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Male Sexual Assault: Issues of Arousal and Consent

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I. INTRODUCTION

In the recent movie, *Forty Days and Forty Nights*,¹ the lead male character attempts to forgo sexual intercourse for the duration of Lent. On the fortieth night, fearful that he will act upon his almost uncontrollable urges, he handcuffs himself to his bed. Meanwhile, his ex-girlfriend sneaks in, takes advantage of his vulnerable state, and has sexual intercourse with him. He remains asleep throughout. However, although admittedly perturbed, he is not necessarily “traumatized” by the experience. He does not visit a rape crisis center. He does not seek medical aid. He does not file a police report. Although the audience is not encouraged to like this ex-girlfriend, the word “rape” never really seems to enter into the picture. This is clearly non-consensual sex, but yet, the audience is left with the impression that although not necessarily condoned, the ex-girlfriend’s conduct is not in the least criminal. Why

¹(Miramax 2002).

not? Was there not penetration without consent? Does the fact that he was physically aroused mean that he enjoyed the experience? What would happen if the gender roles were reversed? What if a female was handcuffed to a bed and her ex-boyfriend snuck in and penetrated her in her sleep? Would the audience be so forgiving? Would the audience call this rape?

Admittedly, many may question whether or not a man in this scenario would feel violated; after all, the victim was “aroused” to the point of ejaculation. He must have received some sexual satisfaction. As Judge Janice M. Rosa from New York State Family Court in Erie County commented, many would respond to this scenario by saying “[w]hat’s your problem? How could you *not* have liked this?”²

The idea that a man would enjoy being sexually violated by a woman stems in part from society’s current conception of sexual victimization: that only women are sexually assaulted.³ As theorist Katie Roiphe notes:

Imagine men sitting around in a circle talking about how she called him impotent and how she manipulated him into sex, how violated and dirty he felt afterward, how coercive she was, how she got him drunk first, how he hated his body and he couldn’t eat for three weeks afterward. Imagine him calling it rape.⁴

One male victim of a rape,⁵ perpetrated by a female, was not even sure how to contextualize his own experience, thinking that only women could be raped.⁶

This preconceived notion that only women can be legitimate victims of rape also operates when men perpetrate rape upon other men.⁷ “[T]he feminization of men who have been forced into sexual ‘passivity’” by other men can make such victims “the object of prejudice normally reserved in our culture for women.”⁸ Thus, society is reluctant to accept the idea that a “real man” could be reduced to such a sexually passive role,⁹ and when a man attempts to report his assault, he is often ridiculed.¹⁰

²Dr. Love, *THE BUFFALO NEWS*, June 23, 1995, *Lifestyles*, at 6C (emphasis added).

³Elizabeth J. Kramer, Note, *When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape*, 73 N.Y.U. L. REV. 293, 318 (1998).

⁴Katie Roiphe, *Date Rape’s Other Victim*, in *FREE SPIRITS: FEMINIST PHILOSOPHERS ON CULTURE* 330, 333 (Kate Meheuron & Gary Percesepe eds., Prentice-Hall, Inc. 1995).

⁵Rape, as understood by the author, encompasses both penetration of a victim without his or her consent *and* the case of a victim forced to penetrate without his or her consent.

⁶See Kate Hilpern & Emma Williams, *Social Change: Suffering in Silence*. The extent of institutionalized racism within the Metropolitan police force was revealed by the Stephen Lawrence report. Unfortunately, the prejudice doesn’t end there. Kate Hilpern and Emma Williams report on efforts by the Met to address problems in dealing with what one victim of Female rape has called ‘the last taboo.’ *THE GUARDIAN* (London), March 3, 1999, at 2.

⁷Kramer, *supra* note 3, at 293, 318. See also Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1063-64 (1996). “Some commentators ignore the reality that a number of men are victims of sexual harassment.” *Id.* at 1064.

⁸*Id.* at 308.

⁹Gillian C. Mezey & Michael B. King, *Preface to MALE VICTIMS OF SEXUAL ASSAULT*, i, v (Gillian Mezey & Michael B. King eds. Oxford Univ. Press 2d ed. 2000). “Male rape is a

The presumption that a real man cannot be raped assumes, in part, that real men secretly enjoy being sexually assaulted.¹¹ After all, the sexually promiscuous female is thought to be every heterosexual man's "dream come true"¹² and the sexually promiscuous male is supposed to be every homosexual man's "dream come true."¹³ This mindset stems from the "valorization of the always-hard, always-ready dick."¹⁴ "We have this underlying belief that men should be sexually available at all times -- and like it."¹⁵

This assumption pervades even the most respected of institutions, including psychotherapy. For example, one male victim recounted how his own therapist questioned whether or not he *really* disliked being raped by a woman, even though the man felt thoroughly traumatized by the experience.¹⁶ This presumption creates an additional barrier that male victims of sexual assault need to overcome to be considered legitimate victims: that sometimes, men simply do not want to have sex.¹⁷

These two presumptions concerning sexual victimization and male sexual availability are especially difficult to overcome in situations where the male victim

taboo subject; it happens but it is concealed by the victims who are too ashamed to speak out and by a society that is not prepared to listen. . . . [Men] face scepticism, criticism, and disbelief, and there are very few sources of support or services specifically for them." *Id.*

¹⁰Kramer, *supra* note 3, at 293, 318. Male sexual assault perpetrated by other males also carries an added stigma that keep victims from reporting their assaults: "Heterosexual male victims may feel that their sexual orientation is called into question and homosexual male victims fear that their sexual preference may be revealed." *People v. Yates*, 637 N.Y.S.2d 625, 629 (Sup. Ct. 1995). *See also* Kramer, *supra* note 3, at 296-97. Male victims of same-sex sexual assault "fear being perceived as unmasculine or gay, or, if they are gay, of being forced to come out" at trial. They also fear that regardless of the evidence against their perpetrator, an anti-gay bias will lead juries to find an assailant innocent. *Id.* at 297.

¹¹*Id.* at 318. *See also* Ronald E. Smith, Charles J. Pine & Mark E. Hawley, *Social Cognitions about Adult Male Victims of Female Sexual Assault*, 24 J. SEX RES. 101, 110 (1988) (presenting the results of a study that found that male victims of sexual assault by female assailants were believed to be more likely to have encouraged and enjoyed the assault).

¹²Aimee L. Widor, *Fact or Fiction?: Role-Reversal Sexual Harassment in the Modern Workplace*, 58 U. PITT. L. REV. 225, 226 (1996).

¹³*Cf.* *State v. Johnson*, 706 So. 2d 468 (La. Ct. App. 1997). In *Johnson*, not only did the police fail to take the rape victim's complaint seriously, but a few jury members also stated that they would have trouble believing a homosexual victim. *Id.* at 471, 477-78. One juror admitted having problems with the concept of homosexual rape altogether. *Id.* at 478.

¹⁴Kerwin Kay, *Introduction*, in *MALE LUST, PLEASURE, POWER, AND TRANSFORMATION* i, xv (Kerwin Kay, et al. eds., Harrington Park Press 2000).

¹⁵Mary Corey, *On-the-Job Sexism Isn't Just a Man's Sin Anymore*, HOUS. CHRON., Aug. 30, 1993, at 1.

¹⁶Dr. Love, *supra* note 2. *See also* Charlene L. Muehlenhard & Stephen W. Cook, *Men's Self-Reports of Unwanted Sexual Activity*, 24 J. SEX RES. 58, 71 (1988) (noting that some therapists do not believe men's reports of being sexually assaulted).

¹⁷Widor, *supra* note 12, at 245 (1996) (discussing the additional barrier in sexual harassment cases that men do not derive enjoyment from all sexual advances).

admits to having maintained an erection during his sexual assault.¹⁸ For example, one survivor of a male rape, perpetrated by another male, remembers being comforted by a friend who told him since he did not have an erection, it was not his fault.¹⁹ The corollary is that if he had maintained an erection, he would have been to blame, or in the very least, would have been considered a consenting participant. An erection under these circumstances however, is purely a biological response that does not indicate consent, or even, sexual pleasure.²⁰ Nonetheless, this physical reaction leaves many men confused as to why their bodies reacted this way and ultimately serves as an additional impediment to seeking counseling or legal aid.²¹ “As male rape is widely thought to be impossible anyway, this extra element of doubt may eliminate what few resources male survivors might access.”²²

This Note argues that an erection under these circumstances does not indicate consent to engage in sexual activity.²³ Part II of this Note explores the reality of male sexual assault and offers various medical, psychological, sociological, and cultural reasons to explain why a male victim may maintain an erection while being sexually assaulted and/or raped. Part II also explores the complex relationship between physical arousal and sexual desire. Part III provides a legal background to both the law’s treatment of male sexual assault generally and in specific instances where the male victim maintained an erection during his assault. This part concludes that the courts have been largely unavailing to male victims of sexual assault. Finally, part IV argues that treating an erection as a signifier for consent serves only to isolate male victims and perpetuates a stereotypical and violent form of masculinity that ultimately undermines sexual violence against all persons.²⁴

¹⁸See MICHAEL SCARCE, MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME 60-61 (Insight Books 1997). “Others, including medical personnel, family, friends, and other support people, may be reluctant to believe a man who admits rape when he shares that he had an erection or ejaculated.” *Id.*

¹⁹*Id.* at 60.

²⁰Widor, *supra* note 12, at 234.

²¹SCARCE, *supra* note 18, at 60 (discussing heterosexual victims who maintain an erection while being raped by other men). See also A. Nicholas Groth & Ann Wolbert Burgess, *Male Rape: Offenders and Victims*, 137 AM. J. PSYCHIATRY 806, 809 (July 1980). Many victims who maintain an erection during an assault are subsequently discouraged from reporting their assault as such evidence could be used to impeach their credibility at trial. *Id.*

²²*Id.* at 60-61.

²³Such a notion would be just as illogical as concluding that a woman who lubricates while being raped is a consenting participant. See Phillips M. Sarrel & William H. Masters, *Sexual Molestation of Men by Women*, 11 ARCHIVES OF SEXUAL BEHAV. 118, at 118 (1982) (hereinafter “*Sexual Molestation of Men by Women*”) (noting data that indicates that most women lubricate during rape and some women actually respond to orgasmic levels).

²⁴This Note does not suggest that male sexual assault is as socially significant in terms of numbers as female sexual assault. See Levit, *supra* note 7, at 1054. “To acknowledge violence against men is not to diminish or deny the persistent and pervasive violence against women.” *Id.* Society should strive to protect all persons from sexual violence. Philip Rumney & Martin Morgan-Taylor, *Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One*, 26 ANGLO-AM. L. REV. 198, 218 (1997) [hereinafter Rumney & Morgan-Taylor Part One].

II. MAINTAINING AN ERECTION DURING SEXUAL ASSAULT: A COMMON PHYSICAL RESPONSE

A. *The Reality of Male Sexual Assault – Dispelling Beliefs*

Although male rape is believed to be extremely rare and not “a significant social problem,”²⁵ the reality is that men are victims of sexual assault, rape, and molestation on a daily basis, and their perpetrators include both men and women.²⁶ However, because of many misguided beliefs about sexual violence, the study of male sexual assault is extremely rare.²⁷ For example, the Federal Bureau of Investigation’s Uniform Crime Reporting Program defines forcible rape as “the carnal knowledge of a female forcibly against her will” and excludes all other types of sex offenses in its data collecting.²⁸

Many believe that male sexual assault is not a significant social problem solely because there are so few reported instances. In fact, there is little documentation in litigated cases.²⁹ However, “[t]he absence of reported cases carries more weight in proving the cloak of stigma associated with making such an allegation, rather than

²⁵MARK COWLING, *DATE RAPE AND CONSENT* 56 (Ashgate Publ’g Co. 1998). *See also Sexual Molestation of Men by Women*, *supra* note 23, at 129 (arguing that such assault is extremely rare). Although the majority of research concludes that male victims constitute only ten percent of all sexual assault victims, *see* Lani Anne Remick, Comment, *Read her Lips: An Argument for A Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1106 (1993); Fred Pelka, *Raped: A Male Survivor Breaks His Silence*, in *RAPE AND SOCIETY: READINGS ON THE PROBLEM OF SEXUAL ASSAULT* 250, 251 (Patricia Searles & Ronald J. Berger eds., Westview Press 1995), one study conducted by Charlene L. Muehlenhard and Stephen W. Cook found that of 507 male and 486 female subjects, two-thirds of the men reported unwanted sexual activity with women while only one-half of the women reported unwanted sexual activity with men. Muehlenhard & Cook, *supra* note 16, at 69.

²⁶Widor, *supra* note 12, at 232. *See also* Rumney & Morgan-Taylor Part One, *supra* note 24, at 203, 205 (noting that the fear of being rape is not limited to women).

²⁷Cindy Struckman-Johnson, *Forced Sex on Dates: It Happens to Men, Too*, 24 J. SEX RES., 234, 234-35 (1988). *See also* Philip Rumney & Martin Morgan-Taylor, *Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part Two*, 26 ANGLO-AM. L. REV. 330, 343 (1997) [hereinafter Rumney & Morgan-Taylor Part Two]. “The lack of research in this area involving large representative samples hinders concrete conclusions.” *Id.* The “[f]ailure of the health care professions to recognize the possibility that a man can be sexually assaulted has influenced research on the subject; there has been none.” *Sexual Molestation of Men by Women*, *supra* note 23, at 129. Thus, men are extremely loath to admit the experience as they “are afraid they will be the butt of jokes by the legal and health care professions. And they have been right.” Phillip M. Sarrel, M.D. & William H. Masters, M.D., *When Men Are Raped by Women*, *SEXUAL MED. TODAY*, July 1982, at 19 [hereinafter *When Men Are Raped by Women*].

²⁸Federal Bureau of Investigation Uniform Crime Reporting Program, at http://www.fbi.gov/ucr/cius_00/00crime2_4.pdf (2000) (last visited Feb. 20, 2003) (on file with author). Some male sexual assault may fall into the category of “general assault” or may be lumped together with statutory rape in a special category for “other sexual offenses.” However, this data is not available online. *Id.*

²⁹Widor, *supra* note 12, at 233.

establishing that the offense never happens.”³⁰ Male victims are extremely hesitant to report such crimes due to the risk of mockery, disbelief, and disdain both from the community and law enforcement who may perceive them as “un-masculine.”³¹ In England, the London Rape Center has reported that almost 90% of men do not report their rapes.³² It has been estimated that male rape in the United States is the most underreported crime in the country.³³ The National Crime Victimization Survey, which attempts to account for unreported crime in the United States, estimates that in 1999 alone, 39,340 men were either raped or sexually assaulted.³⁴

It is not surprising why so many men refrain from reporting their rapes. In one study, researchers Phillip Sarrel and William Masters found that only two out of twenty-two victims of male sexual molestation by women sought legal aid.³⁵ In both cases, the attorneys were unable to find any legal or medical support for their cases.³⁶ Neither attorney even believed their clients “as they thought it was impossible for men to respond sexually while under sexual attack by a woman or women.”³⁷ Fred Pelka, in his article *Rape: A Male Survivor Breaks His Silence*,³⁸ discusses how after he reported his rape, perpetrated by another a male, he was informed by one police officer not to be “so bothered” by his rape since he was a man while another police officer berated him for hitchhiking alone with “shaggy hair” and “dirty clothes.” In *Commonwealth v. Gonsalves*,³⁹ the father of a nineteen-year-old male victim could not understand why his son was unable to fight off his male perpetrator.

³⁰*Id.*

³¹Kramer, *supra* note 3, at 293, 297, 304. See also Michael King, et al., *The Prevalence and Characteristics of Male Sexual Assault*, in MALE VICTIMS OF SEXUAL ASSAULT 1, 4 (Gillian Mezey & Michael B. King eds., Oxford Univ. Press 2d ed. 2000). Not only do few male victims report their sexual assaults, but few even characterize their experience as rape. *Id.* When men do recognize their experience as rape, the stigma attached to male sexual assault forces many men to refrain from reporting the attack, which is why there is such little documentation in litigated cases. Widor, *supra* note 12, at 231-33.

³²Caroline White, *I'm Male, 55 and Overweight. Why Rape Me?; Few men imagine being sexually assaulted and when it happens the shock is profound. But victims receive little support as they rarely report the experience, finds Caroline White*, THE INDEPENDENT (London), Aug. 20, 1991, at 15, reprinted in CONFRONTING RAPE AND SEXUAL ASSAULT 83 (Mary E. Odem & Jody Clay-Warner eds., Scholarly Resources Inc. 1998).

³³Steve Pokin, *Rape: When the Victim's a Man; It's happened in homes, on city streets, in bars and parks. Far more underreported than attack on women, male rape leaves many victims feeling powerless, alone and suicidal*, THE PRESS-ENTERPRISE (Riverside, CA.), Sept. 10, 1995, at D01.

³⁴National Crime Victimization Survey, at <http://www.albany.edu/sourcebook/1995/pdf/t49.pdf> (last visited Feb. 20, 2003) (on file with author).

³⁵*Sexual Molestation of Men by Women*, *supra* note 23, at 130.

³⁶*Id.*

³⁷*Id.*

³⁸*Supra* note 25, at 252.

³⁹499 N.E.2d 1229, 1231 (Mass. App. Ct. 1986).

Given these instances of disbelief and disdain, it is also not surprising that many men fear that they will be questioned with even stricter scrutiny in instances where they were able to maintain erections during their assaults. Contrary to what many might believe, such reactions are not rare. Logically, most male sexual violence perpetrated by women requires an erection and in many instances “demand[s] an erection.”⁴⁰ With regard to male-perpetrated rape, a study of twenty-two subjects conducted by researchers Nicholas Groth and Ann Wolbert Burgess found that half of the male victims maintained an erection throughout their assaults.⁴¹ Researchers Gillian C. Mezey and Michael B. King from the Institute of Psychiatry in London have estimated that 20% of male victims of sexual assault are stimulated to the point of ejaculation during their assaults.⁴²

Thus, the reality of male sexual assault is that it exists in larger numbers than many would believe and a significant portion of male victims maintains an erection during their assaults.

B. Understanding Physical Reactions to Sexual Assault

At first glance, it may seem quite rare and absurd that a male could maintain an erection, and even ejaculate, in response to a sexual assault. “Rape implies penetration – forced penetration. If the rape of a male by a female were to take place, the perpetrator would no longer be forcing penetration, but demanding it: demanding an erection, perhaps even ejaculation.”⁴³ Thus, “it has been assumed that it is impossible for a male to perform sexually on demand.”⁴⁴

However, men are just as likely as women to be psychologically paralyzed with fear when faced with extreme personal threat.⁴⁵ Although it may be difficult for a woman to overpower a man, “[A] man’s preference to not have sex can be overborne by the will of a woman who . . . disregards a man’s wishes and overwhelms him with ‘female psychosocial dominance’ or ‘sexual seduction’ much in the same way that a woman ‘is nevertheless forced to engage in sexual relations.’”⁴⁶

Men have physically responded to sexual assaults perpetrated by women, “even though the males’ emotional states during the molestations have been overwhelmingly negative - embarrassment, humiliation, anxiety, fear, anger, or even

⁴⁰*When Men Are Raped by Women*, *supra* note 27, at 15.

⁴¹Groth & Burgess, *supra* note 21, at 807.

⁴²King et al., *supra* note 31, at 5.

⁴³*When Men Are Raped by Women*, *supra* note 27, at 15.

⁴⁴*Id.*

⁴⁵*See* Groth & Burgess, *supra* note 21, at 809. “Although it is commonly believed that a male is powerful enough to defend himself from a sexual assault, he is in fact susceptible to the same techniques by which assailants gain control over their female victims. In many cases a combination of entrapment, intimidation, and brute strength were employed in the commission of the assault.” *Id.*

⁴⁶Widor, *supra* note 12, at 232. *See also* White, *supra* note 32, at 15. Only eight of the twenty-two subjects in the Mezey and King study were able to offer any physical resistance to their male perpetrators, “[p]eople can be made vulnerable when they are asleep, by drink, drugs, or surprise. Even the strongest person can be paralysed.” *Id.*

terror.”⁴⁷ In one case, a man was raped by two women at gunpoint.⁴⁸ He was able to maintain an erection throughout severe physical abuse until he finally passed out.⁴⁹ In another case, a seventeen-year-old boy was attacked by two men and two women and was able to maintain an erection and ejaculate three times before he was unable to perform further.⁵⁰ Another man was drugged and awoke naked, tied down, gagged, and blindfolded.⁵¹ Approximately four women repeatedly raped him until it was difficult for him to maintain an erection.⁵² Threatened with castration, he was able to maintain an erection after rest periods until eventually he passed out and was left abandoned on a roadside.⁵³

Such scenarios are not limited to stranger assaults. One victim was assaulted by a female acquaintance who masturbated him to partial erection.⁵⁴ In another case, a man alleged that his own wife raped him. The man reported: “I couldn’t believe I had an erection. I was so scared. I had always equated erection with sexual excitement. And then she was sitting on me and she had a quick orgasm. And it was over. I didn’t ejaculate. I felt confused and humiliated.”⁵⁵

Humiliation also haunts men who maintain erections during male-perpetrated rape. “The myth is that if you ejaculated then you must have enjoyed it, and if it was with a man, and with violence, then you must be gay or a masochist.”⁵⁶ Steve Pokin, in his news article, *Rape: When the Victim’s a Man*,⁵⁷ provides several reasons why a man might maintain an erection during a sexual assault:

A major strategy used by some offenders in the assault of males is to get the victim to ejaculate. This effort may serve several purposes. In misidentifying ejaculation with orgasm, the victim may be bewildered by his physiological response to the offense and thus discouraged from reporting the assault for fear his sexuality may become suspect. Such a reaction may serve to impeach his credibility in trial testimony and discredit his allegation of nonconsent. To the offender, such a reaction may symbolize the ultimate and complete sexual control over his victim’s

⁴⁷*Sexual Molestation of Men by Women*, *supra* note 23, at 118.

⁴⁸*When Men Are Raped by Women*, *supra* note 27, at 19.

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹*Sexual Molestation of Men by Women*, *supra* note 23, at 120-21.

⁵²*Id.*

⁵³*Id.*

⁵⁴Gillian Mezey & Michael King, *Treatment of Male Victims of Sexual Assault*, in *MALE VICTIMS OF SEXUAL ASSAULT* 141, 151 (Gillian Mezey & Michael B. King eds., Oxford Univ. Press 2d ed. 2000).

⁵⁵*Sexual Molestation of Men by Women*, *supra* note 23, at 125.

⁵⁶White, *supra* note 32, at 15.

⁵⁷*Supra* note 33, at D01.

body and confirm his fantasy that the victim really wanted and enjoyed the rape.⁵⁸

Some victims may willfully ejaculate as a self-defense strategy to minimize the duration and intensity of the sexual assault “in hopes that [the ejaculation] will signify an end to the assault, that if the rapist believes the ‘sexual’ experience is over, he will cease the attack.”⁵⁹

However, the experience is all the more traumatic when the victim is unable to control his physical reaction: “Spontaneous ejaculation produces a kind of mind/body split for many men, leaving them confused and wondering, ‘My mind was saying no, but my body seemed to say yes. Why did my body betray me this way?’”⁶⁰

From a biological standpoint, these responses should not be interpreted as consent, or even sexual pleasure. When a man is sexually assaulted, “an erection and any subsequent ejaculation is a physical response rooted in biology, not in implied consent.”⁶¹ Such a response is innate; “it should not have a preclusive effect which bars a male victim from charging a woman with rape, sexual assault or sexual harassment.”⁶²

In fact, the male body is able to function and respond sexually under a variety of severe emotional states, “including extreme anxiety, terror, and anger.”⁶³ Researcher John Bancroft offers three medical/psychological explanations for this phenomenon: (1) such a response may be part of a “generalized body reaction to the emotional turmoil;” (2) such a response may be rooted in biology: “although peripheral sexual responses are influenced by the brain, they are mediated through centers in the spinal cord and can function independently, as seen among spinal-cord-injured patients,” thus, “men who describe being ‘paralyzed with fear’ . . . may have had a sexual response determined by spinal cord discharge without full cerebral control;” and (3)

⁵⁸Groth & Burgess, *supra* note 21, at 809. As Steve Pokin likewise states:

Rapists know that those who ejaculate, particularly heterosexual victims, will question their sexuality and wonder if they enjoyed some aspect of the rape. As a result . . . rapists in the community believe that these victims probably won’t call police. They also believe that if they are charged with a crime, jurors are likely to interpret the victim’s orgasm as consent. Getting an unwilling victim to ejaculate also symbolizes complete control over the victim’s body . . . It also can confirm the rapist’s fantasy that the victim enjoyed the rape. Finally, in the mind of some rapists, ejaculation means the victim was homosexual and therefore a legitimate target . . .

Pokin, *supra* note 33, at D01.

⁵⁹SCARCE, *supra* note 18, at 61.

⁶⁰*Id.* at 60.

⁶¹Widor, *supra* note 12, at 234.

⁶²*Id.*

⁶³*Sexual Molestation of Men by Women*, *supra* note 23, at 128.

such a response may be a natural reaction to anxiety or some other previous role reflected in the victim's subconscious.⁶⁴

Thus, it is not uncommon for men to experience such physical reactions, and in some circumstances intend such reactions, even though the overall experience is both psychologically and physically traumatic.

C. Stoltenberg's Theory of "Erection Learning"

Theorist John Stoltenberg, in his book *Refusing to Be a Man, Essays on Sex and Justice*,⁶⁵ has offered a sociological understanding of masculinity that may serve to explain why men have physically responded while being sexually assaulted. Stoltenberg advances a theory of "erection learning." According to this theory, persons born with penises, as Stoltenberg refers to them, are not *born* male but rather, *become* male:

In a society predicated on the notion that there are two 'opposite' and 'complementary' sexes, this idea [of a unified male sex] not only makes sense, it *becomes* sense; the very idea of a male sexual identity produces sensation, produces the meaning of sensation, becomes the meaning of how one's body feels. The sense and the sensing of a male sexual identity is at once mental and physical, at once public and personal. . . . [Men] grow up aspiring to feel and act unambiguously male, longing to belong to the sex that is male and daring.⁶⁶

During adolescence, prior to their indoctrination into manhood, men experience erections under a variety of circumstances: risk, peril, hazard, threat, accidents, anger, riding a bike fast, sled riding, hearing a gunshot, playing or watching exciting games, boxing, wrestling, fear of punishment, and being called on to recite in class; "without much understanding why and without, as yet, any particular sexual content."⁶⁷ Consequently, men *learn* which erections and sensations are appropriately tied a supposed uniform masculinity.⁶⁸ According to Stoltenberg, adolescent males "*learn* to cancel out and deny erotic sensations that are not specifically linked to what they think a real man is supposed to feel. . . . [In favor of] an aggressive and controlling and violative mode."⁶⁹ Moreover, an adolescent male "*learn[s]* to desire such erections because he experiences them as a *resolution* of his gender anxiety, at least temporarily - because while he is feeling them, he is feeling most profoundly a sensory affiliation with what he *infers* to be the sexedness of other men."⁷⁰

⁶⁴John Bancroft, *Psychophysiology of Sexual Dysfunction*, in HANDBOOK OF BIOLOGICAL PSYCHIATRY 359 (Herman M. van Praag ed., M. Dekker, 1979). See also *Sexual Molestation of Men by Women*, *supra* note 23, at 128.

⁶⁵(Penguin Group 1990).

⁶⁶JOHN STOLTENBERG, REFUSING TO BE A MAN, ESSAYS ON SEX AND JUSTICE 31 (Penguin Group 1990).

⁶⁷*Id.* at 51-52.

⁶⁸*Id.* at 33.

⁶⁹*Id.* (emphasis added).

⁷⁰*Id.* at 52 (emphasis added).

As critical theorist Susan Bordo states:

We learn what sexual arousal looks and sounds like . . . and - as with any other language - we pick up the grammar and syntax without being aware of it Desire transforms us profoundly “inside,” alters the color, the smell, the temperature of the world for us, changes our experience of our bodies, commands us into a different mode.⁷¹

Men, according to Stoltenberg, are raised to believe that sexual desire only begins in the penis and is consummated only in the act of penetration.⁷² In a society “hell-bent” on penetration, this consummation becomes synonymous with what Stoltenberg considers a perverted and violent form of objectification.⁷³ This process teaches men to get sexually excited by rape or at the very least, by sex accompanied with the accomplishment of successfully coercing another to be penetrated.⁷⁴

What is the consequence of Stoltenberg’s suggestion that although men have an innate multiplicity of sexual desire, they are persuaded into believing that the penis is their sexual center?⁷⁵ In many ways, this “persuasion” leads many to believe that the presence of an erection signifies consent to engage in sexual activity. However, it is likely that the presence of an erection during a sexual assault is simply a physical response to the *familiarities* of the penetration, violence, and aggression that accompany sexual assault, but does not in any sense indicate the presence of consent, or even pleasure. As Bordo states, since men can learn to have, and in some instances suppress, biological responses, “nothing biologically definitive is proven by the presence or absence of physical arousal.”⁷⁶ In short, an erection is not a per se signifier for consent.

D. Understanding the Relationship Between Physical Arousal and Sexual Pleasure

As argued above, in many circumstances, physical and biological responses can be largely disconnected from the emotional states society generally attributes to them. This section explores the different ways men can experience physical arousal without actually experiencing the sexual pleasure that typically accompanies the presence of an erection.

For centuries now, it has been noted that hanged men often display an erection and even ejaculate upon death.⁷⁷ An old English rhyme describes this phenomenon:

In our town the other day

⁷¹SUSAN BORDO, *THE MALE BODY: A NEW LOOK AT MEN IN PUBLIC AND IN PRIVATE* 65 (Farrar, Straus and Giroux 1st ed. 1999).

⁷²STOLTENBERG, *supra* note 66, at 33-34.

⁷³*Id.* at 33-34, 52.

⁷⁴*Id.* at 34.

⁷⁵*Id.* at 33-34, 52.

⁷⁶BORDO, *supra* note 71, at 177.

⁷⁷Harvey L. P. Resnik, *Eroticized Repetitive Hangings: A Form of Self-Destructive Behavior*, 26 *AM. J. PSYCHOTHERAPY* 4, 10 (1972), reprinted in *SEXUAL DYNAMICS OF ANTI-SOCIAL BEHAVIOR* 224 (Louis B. Schlesinger & Eugene Revitch eds., Charles C. Thomas 2d ed. 1997).

They hanged a man to make him pay
 For having raped a little girl
 As life departed from the churl
 The townsfolk saw, with great dismay
 His organ rise in boldest way
 A sign to all who stood around
 That pleasure e'en in death is found.⁷⁸

“Contemporary evidence suggests that [an] erection under these conditions, rather than signifying sexual arousal, is a purely physiological response emanating from a combination of excitatory and inhibitory innervations that converge upon the lumbar cord reflex center during asphyxiation.”⁷⁹ In the Deep South during the Reconstruction period, black men were repeatedly forced to have sex with women while being whipped on their backs.⁸⁰ In ancient Rome, when a husband caught his wife in bed with another man, it was acceptable for him to anally or orally rape the man.⁸¹ Furthermore, reports from the Bosnian Civil War indicate several incidents where men were forced to engage in sexual conduct with each other.⁸² To characterize any of these scenarios as erotic seems to misunderstand the social and cultural context under which each of these erections occurs.

In some non-western cultures, traditional practices require an erection and ejaculation in situations that do not correlate with sexual gratification. For example, traditional practices amongst Sambia men in Papua New Guinea include forcing adolescent boys to perform fellatio upon the older men in the tribe.⁸³ The traditional belief is that a daily ingestion of semen aids a man in maturing, strengthening the bones and muscles.⁸⁴ Yet, despite this seemingly homosexual practice, the result is a non-homoerotic sexual experience that occurs in a completely heterosexual culture.⁸⁵

⁷⁸*Id.* (quoting an unattributed verse).

⁷⁹*Id.* See also Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 760 (2002).

⁸⁰*Id.*

⁸¹Katherine M. Franke, *Constructing Heterosexuality: Putting Sex to Work*, 75 DENV. U. L. REV. 1139, 1149 (1998). “While it is possible that the person administering the punishment in these circumstances derived some erotic satisfaction from these practices, to characterize them as fundamentally erotic in nature is to radically pervert their meaning.” *Id.*

⁸²*Id.* at 1168-71, 1174. Franke comments on how initially, males who were forced to rape other females and males during the Bosnian Civil War, were not able to bring a rape claim before the International Tribunal in the Hague. Eventually, as rape was re-considered as a form of torture and genocide, male victims were able to bring forth such claims. *Id.*

⁸³*Id.* at 1144-45. The full practice includes cane-swallowing to induce vomiting, defecation to purge the food belonging to the mother, and nose-bleeding to purge the body of the polluted menstrual blood that may remain in the body. *Id.*

⁸⁴*Id.* at 1145.

⁸⁵*Id.* at 1144-45, 1148. Franke questions whether this behavior is erotic at all. Men can achieve erection for a spectrum of reasons independent of eroticism such as fear, sleep, having a full bladder, violence, power, carnival rides, fast bicycle rides, sitting in warm sand, setting a field afire, war movies, being chased by police, hearing the national anthem, and seeing one’s

An erection under these circumstances has little, if anything, to do with sexual pleasure.

Professor Katherine M. Franke, in her article *Constructing Heterosexuality: Putting Sex to Work*,⁸⁶ uses these examples as part of her investigation into assault and how assault becomes labeled as “sexual.” For example, in the recent case of Abner Louima, where policemen forced a wooden handle of a toilet plunger inside his anus and then shoved it into his mouth, all the while calling him a “nigger,” Franke questions why the police were charged with *sexual* assault as opposed to regular assault.⁸⁷ Neither the police officers, nor the victim received any sexual pleasure from the act; the act was motivated more by racial violence.⁸⁸ According to Franke, the overemphasis on the sexual nature of Louima’s assault “deflects attention away from the gender and race-based motivation behind the attack.”⁸⁹

Similarly, researchers Michael King, Adrian Coxell, and Gill Mezey have found that even when rape is defined as “gender-neutral,” it is still assumed that male sexual violence can only be perpetrated by homosexual males; thus, reducing rape to its *sexual* connotation.⁹⁰ Yet, the majority of research indicates that male victims are more likely to be raped by heterosexual men than homosexual men.⁹¹ As Pelka stated:

Most people find it difficult to understand why a straight man would rape another man. But if you see rape as a way of exerting control, of confirming your own power by disempowering others, then it makes perfect sense. . . . If it makes you feel powerful and macho to force sex on a woman or child, think of how much more powerful you feel raping another man.⁹²

Although sexual assault may seem “sexual” in nature, many sexual assaults have less to do with *sexual desire* in as much as they concern *sexual humiliation*. As one perpetrator stated, “I had the guy so frightened I could have made him do anything I wanted. I didn’t have an erection. I wasn’t really interested in sex. I felt powerful, and hurting him excited me. Making him suck me was more to degrade him than for

name in print. At the very least, according to Franke, describing this tradition as homoerotic ignores the primary and cultural reason for the practice. *Id.*

⁸⁶Franke, *supra* note 81, at 1156.

⁸⁷*Id.* at 1154-56. Franke assumes that the attack was deemed sexual because it involved the anus. One might wonder then, if female sexuality encompasses the entirety of the female body, as suggested by French feminist Luce Irigaray, why female rape and sexual assault is explicitly limited to the vagina, anus, and mouth? See LUCE IRIGARAY, *THIS SEX WHICH IS NOT ONE* 23-33 (Catherine Porter & Carolyn Burke trans., Cornell Univ. Press 1985) (detailing the ramifications of reducing the female sexual body to nothing more than a “vagina” to be penetrated).

⁸⁸*Id.* at 1159.

⁸⁹*Id.* at 1160.

⁹⁰See King et al., *supra* note 31, at 1.

⁹¹*Id.* at 1-2.

⁹²Pelka, *supra* note 25, at 251-52.

my physical satisfaction.”⁹³ In another instance, a perpetrator raped his victim as a form of punishment for asking the assailant if he was “a homo.”⁹⁴ According to the perpetrator, “[i]t wasn’t for sex. I was mad and I wanted to prove who I was and what he was.”⁹⁵ In these instances, the perpetrators’ “satisfaction” had less to do with erotic or sexual desire as much as it had to do with power and humiliation.

Nevertheless, erections are consistently considered the sole signifier for male lust and male desire, and society is riddled with examples of viewing them as such. For example, it is a rather common practice for researchers to measure a man’s erection in response to particular photographs in order to make assumptions about male sexual arousal.⁹⁶ In response to such practices, critical theorist Susan Bordo states, “there’s the question of which physiological responses count as ‘erotic arousal’ and whether they couldn’t be evidence of other states.”⁹⁷

Theorist Alan Hyde, in his book *Bodies of Law*,⁹⁸ discusses how the penis is expected to tell a narrative about male sexual desire in his analysis of the penile plethysmograph. For example, in *Harrington v. Almy*,⁹⁹ Norman Harrington, a police officer charged with sexual molestation of a child, was requested to submit to a psychological exam using a penile plethysmograph before he could be reinstated on the police force.¹⁰⁰ Harrington refused and was demoted, and eventually won a substantive due process claim.¹⁰¹ Hyde criticizes the general assumption that a penis is able to communicate “a kind of truth of which the man is unaware or wishes to keep secret.”¹⁰²

In order to avoid the reification of the male organ as a signifier for consent and sexual desire, Franke uses a theoretical rubric known as the “homosocial.”¹⁰³ Rather

⁹³Groth & Burgess, *supra* note 21, at 808.

⁹⁴*Id.*

⁹⁵*Id.*

⁹⁶For examples of such studies, see Karen M. Kramer, Note, *Rape by Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rape*, 47 STAN L. REV. 115 (1994); David P. Bryden & Sonja Lengnick, *Criminal Law: Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194 (1997).

⁹⁷BORDO, *supra* note 71, at 177. Bordo also criticizes recent Viagra advertisements that tend to reduce male sexual pleasure to issues of performance as if pleasure arises solely out of the ability to perform: “It’s harder. It’s firmer. It can go all night. . . . I haven’t yet read one account in the newspapers or magazines in which a man talks about any increase in pleasure, either psychological or physical” *Id.* at 42.

⁹⁸ALAN HYDE, *BODIES OF LAW* 173-180 (Princeton Univ. Press 1997).

⁹⁹977 F.2d 37, 39 (1st Cir. 1992).

¹⁰⁰HYDE, *supra* note 98, at 173. A penile plethysmograph entails placing a pressure-sensitive ring or tube around the penis to measure its circumference in order to detect sexual arousal in response to various stimuli. *Id.* at 173-74, 179.

¹⁰¹*Id.* at 174.

¹⁰²*Id.* at 186.

¹⁰³Franke, *supra* note 81, at 1149. The term was originally coined by theorist Eve Kosofsky Sedgwick. See EVE KOSOFSKY SEDGWICK, *BETWEEN MEN: ENGLISH LITERATURE AND MALE HOMOSOCIAL DESIRE* 7 (Columbia Univ. Press 1985).

than reduce sexual violence to its erotic overtones, the rubric of the homosocial “leaves room for the role of the erotic while recognizing the ‘range of ways in which sexuality functions as a signifier.’”¹⁰⁴ For example, an examination of the traditional “Sambia male initiation rituals reveals that semen practices function symbolically, metonymically, and literally in the transmission of an ideology of gendered power.”¹⁰⁵ By de-emphasizing the sexual aspect of violence under the rubric of the homosocial, “we keep our focus on how sex is put to work to construct men, masculinity, and nations, and to destroy women, men, and a people.”¹⁰⁶

Thus, applying the rubric of the homosocial to instances where male victims maintain an erection during sexual assault de-emphasizes the significance of the male erection in terms of consent and sexual gratification in a way that underscores how sex can be used to humiliate and degrade male victims.

III. THE LAW’S RESPONSE TO SEXUAL VIOLENCE DIRECTED AT MALE VICTIMS

A. The Law’s Treatment of Male Sexual Assault in General

In order to understand why the law has been largely unavailing to male victims of sexual assault who maintain erections during their attacks, it is first important to explore the law’s complicated history with male sexual assault in general. This section provides a brief summary of that history.

The relationship between male sexual assault and the law has fluctuated from outright disbelief to tacit acknowledgement that if male sexual assault exists, its rarity merits a lack of legal recognition. The “perception of the female as a unique creature, harmed in some unique way by untoward sexual behavior, for a long time precluded any thought that sex crime laws should perhaps protect males as well.”¹⁰⁷ This lack of judicial concern for male victims is rooted in society’s beliefs that men cannot be sexually victimized and that men are always sexually available.¹⁰⁸ The struggle for recognition was no more apparent then when men attempted to replace gender-specific rape laws with gender-neutral rape laws.¹⁰⁹

1. The Supreme Court of the United States

In 1981, in *Michael M. v. Superior Court of Sonoma City*,¹¹⁰ the Supreme Court of the United States, in an opinion by then Justice Rehnquist, denied a Fourteenth Amendment Equal Protection challenge to title 9, section 261.5 of the California

¹⁰⁴*Id.* (quoting EVE KOSOFSKY SEDGWICK, *supra* note 103, at 7.).

¹⁰⁵*Id.*

¹⁰⁶*Id.* at 1180.

¹⁰⁷Paul J. Mirabile, Comment, *Rape Laws, Equal Protection, and Privacy Rights*, 54 TUL. L. REV. 456, 458 (1980).

¹⁰⁸*See Kramer, supra* note 3, at 318; Kay, *supra* note 14, at xv.

¹⁰⁹Perhaps many of these lawsuits were unsuccessful because under many of the circumstances, the complainant was a convicted rapist attempting to use the Equal Protection Clause to invalidate his sentence. Judges may have found it hard to sympathize with such complainants.

¹¹⁰450 U.S. 464, 466 (1981).

Penal Code, which defined statutory rape as “an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years.” In applying the “substantial relationship” test for gender-based classifications, the court found that the underlying governmental objective for the statute was to prevent “teenage pregnancies,” which were found to have “significant social, medical, and economic consequences for both the mother and her child, and the State.”¹¹¹ Having determined that this was an important governmental objective, the court held that the gender-based classification was justified because only women could become pregnant, which constitutes a natural deterrent for women from engaging in premarital sex.¹¹² The court concluded, “[a] criminal sanction imposed solely on males thus serves to roughly ‘equalize’ the deterrents on the sexes.”¹¹³

The majority opinion in *Michael M.* has received much criticism for the way it stereotyped masculinity and male sexual violence.¹¹⁴ In his dissent, Justice Stevens criticized the decision for upholding a statute that relied on “traditional attitudes toward male-female relationships.”¹¹⁵ As Justice Stevens stressed, “the possibility that such a habitual attitude may reflect nothing more than an irrational prejudice makes it an insufficient justification for discriminatory treatment that is otherwise blatantly unfair.”¹¹⁶ Likewise, commentators have criticized the *Michael M.* majority for perpetuating commonly held stereotypes about the male sexual drive, all the while, fostering a belief that this drive is rooted in the some innate masculine biology.¹¹⁷

2. Federal Circuit Courts

Prior to the Supreme Court’s decision in *Michael M.*, the circuit courts were split as to whether the Equal Protection Clause of the Fourteenth Amendment required that gender-specific rape statutes be broadened to encompass male victims as well. In each of the following cases, the male defendant was convicted under a gender-specific statutory rape statute for either having consensual sex with, or in some

¹¹¹*Id.* at 470.

¹¹²*Id.* at 473.

¹¹³*Id.*

¹¹⁴Justice Brennan, in his dissenting opinion, noted that the true intent of the statute was to protect underage women who were seen as “legally incapable of consenting to an act of sexual intercourse” and thus, in need of special protection. *Michael M.*, 450 U.S. at 495-96. As other commentators have argued, “[t]he Court stripped the power of consent from the female under the age of eighteen and in the process maintained control over the female body . . .” Deanna Rae Reitman, Note, *The Collision Between the Rights of Women, the Rights of the Fetus and the Rights of the State: A Critical Analysis of the Criminal Prosecution of Drug Addicted Pregnant Women*, 16 ST. JOHN’S J. LEGAL COMMENT. 267, 280-81 (2002). See also William N. Eskridge, Jr., *The Many Faces of Sexual Consent*, 37 WM. & MARY L. REV. 47, 58 (1995) “The law of sexual consent is primarily a law responsive to Victorian male fantasies.” *Id.*

¹¹⁵*Michael M.*, 450 U.S. at 501.

¹¹⁶*Id.*

¹¹⁷Levit, *supra* note 7, at 1057.

instances, raping an underage female and subsequently raised an Equal Protection violation.

In *Meloon v. Helgemo*,¹¹⁸ the First Circuit invalidated New Hampshire's gender specific statutory rape statute under the Equal Protection Clause of the Fourteenth Amendment. The State offered four reasons to justify its gender-based classification: (1) males under the age of fifteen are physiologically incapable of sexual intercourse and thus the class of victims vulnerable to female offenders is smaller than the class of female victims vulnerable to male offenders; (2) adult males are more likely to be perpetrators and thus the class of potential male offenders is larger than the class of potential female offenders; (3) females are more likely to be injured during the commission of such an offense; and (4) only females are able to become pregnant and consequently suffer more severe repercussions.¹¹⁹

Finding these rationales unpersuasive, the court held that a gender-neutral law would better serve the state's interest in protecting *all children* from sexual exploitation.¹²⁰ The court reasoned that since the statute in question defines sexual contact as "any penetration, however slight," prepubescent males are capable of being sexually assaulted in violation of the statute without obtaining a full erection.¹²¹ Moreover, since the statute does not require ejaculation as a necessary element to prove rape and does not allow an affirmative defense if a contraceptive was used during the assault, the court reasoned that the true intent of the statute could not have been to deter unwanted pregnancies.¹²²

Nevertheless, several circuit courts upheld gender-specific rape statutes under the Equal Protection Clause of the Fourteenth Amendment. For example, the Second Circuit found that the rape of males by females is "so extraordinary or even nonexistent as not to warrant specific legislative concern."¹²³ The court rejected the notion that the words "penetration, however slight" was an acknowledgment that a man need not be fully aroused to complete the act of penetration.¹²⁴ Instead, the court held that those words were solely intended "to prevent males from raising defenses concerning completion of an act of sexual intercourse."¹²⁵ Thus, the court concluded that men simply could not be victims of sexual assault as contemplated by

¹¹⁸564 F.2d 602 (1st Cir. 1977).

¹¹⁹*Id.* at 605.

¹²⁰*Id.* at 606-07 (emphasis added).

¹²¹*Id.* at 606.

¹²²*Id.* at 607 n.6. *See also* United States v. Hicks, 625 F.2d 216, 219-21 (9th Cir. 1980) (finding that the state had not shown why "the female, but not the male, is necessarily always 'victimized' or likely to suffer physical injury" as a result of underage sex); Navedo v. Preisser, 630 F.2d 636, 638-41 (1980) (finding that the state had offered no legislative, historical, statistical, or medical data to support the argument that female victims are more likely to be injured during underage sex than male victims).

¹²³Liberta v. Kelly, 839 F.2d 77, 82-83 (2nd Cir. 1988).

¹²⁴*Id.*

¹²⁵*Id.*

the statute.¹²⁶ The court was further persuaded by the argument that only females are at risk of becoming pregnant, thus justifying the gender-based classification.¹²⁷

The reasoning followed by the Second Circuit in *Liberta* is completely unavailing to males because it upholds a statute that explicitly ignores male victims of sexual assault.¹²⁸ However, the reasoning employed by the First Circuit in *Meloon*, which struck down New Hampshire's gender-specific statutory rape statute, is likewise unavailing because the court sought only to protect male victims who maintain *partial* erections during their attacks.¹²⁹ Under either interpretation, men who are able to maintain *full* erections during their sexual assaults would be left without a cognizable legal remedy.

3. State Supreme Courts and Legislatures

As in *Michael M.*, state courts have almost consistently upheld the constitutionality of gender-specific rape statutes, many under the justification that since only women could become pregnant during a sexual assault, they risk additional physical injuries.¹³⁰ Several state courts have gone as far as state that it is physiologically impossible for a man to be raped.¹³¹ The Supreme Court of Utah defended its gender-specific statutory rape statute on the ground that males "are much more aggressive sexually and tend to take advantage of the immature girl."¹³² Although the Supreme Court of Hawaii recognized the possibility of a male rape

¹²⁶*Id.*

¹²⁷*Id.* at 83. See also *Hall v. McKenzie*, 537 F.2d 1232, 1235 (4th Cir. 1976). ("[I]t is obvious that there is a far greater likelihood of physical injury to a sexually immature female . . . [and, such contact] may cause her to become pregnant."); *Country v. Parrott*, 684 F.2d 588, 592-93 (8th Cir. 1982) ("Only women can become pregnant . . . This distinct type of harm constitutes and creates the greater probability of both physical and psychological damage which is precisely the type of factor which justifies heightened sanctions in the criminal law.").

¹²⁸*Liberta*, 839 F.2d at 82-83.

¹²⁹*Meloon v. Helgemoe*, 564 F.2d 602, 606 (1st Cir. 1977).

¹³⁰*Smith v. Alabama*, 409 So.2d 455, 460 (Ala. Crim. App. 1982); *Campbell v. State*, 718 So. 2d 123, 136 (Ala. Crim. App. 1997); *State v. Gray*, 595 P.2d 990, 992 (Ariz. 1979); *State v. LaMere*, 655 P.2d 46, 49-50 (Idaho 1982); *State v. Drake*, 219 N.W.2d 492, 495 (Iowa 1974); *State v. Bell*, 377 So.2d 303, 306 (La. 1979); *State v. Rundlett*, 391 A.2d 815, 819 (Me. 1978); *Parratt v. State*, 684 F.2d 588, 590-91 (Neb. 1982); *Olson v. State*, 588 P.2d 1018, 1018-19 (Nev. 1979); *State v. Thompson*, 392 A.2d 678, 680 (N.J. 1978); *State v. Ware*, 418 A.2d 1, 4 (R.I. 1980); *Stewart v. State*, 534 S.W.2d 875, 877 (Tenn. 1975); *Flores v. State*, 230 N.W.2d 637, 638 (Wis. 1975); and *State v. Ewald*, 216 N.W.2d 213, 218 (Wis. 1974).

¹³¹*State v. Greensweig*, 644 P.2d 372, 375 (Idaho Ct. App. 1982) ("Nature has provided that only a male can accomplish the penetration by sexual intercourse."); *Brooks v. State*, 330 A.2d 670, 673 (Md. Ct. Spec. App. 1975) ("That only females may be raped is nothing short of a physiological reality."); *People v. McDonald*, 272 N.W.2d 179, 182 (Mich. Ct. App. 1978) ("[T]hat physiologically, only men are capable of rape."); and *State v. Lorenze*, 592 S.W.2d 523, 526 (Mo. Ct. App. 1979) ("Forcible rape is an offense that can only be committed against a female, and, insofar as personal participation is concerned, can only be committed by a male . . . [t]o hold otherwise would be contrary to common experience and biological fact.")

¹³²*State v. Housekeeper*, 588 P.2d 139, 141 (Utah 1978).

victim, the court upheld its gender-specific rape statute on the ground that it was not a significant social problem.¹³³ Finally, the Court of Appeals of California in *Guervara v. Superior Court*¹³⁴ upheld its gender-specific rape statute on the ground that only women run the risk of passing AIDS to their offspring during pregnancy.

The highest court in New York however, invalidated its gender-specific rape statute in *People v. Liberta*.¹³⁵ The court found that a more logical legislative goal behind the statute was to deter “unwanted, forcible, and often violent sexual intrusion,” which would be best served by a gender-neutral statute.¹³⁶ The Court found it simply wrong that men are physically incapable of being raped by women.¹³⁷ On appeal, the Second Circuit overturned this decision.¹³⁸ Since *Liberta*, the New York legislature has amended its rape statute to include gender-neutral language.¹³⁹

To date, all but three jurisdictions in the United States have gender-neutral rape statutes.¹⁴⁰ The Georgia Supreme Court has upheld a gender-specific forcible rape

¹³³State v. Rivera, 612 P.2d 526, 529 (Haw. 1980).

¹³⁴73 Cal. Rptr. 2d 421, 426 (1998).

¹³⁵474 N.E.2d 567, 576 (N.Y. 1984). Prior to this, several lower courts in New York upheld the constitutionality of its gender-specific rape statute: State v. Reilly, 85 Misc.2d 702, 706-07 (Westchester County 1976) (“[F]or practical purposes, only females [being] raped is physiological reality.”); State v. Weidiger, 96 Misc.2d 978, 980 (Albany County 1978) (holding the same); State v. Smith, 97 Misc.2d 115, 121 (Albany County 1978) (upholding the gender-specific statutory rape statute even though the male victim was mentally handicapped); State v. Whidden, 51 N.Y.2d 457, 461-62 (N.Y. App. Div. 1979) (reasoning that the gender-classification was justified because only women could get pregnant).

¹³⁶*Liberta*, 474 N.E.2d at 576.

¹³⁷*Id.* at 577.

¹³⁸*Liberta*, 839 F.2d at 82-83.

¹³⁹N.Y. PENAL LAW, tit. H, § 130.35 (2002):

A person is guilty of rape in the first degree when he or she engages in sexual intercourse with another person: (1) By forcible compulsion; or (2) Who is incapable of consent by reason of being physically helpless; or (3) Who is less than eleven years old; or (4) Who is less than thirteen years old and the actor is eighteen years old or more.

The Supreme Court of Texas was one of the few jurisdictions that actually interpreted an existing gender-specific statute to be gender-neutral. See *Ex Parte Groves*, 571 S.W.2d 888 (Tex. 1978).

¹⁴⁰See generally ALA. CODE § 13A-6-61 (2003); ALASKA STAT. § 11.41.410 (2002); ARIZ. REV. STAT. § 13-1406 (2002); ARK. CODE ANN. § 5-14-103 (2003); CAL. PEN. CODE § 261 (2003); COLO. REV. STAT. § 18-3-402 (2002); CONN. GEN. STAT. § 53a-70 (2003); DEL. CODE ANN. tit. 11, § 773 (2003); D.C. CODE ANN. § 22-3002 (2003); FLA. STAT. ANN. § 794.011 (2003); HAW. REV. STAT. § 707-730 (2003); III 720 ILL. COMP. STAT. 5/12-13 (2003); IND. CODE ANN. § 35-42-4-1 (2003); IOWA CODE ANN. § 709.1 (2002); KAN. STAT. ANN. § 21-3502 (2001); KY. REV. STAT. ANN. § 510.040 (2002); LA. REV. STAT. ANN. § 14:41 (2002); ME. REV. STAT. ANN. tit. 17, § 253 (2003); MD. CODE ANN., CRIMINAL LAW § 3-303 (2003); MASS. ANN. LAWS, ch. 265, § 22 (2003); MICH. COMP. LAWS, ANN. § 750.520b (2003); MINN. STAT. § 609.342 (2003); MO. REV. STAT. § 566.030 (2002); MONT. CODE ANN. § 45-5-502 (2002); NEB. REV. STAT. § 28-319 (2002); NEV. REV. STAT. 200.366 (2003); N.H. REV. STAT. ANN. § 632-A:2 (2002); N.J. STAT. ANN. § 2C:14-2 (2003); N.M. STAT. ANN. § 30-9-11 (2003); NY PENAL LAW § 130.35 (2003); N.C. GEN. STAT. § 14-27.2 (2003); N.D. CENT. CODE § 12.1-20-

statute,¹⁴¹ even though Georgia provides equal protection for both male and female victims of statutory rape.¹⁴² Initially, the Mississippi Supreme Court took the stance that men were physiologically incapable of being raped.¹⁴³ However, the court has recently upheld a gender-specific rape statute on the ground that any similarly coercive act upon a male by a female would be sufficiently covered under Mississippi's sexual battery statute.¹⁴⁴ Yet, a distinction between the two Mississippi statutes remains. A male perpetrator convicted of raping a female may receive up to life imprisonment, whereas, a female or male perpetrator convicted of sexual battery upon a male may not receive a sentence greater than thirty years.¹⁴⁵ Finally, Idaho has both a female rape statute and an equivalent male rape statute; however, both focus solely on male perpetrators and neither assume a situation where a female perpetrator rapes a male victim.¹⁴⁶

Thus, in light of this lack of judicial effort to recognize and protect male victims of rape, it is highly likely that courts will be similarly unavailing to male victims who maintain an erection during their assaults. Moreover, it is highly likely given this history, that courts will interpret such physical responses as a signifier for

03 (2003); OHIO REV. CODE ANN. § 2907.02 (2003); OKLA. STAT. tit. 21, § 1114 (2003); OR. REV. STAT. § 163.375 (2001); 18 PA. CONS. STAT. § 3121 (2003); R.I. GEN. LAWS § 11-37-2 (2002); S.C. CODE ANN. § 16-3-652 (2002); S.D. CODIFIED LAWS § 22-22-1 (2002); TENN. CODE ANN. § 39-13-503 (2003); TEX. PENAL CODE § 22.011 (2003); UTAH CODE ANN. § 76-5-402 (2003); VT. STAT. ANN. TIT. 13, § 3252 (2002); VA. CODE ANN. § 18.2-61 (2003); WASH. REV. CODE ANN. § 9A.44.040 (2003); W. VA. CODE § 61-8B-3 (2003); WIS. STAT. § 940.225 (2003); WYO. STAT. ANN. § 6-2-302 (2002). It is not clear however, whether all of these gender-neutral statutes' definition of rape would encompass a situation where a man or woman is forced to penetrate another.

¹⁴¹Lamar v. State, 254 S.E.2d 353 (Ga. 1979). Georgia's rape statute states: "A person commits the offense of rape when he has carnal knowledge of: (1) A female forcibly and against her will; or (2) A female who is less than ten years of age. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ." GA. CODE ANN. § 16-6-1 (2002).

¹⁴²B.L.S., a child, 449 S.E.2d 823 (Ga. 1994). Georgia's statutory rape statute states: "A person commits the offense of statutory rape when he or she engages in sexual intercourse with any person under the age of 16 years and not his or her spouse, provided that no conviction shall be had for this offense on the unsupported testimony of the victim." GA. CODE ANN. § 16-6-3 (2002).

¹⁴³Green v. State, 270 So. 2d 695 (Miss. 1972).

¹⁴⁴Harper v. State, 463 So. 2d 1036, 1038-39 (Miss. 1985).

¹⁴⁵Mississippi's rape statute defines rape as "an assault with intent to forcibly ravish any female of previous chaste character" MISS. CODE ANN. § 97-3-71 (2003). Under Mississippi's sexual battery statute, sexual battery occurs where "he or she engages in sexual penetration with another person without his or her consent." MISS. CODE ANN. § 97-3-95 (2003).

¹⁴⁶Idaho's rape statute defines rape as "the penetration, however slight, of the oral, anal, vaginal opening with the perpetrator's penis accomplished with a female . . ." IDAHO CODE § 18-6101 (2003). Idaho's male rape statute defines male rape as "the penetration, however slight, of the oral or anal opening of another male, with the perpetrator's penis, for the purpose of sexual arousal, gratification, or abuse . . ." IDAHO CODE § 18-6108 (2003).

consent.¹⁴⁷ As Hyde argues, “[i]f law were to construct bodies with agency, bodies that acted without minds, without ‘our leave,’ bodies that had their own civil and criminal responsibility, I am confident that the penis would become that body part par excellence to which independent agency would be attributed.”¹⁴⁸ To the extent that these judicial opinions rely on general stereotypes about victimhood and masculinity, many of the assumptions underlying the American legal system in this regard “are suspect and should not be uncritically adopted.”¹⁴⁹

B. The Law’s Treatment of Male Sexual Assault When the Victim Maintains an Erection

As argued above, many courts have considered male sexual assault as an impossibility, relying largely upon stereotypical notions that rape constitutes a man (the actor) penetrating a woman (the object). “[T]he impossibility argument appears to assume that a male would have to achieve an erection before a female could rape him, an event unlikely without the consent which would constitute a defense to the charge.”¹⁵⁰ Some commentators have attempted to counter such notions by pointing to the fact that “penetration” in most rape statutes is defined as “however slight.”¹⁵¹ Thus, the argument typically follows that since a man need not have a *full* erection to complete the offense of rape, he should equally be able to utilize rape laws when he is a victim of sexual assault.¹⁵² This line of defense is completely unavailing to the male victim who does maintain a *full* erection during his assault, specifically in situations where a male or female perpetrator forces the victim to penetrate. Since society typically equates the one who penetrates as “the actor” in sexual situations, victims who have been forced to penetrate have had no real legal recourse because their experience distorts this “actor/object” dichotomy. This section analyzes the few cases that have addressed this issue of whether a *full* erection constitutes a defense of consent to a charge of rape.

In many instances, reported cases of male rape when the victim maintains an erection are difficult to come across because judges will simply dismiss the charges and thus, the decision remains unpublished. For example, Sue Lees, a University of North London professor, has found at least one trial record in England where the judge dismissed the case because the victim admitted that he had an erection while being raped in prison.¹⁵³ In another unreported case from the counties of Weymouth

¹⁴⁷See King et al., *supra* note 31, at 5 (noting that most courts and lawyers are likely to interpret such reactions as consent). See also Widor, *supra* note 12, at 246–47. A man who experiences such victimization is labeled a “wuss” and the male-dominated judiciary is not only likely to perpetuate these stereotypes but also “discriminate against men who do not readily embrace the traditional model of the strong and self-assured man.” *Id.*

¹⁴⁸HYDE, *supra* note 98, at 184.

¹⁴⁹Rumney & Morgan-Taylor Part Two, *supra* note 27, at 343.

¹⁵⁰*Id.* at 366.

¹⁵¹*Id.*

¹⁵²*Id.*

¹⁵³Hilpern & Williams, *supra* note 6, at 2.

and Dorset, *R. v. Armstrong*,¹⁵⁴ a judge instructed the jury to acquit a defendant charged with forcible sodomy solely on the basis that the victim had an erection during the assault, which the judge accepted as a “defense of submission.”

Nevertheless, in the few cases that have been reported, the impossibility myth flourishes. In *Willan v. Willan*,¹⁵⁵ the English Court of Appeals held that absent a showing of fraud, a man who sustains an erection during intercourse must be deemed as committing a voluntary act. In *Willan*, the wife had frequently demanded sexual intercourse from her husband and when he did not wish to oblige, she would indulge in various types of violence such as pulling his hair, grabbing his ears, shaking his head violently, and at least on one occasion, kicking his injured leg.¹⁵⁶ In denying the appeal, the court, in referencing the husband’s erect penis, reasoned that the actual act of intercourse “constitute[d] the evidence of condonation.”¹⁵⁷ The judge further noted that “[i]t might be otherwise in the case of a wife, but in the case of a husband who has sexual intercourse it can only be said of him that what he does he does on purpose, and that sexual intercourse with his wife must be a voluntary act on his part.”¹⁵⁸

In *R. v. R.J.S.*,¹⁵⁹ a Canadian trial court held that when a male victim maintains an erection during a sexual encounter, the perpetrator may reasonably interpret such “arousal” as consent. In *R.J.S.*, the victim was an eighteen-year-old man who alleged that he was raped by a thirty-five-year-old man while working the night shift at a town skating rink.¹⁶⁰ The older man made sexual advances upon the younger man who allegedly tightened his muscles to show a sign of resistance.¹⁶¹ Throughout the assault, the younger man never made an affirmative showing of consent other than his erection.¹⁶² The court reasoned however, that because the victim “maintained and regained an erection, and then penetrated the accused’s anus while the accused continually moved up and down . . . [he] appeared to go along with the accused.”¹⁶³ Furthermore, the court noted that “[t]he complainant penetrated the accused . . . continuing to lie on the sheet with his clothes off, the light on, *an erection*, looking at the accused, and showing no fear immediately after having had his penis stimulated.”¹⁶⁴ Hence, the court emphasized the erection in granting the affirmative defense of consent. Professor Catherine A. MacKinnon responded to this decision by asking, “[i]f sex is seen as one person acting on another passive person,

¹⁵⁴Cited in Rumney & Morgan-Taylor Part One, *supra* note 24, at 231 n. 167.

¹⁵⁵2 All. E.R. 463, 463 (Ca. 1960).

¹⁵⁶*Id.* at 463-64.

¹⁵⁷*Id.* at 465.

¹⁵⁸*Id.* at 466.

¹⁵⁹123 Nfld & P.E.I.R. 317 (1994), *reprinted in* CATHERINE A. MACKINNON, *SEXUAL EQUALITY* 826-28 (Foundation Press 2001).

¹⁶⁰MACKINNON, *supra* note 159, at 827.

¹⁶¹*Id.*

¹⁶²*Id.* at 826-27.

¹⁶³*Id.* at 827.

¹⁶⁴*Id.* (emphasis added).

what does that make an erection? [P]rima facie consent?"¹⁶⁵ According to the *R.J.S.* decision, an erection does constitute prima facie consent, even if the victim shows other signs of resistance.

Reported American cases have, to some extent, acknowledged that a man is able to sustain an erection during unwanted sexual contact. For example, in *State v. Karlen*,¹⁶⁶ the Supreme Court of South Dakota interpreted a sexual encounter as non-consensual when a man performed fellatio upon another man to the point of ejaculation when the victim had been asleep and/or passed out. The Massachusetts court of appeals held similarly in *Commonwealth v. Tatro*,¹⁶⁷ where the victim dozed off and/or passed out and subsequently awoke to find the defendant performing fellatio on him. In *State v. Tizard*,¹⁶⁸ a 17-year-old male visited a doctor about taking steroids. During the visits, the doctor rubbed the victim's penis to an erection and, on one occasion, masturbated the victim.¹⁶⁹ The doctor explained that he needed a sperm sample to obtain a white blood cell count.¹⁷⁰ The perpetrator was convicted under Tennessee's sexual battery statute.¹⁷¹ In *United States v. Adams*,¹⁷² a military appellate court reversed a lower court finding that as a matter of law, it is unreasonable to have sex with a minor even if you reasonably believe it is your wife who has entered your bed.

Although these cases appear to have positive results because they recognize that a victim can sustain an erection during unwanted sexual touching, their holdings focus solely on the fact that the alleged consent was induced by fraud, drugs, or alcohol. Consequently, none of these cases deal with the more narrow issue of whether a man, in full control of his mental capabilities, could sustain an erection during unwanted sexual conduct and still be understood as denying consent.

Given the complicated historical relationship between male sexual assault and the law, as detailed in the previous section, and the fervent denial that men are able to maintain erections during unwanted sexual activity by the English and Canadian

¹⁶⁵MACKINNON, *supra* note 159, at 827.

¹⁶⁶589 N.W.2d 594, 606 (S.D. 1999).

¹⁶⁷676 N.E.2d 843, 844 (Mass. App. Ct. 1997).

¹⁶⁸897 S.W.2d 732, 736 (Tenn. Crim. App. 1994).

¹⁶⁹*Id.* at 736-37.

¹⁷⁰*Id.* at 739.

¹⁷¹*Id.* at 740. However, Tennessee's sexual battery statute is a Class E felony, which carries a maximum sentence of six years. If the victim was female, the perpetrator could have been liable under Tennessee's rape statute, a Class B felony, which carries a maximum sentence of thirty years. Compare TENN. CODE ANN. § 39-13-503 (2002), and TENN. CODE ANN. § 39-13-505 (2002), with TENN. CODE ANN. §§ 40-35-111 (b)(2), (b)(5) (2002). See also David P. Bryden, *Forum on the Law of Rape, Redefining Rape*, 3 BUFF. CRIM. L. R. 317, 434 (2000). "Presently, the penalties for rape and related offenses are greater than for assault." *Id.*

¹⁷²33 M.J. 300, 302-03 (1991). But see *State v. Leiding*, 812 P.2d 797 (N.M. Ct. App. 1991) (imputing consent to a male rape victim who was persuaded by his male therapist to have sexual intercourse during sessions). In 1993, New Mexico amended its sexual assault statute to render such conduct illegal. See N.M. STAT. ANN. § 30-9-10(A)(5) (2002).

courts, it is highly likely that American courts will be similarly unavailing to victims under similar circumstances.

IV. ANALYSIS: THE SOCIAL IMPLICATIONS OF VIEWING AN ERECTION AS A SIGNIFIER FOR CONSENT

A. Isolating Male Victims of Sexual Violence

Viewing an erection as a signifier for consent to another's sexual advances perpetuates the stereotype that men always want to have sex. "Men are supposed to be ever ready for sex, constantly seeking sex, and constantly seeking to escalate every encounter so that intercourse will result. . . ." ¹⁷³ "Sexually speaking, 'men *are* their penises.'" ¹⁷⁴ Thus, men who are sexually violated, or resist a sexual advance from an available partner, may feel unconnected to their masculinity.

Moreover, these stereotypes teach male victims that an erection during a sexual assault means that they enjoyed their attack, leaving them feeling betrayed by their own bodies. ¹⁷⁵ As one victim was quoted saying, "[m]y mind was saying no, but my body seemed to say yes. Why did my body betray me this way?" ¹⁷⁶ Since men are taught to equate such physical reactions with sexual pleasure, victims may be left wondering which to believe, their *physical* erection or their *mental* feelings of fear and anxiety:

Men are not encouraged within our society to show vulnerability, or to admit to feelings of fear and anxiety. It is unlikely that a man will want to admit to being sexually victimized . . . as he may feel both shame and loss of self-esteem as well as fearing the reactions of friends and others. ¹⁷⁷

Essentially then, the pervasiveness of such stereotypes serves only to isolate male victims: "there nevertheless are many male victims who never have been given the opportunity to share the residual trauma from their experience with a health care professional who could help them." ¹⁷⁸ Furthermore, this isolation prevents male victims from contextualizing their victimization in any meaningful way. ¹⁷⁹ Ignoring male victims in this manner effectively tells them to "suck it up" because they are

¹⁷³Michael S. Kimmel, *Clarence, William, Iron Mike, Tailhook, Senator Packwood, Spur Posse, Magic . . . and US*, in *CONFRONTING RAPE AND SEXUAL ASSAULT*, 263, 265 (Mary E. Odem & Jody Clay-Warner eds., Scholarly Res., Inc. 1998).

¹⁷⁴BORDO, *supra* note 71, at 36.

¹⁷⁵Kramer, *supra* note 3, at 318.

¹⁷⁶SCARCE, *supra* note 18, at 60.

¹⁷⁷Rumney & Morgan-Taylor Part Two, *supra* note 27, at 338.

¹⁷⁸*Sexual Molestation of Men by Women*, *supra* note 23, at 129. See also Kay, *supra* note 14, at xvi. "[T]ired generalizations of men always wanting sex ensures that men's sexual victimization and men's sexual pleasure are silenced." *Id.*

¹⁷⁹See *Confronting the Last Taboo of Male Rape; 'I Never Told Anyone, I Just Blocked it Right Out*, THE GUARDIAN (London), Aug. 24, 1992, the Guardian Home Page, at 2 (interviewing Harvey Milnes, a survivor of male rape who currently counsels other victims).

male.¹⁸⁰ Unfortunately, these experiences of betrayal and disbelief, and subsequent isolation have left male sexual assault the most unreported crime in the United States.¹⁸¹

B. Perpetuating a Violent Form of Masculinity

Isolating victims of male sexual assault is not the only insidious implication of promulgating stereotypes regarding victimhood and masculinity. Such stereotypes become so pervasive that they create an image that all men are “natural rapists.”¹⁸² This conclusion shapes the competitive way men interact with their world:

Questions about sex are intimately linked to questions of power. For men, the connections between sex and power show themselves in an assortment of ways: the portrayal of sex as a competitive game, a matter of “scoring” and “bases;” the image of sex as an intrinsically desirable commodity, a reward offered to those who achieve, or who at least buy the right car; the valorization of the always-hard, always-ready dick.¹⁸³

In effect, these stereotypes create a perverse form of masculine identity.

In explicating how power relations construct identity, French critical theorist Michel Foucault has argued, “[t]his form of power applies itself to everyday life which categorizes the individual, marks him by his own individuality, attaches him to his own identity, imposes a law of truth on him which he must recognize and which others have to recognize in him.”¹⁸⁴ As Stoltenberg emphasizes, men are not born men; they become men.¹⁸⁵ Consequently, as sexual categories of masculinity and femininity are regulated and appropriated, notions of gender, pleasure, and desire also become regulated.¹⁸⁶ Critical theorist Chris Weedon argues that these preconceived notions of gendered-identity infiltrate all facets of self-identification: “Neither the body nor thoughts and feelings have meaning outside their discursive articulation, but the ways in which discourse constitutes the minds and bodies of individuals is always part of a wider network of power relations.”¹⁸⁷

Thus, norms of male-identity are socially constructed:

¹⁸⁰Levit, *supra* note 7, at 1080.

¹⁸¹Groth & Burgess, *supra* note 21, at 809. *See also* Pokin, *supra* note 33, at D01.

¹⁸²Kay, *supra* note 14, at xv.

¹⁸³*Id.*

¹⁸⁴Michel Foucault, *The Subject of Power*, 8 CRITICAL INQUIRY 777, 781 (1982). Explicating Foucault’s theory of power and its unstable relationship with sex, critical theorist Judith Butler has stated, “that there is no ‘sex’ in itself which is not produced by complex interactions of discourse and power.” JUDITH BUTLER, GENDER TROUBLE. FEMINISM AND THE SUBVERSION OF IDENTITY 97 (Routledge 1990).

¹⁸⁵STOLTENBERG, *supra* note 66, at 31, 33. *See also* Kimmel, *supra* note 173, at 264 (“Sexual beings are made, not born.”).

¹⁸⁶BUTLER, *supra* note 184, at 96.

¹⁸⁷CHRIS WEEDON, FEMINIST PRACTICE AND POSTSTRUCTURALIST THEORY 108 (Basil Blackwell 1987).

In all, then, while physiological and chemical factors certainly influence how and why masculinity is treated as a discrete concept, masculinity predominantly remains a social and symbolic concept, decisively shaped and affected by specific historical and cultural factors, that ultimately provides a framework and perspective by which men perceive and understand themselves, others, and their environment. When masculinity intersects with ideological and political orientations, it can establish the priorities, social structures, hierarchies as well as the customs, habits, and patterns of interaction that determine and regulate social systems. . . . [M]asculinity is profoundly and ultimately a communication concept, a socially and symbolically constructed notion, that every culture and every era revisits and redefines in different ways.¹⁸⁸

As a result, the perpetuation of these stereotypes that men cannot be legitimate victims of sexual assault and must always be sexually available, creates, rather than describes, a violent and perverse form of masculinity.¹⁸⁹ Treating an erection as a per se signifier for consent and sexual pleasure serves only to enforce this perversion.

What exactly does this masculinity look like? According to theorist Christopher Hall, masculinity has become so tied to conceptions of violence and power that the erect penis has begun to lose its erotic overtures:

In our society, there is nothing less erotic than a penis; as an icon, it represents rape, war, and death. Male sexuality has not been destroyed, but in the cultural mind, it is a thanatological force, not an erotic one. A 'phallic' symbol is a gun, knife, a spear, a missile; the phrase is almost never taken to imply something that inspires life or growth. . . . [Men] are creatures of violence, and . . . [t]he male sex drive is seen as a dark, predatory thing, not erotic at all, but a constant reminder of the core of violence that defines manhood. The cock is a thing devoid of grace or beauty, which poisons everything it touches. . . . Men are perpetually faced with a paradox: if a man denies the power of his cock, he denies also his manhood, but to acknowledge it is to face an ugly, violent part of himself.¹⁹⁰

¹⁸⁸W. Chesebro & Koji Fuse, *The Development of a Perceived Masculinity Scale*, 49 COMM. Q. 203, 205-06, 207 (2001).

¹⁸⁹See STOLTENBERG, *supra* note 66, at 24. Men defend their choice to rape "by appeal to those dear substances our brain cells, our hormones, our gonads, our DNA." *Id.* "[R]eal men' have been cast as lustful, as driven almost mindlessly by sexual desire, a sexual desire of intense longing that rules and dominates, and in some cases manifests itself in a violent self-indulgent character." Chesebro & Fuse, *supra* note 188, at 222. See also Christopher Hall, *God is a Bullet*, in MALE LUST, PLEASURE, POWER, AND TRANSFORMATION 159, 162 (Kerwin Kay et al., Harrington Park Press 2000) (critiquing feminists who will criticize the amount of violence perpetuated by males and at the same time promote an ideology of "male lust" that makes sexual violence inevitable).

¹⁹⁰Hall, *supra* note 189, at 161.

Extending this definitional perspective illustrates how society's current conception of masculinity "fosters rape as a potential manifestation."¹⁹¹ Viewing the erect penis as a per se signifier for consent and sexual pleasure subscribes to the notion that a man's sexual desires are rooted in his penis and "that 'rape is the result of desires which, once aroused in a man, cannot be controlled and for which women are to blame.'"¹⁹²

Men often subscribe to such notions when justifying sexual violence:

Many men say that sexual arousal is a force of nature they can barely control. They report feeling dominated by an essentially unchosen, yet nearly overwhelming sexual attraction for certain females, triggered by simple cues, often physical appearance. They describe sexual arousal as something that happens to them, that they must struggle to control, and that women can manipulate with ease. Thus men experience sexual attraction for females as a potential threat to their male selves. Yet men – often the same men – view manhood as, in part, defined by the exercise of sexual power. . . . He finds a way to focus his sexual power on his partner so that the woman feels overwhelmed and finally inspired by it. Thus, in subtle, and not so subtle ways, male sexual aggression becomes a positive gender norm.¹⁹³

These myths serve as a "technique of neutralization" that actually create sexual violence: "If a man attributes this to himself, perceives himself as a helpless slave to his desire, then he will be less inclined to curb himself in the face of a woman's refusal and more inclined to resort to force to attain his ends."¹⁹⁴

Likewise, victims of sexual violence also subscribe to such notions when blaming themselves for "enticing" these uncontrolled passions in their attackers: "There was kissing and he got excited. Therefore, he was not thinking rationally. All he cared about was his sexual drive, not about me or my feelings. It was my fault for turning him on."¹⁹⁵

This Note does not attempt to justify male sexual violence under the rubric of a societal-induced, violent form of masculinity. Quite to the contrary, as Stoltenberg argues, men are *mistakenly* taught to believe that masculinity and subsequent male

¹⁹¹Chesebro & Fuse, *supra* note 188, at 223.

¹⁹²Remick, *supra* note 25, at 1134 (quoting Victoria J. Dettman, Comment, *Culpable Mistakes in Rape: Eliminating the Defense of Unreasonable Mistake of Fact as to Victim Consent*, 89 DICK. L. REV. 473, 473 (1985)).

¹⁹³Samuel H. Pillsbury, *Crimes Against the Heart: Recognizing the Wrongs of Forced Sex*, 35 LOY. L.A. L. REV. 845, 917-18 (2002).

¹⁹⁴Stevi Jackson, *The Social Context of Rape: Sexual Scripts and Motivation*, in RAPE AND SOCIETY: READINGS ON THE PROBLEM OF SEXUAL ASSAULT 16, 19-20 (Patricia Searles & Ronald J. Berger eds., Westview Press 1995).

¹⁹⁵Catalina A. Mandoki & Barry R. Burkhardt, *Women as Victims: Antecedents and Consequences of Acquaintance Rape*, in ACQUAINTANCE RAPE: THE HIDDEN CRIME 176, 187 (Andrea Parrot & Laurie Bechhofer eds., Wiley 1991); *see also* Pillsbury, *supra* note 193, at 870 ("Women may not identify the event as a criminal wrong because they blame themselves, believing that their own sexual provocation caused the man to lose control and force himself on her.").

urges are the controlling forces behind rape; when after all, the choice to rape is just that, a choice.¹⁹⁶ Far from justifying rape, this Note argues that viewing an erect penis as a signifier for consent and a secret link to male sexual desire promulgates the popular rape myth that once a man is aroused, sex, and in some instances rape, is the natural result.

In short, society places men in a double bind: exert your male aggressiveness on the playing field, but bow this male aggression to civilization when a girl says “no.”¹⁹⁷ Interpreting an erect penis as consent to unwanted sexual touching reifies the penis over a man’s own mental states of fear and anxiety. Yet at the same time, a man is expected to overpower his erection and subsequent male desires in instances where he has escalated a sexual situation on his own behalf.¹⁹⁸ Consequently, male *victims* are told, “your penis tells us the truth, if you were erect you wanted it;” and male *rapists* are told, “you control your penis, just because you were erect does not mean you couldn’t have stopped it.” The reality *should* be that an erection has absolutely nothing to do with a supposed uncontrollable male sexual desire. Otherwise, as Hyde argues, rapists are provided with a biological scapegoat that serves to justify male sexual violence.¹⁹⁹

Thus, this Note acknowledges that all genders have a stake in recognizing that men can maintain an erection during unwanted sexual touching:

Gender role stereotypes involve both male and female stereotypes. Clearly, any discrimination against men may ultimately result in harm to women. . . . Unless it becomes acceptable for men to hurt, for men to leave roles that foster aggression, for men to complain about the effects of gender role stereotypes, and for men to participate more fully in realms traditionally occupied by women, feminism has little chance of moving forward or expanding its audience. Feminist legal theorists need to explore constructs of masculinity toward the end of promoting practices and politics of masculinity that comport with feminist objective.²⁰⁰

A primary goal in stopping violence against all persons must include changing predominant conceptualizations of masculinity. As Michel Foucault warned: “We must not make the mistake of thinking that sex is an autonomous agency which secondarily produces manifold effects of sexuality over the entire length of its

¹⁹⁶STOLTENBERG, *supra* note 66, at 24. See also AILEEN MCCOLGAN, THE CASE FOR TAKING THE DATE OUT OF RAPE 88, 97 (Pandora 1996). The common myth is that “[i]f a woman is seen as provocative, her attacker’s actions can be explained as involuntary, uncontrolled reactions to her provocation.” *Id.* But the reality is that men do not rape “because they were driven by ‘irrational, subconscious, and uncontrollable’ motivations. The decision to rape . . . [is] usually ‘overt and deliberate.’” *Id.*

¹⁹⁷BORDO, *supra* note 71, at 242.

¹⁹⁸*Id.* (recognizing a similar paradox where men are raised to be competitive in every aspect of their lives and then expected to be gentle in the bedroom).

¹⁹⁹HYDE, *supra* note 98, at 185.

²⁰⁰Levit, *supra* note 7, at 1052, 1115.

surface of contact with power.”²⁰¹ However, recognizing the negative aspects of our current form of masculinity is but the first step; “[t]he more difficult and important step will be to devise new, affirmative norms of manhood.”²⁰²

V. CONCLUSION

An erect penis and subsequent ejaculation by a victim during a sexual assault is not evidence that the victim was a consenting participant. Accordingly, courts should not interpret it as such. Interpreting an erection as legal consent to what would otherwise be deemed non-consensual sexual touching is just as illogical as believing that a woman who lubricates during rape is a consenting participant. However, thus far, the law’s treatment of male sexual assault in instances where the male victim was able to maintain an erection has been largely unavailing because courts often conclude that such physical reactions imply consent. Given the lack of judicial concern for male victims of sexual assault generally, it is most likely that courts will continue to deny the possibility that a male victim can maintain an erection, and perhaps even ejaculate, in response to unwanted sexual activity.

Fortunately, all but three state legislatures have made their rape laws gender-neutral in an attempt to account for male victims. Yet, it is still unclear whether these laws can effectively deal with situations where a male victim maintains an erection during his sexual assault, which is an area with great potential for future research. The pervasiveness of stereotypes regarding victimhood and masculinity has continually isolated male victims from any legal avenues opened up by gender-neutral rape laws. Moreover, these stereotypes have promulgated a violent form of masculinity that serves only to perpetuate sexual violence against both men and women.

Given the varied number of medical, psychological, sociological, and cultural explanations for such physical reactions, law enforcement officials, prosecutors, lawyers, and judges need to begin to recognize that not only does male sexual assault exist, with both male and female perpetrators, but also that male victims can have physical reactions to such assaults that do not indicate consent. Part of this demands that society continue to deconstruct traditional notions of victimhood in order to encompass legitimate male victims of sexual assault. Part of this demands that society continue to deconstruct traditional notions of masculinity in order to dispel the idea that men are always sexually available. A better understanding of the relationship between physical arousal and sexual pleasure will elucidate how stereotypes about victimhood and masculinity perpetuate and justify sexual violence and will ultimately serve to prevent sexual violence against all persons. It is hoped that this Note serves that end.

SIEGMUND FRED FUCHS

²⁰¹MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY; AN INTRODUCTION* 155 (Robert Hurley trans., Vintage Books 1990).

²⁰²Pillsbury, *supra* note 193, at 946-74.