia Bowman<sup>8</sup> denied a sexual attraction that might have made a jury indifferent to what she claimed William Smith did, while Anita Hill exhibited a cool, professional ambition that many found inconsistent with the claimed harassment. I seek to imagine alternative stories consistent with the claimed sexual violation, yet perceived as strategically dangerous in light of the stereotypes that frame the responses to a witness' story.

Finally, I suggest other forums in which true stories, although

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4. Court TV is a national cable network which is dedicated to live and taped coverage of courtroom trials around the U.S.

5. I place Clarence Thomas' name first because the ultimate issue before the Senate was *his* credibility, *his* character, *his* behavior, and *his* fitness to serve on the United States Supreme Court, though one was hard-pressed to keep this in mind while listening to the cross-examination of Anita Hill.

6. See *infra* notes 43-44 and accompanying text.

7. See Mona Charen, *Waiting for the Year of the Woman to End*, NEWSDAY, Oct. 28, 1992, at 84 (asserting that at the time of the Thomas-Hill hearings, women believed Thomas, not Hill, by a margin of almost two to one); John Donnelly, *Jubilant Smith Goes Free: Not-Guilty Verdict Voted in 77 Minutes*, MIAMI HERALD, Dec. 12, 1991, at A1 (recounting the trial and acquittal of William Kennedy Smith); Suzanne Fields, *A Belle Epoque in Politics?*, WASH. TIMES, June 8, 1992, at E1 (stating that the polls taken at the time of the Thomas-Hill hearings showed that the majority of women believed Thomas, not Hill). *But see also* Clinton C. Collins, Jr., *Gender Isn't Way to Pick a Senator*, STAR TRIB., June 19, 1992, at A19 (discussing how women have rallied in response to viewing the interrogation of Anita Hill by a panel of white males and how this movement has helped women to win political elections in many states); Nina J. Easton, "I'm Not a Feminist But..." , L.A. TIMES, Feb. 2, 1992, (Magazine), at 12 (analyzing how Anita Hill's treatment by the Senate Judiciary Committee re-energized feminists and focused attention on women's issues).

8. Since Bowman told her story under her own name on national television after the trial, I identify her here, although she was a nameless blue dot to the American public during the televised trial. *Prime Time Live: Going Public* (ABC television broadcast, Dec. 19, 1991) [hereinafter *Going Public*] (Patricia Bowman's interview with Diane Sawyer).

currently implausible to many people, might be told and heard. Such stories may expand the boundaries of the cultural script, enabling fact finders and the public at large to believe them in the future.

## I. Of Stories, Myths, and Fact Finding

### A. *Plausibility and the Cultural Script*

This Article assumes that fact finders frequently do not believe women's true stories of sexual violation.<sup>9</sup> The range of "credible" stories is narrower than the range of true ones.<sup>10</sup> It may be a useful heuristic device to think about the situations in which fact finders discredit women's claims of sexual violation by dividing them into two categories: "Not True" and "So What." In the first category is a claim that challenges the fact finders' beliefs concerning whether this kind of man, in this kind of

9. The silencing of women's stories of sexual violation has a long, if dishonorable, history. The literally-inclined might trace it back to the tale of Philomela, who had her tongue cut out so she could not tell the story of her rape and who partially overcame this silencing by embedding the story in her weaving. OVID, *METAMORPHOSES* 143-52 (Indiana University Press 1955) (Rolfe Humphries trans., 1955); see Patricia K. Joplin, *The Voice of the Shuttle Is Ours*, in *RAPE AND REPRESENTATION* 35 (Lynn A. Higgins & Brenda R. Ilver eds., 1991) (providing a feminist analysis of Philomela's tale).

When I refer to women's "true stories" I am claiming, first, that women's assertions that they were sexually violated are almost always an accurate representation of what they felt. I thus reject the broadest versions of postmodern feminism that seem to assume that all descriptions are linguistic constructions with no clear linkage to material reality. See Sharon Marcus, *Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention*, in *FEMINISTS THEORIZE THE POLITICAL* 385 (Judith Butler & Joan W. Scott eds., 1992) (challenging the notion that there is any simple correspondence between an event and the victim's account of it). Second, I am asserting that, absent the effect of rape myths, fact finders would believe a significantly larger percentage of such accounts and would render judgments validating the woman's claim.

10. Cultural stereotypes, however, sometimes operate to *enhance* the credibility of stories of sexual violation. See, e.g., DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* 156-65 (1969) (discussing *Powell v. Alabama*, 287 U.S. 45 (1932), a case arising out of the rape conviction of nine young African American men based on what was later discovered to be the perjured testimony of the white alleged victims); Jennifer Wriggins, *Rape, Racism and the Law*, 6 *HARV. WOMEN'S L.J.* 103 (1983) (noting that charges by white women against African-American men are readily believed). These situations are outside the scope of this Article. All feminist reform efforts, however, must be sensitive to the risks of rape myths that make certain men more vulnerable to erroneous disbelief. For example, African-American men accused of raping white women may need to counter the myth that no white woman would consent to sex with an African-American man. See Tamar Lewin, *Rape and the Accuser: A Debate Still Rages on Citing Sexual Past*, *N.Y. TIMES*, Feb. 12, 1993, at B1 (discussing the case of Otis Fearon, an African-American man, who is challenging his conviction for rape because he was not allowed to introduce evidence of the victim's prior consensual sexual activity with other African-American men). The *Fearon* case is currently being argued before the New York Court of Appeals. *People v. Fearon*, 582 N.Y.S.2d 450 (N.Y. App. Div. 1992), *leave to appeal granted*, 596 N.E.2d 414 (N.Y. May 15, 1992).

relationship, would behave in the way alleged toward this kind of woman. Skeptical fact finders decide that he would not and then rationalize the woman's false claim by pointing to some alleged fault in her character. In the second category, "So What," cynical fact finders accept the truth of the woman's assertions as to what happened but decide that these actions are not legitimate grounds for complaint by a "woman like that." The woman's story thus must avoid both these limits, if it is to be taken seriously.<sup>11</sup> As discussed in the next Section, each credibility-limiting category was operative, though in different combinations, in the Thomas-Hill hearings and the Smith trial.

Under the "Not True" category, the fact finders believe the man's story instead of the woman's. In essence, they conclude that the events did not happen as she claims. The story she tells is radically different from what they already "know" about the types of women who are subjected to rape or sexual harassment, and the types of men who commit these acts. Rapists are aggressive, uncouth, lower-class strangers, probably African-American or Hispanic. Sexual harassers are obviously vulgar men whose inability to control their hands or mouths is apparent to fellow workers and to the fact finders themselves. Men do not rape women they know personally or harass women they know professionally. Women who appear to be sexually available were not really raped, because they must have said "yes."

Sometimes, however, fact finders do not believe women because they are *too* good. While rape by a stranger can happen to anyone, a woman's purity can render her claim of date rape or sexual harassment problematic: The predominant cultural image is that men do not violate women who are demure, proper, and professional at work, or women who make clear to a date or an acquaintance that they are not sexually available.<sup>12</sup> The dangers of "Not True," then, are dual: A woman must avoid fitting too neatly into the image of either the madonna or the whore.<sup>13</sup>

11. The two categories are related, though imperfectly, to the dual images of woman as the madonna or the whore. See Carolyn G. Heilbrun, *The Thomas Confirmation Hearings*, 65 S. CAL. L. REV. 1569, 1573 (1992) ("Woman has ever been seen as the temptress or the virgin, either sexual or moral, never both.").

12. See, e.g., *A Clash over Worker Sex Harassment*, S.F. CHRON., Apr. 22, 1981, at 13 ("For the virtuous woman, sexual harassment is not a problem except in the rarest of cases.") (quoting Phyllis Schlafly).

13. The problem is not simply a hypothesized fact finder's rigid application of two long dead cultural myths. These images are still powerful. But we have also entered (and perhaps passed through) the era of sexual liberation. Most of us carry in our heads congeries of different, often contradictory, images of how women ought to behave and the significance of different kinds of sexual activity. Fact finders read any woman's story against their own complex set of myths and partial truths. Fact finders' half-unconscious beliefs about the appropriate and actual sexual behaviors of women of different classes and ethnicities are factors in these myths. The sexual double standard "didn't evolve into a single standard but into a thousand smaller ones." Ellen Goodman,

If the fact finders decide that the woman's claim falls into the "Not True" category, they then must explain why the woman made this false accusation. Rape myths provide a variety of such explanations. The assumption inherent in some myths is that the woman is consciously lying to hide her sexual complicity or to harm the man.<sup>14</sup> Other stereotypes are premised on an assumption that women engage in sexual fantasies and then confuse these with the truth.<sup>15</sup> Distrust of women's claims of sexual violation is built into classic Anglo-American rape law in the traditional "Hale" instruction.<sup>16</sup> This jury instruction, once required to be given at the conclusion of rape trials, cautioned jurors that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."<sup>17</sup>

Under the "So What" alternative, the fact finders believe the facts of the alleged sexual violation, but refuse to deem it "rape" or "sexual harassment." In the most blatant cases, they agree that all the legal elements exist, yet refuse to label it a sexual violation because they believe the woman is an unworthy victim. Frequently, "So What" intertwines with

*Sex, Consent and That Trial*, BOSTON GLOBE, Dec. 8, 1991, at A27.

14. See, e.g., Kathy Dobie, *What the Jury Wouldn't See*, VILLAGE VOICE, Aug. 6, 1991, at 25, 30 (quoting the jury foreman who, after acquitting three St. John's University students of the sexual assault and sodomy of a Jamaican fellow student, commented that "hell hath no fury like a woman scorned").

15. See 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, 1026 (1991) (arguing that even though most psychoanalysts discredit the myth that women engage in rape fantasies, the "myth continues to thrive in our patriarchy"). The falsity embedded in the rape myth is not the claim that women frequently want a man to be assertive sexually or even that women engage in token resistance. See, e.g., Charlene L. Muehlenhard & Lisa C. Hollabaugh, *Do Women Sometimes Say No When They Mean Yes? The Prevalence and Correlates of Women's Token Resistance to Sex*, 54 J. PERSONALITY & SOC. PSYCHOL. 872, 874 (1988) (reporting that 39.3% of undergraduate women in a study reported having engaged in token resistance). The myth is that significant numbers of women who engage in such sexual gameplaying claim that they were raped. See, e.g., Note, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55, 65-70 (1952) [hereinafter *Forcible and Statutory Rape*] (arguing that "[m]any women . . . require as a part of preliminary 'love play' aggressive overtures by the man" and then falsely report the encounter as rape as a result of psychologically distorted memory or malice). But see Laura Masnerus, *Sketchy Statistics: The Rape Laws Change Faster Than Perceptions*, N.Y. TIMES, Feb. 19, 1989, §4, at 20 ("While there is ambivalence, ambiguity and the potential for unjust exaggeration in some cases of acquaintance rape, prosecutors and rape counselors contend that it is unlikely that a woman would float a fantasy or a lie all the way through the criminal justice system.").

16. 1 SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 635 (London, E. Nutt & R. Gosling 1736) (advising caution in accepting accusations of rape as true without careful investigation).

17. *State v. Wiley*, 492 F.2d 547, 554 (D.C. Cir. 1973) (quoting Lord Chief Justice Hale); see also MODEL PENAL CODE § 213.6(5) (Official Draft 1962) (requiring that jurors be given a modified "Hale" instruction). But see A. Thomas Morris, *The Empirical, Historical and Legal Case Against the Cautionary Instruction: A Call for Legislative Reform*, 1988 DUKE L.J. 154 (criticizing the "Hale" instruction).

"Not True" in their application to "undeserving" women.

Certain assumptions about the woman's character or lifestyle may lead the fact finders to decide that she is not truthful, that she does not deserve the law's protection, or that they need not choose between the two responses to her claim of violation.<sup>18</sup> Consider, for example, the conclusion that the woman was "asking for it." Does this statement mean "she really wanted this to happen and did not mean it when she said 'no'," or "given who she was and how she behaved, the man was entitled to act regardless of her expressed distaste or nonconsent"?

Thus, rape myths are doubly dangerous when the woman was sexually active or when she "misbehaved" on the occasion in question by drinking alcohol or dressing provocatively.<sup>19</sup> By going out with or allowing a perpetrator into her home, a woman "consents" to sexual conduct, which precludes real harm and "legal" rape.<sup>20</sup> Sexual harassment law and

18. Thus, "pure" women may be disbelieved; "loose" women are both disbelieved and devalued.

19. See *United States v. Galloway*, 937 F.2d 542, 549-550 (10th Cir. 1991) (Seymour, J., concurring) (discussing the persistent cultural myths that women who have previously had consensual sex are more likely to consent to the accused's sexual advances and are more likely to falsely accuse men of rape); *Government of Virgin Islands v. Jacobs*, 634 F. Supp. 933, 936 (D.V.I. 1986) (asserting that the prohibition on evidence concerning the victim's prior sexual conduct is designed to prevent the jury from using this evidence to conclude that the victim consented to sex); cf. Clarence Page, *Date Rape: A Question of Consent*, CHI. TRIB., Dec. 15, 1991, (Perspective), at 3 ("[I]t can no longer be said, as once it might, that a young female who steps unchaperoned, for example, into the . . . bedroom of a young male is consenting by that simple act to have sex with her host.").

This myth occurs in its most extreme form when the rape victim is a prostitute. See Margaret A. Baldwin, *Split at the Root: Prostitution and Feminist Discourses of Law Reform*, 5 YALE J.L. & FEMINISM 47, 68-70 (1992) (emphasizing the need for rape victims to overcome jurors' inferences of consent from promiscuity); Mary I. Coombs, *Crime in the Stacks, or a Tale of a Text: A Feminist Response to a Criminal Law Textbook*, 38 J. LEGAL EDUC. 117, 126 (1988) (describing the claim in one criminal law textbook that forced sex with a prostitute is not rape) (citing ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 205 (3rd ed. 1982)).

The efforts to enact rape shield statutes were based in large part on the fear that this myth would make it unreasonably difficult to convict those who raped sexually active women. Such laws, however, do not address the incommensurably more difficult problems faced by women of color. A rape shield statute can "purify" a white woman complainant by allowing her to appear as asexual and, therefore, credible. An African-American woman or a Latina, however, is assumed to be sexually loose by her very appearance. Jacqueline Pope, *The Clarence Thomas Confirmation: Facing Race and Gender Issues*, in *COURT OF APPEAL* 165, 166 (The Black Scholar ed., 1992).

20. See *United States v. Kernan*, 11 C.M.R. 314, 320 (A.B.R. 1953) (concerning a court martial that was reversed because, in addition to other factors, the court found it highly unlikely that "a[n intoxicated] man . . . would rape a[n intoxicated] woman acquaintance . . . without first attempting . . . to obtain her consent to intercourse"); *People v. Hunt*, 139 Cal. Rptr. 675, 678-79 (Cal. Ct. App. 2d 1977) (stating that it is a close question if there is sufficient evidence for rape conviction when the woman hitchhiked and did not seek to escape after seeing pornographic pictures on the defendant's dashboard); SUE BESSMER, *THE LAWS OF RAPE* 150-53 (1984) (explaining the tendency to view rape by a boyfriend or an acquaintance as a lesser societal concern). *But cf.* Kit Kinports, *Evidence and Procedure for the Future: Evidence Engendered*, 1991 U. ILL. L. REV. 413,



practice also contain elements of rape myths and, therefore, deny full protection to certain "undeserving" women.<sup>21</sup>

These myths are not only dangerous, but also widely believed.<sup>22</sup> One sociologist found that jurors explained their decisions to acquit with statements such as: "[S]he asked for it, and she got it. It's a poor man who turns down anything for free"; "[S]he led him on. [She] accepted a ride in the middle of the night"; and "[She] consented with her body language."<sup>23</sup> The response of the general public to these cultural images

439 ("Even evidence of the victim's prior sexual relationship with the accused should not invariably be permitted.").

21. See *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57, 69 (1986) ("While 'voluntariness' in the sense of consent is not a defense to [a sexual harassment] claim, it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant."); *Vermett v. Hough*, 627 F. Supp. 587 (W.D. Mich. 1986) (holding that there was no Title VII violation by the defendant, despite numerous incidents of sexual harassment, because the plaintiff was found to be less credible than the other witnesses at the trial); *Halpert v. Wetheim & Co.*, 27 Fair Empl. Prac. Cas. (BNA) 21 (S.D.N.Y. 1980) (concluding that the "independent, aggressive, and successful" plaintiff was not entitled to relief under Title VII, despite defendant's admitted verbal harassment of her and his discrimination against her in failing to promote her because of sex). Frequently, a woman who participates, even self-defensively, in the vulgarities of the workplace is then denied relief on the grounds that the harassment was not "unwelcome" or was "condoned." See *Ukarish v. Magnesium Elektron*, 31 Fair Empl. Prac. Cas. (BNA) 1315 (D.N.J. 1983) (finding that, although there was subjective evidence of sexual discrimination against the defendant, the objective evidence was "more convincing" because the plaintiff had appeared to accept the sexual banter at the workplace and even to join in it).

22. See Martha R. Burt, *Cultural Myths and Supports for Rape*, 38 J. PERSONALITY & SOC. PSYCHOL. 217, 229 (1980) (discussing the results of an empirical study of attitudes about rape which confirmed that rape myths are firmly embedded in Americans' minds). Many people assume that a woman can prevent rape if she wants to and, thus, women "ask for it" and "get what they deserve." See generally LINDA B. BOURQUE, *DEFINING RAPE* (1989) (providing both a summary of the literature and a detailed analysis of the author's own studies of attitudes towards rape among various demographic groups).

The data consistently show that a substantial part of the population accepts rape myths as true and uses them to process new information. *Id.* at 224-30; see also Eugene Borgida & Phyllis White, *Social Perception of Rape Victims: The Impact of Legal Reform*, 2 LAW & HUM. BEHAV. 339 (1978) (showing that when evidence of prior sexual history was admitted, substantial numbers of mock jurors disbelieved a complainant even when the hypothetical facts made consent improbable); Torrey, *supra* note 15, at 1026 (explaining how rape myths skew rape prosecutions in a way that is unfair to victims and suggesting reform measures that correct jurors' misperceptions about rape).

Various studies illustrate that jurors similarly use misconceptions to refuse to label a situation a sexual violation, even though it fits the legal definition of rape or harassment. See, e.g., HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 249-54 (1966) (stating that even when the law recognizes only two issues in a forcible rape case—whether there was intercourse and whether consent was given—juries often harshly scrutinize the victim and her behavior).

23. GARY D. LAFREE, *RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT* 218 (1989). Professor LaFree, in his study of the processing of rape cases in Indianapolis, states that some of the victim's characteristics properly may be used by the jury in concluding that her story is "Not True": "To the extent that jurors weighed such behaviors as drinking, using drugs, and being sexually active outside of marriage as indicators of a victim's *credibility*, their concern

follows gender lines to some extent,<sup>24</sup> but there is no simple dichotomy.<sup>25</sup> Both men and women resist hearing and believing morally complex stories in which "imperfect" women are violated by men who are not monsters.

One can understand why men react as they do. It is in their gendered interest to believe rape and sexual harassment are rare events, attributable only to monsters: These situations have nothing to do with their own lives and require no reexamination of their own behavior.<sup>26</sup> Women, too, are frequently skeptical of more nuanced claims of rape or hostile environment sexual harassment. While the apparent pervasiveness of experiences of sexual violation<sup>27</sup> might make women empathetic to claims by others,<sup>28</sup> there may be a psychological need *not* to identify with victims. The world

with such factors is arguably a permissible one." *Id.* at 227.

24. See *Ellison v. Brady*, 924 F.2d 872, 878-79 (9th Cir. 1991) (stating that the court must analyze the differing perspectives of men and women toward sexual harassment because men may not appreciate the underlying threat of violence that a woman may perceive from unexpected sexual behavior); Kim L. Scheppele, *The Re-Vision of Rape Law*, 54 U. CHI. L. REV. 1095, 1108-13 (1987) (explaining gendered perceptual fault lines in understandings of rape).

25. Analyses of responses to rape myths must also consider the complex interactions between race and gender. See generally BOURQUE, *supra* note 22, at 205 (analyzing the interactive effects of race, gender, socioeconomic status, and other factors on perceptions of rape). At the time of the Thomas-Hill hearings, for example, polls showed that a large percentage of women disbelieved Anita Hill, although her credibility was greater among women than among men. See Margaret A. Burnham, *The Supreme Court Appointment Process and the Politics of Race and Sex*, in RACE-ING JUSTICE, EN-GENDERING POWER 290, 306-07 (Toni Morrison ed., 1992) [hereinafter RACE-ING JUSTICE] (discussing the effects of Hill's testimony on Clarence Thomas' support among men and women); cf. Gloria Berger et al., *The Untold Story*, U.S. NEWS & WORLD REP., Oct. 12, 1992, at 28 (reporting poll data showing that in 1991 69% of women believed Clarence Thomas' story).

26. See, e.g., TIMOTHY BENEKE, MEN ON RAPE 159 (1982) (noting that men in general, and male psychiatrists in particular, "would have us believe that rape is not really a crime of violence but only a sexual aberration on the part of rapists which is brought on by some action of the victim. It makes the crime easy to dismiss. It keeps your own life safe from the horror of the crime.") (quoting Andrea Rechtin, a sexual assault counselor and advocate).

27. See Ronet Bachman et al., *The Rationality of Sexual Offending: Testing a Deterrence/Rational Choice Conception of Sexual Assault*, 26 LAW & SOC. REV. 343, 343-45 (1992) (discussing the prevalence of sexual assault in the United States); Louise F. Fitzgerald, *Science V. Myth: The Failure of Reason in the Clarence Thomas Hearings*, 65 S. CAL. L. REV. 1399, 1400-01 (1992) (citing several studies illustrating the preponderance of sexual harassment in American society); Deborah L. Rhode, *Gender, Race and the Politics of Supreme Court Appointments*, 65 S. CAL. L. REV. 1459, 1461 n.10 (1992) (citing the findings of the United States Merit Protection Board that between one-half and four-fifths of all women will experience sexual harassment at some point in their working lives); see also Wendy R. Willis, Note, *The Gun is Always Pointed: Sexual Violence and Title III of The Violence Against Women Act*, 80 GEO. L.J. 2197, 2199 n.21 (1992) (noting that rape is the most underreported of all crimes).

28. One study found that, although men with a high belief in a just world evaluate rape victims more negatively, women with a similar belief do not. The researchers suggested that with women, empathy for and identification with the rape victim overrode their general belief that in a just world innocent victims do not suffer. Chris L. Kleinke & Cecilia Meyer, *Evaluation of Rape Victims by Men and Women with High and Low Belief in a Just World*, 1990 PSYCHOL. WOMEN Q. 343, 350.

is safer if injustices like rape and sexual harassment happen only to particular kinds of women.<sup>29</sup> Women may believe that the claimed violation did not occur or that the complainant brought it on herself so that they can accordingly believe that it cannot happen to them. If the harassment described was not egregious, then women can accept it without becoming victims in their own eyes and those of the world.<sup>30</sup>

### B. *Litigation and the Construction of Plausible Stories*

Inadequacies in the laws of rape and sexual harassment create gaps between experienced violations and legal confirmation of the violations, but even the most radical doctrinal reforms cannot entirely close those gaps. Doctrine inevitably leaves room for the application of the rape myths of "Not True" and "So What."

First, in rape cases, a properly instructed jury will and should acquit if the story the woman presents does not convince the jurors that the alleged violator is guilty beyond a reasonable doubt. This burden of proof rule exists in all criminal trials, but imposes particular costs when it intersects with rape myths. Insofar as juries find reason to doubt based solely on these myths, the women most vulnerable to the myths become, in effect, free targets for potential sexual violators. Additionally, the public misperception that a not guilty verdict affirms the man's innocence helps reinforce rape myths.<sup>31</sup>

Second, doctrine itself may reflect rape and sexual harassment myths, by assuming the male perspective.<sup>32</sup> In a rape case, the jury could find

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29. Women desperately want to believe that they are not vulnerable to battering or rape: Strangers jumping from bushes are unavoidable, but rare. If rape and sexual harassment are not risks from ordinary men I know, then I am (relatively) safe. If rape or harassment only happen to women who wear revealing clothing or take rides from strangers or use inappropriate language in the workplace, then I can protect myself. See BOURQUE, *supra* note 22, at 287 (suggesting that many women define rapists as dark alley strangers so that they can "belie[ve] that rape is a highly unusual and extreme behavior of little relevance to their own lives"); Nancy Gibbs, *When Is it Rape*, TIME, June 3, 1991, at 48, 50 ("[W]omen tend to be harsh judges of one another—perhaps because to find a defendant guilty is to entertain two grim realities: that anyone might be a rapist, and that every woman could find herself a victim."). See generally Penelope E. Bryan, *Holding Women's Psyches Hostage: An Interpretative Analogy on the Thomas/Hill Hearings*, 69 DENV. U.L. REV. 171, 192-93 & n.66 (1992) (discussing the tendency of observers to place blame upon victims and possible explanations for this behavior).

30. Cf. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 15-19 (1991) (analyzing women's rationalizations for not identifying themselves as battered or victimized within their marriages).

31. See Jim Hampton, *Courtroom Cameras? Sustained!*, MIAMI HERALD, Dec. 15, 1991, at L2 ("Millions know that William Kennedy Smith is innocent, because they saw his accuser and prosecutor fail to prove him guilty."); Marcus, *supra* note 9, at 387 ("[R]ape trials consolidate men's subjective accounts into objective 'norms of truth' and deprive women's subjective accounts of cognitive value.").

32. See Jane H. Aiken, *Differentiating Sex from Sex: The Male Irresistible Impulse*, 12 N.Y.U.

the defendant not guilty because the jurors thought that the woman did not manifest sufficient resistance; or that her fear of his threat, though genuine, was unreasonable; or that he was reasonable, though mistaken, in thinking she had consented.<sup>33</sup> In a sexual harassment case, a fact finder could conclude that the plaintiff did not manifest unwelcomeness with sufficient clarity or that the defendant's behavior, though offensive to the woman, was not so severe and pervasive as to be actionable.<sup>34</sup> Lest we think that such biases are historical relics, daily events remind us of their continuing effects.<sup>35</sup>

Finally, given the seriousness of the crime of rape, a mens rea requirement is necessary. A jury should acquit if it finds that the defendant reasonably believed facts that negated the elements of the crime. The various rape reform efforts, by eliminating or redefining such traditional elements as force, resistance, and nonconsent, clearly mitigate the problems described herein.<sup>36</sup> It is difficult to imagine, however, a plausible reform

REV. L. & SOC. CHANGE 357, 358 (1983-84) ("[M]ale behavior is assumed to define the norm . . . [and] women are expected to . . . behave in such a way as to fit within the male norm."). *But see* Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990) (discussing why the reasonable person standard may be inappropriate in cases of sexual harassment).

33. *See, e.g.,* *People v. Mayberry*, 542 P.2d 1337 (Cal. 1975) (reversing a rape conviction on the grounds that the defendant's reasonable and bona fide belief in consent would negate mens rea); *Goldberg v. State*, 395 A.2d 1213 (Md. Ct. Spec. App. 1979) (reversing a rape conviction based upon an insufficient showing of resistance on the victim's part); *People v. Evans*, 379 N.Y.S.2d 912 (N.Y. Sup. Ct. 1975), *aff'd*, 390 N.Y.S.2d 768 (N.Y. App. Div. 1976) (acquitting the defendant in a rape case in part because of the victim's failure to resist and in part because of the vague nature of the defendant's alleged threats); *see also* *State v. Rusk*, 424 A.2d 720, 733 (Md. 1981) (Cole, J., dissenting) (claiming that a woman "may not simply say 'I was really scared,' and thereby transform consent or mere unwillingness into submission by force"). *See generally* Christina B. Whitman, *Review Essay: Feminist Jurisprudence*, 17 FEMINIST STUD. 493, 493-507 (1991) (discussing legal doctrines which preclude liability for assaults based upon "reasonable" perceptions).

34. *See* *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986) (ruling that a woman must indicate by her conduct that the sexual advances were unwelcome); *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 784 (1st Cir. 1990) (stating that the plaintiff must show that she did not invite the sexual advances and that she consistently resisted them); *Rabidue v. Osceola Refining Co.* 805 F.2d 611, 622 (6th Cir. 1986) (finding that vulgar comments to the plaintiff and calendar displays of nude women were insufficient to constitute a sexually hostile and abusive work environment); *Harris v. Forklift Systems, Inc.*, No. 3:89-0557 1990 U.S. Dist. LEXIS, 20115, at \*17-18 (M.D. Tenn. 1990) (dismissing a Title VII claim because the plaintiff failed to show that she had suffered a severe psychological injury as a result of the harassment), *aff'd*, 976 F.2d 733 (6th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3511 (U.S. Mar. 2, 1993) (No. 92-1168).

35. For instance, an Austin grand jury recently refused to indict a man for sexual assault who entered a woman's bedroom with a knife and had sex with her because, at her request, he wore a condom. *Ross E. Milloy, Furor Over a Decision Not to Indict in a Rape Case*, N.Y. TIMES, Oct. 25, 1992, § 1, at 30. A subsequent grand jury did indict the alleged rapist on charges of aggravated sexual assault and burglary, and the case is currently being litigated. *State v. Valdez*, No. 925263 (Dist. Ct. of Travis County, 167th Judicial Dist. of Texas, filed Oct. 27, 1992). Analogously, based on the first grand jury's decision, it would be a gift rather than robbery if an armed robber let me keep my family photos before making off with the remaining contents of my wallet.

36. Stephen Schulhofer has examined various reform efforts of different states. *See* Stephen

that would make these aspects of the interaction, including the defendant's perspective, wholly irrelevant.<sup>37</sup> Thus, juries remain free to apply rape myths, and feminists must work to eradicate them from our cultural understandings.

Doctrine, then, is sometimes part of the problem, but politically and morally acceptable doctrinal reform can never be more than part of the solution.<sup>38</sup> We must also confront and seek to transcend the interaction of rape myths with the litigation process.

Rape myths affect litigation processes and outcomes because litigation is a form of storytelling. In all litigation, a claimant must design a story to present to the fact finder. To succeed, the fact finder must believe the story and the believed story must include all the elements of the relevant legal standard.

I use the term "story" deliberately. As numerous observers have recognized, fact finders look for stories, not just discrete nuggets of fact to fit into a set of legal rules.<sup>39</sup> Fact finders are more likely to believe

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J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 LAW & PHIL. 35, 39 (1992). His analysis shows that Michigan has elaborately defined force and minimized the consent issue, MICH. COMP. LAWS § 750.520b(1)(f) (1991), Utah has made no consent rather than force the central element of rape, UTAH CODE ANN. § 76-5-402, 406 (1990), and Pennsylvania has transformed consent from a necessary element to only an affirmative defense, PA. STAT. ANN. tit. 18 § 3107 (1992). Schulhofer, *supra*, at 39; see also ESTRICH, *supra* note 2, at 84 (discussing different statutory approaches to expanding the crime of rape by broadening the definition of force and focusing on the attacker's use of force, rather than on the legitimacy of the victim's nonconsent); cf. Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780 (1992) (arguing that legislatures should replace the crime of rape with a variety of new statutory offenses that would more clearly and justly define criminal liability for culpable conduct aimed at causing others to engage in sexual acts). Even the case that has gone the furthest in easing the state's burden of proof, by ruling that failure to protest or resist cannot justify penetration, still places the burden of proof on the state to show that the victim did not give permission for the sexual penetration. *State ex rel. M.T.S.*, 609 A.2d 1266, 1279 (N.J. 1992).

37. The impact of the mens rea requirement is mitigated if consent is defined in a concrete and precise way. A man could rarely claim to have misunderstood a woman's nonconsent if "no means no" or only "yes means yes." See ESTRICH, *supra* note 2, at 102-03 (arguing that nonconsent should be defined so that "no means no" and that unreasonable mistakes, regardless of how honestly claimed, should not exculpate the perpetrator). A claim that "I thought she really meant yes, though she said no" then becomes a mistake of law, which is of no legal significance. *But see* Schulhofer, *supra* note 36, at 42 (arguing that a "no means no" standard "solves few problems" because it evades the determinative issue of force and fails to account for such responses to sexual pressure as silence and qualified acquiescence).

38. I believe that the law currently allows rapists to escape punishment far more often than it falsely convicts, and that this imbalance is greater than that inherent in, and appropriate to, criminal law generally. Nonetheless, false positives are not unknown and are a social and moral evil. The legal rules must allow for acquittals and, thus, will be open to misuse through the application of rape myths.

39. See W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE & JUDGMENT IN AMERICAN CULTURE* 44-45 (1981) (offering an example of

stories that are coherent, internally consistent, plausible, and encompass as much of the evidence as possible. To make this judgment, "legal facts are reconstructed as stories whose plausibility depends on understandings drawn from experience."<sup>40</sup> If the lawyers do not construct an acceptable story, jurors may create their own stories in which they reconceptualize the evidence to fit their understandings about what is likely to have happened. Fact finders exploit—or even create—ambiguities to make the story "fit" their preconceptions. For example, the public translated Anita Hill's desire for interesting work into raw careerism.<sup>41</sup>

Preexisting social constructions limit what the fact finder will believe, and thus, what the parties will present in all litigation.<sup>42</sup> These constructions are particularly problematic, however, in cases alleging

how jurors use the legal facts to create a story that explains the central legal issue); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991) (showing how jurors use the available evidence to construct stories that fulfill as effectively as possible the criteria of coverage, uniqueness, and coherence as well as "goodness of fit" to the legal criteria provided them). *But see* BERNARD S. JACKSON, LAW, FACT AND NARRATIVE COHERENCE 61-88 (1988) (critiquing Bennett and Feldman for their assertion that jurors create the stories and offering an approach that allows all the narrative interactions that occur in the courtroom to be analyzed).

40. BENNETT & FELDMAN, *supra* note 39, at 171.

41. *See* Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283, 1292 (1992) ("Anita Hill told a story of ambition that was neither careerism and a desire for power and status nor a search for security[,] . . . [b]ut the Senate and the media overlooked her clear sense that her work was important and worthy."). In *Rusk v. State*, 406 A.2d 624, 625 (Md. Ct. Spec. App. 1979), *rev'd*, 424 A.2d 720 (Md. 1981), the victim testified:

I said, "If I do what you want, will you let me go without killing me?" Because I didn't know, at that point, what he was going to do; and I started to cry; and when I did, he put his hands on my throat, and started lightly to choke me; and I said "If I do what you want, will you let me go?" And he said, yes, and at that time, I proceeded to do what he wanted me to.

*Id.* at 625. The judges in the case and commentators have argued whether there was a "choking," showing sufficient force, or merely a "heavy caress." *Id.* at 628; *see* ESTRICH, *supra* note 2, at 64 (arguing that in *Rusk* the discussion of whether there was a "light choking" or a "heavy caress" provides an example of the difference in the way that men and women perceive force); Scheppele, *supra* note 24, at 1105 (explaining how the court's description of the events as a "heavy caress" mattered in the adjudication of the case, since it implied an absence of force). In fact, there was no actual testimony of a "caress." Tr. at 137-39, 153, 164. The description was an invention of the defense attorney at oral argument.

42. There is a growing body of literature on the storytelling aspects of litigation and the intersecting effects of the demands of legal formalities and rhetorics of persuasion. *See generally* DAVID R. PAPKE, NARRATIVE & THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW 62-64 (1991) (offering an overview of the use of storytelling during different phases of the legal process); Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984) (describing the role of "stock stories" in people's perceptions and understandings of their world); Pennington & Hastie, *supra* note 39, at 520 (proposing that "a central cognitive process in juror decision making is *story construction*"); *cf.* BENNETT & FELDMAN, *supra* note 39, at 148 (discussing the effect of racial stereotypes on the credibility of stories).

sexual violation. In any litigation, the side that can construct a plausible story—whatever the true facts may be—is at an advantage. In rape or sexual harassment cases, plausibility means, in large part, consistency with gendered myths. Thus, the narratives will reflect deep, underlying cultural understandings of sexuality and gender. Unlike the situation in, for example, a patent or commercial contracts case, one party to a sexual violation case is systematically favored.<sup>43</sup> Legally crucial issues of force, consent or offensiveness are not matters of objectively observable fact and, therefore, are particularly susceptible to cultural preconceptions.<sup>44</sup>

Furthermore, the demands of plausibility and narrative coherence favor stories that are clear, simple, and consistent. Women's true stories of acquaintance rape and hostile environment sexual harassment, however, tend to be complex, ragged, and contradictory, reflecting both the incoherence and contradictions of contemporary sexual mores and the impact of the event on the complainant's capacity to remember the

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43. The jurors hear the particular facts at the trial against the background of their prior beliefs about how men and women, how particular characters, behave in particular situations. "Even as stories unfold in the courtroom, the value of the 'facts' the court will call evidence has been predetermined by the social mechanisms that privilege certain forms of communication." Kristin Bumiller, *Fallen Angels: The Representation of Violence Against Women in Legal Culture*, 18 INT'L. J. Soc. L. 125, 132 (1990).

A striking example of this cognitive filtering can be seen in the pseudo-Freudian *Forcible and Statutory Rape*, *supra* note 15, at 66 ("When her behavior looks like resistance although her attitude is one of consent, injustice may be done the man by the woman's subsequent accusation. . . . Often [women's] erotic pleasures may be enhanced by, or even depend upon, an accompanying physical struggle."). No evidence is cited for this reading of women's behavior.

44. See Schulhofer, *supra* note 36, at 41 ("Force and consent are not observable facts but social constructs. . . . [F]orce and consent, as interpreted by justice system officials, reflect partial, 'male' viewpoints."); see also Frances Olsen, *Feminist Theory in Grand Style*, 89 COLUM. L. REV. 1147, 1157 (1989) (reviewing CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987)) ("As long as women are thought to falsely or ambiguously deny wanting sex, men may be confused regarding consent. . . . 'Consent' is meaningless as long as society fails to hear or believe a woman's refusal of sex.").

Furthermore, in both rape and sexual harassment, the claim is not established if the man reasonably believed that he had the woman's consent or that his actions were welcome. Ambiguity counts against the woman's story under both doctrine and the cultural rules that assume women are required to set the ground rules for sexual encounters. See Aiken, *supra* note 32, at 358 (asserting that courts hold the woman responsible for the man's behavior); see also Eloise Salholz, *Sex Crimes: Women on Trial*, NEWSWEEK, Dec. 16, 1991, at 22, 23 (quoting Camille Paglia, who suggests that every date "by definition is a sexual situation. Each person is giving signals, and every signal can be misinterpreted."). Paglia also asserts that "it's fair to blame the victim if she fails to protect herself." *Id.*

Cases vary in the extent to which fact finders feel free to apply these cultural stereotypes. Juries are most influenced by extralegal factors such as perceptions of the victim's poor moral character or carelessness when there is relatively little corroborating evidence, e.g. physical injury, a recovered weapon, or eyewitness testimony. See Barbara F. Reskin & Christy A. Visher, *The Impacts of Evidence and Extralegal Factors in Jurors' Decisions*, 20 LAW & SOC'Y. REV. 423, 435 (1986) (analyzing a study which showed that jurors were more likely to use extralegal characteristics in cases where little or no "hard" evidence was introduced).

details.<sup>45</sup> Finally, the effect of narrative structures on case outcomes is of particular concern here because unsuccessful narrative structures help reconfirm the very rape myths that make future cases hard to win.

The stories of sexual violation are ultimately women's stories, but the story presented in a legal hearing is not a simple narrative or set of narratives presented by the woman herself. Rather, these narratives are subject to multiple controls by the lawyers, who highlight or obscure various aspects of the claimants' stories.<sup>46</sup> In pretrial strategy sessions, lawyers construct a story to persuade the jury that is built upon, but not a simple reflection of, the story that the claimant brings to them. The jury does not hear a simple, continuous narrative, but rather a story elicited and controlled by each attorney through a series of questions.<sup>47</sup>

The cultural scripts that the jurors bring to the court indirectly influence the stories they will be told. Expectations of how jurors are likely to behave when presented with a particular array of facts affect the decisions of other legal actors: police making investigative decisions, prosecutors making charging decisions, lawyers deciding whether to file a sexual harassment claim, and even victims deciding whether to invoke the legal system.

For example, police may "unfound" a case—that is, decide not to go

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45. See, e.g., *Going Public*, *supra* note 8 (relating that a number of jurors were troubled by Patricia Bowman's inability to remember when and why her pantyhose had been removed). However, rape trauma syndrome experts find such selective loss of memory quite normal. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-III-R 248 (3d rev. ed. 1987).

46. See JACKSON, *supra* note 39, at 76-88 (describing the process by which witnesses' stories are embedded within the "trial story," in which lawyers are the protagonists and persuading the fact finder is the goal). Lawyers with an agenda for social change must often confront the tension between presenting the story best designed to win this particular case for this particular client and using the litigation as a tool for larger purposes which the client may or may not share. See Ruth Colker, *The Practice/Theory Dilemma: Personal Reflections on the Louisiana Abortion Case*, 43 HASTINGS L.J. 1195, 1201-06 (1992) (discussing the difficulties in representing different groups' interests in an amicus brief for an abortion challenge). Such issues may arise in sexual harassment cases, especially when the plaintiff is represented or supported by such institutional litigants as Equal Rights Advocates or NOW Legal Defense and Education Fund; prosecutors of rape cases are less likely to have such broad feminist agendas.

47. Al Kamen & Ruth Marcus, *Experts Fault Prosecutor for Uninspired Performance in Tough Case*, WASH. POST, Dec. 12, 1991, at A22 (citing many commentators who explained the verdict in the William Kennedy Smith case as in large part reflecting the effectiveness of the defense counsel and the ineptness of the prosecutor).

Rape complainants also face the problem of women's different speech styles, which are often perceived as less clear, certain, and assured, and, thus, as less "true." See, e.g., John M. Conley et al., *The Power of Language: Presentational Style in the Courtroom*, 1978 DUKE L.J. 1375, 1380 (exploring the results of a study which showed that female witnesses were more likely to exhibit "powerless" types of speech when testifying); see also Robert Garcia, *Rape, Lies & Videotape*, 25 LOY. L.A. L. REV. 711, 725-26 (1992) (showing how people's perceptions may be altered by the styles women use in talking about rape).



forward if the rape myths create skepticism about the woman's reputation or behavior.<sup>48</sup> The implementation of "unfounding" decisions may obscure the effect of rape myths. For example, if a police officer is not convinced that an event was a rape, he will include facts indicating the "undeserving" character of the complainant in his report, but will exclude them if he expects a prosecution to go forward.<sup>49</sup> Similarly, police are much more likely to "unfound" when the victim is uncooperative.<sup>50</sup> At first glance, this might seem perfectly sensible: The State's ability to prove its case at trial often depends on the victim. This may be another example, however, of the self-reinforcing nature of rape myths. A victim may be unwilling to cooperate because of the poor treatment she has already received or expects to receive from the criminal justice system.<sup>51</sup> Her treatment, however, may reflect the beliefs of others that she is an appropriate target for the defendant's sexual advances.

Prosecutors, too, operate in the shadow of the anticipated effects of cultural stereotypes when deciding whether to charge the alleged offender with the crime.<sup>52</sup> Once again, decisions obscure rape myths and rape myths obscure decisions. For example, it may seem that "nonconforming behavior" by the victim, such as an active sexual history or drinking, only comes up when there is reason to doubt her claimed nonconsent, since evidence of such behavior is rarely introduced when the defense argues that no intercourse occurred or that she mis-identified the defendant. A defense attorney, however, may be more inclined to raise a consent defense, whatever the facts about the encounter, when she can impugn the victim's character.<sup>53</sup>

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48. LAFREE, *supra* note 23, at 74-78. Insofar as the decision to pursue an investigation reflects police beliefs about the potential success of a case rather than the investigators' own reactions to the facts, "unfounding" will be reduced as rape shield statutes and changing sexual mores make it easier to persuade a jury.

49. *Id.* at 76-77.

50. *See, e.g.*, NATIONAL INST. OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, FORCIBLE RAPE: A NATIONAL SURVEY OF THE RESPONSE BY POLICE 2 (1977) (stating that 36% of police would "unfound" a complaint based on the victim's noncooperation regardless of evidence).

51. *See* Wayne A. Kerstetter & Barrick Van Winkle, *Who Decides?: A Study of the Complainant's Decision to Prosecute in Rape Cases*, 17 CRIM. JUST. & BEHAV. 268 (1990) (discussing the results of a study which found that victims are heavily influenced in their decision to prosecute by the detective who initially questioned them).

52. *See* Lynne N. Henderson, *What Makes Rape a Crime?*, 3 BERKELEY WOMEN'S L.J. 193, 199 (1987-88) (book review) ("[P]rosecutors receive rewards for their conviction percentage, and the structure creates a disincentive to pursue cases that prosecutors believe will lead to jury acquittals.") (citing JEANNE C. MARSH ET AL., RAPE AND THE LIMITS OF LAW REFORM 101 (1982)); *see also* Elizabeth A. Stanko, *The Impact of Victim Assessment on Prosecutor's Screening Decisions: The Case of the New York County District Attorney's Office*, 16 LAW & SOC'Y REV. 225 (1981-82) (discussing how the character and credibility of a victim can affect the strategies for prosecution).

53. LAFREE, *supra* note 23, at 206 tbl. 8.2.

Finally, the woman herself may not report a rape or bring a sexual harassment claim in cases in which the cultural stereotypes make such a claim implausible. A woman forced by a social companion to have sex may not recognize the experience as rape because it does not fit the paradigm of the stranger in the bushes; in rejecting the label "rape," she may have no word to explain the experience. As Catharine MacKinnon explained, "We also get many women who believe they have never been raped, although a lot of force was involved. They mean that they were not raped in a way that is legally provable . . . . [T]here was not *enough* violence against them to take it beyond the category of 'sex.'"<sup>54</sup> Even if the woman is certain that she was violated and that an objective observer, applying appropriate legal rules, would concur, she may decide not to file a rape complaint on the realistic assessment that a jury may reject her case.<sup>55</sup>

Those who present stories publicly know that they will be tested against the limiting paradigm of the "good girl" who is subjected to a "real" rape or a "sleep with me or you're fired" demand. If they deviate from these understandings, the women's stories will not be believed. Rational women, and the lawyers advocating for their claims, will seek to succeed within these belief structures. The individual victim wants the fact finder to accept her version of the truth and she wants a remedy. It would be too much to ask that she also use the litigation to help expand the cultural understandings for future cases.<sup>56</sup>

As much as possible, then, it becomes strategically appropriate to tell the story in a way that avoids the stereotypes of "So What" and "Not True." I do not mean that women lie; only that, like all protagonists telling the stories of their own lives, they are sensitive to context and function. Even if the objective truth, the whole truth, and nothing but the truth actually existed, a trial is not the setting for telling it.<sup>57</sup>

54. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 88 (1987).

55. Many women do not report rapes, because "[they] feel embarrassed and humiliated by it . . . . Women also blame [them]selves. We fear being blamed by other people, and they do blame us." *Id.* at 82.

56. See Steven Brill, *How the Willie Smith Show Changed America*, AM. LAW., Jan.-Feb. 1992, at 3, 100 ("The whole purpose of the trial is not to educate people. . . . It's to decide whether or not [the defendant] is guilty. . . .") (quoting the defense lawyer for William Kennedy Smith); see also Bumiller, *supra* note 43, at 139-40 (noting that the call for objective evidence of sexual violation "forces the defenders of victims' rights to resort to tactics that narrow or limit the telling of the woman's story. The claim of objectivity may also have the effect of making it more difficult to establish the woman's 'innocence' in more ambiguous situations where rape differs from the overt violence of 'real rape.'"); Mahoney, *supra* note 41, at 1308 ("Our concessions are shaped by the urgency of need when encountering law: . . . [L]aw intersects the lives of particular individuals at moments of crisis, when attempting to remake social expectation is too large a task.").

57. See Bumiller, *supra* note 43, at 133 (describing the story told at the trial by a complainant in the Big Dan pooltable rape case: "[S]he tried to present herself in society's image of an innocent

## II. The Thomas-Hill and Smith-Bowman Stories

The stories of Anita Hill and Patricia Bowman were told and heard through a filter of preexisting cultural scripts. Each woman had to avoid both "Not True" and "So What" if her claim was to be believed. The media played out these stories in a way that narrowed and made still more tortuous the path to credibility for future women's stories.

Remember the story Anita Hill told.<sup>58</sup> She was a young, intelligent, and somewhat strait-laced woman with an interesting job doing important work. She also had to listen to her boss make repeated requests to socialize (perhaps sexually), despite her repeated explanations that she did not want to do so. She had to listen to him describe pornographic movies, sexual body parts, and sexual prowess, though this made her "extremely uncomfortable."<sup>59</sup> The harassment did not "happen[] every day. . . . But [she] went to work during certain periods knowing that it might happen."<sup>60</sup> She later followed Clarence Thomas to the Equal Employment Opportunity Commission because she liked the work, the sexual overtures seemed to have ended, and other job options seemed distinctly more risky or undesirable.<sup>61</sup> Eventually, she left and accepted a teaching job at Oral Roberts University "in large part . . . to escape the pressures I felt at the EEOC due to Judge Thomas."<sup>62</sup>

Hill sought to maintain cordial relations with a man whom she clearly admired in many ways and who could facilitate or impede her progress

victim rather than revealing weakness and anger. . . . Faced with [the] constraints [of other testimony], her strategy was not to reveal the 'whole' story, but to construct a narrative that she felt would best establish her innocence.").

58. I recognize that much of the text focuses on Anita Hill as woman, thereby implicitly erasing the racial aspects of her story and the responses to it. See Kimberle Crenshaw, *Whose Story Is It, Anyway? Feminist and Antiracist Appropriations of Anita Hill*, in RACE-ING JUSTICE, *supra* note 25, at 402, 407 ("Anita Hill was primarily presented to the American public as simply a woman complaining about sexual harassment."). I also recognize the literal marginalization of including much of the racial analysis in footnotes. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN L. REV. 581, 592 (1990) (noting Catharine MacKinnon's acknowledgment of race only in footnotes). Nonetheless, and with trepidation, I appropriate this story for my purposes, which are predominantly about the dilemmas of gender and credibility.

59. Statement of Professor Anita F. Hill to the Senate Judiciary Committee, Oct. 11, 1991, reprinted in COURT OF APPEAL, *supra* note 19, at 15, 17 [hereinafter Hill Statement].

60. Jill Smolowe, *She Said, He Said*, TIME, Oct. 21, 1991, at 39.

61. Professor Hill might have been able to obtain a job in the private sector again, but preferred the kind of work she had in government to that she would have as a junior associate in a law firm. Civil service rules would have ensured her some job at the Department of Education, but not necessarily one with the civil rights focus that she wished to continue; in any event, staying at Education would subject her to the then-current concern that the entire Department might be abolished. Hill Statement, *supra* note 59, at 18.

62. *Id.* at 17-19.

within the small community of high-powered lawyers.<sup>63</sup> She called him occasionally, helped arrange for him to give a local speech, and drove him to the airport.<sup>64</sup> She kept her misgivings largely to herself until urged by Senate staffers to come forward.<sup>65</sup>

All this seemed utterly credible, even eerily familiar, to many professional women. But most Americans apparently did not believe her.<sup>66</sup> Why?

One possibility, the one the Senate Republicans purported to accept, was that her story was simply "Not True."<sup>67</sup> The truth was Clarence Thomas' counter-story that none of this behavior ever occurred. The behavior attributed to him by Hill was described as extraordinary, vile, and disgusting. Senator Biden in his opening statement declared that "any person guilty of this offense [sexual harassment] is unsuited to serve . . . in any position of responsibility. . . ." Other women who worked with Thomas declared that they had never seen such behavior and asserted that he was incapable of it.<sup>68</sup>

Anita Hill's story also seemed inconsistent with what we knew of her. She presented herself as a decent woman and no decent woman would tolerate such behavior. Yet she endured it without public complaint, followed him from one job to the next, and remained on cordial terms with someone who violated the Civil Rights Act by making what Senator

63. "My working relationship with Judge Thomas was positive," she said. *Id.* at 16.

64. *Id.* at 20; Smolowe, *supra* note 60, at 39. Anita Hill explained her actions by saying that "I may have used poor judgment. . . . I did not want, early on, to burn all the bridges to the EEOC. . . . Perhaps I should have taken angry or even militant steps[,] . . . [b]ut . . . the course that I took seemed the better as well as the easier approach." Hill Statement, *supra* note 59, at 21.

65. She had discussed the incidents of harassment at the time with some friends. She did not volunteer to testify during the Thomas nomination proceedings, but agreed to discuss these incidents when directly asked to do so. See Videotape of Anita Hill testimony of Oct. 11, 1991, Tape 2 (on file with author) [hereinafter Hill Videotape] (showing Senator Leahy questioning Hill as to why she had not come forward earlier).

66. Later polls, and more careful analyses even at the time, showed a shift in public attitudes—far more people believed Hill and disbelieved Thomas. Nonetheless, a substantial number did disbelieve her, and the political perception of relative credibility allowed the Senators to confirm Thomas' appointment. Compare the Gallup polls of October 1992 (43% of respondents believed Hill more; 39% believed Thomas more) with October 1991 (29% believed Hill more; 48% believed Thomas more). Gallup Polls, Roper Center for Public Opinion Research, Univ. of Conn., WL Poll at \*1 (October 1992), \*6 (October, 1991).

67. One must also remember that this was not two stories, side by side. The stories were elicited by examination and cross-examination, and orchestrated by others, like a trial. More accurately, it was a "trial" in which Thomas was aggressively "represented" by the Republicans on the committee, while the Democratic Senators were neutral at best. See Burnham, *supra* note 25, 299-305 (contrasting the organized and effective approach of the Republicans with the unfocused approach of the Democrats to Thomas' confirmation hearing).

68. Hill Videotape, *supra* note 65, Tape 1; cf. Susan Deller Ross, *Proving Sexual Harassment: The Hurdles*, 65 S. CAL. L. REV. 1451, 1451 (1992) (discussing "the cognitive dissonance between the two starkly contrasting images of the . . . talented leader or sexual humiliator").

Specter referred to as "these disgusting comments."<sup>69</sup> As Professor Mahoney perceptively notes, she was treated like a battered woman: Hill's failure to leave was evidence that the abuse did not happen or was not serious.<sup>70</sup>

Because Clarence Thomas asserted under oath that these events never happened,<sup>71</sup> believing him meant accepting the "Not True" counter-story. This required, however, an alternative explanation of Anita Hill's charges. Among the most extraordinary moments of the hearing process were the searches for such explanations: she suffered from delusional erotomania and fantasized it all,<sup>72</sup> she was a scorned woman, she just wanted attention, she was the perjuring dupe of special interest groups.<sup>73</sup> Senator Specter even argued, reminiscent of the infamous "prompt complaint" requirement,<sup>74</sup> that Hill's allegations must not be true since

69. Hill Videotape, *supra* note 65, Tape 2 (showing Senator Specter questioning the veracity of Hill's claims based on her continued relationship with Thomas). Her lack of emotional affect was seen as reflecting lack of harm rather than the triumph of dignity. See Carol Sanger, *The Reasonable Woman and the Ordinary Man*, 65 S. CAL. L. REV. 1411, 1413 (1992) (explaining that unemotional responses like Professor Hill's, while common among rape survivors, are not effective in rape trials).

70. Mahoney, *supra* note 41, at 1286-87; see also Wahneema Lubiano, *Black Ladies, Welfare Queens, and State Minstrels: Ideological War by Narrative Means*, in RACE-ING JUSTICE, *supra* note 25, at 323, 341-42 ("Hill's education and career trajectory discredited her because, . . . unlike an uneducated person, . . . Hill had options."); cf. Rhode, *supra* note 27, at 1465 ("If a woman does not make a strong, contemporaneous complaint, the assumption is the harassment did not occur; if she does make the protest, she's overreacting, strident, humorless and oversensitive."). There were also bizarre and disingenuous attacks on her credibility, such as the suggestion that she would have kept a contemporaneous written record of his harassing comments if they had actually occurred. Hill Videotape, *supra* note 65, Tape 2.

71. Statement of Judge Clarence Thomas to the Senate Judiciary Committee, October 11, 1991, reprinted in COURT OF APPEAL, *supra* note 19, at 7, 10-11.

72. See Ronald Dworkin, *One Year Later, The Debate Goes On*, N.Y. TIMES, Oct. 25, 1992, § 7 (Book Review), at 1, 39 (stating that the notion that Anita Hill had fantasized everything was supported only by the "bizarre testimony of [John Doggett,] a narcissistic witness who [apparently] . . . had emotional problems and needed help himself."); Smolowe, *supra* note 60, at 40 (discussing John Doggett's charges that Hill was unstable and fantasized about romance).

73. See Hill Videotape, *supra* note 65, Tape 2 (showing Senator Heflin questioning Hill concerning possible motives for her accusations). William Safire referred to the "legal brigade using Ms. Hill" and asserted that Judge Thomas was "the victim of a late hit by a self-deluded person manipulated by a conspiracy of character assassins." William Safire, *The Plot to Savage Thomas*, N.Y. TIMES, Oct. 14, 1991, at A19. Senator Specter exhibited a similar willingness to savage Hill and assume both the falsity of her statements and the malice of her motives. For example, he suggested that she was guilty of perjury because she said, "I don't know Phyllis Berry and she doesn't know me," though the sensible explanation was that she used the word "know" metaphorically to indicate that Berry did not know her well enough to have any information regarding Hill's alleged sexual interest in Thomas, and was thus providing ungrounded speculation, not fact, in her testimony. See Hill Videotape, *supra* note 65, Tape 1 (showing Specter attempting to impeach Hill on the basis of her knowledge of Berry). See generally David B. Wilkins, *Presumed Crazy: The Structure of Argument in the Hill/Thomas Hearings*, 65 S. CAL. L. REV. 1517 (1992) (criticizing each of these purported explanations for Hill's charges).

74. See MODEL PENAL CODE § 213.6(4) (Proposed Official Draft 1962) (requiring a rape victim

they were so late; he buttressed his argument with the assertion that Congress had created a special short statute of limitations for sexual harassment cases because such charges were so difficult to defend.<sup>75</sup>

In contrast to the Senate Republicans' reaction, much of the public's response to Hill's charges seems to have been closer to "So What," though Thomas' denial made this illogical.<sup>76</sup> Many people apparently believed that he had indeed said some or all of the things she claimed but did not deem the situation serious enough to justify denying Thomas a Supreme Court seat.<sup>77</sup>

In the "So What" story, Thomas' behavior had not seriously offended Hill. She chose to tolerate discomfort for her own manipulative purposes. If she made such a calculating choice to "listen her way to the top," Hill's assertion now that such behavior was unwelcome and harassing was irrelevant.<sup>78</sup> Alternatively, despite Hill's idiosyncratic response, Thomas' words constituted ordinary workplace behavior which did not merit sanctions.<sup>79</sup>

to notify public authorities within three months of the offense in order to be able to prosecute); ESTRICH, *supra* note 2, at 53-54 ("The absence of a fresh complaint created 'a strong but not a conclusive presumption against a woman.'") (citing WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAW OF ENGLAND 211 (Dawsons of Pall Mall 1966) (1769)).

75. Hill Videotape, *supra* note 65, Tape 2. A 180-day statute of limitations is applicable to all Title VII actions. 42 U.S.C. § 2000e-5(e) (1992).

76. See *supra* note 67.

77. Here, once again, the two barriers to credibility blend. If Hill were in fact a Jezebel, then she lied either about what happened or about her reactions to it. If she were a good woman, she would have reacted with immediate, visible, public outrage—or her purity would have deterred the event itself. See Nell I. Painter, *Hill, Thomas and the Use of Racial Stereotype*, in RACE-ING JUSTICE, *supra* note 25, at 200, 209-10 (discussing the stereotype of "Jezebel," the black woman who instigates sex and "positively revels in sexual promiscuity").

78. Sarah E. Wright, *The Anti-Black Agenda*, in COURT OF APPEAL, *supra* note 19, at 225.

79. If the issue was whether this sexual harassment was forbidden by Title VII, this "reasonable person" gloss on the "So What" story would be appropriate. In order to show a violation of Title VII, a plaintiff alleging "hostile environment" sexual harassment must prove that she was: (1) "subjected to sexual advances, requests for sexual favors, or other . . . conduct of a sexual nature," (2) the "conduct is unwelcome," and (3) the "conduct is sufficiently severe or pervasive to alter the conditions of the . . . employment." *Ellison v. Brady*, 924 F.2d 872, 875-76 (9th Cir. 1991). The circuits are in conflict concerning whether the "severity and pervasiveness" should be evaluated from the victim's or the reasonable person's perspective. *Id.* at 877-78 (adopting the victim's perspective); see also *Harris v. Forklift Systems, Inc.*, No. 3:89-0557 1990 U.S. Dist. LEXIS, 20115, at \*14 (M.D. Tenn. 1990) (adopting a reasonable person's perspective), *aff'd*, 976 F.2d 733 (6th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3511 (U.S. Mar. 2, 1993) (No. 92-1168). The Senators, however, assumed that the behavior alleged here was severe and pervasive and would have constituted sexual harassment if it had occurred. In any event, given Thomas' denials under oath, whether the behavior violated Title VII was legally irrelevant.

What Anita Hill endured, however, even if sufficiently severe and pervasive to be actionable, pales in comparison to the far more severe traumas, including far more severe harassment, that many others experience. Some women apparently felt little sympathy for Hill's complaints because they had survived much worse. Michael Thelwell, *False, Fleeting, Perjured Clarence: Yale's Brightest*

Questions of racial solidarity also colored a few reactions. Some African-Americans believed that, even if Thomas did what Hill alleged and ignored her reactions at the time, she was wrong to raise the issue when it could sink the nomination: A sister should not harm a brother.<sup>80</sup> Orlando Patterson, an African-American sociologist, provided the most vivid version of this racial "So What" story by claiming that the language Thomas used was just a "down-home style of courting" which Hill would have recognized and not found offensive. Patterson claims that Hill had "lifted a verbal style that carries only minor sanction in one subcultural context and [threw] it in the overheated cultural arena of mainstream, neo-Puritan America, where it incurs professional extinction."<sup>81</sup>

Patterson grossly oversimplifies by asserting a clear dichotomy between white neo-Puritanism and an African-American cultural style that is erotically less inhibited. He is correct that there is no one universal set of responses to sexualized speech. He is wrong in assuming that there are two: one white and one black. Anita Hill's claim that *she* was offended seems quite plausible when one takes into account her particular cultural roots as the thirteenth child of a rural Oklahoma Baptist family.<sup>82</sup> Patterson's claim feeds into racial stereotypes of African-American women as Jezebels: sexually loose and therefore sexually available.<sup>83</sup>

and *Blackest Go to Washington*, in RACE-ING JUSTICE, *supra* note 25, at 120, 121.

80. See, e.g., Carol M. Swain, *Double Standard, Double Bind: African-American Leadership After the Thomas Debacle*, in RACE-ING JUSTICE, *supra* note 25, at 225 (noting that many African-Americans felt that Anita Hill had violated a code of censorship, which mandates that African-Americans should not criticize each other in front of whites); see also Painter, *supra* note 77, in RACE-ING JUSTICE, *supra* note 25, at 203-04 (discussing Justice Thomas' hearing strategy and suggesting that he cast Anita Hill in the role of "black-woman-as-traitor-to-the-race").

81. Orlando Patterson, *Race, Gender, and Liberal Fallacies*, 1 RECONSTRUCTION 64, 65 (1992).

82. Hill Statement, *supra* note 59, at 15; see also Rosemary L. Bray, *Taking Sides Against Ourselves*, in COURT OF APPEAL, *supra* note 19, at 47, 49 (quoting Cornel West, Director of the African-American Studies department at Princeton University, as saying, "'She [Hill] clearly is a product of the social conservatism of a rural black Baptist community'"). The unlikelihood that Thomas' alleged language reflected a natural cultural style for Professor Hill is apparent as one watches her deep discomfort as the Senators force her to detail the offensive language. See Hill Videotape, *supra* note 65, Tape 1 (showing Hill's response when Senator Biden asked her to recall, as well as she could, Thomas' exact words). Given Hill's discomfort, it is curious that Patterson described Thomas' language as "a way of affirming their common origins." Patterson, *supra* note 81, at 65.

83. See, e.g., LAFREE, *supra* note 23, at 219-20; Wriggins, *supra* note 10, at 117-23 (describing stereotypes of black women as inherently "more sexually experienced or . . . likely to consent to sex"). Racial stereotypes in the minds of whites also undermined Professor Hill. She sought to present herself as an African-American, as an accomplished professional and as a lady: The culture simply does not have a place where these persona can overlap. See Lubiano, *supra* note 70, at 340-41 (noting the fact that Hill's "'ladylike' (another word for 'middle-class') behavior [was] read as an aberration because a black lady is either an oxymoron, or yet another indication of the pathology of African-American culture"); Painter, *supra* note 77, at 205 ("Simply to comprehend Hill's identity as a highly educated, ambitious, black female Republican imposed a burden on

Furthermore, like all the counter-stories, Patterson's version rejects the concrete reality of the difficult story Anita Hill told and the complex persona she presented in favor of simple stories of good and evil.<sup>84</sup>

Anita Hill displayed extraordinary dignity and composure during the hearings, and these qualities counted against her. They were perceived as evidence that the sexual harassment did not happen, that she would not let it happen, or that it could not have been serious.

A similar oversimplification of reality and preference for the clear and consistent over the ragged and complex truth also appears in the responses to the testimony in the William Smith rape trial. The story Patricia Bowman told at trial is a classic acquaintance rape scenario. She went out with a friend for the evening, met William Kennedy Smith in the fashionable Au Bar, struck up a conversation, and gave him a ride home. When they got to his family's home, she agreed to a tour of the grounds. They walked down to the beach and kissed once or twice. A friendly evening suddenly turned ugly when he pushed her to the ground, held her down, and raped her. The jury was not convinced that Bowman's story was true; in little over an hour, it rendered a not guilty verdict.<sup>85</sup>

In large part, the jury may have accepted Smith's counter-story, or at least found it sufficient to create a reasonable doubt. The claim of rape was "Not True." The sex was consensual; indeed, she had been the sexual aggressor. Smith said, "If you want to know my opinion . . . my impression was that I got picked up that night; . . . things developed along a sexual way very quickly."<sup>86</sup> When they went to his home, she masturbated him on the beach, and when he later sought to leave her and go to bed, she pulled off his towel and massaged him until they could have sex.<sup>87</sup> Smith testified, "[I]t wasn't my decision; it was completely

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American audiences, black and white, that they were unable—at least at that very moment—to shoulder."). While Thomas also challenged white stereotypes, he benefitted both from the sponsorship of powerful white men and from his evocation of white guilt through the word "lynching."

84. Nellie McKay may have best captured Anita Hill's dilemma:

Because Anita Hill is black and a woman, but fits none of the stereotypes of black women to which most white people are accustomed[,] . . . [the Senators] could find no reference point for her, and therefore she had no believability for them. That is why some had to make her over for themselves, imposing on her other images more comfortable for them.

Nellie McKay, *Remembering Anita Hill and Clarence Thomas: What Really Happened When One Black Woman Spoke Out*, in *RACE-ING JUSTICE*, *supra* note 25, at 269, 285.

85. See *FLORIDA V. SMITH: A TRIAL TRAINING VIDEOTAPE*, Tape 2 (American Lawyer Court Television Video Library Service, 1992) [hereinafter *SMITH VIDEOTAPE*] (noting in a commentary that it took the jury only 77 minutes to render a verdict).

86. *Id.* (Smith during cross-examination).

87. See *id.* (direct testimony of Smith).



mutual.”<sup>88</sup> The denial by all the occupants of the estate that they had heard Bowman’s screams under their windows that night provided further room for doubt.<sup>89</sup>

Again, then, the alleged victim must have lied and Smith’s lawyer had an explanation. He argued that she “freaked out” when Smith called her by the wrong name during sex and that she was hurt and angry when he went off to bed without asking for her phone number.<sup>90</sup> In uncanny echoes of the charges made against Anita Hill, he suggested that she was a “woman scorned” or that, after she first called the police and the rape crisis center, she saw how easy it was to get attention.<sup>91</sup>

This “Not True/Woman Scorned” explanation was the central counter-story in the Smith case, but the responses of the public suggest that elements of “So What” were also operating. “She didn’t really explain why, as so devoted a mom, she was out on the town until almost dawn and didn’t call home once to check on the kid,” said columnist Mike Royko.<sup>92</sup> The proverbial “man in the street” had similar reactions: “I think she knew exactly what she was doing. . . . Maybe she’s a very insecure woman who wanted attention and notoriety.”<sup>93</sup> One man said the verdict was “precisely what should have happened, what she deserved. A lot of the feedback you get is that she brought it on herself. . . . Most women will tell you she was doomed since the beginning. She set herself up.”<sup>94</sup>

Social constructions of the loose woman, the woman who really wanted it, and the woman whose sexual desires are conflicted, unreliable, or ultimately irrelevant, are very strong. The prosecution’s task was still more difficult, because Patricia Bowman’s story lacked the clarity, consistency, and completeness that fact finders demand of a complainant’s story. How can a woman persuade a jury, or the public, beyond a reasonable doubt that she was raped when she cannot even remember when

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88. *Id.* (Smith during cross-examination).

89. *Id.* In addition, expert witnesses on such esoterica as the acoustics of the Kennedy estate and soil sampling reinforced the defense case. See Frank Cerabino & Chris Stapleton, *From Astronomy to Botany, Experts Offer Speculation*, PALM BEACH POST, Nov. 24, 1991, at A1 (discussing the “army of experts” being used by both sides in the William Kennedy Smith trial, including an architect hired by the defense to “comment on how sound travels inside and outside the house” and botanists to testify on plant matter found in the woman’s underwear).

90. *Id.* (showing defense attorney using these explanations in his closing argument to show that Bowman’s charge of rape was false).

91. Compare *id.* with text accompanying note 73 (supporting the idea that one motive behind the victim’s allegations was a desire for attention).

92. Mike Royko, *Proof That It’s Not Over Till Verdict’s In*, CHI. TRIB., Dec. 12, 1991, at 3.

93. Elinor J. Brecher et al., *What Would Have Been Your Verdict?* *South Floridians Judge Smith Case*, MIAMI HERALD, Dec. 15, 1991, at J1 (quoting one woman’s opinion of the case).

94. *Id.* (Omission in original).

or where she took off her pantyhose?<sup>95</sup>

Furthermore, Smith did not resemble our cultural image of a rapist. He was a handsome young doctor, regularly presented in the press with his new puppy and boyish grin. We readily believe she had sex with him—that “he wouldn’t need to rape anyone.”<sup>96</sup> Alternatively, his Kennedy-esque reputation as a womanizer meant that she “asked for it” long before the demand for intercourse was made.<sup>97</sup>

Patricia Bowman was too irrational, too emotive, too out-of-control; Anita Hill was too cool, too unemotional, too controlled. Neither fit comfortably within the narrow paradigms of the “True Victim.” Did they present the best stories that could have been told? Let me be clear here. First, no one but the parties knows exactly what occurred in each of these cases. Second, I believe on the basis of what I saw and heard that the core claim of sexual violation was true in each situation. However, I find myself skeptical about certain details of each woman’s story, at least as filtered through the media, which echo aspects of preexisting cultural scripts. In light of this, I would like to engage in an act of imagination: to envision the actual scenarios that might have occurred between Anita Hill and Clarence Thomas and between Patricia Bowman and William Smith. If my imagined versions are true, then both women tailored their stories in an effort to avoid the trappings of rape myths.

Imagine, for example, a woman subjected to the behavior Clarence Thomas allegedly exhibited. The woman found Thomas’ actions distasteful and disgusting. She also valued her career and knew that she would jeopardize it if she created any kind of public confrontation. So, whenever the man acted, she tried to exhibit her discomfort, but only in small ways like changing the topic or cutting the conversation short. She chose not to make an issue out of the behavior even after she left the job in which he

95. See David A. Kaplan et al., *The Trial You Won't See*, NEWSWEEK, Dec. 16, 1991, at 18, 20 (discussing the “dissonance between the trial-you-see and the trial-you-don't”); *Going Public*, *supra* note 7 (discussing Bowman’s version of her encounter with William Smith). There was no rape trauma expert at the Smith trial because of a procedural error by the prosecution. See generally Toni Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395 (1985) (explaining that rape trauma experts can provide a context in which otherwise puzzling aspects of the complainant’s behavior, including memory gaps, become explicable).

96. Christine Evans, *Courtyard 'Jury' Has Own View on Trial*, MIAMI HERALD, Dec. 3, 1991, at A13. Other court watchers said, “I just find it hard to believe that someone with that much money would have to resort to rape to get what he wants” and “He probably just got carried away. Pretty girl. You know. That’s how guys are. I have sons myself.” *Id.*

97. Not surprisingly, Camille Paglia presents this response in its most extreme form: “The girl in the Kennedy rape case is an idiot. You go back to the Kennedy compound late at night and you’re surprised at what happens? . . . [E]veryone knows that Kennedy is spelled S-E-X. . . . [T]his is not rape.” CAMILLE PAGLIA, *The Rape Debate Continued*, in SEX, ART AND AMERICAN CULTURE 55, 58 (1992).

was her supervisor. She was no longer immediately at risk, yet her cordial relationship with a high government official was a benefit she could continue to draw on and share with her new employer.<sup>98</sup> If she created an incident it would not be of any personal benefit and would have labeled her a troublemaker. That was not her style. Finally, even when she was urged to come forward, she was reluctant to do so without assurances that her statement might lead to a quiet withdrawal rather than the public circus that followed.<sup>99</sup>

Or, imagine a woman who meets an attractive, charming scion in a bar one night. She agrees to go home with him to see the family estate. She is genuinely unsure about how she wants the evening to end. There are a couple of kisses on the beach—sensual, not merely friendly. She finds him “attractive.”<sup>100</sup> Before she has a chance to decide if she wants to go further, he knocks her to the ground and forces himself on her.<sup>101</sup>

Both of my versions of the Hill and Bowman stories seem utterly plausible to me. And both involve male behavior that seems clearly wrong. Yet neither, I suspect, would persuade the “reasonable man” in the jury box. If this is the woman’s authentic story, she is caught in a double-bind: The truth evokes rape myths and thus will not get told when the woman’s primary task is to persuade and to win. But as the Thomas and Smith incidents indicate, stories crafted to avoid the myths are risky as well. In crafting stories for litigation, women may create confusion and implausibility, leading fact finders to reject their claims. Nevertheless, the unvarnished, complex truth may be the more risky option. If women agree that the complete truth is more risky, then such stories will not get told in trials. They will remain obscured and the cultural scripts unchallenged so long as the primary source of those scripts is litigation stories and the media reports that surround them.

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98. At one point Senator Specter asked Hill if she had maintained such a relationship “to derive whatever advantage [she] could?” Perhaps rebelling from the implications of raw ambition, which is always suspect in a woman, Hill responded with a disclaimer of any such thought, saying she wanted only to avoid retaliation, not to obtain any benefits. Hill Videotape, *supra* note 65, Tape 2.

99. This may be the story Anita Hill told. However, the structure of the hearings and the manipulation of her testimony by both the Senators and the media prevented my imagined story from reaching the majority of the public. Perhaps it would have been more credible; if I am right, Professor Hill and her advisers thought it less credible.

100. Patricia Bowman apparently said this to the police after the incident. SMITH VIDEOTAPE, *supra* note 85, Tape 2 (showing defense using this fact in closing argument to support the idea that Bowman’s account of the encounter is false).

101. In her interview of Patricia Bowman shortly after the verdict, Diane Sawyer argued that her self-presentation as “Betty Crocker” was not credible and asked her if it weren’t true that “something amorous happened on the beach.” Insistent on maintaining the same persona presented at trial, Ms. Bowman responded, “No, there was no consensual sex.” *Going Public*, *supra* note 8.

### III. Expanding the Cultural Repertoire of Stories

The two cautionary tales presented here are not merely useful illustrations of some larger point that might have been illustrated by any number of examples. Both were widely publicized; both were televised live. What the public watches and reads about such cases confirms or changes its understanding of what counts as sexual violation, of what a woman must be and show and do for her claim to be believed.<sup>102</sup> All trials, especially highly publicized ones, become vehicles for either expanding or silencing public debate.

If litigation and its attendant publicity, along with various sorts of fictions, are among the primary vehicles through which we create and test our cultural understandings of sexual violations, how does that affect the content of those perceptions? The case selected for litigation, which is shaped by the intersecting demands of the cultural preconditions for credibility and the litigation process, becomes the culturally understood paradigmatic case. Yet, the case selected for litigation is almost surely atypical of the universe of experiences of sexual violation and even of the smaller universe of legally actionable violations.

Why should cultural understanding derive so much from litigation stories? Statistics, if we can believe them, show that direct experiences of sexual violation are very common.<sup>103</sup> If people experience sexual

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102. In the long run, the effects of the Thomas-Hill hearings are more complex. See generally RACE-ING JUSTICE, *supra* note 25 (analyzing the strategy of the various participants in the hearings and the impact on public perceptions of race, gender, and sexual harassment). In fact, the hearings appear to have encouraged the filing of sexual harassment complaints. See Jill Smolowe, *Anita Hill's Legacy*, TIME, Oct. 19, 1992, at 56 (stating that the number of complaints rose 50% in the year following the hearings). But see Bryan, *supra* note 29, at 193 ("attributing Anita Hill's victimization to her own behavior also promotes a false sense of security in these women.").

The hearings also served as the impetus for a great deal of the sort of individual, nonlitigative storytelling encouraged in this Article. Inspired by Anita Hill and infuriated by others' reactions, women told their own stories to each other and to the men in their lives. My unverified hunch is that this process of embedding Anita Hill within a context of numerous other sexual harassment incidents was part of the basis for the shift in opinion towards a greater belief in her claim. See Charen, *supra* note 7, at 84 (presenting a change in poll results after the hearings as indicative of belief in Anita Hill's allegations).

One of the more disturbing cultural re-inscriptions of these stories was a Harvard Law School criminal law examination given shortly after the Smith verdict. In the exam's hypothetical, the protagonists were Mary Smith and Willie Jones. Students were to assume a number of facts about Mary: (1) that she went to bars regularly to pick up men and have sex with them, (2) that she went home with Willie and joined him for a romp in the hot tub, (3) that her eventual "no" was arguably only a resistance to sex without birth control, and (4) that her decision to prosecute was in revenge for getting a venereal disease. Harvard Law School Examinations 126, 1990-91 (on file with author). The exam question facilitates rape myths by altering facts of the Bowman-Smith case to make the woman promiscuous and providing a vengeance motive for crying rape.

103. See BOURQUE, *supra* note 22, at 25-40 (discussing several research studies reporting incidence and prevalence of rape); ESTRICH, *supra* note 2, at 10-11 ("Reporting rates of over 50

violation, why are they so prone to believe rape myths and to think the atypical case represents the standard pattern? There are several reasons. First, most *men* do not have any direct knowledge of such experiences.<sup>104</sup> Few men have been raped; few have engaged in sexual violations.<sup>105</sup> At least, they do not realize that they have done so.<sup>106</sup> Second, although many women have endured experiences they perceive as sexual violation, they often lack a context for naming and understanding those experiences.<sup>107</sup>

Finally, women do not talk about their experiences of sexual violation.<sup>108</sup> It is not simply that we do not file lawsuits and criminal charges or speak out publicly. Frequently, we do not even tell these stories in private. We rarely talk about them to our families, our friends, and especially to the men in our lives. Sometimes I think the number of men who believe no one they know has ever been subjected to sexual violation is matched only by the number of straight people who think no one they know is gay.<sup>109</sup>

Developing and using nonlitigation forums for women's stories of sexual violation may begin to break the pattern in which rape myths perpetuate themselves. Ordinary people may begin to doubt the validity and universality of these myths when they hear stories inconsistent with

percent make rape one of the most reported crimes covered by victimizations surveys.”).

104. See, e.g., BOURQUE, *supra* note 22, at 37-38 (citing a study that reported 10.6% of the men surveyed reported incidents of sexual violation).

105. See *id.*; see also LEE MADIGAN & NANCY GAMBLE, *THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM 9* (1991) (citing the U.S. House Select Committee on Children, Youth, and Families (1990) which estimated that only one in twelve rape victims is a male). It is perfectly plausible to assume that a large percentage of women have experienced various forms of sexual violation as a consequence of the actions of a smaller number of persistently sexually aggressive men.

106. Due to gendered perceptions, a woman can be sexually violated by a man who does not believe he is acting wrongfully. See, e.g., Scheppele, *supra* note 24, at 1110-11 (discussing the divergent perceptions of men and women in the context of rape); *Ellison v. Brady*, 924 F.2d 872, 878-79 (9th Cir. 1991) (noting that women tend to have a broader perspective on what constitutes harassment); cf. BOURQUE, *supra* note 22, at 59 (noting that “official statistics portray rapists as overwhelmingly young, black, and poor [, and] psychodynamic studies portray them as mentally diseased men with uncontrollable sexual impulses”) (citations omitted).

107. See *supra* notes 54-57 and accompanying text.

108. “Rape remains the most under-reported of all major crimes: only 7% of all rapes are reported to police.” Willis, *supra* note 27, at 2199 n.21 (citing *2 Legislation to Reduce the Growing Problem of Violent Crime Against Women: Hearings on S. 2754 Before the Senate Comm. on the Judiciary*, 101st Cong., 2d. Sess. 77 (1990)).

109. This call for telling stories is akin to the call by certain gay activists and scholars for a “coming out” that can transform cultural understandings of the group as a whole by displacing the current images of lesbians and gay men as a distinct and deviant group. See generally Marc Fajer, *Can Two Real Men Eat Quiche Together*, 46 U. MIAMI L. REV. 511 (1992) (explaining that open discussions of lifestyle choices will help to transform cultural misperceptions about gay men and lesbians).

them, especially in contexts where skepticism is difficult. We can tell stories of sexual violation in a variety of contexts: in quiet conversations with those we know; in classroom discussions; and in published stories of a fictional, autobiographical, or scholarly nature. Each format for presenting these stories has its own benefits and drawbacks.

Works of fiction and popular culture can sometimes help to expand the public's understanding of what sexual violation is and the contexts in which it can occur. The controversies surrounding such movies as *The Accused*,<sup>110</sup> *The Color Purple*,<sup>111</sup> and *Thelma and Louise*<sup>112</sup> demonstrate that they at least succeeded in focusing attention on these issues,<sup>113</sup> a precondition to changing understandings. Few other forums have as much potential. Because such presentations are fiction, however, those who find them inconsistent with the myths may dismiss them. Furthermore, fiction and popular culture more often reinforce rather than erode preconceived myths: see any soft- or hard-core pornography, or "bodice-ripper" romance novel, and almost any MTV video or rap song, for example. According to Carol Sanger, the mass media and best-sellers "reflect whatever it is that ordinary readers feel most comfortable with" and embody "the quiet encouragement of the reader's existing values."<sup>114</sup>

Autobiographical accounts of sexual violation can also occasionally reach a mass audience.<sup>115</sup> They are powerful if believed, but may lack

110. *THE ACCUSED* (Paramount 1988).

111. *THE COLOR PURPLE* (Warner Bros. 1985).

112. *THELMA AND LOUISE* (Metro-Goldwyn-Mayer 1991).

113. See, e.g., Mia Carter, *The Strange Case of Callie Khourie: Public and Private Responses to Thelma & Louise*, 2 *TEX. J. WOMEN & L.* 125 (1993) (examining the largely negative critical responses to *Thelma & Louise*); Elizabeth V. Spelman & Martha Minow, *Outlaw Women: An Essay on Thelma & Louise*, 26 *NEW ENG. L. REV.* 1281 (1992) (commenting on the intense controversy and debate provoked by *Thelma & Louise*, as reflected in the significant attention the film received from the media); Charlotte L. Allen, *Frightening Messages from the Movies: 'The Accused' and 'Halloween 4,' Though Wildly Different, Have Something Disturbingly in Common*, *L.A. TIMES*, Nov. 13, 1988, (Calendar), at 3 (criticizing *The Accused* for its failure to depict any positive role for masculinity and its depiction of men as entirely evil); Vernon Scott, *The 58th Academy Awards' "Color Purple" Makes Black Men See Red*, *UPI*, Mar. 23, 1986, available in *LEXIS*, Nexis Library, *UPI File* (quoting several African-American men who disparaged the film for its depiction of black men as sex fiends who repeatedly abuse black women).

114. Carol Sanger, *Seasoned to the Use*, 87 *MICH. L. REV.* 1338, 1343 (1989). A skillful analyst can use almost any material to sensitively explore and challenge standard conceptions of men, women, and sexual violation. Cf. Garcia, *supra* note 47 (using director Bertolucci's *LAST TANGO IN PARIS* (Metro-Goldwyn-Mayer 1972) as the basis for an innovative exploration of rape trials). Most of the public, however, engages in popular culture without the filter of a sensitive cultural critic.

115. See, e.g., *MAYA ANGELOU, I KNOW WHY THE CAGED BIRD SINGS* 70-73 (1969) (describing a violation that occurred during the author's childhood); *LINDA LOVELACE & MIKE MCGRADY, ORDEAL* (1980) (describing coerced prostitution which included her performance in the pornographic film *Deep Throat*). One striking story in the popular media, but written in a

the credibility given to women we know or to women with the mantle of scholarly expertise. More recently, some women have included such autobiographical elements within more scholarly works.<sup>116</sup> These accounts are less subject to the skepticism attached to fiction, though their potential audience is unlikely to include those most unthinkingly loyal to the rape myths challenged therein.

Stories of sexual violation can also be told in the classroom. When told by the faculty member, they carry the implicit legitimacy of scholars' stories, and simultaneously allow for a conversation that may challenge and shift preconceptions.<sup>117</sup>

Perhaps the most common, nonlitigation forum for telling stories of sexual violation is the personal conversation. Those who know and respect us may then believe us, even when we tell stories inconsistent with what they thought they already knew.<sup>118</sup> Other women hearing our stories may feel empowered to tell their own and to recognize that they were not at fault.<sup>119</sup>

If out-of-court stories are to change beliefs of listeners, the listeners must first believe them. Are such stories true and are the tellers credible?

dispassionate voice, is Jane Schorer, *It Couldn't Happen to Me: One Woman's Story*, DES MOINES REG., Feb. 25-Mar. 1, 1990 (special reprint). *It Couldn't Happen to Me* won its publisher, Geneva Overholser, a Pulitzer Prize. See Judy Mann, *Women's Empowerment Wins a Pulitzer Prize*, WASH. POST, Apr. 12, 1991, at D3 (noting the recent trend among rape victims of identifying themselves and speaking out in the media and crediting Overholser for initiating that trend).

116. Susan Estrich, followed by Lynne Henderson, opened the door to legal scholarship for such stories. Though in each case their experience fit within the paradigm of the classic rape, they helped counter rape myths by showing rape survivors as simultaneously strong and vulnerable. See ESTRICH, *supra* note 2, at 1-3 (describing her experience of having been raped by a stranger who subsequently stole her car); Henderson, *supra* note 52, at 220-24 (describing the circumstances of her rape by a stranger who broke into her home). See generally Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991) (discussing the uses of feminist narratives in legal scholarship).

117. Even introducing the topic of rape in a law school classroom, or in any other classroom setting, is not without risks. See James J. Tomkovicz, *On Teaching Rape: Reasons, Risks, and Rewards*, 102 YALE L.J. 481 (1992) (arguing that the benefits outweigh those risks). Telling, or creating space in which students can tell, experiential stories of rape increases the stakes on both sides of that equation but is, I believe, worthwhile. See Mary I. Coombs, *Non-Sexist Teaching Techniques in Substantive Law Courses*, 14 S. ILL. U. L.J. 507, 521-23 (1990) (asserting that, because the law does not equally acknowledge male and female perspectives concerning rape, good feminist classroom teaching of rape can and must be used to explore and better understand gendered views); Susan Estrich, *Teaching Rape Law*, 102 YALE L.J. 509, 511-12 (1992) (noting the lack of law school classroom instruction about rape, and describing how she has worked to educate students about rape).

118. Public stories are likely to be most effective when "amplified" by the additional, personal stories they inspire, as appeared to happen in the aftermath of the Hill-Thomas hearings. See *supra* note 102.

119. See *infra* text accompanying note 140 (describing my experience of harassment by a senior partner at my law firm).

Women theoretically *could* tell deliberately false or misleading stories of their own sexual violations to make a political point, but I have seen no evidence that they have done so. I do not mean that there is a simple and identical correspondence between stories and the underlying reality. As I reflect on a story I have told, and will tell again,<sup>120</sup> I realize that the story is inevitably crafted, if only to fit real-time events into the confines of a usable narrative. It reflects my own perspective and understanding of the events in question, and my memory and emotional response shift slightly with each retelling.<sup>121</sup> Nonetheless, the story I have told is always as honest a presentation of the events and my reactions as I could make it at the time. Given the risks of public presentation and the lack of any benefit to the teller other than the hoped-for contribution to others' understanding, such honest telling should presumably be the norm.<sup>122</sup>

Will such nonlitigation stories be believed? Admittedly, they lack the indicia of truth-telling particular to litigation, such as the oath or cross-examination. These devices, however, are arguably a counter to the self-interestedness that makes us skeptical of courtroom testimony. When the incentive to lie is gone, as in the nonlitigation setting, such devices are unnecessary.

The listener's belief in the truth of the particular story told is not necessarily sufficient to erode cultural understandings.<sup>123</sup> People may carve out a little box for these stories, refusing the invitation to generalize.

120. See *infra* notes 140-143 and accompanying text.

121. I do not claim that my story is "objectively true," or even a wholly accurate representation of some unidimensional Coombsian truth. Like all stories, it is hopelessly constructed: its meaning, even its underlying facts, change as I tell it; the purposes of the telling affect my own understanding. Part of the meaning of the consciousness-raising process is rooted in the recognition that even self-believed stories are not the same as truth. Historians and writers have long recognized the intricate and shifting notions of "truth." See, e.g., James Atlas, *Stranger than Fiction*, N.Y. TIMES, June 23, 1991, § 6 (Magazine), at 22, 43 ("Nonfiction is true when it is beautiful; we recognize untruth when we see it like a bad dye job on the street.") (quoting Mary Gordon); see also Marianne Wesson, *Historical Truth, Narrative Truth, and Expert Testimony*, 60 WASH. L. REV. 331, 338 (1985) ("The criterion for the 'truth' of an interpretation or explanation in [the psychotherapist's] sense is its power to illuminate the subject's life in a way that is useful to him, not its perfect correspondence to the past.").

122. For detailed accounts of four rape survivors' experiences, see MADIGAN & GAMBLE, *supra* note 105, at 27-41; see also Kristin Bumiller, *Her Word Against His*, WOMEN'S REV. OF BOOKS, Jan. 1992, at 25, 26 (1992) (reviewing LEE MADIGAN & NANCY C. GAMBLE, *THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM* (1991)) ("The authors don't try to make their accounts more credible by omitting troubling complexities or messy details.").

123. In some contexts, stories must be typical of the range of possible stories before we can legitimately expect people to base action on them. See Abrams, *supra* note 116, at 979 ("Even some readers willing to believe that a narrative scholar has offered a trustworthy account of a particular experience may doubt the 'typicality' of the experience recounted."). In this Article, however, the stories are a challenge to false universal claims. At least insofar as its listeners do not dismiss a given story as freakish, its existence demonstrates the falsely constricted nature of the prior, litigation-derived paradigms.



Or they may simply maintain concurrent, contradictory beliefs. Beliefs in rape myths may, in some instances, serve deep psychological needs that make them resistant to logic and contrary evidence.<sup>124</sup> We cannot expect to magically transform public misconceptions about sexual violation and its victims. New stories of violation may, however, have positive effects at the margins, on persons whose beliefs in rape myths are sufficiently shallow to be more readily uprooted.

Despite the potential benefits to women from the public telling of their stories of sexual violation, there are costs as well. These costs are highest when the stories have the greatest chance of exploding the rape myths: when we tell them to people who know us. We cannot guarantee that our friends will believe us or take us seriously. Negative responses can make us angry or anxious; they can threaten relationships that matter to us. A listener's skeptical or critical reaction can also trigger feelings of shame at being a victim.<sup>125</sup> We should admire women willing to endure these costs to tell their stories in nonlitigation forums, as we admire those willing to endure the still harsher costs of telling stories in court.<sup>126</sup>

One advantage of nonlitigation forums is that legal criteria do not formally restrict these stories. Nonetheless, legal categories structure the stories that we tell ourselves, the stories that we tell others, and the weight those stories carry in the minds of listeners. The law-saturated character of experiences and narratives of sexual violation is inherent in our very vocabulary. The words "rape" and "sexual harassment" both have dual functions: they serve simultaneously as legal conclusions and as the words we use to describe particular experiences.<sup>127</sup> The lack of a distinct

124. For some men, the real motivating force for their beliefs about women's sexual availability may be a subconscious need to dominate women, covered by a thin veneer of self-deception. See BENEKE, *supra* note 26, at 15 ("[F]or many men seeking sex with a woman has more to do with [status, hostility, control, or dominance] than with sensual pleasure or sexual satisfaction."); Willis, *supra* note 27, at 2199 (asserting that men "who feel powerless in a society that defines masculinity in terms of power and who have less access to nonphysical means of asserting their power over women . . . are directly involved in rape").

125. These reactions can be seen in the stories of women who took their experiences to court. Patricia Bowman commented during cross-examination that she was "feeling very guilty. . . . I was trying to figure out what I had done to make Mr. Smith rape me." SMITH VIDEOTAPE, *supra* note 85, Tape 2. At one point, Anita Hill said she was "embarrassed and humiliated" by Judge Thomas' sexualized conversations. Hill Videotape, *supra* note 65, Tape 1.

126. See Henderson, *supra* note 52, at 224:

I understand why other rape survivors find that price [of telling their stories] too high to pay. . . . But we are doomed to stay in the traps of rape mythology unless we look at what rape really is. Women and men must confront the horror, not deny it, and do everything in their power to end it.

*Id.* See generally Paul Marcus & Tara L. McMahon, *Limiting Disclosure of Rape Victims' Identities*, 64 S. CAL. L. REV. 1020 (1991) (positing that disclosure of rape victims' identities should be limited by state statutes that balance the interests of the media and the victim).

127. A particularly poignant example is the way in which Anita Hill used the lay meaning of

vocabulary makes it difficult to capture an experience of sexual violation except insofar as it conforms to the law's formal limits.<sup>128</sup> For example, sexual harassment could not be understood or discussed until a terminology made it a legal and political issue rather than a personal and individualized dilemma.<sup>129</sup>

Nevertheless, nonlitigation forums do allow us to move beyond current legal understandings. Sexual harassment developed first and farthest in consciousness-raising and only later through litigation. Nonlegal settings are, at least, *less* law-drenched. Public storytelling also provides a space for more complex, ambiguous, ragged-edged, real stories. We can use stories of what we think were clear acts of sexual violation to clarify the boundaries for those less knowledgeable about sexual violation and those more inclined to accept rape myths as true; in safer spaces, we can explore fragmentary, ambiguous, and even self-contradictory stories.<sup>130</sup> As

the word "harassment" in describing her experience to the press. Later in the hearings, Senator Specter pilloried her because she refused to use the term in such contexts as the hearings or her FBI statement, where it implied a legal conclusion dependent only in part on the acts he had done and her reactions. Hill tried to explain that "I was not raising a legal claim . . . but attempting to inform you about certain conduct; . . . you can decide if it's sexual harassment." Specter pounced: "So you are not now drawing a conclusion that Clarence Thomas sexually harassed you?," as if in refusing she had denied the fact of the harassing behavior. Hill Videotape, *supra* note 65, Tape 2.

128. The limited capacity of our language to describe the experiences of women is a staple of feminist theorizing. See, e.g., Hélène Cixous, *The Laugh of Medusa*, in *NEW FRENCH FEMINISMS* 245, 248 (Elaine Marks & Isabelle de Courtivron eds., 1980) ("[W]ith a few rare exceptions, there has not yet been any writing that inscribes femininity."); Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 *TEX J. WOMEN & L.* 41, 55 (1993) ("We have few metaphors for sexual desire and passion that are not also metaphors for violence, power, and irresponsibility."); Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 *WIS. WOMEN'S L.J.* 81, 144 (1987) ("Women's subjective internal pain, because it is so silent and invisible—and because it is so different—is quite literally incomprehensible."); cf. Gerald Torres & Kathryn Milun, *Translating Yonnodio by Precedent and Evidence: The Mashpee Indian Case*, 1990 *DUKE L.J.* 625, 629 (describing the difficulty of explaining in traditional legal language the harms that have been done to disempowered groups such as Native Americans).

129. See *MACKINNON*, *supra* note 2, at 27 ("Until 1976, lacking a term to express it, sexual harassment was literally unspeakable, which made a generalized, shared, and social definition of it inaccessible."). MacKinnon also noted, "When an outrage has been so long repressed, there will be few social codifications for its expression. [V]ictims may initially say (and believe) that they are not victims, so near is the denial to erasure. Women's consciousness erupts through fissures in the socially knowable." *Id.* at xii.

130. See Bumiller, *supra* note 122, at 25:

The survivor's claim of violation is almost always invalidated by powerful cultural fantasies that perpetuate the idea that rape is inevitable. The power of women to narrate the story [of rape] is also suppressed by the way law and culture frame sexual identities. Women's stories will not be believed unless they can be heard from a perspective outside of a system of law and language that reinscribes the violence.

*Id.*; see also Henderson, *supra* note 52, at 221 ("What I am advocating is a form of cultural 'consciousness raising' . . . [which] must begin with concrete stories and breaking silence.").

MacKinnon notes, "Personal statements direct from daily life, in which we say more than we know, may be the primary form in which such experiences exist in social space; at this point they may be their only accessible form."<sup>131</sup>

There are at least three reasons for telling stories of sexual violation. First, current cultural [mis]understandings of sexuality and sexual violation inhibit our capacity to comprehend the violation in cases in which the woman clearly and unambiguously said no or made the unwelcomeness of advances known, but was a sexual being in other contexts. In these cases, the stories are complex, because women are complex and their sexuality in one context is entirely consistent with their decision not to be sexually available in another. These cases are difficult solely because of the dichotomous stereotypes of women's sexual nature; ultimately, under the law, they should be easy cases. They may be described as "false ambiguities."

Second, telling stories of sexual violation increases the chances for all honest claims to be believed; these effects in turn increase support for legal reform. The stories provide support for substantive reform, such as changing the legal definition of consent to something akin to "no means no," which might turn a "So What" into a "Good Enough."<sup>132</sup> The tellings may also make evidentiary limitations such as rape shield laws both more politically acceptable and less necessary.<sup>133</sup>

Noncourtroom contexts also allow us to tell stories of "true ambiguities"—cases experienced as sexual violation but problematic under existing legal doctrine. Consider, for example, a "consent" induced by

131. MACKINNON, *supra* note 2, at xii.

132. ESTRICH, *supra* note 2, at 102-03. The proposed rule makes "no" sufficient, but not necessary to convict; a "yes" induced by force or fraud is treated like a "no" as it is in the law of property crimes. Some have gone beyond Estrich, proposing that intercourse is sanctionable absent an explicit "yes." See Schulhofer, *supra* note 36, at 76 (suggesting that, given the seriousness of intercourse, "nothing less than a crystallized attitude of positive willingness[] should ever count as consent"). There is similar dispute in the sexual harassment literature, with the more radical critics proposing that any behavior that the woman finds unwelcome should be forbidden.

133. For a discussion of rape shield statutes, see Harriet Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763 (1986). Several scholars have suggested excluding women's behavior and dress from a "welcomeness" inquiry in sexual harassment. E.g., Christopher P. Barton, *Between the Boss and a Hard Place: A Consideration of Meritor Savings Bank FSB v. Vinson and the Law of Sexual Harassment*, 67 B.U. L. REV. 445, 472-73 (1987); see FLA. STAT. ANN. § 794.022(3) (West 1992) (forbidding admission of evidence of victim's manner of dress to show consent to sexual battery); Barbara Fromm, *Sexual Battery: Mixed-Signal Legislation Reveals Need for Further Reform*, 18 FLA. ST. U. L. REV. 579 (1991) (discussing this Florida law).

Morrison Torrey's proposal to provide potential jurors in rape cases with data to counter rape myths similarly rests on a determination that these myths are both false and pernicious. See Torrey, *supra* note 15, at 1066-67 (advocating the use of expert testimony to "de-program" jurors and counteract the jurors' acceptance of rape myths).

fear that the man will otherwise publicly humiliate the woman with true but embarrassing facts. Or, consider sexually appraising looks and frequent references by a supervisor to a woman employee's physical attractiveness, when she is too discomfited and afraid of the consequences to complain to management. Absent such stories, the weakest case that a prosecutor or victim might conceivably win under existing law and social conventions becomes the "close case." Their absence also sets the boundaries of "Not True" and "So What" at places that exclude much behavior that the law should deter. As a result, anything a man does that is not legal rape or sexual harassment becomes simply "sex" or "flirting."<sup>134</sup>

Finally, story telling allows us to explore the complex gray area between sexual violation and sexual pleasure. As part of the long-term struggle for understanding and transformation, we need to examine our own experiences of sexuality and the social and psychological dynamics of those experiences. The world is not divided neatly into good sex, on the one hand, and rape and violation on the other. There are situations that fit into neither category: endured sex; "bad" sex; degrading, unpleasant, and offensive encounters; sex when one participant wants to please the other or is willing to tolerate sex for the partner's good qualities.<sup>135</sup> Women need to explore the full range of arguably sexual activities and their reactions to them. For instance, a woman may say "no," but mean, "not yet; I'm not sure; let's keep talking." When sex then occurs, it is still desired despite the initial "no." Conversely, a woman may say "yes" to please a man or avoid an anticipated argument, though she did not want sex.<sup>136</sup> The last category of stories in which "no" sometimes does not

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134. The easy slippage from "not rape" to "just sex" is akin to the apparent rule that one is fit for public office if "not indicted."

135. Lynne Henderson is the pioneer in the exploration of these various points along a proposed continuum between rape and pleasurable heterosexuality. See Henderson, *supra* note 128, at 57-63, 73 ("While some writers have posited a continuum between rape and heterosexual intercourse, none to my knowledge has attempted to describe what the continuum between rape and pleasurable heterosexuality might be"); see also Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY, *supra* note 1, at 267 (discussing more generally the sexual continuum).

136. These hypothetical explorations of language should not provide any basis for doubting that something like "no means no" is the right legal rule. First, cases in which a woman falsely claims rape based on nothing more than a "no" which was really a "maybe" are as scarce as the proverbial hen's teeth. Second, a rule that allows a jury to acquit in the face of the woman's "no" is to invite the condemnation of certain women based on rape myths. See, e.g., *People v. Burnham*, 222 Cal. Rptr. 630, 635, 643 (Cal. Ct. App. 5th 1986) (holding as reversible error failure to give mistake of fact instruction, in addition to instruction on consent, where wife was severely beaten and then subjected to acts of sexual intercourse and attempted penetration by canine penis); *People v. Thompson*, 324 N.W.2d 22, 23 (Mich. Ct. App. 1982) (requiring consent defense instruction for alleged rape since court was "not persuaded that consensual sexual intercourse is necessarily impossible in the course of a kidnapping"); Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 835-43 (1988) (proposing a victim-oriented

mean "no" can be misused or misunderstood. Although we may want to be careful where and to whom we tell these stories, we must find a place for these conversations in which we can examine our understandings of the boundaries of pleasure and danger.<sup>137</sup>

In the hope of inspiring others, let me provide two examples of stories and their uses. First, consider the Glen Ridge case, in which several high school athletes were convicted of sexual assault on a young woman with "an I.Q. of 64 and the social acuity of an 8-year old."<sup>138</sup> The acts of sexual violation, including oral sex, fondling, and the insertion of various implements into the woman's vagina, were undisputed. The defendants claimed that all of these activities were consensual, though nothing in the testimony suggested that the activities reflected mutual sexual pleasure. Rather, the victim explained that she participated because "I didn't want to hurt their feelings,' [and because] she had been told that one of the youths would ask her out on a date if she did as they asked."<sup>139</sup> He did not. The legal issue revolved around her capacity to consent. The State asserted that any acquiescence was legally irrelevant, because she did not realize that she could say "no." The trial and the reporting of it provided a compelling introduction to a discussion of what consent means and what sexual experiences society values. I suggest that the woman's willingness to endure sex in order to please men, or in hopes of romance and human recognition, are widely shared, even though this particular woman may

conception of mutuality whereby the welcome character of the sexual act is determined by asking the question of whether the target would have initiated the encounter had she been given a choice; Lois Pineau, *Date Rape: A Feminist Analysis*, 8 LAW & PHIL. 217, 217-43 (1989) (explaining how the mythology surrounding rape enters into a criterion of reasonableness which operates through the legal system to make women vulnerable to unscrupulous victimization). *But see* Steven B. Katz, *Liberal Feminism and the Politics of Rape*, 24 AM. CRIM. L. REV. 1007, 1015 (1987) (book review) ("At some point, consent-acts can be so ambiguous that it is not fair to inculcate the accused, even if we have every reason to believe the complainant was truly not willing to engage in sex."); Muehlenhard & Hollabaugh, *supra* note 15, at 874 (finding that women do sometimes say no and not mean it or they put up a token resistance). These comments mean only that a truly effective "no means no" rape law would put a crimp in the sexual styles of some women as well as some men. Given the relative costs of forced sex and forced clarification of your wishes and those of your partner, the legal rule ought to make it dangerous to ignore a woman's "no."

Similarly, we should formalize rules about sexual harassment in a way that conceptually includes "the games, intrigue, nuances and fun of flirting." In effect, where boundaries of the permissible are culturally contested, doctrine should empower the less powerful party by giving her "no" the force of law. *But see* Susan J. McCarthy, *Cultural Fascism*, FORBES, Dec. 9, 1991, at 116 (condemning such a broadening of sexual harassment law's proscriptions).

137. By telling these stories, we can transcend the dilemma of telling stories that are not true or that cannot be heard. "If women are taught to lie to men and to themselves about the existence of pain . . . how are we to use their experience of pleasure in pain as a basis for feminist theory?" Whitman, *supra* note 33, at 498-99.

138. Jane Fritsch, *Debating Whether 'Yes' Means 'No,'* N.Y. TIMES, Dec. 13, 1992, at A49.

139. *Id.* at A58; *see also* Anna Quindlen, *21 Going on 6,* N.Y. TIMES, Dec. 13, 1992, §4, at 17 (summarizing the victim's explanation of what happened and why she participated).

have lacked the normal capacity to judge the value of her bargain. The story ultimately horrifies and instructs us by its ordinariness—it encourages conversations acknowledging and exploring these reactions.

Second, I have a story of my own that I sometimes use in the classroom and in personal conversation that straddles the boundaries of legal and merely experiential sexual violation. When I tell it in the classroom, it is as the “hypothetical” scenario of sexually harassing behavior by the senior partner, Max, toward the young associate, Susan.

Max and Susan were out of town on firm business, together with several other colleagues. Max sat next to Susan at dinner. During dinner and during the drinks that followed (heavy drinking was part of the firm culture), they discussed the case. Susan was quietly ecstatic at the opportunity to talk about theories of the case and litigation strategy with such a senior attorney. Discussion drifted to gossip about the firm, to law generally, popular culture, this and that. As the conversation continued, they walked back towards his hotel room and across the threshold. She stepped inside, for they were in the midst of a conversation. Then he stepped around her and latched the door. He lay down on the bed, took her wrist, and invited her to join him there.

At that point, I break off the story and ask the students for their response: Is it harassment? What should she do? Inevitably, some students are quick to notice both the awkwardness of her situation and her foolishness in letting it happen. Only then do I identify myself as Susan. Students' perceptions of my credibility validate the story; the structure of the exercise allows them to perceive and respond to its complexities and ambiguities.

It is not clear that this situation would be actionable as sexual harassment, even if the fact finder believed Susan's description of the incident. On the one hand, she avoided the sexual invitation by pleading a failure of nerve and left the firm shortly thereafter. A lawsuit might have exposed the fact that she was a sexually active divorced woman and had had a brief, consensual affair with a married professor a few years previously, which invites a reinforcement of rape myths. On the other hand, a lawsuit would have shown Max's sexually aggressive propensities and that they were common knowledge around the firm.<sup>140</sup> Like his other targets, I never officially complained.<sup>141</sup>

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140. When I finally overcame my embarrassment about my experience with Max and told one of the other women at the firm, her response horrified me: “Oh, didn't anyone warn you? Max pulls stunts like that all the time.”

141. I had little to gain and much at risk given the discretionary nature of associate reviews and recommendations to future employers. Like Anita Hill, “Perhaps I should have taken angry or even militant steps . . . . But . . . the course that I took seemed the better as well as the easier approach.” Hill Statement, *supra* note 59, at 21.

The incident, honestly examined, raises deeper ambiguities of fact and norm. My response of dismay and disgust was not without a soupçon of pleasure that someone of Max's stature and genuine charm had—I thought—chosen me for his overtures.<sup>142</sup> I also blamed myself for allowing the incident to progress that far.<sup>143</sup> I was certain I could have handled the situation more gracefully had I not had so much to drink. I felt both pleased and angry with myself for a response that got me out of the room without placing any blame on Max for his attempt. Like the Glen Ridge woman, and like so many of us so often, I had no sexual desire for what was invited. But my life was not neatly divided into sexual and non-sexual realms. And what made this invitation coercive and offensive could not be neatly encapsulated.

#### IV. Conclusion

Storytelling serves in numerous ways to maximize women's protection from sexual exploitation without jettisoning women's sexual pleasure. In some contexts, storytelling reinforces the substantive and procedural law reforms that feminist lawyers and others helped to institute in the last decades. These reforms redefine sexual assault to include more instances of clearly unwanted sex and provide the doctrinal and theoretical basis for an expanding recognition of sexual harassment as a legally cognizable harm. They make it easier for women to come forward because they reduce the arsenal police and hostile attorneys have traditionally used to attack the credibility and character of women who make such complaints.

All these reforms inevitably leave crucial issues to the determination of the fact finders: Is she telling the truth? Would he have behaved that way? Does the law make that behavior tortious or criminal? In making those decisions, the fact finders will frequently view the evidence through the lens of their assumptions about sexuality and work, men and women,

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142. See Adrienne D. Davis & Stephanie M. Wildman, *The Legacy of Doubt: Treatment of Sex and Race in the Hill-Thomas Hearings*, 65 S. CAL. L. REV. 1367, 1374 (1992) ("Although it is false, the (usually) unspoken message is that only a 'desirable' woman will be harassed. Ironically, as women seek to make themselves desirable to men, they are blamed for male response.") (citations omitted).

143. We must distinguish between the criteria we use in setting legal norms and in organizing our own lives and advising others how to act in a world of sexual danger. We use the language of responsibility in the latter realms, in an effort to increase control over our lives. Would even the most firmly feminist mother not advise her daughter to avoid such danger-fraught situations as alcohol-soaked fraternity parties? Yet she will still insist on the man's responsibility and the right to a legal remedy when a woman has misread the signals or taken a chance. *But see* PAGLIA, *supra* note 97, at 69 ("[I]f you drink a certain number of drinks and behave in a certain way and go to a man's room alone—I believe it's time to take the Sixties attitude toward that; that is, you are consenting to sex").

good women and bad women. Changing those assumptions is thus a crucial additional element in the task of legally protecting women. Storytelling outside the courts is a vital means of exploding rape myths and creating a population of potential fact finders more inclined to believe the stories of those women who do go to court for redress of a sexual violation.

Storytelling can also educate. Redress for sexual violations is, though necessary, a poor second choice to the elimination of such activities. As we tell stories of our experiences and our feelings of having been sexually violated, men—even Maxes—may begin to view their behaviors through the eyes of women and perhaps, to change them; while women may develop a richer understanding of what we do, how our behavior might be understood, and finally, what we really want.

Narratives, for the variety of reasons detailed above, are not a sufficient solution to the problems of sexual violation. In conjunction with legal reform, education, and institutional change, however, they can bring us closer to the day when sexuality is pleasure and play, not danger and degradation, for women and men.