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by Mary Ellen Lemieux*

In May 1984 Starlyn Watts called the Sunnyvale Department of Public Safety to request assistance in resolving a domestic dispute with her husband. Officer David Birgers responded to the call and attempted unsuccessfully to persuade Mrs. Watts' husband to leave the house to “cool off.” Acting on Officer Birgers’ suggestion, Mrs. Watts left her home with her two children, a four year old and an infant, and checked into a motel in nearby Santa Clara, California. The Officer gave Mrs. Watts his business card and requested that she call the Department to tell them where she was staying. Although Mrs. Watts telephoned the Department early in the evening and left a message for Officer Birgers, he did not return her call until he was about to go off duty at 12:30 a.m.. According to Mrs. Watts, the Officer told her he was going to come by to make sure she was “all right.”

Officer Birgers arrived at Mrs. Watts’ motel room and she let him in believing he was acting in his capacity as a police officer. After engaging in small talk, Officer Birgers attempted to fondle and kiss Mrs. Watts. Mrs Watts protested, telling the Officer “No” and got up from the bed where she was sitting. A few minutes later, Mrs. Watts again sat down on the same bed as the Officer, but farther away from him and closer to her daughter Deanne who was sleeping in the next bed. Birgers approached Mrs. Watts again but this time was more persistent. Although she verbally protested and tried to push Birgers away a second time, the Officer ignored Mrs. Watts protests, forced her down onto the bed, and proceeded to have sexual intercourse with Mrs. Watts. After Birgers ejaculated he got up and left stating that “next time it would be without the kids.”

At trial, Officer Birgers testified that he interpreted Mrs. Watts’ actions as nervousness and that her mild resistance was merely intended

* A.B. (English Language and Literature) University of Michigan, 1983; J.D. University of California, Hastings College of the Law, 1990. The author wishes to thank Ronald S. Lemieux, who along with Greg Ward represented Mrs. Watts at trial and on appeal, for his cooperation and support during this project; Joanna Weinberg, Shannon Underwood, Debbie Kochan, Judy Woo, and Helen Goldsmith who all read various drafts of this Note when they really did not have time; and Professor David Jung for his guidance and enthusiasm.
to slow him down, but not to stop him. Birgers further testified that he believed that from Mrs. Watts' "body language" and from "the atmosphere" in the room, she was consenting.

Mrs. Watts revealed the incident only to her mother, husband and psychiatrist, and barricaded herself in her home. When she began to experience genital sores, she went to the Stanford University Hospital for medical treatment and diagnosis. In response to hospital questioning, Mrs. Watts revealed that she had been sexually assaulted several months earlier, and the hospital personnel contacted the police. The District Attorney's office for Santa Clara County declined to bring charges against Birgers, although after an undisclosed internal affairs investigation following Mrs. Watts' report of the incident, Birgers subsequently resigned from the Sunnyvale Department of Public Safety.

Mrs. Watts contacted Greg Ward, a former U.S. Attorney, indicating that she wanted to bring suit against Birgers. On behalf of Mrs. Watts and her daughter Deanne, Ward filed claims for sexual assault and battery, negligent infliction of emotional distress, and for violations of plaintiffs' civil rights under color of law against Birgers. Against the City Of Sunnyvale, Ward filed claims for the negligent supervision and training of Birgers, as well as for vicarious liability under the doctrine of respondeat superior.

In January, 1989, the case was tried before the Honorable William J. Fernandez, a Superior Court Judge in San Jose, California. During the trial, the judge allowed numerous references to Mrs. Watts' alleged sexual conduct with individuals other than the defendant in violation of California Evidence Code sections 1106 and 783. Moreover,

2. CAL. EVID. CODE § 1106 (West Supp. 1990), in pertinent part reads:
   (a) In any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, opinion evidence, reputation evidence, and evidence of specific instances of plaintiff's sexual conduct, or any of such evidence is not admissible by the defendant in order to prove consent by the plaintiff or the absence of injury to the plaintiff . . . .

   Despite this code section, the trial court denied plaintiff's motion ad limine, stating that he needed to observe the evidence as it was presented at trial. Record at 13-14, Questo (No. 573185). The court's reluctance to limit inquiry into sexual conduct undoubtedly stemmed from its view that "sexual liaisons do not happen in a vacuum. They happen because of inducements, blandishments, suggestions and so forth. . . ." Id. at 122. The court went on to state that the purpose of § 1106 is "to protect the person that's raped, somebody that doesn't know the perpetrator of the rape." Id. at 123. Since it is a "different story when you have people that know each other," the court directed that "we're going to have to hear about the blandishments of opportunity and the scent of sexual flavor that a person may exude." Id.
3. CAL. EVID. CODE § 783 (West Supp. 1990), in pertinent part, reads:
Fernandez refused to allow expert testimony on rape trauma syndrome to "disabus[e] the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of constraints of popular myths." This denial was juxtaposed with defense counsel’s opening comments to the jury that its job would be "to decide whether Starlyn Watts’ conduct, after the incident on May the 28th, 1984, is consistent with that of a victim of a violent assault." In closing argument, counsel attacked Mrs. Watts’ prior acquaintance with the Officer, her seemingly passive conduct in the motel room, and her apparent friendliness to the Officer afterwards, arguing that she "was not comporting herself like a violent rape victim, someone who has been...

In any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, if evidence of sexual conduct of the plaintiff is offered to attack credibility of the plaintiff . . ., the following procedures shall be followed:

(a) A written motion shall be made by the defendant to the court and the plaintiff’s attorney stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the plaintiff proposed to be presented . . .

(c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury . . .

(d) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the plaintiff is relevant pursuant to Section 780, and is not inadmissible pursuant to Section 352 [prejudice outweighs probative], the court may make an order stating what evidence may be introduced by the defendant . . .’s objections.

4. Record at 482-84, 490-91, 1132-33, Questo (No. 573185). Mrs. Watts’ counsel was not attempting to present expert opinion that she was suffering from rape trauma syndrome. In People v. Bledsoe, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984), the California Supreme Court found that testimony as to the whether the victim suffered rape trauma syndrome was improper, constituting evidence that a rape in fact occurred. The court recognized, however, that expert testimony "may play a particularly useful role by disabusing the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of popular myths." Id. at 247-48, 681 P.2d at 298, 203 Cal. Rptr. at 457.

5. Record at 101, Questo (No. 573185).
violated and demeaned,” and asked the jury to find she consented based on this conduct.  

Prior to jury deliberations, Judge Fernandez instructed the jury that it was a complete defense to an action for battery or intentional infliction of emotional distress if Officer Birgers proved he had a reasonable good faith belief that Mrs. Watts consented to sexual intercourse. Such an instruction is allowable in a criminal prosecution for rape, but misstates the civil standard.

In civil tort law, a battery is an intentional harmful or offensive touching that a reasonable person would find offensive. Pursuant to the majority view, the intent required by the defendant is merely the intent to do the act that causes the harm and not the intent to cause the harm to the plaintiff. Consent under the civil standard may be explicit,

6. Id. at 1304. In People v. Roscoe, 168 Cal. App. 3d 1093, 1100, 215 Cal. Rptr. 45, 50 (1985), the appellate court found that expert testimony touching on a victim’s response to an assault is:  

Authorized by Bledsoe to permit rehabilitation of a complainant’s credibility [where it] is limited to discussion of victims as a class, supported by references to literature and experience (such as an expert normally relies upon) and does not extend to discussion and diagnosis of the witness in the case at hand.

7. The jury was instructed as follows:  

It is a defense to a charge of battery and/or intentional infliction of emotional distress based on an act of sexual intercourse that the defendant entertained a reasonable and good faith belief that the female person voluntarily consented to engage in sexual intercourse. The defendant has the burden of proof by a preponderance of the evidence of establishing that he reasonably and in good faith believed that the female person voluntarily consented to engage in sexual intercourse. If from all the evidence you believe that a reasonable and good faith belief that the female person voluntarily consented to engage in an act of sexual intercourse you must find the defendant not liable for battery and/or intentional infliction of emotional distress. Record at 1359-60, Questo (No. 573185).

8. In People v. Mayberry, 15 Cal. 3d 143, 155, 542 P.2d 1337,1345, 125 Cal. Rptr. 745, 753 (1975), the California Supreme Court held that a defendant’s mistaken belief as to consent is a complete defense in some circumstances, even though the victim did not actually consent to the conduct. Under [Mayberry], a defendant who entertains both a reasonable and bona fide belief that the victim voluntarily consented to engage in the sexual offense does not have the necessary wrongful intent to be convicted of the crime. The rationale is simple: one who labors under a mistake of fact that negates the existence of any criminal intent cannot be convicted of a crime. People v. May, 213 Cal. App. 3d 118, 261 Cal. Rptr 502 (1989) (quoting People v. Castillo, 193 Cal. App. 3d 119, 124, 238 Cal. Rptr. 207, 210 rev. denied, 47 Cal. 3d 344 (1987) (citations omitted)).


such as an express verbal agreement, or it may be apparent, such as is implied by the plaintiff's "[v]oluntary participation or acquiescence in acts otherwise amounting to an intentional tort . . . ."\(^{11}\) Apparent consent is found "when the words or acts or silence or inaction, would be understood by a reasonable person as intended to indicate consent and they are in fact so understood by the other."\(^{12}\) "On the other hand, if a reasonable person would not understand from the words or conduct that consent is given even though [the defendant] honestly so believes; there is then no apparent consent."\(^{13}\)

In the Watts' trial, the jury returned an eleven-to-one verdict in favor of defendant Birgers. Despite a composition of eight women and four men, the jury objected to Mrs. Watts' inadequate protestations which they believed gave Officer Birgers a reasonable good faith belief that Mrs. Watts consented.\(^{14}\) Mrs. Watts' appeal is currently pending.\(^{15}\)

It is unclear whether Starlyn Watts' experience is typical as there are no statistics available pertaining specifically to civil sexual assault plaintiffs. It is clear, however, that Mrs. Watts' experience at trial as a rape victim was typical. She was assaulted by someone she had met previously, if only briefly. She told the defendant "No" and that refusal was ignored. Fearing the defendant would harm her sleeping children, Mrs. Watts put up little struggle in order to get "it" over with quickly so that the defendant would leave. Mrs. Watts waited several months before informing the authorities, and then only after being diagnosed with genital herpes.

The district attorney looked at Mrs. Watts' case with a somewhat less than enthusiastic eye. It was almost a textbook "bad facts" case that would come squarely up against every juror prejudice and one that could eventually put Mrs. Watts' character on trial.\(^{16}\) Moreover, Birgers was a police officer, a defendant affiliated with a whole department of professional witnesses essential to the district attorney's successful prosecution of other cases. Consequently, the D.A.'s decision not to bring charges is not surprising.

person with the person of another. The intent necessary to constitute battery is not an intent to cause harm, but an intent to do the act which causes the harm.

12. Restatement (Second) of Torts § 892 comment c (1979).
13. Id. (emphasis added).
14. Clerk's Transcript at 232, Questo (No. 573185).
15. Id. at 235.
The bitterest pill in Mrs. Watts’ experience, however, was that the evidentiary safeguards put in place by the legislature failed to protect Mrs. Watts from the very prejudices to which she was ultimately subjected. The conclusion to be drawn is frightening: despite legislative reforms in both criminal and civil law, victims of sexual assault are still subjected to societal prejudice which calls into question the victim’s credibility. This note briefly addresses the evolving trend of sexual assault victims to pursue civil remedies and the uniquely problematic issue of defending against a consent defense in a civil sexual assault case. It further explores the influence of patriarchy and law as ideologies on the issue of sexual assault and why it continues to be a volatile subject between the sexes. Lastly, this note proposes that the reasonable person standard be abandoned and a reasonable woman standard adopted so that justice is measured not against the ideological myth of the reasonable man, but by the reasonableness of a woman’s story against feminine morality. Only by adopting new standards that depart from traditional methods can patriarchal influence be silenced in the law.

I.

The Modern Trend to Sue for Civil Remedies

According to Camille LeGrand and Frances Leonard in Civil Suits for Sexual Assault: Compensating Rape Victims, Starlyn Watts’ decision to seek tort damages from David Birgers and the City of Sunnyvale is part of a rising trend among victims of sexual assault. This trend results from changing societal attitudes toward victims as well as changes in victims’ feelings about themselves. Both factors have led to an increased number of civil and even criminal sexual assault complaints. This increase is due in part to the growing tendency of sexual assault victims to react with anger rather than shame. Anger leads the victims to the criminal process and frustration over the apparent inadequacies of the criminal process leads the victims to pursue

17. The Legislative comment to CAL. EVID. CODE §1106 states: “the evidence introduced by the plaintiff or given by the plaintiff. (d) Nothing in this section shall be construed to make inadmissible any evidence offered to attack the credibility of the plaintiff as provided in [California Evidence Code] Section 783.”


19. Id.
20. Id.
21. Id.
Victims increasingly look to the civil process to obtain the objectives once thought to be best remedied by a criminal prosecution. Many women sue in order to impress upon the rapist and society that the offense is grave and to communicate to the rapist the seriousness of his offense. In cases where the district attorney declines to bring charges, or where the defendant is not sentenced to state prison, the victims frequently feel dissatisfied with the system allegedly protecting their interests, and will bring suit in order to regain control over their lives.

Aside from the psychological vindication a victim may feel, there are other more practical reasons for a victim to pursue tort damages. For one, a verdict in favor of the plaintiff may be easier to obtain because the burden of proof is lower. In a criminal action the prosecution is required to prove beyond a reasonable doubt to a moral certainty that the defendant raped the complainant. In a civil action, the plaintiff need only prove her case by a preponderance of the evidence. Perhaps even more advantageous, in a criminal action a conviction of rape requires actual penetration of the victim by the

22. Id.
23. Id. at 480.
24. Admittedly not all victims of sexual assault are women; however, the California Office of the Attorney General's Bureau of Criminal Statistics and Special Services estimates that in 1988 11,771 forcible rape crimes were committed, with 82,000 women at risk. The Bureau does not keep statistics on the male population at risk. OFFICE OF THE ATTORNEY GENERAL/DEPARTMENT OF JUSTICE/DIVISION OF LAW ENFORCEMENT CRIMINAL IDENTIFICATION AND INFORMATION BRANCH, CRIME AND DELINQUENCY IN CALIFORNIA, 1988 140 (1989). In light of the disproportionate number of female victims, this note will use the female pronoun to refer to victims of sexual assault.
26. In 1988, 51.8% of all forcible rape arrestees were eventually cleared. OFFICE OF ATTORNEY GENERAL, supra note 24, at 146.
27. LeGrand & Leonard, supra note 18, at 480.
29. Addressing the award of damages in assault and battery cases, Professor Jerome Hall noted [assault and battery cases] are intentional aggressions which usually imply moral culpability, and almost always stimulate resentment . . . . In this type of harm the law of torts frequently functions as a punitive apparatus—the "fine" going to the injured victim of the aggression, and many of the cases that defy explanation on other grounds can be understood as preferences to impose substantial judgments rather than the nominal penalties provided by the criminal law . . . . [Moreover, t]he civil judgment is an authoritative vindication of the injured person's rights. Besides [s]he is here not dependent on the public authorities for prosecution and [s]he remains master of the proceedings.
A civil verdict for sexual assault or battery, on the other hand, requires only harmful or offensive touching and includes a wider range of unwanted sexual contact including criminal rape, attempted rape, forcible sodomy and oral sex, as well as forcible intrusion with a foreign object.

Moreover, in the civil context the gravamen of the plaintiff's suit will not be the assault claim, but rather the plaintiff's emotional or psychological injury. Particularly in the context of attempted sexual assault—an area where the district attorney is unlikely to file charges, a plaintiff's successful claim for intentional infliction of emotional distress may provide the greatest allocation of damages.

Finally, a victim of sexual assault may feel compelled to bring suit because collecting a favorable judgment is more than a mere possibility. The rapist generally does not fit the stereotypical indigent criminal defendant who is judgment proof. Rapists are found in every sector of society and are likely to have assets available to compensate the victim. Although insurance money is generally unavailable to compensate victims, the creative plaintiff's attorney may also go after a "deep pocket" third party defendant who arguably has some responsibility for the assault. Thus, a successful judgment against such a defendant sends a strong message to landlords, innkeepers, universities, gas station owners, and other landowners that inadequate security precautions are not without their consequences.

32. CAL. PENAL CODE § 261 (West 1988), in pertinent part, reads: "Rape is an act of sexual intercourse accomplished with a person . . . ." (emphasis added).
33. The common law has historically treated assault and battery as two distinct causes of action in tort. In this context the courts and commentators often use the terms interchangeably. See, e.g., Berger v. So. Pac., 144 Cal. App. 2d 1, 300 P.2d 170 (1956). A Pullman porter allegedly attempted intercourse with a sleeping passenger and had bodily contact with her. The court described the act as a "sexual assault."
34. LEGRAND & LEONARD, supra note 18, at 491. Although lesser forms of criminal sexual assault exist, many district attorneys are reluctant to bring charges unless the rape is the "jump-from-the-bushes" variety. S. ESTRICH, REAL RAPE 17-18 (1987).
35. Id. at 491-92.
36. Id. at 484.
37. Id. citing COHEN, The Psychology of Rapists, 3 SEMINARS IN SOCIETY 307 (1971).
38. Despite the availability of home owner's insurance, most policies do not provide coverage for intentional acts of the policyholder.
39. EPSTEIN, supra note 28, at 51.
II.

The Prevalence of Raising the Consent Issue Only in Civil Sexual Assault Cases

Despite Lord Matthew Hale’s well-known maxim that rape is “an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent,” the difficult experiences of women who bring criminal rape charges are well documented. To successfully prosecute the victim’s case, the district attorney must also defend the victim’s character.

As LeGrand & Leonard state above, sexual assault victims are increasingly bringing civil claims for relief because of changing attitudes in society. One would presume this means that society’s view toward sexual assault victims has softened and that it is rare when the victim herself is put on trial. Specifically, the reader might assume that by taking victims out of the criminal arena and pursuing civil remedies, the issue of the victim’s consent would take on lessened importance. In fact, however, even in the area of civil tort litigation, society has continued to allow defense lawyers to put on their boxing gloves and go in for the count against the complainant victim, making an issue out of her dress, her occupation, her relationship with the defendant, and her judgment for being in the defendant’s proximity. The prejudicial effect of this practice is readily apparent. Moreover, the absurdity of such inquiries is revealed when applied to civil battery cases where sexual assault is not involved.

In Garrett v. Dailey, the well-known law school case where the five-year-old defendant Brian Dailey pulled the chair out from under Mrs. Garrett as she was sitting down, consent by Mrs. Garrett was not alleged. Nor was consent addressed in Ghassemieh v. Scafer, where similar events occurred between a teacher and a 13-year-old student.
Undoubtedly the consent defense was not raised because it was inconceivable that the plaintiffs would consent to such action. Moreover, the credibility of the victims was not questioned despite the arguments that both victims were female and each might have consented merely because they were in the presence of children at the time.

In *Spivey v. Battaglia*, the female plaintiff, known to be shy, was permanently paralyzed when a male co-worker gave her an unsolicited hug. As in the other cases, the issue of consent was never raised by the defendant, although it is arguable (adopting the rationale apparently followed by defense counsel in sexual battery cases) that because the plaintiff was generally known to be passive and was sitting next to the defendant at the time, she consented to the battery. Similarly, in *Lambertson v. United States*, the plaintiff was injured when a co-worker screamed “boo,” pulled the plaintiff’s hat over his eyes and began to ride the plaintiff “piggyback.” The plaintiff was injured when he fell forward and struck his face on some meat hooks on the receiving dock where he was standing at the time. Despite the apparent intent of the defendant’s actions as a practical joke, the plaintiff’s consent, as evidenced by previous conduct between the two parties, never became an issue. Finally, in *Matheson v. Pearson*, the plaintiff, a junior high school maintenance worker, was severely injured after being hit on the head by a tootsie pop hurled from a second story window by two students. Although the plaintiff might have been previously “acquainted” with the boys prior to the incident, was arguably dressed “provocatively” as a maintenance man, and by working below the overhead windows at a junior high school might have created an “atmosphere” inviting the incident, the issue of consent was never raised, and to do so in the manner commonly employed by defense counsel in sexual assault and battery cases would have been absurd. In sexual assault cases, however, the ridiculousness of the practice is overlooked and the judgmental analysis of the plaintiff’s conduct is accepted practice.
III.
The Impact of the Patriarchal Voice on the Ideology of Law

For the uninitiated, "patriarchy" is the feminist term used to describe the phenomenon of male domination in society. The essence of patriarchy is that the male members of society as a class have greater power, socially, economically, and politically, than the female members and have used this power to subordinate and control women. Examples validating this phenomenon abound in society, from the still pervasive use of the male pronoun and the disparity between male and female wages to the male domination of corporate power. Despite the instrumental role of women in society, men continue to be "the locus of cultural value." Whatever their role, so long as exclusively or predominantly male, it is considered overwhelmingly and morally important.

This disparity in the value of the female contribution to society versus the male contribution, it is argued, evolves from a distinction between the female or "domestic" sphere of society and the male or "public" sphere of society. The domestic sphere refers to "minimal institutions and modes of activity that are organized immediately around one or more mothers and their children[.]" The public sphere refers to "activities, institutions, and forms of association that link, rank,

50. K. MILLET, SEXUAL POLITICS 33-34 (1969). For citations to other typical feminist uses of the term, see Bender, A Lawyer's Primer on Feminist Theory and Tort, 38 J. LEGAL EDUC. 3, 6 n.7 (1988). Feminists, however, are quick to point out that not every man uses this power to exploit, disadvantage or undermine women. Id.
52. Only 2% of all executives are women and only 1% are minorities. The Reuter Bus. Rep., Feb. 3, 1989, at BC cycle.
54. Id. at 20-21. For example, consider the considerable prestige accorded to members of exclusive all male private clubs, such as The Bohemian Club in San Francisco (whose members include George Bush, Ronald Reagan and other presidents) and the expense these clubs have undertaken to prevent women and minorities from gaining admittance.
55. ROSALDO, supra note 53, at 23. It was social theorist Frederick Engels who first divided society into two spheres: the production of the means of existence with labor or material reproduction, and the production of people with the family or human reproduction. Cf. N. CHODOROW, MOTHERING, MALE DOMINANCE AND THE CASE FOR SOCIALIST FEMINISM 84 (S. Eisenstein ed. 1979).
56. ROSALDO, supra note 53, at 23.
organize, or subsume particular mother-child groups." 57 In other words, the public sphere refers to the outside world controlled by men, money and power.

Aside from the easily identifiable economic distinctions that patriarchy creates in society, patriarchy has far-reaching ideological underpinnings. Catharine MacKinnon, a law professor, argues that patriarchy has created an all-controlling hierarchy between the sexes that is determined by gender. 58 MacKinnon defines gender not as a biological difference between the sexes, but rather as "an inequality of power, a social status based on who is permitted to do what to whom." 59 Gender is about power and any attempt to define it as difference, be it biological or psychological difference, is nothing but an attempt to neutralize, rationalize, and cover the disparities of power. As Professor MacKinnon so aptly puts it "[d]ifference is the velvet glove on the iron fist of domination." 60

The theoretical, and not so theoretical, effect of a patriarchal hierarchy based on gender, and thus necessarily only two tiers, is that at a very basic level of society the second tier is truly considered the bottom rung. With only two choices—top or bottom—the dominant gender is precariously close to falling among the other, the female sex. Perhaps this is why heterosexual society scoffs so unjustly at male homosexuals, because gay men have fallen among the females, reminding "real men" where they too could end up if they become lax in strutting their peacock feathers. This is not to argue that males in general go around society making periodic checks on their dominance just as the security guard makes his or her rounds to each checkpoint. What it means is that despite a conscious decision in the 20th century to elevate the status of the female gender in society, by granting women the right to vote, by allowing the decriminalization of abortion, and by paying lip service to equal pay for equal work, in reality patriarchy has not allowed the status of the female gender to move very far up the ladder. As women struggle to be considered the same and thus equal to men, the man has become the measure of all things. 61 "[W]omen are measured according to [their] correspondence with man, [their] equality judged by their proximity to his measure [and their difference] judged by [their] distance from his measure." 62

57. Id.
59. Id. at 8.
60. Id.
61. Id. at 34.
62. Id.
The sickening blow is that society’s strides toward a gender-neutral standard, in fact, reflect nothing more than a renaming of the male standard.\textsuperscript{63} In renaming the “reasonable man” to be the “reasonable person,” society really has not fundamentally changed. By seeking to redefine the standard, at best, women have successfully obtained for men what few benefits women have had historically.\textsuperscript{64}

In the legal arena, patriarchy is the hand that fans the fire. Few would challenge the premise that law is a powerful force in our society. Law is, after all, what creates and defines the United States’ federal, state, and local governments. The fact that the Declaration of Independence, United States Constitution, and the numerous other documents protected in the National Archive were created by men of power and economic influence does not dispel the idea that “[l]aw is powerful as both a symbol and a vehicle of male authority.”\textsuperscript{65}

“This power is based on an ideology of law and an ideology of women which is supported by law. One function of ideology is to mystify social reality and to block social change. Law functions as a form of hegemonic ideology.”\textsuperscript{66} Society’s acceptance of statements of law as reality reinforces the law as “a powerful ideological force of social cohesion and stability.”\textsuperscript{67} Thus, when the Honorable William J. Fernandez stated on the record:

Ever since Pharaoh’s [daughter] tried to seduce Moses, th[e] courts have had this problem that they faced ad infinitum throughout the centuries. \textit{I would suggest to you, ... that sexual liaisons do not happen in a vacuum. They happen because of inducements, blandishments, suggestions, and so forth, and that this kind of conduct proceeds to sexual liaisons.}

The reason that you have ... the number of evidence code sections and penal code sections about not showing the unchaste conduct of a female person is to protect the person that’s raped, somebody that doesn’t know the perpetrator of the rape.

It’s a different story when you have people that know each other and have been acquainted with each other before the rape and

\textsuperscript{63. Id.}
\textsuperscript{64. Id.}
\textsuperscript{65. J. Rifkin, \textit{Toward a Theory of Law and Patriarchy,} 3 Harv. Women’s L.J. 83, 84 (1980).}
\textsuperscript{66. Id.}
\textsuperscript{67. Id.}
after the rape. You know, \emph{is it really a rape or is it one of those liaisons of life that people seem to go through} from time to time ad infinitum and will continue to go through throughout history?

I’m afraid that we’re going to have to hear about the blandishments of opportunity and the scent of sexual flavor that a person may exude. One cannot hide behind the cloak of \cite{California Evidence code section} 1106 to prevent same. That has been the law since Moses’s time.\footnote{Record at 122-23, \textit{Questo} (No. 573185) (emphasis added).}

He was reinforcing on the record, through his position as a trial judge and thus an icon of the law, the patriarchal tenet that good girls deserving of protection by the law do not know their attackers.\footnote{S. ESTRICH, supra note 34, at 1.}

The formulation of law into written ideas, principles, and regulations further acts to propel the impact of law as an ideology. “Freezing ideas and information in words makes it possible to assess more coolly and rigorously the validity of an argument, . . . thus, ‘reinforcing a certain kind and measure of [increased] rationality.’ ”\footnote{J. Rifkin, supra note 65, at 84 (citations omitted).}

“The power of law as ideology is to . . . distort social reality in the name of tradition.”\footnote{Id.} The practical effect among judges, lawyers, and law students is a nearly uncontrollable penchant to compare, twist, and tweak the human experience in the “case at hand” until it matches “on all fours” the example contained in the case law, thus distorting the original recollection of the experience. This same effect can also be found among legislators who seek not to distort the human experience to conform to the law, but rather seek to conform the law to the experience of their constituents. In so doing, legislators attempt to address the needs that fall within the broadest range of normal experience. Problems arise when practicality requires the legislators to whittle away at what falls within the normal range, with the resulting effect that, as defined by the law, society’s view of what is normal is also whittled away. “Normal” becomes an ideal that inadequately reflects or fails altogether to reflect reality.

Applied to women, the effect of law as ideology is to further distort and mystify the reality of female capabilities and experiences thus inhibiting social change.\footnote{Id. at 86.} For example, despite the substantial number of American women working in 1908, the United States Supreme Court
upheld a maximum work hours law which applied to women only. The Court rationalized that a woman’s “physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well being of the race, justify legislation to protect her from the greed as well as the passion of man.”

The power of law as ideology is further exemplified by resorting to the courts in massive litigation efforts to enhance the status of women. The reliance on litigation reflects a profound belief by society that law affects social change. As stated above, however, despite changes in the law, the basic hierarchical structure between the genders does not change, rendering any victory hollow in practicality. This is the mainstay of the power of law in patriarchy. By its very framework the law communicates societal issues “as questions of law, claims of right, precedents and problems of constitutional interpretation.” In so doing the effect is to obscure the underlying social issues which are at the root of these claims. Tradition, at the same time, perpetuates the paradigm of law as the symbol of male authority and a legitimate mechanism for deciding societal conflicts.

IV.

The Patriarchal Voice and Its Inherent Conflict With Female Moral Development

The problem with the paradigm of law as the symbol of male authority is that it does not reflect female morality and assumes that male and female morality are identical. In truth, however, male and female morality are very different. “[W]omen have a ‘sense’ of existential ‘connection’ to other human life which men do not. That sense of connection in turn entails a way of learning, a path of moral development, an aesthetic sense, and a view of the world and of one’s place within it . . . .” In part because of women’s ability to give birth, women are more nurturant, caring, loving and responsible to

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73. Id. at 85.
74. Id. quoting Muller v. Oregon, 208 U.S. 412, 422 (1908).
75. Id. at 86.
76. Id.
77. Id. at 87.
78. Id.
80. This view is not universally held by all commentators. Cf. R. West, supra note 79, at 21-22.
Moreover, a woman’s priority on nurturing and caring fundamentally determines the moral terms within which women construct social relations. Women view the morality of their actions against a standard of responsibility to others.

On the other hand, men do not share a sense of connection with other human life and this creates a vastly different view of the world. Men view their actions against a standard of rights and autonomy from others.

The moral imperative . . . [for] women is an injunction to care, a responsibility to discern and alleviate the “real and recognizable trouble” of this world. For men, the moral imperative appears rather as an injunction to respect the rights of others and thus to protect from interference the rights to life and self-fulfillment.

The effect of this distinction between the moral fiber of men and women is to create an inherent conflict between the genders that permeates their individual and collective existential and psychological viewpoints. Women view their purpose and actions from the stance of how they will affect others. Men, valuing autonomy, adopt a moral stance in which they hold themselves apart from other human beings.

When male or female triers-of-fact determine whether, according to the reasonable person standard, a woman was consenting to an act of sexual intercourse, theoretically different analyses should take place. Female jurors presumably would experience the plaintiff’s actions subjectively as a response to the defendant’s actions and to the world in general around her. Male jurors would adopt a more objective observation of a man’s “rights” and the plaintiff’s reactions to those rights, a truly “reasonable man” approach. In practice, however, because law as an ideology promulgates patriarchal ideology, the trier-of-fact only follows the male analysis and determines a woman’s guilt or innocence based upon male moral standards. This is true no matter what the sex of the juror.

Thus, when a woman accuses a man of rape or some form of sexual assault, she confronts not only her attacker, but the basic thread that runs throughout a male-dominated society. Be it criminal or civil, when

81. Id. at 17.
82. Id. at 17-18.
83. Id. at 15.
84. Id. at 18.
85. C. Gilligan, supra note 79, at 100 (emphasis added).
86. R. West, supra note 79, at 18.
a woman files her complaint, she attacks not only the moral integrity of
the individual male to be able to take what he wants, but also the
hierarchy between the two genders, calling into question the ability of
the male gender to maintain its dominance and control over the female
gender. As MacKinnon argues,

[A woman's] access to male power is not automatic as men's is;
we're not born and raised to it. We can aspire to it. Me, for
instance, standing up here talking to you—socially this is an
exercise of male power. It's hierarchical, it's dominant, it's
authoritative. You're listening, I'm talking; I'm active, you're
passive. I'm expressing myself; you're taking notes. Women
are supposed to be seen and not heard.87

No wonder a woman who dares to accuse a man of nonconsenting
sexual intercourse or nonconsenting sexual touching is treated like no
other! She has challenged the basic premise of patriarchal ideology and
its underlying morality. Patriarchy reacts not unlike a cobra whose own
security has been threatened. The cobra rises up and bares its fangs to
its perceived aggressor ready to fight to the death.

When a woman challenges the male hierarchy and its morality she
challenges an ideology that goes back to the time of the Old Testament.
In the story of Genesis, where the creation of the sexes88 and the
subsequent downfall of man at the hands of Eve is told,89 the
beginnings of patriarchal ideology are evident.90 By virtue of woman’s
derivative creation and the secondary character of her existence, woman
was justifiably considered naturally inferior and subordinate to man.

87. C. MACKINNON, supra note 58, at 52.
88. And the Lord God caused a deep sleep to fall upon Adam, and he slept: and he
took one of his ribs, and closed up the flesh instead thereof; And the rib, which
the Lord God had taken from man, made he a woman, and brought her unto the
man. And Adam said, This is now bone of my bones, and flesh of my flesh: she
shall be called Woman, because she was taken out of Man.
Genesis 2:21-23 (King James).
89. And the man said, The woman whom thou gavest to be with me, she gave me of
the tree, and I did eat. And the Lord God said unto the woman, What is this that
thou hast done? And the woman said, The serpent beguiled me, and I did eat. . . .
Unto the woman he said, I will greatly multiply thy sorrow and thy conception;
in sorrow thou shalt bring forth children; and thy desire shall be to thy
husband, and he shall rule over thee. And unto Adam he said, Because thou has
harkened unto the voice of thy wife, and hast eaten of the tree, of which I
commanded thee, saying, Thou shalt not eat of it: cursed is the ground for thy
sake; in sorrow shalt thou eat of it all the days of thy life.
Id. 3:12-13,16-17.
90. The HISTORY OF IDEAS ON WOMEN 17 (R. Agonito ed. 1977).
“Created out of man and for man, to relieve his loneliness and to help him, woman is shown to be responsible for man’s troubles, not the least of which, is his loss of immortality.”

The thread of patriarchal ideology can also be seen in the New Testament in Paul’s epistle to the Corinthians where he states: “The wife hath not power of her own body, but the husband.” Paul continues: “But I would have you know, that the head of every man is Christ; and the head of woman is the man; and the head of Christ is God. . . .” For the man is not of the woman; but the woman of the man. Neither was the man created for the woman; but the woman for the man.” To the Ephesians, Paul stated his point directly:

Wives submit yourselves unto your own husbands, as unto the Lord. For the husband is the head of the wife, even as Christ is the head of the church: and He is the saviour of the body. Therefore as the church is subject unto Christ, so let the wives be to their own husbands in every thing.

Given the deeply embedded historical origins of male dominance in society, it is no wonder why a confrontation in the courtroom over rape or sexual assault is so explosive and newsworthy. Every time a woman confronts a man on the issue of whether she consented to his sexual conduct she challenges his masculinity and morality and, hence, his sense of being. According to Professor MacKinnon, aggression against those with less power is experienced as sexual pleasure, an entitlement to masculinity. “Sexual abuse works as a form of terror in creating and maintaining [inequality between the genders].”

“Traditionally rape has been viewed as an offense one male commits upon another—a matter of abusing ‘his woman.’” This rationale appears to have been abandoned in favor of one that, in fact, characterizes rape as violence, an abuse against all women by all men.

Typically, in today’s society, rape is used as a coercive form of control over the female, taking shape as fear. It is fear that keeps women home at night, that keeps women from revealing sexual harassment at work, and it is fear that keeps women from reporting rape

91. Id. at 18.
92. I Corinthians 7:4 (King James).
93. Id. at 11:3.
94. Id. at 7:8-9.
95. Ephesians 5:22-24 (King James).
96. C. MacKINNON, supra note 58, at 7.
97. K. Millett, supra note 50, at 61.
and sexual assault to the authorities and subsequently bringing criminal or civil charges.

When contemplating bringing charges against their attackers, women fear the repercussions of their actions. These fears range from questioning whether the defense counsel will put the victim on trial (playing into many victims' misgivings that they somehow caused the rape or assault), to fearing the attacker will return if he is acquitted. In the case where a woman does file a complaint and the defendant raises the consent defense, as most do, a woman's character will be brought into question. The defense counsel will cross examine the victim within the bounds of rape shield laws and as close to the outside of those laws as he dares. In the end, the jury will examine all of the evidence and determine whether they believe that the victim consented based on her conduct, her words and actions during the attack, and her past relationship, if any, with the defendant. If the victim did not dress or react or act or speak or communicate in the way imagined by jurors as they ponder how they indeed would dress and react and act or speak or communicate in the same circumstances, then the jurors are likely to acquit the defendant or return a judgment in his favor.98

V.

The Effect of the Patriarchal Voice to Perpetuate Social Myths

The result is predictable because the ideology of law and the ideology of male patriarchy will control the trial proceedings so that the force of law continues to propagate patriarchal myths in society. Professor MacKinnon has said that perhaps the biggest problem with silencing the patriarchal voice is that by its very nature we examine and criticize patriarchy through its own framework. This is true particularly in the area of the law. How can jurors begin to evaluate whether a rape or assault victim has consented or properly (and emphatically) communicated her lack of consent within any other framework than the one provided by the reasonable man standard courtesy of patriarchal ideology? The answer is they cannot.

98. For a disturbing account of criminal rape cases that were overturned on appeal because the victims did not dress or respond in a manner thought reasonable to the appellate court, see, e.g., M.J. Whitley, Appellate Review Of Sexual Assault Cases: Time To Abandon The Special Standard, 1983 S. ILL. U. L.J. 435 (1983).
To truly understand the culture of a foreign land, the visitor must first be able to speak the language. Today's jurors, whether male or female, know only one language and thus hear only one voice. They hear the voice of patriarchal ideology, but they do not understand its import into their decision-making. They do not understand that when they listen to a woman's testimony and cross-examination on how she responded to being approached by a police officer in a hotel room with her two sleeping children, they evaluate the legitimacy of her response according to the morality of a male-dominated society that seeks to control women with fear. Professor MacKinnon illustrates this point with uncompromising clarity:

The crime of rape-- this is a legal and observed, not a subjective, individual, or feminist definition-- is defined around penetration. That seems to me a very male point of view on what it means to be sexually violated. And it is exactly what heterosexuality as a social institution is fixated around, the penetration of the penis into the vagina. Rape is defined according to what men think violates women, and that is the same as what they think of as the sine qua non of sex.99

Almost without exception, every bit of stimulus that has entered and shaped the mind of each juror, the judge, the bailiff, the police officer, even the lawyers is the product of a patriarchal ideology. To the vast majority of people to whom this propaganda has never been exposed, there is no other way to think or to be. As a product, patriarchal ideology enjoys a success that agencies on Madison Avenue can only dream about.

VI.

A Proposal for the Adoption of a Reasonable Woman Standard

The next question is, of course, what do we do about it, what can we do about it? The obvious answer is to inject the feminist perspective into both the ideology and practice of law. Whether we can successfully do this is another story.

To inject the feminist perspective into the ideology of law means a concerted effort on behalf of all feminists, both male and female, to raise the collective consciousness of the insidious nature of patriarchal

99. C. MACKINNON, supra note 58, at 87 (emphasis added).
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ideology. One commentator has suggested actively employing the narrative voice to redefine the articulation of the law, often called the Rule of Law, and thus redefine law as ideology.

Traditionally, application of the Rule of Law begins with an interpretation of the law or a body of legal doctrine and derives from that interpretation an account of justice. Termed the "interpretivist legal theory," it has been criticized because by its method, "the legal text not only reflects, but . . . even defines, what justice requires and hence what a person is." It is a different version of the age-old question, does life imitate art or does art imitate life? Interpretivist theory is what propels the ideal of the reasonable man: the law defines what is reasonable, rather than reasonableness defining justice.

Narrative legal theory, on the other hand, allows the speaker's experiences to define the Rule of Law. The speaker tells his or her story, giving an account or description of how it feels to be a human being within a legal regime. From the speaker's account and the state of nature, a Rule of Law is created that meets the demands of justice. Law in effect becomes a storyteller that reflects true human experience. It is an initial step to breaking down the masks and barriers held in place by the law as ideology.

For victims of sexual assault confronting a consent defense, this means adopting new jury instructions that require a victim to tell her narrative on the witness stand, to spotlight her experience with an emphasis on her feelings, observations, and thoughts at the time of the assault and afterwards. Initially, the desired effect is to draw out of the witness her story as to whether she consented, from which a reasonable woman standard can be formulated. Secondarily, the jury may then take the victim's testimony and examine it to the extent that it reflects the common morality of women with an attendant responsibility to other human beings. The new jury instruction might read as follows: Based on the complainant's testimony as to her story leading up to and including the act of sexual intercourse, as well as her personal feelings

100. R. West, supra note 79, at 62.
101. Id.
102. Id.
103. Id. Arguably this is what judges do when they formulate a result and then find the law to match their desired result.
104. Adoption of a reasonable woman standard has been criticized in Donovan & Wildman, Is The Reasonable Man Obsolete? A Critical Perspective On Self-Defense And Provocation, 14 Loy. L.A.L. REV. 435 (1981). The authors rejected the reasonable woman standard because other minority criminal defendants with unique socio-economic characteristics would be equally excluded by adoption of a reasonable woman standard. Id. at 436-37.
and thoughts during intercourse and afterwards, you must decide whether the complainant felt harmed by the intercourse and thus did not consent, even if the harm does not look like the kind of violence traditionally protected by the Rule of Law. As structured, this instruction will compel the jurors to focus on specific aspects of the victim's testimony, as well as maintain a perspective on her experience. Moreover, by consciously avoiding a specific comparison to a predetermined standard, the reasonableness of the victim's conduct is elicited from her testimony such that the Rule of Law is defined by the victim's narrative and the state of her circumstances.

VII.

Conclusion

Starlyn Watts' experience at trial makes clear that despite legislative safeguards put in place to protect victims of sexual assault in criminal and civil proceedings, the male voice, as the dominating speaker in society, prevents the protection of victims from the stereotypical prejudices against women propagated by male society. It is law as ideology that further gives fuel to this voice as it allows reality to be masked and inhibits social change. To unveil reality and effect social change within the law, the patriarchal voice must be exposed as a potent propaganda. Once unmasked, social change must still be put into motion so that more than one voice may formulate the Rule of Law. Only with exposure and the acceptance of a narrative legal theory so as to give voice to the feminist perspective can the insidiousness of patriarchy be appreciated and ultimately eradicated from society.