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I. INTRODUCTION

> [M]ost thinking, scientific or philosophical, proceeds on assumptions and presuppositions which it naively makes, of which it is often unaware, and which it is, in its own discourse, incapable of explicating or grounding.[1]

> "We all feel she asked for it from the way she was dressed" — jury foreman in a rape case.[2]

Rape is a crime which is widely viewed as horrific, violent and exceedingly invasive. Because victims are forced to perform sexual acts against their will, victims are degraded and left emotionally scarred. Not all forms of rape, however, are viewed similarly.[3] Instead, some forms of rape are viewed as more egregious than others.[4]

Rape committed by a stranger, for example, is generally considered to be the most heinous of all rape offenses.[5] Rape by a stranger has been characterized as "real rape."[6] In marked contrast, many view "date rape" — rape committed by a social acquaintance or date — as a far less serious offense.[7] To a large segment of American society, date rape does not deserve the same appellation or vigorous moral condemnation as "real rape."[8]

This lax attitude towards date rape exists in a variety of forms.[9] Popular culture often supports and reinforces this lax attitude. The

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1. J.N. Mohanty, *Understanding Husserl's Transcendental Phenomenology, in* 2 A PRIORI AND WORLD 3 (W. McKenna, R.M. Hawlem & E.W. Winters eds., M. Meschoff 1981).

2. State v. Lord, *Jury Blames Woman in Rape Case*, Miami Herald, Oct. 5, 1989, at 1A, col. 1 (Broward Cir. Ct. Oct. 4, 1989) [hereinafter *Jury Blames Woman*].

3. *See* S. ESTRICH, REAL RAPE 8-9 (1987).

4. *See id.*

5. *See id* at 25.

6. *See id.* at 3.

7. *See id.* at 4.

8. *See id.*

9. For example, Roy Diamond, the foreman of a Fort Lauderdale jury, explained that the jury acquitted a man charged with raping a woman who wore a lace-fringed mini-skirt and no underwear because "[S]he asked for it." Davidson, *Attire Irrelevant in Rape Trials*, Ft. Lauderdale Sun-Sentinel, May 30, 1990, at 10A, col. 2.

attitude also plays a role in the low incidence of reported date rapes[10] as well as in the marginal success of the few prosecutions brought.[11] This societal ambivalence towards date rape is based on a special permissiveness regarding male sexual aggression against female social acquaintances.[12] This article labels that permissive attitude "the culture of acceptance."

The culture of acceptance includes two dominant stereotypes.[13] One stereotype is the "aggressive male" — the male who actively pursues sexual relations with a female despite cues to the contrary.[14] The other stereotype is the "punished" female — the female who, by the manner in which she dresses, or by other nonverbal actions, implicitly "deserves" or "asks for" sexual intercourse.[15]

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10. *See* S. ESTRICH, *supra* note 3, at 10-15. The reporting of acquaintance or date rape incidents, particularly on college campuses, continues to be very poor. Thus, while the female victims in rape cases that are actually prosecuted often perceive that the modern criminal justice system is more sympathetic to their plight, the acquaintance rape victim is still likely to remain an invisible statistic rather than an aggrieved and vindicated crime victim. *See* J. MARSH, A. GEIST & N. CAPLAN, RAPE AND THE LIMITS OF LAW REFORM 69 (1982). Despite progressive rape laws and an evolving public recognition of rape as a very serious crime — involving not only sex but violence, anger, and an invasion of privacy as well — the incidence of acquaintance rape has continued to climb. S. ESTRICH, *supra* note 3, at 2-3. For example: "While other violent crimes were decreasing between 1969 and 1975, forcible rape increased in Michigan by 56%. In the United States between 1967 and 1977, forcible rape more than doubled from 27,620 to 63,000." *Id.*

11. *See* S. ESTRICH, *supra* note 3, at 15-19. It also influences the length of sentences. *See* Ft. Lauderdale Sun-Sentinel, Apr. 13, 1991, at 17A, col. 1 (reporting that a British judge sentenced a convicted rapist to a lighter sentence because the rapist "showed concern and consideration by wearing a contraceptive").

12. *See* R. WARSHAW, I NEVER CALLED IT RAPE: THE MS. REPORT ON RECOGNIZING, FIGHTING, AND SURVIVING DATE AND ACQUAINTANCE RAPE 46 (1988). In one study conducted by professors from the University of Miami School of Law and Auburn University, for example, 59% of males polled agreed that "[w]omen provoke rape by their appearance or behavior." *Id.* Only 38% of females polled agreed. *Id.* Furthermore, 32% of the males polled, unlike their female counterparts, agreed with the statement that "[i]t would do some women some good to get raped." *Id.* Comparatively 8% of the women polled agreed with that statement. *Id.*

13. Both of these stereotypes — and the culture of acceptance generally — suffer from gender-bias. *See id.* at 42. These gender biases color the roles, expectations and social interactions of the sexes. *See id.* The assumptions underlying the culture of acceptance are particularly evident in the way males and females interpret — or more precisely, misinterpret — nonverbal cues during social exchanges. *See id.*

14. *See id.* at 46. The aggressive male model treats aggressive male behavior that induces, entices, or otherwise obtains sex with a female as acceptable, even without actual consent, depending on the circumstances. *See id.*

15. *See id.* at 36. The punitive model essentially views as acceptable sexual advances by males that retaliate for female nonverbal behavior such as flirting or flaunting. *See id.*

Trials in the criminal justice system offer the most controversial form of the culture of acceptance. Increased controversy might result from the fact that so much is at stake for the defendant.[16] A criminal defendant on trial for rape risks not only a substantial loss of liberty, but the stigma of conviction as well.

A paradigmatic illustration of the influence exerted by the culture of acceptance on the criminal justice system occurred in a Florida state court in the case of *State v. Lord*.[17] In *Lord*, the defendant was tried and acquitted on a charge of rape.[18] The verdict was not unusual; persons charged with rape face only a small chance of conviction.[19] After the *Lord* verdict, however, the foreperson created a nationwide furor by explaining that the verdict was reached in part because of the alleged victim's manner of dress.[20] At the time of the alleged incident, the complainant was wearing a lace skirt and no underwear.[21] In explaining the verdict, the foreperson stated, "she asked for it."[22] The foreperson added: "'[i]t' meant sex, not rape. If a woman goes out at 3 a.m. in that kind of skirt, she is advertising for sex, and she got what she advertised for."[23]

The thesis of this article is that the culture of acceptance, and the stereotypes which the culture of acceptance promote, generate latent gender-based prejudice that unfairly influences date rape trials.[24] This influence prejudices the jury's evaluation of evidence bearing on the issue likely to be dispositive of the case — whether the complainant consented to engage in sexual intercourse.[25] The prejudicial impact becomes even more virulent when the defendant claims that he mistakenly but reasonably believed that the complainant's conduct indicated consent.[26]

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16. *See* S. ESTRICH, *supra* note 3, at 19-25.

17. *Jury Blames Woman*, *supra* note 2, at 1A, col. 1.

18. *Id.* at 24A, col. 3. The defendant in that case claimed that sexual intercourse with the alleged victim had been part of a trade of sex for drugs. *Id.*

19. *See* S. ESTRICH, *supra* note 3, at 15-20. "For example, in New York 2,415 rape complaints yielded 1,085 arrests, 100 grand-jury hearings, 34 indictments, and 18 convictions." R. TONG, WOMEN, SEX AND THE LAW 104, 105 (1984).

20. Bousquet, *Rape Victim's Clothes Irrelevant, Panel Says*, Miami Herald, Apr. 6, 1990, at 13A, col. 1.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Cf.* R. TONG, *supra* note 19, at 103 (explaining that acquaintance rape is not viewed in the criminal justice system as equivalent to stranger rape).

25. *Id.* at 102-03. Because of some prior interaction between the alleged victim and the defendant, the identification of the "perpetrator" generally is a moot question.

26. *See* Milhizer, *Mistake of Fact and Carnal Knowledge*, ARMY LAW., Oct. 1990, at 4-10. The law of mistake was added to rape laws well after it was a feature of other crimes. *See id.*

This article argues that the current application of the rape laws ignores the latent gender-based prejudice resulting from the culture of acceptance. Consequently, the current law is inadequate.[27] If date rape trials are to be fairly administered within evidentiary, constitutional, and moral requirements, an active attempt must be made, at all stages of a trial, to neutralize the latent gender-based prejudice caused by the culture of acceptance.[28]

Neutralizing the effects of the culture of acceptance involves both preventive and educational measures.[29] The preventive measures should eliminate tainted jurors from the jury panel.[30] The educational measures should utilize phenomenological methodology to demystify for jurors any nonverbal contextual evidence.[31] Regardless of the measure employed, courts must be vigilant in not permitting attorneys or jurors to perpetuate latent gender biases.

This article is divided into five sections. Following this introduction, section II explores the elements that comprise the culture of acceptance. Section III examines the current legal response to the culture of acceptance and explains why that response is inadequate. Section IV assesses various solutions to the problem of jury misfeasance and recommends the adoption of special jury instructions and other explicit methodologies to minimize the impact of the culture of acceptance. Section V concludes the article.

II. THE CULTURE OF ACCEPTANCE

The culture of acceptance consists of an attitude embraced by many people in the United States today. This attitude promotes a particular approach towards male-female social relations. The attitude is characterized by two distinct stereotypes or modalities which perpetuate the culture of acceptance. One modality champions aggressive male behavior regardless of the female response.[32] The other modality penalizes the female for what is perceived to be "inappropriate" provocative behavior.[33] The activation of these attitudes becomes most

27. R. TONG, *supra* note 19, at 119-20.

28. *Cf. id.* at 109, 119-20 (indicating that more than mere changes in the law must be effected before rape trials can be fair to all concerned parties).

29. *See id.* at 109, 120.

30. *See id.*

31. *Cf. id.* at 120 (pointing out that society must become aware of its inherent biases and inculcations and rise above them).

32. *See* R. WARSHAW, *supra* note 12, at 36; *supra* note 14 and accompanying text.

33. *See* R. WARSHAW, *supra* note 12, at 46; *supra* note 15 and accompanying text.

forceful when social relations between dates turn sexual.[34] These modalities will be discussed in greater detail below.

A. *The Aggressive Male Stereotype*

The "aggressive male" stereotype encourages males to be socially and sexually forward. The tenets of this approach to social relations are beliefs in male domination, control and power.[35] In both social and sexual interactions, the male attempts to display and exercise his strength.[36]

In the aggressive male's critique of gender interaction, the male's pursuit of sexual relations becomes a competitive venture.[37] The male's goal is conquest-oriented — to win by "achieving" sexual relations.[38] The model of the aggressive male effectively dehumanizes the female.[39] The male views the female as a mere object from which sexual relations can be taken.[40] A male who had been interviewed about his feelings on rape has stated:

> I have been getting a lot of pressure from male friends to take charge with women — "you have to [have intercourse with] them and not worry about it. It's important to [have intercourse with them] because that's what they want. . . . That's mainly what they want no matter what they say."[41]

The popular culture,[42] particularly media forms such as movies and television, often appears to actively promote this form of sexual ag-

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34. For the purposes of this article, I will confine the examination of the issues to the context of heterosexual rape by a male.

35. The corollary is that women are viewed as the weaker sex.

36. *See* R. WARSHAW, *supra* note 12, at 39.

37. *See* S. BROWNMILLER, AGAINST OUR WILL 294 (1975).

38. *See* R. WARSHAW, *supra* note 12, at 39. The female becomes an object or prize, with the result of a dehumanization of the interactions. *See id.* at 93-94.

39. *See id.* at 94.

40. *See id.*

41. T. BENEKE, MEN ON RAPE 53 (1982).

42. *See* R. WARSHAW, *supra* note 12, at 41-42, 95. Other societies permitted actual rape as a deterrent to certain sexual infidelities. *See* S. BROWNMILLER, *supra* note 37, at 284. Studies of certain Indian societies in Brazil, New Guinea, and Africa, indicate that some groups go even further, and use rape as a social tool for punishing certain types of female offenders. *Id.* at 284-88. A study performed at the University of South Dakota indicated that 10% of the undergraduate women who were involved in the study had been physically abused in at least one relationship. R. WARSHAW, *supra* note 12, at 41.

gressiveness.[43] Researchers have concluded that: "[c]ultural depictions of violence against women, such as in some movies, and an increased desensitization to such violence, indirectly resulting in acceptance of it off the screen, even among dating partners,"[44] has led to its social acceptance.[45]

The deification of sexual aggressiveness takes many forms in the popular culture. Myths, magazines, songs,[46] and other cultural cues all inculcate males with the idea that sexual aggression or violence is an acceptable form of behavior.[47] For example, popular culture imagery[48] often portrays aggressiveness as "macho"[49] or virtuous.[50] Such imagery may go so far as to elevate sexual offenders to the status of "mythical heroes."[51] Even "Jack the Ripper," a man who murdered and mutilated five prostitutes in London in 1888,[52] has been cast in an appealing light in several variants of the popular culture.[53] According to one commentator, in some situations when the victim is female and the perpetrator is male, "sexual violence is exalted by men to the level of ideology. . . ."[54]

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43. *See* R. WARSHAW, *supra* note 12, at 95. The historical sexual suppression emanating from the Puritans has led to an increased reliance on nonverbal cues as a significant form of communication between the sexes regarding sexual intent.

44. *Id.* at 41.

45. *See id.* at 40-41.

46. The Rolling Stones, *Midnight Rambler, on* Let it Bleed (Abkco Records, Inc. 1986). Even Mick Jagger of the Rolling Stones sang about the Boston Strangler in the song "Midnight Rambler" in a glorifying fashion:

> "Well you heard about the Boston — aghhh
> It's not one of those.
> Well, talkin' 'bout the midnight-shhh
> The one who closed the bedroom door . . .
> Oh God, hit her head . . . rape her . . . hang her . . .
> The knife sharpened . . . tiptoe . . . uhhh
> Oh just that . . . she was dead — "

Id.; *see also* S. BROWNMILLER, *supra* note 37, at 296 (discussing Mick Jagger's prelude to *Midnight Rambler* on a concert tour).

47. *See* R. WARSHAW, *supra* note 12, at 96.

48. *See id.* at 95-96. The schism between the actual rape laws and the attitudes espoused within segments of the American culture is especially apparent from viewing popular culture with expansive implicit acceptance of aggressive behavior. *See* R. TONG, *supra* note 19, at 102.

49. "Macho" means "an overly assertive, virile, and domineering man." WEBSTER'S NEW WORLD DICTIONARY (3d College ed. 1988).

50. *See* R. WARSHAW, *supra* note 12, at 38-39, 95.

51. S. BROWNMILLER, *supra* note 37, at 295.

52. *See id.* at 294.

53. *See, e.g,* The Rolling Stones, *supra* note 46.

54. S. BROWNMILLER, *supra* note 37, at 293.

The culture's permissiveness toward aggressive male behavior in sexual relations has been recognized in a recent study.[55] In the study, respondents were asked hypothetical questions about "unwanted sexual advances."[56] While more than ninety percent of the respondents concluded that a female had been raped when a stranger attacked her in a parking lot, more than twenty-five percent believed that a woman who attempted to refuse a date's unwanted sexual advances had not been raped.[57] Further, only approximately twenty percent believed strongly that she had been raped.[58]

The disparate level of aggressiveness expected of each gender is a prominent characteristic of the culture of acceptance:

> [W]hat are we to make of the contention that women in dating situations say "no" initially to sexual overtures from men as a kind of pose, only to give in later, thus revealing their true intentions? And that men are thus confused and incredulous when women are raped because in their sexual experience women can't be believed? . . . One point is clear: the ambivalence women may feel about having sex is closely tied to the inability of men to fully accept them as sexual beings. Women have been traditionally punished for being openly and freely sexual; men are praised for it. And if many men think of sex as achievement of possession of a valued commodity, or aggressive degradation, then women have every reason to feel and act ambivalent.[59]

The prevalence of this distorted thought process in social interactions is also recognized by author Robin Warshaw:

> [M]any men simply discount what a woman is saying or reinterpret it to fit what they want to hear. They have been raised to believe that women will always resist sex to avoid the appearance of being promiscuous (and, indeed, some do), will always say "No" when they really mean "Yes," and always want men to dominate them and show that they are in control. Further, many men have been conditioned to

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55. *See* Klemmack & Klemmack, *The Social Definition of Rape*, *in* SEXUAL ASSAULT 135 (1976). Interestingly, all the subjects who participated in the study were female. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. T. BENEKE, *supra* note 41, at 32.

> simply ignore women — whether those women are responding positively to sexual interactions or pushing, fighting, kicking, crying, or otherwise resisting them.[60]

While members of both sexes acknowledge the presence of aggressiveness as a male trait, the research data indicate that men approve of the existence of male sexual aggression in disproportionately greater numbers than women.[61] Consequently, males apparently also embrace the value system underlying the culture of acceptance to a greater degree than do females.

Forged from popular culture and perpetuated historical biases, the aggressive male stereotype has produced many highly publicized comments. The comments include those of an actor who openly stated that the male's goal is to "make [women] surrender to your power";[62] those of a judge who leniently sentenced a rapist and said "it's not like she was chopped up";[63] and those of a well-known basketball coach who stated that a woman being raped should "relax and enjoy it."[64]

B. *The "Punished" Female Stereotype*

While the aggressive male stereotype focuses on the acceptability of the male's aggressive behavior, the punished female stereotype focuses on the female's allegedly inappropriate provocative behavior.[65] According to the punished female model of behavior, a female who engages in offensive displays of sexuality by dress or manner, in an effort to intentionally or negligently provoke a male, forfeits her right to refuse a retaliatory male sexual response.[66] In effect, the female's

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60. R. WARSHAW, *supra* note 12, at 42.

61. *Id.* at 45.

62. *An Extra Thump on the Head to . . .*, NEW WOMAN, Dec. 1990, at 141.

63. *D.A.s Consider Marks Softest Judge in Town*, THE MANHATTAN LAWYER, Feb. 14, 1989, at 8.

64. Bobby Knight, basketball coach, Indiana University, reportedly made the statement. *See* Callahan, *Sex, Lies & Sporting Heroes*, Wash. Post, May 27, 1990, at C3, col. 2.

65. *See* R. TONG, *supra* note 19, at 102-03.

66. T. BENEKE, *supra* note 41, at 18-23. A man may interpret the verbal and nonverbal conduct of a female as inappropriate. *Id.* Regardless of the interpretation's accuracy, a man may view the "inappropriate" conduct as a promise of sex which allows the man to act as seems appropriate. *Id.* (citing Amin, *Victim Precipitated Forcible Rape*, 58 J. CRIM. L., CRIMINOLOGY & POLICE STUD. 493, 494 (1967)).

The punished female stereotype also supports the belief that "[w]hen a woman drinks with a man to the point of intoxication, she practically invites him to take advantage of her person." *See* PLOSCOWE, SEX AND THE LAW 175 (1951), *quoted in* Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 26 (1977). *See generally* Ploscowe, *Sex Offenses: The American Legal Context*, 25 LAW & CONTEMP. PROB. 217 (1960) (noting that sex offense laws are highly outdated).

sexuality is viewed as a weapon, and the male's reaction is considered analogous to self-defense. The female's initial provocation of the male's libido putatively invites a sexual punishment.[67]

The punished female stereotype, therefore, focuses on exacting retribution from the female for serving as a temptress or provocateur to the male.[68] The female's dress or appearance becomes a weapon that, when unleashed, invites retaliation.[69] This model consequently embodies the belief that the female effectively "asked for it." "[I]n all cases where a woman is said to have asked for it [forced sexual intercourse], her appearance and behavior are taken as a form of speech. Actions speak louder than words is a widely held belief. . . ."[70] In essence, a "logical extension of 'she asked for it' is the idea that she wanted what happened to happen; if she wanted it to happen, she *deserved* for it to happen."[71]

Studies indicate that males rely on various triggering factors to conclude that females putatively have waived their right of refusal.[72] These factors include situations in which a woman has invited a man out on a date; in which a man pays for the date; or in which a date occurs at the man's residence rather than in a public place.[73]

Along these lines, many people believe that a woman who "teases" males or "leads them on" implicitly accepts, by virtue of such behavior, the sexual advances that will result and eventually culminate in intercourse.[74] In a 1967 study of sexually aggressive college men, those interviewed said they believed their aggressiveness was justified if the woman was "a tease."[75] A 1979 survey of California high school males indicated that fifty four percent believed rape was justifiable if the female "leads a boy on."[76]

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67. R. TONG, *supra* note 19, at 102.

68. *See id.*

69. *See id.* (stating that "[t]he] image of woman as tempress also cures rape law in ways that disfavor women").

70. T. BENEKE, *supra* note 41, at 30; *see also* Fromm, *Sexual Battery: Mixed-Signal Legislation Reveals Need for Further Reform*, 18 FLA. ST. U.L. REV. 579, 591-94 (1991) (indicating that nonverbal conduct by the victim can trump her express refusal to consent).

71. T. BENEKE, *supra* note 41, at 30.

72. R. WARSHAW, *supra* note 12, at 42-43.

73. *Id.* at 43.

74. *Id.*

75. *Id.* (citing Kanin, *Date Rape: Unofficial Criminals and Victims*, 9 VICTIMOLOGY INT'L J. 95 (1984)).

76. *Id.* A study of undergraduate students supports the existence of the punitive model. *Id.* Research done by Nona Barnett of the University of Miami School of Law and Hubert. S. Field of Auburn University found the following:

Research indicates, however, that the perception that women abuse their sexuality by design to invite sexual advances by men is mistaken. In many situations in which men believe they are "enticed" or "prompted," the women are unaware that their actions are being interpreted as sexual, or as an implicit waiver of their right to refuse a retaliatory male sexual response.[77]

Despite its inaccuracy, the punished female model of the culture of acceptance persists, promoting the concept of "justifiable forced sexual intercourse."[78] At the core of this approach remains the belief that the victim's behavior is "responsible for triggering the man's action."[79]

Statement:	Percentage of Men Agreeing	Percentage of Women Agreeing
In most cases when a woman was raped, she was asking for it.	17	4
If a woman is going to be raped, she might as well relax and enjoy it.	17	7
Women provoke rape by their appearance or behavior.	59	38
A woman should be responsible for preventing her victimization in a rape.	41	27
The degree of a woman's resistance should be the major factor in determining if a rape has occurred.	40	18
In order to protect the male, it should be difficult to prove that a rape has occurred.	40	15
It would do some women some good to get raped.	32	8

Id. at 46.

77. *Id.* at 41.
78. *Id.* at 42.
79. *Id.*

C. *The Impact of the Culture of Acceptance: The Distortion of Nonverbal Cues*

The impact of the culture of acceptance finds its locus in the nonverbal context of social interactions.[80] In particular, the nonverbal context of social interactions is relevant on two different levels. First, defendants may misinterpret the nonverbal cues of their dates; and second, juries may misinterpret the significance of the nonverbal context of a situation when attempting to discern the parties' intentions.

Thus, nonverbal communication can be both the most important and the most obfuscatory area of social relations.[81] The nonverbal context implicit in sexual courting, in particular, is often more significant than the spoken words between the parties.[82] The rules applying to nonverbal social interactions, however, can be so complicated that the average person may lack the basic tools required for accurate interpretations.[83] To obtain skills in basic nonverbal communication, one must possess "a knowledge of gender display rules as well as [the] ability to send and receive non-verbal messages."[84]

The culture of acceptance exacerbates existing difficulties in interpreting nonverbal contextual cues. While misinterpretations of nonverbal cues can be attributed to multiple sources, including poor communication lines and changed meanings over time,[85] the culture of acceptance creates and augments many of these problems.[86] The epistemology of nonverbal contextual cues and their importance to social situations are discussed in greater detail below.

1. Nonverbal Cues Generally

> Those of us who keep our eyes open can read volumes into what we see going on around us.[87]

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80. The aggressive male and punished female components of the culture of acceptance both arise on a situational basis. That is, their presence heavily depends on the circumstances of the social interaction. Where, when, why, how and how long the social interaction takes place are relevant to whether the culture of acceptance becomes operational.

81. *See* R. TONG, *supra* note 19, at 102.

82. *See* R. WARSHAW, *supra* note 12, at 41-42.

83. Riggio & Freedman, *Impression Formation: The Role of Expressive Behavior*, 50 J. PERSONALITY & SOCIAL PSYCH. 421, 426 (1986).

84. *See id.*

85. A. EISENBERG & R. SMITH, NON-VERBAL COMMUNICATION (1970).

86. *See* R. WARSHAW, *supra* note 12, at 42. In fact, it is the abusive interpretation of nonverbal contextual behavior that triggers the action of the aggressive male, or leads to the damning of the punished female. *See* Fromm, *supra* note 70, at 591-92.

87. Hall, *Foreword* to M. KNAPP, NON-VERBAL COMMUNICATION IN HUMAN INTERACTION 1 (1982).

The broad realm of nonverbal behavior, whether intentional or not, constitutes a major form of communication[88] between individuals.[89] In fact, nonverbal conduct, from the manner of a person's dress to a person's body movements, often makes its own independent "statement" to others.[90]

The recognition of nonverbal conduct as a source of communication is an ancient phenomenon.[91] A Chinese proverb suggests that one must be wary of "the man whose stomach doesn't move when he laughs."[92] The Bible even refers to the inferences that can be drawn from nonverbal communications: "[h]e winketh with his eyes, he speaketh with his feet, he teacheth with his fingers. . . ."[93]

The labels that describe nonverbal behavior[94] include nonverbal conduct, cues, kinesics, and body language.[95] All of these terms connote some form of communication.[96] Human communication occurs when "a sender, triggered by the perception of a stimulus and controlled by feedback, transmits, through channels, a set of messages which are perceived and responded to by a receiver."[97]

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88. *See* Ekman & Friesen, *The Repertoire of Nonverbal Behavior — Categories, Origins, Usage, and Coding*, 1 SEMIOTICA 49-98 (1969).

89. *See* M. ARGYLE & P. TROWER, PERSON TO PERSON: WAYS OF COMMUNICATING 8 (1979).

> Again, people are more aware of its obvious uses, such as moving about and picking things up, than its role in communicating. This "body talk" involves such things as positions and movements of the head and trunk, manipulation of the hands and position of the arms and legs.

Id.

90. *Id.*

91. *See* Peskin, *Non-Verbal Communication in the Court Room*, TRIAL DIPL. J., Spring, 1980, at 8.

92. *Id.* at 6.

93. *Proverbs* 6:13.

94. *See* Ekman & Friesen, *supra* note 88, at 49-93. To better understand the subject matter of nonverbal conduct, definitions are required, particularly in light of great difference in description that exist in the literature. *Id.*

95. Nonverbal conduct or body language has also been given these labels: "[B]ody movement, movement, movement behavior, body language, nonverbal communication, nonverbal behavior, NVC, expressive movement, and kinesics." Davis, *The State of the Art: Past and Present Trends in Body Movement Research, in* NON-VERBAL BEHAVIOR: APPLICATIONS AND CULTURAL IMPLICATIONS 51 n.1 (A. Wolfgang ed. 1979).

96. *See* Givens, *Posture is Power*, BARRISTER, Spring, 1981, at 15. "Communication" has been defined as a "set of messages which an individual sends at any one time." *See* A. EISENBERG & R. SMITH, *supra* note 85, at 13.

97. A. EISENBERG & R. SMITH, *supra* note 85, at 18.

Numerous studies on nonverbal communication corroborate the importance of the subject.[98] Studies suggest that "fifty-five percent of effective communication relates to body language and dress, thirty-eight percent to voice, and only seven percent to what is actually said."[99] Even when verbal messages are transmitted from one individual to another, more than sixty percent of the meaning of these verbal messages lies in the nonverbal delivery.[100]

Furthermore, the occurrence of nonverbal communication is often unpredictable.[101] Nonverbal communication may accompany a verbal message or be predicated independently.[102] For example, a frown may accompany a verbal scolding or be completely separate. The two forms of communication may even merge — a vocal sound such as a scream[103] also may constitute a nonverbal cue.[104]

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98. *See* Peskin, *supra* note 91, at 7. In recent times, there have been significant social science inquiries that have analyzed how nonverbal conduct plays a role in communications. These studies have been performed by psychologists, anthropologists, and other social scientists. Even the hearsay rule concerning nonverbal conduct must draw lines between non-assertive and assertive nonverbal action. *See* E. CLEARY, MCCORMICK ON EVIDENCE § 250 (3d ed. 1984). The entire science of kinesics involves the study of body movements, and furthers the scientific inquiry into the subject. *See* Peskin, *supra* note 91, at 6. Yet, the fascination with nonverbal communication on both the professional and lay levels belies the current overall lack of understanding of such an important part of human interaction. *See, e.g.*, Givens, *supra* note 96, at 15 (arguing that nonverbal communication in the courtroom influences judges and juries more than verbal arguments); *see also* Givens, *The Way Others See Us*, JUDGES J., Summer 1980, at 21 (noting that many subtle nonverbal gestures are more influential than obvious gestures everyone knows). Dr. Givens is an anthropologist working out of the University of Washington. Peskin, *supra* note 91, at 6.

99. King, *Verbal Persuasion, What You Need to Know*, TRIAL 71 (Aug. 1988).

100. Peskin, *supra* note 91, at 8.

101. *See* Givens, *supra* note 96, at 15.

102. *Id.*

103. *See* M. KNAPP, *supra* note 87, at 3.

104. *See* Givens, *supra* note 98, at 22. Other categories of nonverbal behavior, as grouped by researchers Ekman and Friesen, include illustrators, which are nonverbal acts associated with speech; affect displays, which indicate the mood or emotional state of the maker; regulators, which are used to connect a speaker and listener during conversations; and adapters, which are fragments of actual aggressive, sexual or intimate behavior and often reveal personal orientations or characteristics covered by verbal messages. *See* Ekman & Friesen, *supra* note 88, at 49-98. This has been called paralanguage by one commentator. *See* M. KNAPP, *supra* note 87, at 5-7.

Nonverbal behavior also relates to many other areas of conduct, such as touching behavior, and the nonverbal context of verbal communication, as compared to the content of the speech. *See* Givens, *supra* note 98, at 22-23. The communication may lie completely outside of a person's conscious awareness. *Id.* at 17. Not only is there intended communication through nonverbal cues, but unintentional cues also serve as communication to the recipient. *See id.* As several researchers have noted, "[t]he impression we form of another person is greatly influenced by

Communicative nonverbal conduct transmits information that serves three major purposes.[105] The nonverbal cues indicate:

(1) The transmitter's general intent in a situation;
(2) The transmitter's response towards himself;
(3) The transmitter's response or feeling towards the recipient.[106]

The overall study of communicative nonverbal conduct has been subdivided into several diverse categories.[107] These categories include sign language, action language, and object language.[108] Sign language essentially comprises action that serves as a substitute for words. For example, a thumb in the air indicates "okay," or "all is well."[109] Action language denotes movements that are nonassertive, such as drinking some water because of thirst or putting on a sweater because of cold weather.[110] Object language pertains to all assertive and nonassertive displays of things such as clothing, art, and structures.[111] This includes what clothes are chosen to be worn, and how one's residence is decorated.[112]

There generally is no intent to communicate with action or object language. Rather, the receiver simply interprets the transmitter's use of the language as having a particular meaning.[113] A nonverbal reve-

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his or her facial expressions, body movements and tone of voice." *See* Snodgrass & Rosenthal, *Interpersonal Sensitivity and Skills in Decoding Nonverbal Channels: The Value of Face Value*, 6 BASIC & APPLIED SOC. PSYCH. 243, 243 (1985) (citing studies by Goffman in 1959 and 1967, by Weitz in 1979 and by Wiemann & Harrison in 1983).

105. A. STRAUSS, MIRRORS AND MASKS: THE SEARCH FOR IDENTITY 59 (1959).

106. *Id.*

107. M. KNAPP, *supra* note 87, at 12.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *See id.*

113. *See id.* at 5. One particular component of action language is body motion. *See id.* While body motions often have no communicative value, some body language is communicative. Nonverbal body language can be transmitted by various parts of the body, including the head, the arms, and even the trunk of a person. M. ARGYLE & P. TROWER, *supra* note 89, at 8. *See* T. SANNITO & P. MCGOVERN, COURTROOM PSYCHOLOGY FOR TRIAL LAWYERS 143-54 (1985). With hand gestures alone, for example, there are different positions that signify different things. *See* Peskin, *supra* note 91, at 7. A closed fist may indicate force, power or intimidation. T. SANNITO & P. MCGOVERN, *supra*, at 139-40. A pointed finger may mean added authority, particularly when the pointed finger is used to assist in teaching and explaining to others. *Id.* at 142. Cues range from the chin stroke, to the chin push, to the eye rub, to the chin rest, to the neck grab, and more. These may merely be reflexes or responses to external stimuli. *Id.* at 144-48.

lation about the transmitter's particular emotional state, like a smile, may be simply the transmitter's affective display without any intent to inform others about the person's mental state.[114] The display, however, may be received in an entirely different manner.[115] In fact, regardless of any intent to transmit,[116] most emotional messages are communicated nonverbally.[117] In date rape trials, both action and object language are important concerns.[118] These forms of nonverbal cues are often utilized to persuade the jury on the crucial issue of consent.[119]

2. The Impact of Gender Roles and Stereotypes on the Interpretation of Nonverbal Cues in Dating Situations

> Your lips tell me "no, no," but . . . there's "yes, yes" in your eyes.[120]

The interpretation of nonverbal cues in social interactions is subject to the influence of many variables.[121] The manner in which the individual receiver of nonverbal cues is socialized,[122] for example, signifi-

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114. M. KNAPP, *supra* note 87, at 16.

115. *See* Givens, *supra* note 98, at 23.

116. *See* M. KNAPP, *supra* note 87 at 16. Commentators indicate that nonverbal conduct may be emotive, communicating what someone is feeling, as well as cognitive, communicating what someone is thinking. Ironically, it appears that those people who have greater skills at deciphering nonverbal visual cues may actually be less sensitive to the feelings of others. *See* Snodgrass & Rosenthal, *supra* note 104, at 243; *see also* M. ROBERTS, TRIAL PSYCHOLOGY: COMMUNICATIONS AND PERSUASION IN THE COURTROOM 232-33 (1987) (stating that nonverbal communication is more a clue to feelings than to thoughts).

117. *See* A. EISENBERG & R. SMITH, *supra* note 85, at 22.

> Body positions deliver information about someone's "gross affect state, that is, whether the emotion is positive or negative," while body acts and facial expressions can reveal specific emotions. Posture, distance, and orientation are thought to reveal a communicator's attitude ("degree of liking, positive evaluation, and/or reference of one individual toward another") toward his addressee. Also, sustained eye contact is believed to indicate a personal or confidential relationship between people.

M. ROBERTS, *supra* note 116, at 232-33.

118. *See* R. TONG, *supra* note 19, at 96-97.

119. *See id.*

120. E. Frascino, cartoon, The New Yorker, 1973, *reprinted in* T. SANNITO & P. MCGOVERN, *supra* note 113, at 92.

121. *See* Peskin, *supra* note 91, at 6-7. In social interactions, nonverbal cues constitute a major form of communication. *See* A. EISENBERG & R. SMITH, *supra* note 85, at 62. Yet, such nonverbal cues often do not assist in promoting the clarity of communication. *Cf. id.* at 29 (stating that distinguishing stimuli which carry nonverbal meaning from stimuli which are not part of the communicative process is more difficult).

122. *See* A. EISENBERG & R. SMITH, *supra* note 85, at 16. Misinterpretations and distortions may be attached to the meaning of nonverbal behavior due to the subjectivity of interpretation and the interpreter's personality. *See id.* at 16, 30, 89.

cantly affects the way that individual evaluates nonverbal conduct.[123] Differences in cultural upbringing may further impact the interpretation of nonverbal information.[124] The influence of the particular culture[125] or subculture[126] extends to the shaping of specific nonverbal cues.[127]

Gender is one variable which may play a unique role in distorting the interpretation of nonverbal messages in social interactions.[128] Studies indicate that the sexes generally appear to express themselves in different ways.[129] These differences are highlighted in social or dating situations.[130]

Differences in the way the sexes view nonverbal social cues are not simply biological, but appear to be partially attributable to environmental influences.[131] Anthropologist Peggy Reeves Sanday of the University of Pennsylvania notes:

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123. *See id.* at 89; *cf.* D. Vinson, *What Makes Jurors Tick*, TRIAL, June 1988, at 59 (noting that the personal backgrounds of jurors often affect their receptiveness to emotional appeals).

124. *See* R. TONG, *supra* note 19, at 100-02. The nature of the nonverbal messages sent to others is shaped by a multitude of stimuli. *See* A. EISENBERG & R. SMITH, *supra* note 85, at 51-54. For example, the form of the nonverbal cues may be shaped by a particular culture or sub-culture. *See id.* at 40-44. One illustration widely used in the United States in the 1960s and 1970s was the peace sign of the anti-war movement. This type of body motion is considered to be an "emblem." *Id.* at 25; M. KNAPP, *supra* note 87, at 13.

125. A person's culture and upbringing exert great influence over him or her. Hall, *supra* note 87, at VII. One result of cultural influences is the way a person reads another's nonverbal behavior.

126. Hall, *supra* note 87, at VIII. Even items such as confession magazines can have a significant impact on the people who read them, affecting the way in which they interpret nonverbal cues. S. BROWNMILLER, *supra* note 37, at 342. According to Ms. Brownmiller, over ten million women read romance, confession, and other comics or magazines. *Id.* Dr. Fredric Wertham also stated that "comic books create sex fears of all kinds." F. WERTHAM, SEDUCTION OF THE INNOCENT 185 (1954); S. BROWNMILLER, *supra* note 37, at 342.

127. Body movements may have different meanings depending on the geographic location as well. *See* A. EISENBERG & R. SMITH, *supra* note 85, at 80-85. Yet, the significance of a nonverbal gesture may transcend national boundaries. *Cf. id.* at 77-78 (discussing cross-cultural differences in nonverbal communication). With respect to the significance of the clenched fist, for example, it has been suggested that "[i]ts meaning is so clear that it is used worldwide as a sign of force, power, and intimidation." *Id.*; T. SANNITO & P. MCGOVERN, *supra* note 113, at 139.

128. *See* R. WARSHAW, *supra* note 12, at 120. In light of these influences, it is difficult for most participants to accurately evaluate nonverbal cues. In fact, without special training, an observer "probably has . . . no better than chance" to accurately assess certain types of nonverbal cues. *Id.*

129. Riggio & Freedman, *supra* note 84, at 426.

130. Wiener, *Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 6 HARV. WOMEN'S L.J. 143, 147 (1983).

131. *Id.*

> It is important to understand that violence is socially and not biologically programmed. Rape is not an integral part of male nature, but the means by which men programmed for violence express their sexual selves. Men who are conditioned to respect the female virtues of growth and the sacredness of life do not violate women.[132]

The disparity in social conditioning between males and females fosters different nonverbal habits.[133] One commentator states:

> [T]hat's because the woman's socialization has most likely taught her that she must not express her own wishes forcefully, that she should not hurt other people's feelings or reject them, that she should be quiet, polite and never make a scene. And, as a girl, she has also learned not to be physical.[134]

3. Social Science Data and Gender-Based Differences

Social science studies support the conclusion that the sexes do not communicate similarly on the nonverbal plane.[135] Two social scientists from Pennsylvania State University conducted an illustrative study.[136] Several nonverbal cues were examined to determine whether males' and females' perceptions of sexual intent differ.[137] This inquiry was a logical continuation of previous studies[138] which showed that men inferred greater sexual meaning from heterosexual social interactions than women.[139] In addition, the earlier studies proved that males generally expected greater sexual interactions to occur as a result of social interactions with the opposite sex.[140] The current Pennsylvania State University researchers observed that in an earlier project,[141] the social

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132. R. WARSHAW, *supra* note 12, at 46-47 (quoting Sanday, *The Socio-Cultural Context of Rape*, 37 J. SOC. ISSUES 5 (1981)).

133. *See id.* at 40.

134. *Id.*

135. *See, e.g.*, Abbey & Melby, *The Effects of Nonverbal Cues on Gender Differences in Perceptions of Sexual Intent*, 15 SEX ROLES 283 (1986) (describing and building on previous studies of gender-based differences in nonverbal communication).

136. *Id.* at 283.

137. *Id.* at 285.

138. *See id.* at 284-85. For example, in one study, males were found to be much more likely than females to view nonverbal cues — such as the manner of a woman's dress — as a statement of sexual intent. *Id.* at 284.

139. *Id.* at 283-84.

140. *Id.* at 284.

141. *See id.* Abbey, in 1982 "asked male-female dyads to interact for five minutes while another hidden male-female dyad observed this interaction." *Id.*

scientist had found "[t]hat men rated both female and male stimulus persons as more seductive and promiscuous than women did. Men were also more sexually attracted to opposite-sexed targets than women were. These findings applied to both actors' and observers' judgments."[142]

Early researchers also asked adolescent females and males to consider a number of different cues in a dating situation and to rate the extent to which each cue indicated a desire for sex.[143] "They found that females [generally] perceive[d] cues as less [of] a sign of sexual intent than did males. Females rated revealing clothing, males' prior reputation, date location, and activities like drinking together or complimenting a date as less indicative of a desire to have sex than males did."[144]

The Pennsylvania State University project analyzed three specific nonverbal cues: interpersonal distance, eye contact, and touch.[145] The researchers chose these particular cues because of their relevance to the conclusions reached in prior studies.[146] The prior studies showed that the closer the interpersonal distance between members of the opposite sex, the greater the positive feelings the individuals have for each other.[147] The studies also established that a similar positive relationship exists between eye contact and the way members of the opposite sex feel about each other.[148] Finally, the studies concluded that touch occurs intentionally only between individuals who "like each other,"[149] signifying such emotions as love, warmth, and friendship.[150]

In their own study, the Pennsylvania State University researchers concluded that the males believed the female target was sexier and more seductive than did the females.[151] In addition, the females were perceived "as more promiscuous by males than by females in the eye contact and distance studies."[152] The researchers also found that men

142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 283.
146. *Id.*
147. *See, e.g., id.* at 285 ("Research has indicated that close interpersonal distances are associated with the attraction.").
148. *See id.* at 285.
149. *Id.* at 286.
150. *Id.*
151. *Id.* at 297.
152. *Id.*

However, contrary to expectations, sexual-trait ratings were not influenced by nonverbal cue ambiguity or an interaction of nonverbal cue ambiguity with subject

believed there was a greater degree of sexuality in a woman's conduct than the women believed about the men's conduct, regardless of the specific nonverbal cues introduced into the situation.[153]

D. *The Misinterpretation of Nonverbal Behavior by Juries*

Despite efforts to minimize biases at trial, juries in date or acquaintance rape cases contribute to the inaccuracy of interpreting nonverbal cues. In date rape cases, jurors, like other laypersons, apply different male and female social norms in evaluating the alleged victim and defendant's actions.[154] In particular, jury members rely on their own social conditioning and gender biases to interpret relevant nonverbal cues.[155]

The jury's adoption of the culture of acceptance and the gender-biased socialization within which the culture of acceptance operates creates numerous problems at trial. The jury's evaluations perpetuate the stereotypes of the aggressive male and the punished female, as well as other latent gender biases, rather than overcoming these stereotypes. Such influences lead to the misuse of otherwise properly admitted evidence.

A study involving post-trial interviews with 360 jurors who sat in rape cases confirmed the considerable role of latent gender bias in jury decisionmaking.[156] The author of the study found that "evidence of a [victim's] good moral character . . . swayed jurors."[157] The author concluded that, based on the study, jurors often assessed whether consent existed based on the "carelessness"[158] of the victim. "One . . . female juror told us, 'you don't get in a car at midnight with two complete strangers and not expect to do something.'"[159] The author added that "[one] female juror told us that the victim 'put herself in a position for it. She asked for it and got it.'"[160]

> sex. While we had hypothesized that this sex difference in perceptions of female sexuality would occur more strongly under ambiguous circumstances, it appears to occur equally under all circumstances.

Id.

153. *Id.* at 297.

154. *See* R. WARSHAW, *supra* note 12, at 142-43. For example, to determine whether a situation is coercive, the presence of physical force is often used as a linchpin. *See id.* at 139.

155. *See id.*

156. G. LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SOCIAL ASSAULT (1989).

157. *Id.* at 217.

158. *Id.* at 218.

159. *Id.*

160. *Id.*

Significantly, the jurors relied heavily on nonverbal behavior:[161] "A . . . female juror told us that the complainant in one case had 'consented with her body language' . . . ; for jurors the victim's moral character was even more important than medical evidence or victim injury."[162]

Juror interviews revealed the impact of latent gender bias and the culture of acceptance on the jury decisionmaking process:[163]

> For example, many jurors claimed that through their clothing and behavior women often "ask" to be raped. One . . . female juror told us, "sometimes it [i.e., rape] is asked for. Women go to taverns and get drunk and leave with strangers. . . . [W]omen may tempt them [i.e., men] by [the] too short seductive attire of skin-tight pants."[164]

III. THE LEGAL RESPONSE TO THE TAINT OF THE CULTURE OF ACCEPTANCE

A. *The Inadequacy of the Current Legal Response*

The current legal response to the culture of acceptance can be characterized as nonfeasance. Few, if any, laws directly minimize or negate the gender-based biases which the culture of acceptance provokes in date rape cases.[165]

This approach to dealing with the problems associated with the culture of acceptance has been and remains inadequate. By maintaining the status quo, the current laws perpetuate rather than dismantle historically entrenched gender-based biases. These biases coalesce at trial to create an improper and perhaps even an unconstitutional prejudice in the jury. Both cultural stereotypes — the aggressive male and the punished female — effectively distort the jury's evaluation of consent-related evidence, possibly delegitimizing the resulting verdict.[166] The overall consequence of this distortion is that the issue of consent in date rape cases often loses its moral or practical force at trial.[167]

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161. *Id.*

162. *Id.*

163. *Id.* at 225.

164. *Id.*

165. *Cf.* R. TONG, *supra* note 19, at 104 (noting that present evidentiary rules are insufficient to fully combat stereotypes).

166. *See* R. WARSHAW, *supra* note 12, at 142-43.

167. *See id.* at 42-43. Furthermore, statistics show that the incidence of acquaintance rape makes it a very common form of nonconsensual sexual activity. *See id.* at 12. Yet, date or acquaintance rape is essentially no different than other forms of rape. *Id.* at 20-21. When it is reported, and a prosecution occurs, the likelihood of a conviction is low. *See id.* at 142-43.

1. Constitutional Implications

The current legal response of nonfeasance towards nonverbal contextual evidence may be inadequate for more than just evidentiary reasons. Specifically, notions of due process[168] and equal protection[169] may require express safeguards against either the "aggressive male" or "punitive female" models.

A salient premise underlying the culture of acceptance is that people subjectively intend their nonverbal conduct. Such a premise is faulty. It assumes that intent is discerned accurately from nonverbal conduct. However, because nonverbal cues often are misinterpreted and misunderstood,[170] reliance on those factors is not likely to provide the fundamental fairness required of the criminal process. Therefore, if juries are permitted to presume that people subjectively intend their nonverbal conduct, the verdicts arguably violate the due process clause. Specifically, the fundamental tenet that the prosecution must prove all of the elements of a crime beyond a reasonable doubt may be circumvented.[171]

Sandstrom v. Montana[172] is instructive in this regard. In *Sandstrom*, the United States Supreme Court held that a jury instruction was unconstitutional which allowed the jury to presume that persons intend the natural and probable consequences of their actions.[173] The Court concluded that such a presumption effectively permitted a jury to convict a defendant without finding each and every element of the crime, specifically intent, beyond a reasonable doubt.[174] Thus, the presumption contravened the mandate of due process.

Although a date rape case is distinguishable from *Sandstrom* at least insofar as the implied presumption created by latent gender biases favors an acquittal of the date rape defendant and not a conviction, the defects in the presumption are equally dangerous. In both situations, the presumption of subjective intent, without rational and relevant proof, permits the jury to reach a conclusion that does not attend to the demands of the law. Therefore, in both cases, the jury

168. U.S. CONST. amend. XIV.

169. *Id.*

170. A. EISENBERG & R. SMITH, *supra* note 85, at 9.

171. *Cf.* Sandstrom v. Montana, 442 U.S. 510, 522-23 (1979) (finding that a jury instruction that permits jury to infer intent through a legal presumption forces the defendant to prove innocence and is in violation of due process).

172. *Id.*

173. *Id.* at 524.

174. *Id.*

system will not function in a fundamentally fair way consistent with its design.[175]

This distorted operation violates the tenets of due process. An alleged rape victim and the society at large for whom such a trial is brought are entitled to a fair trial and due process as much as the criminal defendant. Due process safeguards require that there be adequate notice and ascertainable standards by which to interpret the meaning of the law. If no such standards exist, or cultural distortions would render such standards meaningless, then fair warning or notice would not occur.

In addition to due process requirements, equal protection guarantees[176] also may mandate limitations in jury discretion regarding the inference of subjective intent from nonverbal conduct.[177] The concept of equal protection ensures that individuals who are similarly situated shall be treated similarly by the government.[178] Courts analyzing equal protection claims consider certain governmental classifications more suspect than others and apply heightened scrutiny to claims of discrimination against certain groups.[179] One of those categories is the gender-based classification, considered a quasi-suspect category receiving intermediate scrutiny.[180] Such scrutiny requires that the law be substantially related to an important government interest.

Arguably, the equal protection clause applies when juries use nonverbal conduct evidence in a discriminatory, gender-biased fashion.[181] This type of gender discrimination would probably not survive intermediate level scrutiny because a state or federal government could not likely demonstrate the important governmental interest required to permit such jury discretion. This is particularly true in light of the strong countervailing interest in reliable jury verdicts and the fairness of the trial process. Further, the state or federal government probably could not justify such jury discretion on the basis of protecting the defendant's interests, because the culture of acceptance provides the

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175. It would thus violate due process, which guarantees fundamental fairness in a criminal trial. *See also* U.S. CONST. amend. VI.

176. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

177. U.S. CONST. amends. V, XIV.

178. *See* Pyler v. Doe, 457 U.S. 202, 216 (1982); Craig v. Boren, 429 U.S. 190, 197, 201-02 (1976), *reh'g denied* 429 U.S. 1124 (1977); *Bolling*, 347 U.S. at 497, 499; *see also* Reed v. Reed, 404 U.S. 71, 75-76 (1971) (stating that equal protection does not prevent treating different people differently, so long as the treatment is properly justifiable).

179. *See Pyler*, 457 U.S. at 223; *Craig*, 429 U.S. at 197-98; *Bolling*, 374 U.S. at 499.

180. *See Craig*, 429 U.S. at 197-98.

181. *Cf., e.g., id.* at 197-99 (finding that liquor laws that were gender-based and founded on stereotypes were subject to intermediate scrutiny).

defendant with an unfair advantage, not a legitimate one. Thus, states and the federal government arguably are precluded from permitting juries to have untrammelled discretion to interpret evidence in a manner that favors or disfavors a particular gender.[182]

2. Reasons for the Current State of Nonfeasance in the Law

Multiple reasons may account for the lack of a more rigorous or vigilant legal response to the culture of acceptance. First, the deleterious bias created by the culture of acceptance remains difficult to detect. The bias is neither apparent from, nor inherent in, the evidence itself. In fact, the influence of the culture remains hidden in the interstices of jury operation, manifesting itself only in the way juries interpret the evidence. Further, the secrecy of jury deliberations allows judges, law-makers, and the public to learn about the true nature of the problem only through studies and statements by jurors.[183]

A second reason for the legal system's nonvigilant response to the culture of acceptance is that the history of rape law has been replete with overt gender biases.[184] The elimination of such biases from the law itself offers a misleading and superficial appearance of neutrality, as if prior wrongs have been corrected. Despite the elimination of early overtly gender-biased rape laws,[185] the implicit attitude and approach of the early laws survive.[186] An understanding of the historical development of the rape law is useful in understanding why legal inaction still predominates.

a. Historical Antecedents: The Common Law of Rape

The early common law of rape reflected considerable overt bias against the female complainant. Rape was considered to be essentially[187] a property crime.[188] Husbands were able to seek damages for

182. This is so even if the nonverbal evidence is considered relevant and not unfairly prejudicial.

183. *See Jury Blames Woman*, *supra* note 2, at 1A, col. 1.

184. *See* Berger, *supra* note 66, at 15-16, 23.

185. *See* R. TONG, *supra* note 19, at 91.

186. *See* Berger, *supra* note 66, at 23-24.

187. *See* State v. Smith, 85 N.J. 193, 204, 426 A.2d 38, 43-44 (1981). Another theory notes the exemption of a rape of a wife by her husband evolved from a belief that existence of the marriage created implied consent. Berger, *supra* note 66, at 9. "This norm derives not from the presumed common law unity of husband and wife but from an equally fictional notion that marriage implies continuing consent to sexual relations." *Id.*

188. *See Smith*, 85 N.J. at 204, 426 A.2d at 43-44 (noting the rape as property crime theory and its disfavor in the United States).

the tort of sexual trespass against their wives.[189] Husbands also were exempt from prosecution for engaging in forcible intercourse with their own wives.[190]

In addition, there were numerous other indicia of bias in the early common law of rape. For example, most early rape definitions required an actual showing of either the victim's fear or the use of force against the victim.[191] The traditional element of "force"[192] was defined as "against the will" of the female.[193] To show that sexual intercourse was forced, a female generally had to resist a male's sexual advances or present a good reason for failing to resist.[194] Furthermore, courts often construed the resistance requirement to demand more than minimal resistance; they required the female to resist "until exhausted or overpowered."[195]

The male-oriented interpretation of early rape laws was entirely consistent with the culture of acceptance. For example, the construction of the resistance requirement may have represented the perception that a woman who did not fiercely resist an aggressive male's actions had implicitly consented to them.[196] This rationalization comported with the culture's "game theory" of sexual relations: the female was playing a role in a game of conquest, unless she clearly opted out.[197]

In addition to its impact on the elements of the early rape laws, the culture of acceptance influenced the way rape cases were prosecuted. Societal "ambivalence"[198] towards the date rape victim[199] influ-

189. G. LAFREE, *supra* note 156, at 214.

190. *See Smith*, 85 N.J. at 204, 426 A.2d at 41-43.

191. *See* R. TONG, *supra* note 19, at 96. For example, Lord Coke stated that rape was the "unlawful and carnal knowledge and abuse of any woman above the age of ten years against her will. . . ." 3 COKE INSTITUTES 60 (1628).

192. *See* R. TONG, *supra* note 19, at 96. One commentator has suggested that the historical requirement of physical force may have been perpetuated by the labeling of nonconsensual sexual intercourse as "rape." *See* Fischer, *Defining the Boundaries of Admissible Expert Psychological Testimony on Rape Trauma Syndrome*, 1989 U. ILL. L. REV. 691, 701 n.62 ("Labelling the offence 'sexual assault' rather than rape may rebut jurors' misconceptions that rape requires physical assault.") (citing Wiener, *supra* note 130, at 144 n.6).

193. *See, e.g.*, MD. CRIMES AND PUNISHMENTS CODE ANN. art. 27, § 463(a)(1) (1982) ("by force or threat of force against the will and without the consent of the other person. . . .").

194. J. DRESSLER, UNDERSTANDING CRIMINAL LAW § 33.05 (1987).

195. People v. Dohring, 59 N.Y. 374, 386 (1874).

196. *See* R. TONG, *supra* note 19, at 96.

197. Note, *Elimination of the Resistance Requirement and Other Rape Law Reforms: The New York Exercise*, 47 ALB. L. REV. 871, 873 (1983).

198. Note, *Florida's Sexual Battery Statute: Significant Reform But Bias Against the Victim Still Prevails*, 30 U. FLA. L. REV. 419 (1978).

199. For the purposes of this article, the discussion on rape will not include statutory rape laws pertaining to consensual sexual intercourse between underage individuals, nor the sexual intercourse obtained through fraud, incompetency, "idiocy," or trickery.

enced both police investigators and prosecutors. One commentator noted that:

> [T]he attitudes of police investigators and prosecutors toward rape victims [have] revealed the suspicion that women universally (unconsciously) desire to be raped, and provoke or invite [it] by careless or calculated actions. The penalties for rape are very high, indicating society's concern to protect women, yet no other victim is so often treated by the entire criminal law system as "deserving what she got."[200]

An excerpt from a rape case tried in the District of Columbia further illustrates this entrenched bias:

> Question: Isn't it a fact that you helped those men take that girdle off your body? Isn't it a fact, further, that you did not resist their taking off those underpants from your body?
> Answer: That's not true. That's not true.
> Question: Is it not a fact that on the occasion of the third intercourse, you said to the man "come on, come on"?
> Answer: If I used the words "come on" it meant please leave me alone, come on, don't do this to me . . . but I didn't say "come on" in the sense the other way. . . . I was always resisting.[201]

Even the defense of mistake was utilized in a biased manner. The mistake doctrine allowed for complete exoneration to the charge of rape so long as the defendant showed he was honestly and reasonably mistaken about whether the alleged victim had consented.[202] The "reasonableness" requirement served to limit the extent to which a mistake excused the defendant's conduct.[203] In asking a jury whether an honest mistake was reasonable, however, the mistake doctrine simply provided one more avenue by which interpretive biases could emerge.

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200. Babcock, *Introduction: Woman and the Criminal Law*, 11 AM. CRIM. L. REV. 291, 293 (1973); *see also* Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919 (1973).

201. United States v. Thorne (D.D.C. 1969), Hibey, *The Trial of a Rape Case*, *in* RAPE VICTIMOLOGY 180-81 n.48 (L. Schultz ed. 1975); Berger, *supra* note 66, at 13.

202. *See* R. TONG, *supra* note 19, at 104-05.

203. *See id.* at 105; Berger, *supra* note 66, at 10.

b. The Early Evidentiary Rules at Trial

Early common law evidentiary rules also were subject to gender bias, making it especially difficult to obtain a rape conviction.[204] Due to the nature of the crime, the only eyewitness often was the alleged victim. At trial, the credibility contest between the alleged victim and the defendent was often weighted in favor of the defendant.[205]

The unofficial but pervasive presumption in the nineteenth century was that the alleged victim was motivated to bring improper charges.[206] One commentator reported that "[v]ictims . . . were relegated to the stereotype of chronic liars; triers of fact were to presume false claims."[207]

Stricter evidentiary requirements grew out of this general distrust of rape complainants[208] and the presumed invalidity of rape complaints.[209] Rape laws traditionally required both corroboration[210] of the rape claim and proof of resistance to overcome the historic presumption of false complaints.[211] Ironically, similar requirements were not imposed on the proof of any other complaints, such as robbery or assault.[212]

3. The Gradual Abatement of Overt Bias in Rape Laws

Many of the overt gender biases in the early common law were eroded by the compilation of data about and the changing of perceptions toward rape. Statistics showed that only a small percentage of reported rapes were actually based on false reports,[213] and the media publicized cases in which the rape victim was abused by the trial

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204. *See infra* notes 206-12 and accompanying text.

205. *See id.*

206. Nemeth, *Character Evidence in Rape Trials in Nineteenth Century New York: Chastity and the Admissibility of Specific Acts*, 6 WOMEN'S RTS. LAW REP. 214, 224 (1980).

207. *Id.* at 224.

208. R. TONG, *supra* note 19, at 104.

209. *See* Berger, *supra* note 66, at 10-11. The early view of women as second-class citizens embodied in rape laws also was reflected in the rules of evidence at trial. *Cf. id.* at 11 (indicating that reforms have largely resulted from "heightened respect and concern for females").

210. *See* R. TONG, *supra* note 19, at 104. The corroboration requirement effectively diminished the conviction rate at trial. *Id.* In fact, "[i]t was nearly impossible to obtain independent corroborative proof of each element of the crime of rape. . . ." *Id.*

211. Wiener, *supra* note 130, at 144.

212. Berger, *supra* note 66, at 9. "In the very jurisdictions demanding proof to bolster that of the rape complainant, 'the word of the victim of a robbery, assault, or any other crime may alone . . . sustain a conviction.'" *Id.* (quoting in part Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365 (1972)).

213. Wiener, *supra* note 130, at 143 n.2.

process.[214] Consequently, compassion towards the rape victim increased.

These changes in perceptions affected long-standing legal rules. For example, the traditional doctrine of corroboration was abolished.[215] Additionally, the "force or fear" requirement was abandoned in the law,[216] if not in the minds of the populace.[217]

Over time, the crime of rape became conceptualized as an amalgam of sex, violence, and a serious invasion of privacy.[218] The violent aspect of rape emanated from the nonconsensual, forcible nature of the touching.[219] The sexual aspect of rape related to the type of touching that occurred.[220] Finally, the invasion of the victim's privacy resulted from the denial of the victim's autonomy in deciding how to conduct her sexual behavior.[221] The combination of these three concepts rendered rape "a hostile, humiliating, degrading act of sexual domination by the man of the woman,"[222] and a gender-based sexual "act of terrorism."[223]

Rape[224] eventually became defined as the "carnal knowledge [by a male] of a woman forcibly and against her will."[225] Many jurisdictions interpreted this definition expansively, including all situations in which

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214. *See, e.g., Jury Blames Woman, supra* note 2.

215. Wiener, *supra* note 130, at 143 n.2.

216. *See* R. TONG, *supra* note 19, at 104. This change also was spurred by publicized cases of nonconsensual sexual intercourse, as well as by a growing belief that the "force" requirement did not provide adequate protection to victims of nonconsensual sexual activity. *See* Comment, *Toward a Consent Standard Toward the Law of Rape*, 43 U. CHI. L. REV. 613, 616 (1976). "Society's stated determination to protect women from rape by identifying and punishing rapists must be questioned, in light of its failure to do so more effectively." *Id.*; *see* Berger, *supra* note 66, at 31.

217. R. TONG, *supra* note 19, at 98.

218. J. DRESSLER, *supra* note 194, § 33.04.

219. *Id.*

220. *See* R. TONG, *supra* note 19, at 113.

221. J. DRESSLER, *supra* note 194, § 33.04.

222. *Id.*; *see* State v. Smith, 148 N.J. Super. 219, 226, 372 A.2d 386, 389-90 (1977), *aff'd*, 169 N.J. Super. 98, 404 A.2d 331 (1979), *rev'd*, 85 N.J. 193, 426 A.2d 38 (1981) "Rape is necessarily and essentially an act of male self-aggrandizement. . . . Rape subjugates and humiliates the woman. . . .").

223. Griffin, *Rape: The All American Crime*, *in* RAPE VICTIMOLOGY 36 (L. Schultz ed. 1975).

224. The recognition of rape as a criminal act did not originate with Blackstone, however, and extends at least as far back as Biblical times. Berger, *supra* note 66, at 2. The Bible describes an attack on Jacob's daughter, Dinah, and the ensuing revenge that Jacob's sons exacted on the perpetrators. *Genesis* 34:1-25.

225. 4 W. BLACKSTONE, COMMENTARIES 10; J. DRESSLER, *supra* note 194, § 33.02.

the victim did not consent to the act.[226] These jurisdictions did not require any evidence of physical resistance[227] and permitted evidence indicating lack of consent without any associated evidence of physical force.[228]

4. Rape Shield Statutes: A Specialized Form of Inadequate Protection from the Culture of Acceptance

In accordance with the increasing compassion felt for rape victims, many states have enacted rape shield statutes. These statutes limit the admissibility of evidence and protect the rape complainant from harassment at trial.[229] Specifically, the purpose of these statutes is to control the trial court's discretion in admitting evidence about the victim's sexual history.[230]

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226. *See* Note, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55, 56-57 (1952).

227. *Id.* at 55 n.3; Comment, *supra* note 216, at 615.

228. Note, *supra* note 226, at 57.

229. *See, e.g.*, FLA. STAT. § 794.022(2) (West 1991) (the "Rape Shield" statute).

> Specific instances of prior consensual sexual activity between the victim and any other person other than the offender shall not be admitted into evidence in prosecution under § 794.011 or § 794.041. However, . . . when consent by the victim is at issue, such evidence may be admitted if it is first established to the court in a proceeding in camera that such evidence tends to establish a pattern of conduct or behavior on the part of the victim which is so similar to the conduct or behavior in the case that it is relevant to the issue of consent.

Id. That statute was interpreted in Kaplan v. State, 451 So. 2d 1386 (Fla. 4th D.C.A. 1984). In that case, the defendant was convicted of sexual battery and he appealed, claiming that Florida Statutes § 794.022(2) unconstitutionally limited the cross-examination of the victim. *Id.* at 1386, 1388. The court observed that, "Moreover, the pattern must be so distinctive and so closely resemble the defendant's version of the encounter that it tends to prove that the complainant consented to the acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented." *Id.* at 1387.

The court further noted that the rape shield statute is not a separate exclusionary rule, but "is merely a codification of this jurisdiction's rule of relevance at it applies to the sexual behavior of a sexually battered victim." *Id.*

The court held that the defendant's claim was without merit and that the prior sexual activity of the victim was not closely enough connected to warrant its admissibility. *Id.* at 1387-88.

Interestingly, Judge Walden in dissent claimed that the issue of consent was "close" and that as a result the Sixth Amendment right to confrontation should take precedence over the rape shield statute. *Id.* at 1390 (Walden, J., dissenting).

230. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 773 (1986); Note, *Rape Shield Statutes: Legislative Responses to Probative Dangers*, 27 WASH. U.J. URB. & CONTEMP. L. 271 (1984); Comment, *Rape Shield Statutes: Constitutional Despite Unconstitutional Exclusions of Evidence*, 1985 WIS. L. REV. 1219, 1220.

Rape shield statutes have become a primary protection device for the victim.[231] These laws generally shield the victim from having to defend her "character for unchastity," or her prior sexual practices outside of marriage.[232]

According to one commentator, there are essentially four different types of rape shield laws.[233] The first type completely proscribes the admission of certain kinds of evidence with only certain specifically enumerated exceptions.[234] The second type of rape shield law effectively commits the admissibility determination to the discretion of the trial court.[235] The third type adopts a bright line prohibition against certain kinds of evidence, but expressly permits evidence that is "constitutionally required to be admitted."[236] Finally, the fourth type of rape shield law bases the admissibility of evidence on an initial determination of whether the evidence is offered to prove a substantive issue in the case or whether the evidence is offered to impeach the complainant's credibility.[237]

The scope and shape of these rape shield statutes, however, are limited by competing interests, particularly the constitutional rights of the criminal defendant. As one judge noted, "[t]he right to cross-examine a complainant in a rape case to show a false accusation may be the last refuge of an innocent defendant."[238] Thus, any attempt to protect the victim by excluding "other act" evidence is limited by the rights afforded to a criminal defendant whose liberty is at stake.[239]

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231. *See* Galvin, *supra* note 230, at 770. Other changes include rape crisis counseling centers, special victims treatment and compensation plans, police programs, and other educational programs. *See id.* The term "rape shield statute" is the popular term for evidentiary rape reform laws. *Id.* at 765.

232. *See* Comment, *supra* note 230, at 1219-20. Chastity indicates refraining from engaging in sexual intercourse. *See, e.g.*, State v. Byrd, 302 So. 2d 589, 592 (La. 1974).

233. Galvin, *supra* note 230, at 773-76.

234. *Id.* at 773-74.

235. *Id.* at 774.

236. *Id.* at 774-75. *See, e.g.*, FED. R. EVID. 412(b)(1) (setting out the federal rape shield provision).

237. Galvin, *supra* note 230, at 775-76. Professor Galvin asserts that: Michigan's statute is an example of the most restrictive; Texas's statute is an example of the least restrictive and most discretionary; the Federal Rules of Evidence attempt to combine both of the preceding approaches; and California has adopted an approach dependent upon the purpose for which the evidence is offered. *See id.*

238. Commonwealth v. Joyce, 382 Mass. 222, 229, 415 N.E.2d 181, 186 (1981); *see also* Farhat & Kraus, *Michigan's "Rape Shield" Statute Questioning the Wisdom of Legislative Determinations for Relevance*, 4 COOLEY L. REV. 545, 552 n.44 (1987).

239. *See* Olden v. Kentucky, 109 S. Ct. 480, 483-84 (1988). Along these lines, a jury instruction often cautions the jury that a rape charge is "easily made, and once made, difficult to defend against even if the person accused is innocent." People v. Rincon-Pineda, 14 Cal. 3d

This basic tension has produced a plethora of cases challenging the exclusion of evidence in rape trials, as well as a lively debate in the academic literature.[240]

Despite many objections, the federal system[241] and almost all states[242] have adopted rape shield laws. The composition and objectives of these rape shield laws, however, differ considerably[243] among the various jurisdictions.[244] In particular, the statutes vary extensively in the strength of their restrictions on the admission of evidence about the victim's prior sexual conduct.[245]

864, 871, 538 P.2d 247, 252, 123 Cal. Rptr. 119, 124 (1975) (rejecting this variety of "Lord Hale's Charge").

240. Berger, *supra* note 66, at 12 n.83.

241. *See* Galvin, *supra* note 230, at 774-75.

242. Comment, *supra* note 230, at 1219.

243. Galvin, *supra* note 230, at 773.

244. *See id.*

Sometimes, the variety in composition and objectives can be found through analyzing the changes to a statute over time. In 1974, the Florida Legislature provided in § 794.022(2) that:

> Specific instances of prior consensual sexual activity between the victim and any person other than the offender shall not be admitted into evidence in prosecutions under § 794.021; however, when consent by the victim is at issue, such evidence may be admitted if it is first established to the court outside the presence of the jury that such activity shows such a relation to the conduct involved in the case that it tends to establish a pattern of conduct or behavior on the part of the victim which is relevant to the issue of consent.

FLA. STAT. § 794.022(2) (1974) (current version at § 794.022(2) (1991)). The Florida Rape Shield Statute was substantially changed in 1983 in House Bill No. 348, Chapter 83-258. In that revision, the legislature deleted granting the court the opportunity to instruct the jury regarding the weight and quality of a victim's testimony. 183 FLA. LAWS 258.

The legislature also added provisions that required an in camera hearing prior to the admission of the evidence:

> such evidence may be admitted if it is first established to the court in an in camera proceeding that such evidence may prove that the defendant was not the source of the semen, pregnancy, injury, or disease, or . . . in an in camera proceeding that such evidence . . . is relevant to the issue of consent.

Id. The other major addition in 1983 concerned the modification of the type of evidence permitted on the issue of consent. The preceding law stated that evidence would be admissible when it "shows such a relation to the conduct involved in the case that it tends to establish a pattern of conduct or behavior on the part of the victim which is relevant to the issue of consent." *Id.* The legislature substituted this language and "evidence tends to establish a pattern of conduct or behavior on the part of the victim which is so similar to the conduct or behavior of the case that it is relevant to the issue of consent." *Id.* This language appears to restrict the variety of evidence that may be offered. It also sounds much more like habit evidence, requiring a pattern of conduct or behavior strikingly similar to the conduct in the case. Once again, the Florida Legislature expanded the scope of the shield rule in 1990 by completely barring evidence that would tend to show the victim's apparel choice caused the rape. *See* FLA. STAT. § 794.0222(3) (1991).

245. *See supra* note 244.

Despite eliminating many hurdles in rape laws, however, these statutes do not confront the problems created by the culture of acceptance. None of these laws deal with the latent gender biases that the culture of acceptance instills in jurors. Furthermore, while these statutes provide some protection for the alleged victim, the laws may still fail to have a salutory effect.[246] Instead, the rape shield laws may create the false appearance that rape laws are now administered in a neutral and fair manner when in fact they are not.[247] Such an appearance may actually serve as an excuse for failing to adopt more rigorous standards to control latent biases at trial.

Some states have attempted to control latent biases at trial with relatively novel or innovative approaches while still protecting the defendant's rights. For example, Florida recently passed a law that prohibited the admission of a complainant's manner of dress to show "enticement" to the jury.[248] While the intent of this provision apparently is to protect the rape victim at trial, the provision is not very useful. Because enticement is not an issue in a rape case, this law will not shield a victim from questions that invade her privacy. Moreover, this law will not minimize the distorted inferences that the jury may draw from nonverbal contextual evidence.[249]

Thus, beneficial changes in the rape laws and rape shield statutes have not compensated for the biases created by the culture of acceptance. Although beneficial, these recent additions to and changes in the rape laws have failed to negate the confusion and misinterpretations at trial caused by the culture of acceptance.[250] Instead, the latent gender biases in date rape trials continue to proliferate.[251]

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246. *See* Berger, *supra* note 66, at 69-70.

247. *See* R. TONG, *supra* note 19, at 105.

248. FLA. STAT. § 794.0222(3) (1991).

249. Yet, the Florida provision does add a different dimension to rape shield laws by directly attempting to limit the way in which nonverbal behavioral cues may be used at trial. It is these nonverbal cues that appear to have a disproportionate impact on the jury as it evaluates the question of consent.

250. Most modern statutes presently define rape as the "carnal knowledge of a woman without her consent," although some still use the more traditional language of "carnal knowledge by force or fear." Yet, most states appear to adopt the view that the essence of the crime of rape is the lack of consent to sexual intercourse. ALA. CODE § 13A-6-61(a)(1) (1977); IND. CODE ANN. § 35-42-4-1 (West 1990); LA. REV. STAT. ANN. § 14.41 (West 1986 & Supp. 1990). The definition of consent varies from state to state, but often focuses on the volitional nature of the agreement between the parties. The State of Washington, for example, defines consent as meaning "that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse." WASH. REV. CODE § 9A.44.010(7) (1988); *see* Wiener, *supra* note 130, at 144 n.7 & 143-44. A lack of consent in current laws may

IV. Overcoming Latent Biases Created by the Culture of Acceptance

Because evidentiary rules, rape shield statutes and jury instructions all have failed to address specifically the impact of the culture of acceptance on nonverbal conduct, jurors continue to perpetuate latent gender stereotypes and biases.[252] Therefore, alternate legal responses are required to overcome "the factual and perceptual fogs that cloud acquaintance-rape incidents."[253]

There are several ways to eliminate juror bias in the interpretation of evidence in a date rape case. One alternative involves completely excluding the nonverbal contextual evidence from date rape trials. By

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be evidenced by either an affirmative refusal to engage in sexual intercourse or simply a failure to agree to engage in sexual intercourse. A woman who is incapable of giving consent because she is unconscious, for example, will be considered raped if a male has sexual intercourse with her. *See* Commonwealth v. Burke, 105 Mass. 376, 380-81 (1870).

251. Historically, "mistake" was not a recognized defense to rape. *Cf.* Milhizer, *supra* note 26, at 9 (noting that the historical focus was on the intent to commit a sexual act, not the intent to rape). As the "mistake" defense became accepted in other areas of criminal law, the doctrine of mistake was extended to the law of rape. The increasing prosecution of date or acquaintance rapes likely contributed to the increased incidence of the use of mistake as a defense to a rape charge. *Cf. id.* at 7 (stating that mistake of fact is a popular defense to sex offenses). Under this doctrine, when a defendant claims that he mistakenly believed that the victim consented to sexual intercourse — although in fact she did not — the defendant may still be exonerated if he can show that his mistake was both honest and reasonable. *See, e.g.*, Wiener, *supra* note 130, at 145, 145 n.10.

It is this area of the acquaintance rape law that once again fosters jury consideration of stereotypes and the culture of acceptance in determining whether the male defendant was reasonably mistaken. The two-fold "mistake" standard included both subjective and objective components. *See id.* at 145 n.10. The honesty standard is entirely subjective. *See id.* The reasonableness of the defendant's mistaken belief of consent, however, is objective, completely independent of the actual subjective state of mind of the defendant. *See id.* This reasonableness requirement has served to limit the situations in which a mistake will be forgiven under the law. *See* Commonwealth v. Sherry, 386 Mass. 682, 697, 437 N.E.2d 224, 233 (1982) ("We are aware of no American court of last resort that recognizes [an honest] mistake of fact, without consideration of its reasonableness as a defense. . . ."). Mistake can be a significant defense in a rape trial, particularly in the prosecution of date or acquaintance rape cases. As more of such cases are brought to trial, there will likely be a parallel increased incidence of the use of mistake as a defense to a rape charge. *See* Milhizer, *supra* note 26, at 7. "Acquaintance rape is forced sexual intercourse (or other sexual act) that occurs between two people who know each other." A. Parott, Coping With Date Rape and Acquaintance Rape 9 (1988).

252. *Cf.* R. Tong, *supra* note 19, at 120 (finding that, despite legal reforms, victims are still treated unfairly by the justice system, largely because of the male-oriented nature of society). These biases can lead a jury to conclude that the victim "asked for it." *See, e.g.*, *Jury Blames Woman*, *supra* note 2.

253. R. Warshaw, *supra* note 12, at 41.

excluding the nonverbal evidence, the jury would not hear it, and therefore, would not be able to misinterpret the evidence.

A second response to eliminating juror bias involves both prevention and education. Under the preventive approach, the nonverbal contextual evidence would remain admissible at trial. However, jurors would be screened more carefully during voir dire to allow the attorney to exclude those jurors who are indelibly tainted by the culture of acceptance. The educational component would educate those jurors who are selected to serve in a date rape trial about the dangers of the culture of acceptance. The pedagogical methodologies used could vary, and need not be restricted to the jury instruction format. Further, the trial attorneys also could be educated about the culture of acceptance and prevented, through properly made objections, or side bars with the judge, from suggesting impermissible inferences about the evidence.

Finally, a third response to eliminating juror bias is essentially a tamer version of the educational approach. This response would admit the nonverbal contextual evidence for the jury's consideration, but provide special accompanying cautionary instructions.[254] These solutions will be discussed more fully below.

A. *Excluding Nonverbal Contextual Evidence*

The Federal Rules of Evidence and most states' evidentiary rules require that admissible evidence be relevant.[255] This means that the evidence must tend to make a fact in issue more or less probable.[256] Thus, a rape complainant's express consent to sexual intercourse may render the surrounding context, including the nonverbal circumstances, irrelevant and inadmissible.[257]

In most date rape cases, however, no such express consent occurs. Further, even when express statements are present, the speaker's intonation, manner of expression, and other contextual factors, arguably impact on the statements' meaning. Consequently, the nonverbal context is almost always directly relevant to the jury's determination of whether consent existed.

However, even relevant evidence may be found inadmissible on other grounds. For example, if the evidence is unfairly prejudicial or

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254. These instructions could be offered during the trial and in the jury instruction phase.

255. *See* FED. R. EVID. 401, 403. The relevance and prejudice rules apply to both direct and circumstantial evidence. Most evidence of a person's intent is circumstantial. This maxim exists in rape cases as well.

256. *See, e.g.*, FED. R. EVID. 401.

257. The nonverbal context may still help explain the meaning of the verbal utterances.

confusing, it may be excluded.[258] Thus, if contextual factors such as the manner of dress or the agreement to imbibe alcohol are relevant, their admissibility still depends on the degree to which the evidence is unfairly prejudicial.[259] In many states and under the federal rules,

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258. *See* FED. R. EVID. 403.

259. *See* W. CLEARY, MCCORMICK ON EVIDENCE § 185 (3d ed. 1984). In conjunction with the general rule excluding unfairly prejudicial evidence, the Federal Rules of Evidence and many parallel state laws contain specific exclusions of certain types of evidence that are relevant but presumptively unfairly prejudicial. One type of evidence that falls into this category of presumptively prejudicial evidence is character evidence. *Id.* § 186. According to Professor McCormick, "[c]haracter is a generalized description of a person's disposition, or of the disposition and respect to a generalized trait, such as honesty, temperance or peacefulness." Dean Wigmore, moreover, has stated that character is "[t]he actual moral or psychical disposition, or sum of traits." D. WIGMORE, WIGMORE ON EVIDENCE § 52 (3d ed. 1940). Due to its subject matter, this type of evidence about a person is morally based. *See id.* § 64; Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 779 n.7 (1984). When analyzed under the basic relevance rules framework, character evidence is often considered to be probative but also unduly prejudicial. *See* W. CLEARY, *supra* § 188. Some studies indicate, however, that character evidence may not even be of any significant probative value. *Cf.* Kuhns, *supra*, at 794 (finding general agreement that character evidence has at best marginal probative value). Yet the courts often conclude that character evidence is relevant evidence because if a person has a particular trait, the person is more likely to conform to that trait on a subsequent occasion than a person who does not have such a trait. *See id.* at 793. Evidence of a person's generalized character is also called "propensity" evidence because a person who has a particular character trait is more likely to act in conformity with that trait. *See id.* at 780.

The propensities of both the victim and the defendant may become relevant in deciding facts at issue in a rape case. The defendant's propensity for committing sex crimes, and in particular, sexual attacks on others, arguably make it more likely that the defendant committed the particular sex crime at issue. For contrary view, see A. PAROTT, *supra* note 251, at 57. Dr. Parott argues that

> [a]ny woman can be raped, no matter how many men she has had as sexual partners. The numbers of sexual partners is irrelevant, and the relationship she has with a man is also irrelevant. She may even be raped by a man with whom she has had consensual sex in the past. Any time a woman does not want to have sex but is forced to do so, that act is rape.

Id. Similarly, if the victim had prior sexual relations on a voluntary basis with the defendant, it is arguably more likely, however infinitesimally, that the victim consented to sexual relations in the case at issue.

Even if such character evidence is relevant, the prejudicial impact of the evidence is considerable. *See* W. CLEARY, *supra* § 186. Since people have the will to change and often do, the fact that a person has a particular sexual trait does not mean he or she will act in conformity with that trait on every occasion. *See* Berger, *supra* note 66, at 20. Thus, a jury in a rape case which hears such evidence may be misled about whether on a particular occasion the defendant or the victim acted in conformity with prior traits. Specifically, circumstantial character may convince the jury that because of the complainant's prior sexual history, she acted in conformity with it on this particular occasion.

the evidence will be excluded only if its prejudicial impact substantially outweighs its probative value.[260]

Excluding nonverbal evidence which could establish consent because it is unfairly prejudicial, however, poses a dilemma. The nonverbal contextual evidence that is so susceptible to misinterpretation is often the best or only evidence of the participants' intentions. Completely removing this evidence from the jury's consideration would effectively force the jury to guess the parties' intent.

Furthermore, nonverbal consent evidence is likely to be an essential part of "the story" comprising the circumstances surrounding the alleged act. Therefore, excluding this evidence distorts the remaining evidence and prevents the defendant from effectively offering a defense. This would violate the defendant's constitutional rights.[261]

Another argument against completely excluding contextual consent evidence is that the real problem associated with such evidence is not inherent in the evidence itself. The real problem is the way the jury interprets this evidence. Jurors who subscribe to the culture of acceptance recontextualize the evidence to create a presumption in favor of the defendant's behavior. The "esse percipi" of the evidence — that is the thing itself — is radically altered through the lens of cultural bias. Consequently, a less drastic solution, other than complete exclusion, would be to limit the way the jury interprets the evidence. For example, judges could exclude any improper inferences suggested by counsel. Compared to this alternative, a complete exclusion would be unnecessarily overbroad.[262]

Thus, nonverbal consent evidence should be excluded only if less severe methods fail to ameliorate the evidence's adverse impact. Otherwise, the constitutional,[263] evidentiary,[264] and practical problems caused

260. *See* FED. R. EVID. 403.

261. *Cf. Olden* v. Kentucky, 109 S. Ct. 480, 483 (1988) (finding that evidence related to the victim's sexual history was so essential to defense that the failure to admit the evidence was a violation of the confrontation clause).

262. *Cf. id.* Furthermore, one significant problem that may result from expressly recognizing the different perspectives of men and women is the difficulty inherent in a gender-based system of law. By recognizing a dual system, the likelihood of stigma is considerable. In effect, the notion that "men and women think differently," may become its own stereotype. Special dispensations for a group can generate greater hostility and prejudice toward that group, greater than even the hostility intended to be alleviated. The irony here is that the original intent of eliminating sub rosa stereotypes and biases — to benefit women — could end up adversely affecting the very people whom the changes were intended to help.

263. *See id.* at 483-84.

264. *Cf.* Idaho v. Wright, 110 S. Ct. 3139, 3148 (1990) (implying that the confrontation clause is violated if hearsay is admitted that fails to meet either a traditional exception or the "wild-card" exception of Fed. R. Evid. 803(24)).

by eliminating an essential part of the case from the jury's consideration would not further the goals of dispute resolution, truth-seeking, and fairness in the criminal justice process.[265]

B. *Prevention and Education*[266]

A second alternative method of eliminating juror bias in date rape cases involves a two-pronged attack on the effects of the culture of acceptance. This method would initially attempt to prevent tainted jurors from serving, if possible, and then educate remaining jurors and attorneys about the culture of acceptance and its effects. These two components embody distinct approaches to the problem.

The goal of prevention is to eliminate from the jury panel individuals who are likely to be irreversibly tainted by the latent gender biases of the culture of acceptance. Prevention can be achieved through specialized and extensive questioning on voir dire. For example, counsel or the court could ask jury panel members a series of questions about their attitudes towards date rape. The questions may be general and open-ended, or specific and narrow, like questions used in many of the psychology studies on the subject.[267] Jurors who fail to demonstrate a lack of bias can be struck from the panel for cause.

This attempt to prevent jury bias through juror elimination, however, is not likely to be fully successful. This is because the taint of the culture of acceptance probably will be difficult to discover.[268]

Thus, the education component of this alternative is as important as the preventive component. Those candidates selected for the jury should receive explicit education to minimize the taint of the culture

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265. *See* Delaware v. Van Ansdall, 475 U.S. 673, 683-84 (1986).

266. To counter jury gender bias and the culture of acceptance, a state could minimize improper jury interpretation through special jury instructions or the like. Thus, it can be claimed that jury instructions which direct and channel the way in which a jury views nonverbal conduct in a rape case is not only appropriate for policy reasons, but is necessary because of constitutional limitations. *See* U.S. CONST. amend. XIV. Pursuant to that clause, similarly situated people must generally be treated similarly. *Id.* If the gender biases are permitted to operate unchecked, it is clear that the law implicitly favors male defendants over female complainants. This kind of bias, if permitted in the operation of the jury process would implicitly confer the imprimatur of state approval to gender-based decisions. Thus, while the state is not actively encouraging gender-based decisionmaking, its failure to limit jurors would yield the same result. This lack of state intervention would still likely be subject to, and fail, the intermediate scrutiny test used by the Supreme Court in gender-based classifications. *See, e.g.*, *Craig* v. Borem, 429 U.S. 190, *reh'g denied* 429 U.S. 1124 (1977).

267. *Cf.* R. WARSHAW, *supra* note 12, at 45-46, 93, 120 (outlining several acquaintance rape studies).

268. *See* R. SANNITO & P. MCGOVERN, *supra* note 113, at 7 (noting jurors' tendency to disguise socially unacceptable traits during voir dire).

of acceptance. This education could take several forms, such as instructions by the court, information delivered by expert witnesses, or a videotape. Further, the information could be dispensed at various stages of the trial.[269]

The general goal of a jury education program would be the demystification of nonverbal contextual evidence.[270] This demystification program would attempt to dissolve existing stereotypes and biases to permit a more objective and fairer assessment of the parties' conduct.

A phenomenological approach to interpreting contextual evidence can be used to illuminate many of the myths and fantasies associated with date rape. This approach, made famous by Edmund Husserl,[271] would dissuade jurors from drawing inferences that are based on anecdotal, idiosyncratic, personal experiences. Jurors can be told to disassociate their cultural understanding, such as the significance of drinking alcohol, from the mere mechanics of what occurred.[272] Thus, the jury would be taught how to separate its cultural evaluation of sensory data from the observable data presented at trial.

Similarly, courts could educate and warn trial lawyers and jurors about impermissible latent gender biases. A judge could prohibit attorneys and jurors from inferring consent from nonverbal conduct unless indicia of subjective consent exist. For example, the court could explain that a date's agreement to return to the defendant's apartment after dinner is not tantamount to agreeing to have sexual intercourse. The court could further deter counsel from promoting improper inferences by expressly giving notice that such inferences will be disallowed upon objection.

C. *Special Jury Instructions*

The proposal for eliminating gender bias in date rape cases that is most compatible with the current system involves the creation of special jury instructions. These instructions could provide a limiting framework for the jury's evaluation of the intent component of consent.

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269. Specialized and detailed jury instructions, for example, could be used at various stages of the proceedings to minimize ad hoc jury discretion.

270. If the prejudices and stereotypes that may exist within the jury do not, in the judge's opinion, permit a view of nonverbal cues "for what they are" — and not "for what they could be" — the judge should exclude the evidence upon a proper objection. If the prejudice can be cured, however, the judge should instruct the jury that it should take "at face value" the word spoken by the individuals, and not read into the nonverbal conduct of each participant.

271. *See* J.N. Mohanty, *supra* note 1.

272. Liberman, *Toward a Universal Criticism of Reason — The Comparative Perspective in Phenomenology*, J. PHENOMENOLOGICAL PSYCH., Fall 1986, at 115.

Specifically, the instructions could explain the dangers of the culture of acceptance, and caution the jury against inferring consent simply because the jury disapproves of the victim's nonverbal conduct. As a corollary, the court could expressly inform the jury that retributive reactions based on the "punished female" model of nonverbal cues are unacceptable. In effect, the court could inform the jury that dress and nonverbal cues do not warrant a conclusion that "she asked for it."[273]

Further, the instructions could inform juries explicitly that nonverbal cues such as dress and body language do not impliedly support a finding of consent unless there is a reasonable, unbiased ground for that inference.[274] It is insufficient that the defendant believed the victim was consenting.[275] The belief must be objectively reasonable to be legally sufficient.[276] The court could tell the jury that a reasonable person can be defined as an individual whose behavior is not motivated by male-female stereotypes and biases. Instead, the reasonable person attempts to understand the nonverbal context by considering the other party's culture, perspective, and understanding.[277]

However, attempts to educate the jury about the culture of acceptance could cause several problems. One significant problem is highlighting. Directing the jury's attention to the culture of acceptance, through either special instructions or voir dire, may have the opposite effect from that intended. Jurors may focus on and utilize the culture of acceptance in an aggravating, rather than an ameliorating, manner. The Supreme Court recognized this problem when it concluded that curative jury instructions sometimes may not sufficiently minimize the taint or scope of certain evidence.[278]

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273. *See Jury Blames Woman, supra* note 2.

274. If these instructions were adopted, they would likely be found constitutional. Such instructions do not place a penalty on the defendant for either his socialization or acculturation.

275. *See* Wiener, *supra* note 130, at 145 n.10.

276. *See id. But see* Regina v. Morgan, 1976 App. Cas. 182, 214 (H.L.) (holding that where specific intent is required for rape, an honest yet unreasonable belief in consent is a defense).

277. Therefore, not only rape statutes but jury instructions should be tailored to educate the jury about the meaning of rape, as well as about the biases and prejudices that may hinder an accurate assessment of the evidence on the issue of consent. Jurors should be instructed that the complainant's previous actions do not reduce the culpability of the accused. That is, rape is still precipitated by a defendant who engages in consensual sexual intercourse. A certain manner of dress or nonverbal conduct does not justify "punishment" of a woman through rape. In fact, the jury instructions should be communicated to the jury both prior to and after the evidence has been submitted. *See* Wiener, *supra* note 130, at 146-49.

278. *See* Cruz v. New York, 481 U.S. 186, 193 (1987); Bruton v. United States, 391 U.S. 123, 135-36 (1968). The discipline of phenomenology can be used to assist the jury in overcoming the biases and stereotypes associated with nonverbal cues in a consent situation. Phenomenology

Furthermore, it may be impossible to persuade jurors to change their approach to a subject after years of experience in that area. Instructions from a judge or questions by attorneys in a formal courtroom setting may not unseat deep rooted beliefs or values. This may be particularly true of deeply entrenched social attitudes especially.

Finally, it may be too difficult to direct the jury towards a rational and non-prejudicial interpretation of evidence without interfering with the province of the jury. The jury decides the facts in a case and must use its common sense to discern those facts. Judges attempting to demystify and destabilize the culture of acceptance may interfere with that critical responsibility.

V. CONCLUSION

The culture of acceptance taints date rape trials by perpetuating latent gender stereotypes and biases. This taint emanates from popular

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originated in German universities immediately prior to World War I. Reknowned phenomenologists over the years include Edmund Husserl, Max Scheler, Oscar Becker, and Alexander Pfander. In particular, judges can use the wisdom of phenomenology to determine how, if at all, a jury should be permitted to hear about an alleged victim's manner of dress and other nonverbal cues.

Phenomenology is a philosophy which has been described by Edmund Husserl as a "'criticism of reason as a science of a new sort.'" *See* Liberman, *supra* note 272, at 114. Husserl was one of the leading creators of the discipline of phenomenology and has written extensively in the area. One of the objectives of phenomenology is to eliminate some of the by-products and baggage of traditional thinking about things which obscures evaluations or conclusions about those things. Noted one commentator, "most thinking, scientific or philosophical, proceeds on assumptions and presuppositions which it naively makes, of which it is often unaware, and which it is, within its own discourse, incapable of explicating or grounding." J.N. Mohanty, *supra* note 1, at 3.

In essence, Husserl asks which comes first, reasoning about experience, or experiencing and then reasoning? As Husserl himself noted,

> Our chief purpose is to show that a logic directed straightforwardly to its proper thematic sphere, and active exclusively in cognizing that, remains stuck fast in a naivete which shuts it off from the philosophical merit of radical self- understanding and fundamental self-justification, or, what amounts to the same thing, the merit of being most perfectly scientific. . . .

Id. at 153.

"To what extent do the categories of reason direct our experience of the world, instead of our experiencing leading the categorization?" Liberman, *supra* note 208, at 114.

The impetus for Husserl's and others' work in critiquing not only reason but the social sciences arose from growing questioning about the underlying basis for traditional approaches to reason. One author has stated that: "Reason itself, particularly in our time, has become a problem. We can no longer proceed with an untroublesome concept of reason as the ground of philosophical and scientific knowledge. We must submit reason itself to a radical critique." G. SCHRAG, RADICAL REFLECTION AND THE ORIGIN OF THE HUMAN SCIENCES 103 (1980).

attitudes about the "aggressive male" and the "punished female." It has been reinforced by a diversity of sources, including popular culture and the traditional overt biases built into rape laws.

Modern rape laws have not responded directly to the problem. Instead, current laws permit juries to decide date rape cases on anachronistic and gender-biased grounds. These latent biases may not comport with evidentiary or constitutional requirements. Thus, the current legal response is deficient.

In order to minimize the taint of the culture of acceptance, alternative legal responses are warranted. Laws or court rules should attempt to neutralize the culture of acceptance through jury and attorney education and prevention. Possible methods include additional questioning of potential jurors on voir dire and special jury instructions.[279] Only express measures such as these will minimize, and perhaps eliminate, the impact of the culture of acceptance.

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279. These jury instructions should provide, for example, guidelines about the interpretation of nonverbal date rape evidence, and offer specific illustrations of unacceptable evaluations. On the substantive issue of the reasonableness of a defendant's belief of consent, a jury should be informed that it must judge the issue based on a reasonable person standard under the circumstances, who has the same physical characteristics as the defendant, but not the same prejudices, biases or idiosyncratic mental qualities. The jury also should be informed that a complainant is not to be punished for "bad" nonverbal behavior; instead, the sole question is whether she subjectively intended to consent. If mistake is relevant, the defendant is exonerated if he had an honest and reasonable belief that the complainant agreed to have sexual intercourse with him.